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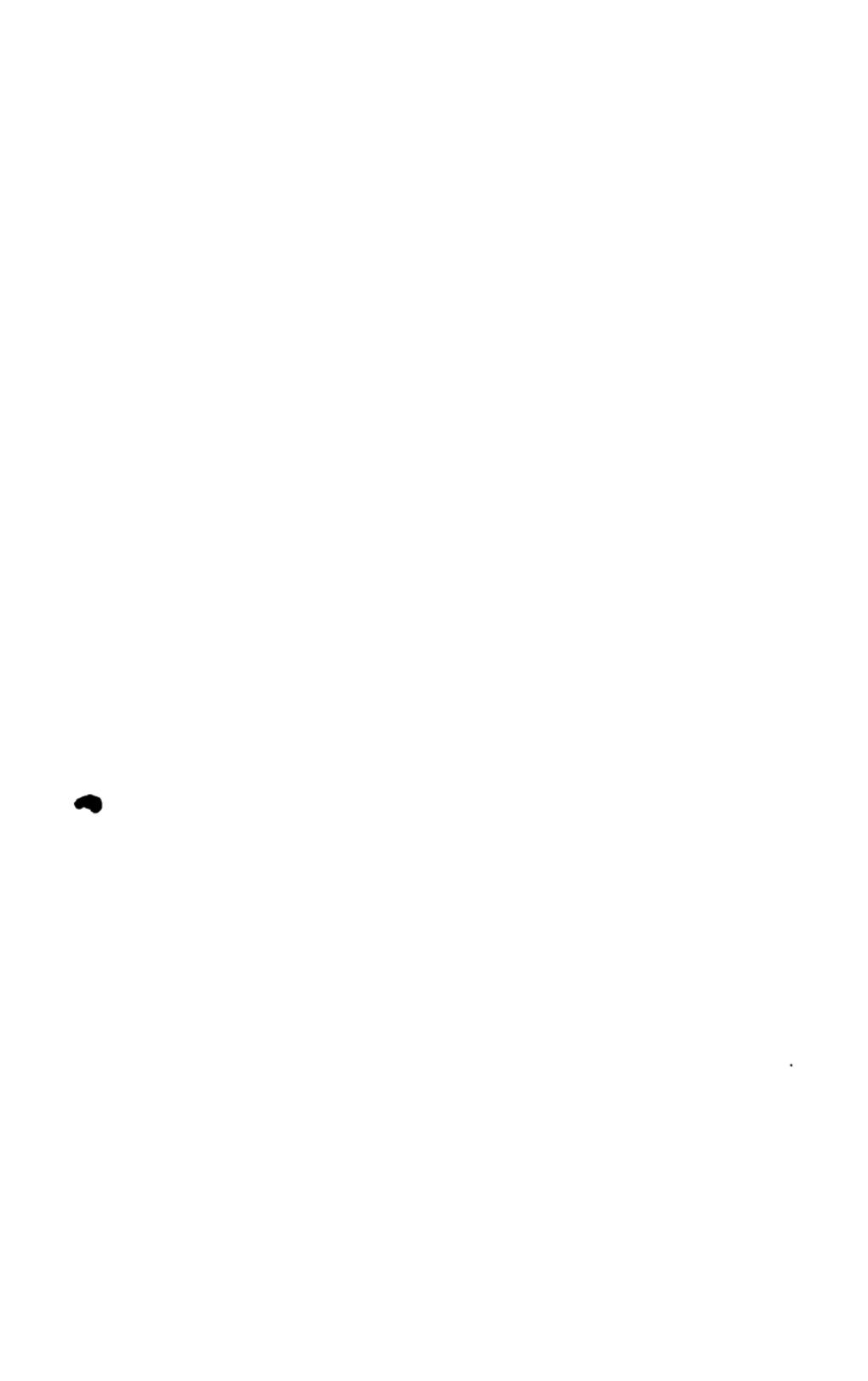


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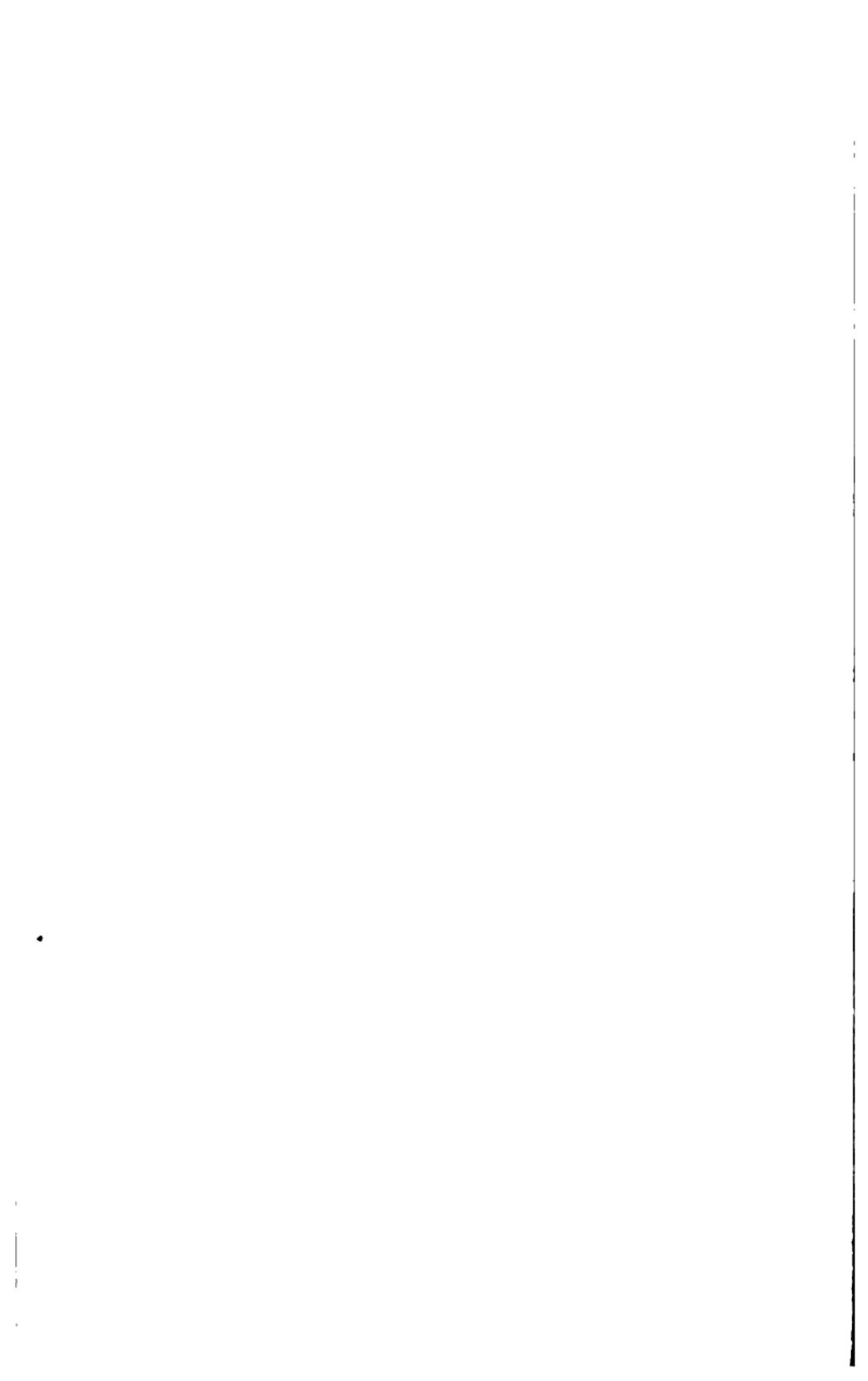
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# LECTURES ON JURISPRUDENCE //

THE

## Philosophy of Positive Law

BY THE LATE

JOHN AUSTIN

OF THE INNER TEMPLE, BARRISTER-AT-LAW

ABRIDGED FROM THE LARGER WORK FOR THE USE OF STUDENTS

BY ROBERT CAMPBELL

OF LINCOLN'S INN, BARRISTER-AT-LAW



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## INTRODUCTION.

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### ON THE PURPOSE AND SCOPE OF THE FOLLOWING LECTURES.

THE VALUE and importance of the late John Austin's work in the field of jurisprudence have been now so long and so widely recognised that it would be superfluous to insist upon them in this place. Except by a very few persons, the recognition was late. Had it come earlier, the author might have been encouraged to complete the record of the work upon which he entered. As it is, that record breaks off *in medio*; and for the preservation and arrangement of what remains, the public are in great measure indebted to the ability and industry of the lady whose name is subscribed to the preface of the first posthumous edition. In that preface Mrs. Austin explained, by a personal narrative of consummate literary skill and absorbing interest, the reasons why the work was broken off and never resumed by its author. An attempt to abridge that narrative would be almost an injury to both the persons here referred to. In order, however, to enable the student to seize the point of view of the original Lectures, the following bare outline of facts seems necessary.

JOHN AUSTIN was born in 1790. At a very early age he entered the army, in which he served for five years. He was called to the bar in 1818 after the usual preparation as a student. In 1820 he married the lady above mentioned, to whom he had been for several years attached. She belonged to a gifted family, the Taylors of Norwich; and to the attractions of great personal beauty in early life, added the enduring qualities of a clear and energetic intellect, high principles of action, and a large heart.

Possessing to excess the subtlety of mind which sometimes, when laid under conventional restraints, contributes to the

reputation of a consummate lawyer, Mr. Austin was yet unfitted for success in business by delicate health and a too highly strung and sensitive organization. After a vain struggle in which his health and spirits suffered severely, he gave up practice in the year 1825.

In 1826 the University of London (now University College) was established. Among the sciences which it was proposed to teach was Jurisprudence, and Mr. Austin was chosen to fill that chair. As soon as he was appointed he resolved upon going to study on the spot what had been done and was doing by the great jurists of Germany, for whom he had already conceived a profound admiration. After some preliminary study of the German language, he went in the autumn of 1827 to Germany. Having visited Heidelberg, he established himself with his wife and child at Bonn, then the residence of Niebuhr, Brandis, Schlegel, Arndt, Welcker, Mackeldey, Heffter, and other eminent men. With ready access to this society, and with the assistance of a young jurist as *privat-docent* in reading German books upon law, he found excellent opportunities for the study and preparation which he desired. In the spring of 1828 he returned to England and commenced his work in the chair.

His career as a professor opened brilliantly, and his first class included many who afterwards became most eminent in law, politics, or philosophy. But it soon became apparent that the inducements to the scientific study of jurisprudence in this country would not afford a succession of students to maintain an unendowed chair; and he found himself under the necessity of resigning.

In June 1832 he delivered his last Lecture. In that year he published the volume entitled 'The Province of Jurisprudence Determined,' in the form of six Lectures, accompanied by an Outline of the entire Course of Lectures contemplated by him. This 'Outline' is in itself a well-considered summary of the topics embraced by the field of law, arranged on a philosophical system. Subsequently (in 1834) an attempt was made by the Society of the Inner Temple to institute a course of instruction in scientific jurisprudence: and Mr. Austin was engaged to deliver a course of lectures. But from causes similar to those already mentioned, and which doubtless applied with still greater force to a scheme inaugurated by a close society, the attempt proved a failure.

In consequence of this double failure Mr. Austin finally abandoned the idea of pursuing in England the work of a teacher of jurisprudence. His activity was turned into other channels: and when periods of rest and improved health supervened, he was not

disposed to pick up the scattered threads of unappreciated and interrupted work. Nor, although a demand was at length established for the published volume, which became out of print, could he be persuaded to republish it.

After his death Mrs. Austin (in 1861) by the advice of friends edited a reprint of the volume containing 'the Province,' with the preface above referred to. This was followed two years later by two volumes containing all that by extreme diligence and assiduity could be found and put together of Austin's work. Subsequently the valuable notes of the original Lectures taken by J. S. Mill, who was a constant attendant upon the course, were placed in Mrs. Austin's hands for another edition. She commenced the preparation, but her death left the work unaccomplished, and it devolved, at the request of the executors, on the present editor, whose edition was published in 1869. Of this the edition of 1873 is a reprint with a few slight verbal corrections.

The large and increasing demand for Austin's Lectures for the use of students has suggested an abridgment, which has been attempted in the following pages. While endeavouring to preserve the train of thought, and much of the characteristic expression of the author, I have not hesitated to diverge from the text where it appeared to me necessary, and I have occasionally introduced illustrations from some events of more recent date than the original work. It being remembered that the last of the Lectures was delivered in 1832, and that the same year was that of the original publication of 'the Province,' these passages will be readily distinguishable. In other passages where I have intentionally departed from the meaning of the text, I have either used brackets and the initials 'R. C.' or expressly pointed out by a note the place of divergence (as for instance on p. 401). For the text of the author so far as remaining extant the reader is referred to the larger edition.

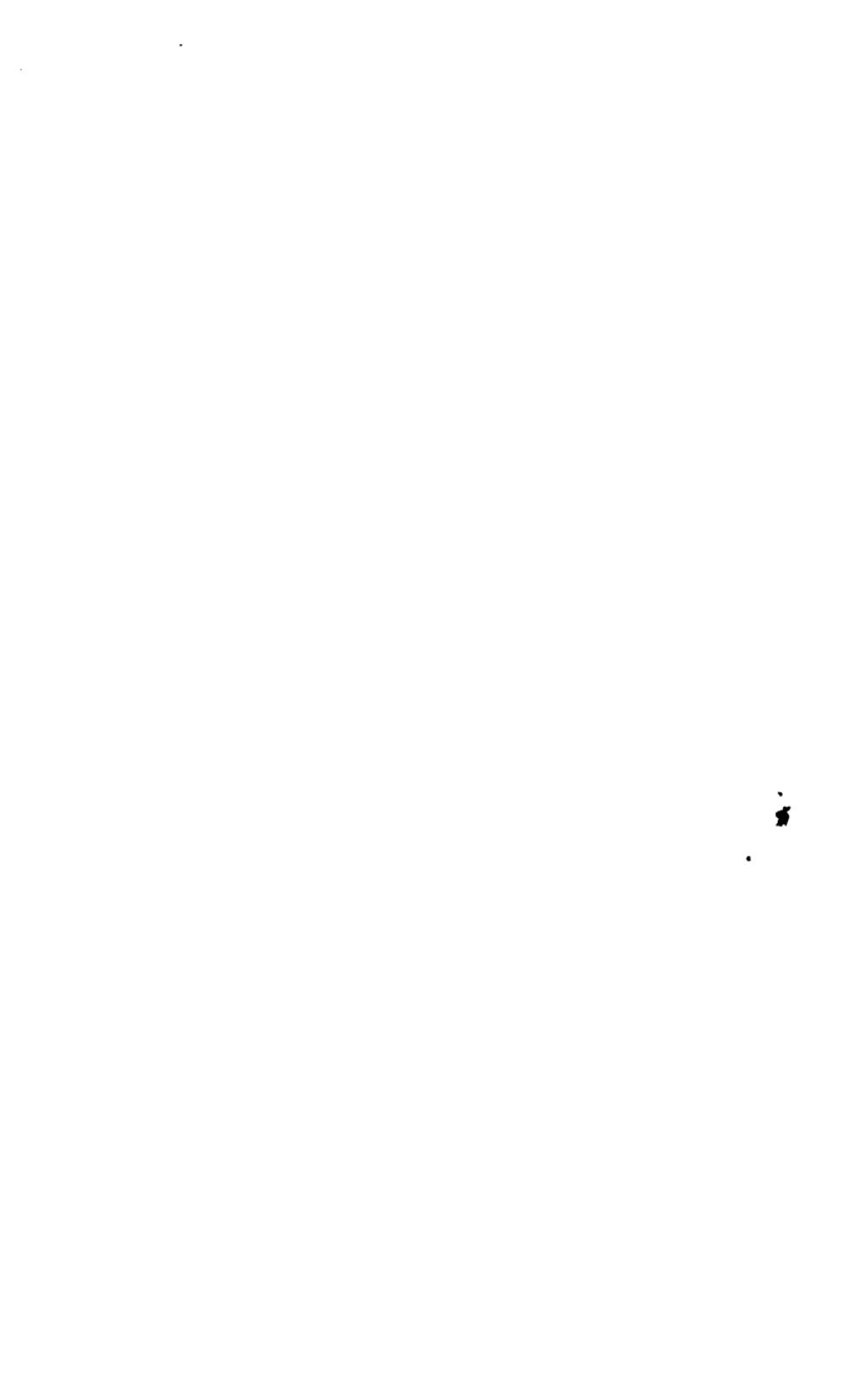
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Having thus briefly explained the circumstances under which the Lectures were originally delivered and published, I now proceed to indicate the salient points which, as I understand the author's method, appear to furnish the key to it.

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\* A considerable part of the substance of the following analysis appeared in the 'Edinburgh Journal of Jurisprudence' for October 1868.—R. C.





as involving the analysis of all the above notions, to analyze the all-pervading and familiar yet most complex notions of *right* and *injury*.

Leaving the preliminary but necessary task of *definition*, the author proceeds to the body of his discourse by considering law under two aspects: *first* in relation to its *sources* and the *modes* in which it begins and ends; and *secondly*, in relation to its *purposes* and the subjects about which it is conversant.

In treating of law in relation to its sources and the modes in which it begins and ends, the following are the leading distinctions and topics adverted to:—

I. A law is set either by the Sovereign *immediately*, or by a person or persons in subjection, by the delegation or permission of the Sovereign.

II. It is set either in the *properly* legislative mode, or in the oblique mode of *judicial* legislation.

III. Although all laws flow from the Sovereign as their source (whether immediate or ultimate), they differ in the causes whereby the Sovereign has been moved to establish them. Amongst these causes perhaps the most important to be considered is *custom*. It is at once the most wide-spread in its operation, and the cause whose mode of operation has been most often misconceived. Many writers on jurisprudence have imagined that custom is itself law, or rather that the persons among whom the custom prevails are, as entertaining and enforcing the custom, the sources or authors of law. Accordingly law obtaining through custom has been erected into a distinct species and called *jus moribus constitutum*.

Now by Austin's analysis it becomes apparent that the phrase last mentioned is misleading, as involving the misconception just adverted to. It is nevertheless important that laws which arise in consequence of custom should be considered in relation to the custom as their cause. And for brevity and because the expression is familiar, it is convenient to speak of law viewed in this aspect as *jus moribus constitutum*. But the phrase, as adopted by Austin, means, not that custom is the source of the law, but that the law has been *fashioned by judicial decision upon pre-existing custom*. The phrase indeed would be equally applicable to law fashioned by direct legislation upon pre-existing custom. But the phrase so employed would embrace laws to which it was never applied by the Roman lawyers. No one has ever imagined that laws of the class last

mentioned emanated from any authority other than the Legislature.

It must be confessed that an investigation into the nature of what is called *customary law* puts a severe strain upon the rigid definition laid down by Austin. There is indeed little difficulty in the case of a community enjoying a well settled system of law like our own. It will readily be admitted for instance that the binding force of a custom such as the intestate descent of gavel-kind lands in Kent to the sons equally, obtains, not by the will and practice of the men of Kent among whom the custom prevails, but by the authority and sanction of the Imperial Courts of justice which maintain and enforce the custom as law. So in the case where a certain course of dealing is set up as the general usage of merchants, or the usage of merchants in a particular trade. Whether or not the usage has the force of law depends on the decisions of the Courts; and many such usages are gradually established as law, first by their existence being proved, and the Court deciding that the usage so proved is good in law; and the Courts subsequently recognising the usage as a good legal custom without special proof. In all these cases the usage is law, not by reason of the habit prevailing amongst those using it, but because a law has been fashioned by judicial decision upon the pre-existing custom. Again there would be no difficulty in the case of communities so destitute of any tie of political cohesion that they may be said to live in a *state of nature*. Here clearly there can be no positive law, nor anything like it.

But take the case of British India: a congeries of societies which the advent of British rule found in various stages of organization. Some of them had the rudiments of a system of property law; most were already fairly organized so far as relates to Police and Land Revenue; while in others the political cohesion itself was of a rudimentary type. In all these societies British rule for the first time introduced *law* (*jus*) in the full significance imparted to the word by Roman institutions—the command of the State pervading the transactions of the individual members of the society. What are here the relations of custom and law? The answer to this question is sketched with a light but masterly hand in Sir H. Maine's interesting and suggestive book on Village Communities. I am informed by my friend Mr. Rattigan, who, as I understand, is preparing a book upon Customary Law in relation to India and particularly to the Punjab—a book which may be looked for with great interest—that the phase now assumed by this question in

the last-named district is especially remarkable. It seems that as the waves of conquest passing the gates of the North-west successively indented upon the Eastern plains the bonds of Hindoo and Mahomedan Law, the inhabitants of the frontier district, unaffected by those written codes, remained clinging with tenacity to their ancient village customs. Hitherto the sanction of these customs has consisted in the force of opinion exerted severally by the innumerable petty village communities; nor have those customs yet received any direct recognition from the State. To such a state of things the Roman notions of *law*, *obligation*, *sanction*, seem hardly applicable. The State can scarcely be said to prescribe as law a custom of which it has no cognisance. Nor can the notions of duty and sanction apply in the case of a custom, to contravene which has not been thought of as within the circle of human desires. The advent of British rule in fact meets with the reign of the Communes in their primitive shape, a form of society which has everywhere yielded to the stronger organization based upon Roman types. With the reign of *Law* in the Roman sense, introduced by British rule, the nature of the customs inevitably became transformed in the manner indicated by Sir H. Maine. What was a flexible and bending custom becomes transmuted into a rigid rule of law. Such customs as may ultimately be established to be good, will obtain as law, not merely because they obtained as custom, but because they are established as law by the decisions of the tribunals. In the mean time and pending the final settlement of the questions which arise, such legal force as the customs enjoy consists not in the authority of the several communes, which can hardly be said to have the force of law, but in the anticipation by the local officers of Government, and by the people themselves, that the custom will be upheld if brought to the notice of the English Courts of Justice.

I have dwelt here upon this point of customary law because the considerations just adverted to furnish a crucial test of what is meant by positive law as defined by Austin, and of the conditions of society under which a *system* of positive law can be said to exist. Those conditions I think imply a society organized on the principle that the command of the State largely pervades the relations and transactions of its individual members—a principle inherited from Roman institutions, and which is the backbone of modern civilization.

Much of what has been said of 'customary law' applies to *jus prudentibus compositum*—law imagined to obtain by the authority

of private lawyers, but which is really fashioned by judicial decision upon opinions and practices of the private and unauthorized lawyers.

IV. The next topic adverted to by the author is *natural law*, as the term is commonly understood by modern writers on jurisprudence. The author dilates on the various misconceptions to which the term has given rise. In doing so he traces the notion of natural law as originating in the *jus gentium* of the Roman lawyers, and shows that this last-mentioned expression was used amongst the early Roman lawyers in a definite and purely historical sense, but that subsequently, and as handled by the later Roman lawyers, it became mixed up with certain speculations borrowed from the Greeks.

V. The author adverts to the distinction between law of domestic growth and law of foreign original—the so-called *jus receptum*—and to the positive law closely analogous to the *jus receptum*, which is fashioned by judicial decision on positive international morality.

VI. The author then adverts to *Equity* in its various meanings, showing that the term as a species of law, is confined exclusively to Roman and English jurisprudence, and that in each it is a purely historical notion.

The author then proceeds to treat of *law in relation to its PURPOSES and the SUBJECTS about which it is conversant.*

In order to find a secure basis for a complete system of general jurisprudence, it is indispensable to discover an arrangement and division of the whole subject which shall possess sufficient precision, and at the same time deviate *quād mīnime* in its terms from those already established and familiar.

Fragmentary as are the remains of Austin's work, this essential part has fortunately been left in a state so nearly complete, as to be a valuable guide to any subsequent workman having the patience to study the plan and the skill to apply the materials so far prepared.

The author has traced outlines of a general arrangement and division of the science of law on two different systems, which may be called by way of distinction, the conventional and the philosophical. The outlines of the first kind are chiefly to be found in the tables and notes appended to the latter volume of the large edition. Of nine or more of these tables, originally prepared by Mr. Austin, unfortunately only three remain. After a search

which must have been most anxious and painful, the recovery of the others has been abandoned as hopeless. The second kind of outline I call, in contradistinction, the *philosophical*, because it is given as the result of Austin's own conception of the best arrangement, arrived at after careful comparison of the existing systems, combined with independent reflection. Such is the 'Outline' published by the author in his lifetime along with the 'Province,' and which is only partially filled up by the Lectures as since published.

Of the tables just mentioned, 'Table I.' is headed 'The arrangement which seems to have been intended by the Roman institutional writers.' The arrangement intended by these writers, whatever it was, is historically the basis of all arrangements in later systematic treatises; and therefore the plan which seemed to Austin to be theirs, is undoubtedly, of all his outlines of a conventional type, the one of primary importance. The terms employed in this table are given in the language of the Roman classical jurists.

The arrangement, according to Austin, which the Roman institutional writers contemplated, was as follows:—

Law (*jus*) was in the first place divided into 'PUBLICUM' and 'PRIVATUM'; the first (*jus Publicum*), 'Quod ad Statum Rei Romanae—ad publice utilia—spectat.' 'Quod in sacris, in sacerdotibus, in magistratibus consistit;—the second (*jus Privatum*), 'Quod ad singulorum utilitatem—ad privata utilia—spectat.' The Roman jurists have left us no *systematic* treatise upon public law; the elementary writers commonly confining themselves to private law. The latter is the subject of the Institutes of Gaius, the basis of the more familiar Institutes of Justinian, which again are historically the foundation of nearly all the more modern systematic treatises.

Private law again was by these writers classed into three great divisions: *Jus* (*law*). *quod ad PERSONAS pertinet*; *quod ad RES pertinet*; *quod ad ACTIONES pertinet*,—or, 1. *De PERSONIS*; 2. *De REBUS*; 3. *De ACTIONIBUS*;—the first of these divisions being also indifferently called, *De JURE Personarum*—*DIVISIO Personarum*: η τῶν προσώπων διαιρεσις—*De CONDICIONE Hominum*—*De STATU Hominum*—*De Personarum STATU*.

In order to distinguish the classes of rights comprised by the first two of the above heads, it is necessary to form an accurate notion of what was meant by *status*. The labour which the author spent upon this point may be appreciated from a passage in his Lectures where he incidentally says, 'For the purpose of ascer-

taining the meaning which should be assigned to the word *status*, I have searched the meanings which were annexed to it by the Roman lawyers through the Institutes of Gaius and Justinian, and through the more voluminous Digest of the latter.' The result of this investigation appears to be shortly the following:—The conditions (or *status*) of various persons are not the sources of the differences in their rights, obligations, or capacities, but are *constituted* or *formed* of those very differences. What is the nature of the set of differences in rights, etc., which constitute a *status*, it is exceedingly difficult to define: their principal characteristics are, that they are attached to classes of persons; that they are unlimited in number and kind; that they sometimes are purely onerous, or consist of obligations only; that they *may* be peculiar to a single determinate individual, but can never belong to all persons indiscriminately. They are, however, finally determined only by an arbitrary line, leaving on one side such sets of rights, etc., as may be conveniently detached from the bulk of the system for the convenience of the comparatively narrow classes of persons whom they concern, and leaving on the other side all other descriptions of rights. Keeping in mind the meaning of *status* thus explained, the division of law into 1. *De Personis*—2. *De Rebus*—and 3. *De Actionibus* becomes equivalent to the following: 1. The law of *Status*—2. Law regarding *substantive* rights and obligations in general *minus* the law of Status—3. The *means* by which rights are enforced when a resort to the tribunals is necessary.

Under the department of law *De Rebus* are again comprised the great subjects, DOMINIUM (in the large signification of the word) and OBLIGATIO (in the correct signification).\*

The class of rights comprised under the word *Dominium* contain again the following *genera*,—viz.: 1. DOMINIUM rei singulae (or *Dominium* in the strict acceptation, otherwise styled PROPRIETAS, or otherwise IN RE POTESTAS); 2. JURA, sive JURA IN RE alienâ: velut *Servitus*, *Jus Pignoris*, etc.; 3. DOMINIUM RERUM per UNIVERSITATEM acquisitarum, velut *Hæreditatis*, *Dotis*, *Peculii*, etc. The same class comprises also the cognate subjects of JUS POSSESSIONIS, and JURIS in re alienâ QUASI POSSESSIO.

\* *Obligatio*, as used by Roman lawyers, differs from 'Obligation' as used by us. With us it is equivalent to 'Duty.' With them it is narrower in one sense, as being restricted to duties corresponding to Rights in personam. But it is used also by them to denote the Right in question, as well as the vicissim including the right and correlative duty.

The class of rights comprised under *Obligatio* contains the following *genera*,—viz.: 1. *OBLIGATIONES ex Contractu et quasi ex Contractu*; 2. *OBLIGATIONES ex Delicto*; 3. *OBLIGATIONES quasi ex Delicto*.

1. *OBLIGATIONES ex Contractu et quasi ex Contractu*. This department relates to

(a.) *Obligations* arising *immediately* from contracts and quasi-contracts,—that is, *Primary obligations*—obligations *not founded on injuries, delicts, or wrongs*; the miscellaneous class of such obligations which cannot be referred to contract, being said, by analogy, to arise from (*quasi*) *contracts*.

(b.) *Injuries* consisting in the non-performance, or in the undue performance, of those primary obligations: e.g., *Mordā*.

(c.) *Obligations* arising *immediately* from those injuries, though *mediately* from the primary obligations of which those injuries are violations: e.g., *Liabilities* on an Action *ex contractu*, with the corresponding *Right of Action* residing in the injured party.

2. *OBLIGATIONES ex Delicto*. This department relates to

(a.) *Delicts* in the *strict* signification of the term: i.e., Damage, intentional or by negligence ('*dolo aut culpā*'), to *absolute* rights—to *jura in rem* (in the largest import of the phrase)—to *jura quæ valent in personas GENERATIM* (as opposed to *jura quæ valent in personas DETERMINATAS*). As examples of *Delicts*, in the strict signification of the term, may be mentioned, Assaults, and other offences against the body; Libels, and other offences against reputation; Thefts, considered as civil injuries; Forcible dispossession; Detention, *mala fide*, from the *Dominus* or proprietor of the subject; Trespass upon another's land; Wounding, or otherwise damaging, his slaves, cattle, or other moveables.

(b.) The *Obligations* incumbent upon the *injuring* parties to restore, satisfy, etc.; with the corresponding Rights of Action, etc., which reside in the *injured* parties.

3. *OBLIGATIONES quasi ex Delicto*. The distinction between Obligations *ex Delicto* and Obligations *Quasi ex Delicto* is considered by Austin superfluous and illogical. The Obligations classed under this head by the Roman jurists arise from two causes:—

(a.) Damage to the right of another by one's own *negligence* (*culpā, imprudentiā, imperitiā*).

(b.) Damage to the right of another by some third person for whose delicts one is liable (e.g., '*filius in potestate*', '*servus*', '*ali-*

quis eorum *quorum opera* exercitor navis aut stabuli navem aut stabulum exercet').

The first of these classes Austin thinks would properly fall within the notion of Delict; those obligations of the second class, in which the party cannot be said to be guilty of intention or negligence, might, he thinks, have been more properly referred to the class of obligations arising *quasi ex contractu*.

Whether the Law of *Crimes*, of *Punishments*, and of *Criminal Procedure*, fell within the plan of the Roman institutional writers, Austin considers doubtful. The title in the Institutes, 'De Publicis Judiciis,' seems not to be a member or constituent part of the work, but rather a hasty and incongruous appendix added on an after-thought. It, moreover, appears that Criminal Law was looked upon by the Roman jurists as properly forming a department of *Jus Publicum*; which was probably not included in the treatises from which Justinian's Institutes were copied or compiled. Whether a similar title was appended to the Institutes of Gaius, is uncertain; the concluding portion of the manuscript being lost or illegible.

I have here transcribed in some detail the outline of what Austin considered to be the arrangement intended by the Roman institutional writers, because it furnishes the key to his own system. Before, however, describing the scheme of arrangement adopted by Austin himself, I shall refer shortly to the remaining tables of the same nature with that above described.

Table II. is exactly coincident with Table I. in its divisions and arrangement. It differs, however, in its terminology, adopting, instead of the language of the Roman classical jurists, the terms which obtained among Civilians from the latter portion of the 16th to that of the 18th century, many of which originated in the Middle Ages, or in times still more recent. The importance of these terms depends on the following considerations:—

1<sup>st</sup>, Some of these terms are better constructed than the corresponding expressions of the ancients; and are indeed the only ones, authorized by general use, which denote the intended meaning without ambiguity.

2<sup>ndly</sup>, Writers upon universal jurisprudence, upon the so-called Law of Nations, and even upon morals generally, who have drawn largely upon the system of the Roman law, have, in their express or tacit references to it, commonly adopted the terms devised by modern Civilians, or by commentators of the Middle Ages.

3<sup>rdly</sup>, These terms have been imported into the technical

language of the systems which are mainly derived from the Roman: e.g. the French law, the Prussian law, the common or general law of Germany.

It is also of importance to draw attention to the origin of the terms, because they are often introduced by expositors of the Roman law without sufficient explanation; and without opposing to, or collating with them, the corresponding expressions which were employed by the authors of the system.

Of this terminology the following is an important instance. Answering to the distinction of the classical jurists between *Dominium* (in its larger sense) and *Obligatio*, the favourite correlative terms among the modern Civilians are *Jus in REM* and *Jus in PERSONAM* (i.e., in *personam CERTAM sive DETERMINATAM*). The importance of these terms will be better seen further on. In the mean time it may be remarked, that though '*Jus in Rem*' is never used by the authors of the Roman law as a distinctive term for a large division of rights, yet where the phrase *in rem* occurs in connection with a right, it always involves the notion of a right which avails *against persons in general* in contradistinction to rights which avail against a *particular person*. Consequently, modern Civilians, in search of a generic term to denote such rights, have found '*Jus in Rem*' a most convenient one, employing as its opposite the term '*Jus in Personam*' as a short expression for '*Jus in Personam certam sive determinatam*'.

A third table, headed 'Summary of Tables I. and II.', is the first step towards a more philosophical analysis founded upon the arrangement of the Roman jurists, and indicates the process by which the author is led to the main outlines of the system which he finally adopts.

The only remaining tables of a kind similar to those already noticed are Tables VIII. and IX. They are respectively headed, VIII. 'The Arrangement which seems to have been intended by Sir William Blackstone'; and IX., 'Exhibiting the *Corpus Juris* ("Corps complet de Droit") arranged in the order which seems to have been conceived by Mr. Bentham.' The nature of the other tables, now irrevocably lost, can only be conjectured from scattered hints throughout other parts of the work.

These tables evince the great pains devoted by Austin towards studying the principles of division and arrangement of the science, according to the views of all the best and most celebrated authors of the systems accessible to him. This trait is very important as bearing upon the value of his own system. Were it not for this

evidence of his having so anxiously measured and weighed the more celebrated existing systems which are recommended either by their intrinsic or their conventional value, it might be easy for a superficial inquirer to suppose his philosophical system built on a less stable foundation than it really is. It is because it is formed of tried materials, built together on a plan designed after an analysis of the most approved structures, that it may be safely put forward as a valuable and indispensable model to all future English legal writers who aim at philosophical accuracy.

The leading divisions contemplated in Austin's own system appear to be the following. He adopts as his main division of the subjects with which law is conversant the twofold one of the Law of Persons, and the Law of Things. This division nearly corresponds with the *Jus Personarum*—*Jus Rerum*, of the Civilians, or with *Jus Quod ad Personas pertinet*—*Quod ad Res pertinet*, of the classical jurists; but differs from it in this respect, that instead of being, as with them, subordinated to the division of *Jus* into *Publicum* and *Privatum*, and co-ordinated with the *Jus Actionum*, it is held superior to all these divisions. The whole of the *Jus Publicum* and of the law of procedure is therefore distributed between the Law of Persons and the Law of Things, according as their several parts belong more properly to one or other of those main divisions, in the wide scope attributed to them by the author.

To understand the nature of the leading division thus adopted, it is necessary to refer to the definition of *status* already given in describing the system of the Roman institutional writers. *Status* is a set of rights attached to classes of persons, and distinguished by certain characteristics, but the exact definition of which is *arbitrary*. It is difficult in this short sketch to give a notion of the labour expended by the author upon collecting from the original sources the exact meaning attached by the Roman lawyers to *status*. The result of this research is shortly expressed in the necessarily vague definition already given. What makes the conception so difficult to understand, is perhaps the fact—which Austin has been the first to point out—that while the idea expressed by *status*, as an aggregate of rights, capacities, etc. of a certain kind, is one inherent in all systems of law, the line which ultimately severs it from other sets of rights is quite arbitrary, and is determined not by the importance of the legal consequences attached to the *status*, but by mere convenience of arrangement. Employing, then, the term *status* in the sense of the Roman jurists, but adjusting the arbitrary line of demarcation to suit the whole arrangement which he contemplates,

Austin lays down the following criteria, by which such aggregations of rights are to be detached from the body of the legal system :—

*1st*, That the rights, etc., constituting the *status*, regard specially a comparatively narrow class of the community; and that it is convenient to have them got together for the use of that class.

*2dly*, That they can be detached from the bulk of the legal system without breaking the continuity of the exposition; and that the so detaching them adds to the clearness of the exposition.

When once this idea of *status* is clearly apprehended, the meaning intended by the division between the Law of Persons and the Law of Things becomes apparent. The Law of Persons is the law concerned with those rights which constitute *status*, or shortly the Law of *Status*. The Law of Things is the Law *minus* the Law of Status. Since the difference which constitutes a *status* can be better understood after the more general classes of rights belonging to the Law of Things have been expounded, the Law of Things is placed *before* the Law of Persons. But since it is impossible to obtain a division attaining perfect distinctness, it will be often necessary in travelling through the Law of Things to touch by anticipation upon a portion of the Law of Persons.

**LAW OF THINGS.**—Austin distributes the Law of Things under two capital departments :—1. *Primary* rights, with *primary* relative duties. 2. *Sanctioning* rights, with *sanctioning* duties. The first of these divisions is meant to include law regarding rights and duties which do not arise directly or immediately from injuries or wrongs; understanding the word injury or wrong in the largest sense, e.g., including trespass or breach of contract. The second division regards rights and duties which arise directly and exclusively from injuries or wrongs; and includes the consideration of procedure, civil and criminal.

**Primary Rights.**—The subdivision of Primary rights with their relative duties is fourfold :—

1. Rights *in rem* as existing simply, or as not combined with rights *in personam*.

2. Rights *in personam* as existing simply, or as not combined with rights *in rem*.

3. Such combinations of *jus in rem* and *in personam* as are less complex.

4. Such more complex aggregates of *jura in rem* and *in personam* as are styled by modern Civilians, *universitates juris*.

The meaning here intended by the expressions *in rem* and *in personam* has already been explained in commenting on the terms of the modern Civilians.

1. Instances of *jura in rem* are, Ownership or Property, Servitude, the right *quoad third parties* to the labour of a hired servant. Some rights *in rem* have no subject, such as a monopoly, right to *my good name*, etc. They are included among rights *in rem* because they avail against *persons in general*; e.g., obliging *all persons* to forbear from selling the commodity in question, from slandering my reputation, etc. This department includes the enumeration of the different kinds of subjects of such rights; the limitations of such rights in extent or time; a description of the events by which such rights arise or are extinguished; and lastly, an account of the *Right of Possession*.

It is in the discussion of this subdivision that the Lectures break off.

2. All rights arising from contract *quoad the contracting party* or his representatives are rights *in personam*: e.g., the right to payment for a thing sold and delivered against the buyer, or one representing him as heir or general assignee; the right *quoad* the hired workman to his services, etc. This head was intended to comprise—I. Definition of leading terms, such as Promise; Convention; Pact; Contract: II. A consideration of the nature of Contract: III. A consideration of *quasi-Contract*, or events which, being neither contracts nor delicts, engender rights *in personam*.

3. A complex right, partaking of the nature of a right *in rem* and *in personam*, may be vested by the same event in the same party: e.g., the rights arising from a sale completed by delivery with warranty.

Rights of this kind form the matter of the third subdivision of primary rights.

4. The last subdivision of primary rights comprises the description of universal succession arising either upon death or insolvency.

*Sanctioning Rights.*—The Lectures having broken off before arriving at this point, the subjects contemplated under the head of Sanctioning Rights can only be gathered from the 'Outline.' After expounding the nature of the distinction between *civil* and *criminal* delicts, it was intended to divide the capital department of *Sanctioning Rights* into :

- (1.) Rights and duties arising from *civil injuries*.
- (2.) Duties and other consequences arising from *crimes*.

(1.) The matter of this sub-department was to be treated in the following order :—

I. Civil injuries to be classed and described with reference to the rights and duties whereof they are respectively infringements.

II. Rights arising from civil delicts (which are generally themselves rights *in personam*) are divided into two departments :—(A.) Those arising from civil delicts which are infringements of rights *in rem*. (B.) Those arising from civil delicts which are infringements of rights *in personam*.

A. The first of these departments again severs into four sub-departments :—(a.) Rights of *vindication*. (b.) Rights to *satisfaction*. (c.) Rights of *vindication*, combined with rights to *satisfaction*. (d.) Rights of preventing or staying, judicially or extra-judicially, impending or incipient offences against rights *in rem*.

B. The second department severs into three sub-departments :—(a.) Rights of compelling, judicially or extra-judicially, the *specific performance* of such obligations as arise from contracts or quasi-contracts. (b.) Rights of obtaining *satisfaction* in lieu of specific performance. (c.) Rights of obtaining specific performance in part, with satisfaction or compensation for the residue.

III. The modes to be considered wherein these rights are exercised, and these duties enforced ; in other words, *Civil Procedure*.

(2.) Under this head to be given—

I. Description of duties considered as relative or absolute.

II. Classification of crimes with reference to the rights and duties whereof they are respectively infringements.

III. Description of the consequences of crimes.

IV. Criminal Procedure and Police.

**LAW OF PERSONS.**—The arrangement of *status* or conditions was intended to be distributed under three principal classes :—1. *Private* conditions. 2. *Political* conditions. 3. *Anomalous* or *miscellaneous* conditions.

*Private Conditions.*—These are classed into, 1. *Domestic* and *quasi-domestic* conditions, such as Husband and Wife ; Parent and Child ; Master and Servant ; Persons who, by reason of age, sex, or infirmity, are thought to require an extraordinary measure of restraint or protection. 2. Professional conditions.

*Political Conditions.*—These are to include, 1. Judges and other ministers of justice. 2. Persons whose appropriate duty is the defence of the community against foreign enemies. 3. Persons in-

vested with rights to collect and distribute the revenue of the State. 4. Persons commissioned by the State to instruct its subjects in religion, science, or art. 5. Persons commissioned by the State to minister to the relief of calamity; *e.g.*, overseers of the poor. 6. Persons commissioned by the State to construct or uphold works which are thought to require its special attention; *e.g.* roads, canals, etc.

*Anomalous or Miscellaneous Conditions.*—These include Aliens; Persons incapable of rights by reason of their crimes, etc. etc.

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The foregoing analysis omits to note some important practical suggestions for law reform embodied in the Lectures and Fragments as contained in the larger edition.

Of the very important considerations stated by the author on the subject of *codification*, it may be enough to say here that the question in this country, after some futile experiments, remains and is likely to remain for some time nearly where Austin left it. More important at present is the subject of *legal education*; a topic on which Austin held very decided views, and views which have largely assisted in maturing an effective public opinion. The following passage, for which I find no convenient place in the body of this work, is extracted from the detached matter contained in the larger edition. It appears to have been contained in the author's opening Lecture either to the course delivered at the London University or to that commenced at the Inner Temple:—

' In order to enable young men preparing for the profession, to lay a solid basis for the acquisition (in the office of a practitioner) of practical skill, and for subsequent successful practice, an institution like the Law Faculty in the best of the foreign universities seems to be requisite: an institution in which the general principles of jurisprudence and legislation (the two including ethics generally), international law, the history of the English law (with outlines of the Roman, Canon, and Feudal, as its three principal sources), and the actual English law (as divided into fit compartments), might be taught by competent instructors.

Necessity for  
a Law  
Faculty.

' In such a school, young men, not intending to practise, but destined for public life, ("ad res gerendas nati,") might find

instruction in the sciences which are requisite to legislators. Young men intended for administration (other than that of justice) would attend the Law Faculty; as, on the other hand, the men intended for law would attend the courses on the various political sciences, such as political economy, etc. For, however great may be the utility of the study of General Jurisprudence to lawyers generally; however absolute its necessity to lawyers entrusted with the business of Codification, its importance to men who are destined to take part in the public business of the country is scarcely inferior.

'It is extremely important that a large portion of the aristocracy, whose station and talents destine them to the patrician profession of practical politics, should at least be imbued with the *generalia* of law, and with sound views of legislation; should, so far as possible, descend into the detail, and even pass some years in practice.

'If the Houses of Parliament abounded with laymen thus accomplished, the demand for legal reform would be more discriminating, and also more imperative; much bad and crude legislation would be avoided;—opposition to plausible projects coming from an unsuspected quarter. This, in the innovating age before us, is no small matter. And though lawyers, fully acquainted with system, alone are good legislators, they need perhaps a check on professional prejudices, and even on sinister interests.

'But such a check (and such an encouragement to good lawyers) would be found in a public of laymen versed in principles of law.

'It appears to me that London possesses peculiar advantages for such a Law Faculty. The instructors, even if not practising lawyers, would teach under the eye and control of practitioners: and hence would avoid many of the errors into which the German teachers of law, excellent as they are, naturally fall, in consequence of their not coming sufficiently into collision with practical men. The realities with which such men have to deal, are the best correctives of any tendency to antiquarian trifling or wild philosophy to which men of science might be prone. In England, theory would be moulded to practice.

'Besides the direct advantages of such an institution, many incidental ones would arise.

'In the first place: A juridical literature worthy of the English bar.

'Good legal treatises (and especially the most important of any,

a good institutional treatise, philosophical, historical, and dogmatical, on the whole of the English law) can only be provided by men, or by combinations of men, thoroughly grounded and extensively and accurately read. Such books might be produced by a body of men conversant (from the duties of their office) with the subjects, but can hardly be expected from the men who now usually make them : viz. not lawyers of extensive knowledge, (whose practical avocations leave them no leisure for the purpose, although generally they are the only men fit for the task,) but young men, seeking notice, and who often want the knowledge they affect to impart.

'Such men as I assume a Law Faculty to consist of, being accustomed to exposition, would also produce well-constructed and well-written books, as well as books containing the requisite information. Excellent books are produced by German Professors, in spite of their secluded habits; many of them being the guides of practitioners, or in great esteem with them (e.g. those of Professor Thibaut). In England, better might be expected, for the reason already assigned : viz. the constant view to practice forced upon writers by constant collision with practical men.

'Secondly : Another effect of the establishment of a Law Faculty would be, the advancement of law and legislation as sciences, by a body of men specially devoted to teaching them as sciences ; and able to offer useful suggestions for the improvement (in the way of systematising or legislating) of actual law. For though enlightened practical lawyers are the best legislators, they are not perhaps so good originators (from want of leisure for abstraction) as such a body as I have imagined. And the exertions of such men, either for the advancement of Jurisprudence and Legislation as sciences, or in the way of suggesting reforms in the existing law, might be expected to partake of the good sense and sobriety to which the presence and castigation of practitioners would naturally form them.

'How far such an institution were practicable, I have not the means of determining.

'There would be one difficulty (at first); that of getting a sufficient number of teachers competent to prove the utility of learning the sciences taught by them: masters of their respective sciences (so far as long and assiduous study could make them so); and, moreover, masters in the difficult art of perspicuous, discreet, and interesting exposition: an art very different from that of oratory, either in Parliament or at the Bar. Perhaps there is not in England a single man approaching the ideal of a good teacher

of any of these sciences. But this difficulty would be obviated, in a few years, by the demand for such teachers; as it has been in countries in which similar institutions have been founded by the governments.

'Another difficulty is, the general indifference, in this country, about such institutions, and the general incredulity as to their utility. But this indifference and incredulity are happily giving way (however slowly); and I am convinced that the importance of such institutions, with reference to the influence and honour of the legal profession, and to the good of the country (so much depending on the character of that profession) will, before many years are over, be generally felt and acknowledged.

'Encouraging symptoms have already appeared; and there is reason to hope from these beginnings, however feeble, that the government of the country, or that the Inns of Court, will ultimately provide for law students, and for young men destined to public life, the requisite means of an education fitting them for their high and important vocations.' \*

It seems relevant here to note very briefly the movements which have taken place in regard to legal education since the date when the above considerations were put forward by the author.

The Incorporated Law Society are fairly entitled to the credit of having made the first definite movement. In 1833, soon after the date of their present charter, they established lectures for the instruction of students intended for their own branch of the profession; and in 1836, at their instance, was established a system of compulsory examination for all persons intending to be admitted as attorneys or solicitors, a system which has ever since remained in force and with the most beneficial results.

After the failure of the attempt by the Inner Temple already mentioned nothing appears to have been done on the part of any of the Inns of Court until 1847, when the Inner Temple established a lectureship on Common Law, while at the Middle Temple lectures were delivered upon Jurisprudence and the Civil Law, and Gray's Inn established a course of lectures followed by voluntary examinations in which the students were classed. In the year 1851 a meeting was convened of the Benchers of the four Inns of Court, with a view to the better instruction of the students, and the result was the establishment of a Council of Legal Education, consisting of eight members,

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\* Written in the year 1884.

two being selected by the benchers respectively of each of the four Inns of Court, and holding their offices for two years. Regulations were also passed for providing Readers who should give lectures and hold Private Classes for the better instruction of the students ; and should at stated intervals conduct an Examination of the Students. The alternative of regular attendance on the lectures or of passing the examination was imposed upon all students ; a condition subsequently relaxed in the case of students who obtained a certificate of attendance for a year as pupils in the chambers of a barrister. Studentships and other encouragements were given for students who distinguished themselves in the examinations.

The attention of Parliament had been directed to legal education so long ago as 1846, when a select committee of inquiry was appointed, who made a report, observing, amongst other things, 'that a system of legal education, to be of general advantage, must comprehend and meet the wants, not only of the professional, but also of the unprofessional student ;' and recommending that the Inns of Court should be united into one body, so as to 'form for all purposes of instruction a sort of aggregate of colleges, or in other words a species of law university.'

In the year 1854 an address to the Crown was voted by the House of Commons, praying Her Majesty to appoint a Commission to enquire into the arrangements of the Inns of Court for promoting the study of the law and jurisprudence, the Revenues properly applicable and the means most likely to secure a systematic and sound education for students of law, and provide satisfactory Tests of fitness for admission to the Bar. A Royal Commission was accordingly appointed, consisting of very eminent lawyers and other competent persons. They took the evidence of a number of experienced teachers, and made enquiries from those most competent to give opinions in regard to the methods of conducting legal education pursued in England, and also in Scotland, in the principal States of Europe, and in the United States of America : and (in 1855) they made their report with the following recommendation :—' We deem it advisable that there shall be established a preliminary examination for admission to the Inns of Court of persons who have not taken a university degree, and that there shall be examinations, the passing of which shall be requisite for the call to the bar ; and that the four Inns of Court shall be united in one university for the purpose of these examinations, and of conferring degrees.' For this purpose they proposed the heads

of a scheme : as to which it need only be observed here that its scope was limited, in like manner with the commission under which they acted, to the Inns of Court and the branch of the legal profession with which they are more immediately associated.

From the time of this Report in 1855 until very recently the question of legal education in England has slept, nor, until urged by an extraneous movement to be presently adverted to, has anything further been done by the Inns of Court either jointly or separately.

I need hardly say that neither the voluntary classes and examinations conducted under the auspices of the Inns of Court, nor the more effective system of examinations and somewhat more animated classes of the Law Institution, satisfy the conditions of a school of law such as that propounded by Austin : nor have the results of the divided and partial efforts above mentioned been in any measure adequate to the just requirements of the public or the opportunities which the professional ability and legal knowledge concentrated in London might be made to afford for a school of law.

In this state of things a movement was set on foot which has become important. The initiative is due to some gentlemen practising as solicitors in the provinces, who felt impressed with the existing deficiency of means whereby the time spent in London by their articled clerks might be turned to account in giving them a wider and deeper knowledge of law than could be picked up in the routine of office work. These gentlemen formed themselves into an Association having for their primary object the institution of a general system of legal education which should embrace both branches of the profession. The programme was communicated to some eminent members of the bar in London, who having first insisted on the elimination of certain irrelevant topics, warmly entered into the project ; and an Association with an influential Council, representing both branches of the legal profession in London as well as in the provinces, was formed with the following objects :—

- 1st. The establishment of a Law University for the education of Students intended for the Profession of the Law.
- 2nd. The placing of the admission to both branches of the profession on the basis of a combined test of Collegiate Education and Examination by a Public Board of Examiners.

This Association, which adopted the name of 'The Legal Education Association,' obtained the invaluable services of Sir Roundell Palmer (now Lord Selborne) as their President; and thus secured at once the attention of Parliament and the public, and an able advocacy of their views. The subsequent movements of the Association have all been from time to time before the public, and I shall allude to them very briefly; but it ought to be placed on record that at the critical period of its existence the Head Centre and most active exponent of the movement was a friend of Mr. Austin's: now a judge in Her Majesty's Court of Queen's Bench—Mr. Justice Quain.

The Association was formally constituted at a meeting held in July 1870, and an Executive Committee of the Council was appointed for the transaction of business.

The specific objects of the Association as defined by the Executive Committee and adopted by subsequent general meetings of the Association are as follows :—

(1.) To place the general course of Studies and the examinations preliminary to and requisite for admission to the practice of the Law, in all its branches, under the management and responsibility of a General School of Law to be incorporated in London.

(2.) To make the passing of suitable Examinations in the General School of Law (or of equivalent Examinations of some University of the United Kingdom) indispensable to the admission of Students to the practice of the Bar, or to practise as Special Pleaders, Certificated Conveyancers, Attorneys, or Solicitors.

(3.) To offer the benefits of the course of Study and Examinations to be afforded by the General School of Law to all classes who may desire to take advantage of them, whether intending or not intending to follow the Legal Profession, in any of its branches, and whether members or not of any of the Inns of Court.

As the first step towards carrying out these objects Sir Roundell Palmer placed two Resolutions on the notice paper of the House of Commons. It was then late in the session of 1870-71, and it was not until the 11th of July 1871 that the author of the Resolutions had the opportunity of bringing them to the notice of the House. His speech was received with marked attention; but owing to the advanced period of the session it was impossible that

the subject should be fully discussed by the House. To the precise terms of those Resolutions, which were settled by the President in conference with the Executive Committee of the Association, it seems here hardly necessary to refer, further than to mention that, besides the objects above mentioned, they embodied an understanding arrived at by the Executive Committee which I do not find elsewhere explicitly recorded, namely, that in the government of the proposed School of Law the different branches of the legal profession in England should be 'suitably represented.' It may be mentioned that the designation 'General School of Law,' instead of 'Legal University,' was adopted in deference to a feeling expressed by persons representing the views of the London University.

Early in the following session of Parliament (1871-72) the following Resolutions were placed on the notice paper of the House of Commons by Sir Roundell Palmer:—

(1.) That it is desirable that a General School of Law should be established in the metropolis, by public authority, for the instruction of students intending to practise in any branch of the legal profession, and of all other subjects of Her Majesty who may desire to resort thereto.

(2.) That it is desirable, on the establishment of such School, to provide for examinations, to be held by Examiners impartially chosen, and to require certificates of the passing of such examinations as may respectively be deemed proper for the several branches of the legal profession as necessary qualifications (after a time to be limited) for admission to practise in those branches respectively.

In support of these Resolutions, a petition was presented signed by about 400 members of the Bar. Out of about 10,000 solicitors practising in England and Wales, 6,000 signed petitions in favour of the Resolutions. Similar petitions were presented by the Incorporated Law Society, the Metropolitan and Provincial Law Society, and by various provincial Law Societies (including those of Liverpool, Manchester, Leeds, Birmingham, Bristol, and Plymouth) in their corporate character. Nor is it a circumstance without significance, as indicating the class who specially feel the want which the objects of the Association are calculated to meet, that Resolutions in favour of those objects were passed by the Congress of Law Students held at Birmingham in the preceding

month of June. On the 1st of March, 1872, Sir Roundell Palmer introduced the motion for adopting the Resolutions, by a speech in which he entered fully into the history of the question and the arguments showing the public need of an institution such as that proposed by the Association. The motion was supported by speeches from Mr. Spencer Walpole, Q.C., Mr. (now Baron) Amphlett, Mr. (now Mr. Justice) Devonan, Mr. (now Sir William) Harcourt, Q.C., Mr. G. Osborne Morgan, Q.C. (who seconded the motion), and Mr. Thomas Hughes, Q.C.

The course taken by the Government in the debate was in effect to put in a plea for delay, on the ground that the time of the House at their disposal was already fully mortgaged. Mr. Gladstone, while stating that the Government did not think it convenient or expedient for the House at that moment to affirm the matter contained in the Resolutions, said that 'it would be a mistake to suppose that they were about to meet with rejection at the hands of the Government.' Notwithstanding this intimation that for the purposes of a division the Government threw their weight into the scale against the motion, Sir Roundell Palmer determined to take the sense of the House upon it; and in a House of 219 members 103 recorded their votes in favour of the motion, which was therefore lost by a majority of 13 only.

This was practically an end of the matter for the session of 1871-72. Before the commencement of the following session, Sir Roundell Palmer (Lord Selborne) having become Lord Chancellor, deemed it expedient to resign his office as President, although he remained a private member of the Association, and assured them of his unabated personal interest in their objects. They were also given to understand that the subject of legal education was likely before long to occupy the attention of Government. In these circumstances it was inevitable that active movement on the part of the Association should be in a measure suspended.

In the mean time an opportunity was afforded to the Inns of Court to show how far they were willing to attempt, or able to effect, the organization of a comprehensive and liberal scheme of legal education. Urged to action by the movement from without which I have attempted to describe, they adopted a new scheme, to come into operation at the beginning of the year 1873; superseding the arrangements for teaching and examination embodied in the Consolidated Regulations of the four Inns of Court, and which were the outcome of the period of activity commenced in 1851. The new scheme creates 'a permanent Committee of eight

members, to be appointed by the Council of Legal Education, and to be called the "Committee of Education and Examination." This Committee is, subject to the control of the Council of Legal Education, 'to superintend the education and examination of students for the Bar.' The scheme provides for the conduct of the work of teaching under a staff of professors and tutors to hold office at the pleasure of the Council for three years and not longer unless re-elected, and also for examinations by a paid board of six examiners, each to hold office for not more than two years, and not to be eligible for re-election until he has been a year out of office.

Into the details of this scheme it is unnecessary to enter further. Considered as a purely Bar scheme it has merits and defects which it would be impertinent here to discuss. But I may permit myself to add one remark, and in doing so may be allowed to borrow from the Report of the Executive Committee of the Legal Education Association adopted by the Association at their annual meeting on the 10th of January, 1873, namely that 'an organization which is confined to students for one branch of the legal profession only, which excludes the general public altogether, which keeps its administration practically in the hands of self-electing bodies claiming to be irresponsible, and which may at any moment be modified or abandoned by those bodies, entirely fails to meet the requirements of a general School of Law, open to all who wish to study law as a science, as well as to those who wish to study it with a view to professional practice, and administered by a public and responsible governing body.'

It may be mentioned that the Inns of Court, after adopting their new scheme and appointing a staff to carry it out, conceded the principle of admitting the general public to the advantages of the instruction provided by them. And although under a system so organized, the concession can hardly be expected to have much practical effect, it is a strong indication of the advance of opinion within the Inns of Court in the direction of the objects advocated by the Association.

On the 12th of December 1873, a deputation from the Association waited upon Lord Selborne (then Lord Chancellor), who informed them that he did not intend to allow more time to pass without reducing into proper form a Draft Bill which might be fit to be submitted, before the meeting of Parliament, to the then Government for their consideration. He added that in this Draft Bill he proposed not only to deal with the scheme of a General School of

Law, but to endeavour at the same time to deal with the constitution and government of the Inns of Court.

The dissolution of Parliament in the end of the year 1873, the change of government ensuing upon the general election, and the consequent late period at which Parliament met, precluded the chance of the subject of legal education being effectively dealt with last session. Lord Selborne, however, no longer trammelled by his official position as Lord Chancellor, again accepted the post of President of the Association, and as a private member of the House of Lords, at a late period of the session, brought in two bills, one for the constitution of a general School of Law, and the other attempting the more difficult but inevitably connected object of dealing with the Inns of Court.

What may ultimately be the relation of the Inns of Court to legal education in this country, it would be premature to speculate: but in concluding this topic, I feel bound to remark that the views of the Association to which I have referred will not, nor will the demands of a widespread and growing conviction of the intelligent public mind, be satisfied by the establishment of a mere examining university, still less by a university or school so constituted as to rest on the Inns of Court as its sole basis.

In the above discussion of a particular object I may appear to have wandered from the proper purpose of an introduction to a course of lectures on general jurisprudence. I have not entered on the topic without deliberation: and I have judged it due both to the memory of Austin and to the objects which he thought desirable, to trace and record the connection between the views so earnestly insisted on by him, and those which through the association of numbers and the most eminent advocacy are now able to command the attention of Parliament and of the Government of the day.

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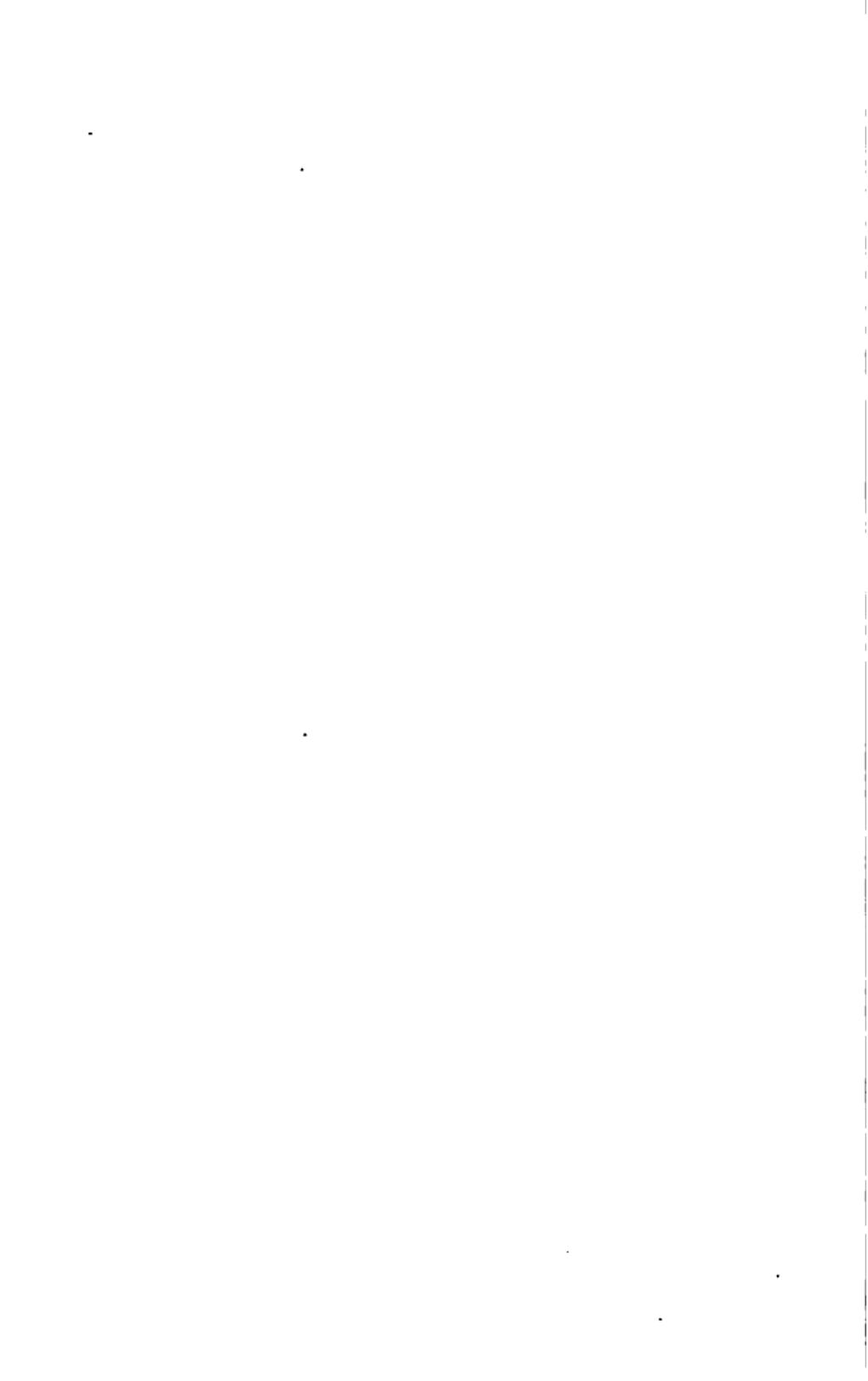
I must here mention that in the final revision of the sheets for the press I am indebted to the suggestions of my friend Mr. W. Payne, of this Inn; and for general help in carrying the work through the press and in compilation of the index I have to acknowledge my obligations to an able assistant, Mr. Walter Clift.

R. CAMPBELL.

*Lincoln's Inn.*

LAW COURTS CHAMBERS, 33 Chancery Lane:

December, 1874.



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## PART I.—DEFINITIONS.

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PART II.—LAW IN RELATION TO ITS *SOURCES*, AND TO THE *MODES* IN WHICH IT BEGINS AND ENDS.

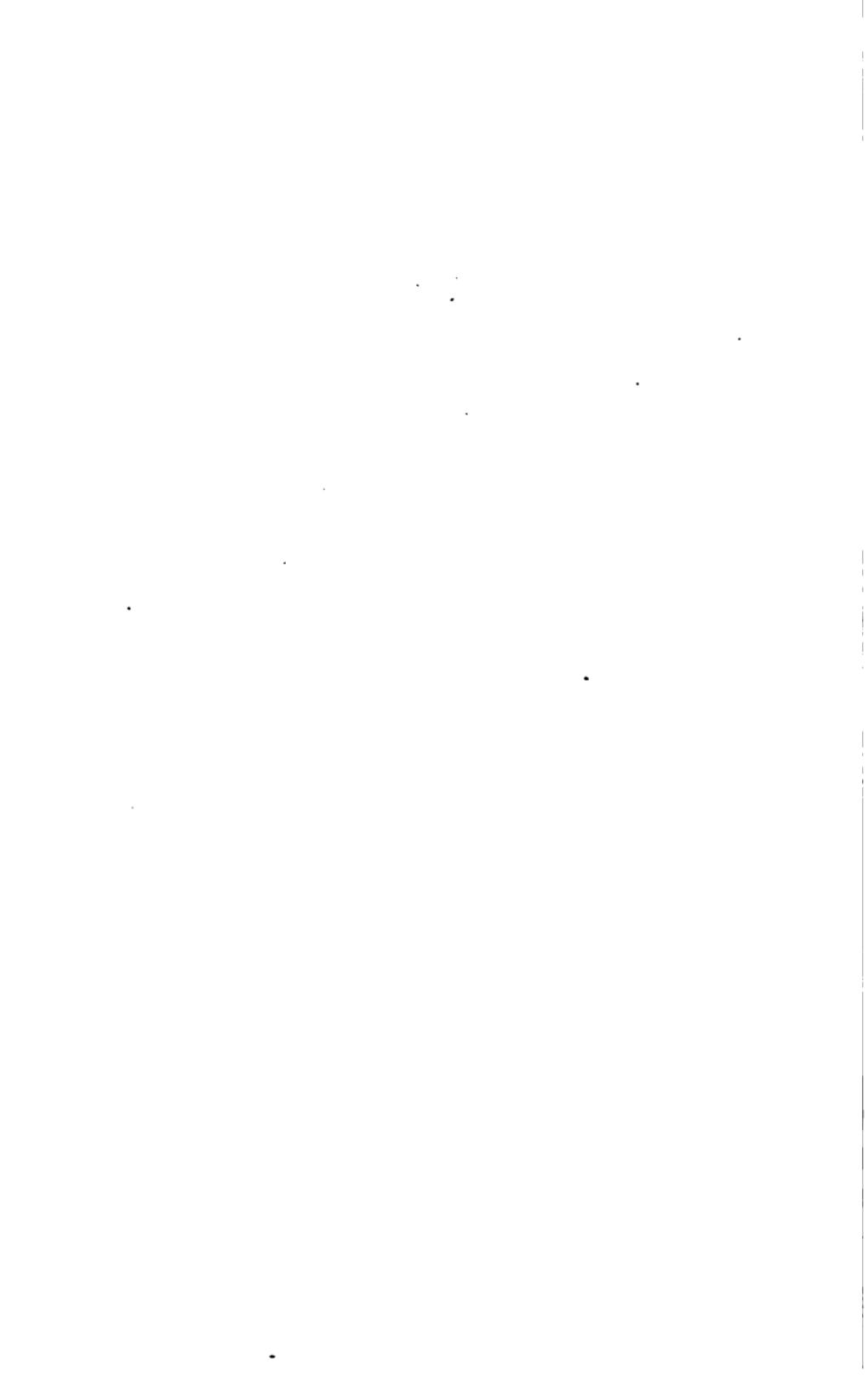
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**PART III—LAW IN RELATION TO ITS PURPOSES AND TO  
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## OUTLINE (IN AN ABSTRACT FORM) OF THE COURSE INTENDED AND IN PART DELIVERED BY THE AUTHOR.

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### PART I.

#### DEFINITIONS.

The province of Jurisprudence determined.

LECT.  
I-VI.

General jurisprudence distinguished from particular.

LECT. XI.

Analyses of certain notions which pervade the science of law.

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XII-  
XXVII.

### PART II.

#### LAW CONSIDERED WITH REFERENCE TO ITS SOURCES, AND TO THE MODES IN WHICH IT BEGINS AND ENDS.

*Written*, or promulgated law; and *unwritten*, or unpromulged law.

LECT.  
XXVIII-  
XXXIX.

Law made directly, or in the proper legislative manner; and law made judicially, or in the way of improper legislation.—Codification.

Law, the occasions of which, or the motives to the establishment of which, are frequently mistaken or confounded for or with its sources: viz.

*Jus moribus constitutum*; or law fashioned by judicial decision upon pre-existing custom:

*Jus prudentibus compositum*; or law fashioned by judicial decision upon opinions and practices of private or unauthorized lawyers:

The *natural law* of modern writers upon jurisprudence, with the equivalent *jus naturale*, *jus gentium*, or *jus naturale et gentium*, of the classical Roman jurists:

*Jus receptum*; or law fashioned by judicial decision upon law of a foreign and independent nation:

## Abstract of Outline.

Law fashioned by judicial decision upon positive international morality.

Distinction of positive law into *law* and *equity*, or *jus civile* and *jus prætorium*.

Modes in which law is abrogated, or in which it otherwise ends.

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### PART III.

#### LAW CONSIDERED WITH REFERENCE TO ITS PURPOSES AND TO THE SUBJECTS ABOUT WHICH IT IS CONVERSANT.

- Lect. Division of Law into Law of Things and Law of Persons.  
XL-XLIV. Principle or basis of that Division, and of the two departments which result from it.

#### *LAW OF THINGS.*

Lect. Division of rights, and of duties (relative and absolute), into primary and sanctioning.

Principle or basis of that division, and of the two departments which result from it.

Principle or basis of many of the sub-departments into which those two departments immediately sever: namely, The distinction of rights and of relative duties, into rights *in rem* with their answering *offices*, and rights *in personam* with their answering *obligations*.

Method or order wherein the matter of the Law of Things is intended to be treated.

Preliminary remarks on things and persons, as subjects of rights and duties: on acts and forbearances, as objects of rights and duties: and on facts or events, as causes of rights and duties, or as extinguishing rights and duties.

#### *Primary Rights, with primary relative Duties.*

- Lect. Rights *in rem* as existing *per se*, or as not combined with rights *in personam*.\*

Rights *in personam* as existing *per se*, or as not combined with rights *in rem*.

Such of the combinations of rights *in rem* and rights *in personam* as are particular and comparatively simple.

Such *universities* of rights and duties (or such complex aggregates of rights and duties) as arise by universal succession.

---

\* The lectures break off while developing this sub-department. The remainder of the outline was never filled up.

*Sanctioning Rights, with sanctioning Duties  
(relative and absolute).*

Delicts distinguished into civil injuries and crimes: or rights and duties which are effects of civil delicts, distinguished from duties, and other consequences, which are effects of criminal.

Rights and duties arising from civil injuries.

Duties, and other consequences, arising from crimes.

[*Interpolated description of primary absolute duties.*]

**LAW OF PERSONS.**

Distribution of *status* or conditions under certain principal and subordinate classes.

Division of law into *public* and *private*.

Review of private conditions.

Review of political conditions.

The *status* or condition (improperly so called) of the monarch or sovereign number.

Division of the law which regards political conditions, into *constitutional* and *administrative*.

Boundary which severs political from private conditions.

Review of anomalous or miscellaneous conditions.

The respective arrangements of those sets of rights and duties which respectively compose or constitute the several *status* or conditions.

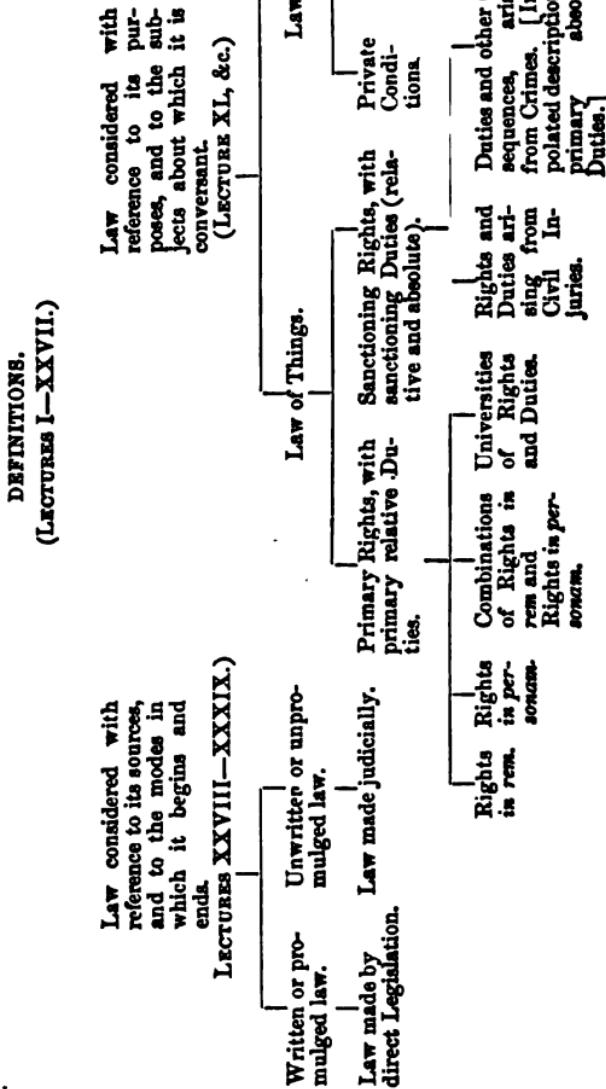
# THE FOREGOING ABSTRACT IN A TABULAR FORM.

## DEFINITIONS.

(LECTURES I—XXVII.)

Law considered with reference to its sources, and to the modes in which it begins and ends.

LECTURES XXVIII—XXXIX.)



# LECTURES ON JURISPRUDENCE.

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## PART I. DEFINITIONS.

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### SECTION I.—THE PROVINCE OF JURISPRUDENCE DETERMINED.

*Introductory.—Purpose and Method of the  
Six ensuing Lectures.*

THE matter of Jurisprudence is *positive law*: law strictly so called, that is, law set by political superiors to political inferiors. But since by the word *law* are also denoted, properly and improperly, other objects related to positive law by resemblance or analogy, it is first necessary to distinguish positive law from those various related objects; in other words *to determine the province of jurisprudence*.

A law, in the literal and proper sense of the word, may be defined as a rule laid down for the guidance of an intelligent being by an intelligent being having power over him. This definition seems to embrace all the objects to which the word can be applied without extension of its meaning by metaphor or analogy, and in this sense *law* comprises

Laws set by God to men, and  
Laws set by men to men.

*Laws set by God to men.*—To the whole or a portion of these has been sometimes applied the phrase, *Law of Nature*, or *Natural Law*. The phrase is also frequently applied to other objects which ought to be broadly distinguished. Rejecting it accordingly as ambiguous and misleading, I designate these laws, considered collectively, by the term *Law of God*.

*Laws set by men to men.*—Of these, 1st, some are established by political superiors acting as such, and are here collectively marked by the name of *positive law*—the ap-

ANALYSIS.  
Lect.  
I-VI.

Purpose of  
the attempt  
to determine  
the province  
of juris-  
prudence  
briefly  
explained.

Law properly  
so called.

Law of God

Human Laws  
two classes.

**PART I.**  
§ 1.

Objects im-  
properly but  
by a close  
analogy  
termed laws.

These and  
the second  
class of  
human laws  
placed  
together  
under the  
name  
'Positive  
Morality.'

Objects  
metaphori-  
cally termed  
laws.

propriate matter of jurisprudence; 2ndly, others are set by men not political superiors, or not acting as such.

Closely analogous to human laws of this second class are a set of objects frequently but improperly termed laws, being rules set and enforced merely by the opinion of an indeterminate body of men; e.g., where the word law is used in such expressions as 'the law of honour,' the 'laws of fashion.' Rules of this species constitute much of what is usually termed 'International law.'

Human laws of the second class above mentioned (*i.e.*, those set by men not as political superiors) with the objects improperly but by close analogy termed laws I place together in a common class under the term *positive morality*. The name morality severs them from *positive law*; while the epithet *positive* disjoins them from the *law of God*, marking the distinction between morality according to the rules and opinions actually prevailing amongst men, and morality conceived of as conforming to the law of God.

There are numerous applications of the term *law* which rest upon a slender analogy, and are merely metaphorical. Such is the case when we talk of *laws* observed by the lower animals, of laws regulating the growth of vegetables, or determining the movements of inanimate bodies or masses. Intelligence is of the essence of law, and where intelligence is not, or is of a kind too limited to take the name of reason, the word law can only be applied by a figure of speech. By using the word law in the figurative sense, and then ignoring the circumstance that the use of the word was merely figurative, a deluge of muddy speculation has been introduced into the field of jurisprudence and morals. In this respect the phrase 'Law of Nature' (*jus naturale*) has much to answer for.

The following table illustrates the division and relations between the several objects indicated:—

| Law of<br>God.   | Human Laws.   | Objects im-<br>properly but, by a<br>close analogy<br>termed laws. | Laws so<br>called<br>by a<br>mere<br>figure of<br>speech. |
|--|---|--|---|
| POSITIVE<br>LAW.<br>(The ap-<br>propriate<br>matter of<br>jurispru-<br>dence.) | Laws set<br>by men<br>not as<br>political<br>superiors. |  |   |
| Positive morality.   |   |  |   |

Four classes  
of laws  
(proper and  
otherwise).

Laws properly so called, with laws improperly so called, may accordingly be divided into the four following kinds.

1. The divine laws, or the laws of God: that is to say, the laws which are set by God to his human creatures.

**2. Positive laws:** that is to say, laws which are simply and strictly so called, and which form the appropriate matter of general and particular jurisprudence.

**3. Positive morality,** rules of positive morality, or positive moral rules.

**4. Laws metaphorical or figurative,** or merely metaphorical or figurative.

Positive laws (the appropriate matter of jurisprudence) are therefore related in the way of resemblance or by close or remote analogies to the following objects. 1. In the way of resemblance they are related to the laws of God. 2. In the way of resemblance they are related to those rules of positive morality which are laws properly so called. And by a close or strong analogy they are related to those rules of positive morality which are laws set by opinion. 3. By a remote or slender analogy they are related to laws figuratively so called.

The leading purpose of the first part of this work is to distinguish positive laws (the appropriate matter of jurisprudence) from the objects lastly above enumerated: objects with which they are often confounded in consequence of the resemblance and analogies above mentioned, and of the common name of 'laws' being applied to all. The first part of this work is accordingly entitled 'The Province of Jurisprudence Determined,' and its purpose is to describe the boundary which severs that province from the regions lying on its confines.

The method I adopt for accomplishing this purpose may be shortly stated as follows:—

I. I determine the essence common to all laws properly so called: in other words I determine the essence of a law imperative and proper.

II. I determine the respective characters of the four several classes into which laws (proper and otherwise) may be divided, assigning to each class the appropriate marks by which laws of that class are distinguished from laws of the others.

It is convenient to treat these classes in the following order:—

- (a) *Laws of God.*
- (b) *Positive Morality.*
- (c) *Laws in a figurative sense.*
- (d) **POSITIVE LAWS.**

By determining the essence or nature of a law imperative and proper, and the respective characters of those four several classes, I determine positively and negatively the appropriate matter of jurisprudence. I determine positively what that matter is; and I distinguish it from various objects which are variously related to it, and with which it is apt to be

**ANALYSIS.  
LECT.  
I-VI.**

**Principle of  
the method  
adopted for  
determining  
the Province  
of juris-  
prudence.**

**PART I.**  
§ 1.

confounded. I show moreover its affinities with those various related objects: affinities that ought to be conceived precisely and clearly, as there are numerous portions of the *rationale* of positive law to which they are the key.

Topics embraced in this portion of the work, and their order.

I. Essentials of law determined.—therein defining 'command,' 'sanction,' 'duty,' 'superior and inferior.'

II. (a) Divine laws, revealed and unrevealed.

Nature of index to the latter.

Reasons for this excursion into the field of ethics.

Having suggested the purpose of that portion of the work contained in the ensuing six lectures, I now will indicate the topics embraced therein, and also the order in which those topics are presented to the reader.

I. In the *first* of the six lectures which immediately follow, I state the essentials of a law or rule (taken with the largest signification that can be given to the term properly). In other words, I determine the essence common to all laws properly so called.

Determining the essence of a law imperative and proper, I determine implicitly the essence of a command; and I distinguish commands which are laws from occasional or particular commands. Determining the nature of a command, I fix the meanings of the terms implied by 'command': namely, 'sanction' or 'enforcement of obedience'; 'duty' or 'obligation'; 'superior and inferior.'

II. (a) In the beginning of the *second* lecture, I briefly determine the characters by which the laws of God are distinguished from other laws; and I divide the laws and other commands of the Deity into two kinds: the revealed or express, and the unrevealed or tacit.

I then pass to the nature of the signs or index through which commands of the latter kind are manifested to Man. Now, concerning the nature of the index to the tacit commands of the Deity, there are three hypotheses: First, the pure hypothesis of general utility; secondly, the pure hypothesis of a moral sense; thirdly, a hypothesis mixed or compounded of the others. And with a statement and explanation of these three hypotheses the greater portion of the *second* lecture, and the whole of the *third* and *fourth* lectures, are occupied.

That exposition of the three hypotheses or theories, if apparently impertinent to my subject, is yet a necessary link in a chain of systematic lectures expounding the principles of jurisprudence. Of those principles, both as regards their essential character, and as they are expressed in the writings of jurists, there are many which could not be expounded correctly and clearly, if the three hypotheses or theories had not been previously expounded. For example: Positive law and morality are distinguished by modern jurists into law natural and law positive: and this distinction nearly tallies with one which pervades the Pandects and Institutes, and which was taken by their compilers from the jurists who are styled 'classical.' By the 'classical'

jurists (of excerpts from whose writings the Pandects are mainly composed), *jus civile* is distinguished from *jus gentium*, or *jus omnium gentium*. For (say they) a portion of the positive law which obtains in a particular nation, is peculiar to that community: And may be styled *jus civile*, or *jus proprium ipsius civilis*. But there are other rules of positive law which obtain in all nations, and there are rules of positive morality which all mankind observe: And since these legal rules obtain in all nations, and these moral rules are observed by all mankind, they may be styled the *jus omnium gentium*, or the *commune omnium hominum jus*. Now these rules, being universal, cannot be purely or simply of human invention and position. More probably are they fashioned by men on laws coming from God, or from the intelligent and rational Nature which is the soul and the guide of the universe. But the legal and moral rules which are peculiar to particular nations, are purely or simply of human invention and position. Inasmuch as they are partial and transient, and not universal and enduring, they can hardly be fashioned by their human authors on divine or natural models.—Now, without a previous knowledge of the three hypotheses in question, the worth of the two distinctions to which I have briefly alluded, cannot be known correctly, or estimated truly. Assuming the pure hypothesis of a moral sense, or assuming the pure hypothesis of general utility, those distinctions are purposeless and idle subtleties. But, assuming the hypothesis compounded of the others, those distinctions are significant, and are also of considerable moment.

Besides, the divine law is the measure or test of positive law and morality. That is to say law and morality, in so far as they are what they *ought* to be, conform, or are not repugnant, to the law of God. Consequently, an all-important object of the science of ethics (or, borrowing the language of Bentham, ‘the science of deontology’) is to determine the nature of the index to the tacit commands of the Deity, or the nature of the signs or proofs through which those commands may be known.—I mean by ‘the science of ethics’ (or by ‘the science of deontology’), the science of law and morality as they respectively *ought* to be: as they respectively *must* be if *they conform to their measure or test*. That department of the science of ethics, which is concerned with positive law as it ought to be, is styled the science of legislation: that which is concerned with positive morality as it ought to be, has not an appropriate name.—Now, though the science of legislation (or of positive law as it *ought* to be) is not the science of jurisprudence (or of positive law as it *is*), still the sciences are connected by numerous and indissoluble ties. Since, then, the nature of the index to the tacit commands of the Deity

ANALYSIS.  
LECT.  
I-VI.

PART I.  
§ 1.

is an all-important object of the science of legislation, it is a fit and important object of the kindred science of jurisprudence.

Deeply convinced of the truth and importance of the theory of general utility, I depart in some degree from my strict Course in order to rectify certain current misconceptions of the theory: to answer certain objections resting on those misconceptions: and to solve or extenuate difficulties with which the theory is really embarrassed.

(b) Positive morality.

(b) At the beginning of the *fifth* lecture, I distribute laws or rules under two classes: First, laws properly so called, with such improper laws as are closely analogous to the proper; secondly, those improper laws which are remotely analogous to the proper, and which I style, therefore, laws metaphorical or figurative.—I also distribute laws proper, with such improper laws as are closely analogous to the proper, under three classes: namely, the laws properly so called which I style the laws of God; the laws properly so called which I style positive laws; and the laws properly so called, with the laws improperly so called, which I style positive morality or positive moral rules.—I assign moreover my reasons for marking those several classes with those respective names.

Having determined, in preceding lectures, the characters or distinguishing marks of the divine laws, I determine, in the fifth lecture, the characters or distinguishing marks of positive moral rules: that is to say, such of the laws or rules set by men to men as are not armed with legal sanctions.—Having determined the distinguishing marks of positive moral rules, I determine the respective characters of their two dissimilar kinds: namely, those which are laws imperative and proper, and those which are laws set by opinion.

The divine law, positive law, and positive morality, are mutually related in various ways. I advert, in the fifth lecture, to the cases wherein they agree, wherein they disagree without conflicting, and wherein they disagree and conflict.

I show, in the same lecture, that my distribution of laws proper, and of such improper laws as are closely analogous to the proper, tallies, in the main, with a division of laws which is given incidentally by Locke in his *Essay on Human Understanding*.

(c) Laws metaphorically so called.

(c) At the end of the same lecture, I determine the characters or distinguishing marks of laws metaphorical or figurative. And I show that laws which are merely laws by a figure of speech, are blended and confounded, by writers of celebrity, with laws imperative and proper.

(d) Positive laws strictly so called.

(d) In the *sixth* and *last* lecture, I determine the characters of laws positive: that is to say, laws which are

simply and strictly so called, and which form the appropriate matter of general and particular jurisprudence.

Herein I determine implicitly the notion of sovereignty, with the implied or corrective notion of independent political society. For the essential difference of a positive law may be stated generally in the following manner. Every positive law, or every law strictly so called, is set by a sovereign person, or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme.

To elucidate the nature of sovereignty, and of the independent political society that sovereignty implies, I examine various topics which I arrange under the following heads. First, the possible forms or shapes of supreme political government; secondly, the limits, real or imaginary, of supreme political power; thirdly, the origin or causes of political government and society. Examining those various topics, I complete my description of the limit or boundary by which positive law is severed from positive morality. For I distinguish them at certain points where the line of demarcation is not easily perceptible.

The essential difference of a positive law (or the difference that severs it from a law which is not a positive law) may be stated generally as I have stated it above. But this general statement is open to certain correctives. And with a brief allusion to those correctives, I close the sixth lecture.

ANALYSIS.  
LECT.  
I-VI.

Herein of  
sovereignty  
and inde-  
pendent  
political  
society.

## LECTURE I.

I.—In pursuance of the purpose above sketched out I proceed in the first place to state the essentials of a law properly so called.

Every *law* or *rule* (taken with the largest signification which can be given to the term *properly*) is a *command*. Or, rather, laws or rules, properly so called, are a species of commands.

Now, since the term *command* comprises the term *law*, the first is the simpler as well as the larger of the two. But, simple as it is, it admits of explanation. And, since it is the key to the sciences of jurisprudence and morals, its meaning should be analyzed with precision.

Accordingly, I shall endeavour, in the first instance, to analyze the meaning of '*command*': an analysis which is necessarily difficult and involves circumlocution in proportion as the term to be explained is simple.

If you express or intimate a wish that I shall do or

LECT.  
I.

Laws or rules  
properly so  
called, are a  
species of  
commands.

PART I.  
§ 1.

The meaning  
of the term  
command.

forbear from some act, and if you will visit me with an evil in case I comply not with your wish, the *expression* or *intimation* of your wish is a *command*. A command is distinguished from other significations of desire, not by the style in which the desire is signified, but by the power and the purpose of the party commanding to inflict an evil or pain in case the desire be disregarded. If you cannot or will not harm me in case I comply not with your wish, the expression of your wish is not a command, although you utter your wish in imperative phrase. If you are able and willing to harm me in case I comply not with your wish, the expression of your wish amounts to a command, although you are prompted by a spirit of courtesy to utter it in the shape of a request. '*Preces erant, sed quibus contradicere non posset.*' Such is the language of Tacitus, when speaking of a petition by the soldiery to a son and lieutenant of Vespasian.\*

The meaning  
of the term  
duty.

Being liable to evil from you if I comply not with a wish which you signify, I am *bound* or *obliged* by your command, or I lie under a *duty* to obey it.

The terms  
command and  
duty are cor-  
relative.

Command and duty are, therefore, correlative terms: the meaning denoted by each being implied or supposed by the other. Wherever a duty lies, a command has been signified; and whenever a command is signified, a duty is imposed.

The meaning  
of the term  
sanction.

The evil which will probably be incurred in case a command be disobeyed or (to use an equivalent expression) in case a duty be broken, is frequently called a *sanction*. The command or the duty is said to be *sanctioned* by the chance of incurring the evil. Some sanctions are called punishments.

To the exist-  
ence of a  
command,  
duty, and a  
sanction, a  
violent mo-  
tive to com-  
pliance is not  
requisite.

Paley, in his analysis of the term *obligation*, lays much stress upon the *violence* of the motive to compliance. His meaning appears to be that, unless the motive to compliance be *violent* or *intense*, the expression of a wish is not a *command*, nor does it place the person to whom it is directed under a *duty*.

But in truth the magnitude of the eventual evil, and the magnitude of the chance of incurring it, are foreign to the matter in question. The greater the eventual evil, and the greater the chance of incurring it, the greater is the efficacy of the command, and the greater is the strength of the obligation. But where there is the smallest chance of incurring the smallest evil, the expression of a wish amounts to a command, and, therefore, imposes a duty. The sanction, if you will, is feeble or insufficient; but still there is a sanction, and, therefore, a duty and a command.

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\* Of a similar nature would be a request or advice tendered by a British Resident to the reigning personage in a (so-called) independent state in India.—R. C.

By Locke and Bentham, the term *sanction*, or *enforcement of obedience*, is applied to conditional good as well as to conditional evil: to reward as well as to punishment. But, with all my habitual veneration for these names, I think this extension of the term pregnant with confusion.

Rewards are, indisputably, motives to comply with the wishes of others. But to talk of commands and duties as sanctioned or enforced by rewards, is surely a wide departure from the established meaning of the terms. If *you* expressed a desire that *I* should render a service, and proffered a reward as the inducement to render it, *you* would scarcely be said to command the service, nor should *I*, in ordinary language, be obliged to render it.

If we put reward into the import of the term *sanction*, we must engage in a toilsome and probably unsuccessful struggle with the current of ordinary speech.

The ideas then comprehended by the term *command* are the following. 1. A wish or desire conceived by a rational being, that another rational being shall do or forbear. 2. An evil to proceed from the former, and to be incurred by the latter, in case the latter comply not with the wish. 3. An expression or intimation of the wish by words or other signs.

It appears from what has been premised, that *command*, *duty*, and *sanction* are inseparably connected terms: that each embraces the same ideas as the others, though each denotes those ideas in a peculiar order or series.

'A wish conceived by one, and expressed or intimated to another, with an evil to be inflicted and incurred in case the wish be disregarded,' are signified directly and indirectly by each of the three expressions. Each is the name of the same complex notion. But they differ in this, that the word '*command*' points directly and prominently to the *wish* expressed by the one; the word '*duty*' to the chance of meeting the evil incurred by the other; the word '*sanction*' to the evil itself; each expression referring less directly and prominently to the remaining notions.

To those who are familiar with the language of logicians (language unrivalled for brevity, distinctness, and precision), I can express my meaning accurately in a breath.—Each of the three terms *signifies* the same notion; but each *denotes* a different part of that notion, and *connote*s the residue.

Commands are of two species. Some are *laws* or *rules*. The others have not acquired an appropriate name, nor is there any short expression which will mark them precisely. I must, therefore, note them as well as I can by the ambiguous and inexpressive name of '*occasional* or *particular commands*'. The distinction may, I think, be stated in the following manner.

Lect.  
I.

Rewards are  
not sanctions

The meaning  
of the term  
*command*,  
briefly re-  
stated.

The insepar-  
able connec-  
tion of the  
three terms,  
*command*,  
*duty*, and  
*sanction*.

The manner  
of that con-  
nection.

*Laws* or *rules*  
distinguished  
from com-  
mands which  
are *occasional*  
or *particular*.

PART I.  
§ 1.

By every command, the party to whom it is directed is obliged to do or to forbear.

Now where it obliges *generally* to acts or forbearances of a class, a command is a law or rule. But where it obliges to a *specific* act or forbearance, or to acts or forbearances *specifically* or *individually*, a command is occasional or particular.

For instance, if you command your servant to go on a given errand, or *not* to leave your house on a given evening, or to rise at such an hour on such a morning, or to rise at that hour during the next week or month, the command is occasional or particular. For the act or acts enjoined or forbidden are specifically determined or assigned.

But if you command him *simply* to rise at that hour, or to rise at that hour *always*, or *till further orders*, it may be said, with propriety, that you lay down a *rule* for the guidance of your servant's conduct. For no specific act is assigned by the command, but the command obliges him generally to acts of a determined class.

If a regiment be ordered to attack or defend a post, or to quell a riot, or to march from their present quarters, the command is occasional or particular. But an order to exercise daily till further orders would be called a *general* order, and *might* be called a *rule*.

If Parliament prohibited simply the exportation of corn, either for a given period or indefinitely, it would establish a law or rule: a *kind* or *sort* of acts being determined by the command, and acts of that kind or sort being *generally* forbidden. But an order issued by Parliament to meet an impending scarcity, and stopping the exportation of corn *then shipped and in port*, would not be a law or rule, though issued by the sovereign legislature. The order regarding exclusively a specified quantity of corn, the negative acts or forbearances, enjoined by the command, would be determined specifically or individually by the determinate nature of their subject.

Again: An act which is not an offence, according to the existing law, moves the sovereign to displeasure: and, though the authors of the act are legally innocent or unoffending, the sovereign commands that they shall be punished. As enjoining a specific punishment in that specific case, and as not enjoining generally acts or forbearances of a class, the order uttered by the sovereign is not a law or rule.

To conclude with an appropriate example, *judicial commands* are commonly occasional or particular, although the commands which they are calculated to enforce are commonly laws or rules.

For instance, the lawgiver commands that thieves shall be hanged. A specific theft and a specified thief being given, the judge commands that the thief shall be hanged, agreeably to the command of the lawgiver.

Now the lawgiver determines a class or description of acts; prohibits acts of the class generally and indefinitely; and commands, with the like generality, that punishment shall follow transgression. The command of the lawgiver is, therefore, a law or rule. But the command of the judge is occasional or particular. For he orders a specific punishment, as the consequence of a specific offence.

LECT.  
I.

The distinction immediately above stated and illustrated does not indeed accurately square with established forms of speech. For instance an order by Parliament stopping the exportation of corn then in port, would very likely be called a law because it wears the form of law and is issued by the sovereign legislature. An act of attainder deliberately passed by a Parliament with the forms of legislation would probably be called a law, though a similar order made by a sovereign monarch without deliberation or ceremony would be styled an arbitrary command. And on the other hand there are many commands issued by way of delegated legislation which really are laws, although not called so by common language. Such are various Orders in Council, Orders issued by Public Departments, Schemes of the Charity Commissioners when duly laid before Parliament, Orders or 'Rules' made under powers given in Acts of Parliament relating to Judicial Procedure or otherwise made in exercise of delegated legislative functions.

According to the line of separation which I have attempted to describe, a law and a particular command are distinguished thus.—Acts or forbearances of a *class* are enjoined *generally* by the former. Acts determined *specifically*, are enjoined or forbidden by the latter.

A different line of separation has been drawn by Blackstone and others. According to them, a law and a particular command are distinguished in the following manner.—A law obliges *generally* the members of the given community, or persons of a given class. A particular command obliges a *single* person, or persons *individually*.

Incorrect account of the distinction given by Blackstone and others.

This is not a correct account of the distinction.

For, *first*, commands which oblige generally the members of the given community, or persons of given classes, are not always laws or rules.

Thus, in the case already supposed; that in which the sovereign commands that all corn actually shipped for exportation be stopped and detained; the command is obligatory upon the whole community, but as it obliges them only to a set of acts individually assigned, it is not a law.

And, *secondly*, a command which obliges exclusively persons individually determined, may amount, notwithstanding, to a law or rule.

For example, A father may set a *rule* to his child or

PART I.  
§ 1.

children : a guardian, to his ward : a master, to his slave or servant. And certain of God's *laws* were as binding on the first man, as they are binding at this hour on the millions who have sprung from his loins.

Again suppose that Parliament creates and grants an office, and binds the grantee to services of a given description, this would be a law established by political superiors, and yet exclusively binding a specified or determinate person.

Laws established by political superiors, and exclusively binding specified or determinate persons, are styled, in the language of the Roman jurists, *privilegia*. Though that name, like most of the leading terms in actual systems of law, is equally applied to a heap of heterogeneous objects.\*

A law, properly so called, is therefore a command which obliges a person or persons ; and as distinguished from a particular or occasional command, obliges generally to acts or forbearances of a class.

Laws and other commands are said to proceed from *superiors* and to bind or oblige *inferiors*. I will, therefore, analyze the meaning of those correlative expressions ; and will try to strip them of a certain mystery, by which that simple meaning appears to be obscured.

*Superiority* is often synonymous with *precedence* or *excellence* : as for instance when we talk of superiors in rank, wealth or virtue.

But, taken with the meaning wherein I here understand it, the term *superiority* signifies *might* : the power of affecting others with evil or pain, and of forcing them, through fear of that evil, to fashion their conduct to one's wishes.

For example, God is emphatically the *superior* of Man. For his power of affecting us with pain, and of forcing us to comply with his will, is unbounded and resistless.

To a limited extent, the Sovereign One or Number is the *superior* of the subject or citizen : the master, of the slave or servant : the father, of the child.

In short, whoever can *oblige* another to comply with his wishes, is the *superior* of that other, so far as the ability reaches : That other being, to the same extent, the *inferior*.

The might or superiority of God, is simple or absolute. But in all or most cases of human superiority, the relation

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\* Where a *privilegium* merely imposes a duty, it exclusively obliges a determinate person or persona. But where a *privilegium* confers a right, and the right conferred *avails against the world at large*, the law is *privilegium* as viewed from a certain aspect, but is also a *general law* as viewed from another aspect. In respect of the right conferred, the law exclusively regards a determinate person, and, therefore, is *privilegium*. In respect of the duty imposed, and corresponding to the right conferred, the law regards generally the members of the entire community.

*The definition  
of a law  
or rule, pro-  
perly so  
called.*

*The meaning  
of the corre-  
lative terms  
*superior* and  
*inferior*.*

of superior and inferior, and the relation of inferior and superior, are reciprocal. The party who is the superior as viewed from one aspect, is the inferior as viewed from another.

For example, To an indefinite, though limited extent, the monarch is the superior of the governed: his power being commonly sufficient to enforce compliance with his will. But the governed, collectively or in mass, are also the superior of the monarch: who is checked in the abuse of his might by his fear of exciting their anger; and of rousing to active resistance the might which slumbers in the multitude.

A member of a sovereign assembly is the superior of the judge: the judge being bound by the law which proceeds from that sovereign body. But, in his character of citizen or subject, he is the inferior of the judge: the judge being the minister of the law, and armed with the power of enforcing it.

It appears, then, that the term *superiority* (like the terms *duty* and *sanction*) is implied by the term *command*: and therefore 'that laws emanate from superiors' is an identical proposition. The meaning which it affects to impart is contained in its subject.

I must now advert to certain objects improperly called laws, not being commands, which may nevertheless be properly included within the province of jurisprudence: namely:—

1. Acts on the part of legislatures to *explain* positive law. Working no change in the actual duties of the governed, but simply declaring what those duties are, they are not commands, but, to borrow an expression from the writers on Roman law, acts of *authentic* interpretation. And although they are not *laws* properly so called, they are so intimately connected with positive law as to come within the province of jurisprudence.

It often, indeed, happens (as I shall show in the proper place), that laws declaratory in name are imperative in effect: Legislative, like judicial interpretation, being frequently deceptive; and establishing new law, under guise of expounding the old.

2. Laws to repeal laws, and to release from existing duties. In so far as they release from duties imposed by existing laws, they are not commands, but revocations of commands. These are often named 'permissive' laws.

Remotely and indirectly, indeed, permissive laws are often or always imperative. For the parties released from duties are restored to liberties or rights: and duties answering those rights are, therefore, created or revived.

But this is a matter which I shall examine with exactness, when I analyze the expressions 'legal right,' 'permission by the sovereign or state,' and 'civil or political liberty.'

Some laws  
improperly so  
called are  
within the  
scope of juris-  
prudence.

## PART I.

## § 1.

## 3. Imperfect laws, or laws of imperfect obligation.

An imperfect law (with the sense wherein the term is used by the Roman jurists) is a law which wants a sanction, and which, therefore, is not binding. A law declaring that certain acts are crimes, but annexing no punishment to the commission of acts of the class, is the simplest and most obvious example. An imperfect law is not so properly a law, as counsel, or exhortation, addressed by a superior to inferiors.

Examples of imperfect laws are cited by the Roman jurists. But with us in England, laws professedly imperative are always (I believe) perfect or obligatory. Where the English legislature affects to command, the English tribunals not unreasonably presume that the legislature exacts obedience. And, if no specific sanction be annexed to a given law, a sanction is supplied by the courts of justice, agreeably to a general maxim which obtains in cases of the kind.

Many of the writers on *moralis*, and on the so called *law of nature*, have annexed a different meaning to the term *imperfect*. Speaking of imperfect obligations, they commonly mean duties which are *not legal*: duties imposed by commands of God, or duties imposed by positive morality, as contradistinguished to duties imposed by positive law. An imperfect obligation, in the sense of the Roman jurists, is exactly equivalent to no obligation at all. For the term *imperfect* denotes simply that the law wants the sanction appropriate to laws of the kind. An imperfect obligation in the other meaning of the expression is a religious or a moral obligation.

The laws (improperly so called) which I have here lastly enumerated, are (I think) the only laws which are not commands, and which yet may be properly included within the province of jurisprudence. But though these, with the so called laws set by opinion and the objects metaphorically termed laws, are the only laws which *really* are not commands, there are certain laws (properly so called) which may *seem* not imperative. I subjoin a few remarks upon laws of this dubious character.

First it may be said that there are laws which *merely* create *rights*: And, seeing that every command imposes a *duty*, laws of this nature are not imperative.

But, as I have intimated already, and shall show completely hereafter, there are no laws *merely* creating *rights*. There are laws, it is true, which *merely* create *duties*: duties not correlating with correlative rights, and which therefore may be styled *absolute*. But every law really conferring a right, imposes expressly or tacitly a *relative* duty, or a duty correlating with the right. This will more clearly appear when I come hereafter to analyze the expression 'rights.'

Secondly, according to an opinion which I must notice

Laws (properly so called) which may seem not imperative.

Laws supposed merely to create rights.

incidentally here, though the subject to which it relates will be treated directly hereafter, *customary laws* are an exception to the proposition ‘that laws are a species of commands.’

By many of the admirers of customary laws (and, especially, of their German admirers) they are thought to oblige legally (independently of the sovereign or state) because the citizens or subjects have observed or kept them. Agreeably to this opinion, they are positive law (or law, strictly so called) inasmuch as they are enforced by the courts of justice: But exist as *positive law* by the spontaneous adoption of the governed, and not by position or establishment on the part of political superiors. And, consequently, customary laws, considered as positive law, are not laws or rules properly so called.

An opinion less mysterious, but somewhat allied to this, is not uncommonly held by the adverse party which is strongly opposed to customary law; and to all law made judicially, or in the way of judicial legislation. According to the latter opinion, all judge-made law is purely the creature of the judges by whom it is established immediately. To suppose that it speaks the legislative will of the sovereign, is one of the foolish or knavish *fictions* with which lawyers, in every age and nation, have perplexed the simplest truths.

It can easily be shown that each of these opinions is groundless: that customary law is *imperative* in the proper signification of the term; and that all judge-made law is the creature of the sovereign or state.

At its origin, a custom is a rule of conduct which the governed observe spontaneously, or not in pursuance of a law set by a political superior. The custom is transmuted into positive law when it is adopted as such, either by being expressly embodied in statutes promulgated by the sovereign authority, or implicitly by decisions of the courts of justice which are enforced by the power of the state.

For the legal rule introduced by a judicial decision (whether suggested by custom or not) is in effect legislation by the sovereign. A subordinate or subject judge is merely a minister. The rules which he makes derive their legal force from authority given by the state: an authority which the state may confer expressly, but which it commonly imparts in the way of acquiescence.

The opinion of the party which abhors judge-made laws, springs from their inadequate conception of the nature of commands.

Like other significations of desire, a command is express or tacit. If the desire be signified by words (written or spoken), the command is express. If the desire be signified by conduct (or by any signs of desire which are not words), the command is tacit.

Now when customs are turned into legal rules by deci-

LAW.  
I.

Customary  
laws.

PART I.  
§ 1.

sions of subject judges, the legal rules which emerge from the customs are *tacit* commands of the sovereign legislature. The state, which is able to abolish, permits its ministers to enforce them: and it therefore signifies its pleasure, by that its voluntary acquiescence, ‘that they shall serve as a law to the governed.’

It appears then that the positive law styled *customary* as well as all positive law made judicially, is established by the state directly or circuitously, and therefore is *imperative*: although it is true that law made judicially and law made by statute are distinguished by weighty differences; and into the nature and reasons of these I shall inquire hereafter.

I assume, then, that the only laws which are not imperative, and which belong to the subject-matter of jurisprudence, are the following:—1. Declaratory laws, or laws explaining the import of existing positive law. 2. Laws abrogating or repealing existing positive law. 3. Imperfect laws, or laws of imperfect obligation (with the sense wherein the expression is used by the Roman jurists).

But the space occupied in the science by these improper laws is comparatively narrow and insignificant. Accordingly, although I shall take them into account so often as I refer to them directly, I shall throw them out of account on other occasions. Or, in other words, I shall limit the term *law* to laws which are imperative, unless I extend it expressly to laws which are not.

Laws which  
are not com-  
mands, eum-  
merated.

LECT.  
II.

II.—HAVING stated the essentials of a law or rule (taken with the largest signification which can be given to the term *properly*), I now proceed, according to the purpose and method above sketched out, to distinguish the characters of the four different kinds or classes of laws (properly and improperly so called) in the order enumerated on p. 7 above.

(a) The Divine laws, or the laws of God.

(a) The Divine laws, or the laws of God, are laws set by God to his human creatures. As I have intimated already, and shall show more fully hereafter, they are laws or rules, *properly* so called.

As distinguished from duties imposed by human laws, duties imposed by the Divine laws may be called *religious duties*. Violations of religious duties are styled *sins*.

As distinguished from sanctions annexed to human laws, the sanctions annexed to the Divine laws may be called *religious sanctions*. They consist of the evils, or pains, which we may suffer here or hereafter, by the immediate appoint-

ment of God, and as consequences of breaking his commandments.

Of the Divine laws, or the laws of God, some are *revealed* or promulgated, others *unrevealed*. Those which are unrevealed are not unfrequently denoted by the phrases; ‘*law of nature*;’ ‘*natural law*;’ ‘*the law manifested to man by the light of nature or reason*;’ ‘*the laws, precepts, or dictates of natural religion*.’

The *revealed* law of God, and the portion of the law of God which is *unrevealed*, are manifested to men in different ways, or by different sets of signs.

With regard to the laws which God is pleased to *reveal*, the way wherein they are manifested is easily conceived. They are *express commands*: portions of the *word of God*: commands signified to men through the medium of human language; and uttered by God directly, or by servants whom he sends to announce them.

Such of the Divine laws as are *unrevealed* are laws set by God to his human creatures, but not through the medium of human language, or not expressly.

These are the only laws which he has set to that portion of mankind who are excluded from the light of Revelation.

These laws are binding upon us (who have access to the truths of Revelation), in so far as the revealed law has left our duties undetermined. For, though his express declarations are the clearest evidence of his will, we must look for many of the duties, which God has imposed upon us, to the marks or signs of his pleasure which are styled the *light of nature*. Paley and other divines have proved beyond a doubt, that it was not the purpose of Revelation to disclose the *whole* of those duties. Some we could not know, without the help of Revelation; and these the revealed law has stated distinctly and precisely. The rest we may know, if we will, by the light of nature or reason; and these the revealed law supposes or assumes. It passes them over in silence, or with a brief and incidental notice.

But if God has given us laws which he has not revealed or promulgated, how shall we know them? What are those signs of his pleasure, which we style the *light of nature*; and oppose, by that figurative phrase, to express declarations of his will?

The hypotheses or theories which attempt to resolve this question, may be reduced, I think, to two.

According to one of them, there are human actions which all mankind approve, human actions which all men disapprove; and these universal sentiments arise at the thought of those actions, spontaneously, instantly, and inevitably. Being common to all mankind, and inseparable

## LECT. II.

Of the Divine laws, some are *revealed*, and others are *unrevealed*.

Such of the Divine laws as are *revealed*.

Such of the Divine laws as are *unrevealed*.

What is the index to such of the Divine laws as are unrevealed?

The hypotheses or theories which regard the nature of that index.

The hypothesis or theory of a moral sense: of innate practical pri-

## PART I.

## § 1.

copies ; of a  
practical  
reason :  
common sense,  
&c., &c.

from the thoughts of those actions, these sentiments are marks or signs of the Divine pleasure. They are proofs that the actions which excite them are enjoined or forbidden by the Deity.

The rectitude or pravity of human conduct, or its agreement or disagreement with the laws of God, is instantly inferred from these sentiments, without the possibility of mistake. He has resolved that our happiness shall depend on our keeping his commandments: and it manifestly consists with his manifest wisdom and goodness, that we should know them promptly and certainly. Accordingly, he has not committed us to the guidance of our slow and fallible reason. He has wisely endowed us with *feelings*, which warn us at every step; and pursue us, with their importunate reproofs, when we wander from the path of our duties.

These simple or inscrutable feelings have been compared to those which we derive from the outward senses, and have been referred to a peculiar faculty called the *moral sense*: though, admitting that the feelings exist, and are proofs of the Divine pleasure, I am unable to discover the analogy which suggested the comparison and the name. The objects or appearances which properly are perceived through the sense, are perceived immediately, or without an inference of the understanding. According to the hypothesis which I have briefly stated or suggested, there is always an inference of the understanding, though the inference is short and inevitable. From feelings which arise within us when we think of certain actions, we infer that those actions are enjoined or forbidden by the Deity.

The hypothesis of a *moral sense* has been expressed by various terms; by the term *common sense* in relation to mankind in general; *conscience* in relation to the individual. And the laws of God to which these feelings are supposed to be the index have been styled *innate practical* principles.

According to the other of the adverse theories or hypotheses, the laws of God, which are not revealed or promulgated, must be gathered by man from the goodness of God, and from the tendencies of human actions. In other words, the benevolence of God, with the principle of general utility, is our only index or guide to his unrevealed law.

God designs the happiness of all his sentient creatures. Some human actions forward that benevolent purpose, or their tendencies are beneficent or useful. Other human actions are adverse to that purpose, or their tendencies are mischievous or pernicious. The former, as promoting his purpose, God has enjoined. The latter, as opposed to his purpose, God has forbidden. He has given us the faculty of observing; of remembering; of reasoning: and, by duly applying those faculties, we may collect the tendencies of

The theory or  
hypothesis of  
utility.

A brief sum-  
mary of the  
theory of  
utility.

our actions. Knowing the tendencies of our actions, and knowing his benevolent purpose, we know his tacit commands.

Such is a brief summary of this celebrated theory. I should wander to a measureless distance from the main purpose of my lectures, if I stated all the explanations with which that summary must be received. But, to obviate the principal misconceptions to which the theory is obnoxious, I will subjoin as many of those explanations as my purpose and limits will admit.

The theory is this.—Inasmuch as the goodness of God is boundless and impartial, he designs the greatest happiness of all his sentient creatures. From the tendencies of human actions to increase or diminish the aggregate of human enjoyments, we may infer the laws which he has given, but has not expressed or revealed.

Now the *tendency* of a human action thus understood is the whole of its tendency: the sum of its probable consequences, remote and collateral, as well as direct, in so far as they may influence the general happiness.

Trying to collect its tendency (as thus understood), we must not consider the action as if it were *single* and *insulated*, but must look at the *class* of actions to which it belongs. The question is this:—If acts of the *class* were *generally* done, or *generally* forborne or omitted, what would be the probable effect on the general happiness or good?

Considered by itself, a mischievous act may seem to be useful or harmless. Considered by itself, a useful act may seem to be pernicious.

For example, If a poor man steal a handful from the heap of his rich neighbour, the act, considered by itself, is harmless or positively good. One man's poverty is assuaged with the superfluous wealth of another.

But suppose that thefts were general (or that the useful right of property were open to frequent invasions), and mark the result.

Without security for property, there were no inducement to save. Without habitual saving on the part of proprietors, there were no accumulation of capital. Without accumulation of capital, there were no fund for the payment of wages, no division of labour, no elaborate and costly machines: there were none of those helps to labour which augment its productive power, and, therefore, multiply the enjoyments of every individual in the community. Frequent invasions of property would bring the rich to poverty, and aggravate the poverty of the poor.

Again: If I evade the payment of a tax imposed by a good government, the *specific* effects of the mischievous forbearance are indisputably useful. For the money which I unduly withhold is convenient to myself; and, compared

Lect.  
II.

The following  
explanations  
of that sum-  
mary-briefly  
introduced.

The true ten-  
dency of a  
human  
action, and  
the true test  
of that ten-  
dency.

PART I.  
§ 1.

with the bulk of the public revenue, is a quantity too small to be missed. But the regular payment of taxes is necessary to the existence of the government. And I, and the rest of the community, enjoy the security which it gives, because the payment of taxes is rarely evaded.

In the cases now supposed, the act or omission is good, considered as single or insulated ; but, considered with the rest of its class, is evil. In other cases, an act or omission is evil, considered as single or insulated ; but, considered with the rest of its class, is good.

For example, A punishment, as a solitary fact, is an evil : the pain inflicted on the criminal being added to the mischief of the crime. But, considered as part of a system, a punishment is useful or beneficent. By a dozen or score of punishments, thousands of crimes are prevented. With the sufferings of the guilty few, the security of the many is purchased. By the lopping of a peccant member, the body is saved from decay.

If the tendencies of actions considered in the light above mentioned be the index to the will of God, it follows that most of his commands are general or universal. The useful acts which he enjoins, and the pernicious acts which he prohibits, he enjoins or prohibits, for the most part, not singly, but by classes : not by commands which are particular, or directed to insulated cases ; but by laws or rules which are general, and commonly inflexible.

For example, Certain acts are pernicious, considered as a class : while such are the motives or inducements to the commission of acts of the class, that unless we were determined to forbearance by the fear of punishment, they would be frequently committed. If we combine these *data* with the wisdom and goodness of God, we must infer that he forbids such acts *without exception*. In the tenth, or the hundredth case, the act might be useful : in the nine, or the ninety and nine, the act would be pernicious. If the act were permitted or tolerated in the rare and anomalous case, the motives to forbear in the others would be weakened or destroyed. In the hurry and tumult of action it is hard to distinguish justly. To grasp at present enjoyment, and to turn from present uneasiness, is the habitual inclination of us all. And thus, through the weakness of our judgments, and the more dangerous infirmity of our wills, we should frequently stretch the exception to cases embraced by the rule.

Consequently, where acts, considered as a class, are useful or pernicious, we must conclude that he enjoins or forbids them, and by a *rule* which probably is inflexible.

Such, I say, is the conclusion at which we must arrive, supposing that the fear of punishment be necessary to incite or restrain. This is not the case in regard to all

According to  
the theory of  
utility, God's  
commands  
are mostly  
rules.

It does not  
follow from  
the theory of  
utility, that

kinds of actions. To some useful acts we are sufficiently prone, and from some mischievous acts sufficiently averse, without the motives which are presented to the will by a lawgiver. Motives *natural* or spontaneous impel us to action in the one case, and hold us to forbearance in the other. In the language of Mr. Locke, ‘The mischievous omission or action would bring down evils upon us, which are its *natural* products or consequences; and which, as *natural* inconveniences, operate *without a law*.’

Now, if the ordinary measure or test for trying the tendencies of our actions be that above explained, the most current and specious of the objections which are made to the theory of utility, is founded in gross mistake, and is open to triumphant refutation.

That objection may be stated thus:

‘Pleasure and pain (or good and evil) are inseparably connected. Every act and forbearance is followed by both: immediately or remotely, to ourselves or to our fellow-creatures.

‘Consequently, if we shape our conduct justly to the principle of general utility, every election which we make between doing or forbearing from an act will be preceded by the following process. *First*: We shall conjecture the consequences of the act, and also the consequences of the forbearance. *Secondly*: We shall compare the consequences of the act with the consequences of the forbearance, and determine the *balance* of advantage.

‘Now suppose we actually tried this process before arriving at our resolves. Mark the absurd and mischievous effects which would inevitably follow.

‘Generally speaking, the period allowed for deliberation is brief: and to lengthen deliberation beyond that limited period is equivalent to forbearance or omission. Consequently, if we performed this process completely, we should often defeat its purpose. But feeling the necessity of resolving promptly, we should *not* perform the process completely or correctly. We should guess or conjecture hastily the effects of the act and the forbearance, and compare their respective effects with equal precipitancy. Our premises would be false or imperfect; our conclusions, badly deduced. Labouring to adjust our conduct to the principle of general utility, we should work inevitable mischief.

‘And such would be the consequences of following the principle of utility, though we sought the true and the useful with simplicity and in earnest. But, as we commonly prefer our own interests to those of our fellow-creatures, and our own immediate to our own remote interests, it is clear that we should warp the principle to selfish and hurtful ends.’

LECT.  
II.

every useful action is the object of a Divine injunction; and every pernicious action, the object of a Divine prohibition.

A current and specious objection to the theory of utility, introduced and stated.

**PART I.****§ 1.**

The two apt answers to the foregoing objection briefly introduced.

Such, I believe, is the meaning of those—if they have a meaning—who object to the principle of utility ‘that it is a *dangerous principle of conduct*.’

It has been said, in answer to this objection, that it involves a contradiction in terms. *Danger* is another name for *probable mischief*: And, surely, we best avert the probable mischiefs of our conduct, by estimating its probable consequences. To say ‘that the principle of utility is a *dangerous principle of conduct*,’ is to say ‘that it is contrary to utility to consult utility.’

Now, though this is so brief and pithy that I heartily wish it were conclusive, I must admit that it scarcely touches the objection. For the objection assumes that we *cannot* foresee and estimate the probable effects of our conduct: and the argument is that by the attempt at calculation, which would inevitably fail, we should fall into error and sin, and so deviate from the principle of utility by which we professed to be guided. A proposition involving when fairly stated nothing like a contradiction.

But, though this is not the refutation, there is a refutation.

And first, If utility be our only index to the tacit commands of the Deity, it is idle to object its imperfections. We must even make the most of it.

If man were endowed with a *moral sense*, or in other words were gifted with a peculiar organ for acquiring a knowledge of the duties imposed upon him by the Deity, these would be subjects of immediate consciousness, and an attempt to displace that invincible consciousness by the principle of utility would be impossible, and manifestly absurd. But, if we are not gifted with that peculiar organ, we must gather our duties, as best we can, from the tendencies of human actions; or remain, at our own peril, in ignorance of our duties.

Before stating the *second* answer to the objection I must observe that the objectors misunderstand the theory which they impugn. They assume that, if we adjusted our conduct to the principle of general utility, every election which we made between doing and forbearing from an act would be preceded by a *calculation*: by an attempt to conjecture and compare the respective probable consequences of action and forbearance.

And, granting their assumption, I grant their inference. I grant that the principle of utility were a halting and purblind guide.

But their assumption is groundless. For, according to that theory, our conduct would conform to *rules* inferred from the tendencies of actions, but would not be determined by a direct resort to the principle of general utility. Utility would be the test of our conduct ultimately,

The first answer to the foregoing objection stated.

The second answer to the foregoing objection briefly introduced.

but not immediately: the immediate test of the rules to which our conduct would conform, but not the immediate test of specific or individual actions. Our rules would be fashioned on utility; our conduct, on our rules.

The second answer to the objection consists merely in a reiteration of the explanations of the theory already advanced, and the deduction of some necessary conclusions.

The whole tendency of an act,—the sum of its probable results in all their infinite ramifications,—can only be measured by supposing that acts of the kind were largely practised, and considering the probable result. The total is often capable of a direct estimation, for which, if we regard only the individual act, there are no certain data. Thus we arrive at a means for testing the quality of the individual act.

The question therefore is what would be the probable effect upon the general happiness or good, if acts of the class were generally done or forborne. If the balance of advantage or disadvantage lie on the positive side, the tendency of the act is good: the general happiness requires that *acts of the class* shall be done. If it lie on the negative side, the tendency of the act is bad: the general happiness requires that *acts of the class* shall be forborne.

But, concluding that acts of the class are useful or pernicious, we are forced upon a further inference. Adverting to the known wisdom and the known benevolence of the Deity, we infer that he enjoins or forbids them by a general and inflexible rule.

Such is the inference at which we inevitably arrive, supposing that the acts be such as to call for the intervention of a lawgiver.

To *rules* thus inferred, and lodged in the memory, our conduct would conform *immediately* if it were truly adjusted to utility.

We should not therefore, as the objection supposes, be under the necessity of pausing and calculating upon each act or forbearance. To do so would be superfluous, inasmuch as the result of that process would be embodied in a known *rule*; and mischievous, inasmuch as the *true* result would be expressed by that rule, whilst the process would probably be faulty if it were done on the spur of the occasion. On the contrary, the inferences suggested to our minds by repeated experience and observation are drawn into *principles*, or compressed into *maxims*; and these we carry about us ready for use, and apply to individual cases promptly or without hesitation.

This is the main, though not the only use of *theory*. which ignorant and weak people are in a habit of opposing to practice.

LECT.

II.

The second  
answer  
stated.

If our con-  
duct were  
truly adjusted  
to the prin-  
ciple of  
general  
utility, our  
conduct  
would con-  
form, for the  
most part, to  
*rules*; rules  
which eman-  
cate from  
the Deity,  
and to which  
the tenden-  
cies of human  
actions are  
the guide or  
index;

PART I.  
§ 1.

'Tis true in *theory*; but, then, 'tis false in *practice*,' says Noodle, with a look of the most ludicrous profanity.

But, with deference to this worshipful and weighty personage, that which is true in *theory* is also true in *practice*.

Seeing that a true theory is a compendium of particular truths, it is necessarily true as applied to particular cases. Unless the theory be true of particulars, and therefore true in practice, it has no *truth* at all. *Truth* is always particular, though *language* is commonly general. Unless the terms of a theory can be resolved into particular truths, the theory is mere jargon: a coil of those senseless abstractions which often ensnare the *instructed*, and betray the ignorant.

They who talk of a thing being true in *theory* but not true in *practice*, mean (if they have a meaning) that the theory in question is false: that the particular truths which it concerns are treated imperfectly or incorrectly; and that, if applied in practice, it might mislead.

Speaking then generally, human conduct is inevitably guided by *rules*, in the form, for the most part, of general principles or *maxims*.

The human conduct which is subject to the Divine commands, is not only guided by *rules*, but also by *moral sentiments* associated with those rules.

If I believe (no matter why) that acts of a class or description are enjoined or forbidden by the Deity, a sentiment of approbation or disapprobation is inseparably connected in my mind with the thought or conception of such acts. And by this I am urged to do, or restrained from doing such acts, although I advert not to the reason in which my belief originated, nor recal the Divine rule which I have inferred from that reason.

Now, if the reason in which my belief originated be the useful or pernicious tendency of acts of the class, my conduct is truly adjusted to the principle of general utility, but not determined by a direct resort to it. It is indeed guided remotely by *calculation*: but, immediately, or at the moment of action, is determined by *sentiment*; a sentiment associated with acts of the class, and with the rule which I have inferred from their tendency.

For example, Reasons which are quite satisfactory, but somewhat numerous and intricate, convince me that the institution of property is necessary to the general good. Consequently, I am convinced that thefts are pernicious; and therefore I infer that the Deity forbids them by a general and inflexible rule. But I am not compelled to repeat the train of induction and reasoning by which I arrive at this rule, before I can know with certainty that I should forbear from taking your purse. Through my previous habits of thought and by my education, a *sentiment of aversion* has become associated in my mind with the thought or concep-

and by sentiments associated with those rules.

tion of a *theft*: And I am determined by that ready emotion to keep my fingers from your purse.

To think that the theory of utility would substitute calculation for sentiment, is a gross and flagrant error: the error of a shallow, precipitate understanding. He who opposes calculation and sentiment, opposes the rudder to the breeze which swells the sail. Sentiment without calculation were blind and capricious; but calculation without sentiment were inert.

To crush the moral sentiments is not the scope or purpose of the true theory of utility. It seeks to impress those sentiments with a just or beneficent direction: to free us of *groundless* likings, and from the tyranny of senseless antipathies; to fix our love upon the useful, our hate upon the pernicious.

If, then, the principle of utility were the presiding principle of our conduct, our conduct would be determined immediately by Divine *rules*, and *sentiments* associated with those rules. And the application of the principle of utility to particular cases, would neither be attended by the errors, nor followed by the mischiefs, which the current objection in question supposes.

But these conclusions (like most conclusions) must be taken with limitations.

There certainly are cases (of comparatively rare occurrence) wherein the specific considerations balance or outweigh the general: cases which (in the language of Bacon) are 'immersed in matter': cases perplexed with peculiarities which cannot be safely neglected, in short *anomalous* cases. Even in these to depart from the rule is mischievous; but the specific consequences of the resolve are so important that the mischief of following the rule may outweigh the mischief of breaking it.

For instance it is a general inference from the principle of utility, that God commands obedience to established Government. Without obedience to 'the powers that be' security is weakened, and happiness, as a general rule, diminished. Disobedience even to a bad government is an evil. But the change from a bad government to a good one is an end so important, that if *resistance will probably attain that end* the subjects are justified in entertaining the question of resistance. The members of a political society who revolve this momentous question must dismiss the rule and calculate specific consequences. They must measure the extent of the mischief wrought by the actual government; the chance of getting a better by resistance; the inevitable evil of resistance whether it prosper or fail; and the possible good which may follow successful resistance. And upon a calculation of these elements they must solve the question to the best of their knowledge and ability.

But in anomalous and excepted cases (of comparatively rare occurrence) our conduct would be fashioned directly on the principle of general utility, or guided by a conjecture and comparison of specific or particular consequences.

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§ 1.

In the anomalous case the application of the principle of utility would be beset with the difficulties which the objection in question imputes to it generally. The calculation and resolve would be a difficult and uncertain process, and one upon which the wise and the good and the brave might differ. A Milton or a Hampden might animate their countrymen to resistance, a Hobbes or a Falkland would counsel obedience and peace.

But although the principle of utility would afford no certain solution, the community would be fortunate if their opinions and sentiments were formed upon it. The pretensions of each party being referred to an intelligible standard, would be capable of abatement by mutual concessions, so that compromise would be at least possible. The adherents of the established government might prefer innovations which they disapproved to the mischiefs of a violent contest. The party affecting reform would probably accept concessions short of their notions and wishes, rather than insist in the pursuit of a greater possible good through the evils and hazards of a war.

But if instead of measuring the object by the standard of utility, each party were led by the ears and appealed to unmeaning phrases such as 'the rights of man,' 'the sacred rights of sovereigns,' 'unalienable liberties,' 'eternal and immutable justice,' 'an original contract or covenant,' or 'the principles of an inviolable constitution,' neither could compare its object with the cost of a violent pursuit, nor would there be room for compromise. The phrases having no meaning, the objects represented by them are of course *invaluable*, and must be fought for 'to the bitter end' regardless of cost.

It really is important that men should think distinctly and speak with a meaning.

In most of the domestic broils which have agitated civilized communities, the result has been determined or seriously affected by the nature of the prevalent *talk*: by the nature of the topics or phrases which have figured in the war of words.

Take for example the needless and disastrous war waged by England with her American colonies. The stupid and infuriate majority who rushed into that odious war, could perceive and discourse of nothing but the *sovereignty* of the mother country, and her so-called *right* to tax her colonial subjects.

Had the dominant opinions and sentiments of the people of England been fashioned on the principle of utility, the public would have asked,—Is it the interest of England to insist upon her sovereignty? Is it her interest to exercise her right without the approbation of the colonists? For the chance of a slight revenue to be wrung from her American

subjects, and of a trifling relief from the taxation which now oppresses herself, shall she drive those reluctant subjects to assert their alleged independence, visit her own children with the evil of war, squander her treasures and soldiers in trying to keep them down, and desolate the very region from which the revenue must be drawn?

If these and the like considerations had determined the public mind, the public would have damned the project of taxing and coercing the colonies, and the Government would have abandoned the project. Thus would the expenses and miseries of the war have been avoided; the connection of England with America not have been torn asunder; and if their common interests had led them to dissolve it quietly, the relation of sovereign and subject, of parent and child, would have been followed by an equal, but intimate and lasting alliance. For the interests of the two peoples coincide, and the hostilities, open and covert, which still smoulder between them, are the offspring of an antipathy begotten of their original quarrel.

Such considerations would have swayed the mind of the English Parliament and public had they listened to Mr. Burke. He asked them what they would get if the project of coercion should succeed; and implored them to compare the advantage with the hazard and the cost. But the sound practical men still insisted on the *right*; and sagaciously shook their heads at him, as a refiner and a theorist.

If a serious difference shall arise between ourselves and Canada, or if a serious difference shall arise between ourselves and Ireland, an attempt will probably be made to cram us with the same stuff. But, such are the mighty strides which reason has taken in the interval, that I hope we shall not swallow it with the relish of our good ancestors. It will probably occur to us to ask whether she be worth keeping, and whether she be worth keeping at the cost of a war?—I think there is nothing romantic in the hope which I now express; since an admirable speech of Mr. Baring, advising the relinquishment of Canada, was seemingly received, a few years ago, with general assent and approbation.\*

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\* This was published in 1832. Since then further advances have been made towards the rational discussion of such questions. Indeed most people would now be ashamed to discuss them without at least *professing* to argue on grounds of utility. The particular topics immediately above referred to are at this time (1874) hardly agitated, the one because Canada is self-reliant and content, the other because leading statesmen of both parties are agreed, on the argument of expediency alone, that Ireland is worth keeping at the cost of a war. By way of contrast to the principal topic discussed in the text may be suggested the question which arose at the commencement of the great war of Secession in America. There were not wanting *cries* or *false issues*—The *right* of Secession—The Union one and indivisible

**PART I.****§ 1.**

**The second answer to the foregoing objection briefly resumed.**

There are, then, anomalous cases; and to these the man whose conduct was fashioned on utility, would apply that ultimate principle immediately or directly. And the application of the principle would probably be beset with the difficulties which the current objection in question imputes to it generally.

But even in these cases, the principle would afford an intelligible test, and a likelihood of a just solution: a probability of discovering the conduct required by the general good, and therefore required by the commands of a wise and benevolent Deity.

And the anomalies, after all, are comparatively few. In the great majority of cases, the general happiness requires that *rules* shall be observed, and that *sentiments* associated with rules shall be promptly obeyed. If our conduct were truly adjusted to the principle of general utility, our conduct would seldom be determined by an immediate or direct resort to it.

**LECTURE III.****LECT.  
III.**

**A second objection to the theory of utility stated.**

BUT here arises a difficulty which is really perplexing, and which hardly admits of a complete solution.

If the Divine laws must be gathered from the tendencies of action, how can they who are bound to keep them, know them fully and correctly?

So numerous are the classes of actions to which those laws relate, that no single mind can mark the whole of those classes, and examine completely their respective tendencies.

Besides, ethical, like other wisdom, ‘cometh by opportunity of leisure:’ And the many busied with earning the means of living, are unable to explore the field of ethics, and to learn their numerous duties by learning the tendencies of actions.

If the Divine laws must be gathered from the tendencies of actions, the inevitable conclusion is absurd and monstrous—God has given us laws which no man can know completely, and to which the great bulk of mankind has scarcely the slightest access.

The considerations suggested by this and the next discourse, may solve or extenuate this perplexing difficulty.

But there were issues more real and important. To confine within the states who owned it their abominable domestic institution—(emancipation was an afterthought): to protect the threatened channels of commerce and national wealth: these were the large objects which tardily determined the inflexible purpose of the President who interpreted the mind of a great nation.—R. C.

In so far as law and morality are what they *ought* to be, legal and moral rules have been fashioned on the principle of utility, or obtained by observation and induction from the tendencies of human actions. But it is not necessary that all whom they bind should know or advert to the process through which they have been gotten. If all whom they bind keep or observe them, the ends to which they exist are sufficiently accomplished; although many of the persons who observe them are unable to perceive their ends, and ignorant of the method by which they have been constructed or of the proofs by which they are established.

