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ELEMENTS
OF
AMERICAN JURISPRUDENCE

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OF
AMERICAN JURISPRUDENCE

BY
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TO
ALL THOSE MEMBERS OF THE
AMERICAN BAR
BETWEEN WHOM AND THE AUTHOR
THE RELATION OF PUPIL AND TEACHER
HAS AT ANY TIME EXISTED
THIS TREATISE
IS
AFFECTIONATELY DEDICATED

PREFACE.

JURISPRUDENCE, as the word is used in the title of this book, denotes the science of which law, as such, is the subject-matter; the science which deals, not with the commands and prohibitions whereof the law consists, but with the law itself, its nature, its origin, its history, its divisions, its forms, its interpretation, and the methods of its application to practical affairs. Of law in general, considered as an essential feature of political society and abstracted from all definite systems of law, there is a universal science known as General Jurisprudence; and of every system of law, differing as each does from every other in some of its exterior characteristics, there is a special science, — the Particular Jurisprudence of the State in which that law prevails. Thus American Jurisprudence is a special science, treating of the laws of the United States and of the States of which the American Union is composed.

Manifestly some knowledge of this science is important to every educated citizen who aspires to the intelligent discharge of his political duties; a more intimate acquaintance with it is indispensable to the lawyer and the judge who participate in the interpretation and administration of the law; while for the jurist and the legislator the mastery over it must be still broader and more profound. In the present work it has been the purpose of the author to assist the various grades of students in their preparation for these different positions in political life. In writing

the text he has had in view the needs of those who are pursuing courses in political science in our universities and colleges, and has endeavored to make it complete enough to afford them all the information which the educated citizen requires and simple enough to be comprehended by those who have no technical knowledge of the law. In prescribing the collateral readings from the reports and treatises he has attempted to open to the professional student a wider field of research, and to guide the advanced explorer of the history and philosophy of our law to those rich treasures of legal thought and learning which have been accumulating in the decisions of our courts and in the text-books of our law-writers for a thousand years.

In reference to these readings it seems scarcely necessary to remark that the treatises selected are but a fragment of the vast literature devoted to this subject. It was the aim of the author to present the student with a small number of representative works, of high authority and easily accessible, through which he might be conducted, if he desired it, into investigations even more extensive than the scope of this elementary manual would permit it to prescribe. But in no case has this choice of treatises been determined by the harmony of their opinions upon open questions with those which the author has himself expressed. On the contrary, as the student will soon discover, there are marked differences in their conclusions concerning the nature and authority of law, the origin of legal rights, and various other matters, caused by the different premises adopted by the writers and the fundamental principles from which their development of the philosophy of law proceeds. Of these differences no particular notice is taken in the text, and no direct attempt is made to expose and contravene the errors which, in the author's judgment, some of these treatises contain. Destructive criticism, if ever profitable, is out of place in a work designed, in part

at least, to introduce beginners to a subject, and hence the author has contented himself with stating his own convictions and the reasoning which supports them; leaving the student to encounter and consider different opinions when his knowledge of the science has become more intimate and his judgment more mature.

In making the selection of readings from the decided cases the author has been confronted with much graver difficulties. To the immense number of decisions published in the Federal and State reports must be added those of the English courts from the first Year-Book to the present day, if one would fairly estimate the volume of case-law which more or less directly bears upon the questions pertaining to a science of which the law itself is the subject. To bring the readings from the cases within the student's practical attainment it was obviously necessary to make the number comparatively few, and to select these from series of reports most likely to be within his reach and to be able to lead him by their notes and references into contact with other cases, both English and American, in which the points decided had also been discussed. After long deliberation the author therefore finally determined to confine himself in these citations to the reports of the Supreme Court of the United States, and to the series of State cases known as the American Decisions, American Reports, and American State Reports. That the Supreme Court Reports should occupy the position here accorded to them no one will doubt who calls to mind the fact that, to a great extent, the science of American Jurisprudence has been created by the decisions of that august tribunal. The reasons for adopting the series of American Decisions, Reports, and State Reports were that it is probably now accessible to a greater multitude of students than the whole body of State decisions or than any other series covering an equal field; that it is a fair

representative collection of State cases, chronologically arranged, from the earliest American reporters to the present time; and that its copious notes, cross-references, and comparative analyses of cases decided on the same point in different States render it particularly helpful to the student of American Law as an entire system rather than as a body of mere local rules. Students who are unable to make use of this series, or prefer to read the cases in the original State reports, will find a Reference Table at the commencement of this volume, indicating the page and number of the State report from which each cited case is taken. This course, however, will prove less profitable to the student since the notes contained in the series followed by the author are absent from the State reports, and as many cases have been cited principally on account of these, the reader of the decision in the State reports will sometimes be compelled to satisfy himself with a judicial opinion of comparatively slight importance, when in the other series he would find it made the text for a general discussion of the law of exceeding interest and value.

It is further to be noted that the citations appended to the paragraphs are, in every instance, readings provided for the student, not mere authorities to support the positions taken in the text. The author has exercised all possible pains not to recommend an entire case unless the entire case is worthy of the careful perusal and consideration of the reader, and not to repeat a case unless its bearing upon the points to which it is subsequently cited is too important to justify him in excluding it. Moreover, the cases should be read in the order in which they are arranged; for the arrangement of the cases, like their selection, has been made with a regard to the requirements of the student and cannot be departed from without some loss to him. It is not, however intended that students of all grades should read and master all the different citations. This

should be the task reserved for the advanced scholar in our graduate schools of law. For the college student in political science the text alone, or with a few of the more simple readings from the treatises, will be sufficient; for the professional law-student the text, the greater portion of the treatises, and a selection made by his instructor from the cases, may be advantageously prescribed.

In issuing this volume from the press the author cannot refrain from expressing the pleasure it has given him, while preparing it, to travel again the paths of legal learning along which for so many years, in conjunction with the late Professor Edward J. Phelps, he conducted the academic seniors of Yale University. Few teachers have ever equalled Professor Phelps in his high appreciation and in his ability as an expounder of American Jurisprudence. It is the ceaseless regret of his colleagues and his pupils that he has not left behind him a treatise on this subject which, though it could not augment, might serve to perpetuate his fame.

WILLIAM C. ROBINSON.

WASHINGTON, D. C., September, 1900.

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	50 D. 445	11 Ill. 157.
327.	51 D. 584	12 Pa. St. 56.
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328.	5 St. 494	123 Ill. 111.
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	31 D. 238	3 Green Ch. (N. J.) 16.
329.	83 D. 240	32 Ill. 45.
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	49 D. 608	2 Strob. (S. C.) 508.
384.	50 R. 296	137 Mass. 231.
	5 D. 727	2 Martin (La.), 138.
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ELEMENTS

OF

AMERICAN JURISPRUDENCE.

CHAPTER I.

OF THE NATURE AND AUTHORITY OF LAW.

§ 1. Of the Essential Nature of Law.

Law, in its widest sense, is a rule imposed by one being upon itself or upon some other being. It is a rule (*regula*, from *rego*, to govern); a norm or standard of being or conduct determining the nature and attributes of a thing or regulating its actions or forbearances. It is imposed by a being possessing and exercising authority over itself or other beings, and enforcing obedience to the rule either by making its observance inevitable, or by attaching to its violation certain penalties. It is directed either to the being from whom it emanates, as where a man makes rules for his own guidance, or a State adopts a constitution, or the Creator establishes laws governing his intercourse with his creatures; or it is ordained for other beings, as where the Almighty gives existence and specific characteristics to a creature, or an artisan fixes the *modus operandi* of a machine, or a sovereign prescribes laws for the government of his subjects. It originates in the reason of the lawgiver, which perceives the relations between causes and effects and the consequences which must flow from different forms of being or different modes of action, and selects the forms and modes adapted to

the purposes to be accomplished by the observance of the law.
*Cum lex sit quædam regula et . . . actuum mensura necessariò
 ad ipsam rationem spectat.*

Read 1 Bl. Com., p. 38 ; Holland, Ch. ii ; Summa S. Th. Aquin.,
 Pr. Sec., Quest. xc ; Summa Ph. Zigliara, M. 22 ;
 Cicero, The Laws, Book i, § iv.

§ 2. Of the Eternal Law.

Behind all other beings lies the Supreme, Self-Existent Being, — the Great First Cause from whom all secondary causes and effects proceed. His reason conceives, and his will summons into actual existence, the natures and attributes of all things with their relations to and their operation upon one another, and thus imposes upon them a law which determines, even to its minutest detail, the evolution and development of the entire Universe from its beginning to its end, except within that narrow field of action whose government He has committed to the reason and will of His intelligent creatures. The law by which He thus rules the Universe is the Eternal Law, — infallible, irresistible, unchangeable save by Himself, — manifesting itself everywhere outside the voluntary acts of rational beings, and exercising upon these a powerful influence through the qualities with which it has endowed them and the conditions by which it surrounds them. All knowledge is the knowledge of this law, and knowledge of this law is knowledge of the Lawgiver Himself; of the Absolute, the Infinite, the Unconditioned; of the Ultimate Beauty, Goodness, and Truth. *Est aliqua lex æterna, ratio videlicet gubernativa totius universi in mente divina existens.*

Read Cicero, The Laws, Book i, § vii, Book ii, § iv ; Summa S.
 Th. Aquin., Pr. Sec., Quest. xci, Art. i, Quest. xciii ;
 Summa Ph. Zigliara, M. 23.

§ 3. Of Natural Law.

The manifestation of this eternal law through finite persons, objects, and events, especially through such as are per-

ceivable by man, is often called the Law of Nature, or the Natural Law. By obedience to the eternal law all creatures participate in the supreme reason from which it originates, enjoy the advantages and achieve the ends which it proposes, and work out, each for itself, the destiny to which it has predetermined them. The law thus written in the forms and properties of matter, operating through the instincts and proclivities of sentient beings, and unfolding itself incessantly in their individual and collective history, is properly styled the Law of Nature, — the law which their nature exhibits and which it is their nature to obey. But this law, by whatever name it may be called, is still the same eternal law, inseparable in this part of it whose effects our minds can apprehend from those parts which control creatures and regions beyond our physical and intellectual vision; the law that binds all beings, physical and spiritual, into one indissoluble Universe which is advancing, under the direction of this law, toward a goal which only its creator, director, and law-giver can foresee.

Read 1 Bl. Com., pp. 39-41; Holland, Ch. iii, pp. 29-33; Summa S. Th. Aquin., Pr. Sec., Quest. xci, Art. ii, Quest. xciv; Summa Ph. Zigliara, M. 24.

§ 4. Of Positive Law.

A rule may be imposed by one being upon another being in either of two ways: (1) By immediately and irresistibly controlling the nature, attributes, or conduct of the subject-being; (2) By commanding the subject-being how to act or to forbear. The latter mode is possible only when the subject-being possesses reason and will, and when its actions and forbearances are under its own control. Thus the eternal law governs all beings, actions and events, except the purely voluntary acts of rational creatures, in the first method, and those voluntary acts in the second method. To the imposition of a rule in the second method it is necessary that the rule should be expressed and promulgated; that is, that it should be positively prescribed and communicated by the law-

giver to the rational subject-being in a manner intelligible to him, and so become a recognized and practical guide of life and conduct. This form of law is known as "Positive Law," and is regarded by many writers as the only form to which the name "Law" can properly be applied.

Read Austin, Lect. i, pp. 86-103; Holland, Ch. iv, pp. 38-40;
Summa S. Th. Aquin., Pr. Sec., Quest. xc, Art. iv;
Summa Ph. Zigliara, M. 25, i.

§ 5. Of Divine Law.

Positive Law is divided, so far as the human race is concerned, into two groups of rules: (1) Divine Law; and (2) Human Law. These groups of rules do not differ in their ultimate origin, for both are expressions of the eternal law. Nor do they differ in their ultimate end, which is the development, elevation, and happiness of mankind. Nor do they rest upon a different authority, for human law, truly so called, is, like the divine, a rule imposed by the supreme reason and will of God. Their distinction resides in the beings by whom they are expressed and promulgated to men. Divine Law is the rule prescribed directly to His rational creatures by the Creator Himself. It is a communication to them of such otherwise undiscoverable or unintelligible portions of the eternal law as may be necessary to enable them to govern their mental, moral, and physical operations in accordance with the attributes of their own natures and the end for which they were created. That such a communication should be made whenever it becomes necessary, and so far as it is necessary, is inevitable, since otherwise the supreme reason would contradict itself and defeat its own designs. Whether and to what extent such a Divine Law has actually been prescribed is a question for the philosopher and theologian.

Read 1 Bl. Com., p. 42; Holland, Ch. iii, p. 36; Markby, §§ 104-115; Summa S. Th. Aquin., Pr. Sec., Quest xci, Art. iv; Summa Ph. Zigliara, M. 25, ii-iv.

§ 6. Of Human Law.

Human Law is a rule prescribed by man for his own government or that of other men. Human Law, like Natural Law and Divine Law, is also part of the eternal law. For since the eternal law determines the nature and attributes of man and the general conditions by which he is surrounded, as well as the circumstances on which his personal disposition, mental and moral strength or weakness, and by far the great majority of his actions and forbearances depend, the field within which his own reason and will exercise dominion evidently must be very narrow, his purely voluntary acts comparatively few, and his responsibility for his life and conduct, and the practical rules which he can make and apply for their direction, correspondingly limited. Hence it results that a very large proportion of human laws, commonly so called, are in reality mere spontaneous recognitions and affirmations of the truths and dictates of the eternal law, to which man has added nothing except the verbal garments in which they are clothed. Furthermore, within the sphere of action which is under human control, and where the intellect of man is competent to devise and his will is free to impose rules of life and conduct, the laws which he prescribes can be, and ought to be, and generally are in accordance with the dictates of the supreme reason from which his own proceeds, and consequently are a part of the eternal law. For as it is apparent from the operations of the eternal law in other spheres of action that every secondary cause is adequate to the production of its intended effect; that every being is qualified for the attainment of the end for which it was created; that every rational creature is endowed with intellect and will sufficient to enable it to direct its voluntary acts and forbearances along the lines of its own normal development and happiness; so when the mind of man applies itself to the careful study of matters within its grasp and honestly endeavors to establish rules tending to promote his physical, mental and moral welfare, it must inevitably succeed, and the new rules it formulates must necessarily conform to and express the dictates of the eternal law in reference to the

action or forbearance which the rule commands. Thus human laws, properly so called, — the productions of right reason and an upright will, — are dictated in the last resort by the supreme reason, are binding in conscience as well as in social comity, and are sanctioned not merely by human authority, but also by the authority of God. (a) *Est in hominibus lex quædam naturalis, participatio videlicet legis æternæ, secundum quam bonum et malum discernunt.*

Read 1 Bl. Com., p. 43; Cicero, *The Laws*, Book i, §§ viii-xii; Lorimer, Book i, Ch. iii, vi, viii, ix; Burlamaqui, Part i, Ch. i-viii, Part ii, Ch. i-xii; Morey, pp. 219-222; Summa S. Th. Aquin., Pr. Sec., Quest. xci, Art. iii, Quest. xcvi; Summa Ph. Zigliara, M. 25, v-ix.

(a) 54 D. 217.

§ 7. Of Human Lawgivers: the State.

Human Law, as thus defined, embraces all those rules, whatever be their character or scope, which man in the exercise of right reason and honest purpose establishes for the government of himself or of his fellow men. Some are prescribed by individuals for the direction of their personal conduct, others by families for the promotion of their united peace and prosperity, others by larger associations for the accomplishment of the objects for which they were organized. These rules, being evoked by conditions which result from the operation of the eternal law, and devised and enforced by faculties with which the eternal law has endowed man in order to enable him to meet these conditions, are truly the projection of the eternal law into the daily actions and forbearances of men, and, therefore, are within their sphere authoritative and infallible. Pre-eminent among these various systems of rules is that which the political society, or State, adopts for its own guidance and the direction of its subjects. A political society or State is distinguished from all other human associations by the possession of sovereignty, or supreme authority over itself and its members. In form and extent a State may be a single family, or a group of

families united in a tribe, or many tribes confederated in a nation. It may occupy a few square miles of territory and consist of a few scores of individuals, or it may permanently control a continent populated by hundreds of millions of its citizens. But if it is subject to no human authority outside itself, and within itself exercises supreme dominion over its own operations and over the lives and conduct of its members, it possesses sovereignty and answers to the definition of a political society or State. (a) The State, like man himself, together with the sovereignty which it enjoys, is the creature of the eternal law, one of the chief among the agencies through which the Infinite Reason works out its vast designs. Man is by nature a social being. His inherent attributes and instincts irresistibly impel him into associations with other men, some sexual, some domestic, some co-operative. His happiness and development depend upon the effect produced upon him by the actions and reactions which in society alone are possible, and thus human society becomes an essential factor in the advancement of the Universe itself. But society implies peace and order. Conflict and antagonism are not society, nor is it possible that in an atmosphere of strife and contention human relations should subsist and exercise their proper influence upon mankind. The existence of society requires that rights should be defined and respected; that duties should be recognized and observed; that injuries, if any are committed, should be redressed. It also requires that when necessary these rights should be protected, these duties enforced, and these wrongs punished by an authority which cannot be resisted or gainsaid. Hence, as it is the function of human laws to define rights, to prescribe duties, and to prohibit injuries, so far as these are left undefined, unprescribed, and unprohibited by the divine law, and as sovereignty alone can adequately protect these rights, enforce these duties and redress these wrongs, it follows that from the eternal law which establishes society the sovereignty of the State and its right and obligation to make and administer laws for its own government are likewise derived. Human Laws made by the State within the field left open to

it by the Law of Nature and the Divine Law, and in the exercise of right reason and integrity of purpose, are thus a part of the eternal law, and above all other human laws are its most perfect and authoritative expression. *Præter æternam et naturalem legem est lex quædam ab hominibus inventa, secundum quam in particulari disponentur quæ in lege naturæ continentur. . . . Necessarium fuit ad quietam et pacificam hominum vitam aliquos ab hominibus leges poni, quibus homines improbi metu pænæ à vitiis cohiberentur et virtutem assequi possent. . . . Quoniam . . . in temporali lege nihil est justum ac legitimum quod non sit ex lege æterna profectum, certum est omnes leges in quantum participant de ratione recta in tantum a lege æterna derivari.*

Read 1 Bl. Com., pp. 47-49; Holland, Ch. iv, pp. 40-48, Ch. xvi, pp. 325-342; Markby, §§ 1-14, 45-49; Austin, Lect. vi, pp. 220-238, 290-338; Lorimer, Book iii, Ch. i-v; Burlamaqui, vol. i, Part i, Ch. ix, x, Part ii, Ch. vi, vol. ii, *totum*; 1 Wilson, Part i, Ch. ii, iii; Woolsey, §§ 36-41, 52; Jameson, §§ 18-23, 27-33; Dillon, Lect. v, pp. 144-154; Amos, Ch. vii, pp. 118-123; Vattel, Book i, Ch. i, ii; Walker, Lect. ii; Cooley, C. Law, Ch. ii, pp. 20-22, 25, 26, 40-43, Ch. xiv, p. 295; Cooley, Const. Lim., Ch. i, pp. 1, 2; Maine, Early Hist. Inst., Lect. xii, xiii; Clark, Part i, Ch. i-xvi; Summa S. Th. Aquin., Pr. Sec., Quest. xc, Art. ii-iv, Quest. xc, Art. i; Summa Ph. Zigliara, M. 49-51.

(a) 79 D. 123 (131); 92 U. S. 542 (549-551); 1 Cranch, 137 (176).

§ 8. Of the Validity of Laws Made by the State.

Sovereignty manifests itself through three acts: (1) The act of making laws; (2) The act of determining what rules of law are to be applied in particular cases; (3) The act of enforcing law. These acts are commonly known as the exercise by the State of its legislative, judicial, and executive functions. These functions are essentially distinct, even although they may be practically discharged by the same person in whom, as in an absolute monarchy, the entire sov-

ereignty of the State resides. The valid exercise of the legislative function requires that the lawmaker should thoroughly understand the subject concerning which he is to legislate, and that the subject itself should be within his legislative powers; that in devising the rule to be prescribed he should be guided by right reason both as to the substance of the rule and the mode of its enforcement; and that in prescribing the rule he should be animated, solely by an honest purpose to promote the welfare of the State and of its members. To a valid judicial act it is necessary that the judge should fully comprehend the facts to which he is about to apply the law; that he should know what rule of law governs those facts and should correctly understand and interpret it; and that without bias toward either party or personal predilection of his own in favor of any theory of law or fact, but with the sole desire to do absolute justice between the contestants, he should decide the controversy and define their rights and duties. A valid executive act requires of the officer a precise obedience to the mandate of the law, subjecting the party against whom he acts to as little loss and inconvenience in person and property as is consistent with his own exact performance of his official duties. Sovereignty is conferred upon the State by the eternal law to be used for the happiness and development of its members, but not to be abused. Ignorant, hasty, or selfish legislation; careless or impulsive judicial acts; cruel and ruthless exercises of executive power are abuses, not the use, of sovereignty. The laws and judgments and relations to which they give birth, though emanating from the proper sources, and consequently in most cases entitled to submission for prudential reasons, are not valid laws or judgments or relations, do not participate in the authority of the eternal law, nor bind the opinions nor the conscience of the citizen. (*r*) Fortunately for society such invalid acts, though too often performed, speedily defeat themselves. The invalid law operates disastrously and becomes obsolete or is repealed; the invalid judgment is soon overruled; the wanton act of the executive recoils upon his own head; and the celerity with which these reactions take place

is as reliable a test of the health of the body politic as the rapidity of recovery from disease is of that of the human body. In a well governed State only valid laws prevail; laws which are (1) just, the offspring of right reason giving to every one his due; (2) consistent with the divine law and the law of nature and with every other manifestation of the eternal law; (3) adapted to the existing condition of the State and its citizens, capable of their observance, affirming their accepted customs, removing their admitted evils, promoting their common good; (4) clearly and definitely expressed; (5) universally promulgated to all by whom they are to be obeyed. *Omnem humanam seu positivam legem necesse est justam, honestam, possibilem secundum naturam, secundum patriæ consuetudinem, loco temporique convenientem, necessariam, utilem, manifestam, et pro communi civium utilitate scriptam esse.*

Read 1 Bl. Com., p. 42; Cicero, The Laws, Book i, §§ xv, xvi, Book ii, § v; Lorimer, Book i, Ch. viii, ix; Book ii, Ch. i; Summa S. Th. Aquin., Pr. Sec., Quest. xcvi, Art. ii, iii, Quest. xcvi, Art. iv-vi; Summa Ph. Zigliara. M. 52-55.

(a) 20 D. 360 (372); 48 D. 178 (183); 79 D. 236 (239).

§ 9. Of the Uniformity of Laws.

It is within the possibilities of the future that all mankind should be united into one political society exercising universal sovereignty throughout the globe. But this, at least since the disruption of the first domestic society, has never yet occurred. From the creation of the human race States have constantly arisen, flourished, and disappeared. The territory which they occupied, the individuals or families of which they were composed, have remained, but the social organisms have disintegrated and their members have formed new cohesions, displacing old institutions with others better suited to their own advanced condition, until the conceptions, purposes, and methods of the modern, civilized, Christian State have been evolved. All this has taken place in obedience to the workings of the eternal law, whose highest expres-

sions through the intellect and will of man, in the present stage of their development, are these modern States, some higher indeed than others, but each a prophecy and promise of nobler, better, and more perfect States to come. In each of them, as in all their predecessors, sovereignty resides, prescribing and enforcing laws, and through their instrumentality the Great First Cause directs, for the most part, the voluntary actions and forbearances of men. But although the sovereignty of every State, past or present, is necessarily independent of every other and exercises absolute dominion within its own territory and over its own people, producing its own system of laws and institutions, yet have the laws and institutions of all States been, in most respects, substantially the same. Wherever the social conditions of these States have been alike the laws devised to meet them have been also similar, manifesting by this uniformity of effects the emanation of the law from sources equally uniform, the right reason and honest purpose which operating upon given premises always reaches the same results. The study of Comparative Jurisprudence daily furnishes new evidence of this uniformity of law; the parallelism between the most ancient and the most modern systems, between the institutions of people the most widely separated from one another in lineage and habitation, becoming more and more apparent the more thoroughly the investigation is pursued.

Read Amos, Ch. ii, pp. 13-28.

§ 10. Of the Civil Law and the Common Law.

Of all the systems of law devised by different States two still exist, by one or the other of which nearly all the civilized nations of the modern world are governed. These are the Civil or Roman Law and the Common or English Law. The Civil Law was originally the law of the Roman Empire, the system adopted in the infancy of that mighty State and developed by its wonderful social progress and its unsurpassed practical wisdom during a period of over a thousand years; and though the empire was long since dismembered,

its law still forms the basis of the legal systems of the new organizations into which the territory and people of the ancient empire have entered, — the States of modern Continental Europe. The Common Law is the law of the barbaric races which inhabited Northern Europe from a remote antiquity, and, by the fusion of these races in the British Isles, by the vigorous evolution of their social and commercial life, by the devoted labors of multitudes of able lawyers and judges, and by the constant influence exerted on it by the Civil Law, has been extending and advancing for more than twenty centuries, and is to-day the law of England and the United States and of all other English-speaking States throughout the world. But though these two great systems of law are independent of each other, they are by no means wholly unlike or often contradictory. The conditions of the peoples governed by them have been in many respects almost identical, and answering to these conditions the laws have been in substance and in mode of application frequently the same. The study of each system thus elucidates the other, and one can hardly now be called an educated lawyer who is not tolerably familiar both with the Common and the Civil Law.

Read 1 Bl. Com., pp. 79-81; 1 Kent, Lect. xxiii, pp. 515-548; Markby, §§ 82-92; Dillon, Lect. i, pp. 22-27; Morey, pp. 192-214.

§ 11. Of International Law.

The systems of law prevailing among nations not governed by the Civil or the Common Law exercise little influence upon the modern world, and are gradually disappearing and being supplanted by systems more or less closely following the models of the Common and the Civil Law. Of these no further mention need be made. But besides the systems of law thus prescribed and enforced by individual States, there are several others of a more universal character which, though not originating in any exercise of political sovereignty, have been recognized and adopted by these different States and have

become imbedded in their individual laws. Chief among these is the body of rules known as International Law, by which States govern themselves in their intercourse with one another. This law is not prescribed to independent States by an exterior sovereign, for independent States cannot acknowledge any sovereignty superior to their own. There is indeed, in recent times, some tendency toward such a limited confederation between civilized nations as may enable them to exercise a collective authority over themselves as individual States in reference to matters in which they have a common interest, but such a confederation, however limited, would involve the surrender by each State of its absolute dominion over itself and its citizens, and therefore is not likely at present to be realized. International Law now consists of the customs which independent States, in the exercise of right reason and with a view to their own welfare, have voluntarily observed in their necessary relations with one another, and these customs, having been adopted and sanctioned by each individual State and expressly made a part of its own laws, have become binding upon itself and its citizens like any other portion of its laws. If citizens violate these customs they are punished, as for other violations of their local law. If States infringe them they subject themselves to the antagonism of other States and possibly to war. (a)

Read Woolsey, §§ 1-35.

(a) 9 Cranch, 191; 175 U. S. 677 (700, 701).

§ 12. Of Maritime Law.

A second universal system of rules, not proceeding as such from the sovereignty of any State, is Maritime Law. The high seas, including the oceans and their waters outside the range of a cannon shot from the shores of States, are not within the territory of any sovereign, and are, therefore, directly subject to no laws. They belong to the people of the world at large as avenues of commerce, and as such have been used indifferently by all nations since traffic and exploration first began. Upon this common highway and in the

ports which fringe its boundaries, the citizens of all States thus meet together, and enter into relations with one another which, like all other human relations, must be defined and protected by obligatory rules. Exercising their reason upon their conditions, maritime peoples, in prehistoric ages, evolved these necessary rules and acted upon them until they became the "customs of the sea," recognized by all navigators as binding upon them in honor and conscience, and finally adopted and enforced by the independent sovereign States as a part of their own laws. This system of Maritime Law is the oldest and most universal of existing bodies of law, and is administered by the Admiralty courts of every maritime nation, whose judgments are binding throughout the civilized world. (*a*)

Read (*a*) 14 Wall. 170; 12 How. 443.

§ 13. Of Ecclesiastical Law.

Another system of rules not derived from the sovereignty of the State, but still sanctioned and enforced as law, is Ecclesiastical or Canon Law. Religion has always been regarded by human society in general as a potent factor in the promotion of the welfare of mankind, and as such has been fostered and encouraged by the State. The rules which associations of men, organized for the preservation and propagation of religion, have framed for their own government and that of their members, have thus always been respected and approved by States unless in their judgment these rules were hostile to their own interests or sovereignty. In the ancient world what pre-eminence was given to religious societies and their laws is matter of familiar history. In the modern world the Canon Law of the Catholic Church, intimately associated in character, purpose, and jurisdiction with the Civil Law, and the Ecclesiastical Laws of other Christian bodies, and even of societies not adhering to the Christian faith, have generally been regarded by all civilized States as binding on the members of these societies when not antagonistic to the interests of the States; and though not directly adminis-

tered by political authority, they are recognized and followed by the State in interpreting and enforcing the contracts and relations into which such members voluntarily enter. (*a*)

Read 1 Bl. Com., pp. 82, 83; Holland, Ch. v. p. 56; Amos, Ch. vii, pp. 133-137; Cooley, C. Law, Ch. xiii, pp. 233-240.

(*a*) 49 D. 608, note; 13 Wall. 727; 11 R. 95; 49 R. 462.

§ 14. Of the Different Significations of the Phrase "Common Law."

"Common Law" is a name of many significations. Its broadest sense is that in which it has already been defined as one of the two great systems now in force, the other being the Roman or Civil Law; and in that sense it is used in the present treatise except when otherwise particularly stated. It is also often employed to denote those portions of our law which have never been explicitly formulated by our legislative bodies, but rest upon and are found in the decisions of our courts. In this meaning it is equivalent to "unwritten law" or "customary law," and is antithetical to "written law" or "statute law." In another and narrower sense it is applied as an adjective phrase to courts and their procedure, — "common law courts," "common law pleading," etc., — to distinguish them from "chancery," "admiralty," "probate," and "military" courts, etc.; the common law courts and proceedings having originated in the ancient customs of the Saxon and Norman peoples, while the others were derived from the Civil, the Maritime, the Ecclesiastical, or the International Law. Common Law, in another usage, frequently adopted by American lawyers, embraces the whole body of the English law, whether formulated in Acts of Parliament or not, as it existed at the severance of our colonies from the mother country, so far as that law has been regarded by our courts and legislatures as suited to the needs and conducive to the welfare of our people; and in this usage it distinguishes the laws derived from England from the laws which the American people have devised and formulated for themselves. The

student of Law will often be embarrassed by the multifarious and sometimes inconsistent uses to which this term "Common Law" is appropriated. He will be taught that certain acts are "void at common law," only to learn a little later that by our statute law these acts are valid. He will read that for certain injuries "the common law gives no relief" while ample remedies await the injured party in our courts of equity. But he will soon discover that all legal terminology is in the same hopeless confusion, and that to understand the language of the law requires considerable knowledge of the law itself.

Read Dillon, Lect. v, p. 155.

§ 15. Of the Common Law in the United States.

The Common Law, as it exists in the United States, is not entirely homogeneous. Each of the States has its own system of laws, and the United States as a nation adds to these another system, all of which are of sovereign authority within their respective spheres. In many details of minor importance, and in some of greater moment, these systems of law differ, so that it cannot be always assumed that rules which are in force in one State are operative in others also. (*a*) Nevertheless, they are sufficiently alike to justify their treatment as a unitary body of law by any jurist who disclaims the purpose of entering into those minutiae of rule and procedure which only the local lawyer ever pretends to understand. Avoiding these it will be found that they constitute a proper single subject for scientific and historical investigation.

Read (*a*) 13 St. 290, note; 15 St. 672.

§ 16. Of the Subjects-Matter of Law: Persons and Things.

Human Laws prescribed by the State in the exercise of its sovereignty, like all other forms of positive law, emanate from and are imposed upon persons. A person is a being endowed with reason and free-will, and therefore capable of self-determination, and a proper author and subject of positive

law. (a) *Persona est rationalis naturæ individua substantia.* From the reason and free-will of the sovereign the law proceeds; to the reason and free-will of the subject it is directed. The law thus relates primarily to persons, though secondarily and on account of persons it operates also upon things, and with an examination of the classes, natures, and attributes of persons, as the law regards them, the study of the law should properly begin. Persons, in law, are of two classes: Natural and Artificial. Natural persons are individual men and women as they are produced by the processes of nature. Artificial persons are natural persons or groups of natural persons whom the law endows with a personality in addition to that which they possess by nature, in order that they may perform certain acts or enjoy certain privileges which to merely natural persons might be impossible. These classes of persons differ in many respects from one another, as their discussion in the ensuing chapters will disclose.

Read Markby, §§ 131, 136-144; Amos, Ch. vi, pp. 78-85; Austin, Lect. xii, pp. 347-354; Summa S. Th. Aquin., Pars Prima, Quest. xxix, Art. i; Summa Ph. Zigliara, O. 29.

(a) 22 R. 529.

CHAPTER II.

OF NATURAL PERSONS.

SECTION I.

OF THE EXISTENCE, IDENTITY, AND NAMES OF NATURAL PERSONS.

§ 17. Of the Legal Existence of Natural Persons.

A natural person is a living human being of whatever age, sex, race, or condition. The actual existence of a human being begins with his conception and continues till the moment of his physical death. On account of the difficulty of ascertaining the date of conception the law regards the personal existence of a child as commencing at the instant of quickening, or when the movements of the child in her womb are first felt by the mother, which usually occurs about four and a half months after conception. From the moment of conception, however, if eventually born alive, the child is treated as having been alive for many beneficial purposes, and while still in the womb of its mother it has civil rights which are entitled to protection; a guardian may be appointed for it; or it may inherit land or take it under a will.^(a) If, however, it perish before birth, this antenatal recognition by the law is withdrawn and the existence of the child, even during that temporary period, is legally ignored. Moreover, until full born, a child is not the subject of a felonious homicide, nor the person causing its death guilty of murder.

Read 1 Bl. Com., pp. 129, 130; Markby, §§ 131-134; Holland, Ch. viii, pp. 81-86.

(a) 26 D. 598; 43 D. 472, note; 51 D. 248.

§ 18. Of the Legal Death of Natural Persons.

The death of a natural person is the extinction of his physical life. In all ordinary cases this is a fact concerning the date of whose occurrence there can be no question. Where there is no proof obtainable as to the fact or date of death, the law presumes that the person reached the ordinary limit of human life. (a) The absence of a person from his customary home for more than seven years, coupled with the failure of any tidings concerning him to reach his relations or neighbors, is *prima facie* evidence of his death in cases where the rights and interests of other parties are alone involved. (b) Nothing but his actual death, however, can divest him of his own rights, and whatever may have taken place in reference to these, on the false assumption of his death, will be invalid, and he can assert and enjoy them as if his continued existence never had been doubted. (c) The civil or imputed death of a still living person, known to the earlier stages of the English law, has never been recognized in the United States.

Read 1 Bl. Com., p. 132; Markby, § 135.

(a) 5 D. 727; 92 D. 698, note.

(b) 97 U. S. 628; 8 D. 658; 22 D. 370; 91 D. 523, note; 96 D. 136.

(c) 47 R. 458, note; 30 R. 746, note; 73 D. 122.

§ 19. Of the Legal Identity and Names of Natural Persons.

The law knows a natural person, not by his face or figure, but by his name. Every person has and must have a name. It may be given to him by other persons, or he may adopt it for himself, or the law may, as it always will if he has none or it is unknown to the law, bestow upon him one of its own selection. (a) He can do no legal act, such as making a deed or will or contract, without using his name or its equivalent description, nor can he be sued for a private wrong nor prosecuted for a crime except under his actual name or a name conferred upon him for the occasion which will become his true name for all the purposes of the suit or prosecution unless he objects to it and discloses his own. Identity of name

is also identity of person, and from the former identity the law presumes the latter until the contrary is proved. (b)

Read (a) 84 D. 51; 100 D. 53.

(b) 15 D. 463.

§ 20. Of Identity of Names: *Idem Sonans*.

Identity of names resides in the sound not in the letter. Names are primarily intended to be, and for the most part are spoken; their expression in writing is merely incidental and comparatively infrequent. Names which make the same impression on the ear — *idem sonans* — are the same in law, however they may vary in spelling or in the written or printed characters of which they are composed. A person may change his name *ad libitum* in its literal form provided he does not alter its sound. If in his native language it requires one group of letters to communicate the audible impression through the eye to the mind of a reader, and in a foreign language a quite different group is necessary for the same purpose, the expression of his name in the foreign language demands the use of the latter group of letters, not the former. Names are the same in sound when they are sufficiently alike to lead the ordinary hearer to think they are the same. Variations in the sounds of letters and in the accentuation of syllables are common to all spoken languages, and within the range of these the sounds of words may vary without misleading any intelligent listener. The same limit, difficult indeed sometimes in application, measures the identity of personal names. (a)

Read (a) 13 D. 232, note; 39 D. 457; 27 St. 783, note; 163 U. S. 452.

§ 21. Of Christian Names, Surnames, and Descriptive Names.

The name of a person consists of his Christian name and his surname. The law recognizes but one Christian name and takes no notice of middle names or letters, nor of prefixes or suffixes, such as titles of office or honor, nor of words used by the family and friends of a person to distinguish him

from others of the same name. In legal documents these adjuncts to the name are sometimes inserted, for they do not impair its identity and may serve a useful purpose where it might otherwise be doubtful which of two persons of the same name was intended. Though no part of the name, they belong to the class of expressions known as words of description, whose employment is always legitimate to prevent ambiguity. A mere letter of the alphabet cannot be a Christian name or a surname, unless its sound is that of a word capable of being used as a name. (*a*)

Read (*a*) 43 D. 597; 16 D. 163; 27 D. 532; 147 U. S. 47.

§ 22. Of the Voluntary Adoption or Change of Personal Names.

As a person may adopt a name where he has none, so he may change his name at his pleasure. It is, however, one thing for him to select and use a new name in speaking of himself, and quite a different thing to compel other persons and the public to recognize and designate him by his new name. If they respect his choice and call him by it until his old name passes out of use and the new one effectually supplants it, then it becomes his name as fully as if he had never had another. If they refuse to recognize it he may have recourse to the legislature of the State, or under the statutes to the courts, whose confirmation of his choice makes its use obligatory upon all men. (*a*)

Read (*a*) 21 R. 179, note.

SECTION II.

OF STATUS.

ARTICLE I.

Of Status in General.

§ 23. Of the Nature of Status.

Every natural person also has a status. Status is the condition of the subject as the sovereign contemplates it when

he prescribes the law, and in view of which he defines the rules by which the subject is to be governed. It is often said that all persons are equal before the law, but this does not mean that all have the same rights or are under the same obligations. Persons are equal before the law when all who have the same rights are equally protected in their enjoyment, and when all who are under the same obligations are equally compelled to fulfil them. (a) Far in fact is it from true that the law recognizes in all citizens the same rights or imposes upon all the same duties. On the contrary, the people of every State are divided into many classes, each of which is differently regarded by the law, each exempt from legal rules to which the others are subject, each subject to legal rules from which the others are exempt. These classes are formed sometimes by nature, sometimes by relations into which persons voluntarily enter, sometimes by the fiat of the law itself. The legal character of each class is its status, and this status is shared by every member of the class and becomes the measure of his legal rights and duties.

Read Holland, Ch ix, pp. 118-128; Markby, §§ 168-180, 300; Morey, pp. 229-238; Austin, Lect. xl, pp. 687-690, Lect. xli-xliii, pp. 697-734.

(a) 170 U. S. 283 (293).

§ 24. Of Normal and Abnormal Status.

Status is either normal or abnormal. Normal status is the legal character of the great body of citizens for whom the general laws are made and to whom in their full scope and meaning they are applied. Abnormal status is the legal character of those peculiar classes who for one reason or another are regarded as improper subjects for the application of the general laws, and are, therefore, exempted to a greater or less extent from their operation. Presumptively, the law being made by persons and directed to persons, the persons to whom it is directed are able to receive it; that is, they have sufficient intelligence to comprehend it, sufficient will to form the determination to obey it, and are free from any

external coercion which hinders them from its complete and exact observance. But this presumption is not supported by the facts. While the vast majority of persons answer this description, multitudes do not, who on account of their want of reason, or weakness of will, or subjection to legitimate superiors, or other recognized limitation or disability, cannot and are not expected to observe the laws in the same way and to the same extent as ordinary citizens. Normal status is then the status of persons of mature age, of sound mind, and free from external coercion. The status of all other persons is abnormal. Concerning persons of normal status nothing further need be said. All general laws are made for them. In enacting statutes, rendering decisions, or discussing principles and rules, legislators, judges, and law writers have only them in view unless they expressly include persons whose status is abnormal; and, therefore, every legal proposition, wherever found, may be assumed to be an exposition of the rights and duties of persons of normal status alone until the contrary appears. But persons of abnormal status require further description. Their exceptional legal characters, and the diverse variations and departures from the general law which these necessitate, form an important part of the whole body of our laws. The principal classes of these persons are: (1) Infants; (2) Insane Persons; (3) Married Women; (4) Persons under Duress; (5) Public Officers; (6) Aliens and other persons who are not citizens; the peculiar rules belonging to each of which will next be considered.

Read Holland, Ch. xiv, pp. 297, 308-313.

ARTICLE II.

Of the Status of Infants.

§ 25. Of Infancy and its Inherent Disabilities.

An infant is a person under adult age. The age at which a person becomes an adult is fixed by law, and in this country, in the absence of a statute prescribing some other age, is twenty-one years. The precise moment at which he

ceases to be an infant is at midnight preceding the day before his twenty-first birthday, since on that day he completes the first twenty-one years of his life, and under the rule that the law knows no fractions of a day it imputes every occurrence of the day to its first and every succeeding moment. (*a*) During this period of his infancy no act, except that of the law, can change his status. Neither the marriage of an infant, whether male or female, nor his formal emancipation by his father from parental control, nor his own claim to be an adult, nor his neglect to assert his privileges as an infant, can relieve him from the disabilities nor deprive him of the rights which the law attaches to his condition. (*b*) The character and extent of these rights and disabilities are determined by the law of the State in which he was born or in which he has his legal residence or domicile, and are variable by the legislature at its pleasure. (*c*) They are wholly personal to himself and do not avail either for or against other persons who may be related to or connected with him, except so far as the interests in property which they acquire through him are affected by the peculiar rules which govern his transactions. (*d*) All persons dealing with an infant are chargeable with a knowledge of his status and of all its legal consequences, and in ignorance of them act at their own peril. (*e*)

Read 1 Bl. Com., pp. 463, 464; Walker, Lect. xv, Lect. xvi, pp. 275-277; 2 Kent, Lect. xxxi, p. 233; Markby, §§ 755-757.

(*a*) 3 Harr. (Del.) 557.

(*b*) 76 D. 409; 88 D. 630; 102 U. S. 300 (313); 51 R. 676; 37 R. 412.

(*c*) 17 D. 179.

(*d*) 13 D. 161.

(*e*) 22 D. 652.

§ 26. Of the Control of an Infant over his Person and Property.

The status of an infant varies from the normal status of the ordinary citizen in the five following particulars: (1) Control over his own person and property; (2) Power to bind himself

by contracts; (3) Liability for torts, or injuries to the persons and property of others; (4) Responsibility for crime; (5) Subjection to the decisions of the courts. The custody and control over the person and property of an infant vest primarily in the State. According to the modern idea of political institutions the State is the true *parens patriæ*, the father and guardian of all its people, especially of those who for any cause are unable to take proper care of themselves; and this paternal supervision it exercises both through the laws which it frames and through its duly appointed officers and tribunals, but principally through the class of courts called Courts of Equity, which have full jurisdiction over infants and can place them and their estates under such control as it deems expedient. (*a*) Unless the law through some of these agencies interferes, however, authority over the persons of legitimate children resides in their father, (*b*) and in the event of the death of the father the same authority devolves upon the mother, (*c*) or some legally designated guardian. (*d*) This authority the parent cannot transfer to any other person except by binding the infant, with his consent, to some third party as an apprentice, thus substituting the master for himself in the protection and guidance of the child; (*e*) or by procuring its adoption in the manner provided by the local statutes, and thereby transferring to the adopting parent the powers which previously vested in himself. (*f*) Over the property of their minor children parents, as such, have no control, (*g*) but its management is entrusted to guardians or trustees appointed by the will of the donor of the property or by a competent court. (*h*) This privation of self-control of the infant, being intended wholly for his benefit, is not without its limitations. An infant who has no parent or guardian, or whose parents or guardians neglect their duties, may do any act which circumstances render essential to his welfare. In obedience to the instincts of their nature, infants of marriageable age — twelve years for females, fourteen years for males, unless otherwise fixed by statute — may marry, and if they have offspring, may provide in any necessary manner for their protection and support. (*i*) In fulfilment of his duty to the State an infant may enlist in

the army or navy; (*j*) and in order to satisfy his inclinations of affection or charity he is permitted, by the statutes of some States, to make a will and distribute among the objects of his bounty his real as well as his personal property. Illegitimate children are, in the eye of the law, related only to their mothers, to whose custody they are entrusted by the State subject to the same control by courts of equity. (*k*)

Read 1 Bl. Com., pp. 446-459, 461-463; 2 Kent, Lect. xxix, pp. 205, 206, 208-215.

(*a*) 44 D. 708.

(*b*) 35 D. 653 (663-668); 53 D. 301; 1 St. 307; 6 St. 653.

(*c*) 6 St. 676.

(*d*) 29 D. 707, note; 77 D. 534.

(*e*) 45 D. 399; 82 D. 223; 2 St. 177, note; 3 St. 115.

(*f*) 14 St. 500 (506-508); 39 St. 196, note.

(*g*) 71 D. 105.

(*h*) 97 D. 449.

(*i*) 66 D. 515; 71 D. 555.

(*j*) 137 U. S. 157.

(*k*) 56 D. 206, note; 56 D. 257, note; 37 St. 118.

§ 27. Of the Power of an Infant to make a Contract.

An infant cannot make a binding contract except for necessities, nor even for these if they are already provided, or would on his request be provided, by his parents or guardians. (*a*) Necessaries are such things as food, clothing, shelter, education, medical attendance, and other matters without which the infant would suffer physical or mental detriment or be deprived of some advantage which his station in life or the condition of his property requires that he should be permitted to enjoy. Here, again, the law is strenuous to protect the interests of the infant, not to prevent him from receiving benefits; and judges what is necessary for him in each instance by its effect upon his personal welfare. (*b*) A binding contract is one whose performance will be compelled by law, or whose breach subjects the party in fault to the payment of damages to the injured party. Not every seeming contract is of this character. Parties may go through the form of mak-

ing a contract, and yet the contract may, for some reason, be absolutely void and in every respect as if it had not been made. Or parties may make a contract by which one of the parties will be bound or not as he chooses, while the other party will be bound if the former chooses to be, but not otherwise. Such a contract is called a "voidable contract." It is not a void contract, because it has a real existence as a contract and is capable of being made binding *ab initio* by a subsequent act of ratification. Nor is it a binding contract, because one of the parties at least is free to repudiate it and so reduce it to complete non-existence. Contracts of an infant which are not for necessities are, unless clearly injurious to him, voidable contracts. (c) The infant may ratify them after he becomes of age, and so make them binding on the other party as well as himself; or he may repudiate them and so destroy them both as to himself and to the other party. (d) Whether in any given case he must by some overt act repudiate in order to destroy, or ratify in order to confirm, depends on the condition of the subject-matter of the contract at the time when the question arises. If the contract is still executory, — that is, if neither party has done anything in pursuance of it, — it is *prima facie* invalid as to the infant and needs his ratification to make it good. (e) If the other party has performed his part, the contract is *prima facie* valid against the infant also and he must disaffirm it in order to escape its obligations. (f) If both parties to a voidable contract are infants, neither can so ratify the contract as to bind the other, but either may disaffirm it and render it completely void.

Read 1 Bl. Com., pp. 465, 466; 2 Kent, Lect. xxxi, pp. 234-239.

(a) 75 D. 445; 15 D. 612; 67 D. 258.

(b) 42 D. 537; 40 D. 512; 20 R. 160; 34 R. 431; 34 R. 449.

(c) 23 D. 526, note; 26 D. 251; 25 St. 708.

(d) 17 D. 735; 10 D. 709; 7 D. 134.

(e) 21 D. 589.

(f) 57 D. 349 (350).

§ 28. Of the Power of an Infant to make a Contract, continued.

Applying these distinctions to the apparent contracts of infants the law reaches the following results. Where an infant makes a contract for necessaries, which he cannot obtain through his parent or guardian, he is bound by it and must pay the stipulated or customary price. (*a*) Co-operating with his parent or guardian he may bind himself out as an apprentice to receive from his master instruction and support in consideration of his obedience and services. (*b*) If he agrees with an adult employer to work for wages he may do the work or not as he pleases, but if he offers to do it the employer must accept it and recompense him according to the terms of his contract. (*c*) Should he enter into partnership with an adult, the adult cannot retire from the firm but the infant is not obliged to continue in it any longer than he wishes; as long as he does remain he is entitled to his share of the profits and yet does not become individually responsible to its creditors for the partnership debts. (*d*) He may act as the agent, attorney, or servant of others, binding them by his acts and receiving compensation for his labor, but he cannot appoint a servant, agent, or attorney for himself except as a means for obtaining those necessaries for which the law allows him to contract. (*e*) When he buys or sells property he may subsequently ratify or revoke the sale. If the property is personal property he may revoke within a reasonable time even during his minority, but he cannot ratify the purchase or the sale of any property, nor revoke that of real property, until after he becomes of age. (*f*) The ratification may be made by acts or words, or by mere failure to act. If he continues to enjoy the fruits of a transaction after the law allows him to repudiate it, his acquiescence is regarded as a confirmation. Conversely, an act inconsistent with the validity of the former contract, such as the conveyance of the sold property to another person, or any assumption of dominion over it, or the return of the purchased articles to the seller with a demand for the repayment of the price, amounts to a revocation. But as a contract of sale is always per-

formed at least on one side by the delivery of the property sold, the presumption is in favor of the contract and the act of revocation must be prompt and unequivocal. (*g*) Where it is possible a revocation must be accompanied by the restoration to the other party of the property purchased or the price received, but if the infant party is unable to do this he may nevertheless revoke the sale although the other party suffers serious injury. (*h*) For those who deal with infants are considered as accepting in advance all the losses which may fall upon them through the exercise by the infant of his legal rights. The same power to revoke the contracts of an infant, in case he dies in infancy, vests in his heirs and representatives to whom the property, if unaffected by the contract, would descend, and they receive it, if they so elect, free from the obligations which his unratified agreements seem to impose upon it. (*i*)

Read 2 Kent, Lect. xxxi, pp. 239, 240, 242.

(*a*) 23 St. 780.

(*b*) 34 D. 537.

(*c*) 23 D. 654; 14 R. 580; 32 R. 152.

(*d*) 7 D. 229; 1 St. 379.

(*e*) 10 D. 747; 65 D. 756.

(*f*) 65 D. 194.

(*g*) 10 Pet. 58; 9 Wall. 617; 102 U. S. 300; 167 U. S. 688; 18 St. 569, note.

(*h*) 62 D. 732, note; 46 R. 314.

(*i*) 19 D. 71.

§ 29. Of the Liability of an Infant for his Torts.

An infant is liable for the injuries he inflicts upon the persons and property of others, though not in all cases precisely to the same extent as an adult. To refrain from injuries of this kind requires but little exercise of the intellect and will, and the law deems it safer to demand this exercise of infants than to subject the rest of the community to the ravages of dangerous and irresponsible human beings. But in estimating their liability attention is paid to their immaturity and

inexperience. Where the element of intention enters into a wrong as one of its integral parts, as in the case of fraud, or where equivocal acts must be interpreted, the mental operations of the infant are not judged by the same standard as those of the adult. With exceptions such as these there is, however, no difference in their responsibility. For trespasses to land, for assaults, libels and slanders, for injuries to or the misappropriation of personal property, they are liable in damages although the wrongful act was perpetrated at the instigation and under the direction of an adult. (a) But where a wrongful act or omission is so related to a voidable contract that to hold the infant liable for the wrong would be an indirect enforcement of the contract, the protection which the law affords him against the contract extends to the wrong also, and he can be sued neither upon the one nor for the other. (b)

Read 2 Kent, Lect. xxxi, p. 241.

(a) 84 D. 741; 33 D. 177, note; 17 D. 756; 4 R. 290; 50 R. 381, note.

(b) 58 R. 53; 56 D. 85.

§ 30. Of the Responsibility of an Infant for Crime.

An infant under seven is incapable of crime. This is an arbitrary rule of law, variable at the pleasure of the State, but adopted in order to escape the necessity of ascertaining in every individual case whether the accused infant has reached that degree of mental and moral development which renders him justly responsible for his conduct. Every crime includes a criminal intent; that is, an intellectual apprehension of the nature and unlawfulness of the criminal act and a voluntary assent of the will to its performance; and this requires a certain amount of knowledge, reasoning power, and self-control. The investigation of this question, in reference to infants of tender years who may happen to commit unlawful acts, would not only be exceedingly difficult but in most instances would lead to very unreliable results; and the law,

following the common opinion of mankind which fixes the "age of reason," or the date when moral responsibility commences, at seven years, assumes that prior to that time the infant could not have a criminal intent and therefore could not be guilty of a crime. Infants over fourteen years of age, unless insane or otherwise relieved from responsibility, are capable of crime. At that age they have attained physical and mental maturity, are able to marry and become heads of families, and properly stand before the criminal law on the same footing as adults. Between the ages of seven and fourteen the law neither asserts nor denies capacity. Many children develop so slowly that even at fourteen they can scarcely entertain a criminal intent; others so rapidly that they possess knowledge and conscience and self-control at the age of seven. Within this debatable period the law, therefore, requires that every case shall be examined by itself as best it may, presuming always that capacity does not exist unless its existence is clearly proved. (a). Another question, similar enough to this to be sometimes confounded with it but in reality quite different, arises in reference to the capacity of infants to commit certain peculiar crimes. There are some crimes in which the external act derives its unlawful character from the intent, or purpose, or design with which it is committed. The sending of poison to another, for example, is not of itself a crime, but if sent with the design that the receiver shall take it and die it is an attempt to kill. The signing of another's name to a promissory note for amusement is not contrary to law, but if done with the intent to defraud anybody it is the crime of forgery. This kind of intent, which is evidently very different from the criminal intent above described as the test of capacity for any crime whatever, is called a "specific intent," is present in comparatively few crimes, and cannot exist unless the person performing the act knows what might possibly be accomplished by it, and wills that a particular result should follow it. Adults as well as infants may thus perform acts which, if coupled with the specific intent to produce certain foreseen consequences by means of those acts, would be crimes, but which, because

they do not know that these consequences may attend the acts, or because they do not design that such consequences shall attend them, are not offences against the law. This question of specific intent, with its elements, — knowledge and purpose, — is always open to inquiry in every case where a crime of which specific intent is an ingredient is charged, and its existence must be clearly proven even where the accused is of full age and mental capacity. And since, the younger infants are, the less knowledge and the less definite purpose to achieve injurious results they probably possess, the law presumes against the presence of a specific intent in their minds the more strongly in proportion to their youth, and requires the more positive and convincing evidence of its existence. (*b*)

Read 1 Bl. Com., pp. 464, 465; 4 Bl. Com., pp. 22-24.

(*a*) 70 D. 494, note; 7 D. 592; 4 St. 207; 45 D. 536.

(*b*) 5 St. 905.

§ 31. Of the Subjection of Infants to the Decisions of the Courts.

According to the general laws which affect persons of normal status, an action for an injury may be brought and pressed to judgment as soon as the injurious act is committed; either party is able to appear in court in person or by attorney and prosecute or defend the suit; and both parties are bound irrevocably by the final judgment. The status of an infant is governed in these respects by somewhat different rules. An infant cannot institute a legal proceeding by himself alone, but must sue by his guardian if he has one, and if not by his "*prochein ami*" or "next friend," who may be his father or any other person sufficiently interested in him to undergo the trouble of the lawsuit and become responsible for the taxable costs. (*a*) When an infant is sued he cannot appear and defend alone, but only by his guardian, and if he has no guardian a guardian *ad litem* must be appointed for him by the court. The particular powers and obligations of

a guardian *ad litem* are fixed by the law of the State in which he is appointed, but it is his general duty to protect the rights of the infant in the litigation. In selecting such a guardian the court is bound to exercise due care. The infant must have been legally summoned into or be present in the court, the concurrence of his parents in the appointment must be obtained if possible, and interference of the adverse party or his counsel with the appointment must be effectually excluded. In default of such a lawfully appointed guardian no judgment rendered against an infant defendant can be valid, and though it is voidable only and not void, and consequently cannot be attacked in an independent proceeding, it may be reversed on a writ of error brought either by the immediate blood relations of the infant or by the infant himself after his majority. A judgment in favor of an infant defendant against an adult plaintiff is valid in spite of irregularities in, or the entire absence of, the appointment of a guardian *ad litem*. (b) Again, in former times there were certain actions relating to real property, which even though lawfully commenced could not be prosecuted to judgment against an infant, but the infant (called *the parol* or pleader) could *demur*, or ask for a suspension of proceedings, and by this *parol demur* postpone the farther consideration of the case till after his majority. Substantially the same privilege is his at present whenever the rendition of a judgment against him would be the indirect enforcement of a contract which he will have a right to disaffirm after he becomes of age. In other cases the courts of equity, which have supreme jurisdiction over all the affairs of infants, may entertain such actions and enforce such decrees with reference to his real and personal property as his own interests and justice to other parties may require. (c) Suits for or against an infant must be brought in his own name notwithstanding his inability to appear alone and prosecute or defend, and service of process upon him in the mode designated by the law of the State is sufficient though the mode be one which, as for instance by publication in a newspaper, would in all probability be ineffectual. (d) Where his infancy would be a defence he can

always assert it and rely upon it, whatever may have been his previous representations to the contrary. (e)

Read 1 Bl Com., p. 464.

(a) 1 D. 26; 21 D. 70; 30 D. 425; 19 D. 409.

(b) 74 D. 83; 23 St. 858; 8 Pet. 128 (144).

(c) 89 D. 172; 74 D. 291.

(d) 103 U. S. 435; 157 U. S. 195 (198).

(e) 7 St. 418; 44 D. 283, note.

ARTICLE III.

Of the Status of Insane Persons.

§ 32. Of Insanity in General.

Another class of persons whose status is abnormal embraces those who are *non compos mentis*, or of unsound mind. Persons of unsound mind were anciently divided by the law as well as by common opinion into two groups: Idiots and Lunatics. Idiots were those whose insanity was permanent; Lunatics those who had lucid intervals. The former were irresponsible for their acts, were subject to the physical control of relatives or public officers, and their property vested in the sovereign, as their legal protector, during their lives. The latter, during their lucid intervals, enjoyed the rights and were under the obligations incident to a normal status, but were at other times in most respects in the same legal condition as idiots. The subject of insanity was then but little understood. Many mental disorders were regarded and treated as voluntary eccentricities, and the presumption of sanity, which then obtained and still obtains in reference to every person, was sufficient to outweigh all evidence of acts or words which did not demonstrate either that the person had no available intellect and will, or was for the time being wholly beyond their control. (a) With the advance of medical science, however, the disorders of the mind have been perceived to be of such great variety, and every variety of so many different degrees, that it might almost be concluded that the

really sane man is the exception rather than the rule. In every degree of every one of these varieties the state of the intellect and will departs more or less from that in which the will and intellect of a person of normal status are supposed to be, and in which they must be in order to make him a proper subject for the provisions of the general law. This variety of already known mental conditions, and the fact that science is rapidly advancing in the discovery of others, renders the whole subject an extremely difficult and uncertain one in its bearings upon legal responsibility, and compels the investigation of each case by itself not only as to the variety and degree of the mental aberration but as to the effect of that aberration upon the particular contract, crime, or other act or relation which may form the subject of the controversy. Therefore, without attempting any detailed classification of mental diseases, which at the best could be only tentative and open to revision, a few distinctions helpful to the understanding of existing rules of law may be briefly indicated.

Read 1 Bl. Com., pp. 302-306; Markby, §§ 723-733.

(a) 29 D. 33.

§ 33. Of the Varieties and Degrees of Insanity.

And first, insanity may extend to both the intellect and the will, or it may affect the intellect leaving the will free, or it may affect the will while the intellect remains unclouded. Insanity affecting the intellect, if of sufficient degree, whether the will is disordered or not, is always recognized by the law as changing the status of the person and as bringing him under the special rules relating to the insane. (a) Insanity of the will, called also "moral insanity" and "emotional insanity," has sometimes been held by the courts to be impossible; sometimes, though admitted to be possible, it has been repudiated as too difficult of proof to warrant its legal recognition as a release from responsibility, especially for crime; but is now more properly treated as a fact to be investigated like the condition of the intellect by the best available method, the responsibility of the person to be measured by what can

be ascertained concerning his actual power of self-control. (*b*) Second, insanity of the intellect may consist in simple weakness of the mind due to old age, bad habits, physical disease, arrested development, or other causes, rendering the person unable to perceive, or to apprehend, or to judge of things, as correctly as sane persons ordinarily do; or it may consist in the subjection of the intellect to delusions, to unreal and imaginary conditions of things which are honestly accepted by the intellect as true and thus govern the convictions and conduct of the person. Third, these disorders of the intellect or of the will may be either total or partial. Weakness of the mind may extend to all its faculties, disabling the person from perceiving, apprehending, or judging anything correctly; or it may be confined to one or more faculties, leaving the others comparatively sound. For example, in senile dementia, or that weakness of mind which frequently accompanies old age, all the mental faculties are impaired and sometimes become wholly dormant; while in that class of persons who are called "incapables" to distinguish them from those more evidently insane, their insanity manifests itself in want of judgment rather than in the inefficiency of their perceptive or apprehensive powers. Delusions also may pervert the operations of the entire intellect or may control them to but a very limited degree. An insane person, for instance, who believes himself to be some other person or a being of some other race than man, labors under a delusion which changes his entire environment, as he contemplates it, and consequently affects all the conclusions of his intellect and all his actions. Another, whose delusion consists in the erroneous conviction that his wife, or child, or parent is his deadly enemy may be sane in thought and conduct as to every other person and as to all the affairs of life in which the parent, child, or wife is not concerned. The will may be so weak by nature, or as the result of long disuse or of external violent suppression in early childhood, that the person "has no will of his own," no proper self-control, but is the mere passive instrument of his own emotions or of the instigations of others; or, on the other hand, this want of self-control may

exist only in reference to one special impulse which the person is unable to resist, as to steal articles of a particular character, to set fire to certain kinds of buildings, to kill or mutilate children or women in peculiar ways, — although as to all other influences he is able to yield or to refrain as he deems best. Fourth, insanity of the intellect or will may be permanent or temporary. Disorders which are due to causes from which there is no escape or recovery, such as infirmity of the mind arising from old age, or an inherent weakness of the will, continue during life, though not always with uniform intensity. The inability to resist a certain special class of impulses is also generally constant and incurable. Delusions are sometimes perpetual and sometimes transient; and temporary loss of self-control under the stimulus of some extreme emotion is even more frequent than a chronic weakness of the will. These transient disorders often occur suddenly without warning, enduring a few moments, days, or weeks, as the case may be, and then as suddenly and unaccountably disappear.

Read Taylor, Med. Jur. "Insanity."

(a) 17 D. 311.

(b) 83 D. 461; 11 R. 731; 15 Wall. 580; 14 St. 879; 16 St. 408.

§ 34. Of the Presumption of Sanity: Burden of Proof: Evidence of Insanity.

The foregoing general distinctions between the varieties and degrees of insanity considered from a practical rather than a scientific point of view, though by no means exhausting the subject, will render the rules of law relating to insane persons, and their application to particular states of fact, more fully and easily intelligible. As every person is presumed to be of normal status and subject to the ordinary rules of law until the contrary appears, so the question as to alleged insane persons always is whether their aberrations of mind or will are sufficient in character and degree to deprive them of that intelligence and freedom which all persons of

normal status necessarily possess. (*a*) This is a question of fact, the burden of proof in reference to which rests on the party who alleges the insanity, and he must support his allegation by evidence of insane acts, words, or habits on the part of the alleged insane person, not by the opinions of his family or neighbors or even of medical attendants unless coupled with such facts as show the opinions to be justifiable. (*b*) Moreover, the question of insanity as it arises in legal controversies always has relation to some particular occasion or transaction, such as the making of a will or contract, the commission of a tort or crime, or the appointment or removal of a guardian; and it is immaterial whether before or after that transaction or occasion the alleged insane person was sane or insane, except so far as his previous or subsequent condition may tend to show the state of his intellect or will at the date in question. (*c*) Nor is the cause which produced the insanity of any consequence provided the insanity actually exists. It is true that temporary insanity immediately superinduced by voluntary drunkenness is not accepted as an excuse for crime, but this is a rule of public safety, and here the criminal intent, which in a sober criminal is manifested only in the criminal act, expresses itself in the deliberate suspension of his direction and control over his own actions and the letting himself loose upon the community as an irrational and unrestrained implement of destruction equally responsible for the consequences as would be the owner of a vicious animal who should turn it out to prey upon the public. But this rule obtains only in the case of crimes and does not apply to private rights and obligations: and even crimes are overlooked where their perpetrator is permanently insane, or has become liable to repeated fits of insanity, as the indirect result of long continued habits of intoxication. (*d*)

Read Markby, §§ 751-754; Walker, Lect. xvi, pp. 277-280.

(*a*) 27 St. 689.

(*b*) 6 D. 58; 10 D. 444.

(*c*) 21 D. 732; 71 D. 431.

(*d*) 8 St. 886; 1 St. 595; 34 D. 340.

§ 35. Of the Power of an Insane Person to make a Contract.

The peculiar rules of law governing the status of insane persons relate to the following subjects: (1) The power of an insane person to make a binding contract; (2) His power to make a valid will; (3) His liability for his injuries to the private rights of others; (4) His responsibility for crimes; (5) His standing in the courts; (6) The subjection of his person or property to the control of a guardian. As to each of these subjects the practical distinctions between the varieties and degrees of insanity must be borne in mind. And first, as to the power of an insane person to make a binding contract. With the exception of those insane persons who have been expressly deprived of their contracting power by being placed under a legal guardian, the law presumes that every insane person had the capacity to make any contract which he went through the outward form of making. (*a*) There is no arbitrary rule in his case, as in that of infants, limiting his responsibility because he is in a certain general condition. Similar as the status of insane persons is to that of infants in many particulars, there is no true parallelism between them. The infant because he is an infant comes under special rules adapted to the condition of infancy and therefore equally applicable to every infant. But the special rules applied to insane persons are not prescribed with a view to any general condition of insanity in which all insane persons alike participate, although under the ancient ideas of insanity heretofore mentioned some such community of condition may have been incidentally recognized by the law. Hence the contract of an insane person is not void or voidable simply because he is insane, but only when his insanity, by reason of its character and degree, so affected him in the making of the contract that he could not have made it with that full intelligence and freedom of self-control which the law requires in order to make any contract valid. In reference to every apparent contract of an insane person there are, therefore, two points to be considered: (1) The nature of the contract; and (2) The variety and degree of the insanity. If the latter were such that the former could not have been understood in all its details

and consequences and freely accepted, the contract is not binding. If, on the contrary, in spite of his insanity the insane person could have comprehended the terms and obligations of the contract, and was not constrained to enter into it, his responsibilities under it are the same as those of any sane person would have been. (b) Thus the contract of an insane person for necessaries for himself, his wife or children, in pursuance of which the necessaries are delivered to and consumed by him, is so far valid that he can be compelled to pay for them the customary and reasonable price, since every insane person who can go through the form of purchasing necessaries may properly be chargeable with sufficient understanding of his bodily needs to render such a contract the concurrent act of his intelligence and will. (c) Contracts made by an insane person whose insanity consists in a special delusion, or an inability to resist particular impulses, are binding when they have no connection with and could not have been influenced by that impulse or delusion. Persons afflicted with an extreme general weakness of the mind or will, or under some delusion which covers the whole field of their experience, usually have no contracting power, though even in such cases its absence is not to be assumed without investigation. The contract of an insane person, when not binding, is now regarded as voidable rather than void, and consequently valid as against the sane party to it and capable of ratification or disaffirmance by the insane party if he ever regains the use of his faculties. (d) The extreme hardship of this doctrine to the sane party, who might thus lie under the obligations of the contract during the entire life of the insane party, although it was apparent that his insanity was incurable and that he never would be able to ratify and fulfil the contract upon his part, is somewhat relieved by the further rule that the contracts of insane persons when executed are valid if the sane party entered into them in good faith, without knowledge of or a sufficient reason to suspect the insanity of the insane party, and where he cannot be reinstated in his former rights and possession should the contract now be held invalid. (e) The ancient doctrine that the contract of a hopelessly insane

person was void was the simpler and perhaps the better one, leaving both parties free as if the contract never had been made.

Read (a) 15 D. 354, note; 17 St. 686; 71 St. 418, note.

(b) 118 U. S. 127; 60 D. 313; 83 D. 514.

(c) 55 D. 430; 45 D. 700.

(d) 89 D. 705; 39 D. 744; 15 Wall. 9; 22 D. 372; 1 R. 309; 47 St. 463; 66 D. 414.

(e) 92 D. 428; 97 D. 592.

§ 36. Of the Power of an Insane Person to make a Valid Will.

The validity of the last will and testament of an insane person is determined by the same method as that of his contract. It is sometimes said that it requires less mental capacity to make a will than to make a contract, but the truth of this statement depends upon the comparative intricacy of the contract and the will and the relations of their respective provisions to the peculiar mental disorders of the maker. Some wills require greater mental capacity than some contracts and some contracts are more difficult to comprehend than some wills, while both wills and contracts are equally liable to be without or within the influence of their maker's idiosyncrasies. In order to make a valid will it is necessary that the testator should be able to understand what property he owns, to whom his property would descend if he made no will, to whom in justice and in obedience to the dictates of natural affection it ought to go at his death, and to whom it will go under the provisions of the will as he has made it, and that he should freely determine that it shall go to the persons and in the manner expressed in the will. A simple testament distributing property among immediate relatives without trusts or other intricate legal limitations obviously requires very little mental power or force of will compared with one which turns the current of descent away from natural heirs and vests the estate in strangers coupled with conditions and obligations whose interpretation taxes the wisdom

and sagacity of the ablest lawyers. Here, therefore, as in reference to contracts, every case must be judged by itself, and if the testator at the time he made the will in question had intelligence enough to know what he could do, what he ought to do, and what he did do with his property, and really intended to do with it what he has done, his will is valid however weak his mind may otherwise have been, and under whatever insane delusions and impulses, not affecting him in the making of his will, he may have labored. (*a*) This description of the capacity requisite to make a valid will shows that the will of an insane person is invalid when he is wholly without mental powers or self-control, or when the nature of its provisions is such that he could not have comprehended it, or when it is made under the influence of some general or special delusion or in obedience to an impulse at once unreasonable and irresistible or under the pressure of external conditions which perverted his judgment or exercised such undue control over his testamentary act that it could not have been entirely voluntary. (*b*)

Read (*a*) 17 D. 722; 50 D. 329; 51 D. 253; 14 R. 79; 36 R. 422; 8 R. 181; 6 R. 703; 84 D. 220; 21 D. 732; 63 St. 72, note.

(*b*) 16 D. 253; 19 D. 402.

§ 37. Of the Liability of an Insane Person for his Torts.

An insane person is liable for the injuries which he commits against the persons and property of others to the same extent as if he were sane, except where such injuries involve a mental operation or a purpose of which he is proved to be incapable. Notwithstanding his infirmities of mind and will it is only just that other persons should be protected against or compensated for the harmful consequences of his unlawful acts; for his insanity is his misfortune not theirs, and if he cannot control his conduct he has no legal right to be at large. Infants are bound by equally stringent rules, and yet their condition is natural and inevitable, and liberty is necessary to their education and development, while insanity, if some-

times unavoidable, is at the least unnatural, and when combined with freedom from restraint is dangerous alike to its victim and to the community. Acts whose unlawfulness depends upon the intent or knowledge with which they are performed, among which are deceits, conspiracies, and appropriations of property under false claims of ownership, entail upon him no responsibility when such intent or knowledge is beyond his powers, for in the absence of this knowledge or intent the wrong itself is not committed even by a sane person, and it is immaterial whether their absence is due to the presence of opposite ideas and purposes or to simple incapacity. The negligence of an insane person is judged by the same standards as that of other persons, unless those dealing with him and suffering through his negligence had notice of his want of understanding or his lack of self-control, for every person entering into relations with others is entitled to assume that they are sane and to expect from them the care and diligence which sane persons are required to exercise, and unless in some way put upon his guard is not compelled to investigate their mental condition before placing his person or property within their power. But where either the negligence or the wrongful act of an insane person are so connected with his contract as to constitute its violation and the contract itself is one which he had not the capacity to make, he is not liable for the act or the neglect. (*a*)

Read (*a*) 42 St. 743.

§ 38. Of the Responsibility of an Insane Person for Crime.