LECT.  
III.

An answer to  
that second  
objection  
introduced.

According to the theory of utility, the science of Ethics or Deontology (or the science of Law and Morality, as they *should* be, or *ought* to be) rests upon observation and induction. The science has been formed, through a long succession of ages, by many and separate contributions from many and separate discoverers. No single mind could explore the whole of the field, though each of its numerous departments has been explored by numerous inquirers.

If positive law and morality were exactly fashioned to utility, all its constituent *rules* might be known by all or most. But all the numerous *reasons*, upon which the system would rest, could scarcely be compassed by any: while most must limit their inquiries to a few of those numerous reasons. Many of the rules of conduct actually observed or admitted would be taken even by the most instructed on authority, testimony, or trust, and a large number of the less instructed, without an attempt to examine the reasons, must receive the whole of the rules from the teaching and example of others.

But this inconvenience is not peculiar to law and morality. It extends to all the sciences, and to all the arts.

Many conclusions of mathematics applied to natural phenomena are doubtless believed on authority or testimony by deep and searching mathematicians; and of the thousands who apply arithmetic to daily and hourly use, not one in a hundred knows or surmises the reasons upon which its rules are founded. Of the millions who till the earth and ply the various handicrafts, few are acquainted with the grounds of their homely but important arts, though these arts are generally practised with passable expertness and success. The greatest part of any man's knowledge consists of *results* gotten by the researches of others, and taken by himself upon *testimony*.

And in many departments of science we may safely rely upon testimony: though the knowledge which we thus obtain is less satisfactory than that which we win for ourselves by direct examination of the proofs.

In the mathematical and physical sciences, and in the arts which are founded upon them, we may commonly trust the

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conclusions which we take upon authority. For the adepts in these sciences and arts agree in many of their most important results, and are at least free from any temptation to deceive the ignorant.

An objection  
to the foregoing  
answer  
stated.

But the case is unhappily different with the important science of ethics, and with the various sciences—legislation, politics, and political economy—nearly related to ethics. Those who have inquired, or affected to inquire into ethics, have rarely been impartial, and therefore have differed in their results. Sinister interests, and prejudices thence arising, have made them advocates rather than inquirers. Instead of examining the evidence and honestly pursuing its consequences, most of them have hunted for arguments in favour of *given* conclusions, and have neglected or purposely suppressed the unbending and incommodious considerations which pointed at opposite inferences.

Now how can the bulk of mankind, who have little opportunity for research, compare the respective merits of these varying and hostile opinions? Here, testimony is not to be trusted. There is not *that concurrence or agreement of numerous and impartial inquirers*, to which the most cautious and erect understanding readily and wisely defers. The multitude, anxiously busied with the means of earning a precarious livelihood, are debarred from every opportunity of carefully surveying the *evidence*: whilst every *authority*, whereon they may hang their faith, wants that mark of trustworthiness which justifies reliance on authority.

Accordingly, the science of ethics and the nearly related sciences lag behind the others. The sincere inquirers are few, and the multitude undiscriminating. Consequently the advancement of the sciences themselves is comparatively slow; whilst the most perspicuous of the truths, with which they are occasionally enriched, are either summarily rejected by the many or win their way to general assent through a long and dubious struggle with established and obstinate errors.

Many of the legal and moral rules which obtain in the most civilized communities, rest upon brute custom and not upon manly reason. They have been taken from preceding generations without examination, and are deeply tintured with the childish caprices and narrow views of barbarity. And yet they have been cherished and perpetuated, through ages of advancing knowledge, to the comparatively enlightened period in which it is our happiness to live.

The foregoing  
objection to  
the foregoing  
answer,  
solved or  
extenuated.

It were idle to deny the difficulty. The diffusion and the *advancement* of ethical truth are hindered by great and peculiar obstacles.

But these obstacles, I am firmly convinced, will gradually

disappear. In two causes of slow but sure operation, we may clearly perceive a cure, or, at least, a palliative of the evil.— In every civilized community of the Old and New World, the *leading principles* of the science of ethics, and of the nearly related sciences, are gradually finding their way, in company with other knowledge, amongst the mass of the people: whilst the persons who accurately study, and labour to advance these sciences, are proportionally increasing in number, and waxing in zeal and activity. From the combination of these two causes we may hope for a more rapid progress both in the discovery and in the diffusion of moral truth.

Profound knowledge of these, as of the other sciences, will always be confined to the comparatively few who study them long and assiduously. But the multitude are fully competent to conceive the *leading principles*, and to apply them to particular cases. And, if they were imbued with those principles, and practised in the art of applying them, they would be docile to the voice of reason, and armed against sophistry and error. The man who is both ignorant of principles and unpractised in right reasoning differs vastly from the man who is simply ignorant of particulars or details. The latter can reason correctly from premises supplied to him, and can justly estimate the conclusions drawn from those premises by others. If the minds of the many were informed and invigorated, so far as their position will permit, they could distinguish the statements and reasonings of their instructed and judicious friends, from the lies and fallacies of those who would use them to sinister purposes, and from the equally pernicious nonsense of their weak and ignorant well-wishers. They would thus be competent to examine and fathom the questions which it most behoves them to understand: Though the leisure which they can snatch from their callings is necessarily so limited, that their opinions upon numerous questions of subordinate importance would continue to be taken from the mere *authority* of others.

The shortest and clearest illustrations of this most cheering truth, are furnished by the inestimable science of political economy. The broad or leading principles of this science may be mastered, with moderate attention, in a short period. With these simple, but commanding principles, a number of important questions are easily resolved. And if the multitude (as they can and will) shall ever understand these principles, many pernicious prejudices will be extirped from the popular mind, and truths of ineffable moment planted in their stead.

For example, the inequality which in all civilized countries follows the beneficent institution of property, is

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necessarily invidious. To the jaundiced eyes of the *ignorant* poor it seems monstrous that they who toil and produce should fare scantily, while others who 'delve not nor spin' should batten on the fruits of labour. Of the numerous evils which flow from this single prejudice I shall touch on a few.

In the first place, this prejudice blinds the people to the cause of their sufferings, and to the only remedy or palliative which the case will admit.

Want and labour spring from the niggardliness of nature, and not from the inequality which is consequent on the institution of property. These evils are inseparable from the condition of man upon earth; and are lightened, not aggravated, by this useful, though invidious institution. Capital and the arts which depend on it are creatures of the institution of property; and from capital and by means of the arts depending on it the reward of the labourers is obtained. Without the institution of property and the capital accumulated by it their reward would be far scantier and infinitely more precarious than it is. They are in fact, though not in name, co-sharers in the accumulated wealth.

It is to be wished that their reward were greater, and that their toil consisted of less incessant drudgery. But any change in these respects depends on themselves and not on the will of the rich. In the *true principle of population*, detected by the sagacity of Mr. Malthus, they must look for the cause and the remedy of their penury and excessive toil. There they may find the means of comparative affluence, of reasonable leisure, and of personal dignity and political influence.

And these momentous truths are deducible from plain principles, by short and obvious inferences. Here is no need of large and careful research, or of subtle and sustained thinking. If the people understood distinctly a few indisputable propositions, and were capable of an easy process of reasoning, their minds would be purged of the prejudice which blinds them to the cause of their sufferings, and they would see and apply the remedy suggested by the principle of population. Their repinings at the affluence of the rich, would be appeased. Their murmurs at the injustice of the rich, would be silenced. They would see that violations of property are mischievous to *themselves*:—by weakening the motives to accumulation, and so diminishing the fund which yields the labourer his subsistence. They would see that they are deeply interested in the *security* of property: that, if they adjusted their numbers to the demand for their labour, they would share abundantly with their employers in the blessings of that useful institution.

Another of the numerous evils which flow from the prejudice in question, is the frequency of crimes. Nineteen offences out of twenty are offences against property. To

offences of this class poverty, for the most part, is the incentive.

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III.

And while this prejudice perpetuates poverty by blinding people to the cause and the remedy, it weakens the restraints which arise from public disapprobation. Compared with the fear of legal punishment, that of public disapprobation is scarcely less effectual as a deterring motive, and infinitely more effectual as a means of rooting in the soul a prompt aversion from crime. The activity aroused in the case of crimes which excite public disapprobation strengthens the legal sanction by making detection and punishment more certain.

If the people saw distinctly the tendencies of offences against property and the grounds of the punishments; if they were therefore bent upon pursuing the criminals to justice; the laws which prohibit these offences would seldom be broken with impunity, and by consequence would seldom be broken. An enlightened people were a better auxiliary to the judge than an army of policemen.

But, in consequence of the prejudice in question, the fear of public disapprobation scarcely operates upon the poor to the end of restraining them from offences against the property of the wealthier classes. For every man's public is formed of his own class. The poor man's public is formed of the poor. And the crimes which affect merely the property of the wealthier classes are regarded with little disfavour, and with no abhorrence, by the indigent and ignorant portion of the working people. Not perceiving that such crimes are pernicious to *all* classes, but considering property to be a benefit in which they have no share and which is enjoyed by others at their expense, they are prone to consider such crimes as *reprisals* made upon usurpers and enemies. They regard the criminal with sympathy rather than with indignation. They incline to favour, or, at least, wink at his escape, rather than to lend their hearty aid towards bringing him to justice.

Those who have inquired into the causes of crimes, and into the means of lessening their number, have commonly expected magnificent results from an improved system of *punishments*. Doubtless something might be and has been done by a judicious mitigation of punishments, and by removing that frequent inclination to abet the escape of a criminal which springs from their repulsive severity. Something also by improvements in prison-discipline, and by providing a refuge for criminals who have *suffered* their punishments. For the stigma of legal punishment is commonly indelible; and, by debarring the unhappy criminal from the means of living honestly, forces him on further crimes.

But nothing but the *diffusion of knowledge through the great mass of the people* will go to the root of the evil.

Advantage  
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Nothing but this will extirpate their prejudices, and correct their moral sentiments: or lay them under the beneficial restraints which operate so potently on the more cultivated classes.

The evils which I have now mentioned, with many which I pass in silence, flow from a *single* prejudice,—a *single* error. And this, with other prejudices, might be expelled from the understandings and sentiments of the multitude, if they had mastered the broad principles of the science of political economy, and could make the easiest applications of those simple, though commanding truths.

The *nicer* points of political economy, e.g., the functions of paper money, the incidence of taxes, &c., will probably never be understood by the multitude, and their opinions (if they have any) on those points will always be taken from *authority*. But the infinitely more important principles,—the reasons which call for the institution of property, and the effect of the principle of population on the price of labour,—are *not* difficult to master. If these were clearly apprehended by the many, they would be raised from penury to comfort: from the necessity of toiling like cattle, to the enjoyment of sufficient leisure: from ignorance and brutishness, to knowledge and refinement: from abject subjection, to the independence which *commands* respect.

I could show, by many additional and pregnant examples, that the multitude might clearly apprehend the *leading principles* of ethics, and also of the nearly related sciences: and that, if they had seized these principles, and could reason distinctly and justly, all the more momentous of the derivative practical truths would find access to their understandings and expel the antagonist errors.

And the multitude (in civilized communities) would soon apprehend these principles, and would soon acquire the talent of reasoning distinctly and justly, if one of the weightiest of the duties, which God has laid upon governments, were performed with fidelity and zeal. For, if we must construe those duties by the principles of general utility, it is not less incumbent on governments to forward the diffusion of knowledge, than to protect their subjects from one another by a due administration of justice, or to defend them by a military force from the attacks of external enemies. A small fraction of the sums which are squandered in needless war, would provide complete instruction for the working people: would give this important class that portion in the knowledge of the age, which consists with the nature of their callings, and with the necessity of toiling for a livelihood.

If ethical science rest upon observation and induction applied to the tendencies of actions, much of it (I admit)

will ever be hidden from the multitude, or be taken by them on authority, testimony, or trust.

But the multitude might clearly understand the elements or groundwork of the science, together with the more momentous of the derivative practical truths. To that extent they might be freed from the dominion of authority: from the necessity of blindly persisting in hereditary opinions and practices; or of turning and veering, for want of directing principles, with every wind of doctrine.

Nor is this the only advantage which would follow the wide diffusion of those elements of ethical science. Another advantage would be the rapid advancement of the science itself.

If the minds of the many were informed and invigorated, their coarse and sordid pleasures, and their stupid indifference about knowledge, would be supplanted by refined amusements, and by liberal curiosity. A numerous body of recruits from the lower middle class and the higher class of the working people would thicken the slender ranks of the reading and reflecting public: the public whose opinion determines the success or failure of books; and whose notice and favour are naturally courted by the writers.

And until that public shall be much extended, the science of ethics, with all the nearly related sciences, will advance slowly.

It was the opinion of Locke, in which I fully concur, that there is no peculiar uncertainty in the *subject* or *matter* of these sciences: that the great difficulties by which their advancement is impeded, are *extrinsic*, and arise from prejudices, the offspring of sinister interests: and that if those who seek or affect to seek the truth would pursue it with steadiness and 'indifferency' they might frequently hit upon the object.

But this 'indifferency,' or impartiality, will be a rare quality among professors of truth, so long as their audience shall continue to be formed only from the classes elevated by wealth and social rank, and from the so-called 'liberal' callings. The only sure guide in these sciences is *general utility*: and the true conclusions of general utility will always run counter to the special interests of particular and narrow classes. It is hardly to be expected of writers whose reputation depends upon such classes, that they should fearlessly tread the path indicated by the general well-being. 'Indifferency' is hardly to be expected of writers in so base a position. Knowing that a fraction of the community can make or mar their reputation, they (perhaps unconsciously) accommodate their conclusions to the prejudices of that narrower public. Or again to borrow the apt expressions of Locke, 'they begin by espousing the well-endowed opinions

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in fashion ; and then seek arguments to show their beauty, or to varnish and disguise their deformity.'

This sinister influence is exemplified in the celebrated and much esteemed treatise of Paley on Moral and Political Philosophy. Dr. Paley was, as men go, a wise and virtuous man. By the qualities of his head and heart, by the cast of his talents and affections, he was fitted, in a high degree, to seek for ethical truth, and to expound it successfully to others. He had a clear and a just understanding ; a hearty contempt of paradox, and of ingenious, but useless refinements ; no fastidious disdain of the working people, but a warm sympathy with their homely enjoyments and sufferings. He knew that they are more numerous than all the rest of the community, and he felt that they are more important than all the rest of the community to the eye of unclouded reason and impartial benevolence.

If the bulk of the community had been instructed, so far as their position will permit, he might have looked for a host of readers from the middle classes : and from the better paid and more intelligent of the working people. To such readers, a well made and honest treatise on Moral and Political Philosophy, in his clear, vivid, downright, *English* style, would have been the most easy and attractive, as well as instructive and useful, of abstract or scientific books.

But those numerous classes of the community were commonly too coarse and ignorant to care for books of the sort. The great majority of the readers who were likely to look into his book, belonged to the classes which are elevated by rank or opulence, and to the peculiar professions or callings which are distinguished by the name of 'liberal.' A steady pursuit of the conclusions of *general* utility was therefore not the way to professional advancement, nor even the short cut to extensive reputation. And the character of the book betrays the position of the writer. In almost every chapter, and in almost every page, his fear of offending the prejudices of his audience palpably suppresses the suggestions of his clear and vigorous reason, and masters the better affections which inclined him to the *general* good.

He was one of the greatest and best of the great and excellent writers, who, by the strength of their philosophical genius, or by their large and tolerant spirit, have given imperishable lustre to the Church of England, and extinguished or softened the hostility of many who reject her creed. He may rank with the Berkeleys and Butlers, with the Burnets, Tilloteons and Hoadlys.

But, in spite of the esteem with which I regard his memory, truth compels me to add that the book is unworthy of the man. For there is much ignoble truckling to the dominant and influential few. There is a deal of shabby

sophistry in defence or extenuation of abuses which the few are interested in upholding.

If there were a reading public numerous, discerning, and *impartial*, the science of ethics, and all the various sciences which are nearly related to ethics, would advance with unexampled rapidity.

By the hope of obtaining the approbation which it would bestow upon genuine merit, writers on these subjects would be incited to the patient research and reflection appropriate to a scientific inquiry. They would cultivate accuracy and simplicity of method, and seek precision, clearness and conciseness, as the first and only essential requisites of style. And, what is equally important, they would become imbued with the spirit of dispassionate inquiry: they would pursue truth with 'indifference,' secure in the protection of a numerous and just public. They would scrutinise established institutions, and current or received opinions, fearlessly, but coolly; with the freedom which is imperiously demanded by general utility, but without the antipathy which is begotten by the dread of persecution.

This patience in investigation, this accuracy and distinctness of method and style, this freedom and 'indifference' in the pursuit of the useful and the true, would thoroughly dispel the obscurity by which the science is clouded, and would clear it from most of its uncertainties. The wish, the hope, the prediction of Locke would in time be accomplished: and 'ethics would rank with the sciences which are *capable of demonstration*.' The adepts in ethical, as well as in mathematical science, would commonly agree in their results: And, as the jar of *their* conclusions gradually subsided, a body of doctrine and authority to which the *multitude* might trust would emerge from the existing chaos. For while the multitude would confine their direct examination to the elements of the science, they would find in the *unanimous or general consent of numerous and impartial inquirers* that mark of trust-worthiness which justifies reliance on authority, wherever we are debarred from the opportunity of examining the evidence for ourselves.\*

\* The period which has elapsed since the foregoing lecture was written, if not fully answering to the author's sanguine hopes, yet seems to have reached the beginning of a tardy fulfilment of some of them. And if sound conceptions of ethics and political economy have in our own country penetrated more widely and deeply than a few years ago was apparent, I believe it possible to discern, in the writings of those who have been most successful in diffusing this knowledge among the populace, a trace at least of Mr. Austin's influence; an influence far more powerful, as I have been assured, by those conversant with his living discourse, than can be estimated by those acquainted only with the remains of his writings.—R. G.

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The connection of the fourth with the third lecture.

## LECTURE IV.

IN ORDER to link this lecture with the preceding one, I will now restate, in an abridged shape, the objection and the answer with which that lecture was occupied.

The objection may be put briefly, in the following manner.

If utility be the proximate test of positive law and morality, it is impossible that the rules of conduct *actually obtaining amongst mankind* should accord completely and correctly with the laws *established by the Deity*. The index to his will is imperfect and uncertain. His laws are signified obscurely to those upon whom they are binding, and are subject to inevitable and involuntary misconstruction.

For, *first*, positive law and morality, fashioned on the principle of utility, are gotten by observation and induction from the tendencies of human actions. And, these actions being infinitely various, and their effects being infinitely diversified, the work of classing them and of collecting their effects completely, transcends the limited faculties of created and finite beings.

And, *secondly*, if utility be the proximate test of positive law and morality, the defects and errors of *popular* or *vulgar* ethics will scarcely admit of a remedy. For if ethical truth be matter of science, and not of immediate consciousness, most of the ethical maxims which govern the sentiments of the multitude must be taken, without examination, from human authority. And human authority upon such subjects seems to consist of conflicting maxims, taught under the influence of prejudice—the offspring of sinister interests.

Such is the objection.—The only answer of which the objection will admit, is suggested by the remarks which I offered in my last lecture, and which I here repeat in an inverted and compendious form.

In the *first* place, the *diffusion* of ethical science amongst the great bulk of mankind will gradually remove the obstacles which prevent or retard its *advancement*.

*Secondly*: Though the many must trust to authority for a number of subordinate truths, they are competent to examine the elements which are the ground-work of the science of ethics, and to infer the more momentous of the derivative practical consequences.

And, *thirdly*, as the science of ethics advances, and is cleared of obscurity and uncertainties, they who are debarred from opportunities of examining the science extensively will find an authority whereon they may rationally rely, in the unanimous or general agreement of searching and impartial inquirers.

But this answer, it must be admitted, merely *extenuates* the objection. It shows that law and morality fashioned on the principle of utility might approach continually and indefinitely to absolute perfection. But it grants that law and morality so fashioned is inevitably defective and erroneous: that if the laws established by the Deity must be construed by the principle of utility, the most perfect system of ethics which the wit of man could conceive, were a partial and inaccurate copy of the Divine original or pattern.

And this (it may be urged) disproves the theory which makes the principle of utility the index to the Divine pleasure. For it consists not with the known wisdom and the known benevolence of the Deity, that he should signify his commands defectively and obscurely to those upon whom they are binding.

But, admitting the imperfection of utility as the index to the Divine pleasure, there is no necessary inference 'that utility is *not* the index.'

The objection is founded on the alleged inconsistency of evil with the perfect wisdom and goodness of God. But the argument of the objector proves too much. If the argument is sound, it would prove not only that all God's works are in fact exempt from evil, but also that the notion conveyed by the terms law duty and sanction, as applied to the Law of God, is a meaningless abstraction. For these terms imply the presence of evil in the world, and the prevention or remedy of that evil by a restraint which is in itself a further evil.

In truth, owing to causes hidden from the human understanding, all the works of God which are open to human observation are alloyed with imperfection or evil. Laws or commands (like medicine) suppose the existence of evils which they are designed to remedy, and let them be signified as they may, they remedy those evils imperfectly. Analogy might lead us to suppose that the Deity should signify his commands defectively and obscurely. That he should do so is strictly in keeping with the rest of his inscrutable ways; and such imperfection in the mode of manifesting his commands would be strictly analogous to the imperfection or evil which those commands or laws are designed to remedy. 'That his laws are signified obscurely, if utility be the index to his laws,' is therefore rather a presumption in favour of the theory which makes utility our guide.

My answer to the objection is the very argument which the excellent Butler, in his admirable 'Analogy,' has wielded in defence of Christianity with the vigour and the skill of a master.

Considered as a system of rules for the guidance of human conduct, the Christian religion is defective. There are also circumstances, regarding the manner of its promulgation,

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The second  
objection to  
the theory of  
utility, re-  
sumed.

A further  
answer to  
that second  
objection.

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which human reason vainly labours to reconcile with the wisdom and goodness of God. Still it were absurd to argue ‘that the religion is not of God, because the religion is defective, and is imperfectly revealed to mankind.’ For, since evil pervades the universe, in so far as it is open to our inspection, a similar objection will lie to *every system* of religion which ascribes the existence of the universe to a wise and benevolent Author. Whoever believes that the universe is the work of benevolence and wisdom, is concluded, or *estopped*, by his own religious creed, from taking an objection of the kind to the creed or system of another.

Analogy (as Butler has shown) would lead us to expect the imperfection upon which the objection is founded. Something of the imperfection which runs through the frame of the universe, would probably be found in a revelation emanating from the Author of the universe.

And here my solution of the difficulty necessarily stops. To reconcile the existence of evil with the wisdom and goodness of God is a task which surpasses the powers of our narrow and feeble understandings. From the decided predominance of good which is observable in the order of the world, and from the manifold marks of wisdom which the order of the world exhibits, we may draw the cheering inference ‘that its Author is good and wise.’ Why the world which he has made is not altogether perfect, is a question impossible to solve, and idle to agitate. It is enough for us to know that the Deity is perfectly good; and that, since he is perfectly good, he wills the happiness of his creatures. *This is a truth of the greatest practical moment.* For the cast of the affections, which we attribute to the Deity, determines, for the most part, the cast of our moral sentiments.

If we reject *utility* as the index to God’s commands, we must assent to the theory or hypothesis which supposes *a moral sense*. One of the adverse theories which regard the nature of that index is certainly true. He has left us to *presume* his commands from the tendencies of human actions, or he has given us a peculiar *sense* of which his commands are the objects.

All the hypotheses, regarding the nature of that index, which discard the principle of utility, are built upon the supposition of a peculiar or appropriate *sense*. The language of each of these hypotheses differs from the language of the others, but the import of each resembles the import of the rest.

By ‘*a moral sense*,’ with which I am furnished, I discern the human actions which the Deity enjoins and forbids: And, since you and the rest of the species are provided with a like organ, it is clear that this sense of mine is ‘*the common sense of mankind*.’ By ‘*a moral instinct*,’ with which the Deity has endowed me, I am urged to some

The hypothesis of a moral sense, briefly introduced.

‘A moral sense,’ ‘a common sense,’ ‘a moral instinct,’ ‘a principle of reflection or conscience,’ ‘a practical reason,’ ‘innate practical principles,’ ‘concrete practical principles, &c., &c., are

of these actions, and am warned to forbear from others. '*A principle of reflection or conscience*,' which Butler assures me I possess, informs me of their rectitude or pravity. Or '*the innate practical principles*,' which Locke has presumed to question, define the duties which God has imposed upon me, with infallible clearness and certainty.

The hypothesis of a moral sense, variously signified by these various but equivalent expressions, involved two assumptions: 1st, That we are gifted with moral sentiments which are *ultimate* or *inscrutable facts*; 2ndly, That these inscrutable sentiments are signs of the Divine will, or the proofs that the actions which excite them are enjoined or forbidden by God.

The first assumption involves certain positive and negative propositions; it implies *positively* that the conceptions entertained by human beings of certain human actions are generally accompanied by certain sentiments of approbation or disapprobation, and *negatively* that these sentiments are *not* the consequences of reflection upon the tendencies of human actions, *not* the consequences of education, *nor* the consequences or effects of any antecedents within the reach of our inspection. To express these negative propositions briefly, the sentiments in question are said to be '*instinctive*', or are termed '*moral instincts*'. This word '*instinct*', it must be remembered, is essentially *negative*. When we say a bird builds her nest by *instinct*, we merely mean that she has not been taught how to do it by example or through education imparted by others. This it is necessary to remark, because (simple as the meaning is) the advocates of the theory now in question are apt to invest the word with the false and cheating appearance of a mysterious and magnificent meaning.

In order that we may clearly apprehend the nature of these '*moral instincts*', I will descend from general expressions to an imaginary case.

I will take the liberty of borrowing Paley's solitary savage: a child abandoned in the wilderness immediately after its birth, and growing to the age of manhood in estrangement from human society. In dealing with his subsequent history I shall not follow Paley, but proceed after my own fashion.

I imagine that the savage, as he wanders in search of prey, meets, for the first time in his life, with a man. This man is a hunter, and is carrying a deer which he has killed. The savage pounces upon it. The hunter holds it fast. And, in order that he may remove this obstacle to the satisfaction of his hunger, the savage seizes a stone, and knocks the hunter on the head.—Now, according to the hypothesis in question, the savage is affected with *remorse*—not merely *compassion*—but the more complex emotion of

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various ex-  
pressions for  
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same hypo-  
thesis.

The hypo-  
thesis in  
question  
involves two  
assumptions.

The first o  
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the hypo-  
thesis in  
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self-condemnation : with the feeling that haunts and tortures civilized or cultivated men, whenever they violate rules which accord with their notions of utility, or which they have learned from others to regard with habitual veneration.

Again : Shortly after the incident which I have now imagined, he meets with a second hunter whom he also knocks on the head. But, in this instance, he is not the aggressor. He is attacked, and to prevent a deadly blow which is aimed at his own head, he kills the assailant.—Now here, according to the hypothesis, he is *not* affected with remorse. The sufferings of the dying man move him, perhaps, to *compassion* : but his *conscience* (as the phrase goes) is tranquil. He feels as you would feel after a justifiable homicide : after you had shot a highwayman in defence of your goods and your life.

That *you* should feel remorse if you kill in an attempt to rob, and should not be affected with remorse if you kill a murderous robber, is a difference which I readily account for without the supposition of an instinct. The law of your country distinguishes the cases : and the current morality of your country accords with the law.

If you have never adverted to the reasons of that distinction, the difference between your feelings is easily explained by imputing it to *education* :—the influence of authority and example on opinions, sentiments, and habits.

If you have adverted to the reasons of that distinction, you, of course, have been struck with its obvious utility. —Generally speaking, the intentional killing of another is an act of pernicious tendency. If the act were frequent, it would annihilate that general security, and that general feeling of security, which are, or should be, the principal ends of political society and law. But the intentional killing of a robber who aims at your property and life, is an exception. Instead of being adverse to the principal ends of law, it rather promotes those ends. It tends, as punishment would, to deter others from the crime of murder ; and in the particular instance, prevents the execution of the murderous design, an end which punishment would be too tardy to reach. The difference between the sentiments with which you regard the two acts is therefore easily explained by your imputing it to a perception of *utility*.

But the difference, supposed, between the feelings of the solitary *savage*, cannot, on the hypothesis, be imputed to *education*.

Nor can the supposed difference be imputed to a *perception of utility*.—He knocks a man on the head, that he may satisfy his hunger. He knocks another on the head, that he may escape from wounds and death. So far, then, as these different actions exclusively regard him-

self, they are equally good: and so far as these different actions regard the men whom he kills, they are equally bad. As tried by the test of utility, *and with the lights which the savage possesses*, the moral qualities of the two actions are precisely the same.

To the social man the difference between these actions, as tried by the test of utility, is immense.—The general happiness or good demands the institution of property: that the exclusive enjoyment conferred by the law upon the owner shall not be disturbed by private and unauthorized persons without the authority of the sovereign acting for the common weal. Were want, however intense, an excuse for violations of property, that beneficent institution would become nugatory, and the ends of government and law would be defeated.—And, on the other hand, the very principle of utility which demands the institution of property requires that an attack upon the body shall be repelled at the instant: that, if the impending evil cannot be averted otherwise, the aggressor shall be slain on the spot by the party whose life is in jeopardy.

But these are considerations which would not present themselves to the solitary savage. They involve a number of notions with which his mind would be unfurnished. They involve the notions of political society; of supreme government; of positive law; of legal right; of legal duty; of legal injury. The good and the evil of the two actions, in so far as the two actions would affect the immediate parties, is all that the savage could perceive.

The difference, supposed by the hypothesis, between the feelings of the savage, must, therefore, be ascribed to a *moral sense*, or to *innate practical principles*. Or (speaking in homelier but plainer language) he would regard the two actions with different sentiments, *we know not why*.

The first assumption then involved by the hypothesis in question, is that certain inscrutable sentiments or feelings accompany our conceptions of certain human actions, and that these sentiments or feelings are ultimate facts—simple elements of our nature. And thus far the hypothesis has been embraced by sceptics as well as by religionists. For example, it is supposed by David Hume, in his essay on the 'Principles of Morals,' that *some* of our moral sentiments spring from a *perception of utility*; but he also appears to imagine that *others* are not to be analyzed, or belong exclusively to the province of *taste*. His intention, however, is not clear. When he speaks of *moral sentiments* belonging to the province of taste, he may be advertising only to the origin of *benevolence* or *sympathy*, a very different thing from the sentiments of approbation or disapprobation which accompany our judgments upon actions.

The second assumption is this:—That the inscrutable The second

The first of  
the two as-  
sumptions  
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question  
briefly  
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the two assumptions involved by the hypothesis in question, briefly stated.

sentiments, the existence of which is assumed by the first assumption, are signs of the Divine will, or proofs that the actions which excite them are enjoined or forbidden by God.

In the language of the admirable Butler (who is the ablest advocate of the hypothesis), the human actions by which these feelings are excited are their direct and appropriate objects: just as things visible are the direct and appropriate objects of the sense of seeing.

In homelier but plainer language, I may put his meaning thus.—As God has given us eyes, in order that we may see therewith; so has he gifted or endowed us with the feelings or sentiments in question, in order that we may distinguish directly, by means of these feelings or sentiments, the actions which he enjoins or permits, from the actions which he prohibits.

Now, if the Deity has endowed us with a moral sense or instinct, we are free of the difficulty to which we are subject if we must construe his laws by the principle of general utility. According to the hypothesis in question, the inscrutable feelings which are styled the moral sense, arise directly and inevitably with the thoughts of their appropriate objects. We cannot mistake the laws which God has prescribed to mankind, although we may often be seduced by the blandishments of present advantage from the plain path of our duties. The understanding is never at a fault, although the will may be frail.

But is there any evidence to sustain the hypothesis in question?

The hypothesis in question is disproved by the negative state of our consciousness.

But here arises a small question.—Is there any evidence that we are gifted with feelings of the sort?

That this question is possible, or is seriously asked and agitated, would seem of itself a sufficient proof that we are *not* endowed with such feelings.—According to the hypothesis of a moral sense, we are conscious of the feelings which indicate God's commands, as we are conscious of hunger or thirst. If I were really gifted with feelings or sentiments of the sort, I could no more seriously question whether I had them or not, and could no more blend and confound them with my other feelings or sentiments, than I can seriously question the existence of hunger or thirst, or can mistake the feeling which affects me when I am hungry for that which affects me when I am thirsty.

The two current arguments in favour of the hypothesis in question, briefly stated.

The first argument in favour of the

The two current arguments in favour of the hypothesis in question are raised on the following assertions. 1. The judgments which we pass internally upon the rectitude or pravity of actions are immediate and involuntary. 2. The moral sentiments of all men are precisely alike.

Now the first of these venturesome assertions is not universally true. In numberless cases, the judgments which

we pass internally upon the rectitude or pravity of actions are hesitating and slow. And it not unfrequently happens that we cannot arrive at a conclusion, or are utterly at a loss to determine whether we shall praise or blame.

And, granting that our moral sentiments are always instantaneous and inevitable, this will not demonstrate that our moral sentiments are instinctive. Sentiments which are factitious, or begotten in the way of association, are not less prompt and involuntary than feelings which are instinctive or inscrutable. For example, we begin by loving money for the sake of the enjoyment which it purchases. In time, our love of enjoyment becomes inseparably associated with the thought of the money which procures it. Again: we begin by loving knowledge as a mean to ends. But, in time, the love of the ends becomes inseparably associated with the thought or conception of the instrument. Curiosity is instantly roused by every unusual appearance, although there is no purpose which the solution of the appearance would answer, or although we advert not to the purpose which the solution of the appearance might subserve.

The promptitude and decision with which we judge of actions are impertinent to the matter in question: for our moral sentiments would be prompt and inevitable, although they arose from a perception of utility, or were impressed upon our minds by the authority of our fellow-men. At the outset indeed, the sentiment derived from either of these sources would hardly be excited by the thought of the corresponding action. But, in time, the sentiment would adhere inseparably to the thought of the corresponding action; and without recalling the ground of our moral approbation or aversion, would recur directly and inevitably with the conception of its appropriate object.

But, to prove that moral sentiments are instinctive or inscrutable, it is boldly asserted, by the advocates of the hypothesis in question, that the moral sentiments of all men are precisely alike.

The argument raised on this hardy assertion may be stated briefly as follows:—No opinion or sentiment which is a result of observation and induction is held or felt by all mankind. Observation and induction, as applied to the same subject, lead different men to different conclusions. But the judgments which are passed internally upon the rectitude or pravity of actions, or the moral sentiments or feelings which actions excite, are precisely alike with all men. Consequently, our moral sentiments or feelings were neither acquired by our own inductions from the tendencies of actions, nor obtained by the inductions of others and then impressed upon our minds by human authority and example. Therefore, our moral sentiments are instinctive, or are ultimate or inscrutable facts.

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hypothesis in  
question,  
examined.

The second  
argument in  
favour of the  
hypothesis in  
question,  
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Now, although the assertion were granted that the moral sentiments of all men were precisely alike, it would hardly follow that moral sentiments are instinctive.

But the assertion is groundless, and contradicted by notorious facts. That the respective moral sentiments of different ages and nations, and of different men in the same age and nation, have differed to infinity, is a proposition resting on facts so familiar to every instructed mind, that I should hardly treat my hearers with due respect if I attempted to establish it by proof. I therefore assume it without an attempt at proof; and I oppose it to the assertion which I am now considering, and to the argument which is raised on that assertion.

A brief statement of the fact whereon the second argument in favour of the hypothesis in question is founded.

The fact accords exactly with the hypothesis or theory of utility.

The plain and glaring fact is this.—With regard to actions of a few classes, the moral sentiments of most, though not of all men, have been alike. But, with regard to actions of other classes, their moral sentiments have differed, through every shade or degree, from slight diversity to direct opposition.

And this is what might be expected, supposing that the principle of general utility is our only guide or index to the tacit commands of the Deity. For, first, the positions wherein men are, in different ages and nations, are, in many respects, widely different: and, secondly, since human tastes are various, and human reason fallible, men's moral sentiments must often widely differ even in respect of the circumstances wherein their positions are alike. But, with regard to actions of a few classes, the dictates of utility are the same at all times and places, and are also so obvious that they hardly admit of mistake or doubt. And hence would naturally ensue what observation shows us is the fact: namely, a general resemblance, with infinite variety, in the systems of law and morality which have actually obtained in the world.

A brief statement of the intermediate hypothesis which is compounded of the hypothesis of utility and the hypothesis of a moral sense.

According to the hypothesis which I have now stated and examined, the moral sense is our *only* index to the tacit commands of the Deity. According to an intermediate hypothesis, compounded of the hypothesis of utility and the hypothesis of a moral sense, the moral sense is our index to *some* of his tacit commands, but the principle of general utility is our index to *others*.

In so far as I can gather his opinion from his admirable sermons, it would seem that the compound hypothesis was embraced by Bishop Butler. But of this I am not certain: for, from many passages in those sermons, we may perhaps infer that he thought the moral sense our only index or guide.

The compound hypothesis now in question naturally arose from the fact to which I have already adverted.—With

regard to actions of a few classes, the moral sentiments of most, though not of all men, have been alike. With regard to actions of other classes, their moral sentiments have differed, through every shade or degree, from slight diversity to direct opposition.—In respect to the classes of actions, with regard to which their moral sentiments have agreed, there was some show of reason for the supposition of a moral sense.—In respect to the classes of actions, with regard to which their moral sentiments have differed, the supposition of a moral sense seemed to be excluded.

But the modified or mixed hypothesis now in question is not less halting than the pure hypothesis of a moral sense or instinct.—With regard to actions of a few classes, the moral sentiments of *most* men have concurred or agreed. But it would be hardly possible to indicate a single class of actions, with regard to which *all* men have thought and felt alike. And it is clear that every objection to the simple or pure hypothesis may be urged, with slight adaptations, against the modified or mixed.

At this point I will briefly indicate the practical importance of the above disquisition to a treatise occupied with the *rationale* of jurisprudence.

By modern writers on jurisprudence, *law* (including in the term positive law and a portion of positive morality) is divided into *law natural* and *law positive*. By the classical Roman jurists, borrowing from the Greek philosophers, *jus civile* (or positive law together with a portion of positive morality) is divided into *jus gentium* and *jus civile*. These are exactly equivalent divisions.

By reason of these respective divisions of *law*, crimes are divided, by modern writers on jurisprudence, into 'mala in se' and 'mala quia prohibita':—by the classical Roman jurists, into crimes *juris gentium* and crimes *jure civili*. And these divisions of crimes, like the divisions of law wherefrom they are respectively derived, are equivalent.

Now without a clear apprehension of the hypothesis of utility, of the pure hypothesis of a moral sense, and of the modified or mixed hypothesis which is compounded of the others, the distinction of law into *natural* and *positive*, with the various derivative distinctions which rest upon that main one, are utterly unintelligible. Assuming the hypothesis of utility, or assuming the pure hypothesis of a moral sense, these distinctions are senseless. But, assuming the intermediate hypothesis which is compounded of the others, positive law, and also positive morality, is inevitably distinguished into *natural* and *positive*. In other words, if the modified or mixed hypothesis be founded in truth, positive human rules fall into two parcels:—1. Positive human rules which obtain with all mankind; and the conformity of

The division of positive law into law natural and law positive, and the division of jus civile into jus gentium and jus civile, suppose or involve the intermediate hypothesis which is compounded of the hypothesis of utility and the hypothesis of a moral sense.

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§ 1.

which to Divine commands is, therefore, indicated by the moral sense: 2. Positive human rules which do not obtain universally; and the conformity of which to Divine commands is, therefore, not indicated by that infallible guide.

The foregoing disquisitions on the index to God's commands, closed with an endeavour to clear the theory of utility from two current though gross misconceptions.

The two misconceptions stated.

The first misconception examined.

Having stated the hypothesis of utility, the hypothesis of a moral sense, and the modified or mixed hypothesis which is compounded of the others, I will close my disquisitions on the index to God's commands with an endeavour to clear the hypothesis of utility from two current though gross misconceptions.

Of the writers who maintain as well as those who impugn the theory of utility, three out of four fall into one or the other of the following errors.—1. Some of them confound the *motives* which ought to determine our conduct with the proximate *measure* or *test* to which our conduct should conform and by which our conduct should be tried.—2. Others confound the *theory of general utility* with that *theory or hypothesis concerning the origin of benevolence* which is branded by its ignorant or disingenuous adversaries with the misleading and invidious name of the *selfish system*.

I will examine these two errors in their order.

According to the theory of utility, the measure or test of human conduct is the law set by God to his human creatures. Now some of his commands are revealed, whilst others are unrevealed. The commands which God has revealed, we must gather from the terms wherein they are promulgated. The commands which he has not revealed, we must construe by the principle of utility: by the probable effects of our conduct on that general happiness or good which is the final cause or purpose of the good and wise lawgiver in all his laws and commandments.

Strictly speaking, therefore, utility is not the *measure* to which our conduct should conform, nor the *test* by which our conduct should be tried. It is not in itself the source or spring of our highest or paramount obligations, but it guides us to the source whence these obligations flow. It is the *index* to the measure, the *index* to the test. But, since we conform to the measure by following the suggestions of the index, I may say with sufficient, though not with strict propriety, that utility is the *measure* or *test prarimately* or *immediately*. Accordingly, I style the Divine commands the *ultimate* measure or test: but I style the principle of utility, or the general happiness or good, the *proximate* measure to which our conduct should conform, or the *proximate* test by which our conduct should be tried.

Now, though the general good is that proximate *measure*, or *test*, it is not in all, or even in most cases, the *motive* or *inducement* which ought to determine our conduct. If our

conduct were always determined by it considered as a *motive* or *inducement*, our conduct would often disagree with it considered as the *standard* or *measure*.

Though these propositions may sound like paradoxes, they are perfectly just. I cannot here go through the whole of the proofs by which they are capable of being established beyond contradiction. I shall content myself with throwing out some hints by way of illustration.

By the *general* or *public* good or happiness I mean the aggregate enjoyments of the individuals to whom I refer collectively by the words '*general*' or '*public*.' These words '*general*', '*public*', and others such as '*family*', '*country*', '*mankind*', are concise expressions for a number of individual persons considered collectively or as a whole. If the good of those persons considered singly were sacrificed to the supposed good of the whole, the general good would be destroyed by the sacrifice. The general good would be sacrificed to the *name* of the general good:—an absurdity when broadly stated, but nevertheless a consequence to which some current notions, for example the notion of the *public good* current in the ancient republics, have inevitably tended.

Now (speaking generally) every individual is the best possible judge of his own interests: of what will affect himself with the greatest pleasures and pains. Compared with this intimate knowledge, his knowledge of the interests of others is vague conjecture.

If every individual neglected his own for the sake of pursuing and promoting the interests of others, the interests of every individual would be managed unskilfully; and the general or public good would diminish with the good of the individuals of whom that general or public is constituted or composed.

Consequently, the principle of general utility imperiously demands that each shall commonly attend to his own rather than to the interests of others: that he shall not habitually neglect that which he knows accurately in order that he may habitually pursue that which he knows imperfectly.

This is also the arrangement which the Author of man's nature manifestly intended. For our self-regarding affections are steadier and stronger than our social: the motives by which we are urged to pursue our peculiar good operate with more constancy, and commonly with more energy, than the motives by which we are solicited to pursue the good of our fellows.

The principle of general utility does not demand of us that we shall always or habitually intend the general good: but only that we shall never pursue our own peculiar good by means inconsistent with that paramount object.

For example: A man delves or spins to put money in his purse, and not with the purpose or thought of promoting the

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general well-being. But by delving or spinning, he adds to the sum of commodities: and promotes that general well-being, which is not, and ought not to be, his practical end. General utility is not his motive to action. But his action conforms to utility considered as the standard of conduct: and, when tried by the test of utility, deserves approbation.

Again: Of all pleasures bodily or mental, the pleasures of mutual love, cemented by mutual esteem, are the most enduring and varied. They therefore contribute largely to swell the sum of human happiness. And for that reason, the well-wisher of the general good must consider them with much complacency. But he is far from maintaining that the general good ought to be the motive of the lover. It was never contended or conceived by a sound, orthodox utilitarian, that the lover should kiss his mistress with an eye to the common weal.

And by this last example, I am naturally conducted to this further consideration.

Even where utility requires that benevolence shall be our motive, it commonly requires that we shall be determined by partial rather than by general benevolence: by the love of family, rather than by sympathy with the wider circle of friends or acquaintance: by sympathy with friends or acquaintance, rather than by patriotism: by patriotism, or love of country, rather than by the larger humanity which embraces mankind.

In short, the principle of utility requires that we shall act with the utmost effect, to the end of producing good. And (speaking generally) we act most effectively to that end when our motive or inducement to conduct is the most urgent and steady, when the sphere wherein we act is the most restricted and the most familiar to us, and when the purpose which we directly pursue is the most determinate or precise.

The foregoing general statement must, indeed, be received with numerous limitations. The principle of utility not unfrequently requires that the order at which I have pointed shall be inverted or reversed: that the self-regarding affections shall yield to the love of family, or to sympathy with friends or acquaintance: these to the love of country: the love of country to the love of mankind: in short that the general happiness or good, which is always the test of our conduct, shall also be the practical end to which our conduct is directed.

In order further to dissipate the confusion of ideas giving rise to the misconception last examined, I shall here pause to analyze the expression 'good and bad motives,' and to show in what sense it represents a sound distinction.

Properly speaking, no motive is either good or bad: since there is no motive which may not by possibility, and

which does not occasionally in fact, lead both to beneficial and to mischievous conduct.

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Thus in the case which I have already used as an illustration, that of the man who digs or weaves for his own subsistence; the motive is self-regarding, but the action is beneficial. The same motive, the desire of subsistence, may lead to pernicious acts, such as stealing. Love of reputation is a motive generally productive of beneficial acts; and with some persons a most powerful incentive to acts for the public good. That form of love of reputation called vanity, on the other hand, implying, as it does, that the aim of its possessor is set upon worthless objects, commonly leads to a waste of energy, and is therefore of evil tendency. Yet if subordinated in the individual to other springs of action, and existing merely as a latent feeling of self-complacency arising out of considerations however foolish or unsubstantial, it may be harmless, or even useful as tending to conserve energy. Benevolence, on the other hand, and even religion, though certainly unselfish, and generally esteemed good motives, may, when narrowed in their aims, or directed by a perverted understanding, lead to most pernicious actions. For instance, the affection for children is with many persons more apt to lead to acts contrary to the public good than any purely selfish motive; and the palliation, which the supposed goodness of the motive constitutes in the eyes of the public for the pernicious act, encourages men to do for the sake of their children, actions which they would be ashamed to do for their own direct interest. Even that enlarged benevolence which embraces humanity, may lead to actions extremely mischievous, unless guided by a perfectly sound judgment; e.g. attempts at tyrannicide.

But, although every motive may lead to good or bad, some are pre-eminently likely to lead to good; e.g. benevolence, love of reputation, religion. Others pre-eminently likely to lead to bad, and little likely to lead to good; e.g. the anti-social;—antipathy—particular or general. Others, again, are as likely to lead to good as to bad; e.g. the self-regarding. They are the origin of most of the steady industry, but also of most of the offences of men.

In this qualified sense we may correctly speak of good motives,—good dispositions: and these ought to be recognised and approved. For the quality of the act, though ultimately tested by its conformity to utility, does to some extent depend upon the motive or disposition. These are the springs of action. It is important that they should be abundant and healthy: but whether their effect shall be a bounteous harvest or a desolating torrent depends on how they are guided and directed.

To adjust the respective claims of the selfish and social motives, of partial sympathy and general benevolence, is a

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task which belongs to the detail, rather than to the principles of ethics; and if pursued would lead me too far from the appropriate purpose of my Course. What I have suggested will suffice to conduct the reflecting to the following conclusions. 1. General utility considered as the measure or test, differs from general utility considered as a motive or inducement. 2. Our conduct, if truly adjusted to the principle of utility, would conform to rules fashioned on the principle of utility, or be guided by sentiments associated with such rules. But, this notwithstanding, general utility, or the general happiness or good, would not be in all, or even in most cases, our motive to action or forbearance.

The second misconception examined.

Having touched on the first of the two misconceptions, I will now advert to the second.

They who fall into this misconception are guilty of two errors. 1. They mistake and distort the hypothesis concerning the origin of benevolence which is styled the *selfish system*. 2. They imagine that that hypothesis, as thus mistaken and distorted, is an essential or necessary ingredient in the *theory of utility*. The first of these mistakes is made amongst others by Godwin,<sup>\*</sup> the second by Paley.

I will examine the two errors into which the misconception may be resolved, in the order wherein I have stated them.

1. According to an hypothesis of Hartley and of various other writers, benevolence or sympathy is not an ultimate fact,—it emanates from self-love, or from the self-regarding affections, through that familiar process styled ‘the association of ideas,’ to which I have already adverted.

It follows that these writers dispute not the *existence* of disinterested benevolence or sympathy: but, assuming the existence of the feeling, they endeavour to trace it to the simpler and ulterior feeling of which they believe it the offspring.

Yet, palpable as this consequence is, it is fancied by many opponents of the theory of utility, and even by some of its adherents, that these writers dispute the *existence* of disinterested benevolence or sympathy.

According to the hypothesis in question, *as thus mistaken and distorted*, we have no sympathy properly so called with the pleasures and pains of others. That which is styled sympathy, or that which is styled benevolence, is provident regard to self. Every good office done by man to man

\* ‘Enquiry concerning Political Justice.’ By William Godwin. January, 1793, book iv. ch. viii. I presume the author classes Godwin amongst the adherents of the theory of utility. This writer certainly anticipates, under the name of the *principle of justice*, some of the arguments most effectively urged in favour of the theory of utility by its more modern adherents.—R. C.

springs from a *calculation* of which self is the object. We perceive that we depend on others for much of our own happiness: and, perceiving this, we do good unto others that others may do it unto us.\*

2. Having thus mistaken and distorted the so-called *selfish system*, many opponents of the *theory of utility*, together with some adherents of the same theory, imagine that the former, as thus mistaken and distorted, is a necessary portion of the latter. And hence it naturally follows, that the adherents of the theory of utility are styled by many of its opponents 'selfish, sordid, and cold-blooded calculators.'

According to the theory of utility, the principle of *general utility* is the index to God's commands. Though benevolence be nothing but a name for provident regard to self, we are moved by regard to self, when we think of the awful sanctions of those commands to pursue the generally useful, and to forbear from the generally pernicious. This is the version of the theory of utility rendered by Paley. He lays down *general utility* as the proximate test of conduct; but he supposes that all the motives by which our conduct is determined are purely self-regarding.

Now the theory of ethics, which I style the theory of utility, has no necessary connection with any theory of motives; nor is it concerned with any hypothesis as to the nature or origin of benevolence or sympathy. I think Paley's version of the theory of utility is coherent: though I think his theory of motives miserably partial and shallow, and that mere regard to self, although it were never so provident, would hardly perform the office of genuine benevolence or sympathy. For if genuine benevolence or sympathy is a portion of our nature, it furnishes, besides the self-regarding

\* The *selfish system*, in this its literal import, is flatly inconsistent with obvious facts, and is hardly deserving of serious refutation. We are daily and hourly conscious of disinterested benevolence or sympathy in the sense of wishing the good of others without regard to our own. And here I must note an ambiguity of the word *selfish*. In the wider sense all motives are selfish. A motive is a wish, and therefore a pain affecting a man's *self*, which seeks relief. In the narrower sense *selfish* motives are opposed to *benevolent* ones. To obviate the ambiguity Bentham discards the word *selfish*. The motives which solicit us to pursue the good of others he styles *social*. Those which impel us to pursue our own advantage he styles *self-regarding*. Besides this, there are disinterested motives by which we are solicited to visit others with evil. These disinterested but malevolent motives Bentham styles *anti-social*. The existence of such motives has been questioned, but in imputing them to human nature, Bentham is not singular. Their existence is assumed by Aristotle and Butler, and by all who have examined the springs or motives of conduct. And the fact is easily explained by the all-pervading principle which is styled 'the association of ideas.'

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motive, a *distinct* inducement to consult the general good, namely, a disinterested regard for the general welfare or happiness. And without this the motives impelling us to promote the general good would be more defective than they are. But whether benevolence or sympathy be a simple or ultimate fact, or be engendered by the principle of association on the self-regarding affections, it is one of the motives by which our conduct is determined. And, on either of the conflicting suppositions, the principle of utility, and not benevolence or sympathy, is the *measure* or *test* of conduct: For as conduct may be generally useful, though the motive is self-regarding; so may conduct be generally pernicious, though the motive is purely benevolent. Accordingly, in all his expositions of the theory of utility, Bentham assumes or supposes the existence of disinterested sympathy, and scarcely adverts to the hypotheses which regard the origin of the feeling.\*

## LECTURE V.

LECT.  
V.

Explanation  
of certain  
terms.

Resemblance.

Analogy.

THE term *law*, or *laws*, is applied to the following objects: —to laws proper or properly so called, and to laws improperly so called: to objects which have all the essentials of an imperative law or rule, and are said to *resemble* (in the narrow sense of the word): and to objects which are wanting in some of those essentials, but to which the term is unduly extended either by reason of *analogy* or in the way of *metaphor*.

What is here meant by the word *resemble*, and by the word *analogy*, may be explained as follows. *Resemblance*, in the wider sense of the word, includes every degree of likeness between objects or classes of objects. But in the narrower sense and in the language of logic, objects which have *all* the qualities composing the essence of the class, and all the qualities which are the consequences of those composing the essence, *resemble*.

*Analogy* in the original and proper sense of the word is used to express the relation between two objects or groups of objects which consists in the fact that one has some of the properties, and the other all the properties of a class expressly or tacitly referred to.

\* But here I may remark that although not directly an ingredient in the theory of utility, the hypothesis of Hartley is, if well founded, very important in determining the nature of a sound system of education. For as I have shown the importance of motives, which are the springs of action, it follows that the process by which they are generated is of great practical moment, and well deserving of close and minute examination.

*Metaphor*, in its larger sense, may be defined as the transference of a term from its primitive signification to objects to which it is applied in a secondary sense. An analogy real or supposed is always the ground of the transference; hence every metaphor is an analogical application of a term, and every analogical application of a term is a metaphor.

In common parlance, however, *analogy* has come to be used in a somewhat narrow and definite sense; namely, to mark the resemblance between natural objects which do *not* belong to the same *species* (that is to say, a natural division which we conceive of as a somewhat narrow one), but which do belong to the same *genus*, *order*, *class*, or whatever name may be used to denote a larger natural division of objects. To explain the distinction fully would require a solution of the question—What are the *criteria* of a true classification of natural objects:—a question amongst the most profound of those which are in any way hopeful of solution.\* But the distinction may be suggested by a single illustration. There is a close resemblance between a leaf and the petal of a flower—there is an analogy between both these and the breathing organs of an animal. But when a feature of the human face is described as ‘tip-tilted like the petal of a flower,’ we are conscious that the expression is based on a remote and fanciful resemblance. Accordingly we say that the expression is a *figure of speech*. To call the feature in question a ‘petal’ (not because it breathes, but because it is ‘tip-tilted’), would be a metaphor.

Now it is convenient to make a similar distinction between the terms *analogy* and *metaphor* as applied to the complex objects comprehended by the term law or laws. Of laws, improperly so-called, some are *closely*, others are *remotely* analogous to laws proper. The term *law* is extended to some by a decision of the reason or understanding. The term *law* is extended to others by a turn or caprice of the fancy.

I style laws of the first kind *laws closely analogous to laws proper*. These are merely opinions or sentiments held or felt by men in regard to human conduct. I say that they are called *laws* by an *analogical* extension of the term.—]

LECT.

V.

Metaphor.

Analogy  
metaphor  
used in  
common  
parlance  
defined.

Laws im-  
proper are  
of two  
kinds.—  
1. Laws  
closely ana-  
logous to law  
proper.  
2. Laws  
metaphorical  
or figurative.

\* I have here treated the text somewhat freely, but I think fairly representing the author's meaning, in his use of the word *analogy*. The best *rationale* of classification I have yet seen is given in Mill's 'Logic,' ch. vii. § 4. Although he does not go quite to the root of the matter, his account of it is very important and suggestive. The question remains, what are the *grounds* of the induction by which we infer that the common properties of the natural objects which constitute a *true kind* are indefinite and inexhaustible. Can we, indeed, resolve this without an inquiry into the physical *origin of species*?—R. C.

**PART I.**  
§ 1.

Distribution of laws proper, and of such improper laws as are closely analogous to the proper, under three capital classes.—  
1. The law of God.  
2. Positive law.  
3. Positive morality.

Explanation of the terms positive law and positive morality.

style laws of the second kind *laws metaphorical or figurative*. I say that they are called *laws* by a *metaphor* or *figure of speech*.

I distribute laws proper, with such improper laws as are closely analogous to the proper, under three capital classes.

The first comprises the laws of God—the laws (properly so called) which are set by God to his human creatures.

The second comprises positive laws—the laws (properly so called) which are set by men as political superiors, or by men, as private persons, in pursuance of legal rights.

The third comprises laws of the two following species:

1. The laws (properly so called) which are set by men to men, but not by men as political superiors, nor by men, as private persons, in pursuance of legal rights: 2. The laws which are closely analogous to laws proper, but are merely opinions or sentiments held or felt by men in regard to human conduct.—I put laws of these two species into a common class, and I mark them with the common name of *positive morality*, or *positive moral rules*.

My reasons for using the two expressions '*positive law*' and '*positive morality*', are the following.

There are two capital classes of human laws. The first comprises the laws (properly so called) which are set by men as political superiors, or by men, as private persons, in pursuance of legal rights. The second comprises the laws (proper and improper) which belong to the two species immediately above mentioned.

As merely distinguished from the second, the first of those capital classes might be named simply *law*. As merely distinguished from the first, the second of those capital classes might be named simply *morality*. But both must be distinguished from the law of God: and, for the purpose of distinguishing both from the law of God, we must qualify the names *law* and *morality*. Accordingly, I style the first of those capital classes '*positive law*:' and I style the second of those capital classes '*positive morality*.' By the common epithet *positive*, I denote that both classes flow from human sources. By the distinctive names *law* and *morality*, I denote the difference between the human sources from which the two classes respectively emanate.

The use which I so make of the term '*positive law*' is strictly in accordance with the language commonly employed by writers on jurisprudence. The term '*positive morality*' I have adopted as an expressive phrase to denote a class of objects bearing to morality a relation similar to that which *positive law* bears to *law*. For the term *morality* taken by itself may signify either what I have just called *positive morality*, or it may signify that Divine law which is the ultimate test of *positive morality* as it ought to be.

From the expression *positive law* and the expression *positive morality*, I pass to certain expressions with which they are closely connected.

The science of jurisprudence (or, simply and briefly, *jurisprudence*) is concerned with *positive laws*, or with laws strictly so called, as considered without regard to their goodness or badness.

*Positive morality*, considered without regard to its goodness or badness, *might* be the subject of a science closely analogous to jurisprudence. I say ‘*might* be’ since it is only in one of its branches (namely, the law of nations or international law), that positive morality, thus considered, has been treated by writers in a scientific or systematic manner.—For the science of positive morality considered without regard to its goodness or badness, current or established language will hardly afford us a name. But, since the science of jurisprudence is not unfrequently styled ‘the science of *positive law*,’ the science in question might be styled analogically ‘the science of *positive morality*.’ The department of the science in question which relates to international law, has actually been styled by Von Martens, a writer of celebrity, ‘*positives oder praktisches Völkerrecht*:’ that is to say, ‘*positive international law*,’ or ‘*practical international law*.’ Had he named that department of the science ‘*positive international morality*,’ the name would have hit its import with perfect precision.

The science of ethics (or, in the language of Bentham, *the science of deontology*) may be defined in the following manner.—It affects to determine the test of positive law and morality. In other words, it affects to expound them as they ought to be; as they would be if they were good or worthy of praise; or if they conformed to an assumed measure.

The science of ethics (or, simply and briefly, *ethics*) consists of two departments: the one affects to determine the test of positive law, and is styled *the science of legislation*, or briefly, *legislation*; the other affects to determine the test of positive morality, and is styled *the science of morals*, or, briefly, *moralis*.

Here I may observe that when we say that a human law is good or bad, or is what it ought or ought not to be, we mean (unless we intimate our mere liking or aversion) this: namely, that the law agrees with or differs from a something to which we tacitly refer it as to a measure or test. According to the theory of utility, which I now assume as sufficiently proved, a human law is good or bad as it agrees or does not agree with the law of God as indicated by the principle of utility.

Positive laws, the appropriate matter of jurisprudence, are related in the way of resemblance, or by a close or

Explanation  
of the follow-  
ing expres-  
sions: viz.  
*science of ju-  
risprudence*  
and *sciences of  
positive mor-  
ality*; *science of  
ethics* or  
*deontology*,  
*science of le-  
gislation*, and  
*science of  
moralis*.

Meaning of  
the epithet  
good or bad as  
applied to a  
human law.

The connec-  
tion of the  
present (the

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(Fifth) lecture  
with the  
first, second,  
third, fourth,  
and sixth.

remote analogy, to the following objects.—1. In the way of resemblance, they are related to the laws of God. 2. In the way of resemblance, they are related to those rules of positive morality which are laws properly so called.—3. By a close or strong analogy, they are related to those rules of positive morality which are merely opinions or sentiments held or felt by men in regard to human conduct. 4. By a remote or slender analogy, they are related to laws merely metaphorical, or laws merely figurative.

To distinguish positive laws from the objects now enumerated, is the purpose of the present attempt to determine the province of jurisprudence.

In pursuance of the purpose to which I have now adverted, I stated, in my first lecture, the essentials of a law or rule (taken with the largest signification which can be given to the term *properly*).

In my second, third, and fourth lectures, I stated the marks or characters by which the laws of God are distinguished from other laws. And, stating those marks or characters, I explained the nature of the index to his unrevealed laws, or I explained and examined the hypotheses which regard the nature of that index. I made this explanation at a length which may seem disproportionate, but which I have deemed necessary because these laws, and the index by which they are known, are the standard or measure to which all other laws should conform, and by which they should be tried.

Before proceeding further I must shortly indicate the essential difference of a positive law (*i.e.* the difference which severs it from a law which is not a positive law) and advert to the reason why I postpone its complete definition until after I have described the remaining sets of objects above mentioned.

Every positive law, or every law, simply and strictly so called, is set by a sovereign person or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme.

But the full analysis of these expressions occupies so large a space that it will be convenient to postpone it, and I shall accordingly complete the determination of the province of Jurisprudence in the following order.

Order in  
which the  
determina-  
tion of the  
province will  
be completed.

In the present lecture I shall examine the distinguishing marks of those positive moral rules which are *laws properly so called*; of those positive moral rules which are styled *laws* or *rules* by an *analogical* extension of the term; and of the laws which are styled *laws* by a *metaphor*. In doing this I shall also touch on some subordinate topics, and also (so far

as is absolutely necessary to the immediate objects of this lecture) I must anticipate the fuller analysis of *sovereignty* which I reserve for the following lecture. In the following (the sixth) lecture I shall conclude the determination of the province of jurisprudence, by explaining the marks or characters which distinguish positive laws. I shall at the same time analyze the expression *sovereignty*, the correlative expression *subjection*, and the inseparably connected expression *independent political society*.

(b) In pursuance of the order stated on p. 7, and above adverted to, I proceed to analyze positive morality, describing separately rules of the two species described on p. 60 and there classed together under this name.

From the definition of a law, properly so called, contained in the first lecture, it follows that every law properly so called, flows from a *determinate* source, or emanates from a *determinate* author.

It follows also from the premisses stated in the preceding lectures that the laws of God are laws properly so called.

Positive laws or laws *strictly* so called, are established *immediately* by monarchs or sovereign bodies, as supreme political superiors; by men in a state of subjection as subordinate political superiors; or by subjects as private persons in pursuance of legal rights. In each case they are set directly or circuitously by a monarch or sovereign body. They therefore flow from a *determinate* source and are laws properly so called.

Besides the human laws which I style positive law, there are human laws which I style positive morality, rules of positive morality, or positive moral rules.

The positive moral rules which are laws properly so called, are distinguished from other laws by the union of two marks.—1. They are imperative laws or rules set by men to men. 2. They are not set by men as political superiors, nor are they set by men as private persons, in pursuance of legal rights. They are not commands (either direct or circuitous) of sovereigns in the character of political superiors.

Consequently, they are not positive laws: they are not clothed with *legal* sanctions, nor do they oblige *legally* the persons to whom they are set. But being *commands* (and therefore being established by *determinate* individuals or bodies), they are laws properly so called: they are armed with *sanctions*, and impose duties, in the proper acceptation of the terms.

Of positive moral rules which are laws properly so called, some are established by men who are not subjects, or are not in a state of subjection to a monarch or sovereign number.—Of these, some are established by men living in the negative state which is styled a state of nature or a

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(b) Positive  
Morality.

A corollary  
from the  
definition of  
laws proper.

Laws of God  
and positive  
laws are laws  
proper.

Definition of  
positive law  
further an-  
ticipated.

The positive  
moral rules  
which are  
laws properly  
so called, are  
not set  
by political  
superiors.

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state of anarchy: that is to say, by men who are *not* members, sovereign or subject, of any political society: others are established by sovereign individuals or bodies, but not in the character of political superiors.

Of laws properly so called which are set by subjects, some are set by subjects as subordinate political superiors; others by subjects as private persons:—meaning by ‘private persons,’ subjects not in the class of subordinate political superiors, or subordinate political superiors not considered as such. Laws set by subjects as subordinate political superiors, are positive laws: they are clothed with legal sanctions, and impose legal duties. They are set circuitously or remotely by sovereigns or states in the character of political superiors. Of laws set by subjects as private persons, some are not established by sovereign or supreme authority—these are rules of positive morality; they are not clothed with legal sanctions, nor do they oblige legally the parties to whom they are set: others are set or established in pursuance of legal rights residing in the subject authors—and these are positive laws or laws strictly so called; they are clothed with legal sanctions; they are commands of sovereigns as political superiors, although they are set by sovereigns circuitously or remotely.

It appears from the foregoing distinctions, that positive moral rules which are laws properly so called are of three kinds.—1. Those which are set by men living in a state of nature. 2. Those which are set by sovereigns, but not by sovereigns as political superiors. 3. Those which are set by subjects as private persons, and are not set by the subject authors in pursuance of legal rights.

To cite an example of the first kind, would be superfluous labour. A man living in a state of nature may impose an imperative law. And the law being *imperative* (and therefore proceeding from a *determinate source*) is a law properly so called; though, for want of a sovereign author, proximate or remote, it is not a positive law but a rule of positive morality.

An imperative law set by a sovereign to a sovereign, or by one supreme government to another supreme government, is an example of rules of the second kind. Not being set by a political superior, it is not a positive law or a law strictly so called. But being *imperative* (and therefore proceeding from a *determinate source*), it amounts to a law in the proper signification of the term, although it is purely or simply a rule of positive morality.

The following imperative laws so far as they are set by their authors as private persons merely, and not in pursuance of legal rights, are examples of rules of the third kind: namely, those set by parents to children; by masters to servants; by lenders to borrowers; by patrons to parasites.

Being *imperative* (and therefore proceeding from *determinate* sources), they are laws properly so called. Being set by subjects as private persons, and not in pursuance of legal rights, they are not positive laws but rules of positive morality.

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Again: A club or society of men, signifying its collective pleasure by a vote of its assembled members, passes or makes a law to be kept by its members severally under pain of exclusion from its meetings. Now if, and so far as it be not made by its authors in pursuance of a legal right, the law so voted and passed is a further example of rules of the third kind.

The positive moral rules which are laws improperly so called, are *laws set or imposed by general opinion*: that is to say, by the general opinion of any class or any society of persons. For example, Some are set or imposed by the general opinion of persons who are members of a profession or calling: others, by that of persons who inhabit a town or province: others, by that of a nation or independent political society: others, by that of a larger society formed of various nations.

The positive moral rules which are laws improperly so called, are *laws set or imposed by general opinion*.

A few species of the laws which are set by general opinion have gotten appropriate names.—For example, There are laws or rules imposed upon gentlemen by opinions current amongst gentlemen. And these are usually styled *the rules of honour*, or *the laws or law of honour*.—There are laws or rules imposed upon people of fashion by opinions current in the fashionable world. And these are usually styled *the laws set by fashion*.—There are laws which regard the conduct of independent political societies in their various relations to one another: or, rather, there are laws which regard the conduct of sovereigns or supreme governments in their various relations to one another. And laws or rules of this species, which are imposed upon nations or sovereigns by opinions current amongst nations, are usually styled *the law of nations* or *international law*.

Now a law set or imposed by general opinion is a law improperly so called. It is styled a *law* or *rule* by an analogical extension of the term. The fact denoted by the expression is the following:—Some *indeterminate* body or *uncertain* aggregate of persons regards a kind of conduct with a favourable or unfavourable opinion. In consequence of that sentiment, or the sentiment associated with that opinion, it is likely that they or some of them will be displeased with a party who shall pursue or not pursue conduct of that kind. And, in consequence of that displeasure, it is likely that *some* party (what party being undetermined) will visit the party provoking it with some evil or another.

A law set or imposed by general opinion, is merely the opinion or sentiment of an indeterminate body of persons in regard to a kind of conduct.

The body by whose opinion the law is said to be set does not *command*, either expressly or tacitly. For, since

An indeterminate body cannot command.

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it is not a body precisely determined or certain, it cannot, as a body, express or intimate a wish.

A determinate member of the body, who shares in the opinion or sentiment, may doubtless be moved or impelled, by that very opinion or sentiment, to *command* that conduct of the kind shall be forborne or pursued. The command so expressed or intimated is a law properly so called. But the author is the determinate member, not the general indeterminate body. For example, The so-called law of nations consists of opinions or sentiments current amongst nations generally. These are not laws properly so called. But one supreme government may doubtless *command* another to forbear from a kind of conduct which the law of nations condemns. And, though it is fashioned on law which is law improperly so called, this command is a *law* in the *proper* signification of the term. Speaking precisely, the command is a rule of positive morality set by a determinate author. For, as no supreme government is in a state of subjection to another, the government commanding does not command in its character of political superior. If the government receiving the command were in a state of subjection to the other, the command, though fashioned on the law of nations, would amount to a positive law. Nor does the government which gives the command act as the executor of a *command* proceeding from the uncertain body —the collective family or aggregate of nations. That government may, however, act as the executor of a command proceeding from a definite number of sovereign states allied under a treaty. In that case there would be a command issuing from the allied states collectively, and enforced by the one government as their minister. This would be still a rule of positive morality and not of positive law, because the government or state which is to be coerced would not (on the hypothesis) be in a state of subjection either to the allied governments collectively, or to the government who for the occasion acted as their minister.

A brief statement of the analogy between a law proper and a law set or imposed by general opinion.

It follows from the foregoing reasons, that a so-called law set by general opinion is not a law;—is not armed with a sanction;—and does not impose a duty, in the proper acceptation of the expressions:—but is closely analogous to a law, in the proper signification of the term, in the following respects:—1. In the case of a law properly so called, the determinate individual or body by whom the law is set wishes that conduct of a kind shall be forborne or pursued. In the case of a law imposed by general opinion, a wish that conduct of a kind shall be forborne or pursued is felt by the uncertain body whose opinion imposes it. 2. If a party obliged by the law proper shall not comply with the wish of the determinate individual or body, he probably will suffer, in consequence of his not complying, the evil or inconveni-

ence annexed to the law as a sanction. If a party liable to their displeasure shall not comply with the wish of the uncertain body of persons, he probably will suffer, in consequence of his not complying, some evil or inconvenience from some party or another. 3. By the sanction annexed to the law proper, the parties obliged are inclined to act or forbear agreeably to its injunctions or prohibitions. By the evil which probably will follow the displeasure of the uncertain body, the parties obnoxious are inclined to act or forbear agreeably to the sentiment or opinion which is styled analogically a law. 4. In consequence of the law properly so called, the conduct of the parties obliged has a steadiness, constancy, or uniformity, which, without the existence of the law, their conduct would probably want. A precisely similar consequence results from the sentiment or opinion which is styled analogically a law.

In the foregoing analysis of a law set by general opinion, the meaning of the expression '*indeterminate* body of persons' is indicated rather than explained. To complete my analysis of a law set by general opinion (and to abridge that analysis of sovereignty which I shall place in my sixth lecture), I will here insert a concise exposition of the important distinction between a *determinate*, and an *indeterminate* body of persons.

Distinction  
between a  
*determinate*,  
and an *indefi-*  
*nite*  
body of  
single or  
individual  
persons.

I will first describe the distinction in general or abstract terms, and then illustrate the general description.

Distinction  
stated in  
general  
terms;

If a body of persons be *determinate*, all the persons who compose it are determined and assignable.

Determinate bodies are of two kinds. Either, 1st. The body is composed of persons determined specifically and individually. It consists of the persons, A. B. C. &c., as individuals determined, each by his specific and appropriate description. Or—2ndly. The body is composed of persons determined generically; in other words, *every* person who answers to a given generic description, or to any of two or more given generic descriptions, is also a member of the determinate body: and is such not by reason of his own personal description or character, but by reason of his answering to the given generic description.

If a body be *indeterminate*, all the persons who compose it are not determined and assignable. Not *every* person who belongs to it is determined, or capable of being indicated. An indeterminate body consists of *some* of the persons who belong to another and larger aggregate. But *how many of those persons* are members of the indeterminate body, or *which of those persons in particular* are members of the indeterminate body, is not and cannot be known completely and exactly.

For example, The trading firm or partnership of A. B. and C. is a determinate body of the kind first described above.

and illus-  
trated by  
examples.

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§ 1.

Every member of the firm is determined specifically, or by a character or description peculiar or appropriate to himself. And every member of the firm belongs to the determinate body, not by reason of his answering to any generic description, but by reason of his bearing his specific or appropriate character.

The British Parliament for the time being is a determinate body of the second kind above described. It comprises the one person answering to the description of King [or Queen] not as an individual, but as the person for the time being answering to the *generic* description contained in the Act of Settlement. It comprises *every* person belonging to the class of peers who are entitled for the time being to vote in the Upper House. It comprises *every* person belonging to the class of commoners who for the time being represent the commons in Parliament. And the peers or commoners who are entitled to sit and vote, are so entitled not in their several capacities as individuals; but in their generic character as *peers* and *representatives of the commons*, or as respectively answering to the smaller but still *generic* descriptions of *Earl of A.* (according to the limitations of his patent), *Knight of the Shire of B.*, or *Member for the Borough of C.* duly returned pursuant to the Royal Writ (or the Speaker's Writ as the case may be).

To exemplify the foregoing description of an indeterminate body, I will revert to the nature of a law set by general opinion. Where a so-called law is set by *general* opinion, *most* of the persons who belong to a determinate body or class have certain feelings or sentiments in regard to a kind of conduct. But the number of that majority, or the several individuals who compose it, cannot be fixed or assigned with perfect fulness or accuracy. For example, A law set or imposed by the *general* opinion of a nation, of a legislative assembly, of a profession, or of a club, is an opinion or sentiment, which is held or felt in regard to conduct by *most* of those who belong to that certain body. But how many of that body, or which of that body in particular, hold or feel that given opinion or sentiment, is not and cannot be known completely and correctly. Generally speaking, therefore, an indeterminate body is an indeterminate portion of a body determinate or certain. But a body or class of persons may also be indeterminate, because it consists of persons of a vague generic character. For example, a law set by the *general* opinion of gentlemen is an opinion or sentiment of most of those who are commonly deemed to be gentlemen; or a class of persons whose generic character cannot be described precisely; for whether a given man is a gentleman or not, is a question which different men might answer in different ways.—An indeterminate body may therefore be indeterminate after a twofold manner. It may consist of an

uncertain portion of a certain body or class, or of an uncertain portion of an uncertain body or class.

A determinate body of persons is capable of corporate conduct. Whether it consist of persons determined by specific characters, or of persons determined or defined by a character or characters generic, every person who belongs to it is determined and may be indicated. In the first case, every person who belongs to it may be indicated by his specific character. In the second case, every person who belongs to it is also knowable; for every person who answers to the given generic description, or who answers to any of the given generic descriptions, is therefore a member of the body. Consequently, the entire body, or any proportion of its members, is capable, *as a body*, of positive or negative conduct: as, for example, of meeting at determinate times and places; of issuing expressly or tacitly a law or other command; of choosing and deputing representatives to perform its intentions or wishes; of receiving obedience from others, or from any of its own members.

An indeterminate body is incapable of corporate conduct, inasmuch as the several persons of whom it consists cannot be known and indicated completely and correctly. But in case a portion of its members act or forbear in concert, that given portion of its members is, by that very concert, a determinate or certain body. A law imposed by general opinion may be the cause of a law in the proper acceptation of the term. But the law properly so called, which is the consequent or effect, utterly differs from the so-called law which is the antecedent or cause. The one is an opinion or sentiment of an uncertain body of persons; of a body essentially incapable of joint or corporate conduct. The other is set or established by the positive or negative conduct of a certain individual or aggregate.

For simplicity, I have supposed that a determinate body either consists of persons determined by specific characters, or of persons determined or defined by a generic description or descriptions. But a determinate body may consist partly of persons determined by specific or appropriate characters, and partly of persons determined by a character or characters generic. Let us suppose, for example, that the individual (Oliver Cromwell was sovereign or supreme in England: that he convened a House of Commons elected in the ancient manner: and that he yielded a part in the sovereignty to this representative body. Now the sovereign or supreme body formed by Cromwell and the House would have consisted of a person determined or defined specifically, and of persons determined or defined by a generic character or description. A body of persons, forming a body determinate, may also consist of persons determined or defined specifically, and determined or defined moreover by a

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A determinate body is capable of corporate conduct.

Not so an indeterminate body of persons.

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character or characters generic. A select committee of a body representing a people or nation, consists of individual persons named or appointed specifically to sit on that given committee. But those specific individuals could not be members of the committee, unless each answered the generic description 'representative of the people or nation.'

It follows from the exposition immediately preceding that the one or the number which is sovereign in an independent political society is a *determinate* individual person or a *determinate* body of persons. If the sovereign one or number were not determinate or certain, it could not, as already shown (p. 65 *supra*), command expressly or tacitly, and could not therefore be an object of obedience to the subject members of the community.

As closely connected with the matter of the exposition immediately preceding, the following remark concerning supreme government may be put conveniently in the present place. In order that a supreme government, whether monarchical or otherwise, may possess much stability, and that the society wherein it is supreme may enjoy much tranquillity, the persons who take the sovereignty in the way of succession, must take or acquire by a given generic mode, or by given generic modes, or by reason of their respectively answering to given generic descriptions. This is well illustrated by the history of Rome under the government of the Emperors or 'Princes,' whose succession did not go according to any generic title.

By a caprice of current language, Laws set by *general* opinion, or opinions or sentiments of indeterminate bodies, are the only opinions or sentiments that have gotten the name of *laws*. But an opinion or sentiment held by an individual or by all the members of a determinate body, may be as closely analogous to a law proper, as the opinion or sentiment of an indeterminate body. The foregoing analysis, however, applies only to such laws analogous to laws proper as are set by *general* opinion.

It appears from the expositions in the preceding portion of my discourse, that laws properly so called, with such improper laws as are closely analogous to the proper, are of three capital classes.—1. The law of God. 2. Positive law. 3. Positive morality.

It also appears from the same expositions, that positive morality consists of rules of two species.—1. Those positive moral rules which are express or tacit commands, and which are therefore laws in the proper acceptation of the term. 2. Those laws improperly so called (but closely analogous to laws in the proper acceptation of the term) which are set by opinion.

The sanctions annexed to and the duties imposed by the laws of God, may be styled *religious*.—The sanctions annexed

The foregoing distribution of laws proper and of such improper laws as are closely analogous to the proper, briefly recapitulated.

The sanctions proper and

to and the duties imposed by positive laws, may be styled, emphatically, *legal*: for the laws to which these sanctions are annexed, these duties imposed, are styled, simply and emphatically, *laws or law*. Or, as every positive law supposes a *nóta*, or *civitas*, or supposes a society political and independent, the epithet *political* may be applied to these sanctions and duties. Of the sanctions which enforce compliance with and the duties imposed by positive moral rules, some are sanctions and duties properly so called, and others are styled *sanctions* and *duties* by an analogical extension of the term: that is to say, some are annexed to and imposed by rules which are laws imperative and proper, and others enforce and are imposed by rules which are laws set by opinion. Since rules of either species may be styled positive morality, the sanctions which enforce compliance with and the duties imposed by rules of either species may be styled *moral sanctions—moral duties*.

To the propositions regarding sanctions and duties stated in the last paragraph, propositions in all respects correlative may be stated in regard to *rights* which correspond to the *duties* imposed by the several kinds of rules above mentioned. But inasmuch as the nature of *right* cannot be fully explained until positive law is distinguished from the various related objects, I shall here content myself with the above general observation, leaving the student to apply it for himself when the meaning of the term *right* has been fully explained to him.

The foregoing distribution of laws proper, and of such improper laws as are closely analogous to the proper, tallies in the main with a division of laws which is given incidentally by Locke in his 'Essay on the Human Understanding,' Book II. Chapter xxviii. The passage of his essay in which the division occurs, is part of an inquiry into the nature of *relation*, and is therefore concerned *indirectly* with the nature and kinds of *law*. The student is, however, recommended to consult this chapter, and compare the propositions laid down by Locke in regard to 'the Divine law,' 'the civil law,' and 'the law of opinion or reputation,' with those stated in these lectures.

The laws composing those aggregates respectively here styled the law of God, positive law, and positive morality, sometimes coincide, sometimes do not coincide, and sometimes conflict.

They coincide, when acts which are enjoined or forbidden by a law of the one class are also enjoined, or are also forbidden, by those of the others respectively. For example, The killing which is styled *murder* is forbidden by the positive law of every political society: it is also forbidden by a so-called law which the general opinion of the society has set or imposed: it is also forbidden by the law of God as known through the principle of utility.

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improper,  
by which  
those laws  
are respec-  
tively en-  
forced; the  
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which those  
laws respec-  
tively im-  
pose; and  
the rights,  
proper and  
improper,  
which those  
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The fore-  
going dis-  
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laws proper,  
and of such  
improper  
laws as are  
closely ana-  
logous to the  
proper, tallies  
with a divi-  
sion of laws  
given inci-  
dentially by  
Locke in his  
'Essay on  
Human Un-  
derstanding.'

The law of  
God, pos-  
itive law,  
and positive  
morality,  
sometimes  
coincide,  
sometimes  
do not coin-  
cide, and  
sometimes  
conflict.

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They do *not* coincide, when acts which are enjoined or forbidden by a law of the one class are not enjoined or are not forbidden by any law of one of the other classes. For example, Though smuggling is forbidden by positive law, and (speaking generally) is not less pernicious than theft, it is not forbidden by the opinions or sentiments of the ignorant or unreflecting: and where the impost or tax is itself of pernicious tendency, smuggling is hardly forbidden by the opinions or sentiments of any. Offences against the game laws are also in point: for they are not offences against positive morality, although they are forbidden by positive law. A gentleman is not generally shunned by gentlemen, though he shoots without a qualification. A peasant who wires hares escapes the censure of peasants, though the squires, as doing justiceship, send him to the prison and the tread-mill.

They *conflict*, when acts which are enjoined or forbidden by a law of the one class are forbidden or enjoined by some law of one of the other classes. For example, In most of the nations of modern Europe, the practice of duelling is forbidden by positive law. It is also at variance with the law which is received in most of those nations as having been set by the Deity in the way of express revelation. But in spite of positive law, and in spite of his religious convictions, a man may be forced by the law of honour—the opinion of the class to which he belongs—to give or to take a challenge.

The simple and obvious considerations to which I have now adverted, are often overlooked by legislators. If they fancy a practice pernicious, or hate it they know not why, they proceed, without further thought, to forbid it by positive law. They forget that positive law may be superfluous; that the moral or the religious sentiments of the community may already suppress the practice as completely as it can be suppressed; or that, if the practice is favoured by those moral or religious sentiments, the strongest possible fear which legal pains can inspire may be mastered by a stronger fear of other and conflicting sanctions.

In consequence of the frequent coincidence of positive laws and rules of morality, and of the positive laws and the laws of God, the true nature and fountain of positive law is often absurdly mistaken by writers upon jurisprudence. Where positive law has been fashioned on positive morality, or on the law of God, they forget that the copy is the creature of the sovereign, and impute it to the author of the model.

For example: Customary laws are positive laws fashioned by judicial legislation upon pre-existing customs. Now, until clothed with legal sanctions by the sovereign one or number, the customs are merely rules set by opinions of the

Their coincidence sometimes gives rise to a misconception concerning the origin of positive law.

governed, and sanctioned or enforced morally: Though, when they become the reasons of judicial decisions upon cases, and are clothed with legal sanctions by the sovereign one or number, the customs are rules of positive law as well as of positive morality. But, because the customs were observed by the governed before they were clothed with sanctions by the sovereign one or number, it is fancied that customary laws exist *as positive laws* by the institution of the private persons with whom the customs originated.

Again: The portion of positive law which is parcel of the *law of nature* (or, in the language of the classical jurists, which is parcel of the *jus gentium*) is often supposed to emanate, even as positive law, from a Divine or Natural source. But (admitting the distinction of positive law into law natural and law positive) it is manifest that law natural, considered as a portion of positive, is the creature of human sovereigns, and not of the Divine monarch. To say that it emanates, as positive law, from a Divine or Natural source, is to confound positive law with law wheron it is fashioned, or whereunto it conforms.

Before leaving the subject of positive morality, I must note a prevailing tendency to confound what is with what ought to be law or morality, that is, 1st, to confound positive law with the science of legislation, and positive morality with deontology; and 2ndly, to confound positive law with positive morality, and both with legislation and deontology.

A law which exists *is a law*, though we happen to dislike it, or though it vary from our assumed standard. This truth, when formally announced as an abstract proposition, is so simple and glaring that it seems idle to insist upon it: but the enumeration of the instances in which it has been forgotten would fill a volume.

Blackstone, for example, says, in his 'Commentaries,' that the laws of God are superior in obligation to all other laws; that no human laws should be suffered to contradict them; that human laws are of no validity if contrary to them; and that all valid laws derive their force from that divine original.

Now, he *may* mean that where human laws conflict with the Divine, we *ought* to obey the latter rather than the former. If this be his meaning, I assent to it without hesitation, and have only to observe that, the sanctions of the Divine law being infinitely stronger and surer than those of human law, the proposition is identical, and a mere truism.

Perhaps, again, he means that human lawgivers are themselves obliged by the Divine laws to fashion the laws which they impose by that ultimate standard.

But the meaning of this passage of Blackstone, if it has

Two tendencies leading to confusion of thought.

1st. Tendency to confound positive law with the science of legislation and positive morality with deontology.

Example from Blackstone.

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a meaning, seems rather to be this: that no human law which conflicts with the Divine law is binding. Now, to say this is sheer nonsense. The most pernicious laws, and therefore those which are most opposed to the will of God, have been and are continually enforced as laws by judicial tribunals. Suppose an act innocuous, or positively beneficial, be prohibited by the sovereign under the penalty of death; if I commit this act, I shall be tried and condemned, and if I impugn the validity of the sentence, on the ground that it is contrary to the law of God, the ultimate minister of justice (*videlicet* the hangman) will demonstrate the inconclusiveness of my reasoning.

But this abuse of language is not merely puerile, it is mischievous; and in times of civil discord the mischief is apparent. To prove by pertinent reasons that a law is pernicious is highly useful, because such process may lead to the abrogation of the pernicious law. To incite the public to resistance by determinate views of *utility* may be useful. But to proclaim generally that all laws which are pernicious or contrary to the will of God are void and not to be tolerated, is to preach anarchy, hostile and perilous as much to wise and benign rule as to stupid and galling tyranny.

Another example from Blackstone.

In another passage of his 'Commentaries,' Blackstone enters into an argument to prove that a master cannot have a right to the labour of his slave. Had he contented himself with expressing his *disapprobation*, a very well-grounded one certainly, of the institution of slavery, no objection could have been made to his so expressing himself. But to dispute the existence or the possibility of the right is to talk absurdly. For in every age, and in almost every nation, the right has been given by positive law, whilst that pernicious disposition of positive law has been backed by the positive morality of the free or master classes.

Paley's definition of civil liberty.

Paley's admired definition of civil liberty appears to me to be open to the same objection. 'Civil liberty,' he says, 'is the not being restrained by any law but that which conduces in a greater degree to the public welfare;' and this is distinguished from *natural* liberty, which is the not being restrained at all. Now, if *civil* liberty means anything as opposed to *natural* liberty, it means the liberty which is given and protected by law, which is the same thing as *right*. But Paley's definition can only apply to 'civil liberty' or right as it would be if it conformed to the standard of utility.

Example from the writers of international law.

Grotius, Puffendorf, and the other writers on the so-called law of nations, have confounded positive international morality, or the rules which actually obtain among civilized nations in their mutual intercourse, with their own vague conceptions of international morality as it *ought to be*, with that indeterminate something which they conceive it

would be, if it conformed to that indeterminate something which they call the law of nature. Professor Von Martens, of Göttingen, who died only a few years ago,\* is actually the first writer on the law of nations who has avoided that confusion. He distinguished the rules which *ought* to be received in the intercourse of nations from those which *are* so received, endeavoured to collect from the practice of civilized communities what are the rules actually recognised and acted upon by them, and gave to these rules the name of positive international law.

Those who know the writings of the Roman lawyers only by hearsay are accustomed to admire their philosophy. Their real merit consists in this, that they have seized the general principles of the Roman law with great clearness and penetration, have applied these principles with admirable logic to the explanation of details, and have thus reduced this positive system of law to a compact and coherent whole. But the philosophy which they borrowed from the Greeks, or fashioned after the examples of the Greeks, is naught. Their attempts to define jurisprudence and to determine the province of the jurisconsult are absolutely pitiable, and it is hardly conceivable how men of such admirable discernment should have displayed such contemptible imbecility.

At the commencement of the Digest is a passage attempting to define jurisprudence. ‘*Jurisprudentia est divinarum atque humanarum rerum notitia, justi atque injusti scientia.*’ In the excerpt from Ulpian, which is placed at the beginning of the Digest, it is thus attempted to define the office or province of the jurisconsult. ‘*Juri operam daturum prius nosse oportet, unde nomen juris descendat. Est autem a justitia appellatum; nam, ut eleganter Celsus definit, jus est ars boni et aequi. Cujus merito quis nos sacerdotes appellat; justitiam namque colimus, et boni et aequi notitiam profitemur, aequum ab iniquo separantes, licitum ab illicito discernentes, bonos non solum metu prenarum verum etiam premiorum quoque exhortatione efficere cupientes, veram, nisi fallor, philosophiam, non simulatam affectantes.*’

Were I to present you with all the criticisms which these two passages suggest, I should detain you a full hour. I shall content myself with one. Jurisprudence, if it is anything, is the science of law, or at most the science of law combined with the art of applying it; but what is here given as a definition of it, embraces not only law, but positive morality, and even the test to which both these are to be referred. It therefore comprises the science of legislation and deontology. Further, it affirms that law is the

LECT.  
V.

2nd. Tendency to confound positive law with positive morality, and both with legislation and deontology.

Examples from the Roman Jurists.

\* This, it will be remembered, was spoken in the year 1830 or 1831.

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§ 1.

creature of justice, which is as much as to say that it is the child of its own offspring. True, we speak of law and justice as opposed to each other; but when we do so, we mean to express mere dislike of the law, or to intimate that it conflicts with another law, the law of God, which is its standard. But, in truth, law is itself the standard of justice. What deviates from any law is unjust with reference to that law, though it may be just with reference to another law of superior authority. The judge who habitually talks of equity or justice—the justice of the case, the equity of the case, the imperious demands of justice, the plain dictates of equity,—forgets that he is there to enforce *the law of the land*, else he does not administer that justice or that equity with which alone he is immediately concerned.

Example  
from Lord  
Mansfield.

This is well known to have been a strong tendency of Lord Mansfield—a strange obliquity in so great a man. I will give an instance. By the English law, a promise is not binding without a motive of a particular kind, called a *consideration*. Lord Mansfield, however, overruled the distinct provisions of the law by ruling that moral obligation was a sufficient consideration. Now, moral obligation is an obligation imposed by opinion, or an obligation imposed by God: that is, moral obligation is anything which we choose to call so, for the precepts of positive morality are infinitely varying, and the will of God, whether indicated by utility or by a moral sense, is equally matter of dispute. This decision of Lord Mansfield, which assumes that the judge is to enforce morality, enables the judge to enforce just whatever he pleases.

I do not blame Lord Mansfield for having assumed the office of a legislator. I by no means disapprove of what Bentham has chosen to call by the disrespectful, and therefore, as I conceive, injudicious, name of judge-made law. My censure refers to the timid, narrow, and piecemeal manner in which judges have legislated, and for legislating under cover of vague and indeterminate phrases, such as Lord Mansfield employed in the above example, and which would be censurable in any legislator.

Laws meta-  
phorical or  
figurative.  
—The com-  
mon and  
negative  
nature of  
laws of the  
class.

(c) The analogy borne to a law proper by a law which opinion imposes, lies mainly in this point of resemblance:—In each case a rational being or beings are liable to contingent evil, in the event of their not complying with a known or presumed desire of another. The analogy lies in the resemblance of the improper sanction and duty to the sanction and duty properly so called. That analogy is strong or close. The defect which excludes the law imposed by opinion from the rank of a law proper, merely consists in this: that the wish or desire of its authors has not been

duly signified, and that they have no formed intention of inflicting evil or pain upon those who may break or transgress it.

But, beside the laws improperly so called which are set or imposed by opinion, there are others which are related to laws proper by slender or remote analogies. I style these laws metaphorical, or laws merely metaphorical. The analogies by which they are suggested are numerous and different, but these so-called laws have the following common and negative nature.—No property or character of any metaphorical law can be likened to a sanction or a duty. Consequently, every metaphorical law wants that point of resemblance which mainly constitutes the analogy between a law proper and a law set by opinion.

The most frequent and remarkable of those metaphorical applications is suggested by that uniformity, or that stability of conduct, which is one of the ordinary consequences of a law proper. We say, for instance, that the movements of lifeless bodies are determined by certain *laws*: though, since the bodies are lifeless and have no desires or aversions, they cannot be touched by aught which in the least resembles a sanction, and cannot be subject to aught which in the least resembles an obligation. We mean that they move in certain uniform modes, and that they move in those uniform modes through the pleasure and appointment of God: just as parties obliged behave in a uniform manner through the pleasure and appointment of the party who imposes the law and the duty.—Again: We say that certain actions of the lower and irrational animals are determined by certain *laws*. We mean that they act in certain uniform modes; and that, since their uniformity of action is an effect of the Divine pleasure, it closely resembles the uniformity of conduct which is wrought by the authors of laws in those who are obnoxious to the sanctions.\*—In short, whenever we talk of *laws* governing the irrational world, the metaphorical application of the term *law* is suggested by this double analogy: 1. The successive and synchronous phenomena composing the irrational world, happen and exist, for the most part, in uniform series: which uniformity of succession and coexistence resembles the uniformity of conduct

The common  
and negative  
nature of  
laws meta-  
phorical or  
figurative,  
shown by  
examples.

\* Speaking with absolute precision, the lower animals, or the animals inferior to man, are not destitute of reason. Since their conduct is partly determined by conclusions drawn from experience, they observe, compare, abstract, and infer. But their intelligence is so extremely limited, that, adopting the current expression, I style them *irrational*. Some of the more sagacious are so far from being irrational, that they understand and observe laws set to them by human masters. But these laws being few and of little importance, I throw them, for the sake of simplicity, out of my account. I say universally of the lower animals, that they cannot understand a law, or guide their conduct by a duty.

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produced by an imperative law. 2. That uniformity of succession and coexistence, like the uniformity of conduct produced by an imperative law, springs from the will and intention of an intelligent and rational author. When an atheist speaks of *laws* governing the irrational world, the metaphorical application is suggested by an analogy still more slender and remote than that which I have now analyzed. He means that the uniformity of succession and coexistence resembles the uniformity of conduct produced by an imperative rule. If, to draw the analogy closer, he ascribes those laws to an author, he personifies a verbal abstraction, and makes it play the legislator. He attributes the uniformity of succession and coexistence to *laws* set by *nature*: meaning, by *nature*, the world itself; or, perhaps, that very uniformity which he imputes to nature's commands.

Many metaphorical applications of the term *law* or *rule* are suggested by the analogy following.—An imperative law or rule guides the conduct of the obliged, or is a *norma*, model, or pattern, to which their conduct conforms. A proposed guide of human conduct, or a model or pattern offered to human imitation, is, therefore, frequently styled a *law* or *rule* of conduct, although there be not in the case a shadow of a sanction or a duty.

For instance, we often speak of a law set by a man to himself: meaning that he intends to pursue some given course of conduct as exactly as he would pursue it if he were bound to pursue it by a law. He is not constrained to observe it by aught that resembles a sanction. For though he may fairly purpose to inflict a pain on himself, if his conduct shall depart from the guide which he intends it shall follow, the infliction of the conditional pain depends upon his own will.—Again: When we talk of *rules* of art, the metaphorical application of the term *rules* is suggested by the analogy in question. By a *rule* of art, we mean a prescription or pattern which is offered to practitioners of an art. There is not the semblance of a sanction, nor is there the shadow of a duty. But the offered prescription or pattern may guide the conduct of practitioners, as a rule imperative and proper guides the conduct of the obliged.

The preceding disquisition on figurative laws is not superfluous. Figurative laws are not unfrequently mistaken for laws imperative and proper. Nay, attempts have actually been made, and by writers of the highest celebrity, to explain and illustrate the nature of laws imperative and proper, by allusions to so-called laws which are merely such through a metaphor.

For instance, an excerpt from Ulpian placed at the beginning of the Pandects, and also inserted by Justinian in the second title of his Institutes, a fancied *jus naturale*,

Laws metaphorical or figurative are often blended and confounded with laws imperative and proper.

Examples :  
1. Ulpian.

common to all animals, is thus distinguished from the *jus naturale* or *gentium* to which I have adverted above. ‘*Jus naturale* est, quod natura omnia animalia docuit: nam jus istud non humani generis proprium, sed omnium animalium, quasi in terra, quasi in mari nascuntur, avium quoque commune est.’ Hinc descendit maris atque feminæ conjunctio, quani nos matrimonium appellamus; hinc liberorum procreatio, hinc educatio: videmus etenim cetera quoque animalia, feras etiam, istius juris peritia censerit. *Jus gentium* est, quo gentes humanae utuntur. Quod a *naturali* recedere, inde facile intelligere licet; quia illud omnibus animalibus, hoc solis hominibus inter se commune est.’ The passage here cited discloses a double confusion in the mind of the author, namely, 1st, By the slender analogy above mentioned he is misled into confounding the instincts of animals with laws. 2ndly, He confounds laws with certain motives or affections which are among the ultimate causes of laws.—I must, however, remark that the *jus quod natura omnia animalia docuit* is a conceit peculiar to Ulpian: and that this most foolish conceit, though inserted in Justinian’s compilations, has no perceptible influence on the detail of the Roman Law. The *jus naturale* of the classical jurists generally, and the *jus naturale* occurring generally in the Pandects, is equivalent to the *natural law* of modern writers upon jurisprudence, and is synonymous with the *jus gentium*, or the *jus naturale et gentium*, which I have already adverted to (p. 51, ante). It means those positive laws and those rules of positive morality, which are not peculiar or appropriate to any nation or age, but obtain, or are thought to obtain, in all nations and ages: and which, by reason of their obtaining in all nations and ages, are supposed to be formed or fashioned on the law of God or Nature as known by the moral sense. ‘Omnes populi’ (says Gaius), ‘qui legibus et moribus reguntur, partim suo proprio, partim communis omnium hominum jure utuntur. Nam quod quisque populus ipse sibi ius constituit, id ipsius proprium est, vocaturque ius civile; quasi ius proprium ipsius civitatis. Quod vero naturalis ratio inter omnes homines constituit, id apud omnes populos persequitur custoditur, vocaturque ius gentium, quasi quo jure omnes gentes utuntur.’ The universal *leges et mores* here described by Gaius, and distinguished from the *leges et mores* peculiar to a particular nation, are styled indifferently, by most of the classical jurists, *jus gentium*, *jus naturale*, or *jus naturale et gentium*. And the law of nature, as thus understood, is not intrinsically absurd. For as some of the dictates of utility are always and everywhere the same, and are also so plain and glaring that they hardly admit of mistake, there are legal and moral rules which are nearly or quite universal, and the expediency of which must be seen by merely *natural* reason, or by reason without the

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lights of extensive experience and observation. The distinction of law and morality into natural and positive, is a needless and futile subtlety: but is founded on a real and manifest difference, and would be liable to little objection, if it were not supposed to be the offspring of a moral instinct or sense, or of innate practical principles. But, since it is closely allied (as I shall show hereafter \*) to that misleading and pernicious jargon, it ought to be expelled, with the *natural law* of the moderns, from the sciences of jurisprudence and morality.

2. Montesquieu.

The following passage is the first sentence in Montesquieu's *Spirit of Laws*. ‘Les lois, dans la signification la plus étendue, sont les rapports nécessaires qui dérivent de la nature des choses: et dans ce sens tous les êtres ont leurs lois: la Divinité a ses lois; le monde matériel a ses lois; les intelligences supérieures à l'homme ont leurs lois; les bêtes ont leurs lois; l'homme a ses lois.’ Now objects widely different, though bearing a common name, are here blended and confounded. The considerations which have been already stated are sufficient to suggest a criticism of the passage which the student should, as a useful exercise, work out for himself.

3. Hooker.

If you read the disquisition in Blackstone on the nature of laws in general, or the fustian description of law in Hooker's Ecclesiastical Polity, you will find the same confusion of laws imperative and proper with laws which are merely such by a glaring perversion of the term. The cases of this confusion are, indeed, so numerous, that they would fill a considerable volume.

Physical or natural sanctions.

From the confusion of metaphorical with imperative and proper laws, I turn to a mistake, somewhat similar, which, I presume to think, has been committed by Bentham.

Sanctions proper and improper are of three capital classes:—the sanctions properly so called which are annexed to the laws of God: the sanctions properly so called, which are annexed to positive laws: the sanctions properly so called, and the closely analogous sanctions, which respectively enforce compliance with positive moral rules. But to sanctions religious, legal, and moral, this great philosopher and jurist adds a class which he styles *physical* or *natural* sanctions.

When he styles these sanctions *physical*, he does not intend to intimate that these are the only sanctions which affect the sufferers through means physical or material. Any sanction of any class may reach the suffering party through physical means.

The meaning annexed by Bentham to the expression ‘physical sanction,’ may, I believe, be rendered in the fol-

\* Lect. xxxii. post.

lowing manner.—A physical sanction is an evil brought upon the suffering party by an act or omission of his own. For example: If your house be destroyed by fire through your neglecting to put out a light, you bring upon yourself, by your negligent omission, a *physical or natural* sanction: supposing, I mean that your omission is not to be deemed a sin, and that the consequent destruction of your house is not to be deemed a punishment inflicted by the hand of the Deity.

Such physical or natural evils are related by the following analogy to sanctions properly so called. 1. When they are actually suffered, they are suffered by rational beings through acts or omissions of their own. 2. Before they are actually suffered, or whilst they exist in prospect, they affect the wills or desires of the parties liable to them as sanctions properly so called affect the wills of the obliged. The parties are urged to the acts which may avert the evils from their heads, or are deterred from the acts which may bring the evils upon them.

But in spite of the specious analogy at which I have now pointed, I dislike the application of the term *sanction* to these physical or natural evils: 1. Because they are not suffered, by intelligent beings, as *consequences* of their not complying with desires of intelligent rational beings. 2. By the term *sanction*, as it is now restricted, the evils enforcing compliance with laws imperative and proper, or with the closely analogous laws which opinion sets or imposes, are distinguished from other evils briefly and commodiously. If the term were commonly extended to these physical or natural evils, this advantage would be lost. The term would then comprehend every possible evil which a man may bring upon himself by his own voluntary conduct.

I close my disquisitions on figurative laws, and on those metaphorical sanctions which Bentham denominates *physical*, with the following connected remark.

Declaratory laws, and laws repealing laws, ought in strictness to be classed with laws metaphorical or figurative: for the analogy by which they are related to laws imperative and proper is extremely slender or remote. Laws of imperfect obligation (in the sense of the Roman jurists) are laws set or imposed by the opinions of the law-makers, and ought in strictness to be classed with rules of positive morality. But though laws of these three species are merely analogous to laws in the proper acceptation of the term, they are closely connected with positive laws, and are appropriate subjects of jurisprudence. I separate them accordingly from the classes of improper laws to which in strictness they belong.

In strictness, declaratory laws and laws repealing laws ought to be classed with laws metaphorical or figurative, and laws of imperfect obligation (in the sense of the Roman jurists) with rules of positive morality.

## LECTURE VI.

PART I.  
§ 1.

The connection of the sixth lecture with the first, second, third, fourth, and fifth.

(d) Positive law.  
Definition.

ACCORDING to the purpose and order stated at the commencement of these lectures, and adverted to in the last preceding lecture (p. 62), I proceed to explain the marks or characters which distinguish *positive laws* from the various related objects above described, and to analyze certain expressions which are essential to that distinction.

(d) The essential difference of a positive law (or the difference that severs it from a law which is not a positive law) may be stated thus. Every positive law or every law simply and strictly so called, is set by a sovereign person, or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme. In other words, it is set by a monarch, or sovereign number, to a person or persons in a state of subjection to its author.

It is therefore necessary to analyze the expression *sovereignty*, the correlative expression *subjection*, and the inseparably connected expression *independent political society*.

The superiority which is styled sovereignty, and the independent political society which sovereignty implies, is distinguished from other superiority, and from other society, by the following marks or characters.—1. The *bulk* of the given society are in a *habit* of obedience or submission to a *determinate* and *common* superior; let that common superior be a certain individual person, or a certain body or aggregate of individual persons. 2. That certain individual, or that certain body of individuals, is *not* in a habit of obedience to a determinate human superior.

Or the notions of sovereignty and independent political society may be expressed concisely thus.—If a *determinate* human superior, *not* in a habit of obedience to a like superior, receive *habitual* obedience from the *bulk* of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent.

To that determinate superior, the other members of the society are *subject*: or on that determinate superior, the other members of the society are *dependent*. The position of its other members towards that determinate superior, is a *state of subjection*, or a *state of dependence*. The mutual relation which subsists between that superior and them, may be styled *sovereignty and subjection*.

Hence it follows, that it is only through an ellipsis that the society is styled *independent*. The party truly independent (independent, that is to say, of a determinate human superior), is not the society, but the sovereign portion of the

The relation of sovereignty and subjectivity.

Strictly speaking the sovereign portion of the society, and not the

society. By 'an independent political society,' or 'an independent and sovereign nation,' we mean a political society consisting of a sovereign and subjects, as opposed to a political society consisting entirely of persons in a state of subjection.

In order that a given society may form a society political and independent, the two distinguishing marks which I have mentioned above must unite. The *generality* of the given society must be in the *habit* of obedience to a *determinate* and *common* superior: whilst that determinate person, or determinate body of persons, must *not* be habitually obedient to a determinate person or body. It is the union of that positive, with this negative mark, which renders that certain superior sovereign or supreme, and which renders that given society (including that certain superior) a society political and independent. I proceed to illustrate and explain the marks which must so unite.

1. The generality or bulk of its members must be in a *habit* of obedience to a determinate and common superior.

In case the generality of its members obey a determinate superior, if the obedience be rare or transient, and not habitual or permanent, the relation of sovereignty and subjection is not created thereby between that certain superior and the members of that given society. In other words, that determinate superior and the members of that given society do not become thereby an independent political society.

For example: In 1815 the allied armies occupied France; and so long as the allied armies occupied France, the commands of the allied sovereigns were obeyed by the French government, and, through the French government, by the French people generally. But since the commands and the obedience were comparatively rare and transient, they were not sufficient to constitute the relation of sovereignty and subjection between the allied sovereigns and the members of the invaded nation. In spite of those commands, and in spite of that obedience, the French government was sovereign or independent. In spite of those commands, and in spite of that obedience, the French government and its subjects were an independent political society, whereof the allied sovereigns were not the sovereign portion.

Now if the French nation, before the obedience to those sovereigns, had been an independent society in a state of nature or anarchy, it would not have been changed by the obedience into a society political. And it would not have been changed by the obedience into a society political, because the obedience was not habitual. For instance, while Paris was in the hands of the Commune after the capitulation to the Germans in 1871, and although both the contending parties obeyed occasional commands of the German sovereign, it could scarcely be said that France including

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society itself  
is indepen-  
dent, sove-  
reign, or  
supreme.

In order that  
a given  
society may  
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political and  
independent,  
the two dis-  
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marks which  
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tioned above  
must unite.

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Paris formed one political society, still less that France and the German government formed a political society of which the latter was sovereign.

2. In order that a given society may form a society political, habitual obedience must be rendered, by the *generality* or *bulk* of its members, to a determinate and *common* superior. In other words, habitual obedience must be rendered, by the *generality* or *bulk* of its members, to *one and the same* determinate person, or determinate body of persons.

For example: In case a given society be torn by intestine war, and in case the conflicting parties be nearly balanced, the given society is either in a state of nature or is split up into two or more independent political societies. If the bulk of each of the parties be in a habit of obedience to its head, the given society is broken into two or more societies, which, perhaps, may be styled independent political societies. If the bulk of each of the parties be not in that habit of obedience, the given society is simply or absolutely in a state of nature or anarchy. It is either resolved or broken into its individual elements, or into numerous societies of a size so limited, that they could hardly be styled societies independent and *political*. For, as I shall show hereafter, a given independent society would hardly be styled *political*, in case it fell short of a *number* which cannot be fixed with precision, but which may be called considerable, or not extremely minute.

3. In order that a given society may form a society political, the generality or bulk of its members must habitually obey a superior *determinate* as well as *common*.

On this position I shall not insist here. For I have shown sufficiently in my fifth lecture, that no indeterminate party can command expressly or tacitly, or can receive obedience or submission: that no indeterminate body is capable of corporate conduct.

4. It appears from what has preceded, that, in order that a given society may form a society political, the bulk of its members must be in a habit of obedience to a certain and common superior. But, in order that the given society may form a society political and independent, that certain superior must *not* be habitually obedient to determinate human superior. He may be habitually affected by so-called laws which *opinion* sets or imposes, or may render *occasional* submission to commands of determinate parties. But the society is not independent, although it may be political, if that certain superior *habitually* obeys the commands of a *certain* person or body.

Let us suppose, for example, that a viceroy obeys habitually the author of his delegated powers. And, to render the example complete, let us suppose that the viceroy receives habitual obedience from the generality or bulk of the persons who inhabit his province. In such circumstances the viceroy

is not sovereign within the limits of his province, nor are he and its inhabitants an independent political society. He and through him the inhabitants of his province are in a state of subjection to the sovereign of that larger society. He and the inhabitants of his province are a society political but subordinate.

A natural society, or a society in a state of nature, is composed of persons who are connected by mutual intercourse, but are not members, sovereign or subject, of any society political. None of the persons who compose it live in a state of subjection: all live in the negative state which is styled a state of independence.

Considered as entire communities, and considered in respect of one another, independent political societies live, it is commonly said, in a state of nature. And considered as entire communities, and as connected by mutual intercourse, independent political societies form, it is commonly said, a natural society. To speak more accurately, the several members of the several related societies are placed in the following positions. The sovereign and subject members of each of the related societies form a society political: but the sovereign portion of each of the related societies lives in the negative condition which is styled a state of independence.

Society formed by the intercourse of independent political societies, is the province of international law, or of the law obtaining between nations. For (adopting a current expression) 'international law, or the law obtaining between nations, is conversant with the conduct of independent political societies considered as entire communities: *circa negotia et causas gentium integrarum*. Speaking with greater precision, international law, or the law obtaining between nations, regards the conduct of sovereigns considered as related to one another.

And hence it inevitably follows, that the law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author. As I have already intimated, the law obtaining between nations is law (improperly so called) set by general opinion. The duties which it imposes are enforced by moral sanctions: by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility and incurring its probable evils in case they shall violate maxims generally received and respected.

A society political but subordinate is merely a limb or member of a society political and independent. All the persons who compose it, including the person or body which is its immediate chief, live in a state of subjection to one and the same sovereign.

Besides societies political and independent, societies independent but natural, society formed by the intercourse of

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A society  
independent  
but natural.

Society  
formed by the  
intercourse of  
independent  
political  
societies.

A society  
political but  
subordinate.

A society not  
political, but  
forming a

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Member or  
part of  
a society  
political and  
independent.

independent political societies, and societies political but subordinate, there are societies consisting of subjects considered as private persons.—A society consisting of parents and children, living in a state of subjection, and considered in those characters, may serve as an example.

To distinguish societies political but subordinate from societies not political but consisting of subject members, is to distinguish the rights and duties of subordinate political superiors from the rights and duties of subjects considered as private persons. And before I can draw that distinction, I must analyze many expressions of large and intricate meaning which belong to the detail of jurisprudence. But an explanation of that distinction is not required by my present purpose, which is merely to determine the notion of sovereignty, with the inseparably connected notion of independent political society.

The definition of the abstract term *independent political society* (including the definition of the correlative term *sovereignty*) cannot be rendered in expressions of perfectly precise import, and is therefore a fallible test of specific or particular cases. The least imperfect definition which the abstract term will take, would hardly enable us to fix the class of every possible society. It would hardly enable us to determine of every *independent* society, whether it were *political* or *natural*. It would hardly enable us to determine of every *political* society, whether it were *independent* or *subordinate*.

In order that a given society may form a society political and independent, the positive and negative marks which I have mentioned above must unite. The *generality* or *bulk* of its members must be in a *habit* of obedience to a certain and common superior: while that certain person, or certain body of persons, must *not* be *habitually* obedient to a certain person or body. It is obvious that the terms *bulk* or *generality*—*habit* and *habitually*—are so wanting in precision as not always to furnish a certain test whether or not a given society is independent.

I proceed to illustrate this. And first as to the positive test or mark of independent political society.—In some cases, so large a proportion of the members obey the same superior, and the obedience of that proportion is so frequent and continued, that, without a moment's difficulty and without a moment's hesitation, we should say that the *generality* of its members were in a *habit* of obedience or submission to a certain and *common* superior, and should accordingly pronounce the society *political*. Such, for example, is the ordinary state of England, and of every independent society somewhat advanced in civilization. In other cases, obedience to the same superior is rendered by so few of the members, or general obedience to the same is so unfrequent

and broken, that, without a moment's difficulty and without a moment's hesitation, we should pronounce the society *natural*: we should say the *generality* of its members were *not in a habit* of obedience to a certain and *common* superior. Such, for example, is the state of the independent and savage societies which subsist by hunting or fishing in the woods or on the coasts of New Holland.

But in the cases of independent society which lie between the extremes, we should hardly find it possible to determine with absolute certainty, whether the generality of its members did or did not obey one and the same superior, or whether the general obedience to one and the same superior was or was not habitual. For example: During the height of the conflict between Charles the First and the Parliament, the English nation was broken into two distinct societies: each of which societies may perhaps be styled political, and may certainly be styled independent. After the conflict had subsided, those distinct societies were in their turn dissolved; and the nation was reunited, under the common government of the Parliament, into one independent and political community. But at what juncture precisely, after the conflict had subsided, were those distinct societies completely dissolved, and the nation completely reunited into one political community? When had so many of the nation rendered obedience to the Parliament, and when had the general obedience become so frequent and lasting, that the *bulk* of the nation were *habitually* obedient to the body which affected sovereignty? And in the mean time what was the class of the society which was formed by the English people? These are questions which it would be impossible to answer with certainty, although the facts of the case were precisely known.

Next, as to the negative mark of independent political society.—Given a determinate and common superior, and also that the bulk of the society habitually obey that superior, is that common superior free from a *habit* of obedience to a determinate person or body?

For example: Previously to the war of 1866 which ended with Sadowa, the smaller German states which now form part of the German Empire may be said to have been independent. For although they obeyed the occasional commands of a superior, whether of Prussia, Austria, or the Bund, it was not definitely ascertained to which of those authorities obedience was due, still less can it be said of some of these states (e.g. Saxony) that they were in the *habit* of obedience to a definite and certain superior. After the conclusion of the war of 1870-71, the smaller States comprised in the German Empire can hardly be said to be independent. But it would be difficult to state with precision the time at which the *habit* of obedience to the supreme federal

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§ 1.

Government, whether under the name of the North German Confederation or the German Empire, became established.

The difficulties which I have laboured to explain, often embarrass the application of those positive moral rules which are styled international law.

For example: At the commencement of the war of Secession in America, was the Union a Political Society? Were the Seceding States rebels or Confederate Independent States at war with the Union? These were at the time and long remained embarrassing and difficult questions to Governments who looked on from a distance.

This difficulty presents itself under numerous forms in international law: indeed almost the only difficult and embarrassing questions in that science arise out of it. And law strictly so called is not free from like difficulties. What can be more indefinite, for instance, than the expressions *reasonable* time, *reasonable* notice, *reasonable* diligence? than the line of demarcation which distinguishes libel and fair criticism; or that which constitutes a violation of copyright; or that degree of mental aberration which constitutes idiocy or lunacy? In all these cases, as in the case in point, the difficulty arises from the vagueness or indefiniteness of the terms in which the definition or rule is inevitably conceived.

I have tacitly supposed, during the preceding analysis, that every independent society forming a society political possesses the essential property which I will now describe.

In order that an independent society may form a society political, it must not fall short of a *number* which cannot be fixed with precision, but which may be called *considerable*, or not extremely minute. A given independent society, whose number may be called *inconsiderable*, is commonly esteemed a *natural*, and not a *political* society, although the generality of its members be habitually obedient or submissive to a certain and common superior.

Let us suppose, for example, that a single family of savages lives in absolute estrangement from every other community. And let us suppose that the father, the chief of this insulated family, receives habitual obedience from the mother and children. Although the society has all the marks expressly mentioned in my definition, it would be ridiculous to style such a society a society *political* and independent, the father and chief a *monarch* or *sovereign*, or the obedient mother and children *subjects*.—‘*La puissance politique*’ (says Montesquieu) ‘comprend nécessairement l’union de plusieurs familles.’

In the case of tribes such as those who live by hunting or fishing in the woods or on the coasts of New Holland; and those tribes of Indians who range the unsettled parts of the North American continent, we should deny the title

In order that  
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dent society  
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cal, it must  
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which may be  
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'independent political society,' because the bond which connects the *congeries* of families of which they consist is too slight to say that they render *habitual* obedience to any certain superior, although they may on occasions unite in obedience to a leader for warlike purposes. If we admitted the term 'independent political society' to describe a society, *however small*, which united the conditions above mentioned, we should say that these tribes consisted of a *congeries* of independent political communities. They are, strictly speaking, a *congeries* of groups having all the marks of independent political societies except size. They are commonly included in the expression *natural* society, although that expression as above defined strictly applies to a *congeries* of independent units.

The lowest possible number which will satisfy the condition now under consideration cannot be fixed precisely. But, looking at many of the communities which commonly are considered and treated as independent political societies, we must infer that an independent society may form a society political, although the number of its members exceed not a few thousands, or even a few hundreds. The ancient Grison Confederacy (like the ancient Swiss Confederacy with which the Grison was connected) was rather an alliance or union of independent political societies, than one independent community under a common sovereign. Now the number of the largest of the societies which were independent members of the ancient Grison Confederacy hardly exceeded a few thousands. And the number of the smallest of those numerous confederated nations hardly exceeded a few hundreds.

The condition immediately above considered, it will be observed, introduces a further element of vagueness into this definition of *independent political society*, and adds to the difficulties which, as I have already stated, are owing to the vagueness of the *terms necessarily employed*.

But here I must briefly remark, that the property which I have last described is not an essential property of *subordinate* political society. If the independent society, of which it is a limb or member, be a political and not a natural society, a subordinate society may form a society political, although the number of its members might be called extremely minute. For example: A society incorporated by the state for political or public purposes is a society or body politic; although it may consist of a very small number of members.

Having tried to determine the notion of sovereignty, with the implied or correlative notion of independent political society, I will produce and briefly examine a few of the definitions of those notions which have been given by writers of celebrity.

Certain of the definitions of the term sovereignty, and of the implied or correlative

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term independent political society, which have been given by writers of celebrity.

1. Bentham.

Distinguishing *political* from *natural* society, Bentham, in his Fragment on Government, thus defines the former: 'When a number of persons (whom we may style *subjects*) are supposed to be in the *habit* of paying *obedience* to a person, or an assemblage of persons, of a known and certain description (whom we may call *governor* or *governors*), such persons altogether (*subjects* and *governors*) are said to be in a state of *political society*.' And in order to exclude from his definition such a society as the single family conceived of above, he adds a second essential of political society, namely that the society should be capable of indefinite duration.— Considered as a definition of independent political society, this definition is defective, by the omission of the negative mark; namely, that the sovereign is *not* habitually obedient to another. It is also a defective definition of political society in general. For before we can distinguish political society from society not political, we must determine the nature of those societies which are at once political and independent. For a political society which is not independent is a member or constituent parcel of a political society which is. The powers or rights of subordinate political superiors are merely emanations of sovereignty,—particles of sovereignty committed by sovereigns to subjects.

2. Hobbes.

*Powers  
of  
sovereignty*

According to the definition of independent political society which is stated or supposed by Hobbes, in his excellent treatises on government, a society is not a society political and independent, unless it can maintain its independence, against attacks from without, by its own intrinsic or unaided strength. But as I have already remarked, this can hardly be said of any existing society. The weaker of such actual societies as are deemed political and independent, owe their precarious independence to positive international morality, and to the mutual fears or jealousies of stronger communities. The most powerful of such actual societies as are deemed political and independent, could hardly maintain its independence, by its own intrinsic strength, against an extensive conspiracy of other independent nations.

3. Grotius.

In his great treatise on international law, Grotius defines sovereignty in the following manner. '*Summa potestas civitatis illa dicitur, cuius actus alterius juri non subsunt, ita ut alterius voluntatis humanæ arbitrio irriti possint redi. Alterius cum dico, ipsum excludo, qui summa potestate utitur; cui voluntatem mutare licet.*' Now, in order to an adequate conception of the nature of international morality, as well as in order to an adequate conception of the nature of positive law, the positive as well as the negative of the two essential marks of sovereignty, stated in my definition, must be noted or taken into account. But the positive essential of sovereign power is not inserted by Grotius in

his definition. And the negative essential is stated inaccurately. If, as the definition supposes, perfect or complete independence be of the essence of sovereign power, there is not in fact the human power to which the epithet *sovereign* will apply with propriety. Every government, let it be never so powerful, renders occasional obedience to commands of other governments; defers frequently to those opinions and sentiments which are styled international law; and ~~defers habitually~~ to the opinions and sentiments of its own subjects. Not to be in the *habit* of obedience to another constitutes all the independence that a government can possibly enjoy.

According to Von Martens of Göttingen (the writer on positive international law already referred to), 'a sovereign government is a government which *ought* not to receive commands from any external or foreign government.'—Of the conclusive and obvious objections to this definition of sovereignty the following are only a few. 1. If the definition in question applies to sovereign governments, it will also apply to a subordinate government which holds its power at the will of and as a trustee for its own sovereign. 2. Whether a given government be or be not supreme, is a question of fact. A government reduced to subjection is actually a subordinate government, although, according to the morality which obtains between states, it *ought* to be sovereign or independent. 3. It cannot be affirmed absolutely of a sovereign or independent government, that it *ought* not to receive commands from foreign or external governments. Although the morality which actually obtains between states as well as that international morality which is commended by general utility forbids excessive intermeddling by independent governments with other independent governments, yet, according to both systems of morality, no independent government ought to be freed completely from the supervision and control of its fellows. 4. In this definition by Von Martens (as in that which is given by Grotius) there is not the shadow of an allusion to the positive character of sovereignty.

4. Von Mar-  
tens.

In order further to elucidate the nature or essence of sovereignty, and of the independent political society which sovereignty implies, I will make a few concise remarks upon the following subjects or topics.—1. The various shapes which sovereignty may assume, or the various possible forms of supreme government. 2. The real and imaginary bounds which limit, or are supposed to limit, the power of sovereigns. 3. The origin of government, with the origin of political society: or the causes of the habitual obedience which is rendered to the sovereign by the bulk of subjects.

The ensuing portion of the present lecture is concerned with the following topics.—1. The forms of supreme government. 2. The limits of sovereign power. 3. The origin of government.

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or the origin  
of political  
society.

1. The forms  
of supreme  
government.

Every su-  
preme go-  
vernment is a  
monarchy  
(properly so  
called) or an  
aristocracy  
(in the  
generic mean-  
ing of the  
expression).  
In other  
words it is a  
government  
of one, or a  
government  
of a number.

1. An independent political society is divisible into two portions: namely, the portion of its members which is sovereign or supreme, and the portion of its members which is merely subject. For unless every member of a political society were adult and of sound mind, it would be impossible for the sovereignty to reside in *all* the members. The existence of such a society is so improbable, that, with this passing notice, I throw the idea of it out of my account.

When the sovereign portion consists of a single member, the supreme government is properly a *monarchy*, or the sovereign is properly a *monarch*.\* When the sovereign portion consists of a number of members, the supreme government may be styled an *aristocracy* (in the generic meaning of the expression). And here I may briefly remark, that a monarchy or government of one, and an aristocracy or government of a number, are essentially and broadly distinguished by the following important difference. In the case of a monarchy or government of one, the sovereign portion of the community is simply or purely sovereign. In the case of an aristocracy or government of a number, that sovereign portion is sovereign as viewed from one aspect, but is also subject as viewed from another. Considered collectively, or considered in its corporate character, that sovereign number is sovereign and indepen-

\* In every monarchy, the monarch renders habitual deference to the opinions and sentiments held and felt by his subjects. But in almost every monarchy, he defers especially to the opinions and sentiments, or he consults especially the interests and prejudices, of some especially influential though narrow portion of the community. If the monarchy be military, or if the main instrument of rule be the sword, this influential portion is the military class generally, or a select body of the soldiery. If the main instrument of rule be not the sword, this influential portion commonly consists of nobles, or of nobles, priests, and lawyers. For example: In the Roman world, under the sovereignty of the princes or emperors, this influential portion was formed by the standing armies, and, more particularly, by the Praetorian guard: as, in the Turkish empire, it consists, or consisted, of the corps of Janizaries. In France, after the kings had become sovereign, and before the great revolution, this influential portion was formed by the nobility of the sword, the secular and regular clergy, and the members of the parliaments or higher courts of justice.

Hence it has been concluded, that there are no monarchies properly so called: that every supreme government is a government of a number: that in every community which seems to be governed by one, the sovereignty really resides in the seeming monarch or autocrat, with that especially influential though narrow portion of the community to whose opinions and sentiments he especially defers. This, though plausible, is an error, arising from a confusion of laws properly so called with laws improper imposed by opinion. The habitual independence which is one of the essentials of sovereignty, is merely habitual independence of laws imperative and proper. By laws which opinion imposes, every member of every society is habitually determined.

dent. But, considered severally, the individuals and smaller aggregates composing that sovereign number are subject to the supreme body of which they are component parts.

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Governments which may be styled aristocracies (in the generic meaning of the expression) are not unfrequently distinguished into the three following forms: namely, *oligarchies*, *aristocracies* (in the specific meaning of the name), and *democracies*. If the proportion of the sovereign number to the number of the entire community be deemed extremely small, the supreme government is styled an *oligarchy*. If the proportion be deemed small, but not extremely small, the supreme government is styled an *aristocracy* (in the specific meaning of the name). If the proportion be deemed large, the supreme government is styled *popular*, or is styled a *democracy*.<sup>1</sup> But these three forms of aristocracy (in the generic meaning of the expression) can hardly be distinguished with precision, or even with a distant approach to it, and the line of demarcation, vague as it necessarily is, shifts according to the prepossessions of the person who uses the respective phrases.

Of such distinctions between aristocracies as are founded on differences between the proportions which the number of the sovereign body may bear to the number of the community.

The distinctions between aristocracies to which I have now adverted, are founded on differences between the proportions which the number of the sovereign body may bear to the number of the community.

Other distinctions between aristocracies are founded on differences between the modes wherein the sovereign number may share the sovereign powers.

Of such distinctions between aristocracies as are founded on differences between the modes wherein the sovereign number may share the sovereign powers.

For the sovereign number is commonly a mixed or heterogeneous body, or a body of individual persons whose political characters are different. And the various constituent members of the heterogeneous and sovereign body may share the sovereign powers in any of infinite modes.

Of such aristocracies as are styled limited monarchies

The infinite forms of aristocracy which result from those infinite modes, have not been distinguished systematically by generic and specific names. But some of them have been distinguished broadly from the rest, and marked with the common name of *limited monarchies*.

In all or most of the governments which are styled limited monarchies, a single individual shares the sovereign powers with an aggregate or aggregates of individuals: the share of that single individual, be it greater or less, surpassing or exceeding the share of any of the other individuals who are also constituent members of the supreme and heterogeneous body. And by that pre-eminence of share in the sovereign or supreme powers, and (perhaps) by precedence in rank or other honorary marks, that single individual is distinguished, more or less conspicuously, from any of the other individuals with whom he partakes in the sovereignty. But he is not a monarch in the proper acceptation of the term. He is not sovereign, but is one of

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§

a sovereign number. Considered singly, he lives in a state of subjection, and is subject to the sovereign body of which he is merely a limb.

Limited monarchy, therefore, is not monarchy. It is one or another of those infinite forms of aristocracy which result from the infinite modes wherein the sovereign number may share the sovereign powers. And, like any other of those infinite forms, it belongs to one or another of those three forms of aristocracy which I have noticed in a preceding paragraph.

As meaning monarchical power limited by positive law, the name *limited monarchy* involves a contradiction in terms. For a monarch properly so called is supreme, and supreme power is incapable of *legal* limitation. It is true that the power of an aristocracy, styled a limited monarchy, is limited by positive morality, and also by the law of God. But, the power of every government being limited by those restraints, the name *limited monarchy*, as pointing to those restraints, is not a whit more applicable to such aristocracies as are marked with it than to monarchies properly so called. Its application too is capricious, and indeed is commonly determined by a purely immaterial circumstance: by the nature of the title, or the nature of the name of office, which that foremost member of the mixed aristocracy happens to bear. For example: 'The title of ~~sovereign~~, ~~raz~~, or *king*, is commonly borne by monarchs in the proper acceptance of the term: and since our own king happens to bear that title, our own mixed aristocracy of king, lords, and commons, is usually styled a limited-monarchy. If his share in the sovereign powers were exactly what it is now, but he were called protector, president, or stadholder, the mixed aristocracy of which he is a member would probably be styled a *republic*. And for such verbal differences between forms of supreme government has the peace of mankind been frequently troubled by ignorant and headlong fanatics.'

Various meanings of the following terms: 1. The term 'sovereign,' or 'the sovereign.' 2. The term 'republic,' or 'commonwealth.' 3. The term 'state,' or 'the state.' 4. The term 'nation.'

\* The present is a convenient place for the following remarks upon terms.

The term 'sovereign,' or '*the sovereign*,' applies to a sovereign body as well as to a sovereign individual. 'Il sovrano' and 'le souverain' are used by Italian and French writers with this generic and commodious meaning. 'Die Obrigkeit' (the person or body over the community) is also applied indifferently, by German writers, to a sovereign individual or a sovereign number: though it not unfrequently signifies the aggregate of the political superiors who in capacities supreme and subordinate govern the given society. But though 'sovereign' is a generic name for sovereign individuals and bodies, it is not unfrequently used as if it were synonymous with 'monarch' in the proper acceptance of the term. 'Sovereign,' as well as 'monarch,' is also often misapplied to the foremost individual member of a so-called limited monarchy.

'Republic,' or 'commonwealth,' has the following amongst other

To the foregoing brief analysis of the forms of supreme government, I append a short examination of the four following connected topics. 1. The exercise of sovereign powers, by a monarch or sovereign body, through political subordinates or delegates representing their sovereign author. 2. The distinction of sovereign and other political powers into *legislative* and *executive*. 3. The true natures of the communities or governments which are styled by writers on positive international law *half-sovereign states*. 4. The nature of a *composite state*, or a *supreme federal government*: with the nature of a *system of confederated states*, or a *permanent confederacy of supreme governments*.

It is conceivable that in an independent political society of the smallest possible magnitude, inhabiting a territory of the smallest possible extent, and living under a monarchy or an extremely narrow oligarchy, all the supreme powers (save those committed to subjects as private persons) might be exercised directly by the monarch or supreme body. But by every actual sovereign (whether an individual or a number), some of those powers are exercised through

Of the exercise of sovereign powers, by a monarch or sovereign body, through political subordinates or delegates representing their sovereign author.

meanings.—1. Without reference to the form of the government, it denotes the main object for which a government should exist;—the weal or good of an independent political society. 2. Without reference to the form of the government, it denotes a society political and independent. 3. Any aristocracy, or government of a number, which has not acquired the name of a limited monarchy, is commonly styled a republican government, or, more briefly, a republic. But the name ‘republican government,’ or the name ‘republic,’ is applied emphatically to such of the aristocracies in question as are deemed democracies or governments of many. 4. ‘Republic’ also denotes an independent political society whose supreme government is styled republican.

The meanings of ‘state,’ or ‘*the state*,’ are numerous and disparate: of which numerous and disparate meanings the following are the most remarkable.—1. ‘*The state*’ is usually synonymous with ‘*the sovereign*,’ the individual or body bearing the supreme power. This is the meaning which I annex to the term, unless I employ it expressly with a different import. 2. By the Roman lawyers, the expression ‘*status reipublicæ*’ seems to be used in two senses:—it is either synonymous with ‘republic,’ in the first of the four meanings enumerated above; or it denotes the individual or body which is sovereign in a given society, together with the subject individuals and subject bodies who hold political rights from that sovereign one or number. 3. Where a sovereign body is compounded of minor bodies, or of one individual person and minor bodies, those minor bodies are not unfrequently styled ‘states’ or ‘estates.’ 4. An independent political society is often styled a ‘state,’ or a ‘sovereign and independent state.’

An independent political society is often styled a ‘nation,’ or a ‘sovereign and independent nation.’ But the term ‘nation,’ or the term ‘*gens*,’ is used more properly with the following meaning. It denotes an aggregate of persons, exceeding a single family, who are connected through blood or lineage, and perhaps through a common language. And, thus understood, a ‘nation’ or ‘*gens*’ is not necessarily an independent political society.

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political subordinates or delegates representing their sovereign author. This is practically necessary for numerous reasons. For example: If the number of the society be large, or if its territory be large, although its number be small, the quantity of work to be done in the way of political government is more than can be done by the sovereign without the assistance of ministers. If the society is governed by a popular body, especially if dispersed through a wide area, there is, by reason of the bulk and dispersion of that body, some of the business of government which cannot be done by the sovereign without the intervention of representatives. Some of the business of government also the body is prevented from performing by the private avocations of its members.