The responsibility of an insane person for his criminal acts is determined by the same comparison between his actual mental or volitional condition at the time the act was committed and the intents and purposes which are essential to the perpetration of the crime. There is, as has been already explained, no crime without a criminal intent, a consent of the will to the performance of a known unlawful act. This requires that the criminal should have mind enough to be able to understand the nature of the act and that it is unlawful

or morally wrong, and that he should have sufficient self-control to be able to refrain from doing it. The law presumes that all sane persons know the law and consequently know when they commit unlawful acts, and intend to do whatever they actually perform, and hence imputes the criminal intent to every voluntary performer of the act who has capacity enough to comprehend its nature as prohibited by law. But where a criminal act is committed when the mind or will is so weak that the act is not intelligent and voluntary, or when the perpetrator is under the control of a general or special delusion which so far perverts his apprehension or judgment that he does not comprehend the nature and consequences of the act or is convinced that it is right or necessary, or when he is impelled to commit the act by an irresistible impulse in spite of his knowledge and consciousness of wrong, the act is not a crime, because the criminal intent without which crime is impossible does not exist.^(a) What has been said concerning the temporary insanity arising from voluntary drunkenness should be here repeated. If through indulgence in strong drink or drugs a man has deprived himself of intelligence and free will, he is none the less insane and unable to understand and control his actions than if his insanity had been congenital or resulted from disease, and if insanity itself exempted its subjects from liability for crime the drunkard could not be denied the benefit of the exemption. But it is the law, not the individual or his condition, which determines the nature of crimes and who shall suffer punishment for them, and if the interests of society demanded that insane persons or even infants should be held to the full measure of responsibility attached to sane adults, the law could justly require it. The law does not assert that persons insane through drink are not insane, nor that they understand and will the acts which they commit, but that having voluntarily put themselves into this condition they have, in advance, assumed all its consequences and must suffer the same penalties as if their acts had been intelligently and purposely committed; and this it does because society would otherwise be without adequate protection against the dangers to which

the presence of multitudes of irresponsible drunkards would subject it. But where the reason of the rule ceases the law itself ceases, and when a drunkard through long self abuse becomes actually and permanently insane — a case comparatively rare — he stands before the law precisely like any other insane person. (*b*) In reference to the specific intent which is in some crimes an essential part of the criminal act, the question is always open, both as to voluntary drunkards and all other persons, whether the external action or omission was coupled with the particular intent or purpose which makes the omission or the act a criminal act; and on this question the mental capacity of the accused to entertain and act upon the purpose or intent is the principal matter for investigation, since if incapable of conceiving this particular design, or of purposing to accomplish it by means of this particular external action, the required specific intent could not exist and consequently the criminal act could not be committed. (*c*) In criminal cases especially the general presumption of sanity must be overcome by reliable and preponderating evidence. It is the duty of the accused to offer testimony sufficient to show that he was probably insane when the act was performed, and the interests of society require that he should escape punishment only when there is a reasonable doubt whether he was mentally and morally capable of the crime. (*d*) When acquitted on the ground of insanity he is by the laws of some States, and ought to be by the laws of all, subjected to such restraints as would effectually protect the community against further repetitions of his irresponsible acts. An insane person while insane, cannot be tried or punished, and proceedings against him, though commenced, must be suspended until his recovery. (*e*)

Read 4 Bl. Com., pp. 24-26.

(*a*) 97 D. 162, note; 99 D. 634; 36 D. 398, note; 41 D. 458; 83 D. 231; 31 R. 360; 60 R. 193, note.

(*b*) 40 R. 556, note; 72 D. 484; 37 St. 811; 20 R. 292, 43 R. 799.

(*c*) 45 D. 558; 36 R. 13; 26 St. 44.

(*d*) 69 D. 642; 80 D. 154; 160 U. S. 469.

(*e*) 47 D. 216.

§ 39. Of the Standing of an Insane Person in the Courts.

An insane person, not under legal guardianship, may sue and be sued like any other person in actions for private injuries, and will be bound by the judgment of the court if he has appeared in the case and has had an opportunity to be heard. (*a*) Where legal proceedings instituted by him necessitate contracts, or where compliance with the orders of the court would place him under contract obligations, the validity of these must be determined by his capacity to enter into them; and if he is unable to make them, and the litigation cannot be carried on without them, it must cease, or a guardian must be appointed for him by whom it may be conducted. Where an insane person is a defendant, and manifestly incapable of protecting his own interests, the court will interfere and provide him with a suitable attorney. (*b*) An insane person may testify as a witness in a lucid interval, or when he understands the obligation of an oath, can comprehend the questions put to him and can state correctly what he has seen and heard; and of these qualifications the court in every instance is the judge. (*c*)

Read (*a*) 54 D. 614; 32 D. 68; 74 D. 503.

(*b*) 79 D. 67.

(*c*) 107 U. S. 519.

§ 40. Of the Guardianship of Insane Persons.

An insane person is always regarded as the ward of the Staté, which exercises supervision over him, when it deems best, through courts of equity or statutory courts endowed with equity powers, by whom a guardian is appointed for him to take custody of and have control over his person or his property or both, as the necessities of the case require. (*a*) Preliminary to the exercise of this supervision the presumption of sanity must be overcome by an investigation of his mental condition. On the application of the insane person himself, or of any one who may be interested in him, a commission of lunacy issues from the court to certain individuals to ascertain by evidence or otherwise the state of his intellect and

will and report the result of their researches to the court. In some States, under their local practice, this examination is conducted directly by the court. If the person is found to be insane the court makes such a disposition of him and his estate as his interests and those of society demand. He may be committed to an asylum where he will be kept under restraint, or permitted to go at large under such oversight as the guardian now appointed for him may be directed to give. (b) His property may be taken out of his control and entrusted to his guardian to manage for his benefit, or he may be allowed to keep and use it subject to the prohibitions of his guardian. He may be entirely deprived of all contracting power so that his apparent contracts will be wholly void, or he may be permitted to make contracts which become valid by the ratification of his guardian. (c) In short, whatever restrictions the court from time to time thinks necessary for his welfare may be placed upon his liberty and modified or removed as his capacity to take care of himself and his estate diminishes or improves. This power to appoint guardians for insane persons, which has for centuries been vested in equity courts, is now commonly extended by statute to reach spendthrifts, habitual drunkards, and all other species of "incapables," who for this purpose are classed with the insane. While under guardianship the personality of the insane person is superseded by that of the guardian according to the scope of the guardian's powers, and he can do nothing of himself within the field allotted to his guardian. When the guardian takes possession of the ward's estate he must support him from it so far as may be possible and necessary, and after his death or restoration to complete capacity must account to him or his legal representatives for whatever balance may remain unexpended in his hands.

Read (a) 15 St. 386; 6 St. 913; 41 St. 258; 46 D. 280; 77 D. 572.

(b) 1 R. 334.

(c) 68 D. 465; 22 D. 655.

ARTICLE IV.

Of the Status of Married Women.§ 41. **Of the Legal Character and Validity of Marriage.**

A third form of abnormal status is that of *Femes Covert*, or Married Women. The marital relation, as regarded by the law, is an institution based on public policy, established by the laws of the State, and subject both as to its formation and destruction to State control. It consists in the voluntary union of a man and a woman for all the purposes embraced in the legal conception of marriage. It is created by the consent of the parties to be now and hereafter husband and wife (*a*); but is dissoluble only by death or by the action of the State, which can terminate the relation, with or without cause, at its pleasure. (*b*) No ceremonies are necessary to its validity unless expressly made so by statute (*c*), and if valid by the laws of the State where it is created it is valid in all other States except when contrary to their settled public policy or to their standards of morality. (*d*) Marriage, in legal contemplation, is therefore not a mere ecclesiastical ceremony entailing the observance of religious duties, nor a mere contract the terms of which the parties are competent to fix, nor a combination of the two, but a true change of status after which the female party at least occupies an entirely different position before the law. (*e*) Variations in this status may be caused by the legal separation of the parties or by their divorce *a mensa et thoro*. By death or divorce *a vinculo* the status itself is destroyed, and the normal status of both parties, or of the survivor, is restored. (*f*)

Read 1 Bl. Com., pp. 433-442; 2 Kent, Lect. xxvi, pp. 75-93;
Holland, Ch. xii, pp. 216, 217.

(*a*) 22 D. 563; 53 D. 164.

(*b*) 20 D. 402 (407, 408); 48 St. 928.

(*c*) 2 St. 105.

(*d*) 10 St. 648.

(*e*) 125 U. S. 190; 58 D. 59; 85 D. 658.

(*f*) 65 D. 319, note.

§ 42. Of the Status of Married Women under our Ancient Laws.

Under the ancient rules of the common law the status of married women departed more widely from a normal status than that of any other class of persons. In fact, even her personality itself was suspended and merged during the coverture in that of her husband, with whom she became in law one person and that person the husband. (*a*) As a consequence of this her husband acquired the control over all her acts and might even by force compel her obedience. (*b*) She was obliged to follow him in his various changes of abode, and could not acquire a legal residence of her own unless deserted by him or for the purpose of seeking a divorce or already separated from him by the intervention of the courts. (*c*) Contracts subsisting between them at the time of the marriage became null and void (*d*); no new legal contracts were possible between them while the marital relation lasted except through third persons as trustees; nor could the wife contract with any other person unless abandoned by her husband and thus restored to the legal capabilities of a *feme sole*. (*e*) All her personal property which she had in her possession at the date of the marriage instantly became the property of the husband, and all her claims and rights of action against others vested in him to be collected by him and applied to his own use if he chose. (*f*) Her temporary interests in lands, the rents and profits of her real estate (*g*), and all her services and earnings while she was his wife (*h*), were also his, and if they owned joint property the dominion over it resided in him during his life or until the marriage relation was legally dissolved. (*i*) Moreover, the merging of her personality in that of her husband delivered her from many of the legal responsibilities of a person and imposed them upon him. By the marriage he became liable for all her antenuptial debts (*j*), for her adequate support according to her station in life (*k*), for all her private injuries to the persons, character and property of others (*l*), and for all the crimes which she committed in his presence and by his command except treason, robbery, and murder. (*m*) She had no stand-

ing in the courts apart from him, and could neither sue nor be sued without making him a party except in her own actions against him for a separation or divorce. (*n*) Communications between them were considered sacred, and neither could be compelled to divulge them even under the sanction of an oath. (*o*)

Read 1 Bl. Com., pp. 442, 415; 2 Bl. Com., pp. 433-436;
2 Kent, Lect. xxviii, pp. 129-162, 179-187;
Walker, Lect. xiv.

- (*a*) 56 D. 288.
- (*b*) 86 D. 436, note; 98 D. 78.
- (*c*) 76 D. 440; 21 How. 582; 23 D. 549.
- (*d*) 53 D. 236.
- (*e*) 45 D. 171; 64 St. 854, note.
- (*f*) 79 D. 73; 47 D. 120; 82 D. 144; 83 D. 351.
- (*g*) 31 D. 257.
- (*h*) 13 St. 847; 39 D. 623; 73 D. 323.
- (*i*) 10 St. 94; 26 St. 475; 38 St. 430.
- (*j*) 60 D. 258; 98 D. 587.
- (*k*) 33 St. 917; 28 St. 362; 10 D. 458; 66 D. 137.
- (*l*) 37 St. 374.
- (*m*) 6 D. 105, note; 8 R. 422; 94 D. 684.
- (*n*) 15 D. 673; 66 D. 137; 47 R. 112.
- (*o*) 29 St. 405.

§ 43. Of the Status of Married Women under our Present Laws.

In more recent times, however, these exemptions and disabilities which once attached to the status of married women have been variously modified, both by the action of courts of equity and by legislative enactment. The principal spheres of influence of courts of equity have been the separate estates of married women, and beneficial contracts between them and their husbands. Instances occasionally arose where property became vested in a wife under express conditions which excluded her husband from any interest in it or control over it, and as it then could have no owner or personal representative except the wife, the courts of equity took notice of her

relation to it (as the courts of law could not do) and sustained her claims and contracts in regard to it as if she were still single and unmarried. (*a*) Beneficial contracts between married persons as to their separation when it became no longer possible to live peaceably together (*b*), or as to transfers of property from one to the other, though void at law, were also recognized and enforced in equity as if made between parties having no legal disabilities in reference to one another. (*c*) The changes introduced by statute have been still more extensive. Modern ideas as to the mental capacity of woman, as to the character of the marital relation, and as to the true interests of the parties to it—ideas largely resulting from changes in economic conditions and the consequent ability of woman to dispense with the support of man—have led to the adoption of statutes which are inconsistent with the theory that the personality of the wife is merged in that of the husband, and which recognize in her a greater or less degree of self-control and individual responsibility. But not in all States under the jurisdiction of the common law have these statutory modifications of the earlier rules been identical. In some, they seem to tend toward the complete severance of the wife's personality from that of the husband and the entire emancipation of her property as well as her person from his protection and authority. In others, the law has been changed only in reference to such details of her rights and duties as the conditions of modern society imperatively require. Thus each State has its own system of laws governing married women, and sometimes different systems applied to parties married before or after certain dates, and sometimes different systems under any one of which the parties may elect to live. Resemblances between these systems indeed exist not only in the ancient rules which they still retain, but in the provisions which render married women responsible for their own torts and crimes (*d*), or release their husbands from their antenuptial debts, or make them the owners under certain limitations of their real and personal property (*e*), or recognize in them a measure of contracting power. (*f*) But for an accurate knowledge of any of these systems as applied to married

persons the student must resort to the Constitution, statutes and decisions of the State in which they have their legal residence or domicile. (*g*)

Read 2 Kent. Lect. xxviii. pp. 162-178.

(*a*) 5 R. 675; 78 D. 216, note; 99 D. 587, note.

(*b*) 90 D. 358.

(*c*) 11 D. 396; 57 D. 583; 4 R. 631; 9 R. 679; 32 D. 362; 9 St. 319; 88 D. 49; 101 U. S. 225; 111 U. S. 117; 58 St. 490, note.

(*d*) 46 St. 122; 83 D. 772, note.

(*e*) 76 D. 363, note; 57 D. 330.

(*f*) 13 St. 273; 99 D. 587, note; 57 St. 163, note.

(*g*) 33 D. 168.

ARTICLE V.

Of the Status of Persons under Coercion or Duress.

§ 44. Of the Nature of Coercion and Duress.

The status of persons under coercion or duress is also abnormal. One whose freedom of action is entirely destroyed by external physical coercion is no longer a person. His power of self-determination is lost though he may still possess a sound intellect and undiminished will. He has become a mere passive instrument in the hands of others and his apparent acts are theirs, not his. In such a situation a person has no duties or responsibilities and is not amenable to law. Coercion operates upon the body; duress, on the other hand, operates upon the mind. (*a*) It consists in an unlawful constraint of the will, produced by the conduct of other persons, and impelling the party under duress to act as he otherwise would not act. (*b*) It always involves wrong and injustice toward the person constrained, and to the extent to which he is influenced by the constraint it changes his ordinary legal rights and obligations. Duress may be effected by words, actions, or conditions. Threats (*c*), menaces, false imprisonment (*d*), bodily privation or torture, circumstances naturally creating fear and terror, even the unlawful forcible

withholding of property (*e*), tend to this result, and in determining the degree to which they deprive their victim of his freedom, his own vigor of mind and strength of will must be considered. Conditions which in one person would excite grave apprehensions of immediate danger will be met by another with careless defiance, and the question therefore always is a personal one and one relating to a particular occasion. (*f*) An individual of weak mind, or of extreme youth or age, or dependent upon the constraining parties for protection or support, or under lawful subjection to their authority as to his general conduct, is necessarily more easily controlled than one in an entirely opposite condition; and in the case of any person less constraint is needed to induce an act of little consequence than one of greater importance or enormity. Lawful constraint of one person by another is never duress although its exercise may bring the subject-party into such habitual fear of or dependence on the other that a slight unlawful usurpation of control may produce a duress far more intense than if the previous relations had not subsisted. At the same time, the law expects every one to assert such manhood as he has, and not to yield to influences which, in view of his mental and moral state, he is evidently able to resist.

Read 1 Bl. Com., 130, 131; Holland, Ch. viii, p. 94; Ch. xii, p. 239; Markby, §§ 254-256, 758-763.

(*a*) 5 D. 659.

(*b*) 49 D. 596.

(*c*) 82 D. 395.

(*d*) 26 D. 370, note; 4 D. 170; 29 St. 170.

(*e*) 45 D. 145, note.

(*f*) 24 St. 166.

§ 45. Of the Liability of Persons under Duress on their Contracts or for their Crimes.

The principal instances in which these rules concerning duress are applied relate to contracts, to transfers of property, and to crimes. A contract entered into by a person under the fear of immediate death or serious injury to himself, his wife,

his children or his property, produced by the unlawful conduct of the other parties to the contract, is voidable (*a*); and though it can be ratified by its maker after he is released from the duress, it cannot, until ratified, be enforced against him either in the courts of law or courts of equity. (*b*) A deed given under similar circumstances is likewise voidable (*c*), and money extorted by such duress may be recovered in a suit at law. Contracts between persons, one of whom occupies toward the other an artificial dependent relation, such as that of a ward to his guardian or of a *cestui que trust* to his trustee, are always open to the suspicion of duress, and if duress is proved, and was sufficiently severe to compel the person to act against his will, the contract is not binding upon him. (*d*) A will made under duress is void; and where a testator is infirm in mind or body, and dependent on the services of his beneficiaries, a comparatively small degree of influence on their part in their own favor constitutes duress enough to make the will invalid. (*e*) In accepting duress as an excuse for criminal acts the law rules the more stringently in proportion to the enormity of the offence committed and its natural effect upon the welfare of society. No duress can excuse an act of treason unless the act was perpetrated under a reasonable and well grounded fear of immediate death at the hands of the enemy in case of refusal. (*f*) Duress excuses voluntary homicide only when the unlawful conduct of the victim produces in the slayer an honest conviction that his act of homicide affords him the sole means of preventing the impending death or serious mutilation of himself or members of his family, or the felonious destruction of his property. (*g*) Crimes of less moment may be overlooked although the mental disturbance and moral constraint fall short of the intensity required in treason and homicide, and though the constraint proceeds from parties who are not to suffer but to profit by the crime. as, for example, where a wife commits a criminal act in the presence and under the influence of her husband. (*h*) But constraint arising out of circumstances which occur in the natural course of events, and not due to the unlawful conduct of others, is not such duress as justifies a criminal act. (*i*)

Thus poverty, however extreme, does not excuse a theft, nor danger in shipwreck warrant the sacrifice of other lives to save one's own. In all cases of alleged coercion or duress the law, moreover, subjects the situation of the party claiming it to careful scrutiny, and allows his claim only when the fact that he was compelled to act against his will is clearly proved.

Read 4 Bl. Com., pp. 27-32.

(a) 81 D. 597; 1 D. 643; 19 R. 695.

(b) 98 D. 432.

(c) 7 Wall. 205.

(d) 25 R. 718; 100 D. 314.

(e) 51 D. 649.

(f) 2 Dall. 86.

(g) 71 D. 370; 100 D. 173.

(h) 31 R. 331; 33 St. 414; 33 St. 88, note.

(i) 7 Cranch, 218.

ARTICLE VI.

Of the Status of Public Officers.

§ 46. **Of the Nature of Public Office.**

A fifth class of persons occupying an abnormal status is that of public officers. Public office is a continuing charge, occupation, station, or employment, created by the State for the benefit of the public, and conferred by the act of the sovereign upon a person or a group of persons whose official duties and privileges are defined by law. It is not a contract to which the State and the officer are parties, though many of its features have a contract aspect, but a specific legal condition into which the incumbent enters and from which he departs, having no power over its rights and obligations except to bring himself into or remove himself from a personal relation to them. All public offices are methods or instrumentalities through which the functions of sovereignty are discharged by the State; and inasmuch as the exercise of these functions is in the nature of things to some extent in-

compatible with complete obedience to the general rules of law, to that extent every public officer is exempt from the authority of those general rules and is governed by special rules appropriate to his office, and so far differs in status from the ordinary citizen. (*a*) Eligibility to office equally with other persons of the same status with himself is one of the political rights embraced in citizenship. (*b*)

Read 2 Bl. Com., pp. 36, 37.

(*a*) 8 R. 488; 63 St. 174, note.

(*b*) 15 D. 322.

§ 47. Of the Incidents of Public Office.

Public office comprises the elements of term, tenure, duties, and emoluments; term, the period of its duration; tenure, the conditions on which it is conferred; duties to be performed; emoluments to be received. (*a*) It is held at the will of either party unless a different term is expressed or is implied from the provisions of the law, from the nature of the office, or from ancient usage. It becomes vacant by the expiration of the term prescribed by law, by the death or resignation of the incumbent, or upon his removal by the sovereign. A resignation may be made by acts or words but must be accepted before it can take effect. (*b*) The power to remove an officer is incidental to the power to appoint him, and no pledge or promise that the State may make to him, and no act of general or special legislation, can deprive it of the right to exercise this power whenever the public good requires it. In the absence of specific legal restrictions an officer may be removed by the appointing authority at any time and in any manner, with or without cause and with or without notice. When he is removable only for cause, the existence of the cause must first be established by judicial investigation. The tenure of an office cannot be changed during the term unless the change is demanded by the interests of the public and the office is neither lucrative nor honorary; but the rights and duties of the officer may be extended or constricted at the pleasure of the State and his compensation, although already

definitely fixed by law, may be increased or diminished by the legislature without his consent, or his office may be abolished altogether. (*c*) A public office may be forfeited by the refusal of the appointee to accept it, or by his non-user or misuser of the authority which it confers. (*d*) Two or more offices may vest in the same person if their respective duties are not incompatible. (*e*)

Read (*a*) 6 Wall. 385 (393).

(*b*) 41 R. 418.

(*c*) 13 Pet. 230 (259); 25 D. 677, note; 10 How. 402; 134 U. S. 99; 7 R. 87; 41 St. 606; 39 D. 187; 64 D. 680; 43 D. 740.

(*d*) 83 D. 367, note.

(*e*) 130 U. S. 439 (451).

§ 48. Of Public Officers.

The class of public officers includes all persons and groups of persons exercising executive, judicial, or legislative powers, all persons engaged in the diplomatic or administrative service of the State, and all the regularly commissioned or enlisted members of its naval and military forces. A person contracting with the State to discharge duties of a private character does not thereby become an officer, nor does the presence of contract aspects in the relations of an officer to the State render him any the less a public functionary. (*a*) Thus an architect employed to design public buildings, a teamster hired to transport military supplies, do not by reason of their occupations become public officers, while common soldiers by the act of enlistment obtain an official character and status, although by the same act they make a contract with the State to serve it in a certain manner for a specified amount of wages. (*b*) In number and variety these public offices and their incumbents are almost beyond computation and description, and every one of them has its own body of rules by which the privileges and duties attached to that particular office are defined. Nevertheless, official status, as such, has certain general characteristics and distinctions in which the

principles underlying all these various rules have been embodied and expressed. A brief examination of these will furnish the student with sufficient tests by which in any given case the scope of the official status, the validity of official acts, and the exemption of the officer from the operation of the general rules of law, may be determined.

Read (a) 99 U. S. 508; 103 U. S. 5; 72 D. 169, note
(b) 137 U. S. 147.

§ 49. Of Officers *de Jure* and Officers *de Facto*.

Public officers are either officers *de jure* or officers *de facto*. An officer *de jure* is one who has been in all respects legally elected or appointed, and who has duly qualified by taking the official oath, filing the official bond, and performing all the other prerequisites to the assumption of his official duties. (a) An officer *de facto* is one who, having been apparently though not actually appointed or elected and qualified in strict accordance with the law, is recognized by the public as an officer and, under color of his apparent appointment or election, performs official acts in the customary manner. (b) A person duly elected or appointed to an office, but who never qualifies or acts, is not an officer at all. A mere usurper, discharging official duties without color of an appointment or election, is not an officer — not even a *de facto* officer. (c) The law presumes that all persons exercising official functions under color of a lawful election or appointment are officers *de jure*, and though it permits either the State or the true incumbent to attack the official character of an officer *de facto*, it does not impose upon the general public nor upon private parties the task of ascertaining the legality of his appointment or election before they can safely avail themselves of his official services. (d) Thus the acts of a *de facto* officer are valid so far as they affect public or private interests, although he cannot collect compensation from the State for public services nor withhold from the true incumbent such remuneration as he may already have received. (e) The title of an officer to the office which he holds is tried in a proceeding known as a

Quo Warranto, brought by the State in its own name, either of its own motion or on the relation of some public or private person. (*f*)

Read (*a*) 44 D. 574 ; 3 St. 176.

(*b*) 19 D. 61, note; 9 R. 409.

(*c*) 24 St. 276.

(*d*) 10 St. 357 ; 37 St. 478, note.

(*e*) 10 St. 280 ; 8 St. 17 ; 28 St. 163.

(*f*) 45 D. 355 ; 30 D. 33, note ; 171 U. S. 366.

§ 50. Of Ministerial Officers and Judicial Officers.

The duties of public officers are either ministerial or judicial. (*a*) A ministerial duty is one which must be performed in a prescribed manner, without any exercise of choice or discretion on the part of the officer. A judicial duty is one which either as to the fact of its performance or as to the mode of its performance is entrusted to the judgment of the officer. Duties of both these kinds are connected with almost every office, and consequently officers purely ministerial or purely judicial are rarely found. Many details of acts, which as a whole are ministerial, are also necessarily left to the discretion of the officer, simply because the law cannot foresee all the circumstances which may attend future official acts and formulate rules to meet every possible emergency. As the authority and liability of an officer for his judicial acts are very different from his authority and liability for ministerial acts, whenever the question arises as to the lawfulness of official action the first inquiry is directed to this distinction; and if the act, or that part of it whose legality is doubted, were ministerial its lawfulness is measured by one standard, and if it were judicial by another. If the act were ministerial and the officer has departed in any particular from the specific directions given him by the law, he has exceeded his authority and is liable in damages to the injured party, for whose relief from the disastrous consequences of the unwarranted official action the courts in other effective ways will interfere. (*b*) If the act were judicial, and in a matter law-

fully submitted to the officer, it is valid in spite of his manifest errors of judgment, and he incurs no liability thereby unless his decision is proved to have been wilfully oppressive and corrupt. (*c*) But judges of the higher courts, or courts of record, are not liable to private parties for any act of a judicial character within their jurisdiction, whatever may have been their motives, though they are subject to impeachment for corruption at the instance of the State. (*d*)

Read (*a*) 79 D. 468, note.

(*b*) 40 D. 131; 18 How. 396; 94 D. 571.

(*c*) 10 D. 582; 68 D. 735.

(*d*) 18 D. 432; 7 Wall. 523; 13 Wall. 335.

§ 51. Of the Responsibility of Public Officers for their Acts and Defaults.

The State is not responsible for the misconduct or neglect of public officers, nor does it guarantee the validity of their official acts, nor when performed on its behalf is it bound by them beyond the scope of the authority it has conferred. (*a*) Superior officers are not liable for the negligence or unlawful conduct of their deputies unless they knowingly employ improper ones, or the illegal action or default resulted directly from their prohibitions or commands. (*b*) Every officer is chargeable with knowledge of his legal duties, and of the limits of his own authority, and if he happens, in a given instance, to be ignorant, his ignorance is imputed to him as a fault and affords him no protection. (*c*) When he obeys the mandate of a court which has no jurisdiction to issue the command, or acts in pursuance of unlawful orders from his civil or military superiors, he is no less amenable to suit or prosecution than if his actions or omissions were spontaneous, unless the circumstances show that he was under actual coercion or duress. (*d*) On the other hand, where a public officer acts within the scope of his authority, or in obedience to the lawful directions of his superiors, he incurs no personal responsibility, and other persons, suffering from his acts, must look for compensation or relief to the State or private

parties or official masters, on whose behalf or by whose orders they have been performed. (*e*)

Read (*a*) 8 Wall. 269; 112 U. S. 24 (31).

(*b*) 127 U. S. 507; 94 D. 461.

(*c*) 13 How. 115 (137); 2 Cranch, 170 (179).

(*d*) 20 D. 95; 89 D. 605.

(*e*) 21 D. 181, note; 14 Wall. 613; 61 D. 470.

§ 52. Of the Remedies and Penalties for Breaches of Official Duty.

Public officers may violate the trust reposed in them by failing to act where it is their duty to act (*a*), by acting where it is their duty not to act (*b*), and by performing an official act in one way when it is their duty to perform it in another. (*c*) By either of these methods the interests of the State may be imperilled, the persons or property of private parties may sustain an injury, and the officer himself become liable to impeachment and removal, or to summary dismissal, or to prosecution for the crimes of official negligence or oppression, or to a suit for damages, or to proceedings in the courts of law or equity to compel him to correct the wrong. The process of impeachment and removal is usually confined to officers of great political importance, such as the President, the governors of States, and judges of the higher courts, over whom there is no superior to whom they are accountable and by whom they could be dismissed; and officers found guilty on this process are not only ousted from the office which they have abused, but are forever disqualified from holding any other. (*d*) The punishment of summary dismissal is inflicted by superior officers upon their inferiors or by legislative bodies on their members after such a trial as the law in either case provides; and every officer, unless belonging to a class expressly exempted from the jurisdiction of the criminal courts, is subject to indictment for his unlawful actions or omissions. (*e*) In affording a remedy to a private person for the misconduct of a public officer the courts are guided by the nature of the official act in question as ministerial or judicial, the form

of the misconduct as a refusal to act or an unlawful action, and the relative date of the misconduct as past or prospective. Wrongful official acts reasonably expected but not yet committed may be prevented by a writ of prohibition or an injunction issuing from a court of equity. (*f*) The performance of a ministerial act in the prescribed method, and the exercise of judicial power where a party has the right to invoke its exercise, may, on the officer's refusal to discharge his duty, be compelled by a mandamus or injunction. (*g*) Against the consequences of unlawful acts already committed, or of ministerial acts improperly performed, the courts of equity can sometimes give relief by placing the injured party in his former condition; in other cases resort must be had to the courts of law for compensation. For errors in judicial acts which were within the sphere of the officer's authority no suit at law or equity can be maintained; the only remedy is by writ of error or appeal. (*h*) All persons dealing with public officers are presumed to be cognizant of the scope of their authority, and if ignorant thereof act at their own peril. (*i*)

Read Cooley, C. Law, Ch. vii, pp. 175-178.

(*a*) 11 Wall. 136; 40 D. 305, note; 12 D. 201, note; 95 D. 418. note

(*b*) 111 U. S. 17.

(*c*) 14 D. 352, note; 90 D. 713, note.

(*d*) 15 D. 322 (327); 85 D. 643.

(*e*) 35 D. 551; 63 D. 768, note; 74 D. 676, note.

(*f*) 12 D. 596, note; 87 D. 578.

(*g*) 33 D. 346; 7 Wall. 347; 128 U. S. 40

(*h*) 48 D. 652.

(*i*) 93 U. S. 247 (256, 257).

§ 53. Of the Exemption of Public Officers from the Liabilities of Normal Status.

The exemption of a public officer from the general rules of law is commensurate with the freedom of action required for the performance of the official duties which have been imposed upon him. Thus, for example, the ambassadors and other diplomatic representatives of foreign nations, whose official

relations are directly with the State itself, are relieved from every obligation to its laws. (a) The members of a legislative body are not subject to arrest on civil process while in attendance on its sessions or while going to or returning from its place of meeting; nor are they liable for their legislative acts or for their utterances in debate except to the body to which they belong. (b) The military commander of a district in time of war, or of great popular commotion when the ordinary machinery of the law is powerless, may set the entire system of law aside and establish a temporary system in its stead, of which he is at once the lawgiver, the judge, and the executive. (c) Officers of all grades, in serving process, in executing judgments, in collecting revenue, and in every other mode of public service, may perform acts which in others would be trespasses to person or property, unlawful attacks upon reputation, invasions of personal liberty, and in some cases even crimes. These exemptions may extend also to their property, — the residence of an ambassador partaking of the sacredness of his own person, and the fees and salaries of public officers in general being free from liability to attachment or execution. (d)

Read 1 Bl. Com., pp. 164, 165, 253-255; 1 Kent, Lect. ii, pp. 38, 39, 44, 45; Cooley, C. Law, Ch. iv, pp. 61-63, Ch. vii, p. 174, Ch. xiv, pp. 303, 304; Woolsey, §§ 87-96; 1 Whart. I. L. Dig. §§ 92-105; Vattel, Book iv, Ch. vii-ix.

(a) 7 Cranch, 116.

(b) 3 D. 189; 4 Dall. 107

(c) 4 Wall. 2 (127).

(d) 23 R. 661; 16 Pet. 435.

ARTICLE VII.

Of the Status of Aliens and other Persons who are not Citizens

§ 54. Of Citizenship.

The sixth form of the abnormal status of natural persons, and the last one which it will be necessary to particularly

notice, is that of aliens and other persons who are not citizens. The general laws are made for the government of citizens and the protection of their legal rights, and consequently citizenship is an essential element of normal status although the status of some citizens may be abnormal on account of their infancy, insanity, coverture, coercion or duress, or their official character. Persons not citizens, therefore, depart from a normal status as to all those rights and obligations which are dependent upon citizenship, and also as to any special disabilities and privileges which the law may prescribe in reference to them. The distinctions between citizenship and non-citizenship depend partly upon the nature of things and partly upon the enactments of positive law. Citizens are members of the political society or State. Taken collectively, they compose the State and exercise sovereignty through the representatives whom they appoint. (a) Every State, properly so called, in that it possesses sovereignty, is separate from and independent of every other State, and in modern times and among civilized races asserts its sovereignty over a limited territorial area and a definite population. Sovereignty is necessarily exclusive. It must reside in its entirety within the State over whose territory and people it is exercised, otherwise it would not be sovereignty, and hence its source must be the members of that political society, the citizens of that State, and them alone. The group of citizens composing any given State is, therefore, always distinct from that composing any other State; and for this reason a person cannot be at the same time a citizen of two or more sovereign States, nor can he be a citizen at all unless he is a member of some community which has a complete political organization and governs itself with an exclusive sovereignty. Thus, with regard to their political relations to any given State, natural persons may be divided into three classes: (1) Citizens of that State; (2) Aliens, or citizens of other States; (3) Persons, not citizens of any State. Every person belongs to one of these three classes; no person can belong at the same time to more than one.

Read (a) 92 U. S. 542; 19 How. 393 (404).

§ 55. Of the Right to Citizenship

Every State possesses the inherent right to determine for itself what persons may be admitted to its citizenship. (*a*) The State is formed by the free consent of its individual members to unite in a political organization, and this free consent relates not only to the act of the individual in joining the association, but to the act of the association in admitting him to membership. The power to accept contains the power to exclude, and therefore every State must, of its own nature, and as a condition of its existence as a State, have the authority to confine its membership within such limits as it deems expedient. (*b*) But while it may prescribe rules of exclusion, it cannot trespass on the sovereignty of other States over their own territory and population by making citizens of whom it will. Within its own domain and over all persons who reside therein its power is absolute. It may require all residents to become citizens, and on such conditions as it may elect, under penalty of exclusion from its borders; or it may restrict citizenship to those whom, judging by such standards as it pleases, it may consider qualified to exercise political rights and discharge political obligations. Until a very recent period this right to admit or exclude was supposed to cover also the right to retain, and consequently citizenship once conferred by a State upon an individual could not be repudiated by him without the State's consent. This position is still maintained by many nations, among whom the idea that the existence of the State rests on the free consent of its members does not yet fully prevail. It was even asserted by the courts of this country in the earlier days of the republic. But it is not consistent with our theory of the nature of the State or the personal liberty of citizens, and was long since by statutes and decisions so far modified as to be practically eliminated from our law. (*c*)

Read Vattel, Book i. Ch. xix; 2 Whart. I. L. Dig. §§ 171-172 a;
176-182.

(*a*) 84 D. 700.

(*b*) 130 U. S. 581.

(*c*) 33 D. 516.

§ 56. Of Citizenship of the United States by Birth and by Adoption.

Persons become citizens of the United States by birth or by adoption. (*a*) Citizenship by birth vests in all persons born in any part of the world whose parents are citizens of the United States, and in all persons, except Indians and the children of diplomatic officers of foreign States, whose parents at the time of their birth were resident in the United States. Citizenship by adoption is ordinarily conferred on residents, who are not citizens by birth, by a proceeding in some competent court of record in the United States called naturalization, upon their public renunciation of all foreign citizenship and their acceptance of the duties and obligations of our own, the conditions precedent to which and the method of procedure being fixed from time to time by Acts of Congress. (*b*) The admission of new territory with its population into the Federal Union as a State bestows a similar citizenship upon all its members. (*c*) Citizenship by birth exists irrespective of sex, color, race, or previous condition of servitude. Citizenship by adoption extends to the wife and minor children of the person naturalized if they reside also in this country. (*d*) Citizenship of the United States is lost only by death or by the adoption of the person as a citizen of some other nation. (*e*) The marriage of a female citizen with an alien does not deprive her of her citizenship, nor does the temporary submission of a citizen to a hostile military force occupying the territory where he resides work any permanent change in his relations to the State, although for the time being it may be necessary to treat him as an enemy. (*f*)

Read 1 Bl. Com., pp. 366-371, 373, 374; 2 Kent, Lect. xxv, pp. 39-53, 64-73; Cooley, C. Law, Ch. iv, pp. 88, 89, Ch. xiv, pp. 268-272; 2 Whart. I. L. Dig. §§ 173-175, 183-188.

(*a*) 169 U. S. 649.

(*b*) 68 D. 735.

(*c*) 143 U. S. 135.

(*d*) 7 Wall. 496; 6 Cranch, 176.