In most or many of the societies whose supreme governments are monarchical, oligarchical, or aristocratical (in the specific meaning of the name), many of the sovereign powers are exercised by the sovereign directly. This is also the case even in *some* of the societies whose supreme governments are popular. For example: In the democracies of ancient Greece and Italy, the sovereign people or number, formally assembled, exercised directly many of its sovereign powers. And in some of the Swiss Cantons whose supreme governments are popular, the sovereign portion of the citizens, regularly convened, performs directly much of the business of government.

But in many of the societies whose supreme governments are popular, the sovereign or supreme body (or any numerous body forming a component part of it) exercises through representatives, whom it elects and appoints, the whole, or nearly the whole, of its sovereign or supreme powers. In our own country, for example, the *commons* (a name specifically applied to those commoners who share the sovereignty with the King and the Peers) exercise through representatives the whole of their sovereign powers, except their sovereign power of electing and appointing representatives to represent them in the British Parliament.

Where a sovereign body (or any smaller body forming a component part of it) exercises through representatives the whole of its sovereign powers, it may delegate its powers in either of two modes. 1. It may delegate them subject to a trust or trusts. 2. It may delegate them absolutely or unconditionally, so that the representative body, during the period for which it is elected and appointed, occupies completely the place of the electoral, and is invested completely with the sovereign character of the latter.

For example: The commons delegate their powers to the members of the commons' house, in the second of the above-mentioned modes; and (as it has been supposed) so absolutely that the commons' house might concur with the

king and the peers in defeating the principal object of its election, e.g. by passing an Act extending its own duration for twenty years. When Parliament is dissolved, or the period for which a member is elected expires, the delegated share in the sovereignty reverts to the delegating body, so far at least as regards the choice of new representatives.

If the commons, instead of delegating their powers in the second of the above-mentioned modes, had delegated them subject to a trust, that trust would have imposed upon the representative body either a legal or a moral obligation. That is to say, the trust would be enforced either by legal or by merely moral sanctions. The representative body would be bound by a positive law or laws: or merely by a fear that it may offend the bulk of the community, in case it shall break the engagement which it has contracted with the electoral.

This last is really the position occupied by the members of the commons' house. Adopting the language of most of the writers who have treated of the British Constitution, I have supposed that the present parliament, or the parliament for the time being, is possessed of the sovereignty. But, speaking accurately, the members of the commons' house are merely trustees for the body by which they are elected and appointed: and, consequently, the sovereignty always resides in the king and the peers, with the electoral body of the commons. The supposition that the powers of the commons are delegated absolutely to the members of the commons' house probably arose from the following causes. 1. The trust imposed by the electoral body upon the body representing them in parliament, is tacit rather than express: consequently the trust is general and vague. The representatives are merely bound, generally and vaguely, to abstain from any such exercise of the delegated sovereign powers as would tend to defeat the purposes for which they are elected and appointed. 2. The trust is simply enforced by moral sanctions. In other words, that portion of constitutional law which regards the duties of the representative towards the electoral body, is positive morality merely.

From the exercise of sovereign powers by the sovereign directly, and also by the sovereign through political subordinates or delegates, I pass to the distinction of sovereign, and other political powers, into such as are *legislative*, and such as are *executive* or *administrative*.

It seems to be supposed by many writers, that legislative political powers and executive political powers may be distinguished with an approach at least to precision: and that in every society whose government is a government of a number, the legislative sovereign powers and the executive sovereign powers belong to distinct parties. According, for example, to Sir William Blackstone, the legislative sovereign powers

Of the distinction  
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reside in the parliament: that is to say, in the tripartite sovereign body formed by the king, the members of the house of lords, and the members of the house of commons. But, according to the same writer, the executive sovereign powers reside in the king alone.

Now, on a moment's consideration it will appear that the distinction is not precise. So far as political powers can be described by the words *legislative* and *executive* in any determinate meaning, that meaning must be this. Legislative powers are powers of establishing laws, and issuing other commands; administrative powers are powers of administering or carrying into operation laws or other commands already established or issued. If this be the meaning of the words, they cannot accurately describe two opposed classes of sovereign powers. For a great part of the *administration* of existing law consists in *making laws*. For instance, the *decree* of a Court of Justice is in many cases a *law proper*, laying down a *rule*, or prescribing to the parties a *course of conduct*. And the *judgment* of a Court of Justice in a particular case, so far as the Court (exercising delegated powers of sovereignty) thereby intimate that they will in future adhere to the *precedent* established by the case, is a law just as much as an Act of Parliament is a law. Rules of procedure, too, laid down for the guidance of Courts of Justice (whether made by the Courts themselves or by Parliament) are at once laws, and means of administering laws.

That the legislative sovereign powers and the executive sovereign powers belong, in any society, to distinct parties, is a supposition easily shown to be false by the following, amongst other, examples. 1. The power of making laws subsidiary to the execution of other laws is seldom confined exclusively either to what is commonly called the *legislative*, or to what is called the *administrative* branch of government. Whether, therefore, this function be deemed legislative or administrative, the fallacy of the supposition in question is equally apparent. 2. In almost every society, *judicial* powers commonly esteemed executive or administrative, are exercised directly by the supreme legislature. The Roman *emperors* or *princes* issued not only edictal constitutions, but *decretes* or judgments. In *liberal republics*, or before the virtual dissolution of the free or popular government, the sovereign Roman people, then the supreme legislature, was a High Court of Justice for the trial of criminal causes. In this country the powers of supreme judicature inhering in the *modern parliament* consisting of the king and the upper and lower houses have, I believe, never been brought into exercise; for in making the *ex post facto* statutes called *Acts of attainder*, parliament is not properly a Court of Justice. But the ancient parliament,

formed by the king and the barons, of which the modern is the offspring, was the ultimate court of appeal as well as the sovereign legislature. The Scottish parliament retained its character as an original court of jurisdiction until a comparatively late period,\* and retained its character as a court of ultimate appeal (although not without controversy) † up to the Union of the Kingdoms in 1707. To the present time, important executive or administrative powers have been exercised by each of the houses, in whom is vested, conjointly with royalty, the greatest part, if not the whole, of the sovereign powers. The House of Lords exercise jurisdiction as the ultimate court of appeal (although by the Supreme Court of Judicature Act of 1873 a term has been assigned to its functions as an English Court of Appeal); and until the Parliamentary Elections Act, 1868, by which the power of trying the validity of an election was committed to subordinate judges, that judicial power was exercised by the lower house through a committee of its members. 3. The sovereign administering the law through subordinate courts of justice is the author of that measureless system of judge-made law or rules of law made judicially, which has been established by those subordinate tribunals as directly exercising their judicial functions. In this country, where the rules of judge-made law hold a place of almost paramount importance in our legal system, it can hardly be said that Parliament (the so-called *legislature*) is the author of those rules. It may, indeed, be said, that Parliament by not interfering permits them to be made, and, by not repealing them by statute, permits them to exist. But, in truth, Parliament has no effective power of preventing their being made, and to alter them is a task which often baffles the patience and skill of those who can best command parliamentary support.‡

(Of all the larger divisions of political power, that into

\* At all events so late as the institution of 'the Session' by James I., in 1425.

† The process was called 'protestation for remedie of law,' and forms a curious episode in the history of the Scottish Bar. An account of it will be found in an address on the Historical Study of the Law delivered to the Juridical Society of Edinburgh, in 1863, by the Right Hon. John Inglis, then Lord Justice-Clerk. (Blackwood and Sons, Edinburgh and London, 1868.)

‡ Austin instances as legislative powers exercised by the king and not by parliament, the power of making articles of war, and the power exercised through subordinate judges of making rules of procedure. But these are, at all events in the present day, not sovereign powers exercised independently of Parliament, but powers of legislation formally delegated by Parliament, viz., by the annual Mutiny Act, and by the various statutes relating to Procedure. Of a similar nature are various Orders in Council, &c., &c., made under authority of various Acts of Parliament.—R. C.

## PART I.

## § 1.

Division of political powers into supreme and subordinate.

*supreme* and *subordinate* is perhaps the only precise one, and is possibly sometimes the one really present to the minds of those who speak of the distinction between *legislative* and *executive* powers as if it were a precise division. *Supreme* political powers are those, infinite in number and kind, which, partly brought into exercise and partly lying dormant, belong to a sovereign or state; *subordinate* political powers are those which are delegated to political subordinates, being either persons merely subordinate or persons who are themselves immediate participants in the supreme powers.

The true nature of the communities or governments which are styled by writers on International law half-sovereign states.

There were formerly in Europe many of the communities or governments which are styled by writers on positive international law *half-sovereign states*. In consequence of the mighty changes wrought by the French Revolution, such communities or governments have wholly or nearly disappeared; and they are here adverted to not so much for their intrinsic importance as because the epithet *half-sovereign* obscures the essence of sovereignty and independent political society, by suggesting the notion that these governments are at once sovereign and subject.

According to writers on positive international law, a government half or imperfectly sovereign has most of the political and sovereign powers which belong to a supreme government, and in particular in regard to its foreign alliances and the making war or peace. But, notwithstanding this, the government, or a member of the government of another political society, has political power over it. For example: In the Germanico-Roman Empire, the German governments holding of the empire *in capite* were deemed imperfectly sovereign in regard to that general government which consisted of the Emperor and themselves as forming the Imperial Diet. For, although in their foreign relations they were independent or nearly so, they were bound (in reality or show) by laws of that general government; and the political communities in which they were half-supreme were subject to the appellate jurisdiction of the imperial tribunals.

Now every government which is deemed imperfectly supreme will be found on analysis to be, in relation to the government to which it is deemed to be half subject, in one or another of the following predicaments. It is either, 1st, wholly subject; or, 2ndly, perfectly independent; or, 3rdly, in its own community it is jointly sovereign with the other, and is therefore a constituent member of a government supreme and independent.

A government is in relation to another in the first of those three predicaments, when the political powers of the one government are exercised entirely and habitually at the pleasure and bidding of the other. For instance, the various so-called independent princes in India, from

Cape Comorin to the Himalayas, from the Bay of Bengal to the Khyber Pass, are in this position in relation to the British government of India. The power which they exercise over the people in their respective territories is held virtually by the will of the *Sirkar*—the acknowledged paramount authority of the British government—and they habitually obey the commands of that government conveyed through the British Superintendent or Resident. An instance of a government standing in relation to another in the second of those predicaments is furnished by the Great Frederic of Prussia, who, as prince-elector of Brandenburg, was deemed half or imperfectly sovereign in respect of his feudal connection with the German empire. Potentially and in practice he was thoroughly independent of the imperial government. Being in the habit of thrashing its armies, he was not in a habit of submission to his seeming feudal superior. Instances of governments standing to another in the third predicament are furnished by the domestic governments of the communities now united under the leadership of the King of Prussia as Emperor of Germany, and by those British Colonies which possess independent legislatures, in their respective relations to the Imperial Government.

For the reasons above given, I believe that no government is sovereign and subject at once: nor can be properly styled *half* or *imperfectly* supreme.\*

It frequently happens that one government, political and sovereign, arises from a federal union of several political governments. By some of the writers on positive international law, such a sovereign government is styled a *composite state*. It would be more aptly, as well as more popularly, styled a *supreme federal government*. It also frequently happens that several independent political societies are compacted by a permanent alliance. By some of these writers the

A composite state or a supreme federal government—A system of confederated states, or a permanent confederacy of supreme governments.

\* The application of the epithet *half-sovereign* is capricious. For example: No one has applied the term to those communities wherein the Roman Catholic is the prevalent and established religion, and where legislative and judicial powers are exercised by the Pope. It seems to be supposed by the writers in question, that in every such political community, either those powers are merely exercised by the authority of the domestic government, or the domestic government and the Pope are jointly sovereign. On the former of those suppositions the domestic government is perfectly sovereign; on the latter the domestic government is a constituent member of a government supreme and independent. According, indeed, to some of such writers, although those powers are not exercised by the permission or authority of the domestic government, yet if the exercise be confined to matters strictly ecclesiastical, the sovereignty of the domestic government is not impaired. But those powers, whether in matters ecclesiastical or not, are still legislative and judicial powers. And how is it possible to distinguish matters which are strictly ecclesiastical from those which are not?

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several societies or governments so compacted are styled *a system of confederated states*. But they might be more aptly styled *a permanent confederacy of supreme governments*.

I advert to the nature of a so-called composite state, and to that of a system of confederated states, 1st, in order to show that the former of these objects is no exception to the rule that in an independent political society the sovereign is either one individual or one body of individuals; and, 2ndly, in order to obviate the confusion which is apt to arise from the fallacious resemblance which exists between these widely-different objects.

1. In the case of a so-called composite state or supreme federal government it will easily be seen that the common or general government is not sovereign or supreme; and also that no one of the several governments is sovereign or supreme, even in the general society of which it is the immediate chief. For if the general government were supreme, each of the several governments considered in that character would be purely subordinate. And if the several governments were severally sovereign, they would not be members of a composite state, although, as I shall show presently, they would form a system of confederated states.

The sovereignty of each of the united societies, and also of the larger society, arising from the union of all in fact, resides in the united governments as forming one aggregate body; that is to say, as signifying their joint pleasure or the joint pleasure of a majority of their number agreeably to the form determined by the federal compact. By that aggregate body the powers of the general government were conferred and determined; and by that aggregate body its powers may be revoked, abridged, or enlarged. By the same aggregate body, also, the powers of the several governments forming its constituent members are conferred, and may be revoked, abridged, or enlarged. For the powers of the general government are so many powers subtracted from the powers of the several governments; and, therefore, when that is determined these are deducible by necessary inference.

To illustrate the nature of a supreme federal government, I will add the following remark. Neither the immediate tribunals of the common or general government, nor the immediate tribunals of the several or domestic governments, are bound or empowered to execute *every* command that the general government may issue. The political powers of the common or general government are merely those portions of their several sovereignties which the several governments, as parties to the federal compact, have relinquished and conferred upon it. The competence of

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the general government to make laws and to issue other commands may and ought to be examined by its own immediate tribunals, and also by the domestic tribunals of the several governments. And if, in making a law or issuing a command, the general government exceed the limited powers which it derives from the federal compact, both the tribunals of the general government and of the several governments are empowered and bound to disobey.

The supreme government of the United States of America agrees (I believe) with the foregoing general description of a supreme federal government. I believe that the common government, or the government consisting of the Congress and the President of the United States, is merely a subject minister of the united states' governments. I believe that no one of the latter is properly sovereign or supreme, even in the state or political society of which it is the immediate chief. And, lastly, I believe that the sovereignty of each of the states, and also of the larger state arising from the federal union, resides in the states' governments *as forming one aggregate body: meaning by a state's government, not its ordinary legislature, but the body of its citizens which appoints its ordinary legislature, and which (the union apart) is properly sovereign therein.* If the several immediate chiefs of the several united states were respectively single individuals, or were respectively narrow oligarchies, the sovereignty of each of the states, and also of the larger state arising from the federal union, would reside in those several individuals, or would reside in those several oligarchies, *as forming a collective whole.*"

2. A system of confederated states is broadly distinguished from a composite state or supreme federal government by the following essential difference. In the case of a composite state, the several united societies form one independent society or are severally subject to one sovereign body. In the case of a system of confederated states, each of the several societies is an independent political society, and each of their several governments is properly sovereign or supreme. Although the aggregate of the several governments was the framer of the federal compact and may subsequently pass resolutions concerning the entire confederacy, neither the terms of that compact nor such subsequent resolutions are enforced in any of the societies by the authority of that aggregate body. They owe their

It will be recollect that the lectures (from which the above paragraph is transcribed entire) were delivered in 1830-32, long before the war of 1860-61, the result of which was to give a new and very conclusive demonstration of the sovereignty of the Union, which is here maintained by Austin to have been the intention of the founders, on a true construction of the written Constitution framed by deputies from the several states in 1787.—R. C.

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legal effect, in any one of those several societies, to laws and other commands which the government of that society makes or fashions upon them, and which of its own authority it addresses to its own subjects. In short, a system of confederated states cannot be distinguished by any definite mark from a number of independent governments connected by an ordinary alliance. All that can be said is, that the compact is intended to be permanent, and that the ends and purposes of the compact are more numerous and complicated than those of a simple alliance.

I believe that the German *Bund* or Confederation, which succeeded to the ancient Empire, was merely a system of confederated states; that the Diet of that period was merely an assembly of ambassadors from several confederated but severally independent governments; and that the resolutions of the Diet were merely articles of agreement spontaneously adopted by each of the confederated governments, and which owed their legal effect in any one of the several compacted societies merely to laws and commands fashioned on them by its own domestic sovereign. The Diet, as such, never really possessed any power of enforcing its own decrees. What was called *federal execution* took place merely when Prussia or Austria, or both, with such of the smaller states as chose or were influenced by fear or example of the stronger power, found it convenient to unite and enforce a command in conformity with the resolution of the Diet.

The nature of the *Bund* is strongly illustrated by the events which preceded its breaking up in 1866. The subsequent development of the North German Confederation and its transformation by the course of events into a composite state, under the leadership of the King of Prussia (with the title of the Emperor of Germany), are matters fresh in the recollection of everyone, and further illustrate the broad difference between the two classes of objects here considered.

The Swiss Confederation may probably be classed as a system of confederated states. The criterion always is, whether the federal government enforce their own resolutions, in which case the aggregate body is sovereign; or whether those resolutions are only carried out by command issued and enforced at the will and by the power of the several governments, in which case there is merely a confederacy (more or less permanent) of supreme governments. For the purpose of national defence, doubtless the Swiss confederacy is very close and likely to be lasting. But its permanence seems rather to depend on the unanimity of the several governments in regard to that object than on any recognised power in the general government to coerce any single community. This instance, however, is one that

illustrates the difficulty of drawing a precise line of demarcation between the two classes of objects.

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+ From the various possible forms of supreme government, I proceed to the limits, real and imaginary, of sovereign power.

The limits of sovereign power.

The essential difference of a positive law may be put thus:—It is set directly or circuitously by a monarch or sovereign member to a member or members of the independent political society wherein that person or body is sovereign or supreme.

The essential difference of a positive law.

It follows that the power of a monarch properly so called, or the power of a sovereign number in its collegiate and sovereign capacity, is incapable of *legal* limitation. For a monarch or sovereign number bound by a legal duty would be subject to a higher or superior sovereign:—contrary to the hypothesis involved in the definition of the terms monarch and sovereign number.

It follows from the essential difference of a positive law and from the nature of sovereignty and independent political society that sovereign power is incapable of legal limitation.

And every political society must have a sovereign (one or a number) freed from *legal* restraints. For if the society is subject to a person or body not freed from legal restraints, that person or body must be subject to another person or body, and so on in a series of human authorities, which must terminate, and must therefore terminate in a person or body who is freed from legal restraint, and is sovereign.

Attempts of sovereigns to oblige themselves or to oblige the successors to their sovereign powers.

Monarchs and sovereign bodies have attempted to oblige themselves or to oblige the successors to their sovereign powers. But, in spite of such attempts, the position that sovereign power is incapable of legal limitations holds without exception.

The author of a law of the kind, or any of the sovereign successors to that immediate author, may abrogate the law at pleasure. And if the law be not abrogated, the sovereign, for the time being, is not constrained to observe it by any legal sanction. If he were, he would be in a state of subjection—*contra hypothesen*.

As regards the author of a law purporting to oblige the sovereign, such a law is merely a law by a metaphor, being only a principle assumed for the guidance of his own conduct. As regards his successors, it amounts at most to a rule of positive morality, the *quasi* sanction being the opinion of those who revere the memory of the author, or admire (rightly or wrongly) the principle of the so-called law. If that is a good principle, its violation by the sovereign may be not only a breach of positive morality, but a sin; it cannot be a breach of legal duty.

For example: The sovereign Roman people solemnly voted or resolved that they would never pass or even take into consideration what I will venture to denominate *a bill of pains and penalties*. This solemn resolution or vote was

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passed with the forms of legislation, and was inserted in the Twelve Tables in the following imperative terms:— *privilegia ne irroganto.* But although the resolution or vote was passed with the forms of legislation, it scarcely was a law in the proper acceptation of the term, and certainly was not a law simply or strictly so called. By that resolution or vote, the sovereign people adopted, and commanded to their successors in the sovereignty, an ethical principle or maxim which (admirable as it is) could not legally bind the then present or any future sovereign. If the supreme government for the time being had afterwards passed a law or command infringing on the principle, the Roman tribunals could not have treated such a law or command as not legally binding.

Again: By the authors of the Union between England and Scotland an attempt was made to oblige the legislature which, in consequence of that union, is sovereign in both countries. It is declared in the Articles and Act of Union, that the preservation of the Church of England and of the Kirk of Scotland is a fundamental condition of the union. Now, so long as the bulk of either nation shall regard its established church with love and respect, the abolition of that church by the British Parliament would be an *immoral* act, for it would violate the positive morality which obtains with the bulk of the nation affected by the change. Supposing the abolition to conflict with the law of God, either as revealed or commanded by general utility, the act would be a *sin*. But assuming, what will scarcely be denied, that the parliament for the time being is sovereign both in England and Scotland, no man, talking with a meaning, would call a parliamentary abolition of either or both of the churches an *illegal* act. The condition which affects to confer immortality upon those ecclesiastical institutions is not a positive law, but is counsel or advice offered by the authors of the union to future supreme legislatures.

By the topic lastly above discussed, I am led to consider the meanings of the epithet *unconstitutional*, as applied to conduct of a monarch, or to conduct of a sovereign number in its collegiate and sovereign capacity. This epithet as thus applied, and as opposed to the epithet *illegal*, is sometimes used with a more general and vague, and sometimes with a more special and definite meaning. I will begin with the former.

1<sup>st</sup> In almost every independent political society, there are principles or maxims expressly adopted or tacitly accepted by the sovereign, and which the sovereign habitually observes. The cause of this observance commonly lies in the regard which is entertained for those principles or maxims by the bulk or most influential part of the community; or it may be that those principles or maxims have been adopted

The meanings of the epithet unconstitutional, as it is contradistinguished to the epithet illegal, and as it is applied to conduct of a monarch, or to conduct of a sovereign number in its collegiate and sovereign capacity.

from a perception of utility or from a belief of their conformity to the Divine will, or lastly they may have had an origin which affords no valid reason for their continuance. A law is said to be *unconstitutional* in the more general sense if it conflicts with these principles or maxims. For example: The *ex post facto* statutes which are styled *Acts of Attainder*, may be called *unconstitutional*, though they cannot be called *illegal*. For they conflict with a principle of legislation which parliament has habitually observed, and which is regarded with approbation by the bulk of the British community.

In short, when an act of a sovereign is styled *unconstitutional* in that more general sense of the word, what is meant is, I believe, this: That the act is inconsistent with some given principle or maxim: that the given supreme government has expressly adopted the principle, or, at least, has habitually observed it, and that the principle is conformable to the general opinion and sentiments of the community which are shocked by the act in question: or that the principle is useful and the act pernicious: or that the principle is approved and the act disliked by the speaker, without any reason of which he can give an account.

2. The epithet *unconstitutional* as applied to conduct of a sovereign, and as used with the meaning which is more special and definite, imports that the conduct in question conflicts with *constitutional law*.

By the expression *constitutional law*, I here mean the positive morality, or the compound of positive morality and positive law, which determines the character of the person, or the respective characters of the persons, in whom, for the time being, the sovereignty shall reside: and which, moreover, supposing the government in question an aristocracy or government of a number, determines the mode wherein the sovereign powers shall be shared by the constituent members of the sovereign number or body.

Now, against a monarch properly so called, or against a sovereign body in its collegiate and sovereign capacity, constitutional law, whether expressly adopted by the sovereign or his predecessors or not, is positive morality merely, though, as I shall show hereafter, it may amount to positive law, or may be enforced by legal sanctions, against the members of the body considered severally. Consequently, although an act of the sovereign which violates constitutional law, may be styled with propriety *unconstitutional*, it is not an infringement of law simply and strictly so called, and cannot be styled with propriety *illegal*.

For example: From the ministry of Cardinal Richelieu down to the great Revolution, the king for the time being was virtually sovereign in France. But, in the same country, and during the same period, a traditional maxim cherished

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by the courts of justice, and rooted in the affections of the bulk of the people, determined the succession to the throne agreeably to the canon of inheritance which was named the Salic law. Now, in case an actual king, by a royal ordinance or law, had attempted to divert the throne to his only daughter and child, that royal ordinance or law might have been styled with perfect propriety an *unconstitutional* act. But *illegal* it could not have been called: for, inasmuch as the actual king was virtually sovereign, he was inevitably independent of legal obligation.

Again: An Act of the British parliament vesting the sovereignty in the king, or vesting the sovereignty in the king and the upper or lower house, would essentially alter the structure of our present supreme government, and might therefore be styled with propriety an *unconstitutional* law. But to call it *illegal* were absurd: for if the parliament for the time being be sovereign in the United Kingdom, it is the author, directly or circuitously, of all our positive law, and exclusively sets us the measure of legal justice and injustice.\*

When I affirm that the power of a sovereign is incapable of legal limitation, I always mean by a 'sovereign,' a mon-

The meaning  
of Hobbes'  
proposition  
that 'no law  
can be un-  
just.'

\* It is affirmed by Hobbes, in his masterly treatises on government, that 'no law can be unjust': which proposition has been deemed by many an immoral or pernicious paradox. If we look at the scope of the treatises in which it occurs, or even at the passages by which it is immediately followed, we shall find that the proposition is neither pernicious nor paradoxical, but is merely a truism put in unguarded terms. His meaning is obviously this: that 'no positive law is *legally* unjust.' And the decried proposition, as thus understood, is indisputably true.

Just or un-  
just, justice  
or injustice,  
are terms of  
relative and  
varying  
import.

Just or *unjust*, *justice* or *injustice*, are terms of relative and varying import. When uttered with a determinate meaning, they are uttered with relation to a determinate law which the speaker assumes as a standard of comparison. This is hinted by Locke in the passage referred to at the end of my fifth lecture; and it is, indeed, so manifest, on a little sustained reflection, that it hardly needs the authority of that great and venerable name. If positive law be taken as the standard of comparison, it is manifest that a positive law cannot be unjust. For that were equivalent to saying that it would be found unequal to itself used as a measure.

Though signifying conformity or non-conformity to any determinate law, the terms *justice* or *injustice* sometimes denote emphatically, conformity or nonconformity to the ultimate measure or test: namely, the law of God. This is the meaning annexed to *justice*, when law and justice are opposed: when a positive human rule is styled unjust. And when it is used with this meaning, *justice* is nearly equivalent to *general utility*. The only difference between them consists in this: that, as agreeing immediately with the *law of God*, a given and compared action is *just*; whilst, as agreeing immediately with the *principle* which is the index to the law of God, that given and compared action is *generally useful*. And hence it arises, that when we style an action *just* or *unjust*, we not uncommonly mean that it is *generally useful* or *pernicious*.

arch properly so called, or a sovereign number in its collegiate and sovereign capacity. Considered collectively, or considered in its corporate character, a sovereign number is sovereign and independent: but, considered severally, the individuals and smaller aggregates composing that sovereign number are subject to the supreme body of which they are component parts. Consequently, though the body is inevitably independent of legal or political duty, any of the individuals or aggregates whereof the body is composed may be legally bound by laws of which the body is the author. If a law set by the body to its members, even as members of the sovereign body, is clothed with a legal sanction, or the means of enforcing it judicially are provided by its author, it is properly a positive law. If it regards the constitution or structure of the given supreme government, a breach of the law, by the party to whom it is set, is not only *unconstitutional*, but is also *illegal*. The breach of the law is *unconstitutional*, inasmuch as the violated law regards the constitution of the state. The breach of the law is also *illegal*, inasmuch as the violated law may be enforced by judicial procedure.

In fact or practice, the members considered severally, but considered as members of the body, are commonly free, wholly or partially, from legal or political restraints. For example: The king, as a limb of the parliament, is not responsible legally, or cannot commit a legal injury: and, as partaking in conduct of the assembly to which he immediately belongs, a member of the house of lords, or a member of the house of commons, is not amenable to positive law. But though this freedom from legal restraints may be highly useful or expedient, it is not necessary or inevitable. Considered severally, the members of a sovereign body, be they individuals or be they aggregates of individuals, *may* clearly be legally amenable, even as members of the body, to laws which the body imposes.

And here I may remark, that if a member considered severally, but considered as a member of the body, be wholly or partially free from legal or political obligation, that legally irresponsible aggregate, or that legally irresponsible individual, is restrained or debarred in two ways from an unconstitutional exercise of its legally unlimited power. 1. Like the sovereign body of which it is a member, it is obliged or restrained morally:—by opinions and sentiments current in the given community. 2. If it affected to issue a command which it is not empowered to issue by its constitutional share in the sovereignty, that command would not be legally binding. Nay, the persons whom it commissioned to execute the unconstitutional command, would probably be amenable to positive law, if they tried to accomplish their mandate. For example: If the king or either

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Considered severally, the members of a sovereign body are in a state of subjection to the body, and may therefore be legally bound, even as members of the body, by laws of which it is the author.

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of the houses, by way of proclamation or ordinance, affected to establish a law equivalent to an act of parliament, the pretended statute would not be legally binding, and disobedience to the pretended statute would therefore not be illegal. And although the king or the house would not be responsible legally for this supposed violation of constitutional law or morality, those whom the king or the house might order to enforce the statute, would be liable civilly or criminally, if they attempted to execute the order.

*Apparent exception in certain societies where the government is styled a limited monarchy.*

And this leads me to explain an *apparent* exception to my proposition that, considered severally, all the individuals and aggregates composing a sovereign number are subject to the supreme body of which they are component parts; and to show that the apparent exception is not a real one. In some of the mixed aristocracies which are styled limited monarchies, the so-called limited monarch is exempted or absolved completely from legal or political duty. For example: According to a maxim of the English law, the king is incapable of committing wrong: that is to say, he is not responsible legally for aught that he may please to do, or for any forbearance or omission.

But though he is absolved completely from legal or political duty, it cannot be thence inferred that the king is sovereign or supreme, or that he is not in a state of subjection to the sovereign or supreme parliament of which he is a constituent member.

Of the numerous proofs of this negative conclusion, which it were easy to produce, the following will amply suffice.—1. Although he is free in fact from the fetters of positive law, he is not *incapable* of legal obligation. A law of the sovereign parliament, made with his own assent, might render himself and his successors legally responsible.—2. If he affected to transgress the limits which the constitution has set to his authority, disobedience on the part of the governed to his unconstitutional commands, would not be illegal: whilst the ministers or instruments of his unconstitutional commands, would be legally amenable, for their unconstitutional obedience, to laws of that sovereign body whereof he is merely a limb.—3. He habitually obeys the laws set by the sovereign body of which he is a constituent member. If he did not, he must speedily yield his office to a less refractory successor, or the British constitution must speedily expire. If he habitually broke the laws set by the sovereign body, the other members of the body would probably devise a remedy: though a prospective and definite remedy, fitted to meet the contingency, has not been provided by positive law, or even by constitutional morality. But in all these points the king differs from a sovereign properly so called. For—1. The sovereign is *incapable* of legal obligation. 2. The subjects are bound to obey its commands, and the

ministers executing them are absolved by the command from legal liability to any person who may feel aggrieved by reason of such execution.—3. The sovereign cannot habitually obey the commands of another determinate body.

But if sovereign or supreme power be incapable of legal limitation, or if every supreme government be legally absolute, wherein (it may be asked) doth political liberty consist, and how do the supreme governments which are commonly deemed free, differ from the supreme governments which are commonly deemed despotic?

I answer, that political or civil liberty is the liberty from legal obligation, which is left or granted by a sovereign government to any of its own subjects: and that, since the power of the government is incapable of legal limitation, the government is legally free to abridge their political liberty, at its own pleasure or discretion.

Political or civil liberty has been erected into an idol, and extolled with extravagant praises by doting and fanatical worshippers. But political or civil liberty is not more worthy of eulogy than the political or legal restraints which are implied by the words *πολιτεία* and *civitas*. The final cause or purpose for which government ought to exist, is the furtherance of the common weal to the greatest possible extent. And it must attain this purpose not less by imposing restraints than by conferring rights or liberties. As I shall show hereafter, political or civil liberties rarely exist apart from corresponding legal restraints. Where persons in a state of subjection are free from legal duties, their liberties (generally speaking) would be nearly useless to themselves, unless they were protected in the enjoyment of their liberties, by having legal rights (imposing legal duties on their fellows) to those political liberties which are left them by the sovereign government.\* I am legally free, for example, to move from place to place, in so far as I can move from place to place consistently with my legal obligations: but this my political liberty would be but a sorry liberty, unless my fellow-subjects were restrained by a political duty from assaulting and imprisoning my body.

The nature  
of political or  
civil liberty,  
together  
with the sup-  
posed differ-  
ence between  
free and  
despotic  
gov-  
ern-  
ments

\* Political or civil liberties are left or granted by sovereigns, in two ways; namely, through permissions coupled with commands, or through simple permissions. If a subject possessed of a liberty be clothed with a legal right to it, the liberty was granted by the sovereign through a permission coupled with a command: a permission to the subject who is clothed with the legal right, and a command to the subject or subjects who are burthened with the relative duty. But a political or civil liberty left or granted to a subject, may be merely protected against his fellows by religious and moral obligations. In other words, the subject possessed of the political liberty may not be clothed with a legal right to it. And, on that supposition, the political or civil liberty was left or granted to the subject through a simple permission of the sovereign or state.

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Supposed  
distinction  
between  
governments  
as free or  
despotic.

Political liberty is therefore fostered by that very political restraint from which the devotees of the idol liberty are so fearfully and blindly averse.

From the nature of political or civil liberty, I turn to the supposed difference between free and despotic governments.

Every supreme government is *free* from legal restraints: or (what is the same proposition dressed in a different phrase) every supreme government is legally *despotic*. The distinction, therefore, cannot mean that some governments are freer from restraints than others: nor can it mean that the subjects of the governments which are denominated free, are protected against their governments by positive law. Those who use the distinction employ the epithet *free* as importing praise, and the epithet *despotic* as importing blame. They can therefore hardly mean that the governments which are denominated free, leave or grant to their subjects more of political liberty than those which are styled despotic. For they who distinguish governments into free and despotic, suppose that the first are better than the second. But inasmuch as political liberty may be generally useful, it cannot be assumed that one government is better than another, merely because the sum of the liberties which the former leaves to its subjects, exceeds the sum of the liberties which are left to its subjects by the latter. The excess in the sum of the liberties which the former leaves to its subjects, may be purely mischievous. In consequence, for example, of that mischievous freedom, its subjects may be guarded inadequately against one another, or against attacks from external enemies.

They who distinguish governments into free and despotic, probably mean by a 'free government' a government of a popular or democratic form, and by their distinction wish to imply that such a government, being likely to regard the weal of the whole and not only of a narrow section of the community, is apt to leave or grant to its subjects not perhaps *more* political liberty than is left or granted them by a government of one or a few, but *more of that political liberty which conduces to the common weal*. They mean that, as leaving or granting to its subjects *more of that useful liberty*, a government of many may be styled *free*: whilst, as leaving or granting to its subjects less of that *useful liberty*, a government of one or a few may be styled *not free*, or may be styled *despotic* or *absolute*. In short, by the epithet *free*, as applied to governments of many, they mean that governments of many are comparatively *good*: and by the epithet *despotic*, as applied to monarchies or oligarchies, they mean that monarchies or oligarchies are comparatively *bad*.

The epithets *free* and *despotic* are rarely, I think, em-

ployed by the lovers of monarchy or oligarchy. If the lovers of monarchy or oligarchy did employ those epithets, they would probably apply the epithet *free* to governments of one or a few, and the epithet *despotic* to governments of many. For they think the former comparatively *good*, and the latter comparatively *bad*; or that monarchical or oligarchical governments are better adapted than popular, to attain the ultimate purpose for which governments ought to exist.

But with the respective merits or demerits of various forms of government, I have no direct concern. I have examined the current distinction between free and despotic governments, because it is expressed in terms which are extremely inappropriate and absurd, and which tend to obscure the independence of political or legal obligation, that is common to sovereign governments of all forms or kinds.

That the power of a sovereign is incapable of legal limitation, has been doubted, and even denied. But the difficulty, like thousands of others, probably arose from a verbal ambiguity—from the circumstance that the foremost individual member of a so-called limited monarchy, whose power is not only capable of legal limitations, but is sometimes actually limited by positive law, is often improperly styled *monarch* or *sovereign*.

Whatever may be its origin, the error is remarkable. For the legal independence of monarchs in the proper acceptance of the term, and of sovereign bodies in their corporate and sovereign capacities, not only follows inevitably from the nature of sovereign power, but is also asserted expressly by renowned political writers of opposite parties or sects: by celebrated advocates of the governments which are decked with the epithet *free*, as by celebrated advocates of the governments which are branded with the epithet *despotic*.

' If it be objected (says Sidney) that I am a defender of arbitrary powers, I confess I cannot comprehend how any society can be established or subsist without them. The difference between good and ill governments is not, that those of one sort have an arbitrary power which the others have not; for they all have it; but that in those which are well constituted, this power is so placed as it may be beneficial to the people.'

' It appeareth plainly (says Hobbes) to my understanding, that the sovereign power, whether placed in one man, as in monarchy, or in one assembly of men, as in popular and aristocraticall commonwealths, is as great as men can be imagined to make it. And though of so unlimited a power men may fancy many evill consequences, yet the consequence of the want of it, which is warre of every man

Why it has  
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The proposi-  
tion is as-  
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opposite  
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against his neighbour, is much worse. The condition of man in this life shall never be without inconveniences: but there happeneth in no commonwealth any great inconvenience, but what proceeds from the subjects' disobedience. And whosoever, thinking sovereign power too great, will seek to make it lesse, must subject himselfe to a power which can limit it: that is to say, to a greater.'—'One of the opinions (says the same writer) which are repugnant to the nature of a commonwealth, is this: that he who hath the sovereign power is subject to the civil lawes. It is true that all sovereigns are subject to the lawes of nature; because such lawes be Divine, and cannot by any man, or by any commonwealth, be abrogated. But to the civil lawes, or to the lawes which the sovereign maketh, the sovereign is not subject: for if he were subject to the civil lawes, he were subject to himselfe; which were not subjection, but freedom. The opinion now in question, because it setteth the civil lawes above the sovereign, setteth also a judge above him, and a power to punish him: which is to make a new sovereign; and, again, for the same reason, a third to punish the second; and so continually without end, to the confusion and dissolution of the commonwealth.'—'The difference (says the same writer) between the kinds or forms of commonwealth, consisteth not in a difference between their powers, but in a difference between their aptitudes to produce the peace and security of the people: which is their end.'\*

\* By his modern censors, French, German, and even English, Hobbes' main design in his various treatises on politics, is grossly and thoroughly mistaken. With a marvellous ignorance of the writings which they impudently presume to condemn, they style him 'the apologist of tyranny': meaning by that rant, that his main design is the defence of monarchical government. Now though he prefers monarchical, to popular or oligarchical government, it is certain that his main design is the establishment of these propositions: 1. That sovereign power, whether it reside in one, or in many or a few, cannot be limited by positive law: 2. That a present or established government, be it a government of one, or a government of many or a few, cannot be disobeyed by its subjects consistently with the common weal, or consistently with the law of God as known through utility or the Scriptures.—That his principal purpose is not the defence of monarchy, is sufficiently evinced by many passages of his *Leviathan*, and also of his treatise *De Cive*. To those who have really read, although in a cursory manner, these the most lucid and easy of profound and elaborate compositions, the current conception of their object and tendency is utterly laughable.

The capital errors in Hobbes' political treatises, are the following.—1. He inculcates too absolutely the religious obligation of obedience to present or established government. He makes not the requisite allowance for the anomalous and excepted cases wherein disobedience is counselled by that very principle of utility which indicates the duty of submission. Writing in a season of civil discord, or in apprehension of its approach, he naturally fixed his

Before I discuss the origin of political government and society, I will briefly examine a topic allied to the liberty of sovereigns from political or legal restraints.

A sovereign government of one, or a sovereign government of a number in its collegiate and sovereign capacity,

attention upon the glaring mischiefs of resistance, and scarcely adverted to the mischiefs which obedience occasionally engenders. And although his integrity was not less remarkable than the gigantic strength of his understanding, we may presume that his extreme timidity somewhat corrupted his judgment, and inclined him to insist unduly upon the evils of rebellion and strife.—2. Instead of directly deriving the existence of political government, from a perception by the bulk of the governed of its great and obvious expediency, he ascribes the origin of sovereignty, and of independent political society, to a fictitious agreement or covenant. He supposes, indeed, that the subjects are induced to make that agreement, by their perception of the expediency of government, and by their desire to escape from anarchy. But, placing his system immediately on that interposed figment, instead of resting it directly on the ultimate basis of utility, he often arrives at his conclusions in a sophistical and quibbling manner, though his conclusions are commonly such as the principle of utility will warrant.

If these two capital errors be kept in mind by the reader, Hobbes' extremely celebrated but extremely neglected treatises may be read to great advantage. I know of no other writer (except Jeremy Bentham) who has uttered so many truths, at once new and important, concerning the necessary structure of supreme political government, and the larger of the necessary distinctions implied by positive law. And he is signally gifted with the talent, peculiar to writers of genius, of inciting the mind of the student to active and original thought.

The authors of the antipathy with which he is commonly regarded, were the papistical clergy of the Roman Catholic Church, the high church clergy of the Church of England, and the Presbyterian clergy of the true blue complexion. The pretensions which these persons advanced in favour of 'the church' to an authority in 'ecclesiastical matters,' co-ordinate with the authority of the secular government, were offensive to Hobbes, who supported with unfailing loyalty the temporal sovereign for the time being. He repelled those anarchical pretensions with a weight of reason, and an aptness and pungency of expression, which the aspiring and vindictive priests did bitterly feel and resent. Accordingly, they assailed him with the poisoned weapons of malignity and cowardice. And so deep and enduring is the impression which they made upon the public mind, that 'Hobbes the Atheist,' or 'Hobbes the apologist of tyranny,' is still regarded with plaus, or with republican horror, by all but the extremely few who have ventured to examine his writings.

Of positive atheism; of mere scepticism concerning the existence of the Deity; or of, what is more impious and mischievous than either, a religion imputing to the Deity human infirmities and vices; there is not, I believe, in any of his writings, the shadow of a shade.

It is true that he prefers monarchical (though he intimates his preference rarely), to popular or oligarchical government. But of tyranny in the sense of monarchical misrule, he is no apologist, but may rank with the ablest and most zealous of its foes. Scarcely a

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rights (in the  
proper sense).

*sens.* has no legal rights (in the proper acceptation of the term) against its own subjects.

Every legal right is the creature of a positive law: and it answers to a relative duty imposed by that positive law,

single advocate of free or popular institutions, even in these latter and comparatively enlightened ages, perceives and inculcates so clearly and earnestly as he, the principal cause and preventive of tyrannous or bad government—namely, ignorance on the part of the multitude of sound political science.

In those departments of his treatises on politics, which are concerned with 'the office (or duty) of the sovereign,' Hobbes insists on the following propositions: *That good and stable government is simply or nearly impossible, unless the fundamentals of political science be known by the bulk of the people*: that the bulk of the people are as capable of receiving such science as the loftiest and proudest of their superiors in station, wealth, or learning: that to provide for the diffusion of such science throughout the bulk of the people, may be classed with the weightiest of the duties which the Deity lays upon the sovereign: that he is bound to hear their complaints, and even to seek their advice, in order that he may better understand the nature of their wants, and may better adapt his institutions to the advancement of the general good: that he is bound to render his laws as compendious and clear as possible, and also to publish their more important provisions through every possible channel: that if the bulk of his people know their duties imperfectly, for want of the instruction which he is able and bound to impart, he is responsible religiously for all their breaches of the duties whereof he hath left them in ignorance.

In regard to the respective aptitudes of the several forms of government to accomplish the ultimate purpose for which government ought to exist, Hobbes' opinion closely resembles the doctrine, which a century later, that is, about the middle of the eighteenth century, was taught by the French philosophers who are styled emphatically the *Economists*.—In order, say the *Economists*, to the being of a good government, two things must preexist: 1. Knowledge by the bulk of the people, of the elements of political science (in the largest sense of the expression): 2. A numerous body of citizens versed in political science, and not misled by interests conflicting with the common weal, who may shape the political opinions, and steer the political conduct, of the less profoundly informed, though instructed and rational multitude.—And, for numerous and plausible reasons (which my limits compel me to omit), they affirm, that, in any society thus duly instructed, monarchical government would not only be the best, but would surely be chosen by that enlightened community, in preference to a government of a few, or even to a government of many.

The opinion taught by the *Economists* is rather, perhaps, defective, than positively erroneous. They leave an essential consideration uncanvassed and nearly untouched.—In a political community not duly instructed, is not popular government, with all its awkward complexity, less inconvenient than monarchy? And, unless the government be popular, can a political community not duly instructed, emerge from darkness to light? from the ignorance of political science, which is the principal cause of misrule, to the knowledge of political science, which is the best security against it? The *Economists*, indeed, occasionally admit, 'que dans l'état

and incumbent on a person or persons other than the person or persons in whom the right resides. To every legal right, there are therefore three several parties: namely, a party bearing the right; a party burthened with the relative duty; and a sovereign government setting the law through which the right and the duty are respectively conferred and imposed.] A sovereign government cannot acquire rights through laws set by itself to its own subjects. A man is no more able to confer a right on himself, than he is able to impose on himself a law or duty. Consequently, if a sovereign government had legal rights against its own subjects, those rights would be the creatures of positive laws set to its own subjects by a third person or body, who must, therefore, be sovereign over them. The community would therefore be subject to two different sovereigns, which is contrary to the definition of sovereignty.]

LECT.  
VI.  
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the term)  
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own subjects.

*'Ignorance l'autorité est plus dangereuse dans les mains d'un seul, qu'elle ne l'est dans les mains de plusieurs.'* But with this consideration they rarely meddle. They commonly infer or assume, that, since in *the state of ignorance* the government is inevitably bad, the form of the government, during that state, is a matter of consummate indifference. Agreeing with them in most of their premises, I arrive at an inference extremely remote from theirs; namely, that in a community already enlightened, the form of the government were nearly a matter of indifference; but that where a community is still in *the state of ignorance*, the form of the government is a matter of the highest importance.

The political and economical system of Quesnai and the other Economists, is stated concisely and clearly by M. Mercier de la Rivière in his '*L'Ordre naturel et essentiel des Sociétés politiques*'

\* It has often been affirmed that 'right is might,' or that 'might is right.' But this paradoxical proposition (a great favourite with shallow scoffers and buffoons) is either a flat truism affectedly and darkly expressed, or is thoroughly false and absurd.

If it mean that a party who possesses a right possesses the right through might or power of his own, the proposition is false and absurd. For a party who possesses a right necessarily possesses the right through the might or power of another: namely, the author of the law by which the right is conferred.

If it mean that right and might are one and the same thing, or are merely different names for one and the same object, the proposition in question is also false and absurd. My physical ability to move about, when my body is free from bonds, may be called *might* or *power*, but cannot be called a *right*: though my ability to move about *without hindrance from you*, may doubtless be styled a *right*, with perfect precision and propriety, if I owe the ability to a law imposed upon you by another.

If it mean that every right is a creature of might or power, the proposition is merely a truism disguised in paradoxical language. For every right (divine, legal, or moral) rests on a relative duty. And, manifestly, that relative duty would not be a duty substantially, if the law which affects to impose it were not sustained by might.

I must here observe that 'right' as a noun substantive has two meanings which ought to be distinguished carefully.

The noun substantive 'a right' signifies that which jurists deno

'Right is  
might.'

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But so far as they are bound by the law of God to obey their temporal sovereign, a sovereign government has *rights divine* against its own subjects: rights which are conferred upon itself, through duties which are laid upon its subjects, by laws of a common superior. And so far as the members of its own community are severally constrained to obey it by the opinion of the community at large, it has also *moral rights* against its own subjects severally considered: rights

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minate 'a faculty:' that which resides in a determinate party or parties, by virtue of a given law; and which avails against a party or parties (or answers to a duty lying on a party or parties) other than the party or parties in whom it resides. And the noun substantive 'rights' is the plural of the noun substantive 'a right.' But the expression 'right,' when it is used as an adjective, is equivalent to the adjective 'just:' as the adverb 'rightly' is equivalent to the adverb 'justly.' And when used as the abstract name corresponding to the adjective 'right,' the noun substantive 'right' is synonymous with the noun substantive 'justice.'

'Right' as  
meaning  
'faculty,'  
'right' as  
meaning  
'justice,' and  
'right' as  
meaning  
'law.'

It is manifest that 'right' as signifying 'faculty,' and 'right' as signifying 'justice,' are widely different though not unconnected terms. But, nevertheless, the terms are confounded by many of the writers who attempt a definition of 'right,' and their attempts to determine the meaning of that very perplexing expression are, therefore, sheer jargon. By many of the German writers on the sciences of law and morality (as by Kant, for example, in his 'Metaphysical Principles of Jurisprudence'), 'right' in the one sense is blended with 'right' in the other. And through the disquisition on 'right' or 'rights,' which occurs in his 'Moral Philosophy,' Paley obviously wavers between the dissimilar meanings.

The Italian 'diritto,' the French 'droit,' the German 'recht,' and the English 'right,' signify 'right' as meaning 'faculty,' and also signify 'justice:' though each of those several tongues has a name which is appropriate to 'justice,' and by which it is denoted without ambiguity.

In the Latin, Italian, French, and German there is a further ambiguity: the name which signifies 'right' as meaning 'faculty,' also signifies 'law:' 'jus,' 'diritto,' 'droit,' or 'recht,' denoting indifferently either of the two objects. Accordingly, the 'recht' which signifies 'law,' and the 'recht' which signifies 'right' as meaning 'faculty,' are confounded by German writers on the philosophy or *rationale* of law, and even by German expositors of particular systems of jurisprudence. They treat 'recht' as a *genus* or kind, which they divide into two *species* or two sorts: namely, the 'recht' equivalent to 'law,' and the 'recht' equivalent to 'right' as meaning 'faculty.' And some of them thicken the mess by a misapplication of terms borrowed from the Kantian philosophy. They divide 'recht,' as forming the *genus* or kind, into 'recht in the objective sense,' and 'recht in the subjective sense;' denoting by the former of those unapposite phrases, 'law;' and denoting by the latter, 'right' as meaning 'faculty.' (See note, p. 175, post.)

The confusion of 'law' and 'right,' our own writers avoid: for the two disparate objects which the terms respectively signify, are commonly denoted in our own language by palpably distinct marks. But Hale and Blackstone are misled by this double meaning of the word *jus*, and translate *jus personarum et rerum*, 'rights of persons and things:' which is mere jargon.

which are conferred upon itself by the opinion of the community at large, and which answer to relative moral duties.

Consequently, when we say that a sovereign government, as against its own subjects, has or has not a *right* to do this or that, we necessarily mean by a *right* (supposing we speak exactly), a right *divine* or *moral*: we necessarily mean (supposing we speak exactly), that it has or has not a right derived from a law of God, or derived from a law improperly so called which the general opinion of the community sets to its members severally.

But when we say that a government, as against its own subjects, has or has not a *right* to do this or that, we not uncommonly mean that we deem the act in question *generally useful* or *pernicious*. And this application of the word is not inexact if we mean that the act conforms to the Divine law as measured by the standard of utility; and that the government have therefore a right conferred on them by the Divine law to do such an act.

To ignorance or neglect of these palpable truths, we may impute a pernicious jargon that was current in our own country on the eve of her horrible war with her North American children. By the great and small rabble in and out of parliament, it was said that the government sovereign in Britain was also sovereign in the colonies; and that, since it was sovereign in the colonies, it had a *right* to tax their inhabitants. It was objected by Mr. Burke to the project of taxing their inhabitants, that the project was *inexpedient*: pregnant with probable evil to the inhabitants of the colonies, and pregnant with probable evil to the inhabitants of the mother country.

But to that most rational objection, the sticklers for the scheme of taxation returned this asinine answer. They said that the British government had a *right* to tax the colonists; and that it ought not to be withheld by paltry considerations of *expediency*, from enforcing its sovereign right against its refractory subjects. Now, if they attached any determinate meaning to the word *right*, they must have meant that the British government was empowered by the law of God to tax its American subjects. But it had not a Divine right to tax its American subjects, unless the project of taxing them accorded with general utility: for every Divine right springs from the Divine law; and to the Divine law general utility is the index. To oppose the *right* to *expediency*, was, therefore, to oppose the *right* to the only test by which it was possible to determine the reality of the *right* itself.

A sovereign government of one, or of a number in its collegiate and sovereign capacity, may appear in the character of defendant, or of demandant, before a tribunal of its own appointment, or deriving jurisdiction from itself.

From an  
appearance of  
a sovereign  
government  
before a  
tribunal of

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## § 1.

Its own, we  
cannot infer  
that the  
government  
lies under  
legal duties,  
or has legal  
rights  
against its  
own subjects.

But we cannot hence infer that the government lies under legal duties, or has legal rights against its own subjects.

The claim of the plaintiff against the sovereign defendant cannot be founded on a positive law. For then would the sovereign defendant be in a state of subjection—contrary to the definition of sovereignty. And the claim of the sovereign defendant cannot be founded on a positive law; for such a law must have been set by a third party to a member or members of the society wherein the demandant is supreme: or in other words, the society is subject to another sovereign—that is to two sovereigns at once—contrary to the nature of sovereignty.

In fact, where the sovereign government appears in the character of defendant, it appears to a claim founded on a so-called law which it has set to itself. Where it appears in the character of demandant, it apparently founds its claim on a positive law of its own, and it pursues its claim judicially. The rights which are pursued against it before tribunals of its own, and also the rights which it pursues before tribunals of its own, are merely *analogous* to legal rights (in the proper acceptation of the term): they are *quasi* legal rights. The rights which are pursued against government before tribunals of its own, it may extinguish by its own authority. But it yields to those claims, when they are established judicially, *as if* they were truly founded on positive laws set to itself by a third and distinct party.—The rights which it pursues before tribunals of its own, are powers which it is free to exercise according to its own pleasure. But it prosecutes its claims through the medium of judicial procedure, *as if* they were truly founded on positive laws set to the parties defendant by a third person or body.

The foregoing explanation of the seeming legal rights which are pursued against sovereign governments before tribunals of their own, tallies with the style of judicial procedure, which, in all or most nations, is observed in cases of the kind. The object of the plaintiff's claim is not demanded as of right, but is begged of the sovereign defendant as a grace or favour. In our own country, whether the claim be against the sovereign, or against the king individually, the form of proceeding is by what is called a *Petition of Right*.\* In the latter case this mendicant style of pre-

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\* A Petition of Right according to the English practice may relate to a claim arising out of the act or omission of a department of Government, or to a claim against the Queen in a private capacity. In the former case redress is prayed from 'Her Majesty,' meaning (I think) the sovereign, as the ultimate author of the wrong, and morally responsible for it; and from the nature of the case, if in the power of the sovereign to give or withhold redress. The Act of Parliament (28 and 24 Vict. c. 84) which at present regulates the

senting the claim is merely accidental. It arises from the mere accident to which I have adverted already: namely, that our own king, though not properly sovereign, is completely free in fact from legal duties.

procedure, is in strict conformity with this view of the case. By sec. 14 of that Act, the Commissioners of the Treasury are required to pay the money and costs decreed 'out of any moneys in their hands for the time being legally applicable thereto, or which may be hereafter voted by Parliament for that purpose.' Where the petition relates to a claim of the latter kind, it also appears that the compulsion is merely a moral one. By the section last quoted it is in this case provided that 'the amount to which the suppliant is entitled shall be paid to him out of such funds or moneys as Her Majesty shall be graciously pleased to direct to be applied for that purpose.' So runs the statute in accordance with the venerable tradition that the queen is personally free from legal obligation. This, as Austin shows, is a mere accident or peculiarity of our system of positive law. It is clear that if Parliament were to authorize legal execution against the queen's private property, however unconstitutional such an act might be considered, the queen would be bound personally by a legal obligation. It will appear from what is said above, that in the style of formal documents the words 'Her Majesty' or the 'Queen's most Excellent Majesty' are used in three entirely different senses:—1. As meaning the sovereign, e.g. when we speak of Her Majesty's Court of Queen's Bench. 2. As meaning the queen in a public capacity, but merely as a subject member of the parliament or of the body politic. 3. As meaning the queen as a private person.

The circumstance that suits brought in the Courts in India against the 'Government of India' are in the form of ordinary actions is hardly an exception to the proposition that claims against the sovereign are presented in a mendicant form. The 'Government of India,' as the phrase is here used, is a political subordinate, whose relations with the Imperial Government are of a very complex description. In this country 'the Secretary of State in Council of India' represents the pecuniary liabilities of the Government of India, and is constituted a legal person capable of being sued in an ordinary action. But notwithstanding this, the Indian Government *in the Political Department*, which is under the absolute control of the Secretary of State, is not *formally* amenable to any legal liability. The anomaly is, that there is no certain criterion to determine the class of matters which belong to the Political Department, and such determination is often practically left to the uncertain and capricious action of subordinate officials.

This may be the place to observe that in this country the immunity which the sovereign necessarily has, and which the king actually has, from legal obligation, is extended *in form* to the ministers or servants of the crown. Thus no civil action or mandamus will lie against the Lords of the Treasury, or the Postmaster-General, nor action against persons in their respective employ, *as such* public servants. (*The Queen v. Lords Commissioners of the Treasury*, L.R. 7 Q. B. 887.) And there are some wrongs for which there is no redress by Petition of Right. For that is only admissible where the quasi-obligation of the king or sovereign is equivalent to a debt, or arises in respect of the possession of a hereditament or chattel, or out of the breach of a contract made within the

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A sovereign government may have a legal right against a subject or subjects of another sovereign government.

The origin or causes of political government and society.

Though a sovereign government of one, or a sovereign government of a number in its collegiate and sovereign capacity, cannot have legal rights against its own subjects, it may have a legal right against a subject or subjects of another sovereign government. A law imposed by the other government upon its own subjects may create a right in favour of the first government. The possession of a legal or political right against a subject or subjects of another sovereign government, consists, therefore, with that independence which is one of the essentials of sovereignty.\*

Having determined the general notion of sovereignty, and illustrated my definition by considering the possible forms of supreme government and the limits of supreme political power, I now proceed to the origin or causes of the habitual or permanent obedience, which, in every society political and independent, is rendered by the bulk of the community to the monarch or sovereign number. In other words, I proceed to the origin or causes of political government and society.

powers constitutionally committed to the Minister or Department of Government by whom the contract is made.

The remedy against a servant of the crown lies only in a complaint to the Head of the Department; and if redress is got from him, the remedy would, I think, according to Austin's scheme, be a *legal* one, though not obtained by the ordinary forms of law. Again, if it is the act of the Head of the Department that is complained of, the attention of the Government as a body might be called to it by a motion or question in Parliament; and if made a Cabinet question, and the Government as a body disapproved of the act, the offending minister might be compelled to vacate his office. This again would, according to Austin's definitions, be strictly a *legal* sanction. But if the Government should defend the act, or not think proper to interfere, the only means of redress which remain are those which are morally sanctioned; namely, by the force of opinion—whether expressed in the censure of a definite body or bodies, such as Parliament or the constituencies convened at an election, or remaining in the indefinite form called *public opinion*;—unless indeed, there is taken into account the exceptional and extraordinary remedy of a parliamentary impeachment, which would be, according to Austin's analysis, a *legal* remedy.—R. C.

\* In our own courts of law and equity it is held as undoubted, that foreign sovereigns, whether in name monarchs or republics, can sue in their sovereign capacity; and they are recognised as plaintiffs in our courts of law and equity by the same name and style under which they are recognised by our own sovereign (that is, nominally, by Her Majesty) in diplomatic intercourse.—(Case of the King of Spain, judgment by Lord Lyndhurst in the House of Lords, 2 Bligh Reports. New series, p. 81. Case of the United States of America v. Wagner, Court of Chancery, May 29, June 11, 17, 1867. L. R. 2 Ch. 582. Judgment by Lord Chancellor Chelmsford and Lord Justices Turner and Cairns.)

As to the possibility of a sovereign being subject to another sovereign, to certain limited effects, see concluding explanations in this chapter.—R. C.

The proper purpose or end of a sovereign political government, or the purpose or end for which it ought to exist, is the greatest possible advancement of human happiness. To accomplish that end effectively, it commonly must labour directly and particularly to advance as far as is possible the weal of its own community. For the good of the universal society formed by mankind is the aggregate good of the particular societies into which mankind is divided: just as the happiness of any of those societies is the aggregate happiness of its single or individual members. And if every government consulted the weal of its own subjects, the probable tendency would clearly be to promote the general happiness of mankind. And it were easy to show, that the general and particular ends never or rarely conflict. An enlightened regard for the common happiness of nations, implies an enlightened patriotism; whilst the stupid and atrocious patriotism which looks exclusively to country, and would further the interests of country at the cost of all other communities, grossly misapprehends and frequently crosses the interests that are the object of its narrow concern. But the topic which I now have suggested, belongs to the province of ethics, rather than the province of jurisprudence.\*

\* The proper purpose or end of a sovereign political government is conceived inadequately or obscurely by most or many of the writers on political government and society.

Speaking generally and vaguely, it may be said that the proper end of government is to co-operate in advancing the happiness of mankind. This is the same as to say that the particular and determinate end is (in an enlightened manner, and therefore with due regard to the happiness of other communities) to advance as far as possible the weal of its own community. The writers in question mistake for the proper absolute end one or a few of the instrumental ends through which a government must accomplish that absolute end.

For example: It is said by many of the speculators on political government and society, that 'the end of every government is to institute and protect property.' And here I must remark, by the by, that the propounders of this absurdity give to the term 'property' an extremely large and not very definite signification. They mean generally by the term 'property,' legal rights, or legal faculties: and they mean not particularly by the term 'property,' the legal rights, or legal faculties, which are denominated strictly 'rights of property or dominion.' Now the proper paramount purpose of a sovereign political government, is not the creation and protection of legal rights or faculties, or (in the terms of the proposition) the institution and protection of property. If that were the paramount purpose, the end might be the advancement of misery, rather than the advancement of happiness, since many of the legal rights which governments have created and protected (as the rights of masters, for example, to and against slaves), are generally pernicious, rather than generally useful. To advance as far as is possible the common happiness or weal, a government must confer on its subjects ~~dangerous~~ legal rights, or such legal rights as general

The proper purpose or end of political government and society, or the purpose or end for which they ought to exist.

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From the proper purpose or end of a sovereign political government we may readily infer the causes of that habitual obedience which would be paid to the sovereign by the bulk of an enlightened society. If they thought the government perfect, or that the government accomplished perfectly its proper purpose or end, this their conviction or opinion would be their motive to obey. If they deemed the government faulty, a fear that the evil of resistance might surpass the evil of obedience, would be their inducement to submit; for

utility commands; and, having conferred on its subjects beneficent legal rights, must preserve those rights from infringement, by enforcing the corresponding sanctions. But the institution and protection of beneficent legal rights, or of the kinds of property that are commended by general utility, is merely a subordinate and instrumental end through which the government must accomplish its paramount or absolute purpose.—As affecting to determine the absolute end for which a sovereign government ought to exist, the proposition in question is, therefore, false. And, considered as a definition of the means through which the sovereign government must reach that absolute end, the proposition in question is defective. [If the government would duly accomplish its proper paramount purpose, it must not confine its care to the creation of legal rights, and to the creation and enforcement of the answering relative duties. There are absolute legal duties, or legal duties without corresponding rights, that are not a whit less requisite to the advancement of the general good than legal rights themselves with the relative duties which they imply.] Nor would a government accomplish thoroughly its proper paramount purpose, if it merely conferred and protected the requisite rights, and imposed and enforced the requisite absolute duties: Though a good legislation with a good administration of justice, or good laws well administered, are doubtless the chief of the means through which it must attain to that end, or (in Bacon's figurative language) are the *nerves* of the common weal.

The prevalent mistake which I now have stated and exemplified, is committed by certain of the writers on the science of political economy, whenever they meddle incidentally with the connected science of legislation. Whenever they step from their own into the adjoining province, they make expressly, or they make tacitly and unconsciously, the following assumption: that the proper absolute end of a sovereign political government is to further as far as is possible the growth of the national wealth. If they think that a political institution fosters, or that a political institution damps production and accumulation, they forthwith pronounce that the institution is good or bad. They forget that the wealth of the community is not the weal of the community, though wealth is one of the means requisite to the attainment of happiness. They forget that a political institution may further the weal of the community, though it checks the growth of its wealth; and that a political institution which quickens the growth of its wealth, may hinder the advancement of its weal.\*

\* This it will be remembered was written long before the appearance of J. S. Mill's 'Political Economy.' That author and Professor Fawcett must be mentioned as writers by whom the distinction here referred to is never ignored or forgotten.—R.C.

they would not persist in their obedience to a government which they deemed imperfect, if they thought that a better government might probably be got by resistance, and that the probable good of the change outweighed its probable mischief.

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Since every actual society is inadequately instructed or enlightened, the habitual obedience to its government which is rendered by the bulk of the community, is partly the consequence of custom—the habit already acquired. Or it is partly the consequence of prejudices: meaning by 'prejudices,' opinions and sentiments which have no foundation whatever in the principle of general utility. If, for example, the government is monarchical, they partly pay that obedience to that present or established government because they are fond of monarchy inasmuch as it is monarchy, or because they are fond of the race from which the monarch has descended. Or if, for example, the government is popular, they partly pay that obedience to that present or established government, because they are fond of democracy inasmuch as it is democracy, or because the word 'republic' captivates their fancies and affections.

But though that habitual obedience is partly the consequence of custom, or of prejudices, it partly arises from a reason based upon the principle of utility. If, for specific reasons, they are attached to the established government, their perception of the utility of government concurs with their attachment, and assists in confirming the habit. If they dislike the established government, their dislike is controlled by the same cause. The perception, by the bulk of the community, of the utility of political government, or a preference by the bulk of the community of any government to anarchy, is the only cause of the habitual obedience in question, which is common to nearly all societies: and therefore the only cause which the present general disquisition can properly embrace. The causes of the obedience in question which are peculiar to particular societies belong to the province of statistics, or the province of particular history.

The only general cause of the *permanence* of political governments, and the only general cause of the *origin* of political governments, are exactly or nearly alike. Though every government has arisen in part from specific or particular causes, almost every government must have arisen in part from the following general cause; namely, that the bulk of the natural society from which the political was formed, were desirous of escaping to a state of government, from a state of nature or anarchy. If they liked specially the government to which they submitted, their general perception of the utility of government concurred with their special inclination. If they disliked the government to

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The position 'that every government continues through the people's consent,' and the position 'that every government arises through the people's consent,' examined and explained.

which they submitted, their general perception of the utility of government controlled and mastered their repugnance.

According to a current expression, the permanence and origin of every government are owing to the people's *consent*: that is to say, every government continues through the *consent* of the people, or the bulk of the political community: and every government arises through the *consent* of the people, or the bulk of the natural society from which the political is formed. According to the same opinion dressed in a different phrase, the power of the sovereign flows from the people, or the people is the fountain of sovereign power.

That a government continues through the people's *consent* is true in one sense. The permanence of every government depends on the habitual obedience which it receives from the bulk of the community. But all obedience is *voluntary* or *free*, or every party who obeys *consents* to obey. In other words, every party who obeys *wills* the obedience which he renders, or is determined to render it by some *motive* or another. That acquiescence which is purely *involuntary*, or which is purely the consequence of physical compulsion or restraint, is not obedience or submission. As correctly or truly apprehended, the position 'that every government continues through the people's *consent*' merely amounts to this; that, in every society political and independent, the people are determined by motives of some description or another, to obey their government habitually; and that, if the bulk of the community ceased to obey it habitually, the government would cease to exist.

But the position in question, as it is often understood, is taken with one or another of the two following meanings:—

1st. That the bulk of every community, without inconvenience to themselves, can abolish the established government, and yet consent to its continuance or pay it habitual obedience; which is the same as to say, That the bulk of every community approve of the established government, and consent to its continuance, or pay it habitual obedience, by reason of that their approbation. As thus understood, the position is ridiculously false; the habitual obedience of the people, in most or many communities, arising wholly or partly from their fear of the probable evils which they might suffer by resistance. Or 2ndly, That if the bulk of a community dislike the established government, the government *ought* not to continue. If every actual society were adequately instructed or enlightened, the position, as thus understood, would approach nearly to the truth. For the dislike of an enlightened people towards their established government, would beget a violent presumption that the government was faulty or imperfect. But, in every actual society, the government has neglected to instruct the people

in sound political science ; or pains have been taken by the government, or the classes that influence the government, to exclude the bulk of the community from sound political science, and to perpetuate or prolong the prejudices which weaken and distort their undertakings. Every society, therefore, is inadequately instructed or enlightened ; and, in most or many societies the love or hate of the people towards their established government would scarcely beget a presumption that the government was good or bad. An ignorant people may love their established government, though, by cherishing pernicious institutions and fostering mischievous prejudices, it positively prevents the progress in useful knowledge and in happiness, which its subjects would make spontaneously if it simply were careless of their good. And so may an ignorant people hate their established government, though it labours strenuously and wisely to further the general weal. The dislike of the French people to the ministry of the godlike Turgot, amply evinces the melancholy truth. They stupidly thwarted the measures of their warmest and wisest friend, and made common cause with his and their enemies—with the rabble of nobles and priests who strove to uphold misrule and to crush the reforming ministry with a load of calumny and ridicule.

That the permanence of every government is owing to the people's consent, and that the origin of every government is owing to the people's consent, are two positions so closely allied, that what I have said of the former will nearly apply to the latter.

Every government has arisen through the consent of the people, in this sense, that their submission is a consequence of motives, or they will the submission which they render. But a special approbation of the government to which they freely submit may not be their motive to submission. Although they submit to it freely, the government perhaps is forced upon them by a fear of the evils which would follow a refusal to submit. Through a fear of those evils (and, probably, by a general perception of the utility of political government), they freely submit to a government from which they are specially averse.

The expression 'that every government arises through the people's consent' is often uttered with the following meaning ; that the bulk of a natural society about to become a political, or the inchoate subjects of an inchoate political government, promise, expressly or tacitly, to obey the future sovereign. The expression, as uttered with this meaning, confounds consent and promise, and therefore is grossly incorrect. The proposition so intended to be conveyed is, however, noteworthy as being involved by an hypothesis which I proceed to examine.

In every political society the subjects are under duties to

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*original covenant or the fundamental civil pact.*

the sovereign one or body, partly religious, partly legal, and partly moral. The sovereign government is under duties to the subjects, religious and moral, but not legal. This can easily be made to appear by an easy application of the principles reiterated in the preceding lectures.

It follows that the duties of the subjects towards the sovereign government, with the duties of the sovereign government towards the subjects, originate respectively in three several sources; namely, the Divine law (as indicated by the principle of utility), positive law, and positive morality. And, to my understanding, it seems that we account sufficiently for the origin of those obligations, when we simply refer them to those their obvious fountains, and that an ampler solution of their origin is not in the least requisite, and, indeed, is impossible. But there are many writers on political government and society, who are not content to account for their origin by simply referring them to those their manifest sources, and who accordingly resort to the hypothesis of the *original covenant* or *contract*, or the *fundamental civil pact*.

By the writers who resort to it, this renowned and rot exploded hypothesis is imagined and rendered variously. But its effect as imagined and rendered by most of those writers, may be stated generally thus:

To the formation of every society political and independent—of every *πόλις* or *civitas*—all its future members then in being are joint or concurring parties: parties to an agreement in which the body politic then originates, and on which as a basis it afterwards rests. As being the necessary source of the independent political society, this agreement of all is styled the *original covenant*: as being the necessary basis whereon the *civitas* afterwards rests, it is styled *pactum civile fundamentale*.—In the process of making this covenant or pact there are three several stages; which may be described in the following manner. 1. The future members of the community about to be created jointly resolve to unite themselves into an independent political society: signifying and determining withal the paramount purpose of their union, or even some of its subordinate or instrumental ends. And here I must briefly remark, that the paramount purpose so determined is the paramount purpose for which a society political and independent ought to be founded and perpetuated. By the writers who resort to the hypothesis, this paramount purpose or absolute end is conceived differently. To writers who admit the system which I style the theory of utility, this purpose or end is the advancement of human happiness. To a multitude of writers who have flourished and flourish in Germany, the following is the truly magnificent though somewhat mysterious object of political government and society: namely, the extension over the

earth, or over its human inhabitants, of the empire of right or justice. It would seem that this right or justice, like the good Ulpian's justice, is absolute, eternal, and immutable. It is not the right or justice which is merely a creature of the law of God, but something self-evident to which his law conforms or should conform. I cannot understand it, and will not attempt to explain it. Merely guessing at what it may be, I take it for the right or justice mentioned in a preceding note: I take it for general utility darkly conceived and expressed. 2. Having resolved to unite themselves into an independent political society, all the members of the inchoate community jointly determine the constitution of its sovereign political government; the member or members in whom the sovereignty shall reside; and if there are to be more than one, they jointly determine the mode wherein the sovereign number shall share the sovereign powers. 3. The process of forming the independent political society is completed by promises given and accepted: namely, by a promise of the inchoate sovereign to the inchoate subjects, by promises of the latter to the former, and by a promise of each of the latter to all and each of the rest. The purport of these promises is the following.—The sovereign promises generally to govern to the paramount end of the independent political society, and specially to govern to the subordinate ends (if any) signified by the resolution to form the society. The subjects promise to render to the sovereign such obedience as shall consist with that paramount purpose and those subordinate purposes. The resolution of the members to unite themselves into an independent political society, is styled *pactum unionis*. Their determination of the constitution or structure of the sovereign political government, is styled *pactum constitutionis* or *pactum ordinationis*. The promise of the sovereign to the subjects, with the promises of the subjects to the sovereign and to one another, are styled *pactum subjectionis*: for, through these promises the relation of subjection and sovereignty arises between the parties. But of the three so-called *pacts*, the last only is properly a convention. Through this convention, which is styled the original convention, or fundamental pact, the sovereign is bound (at least religiously) to govern as is mentioned above: and the subjects are bound (religiously) to render to the sovereign for the time being, the obedience above described. And the binding virtue of this fundamental pact is not confined to the founders of the independent political society; but extends to their respective successors. Through the promise made by the original sovereign, following sovereigns are bound (religiously) to govern as is mentioned above. Through the promises made by the original subjects, following subjects are bound (religiously) to render to the sovereign for the time being, the

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obedience above described.—In every society political and independent, the duties (that is to say, religious duties) of the sovereign towards the subjects, and of the subjects towards the sovereign, arise from a pact or original covenant such as I have above delineated. Unless we suppose such an agreement, we cannot account adequately for those their respective obligations.

Such, I believe, is the general purport of the hypothesis, as it is imagined and rendered by most of the writers who resort to it.

But, as I have remarked above, the writers who resort to the hypothesis imagine and render it variously. According to some, The original subjects, covenanting for themselves and their followers, promise obedience to the original and following sovereigns: but the original sovereign is not a promising party to the fundamental civil pact. And by the different writers who render the hypothesis thus, the purport of the subjects' promises is variously imagined. For example, some suppose that the obedience promised by the subjects is the qualified or conditional obedience described above; whilst others suppose that the obedience promised by the subjects is an obedience passive or unlimited. But though the writers who resort to the hypothesis imagine and render it variously, they concur in this. That the religious duties of the subjects towards the sovereign are creatures of the original covenant. And the writers who fancy that the original sovereign was a promising party to the pact, also concur in this: That the religious duties of the sovereign towards the subjects are engendered by the same agreement.

Having stated the purport of the hypothesis, I will now suggest shortly a few of the conclusive objections to which it is open.

1. To account for the respective duties of subjects towards their sovereign government, and of the sovereign government towards its subjects, is the scope of every writer who supposes an original covenant. But we sufficiently account for the origin of those respective obligations, when we refer them simply (or without the supposition of an original covenant) to their apparent and obvious fountains: namely, the law of God, positive law, and positive morality. Besides, if the formation of an independent political society were really preceded by a fundamental civil pact, scarce any of the duties lying thereafter on the subjects, or on the sovereign, would be engendered or influenced by that foregoing convention. The hypothesis, therefore, of an original covenant, is needless, and is worse than needless. It affects to assign the cause of certain phenomena, namely, the respective duties of subjects and sovereign: and the cause which it assigns is not only superfluous, but also inefficient.

Three conclusive objections to the hypothesis suggested.

1. For its professed object, namely, to account for the relative duties of sovereigns and subjects, the hypothesis is needless, and inappropriate.

That an original covenant, although it really preceded the formation of an independent political society, would hardly oblige (*legally, religiously, or morally*) the original subjects or sovereigns or their respective successors, will appear from the following analysis.

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Every convention which obliges legally (or every contract properly so called) derives its legal efficacy from a positive law. Speaking exactly, it is not the convention that obliges legally, or that engenders the legal duty: but the law annexes the duty to the convention; or determines that duties of the given class shall follow conventions of the given description. Consequently, if the sovereign government were bound *legally* by the fundamental civil pact, the legal duty lying on the government would be the creature of a positive law annexing the duty to the pact. And such a law must have been set by a sovereign government other than the sovereign government bound by it. Consequently, the latter would be in a state of subjection—contrary to the hypothesis. The subjects, however, might be legally bound to keep the original covenant. But this legal duty would properly proceed from the law set by their own sovereign, and not from the covenant itself.

Again, if the sovereign or subjects were bound *religiously* by the fundamental civil pact, the religious duty lying on the sovereign, or the religious duty lying on the subjects, would properly proceed from the Divine law, and not from the pact itself.

The proper absolute end of an independent political society, and the nature of the index to the law of God, are conceived differently by different men. But whatever be the absolute end of an independent political society, and whatever be the nature of the index to the law of God, the sovereign would, without an original covenant, be bound religiously to govern to that absolute end: and the subjects would, without an original covenant, be bound religiously to render to the sovereign the obedience which the accomplishment of the end might require. The original covenant, if consistent with that absolute end, would be superfluous and therefore inoperative. If the original covenant conflicted with that absolute end, it would also conflict with the law which is the source of religious obligations, and would not oblige religiously the sovereign government or its subjects.

And though the original sovereign or the original subjects might have been bound religiously by the original covenant, why or how should it bind religiously the succeeding sovereigns or subjects? Duties to the subjects for the time being, would be laid by the law of God on all the following sovereigns; and duties to the sovereign for the time being, would be laid by the law of God on all the following subjects: but why should those obligations be laid on those following parties, through the fundamental pact?

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—through or in consequence of a pact made without their authority, and even without their knowledge? *Legal* obligations often lie upon parties (as, for example, upon heirs or administrators), through or in consequence of promises made by other parties whose faculties or means of fulfilling obligations devolve or descend to them by virtue of positive law. And I perceive readily the expediency of these provisions of positive law. But I am unable to perceive, why or how a promise of the original sovereign or subjects should bind religiously the following sovereigns or subjects: though I see that the cases of legal obligation to which I now have adverted, probably suggested the groundless conceit to those who devised the hypothesis of a fundamental civil pact.

If, again, the sovereign were bound *morally* to keep the original covenant, the sovereign would be bound by opinions current amongst the subjects, to govern to the absolute end at which its authors had aimed. And if the subjects were bound *morally* to keep the original covenant, they would be bound severally by opinions of the community at large, to render to the sovereign the obedience which the accomplishment of the end might require. But the moral obligations thus incumbent on the sovereign, with the moral obligations thus incumbent on the subjects, would not be imposed by the positive morality of the community, *through or in consequence of the pact*.

To take the case most favourable to the hypothesis that these obligations arise from such a pact, let us assume that the fancied original covenant was conceived and constructed by its authors, with some particularity and precision: that, having determined the absolute end of their union, it specified some of the ends positive or negative, or some of the means or modes positive or negative, through which the sovereign government should rule to that absolute end. The founders, for example, of the independent political society (like the Roman people who adopted the Twelve Tables), might have adverted specially to the monstrous and palpable mischiefs of *ex post facto* legislation. The fancied covenant might have determined specially, that the sovereign government about to be formed should forbear from legislation of the kind; and the obedience promised by the subjects might have been promised with a corresponding reservation.

Now the bulk or generality of the subjects, in an independent political community, might think alike concerning the absolute end to which their sovereign government ought to rule: and yet their uniform opinions concerning that absolute end might bind or control their sovereign very imperfectly. For notwithstanding such uniformity of sentiments they might think so variously in regard to the subordinate ends by which that paramount end was to be compassed that they would hardly oppose to the government, in any particular

case, a uniform, simultaneous, and effectual resistance.—But if the mass of the subjects thought alike or uniformly concerning more or fewer of the proper subordinate ends of government, those uniform opinions would probably exercise a potent influence over the sovereign. Speaking generally, the proper subordinate ends of a sovereign political government may be imagined in forms, and stated in expressions, which are neither extremely abstract, nor extremely vague. And, if they are clearly conceived and definitely expressed, the government could hardly venture to deviate from any of them without incurring discontent and possible resistance.

The extent to which a government is bound by the opinions of its subjects and the efficacy of the moral duties which their opinions impose upon it depend, therefore, mainly on the two following causes: First, the number of its subordinate ends concerning which the mass of its subjects think alike or uniformly: secondly, the degree of clearness and precision with which they conceive the ends in respect whereof their opinions thus coincide.

It follows from what I have premised, that, if an original covenant had determined clearly and precisely some of the subordinate ends of government, and those ends were favoured by the opinions of the mass of the subjects for the time being, the sovereign would be bound effectually by the positive morality of the community, to rule to the subordinate ends which the covenant had thus specified. And here (it might be argued) the sovereign would be bound morally to rule to those same ends, through or in consequence of the fundamental pact. For (it might be said) the efficacy of the opinions binding the sovereign government would mainly arise from the clearness and precision with which those same ends were conceived by the mass of the subjects; and this again from the clearness and precision with which those same ends had been specified by the original covenant. It will, however, appear, on a moment's reflection, that the opinions of the subject founders of the independent political society were the cause rather than the effect of the covenant. And, granting that the clearness with which they were specified by the covenant would impart an answering clearness to the conceptions of the subjects their successors, that effect would not be wrought by the covenant as being a covenant or pact; but as being a luminous statement of those same subordinate ends. And any similar statement which might circulate widely (as a similar statement, for example, by a popular and respected writer), would work a similar effect.

The following (I think) is the only, or nearly the only case, wherein an original covenant, as being a covenant or pact, might generate or influence any of the duties lying on the sovereign or subjects.

It might be believed by the bulk of the subjects, that their sovereign government was bound religiously to govern

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to what they esteemed the absolute end of government, rather because it had *promised* to govern to that absolute end, than by reason of the intrinsic worth belonging to the end itself. Now, if the mass of the subjects potently believed this, the duties of the government towards its subjects, which the positive morality of the community imposed upon it, would exist wholly or in part, because the original covenant had preceded or accompanied the institution of the independent political society. For if it departed from any of the ends determined by the original covenant, the mass of its subjects would be moved to anger (and perhaps to eventual rebellion), by its breach of its *promise*, real or supposed, rather than by that misrule of which they esteemed it guilty. In this single case, the moral duties of the sovereign towards the subjects would be influenced by an original covenant real or supposed. But it will appear from the following analysis, that, where it might engender or influence any of those *moral* duties, that preceding convention would probably be pernicious.

An original covenant would be simply useless, if it merely determined the absolute end of the sovereign political government: if it merely determined that the absolute end of the government was the greatest possible advancement of the common happiness or weal. For though the covenant might give uniformity to the opinions of the mass of the subjects in regard to that paramount purpose expressed in general terms, that uniformity would, as I have shown already, hardly influence the conduct of their sovereign political government.

But the covenant might specify some of the means through which the government should rule to its absolute end—the common weal. And as specially determining any of those means, or any of the subordinate ends to which the government should rule, the original covenant would be simply useless, or would be positively pernicious.

If the covenant of the founders of the community did not affect the opinions of its succeeding members, it would be simply useless.

If the covenant of the founders of the community did affect the opinions of its succeeding members, it probably would be pernicious. The community would impute to the subordinate ends specified by the original covenant, a worth extrinsic and arbitrary, or independent of their intrinsic merits. They would respect the specified ends not merely because they believed them to be useful, but because the venerable founders of the independent political society had determined (by the venerable original covenant) that these same ends were some of the ends or means through which the weal of the community might be furthered by its sovereign government. Now the venerable age wherein the

community was founded, would probably be less enlightened (notwithstanding its claims to veneration) than any of the ensuing and degenerate ages through which the community might endure. Consequently, the opinions held in an age comparatively ignorant, concerning the subordinate ends to which the government should rule, would influence, more or less, through the medium of the covenant, the opinions held, concerning those ends, in ages comparatively well-informed. Let us suppose, for example, that the formation of the British community was preceded by a fundamental pact. Let us suppose (a 'most unforced' supposition) that the ignorant founders of the community deemed foreign commerce hurtful to domestic industry. Let us suppose, moreover, that the government about to be formed promised for itself and its successors, to *protect* the industry of its own society, by forbidding and preventing the importation of foreign manufactures. Now if the fundamental pact made by our worthy ancestors were devoutly reverenced by many of ourselves, it would hinder the diffusion of sound economical doctrines through the present community: and it would prevent the existing sovereign government from legislating wisely and usefully in regard to our commercial intercourse with other independent nations. Nay, the lovers of darkness assuredly would affirm, and probably would potently believe, that the government was *incompetent* to withdraw the restrictions which the laws of preceding governments have laid on our foreign commerce: that being, as it were, a *privy* of the first or original government, it was *estopped* by the solemn promise which that government had given.

Promises or oaths on the part of the original sovereign, or of succeeding sovereigns, are not the efficient securities, *moral* or *religious*, for beneficent government or rule. The best of *moral* securities, or the best of the securities yielded by positive morality, would arise from a wide diffusion, through the mass of the subjects, of the soundest political science which the lights of the age could afford. The best of *religious* securities would arise from worthy opinions, held by rulers and subjects, concerning the wishes and purposes of the Good and Wise Monarch, and concerning the nature of the duties which he lays upon earthly sovereigns.

2. It will appear from the following strictures, that the hypothesis of the fundamental pact is not only a fiction, but is a fiction approaching to an impossibility: that the institution of a *polis* or *civitas*, or the formation of a society political and independent, was never preceded or accompanied, and could hardly be preceded or accompanied, by an original covenant properly so called, or by aught resembling the idea of a proper original covenant.

Every convention properly so called consists of *a promise or mutual promises proffered and accepted*. Where one only

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of the agreeing parties gives a promise, the convention is said to be *unilateral*. Wherever mutual promises are proffered and accepted, there are, in strictness, two or more conventions: for the promise proffered by each, and accepted by the other of the agreeing parties, is of itself an agreement. But where the performance of either of the promises is made to depend on the performance of the other, the several conventions are commonly deemed one convention, and the convention is then said to be *bilateral*.

The main essentials of a convention are these: First, a *signification* by the promising party, of his *intention* to do the acts, or to observe the forbearances, which he promises to do or observe: secondly, a *signification* by the promisee, that he *expects* the promising party will fulfil the proffered promise. And that these are of the very essence of a proper convention or agreement, will appear on a moment's reflection.

The conventions enforced by positive law or morality are enforced legally or morally for various reasons, of which the following is always one.—Sanctions apart, a convention tends to raise in the mind of the promisee an *expectation* that its object will be accomplished: and to the expectation so raised he naturally shapes his conduct. Now, as much of the business of human life turns or moves upon conventions, frequent disappointments of those expectations which conventions naturally excite, would render human society a scene of baffled hopes, and of thwarted projects and labours. To prevent such disappointments is a main object of the legal and moral rules whose direct and appropriate purpose is the enforcement of pacts or agreements. But the promisee would not entertain the expectation, unless the corresponding intention were signified by the promising party: and, unless the existence of the expectation were signified by the promisee, the promising party would not be apprised of its existence, although the proffered promise had actually raised it. Without the signification of the intention, there would be no promise properly so called: without the signification of the expectation, there would be no sufficient reason for enforcing the genuine promise which really may have been proffered. A promise proffered but not accepted is called, in the technical language of the Roman jurists, a *pollicitation*.\*

It follows that an original covenant properly so called,

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\* The incidental statement, in the text, of the essentials of a convention or pact, is sufficient for the limited purpose to which I have there placed it. A good exposition of the *rationale* of contract or convention would involve a searching analysis of the following intricate expressions:—promise; pollicitation; convention, agreement, or pact; contract; quasi-contract; some of which will be further adverted to in the sequel.

or aught resembling it, could hardly precede the formation of an independent political society.

According to the hypothesis of the original covenant, in so far as it regards the promise of the original sovereign, the sovereign promises to govern to the absolute end of the union (and, perhaps, to more or fewer of its subordinate or instrumental ends). And the promise is proffered to, and is accepted by, *all* the original subjects. According to the hypothesis of the original covenant, in so far as it regards the promise of the original subjects, they promise to render to the sovereign such a qualified obedience as shall consist with the given ends. And the promise of the subjects passes from *all* the subjects: from all and each of the subjects to the monarch or sovereign body, or from each of the subjects to all and each of the rest.

Now it appears from the foregoing statement of the main essentials of a convention, that the promise of the sovereign to the subjects would not be a covenant properly, unless the subjects *accepted* it. But the subjects could hardly accept it, unless they apprehended its object. Otherwise, the promise could hardly raise in their minds any determinate expectation, still less could they *signify* such expectation. Now the ignorant and weaker portion of the inchoate community (the portion, for example, which was not adult) could hardly apprehend the object of the sovereign's promise, whether general or special. We know that the great majority, in any actual community, have no determinate notions concerning the absolute end to which their sovereign government ought to rule; nor any determinate notions concerning the ends or means through which it should aim at the accomplishment of that its paramount purpose. It surely, therefore, is absurd to suppose, that all or many of the members of any inchoate community would have determinate notions concerning the scope of their union, or concerning the means to its attainment. Consequently, most or many of the original subjects would not apprehend the object of the original sovereign's promise: and, not apprehending its object, they would not accept it in effect, although they might accept it in show. With regard to them, the promise of the original sovereign would be *hardly a covenant or pact, but a mere pollicitation.*

The remarks which I have now made on the promise of the original sovereign, will apply, with a few obvious adaptations, to the promise of the original subjects.

If you would suppose an original covenant which as a mere hypothesis will hold good, you must suppose that the society about to be formed is composed entirely of adult members: that all these adult members are persons of sane mind, and even of much sagacity and much judgment; and fairly acquainted with political and ethical science. On

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these bare possibilities, you may build an original covenant which shall be a coherent fiction.

It is hardly necessary to add, that the hypothesis of the original covenant, in any of its forms or shapes, has no foundation in actual facts. There is no historical evidence, that the hypothesis has ever been realised: that the formation of any society political and independent has actually been preceded by a proper original covenant, or by aught approaching to the idea.

In a few societies political and independent (as, for example, in the Anglo-American States), the sovereign political government has been determined at once, and agreeably to a scheme or plan. But, even in these societies, the parties who determined the constitution (either as scheming or planning, or as simply voting or adopting it) were merely a slender portion of the whole of the independent community, and were virtually sovereign therein before the constitution was determined: insomuch that the constitution was not constructed by the whole of an inchoate community, but rather was constructed by a fraction of a community already consummate or complete. In most societies political and independent, the constitution of the supreme government has *grown*. By which fustian but current phrase, I intend not to intimate that it hath come of itself, or is a marvellous something fashioned without hands. I mean that its constitution has been the work of a long series of authors, comprising the original members and many generations of their followers. And the same may be said of most of the ethical maxims which opinions current with the subjects constrain the sovereign to observe. The original sovereign government could not have promised its subjects to govern by those maxims. For the current opinions which actually enforce those maxims, are not coeval with the independent political society, but rather have arisen insensibly since the society was formed. In some societies political and independent, oaths or promises are made by rulers on their accession to office. But such an oath or promise, and an original covenant to which the original sovereign is a promising party, have little or no resemblance. That the formation of the society political and independent preceded the conception of the oath itself, is commonly implied by the terms of the latter. The swearing party, moreover, is commonly a limited monarch, or occupies some position like that of a limited monarch: that is to say, the swearing party is not sovereign, but is merely a limb or member of a sovereign body.

It is said, however, by the advocates of the hypothesis, (for the purpose of obviating the difficulty which these negative cases present), that a *tacit* original covenant pre-

ceded the formation of the society, although its formation was not preceded by an *express* covenant of the kind.

Now the only difference between an express, and a tacit or implied convention, lies in this: That, where the convention is express, the intention and acceptance are signified by language, or by signs which custom or usage has rendered equivalent to language: but that, where the convention is tacit or implied, the intention and acceptance are not signified by words, or by signs which custom or usage has made tantamount to words.

Most or many, therefore, of the members of the inchoate society, could not have been parties, as promisors or promisees, to a tacit original covenant. For they could not have conceived the object with which, according to the hypothesis, an original covenant is concerned; and could not have signified in any way an intention which they were not competent to entertain.

Besides, in many of the negative cases to which I now am adverting, the position and deportment of the original sovereign government, and the position and deportment of the bulk of the original subjects, exclude the supposition of a tacit original covenant. For example: Where the original government begins in a violent conquest, it scarcely promises tacitly, by its violences towards the vanquished, that it will make their weal the paramount end of its rule. And a tacit promise to render obedience to the intrusive and hated government, scarcely passes from the reluctant subjects. They presently *will* to obey it, or presently *consent* to obey it, because they are constrained to obey it, by their fear of its military sword. But the *will* or *consent* to obey it presently, to which they are thus constrained, is scarcely a tacit *promise* (or a tacit manifestation of intention) to render it future obedience. For they intimate pretty significantly, by the reluctance with which they obey it, that they would kick with all their might against the intrusive government, if the military sword which it brandishes were not so long and fearful.

By certain of the later advocates of the hypothesis of the original covenant (chiefly German writers on political government and society), it is commonly admitted that original covenants are not historical facts: but they zealously maintain, notwithstanding this sweeping admission, that the only sufficient basis of an independent political society is a fundamental civil pact. I will not undertake to guide the student into the transcendental regions where this language is supposed to have a meaning.\*

\* For the notions or language, concerning the original covenant, of German writers on political government and society, I refer the curious reader to the following books.—1. Kant's *Metaphysical*

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a. The hypothesis proceeds on a false assumption as to the universal connexion between duty and convention.

3. I close my strictures on the hypothesis of the original covenant, with the following remark:

It would seem that the hypothesis was suggested to its authors, by one or another of these suppositions. 1. Where there is no convention, there is no duty. In other words, whoever is obliged, is obliged through a promise given and accepted. 2. Every convention is necessarily followed by a duty. In other words, wherever a promise is given and accepted, the promising party is obliged through the promise, let its object and tendency be what they may. It is assumed, expressly or tacitly, by Hobbes, Kant, and others, that he who is bound, has necessarily given a promise, and that he who has given a promise is necessarily bound.

But both suppositions are grossly and obviously false.—Of religious, legal, and moral duties, some are imposed by the laws which are their respective sources, through or in consequence of conventions. But others are annexed to facts which have no resemblance to a convention, or to aught that can be deemed a promise. Consequently, a sovereign government might lie under duties to its subjects, and its subjects might lie under duties towards itself, though neither it nor its subjects were bound through a pact.—And as duties are annexed to facts which are not pacts or conventions, so are there pacts or conventions which are

Principles of Jurisprudence. For the original covenant, see the head *Das Staatsrecht*.—2. A well made Philosophical Dictionary (in four octavo volumes), by Professor Krug of the University of Leipzig. For the original covenant, see the article *Staatsursprung*.—3. An exposition of the Political Sciences (*Staatswissenschaften*), by Professor Pölitz of the same University: an elaborate and useful work in five octavo volumes. For the original covenant, see the head *Staats und Staatenrecht*.—4. The Historical Journal (for Nov. 1799) of Fr. v. Gentz: a celebrated servant of the Austrian government.

For, in Germany, the lucid and coherent doctrine to which I have adverted in the text, has not been maintained exclusively by mere metaphysical speculators, and mere university-professors, of politics and jurisprudence. We are gravely assured by Gentz, that the original covenant (meaning this same doctrine touching the original covenant) is the very basis of the science of politics: that, without a correct conception of the original covenant, we cannot judge soundly on any of the questions or problems which the science of politics presents. ‘Der gesellschaftliche Vertrag (says he) ist die Basis der allgemeinen Staatswissenschaft. Eine richtige Vorstellung von diesem Vertrage ist das erste Erforderniss zu einem reinen Urtheile über alle Fragen und Aufgaben der Politik.’ Nay, he thinks that this same doctrine touching the original covenant, is probably the happiest result of the newer German philosophy; insomuch that the fairest product of the newer German philosophy is the conceit of an original covenant which never was made anywhere, but which is the necessary basis of political government and society.—Warmly admiring German literature, and profoundly respecting German scholarship, I cannot but regret the proneness of German philosophy to vague and misty abstraction.

not followed by duties. Conventions are not enforced by divine or human law, without reference to their objects and tendencies. There are many conventions which positive morality reprobates: there are many which positive law will not sustain, and many which positive law actively annuls: there are many which conflict with the law of God, inasmuch as their tendencies are generally pernicious. Consequently, although the sovereign and subjects were parties to an original covenant, neither the sovereign nor subjects would of necessity be bound by it.

From the origin or causes of political government and society, I pass to the distinction of sovereign governments into governments *de jure* and governments *de facto*. For the two topics are so connected, that the few brief remarks which I shall make on the latter, may be placed aptly at the end of my disquisition on the former.

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The distinc-  
tion of sove-  
reign govern-  
ments into  
governments  
*de jure* and  
governments  
*de facto*.

In respect of the distinction now in question, governments are commonly divided into three kinds: First, governments which are governments *de jure* and also *de facto*; secondly, governments which are governments *de jure* but not *de facto*; thirdly, governments which are governments *de facto* but not *de jure*. A government *de jure* and also *de facto*, is a government deemed lawful, or deemed rightful or just, which is present or established: that is to say, which receives presently habitual obedience from the bulk or generality of the members of the independent political community. A government *de jure* but not *de facto* (shortly expressed by the elliptical phrase 'a government *de jure*'), is a government deemed lawful, or deemed rightful or just, which, nevertheless, has been supplanted or displaced: that is to say, which receives not presently (although it received formerly) habitual obedience from the bulk of the community. A government *de facto* but not *de jure* (or more shortly 'a government *de facto*'), is a government deemed unlawful, or deemed wrongful or unjust, which, nevertheless, receives presently habitual obedience from the bulk of the community.

In respect of *positive law*, a sovereign political government which is established or present, is neither lawful nor unlawful: In respect of *positive law*, it is neither rightful nor wrongful, it is neither just nor unjust. It is therefore neither *legal* nor *illegal*.

In every society political and independent, the actual positive law is a creature of the actual sovereign. Law, no longer enforced by the present supreme government, would cease to be law in the sense of positive law. To borrow the language of Hobbes, 'The legislator is he (not by whose authority the law was first made, but) by whose authority it continues to be law.'

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Consequently, an established sovereign government, in respect of the positive law of its own independent community, is neither lawful nor unlawful. For if so, it were lawful or unlawful by some law either of its own appointment, or by the appointment of another sovereign. The former alternative is manifestly absurd; and the latter is contrary to the hypothesis of its sovereignty.

In respect of the positive law of that independent community wherein it once was sovereign, a so-called government *de jure* but not *de facto*, is not, and cannot be, a lawful government: for by the positive law of the community, which exists by the authority of the government *de facto*, the supplanted government is proscribed, and attempts to restore it are made legal wrongs. In respect of the positive law of another independent community, a so-called government *de jure* but not *de facto* is neither lawful nor unlawful. For by the hypothesis, the other independent community has no power recognised by habitual obedience, by which it can interfere.

In respect, then, of *positive law*, the distinction of sovereign governments into lawful and unlawful is a distinction without a meaning. For, as tried by this test, or as measured by this standard, a so-called government *de jure* but not *de facto* cannot be lawful: and, as tried by the same test, or measured by the same standard, a government *de facto* is neither lawful nor unlawful.

In respect, however, of *positive morality*, the distinction of sovereign governments into lawful and unlawful, is not a distinction without a meaning.

A government *de facto* may be lawful, or a government *de facto* may be unlawful, in respect of the positive morality of that independent community wherein it is established. If the opinions of the bulk of the community favour the government *de facto*, the government *de facto* is morally lawful in respect of the positive morality of that particular society. If the opinions of the bulk of the community be adverse to the government *de facto*, it is morally unlawful in respect of the same standard.

And a government *de facto*, or a government not *de facto*, may be morally lawful, or morally unlawful, in respect of the positive morality which obtains between nations or states. Though positive international morality looks mainly at the possession, every government in possession, or every government *de facto*, is not acknowledged of course by other established governments. In respect, therefore, of positive international morality, a government *de facto* may be unlawful, whilst a government not *de facto* may be a government *de jure*.

A government, moreover, *de facto*, or a government not *de facto*, may be lawful or unlawful in respect of the law of

God. Tried by the Divine law, as known through the principle of utility, a sovereign government *de facto* is lawfully a sovereign government, if the general happiness or weal requires its continuance. Tried by the same law, as known through the same index, a sovereign government *de facto* is not lawfully sovereign, if the general happiness or weal requires its abolition.

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The definition of a positive law implicitly contained in the foregoing lectures, and which has been already stated by anticipation (p. 82 *supra*), may now be reiterated in terms which have been explained with an approach to precision. The essential difference which severs a positive law from a law not a positive law is this:—Every positive law (or every law simply and strictly so called) is set, directly or circuitously, by a sovereign individual or body, to a member or members of the independent political society wherein its author is supreme. In other words, It is set, directly or circuitously, by a monarch or sovereign number, to a person or persons in a state of subjection to its author.

The definition, however, only approaches to a perfectly complete and perfectly exact definition. It is open to certain correctives which I will now briefly suggest.

Every law properly so called is set by a superior to an inferior or inferiors: it is set by a party armed with might, to a party or parties whom that might can reach. Now (speaking generally) a party who is liable to be reached by the might of the author of the law is a member of the independent community wherein the author is sovereign. In other words, a party who is amenable to a legal sanction is a subject of the author of the law to which the sanction is annexed. Although the positive law may affect to oblige strangers (or parties who are not members of that independent community), none but members of that independent community are virtually or truly bound by it. Besides, if the positive law of one independent community bound legally (and generally) the members of another, the other independent community would not be an independent community, but merely a subordinate community forming a limb of the first.

Speaking, then, generally, we may say that a positive law is set or directed exclusively to a subject or subjects of its author: or that a positive law is set or directed exclusively to a member or members of the community wherein its author is sovereign. But, in many cases, the positive law of a given independent community imposes a duty on a stranger: on a party who is *not* a member of the given independent community, or is only a member to certain limited purposes. For such, in these cases, is the position of the stranger, that the imposition of the legal duty consists with

A general definition of a positive law: Or a general statement of the essential difference by which it is severed from a law not a positive law.

This definition of a positive law is assumed expressly or tacitly throughout the foregoing lectures. But it only approaches to a perfectly complete and perfectly exact definition. And, consequently, the determination of the province of jurisprudence, which is attempted in the foregoing lectures, only approaches to a perfectly complete and perfectly exact determination.

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the sovereignty of the government of which he is properly a subject. For example: A party not a member of a given independent community, but living within its territory and within the jurisdiction of its sovereign, is bound or obliged, to an extent which is limited by its positive law. Living within the territory, he is liable to be reached by the legal sanctions by which the law is enforced. And the legal duties imposed upon him by the law are consistent with the sovereignty of the foreign government of which he is properly a subject. For the duties are not imposed upon the foreign government itself, nor upon the members generally of the community subject to it, nor are they laid upon the obliged party as being one of its subjects, but as being a member, to certain limited purposes, of the community wherein he resides. Again: If a stranger not residing within the given community be the owner of land or moveables lying within its territory, the sanction of the law may reach him through the land or goods. For instance, if he be sued on an agreement, and judgment be given for the plaintiff, the tribunal may execute its judgment by resorting to the land or moveables, although the defendant's body is beyond the reach of its process. And this consists with the sovereignty of the government of which the stranger is properly a subject. In all the cases, therefore, which I now have noted and exemplified, the positive law of a given independent society may impose a duty on a stranger. By reason of the obstacles mentioned in the preceding paragraph, the binding virtue of the positive law cannot extend generally to members of foreign communities. But in the cases which I now have noted and exemplified those obstacles do not intervene.

The definition, therefore, of a positive law, which is assumed expressly or tacitly throughout the foregoing lectures, is not a perfectly complete and perfectly exact definition. In the cases noted and exemplified in the last paragraph, a positive law obliges legally, or a positive law is set or directed to, a *stranger* or *strangers*: that is to say, a person or persons *not* of the community wherein the author of the law is sovereign or supreme. Now, since the cases in question are omitted by that definition, the definition is too narrow, or is defective or inadequate: and to a corresponding extent the determination of the province of jurisprudence, which is attempted in these discourses, falls short of being a complete and exact determination.

But the truth of the positions and inferences contained in the preceding lectures is not, I believe, materially impaired by this omission and defect. And though the definition is not complete, it approaches nearly to completeness. Allowing for the omission of the anomalous cases in question, it is, I believe, an adequate definition of its subject.

I have said that a given society is a society political and independent. if the bulk or generality of its members

habitually obey the commands of a determinate individual, or body of individuals, not obeying habitually the express or tacit commands of a determinate human superior. But by what characters, or by what distinguishing marks, are the members of a given society severed from persons who are not of its members? Or how is a given person determined to a given community? These questions are not resolved or touched by my definition: and it might seem, therefore, that the definition is not complete or adequate. But, for the following reasons, I believe that the foregoing definition, considered as a general definition, is, notwithstanding, complete or adequate: that a general definition of independent political society could hardly resolve the questions which I have suggested above.

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general de-  
finition of  
independent  
political  
society.

1. It is not through one mode, or it is not through one cause, that the members of a given society are members of that community. A person may be determined to a given society, by any of numerous modes, or by any of numerous causes: as, for example, by birth within the territory which it occupies; by birth without its territory, but of parents being of its members; by simple residence within its territory; or by naturalization.\*—Again: a subject member of one society may be, at the same time, a subject member of another. A person, for example, who is naturalized in one independent society, may yet be a member completely, or to certain limited purposes, of that independent society which he affects to renounce: or a member of one society who simply resides in another, may be a member completely of the former society, and, for limited purposes, a member of the latter. Nay, a person who is sovereign in one society, may be, at the same time, a subject member of another. Before I could have resolved these questions I must have descended into the detail of jurisprudence; and therefore I must have wandered from the proper purpose or scope of the foregoing general attempt to determine the province of the science.

2. By a general definition of independent political society

\* The following brief explanation may be placed pertinently here.

Generally speaking, a society political and independent occupies a determined territory. Consequently, when we imagine an independent political society, we commonly imagine it in that plight: And, according to the definition of independent political society which is assumed expressly or tacitly by many writers, the occupation (by the given society) of a determined territory, or seat, is of the very essence of a society of the kind. But this is an error. History presents us with societies of the kind which have been, as it were, *in transitu*. Many, for example, of the barbarous nations which invaded and settled in the Roman Empire, were not, for many years before their final establishment, occupants of determined seats.

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(or such a definition as is applicable to every society of the kind), I could not have resolved completely the questions suggested above, although I had discussed the topics touched in the last paragraph. For the modes through which persons are members of particular societies (or the causes by which persons are determined to particular societies) differ in different communities. It therefore is only in relation to a given particular society that the questions suggested above can be completely resolved.

Restrictions or explanations of the two following positions: namely, that a sovereign government cannot be bound *legally*, and that it cannot have legal rights against its own subjects.

I have assumed expressly or tacitly throughout the foregoing lectures that a sovereign government of one, or a sovereign government of a number in its collective and sovereign capacity, cannot be *bound legally*. This needs a slight explanation, which may be placed conveniently at the close of my present discourse.

It is true universally that, as being the sovereign of the community wherein it is sovereign, a sovereign government cannot be bound legally: and this is the sense with which I have maintained the position throughout the present lecture. But, as being a subject of a foreign supreme government (either generally or to certain limited purposes), it may be bound by laws (simply and strictly so called) of that foreign supreme government. And if the laws be exclusively laid upon it as subject in the foreign community, its sovereignty is not impaired by the obedience which it yields to them, although the obedience amounts to a *habit*. The following case will amply illustrate the meaning which I have stated in general expressions.—Before the French revolution, the sovereign government of the Canton of Bern had money in the English funds: and if the English law empowered it to hold lands, it might be the owner of lands within the English territory, as well as the owner of money in the English funds. Now, assuming that the government of Bern is an owner of lands in England, it also is subject to the legal duties with which property in land is saddled by the English law. But by its subjection to those duties, and its habitual observance of the law through which those duties are imposed, its sovereignty in its own Canton is not annulled or impaired. For the duties are incumbent upon it (not as governing there, but) as owning lands here: as being, to limited purposes, a member of the British community, and amenable, through the lands, to the process of the English tribunals.

I said in an earlier part of this lecture (p. 115 *supra*), that a sovereign government of one, or a sovereign government of a number in its collective and sovereign capacity, cannot have *legal rights* (in the proper acceptation of the term) against its own subjects. In the sense with which I have advanced it, the position will hold universally. But it

needs a slight explanation, which I will now state or suggest.

It is true universally, that against a subject of its own, as being a subject of its own, a sovereign political government cannot have legal rights: and this is the sense with which I have advanced the position. But against a subject of its own, as being generally or partially a subject of a foreign government, a sovereign political government may have legal rights. For example: Let us suppose that a Russian merchant is resident and domiciled in England: that he agrees with the Russian emperor, to supply the latter with naval stores: and that the laws of England, or the English tribunals, lend their sanctions to the agreement. Now, according to these suppositions, the emperor bears a right, given by the law of England, against a Russian subject. But the emperor has not the right through a law of his own, or against a Russian subject in that capacity or character. He bears the legal right against a subject of his own, through the positive law of a foreign independent society; and he bears it against his subject (not as being his subject, but) as being to limited purposes, a subject of a foreign sovereign. And the relative legal duty lying on the Russian merchant consists with the emperor's autocracy in all the Russias. For since it lies upon the merchant as resident and domiciled in England, the sovereign British Parliament, by imposing the duty upon him, does not interfere with the autocrat in his own independent community.

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## SECTION II.—GENERAL JURISPRUDENCE DISTINGUISHED FROM PARTICULAR.

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### LECTURE XI.\*

*On general as distinguished from particular jurisprudence.*

HAVING determined the province of jurisprudence, I now proceed to distinguish general jurisprudence, or the philosophy of positive law, from what may be styled particular jurisprudence, or the science of particular law: that is to say, the science of any such system of positive law as now

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distinguished  
from par-  
ticular juris-  
prudence.

\* The preceding six lectures comprise the substance of the first ten lectures as actually delivered, being those which were revised and enlarged by the author himself, and published by him (in 1832) in the form of six lectures in the volume entitled 'The Province of Jurisprudence Determined.'—R. C.

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Rationale  
of that  
distinction.

actually obtains, or once actually obtained, in a specifically determined political society.

The appropriate subject of jurisprudence, in any of its different departments, is positive law: meaning by positive law, law established or 'positum,' in an independent political society, by the express or tacit authority of its sovereign or supreme government.

Considered as a whole, and as implicated or connected with one another, the positive laws or rules of a particular or specified community, are a system or body of law. And as limited to any one of such systems, or to any of its component parts, jurisprudence is particular or national.

Though every system of law has its specific and characteristic differences, there are principles notions and distinctions common to various systems, and forming analogies or likenesses by which such systems are allied.

Many of these common principles are common to all systems;—to the scanty and crude systems of rude communities, and the ampler and maturer systems of refined societies. But the ampler and maturer systems of refined societies are allied by the numerous analogies which obtain between all systems, and also by numerous analogies which obtain exclusively between themselves. Accordingly, the various principles common to maturer systems are the subject of an extensive science: which, as contradistinguished to particular jurisprudence on one side, and on another, to the science of legislation, has been named general (or comparative) jurisprudence, or the philosophy of positive law. This science is the topic, and measures the scope of the present course of lectures. Of all the concise expressions which I have turned in my mind, 'the philosophy of positive law' is the most significant to mark it. I have borrowed the expression from a treatise by Hugo, a celebrated professor of jurisprudence in the University of Göttingen, and the author of an excellent history of the Roman law. Although the treatise in question is entitled 'the law of nature,' it is not concerned with the law of nature in the usual meaning of the term. In the language of the author, it is concerned with 'the law of nature as a philosophy of positive law.' But though this expression is happily chosen, the subject and scope of the treatise are conceived indistinctly. General jurisprudence, or the philosophy of positive law, is blended and confounded, from the beginning to the end of the book, with the portion of deontology or ethics, which is styled the science of legislation: while, as I shall show immediately, general jurisprudence, or the philosophy of positive law, is not concerned directly with the science of legislation.

As principles abstracted from positive systems are the subject of general jurisprudence, so is the exposition of such

principles its exclusive or appropriate object. With the goodness or badness of laws, as tried by the test of utility (or by any of the various tests which divide the opinions of mankind), it has no immediate concern. If, in regard to some of the principles which form its appropriate subject, it advert to considerations of utility, it advert to such considerations for the purpose of explaining such principles, and not for the purpose of determining their worth. And this distinguishes the science in question from the science of legislation, which affects to determine the test or standard (together with the principles subordinate or consonant to such test) by which positive law ought to be made, or to which positive law ought to be adjusted.

If the possibility of such a science as that which I have undertaken to expound appear doubtful, the doubt arises from this; that in each particular system, the principles and distinctions which that system has in common with others, are complicated with its individual peculiarities, and are expressed in a technical language peculiar to itself.

It is not meant to be affirmed that these principles and distinctions are conceived with equal exactness and adequacy in every particular system. In this respect different systems differ. But, in all, they are to be found more or less nearly conceived; from the rude conceptions of barbarians, to the exact conceptions of the Roman lawyers or of enlightened modern jurists.

I mean, then, by 'General Jurisprudence,' the science concerned with the exposition of the principles notions and distinctions which are common to systems of law: understanding by systems of law the ampler and mature systems which, by reason of their amplitude and maturity, are pre-eminently instructive.

Of the principles notions and distinctions which are the subjects of general jurisprudence, some may be esteemed necessary. For we cannot imagine coherently a system of law (or a system of law as evolved in a refined community), without conceiving them as constituent parts of it.

Of these necessary principles notions and distinctions, I will suggest briefly (by way of anticipation of the more full analysis to be given hereafter) a few examples.

Some of the principles notions and distinctions which belong to general jurisprudence are necessary.

1. The notions of Duty, Right, Liberty, Injury, Punishment, Redress; with their various relations to one another, and to Law, Sovereignty, and Independent Political Society:

Examples of these.

2. The distinction between written and unwritten law, in the juridical or improper senses attributed to the opposed expressions; in other words, between law proceeding immediately from a sovereign or supreme maker, and law proceeding immediately from a subject or subordinate maker (with the authority of a sovereign or supreme):

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§ 2.

3. The distinction of Rights, into rights availing against the world at large (as, for example, property or dominion), and rights availing exclusively against persons specifically determined (as, for example, rights arising from contracts):

4. The distinction of rights availing against the world at large, into property or dominion, and the variously restricted rights which are carved out of property or dominion:

5. The distinction of Obligations (or of duties corresponding to rights against persons specifically determined) into obligations which arise from contracts, obligations which arise from injuries, and obligations which arise from incidents that are neither contracts nor injuries, but which are styled analogically obligations 'quasi ex contractu':

6. The distinction of Injuries or Delicts, into civil injuries (or private delicts) and crimes (or public delicts); with the distinction of civil injuries (or private delicts) into torts, or delicts (in the strict acceptation of the term), and breaches of obligations from contracts, or of obligations 'quasi ex contractu.'

It will, I believe, be found on a little examination and reflection that every system of law evolved in a refined community implies the notions and distinctions which I now have cited as examples; together with a multitude of conclusions imported by those notions and distinctions, and drawn from them by the builders of the system through inferences nearly inevitable.

Of the principles notions and distinctions which are the subjects of General Jurisprudence, others are not necessary (in the sense which I have given to the expression). We may imagine coherently an expanded system of law, without conceiving them as constituent parts of it. But as they rest upon grounds of utility which extend through all communities, and which are palpable or obvious in all refined communities; they in fact occur very generally in matured systems of law; and therefore may be ranked properly with the general principles which are the subjects of general jurisprudence.

Such, for example, is the distinction of law into 'jus personarum' and 'jus rerum': which is the leading principle of the scientific arrangement given to the Roman Law by the authors of the elementary treatises from which Justinian's Institutes were copied and compiled. The distinction, I believe, is an arbitrarily assumed basis for a scientific arrangement of a body of law. But being a commodious basis for an arrangement of a body of law, it has been very generally adopted by those who have attempted such arrangements in the modern European nations. It

Of the principles  
notions and  
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to general  
juris-  
prudence  
some are not  
necessary.

Examples.

has been very generally adopted by the compilers of the authoritative Codes which obtain in some of those nations, and by private authors of expository treatises on entire bodies of law. Nay, some who have mistaken the import of it, and who have contemptuously rejected it as denoted by the obscure antithesis of 'jus personarum et rerum,' have yet adopted it under other (and certainly more appropriate) names as the basis of a natural arrangement. Meaning, I presume, by a natural arrangement, an arrangement so commodious, and so highly and obviously commodious, that any judicious methodiser of a body of law would naturally (or of course) adopt it.

But it will be impossible, or useless, to attempt an exposition of these principles notions and distinctions, until by careful analysis we have accurately determined the meaning of certain leading terms which we must necessarily employ; terms which recur incessantly in every department of the science: which, whithersoever we turn ourselves, we are sure to encounter. Such, for instance, besides Law, which I have endeavoured to define in the preceding lectures, are the following: Right, Obligation, Injury, Sanction, Person, Thing, Act, Forbearance. Unless the import of these are determined at the outset, the subsequent speculations will be a tissue of uncertain talk.

It is not unusual with writers who call and think themselves '*institutional*,' to take for granted that they know the meaning of these terms, and that the meaning must be known by those to whom they address themselves.

These terms, nevertheless, are beset with numerous ambiguities: their meaning, instead of being simple, is extremely complex. They are short marks for long series of propositions. And what aggravates the difficulty of explaining their meaning clearly, is the intimate and indissoluble connection which subsists between them. To state the signification of each, and to show the relation in which it stands to the others, is not a thing to be accomplished by short and disjointed definitions, but demands a dissertation, long, intricate, and coherent.

The proper subject then of General Jurisprudence (as distinguished from the Science of Legislation) is a description of such subjects and ends of Law as are common to all systems; and of those resemblances between different systems which are bottomed in the common nature of man, or correspond to the resembling points in their several positions.

And these resemblances will be found to be very close, and to cover a large part of the field. They are necessarily confined to the resemblances between the systems of a few nations; since it is only a few systems with which it is possible to become acquainted, even imperfectly. And it is

PART I.  
§ 2.

only the systems of two or three nations which deserve attention;—the writings of the Roman Jurists; the decisions of English Judges in modern times; the provisions of French and Prussian codes as to arrangement.\*

Inevitable  
(and some-  
times in-  
tentional)  
Implication  
of Legisla-  
tion with  
Juris-  
prudence.

It is impossible to consider Jurisprudence quite apart from Legislation; since the inducements or considerations of expediency which lead to the establishment of laws, must be adverted to in explaining their origin and mechanism. If the causes of laws and of the rights and obligations which they create be not assigned, the laws themselves are unintelligible.

Where the subject is the same, but the provisions of different systems with respect to that subject are different, it is necessary to assign the causes of the difference: whether they consist in a necessary diversity of circumstances, or in a diversity of views on the part of their respective authors with reference to the *ends* of Law. Thus, the rejection or limited reception of entails in one system, and their extensive reception in another, are owing partly to the different circumstances in which the communities are placed;—partly to the different views of the aristocratic and democratic legislators by whom these provisions have been severally made.

So far as these differences are inevitable—are imposed by force of circumstances—there can be no room for praise or blame. Where they are the effect of choice, there is room for praise or blame. I shall, however, treat them not as subjects of either, but merely as effects of those respective causes. So of the admission or prohibition of divorce—Marriages within certain degrees, etc.

Wherever an opinion is pronounced upon the merits and demerits of Law, an impartial statement of the conflicting opinions should be given. The teacher of Jurisprudence may have, and probably has, decided opinions of his own; and it may be questioned whether earnestness be less favourable to impartiality than indifference; but he ought not to attempt to insinuate his opinion of merit and demerit under pretence of assigning causes. In certain cases which do not try the passions (as rescission of contract for inadequacy of consideration) he may, with advantage, offer opinions upon merits and demerits. These occasional excursions into the

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\* Evidently the author was not acquainted with the works of the Scotch Institutional writers. The Scotch law is in the main based upon the Roman. But as expounded by its institutional writers, and notably by Lord Stair, whose work was a treatise on general jurisprudence illustrated by the law of Scotland in particular, the law of Scotland holds an important and independent position, both in regard to general jurisprudence, and as an aid to the historical study of English law.—R. C.

territory of Legislation, may serve to give a specimen of the manner in which such questions should be treated. This particularly applies to Codification: a question which may be agitated with safety, because everybody must admit that Law ought to be known, whatever he may think of the provisions of which it ought to consist.

Exounding principles and distinctions which are the appropriate matter of general Jurisprudence, I shall present them abstracted from every particular system. But I shall also endeavour to illustrate them by examples from the two particular systems which I have studied with some accuracy, namely, the Roman Law, and the Law of England.

For the following sufficient reason (to which many others might be added), the Roman or Civil Law is, of all particular systems, other than the Law of England, the best of the sources from which such illustrations might be drawn.

In some of the nations of modern Continental Europe (as, for example, in France), the actual system of law is mainly of Roman descent; and in others of the same nations (as, for example, in the States of Germany), the actual system of law, though not descended from the Roman, has been closely assimilated to the Roman by large importations from it.

Accordingly, in most of the nations of modern Continental Europe, much of the substance of the actual system, and much of the technical language in which it is clothed, is derived from the Roman Law, and without some knowledge of the Roman Law the technical language is unintelligible; whilst the order or arrangement commonly given to the system imitates the exemplar of a scientific arrangement which is presented by the Institutes of Justinian. Even in our own country, a large portion of the Ecclesiastical law, and some portion of Equity and Common Law, is derived immediately from the Roman Law, or from the Roman through the Canon.

Nor has the influence of the Roman Law been limited to the positive law of the modern European nations. For the technical language of this all-reaching system has deeply tinctured the language of the international law or morality which those nations affect to observe. By drawing, then, largely for examples on the Roman or Civil Law, an expositor of General Jurisprudence (whilst illustrating his appropriate subject) might present an idea of a system which is a key to the international morality, the diplomacy, and to much of the positive law, of modern civilized communities.

It is much to be regretted that the study of the Roman

Manner of  
expounding  
the science  
of general  
juris-  
prudence.

Value of the  
Study of  
Roman Law.

PART I.  
§ 2-

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Law is neglected in this country, and that the real merits of its founders and expositors are so little understood.

Much has been talked of the philosophy of the Roman Institutional writers. Of familiarity with Grecian philosophy there are few traces in their writings, and the little that they have borrowed from that source is the veriest foolishness: for example, their account of *Jus naturale*, in which they confound law with animal instincts; law, with all those wants and necessities of mankind which are causes of its institution.

Nor is the Roman law to be resorted to as a magazine of legislative wisdom. The great Roman Lawyers are, in truth, expositors of a positive or technical system. Not Lord Coke himself is more purely technical. Their real merits lie in their thorough mastery of that system; in their command of its principles; in the readiness with which they recall, and the facility and certainty with which they apply them.

In support of my own opinion of these great writers I shall quote the authority of two of the most eminent Jurists of modern times.

'The permanent value of the *Corpus Juris Civilis*', says Falck, 'does not lie in the Decrees of the Emperors, but in the remains of juristical literature which have been preserved in the Pandects. Nor is it so much the matter of these juristical writings, as the scientific method employed by the authors in explicating the notions and maxims with which they have to deal, that has rendered them models to all succeeding ages, and pre-eminently fitted them to produce and to develop those qualities of the mind which are requisite to form a Jurist.'

And Savigny says, 'It has been shown above, that, in our science, all results depend on the possession of leading principles; and it is exactly this possession upon which the greatness of the Roman Jurists rests. The notions and maxims of their science do not appear to them to be the creatures of their own will; they are actual beings, with whose existence and genealogy they have become familiar from long and intimate intercourse. Hence their whole method of proceeding has a certainty which is found nowhere else except in mathematics; and it may be said without exaggeration, that they calculate with their ideas. If they have a case to decide, they begin by acquiring the most vivid and distinct perception of it, and we see before our eyes the rise and progress of the whole affair, and all the changes it undergoes. It is as if this particular case were the germ whence the whole science was to be developed. Hence, with them, theory and practice are not in fact distinct;

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\* *Jurist. Encyc. cap. ii. § 109.*

their theory is so thoroughly worked out as to be fit for immediate application, and their practice is uniformly ennobled by scientific treatment. In every principle they see a case to which it may be applied; in every case, the rule by which it is determined; and in the facility with which they pass from the general to the particular and the particular to the general, their mastery is indisputable.\*

In consequence of this mastery of principles, of their perfect consistency ('elegantia'), and of the clearness of the method in which they are arranged, there is no positive system of law which it is so easy to seize as a whole. The smallness of its volume tends to the same end.

The principles themselves, many of them being derived from barbarous ages, are indeed ill fitted to the ends of law; and the conclusions at which they arrive being logical consequences of their imperfect principles necessarily partake of the same defect.

A subordinate merit of the Roman lawyers is their style, always simple and clear, commonly brief and nervous, and entirely free from *nitor*. Its merits are appropriate and in perfect taste.

The number of the analogies between the Roman Law and many of the Continental systems, and between the Roman and English Law, is not indeed to be wondered at: since those Continental systems and also our own system of Equity, have been formed more or less extensively on the Roman Law; chiefly on the Roman, through the Canon. But the English Law, like the Roman, is for the most part indigenous, or comparatively little has been imported into it from the Roman. The coincidences show how numerous are the principles and distinctions which all systems of law have in common. The extensive coincidence of particular systems may be ascertained practically by comparing two expositions of any two bodies of law. The coincidence is pre-eminently remarkable in the Roman Law and the Common Law of England.

The subject and scope of general jurisprudence, as contradistinguished to particular jurisprudence, are well expressed by Hobbes in that department of his *Leviathan* which is concerned with civil (or positive) laws. 'By civil laws,' says he, 'I understand the laws that men are therefore bound to observe, because they are members, not of this or that commonwealth in particular, but of a commonwealth. For the knowledge of particular laws belongeth to them that profess the study of the laws of their several countries: but the knowledge of civil laws in general, to any man. The ancient law of Rome was called their "civil law" from

Subject and  
scope of  
general juris-  
prudence we  
expressed  
by Hobbes.

\* Vom Beruf unserer Zeit für Geetzgebung und Rechtswissenschaft, cap. iv.

PART I.  
§ 2.

the word *civitas*, which signifies a commonwealth: And those countries which, having been under the Roman empire, and governed by that law, still retain such part thereof as they think fit, call that part the "civil law," to distinguish it from the rest of their own civil laws. But that is not it I intend to speak of. My design is to show, *not what is law here or there, but what is law*: As Plato, Aristotle, Cicero, and divers others have done, without taking upon them the profession of the study of the law.'

Uses of the Study of Jurisprudence.

Having stated generally the nature of the science of Jurisprudence, and the manner in which I think it ought to be expounded, I proceed to indicate a few of its uses.

I would remark, in the first place, that a well-grounded study of the principles which form the subject of the science, would be an advantageous preparative for the study of English Law.

To the student who begins the study of the English Law, without some previous knowledge of the *rationale* of law in general, it naturally appears an assemblage of arbitrary and unconnected rules. But if he approached it with a well-grounded knowledge of the general principles of jurisprudence, and with the map of a body of law distinctly impressed upon his mind, he might obtain a clear conception of it (as a system or organic whole) with comparative ease and rapidity.

With comparative ease and rapidity he might perceive the various relations of its various parts; the dependence of its minuter rules on its general principles; and the subordination of such of these principles as are less general or extensive, to such of them as are more general, and run through the whole of its structure.

In short, the preliminary study of the general principles of jurisprudence, and the mental habits which the study of them tends to engender, would enable him to acquire the principles of English jurisprudence in particular, far more speedily and accurately than he possibly could have acquired them in case he had begun the study of them without the preparative discipline.

There is (I believe) a not unprevalent opinion that the study of the science whose uses I am endeavouring to demonstrate, might tend to disqualify the student for the practice of the law, or to inspire him with an aversion to the practice of it. That some who have studied this science have shown themselves incapable of practice, or that some who have studied this science have conceived a disgust for practice, is not improbably a fact. But in spite of this seeming experience in favour of the opinion in question, I deny that the study itself has the tendency which the opinion imputes to it.

A well-grounded knowledge of the general principles of jurisprudence helps, as I have said, to a well-grounded knowledge of the principles of English jurisprudence; and a previous well-grounded knowledge of the principles of English jurisprudence can scarcely incapacitate the student for the acquisition of practical knowledge in the chambers of a conveyancer, pleader, or draftsmen. Armed with that previous knowledge, he seizes the *rationale* of the practice which he there witnesses and partakes in, with comparative ease and rapidity; and his acquisition of practical knowledge, and practical dexterity and readiness, is much less irksome than it would be in case it were merely empirical. Insomuch that the study of the general principles of jurisprudence, instead of having any of the tendency which the opinion in question imputes to it, has a tendency (by ultimate consequence) to qualify for practice, and to lessen the natural repugnance with which it is regarded by beginners.

The advantage of the study of common principles and distinctions, and of history considered as a preparative for the study of one's own particular system, is fully appreciated in Prussia: a country whose administrators, for practical skill, are at least on a level with those of any country in Europe.

In the Prussian Universities, little or no attention is given by the Law Faculty to the actual law of the country. Their studies are wholly or almost entirely confined to the general principles of law; to the Roman, Canon, and Feudal law, as the sources of the actual system: the Government trusting that those who are acquainted with such general principles and with the historical basis of the actual system, will acquire that actual system more readily, as well as more groundedly, than if they had been at once set down to the study of it, or had tried to acquire it empirically.

'In the Prussian states,' says Savigny, 'ever since the establishment of the Landrecht, no order of study has ever been prescribed; and this freedom from restraint, sanctioned by the former experience of the German Universities, has never been infringed upon. Even the number of professors, formerly required on account of the Common Law (*Gemeines Recht*), has not been reduced, and the curators of the universities have never led either the professors or the students to believe, that a part of the lectures, formerly necessary, were likely to be dispensed with. Originally it was thought advisable that, in each University, one chair at least should be set apart for the Prussian law, and a considerable prize was offered for the best manual. But even this was subsequently no longer required; and, up to the present time, the Prussian law has not been taught at the University of Berlin. The established

System  
adopted in  
Prussia.

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§ 2.

examinations are formed upon the same principle; the first, on the entrance into real matters of business, turning exclusively on the common law; the next period is set apart for the directly practical education of the juris-consults; and the two following examinations are the first that have the Landrecht for their subject-matter; at the same time, however, without excluding the common law. At present, therefore, juridical education is considered to consist of two halves; the first half (the university) including only the learned groundwork; the second, on the other hand, having for its object the knowledge of the Landrecht, the knowledge of the Prussian procedure, and practical skill.'

Authorities  
in support of  
the value of  
this study.

The opinion I have expressed was that of Hale, Mansfield,<sup>†</sup> and others (as evinced by their practice), and was recommended by Sir William Blackstone, more than a century ago.<sup>‡</sup>

Backed by such authority, I think I may conclude that the science in question, if taught and studied skilfully and effectually, and with the requisite detail, would be no inconsiderable help to the acquisition of English Law.

I may also urge the utility of acquiring the talent of seizing or divining readily the principles and provisions (through the mist of a strange phraseology) of other systems of law, were it only in a mere practical point of view:

1. With a view to practice, or to the administration of justice in those of our foreign dependencies wherein foreign systems of law more or less obtain.
2. With a view to the systems of law founded on the Roman directly, or through the Canon or the Roman, which even at home have an application to certain classes of objects.
3. With a view to questions arising incidentally, even in the Courts which administer indigenous law.
4. With a view to the questions in the way of appeal coming before the Privy Council: A Court which is bound to decide questions arising out of numerous systems, without the possibility of judges or advocates having any specific knowledge of them: an evil for which a familiarity with the general principles of law on the part of the Court and advocates is the only conceivable palliative.

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\* Savigny, *Vom Beruf*, etc., Hayward's translation, p. 165.

† 'Lord Hale often said, the true grounds and reasons of law were so well delivered in the (Roman) Digesta, that a man could never understand law as a science so well as by seeking it there, and therefore lamented much that it was so little studied in England.'—Burnet's *Life*, p. 7.

‡ Blackstone recommends the study of the Law of Nature, and of the Roman Law, in connection with the study of the particular grounds of our own. By Law of Nature, etc. he seems to mean the very study which I am now commanding.

Arguments  
in support of  
the study as  
an aid to  
practice.

For, certainly, a man familiar with such principles, as detached from any particular systems, and accustomed to seize analogies, will be less puzzled with Mahomedan or Hindoo institutions than if he knew them only *in concreto*, as they are in his own system; nor would he be quite so inclined to bend every Hindoo institution to the model of his own.

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And (secondly) without some familiarity with foreign systems, no lawyer can or will appreciate accurately the defects or merits of his own.

And as a well-grounded knowledge of the science whose uses I am endeavouring to demonstrate, would facilitate to the student the acquisition of the English Law, so would it enable him to apprehend, with comparative ease and rapidity, almost any of the foreign systems to which he might direct his attention. So numerous, as I have said, are the principles common to systems of law, that a lawyer who has mastered the law which obtains in his own country, has mastered implicitly most of the substance of the law which obtains in any other community. So that the difficulty with which a lawyer, versed in the law of his own country, apprehends the law of another, is rather the result of differences between the terms of the systems, than of substantial or real differences between their maxims and rules.

Now the obstacle to the apprehension of foreign systems which is opposed by their technical language, might in part be obviated or lightened to the student of General Jurisprudence, if the science were expounded to him competently, in the method which I shall endeavour to observe. If the exposition of the science were made agreeably to that method, it would explain incidentally the leading terms, as well as the leading principles, of the Roman or Civil Law. And if the student were possessed of those terms, and were also grounded thoroughly in the law of his own country, he would master with little difficulty the substance of the Roman system, and of any of the modern systems which are mainly derivatives from the Roman.

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### SECTION III.—ANALYSIS OF PERVERSING NOTIONS.

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#### LECTURE XII.

##### *Analysis of the term Right—Person, &c.*

By the analysis contained in the first six lectures determining the province of jurisprudence and thereby defining the term *law* in its strict sense, I have in part effected the object

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XII.

**PART I.**  
§ 8.

the necessity of which I adverted to in the last lecture, namely, of determining by careful analysis the meaning of the terms employed in the science which I am expounding. In further pursuance of that object, I shall now endeavour to unfold the essential properties of Rights: meaning by Rights, *legal rights*;—rights which are creatures of Law strictly or simply so called.

*Natural and Moral Rights, or Rights which are merely sanctioned religiously or morally.*

There are, indeed, Rights which arise from other sources: namely, from the laws of God or Nature, and from laws which are sanctioned morally. But these I shall not pause to examine formally, although I shall advert to them in the course of the ensuing Lectures. At present, I dismiss them with the following remarks. 1st, Like the Obligations to which they correspond, they are *imperfect*, in so far as they are not armed with the legal sanction. 2ndly, The Rights (if such they can be called) which are conferred by positive morality, partake of the nature of the source from which they emanate. So far as positive morality consists of laws *improper*, the rights which are said to arise from it are rights by way of analogy.

For example, rights derived from the Law of Nations are related to rights derived from positive Law, by a faint resemblance. They are neither armed with the legal sanction, nor are they creatures of Law established by determinate superiors. They are not therefore rights strictly so called. But, according to received language, they are called rights; thus, for example, we speak of rights created by treaty.

In attempting to explain the nature of a legal Right, I must advert to the import of the following terms:

1st, Law, Duty, and Sanction. For, though every law does not create a right, every right is the creature of Law. And, though every obligation and sanction does not imply a right, every right implies an obligation and a sanction.

2ndly, Person, Thing, Act and Forbearance. For rights reside in persons, and relate to persons, things, acts and forbearances, as the matter about which they are conversant.

3rdly, Injury, Wrong, or Breach of Obligation or Duty by commission or omission. For as rights imply obligations and sanctions, so do obligations or sanctions imply possible injuries or wrongs.

4thly, Intention and Negligence (including under the latter of these terms what may be called rashness or temerity). For every injury supposes intention or negligence on the part of the wrongdoer.

5thly, Will and Motive. For the import of the expressions 'will' and 'motive' is implied in the import of the expressions 'intention' and 'negligence.' And obligations and sanctions operate upon the will of the obliged, and are

*Ideas, the analysis of which is inevitably involved in that of right.*

thereby distinguished from the *compulsion*, which (for want of a better name) may be styled merely physical.

I shall also interpose an explanation of Political or Civil *Liberty*:—a term not unfrequently synonymous with *right*; but which often denotes simply *exemption from obligation*, conferred by *permission*. For it will be shown in the sequel that when the law only permits, it as clearly confers a right as when it commands.

While attempting to explain the import of the term 'Right,' and touching upon the import of the several terms or expressions which I have now enumerated, I shall advert to the ambiguities by which some of them are obscured. Each of these expressions is so implicated with the rest, that the explanation of any one of them involves allusions to the others. For this reason, the student, after a careful perusal of the analysis of pervading notions contained in this section of the present work, should reperuse in detail every part of the section so as to appreciate its bearing upon the whole.

**Every Law (properly so called) is a *Command*.**

By every command, an *Obligation* is, by virtue of the corresponding sanction, imposed upon the party to whom it is addressed or intimated.

Obligations  
or Duties are  
positive or  
negative.

Every Obligation or Duty (terms which, for the present, I consider as synonymous) is *positive* or *negative*. In other words, the party upon whom it is incumbent is commanded to do or perform, or is commanded to forbear or abstain.

A duty to deliver goods agreeably to a contract, to pay damages in satisfaction of a wrong, or to yield the possession of land in pursuance of a judicial order, is a positive duty. A duty to abstain from killing, from taking the goods of another without his consent, or from entering his land without his licence, is a negative duty.

I observe that *forbearances* have been styled by Mr. Bentham \* *negative services*. But the expression seems hardly authorized by established language. If you abstain from knocking me on the head, or from taking my purse, or from blackening my reputation, it can scarcely be said with propriety that 'you render me a service.' Bentham seems to have transferred to the *object* of a duty, an expression which applies correctly to the duty itself. For we may properly speak of a negative duty.

Forbearances  
cannot be  
styled with  
propriety  
negative  
services.

Duties may also be distinguished into *relative* and *absolute*.

A relative duty is incumbent upon one party, and answers to a right residing in another party. Where a duty

Duties are  
relative or  
absolute.

\* *Traité de Législation*, I. p. 154.

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§ 8.

is absolute, there is no right to which it answers. The definition of the latter is thus merely negative, and hence the full explanation of absolute duties is inevitably postponed to the explanation of rights, and the duties which answer to rights.

Rights imply  
*persons,*  
*things,*  
*acts,*  
and *forbearances.*

Since rights reside in *persons*, and since *persons, things, acts, and forbearances* are the subjects or objects of rights, I must advert to the respective significations of these various related expressions, before I address myself to rights, and to the obligations to which they answer.

Persons  
natural or  
fictitious.

Persons are divisible into two classes:—physical or natural persons, and legal or fictitious persons. The expression ‘physical’ or ‘natural’ is here used merely to distinguish persons, properly so called, from persons which are such by a figment. When I speak of ‘*persons*’ simply, I mean physical or natural persons.

Meaning of  
'physical  
'person,' or  
'person'  
simply.

By a physical or natural *person*, or, by a *person* simply, I mean *homo*, or a *man*, in the largest signification of the term: that is to say, as including *every* being which can be deemed *human*. This is the meaning which is given to the term *person*, in familiar discourse. And this, I believe, is the meaning which is given to it by the Roman Lawyers (from whose writings it has been borrowed by modern jurists) when they denote by it a physical or natural person, and not a legal or fictitious one.

This mean-  
ing unduly  
narrowed  
by some  
modern  
Civilians.

Many of the modern Civilians have narrowed this simple import of the term *person*.

They define a *person* thus: ‘*homo, cum statu suo consideratus:*’\* a ‘human being, invested with a condition or *status*.’ And, in this definition, they use the term *status* in a restricted sense: As including only those conditions which comprise *rights*; and as excluding conditions which are purely onerous or burthensome, or which consist of duties merely.

Agreeably to this definition, as so understood by them, a *person* is a human being invested with, or capable of *rights*.

But this I am convinced was not the notion attached to the term ‘*person*’ by the Roman Lawyers themselves, when they denoted by it a physical or natural person.

For not only is *status* in many passages of the classical jurists ascribed to slaves, but in all their divisions of persons slaves are considered as *persons*. The words ‘*persona*’ and ‘*homo*’ are, moreover, used by Gaius as well as in various passages of the Institutes and Digest of Justinian as synonymous expressions. ‘*Summa divisio de jure personarum, haec est: quod omnes homines aut liberi sunt aut*

\* Heineocii Recitationes, lib. I. tit. 8.

*servi.*' Again : 'Sequitur de jure *personarum* alia divisio. Nam quædam *persona* sui juris sunt ; quædam alieno juri subjectæ. Sed rursus earum *personarum* quæ alieno juri subjectæ sunt, aliae in potestate, aliae in manu, aliae in mancipio sunt. Videamus nunc de iis quæ alieno juri subjectæ sunt : Ac prius dispiciamus de iis qui in alienâ potestate sunt. In potestate itaque sunt *servi* dominorum.'\* Now, down to the time of the Antonines, slaves had *no rights*; and although under certain constitutions of these emperors they enjoyed some degree of protection against the violence of their masters, there is no trace of that circumstance having been adverted to by the institutional writers when they classed *slaves* amongst *persons*. *Homo* and *persona* are in the above passages applied indifferently, and it is clear that the word *persona*, as well in these as in many other passages which might be cited, is used in the familiar or vulgar sense, as denoting *any human being*.

The modern limitation of the term 'person' to 'human beings considered as invested with rights,' appears to have arisen thus: 1st, A *person* was defined by many of the modern Civilians (although there is no classical authority for the definition), as 'a human being bearing a *status* or condition.' 2ndly, The authors of the definition used the term '*status*' in a peculiar and narrow sense. They assumed that every *status* comprises *rights*, or, at least, capacities to acquire or take rights : whereas, as I shall more fully show in the sequel, *status* was applied by the Roman lawyers to various conditions of persons considered merely with regard to their incapacities.

The truth appears to be that the authors of the definition considered the term '*status*' as equivalent to the term '*caput*:' a word denoting conditions of a particular class: conditions which *do* comprise rights, and comprise rights so numerous and important, that the conditions or *status* of which those rights are constituent parts, are marked and distinguished by a name importing pre-eminence.

I am, therefore, justified by authority, as well as by the convenience which results from it, in imputing to the term *person* (as denoting a physical or natural person) the familiar or vulgar meaning ;—namely, as equivalent to *homo*, or 'man' in the largest signification of the term.

But, instead of denoting a man (or human being), *person* sometimes denotes the *condition* or *status* with which a man is invested. And taking the term in this signification, every human being who has rights and duties bears a *number* of persons. 'Unus homo sustinet plures personas.' For example, every human being who has rights and duties, is *citizen* or *foreigner* : that is to say, he is either a member of

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§ 3.

a given independent society, or he is not a member of that given independent society. He is also a *son*. Probably, he is *husband* and *father*. It may happen, moreover, that he is *guardian* or *tutor*. His *profession* or *calling* may give him distinctive rights, or may subject him to distinctive duties. And with the various conditions or *status* of citizen, son, husband, father, guardian, or tutor, he may combine the condition of judge, or of member of the supreme legislature, and so on to infinity.

The term 'person,' as denoting a condition or *status*, is therefore equivalent to *character*. It signified originally, a mask worn by a player, to mark the character which he bore in the piece: and is transferred by a metaphor to the character itself. By a further metaphor it is transferred from dramatic character to legal condition. For men as subjects of law are distinguished by *conditions*, just as players by the *characters* which they present. By the Greek commentators and translators, the equivalent for *persona* is *πρόσωπον*, which correctly renders both the original and the metaphorical meaning.

Fictitious or legal persons.

Fictitious or legal persons are of three kinds: 1st, Some are collections or aggregates of physical persons: 2ndly, others are *things* in the proper signification of the term: 3rdly, others are collections or aggregates of rights and duties. The *collegia* of the Roman Law, and the corporations aggregate of the English, are instances of the first: the *prædium dominans* and *serviens* of the Roman Law, is an instance of the second: the *hæreditas jacens* of the Roman Law, is an instance of the third.

The nature of legal persons is various, and the ideas for which they stand extremely complex. They are persons by a figment, and for the sake of brevity in discourse. By ascribing rights and duties to feigned persons, instead of the physical persons whom they in truth concern, we are frequently able to abridge our descriptions of them.

To take the easiest instance;—the *prædium dominans* and *serviens* of the Roman Law. A *servitus* or easement over one *prædium* resides in every person who occupies another *prædium*: meaning by a *prædium* a given piece of land, or a given building with the land on which it is erected. The servitude or easement in question (as, for instance, a right of way) is ascribed, by a fiction, to one of these *prædia*; and, by a similar fiction, a duty to bear the exercise of the servitude is imputed to the other. The first is styled *dominans*; the latter *serviens*. In English Law we should say that the easement (i.e. the *jus servitutis*) is appurtenant to lands or messuages. In truth, the right resides in every physical person who successively owns or occupies the *prædium* styled *dominans*: and avails against every physical person who successively owns or occupies the *prædium* styled

*seriens*. But by imputing these rights and obligations to the *prædicta* themselves, and by talking of them as if they were persons, we express the rights and duties of the persons who are really concerned, with greater conciseness.

To take another instance. *Hæreditas jacens* was a term employed in the Roman Law to denote the whole of the rights and obligations which, at any instant of time during the period which intervenes between the death of the testator or intestate, and the heir's acceptance of the inheritance, would have devolved upon an heir at that instant entering upon the inheritance. This mass of rights and obligations was by a fiction styled a person, and this fiction was a convenient way of expressing that any benefit accruing to the inheritance during the above period, would enure to the benefit of the heir.

As intimately concerning persons I shall here interpose a remark on the meaning of *liberty*.

Political  
and Civil  
Liberty.

Freedom, Liberty, are terms denoting the absence of restraint. Civil, Political, or Legal Liberty, is the absence of *legal* restraint, whether such restraint has never been imposed, or, having been imposed, has been withdrawn.

Liberty and Right are synonymous; since the liberty of acting according to one's will would be altogether illusory if it were not protected from obstruction. There is however this difference between the terms. In Liberty, the prominent or leading idea is, the absence of legal restraint: whilst the security or protection for the enjoyment of that liberty is the secondary idea. Right, on the other hand, denotes the protection and connotes the absence of Restraint.

If the protection afforded by the Law be considered as afforded against private persons, the word Right is commonly employed. If against the Government, or rather against some member of the Government, Liberty is more frequently used: e.g. the Liberties of Englishmen. Liberty and Right are not however always coextensive, since the security for the enjoyment of the former may in part be left to the moral and religious sanctions.

(*Sed quære.*) Whether Liberty can ever mean anything but the right to dispose of one's person at pleasure? Liberty or Freedom to deal with an external subject seems, however, to be equivalent to 'Right to deal with it.' In this sense liberty is included in the term 'personal security.'

On the whole, Right and Liberty seem to be synonymous:—either of them meaning, 1st, permission on the part of the Sovereign to dispose of one's person or of any external subject (subject to restrictions, of course); 2ndly, security against others for the exercise of such right and liberty.

Where protection is afforded, *Right* is the proper word. As against the sovereign, there can be no legal right.

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§ 3.

Physical freedom is the absence of external obstacles; i.e. the absence of causes which operate independently of the will. Moral freedom is the absence of motives of the painful sort.

### LECTURE XIII.

#### *Things and their relation to Rights.*

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XIII.

Thing in the  
strict and  
primary  
sense of the  
word.

HAVING considered the import of *person*, I proceed to the significations of *Thing*, *Act* and *Forbearance*.

*Things* are such permanent objects, *not being persons*, as are sensible, or perceptible through the senses. Such (for example) is a field, a house, a horse, a garment, a piece of coined gold. Such is a quantity of coined or uncoined gold, determined or ascertained by number or weight. Such is a quantity of cloth, corn, or wine, determined or ascertained by measure.

Things are opposed, on the one hand, to *persons*; and, on the other, to the *acts* of the persons, and to *facts* or *events*.

Things resemble persons in this: That they are permanent objects which are perceptible through the senses. They differ from persons in this: That *Persons* are invested with rights and subject to obligations, or, at least, are capable of both: *Things* are essentially incapable of rights or obligations; although (by a fiction) they are sometimes considered as persons, and rights or obligations are ascribed or imputed to them accordingly.

They differ from facts or events in this: That things are permanent external objects; whilst facts or events are transient objects. In drawing the line I am far from aspiring to exactness of definition. If I endeavoured to define exactly the meaning of 'permanent object,' I should enter upon the perplexing question of sameness or identity. If I endeavoured to define exactly the meaning of 'sensible object,' I should enter upon the interminable question about the difference between mind and matter, or percipient and perceived. And, in either case, I should thrust a treatise upon Intellectual Philosophy into a series of discourses upon Jurisprudence. I have accordingly indicated rather than determined the boundary, and must leave my hearers to settle it for themselves, according to their own fashion. The discretion which prompts my reserve will be understood by those who have turned a portion of their attention to the Philosophy of the Human Mind, and will meet with approbation rather than censure.

But, to avoid a very perplexing ambiguity, I must note two distinct significations of 'permanent' and 'transient.'

The expression '*permanent*' when applied to a sensible object in the sense already employed imports that the object so described is perceptible *repeatedly*, and is considered by those who repeatedly perceive it, as being one and the same object. Thus, the horse or the house of to-day is the horse or house of yesterday; in spite of the intervening changes which its appearance may have undergone.

The *transient* sensible objects which rank with facts or events, are *not* perceptible repeatedly. They exist for a moment: disappear: and never recur to the sense, although they may be recalled by the memory. Taking the terms in these significations, all *things* are *permanent*, and no *things* are *transient*.

But, taking the terms in other significations, things may be distinguished into *permanent* and *transient*, or into such as are more permanent and such as are less permanent. For some are more enduring; others are less enduring. Some retain the forms which give them their actual names for a longer, others for a shorter period.

The purpose of this last distinction will appear clearly when I consider the kinds and sorts into which things are divisible: especially the *kind* of things which have been styled *fungible*, and the *sort* of fungible things *quaer usu consumuntur*.

Resuming the definition of a thing, I mean by a *thing* (as contradistinguished from an *event*) any permanent external object *not* a person—meaning by 'permanent,' 'capable of being perceived *repeatedly*'.

From the import of the term *thing* (in the strict sense of the word and as opposed to *person* and *event*) I proceed to certain other meanings of the term, which, unless distinguished, are apt to perplex the student.

And, first, '*res*' (or *thing*) as used by the Roman Lawyers is frequently extended from *things* strictly so called, to *acts* and *forbearances* considered as the objects of duties and of the corresponding rights. For example, If you are bound by virtue of a contract to *do* or to *forbear* from certain acts, the acts or forbearances to which you are *obliged*, and to which the opposite party has a corresponding *right*, are *res* or *things* in this extended sense of the word.

Things as  
signifying  
acts and for-  
bearances.

A more remarkable and a more perplexing use of the term is the following.

Things as  
divided into  
corporeal and  
incorporeal.

Things are divided by the Roman Lawyers into corporeal and incorporeal.

By 'Corporeal' things (*res corporales*), they understood, according to the philosophical jargon which they borrowed from the Greeks, 'Tangible' things (*res quaer tangi possunt*), meaning by 'tangible,' sensible or perceptible through the

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§ 8.

senses. For in the language of the Stoics and also of the Epicureans the various sensations were considered as modifications of the sensation of touch.\*

Under *corporeal* things are included,

1st, Things strictly so called: that is to say, permanent external objects *not* persons. 2ndly, Persons considered as the subjects of rights and duties residing in, or incumbent upon others. 3rdly, Acts and Forbearances, considered as the objects of rights and obligations. To forbearances indeed the term *res corporales* will not apply strictly, but is extended to them partly for convenience and partly because the *acts* to be forborne are perceptible by the sensea.

By 'incorporeal things,' they understood rights and obligations themselves: 'Ea quae in jure consistunt: velut 'jus hereditatis,' 'jus utendi fruendi,' 'jus servitutis,' 'obligationes, quoquo modo contractae.'

In the language then of the Roman Lawyers, the term *res* has two significations which are widely different. 1st, It denotes Things, Acts, and Forbearances, and sometimes Persons, considered as the subjects or objects of rights and obligations. 2ndly, It denotes not only these, but Rights and Obligations themselves. In this larger sense the word in fact embraces the whole matter with which *laws* are conversant.

In the English Law, we have this same jargon about 'incorporeal things' (derived from the Stoical Philosophy through the Roman Law), applied less extensively. With us, *all* rights and obligations are not *incorporeal things*; but certain rights are styled *incorporeal hereditaments*, and are opposed by that name to *hereditamenta corporeal*. That is to say, *rights* of certain kinds are absurdly opposed to the *things* (strictly so called) which are the objects of rights of other kinds. A corporeal hereditament is the thing itself which is the subject of the right; an incorporeal hereditament is not the subject of the right, but the right itself. The subject of the right called an incorporeal hereditament is often corporeal, e.g. the produce which is the subject of the right of tithe.

I observed, in my last Lecture, that the slave is styled by the Roman Lawyers a 'person.' But considered as the subject of the *dominion* which resides in the master (a right which the master can assert against the rest of the world), he was sometimes styled a *thing*. For example, If unjustly

\* 'Pondus uti saxis, calor ignibus, liquor aquai  
Tactus corporibus cunctis, intactus Inani.'

• Tactus enim, Tactus, proh Divum numina sancta !  
Corporis est sensus, vel cum res extera sese  
Insinuat, vel cum iedit, que in corpore nata est.'

Lucretius, Lib. I. & II.

detained by a third party, the master might recover him by that peculiar action which is styled *rei vindicatio*. Their application of the word *res* in this sense was capricious. For the action styled *rei vindicatio* could not be brought by the father for the purpose of recovering his son, although the *patria potestas* (or right of the father in the son) was closely analogous to the dominion of the master. If the slave considered as the object of rights be termed a thing, there is no reason why any person considered from a similar point of view should not be so termed.

There are however very few cases in which the slave is styled a thing (even when he is considered as the *subject* of the master's dominion). Generally speaking, he is styled *homo*, or *servilis persona* (even when considered under that aspect): For instance, when he is considered as the subject of the ancient and formal conveyance called *mancipatio* (Gaius, I. §§ 119, 120).

Having made these general remarks on the import of the term '*thing*', and attempted to explain the distinction between things corporeal and things incorporeal, I will pass in review certain other divisions between things, which are made in the Roman and English law.

Permanent sensible objects which are not persons are divided into things moveable and things immovable.

Physically, Moveable things are such as can be moved from the places which they presently occupy, without an essential change in their actual natures.

Physically, Immovable things are such as cannot be moved from their present places; or cannot be moved from their present places without an essential change in their actual natures. A field is an example of the first. A house, a growing tree, or growing corn is an example of the second.

But things which are physically moveable may be considered in law immovable by reason of their intrinsic character and use, as the key of a door, or any essential part of a fixed machine.

Sometimes also by reason of a design or intention extrinsic to their proper character or use; e.g. by the doctrines of English Equity, money directed to be laid out in land, will, during the subsistence of the trust, descend like land to the heir.

Another division of sensible permanent things is, into things determined specifically or individually, and things which are merely determined by the classes to which they belong: e.g. The field called Blackacre, or *a* field. This or that horse, or *a* horse. A bushel of corn, a yard of cloth, a pound of gold, a given number of guineas; or the bushel of corn contained in such a bag, or the yard of cloth or the pound of gold bearing such a mark, or the ten specific guineas now in your purse.

Other distinctions among things in established systems of law.

Moveable and immovable.

Things determined specifically and things determined by their kind.

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In the language of the Roman Lawyers, a thing individually determined is styled '*species*.' A thing which is merely determined by the class to which it belongs, is styled '*genus*.' Sometimes, *genus* signifies the class of things, and the indeterminate individual belonging to the determined class is styled '*quantitas*:' though the term *quantitas* is often limited to indeterminate things of determinate classes, such as *mensurā, numero, vel pondere constant*: As, to a bushel of corn, a pound of gold, and so on. The thing is determined by mensuration as well as by kind, although it is not determined specifically or individually.

The terms *species* and *genus*, in the language of jurisprudence, have therefore a meaning different from that which they bear in the language of logicians. In the language of logicians, a *genus* is a larger class, and a *species* is a narrower class contained by the *genus*. As animals are a *genus*, men are a *species* of animals.

In the language of jurisprudence, *genus* denotes a *class* (whether it be a *genus* or *species* in the language of logicians), or it denotes an individual or portion not specifically determined, belonging to a determined class. Hence the expression, 'specific legacy, specific performance.'

Allied to the distinction between *species* and *genus*, or *species* and *quantitas*, is the distinction of things into *fungible* and *not fungible*.

Where a thing which is the subject of an obligation (i.e. which one man is bound or obliged to deliver to another) must be delivered *in specie*, the thing is not fungible: i.e. that very individual thing, and not another thing of the same or another class, in lieu of it, must be delivered.

Where the subject of the obligation is a thing of a given class, the thing is said to be fungible: i.e. the delivery of any object which answers to the generic description will satisfy the terms of the obligation. 'In genere suo functionem recipiunt:' meaning that the obligation is performed by the delivery of *genus* or *quantitas*:—'Una fungitur vice alterius.' In the language of the German jurists, fungible things are styled '*vertretbar*'—representable; a thing whose place may be supplied by another.

Things are fungible or not fungible, not in their own nature, but with reference to the terms of the given obligation. Fungible things are often confounded with things *quae usu consumuntur* because these, for obvious reasons, are usually sold *in genere*, not *in specie*. But these things may be the objects of a specific obligation. I may be bound to deliver to you, not only so much wine, but that specific parcel of it now lying in my cellar, and in such a corner of it. Again, things which are not consumed by use may be the object of a generic obligation. A farm, a house, might for instance, be devised generically, though in English law

Fungible and  
not fungible.

the bequest would probably be void for uncertainty. But in the writings of the Roman Lawyers there are actual instances of facts of the kind.

Legr.  
XIII.

This distinction is of considerable importance in practice with reference to performance *in specie* or recovery *in specie*. Almost the only ground for enforcing specific performance is, that nothing else can completely supply the place of that very thing for which the party contracted. Where it can, there is no reason for enforcing the contract *in specie*.

In English Equity, a specific delivery is, generally speaking, not enforced unless the subject of the contract is land: although contracts to deliver moveable objects have been specifically enforced, because the objects were of so peculiar a nature that they could not be replaced. Such was the case of the Pusey horn, an object so specific and so completely *sus generis*, that the party never could have replaced it. Neither is specific delivery enforced by our Common Law, although by the C. L. P. Act 1854, § 78, a discretion is given to the judge to enforce specific delivery in an action for the wrongful detention of a chattel.

Things were divided in Roman Law into *res mancipi* and *res nec mancipi*. This distinction turns on forms of conveyance. *Res mancipi* were things which could only be aliened by a certain mode of conveyance. If they were not conveyed by the prescribed form, the party could only acquire them by *usucaption*, working on his actual possession. The mere conveyance imparted no interest to him.

*Res mancipi  
and res  
nec mancipi*

Things are again divided into *res singulae* and *universitates rerum*; things which are themselves individual and single, and cannot be divided without completely destroying their actual nature, and lots or collections of individual things. A sheep belongs to the first class, a flock of sheep to the second. This is not a distinction without a difference. If a man contracts to deliver so many sheep, and if he contracts to deliver a flock consisting of that number of sheep, his legal position is not the same in the two cases. If some of the sheep die in the interval, he must yet, in the first case, deliver the stipulated number; in the second, he need not, because you bought them in the gross.\*

*Res singulae  
and universi-  
tates rerum*

\* Intermediate between the two cases is a contract such as the sale of cotton to arrive, according to the usage of the Liverpool market, at that stage of the transaction where the bales have been invoiced, but not weighed over. It is a sale of specific bales with an implied engagement to replace any that may be lost or damaged with others of the quality specified. The precise nature of the contract becomes important when a question arises as to *periculum rei venditae*. In the contract here instanced it appears to be the understanding of the market that the risk is transferred on the bales respectively being weighed over or 'passing the scale.' And this understanding (being proved) has been held to constitute a

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§ 2.

The chief reason for defining and distinguishing things in the law, or in the expositions of it, is in order that dispositions of things and contracts relating to them may be facilitated; and that parties may know the effect of using such and such expressions in contracts and conveyances. It is important that the meaning of such terms as *messuage*, for instance, should be practically settled, in order that the import of the words used in a contract, for example, may be exactly known. There are several cases in our law books turning on that very question. What does a party dispose of, by disposing of his *furniture*, or by disposing of all his *effects*? These are questions which the law must determine: that is, the law must determine the meaning it will attach to the words if the parties have not explained clearly the meaning which they annex to them; so that a person may know what construction the Courts of Justice will put upon those names.

In our conveyances, we make up for the indefiniteness of the general description, by attaching to the term which ought to convey the whole meaning a list of as many of the parts which fall under it as we can think of; a sort of drag net, to comprehend everything which happened to be omitted out of the comprehension of the one general name. This would be avoided if the exact import of those single names were specially determined by the legislator.

*Distinction  
between jus  
rerum and  
jus per-  
sonarum  
briefly intro-  
duced.*

I take this occasion of recalling to your attention the double meaning of *persona* in the Roman law as signifying, sometimes a physical or real person, and sometimes, *status* or condition: for the purpose of observing that the last acceptation of *persona*, combined with that of *res* as denoting in certain cases rights and obligations, throws considerable light on the celebrated distinction between *jus rerum* and *jus personarum*; phrases which have been translated so absurdly by Blackstone and others—*rights of persons* and *rights of things*. *Jus personarum* did not mean *law of persons* or *rights of persons*, but *law of status* or *condition*. A person is here not a physical or individual person, but the *status* or condition with which he is invested. Gaius, when purporting to give the title or heading of this part of the law, has entitled it thus, ‘*De conditione hominum*:’ and Theophilus, in translating the Institutes of Justinian from Latin into Greek, has translated *jus personarum*—*ἱ τῶν προσώπων διαιρέσις*—*Divisio personarum*: understanding evidently by *persona* or *πρόσωπον* not an individual or physical person, but the *status*, condition, or character borne by physical persons. The *law of persons*, as thus understood, is the *law of status* or condition; the *law of things* is the *law*

of rights and obligations, considered in a general manner and as distinguished from those peculiar collections of rights and obligations which are styled conditions, and considered apart.

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XIII.

From the same ambiguity arose the mistake of supposing that *jura in rem* must have something to do with things; whereas the phrase really denotes rights which avail *generally* as distinguished from those which avail only against some determinate individual.

## LECTURE XIV.

### *Act and Forbearance. Jus in rem—in personam.*

In the two preceding Lectures I entered upon the analysis of the term 'Right,' and considered the term 'person' and the term 'thing,' in their primary and strict import, as well as in certain secondary meanings which have been assigned to them by writers on jurisprudence. I also adverted to the terms 'Act' and 'Forbearance.' In the present Lecture I shall further define 'Act' and 'Forbearance,' and shall consider briefly an important distinction which obtains between rights themselves—a distinction of which we must seize the general scope or import, before we can understand, and can express adequately and correctly, that nature or essence which is common to *all* rights.

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XIV.

Reverting to the strict import of the terms *person* and *thing*; persons and things may be distinguished from other objects, in the following manner:—1st. Each is an object perceptible by sense: 2ndly. is capable of being perceived *repeatedly*: and 3rdly. is considered by him who repeatedly perceives it as being, on those several occasions, *one* and the *same* object.

Persons and  
Things.

Events may be distinguished from persons and things in the following manner. 1. Not every event is a *sensible* object. Of events, *some* are perceptible by sense; but *some* are determinations of the will, or phases of mental activity which are not immediately perceptible to the senses of persons other than the individual whose will or mind is conceived of as in operation.

Events.

2. An event perceptible by sense (like every other event) is *transient*. That is to say, not perceptible *repeatedly*. It exists for a moment; then ceases to exist; and *never recurs* to the sense, although the memory may recall it.

Events are simple or complex. A simple event is one which is considered incapable of analysis. A complex event is a number of simple events, marked (for the sake of brevity) by a collective name.

Events are simple or complex.

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§ 2.

Import of  
'fact' and  
'incident.'

The terms 'fact' and 'incident' are sometimes synonymous with the term 'event.' But, not unfrequently, 'fact' is restricted to human acts and forbearances, and 'incident' employed in a sense to which I shall advert hereafter. 'Fact' and 'incident' are therefore ambiguous. To denote the objects I am now distinguishing from 'person' and 'thing,' I prefer the term 'event,' which is adequate and unambiguous.

Acts and Forbearances.

Act.

Forbearance.

The class of events to which I particularly advert at present, are *human acts and forbearances.*

Bentham has distinguished acts into internal and external,\* meaning by 'internal acts,' *determinations of the will.* Rejecting this distinction as superfluous, I employ the term 'determination of the will' as sufficient to denote the class of objects called by Bentham 'internal acts,' and use the word 'acts' to denote only *such motions of the body as are consequent upon determinations of the will.*

A Forbearance is the *not doing* some given external act, and the *not doing it in consequence of a determination of the will.* The import of the term is, therefore, double. As denoting the determination of the will, its import is *positive.* As denoting the inaction which is consequent upon that determination, its import is *negative.*

This double import should be marked and remembered. For mere inaction imports much less than *forbearance* or abstinence from action.

And here I dismiss for the present the terms 'Act' and 'Forbearance.' It already appears that a complete determination of their meaning involves a determination of the

\* 'In the second place, acts may be distinguished into *external* and *internal.* By external are meant corporal acts; acts of the body: by internal, mental acts; acts of the mind: Thus, to strike is an external or exterior act: to intend to strike, an internal or interior one.'—*Bentham, Principles, etc.* p. 70.

I have followed the author's final decision in rejecting Bentham's extended use of the term 'acts.' I must, however, remark that if the author intends to exclude from the category of acts all processes that do not immediately result in a *palpable* bodily movement, he is inconsistent.

The author elsewhere (p. 222 *post*) implicitly recognizes *meditation* as an act: Further (*ibid.*), while he regards the conviction produced by evidence as a case of physical compulsion, he recognizes that non-belief may be blameable, if the result of insufficient examination, refusal to examine, &c. The process of examination is therefore the object of a duty, and hence, according to his own analysis, it is an act.

It is difficult to see why *cogito* should not be classed with acts, just as much as *curro* or *hauro.* And such a use of the term act is not at variance with established language. The *consilium* or *cogitatio* has even been recognized by positive law as a crime, provided it is evidenced by an *overt act*, a term devised, as it appears to me, not without psychological insight. (See p. 216 *post*.)—R. C.

meaning of 'Will.' I accordingly postpone further consideration of these terms until I have considered the meaning of 'Will' and of the inseparably connected term, 'Intention.'

I now proceed to analyze an important distinction which obtains between rights, and which, for reasons to be presently adduced, I mark by the phrases 'rights *in rem*', 'rights *in personam*'.

But I must interpose an explanation of certain terms, which I have already employed and shall again have occasion to employ, and which have an important bearing on the distinction to be here analyzed.

I have already (p. 167 *ante*) spoken of acts and forbearances as the *objects* of duties, and I have spoken of persons and shall also speak of things as the *subjects* of rights and duties. When I style acts and forbearances the *objects* of duties, or of the rights (if any) which answer to those duties, I mean that the duties are imposed upon the persons obliged in order that they may act or forbear in the manner specified. When I style persons or things the *subjects* of rights, I mean that the acts or forbearances which are the *objects* of those rights relate to those persons or things; and I employ the expression only in regard to those rights which avail against persons generally; e.g. when I speak of the right of the master in or to his servant, the object of the right is the forbearance, at the hands of all other persons, from so meddling with the servant as to prejudice the master's enjoyment of his services. Here I call the servant the *subject* of the right. It is to be observed, as I shall show hereafter, that this right is entirely distinct and separate from the master's right as against the servant—the right, namely, which answers to the duty of the servant to do and forbear according to his contract. So when I speak of the right of property in a horse or in a field, I call that horse or that field the *subject* of the right.\*

I must also interpose one explanation further. When I say that a right *avails* against a person or persons, what I mean is this. Every right resides in a person or persons, and has for its object one or more acts or forbearances at the hands of another or other persons. To express shortly the last part of this proposition I say that the right *avails* against the person or persons last mentioned.

Important  
distinction  
between  
rights, Jus in  
rem, Jus in  
personam.

\* It may be noted that the author in using the word *subject* in this sense, advisedly differs from the German jurists, who commonly call the person in whom the right resides, the *subject* of the right. The author elsewhere suggests (p. 787 of larger edition) that this use of the word *subject* led them into the confusion mentioned in a former note (p. 118 *supra*); fancying that it was connected with the use of the term *subjective* in the Kantian philosophy.—R. C.

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§ 3.

I proceed to distinguish 'rights *in rem*' from 'rights *in personam*', which I do shortly as follows:—

*Definition.—Rights IN REM are those which avail against persons generally: rights IN PERSONAM are those which avail exclusively against certain or determinate persons.*

This distinction is one which pervades the writings of the Roman lawyers; and is assumed by the Roman Institutional critics as the main groundwork of their arrangement. Nevertheless, the terms *jus in rem*—*jus in personam*, are not explicitly adopted by these writers to indicate the distinction. These terms were devised by the Civilians who wrote subsequently to what has been termed the revival of the study of Roman Law, and I adopt them as the terms which most adequately and least ambiguously express the distinction.\* '*Jus in personam certam sive determinatam*' is expressive and free from ambiguity. Cut down to '*jus in personam*' it is also sufficiently concise. '*Jus in rem*', standing by itself, is ambiguous and obscure. But when it is contradistinguished to *jus in personam*, it catches a borrowed clearness from the expression to which it is opposed.

And here I must make a remark as to what *jus in rem* does *not* mean. Recurring to the phrase I have already used in styling persons and things the *subjects* of rights; that phrase might be varied by saying that the right exists *over*, *in*, or *to* a thing. And, as I have already indicated, I employ these expressions only in the case of rights which avail against persons generally.† The student might be apt to infer that *jus in rem* means a right *over*, *in*, or *to* a thing. He would be wrong. I do not say that the ideas are historically unconnected; but however that may be, the phrase *in rem* as here used, denotes not the *subject* but the *compsas*

\* The terms which were employed by the Roman lawyers themselves, with various other names for the classes of rights in question, will be found briefly stated in a note at the end of this Lecture.—R. C.

† I have here, although Austin does not *explicitly* so state it, treated the restriction of the phrase 'right *over* a person or thing' to those rights which avail against persons generally, as perfectly arbitrary. The reason for so restricting the expression appears to be that it is convenient to divide rights *in rem* into those which have and those which have not persons or things as subjects, whereas there is no corresponding convenience in so dividing rights *in personam*. But there seems no necessary ground for the restriction. Suppose, for instance, I am in possession of a piece of ground with a merely equitable title. Why should my right against persons generally to forbear from trespass, be more a right *over* or *in* the land, than my right to compel the person having the legal estate to grant a conveyance?—R. C.

of the right. It denotes that the right in question *avails against persons generally*; and *not* that the right in question is a right *over a thing*. For many of the rights which are rights *in rem* are either rights over or to persons, or have no subject (person or thing).

*Corollary to definition.*—These two classes of rights are further distinguishable thus. The duties which correlate with rights *in rem*, are always *negative*: that is to say, they are duties to forbear or abstain.\* Of the obligations which correlate with rights *in personam*, *some* are negative, but *some* (and *most*) are *positive*: that is to say, obligations to do or perform.

I shall now briefly give a few instances to illustrate the character of the rights comprised in these two great classes respectively.

Instances of rights *in rem* are 1st, *Ownership* or *property*. This is a term of such complex or various meaning that I must defer the full and accurate explanation of it. But, for the present purpose, the following is a sufficient definition of Ownership or Property; ‘the right to *use* or *deal with* some given subject, in a manner, or to an extent, which, though not unlimited, is indefinite.’

Illustrations  
of the dis-  
tinction  
between  
*jus in rem*  
and *jus in  
personam*.  
Property.

Now in this description it is necessarily implied, that the law will protect or relieve the owner against every disturbance of his right. That is to say, *all* other persons are bound to *forbear* from acts which would prevent or hinder the enjoyment or exercise of the right.

But here the duties which correspond to the right of property terminate. Every *positive* duty which may happen to concern or regard it, and every negative duty regarding it which binds exclusively certain persons, is not a duty properly corresponding to the right of property, but to some right collateral to the right of property, and flowing from some incident specially binding the person upon whom the duty is incumbent:—e.g. from a covenant with the owner; or from a breach of one of the negative duties which properly correspond to the right of property, as a trespass laying the trespasser under the duty to make reparation.

Ownership or Property is, therefore, a *species* of *jus in rem*. It is a right residing in a person, over or to a person or thing, and *availing against other persons universally or generally*. The obligations implied by it are also negative as well as universal.

\* This indeed is almost a necessary consequence of the definition. For if rights of the class *jus in rem* involved positive duties every such duty would either set the whole world in motion, or involve universal liability to punishment; a result which it would be absurd to contemplate.—R. C.

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Where the subject of a right *in rem* happens to be a person, the position of the party who is invested with the right wears a double aspect. He has a right (or rights) *over* or *to* the subject as against other persons generally. He has also rights (*in personam*) against the *subject*, or lies under *obligations* (in the sense of the Roman lawyers) towards the subject. But this is a matter to which I shall revert.

**Servitus.** 2ndly. The *Servitutes* of the Roman law, and of the various modern systems which are modifications of the Roman law, may also be adduced as examples of rights *in rem*.

*Servitus* (for which the English ‘Easement’ is hardly an adequate expression) is a right to *use* or *deal with*, in a given and definite manner, a subject *owned* by another. Take, for instance, a Right of Way over another’s land. According to this definition, the capital difference between *ownership* and *servitus* consists in this, that in the former case the right of dealing with the subject is larger and indeed *indefinite*, in the latter case narrower and *determinate*. But each is a right *in rem*. For *servitus* avails against *all mankind* (including the owner of the subject). It implies an obligation upon *all* (the owner again included) to *forbear* from every act inconsistent with the exercise of the right.

But this *negative* and *universal* duty, is the only obligation which *correlates* with the *jus servitutis*. Every *special* obligation which happens to regard or concern it is a duty answering, not to the *jus servitutis*, but to some right extraneous or merely collateral to it; e. g. the *owner* of the subject may have *granted* an easement over it and covenanted with the grantee for quiet enjoyment. The grantor here lies under *two* duties which are completely distinct and disparate, although the objects of the duties are the same: one of these duties arises from the *grant*, and thereby he is bound, like the rest of the world, to forbear from molesting the grantee in exercise of the right created by the grant; the other arises from the contract by which he is specially bound.

**Examples of rights *in personam*.**

1st. A right arising out of a contract.

Instances of rights *in personam* are:—

1st. A right arising from a *contract*.

Rights, which, properly speaking, arise from *contracts*, avail against the parties who bind themselves by contract, and also against the parties who are said to *represent* their persons: that is to say, who succeed on certain events to the aggregate or bulk of their rights; and, therefore, to their *faculties* or means of fulfilling or liquidating their obligations. But as against all other persons the rights which properly speaking arise from contracts have no force or effect: although by a confusion of thought to which I shall revert, rights *in rem* are sometimes imagined to pro-

ceed from contract. This occurs in the case where the same transaction bears the double character of a contract and a conveyance. To avoid in the mean time the effect of this confusion, I assume in the following example, that we are considering the case on the principles of the Roman law or of some system of law consciously based on the Roman law.

Suppose you contract with me to deliver some moveable (a horse, a garment, or what not); but, instead of delivering it to *me*, in pursuance of the contract, that you sell and deliver it to *another*. Now, here, the rights which I acquire by virtue of the Contract or Agreement are the following. I have a right to the moveable in question, as against you *specially* (*jus ad rem acquirendam*). So long as the ownership and the possession continue to reside in *you*, I can force you to deliver me the thing in specific performance of your agreement, or, at least, to make me satisfaction, in case you detain it. After the delivery to the *buyer*, I can compel you to make me satisfaction for your breach of the contract with *me*. But here my rights end. As against strangers to that contract, I have no right whatever to the moveable in question. And, by consequence, I can neither compel the buyer to yield it to *me*, nor force him to make me satisfaction as detaining a thing of *mine*. For ‘*obligationum substantia non in eo consistit ut aliquid nostrum faciat, sed ut alium nobis obstringat ad dandum aliquid, vel faciendum, vel praestandum.*’ (See the admirable Title in the Digests, ‘*De Obligationibus et Actionibus*,’ xliv. 7.) But if you deliver the moveable, in pursuance of your agreement with *me*, my position towards other persons generally assumes a different aspect. In consequence of the Delivery by *you* and the concurring Apprehension by *me*, the thing becomes *mine*. I have now *jus in rem*:—a right to the thing delivered, as against all mankind: a right answering to obligations *negative* and *universal*. And, by consequence, I can compel the restitution of the subject from *any* who may take and detain it, or can force him to make me satisfaction as for an injury to my right of ownership.—‘*Ubi rem meam invenio, ibi eam vindico; sive cum ea persona negotium mihi fuerit, sive non fuerit. Contra, si a bibliopolâ librum emi, isque eum nondum mihi tradidum venderiderit iterum Sempronio, ego sane contra Sempronium agere nequeo; quia cum eo nullum mihi unquam intercessit negotium: sed agere debeo adversus bibliopolam a quo emi; quia ago ex contractu, i.e. ex jure ad rem.*’—Heineccii *Recitationes*, lib. ii. tit. I. § 331.

2ndly. *Rights of action*, with all other rights founded upon *injuries*, are also *jura in personam*. For they answer to obligations attaching upon the *determinate* persons, from whom the injuries have proceeded, or from whom they are apprehended.

2ndly. A  
right  
founded on  
an injury.

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It is true that difficulties have arisen about the nature of Actions *in rem*; i.e., those Actions (or, rather, those Rights of Action) of which the *ground* is an offence against a right *in rem*, and of which the *intention* (scope, or purpose) is the *restitution* of the injured party to the exercise of the violated right. But these and other difficulties besetting the Theory of Actions, appear to have sprung from this; that the nature of the right which is affected by the injury, and the nature of the remedy which is the purpose of the action, are frequently blended and confounded by expositors of the Roman Law. And this confusion of ideas absolutely disparate and distinct, seems to have arisen from the abridged shape of the expressions by which rights of action are commonly denoted. By an *ellipsis* commodious and inviting, but leading to confusion and obscurity, a name or phrase applicable to the violated right is often extended improperly to the remedy. Thus, the phrase '*in rem*' is extended to certain *actions*, which, though they are necessarily directed against determinate persons, are grounded upon violations of rights availing against all mankind. And, thus, certain *actions* are styled '*ex contractu*', although they properly arise from the *non-performance* of contracts, and are only remote and incidental consequences of the contracts themselves.\*

Rights *in personam* are rights to acts and forbearances and to nothing more.

All rights *in personam* are rights to acts and forbearances and to nothing more. The species of rights which have been termed *jus ad rem* form no exception. What has been styled *jus ad rem* is an elliptical expression, and is more properly rendered *jus ad rem acquirendum*, or still more completely, *JUS IN PERSONAM AD JUS IN REM ACQUIRENDUM*. That is to say, the person entitled has a right, availing against a determinate person, to the *acquisition* of a right availing against the world at large. And by consequence, his right is a right to an *act* of conveyance or transfer on the part of the person obliged.

\* I have taken this passage from the Notes on Tables (p. 969 of former edition), where the author's meaning seems more fully expressed than in the corresponding passage of the Lectures. But I think the author here inverts the historical sequence of ideas. He has himself observed that the phrase *in rem* is not applied by the Roman lawyers themselves to describe a class of rights. But it is applied by them to a leading division of *actions*. The simple and obvious explanation seems to be that the phrase was suggested by the circumstance that in the typical and most important of these actions, the *vindicatio rei*, the result was the specific restitution of *the thing*. The meaning of *in rem* as denoting *generality* of a right, is, I think, a secondary meaning, due in the first place, to the association of the *vindicatio rei* with *dominium*—the right which gave rise to that action—and in the second place, to the extension of the term *dominium* to that large sense which includes the whole class of rights comprehended by the civilians under the term *jus in rem*.—R. C.

I now revert to the confusion created by a class of cases which obscure the otherwise broad and distinct line of demarcation between these two great classes of rights. Rights *in rem* sometimes arise from an instrument which is called a contract, and are therefore said to arise from a contract: the instrument in these cases wears a double aspect, or has a twofold effect; to one purpose it gives *jus in personam* and is a contract, to another purpose it gives *jus in rem* and is a conveyance. When a so-called contract passes an estate, or, in the language of the civilians, a right *in rem*, to the obligor, it is to that extent not a contract but a conveyance; although it may be a contract to some other extent and considered from some other aspect.

For example, by the English law the sale of a specific moveable is a conveyance, and transfers the right *in rem*. [But from the exigencies of commerce this right *in rem* is shorn of some of the incidents of a full right of property, for instance, by the operation of the rules both of law and equity as to the rights of unpaid vendors; the Bills of Sale Act; the 'reputed ownership' clauses of the Bankrupt Acts: all of which are clumsy expedients for obtaining the results which naturally flow from the simple principle of the Roman law and the systems consciously based on that law, namely, 'Traditionibus non nudis pactis dominia rerum transferuntur.'—R.C.]\*

In the French law, a contract for the sale of an immoveable is of itself a conveyance; there is no other; the contract, or agreement to sell, is registered, and the ownership of the immoveable at once passes to the buyer.

By the provisions of that part of the English law which

#### LECT. XIV.

*Confusion arising from the circumstance that the same instrument or transaction is at once a contract and a conveyance.*

\* It is curious to observe the approximation in practical effect of the mercantile laws of two countries which start with opposite theories. The approximation has been slightly aided in England and Scotland by the Mercantile Law Amendment Acts, for the respective countries (1856).

By the law of England, the right of the buyer of a specific moveable not delivered is *jus in rem*. It is available against everybody except:

1. The unpaid vendor (in security for his payment).

2. The creditors of the vendor, where personal chattels not being goods sold in the ordinary course of trade, are sold under a bill of sale not duly registered under the Bills of Sale Act.

3. The trustee in Bankruptcy of the vendor in certain cases falling under the 'reputed ownership' clause of the Bankrupt Act.

By the law of Scotland, the right of the buyer is *jus in personam* and avails against:

1. The vendor (subject to the condition of payment).

2. By the Mercantile Law Amendment Act, it avails to a sub-vendor against the original vendor.

3. By the same Act, it avails against the creditors of the vendor, except in certain cases to which the common law of Scotland applies the doctrine of reputed ownership.

R. C.

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is called equity, a contract to sell an immoveable at once vests *jus in rem* or ownership in the buyer, and the seller has only *jus in re alieni*. But according to the conflicting provisions of that part of the English system peculiarly called *law*, a sale and purchase without certain formalities merely gives *jus ad rem* or a right to receive the ownership, not ownership itself; and for this reason a contract to sell, though in equity it confers ownership, is yet an imperfect conveyance in consequence of the conflicting pretensions of law.\* To complete the transaction the buyer has a right *in personam* against the seller, to compel him to pass his legal interest.

#### NOTE.

##### ON THE DIFFERENT TERMS USED BY JURISTS TO MARK THE CAPITAL DISTINCTION BETWEEN RIGHTS INTRODUCED IN THE ABOVE LECTURE.

One of the great *desiderata* in the language of jurisprudence is this: A pair of opposed expressions denoting briefly and unambiguously the two classes of rights which are the subject of the present note: namely, Rights availing against persons *generally* or *universally*, and Rights availing against persons *certain* or *determinate*.

The opposed or contrasted expressions commonly employed

\* It should here be observed, however, that the owner of what is called the equitable estate cannot even *in equity* recover against a purchaser for value, having no notice of his equitable title, who has got the *legal estate*; 'legal estate' in this instance expressing not merely the estate according to *law* as distinguished from *equity*, but being an expression loosely used to express the fiction more properly denoted by the word *seisin* (or, in rights not capable of *seisin*, the completion of title in a mode analogous to *seisin*). If *seisin* were public in fact as it is in theory, a purchaser of land might rely upon the register, if the expedient were adopted (as it is in Scotland) of making registration the *only* mode of transferring the *seisin*. The principle which in England secures 'the purchaser for value, without notice of an adverse title, who has got the legal estate,' is the one piece of solid ground in English title. If *registration* were made, by statute, the only mode of transferring the legal estate, and no notice were allowed to affect a purchaser, other than should appear on the face of the registered title, or by the actual state of possession, and if every transfer of the legal estate gave the transferee a power of sale for all the estate and interest of the transferor, titles would in time become more secure and much more simple.

The above paragraph was in type before I had read the 7th Section of the Act passed last session under the innocent title of the Vendor and Purchaser Act, 1874: nor can I now guess what will be the practical effect of this curiously enacted fragment of an abortive Land Titles Bill.—R. C.

for the purpose, are the following : ' *jus in re*'—' *jus ad rem* : ' ' *jus in rem*'—' *jus in personam* : ' ' *jus reale*'—' *jus personale* : ' ' *dominium*' (sensu latiore)—' *obligatio*. ' But these are liable to the general objection that *jus in re*, *jus in rem*, *jus reale* and *dominium*, will none of them denote, without a degree of ambiguity, the entire class of rights which avail against the world at large. For although they are often employed in that extensive signification, they commonly signify such of those rights as are rights to determinate things.

Besides this general objection, each of these pairs of terms is liable to special objections, which now I will briefly indicate. In the course of this review, certain terms, synonymous with the terms in question, will be noticed with the same brevity. At the close, I will shortly state my reasons for giving a decided preference to '*jus in rem*' and '*jus in personam*. '

1. '*Jus in re*' and '*Jus ad rem*. '—*Jus ad rem* frequently signifies any right which avails against a person *certain*. Still it is often and properly restricted to a *species* of such rights: to those which correlate with obligations '*ad dandum aliquid*: ' or is, properly speaking, *jus in personam ad jus in rem acquirendum*. It is, therefore, ambiguous.

This double meaning of *jus ad rem* is closely connected with a confusion of thought, which, as I shall show afterwards, has an important bearing upon certain mistakes in the French and Prussian Codes (see Lect. *xxxix. post*). The confusion arose in this way. In numerous cases of transactions which have their origin in contract, the acquisition of a *jus in rem* is preceded by *jus ad rem* in the restricted sense of the term above mentioned. The way in which this occurs is illustrated by the example given on p. 179 *supra*. Observing that this sequence took place in certain transactions which are striking by their frequency and importance, Heineccius and other Civilians by a hasty generalization fell into the following errors: 1st. They inferred that every acquisition of *jus in rem* is preceded by *jus ad rem*, and by a correlating or corresponding *obligation*. This invariable sequence (as they supposed it to be) they marked in the following manner: —To the fact or incident imparting the *jus in rem* they gave the name of '*modus acquirendi*', or '*modus acquisitionis*'. To the preceding incident imparting *jus ad rem* (which they considered a step or means to the acquisition of *jus in rem*) they gave the name of '*titulus ad acquirendum*', or briefly '*titulus*'. For example: According to their language, a contract to deliver a thing is '*titulus ad acquirendum* (*jus in rem*): ' The delivery or tradition which follows it, or by which it ought to be followed, is '*modus (jus in rem) acquirendi*', or '*modus acquisitionis*'. 2ndly. From this first error they fell into a second. Perceiving that *jus ad rem*, in the restricted and proper sense above mentioned, is the forerunner of the incident by which *jus in rem* is acquired, and confounding the proper sense of *jus ad rem* with the larger sense of the expression as extending to every *jus in personam*, they supposed that every incident which imparts *jus in personam*, is merely '*titulus ad (jus in rem) acquirendum*', that

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is, merely preparatory to a '*modus acquisitivus*' or to the incident imparting the *jus in rem*.

Heineccius further expresses the supposed invariable sequence by calling the '*titus*' the remote cause, and the '*modus*' the proximate cause of the consequent right (*jus in rem*). The authors of the French Code crown this confusion of thought by speaking of *property* as acquired and transmitted (amongst other ways) '*par l'effet des obligations*.' Art. 711.

2. '*Jus reale*' and '*Jus personale*'.—These are used to denote the distinction in question. But they tend to create confusion:—

First, because they might lead to confusion of thought by suggesting that the distinction had something to do with the widely different distinction—*jus rerum, jus personarum*—which belongs to a division not of rights, but of the whole *corpus juris*.

Secondly, because it would be apt to suggest to a student of English law the entirely different distinction of rights into *real* and *personal*, i.e. *heritable* and *administrable*.

Thirdly, because the words *real* and *personal* have been applied to servitudes to mark a widely different distinction, namely that between servitudes which are *appurtenant*, and those which are *in gross*.

3. '*Dominium*' (*sensu latiore*) and '*Obligatio*'.—Besides the general objection which is mentioned above, *dominium* (as opposed to *obligatio*) differs from *dominium* (in the strict signification). As opposed to *obligatio*, it embraces '*jura in re*' (in the sense of the Classical Jurists): that is to say, '*jura in re aliena*': rights or interests in subjects which are *owned* by others. Taken in the strict signification, it is directly *opposed* to these rights; being synonymous with '*proprietas*', with '*in re potestas*', or with '*jus in re propriid*'. The numerous ambiguities which beset the term *obligatio* will be noted hereafter. In the mean time it may be observed that in the larger sense of the term, and that in which it is usually employed by the Roman lawyers, *obligatio* is equivalent to *jus in personam*. But it is used in so many narrower and restricted senses in modern systems of law, as to have become inconvenient as a technical term to denote the larger of rights in question.

4. '*Potestas*' and '*Obligatio*'.—It has been proposed to substitute these in the place of *dominium* and *obligatio*, *jus in rem* and *jus in personam*, etc. But this were a change to the worse. For, first, *potestas*, as synonymous with *dominium*, is encumbered with all the ambiguities which stick to the latter. And, secondly, it is liable to an objection from which the latter is free. For it usually signifies certain *species* of the rights which avail against persons *determinate*: namely, the rights of the master against the slave ('*potestas dominorum in servos*'); and the rights of the *paterfamilias* against his descendants ('*patria potestas*', or '*potestas parentum in liberos*').

5. '*Absolute rights*' and '*Relative rights*'.—These expressions as thus applied, are flatly absurd. For rights of both

classes are *relative*: or, in other words, *rights* of both classes correlate with *duties* or *obligations*. The only difference is, that the former correlate with duties which are incumbent upon the world at large; the latter correlate with obligations which are limited to determined individuals.

6. 'Jura quae valent in personas *generatim*,' and 'Jura quae valent in personas *certas* sive *determinatas*'—These expressions are sufficiently clear and precise. But they are rather definitions than names, and are much too long for ordinary use.

7. 'Law of *Property*' and 'Law of *Contract*'—These expressions, as thus opposed, are intended to express the distinction which is the subject of the present note. But they do the business wretchedly. Of the numerous objections which immediately present themselves, I will briefly advert to the following.

First, we need contrasted expressions for the two classes of *rights*, and not for the *laws* or *rules* of which those rights are the creatures.

Secondly, *property* is liable to the objection which applies to *dominium*. In this instance, its meaning is *generic*. It signifies rights of *every* description which avail against the world at large. But, in other instances, it distinguishes some *species* of those rights from some other *species* of the same rights. For example: It signifies *ownership*, as opposed to *servitude* or  *easement*; or it signifies ownership indefinite in point of duration, as opposed to an interest for a definite number of years. In short, if I travelled through all its meanings and attempted to fix them with precision, this brief notice would swell to a long dissertation.

Thirdly, *contract* is not a name for a class of *rights*, but for a class of the *facts* or *tiles* by which rights are generated.

Fourthly, rights arising from contracts are only a portion of the rights, which the expression 'law of contract' is intended to indicate. For 'law of contract,' as opposed to 'law of property,' denotes, or should denote, rights *in personam certam*: a class which embraces rights *not* arising from contracts, as well as the species of rights which emanate from those sources.

8. 'Jus in *rem*' and 'Jus in *personam*'—The phrase '*in rem*' is an expression of frequent occurrence in the writings of the Roman lawyers. And although it is nowhere used by them for the purpose of signifying briefly and unambiguously rights of every description which avail against persons generally, yet in all the instances in which it occurs, the subject to which it is applied is a something which avails *generally*: 'quod *generatim* in *causam aliquam* valet.'

The expression *jus in rem* was devised by the Glossators, or by the Commentators who succeeded them. Seeing that the phrase '*in rem*' always importred *generality*, and feeling the need of a term for '*rights* which avail *generally*', they applied the former to the purpose of marking the latter, and talked of '*JURA in rem*'. And, in this instance, as in many others, they evince a strength of discrimination, and a compass of thought

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which are rarely displayed by the elegant and fastidious scholars who scorn them as scholastic barbarians. In spite of the *ignorance* to which their position condemned them, their *reason* was sharpened and invigorated by the prevalent study of their age: by that school logic which the shallow and the flippant despise, but which all who examine it closely, and are capable of seizing its purpose, regard with intense admiration.

Now the expression *jus in rem*, in this its analogical meaning, perfectly supplies the *desideratum* which is stated above. For as '*in rem*' denotes *generality*, '*Jus in rem*' should signify *rights* availing against persons *generally*. Therefore, it should signify *all* rights belonging to that *genus*, let their specific differences be what they may. And *that* is the thing which is wanted.

If it were possible for me to fix the meaning of words, I should distinguish the two classes of rights and obligations in the following manner.

1°. Obligations considered universally, I would style, '*Offices*' or '*Duties*'.

2°. Rights which avail against persons *generally* or *universally* I would style '*Rights in rem*'.

3°. Rights which avail against persons *certain* or *determinate*, I would style '*Rights in personam*'.

4°. Obligations which are incumbent upon persons *generally* or *universally*, I would style '*Offices*' or '*Duties*'.

5°. To those which are incumbent upon persons *certain* or *determinate*, I would appropriate the term '*Obligations*'.

Without introducing a single new term, and without employing an old one in a new manner, we should thus be provided with language passably expressive and distinct: which would enable the writer or speaker to move onward, without pausing at every second step to clear his path of ambiguities. All that is necessary to this desirable end, is to use established terms in established meanings, taking good care to use them *determinately*: i.e. to restrict each term to its appropriate object.

## LECTURE XV.

### *Jus in rem—in personam (continued).*

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XV.

Further  
illustrations  
of the dis-  
tinction  
between *jus  
in rem* and  
*jus in  
personam*.

In order that I may further illustrate the import of the leading distinction between rights introduced in my last Lecture, I shall direct your attention to those rights *in rem* which are rights over *persons*, and to certain rights *in rem*, or availling against the world at large, which have no determinate subjects (persons or things).

Of rights existing over persons, and availling against other persons generally, I may cite the following as ex-

amples:—The right of the father to the custody and education of the child:—the right of the guardian to the custody and education of the ward:—the right of the master to the services of the slave or servant.

Against the child or ward, and against the slave or servant, these rights are rights *in personam*: that is to say, they are rights answering to *obligations* (in the sense of the Roman Lawyers) which are incumbent *exclusively* upon those *determinate* individuals. In case the child or ward desert the father or guardian, or refuse the lessons of the teachers whom the father or guardian has appointed, the father or guardian may compel him to return, and may punish him with due moderation for his laziness or perverseness. If the slave run from his work, the master may force him back, and drive him to his work by chastisement. If the servant abandon his service before its due expiration, the master may sue him as for a breach of the *contract of hiring*, or as for breach of an obligation (*QUASI ex contractu*) implied in the *status* of servant.

But considered from another aspect, these rights are of another character, and belong to another class. Considered from that aspect, they avail against persons *generally*, or against the world at large; and the duties to which they correspond, are invariably *negative*. As against other persons generally, they are not so much rights to the custody and education of the child, to the custody and education of the ward, and to the services of the slave or servant, as rights to the *exercise* of such rights *without molestation by strangers*. As against strangers, their substance consists of duties, incumbent upon strangers, to *forbear* or *abstain* from acts inconsistent with their scope or purpose.

In case the child (or ward) be detained from the father (or guardian), the latter can *recover* him from the stranger. In case the child be beaten, or otherwise harmed injuriously, the father has an action against the wrong-doer for the wrong against his *interest* in the child; and so on.

And here I may remark conveniently, that where a right *in rem* is a right *over* or *to* a person, the person is neither invested with the right, nor is he bound by the duty to which the right corresponds. He is merely the *subject* of the real right, and occupies a position *analogous* to that of a *thug* which is the subject of a similar right.

For example, Independently of his rights against the child, and independently of his obligations towards the child, the parent has a right *in* the child availing against the world at large.—Independently of his rights against the parent, and independently of his obligations towards the parent, the child has a right *in* the parent availing against the world at large. The murder of the parent by a third person might not only be treated as a *crime*, or *public wrong*,

A person who is the subject of *ius in rem* is placed in a position like the position of a thing which is the subject of a similar right.

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§ 8.

but might also be treated as a *civil* injury against that right in the parent which belongs to the child. By the laws of modern Europe, the civil injury merges in the crime; but in other ages the case was different; the offender lay under a twofold obligation: to suffer punishment on the part of the society or community, and to satisfy the parties whose interest in the deceased he had destroyed. Before the abolition of Appeals in criminal cases,\* this was nearly the case in the law of England. The murderer was obnoxious to *punishment* to be inflicted on the part of the State; and the wife and the heir of the slain were entitled to vindictive *satisfaction*, which they exacted or remitted at their pleasure. And this is the distinction, and the only one, which exists between a civil injury and a crime.†

And may be styled (by analogy) a *thing*.

Now, considered as the subject of the real right which resides in the parent, the child is placed in a position *analogous* to that of a *thing*, and might be styled (in respect of that analogy) a *thing*; and so *vice versa*. In short, whoever is the subject of a right which resides in *another* person, and which *avails* or *obtains* against a *third* person or persons, is placed in a position *analogous* to that of a *thing*, and might be styled (in respect of that analogy) a *thing*.

But this analogical application of the term *thing* has (in fact) been partial and capricious. So far as I can remember there are only two instances in which the term *thing* has been applied to *persons*, considered as the *subjects* of rights.—By the Roman lawyers, the slave, considered as the *subject* of the *real* right which resides in the master, was occasionally ranked with *things*.—By certain modern Civilians (Heineccius and others) the *filiusfamilias*, considered as the *subject* of the *real right* which resides in the *paterfamilias*, has been classed with *things*.

It has been commonly supposed that the slave was not considered by the Roman Lawyers as belonging to the class of *persons*. But this is one of those assumptions utterly destitute of foundation, which have been successively received by successive generations, though the means of *disproof* are open and obvious to all. Considered as bound by duties towards his master and others, the slave is ranked by the Roman Lawyers with physical *persons*; and is spoken of

\* By the 59 Geo. III. c. 46.

† By the law of Scotland the wife and family of the slain have still the right to bring a civil action for *assytheement* (the ground of action being not only indemnification for damage, but also *solatium* for the bereavement), notwithstanding a criminal prosecution instituted by the Public Prosecutor, unless capital punishment be suffered. It is the Scotch action of *assytheement* which suggested to Lord Campbell the introduction into England of a law for compensating the families of persons killed by accidents, by the Act 9 and 10 Vict. c. 98, commonly called Lord Campbell's Act.

as bearing, or sustaining, a person, *status*, or condition. Considered as the subject of the right residing in his master and availing (*not against himself, but against third persons*), he is occasionally styled *res*. But, even as considered from this aspect, he is usually deemed a person rather than a thing, and is styled usually *servilis persona*. Gaius, for instance, in describing *mancipation*, which is a particular form of conveyance, and enumerating the subjects which may be conveyed by it, says, *Eo modo et serviles et liberae persona mancipantur*. The right of the master to the services of the slave is distinguished by a different name from that which expresses the analogous right in a thing. It is called *potestas*, or *potestas domini in servum*, not *dominium*.

As for the *filiusfamilias*, I am not aware of any passage in the classical jurists where he is styled a thing. In the passage of the Digest where the action called *rei vindicatio* is said to be applicable to the recovery of a slave, the same action is denied to be applicable to a *filiusfamilias*. *Per hanc autem actionem, liberae persona qua sunt juris nostri, ut puta liberi qui sunt in potestate, non petuntur*. The right of the father over his son is never styled *dominium* or *proprietas*, but *patria potestas*, or *potestas patris in liberis*.

Having cited examples of *real* rights which are rights over *persons*, I will cite an example or two of *real* rights, which are *not* rights over things or persons, but are rights to *forbearances* merely.

Jus realiter  
personale.  
Rights in  
rem, without  
determinate  
subjecta.

1. A man's right or interest in his *good-name* is a right which avails against persons, considered generally: they are bound to *forbear* from such imputations against him as would amount to *injuries* towards his right in his reputation. It is therefore a right *in rem*. But there is no subject, thing or person, over which it can be said to exist.

2. A monopoly, or the right of selling exclusively commodities of a given class (a patent right for instance), is also a *real* right: All persons, other than the party in whom the right resides, are bound to *forbear* from selling commodities of the given class or description. But, though the right is a *real* right, there is no subject, person or thing, over which it can be said to exist, unless it be the future profits, above the average rate, which he may possibly derive from his exclusive right to sell.

3. Many examples of this class of rights might be selected from among *franchises*; a law term embracing an immense variety of rights, having no common property whatever except their supposed origin, being all of them considered to have been originally granted by the Crown. Such, for example, is a right of exclusive jurisdiction in a given territory, or a right of levying a toll at a certain bridge or ferry. The rights *in personam* which concur with the

rights in question (*e.g.* the rights answering to the obligations on the persons who happen to traverse the bridge) are perfectly distinct from the rights *in rem* of which the franchise consists: namely, the obligation not to impede the exercise of the jurisdiction, the levying of the toll, or the passage over the bridge; nor to carry passengers across within the limits of the ferry, to the detriment of the exclusive right of the person entitled.

4. The right of the heir to the heritage. According to the Roman Law the heir had, as distinguished from the several rights which devolve upon him from the testator or intestate, a right in the *aggregate* formed by those several rights coupled with the obligations of the deceased. In this heritage, so far as it consisted of rights, the heir had by the Roman law a right, availing against the world at large, and which he could maintain against any one who might gainsay or dispute it by a peculiar judicial proceeding called *petitio hereditatis*, which was an action *in rem*, i.e. grounded on an injury to a *real* right, and seeking the restoration of the injured party to the unmolested exercise of the right in which he had been disturbed.

5. Lastly, a right in a *Status* or Condition (considered as an aggregate of rights and capacities) is also a real right. To determine precisely what a *Status* is, is in my opinion the most difficult problem in the whole science of jurisprudence. But for the purpose immediately before me, it may suffice to say that it consists of an aggregate of rights, duties, and capacities, or of one or more of those classes of objects. So far as a condition consists of rights, and of capacities to take rights, we may imagine a right in the condition considered as a complex whole.

According to the Roman Law, as the heir has a right in the *heritage* (abstracted from its several parts), so has the party invested with a *condition*, a right or interest in the condition itself (abstracted from the rights and capacities of which it is compounded). His right in the condition, considered as an aggregate or whole, is *analogous* to the right of ownership in a single or individual *thing*.

Consequently, wrongs against this right are analogous to wrongs against ownership; and, according to the practice of the Roman Law, wrongs of both classes are redressed by similar remedies. Where the individual thing is unlawfully detained from the owner, he may *rindicte* or recover the thing. And where the right in the condition is wrongfully disputed, the party may assert his right by an appropriate action, which is deemed and styled a *rindication*.

The reason why *status* or condition makes so little figure in the English law as compared with the Roman, though the idea must of course exist in all systems of law, seems to be this: that the right in a *status* may by the Roman law be

asserted directly and explicitly by an action expressly for its recovery; while in English law (if we except certain actions peculiar to the Court for Divorce and Matrimonial Causes)\* no such action can be brought, and the right to a *status*, though of course it often becomes the subject of a judicial decision, almost always comes in as an episode, incidental to an action of which the direct purpose is something else. Thus a question of legitimacy, which is precisely a question of *status*, is usually brought in and decided upon incidentally, in an action of ejectment. The question whether or not a particular person is a *slave*, would generally come before the judge upon a prosecution by the slave of the person claiming to be his master for doing some act which would be illegal unless the claim could be established. The only case in which a question of *status* is decided directly in English law, is when a jury is summoned to try that precise question as an *issue* incidental to a suit in another court.

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## LECTURE XVI.

### *Rights considered generally.*

In the present Lecture, I shall endeavour to settle the import of the term 'right' considered as an expression embracing *all* rights.

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XVI.

Purpose of

\* Declaratory actions negative of *status* have long been known in the old Ecclesiastical and modern Divorce Courts in England. Instances are the action of Nullity of Marriage, and of Jactitation of Marriage (more expressively in Scotland called 'Putting to Silence'). The comparatively recent introduction by 'the Legitimacy Declaration Act, 1858,' of an action to establish a *status* of Legitimacy is an anomaly. The Attorney-General is made a party, apparently in the character of *advocatus diaboli*. One would suppose that the framers of the statute originally entertained the idea that the decree pronounced in the action should be conclusive against persons in general. If so, that intention was abandoned before the bill became an act. For the statute (as passed) contains the very reasonable proviso that the judgment or decree in the action shall not prejudice persons who neither were parties nor claim through others who were parties to the action. It may be here observed as a principle of general jurisprudence that a judgment or decree in an action of *status* (like every other judgment or decree) is conclusive only between the parties to the action in which it is pronounced, and persons in privity with them. The Roman *actio in rem* was no exception to this principle, although if the defendant was in possession (which he probably was) the decree, by enforcing specific restitution, gave the plaintiff the advantage of that possession, and consequently gave him the advantage of being the defendant in any action which another claimant might bring.—R. C.

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The present Lecture.

Common  
nature  
of  
rights.

To accomplish this purpose I shall proceed in the following order:

1st, I shall endeavour to state, in general expressions, the nature, essence, or properties, common to *all* rights. 2ndly, I shall examine certain *definitions* of the term '*right*' ; and I shall endeavour to elucidate the common nature of rights, by showing the vices or defects of those definitions.

Every right is a right *in rem*, or a right *in personam*.

The essentials of a right *in rem* are these :

It resides in a determinate person, or in determinate persons, and avails against *other* persons *universally* or *generally*. Further, the duty with which it correlates, or to which it corresponds, is *negative* : that is to say, a duty to forbear or abstain. Consequently, all rights *in rem* reside in determinate persons, and are rights to *forbearances* on the part of persons *generally*.

The essentials of a right *in personam* are these :

It resides in a determinate person or persons and avails against a person or persons certain or determinate. Further, the obligation with which it correlates is negative or positive : that is to say, an obligation to forbear or abstain, or an obligation to do or perform.

It follows from this analysis, first, That all rights reside in *determinate* persons. Secondly, That all rights correspond to duties or obligations incumbent upon *other* persons : that is to say, upon persons distinct from those in whom the rights reside. Thirdly, That all rights are rights to *forbearances* or *acts* on the part of the persons who are bound.

These (I believe) are the only properties wherein *all* rights resemble or agree.

Consequently, Right considered in abstract (or apart from the *kinds* and *sorts* into which rights are divisible) may be conceived and described generally in the following manner.

A monarch or sovereign body expressly or tacitly commands that one or more of its subjects shall do or forbear from acts towards or in respect of a distinct and *determinate* party. The person or persons who are to do or forbear from these acts are said to be subject to a duty, or to lie under a duty. The person *towards* whom those acts are to be done or forbear, is said to have a *right*, or to be invested with a *right*.

Consequently, the term '*right*' and the term '*relative duty*' (see p. 161 *supra*) signify the same notion considered from different aspects. Every right supposes distinct parties : A party commanded by the sovereign to do or to forbear, and a party *towards* whom he is commanded to do or to forbear. The party to whom the sovereign expresses or intimates the command, is said to lie under a *duty* : that is to say a *relative* duty. The party *towards* whom he is commanded to

The import of  
'Right' in  
abstract.

do or to forbear, is said to have a *right* to the acts or forbearances in question.

I now proceed to examine certain definitions which have been given of the term right.

1. A right has been defined by certain writers, as that security for the enjoyment of a good or advantage which one man derives from a duty imposed upon another or others.

2. It has also been said that rights are powers: powers over, or powers to deal with, things or persons.

Objections: 1st, *all* rights are not powers over things or persons. All (or most) of the rights which I style rights *in personam* are merely rights to acts or forbearances. And many of the rights which I style *jura in rem* have no subjects (persons or things). 2ndly. What is meant by saying that a right is a power? The party invested with a right is invested with that right by virtue of the corresponding duty imposed upon another or others. And this duty is enforced, not by the power of the party invested with the right, but by the power of the state.

It may, indeed, be said, that a man has a power over a thing or person, when he can deal with it according to his pleasure, free from obstacles opposed by others. Now, in consequence of the duties imposed upon others, he is thus able. And, in that sense, a right may be styled a power. But, even in this sense, the definition will only apply to certain rights to *forbearances*. In the case of a right to an *act*, the party entitled has not always (or often) a power.

3. *Facultas faciendi (aut non faciendi)*. This definition is open to the same objections as the last definition. '*Facultas*,' what?

4. Right;—the capacity or power of exacting from another or others acts or forbearances. This nearly approaches a true definition. It falls short of it however in this respect, that the means of exacting the act or forbearances, namely, through the sanction enforced by the state, is not expressly adverted to.

My definition briefly is this:—A party has a right, when another or others are bound or obliged by the law, to do or to forbear, *towards* or *in regard* of him.

But, as I stated at the outset of the analysis, the full import of the term 'right' cannot be made to appear till all the related expressions are examined.

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Certain  
definitions of  
a right, ex-  
amined.

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XVII.Duties are  
relative or  
absolute.Absolute  
duties  
defined by  
exhaustive  
enumeration.Four cases in  
which duties  
are absolute.Self-regarding  
duties, and  
duties not  
regarding  
man, regard  
persons  
generally in  
respect of  
their remote  
purpose.

As I intimated at the outset of the analysis through which I am now journeying, duties may be distinguished into *relative* and *absolute*. I then observed (p. 162), that the full explanation of the latter and negative term must be postponed to an explanation of rights, and the duties which answer to rights. Having attempted to explain these, I now proceed to the duties which have *no* corresponding rights, or which (in a word) are *absolute*.

Every legal duty (like every legal right) emanates from the command of a sovereign. And the party upon whom it is imposed is said to be legally obliged, because he is liable to the means of compulsion wielded by that superior.

Every duty is a duty to do or forbear. A duty is relative, or answers to a right, where the sovereign commands that the acts shall be done or forborne towards a *determinate* party, *other than* the obliged. All other duties are absolute.

Consequently, a duty is absolute in any of the following cases: 1st, where it is commanded that the acts shall be done or forborne towards, or in respect of, the party to whom the command is directed: or where, in other words, the duty is self-regarding. 2ndly, Where it is commanded that the acts shall be done or forborne towards or in respect of parties *other* than the obliged, but who are not *determinate* persons, physical or fictitious. For example, towards the members generally of the given independent society; or towards mankind at large. 3rdly, Where the duty imposed is not a duty towards *man*; or where the acts and forbearances commanded by the sovereign, are not to be done or observed towards a *person* or *persons*. 4thly, Where the duty is merely to be observed towards the sovereign imposing it: i.e. the monarch, or the sovereign number in its collegiate and sovereign capacity.

I shall consider these duties in the order which I have now announced.

But before I endeavour to explain and exemplify the classes of absolute duties, I will briefly advert to a topic upon which I may insist hereafter.

In styling some of these duties self-regarding, and in affirming of others of these duties 'that they are not duties towards man,' I look exclusively at their immediate or proximate scope.

Considered with reference to their more remote purposes, they are absolute duties regarding persons generally. For, assuming that they are imposed at the suggestion of general utility, they regard the members generally of the given political society.

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XVII.

For example, the duty incumbent upon you to forbear from suicide, is a self-regarding duty, in respect of its proximate purpose—to the end of deterring you from destroying your own life. But, remotely or indirectly, it is an absolute duty regarding persons generally. For it is partly imposed for the purposes of preserving a member to the community, and of deterring its members generally from the act of suicide.

Again : A duty to forbear from cruelty towards the lower animals, is not a duty towards *man* in respect of its proximate scope. Its proximate or direct scope, is to save the lower animals from needless suffering. But in respect of its remote purposes, the duty is an absolute duty regarding *persons* indefinitely. For, tending to preserve and cherish the sentiment of benevolence or sympathy, it tends to the good of the community, and to the good of mankind at large.

The same remark applies to relative duties as well as to absolute duties of the kinds immediately above mentioned.

In numerous instances, rights are conferred (and their correlating duties imposed) with the direct or immediate purpose of promoting the general good ; (as, for example, the rights of judges and other political subordinates) : and rights are conferred indirectly to the same extensive purpose, although their proximate end be the advantage of the parties entitled, or of other determinate parties for whom they are conferred in trust. For instance, the right of property,—whether the proprietor is simply owner, or is a trustee for other determinate persons who have what is called the beneficial interest.

Relative  
duties regard  
persons  
generally, in  
respect of  
their remote  
purpose.

In order that we may conceive correctly many important distinctions, it is necessary that we should conceive precisely the truths which I have now stated.

For example, the Roman Lawyers, and most writers upon Jurisprudence, divide Law into Public and Private. According to the Roman Lawyers, Public Law is that, ‘*quod ad publice utilia spectat*.’ Private Law is that department of the whole, ‘*quod ad singulorum utilitatem—ad privatim utilia—spectat*.’

Jus Publicum  
et Privatum.

But this, it is manifest, is *not* the ground of the intended distinction. For since the general interest is an aggregate of individual interests, Law regarding the former, and Law regarding the latter, regard the same subject. In other words, the terms ‘public’ and ‘private’ may be applied indifferently to *all* Law.

Briefly stated, the distinction between Public and Private

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Law is this. The former regards persons as bearing political characters. The latter regards persons who have no political characters, and persons also who have them as bearing different characters. I shall endeavour hereafter to analyze the distinction (see Lect. XLIV., *post*).

**Civil Injuries  
and Crimes.**

Again: Civil Injuries and Crimes are distinguished by Blackstone and others in the following manner. Civil Injuries are *private* wrongs, and concern individuals only. Crimes are *public* wrongs, and affect the whole community.

If Blackstone had but reflected on his own catalogue of crimes, he must have seen that this is not the basis of the capital distinction in question. Most crimes are violations of duties regarding determinate persons, and therefore affect individuals in a direct or proximate manner. Such, for instance, are offences against life and body: murder, mayhem, battery, and the like. Such, too, are theft and other offences against property.

But independently of this, Blackstone's statement of the distinction is utterly untenable.

All offences affect the community, and *all* offences affect individuals. But though all affect individuals, some are not offences against *rights*, and are therefore, of necessity, pursued directly by the Sovereign, or by some subordinate representing the Sovereign.

Where the offence is an offence against a right, it *might* be pursued (in all cases) either by the injured party, or by those who represent him. But, for reasons which I shall explain at large when I arrive at the distinction in question, it is often thought expedient that the pursuit of it should not be left to the discretion of the injured party or his representatives, but should be assumed by the Sovereign or by the subordinates of the Sovereign. In this difference of procedure, and not in any distinction between the tendencies of the acts, lies the distinction between Crimes and Civil Injuries. An offence which is pursued at the discretion of the injured party or his representative is a Civil Injury. An offence which is pursued by the Sovereign or by the subordinates of the Sovereign, is a Crime.\*

\* It may be here observed that in Scotland and other countries where there is a Public Prosecutor charged with the investigation and prosecution of crimes and offences, the distinction between crimes and offences on the one hand, and civil injuries on the other, is much more intelligible than in the English system. For the distinction, such as it is, in English Law, does not arise *until commitment for trial* (*cide* Stephen's *Criminal Law*, p. 155). In Scotland the duty of investigation and prosecution, as well as the power of abandoning proceedings, from the time of the commission of the crime until sentence, lies with Her Majesty's Advocate, and his subordinates for whom he is responsible; and there is further this distinction, that all criminal proceedings are either taken in, or are subject to review by the Court of Justiciary; a court with a juris-

In many cases (as in cases of Libels and Assaults), the same offence belongs to both classes. That is to say, the injured has a remedy which he applies or not as he likes, and the Sovereign reserves the power of visiting the offender with punishment.

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It follows, that in distinguishing relative from absolute duties, and in distinguishing the kinds of the latter, we must not look to the ultimate scope or purpose with which duties are imposed. For, as that is the same in all cases, it can never enable us to draw the distinctions in question.

Difference  
between  
relative and  
absolute  
duties, etc.

A relative duty corresponds, as I have said, to a right: i.e. it is a duty to be fulfilled towards a *determinate person* or *determinate persons*, other than the obliged, and other than the Sovereign imposing the duty. All other duties are absolute.

All absolute obligations are enforced criminally: they do not correspond with rights in the Sovereign, the Public, etc.; nor with rights at all. But rights to enforce, exist in persons delegated by the Sovereign. e.g. In England, offences against absolute duties, like all other crimes, are said to be offences against the King. By which is simply meant that it is part of his office to pursue those offences as well as other crimes.

Absolute duties are distinguishable by their proximate or immediate purposes.

Distinctions  
between  
absolute  
duties.

1st. The proximate purpose of some is the advantage of the party obliged. And these I style self-regarding.

*Examples* of violations of these duties: Drunkenness.\* Suicide.† Breach of chastity, not accompanied by violation of a right residing in another, as by adultery, rape, seduction. (Rape includes injury to the party ravished, and to others who have an interest, etc.)

2ndly. The proximate purpose of others is the advantage of persons indefinitely: for instance, of the community at large, or of mankind in general.

*Examples.*—The duty of military service, in most countries. The duty of all persons to shut a cattle gate which opens from a railway, a duty imposed proximately for the safety of the public, although it indirectly concerns the Railway Company.

*Violations:*—Arson, or wilful fire-raising, which is prohibited

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diction quite distinct from that of the Court of Session, which is the proper tribunal in civil actions. This system has the advantage (amongst others), that the magistrate, who wields the power of the state for the protection, primarily, of the general community, cannot be made a tool and dupe for mere private ends.—R. C.

\* Blackstone, iv. 64.

† *Ibid.* 189.

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§ 3.

not so much on account of the damage to the individual owner of the property set fire to—for it is equally a crime if a man set fire to his own property—but on account of the danger to the public. Treason, which is properly an offence against the Sovereign; though an offence against a member of the sovereign body is often so considered.

3rdly. The proximate purpose of others is not the advantage of any person or persons

Towards God: (Ascetic observances.) (Blackstone, vol. iv. p. 43.)

Towards the lower animals.

The Deity, an infant, or one of the lower animals, *as being the party towards whom a duty is to be performed*, might be said to have a right. But so, in the same case, might an inanimate thing. To call the Deity a person, is absurd.\*

## LECTURE XVIII.

### *Will and Motive.*

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XVIII.

EVERY legal duty is a duty to do (or forbear from) an outward act or acts, and flows from the command of the Sovereign.

To fulfil the duty which the command imposes, is *just* or *right*. That is to say, the party does the act, or the party observes the forbearance, which is *jussum* or *directum* by the author of the command.†

To omit (or forbear from) the act which the command enjoins, or to do the act which the command prohibits, is a wrong or *injury*:—A term denoting (when taken in its largest signification) every act, forbearance, or omission,

\* For definition of 'person' see Lect. XII., *ante*.—R. C.

† *Just* is that which is *jussum*; the past participle of *jubeo*.

*Right* is derived from *directum*; the past participle of *dirigo*; or, rather, *right* is probably derived from some Anglo-Saxon Verb, which comes with *dirigo* from a common root. The German *recht*, *gerecht*, *richtig*, *rechtern* (*just*) is from the obsolete *richten* or *rechten* (*dirigo*). Hence *Richter*, a judge. Latin—*Rego*, *Rex*, *Regula*, *Rectum*. (*Wrong*=*Wrung*; the opposite of *rectum*.)

And as *just* and *right* signify that which is commanded, so do the Latin *Aequum* and the Greek *Dikaion* denote that which conforms to a law or rule. Manifestly, a metaphor borrowed from measures of length. Something equal to, or even with, a something to which it is compared. *Aequum=jus gentium*.

The abstracta, *justice*, or *justum*, *dikaios*, equity, etc., denote conformity to Command; as their answering concretes denote a something which is commanded, or equal (see note p. 118, *supra*).

which amounts to disobedience of a Law (or of any other command) emanating directly or circuitously from a Monarch or Sovereign Number—'Generaliter injuria dicitur, *omne quod non iure fit.*'

A party lying under a duty is liable to evil or inconvenience (to be inflicted by sovereign authority), if he disobeys the Command. This conditional evil is the *Sanction* which enforces the duty; and the party bound or obliged, is bound or obliged, because he is liable to this evil, if he disobeys the command. That bond, *vinculum*, or *ligamen*, which is of the essence of *duty*, is, simply or merely, liability to a *Sanction*.

It follows from these considerations, that, before I can complete the analysis of legal *right* and *duty*, I must advert to the nature or essentials of legal Injuries, and of legal or political Sanctions. As Person, Thing, Act and Forbearance, are inseparably connected with the terms 'Right' and 'Duty,' so are Injury and Sanction imported by the same expressions.

But before we can determine the import of 'Injury' and 'Sanction' (or can distinguish the compulsion or restraint which is implied in Duty or Obligation, from that compulsion or restraint which is merely physical), we must try to settle the meaning of the following perplexing terms: namely, Will, Motive, Intention, and Negligence:—including, in the term 'Negligence,' those *modes* of the corresponding complex notion, which are styled 'Temerity' or 'Rashness,' and 'Imprudence' or 'Heedlessness.'

Accordingly, I shall now endeavour to state or suggest the significations of 'Motive' and 'Will.'

Nor is this incidental excursion into the Philosophy of Mind a wanton digression from the path which is marked out by my subject.

For 1st, the party who lies under a duty is bound or obliged by a *sanction*. This conditional evil determines or inclines his *will* to the act or forbearance enjoined. In other language, he wishes to avoid the evil impending from the Law, although he may be averse from the fulfilment of the duty which the Law imposes upon him. It is necessary, therefore to clear the expressions 'Motive' and 'Will' from the obscurity with which they have been covered by philosophical and popular jargon.

2ndly, The *objects* of duties are acts and forbearances. But every act, and every forbearance from an act, is the consequence of a volition, or of a determination of the will. We must try, therefore, to know the meaning of the term 'Will.'

3rdly, Some injuries are *intentional*. Others are consequences of *negligence* (in the large signification of the term).

Obligation,  
Injury, and  
Sanction  
imply Motive,  
Will, Inten-  
tion, Negli-  
gence, and  
Rashness.

Apology for  
inquiry into  
'Motive,'  
'Will,' etc.

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§ 3.

We must try, therefore, to determine the meaning of 'Intention' and 'Negligence.'

It is absolutely necessary that the import of the last-mentioned expressions should be settled with an approach to precision. For both of them run, in a continued vein, through the doctrine of injuries or wrongs; and of the rights and obligations which are begotten by injuries or wrongs. And one of them (namely, 'Intention'), meets us at every step, in every department of Jurisprudence.

But, in order that we may settle the import of the term 'Intention,' it is again necessary to settle the import of the term 'Will.' For, although an intention is not a volition, they are inseparably connected. And, since 'Negligence' implies the absence of a due volition and intention, it is manifest that the explanation of that expression supposes the explanation of these.

Accordingly, I will now attempt to analyze the expressions 'Will' and 'Motive.'

The Will.

Certain parts of the human body obey the *will*. In other words, we have the *power* of moving, in certain ways, certain parts of our bodies.

These expressions, and others of the same import, merely signify this:

Certain movements of our bodies follow invariably and *immediately* our wishes or desires for those *same* movements: Provided, that is, that the bodily organ be sane, and the desired movement be not prevented by an outward obstacle or hindrance. If my arm be free from disease, and from chains or other hindrances, my arm rises, so soon as I wish that it should. But if my arm be palsied, or fastened down to my side, my arm will not move although I desire to move it.

These antecedent wishes and these consequent movements, are human *volitions* and *acts* (strictly and properly so called). They are the only objects to which those terms will strictly and properly apply.

But, besides the antecedent desire (which I style a *volition*), and the consequent movement (which I style an *act*), it is commonly supposed that there is a certain 'Will,' which is the cause or author of both. The desire is commonly called an act of the *will*; or is supposed to be an effect of a *power* or *faculty* of *willing*, supposed to reside in the man.

That this same '*will*' is simply nothing, has been proved (in my opinion) beyond controversy by the late Dr. Brown, who also expelled from the region of entities, those fancied beings called '*powers*,' of which this imaginary '*will*' is one. This author, in his analysis of the relation of cause and effect, considered the subject from

numerous aspects equally new and important; and was (I believe) the first who rightly explained what we mean when we talk about the *Will*, and the *power or faculty of willing*. When I speak of *willing* a movement of my body, all that I mean (so far as I have an intelligible meaning) is that I *wish* the movement, that I expect the movement to follow my wish, and that it does follow accordingly.

For proof that nothing more is really meant, I must refer to Brown's 'Analysis of Cause and Effect.'\* A detailed exposition of the subject would be inconsistent with the limits by which I am confined, and with the direct or appropriate purpose of these Lectures.

The wishes which are immediately followed by the bodily movements wished, are the only wishes *immediately followed by their objects*.

In every other instance of wish or desire, the object of the wish is attained (in case it be attained) through a *mean*; and (generally speaking) through a *series* of means—each of the means being (in its turn) the object of a distinct wish; and each of them being wished (in its turn) as a step to that object which is the end at which we aim.

For example: If I wish that my arm should rise, the desired movement of my arm immediately follows my wish. There is nothing to which I resort, nothing which I wish, as a mean or instrument wherewith to attain my purpose. But if I wish to lift the book which is now lying before me, I wish certain movements of my bodily organs, and I employ these as a mean or instrument for the accomplishment of my ultimate end.

It will be admitted by all (on the bare statement) that the dominion of the will is limited or restricted to *some* of our bodily organs. The motion of my heart, for instance, would not be immediately affected, by a wish I might happen to conceive that it should stop or quicken.

That the dominion of the will extends not to the mind, may appear (at first sight) somewhat disputable. It has, however, been *proved* by the writers to whom I have referred. Nor, indeed, was the proof difficult, so soon as a definite meaning had been attached to the term *will*. Here (as in most cases) the confusion arose from the indefiniteness of the language by which the *subjects* of the inquiry were denoted.

If volitions be nothing but wishes immediately followed by their objects, it is manifest that the mind is not obedient to the will. In other words, it will not change its *actual*, for *different* states or conditions, *as* (and so soon as) it is wished

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Dominion of  
the will  
limited to  
bodily  
organs.

Dominion of  
the will  
limited to  
*some* bodily  
organs.

Dominion of  
the will ex-  
tends not to  
the mind.

\* Brown's Enquiry into the Relation of Cause and Effect. (For the Will in particular, Part 1, Section 8.) Mill's Analysis of the Phenomena of the Human Mind, cap. 24, 25.

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## § 3.

or desired that it should. Try to recall an absent thought, or to banish a present thought, and you will find that your desire is not immediately followed by the attainment of its object. It is, indeed, manifest that the attempt would imply an absurdity. Unless the thought desired be present to the mind *already*, there is no determinate object at which the desire aims, and which it can attain *immediately*, or without the intervention of a mean. And to desire the absence of a thought actually present to the mind, is to conceive the thought of which the absence is desired, and (by consequence) to perpetuate its presence.

Changes in the state of the mind, or in the state of the ideas and desires, are not to be attained immediately by desiring those changes, but through long and complex series of intervening means, beginning with desires which *really* are *volitions*.\*

*Volitions, what.*

Our desires of those bodily movements which immediately follow our desires of them, are therefore the only objects which can be styled *volitions*.

*Acts, what.*

And as these are the only *volitions*; so are the bodily movements, by which they are immediately followed, the only *acts* or *actions* (properly so called).

*Names of acts comprise certain of their consequences.*

The only difficulty with which the subject is beset, arises from the concise or abridged manner in which (generally speaking) we express the objects of our discourse.

Most of the names which seem to be names of acts, are names of acts *coupled with certain of their consequences*. For example: If I kill you with a gun or pistol, I *shoot* you. And the long train of incidents which are denoted by that brief expression, are considered (or spoken of) as if they constituted an *act*, perpetrated by me. In truth, the only parts of the train which are my act or acts, are the muscular motions by which I raise the weapon, point it at your head or body, and pull the trigger. These I *will*. The contact of the flint and steel, the ignition of the powder, the flight of the ball towards your body, the wound and subsequent death, with the numberless incidents included in these, are *consequences* of the act which I *will*. I *will* not those consequences, although I may *intend* them. But in common language the words *will* and *intend* are often confounded. To this subject I shall revert in the ensuing Lecture.

*Motive and Will.*

The desires of those bodily movements which immediately follow our desires of them, are imputed (as I have said) to an imaginary being, which is styled the *Will*. They have been called *acts of the will*. And this imaginary being is said to be *determined* to action, by *Motives*.

All which (translated into intelligible language) merely

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\* Examples: Taking up a book to banish an importunate thought. Looking into a book to recover an absent thought.

means this : I wish a certain object. That object is not attainable *immediately*, by the wish or desire itself. But it is attainable by means of bodily movements which will immediately follow my desire of them. For the purpose of attaining that which I cannot attain by a wish, I wish the movements which will immediately follow my wish, and *through* which I expect to attain the object which is the end of my desires (as in the foregoing instance of the book).

A motive, then, is a wish causing or preceding a volition—a wish for a something not to be attained by wishing it, but which the party believes he shall probably or certainly attain, by *means* of those wishes which are styled acts of the will.

In a certain sense, motives may precede motives as well as acts of the will. For the desired object which is said to determine the will may itself be desired as a mean to an ulterior purpose. In which case, the desire of the object, which is the ultimate end, prompts the desire which immediately precedes the volition.

That the will should have attracted great attention, is not wonderful. For by means of the bodily movements which are the objects of volitions, the business of our lives is carried on. That the will should have been thought to contain something extremely mysterious, is equally natural. For volitions (as we have seen) are the only desires which consummate themselves—the only desires which attain their objects without the intervention of means.

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Motives to volitions.

Motives to motives.

Why the will has attracted so much attention : and been thought mysterious.

## LECTURE XIX.

### *Intention.*

To discard established terms, is seldom possible ; and where it is possible, is seldom expedient. Instead of rejecting conventional terms because they are ambiguous and obscure, we shall commonly find it better to explain their meanings, or (in the language of old Hobbes) 'to *snuff* them with distinctions and definitions,' so as to give a better light.

Accordingly, I shall talk of 'willing ;' of 'determinations of the will ;' and of 'motives determining the will.' But all that I mean by those expressions, is this. 'To will,' is to *wish* or *desire* certain of those bodily movements which immediately follow our desires of them. A 'determination of the will,' or a 'volition,' is a wish or desire of the sort. A 'motive determining the will' is a wish, *not* a volition, but suggesting a wish which is. The wish styled a 'motive,' is not immediately followed by its appropriate object : but the

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bodily movement which is the appropriate object of the *volition*, seems to the party a certain or probable *mean* for attaining the something which is the appropriate object of the *motive*. In case that something be wished as a *mean* to an ulterior object, the wish of the ulterior object is a motive to a *motive*; as the wish of the *intervening* mean is a motive to the *volition*.

**Acts.**

The bodily movements which immediately follow our desires of them, are the only human *acts*, strictly and properly so called. For events which are not *willed*, are not *acts*; and the bodily movements in question are the only events which we *will*. They are the only objects which follow our desires, without the intervention of means.

But, as I observed in my last Lecture, most of the names which seem to be names of *acts*, are names of *acts* strictly and properly so called, coupled with *more or fewer of their consequences*.

And as the names of *acts* comprise certain of their *consequences*, so it is said that those consequences are *willed*, although they are only *intended*. In the case which I have just supposed, it would be said that I *willed* the consequences of my voluntary muscular movements, as well as the movements themselves.

Nor is it practicable to discard these forms of speech, although they involve the nature of will and intention in thick obscurity. They are inseparably interwoven with the rest of established language; and if I attempted to change them for new and precise expressions, I should either resort to terms which others would not understand, or to tedious circumlocutions which others would not endure. To analyze, mark, and remember their complex import, is all that I can accomplish.

Accordingly, I must often speak of '*acts*', when I mean '*acts and their consequences*'; and of those consequences as if they were *willed*, though, in truth, they are *intended*.

**Intention as regarding present acts, or the consequences of present acts.**

The bodily movements which immediately follow our desires of them, are *acts* (properly so called).

But every act is followed by *consequences*; and is also attended by *concomitants*, which are styled its *circumstances*.

To desire the *act* is to *will* it. To *expect* any of its *consequences*, is to *intend* those consequences.

The act itself is *intended* as well as *willed*. For every volition is accompanied by an expectation or belief, that the bodily movement wished will immediately follow the wish.

**Confusion of Will and Intention.**

And hence (no doubt) the frequent confusion of *will* and *intention*. Feeling that *will implies intention*, numerous writers upon Jurisprudence (and Mr. Bentham amongst the

number) employ 'will' and 'intention' as synonymous or equivalent terms. They forget that *intention does not imply will*.

Now the consequence of an act is never *willed*. For none but acts themselves are the appropriate objects of volitions. Nor is it always *intended*. For the party who wills the act, may not expect the consequence. If a consequence of the act be *desired*, it is probably *intended*. But (as I shall show immediately) an *intended* consequence is not always *desired*. Intentions, therefore, regard *acts*: or they regard the *consequences* of acts.

To show that the agent may not intend a consequence of his act I will give an example:

Shooting with a pistol at a mark chalked upon a paling, one of my shots hits and wounds a person passing along a road at the other side of the fence.

Now, when I aim at the mark, and pull the trigger, I may not *intend* to hurt the passenger. For though the hurt of a passenger be a probable consequence, I may not think of it, or advert to it, as a consequence. Or, though I may advert to it as a possible consequence, I may think that the fence will intercept the shot, and prevent it from passing to the road. Or the road may be one which is seldom travelled, and I may think the presence of a stranger at that place and time extremely improbable.

On any of these suppositions, I am clear of *intending* the harm: Though (as I shall show hereafter) I may be guilty of *heedlessness* or *rashness*. Before *intention* can be defined exactly, the import of those terms must be taken into consideration.

Where the agent *intends* a consequence of the act, he may *wish* the consequence, or he may *not* wish it.

And, if he *wish* the consequence, he may wish it as an *end*, or he may wish it as a *mean* to an end.

Strictly speaking, no external consequence of any act is desired as an *end*. For the end or ultimate purpose of every volition and act is a feeling or sentiment:—pleasure, direct or positive; or the pleasure which arises indirectly from the removal or prevention of pain. But where the pleasure, which (in strictness) is the end of the act, can only be attained through a *given* external consequence, that external consequence is inseparable from the end; and is styled (with sufficient precision) the end of the act and the volition.

Where an intended consequence is wished as an *end* or a *mean*, motive and intention concur. In other words, The consequence intended is also wished; and the wish of that consequence suggests the volition. This possibly is the reason why motive is frequently confounded with intention

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A conse-  
quence of an  
act is not  
willed, and  
may not be  
intended.

An intended  
consequence  
of an act may  
be wished (as  
an end or  
mean) or not  
wished.

Consequence  
of an act  
wished as an  
end.

Occurrence  
of Motive  
and Inten-  
tion.

Hence arises  
confusion of

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Motive with  
Intention.

Exemplifica-  
tions of the  
three fore-  
going sup-  
positions.

Of the first  
supposition.

Of the second  
supposition.

Of the third  
supposition.

by writers on jurisprudence. Of this confusion the law of England affords a flagrant instance when it lays down that murder must be committed of *malice aforethought*; by which is only meant that it must be committed intentionally (see p. 212, *infra*).

I will now exemplify those three varieties of intention at which I have pointed already.

1st. The agent may *intend* a consequence; and that consequence may be the *end* of his act.

2ndly. He may *intend* a consequence; but he may desire that consequence as a *mean* to an end.

3rdly. He may *intend* the consequence, without desiring it.

As examples of these three varieties, I will adduce three cases of intentional killing.

You hate me mortally: and, in order that you may appease that painful and importunate feeling, you shoot me dead.

Now here you *intend* my death: and (taking the word '*end*' in the meaning which I have just explained) my death is the *end* of the act, and of the volition which precedes the act. Nothing but that consequence would appease your hate, or satisfy your malice.

Again:

You shoot me, that you may take my purse. I refuse to deliver my purse when you demand it. I defend my purse to the best of my ability. And, in order that you may remove the obstacle which my resistance opposes to your purpose, you pull out a pistol and shoot me dead.

Now here you *intend* my death, and you also *desire* my death. But you desire it as a *mean*, and not as an *end*. Your desire of my death is not the ultimate *motive* suggesting the volition and the act. Your ultimate motive is your desire of my purse.

Lastly:

You shoot at Sempronius or Styles, at Titius or Nokes, desiring and intending to kill him. The death of Styles is the *end* of your volition and act. Your desire of his death, is the *ultimate motive* to the volition. You contemplate his death, as the probable consequence of the act.

But when you shoot at Styles, I am standing close by him. And you think it not unlikely that you may kill *me* in your attempt to kill *him*. You fire, and kill me accordingly. Now here you do not desire my death, neither as an *end* nor as a *mean*. But, since you contemplate my death as a probable consequence of your act, you *intend* my death.

Forbearances  
are intended,  
but not  
willed.

It follows from the nature of Volitions, that *forbearances from act's* are not *willed*, but *intended*.

When I forbear from an act (speaking generally)\* I will. But I will an act other than that from which I forbear or abstain: and, knowing that the act which I will, excludes the act forbore, I intend the forbearance.

For example, It is my duty to come hither at seven o'clock. But, conscious that I ought to come hither, I go to the Playhouse at that hour, instead. Now, in this case, my absence from this room is *intentional*. I know that if my legs brought me to the University, they would not carry me to the Playhouse.

If I forgot that I ought to come hither, my absence would not be *intentional*, but the effect of *negligence*.

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## LECTURE XX.

### *Negligence, Heedlessness, and Rashness.*

THE motives to *forbearances* (or, rather, to the *acts* which exclude the acts forbore) are different in different cases.

I may forbear from the act because I dislike its consequences: or because I prefer the consequences of the act which I presently will, and which I could not perform unless I forbore from the other. In either case, the act which I will, and not the forbearance, is the object of the volition itself. 'To will nothing' is a flat contradiction in terms.

Forbearances must be distinguished from Omissions.

'To forbear,' is not to do, with an intention of not doing.

'A forbearance,' is a not doing, with a like intention.

'To omit,' is not to do, but without thought of the act which is not done.

'An omission,' is a not doing with a similar absence of consciousness.

These significations are clear and precise, and the terms are convenient for expressing them. Sometimes, indeed, 'omit' is used with the meaning to omit unlawfully, and

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Motives to  
forbearances

Forbearances  
distinguished  
from  
Omissions.

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\* Not every present forbearance from a given act is preceded or accompanied by a present volition to do another act; e.g. I may lie perfectly still, intending not to rise.

But it is generally true, that every present forbearance is preceded or accompanied by a volition. In our waking hours, our lives are a series (nearly unbroken) of volitions and acts. And, when we forbear, we commonly do something inconsistent with the act forbore, and which we are conscious is inconsistent with it.

Where a forbearance is preceded or accompanied by inaction, the desire leading to the forbearance is not to be compared to a volition. The forbearance is not, like the act, the direct and appropriate object of the wish.

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'forbear' with the meaning to forbear lawfully. But although the terms are sometimes used in these more restricted senses, I think I am justified not only by convenience, but also by the usage of numerous and good writers, in attaching the above large significations to the terms in question. If you wish to denote 'that a forbearance or omission is a breach of duty,' you can accomplish that purpose by styling it 'injurious' or 'unlawful,' or you may call it 'culpable.'

**Negligence.**

Injurious or culpable omissions are frequently styled 'negligent.' The party who omits, is said to 'neglect' his duty. The omission is ascribed to his 'negligence.' The state of his mind at the time of the omission, is styled 'negligence.' These (I think) are the meanings usually attached to these terms; although the Roman lawyers (as I shall show immediately) have given them a larger signification.

**heedlessness**

'Heedlessness' differs from negligence, although they are closely allied.\*

The party who is negligent *omits* an act, and breaks a *positive* duty:

The party who is heedless *does* an act, and breaks a *negative* duty.

I endeavoured in my last Lecture to illustrate my meaning, by an example to which I now refer you.† In the case supposed, I did not advert to the probable consequence of my act. And, since it was my duty to advert to it, I am guilty of *heedlessness*, although I am clear of *intentional* injury.

**Negligence  
and Heed-  
lessness  
compared.**

The states of mind which are styled 'Negligence' and 'Heedlessness,' are precisely alike. In either case, the party is inadvertent. In the first case, he does *not* an act which he was bound to do, because he adverts not to it. In the second case he *does* an act from which he was bound to forbear, because he adverts not to certain of its probable consequences. Absence of a thought which one's duty would naturally suggest, is the main ingredient in each case.

**Rashness.**

The party who is guilty of Temerity or Rashness, like the party who is guilty of heedlessness, does an act, and breaks a positive duty. But the party who is guilty of heedlessness, thinks not of the probable mischief. The party who is guilty of rashness *thinks* of the probable mischief; but, in consequence of a misapposition begotten by *insufficient* advertence, he assumes that the mischief will not ensue in the given instance or case. Such (I think) is the meaning invariably attached to the expressions, 'Rashness,'

\* Bentham, 'Principles,' etc. pp. 86, 161.

† See p. 205, *ante*.

'Temerity,' 'Foolhardiness,' and the like. The radical idea denoted is always this—The party runs a risk of which he is conscious; but he thinks (for a reason which he examines insufficiently) that the mischief will probably be averted in the given instance. I will illustrate my meaning, by recurring to the example already given (*ante*, p. 205).

When I fire at the mark chalked upon the fence, it occurs to my mind that a shot may pierce the fence, and may hit a passenger. But without examining carefully the ground of my conclusion, I conclude that the fence is sufficiently thick to prevent a shot from passing to the road: or that no one is there, the road being seldom passed. In either case, my confidence is *rash*; and, through my *rashness* or *temerity*, I am the author of the mischief. My assumption is founded upon evidence which the event shows to be worthless, and of which I should discover the worthlessness if I scrutinised it as I ought.

By the Roman lawyers, Rashness, Heedlessness, or Negligence, is, in certain cases, considered equivalent to 'dolus': that is to say, to intention. '*Dolo comparatur.*' '*Vix est ut a certo nocendi proposito discerni possit.*' Their meaning (I believe) was this:—

Judging from the conduct of the party, it is impossible to determine whether he *intended*, or whether he was negligent, heedless, or rash. And, such being the case, it shall be *presumed* that he *intended*, and his liability shall be adjusted accordingly, *provided that the question arise in a civil action*. If the question had arisen in the course of a criminal proceeding, then the presumption would have gone in favour of the party and not against him.

Such (I think) is the meaning which floated before their minds: although we must infer (if we take their expressions literally) that they believed in the possibility of a state of mind lying between consciousness and unconsciousness. If they believed in such a state of mind, it appears to me that they were under a mistake.

Intention (it seems to me) is a *precise* state of the mind, and cannot coalesce or commingle with a different state of the mind. 'To intend,' is to believe that a given act will follow a given volition or act, or that there is a chance of its following his volition or act. Intention, therefore, is a state of consciousness.

e.g.: Instead of assuming confidently that the fence will intercept the ball, or that no passenger is then on the road, I may surmise that the assumption upon which I act is not altogether just. I think that a passenger may chance to be there, though I think the presence of a passenger somewhat improbable. Or, though I judge the fence a stout and thick *paling*, I tacitly admit that a brick wall would intercept a

What was meant by the Roman lawyers when they considered negligence in certain cases equivalent to intention.

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pistol-shot more certainly. Consequently, I *intend* the hurt of the passenger who is actually hit and wounded. I think of the mischief, when I will the act; I believe that my mis-supposition *may* be a missupposition; and I, therefore, believe there is a *chance* that the mischief to which I advert may follow my volition.

But negligence and heedlessness suppose unconsciousness. In the first case, the party does *not* think of a given act. In the second case, the party does *not* think of a given consequence. Rashness, again, implies that although the actor *has* adverted to the consequence, he assumes that it will not follow in the particular instance. By the hypothesis he at the moment of action does not regard the consequence as a probable result of the act. If he regards the consequence as probable, though only in a slight degree, he *intends* it.

Now either the acting party thinks, or he does *not* think, of the act or consequence. And if he thinks of the consequence, he either regards or he does not regard it as probable. If he thinks of the act and consequence and regards the consequence as probable, he *intends*. If otherwise, he is *negligent, heedless, or rash*.

It is, therefore, clear to me, that Intention is always separated from Negligence, Heedlessness, or Rashness, by a precise line of demarcation. The state of the party's mind is always *determined*, although it may be difficult (judging from his conduct) to ascertain the state of his mind.

Before I quit this subject, I may observe that *hasty* intention is frequently styled *rashness*. For instance, an intentional manslaughter is often styled *rash*, because the act is not premeditated, or has not been preceded by deliberate intention. Before we can distinguish *hasty* from *deliberate* intention, we must determine the nature of intention *as it regards future acts*. But it is easy to see that sudden or *hasty* intention is utterly different from *rashness*. When the act is done, the party contemplates the consequence, although he has not *premeditated* the consequence or the act.

I must here also advert to a convenient distinction suggested by Bentham. '*Direct intention*' may be conveniently used to imply that the consequence is not only intended, but desired. '*Indirect intention*' has been used to signify that the consequence, although intended, is not desired.

Having tried to analyze intention (where it is coupled with will), and to settle the notions of negligence, heedlessness, and rashness, I will now trouble you with a few remarks upon certain established terms.

*Dolus* denotes, strictly, *fraud*:\*—'Calliditas, fallacia,

*Dolus*.

\* Bentham, Pr. 91.

*machinatio, ad circumveniendum, decipiendum, fallendum alterum, adhibita.*

By a transference of its meaning which is not very explicable, it also signifies *intention*, or *intentional wrong*, provided the intention be of the species which I have above termed direct intention:—"Inuria qualiscunque *scienter admissa* :—"Inuria quam quis *sciens volensque* commisit."

The use of the term *dolus* for the purpose of signifying *intention*, may, perhaps, be explained thus:

Fraud imports *intention*: For he who contrives or *machinates ad decipiendum alterum*, pursues a given purpose. For want, therefore, of a name which would denote *Intention*, the Roman lawyers expressed it (as well as they could) by the name of a something which necessarily implied it.

It is an instance of those generalizations which are so common in language: of the extension of a term denoting a species, to the genus which includes that species. [e.g. *Virtue*.]

*Culpa*, as opposed to *dolus*, imports negligence, heedlessness, or temerity; as well as indirect intention:—  
*'Omnia protervitas, temeritas, inconsiderantia, desidia, negligentia, imperitia, quibus citra dolum, cui nocutum est.'*  
*'Generatim, culpa dicitur quævis injuria ita admissa, ut jure imputari possit ejus auctori.'* In order that a given mischief may be *imputed* to another, 'neccesse est, ut culpa ejus id acciderit.' That is to say, through his *intention*; or through his negligence, heedlessness, or temerity (as I have explained them above).

Again: the term *Culpa* is sometimes opposed to *negligentia*. In which case, these words have a very peculiar meaning.

*Culpa*, in this sense—sometimes distinguished as *culpa Aquilia*, to mark that a breach of the *lex Aquilia* is referred to—is restricted to *delicts* (stricto sensu).

The injuries done through *Culpa* (in this sense) '*faciendo semper admittantur*'.

The injuries done '*negligentia*' (when opposed to *culpa* in this sense) comprise all breaches of obligations, whether those obligations are positive or negative, and are committed '*faciendo aut non faciendo*'.

Here then *negligentia* includes, Intention, Negligence (properly so called), Heedlessness, and Temerity.

Origin of this application. *Negligentia* opposed to *Dolus*.

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\* The word *malus* is often coupled with *dolus* by the Roman lawyers. The reason is that there is a *dolus bonus*, a *machinatio*, which is innocent or laudable: *artifice* for example, which is made use of to prevent an impending crime. All other *dolus* is *dolus malus*, and this is the only meaning of *malus* when attached to *dolus*.

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Malice.

*gentia*: i. e. that care which (ex obligatione) the obliged party, e. g. a trustee, bailee, &c., is often obliged to employ about the interests of another.

I have already remarked upon the extension of *Dolus* to Intention generally. In the English law the word 'Malice' is sometimes employed with a similarly extended meaning. As malice (*stricto sensu*) implies intention, it has been extended to cases in which there is no malice. The meaning in this case is wider than in the case of *dolus*, and extends to indirect intention: e. g. I shoot at A while B is standing by, and kill B, not desiring to do so, but knowing that his death was a probable consequence of my act. According to English law I am guilty of murdering B, that is to say, of slaying him '*of malice aforethought*'.

Infortunium.  
Dolus and  
Culpa.  
Roman law.

To sum up in a few words the meaning of the leading terms on this subject in the Roman law. Unintentionality, and innocence of intention, seem both to be included in the case of *infortunium*, where there is neither *dolus* nor *culpa*. Unadvisedness coupled with heedlessness, and unadvisedness coupled with rashness, correspond to the *culpa sine dolo*. Direct intentionality corresponds to *dolus*. Oblique intentionality is included in *culpa*. [*Scientia*, but without the *voluntas nocendi*. *Prope dolum*, but not *dolus*.] Nothing can be more accurate.

## LECTURE XXI.

### *Intention further considered.*

LECT.  
XXI.

Intentions  
coupled with  
volitions  
and acts.

Present  
intention to  
do a future  
act, dis-  
tinguished  
from an act  
with a pre-  
sent volition  
and inten-  
tion.

Present  
intention to

THE intentions which I considered in my last Lecture, are coupled with present volitions, and with present acts.

But a *present* intention to do a *future* act, is not coupled with the present performance of the act. For the intention, though present, regards the future. Nor is it coupled with a present *will* to *do* the act intended. For to *will* an act is to *do* the act, provided that the bodily organ, which is the instrument of the volition and the act, be in a sound or healthy state.

Consequently, to do an act with a present intention, is widely different from a present intention to do a future act. In the first case, the act is willed and done. In the second case, it is neither willed nor done, although it is intended.

A present intention to do a future act, may (I think) be resolved into the following elements.

First, The party *desires* a given object, either as an end, or as a mean to an end.

Secondly, He *believes* that the object is attainable through acts of his own.

Thirdly, He *presently* believes that he shall do acts *in future*, for the purpose of attaining the object.

The belief 'that the desired object is attainable through acts of our own,' is obviously implied in the belief 'that we shall do acts hereafter for the purpose of attaining it.' For I can hardly believe that I shall try to attain an object which I know to be utterly beyond my reach.

Consequently, a present intention to do a future act may be defined to be: 'A present *desire* of an object (either as an end or a mean), with the present *belief* by the party that he will do acts hereafter for the purpose of attaining the object.' It is this belief which distinguishes the intention from a simple desire of the object. e.g.: If I wish for a watch hanging in a watchmaker's window, but without believing that I shall try to take it from the owner, I am perfectly clear of *intending* to steal the watch, although (if the wish recur frequently) I am guilty of *coveting* my neighbour's goods.

It may also be distinguished briefly from a present volition and intention, in the following manner:

In the latter case, we presently will, and presently act, *expecting* a given consequence. In the former case, we neither presently will nor presently act, but we *presently* expect or believe that we *shall* will *hereafter*.

When we intend a future act, it is commonly said 'that we resolve or determine to do it;' or 'that we make up our minds to do it.' Frequently, too, a verbal distinction is taken between a strong and a weak intention; that is to say, between a strong or a weak belief that we shall do the act in future. Where the belief is strong, we are more apt to say 'that we *intend* the act.' Where the belief is weak, we are more apt to say 'that we *believe* we shall do it.'

It is clear that such expressions as 'determining,' 'resolving,' 'making up one's mind,' can only apply in strictness to 'volitions': that is to say, to those desires which are instantly followed by their objects, and by which it may be said that we are *concluded*, from the moment at which we conceive them.

But when such expressions as 'resolving' and 'determining' are applied to a present intention to do a future act, they simply denote that we desire the object *intensely*, and that we believe (with corresponding confidence) we shall resort to means of attaining it.

And this perfectly accords with common apprehension, although it may sound like a paradox. For every *intention*

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XXI.  

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do a future  
act, what.

PART I.  
§ 2.

Intending a future forbearance.

which regards the future, is *ambulatory* or *revocable*. The present *desire* of the object may cease; and the *belief* that we shall resort to the means of attaining the object, will, of course, cease with the wish for it.

It is clear that we may presently intend a future forbearance as well as a future *act*.

We may either desire an object inconsistent with the act to be forbore, or we may positively dislike the probable consequences of the act. In the first case, we may presently believe that we shall forbear from the act hereafter, in order that we may attain the object which we wish or desire. In the latter case, we may presently believe that we shall forbear from the act hereafter, in order that we may avoid the consequences from which we are averse.

All that can be said (in general) of intentions to *act* in future, may be applied (with slight modifications) to intentions to *forbear* in future. I confine myself to intentions to *act* in future, in order that my expressions may be less complex, and, by consequence, more intelligible.

When we intend a future act, we also intend certain of its consequences. In other words, we believe that certain consequences will follow that future act, which we presently believe we shall hereafter *will*.

But we may also intend or expect that the act may be followed by consequences which we do not desire, or from which we are averse. For example: I may intend to shoot at and kill you, so soon as I can find an opportunity. But knowing that you are always accompanied by friends or other companions, I believe that I may kill or wound one of these in my intended attempt to kill you; a consequence to which I am averse.

The execution of every intention to do a future act, is necessarily postponed to a future time.

Every intention to do a future act, is also revocable or ambulatory. That is to say, Before the intention be carried into execution, the desire which is the ground of the intention may cease or be extinguished, or, although it continue, may be outweighed by inconsistent desires.

The intention to do the future act may be precise and matured or it may not be so. For example, I may intend to kill you by shooting at a given *place* and *time*. Or, though I intend to kill you, I may neither have determined the mode nor the time and place for executing the murderous design.

It not unfrequently happens, that a long and complex series of acts and means is a necessary condition to the attainment of the desired object (supposing it can be attained). To determine these means, or to deliberate on the choice of them, is commonly styled 'a compassing of the desired object.' Or, when the intended means are thus

Intentions to do future acts are revocable.

Are matured or not.

A compassing or compass-  
ing.

complicated, the intention is frequently styled *consilium*. Either of the terms denotes the deliberation or pondering, which necessarily attends the intention before it becomes precise.

Such (I think) are the proper meanings of *compassing* and *consilium*. But it must be confessed, that the terms are frequently applied loosely. In the language of the English Law, you would *compass* and imagine the death of the King, although you intended to slay him by the shortest and simplest means.

It frequently happens that the desired object is not accomplished by the intended act. For example, I point a gun, and pull the trigger, intending to shoot you. But the gun misses fire, or the shot misses its mark. In this case, the act is styled an *attempt*: an attempt to accomplish the desired object. It also frequently happens, that several acts must be done in succession before the desired object can be accomplished. And the doing any of the acts which precede the last, is also styled an *attempt*. For example: To buy poison for the purpose of killing another, or to provide arms for the purpose of attacking the king, are attempts or endeavours towards murder or treason. Attempts are evidence of the party's intention; and, considered in that light, are styled in the English Law, '*overt acts*'.

Where a criminal intention is evidenced by an attempt, the party is punished in respect of the criminal intention.† Sometimes he is punished as severely as if he had accomplished the intended object. But more commonly with less severity.

The reason for requiring an attempt, is probably the danger of admitting a mere confession.‡ When coupled with an overt act, the confession is illustrated and supported by the latter. When not, it may proceed from insanity, or may be invented by the witness to it.

I have here considered the import of the term '*Intention*', in order that I might elucidate the general nature of Injuries.

Intention  
considered  
without refer-  
ence to in-  
juries.

\* 'Delictum consummatum. Conatus delinquendi.' Consummate Crimes and Criminal Attempts.—Feuerbach, p. 41.

† Eine Handlung, welche die Hervorbringung eines Verbrechens zum Zwecke hat, ohne den berweckten verbrecherischen Thatbestand wirklich zu machen, ist ein Versuch.—Rosakir, p. 86.

‡ I venture to think, in accordance with my remarks in the note on p. 174 ante, that the ratio of this punishment is more simple, and that the *consilium* or *cogitatio* for which the party is punished is an *act* evidenced by the *overt act*.—R. C.

§ Example of a man punished for confessed intention (without overt act) to kill Henry III. of France.

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But the word intention is often employed, without reference to wrongs. We speak of the intention of the legislator, in passing a law; of the intention of testators; of the intention of parties to contracts, and so on. In each of these cases, the notion signified by the term 'Intention' may be reduced to one of the notions which I have already endeavoured to explain: namely, a present volition and act, with the expectation of a consequence; or a present belief, on the part of the person in question, that he will do an act in future.

When we speak of the intention of the legislator, we either advert to the purpose with which he made the law; or we advert to the sense which he annexed to his own expressions, and in which he wished and expected that others would understand them. In either case we mean that he willed and performed a given act, *expecting* a given consequence: *e. g.*—that he made the provision, expecting the purpose would be attained; or that he used his words with a certain sense, *expecting* that others would understand them in the same sense. When we say, that 'the will or intention of the testator is ambulatory,' we mean that 'he may will and intend anew.'

When we speak of the *intention* of contracting parties, we mean the sense in which it is to be inferred from the words used, or from the transaction, or from both, that the one party gave and the other received the promise. Paley's rule<sup>\*</sup> would lead to this: that a mistaken apprehension by the promisor of the apprehension by the promisee, would exonerate the promisor. This would be to disappoint the promisee. If the apprehension of the promisee did not extend to so much as the promisor apprehends that it did, it is true that the promisor is not surprised by a more onerous obligation than he expected; but then there is no reason for giving the promisee an advantage which he did not expect: pain of loss being greater than the mere pleasure of gain, which this advantage would be. But by the hypothesis no expectation is raised, and there is therefore no engagement.

If, on the other hand, the promisor underrates the expectation of the promisee he disappoints an expectation.

\* 'Where the terms of a promise admit of more senses than one, the promise is to be performed "in that sense which the promiser apprehended, at the time that the promisee received it."

'It is not the sense in which the promiser actually intended it, that always governs the interpretation of an equivocal promise; because, at that rate, you might excite expectations which you never meant, nor would be obliged, to satisfy. Much less is it the sense in which the promisee actually received the promise; for, according to that rule, you might be drawn into engagements you never designed to undertake. It must therefore be the sense (for there is no other remaining) in which the promiser believed that the promisee accepted his promise.'—*Paley, Moral and Polit. Philosophy*, vol. i. chap. v.

The true rule is the understanding of both parties. If the facts in evidence are such as to raise the legal inference that the understanding of the parties differed materially, there is no *consensus* and therefore no contract. But if the instrument in writing was understood by both to contain the terms of their contract, so that it became the *medium* of the *consensus*, then the instrument is the only admissible evidence of what those terms were. In the example, Paley seems to confound the sense which the promisor, in common with all, must have put on his promise, with his secret intention of breaking it.

The *sense* of the promise, i.e. the meaning which each party apprehends that the words or transaction must denote, is a totally different thing from the *intention* of the parties: but commonly agrees with their intention. Each of the parties does a present act, expecting a given consequence.

## LECTURE XXII.

### *Sanction.*

The difference between Sanction and Obligation is simply this.

Sanction is evil, incurred, or to be incurred, by disobedience to command.

Obligation is liability to that evil, in the event of disobedience.

Obligation regards the future. An obligation to a past act, or an obligation to a past forbearance, is a contradiction in terms.

If the party has acted or forbore agreeably to the command, he has fulfilled the obligation wholly or in part. And here there is a certain difference between positive and negative duties. The performance of a positive duty extinguishes both the duty and the corresponding right: a negative duty is never extinguished by fulfilment, though if the right be extinguished by another cause, the duty ceases.

It is not unfrequently said 'that Sanctions operate upon the *Will*,' and 'that men are obliged to do or forbear through their *wills*.'

It were more correct to say 'that Sanctions operate upon the *desires*,' and 'that men are obliged to do or forbear through their *desires*.'

Sanction and  
Obligation  
disting-  
guished.

Obligation  
regards the  
future.

Sanctions  
operate  
upon the  
*desires*.

Stated plainly and precisely, the fact is this. The party

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**§ 3.**

obliged is averse from the conditional evil, which he may chance to incur in case he break the obligation : In other words, he wishes or desires to avoid it. But, in order that he may avoid the evil, or may avoid the chance of incurring it, he must fulfil the obligation : He must do *that* which the Law enjoins, or must forbear from *that* which the Law prohibits.

That every sanction operates upon the *desires* of the obliged, is true. For he is necessarily averse from the evil with which he is threatened by the Law, as he is necessarily averse from every evil whatsoever.

That *every* sanction operates upon the *will* of the obliged, is not true. If the duty be *positive*, and if he fulfil the duty out of regard to the sanction, it may be said with propriety that the sanction operates upon his *will*. For his desire of avoiding the evil which impends from the Law, makes him *do*, and, therefore, *will*, the act which is the object of the command and the duty. But if the duty be *negative*, and if he fulfil the duty out of regard to the sanction, it can scarcely be said with propriety that the sanction operates upon his *will*. His desire of avoiding the evil which impends from the Law, makes him forbear from the act which the Law prohibits. But, though he *intends* the forbearance, he does not *will* the forbearance. He either wills an act which is inconsistent with the act forbore, or he remains in a state of inaction which equally excludes it.

The proposition that we are obliged through our wills is therefore only true in the case of a positive duty, and in this sense, namely, that the Law threatens us with the sanction, in order that we may *act*; and in order that we may *act*, we must *will*. The force of the obligation lies in our *desire* of avoiding the threatened evil. But, in order that we may avoid that evil by performing the obligation, we *will* the act which is commanded. In the case of a positive duty, therefore, it may be truly said that we are obliged to will, or that we are obliged through our wills.

And this is true. For *acts and their consequences* are the objects of positive duties; and every volition is followed by the act which is willed, if the appropriate bodily organ be sound or healthy.

And here I may remark that we cannot be obliged to desire or *not to desire* in the sense in which *desire* is opposed to *will*; i.e. to desire that which the Law enjoins, or *not to desire* that which the Law forbids: For although we desire to avoid the sanction, we are not *therefore* averse from that which the Law forbids, nor do we therefore incline to that which the Law enjoins.

In spite of our aversion from the evil with which we are menaced by the Law, we may still desire that which the Law forbids, or may desire to evade that which the Law

An obligation  
to *will* not  
impossible.

An obligation  
to desire not  
possible.

exacts: although our necessary desire of avoiding the sanction, may be stronger than the opposite desire which urges us to a breach of our duty. The desire of avoiding the sanction may *control* the opposite desire, but cannot supplant or destroy it, unless in the oblique or indirect manner to which I shall advert immediately.

It is equally manifest, that we are not *obliged* to our desire of avoiding the sanction. We are not *bound* or obliged to entertain the desire; but we are bound or obliged, because we are threatened with the evil, and because we inevitably desire to *avoid* the evil.

When we desire that which the Law forbids, or when we are averse from that which the Law enjoins, we observe our duty (supposing we do observe it) because our aversion from the sanction overcomes the conflicting wish.

LECT.  
XXII.

Supposed  
conflict of  
desire and  
will.

In these, and in similar cases, it is not unusual to suppose a *conflict* between desire and will. Because we *will* a something from which we are averse, it is imagined that we will against our *desires*. The truth, however, is, merely that we will or forbear in compliance with a stronger desire, instead of forbearing or willing in compliance with a weaker desire.

It is truly astonishing that this obvious solution of the difficulty escaped the penetration of Mr. Locke. It is of no small importance that the difficulty should be clearly conceived, and the solution distinctly apprehended. For I believe that the mysterious jargon about the nature of the will has arisen entirely from this purely verbal puzzle.

I have said that we cannot be obliged *not* to desire; that the desire of avoiding the sanction may *master* or *control*, but cannot extinguish a desire which urges to a breach of duty.

Effect of  
obligation  
in extin-  
guishing  
desires  
which urge  
to a breach  
of duty.

But this, though true in the main, must be taken with an important qualification. The desire of avoiding the sanction, though it cannot destroy *directly* the conflicting and sinister desire, may do so *gradually* or *in the way of association*. The thought of the act or forbearance which would amount to a breach of duty, is habitually coupled with the thought of the evil which the Law annexes to the wrong. If our desire of avoiding the evil, which the Law annexes to the wrong, be stronger than our desire of the consequences which might follow the act or forbearance, we regard the latter as a cause of probable evil, and we gradually transfer to the cause our aversion from the effect. Our stronger desire of avoiding the Sanction, gradually extinguishes the weaker desire.

This is merely a case of a familiar and indisputable fact. Objects originally agreeable become disagreeable on account of their disagreeable consequences. And objects originally

This is an ex-  
ample of the  
familiar  
principle of  
association.

pleasing become displeasing by reason of painful consequences with which they are pregnant.

This gradual effect of sanctions in extinguishing sinister desires, is a matter of familiar remark, and is expressed in various ways. Owing to the prevalent misconceptions regarding the nature of the will, the effect which is really wrought upon the state of the desires is frequently ascribed to the will.

We are told, for instance, by Hobbes, in his 'Essay on Liberty and Necessity,' 'that the habitual fear of punishment maketh men just: ' 'that it frames and moulds their wills to justice.' The plain and simple truth is this: that it tends to quench wishes which urge to breach of duty, or are adverse to that which is *jussum* or ordained.

Where the fear of the evils which impend from the Law has extinguished the desires which urge to breach of duty, the man is *just*. He is not compelled or restrained by fear of the sanction, but he fulfils his duty spontaneously. He is moved to right, and is held from wrong by that habitual aversion from wrong or injury, which the habitual fear of the sanction has gradually begotten. He comes to love justice with disinterested love, and to hate injustice with disinterested hate. So far as he fulfils his duties through these disinterested affections, the man is just. '*Justitia est perpetua voluntas suum cuique tribuendi.*'

The man who fulfils his duty because he fears the sanctions is an *unjust man*, although his *conduct* is just. If he were freed from the fear which compels or restrains him, his conduct would accord with the sinister desires and aversions, which solicit or urge him to violate his duty.

When I affirm that our fear of the evils by which our duties are sanctioned is frequently transmuted into a disinterested hate of injustice, I am far from intimating that that fear is the *only* source of this beneficent disposition. The love of justice, or the hate of injustice, is partly generated (no doubt) by a perception of the *utility* of justice, and by that love of general utility which is felt by all or most men more or less strongly. But it is also generated, in part, by the habitual fear of sanctions. The effect of sanctions is therefore of a double character: their remote or indirect effect—to inspire a disinterested love of justice; their proximate and direct effect—to compel us to right, or restrain us from wrong, in case that useful sentiment be absent or defective.

When the desires of the man habitually accord with his duty, we say that the man has a disposition to justice. And this disposition is a ground for mitigation in measuring out punishment or in measuring out censure.

Every legal crime should be visited with legal punishment, and every offence against morals should be visited

The dispositions of men commonly termed just and unjust hence in part accounted for

with reprobation. The general consequences which would ensue if the offender passed with impunity, render it expedient that it should be visited with punishment or censure. But since there would be few offences if good dispositions were general, it is also expedient to mitigate the punishment or censure, having regard to the good disposition manifested by the criminal.

And this, accordingly, is the usual habit of the world. The occasional aberrations of a man who is habitually just or humane, are treated with less severity, both in regard to legal and moral sanctions, than the offences of the dishonest and the cruel.

Where the desires of the man are habitually adverse to his duty, we may properly call the state of his mind a disposition to injustice.

Owing to the prevalent misconceptions about the nature of will, we frequently style the predominance of pernicious desires, a depraved or wicked will. Sometimes, indeed, we mean by a depraved or wicked will a deliberate intention to do a criminal act. Although it is perfectly manifest, that badness or goodness cannot be affirmed of the will, and that a criminal intention may accord with a good disposition.

Lect.  
XXII.

### LECTURE XXIII.

#### *Physical Compulsion Distinguished from Sanction.*

I now proceed to distinguish physical compulsion or restraint from the restraint which is imposed by duty or obligation.

A sanction is a conditional evil. The party obliged is obliged, because he incurs the risk of this evil in the event of disobedience, and because he *desires* to avoid it. Desiring to avoid the sanction, or else through a disinterested motive (probably begotten of the sanction through the process of association) he desires to fulfil the duty, and in accordance with this desire he wills the act or intends the forbearance which is the object of the duty.