(*e*) 84 D. 193, note.

(*f*) 3 Pet. 242.

§ 57. Of Citizenship of the Individual States of the American Union.

In addition to his citizenship of the United States, every citizen is a citizen also of the individual State in which he may reside. (a) These individual States were once independent political societies, each exercising sovereignty within its own territory, and though they have ceased to be such since their admission into the Federal Union, their organic form is still preserved and some residuum of their ancient sovereignty remains. Citizenship of such a State is not, therefore, in itself precisely the same thing as citizenship of the United States, which is an independent nation, but so far as the individual State is now a State its members are truly citizens. They owe to it an allegiance subordinate to that due to the United States, participate in its restricted sovereignty, exercise in reference to it certain political rights, and are entitled to the protection of its institutions and its laws. (b) Over this citizenship, such as it is, the individual State retains control, both as to its privileges and qualifications, subject to the provisions of the Federal Constitution, which prohibit it from denying citizenship to any person on the ground of race, color, or previous condition of servitude, and compel it to allow to the citizens of all other States of the Union the immunities which it confers upon its own. (c) State citizenship is transferable at the pleasure of the citizen by a *bona fide* change of residence with an intention to make the new State his permanent place of abode; but transient change of habitation for the purpose of eluding the jurisdiction of the local courts, or with any other fraudulent design has no effect upon his citizenship. (d) Persons whose birthplace is uncertain, but who, for aught that appears, may have been born in the State, and who have long resided in its territory, are likewise recognized as citizens. (e)

Read (a) 6 Pet. 761.

(b) 95 D. 350.

(c) 16 Wall. 36; 94 U. S. 391; 92 U. S. 214.

(d) 129 U. S. 315 (328).

(e) 6 How. 163 (185).

§ 58. Of the Political Rights of Citizens.

Citizenship confers upon a person certain general rights and imposes on him certain general obligations. His rights may be divided into two: (1) To participate equally with all other citizens in the exercise of the sovereignty of the State; (2) To be protected by the State in his person, in his property, and in his various relations. His duties are likewise two: (1) To support the State; (2) To obey its laws. The mode in which he participates in the exercise of sovereignty depends upon the form of government which the State has adopted, and the general plan upon which its institutions are conducted. It is not necessary that he should be eligible to office, nor enjoy the privilege of suffrage, nor directly take part in any governmental function, nor even be called upon for any public expression of his wishes or opinions in reference to political affairs. (*a*) If equally with other citizens of his own status, and on the same conditions, he enjoys these privileges and all enjoy them so far as the nature of the State permits, his rights and theirs are respected and preserved. (*b*) The sovereignty of any civilized state, the character of its institutions, the direction of its progress, the general tendency of its domestic laws and foreign policy, are always manifestations of the settled convictions of its people, and in the development of these convictions every citizen who has reached the age of reason, whether male or female, infant or adult, participates in proportion to his personal intelligence and his devotion to his country.

Read Cooley, C. Law, Ch. xiv, pp. 275-294; Cooley, Const. Lim. Ch. xvii.

(*a*) 21 Wall. 162; 29 R. 582, note; 97 D. 248, note.

(*b*) 92 U. S. 542.

§ 59. Of the Personal Rights of Citizens.

A citizen is entitled to the complete legal protection by the State of his person, his property, and his relative rights against all wrongdoers, whether these are his fellow-citizens, the officers of the State itself, or the citizens or officers of

foreign States. All the wrongs committed by one citizen against another, and many of those committed by public officers against private citizens, are either torts or crimes, and these it is the duty of the State to prevent, if possible, by appropriate laws suitably enforced and to give adequate compensation for them when they are committed. Official wrongs outside the field of crimes and torts, such as oppressive legislation, corruption or incompetency in the courts, or the betrayal of their trust by high executives, the State should guard against by proper constitutional provisions, by the restrictions which it throws around the action of its courts and legislatures, and by the condign punishment of the offender by impeachment and removal. Wrongs committed by a citizen of a foreign State, if not redressed by the tribunals of that State, become a ground of complaint against it on the part of the State whose citizen has suffered injury, and this complaint may be enforced, if need be, by reprisal or by actual war. The same mode of redress is open when the citizen of one State is injured by the direct action of a foreign State.

Read 1 Bl. Com., pp. 125-128, 141, 142, 233-236, 369 ; Vattel, Book i, §§ 38-51, 158-172, Book ii, §§ 71-78, 341-350 ; 2 Burlamaqui, pp. 90-107, 178, 179, 180-183 ; Woolsey, §§ 76, 116, 118.

§ 60. Of the Duties of Citizens.

The obligation of a citizen to support the State extends to both his person and his property. It is his duty, when called upon according to the rules of law, to render personal service in the military or naval forces, to aid in the pursuit and arrest of criminals, to give assistance to executive officers, to sit on juries and to perform any other acts for the public which the law may from time to time require. Out of his property he must pay taxes in whatever form the State may lawfully impose them as his proportionate contribution toward public expenses, and, furthermore, he must surrender his specific property to the State for public use whenever, in the judgment of the State, necessity demands it. (a) His obligation to obey

the laws relates to all the laws which have been made for the observance of natural persons, unless through infancy, insanity, or some abnormality of status consistent with his citizenship he has become exempted from their operation.

Read Cooley, C. Law, Ch. iv, pp. 56-61; Cooley, Const. Lim., Ch. xiv.

(a) 88 D. 515.

§ 61. Of the Abnormal Status of Aliens.

The peculiar attributes which characterize the status of alienage are suggested by this description of the rights and duties of a citizen. An alien is a citizen of a State other than our own. If he lives in this country he is known as a denizen or resident alien. If his nation is at peace with ours, he is an alien friend; if war prevails between them, he is an alien enemy. An alien friend, resident abroad, has no legal rights or duties in reference to the United States except as to whatever property of his may be within our borders. He cannot participate with our own citizens in the exercise of sovereignty, nor meddle with the conduct of our political affairs otherwise than by the expression of his opinion or advice. He has no claims upon our government for the protection or redress of any injuries not threatened or committed by itself or by its subjects, owes it no duty of public service, and is not personally bound to contribute to its support nor under any obligation to obey its laws. The property which he holds in this country is, however, under its control. As to that, his ownership, enjoyment, and responsibilities are measured by our laws. A resident alien friend enters into a closer relation with the State. He cannot legitimately participate in political affairs, nor be obliged to serve the State in any governmental capacity, as in the army or the navy, or as a public officer or on a jury, but is liable to all the private duties of a citizen and entitled to the personal protection of our laws. (a) His property in this country is also held, transmitted, and defended by our laws, and is subject to the same burdens as that of our own citizens. An alien enemy, wherever resident, has no legal rights, either of property or person,

but if within our borders might, as a matter of strict law, be treated as a prisoner of war, and all his property might be confiscated by the State. Customs of long standing and observance among civilized nations have, in modern times, established a policy more liberal and humane, and resident alien enemies, not actually engaged in hostile machinations, are now accorded the same rights as alien friends. (*b*)

Read 1 Bl. Com., p. 372.

(*a*) 9 R. 489.

(*b*) 8 Cranch, 253 (283, 291-295).

§ 62. Of Recent Ameliorations in the Abnormal Status of Aliens.

The disabilities which attend the status of alienage were formerly extensive and severe. Under the laws which once prevailed in this country as well as England an alien could acquire real property only by purchase and could hold it only until the sovereign saw fit to take it away. (*a*) He was permitted to own personal estate and to dispose of it by sale or gift or testament, but he had no inheritable blood and could neither be the heir of any other person nor have heirs of his own. (*b*) He was distinctly disfavored by the law, which seemed to have been framed in order to discourage and, if possible, prevent the residence of foreigners and compel them to remain in the countries in which they were born. The advent of the United States into the family of nations, with its immense and sparsely peopled territory and its inexhaustible but almost wholly undeveloped resources, soon dissipated these exclusive theories and introduced a new policy into the common law. The necessity of increasing the population as rapidly as possible became apparent, and laws encouraging emigration and removing many of the disabilities of alien residents were speedily enacted. Every inducement was offered to such residents to become citizens, and during the past century a gradual assimilation of their status, as to personal rights, to that of citizens has been in progress. Their political disabilities still remain, for these are the essential elements which differentiate the alien from the citizen; but

they now stand before the courts and have the same rights in real and personal property as if they were citizens. (c) Non-resident aliens are also allowed to purchase and hold lands and to transmit them by deed or will to other aliens; but it is still the law, at least in some of our States, that they have no inheritable blood and, therefore, cannot take lands by descent either from resident aliens or citizens. Where this doctrine is recognized no other person, whether citizen or alien, can inherit lands from any citizen or resident alien, if, in order to inherit, he must trace his relationship to the former owner through a non-resident alien who could not himself have inherited the property. This disability is, in fact, almost the only private one remaining of the many from which aliens suffered a hundred years ago.

Read 1 Bl. Com., pp. 369-372; 1 Kent, Lect. iii, pp. 56-65; 2 Kent, Lect. xxv, pp. 53-73; Vattel, Book ii, §§ 99-115, Book iii, §§ 70-77; Woolsey, §§ 65-69, 71-74, 124-126; 2 Whart. I. L. Dig. §§ 201-206.

(a) 7 Cranch, 603; 11 Wheat. 332.

(b) 6 Pet. 102; 24 D. 198.

(c) 1 Wash. R. P. p. 49, note 1; 76 D. 622, note.

§ 63. Of the Abnormal Status of Indians.

The principal persons who are not citizens of any State, and of whom our laws in any way take notice, are the Indian tribes inhabiting the territory of the United States. These are conquered peoples whom it has been the policy of our government not to civilize and incorporate among our own people but to maintain in a certain state of independence. They are not citizens of the United States but distinct nations, and yet not nations in a legal sense as enjoying an exclusive sovereignty over themselves. They are States, having their own rules and customs, but neither States foreign to the United States nor States of our Federal Union. They are domestic, dependent nations, the wards of the United States, to whom our government stands *in loco parentis*. They are subject to the Acts of Congress and the laws of the United

States and yet possess a political autonomy which enables them to treat with the United States like other nations and makes a treaty with them the supreme law of the land. Their status is thus a most peculiar one, difficult alike to justify and to understand, not capable of any clear general statement but expressed only in the detailed treaties and statutes by which their position before the laws of the United States has been defined. (*a*)

Read 1 Kent, Lect. xii, pp. 257-260; 2 Whart. I. L. Dig. §§ 203-211.

(*a*) 8 Wheat. 543; 5 Pet. 1; 17 Wall. 211 (243); 112 U. S. 94; 118 U. S. 375; 11 D. 351.

§ 64. Of the Abnormal Status of Slaves.

A slave, though actually a natural person and by birth entitled to all the rights of any other person, has in law no status, because in law he is not a person but a thing. By his reduction to a state of involuntary servitude he has surrendered or been deprived of his capacity to think and will for himself, and has become wholly subject to the will of other men. The law can logically take no other notice of him than of any other animal whom it may restrain or destroy for the good of society, and who can have no rights which the law can recognize or protect and no duties which he can be expected to perform. Illogically or not, however, the law is in some cases compelled to impute to him personal attributes and treat him as capable of self-guidance and criminal responsibility. While the Constitution and the people of the United States tolerated the institution of slavery, this was the status, or want of status, of the slave. (*a*) The abolition of the institution and the Amendments to the Federal Constitution gave to former slaves the privileges of citizenship and placed them upon equal ground before the law with those who had been always free.

Read 1 Bl. Com., pp. 423-425; 2 Kent, Lect. xxxii, pp. 248-258; Cooley, C. Law, Ch. xiii, pp. 233-240.

(*a*) 19 How. 393; 41 D. 241.

§ 65. Of the Dependence of Status upon Law.

In closing the discussion of this subject it may be useful to repeat that in most instances it is the law which determines status and defines its rights and duties. (*a*) Except in those cases where abnormality of status arises out of the essential nature of political relations, as in alienage or public office, varieties of status are altogether artificial; and were it deemed advisable the State could abolish these distinctions and govern all natural persons by the same uniform rules. But it is in the interest of justice and humanity that these distinctions should be made and recognized, and the law fitted as far as may be to the exigencies of each individual or class of individuals; and one of the chief characteristics as well as causes of the progressive amelioration of social and political conditions is the increasing minuteness of the classification by which one status is distinguished from another.

Read (*a*) 19 How. 393 (595); 55 D. 87.

SECTION III.**OF DOMICILE.****§ 66. Of the Nature of Domicile.**

Every natural person has a domicile. Domicile is the place in which a person has his legal home. (*a*) The nature of political society requires that every member of it must have his political abode within the territory over which it exercises sovereignty, although he may be physically absent from it; and when its territory is divided into minor districts which limit the local jurisdiction of its courts, the precincts of its executive officers, the enjoyment of the elective franchise, the imposition of taxes, and other governmental operations, or in which special rules control the ownership and transmission of property, it is necessary that every person should be so related to one of these districts, to the exclusion of all others, that his legal privileges and obligations may at any moment be precisely ascertained. (*b*) Residence and domicile are, therefore, not identical in law. Residence is any place in which:

the person physically abides, as distinguished from the place in which he tarries on his journey to some other place, and includes the elements of bodily presence and an intention to remain for a greater or less period of time as an inhabitant. A person may thus have many residences, alternate or successive, for purposes of business or pleasure, yet none of these may be the place where he politically belongs and has his legal home. (c) Domicile is a matter not merely of physical presence or of interior intention (d), but of legal relation, although the law presumes that every person resides where he now is, and that his place of residence and domicile are one, until an investigation causes his true residence or domicile to appear. (e)

Read (a) 83 D. 502.

(b) 23 St. 37.

(c) 32 D. 423; 55 D. 350; 48 St. 706, note.

(d) 59 D. 107, note; 61 D. 530.

(e) 39 D. 142; 60 D. 135.

§ 67. Of the Locality of Domicile.

Domicile is a place having a fixed centre but a variable circumference. The fixed centre is the precise spot on which or in which the person dwells when he is at his legal home. This point of contact between the person and the locality remains always the same, but the area covered by the domicile enlarges or contracts with the legal purposes for which the domicile has been established. A person, for instance, has his legal home in one of the wards of a certain city; the city is included in a town; the town in a probate district; the probate district in a county; the county in a State; the State in the United States. The exact spot which constitutes his legal home may never vary during his lifetime, but for some purposes, such as the time and place of voting for city officers and the candidates for whom he may cast his ballot, his domicile is the city ward; for other purposes, such as public-school privileges, city ordinances and taxation, the city is his domicile; for other purposes, such as the election of repre-

sentatives to the State legislature, the town is his domicile; for the settlement of his estate after his decease, the probate district is his domicile; for the jurisdiction of county courts, his domicile is the county; for every governmental purpose not distinctly national or by the Federal Constitution exclusively lodged in the United States, the State is his domicile; for national purposes and for all other matters over which the United States has the sole jurisdiction, his domicile is bounded by the limits of the United States. Two persons may thus have the same domicile in reference to one political subdivision of the territory and a different domicile in reference to another; the same as to the city, different as to the ward; the same as to the United States, different as to the State; and only those whose legal homes are in the same minutest subdivision can have in all respects precisely the same domicile, and subject to their differences of status enjoy exactly identical legal rights. (*a*)

Read (*a*) 10 R. 698.

§ 68. Of the Domicile of Origin.

The first domicile which any person has is his domicile of origin, to which he becomes legally attached by operation of law at the earliest moment of his independent physical existence. In the case of a legitimate child this is the place where its father had his domicile at the date of the birth of the child; if the child is illegitimate, its domicile is the place where it is born, or according to some authorities the place where at its birth its mother has her domicile. The domicile of origin, thus acquired without the concurrence of the person, remains until it is exchanged for another either by the person himself or by some other person competent to change it. (*a*) A male infant cannot alter his own domicile, but follows that of his father while the father lives, then that of his mother if she still survives (*b*); and if both parents die he retains the domicile last acquired, unless he is removed out of the State by other blood relations and by the law of his new residence obtains a domicile therein. (*c*) The domicile of a female

infant is fixed by the same rule, except in the event of her marriage, after which her domicile is that of her husband. A guardian cannot change the domicile of his infant ward (*d*), nor can a married woman, under ordinary circumstances, vary her own domicile. The legal home of her husband is hers also during coverture, whether she actually lives with him or not. (*e*) But when they have been separated by the courts, though not absolutely divorced, or when in order to apply for a divorce it is necessary for her to possess a different domicile from his, she can obtain a new one like any other person. The domicile of a widow continues to be that of her deceased husband until she has acquired one for herself. (*f*)

Read Story, Conf. L., §§ 505, 506.

(*a*) 54 D. 55.

(*b*) 37 D. 525; 39 St. 196 (204, 205).

(*c*) 114 U. S. 218 (222, 223).

(*d*) 112 U. S. 452 (470-472).

(*e*) 110 U. S. 701.

(*f*) 21 How. 103.

§ 69. Of Change of Domicile.

An adult, other than a married woman, has a legal right to change his domicile as often as he chooses. Every domicile once existing continues until a new one is obtained, and is not affected by any mere absence of the person from it, however prolonged. (*a*) To change his domicile it is necessary for him to take up his actual abode in the new locality with the intention to finally abandon his former legal home, and to make the new locality his present and future legal home either permanently or for an indefinite time. The fact of his departure from the old abode and of his residence in the new one is apparent to all observers. His intention to finally abandon the old home and make the new one permanent may be inferred from circumstances, such as his own declarations, his exercise of local political rights, his payment of personal taxes, his embarkation in a settled business, or his erection or purchase of a dwelling house. (*b*) No specified period of time is necessary to perfect this transfer. (*c*) If the removal of

his home from one place to the other is complete and has been coupled with the requisite intention, his domicile is already changed. (*d*)

Read 1 Kent, Lect. iv, pp. 76-79

(*a*) 70 D. 372; 61 D. 237

(*b*) 21 Wall. 350; 117 U. S. 123; 34 St. 311, note.

(*c*) 13 St. 896.

(*d*) 129 U. S. 315.

§ 70. Of the "Law of Domicile."

The particular system of rules in force in the locality in which a person has his legal home is known as the *lex domicilii*, or "the law of the domicile." To what subjects these rules extend, and how large a proportion of the whole body of law by which a person is governed consists of the *lex domicilii*, depends upon the scope of the word "domicile" when used in speaking of its law. Obviously, the *lex domicilii* of a city is not identical with the *lex domicilii* of the State, the former being comprised within a narrow range of subjects as compared with the latter, yet at the same time prescribing many details as to which the latter establishes no rule. In regard to many questions of right and duty the student will find himself referred for their determination to the law of domicile, and must, therefore, understand that by this law is meant the entire body of rules which govern the question in that particular locality where the domicile is fixed, whether these rules proceed from the United States, the State, or any smaller subdivision of the body politic, or have resulted from the legislative acts of all, each legislating in its own peculiar sphere.

CHAPTER III.

OF ARTIFICIAL PERSONS OR CORPORATIONS.

SECTION I.

OF THE NATURE AND ATTRIBUTES OF CORPORATIONS.

§ 71. *Of the Nature and Purpose of Corporations.*

Artificial persons, called also "conventional persons," "juristic persons," "bodies politic and corporate," but most commonly known as "corporations," are persons created by the law for purposes which natural persons could not accomplish. A natural person is subject to two imperfections which render him incapable of meeting all the demands of social and political interests. In the first place he is mortal; his reason and will operate upon mundane affairs, so far as we know, only for the short period of his earthly life; and the enterprises which he inaugurated or controlled then pass under the direction of other persons, who may or may not be able and willing to carry forward his designs. Persistency in the prosecution of purposes, whose realization requires a long continued uniformity of intention and endeavor, can be secured only by committing such purposes to personalities which do not die, but whose reason and will subsist unchanged and indefectible until the ends to which they were originally devoted have been fully attained; and as such personalities do not exist by nature it is necessary that they should be created by the law. In the second place, a natural person is limited in knowledge, wisdom, energy, and possessions. Conscious of these limitations, he instinctively seeks to escape them by entering into combinations with other per-

sons, in order that by their united powers and property objects might be accomplished which to his single personality would be impossible. But every such voluntary combination is unstable, since it depends for its existence upon the continuing consent of all its members, and for its success upon their harmonious co-operation. It is only when its existence is rendered imperishable by law, and its harmonious operation is guaranteed by the substitution for the several divergent personalities by which it is naturally controlled of a new personality whose action, being single, cannot be antagonistic to itself, that the highest results of human combination are achieved. Hence in civilized States, in every age, these artificial personalities have appeared, for governmental, social, charitable, religious, or commercial purposes, emanating from the sovereign authority of the State and endowed by it with unity, immortality, and whatever other powers and attributes the accomplishment of their purposes might require. To our own law they have been known for upwards of a thousand years, created at first mainly for charitable and religious objects, but later also for the conduct of commercial enterprises. (*a*)

Read 1 Bl. Com., pp. 467-469; 2 Kent, Lect. xxxiii, pp. 268-272; Holland, Ch. xiv, pp. 298-308; Markby, §§ 136-145, 321; Morey, pp. 262-266.

(*a*) 4 Wheat. 518 (636, 667, 668); 34 St. 541 (545-547).

§ 72. Of the Creation of Corporations.

Corporations are created by the State; in this country, through its legislative body by an act called "an act of incorporation," or "the grant of a charter." (*a*) This act may be a special statute conferring a specific charter upon one association of natural persons, or it may be a general statute prescribing certain conditions upon the fulfilment of which any association of persons will become a corporation. Where a corporation is created by special statute, the statute itself is at once the charter and the act of conferring it, and in it the nature, attributes, and powers of the corporation are fully

set forth. Where the corporation is organized under a general statute, the written certificate of their corporate character and purposes which its members are compelled to file in some public office, as one of the conditions precedent to their acquisition of a corporate personality, describes in detail its attributes and powers, and taken together with the provisions of the general statute constitutes its charter. (*b*) To render a charter effective it must be accepted by the persons on whom it is conferred. As to a corporation organized under a general statute, the compliance of its members with the conditions precedent is also their acceptance of the charter, to obtain which the conditions are performed. A charter granted by a special statute can be accepted only after or at the time the grant is made, and this acceptance may be manifested by a formal vote of the members or by their corporate action in pursuance of the grant. (*c*)

Read 1 Bl. Com., pp. 472-474 ; 2 Kent, Lect. xxxiii, pp. 276, 277.

(*a*) 95 D. 263 ; 134 U. S. 594 (599, 600) ; 143 U. S. 305 (312, 313) ; 153 U. S. 525.

(*b*) 73 D. 658 ; 33 St. 172, note.

(*c*) 10 D. 34 ; 53 D. 450, note.

§ 73. Of the Charter of a Corporation.

The charter of a corporation is the evidence of its organic life and the definition of its personal rights and duties. Its existence begins, continues, and ends at and during the periods fixed by its charter, and all its privileges and obligations are measured by the language of that instrument, including both what it expresses and what it necessarily implies. Whatever might have been the original intention of its members or may now be for their interest, and whatever purpose the legislature may have entertained in its creation, the charter is the final and inflexible manifestation of that purpose and intention, and cannot be enlarged by interpretation or by implication beyond its evident meaning at the time it was conferred. The enumeration of corporate powers in the

charter thus excludes all other powers except those whose enjoyment is incidental to the exercise of such as are enumerated, and prohibits every corporate act in excess of these enumerated and incidental powers. (*a*) In interpreting a corporate charter the courts are guided by a double rule: first, that the manifest intention of the legislature to create a corporation with some rights and duties must be sustained; second, that as to these particular rights and duties it cannot have intended anything more favorable to the corporation than the charter clearly defines. This is what is meant when it is said that the construction of a charter must be favorable to the public and against the corporation. It is favorable both to the public and the corporation to assume that whatever grant the public has attempted to bestow is valid; it is favorable to the public and against the corporation to resolve all doubts as to the scope of its authority by the rule that whatever is not clearly granted has not been conferred. (*b*)

Read 1 Bl. Com., pp. 475-479; 2 Kent, Lect. xxxiii, pp. 298-300.

(*a*) 41 R. 221; 67 D. 471 (472); 75 D. 574.

(*b*) 11 Pet. 420 (544-549); 1 Black, 358 (380); 3 Wall. 51 (74, 75).

§ 74. Of the Franchises and Powers of a Corporation.

The powers bestowed upon a corporation by its charter are sometimes called its "franchises." A franchise, strictly speaking, is a privilege which by its nature belongs solely to the State, and which consequently private persons cannot enjoy unless by virtue of a grant to them by the State. (*a*) Thus the right to be or to create a legal personality, or to take the property of individuals for public use, or to impose or release from taxation, are franchises, being sovereign rights beyond the reach of any natural person unless admitted to participate in them by the act of the sovereign himself. Every corporate charter confers at least one franchise of this character, — the right to be a legal personality, — and may confer others according to the purposes for which the corporation has been

formed. (*b*) But in addition to such rights as these every corporation has many powers which natural persons also possess, and which, therefore, are not franchises in any proper sense, although they are frequently so named because they are enumerated in its charter, and if not so enumerated could not be enjoyed. This distinction between the proper and improper use of the term "franchise" becomes important mainly in reference to the authority which a corporation has over its own charter powers. A true franchise it can neither acquire, control, transfer, nor abandon without the initial or concurrent action of the State. (*c*) Its franchises in the other sense — that is, the powers it shares with every natural person — it can use, disuse, or dispose of with the same freedom as any other person, unless restrained by the nature of the corporate body or by the provisions of its charter. Among these natural powers of every corporation are the power to govern itself by enacting by-laws (*d*) and determining questions by majority vote, the power to take, hold, and convey property, the power to make contracts and to sue and be sued, and the power to appoint officers or agents and to prescribe rules for their observance, always, however, within the limits set for it by the act of its creation (*e*); the difference in this respect between the natural and artificial persons being that the natural person is a complete personality, equal in rights to every other person, and therefore can do anything within his natural powers which the law does not forbid him to do, while the artificial person is a restricted personality commensurate only with the purposes for which it was created, and, therefore, can do nothing which the law has not expressly or impliedly clothed it with authority to do.

Read 2 Bl. Com., p. 37; 2 Kent, Lect. xxxiii, pp. 277, 278, 289-298.

(*a*) 41 D. 109 (112).

(*b*) 3 St. 492; 22 D. 679, note; 69 D. 389 (391, 392).

(*c*) 75 D. 518, note; 87 D. 672; 139 U. S. 24; 35 St. 385, note; 43 St. 105.

(*d*) 49 D. 604; 85 D. 613, note.

(*e*) 94 D. 378, note; 46 D. 181.

§ 75. Of the Officers and Agents of Corporations.

A corporation can perform physical acts only through the instrumentality of its officers and agents. (*a*) It has no body by means of which it can communicate with others by speech or writing, or do or suffer anything in reference to them. Its nearest approach to action is its vote, not the expression of its conclusion but the conclusion itself; for the expression is always the act of its members, who are different persons from the corporation, or of some officer or agent acting in its name, and its conclusion is an intellectual not a physical act. These officers and agents must be appointed in accordance with its charter and by-laws in order to be clothed with lawful authority to act on its behalf, but the corporation may adopt and ratify actions beneficial to itself when performed by persons acting as its agents without such appointment, and will thenceforth be bound by those actions as if the agents had been duly authorized. (*b*) For all the acts of its officers and agents within their authority the corporation is liable, and also for the torts and crimes which they commit in the fulfilment of the duties which its rules prescribe. (*c*)

Read 1 Bl. Com., p. 476.

(*a*) 16 D. 705; 91 U. S. 540 (545, 546).

(*b*) 5 Wall. 772 (781, 782).

(*c*) 13 D. 550.

§ 76. Of Acts *Ultra Vires*.

Corporate acts not warranted by the charter are said to be "acts *ultra vires*," and as such are unlawful and void. The corporation itself can take no advantage by them, nor can other persons dealing with it demand or retain what it had no power to promise or to give. (*a*) This rule is not intended, however, to operate in aid of fraud or injustice. While the corporation cannot be compelled to perform a contract which it had no right to make, nor be prevented from reclaiming property which it had no right to bestow, yet persons who in good faith have sold and delivered to it lands or goods which it cannot restore, or paid it money for property which it has

pretended to convey to them, may, notwithstanding the invalidity of the express contract under which these things were done, recover in equity or otherwise the value of their lands or goods, or the money they have paid for property that the corporation could not lawfully transfer. (b) For injuries to the persons or property of other individuals, either by omission or commission, the corporation is also liable, although the wrongful acts or defaults were wholly outside of its charter powers. (c) Acts *ultra vires* not affecting other persons can be complained of only by the State. Such are the acquisition of property greater in amount or different in kind from what the charter permits, or the embarking in enterprises not within the purposes for which the corporation was created. Violations of its charter by these and similar acts may indeed indirectly prejudice the interests of private individuals, but they are neither breaches of contracts nor actionable wrongs, and hence the State alone can interfere, and by a proper suit in its own name, through its own legal officers, can force the corporation to keep within its designated sphere. (d) This doctrine of *ultra vires* applies only to the corporate party to a transaction, but where all parties are corporations it applies alike to each, and the transaction will be void if, by entering into it, any one of them exceeds its charter powers. (e)

Read (a) 15 D. 100, note; 99 D. 300, note; 139 U. S. 24 (59-61); 167 U. S. 362; 70 St. 149, note.

(b) 20 R. 504; 101 U. S. 83 (85-87).

(c) 17 R. 702; 52 R. 353; 100 U. S. 699.

(d) 132 U. S. 282 (294).

(e) 139 U. S. 24 (54).

§ 77. Of the Name and Identity of a Corporation.

A corporation, like a natural person, is known to the law only by its name. That name, selected originally by its members and sanctioned by the State, distinguishes this artificial person from all others, and by it the corporation must enter into contracts, sue and be sued, and receive and transfer property. (a) It has no power to change its name, but for

this purpose must have recourse to the State, although common usage may give it another name, and in such usage it may so long acquiesce as to prevent it from disclaiming the new name when charged with the liabilities which under that new name it has incurred. In solemn contracts and conveyances the corporation is known also by its seal. (*b*) No special form of seal is necessary, but whatever form is used must have been lawfully adopted by the corporation, and it must be affixed by some one who is duly authorized to do so. (*c*)

Read 1 Bl. Com., p. 475 ; 2 Kent, Lect. xxxiii, p. 292

(*a*) 9 D. 402 ; 18 D. 7

(*b*) 7 Cranch, 299.

(*c*) 14 D. 316 ; 11 D. 551 ; 50 St. 146, note ; 64 St. 257, note.

§ 78. Of the Status of a Corporation.

The status of a corporation is always abnormal. Its immortality and intangibility confer upon it privileges and immunities which no natural person can possess, while the limitation of its powers to those enumerated in its charter precludes it from rights and duties which attach to every natural person whose status is normal. Thus the laws which govern the transmission of property to heirs and representatives upon the death of its former owner have no relation to a corporation, because it never dies and never parts with property which it has once acquired save by its own free act or the superior authority of the State. Because it has no body it cannot suffer corporal punishment for crime, nor be guilty of a crime for which corporal punishment is the only penalty, nor undergo assaults or batteries or false imprisonment, although it may be punished for offences by a fine or by the destruction of its corporate existence (*a*), and has a reputation which it may protect by ordinary processes of law. (*b*) Exempt for these reasons from the operation of a large proportion of the rules of law, every corporation is still further emancipated by the legal character imposed upon it by its charter as a charitable corporation, a railroad corporation, a

banking corporation, or whatever it may be, which, placing it under the control of a special group of laws framed for the direction of corporations of that peculiar character, removes it from the influence of other groups of laws by which corporations of a different character are governed. And, finally, every corporation by the provisions of its charter is differentiated more or less from other corporations of the same legal character either by particular attributes, or as to the place or method or degree in which it may exercise its powers. Hence the status of no two corporations can be precisely the same, for should their charters be identical, except as to the artificial personality which they create, priority of action on the part of either corporation in pursuance of its charter would clothe it with the right to occupy the field in preference to the other, and at once introduce into its status a new element, which would effectually distinguish its present powers and duties from those of its competitor.

Read (a) 87 D. 391 (394, 395).

(b) 57 D. 400.

§ 79. Of the Domicile of a Corporation.

The domicile of a corporation, sometimes called its "citizenship," is in the State from which it receives its charter, and in that State only does it legally subsist. (a) To endow the same group of natural persons with a corporate existence in another State, they must obtain a charter in the second State, and neither charter is aided by the other either as to the extent or the definition of its powers. (b) The members of a corporation are presumed to have their legal home in the same State, but this is not essential unless the laws of the incorporating State require it. Acts of the corporation which involve the presence of the corporation itself, such as the meetings and votings of its members or the enactment of by-laws, must also be performed within the State of its creation (c), but acts through officers or agents may take place in any other State if its laws permit. (d) No corporation has an

inherent legal right to act in any manner in States other than its domicile, though as a general rule States in their mutual comity allow the corporations of other States to transact business, enter into contracts, and hold property within their borders upon such conditions as the protection of their own citizens seems to require (*e*), but this permission may at any time be withdrawn and the foreign corporation be thenceforth excluded from their territory. (*f*) A corporation acting in another State submits itself to the local laws of that State, and may sue and be sued in its local courts, so far as the business there transacted or the property there situated is concerned. (*g*) The domicile of a corporation may be restricted to a certain district in the State, as a town or city, if its charter makes its location in that district an attribute of its personality, and in that case its corporate acts must be performed within the district as well as within the State. (*h*)

Read (*a*) 52 D. 248.

(*b*) 1 Black, 286; 88 D. 579.

(*c*) 83 D. 329; 46 D. 619; 118 U. S. 161 (168-170).

(*d*) 33 D. 481.

(*e*) 13 Pet. 519; 8 Wall. 168; 54 D. 522; 95 D. 529, note.

(*f*) 125 U. S. 181 (188-190).

(*g*) 96 D. 331, note; 171 U. S. 658.

(*h*) 73 D. 319.

§ 80. Of the Control of the State over its Corporations.

A corporation is always subject to the legislative control of the State from which its personality and powers were both derived. (*a*) Under the fundamental principle that no legislative act can trammel the freedom of a subsequent legislature, it might be held that the subjection of a corporation to legislative control was absolute, and that its privileges might be at any time abolished, and even its corporate personality destroyed. But under that provision of the Federal Constitution, which forbids our legislatures to pass any law impairing the obligation of contracts, it is now held, wisely or

unwisely as the event may prove, that where the charter of a corporation is granted by the State with the manifest expectation that it will be acted on by the corporation in such a manner that its subsequent change or withdrawal would prejudice the interests of the corporate body, and such action accordingly takes place, an inviolable contract has been formed between the corporation and the State that the corporation shall continue to enjoy the privileges enumerated in its charter so long as it does not neglect or abuse its powers. (*b*) This doctrine does not, however, deprive a State of all authority over its corporations. Corporations whose charters are not contracts, either because they create no obligations of a contract nature, or because contract charters had been previously forbidden by the State constitution or its general laws, and corporations whose charters contain provisions for their repeal or modification at the discretion of future legislative bodies, are entirely at the mercy of the State, and their charters may be altered or recalled at its pleasure. (*c*) Charters which are contracts can be amended and the privileges of the corporation be increased or diminished if the purposes for which it was organized are not defeated and its power to accomplish them is not curtailed. (*d*) Such limitations or extensions of charter powers may be made by the legislature either by alterations in the charter of the corporation, or by general laws applying to all corporate bodies; but a charter issuing from the legislature in the form of a special statute is not affected by subsequent inconsistent legislation unless such is the manifest intent of the later legislative body. (*e*) The franchises and other property of corporations, like the property of a natural person, are always liable to be appropriated by the State for public use whenever in the judgment of the State such appropriation becomes necessary. (*f*)

Read (*a*) 62 D. 625.

(*b*) 4 Wheat. 518; 13 Wall. 190 (212-214).

(*c*) 90 D. 617.

(*d*) 56 D. 471; 128 U. S. 174.

(*e*) 53 D. 450, note; 17 Wall. 425.

(*f*) 35 D. 466.

§ 81. Of the Combination and Consolidation of Corporations.