Consequently, the compulsion or restraint which is implied in Duty or Obligation, is hate and fear of an evil which we may avoid by *desiring*: by desiring to fulfil a something, which we *can* fulfil if we wish.

Other compulsion or restraint may be styled merely *physical*.

For example: I am imprisoned in a cell from which I am able to escape; but knowing that I may be punished in

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Physical compulsion or restraint distinguished from that which is im-

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ported by  
duty or obliga-  
tion.

case I attempt to escape, the fear of the probable punishment determines or inclines me to stay there. In this case it may be said I am *obliged* to stay in my cell.

But if I am imprisoned in a cell of which the door is locked, physical restraint is applied to my body. I cannot move from my cell, although I desire to move from it. Whether I shall quit, or whether I shall stay in my cell, depends not upon my desires.

Again: if the judge sentence me to imprisonment, he may command that I shall be dragged to prison in case I refuse to go, or he may command me to go to prison under peril of an additional punishment. If I go to prison through dislike of being dragged there, or fear of the additional punishment, it may be said that I am *obliged* to go, or that I desire to go as a means of avoiding the greater evil. But if I refuse to go to prison, and am dragged thither by the officers without a movement of my own, physical *compulsion* is applied to my body. Whether I shall move to prison, or not, depends not upon my desires.

Physical compulsion may affect the mind as well as the body.

As I observed in a former Lecture, the dominion of the will extends not to the mind.\* That is to say, no change in the state of the mind is immediately accomplished by a mere desire. But changes in the mind may be wrought through *means* to which we resort in consequence of such desires: e.g. acquiring knowledge of a particular science by reading, writing, and meditation.

But a change in the mind may be wrought or prevented, whether we desire the change or whether we do not desire it. And, in all such cases, it may be said that the mind is affected by physical compulsion or restraint.

The conviction produced by evidence, is a case of physical compulsion. If I perceive that premises are true, and that the inference is justly drawn, I admit the conclusion, though I do not *wish* to admit it, or though the truth be unwelcome. Accordingly, if I love darkness, and hate the light, I refuse to examine the proofs which might render the truth irresistible, and dwell with complacency upon every shadow of proof which tends to confirm my prepossession.†

I observe that certain writers talk of obligations to suffer, and of obligations not to suffer. And, as an instance

\* P. 201 *ante.*

† For this reason, non-belief may be blameable. Where (e.g.) it is the result of insufficient examination, refusal to examine, partiality or antipathy indirectly removable, etc.

‡ *Traité*, etc. vol. i. pp. 289, 245.

of an obligation to suffer, they cite the supposed obligation to suffer punishment, which is incumbent upon a criminal.

But it is clear that we cannot be *obliged* to suffer or not to suffer. For whether we shall suffer, or shall not suffer, does not depend upon our desires; although by acts or forbearances which *do* depend upon our desires, we may induce suffering upon ourselves, or we may avert suffering from ourselves.

The Criminal who is condemned to punishment is never *obliged to suffer*, although (*e.g.* under the rules of prison discipline) he may be obliged to acts which facilitate the infliction of the suffering, or may be obliged to forbear from acts which would prevent or hinder the infliction. But in the last result every obligation is sanctioned by suffering, that is to say, by some pain which may be inflicted upon the wrong-doer independently of an act or forbearance of his own. If this were not the case, and if every obligation were sanctioned by a further obligation, no obligation could be effectual.

Passion or  
suffering,  
what. Is  
the ultimate  
sanction of  
every obliga-  
tion.

Either in the first instance, or at some subsequent point, I must be visited with a sanction which can be inflicted without my consent.

For example: I am condemned to restore a horse which I detain from the owner; to make satisfaction for a breach of contract; to pay damages for an assault, to the injured party; or to pay a fine for the same offence.

The sanction which attaches upon me, in this the first stage, is an obligation: An obligation to deliver the horse, or to pay the damages or fine.

If I refuse to perform this obligation, I may incur a further obligation: for instance, an obligation to pay a fine under sanction of imprisonment or of having my goods seized in execution.

Suffering, therefore, is the ultimate sanction.

But though suffering is the ultimate sanction, we cannot be obliged to suffer. For that supposes that we can be obliged to a something which depends not upon our desires. The only possible objects of duties or obligations are *acts* and *forbearances*.

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## LECTURE XXIV.

### *Injury or Wrong, Guilt, Imputability.*

I now proceed to consider the import of '*guilt*' or '*imputability*:' which it is necessary to determine in order that we may fully apprehend the nature of injury or wrong.

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Immediate  
and remote  
objects of  
duties.

Import of  
the cognate  
expressions,  
'Injury,'  
'Guilt,' 'Im-  
putability.'

Definition of  
'Injury,'  
'Guilt,' 'Im-  
putability.'  
Each =  
Breach of  
Duty.

Intention,  
negligence,  
heedlessness,  
or rashness,  
is of the  
essence of in-  
jury, guilt,  
imputability,  
or breach of  
duty.  
But is not of  
itself in-  
jury, guilt,  
&c.

Brief analysis  
of negligence  
and its  
modes; of  
Intention  
regarding the  
present, and  
Intention re-  
garding the  
future.

That an act or acts may be done or forborne is the immediate purpose of a positive or of a negative duty respectively. The production of events by which the act or forbearance may be followed, or the prevention of events which may happen if the act be not done or forborne, is the more remote purpose for which the duty is imposed.

Certain forbearances, omissions, and acts, are injuries or wrongs.

The persons who have in those certain ways forborne, omitted, or acted, are guilty. Or the persons who have forborne, omitted, or acted, are in that plight or predicament which is styled 'guilt.'

Those certain forbearances, omissions, or acts, together with such of their consequences as it was the purpose of the duties to avert, are imputable to the persons who have forborne, omitted, or acted. Or the plight or predicament of the persons who have forborne, omitted, or acted, is styled 'imputability.'

All these expressions, it appears to me, are equivalent. They all of them denote this, and nothing but this: 'that the persons, who have forborne, omitted, or acted, have thereby violated or broken duties or obligations.' Such forbearances, omissions, or acts, are wrongs or injuries. The parties so forbearing, omitting, or acting are guilty, and their plight is styled guilt or imputability.

As I shall show hereafter, intention, negligence, heedlessness, or rashness, is an essentially component part of injury or wrong, or of breach or violation of duty or obligation; and is a necessary condition precedent to the existence of the predicament styled guilt or imputability.

But intention, negligence, heedlessness, or rashness, is not of itself injury or wrong; is not of itself breach of duty; will not of itself place the party in the plight or predicament of guilt or imputability. Action, forbearance, or omission, is as necessary an ingredient in the notion of injury, guilt, or imputability, as the intention, negligence, heedlessness, or rashness, by which the action, forbearance, or omission, is preceded or accompanied. The notion of injury, guilt, or imputability, does not consist of either considered alone, but is compounded of both taken in conjunction.

This may be made manifest by a short analysis.

If I am negligent, I advert not to a given act: And, by reason of that inadvertence, I omit the act.

If I am heedless, I will and do an act, not adverting to its probable consequences: And, by reason of that inadvertence, I will and do the act.

If I am rash, I will and do an act, adverting to its probable consequences; but, by reason of a missupposition

which I examine *inadvertently*, I think that those probable consequences will not ensue. And, by reason of my insufficient advertence to the ground of the missupposition, will and do the act.

Consequently, negligence, heedlessness, or rashness connote an omission or act, and denote the inadvertence, from which the omission or act ensues.

If I *intend*, my intention regards the present, or my intention regards the future. If my intention regards the present, I presently do or forbear from an act, expecting consequences. These expressions, therefore, *negligence*, *heedlessness*, *rashness*, *present intention*, all derive their significance from an act or forbearance. That he has done or omitted is necessarily predicate of him who is negligent, heedless, rash, or who has formed an intention of the kind which relates to a present act or forbearance.

If, however, my intention regard the future, I *presently expect* or believe that I shall act or forbear *hereafter*.

And, in this single case, it is (I think) possible to imagine, that *mere consciousness* might be treated as a *wrong*: might be *imputed* to the party: or might place the party in the *plight* or *predicament* which is styled *imputability* or *guilt*.

We *might* (I incline to think) be *obliged* to forbear from *intentions* which regard future acts, or future forbearances from action: Or, at least, to forbear from *such* of those intentions as are settled, deliberate, or frequently recurring to the mind. The fear of punishment might prevent the frequent recurrence; and might therefore prevent the pernicious acts or forbearances, to which intentions (when they recur frequently) certainly or probably lead.

Without, however, staying to inquire, whether we *might* be obliged to forbear from naked intentions as regards the future, I assume, for the present,\* the following conclusion: a conclusion which accords with general or universal practice.

Intention (in the sense of present intention), negligence, heedlessness, or rashness, is not *of itself* wrong, or breach of duty or obligation; nor does it *of itself* place the party in the *predicament* of *guilt* or *imputability*. In order that the party may be placed in that *predicament*, his intention, negligence, heedlessness, or rashness, must be referred to an act, forbearance, or omission, of which it was the *cause*.

In the language of lawyers, however, and especially of criminal lawyers, '*guilt*' or '*culpa*' is frequently restricted to the state of the party's mind—his intention, negligence,

Whether an intention, neither consummate nor followed by an attempt, could be made the object of a negative obligation? (See p. 213, *supra*.)

Restriction  
of '*Guilt*'  
or '*Culpa*' to  
Intention.

\* The argument by which this position is established will be found in the next Lecture. See p. 229, *infra*.

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**Negligence,  
 Headlessness,  
 or Raahness,  
 as the cause  
 of Action,  
 Forbearance,  
 or Omission.**

heedlessness, or rashness, as the case may be. To show this, I will transcribe a few passages from two treatises on German Criminal Law.

One of them is the work of Feuerbach ; the most celebrated Criminal Lawyer now living : \* formerly professor of Roman and German Jurisprudence, and now president of a Court of Appeal in the Kingdom of Bavaria.

The other is by Dr. Rosahirt, professor of Law at Heidelberg.

Feuerbach's book is entitled, 'Institutes of the Penal Law which obtains generally in Germany.'

The title of Dr. Rosahirt's book may be translated as follows: 'Institutes of the Criminal Law which obtains generally in Germany : Including a particular Exposition of Roman Criminal Law, in so far as the German is derived from it.'

'The application (says Feuerbach) of a penal Law, supposes that the will of the party was determined positively or negatively : that this determination of the will was contrary or adverse to the duty imposed by the Law : and that this determination of the will was the *cause* of the criminal fact.' 'The reference of the fact *as effect* to the determination of the will *as cause*, constitutes that which is styled *imputation*. And a party who is placed in such a predicament, that a criminal fact may be imputed to a determination of his will, is said to be in a state or condition of *imputability*.'

'The reference of the fact *as effect* to the determination of the will *as cause*, settles or fixes the legal character of the latter.

'In consequence of that reference (or by reason of the imputation of the fact) the determination of the will is held or adjudged to be *guilt* : Which *guilt* is the ground of the punishment applied to the party.'

He adds, in a note, that the '*culpa*' of the Roman Lawyers (as taken in its largest signification), and also the '*reatus*' of more recent writers upon jurisprudence, answers to the '*Schuld*' or '*das Verschulden*' of the German Law.

'*Culpa*' (as taken in its largest signification), *reatus*, and '*Schuld*' (or '*das Verschulden*') may (I apprehend) be translated by the English '*Guilt*'.

The language of Dr. Rosahirt accords with that of Feuerbach.† 'In order (says he) to the existence of a *Crime*, the *will of the party* must have been in such a predicament, that the criminal fact may be *imputed* : that is to

\* He died in 1883. The passage quoted is at pages 78, 79 of his work.

† Pages 35-42 (*ibid.*).

say, that the criminal fact may be imputed *as effect* to the state of his will *as cause.*

The term "*Culpa*," as used by the Roman Lawyers, is frequently synonymous with *Crime* or *Delict*, or with *Injury* generally. But, when they employ it in a stricter sense, it is equivalent to the *reatus* of modern philosophical jurisprudence, to the *Verschulden* of the German Law. It denotes the *state of the party's will*, considered as the *cause* of the criminal fact. It denotes the *dolus*, or the *negligentia*, of which the criminal fact is the ascertained consequence or effect.'

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In translating these passages I have thrown overboard certain terms borrowed from the Kantian Philosophy. For the modern German Jurists (like the Classical Jurists of old) are prone to show off their knowledge of Philosophy, though actually occupied with the exposition of municipal and positive Law.

These impertinent terms being duly ejected, the meaning of the passages is clear and simple.

It merely amounts to this. '*Culpa*' denotes the state of the party's mind—his intention, negligence, heedlessness, or rashness; although it connotes (or embraces by implication) the positive or negative consequence of the state of his mind.

But I think that the term 'Guilt,' as used by English lawyers, denotes not only the state of the party's mind, but also the act, forbearance, or omission, which was the consequence. It imports generally 'that the party has broken a duty.' It embraces *all* the ingredients which enter into the composition of the wrong; and is not restricted to *one* of those necessary ingredients.

And this extended meaning of the word guilt is likewise (I think) the meaning which convenience prescribes. A general expression for culpable *intention*, and for the various modifications of *negligence*, tends to confusion and obscurity rather than to order and clearness. I am not aware of a single instance, in which it can be necessary to talk of them collectively. But it is often necessary to distinguish them.

Before I conclude this Lecture, I will remark that the term 'Injury,' and also the term 'Guilt,' is merely the contradictory of the term 'Duty' or 'Obligation.'

Injury, etc.,  
is the con-  
tradic-tory of  
duty.

If I am bound or obliged to *do*, I am bound or obliged *not* to pretermit the act *intentionally or negligently*.

If I am bound or obliged to *forbear*, I am bound or obliged *not* to do the act *intending certain consequences, or not to do the act heedlessly or rashly.*

I am not absolutely obliged to do or forbear, but to do or forbear *with those various modifications.*

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If I prætermit an act intentionally or negligently, I break a positive duty.

If I do an act intending certain consequences, or if I do an act heedlessly or rashly, I break a negative duty.

An injury, or breach of duty, is therefore the *contradic-tory* of *that* which the Law imposing the duty enjoins or forbids:—‘*Id quod non jure fit.*’

*Corpus Delicti.*

*Corpus delicti*: (a phrase introduced by certain modern civilians) is a collective name for the sum or aggregate of the various ingredients which make a given fact a breach of a given Law.\* *Corpus* is used by the Roman lawyers (like *universitas*) to express every whole composed of parts, as in the phrase *corpus juris*, which with the Roman lawyers stood for the aggregate of the laws, though by the moderns it is applied to the particular volumes which contain Justinian’s collections.

Adopting this expression, *attempt* may be thus distinguished from *consummation* of a criminal purpose. For want of the consequence there is not the *Corpus* of the principal delict. But the intention coupled with an act *tending to the consequence* constitutes the *corpus* of the secondary delict styled an ‘attempt.’

*Ambiguity of Schuldner, Reus, etc.*

I stated in a former note (p. 118 *supra*) one ambiguity adhering to the terms ‘*jus*,’ ‘*recht*,’ or ‘*right*.’ Each of these terms is sometimes applied with a third meaning, namely as denoting the duty incumbent on the party obliged. ‘I have a *right* to do it,’ meaning ‘I am *obliged*,’ is good Saxon English. The ‘*Obligatio*’ of the Roman Lawyers denotes the *jus in personam* residing in the party entitled, as well as the *obligation* incumbent upon the party obliged.

The German ‘*Schuld*’ (or ‘*das Verschulden*’) has a similar ambiguity. ‘*Schuld*’ signifies properly ‘*liability*.’ To impute to a person ‘*Schuld*’ is to say that he has broken a duty, and is now *liable* to the sanction. Accordingly, ‘*Schuldner*’ is synonymous with the Roman ‘*Debitor*;’ which applies to any person lying under any *obligation*: that is to say, an *obligation (stricto sensu)*, or in the sense of the Roman Lawyers. But it is remarkable that ‘*Schuldner*’ (in the older German Law) applied to the *Creditor*, as well as to the *Debitor*.

The *Reus* of the Roman Lawyers is in the same predicament. As opposed to ‘*Actor*’ it signifies the *defendant* in a *civil* proceeding, or the party who is the object of accusation in

\* For *Corpus Delicti*, see Feuerbach, 75, 76; Rosshirt, 79.

a criminal proceeding. And, taken in this sense, it is not ambiguous.

But *reus* also signifies a party to a *stipulation*: that is to say, a unilateral contract accompanied by peculiar solemnities. And, taken in this sense, it applies to the promisee or obligee, as well as to the promisor or obligor. Both are *rei*. The party who makes the promise is styled *reus promittendi*: The party to whom it is made, and by whom it is accepted, is styled *reus stipulandi*. *Correi promittendi* are joint promisors: *Correi stipulandi*, joint promises.

'Creditor,' is the correlative of 'Debitor,' and applies to any person who has *jus in personam*. The French '*Débiteur*' and '*Créancier*' have precisely the same meanings. The English '*Obligor*' and '*Oblige*' ought to bear the same significations. But, in the technical language of our Law, the term '*obligation*' or '*bond*' has been miserably mutilated. Instead of denoting *obligatio* (as correlating with *jus in personam*), it is applied exclusively to the writing under seal by which certain unilateral contracts are evidenced. That is to say, it is not the name of an *obligation*, but of an *instrument* evidencing a *contract* from which an obligation arises.

In the strict technical import which it bears in the English Law, the meaning of '*debt*' is not less narrow and inconvenient than the meaning of '*bond*' or '*obligation*'.

In the Roman Law, the term '*debitum*' is exactly co-extensive with the related or paronymous expression '*debitor*'. As '*debitor*' signifies generally a person lying under an *obligation*, '*debitum*' denotes (with the same generality) every act or forbearance to which a person is *obliged*: '*id quod ex obligatione prestandum est*'.

But in the strict technical import which it bears in the English Law, '*debt*' is restricted to a *definite sum of money*, due or owing from one party to another party.

## LECTURE XXV.

*Analysis of Injury or Wrong continued.—Grounds of Non-imputability.*

I ASSUMED, in my last Lecture (p. 225, *supra*), that Intention, Negligence, Heedlessness, or Rashness is a necessary ingredient in injury or wrong.

A short analysis will show the truth of the assumption. Reverting to my definition (p. 224), an injury is a forbearance, omission, or act, whereby a person has violated a duty. Now there can obviously be no breach of duty—no rupture of the *vinculum juris*—unless the duty has some binding force, that is to say, unless the sanction were capable

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of operating as a motive to the fulfilment of the duty. But sanctions operate upon the obliged in a twofold manner: that is to say, they counteract the motives or desires which prompt to a breach of duty, and they tend to excite the attention which the fulfilment of duty requires. And unless the party knew that he was violating his duty, or unless he *might* have known that he was violating his duty, the sanction could not operate, at the moment of the wrong, to the end of impelling him to the act which the Law enjoins, or of deterring him from the act which the Law forbids.

Consequently, injury or wrong supposes unlawful *intention*, or unlawful *inadvertence*. And it appears from the foregoing analysis, that every mode of unlawful inadvertence must be one of those which are styled negligence, heedlessness, or rashness.

An absurdity  
in English  
Law from in-  
attention to  
this principle.

The only instance wherein intention or inadvertence is not an ingredient in breach of duty is furnished by the Law of England. By that law, in cases of Obligation arising directly from contract, it frequently happens that the performance of the obligation is due from the very instant at which the obligation arises. Or (speaking more accurately) the time for performance is not determined by the contract, and performance is due so soon as the obligee shall desire it.

For example: if a moveable be deposited with me in order that I may keep it in safety, I am bound, *from the moment of the deposit*, to restore it to the bailor.

If I buy goods, and no time be fixed for the payment of the price, I am bound, *from the moment of the delivery*, to pay the price to the seller.

Now, in these, and in similar cases, it is impossible that the obligation should be broken, *through intention or inadvertence*, until the obligee desire performance, and until the obligor be informed of the desire. For, strictly speaking, he is bound to perform the given act, so soon as the obligee shall wish the performance, and so soon as he himself shall be duly apprised of the wish. But, according to the rule which obtains in the Courts of Common Law, the creditor may sue the debtor, as for a breach of the obligation, without a previous demand: The debtor being liable in the action for damages and costs, just as he would be liable if performance had been required, and the obligation had then been broken through his own intention or negligence.

Now as every right of action is founded on an injury, here is a case of injury without intention or inadvertence. For, without a previous demand, or without some notice or intimation that the creditor desires performance, the debtor

cannot know that he is breaking his obligation, by not performing the act to which he is obliged.

This monstrous rule of the Common Law Courts is justified by a reason which is not less monstrous. For it is said that a previous demand were superfluous and needless, inasmuch as the action is itself a demand.

The reason forgets, that a right of action is founded on an injury; that unlawful intention or inadvertence is of the essence of injury; and that, in all the cases which I am now considering, there is no room for unlawful intention or inadvertence, until the creditor desire performance, and until the debtor be apprised of the desire.

In looking over Evans's Digest of the Statutes for another purpose, I have had great pleasure in observing that so judicious a writer takes the same view of this question which I have just stated. He says (vol. iii. p. 289): 'There is another Rule in Courts of Equity which may deserve a different consideration, as applied to legal demands, viz. that length of time is no bar in case of a trust. Where a man deposits money in the hands of another, to be kept for his use, the possession of the custodee ought to be deemed the possession of the owner, until an application and refusal, or other denial of the right; for, until then, there is nothing adverse; and I conceive that upon principle, no action should be allowed in these cases, without a previous demand; consequently, that no limitation should be computed further back than such demand. And I think it probable that, under these circumstances, the limitation would not be allowed to attach, though the other part of the observation would be as probably disallowed. For a sweeping rule has been by some means introduced into practice, that an action is a demand; whereas *every action in its nature supposes a preceding default*; where money is improperly received, or goods are bought without any specific credit, or even where money is borrowed generally, there is held to be an immediate duty, and it is a perfectly legitimate conclusion that no demand can be necessary, in addition to the duty itself. But wherever there is a loan in the nature of a deposit, or any other confidential duty is contracted, the mere creation of that duty, unaccompanied with the absolute breach of it, by denial or inconsistent conduct, ought not to be considered as a ground of action.'

I perfectly agree with this reasoning as applied to the case of the deposit.

But similar reasoning is also applicable to the case of goods sold without specific credit; of money lent generally; and of money paid and received by mistake.

In the case of money paid and received by mistake, it is necessary to distinguish.

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If the money was received *bond fide*, it surely is expedient that a demand should precede the action.\* For until the debtor is apprised of the mistake, it is impossible to say that he has broken *intentionally* or by *negligence* his obligation to return the money.

If the money was received *mala fide*, the act of receiving the money was in itself an *injury*: an injury *analogous* to unlawful taking. In certain cases of the class I am now considering, it is indeed expedient that the creditor should be permitted to sue, although no demand has been made upon the debtor. But why? Because the debtor has actually broken the obligation; or because he *intends* to break it, and the delay occasioned by a formal demand might facilitate the execution of his unlawful design. For example; if the debtor withdraw himself from his home to *evade a demand*.†

The principle applied to possession of *res alienae*.

I shall here remark, generally, a distinction which exists between obligations arising from the possession of *res alienae*, or things which are the property of another person. The party entitled has always a right to the restitution of the goods or to satisfaction for their loss, and the party in possession is always bound to restore or satisfy.

But the nature of the obligation depends upon the consciousness of the party in possession:‡ If he possess the subject *mala fide*, his possession is itself a wrong. His obligation to restore or satisfy, arises from an *injury*; and, inasmuch as the right which is violated is *jus in rem*, the obligation is *ex delicto* (strictly speaking).

If he possess the subject *bond fide*, his possession is not a wrong. His obligation to restore or satisfy is *quasi ex*

\* And the demand in such a case was thought necessary by Martin and Bramwell, BB., in *Freeman v. Jeffries*, May 6, 1869, L. R. 4 Exch. 199, 200.

† It might be added that in the case of apprehended insolvency, if some creditors were obliged to make a previous demand while others could sue without one, the former class would be at a disadvantage in the race for securing their claims. This consideration is some set off against the hardship of the legal rule. But the reason why the existence of this rule is found tolerable in practice is this:—The *moral* sanction which prevents undue advantage being taken of it is a *strong* one. ‘A respectable attorney will always make a demand of some sort on behalf of his client before complying with his instructions as to issuing the writ.’ Broom, Com. Law, 4th ed. p. 114.—R. C.

‡ In those actions in English law which are deemed to arise out of *tort*, the principle maintained in the text is recognized. In *trover* (to use the expression properly belonging to the period before the C. L. P. Acts) intention is of the essence of the *wrongful conversion*. In *detinue*, intention or negligence. In both cases the evidence may and commonly does consist of proof of demand and refusal. But to prove conversion, it must be further shown that at the time of the demand the goods were in defendant’s custody.—R. C.

*contractu*: That is to say, It arises from a fact which is neither an injury nor a convention. But so soon as he is apprised of the right which resides in the party entitled, the obligation alters its nature. It may either be considered as arising from a breach of the quasi-contract; or from a violation of the *jus in rem* which resides in the party entitled. And, on either supposition, it arises from an injury.

The allegation in bills in Chancery, 'that the plaintiff has requested the defendant to perform the object of the suit, but that the defendant has refused or neglected to comply with that request,' is, in a case where injury is otherwise shown, merely formal: i.e. it is not incumbent on the plaintiff to prove it. But where notice must be given, before the defendant can commit an injury, there (I apprehend) a demand on the part of the plaintiff, with subsequent refusal or neglect on the part of the defendant, is a necessary preliminary to the institution of the suit. *E.g.*: If you are seized in fee in trust for me, you are bound to convey the legal estate as I shall direct. But if I filed a bill for the purpose of compelling a conveyance without previous demand and consequent refusal or neglect, I think that *Equity* (who, let men traduce her as they may, is far more rational than her sister and rival *Law*) would compel me to pay the costs of the wanton and vexatious suit.

The Roman Law, in regard to the matter in question, is perfectly rational and consistent. In all cases, the institution of an action must be preceded by a notice to the debtor, provided the debtor can be found. The question is however sometimes mooted whether a demand must be made by the creditor, in order that the debtor may be *in mord*, and may incur the liabilities which are incident to that predicament. This I will endeavour briefly to explain.

Roman law  
maintains  
the principle  
consistently.

The non-performance of an obligation is in the Roman Law styled *mora*\*: for the debtor *delays* performance. Mora.

But the predicament in which the debtor is placed in consequence of his non-performance, is also styled *mora*. *Debitor qui moram fecit in mord dicitur*. Being *in mord*, he incurs liabilities from which he were exempt if he were not *in mord*.

For example: The debtor in the obligation arising from the deposit of a moveable for safe keeping is *in mord* if he refuses to return it on demand made by the creditor. Thenceforth he is liable for accidental damage, as well as for damage occasioned by his intention or negligence.

If he owe money payable on demand, and after demand decline or neglect payment, he is *in mora*, and is then bound to pay interest on the money which he detains, though no interest was previously payable.

\* Mühlenbruch, i. 825, 899. Mackeldey, ii. 156, 165.

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Speaking generally, if no time be fixed for the performance of the obligation, the debtor is not *in mord*, and does not incur the liabilities incident to that predicament, unless a demand of performance be made by the creditor, and unless the debtor comply not with the demand. The rule is '*Interpellandus est debitor loco et tempore opportuno.*' The authors of the rule justly considered, that intention or inadvertence is of the essence of wrong; and that the obligation could not be broken, either through intention or inadvertence, until the creditor required performance.

But if a specific *terminus* or time be fixed for the performance, the debtor is *in mord*, unless he perform at that time, although no demand be made by the creditor. '*Dies interpellat pro homine.*' (N.B. *Interpellatio* signifies making a demand.) For, here, the debtor breaks the obligation, intentionally or by negligence, whether a demand be made or not by the opposite party.

Breach of contract no exception to the principle.

Before I dismiss this subject, I may make this general remark. In most cases of breach of contract, the intention or negligence of the debtor is so manifest that the question is not agitated or even adverted to. But on close examination we perceive that breach of contract, as well as any other injury, necessarily supposes intention or negligence.

For instance: the questions whether or not a demand be an essential preliminary to an action, and whether or not the debtor be *in mord* without a demand, entirely depend upon the presence or absence of intention or negligence. This sufficiently appears from what has been already said on the subject. In all cases in which the contract binds him to *diligentia* (as in cases of bailment), the question of 'negligence or not,' also frequently arises. In other cases the question does not arise, merely because the intention or negligence is manifest and indisputable. I make this remark because, owing to the arrangement adopted by the Roman institutional writers, one is liable to suppose that breaches of contract are not similar to other breaches of obligation, and are not even injuries at all; not being ranked with delicts or injuries, nor bearing the same name. In the arrangement of the Roman law, not only the primary obligations arising from contracts and quasi-contracts, but likewise the obligations arising from breaches of these primary obligations are said to be obligations arising *ex contractu* or *quasi ex contractu*. And in our own law we talk of actions *ex contractu*, and distinguish them from actions *ex delicto*; although the former are clearly just as much founded on injury as the latter.

Resume the principle, that intention

Unlawful intention or unlawful inadvertence is, therefore, of the essence of injury, and for this reason, that the

sanction could not have operated upon the party as a motive to the fulfilment of the duty, unless at the moment immediately preceding the wrong he had been conscious that he was violating his duty, or unless he *would* have been conscious that he was violating his duty, if he had adverted or attended as he ought.

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tion or in-  
adverte is  
of the essence  
of injury.

If we examine the grounds of the various exemptions from liability, we shall find that most (though not all) of them are reducible to the principles which I have now stated. We shall find (generally speaking) that the party is clear of liability, because he is clear of intention or inadvertence; or (what in effect comes to the same thing) because it is *presumed* that he is clear of intention or inadvertence.

Thus: No one is liable for a mischief resulting from *accident* or *chance* (*casus*). That is to say, from some event (other than act of his own), which he was unable to foresee, or, foreseeing, was unable to prevent. This (I think) is the meaning of *casus* or *accident* in the Roman, of *chance* or *accident* in our own Law.

'By the Common Law' (says Lord Mansfield) 'a carrier is an insurer. It is laid down that he is liable for every *accident*,<sup>†</sup> except by the act of God or the king's enemies.' Here, the term *accident* includes the *acts of men*: namely, of the king's enemies. And in the Digest it is expressly said, '*fortuitis casibus solet etiam adnumerari aggressura latronum.*'

In the language of the English Law, an event which happens without the intervention of man, is styled 'the Act of God.' The language of the Roman Law is nearly the same. Mischiefs arising from such events are styled *donna fatalia*, or *detrimenta fatalia*. They are ascribed to *vis divina*, or to a certain personage styled *fatum*. Or the *casus* or *accident* takes a specific name, and is called *fatalitas*.

The language of either system is absurd. For the act of man is as much the act of God as any event which arises without the intervention of man. And if we choose to suppose a certain *fate* or *destiny*, we must suppose that she

Grounds of  
exemption  
from liability,  
mostly  
reducible to  
the same  
principle.

1. Casus or  
Accident.\*

\* Mühlenbruch, i. 179, 826, 831. Mackeldey, ii. 157. Blackstone, iv. 28; iii. 165. Heineccii Recitationes, 588, 589.

† It might have been in this case more correct to say that in the contract of carriage there is an implied warranty against the act of man except the King's enemies. Tracing the history of this principle to its source in the celebrated edict of the Praetor, 'Nautae canopes stabularii, quod cujusque salvum fore reperirent nisi restituerit in eos judicium dabo' (D. iv. 9), the object, according to the commentator in the Pandecta, was to prevent collusion with thieves on the part of the carrier.—R. C.

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or it determines the acts of men, as well as the events which are not acts of men.

Returning to the legal effect of *casus*, *chance*, or *accident*, no man is liable, civilly or criminally, for a purely *accidental* mischief. For, as he could not foresee the event from which the mischief arose, or was utterly unable to obviate the event or its consequences, the mischief is not imputable to his intention or negligence.

For example, If I am in possession of a house, or of a moveable belonging to another, and the subject whilst in my possession is destroyed by an accidental fire, I am not liable to the owner in respect of the damage. ‘*Dannunus ex casu sentit dominus*.’

But when I say, ‘that no man is liable in respect of an accidental mischief,’ I mean, ‘that he is not liable *as for an injury or wrong*.’ For, by virtue of an obligation *arising aliunde*, he may be liable.

To revert to the instance which I have just cited:—I am liable to the owner for the damage done by the fire, *in case* I contracted with him to that effect. I am also liable *in case* I am a carrier, and the subject has come into my possession in the course of my calling. If the subject was deposited with me in order that I might keep it safely, I am also liable (according to the Roman Law) if I am *in mord*: that is to say, if the owner has requested me to return the subject, and I have nevertheless kept possession of it.

But in these and similar cases I am not liable *as for an injury*, but by virtue of an obligation *ex contractu* or *quasi ex contractu*. The mischief done by the fire is not the consequence of an injury done by me; although I *shall* be answerable, *as for an injury*, in case I perform not my special obligation to make good the loss arising from the accident.

2. Ignorance  
or Error.

Another ground of exemption is *ignorance* or *error* with regard to matter of fact.

Now, here, although the *proximate* ground is ignorance or error, the *ultimate* ground is the absence of unlawful intention or unlawful inadvertence. For unless the ignorance or error was *inevitable* or *irrincible* (or, in other words, unless it could not have been removed by due attention or advertence) the act, forbearance, or omission, which was the consequence of the ignorance or error, is imputable to negligence, heedlessness, or temerity.

I will touch briefly upon a few cases, wherein the party is exempt from civil and criminal liability, by reason of ignorance or error.

‘*Si quis*’ (says Ulpian) ‘*hominem liberum ceciderit, dum putat serrum suum, in ea causâ est, ne injuriarum teneatur.*’

Another case, closely resembling the last, is the following:—If the party possess *bond fide* a thing belonging to another, and if the thing be damaged by his abuse or carelessness, he is not liable to the owner for the damage. ‘*Rem enim quasi suum neglexit.*’

The foregoing examples are taken from the Roman: the following from the English Law.

If I hire your servant, *knowing* that he is your servant, I am guilty of an offence against your right in the servant, and am liable to an action on the case. But if I hire your servant, *not* knowing that he is your servant, I am not guilty of a wrong, and am not liable to an action, until I receive notice of his previous contract with you.

If I keep a dog given to worry cattle, and if I am apprised of *that* his mischievous inclination, I am liable for damage done by the dog to my neighbour’s cow or sheep. But unless I am apprised of his vicious disposition, I am not guilty of an injury, and am not liable to make good the damage.\* For the damage is not imputable to my intention or inadvertence.

If, intending to kill a burglar who has broken into my house, I strike in the dark and kill my own servant, I am not guilty of murder, nor even of manslaughter. For the mischief is not imputable to intention or inadvertence, but to inevitable error.

And so much for ignorance or error, with regard to matter of fact.

Before I dismiss the subject, I will briefly advert to ignorance or error, with regard to the state of the law.

Ignorance of  
law.

In order that an obligation may be effectual, two conditions must concur. 1st, It is necessary that the party should know the law by which the *Obligation* is imposed, and to which the *Sanction* is annexed. 2ndly, It is necessary that he should actually know (or, by due attention or advertence, *might* actually know) that the given act, or the given forbearance or omission, would violate the law, or amount to a *breach* of the obligation.

\* The presumption which formerly existed in England in favour of the *mansuetu natura* of our dogs has elsewhere been severely criticized. In a case in Scotland where sheep had been worried by a foxhound, the late Lord Cockburn repudiated the principle that ‘every dog is entitled to have at least *one* worry’: and the Scotch Court agreed with him in presuming, that if a dog worry sheep, the owner is to blame. The House of Lords (Lords Cranworth and Brougham) overruled this decision (2 Macquen, 14). An Act was subsequently passed (for Scotland), declaring it unnecessary, in an action against the owner of a dog, to prove a previous propensity to injure cattle (26 & 27 Vict. c. 100). An Act to a similar purport was afterwards passed for England (28 & 29 Vict. c. 60).—R. C.

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Unless these conditions concur, it is impossible that the sanction should operate upon his desires.

Accordingly, inevitable ignorance or error in respect to matter of fact, is considered, in every system, as a ground of exemption.

With regard to ignorance or error in respect to the state of the law, the provisions of different systems appear to differ considerably; although they all concur in assuming *generally*, that it shall not be a ground of exemption. '*Regula est, juris ignorantiam cuique nocere,*' is the language of the Pandects. And *per* Manwood, as reported by Plowden, 'It is to be presumed that no subject of this realm is misconscious of the Law whereby he is governed. Ignorance of the Law excuseth none.'

I have no doubt that this rule is expedient, or, rather, is absolutely necessary. But the reasons assigned for the rule, which I have happened to meet with, are not satisfactory.

The reason given in the Pandects is this: 'In omni parte, error *in jure* non eodem loco quo *facti* ignorantia haberi debet, quum jus *finitum* et possit esse et debeat: facti interpretatio plerunque etiam prudentissimos fallat.'

Which reasoning may be expressed thus:

'Ignorance or error with regard to matter of fact, is often inevitable: that is to say, no attention or advertence could prevent it. But ignorance or error with regard to the state of the law, is never inevitable. For the law both can be and ought to be definite and knowable. Consequently, ignorance or error with regard to the law is no ground for exemption.'

The reasoning involves the small mistake of confounding 'is' with 'can be' and 'ought to be.' That Law *can* be knowable by all who are bound to obey it, or that Law *ought* to be knowable by all who are bound to obey it—'*finitum et possit esse et debeat*', is, I incline to think, true. That any actual system *is* so knowable, or that any actual system has ever been so knowable, is so notoriously and ridiculously false that I shall not occupy your time with proof of the contrary.

Blackstone produces the same *preiosa ratio*, flavoured with a spice of that circular argumentation wherein he delights. 'A mistake (says he) in point of Law, which every person of discretion, not only *may*, but is bound and presumed to know, is in criminal cases no sort of defence.'

Now to affirm 'that every person *may* know the law,' is to affirm the thing which is not. And to say 'that his ignorance should not excuse him because he is *bound* to know,' is simply to assign the rule as a reason for itself.

The only *sufficient* reason for the rule in question, seems to be this: that if ignorance of law were admitted as a

ground of exemption, the Courts would be involved in questions which it were scarcely possible to solve, and which would render the administration of justice next to impracticable.

Ignorance would be alleged in almost every instance. And it would become incumbent upon the Court to examine the following questions of fact: 1st, Was the party ignorant of the law at the time of the alleged wrong? 2ndly, Assuming that he was ignorant of the law at the time of the wrong alleged, was his ignorance of the law *inevitable* ignorance? Either of these questions would be next to insoluble. The first is hardly capable of being tested by evidence: And the second would involve an interminable inquiry into the circumstances of the man's whole life.

That the party shall be *peremptorily* presumed conusant of the law, is a rule so necessary, that law would become ineffectual if it were not applied by the Courts generally. And if due pains were taken to publish the law in a form cleared from needless complexity, the presumption would accord with the truth in the vast majority of instances. The reasoning in the Pandects would then be just. The law would be in *fact* as '*finitum*' and knowable, as '*possit esse, et debeat*'.

The admission of ignorance of *fact* as a ground of exemption, is not attended with the inconveniences above referred to. The inquiry is limited to a given incident, and to the circumstances attending that incident, and is, therefore, not interminable.

I have said that the provisions of different systems seem to differ considerably with regard to the principle which I am now considering.

In our own law, '*ignorantia juris non excusat*' seems to obtain without exception. I am not aware of a single instance in which ignorance of law (considered *per se*) exempts or discharges the party, civilly\* or criminally.

From an opinion thrown out by Lord Eldon, in the case of Stockley v. Stockley,† I inclined to think (at the first blush) that a party would be relieved, in certain instances, from a contract into which he had entered in ignorance of law. The species of transaction referred to is where a person transfers a valuable right, in consideration, as he erroneously thinks, of getting a valuable right in return. But, admitting the justness of Lord Eldon's conclusion, the

\* In one case, however, ignorance of law is allowed in English law as at least a partial excuse. If I sell land, and it turns out that I have no title, I am not liable to pay *substantial* damages for the loss of the land bargained for, but only the costs occasioned by the abortive transaction. The reason is that the pitfalls in English title to land are so notorious that no one can be presumed to know whether he has a good title or not.—R. C.

† 1 Vesey and R. 31.

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agreement (I conceive) would be void, not because the party was ignorant of the law, but because there is no consideration to support the promise.\*

According to the Roman Law, there are certain classes of persons, 'quibus permisum est jus ignorare,' e.g. women, soldiers, &c. They are exempt from liability (at least for certain purposes), not by reason of their general imbecility, but because it is presumed that their information does not extend to a knowledge of the law. Such are women, soldiers, and persons who have not reached the age of twenty-five.

And this (I apprehend) shows distinctly, that the exclusion of *ignorantia juris*, as a ground of exemption, is deducible from the reason which I have already assigned. In ordinary cases, the admission of *ignorantia juris* as a ground of exemption would lead to interminable inquiry. But, in these excepted cases, it is *presumed* from the *sex*, or from the *age*, or from the *profession* of the party, that the party was ignorant of the law, and that the ignorance was inevitable. The inquiry into the matter of fact is limited to a given point: namely, the sex, age, or profession of the party who insists upon the exemption.

Before I quit this subject, I will advert to a curious distinction made by the Roman Law.

The persons, *quibus permisum est jus ignorare*, cannot allege with effect their ignorance of the law, in case they have violated those parts of it which are founded upon the 'jus gentium.'† For the persons in question are not generally imbecile, and the *jus gentium* is knowable *naturali ratione*. With regard to the *jus civile*, or to those parts of the Roman Law which are peculiar to the system, they may allege with effect their ignorance of the law.

This coincides with our distinction between *malum prohibitum* and *malum in se*; and the distinction is reasonable. For some laws are so obviously suggested by utility, that any person not insane would naturally surmise or guess their existence; which they could not be expected to do, where the utility of the law is not so obvious. And most men's knowledge of the law, and even that of lawyers in regard to matters lying outside their own branch of practice, is mostly of this kind.

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\* But *quare* whether equity will not relieve even against an executed agreement which has proceeded on a mistaken reading of a grant of doubtful construction.—Beauchamp v. Winn, L. R. 6 H. of L. Ap. 223, 234. Here, again, the reason given is that no negligence is imputable. If the doubt had been adverted to, there would be no relief. For here there would be no error.—Stockley v. Stockley, *ut supra*. Compare Lord Stair's Inst. i. 7, 9.—R. C.

† Nor (per Labeo) can they allege it, if the law might have been conjectured, or if they had access to good legal advice. Digest, xxii. 6, 9.

Before I conclude, I must observe that the objection to laws *ex post facto*, is deducible from the general principle already explained, namely, that intention or inadvertence is necessary to constitute an injury. The law was not in existence at the time of the given act, forbearance, or omission: consequently the party did not, and could not know that he was violating a law. The sanction could not operate as a motive to obedience, inasmuch as there was nothing to obey.

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The objection  
to *ex post  
facto* laws,  
deducible  
from the  
same prin-  
ciple.

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## LECTURE XXVI.

*Grounds of Non-Imputability.—Digression on Presumptions.*

TOWARDS the close of the last Lecture, I showed that the rule, *ignorantia juris non excusat*, was, according to the Roman Law, subject to certain exceptions, and that those exceptions both consist with the reason of the general maxim and serve to indicate what that reason is. I also observed that these exceptions ultimately rest on the principle which it was the main purpose of my Lecture to explain and illustrate:—and showed that wherever ignorance of law exempts from liability, the ignorance is *presumed* to be inevitable, and the party, therefore, to be clear from unlawful intention and inadvertence.

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While I am on the subject of legal presumptions, I shall digress from the main subject of the Lecture, for the purpose of giving some explanations for which no other occasion may arise.

Digression on  
the different  
kinds of pre-  
sumptions  
juris.

It is absurd to style conclusive inferences, *presumptions*. For a presumption, *ex i*n* termini*, is an inference or conclusion which *may* be disproved. Till proof to the contrary be got, the inference may hold. *On proof to the contrary, it can hold no longer.*

But according to the language of the Civilians (language which has been adopted by some of our writers on evidence), *presumptions* are divisible in the following manner.

Presumptions are *præsumptiones juris*, or *præsumptiones hominis*. *Præsumptiones juris* are inferences drawn in pursuance of the preappointment of the law. *Præsumptiones hominis*, or *presumptions* simply so called, are drawn from facts of which the law has left the probative force to the discretion of the judge.\* *Præsumptiones juris*, are again

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\* It is hardly necessary to observe that the word 'judge' is here used as including the jury, where the assistance of a jury is em-

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divisible into *præsumptiones juris* (simply so called) and *præsumptiones juris et de jure*.

There are therefore three classes of presumptions: *præsumptiones hominis*, *præsumptiones juris*, and *præsumptiones juris et de jure*.\*

Where the presumption is a *præsumptio hominis*, not only is proof to the contrary admissible, but the presumption is not necessarily conclusive, though no proof to the contrary be adduced. For instance: I sue you for goods sold and delivered, and I produce a fact leading to a presumption that the goods *were* delivered. Not only is it competent to the judge to admit counter-evidence, but to reject the presumption as *insufficient*, though no counter-evidence be adduced.

Where the presumption is *præsumptio juris* simply, proof to the contrary is *admissible*, but, till it be produced, the presumption necessarily holds. For, here, the law has predetermined the probative force of the fact, although it permits the judge to receive counter-evidence. The law, or the maker of the law, says to the Courts, 'Receive counter-evidence if it be produced, and weigh the effect of that evidence against the worth of the presumption. But till such counter-evidence be produced, draw from the given fact the inference which I predetermine.'

ployed as judges of facts. We are not concerned at present with the division of functions between the *judge* in the popular sense of the term and the *jury*.—R. C.

\* The following provisions of Mr. Stephen's Indian Evidence Act contain a neat statement of the three classes of presumptions as acted on by Courts administering justice according to the English rules of evidence.—R. C.

'Proved.'

3. In this Act  
A fact is said to be proved when after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

'Disproved.'

A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

'Not proved.'

A fact is said not to be proved when it is neither proved nor disproved.

'May presume.'

4. Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.

'Shall presume.'

Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.

'Conclusive proof.'

When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.'

Where the *præsumptio juris* is *juris et de jure*, the law predetermines the probative force of the fact, and also forbids the admission of counter-evidence. The inference (for it is absurd to call it a presumption) is *conclusive*. That is to say, proof to the contrary is not admissible. For, all that is meant by a conclusive proof, is a proof which the law has made so.

[Presumptions *juris et de jure*\* (as well as simple presumptions *juris*) are often founded on verisimilitude. But in some cases the fact presumed is highly untruthlike. In such a case the presumption is commonly called a fiction. These fictions have been resorted to by the Courts as a means of legislating indirectly. They were great favourites of the Roman Law.

It is obvious that in order fully to answer the purpose of indirect legislation, the presumption must be one *juris et de jure*. And the Roman Lawyers, with their usual logical acuteness, always made them so. A similar object is often compassed by fictitious presumptions in English Law. But as our Lawyers have seldom had the hardihood to accept the logical necessity of making the presumption *juris et de jure*, this end is attained very imperfectly. Fictions are consequently less rigid and more plastic in the English Law than in the Roman.

For example: Acquisitive prescription is unknown to the English Common Law in its direct form. In other words, length of enjoyment does not, avowedly and directly, constitute a *title*. But in land the mere fact of possession affords a *præsumptio juris* of a title as owner (i.e. the title technically described as *seisin in fee*). In the case of an *easement*, a *profit à prendre* out of the land of another, and those various rights called *franchises*, uninterrupted enjoyment for more than a certain period affords the presumption of a *grant* (the only kind of *title* appropriate to these rights). But in none of these cases is the presumption at Common Law *conclusive*, unless the possession extends to what is called the period of legal memory, that is to the commencement of the reign of Richard I. And, inasmuch as the proof of this is obviously impossible, no such presumption is (except by aid of the Statute to be presently mentioned), *juris et de jure*.

To take a typical instance:—A. is in the possession of land. B. brings ejectment; and in order to succeed, must have what is called a *title*. A. has the ordinary advantage of a defendant to put the plaintiff to the proof. Therefore B. must prove a *title*. Now suppose B. proves that he is heir-at-law to C., who was in peaceable possession of the land at his death, and who by his will devised it to his wife until her death or second marriage, remainder to his own right heirs, and that A. got into possession by marrying the widow; the Court are now bound to presume

\* The passage here within brackets, though suggested by matter contained in Austin, is entirely recast; and the present editor is alone responsible for the propositions contained in it.—R. C.

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that C., being in peaceable possession of the land at his death, was seized in fee, and that B., as his heir-at-law, is the true owner. Again, suppose A. now produces a counterpart lease, by which C. took the land from D. for a term of three lives (which have expired) at a peppercorn rent, and offers to prove that he is heir-at-law to D.: B. objects that A. is estopped from setting up this title by reason that A.'s possession was merely a continuance of the possession of the widow, who, coming in under the will, could not dispute the title of her testator. The Court would probably give effect to B.'s contention; and in that case A. could (if the objection is insisted on) only make good his title by giving up possession and bringing ejectment as plaintiff. But if the Court should hold that A.'s possession was not a continuance of the widow's possession, but a new possession which did not estop him from disputing her testator's title,—or if A., instead of getting possession by marrying the widow, had come into the possession which had been left vacant by her,—then, if A. should succeed in proving his heirship to D., he would overturn the previous presumptions of law, and succeed in the proof of title.

In the case of title to land, the presumption raised by possession, although not a *presumptio juris et de jure*, is something more than a mere *presumptio juris*. The party (whether plaintiff or defendant) against whom the presumption is once established must succeed *by the strength of his own title, and not by the weakness of his opponent's*. And if a party establishes the fact of peaceable possession, the circumstance that such possession has been acquired by a wrongful act against a third party, although this appears on the face of his own evidence, is of no consequence. The presumption afforded by possession in English law is a weapon of vast importance—of far higher importance than any system of direct acquisitive prescription. By its use (and with the aid of a stringent law of *limitation* or *negative prescription*) the English Law of landed property, notwithstanding its many and great defects, is in advance of most other systems. The so-called *positive prescription* in the Law of Scotland is commonly elusive, and may fail notwithstanding an adverse possession for centuries.

Suppose the right in question be an *easement*. B. proves that he has for the period of twenty years enjoyed, as appurtenant to his lands of Y., a right of way over the lands of X. belonging to A. The Court now presumes a legal title to the easement. Before the Statute 2 & 3 Will. IV. c. 71 (1832), this was only a *presumptio juris*, and might be defeated, amongst other ways, by showing that the user commenced at a definite period before the twenty years. In this one respect the presumption was extended by the Statute, which enacts that the claim shall not be defeated merely by showing that the easement claimed was first enjoyed at a time prior to the twenty years. But if B. had proved continued enjoyment for forty years immediately preceding the action, the presumption is extended by the Statute into a *presumption juris et de jure*, except only

if it should appear that the enjoyment was had under a deed or agreement in writing. Only in the easement of ancient lights, a similar statutory presumption *juris et de jure* is raised by twenty years' enjoyment.

Again, suppose the right claimed by B. is a *profit à prendre* out of the land of A. What is said as to an easement, such as a right of way, applies to this species of right, changing the periods of twenty and forty years for thirty and sixty years respectively.

Now a person may fail in the proof of enjoyment for the statutory period, not by reason of the non-existence of the servitude as between the dominant and servient tenements, but by reason of the *suspension* of its exercise, e.g. because, for some part of the time, the same person was seized in fee of one tenement, and seized as tenant for life of the other—for if the same person were at any time seized in fee of both, the servitude would be extinguished. The statutory aid to the presumption then fails, and the parties are thrown back upon the presumptions as obtaining at Common Law. It has also been decided, on grounds which it is difficult to understand, that the Statute does not apply to rights *in gross* (*Shuttleworth v. Fleming*, 19 C. B. N.S. 687 : 34 L. J. C.P. 309). These, therefore, remain as before the Statute. Now the only difference at Common Law between such rights *appurtenant* and similar rights *in gross* was that the former might be expressly pleaded as enjoyed from time immemorial, the latter could only be pleaded as founded on a grant. But, in the absence of an actual grant, both equally depend on presumptions. According to the theory of Law, a right *in gross*, being itself a tenement of an incorporeal nature, can only be constituted by a substantive grant of the right. Rights *appurtenant* are in one of two conditions. Either they have been, at some time, granted by the proprietor of the servient tenement, or they have been enjoyed as appurtenant to the dominant tenement for the time of legal memory, in which case the presumption (*juris et de jure*) arises that they were included in the '*Tenendis*' clause of some grant or charter of the dominant lands before the time of Richard I. For instance, the presumption arising from long enjoyment is rebutted if it is shown that, at some period within legal memory, the exclusive right to the profit in question existed as a *separate tenement*, i.e. as itself the subject of a substantive grant.

Again, suppose the right claimed to be a *franchise*, as a right to levy a toll. Here the presumption is raised by proof of enjoyment for a period which is indefinitely described as a 'very long time,' and which would probably be not less than forty to sixty years, according to the species of facts proved. But the presumption may be rebutted by any circumstance showing that the enjoyment did not in fact extend back to the time of Richard I, and could not have been acquired by grant at any time since; or that the right claimed is such as cannot, against the defendant, legally exist: e.g. B. claims a toll upon

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all goods passing through a certain town, and demands it from A., a railway company acting as carriers of the goods. But the company show that every inch of the road along which the goods are carried is vested in them as owners pursuant to the Acts of Parliament under which they are constituted. The company succeed in their defence, it being inconsistent with the *dominium* established in them to pay toll for goods carried by them over their own land (*Brecon Markets Company v. Neath and Brecon Railway*, L. R. 7 C. P. 555; 8 C. P. 157). Sometimes the franchise arises from a grant, or may, by a truthtlike presumption, be inferred so to arise. In that case it is, properly speaking, a *tenement*. But sometimes this presumption would be so untruthtlike that we say there is a presumption—not of a grant, but—of a *legal origin* prior to the time of Richard I. For instances, see the case of a marriage fee—*Bryant v. Foot*, L. R. 3 Q.B. 497. The right to dredge for oysters—*Foreman v. Free Fishers of Whitstable*, L. R. 4. H. of L. Ap. 276.—R. C.]

Consideration  
of the  
exemptions  
from liability  
resumed.

2. Infancy  
and Insanity.

Reverting to the subject from which I have digressed, namely, the exceptions to the principle *ignorantia juris non excusat*, I shall touch on a few to which I did not advert in my last Lecture.

An infant or insane person is exempted from liability, because it is inferred from his infancy or insanity that, at the time of the alleged wrong, he was not capable of unlawful intention or inadvertence, inasmuch as he neither knew the law, nor was able to apply the law as a guide to his conduct. That this is the ground of the exemption, appears from this consideration. If the infant was *doli capax* (or was conscious that his conduct conflicted with the law), his infancy does not excuse him. And this capacity may be established by evidence appropriate to the nature of the case. And if the alleged wrong was done in a lucid interval, the fact is imputed to the madman. In the case of an infant under seven years, the inference of incapacity, according to the Roman Law, and (semble) according to our own, is a presumption *juris et de jure*. This is a presumption probably well founded in fact in most cases. And it is made conclusive in *all*, on account of the little advantage which could arise from the legal punishment of a child in any instance whatever.

Infancy or insanity is therefore a ground of exemption, partly because the party was ignorant of the law, or is presumed to have been ignorant of the law. This does not contradict what I before said, that in English law ignorance of the law is not (*per se*) a ground of exemption. For in the case of insanity or infancy ignorance of law is only considered as one ground of the exemption in company with other grounds from which it is impossible to sever it in the particular cases.

In the English Law, drunkenness is not an exemption. In criminal cases, never : nor in civil cases when the ground of the liability is of the nature of a delict ; but a party is at times released from a contract which he entered into when drunk. In the Roman Law, drunkenness was an exemption even in the case of a delict ; provided the drunkenness itself was not the consequence of unlawful intention : if, for instance, I resolve to kill you, and drink in order to get pluck, according to the vulgar expression, the mischief is ultimately imputable to my intention. In all other cases, drunkenness was a ground of exemption in the Roman Law.

The ultimate ground of this exemption is the same as in the case of insanity or infancy. The party is unable to remember the law if he knew it, or to appreciate distinctly the fact he is about, so as to apply the law to guide his conduct.

Where drunkenness which is not itself the consequence of unlawful intention is not a ground of exemption, the party, it is evident, is liable in respect of heedlessness. He has heedlessly placed himself in a position, of which the probable consequence will be the commission of a wrong.

Another ground of exemption is sudden and furious anger. In English Law, this is never a ground of exemption : in Roman Law it is (provided it is such as to exclude all consciousness of the unlawfulness of the act), for the same reason as drunkenness and insanity.

Where the party is answerable for an alleged wrong done in furious anger, the reasoning is the same as in the case of drunkenness. He is guilty, not in respect of what he has done in furious anger, but in respect of his having neglected that self-discipline, which would have prevented such furious fits of anger. On similar grounds, *imperitia*, or want of skill, is the source of a common case of liability, both in our own and in the Roman Law. Pretending to practise as a physician or as a surgeon, I do harm to some person : in the particular case I attend with all my skill, and the mischief is not imputable to unlawful intention or inadvertence at that time, but to neglect of the previous duty of qualifying myself by study for the profession I affect to exercise.

Liability for injuries done by third parties, is ascribed justly by Mr. Bentham to the same cause. I am liable for injuries done by persons whom I employ,\* because it is

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4. Drunkenness (in some systems of law).

5. Sudden and furious anger (in some systems).

\* An exception has, in English and American law, been made to this liability, where the injured person is a servant in the employ of the same master as the servant by whose act the injury ensues. This is stated to be on the ground of an implied term in the contract of service, that the servant undertakes the risks 'incident to the employment,' and contemplates the negligence of a fellow-servant as one of such risks. The Court of Session in Scotland long struggled against this implication, but their judgment was overruled on ap-

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generally in my power not to employ persons of such a character, or to form them by discipline and education so as to be incapable of the commission of wrong. The first reason applies to a man's servants, the last to his children. The obligation is peculiarly strong in the Roman Law, because of the great extent of the *patria potestas*: by reason of which it probably was in the power of the father not only to form the character of his child by previous discipline, but in most cases to prevent the specific mischief by specific care.\*

An illogical distinction in Roman Law between delicts and quasi-delicts.

Before I quit the subject, I shall remark on a distinction which is made by the Roman Lawyers, and which appears to me illogical and absurd: (a rare and surprising thing in the Roman Law). I mean the distinction between *delicts* and *quasi-delicts*. From the capricious way in which they arrange offences under these two heads, I cannot discover any ground for this distinction.

The *imperitia* for instance of a physician is a delict: but the *inprudentia* of a judge, who is liable in certain cases for erroneous decisions, is a quasi-delict. The ground of the liability in these two cases is precisely the same. The guilt of the party in both cases consists in taking upon himself the exercise of a function, without duly qualifying himself by previous preparation. And as the right violated is in both cases a right *in rem*, the offence is properly a delict. This distinction, therefore, appears to me to be groundless; though I draw such a conclusion with diffidence, when it refers to any distinction drawn by the Roman Lawyers, whose distinctions I have found in almost every other case to rest on a solid foundation.

The party is exempted in some cases in which the sanction might act on his desires, but in which the fact does not depend on his desires.

Such is the case of physical constraint. In this case, he may be conscious of the obligation, and fear the sanction: but the sanction would not be effectual if applied, because it is impossible for him to perform the obligation.

There is still another case which is distinguishable from this; in which the sanction might operate on the desires of the party, might be present to his mind, and the performance of the duty might not be altogether independent of his desires; but the party is affected with an opposite desire, of a strength which no sanction can control, and the sanction therefore would be ineffectual. Such for instance is the case in which a party is compelled by menaces of instant death

peal in the Barton's-hill Colliery case, 3 Macq. 266, 300. See also Feltham v. England, L. R. 2 Q. B. 33; Wilson v. Merry, L. R. 1 H. of L. Sc. 321; Gregory v. Hill, Court of Session, Dec. 14, 1869, 8 Macph. 282.—R. C.

\* See Pothier, 'Traité des Obligations,' Part II. ch. vi. sec. viii. Art. II. § 5. (454).

Grounds of exemption not depending on the foregoing principle.  
 1. Physical compulsion.

2. Extreme terror.

to commit what would otherwise be a crime. The reason is that I am urged to a breach of the duty by a motive more proximate and more imperious than any sanction which the law could hold out: and as the sanction therefore would not be operative, its infliction would be gratuitous cruelty.

I believe that all these exemptions, except the two last mentioned, may be explained on the principle so often referred to, namely, that the party neither was conscious, nor could be conscious, that he was violating his duty, and consequently the sanction could not operate on his desires. It would indeed be more correct, instead of speaking of *exemptions* from liability, to say, that they are cases in which the parties are not obliged; cases to which the notion of obligation, and therefore of injury, cannot apply, because the sanction could not be operative. The sanction would be ineffectual, either as not operating on the desires, as in the five first-mentioned cases, or as operating upon them in vain, as in the two cases last mentioned.

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The so-called exemptions not properly exemptions, but cases to which the idea of obligation does not apply.

## LECTURE XXVII.

### *Different Kinds of Sanctions.*

HAVING endeavoured to explain the essentials of Injuries and Sanctions, and, therein, to illustrate the nature of obligations or duties, I will now advert to the more important differences by which sanctions are distinguished.

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Sanctions civil and criminal.

And, first; Sanctions may be divided into *civil* and *criminal*, that is, into *private* and *public*.

As I remarked in a former Lecture,\* the distinction between private and public wrongs, or civil injuries and crimes, does not rest upon any difference between the respective tendencies of the two classes of offences: *All* wrongs being in their *remote* consequences *generally* mischievous: and most of the wrongs styled public, being *immediately* detrimental to determinate persons.

But in certain cases of wrongs which are breaches of relative duties, the sanction is enforced *at the instance or discretion* of the injured party. In these cases, the injury and the sanction are styled *civil*, or *private*.

In other cases of wrongs which are breaches of relative duties, and in all cases of wrongs which are breaches of absolute duties, the sanction is enforced *at the discretion* of the

\* Lecture XVII. p. 196, ante,

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Sovereign or State. It is only by the sovereign or state that the liability incurred by the wrong-doer can be remitted. And in every case of the kind, the injury and the sanction may be styled *criminal* or *public*.\*

The distinction, as I have now stated it, between civil injuries and crimes, must, however, be taken with the following explanations.

1st. In certain cases of civil injury, it is not competent to the injured party, either to pursue the offender before the tribunals, or to remit the liability which the offender has incurred. For example, An infant who has suffered a wrong is not capable of instituting a suit, nor of renouncing the right which he has acquired by the injury. The suit is instituted on his behalf by a general or special Guardian: who (as a trustee for the infant) may also be incapable of remitting the offender's liability.

It would, therefore, be more accurate to say, that where the wrong is a civil injury, the sanction is enforced at the instance of the injured, or of his representative.

2ndly. When I speak of the discretion of the sovereign or state, I mean the discretion of the sovereign or state as exercised according to law. For, by a special and arbitrary command, the sovereign may deprive the injured of the right arising from the injury, or may exempt the wrong-doer from his civil liability; e.g., by issuing letters of protection to debtors to secure them from the pursuit of their creditors. In cases of this kind the sovereign partially abrogates his own law to answer some special purpose. This is never practised by wise governments, whether monarchical or other. The Great Frederick, in spite of his imperious temper and love of power, always conformed his own conduct to his own laws.

Letters of protection were granted in this country by the King, so late as the reign of William III.† These must have been illegal. For though the King is empowered by the Constitution to pursue and pardon criminals at his own discretion, it is not competent to him to disregard the law by depriving the injured party of a right of civil action. In an analogous case, this has, however, been done by the Parliament. A person named Wright sued a number of clergymen for non-residence;‡ and though he had been encouraged to bring these actions by the invitation of the existing law, Parliament passed an Act indemnifying the clergymen, and put off poor Wright with the expence of the actions which he had brought.

\* See distinction between Civil Injuries and Crimes, in Lecture XVII. ‘On Absolute Duties,’ p. 196, *ante*.

† See the case of Lord Cutta, 8 Lev. 532.

‡ Some of these cases are reported in Taunton, vols. v. and vi. I presume the Act referred to is 57 Geo. III. c. 99.—R. C.

The distinction between private and public wrongs, is placed by some on another ground :

Where, say they, the injury is a crime, the end or scope of the sanction is the *prevention* of future injuries. Where the injury is civil, the end of the sanction is redress to the injured party.

Now, it is certainly true, that where the injury is treated as a crime, the end of the sanction is the prevention of future wrongs. The sanction is *pæna* or *punishment* (strictly so called) : that is to say, an evil inflicted on a given offender by way of example or warning, or, to use the word commonly used by Latin writers, and more especially by Tacitus—*documentum*. If the evil did not answer this purpose, it would be inflicted to no end.

It is also true, that where the injury is deemed civil, the proximate end of the sanction is, generally, redress to the injured. But, still, the difference between civil injuries and crimes, can hardly be found in any difference between the ends or purposes of the corresponding sanctions.

For, first ; although the proximate end of a civil sanction, is, commonly, redress to the injured party; its remote and paramount end, like that of a criminal sanction, is the prevention of offences generally. And, secondly ; an action is sometimes given to the injured party, in order that the wrong-doer may be visited with *punishment*, and not that the injured party may be *redressed*. Actions of this sort (to which I shall presently revert) are styled *penal*: In the language of the Roman Law, *pæna persecutoriae*. These propositions I will endeavour to explain.

It is clear that the necessity of making redress, and of paying the costs of the proceeding by which redress is compelled, *tends* to prevent the recurrence of similar injuries. The immediate effect of the proceeding is the restitution of the injured party to the enjoyment of the violated right, or the compulsory performance of an obligation incumbent upon the defendant, or satisfaction to the injured party in the way of equivalent or compensation. But the proceeding also operates *in terrorem*.

Accordingly, a promise *not* to sue, in case the promisee shall wrong the promisor, is void (generally speaking) by the Roman Law: although it is competent to a party who has *actually* suffered a wrong, to remit the civil liability incurred by the wrong-doer. And the reason alleged for the prohibition is this: that such a promise removes the salutary fear which is inspired by prospective liability.

In short, the end for which the action is given is double : redress to the party directly affected by the injury, and the prevention of similar injuries.

Assuming, then, that the redress of the injured party is always one object of a civil proceeding, it cannot be said

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that civil and criminal sanctions are distinguished by their ends or purposes.

It may, however, be urged, that the prevention of future injuries is the sole end of a criminal proceeding ; whilst the end of a proceeding styled civil, is the prevention of future injuries *and* the redress of the injured. But even this will scarcely hold. For in those civil actions which are styled *penal*, the action is given to the party, not for his own advantage, but for the mere purpose of punishing the wrong-doer : *e.g.*, the power of imprisonment reserved under the Acts of 1869, under which imprisonment for debt was ostensibly abolished. The express or ostensible object of the reservation is to punish the debtor in certain cases, although it may be, and, doubtless, commonly is, used as an indirect means of obtaining redress. To the same category may be referred the cases where a trustee in bankruptcy under the Act of 1869, is ordered to prosecute.

In the Roman Law, actions of this kind are numerous.

For example ; Theft in the Roman Law is not a crime, but a private delict : But besides the action for the recovery of the thing stolen, the thief was liable to a penalty, to be recovered in a distinct action by the injured party.

So, again, if the heirs of a testator refused to pay a legacy left to a temple or church, they were not only compelled to yield '*ipsam rem vel pecuniam quæ relictæ est, sed aliud, pro pñnd.*'

Although by these civil actions a right is conferred upon the party injured, the end for which the actions are given is not to redress the damage which has been suffered by him, but to punish the wrong-doer, and by that means to prevent future wrongs. Also popular actions, or actions given *civis ex populo*, which exist both in the Roman and English Law, evidently have the punishment of the offender for their object.

Laws sometimes sanctioned by nullities.

Besides this principal distinction, there are other species of sanctions requiring notice. Laws are sometimes sanctioned by nullities. The legislature annexes rights to certain transactions ; for example, to contracts, on condition that these transactions are accompanied by certain circumstances. If the condition be not observed, the transaction is void, that is, no right arises ; or the transaction is voidable, that is, a right arises, but the transaction is liable to be rescinded and the right annulled, *provided* the means of doing so have not become too complicated, by reason of the acquisition through the transaction of rights in favour of innocent parties.

In certain cases, sanctions consist in pains to be endured by others, and are intended to act on us through sympathy. These Bentham has styled vicarious punishments. For-

feiture, in treason, is an instance. As it falls upon a person who by the supposition is to be hanged, it is evident that it cannot affect *him*, but it affects those in whom he is interested, his children or relations, and may possibly, for that reason, influence his conduct. Annulling a marriage has in part the same effect, since it not only affects the parties themselves whose marriage is annulled, but also bastardises the issue.

Sanctions, in some other cases, consist of the application of something not itself affecting us as an evil in itself, but by way of association. Posthumous dishonour in the manner of burial in case of suicide is of this nature. This, of course, can only operate upon the mind of the party by association, since at the time when he is buried he is not conscious of the manner of his burial.

I now advert to the various meanings of the word *sanction*.

As it is at present used, it has the extensive meaning which I have attached to it, and denotes any conditional evil annexed to a law, to produce obedience and conformity to it. But the term *sanction* is frequently limited to punishments under a criminal proceeding. This is the sense in which the word is used by Blackstone, though not consistently. With the Roman lawyers, who adopted the term from the popular language of their own country, *sanction* denoted, not the pain annexed to a law to produce obedience, but the clause of a penal law which determines and declares the punishment.

In the Digest the etymology of the word is said to be this: *Sanctum* is defined *quod ab injuria hominum defensum est*, and is said to be derived from *sagmina*, the name of certain herbs which the Roman ambassadors bore as marks of inviolability. The term was transferred, in a manner not uncommon, from the mark of inviolability, to what is frequently a cause of inviolability, namely punishment.

In other cases *sanction* signifies confirmation by some legal authority. Thus, we say that a Bill becomes law when *sanctioned* by Parliament, or that it receives the Royal sanction. The term is often used in this sense by the Roman lawyers.

*Sanctio* is also used to denote generally a law or legislative provision, or to denote the law or body of law collectively. Thus, in the beginning of the Digest, *totam Romanam Sanctionem* is used for the whole of the Roman law. *Sancire* means to enact or establish laws. These last two meanings are also instances of the transference of a term by way of association to a secondary sense.

## PART II.

### LAW IN RELATION TO ITS SOURCES

AND TO THE

### MODES IN WHICH IT BEGINS AND ENDS.

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### LECTURE XXVIII.

#### *On the Various Sources of Law.*

##### PART II.

Meanings of  
the phrase  
'Sources  
of  
the law.'  
1. The direct  
or immediate  
author of the  
law.

In many legal treatises, and especially in treatises which profess to expound the Roman law, that department or division which regards the *origin* of laws, is frequently entitled '*De juris fontibus.*' The expression *fontes juris*, or *sources of law*, is of course metaphorical, and is used in two meanings.

In one of its senses, the source of a law is its direct or immediate author. Now the immediate author may either be the sovereign (who is the *ultimate* author of all law) or a person or body legislating in subordination to the sovereign. In the latter case it is an improper use of the metaphor to describe the immediate author as the *source*. Individuals or bodies legislating in subordination to the sovereign, are more properly *reservoirs* fed from the source of all law, the supreme legislature, and again emitting the borrowed waters which they receive from that Fountain of Law. For convenience, however, I adopt the expression *sources of law* as meaning the authors from whom it emanates *immediately*.

In another acceptance of the term, the fountains or sources of laws are the *original* or *earliest extant* monuments or documents by which the existence and purport of the body of law may be known or conjectured.

Taken in this acceptance, the fountains or sources of *laws* are properly sources of the *knowledge* which is conversant about laws: '*fontes e quibus juris notitia hauritur.*'

Speaking generally, the extracts from the classical jurists contained in Justinian's Digest, the Imperial Constitutions contained in his Code, and such other relictæ of antiquity as regard the Roman law, are the earliest extant evidence for the several parts of the system to which they respectively relate. These, therefore, are '*fontes.*'

But the works of the Glossators and Commentators who wrote in the Middle Ages, with the works of Civilians who

2. The earliest  
documents  
by which the  
existence of  
law is evi-  
denced.

have written in subsequent periods, are not fountains or sources of that knowledge of the system which may be gotten at the present hour. For the countless authors of those countless volumes derived their own knowledge of the Roman Law from ancient documents or monuments which are still extant and accessible. Their works are accordingly called by German writers '*literatura*,' as distinguished from '*fontes juris*'.

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And so, (in regard to the English law,) the statutes, the reports of judicial decisions, with the old and authoritative treatises which are equivalent to reports, may be deemed sources (in the sense last-mentioned) of English jurisprudence; whilst the treatises on the English law, which merely expound the matter of those statutes and reports, are not sources of English jurisprudence, but are properly a legal literature drawn or derived from the sources.

Law considered with reference to its sources, is usually distinguished into law written and unwritten.

Law written  
and un-  
written.  
As under-  
stood by the  
modern  
Civilians.

The distinction between written and unwritten law in the sense in which the terms are employed by the modern Civilians, is this: *Written* law is law which the supreme legislature makes immediately and directly. Unwritten law is not made directly and immediately by the supreme legislature, though it owes its validity, or is *law* by the authority, expressly or tacitly given, of the sovereign or state. How the plebs or the senate came to be held equivalent to the *populus* assembled in centuries will be considered in a subsequent part of this Lecture.

As I shall show presently, the terms *written* and *unwritten*, as used to mark this distinction, are inappropriate and misleading. But as they have been accepted in this sense, not only by the modern Civilians, but in some respects by Hale and Blackstone, I find it convenient for the present not entirely to discard them, but I distinguish this their improper meaning from the grammatical one by calling it the *juridical* meaning.

This meaning  
of written  
and un-  
written as  
applied to  
law I call  
the juridical  
meaning of  
the terms.

By the Roman Lawyers themselves, little importance was attached to the distinction between written and unwritten law. And, in every instance in which they take the distinction, they understand it in its literal sense. When they talk of *written* law, they do not mean law proceeding directly from the supreme Legislature, but law which was committed to writing at its origin: *quod ab initio litteris mandatum est*. Law not so committed to writing, they call unwritten. When I revert to this meaning of the terms, I shall call it their *grammatical* meaning.

Written and  
unwritten  
law, as under-  
stood by the  
Roman  
Lawyers.

The distinction between written and unwritten law, in what I have called the juridical meaning of the terms, is

Written and  
unwritten  
law, accord-

PART II.  
ing to the im-  
proper and  
juridical  
meaning of  
the terms, is  
an important  
distinction.

The distinc-  
tion stated in  
appropriate  
terms.

Examples of  
laws made di-  
rectly by the  
sovereign.

1. Acts of the  
British Par-  
liament.

2. Ordinances  
made by the  
États-Géné-  
raux in old  
France, while  
they sub-  
sisted, and by  
the King  
afterwards.

3. The *leges*,  
*plebiscita*,  
and *senatus-  
consultia* of  
the Romans.

important. But, as I have already indicated, nothing can be less significant or more misleading than the terms *written* and *unwritten* as thus applied. For, first, law, though it originate with the supreme legislature, may be, and in many nations has been, established and published without writing. And law flowing from another source, though obtaining as law with the consent of the supreme legislature, may be committed to writing at its origin. Such, for instance, are the laws of Provincial and Colonial Legislatures. And such especially (as I shall show hereafter) were the Edicts of the *Prætors*.

Laws, then, are distinguished, in respect of their immediate authors, into laws made directly and immediately by the supreme legislature, and laws not made directly and immediately by the supreme legislature, although they derive their validity from its express or tacit authority. I shall now proceed to give examples of these two kinds of laws.

An example of laws made by the sovereign body directly and immediately, is that of our own Acts of Parliament, which are made directly by the supreme legislature in its three branches, the King, the House of Lords, and the House of Commons.

Another example is that of the enactments passed by the États-Généraux in France, while that body continued to exist and to be recognized as the supreme legislature. When the Kings of France became constitutionally the sovereigns, or when the French Government became a monarchy, the royal ordinances were laws of the same kind.

In Rome under the Commonwealth, or *liberæ republicæ*, laws established by the supreme legislature were of three kinds: there were three distinct bodies whose decrees were considered as made by the sovereign or supreme legislature. These were, 1st—the *populus* assembled in *curiæ*, according to the most ancient form, or, according to the manner subsequently introduced, in *centuries*; 2ndly, the *plebs*, assembled in tribes; and 3rdly, the *senate*.

Strictly speaking, the sovereignty resided in the *populus*; which included every Roman invested with political powers, and therefore included members of the *senate*, as well as citizens who were not senators. To laws made by the *populus* (whether assembled in *curiæ*, according to the more ancient manner; or in *centuries*, according to the more recent fashion), the term '*leges*' or '*statutes*' (when used with technical exactness) was exclusively applied. But they were commonly styled, for the sake of distinction, '*Leges curiatae*' or '*Leges centuriatae*'.

The *plebs* (as distinguished from the *senate*) included all citizens of plebeian birth who were not senators.

The *senate* (as distinguished from the *plebs*) included all

citizens of patrician birth, and also all citizens of plebeian birth who filled or had filled certain of the higher offices, as the consulship or the office of *praetor*.

The distinction between *patrician* and *plebeian*, and the distinction between *senate* and *plebs*, were therefore disparate. For, although every patrician seems to have been a senator, many of plebeian birth sat and voted in the senate.

A law passed by the *plebs* was styled in accurate language, a *plebiscitum*. But as every *plebiscitum* was equivalent to a *lex*, the term '*leges*' was extended *improperly* from laws made by the *populus* to laws made by the *plebs*.

How *plebiscita* acquired the force of *leges* it is not very easy to determine. For the *plebs* was only a portion of the whole Roman People, and therefore was not the body wherein the sovereignty resided. It seems not unlikely, that the *plebs* (instigated by their Tribunes) assumed the power of legislating for the whole community: and that the senate (too feeble to resist) yielded, after a struggle, to the unconstitutional pretension. Gaius tells us expressly, that the senate at first refused to recognize *plebiscita* as *leges* generally binding; but that the force of *leges* was at length imparted to *plebiscita* through a law passed by the *populus*.\*

Laws passed by the senate (which were styled *senatus-consulta*) were also equivalent to *leges* made by the assembled *populus*.

It has often been inferred from a passage in Tacitus, that consults or acts of the senate first acquired this virtue under the reign of Tiberius. But they are distinctly placed by Cicero (writing *liberā republicā*) on a level with *leges* and *plebiscita*. Nor is there here the slightest difficulty. For, since the tribunes of the *plebs* sat in the senate, and by simply uttering their *veto* might have arrested its proceedings, it follows that a consult of the senate was passed with the concurrence of the *plebs*, assenting to the act by its representatives.

The result then seems to be this:

*Liberā republicā*, or, during the Commonwealth, the supreme legislative power resided in the Roman *People* (including the *senate* and *plebs*).

This legislative power was sometimes exercised by the people, as collected in a single assembly. At other times, it was exercised by the same people as divided into two bodies:—namely, *by the plebs*, with the concurrence of the *senate*; or *by the senate*, with the concurrence of the *plebs*. If our House of Lords and House of Commons sometimes sat and voted in one assembly, and sometimes separately as at present, they would afford an exact parallel to the manner

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in which the sovereignty was divided in the Roman Republic. Acts passed by the two bodies assembled in one house, would correspond to *leges curiatae* and *centuriatae*; acts originating in the one House, and adopted by the other, would be *plebiscita* or *senatus-consultum*. The only difficulty in this explanation is, that the equestrian order, although of course members of the *populus*, were not members either of the *senate* or *plebs*. Enactments passed by one of those bodies with the concurrence of the other were therefore not, strictly speaking, acts of the entire *populus*; though acts of the *populus*, united in *curiae* or *centuriæ*, were so.

While, then, the Roman Commonwealth virtually existed, law created immediately by the supreme legislature was established in three modes:—by *leges*, or *statutes*, strictly so called; by *plebiscita*, also styled *leges*; and by *senatus-consultum*.

*Lex*, it must be observed, is never used as a generic term for law, but is invariably applied to a particular law of the species we should term a *statute*.

After the destruction of the Commonwealth and the establishment of the Empire, the supreme legislative power, though it virtually resided in a monarch, was long exercised *to appearance* in the ancient and constitutional modes. Laws were still made by the *populus*, *plebs*, or *senate*, although those bodies were obedient instruments of the Emperor, and legislated at his suggestion, or at the suggestion of his creatures. As assemblies of the *populus* or *plebs* were the less commodious tools, the work of supreme legislation was commonly done to appearance by the smaller and more manageable body. The laws which really emanated from the military chief of the Empire, were usually voted by the *senate* at the instance of the prince, ('ad orationem principis,) and were published as *senatus-consultum*.

And here it may be observed that the only constitutional title of the chief of the state was *Princeps*, an honorary title given to the most prominent member of the *senate*, and holding in that body a precedence and pre-audience somewhat like that accorded by courtesy to the Lord Chancellor in our own House of Lords. The head of the state, though really despotic, was by fiction nothing more than *princeps senatus*; he was never called emperor (*imperator*), which was a mere military title and denoted *general*; except when he was considered as chief of the army. *Princeps* is the title invariably given by Tacitus.

From the accession of Hadrian, and perhaps from an earlier period, the Emperors openly assumed the supreme legislative power which they had before exercised covertly. Instead of emitting their laws through the *populus*, *plebs*, or *senate*, they began to legislate avowedly as monarchs and

4. The constitutions of the Roman Emperors.

autocrats, and to notify their commands to their subjects in *Imperial Constitutions*.

These imperial constitutions (*principum placita*) were general or special.

By a *General Constitution* (*edictum, lex edictalis, epistola generalis*) the emperor or prince, acting in his legislative capacity, established a law or rule of a universal or general character, and not regarding specifically a single person or case. It is necessary to add the latter and negative character, because the kind of special constitution called a *privilegium*, although it specifically regards a single person, does sometimes (e.g., where it consists in conferring a monopoly) lay a command upon *persons generally*.

*Special constitutions* were of various kinds, but agreed in this: that they regarded specifically single persons or cases. One kind of special constitution was called an extraordinary mandate; and was an order addressed to a civil or military officer, for the regulation of his general conduct in the execution of his office, or even for the regulation of his conduct on a particular occasion.

By a Special Constitution of another class, the Emperor conferred on some single person some anomalous or irregular right, or imposed upon some single person some anomalous or irregular obligation, or inflicted on some single person some anomalous or irregular punishment. Such constitutions were styled *privilegia*. When such *privilegia* conferred anomalous rights, they were styled *favorable*. When they imposed anomalous obligations, or inflicted anomalous punishments, they were styled *odious*. An act of the British Parliament giving to the inventor of a machine an exclusive right of selling it, would be styled in the language of the Roman Law 'a favorable privilege.' An Act of Attainder would be styled in the same language 'an odious privilege.' The word differs from our use of the word 'privilege' in this—that the English word is applied to the *right* conferred instead of to the *law* imposed, and is confined to *favorable* privileges.

A third class of these Special Constitutions, and the most important and remarkable, consisted of those *decretes* and *rescripts* which were made by the Emperors in their quality, not of sovereign legislators, but of sovereign judges; a *decree* being an order made on a regular appeal from the judgment of a lower tribunal; and a *rescript* being an order preceding the judgment of the lower tribunal, and instructing that lower tribunal how to decide the cause. For sovereignty includes the judicial as well as the legislative power: and although in modern Europe the judicial power residing in the sovereign is commonly delegated by him to individuals called judges, the Roman emperors were themselves judges in the last resort.

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General Constitutions.

Special Constitutions.  
(a) Extra-  
ordinary  
mandate.

(b) Privilegia.

(c) Decreta  
and rescripta.

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Examples of law not made directly by the sovereign or supreme legislature.

Acts of the Governor-General of India in Council.

Colonial legislatures not merely subordinate.

(3) Bye-laws made by collegia or corporate bodies.

(3) Laws made in the way of direct legislation by Courts of Justice.

Having now given examples of law made directly and immediately by the sovereign, I proceed to examples of law *not* made directly and immediately by the sovereign, although it exists or obtains *as law* by the express or tacit authority of the supreme legislature.

And, first, laws made by subordinate legislatures, in the direct or legislative manner, are not established *immediately* by the *supreme* legislature, although they derive their force from the *authority* of the sovereign.

Such are Acts passed by the Governor-General of India in Council under the authority conferred by the British Parliament by the Act of 1833 (3 and 4 Wm. IV., c. 85), an authority which Parliament still permits to be exercised. For not only is the right of Parliament to legislate for India expressly reserved by that Act, but it is undoubted that the authority of the British Parliament is in all respects paramount in India, although it is accustomed (with rare exceptions) to delegate all the sovereign powers relating to India to subordinates. The case is different in some of our more important colonies, for instance in Canada. By an Act in the year 1840 (3 and 4 Vict. c. 35) the British Parliament irrevocably conferred full powers of legislation for Canada (subject only to a veto reserved to Her Majesty in Council) on the Legislature of the Dominion constituted by that Act. And no one supposes that the British Parliament have the power, even if they had the wish, to resume the initiative in legislation for Canada. This does not contradict what has been already said as to the sovereign power being incapable of legal limitation (p. 105 *supra*). For the British Parliament is not sovereign in Canada, although it retains a share in the sovereign power. And although the British Parliament could not of its own authority revoke or re-construct the Constitution of Canada as contained in the Act of 1840, it might be re-constructed by the concurrent Act of the Legislature of the Dominion and the British Parliament. Even the abolition of the Legislature of Jamaica, as existing prior to 1866, was *formally* effected by its own Act jointly with that of the British Parliament. (See 29 and 30 Vict. c. 12.)

Laws made by *collegia*, or by corporate bodies, belong to the same class. They are made immediately by the corporate bodies themselves, but owe their legal validity to the authority of the sovereign. There are in England, for instance, a variety of regulations emanating under statutory authority from various bodies or Boards of Commissioners, e.g., Board of Trade Regulations, Schemes of Charity Commissioners, 'the Rules of Hyde Park,' &c.

Among laws made by subordinate legislatures in the direct or legislative mode are those which are made by Courts of Justice or persons holding judicial appointments, not in their judicial capacity, and in the way of decisions

on particular cases, but by a power of proper legislation conferred upon them expressly or tacitly by the supreme legislature.

Such are the *regulae praxis* published by our own Courts of Justice, which are distinguished broadly from the laws established by the same Courts in the indirect mode of judicial decision.

Such also were the *arrêts réglementaires* of the French *parlements*, which were in the nature of general statutes. Their judicial decisions on specific cases were called *arrêts judiciaires*.

Such above all were the edicts of the Roman *Praetors* forming the body of law called *Jus Praetorium*. The manner in which this portion of the Roman Law was made, and the causes of its being made, are among the most interesting phenomena in the history of jurisprudence. It consisted not of judicial decisions, but of general laws made and published in the way of direct legislation; by virtue of a power assumed at first by the *Praetors*, with the acquiescence of the supreme legislature, and subsequently confirmed to them by its express recognition and authority.

Another species of laws emanating immediately from a subordinate authority, consists of laws established by judicial decisions of subordinate tribunals. For, as already observed, laws are occasionally made in this oblique manner by the sovereign himself.

The term *unwritten law* in the same juridical meaning is applied by the same Civilians to *jus moribus constitutum*, and *jus prudentibus compositum*, that is to say, law supposed to emanate from opinions emitted by respected, but merely private, *jurisconsults*, in responses, in commentaries, or in systematic treatises. But, as I shall in a subsequent lecture (Lecture XXX.) endeavour to show, neither laws originating in customs, nor laws originating in the private opinions of *jurisconsults* or institutional writers, are (properly speaking) distinct species of law in respect of their sources.

Another species of laws not made by the supreme legislature are laws (if such they can be called) which are established by private persons, and to which the supreme legislature lends its sanction. For example, By my will I may impose certain conditions upon devisees or legatees. As a father or guardian, I may prescribe to my child or ward certain conduct, which the Courts of Justice will compel him to follow.

I mention this because such commands are styled by some modern writers *autonomie-gesetze*, which is equivalent to *laws* made autonomically, or by private authority. This, however, is incorrect, because a private person cannot be the author of law; though he may be a party to a transaction, whereby, in virtue of a general law made by the legislator, he gives certain *rights* and creates certain obligations.

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(a) *Regulae  
praxis* of our  
own Courts.

(b) The *arrêts  
réglementaires* of the  
French *Parlementa*.

(c) The edicts  
of the Roman  
*Praetors*.

(d) Laws  
made in the  
way of judicial  
decisions.

Laws originating in  
customs, and  
in the opinions of the  
*jurists*, not  
distinguishable from  
other laws in  
respect of  
their source.

(5) Auto-  
nomic laws.

## LECTURE XXIX.

*Law : Written and Unwritten—Statute and Judiciary.*PART II.

Written and unwritten law, *sensu juridico*.  
 The same distinction sometimes expressed by the terms promulgated and unpromulged.

THE distinction between written and unwritten law, in the juridical meaning of the terms, is also denoted in the writings of the same Civilians, by the opposed epithets *promulgated* and *unpromulgated*. Law made by the supreme legislature is called *promulgated* law, and law emanating immediately from a subordinate source is called *unpromulgated* law.

To explain this term it must be recalled to mind that a law cannot be binding—the sanction cannot act on the desires so as to be a sanction properly so called—unless the law be made known to the persons whom it concerns to obey it. And in every system of positive law, a law is *presumably* or in fact known to the parties who are bound by it.

The phrase '*promulgare legem*' originally meant, to submit a proposed law to the members of the legislature, in order that they might know its contents, and consider the expediency of passing it. This meaning the phrase retained in the language of the Roman jurisprudence during the Commonwealth. Under the Emperors, however, the phrase acquired its present sense, namely, to publish a law for the information of the subjects who are bound by it. Now, supposing there is only one person, or a few persons, bound to obey the law (e.g. supposing the law to be a judicial decision), it may in one sense be said to be published, that is to say, it is made known sufficiently to answer the purpose for which promulgation is necessary. But the phrase *promulgare legem* in this its secondary meaning probably implied that the law was made known generally, or to a considerable and promiscuous part of the people. And this seems to be what is meant by '*promulgated*' in the distinction now adverted to.

But these terms also misexpressive.

Now the terms *promulgated* and *unpromulgated*, as thus applied, are not less misexpressive than *written* and *unwritten* (*sensu juridico*).

For, *first*, laws established immediately by sovereign authors are not necessarily *promulgated*.

It is true that, according to the practice which obtained under the Roman Emperors, their *general* or *edictal* Constitutions were not binding until they were published for the information of the people generally. And, hence, it probably has happened, that modern Civilians have applied the

term '*promulgated*' to laws proceeding immediately from sovereign authors.

But the rescripts of the Emperors, with others of their *special* constitutions, were exclusively addressed (for the most part) to the particular or determinate persons whom they specifically regarded. And yet, through these special constitutions, Law was established, *immediately* by those sovereign princes, in their judicial (or legislative) capacity.

And in this country, a Bill which has passed the two Houses, is a statute, or becomes *obligatory*, from the moment at which it receives the Royal Assent. No promulgation is requisite; '*Because*' (as Blackstone remarks) '*every man in England is, in judgment of Law, party to the making of an Act of Parliament, being present thereto by his representatives.*' It is true, that Acts of Parliament are printed, and may be had by those who choose to buy them; but this is not promulgation; for, before an Act is printed, and whether it is printed or not, it is a statute, and is legally binding. There is a *præsumptio juris et de jure* that it is known to the subjects. The reason given by Blackstone for the presumption is highly satisfactory, inasmuch as in his time not one person out of ten in England had any representatives whatever.

And, *secondly*, as Law made immediately by a sovereign author is not necessarily published generally, so Law may be generally published though it emanates from a subordinate source. Such, for example, was the case with the Law or Equity of the *Prætors*; whose Edicts were published carefully and conspicuously, in order that all whose interests they might touch might know their provisions and regulate their conduct accordingly.

The distinction between written and unwritten law, taking the terms in their *grammatical* meaning, is built not upon a difference in the *source* of laws, but on a difference in the mode in which they originate. According to the distinction in the *grammatical* sense of the terms, *any* law (whether it be statute or judiciary, or whether it emanate from a sovereign or a subordinate source) is *written* law, or (*jus quod scripto venit*) if it be written, at the time of its origin, by the authority of its immediate maker. If it be not so written, it is *unwritten* law, or *jus quod sine scripto venit*.

*written and  
unwritten  
law sensu  
grammatico,  
disparate  
from the dis-  
tinction  
sensu ju-  
ridico.*

That this was the *only* distinction between *written* and *unwritten* law recognized by the Roman lawyers, appears in this way:—The *prætorian edicts* and the *responsa prudentium* (as well as *Lex*, *Plebisita*, *Senatus-consultia*, and *Principum Placita*) are entitled by Justinian, *jus scriptum* (Inst. I. 2. 3). But the *Prætorian edicts* are clearly *unwritten* law in the juridical sense of the term; and the *responsa prudentium*, assuming that those private *jurisconsults* were properly

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authors of law, are necessarily *unwritten* law, in the juridical meaning of the expression. It does not appear that Gaius anywhere adverts to the distinction between written and unwritten law.

Customary Law is, according to Justinian, *jus non scriptum*. (*Inst. I. 2. 9.*) And it is so in the grammatical sense; for, assuming that customary law obtains as *positive law* by virtue of the *consensus utentium*, it naturally originates *sine scripto*.

Law originating in the *usus fori*, or made by subordinate tribunals through judicial decisions, is not referred by Justinian to either class.

But it may belong to either class (taking the opposed terms in their *grammatical* sense). If the decisions of the tribunals were committed to writing by *authority* (in the manner proposed by Lord Bacon, or as was imperfectly done in the old Year Books),\* law established by such decisions would be written law. If they are *not* committed to writing (or are committed to writing by private and unauthorised reporters) the law established by them is unwritten.

This sense of *jus scriptum* and *jus non scriptum*, which I have called their grammatical sense, corresponds with the meaning of those phrases in the old French law: *Pays de droit écrit* and *Pays de coutumes*. *Pays de droit écrit* meant those parts of France where the Roman law prevailed. It was written law in the literal or grammatical sense, but not in the other sense. It was not law made and published by the supreme legislator: for it obtained not by his direct enactment, but by his tacit consent, having been established in those countries before they were conquered by the Franks. But it was written law in the sense which I have called the grammatical sense, for it already existed in writing when it was adopted by the French Courts.†

*Written and  
unwritten  
law sense  
Hale and  
Blackstone.*

The distinction between written and unwritten law (as drawn by modern Civilians) has been adopted by Sir Matthew Hale in his History of the Common Law, and imported

\* The judgments delivered by the Judicial Committee of the Privy Council are a still more complete instance. The judgment in its authenticated form is jointly considered and committed to writing *before* being published; an admirable method considering the *quasi-legislative* character attaching to judgments by an appellate tribunal of the last resort.—R. C.

† Law so adopted has been called *jus receptum*; and has sometimes been supposed to obtain independently of sovereign authority.

It may be fashioned on { Foreign positive Law,  
or  
International Morality.

The term 'jus receptum' has even been extended to customary law.

by Sir William Blackstone into his Commentaries. By these writers on English Law, the terms '*written law*' and '*unwritten law*' are apparently taken in their *juridical* meanings. They both of them restrict the expression *leges scriptæ*, or the written laws of this kingdom, to '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.' General and particular customs, together with laws established by the practice or usage of Courts, they refer to the *leges non scriptæ*, or unwritten law.

It must, however, be remarked, that they seem to confound the distinction *sensu juridico* and the distinction *sensu grammatico*; and, by consequence, to arrive at a division of law which is incomplete and perplexed.

Speaking of the unwritten Law, Blackstone says, 'I 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.'

Now (according to this) the division of Blackstone and Hale stands thus.

Acts of the supreme legislature are *leges scriptæ*.

But any law (*not created immediately by the supreme Legislature*) is *non scriptum*: Provided, that is, that its original institution be *not set down in writing*.

Now (according to this division in which the two distinctions are manifestly confounded) what becomes of laws made immediately by subordinate legislatures?

And what would be the class of the law made by judicial decisions of subordinate judges authoritatively recorded?

It may be here observed that the terms themselves, *written* and *unwritten* law, are foreign to the language of English law, though found in Bracton (who evidently borrowed them from the Roman lawyers), and in Hale and Blackstone subsequently. The terms proper to the English law are not *written* and *unwritten* law, but *statute* law and *common* law: a classification which seems to exclude the laws made in the direct or legislative mode by subordinate legislation.\*

Their confu-  
sion of the  
two sensea.

\* The following passage in Glanville's Preface is worth citing here, both for his use of the term *scriptum* as applied to law, and also for the light which it throws upon the early growth of the common law of England. He says: 'Leges namque Anglicanas, licet non scriptas, leges appellari non videtur absurdum (cum hoc ipsum lex sit, quod principi placet, et legis habet vigorem), eas scilicet, quas super dubius in consilio definendis, procerum quidem consilio,

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**Distinction between law established in the direct or legislative mode and law obtaining obliquely.**

It has been shown in the preceding Lecture that the distinction between law *written* and *unwritten* in the grammatical meaning was one to which the Roman writers who suggested it, attached little importance. And it clearly is unimportant.

But there is another distinction between laws, depending not on their sources, but on the modes in which they originate, and which is very important. This is the distinction between law made *obliquely* in the way of judicial decision, and that made *directly* in the way of legislation. When a law or rule is established directly, the proper purpose of its immediate author or authors is the establishment of a law or rule. When the law or rule is introduced obliquely, the proper purpose of its immediate author or authors is the decision of a specific case or of a specific point or question. Generally the new rule disguised under the garb of an old one, is applied as law to decide the specific case, and, that case passing into a *precedent*, the same rule is applied to subsequent cases.

Now, whether established directly or obliquely, a law or rule may emanate either from the sovereign or from an inferior or subordinate source. The judicial power, like all other power, resides in the sovereign, although in most of

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et principis accende authoritate constat esse promulgatas. Si enim ob scripture solummodo defectum leges minime censerentur, majoris (procul dubio) autoritatis robur ipsis legibus videretur accommodare scriptura, quam vel decernentis equitas, vel ratio statuentia. Leges autem et jura regni scripto universaliter concludi nostris temporibus omnino quidem impossibile est: cum propter scribentium ignorantiam, tum propter eorum multitudinem confusam: verum sunt quedam in Curiā generalia, et frequentius usitatā, que scripto commendare non mihi videtur presumptuosum, sed et plerisque pertinile, et ad adjuvandam memoriam admodum necessarium. Harum itaque particulam quandam in scripta redigere decrivi, stilo vulgari et verbis curialibus utens ex industria ad notitiam comparandam eis qui hujusmodi vulgaritate minus sunt exercitati.'

*Bracton* borrows part of this passage, but, missing the fine irony of the reference to the doctrine of the Roman lawyers and the elegance of the argument *a fortiori*, has reduced it to what our author might well call 'jargon.' *Bracton* says: 'Sed absurdum non erit leges Anglicanas (licet non scriptas) leges appellare, cum legis vigorem habeat, quicquid de consilio et de consensu magnatum, et reipublice communi sponsione, autoritate regis a principio precdente, justè fuerit definitum et approbatum.'

By *Glanville* following the Roman lawyers, *scriptum* as applied to *jus* is understood in its literal sense. His argument is If under the Roman system the pleasure of the Princeps was law, much more rationally may we call that law which, though unwritten, is known to have been the sentence of the Great Council, with the authority of the King to boot, given after solemn deliberation upon doubtful questions referred to their determination.' To reduce into writing the laws thus floating in the cognisance and memory of those conversant with the practice of the *Curia* is the task humbly undertaken by that great lawyer.—R. C.

the governments of modern Europe it is committed by the sovereign to subject or subordinate tribunals.

At an earlier period, however, the person or body of persons composing the supreme legislature was also the judge in the last resort, or even in the first instance. The *populus* of Rome, which was the supreme legislative body, was also the judge in capital cases. The Mickle-mote or Wittenagemote of the Anglo-Saxons was both the Legislature and a Court of Justice. Even after the Norman Conquest, the *Aula Regis* was a Court of Justice as well as the Supreme Legislature, and it is from the *Aula Regis* that our House of Lords, although only a branch of the Supreme Legislature, derives the judicial power which it still exercises. From the time when our Parliament acquired its present form of King, Lords, and Commons' House, the judicial power seems to have been more completely detached from the legislative in our own country than in any other.

As no short names are afforded by established language, I shall indicate the distinction in question by periphrasis or circumlocution.

For example: Law belonging to *one* of the kinds in question, I shall style, 'Law established *directly* ;' or 'Law established in the *legislative* manner.' That is to say, established immediately by the sovereign, or by any subordinate author, as properly exercising *legislative*, and not *judicial* functions. Or, to use the expression of Thibaut, in his admirable work on legislation, as *gesetzgebend*, and not as *richtend*.

Laws belonging to the *opposite* kind, I shall style, 'Law introduced and obtaining *obliquely* ;' or 'Law established in the way of *judicial* legislation :' That is to say, introduced immediately by the sovereign, or by any subordinate author, as properly exercising *judicial*, and not *legislative* functions. (As *richtend*, and not as *gesetzgebend*.)

Law of this latter kind (or rather, perhaps, a certain sort of it) has been styled by Bentham '*Judge-made* law :'—a term pithy and homely, but which I am constrained to reject, 1st, because it savours of the disrespect entertained by Bentham to this mode of legislation, in which I do not concur; 2ndly, because it tends to confound the sources from which law immediately proceeds, with the modes in which it originates.

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## LECTURE XXX.

*Certain Supposed Sources of Law Examined.—Jus Moribus constitutum, Jus Prudentibus compositum, Jus Naturale.*

LECT.  
XXX.

Supposed  
kinds of pos-  
tive law.

EVERY Positive Law, obtaining in any community, is a creature of the Sovereign or State: having been established *immediately* by the *monarch* or *supreme body*, as exercising legislative or judicial functions: or having been established immediately by a *subject* individual or body, as exercising rights or powers of direct or judicial legislation, which the monarch or supreme body had expressly or tacitly conferred.

But it is supposed by a multitude of writers on general and particular jurisprudence, that there are positive laws which exist *as positive laws*, independently of a sovereign authority.

The kinds of positive law to which this independent existence is most frequently attributed, are these:—

1. Customary law: or, the positive law which is made by its immediate authors on customs or *mores*:—

2. The positive law which is made by its immediate authors on opinions and practices of private lawyers:—

3. The law, which, as forming a part (or as deemed to form a part) of every system or body of positive law, is styled natural or universal.

To show the falsity of the supposition in question, through a brief examination of the natures of these three kinds of law, is the main object of the present Lecture.

Customary  
laws; no-  
torious, and  
needing  
proof.

The laws or rules styled *customary* may be divided into two classes:—Those which are enforced by the tribunals, without proof of their existence; and those which must be proved, before the tribunals will enforce them.

Laws or rules of the former class, are styled *notorious*. Or it is said that the tribunals take *judicial* notice of them. Those of the latter class require proof, like any other fact on which the decision in the particular case depends.

This division does not coincide with a division sometimes made of laws into *general* and *particular*; *general* laws being those which prevail throughout the country, *particular* laws prevailing only in portions of the territory. *General customary* laws are doubtless of the class of those which are *notorious*; but of *particular customary* laws, some are also notorious (e.g., the custom of gavelkind), although many are of the class of those which need proof, like any other fact.

Civil and  
Canon Laws,  
as recepta,  
ranked by

It is remarkable that the Civil and Canon Laws (as obtaining in England) are ranked by Blackstone and Hale with *particular customary* laws.

The truth is, they are what would be styled by the Roman Jurists '*singular*': that is to say, not singular, as applying exclusively to peculiar subjects, or as obtaining in districts or places, but as not harmonising or being homogeneous with the great bulk of the system.

This want of harmony or consistency with the great bulk of the system, the Roman Lawyers denote by a very odd expression: '*inelegantia juris*'.<sup>\*</sup> Now the Canon and Civil Laws (as they obtain in England) may be *singular* or *inelegant*, but they are not less portions of the general law of the land than Common Law or Equity.

I shall advert for the present to general customary laws, and to those particular customary laws which tribunals will enforce without proof of their existence. Those *particular* customary laws of which the tribunals are not judicially informed, I shall consider afterwards. For to them, many of the remarks immediately following will not apply.

Independently of the position or establishment which it may receive from the sovereign, the rule which a Custom implies is merely a rule of positive (or actual) morality, and derives its obligatory force from the sentiments called public opinion.

Now a merely *moral*, or merely customary rule, may take the quality of a *legal* rule (or law) in two ways:—it may be adopted by a sovereign or subordinate legislature, and turned into a law in the direct mode; or it may be taken as the ground of a judicial decision, which afterwards obtains as a precedent; and in this case it is converted into a law after the judicial fashion.

On the first of these suppositions, the legal rule, which is derived from the customary, is Statute Law: and although fashioned by its immediate author, on a pre-existing custom, no one doubts that it derives its force as law from the legislative authority.

On the second of these suppositions, the legal rule which is derived from the customary, is a rule of *judiciary* law. But though, as a rule of judiciary law, it is not less positive law than it would be if it were a statute, it often is deemed law emanating from custom, or *jus moribus constitutum*. For the judicial legislator naturally abstains from the show of legislation, and therefore, while really fashioning a new positive law on an old moral rule, he *apparently* applies an old law. And the *cause* of the moral rule (namely custom) is not unfrequently, by a confusion of thought, supposed to be the *source* of the positive law established in accordance with it.

LECT.  
XXX.

Blackstone  
with particu-  
lar customs.

A custom is  
only a moral  
rule until en-  
forced by the  
tribunals.

When turned  
into a law, it  
is law eman-  
ating from  
the sove-  
reign, or  
from a sub-  
ordinate  
legislator or  
judge.

\* 'Sed postea divus Hadrianus iniquitate rei et inelegantia juris motus, restituit,' etc.

'Sed et in hac specie divus Vespasianus inelegantia juris motus, restituit juris gentium regulam,' etc.—*Gaii Comm.* I. 84, 85.

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On either supposition, the source or *fons* of the legal rule, is not *consensus utentium*, but the legislator or judge as the case may be. But when clothed with the legal sanction in the judicial mode, the law commonly is called customary law.

*Generation  
of Customary  
Law, pr.  
Cicero.*

That a custom becomes law, only when enforced by the political sanction, was clearly perceived by Cicero, and stated by him with more of precision than is commonly met with in his writings. If we reject the talk about *nature*, and allow for his habit or trick of sacrificing precision to euphony, we shall find, in the following passage, a correct statement of the origin of customary law. ‘*Justitia initium est a naturâ profectum. Deinde quædam in consuetudinem ex utilitatis ratione venerunt. Postea res, et a naturâ profectas, et a consuetudine probatas, legum metus et religio sanxit.*’

Law styled customary then is merely judiciary law founded on custom, and owes its existence as law, like every other law, to the sanction of sovereign authority.

But it is commonly supposed by writers on jurisprudence (Roman, English, German, and others) that law shaped upon customs obtains as positive law, independently of the sanction adjected to the customs by the State. It is supposed for example by Hale and Blackstone (and by other writers on English jurisprudence) that all the judiciary law administered by the Common Law Courts (excepting the judiciary law which they have made upon statutes) is *customary* law: and that since this *customary* law exists as positive law by force of immemorial usage, the decisions of those Courts have not created, but have merely expounded or declared it.

The following are a few specimens of the numerous absurdities and inconsistencies with which this hypothesis is pregnant.

*All* the customs immemorially current in the nation are not legally binding. But *all* these customs *would be* legally binding, if the positive laws, which have been made upon some of them, obtained as positive laws by force of immemorial usage.

Positive law made upon custom is often abolished by Parliament or by judicial decisions. Indeed the writers in question admit that the *continuance* of the rule as law depends on the sovereign pleasure. But supposing it existed as positive law by virtue of the *consensus utentium*, it could not be abolished, conformably to that supposition, without the consent and authority of these its imaginary founders.

According to the hypothesis in question, customary laws are not positive laws until their existence *as such* is declared to the people by decisions of the Common Law Courts. But if they existed as positive laws, *because* the people had observed them as merely customary rules, such decisions

*Hypothesis  
of Black-  
stone, etc.,  
about Cus-  
tomy Law.*

would not be necessary preliminaries to their existence in the former character. In truth, there is much of the judiciary law, administered by the Common Law Courts, which has not been formed upon immemorial custom, or upon any custom: much of it (such for instance as mercantile law relating to bills of exchange) having been made in recent times, on customs of recent origin; and much of it having been derived by its authors, the Judges, from their own conceptions of public policy or expediency.

Finally the hypothesis seems to be restricted to the rules of judiciary law which are administered by the Common Law Courts; though if all the judiciary law administered by them must be deemed customary law, the hypothesis ought to be extended to all the judiciary law administered by the other tribunals.

The conceit that customary law obtains as positive law by virtue of the *consensus uidentium*, was suggested to its numerous modern partisans by certain passages in Justinian's Pandects, particularly the following passage of Julian:

The prevalent notion about nature of Customary Law suggested to moderns by passage in Pandecta.

'Inveterata consuetudo pro lege non immerito custoditur: Et hoc est jus, quod dicitur *moribus constitutum*. Nam quum ipsae leges nullā aliā ex causā nos teneant, quam quod iudicio populi receptae sunt, merito et ea, quae sine ullo scripto populus probavit, tenebunt omnes. Nam quid interest, populus *suffragio voluntatem suam declarat, an rebus ipsis et factis?*'<sup>6</sup>

Without pausing to analyze the passage, I shall briefly remark on a few of the errors with which it overflows. First, it confounds an act of the people in its collective and sovereign capacity with the acts of its members considered severally, and as subjects of the sovereign whole.

Secondly: The position maintained in the passage is this:—That a customary rule which the people actually observes, is equivalent to a law which the people establishes formally; since the people (*which is the sovereign*) is the immediate author of each.

Now, admitting that the position will hold, *where the people is the sovereign*, how can the position possibly apply where the people is ruled by an oligarchy, or where it is subject to a monarch? During the virtual existence of the Roman Commonwealth, the position maintained in the passage might have been plausible. But it is strange that the author of the passage (who lived under Hadrian and the Antonines, after the Roman World had become virtually a monarchy) did not perceive its absurdity. He must have known that the laws formally established by the virtual monarch, and customs observed spontaneously by the subject

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Roman community, could not be referred (in any sense whatever) to one and the same source.

And here I would remark, by the bye, that the *juridical* meaning of the terms 'written and unwritten Law' arose from a misconstruction, by modern Civilians, of the passage which I have read and examined; although it is manifest, that the term '*jus scriptum*' is used by the author of the passage, in the grammatical or literal sense.

Blackstone's  
supplement  
to Julian.

Blackstone borrows this passage of Julian, enhancing its original absurdity by adding nonsense of his own. 'Thus,' he remarks, (after he has cited the passage,)—'*thus did they reason, while Rome had some remains of her freedom.* 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 was probably introduced by the *voluntary consent* of the people.'

Now customary law (as positive law) is established by the sovereign. And, consequently, whether it be introduced (or not) by the *consent* of the people, depends upon the form of the government. If the people are the sovereign, or if they share the sovereignty with one or a few, customary law (like other law) is, of course, introduced by their *consent* (in the strict acceptation of the term). But if the people have no share in the sovereignty, they have no part whatever in the introduction of *positive law*, customary or otherwise; and can only be said to *consent* to its introduction in the remote sense that they acquiesce (whether by reason of fear or some other motive) in the existence of the government which establishes the law.

And under monarchies or oligarchies, as well as under governments purely or partially popular, much or most of the law which obtains in the community is (commonly) *customary law*. So that customary law cannot be a *mark of freedom*, a term which means, if it mean anything, that the government of the community is purely or partially popular.

Sir William Blackstone's meaning may have been this:—That the *antecedent customs*, which are the *groundwork* of customary law, are necessarily introduced by the *consent* of the people: Or, in other words, are necessarily consonant to their interests or wishes.

But even this is false.

If the people be enlightened and strong, custom, like law, will commonly be consonant to their interests and wishes.

If they be ignorant and weak, custom, as well as law, will commonly be against them.

During the Middle Ages, the body of the people, throughout Europe, were in the serf or slavish condition. And this slavish condition of the body of the people originated in

*custom*: Although the imperfect rights which custom gave to their masters, together with the imperfect obligations which custom imposed on themselves, were afterwards enforced by Law of which that custom was the basis. In various parts of Europe, the people have gradually escaped from the servile condition through successive acts of the Legislature. So that the body of the people in many of the European nations, have been released, *by direct legislation*, from the servile and abject thraldom in which they had been held by *custom*, and by law framed upon custom. A notable recent instance is the emancipation of the serfs in Russia.

In Rome, the absolute dominion of the *paterfamilias* over his wife and descendants, arose from custom and consequent customary law, and was gradually abridged by direct legislation: namely, by the edicts of the Praetors, the laws of the People, and the edictal constitutions of the Emperors.

Let us turn our eyes in what direction we may, we shall find that there is no connection between customary law, and the well-being of the many.

[A system of positive law, in the sense of these Lectures, involves the notion that every important relation and transaction of human life is pervaded by the influence of commands or rules resting on the authority of the state as their ultimate sanction. This pervading influence of positive law, the offspring of Roman institutions, is one of the chief characteristics of European civilization. In rude societies the influence of custom is all-pervading; the domain of positive law being limited to the capricious action of the state punishing what it deems crimes. As a society advances in organization and refinement, positive law wrests from custom some part of its domain. The state appoints its police and tax-gatherers, and prescribes for the tenure of land rules calculated to secure its own revenue. When a society has attained the elements of good government and *freedom* (in the sense of *wholesome restraint*), then it is commonly seen that positive law has supplanted and transmuted custom throughout the whole range of human relations. The process of transmutation is very striking in the first contact between British law and native custom in India. The process is nearly complete in Bengal. Its commencement in Oudh was comparatively recent; in the Punjab it may be said to be in its commencement. It is everywhere the same. Courts of law which command the whole machinery of the British Government and the resources of the Empire for the ultimate enforcement of their decrees, have to decide upon disputes, which formerly were abandoned to the rule of custom—customs vague in their conception and scope, and sanctioned rather by the indefinite opinion or action of society than by

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any systematic interference on the part of the state. Even the Hindoo widow now claims and obtains from the state protection and redress against excessive family oppression. To any one watching on the spot the process of transmutation, it is difficult to resist the impression that *here, at least, custom is law*. For it appears to be the *only* law which the judge can apply. The truth is that custom and law are here alike, because it is known that the judges will mould the nascent law upon the existing customs. So far as is consistent with general welfare and some regard to *elegantia juris*, custom will (according to the known principles of British rule) be taken as the model on which law is established by the indirect mode of judicial decision.—R. C.]

*Jus prudentibus compositum.*  
Law supposed to arise from the unauthorized opinions of private lawyers.

From Customary Law, I pass to positive law which is made by its immediate authors on opinions and practices of private lawyers. Law of this kind is named by the Roman Lawyers *jus prudentibus compositum*: law constructed by private jurisconsults respected for their knowledge and judgment.

The remarks which I have applied to the law styled *customary*, will apply (with a few variations) to that imaginary law, which is supposed to emanate from the *Auctorites prudentium*, or from the opinions of private lawyers eminent for their knowledge and ability. It will clearly appear by reasoning similar to the above, that although the opinions of private lawyers are often, like custom, *causes* of law, by influencing the judge or legislator, those private lawyers are not *sources* of law. Those opinions derive their effect as *law*, not from the private lawyers who emitted them, but immediately from the judge or legislator who interposes his authority to them.

Such, for example, is the case with those excerpts from the writings of jurists, of which Justinian's Digest is almost exclusively composed. As forming parts of those writings, they were not law but as compiled and published as law by Justinian, they took the quality of law immediately proceeding from the sovereign.

'Quicquid ibi scriptum, hoc nostrum, et ex nostra voluntate compositum.'—Such is the language of Justinian himself when speaking of the excerpts in the Act confirming the compilation.

According to an obscure story told in the Digest,\* the tribunals were instructed (under Augustus) to take the Law, in doubtful cases, from certain jurisconsults who were appointed by the Legislature to expound it. Now, if this story be true, *these* jurisconsults ('*quibus permissum erat iura condere*') † were, in truth, judges of Law. They formed

\* Digest, i. 2, 2, § 47.

† Inst. i. 2, § 8.

an extraordinary tribunal to which the ordinary judges were bound to defer.

And, on that supposition, their responses were judicial decisions, and not the opinions of merely private jurisconsults.

The story, however, is beset with inexplicable difficulties.

It is most probable, that the responses and writings of jurisconsults were never *sources* of Law: although they acquired the influence which the opinions of the instructed and expert will naturally obtain.

The *jus a prudentibus compositum* (though not marked, with us, by a distinct name) is not a stranger to our own law.

For example; much of the law in Lord Coke's writings, consists (in the language of Hale) 'of illations made by the writer upon existing law:' much of it, of positions and conclusions founded upon the writer's notions of general Utility. For (as he says himself over and over again) '*argumentum ab inconvenienti plurimum valet in lege.*' And, undoubtedly, many of these illations and conclusions of this most illustrious of our *prudentes*, have served as the basis of judicial decisions, and have thus been incorporated with English judiciary Law.

The only difference (in this respect) between our own and the Roman Law, lies in the different turns given to the expression.

With the Romans, judiciary law, bottomed in such illations and conclusions, would at once be referred to its remote cause. It would be styled *jus a prudentibus compositum*.

With us, the authority of the *prudentes* is affectedly sunk; and the judicial decisions, really framed upon their opinions, are considered *declarations* of Law established by immemorial custom.

Again: Much of the law of real property is notoriously taken from opinions and practices, which have grown up, and are daily growing up, amongst conveyancers. And, I may observe, that the body of eminent conveyancers for the time being, is a partial picture (in little) of that body of eminent jurisconsults who (at any given period) were the *prudentes* in ancient Rome. Neither the eminent conveyancers, nor the *prudentes*, can be considered as *sources* or authors of Law. But the opinions of both, as determining the decisions of the tribunals, may be considered as *causes* of that law, which (in spite of the puerile fiction about immemorial usage) is notoriously introduced by judges acting in their judicial capacity.

When the positions of a legal writer have been frequently and uniformly adopted, he acquires the reputation of an *authority*. This means, strictly speaking, not that his positions are *law as emanating from him*, but that they probably *will be law* if a case should arise in which they are in point.

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That is to say, the habitual deference of judges to the opinion of the writer is such that the judgment of the Court on a new point is likely to be in accordance with his opinion.

The third *supposed* source of law which I proposed to examine is that styled natural, or universal.

It will be convenient to postpone the complete examination of the laws styled natural, and the distinction made between laws natural and positive, until after I have explained the *jus gentium* of the earlier Roman lawyers, and the distinction between *jus gentium* and *civile*, as made by them and by the classical jurists.

God or nature  
not a source  
of positive  
law.

In the meantime, I content myself with remarking that God or nature is not a source of law in the strict sense ; that is, of law established by the sovereign or state immediately. God, or nature, is ranked among the sources of law, through the same confusion of the sources of law with its remoter causes, which I pointed out in treating of the law supposed to emanate from custom, and of the law supposed to emanate from private lawyers or jurisconsults. Taking the principle of general utility as the only index to the will of God, every useful law set by the sovereign accords with the law set by God, or (adopting the current and foolish phrase) with the law set by nature ; or, assuming the existence of a moral sense, every law which obtains in *all* societies, is made by sovereign legislatures on a Divine or natural original. But in any case it is a law, strictly so called, by the establishment it receives from the human sovereign. The sovereign is the author of all law strictly so called, although it be fashioned by him on the law of God or nature ; just as customary law is established by the sovereign, although he fashions it after a pre-existing custom. God, or nature, is the remote cause of the law, but its source and proximate cause is the earthly sovereign, by whom it is *positum* or established.

*Extension of  
"source" to  
every "re-  
mote cause"  
of Law, leads  
to confusion.*

The 'jus quod natura inter omnes homines constituit,' the 'jus moribus constitutum,' and the 'jus a prudentibus conditum sive compositum,' are manifestly in the same predicament. Each derives its distinctive name from its remote cause or one of its remote causes. And deriving its distinctive name from a cause *leading* to its establishment, it is supposed to *emanate* from that cause *as from its fountain or source*, and to exist as Law (strictly so called), independently of the position or institution which it receives from the sovereign or state. The absurdity of the supposition may be shown by a familiar illustration. Not unfrequently a small piece of legislation is associated with the

name of a great lawyer, at whose instance it was passed by Parliament (e.g., 'Lord Campbell's Act,' 'Lord Kingsdown's Act'). Now, although the knowledge, industry, and reputation of the lawyer in question are, doubtless, amongst the principal causes of the Act being passed, Parliament, and not that lawyer, was its source or author. To suppose that so-called *customary* or *natural* law derives its binding authority from any other source than the sovereign or the subordinate legislators or judges to whom its authority is delegated is not a whit more rational than to suppose that the Acts popularly known by the names of their promoters derive their binding authority from the persons with whose names they are thus labelled.

Lectr.  
XXX.

## LECTURE XXXI.

*Jus gentium.*

I now proceed to consider the *jus gentium* of the earlier Roman lawyers, and the distinction between *jus gentium* and *civile*, as understood by them and by the classical jurists. My chief motive for this inquiry is the intimate connexion of the Roman *jus gentium* with *equity*, meaning a department of positive law, and not in any of the other and numerous meanings attached to that slippery expression. The *equity* of which I am now speaking includes as well the Roman *jus prætorium*, as our own *equity*; the one introduced by the edicts of the *Prætors* in the way of direct legislation: the other by English Chancellors, as judges exercising their extraordinary jurisdiction; or by Acts of Parliament relating to the matters chiefly dealt with by the Court of Chancery. By stating the history of the phrase *equity*, I shall be enabled to dispel the darkness in which it is involved; but I must first explain the original meaning of *jus gentium*, and the meanings afterwards annexed to that term and to the partly corresponding, partly disparate expression, *jus naturale*. I shall accordingly deal with these subjects in the following order.

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XXXI.

*First*; I shall endeavour to explain the meaning of the term *jus gentium*, as understood by the Roman lawyers, before they imported into their own system of positive law notions or principles borrowed from the philosophy of the Greeks.

*Secondly*; I shall state its meaning as used by Justinian in the Institutes and Pandects, or rather as used by the

Different  
meanings of  
*jus gentium*  
at different  
periods.

1. Ancient Roman Law.
2. Classical Juris.

PART II.2. Ulpian's  
*jus naturale.*

jurists styled classical, from whose writings the Institutes and Pandects are extracted and compiled.

*Thirdly*; from the *jus gentium* of the older Roman law, and from the *jus gentium* or *naturale* of the classical jurists, I shall advert to a *jus naturale* (*a mirum jus naturale!*) which I take the liberty of styling 'Ulpian's Law of Nature.'

Statement  
of the *jus  
gentium* of  
the earlier  
Roman  
Lawyers.

According to  
Roman Law,  
strangers had  
no rights.

And first, I proceed to state the meaning of the *jus gentium* of strictly Roman origin, or of the Roman lawyers who preceded the classical jurists.

According to the Roman law, a member of an independent nation, *not in alliance* with the Roman people, had no rights as against Romans, or as between himself and other foreigners or aliens. And even a member of an independent nation, *the ally of the Roman People*, had no rights (as against Romans or foreigners), except the rights conferred on members of that nation by the provisions of the *fædus* or alliance.

When I say that the members of an independent nation, *not in alliance with the Roman People*, had no rights as against Romans or foreigners, I understand the proposition with limitations.

When a member of any such nation *was residing in the Roman territory*, it is probable that his person was protected from violence and insult: and, although he was incapable of acquiring by transfer or succession, or of suing upon any contract into which he had affected to enter, goods actually in his possession were probably *his* goods, as against *all* who could show no title whatever. Unless we understand the proposition with these limitations, a *peregrinus* or alien, not a *socius* or ally of the Roman People, was liable to murder and spoliation at every instant, when dwelling on Roman soil. In short, the proposition must be understood with limitations analogous to those which restrict the application in practice of the rule, broadly stated by writers on English law, that an alien enemy or an outlaw has no rights. But, taking the proposition with the limitations which I have just suggested, the members of an independent nation, *not in positive alliance with the Roman People*, had no rights which the Roman Tribunals would enforce.

This unsocial maxim (of which there are vestiges even in Modern Europe) obtained in the Roman Law from the very foundation of the city to the age of Justinian. It is laid down broadly in an excerpt in the Pandects, 'that every people, *not in alliance with us*, keep everything of *ours* which they can contrive to take; whilst *we*, in return, appropriate everything of theirs which happens to fall into our hands.' 'Si cum gente aliqua neque amicitiam, neque hospitium, neque *fædus amicitiae* causâ factum habemus, hi *hostes* quidem non sunt. Quod autem ex *nostro* ad eos per-*venit*, illorum fit; et liber homo *noster* ab eis captus servus

fit eorum. Idemque est, si ab illis ad nos aliquid perverniat.'

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XXXI.

From the *pure peregrini* or aliens (or from members of *foreign* and *independent* nations), I turn to the members of the communities which formerly had been independent, but which had been subdued by the Roman arms, and brought into a state of subjection to the Roman Commonwealth.

Condition of  
aliens, mem-  
bers of  
conquered  
nations.

The members of an independent community subdued by the Roman arms were placed in a peculiar position. They were not admitted to the rights of Roman Citizens, nor were they reduced to the servile condition and stripped of *all* rights. Generally speaking, they retained their ancient government and their ancient laws, so far as the continuance of those institutions consisted with a state of subjection to the Roman Commonwealth.

It is clearly laid down in the Digests, that, unless the sovereign legislature has specifically directed the contrary, the judge shall consult, in the first instance, the law peculiar to the particular region: and that the Law of Rome itself ('*jus quo urbs Roma utitur*') shall not be applied to the case which awaits decision, unless the law peculiar to the particular region shall afford no solution of the legal difficulty.

Such being the condition of the conquered and subject nations, the following difficulties inevitably arose.

Neither the Law of Rome, nor that of the particular subject community, afforded to the members of that subject community any rights against the citizens of Rome, or against the members of any other subject community.

Difficulties  
arising from  
their pos-  
ition.

Consequently, whenever a controversy arose between a Roman and a Provincial, or between a Provincial of one and a Provincial of another Province, there was no law applicable to the case, and the party who had suffered the damage was left without redress.

To meet such cases, there was a manifest necessity for a system of rules which should embrace all the nations composing the Roman Empire: which should serve as a *supplement* or *subsidiump* to the Law of Rome itself, and to each of the various systems of provincial law prevailing in the conquered territory.

The obvious and urgent want was supplied in the following manner:—

In addition to the ancient *Prætor* (who judged in civil questions between Roman Citizens, and agreeably to the law peculiar to the *Urbs Roma*), a *Prætor* was appointed to determine the civil cases which arose from the relations between the victorious Republic and the subject or dependent communities. The inconvenience was inevitably felt in the

Creation of  
*Prætor*  
*Peregrinus*,  
to administer  
justice in  
Italy, be-  
tween Ro-  
mans and  
members of  
*Italian States*  
and between  
members of  
any of those  
States and  
members of  
any other.

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early ages of Rome, and the remedy was adopted before her Empire had extended beyond the bounds of Italy.

This new Magistrate (who resided in Rome itself, but who seems to have made periodical circuits through the conquered States of Italy) exercised civil jurisdiction in the following cases: namely—1st, in all questions or controversies between Roman citizens and members of the Italian states which were vassals and dependents of the Roman people; 2ndly, between members of any one of these vassal states and members of any other; 3rdly, between members of subject states when residing in Rome itself; which might be considered as a distinct class of questions, because, if the parties were members of the same community, the dispute was properly decided by the law of that community.

This new magistrate was styled '*Prætor Peregrinus*: ' Not because his jurisdiction was *restricted* to questions between *foreigners*; but because the questions, over which his jurisdiction extended, arose *more frequently* between foreigners and foreigners than between foreigners and Roman Citizens: '*Quod plerumque inter peregrinos jus dicehat.*'

In the strict sense of the term *Peregrinus*, the parties, whose causes he commonly determined, were not *peregrini*, or foreigners, but friends and vassals of Rome. But since they *had been* foreigners before their subjection to Rome, and had not been admitted afterwards to the rights of Romans, they were still called *peregrini* or foreigners (as distinguished from *Cives* or Roman Citizens).

As I have remarked already, it is not probable that a foreigner (in the strict acceptation of the term) could regularly maintain a civil action before any of the Roman Tribunals.

After the appointment of the *Prætor Peregrinus*, the ancient and ordinary *Prætor* was styled (by way of distinction) *Prætor Urbanus*: Partly because his tribunal was immovably fixed at Rome, and partly because he decided between Romans and Romans, agreeably to the peculiar law of their own pre-eminent City.

From the appointment of the *Prætor Peregrinus*, and the causes which led to the creation of his new and extraordinary office, I proceed to the law which he administered.

In questions between foreigners and Romans, and between foreigners of different dependent States, the *first Prætor Peregrinus* must have begun with judging arbitrarily. For neither the law of Rome herself, nor the law obtaining in any of the vassal nations, afforded a body of rules by which such questions could be solved.

But a body of subsidiary law, applicable to such questions, was gradually established by the successive *Edicts*,

*Prætor  
Urbanus.*

Law ad-  
ministered  
by *Prætor  
Peregrinus*.

which he and his successors (imitating the *Prætores Urbani*) emitted on their accession to office. This subsidiary law, thus established by the Foreign Praetors, was probably framed, in part, upon general considerations of general utility. But, in the main, it seems to have been an *abstraction* (gathered by comparison and induction) from the peculiar Law of Rome herself, and the various peculiar systems of the subject or dependent nations.

Perpetually engaged in judging between foreigners and citizens of Rome, and between foreigners of *different* dependent States, these magistrates were led to compare the several systems of law \* which prevailed in the several communities composing the Roman Empire. And, comparing the several systems prevailing in those several communities, they naturally extracted from those several systems, a system of a liberal character; free from the narrow peculiarities of each particular system, and meeting the common necessities of the entire Roman World.

This body of law, thus introduced by successive edicts, acquired the name of *jus gentium*, and this was the meaning originally annexed to that ambiguous and obscure expression.

It probably acquired this name for one of the following reasons:—*First*, as extending to all communities (including Rome itself) which formed part of the Roman Empire, it was properly *jus gentium* or *jus omnium gentium*, as opposed to the law peculiar to Rome and contradistinguished to the law of a single dependent State. This is the likeliest origin of the expression. *Secondly*, it may have meant law conversant about *gentes* or foreigners—namely, those foreigners who were subjects of the Roman People, and with whom it was most concerned. For the term *gentes* is frequently used in opposition to *cives*, to mean foreigners, a distinction similar to that of ‘Ελληνες καὶ Βάρβαροι’—‘Jews and Gentiles.’

Origin of the term *jus gentium*.

After the dominion of Rome had extended beyond Italy, the *subsidiary Law*, introduced into *Italy* by the Edicts of the *Prætores peregrini*, was adopted and improved by the Edicts of the various Roman Governors, who (under the various names of Proconsuls, Praetors, Proprætors, or Presidents) represented the Roman People in the *outlying Provinces*.

Extension of the *jus gentium* created by the *Prætores peregrini* to the outlying provinces.

For the governors of these outlying provinces (like the

\* The phrase ‘systems of law’ seems here used as a short expression for what might perhaps be more accurately described as a heterogeneous mass of rules of positive law and positive morality. The materials for the induction would consist in great measure of customs hardly yet transmuted into law. To speak here of *systems of law* in the sense we attach to the expression would be to anticipate the march of Latin civilization by some centuries.—R. C.

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*Prætor Peregrinus*, whose jurisdiction was confined to Italy, and like the proper magistrates of the Roman People) were tacitly or expressly authorised to legislate, as well as to judge; 'jus edicere' as well as 'dicere.'

As between Provincials of his own province, the governor of an outlying province regularly administered the law, and doubtless transmuted into law many customs which had obtained in the province before its subjection to Rome. As between Romans and Romans residing within his province, he regularly administered the law peculiar to Rome herself. But neither the peculiar law of his own province, nor the peculiar law of Rome (in its old and unsocial form), would apply to civil cases between Romans and Provincials, or between Provincials of different provinces.

In questions, therefore, between Roman Citizens and Provincials, or between Provincials residing in his province (*but belonging to different provinces*), he administered the subsidiary law created by the *Prætores Peregrini*, or a similar subsidiary law created by himself or his predecessors. Consequently, *before* and *after* the dominion of Rome had extended beyond Italy, a law was administered in Italy (by the *Prætores Peregrini*) in aid of the law peculiar to Rome herself, or of that peculiar to any of her subject Italian communities. *After* the dominion of Rome had extended beyond Italy, a similar law was administered in the outlying provinces (by their respective Presidents or Governors), in aid of the law peculiar to Rome herself, or of the law prevailing in any of those provinces before its subjection to the conquering City. And this subsidiary law, thus administered in Italy and in the outlying provinces, was applied to civil questions between citizens of Rome and members of the nations subject to Rome, or between members of any of those nations and members of any other.

Since the want which led to the creation of this subsidiary law was the same in Italy and the outlying Provinces, and since all its immediate authors were representatives of the same sovereign, it naturally was nearly uniform throughout the Roman World, notwithstanding the multiplicity of its sources. The Presidents of the outlying provinces naturally borrowed from the Edicts of *Prætores Peregrini*; and the *Prætores Peregrini* as naturally adopted the improvements which the Edicts of those Presidents introduced.

As distinguished from the system of law which was *peculiar* to Rome herself, and also from the systems of law which were respectively *peculiar* to the subject or dependent communities, this subsidiary law was styled *jus gentium*, or *jus omnium gentium*: the law of *all* the nations (including the conquering and sovereign nation) which composed the Roman World. As being the law *common* to these various nations, or administered *equally* or *universally* to members

Resumed statement of the subsidiary law obtaining in Roman Empire, as administered both by *Prætores Peregrini*, and by *Præsidēs provinciarum*.

Uniformity of this subsidiary law throughout the Roman Empire.

This subsidiary law was styled *jus gentium*, and was the *jus gentium* of the earlier Roman lawyers, and was also styled *jus aquae* or *equitas*.

of these various nations, it was also styled *jus æquum*, *jus æquabile*, *æquitas*: though the term '*æquitas*' seems to have denoted properly, not this common or equal law, but *conformity* or *consonance* to this common or equal law; as the more extensive but analogous term *justitia* signifies conformity or consonance to any *jus* or *law* of any kind or sort.

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As contrasted with the proper Roman Law, which arose in an age comparatively barbarous and was a product of narrow experience, the *jus gentium* which I have attempted to describe arose in an age comparatively enlightened, and was a product of large experience. The *jus gentium*, therefore, was so conspicuously better than the proper Roman Law that naturally it became by degrees incorporated with the latter. It influenced the legislation of the *Populus*, *Plebs*, and *Senate*; it influenced the opinions held and emitted by the *Prudentes*; and (above all) it served as a pattern to the *Prætores Urbani*, in the large and frequent innovations which they made by their general edicts, upon the old, rude, and incommodious law peculiar to the *Urbs Roma*.