The control of the State over its corporations extends to changes in their personality as well as in their powers. It may create a new corporate personality out of two or more existing corporations by conferring upon them another charter whereby the former corporations are made members of a new corporation, preserving their distinct corporate personalities but collectively enjoying the privileges bestowed by the new charter, or it may consolidate the former corporate personalities into a new corporate personality in which the former corporations are completely merged. Whether a union of corporations produces the first or the second of these results depends upon the agreement of the parties and the terms of the legislative act by which it is effected. (*a*) In the first (which, to distinguish it from the second, might be called a "combination of corporations"), the members of the new corporation are the old corporate bodies, not the natural persons of whom those bodies are severally composed. These still remain members of their respective corporations, and only indirectly and through the acts of the corporations to which they belong do they participate in the management of the new corporation. The old corporations likewise retain their ancient rights and are subject to their former liabilities, except so far as these are expressly or by necessary implication varied by the combination charter. But in a consolidation of corporations the old corporations disappear, and their privileges and responsibilities, so far as they exist at all under the new charter, are transferred to the new corporation, of which also their members become members immediately directing and controlling its affairs. (*b*) But exemptions from taxation and other special immunities enjoyed by the old corporations are not transmitted to the new unless expressly granted to it by the legislature. (*c*) As the bestowal of a combination charter does not affect the corporate franchises of the individual corporations of which the combination is composed, these individual corporations may or may not be domiciled within the State by which the combination is created. In a consolidation, however, the former corporate franchises are

withdrawn, and, as such withdrawal can be effected only by the State which bestowed them, the recipients of a consolidation charter must all be corporations of the State from which the charter issues, or the new charter must be separately granted by all the States to which these corporations may belong. (*d*) A consolidation charter granted by two or more independent States not only creates a franchise, but constitutes a compact between the States themselves to recognize and protect the charter privileges of the new corporation within their respective jurisdictions. (*e*) Without the grant of a new charter the union of the names, officers, enterprises, or property of several corporations is a mere business arrangement which neither affects their personality nor adds to nor diminishes their powers (*f*); for no corporate relation can be established even between existing corporations without the action of the State, whatever agreement the several corporations may have made between themselves. (*g*) Whether consolidation can take place without the unanimous consent of all the members of the uniting corporations has been variously decided. (*h*)

Read (*a*) 92 U. S. 665; 114 U. S. 587 (595); 152 U. S. 301.

(*b*) 98 U. S. 359; 79 D. 418, note; 95 U. S. 319; 39 St. 381; 59 St. 543, note; 95 D. 654.

(*c*) 96 U. S. 499; 117 U. S. 139.

(*d*) 12 Wall. 65 (82).

(*e*) 53 D. 531 (536).

(*f*) 136 U. S. 356.

(*g*) 35 St. 681; 161 U. S. 677 (701-703).

(*h*) 1 Wall. 25; 72 D. 685.

§ 82. Of the Dissolution of Corporations.

The supreme exercise of legislative authority over a corporation is its dissolution. (*a*) Every corporation receives its existence from the State upon the condition that it will use and not abuse its charter powers. No matter how largely private interests may seem to be promoted by the grant of corporate franchises, the creation of these immortal and in-

tangible personalities is justified only by the assumption that they do, to some extent, redound to the benefit of the public, and this would be impossible if they did not act at all, or if they acted in defiance of the limitations prescribed by the State at their incorporation. The failure of a corporation to exercise its powers (*b*) is thus a breach of the fundamental condition upon which they were granted equally with their exercise in an unlawful manner or degree (*c*); and in either case the State may, if it pleases, treat the breach of condition as a ground of forfeiture and repeal the grant. This is a matter, however, entirely for the State, which must proceed in its own name and through its own officers to dissolve the corporation, though it may act at the instigation or relation of private individuals whose rights are prejudiced by the corporate inaction or abuse. (*d*) According to the ancient rules of our law, upon the dissolution of a corporation its real property reverted to the donor or his heirs, its personal property vested in the State, and its contract rights and obligations were extinguished. (*e*) In equity it is now regarded as a trustee for its beneficiaries or members, and after its dissolution new officers are appointed by the court to carry out the trust and administer its assets for the benefit of those who may appear to be entitled to them. (*f*)

Read 1 Bl. Com., pp. 484, 485; 2 Kent, Lect. xxxiii, pp. 305-315.

(*a*) 35 D. 292; 33 D. 656 (660).

(*b*) 18 D. 454; 35 D. 551; 41 D. 109.

(*c*) 53 D. 106.

(*d*) 96 D. 747, note; 41 D. 690; 94 D. 84.

(*e*) 12 D. 234, note; 57 D. 168; 52 D. 412.

(*f*) 8 Pet. 281; 133 U. S. 50; 18 St. 192 (211).

§ 83. Of the Distinction between the Personalities of a Corporation and its Members.

The complete distinction between the person of a corporation and the persons of its members is evident from the foregoing description of its character and attributes. Its reason,

its will, its actions, are all separate from theirs. Its property is not their property (*a*); its contracts are not their contracts (*b*); its debts are not their debts, if they are not expressly made so by its charter. Unless appointed by the corporation as its agent, no knowledge which a member possesses, no act which he performs, can be imputed to it as its act or knowledge (*c*); and even were all its members to unite in an action, such as the signing of a deed, the action would not be that of the corporate body nor in any way affect its rights. As a distinct person from its members it may sue them at law or in equity, and they in turn may institute proceedings against it to recover claims which they may hold against it or to prevent it from violating its charter powers. (*d*) It can estop itself by its own conduct or agreement from asserting its privileges against particular individuals (*e*); but the motives which impel it to perform its lawful acts are not open to inquiry. (*f*) It is entitled under the Fourteenth Amendment to the Federal Constitution to the protection of itself and its property in all our States, and its identity remains unchanged, notwithstanding any legislative increase or diminution of its powers, until its personality is merged by the State in that of a new corporation or its charter is formally repealed. (*g*)

Read (*a*) 140 U. S. 304; 13 St. 23; 34 St. 541.

(*b*) 13 Pet. 519 (586, 587).

(*c*) 36 D. 186.

(*d*) 18 How. 331 (341-344).

(*e*) 10 Wall. 604 (644-646).

(*f*) 105 U. S. 605.

(*g*) 125 U. S. 181 (187, 188).

§ 84. Of Corporations De Jure.

The foregoing rules are applicable to their full extent only to perfect corporations, or, as they are technically called, corporations *de jure*. A corporation *de jure* is one which has been created and has duly organized in all respects in conformity to law. It presupposes that a charter has been

granted to the individuals of whom the corporation is composed, that the governmental agency from which the charter issued had the power to confer the precise corporate franchise which it has attempted to bestow, that the members of the corporate body have accepted the charter and have complied with every requirement necessary to render their title to the franchise indisputable and complete. Any defect in any of these particulars prevents the association from attaining and enjoying in their ordinary measure the prerogatives legally attached to corporate existence and leaves it in the imperfect condition of a *de facto* corporation, a *quasi* corporation, or an association wholly unincorporated. (a)

Read 2 Kent, Lect. xxxiii, pp. 244-276.

(a) 42 St. 677.

§ 85. Of Corporations De Facto.

A *de facto* corporation is an association of individuals to whom the State has granted through some competent governmental agency an apparently valid charter under which the association has organized and acted as a corporation *de jure*, but in whom, on account of some defect either in the charter itself or in the mode of granting it, or in the method of its acceptance by the association, or in their organization under it, no indefeasible right to maintain and exercise their supposed corporate privileges has ever legally been vested. (a) As between the State and such an association no corporate franchise exists, and their right to act as a corporate body may at any time be called in question by the State and their exercise of corporate privileges be prohibited. (b) But inasmuch as the State could if it chose have created such a corporation and could have endowed it with the powers named in its charter and has evidently attempted so to do, and the members in their turn have endeavored to comply with its conditions and acquire a perfect title to the franchise, all private parties are warranted in assuming, until the State does interfere, that the corporate character of the association is unassailable, and may therefore deal with it as if it were a corporation *de jure* with-

out the risk that on account of its defective personality either its acts or theirs will be declared invalid. (c)

Read (a) 47 St. 153, note; 41 St. 151; 38 St. 552.

(b) 33 St. 172, note.

(c) 29 St. 596, note; 26 St. 743; 24 St. 887.

§ 86. Of Quasi Corporations.

A *quasi* corporation is an association of individuals which, although unincorporated, acts customarily or necessarily as a unitary body, and which either by statute or by the doctrines of the unwritten law is recognized as possessing, in reference to these necessary or customary acts, the attributes of a true corporation. Generally this recognition is extended by the law only to associations to which some public interest or duty has been committed, such as towns, counties, or school districts, though the same character has sometimes been imputed to more private organizations, such as religious congregations. These associations possess no corporate personality in which the individual personalities of their members have been merged. On the contrary their members are held by certain courts to be the ultimate parties to all transactions into which the association enters, and to be personally bound by all its obligations. But since the association enjoys an immortality independent of the changes in its membership, governs itself by majorities and not by universal consent, transacts business only through officers and agents, and has a common name in which it can contract, or sue and be sued, or acquire, hold, and transfer property, it has to a considerable extent a corporate aspect, and when its unitary acts are authorized by statute or recognized as valid by the courts, the corporate character of the association is to a similar extent affirmed. Prior to the reign of Henry VI. (A. D. 1422) the minor political subdivisions of England were usually regarded as *quasi* corporations, and though since that date the practice of granting special municipal charters to these subdivisions has been gradually increasing, both in England and this country instances still

occur to which the law of these imperfect corporations is applied. (*a*)

Read (*a*) 13 D. 522, note; 31 St. 63; 68 D. 290, note; 62 D. 424 (419).

§ 87. Of Unincorporated Associations.

An unincorporated association is a group of individuals united together for a common purpose but without a charter, and to whom the law will not impute either an actual or qualified corporate existence. These associations are, however, fully recognized by the law as and for what they truly are, though their precise legal character it is not in every case easy to define. They possess some of the attributes of a partnership, some also of the features of a tenancy in common. Their members can act together, not as a single personality under the name of the association, but in the names of all enumeratively or in the name of one "and his associates," and in this manner they can purchase and sell property, make contracts, and sue and be sued. But one has no implied authority to bind the rest, and when appointed as the agent of the association his acts oblige only himself and those other members who concurred in his appointment or in the special enterprise to promote which his appointment was made. The liability of the members who participate in any transaction of the association resulting in a debt due to a third party is joint and several, and the whole amount may be collected out of any one of them, leaving him to proceed against the others for the payment of their shares. (*a*)

Read (*a*) 12 D. 495, note; 28 D. 650; 59 D. 708, note; 95 D. 107; 50 R. 505; 52 R. 436; 39 R. 818; 59 St. 193, note; 63 St. 852, note.

§ 88. Of the Classes of Corporations: Corporations Sole: Corporations Aggregate.

The division of corporations into corporations sole and corporations aggregate is based upon the number of natural

persons of whom the corporation is legally composed. A corporation sole is constituted when a charter is granted to a single individual; a corporation aggregate, when the grantee is an association of two or more individuals. Corporations sole, though common in England, rarely occur in this country. They are usually created for official purposes, in order that the powers and property connected with some public office may pass without a new grant from one incumbent to his immediate successor. But a State, unless prohibited by its Constitution, may establish such corporations for commercial or ecclesiastical as well as for political purposes, at its discretion. (a) The legal character of a corporation aggregate is not changed by the reduction of its membership to a single individual, unless according to its charter the vanished members were integral parts of the corporate personality, without whom the corporation itself cannot exist.

Read 1 Bl. Com., pp. 469, 470; 2 Kent, Lect. xxxiii, pp. 273, 274.

(a) 33 D. 656.

§ 89. Of the Classes of Corporations Public, Private, and Quasi Public Corporations.

Corporations are divided, according to their essential character, into Public Corporations and Private Corporations. A public corporation is a political body established by the State for governmental purposes, and organizing the people inhabiting a certain portion of its territory under a subordinate government exercising legislative, judicial, and executive powers, in order that their laws may be suited to their local conditions. A private corporation has no political character and exercises no governmental functions except over its own private affairs, but is created for the promotion of some interest in which its members are directly or officially concerned. A *quasi* public corporation is a private corporation to which, on account of the value to the public of the enterprise in which it is engaged, certain privileges have been conceded which ordinarily vest only in the State or in the

public corporations to whom its governmental powers are delegated. The rules to which these three classes of corporations are subjected differ in many important details, and render necessary a more minute description of each class and the particular statement of its laws. (*a*)

Read 2 Kent, Lect. xxxiii, pp. 274-276.

(*a*) 99 D. 300 (306, 307); 56 D. 666 (669).

SECTION II.

OF PRIVATE CORPORATIONS.

§ 90. Of the Attributes of Private Corporations.

All corporate bodies except those which have been created for political purposes as subordinate divisions and instruments of the government are private corporations, whatever be their character, their objects, or their privileges. It is to this class of corporations that the general rules of corporation law particularly apply. Their powers are limited to those enumerated in their charters, which are strictly construed against them in the light of the law as it existed when the charters were granted. Their charters are in most cases contracts which the State cannot impair by subsequent legislation unless it has reserved the right to do so, and must be accepted by the corporation membership before they can take effect. The power to enact by-laws, appoint officers, make contracts, and hold property for the purposes indicated in their charters, resides by implication in such corporations where it is not expressed. They act within the corporate body only by a majority vote, and without it only through their officers and agents. They are liable for their torts committed through their agents (*a*), although involving mental purpose and intent, and for such crimes as can be perpetrated without actual violence. (*b*) They are subject to legislative control, not infringing their charter rights, and their corporate franchises as well as their property may be appropriated by the State, either directly or through the agency of other corporations. Finally, their right to their charters may be for

feited by the non-user or mis-user of their powers, and the State may then repeal the charter and dissolve the corporation by due process of law.

Read (a) 13 D. 588, note ; 58 D. 439 ; 91 D. 672 ; 108 U. S. 317.

(b) 37 D. 38; 87 D. 391; 100 D. 570.

§ 91. Of the Organization of Private Corporations.

A private corporation is formed by the voluntary agreement of its future members to unite in an association for a designated purpose, followed by their application to the State in the customary manner for a charter, by its grant and their acceptance, and by their organization under it as a corporate body. Their acceptance of the charter and their organization under it by framing by-laws and electing officers mark the date when the existence of the corporate personality begins. (a) Prior to that date their acts are those of an unincorporated association, or of independent individuals, and do not bind the corporation unless adopted and ratified by it after its organization is complete. (b) Promoters of the enterprise, whether becoming members of the corporation at its organization or not, are bound to good faith with it in all their dealing, and promises to them obtained by fraudulent silence or misrepresentation cannot be enforced. (c) In enacting by-laws, the general law, the charter, and the purposes of the corporation must be kept in view, and any reasonable by-law consonant with these is binding on its members. (d) The usual officers of a private corporation are a President, Secretary, Treasurer, and a Board of Directors, whose duties are indicated by their names and are further specified in the by-laws under which they are appointed. The management of the corporate affairs is mainly conducted by these officers; meetings of the entire corporation being held at such intervals as the law or convenience may determine. (e) The powers confided to these officers are held and exercised by them, not for their own benefit, but in trust for the corporation as a whole, and any abuse of their authority may be restrained and remedied

by the corporation either through its own action or through the instrumentality of the courts. (*f*)

Read (*a*) 33 St. 355; 41 St. 454.

(*b*) 17 D. 159; 16 R. 587; 21 R. 39.

(*c*) 31 St. 653; 40 St. 837; 42 St. 159.

(*d*) 43 St. 147, note; 6 D. 619 (625); 43 D. 457.

(*e*) 68 D. 544; 27 D. 33, note.

(*f*) 53 D. 624.

§ 92. Of the Powers of Private Corporations.

The legal character and corporate capacity of a private corporation being defined by its charter cannot be varied by any other authority than that by which they were originally conferred. Wherever the corporation may transact its business through its officers and agents, it is there the same corporation that it is in the place of its creation; and every limitation of its powers by its charter, or by the general laws of the State of its creation, follows it in every other State in which its property or its interests reside. (*a*) By the laws of such other States its rights may be more restricted than they are in its domicile, but they cannot be enlarged. Hence no concession by one State to the corporations of other States can give them a corporate existence in its territory or make their corporate action therein valid, although it may permit their officers and agents to dwell within its borders and from thence direct the management of its affairs, and may allow the corporations to hold such lands or other property as their corporate capacity authorizes them to acquire.

Read (*a*) 22 R. 133; 46 St. 285.

§ 93. Of Eleemosynary Corporations.

Private corporations are divisible into Civil Corporations and Eleemosynary Corporations. A civil corporation is established for the benefit of its own members or for the promotion of a cause in which both its own members and other persons are interested. An eleemosynary corporation exists

exclusively for charitable purposes; that is, for purposes conducive to the bodily, intellectual, or spiritual welfare of its beneficiaries. Hospitals, asylums, free schools, missionary societies, are instances of these; but not parishes, nor colleges supported by tuition fees, nor private sanitariums. (*a*) In eleemosynary corporations, and in those created for the promotion of a cause, the corporation, in addition to the laws which govern it as a corporate body, becomes subject also to the law of trusts. (*b*) The powers and the property of such corporations are vested in them for the sake and in the right of the beneficial enterprise, and the corporation is compelled to hold and use them for such purposes and for such purposes alone. Thus, for example, a religious society established and endowed with property for the propagation of certain doctrines, or as a branch of a larger religious body, cannot employ its property or corporate privileges in the promulgation of different doctrines nor sever its connection with the larger body though all its members have changed their belief and desire to alter their ecclesiastical affiliations. (*c*) An eleemosynary corporation, founded and supplied by its projectors with funds for the support of orphans or the insane or paupers, or for the healing and care of the sick, or other charitable objects, violates its trust by any application of its means to other purposes besides exceeding its specific charter powers. To keep such corporations within the limits prescribed by their founders, a board of visitors is sometimes appointed by their charters, who have authority to correct abuses whenever they arise (*d*), and at all times the courts of equity are open to the proper beneficiaries of such a corporation, who have reason to complain of the management of its affairs, and can take any steps that may be necessary to prevent a further perversion of its funds. (*e*)

Read 1 Bl. Com., pp. 470, 471, 480-484.

(*a*) 4 Wheat. 518 (629, 638); 31 D. 72 (86-91); 6 St 745.

(*b*) 67 D. 160.

(*c*) 13 Wall. 679 (722-732).

(*d*) 29 D. 591.

(*e*) 84 D. 470.

§ 94. Of Civil Corporations.

A corporation created for the exclusive benefit of its members may have in view their intellectual, moral, social, physical, or pecuniary interests, or any other matter conducive to their welfare or their pleasure and not forbidden by the law. The details of such corporations — their organization, by-laws, officers, property, and methods of operation — conform to their particular objects and consequently are of great variety. What has been already stated as to the general law of corporations embraces, in principle at least, the body of legal rules by which all of them are governed, with the exception of that class of business corporations known as “stock corporations,” of which a more extended description is required.

§ 95. Of Stock Corporations.

A stock corporation is intended to enable a number of persons to unite their money in a business enterprise in which they incur no liability beyond their investment and from which they can at any time retire by the transfer of their interests to other persons. In its combination of persons and property it resembles a partnership, but in its restriction of their liability for its debts and their power to substitute other persons for themselves as members of the association, it is entirely different. The mode of its formation is usually as follows: Its projectors having determined the amount of capital required for the transaction of the contemplated business and fixed the value of the equal shares into which it is to be divided, subscribe for such a number of these shares as they individually desire until the whole are taken, the payment for which they make in advance or agree to make to the corporation whenever called upon in pursuance of its charter and by-laws. Unless a charter has been already granted to the proposed corporation one is now obtained, and the corporation organizes under it by enacting by-laws and appointing officers. Upon the completion of its organization the subscriptions to its stock, which hitherto have been contingent and could be withdrawn, become vested rights, and it may call upon its

members for the price of their respective shares with which to commence its business, and may collect the amounts by suit at law or by a forfeiture and sale of the shares. (*a*) If the business is profitable, a dividend of the profits is declared, from time to time, in favor of each share, and paid to the stockholder to whom the share may then belong (*b*), and should the corporation cease its business and wind up its affairs, the surplus of its property remaining after the payment of its debts is divided among the then existing stockholders according to the number of shares of stock which each may then possess. During the existence of the corporation any stockholder may sell the whole or any number of his shares to any other person, who by the transfer takes the place of the vendor in the corporation and succeeds to all his rights and liabilities.

Read (*a*) 5 D. 638; 8 D. 128; 66 D. 257; 42 St. 379; 47 St. 323; 44 St. 838.

(*b*) 99 D. 758, note; 153 U. S. 486 (496-499).

§ 96. Of Shares of Stock.

This outline of the history of a stock corporation explains the legal character of a share of stock and its relations to the corporate property and business. A share of stock is not a share in the property owned by the corporation, for in these corporations, as in all others, the personality, rights, obligations, and property of the corporation are entirely distinct from those of its members. A share of stock is a chose in action; that is, it is a right to a thing as distinguished from the thing itself, and the things to which a share of stock is the right are, first a specific proportion of the profits of the corporate business; second, a specific proportion of the surplus property of the corporation after it ceases to exist and its debts are paid; and third, the right to exercise a degree of influence in the general direction of corporate affairs measured by the ratio which one share bears to the whole number of shares. (*a*) But the ownership of a share of stock does not entitle the owner to participate directly in the current man

agement of the corporate business. This is intrusted to the board of directors or other officers, in whose election every stockholder has a voice, but with whom after their appointment no stockholder has a right to interfere unless they act in violation of the charter or squander the assets of the corporation, in which event any stockholder may invoke the protection of a court of equity, if the corporation as a whole refuses to act in his defence. (*b*) For the corporation is a trustee for its stockholders and owes them the duty not only of promoting their interests by the wise conduct of its affairs, but of preserving them from injury and loss at the hands of its own officers and agents; and its persistent refusal to discharge this duty may result in the transfer of its management to a receiver under the supervision of a court of equity and in the final winding up of the corporate enterprise. (*c*)

Read (*a*) 42 St. 17; 3 St. 586 (591, 592).

(*b*) 46 D. 690; 76 D. 508, note; 65 D. 557.

(*c*) 53 D. 624, note; 66 D. 490.

§ 97. Of the Liabilities of Stockholders.

The obligations of a stockholder to the corporation and indirectly to its creditors are measured by the contract into which he enters by his subscription for his shares of stock. As between himself and the corporation his obligations are fulfilled if he pays for his stock in the property, time, manner, and amount which his agreement with the corporation or its other projectors requires, whether the payment equals the nominal value of the stock or not. (*a*) But as between himself and the creditors of the corporation who have done business with it in good faith on the assumption that the nominal value of the stock was payable in full as the progress of the business might demand, — an assumption that any creditor has the right to make unless he has some notice to the contrary, — the stockholder may be compelled to pay the full value of his shares in spite of any promise or release which the corporation may have previously given him. (*b*) Whenever necessary a court of equity will force the corporation to collect the

unpaid balance for its shares from their respective holders, according to their nominal value, and use the proceeds for the payment of its debts (*c*); and if the corporation does not or cannot act, a receiver may be appointed with similar powers, or the creditors collectively, or one in the name of all, may sue the delinquent stockholders for the amounts still remaining due. (*d*) But when the stockholder has once, in good faith, paid the full nominal value of his stock in money, or, if the charter allows it, in property available for the use of the corporation, his obligations are fulfilled, and, in the absence of a statute rendering him still further liable, he is discharged from all responsibility whether to the corporation or its creditors. (*e*)

Read (*a*) 119 U. S. 343; 45 St. 133; 45 St. 700.

(*b*) 144 U. S. 104 (113, 114); 91 U. S. 56; 105 U. S. 143.

(*c*) 139 U. S. 118; 100 D. 546, note; 52 D. 412; 150 U. S. 371; 51 R. 166; 57 St. 60, note.

(*d*) 101 U. S. 205; 99 U. S. 628; 26 St. 639; 139 U. S. 417; 137 U. S. 366; 21 St. 798.

(*e*) 101 U. S. 216; 43 D. 685, note; 49 D. 286, note; 99 D. 427, note; 3 St. 797, note.

§ 98. Of the Ownership and Transfer of Stock.

Any person, natural or artificial, may be the owner of shares of stock in a stock corporation. (*a*) The corporation itself may hold a part of its own shares, and in the inception of a corporate enterprise this often happens, where not all the shares are taken by the projectors on their own account, but some are vested in the corporate body for future disposition. (*b*) The State may also own stock in private corporations, but when it does so it is as a corporate body not as sovereign. (*c*) In substituting other owners for himself by the transfer of his stock, a stockholder must observe the rules prescribed by the corporation, and the purchaser will take the stock subject to such rules and to any lien for unpaid subscriptions, and to any other equitable rights which the corporation may possess against the former owner. (*d*) All shares of stock are now re-

garded as personal property, although the property of the corporation may be real, and a transfer on the books of the corporation or by indorsing the certificate of stock, without a deed, is legally sufficient. (*e*)

Read (*a*) 13 St. 590 (603, 604); 36 St. 130, note.

(*b*) 33 St. 331, note.

(*c*) 9 Wheat. 904 (907, 908); 11 Pet. 257 (323-327).

(*d*) 11 D. 575, note.

(*e*) 19 D. 306; 57 St. 373, note.

§ 99. Of the Rights and Liabilities of Stockholders in Reference to Outside Parties.

Although the stockholders as such have no direct participation in the current management of the corporate business, yet they are not without power to protect their interests against outside parties as well as against the corporation itself. (*a*) In extreme cases, where the corporation will not or cannot institute proceedings in its own behalf, the stockholders collectively, or one in the name of himself and all the rest, may bring the suit, making the corporation a party to the action; and in this manner they may follow perverted funds wherever they can reach them, or assert its rights to property in the hands of adverse claimants. (*b*) Stockholders, so far as their own stock is concerned, are also bound by all proceedings against the corporation on the part of others. (*c*) The holders of new stock issued by the corporation under legal authority during the progress of its business occupy the same position in all these respects as the subscribing owners and transferees of the original shares.

Read (*a*) 90 D. 617; 22 D. 785; 84 D. 134.

(*b*) 18 Wall. 626; 149 U. S. 473.

(*c*) 131 U. S. 319.

SECTION III.

OF QUASI PUBLIC CORPORATIONS.

§ 100. **Of the Peculiar Franchises of Quasi Public Corporations.**

Quasi Public Corporations are private corporations, and ordinarily stock corporations, upon which in view of their importance to the public certain true franchises are conferred in addition to the corporate franchise. (*a*) These franchises are bestowed upon the corporation, not as a reward for public service, but solely as a means by which it may be enabled to render service to the public, and the language in which they are enumerated in the charter must be so construed as to restrict their application to the public needs. (*b*) These franchises are of various species, but the principal ones are (1) the right to occupy public property; (2) the right of eminent domain; (3) the right to a monopoly; and (4) the right to take tolls.

Read (*a*) 99 D. 300.

(*b*) 16 Wall. 694.

§ 101. **Of the Right to Occupy Public Property.**

The right to occupy public property is sometimes vested in a private corporation in order that the property may be better adapted and applied to public use. Thus, for example, a public river may be placed under the control of a navigation-improvement company, who expend their capital and energies in removing obstacles, maintaining wharves, buoys, lights, and means of transportation, and receive their recompense through the exclusive use of the river for their own boats or from the fees paid for their passage by the owners of other vessels. (*a*) The appropriation of a public highway to a turnpike company, or to corporations owning and operating street railways, telegraphs or telephones, gas or water works, or similar enterprises, are other instances of the enjoyment of this valuable franchise. (*b*)

Read (*a*) 25 D. 36; 38 R. 222.

(*b*) 91 D. 81; 69 D. 651, note.

§ 102. Of the Right of Eminent Domain.

The right of eminent domain is the right to take private property for public use. Under the laws of this country this right cannot be exercised even by the State without payment of due compensation to the owner of the property, but the right is none the less a true franchise since no private person can compel others to part with their property against their will, whatever compensation he may be prepared to make them. Still, without this right many corporate enterprises would be impracticable, and where the public welfare requires the facilities which such enterprises would furnish the State can confer this right upon any private corporation by whom the enterprise may be conducted. The right given to railroad corporations to take any land required for their road-bed or buildings upon payment of its value to the owner is the most familiar form of this franchise, but it embraces all other such appropriations, whether the property taken be lands or goods or incorporeal rights, or even franchises possessed by other corporations. (a) The imposition of taxes by the State upon its people in aid of *quasi* public corporations has sometimes been held justifiable on similar grounds. (b)

Read Cooley, Const. Lim., Ch. xv; Cooley, C. Law, Ch. xvi, pp. 363-377.

(a) 22 D. 679, note; 40 D. 705; 55 D. 266, note; 69 D. 389 (391, 392).

(b) 16 Wall. 678; 56 D. 522, note.

§ 103. Of the Right to a Monopoly.

The right to a monopoly is the right to exclude all other persons from participating in some common privilege which the monopolist enjoys. The power of the sovereign to exercise or to grant this right is limited, by the principles of modern law, to cases in which the public will derive a greater benefit from the concentration of the privilege in one person than from its diffusion among many. This right is a true franchise because no private person can prevent other persons from sharing with him that which by nature or by the ordi-

nary rules of law is common to all, while the State for its own welfare can restrict the ownership and use of property to any extent it may deem necessary. The grant of a monopoly is never presumed, but must be clearly expressed or implied in the act of the sovereign, though when granted it will be protected and enforced by law. Monopolies are bestowed on private corporations to induce them to embark in public enterprises which would not be undertaken were the business of the corporation to be open to competition, such as water or lighting companies, street or steam railways, ferries or bridges; and when conferred in their charter are a part of their contract with the State which cannot be impaired by subsequent legislation unless the power to do so was definitely reserved. (*a*)

Read (*a*) 36 D. 202; 44 D. 83; 65 D. 535; 42 D. 716.

§ 104. Of the Right to Take Tolls.

The right to take tolls is the right to exact a specific fee or reward for a service rendered, irrespective of the value of the service or of any contract between the parties. In all ordinary cases of service the price to be paid is fixed either by the agreement of the parties or by the benefit of the service to one, or by its cost in time, money, or energy to the other. But in many instances of service rendered to the general public or to a large number of individuals the making of such agreements or the estimate of benefit and cost would be impracticable, and here the State, as a condition of the privilege of rendering the service and receiving payment for the same, arbitrarily, though with due regard to all the circumstances, establishes the price and imposes it upon every person who accepts the service. This arbitrary price is called "a toll," and the right to collect it is usually embraced within the franchises conferred on railroad, turnpike, ferry, and canal companies, and other corporations occupying a similar relation to the public. (*a*)

Read (*a*) 39 D. 778; 40 D. 740 (741, 742, 747); 18 R. 345.

§ 105. Of the Control of the State over Quasi Public Corporations.

A *quasi* public corporation, by virtue of the foregoing franchises, is brought into a more immediate connection with the State than other private corporations, and is subject to more frequent legislative interference. Often also it is placed under the general supervision of commissioners appointed by the State and is obliged to conduct its public business according to their directions. (a) But neither of these incidents changes its essential character as a private corporation, nor can the State, either through its commissioners or its legislative body, carry its interference to a degree which thwarts the purposes for which the corporation was created or impairs the privileges conferred upon it by its charter. (b)

Read (a) 15 St. 460, note; 94 U. S. 155.

(b) 62 St. 261, note.

SECTION IV.**OF PUBLIC CORPORATIONS.****§ 106. Of the Nature and Powers of Public Corporations.**

Public corporations or, as they are now commonly called, "municipal corporations," are not mere representatives or agents of the State, but are integral parts of its governmental organization, exercising a subordinate and delegated sovereignty over a limited area of contiguous territory and over the persons who either permanently or temporarily are present in it. (a) The principal classes of these corporations now known in this country are counties, cities, townships, and boroughs. They are created by the State at its discretion and usually by a legislative act conferring on the territory and population a distinct corporate existence; though where communities have long enjoyed municipal prerogatives without a formal charter the grant and loss of such a charter may be judicially presumed, or by the legislative recognition of the community as a true public corporation it may be as

effectually established as if it had originally been organized by State authority. (b) The public powers attached to a municipal corporation are also determined by the State. They include not only the powers expressly enumerated in its charter, but whatever incidental powers may become necessary in order to carry those which are expressed into complete effect. (c) In addition to these public powers it may be clothed with rights of a more private character, enabling it to deal with its own people or with outside parties like any other private corporation. (d) The express public powers of a municipal corporation generally embrace the control over streets, sewers, health, education, police and fire departments, water and light supply, markets, paupers, hospitals, cemeteries, and such other kindred enterprises as the legislature may commit to its direction. Its incidental powers comprise the power to make contracts, the power to acquire and hold property, the power to borrow money and issue bonds or other acknowledgments, the power to impose and collect taxes, and the power to incur debts. Its power to make contracts is limited by its charter and the nature of the public purposes to which the contracts are related, and its agreements *ultra vires* cannot be enforced. (e) The property which it acquires for public purposes is public property, is held by it in trust for its citizens, and cannot be taken in execution for its debts nor taxed nor otherwise interfered with except by the State. (f) Its power to borrow money on its bonds does not include the power to issue commercial paper, vesting in the *bona fide* holder a right to the amount of its apparent value free from all equities on behalf of the municipality, but its actual emission of the bonds together with their lawfulness every purchaser at his own risk must ascertain. (g) Its taxing power extends to all private property within its territorial boundaries, and may be exerted at any time for the payment of its obligations either voluntarily or under a *mandamus* from the courts at the instance of its creditors. (h) Its power to incur debts for its lawful purposes is without limit unless it is restrained by the provisions of its charter or the general law (i), but where its extravagance is manifest and taxpayers have no other redress,

where necessary

a court of equity may, on their petition, enjoin the officers of the corporation from a further waste of funds. (*j*)

Read Cooley, C. Law, Ch. xvii, pp. 378-380.

- (*a*) 69 D. 565 (577); 40 St. 109 (115, 116); 36 R. 840.
- (*b*) 170 U. S. 304; 69 D. 489; 133 U. S. 198; 12 Wheat. 64 (70-76).
- (*c*) 108 U. S. 110; 30 St. 214, note.
- (*d*) 35 St. 515, note; 72 D. 730 (735, 736).
- (*e*) 36 St. 88; 2 Black, 722.
- (*f*) 99 U. S. 149; 88 D. 248, note; 40 St. 109; 17 Wall. 322; 9 How. 172.
- (*g*) 30 D. 185, note; 19 Wall. 468; 121 U. S. 615; 145 U. S. 135.
- (*h*) 98 U. S. 381; 66 D. 627; 102 U. S. 472.
- (*i*) 44 St. 222, note; 45 St. 252, note.
- (*j*) 2 St. 85, note.

§ 107. Of the Legislative Powers of Public Corporations.

The public powers of a municipal corporation are either Legislative or Administrative. In the exercise of its legislative powers it may enact by-laws or "ordinances" which, when valid, are of the same force as the statutes of the State itself. (*a*) The validity of such ordinances depends upon their conformity to the general law, to the charter of the corporation, and to those fundamental principles of reason and justice which every government is obliged to respect. Thus ordinances derogating from the rules already adopted by the State, as where they change the legal character of criminal acts which the State has previously defined (*b*), or exempting individuals from liabilities imposed upon them by the State (*c*), or unnecessarily restricting personal liberty (*d*), are void. But ordinances are not invalid simply because they are burdensome to the inhabitants, nor can the private motives of the municipal legislators in prescribing them be made the subject of investigation. (*e*) The authority of valid by-laws extends to strangers passing through the territory of the corporation (*f*), and may in certain cases reach beyond its limits where their enforcement within its territory cannot otherwise

be effected. (*g*) The legislative power of a municipal corporation inheres not in itself but in the State whose delegate it is, and though the ordinances in which it results may be declared invalid by the courts, they have no right to anticipate that it will make invalid laws and interfere on that account with its intended exercise of legislative power. (*h*) Nor can one legislative act of the municipality forestall its future legislative action and deprive it of that freedom which every legislative body necessarily enjoys to disregard, repeal, or modify its own enactments at its pleasure. (*i*)

Read Cooley, Const. Lim., Ch. viii.

- (*a*) 19 St. 490; 34 D. 625, note; 36 D. 441.
- (*b*) 68 D. 452.
- (*c*) 29 St. 750.
- (*d*) 6 St. 310; 16 St. 578.
- (*e*) 113 U. S. 27; 113 U. S. 703; 92 D. 73, note.
- (*f*) 17 D. 351.
- (*g*) 16 D. 189, note.
- (*h*) 36 St. 438; 41 St. 248.
- (*i*) 47 St. 258.

§ 108. Of the Administrative Powers of Public Corporations.

The administrative powers of a public corporation are either Judicial or Ministerial. Its judicial powers are exercised in determining such matters as by the general law, the express or implied powers of its charter, or the essential nature of things, are left to its discretion. Its ministerial powers are exercised in carrying into practical effect the decisions at which it judicially arrives, or in performing duties directly imposed upon it by the State. The line between these is not always easy to draw, since every ministerial act in which the reason and will of the actor are employed demands to some extent the exercise of judgment; but the distinction is well recognized in law, and in most instances presents no insuperable difficulty. The judicial powers of a municipal corporation are applied chiefly in deciding whether or not an act which is within its discretion shall be performed, and if so, in what mode, if several lawful modes there be. But having

once decided that the act shall be performed, and selected the lawful mode in which it shall be done, the performance of the act according to that mode involves only its ministerial powers, which are controlled, as to the method of their exercise, not by municipal discretion, but by the ordinary legal requirement of proper care and skill. The principal cases in which this distinction becomes important are those arising out of injuries to third parties as a consequence of municipal action, and as to these the same rules are observed as in reference to other public official acts. For injuries resulting from the exercise of its judicial powers the corporation is not liable (*a*); for those which it occasions by its ministerial action it is responsible like any private individual. (*b*)

Read (*a*) 55 D. 347, note; 22 R. 507; 47 St. 596, note.

(*b*) 89 D. 450; 94 D. 461; 6 St. 256; 10 St. 35; 36 St. 438, note; 27 D. 95; 9 How. 248; 15 St. 840, note; 32 D. 730.

§ 109. Of the Liability of Public Corporations in Reference to Streets, Sewers, Bridges, etc.

Instances of the application of these rules to municipal corporations by the courts have related chiefly to injuries occasioned by the construction or condition of streets, sewers, or bridges, the maintenance and operation of police and fire departments, and the exercise of its police powers for the protection of the public health and safety. Whether or not a new street shall be opened or an existing street be widened or graded are questions of discretion only, and no liability attaches to the municipality for any consequences which may follow from the opening of the street in that locality, or from the extension of its width, or the raising or lowering of its grade. (*a*) But if in opening the new street, or broadening or changing the elevation of an old one, the work is so improperly performed according to the ordinary standards of care and skill, or if the street itself, after it is completed, is suffered to become and remain out of repair, and damage is thereby occasioned to third parties, the municipality is

liable. (*b*) Whether any and what portions of the territory of the corporation shall be sewered and upon what general plan the sewers shall be erected (*c*), whether and how public bridges shall be built (*d*), whether police or fire departments shall be maintained, and, if so, upon what scale of equipment and official numbers (*e*), what measures shall be taken to prevent the spread of disease or to remove public nuisances (*f*), are likewise matters of discretion upon which the municipality is free to act without responsibility to those who may be prejudiced by its decision; but in carrying its decisions into effect it becomes accountable for any failure on its part to exercise that measure of capability and caution which the law requires of other individuals.

Read Cooley, Const. Lim., Ch. xvi.

- (*a*) 43 D. 719; 49 D. 412; 30 St. 832, note; 20 How. 635.
- (*b*) 29 St. 758, note; 31 St. 839, note; 63 D. 345, note; 83 D. 557, note; 17 St. 732, note; 45 St. 853, note; 2 Black, 418.
- (*c*) 78 D. 342; 53 D. 316, note; 55 D. 347; 24 R. 552, note; 29 St. 730, note.
- (*d*) 99 U. S. 635.
- (*e*) 2 R. 368.
- (*f*) 92 D. 73, note; 115 U. S. 650; 152 U. S. 133; 171 U. S. 1; 17 St. 696 (698); 35 St. 152 (155-157); 47 St. 525, note.

§ 110. Of the Liability of Public Corporations for the Conduct of their Officers and Agents.

Municipal corporations, like other bodies corporate, can act only by majority vote or through their lawfully appointed or adopted officers and agents. The official personages connected with municipal corporations are divisible into three classes: (1) Agents of the corporation in its private capacity; (2) Agents of the corporation in its public capacity; (3) Public officers. The first class are appointed by the corporation to transact its business as a private corporation, when such a corporate character has been impressed upon it by its charter. For their acts and defaults the municipality is responsible in

the same degree as if it possessed no public character or property or powers. (a) The second class are employed by the corporation to act on its behalf as a public corporation, and their acts bind it so far as they do not exceed its charter powers or the scope of the specific agency to which they have been appointed. (b) The third class, though sometimes designated and paid by the municipality and performing their official duties within its territory and in relation to its people, are not its agents, but officers of the State, and by their acts and omissions, of whatever character, the corporation incurs no liability. To this class belong policemen, firemen, health-officers, and all other functionaries who, though connected with the corporation and using the instrumentalities which it supplies, are really exercising the sovereign powers of the State itself for the protection of the persons and property of its citizens. (c) Their acts are acts of the State, not of the corporation, and being public acts of public officers an injury resulting from them is not a legal injury, nor entitled to redress, unless the acts have been corruptly or maliciously performed. (d)

Read (a) 38 D. 669, note; 45 St. 114.

(b) 34 St. 17, note.

(c) 30 St. 373, note; 46 St. 760; 79 D. 721; 33 R. 154;
6 R. 196; 9 R. 382; 48 R. 762.

(d) 82 D. 556.

§ 111. Of the Control of the State over its Public Corporations.

The authority of the State over its public corporations is unlimited, except by its own Constitution and the fundamental principles of law. Their charters are amendable and repealable at its pleasure. It may combine or divide them as it deems expedient, and correspondingly distribute or consolidate their rights and liabilities. (a) It may ratify their unauthorized actions and so make them valid. It may recognize a *de facto* corporation as duly clothed with charter powers and thereby make it thenceforth a corporation *de jure*. (b) No acceptance of its original charter or of any subsequent amendments to it by the corporation is necessary to render them

effectual, nor have its members any legal right to complain of any change which the State may make in their corporate character or powers. But while the State can thus create and fashion and extinguish the corporate personality, it cannot force it to perform acts prejudicial to its members or subversive of the vested rights of others. It cannot compel it to plunge into debt for public improvements, or to pay salaries which exhaust its resources, or to impose excessive and destructive taxes, or to violate its obligations toward its creditors. (c)

Read (a) 67 D. 748; 24 R. 661; 100 U. S. 514; 35 St. 515, note.

(b) 7 Wall. 1.

(c) 116 U. S. 289.

§ 112. Of the State as a Corporation.

The State has many of the attributes of personality, and, not being in any sense a natural person, is often called a corporation, though not, of course, created directly by the law. Its powers are inherent not conferred, and are, like those of public corporations, either public or private. Its public powers are not franchises but elements of its sovereign prerogative. (a) Its private powers are co-extensive with the requirements of its condition, and in their exercise it assumes the character of a private person, and is bound by its own laws like any individual citizen. (b) In this capacity it may make contracts, acquire, hold, and convey property, employ agents, and sue at law or in equity for the violation of its rights. (c) It cannot, however, be sued in its own courts without its special consent. (d) These rules apply equally to the several States of the American Union and to the United States.

Read Holland, Ch. xvi, pp 340-342.

(a) 78 D. 571; 8 St. 744.

(b) 94 D. 635; 7 Wall. 666.

(c) 11 How. 229.

(d) 12 D. 516, note; 18 D. 191, note; 41 D. 549 (552, 553); 63 D. 130; 10 St. 712; 22 St. 624, note; 106 U. S. 196.

CHAPTER IV.

OF THINGS.

§ 113. *Of the Nature of Things.*

A thing is a being devoid of personality. Every object of which the law can take cognizance, and which is not a natural or artificial person, is embraced within this definition and is known as a thing. Persons also, when deprived temporarily or permanently of the essential elements of personality, fall within the same class of beings and become mere things. Thus a human being after life is extinct, or while consciousness, reason, and will are suspended, or when under the control of irresistible external force, ceases to be capable of self-determination, and is reduced from the state of a person to that of a thing. A similar change of state may be effected by the law, as in the case of a slave who, though naturally a person, is in many respects legally only a thing.

Read Holland, Ch. viii, pp. 86-92; Markby, § 125; Amos, Ch. vi, pp. 85-88; Austin, Lect. xiii, pp. 358-360, Lect. xlvi, pp. 773-783.

§ 114. *Of Things Corporeal and Incorporeal.*

Things are divisible according to their nature into two classes: Corporeal and Incorporeal. The distinction between these classes is not the same as between things material and immaterial, or between things physical and spiritual, but rather that between things tangible and things intangible. Things corporeal are those which can be handled, and either occupied by man or delivered by one person to another. Such are lands and houses into which a man can enter, or animals, furniture, and vessels which he can manually transfer to

another. Things incorporeal are those which cannot be handled or occupied or delivered. They may be material or immaterial, physical or spiritual. They may or may not be perceptible to the senses of sight, smell, taste, and hearing, but they do not come under the manual control of persons, and cannot be transferred by one person to another except by words, written or spoken, or by some act which signifies that the dominion of the former owner over them has ceased and that of a new owner has begun. Examples of incorporeal things are the unchained forces of nature, the powers of the mind, the franchises of corporations, and the privileges which one person may possess in reference to the persons and property of others. Whether some things are corporeal or incorporeal depends on their condition rather than their nature. The vapors of the atmosphere, for instance, while unconfined, are incorporeal; enclosed in a receptacle or condensed into water or frozen into ice, they become corporeal. Other things, like buildings, money, furniture, are corporeal as long as they preserve their identity. Others, such as the mental faculties, franchises, and similar privileges, are always incorporeal.,

Read 2 Bl. Com., p. 17; Markby, §§ 126-128; Austin, Lect. xiii, pp. 361, 362.

§ 115. Of Incorporeal Things which Exist only in Contemplation of Law.

Things incorporeal may either have an actual existence, or they may exist only in contemplation of law. The forces of nature, mental conceptions, and the like, are essential realities, not depending on human society or political institutions for their being. But franchises, privileges in the property of others, contract rights, rights of action, and many other incorporeal objects, cannot exist except in society, and only exist there by virtue of the creative act of the law. In the eye of the law these are, however, as real as any other objects, and are as fully subject to its protection and control. The number of these objects rapidly increases with the development

of social life, and they often rival, if not perhaps surpass, in value those whose existence is independent of the law.

Read 2 Bl. Com., p. 20; Holland, Ch. xi, pp. 183-186; Amos, Ch. viii, pp. 167-170.

§ 116. Of Things Movable and Immovable.

Things are divided according to their relations to other things into Movable and Immovable. Things corporeal are movable when they can be transported from one place to another without losing their identity. Things corporeal are immovable when they are permanently attached to one locality or can be removed only by disintegration and destruction. This distinction, simple enough as thus stated, is more or less complicated by certain rules of law which declare that corporeal objects movable in themselves are in some cases legally immovable, — meaning thereby that the owner of the movable object has no legal right to remove it from the place where at the time it happens to be. Thus a tree planted in the soil is actually movable without loss of its identity, and if the owner of the soil and the owner of the tree are the same person, he ordinarily has also the legal right to remove it; but under certain circumstances, as, for instance, if he has mortgaged or contracted to sell the land with the tree growing in it, the tree will become immovable in law, though in fact as easily movable as ever. Apart from these legal rules, which apply only to cases where two or more parties have conflicting interests in the same object, — one to remove, the other to retain it in its present place, and the law decides in favor of the latter, — corporeal things are movable or immovable according to their actual mobility. Things movable are said to follow the person of the owner wherever he goes. This does not, however, imply that they move as he moves, but that wherever they may be they are always in his legal possession, and are governed by the system of laws prevailing in the place in which he legally resides. Things immovable, on the other hand, remain always, both in law and in fact, in the same locality, and are controlled by the laws of the place

where they are situated. To things incorporeal the physical attributes of mobility and immobility, of course, do not apply. But as immovable things are generally permanent, and movable things are often transitory, the law ascribes the attribute of immobility to certain incorporeal things whose duration is interminable or indefinitely protracted, or whose relation to immovable corporeal property is such that both must be governed by the same system of laws, while other incorporeal things are classed as movable.

Read 2 Bl. Com., pp. 384-388.

§ 117. Of Things Real and Personal.

Things are also divided into Real and Personal. This classification originally rested upon the legal status of objects as chiefly manifested by the remedy which the law afforded to their rightful possessor when he had been unlawfully deprived of their possession. In former times such rightful possessor, if the objects of which he had been deprived were of a certain character, could recover by an action at law the possession of those very objects, and hence those actions were called "real actions," and the objects recoverable by them were known as "things real." On the other hand, if the objects were of a different character he could not recover by his action at law the real objects themselves, but only damages for their privation, to be collected from the wrong-doer, if necessary, by the imprisonment of his person, and hence such actions were called "personal actions," and the objects for whose dispossession they were brought were known as "things personal." This line of distinction was not an exact one, for in certain cases the actual possession of things personal could also be recovered, but it was of sufficiently general application to warrant this classification of objects by the law. Now, as it happened, the things which could thus be legally recovered in specie were, for the most part, immovable or permanent, while the things for which damages alone could be obtained were movable; and for this reason the name "real" became gradually applied to immovable objects, and the name

“personal” to those which are transitory or movable, until by many modern jurists these classifications have been treated as identical. But, strictly speaking, they are not so. Under our modern law things movable can in many cases be recovered in specie, and such things are, therefore, as real, in the ancient sense, as things immovable, and thus not only has the old ground of distinction between things real and personal nearly disappeared, but the correspondence between personal and movable on one side, and immovable and real upon the other, has also vanished. During the period when this distinction and correspondence did exist, however, there grew up two bodies of law, respectively known as the Law of Real Property and the Law of Personal Property, which were separated from one another by certain fundamental differences relating mainly to the acquisition and transfer of the two species of property. Objects governed by the law of Real Property, whether as formerly they are immovable or as in later times they are frequently movable, are appropriately called “real,” while objects regulated by the law of Personal Property may be truly known as “personal.” The distinction, therefore, now rests as it did anciently upon the legal status of the objects rather than their mobility or immobility, not indeed their legal status as to the law of remedies alone, but as to the two great bodies of law, — the law of Real Property on one hand and the law of Personal Property upon the other. Everything governed by the law of Personal Property is personal; everything governed by the law of Real Property is real. As to what objects shall be subjected to each of these systems of law, the law itself decides, and may at any time remove an object from the control of one system to that of the other.

Read 2 Bl. Com., p. 16; Markby, §§ 129, 130; Williams, R. P. pp. 1-10.

§ 118. Of the Authority of the State over Things.

All things, like all persons, are subject to the law. Not that the practical sovereignty of the State now extends to and

controls all objects corporeal or incorporeal, for it is actually confined to those which come in some way into relations with the human race, but that as man advances and widens his horizon and acquires new possessions and establishes new relations all these, to the utmost possibility of human development, must fall one after the other under the practical sovereignty of the State and become subject to the operation of its laws. Already the law of things, or the law which governs the rights of persons in things, far outstrips in volume and detail the law of persons, and constantly presents new questions of the most difficult character and of the most serious import to mankind.

CHAPTER V.

OF RIGHTS, DUTIES, WRONGS, AND REMEDIES.

SECTION I.

OF RIGHTS.

§ 119. *Of the Purpose of Law.*

The purpose of law is the definition and assertion of rights. If all the rights of States and individuals were spontaneously understood and respected there would be no occasion for the enactment by political society of any rules of conduct. But because these rights are not always comprehended, or when comprehended are not always respected, society is obliged for its own preservation and the protection of its members to make laws and to compel their observance. Thus, in communities composed of intelligent and upright persons, who instinctively and almost unconsciously perform the acts which the law would otherwise command, rights require little specific definition or protection and the laws are consequently either few in number or rarely appear as important elements in social life. On the contrary, in ignorant or turbulent communities the machinery of the law is in vigorous and constant operation, the several functions of the State being incessantly exercised in the assertion and defence of individual and public rights. Hence it is that, to a great extent, rights become consciously known and understood only through their legal definition, and this relation between law and right has led some writers to maintain that rights have their origin in law, and that in the absence of political society,

manifesting its authority by the definition and assertion of rights, individuals would have no rights which other individuals would be under any obligation to respect. Were this proposition true, not only would there be in individuals no right to form a State and no obligation to unite with and obey it, but the State, when formed, or the ruling majority in it, would possess absolute dominion over the persons and property of its citizens, and, however unreasonable and unjust its acts might be, they could work no wrong to any one, since wrong consists in the violation of rights, and there could be no rights except such as the State, or the majority in it, might see fit to concede.

Read Holland, Ch. vi, pp. 68-70, Ch. xiii, p. 284.

§ 120. Of the Origin of Rights.

Rights have their origin in the nature of persons, and consequently exist by virtue of the eternal law. A right is the authority, inherent in a person, to freely exercise in accordance with reason and justice his natural and acquired capabilities. The natural capabilities of a person reside in him in obedience to the natural law. His acquired capabilities result from the development of his natural capabilities by forces which owe their existence and their influence upon him to the same natural law. And as all the operations and effects of the natural law proceed from the intelligence and purpose of the Supreme First Cause, so do all the capabilities of a person, whether natural or acquired, subsist in him in pursuance of the same supreme intelligence and purpose, and in order that they may be exercised by him in the attainment of those ends for which by the same intelligence and purpose he has been designed. The possession of a power to act thus carries with it a right to act,—the right and the power equally relating back to the ultimate intellect and will out of which all created nature springs. Now were there but one person in the universe, and he endowed with but a single

capability, his right to exercise that capability to its fullest possible extent would follow necessarily from its possession. But where, as in mankind, many capabilities reside in the same person, each must be exercised with due regard to the beneficial exercise of the others, such harmony and subordination being maintained between them as will insure to their possessor, from their collective exercise, the most advantageous result. The power to eat, for example, must be exerted with reference to the power to digest; the physical and mental capabilities must be maintained in proper subordination to each other, neither the body exhausted by mental effort nor the mind clouded by sensual indulgence, but every faculty restricted in its operation to occasions, methods, and degrees which allow every other faculty its adequate influence upon the individual character and life. Hence in a composite person like man, although the right exists because the power exists, yet the right is not commensurate with the power, but is necessarily limited by the co-existence and contemporaneous exercise of other equally essential powers. It is the principal office of the human reason to act as mistress and arbiter over these various capabilities and to duly order and proportion the exercise of each one to the others. An exercise of powers is reasonable and right when this order and proportion are preserved; unreasonable and wrong, whenever they are violated; and thus a right consists, so far as its individual possessor is alone concerned, in the authority to use his collective capabilities according to the dictates of reason. Moreover, man is not the only person in the universe. He is surrounded by an innumerable multitude of persons, all endowed with powers and clothed with rights under the natural law, and related to himself in such a manner that more or less of them are constantly affected by his conduct, and he in turn by theirs. As the rights of these other persons rest on the same basis as his own, they are of equal validity and authority with his, and thus the law of nature imposes upon him the obligation to recognize their rights and so adjust the exertion of his capabilities to theirs that every one may freely exercise his powers to the utmost extent com-

patible with their equally free exercise by every other. This adjustment is again the office of the reason, and its measure and result are fixed by justice, which compels every person to render to every other person that which is his due. Thus a further differentiation arises between the scope of rights and that of powers, the right to exercise the power existing only when its exercise is reasonable and just.

Read Lorimer, Book i, Ch. vii.

§ 121. Of the Legal Definition and Assertion of Essential Rights.

If all men were intuitively governed by right reason and strict justice, every man would be a sufficient law unto himself, and every right would be spontaneously recognized and respected. But since in man, as he really exists, the light of reason is generally deficient or the sense of justice weak, it is necessary that some authority external to himself should point out to him the true limitations which reason and justice establish to the exercise of his various powers, — in other words, that it should define his rights and prescribe rules of conduct by which they may be preserved. One of the chief of these authorities, though not by any means the only one, is the State, which, with a view primarily to the welfare of the social body as a whole, undertakes to define and protect by its laws such of these rights as cannot be invaded without detriment to society itself, either through the loss entailed upon the individual or through the disturbance of the public peace and order. Rights thus defined become known as “legal rights,” not because they are created by legislative action, nor because, having been originally natural rights, they have lost their intrinsic validity and obligation, but because, having received the sanction and protection of the laws, they now possess a new vitality and energy through their adoption and assertion by the State. Outside of these still lies the vast field of purely natural rights, of which as yet the State takes no cognizance, either because the common sense and

natural instincts of its members sufficiently secures their due observance, or because their recognition is not necessary to the accomplishment of the purposes for which political society exists. (a)

Read 1 Bl. Com., pp. 53-55; Markby, §§ 147-153, 159-162; Holland, Ch. vii, pp. 71-78, Ch. viii, pp. 79-81; Amos, Ch. vi, pp. 88-97; Austin, Lect. xii, pp. 343-347, Lect. xvi, pp. 393-398.

(a) 14 St. 693 (694); 169 U. S. 366.

§ 122. Of the Legal Definition and Assertion of Incidental Rights.

For the most part natural rights in becoming legal rights undergo no formal change in character or comprehension but are defined and asserted by the law according to their true nature and relations. But in many cases the practical application of the law to the protection of these rights requires the adoption of artificial means, in reference to the use of which new rights arise, having apparently no other origin than the immediate fiat of the State. To this class belong all those rights which pertain to the operations of remedial justice, — such as the law of actions, pleading, evidence, and procedure. — as well as to those measures which the State employs in enforcing its own rights against the persons and property of its citizens, — such as conscription, taxation, and eminent domain. Still the real basis of these rights is the natural law. For the law of natural justice dictates that when a right is violated the wrong-doer shall make adequate restitution. The nature of the State imposes upon it the duty to compel this restitution when the wrong-doer fails to voluntarily award it, and in the performance of this duty to adopt the remedial methods which are best suited for this purpose in view of the circumstances of the case. In like manner the law of nature obliges the citizen to support the State of which he is a member and authorizes the State to provide means by which this support can be most easily and effectively sup-

plied. Hence whatever rights the State confers on individuals or asserts for itself in the fulfilment of these duties, though in form they may seem technical and arbitrary to the last degree, nevertheless derive their existence from the same law of nature as the rights which they assert, and are determined even as to their form by events and conditions which likewise owe their origin to the same natural law. Thus every right which the law recognizes is either an essential natural right or is included in it as its necessary incident, and consequently rests upon the same authority, is indorsed by the same sanction, and inheres in the person who possesses it as his natural endowment, and not as a mere concession of the State.

§ 123. Of Rights Public and Private.

Legal rights are divisible into Public Rights and Private Rights. Public rights are those which inhere in the State or in its governmental agents, or in private individuals as against the State or its agents. The rights of the State, taken together, constitute its sovereignty, or the authority to do whatever may be necessary for the common good. Enumeratively, they are the right to receive the obedience and support of its own subjects and to establish such relations between itself and other States as its just interests require. These rights are defined in part by the general provisions of international, constitutional, and criminal law, and in part by the enactments and treaties of the State itself. The public rights of citizens, sometimes called their political rights, are the right to the protection and vindication by the State of their private legal rights, the right to participate in the government of the State according to current constitutional provisions, and the right to be free from the interference of the State except by due course of law. Private rights are those which reside in natural or artificial persons in their private capacity and are assertible only against other private

individuals. They include all legal rights of persons which are not strictly of a public character.

Read Holland, Ch. ix, pp. 111-114.

§ 124. Of Rights Normal and Abnormal.

Legal rights are also divisible into Normal Rights and Abnormal Rights. Normal rights are those which belong to persons having a normal status. Abnormal rights vest in persons whose status is abnormal, and vary from normal rights in a direction and degree corresponding to the deviation of the status of the person from the normal standard. Thus the rights of an artificial person, or of a natural person under age or legal disability, are normal so far as the status is normal, and in other respects are determined by its peculiar characteristics.

Read Holland, Ch. ix, pp. 122-124, Ch. xiv, pp. 297, 298.

§ 125. Of Rights in Rem and in Personam.

Legal rights are again divisible into Rights *in Rem* and Rights *in Personam*. A right *in rem* is a right assertible against all other persons, such as a right to property or the right of personal security or liberty. A right *in personam* is a right assertible only against one or more specific persons, such as the right of a father over his child or of one contracting party against the other. The same distinction is sometimes expressed by the phrases "rights against the world" and "rights against individuals."

Read Holland, Ch. ix, pp. 128-130, Ch. xiii, pp. 282-288; Markby, §§ 164-167; Austin, Lect. xiv, pp. 369-371.

§ 126. Of Rights Antecedent and Remedial.

Legal rights are further divisible into Antecedent Rights and Remedial Rights. An antecedent right inheres in a

person irrespective of the wrongful acts or defaults of other persons. It may be a right conferred on him by nature, like the right to life or liberty, or it may be a right arising from some lawful act of other persons, such as a gift, a contract, or a relation voluntarily established. A remedial right vests in one person as the result of some wrongful act or default of another. It consists in the right to seek and obtain, from the law or otherwise, redress for the injury inflicted by the commission of the wrong.

Read Holland, Ch. ix. p. 130.

§ 127. Of Normal Antecedent Rights in Rem.

The foregoing divisions of legal rights into normal and abnormal, *in rem* and *in personam*, antecedent and remedial, furnish, when variously grouped together, a fourfold classification under which the particular normal rights pertaining to private persons may be conveniently enumerated. These four classes are: (1) Normal antecedent rights *in rem*; (2) Normal antecedent rights *in personam*; (3) Normal remedial rights *in rem*; (4) Normal remedial rights *in personam*. Normal antecedent rights *in rem* are those rights which inhere in persons of normal status irrespective of the wrongful acts or defaults of other persons, and are assertible against all mankind. Of such rights there are five: (1) The right of personal security; (2) The right of personal liberty; (3) Family rights *in rem*; (4) The right to property; (5) The right to immunity from fraud. The right of personal security is the right to the legal and uninterrupted enjoyment of life, limbs, body, health, and reputation. (a) The right of personal liberty is the right of a person to control his own acts and forbearances without restraint except by due course of law. (b) A family right *in rem* is the right which a domestic superior has, as against all other persons, to the control of his domestic inferior. Family rights are often identified with "relative rights" because they attach to the relations of husband and wife, parent and child, guardian and ward, master

and servant; but they are rights *in rem* only in reference to the superior; as to the inferior, they are rights merely *in personam*. (c) The right to property is the right to acquire, use, and dispose of property, subject to no interference except that of the law. (d) The right to immunity from fraud is the right of one person to honesty and fairness on the part of all other persons in every transaction where their intentional false representations might lead him to act contrary to his own interests. (e)

Read Holland, Ch. xi, pp. 148-166, 207-211; Austin, Lect. xiv, pp. 371-373.

(a) Amos, Ch. vii, pp. 123-133; Cooley, C. Law, Ch. xiii, pp. 246-263.

(b) Lorimer, Book ii, Ch. i-v, Book iv, Ch. i; Cooley, Const. Lim., Ch. x, xii, xiii; 4 St. 465 (468); 37 St. 206 (208); 46 St. 315 (319, 320).

(c) 1 Bl. Com., pp. 134-138; Austin, Lect. xiv, pp. 373-378, Lect. xvii, pp. 783-789.

(d) 1 Bl. Com., pp. 138-140; 2 Bl. Com., pp. 1-15; Cooley, Const. Lim., Ch. xi, pp. 351-369; Amos, Ch. viii, pp. 148-167, 173-189; Austin, Lect. xv, pp. 382-391, Lect. xvii-iii, pp. 789-856, Lect. liv-lvii, pp. 870-905; 37 St. 206 (209); 14 D. 575, note; 55 D. 403, note.

(e) 47 St. 489 (494, 495).

§ 128. Of Normal Antecedent Rights in Personam.

Normal antecedent rights *in personam* are those rights which inhere in persons of normal status, irrespective of the wrongful acts or defaults of other persons, but are assertible only against one or more specific individuals. These rights are three: (1) Contractual rights; (2) Fiduciary rights; (3) Family rights *in personam*. Contractual rights are either Contract rights, or *Quasi-Contract* rights. Contract rights are those which arise out of agreements between two or more parties, upon sufficient consideration, to act or forbear to act in some legal and possible manner. *Quasi-Contract* rights are those which arise without a contract from such voluntary

acts of one person as, in justice and reason, commit him to duties or confer on him privileges in reference to other persons. Instances of such rights are the right of one, who has volunteered without request to render to another a beneficial service, to be compensated therefor; or the right of one, who without any legal or moral obligation has paid money under a mistake of fact, to recover it from the payee. Fiduciary rights are rights arising in one person from a confidence by him reposed in and accepted by another either as incidental to a relation or by virtue of some transaction between them. Such rights are the right of one, whose property has been intrusted to another, to have it administered according to the trust; the right of one joint owner of property, which is in the possession of the other joint owner, to have it properly preserved and used for their joint benefit or equally divided; or the right of one party to a relation to immunity from any fraudulent advantage which might be taken of him by the other. Family rights *in personam* are those which the parties to the domestic relations of husband and wife, parent and child, guardian and ward, and master and servant possess only against each other.

Read 2 Bl. Com., pp. 442-470: Holland, Ch. xii, pp. 213-273; Ainos, Ch. vii, pp. 141-144, Ch. ix, pp. 190-227; Austin, Frag. pp. 906-915.

§ 129. Of Normal Remedial Rights in Rem.

Normal remedial rights *in rem* are those which are vested in persons of normal status as the result of some wrongful act or default on the part of other persons, and are assertible against all the world. These rights are comparatively rare, but they exist in certain cases, as where the law in applying a remedy for the violation of a right by one wrong-doer affirms the right conclusively against all other possible invaders. Thus, for example, rights of property in vessels arising out of maritime liens may be so defined and vindicated in an action between two immediate contestants as to bar the asser-

tion of a contrary right by any person whatsoever; or a decree divorcing a husband and wife not only dissolves the relation as to them, but changes their legal attitude and liability toward all mankind.

Read Holland, Ch. xi, p. 148, Ch. xiii, pp. 287, 288; 66 D. 290 (295); 75 D. 714, note.

§ 130. Of Normal Remedial Rights in Personam.

Normal remedial rights *in personam* are those which vest in a person of normal status as the result of some wrongful act or default on the part of another person, and are assertible only against the wrong-doer. These rights are four: (1) The right of the injured party to defend himself and his property against an attempted wrong; (2) The right to regain, by a reasonable exercise of force, the possession of the property or privileges of which he has been wrongfully deprived; (3) The right to have the wrongful act or default prevented or discontinued by the intervention of the courts; (4) The right to obtain compensation from the wrong-doer through judicial or other governmental agencies.

Read 3 Bl. Com., pp. 3-23; Holland, Ch. xiii, p. 287; Walker, Lect. xxxvii, pp. 584-587.

§ 131. Of the Extinguishment and Transfer of Legal Rights.

Legal rights may be extinguished, or at all events may lose their legal character, identity, or assertibility, in four methods: (1) By Merger of the right in some more comprehensive right, as where a debt merges in a judgment or a less estate in a greater (*a*); (2) By Waiver, or the intentional relinquishment of a known legal right by its owner, manifested by deliberate and unequivocal acts or words (*b*); (3) By Forfeiture, as where the owner of a legal right on account of his misconduct or *laches* (*c*) or the position in which he has voluntarily led other persons to place themselves (*d*), is either

deprived of the possession of the right, or is forbidden by the law to assert it against any person, or is estopped from vindicating it against those persons whom if he did assert it he would then have misled to their injury; (4) By Satisfaction, which exhausts the right by vesting in its owner the complete object or privilege to which the right pertains. Private legal rights are also capable of transfer by their owner so far as their nature will permit, subject to such restrictions as may be necessary for the common good.

Read Holland, Ch. x, pp. 137, 138, Ch. xii, pp. 273-276, Ch. xiii, pp. 293-296.

(a) 15 D. 78, note.

(b) 85 D. 240 (245); 31 R. 42, note; 72 D. 738, note; 78 D. 186, note; 31 R. 34, note; 17 D. 233, note.

(c) 54 D. 126, note.

(d) 16 D. 741, note; 57 R. 424, note; 38 D. 628, note; 63 D. 665, note.

SECTION II.

OF DUTIES.

§ 132. Of the Relation between Rights and Duties.

The inherence of a right in one person imposes upon other persons the obligation to respect it. This obligation, equally with the right, has its origin in the natural law, since the right could not be practically enjoyed unless the individuals against whom it must be exercised, if exercised at all, acquiesced either voluntarily or involuntarily in its enjoyment. The existence of the right thus creates the obligation, and hence the obligation is commensurate with the right in character, in scope, and in the number of persons upon whom it is imposed. This obligation being prescribed by reason and justice, and not by an exterior physical force, is properly called a "duty" or the practical recognition of that which is due to another by virtue of the right residing in him.

Read Lorimer, Book i, Ch. xi; Austin, Lect. xvii, pp. 400-407.

§ 133. Of Legal Duties.

Legal duties correspond to legal rights. Wherever a natural right receives the sanction of the laws, and thus becomes a legal right, a legal obligation to respect the right immediately rests upon all persons by whom the right could be violated. The field of legal duty is thus identical with that of legal right. Some authors have, indeed, attempted to distinguish a class of legal duties to which there were no corresponding legal rights, such, for example, as the legal duty to refrain from cruelty to animals, from suicide, from conspiring against foreign States, and from disrespect to objects of religious worship. But this attempt is grounded in an error which first assumes that the only rights invaded by these actions are the rights of animals against mankind, the rights of man against himself, the rights of foreign governments, or the rights of the Creator against his creatures, — none of which, of course, are strictly legal rights; and, secondly, ignores the fact that every political society has the right to protect itself against the outrage of its sensibilities occasioned by the first offence, against the loss of its own members occasioned by the second, against the international complications occasioned by the third, and against the shock to its ideals or the degradation of its moral character occasioned by the fourth. The State has the natural right to enact whatever laws the physical, economical, intellectual, moral, or spiritual welfare of its people or its own national peace and security may demand; and having enacted such laws it has the legal right to have them obeyed, irrespective of the fact that the beings or persons whose natural rights they protect may be beyond its sphere. Thus whether the State creates a legal duty by directly imposing it upon the citizen, or by giving legal sanction to some natural right out of which the duty springs, there is always a legal right to which the duty corresponds, and if this legal right does not reside in persons who are under the protection of the State, it does reside in the State itself, whose legal right to the obedience of its subjects no one can call in question. The fact that the four acts above described, when noticed by the law at all, are uni-

formly punished as crimes against the State, shows at once whose rights they infringe and to whom the duties which they violate are due.

Read Austin, Lect. xxii, xxiii, pp. 443-457, Lect. xxvii, pp. 499-507.

§ 134. Of the Classes of Legal Duties.

The divisions of legal rights already given indicate the corresponding classes of legal duties. A public legal duty is the obligation to respect the public rights of the State, of its governmental agents, and of its members considered in their capacity of citizens. A private legal duty is the obligation not to hinder nor curtail the enjoyment of the private legal rights of natural or artificial persons. Normal legal rights impose general legal duties, applicable to persons of normal status. Abnormal legal rights give rise to exceptional and variable legal duties according to the character and degree of the abnormal status. Legal rights *in rem* place all mankind under the corresponding legal obligations. Legal rights *in personam* create legal duties only in reference to the individuals against whom the rights subsist. Antecedent legal rights elicit primary legal duties securing such rights against violation. Remedial legal rights involve secondary or compensatory duties, affording to the owner of the violated right a proper satisfaction for the wrong he has sustained. The individual duties embraced in these divisions need not be enumerated nor their specific character explained, since they are already sufficiently suggested by the description of the rights to which they correspond.

§ 135. Of the Relation of Duty to Status.

This correspondence between legal rights and legal duties, both in their number and essential nature, does not, however, imply that the legal duty presses equally upon every person without reference to his own status. Even the duties which are imposed on all mankind by rights *in rem* do not entail

the same obligations upon natural and artificial persons, upon public officers and private citizens, upon adults and infants, upon the insane and the sane. Differences of status create differences of duty as well as differences of right, and what has been explained in detail under that title in a previous chapter must be taken as a part of this and of every other discussion concerning rights, duties, or wrongs.

§ 136. Of Acts and Forbearances.

In reference to the nature of the conduct which they involve, legal duties consist either of acts or forbearances. An act is a voluntary external movement of the whole or a part of the body of a person. In it two forces concur, — the physical organism and the will. All other movements of the body are mere casual events, not imputable to the person because not prompted by his intellect nor governed by his will. Acts, thus defined, include the active and intentional exercise of the senses of sight, smell, taste, and hearing as well as of the faculties of speech and touch, and without reference to the degree of force which any of these operations may require. A forbearance is a voluntary omission to act when action is possible. Legal duties consisting of acts are called "positive" duties; those consisting of forbearances are called "negative" duties. A large proportion of legal duties are of the latter class. Those answering to normal antecedent rights *in rem*, with very few exceptions, are mere forbearances. Many of those imposed by normal antecedent rights *in personam*, especially of those growing out of certain species of contracts, are of the same character. On the other hand, those corresponding to abnormal rights, or to remedial rights, or to normal antecedent rights *in personam* based on other species of contracts or on *quasi*-contracts, or on domestic relations, generally require the performance of acts on the part of those against whom the right subsists.

Read Holland, Ch. viii, pp. 92-109; Markby, §§ 214-235; Amos, Ch. vi, pp. 99-116; Austin, Lect. xiv, pp. 365-369.

§ 137. Of the Distinction between Positive and Negative Duties

A principal distinction between negative and positive duties resides in the fact that negative duties can be performed only by the persons charged with the duty, while positive duties may sometimes be performed either by such persons or their authorized agents, or even by unauthorized persons upon their behalf. A forbearance by a person who is under no legal obligation to forbear never can legally take the place of the forbearance of the persons upon whom the duty of forbearance rests, since the right to which the duty of forbearance corresponds is completely violated by the failure of the obligated person to forbear, though every other person in the world should carefully refrain from any interference with the right. Thus, for example, if a manufacturer were to sell his factory, together with its business and good-will, and covenanted with the buyer not to start a rival factory in that vicinity, yet broke his covenant and did so, it is apparent that the rights of the buyer are invaded as effectually as they could ever be, though no other maker of the same commodities attempted to establish any similar competing enterprise. But if the duty of the selling manufacturer had been a positive one, such as maintaining the ponds from which the water power was to be supplied at a given height and area, and failing to do this himself the same acts were performed on his behalf either by his agents or some interested relative, the buyer would sustain no loss of privilege and consequently no violation of his rights. In cases, however, where the act to be performed involves judgment and discretion, only the person upon whom the duty rests can legally discharge it.