So much indeed of the *jus gentium* passed into the *jus prætorium* (or the law which the *Prætores Urbani* created by their general edicts), that one of the names given to the latter was probably transferred to it from the former. It probably was named *æquitas*, (or *jus æquum*,) after that *equal* or *common* law, from which it had borrowed the bulk or a large portion of its provisions.

The law formed by the Edicts of the *Prætores Urbani* (or the *Prætors* who sat immovably in the *Urbs Roma*, and administered justice between Roman Citizens) was commonly called *jus prætorium*. But having borrowed largely from the *jus gentium*, it was also styled, like the *jus gentium*, '*æquitas*:' a name which was extended to it the rather, for this reason—that *æquitas* had become synonymous with *general utility*; and that the *jus prætorium* (when contrasted with the old law, to which it was a corrective and supplement) was distinguished by a spirit of impartiality or fairness, or by its regard for the interests of the weak as well as for the interests of the strong: e.g., It enlarged the rights of women; gave to the *filius familias* rights against the father; to the members of the subject States rights against Roman citizens.

Now after the incorporation of the *jus gentium* with the proper Law of the *Urbs Roma*, the latter was distinguishable, and was often distinguished, into two portions—namely, the *jus gentium* which had been incorporated with it, and that remnant of the older law which the *jus gentium* had not superseded. As being proper or peculiar to the City of Rome, this remnant of the older law (when contradistinguished to the *jus gentium*) was styled *jus civile*: that is to say, the proper or peculiar Law of that *Civitas* or Inde-

The term  
'æquitas.'

*Jus Civile* as  
opposed to  
*Jus Gentium*  
of Roman  
origin.  
Near equiva-  
lence of that  
distinction to  
'*jus civile et*  
*jus præ-  
torium*'

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pendent State. Though (as I shall show hereafter) *jus civile* (taken in a larger meaning) included the *whole* of the Roman Law: the *jus gentium* which it had borrowed, as well as the *jus civile* (taking the expression in the narrower meaning) upon which the *jus gentium* had been superinduced.

This distinction between *jus civile et gentium* (as denoting different portions of the more recent Roman Law) nearly tallied with the distinction between *jus civile et praetorium*. For first: Though much of the *jus Praetorium* (or the law introduced by the edicts of the *Praetores Urbani*) was not suggested to its authors by the *jus gentium*, most of it was naturally formed upon the model or pattern which that *jus aequum* presented to imitation.

Secondly; although the incorporation of the latter with the Law of the *Urbs Roma*, was partly accomplished by acts of the *Populus*, *Plebs*, and Senate, still it was principally effected through the edicts of the *Urban Praetors*; by whom (as I shall show in a future Lecture) the business of Civil Legislation was mainly carried on.

Now as most of the *jus praetorium* consisted of *jus gentium*, and as most of the *jus gentium* (imported into the Roman Law) was imported by the Edicts of those Praetors, it is not wonderful or remarkable (considering the clumsy manner in which language is usually constructed) that *jus praetorium* and *jus gentium* were considered synonymous expressions:—that the distinction between *jus civile et jus gentium*, and the distinction between *jus civile et jus praetorium*, were considered as equivalent distinctions (although, in truth, they were disparate).

*Aequitas.* And (for the same reason) the extension of the term '*aequitas*' was restricted to the *jus praetorium*; though the term might have been extended to a *lex*, or a *Senatus-consultum* which had borrowed its provisions or principle from the *jus gentium*.

The *jus gentium* therefore of the earlier Roman Lawyers was the general law of the community composing the Roman world, as contradistinguished to the particular systems which were respectively peculiar to those several communities or *gentes*.

But in consequence of this incorporation of the *jus gentium* with the law peculiar to the *Urbs Roma*, the *jus gentium*, as a separate system, eventually disappeared. For the proper Roman Law, having adopted and absorbed it, became applicable to the cases which it had been made to meet. That is to say, to civil questions between Citizens of Rome and members of the communities which Rome had subdued, or between members of any of those communities and members of any other. And, by consequence, the office of the *Praetor Peregrinus* fell into disuse; and the Edicts of the Presidents in the various provinces became exclusively occupied with purely provincial interests.

Incorporation  
of *jus gentium*  
by proper  
law of *Urbs Roma*.

The Roman Law having absorbed the *jus gentium*, and tending in every direction to universality, had now put off much of its exclusive character. Although that older portion of it which was marked with the distinctive name of *jus civile* was still the peculiar law of Roman Citizens, much of the later law introduced by the people and Senate, and more of the law established by the Urban Praetors, was adapted to the common necessities of the entire Roman world. Hence the Law of the *Urbs Roma* (though originally the peculiar law of the dominant City) was applied (*in subsidium*) to cases between Provincials, although the contending parties were members of the same province, and were actually within the jurisdiction of its peculiar tribunal. Owing to the character of universality which it thus acquired, and which was afterwards heightened by the labours of the Classical Jurists, the Roman Law (though the law of a single people living in a remote age) became incorporated into the systems of law obtaining in Modern Europe, as auxiliary to their own peculiar laws.

And here I would remark that a general law or *jus aequum*, nearly resembling the *jus gentium* in question, has prevailed in almost every nation with which we are acquainted.\* For every system which is common to a limited number of nations, or to all the members of a single nation, is a *jus gentium* (as the phrase was understood by the earlier Roman Lawyers) when opposed to the particular systems of those several communities, or to the particular bodies of law prevailing in that one community.

From the *jus gentium* of the older Roman Law I pass to the *jus gentium*, otherwise *jus naturale*, of the Institutes and Pandects.

### The *jus gentium* or *naturale* of the Institutes and Pandects

\* (E. g. Roman Law as subsidiary law of a limited number of modern nations. General Feudal Law (or *abstractum* contained in *Libri Feudorum*) as subsidiary law of a limited number of modern (or middle age) nations.

*Jus commune Germanicum*, since the dissolution of the Empire.

Mercantile Law.

Canon Law.

*Jus commune Germanicum*, before the dissolution of the Empire.

Law contained in the general Prussian Code.

Common Law of United States of America, which is applied by Federal Courts in cases over which the Constitution has given them jurisdiction, in default of law made or specified by the Constitution or by Congress.

Common Law of England, as originally understood : though the original idea is now cut down to Law judiciary, not made on statutes, administered by Courts of Common Law and prevailing as Law throughout the Realm.

Comp. Falck, § 124. Blackstone, vol. ii. 44; vol. iv. 67. Du Ponceau's Jurisdiction of Federal Courts.

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compiled by Justinian has little or no connexion with the *jus gentium* explained above. The *jus gentium* of the Institutes and Pandects was imported into the Roman law from the systems of the Grecian philosophers by the jurists styled classical : that is, the jurists who lived and wrote during the period intervening between the birth of Cicero, and the reign or death of the Emperor Alexander Severus, and of whose writings the Institutes and Pandects are almost entirely composed. Servius Sulpicius, the friend of Cicero, is generally, I believe, considered the first of the classical jurists ; Ulpian, who held the post of ' Praefectus annonae ' and other offices under Alexander Severus, closed the series. They are esteemed classical probably because many of them lived in the time of Augustus or in the classical ages which immediately succeeded him, and those who lived at a later period retained the classical manner. It is to these jurists that the Roman law owes the regularity and symmetry of its form and the matchless consistency of its parts. But in spite of their manly sense and admirable logic, they unluckily introduced into their expositions of their own positive system, notions or principles drawn from the Greek philosophers with which shallow declaimers have been vastly taken, but which have no connexion with the system on which they are injudiciously stuck, and which must be detached from the fabric before we can perceive the beauty of its proportions, or feel a due admiration for the scientific correctness and elegance of its structure. Among these notions I am compelled to rank the *jus gentium*, or, as it is often termed, *jus naturale*, as understood by the classical jurists, and as it appears in the Institutes and Pandects.

The distinction of *jus civile* into *jus civile et jus gentium* which was made by the classical jurists, and occurs in Justinian's compilations. (See p. 79, ante.)

It is said in the Pandects and Institutes of Justinian, and also in the Institutes of Gaius (from which Justinian's Institutes were principally copied), that every independent nation has a positive law and morality (' *leges et mores* '), which are peculiar to itself, of which the given community is the source or immediate author, and which, as being peculiar to that given community or *civitas*, may be styled aptly *jus civile* : but that every nation, moreover, has a positive law and morality which it shares with every other nation ; of which a natural reason is the source or immediate author ; and which, as being observed by all nations, may be styled aptly '*jus gentium*', or '*jus omnium gentium*'.

' *Omnis populi, qui legibus et moribus reguntur, partim suo proprio, partim communis omnium hominum iure utuntur. Nam quod quisque populus ipse sibi jus constituit, id ipsius proprium est, vocaturque jus civile; quasi jus proprium ipsius civitatis. Quod vero naturalis ratio inter omnes homines constituit, id apud omnes populos peraeque custoditur, vocaturque jus gentium; quasi quo jure omnes gentes utuntur.*'

And the *jus gentium* described in the foregoing passage is described in other passages in the Pandects and Institutes as the 'commune omnium hominum (sive civitatum) jus :' 'he antiquius jus quod cum ipso genere humano proditum est :' the 'naturale jus quod vocatur jus gentium ; quod divinâ quadam providentia constitutum, semper firmum atque immutabile permanet.'

It is manifest, moreover, from the language of these passages, that the *jus gentium* occurring in Justinian's compilations is the natural or *divinum jus* which occurs in the writings of Cicero; and which Cicero himself, as well as the Classical Jurists, who probably were influenced by his example, borrowed from the φυσικὸν δίκαιον, or natural rule of right, conceived by Greek speculators on Law and Morals.

'Non a duodecim tabulis (says Cicero), neque a Praetoris edicto, sed penitus, ex intima philosophia, haurienda juris disciplina.'

It seems to follow from the foregoing statement, that the distinction between *jus civile* and *jus gentium*, which occurs in Justinian's compilations, is speculative rather than practical; and that the Classical Jurists introduced it into their treatises on the Roman Law, rather to display their acquaintance with the ethical philosophy of the Greeks, than because it was a fit basis for a superstructure of legal conclusions. Accordingly, a legal inference drawn from the distinction, is scarcely to be met with in any of Justinian's compilations; though, since the distinction is placed at the beginning of the Pandects and Institutes, and is there announced to the reader with a deal of formality, one might naturally think it the forerunner to a host of important consequences.

The distinction between *jus civile* and *jus gentium* which occurs in Justinian's compilations, is speculative rather than practical.

The only instance occurring to me, in which a consequence is built upon the distinction between the *jus civile* and *jus gentium*, is the difference which I have formerly mentioned between crimes, with reference to the cases in which *ignorantia juris* is an excuse. Persons belonging to the classes *quibus permissum est jura ignorare*, and who are accordingly exempt from certain legal consequences of that ignorance, are not not excused if they have committed an offence against *jus gentium* or *naturale*; for *jus gentium* being known *naturali ratione*, or by a moral sense or instinct, the party must have known that he was violating the law of nature, and must have surmised that he was violating the law of the State. The plea of ignorance is therefore inferred to be false and the exemption fails. (See p. 240, *ante.*)

The distinction indeed between *jus civile* and *jus prætorium*, is as penetrating and as pregnant with consequences as our distinction between law and equity. But, as a legal distinction, that of *jus civile* and *jus gentium* is nearly barren.

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Doubtless meaning of *jus naturale*.

The *jus naturale* or *gentium* of the classical jurists, like the law natural of their modern imitators, is ambiguous. It sometimes means that portion of positive law which is a constituent part of all positive systems. For example, slavery, in certain passages of the classical jurists, is said to exist *jure naturali* or *jure gentium*; for the institution of slavery was common to all nations with which the Romans were acquainted. But, in other passages, it is asserted that all men are naturally free, and that the institution of slavery is repugnant to the law of nature. This can only mean that it is repugnant to the standard to which, in the writer's opinion, law ought to conform.

Of *jus gentium* as signifying international morality.

Before I conclude, I shall advert to certain meanings of *jus gentium* different from those which I have explained. It sometimes seems to include positive morality, as well as positive law, especially that part of positive morality which is styled international law, and which is supposed to be a constituent portion of all positive morality. As including all law, and all morality supposed to be general or universal, the phrase *jus gentium* necessarily includes that morality which exists *inter gentes*. It is not certain that the phrase is ever used in this sense by the Roman Jurists, but certainly Livy and Sallust so employ it. International law is styled by Gaius, as by Grotius and others of the moderns, *jus bellicum*; by other Roman jurists it is termed *jus feciale*; and even by Livy and Sallust *jus gentium* is not applied specially to international law, though it includes that with many other objects.

In some modern treatises, almost any system of law which enters into many positive systems, is styled *jus gentium*. Spelman, for example, styles the feudal law the *jus gentium* or law of nature of this western world. The same notion which the Roman Jurists expressed by the term is here applied on a different scale. In the same manner the name *jus gentium* might be given to the Roman Law as applied in the states of modern Europe, since it forms a part of almost all their systems of law.

Ulpian's *jus naturale*.  
(See p. 79, ante.)

Agreeably to the plan which I have sketched in the outset of this Lecture, I should next examine the *jus naturale*, which I style, for the sake of distinction, *Ulpian's Law of Nature*—a law which, according to him, is common to man and beast; and which he distinguishes from that *jus gentium* or *naturale*, which tallies with the law natural of modern jurists and moralists.

In two or three excerpts from Ulpian, which are given in the beginning of the Pandects, and one of which also occurs at the beginning of Justinian's Institutes, he opposes to that *jus gentium* which tallies with the law natural of the moderns, a certain *jus naturale* common to man and beast:—‘*Jus quod natura omnia animalia docuit.*’

This last-mentioned *jus naturale* (which accords with an admired conceit of Hooker and Montesquieu) seems to have been taken by the good Ulpian from certain inept speculations of certain Stoic philosophers. Since it is peculiar to Ulpian, and since no attempt to apply it occurs in the Pandects or Institutes, it can scarcely be considered the *natural Law of the Romans*, nor can it be fairly imputed to the body of the Classical Jurists.

Did it not stand at the *beginning* of the Institutes and Pandects, and were it not the source of certain conceits which have gotten good success, I should have dismissed it without examination. But since it occupies the foremost place in Justinian's Institutes and Pandects, and since it is manifestly the groundwork of more imposing nonsense, it possesses an extrinsic or accidental importance which demands a passing and brief notice.

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## LECTURE XXXII.

FROM the *jus gentium* of the earlier Roman Lawyers I proceed to the distinction of positive law into natural and positive, as the distinction is commonly understood by modern writers on jurisprudence.

The distinction of positive law into natural and positive, as commonly understood by modern writers on jurisprudence.  
*Rationale of the distinction.*

The positive laws of any political community are divisible into two kinds :

Some it would probably observe as moral or customary rules, although it were a society not political, and also had not ascended from the savage state. Others it certainly or probably would *not* so observe, if it were a natural society, and were also in the savage condition. Of the positive laws, moreover, of any political community, some are peculiar or proper to that single political community ; others are common to all political communities.

It is probable that some of the laws which obtain as positive laws in all political communities, would, from their obvious utility, obtain as moral rules in any political community, although it were a natural society, and living in the savage condition. Now the positive laws which are common to all political communities, and which, moreover, are everywhere palpably useful, are apparently the 'natural laws' contemplated by modern writers on jurisprudence.

The *rationale* of the distinction of laws into natural and positive may be stated thus :—

The positive laws accounted *natural* are those which are common to all political societies, in the character of positive

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laws ; and being palpably useful to every society have their counterpart in the shape of moral rules in every society (political or natural).

Laws accounted *positive* in the sense in which the word is opposed to *natural*, are not common, as positive laws, to all political societies ; or though they be common, as positive laws, to all political societies, the analogous rules have not their counterpart in the moral rules of all societies (political or natural).

*Current argument  
for the distinc-  
tion of  
positive law  
and morality  
into natural  
and positive.*

The above distinction of laws into *natural* and *positive* appears to be that which modern writers intend when they use the terms. But since the distinction is utterly or nearly useless, (though it rests upon a real difference between those laws and rules,) I will now add to the foregoing statement of it, a short notice of the argument by which it commonly is maintained.

That current argument may be put in the following manner :

There are positive rules of conduct, (legal and moral, or exclusively moral,) which obtain universally, or are observed by *all* societies. This universal and concurrent observance cannot have been the result of induction from utility by varying and fallible reason. The human authors, therefore, of these universal rules, copied them from divine originals : which divine originals were known to those human authors, not through fallible reason led by a fallible guide, but through an instinct or sense, or through immediate consciousness. These universal rules, therefore, are not so properly rules of *human* position or establishment, as rules proceeding immediately from the Deity himself, or the intelligent and rational Nature which animates and directs the universe.

But there also are positive rules (legal and moral, or exclusively moral), which are *not* universal. And since these rules are not universal, there is no ground for inferring that they were copied from divine originals, or from divine originals as known instinctively and infallibly. Consequently, they certainly or probably are of purely human position : and therefore may aptly be opposed to universal and natural rules, by the epithet of positive or *merely* positive.

The distinction, therefore, of positive rules into natural and positive seems to rest on the supposition of a moral instinct ; or, (as this real or imaginary endowment is named by the Roman Lawyers and by various modern writers,) a *natural* reason, or a universal and practical reason.

The distinction, indeed, is not unmeaning, although the principle of general utility be the *only* index to the laws of Nature or the Deity. For as some of the dictates of general utility are obvious and nearly the same at all times and places, there are positive or human rules which are nearly

*The distinc-  
tion rests  
upon a real  
difference.*

universal, and the expediency of which must be seen without the lights of extensive experience and observation. The distinction is not imaginary, though it is impossible to draw the line of demarcation exactly.

But assuming the principle of general utility as the only index to the laws of the Deity, the distinction, though not unmeaning, seems to be utterly or nearly purposeless. For every human rule (be it universal or particular) which accords with the principle of utility, must accord with the Divine Law of which that principle is the exponent. So that all positive rules, particular as well as universal, which may be deemed beneficent, may also be deemed *natural* laws, or laws of Nature or the Deity which men have adopted and sanctioned.

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But upon the theory of general utility, is nearly useless.

Besides, rules which are peculiar to particular countries may be just as *useful* as rules which are common to all countries. For instance: laws imposing taxes necessary to the maintenance of political government, are not less useful than the laws which guard property or life: though the former are merely positive, (as following the existence of government,) whilst the latter obtain universally (in the character of moral rules), and therefore are deemed *natural*.

The distinction of crimes, made by the Roman Law into crimes *juris gentium* and crimes *jure civili*, tallies with the distinction of crimes made by modern writers into *mala in se* and *mala prohibita*. Offences against human rules which obtain universally, are (according to these writers) *mala*, or offences, *in se*, inasmuch as they *would be* offences against the Law of Nature or the Deity, although they were not offences against rules of human position. But offences against human rules which only obtain partially, are *not*, according to those writers, offences against laws of nature. Or at least, they would not be offences against laws of the Deity if they were not offences against positive law or morality. And therefore they are *mala*, or offences, *qua prohibita*, or they take their quality of offences from human prohibitions and injunctions. I believe that no legal consequence has been built on this last distinction, by any of the systems of positive law obtaining in modern Europe.

Distinction  
of crimes  
*juris gentium*  
and *civili*  
tallies with  
modern distinc-  
tion into  
*mala in se*  
and *mala pro-  
hibita*.

I will here advert for a moment to two of the disparate meanings which are annexed to the ambiguous expression 'Natural Law,' by writers on jurisprudence and morals.

Taken with the meaning which I have endeavoured to explain, it signifies certain rules of human position; namely the human or positive rules which are common to *all* societies, in the character of law and morality, or in the character of morality.

But taken with another meaning, it signifies the laws

'Natural  
Law' as  
meaning cer-  
tain rules of  
human posi-  
tion: and  
'Natural  
Law' as  
meaning some  
standard to which  
human rules  
should con-  
form.

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which are set to mankind by Nature or the Deity, or more generally, it signifies the *standard* (whether that standard be the laws of the Deity, or a standard of man's imagining) to which, in the opinion of the writer, human or positive rules *ought* to conform. And by the confusion of the meaning which I endeavoured to explain, with the meaning which I now have suggested, the grossest contradiction and nonsense is frequently engendered.

The ambiguity is the same with that already spoken of in the last Lecture with regard to the *jus gentium* or *naturale*, as the terms are employed by the Classical Jurists : for example, where the institution of slavery is at one time said to be the creature of the *jus naturale* or *gentium*, and at another to be repugnant to natural law ; and where the *jus civile* is said to be the law we make when we add anything to, or detract anything from, the *law of nature*.\*

Natural Rights.

Before I conclude, I will offer a few remarks upon Natural Rights.

Natural Rights would be expected to mean the rights which correspond to Natural Law : Rights which are given by all or by most positive systems, and which would exist as *moral* rights though government had never arisen.

But by the term 'natural rights' is frequently meant the rights and capacities which are said to be original or innate ; that is which a man has as simply being a man, or as simply living under the protection of the state. Such (for example) is the right which Blackstone styles the right to personal security, the right to reputation, or the capacity to acquire rights by conveyance or contract. Natural rights as thus understood, are totally different from natural rights in the sense of rights corresponding to natural law. The right to reputation, for instance, could hardly exist in a savage condition.

All other rights and capacities originate in some particular incident or *mode of acquisition*, and are again divided into those which arise out of some particular *status* or condition, and those which are said to arise ex *speciali* titulo, as by a contract ; the word title, or mode of acquisition, being confined to those incidents which do not, *uno ictu*, give a whole set of rights and capacities, such as constitute a *status*.

Blackstone has confounded natural rights as taken in the two distinct senses above indicated ; and because he has styled natural rights (in the sense of rights not acquired by a particular incident) the absolute rights of persons, he has supposed them to belong to the Law of Persons, although, as I shall show hereafter, rights of this class belong preminently to the Law of Things.

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\* See p. 288, *ante*.

† Hugo, *Naturrecht*. Blackstone, vol. i. p. 123.

## LECTURE XXXIII.

*Different Meanings of Equity.*

As I remarked in the Lecture before the last, the original *jus gentium* is the universal and subsidiary law which was introduced into Italy by the Edicts of the *Prætores Peregrini*, and was afterwards extended to the outlying Provinces by the edicts of their Presidents or Governors.

This law, introduced *in subsidium* by the edicts of these *Prætors* and Presidents, was styled *jus gentium*, or *jus omnium gentium*, because it was *common* to the nations composing the Roman world, and was neither peculiar to the sovereign State, nor to any of the States (formerly foreign and independent) which her victorious arms had reduced to dependence or subjection.

It was also styled *jus æquum*, *jus æquabile*, or *æquitas*: that is to say, Law universal or general, and not particular or partial. This is the primary sense of the term equity.

Taken, then, in its primary sense, equity, or *æquitas*, is synonymous with *universality*. In which primary sense it was applied to the *jus gentium* of the earlier Roman Law, because the *jus gentium* of the earlier Roman Law was *æquum*, or common, and not restricted or particular. The *jus gentium* to which it was applied being distinguished by comparative fairness, equity came to denote (in a secondary sense) *impartiality*. And impartiality being good, equity is often extended (as a vague name of praise) to any system of law, or to any principle of direct or judicial legislation, which, for any reason, is supposed to be worthy of commendation. The applications of the term 'equity' are extremely numerous. But, in almost every instance wherein it is applied, one of the meanings now indicated is the *basis* of the complex notion which the term is employed to mark. Of all the various objects denoted by this slippery expression, the most interesting, and the most complex, are those portions of the English and Roman *law*, which arose from the Edicts of the *Prætores Urbani*, and from judicial decisions of our own Chancellors, as exercising their extraordinary jurisdiction. And accordingly, those portions of *Roman* and of *English Law*, are the *Æquitas*, or the *Equity*, to which I shall more especially direct your attention.

But before I proceed to '*Equity*' as meaning a department of *Law*, I will briefly advert to a few of the other and numerous meanings which are not unfrequently attached to that most ambiguous term. It is hardly necessary at the present day (1874) to advert to a supposition which (incredible as it may seem to the student) was not uncommon

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Origin of  
term Equity  
as meaning  
Law.

Equity = uni-  
versality.  
Ergo, Impar-  
tiality.  
Ergo, applica-  
ble to any  
good law, etc.

Supposition  
that 'Law'  
and 'Equity'  
is a universal

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and necessary  
distinction.

among lawyers in the last generation, namely, that the distinction between 'Law' and 'Equity' in the English technical sense of the terms, rested on necessary and universal principles: still less is it necessary to discuss the absurd supposition that the functions of the Chancellor as exercising his extraordinary jurisdiction, are like the *arbitrium boni viri*, or the functions of an arbiter released from the observance of *rules*. I proceed to enumerate certain of the senses which the term bears, when it does not denote a certain portion of positive law.

First: There is a species of interpretation or construction (or rather of judicial legislation disguised with the name of interpretation) by which the defective but clear provisions of a statute are extended to a case which those provisions have omitted. When the provisions of the statute are extended to an omitted case, because that omitted case falls within its reason, the statute is said to be interpreted agreeably to the demands of *Equity*.

This so-called interpretation is widely different from the *genuine* extensive interpretation which takes the reason of the law as its index or guide. In the latter case, the reason or general design is unaffectedly employed as a *means* for discovering or ascertaining the specific and doubtful intention. In the former case the reason or principle of the statute is itself erected into a law, and is applied to a *species* or *case* which the lawgiver has manifestly overlooked.

Now in this application of the term '*Aequitas*', the radical idea is '*uniformity*' or '*universality*'. The law (it is supposed) should be applied *uniformly* to *all* the cases which come within its principle. '*Quod in re pari valet, valeat in hac quæ par est. Valeat æquitas: quæ paribus in causis paria jura desiderat.*'

By Grotius, the term '*æquitas*' has been applied to a species of pretended interpretation or construction, whereby the provisions of the statute are *restricted* contrary to the plain meaning of its provisions. Or, according to Grotius, a law is also interpreted agreeably to the demands of *Equity*, when it is *not* applied to a case which it actually includes, but which (looking at its purpose) its provisions should not embrace.

By the ancient writers, '*æquitas*' (I believe) is never applied to *restrictive* interpretation. The '*æquitas*' of Cicero and the Classical Jurists (when they mean by *æquitas*, interpretation or construction) is the so-called *extensive* interpretation *ex ratione legis* of modern writers upon Jurisprudence; the '*æquitas, quæ paribus in causis paria jura desiderat.*'

It may indeed be doubted (as I shall show in the proper place), whether the so-called interpretation, which *restricts* the operation of statutes, was permitted by the Roman Law, or ought to be permitted by any.

Equity as  
meaning ex-  
tensive (or  
restrictive)  
interpre-  
tation, *ex ra-  
tione legis*.

It may seem, at first sight, that the pretended interpretation which extends, and the pretended interpretation which restricts are nearly alike. Their consequences, however, might be widely different. A judge may safely be trusted with the discretion of extending a law to an omitted case, but to allow a judge *not* to apply the law in a case plainly embraced by it, would be to leave him to apply the law or not at his own mere *arbitrium*: 'Cessante ratione legis cessat lex ipsa,' is a maxim which sounds well, but which tends directly to tyranny.

Secondly: Equity often signifies *judicial impartiality*: that virtue which is practised by judges, when they administer the law, agreeably to its spirit or purport.

Equity as meaning judicial impartiality.

Thirdly: Taken in the significations which I have now considered, Equity means something determinate and precise. But, frequently, as defined by Cicero and others, it signifies nothing more than the arbitrary pleasure of the judge (or the *arbitrium* of the judge as determined by narrow considerations of good and evil) disguised by a name which imports praise, and which is therefore specious and captivating. A so-called Equity in this sense would be merely mischievous, by making the application of the law uncertain and capricious.

Equity as meaning arbitrium.

Fourthly: I remarked in a former Lecture that the *ius naturale* or *gentium* of the classical jurists and the Law Natural of modern writers on jurisprudence, often mean nothing more than that standard to which, in the opinion of the speaker, law should conform.

Equity as meaning standard legislative (or other ethical) principles.

The same may be said of *æquitas*, or *naturalis æquitas*.

In this sense it is said that equity is the spirit of laws: or (as the French have it) 'L'équité est l'esprit de nos lois.' In this sense of the term, writers often talk of an *Æquitas legislatoria*, by which, if they mean anything distinct, they must mean general utility. In this sense, *Æquitas* is reckoned by Cicero amongst the sources of Law; which is obviously absurd.

Equity as meaning performance of imperfect obligations.

Fifthly and lastly: Equity is often synonymous with the performance of imperfect obligations.\* An equitable or just man is a man who, though not compelled by the legal sanction, performs the obligations imposed by the moral and religious sanctions. In like manner equity is often used as synonymous with morality.† Whether with positive morality, or with morality as it ought to be, is generally left undetermined.

As meaning Morality.

\* Mühlenbruch, vol. i. p. 76.

† 'Velut erga Deum religio: ut parentibus et patris pareamus.'

D. i. 1, 2.

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## LECTURE XXXIV.

*Equity as a Department of Law considered Historically.  
Jurisdiction of the Prætor Urbanus.*LECT.  
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HAVING examined certain meanings of the term 'Equity' as *not* denoting law (or a portion of some body of law), I proceed to those portions of certain bodies of law which are distinguished by the name of 'equity,' or by the epithet of 'equitable;' or which are said to rest exclusively, or in the main, upon 'equitable' grounds or principles.

Of all those portions or departments of bodies or systems of Law, which have gotten the name of 'Equity,' or the epithet of 'equitable,' the most remarkable and interesting are the following: namely, that portion or department of the Roman Law, which was introduced by the Perpetual Edicts of the *Prætores Urbani*; and that portion or department of the Law of England which was introduced by judicial decisions of the English Chancellors as exercising their extraordinary jurisdiction; and has until now been either exclusively or for the most part administered by Courts styled 'Courts of Equity.' The former is commonly styled *Jus prætorium*. An appropriate name for the latter would be 'Chancery Law.'

Taking equity as not meaning law, Courts of Equity and Courts of Law are equally concerned with it, or equally strangers to it.

Equity as a department of law: an historical and particular notion.

The application of the term 'Equity' to the last mentioned portion of our Law, and of the phrase 'Courts of Equity' to the tribunals by which it is administered, is grossly improper, and leads to gross misconceptions. Taking the term 'Equity' as meaning a species of interpretation; or as meaning the impartiality which is incumbent on judges and arbiters; or as meaning judicial decision not determined by rules; or as meaning good principles of direct or judicial legislation; or as meaning the cheerful performance of imperfect duties; or as meaning positive morality, or good principles of deontology, the Courts styled 'of Equity' and the Courts styled 'of Law' are equally concerned with Equity, or are equally strangers to Equity.

I shall now endeavour to compare or contrast Prætorian and Chancery Law; and for the following two reasons:—

First: It will show that the distinction between Law and Equity (meaning by equity a portion or department of law) is not deducible from the universal principles of jurisprudence, but is accidental and anomalous.

Secondly: By previously comparing or contrasting Prætorian and Chancery Law, I shall be able to state and examine, with more clearness and effect, the distinctive properties of direct and judicial legislation; the respective advantages and disadvantages of the two species; with the much agi-

tated and interesting question, which regards the expediency of reducing bodies of Law into formal systems or Codes.

To explain the *jus prætorium*, I must state the nature of the jurisdiction exercised by the *Prætores Urbani*; and also the nature and causes of the direct legislative power, which they first exercised with the tacit, and then with the express, authority of the sovereign Roman People.

In the earlier ages of the Roman Republic criminal cases were regularly tried and determined by the assembled Roman People: and this doubtless is the reason why the procedure relating to crimes, as well as crimes themselves, acquired respectively the names '*judicia publica*', '*delicta publica*': which they retained even after the popular government had been virtually dissolved.

In the same early period, civil jurisdiction (or *jurisdiction* properly so called) was exercised by the Consuls. But as the Consuls were commonly busied with military command, a magistracy styled '*Pretura*' was afterwards created; and to the magistrate filling this office was transferred (with some immaterial exceptions, as, e.g., the duties of the *Aediles*) all the civil jurisdiction originally exercised by the Consuls.

The tribunal of the original *Prætor* (namely, of the *Prætor* who was appointed as the substitute for the *Consuls*) was fixed immovably in the City of Rome: And (owing to the cause—explained in a former Lecture—) his jurisdiction was originally restricted to civil cases arising between Roman Citizens. Consequently, after the subsequent appointment of the *Prætor Peregrinus*, and of Presidents or Governors (*Præsides provinciarum*, sometimes also styled *Prætors*) to the outlying provinces, he was styled, by way of distinction, *Prætor Urbanus*. When that distinctive epithet was not needed, he was styled *Prætor* simply.

In causes falling within the jurisdiction of the *Prætor*, the ordinary or regular procedure was this:—

The *Prætor* alone heard and determined the cause in the following events:

First, If the defendant confessed the *facts* contained in the plaintiff's case, without disputing their sufficiency in law to sustain the demand:

Secondly, If the contending parties were agreed as to the *facts*, but came to an issue of *law*:

Thirdly, If the defendant disputed the truth of the plaintiff's statement, but the statement was supported by evidence so short, clear, and convincing, that the *Prætor* could decide the issue of fact without an elaborate and nice inquiry.

But if the parties came to an issue involving a question of fact, and the evidence produced to the *Prætor* appeared

Criminal  
Jurisdiction  
*liberd. repub-  
lica, with dis-  
tinction of  
wrongs into  
public and  
private.*

Civil juris-  
diction of  
*Prætores  
Urbani.*

Order of  
procedures  
before the  
*Prætor* as  
exercising  
his judicial  
functions.

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doubtful, the Praetor defined or made up the issue, or put the disputed point into a *formula* or statement, generally involving a question of mixed law and fact thus:—*Si pater Aulum Egerium opud Numerium Egerium argentum deposuisse, iaque die nominato Numerius Egerius Aulo Egerio non reddiderit . . . condemnato.*

The question embraced in this *formula* was then submitted to the decision of a *Judex* or *Arbiter*, who not only inquired into the question of fact, but gave judgment upon the case submitted to his decision.\*

The *formula* together with the judgment of the *judex* or *arbiter*, was next remitted to the *Praetor* (or to the Court above).

The judgment of the *judex* or *arbiter*, was then carried into execution by or by the command of the *Praetor*, by whom (in every cause) the consummation, as well as the initiative of the procedure, was superintended or directed.

*Jus et  
Judicium.*

*Natural  
procedure.  
Afterwards  
altered.*

I may remark that the proceedings before the *Praetor* were called proceedings *in jure*; those before the *judex* or *arbiter* to whom he remitted any part of the case, proceedings *in judicio*.

I shall also observe, that the original proceedings before the *Praetor* approached more closely than any other proceedings which I know to what Mr. Bentham calls *natural procedure*; for the whole pleading or process by which the precise point at issue is elicited, took place *videlicet* in the presence of the *Praetor* himself. The witnesses were present and the *Praetor* himself decided the cause immediately and on the spot, if the question of fact was not attended with difficulty. Nothing could be more summary or less dilatory and expensive.

After the judicial constitution was changed, the distinction between the *Praetor* and the *Judex* was abolished, and the whole proceeding took place before a single judge. A similar alteration took place about the same period in the manner of conducting the pleading. The parties began to put in their mutual allegations in writing, in the modern form, which has introduced the delay and expense of the administration of justice in modern times.

In certain cases, the *Praetor* at the outset gave provisional or conditional judgments, or issued provisional commands

*Procedure on  
an Interdict.  
See p. 301,  
post.*

\* The proceeding seems to have been not unlike a reference to arbitration according to the present practice in English common law cases, only without the absurd waste of time and expense caused by the preparations for a trial by jury, which is found unsuited to the case. This absurdity will be more or less remedied when the new Judicature Act comes into operation. It is clear that the functions of the *judex* have hardly any analogy, nor have they historically any relation, to those of the *jury*.—R. C.

on an *ex parte* statement by the Plaintiff: a process like an Injunction obtained *ex parte* in Chancery or a rule for a *Mandamus* at Common Law. The party to whom the provisional command was addressed might show cause against it; and if there then appeared doubt as to a question of fact, this question was treated in the regular manner and remitted to a *judex*.

What I have now described was the regular and ordinary proceeding. In certain cases, which it is not necessary to detail, the Prætor was said to have not only *jurisdictio* but *cognitio*. He might enquire into a question of fact, whatever might be its difficulties, and dispose of the whole case without a *judex* or *arbiter*. This proceeding was called *judicium extra ordinem*. The Prætor, too, like some modern courts of justice, exercised a voluntary jurisdiction in cases relating to contracts; lending his auspices, not as a judge, but as sanctioning the proceeding; just as the Common Pleas lent its sanction to the proceeding of a fine or recovery, or as the Scotch Courts do so to contracts or obligations recorded by consent in their books.

The jurisdiction which I have attempted to describe, and the division of the judicial powers in certain cases between the Court above and an occasional temporary tribunal, seems to have been altered about the end of the third century. It was in force in the time of Gaius: but in the time of Justinian the old judicial establishments had been completely altered. It is for that reason asserted in the Institutes *hodie omnia judicia sunt extra ordinem*. The cognisance of the suit from its institution to its completion was then wholly had by a single judge, and the original practice, which seems to have been generally adopted, of dividing the judicial power in the manner above mentioned, was dropped.

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*Cognitio*, or  
proceeding  
*extra ordinem*.

Ultimately  
*cognitio*, or  
proceeding  
*extra ordinem*, uni-  
versal.

## LECTURE XXXV.

### *Legislation of the Pretors.*

FROM the judicial functions of the *Pretores Urbanii*, I proceed to that power of direct legislation which they exercised at first with the tacit consent, and afterwards with the express authority of the sovereign Roman People.

Originally and properly, the Prætor was merely a judge. It was his business to *administer* the Law, established by the Supreme Legislature, in specific cases falling within his jurisdiction.

But the manner of administration, or the mode of procedure, was left, in a great measure, to his own discretion.

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The direct  
legislative  
power of the  
Pretors was  
originally  
confined to  
Procedure,  
but after-  
wards ex-

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tended to  
Substantive  
Law.

Accordingly, every Praetor, on his accession to the Praetorship, made and published *Rules of Procedure or Practice* to be observed, during his continuance in office.

Such was the direct legislative power originally exercised by the Praetors. But, in consequence of incessant changes in the circumstances and opinions of the Roman community, corresponding changes in its institutions were absolutely necessary. And, inasmuch as the demand for innovation was slowly and imperfectly supplied by the supreme and regular legislature, the Praetors ventured to extend their direct legislative power, and to amend or alter the substantive law which properly it was their office to administer.

As I have used the expression substantive law, I may here note that this name is applied by Bentham to the law which the Courts are established to administer, as opposed to the rules according to which the substantive law is itself administered. These last, or the rules of procedure or practice, he has termed adjective law.

I adopt, for the present, the distinction between substantive and adjective law, although, as I shall show hereafter, it cannot be made the basis of a just division.

The Law introduced by the Praetors was introduced (for the most part) by their *general Edicts*.

The Edicts, Orders, or Precepts, issued by the Praetors, were of two kinds: general and special.

A general Edict was a statute, or a body of statute law; and was made and published by its author *as a subordinate legislator*. A special edict was an order, made in a specific cause; and was made and issued by its author *as a judge*.

It appears, then, that the term 'Edict' was often applied indifferently to the general rules or orders which were published by the Praetors as legislators, and to the special orders or commands which they made and issued as judges. But the term 'Edict,' used *simply* and without qualification, nearly always refers to the *general* or legislative Edict. And so, '*edicere*' or '*jus edicere*', applied to the Praetor, means to legislate *directly*: The act of *judging* (or of applying existing law in specific causes) being denoted by the expression '*jus dicere*' (or '*jus decernere*').

In the orations of Cicero against Verres, '*edicere*' and '*decernere*' are directly and distinctly opposed in the senses which I have now referred to. For one of the charges against Verres (who, as Governor or President of a province, was invested with the *jus edicendi*) is this: *quod aliter, atque ut edicerat, decreverat* :—that in the decrees or orders, which he issued as judge, he violated the rules, which he had established in his legislative capacity, by his own general edict. In like manner, the *general* constitutions issued by the Emperors as legislators (when opposed to

Difference  
between  
general and  
special  
Edicts.

the decrees which they made as judges in the last resort) are frequently styled '*edicta*'.

*Interdicere* (as well as *dicere* and *decernere*) is also opposed to *edicere*. But an *interdictum* was a special and judicial order of a particular species. It was a provisional or conditional order made by the *Prætor* on the *ex parte* statement of the applicant: the party to whom it was addressed having the power of showing cause why the order should not be carried into effect.

Any *Prætor* might publish a general edict at *any* period during his stay in office. But, generally speaking, all the rules or laws, which were published by any given *Prætor*, were made public *immediately after his accession*, and were comprised in *one* Edict, or constituted one Edict.

The Edict published by any given *Prætor* was not legally binding upon his successor in the *Prætorship*, and only obtained as Law till the end of the year during which he himself continued in office. And, accordingly, the general edicts of the *Prætors*, or their edicts simply so called, are styled by Cicero and others '*Edicta annua*', or '*leges annuae*'. They are also styled *perpetual*. When thus applied, the epithet '*perpetual*' is merely opposed to '*occasional*', and is used to distinguish the *general* edicts of the *Prætors* from the *special* edicts or orders which they issued in their judicial capacity.

But though the Edict of every foregoing *Prætor* was superseded by the Edict of his immediate successor in the office, every succeeding *Prætor* inserted in his own edict, all such rules and provisions, contained in the edict of his predecessor, as had met with the approbation of the public or of the influential classes of the Public. For, as the legislative power of the *Prætors* was derived from the tacit consent of the sovereign people, its exercise was inevitably determined by general opinion.

Such being the case, the Edict published by every succeeding *Prætor* was a simple or modified copy of that published by his predecessor. If he simply copied (or transferred) the Edict of the foregoing *Prætor*, his Edict was said to be *translatitius*, or *tralatitius*. This was indeed rarely the case. If he copied the Edict of his predecessor with certain modifications, the Edict promulgated by himself was partly *Edictum tralatitium*, and partly *Edictum novum*.

It is remarkable that all the edicts of all the successive *Prætors* are frequently considered as constituting *one* Edict. They are frequently styled (in the singular number) '*the Edict*'; '*the Prætorian Edict*'; or '*the Edict of the Prætors or Prætor*'. The process of translation or transference which I have attempted to describe, explains this form of expression. With reference to its *promulgation*, the general Edict, which was in force at any given period, was the

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Why the  
general  
Edicts of the  
*Prætors*  
were styled  
*perpetual*

Edictum  
tralatitium,  
or the Edict of  
the Prætor  
or Prætors.

Why Edicts  
collectively  
called 'The  
Edict.'

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**Edict of the Praetor** who then occupied the Praetorship. But with reference to its *contents*, it consisted of a series of edicts, the joint work of a series of Praetors, forming a continuous chain and an indivisible whole.

And here I may remark, that, after the Praetors had legislated through a long tract of time, the general Edict of the Praetor for the time being naturally consisted (for the most part) of derivative or transalatitious rules. For as the legislative power of the Praetor was commonly exercised discreetly, the rules introduced originally by the Praetor for the time being bore a small and insignificant proportion to those provisions of his predecessors which were also a part of his Edict, and which had accumulated through a series of ages.

The 'jus prætorium' was formed by the *Edicts* of the Praetors.

The aggregate of rules, which had been introduced by successive Edicts, and which were embodied in the edict obtaining for the time being, formed or constituted, at any given period, the portion of the Roman Law which was styled '*Jus Prætorum*'.

A part of the Roman Law (like much of the Law of England) was made by judicial decisions on specific or particular cases. For in the Roman Law as in our own, decided cases exerted by way of *precedent* an influence upon subsequent decisions, *provided* there was a sufficient train of *uniform* decision. This influence was styled '*auctoritas rerum perpetuo similiter judicatarum*'.

And as most civil cases fall within the jurisdiction of the Praetor, most of the civil law, which was formed by judicial decisions, *might* have been styled with propriety '*prætorian law*'. But, nevertheless, the term '*jus prætorium*' was exclusively applied to the law which the Praetors made by their general edicts in the way of direct legislation.

This is a fact which I cannot account for satisfactorily; but which (perhaps) may be explained by the circumstance that the portion of the Roman Law formed by judicial decisions bore an insignificant proportion to the rest of the system. Demand for law of the kind was superseded, in a great measure, by the law which the Praetors introduced in the exercise of their legislative powers.

The 'jus edicendi' was a part of the 'jus honorarium'.

The *jus edicendi* (or the power of legislating directly by general edicts or statutes) was not confined to the *Praetores Urbani*. It was exercised by every magistrate of a superior or elevated rank, with reference to such matters as fell within his jurisdiction. It was exercised by the high priests or *Pontifices maximi*. It was exercised by the *Ediles*, or the surveyors and curators of public buildings, roads, and markets. With reference to cases arising in Italy, between provincials and provincials, or between provincials and Roman citizens, it was exercised by the *Praetores Peregrini*. In the outlying provinces, it was exercised by the Proconsuls, and

other Presidents or Rulers, to whom the government of those Provinces was committed by the Roman People.

The rules which were established by the general edicts of the magistrates who enjoyed the *jus edicendi*, were often considered as constituting a whole, and were styled (when considered as a whole) the *jus honorarium*. The name is derived from the *honores*, or honorable offices filled by the persons who enjoyed and exercised the power of promulgating general edicts.

Hence it follows, that the *jus prætorium* was merely a portion of the *jus honorarium*. But as no other portion of the *jus honorarium* was equal in extent and importance to the *jus prætorium*, the term *jus honorarium* is frequently restricted to the latter.

The materials out of which the *Prætores Urbani* constructed the *jus prætorium* appear to have been the following:—

First: Those *prætors* gave the force of Law (through the *medium* of their general edicts) to various customary or merely moral rules which had obtained generally amongst the Roman people.

Secondly: They imported into the Roman Law (through the same *medium*) much of that *jus gentium*, or that *æqual* or common Law, which had been formed by the *Prætores Peregrini*, and by the Presidents of the outlying provinces.

Thirdly: So far as the opinion of the Roman public invited or permitted such changes, they supplied the defects of the *jus civile*, or proper Roman Law, and even abolished portions of it, agreeably to their own notions of public or general utility.—'Jus Prætorium est' says Papinian 'quod *prætores* (supplendi vel corrigendi juris civilis gratiâ) introduxerunt, propter utilitatem publicam.'

Inasmuch as the body of law, formed by the *Prætores Urbani*, was partly derived from the *jus gentium*, and was partly fashioned upon Utility (as conceived by the *Prætors* and the public), it was naturally styled the *Equity* of the *Prætors*, or was said to be founded by the *Prætors* upon *equitable* grounds or principles. For (as I remarked in a former Lecture) the *jus gentium* was styled *jus æquum*, whilst general utility (or principles of legislation supposed to accord with it) was often styled '*Æquitas*'. It is said in a passage of the Digest (referring to a certain rule of the *jus prætorium*) 'hoc *æquitas* supradicit et si *jure* deficiamus:' that is to say, the rule was commended by general utility (or equity), although it was not recognised by that portion of the Roman Law which was opposed to the *jus prætorium* by the name of '*jus civile*'.

Inasmuch as the *jus prætorium* grew gradually, or was formed by successive edicts of many successive *Prætors*, it

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Materials out  
of which the  
*jus prætorium*  
was formed.

The term  
*Equity*.  
*Æquitas* =  
*Utilitas*, or  
other ap-  
proved  
principle of  
legislation.  
*Justitia*, as  
meaning  
*utilitas*, or  
other ap-  
proved prin-  
ciple, etc.

*Jus Præ-*  
*torium*, an  
inconclive

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heap of  
insulated  
rules.

Implication  
of substan-  
tive law,  
and, in par-  
ticular, of  
substantive  
prætorian  
law, with  
procedure.

was not a formal system or digested body of law, but an incondite collection or heap of single and insulated rules. No Prætor thought of legislating systematically: nor would his stay in office have allowed him to legislate systematically, although the opinion of the public had favoured the attempt, and the supreme or regular legislature had inclined to acquiesce in it.

It is also remarkable, that even the substantive law introduced by the Edicts of the Prætors was implicated with procedure.

If the Prætor gave a right unknown to the *jus civile*, he did not give that right explicitly and directly. He promised or declared, through the medium of his General Edict, that, in case any party should be placed in a certain position, he, the Prætor, would give him an action, or would entertain an *action*, if he should think fit to bring one. If the Prætor abolished a rule which was parcel of the *jus civile*, he did not abolish or repeal it formally or explicitly. He promised or declared, through the medium of his General Edict, that in case an attempt should be made to enforce the rule by action, he would empower or permit the defendant to *except* to the plaintiff's action, or to defeat the plaintiff's action by plea.

Actiones  
Utiles et In  
factum.

The actions (or rights of action) created by the Prætorian Edict, are frequently styled *utiles*.\*

They are also frequently styled 'actiones in factum,' or 'actiones in factum conceptæ.' A form of expression which seems to have arisen from a peculiarity in the form of procedure. Where an action was founded on the *jus civile*, it would seem that the plaintiff not only stated his case, but alleged or quoted the law upon which he rested his demand. Whence such actions were styled actions *in jus*, or actions

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\* The author, apparently following Thibaut, derives the word 'utiles' as applied to these actions, from 'uti' the adverb, because the action was given by way of analogy to a right of action obtaining according to the *jus civile*. I prefer the more obvious derivation. The cause moving the Prætor to grant the action was *utility*. 'Utile visum est . . . quasi in rem actionem polliceri.' D. xlvi. 18. (De superficiebus) l. 1. § 1:—and the action is, moreover, *utiles* in the sense of being really *available* in contradistinction to the often illusory actions of the civil law. It is certainly hard to find a passage furnishing the *elenchus*; and for this reason, that the action is almost invariably given by way of analogy as well as on grounds of utility. But I think the burden of proof is on the supporters of the more ingenious derivation, and I am not aware that it is supported even by *prima facie* evidence which is unequivocal. Still less am I aware of any grammatical analogy for it. I should be surprised by the discovery of an obscure fragment containing the word 'quasilia.' But to say that *uti=quasi* is a long step to begin with. The idea in *uti* is not analogy, but *similarity* in the narrow sense of the word: *uti=ita*, fitted to a 't.—R. C.

*in jus conceptæ.* But where an action was founded on the *jus prætorium*, the plaintiff merely stated the *facts* without expressly referring to the *law* which gave him a right to sue. And since the *actor* merely detailed the facts, his action was styled an action *in factum*, or an action *in factum concepta*.

Under the virtual sovereignty of the Emperors or Princes, at least till the reign of Hadrian, the Prætors continued to exercise the properly legislative powers which they exercised *liberâ republicâ*. But with this difference.

*Liberâ republicâ*, the Prætors exercised those legislative powers by the express or tacit authority of the *sovereign Roman People*. After the virtual dissolution of the popular government, the Prætors exercised those legislative powers by the express or tacit authority of the *Emperors or Princes*, who at first were substantially though covertly, and at length were substantially and avowedly, monarchs or autocrats in the Roman World.

In the reign of Hadrian, the *Jus Prætorium*, or the Prætorian Edict, underwent a considerable change. It was amended or altered by the jurisconsult Julian, and was then published, by the command of Hadrian, in the form of a body of rules proceeding *immediately* from the sovereign. Taking the terms *written* and *unwritten* in their juridical and improper meanings, the *jus prætorium* passed from the department of *unwritten*, into the department of *written* law.

The Prætorian Edict, as published by the command of Hadrian, was styled '*perpetual*', in a new signification of the epithet. It was now not only perpetual in the sense of being a general command remaining in force for the Prætor's term of office, as distinguished from those occasional commands which he issued judicially in regard to specific cases. It was also perpetual in the sense of being calculated to endure *in perpetuum*, or until it should be abrogated by competent authority.

Whether the Prætors after this change under Hadrian, continued to legislate *directly* (or to legislate by *general edicts*), is an agitated and doubtful question. But, however this may be, it is certain that the Prætors ceased to legislate *directly* in the course of the third century.

At or before the close of the third century, the direct legislation of the Prætors, and also the legislation of the Populus, Plebs, and Senate, had yielded to the avowed legislation of the virtual monarchs or autocrats. Thenceforward to the accession of Justinian, the *living* Roman Law was drawn exclusively from the two following sources: namely, the general and special Constitutions of the Emperors or Princes, and the writings of the jurisconsults whose opinions were deemed authoritative. For since, in the absence of an Imperial Constitution to meet the case, the

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History of  
the Prae-  
torian edict  
from the end  
of the  
popular go-  
vernment to  
the reign of  
Justinian.

The Prae-  
torian Legisla-  
tion after  
the change under  
Hadrian.

Sources of  
the law  
administered  
by the tri-  
bunals, from  
Alexander  
Severus to  
the accession  
of Justinian.

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tribunals were guided by the exposition of principles and solutions of cases contained in the writings of those juris-consults, these were in effect equivalent to statutes and judicial decisions.

**Effect of the  
Prætorian  
Edict on  
arrangement  
of Code and  
Pandecta.**

Having sketched the history of the Prætorian Edict to the accession and reign of Justinian, I will now note the effect of its structure on the arrangement of his *Code* and *Pandects*.

The Roman Law, as it was left by Justinian, lies mainly in his *Code* and *Pandects*: it having been the intention of their imperial projector, that they should comprise the *whole* of the Roman Law which should obtain thereafter in the Empire.

His Institutes are properly a hornbook for the instruction or institution of students; but since its publication was *subsequent* to the publications of the *Code* and *Pandects*, it was regarded as a *source of law*, in so far as it conflicted with those two compilations, or was concerned with matters for which those two compilations had not provided.

The publications of his *Code*, *Pandects*, and *Institutes*, completed the design of the imperial reformer. His *Novels*, or new Constitutions, were published subsequently; and are merely partial supplements, or partial correctives, to the three compilations embraced by his original project.

**Matter of the  
Code and  
Pandecta.**

His *Code* is composed partly of *edictal* or *general* constitutions (*i.e.* statutes), made and published by the Roman Emperors or Princes in their quality of sovereign legislators; and partly of *special* constitutions (*i.e.* judicial decrees and orders) issued by Roman Emperors in their quality of sovereign administrators.

His *Pandects* are almost entirely composed of excerpts from writings by jurisconsults. Some of these excerpts are didactic expositions, in general or abstract terms, of laws or principles of law. Others are mere resolutions of specific or particular questions. As having been adopted and published as law by Justinian, (who was sovereign in the Roman World,) these general expositions and particular resolutions are properly statutes and judicial decisions; although those characters cannot be properly attributed to them as being the productions of their original authors.

Each, therefore, of these two compilations is a compound of statute and *judiciary* law: being partly a collection of statutes proceeding immediately from a sovereign legislator, and partly a collection of judicial decisions proceeding immediately from a sovereign judge.

**Arrangement  
of the Code  
and Pandecta.**

The order or arrangement of each of these two compilations is copied from the order of the Perpetual Edict: that is to say, the Prætorian Edict, (or *chain* of prætorian edicts,) (

as altered by the jurisconsult Julian, and published as Law by the Emperor Hadrian.

This appears from the *Commission*, (to adopt a modern expression,) prefixed to the Pandects, and styled '*De Conceptione Digestorum.*' By this Commission, Justinian commands Tribonian and his associates to arrange the selected excerpts, 'tam secundum nostris constitutionem codicis, quam edicti perpetui imitationem.'

It is probable that the order of the Code and Pandects imitated the order of the Perpetual Edict, for the following reasons or causes.

In the first place: No attempt had been ever made to collect and arrange the Laws of the *Populus* or *Plebs*, nor the consults of the Senate, nor the constitutions of the Emperors, nor the judicial decisions of the subordinate tribunals. Consequently, The order of the Prætorian Edict (which, though a shapeless mass of occasional and insulated rules, was, at least, a *collection* of rules), was the only known model for the arrangement of the projected compilations. And, Tribonian and his associates being uninventive and servile copiers, ordered the matter of their compilations according to the solitary pattern which the Edict presented to their imitation. In the Institutes indeed they followed Gaius in the scientific or systematic method pursued by that most eminent Classical Jurist in his elementary treatise for the instruction of students. In this too they were servile copiers. And as this scientific method had never in fact been observed by any but *institutional writers*, they never thought of pursuing it in the composition of those larger compilations which were destined to embrace the detail of Justinian's legislation.

In the second place: Many of the writings of the jurisconsults whose opinions were deemed authoritative, were running annotations or commentaries on the *jus prætorium*. The arrangement of the Edict was therefore familiar to practising lawyers, and afforded some convenience on that account.

Since the contents of the Code and Pandects were arranged according to the order of the Prætorian Edict, their arrangement has as little pretension to the name of *systematic* as if it were merely alphabetical.

By many modern writers, it is supposed that the changes, which the Prætors wrought in the Roman Law, were introduced *per artes* (or surreptitiously), and were a cheat upon the sovereign legislature.

It is said, for example, by Heineccius, in his excellent *Antiquities of the Roman Law*:

Supposition  
that the  
direct legis-  
lative power  
exercised by  
the Prætors  
was usurped  
and intro-  
duced *per  
artes.*

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'Quamvis vero Prætores initio magistratus in leges jurarent: revera tamen leges edictis suis evertebant sub specie sequitatis. Utebantur hanc in rem variis artibus, veluti *fictionibus*; quando, verbi gratia, fingebant, rem usum captam, quæ usucapta haud esset, vel contra, etc.'

Now when the *Prætor* declared by his Edict, 'that, in certain cases, a thing acquired by usucaption would be by him considered as not having been so acquired,' he abrogated a portion of the *jus civile* avowedly and openly. And all the fictions by which the *Prætors* upset the *jus civile*, were just as palpable as that to which I now have adverted. They commonly consisted in feigning or assuming, 'that something which obviously *was*, was *not*; or that something which obviously *was not*, *was*.' It is ridiculous to suppose that such fictions could deceive, or were intended to deceive: or that the authors of such innovations had the purpose of introducing them covertly.

The reason of fictions having been employed by the *Prætors* as subordinate legislators and by subordinate judges in our own country appear to be twofold:—1st, A respect for the law which they virtually changed: 2ndly, A wish to conciliate the lovers of things ancient.

There is another class of fictions for which it is more difficult to account: e.g., the fiction of the English Law, 'that the husband and wife are one person:' or that of the Roman Law, 'that the wife is the *daughter* of her husband.' These probably owe their origin to ignorant attempts on the part of judges or lawyers to account for laws originating in customs belonging to an ancient form of society, but repudiated by modern sentiments.

That the direct legislative power assumed by the *Prætors* was not usurped and was not *assumed covertly*, will also amply appear from the following obvious considerations.

It was assumed and exercised, from the beginning, with the tacit approbation, although not by the direct authority of the sovereign Roman People. For the law made by the *Prætors*, in the exercise of this legislative power, was express statute law made and published conspicuously under the eyes of the people, whose interests it concerned, and who, by an expression of their will, might have abolished it, and called its makers to account.

Add to this, that it was made and published under the eyes, and therefore with the approbation, of the Tribunes of the people: who by their *veto* might have prevented it from taking effect, and forced its authors to recall it.

And though the legislative power exercised by the *Prætors* was not assumed in the beginning by the direct authority of the people, it afterwards was sanctioned

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\* Antiq. Rom. Syntagma. Ed. Haubold. Lib. I. Tit. 2. c. 24.

directly by acts of the sovereign legislature. For numberless *leges* of the *populus* and *plebs*, with numberless *consults* of the senate, assume that the *jus prætorium* is parcel of the Roman law, and accommodate their enactments to its provisions: just as Acts of our own Parliament are moulded and fashioned on the judge-made law of the tribunals.

The obvious truth is, that in Rome (as in most other communities), powers of legislation, direct and judicial, were assumed and exercised by subordinate judges; at first with the tacit approbation, and in time by the direct authority, of the sovereign legislature.

In almost every community, such has been the incapacity, or such the negligence, of the sovereign legislature, that unless the work of legislation had been performed mainly by subordinate judges, it would have been performed most ineffectually or not at all.

Perceiving this palpable truth, the sovereign legislature, in almost every community, has permitted and authorised subordinate judges to perform legislative functions. And while law made by subordinate judges has thus obtained, in almost every community, on account of its obvious utility, the *jus prætorium* was peculiarly acceptable to the Roman people, because (although judge-made) it was *not* judiciary law imbedded in a heap of particular decisions, but was clear and concise statute law, really serving as a guide of conduct. In the Digests, it is favourably contrasted, for this very reason, with judiciary law: the certainty of the one being opposed to the comparative uncertainty and *ex post facto* operation of the other.

'*Magistratus quoque (says Pomponius) jura reddebant. Et ut scirent cives, quod jus de quaque causâ quisque dicturus esset, seques præmunirent, edicta magistratus proponebant: quae edicta prætorum jus honorarium constituerunt.*' Lord Coke's redactions (if authorised) would have strongly resembled Prætorian Edicts, and been statute law: for law given in general formulæ is statute law.

It is to be regretted, that the legislative power of the judges is not exercised directly and avowedly with us, as it was in Rome; that judge-made law is not made in the form of statute law, but in that of judiciary law; that our Courts do not, like the Prætors, express and publish their law in the form of general rules, and thus legislate openly instead of covertly.

The incapacity of a sovereign legislature to perform in detail the business of legislation is inherent in the constitution of most societies. The incapacity inherent in a hereditary monarchy is obvious. Legislatures consisting of numerous bodies have also peculiar incapacities, which obviously are increased in proportion to the number to be convened; and which especially affected such legislatures as the assemblies of the *populus* and *plebs* at Rome.

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The business of legislation ought to be performed by persons at once thoroughly versed in the sciences of jurisprudence and legislation, and in the particular system of the given community : The sovereign legislature merely authorising and checking, and not affecting to legislate itself. The difficulty in our country in carrying out such a mode of legislating, as well as of allowing judges to legislate directly, arises from *constitutional jealousy*; a feeling which is absurdly capricious in the objects selected for its aversion.

I may here remark upon a strange inconsistency of Hugo and other German jurists, who are great enemies of codes, and admirers of customary law, as being made by the people themselves, but who yet profess the greatest admiration of the Roman Law.

As lovers of customary law, they deprecate statute law generally, and especially abhor codes, or compact and systematic bodies of law. As historians and admirers of the Roman Law, they insist (and justly insist) on those excellencies of the *jus prætorium* which I have briefly stated or suggested. They do not perceive that those excellencies belong to it *as being a faint approach to a code*: and that they belong to a well-made code in a degree incomparably higher.

## LECTURE XXXVI.

*Jus Prætorium and English Equity Compared.*LECT.  
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Examination of the opinion that the distinction of law into law and equity is necessary or essential.  
The distinction is accidental and historical.

Is nearly confined to Roman and English Law.

It has been imagined by many, that the distinction between Law and Equity is *necessary* or *essential*; or, in other words, that *every* system of positive law is distinguished or distinguishable into Law and Equity. But, in truth, the distinction is merely historical and confined to the particular systems of *some* societies. And the equity obtaining in any of the systems to which the distinction is confined, is widely different from the equity obtaining in any of the rest.

So far is the distinction from being universal and necessary, that I believe it is nearly confined to the Roman and English Law: comprising in the phrase 'English Law' the law of those American states which have borrowed from the English system a great part of their law and with it the distinction between Law and Equity in the English sense of the terms.

In other particular systems there is equity in the various senses before mentioned:—judicial impartiality:—impartial maxims of legislation:—the *arbitrium* of the judge:—the parity or analogy which is the ground of the so-called interpretation *ex ratione legis*. But there is no body of positive law, distinguished by the name of equity, and opposed under that denomination, to other portions of the legal system.

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In France, for example, the *arrêts réglementaires*, issued by the ancient parliaments, bore a close resemblance to the edicts of the Roman *Prætors*. For they were properly statutes, not concerned exclusively with mere procedure or practice, and often annulling or modifying laws proceeding immediately from the sovereign legislature. But the law so made never acquired the name of Equity; nor was it, I believe, distinguished from the rest of the legal system, by any appropriate denomination: nor was there ever in France any body of law styled Equity in a sense resembling the English sense of the word.

The origin and history of the peculiar Courts in this country, styled Courts of Equity, has been given with great clearness by Blackstone, in probably the best chapter of his whole work. From the facts detailed by him, it is obvious that equity arose from the sulkiness and obstinacy of the Common Law Courts, which refused to suit themselves to the changes which took place in opinion and in the circumstances of society. If the Courts of Common Law had not refused to introduce certain rules of law or of procedure which were required by the exigencies of society, the equitable or extraordinary jurisdiction of the Chancellor would not have arisen, and the distinction between Law and Equity would never have been heard of. If, for instance, the Common Law Courts would have extorted evidence from the parties, plaintiffs would not have had recourse to the Chancellor to obtain the power of interrogating the defendant. If, again, the Common Law Courts would have consented to enforce certain trusts; trusts as a subject of the jurisdiction of Courts of Equity would never have been heard of. There would indeed have been trusts, and suits in relation to trusts, these being involved in almost all law, but those particular classes of trusts which are enforced by Courts of Equity would never have been heard of, as distinguished from others.

Not only is this verbal distinction peculiar to the Roman and to the English Law, but it means in each of those systems, something peculiar to those systems respectively.

From the historical sketch given in former Lectures, it has been seen how peculiar was the origin of the Praetorian

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law. The history of the equitable jurisdiction of the English Chancellors may be found in the Commentaries of Sir William Blackstone, and in a work of Chief Baron Gilbert.

I shall contrast the two systems, for the purpose of showing how dissimilar they are, and of adding a few short remarks.

Differences  
between  
Roman and  
English  
Equity.

The first difference is, that the Praetorian Equity was administered by the ordinary civil tribunals; English Equity, by an exceptional or extraordinary tribunal.\*

A second, and still more important, difference is, that the equity administered by the Roman praetors was *statute* law, or law expressed and published in an abstract or general form: whereas Chancery law is for the most part not *statute*, but *judiciary* law.

A third distinction is that the subjects with which Praetorian Equity and English Equity are conversant are widely different. I shall merely mention two or three remarkable cases.

By the ancient law of Rome succession *ab intestato* was confined exclusively to *agnates*—males related through males. The Praetors, by gradual innovations, altered the whole law on this subject, by letting in *cognates* or relations in the female line in preference to remoter *agnates*. The law on this subject, as laid down in Justinian's Code and Novels, is entirely copied from the praetorian equity; and, transmitted through the medium of the Canon law, forms the foundation of the law obtaining on this great subject in England and throughout Europe.

Under the influence of similar good intentions the Praetors gradually limited the power of testamentary bequest. By the Twelve Tables a testator was empowered to dispose of his property *ad libitum*.†

The praetors afterwards took upon themselves to set aside wills by which a father disinherited his children; and afterwards gave the children, in spite of the will, a certain portion. This was the origin of the *legitima portio* of the Roman Law, the *légitime* of French Law. In time this determinate portion came to be adopted by the sovereign

\* This is changed (at least in name) by the Judicature Act of 1878, the operation of which is postponed for the present. As, however, Courts, which will be practically Courts of Law and Courts of Equity, will for some years continue to sit at Westminster and Lincoln's Inn respectively, the 'fusion' of Law and Equity which is imperfectly attempted in that Act will be still more imperfectly carried out in practice.—R. C.

† A different view, however, of the original intention of this law of the Twelve Tables will be found in the able and ingenious chapter on the history of testamentary succession in Maine's *Ancient Law*. —R. C.

legislature, and now obtains as law in probably every country in Europe except England.\*

Our Courts of Equity have never meddled with the subject of succession or with that of testamentary disposition. The maxim, *aequitas sequitur legem* has on these subjects been strictly adhered to.

On the other hand, one of the principal subjects of the jurisdiction of our Courts of Equity, is what are called technically *trusts*: not that trusts are peculiar to equity, since they are of the essence of all law whatever; but that there are certain trusts which are not enforced by the ordinary tribunals. In the Roman Law there were also what were called *fideicomissa*, equivalent to trusts; but these, it is remarkable that the tribunals and the praetors themselves would not enforce; they were first enforced by the Emperors. Thus, then, one of the chief subjects of the equity jurisdiction of the Chancellor was completely excluded from that of the Roman Praetor.

The only resemblances between Roman and English equity, are, in fact, two. First, they both are unsystematic in their form, and were introduced by gradual innovations. Neither of them is a *system* of Law. It is impossible to give any idea of either, in general or abstract expressions. In order to convey any notion of them, it is necessary to enter into the whole extent of the details. The notion that there is any essential or necessary distinction is the mere absurdity.

The other resemblance is, that in both cases the party

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\* I should think it probable that the *légitime* of the old French law as it existed in the *Pays de Coutume*, had a more homely, though not less venerable origin, in the archaic notion of the community of goods in the family subject to the right of administration of the husband and father. To a similar origin, and not to a Roman source, I think, should be referred that division of the moveable goods which in the twelfth century was common to England and Scotland, and which in the latter country remains unchanged to this day. The division is tripartite, if wife and children both survive; bipartite, if wife only or children only. One share is subject to the disposal of the deceased; the remaining shares belong to the wife and children respectively. The children's share, in Scotch law, was anciently and properly described as the *bairns' part*; but when the study of the civil law became prevalent, it was improperly and by analogy styled the *legitim*. The division obviously corresponds neither to the *quarta legitima* of the middle Roman law, nor to the rule adopted by Justinian. It is indeed not unlikely that the principle of *legitim* introduced by the Praetors was part of the *jus gentium* which they observed to prevail as custom in surrounding nations—a custom which had been virtually abrogated at Rome itself, owing to the sweeping terms of the law of the Twelve Tables. The shares of the wife and children appear to have vanished in England owing to the accident of their having been marked by the ambiguous word *rationabiles partes* (see Blackstone, vol. ii. p. 492).—R. C.

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said to administer equity affects not to alter the other system, but to correct or supply its deficiencies. In extent, or to appearance, the law which is superseded still continues to exist; so that there are two systems existing at the same time, containing contrary provisions as to the same matter; one of them the shadow of a law which has been superseded but is feigned still to exist as law, the other the law which has superseded it.

## LECTURE XXXVII.

*Statute and Judiciary Law.*LECT.  
XXXVII.Statute and  
judiciary  
law.Meaning of  
the terms.

In the following discourse, I shall call your attention to a few of the numerous differences which distinguish *statute law* (or law made by direct, or proper legislation) from *judiciary law* (or law made by judicial, or improper legislation). And having stated or suggested a few of those numerous differences, I shall remark upon the advantages and disadvantages of judicial or improper legislation, and the possibility of excluding that prevalent mode of legislation, by means of *codes*, or *systems of statute law*.

By the opposed expressions 'statute law' and 'judiciary law,' I point at a difference, not between the *sources* from which law proceeds, but between the *modes* in which it begins. By the term 'statute law,' I mean any law (whether it proceed from a subordinate, or from a sovereign source) which is made directly, or in the way of proper legislation. By the term 'judiciary law,' I mean any law (whether it proceed from a sovereign, or a subordinate source) which is made indirectly, or in the way of judicial or improper legislation.

I must here interpose a remark upon the phrase 'judiciary law.' In using it I have the authority of Bentham, who styles the law which is made by judges, as properly and directly exercising their judicial functions, 'judiciary law.' In the language of the French Code, too, the judicial decisions of judges are opposed under the names '*arrêts judiciaires*' to their '*arrêts généraux et réglementaires*', i.e. their statute laws. The phrase *judicial law* has been applied by Sir Samuel Romilly and others, and would answer the purpose nearly as well. *Unwritten law* is inappropriate as well as ambiguous, as has been already pointed out. '*Common*' law is inadequate, as not comprising the whole of judiciary law. Judge-made law will not do, because it would include the statute law made by subordinate judges.

The principal or leading difference between those kinds of law which I thus mark by the terms *statute* and *judiciary* law is, I apprehend, the following:

The principal  
or leading  
difference  
between

A law made judicially, is made on the occasion of a judicial decision. The direct or proper purpose of its immediate author is the decision of the specific case to which the rule is applied, and not the establishment of the rule. Inasmuch as the grounds of the decision may serve as grounds of decision in future and similar cases, its author legislates substantially or in effect: and his decision is commonly determined by a consideration not only of the case before him, but of the effect which the grounds of his decision may produce as a general law or rule. But his direct and proper purpose is not the establishment of the rule, but the decision of the specific case. He legislates *as properly judging*, and not *as properly legislating*.

A statute law is made solely and professedly *as a law or rule*. It is not the instrument or mean of deciding a specific case, but is intended solely to serve as a rule of conduct, and therefore to guide the tribunals in their decisions upon classes of cases.

The principal difference, therefore, between statute and judiciary law, lies in a difference between the forms in which they are respectively expressed.

A statute law is expressed in general or abstract terms, or wears the form or shape of a law or rule.

A law (or rule of law) made by judicial decisions, exists nowhere in a general or abstract form. It is implicated with the peculiarities of the specific case or cases, to the adjudication or decision of which it was applied by the tribunals; and in order that its import may be correctly ascertained, the circumstances of the cases to which it was applied, as well as the general propositions which occur in the decisions, must be observed and considered. The reasons given for each decision must be construed and interpreted according to the facts of the case by which those reasons were elicited; rejecting as of no authority any general propositions which may have been stated by the judge, but were not called for by the facts of the case, or necessary to the decision. The reasons when so ascertained must then be abstracted from the detail of circumstances with which in the particular case they have been implicated. Looking at the reasons so interpreted and abstracted, we arrive at a ground or principle of decision, which will apply universally to cases of a class, and which, like a statute law, may serve as a rule of conduct.

Without this process of abstraction, no judicial decision can serve as a guide of conduct, or can be applied to the solution of subsequent cases. For as every case has features of its own, and as every judicial decision is a decision on a specific case, a judicial decision *as a whole*, (or as considered *in concreto*,) can have no application to another, and, therefore, a different case.

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statute and  
judiciary law.

The principal difference between statute and judiciary law lies in a difference between the forms in which they are respectively expressed.

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An enormous fault of the Pandects and Code, considered as a Code.

And here I will remark (before I proceed further) an enormous fault of Justinian's Pandects and Code, considered as a *code* (in the modern acceptation of the term :) that is to say, as a body of general rules.

I showed in a previous Lecture, by a description of the matter of the Code and Pandects (p. 306 *supra*), that each of those two compilations is a compound consisting partly of statute and partly of judiciary law.

I now proceed to show that the principles of construction or interpretation of rules of these two classes is essentially diverse. The primary index to the intention with which a statute was made, or the primary guide for the interpretation of a statute, is the literal and grammatical sense of the words in which it is expressed. It is true that if the literal meaning is indeterminate or ambiguous, the interpreter may seek in other *indicia*, the intention of the legislature;—for example, in the reason of the statute, as indicated by the statute itself; in the reason of the statute, as indicated by its history—the mischief to be remedied; or in the clear enactments of other statutes made by the same legislature *in pari materia*.

But if he be able to discover in the literal meaning of the words any definite and possible purpose, he commonly ought to abide by the literal meaning of the words, though it vary from the other indices to the actual intention of the legislature. For, the statute being framed for the very purpose of laying down a rule to guide the tribunals, it must be assumed that the terms in which the law is expressed were carefully measured. If the interpreter might *ad libitum* desert the literal meaning, it would be impossible for the legislator to express his meaning in terms which would certainly attain their end.

But the primary index to a rule created by a judicial decision is not the grammatical sense of the very words or terms in which the judicial decision was pronounced by the legislating judge: Still less is it the grammatical sense of the very words or terms in which the legislating judge uttered his general propositions. As taken apart (or by themselves), and as taken with their literal meaning, the terms of his entire decision (and, *a fortiori*, the terms of his general propositions) are scarcely a clue to the rule which his decision implies. In order to an induction of the rule which his decision implies, their literal meaning should be modified by the other indices to the rule, from the very commencement of the process. From the very beginning of our endeavour to extricate the implicated rule, we should construe or interpret the terms of his entire decision and discourse, by the nature of the case which he decided; and we should construe or interpret the terms of his general or abstract

propositions, by the various specific peculiarities which the decision and case must comprise. For it is likely that the terms of his decision were not very scrupulously measured, or were far less carefully measured than those of a statute; insomuch that the reasons for his decision, which their literal meaning may indicate, probably tally imperfectly with the reasons upon which it was founded. And his general propositions are impertinent, and ought to have no authority, unless they be imported necessarily (and therefore were provoked naturally) by his judicial decision of the very case before him. It is even unnecessary that the general grounds should be expressed by the judge. In which case, the only index is, the specialities of the decision as construed by (or receiving light from) the nature of the case decided. An inference *ex rei natura*.

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Now not only does a large portion of the Code and Pandects consist of judicial decisions or opinions which, having the sanction of the Imperial Compiler, are tantamount to judicial decisions, but what is worse, the portion of the Code and Pandects which consists of such decisions and opinions, is constructed with so little reflection and so little skill, that the general reasons or principles which were the bases of the decisions and opinions are often extremely uncertain. For, in order (it may be presumed) to attain conciseness, or to get at propositions of an abstract or general form, the facts of the cases contained in the Code and Pandects are often suppressed by the compilers. The general propositions contained in the special Constitutions, or in the analogous opinions of the jurisprudential writers, are detached from the facts to which they were applied, and which are requisite guides to their exact import.

Consequently, before we can arrive at their exact import, we must perform a double process. From the remaining fragments of the particular case to which a proposition of the kind was applied by the judge or jurisconsult, we must gather the residue of that specific case. And having thus conjectured the subject of the decision or opinion, we must collect the import of the proposition (as a general principle or rule), by the process of abstraction and induction to which I have already adverted.

It follows from what has preceded, that law made judicially must be found in the general *grounds* or *reasons* of judicial decisions, detached or abstracted from the specific peculiarities of the decided or resolved cases. Since no two cases are precisely alike, the decision of a specific case may partly turn upon reasons which are suggested to the judge by its individual peculiarities or differences. And that part of the decision which turns on those differences (or that part

*Ratio legis  
et ratio  
decidendi.*

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of the decision which consists of those special reasons) cannot serve as a *precedent* for subsequent decisions, and cannot serve as a rule or guide of conduct.

The general reasons or principles of a judicial decision (as thus abstracted from any peculiarities of the case) are commonly styled, by writers on jurisprudence, the *ratio decidendi*. And this *ratio decidendi* (which is simply the rule of judiciary law ascertained by the process of abstraction and induction from the decision or decisions in which it is contained) must be carefully distinguished from that which is commonly called *ratio legis*. The latter is the end or purpose which moved the legislator to establish a statute law, or some part of the provisions of a statute. It is not a law; nor is it the *primary* guide to the interpretation of statute law, although it may be looked on in some cases as an aid to interpretation.

And here I will briefly remark, that, when I speak of a rule made by a judicial decision, I do not speak of a decision which is a mere application of previously existing law. In every judicial decision by which law is made, the *ratio decidendi* is a new ground or principle, or a ground or principle not previously law.

Summary of foregoing argument.

A statute law, then, is expressed in general or abstract terms which are *parcel* of the law itself. And, consequently, the proper end of interpretation is the discovery of the meaning which was actually annexed by the legislator to those very expressions. For if judges could depart *ad libitum* from the meaning of those expressions, and collect the provisions of the statute from other *indicia*, they would desert (generally speaking) a more certain, for a less certain guide.

But a rule of law established by judicial decision, exists nowhere in precise expressions, or in expressions which are *parcel* of the *ratio decidendi*. The terms or expressions employed by the judicial legislator are rather faint traces from which the principle may be conjectured, than a guide to be followed inflexibly in case their obvious meaning be perfectly certain.

Broad as the distinction is between the interpretation of statute law and the analogous process of induction by which a rule is extracted from a judicial decision or decisions, the two distinct processes have commonly been confounded by those who have written on the interpretation of the Roman law.

Most of the modern Civilians who have treated of interpretation have applied to the *statute law* contained in Justinian's compilations, and to the *decisions* and *casuistical*

*solutions* which the compilations also comprise, the *same* rules of interpretation or construction.

For example : They have confounded *extensive* interpretation of statute law with the application of a decided case to a resembling case.

The so-called *extensive* interpretation of statute law *ex ratione legis*, is the extension of the provisions of the law to a case which they do not comprise, because the case falls within the scope of the law, although the provisions of the law do not include it. There is truly an *extension* of the law.

But the application of a decided case to the solution of a similar case is the *direct application* of the judiciary law itself, and not the *extension* of the law agreeably to its reason or scope. For, here, the law cannot be extended agreeably to the reason of the decision, inasmuch as the reason of the decision (or the ground or principle of the decision) is itself the law. The application, therefore, of a decided case to the solution of a resembling case, is the *direct subumption* of a case to which the law itself directly applies, and not the extension of a law *ex ratione ejus* to a case or *species obveniens* which the law does not embrace.

Again : One of their commonest rules of interpretation—*cessante ratione legis, cessat lex ipsa*—applies solely to precedents, and does not apply to statute law. For in statute law, the law is one thing, the reason another; the law, as a command, may continue to exist, although its reason has ceased, and the law consequently ought to be abrogated ; but there it is, the solemn and unchanged will of the legislator, which the judge should not take upon himself to set aside, though he may think it desirable that it should be altered. But in the case of judiciary law, if the ground of the decision has fallen away or ceased, the *ratio decidendi* being gone, there is no law left.

Professor Thibaut of Heidelberg (in his Interpretation of the Roman Law) was the first (I believe) who saw distinctly, that the rules of interpretation which will apply to the Edictal Constitutions contained in Justinian's compilations, have little or no applicability to those judicial decisions (or to those solutions of cases that are analogous to judicial decisions) which the same compilations also embrace.

It is to be regretted that the excellent work of Professor Thibaut \* is on the interpretation of the Roman law only, not on the interpretation of law in general; for, consequently, owing to the strong peculiarities of Justinian's compilations, it has little to do with the general principles of construction. But I am scarcely acquainted with any

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\* Thibaut, Theorie der logischen Auslegung des römischen Rechts.

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Competition  
of analogies—  
Paley and  
Romilly.

book which, within so small a compass, contains so much original thinking. As was said by Gassendi of some work of Hobbes', *parvus est libellus, at medullā scatet.*

I must here advert to the phrase 'Competition of opposite analogies' in a passage of Paley, which has been controverted by Sir Samuel Romilly in a paper in the 'Edinburgh Review' on Codification.\* Paley's proposition is this :— 'After all the certainty and rest that can be given to points of law, either by the interposition of the Legislature, or the authority of precedents, one principal source of disputation, and into which indeed the greater part of legal controversies may be resolved, will remain still, namely, the competition of opposite analogies.' Sir Samuel Romilly denies that this 'source of disputation,' as Paley calls it, can arise in the case of statute law, but maintains that it is peculiar to judiciary law.

Now the 'competition of opposite analogies' (if the phrase mean anything) cannot apply to the process of the discovery of a rule of judiciary law by abstraction or induction as already indicated. If the rule of law has been inferred from one decided case, it cannot have been founded on opposite analogies. If it was established by several decided cases, it was founded on the resembling and not on the differing properties of those several cases.

Paley probably refers, not to the discovery of the rule, but to the application of it to the case awaiting solution. That case may in some points resemble the hypothetical or abstract case which is the subject of the rule proposed to be applied. It may in other points resemble a hypothetical case which forms the subject of a different rule. These are certainly competing analogies. But they are not peculiar to judiciary law, and occur where law of any kind is to be applied.

[Probably what Sir S. Romilly refers to, is a very different process of applying judiciary law, not unfrequently resorted to, and which one is sometimes in practice compelled to resort to, in despair of discovering the *ratio decidendi* of the cases. Instead of first inferring the rule of law and then applying it, we compare the circumstances of the case awaiting solution with those which existed in one or more cases which have been already decided; and having ascertained which case it most resembles, assume that the decision will be similar. This is a method not so much of judging, as of *guessing* what the decision of a judge or of a Court of Appeal is likely to be. The method (if it may be called one), although a blind guide, sometimes answers in the dark as well as another. The student is, however, recommended to endeavour, if possible, to discover

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\* Edin. Rev. vol. xxix. p. 224.

**the principle** of the decisions relied on before attempting to apply them.—R. C.]

As being connected with the subject which I am now considering, I will advert to a foolish remark of Sir William Blackstone concerning the judicial decretes of the Roman Emperors.

He tells us that these decretes, ‘contrary to all true forms of reasoning, argue from particulars to generals.’\*

The truth is, that an imperial decree of the kind to which Blackstone alludes, is a judicial decision establishing a new principle. Consequently, the application of the new principle to the case wherein it is established, is not the decision of a general by a particular, but the decision of a particular by a general. If he had said that the principle applied is a new principle, and, therefore, an *ex post facto* law with reference to that case, he would say truly. But the same objection (it is quite manifest) applies to our own precedents.

What hindered him from seeing this, was the childish fiction employed by our judges, that judiciary or common law is not made by them, but is a miraculous something made by nobody, existing, I suppose, from eternity, and merely *declared* from time to time by the judges. This being the case, of course there can be no *ex post facto* legislation in the English judiciary law.

The natural or customary order in which the law of any country arises, or is founded, seems to be this:

1st. Rules of positive morality.

2ndly. The adoption and enforcement of these rules by the tribunals.

3rdly. The addition of other rules drawn from the former by consequence or analogy.

4thly. The introduction of new rules by the judges *proprio arbitrio*; and illations from these.

5thly. Legislation proper, by the sovereign legislature, in the same order.

6thly. The action and reaction of judicial legislation and legislation proper.

7thly and lastly: A Code.

The conception of a code, or systematic and complete body of statute law, intended to supersede all other law whatever, does not seem to belong to any age less civilized than our own. It is essentially a modern thought.†

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Blackstone's  
remark con-  
cerning the  
decretes of  
the Roman  
Emperors.

The order in  
which law is  
naturally  
generated.

\* Vol. i. p. 59.

† Anciently, all collections of laws (or legal rules) promulgated by the legislature, were called *Codes*. The modern idea of a Code—a complete and exclusive body of law—did not arise till after the middle of the last century. First examples of such *Codes*: in Prussia, 1747; Austria, 1753; Russia 1767; France, 1793; Italy, 1866.

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It does indeed appear from the Pandects, that Justinian intended them and the Code to be the only law thereafter to obtain in the Roman Empire ; but we can only marvel at the conceit. For those compilations were no sooner promulgated, than he was obliged to set about a new edition and to add to them a body of Novels as big as themselves.

This, however, is the only example occurring, as far as I am aware, in ancient times, which can be considered as an approach to the conception of a Code. Cæsar's idea does not seem to have gone beyond a compilation of the *leges* of the *populus* and *plebs*; a digest of the then existing statute law.

The conceptions entertained of a Code in modern times have generally been as indistinct as Justinian's. And this is the chief cause of the imperfections of all recent attempts at codification, and the cause by reason of which the codifiers have left to be covered by judiciary law the wilderness which they knew not how to deal with.

## LECTURE XXXVIII.

*Groundless Objections to Judicial Legislation.*Lect.  
XXXVIII.

HAVING touched upon a few of the numerous differences which distinguish *statute* from *judiciary law*, I pass to the advantages and disadvantages of judicial or improper legislation, and the possibility of excluding that prevalent mode of legislation, by means of *codes*, or *systems of statute law*.

I will first consider some groundless objections which are made to judiciary law. I then will remark on some of the evils with which it really is pregnant. I shall then proceed to the question of *codification*.

It seems to be denied by Bentham, that judiciary law is properly law. He says it consists, at the most, of *quasi-commandments*.

This objection I have already partly answered. It suggests, however, in this place the following remark.

It appears to me that judiciary law, whether made by the sovereign or by subordinate judges, quadrates with Bentham's own definition of a genuine but tacit command, as given in a note to his 'Fragment on Government.' Where it is perfectly well known to be the will of the sovereign that the principles or grounds of judicial decisions should be observed by the subjects, as rules of conduct to

Bentham's  
objection to  
judiciary law,  
that it is not  
law.

be enforced by sanctions, the intimation of the sovereign will is as complete as in any other case.

LECT.  
XXXVIII.

Another objection to judicial legislation which is often insisted upon, (and which is urged by Sir Samuel Romilly, in the article already referred to,) is also (I think) founded in mistake. It is objected to judicial legislation, that where subordinate judges have the power of making laws, the community has little or no control over those who make the laws by which its conduct must be governed.

A second  
groundless  
objection to  
judiciary law.  
Irresponsibility of its  
framers.

Now this objection, it is manifest, is not an objection to judiciary law, but to law proceeding from authors (judicial or not) who are not sufficiently responsible to the bulk or mass of the community.

The objection, as aimed particularly at English judiciary law, would apply to *statute law*, made by the English judges after the manner of the Roman Praetors.

It would indeed apply to such statute law in a less degree. For a legislator going to work in the way of judicial legislation, has more opportunities of covering a sinister intent, than a legislator who sets a rule directly and professedly. A statute law being expressed in an abstract or general form, its scope or purpose is commonly manifest; and if its purpose is pernicious, its author cannot escape from general censure. But a law made judicially being implicated with a peculiar case, and its purpose not being expressed in any determinate shape, its author can, with comparative ease, disavow any purpose which has excited hostile criticism.

It is a remark of Kant, that the expression *in abstract and general terms* of a given maxim or principle, affords a proof, (or a presumption,) that the maxim or principle, as a maxim or principle, is consonant to truth and reason. 'Der allgemeine Ausdruck einer Maxime zum Beweise dient, sie sey als Maxime vernünftig.' It certainly affords a proof, (or a presumption,) that, in the opinion of the party who so expresses the maxim, the maxim is consonant to reason, and may be laid open and bare to the examination of others.

A third  
groundless  
objection to  
judiciary law.  
That judges  
legislate  
arbitrarily.

Another current objection to judiciary law supposes that judicial legislators legislate arbitrarily: that the body of the law by which the community is governed, is, therefore, varying and uncertain: and that the body of the law for the time being, is, therefore, incoherent.

Now this may be true, to some extent, of *supreme* judicial legislation, for the Sovereign in the character of judge, (like the Sovereign in the character of legislator,) is controlled by nothing but the opinions or sentiments of the community. But in respect of supreme legislation, the objection is equally applicable to statute law.

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To judiciary law made by subordinate judges (which, in almost every community, forms the greater portion of judiciary law), the objection in question will hardly apply at all. For the *arbitrium* of subordinate judges (like that of the sovereign legislature) is controlled by public opinion. It is controlled, moreover, by the sovereign legislature: under whose inspection their decisions are made: by whose authority their decisions may be reversed: and by whom their misconduct may be punished. It is controlled particularly by courts of appeal: by whose judgments their decisions may be reversed: and who may point them out to general disapprobation.

And (admitting that the objection will apply to that judiciary law which is made directly by subordinate judges) it also will apply, with a few modifications, to all statute law which is established by subordinate authors.

Another and very important influence controlling the *arbitrium* of judges, in legislating whether directly or indirectly, is the influence of private lawyers, with the authority which is naturally acquired by their professional opinions and practices. The supervision and censure of the bar, and of other practitioners of the law, prevent deviations from existing law, unless they be consonant to the interests of the community, or, at least, to the interests of the craft. And though the interests of the craft are not unfrequently opposed to the interests of the community, the two sets of interests do, in the main, chime.

The judiciary law made by the tribunals, is, in effect, the joint product of the most experienced and most skilful part of the legal profession. In the somewhat disrespectful language of Bentham, it is not the product of Judge only, but it is the joint product of Judge and Co. So great is the influence of this professional opinion, that it frequently forces upon the Courts the adoption of a rule of law, by a sort of moral necessity. When the anticipation of lawyers as to what the Courts would probably decide if the case came before them, has been often acted upon, so many interests are adjusted to it, that the Courts are compelled to make it law. A rule, for instance, established by the practice of conveyancers being constantly acted upon, and engaging a vast variety of incidents in its favour, performs the functions of a law, and will probably become law as the particular cases arise.

The way in which law is made by private lawyers, is well described in the Digests, by an excerpt from *Pomponius*. ‘*Constare non potest jus, nisi sit aliquis juris peritus, per quem possit quotidie in melius produci.*’ This is almost inevitably the growth of law. The laity (or non-lawyer part of the community) are competent to conceive the

more general rules: but none but lawyers (or those whose minds are constantly occupied with the rules) can produce (or evolve) those numerous consequences which the rules imply, or can give to the rules themselves the requisite precision.

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Savigny describes modern law as composed of two elements, the one element being a part of the national life itself, and the other element being the product of the lawyers' craft. The first he names the *political*, and the last the *technical* element.

Independently of the external checks above mentioned, there are causes which naturally determine judges to abide by old rules, or to form new ones by analogy to the old: namely, 1st; A regard for the interests and expectations which have grown up under established rules: 2ndly; A perception of consequence and analogy which determines the understanding, independently of any other consideration.

The truth is, that too great a respect for established rules, and too great a regard for consequence and analogy, has generally been shown by the authors of judiciary law. Where the introduction of a new rule would interfere with interests and expectations which have grown out of established ones, it is clearly incumbent on the Judge *stare decisis*; since it is not in his power to indemnify the injured parties. But it is much to be regretted that Judges of capacity, experience and weight, have not seized every opportunity of introducing a new and beneficial rule wherever its introduction would have no such effect. This reproach may be made against Lord Eldon.

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## LECTURE XXXIX. (PART I.)

### *Disadvantages of Judicial Legislation.*

In my last discourse, I directed attention to a few of the numerous differences which distinguish *statute* law from *judiciary* law, and I examined certain objections to judiciary law, which, in my opinion, are founded in misapprehension. I now shall state a few of the numerous evils which judiciary law really produces.

LECT.  
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Tenable ob-  
jections to  
judiciary law

Although, as I showed in my last Lecture, judiciary law has more of stability and coherence than might at first sight be imagined; every system of judiciary law has all the evils of a system which is really vague and inconsistent. For it is to the bulk of the community absolutely unknown and unknowable. And even to the mass of lawyers it is imperfectly known and liable to be misconceived. This arises

First tenable  
objection to  
judiciary law  
Difficult to  
ascertain.

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from the *concrete* form in which the law is expressed ; every rule being implicated with the peculiarities of the case or cases by the decision or decisions wherever the law was established. And it arises in two ways ; namely, by reason of the enormous bulk of the documents in which the law must be sought, and by reason of the difficulty of extracting the law (supposing the decisions known and collected for the immediate purpose) from the particular decided cases in which it lies imbedded.

This enormous bulk of judiciary law is an obvious consequence of its form, and needs no comment.

The difficulty of extracting the law from the particular decisions becomes apparent if we advert to the process, which I described in a previous Lecture, of ascertaining the *ratio decidendi*, which really constitutes the rule. To arrive at the *ratio decidendi* of any decision we must look at the whole case which it was the business of the judge to decide, and to the whole of the discourse by which he signified his decision ; and thence find the *ratio decidendi* by a combined process of inference (or induction) and abstraction. The reasons of the decision are compared with the facts of the case ; thence a *ratio decidendi* is inferred, and the process is completed by abstracting the principle or *ratio decidendi* from the peculiarities and details of the case with which it was implicated—making use of all the decisions (if more than one) to eliminate the specialties of fact and elicit the general principle. The process is often a delicate and difficult one, its difficulty being proportioned to the number and the intricacy of the cases from which the rule is to be taken.

Now by reason of its bulk as well as the difficulty of interpretation above mentioned, a system of judiciary law (as every candid man will readily admit) is nearly unknown to the general community, although they are bound to adjust their conduct to the rules or principles of which it consists. And by the great body of the legal profession (when engaged in advising those who resort to them for counsel), the law (generally speaking) is divined rather than ascertained. Whoever has seen opinions even of celebrated lawyers, must know that they are often worded with a discreet and studied ambiguity, which, whilst it saves the credit of the uncertain and perplexed adviser, thickens the doubts of the party who is seeking instruction and guidance. As to the bulk of the community—the simple-minded laity (to whom, by reason of their simplicity, the law is so benign)—they might as well be subject to the mere *arbitrium* of the tribunals, as to a system of law made by judicial decisions. A few of its rules or principles are extremely simple, and are also exemplified practically in the ordinary course of affairs. Such, for example, are the rules

which relate to certain crimes, and to contracts of frequent occurrence. And of these rules or principles, the bulk of the community have some notion. But those portions of the law which are somewhat complex, and are not daily and hourly exemplified in practice, are by the mass of the community unknown and unknowable. Of those, for example, who marry, or of those who purchase land, not one in a hundred (I will venture to affirm) has a distinct notion of the consequences which the law annexes to the transaction.

Lxxv.  
XXXIX.

I am far from thinking, that the law ever can be so condensed and simplified, that any considerable portion of the community may know the whole or much of it.

But I think that it may be so condensed and simplified that *lawyers* may know it: and that, at a moderate expense, the rest of the community may learn from lawyers beforehand the legal effect of transactions in which they are about to engage.

The evil upon which I am insisting is certainly not *peculiar* to judiciary law. Statute law badly expressed, and made bit by bit, may be just as bulky and just as inaccessible as law of the opposite kind. But there is this essential difference between the kinds of law. The evil is inherent in judiciary law, although it be as well constructed as judiciary law can be. But statute law (though it often is bulky and obscure) *may be* compact and perspicuous, if constructed with care and skill. There is in this respect an essential difference between statute and judiciary law.

It must further be recollected, that whether performed by judges applying the rule to subsequent cases, or by private persons in the course of extra-judicial business, the delicate and difficult process of induction and abstraction from decisions selected out of the enormous mass is commonly performed in haste. Insomuch that the persons trying to ascertain the rule and apply it, must often mistake its import if they do not in their hasty search miss the particular decision containing the rule sought for.

And this naturally conducts me to a *second* objection: namely, that judiciary law (generally speaking) is not only applied in haste, but is also *made* in haste. It is made (generally speaking) in the hurry of judicial business, and not with the mature deliberation which legislation requires.

A second  
tenable  
objection to  
judiciary law.  
Made in  
haste.

This objection does not necessarily apply to all judiciary law; for when made on appeal, after solemn argument and deliberation, it may be made with as much care and foresight, perhaps, as any statute law. This was the case with many of the decretes of the Roman emperors, as the supreme judicatory of the empire, which were drawn up by the *Præfectus prætorii*, commonly the most eminent lawyer in

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the empire, or by the eminent jurisconsults whom he consulted. This is the case to some extent with the Courts of ultimate Appeal in this country, particularly where, as hitherto has been the practice in the Judicial Committee of the Privy Council, the judgment is settled in writing as the joint judgment of the Court, so that its effect is not weakened by the doubts and dissents of individual judges.

*A third tenable objection to judiciary law. It is ex post facto.* Thirdly : In relation to the decided case by which the rule is introduced, a rule of judiciary law is always (strictly speaking) and often in its practical effect an *ex post facto* law.

It is not *always* so in practical effect ; for as I observed in my last Lecture, the decisions of the Courts are often anticipated by private practitioners. And the law thus anticipated, though not strictly law, performs the functions of actual law, and generally becomes such ultimately. Though not forewarned by the legislature, the parties are in effect forewarned by the opinion or practice of those whose opinions and practices the tribunals commonly follow.

The limitation, however, immediately above suggested is insignificant : and (speaking generally) a rule of judiciary law, with reference to the case to which it is first applied, is not only strictly an *ex post facto* law, but has all the mischievous consequences of *ex post facto* legislation.

*A fourth tenable objection to judiciary law. No certain test of its validity.* Fourthly : I am not aware that there is any *test* by which the validity of a rule made judicially can be ascertained.

Is it the *number* of decisions in which a rule has been followed, that makes it law binding on future judges ? Or is it the *elegantia* of the rule (to borrow the language of the Roman lawyers), or its consistency and harmony with the bulk of the legal system ? Or is it the *reputation* of the judge or judges by whom the case or cases introducing the rule were decided ?

In fine, we can never be absolutely certain (so far as I know) that any judiciary law is good or valid law, and will certainly be followed by future judges in cases resembling the cases by which it has been introduced.

Here then is a cause of uncertainty which seems to be of the essence of judiciary law. For I am not aware of any contrivance by which the inconvenience could be obviated.

It is manifestly *not* of the essence of *statute* law. For assuming that statute law is well constructed, and is also approved of by the bulk of the community, it is absolutely certain until it is repealed.

If, indeed, it be obscure, or generally disliked, it is not more certain than judiciary law. If it be obscure, it is not knowable. And if it be generally disliked, although it be perfectly perspicuous, it probably will be abrogated by the tribunals at the instance of public opinion. A curious case

of this has been mentioned to me by Colonel Murat,\* son of the late King of Naples, who, curiously enough, has practised as an English barrister in the Floridas, and seems to have a very pretty knowledge of English law. He says that the Acts of the legislatures of those American States in which he has resided, are habitually overruled by the judges and the bar. At the beginning of every term they meet and settle what of the Acts of the preceding session of the legislature they will abide by; and such is the general conviction of the incapacity of the State legislature, and of the comparative capacity and the experience of the judges and the bar, that the public habitually acquiesce in this proceeding. Accordingly, if a law, which the profession have agreed not to obey, is cited in judicial proceedings, it is absolutely rejected and put down by the lawyers *sans cérémonie*. In such a case as this it is evident that the statute law is not certainly law, unless it chime in with the opinion of the judges and of the bar.

An objection is sometimes made to judiciary law, which is founded on an accident rather than inherent in its nature: that it is not attested by authoritative documents, but resides in the memory of the judges, or is attested by the disputable records of private reporters.

An evil not  
inherent in  
judiciary law.

In some of the smaller States of Germany, the decisions of the Courts are not recorded and circulated among the public, even by private reporters, in consequence of the smallness of the State, and the small quantity of business, which is not sufficient to pay a reporter. In these States the law must be utterly unknown! According to Thibaut,† it in fact is unknown even to the lawyers. There is an approximation to this in certain cases in our own country: in local Courts, for instance, such as that of the Duchy of Lancaster. The peculiar law administered by these Courts dwells

\* It may not be impertinent to say, that the 'Murat' here alluded to is Achille Murat, the eldest son of the somewhat King of Naples. After the fall of Bonaparte he settled in America, where he married a grandniece of Washington and became a practising advocate at the American bar. In 1831 he and his wife resided for some time in England and frequently visited us. The conversation between Mr. Austin and M. Murat almost always turned on law. It was strange to hear the technical language of English law familiarly used by a man whose features reminded one at every moment of his origin, and of the widely different destiny which had seemed to await him. M. Murat afterwards wrote a book in which the institution of slavery was represented as indispensable to the highest forms of civilization. He died some years ago.—S. A.

† 'Ueber die Nothwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland' (in the 'Civilistische Abhandlungen,' and also printed separately, Heidelberg, 4th edit.). This is the book to which Savigny's 'Vom Beruf, etc.' was an answer.

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entirely in the memory of the registrar; that is, it exists somewhere, but is entirely what he chooses to make it in the particular case. And every one who frequents our Courts must have seen that occasionally, when the judge is at a standstill, he stoops down and whispers to the registrar of the Court, in whose *Bewusstseyn*, or consciousness, that portion of the law of the Court does really reside. All this, however, is not inherent to judiciary law. It is clear that there *might* be an authentic publication and record of judiciary law. Neither is the objection peculiar to judiciary law. Statute law is not *necessarily* written or *necessarily* published or recorded in an authentic form.

A fifth tenable objection to judiciary law. The rules are not comprehensive.

Fifthly: In consequence of the implication of the *ratio decidendi* with the peculiarities of the decided case, the *ratio* or rule is never or rarely comprehensive. It is almost necessarily confined to such future cases as closely resemble the case actually decided: although other cases, more remotely resembling, may need the care of the legislator.

And this inconvenience (for a reason which I have noticed above) is probably of the essence of judiciary law. So delicate and difficult is the task of legislation, that any comprehensive rule, made in haste, and under a pressure of business, would probably be ill adapted to meet the contemplated purpose. The most experienced, and the most learned and able of our judges, have commonly abstained the most scrupulously from throwing out general propositions not necessarily called for by the case to be decided; and conversely when a decision is expressed to be based on a principle laid down more broadly than the facts required, it is often found necessary in subsequent decisions to narrow the rule apparently laid down by the first decision. This is commonly done by distinguishing the species of facts in the new case from those which called for the decision in the first case.

A sixth tenable objection to judiciary law. The co-existent statute law is bulky and unsystematic.

Sixthly: wherever much of the law is judiciary law, the statute law which coexists with it, is imperfect, unsystematic, and bulky. The statute law is not of itself an edifice, but is merely a set of irregular or unsystematic patches stuck from time to time upon the edifice reared by judges.

It is true that a body of statute law (though it be not stuck patchwise on a groundwork of judiciary law) may be irregular and bulky; and this is actually the case with that portion of the Prussian Law made from time to time by the Prussian Law Commission for the purpose of amending the Code. But this arises mainly from the original bad construction of the Code, and the neglect of the Government in not remodelling the Code from time to time and inserting the amendments which have been found expedient.

And there is this essential difference between a complete

body of statute law, and a body of statute law stuck patch-wise on a groundwork of judiciary law. The latter *must* be irregular; *must* be bulky; and therefore *must* be difficult of access. The latter *may* be systematic; *may* be compact; and therefore *may* be (in the language of Mr. Bentham) *cognoscible*. It would be so if a code were originally well constructed and from time to time systematically amended.

Wherever, therefore, much of the law consists of judiciary law, the entire legal system, or the entire *corpus juris*, is necessarily a monstrous chaos: partly consisting of judiciary law, introduced bit by bit, and imbedded in a measureless heap of particular judicial decisions, and partly of legislative law stuck by patches on the judiciary law, and imbedded in a measureless heap of occasional and supplemental statutes.

## LECTURE XXXIX. (PART II.)

*The question of Codification discussed.*

THE question of codification may be considered in the abstract or in the concrete.

By the question of codification considered in the abstract I mean the question whether a *good* and complete code is better than a body of law (supposing it to be well expressed in its way) consisting in whole or in part of judiciary law. By the question of codification, considered in the concrete, I mean the question whether, having regard to the circumstances of a given community, it is expedient to attempt the reduction of the law to a code.

In the first place I shall confine myself to the question in the abstract. I shall then make a few and brief remarks, —not discussing codification in the concrete, for that would involve a number of particular considerations which do not fall within my design, but—upon the nature of the considerations on which the discussion of that question ought to turn.

And first in the abstract:—

That codification is practicable appears as follows.

It is possible to extract from particular decisions, *rationes decidendi*. Else judiciary law would not be law at all, but a mere heap of decisions depending, so far as not resting on statute, on the mere *arbitrium* of the judge. These *rationes decidendi*, if stated in the abstract (and illustrated by typical instances), would be clearer than when lying in the concrete implicated with the circumstances of the

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particular cases. They would also be more general, abstract, and adequate. For they would be so expressed as to apply to all cases of the species, and not limited to the cases (with their accidents) by which the *ratiōnes* (or rules) were established. The induction (previous to the application) of the *ratio decidendi* of a decided case, is codification *pro tanto* of judiciary law. The process is undoubtedly difficult, and great harm is done to the cause of codification by representing it as easy. But if judiciary law is law at all, it is possible to codify it.

That codification of statute law is practicable will not admit of a doubt. If it is practicable to establish general rules (in an abstract form) one by one and without system, it is practicable to establish a system of such rules. This is done *pro tanto* when the statute law on a particular subject is consolidated. A consolidating statute in effect very commonly answers to one of the Special Codes desired by Bentham. It is a code of a certain department of the Law of Persons.

That codification (considered in the abstract) is expedient is in my opinion amply demonstrated by a mere statement of the evils inherent in judiciary law.

I have in the first part of this Lecture enumerated the principal evils inherent in a body of judiciary law, or in a body composed of judiciary law and statutes supplementary to it. There remains nothing *pertinent* to be said about the question of codification in the abstract. But it remains to strip the question of certain *impertinent* arguments which have been adduced by the advocates on the two sides of the so-called question.

Before I advert to those arguments, I would briefly interpose the following remarks:—

In speaking of the advantages and disadvantages of statute and judiciary law I advert to the form and not to the matter. It is clear that these considerations are completely distinct. Judiciary law of which the purposes are beneficent, may produce all the evils on which I have insisted. Statute law, well arranged and expressed, may aim at pernicious ends.

In like manner, codification does not involve any innovation on the *matter* of the existing law. To imagine the contrary is a mistake often made by the opponents of codification. They often suppose codification to mean an entire change of all the law obtaining in the country.

First leading  
objection to  
codification.

The first and most current objection to codification, is the necessary incompleteness of a code. It is said that the individual cases which may arise in fact or practice, are

infinite; and that, therefore, they cannot be anticipated, and provided for, by a body of general rules.

My answer to this objection is, that it is equally applicable to all law: and that it implies in the partisans of judiciary law (who are pleased to insist upon it), a profound ignorance, or a complete forgetfulness, of the nature of the law which is established by judicial decisions.

For either judiciary law consists of *rules*, or it is merely a heap of particular decisions inapplicable to the solution of future cases. On the last supposition it is not law at all. On the first supposition it is clearly impossible that the rules, being finite in their number and scope, can provide for the infinite variety of possible cases that may arise in practice.

Yet this objection is insisted on by many of the redactors of the French Code, whom one might almost suppose to be enemies of codification, and desirous to defeat the purpose of the code which they were appointed to make. In the 'Conférences du Code Napoléon,' a work containing a report of the discussions in the Council of State upon the original project of the code, Portalis says that a code can provide only very imperfectly for the variety of cases which arise, and that much must be left to *le bon sens* and *l'équité*. Now if *le bon sens* and *l'équité*, that is, the *arbitrium* of the judge, are to decide, I cannot see the use of all the pother about legislation. So far as the judge's *arbitrium* extends, there is no law at all.

Hugo's objection\* is, that if a body of law affected to provide for every possible question, its provisions would be so numerous that no judge could know them all: and as to the cases which it left undecided (which would necessarily be numerous) the conflicting analogies presented by those cases would be in exact proportion to the number and minuteness of its provisions.

Second :-  
Hugo's objec-  
tion. A Code  
liable to  
engender  
'competing  
analogies.'  
See p. 230,  
*supra*.

The objection proceeds on the mistake of supposing that a code must provide for every possible concrete case.

To the first part of the objection it may be answered that either the future case must be provided for by a law or it must be left to the mere *arbitrium* of the judge. And you do not obviate the incompleteness inherent in statute law by *making no law*.

The second part of the objection is founded on the supposition that the provisions of a code are more minute and numerous than the rules embraced by a system of judiciary law: and it is supposed that therefore the rules are more likely to conflict.

Now it seems to me that this is the reverse of the truth.

\* Cited by Savigny (*Vom Beruf*, etc. p. 24).

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As I have shown above, a rule made by judicial decision is almost necessarily narrow: whilst statute laws *may* be made comprehensively, and may embrace a whole genus of cases, instead of embracing only one of the species which it contains.

And which, I ask, is the most likely to abound in 'competing analogies': A system of rules formed together, and made on a comprehensive survey of the whole field of law? or a *congeries* of decisions made one at a time, and in the hurry of judicial business?

I admit that no code can be complete or perfect. But it may be less incomplete than judge-made law, and (if well constructed) free from the great defects which I have pointed out in the latter. It may be brief, compact, systematic, and therefore knowable as far as it goes. And many devices may be hit upon, which have never yet been thought of, or which have been neglected, for removing the defects incident to codes.\*

A third objection to codification is founded on the alleged ill success of the so-called codes which have been compiled in France, Prussia, and other countries, by order of the government, and established as law by its authority. I now proceed to consider this objection, and in doing so I shall have occasion to advert to a treatise by Savigny on the subject of codes (*Vom Beruf unserer Zeit fur Gesetzgebung und Rechtswissenschaft*. Heidelberg, 1814). I reserve for the concluding part of this Lecture a special examination of that specious but hollow treatise.

It must be admitted that the codes of France and Prussia, to which at present I confine my remarks, have not accomplished the primary ends of a code in the modern sense of the term, that is, a complete body of law intended to supersede all the other law obtaining in the country.

In France, the code is buried under a heap of subsequent enactments of the legislature, and of judiciary law subsequently introduced by the tribunals. In Prussia, the mass of new laws and authoritative interpretations which have been introduced subsequently to the promulgation of the code, is many times the size of the code itself.

Now the ill success of particular codes, admitting their failure to be as complete as is affirmed, would prove nothing against codification. Those who would make it tell as an objection to codes in general, must show that the particular

These codes  
have failed,  
not as codes,  
but by reason  
of their

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\* Amongst such devices may be instanced the method adopted in the instalments of a code for India which were published under the authority of Her Majesty's Commissioners; a method, combining concise statement of principles with illustration by practical examples. A similar method has been followed by Mr. Stephen in his admirable piece of work:—'The Indian Evidence Act, 1872.'—R. C.

codes in question have failed as being codes, or by virtue of the qualities belonging to them as codes, not by defects peculiar to the codes in question. Accidental and avoidable causes have rendered the French and Prussian codes unsuccessful to a considerable extent; though, after all, the failure of these codes has been much exaggerated.

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faulty con-  
struction

I shall briefly advert to these causes, and in doing so I shall mainly confine my observations to the French code, because its failure is the most remarkable, and because it is the best known, or the only one which is known, to English lawyers. Some of its faults are mentioned by Savigny; others, which are more important, he has not mentioned.

The first glaring deficiency of the French code is the total want of definitions of its technical terms, and explanations of the leading principles and distinctions upon which it is founded. This grievous defect Savigny has not mentioned. Without definitions of the technical terms and explanations of the leading principles and distinctions, the particular provisions of the code must be defective and incoherent, and its language dubious. For unless these leading principles are habitually present to the minds of the authors, how are they to thread with certainty the labyrinth of the details? And unless the leading principles and distinctions are defined, how are those leading principles and distinctions to be constantly present to the minds of the codifiers in a definite shape? Again, unless both sets of definitions are contained in the code itself, the judges and all other persons who have occasion to apply it, must be perpetually at a loss for the meaning. Unless, therefore, the code contains a statement of leading principles as well as details, the code itself does not furnish the necessary guides to its own meaning; if those guides exist at all, they exist *en dehors* of the code.

First defect  
in the French  
code: it is  
totally  
devoid of  
definitions  
of the tech-  
nical terms,  
and explana-  
tions of the  
leading prin-  
ciples of the  
French law.

Now, of the necessity of explanations of the leading principles and distinctions, and of defining the technical terms, the compilers of the French code had no idea. The principles and distinctions they tacitly borrowed from the ancient law, and clothed them in the technical terms of the same law, without any attempt to determine the meaning of those terms, but tacitly assuming them to be known and certain.

And not only did they abandon definition to be supplied by the old sources of law, but in the details of the code they display a monstrous ignorance of the principles and distinctions of the Roman law which they tacitly assumed. To give a flagrant instance;—Without a distinct conception of the distinction between *dominia* and *obligationes* (as the terms are used by the Classical Jurists, meaning the distinction which I have marked by the expressions *jura in rem* and *jura in personam*), no clear conception can be formed of the general

Monstrous  
ignorance of  
the authors  
of the French  
code with  
regard to the  
Roman Law.

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structure of the Roman law, or indeed of what must necessarily be the structure of any system of law. Now, as Savigny remarks, the authors of the French code never conceived this distinction clearly, and the consequent darkness, confusion, and incoherency introduced into the code are incredible. Among other blunders into which the want of that conception has led the authors is the following. Having adopted the two-fold error which I mentioned in a former Lecture (p. 183) about *titulus* and *modus acquirendi*, and involving it with a looseness of expression of their own, they apply to the right of property ('la propriété') the exquisitely absurd expression that it is acquired and transferred (amongst other words) 'par l'effet des obligations,' (Art. 711). What is really meant is simply that in certain cases, namely in sales of immoveables, the same transaction wears the double aspect of a convention or agreement and a conveyance. But that these servile copiers of the compilations of Justinian should use the word 'obligation' (which in the sense of the Roman lawyers is always contrasted with and excludes 'dominium') as that which imparts the *dominium*, betrays an entire ignorance of the meaning of those writers whose language they blindly adopted. In this point the ignorance of these compilers is unpardonable, because a mistake of the same kind had already been committed in the Prussian code. By the authority of the Chancellor Von Kramer, overruling Suarez (the man of real capacity among the framers of the Prussian code) the head of *contracts* had been stuck into *dominium*, under the erroneous notion that every acquisition of property is preceded by a *modus acquirendi*: that is, *obligationes* had been stuffed into the opposite department of *dominium* or property. This blunder had been so much commented upon by German writers, that the compilers of the French code ought to have been thoroughly acquainted with the merits of the controversy. But, knowing nothing about the matter, instead of avoiding the mistake, they have only thickened the confusion.

On the  
Prussian  
code.

The Prussian code has also the vice of being devoid of definitions. Being based on the Roman law, it refers throughout to the principles and distinctions of the Roman law, and borrows the technical language of that system, without the requisite explanation of the import of that language. A knowledge of the Roman law, and of the other systems of law previously obtaining in Germany, is still a necessary preliminary to a study of the code. The code has not superseded completely the old subsidiary or common law which it was intended to supplant.

It is remarkable that the authors of Justinian's compilations, in spite of their general incompetence, had some notion of the necessity of explaining in the code itself,

its leading principles and distinctions, and defining its technical terms. The last title but one of the Pandects, *de verborum significatione*, is an attempt, though executed very imperfectly, to define certain leading terms. The last title (*de diversis regulis juris*) is an attempt to collect some of the legal rules which run through the whole law. Another means taken to render reference to the previous law unnecessary was the insertion in the Pandects, and in various places in the Code, of much historical matter; and this, having been unskillfully inserted, has often been confounded by modern commentators with the imperative part of the law.

It may be said that it is impossible to give, in the code itself, explanations of the leading principles and distinctions, and definitions of the technical terms. My answer is, that though undoubtedly difficult, it is not impossible. The principles and distinctions must exist somewhere, and the terms must have a determinate meaning, which it must be possible to find; and though the principles and distinctions and the meanings of the terms may be imbedded in much other matter, they *may* be extracted and put into an abstract shape.

Another defect of the French Code is pointed out by Savigny. It appears from the *Conférences* or discussions in the Council of State upon the project of the Code, that it was not the design of the compilers to make it a code in the modern sense of the term, that is, a complete body of statute law. In those discussions, they refer perpetually to various *subsilia* with which it is to be eked out. I shall mention some of them. 1. *Équité naturelle, loi naturelle.* 2. The Roman law. 3. The ancient customs. 4. *Usage, exemple, décisions, jurisprudence.* 5. *Droit commun.* 6. *Principes généraux, maximes, doctrine, science.* It thus appears that they intended to leave many of the points which the Code should have embraced to *usage* and *doctrine*: that is, to the tribunals as guided by *usage* and *doctrine*, not by the Code itself. How, then, is it possible for any candid person to argue that when the very authors of the so-called French Code did not intend it to supersede all other law, its not having done so is a proof that what they did not *attempt* cannot be accomplished?

The French Code never expected by its compilers to supersede all other law; but meant to be eked out by various *subsilia*.

And here I may remark that the so-called Prussian Code was not intended by its author, the great Frederic, or by the persons whom he employed to draw it up, as a code in the modern acceptation, that is, a complete body of law. In most of the German States before the introduction of codes, the state of the law was as follows:--they were partly governed by their own local laws, and partly by what was called *Gemeines Recht*, or common law of Germany, consisting in part of the Roman and the Canon law, in part of

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rules of domestic or strictly German growth, which were got at by comparing the different local systems. This common law was resorted to in cases for which the local laws or customs of the different States did not afford a solution. Now the Prussian Code was not intended to codify all the law obtaining in Prussia, but only this subsidiary common law; leaving the codification of the different laws obtaining in particular parts of the Prussian dominions to a future opportunity.

I may also observe that, by virtue of a provision of the Code, *præjudicia* or precedents have no authority. The Courts are expressly forbidden to guide their decisions by the decisions of their predecessors. All doubtful points of law are referred to a Law Commission, who emit a declaratory law on the occasion of every case so submitted to them. The supplementary law which I have already mentioned consists, in consequence, not of decisions on the Code, but of acts of authoritative interpretation, issued immediately by the government. This at least is the theory of the Prussian system. In practice I believe that *præjudicia* or decided cases do influence the decisions of the Courts. For it is certain that reports of decided cases are published regularly at Berlin; and they probably have an indeterminate and unacknowledged influence not unlike that which the decisions of the English Courts are known to have in the United States.

*Extreme haste with which the French Code was drawn up.*

Another and a perfectly sufficient reason for the defects of the French Code is the extreme haste with which it was drawn up. The original *projet* was prepared, in little more than four months, by a commission consisting of Tronchet, Malléville, Portalis, and Bigot-Préameneu; it was then submitted to the Council of State, where it was discussed article by article. But it is obvious that the examination it received in the debates of this numerous body, many of whom were not even lawyers, could have no tendency to correct the vices in the original conception.

Of the profound ignorance of the authors of the Code on the subject of the Roman law, on which the then existing French law was wholly founded, and of which in truth the Code itself is little but a *réchauffée*, Savigny mentions numerous instances. They had indeed a superstitious veneration for the Roman law, but they knew scarcely anything of it: what they knew was derived solely from Justinian's Institutes, and from the various popular *compendia* which for the most part follow the Institutes. And this accounts for many of the defects of their Code. It explains why they passed over many highly important questions of law, namely because these did not fall within the scope of that institutional treatise, or of the many popular expositions founded on it.

As I remarked, no code can be perfect; there should therefore be a perpetual provision for its amendment, on suggestions from the judges who are engaged in applying it, and who are in the best of all situations for observing its defects. By this means the growth of judiciary law explanatory of, and supplementary to, a code, cannot indeed be prevented altogether, but it may be kept within a moderate bulk, by being wrought into the code itself from time to time. In France this has been completely neglected; a fact which would of itself suffice to account for the alleged failure of the Code. An endless quantity of judiciary law has been introduced; acts of the legislature and *ordonnances* of the king issued by authority of the legislature, have been emitted from time to time separately; but there has been no attempt to work them into the body of the Code. So with the Prussian Code. The Novels or new constitutions, and the acts of authentic interpretation emanating from the Law Commission exist in a separate state; there has been no attempt to work them into the Code, or to amend it in pursuance of them.

The accidental defects which I have now mentioned, as well as others which I shall advert to hereafter, and many on which I shall be silent, account for the partial failure of the Prussian and French Codes. After all, the alleged ill success of the French and Prussian Codes is greatly exaggerated. They at least give a compendious, though a defective, view of the old law; they have cleared it of a load of inconsistencies and much reduced its bulk, though they have not superseded it completely. If any Frenchman or German of the requisite knowledge is asked whether the Code, even as it is, be preferable or not to the law in its previous state, he does not hesitate to say that it is greatly preferable, and that the quantity of litigation arising from doubt as to the law is very greatly diminished.

I now proceed to notice the objections which have been particularly urged by Savigny, in his treatise 'Vom Beruf,' etc. (on the Vocation of our Age to Legislation and Jurisprudence). The professed purpose of this work is, as I have already mentioned, to prove the inexpediency, not of codification in general, but of codification for a part of Germany, and especially of a code proposed by Thibaut. So far, therefore, as the work is in keeping with its professed purpose, it does not apply to codification in general or in the abstract, but to codification and to a specific scheme of the codification, at a given place and time. But while pursuing this ostensible purpose, Savigny employs many arguments which either directly or obliquely impugn codification considered generally or in the abstract; and so far as this is the case, his work falls within the scope of my

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No provision  
for amending  
the Prussian  
and French  
codes, and  
for keeping  
down the  
growth of  
judiciary and  
supplemental  
law by work-  
ing them into  
the code  
from time to  
time

Failure of  
the Prussian  
and French  
codes grossly  
exaggerated

Savigny's  
objection to  
codification  
examined.

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present examination. I advert to these arguments on account of the attention which is due to whatever emanates from a man of Savigny's genius and learning, and because if his objections can be answered completely, those of other and inferior persons may safely be dismissed without notice.

Savigny is himself an advocate for a code, even in Germany, to a certain limited extent: he holds a code to be expedient, if it could be confined to the codification of the existing law, without affecting to anticipate future cases. This is in reality an admission almost of the whole question. As to the anticipation of cases which have not actually arisen, nor resemble any which have actually arisen, it is impossible that any code can include them completely; but judiciary law is, as I have shown, in a much worse plight for this purpose than a code.

Savigny himself suggests one of the best arguments for the possibility of codification, by showing that one of its greatest difficulties (namely, unity of conception in the plan and execution) is not insurmountable. In arguing against codification in Germany, he is led to examine the worth of the law now obtaining which a code would supersede. This law is mainly founded on that portion of the Roman law which was made by the writings or opinions of jurisconsults, and which is known in Germany by the distinctive name of Pandect law. Savigny admits and praises the coherency of this law. Although it was made in succession by a series of jurisconsults continuing for more than two centuries, each of these jurisconsults was so completely possessed of the principles of the Roman law, and they were all so completely masters of the same mode of reasoning from and applying those principles, that their successive works have the coherency commonly belonging only to the productions of one master mind. Each was master of the Roman law in its full extent; each had the whole of its principles constantly present to his mind, and could argue down from them and apply them with the greatest certainty. Now, if the production of a succession of jurisconsults filling two centuries, possesses perfect coherency, *a fortiori* it is possible that a body of law may be equally coherent if produced by a number of persons working in concert, provided they be as fully masters of its principles, and as capable of arguing from them and applying them, as the Roman lawyers were. Such a set of persons would be in a much more favourable position for producing a homogeneous and consecutive whole than persons working in a disjointed and unconnected manner.

But in spite of Savigny's admission of the expediency of codification in a limited sense, and his suggestion of a ground for believing it to be practicable, many of his argu-

ments are directly, and still more of them obliquely, aimed at codification in general. I have already adverted to two of these: the impossibility of anticipating all future cases, and the alleged failure of past attempts at codification.

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Another argument is that no determinate leading principles will be followed consistently by the makers of the code, and therefore its provisions must be defective and incoherent. This argument is answered by his own testimony as to the qualities possessed by the Roman jurists. It is applicable only where these are wanting, as was the case with the authors of the French Code.

Again: he asserts that in an age capable of producing a good code, no code could be necessary, the want being supplied by private expositors. Now although good expositions render a code somewhat less necessary, they do not supply the want of it. The exposition may be just as well constructed as the code, but this essential difference will remain. The one is authorised and the judge is bound to abide by it; the other is no expression of the will of the sovereign, and the judge is not obliged to follow it: which makes all the difference between uncertain and certain law.

Savigny affirms, contrary to the fact, that during the times of the classical jurists the want of a code or digest was not felt. This assertion is directly in the teeth of the evidence furnished by Suetonius, Livy, and Tacitus.

Another strange objection made by Savigny to codification is this: That a code makes the defects of the law more obvious, and therefore emboldens knaves. But knaves who know or take good advice upon the pitfalls of the law, have probably a larger field open to them in the uncodified than in a codified state of the law.

Another argument, which none but those who know the Germans can appreciate, is this: that if a code could be made mechanically and without any difficulty at all, this would be a reason for rejecting it.

From the arguments above set forth, it follows that what I have called the question of codification in the concrete—the expediency of codification in a particular society and at any given time—ought to turn upon the following considerations.

Considerations on  
which the  
question of  
codification  
in the  
concrete  
ought  
to be dis-  
cussed.

Such are the evils of judicial legislation, that the expediency of a code (or of a complete or exclusive body of statute law) admits of no doubt; provided that the chaos of judiciary law, and of the statute law stuck patchwise on the judiciary, could be superseded by a *good* code.

Whoever has considered the difficulty of making a good statute, will not think lightly of the difficulty of making a code. To conceive distinctly the general purpose of a

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statute, and the subordinate provisions through which that must be accomplished, and to express both in adequate and unambiguous language, is a task of extreme delicacy and difficulty. It is far easier to conceive justly what would be useful law, than so to construct that same law that it may accomplish the design of the lawgiver. Accordingly, statutes made with great deliberation, and by learned and judicious lawyers, have been expressed so obscurely, or constructed so unaptly, that decisions interpreting or supplementing their provisions, have been of necessity heaped upon them by the Courts of Justice. Such is notably the case with the celebrated Statute of Frauds.\*

It follows that the question of Codification is a question of time and place. Speaking in abstract (or without reference to the circumstances of a given community) there can be no doubt that a complete code is better than a body of judiciary law: or is better than a body of law partly consisting of judiciary law, and partly of statute law stuck patchwise on a body of judiciary.

But taking the question in concrete (or with a view to the expediency of codification in this or that community) a doubt may arise. For here we must contrast the existing law—not with the *beau idéal* of possible codes, but—with that particular code which an attempt to codify would then and there engender. And that particular and practical question (as Herr von Savigny has rightly judged) will turn mainly on the answer that must be given to another: namely, Are there men, then and there, competent to the difficult task of successful codification? of producing a code, which, on the whole, would more than compensate the evil that must necessarily attend the change?

The vast difficulty of successful codification, no rational advocate of codification will deny or doubt. Its impossibility none of its rational opponents will venture to affirm.

Before I quit the subject of codification, I shall remark that one advantage not generally adverted to would flow from it; an improvement in the character of the legal profession. If the law were more simple and scientific, minds of a higher order would enter into the profession, and men in independent circumstances would embrace it, who are

\* 29 Car. II. c. 3. The Bill on which this statute was framed was brought in by Lord Chancellor Nottingham, who claimed the merit of having been its originator; although it received 'some additions and improvements from the judges and Civilians' (Lord Campbell's Lives of the Chancellors, vol. iv. p. 271). Lord Hale is often credited with having had a hand in it, but this is hardly probable; for some time before the date of the Act, he was in failing health and had petitioned for relief from his ordinary duties.—R. C.

now deterred by its disgusting character; for disgusting it really is. What man of literary education and cultivated intellect can bear the absurdity of the books of practice, for example: and many other parts of the law? Nothing but a strong necessity, or a strong determination to get at the *rationale* of law through the crust which covers it, could carry any such person through the labour. But if the law were properly codified, such minds would study it; and we might then look for incomparably better legislation, and a better administration of justice, than now. The profession would not be merely venal and fee-gathering as at present, but, as in ancient Rome, would be the road to honours and political importance. Much, no doubt, of the drudgery of the profession would still be performed by persons aiming only at pecuniary reward, but the morality prevailing in the entire profession would be set, in a great degree, by this high part of it, which would also comprise the practical legislators of the community. This would be a highly important consequence of the simplification of the law: for I am fully convinced that only from enlightened and experienced lawyers is any substantial improvement of the law ever to be hoped for.

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XXXIX.

*Note.*—As the great controversy on the expediency of constructing a Code of Laws for the whole of Germany is frequently alluded to in the foregoing Lecture, and constant reference made to the works of the two great leaders of the conflicting parties, it may not be superfluous to say a few words concerning them.

After the deliverance of the country from the French yoke, the minds of patriotic Germans were anxiously employed in enquiries into the causes of the feeble and divided resistance made by their country, and in projects for strengthening the bonds which might unite the several States into a well-compacted whole.

Among them, was that of which Thibaut was the ardent and eloquent advocate. In his Essay 'On the Necessity of a general Municipal (or National) Law for Germany,' he treats the construction of such a body of law, 'clear, precise, and adapted to the requirements of the time,'—as one of the first conditions of a strong and efficient Confederation.

Thibaut was a Hanoverian by birth, and had studied at Göttingen, Königsberg, and Kiel, at which latter place he took his degree, and was appointed Professor. In 1802 he had a call to Jena, and in 1805 he was invited to assist in the reorganization of the University of Heidelberg.

Thibaut's works are numerous and of high authority. His style is homely and familiar, but has great force and animation. He proposed that a Collegium or Commission should be nominated by the several States, and he maintained that by the co-

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operation of the ablest theoretical jurists (Professors in the different Universities), with practising lawyers, such a Code of Laws as above described, applicable to all Germany, might be constructed.

The most illustrious opponent of this scheme was Savigny, the leader of the so-called Historical School (founded by Hugo and Schlosser); whose great learning and acuteness, combined with a consummate talent for exposition, rendered him a formidable antagonist.

In his youth he had the rare advantage of being able to travel throughout Germany, France, and Italy, in search of unknown or neglected sources of Roman Law, and returned laden with spoils to Marburg, where he had studied, and was now appointed Professor. In 1803, he wrote his Treatise on the Law of Possession. On the creation of the University of Berlin in 1810, Savigny was one of the first teachers appointed. His lectures, especially those on the Institutes, together with the history of the Roman Law and the Pandects, drew crowded audiences, not only by the copiousness and importance of the matter, but by the extraordinary clearness and beauty of the form.

His celebrated work, 'On the Vocation of our Age for Legislation,' is known to the English public through Mr. Hayward's translation.

The discussion on the expediency of Codification was carried on with great asperity; its partisans complained that they were unfairly represented by the leaders of the Historical School, as advocating the introduction (or rather the imposition) of an entirely new body of Laws (which they never contemplated); while their adversaries disclaimed the opinion imputed to them—that Law should have no other source than a historical one.

In one of the Essays contained in the volume which has been frequently quoted, 'On the Influence of Philosophy on the Exposition of Positive Law,' Thibaut concludes with the following discriminating and impartial statement of the claims of the contending parties:—

'Nothing is more to be wished than that the philosophical and the elegant jurists should soon cease to regard themselves as two hostile parties. Each side must abate somewhat of its pretensions, and reciprocally take what is good from the other. Without philosophy there is no complete history; without history, no safe application of philosophy. Both must unite as aids to Interpretation, and must exercise a continual influence on each other. The jurist who aspires after perfection will therefore endeavour to combine profound historical knowledge with philosophical views; for the historical part of Jurisprudence can never be separated by a sharp line from the philosophical. In each are gaps, which can only be filled by the aid of the other.'—S. 4.

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LAW IN RELATION TO ITS PURPOSES  
AND TO THE  
SUBJECTS WITH WHICH IT IS CONVERSANT.

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**LECTURE XL.**

*Law of Things and the Law of Persons or Status.*

FROM law considered with reference to its *sources*, and to the manner in which it begins and ends, I pass to law considered with reference to its *purposes*, and to the *subjects* about which it is conversant.

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The first great distinction of Law considered under this aspect, is the celebrated one into the Law of Persons and the Law of Things; or (as I think it ought to be stated), the Law of Things and the Law of Persons.

This distinction may be stated generally as follows:—

There are certain *rights* and *duties*, with certain *capacities* and *incapacities* to take rights and incur duties, by which *persons*, as subjects of law, are variously determined to certain *classes*. By a *capacity* I mean this:—A person is capable of a given right and of a given duty if on the happening of a given event the law would invest him with that right, or impose on him that duty.

The rights, duties, capacities, or incapacities, which determine a given person to any of these classes, constitute a *condition* or *status* with which the person is invested.

One and the same person may belong to many of the classes, or may occupy, or be invested with, many conditions or *status*. For example, one and the same person, at one and the same time, may be son, husband, father, guardian, advocate, or trader, member of a sovereign number, and minister of that sovereign body.

The rights, duties, capacities, and incapacities, whereof conditions or *status* are respectively constituted or composed, are the appropriate matter of the department of law which commonly is named the *Law of Persons—Jus quod ad Personas pertinet*:—*Jus Personarum—De conditione*

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*hominum.* Less ambiguously, and more significantly, that department of law might be styled the 'Law of Status.' For though the term *persona* in one sense of the word is properly synonymous with *status*, yet in its usual and more commodious signification, it denotes not *status* but *homo*, a man (including woman and child); or it denotes an aggregate or collection of men.

The department, then, of law, which is styled the Law of Persons, is conversant about *status* or conditions; or (expressing the same thing in another form) it is conversant about *persons* (meaning *men*) as bearing or invested with *persons* (meaning *status* or *conditions*).

The department of law which is opposed to the Law of Persons, is commonly named the *Law of Things*: *Jus quod ad Res pertinet*: or the department of law 'De rebus.'

How this department of law came to be called the 'Law of Things' is somewhat obscure; but referring to what has been said in Lecture XII. *supra*, about the various meanings of this flexible word *res*, it seems not impossible to catch the train of ideas. It has been seen that *res* or 'thing' in its widest meaning, embraced the whole matter with which laws are conversant, p. 168 *supra*. Having for convenience singled out a department of law and called it (not without significance), 'Law of Persons,' it seems natural that the authors of those institutional treatises—familiar with the term *res* as wide enough to embrace all the subject matter of law—should call the opposed department the 'Law of Things.' This would be the more easily suggested to their minds from the circumstance that *res* in the narrow and strict sense of the word was already opposed, as has been shown (*supra*, pp. 166, 167), to *persons*.

That such was the general conception of the distinction by the Roman jurists, is manifest from the order adopted in the Institutes. The first book of the Institutes of Justinian, following Gaius, treats of the law relative to *status* or conditions under the name '*de jure personarum*', or '*de condicione hominum*.' The second opens with words to this effect:—

'Having treated of the Persons, let us now treat *de rebus*.' It then proceeds to divide *res* into *corporales* and *incorporales*, and then treats of rights and duties under their various subdivisions.

It would be absurd to suppose that the Law of Persons can peculiarly relate to persons meaning *homines* or human beings; or the Law of Things to *things*, in the proper sense of the term. Many rights and duties treated of in the Law of Persons relate to things properly so called: as, for instance, an estate in land belonging to a married woman: and many rights and duties treated of in the Law

of Things have no regard to *things* proper ; as, for instance, the right arising from an obligation to *forbear* under a *contract*.

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The distinction, therefore, between the Law of Things and the Law of Persons rests upon the notion of *status* or condition. The Law of Persons is that part of the law which relates to *status* or conditions. The Law of Things is *the law—the corpus juris*—minus the law of *status* or conditions. The Law of Persons is the law of *status* or conditions, detached for the sake of convenience from the body of the entire legal system.

The question, therefore, which first arises is this : What constitutes a *status* or condition ?

What constitutes a status or condition.

The rights, duties, capacities, or incapacities, which, as above mentioned, determine a given person to a given class constitute his *status* or condition. His condition is not the source of his distinctive rights and obligations, for these are his condition. The source of these rights and obligations is the fact, event, or incident which invests him with the condition ; that is to say, which gives him the rights and capacities, and subjects him to the duties and incapacities of which the condition is composed. For example, a barrister or an attorney is distinguished from other men, by peculiar obligations which are imposed on him and by peculiar rights which he enjoys. These obligations and these rights are the condition of Barrister or of Attorney. The source or cause of his condition, or of his distinctive obligations and rights, is his Call to the Bar, or his Admission as Attorney.

The notion of *status* or condition (as understood by the Roman Lawyers), has been covered with thick darkness by the vague talk of their successors, and is not entirely free from difficulty and doubt. But I think that the plain account of it, which I have given above, will be found to tally with the truth, or to approach it pretty closely, by those who will take the trouble (trouble too seldom taken) of seeking, inspecting, and collating the original and proper authorities.

See and compare the following places :—*Gaii Comm.* i. §§ 8, 9, 13, 67, 80, 81, 128, 159, 162.—*Inst.* i. 3, § 4.—i. 5, § 3.—i. 16, § 4.—i. 22, § 4.—ii. 11, § 5.—ii. 17, §§ 1, 4, 6.—*Dig.* i. 5 (*De statu hominum*), l. 5, pr. l. 9, 21, 26, *sub fine*.—i. 9 (*De Senatoribus*), l. 10.—iv. 5 (*De capite minutia*), l. 3, § 1, l. 11.

To fix the notion of *STATUS* with perfect exactness, seems to be impossible. For there are certain sets or series of rights and obligations, which would probably be considered by one man as forming or composing *Status*, though another would rather refer them to the *Jus Rerum*—i.e. the Law (or Doctrine) of Rights and Obligations in general, or

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of Rights and Obligations *abstracted or apart from conditions.*

The distinction between *status*, and any other rights, &c., not susceptible of any strict definition.

No generic character common to all conditions; but they bear the following marks:—

1. Condition resides in an individual as belonging to a class.

2. The rights, &c., which constitute the *status* specially regard persons of that class.

3. The class must be such as from its nature cannot include all or nearly all persons.

After the best consideration which I have been able to give to the subject, and after an extensive examination of the opinions of others, I still find no mark by which a *status* or condition can be distinguished from any other collection of rights and duties.

Speaking, however, generally, the rights and duties, capacities and incapacities which constitute *status* or conditions, bear the following marks:—

First: The condition resides in the individual not as being that individual person, but as a member of a class. That is to say, a *privilegium* (in the proper sense of the word) is not a *status*.

Secondly:—(Being a corollary to the above)—The rights, duties, capacities and incapacities composing the *status* or condition, regard or interest *specially* persons of that class. For instance, though the rights of a father in his child regard persons generally, inasmuch as corresponding duties are laid upon everybody, yet those rights specially regard the father as such. It seems indeed obvious that the rights and duties which reside in an individual as a member of a class cannot be such as extend to persons indiscriminately. But this notwithstanding Sir Matthew Hale, followed by Blackstone, places among the Rights of Persons (meaning the Law of Persons) certain rights which they are pleased to style *absolute*, namely, the right to liberty; the right to bodily security; the right to reputation, &c.: rights which reside in *every* person to whom the sovereign or state extends a particle of protection, and which, therefore, pre-eminently belong to the Law of Things or the general law.

Thirdly: The class itself must not be such that it *may* comprise any or nearly any person whatever. The meaning of which I explain as follows:—

*Any* rights and duties, not *singular*, or peculiar to a specific or determinate individual, are properly determined to a *class* of persons. For example, the rights and duties arising from a contract, are determined to the class of *contractors*. The rights and duties arising from a mortgage, are determined to the class of *mortgagors*, and to that of *mortgagees*.

But classes of persons may be divided into two kinds: *first*, classes which might comprise persons of any description, or nearly so; no persons being necessarily excluded, except some classes labouring under a special incapacity which would itself constitute a *status*: *secondly*, classes which can only comprise persons of one given description. For example, whatever be his other characters, any person, unless he labours under a special incapacity as an infant, &c., may be a contractor. The rights and duties, therefore,

which concern contractors may concern almost anybody, and are therefore properly discussed in the department of *general law*—the ‘Law of Things.’

The classes, therefore, to which persons are determined by (or which are coterminous with) *conditions*, are classes which can only comprise a part of the community; as husbands and wives, masters and servants, parents and children; any or all of whom may be promisors or promisees, mortagors or mortgagees, contractors, and so on. The indefiniteness of the notion of *class*, creates the whole difficulty of the case. By taking the word *class* in its widest sense, we might throw the whole body of law into the Law of Persons: but that was not the object of those who have taken the distinction: they wished to separate the rights and duties specially affecting *portions* of the community from rights and duties of more general interest.

Fourthly: The rights, duties, capacities and incapacities constituting a *status* or condition are commonly indefinite in number and kind, and such as to give a conspicuous character to the individual, or to influence extensively his social relations. This mark like the rest is of a vague and indeterminate description. It will not, for instance, exclude from the description of *status* the rights, duties and capacities which constitute a *hereditas*, i.e. which devolve by testament or intestacy upon executor, general devisee, administrator or heir. Nor, indeed, does there exist any mark which would distinguish the *hereditas* from a *status*. But by general consent the rights, &c., constituting the *hereditas* have been treated in the general department of law—the Law of Things. And it is convenient so to treat them.\*

4. The rights, &c., are such as to influence extensively the social relations of the individual.

I now proceed to the *uses* of the distinction between the Law of Things and the Law of Persons.

Uses of the distinction.

The idea of *status* or condition, although not capable of precise definition, is essential or necessary, and must exist

\* To the marks of a *condition* I think it should be added that the notion of *status* is historically connected with the fact that a person has little or no control over the circumstances which determine him to the class, and that still less has his consent any effect upon his rights and obligations when once fixed as a member of the class. That this was literally the case with most conditions with which ‘Ancient Law’ was conversant, is well pointed out by Sir H. Maine in his able and suggestive work under that title. That in modern systems of law this ceases to be a universal mark of *status* is a consequence of the progress described by the same author in the pregnant observation that ‘the movement of the progressive societies has hitherto been a movement from *status* to contract.’ But the old connection of *status* with the idea of permanence has doubtless an influence upon the line of demarcation usually adopted in assigning the term *status* to some sets of rights, duties, &c., and not to others.—R. C.

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in every body of law. The division of the *corpus juris* into *Jus Personarum* and *Jus Rerum* is not essential or inevitable. It is adopted as being a convenient basis for the arrangement of the *corpus juris*; and it is easy to conceive arrangements founded on principles altogether dissimilar.

The main advantages of this division seem to me to be these:—

1. Repetition, and consequent voluminousness, avoided.

First: in the Law of Things, or *The Law* generally, all which can be affirmed of rights and duties considered generally, or as abstracted from *status* or condition, is stated once for all. One advantage, therefore, of the division is that it is productive of brevity. The general rules and principles with which the Law of Things is properly or directly concerned, are preserved, detached, and abstracted from everything peculiarly relating to particular classes or persons; they are, therefore, presented more clearly than if they were interspersed with that more special matter. For example, the rights and duties which constitute, and are annexed to an estate in fee, or which arise from contracts, or from delicts, are stated much more briefly and clearly than they could be if they were presented as modified by the peculiar rights, or the peculiar incapacities, of married women or of infants.

2. The portions of law specially affecting peculiar classes, rendered more accessible and cognoscible.

Secondly: by distinguishing such parts of the law as are peculiar to particular classes from the parts which are common and of universal application, and by placing the former under a separate department, the matter peculiar to every particular class is rendered easy of reference. The distinction would be attended, if its principle were steadily adhered to, with one great and indisputable advantage; namely that every class of persons might know, to a considerable extent, the parts of the law relating to themselves.

Identity of the division into Law of Things and Law of Persons with Mr. Bentham's division into General and Special Codes.

The plan of collecting under separate heads such portions of the law as are peculiar to special or particular classes, is strongly and justly recommended by Bentham. His General Code, as distinguished from his proposed Special Codes or bodies of law specially relating to particular classes, is in fact the *jus rerum*, or Law of Things, of the classical Roman jurists. It is a strong presumption in favour of the distinction, that Bentham by his unassisted invention arrived at it; for he certainly did not derive it from the Roman law. The only form in which the distinction made by the Roman lawyers was familiar to him was the absurd travesty of it by Sir W. Blackstone, who (following Sir M. Hale) actually translates *jura personarum* and *jura rerum* 'the Rights of Persons' and the 'Rights of Things.'

Two other possible

In stead of this division, there are many other divisions of the *corpus juris* which might be adopted. I shall briefly

advert to two of these possible divisions, because they may serve to illustrate that of which I have been treating.

First: the head *jus rerum* might be rejected, and the whole body of the law divided into special codes, heads, or chapters, appropriate to peculiar classes of persons. The inconvenience of this would be, that the matter which is common or universal or has no special relation to any peculiar class, must be inserted under every head. In effect, each of the special codes would consist of the whole of the common matter, *plus* the matter specially referring to the peculiar class. The repetitions of the general matter would be as numerous as the special classes; and consequently the bulk of the whole body of law would be truly immense. By adopting the division into *Jus Rerum* and *Jus Personarum*, the description of the common matter is disposed of at once. Nor is the difficulty of ascertaining the law enhanced to persons belonging to any special class: the only difference is, that they must look for it under two heads or chapters instead of one; which is no increase of the trouble. For example, a person wishes to contract with an infant. He refers to the chapter on Infants to find in what manner the *status* of an infant modifies the general provisions of the law on the subject of contracts; and if this is not intelligible to him he refers to the title 'Contracts' in the General Code.

Not to exaggerate, however, the effect of this separation of the body of law into the General Code and a number of Special Codes, in rendering the law cognoscible, I must observe that a complete knowledge of any of these separate parts implies a knowledge of the *jus rerum* of which they are only a modification, and requires therefore a knowledge of that immense whole which it modifies. In the example which I have already made use of, that of an infant entering into a contract, it is obvious that we must know the general nature of contracts, and the rights and duties annexed to them, to enable us to know in what manner those rights and duties are modified by the peculiar *status* of an infant.

A second possible division is the following:—The *jus personarum* might be rejected, and the sets of special provisions relating peculiarly to special classes, not collected under appropriate chapters, but appended to the more general provisions which they modify and control. But by this mode brevity and clearness in the exposition of the general principles would be lost; for to every principle, all the modifications it receives from the peculiar position of every particular class must be appended; and the peculiar law of each class being scattered everywhere through the code, the persons affected by the peculiar law would not find it collected to their hands, but must pick it out bit by bit,

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The division  
into Law of  
Things and  
Law of Per-  
sons prefer-  
able to  
either.

The distinc-  
tion not  
correctly and  
consistently  
followed  
out by its  
authors.

The division into *jus personarum* and *jus rerum* combines the advantages of both these adverse methods. Like the one, it enables all classes to find easily the law peculiarly affecting themselves; like the other, it presents in a connected series those principles of the law which are common to all classes.

These, however, are not so much the advantages which the division *has* produced as those it *would* produce if its principles were clearly and strictly pursued. By the Roman lawyers, as for example in the Institutes, the special law of particular classes is often placed in the Law of Things: and the same in Blackstone, in the French Code, and in almost all the other compilations of lawyers. Hence the question has been much agitated, whether the *jus personarum* of the Roman lawyers was properly the law of *status* (or the description of the rights and duties, capacities and incapacities constituting *status*;) or merely a description of the facts or events by which *status* is invested or divested. Whether for instance, under *marriage* all the rights and duties peculiarly affecting husbands and wives, were intended to be inserted, or merely marriage itself, the incident by which the *status* arises, with the modes by which marriage may be dissolved. The truth is that the authors of the distinction have not been consistent. Sometimes they inserted in the *jus personarum* descriptions of the rights and duties composing the *status*, while in other cases they simply described the investing and divesting facts, reserving the description of the rights themselves for the Law of Things.

On the whole, the two principal reasons for detaching sets of rights, etc. from the body of the legal system seem to be,

1st. That the rights, etc. constituting the *status*, regard specially a comparatively narrow class of the community; and that it is convenient to have them got together for the use of that class.

2dly. That they can be detached from the bulk of the system without breaking the continuity of the exposition. And that the so detaching them tends to give clearness and compactness to the exposition of the bulk of the law.

[The line, however, of demarcation between the different departments, depending as it does on convenience, is inevitably an arbitrary one.

And the convenience of separating the law relating to certain classes may be different at different periods, and in different communities. The rights, etc. of *Traders* would hardly have been considered a *status* in Roman Law. But in modern communities not only do they occupy an important and conspicuous position, but the collection of the laws with which they are concerned (as traders) into a

separate department, has this special advantage, that the law in this department is the same or nearly so in communities whose laws in other respects are different. *Codes de Commerce* may therefore sometimes be adopted with great advantage even where the general law remains uncodified. This was recently (in 1869) done in Germany, doubtless not without regard to political considerations, by the General German Mercantile Code.\*—R. C.]

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\* While upon the subject of mercantile codes, I may make the following observation. It is hardly possible that a code could be so complete an embodiment of existing law as to avoid some innovation. So far as it innovated, there would inevitably be a proviso express or implied that the changes made in the law should not affect past transactions, but only regulate the effect of future ones. Consequently the existing sources and literature of the law will remain indispensable to lawyers up to a period when any code that may be enacted in our own time shall itself have become crusted with age. But the transactions with which traders are commonly concerned are commenced and concluded within comparatively short periods. A code of *mercantile* law, or a part of it—such as the law relating to marine insurance—would in a comparatively short time practically supersede the existing sources and literature of the law relative to those transactions.

Codes of the nature here spoken of differ in some respects from any department of the code contemplated by the author as the best form of a code. For so long as the General Law—the Law of Things—remains uncodified; or the General Code unaccomplished; a Special Code must either contain much matter which ought properly to be contained in the General Code, or much must be left to the operation of the uncodified law. Thus in a code of the Law relating to Traders, much matter relating to contracts in general, and which would properly belong to the General Code, must be inserted, or the Special Code left incomplete.

This leads me to some further remarks which concern the general subject of codification discussed in the last Lecture, but which I could hardly make before the subject of Special Codes had been introduced. In making these remarks I must refer to a very able and suggestive paper on the subject of codification in the Edinburgh Journal of Jurisprudence for June 1874. The author of that article argues that an absolute and all sufficient code has a necessary tendency to repress and discourage the study of the principles and reasons of law. This argument is chiefly grounded on the circumstance that France since the date of the Code Napoléon has not produced a Pothier; an argument which may be fairly balanced by the fact that England, though not hampered by a Code, has since Coke produced no great institutional writer. The remaining arguments of the author of that article against codification concern codification in the concrete, and with these the present work is hardly concerned. But he assumes as the only possible approach to codification, in the absence of an absolute and all sufficient code, that there should be an Institute of the Law under Parliamentary sanction, but still possessing only an undefined authority something like that possessed by Coke's Institutes. And he argues that such an Institute being of no use to the general public, but only for the convenience of lawyers, would not be worth the expenditure of public money required for it. But even admitting that in regard

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## LECTURE XLII.

Status.—*Erroneous Definitions examined.*LECT.  
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In my last Lecture, I endeavoured to explain the import of the distinction between the Law of Persons and the Law of Things. In doing so I showed that the distinction rested upon the notion of *status*; and I stated the marks or characters belonging to that notion; showing at the same time that the notion is incapable of definition by any determinate or precise description.

I will now examine certain definitions of *status*, with certain definitions of the distinction founded on the idea of *status*, which, in my opinion, are thoroughly erroneous, and have engendered much of the obscurity wherein the idea and the distinction are involved.

According to a definition of *status*, now exploded, but which was formerly current amongst Civilians, ‘*Status est qualitas, cuius ratione homines diverso jure utuntur.*’ ‘*Exempli gratia,*’ (adds Heineccius,) ‘*alio jure utitur liber homo ; alio, servus ; alio, civis ; alio, peregrinus.*’

Now a given person bears a given condition, by virtue of the rights or duties, the capacities or incapacities, which are peculiar to persons of that given kind or sort. Those rights or duties, capacities or incapacities, are the condition or *status* with which the person is clothed. They are considered as forming a complex whole: and, as forming a complex whole, they are said to constitute a *status* which the person occupies, or a condition, character, or *person*, which the person bears.

But, according to the definition which I am now con-

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to the General Law, the Law of Things, a work of the nature of an Institute of the Law is the only practicable or desirable approach to codification; an authoritative Institute of the General Law would at least impart to the Special Codes precision and significance which is at present even in a consolidating statute impossible. If it should become practicable (a school of lawyers being first educated in the sense insisted on by Austin) to produce a good authoritative Institute of the *General Law*, the Law of Things, and *Special Codes*, comprising the different departments of the Law of Persons, there would be at least a vast improvement on the present form of the law. Neither would such a General Institute, supposing it well framed to begin with, require any very great expense or labour to revise and adapt it from time to time to the growing requirements of the community, and to the judicial and other legislation which might grow up in the mean time.—R. C.

Certain erroneous definitions of the idea of *status*.  
First erroneous definition :  
*Status* an occult quality (Modern Civilians).

sidering, the *status* is a quality which lies or inheres in the given person, and of which the rights or duties, capacities or incapacities, are merely products or consequences.

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The definition (it is manifest) is merely an instance of the once current jargon about *occult qualities*; the same which I analyzed in a former Lecture (p. 200, *supra*) in reference to volitions, and the imagined entity styled the *will* supposed to be their cause. Between the fact or event by which the condition arose and the rights, etc. constituting the condition, a certain supposed quality was imagined to intervene in the chain of causation. This supposed *quality*, which clearly is a mere fiction, was said to be the *status*.

Before I dismiss the definition which I am now considering, I will remark that the *qualitas* in question (assuming its existence) will not distinguish a *status* or condition from any other set or collection of rights or duties. The fiction is precisely the same as that which is with more consistency expressed by the English word ‘estate.’ Now the above mentioned definition would apply to an *estate* in fee simple just as well as to the *estate* of matrimony. But no one ever thought of attaching the word *status* to the rights of fee simple proprietors or of placing the law relating to those proprietors by itself in a department of the Law of Persons.

The supposition, therefore, that a *status* is a quality inhering in the party who bears it, has every fault which can possibly belong to a figment. The supposed quality is merely fictitious. And, admitting the fiction, it will not serve to characterize the object, for the purpose of distinguishing which the fictitious quality was devised.

It is remarkable that Bentham (who has cleared the moral sciences from loads of the like rubbish) adopts this occult quality under a different name. In the chapter in the ‘Traité de Législation,’ which treats of *Etats* (or of *status* or conditions,) he defines a *status* thus: ‘Un état domestique ou civil n'est qu'une base idéale, autour de laquelle se rangent des droits et des devoirs, et quelquefois des incapacités.’

This is the more remarkable, inasmuch as Bentham, in the next sentence but one, tells us, with perfect correctness, that ‘connaitre un état, c'est connaitre séparément les droits et les devoirs qui y sont réunis;’ implying that a *status* or condition is nothing fictitious or ideal, but a lot of rights or duties marked by a collective name, and bound by that name into a complex aggregate.

I will remark, before I proceed to the next topic, that the rights or duties which are constituent elements of a *status*, are of two kinds. 1. Those which arise solely from the very fact or event by which the party was invested with

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the condition. 2. Those which arise from the fact or event coupled with another and a subordinate fact or event. For example: The right of the husband or wife to the *consortium* or company of the other (whether against the other, or against third persons or strangers) is a right which arises solely from the mere fact of the marriage. But a right or interest of either in goods or land acquired by the other, is the joint result of the *causa* or fact by which the goods or land were acquired, and of the marriage itself. From that acquisitive fact, the right of the husband or wife in the goods or land arises: by virtue of the marriage, that right or interest is so modified, that a right or interest in the same subject accrues to the other of the two parties.

Rights or duties which arise solely from the investitive fact, are said to arise *ex statu immediatè*. Those which arise from that fact coupled with another and subordinate fact, are said to arise *ex statu mediatè*.

Rights which arise *ex statu immediatè*, are closely analogous (as I shall show in a subsequent Lecture, p. 365 *post*) to the rights which are styled by Blackstone '*absolute* rights,' and which are styled commonly '*natural* or *innate* rights.'

The only difference between them is this: The former are rights which arise solely from the investitive fact: the latter are rights which arise solely from the fact of the party who bears them being under the protection of the state. By some writers, accordingly, *absolute* rights, or *natural* or *innate* rights, are styled, aptly enough, 'rights arising *sine speciali titulo*.' The only objection to the phrase is this: that it applies to rights arising *ex statu immediatè*, as well as to those more general (and, indeed, universal) rights, which are styled *natural* or *inborn*.

Second erroneous definition: 'Consequences of the same investitive fact' (Bentham).

In the chapter in Bentham's 'Traité de Législation' last referred to, after (correctly) saying that 'connaitre un état, c'est connaître séparément les droits et les devoirs qui y sont réunis,' he goes on to ask, 'mais quel est le principe d'un union qui les ressemble, pour en faire la chose factice qu'on appelle un état ou une condition?' And to the question thus suggested he gives the following answer: 'C'est l'identité de l'événement investitif, par rapport à la possession de cet état.'

It may, I think, be inferred from this answer, that, in Bentham's opinion, the following are the *tests*, or *distinguishing marks*, of a *status*, condition, or person.

1. A *status* is a *set* or *collection* of *various* rights or duties, or of various capacities or incapacities to take or incur rights or duties. 2. The rights or duties which are its constituent elements, are legal effects or consequences of one investitive fact, of one title or mode of acquisition, or (in the usual language of the Roman lawyers) of one *causa* or antecedent.

Now it certainly is true, that a *status* is a *set* or *collection* of various rights or duties. And that the rights or duties which are its constituent elements, are legal effects or consequences, mediately or immediately, of one and the same title or investitive fact or event. The *status*, for example, of husband or wife, is a set or collection of various rights and duties, and various capacities and incapacities; all of which arise, mediately or immediately, from the one fact of the marriage, or from the one title or *causa* by which the *status* is engendered.

But though these two properties belong to every *status*, they will not distinguish *status* or conditions from those rights and duties which are matter for the Law of Things.

For, first, these properties belong to each of the aggregates which are styled by modern civilians *universitates juris*: that is to say, complex sets or collections of rights or duties: e.g. the aggregate of rights and duties devolving on the heir, executor, or administrator by virtue of the testament or of the intestate decease. Now this aggregate has never been deemed a *status* or condition, but is always considered under the general law forming the bulk of the legal system. In the institutional writings of the Roman lawyers, in the French and Prussian codes, and in every systematic code (or every systematic exposition of a *corpus juris*) of which I have any knowledge, the rights and duties of heirs (or of universal successors to deceased persons) are placed in the *jus rerum* and not in the *jus personarum*. And by our own Hale and Blackstone, (the only systematic expositors of our own *corpus juris*) the rights and duties of the executor and administrator (who are properly the *haeres testamentarius* and the *haeres legitimus* of the Roman Law) are inserted in the general department which they style the *Rights of Things*, and not in the special and exceptional department which they style the *Rights of Persons*. By Hale, indeed, in his analysis of the law, the rights and duties of the heir (who, in some respects, though not in all, is *successor universalis*) are placed, inconsistently enough, in the Law of Persons, as well as in the Law of Things.

And, secondly, the two properties, which, in Bentham's opinion, characterize a *status* or condition, are not even peculiar to those aggregates of rights and duties which are styled by modern civilians *universitates juris*. They are found in most or many of those numerous rights or duties, which, as contradistinguished to *universities* of rights and duties, are deemed *particular* or *singular*. Take, for example, the right of dominion or property in a specifically determined thing: as, a horse, a slave, a garnieut, a house, a field, or what not. It is manifest that the right, though deemed singular, is truly a collection or aggregate of rights of which an adequate description would occupy a bulky

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volume. It consists, for example, of the right of exclusive user or possession; of the right of disposing or aliening totally or partially; of rights of vindication, and other rights of action, in the event of a disturbance of any of those primary rights: and each of these rights, which combine to form the right of dominion, may itself be resolved into other rights which are less complex. Still more complicated is the right vested in the mortgagor by means of a mortgage in the usual English form. Indeed, as I shall show hereafter, the difference between a *universitas* of rights and duties and a right or duty deemed singular is merely a difference of degree.

*Third erroneous definition : Status constituted by the divisibility of the collection of rights and duties into those arising immediately from the title which engenders the aggregate, and those arising meditately from that title, through special titles.*

I have remarked above, that the rights or duties which are constituent elements of a *status*, are commonly divisible into two kinds: 1st, those which arise immediately or directly from the paramount and more general title which engenders the *status*: 2dly, those which arise mediately from that paramount and more general title, through subordinate and more special titles.

And, at the first glance, I imagined that this was the distinguishing mark of a *status* or condition. But I am not sure that every set of rights or duties, deemed a *status* or condition, is divisible in that manner. And it is clear that universities of rights and duties not deemed conditions, with sets of rights or duties deemed particular or singular, are divisible in that manner. Some of the rights or duties composing the aggregate or set, arise immediately from a paramount and more general title by which the aggregate or set is itself engendered; e.g. the right of the owner of a field to walk over it: whilst others arise mediately from that paramount and more general title, through subordinate and more special titles; e.g. the right of the owner to prosecute a trespasser, arising out of the investigative fact whereby he obtained the dominium and through the special title of the injury done against that paramount right.

*Fourth erroneous definition : Status constituted by jus in rem in the complexion or aggregate of rights.*

A person clothed with a condition, or bearing a person or character, has *jus in rem* (or a right availing against the world at large) in the aggregate of rights which are constituent elements of the *status*.

At first I imagined that this might distinguish a *status*, from the set of rights or duties which are not *status*. But I am convinced that this *jus in rem* over the *status* itself is not a character or distinguishing mark by which we can determine what a *status* is.

For, 1st, in purely onerous conditions, the mark is *not* to be found: a right to a burthen, or to vindicate the enjoyment of a burthen, being an absurdity.

And 2dly, the mark is to be found in universities of

rights, which have never been deemed conditions or *status*, but have been placed by common consent in the Law of Things; e.g. the aggregate of rights called *hereditas*.

3dly, the mark may be found in many of the sets of rights which are deemed singular or particular. For instance:—When the owner vindicates his right as *dominus* he reinstates himself in the enjoyment of many separate rights. And what more is done by an action *ex statu*, or by any other action founded on a *juris universitas*?

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## LECTURE XLII.

*Status.—Erroneous definitions further considered.*

I now proceed to a definition of *status* which, in my opinion, is not less erroneous than any of the various definitions that I examined in my last Lecture.

According to the definition of a *status*,\* to which I now advert, a *status* is a *capacity* or *faculty*: for in the language of modern Civilians (and of all modern jurists whose terms are fashioned on the language of modern Civilians) the term *faculty*, though commonly denoting a *right*, also signifies a *capacity* or *ability* to take or acquire a *right*, or to incur, or become subject to, a *duty*. In the language of the German jurists, who adopt the definition of a *status* to which I now am advertiring, a *status* is denominated *Rechtsfähigkeit*: literally, or strictly, a capacity or ability to take or acquire a *right*; but meaning a capacity or ability to take or acquire a *right*, or to incur, or become subject to, a *duty*. For, amongst the numerous ambiguities by which the German ‘*Recht*’ (like the Latin ‘*jus*’) is perplexed and obscured, is this: that, though it signifies a *right*, it occasionally embraces in its comprehension, a *duty*. For example: to succeed ‘in omne *jus* defuncti,’ is to succeed, by universal succession, or *per universitatem*, to all the descendible duties, as well as to all the descendible rights, of the deceased testator or intestate.

According to this definition, a *status* or condition, or a person as meaning a *status* or condition, is a capacity or ability to take rights, or to incur or become subject to duties which the law confers or imposes upon the person, as meaning the *homo* or man. In Mühlenbruch’s *Doctrina Pandectarum* the definition is given thus:

‘Personam (quae quidem a personando dicitur) potestatem juris vocamus: sive facultatem et jurium exercendorum

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Fifth erro-  
neous defini-  
tion: *Status*  
a capacity or  
ability  
(*Facultas*, or  
*Rechtsfähigkeit*).

*Status—a  
capacity, etc.*

\* Namely, that contained in Thibaut’s ‘System,’ vol. I p. 160, § 207.

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et officiorum subeundorum, hominibus jure accommodatam et velut impositam. Ex quo intelligitur, quid sit, quod persona abjudicetur iis, qui aut prorsus nullo aut valde imperfecto gaudent jure, etc.\*

According to a definition of *jus personarum*, which is equivalent to the above definition of *persona* or *status*, the law of persons is concerned with the *capacities* of persons (as meaning men) to take rights or incur duties; or it is concerned with persons (as meaning men) in so far as they are *capable* of rights or duties.

This definition of *status* (with the equivalent definition of *jus personarum*) is liable to the following, amongst other objections.

1st. There are capacities which are common to *all* persons, who either completely, or to certain limited intents, are members of the given society political and independent, or subjects of its sovereign government. Every person, for example, whether free or slave, citizen or foreigner, adult or infant, married or unmarried, trader or not trader, has a capacity (unless he be excluded completely or nearly from all legal rights) to purchase and acquire property in such outward things as are necessary to the sustenance of life. Granting, then, that a condition *is* a capacity, its being a capacity will not serve to characterize it; seeing that there are capacities which are not conditions. A condition regards specially persons of a given class, and cannot consist of aught which regards indifferently all or most classes.

2dly. There are many conditions which consist mainly, not of capacities, but of *incapacities*. The condition, for example, of the slave consists mainly of incapacities to take rights: the condition of the infant freeman, of incapacities (mainly or wholly imposed upon him for his own benefit) to take certain rights and incur certain duties.

3dly. As I remarked in my last Lecture (p. 355), and shall explain a little more fully hereafter, the rights and duties, which together with capacities and incapacities, are the constituent elements of most conditions, are divisible into two kinds: namely, rights or duties which arise from the *status immediate*, and rights or duties which arise from the *status mediata*.

Now the rights or duties which arise from the *status immediate* are *rights* or *duties*, and not *capacities* or *faculties* '*jurium exercendorum et officiorum subeundorum*'—Wherever, therefore, the constituents of a *status* are divisible in the manner which I have now suggested,—and the constituents of most *status* are so divisible,—the *status* is not a capacity, or a bundle of capacities, but an aggregate of rights and duties *with* capacities.

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\* Mühl. vol. ii. p. 1.

I remarked in a former Lecture (p. 163 *supra*), that there are certain pre-eminent *status* which the Roman lawyers seem to have distinguished by the name of *capita*. These are, first, *status libertatis* (or the condition of the freeman, as opposed to that of the slave); secondly, *status civitatis* (or the condition of the Roman citizen, as opposed to that of the foreigner); and, thirdly, *status familiæ*; that is to say, the condition of being a member of a given family, and as such enjoying certain rights, or being capable of certain rights. For example: Unless a person were a member of a given family, he could not take by succession *ab intestato* from any member of that family. And, by consequence, when a man was adopted by the head of another family, or when a woman married and thereby became a member of her husband's family, the *status familiæ* (with reference to the family quitted) was lost; though a new *status familiæ* (in reference to the family entered) was at the same time acquired.

Now a definition of *caput* (resembling the definition of *status* which I have just examined) is given by many German Civilians. They say that a *caput* is a condition precedent (*Bedingung*) to the acquisition of rights: which merely means (if it mean anything) that a *caput* comprises capacities to acquire rights. The definition, therefore, is liable to one of the objections which I made to the definition of a *status* that I have just examined. A *caput*, indeed, comprises capacities; and, in so far as it comprises them, is a condition precedent to the acquisition of rights. But it comprises rights and duties arising from the *status immediate*, as well as mere capacities to take and incur rights and duties on the happening of particular and subordinate facts.

I also remarked, in the Lecture just referred to, that a certain absurd definition of the term person arose from a confusion of *caput* and *status*: from a supposition that the Roman lawyers limited the term *status* to those peculiar *status* which they called *capita*.

But that the Roman lawyers limited the term *status* to these three *capita*, is utterly and palpably false. They speak, for example, of the *status* of a slave who had not, and could not have, *caput*: the want of liberty implying a want of citizenship, and also of relationship to a family of Roman citizens. They also speak of the *status* of a *peregrinus* or foreigner; of the *status* of a senator; of the *status lese existimationis*, or of a *status* consisting of certain incapacities consequent on having been noted or branded by the censors.

But there is one consideration which is quite conclusive. In the first book of Gaius' and Justinian's Institutes,

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*peregrini* or foreigners, *libertini* or freedmen, masters or slaves, fathers and children, husbands and wives, guardians and wards, with other classes of persons, are passed in review: and to the whole book, regarding specially the various classes of persons, the common title of *De persona* (and in Gaius, the title of *De conditione hominum* also) is prefixed.

## LECTURE XLIII.

*The subject of Status and Division of Law into Jus Rerum and Jus Personarum concluded.*

LECT.  
XLIII.Supplementary remarks.

HAVING endeavoured to settle the import of the distinction between *jus rerum* and *jus personarum*, and to define the notion of *status* or condition, on which that distinction is founded, I will now add a few remarks, supplementary to the Lectures in which I have discussed this subject.

First then: It has been doubted whether the Roman lawyers intended to insert in the *jus personarum* the description of the rights duties capacities and incapacities of which *status* or conditions are comprised; or to confine themselves to the facts or events by which the *status* are invested and by which they are divested. The solution of this doubt is, that neither the Roman lawyers, nor those modern Civilians who have adopted from them the distinction of *jus rerum* and *personarum*, conceived with perfect distinctness its purpose, nor did any of them in the detail of their writings pursue it consistently.

Both the Roman lawyers and Sir William Blackstone inconsistently inserted in the Law of Things many rights and duties manifestly arising ex *statu*: and the Roman lawyers in many cases inserted in the Law of Persons a description only of the event which engendered the *status*, and the events by which it was destroyed: not of the rights and duties of which it consisted. For instance, in the Law of Marriage, they inserted only the manner in which marriages were contracted, the different conditions of a *valid* marriage, and the modes in which marriage was dissolved. In the law of tutelage and guardianship, on the contrary, they inserted not only the modes in which the *status* was acquired or lost, but also the rights and duties which constituted it. They had in truth no distinct conception of their own purpose, and they therefore pursued it in the detail inconsistently.

Through blending, as they do, the two methods, they lose the advantage of the first; keep the disadvantage of

the second; and add a difficulty of their own: i.e. that of obliging the seeker to look for the peculiarities of *status*, not only under the descriptions of the several rights and titles, but also under the (as by them treated) purposeless department of *jura personarum*.

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*Jus actionum*  
co-ordinated  
by the  
Roman law-  
yers with *jus*  
*rerum* and  
*jus person-  
arum*. This  
is a logical  
blunder.

The Roman lawyers divide law, in the first place, into *jus publicum* and *jus privatum*; and in their institutional treatises they confine themselves principally to *jus privatum*. This they again divide into *jus personarum*, *jus rerum*, and *jus actionum*, including under this third head the law of civil procedure: This last distinction is also adopted in the Commentaries of Sir William Blackstone, whose object was more comprehensive, as he treats not only of what the Roman lawyers called private law, but also of what they comprised under the name of public law, namely, the law of political conditions; criminal law; and the law of criminal procedure. Both in the Roman lawyers and in Blackstone this division is grossly inconsistent; it deviates from the object of the distinction between the Law of Things and the Law of Persons. In order to carry out that object, all the *generalia* of the *jus actionum* should be left in the *jus rerum*, while those parts which have relation specially to particular classes of persons, and which can be detached from the bulk of the legal system without breaking its continuity, should be placed under the respective heads of the *jus personarum* to which they belong. For example, the mode of suing or defending by means of a next friend or a guardian *ad litem* in the case of an infant is properly matter for the *jus personarum* under the head of infancy.

The division therefore of the *corpus juris* into *jus personarum*, *jus rerum*, and *jus actionum* is a gross logical error. In Blackstone, the error is a consequence of his original division. For he does not, like the Roman lawyers, begin by dividing the law into *jus publicum* and *jus privatum*, and this last into *jus personarum* and *jus rerum*; but he divides the whole *corpus juris* into law regarding rights and law regarding wrongs. By law regarding wrongs, he means law regarding injuries, the rights and duties arising from injuries, and civil and criminal procedure. Having divided the *corpus juris* into these two divisions, and having then divided the first, or law regarding rights, into *jus personarum* and *jus rerum*, he could not include in either of these heads the law regarding actions. His division is illogical, it being manifest that the law regarding wrongs does not regard wrongs only, but rights also, namely, the rights which arise out of wrongs; as will be sufficiently evident to anyone who looks through the third book of his Commentaries, and observes the matter of which it is composed.

Logical in-  
accuracy of  
Blackstone's  
division of  
the *corpus*  
*juris* into law  
regarding  
rights and  
law regard-  
ing wrongs.

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The nature of the distinction between public and private law I shall advert to in my next Lecture; when I shall show that it is as erroneous as this distinction of Blackstone's; and that public law is not one main half of the *corpus juris* which ought to be opposed to the other half, but a very small portion of it, which ought to be included in the Law of Persons as a subordinate member: and Blackstone, in imitation of Sir Matthew Hale, has so included it. I am now speaking of public law in its narrower acceptation, for in its larger, the whole of criminal law is included in it. Criminal law as a part of public law (*latius acceptum*) is excluded by the Roman jurists from Law of Persons and Law of Things. But it ought to be distributed under those two departments.

*The law of things should precede the law of persons in the corpus juris.*

The next topic to which I shall advert is the order in which the Law of Things and the Law of Persons should stand relatively to each other. The Law of Things is *the* law, *minus* the Law of Persons, while the Law of Persons contains such portions of the law as relate to specific and narrow classes of persons, and can be detached from the body of the law without breaking its continuity. Consequently the General Code should come first, and the comparatively miscellaneous matters, which are properly a sort of appendix, should come last. Accordingly, Sir Matthew Hale suggested, and Sir William Blackstone practically adopted, this order. It is, however, impossible to sever completely the *jus personarum* and the *jus rerum* from one another. Even the *jus personarum*, though consisting mainly of the narrower positions and rules which modify the more general matter comprising the *jus rerum*, yet contains many positions which must be anticipated before it is possible to explain the Law of Things. But the number of the *præcognoscenda* in the Law of Things is incomparably greater than in the Law of Persons. Although the two departments cannot be completely disengaged from one another, the student must begin somewhere: and he should begin where he will require fewest references to what is to come afterwards.

*Natural or inborn rights, what?*

I may immediately explain in this place the nature of certain rights, which have been confounded by mysterious jargon; namely, those which are called *natural* or *inborn*, and by Blackstone *absolute* rights. For his 'Law regarding the Rights of Persons' is not the *jus personarum* of the Roman jurists; their *jus personarum* is only one species of his Law regarding the Rights of Persons, a species which he calls 'law regarding the *relative* rights of persons'; as distinguished to another species, namely 'law re-

garding the absolute rights of persons,' that is, these natural or inborn rights.

I have already observed (p. 355, *supra*), that the rights or duties constituent of *status* arise in two ways: they arise *ex statu immediate*, either directly from the general or paramount title which engenders *status*; or from that general title through some subordinate title. The distinction between natural or inborn rights and any other rights is analogous to this.

Natural or inborn rights are those which reside in a party merely as living under the protection of the State, or as being within the jurisdiction of the State; if the party have any rights whatever, which the Roman slave had not. Now these are exactly what Blackstone called absolute rights. Such, for instance, is the right of personal security. Such also is the right to reputation, which Blackstone includes under the right of personal security, but which is distinct from, and ought to have been co-ordinated with, it. These rights have been called natural or inborn merely because they arise *sine speciali titulo*; that is, reside in a party, merely as living under the protection or within the jurisdiction of the State. It is manifest, however, that they are not, properly speaking, natural or inborn; for they are as much the creatures of the law as any other legal rights.

Blackstone\* here runs into a signal confusion of ideas, for: 1st. He opposes these rights, by the name of absolute rights, to what he calls the relative rights of persons. But all rights are relative; they suppose duties incumbent on others. 2ndly. He defines these absolute rights to be rights appertaining to them merely as individuals or single persons. But I cannot conceive how they can be distinguished by *that*. All or most rights must belong to particular persons, and must belong to them *as* particular persons. *Dominium*, for instance, and all rights arising from contracts, come under this description. 3rdly. He further defines them, rights which would belong to persons in a state of nature; rights which they would be entitled to enjoy either in or out of society. But considered as moral rights, many others, such as rights arising from convention, are in the same predicament. And as to *legal* rights, with which alone Blackstone was properly concerned, they, it is obvious, can only belong to a man in society.

Gross absurdities of  
Blackstone  
on this  
subject.

Amongst others of these absurdities, Blackstone instances, as an absolute right, the right of private property! A right which, it is quite obvious, cannot exist out of a state of society. What he meant by the right of private property in this passage I could not for a long time make

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\* See Table VIII. post.

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out; but it is cleared up by comparing the passage with a corresponding passage in his third volume, and it appears to be merely a collective name for all those rights which, either as property in the strict sense, or as rights derived from contracts or quasi-contracts, are the subject of his whole commentaries. He also instances the right of *personal liberty*. But as I have shown (p. 165, *supra*), either this is properly included in the term personal security, or else it is coextensive with *right*, and ought not to be treated as a *species* of right.

Another error of Blackstone is that of putting those *absolute* rights of persons under the head Rights of Persons at all. As residing in *all* persons, these rights are not matter for the Law of Persons, but for the Law of Things; and by the Roman lawyers are so treated. The cause why this was overlooked by Blackstone seems to be that in this, as in other instances, the rights are not explained by the Roman lawyers directly, but only by implication under the head of delicts; and the explanation nowhere else occurs.

## LECTURE XLIV.

*Law, Public and Private.*LECT.  
XLIV.

HAVING discussed the distinction between Law of Things and Law of Persons, I proceed to the connected distinction between Public Law and Private Law.

The term '*public law*' has two principal significations: one large and vague; the other, strict and definite.

Taken with its strict and definite signification (to which I will advert in the first instance), the term public law is confined to that portion of law which is concerned with political *conditions*: that is to say, with the powers rights duties capacities and incapacities which are peculiar to political superiors, supreme and subordinate. Taken in this meaning, public law ought not (I think) to be *opposed* to all the rest of the law, but ought to be inserted in the Law of Persons, as one of the limbs or members of that supplemental department.

*Two difficulties in giving an account of public law in strict sense.*

But before I proceed to the *place* which public law (as thus understood) ought to occupy in an arrangement of a *corpus juris*, I will touch briefly on two difficulties, which, it appears to me, are the only difficulties that the subject really presents.

*1st difficulty :  
AA.*

I have said that public law is confined to that portion

of law which is concerned with political conditions. So far as public law relates to the Sovereign, it is clear that much of it is not law, but is merely positive morality, or ethical maxims. As against the monarch properly so called, or as against the sovereign body in its collective and sovereign capacity, the so-called laws which determine the constitution of the State—the ends or modes to and in which the sovereign powers shall be exercised—are not properly positive laws, but are laws set by general opinion, or merely ethical maxims which the Sovereign spontaneously observes.

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of public law  
in this sense  
must com-  
prise some of  
the rules of  
positive  
morality.

But though, in logical rigour, much of the so-called law which relates to the Sovereign, ought to be banished from the *corpus juris*, it ought to be inserted in the *corpus juris* for reasons of convenience which are paramount to logical symmetry. For though, in strictness, it belongs to positive morality or to ethics, a knowledge of it is absolutely necessary in order to a knowledge of the positive law with which the *corpus juris* is properly concerned. The law of England, for example, cannot be understood, without a knowledge of the constitution of Parliament, and of the various rules by which that sovereign body conducts the business of legislation.

And, since the law regarding the Sovereign ought to be inserted in the Law of Persons, we may say, by way of analogy, that the Sovereign has a *status* or condition; although a *status*, properly so called, is composed of *legal* rights and *legal* duties, or of capacities or incapacities to take or incur legal rights and duties.

Public law (in its strict and definite meaning) is not unfrequently divided into two portions: *constitutional* law, and *administrative* law: (*Staats-recht* or *Constitutions-recht*, and *Regierungs-recht*). The first comprises the law which determines the *constitution* of the sovereign government: the second comprises the law which relates to the *exercise* of the sovereign powers, either by the sovereign or by political subordinates.

The second of the two difficulties to which I have adverted, is the difficulty of drawing the line of demarcation, by which the conditions of private persons are severed from the conditions of political subordinates.

2nd diffi-  
culty: That  
of distin-  
guishing  
political from  
private con-  
ditions.

The rights and duties of political subordinates, and the rights and duties of private persons, are creatures of a common author (the Sovereign or State), and often subserve and are intended by their sovereign author to subserve the same general ends; for instance, the prevention of crime. Accordingly, the conditions of parent and guardian (with the answering conditions of child and ward) are not

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unfrequently treated by writers on jurisprudence, as portions of public law. For example: The *patria potestas* and the *tutela* of the Roman Law, are treated thus, in his masterly 'System des Pandekten-Rechts,' by Thibaut of Heidelberg: who, for penetrating acuteness, rectitude of judgment, depth of learning, and vigour and elegance of exposition, may be placed by the side of Savigny, at the head of all living Civilians. (See note, p. 343 *supra*.)

The powers of punishment which the Roman law originally entrusted to the *paterfamilias* were so extensive, that this accounts for the very small space occupied by criminal law in the early Roman law. The place of criminal law was mostly supplied by the powers vested in those private persons, who being the proprietary and respectable class, were little tempted to commit crimes, while the remainder of the community were subject to these powers residing in them, and were thereby prevented from committing crimes; or, if they did commit crimes, were punished by, and at the discretion of those in whose *potestas* they were.

The only difference that I can assign between political and private conditions is this: that when the condition is private, the powers vested in the person who bears it *more peculiarly* regard persons determined specifically; when public, those powers more peculiarly regard the public considered indeterminately.

*Public law, or  
the law of  
political con-  
ditions,  
should not be  
opposed to  
the rest of  
the legal  
system, but  
should form  
one member  
or head of  
the Law of  
Persons.*

Having touched on these difficulties, I now proceed to give my reasons for the proposition which I laid down at the outset of this Lecture, namely, that public law, in its strict and definite meaning, as the law of political conditions, should not be opposed to the rest of the law, but should be inserted in the Law of Persons, as one member or head of that department of the *corpus juris*.

Of the various reasons which might be given for this arrangement, the following reason, I think, will amply suffice.

In explaining the nature of the distinction between Law of Things and Law of Persons, I said that there are two reasons for detaching the rights and duties of certain classes from the body of the legal system, namely: 1st. Convenience for reference; 2ndly, Coherence of the general body of the legal system, which is attained by omission of the special matter.

Now both these reasons apply in an eminent degree to the powers rights and duties of political superiors. With the exception of the powers and duties of judges and other ministers of justice (which perhaps it is expedient to prefix to the general law of procedure), there are no classes of persons whose peculiar rights and duties may be detached

more commodiously from the bulk of the legal system than those of public or political persons. And if the powers rights and duties of political persons ought to be detached from the bulk of the legal system, it is clear that they ought not to be opposed to all the rest of the system; but ought to form a limb of the miscellaneous and supplemental department which is marked with the common name of the Law of Persons. For the law which regards specially the powers and duties of political persons, is not of itself a complete whole, but is indissolubly connected, like the law of any other *status*, with that more general matter which is contained in the Law of Things, and also with the law regarding other conditions.

Take, for example, the case of our own King. It is clear that a knowledge of his peculiar powers rights and exemptions presupposes a knowledge of the Law of Things, and also of many of the *status* which are styled private. Without a knowledge of the general rules of property, his peculiar proprietary rights, as king, are not intelligible. Without a knowledge of the law of descents, the peculiarities of his title to the crown are not to be understood. Without a knowledge of the law of marriage, his peculiar relations to his royal consort are not explicable.

And the same may be said of the powers and duties of any political person whatever. Considered by themselves, they are merely a fragment. Before they can be fully understood, they must be taken with their various relations to the rest of the legal system.

The opposed terms *public* and *private* law tend moreover, in my opinion, to generate a complete misconception of the real ends and purposes of law. Every part of the law is in a certain sense public, and every part of it is in a certain sense private also. There is scarcely a single provision of the law which does not interest the public, and there is not one which does not interest, singly and individually, the persons of whom that public is composed.

Agreeably to the view which I now have taken of the subject, Sir Matthew Hale, in his 'Analysis of the Law,' and Sir William Blackstone, following Sir M. Hale, have placed the law of political persons (sovereign or subordinate) in the Law of Persons: instead of opposing it, as one great half of the law, to the rest of the legal system.\* Blackstone divides what he calls law regarding the relative rights of persons into law regarding public relations, and law regarding private relations. Under the first of these he places constitutional law and the powers rights and duties of subordinate magistrates, of the clergy, and of

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\* See Table VIII. *post.*

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persons employed by land or sea in the military defence of the State.

This placing the law of political persons in the Law of Persons as one of its limbs or members, instead of opposing it to the rest of the *corpus juris*, is nearly peculiar to Hale and Blackstone; and originated with Hale. The German jurists treat this arrangement as a great absurdity, importing great *Verwirrung*, or confusion of ideas, though the direct contrary appears to me to be the truth. And the adoption of this arrangement by Sir Matthew Hale, appears to me a striking indication of his originality and depth of thought, since if he had been a mere copyist, he would have adopted the arrangement which was already familiar to him in the writings of the Civilians.

Public law in its large and vague signification originating with the use made of the term by the Roman lawyers. Logical mistake of the distinctions built upon it. Even taken in this sense there is no intelligible basis for the distinction between public and private law as co-ordinate departments.

From public law with its strict and definite meaning, I pass to public law with its large and vague signification.

The Roman lawyers divide the *corpus juris* into two opposed departments:—the one including the law of political conditions, and the law relating to crimes and criminal procedure: the other including the rest of the law. The first they style *jus publicum*, the second they style *jus privatum*. This division is the model or pattern upon which all the modern distinctions into public and private law have been formed.

In former Lectures\* I explained the origin of the term ‘public wrongs,’ as applied to crimes, and observed that they acquired this name from a mere accident, from the fact that crimes were originally tried by the sovereign Roman People. The original reason ceased when the jurisdiction in criminal causes was removed from the people, and vested in subordinate judges. But the name remaining, it was supposed afterwards by the Roman jurists, that crimes were called public wrongs, because they affected more immediately the interests of the whole community. I have already exposed this fallacy, and shown that the distinction between civil injuries and crimes rests not upon any difference, in their consequences and effects, but upon the different way in which they are pursued. The distinction, although grounded on expediency, is arbitrary in its scope; that is a civil injury in one system of law which is a crime in another.

Inasmuch as crimes were, however, supposed to affect more directly the interests of the whole community, and inasmuch as the law of political *status* does really in a peculiar manner regard the whole community, criminal law and the law of political conditions were placed by the

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\* See pp. 195, 249, 297, *supra*.

classical jurists together, and were opposed to all the rest of the *corpus juris*.

They style criminal law and the law of political conditions *jus publicum*: for, say they, ‘ad statum rei Romanae, ad publice utilia spectat.’

They style the opposed department of the *corpus juris* *jus privatum*: for, say they, ‘ad singulorum utilitatem, ad privatum utilia spectat.’

This explains the order of Justinian’s Institutes. It is merely a treatise upon private law. By consequence, criminal law, with the law of political *status*, is not comprised by it; the classical jurists, from whose elementary works the Institutes were copied, having thought (it would be hard to say why) that public law was not a fit subject for an institutional or elementary treatise. The Institutes close with a very short title, ‘De publicis judiciis,’ and this is the only part of this treatise which relates to crimes.

Blackstone’s Commentaries are not confined to private law, but are intended to serve as an institutional treatise on the whole Law of England: though he touches upon certain parts (as upon equity and ecclesiastical law) in a comparatively brief and superficial manner. As I have already observed, he places the law regarding political conditions in the Law of Persons, and the only trace of the distinction between public and private law to be found in his Commentaries is that he styles the department which relates to crimes and to punishments and criminal procedure ‘Public Wrongs.’\* Hale retains no trace of the distinction: for, in his analysis, he throws out criminal law altogether. In his ‘pleas of the Crown,’ he does not designate crimes by the name of public wrongs, but calls them, more appropriately, ‘Pleas of the Crown,’ that is, offences of which the Crown or State retains the prosecution in its own hands.

With reference to its ultimate purpose, the law of political *status*, and criminal law, is not to be distinguished from the so-called *private law*. Each tends to the security of the public: meaning by the *public* the several individuals who compose the society, as considered collectively or without discrimination.

Another reason against the distinction is this. That the matter of the law of things is just as much implicated with public law, in the large sense, as with the law of private conditions.

In short, whether ‘public law’ be taken in its large or in its narrower sense, the distinction between public law

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\* See Table VIII. *post.*

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and private law (considered as co-ordinate departments) rests upon no intelligible basis and is inconvenient.

In fact nothing can be more various than the views taken by some modern writers of the distinction between public and private law. Some include in public law, besides the law of political conditions and of crimes and criminal procedure, the whole law also of civil procedure. Others, in despair of finding a stable basis for the division, exclude criminal law. They see that a multitude of crimes affect individuals as directly as the delicts styled civil.

But the greatest logical error of all is that committed by many continental jurists, who include in public law, not only the law of political conditions, of crimes, and of civil and criminal procedure, but also *international* law; which is not positive law at all, but a branch of positive morality. It is sometimes expedient to include in the *corpus juris* a part of what is really positive morality, because positive law is not intelligible without it: but there is no such reason for so including international law, except those parts of it which have changed their nature, and become positive law by adoption as a part of the positive law obtaining in the particular country. If not parts only, but the whole of international law is to be included in the *corpus juris*, there is the same reason for including in it the whole of the positive morality of the particular country; for on this, as well as on international morality, positive law is in a great measure founded.

**Various  
other mean-  
ings of the  
phrase  
'public law.'**

The phrase *public law* has at least four or five totally different meanings. 1st; it has either of the two meanings above adverted to: its strict or definite, and its large or vague sense. 2ndly; it sometimes means the law which proceeds either from the Supreme Legislature, or from subordinate political superiors, as distinguished from what have been termed laws *autonomic*, that is, laws set by private persons in pursuance of legal rights with which they are invested. 3rdly; public laws are sometimes opposed to laws creating *privilegia*. Laws of this kind are sometimes called *jus singulare*; and *jus publicum*, as opposed to them, is called *jus commune*. 4thly; under public law are sometimes classed definite and obligatory modes of performing certain transactions. 'Testamenti factio non privati sed publici juris est.' 5thly; by public laws are sometimes meant the laws called *prohibitive* or *absolutely binding*, as opposed to the laws called *dispositive* or *provisional*. The legislator in certain instances determines absolutely what shall be the effect of a given transaction, that is, he determines what effect the transaction shall have, if the parties do not provide otherwise. Now, when the legislature determines absolutely the effect of a transaction,

the law is called *public*: when he leaves a certain latitude to the parties, it is called dispositive or provisional; being to take effect only in case no disposition is made by the parties themselves. In France, this is the case with the law of marriage. The Code lays down two or three different sets of rights and duties, which may be the consequences of marriage at the option of the parties; merely determining what legal effect the marriage shall have if the parties do not alter the disposition of the law. This use of terms accounts for the meaning of several principles of law which appear to have a great sense in them, but which are merely identical propositions. *Jus publicum privatorum pactis mutari non potest: privata conventio juris publico nihil derogat.* Now, as *jus publicum* in these sentences only means the law which cannot be modified by conventions, the propositions are simple truisms.

I may conclude this Lecture with the observation that the logical error of opposing a small bit of the law to the remainder of the body, is not confined to the distinction between the Law of Things and the Law of Persons, or between public and private law. Many writers, for example, detach criminal law from the whole legal system, calling the rest of the law civil. Others detach ecclesiastical law, and oppose all the remainder to it, by the name of civil. Others distinguish the law into military and civil. The word civil has about twelve different meanings; it is applied to all manner of objects, which are perfectly disparate. As opposed to criminal, it means all law not criminal. As opposed to ecclesiastical, it means all law not ecclesiastical: as opposed to military, it means all law not military, and so on. Even *jus privatum* is sometimes also called *jus civile*.

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## LECTURE XLV.

THERE are facts or events from which rights and duties arise, which are legal causes or antecedents of rights and duties, or of which rights and duties are legal effects or consequences. There are also facts or events which extinguish rights and duties, or in which rights and duties terminate or cease. The events which are causes of rights and duties may be divided in the following manner: namely, into acts, forbearances, and omissions, which are violations of rights or duties, and events which are not violations of rights or duties.

Division of  
the Law of  
Things (or  
the Law  
minus the  
Law of Per-  
sons) into  
primary and  
sanctioning  
rights, etc.

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Acts, forbearances, and omissions, which are violations of rights or duties, are styled delicts, injuries, or offences.

Rights and duties which are consequences of delicts, are sanctioning (or preventive) and remedial (or reparative). In other words the ends or purposes for which they are conferred and imposed, are two: first to prevent violations of rights and duties which are not consequences of delicts: secondly to cure the evils or repair the mischiefs which such violations engender.

Rights and duties not arising from delicts, may be distinguished from rights and duties which are consequences of delicts, by the name of 'primary' (or principal). Rights and duties arising from delicts, may be distinguished from rights and duties which are not consequences of delicts by the name of 'sanctioning' (or 'secondary'). I call them 'sanctioning' because their proper purpose is to prevent delicts or offences.

My main division of the matter of the Law of Things, rests upon the basis or principle at which I have now pointed: namely, the distinction of rights and of duties (relative and absolute) into primary and sanctioning. Accordingly, I distribute the matter of the Law of Things under two capital departments—1. Primary rights, with *primary* relative duties. 2. Sanctioning rights with *sanctioning* duties (relative and absolute), delicts or injuries (which are causes or antecedents of sanctioning rights and duties) included.

*Substantive and adjective law. The terms suggestive of a misconception.*

If I adopted the language of Bentham, and of certain German writers, I should style the law of primary rights and duties, *substantive* law; and the law of sanctioning or secondary rights and duties, *adjective* or *instrumental* law. In other words, I should divide the Law of Things, or the bulk of the legal system, into law conversant about rights and duties which are *not* means or instruments for rendering others available; and law conversant about rights and duties which are merely means or instruments for rendering others available. Substantive law as thus understood is conversant about the rights and duties which I style primary: adjective law, about the rights and duties which I style secondary.

But it will appear, on a moment's reflection, that the terms substantive and adjective law tend to suggest a complete misconception of the nature of the basis on which the division rests.

These terms suggest the division of rights and duties into two classes under the following descriptions:

1st. Those which exist *in* and *per se*: which are, as it were, the ends for which law exists: or which subserve immediately the ends or purposes of law.

2ndly. Those which imply the existence of other rights and duties, and which are merely conferred for the better protection and enforcement of those other rights and duties whose existence they so suppose.

Now although sanctioning rights and duties (or rights and duties arising out of injuries) are of this last character, many rights and duties which are primary or principal (or which do not arise out of injuries) are also of the same nature. The division therefore of Law into law regarding primary rights and duties, and law regarding sanctioning or secondary rights and duties, cannot be referred to a difference between the purposes for which those rights and duties are respectively given by the State. And I object to the names, 'Substantive and Adjective Law,' as tending to suggest that such is the basis of the division. It appears to me that the true principle of division rests exclusively upon a difference between the events from which the rights and duties respectively arise. Those which I call primary do not arise from injuries, or from violations of other rights and duties. Those which I call secondary or sanctioning (I style them sanctioning because their proper purpose is to prevent delicts or offences) arise from violations of other rights and duties, or from injuries, delicts, or offences.

My main division, then, of the Law of Things is this: 1st. Law regarding rights and duties which do not arise from injuries or wrongs, or do not arise from injuries or wrongs directly or immediately; 2ndly. Law regarding rights and duties which arise directly and exclusively from injuries or wrongs. Or, Law enforced directly by the Tribunals or Courts of Justice; and Law which they only enforce indirectly or by consequence. For it is only by enforcing rights and duties which grow out of injuries, that they enforce those rights and duties which arise from events or titles of other and different natures.

Main division of Law of Things.  
1. Law regarding primary rights and duties :—  
2. Law regarding sanctioning rights and duties.  
The second department includes procedure.

Under the department of the law which relates to sanctioning rights and duties I include procedure, civil and criminal. For it is manifest that much of procedure consists of rights and duties, and that all of it relates to the manner in which sanctioning rights and duties are exercised or enforced.

And here Bentham's arrangement seems to me to be defective, as is also that of several German writers who have adopted the same views. In the *Traité de Législation* Bentham severs from *droit substantif* or the law, *droit adjetif* or the law of procedure. This, as it appears to me, involves a double logical error. For in *droit substantif* he includes *droit civil* (as opposed to *droit pénal*) and *droit pénal*; including under *droit pénal*, the law relating to civil injuries and to crimes with their punishments, together with

PART III. the rights and duties growing out of those delicts and of those punishments. But first, as I have already remarked of substantive law as thus understood, much is adjective or instrumental. For all rights of action arising out of civil injuries are purely instrumental or adjective; as well as the whole of criminal law and the whole law relating to punishments. And 2ndly, if he calls the law of procedure *droit adjetif*, he ought to extend that term to the law relating to the rights and duties arising from civil injuries and from crimes and punishments.

Distinction  
between an  
action con-  
sidered as a  
right, and an  
action con-  
sidered as an  
instrument  
for enforcing  
that right.

I must here advert to the distinction which is sometimes made between an action considered as a right, and an action considered as an instrument by which the right of action is itself enforced.

It is said by *Heineccius*, ‘*actio non est ius, sed medium ius persequendi.*’ But it is impossible to distinguish completely a *right of action* from the action or procedure which enforces it. For much of the right of action consists of rights to take those very steps by which the end of the action is accomplished.

It is perfectly true, that the scope or purpose of the right of action is distinct from the procedure resorted to when the right is enforced. Much of the procedure consists of rights which avail against the ministers of justice rather than against the defendant. And the parts of it which consist of rights against the defendant himself, are totally distinct from the end which it is the object of the process to accomplish. But still it is impossible to extricate the right of action itself from those subsidiary rights by which it is enforced. And it is manifestly absurd to deny that the process involves *rights*, because the rights which it involves are instruments for the attainment of another right.

While I am upon this subject, I will observe that a position of mine in a former part of my course, that every right of action arises from an injury, or violation of some other rights, has been objected to.

But it seems to me that the only cases in which a right of action *does not* presuppose an injury, arise from that anomaly in the English Law which I endeavoured to explain in a preceding Lecture (pp. 230–233 *supra*); *i. e.* cases in which a right of action is given, although there has been no wrong, on account of the want of wrongful consciousness on the part of the defendant.

No Court of Justice (*acting as such*) would decide on a question of law or fact without a suggestion, on the part of the plaintiff, of a wrong, actual or impending.\* In exer-

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\* The power to Courts of Justice to decide a question upon a

cising voluntary jurisdiction, they are rather lending solemnities to certain contracts. They are rather acting as registration offices than as courts of justice. What is called voluntary, and what is called contentious jurisdiction are only linked up together under one name, because the judges, who, as such, have to do with the latter alone, sometimes combine with it the former, as they do various other functions.

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In most systems of law, a vast number of primary rights and duties are not separated from the secondary. That is to say; the primary right and duty is not described in a distinct and substantive manner; but it is created or imposed by a declaration on the part of the Legislature, that such or such an act, or such and such a forbearance or omission, shall amount to an injury; and that the party sustaining the injury shall have such or such a remedy against the party injuring, or that the party injuring shall be punished in a certain manner.

Nay, in some cases, the law which confers or imposes the primary right or duty, and which defines the nature of the injury, is contained by implication in the law which gives the remedy, or which determines the punishment. This is generally the case in regard to the duties which I have called absolute, namely the duties owed to the State. These are hardly ever described separately, but are generally involved in the description of the acts or omissions which are violations of them, or of the procedure by which these violations are to be pursued. The same was the case, as I have previously shown (p. 304 *ante*), with the Praetor's Edict, which virtually enacted laws by declaring that in certain circumstances an *action* would be given or an *exception* allowed.

And it is perfectly clear that the law which gives the remedy, or which determines the punishment, is the only one that is absolutely necessary. For the remedy or punishment implies a foregone injury, and a foregone injury implies that a primary right or duty has been violated. And, further, the primary right or duty owes its existence as such to the injunction or prohibition of certain acts, and to the remedy or punishment to be applied in the event of disobedience.

The essential part of every imperative law is the imperative part of it: *i. e.* the injunction or prohibition of

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special case (introduced by statute 13 & 14 Vict. c. 35); and the power given to the Court of Chancery in England to give advice to trustees (22 & 23 Vict. c. 85, s. 80), are hardly exceptions to this statement. In both cases there is an implied suggestion of an impending wrong.—R. C.

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some given act, and the menace of an evil in case of non-compliance.

In strictness, my own terms, 'primary and secondary rights and duties,' do not represent a logical distinction. For a primary right or duty is not of itself a right or duty, without the secondary right or duty by which it is sustained ; and *e converso*.

The reason for describing the primary right and duty apart, for describing the injury apart, and for describing the remedy or punishment apart, is the clearness and compactness which result from the separation. For the same remedial process is often applicable to a variety of classes of rights, and repetition is consequently avoided. Another reason is that many injuries are complex ; being violations of several distinct rights.

To show how little logic is to be found in the very best attempts yet made to distribute the *corpus juris* into parts, I will observe that the description of the injury and of the remedy is sometimes annexed immediately to the primary right or duty ; in other cases, removed to a totally distinct department. An example of this is the order of the Institutes in respect to rights and duties which arise from the infringement of rights *ex contractu* and *quasi ex contractu*. By *obligationes ex delicto*, they meant what we mean by the same phrase in English law, namely, duties arising from violations of rights which avail against the world at large. Now the authors of the Institutes oppose to these, *obligationes ex contractu*, and *quasi ex contractu* : but rights and duties arising from contracts and quasi-contracts are rights and duties existing for their own sake, as the Germans express it : they belong to the class of primary or principal rights and duties. Consequently there is no place for the obligations arising from the breach of obligations *ex contractu* and *quasi ex contractu* ; these are consequently attached to the description of those obligations themselves. By this rule, however, *obligationes ex delicto* (by which the authors of the Institutes meant obligations which arise from violations of *jura in rem*) ought, in consistency, to be attached to that part of the law which is concerned with *dominia* or *jura in rem* ; or, if banished to a separate head, obligations arising by offences against the rights founded on contracts and quasi-contracts ought to be placed there along with them. Such, for instance, are rights of action arising from a contract ; for it is evident that there can be no action upon a contract until it is broken.

Blackstone's method, though in general greatly inferior to that of the Roman Lawyers, is here superior to it. Under the head of personal property he treats of those obligations arising from contracts and quasi-contracts which are *primary* : in his third volume, when treating of wrongs,

he adverts to those obligations growing out of contracts or quasi-contracts which arise from breaches of those primary ones.

Lect.  
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## LECTURE XLVI.

*Method of subdivision of Primary Rights, etc.*

AFTER distinguishing primary or principal from secondary or sanctioning rights and duties, I next proceed to subdivide the former division, or that of primary rights.

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First great  
division of  
primary  
rights into  
rights in  
*rem* and in  
*personam*.

The first great distinction among primary rights has been very fully explained in a preceding part of this course (p. 175, etc.). I allude to the distinction between *dominia* and *obligationes*, as they were called by the classical jurists; between *jura in rem* and *jura in personam*, as they have been styled by modern Civilians. For this distinction, *as conceived with the whole of its extent and importance*, we are indebted to the penetrating acuteness of the classical Roman jurists, and to that good sense, or rectitude of mind, which commonly guided their acuteness to true and useful results. Every student of law who aspires to master its principles, should seize the distinction in question adequately as well as clearly; and should not be satisfied with catching it, as it obtains here or there. For the difference whereon it rests, runs through every department of every system of jurisprudence: although, in our own system, the difference is far from being *obvious*, and cannot be expressed at once sufficiently and concisely without a resort to terms unknown to the English law, and which may appear uncouth and ridiculous to a merely English lawyer.

With the help of the explanations given in previous Lectures I can now indicate the method or order wherein I treat or consider the matter of the Law of Things. That method may be suggested thus:

The matter of the Law of Things, I arrange or distribute under two capital departments.

Distribution  
of primary  
rights, &c.  
under four  
sub-depart-  
ments.

The subjects of the first of those capital departments are *primary* rights, with *primary* relative duties; which I arrange or distribute under four sub-departments.—1. Rights *in rem* as existing *per se*, or as not combined with rights *in personam*. 2. Rights *in personam* as existing *per se*, or as not combined with rights *in rem*. 3. Such of the combinations of rights *in rem* and rights *in personam* as are particular and comparatively simple. 4. Such *universities* of rights and duties (or such complex aggregates of rights and duties) as arise by universal succession.

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The subjects of the second of those capital departments are *sanctioning* rights (all of which are rights *in personam*); and *sanctioning* duties (some of which are relative, but others of which are absolute), together with *delicta* or *injuria* (which are causes or antecedents of sanctioning rights and duties).

This division,  
why prefer-  
able to that  
of the  
Roman  
lawyers.

This order is somewhat different from that of the institutional treatises of the Roman lawyers, and from that of those modern Civilians who have followed the method of those treatises. By them, the matter of the law of things is divided into *dominia* (in the largest sense of that term), or *jura in rem*—and *obligationes*, or *jura in personam*. And *dominia* (in the large sense) are again divided into *dominium rei singulae*, *jura in re aliena*, and *universitates juris*.

This division appears to me very incorrect. A man's inheritance or patrimony, for instance (which is a *universitas juris*), includes both *jura in rem* and *jura in personam*, because rights of both sorts devolve on universal successors.

It is more convenient, as well as more correct, to distinguish primary rights into *jura in rem*, *jura in personam*, and aggregates more or less complex of rights of both kinds. There are combinations of both kinds of rights which are hardly included in the expression '*universitas juris*'. For example, the right conferred by a mortgage, is a combination of rights *in rem* and rights *in personam*. So is the right conferred by a *sale*, completed by delivery, under some circumstances; for instance, if accompanied by a *warranty*.

Even by my own method the distinction between the classes of rights is not complete, and they cannot by any method be kept quite separate. Under the head of *universitas juris*, we cannot avoid referring forward to obligations arising from injuries: for many rights arising from injuries often devolve from Testators, Intestates, or Insolvents, to those who take *per universitatem*.

## LECTURE XLVII.

*Rights in rem as existing per se—Different meanings of 'Dominium' or 'Property.'*

LECT.  
XLVII.

Rights in  
rem as exis-  
ting per se,

IN treating of rights *in rem* as existing simply (or as not combined with rights *in personam*), I will first touch upon them briefly, with reference to differences between their *subjects*, or between the aspects of the forbearances which may be styled their *objects*.

And here I shall further explain a position stated in a previous Lecture (see p. 176 *supra*).

with refer-  
ence to  
differences  
between  
their sub-  
jects.

The expression *in rem*, when annexed to the term *right*, does not denote that the right in question, *is a right over a thing*. Instead of indicating the nature of the subject, it points at the compass of the correlating duty. It denotes that the relative duty lies upon persons generally, and is not exclusively incumbent upon a person or persons determinate. In other words, it denotes that the right in question *avails against the world at large*.

Accordingly, some rights *in rem* are rights over *things*: others are rights over *persons*: whilst others have *no* subjects (*persons* or *things*) over or to which we can say they exist, or in which we can say they inhere.—For example: Property in a horse, property in a quantity of corn, or property in, or a right of way through a field, is a right *in rem* over or to a *thing*, a right *in rem* inhering in a *thing*, or a right *in rem* whereof the subject is a *thing*.—The right of the master, against third parties, to his slave, servant, or apprentice, is a right *in rem* over or to a *person*. It is a right residing in one person, and inhering in another person as its subject.—The right styled a monopoly, is a right *in rem* which has *no* subject. There is no specific subject (*person* or *thing*) over or to which the right exists, or in which the right inheres. The *officium* or common duty to which the right corresponds, is a duty lying on the world at large, to forbear from selling commodities of a given description or class: but it is not a duty lying on the world at large, to forbear from acts regarding determinately a specifically determined subject. A man's right or interest in his reputation or good name, with a multitude of other rights, would also be found, on analysis, to avail against the world at large, and yet to be wanting in persons and things which could be styled their subjects.

I shall therefore distinguish rights *in rem* (their answering relative duties being implied) with reference to differences between their *subjects*, or between the aspects of the forbearances which may be styled their *objects*. As distinguished with reference to those differences, they will fall into three classes.—1. Rights *in rem* of which the subjects are *things*, or of which the objects are such forbearances as determinately regard specifically determined *things*. 2. Rights *in rem* of which the subjects are *persons*, or of which the objects are such forbearances as determinately regard specifically determined *persons*. 3. Rights *in rem* without specific subjects, or of which the objects are such forbearances as have no specific regard to specific *things* or *persons*.

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In explaining, in my earlier Lectures, the nature of the distinction between *jus in rem* and *in personam*, I cited numerous examples of rights in the former class which have no specific subjects (persons or things, p. 188 *supra*). And it will, therefore, not be necessary to adduce examples here.

With regard to *jura in rem*, which are rights over persons, I would observe that all (or nearly all of them) are matter for the Law of Persons and the Law of *Status*. Such, for example, is the case with the right of the master to the slave; the right of the master in the servant; the right or interest of the parent or husband in the child or wife; and the right or interest of the child or wife in the parent or husband. In these, and various other cases, the right is *jus in rem* (or a right availing against the world at large) of which the subject is a person. But in each of these cases, the right is a constituent element of a *status* or condition, and therefore is appropriate matter for that appendix or supplement which is styled the Law of Persons.

The only right in or over a person which seems appropriate matter for the Law of Things, is what may be called a man's right in his own person or body: that is to say, a man's right to enjoy and dispose of (free from hindrance by others) his bodily organs and powers, in so far as such enjoyment and disposition consist with the rights of others, or (generally) with any of the duties incumbent on himself.

This right (which, as I shall show hereafter, may be likened to property or dominion in a thing, strictly so called) is properly matter for the Law of Things, or for the Law exclusive of the law of *status*. Instead of being parcel of a *status* or condition, it resides in every person (who has any rights at all) by the mere fact of his living under the State, or within the protection which it yields to those who are living under its jurisdiction.

*Rights in rem over things, the only rights which I shall treat directly.*

In treating of rights *in rem* as existing simply (or as not combined with rights *in personam*), the only rights which I shall consider directly are, rights over *things*, in the strict acceptation of the term: that is to say, such permanent external objects as are not persons. Rights *in rem* in or over persons, and rights *in rem* which have no subjects, I shall touch incidentally (in so far as I may find it necessary to advert to them), as I treat of rights of the class in or over things.

Of the various distinctions between rights *in rem* over things, the first to which I address myself, is the distinction which I must mark, for the present, by the ambiguous and inadequate names of *dominium* and *servitus*. The rationale of this distinction is the following:—

By different rights *in rem* over things, the different per-

*Distinction between property or dominium, and easement or servitus.*

sons in whom they respectively reside are empowered to use or deal with their respective subjects in different degrees or to different extents. And such differences obtain between such rights, independently of differences between their respective durations, or the respective quantities of time during which they are calculated to last.

Of such differences between such rights, the principal or leading one is this.—1. By virtue of some of such rights, the entitled persons may use or deal with the subjects of the rights to an extent which is incapable of exact circumscription, although it is not unlimited. For example: The proprietor or owner is empowered to turn or apply the subject of his property or ownership, to uses or purposes which are not absolutely unlimited, but which are incapable of exact circumscription with regard to class or number. The right of the owner, in respect of the purposes to which he may turn the subject, is only limited, generally and vaguely, by all the rights of all other persons, and by all the duties (absolute as well as relative) incumbent on himself. He may not use his own so that he injure another, or so that he violate a duty (relative or absolute) to which he himself is subject. But he may turn or apply his own to every use or purpose which is not inconsistent with that general and vague restriction. And to an extent which is likewise indefinite he may exclude others from the use of the subject. 2. By virtue of other of such rights, the entitled persons, or the persons in whom they reside, may merely use or deal with their subjects, to an extent exactly circumscribed (at least, in one direction). For example: he who has a right of way through land owned by another, may merely turn the land to purposes of a certain class, or to purposes of determined classes. He may cross it in the fashions settled by the grant or prescription, but those are the only purposes to which he may turn it lawfully.

A right belonging to the first-mentioned kind, may be styled *dominium*, or *property*, with the sense wherein *dominium* is opposed to *servitus*. As contradistinguished to a right belonging to the first-mentioned kind, a right of the last-mentioned kind may be called *servitus*. *Dominum* or *property* is a name liable to objection, on account of the numerous meanings (to which I shall presently advert) in which the word has been used. *Servitus* is also liable to objection as not adequately expressing the class of rights which I have denoted by it. But notwithstanding the ambiguities which encumber the terms, I prefer them, as being known and established terms, to newly devised names; and this for reasons which I have repeatedly hinted at in the course of these Lectures.

Before I close the present Lecture, I will make a few Various meanings

PART III.  
 'property'  
 or 'domi-  
 nium,' etc.

remarks upon the various meanings of the very ambiguous word 'Property' or 'Dominium.'

1. Taken with its strict sense, it denotes a right—indefinite in point of user—unrestricted in point of disposition—and not restricted by regard to rights of others whose enjoyment is postponed—over a determinate thing. In this sense, it does not include *servitus*, nor any right limited by regard to an indefeasible remainder or reversion in another person. Sometimes it is taken in a loose and vulgar acceptation, to denote not the right of property or dominion, but the *subject* of such a right; as when a horse or piece of land is called my property.

2. Sometimes it is applied to a right indefinite in point of user, but limited by regard to rights of persons entitled in remainder or reversion: for instance, in common parlance, a life interest in an immoveable is a property.

3. Sometimes the term 'right of property' or 'dominium' is opposed to a right of possession; in this sense the term 'right of property' even includes *servitus*.

4. In the language of the classical Roman jurists, the term *proprietas*, or *in re potestas* or *dominium*, has two principal meanings. It is either a right, indefinite in point of user, over a determinate thing: or, generally, *jus in rem*. In the first sense, it is opposed to *servitus*; and these form the two divisions of rights availing generally against the world. In the second or large and vague sense, it includes all to which in the first sense it is opposed; all rights not coming within the description of *obligatio*.

5. In English law, unless used vaguely and popularly, the term *property* is not applied to rights in immoveables. We talk of *property* in a moveable thing; and by this we mean what the Roman lawyers called *dominium* (in the narrower sense of the term) or *proprietas*, they having no distinction between real and personal property. But in the strict language of English law, when we refer to a right or interest in immoveables, we speak of an *estate* in fee simple, an *estate* in tail, an *estate* for life and so on, but never a *property*. An estate in fee simple corresponds as nearly as may be to absolute property in a personal chattel.

6. Another strange caprice of language is the following. The term 'property' is applied to some rights *in rem* over or in persons but not to others. For example, the right of the master in the slave is called *dominium* in the Roman law and *property* in the English. The former word seems to have originally been applied exclusively to that right; to have been co-extensive with *dominus*, and to have extended only by analogy to *things* strictly so called. But in neither the Roman nor the English law is the analogous right of the father in his son included under the same name. So a man's right in his own person has been called a right

of personal security, but never a property in his own person. This is analogous to the capricious application of the term *thing*, which I mentioned in a previous Lecture (p. 398, *supra*).

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7. Another meaning of the word *property* is the aggregate of a man's faculties, rights, or means. It is tantamount to the term *estate and effects*, or perhaps to the term *assets*. In this sense it implies rights *in personam*, or *obligations*, as well as rights of every other class.

8. A still more remarkable acceptation is the following. In the largest possible meaning, property means legal rights or faculties of any kind; as when we talk of the institution of property: or of security to property as arising from such and such a form of Government, or the like. It is commonly said that Government exists or should exist to institute and protect property. I have demonstrated in a note to my published Lectures, the absurdity of this doctrine.\* But the *property* here spoken of must mean legal rights in the largest sense. It cannot be meant that Government exists or ought to exist for the purpose of creating and protecting rights of dominion in the narrower sense, else it would be implied that it ought not to exist for the purpose of protecting rights arising from contracts and *quasi-contracts*.

## LECTURE XLVIII.

### Dominium as opposed to Servitus.

PURSUING my examination of the distinction, which, for want of better names, I marked with the opposed expressions *dominium* (or property) and *servitus*, I proceed to remark that whoever has a right of property may apply the subject of his right to any purpose or use which does not amount to a violation of any right in another, or to a breach of any duty lying on himself. And it is only in that negative manner that the extent of the power of user imported by the right of property can possibly be determined.

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Distinction  
between  
*dominium* (or  
property)  
and *servitus*.

But in the case of a right of servitude, the purposes or uses to which the person invested with the right may apply the subject, are not only limited generally by the duties incumbent upon him, but are determined or may be determined by a positive and comprehensive description.

In a word, *servitus* gives to the entitled party, a power or liberty of applying the subject to exactly determined purposes. Property or *dominium* gives to the entitled party the power or liberty of applying it to *all* purposes, save such

\* See note, p. 300, *supra*.

PART II. purposes as are not consistent with his relative or absolute duties.

I would briefly remark (before I proceed) that in treating of the distinction now in question, I suppose that the right of the party is present or vested, and is also accompanied with a right to the present enjoyment of the right, or to the present exercise of it. To the nature of contingent rights, and of such vested rights as are not coupled with a right to present enjoyment or exercise, I shall advert hereafter.

Property is  
susceptible  
of various  
modes.

Property or *dominium* (used with the meaning which I am now annexing to the term) is applicable to any right which gives to the entitled party an indefinite power or liberty of using or dealing with the subject. But property (as thus understood) is susceptible of various *modes*: that is to say, the limitations or restrictions to that power or liberty may vary to infinity; according to the purpose or intention of the State in granting or conceding the right, and the consequent duties laid on the owner, either absolutely or having regard to rights conferred on others in the same subject.

For example: An estate in fee-simple in land, or absolute property in a personal chattel, and an estate for life or years in land or a personal chattel, are equally *property* (in the present sense of the expression): for, in either case, the power or liberty of user which resides in the entitled party, is not susceptible of positive and exact circumscription.

But the limitations or restrictions to that indefinite right of user, are, in the different cases, widely different.

In the case of the estate in fee, or the absolute property in the personal chattel, the owner may waste or destroy the subject, in so far as such waste or destruction may not be injurious to other persons considered generally.

In the case of the estate for life, or of the estate for years, this power or liberty is restrained, not only by the rights of others considered generally, but by the rights in the same subject of those entitled in remainder or reversion: that is to say, who have rights in the same subject, calculated to confer an enjoyment subsequent to that of the owner for life or the owner for years. For if the tenant for life or for years had the same power of user which resides in the absolute owner, it is clear that the rights of those entitled in remainder or reversion would be merely illusory. In respect of their rights, he, at least, must be subject to the duty of not destroying the subject, or of so dealing with it as would render it absolutely worthless.

But the restrictions to the right of the limited owner, which arise from the rights of the remainderman or rever-

sioner, may also be fixed differently by the absolute dispositions of the law, or by private dispositions which the law allows and protects. We may suppose, for example, that the owner for life of land may be empowered to divest it completely of timber and buildings, to exhaust the valuable minerals, and even to carry away the surface soil: or that his power of taking minerals and timber, and demolishing buildings, may be more or less restricted.

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But though the possible *modes* of property are infinite, and though the indefinite power of user is always restricted more or less, there is in every system of law, some one mode of property in which the restrictions to the power of user are fewer—the power of indefinite user more extensive—than in others. And to this mode of property, the term dominion, property, or ownership is pre-eminently and emphatically applied.

Property  
pre-emi-  
nently  
so called.

Such, for example, in the Roman law, is *dominium* (in the strict sense): such, in the French law, is *propriété* (in the same sense): such, in our own law, is absolute property in a moveable. Such, too, in our own law, is an estate in fee-simple in land: but which (although it is closely analogous to absolute property in a moveable) is not commonly called property or ownership.

But even the right of property pre-eminently so called is not unlimited in respect of the power of user which resides in the proprietor. The right of user (with the implied or corresponding right of excluding others from user) is restricted to such a user as shall be consistent with the rights of others generally, and with the duties incumbent on the owner.

Property pre-  
emi-  
nently  
so called, is  
not unlimited  
in respect of  
the power of  
user.

For example: I may exclude others generally from my own land or house; but I cannot exclude officers of justice, who, authorised by a warrant or other due authority, come to my house to search for stolen goods. If I am the absolute owner of my house, I may destroy it if I will. But I must not destroy it so as to cause damage to any of my neighbours. If, for example, I live in a town, I may not destroy it by fire, or blow it up by gunpowder.

I have a right in my own person which is analogous to the right of property in a determinate thing. And, as a consequence of that right, I may (generally speaking) move from place to place. But this my liberty and right of locomotion, does not empower me to enter the land or house of another, unless I am specially authorised by the owner's license, by a right of way through his house or land, or by some other cause specially empowering me to enter it.

And the power of user which is implied by the right of

PART III.

property, may also be limited by duties which are incumbent on the owner specially and accidentally.

For example: The power of user may be restricted by duties or incapacities which attach upon the owner in consequence of his occupying some *status* or condition. For example, an infant proprietor is restricted in his user by reason of the powers of management vested in his guardians or committee.

Or the power of user may be restricted by reason of a concurrent right of property residing in another over the same subject, a species of right called *condominium* in the Roman law, joint property and property in common in our own.

Or the power of user may be restricted by virtue of a right of servitude residing concurrently over the same subject in another person. For example: I have (speaking generally) a right of excluding others from my own field. But I have not a right of excluding you (exercising your servitude or easement), if you have a right of way (by grant or prescription) over the subject of my right of property. I have (speaking generally) a right to the produce of the field: but that right is limited by a right in the person to a tithe, unless my land be tithe free.

Property pre-  
eminent,  
so called, or  
any of its  
modes, can-  
not be de-  
fined (in  
respect of the  
power of  
user) exactly.

It follows from what has preceded, that neither that right of property which imports the largest power of user, nor any of the rights of property which are modes or modifications of that, can be defined exactly. For property or dominion, *ex vi termini*, is *jus in rem* importing an indefinite power of user. The definition, therefore, of the right of property lies throughout the *corpus juris*, and imports a definition of every right or duty which the *corpus juris* contains.

The modes of  
property are  
distinguish-  
able from  
one another  
by precise  
lines of demar-  
cation.

But though neither absolute property, nor any of its modes, is capable of exact circumscription, the various modes are distinguishable from one another by precise lines of demarcation.

For example: The right of a limited owner such as a tenant for life or for years, may be distinguished from the right of the absolute owner, by an enumeration of the powers of user (belonging to the absolute owner) from which the limited owner is excluded.

And this (I apprehend) is the way in which these modes of property are distinguished from absolute property and from one another. Such or such a use, for example, which the absolute owner may lawfully derive from the subject, would at the hands of the limited owner be an injury to the remainderman or reversioner.

What I have said with regard to the definition of abso-

lute property quadrates with the practice of law writers or makers of codes.

In the Institutes of Gaius and Justinian, the right of property or *dominium* is not defined at all. Things are described; the modes of acquiring property in them are described; servitudes are described; but of the right of property or *dominium* no direct description is given. The nature of the right (in respect of the power of user) is left to be inferred from the treatise generally. In the codes or treatises which attempt a definition of it, merely a few of its properties or qualities are given: and those properties or qualities are given with restrictions which lie throughout the body of the law. Thus, in the 544th article of the French Code, property is declared to be the absolute right of using or dealing with a thing as we will, provided we do not use it in any manner which is prohibited by laws or *règlements*.

Such maxims of law as these, *Sic utere tuo ut alienum non lèdas*; *Qui jure suo utilur neminem lèdit*, and the like, arise from this impossibility of exactly defining and circumscribing the right of ownership or property, and are really almost identical propositions.

The distinction between legal and equitable property (or *dominium ex jure Quiritium* and *dominum bonitatum*) is a mere accident, arising from the existence of the accidental distinction between *law* and *equity*, or *jus civile* and *jus pratorium*.

LECT.  
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The definitions (or no definitions) of property in various codes or systematic treatises.

## LECTURE XLIX.

### *Servitus as distinguished from Dominium.*

In my last Lecture I considered particularly property or *dominium* as opposed to *servitus*. In my present Lecture I shall consider particularly *servitus* as opposed to property or *dominium*.

LECT.  
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Before I consider particularly the nature and kinds of servitudes, I must interpose the following remarks.

1st. Speaking generally, the subject of a right of servitude is also at the same time the subject of property residing in another or others. For example, if I have a right of way over a field, the field is yours solely, or is yours jointly or in common with others, or is yours for life or years (solely or jointly with others) subject to rights in others calculated to confer future enjoyment.

Speaking generally, right of servitude is a fraction of a right of property residing in another or others. But

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a right of servitude may exist over a subject which has not an owner properly so called.

For this reason, rights of servitude are styled by the Roman lawyers *jura in re aliena*: that is to say, rights over subjects of which the property or dominion resides in another or others. Though (as I shall show hereafter) rights of servitude are not the only rights to which the expression *jus in re aliena* (or, briefly, *jus in re*) is applied. For the same reason, a right of servitude is styled by Bentham a *fractional* right; and by Savigny (in his matchless treatise on the Right of Possession) a single or particular *exception* (accruing to the benefit of the party in whom the right resides) from the general power of user and exclusion residing in the owner of the thing.\* For the same reason, rights of servitude are styled by French writers, '*démembremens* du droit de propriété': that is to say, detached bits or fractions of the indefinite right of user which resides in the person or persons who own the subject of the servitude.

A right in the nature of *servitus* may however exist over a thing, which, speaking with precision, has no owner. We may conceive, for example, that the Sovereign or State reserves to itself a portion of the national territory; but that it grants to one of its subjects, over a portion of the territory so reserved, a right which quadrates exactly with the notion of a right of servitude: that is to say, a right to use or apply the subject in a definite manner.

Now, in the case imagined, there is not, properly speaking, any right of property in the thing which is subjected to the servitude. For, it is only by analogy that we can ascribe to the Sovereign a legal right. Strictly speaking, the party has a right of servitude, while the indefinite power of using the thing has been reserved by the Sovereign or State to itself.

But since most rights of servitude imply rights of ownership, and cannot be explained without reference to those rights of ownership, I shall assume for the present, that every right of servitude is *jus in re aliena* — a definite fraction, or *démembrement*, of property or dominion in the given subject, which resides in another or others.

Dificulties  
encumbering  
the terms  
'property,'  
'servitus,'  
and 'easement.'

2ndly, I showed in my last Lecture, that the modes of property (as I understand the expression) are infinite: and that to some of those modes we cannot apply the term 'property' without a departure from established usage. For example: The right of a tenant for years of land, is hardly, in English law, termed a right of property. Various other difficulties, which encumber the term 'property,' I stated in the Lecture before the last. I will merely add at present, that I mean by the term *property* (as contradistinguished

\* Recht des Besitzes, § 46.

to *servitus*) any right *in rem* which gives to the entitled party an *indefinite* power of user. For I am not considering rights of property with reference to the modifications imposed in regard to the rights of the remainderman or reversioner. These I shall deal with in a subsequent Lecture.

The term *servitus* is not less encumbered with difficulties than the term *property*. For there are many rights (as I shall show presently) which, in the language of the Roman law and of the modern systems derived from it, are styled *servitudes*: but which, in the language of the English, would be styled *rights of property*. And justly: for they are rights importing an indefinite power of user. To these improper servitudes I shall advert more fully hereafter. And I now merely add, that I mean, for the present, by a *right of servitude* (as opposed to a *right of property*) any such right in a subject owned by another or others as gives to the party a *definite* power of using it.

The term *easement* is not less objectionable than the term *servitus*. For though it is never extended to any such rights *in rem* as fall properly within the category of *property*, it is *not applied* to certain rights *in rem* which fall properly within the category of *servitudes*. For example: A right of way over another's field is styled an easement. A right of common is also sometimes loosely styled an easement, though it consists of rights strictly and technically called *profits à prendre*. But a right to predial tithes (or to a definite portion in the produce of another's land) is never styled an easement; although it is called a *servitude* (or by a name of similar import) in the language of the legal systems which have borrowed largely from the Roman.\*

3rdly. For the sake of simplicity, I have assumed that every right of servitude is a right of *using* a subject owned by another or others. But, as I shall show immediately, there are certain servitudes, which, in the language of modern Civilians, are called *negative*; and which, in the language of the Roman lawyers, are said to consist *non faciendo*; that is to say, not to consist of a right to *use positively* the given subject, but in a right to a *forbearance* (on the part of the owner or occupier) from putting the given subject to a given use.

Quare,  
Whether a  
negative  
servitude be  
a right of  
using the  
subject?  
And whether  
it be not  
merely *jus*  
*personum*  
against the  
owner or  
occupant

In describing and distinguishing the kinds of servitudes, I shall examine:—

Order where  
in the nature

\* For instance, Teind (or tithe in Scotland) is ranked by Stair and other Scotch legal authorities amongst servitudes. Another right in the law of Scotland, invariably classed amongst servitudes, is that of *thirlage*, or the obligation upon all the tenants of the lands within the thirl (or servient district) to bring their grain to be ground at the dominant mill.—R. C.

PART III.  
and kinds of  
servitudes  
will be con-  
sidered.

1st. The distinction between the servitudes which are respectively styled by modern civilians *affirmative* or *positive* and *negative* servitudes.

2ndly, the celebrated position, that no right of servitude is a right to an *act* on the part of the owner.

3rdly, the distinction between *real* servitudes and *personal* servitudes.

4thly, certain rights of property or dominion (meaning by *property* or *dominion*, any right *in rem* importing an indefinite power of user) which, in the Roman law, are ranked improperly, as I conceive, with rights of servitude. The principal amongst these are *Usofructus*, *usus*, *habilatio*, *superficies*, and *emphyteusis*.

1. Distinction  
between  
affirmative  
or positive  
and negative  
servitudes.

In pursuance of the order which I have now indicated, I begin with the established division of rights of servitude into *positive* or *affirmative* servitudes, and *negative* servitudes.

The right of property or *dominium* (in so far as the right of user is concerned) may be resolved into two elements: 1st, the power of using indefinitely the subject of the right: 2ndly, a power of excluding others (a power which is also indefinite) from using the same subject. For a power of indefinite user would be utterly nugatory, unless it were coupled with a corresponding power of excluding others generally from any participation in the use. The power of user and the power of exclusion are equally rights to *forbearances* on the part of other persons generally. By virtue of the right or power of indefinitely using the subject, other persons generally are bound to forbear from disturbing the owner in acts of user. By virtue of the right or power of excluding other persons generally, other persons generally are bound to forbear from using or meddling with the subject. The rights of user and exclusion, however extensive, are never absolute or complete. They are always restricted by the absolute duties to which the proprietor is subject. Frequently, they are restricted by rights over the same subject, residing specially in determinate parties: as by the rights of a joint or co-proprietor, or by the rights of a remainderman, or reversioner.

Where a determinate party has a right (as against the owner and the rest of the world) to put the thing to uses of a definite class, the party has a right over the thing, which is commonly called a *servitude*. Where a determinate party has a right to a forbearance (on the part of the owner and everybody else) from putting the thing to uses of a definite class, that party has also a right over the thing which also is styled a servitude. It is necessary (I apprehend) in order to the existence of a servitude, that the right of the party should be *jus in rem*, or a right against the world at large. If it merely availed against

the owner (or against the other occupant for the time being) it would not completely answer to the notion of *servitus*. This will be further considered under the next head. It is also necessary (I apprehend) in order to the existence of a servitude, that the party entitled should have a right to use the subject in the manner specified, an indefinite number of times, and for a period not determinable at any instant at the will of the proprietor. If, for instance, a proprietor gives me a day's salmon-fishing in the Tweed, or a day's trout-fishing in the Wandle, it is a mere licence, and does not confer a right in the nature of a servitude. It would be a mere licence even if he were, in an unguarded moment, to confer the benefit of a choice of days, or the liberty to fish at any time until he should recall the permission.

Where the party entitled to the servitude has a right to *use* the subject, his right is styled, by modern Civilians, 'a positive or affirmative servitude.' Where he has a right to a *forbearance* (on the part of the owner and everybody else) from using the subject, the right is styled by the same Civilians, a *negative* servitude.

By the Roman Lawyers, a positive servitude (in respect of the owner) is said to consist in *patiendo*: i.e. in his duty to forbear from molesting the other in the given user of the subject. A negative servitude (in respect of the owner) is said to consist in *non faciendo*: i.e. in his duty to forbear from using the subject in the given manner or mode. In either case, the duty lying upon the owner (and others) in respect of the servitude is to forbear. It is a negative duty. The words *positive* and *negative* are therefore applied to the different servitudes not as they affect the owner of the subject, but as they affect the person entitled to the servitude. The so-called positive servitude gives him a right to do acts over the given subject, as well as a right to a forbearance on the part of the owner (and others) from molesting him in the performance of those acts. But a negative servitude merely gives him a right to forbearances.

Cases of positive servitudes are rights of way or of common. These are rights of dealing positively with the subject—of putting the subject to certain positive uses. Cases of negative servitude are the *servitus altius non tollendi*, and the *servitus ne luminibus* and *ne prospectus officiatur*. Generally speaking, the owner has a right of building on any part of his own land; *cujus est solum ejus et usque ad cælum*. But, by a right of servitude residing in another person, I may be prevented from building so as to prevent his looking over my land from his house; I may be prevented from building so as to obstruct his *ancient lights*, or to prevent his enjoying a look out which he had acquired by a special title. Another example is the *servitus*

### LECT. XLIX.

A servitude  
disting-  
guished from  
a licence.

Positive or  
affirmative  
servitudes  
(*qua in patiendo  
consistunt*),  
and negative  
servitudes  
(*qua in non  
faciendo  
consistunt*).

PART III.

*stilicidii recipendi*: a right to compel your neighbour to receive the water which drops from your roof. An analogous right which often leads to contest in cities, the right of compelling your neighbour to receive through his house the drainage running from your own, would also be deemed a negative servitude. It is not a right of putting his land or house to any positive use, but a right to prevent him from dealing with his land or house in certain ways in which, but for your right, he would be at liberty to deal with it.

Doubtful whether there is any scientific foundation for this distinction.

I have endeavoured to state the distinction, because it is found in the Roman law and other legal systems; but I doubt whether there is anything in it. It seems to turn on the extent you give to the word *user*. In a right of way or of common you are said to *use* the thing which is the subject of your right of servitude. But in case of a duty to receive the drainage from your house, or to permit light and air to pass freely over the neighbouring tenement to your ancient windows, you may also be said with propriety to put the servient tenement to certain uses.\*

2. No right of servitude can consist in *faciendo*.

No right of servitude can consist in *faciendo*:† i.e. can consist in a right to an *act* or *acts* on the part of the owner or other occupant. This follows from the very nature of a servitude, to which it is essential that it should be *jus in rem*, or a right availing against persons generally; for if it consisted in a right to an *act* to be done by the owner or other occupant, it would be merely *jus in personam* against that determinate party.

In the case of a servitude, the *jus in rem* may happen to be combined with *jus in personam* against the owner: and so may happen to be combined with a right to an *act*, against the owner: e.g. a right to have a way repaired by the owner.

When it is said that *servitus* is *jus in rem*, this must be taken subject to the following explanation. Every *servitus* is *jus in personam* against the owner or other occupant, and *jus in rem* against the rest of the world.

An affirmative servitude may clearly avail against *any*, and may be violated by *any*. e.g. A stranger to the soil may violate a commonable right, by putting his cattle on the common.‡ And in the case of a negative servitude,

\* The distinction made in English law between an *easement* and a *profit à prendre* is really a more intelligible one. Where the right consists in taking away something corporeal and tangible from the land of another, it is called a *profit à prendre*, such as a right of fishing, a right of common of pasture, &c.—R. C.

† Mackeldey, vol. ii. pp. 78, 88. Thibaut, *Versuche*, vol. I. p. 27.

‡ Blackstone, vol. iii. p. 237.

it is possible for a stranger (*e.g.* a trespasser) to do the act which would prevent the enjoyment of the servitude: *e.g.* to build up, or otherwise obstruct, ancient lights. In the case, however, of a negative servitude, it is less likely that a stranger should disturb.

I apprehend that a negative servitude is usually assigned to the category of *jura in rem* on the ground that it avails *adversus quemcumque possessorem*: *i.e.* with or without title from the actual or preceding owner. But since a right of servitude, positive or negative, *may* be violated by third parties (being mere trespassers, not even in actual possession of the subject), it implies a duty to forbear from disturbing, which lies upon persons generally, although it also lies in a special manner upon the owner or other occupant of the thing.

The distinction between an occupant without title, and a mere trespasser or other stranger, is, that the former is exercising over the subject a right of property residing in another; while the latter does not affect to exercise any such right. To explain this, we must analyze the right of possession.

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## LECTURE L.

### *Real and Personal Servitudes.*

SERVITUDES are distinguished by the Roman Law into two kinds: 1. Predial or *real* servitudes ('servitutes prædiorum sive rerum'); 2. *Personal* servitudes ('servitutes personarum sive hominum'). The distinction is an essential one, and is similar to the distinction in English law between rights (of easement or *profit à prendre*) *appurtenant* and *in gross*.

Lect.  
L.

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a. Real and  
Personal  
servitudes.  
Nature of the  
distinction.

Now '*real*' and '*personal*', as distinguishing the kinds of servitudes, must not be confounded with '*real*' and '*personal*', as applied to rights and as synonymous with '*in rem*' and '*in personam*'.

In a certain sense, all servitudes are *real*. For all servitudes are rights *in rem*, and belong to that *genus* of rights *in rem* which subsist in *re aliena*. And, in a certain sense, all servitudes are *personal*. For servitudes, like other rights, reside in *persons*, or are enjoyed or exercised by *persons*.

The distinction between '*real*' and '*personal*', as applied and restricted to servitudes, is this: A *real* servitude resides in a given person, as the owner or occupier, for the time being, of a given *prædium*: *i.e.* a given field, or other parcel of land; or a given building, with the land whereon it is erected. A *personal* servitude resides in a given person; without respect to the ownership or occupation of a

PART III.

*prædium.* To borrow the technical language of the English Law, *real* servitudes are *appurtenant to lands or messuages*: *personal* servitudes are servitudes *in gross*, or are annexed to the persons of the parties in whom they reside. Every *real* servitude (like every imaginable right) resides in a *person* or *persons*. But since it resides in the person as occupier of the given *prædium*, and devolves upon every person who successively occupies the same, the right is ascribed (by a natural and convenient *ellipsis*) to the *prædium* itself. Vesting in every person who happens to occupy the *prædium*, and vesting in every occupier *as* the occupier thereof, the right is spoken of as if it resided in the *prædium*, and as if it existed for the advantage of that senseless, or inanimate subject. The *prædium* is erected into a legal or fictitious *person*, and is styled '*prædium dominans*' On the other hand, the *prædium*, against whose occupiers the right is enjoyed or exercised, is spoken of (by a like *ellipsis*) as if it were subject to a duty. The duty attaching to the successive *occupiers* of the *prædium*, is ascribed to the *prædium* itself: which, like the related *prædium*, is erected into a *person*, and contrasted with the other by the name of '*prædium serviens*'. Hence the use of the expressions '*real*' and '*personal*', for the purpose of distinguishing servitudes.

The rights of servitude which are inseparable from the occupation of *prædia*, are said to reside in those given or determinate *things*, and not in the physical persons who successively occupy or enjoy them. And, by virtue of this *ellipsis* and of the fiction which grows out of it, servitudes of the kind are styled '*servitutes rerum*' or '*servitutes reales*;' i.e. rights of servitude annexed or belonging to *things*.

The rights of servitude which are not conjoined with such occupation, cannot be spoken of as if they resided in *things*. And since it is necessary to distinguish them from real or predial servitudes, they are styled '*servitutes personarum*' or '*servitutes personales*' : i.e. rights of servitude annexed or belonging to persons.

The expression '*personal*' (as here used) is, like a multitude of other expressions wearing a positive form, a merely negative term. It means that the servitude to which it is applied, is *not* a real servitude (in the sense which I have just explained): that it does *not* reside in the party entitled to it, *as being* the owner or occupier of a given or determinate thing other than the determinate thing over which the right exists.

A real servitude can hardly exist over a moveable. It is essential to the being of a real servitude that there should be a '*prædium serviens*', and a '*prædium dominans*'.

In fact and practice, all the real servitudes of the Roman Law are servitudes over immoveables.

LECT.  
L.

The division of servitudes into affirmative and negative and into real and personal, are manifestly cross divisions. A right of way and a right of common are both of them affirmative servitudes, being rights to use or deal positively with the subject: and they may be either *appurtenant* or *in gross*; that is, either real or personal.

Negative servitudes, perhaps, are nearly universally real. They generally avail only to the advantage of the owner or occupant of the one *praedium*, as being such owner or occupant, against the owner or occupant of an adjoining *praedium*.

There is a distinction of real servitudes into *servitudes prædiorum urbanorum*, and *servitudes prædiorum rusticorum*. The distinction is peculiar to the Roman Law, and has no scientific precision.

*Servitudes  
prædiorum  
urbanorum  
et rusticorum.*

An urban servitude is a real servitude appurtenant to a building (including the land whereon it is erected): and its principal scope is, speaking generally, the commodious enjoyment of a dwelling-house to which it is annexed. The principal scope of a rustic servitude is, speaking generally, the commodious cultivation of a parcel of land to which the servitude is appurtenant. Consequently urban servitudes occur most frequently in a city or town: rustic servitudes occur most frequently in the country. Hence the respective names. But an urban servitude may be annexed to a building situate in the country, and a rustic servitude may be appurtenant to land within the boundary of a city or town.

Examples: A right to a forbearance from an obstruction to one's ancient lights, is an urban servitude: i.e. annexed to a building: A right to pasture one's oxen on land belonging to another, is, speaking generally, a rustic servitude: i.e. annexed to a farm, and not to any of the farm buildings.\*

In the English Law, we have no adequate names to mark the distinction between real and personal servitudes, any more than we have an adequate name for servitudes. The names approaching to the Roman, would be, rights, (whether easements, or *profits à prendre*) appendant, or appurtenant, and in gross. I may here remark that the only

Rights  
appurtenant  
and in gross  
in English  
Law.

\* The inappropriateness of the names to mark the distinction might be exemplified by the right of common called *common of turbary*, or the right of taking turves for burning in the *house* on the dominant tenement. The right is annexed to the enjoyment of the dwelling-house. But it would be odd to call it an *urban servitude*.—R. C.

PART III.

difference between *appendant* and *appurtenant* relates to the feudal notion of tenure ; and is merely this, that a right appendant is one presumably, (i.e. by reason of long enjoyment), or in fact (i.e. by grant, which, if made by a subject, must have been before the statute of Quia Emptores), constituted simultaneously, and *uno ictu* with the creation of the dominant tenement. A right appurtenant may be annexed to an already existing tenement, by subsequent grant or by such enjoyment as affords a legal presumption of such subsequent grant.

**Examples of real and personal servitudes.**

Having explained these two classes of servitudes in general terms, I shall advert to some examples of each kind.

A right of way *appurtenant* is an obvious example of a real servitude ; and a right of way, *in gross*, of a personal servitude.

Commonable rights, e.g. common of pasture, common of turbary, &c., appendant or appurtenant, as opposed to similar rights in gross, are equally familiar examples of real servitudes.

Another instance of a servitude is a right to a pew in church. In some cases, there is a right to a pew by prescription as appurtenant to a messuage ; in other cases, a pew is granted to a person by the Ordinary, and then it is an easement in gross. It is clearly an easement; being a right to go into and use a particular part of the church as against the person in whom the freehold of the church resides, and everybody else.

This seems a convenient place for the following observations :—

*Nulli res sua servit.*

Inasmuch as every servitude is a definite subtraction or exception (accruing to the party having the right of servitude) from the indefinite rights of user or exclusion which reside in the proprietor of the thing, it follows that no man has a right of servitude in a thing of which he is the owner: *Nulli res sua servit*. Consequently, if the party having a right of servitude acquires the property of the thing, the right of servitude is lost in the more extensive right, or at least is suspended, so long as the right of property continues to reside in him. This is very important in regard to the acquisition of rights of servitude by prescription.

'*Servitus*' means the *onus*, or the *jus in re*.

The term '*Servitus*' has two meanings. It means, originally, the metaphorical servitude or duty of the thing: i.e. the duty really incumbent on any proprietor of the thing, or on any occupant of the thing exercising rights of property over it. But it means also the *jus servitutis*, or the right which corresponds to that duty: the *jus in re alienum*.

A right of

It is clear that a right of servitude may exist in a sub-

ject, although the proprietary rights in the same subject are distributed amongst different persons, and whatever be the mode of distribution. And the right of servitude will remain unchanged, although the subject is possessed by a person not the owner, and adversely to the owner.

A servitude (considered as a duty) must correspond with a right residing in a determinate party. The duty cannot be imposed with reference to the interests of persons generally. There are certain duties incumbent on proprietors which are confounded with servitudes, but which are not properly such: e.g. the duty not to let my house (being situate in a town) go to ruin so as to endanger persons passing in the street (an absolute negative duty); or the duty to keep a certain public road in repair (an absolute positive duty).

From the distinction between real and personal servitudes, I proceed to certain rights, which, in the language of the Roman Law, and of the modern systems which borrow its terms and classifications, are improperly (as I conceive) styled servitudes. For in all these cases, the party entitled to the so-called servitude has an indefinite power or liberty of using or dealing with the object. The right, therefore, is not a definite subtraction from the indefinite power of user or exclusion residing in the owner of the subject. It is not a servitude properly so called, but a mode of property or dominion.

Unless, at least, these so-called servitudes be modes of property, I cannot perceive that there is any intelligible distinction between *dominia* and *servitutes*, or account for the terms wherein the latter are commonly distinguished from the former. All the rights in question are, it seems to me, rights of property for life.

1. The first is *usufructus*: a right of completely enjoying the whole subject for life merely under certain restrictions. The entitled party cannot cede his usufruct so as to put the alienee in his own place, though he may let it out, reserving a reversion to himself.

2. The next is *usus*: which in practice is a mere mode of usufruct, that is, the same right with some additional limitations in point of user.

3. The next is *habitatio*: also a mode of usufruct. This is a right of residing in the house which is the subject of the right; and a power of dealing with it, not positively defined or circumscribed, but still more restricted than in the case of *usus*. The party must use it for his own habitation; he cannot alienate it; but still his power of user is indefinite: it is an estate for life restricted in point of user.

4. The next is *opera servorum*: a so-called servitude

LECT.

L.

servitude  
may co-exist  
with any  
mode of  
property  
(e.g. owned  
by tenants in  
common, or  
by one as  
tenant for  
life and  
another as  
owner in fee  
in reversion)  
etc.

Absolute  
duties (posi-  
tive or nega-  
tive) annexed  
to property  
are not ser-  
vitudes.

4. The modes  
of property,  
which, in the  
language of  
the Roman  
Law, and of  
the modern  
systems  
borrowing its  
terms and  
classifica-  
tions, are  
improperly  
styled 'ser-  
vitudes.'

PART III.

over a person ; not, however, a servitude, but a letting of a slave, for the life either of the slave or of the party to whom he is let, with a reversion to the party who lets.

All these various rights of *ususfructus*, *usu*, and *habitatio*, would be deemed (I think) by English lawyers, rights of property (for the life of the owner) variously restricted in respect of the power of user. In our own law, we have various modes of property, variously distinguished from one another by similarly varying limitations to the power of user ; for example, tenancy for life, with or without impeachment of waste, tenancy by the courtesy, tenancy in dower, etc. : In each of which cases, the indefinite power of user is restricted somewhat differently.\*

The distinction between *dominium* and *servitus* above explained, although suggested by the Roman law, and more or less formulated by modern Civilians, is nowhere laid down in terms by the Roman lawyers themselves. In the language of the Roman law the word *servitus* appears strictly and properly to have denoted one of the *servitutes praediorum*, (*urbanorum et rusticorum*). It was occasionally extended by way of analogy to *ususfructus* and the other rights of a similar character above mentioned, and in one passage these are distinguished under the name *servitutes personarum* from the predial servitudes which are termed *servitutes rerum* (Dig. viii. 1. 1). This extension of the term servitude was arbitrary ; the term might equally well have been extended to the rights called *emphyteusis* and *superficies*. The truth

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\* On the nature of *ususfructus* and of the residuary rights in the *proprietarius* I should suggest as an exercise for the student to study the original authorities in the Digest, and consider particularly the following passages :—Dig. vii. 1 (De usufructu, &c. l. 12 [18] pr. l. 18 [15] § 5. l. 19 [28] § 1 : Dig. xlivi. 26 (De precario) l. 6, § 2. Dig. xlvi. 17 (Uti possidetis) l. 4. Dig. xlvi. 24 (Quod vi aut clam) l. 16, 18 : Dig. xlvi. 19 (De itinere, &c.) l. 8, § 6, and Vat. Frag. 45, 47, 75-77.

The *lisperent* of the Scotch law is conceived on the pattern of the Roman *usufruct*, being only somewhat less extensive in regard to minerals. It differs in some respects from the life-estates of the English law. By Stair and Erskine it is classed with personal servitudes.

Upon the whole I agree with the author that it is more convenient to treat all these rights as modes of property than as servitudes. But I cannot concur in accusing those who have called *usufructus* a servitude, with inconsistency. The line *must* be more or less arbitrary. The author, for instance, classes a right of common as a servitude. And yet *rights of common* (particularly, for instance, the species called *common of estovers*) imply a user which it is practically very difficult to define. It would be hard to assign a limit to the variety of species of acts which might be justified under these rights. And where the common rights are strong (and supposing there are no minerals of value), the rights of the lord may be reduced to a mere shadow.—R. C.

is, the Roman lawyers did not use the word *servitus* to mark a philosophical distinction of rights into classes. When they wished to refer these rights to a *class* or *genus*, they included them (amongst other rights) in the class of rights called *jura in re alienâ*, *jura in re*, or (more briefly and elliptically still) *jura*. In one instance only, is a practical effect apparently given to the circumstance of *usufructus* and *usus* being deemed servitudes: namely, where it is said that such a subject as *usufructus itineris* cannot be bequeathed by way of legacy ‘*quia servitus servitutis esse non potest*’, I. xxxiii. 2 (*De usu*, &c.) l. 1. But another sufficient reason is at the same time assigned for the rule; which, after all, was merely a technicality, and evaded in practice, as the passage itself points out.

In the Institutes of Justinian (II. 2, 3), apparently following Gaius, though the parallel passage in the latter is nearly illegible, the term *servitus* is limited to real servitudes; *usufructus*, *usus*, and *habitatio* are not deemed servitudes; and personal servitudes properly so called (such for instance as what would in English law be called a right of way *in gross*) are passed over without notice.

The same method is followed in the French Code. In the second title of the second book, property or dominium is treated of. In the third title *usufruct*, *usage*, and *habitatio* (which are not called servitudes), are handled seriatim. And the fourth title is devoted to *servitudes* or *services fonciers*: i.e. real or predial servitudes.

## LECTURES LI. AND LII.

*Rights limited by regard to successive periods of enjoyment—  
The Jura in Re Alienâ of the Roman law.*

[*Note.*—As, in these two and the following Lecture (LIII.), I have in some measure departed in substance as well as in form from the text of the Lectures, I here cease to speak in the first person in the name of the author. For the complete record of the author's work, so far as it is extant, I refer to the larger edition. I am bound, however, to say that I think the matter of some of these later Lectures, and particularly Lectures LI. and LIII., is not equally matured with the former ones: and I think it not improbable that they would have undergone great modification at the hands of the author had he completed and revised his own work.—R. C.]

It was pointed out in a recent Lecture (p. 386 *supra*) that a right of *property* as distinguished from *servitus* (that is to say importing an indefinite power of user) is susceptible

LECT.  
I.

Lect.  
LI. LII.

Dominium  
ut *jus in re*  
*alienâ*.  
Reasons for

PART III.  
considering  
the distinc-  
tion.

of various modes, the powers implied in the right being variously restrained in pursuance of the purpose of the concession made by the State. Amongst the distinctions hence arising a very important one relates to the restrictions imposed by the State on the owner, for the purpose of giving or reserving to some other person or persons a future enjoyment. But the nature of these restrictions, and the corresponding rights conferred on the expectant beneficiary, will be most conveniently handled after adverting to the meaning of *jus in re alienā* in the Roman law and the situation of the State in regard to divided rights of property.

It is now convenient to explain a distinction which has been already referred to in these Lectures; namely, the distinction made by the Roman lawyers and by the modern expositors of the Roman law between *dominium* strictly so called, or *proprietas* (*jus in re propriā*), and that class of rights which they oppose to dominium in the strict sense by the name of *jura in re alienā*, *jura in re*, or (more briefly and elliptically still) *jura*.\* This is necessary for the full understanding and history of the distinction already considered between rights which import an indefinite and rights which import a definite power of user or exclusion, and also of the distinction between rights considered as parcelled out with regard to successive periods of enjoyment by different persons.

Relation of  
the State to  
the private  
proprietor.

In order fully to explain the meaning of *property*, it is also necessary to advert to the relations which the Sovereign or State has assumed or may assume towards the individual members of the community, with regard to their respective enjoyment of the material wealth within its territory. Those societies only are here spoken of which can be truly said to have a system of positive law; for in these alone can *property*, considered as a legal right, be said to exist. It is manifest that in those communities where the sovereign power as such does not systematically intervene to regulate as between individual members their enjoyment of material wealth (that is to say where custom has never been transmuted into law), there can be no *rights of property* properly so called. It will be convenient in considering these relations to use the terms employed by Roman lawyers, whose language in regard to them has been adopted into that of all civilized communities.

It has been already shown that the Sovereign as such is under no legal duties to, nor can it have legal rights against the individual members of the society. But as the Sovereign has the power of dealing with all things within its territory at its own pleasure or discretion unrestrained by positive

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\* Thibaut, *Versuche*, vol. ii. pp. 84, 91.

law, and has a very large power of so dealing without being restrained even by moral sanctions, it may be said (for the sake of brevity and because established language furnishes us with no better expressions) that the Sovereign or State has a *right* to all things within its territory, or is absolutely the *proprietor* or *dominus* thereof.

LECT.  
LI. LII.

Now of the things which are the property of the State in the sense immediately above mentioned, there are some which it reserves to itself, and some the use or enjoyment of which it leaves or concedes to determinate private persons. To those which it reserves to itself the term *res publicæ* is commonly applied: those the enjoyment or use of which it leaves or concedes to determinate private persons are commonly called *res privatae*. From what has been said above it is manifest that in a certain sense all things within the territory are *res publicæ*. For the quasi-dominion of the State (i.e. its dominion in the sense mentioned in the preceding paragraph) remains, notwithstanding the concession to the individual.

*Res publicæ*  
and *res privatae*.

Of *res publicæ* (taking the expression in the ordinary sense of the word) there are some which the State permits its subjects generally to use or deal with in certain limited and evanescent modes. Such, for example, are public ways, public rivers, the shores of the sea (in so far as they are not appropriated by private persons), the sea itself (in so far as it forms a part of the territory of the State) and so on. Those, the use of which the Sovereign thus permits to *all* its subjects, are often termed *res communæ*, a term which is objectionable, inasmuch as it implies the fallacy of supposing that the subject members of the community have the use by a title anterior to any that the State can impart.

*Res communæ*.

Again: of *res publicæ* there are some of which the State retains the control and management by the hands of its immediate servants or ministers, and some which it concedes to public persons (individual or complex) as trustees for itself, or for purposes expressly having for their scope the good of the community in general, or some considerable section of it. The former are sometimes styled the 'patrimony' or 'domain' of the State, or are said to belong to the *fisc*. Such, for example, is the money which it raises by taxes on its subjects, the land which it reserves especially for the purposes of supreme government, or the *res privatae* which revert to it by forfeiture or escheat as being the *ultimus hæres* of all its subjects. Those which it concedes to public persons as trustees for itself, are styled by the Roman lawyers *res universitatis*, things in the patrimony of corporate bodies. For these public persons were and are commonly corporate bodies, as for example the corporate

*Res universitatis*.

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governments of cities. Instances in this country are the Corporation of London, the Metropolitan Board of Works, the Conservators of the Thames, etc. We might conceive indeed that a *res publica* should reside in an individual or single person. But even then it would probably reside in him as having a legal *persona* distinct from his *persona* as being that individual. In this way, for instance, the fabric of the church is vested in the parson.

The expression *res universitatis*, however, is inappropriate to mark the public nature of the purpose for which the body is constituted. For a corporate body *may* be (and often is) constituted for the purpose *primarily* of profit to individuals. In that case a thing belonging to the corporation is *res privata*, not *res publica*. Take for instances (in this country) a Banking or Insurance Company incorporated by Charter or Act of Parliament; or one of the innumerable Companies to which the State has thought fit (in this country) to concede the privilege of incorporation on condition of being registered under the Act of 1862.

**Property  
vested in  
bodies incor-  
porated for  
public under-  
takings.**

Here must be mentioned an important class of things which partake of the character both of *res publicæ* and of *res private*, the property, namely, which the State concedes to or permits to be held by Companies incorporated for public undertakings, and who for the encouragement of those undertakings are permitted to levy from those using them tolls or fares (within certain limits as to amount), and to share the profits among the individuals contributing the capital. Such is the case with Canal and Railway Companies. And there seems no difference on principle whether by the terms of those concessions they are to enjoy the property for a limited (as in most countries in Europe), or for an unlimited period (as in this country); nor whether they are empowered to divide the profits *so nomine* or only to raise money on the security of their revenue and to pay interest upon it to the debenture (obligation) or mortgage holders. The last is the situation of the Mersey Docks and Harbour Board Trustees, who are bound to apply all surplus income in the reduction of the dues leviable. In a certain sense indeed there may be said to be private property wherever a public body *not being the Supreme Government* is entrusted with property mortgaged or subject to a legal liability in favour of private individuals, as road trustees, school boards, or even 'the Secretary of State in Council' (of India).

The distinctions above adverted to blend at various points. For example: Of the *res publicæ* of which the State retains the immediate management, it may concede some to private persons for periods of longer or shorter duration. For instance, it may, in order to obtain revenue, let a part of its domain to a private person in farm. The only difference between the property so acquired by private

persons, and that in *res privatae* properly so called, is that the latter are conceded to private persons rather with a view to their own advantage than to that of the State. And of *res universitatis* some fall under the species of *res publicae* which are styled *res communes*. Such, for instance, are those parts of the Thames and its banks which are vested in the Conservators and are used and enjoyed by the public. Such also are certain open spaces, as Wimbledon Common and Hampstead Heath, which under recent Acts have been vested in corporations for the use and recreation of the public.

One class of things which occurs in Roman law and is there distinguished from *res publicae* consists of things said to be *res divini juris*. But these are really a class of *res publicae*. They are things specially reserved by the State or granted in trust to public persons, and destined to certain uses.

To revert to *res privatae*. *Res privatae*, properly so called, are those of which the State (which is in the sense above mentioned the ultimate owner) leaves or concedes to determinate private persons rather for their own advantage than for the immediate benefit of its own patrimony.

In respect of user the right granted by the State may amount to a mere (*quasi*) servitude, or to property (in any of its various modes): and in the latter case the property may be burdened with a (*quasi*) servitude reserved by the State to itself. I say *quasi-servitude* in the first case, because the State cannot have *legal property*, but only a *quasi-dominium* in the thing, and the right which is a restriction of or deduction of that *quasi-dominium* is only a servitude *quasi* or by analogy: and in the second case, because the right reserved by the State is not a legal right, and is therefore only by *analogy* a right of servitude. An instance of a *quasi-servitude* of the first sort is a public right of way over a private farm, or a right of way appertaining to a farm in the patrimony of the State over a neighbouring private farm. An instance of the second sort would be a right of way appertaining to a private farm over a farm in the patrimony of the State; or a right of common (supposing such to be reserved) over the waste of a manor which has been purchased by the State and dedicated to the use and recreation of the public.

Again, rights of property are susceptible of various modes having regard to the duration and period of enjoyment which it is the scope and purpose of the right to confer.

When we speak of a right we can only (using language accurately) refer to the present moment. A future right is a contradiction in terms. All the terms above used

Lect.  
LI. LII.

*Res dictata  
juris.*

*Res Privatae.*

*Quasi-servi-  
tude over a  
thing in the  
patrimony  
of the State.*

*Quasi-servi-  
tude reserved  
by the State  
over a *res  
privatae*.*

*Various  
modes of  
property,  
determined  
by regard to  
the purposes  
(having re-  
gard to pre-  
sent and  
future enjoy-  
ment) for*

PART III.  
which the  
right of  
property is  
conceded by  
the State.

in the analysis of right—*command, duty, sanction, will, intention* (meaning present intention and not mere expectation)—refer to an instant contemplated as present. A future right, if it means anything, means a *mere expectation* of a right. But the *purpose* of the concession by the State may regard the future, and so far as that *purpose* regards the *future*, the State may confer a *present right*: e.g. to protect the expected enjoyment or the expectation of a right which the State desires to confer upon him, the State gives the remainderman a right to a forbearance from waste on the part of the tenant for life. This is properly a right because enforced by a present command and sanction.

In order to attain clear notions upon the nature of the distinction of rights now under discussion it is necessary to fix the attention upon a given point of time, and consider what at that given epoch are the purposes which the rights and duties enforceable by law are calculated to accomplish. These (by an inevitable inference) are the ends designed by the Sovereign or State in conceding and enforcing those various rights and duties. By the word 'concession' which I have just employed and shall have further occasion to employ, I mean the entire sum and scope of the acts, intentions, purposes, and desires of the State as declared or intimated at the given epoch in relation to the use and enjoyment, present and future, of the thing (the subject of the concession) and to the interests of the various members of the community therein. I shall also call the person to whom the immediate enjoyment at the given epoch is conceded 'the owner,' inasmuch as he is the person to whom are given (generally speaking) rights which are indefinite in their extent.

Now the concession may be calculated to confer enjoyment upon one or more persons, either for a limited period or for an unlimited period; that is for a period which may last beyond any assignable term. For instance the concession may be calculated to confer the enjoyment upon A. for a certain term of years if he shall so long live; or upon A. and his heirs for a certain term of years; or upon A. for life; or upon A. and his heirs during the life of B. In all these cases the period of enjoyment would be limited, and in the first two cases may be said to be measured as well as limited. Or lastly, it may be intended to confer the enjoyment upon A. and his heirs for ever. What is meant by heirs\* cannot be fully explained without the explanation

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\* It may be here mentioned that according to most systems of law an express grant or concession (whether by the State, or a private individual in exercise of the power conceded to him by the State) to A. commonly implies the intention that the property, so

(which belongs to a later part of the course) of the devolution of a *universitas juris* from the dead (as such) to the living. In the mean time it is enough to say that by heirs are meant a series of persons pointed out by their relation to A., according to the general rules of the municipal or particular law, and being such as may continue beyond any epoch of time that can be assigned. To introduce here another term, the full explanation of which must likewise be postponed), *heirs* of A. are persons capable of taking, by way of *descent* from the *præpositus* (namely A.); the word *descent* implying that the relation on which heirship is founded is commonly based (either in fact or by a fiction) on physical unity of origin. Now in the case last supposed the period of enjoyment contemplated by the concession is unlimited; that is to say, provided the subject of the concession remains in existence, and the concession is not in the meantime revoked, no term can be assigned within which the enjoyment under the concession must necessarily cease, or in other words, within which the subject of the concession will *revert* to the State. This is of course only one mode out of many in which the State may be conceived to concede a right with the intention of conferring enjoyment in a thing for an unlimited period. But it is in practice incomparably the most important. The only other case of importance is when the State concedes the enjoyment in perpetuity to a corporation—a person or body of persons on whom it at the same time confers the power or capacity (or on whom it has previously conferred the power or capacity) of perpetually maintaining its *persona*; i.e. of devolving the *universitas* of its rights upon a succession of individuals of unlimited duration, and who are determined by some means pointed out by law, but not by way of descent.

Again, the purpose of the concession may be that the right shall be alienable, or that it shall not be alienable. By the right being *alienable* is meant, that the person immediately entitled under the concession shall have power to assign, convey, or *dispose* the estate (or aggregate of rights

Modes of  
property de-  
termined by  
the intention  
of the State  
as to power  
of alienation  
by the owner.

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far as it remains in *bonis* at A.'s death or at the time when a conveyance or assignment by him takes effect, shall be enjoyed by his heirs or assignees. And this implication is so familiar, that it is often considered an eccentricity of English real property law that by a grant to A. shall be understood only a grant for life. With the arguments for altering this implication of law (and which are partially recognised by the policy of the Wills Act, 1 Vict. 26), I am not here concerned. But I must here remark that the language of an English conveyance 'to A., his heirs and assigns for ever,' expresses the real intention of the grant as nearly as is consistent with brevity.—R. C.

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in the subject) to another, and that in case of such assignment or disposition, the State will continue the concession in favour of the assignee, (say B.) or in favour of B. and his heirs or assignees, as the case may be. It is obvious this power of alienation might take different forms; for example, suppose the concession was in the first instance to A. and his heirs, but with power of alienation to A. Then if A. assigned to B. and his heirs, the State *might* concede the enjoyment to B. and his heirs only so long as there shall be an heir to A. in existence. Or again, although the original concession was only for the enjoyment of A. during his life, it *might* be intended that A. should have the power of alienating so that his assignee should get an estate to him and his heirs. Speaking generally, however, where the purpose of the concession is in the first instance to confer an enjoyment of limited duration, and this is to be coupled with a power of alienation, the enjoyment is conceded to the assignee and his heirs and assignees only during the term of the original concession; but where the purpose is, in the first instance, to confer upon the first taker and his heirs an enjoyment of unlimited duration, and that enjoyment is to be coupled with a power of alienation, then if the power is exercised by an out and out assignment or disposition in favour of B. and his heirs, the property becomes assignable by B. or his heirs, just as it was by A.; the concession of enjoyment is continued so long as there remains a person capable of taking the property by descent from the last assignee or donee, and then the property reverts to the State, whether there is or is not an heir in existence of the original grantee, or of any mesne assignee or donee. And here it may be remarked generally that where a power of alienation is conceded by the State, it is often competent for the owner to dispose of or *limit* the estate (or sum of rights) in such a way as to give the successive enjoyment to different persons, and (as it were) to carve out of the whole estate, smaller estates, keeping a *reversion* to himself, and generally to imitate the mode of grant or concession made by the State itself. But this within certain restrictions. For instance, a private owner cannot, in England, imitate the State in creating a relation by way of *tenure* under himself in fee simple. A power of alienation, it must be observed, *may* be given to persons who have not an *estate* or right of enjoyment. The State might concede a power of this kind; and by private dispositions, such a power (without any right giving a claim to *possession*, present or future) is in English settlements of land frequently given to trustees, to be exercised with consent (if *sui juris*) of the limited owner. An *advowson* is indeed a *power* delegated by the State, and transferable by the party invested with it.

Here it may be remarked that a *power* delegated by the

State implies a promise that on the power being exercised by the party entitled, the State will give a *right*. The power itself is a species of right *in rem* implying by a short train of consequences duties on persons generally.

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Again the purpose of the State in making the concession might be that the thing may be enjoyed by A. for his life (with power to him to alienate in any manner he chose, but so that the enjoyment shall only be conceded to the assignees and their heirs during the life of A.), and that after the death of A. [the subject shall be enjoyed by B. and his heirs *being issue of his body*, with power to B. or the heir of B., being issue of his body, who shall have succeeded him to alienate, but only by a deed executed with certain formalities, and if executed during the lifetime of A., only with A.'s consent, testified by his executing the deed, and with the further intention that in case of a deed of alienation being so executed (with consent of A. if alive), the enjoyment shall be conceded to the assignee, his heirs and assigns for ever; and that if B. or his heir shall attempt to alienate, but without those formalities, or in the lifetime of A. without A.'s consent (expressed in the deed and testified by his execution of it), then the enjoyment shall be conceded to the assignee and his heirs only so long as B. or issue of B. are alive; and that if the subject shall not have been conveyed by B., or any heir of his, in a manner to satisfy the above requirements, then that after the death of B. and failure of issue of the body of B.],\* the thing shall be enjoyed by C. and his heirs for ever, with power to C. or any heir of C.'s who would but for the previous limitations have been the person designed for the immediate enjoyment, to alienate so that his assignees shall (subject to the prior limitations) have an estate to him and his heirs and assignees for ever. This nearly expresses the intention as construed by English law of a grant to A. [remainder to B. and the heirs of his body],\* remainder to C. and his heirs.'