Read Markby, §§ 181-192.

§ 138. Of the Extinguishment of Duties.

An obligation ceases either upon the performance of the duty or the extinction of the right. Where the individual in whom the right inheres intentionally relinquishes it, or is guilty of an act or default which works its legal forfeiture,

the persons against whom it might previously have been enforced are no longer bound to notice or regard it. (a) Such an extinction of the right may take place in favor of all persons upon whom the obligation rests, or upon one or more of them, remaining in its full validity against the others. But the complete performance of the duty, by any one who has the power to do so, satisfies the right and thereupon the obligation ceases, not only as to him by whom it was performed, but as to all others upon whom the duty was imposed. (b) The owner of a tract of land, for instance, may waive his right to exclude from it certain persons without impairing the obligation of all other persons to keep outside its boundaries. But if one of several joint trespassers thereon, all of whom are bound to make him compensation for the injury, pays him a sum equivalent to the damage which he has sustained, the duty is discharged as to all and his right to compensation ceases to exist. Negative duties which correspond to rights *in rem* cannot, however, be completely performed by any number of persons less than all mankind, and consequently these duties, like their originating rights, continue until the rights themselves are waived or forfeited or all the persons in whom they inhere cease to exist.

Read Holland, Ch. xii, pp. 276-281.

(a) 39 St. 577, note.

(b) 14 R. 60.

SECTION III.

OF WRONGS.

§ 139. Of the Nature and Scope of Legal Wrongs.

A legal wrong is the failure to discharge a legal duty, and consequently consists in some act or forbearance in violation of a legal right. Where the duty is positive it is not fulfilled, and therefore a wrong is committed, unless the obligatory act is precisely and completely performed. Thus, for example, the duty of a lessee to surrender the leased premises to the lessor, on a day stipulated in the lease (which is a posi-

tive duty), is not discharged by the relinquishment of any fraction of the premises, however great, at the appointed time, nor of the entire premises at any later date. Hence wrongs against positive duties admit of degrees. Although it is a wrong, yet it is obviously a smaller wrong for the lessee to delay the surrender of the premises, or to temporarily withhold a part, than to permanently retain the whole; or for a debtor to let pay-day pass without a payment than never to pay his debt at all; or for a husband or a father to afford inadequate protection to his wife or children than to utterly neglect them; or for a criminal to passively disobey the laws than to rebel openly against the State. And though it is as true of one degree as of the other that rights have been invaded and duties unperformed, still the injury inflicted or the guilt incurred, and the restitution to be made or the penalty endured, are manifestly not the same in measure and severity. For this reason wrongs which violate positive duties are complex and scarcely capable of enumeration, vastly exceeding in variety the rights which they attack. But on the contrary, when the duty is negative, no act less than the whole act which the negative duty forbids can transgress the duty or constitute a wrong. The duty not to commit fraud by intentionally misleading others to their injury, for instance (which is a negative duty), is not infringed by unintentionally misleading them, nor by an ineffectual endeavor to mislead them, nor by intentionally misleading them without resulting loss. (a) Wrongs against negative duties thus admit of no degrees. The duty and the right out of which it arises are precise and specific, and the duty to respect the right cannot be violated by any act less than or different from the one proscribed. Wrongs against negative duties are consequently few and simple, their number, nature, and effects being clearly indicated by the statement and description of the rights which they invade.

Read Markby, §§ 592-602; Austin, Lect. xviii-xix, pp. 410-421, Lect. xxi, pp. 435-443, Lect. xxiv-xxvi, pp. 457-499.

(a) 81 D. 374; 72 D. 639; 32 R. 562.

§ 140. **Of Malfeasances, Misfeasances, and Nonfeasances.**

Wrongs are divisible, according to the nature of the acts or forbearances of which they consist, into Malfeasances, Misfeasances, and Nonfeasances. Malfeasance is the doing of that which it was the duty of the doer not to do. Misfeasance is the doing in an unlawful manner of that which the doer was either bound to do or had the right to do. Nonfeasance is the not doing of that which it was the duty of the non-doer to do. Malfeasance thus implies an act and nonfeasance a forbearance; but misfeasance may assume the form either of an act or a forbearance; of an act, when the misfeasance consists in carrying the lawful act to an unlawful excess either in quantity or method; of a forbearance, when the act, although performed, falls short in quantity or method of what the law requires. Malfeasances and such misfeasances as assume the form of an act therefore involve the idea of intentional wrong-doing, — a positive aggressive invasion of the rights of others. Nonfeasances and the misfeasances consisting in forbearance are due to negligence, either a simple negligence inadvertent of the rights of others and inert in responding to the demands of duty, or a gross negligence conscious of rights and duties but wantonly and purposely refusing to regard them. (a)

Read Holland, Ch. xiii, pp. 288-293; Austin, Lect. xx, pp. 425-433.

(a) 90 D. 49 (52); 12 St. 698, note; 87 D. 644; 48 St. 132 (136, 137); 8 St. 624 (625, 626).

§ 141. **Of Public Wrongs.**

The classification of wrongs according to the nature of the rights which they invade necessarily follows that of rights and duties. Wrongs which infringe public legal rights are public wrongs. Wrongs which violate private rights are private wrongs. An act or forbearance which transgresses both public and private rights, as is sometimes the case, is in its former character a public wrong, and in its latter character

a private wrong. Public wrongs are in most cases prosecuted and punished by the State by proceedings instituted by it of its own accord and in its own name, and are then known as "crimes." In other cases they are met by peculiar measures adapted to the individual wrong, such as the removal from office of those who neglect their public duties, the arbitrary increase of the taxes of persons who conceal their taxable property, the confiscation of smuggled importations, the commitment for contempt of jurors, witnesses, and other individuals who refuse to obey a legal mandate of the courts. (a) In still other cases the public wrong passes unnoticed by the State, either because it is regarded by the popular judgment as of slight importance, or because no adequate mode of dealing with it has yet been contrived. Where public wrongs also involve a violation of private rights, the remedy of the injured party against the wrong-doer is usually the same as if the wrongful act or forbearance had no public character. (b)

Read 4 Bl. Com., pp. 5-7; Amos, Ch. x, pp. 228-263.

(a) 16 St. 813; 50 D. 68.

(b) 60 D. 698; 28 R. 45, note.

§ 142. Of the Ingredients of a Private Wrong.

Every private legal wrong contains two ingredients; the wrongful act or forbearance of the wrong-doer, called the *injuria*, and the resulting loss to the injured party, called the *damnum*. Under the term *injuria* the law includes every action and forbearance which does not lie within the sphere of the actor's or forbearor's legal rights. Under the term *damnum* it embraces every form of loss, actual or implied, which it regards as capable of flowing from a violation of the legal rights of the person who sustains the loss. *Injuria* and *damnum* concur whenever one person performs an act which he had no legal right to perform, or omits an act which he had no legal right to omit, and as a consequence of his action or omission some other person suffers a loss, — either an actual loss or a loss implied by law, — from which he had

a legal right to be exempt. An *injuria sine damno*, or an unlawful act which causes no loss, of which the law will take notice, to another party in violation of his legal rights, is not a private wrong, though it may be a public one, and a *damnum absque injuria*, or a loss of which the law could otherwise take notice but which in this case has resulted from a lawful action or forbearance, is not a violation of a legal right, since the legal rights of one person can never be infringed by the lawful actions or omissions of another. (a) Hence the truth of the ancient maxims that neither from *damnum absque injuria* nor from *injuria sine damno* can any suit at law arise; for in the first case the actor or forbearor has kept within his legal rights, and in the second the legal rights of the person who sustains the loss have never been infringed.

Read (a) 8 D. 369.

§ 143. Of the Distinction between Torts and Breaches of Contract.

Private legal wrongs are sometimes called "torts," a generic name employed to distinguish them from crimes. But in the language of the English and American law this name is usually confined to private wrongs which do not consist in the failure to perform the obligations of a contract or a *quasi*-contract, or to discharge the duties growing out of legal relations between the wrong-doer and the injured party. Though this distinction between torts and other private wrongs may not be philosophically correct, yet it is so deeply imbedded in our law that it cannot now be obliterated or ignored. Upon it are based many differences in forms of actions, modes of procedure, and the scope and application of judicial remedies; and thus there has gradually arisen a division of private wrongs into the two classes, — torts and breaches of contract, — which are separated from one another not so much by any permanent variation in character as by the dissimilar modes in which the injured parties seek and find redress. Between these classes, however, no sharp, inflexible line of demarca-

tion can be drawn. Many acts and forbearances which are violations of contract or of relative rights are also torts, and would be torts even if no contract or relation had ever subsisted between the parties; and in such cases the injured party may pursue his remedy either for the tort or breach of contract or for both, although he can recover but one complete satisfaction for the wrong.

Read 3 Bl. Com., pp. 118, 119: 17 D. 238, note.

§ 144. Of Breaches of Contract.

Of what acts or forbearances a breach of contract consists the contract itself in its true legal interpretation must determine. Anything less than the complete performance of the contract according to its terms is such a breach, though of immaterial and minute variations from its letter, working no harm to either party, the courts are not inclined to take notice, provided the substantial benefits of the agreement are secured. (a) Thus a contract to pay money on a certain day is substantially performed by its payment at a subsequent day with the lawful interest accruing during the interval, and the acceptance of the money with its interest by the creditor, or even its tender by the debtor, is a satisfaction of the rights created by the contract although it has not been literally fulfilled. But the failure of one party to perform any essential provision of the contract is a wrong whether or not the other party suffers actual loss, since the wrong consists not in the disastrous consequences which follow an invasion of the right but in the invasion of the right itself, the law adverting to the consequences only to ascertain the amount of compensation which the injured party is entitled to recover. In like manner the duties growing out of a *quasi*-contract or a legal relation between the parties define the nature and extent of any wrong by which the rights of either party may be violated.

Read 3 Bl. Com., pp. 153-166; Markby, §§ 603-666.

(a) 32 D. 515; 72 D. 412.

§ 145. Of Torts.

To the class of torts, technically so called according to our law, belong all private malfeasances which do not consist purely in the commission of some act that, but for the contract or relation into which he has entered, the doer would have had a right to do. Such are all acts against security, liberty, property, or family rights, unless performed in the lawful assertion of a private right, or by the lawful consent of the injured party, or in the exercise of legal authority; and also all acts of positive and intentional fraud resulting in pecuniary loss to the person deceived. In the same class are comprised all private nonfeasances which consist in the failure to discharge some duty imposed by law upon all persons or on all persons of a certain group in which the non-feasor is included; and all private misfeasances which consist in acts exceeding the measure of the actor's legal right or in forbearances by which a general legal duty is imperfectly discharged. Most of these torts are violations of rights *in rem*, though some infringe duties which originate in contracts or relations, while wrongs against rights *in rem* are always torts even when such rights have been fortified by special relations or agreements which are also violated by the perpetration of the wrong.

Read 3 Bl. Com., pp. 119-153, 166-174, 208-242; Markby, §§ 667-716; 88 D. 503.

§ 146. Of the Relation of Wrongs to Status.

The complete capacity to commit legal wrongs resides in persons of normal status alone. Such persons not only possess all legal rights but are subject to all legal duties, and are consequently able to infringe them. But persons of abnormal status are at once limited in rights, in obligations, and in ability to perpetrate wrongs, according to the peculiar characteristics attached by the law to their status, and outside those limitations cannot be guilty of a tort, a breach of contract, or a crime, whatever may be the nature of their

actions or omissions or the injuries to others in which they result. Thus an infant does not break a contract by failing to perform his agreements other than those for necessities; an idiot does not become guilty of a murder by the intentional killing of his neighbor; a married woman did not, under our earlier laws, violate a private right by any acts of violence against others in which she might engage. The consideration of the status of the alleged wrong-doer, as well as that of the owner of the right which is or is supposed to be violated, must, therefore, enter into every question concerning the existence of a legal wrong.

§ 147. Of the Extinguishment of Wrongs.

A legal wrong may be extinguished by the person whose rights it has invaded, provided the consent of the wrong-doer is obtained. Where the State thus obliterates a public wrong its act is called a "pardon," and may be absolute, — taking effect at all events, or be conditioned upon the conduct of the person pardoned. It extinguishes not merely the liability to prosecution and punishment but also the very imputation of the crime, so that the wrong-doer is no longer regarded by the law as having been guilty of the crime. To the validity of a pardon its acceptance by the criminal is necessary and its effect is limited to the particular wrongs enumerated in the grant by which it is conferred. (*a*) The commutation of a penalty, though like a pardon an act of sovereign grace, is not in any sense a pardon, since it operates upon the punishment alone and does not purport to affect the crime. (*b*) The condonation of a private wrong by the injured party may be gratuitous or upon consideration, and when gratuitous may be irrevocable or subject to recall upon a repetition of the wrong. Instances of such condonation occur where a creditor accepts the amount due him after the date when it should have been paid, or a wife admits an adulterous husband to his conjugal privileges after she has notice of his

adultery, or any injured party releases the wrong-doer upon the receipt of some satisfaction for the wrong. (c)

Read 4 Bl. Com., pp. 394-402; Cooley, C. Law, Ch. v, pp. 115-117.

(a) 84 D. 431, note; 59 D. 566, note; 7 Pet. 150; 48 R. 462; 19 D. 679, note; 49 R. 684; 30 R. 395; 31 R. 385.

(b) 18 How. 307.

(c) 52 D. 561; 46 R. 476; 41 D. 370; 100 D. 752.

SECTION IV.

OF REMEDIES.

§ 148. Of the Relation of Remedies to Wrongs.

The commission of a legal wrong vests in the injured party a remedial right. It is a maxim of the law that "*Ubi jus ibi remedium*," or wherever a legal right exists to be invaded the law will give redress when it is violated. The complete infliction of the injury thus immediately calls into existence the remedial right. Where the wrong is instantaneous, like an act of violence, it becomes complete at once, and the remedial right may be forthwith asserted. Where it consists in some neglect of duty further steps may be essential on the part of the injured person, such as a demand upon the other person to perform the duty, before the omission will be recognized as a legal wrong. (a) Where, though the wrongful act or forbearance is itself perfected, the loss which it is likely to entail remains in abeyance, awaiting the occurrence of conditions in which it may fall with its full weight upon the owner of the violated right, the vesting of the remedial right is also suspended until the loss has been endured. (b) This legal connection between the wrong and the remedy only the extinguishment of the wrong can interrupt; the remedial right following the infringement of the antecedent right as any other effect follows from its cause.

Read 1 Bl. Com., pp. 56-58, 141-145; 3 Bl. Com., p. 23.

(a) 76 D. 174; 77 D. 468, note; 40 D. 310, note.

(b) 17 D. 782; 70 D. 638.

§ 149. Of the Primary Purpose of Remedies.

The primary object of every effort of remedial justice is satisfaction for the wrong committed. Whenever a right is invaded the equilibrium established by reason between the mutually restrictive rights of the parties is disturbed, and reason demands its restoration by placing the parties as nearly as may be possible in their former condition. This dictate of reason manifests itself in the most barbarous of races, and even in children, as that instinct of reprisal which impels them as communities and families and individuals to preserve the balance of rights by wresting satisfaction for an injury from the wrong-doer, either in some form of compensation to the injured party or in some equal privation inflicted on the injurer. To attribute this instinct and its practical expression to a disposition for revenge, as is the custom with such writers as seek the origin of human motives in the rude passions of ancestral beasts, is to cast away the only sanction which gives remedial justice its supreme authority over the violators of a legal right. Revenge has its root in malice, is the worst form of hatred, operates without reference to reason and justice, exults in wrong committed not in rights restored. The instinct of reprisal, or the *lex talionis*, is essentially reasonable and just, necessary in the present condition of mankind to the prevention of wrongs and the preservation of rights, and therefore must express itself in human institutions and through human laws until man passes into a condition where the disturbance of the equilibrium of human rights is spontaneously avoided or forcibly restrained.

Read Markby, §§ 828-830, 839.

§ 150. Of Remedies which Place the Parties in Statu Quo.

In certain cases of violated legal rights the exact or approximate restoration of the wrong-doer and the injured party to their former condition is possible. Where, for example, the owner of a tract of land is ousted from its possession by a wrongful act, the ejection of the intruder, the delivery of pos-

session to the rightful owner, the return to him of the intermediate rents and profits, and the payment of such costs and expenses as have accrued from his removal from the land and his endeavors to regain it, not only deprives the wrong-doer of the advantage which his wrongful act conferred upon him, but reverts the owner of the land with all the legal privileges and benefits which he could have enjoyed if his original rights had remained undisturbed. True his wounded feelings, his loss of comfort, his anxieties of mind, cannot be recalled and prevented, but these are sufferings which have no necessary connection with the invasion of his legal rights, are largely due to personal idiosyncrasies, are incapable of prevention or of adequate compensation, and so far as they do result from legal injuries are rarely and reluctantly noticed by the law. Other instances of the return of the parties to their former condition occur in the restoration of personal property to its owner with damages for its detention, in the specific performance of a contract, in the induction of an officeholder into an office from which he has been unlawfully excluded, the payment of an overdue debt with interest during the time of its delay, the rescission of an agreement obtained by fraud, or the enforcement of the duties of trustees. (a) The tendency in all civilized States — stronger and more successful in proportion to their degree of civilization — is to seek for forms of satisfaction for completed wrongs which place the parties *in statu quo* and to devise methods for applying them, and thus to establish remedial systems which, next to such as prevent wrongs altogether, are the most consonant with reason and the most useful to mankind.

Read 3 Bl. Com., pp. 116, 174-184, 198-207.

(a) 14 D. 614; 52 D. 777; 27 D. 578; 35 D. 131; 12 D. 70.

§ 151. Of Compensatory Remedies for Public Wrongs.

As yet, however, the vast majority of legal wrongs have not been met with remedies affording this exact or approxi-

mate return of the parties to their previous condition. With scarcely an exception that class of public wrongs, known as crimes, affords no opportunity for such a remedy. The denial of the authority of the State, its insulted majesty, the breach of public peace and order, the injury inflicted on it directly or through the persons of its citizens, cannot be obliterated by any repentance or restitution on the part of the wrong-doer. A passive submission to such wrongs by the State is incompatible with its political supremacy; immunity to the wrong-doer is contrary to justice; and hence in reason and in justice it is necessary that the State should exact from the wrong-doer such reparation as shall be, as nearly as possible, the equivalent of that obedience and respect to which it was originally entitled. Defective as the administration of criminal law may now be in our modern States, it nevertheless goes far toward the attainment of this end. Corporal punishment, imprisonment and fines, inflicted by the State and endured by the offender, vindicate its authority, repair the insult to its majesty, manifest the supremacy of public order over personal conduct, and assert the sacredness of the particular rights which have been violated by the crime. Better methods than these undoubtedly remain as yet undiscovered, more precisely adjusting the remedy to the reparation of the wrong, but these disclose sufficiently the principle which underlies the punishment of crime, and truly, though perhaps inadequately, embody its demands. (a)

Read 4 Bl. Com., pp. 7-19; Amos, Ch. x, pp. 263-289; Austin, Frag. pp. 1040-1070.

(a) 35 St. 706.

§ 152. Of Compensatory Remedies for Private Wrongs.

In numerous instances of private legal wrongs an equal difficulty exists in finding and applying remedies which return the parties to their *statu quo*. The blow, the slander, the false imprisonment, the interference with family authority, the destruction of property, cannot be recalled, and that

condition of affairs be reproduced in which these wrongful acts had not been done. But some approach toward a restoration of the equilibrium of rights between the parties can be made which, however slight, is more consonant to reason and justice than to leave the wrong-doer triumphant and unmoled in his wrong. Even if nothing more is possible than to subject him to a privation equal to that which he has inflicted on his victim, — “an eye for an eye, and a tooth for a tooth,” — it is better so than that the law should permit the victim to suffer and his injurer to go unscathed. Resultless in physical or pecuniary benefit to the injured party as such primitive remedies as these might be, still his sense of justice is satisfied, the sanctity of his rights is vindicated, and the wrong-doer is provided with a powerful motive to anticipate the action of the law and to compensate him for the wrongs in methods more acceptable to both. And when, in the advance of society, property becomes if not the most important yet the most universally esteemed of human possessions, and money as its representative the standard of all values, money may well be taken, in default of something higher, as the equivalent of many rights, of all rights indeed whose violations do not involve the debasement of the intellect or the defilement of the soul. As long as men voluntarily hazard life and health and reputation and liberty and family rights for pay, as the vast multitude of all mankind habitually do, there can be no great anomaly in treating money as a sufficient compensation for the loss of these endowments when the loss is occasioned by the violation of their rights. Thus the logic of events, which is the law of nature, has established, at least until some better satisfaction is devised, an award of damages payable in money, and enforceable against the person and property of the wrong-doer, as an adequate compensation for the injured party for the wrong inflicted by the invasion of his private rights, and as in effect, though not in form, the restoration of both parties to the condition which existed before the right was violated. (a)

Read Markby. § 843.

(a) 27 D. 682, note; 50 D. 766, note; 27 R. 524, note.

§ 153. Of Preventive Remedies for Public Wrongs.

In addition to the measures by which satisfaction is afforded for a completed wrong, States of a higher civilization have endeavored to create and apply methods by which the perpetration of the wrong itself could be prevented. In the field of public wrongs, besides the police restraints which are intended to make the commission of crime difficult, the purposes of punishment for crime have been extended to embrace the reformation of the criminal and the dissuasion of others from following his example. Corporal suffering has been so inflicted as not merely to satisfy the demands of justice but to incapacitate the criminal for a repetition of the offence. Imprisonment as a simple penalty has been surrounded by such intellectual and moral influences as to acquire an educational value in the development of stronger principles and nobler aims. Such methods have at present, however, scarcely passed beyond the region of experiment, and apparently demand for their complete success resources and administrative systems which no State has ever yet possessed.

Read 4 Bl. Com., pp. 251-257; 35 St. 666, note.

§ 154. Of Preventive Remedies for Private Wrongs.

Preventive measures against private wrongs have long been an important feature in the law of remedies. Introduced at first to meet and ward off a few irreparable injuries, they have been gradually multiplied, until they are available in almost any case where justice would be better served by hindering the wrong than by allowing it to be committed and then affording legal satisfaction. (*a*) These measures are often styled preventive remedies, although a remedy contemplates the past as a prevention does the future, because they must be sought in the judicial tribunals where remedies, properly so called, are applied. Those recognized by our laws are known by the general name of "injunctions" and are within the exclusive jurisdiction of the courts of equity. Resort to these

is no bar to the simultaneous prosecution of measures for the satisfaction of completed wrongs.

Read Markby, §§ 831-832.

(a) 12 D. 550 ; 62 D. 372 ; 69 D. 184.

§ 155. Of Existing Defects in the Application of Remedies to Wrongs.

Obviously, with all the provision which the law makes for the prevention and remedy of wrongs, rights even in the most favored States are not always perfectly protected nor wrongs always adequately redressed. Breaches of contract, torts, and crimes abound, and even when the State has exhausted all its legislative and judicial powers according to the light of the current age, a vast residuum of wrong remains for which no satisfaction is obtainable. But this is due not to the unwisdom or injustice of the laws but to those circumstances of individual persons over which the State has no control. Preventive remedies are launched in vain against intending wrong-doers who are alert enough to anticipate the prohibition of the law, and satisfaction, though awarded by the courts, is fruitlessly demanded from the insolvent and the dead. Nor can these remedies be applied at all without intricate legal machinery started and kept in operation by the injured party, moving with cautiousness and deliberation, liable to err but sedulously retracing its progress in order to correct its errors, and all this at the expense of time and money to the seeker for redress, until in multitudes of cases it is evident that he would suffer less by patiently acquiescing in the wrong than by endeavoring to obtain relief. Great as these evils are, they are undoubtedly destined to eventually disappear through the gradual extension of the field of preventive remedies, the simplification of legal procedure, and the wider dissemination among all classes of citizens of their knowledge of their legal rights and obligations.

SECTION V.

OF THE LOGICAL AND CHRONOLOGICAL RELATIONS OF RIGHTS,
DUTIES, WRONGS, AND REMEDIES.

§ 156. **Of the Logical Relations of Rights, Duties, Wrongs, and Remedies.**

A system of laws promulgated by a lawgiver of sufficient wisdom and illimitable foresight would undoubtedly commence with a definition of rights, and thence proceed to prescribe duties, thence to prohibit wrongs, and finally to provide legal remedies. Such a system would be complete and logical, adapted not only to the present but to all future ages, and require only implicit obedience in order to realize its beneficial results. In the State which it governed the legislative function would lie dormant, the judicial would be exercised merely in construing its verbal mandates, the executive in carrying out its invariable decrees. The knowledge of the law would resolve itself into a simple act of memory, its administration into a mechanical routine. But such a system of law never has existed. Attempts in that direction have been made in modern as well as ancient times, and still the legal reformer dreams of codes and institutes which speak the final word of human law. But the lawgiver of sufficient wisdom and illimitable foresight has not yet appeared and never will appear, and till he comes mankind will wait in vain for any complete and logical and unmistakable and unamendable system of human laws.

§ 157. **Of the Chronological Relations of Rights, Duties, Wrongs, and Remedies.**

The origin and development of our laws, as of the laws of all known peoples on the earth, have been entirely different from this. Political society has first become conscious of itself and of its authority over and its responsibility for its members through its contact with wrongs. In social conditions, where all rights are respected, rights require neither

enumeration nor definition, duties are not prescribed, wrongs are not forbidden nor remedies devised. It is only when some act or omission contrary to the innate sense of reason and justice attracts the attention and awakes the indignation of the community, that the idea of wrong develops in the popular mind and urges the popular will to exact a satisfaction for the injury. Guided in its first impulse by the visible consequence of the wrong, it visits on the guilty party an evil measured by the physical evil he inflicts, demanding blood for blood and life for life. And here for many ages the development of law may pause, the State recognizing no wrongs beyond the manifestation of physical violence to person or property, and meting out their redress by the true *lex talionis*, which is wise as well as just. But with the advance of society into higher and broader conditions this narrow field of wrongs widens to take in other injuries whose nature is less evident, and for whose satisfaction the *lex talionis* cannot be applied. Here an investigation of the character of wrongs as such, as well as of the differences between them, must be made, and this compels a reference of the wrongful action or omission to some standard by which its nature is determined and the degree of its enormity is ascertained. As this standard can be no other than the right invaded by the wrong the investigation of the wrong brings the State into contact with the right, which it is forced to analyse, define, and formulate as the measure both of the wrong and of the satisfaction it demands. And in this process the idea of duty is evolved as the counterpart of the right and the antithesis of the wrong, — the latest conception in the actual, though the second in the logical, development of law.

Read Maine, *Early Law and Custom*, pp. 362-392 ; Amos, Ch. iii, pp. 29-46.

§ 158. Of Legal Rights not yet Defined.

This partial and illogical evolution of the ideas of wrong, remedy, right, and duty which is historically true of almost

every people, and is particularly so of the legal ancestors from whom we spring, accounts for many peculiar phenomena in our law. Among them is the fact that no complete enumeration of legal rights has ever been attempted, but only those have been defined which have already been invaded by some actually occurring legal wrong. That neither in our customary nor our statute law a conjectural right is hinted at is, therefore, no conclusive argument that it does not exist. Until violated by a wrong our legislatures generally do not and our courts cannot recognize it or declare it, and it may thus reside in individuals and be enjoyed by them for centuries before it falls within the conscious vision of the law. Myriads of undefined and unasserted rights remain in this condition to this day. Yet they are not mere natural rights. Though still in embryo they are true legal rights, because included in those larger legal rights which have from immemorial time been stated and protected by the law, and any wrong specifically invading them would at once evoke the judgment by which their legal character would be declared.

Read Markby, §§ 193-202.

§ 159. Of the Definition of Rights by the Prohibition of Wrongs.

Another fact arising from the same conditions is that in defining and asserting rights the law does it principally by defining and forbidding wrongs. This is equally true of public law and of private law. Nearly the whole body of our criminal law, for instance, consists of prohibitions; and in no branch of public law outside of written constitutions, treaties, and charters is there to be found any considerable number of affirmative declarations of public rights. Legislative enactments in aid of private rights are also usually directed against the wrong by which the right might be invaded, and judgments of the courts sustaining rights are always in form decisions pointing out and condemning actual or threatened wrongs. Many rights of property and person have thus at

last attained a fulness of description which permits them to be formulated in permanent rules, but a far greater number are still best understood by examining the torts and other injuries by which they are infringed. What is true of antecedent rights is true also of remedial. Although these have been formally conferred by law, yet they have been developed in detail by the correction of errors in their use rather than by the elaboration of specific mandates, and the law of pleading, evidence, and procedure owes its perfection not to the genius or the foresight of the legislator, but to the criticism of the judges upon the mistakes of their predecessors and the bar.

§ 160. Of the Study of Rights from the Standpoint of Wrongs.

The character of our legal literature is another consequence of the chronological order in which wrongs and rights have been defined. In the earlier as well as in the later general treatises the law of wrongs and remedies occupies by far the greater portion of their pages, and in some of the oldest, which purport to contain the whole body of our then existing law, little is to be found beyond a discussion of the unlawful actions and omissions by which rights are invaded and the forms of action through which they are redressed. The ancient student of the law approached the subject through the avenue of remedies and wrongs, not through that of rights and duties; and it is still the judgment of many eminent scholars that this is the true path to legal knowledge. The study of law in the decided cases is only another method of the same species of research, the investigation of rights and duties as they are brought into view by the judicial definition and punishment of wrongs; and whatever success this method of investigation has attained is due not to its philosophical coherence but to its correspondence with the natural order in which the ideas of concrete wrong and remedy and abstract right and duty have been developed by experience in the human mind.

§ 161. **Of the Relation of Preventive Remedies to the Definition of Rights.**

Finally, the late appearance and slow recognition of the value of preventive remedies is due to the same cause. The visible consequences of a wrongful act suggest the character and measure of the restitution which justice does and the law should require. No analysis of the wrong itself is necessary for this purpose, nor any clear conception of the right which has been violated. But for the application of preventive remedies an adequate knowledge of the right to be protected is an essential prerequisite. The modes in which a right can be invaded may be numerous, each constituting in itself a separate wrong, and the prohibition of any number of these less than the whole does not afford protection to the right. Yet not until the right is fully comprehended can it be known by what or by how many varieties of wrongful conduct it can be infringed, nor till it can be stated in its correct and perfect legal form can corresponding obligations to respect it be enforced. The process of accumulating a knowledge of rights through the perception and redress of individual wrongs must have been long in operation before complete and accurate ideas of rights could be obtained; and this result must have been earlier reached in reference to some more simple or more frequently invaded rights than in reference to others. And hence although preventive remedies are easier of application, more beneficial to society, and more consonant to reason, than those which afford such compensation as is possible after the wrong has been committed, they are even yet exceptional and are only granted where compensatory remedies must evidently fail to secure justice to the person threatened with the wrong.

CHAPTER VI.

OF THE DIVISIONS OF THE LAW.

§ 162. Of the Classification of the Rules of Law.

The development of law through the recognition and redress of wrongs produces in the course of ages a vast number of specific rules, each formulated in connection with the wrong which the rule was intended to prevent or remedy, but never a complete legal system in which all legal rights and duties are asserted and all possible wrongs against them are forbidden. Should such a system ever appear, it would be the achievement of a State in which this multitude of rules had been already promulgated and observed and by the labors of her legal scholars had been in later generations compared, collated, harmonized, and classified. Attempts in this direction were made in Egypt, according to tradition, before the era of the Pharaohs, and the laws of that ancient people were gathered and arranged in eight books, on which the imperial sanction was bestowed. The Civil Law of Rome, after twelve hundred years of evolution and experience, received the same systemization under the auspices of Theodosius and Justinian. But whether or not a body of laws has reached this stage, it is evident that some grouping together of its rules according to their natural affiliations is necessary to their profitable study, since only thus can the principles upon which they are based be understood and their relation to the whole body of the law be ascertained. It has, therefore, been customary, even with reference to laws so fragmentary as our own, to relegate the specific rules to a few general divisions or classes of the law, distinguished one from another by the same characteristics which are followed in the classification of rights and wrongs. These general divisions are: (1) Substantive

Law and Adjective Law; (2) National Law and International Law; (3) Private Law and Public Law; (4) Federal Law and State Law; (5) English Law and American Law.

SECTION I.

OF SUBSTANTIVE LAW AND ADJECTIVE LAW.

§ 163. Of the Distinction between Substantive Law and Adjective Law.

This division rests upon the same distinction which separates antecedent from remedial rights. Substantive Law is the law governing antecedent rights. Adjective Law is the law regulating remedial rights. As every legal right is either antecedent or remedial, every rule of law falls under one or the other of these divisions. Quite as properly, perhaps, these groups might have been designated by the same names as the rights which they define, and have been called "antecedent law" and "remedial law," but clearness and convenience are subserved by giving them different appellations although the meaning may be almost identical. A thing is substantive when it exists in and of itself and for its own sake; adjective, when it is collateral to and dependent upon something else for whose sake it was created and remains in being; as in grammar, a substantive is a name denoting a person or thing, an adjective is the name of a quality or circumstance which attaches to or affects the person or thing. An antecedent right is substantive; it exists of itself and for its own sake. A remedial right is adjective; it depends upon the antecedent right and is called into being only to protect or vindicate it. The two members of this division of the law thus take their character from that of the rights which they assert, and not from anything peculiar to the nature of the law. Substantive Law comprises the whole body of laws except those which are concerned with the administration of remedies; these fall under the head of Adjective Law.

Read Holland, Ch. vii, p. 78; Austin, Lect. xlv, pp. 760-772.

§ 164. Of the Rules of Substantive Law.

The rules included under substantive law are found in every other division into which the rules of law are grouped. By them are defined and asserted the rights of nations both in peace and war, the rights of States and citizens against each other, the rights of citizens among themselves. The law of tort and contract, of property and crimes, of natural and artificial persons, of family and fiduciary relations, the law expressed in constitutions and treaties, the binding usages and customs of the maritime and mercantile world, are all alike concerned with antecedent rights and form some portion of substantive law. The impossibility of gathering all these rules together and discussing them in a continuous treatise must always render this division of law into substantive and adjective of less practical importance than the other divisions hereafter to be mentioned, though to the jurist, investigating the inherent justice, permanency, and value of the rules of law, substantive law, which is the direct expression of the law of nature, must ever be superior to adjective law, which is the offspring of emergencies and is necessarily imperfect and ephemeral.

§ 165. Of the Rules of Adjective Law.

Adjective law also comprises rules which are found in both members of every other classification of the law. Substantive law is always liable to disobedience and none of its provisions is beyond the possibility of invasion by a wrong. Answering to the right and awaiting its violation, therefore, ever present is the remedy, between nations, between States and citizens, between individuals. The laws of war, the law of criminal procedure, the law of private actions and defences, accompany with equal step the law which asserts the antecedent rights of independent sovereignty, of constitutional supremacy, of personal security and liberty, of property and domestic peace. But though the adjective law is thus no less ubiquitous than substantive law, the variety and number of the rules which it includes are comparatively limited. Those which govern

hostile nations in their movements of aggression and defence, the rules of courts, of civil and criminal proceedings, of pleading, evidence, and damages, of preventive and extraordinary remedies, occupy the entire field of adjective law and could be sufficiently expounded in a few volumes of very moderate dimensions.

Read Holland, Ch. xv, pp. 314-320.

SECTION II.

OF NATIONAL LAW AND INTERNATIONAL LAW.

§ 166. Of the Source of National Law.

National or Municipal Law is that body of rules by which a State asserts and protects its own rights against its citizens and their rights against it and against one another. International Law is that body of rules which regulates the intercourse of independent nations. In these two classes also all law is comprised. Both contain provisions of adjective as well as substantive law. National Law emanates from the supreme authority in the State for which it is prescribed, not necessarily from the legislative body technically so called, but from any person or group of persons exercising the law-making and defining power. A rule of law formulated for the first time by a court acting within its lawful jurisdiction is, as to the controversy which it governs, the product of legislative authority as truly as though enacted in the form of a statute, and if accepted and followed by other courts, becomes at last a part of the universal as well as of the supreme law of the land. It is for every State to determine where such authority shall be lodged and how it shall be exerted, and it may and often does confer it upon individuals or communities whose legislative action is thereby made as binding as its own. In the very nature of things, the law-making power is the supreme power in the State, and by whomsoever laws can lawfully be made, in him or them, so far as the per-

sons subject to such laws are concerned, does sovereignty reside. (*a*)

Read 1 Bl. Com., pp. 44-46.

(*a*) 87 D. 52 (55-57); 27 St. 106 (113, 114).

§ 167. Of the Authority of National Law over the State.