The above is a very simple instance of the many varieties of intention and purposes which the State may entertain in regard to the successive use and enjoyment; and in order to simplify the case as much as possible, I take the intention or purpose above described without the passage in brackets. It is nearly a description of the intention or purpose (as construed by English law) of a grant or concession to A. as tenant for life, remainder to C. and his heirs in fee. If I were to add the purpose that C. should have a power of entry during the life of A. to look after his own interests, and should further have a power to fell and take away timber,

\* The student may in the first instance leave out the words within brackets if he finds the sentence too complicated to follow.

PART III. provided he did not interfere with A.'s enjoyment, and also a proviso that A. should not be able to assign away his entire interest without leaving a reversion in himself, it would be nearly a description of the purpose of the State (as construed by Roman law) when it permits A. to have the *usufruct* and B. the *proprietas*. But even then the expression of the purpose is so brief and elliptical as hardly to afford a clue to the rights and duties of the several persons interested in the concession. For generally speaking, it is not in the nature of things that the identical subject of the concession should remain to be enjoyed by the successive *concessionaires*. And accordingly the Roman lawyers defined *usufruct* as the right of using and enjoying the thing provided the *substance* be kept entire, *jus utendi frumenti salvo rei substantiæ*. But what is the substance of the thing? And what in detail are the species of acts on the part of the life tenant that fulfil this condition? These questions will be differently answered in different systems of law, and the detail in each would fill a volume. And little light can be thrown upon them by general definitions. The Roman law likened the administration to which the *usufructuarius* was bound, to that of a *prudens paterfamilias*. The position of the English tenant for life might sometimes be likened to that of the dog in the manger. In fact, the rights and duties in detail are settled by a train of decisions in the way of judiciary law, founded on custom.

## Substitution.

According to English law, if you make a grant 'to A. and his heirs, and if A. shall die intestate or without alienating the estate, then to B.', the last clause would be construed as *repugnant* to the first gift, and would go for nothing. A grant in similar terms, according to Scotch law, would mean that A. shall be the owner with full power of alienation, and that if such power is not exercised, then at his death the estate or what is left of it shall go not to A.'s *heir general*, but to B. and his heirs and assignees. This intention (or *destination*) is, according to Scotch usage, more briefly and properly expressed by a disposition 'to A., whom failing to B.' Such a destination is called a *substitution*. According to English law this intention would be most nearly expressed by a grant or devise 'to A. and his heirs, to hold to such uses as A. shall by deed or will appoint, and in default of such appointment, and so far as such appointment shall not extend, to the use of B., his heirs and assigns for ever.' The only difference between the effect of such a grant and a destination such as I have mentioned according to the Scotch law would be that if A., subsequently to January 1, 1838, made or republished a will containing a general devise of real estate without referring to the particular property or to the power so given to him, it would be a good exercise of the power of

appointment. In Scotland a general disposition of property not expressly referring to the particular land would not be construed as intended to comprise land previously disposed to a substitute; and in England, before the Wills Act, a devise which did not expressly refer to the power was not construed as intended to exercise a *general* power of appointment.

In a destination of the kind referred to in the last paragraph, however the intention may be expressed, the expectation of B. is entirely defeasible by A. An expectation of this nature, as well as that of the *heir* (or the person destined to the succession according to the general rules of law) is called a *spes successionalis* in the strict and technical sense of the phrase. Inasmuch as every right having future enjoyment for its scope, is, so far as relates to the individual entitled, nothing more than the right to a *chance* of enjoyment, the interest of every person having such right *might* be literally called a *spes successionalis*. But this phrase is technically and conveniently limited to those expectations which are (generally speaking) defeasible in the particular manner above pointed out. It may be observed that destinations which, according to their general character, would create a defeasible interest of the kind above pointed at, may, in certain circumstances, create an indefeasible interest: as where the proprietor, being an infant or lunatic, is laid under restraint primarily conceived for his own benefit, but which indirectly benefits the person pointed out by law as his successor (whether *per universitatem* or *in re singulare*) in default of exercise of the suspended powers.

Here it may be remarked that in whatever terms or in whatever mode the destination in the grant or concession may be conceived or expressed, the series of persons capable of taking under it *may* come to an end. And then the thing (the subject of the concession), or what is left of it, reverts of course to the State: for since the Sovereign or State (speaking by analogy) is the ultimate owner, it is also (speaking by a similar analogy) the *ultimus hæres*. On the expiration of all the rights over the thing, which merely subsist therein by its own pleasure, it naturally retakes the thing into its own possession. In some countries, indeed, the State, in such circumstances, leaves the thing to the first occupant, who by virtue of his occupancy takes from the State a fresh right. In that case the occupant in effect acquires from the Sovereign or State a new concession.

What has been said applies equally, whatever be the nature of the subject of the concession, and to whatever category of property it may be referred in the systems which distinguish between 'real' and 'personal'—'heritable and moveable' property. For a chattel may be capable of

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*Spes successionalis.*

The  
Sovereign  
is ultimate  
Owner.  
This is a  
principle of  
general juris-  
prudence

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successive ownership not less than land; a diamond, for instance, is even more capable of being enjoyed while preserving the substance in its entirety than most things commonly assigned to the category of 'real' or 'heritable' estate. The only difference lies in this. If the concession from the State, or the disposition by a private individual within the powers conceded by the State, is in express terms, being (for instance) contained in a written instrument (a deed of grant or will), the purpose or 'intention' is differently construed according to the nature of the subject. In the systems which adopt the division of property I am here adverting to, the distinction is commonly based upon the notion that the property descending to *heirs* is of a more permanent character, or such as ought to be preserved for the benefit of the family. That which goes to administrators (originally officers of the Church) is supposed to be of a more transient character (being 'moveable' as not being fixed to any spot, and being therefore 'personal' as conceived to follow the person) and to be the fund properly applicable for paying the funeral expenses and duly providing for the soul of the deceased. In systems of law in which this division is adopted, the intention to limit the estate to a series of persons is more readily presumed in *heritable* than in *administrable* property. Sometimes in property of both kinds, and especially in property of the latter kind, the State refuses to enforce an attempt on the part of an owner to lay restraints in respect of alienation upon others who take under will or assignment from him.

Absolute  
property  
(*Jus in re*)  
defined.

With what has been now premised it is possible to state with an approach to accuracy the nature of absolute property: of *dominium* strictly so called: or of *jus in re propriis*.

It is a right imparting to the owner a power of indefinite user, capable of being transmitted to universal successors by way of descent, and imparting to the owner the power of disposition \* (from himself and his successors *per universitatem*).

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\* Strictly speaking, and to make the definition apply to every system of law, *disposition* here must be confined to an alienation to take effect in the lifetime of the party entitled. The powers of alienation *in extremis* are in most systems of law subject to peculiar restraints (see p. 318 *supra* and note there). These restraints commonly apply to the *universitas* of a man's rights. But if in the particular subject, the party entitled has (the other criteria above mentioned being satisfied) the largest power of alienation which is allowed by law in regard to his rights in general, this may be said to be sufficient to constitute the particular right a right of absolute property. Even in life and health, the powers of alienation were, in some particular systems of law, generally restrained, as for instance, in the case of the English tenant in fee according to the

*rem* and from all other persons who have a *spes successionis* under any existing concession or disposition), in favour of such person or series of persons as he may choose, with the like capacities and powers as he had himself, and under such conditions as the municipal or particular law allows to be annexed to the dispositions of private persons.

Having thus endeavoured to determine the notion of absolute property (*jus in re propriâ*), I am in a position to explain the nature of *jura in re alienâ*.

Every *jus in re alienâ* is a fraction or particle (residing in one party) of dominion, strictly so called, residing in another determinate party.

*Jura in re alienâ* have no other common property than that which I have now stated. Different rights of the class are composed of different fractions of that right of absolute property from which they are respectively detached. Some are definite subtractions from the right of user and exclusion residing in the owner. Others are indefinite subtractions from his power of user and exclusion calculated to confer enjoyment for a limited time; and so on.

The *jura in re alienâ*, which commonly are marked by modern expositors of the Roman law, are, *servitus*, *emphyteusis*, *superficies*, and the *jus in rem* which is taken by a creditor under a pledge or *hypotheca*.†

Servitudes properly so called (whether affirmative or negative, real or personal) were esteemed *jura in re alienâ*, because they gave a right of definite user over a subject owned by another, or of subtracting a definite fraction from the owner's right of user or exclusion.

Servitudes improperly so called (*usufructus*, *usus*, and *habitatio*) were modes of property, that is to say forms of property modified by regard to the rights of the person entitled to the enjoyment in expectancy, who in these cases is the owner or *dominus*. As I have already stated, however, the *dominus* was in those cases not excluded from the enjoyment of such rights (if any) as he could exercise without injury to the enjoyment of the other. The rights of improper servitude here spoken of were commonly rights to the enjoyment for life, but they might be constituted so as

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*Jura in re alienâ* defined.

Different *jura in re alienâ* are different fractions of the various rights which constitute the dominium from which they are respectively detached.\*

*Servitus* considered as a species of *jus in re alienâ*.

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old law. This, as it would occur by general provision of law, would not cut down the right to less than 'absolute ownership.' But where the restraint is laid on by the particular title, as in the case of a tenant for life under a strict settlement in English law, or of a Scotch strict entail (in the old form of which the restraints or *fefters*, as they were termed, were elaborately set forth), we should hardly call the right one of absolute property.

\* Thibaut, *Versuche*, vol. ii. p. 85. System, vol. ii. p. 8.

† Mackeldey vol. ii. p. 6.

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to confer the enjoyment upon a person for a period of measured duration, as a term of years certain, if he should so long live, or until the happening of an event, or from the happening of an event, or on alternate days, or in an indefinite variety of ways. The right of the dominus when expressly referred to as burdened with a usufruct is commonly called not *dominium*, but *proprietas*.

*Emphyteusis.*

*Emphyteusis*, under the Roman law, meant originally land of which some corporate body (as for instance a municipium) had the absolute property and which was let out to a person and his heirs (that is, for an unlimited duration) in consideration that he would cultivate it (and hence the origin of the term, which was analogous to the original meaning of the word *colonists*), and would bring to the owner a given rent. Now this was *jus in re alienā*, because, although of unlimited duration, accompanied with power in the *emphyteuta* of unlimited user, and alienable by him from his own heirs, it was nevertheless a right or estate carved out of another estate, or having a reversion expectant upon it. It reverted to the author or grantor or his representatives. It was not absolute property, because there was no power of aliening from *all* successors. There is a reversion or *spes successionalis* in the corporate body (under the concession of the State) which the *emphyteuta* cannot defeat.

The later history of *emphyteusis* has had such an important influence upon the system of landed property prevailing in Europe, and in the formation of the notion familiar to most modern systems of law under the name of *tenure*, that I must revert to the subject presently. In the mean time I proceed to advert, in their order, to the other species of *jus in re alienā* above mentioned.

*Superficies.*

The next case of *jus in re alienā* is the right styled *superficies*. This right originated in a contract of the nature of *locatio conductio* or sale of the *superficies*; a contract made for purposes not unlike those of a modern building lease. The notion implied was the following:—The maxim *cujus est solum ejus est usque ad cælum* was very unbending; being indeed based upon the obvious physical fact that the actual possession of the *solum* carries with it (generally speaking) the immediate power to raze to the ground any superstructure that may exist, and to erect any other superstructure. But by *contract* whether of demise or sale, the owner might carve out, as it were, of the subject of his ownership a *superficies*, that is to say a *solid space bounded by one or more superficies* (in the mathematical sense of the word) extending laterally. Under such a contract the lessee or purchaser originally acquired only a right of action *in personam* against the lessor or vendor, and could only

sue third parties through the latter. But the Praetor, for the better protection of the *superficiarius*, allowed him a *quasi in rem actio*, and also for the same purpose introduced a special interdict after the analogy of the interdict *uti possidetis*, by which possession of the *solum* was protected. By these remedies the enjoyment was protected *secundum legem locationis*, and against everybody except a person who had a better title than the possessor of the *solum* himself, and who therefore could evict both. Thus the *superficies* became in effect a *jus in rem*, and being conceived of as a fragment of the *dominium* residing in the proprietors of the *solum* was a *jus in re alienâ*.

Here may be a convenient place to note the distinction made by the Roman lawyers between *possession* and *quasi-possession*. *Possession*, simply and strictly so called, was a legal relation based on the fact of exercising acts of ownership, and protected by the interdicts against everybody except an owner whose rights the possessor exercised by way of trespass or as a tenant on sufferance. Now a person having or exercising *jus in re alienâ* did not possess the *res*. But the person actually exercising the *jus in re alienâ* had remedies (interdicts) for the protection of that exercise analogous to the remedies which the possessor of the *res* or subject of the right had for the protection of his possession. Hence the person actually exercising the *jus in re alienâ* was said to have *quasi-possession* of that right. For instance, the *usufructuarius* (or the person for the time being exercising his rights) had *quasi-possession* of the *usufruct*; the *superficiarius* *quasi-possession* of the *jus superficies*, and so on.

The last of these rights is the right of a creditor by virtue of a pledge or hypothec. The creditor has a double right: he has *jus in personam* in respect of the rights secured to him by the pledge; *jus in rem* in the subject pledged or mortgaged as a security. For against any possible possessor, whether by alienation from the pledgor or mortgagor, or as adverse possessor, the pledgee or mortgagee may make his right over the subject good or available. The obliged thing might itself be *jus in re alienâ*: as, for example, a personal servitude granted out of the dominion of another may itself be the subject of a mortgage, and thus the *jus in rem* of the mortgagee would be *jus in re alienâ* over a subject which is itself *jus in re alienâ*.

In Roman law, the right of the pledgee or *hypothecarius* was merely a right to sell the obliged thing in case his debt is not duly satisfied, and to repay from the proceeds of the sale his debt with the interest and all incidental costs. It was much like the right which would be acquired in English law by a mortgage with a power of sale, provided the mortgagee could not foreclose: or like the right of a

The *jus in rem* of the creditor in a thing pledged or mortgaged.

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judgment creditor who, having sued out a writ of *ad elegendam* and got possession, is entitled to proceed to a sale in the manner pointed out by 27 and 28 Vict. c. 112. In Roman law the creditor could not acquire property in the subject of the pledge or hypothec.

Tenure.

Having explained the notion of *jus in re aliena* in the Roman Law, it is now possible to explain the complex and purely historical notion of *tenure*, without which it is hardly possible to understand any of the various systems of law relating to land in the countries of Europe whose laws have not been recast through revolution. Even in England the system of landed property is based upon *tenure*, modified indeed as will be after mentioned.

Amongst those innumerable semi-independent communities which existed in Northern Europe from the time of the virtual dissolution of the Roman Empire, it was not uncommon for the several sovereigns or those having more or less power over those several communities to become mutually bound by engagements, of which the details might vary indefinitely, but of which the leading features were of the following character. A prince who had reduced a province or district to temporary obedience by force of arms, would find it convenient to give the possession to another, who, by reason of his having the inhabitants of the conquered district, or their immediate neighbours, already in the *habit* of obedience to him, was capable of exerting and enforcing a permanent authority. The latter would acknowledge that he held the territory as a loan in trust, and promise fidelity and allegiance. Thus the Saxon Chronicle relates (in the year 945) that 'this year K. Edmund overran all Cumberland, and let it all to Malcolm, King of the Scots, on the condition that he became his ally both by sea and land,' a magnificent loan (of a province extending from the Tyne to the Forth), made in consideration of an indefinite promise of assistance, in which doubtless originated the celebrated claim of feudal superiority of which so much was heard two and a half centuries later. Nor were relations of this kind peculiar to the middle ages of Europe. Something of the kind is apt to occur wherever the elements of political society are in a state of transition and imperfect fusion. The *Ghatwallees* chiefs among the hill tribes of India for instance, previously to the settlement of those regions under British authority, held their lands of the *Huzoor* (or Government) on condition of guarding the passes and generally of performing services the nature of which has afforded much scope for controversy, and which were probably never capable of accurate definition. The indefinite relation I have been attempting to indicate between the acknowledged superior

potentate and the person who received such possession at his hands, and who promised fidelity, seems to have been marked in the north of Italy and the adjacent countries by the word *fio* or *feu*, a word which in the beginning of the eleventh century, or possibly still earlier, made its appearance in legal documents, latinised into *feudum*.

The formulation into written documents of the indefinite relations above described, marks a critical stage in the history of the relations themselves: and the form of the document had doubtless a most important influence upon the character of the tenure. The documents of this nature which are preserved to us from the eighth and ninth centuries, relate chiefly to tenures at the hands of ecclesiastical persons, and are modelled on the *precarium*, a tenancy revocable (in name at least) at the will of the grantor, and ceasing at the death of the grantee. The grant was made upon the petition of the tenant, and gave him *possession* at the will (in name at least) of the grantor, and availing against all except the grantor. But it had the inconvenience (if it was wished to continue the right beyond the lifetime of the immediate tenant) that it imparted to his heir not even the right of possession.

A device was however invented, probably by Longobard lawyers about the end of the tenth century, of engraving upon the *precarium* the terms of the *emphyteusis*; a device by which the right of possession was conferred upon the heirs of the grantee, and scope was found for inserting various express conditions. For this purpose the *emphyteusis* was conveniently elastic. 'Talis contractus quia inter veteres dubitabatur, et a quibusdam locatio, a quibusdam venditio existimabatur, lex Zenoniana lata est, quae emphyteuseos contractus propriam statuit naturam, neque ad locationem neque ad renditionem inclinantem, sed *suis passionibus fulciendam*' (Inst. iii. 24, § 3.) Into this composite document accordingly were commonly incorporated the various customary obligations already known under the name of *fio* or *feu*, and the tenure so created became known as *feudum*. Gradually the form of the *precarium* was dropped, and *emphyteusis* remained the model, as to legal form, of tenure.

A remarkable example belonging to the transition period is the following. In a notable charter of the year 1033, printed in Muratori's collection, and the draft of which was apparently settled by two lawyers, one learned in the laws of the Longobards, and the other in the Roman civil law, certain lands are conveyed 'habendum *precaria atque EXFIO THECARIA nomine*', thus combining the *precarium*, the *emphyteusis*, and the domestic *fio*.

The tenures so created by the great potentates were copied by the smaller lords in their grants to their vassals,

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and within a century from the time when the *emphyteusis* was launched on its new career, a system of feudal tenures had been elaborated, incorporating and formulating the floating usages of that rude period. The chains forged by custom were riveted by contract and law.

**Tenure and  
tenancy of  
land in  
England.**

In England the creation of new subordinate tenures was prohibited by the statute of 'Quia emptores,' 18 Edward I., and most of the peculiar and inconvenient incidents of the old tenures were swept away in the time of the Commonwealth, and their abolition was confirmed in the year of the Restoration by the Act 12 Car. II. c. 24. The change in the value of money has still further lightened to the vassal the burden of his obligations to the lord, and the only incidents of subordinate tenure which practically remain are a quit rent of small amount, doubled on the death of each tenant, and the escheat or reverter to the mesne lord in case of failure of heirs to the tenant. Forfeiture by attainder was abolished by 33 and 34 Vict. c. 23.

What has been said above in regard to *tenure*, does not apply to English copyhold tenancy, which has altogether a peculiar history. The copyholders were originally the slaves of the manorial estate, and occupied their holdings in fact, as they still do in name, at the will of the lord.

Strictly speaking, therefore, where lands in England are held of a *mesne* lord, the right of the tenant is what would be called by the Roman lawyers *jus in re alieni*. The dominion of the tenant does not amount to absolute property, inasmuch as the lord has a reversion which the tenant cannot defeat.

The right of a tenant in an English lease for lives or a term of years is also what the Roman lawyers would have called *jus in re alieni*. The historical antecedent of the modern lease is not *emphyteusis*, but simple *locatio conductio*. Now although, as we have seen, in the case of a *superficies* let for building purposes for a considerable term, the tenant acquired a *jus in re (aliendi)*, it does not appear that in the case of cultivated land the tenant acquired under a contract of *locatio conductio* any *real* right. Probably it was not usual to create such a tenancy for any considerable term, unless it amounted to an *emphyteusis*. If a person wanted to acquire the enjoyment of cultivated land for a measured term, or for life, he would probably purchase the *usufruct*. The tenant, however, under an English lease acquired a real right; the Courts of Common Law having, so early as the time of Edward IV., given to the lessee who had been ousted from possession, specific restitution to his *term* in the land. This remedy the Roman lawyers would have termed a *quasi in rem actio*, and the right of the English tenant for years would have been termed by them *jus in re*.

*attend.* The difference, indeed, between the modern English tenancy and the feudal tenures consists merely in the history and peculiar incidents of the latter, and in the fact that an English proprietor has been unable, since the statute of Quia Emptores, to create a tenure in fee simple to be held under himself.

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LI. LII.

### LECTURE LIII.

#### *On Complete and Inchoate—Vested and Contingent—Rights.*

THE purpose intimated by the State at a given epoch (see p. 406 *supra*), and considered in regard to the respective persons interested in the specifically determined thing (the subject of the concession), may be to confer

- (a) Present enjoyment, or
- (b) Future enjoyment.

When the intention of the concession is to confer present enjoyment, the person interested may have the enjoyment in actual possession; or may have the right, by aid of the State, immediately to get possession, i.e. a right of action in the nature of *vindicatio rei*.

When the intention is to confer future enjoyment, the enjoyment may be destined by the express terms of the grant or concession, either

- (c) To a person or persons individually ascertained, i.e. determined by events which have happened, or
- (d) To a person or persons not individually ascertained.

*Illustration.*—Grant of real estate, according to English law, to A. for life, remainder to B. for life, remainder to C. and his heirs. B. and C. are each said to have vested remainders, B. for a life estate, and C. for an estate in fee.

And in the case last mentioned, one or other of the following alternatives must exist, viz.:

- (e) There is a certain person or there are certain persons in existence who, or one or more of whom, (according to the purpose intimated by the State) will, on the happening of a specified event, become either determined to the then present enjoyment, or destined to the enjoyment in like manner with the person or persons in case (c) above mentioned.

*Illustration.*—Grant to A. for life, remainder to B. and his heirs, if B. shall attain twenty-one. When B. attains twenty-one,

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Intention of  
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if A.'s estate has then come to an end, B. will be entitled in possession. If not, then B. will have become entitled to a vested remainder.

Or lastly:

(f) There is no person in existence to whom the purpose of the State relates as last mentioned.

*Illustration.*—To A. for life, remainder to B. for life, remainder to first and other sons of B. in tail respectively (B. having as yet no son).

In all the above cases except (a) it is obviously uncertain whether any given person will ever have the destined enjoyment.\* For even in the case (c) the person pointed out by the concession may not live until the period of enjoyment so destined to him. In this case indeed, most systems of positive law annex to the interest a power of alienation and a capacity of transmission to heirs, or universal successors by way of descent. But it is clear that as regards the *individual* to whom the future enjoyment is destined, his interest is no more than a *chance* of future enjoyment. And supposing that the enjoyment destined to him is merely an interest for his life, he can neither have nor transmit any interest unless the enjoyment fall into possession in his lifetime. In the last case (f) no existing person can be said to have even the *spes successionis*.

But in all the cases, with the exception immediately to be mentioned, the State, in order to carry out its purpose, lays some duties on the proprietor or other party in possession. An exception may obviously occur wherever the destined interest is a mere *spes successionis* in the narrow sense of the word, whether that of a presumptive heir or universal successor by way of descent to the proprietor, or

\* This uncertainty indeed exemplifies the very arbitrary nature of the distinction. So far as relates to the expectation of enjoyment by any particular individual, the distinction appears to depend on the accidental circumstance whether the contingency of his being alive is left to the implied condition of all human affairs, or whether by some express term of the concession or of a private disposition made pursuant to a conceded power, the contingency is explicitly made a *condition precedent* to the enjoyment. What amounts to a condition precedent, as Mr. Hawkins justly says, *the cases only can determine* (see p. 425 post).

† It may here be observed that no person can, in regard to the universal succession by way of descent to a living person, have any higher interest than that of a presumptive heir. *Nemo est heres viocantis.* The presumptive heir commonly called the *heir apparent*, is only a person in whose case the presumption is stronger than in the case of the person commonly called an *heir presumptive*. The heirship of the former is only defeasible in the event of his death in the lifetime of the *propositus*. That of the latter may be defeated also by the birth of a nearer heir.

of a substitute or person destined to take in default of appointment, as mentioned on p. 411 *supra*.

In all the cases above enumerated, by letters (a) (b) &c., except the last (f), the duties laid upon the proprietor or possessor, so far as relates to the specifically determined persons destined to the enjoyment, are *relative* duties, and to the same extent corresponding *rights* reside in those specifically determined persons.

But in the last case (f) there is no existing person whom those duties specially regard. The State enjoins the possessor to do, or more commonly to forbear from, acts; but not *towards* or *in respect of* a distinct and determinate party. Strictly speaking, therefore, according to the foregoing analysis (p. 194 *supra*) those duties are absolute duties, and belong to the fourth category of absolute duties there mentioned, namely, 'where the duty is merely to be observed towards the Sovereign imposing it.' The State or Sovereign reserves to itself a *quasi-right*. But in this they differ from most other absolute duties; that the *quasi-right* reserved by the State to itself is reserved not directly for the benefit of the community in general or any large part of it, but directly for the benefit of the narrow class of beneficiaries pointed out by the concession or the private grant made in pursuance of the power conceded by the State. The State in reserving this *quasi-right* is a trustee for the limited class of possible beneficiaries. The case is anomalous, and it seems more in accordance with ordinary language to place these duties in the category of relative duties. And this would be consonant to the practice usually adopted by the State in those particular systems of positive law which recognise such duties, namely the systems which admit of *entails* or *limitations* of the *estate* in strict settlement (I speak of what would be called in English law *legal* limitations, and not limitations by way of trusts, for in these the trustees have rights, strictly so called, by which the interests of future beneficiaries can be protected). For I think it is not the practice of the State to enforce these duties, like other absolute duties, by action or suit at the instance of itself or its officers. The Sovereign merely intimates that when the beneficiaries in question come into existence, it will give a remedy by action or suit at their instance against the contravengers or their estates,\* including

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Anomalous species of duties imposed in accordance with the intention of the State in case (f).

\* This appears to be according to English law the predicament of a legal contingent remainder in favour of persons unborn. The leading case of *Garth v. Cotton* (1 Vesey sen. 524, 546) is thus stated in Fearne's Contingent Remainders, ed. J. W. Smith, p. 566. A. being tenant for 99 years determinable on his life without impeachment of waste except voluntary, remainder to trustees to support contingent uses, remainder to the first and other sons of A. successively in

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those who by getting into possession or otherwise have gained advantage by the illegal acts.

The terms  
'*inchoate*  
and '*complete*'  
as ap-  
plied to  
rights.

Inasmuch as a person in the predicament (e) will in case of the happening of an event acquire a right of the nature mentioned in one of the cases (a) or (e), such last mentioned right may be said to be *inchoate* in a person who is in the predicament (e). And conversely the right of the person who is in the predicament (a) or (c) may as distinguished from the *inchoate right* of the person in predicament (e) be called a complete or completed right. What is here called an *inchoate right* is not a right, but the *possibility of a right*; and from the foregoing analysis it appears that the person in whom it resides may or may not have a *right* properly so called. If he has a right, it is a right of a different kind to the right which is here said to be *inchoate*.

If it is considered desirable to make the distinction between *inchoate* and *complete* rights co-extensive with all possible interests, we may call the possibility of a right in the possible persons in the predicament (f) an *inchoate right*. But the expression *inchoate right* is somewhat less appropriate than in the other cases, inasmuch as there is no *person* in whom it can be said presently to reside.

Interests  
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classes under  
the names of  
'Complete  
rights' and  
'Inchoate  
rights.'

The interests which arise under the concession or declared purpose of the State (whether having for their scope present or future enjoyment) may therefore be divided into two classes, and these may, not without significance, be designated by the terms *complete rights* and *inchoate rights*. These may be defined as follows:—

*Complete rights* are those of persons in the actual enjoyment pursuant to the concession of the State; of persons having right to be immediately placed in possession or permitted to exercise the enjoyment; and of persons *individually ascertained* on whom by the express terms of the con-

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tail, remainder to B. in fee; A., having no son then born, agreed with B. to fell timber and divide the profits; a son was afterwards born, and Lord Hardwicke decreed that the son should recover against the representatives of B. In this case, doubtless, the trustees to support contingent uses might have interfered by injunction to prevent the waste. So long therefore as the principle of English law remained that a contingent remainder could not be indefeasibly created without the interposition of trustees to preserve it, there was usually somebody invested with a present right to protect the future interest. But since the necessity of interposing these trustees for certain technical purposes was abolished, it has become a usual practice among conveyancers to omit them. Consequently, under a modern settlement, it often happens that a legal estate is indefeasibly destined to unborn persons, without any person having any right to interfere at the time when waste may be committed.

cession the State has unconditionally declared its purpose of conferring the enjoyment at a future time.

All other interests under the concession are *inchoate rights*; and according to the above analysis they *may* reside in persons who have *rights*, properly so called—rights which (as distinguished from rights to the enjoyment present or future) may be called rights to the *chance* of enjoyment; or they may reside in persons who have no rights, but a bare *spes successionis*; or, lastly, they may be destined to persons of a certain description, but not in existence.

The only part of the above distinction which is *necessary* consists in this. Every right must be constituted by reason of one or more facts or events which have happened. When one or more, but not all of these events have happened, the predicament may be termed an *inchoate right*. But the particular division of objects above made is arbitrary. For as the rights of the actual possessor differ from those of a person out of possession, but who is entitled to be immediately placed in possession (*i.e.* permitted to exercise the enjoyment), and these again differ from the rights of the remainderman or reversioner in the predicament (c), we *might* have confined the phrase *complete right* to that of the person having right to the present enjoyment, or even to that of the owner in actual possession. Again, a *right* to the *chance* of future enjoyment *might* have been called a *complete right* (*in rem*). For it is a right *in rem*, having also for its subject a specifically determined thing; and the right, such as it is, is perfect and needs no other event to consummate it.

But the division, as the line of demarcation has been above drawn, is important; because it tallies in the main with an important distinction made by some of the more important modern systems of law: the distinction, namely, between what are called *vested rights* and other objects distinguished according to the particular systems by various names, but which are often confounded together under the loose and misexpressive name *contingent rights*.

In the older Roman law there is scarcely anything to be met with about contingent rights. There is scarcely any instance of a disposition suspending the exercise of any right, or by which a right is carried over on a contingency, or is to commence on a contingency. Every disposition on which depends a right to take effect at a future time, seems to have been forbidden absolutely. It was the prætorian law which afterwards introduced substitutions or entails.

The notion conveyed by the word 'vested' is altogether historical—a circumstance suggested to me, or of which I am reminded, by the chapter on 'Vesting' in Mr. Hawkins's admirable book on Wills—and belongs to general

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jurisprudence merely for the reason that it belongs to most modern systems of particular jurisprudence. It originates in the all-pervading feudal tenures. In the language of feudal lawyers the notorious and conspicuous fact of the person entitled being placed in possession was called the *investiture*. Thereby as by the putting on of a palpable and substantial garment were imagined to be clothed one or other of the following objects (for the metaphor is somewhat loosely conceived and applied):—viz. the naked intention of the conceding Sovereign or private grantor; the bare right of the person entitled; or that person himself.

Originally therefore 'vesting' meant the completing of the owner's right by actual possession. By analogy the meaning has been extended to rights other than that of the owner seized in actual possession; and the fact or event which (either alone or as the last and crowning event with others) completes the predicament to which the law annexes the right, is said to 'vest' the right. Thus 'vested' as applied to a right is nearly synonymous with 'completed.' The fact which vests the right is called the 'investitive fact,' an expression which, for convenience, has been already used in these Lectures.

- That some rights are termed 'vested,' and others are not termed 'vested,' although the facts or events to which the law annexes the right have all happened, is a circumstance which cannot be assigned to any necessary reason; nor are the rights or facts to which the term is applied the same in all particular systems of law, nor even in different branches of the same system. For instance, as Mr. Hawkins points out, the term 'vested' has a different signification in English law when applied to a legal remainder in real estate, from what it has when applied to a legacy.

The use of the term 'vested rights' in particular systems of law is in fact arbitrary, and the arbitrary manner in which the term is applied fails to be transparent only because the word 'vest,' through its metaphorical origin, has acquired an air of mystery.

To pursue the account of 'vesting' into the particular systems of law would lead into details not appropriate to the subject of the course. When the student approaches the subject in the particular system of law to which he may devote himself, I should recommend him to keep these two questions clearly and distinctly before him: 1st, *What are the juridical effects which the particular law or the branch of it which he is studying attaches to the circumstance of 'vesting'?*—or, in other words, What is the nature of the respective rights to which the law applies the expression, and in what do they differ from rights to which the law does not apply the word? Wherein, for instance, in English law consists the practical difference, or is there any, between a legacy to A. 'if he shall attain twenty-one' and a legacy to A.

with a gift over on his death under twenty-one? Or does it make any difference if for 'A.' you read 'a person unborn' and for 'twenty-one' read 'twenty-five'? 2ndly. What are the species of the facts, or the expression of intention, which the law construes as creating a *vested right*?

For the student of English law, as an introduction to the thorny path which this subject opens up, I shall select one or two of the principles which have been laid down.

And first I shall select the criterion of what, in English law, is called a *vested remainder* as distinguished from a *contingent remainder*. But I shall first remark that the principal juridical effect of a *vested* as distinguished from a *contingent* remainder is that it is indefeasible except by the expiration of the term assigned for its continuance. A *contingent remainder* was formerly defeasible in a variety of ways, but cannot now be defeated (as formerly) by the act of the tenant in possession. The test of the species of events which constitute a *vested remainder* is given by Fearne as follows:—

'It is not the uncertainty of ever taking effect in possession that makes a remainder contingent; for to that, every remainder in life or in tail is and must be liable; as the remainderman may die, or die without issue before the death of the tenant for life. *The present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent.*'\*

For example: If land be given to A. for life, remainder to B. for life, B. has a *vested remainder*. But if land be given to A. for life, and in case B. survive A., to B. and his heirs, B. has a *contingent remainder*. For, in the latter case, if A. in his lifetime left the possession vacant, there is no person who by the terms of the grant is entitled to fill it.

It will be observed that a *vested remainder*, according to English law, is in the predicament (c) p. 419 *supra*, subject to the further condition that the enjoyment must not, *by the express terms* of the concession, or private disposition made pursuant to the conceded power, be postponed to a period which may outlast the estate on the determination of which the remainder is expectant.

*Vested estates* (other than remainders), according to the English law of real property, appear to correspond to the above predicament (c) without the further condition just mentioned, and this I think comes to the same thing as the following remark of Mr. Hawkins:—'The only definition that can be given of the word "vested" in English law as applied to future interests, other than remainders, is, that it means "not subject to a condition precedent;" what amounts

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Examples in  
English law.

\* Fearne on Contingent Remsiders, 10th ed. vol. i. p. 216.

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to a condition precedent, the cases only can determine. This remark applies both to real and personal estate; but the rules as to what expressions are construed to create a vested interest differ widely according to whether 'real' or 'personal' estate is in question.

'Personal' estate vested in the civil law equivalent to unconditional or transmissible.

I further quote the following remarks of Mr. Hawkins as appropriate not only to explain the meaning of 'vested' as applied, in English law, to personal estate, but also to show the source in the civil law from which many of the distinctions as to vesting, both in English law relating to 'personal' estate, and in other systems of law, are derived.

The rules and expressions relative to the vesting of personal estate have been derived in a great measure from the civil law. In that system (see Domat. L. iv. Tit. 2, sec. 9) legacies not immediately payable are divided into two classes:—(1) legacies payable at a future time certain to arrive (as to which, *dies legati* was said *cessisse*, though not *venisse*): and (2) conditional legacies, or legacies payable on an event which might never happen. The former class were *transmissible* to the representatives of the legatee, if he died before the time of payment: the latter were not.

In speaking of the civil rules, it is natural to use the term "vested" to denote the former class of legacies, and "contingent" to denote the latter. In the civil law, therefore, "vested" is equivalent to *unconditional* and to *transmissible*: "contingent" is equivalent to *conditional* and to *non-transmissible*.

'Civil law sense of "vested" not applicable to English law.'

But it is obvious that this division is wholly inapplicable to the English law of legacies, which allows future conditional interests to be transmitted to the representatives of the legatee, and which considers some kinds of conditional gifts as "vested subject to be divested," i.e. subject to a condition subsequent and not precedent. By English law contingent legacies may be transmissible (as a legacy to A., if B. returns from Rome), and vested legacies may be conditional (as a legacy to A., with a gift over on his death under twenty-one). To retain, therefore, the civil law definitions of "vested" and "contingent" as equivalent respectively to "transmissible" and "non-transmissible," as is done by Roper (Rop. Leg. vol. i. p. 550, 4th ed.), appears to be fallacious.\*

The distinction above made between *complete* and *inchoate*—vested and contingent—rights, will apply, with some modification, to rights *in personam* and to rights *in rem* generally, as well as to rights *in rem* having a determinate thing for their subject. But for simplicity as well as because the terms 'vested' and 'contingent' are more commonly applied in relation to the enjoyment of a specific thing (or

\* Hawkins on Wills, p. 222.

to a *universitas*, in regard to which rights are precisely similar to those over a specifically determined thing), the distinction properly belongs to the present part of the course.

Here may be adverted to a meaning frequently annexed to the expression 'vested rights,' which is mentioned in a treatise 'On the Use and Abuse of Political Terms,' by the late Sir G. C. Lewis.

When it is said that the Legislature ought not to deprive parties of their 'vested rights,' all that is meant is that the rights styled 'vested' are *sacred* or *inviolable*, or are such as the parties ought not to be deprived of by the Legislature. The phrase is either purely an identical proposition or begs the question at issue.

If it mean that there are no cases in which the parties are not to yield to considerations of expediency, the proposition is manifestly false, and conflicts with the practice of every Legislature on earth. For almost every public undertaking on a considerable scale, there must be some sacrifice of private convenience. Parties have to give up a portion of their powers of user or exclusion, receiving compensation according to the provisions of the act of expropriation.

The expression 'vested right,' when used in the above connection, *may* mean that, in interfering with rights, the Legislature ought to tread with the greatest possible caution, and ought not to abolish them without a great and manifest preponderance of general utility. But in the proposition as thus understood, it is clear that 'vested' has a sense different from that in which it is used in positive law. Wherever expectations have been raised in accordance with the declared purpose and concession of the State, to disappoint those expectations by recall of the concession without a manifest preponderance of general utility is equally pernicious, whether the expectation amounts, or does not amount, to that which according to the particular system of positive law is a 'vested right.'

Still I apprehend there is a difference in this point of view between expectations which are *rights* properly so called, and those which consist of a mere *spes successionis* in the strict sense of the term. For as such an expectation is defensible by the act of a private person, the expectant seems to have no reason to complain if he is deprived of it by the act of the State. So that an Act altering the law of succession, such as that which in England declared that in case of death after the date of the Act the succession in real estate should go to the heir of the last purchaser instead of the heir of the last person seized—or that which in Scotland (1868) converted heritable debts (as regards the creditor) into moveable (or personal) estate,—seems not to have infringed on any sound principles of morals.

LECT.  
LIII.  

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*'Vested rights' as the phrase is applied in questions of legislation.*

PART III.

The Act of 1848 (called the Rutherford Act), which destroyed the perpetuity of Scotch entails by enabling the heir in possession, with certain consents, to bar the entail, stands on a somewhat different footing. Many of the persons whose expectations it defeated had *rights* strictly speaking—rights to the *chance* of future enjoyment—and those rights were recognised by law, inasmuch as those persons were necessary parties to any suit to affect the entailed estate. But these expectations were so exceedingly remote, that the public purpose of doing away with the interminable series of interests was doubtless sufficient justification for this change of purpose on the part of the Sovereign Legislature.\*

## LECTURE LIV.

*Introducing the subject of Titles, Modes of Acquisition, or Investitive and Directive Facts.*LECT.  
LIV.

Introduction  
to the con-  
sideration of  
Titles, or of  
Investitive  
and Directive  
Facts.

I PROCEED to consider rights *in rem* in respect of their *titles*: meaning by their titles, the facts or events of which they are legal consequences (or on which, by the dispositions of the law, they arise or come into being), and also the facts or events on which, by the dispositions of the law, they terminate or are extinguished.

In order to connect what goes before with the subject of titles, it is convenient to explain further what is meant by the expression previously employed, ‘Concession of the State at a given epoch.’ It has been supposed (*p. 408 supra*) that the State at a given epoch intimates its entire purpose in relation to the enjoyment, present and future, of the determinate thing which is the subject of the right in question.

We might imagine the State to designate individually, and by specific marks, certain individuals to the enjoyment present and future. Or we might imagine the Legislature to enact a statute; expressly reciting in its preamble the

\* When, in discussing questions relating to legislation, the term ‘vested’ is applied to rights which the State concedes to persons or corporations for purposes specially directed to the general welfare and not to the benefit of individuals, the use of the term is merely begging the question at issue; or else is made with the wrong-headed, if not consciously misleading, intention of suggesting that the rights in question are on the same footing as those which directly and specially concern individual expectations; and that a change on the part of the State in regard to the purposes of its concession inevitably conduces to the totally dissimilar end of interference with what, for shortness, and to employ a popular and not entirely inappropriate phrase, may be termed the *institution of property*.—R. C.

provisions of a previous enactment (if any) relating to the enjoyment, the state of existing facts relevant to the provisions of that previous and of the present enactment, and the general principles of law relative to that state of circumstances, having regard to the provisions of the previous enactment;—that such statute should then proceed to declare who are the persons (by specific and individual description) presently having right to enjoyment;—that it should describe the future facts or events (either certain or uncertain) whereby that enjoyment is to terminate, and point out (either by specific and individual marks, or by general description, having regard to facts or events yet uncertain, or partly by both modes) the persons who are to have the enjoyment on the determination of the enjoyment of the persons presently entitled thereto, and so on.

Nor is the supposition merely imaginary. An act of the first kind really takes place (so far as relates to the persons immediately taking under it) at the instant when a right is constituted by direct grant, charter, or letters patent by the Sovereign or its officers in that behalf duly authorized. An enactment of the second kind is really made (according to English practice) at the instant of the confirmation by statute of an award by Enclosure Commissioners: or, in the case of an Indian Settlement, by the final order of the Revenue Authority relating to a specific piece of land.

And what is in these cases done by explicit enactment is what virtually occurs at every moment by reason of the implied purpose of the State as intimated by a combination of the following indices, viz.—the previous enactments (if any), the existing facts and circumstances, and the general principles of law. And that purpose is capable of being made clear—*constat, potentially*—by evidence, that is to say by documents which a Court of law permits or orders to be produced and oral statements which it permits to be made.

Now, so far as any such enactment, simply and explicitly, designates persons individually, and by specific marks, to the enjoyment present or future, these persons may be said to acquire right *immediately from the law*. In all other cases persons to be benefited may be said to acquire rights by a *title*.

Now although for simplicity and clearness the concession of the State has been considered as relating specially to the enjoyment of a specific thing, it is obvious that a great deal of what has been said in that relation applies to rights *in rem* having no specific subject (person or thing), and also to rights *in personam*. And although the observations made at this part of the course are specially directed to titles as engendering and extinguishing rights *in rem*,

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considered *per se*, it is convenient to preface them by certain remarks which apply to titles generally.

*Order in  
which the  
subject of  
titles is to be  
treated.*

Having made those prefatory remarks, I shall proceed, having regard specially to rights *in rem*, to the leading distinctions between titles; and conclude the subject of titles by a consideration *seriatim* of certain titles which, being, in some shape or other, found in every system, are appropriate matter for General Jurisprudence.

Of the titles thus to be considered simply and *seriatim*, the following are the principal:

1st. The acquisition of *jus in rem* by *occupancy*: i.e. by the apprehension or occupation of a thing which has no owner, with the purpose of acquiring it as one's own. (We might take a thing having already an owner, with the purpose of acquiring it as our own. But in that case the right which we acquire is a different right; that which is called a *right of possession*, a right availng against all the world except the owner of the subject.)

2ndly. The acquisition of *jus in rem* by *labour*: i.e. by labour expended on a subject which has no previous owner, or even on a subject which has. For there are various cases in which a party acquires a right in a thing belonging to another, by labour employed upon it; for instance, in the Roman Law by *specification*, that is, by giving it a new form.

3rdly. The acquisition of *jus in rem* by *accession*: that is to say, through the medium of a thing of which the party is owner already; as in the case of land washed away and joined to one's own land, or the fruits arising from one's own land.

4thly. The acquisition of *jus in rem* by occupancy or labour, combined with accession.

5thly. The various modes of acquiring *jus in rem* which fall under the generic name of *title by alienation*: meaning by alienation, the intentional and voluntary transfer of a right (or of a fraction of a right) by the party in whom the right resides, to another party.

6thly. The acquisition of *jus in rem* by *prescription*: the consideration of which will involve a previous consideration of the so-called *right of possession*.

7thly and lastly. Such modes of losing rights as are not involved by implication in *modes* of acquiring them. For as *every* mode of acquisition is not derived from a pre-existing title, so may a title end without engendering another. Occupancy, for example, is not a title derived from a previous title. And so, where absolute property terminates by the annihilation of its subject, or by reverter to the State, not considered as a trustee for a private person or persons, the mode by which the owner loses his right is not at the same time a title to a right in another.

In considering the titles to which I have now adverted, I shall commonly assume that the right which is the subject of the acquisition or loss, is absolute property, or dominion strictly so called, over a singular or particular *thing* in the proper acceptation of the name: noting from time to time, as I may see occasion, the effect of any title in engendering or extinguishing rights which are not rights of that class or description.

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LIV.

## LECTURE LV.

## Titles.

CONSIDERED with reference to the modes wherein they respectively begin, or wherein the entitled persons are respectively invested with them, Rights may be divided into two kinds.

1. Some are conferred by the law, upon the persons invested with them, through intervening facts to which it annexes them as consequences.

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Titles con-  
sidered gen-  
erally.

2. Others are conferred by the law upon the persons invested with them, immediately or directly: that is to say, not through the medium of any fact distinguishable from the law or command which confers or imparts the right.

The only rights which arise from laws immediately are of the class of rights which are strictly *personal privileges*.

Rights ar-  
lege imme-  
diat.

And here it is to be observed, that every privilege properly so called is a strictly personal privilege: that is to say, an anomalous right (or an anomalous immunity from duty) conferred by a law (also called a privilege) on a specifically determined person (individual or complex), as being that very person. For example: A monopoly granted to Styles, as being the individual Styles, is a strictly personal privilege: it is given to the very individual, as being the very individual, and therefore is not assignable or transmissible to his representatives. A monopoly granted to a corporate body, as being that very body, is also a personal privilege. For it is not exercisable by any but the complex person to whom it is granted specifically.

Certain so-called privileges indeed are *privilegia rei*, or privileges conferred on a *prædium*, meaning thereby a privilege conferred on its successive owners or occupants as being such owners or occupants. And of privileges conferred upon persons not as being owners or occupants of specifically determined *prædia*, some are transmissible and assignable to the heirs and alienees of the grantees, and are not exclusively exercisable by the very grantees themselves.

But, strictly speaking, a *privilegium rei* (or a privilege

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granted to the occupants of a given *praedium*) is not a privilege. It is not granted to the parties as being those very parties, but as being persons of a given class, or as being persons who answer to a given generic description;—as being owners or occupants of the *praedium* or parcel of land, whereon, by an ellipsis, the privilege is said to be conferred.

Though the class of persons entitled in succession is comparatively narrow, the right may be likened to those anomalous rights which are occasionally granted to extensive classes of persons: as, for example, to soldiers, to infants, or to married women.

A so-called personal privilege transmissible to heirs or assigns, is, in so far as it is so transmissible, in the same predicament with a *privilegium rei*. In respect of the person to whom it is first granted, it may be deemed a privilege, being granted to a party specifically determined as bearing his individual or specific character. But, in respect of the heirs of that person, or in respect of the persons to whom he may assign it, it is not a privilege properly so called. The law confers it upon them, not as being specifically determined persons, but as being persons of generic descriptions or classes; that is to say, as being the persons who answer to the description of his heirs, or alienees. And, accordingly, although the first grantee may acquire by the law directly, it is impossible (as I shall show immediately) that his heirs or alienees should take from the law without the intervention of a title.

The essence of a privilege properly so called, is this: that the eccentric or anomalous right is conferred on a specific person, not as belonging to a class of persons, but as bearing the specific character peculiar to him or it.

Now a privilege properly so called may be conferred by the law (*privilegium*) which confers it directly: that is to say, without the intervention of a fact distinguishable from the law itself. Or it *may* be conferred through a *title*. For example: The law may grant a privilege to a person now an infant *in case* he shall come of age, on which supposition, the privilege will not vest unless the infant come of age; and the fact of his coming of age, is therefore a title, or *investitive* fact, necessary to the *consummation* of the right.

But where a right is not properly a privilege, (or is not conferred on a specific person as being that specific person,) the right arises of necessity through a *title*: through a fact distinguishable from the law conferring the right, and to which the law annexes the right as a consequence or effect. For example: If you acquire by occupancy, or by alienation, or by prescription, you do not acquire as being the individual *you*, but because you have occupied the subject, or have received it from the alienor, or have enjoyed it adversely for a given time, agreeably to the provision of the

rule of law which annexes the right to a fact of that description.

And the same may be said of the privileges improperly so called, which are either *privilegia rei* (or privileges annexed to *praedia*), or are so-styled personal privileges passing to heirs or alienees. It is as being the occupant of the thing, and not as being the very person who then happens to occupy it, that the occupant of the thing acquires the so-called privilege. And it is as being the heir or the alienee of the first grantee, and not as being the very person who is heir or alienee, that the heir or alienee of the first grantee takes the privilege mis-styled personal.

In short, wherever the law confers a right, *not* on a specific person as being such, the law of necessity confers the right through the intervention of a title. For, by the supposition, the person entitled is not *determined* by the law through any mark specifically peculiar to himself.

It is manifest that duties, as well as rights, may arise from the law *immediatè*, or may arise from the law through the intervention of facts to which the law annexes them.

Where the duty is relative, it arises from the very fact which engenders the corresponding right. Consequently, If the right be a privilege properly so called, the relative duty, as well as the right, may arise from the law *immediatè*. If the right arise from a title, the relative duty as well as the right must arise from a title also.

In the case of absolute duties, the duty may either be imposed on a specified person as such, or may be imposed on a person through an intervening fact. In the first of those cases, the duty may be imposed by the law *immediatè* or directly. In the latter of those cases, the fact through which the law imposes the duty may also be styled a *title*. I apply the term *title* to every fact whatever, *through* which the law confers or extinguishes a right, or imposes or exonerates from a duty.

What has been said of rights and duties in respect of their commencement, will apply to rights and duties in respect of their termination. For a right or a duty may terminate by a specific provision of the law exclusively applicable to the specific instance: on which supposition, it may be said to terminate by the mere operation of law. Or the right, or the duty, may terminate through, or in consequence of, a fact to which the law has imparted that extinctive effect. On which supposition, the right or duty may be said to terminate through, or in consequence of, a *title*.

I will now briefly advert to the functions of Titles: and Functions of titles.

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to the reasons why facts of some kinds are selected to serve as titles, in preference to facts of other kinds.

It is impossible that every right and duty should be conferred and imposed by the law immediately. For, on that supposition, there must be as many systems of law as there are individuals in the community.

It is only in comparatively few, and comparatively unimportant cases that rights or duties can be created or extinguished by the mere operation of the law. Generally speaking, rights must be conferred and extinguished, and duties imposed or withdrawn, through titles.

Titles are necessary, because the law, in conferring and imposing rights and duties, and in divesting them, necessarily proceeds on general principles or maxims. It confers and imposes on, or divests from, persons, not as being specifically determined, but as belonging to certain classes. And the title determines the person to the class.

But though the facts which serve as titles mark the beginnings and endings of rights and duties, it is not (generally speaking) for that reason only that the law imparts to those facts their creative and extinguitive effects.

Independently of a given title serving as such a mark, there is generally another reason why it is selected as a title : a reason founded on utility, partial or general, well or ill understood. It is deemed expedient that the given fact should perform the functions of a title, in preference to other facts, which, as mere marks, might perhaps perform the functions equally well.

For example : Considering a title as a mere mark determining the commencement of a right, it would be utterly indifferent whether a man's lands and goods passed on his decease to his children or to his remoter relations. But for certain reasons, founded on obvious utility, his lands and goods generally pass to his children in preference to his remoter relations.

Bentham's criticism on the word title.

Bentham, in the *Traité de Législation*, objects to the word 'title,' that though it denotes the facts to which the law annexes rights, it does not commonly denote the facts through which the law puts an end to rights.

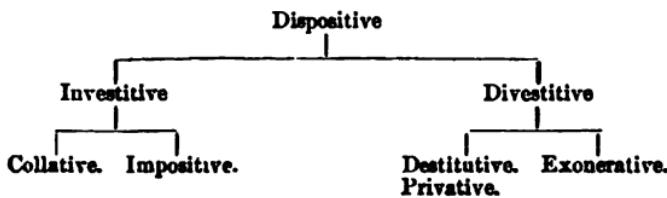
Another objection to the word 'title' is, that it is not applicable to facts considered as engendering or extinguishing *duties*, relative or absolute. Where the duty is relative, perhaps a term is scarcely necessary, as the relative duty arises necessarily from the fact which engenders the corresponding right. But where the duty is absolute there is need of some generic expression for facts which engender or extinguish duties. The word 'title' does not serve the purpose : we hardly speak of a *title* to a burthen or duty.

The same objections apply to the term *modus acquirendi*.

or mode of acquisition which is employed by the modern Civilians, and by all the legal systems which are mainly derivatives of the Roman law. We cannot talk of acquiring a duty.

Bentham, to obviate the inconvenience of this defective nomenclature, suggests the following terms. He proposes to call every fact whatever, by which a right or a duty is engendered or extinguished, a *dispositive fact*. These *dispositive facts* he divides into *investitive* and *divestitive*, meaning by *investitive*, facts which give commencement to rights and duties; by *divestitive*, facts which put an end to rights or duties. *Investitive* facts, again, he divides into *collative* and *impositive*, collative being such as *confer* rights, impositive such as *impose duties*. *Divestitive* facts he distinguishes into *destructive* or *privative*, and *exonerative*, meaning by the former, facts which put an end to rights; by the latter, those which extinguish or relieve from duties.

These arranged in a tabular form are as follows:—



It may be doubted whether this multitude of expressions is of much use, and there are some objections even to these terms. It appears convenient to use the common term *title* in the large sense annexed to it in these Lectures, as meaning any fact, by the intervention of which the law invests or divests a right, or imposes or withdraws a duty.

Proposed use  
of title with  
extended  
meaning.

Blackstone himself often seems to use *title* to designate a fact which ends a right as well as one which begins it, so that the large import here given to the term would not to a great extent shock established usage.

It is remarkable that the Roman lawyers have scarcely any settled generic name for *investitive* or *divestitive* facts. They generally employ some kind of circumlocution. Even the phrase *modus acquirendi* was not theirs, but devised by the modern Civilians.

The word *titulus* in Roman law, is not at all equivalent to *title* in the English. It is not a mode of acquisition, but a part only of a complex mode of acquisition; and even in that narrower sense it is only applied in a few cases, namely certain cases in which rights are acquired by tradition and by prescription.

A title may often be separated into two distinct facts or sets of facts—an antecedent and a consequent; and then

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*titulus* is the name given to the antecedent part, *modus acquirendi* to the residue or consequent part. The word *titre* in the French law is always understood in the same sense as *titulus* in the Roman law. It never means, as with us, *mode of acquisition*.

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## LECTURE LVI.

*Titles continued.*LECT.  
LVI.

*Titles* (or the facts through which the law confers and divests rights, or, through which the law imposes and withdraws duties) are divisible into *simple* and *complex*.

Titles distinguished into simple and complex. But really always complex.  
A title may consist of a fact which is deemed *one* and *indivisible*, and is said to be simple. Or a title may consist of a fact which is *not* deemed one and indivisible, but is deemed a number of single and indivisible facts compacted into a collective whole, and may then be called complex.\*

Every title is really complex. In the case, for example, of acquisition by occupancy, (which perhaps is the least complex of all titles), the title consists, at the least, of three distinguishable facts: namely, the negative fact that the subject occupied has no previous owner; the positive fact of the apprehension or taking possession of the subject; and the intention, on the part of the occupant, of appropriating the subject to himself—*animus rem sibi habendi*.

Nay, each of the simpler facts into which a title deemed simple is immediately resolvable, may itself be resolved into facts which are still more simple or elementary. The negative fact, for example, that the thing acquired by occupancy is *res nullius*, is the absence or negation of that multitude of facts which are imported by the positive fact of a thing being owned already. And the fact of taking possession, or the *animus rem sibi habendi*, is also resolvable into a number of facts which it would take a long treatise to distinguish and describe.

The terms simple and complex, as applied to titles, are, therefore, merely relative. A so-called *simple* title is a title consisting of parts, which, for the purpose contemplated by the speaker, it is not necessary to distinguish: whilst a so-called *complex* title is a title consisting of parts, which, for the same purpose, it is necessary to consider separately.

According to Bentham, in his '*Vue générale d'un Corps*

Component elements of a

\* Bentham, *Treatise*, vol. i. p. 273.

*de Droit*, the distinguishable facts which constitute a complex title, are divisible, in some cases, into '*principal*' and '*accessory*.' Looking at the *rationale* of the distinction which he seems to have in view, (and which is a distinction of great practical moment), the terms *essential* or *intrinsic*, and *accidental* or *adventitious*, would be more significant than principal and accessory.

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complex title.  
Principal and  
accessory.

The *rationale* of the distinction appears to be this:

As it was remarked in the preceding Lecture, there are generally certain reasons, derived from the nature of the fact which serves as a title, why such or such a right or duty should be annexed to that fact rather than another, or why that fact rather than another should divest such or such a right or duty.

Now it may happen, that, looking at the reasons or purposes for which a given right is annexed to a given title, *all* the facts of which the title is constituted are of its very essence. Or it may happen that some of those facts are not of the essence of the title: that is to say, it would be consistent with those reasons or purposes for the right to arise through the supposed title, although the facts in question were not constituent parts of it.

For example: Looking at the reasons for which a convention is made legally obligatory, or for which legal rights and duties are conferred and imposed on the parties to the agreement, a promise by the one party, and an acceptance of the promise by the other party, are of the essence of the title.

But in certain cases, a convention is not legally binding, unless the promise be reduced to writing, and the writing be signed by the promisor: or unless the promise be couched in a writing of a given form: or (generally) unless the contracting parties observe some solemnity which has no necessary connexion with the promise and acceptance.

Now, though the given solemnity, let it be what it may, is, in all such cases, a constituent part of the title, it is not of the essence of the title. The right and duty might arise, (consistently with the reasons for which conventions generally, or conventions of the particular class, are made obligatory), although the solemnity were no portion of the title. The solemnity may be convenient evidence of that which is essential to the title, but, though it is a part of the title, it is not necessarily such. Where this is the case, the several facts into which the title is resolvable may be divided into *essential* and *accidental*, *intrinsic* and *adventitious*, or (in the language of Bentham) *principal* and *accessory*. The facts which are essential or principal are parts of the title, because they are absolutely necessary to the accomplishment of the purposes for which the right is annexed to the title by the lawgiver.

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But the facts which are accidental or accessory, are constituent parts of the title, not because they are *necessary* to the accomplishment of those purposes, but for some reason collateral or subsidiary to those purposes.

For the sake of simplicity let us confine ourselves to titles considered as investing with rights.

Where some of the elements of a title are accidental or accessory, they (generally speaking) are merely subservient to the essential or principal parts of it. For example: They serve as *evidence*, preappointed by the law, that that which is substantially the title has happened. This is the case, wherever tradition or delivery of the subject, or a writing with or without seal, or an entry or minute of the fact in a register, or any other solemnity of the like nature, is a constituent part of a valid alienation of a thing of a given class.

The invalidity or nullity of the title, in case the evidentiary fact be not a constituent part of it, is the *sanction* of the rule of law by which the evidence is required. But it is clear that the rule of law *might* be sanctioned otherwise. For example: The absence of the given solemnity, instead of nullifying the title (or being made a presumption, *juris et de jure*, that the title had not accrued), might be made a presumption *prima facie*: that is to say, a presumption which the party insisting on the title might be at liberty to rebut, by explaining the reason why the prescribed solemnity had not been observed, and by producing evidence, *other than* the pre-appointed solemnity, that the title *had* accrued.

Or the absence of the given solemnity might be visited on the party bound to observe it, not by nullifying his title, but by punishing him with a pecuniary fine.

And, on either of these suppositions, the prescribed solemnity, though still prescribed or exacted, would not be *indispensable* evidence of the *substance* of the title, or (what is the same thing) would not be a *constituent part* of the title. For it is manifest, that, wherever an evidentiary fact is indispensable evidence of a given title, *that* evidentiary fact is a component part of the title, although it is not an *essential* part, but is merely an *accidental* or *adventitious* one.

Now the elements of a title which are non-essential or accidental, although (generally speaking) merely subservient to the essential parts of it, are sometimes merely collateral, and in no respect subservient to its essential or principal parts. They are entirely foreign to the reasons or purposes for which the right in question is annexed by the law to the title.

This, for example, is the case, wherever a deed or other writing is indispensable evidence of the title, and where

moreover the writing is not admissible evidence, in case a stamp was not affixed to it when the alleged title arose. Such is the case with a policy of insurance. In this instance, the stamp is made a part of the title, not because it has any connection with the essentials or substance of the title, but to secure the due payment of a given tax.

And here, again, the distinction between the essentials and the accidentals of the title is glaring and manifest.

The nullity or invalidity of the title, in case the stamp be not affixed when the alleged title arises, is the *sanction* of the law which imposes the tax. But it is clear that the law imposing the tax might be sanctioned otherwise: as, by a fine. In some cases the law imposing a tax on a deed or evidentiary instrument is sanctioned in the manner which is now suggested. Although the duty ought to have been paid, and the stamp affixed to the evidentiary instrument, when, or immediately after, the alleged title arose, still the instrument is admissible evidence of the title, if a tax *and penalty* be paid, and a stamp be affixed to the instrument, subsequently to the time prescribed for those purposes. And, in this case, the payment of the tax, though still requisite, is no *part of the title*.

In the preceding Lecture, it was observed that wherever a right or duty commences or is ended through a law *without the intervention of a fact distinct from the law itself*, the right or duty may be said to arise or be extinguished by the law, immediately or directly; or *ipso jure*. But in the language of our own law, and of other particular systems of positive law, these and the like expressions are not used with this meaning, but in senses totally different, and which may be called improper applications of the expressions.

These improper applications may be reduced, I think, to two.

First, in some cases of title, the title, or one or more of the several facts constituting the title, is some *act* done by the person entitled. But in other cases of title, neither the title, nor any of the several facts constituting the title, is an *act* done by that person. Now where the title is in this latter predicament, the right or duty has been said to arise, or to be divested or withdrawn, '*lege immediate*;' '*ipso jure*'; '*by act or operation of law*'; and so on: These and the like expressions really denoting (*not* that the right or duty is invested or divested without the intervention of *any* title, but) that the title, by which the right or duty is invested or divested, does not consist of or comprise any act of the invested or divested person.

For example: According to the Roman law, heirs of certain classes, whether they be heirs *ex testamento*, or heirs *ab intestato*, are not heirs completely, unless they *accept* the

Improper applications of the expressions *ex lege immediate*, &c.

1st. Their use to indicate whether or not an act of the party entitled is part of the title.

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heritage. And, accordingly, such heirs are styled *rotuntary*, or are said to acquire by their own act. But on heirs of other classes, the inheritance devolves, whether they wish it or not, on the decease of the testator or intestate, without an act of their own. And, accordingly, such heirs are styled *necessary* (or heirs necessitated or obliged to take), and are said to take the heritage *ipso jure*, or, as we should say, *by mere operation of law*.

Again Blackstone says,\* that purchase or *perquisitio* is distinguished from acquisition by right of blood, and is made to include all modes of acquisition except inheritance; because in this last case the title is vested in the party, not by his own act or agreement, but by simple operation of law. This is clearly a mistake: for according to the law in Blackstone's time (and still according to the strict theory of law) the estate where it consisted of land in possession did not vest until entry. The principle has been of little practical importance since the change in the law of intestate succession (3 & 4 W. IV. c. 106; 22 & 23 Vict. c. 85, secs. 19 & 20) which makes seizin of the heir unnecessary in order to the transmission of the right to his own heirs *ab intestato*. By the law of Scotland a new seizin (or infestment) by the heir is necessary in order completely to vest the succession in him to the effect of rendering his estate liable to succession duty: *Lord Advocate v. Stevenson, House of Lords, February 1869.*

In English law by the operation of the 17th section of the Statute of Frauds acceptance of the goods sold is in some cases part of the *title* to the various rights and duties consequent upon sale. The acceptance is a determination of the will on the part of the purchaser, with the intention of keeping the goods as his own.

Secondly. Another improper application of the expressions in question seems to be this:

Certain classes of titles, or of modes of acquisition, have concise names: as, for example, 'occupancy,' 'alienation,' 'prescription,' and so on.

But other classes having no concise names, and not being expressible without long circumlocutions, they are commonly lumped up together, and opposed to the classes which have such names, by the expression '*ex lege*.' This is one of the meanings sometimes annexed to the term by the Roman lawyers and by modern Civilians.

These improper applications mostly arise from not considering that *every* right and duty must arise and be determined by law. They are all consequences of law; but some

2ndly. To distinguish certain well-known titles;

\* 'By inheritance the title is vested in a person, not by his own act or agreement, but by the single operation of law.'—Blackstone, vol. ii. p. 241.

arise or are divested through a title, others without the intervention of any title, and these last can alone be said with correctness to arise from the law immediately.

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## LECTURE LVII.

### *Titles variously classified.*

On the subject of titles it remains, according to the purpose sketched out on p. 430 *supra*, to mark out certain leading divisions of the titles which properly belong to the department of the Law of Things now under consideration: namely, the titles by which rights *in rem*, considered as existing *per se*, are acquired or lost, or invested and divested. Even in considering these titles, it will be necessary to advert occasionally to titles of other classes.

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Titles by  
which rights  
*in rem* are  
acquired or  
lost.

Various at-  
tempts at  
classification  
Doubtful  
whether any  
successful.

These various divisions are disparate and cross. They are various attempts to find a basis for a classification or arrangement of the various genera and species of titles. It may indeed be doubted whether any scientific principle of division is practicable or useful:—whether it be not better to select the principal titles, and then to add a miscellany—*ex lege*, in the sense of the modern Civilians adverted to on p. 440 *supra*. This is done by Blackstone, the compilers of the French Code, Ulpian, Bentham. None of them attempt to reduce in the first instance the whole mass of titles into a small number of very extensive genera, and then refer the various subordinate genera and species to them. They begin by placing on a line a considerable number of genera which are comparatively narrow; and some of them: eke out these by a miscellaneous head.

The great difficulty is the mixed character of most of the titles which occur in every system.

### *Titles ex Jure Gentium and ex Jure Cirili.*

The arrangement of titles in Gaius and the Institutes, mainly founded on this division. But it is liable to the objection that modes of acquisition *jure circili* commonly consist of facts which are not of the essence of the right, but are merely accidental: peculiar formalities prescribed by the law as necessary to the acquisition.

The Institutes absurdly interpose servitudes, which are *ex jure circili*, between these two sorts of titles. And the anomaly is that acquisitions *per universitatem* are not included under either department.

PART III.*Original and Derivative Titles.*

Investigative events are original or derivative; i.e. acquired from the State directly, as in cases of occupancy; or from .. through a person in whom a right or its subject formerly resided.

The distinction appears to be confined by some to rights *ex jure gentium*.

By others it is confined to acquisitions of *dominianum* or property, preeminently so called, and other *jura in rebus*. But it is just as applicable to *jus in personam*: e.g. assignee of a contract: succession by heir to rights *in personam* of deceased.

The distinction appears to be useless, except for this purpose: that in many cases of derivative titles, the party is subject to duties passing from the party from whom his right is derived.

*Title by descent and title by purchase.*

This is a convenient division in the Law of English Real Property, for reasons given by Christian and Blackstone. (Blackstone, vol. ii. pp. 200, 241-3.) But a division only of one class of rights: rights *in rebus singulis* falling under the law of real (i.e. *inheritable*) property.

It would not be a convenient basis for a general division: And, accordingly, modes of acquiring personal property are not divided in that manner.

It is not complete, even with reference to real property.

**OUTLINE OF REMAINING PART OF THE INTENDED COURSE,  
WHICH, FOR REASONS MENTIONED IN THE INTRODUC-  
TION, WAS NEVER ACCOMPLISHED.**

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[Having suggested certain of the leading divisions of the titles by which *jura in rem per se* are invested and divested, the next point in order according to the purpose sketched out by the author on p. 430 *supra* would be to consider *seriatim* certain classes of titles (being especially titles to rights *in rem*) which are found in most systems of positive law. But here the Lectures abruptly break off. The last was delivered on June 20, 1832, after which Mr. Austin was compelled by ill-health to go abroad. The record indeed of this last Lecture consists only of notes prepared by the author for oral discourse, and part of these form the substance of what is above printed as Lecture LVII. The rest are too fragmentary to be usefully placed before the student in the present elementary work. What here follows, is reprinted from the 'Outline,' published by Mr. Austin in the original volume containing 'The Province of Jurisprudence Determined.'—R. C.]

PART III.*The Right of Possession.*

If one person exercise a right residing in another person, but without authority from the latter, and without authority from those through whom the latter is entitled, the former acquires, by his unauthorized or *adverse* exercise, the anomalous right which is styled the *right of possession*.

This general description of the right of possession must, however, be taken with the following limitation.—The person who possesses adversely, or who exercises the right of another without the requisite authority, does not acquire thereby the right of possession, in case his adverse possession began *vi*, or arose through any of the means which fall within the name of violence.

The *right of possession* must be distinguished from the *right of possessing*, or (changing the phrase) from the *right to possess*: for the *right of possessing*, or the *right to possess*, is a property or integrant part of the *right of possession* itself, and also of numerous rights which widely differ from the latter. In other words, the *right of possessing*, considered generally, may arise from any of various titles or causes: but the peculiar *right of possessing* which is styled the *right of possession*, is a *right of possessing* that arises exclusively from the fact of an adverse possession.

Although it arises from actual possession, the *right in rem* which is styled the *right of possession*, must also be distinguished from the rights *in rem* which arise from occupation or occupancy. For the fact of *possessing* which is styled occupation or occupancy, consists in the possession of a something that is *res nullius*. But the fact of *possessing* which gives the *right of possession*, consists in the *adverse exercise*, by the person who acquires the *right*, of a *right residing in another*.

Consequently, the following description of the *right of possession* has all the exactness which accords with extreme brevity.—It is that *right to possess* (or to use or exercise a *right*) which springs from the fact of an *adverse possession* not beginning through violence.

As against all but the person whose *right* is exercised adversely, the person who acquires the *right of possession* is clothed with the very *right* which he affects to exercise. And as against the person whose *right* is exercised adversely, he may acquire the very *right* which he affects to exercise through the title, or mode of acquisition, styled *prescription*. Or (adopting a current but inadequate phrase)

the right of possession ripens, by prescription, into the right of dominion or property.

*Note.*—The right of possession strictly and properly so called, or the right of possession considered as a *substantive* right, is a right that arises exclusively from the fact of an adverse possession. But the term *right of possession* is not unfrequently employed with an extremely large signification. Taking the term with this very extensive meaning, the right of possession arises from an actual possession, whether the actual possession be adverse or not. For example: It is said that the *dominus* in actual possession, has a right of possession which arises from that actual possession, and which is completely independent of his right of dominion. But (as I shall show in my Lectures) the right of possession considered as a *substantive* right, is a right that arises exclusively from the fact of an adverse possession: the so called right of possession which arises from an actual possession not adverse, being a *property of another right*, or being an *integral part of another right*. For example: It is absurd to ascribe to the *dominus* in possession, a right of possession independent of his right of dominion: for if the *dominus* actually possess, it is as *dominus* that he actually possesses. As I shall show in my Lectures, the term *right of possession* acquired the large signification to which I have adverted above, in consequence of an extension of such *possessory remedies* as in their origin were appropriate to parties invested with the right of possession strictly and properly so called. These possessory remedies, though originally appropriate to such parties, were afterwards extended to any possessors who had been wrongfully disturbed in their actual possessions. In the Roman Law, for example, a certain *interdict* (closely analogous to an *action of ejectment*) was originally appropriate to parties invested with the right of possession strictly and properly so called. But it was extended to the *dominus* who had been wrongfully evicted from his actual possession. For by resorting to an interdict grounded on his actual possession, instead of resorting to an action grounded on his right of dominion, he avoided the inconvenient necessity of proving his right of dominion, and had merely to demonstrate his actual possession at the time of the wrongful eviction: just as a party who is seized or entitled in fee, recovers through an action of ejectment, from an ejector without title, by merely proving his actual possession at the time of the wrongful ejectment. And since the *dominus* recovered by the interdict, on merely proving his actual possession, he recovered in a certain sense, through his right of possession merely. But yet it were absurd to affirm that he had any right of possessing independently of his right of dominion; or to liken the right of possessing which is parcel of the right of dominion, to the substantive right of possessing which arises solely or exclusively from the fact of an adverse possession.—The above-mentioned extension of possessory remedies, has rendered the right of possession one of the darkest of the topics which the science of jurisprudence

PART III. presents. But there is not intrinsically any remarkable difficulty in the right of possession which is strictly and properly so called: that is to say, which arises solely or exclusively from the fact of an adverse possession, and which is the basis of acquisition by *usucaption*, and of other acquisition by *prescription*.

At this point of my Course, I shall therefore proceed in the following manner.

I shall analyze the anomalous and perplexed right which is styled the right of possession. Performing the analysis, I shall happily be able to borrow from a celebrated treatise by *Von Savigny*, entitled *Das Recht des Besitzes*, or *De Jure Possessionis*: of all books upon law, the most consummate and masterly; and of all books which I pretend to know accurately, the least alloyed with error and imperfection.

Having analyzed the right of possession, I shall turn to the title, or the mode of acquisition, wherein the right of possession is a necessary ingredient: namely, *usucaption* and other *prescription*. I shall consider generally the nature of the title; and shall advert to the respective peculiarities of the Roman and English Law, in regard to the terms or conditions whereon the title is allowed. If I find it possible or prudent to touch that extensive subject, I shall proceed from title by prescription to the connected subject of *registration*.

Rights *in personam* as existing *per se*, or as not combined with rights *in rem*.\*

Rights *in personam*, including the obligations which answer to rights *in personam*, arise from facts or events of three distinct natures: namely, from *contracts*, from *quasi-contracts*, and from *delicts*.

The only rights *in personam* which belong to this sub-department, are such as arise from contracts and quasi-contracts. Such as arise from delicts, belong to the second of the capital departments under which I arrange or distribute the matter of the Law of Things.

*Note.*—Perceiving that rights *ex delicto* were generally rights *in personam*, but not adverting to the importance of marking their sanctioning character, the classical Roman jurists, in their institutional or elementary writings, arranged them with rights *ex contractu* and *quasi ex contractu*: with rights which also are rights *in personam*, but are not bottomed, like rights *ex delicto*, in infringements of other rights. And hence much of the obscurity which hangs over the Institutes of their imitator, the Emperor Justinian.

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\* See method of division sketched out in Lect. XLVI. p. 379 *supra*.

The matter of this sub-department will be treated in the following order.

I. I shall define or determine the meanings of certain leading expressions: viz. Promise: Pollicitation: Convention or Agreement: Pact: Contract: Quasi-Contract.

II. Having defined the meanings of those leading expressions, I shall consider particularly the nature of *contracts*. I shall distinguish contracts properly so called, from certain facts or events which are styled contracts, but which virtually are alienations or conveyances. I shall distribute contracts under their various classes: expounding the distinctions (with many other distinctions) between unilateral and bilateral, principal and accessory, nominate and innominate contracts. Expounding this last distinction, I shall show what is meant by the *essence*, and what by the *accidents* of a contract. I shall notice the solemnities or formalities which are essential to the validity of certain contracts: and, thereupon, I shall analyze the *rationale* of the doctrine of *considerations*. Finally, I shall turn to the events whereon, or to the modes wherein, the rights and obligations arising from contracts, cease or are extinguished.

III. From contracts, I shall proceed to *quasi-contracts*: that is to say, facts or events which are neither contracts nor delicts; but which, inasmuch as they engender rights *in personam* and obligations, are, in that respect, *analogous* to contracts. I shall notice the frequent confusion of merely quasi-contracts with contracts which properly are such, although they are tacit or implied. I shall show that quasi-contracts are analogous to the fancied contracts from which speculators on government have derived the duties of the governed: and I shall show the causes of the tendency to imagine or feign contracts, for the purpose of explaining the origin of duties which emanate from other sources. I shall advert to the classes of quasi-contracts; and to the events whereon, or the modes wherein, the rights and obligations which they generate, cease or are extinguished.

Such of the combinations of rights *in rem* and rights *in personam* as are particular and comparatively simple.\*

Though *jus in rem*, or *jus in personam*, may exist separately, or uncombined with the other, both may vest *uno ictu* in one and the same party: or (changing the expression) an event which invests a party with a right *in rem* or *in personam*, may invest the same party with a right *in personam* or *in rem*. As examples of such events, I may

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\* See method of division sketched out Lect. XLVI., p. 879 *supra*.

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mention the following: namely, a conveyance with a covenant for title: a *hypotheca* or mortgage, express or tacit: a sale completed by delivery, with a warranty, express or tacit, for title or soundness. And, as I shall show in my Lectures, many a fact or event which is styled simply a contract, is properly a complex event compounded of a conveyance and a contract, and imparting *uno statu* a right *in rem* and *in personam*.

Such of the combinations of rights *in rem* and *in personam* as are particular and comparatively simple, are the matter of this sub-department. What I mean by their *particular*, or rather their *singular*, combinations, as distinguished from the *universal* aggregates which are the matter of the next sub-department, would scarcely admit of explanation within the limits of an outline. In order to an explanation of my meaning, I must explain the distinction between singular and universal successors, or succession *rei singulae* and succession *per universitatem*: nearly the most perplexed of the many intricate knots with which the science of law tries the patience of its students.

Such *universities* of rights and duties (or such complex aggregates of rights and duties) as arise by universal succession.\*

The matter of this sub-department will be treated in the following order.

I. The complex aggregates of *rights* and *duties*, which commonly are named by modern Civilians, '*universitates juris*', will be distinguished from the aggregates or collections of *things*, which commonly are named by the same Civilians, '*universitates rerum sive facti*'. They will also be distinguished from the complex and fictitious *persons* (or the collective bodies of individual or physical persons), which are named by the Roman Lawyers, *universitates* or *collegia*, and by the English Lawyers, *corporations aggregate*. —The universities of rights and duties, which are the matter of this sub-department, will also be distinguished from *status* or conditions. For the aggregates of rights and duties, capacities and incapacities, which are styled *status* or conditions, are, for the most part, *juris universitates*.

II. Since all the universities of rights and duties, which are the matter of this sub-department, arise by universal succession, the distinction between singular and universal successors, or succession *rei singulae* and succession *per universitatem*, will be stated and explained. As I have already remarked, that knotty distinction would scarcely admit of explanation within the limits of an outline. But

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\* See method of division sketched out Lect. XLVI., p. 379 *supra*.

the following examples may suggest to the reflecting reader, the character of successors *per universitatem*, with the nature of the *universitates* to which such successors succeed.—The executor or administrator of a testator or intestate, with the general assignee of a bankrupt or insolvent, are universal successors. And, in respect of specialty debts due from the ancestor or devisor, the heir or devisee, general or particular, succeeds *per universitatem*. The aggregate of rights and obligations which devolves from the testator or intestate to the executor or administrator, with that which passes from the bankrupt or insolvent to the general assignee of his estate and effects, are universities of rights and duties. And since all the obligations of a given class, which were due from the ancestor or devisor, attach at once upon the heir or devisee, that mass of obligations falls within the notion of a *juris universitas*.

For every *juris universitas* bears one or both of the following characters. First: Where a *universitas juris* arises by universal succession, rights residing in, or obligations incumbent upon, a person or persons, pass *uno ictu* to another person or persons, and pass *in genere* and not *per speciem*. In other words, they pass or devolve at once or together, and they pass or devolve as belonging to their kinds or sorts, and not as determined by their specific or individual natures. Secondly: Whatever be its origin, a *universitas juris*, so far as it consists of rights, is of itself (or considered as abstracted from its component particulars), the subject of a right *in rem*. The party invested with a *universitas juris*, has a right in the aggregate availing against the world at large, even though all the rights which are constituent elements of the aggregate, be merely rights *in personam*, or availing against persons determinate. —I shall show in my Lectures, that every *status* or condition which is not purely burthensome, bears the last of these marks, and therefore is *juris universitas*. I shall also explain in my Lectures, why the right *in rem* over a *juris universitas* (considered as abstracted from its component particulars) stands out conspicuously in the Roman Law, and is far less obvious in the English.

The legatee of a specific thing, the alienee of a specific thing by transfer *inter vivos*, or the assignee of a given bond or other contract, are singular successors, or successors *res singulae*.

III. From the generic nature of *universitates juris*, and the peculiar nature of such of them as arise by universal succession, I shall proceed to such of these last as are the matter of this sub-department. Now *universitates juris* which devolve to universal successors, and which are the matter of this sub-department, are of two kinds: 1. *Universitates juris* devolving from the dead as such:

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2. *Universitates juris* devolving from the living, or devolving from the dead, but not from the dead as such. And those two kinds I shall consider in that order.

Universal successors succeeding to the dead as such, take *ab intestato* or *ex testamento*. Accordingly, I shall explain universal succession *ab intestato*, and universal succession *ex testamento*. And to exemplify my explanation of the distinction, I shall compare the characters of the Roman *heres legitimus*, of the English *administrator* and *next of kin*, and of the English *heir*: of the Roman *heres testamentarius*, of the English *executor* and *residuary legatee*, and of the English *devisee* general or particular.

*Note.*—By the English lawyers, *real rights* (property in things *real*, or *real property*) are distinguished from *personal rights* (property in things *personal*, or *personal property*). These two classes of rights blend at so many points, that the difference between them cannot be described correctly in generic and concise expressions. A correct description of the difference between the two classes of rights, would involve a complete description of the several or various rights which belong to those classes respectively. Of the generic and concise descriptions which the difference in question will take, the following, I incline to believe, is the least remote from the truth. Real rights (property in things *real*, or *real property*) are rights which are *inheritable*: which (where they are transmissible to representatives) devolve *ab intestato* to *heirs*. Personal rights (property in things *personal*, or *personal property*) are rights which are *not inheritable*: which (where they are transmissible to representatives) devolve *ab intestato* to *administrators* (or *next of kin*). The difference, therefore, between real and personal rights, mainly consists in this. According to the English law, succession *ab intestato* is of two descriptions: namely, succession by *heirs* (strictly and technically so called), and succession by *administrators* (or *next of kin*). Rights devolving *ab intestato* to successors of the former description, are *real*: rights devolving *ab intestato* to successors of the latter description, are *personal*. It were easy to demonstrate, that the division of rights into *real* and *personal* (or the division of property into *real* and *personal*) does not quadrate with the division of things into things *immoveable* and things *moveable*: It were also easy to demonstrate, that it does not quadrate with the division of things into things *which are subjects of tenure* and things *which are not*. As I have remarked already, the division of property into *real* and *personal*, is not susceptible of a precise generic description. He who would know precisely the meaning of the division in question, must master all the details which each of its compartments embraces. Or (changing the expression) the various details which each of its compartments embraces, are not connected by a common character or property, but form a heap, inevitably incondite, of heterogeneous particulars. This needless distinction between *real* and *personal property*, which is nearly the largest of the distinctions that the Law of England contains, is one prolific source of the unrivalled

intricacy of the system, and of its matchless confusion and obscurity. To the absence of this distinction (a cause of complexity, disorder, and darkness, which naught but the extirpation of the distinction can thoroughly cure), the greater compactness of the Roman system, with its greater symmetry and clearness, are mainly imputable. There is not, indeed, in the Roman jurisprudence, the brevity and harmony of parts, with the consequent lucidity and certainty, which are essential to a system of law that were worthy of the prostituted name: a system of law that were truly a guide of conduct, and not a snare in the way of the parties bound to observe its provisions. But, this notwithstanding, the Roman Law (mainly through the absence of the distinction between real and personal property) is greatly and palpably superior, considered as a system or whole, to the Law of England. Turning from the study of the English to the study of the Roman Law, you escape from the empire of chaos and darkness, to a world which seems by comparison, the region of order and light.

The distinction of the English Lawyers, between *real* and *personal* rights, is peculiar to the systems of positive law which are mainly bottomed in feudal institutions. As I have stated already, there is not in the Roman Law the faintest trace of it. According to the Roman Law, rights devolve *ab intestato* agreeably to a uniform and coherent scheme. It is true that rights are distinguished by most of the modern Civilians, into *jura realia* and *jura personalia*: and that this distinction of rights into *jura realia* and *jura personalia*, obtains in every system of particular and positive law, which is an offset or derivative of the Roman. But the distinction of the modern Civilians, between *jura realia* and *jura personalia*, is equivalent to the distinction made by the same Civilians, between *jura in re* and *jura in personam*; and it is also equivalent to the distinction, made by the Roman Lawyers, between *dominia* (with the larger meaning of the term) and *obligationes*. *Real* rights (in the sense of the English lawyers) comprise rights which are *personal* as well as rights which are *real* (in the sense of the modern Civilians): and *personal* rights (in the sense of the former) comprise rights which are *real* as well as rights which are *personal* (in the sense of the latter). The difference between *real* and *personal* rights (as the terms are understood by the modern Civilians) is essential or necessary. It runs through the English Law, just as it pervades the Roman: although it is obscured in the English, by the multitude of wanton distinctions which darken and deform the system. But the difference between *real* and *personal* rights (as the terms are understood by the English Lawyers) is purely accidental.

And since this difference is purely accidental, it is not involved by general jurisprudence: for general jurisprudence, or the philosophy of positive law, is concerned with principles and distinctions which are essential or necessary. Accordingly, I shall touch upon the difference in a merely incidental manner, and merely to illustrate principles and distinctions which the scope of general jurisprudence properly embraces.

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Succession to the subject of a *specific*, or other *particular* legacy, is succession *rei singulae*: and it therefore belongs logically to one or another of the three foregoing sub-departments. But since such succession, although it be singular, is succession *ex testamento*, it could not be considered, under any of those sub-departments, without an inconvenient anticipation of the doctrine of testaments. Accordingly, succession to the subject of a specific, or other particular legacy, will be considered at this point of this sub-department. For a similar reason, the *entails* and *trust-substitutions* of the English and Roman Law, will be postponed to the same point. According to the Roman law, the person who takes virtually by a trust-substitution is always, in effect, *successor singularis*: but the *subject* of a trust-substitution is either a *juris universitas* or a *res singula*. According to the same system, every trust-substitution is created by testamentary disposition. And, according to the Law of England, an entail is created by testament or will, as well as by act *inter vivos*. I therefore shall find it expedient to postpone substitutions and entails, until I shall have passed in review the nature of a *juris universitas*, and of succession, universal and singular, *ex testamento*. In *liberd republic*, and under the earlier Emperors, every disposition suspending the vesting of its subject, and almost every disposition restraining the power of alienation, was prohibited by the Roman Law; and such dispositions of the kind as it afterwards allowed, were created exclusively by testament or codicil, and in the circuitous and absurd manner of a *fidei-commissum*. Consequently, as succession *ex testamento* will lead me to entails, so will entails conduct me to the nature of *trusts*: that is to say, to the nature of trusts in general, as well as to the *fidei-commissa* which are peculiar to the Roman Law, and to the uses and trusts (an offset of those *fidei-commissa*) which are peculiar to the Law of England.

Having treated of universal successors succeeding to the *dead* as such, I shall treat of universal successors succeeding to the *living*, or succeeding to the dead, but not to the dead as such. And treating of universal successors of those generic characters, I shall consider particularly the succession *per universitatem* which obtains in cases of *insolvency* and of the consequent *cessio bonorum*.

*Note.*—In this sub-department of the Law of Things, I shall consider universal succession as it obtains *generally*. In other words, I shall consider universal succession abstracted from persons, in so far as persons are invested with *status* or conditions.

In some cases of universal succession, the succession is the consequence of certain *status* or conditions, or supposes the pre-existence of certain *status* or conditions: and in other cases of universal succession, certain parties are invested with conditions

in consequence of the succession itself. As examples of universal succession, the effect or cause of conditions, I adduce the following cases from the Roman and English Law: namely, universal succession *ab intestato* or *ex testamento*, to the rights and obligations of a *freedman*: universal succession, by the adopting father, to the rights and obligations of an *adrogated son*; universal succession by the general assignees or trustees, to the rights and obligations of an insolvent *trader*. For through a distinction built on an essential difference, but carried to needless length and breeding needless complexity, the Law of England, and of other modern nations, severs the insolvency of traders from other insolvency, and makes it the subject of a peculiar system of rules.

Now where universal succession is the effect or cause of conditions, it ought to be excluded from the Law of Things, and treated with the conditions from which it emanates, or of which it is the fountain or spring.

But in spite of that exclusion, the consideration of the universal succession which is matter for the Law of Things, involves large anticipations from the Law of Persons. For example: Succession *ab intestato* cannot be explained completely, without an explanation of consanguinity, or of cognition (*sensu latiore*): whilst consanguinity cannot be explained completely, without a large anticipation from the law of marriage, or a long reference forward to the *status* of husband and wife. Wearing the peculiar form which it takes in the Roman Law, succession *ab intestato* cannot be explained completely, without an explanation of cognition (*sensu latiore*), of the relation styled agnation, and also of that cognition which is contradistinguished to agnation, and which therefore differs from cognition (in the larger meaning of the term). But since the relation styled agnation results from the *patria potestas*, the consideration of the Roman succession *ab intestato*, involves a double reference to the Law of Persons: namely, a reference to the *status* or conditions of *pater et filius familias*, as well as to the *status* or conditions of husband and wife.

As I shall show in my Lectures, that portion of the Law of Things which is concerned with universal succession, is more implicated than any other with the Law of Persons or *Status*. If, indeed, it were closely analyzed, the whole of that portion of the Law of Things might be found to consist of matter belonging logically to the Law of Persons, but interpolated in the Law of Things, for the sake of commodious exposition.

As I treat of universal succession to intestates, testators, and insolvents, another implication of the parts of my subject will compel me to draw upon the second of those two capital departments under which I arrange or distribute the matter of the Law of Things. For rights and obligations arising from *delicta* devolve or pass, in company with others, to the universal successors, or general representatives, of intestates, testators, and insolvents.

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*Sanctioning Rights, with sanctioning Duties (relative and absolute): Delicts or Injuries (which are causes or antecedents of sanctioning rights and duties) included.\**

This is the second of the capital departments under which I arrange or distribute the matter of the Law of Things.

Before I proceed to the sub-departments under which I distribute the subjects of this second capital department, I shall distinguish delicts into civil *injuries* and *crimes*: or (what is the same process stated in different expressions) I shall distinguish the rights and duties which are effects of civil delicts, from the duties, and other consequences, which are effects of criminal.

Having expounded the nature of the distinction between civil and criminal delicts, I shall distribute the subjects of this second capital department under two sub-departments.—1. Rights and duties arising from *civil injuries*. 2. Duties, and other consequences, arising from *crimes*.

#### Rights and duties arising from *civil injuries*.

The matter of this sub-department will be treated in the following order.

I. Civil injuries will be classed and described with reference to the rights and duties whereof they are respectively infringements.

II. Rights arising from civil delicts are generally rights *in personam*: that is to say, rights availing against persons certain, or rights answering to duties incumbent on determinate persons.

The rights arising from civil delicts, including the relative duties answering to those rights, I distribute under two departments: each of which two departments immediately sever into various sub-departments.

The division of those rights into those two departments, rests upon a principle of division which may be stated thus: namely, the difference between the natures of the rights and duties whereof civil delicts are respectively infringements. Accordingly, rights arising from civil delicts which are infringements of rights *in rem*, are the subjects of the first department. Rights arising from civil delicts which are infringements of rights *in personam*, are the subjects of the second department.

The various sub-departments into which those two departments immediately sever, rest upon a principle of division which may be stated thus: namely, the respective

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\* See p. 274, *supra*.

differences between the immediate purposes which the rights and duties arising from civil delicts are respectively calculated to accomplish.

*Note.*—In the language of the Roman Law, the term *delict*, as applied to civil injuries, is commonly limited to civil injuries which are infringements of rights *in rem*. Violations of rights *in personam*, or breaches of contracts and quasi-contracts, are not commonly styled *delicts* or *injuries*, and are not commonly considered in a peculiar or appropriate department. In the Institutes of Gaius, as well as in those of Justinian, they are considered with contracts and quasi-contracts, or with the primary rights *in personam* of which they are infringements.

In the language of the English Law (here manifestly borrowing the language of the Roman), the term *delict* (in so far as the term is employed by English Lawyers) is also limited to civil injuries which are infringements of rights *in rem*. Remedies by action are not unfrequently distinguished into actions *ex delicto* and actions *ex contractu*. The former are remedial of injuries which are infringements of rights *in rem*: the latter are remedial of breaches of contracts, and of breaches of quasi-contracts. Such, at least, is the nature of the distinction as conceived and stated generally. The various classes of actions having been much confounded, the foregoing general statement of the nature or *rationale* of the distinction, must be taken with numerous qualifications. For example: In *case*, strictly so called, the general issue is *not guilty*, and the ground of the action is properly a *tort*: that is to say, the ground of the action is properly a *delict* (in the narrower signification of the term to which I have now adverted). But, this notwithstanding, the action is frequently brought on breaches of contracts, and on breaches of quasi-contracts. The department of the English Law which relates to rights of action, is signally impressed with the disgraceful character of the system: namely, a want of broad and precise principles; and of large, clear, and conspicuous distinctions.

In the language of the Roman Law, the term *delict* has another and a larger meaning: being co-extensive with the term *injury*, and signifying *any* violation of *any* right or duty. This is the meaning with which I employ the term, unless I employ it expressly with its narrower signification.

Agreeably to the principles of division which I have stated or suggested above, the rights arising from civil delicts, including the relative duties answering to those rights, will be distributed under the two departments, and the various sub-departments, which are sketched or indicated below.

1. Rights arising from civil delicts which are infringements of rights *in rem*, are the subjects of the first department: which first department immediately severs into the four following sub-departments.

i. If the user of a right *in rem* be prevented or hindered

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*presently*, and the preventive cause or hindrance can be removed or abated, the party injured by the prevention or hindrance, may be restored to the ability of exercising the right freely. Rights to such restoration are of two kinds. Some, and most, are rights of *action*: but others are exercised extra-judicially, and are matter for *justification*. A right of action to obtain possession of a house, or to procure the abatement of a nuisance which hinders the user of the house, is a right of the former kind. A right of recapturing without resorting to action, is a right of the latter kind.—Rights to such restoration, which might be styled significantly and shortly, ‘rights of  *vindication*’, are the subjects of the first sub-department.

ii. If a violated right *in rem* be virtually annihilated by the injury, the only remedy of which the case will admit is *satisfaction* to the injured party. Where a prevention or hindrance opposed to the user of a right, has been withdrawn, or has otherwise ceased, satisfaction to the injured party for the past prevention or hindrance is the apt or appropriate remedy. And, generally, the apt or appropriate remedy for a *past delict* is *satisfaction* or compensation to the injured party for the damage or inconvenience which the party has suffered through or in consequence of the offence.—Rights to *satisfaction*, pecuniary or other, are the subjects of the second sub-department.

iii. If the user of a right *in rem* be prevented or hindered *presently*, the party injured by the prevention, or hindrance, has commonly a right to *satisfaction* for damage or inconvenience, as well as a right of *restoration* to the ability of free exercise.—Rights of *vindication* combined with rights to *satisfaction*, are the subjects of the third sub-department.

iv. Where an offence is merely incipient or impending, the offence may be stayed or prevented. For example: Forcible dispossession is prevented, and waste is prevented or stayed, by an interdict or injunction: or if I be threatened with an instant assault, I may prevent the approaching injury by repelling the assailant.—Rights of preventing or staying, judicially or extra-judicially, impending or incipient offences against rights *in rem*, are the subjects of the fourth sub-department.

2. Rights arising from civil delicts which are infringements of rights *in personam*, are the subjects of the second department: which second department immediately severs into the three following sub-departments.—First: Rights of compelling, judicially or extra-judicially, the *specific performance* of such obligations as arise from contracts and quasi-contracts: e.g. A right of compelling performance by *action* or *suit*: A right to an *interdict* or *injunction*, for the purpose of preventing the obligor or debtor from evading the fulfilment of the obligation: A right of *retainer* or *detention*, by

the creditor or obligee, of a thing or person which belongs to the obligor or debtor, but on which the obligee or creditor has expended money or labour.—Secondly: Rights of obtaining *satisfaction*, in lieu of specific performance, where obligees or creditors are content with compensation, or where specific performance is not possible, or where specific performance would not be advantageous to creditors, or would be followed by preponderant inconvenience to obligors or debtors.—Thirdly: Rights of obtaining specific performance in part, with satisfaction or compensation for the residue.

*Note.*—I here shall analyze the principles whereon specific performance is rationally compelled. The caprices of the English Law with regard to specific performance, and with regard to the connected matter of recovery *in specie*, I shall try to explain historically.

Travelling through the rights which arise from civil injuries, I shall note the respective applicability of those various remedies to the various cases of injury previously classed and described.

III. Having classed and described civil injuries, and treated of the rights and duties which civil injuries engender, I shall consider the *modes* wherein those rights are exercised, and wherein those duties are enforced. In other words, I shall consider *civil procedure*.

Now the pursuit of rights of *action*, with the conduct of the incidental *defences*, are the principal matter of that department of jurisprudence. The consideration of which matter will involve a consideration of the following principal, and of many subordinate, topics:

The functions of judges and other ministers of justice.

The *rationale* of the process styled *pleading*, with the connected *rationale* of judicial *evidence*.

Judicial decisions, with their necessary or more usual concomitants: namely, The *interpretation* or *construction* of statute law, or law established in the properly legislative mode: The *peculiar process of induction* (not unfrequently confounded with the interpretation of statute law) through which a rule made by judicial legislation, is gathered from the decision or decisions whereby it was established: The *application* of the law, be it statute law or a rule made judicially, to the fact, case, or *species obveniens*, which awaits the solution of the tribunal.

The judgments, decrees, or judicial commands, which are consequent on judicial decisions. Appeals. Execution of judgments.

Judgments considered as *modes of acquisition*: that is to say, not merely as instruments by which rights of action are

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enforced, but as causes of ulterior rights: e.g. as causes of liens, or tacit mortgages, given to plaintiffs on lands or moveables of defendants.

Such judgments or decrees as virtually are mere solemnities adjoined to conveyances or contracts. The explanation of which solemnities will involve an explanation of the distinction between *voluntary* and *contentious* jurisdiction.

*Note.*—A right which arises from a judgment is often distinct from the right of action which is pursued to judgment and execution. Arising directly from the *judgment*, it arises not from the *injury* which is the cause of the right of action, as from a *mode of acquisition*. Consequently, rights of the kind ought in strictness to be classed with rights which I style *primary*: that is to say, with rights which do *not* arise from delicts or offences. But the classing them with primary rights were followed by this inconvenience: that the writer were unable to explain them in a satisfactory manner, unless he anticipated the doctrine of injuries, of rights arising from injuries, and of civil procedure.

As certain rights arising from judgment should in strictness be placed under a foregoing head, so should 'the functions of judges and other ministers of justice' be placed under a following: namely, the Law of Persons. But if this matter, which logically belongs to that following head, were not anticipated under the present, the exposition of civil procedure would be incomplete.

Whoever reads and reflects on the arrangement of a *corpus juris*, must perceive that it cannot be constructed with logical rigour. The members or parts of the arrangement being extremely numerous, and their common matter being an organic whole, they can hardly be *opposed* completely. In other words, the arrangement of a *corpus juris* can hardly be so constructed, that none of its members shall contain matter which logically belongs to another. If the principles of the various divisions were conceived and expressed clearly, if the departments resulting from the divisions were distinguished broadly, and if the necessary departures from the principles were marked conspicuously, the arrangement would make the *approach* to logical completeness and correctness, which is all that its stubborn and reluctant matter will permit us to accomplish.

#### Duties, and other consequences, arising from *crimes.*

This is the second sub-department of the second of the capital departments under which I arrange or distribute the matter of the Law of Things.

The matter of this sub-department will be treated in the following order.

I. Duties are relative or absolute. A relative duty is implied by a right to which that duty answers. An absolute duty does not answer, or is not implied by, an answering right.

As an example of an absolute duty, I may mention a duty to forbear from cruelty to any of the lower animals. For a necessary element of a right (implying or answering the duty) is wanting. There is no *person*, individual or complex, towards or in respect of whom the duty is to be observed.

I have adduced the foregoing example of an absolute duty, on account of its extreme simplicity, and of the brevity with which it may be suggested. But, as I shall show in my preliminary Lectures, absolute duties are very numerous, and many of them are very important. As I shall also show in my preliminary Lectures, there are three cases wherein a duty is absolute, or wherein it answereth not to an answering right; wherein it answers to nothing which we could call a *right*, unless we gave to the term so large and vague a meaning, that the term would denote, in effect, just nothing at all. The three cases may be stated briefly, in the following manner.—The duty is absolute, in case there be no *person*, individual or complex, towards or in respect of whom the duty is to be observed. The duty is absolute, in case the persons, towards or in respect of whom the duty is to be observed, be *uncertain* or *indeterminate*. The duty is absolute, in case the only person, towards or in respect of whom the duty is to be observed, be the *monarch*, or *sovereign number*, ruling the given community.

Now absolute duties, like relative duties, are primary or sanctioning: that is to say, *not* arising from injuries, or arising from injuries. Again: Primary rights, with the primary relative duties which respectively answer to those rights, are the only subjects of the capital department to which I have given the title of '*primary* rights and duties.' But primary *absolute* duties ought to be placed somewhere. And though the present sub-department be a member of the capital department to which I have given the title of '*sanc-tioning* rights and duties,' primary absolute duties may be placed commodiously here. For infringements of duties primary and absolute, belong to the class of delicts which are styled *crimes*.

Accordingly I shall here interpolate a description of the primary absolute duties which are not appropriate subjects for the Law of Persons. As I have already remarked, such interpolations of foreign matter cannot be avoided always.

II. Having interpolated a brief description of primary absolute duties, I shall class and describe *crimes* (be they breaches of primary absolute, or of primary relative duties), with reference to the rights and duties whereof they are respectively infringements.

III. Having classed and described crimes, I shall briefly touch upon the duties (all such duties being absolute) which arise from crimes. I shall also notice briefly those

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IV. I shall advert to *criminal procedure*, with what may be called, by a strict application of the name, *police*. In other words, I shall advert to the modes wherein crimes are pursued to punishment, with the precautions which may be taken to prevent them.

## LAW OF PERSONS.

Having made an attempt, at a previous point of my Course,\* to determine the notion of *status* or condition, I shall enter the department of law which is styled the Law of Persons, with an attempt to distribute *status* or conditions under certain principal and subordinate classes.

Accordingly, I shall divide conditions into *private* and *political*.—I shall divide private conditions into *domestic* (or *economical*) and *professional*.—Certain conditions nearly related to the domestic, I shall place with the latter: styling the former, by reason of the analogy through which they are so related, *quasi-domestic* conditions.—Certain conditions which will not bend to my arrangement, I shall place on a line with private and political conditions, and shall style *anomalous* or *miscellaneous*.

My arrangement, therefore, of *status* or conditions will stand thus :

I shall distribute conditions under three principal classes : 1. *Private* conditions : 2. *Political* conditions : 3. *Anomalous* or *miscellaneous* conditions. And I shall distribute private conditions under two subordinate classes : 1. *Domestic* (or *economical*) and *quasi-domestic* conditions : 2. *Professional* conditions.

*Note*.—According to the jurists of ancient Rome, and to the jurists of the modern nations whose law is fashioned on the Roman, the capital or leading division of the entire *corpus juris* is the division of *jus* into *publicum* and *privatum*. In other words, positive law (considered with reference to its different purposes and subjects) is divided by those jurists, at the outset of the division, into *public* and *private*.

Now the name *public law* has two principal significations : one of which significations is large and vague ; the other, strict and definite.

Taken with its large and vague signification, the name will apply indifferently (as I shall show in my Lectures) to law of

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\* See Lecture XL. *spru*, and following Lectures.

every department. The various writers, therefore, who take it with that signification, determine the province of public law in various and inconsistent ways. According to some, the province of public law comprises political conditions, together with civil procedure, and the law which is styled criminal: that is to say, the department of law which is concerned with crimes; with the duties arising from crimes; with the punishments annexed to crimes; and with criminal procedure and preventive police. According to others, the province of public law embraces criminal law, but excludes civil procedure. According to others, its province rejects both. Whilst others (confounding positive law and positive morality) extend its province to the so-called law of nations, as well as to civil procedure and to the law which is styled criminal. But in one thing all of them agree. All of them distribute the entire *corpus juris* under two principal and contradistinguished departments: namely, *jus publicum* and *jus privatum*. And, consequently, all of them contradistinguish their so-called *public law* to the two principal and opposed departments of their so-called *private law*: namely, The Law of Persons and The Law of Things. Now, as I shall show in my Lectures, this notable division and arrangement of the *corpus juris* is erroneous and pregnant with error: springing from a perplexed apprehension of the ends or purposes of law, and tending to generate a like apprehension in the helpless and bewildered student. As I shall show also, every department of law, viewed from a certain aspect, may be styled private; whilst every department of law, viewed from another aspect, may be styled public. As I shall show further, *public law* and *private law* are names which should be banished the science; for since each will apply indifferently to every department of law, neither can be used conveniently to the purpose of signifying any. As I shall show, moreover, the entire *corpus juris* ought to be divided, at the outset, into Law of Things and Law of Persons; whilst the only portion of law that can be styled *public law* with a certain or determinate meaning, ought not to be contradistinguished to the Law of Things and Persons, but ought to be inserted in the Law of Persons, as one of its limbs or members.

Taken with its strict and definite signification, the name *public law* is confined to that portion of law which is concerned with political conditions. Accordingly, I take the name with that its determinate meaning, and I deem that portion of law, a member of the Law of Persons. But, to obviate a cause of misconception, I style that portion of law, The Law of Political *Status*, or the Law of Political Conditions: suppressing the ambiguous names of *public* and *private* law along with that groundless division of the *corpus juris* which those opposed names are commonly employed to signify. For, as I have intimated above, the Law of Political *Status*, like every other portion of the entire *corpus juris*, might be styled with perfect propriety, *public* or *private*: *public*, when viewed from a certain aspect; *private*, when viewed from another.

In rejecting the division of law into *public* and *private*, in rejecting the names by which the division is signified, and in classing political conditions with conditions of other natures, I

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am justified by the great authority of our own admirable Hale, as well as by the cogent reasons whereon I shall insist in my Lectures. In his Analysis of the Law of England (or rather of the Law of England, excepting the criminal part of it), he classes political conditions (or 'political relations') with the private conditions (or 'relations') which he styles economical. Nor can I discover in any nook of his treatise the slightest trace of the perplexed apprehension which is the source of the division of law into public and private. Even in adverting to criminal delicta, where it was most likely that he would fall into the error, he avoids it. Unlike his imitator, Blackstone, who calls them *public wrongs*, he styles them *criminal wrongs*, or *matter for Pleas of the Crown*: hitting precisely by the last expression the basis of the division of wrongs into civil injuries and crimes. We scarcely can estimate completely the originality and depth of his Analysis, unless we compare it closely with the Institutes of Gaius or Justinian, and unless we look vigilantly for the instructive but brief hints which abound in every part of it. The only gross mistakes that I have found in his masterly outline are his glaring and strange mistranslation of '*jus personarum et rerum*', and his placing under the department assigned to the *status of persona*, certain rights of persons which he styles their *absolute rights*. Seeing that *all* rights are rights of persons, and seeing that things are merely *subjects* of rights, it is clear that the genuine meaning of '*jus personarum et rerum*' is not very happily rendered by '*rights* of persons and things.' And as to *absolute* (commonly denominated *natural* or *innate*) rights, they are not matter for the Law of *Status*, but belong preeminently and conspicuously to the contradistinguished department. But, in justice to this great and excellent person, I must add that the former mistake is verbal rather than substantial. Unlike the imitator Blackstone, with his '*rights* of persons and things,' Hale seizes, for the most part, the genuine meaning of the distinction, though he thickens the obscurity of the obscure phrases by which the modern Civilians usually express it.—In rejecting the division of law into public and private, and in classing political with other conditions, Hale, I believe, is original and nearly singular. In an *Encyclopædia* by Falck, a professor of law at Kiel, it is said that the authors of the Danish code, with those of the Danish writers who treat law systematically, observe, in this respect, the arrangement observed by Hale. But in all the treatises by Continental Jurists which have fallen under my inspection, law is divided into public and private, though the province of public law is variously determined and described.

It is true that Sir William Blackstone also rejects that division, and also considers the law which is concerned with political conditions a member of the Law of Persons. But the method observed by Blackstone in his far too celebrated Commentaries, is a slavish and blundering copy of the very imperfect method which Hale delineates roughly in his short and unfinished Analysis. From the outset to the end of his Commentaries he blindly adopts the mistakes of his rude and compendious model, missing invariably, with a nice and surprising infelicity, the pregnant but obscure suggestions which it proffered to his

attention, and which would have guided a discerning and inventive writer to an arrangement comparatively just. Neither in the general conception, nor in the detail of his book, is there a single particle of original and discriminating thought. He had read somewhat (though far less than is commonly believed); but he had swallowed the matter of his reading, without choice and without rumination. He owed the popularity of his book to a paltry but effectual artifice, and to a poor, superficial merit. He truckled to the sinister interests and to the mischievous prejudices of power; and he flattered the overweening conceit of their national or peculiar institutions, which then was devoutly entertained by the body of the English people, though now it is happily vanishing before the advancement of reason. And to this paltry but effectual artifice he added the allurement of a style which is fitted to tickle the ear, though it never or rarely satisfies a severe and masculine taste. For that rhetorical and prattling manner of his is not the manner which suited the matter in hand. It is not the manner of those classical Roman jurists who are always models of expression, though their meaning be never so faulty. It differs from their unaffected, yet apt and nervous style, as the tawdry and flimsy dress of a milliner's doll, from the graceful and imposing nakedness of a Grecian statue.

Having distributed *status* or conditions under the principal and subordinate classes mentioned above, I shall consider them particularly in the following order and manner.

I. I shall review domestic and quasi-domestic conditions : describing the rights and duties, capacities and incapacities, of which they are constituted or composed : and also describing the events by which persons are invested with them, or are divested of them.—Of these conditions the following are the principal: namely, The conditions of Husband and Wife: of Parent and Child: of Master and Slave: of Master and Servant: of Persons who by reason of their age, or by reason of their sex, or by reason of infirmity arising from disease, require, or are thought to require, an extraordinary measure of protection and restraint.

Having reviewed domestic and quasi-domestic conditions, in the manner which I have now suggested, I shall review professional conditions (the other leading class of private conditions), in a similar manner.

II. Having reviewed private conditions, in the manner suggested above, I shall review, in a similar manner, political conditions: that is to say, the *status* or conditions of subordinate political superiors. Of the classes of persons bearing political conditions, the following are the most remarkable. 1. Judges and other ministers of justice. 2. Persons whose principal and appropriate duty is the defence of the community against foreign enemies. 3. Persons

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invested with rights to collect and distribute the revenues of the State. 4. Persons commissioned by the State to instruct its subjects in religion, science, or art. 5. Persons commissioned by the State to minister to the relief of calamity : e.g. overseers of the poor. 6. Persons commissioned by the State to construct or uphold works which require, or are thought to require, its special attention and interference : e.g. roads, canals, aqueducts, sewers, embankments.

*Note.*—Before I dismiss the matter of the present article, I will request the attention of the reader to the following explanatory suggestions.

1. The monarch properly so called, or the sovereign number in its collegiate and sovereign capacity, is not invested with a *status* (in the proper acceptation of the term). A *status* is composed or constituted of *legal* rights and duties, and of capacities and incapacities to take and incur them. Now, since they are merely creatures of the positive law of the community, and since that positive law is merely a creature of the sovereign, we cannot ascribe such rights and duties to the monarch or sovereign body. We may say that the sovereign has *powers*. We may say that the sovereign has rights conferred by the Law of God ; that the sovereign has rights conferred by positive morality ; that the sovereign is subject to duties set by the Law of God ; that the sovereign is subject to duties which positive morality imposes. Nay, a sovereign government may have a legal right against a subject or subjects of another sovereign government. But it cannot be bound by legal duties, and cannot have legal rights against its own subjects. Consequently, a sovereign government of one, or a sovereign government of a number in its collegiate and sovereign capacity, is not invested with a *status* (in the proper acceptation of the term) ; or it is not invested with a *status* (in the proper acceptation of the term) derived from the positive law of its own political community.

For the sake, however, of shortness, but not without impropriety, we may say that the sovereign bears a *status* composed or constituted of *powers*. And, by reason of the intimate connexion of that improper *status* with the *status* (properly so called) of subordinate political superiors, I shall consider the powers of the monarch, or the powers of the sovereign number in its collegiate and sovereign capacity, with the rights and duties of the subordinate political superiors to whom portions of those powers are delegated or committed in trust. Or, rather, I shall consider the powers of the sovereign, at the present point of my Course, in so far as the essentials of the matter may not have been treated adequately in my preliminary Lecture on sovereignty and independent political society.

2. The law of political conditions, or public law (with the strict and definite meaning), is frequently divided into *constitutional* and *administrative*.

In a country governed by a monarch, constitutional law is extremely simple : for it merely determines the person who shall bear the sovereignty. In a country governed by a number,

constitutional law is more complex: for it determines the persons, or the classes of the persons who shall bear the sovereign powers; and it determines, moreover, the mode wherein those persons shall share those powers.—In a country governed by a monarch, constitutional law is positive morality merely: In a country governed by a number, it may consist of positive morality, or of a compound of positive morality and positive law.

Administrative law determines the ends and modes to and in which the sovereign powers shall be exercised: shall be exercised directly by the monarch or sovereign number, or shall be exercised directly by the subordinate political superiors to whom portions of those powers are delegated or committed in trust.

The two departments, therefore, of constitutional and administrative law, do not quadrate exactly with the two departments of law which regard respectively the *status* of the sovereign, and the various *status* of subordinate political superiors. Though the rights and duties of the latter are comprised by administrative law, and are not comprised by constitutional law, administrative law comprises the powers of the sovereign, in so far as they are exercised directly by the monarch or sovereign number.

In so far as the powers of the sovereign are delegated to political subordinates, administrative law is positive law, whether the country be governed by a monarch or by a sovereign number. In so far as the sovereign powers are exercised by the sovereign directly, administrative law, in a country governed by a monarch, is positive morality merely: In a country governed by a number, it may consist of positive morality, or of a compound of positive morality and positive law.

3. It is somewhat difficult to describe the boundary by which the conditions of political subordinates are severed from the conditions of private persons. The rights and duties of political subordinates, and the rights and duties of private persons, are creatures of a common author: namely, the sovereign or state. And if we examine the purposes to which their rights and duties are conferred and imposed by the sovereign, we shall find that the purposes of the rights and duties which the sovereign confers and imposes on private persons, often coincide with the purposes of those which the sovereign confers and imposes on subordinate political superiors. Accordingly, the conditions of parent and guardian (with the answering conditions of child and ward) are not unfrequently treated by writers on jurisprudence, as portions of *public law*. For example: The *patria potestas* and the *tutela* of the Roman Law are treated thus, in his masterly *System des Pandekten-Reck's*, by Thibaut of Heidelberg: who, for penetrating acuteness, rectitude of judgment, depth of learning, and vigour and elegance of exposition, may be placed, by the side of Von Savigny, at the head of all living Civilians.

At the earliest part of my Course that will admit the subject conveniently, I shall try to distinguish political from private conditions, or to determine the province of *public law* (with the strict and definite meaning): an attempt which will lead me to examine the current division of law into *jus publicum* and *jus privatum*; and which will lead me to explain the numerous and

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disparate senses attached to the two expressions. I would briefly remark at present, that I merely mean by *private* persons persons *not* political: that is to say, persons not invested with political conditions; or persons bearing political conditions, but not considered in those characters, or not viewed from that aspect. I intend not to intimate by the term *private*, that private or *not* political, and public or political persons, are distinguishable by differences between the ultimate *purposes* for which their rights and duties are respectively conferred and imposed.

III. Having reviewed private and political conditions, in the manner suggested above, I shall review anomalous or miscellaneous conditions in a similar manner.—As examples of such conditions, I adduce the following: namely, the conditions of Aliens: the conditions of Persons incapable of rights by reason of their religious opinions: the conditions of Persons incapable of rights by reason of their crimes.

*Note.*—In any department of the Law of Persons assigned to a given condition, the rights and duties composing the given condition, would naturally be arranged (in a *corpus juris*) agreeably to the order or method observed in the Law of Things. For example: Agreeably to the order or method which I have delineated above, the rights and duties composing the given condition, would naturally be divided at the outset, into primary and sanctioning: those primary rights and duties being divided again, into rights *in rem*, rights *in personam*, combinations of rights *in rem* and rights *in personam*, and so on. And in any department of the Law of Persons assigned to a given condition, the constituent elements of the given condition would naturally be treated with perpetual reference to the principles and rules expounded in the Law of Things.

---

To the series of Lectures briefly delineated above, I shall add a concise summary of the positive moral rules which are styled by recent writers, the positive law of nations, or positive international law: concluding therewith my review of *positive law*, as conceived with its relations to positive morality, and to that *divine law* which is the ultimate test of both.

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## T A B L E S.

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Of the Tables which Mr. Austin drew out and distributed to the members of his class, and which with explanatory notes accompanying them were constructed with great care, the late editor (Mrs. Austin) was only able to find a few. Their purpose was to collate and explain the system of arrangement adopted by eminent writers on jurisprudence, commencing with the Roman Jurists of the classical period and ending with Bentham. The following tables are abridged from the few which remain, and which were published by the late editor in the original edition of this work. To append at any length the notes which accompany these tables would be hardly consistent with the purpose of the present abridgment. To present them as detached notes in an abridged form would be useless to the student. In the body of the present work, however, I have kept these notes in view, and in some instances borrowed largely from them.

R. O.

## TABLE

The Arrangement which seems to have been in-

## JUS (law) PUBLICUM :

(*'Quod ad Statum Rei Romanae—ad publice utilia—spectat : Quod in sacris, in sacerdotibus, in magistratibus consistit'*).

JUS (law) *quod ad PERSONAS*  
pertinet: (otherwise, *De PERSONIS—De  
JURE PERSONARUM—De CONDICIONE  
HOMINUM*).

JUS (law) *quod ad Res*  
pertinet: (otherwise *De  
REBUS*).

DOMINIUM (in the large signification):  
A class of Rights (their corresponding duties being implied) which contains the following genera; viz.—

DOMINIUM rei singulae: (or Dominium, in the strict sense; PROPRIETAS; or IN RE POTESTAS)

JURA, sive JURA IN RE alienâ: velut Servitus, Jus Pignoris, etc.

DOMINIUM Rerum per UNIVERSITATEM acquisitarum: velut Hereditatis, Dotis, Peculii, etc.

The exercise of such rights by a person not entitled being termed respectively

Possessio

QUASI Possessio

and imparting corresponding rights against all persons except the owner, and except persons in respect of whom the right is exercised *vi, clum, aut precario*.

## I.

tended by the Roman *Institutional Writers*.

JUS (law) PRIVATUM:  
(‘Quod ad singulorum utilitatem—ad privatim utilia—spectat’).  
Containing—

JUS (law) quod ad ACTIONES  
pertinet: (otherwise De AC-  
TIONIBUS.)

A department exclusively conversant (according to the intended arrangement) with Civil *Procedure*; but (as given by Gaius, and by his imitator Justinian) including the description of a few *substantive* rights and obligations.

OBLIGATIO (in the correct signification).  
A class of Rights and Obligations which contains the following genera, viz.:—

OBLIGATIONES ex Contractu  
et quasi ex Contractu, viz.:

1. Arising *immediately* from contracts and quasi-contracts (—*Primary Obligations*).

2. *Injuries* consisting in the non-performance, or in the undue performance, of primary obligations.

3. *Obligations* arising *immediately* from those injuries, though *mediately* from the violated primary obligations: e.g. the rights and liabilities with which an Action *ex contractu* is concerned.

OBLIGATIONES ex De-  
lictio, viz.:

1. *Delicts*, in the strict signification of the term: i.e., Damage, intentional or by negligence (‘*dolo aut culpi*’) to *jura in rem* (in the largest import of the phrase), such as Assault, Slander, Theft, considered as a civil injury, Foreible Dispossession: Detention *mala fide* from the owner: *trespass* on another’s land: Damage, wilful or negligent, to his moveables.

2. The *Obligations*, incumbent upon the injuring parties, to restore, satisfy, etc.; with the corresponding *Rights of Action*, etc. which reside in the injured parties.

Whether the Law of *Crimes*, of *Punishments*, and of *Criminal Procedure*, fell within the plan of the Roman *Institutional writers*, seems to be doubtful.

## TABLE II.

The Arrangement intended by the Roman Institutional Writers (according to the opinion current amongst Civilians from the latter portion of the 16th to that of the 18th Century).

## Jus (law) PUBLICUM :

Jus (law) PERSONARUM :  
 (in the language of the Classical Jurists, 'JUS quod ad PERSONAS pertinet,' &c.)

Jus (law) RERUM :  
 (in the language of the Classical Jurists, 'JUS quod ad RERAS pertinet,' &c.)

Which relates to—

## Jus (law) PRIVATUM :

Jus (law) ACTIOMVM :  
 (in the language of the Classical Jurists, 'JUS quod ad ACTIONES pertinet,' &c.)

Jus (law) ACQUIRENDAM :  
 (i.e. *ad rem ACQUIRENDAM*) : Jus IN PERSONAM ; or, JUS PERSONALE  
 (in the language of the Classical Jurists, 'OBLIGATIO :')

Jus IN RE : Jus IN REALE :  
 (in the language of the Classical Jurists, 'DOMINIUM,' *etiam latiore* :)

Jus AD REM : (i.e. *ad rem ACQUIRENDAM*) : Jus IN PERSONAM ; or, JUS PERSONALE  
 (in the language of the Classical Jurists, 'OBLIGATIO :')

DOMINIUM :  
 (genus stricto.) JURA IN RE alienâ :  
 velut, Servitus, Jus  
 Pignoris, etc. :  
 JUS POSSESSIONIS : QUASI POSSESSIO.

JURIS (give Rerum)  
 UNIVERSITATES :

OBLIGATIONES ex Con-  
 tractu (or more gene-  
 rally, ex Contractu)  
 et  
 quasi ex Contractu.

OBLIGATIONES ex Delicto :  
 quasi ex Delicto.

Dr. Punitus JUDICIS.

## SUMMARY OF TABLES I. AND II.

Jus (law) PUBLICUM:

Jus (law) PRIVATUM:  
Comprising—

**Jus (law) PERSONARUM:**  
 Regarding the *Status or Conditions of Persons*:  
 that is to say, the *distinctive Rights and Duties, Capacities and Incapacities, which are the basis of the Division of Persons, or of the Distribution of Persons into Classes.*

**Jus (law) RESUM:**  
 Regarding *Rights, Duties, and Capacities generally*: that is to say, apart from the Rights and Duties, Capacities and Incapacities, by which classes of Persons are distinguished:  
 Describing—

*The Subjects and Objects of rights and duties—RES :*

*Rights and Duties themselves—RES (INCORPORALLES):*  
 together with  
*The Events by which rights are given or withdrawn, and duties imposed or removed;*  
*Rights and duties being divisible into—*

*Rights IN REM with their corresponding Offices:*

*Rights IN PERSONAM with their corresponding ObligATIONS,*

**Jus (law) ACTUONUM:**  
 Law of Civil Procedure.

## TABLE VIII.

The Arrangement which seems to have been intended by *Blackstone*.

Law regarding Rights: (i.e. primary Rights and Duties):  
Containing—

Law regarding Wives; Regarding—

Law regarding the 'Rights of Persons': 'Rights which concern, and are annexed to the Persons of Men':

Containing—

Law regarding the 'Rights of Persons': 'Rights which concern, and are annexed to the Persons of Men':

'Jura Personarum': 'Rights which a man may acquire over Things unconnected with his Person': i.e.—

Law regarding 'The ABSOLUTE Rights of Persons': viz.:—

Law regarding 'The RELATIVE Rights of Persons': i.e.—

of personal of private liberty, property.

Law regarding the 'Rights of Persons': 'Rights which concern, and are annexed to the Persons of Men':

'Jura Personarum': 'Rights which a man may acquire over Things unconnected with his Person': i.e.—

Public Relations: i.e. Law regarding—

Private Relations: viz.—

1. Constitutional 2. Subordinate Law: comprising:—

3. The other officers.

4. Corporations.

5. Persons en-

gaged in the State.

6. Persons bearing titles of honour.

7. Aliens and deni-

zing.

8. The

magistrates, and Clergy.

Those of Master and Servant—Husband and Wife—Parent and Child—Guardian and Ward.'The condition of Idiots and Lunatics.

4. The Legislative Branch of the Sovereignty (meaning the supreme power); a department embracing the constitution and procedure of Parliament.

'The Executive Branch of the Sovereignty,' containing an account of the King: his Title—his Family—his Councils—his Duties—his Privileges—his Revenue: And International Law.

**REAL Property**, (in the sense of the English Lawyers):  
that is to say, rights which are *inheritable*: being divisible into—

**Personal Property**: i.e. Rights which are *not inheritable*: but which devolve *ab intestato* to *Administrators*, and divisible into—

**Corporal Hereditaments**: being rights *in rem*, having for their subject a thing strictly so called, and indefinite in respect of user.

Some are rights *in rebus determinatis*: Some are rights *in rem*, but have no things: but restricted and definite in determinate subjects : point of user.

e.g.

A right to Tithes:—A right to a Rent Right to an office or dignity:—Franchises of certain sorts: as a right of jurisdiction within certain limits, or a certain sorts: as a right of free warren or fishery:—Rights of Common:—right of levying a toll at a bridge or Ferry.

**Incorporeal Hereditaments**: Which may be classed as follows: viz.—

Some are rights *in personam*: but descending *ab intestato* to the heirs of the entitled parties,

e.g.

Right to an annuity, charging the person of the grantor, but payable to the grantee and his heirs.

**Property in possession**:  
Divisible into—

**Property in action**:  
Divisible into—

**Universitates Juris**

or  
Rights and Duties devolving collectively or in mass:

e.g.

by Bankruptcy, Testament,

or Intestacy.

*Jura in personam*.

Rights arising directly from contracts and *statu-contractu*.

*Jura in rem*.

Absolute or qualified property

divested of possession by wrong:

*Jura in rem* combined with *jura*

*in personam*: viz. with rights

of action against the wrong-doer.

**Civil Injuries**: Rights and Obligations arising from Civil Injuries. Civil Procedure. Crimes: Punishments: Criminal Procedure.

## TABLE

Exhibiting the *Corpus Juris* ('Corps complet de  
been conceived

NATIONAL, MUNICIPAL, or INTERNAL LAW [i.e. JUS CIVILE, in one of its  
numerous senses] :

Containing—

DROIT POLITIQUE [i.e. JUS PUBLICUM] :

Containing—

*Droit Constitutionnel* :

Relating to

1. The Powers of the *Sovereign*, in the large and correct signification.—  
i.e. of the One, the Few, or the Many, in whom the *Sovereignty*—the  
supreme, unlimited, and *legally* irresponsible Command—resides.

2. The *Distribution* of the Sovereign powers, where not united in a single  
person.

3. The *Duties* of the Government (subjects or citizens) towards the  
Sovereign.

A large portion of Constitutional Law is, strictly a branch of *Morals*.  
See 'Traité, etc.', vol. i. pp. 167, 826.

DROIT CIVIL (as opposed to *Droit pénal*) [i.e. Law  
regarding primary Rights and Obligations] :

Relating to—

Rights IN REM, with their  
corresponding Duties:

Rights IN PERSONAM, or OBLIGA-  
TIONS *stricto sensu* :  
In which Department of rights and  
obligations are comprised the following  
*genera* : viz.—

Obligations arising from *Pacte*  
ou *Convention* (i.e. ex CON-  
TRACTU) :

Obligations arising from *Bonis supérieur*  
*Service antérieur, Responsabilité pour*  
*une personne tierce, etc.*) i.e. QUASI ex  
Contractu).

## IX.

Droit') arranged in the order which seems to have by *Bentham*.

**INTERNATIONAL, or EXTERNAL LAW** [i.e. *Jus Integrarum Gentium*]:  
Relating to the Rights and Obligations of *Independent Political Societies towards one another*.  
Thus considered, it is, strictly, a branch of *Morals*. See '*Traité, etc.*' vol. i. pp. 168, 328. But, as enforced in any given Society by the Sovereign, or Supreme Power, it properly constitutes a portion of (national or internal) *Law*.

**DROIT CIVIL** (as opposed to *Droit politique*) [i.e. *Jus PRIVATUM*]:  
Containing—

*Law regarding*

The Rights and Obligations of Persons clothed with Political Powers in subordination to the Sovereign. See '*Traité, etc.*' vol. i. pp. 835, 839, 846, etc.: *Organisation judiciaire, Code Militaire, Code de Finance, Code ecclésiastique, etc.*

**CODE GÉNÉRAL, ou Lois GÉNÉRALES**  
[i.e. *JUS RERUM*]:  
Containing—

**CODES PARTICULIERS, ou Recueils de Lois PARTICULIERS** [i.e. *JUS PERSONARUM*].

**DROIT SUBSTANTIF** [or *The Law*]:  
Containing—

**DROIT ADJECTIF** [or *Law of Procedure*]:  
Containing—

Law of *Civil Procedure*:

Law of *Criminal Procedure*.

**DROIT PÉNAL** [i.e. Law regarding *Injuries*; with the Rights and Obligations (*secondary* or *sanctioning*) which arise from injuries]:  
Relating to—

*Civil Injuries*; with the Rights of the injured parties or their representatives, and the correlating Obligations.

*Crimes and Punishments*; together with the Satisfaction to the injured parties or their representatives, which (in the opinion of Bentham) it would be expedient to exact from the criminals.



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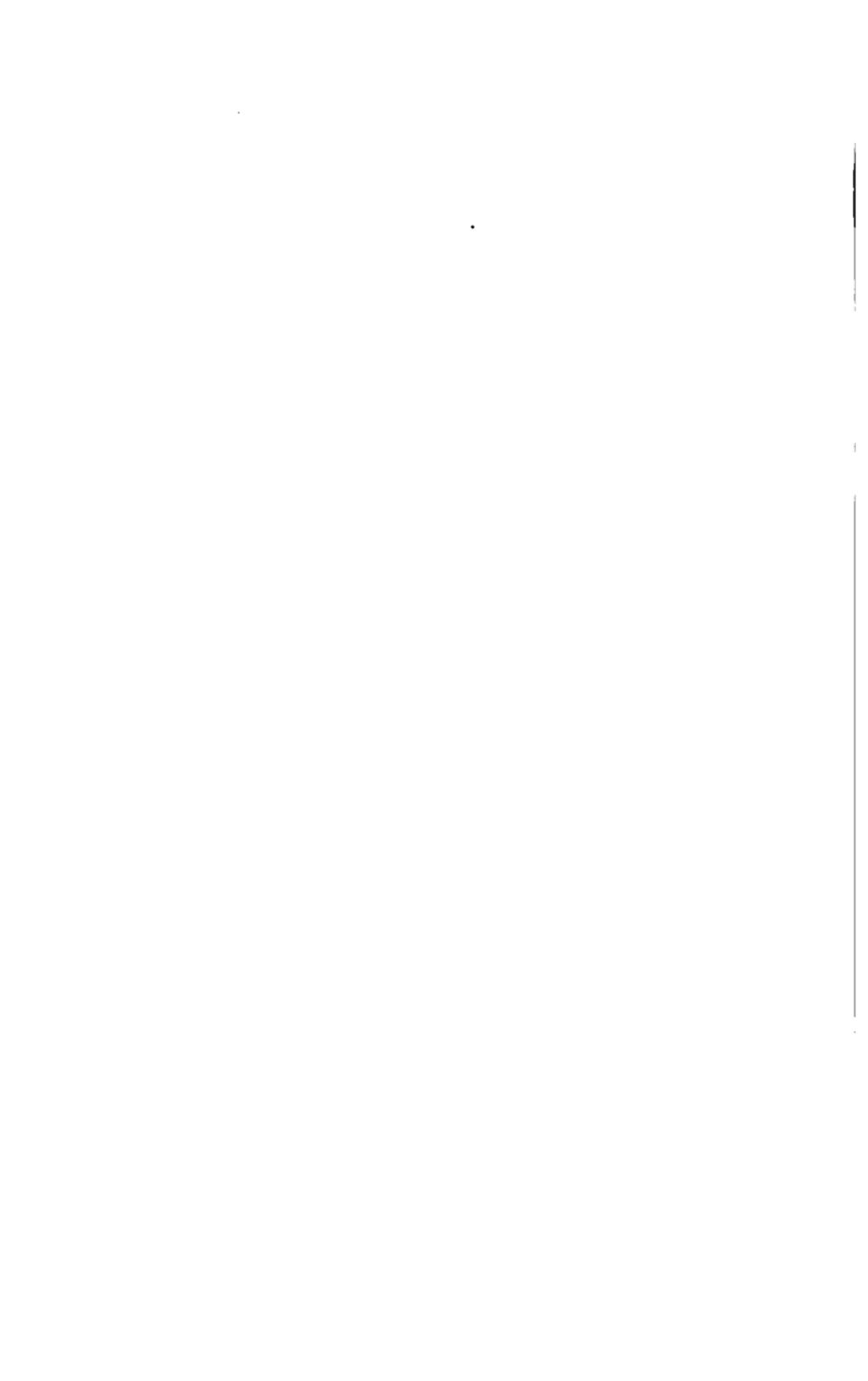
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