National law imposes obligations on the State as well as on the citizen. The theory that the State is impersonal and consequently has no legal rights or duties is not recognized in our law. The State is a political community composed of citizens acting through their representatives for their mutual advancement and protection, and whether contemplated as the entire community or as the group of representatives by whom the power of the community is wielded, the purposes for which the community exists and its powers are exercised restrict the right of the State to act and to forbear within the compass of those measures which are conducive to the common good. (*a*) This restrictive law is not imposed upon the State from without, nor by the State itself after it formally becomes a State, but is established and is made effective by the very act of the community in assuming political authority and asserting for itself the sovereignty which is the essential attribute of a State. (*b*) Not that any compact between the members of the community need have been made, nor any date be ascertainable when the community became a State; the fact that it now claims and exercises sovereignty is, in our theories, a sufficient proof that it received its sovereignty in trust for the people over whom it rules and must exert its powers solely for their individual and collective benefit. (*c*) Whether the State then be regarded as a determinate or an indeterminate person it owes duties and possesses rights, the general character of which is fixed by the purposes for which the State exists, while their specific elements and obligations are left to be enumerated in the laws which, as at once preserving and applying its governmental powers for the benefit of its people, the State from time to time adopts. Thus the State necessarily embraces in its national law the definition and assertion

of its own rights and obligations as well as those of its citizens, and equally with them regards itself as bound by its own laws.

Read Dillon, Lect. viii, pp. 224-228.

(a) 15 St. 460 (463-465); 16 St. 813 (815); 20 D. 360 (372-374); 79 D. 236.

(b) 35 D. 326; 95 D. 350.

(c) 79 D. 123 (131, 132).

§ 168. Of the Authority of National Law over the Citizen.

The obligations imposed by national law upon the citizens of the State extend to all their intercourse and relations with the State and with one another. It also reaches to their acts and forbearances in reference to other States so far as these may involve the amicable or hostile attitude which they may occupy toward his own State. In time of war many acts otherwise lawful and perhaps commendable assume a treasonable character when the actor is a subject of either of the combatants, and are still crimes, though lesser ones, when he is the subject of a neutral State. In time of peace seditions and conspiracies conducted in his own country against a foreign State are breaches of international comity and may be prohibited and punished by the State where they occur. Thus the field of national law embraces all the rights and duties of private persons and all the rights and obligations of public persons except those which one State may possess against another.

Read 1 Whart. I. L. Dig. §§ 18-21; 2 Whart. I. L. Dig. §§ 268-282.

§ 169. Of the Authority of Two or more National Laws in the Same State.

In States composed of minor States confederated together in a common nation, of which the United States is an example, the nation and each different State may have its own peculiar national law. To render this possible, the field of national law must be divided, certain matters being subject to

the jurisdiction of the nation and to be governed by its law, others being placed within the jurisdiction of the individual States to be regulated by their respective laws. Within the topical jurisdiction of each one of these sovereignties its law is supreme, and the citizen is directed in his conduct by one law or the other, according to the nature of his act or the object to which it relates. As against one another these minor States may be independent sovereignties, the common national law by which they are controlled in their reciprocal relations discharging as to them the functions of an international law, though as to the nation to which they alike belong it is still a national law.

§ 170. Of the Territorial Jurisdiction of National Law.

National law has no force beyond the territory of the sovereign by whom it is prescribed. (*a*) Over the country which he governs and over other places which the law presumes to be part of his territory, such as the vessels which sail under his flag, and no farther, its authority extends. (*b*) In other States its rules may be noticed and obeyed, as an act of international comity, in reference to controversies which for any reason ought to be governed by its laws rather than by the laws of the State where they arise; but even this courtesy is optional with the latter State, though now so customary that it can scarcely be refused. Between the different States of our own Union this recognition is obligatory under the provisions of the Federal Constitution.

Read 1 Kent, Lect. ii, pp. 21-23, 29-31; Story, Conf. L. §§ 18-22; 1 Whart. I. L. Dig. §§ 1, 9, 26-33.

(*a*) 54 D. 630; 79 D. 440; 21 D. 89; 16 Pet. 367; 25 D. 745; 36 D. 458.

(*b*) 32 D. 114; 43 D. 180; 74 D. 703; 7 Cranch, 116.

§ 171. Of International Law.

International Law is that body of rules which defines and protects the rights of independent States as against one an-

other. Although not law in the sense that it is formally prescribed by any political superior to whom the States bound by the law are subject, yet in the sense that it is a rule imposing duties and obligations which the States in their political character are bound to observe, and will unite to enforce, it is law by which certain legal rights are asserted and wrongs against those rights are redressed. As such it is based upon the law of nature, and is therefore referable to the eternal law. For it is manifest that all mankind cannot now be grouped together into one State, and consequently that for their social preservation and development many States must exist; that these States must have some reciprocal relations and consequently some intercourse with one another; that national intercourse cannot peacefully subsist without some norm or rule of national action and forbearance recognized by the related nations and on which each can rely in determining its own acts and omissions. And as this distribution of mankind into many nations, this necessity for mutual intercourse, and this impossibility of continued peaceful intercourse without law are all facts resulting from the operation of the natural law, the law which governs international intercourse is the legitimate and inevitable offspring of the law of nature and receives from it a sanction and authority co-extensive with the power which the promotion of good order among nations compels it to exert. It is true that all actual power over independent States resides in the community of States to which these independent States belong, and thus the governing body and the governed appear to be the same. But this is equally true of individual States considered with reference to their own subjects. The State is ruled by its own laws in pursuance of the obligations assumed by it in becoming a political society and charging itself with the protection and advancement of its citizens. By the same act of becoming a State and entering into the family of nations, every State submits itself to the rules dictated by the natural law concerning the mutual intercourse of States and undertakes to co-operate with other States in the enforcement of these rules. The right of one State to set at defiance all obli-

gations of justice and reason toward other States has never been admitted for a moment as a practical doctrine for the guidance of international relations, and if some States have acted in this manner it has been tolerated only because the other members of the family of nations were too weak to interfere. The independence of a State consists in its right to exercise unrestricted political sovereignty over its own people, not in its right to disregard its national obligations toward other States, and whatever may be our theory concerning the presence or absence of any visible political sanction for the law of nations, the transgression of any State against its rules is liable to meet with an indignant protest from the other States, the disregard of which is a sufficient provocation for immediate war.

Read Wilson, Part i, Ch. iv; Walker, Lect. xli; Amos, Ch. xii, pp. 322-359.

§ 172. Of the Origin and Development of International Law.

The rules of international law first appear as usages or customs which, in obedience to their innate instincts of justice and utility, the nations have followed in their intercourse with one another. As time and experience have ratified the dictates of these instincts and proved the wisdom of these usages, the rules which they have practically applied have come to be regarded as inviolable, and when disputed by one State have been affirmed by the united judgment of the rest. In such affirmations and by other methods recognition has been given by the family of nations to one after another of these customs, the rules which they embody have been clearly expressed, and in determining subsequent controversies in reference to them they have been copiously illustrated and explained. In this manner international law, without any formal enactment or promulgation, has gradually assumed the character of a fixed body of law, with its appropriate subdivisions, which is now amply set forth in the works of

learned jurists, the decisions of courts, the treaties between States, and the awards of international arbitrations. (a)

Read Vattel, Preface, pp. vii-xvii, Prelim., §§ 1-28; 1 Kent, Lect. i, pp. 1-20, Lect. iii, pp. 69-71.

(a) 175 U. S. 677.

§ 173. Of the Territorial Jurisdiction of International Law.

International law applies only to States and to those States which have a place among the family of nations. Not every political society is a State and not every State is necessarily a member of the family of nations. Any association of persons not already subjects of a State, who are organized for the purpose of protecting their common and individual rights of security, liberty, and property by the enactment and enforcement of certain laws, is a political society; but such a society is not a State unless endowed with complete sovereignty over its members, although it does possess political and legal institutions and exercises its authority through an established form of government. A sovereign State, having unlimited dominion over its own people, may never have been recognized by other nations as an independent State, either because of its recent origin, its precarious existence, its attitude toward one or more of their own number, or the intrinsic antagonism between its political purposes or theories and theirs; and so it may remain outside the family of nations until they see fit to admit it. Until our own historic period this family embraced only the so-called Christian nations, but is now gradually extending to include all independent States with whom commercial interests require that international relations shall be maintained. On all the States within this family international law is binding. All have adopted it as a part of their own national law so far as it imposes obligations on their private citizens, and cannot alter it by any legislative action nor depart from it in a decision of their courts.

Read Holland, Ch. xvii, pp. 343-348, Ch. xviii, pp. 378, 379; 1 Whart. I. L. Dig. § 8.

§ 174. **Of the Topical Jurisdiction of International Law.**

International law decides all questions between independent States so far as its own doctrines and rules have been developed. New rules and doctrines can arise only by custom or common consent, and outside the limits to which usage and compact have already brought the law nations must determine their controversies by concession, by arbitration, or by war. The principles of reason, justice, and equity which it applies to States are the same which national law applies to individuals. The subjects which it has thus far brought within its control are chiefly these: the right of a political society to be a State and a member of the family of nations; the right of a State to its national honor and reputation; the jurisdiction of States over property beyond their own borders; the immunities of subjects; the exercise of treaty powers; the modes of civilized warfare; and the status, rights, and obligations of belligerents and neutrals.

Read Holland, Ch. xvii, pp. 348-357; Woolsey, §§ 222-231.

SECTION III.

OF PRIVATE LAW AND PUBLIC LAW.

§ 175. **Of the Distinction between Private Law and Public Law.**

The division of law into Private Law and Public Law is one of the most ancient modes of classifying law and is based upon the distinction between private and public rights. Private rights are defined and enforced by Private Law; public rights by Public Law. All bodies of law fall under one or the other of these divisions, though some writers exclude international law from both, and divide the law into three classes, — private, public, and international, — not because the rights governed by international law are neither public nor private, but because they do not regard international law as law at all in the same sense that national law is law, to which they confine the distinction between Public and Private Law. Whatever may be the correctness of their claim as to the

character of international law as law, their threefold division of the law is incorrect, since the principle of differentiation which separates Public Law from Private Law is not the same as that which distinguishes international law from law truly so called. Law of every kind is wholly occupied with rights, and every right is either public or private, and consequently every rule of law is a rule of Public Law or a rule of Private Law.

Read Markby, §§ 291-295; Austin, Lect. xlv, pp. 744-759.

§ 176. Of the Divisions of Private Law.

Private law is divisible into: (1) The law of Personal Rights; (2) The law of Family Rights; (3) The law of Property Rights; (4) The law of Private Wrongs; (5) The law of Private Remedies. The first four of these are branches of substantive law; the last is adjective law. The law of Personal Rights comprises the rules defining and asserting the rights of personal security and liberty. The law of Family Rights embraces the rules governing those rights both *in rem* and *in personam* which arise out of the domestic relations. The law of Property Rights includes all legal provisions relating to the acquisition, ownership, possession, and transfer of any species of property, corporeal or incorporeal. The law of Private Wrongs covers every violation of private rights, whether by breaches of contracts, or by tortious acts, or by tortious forbearances. The law of Private Remedies directs all methods by which the law endeavors to prevent or to afford redress for private wrongs. These divisions of Private Law farther divide and sub-divide into many branches as the details of the rights or wrongs or remedies to which they pertain are subjected to a more minute examination.

Read Markby, §§ 296-306.

§ 177. Of the Relation of Private Law to National Law and International Law.

Private Law is always national law. Certain privileges which private citizens possess to avail themselves in one

State of the laws of another State in reference to their personal status, or their contracts or other property, have been sometimes grouped under the name of Private International Rights, and the rules which govern them have correspondingly been called Private International Law. But this is so violent a misuse of the term "international" as to have merited and received the severest criticism. The comity which permits the enjoyment of such privileges may be within the sphere of international law, but the comity is public between State and State and not between the State and any private foreign citizen, and that he receives the privilege is not the consequence of any private right which he possesses against either State, but of the international relations which the States have assumed toward each other. The law which recognizes and directs the mode in which the privilege may be made available is a portion of the private national law, belonging partly to the laws of personal, family, and property rights, and partly to the law of remedies, and when discussed as a separate subject is usually treated under the title of "Conflict of Laws," or perhaps more properly the "Jurisdiction of Laws."

§ 178. Of the Divisions of Public Law.

Public Law is divisible into: (1) International Law; (2) Constitutional Law; (3) Administrative Law; (4) The Law of Public Wrongs; (5) The Law of Public Remedies. International Law is the law which defines the mutual rights of independent States. Constitutional Law asserts the duties of the State toward itself and its own citizens and the obligations toward it which are imposed upon its members. Administrative Law regulates the various governmental operations of the State. The Law of Public Wrongs prohibits specified actions and omissions as violations of public rights. The Law of Public Remedies controls the measures adopted by the State for the prevention, punishment, or rectification of public wrongs. International Law and Constitutional Law are generally treated by jurists as single departments of the

law, although each is divisible according to the subjects which it includes. Administrative Law comprises Parliamentary Law, or the rules which govern the proceedings of legislative assemblies; Revenue Law, or the rules which provide for the financial support of the State by its citizens; Ecclesiastical Law, or the rules which fix the relations between the State and religious bodies, and where there is an established church control also its internal affairs; Military Law, or the rules which regulate the military and naval forces of the State; Martial Law, or the rules framed by a military commander occupying hostile or insurgent territory for the government of the inhabitants of that territory when the ordinary laws are set aside by violence and the usual course of justice is impeded; and whatever other laws, such as police laws, poor laws, labor laws, postal laws, banking laws, and school laws, the economic, sanitary, or commercial condition of the State may demand. The Law of Public Wrongs embraces Criminal Law, and also such special prohibitions as the State directs against actions and omissions which, though not possessing the essential elements of crime, are prejudicial to the commonwealth. The Law of Public Remedies includes Criminal Procedure and whatever other measures the State employs to ward off or redress a public wrong.

Read Holland, Ch. xvi, pp. 321-340.

SECTION IV.

OF FEDERAL LAW AND STATE LAW.

§ 179. Of the Distinction between Federal Law and State Law.

The three foregoing divisions pertain to all law; the two following to the law as it now exists and is administered in the United States. Of these two the first is the division between State Law and Federal Law. State Law, as the phrase is here employed, signifies the local law in force in the several States of the American Union. Federal Law is the general law of the United States considered as a nation, and

is in force wherever that national authority extends. State Law emanates from the supreme power in each State, governs only that State and its citizens and the persons and property within its borders, and governs these only with reference to matters which are not of a national but of a purely local character. Federal Law emanates from Congress and from other official bodies or persons exercising the legislative authority of the United States, and governs the United States and every State, and all the people and property within the territory of the United States, in reference to matters of a national character. Thus within every State of the American Union there exist two distinct systems of law, differing from each other in the sovereignty by which they are prescribed and in the subjects-matter to which they relate, but each of paramount authority within the sphere to which it is confined.

Read Dillon, Lect. viii, pp. 216-223; Cooley, C. Law, Ch. ii, pp. 33-35, Ch. vi, pp. 152-155, 157-159; Walker, Lect. v, ix, x.

§ 180. Of the Territorial Jurisdiction of Federal Law and State Law.

Included within the territory of the United States are the fully organized States of the Union, the organized Territories, the District of Columbia, and other countries and populations not yet having a separate organic political existence. With the exception of the District of Columbia and the organized States all these are States in their formative period; some, like the organized Territories, approximating statehood; others just emerging from barbaric disorder into civilized life. The District of Columbia and the unorganized territory have no local law, but are governed entirely by the provisions of the Federal Law. The organized Territories possess local legal systems more or less elaborate, but these are dependent for their authority and sanction on the Federal Government, and though they resemble State Law in the fact of their local application, yet, in view of the source from

which they are ultimately derived and the power by which they are enforced, they belong properly to Federal Law. (*a*)

Read Cooley, C. Law, Ch. ii, pp. 37, 38, Ch. viii. pp. 182-186;
1 Whart. I. L. Dig. §§ 2, 3.

(*a*) 158 U. S. 564; 101 U. S. 129; 19 How. 393 (446-450); 1 Pet. 511.

§ 181. Of the Topical Jurisdiction of Federal Law and State Law.

The distinction between State and Federal law thus exists in its completeness only in reference to the fully organized and duly admitted States of the American Union, and in these this distinction is based on the subjects-matter over which the sovereignties of the United States and of the individual States respectively exercise jurisdiction. The authority of the United States extends to all subjects of a national character, of the individual States to all subjects not of a national character. This line of demarcation, so easily expressed in words, is in its practical application of constantly increasing difficulty. That all matters pertaining to the relations of the United States to other nations or to the mutual relations of the States of the Federal Union, and all matters placed within the exclusive control of the United States by the express language of the Federal Constitution or its necessary implications, are of a national character admits of no question. (*a*) That the mode in which an individual State shall discharge its legitimate legislative, judicial, and executive functions, the measures it adopts for the protection of the security and liberty of its own citizens, the rules which govern the acquisition and transfer of property, especially of real property, and the wrongs of which it will take notice as offences against itself, together with the punishment which it will inflict for them, are matters not of a national character is equally evident. (*b*) But between the matters so clearly separated from one another there is a wide field of rights and duties not strictly national in their intrinsic character and yet of such grave and universal importance to the whole people of the

United States as to be national in the effects which any law or decision concerning them may produce. Into this field, formerly regarded as within State authority alone, the law of the United States in pursuance of most liberal interpretations of the Federal Constitution is gradually extending, and with the increasing intimacy of commercial and community relations between our people, and the consequent homogeneity of political ideas and institutions irrespective of State lines, must continue to extend until every interest which is common or identical to all the inhabitants of the United States shall be governed by one uniform law, which can be no other than a Federal law. (c) How much of State Law will remain, outside of its internal political regulations, after this period of our legal development is reached it is idle to conjecture. It is of less moment to the citizen from what authority the laws which govern him proceed than that such laws be permanent, consistent, wise, and just.

Read Cooley, C. Law, Ch. iv. pp. 66-83, Ch. ix, pp. 187-195.

(a) 11 Pet. 102; 95 D. 350; 149 U. S. 698 (711-713); 21 How. 506; 4 Wheat. 316; 9 Wheat. 203; 175 U. S. 211.

(b) 169 U. S. 366; 97 D. 248, note; 1 R. 399; 35 D. 326; 92 D. 468; 95 U. S. 465.

(c) 16 Pet. 1 (18, 19); 96 D. 73.

§ 182. Of the Concurrent Topical Jurisdiction of Federal Law and State Law.

Within the intermediate field of rights and duties above mentioned there are many which at present are conceded to be under the authority both of the United States and the individual State, and consequently to be proper subjects-matter as well of State as of Federal Law. But State and Federal authority do not in reference to such matters stand on equal ground. If they did, a conflict might arise between them which would be irreconcilable. On all such matters the authority of the United States is superior to that of any or all individual States. Until the United States has taken

cognizance of these subjects and enacted laws concerning them, each State may treat them in its own territory as under its jurisdiction and may make and apply laws for their administration. But when Federal Law has once embraced them State Law ceases to have any force concerning them until the Federal Law has been repealed. Instances of such superior authority in Federal Law are seen in the supersession of State insolvent laws by a national bankruptcy act, in the exercise of State authority over certain navigable waters until the United States assumes control over them, and in the removal of causes from the State courts into the Federal courts, at the demand of either party, when they involve the interpretation of the Acts of Congress or the Constitution of the United States. (*a*)

Read 1 Kent, Lect. xviii, pp. 387-395; Cooley, C. Law, Ch. ii, pp. 35, 36, Ch. iv, pp. 83-85.

(*a*) 70 D. 151; 4 Wheat. 122; 7 D. 106; 95 U. S. 459; 113 U. S. 205.

§ 183. Of the Judicial Application of Federal Law and State Law.

Both Federal Law and State Law are administered in all the courts of the United States and of the individual States. No doubt a great proportion of the cases raising questions of Federal Law are heard and determined in the Federal courts, and by far the greater number of questions as to the law of any State are adjudicated in the courts of that State. But this is the result of circumstances, not of legal requirement. Whenever the courts of the United States in the trial of causes are called upon to interpret and apply a purely local State law under which the rights of the parties have been acquired, as distinguished from the general or commercial law, they give to it the same construction which it has received in the State of its enactment, and apply it as it would have been applied had the suit been prosecuted in the local courts. (*a*) Similarly a State court, meeting in a case before it with a question of Federal Law, accepts the decision of the

question already made or likely to be made by the courts of the United States, and passes judgment on the case in view of that decision. (*b*) By thus keeping inviolable the doctrines of the Federal Law and of the State Law by whatsoever court they may be administered, and by recognizing the superiority of Federal Law over all matters concerning which there can be any question as to rightful jurisdiction, serious conflicts between the State Law and the Federal Law have been almost entirely prevented, and those which have arisen have been of a political rather than a legal character.

Read (*a*) 107 U. S. 20 (33, 34); 125 U. S. 555 (582-585); 12 Wheat. 153; 11 Wheat. 361; 4 Wall. 196 (203, 204); 8 Wall. 575; 5 Pet. 398; 165 U. S. 593.

(*b*) 37 D. 761; 40 D. 705; 55 D. 494.

SECTION V.

OF ENGLISH LAW AND AMERICAN LAW.

§ 184. Of the English Portion of our Law.

The division of our law into English Law and American Law results from the derivation of our law from two quite distinct sources. Prior to the Revolution the people of this country were governed by the law of England, so far as its rules were applicable to their circumstances, together with such statutes as the colonial legislatures might enact. The law of England was then composed of the ancient maxims and definitions of the common law, the great Charters of the Crown and Acts of Parliament, and the decisions of the various English courts. Taking its name from its origin, this entire body of law was and is called the "common law," not in this case to distinguish it from the Civil or Roman Law or from the "written law," but from the rules of law originating in the United States. Under this law the colonists had lived for five generations, when the Declaration of Independence severed their connection with the mother country and erected the several colonies into independent States. But this severance wrought no special change either in their

private legal rights and duties or in their ideas as to the proper methods of enforcing or protecting them. The same system of law which had answered their purposes and governed their conduct while subjects of the British sovereign corresponded to their needs when that sovereignty was transferred to local governments of their own creation, and thus became the law of the new nation as it embarked upon its independent political career. (*a*)

Read Dillon, Lect. v, pp. 155-157, Lect. xiii, pp. 350-388.

(*a*) 23 D. 280 (290-291).

§ 185. Of the American Portion of our Law.

Upon this foundation of the English Law both the public and the private law of the United States was gradually raised. New conceptions of the nature, attributes, and residence of sovereignty, new conditions of public and private affairs, have found expression in rules by which the English law of 1776 has been in many respects modified, extended, or superseded, and these rules constitute the American as distinguished from the English Law. They are contained in our written State and Federal Constitutions, in local statutes and Acts of Congress, and in the reported judgments of our courts. But even in these documents the English and American Laws are intimately blended. The new provisions are but shoots or scions sprouting from or grafted into the ancient tree. The trunk and stem are still the venerable and imperishable system of the old English common law, sprung from the soil and nourished by the spirit of a people whose regard for personal liberty and whose practical wisdom in the conduct of affairs have never been surpassed among the sons of men.

§ 186. Of the Extent to which English Law now Enters into our Law.

To what extent the doctrines of the English Law, as it existed at the time of the Revolution, now prevail in our American States is a matter of some uncertainty. Where

any of its rules are formulated in our statutes or incorporated in our Constitutions or adopted and applied by our courts, they are, of course, part of our local law. Where any State has framed for itself, by legislative or judicial action, a new law partially or wholly inconsistent with the corresponding mandate of the English Law, the new rule supersedes the English rule, if indeed that rule was ever recognized. But where a State has as yet taken no position in favor of or against the English rule, and questions are raised which the courts of that State could, if they would, refer to the English rule, their determination is controlled by the same principle which influenced the colonists in their acceptance or rejection of the common law. If in the circumstances of the case the English rule is just and consonant with the usages of the people of the State, it is regarded as having always been a part of the common law of the State and is enforced accordingly. (*a*)

Read (*a*) 19 St. 364; 62 D. 742.

§ 187. Of the Dependence of the American Portion of our Law upon the English Portion.

This distinction between the rules of law originating in this country and the rules of law derived from England is not obliterated by the adoption of the English rules by our own courts and legislatures. True, these rules then become a portion of our law, but they do not thereby cease to be distinguished from its other portions by several important characteristics. In the first place, the English Law is in a certain sense superior to the American, as the trunk and root are superior to the grafted branches of the tree. Thus the English Law furnishes a standard of interpretation to the American Law as to all terms and phrases which had acquired a settled meaning in the English Law prior to the Revolution, unless it is apparent that American lawgivers have intended that they should be differently understood. The English Law is also regarded as the law governing all cases for which no rule of the American Law has been hitherto provided, unless the English rule has been formally repudiated or a rule in-

consistent with it is now announced. Again, an English rule, once recognized, remains in force notwithstanding the enactment of an American rule covering the same subject, unless the latter rule expressly or impliedly excludes the former, for an American rule in derogation of an English rule is always construed strictly so as to leave as far as possible the operation of the English rule unimpaired. Finally, whenever the American Law confers a right, whether it be a public or a private right, and yet supplies no remedy for its violation, the public wrong is to be punished or the private wrong redressed according to the methods afforded by the English Law. (*a*)

Read Black, Ch. viii, §§ 94-99.

(*a*) 11 Pet. 420 (545, 546); 91 U. S. 270; 169 U. S. 649 (654, 655); 49 D. 697.

§ 188. Of the Interpretation of the English Portion of our Law by the English Decisions.

In the second place, the distinction between the English Law and the American Law manifests itself in the authority which attaches to the decisions of the English courts as interpreters and expounders of these two component portions of our law. In reference to a rule originating in this country an English case has no binding authority, even when a similar rule exists in England and is explained and applied in that particular case, although the case may be considered by our courts and will influence them according to its intrinsic merits. But in reference to a rule derived from the English Law a case decided in England before the Revolution is of binding authority with our judges also, until formally and intentionally overruled, and cases decided since the Revolution are entitled to respect although not of the same obligation as their predecessors. Thus the English treatises, statutes, and reports prior to 1776 are an essential part of our own legal literature, and keeping in view those variations in our circumstances which affect our legal conditions and relations, are the sources from which our knowledge of the English

portion of our law is drawn. That Blackstone's Commentaries contain a summation of the English Law as it existed at the date when it became incorporated with our own, is a sufficient reason, apart from the many other excellences of that unrivalled production, for its universal acceptance and authority among the lawyers and jurists of the United States. (*a*)

Read Dillon, Lect. xi, pp. 297-313.

(*a*) 43 D. 373 (382, 383).

§ 189. Of the American States in which the English Law has been Adopted as a Portion of their Law.

What has thus far been stated concerning the relations of the English and American Law is true of the original thirteen colonies and of the States into which they have since been formed. Into the new States created out of territory occupied by English settlers or their descendants, or not occupied by any organized political community, the English Law has also been extended, and there combined with the American Law imported into or developed in the new community, the two systems constituting, as in the older States, the body of their local law. In States formed out of territory already populated by inhabitants of different origin and having their own established systems of law, the previous system takes the place which in the other States is held by English Law. Such, for example, is the case in Louisiana, where before the cession of that territory to the United States the Civil Law prevailed, and where it still forms the basis, interprets the provisions, and supplies the defects of the American Law. Into the law of the United States as a nation the English Law has largely entered. The Federal Constitution is an embodiment of principles most of which had been imbedded in that law for centuries, and from it has been borrowed in great measure the Federal legislation by which rights are affirmed and remedies applied. (*a*)

Read (*a*) 3 Wheat. 212; 7 Cranch, 32; 3 Pet. 443 (446, 447).

§ 190. Of the Presumption that the English Portion of our Law is Identical in all our American States.

A natural presumption growing out of this historical condition of the greater part of the United States is that the English Law prevails to an equal extent in all the States of the Union, and that any rule of that law which has been accepted by any State is adopted and in force in every other. This presumption is recognized and acted on by our courts. (*a*) It is open to rebuttal and, as is evident from what has been already stated, is subject to many limitations. As each of the States has proceeded independently of the others in its acceptance or rejection of the doctrines of the English Law, no other uniformity among them was to be expected than such as necessarily grows out of the similarity of their conditions and the identity of their political conceptions. Thus States whose early inhabitants resembled one another in origin, pursuits, religious sympathies, and social traditions, resemble one another also in the extent to which they have preserved in their jurisprudence the ancient rules of the English Law, while States whose populations were widely variant in these respects correspondingly differ from one another in the character or number of the English rules to which they still adhere. As a consequence of this resemblance or divergence among the States, the decisions of the courts of one State upon questions of law are not of equal weight in every other, but are of great authority in States into whose law the English element enters in the same degree and of less influence, or even of none whatever, in other States in proportion to the quantity of English Law which they retain.

Read (*a*) 25 D. 536 ; 2 R. 81 ; 68 D. 658.

CHAPTER VII.

OF THE JURISDICTION OF LAWS.

§ 191. Of the Recognition and Enforcement by one State of the Laws of other States.

The jurisdiction of a State over all persons and things within its territory is supreme, and, if it chooses, it can subject them absolutely, and in reference to every particular right and duty, to its laws. Were all mankind embraced in one State, or were there no relations, public or private, between States or between their citizens, the assertion by the State of such absolute and exclusive supremacy for its laws would not only be natural but would produce no serious inconvenience. When, however, as has always been the case to some extent and is especially true in the modern world, the intercourse between States is intimate and incessant, the commercial and domestic relations between citizens of different States are numerous and important, the transfer of residence and even of citizenship from one State to another is of frequent occurrence, and the rights and duties of any individual may thus extend far beyond the territory of the State in which he dwells, reason and justice demand that every State should so far recognize the laws of other States, under which its subjects have acquired rights or assumed duties, as to secure the performance of their duties and the protection of their rights. In answer to this demand has grown up that doctrine of interstate comity, in obedience to which all civilized States admit, in certain cases arising in their own territory, the jurisdiction of laws other than their own and administer and enforce them in their courts with equal fidelity and vigor. Thus while the jurisdiction of a State is absolute and exclusive over all things and persons in

its territory, it cannot be concluded that such is the jurisdiction of its laws. In many instances its laws give way to those of other States, which it treats, for the time being, as if they were its own.

Read Story, Conf. L. §§ 23-38 a; Cooley, C. Law, Ch. x, pp. 196-212.

§ 192. Of the Present Enforcement of Laws Already Repealed.

Moreover, as a general rule, the laws by which at any particular period a State is governed are the laws theretofore enacted and not then repealed. Laws once in force but since rescinded and laws hereafter to be made are alike unavailable for the definition and assertion of rights or the prevention and redress of wrongs. And this would be the universal rule were rights and duties immediate and evanescent, having no roots in the past and bearing no fruit in the future. The laws of the present moment would then be sufficient to fix the limits of the one and secure the full performance of the other. But with the continual changes of the law on one hand, and the persistent character of rights and duties on the other, the present rule of law, apart from any connection with the past, may be entirely inadequate to afford that protection to a vested right which it is the principal purpose of the law to furnish, and hence it becomes necessary for the State in reference to that particular vested right to recognize and follow rules which it has long since banished from its current laws. As in those cases where reason and justice require it to substitute a foreign law for its own the State yields to the requirement, so where the same motives demand that the jurisdiction of its present laws should be superseded by the jurisdiction of laws which it has formally repealed, it will concede this also, and apply the old law rather than the new. Thus in the same State several rights of the same class, identical in all respects as rights, may as to the same persons be under the control of different laws, as the result of different changes in the law between the dates at which the several rights accrued.

§ 193. Of the Jurisdiction of Laws : "Conflict of Laws ;" "Private International Law."

Under the jurisdiction of what laws a right must find protection, therefore, depends not merely on the present condition of the laws in the State where the right seeks protection, but on the laws of other States as well as on its own past legal rules. The questions thence arising are often of no ordinary difficulty. The perplexity which they occasion in the legal mind has given to the body of rules in which their solution is attempted the name of "Conflict of Laws"—not because the laws themselves conflict, for the law which governs any individual fact is always single and consistent with itself—but because of the conflict of opinions which these questions have been and are still liable to provoke. Other authorities have given it the title of "Private International Law," using the middle term in an equivocal and consequently an erroneous sense, and also treating the questions as if they arose only in reference to the jurisdiction of the laws of different nations, whereas they pertain also to the laws of subordinate States and to the varying laws of the same State. As the real question always is: Under the jurisdiction of what laws did the right accrue and must its protection be secured? the broader name expressive of that question has been here adopted, and the subject will be treated according to its natural divisions: (1) Jurisdiction of the laws as dependent upon Place; and (2) Jurisdiction of the laws as dependent upon Time.

Read Holland, Ch. xviii, pp. 358-371; Walker, Lect. xlii

SECTION I.

OF THE JURISDICTION OF THE LAWS AS DEPENDENT UPON PLACE.

§ 194. Of the *Lex Fori*.

That all questions as to legal rights, duties, wrongs, and remedies are to be determined by the current laws of the State in which they arise is presumed until the contrary appears;

and the person who invokes the aid of other laws must prove that in his case the comity of States requires their recognition and enforcement. (a) The law of the State where the question is raised is known as the "Lex Fori," the law of the Forum or Court, the law prevailing in the territory within and for which the court is held. By whatever law the rights, duties, and wrongs which are involved in the controversy may be defined and measured, it is manifest that all questions concerning the remedy and its application must be governed by the *lex fori*. In the assertion of rights and duties, and in the prohibition of wrongs, only mental conceptions and the words which express them are employed, and the courts of one State can temporarily adopt these conceptions and expressions from the laws of another State without serious inconvenience. But not so with the remedy. The remedy calls into action the practical machinery of the law, which must operate in prescribed methods when it operates at all, and it would be impossible for a State to change the organization and jurisdiction of its courts, their forms of procedure, their rules of evidence, and their modes of enforcing their decrees, in order to bring them into conformity with those of another State in which the right had been created or the wrong committed. Hence all these matters, and whatever else may be connected with the administration of remedies, must be controlled by the *lex fori*. (b) The form of action to be brought; the court in which the suit must be commenced; the process of summons, attachment, or arrest; the pleadings and proof; the trial, judgment, and execution; the measure of damages; the limitation of actions; are examples of those matters over which the *lex fori* necessarily has exclusive jurisdiction, even when the comity of the State is most liberally displayed toward other States in its recognition of their substantive rules of law. (c)

Read Story, Conf. L. §§ 556-558.

(a) 63 D. 661.

(b) 96 D. 345.

(c) 65 D. 679; 36 D. 364; 4 R. 29; 9 How. 407; 37 D. 187.

§ 195. Of the Laws which may Supersede the Lex Fori.

The laws which the State of the forum will in suitable cases permit to supersede its own are: (1) The *Lex Ligeantiæ*, or the law of the foreign State to which one of the parties connected with the controversy owes allegiance; (2) The *Lex Domicilii*, or the law of the domicile of one of the parties; (3) The *Lex Rei Sitæ*, or the law of the place where the thing in controversy is situated; (4) The *Lex Loci Actus*, or the law of the place where some matter involved in the controversy transpired; (5) The *Lex Loci Contractus*, or the law of the place where the contract in controversy was made; (6) The *Lex Loci Solutionis*, or the law of the place where the contract in controversy was to be performed; (7) The *Lex Loci Pacti*, or the law of the place by whose laws the parties to a contract expressly agreed that their rights under it should be determined. And though recourse by the tribunals of any State to foreign laws is in practice comparatively rare, yet it is not impossible that in a single case comity may require that all these different systems, each perhaps pertaining to a different State, should be consulted in order that the true rules governing the various points in controversy may be ascertained. (a)

Read (a) 46 St. 439, note; 16 D. 212.

§ 196. Of the Lex Ligeantiæ.

The *Lex Ligeantiæ*, or law of natural allegiance, is the law which defines the relations between a person and the State of which he is a native born citizen, as well as his political relations to foreign States. His civil condition; capacity to act and contract under the laws of his own State; his legitimacy, majority, subservience to guardianship; or, in the case of a married woman, the disabilities attaching to her coverture, — are fixed by this law not only before the courts of his native State but in all other States where perfect comity prevails. The rights and duties which attach to him at home follow him when he travels into distant States and emanci-

pate him from many obligations to which their citizens are bound; and this immunity, if attacked in foreign courts, he can secure by directing the attention of the court to those laws of his own country by which his political status is defined. The most prominent examples of the recognition of this law are those concerning ambassadors and ministers of States who, while residing in the nations to which they are accredited still remain subject even in private matters only to the laws of their own State; or those of navies and armies passing through a foreign territory by consent of its sovereign, who are regulated there as elsewhere by their own military laws. The *lex ligeantia*, however, cannot create artificial disabilities which foreign States are bound by comity to recognize. The person who under the laws of his own State is a slave, or civilly dead, or subject to the penalty of infamy or attainder, or deprived of ordinary rights because of his religion or social rank, is not regarded as such by the courts of other countries where these legal disabilities are unknown and where the laws imposing them are prohibited. The *lex ligeantia* ceases either to bind or to protect when the allegiance ceases, and this, according to the modern doctrine in the United States, is at the option of the citizen who may by taking proper steps transfer his citizenship from one State to another, and it may be superseded by the law of domicile whenever the legal residence of the party has been permanently changed. (a)

Read Story, Conf. L. §§ 51-54.

(a) 17 D. 179, note; 55 D. 87.

§ 197. Of the *Lex Domicilii*.

The *Lex Domicilii*, or law of the domicile, is the law in force in that place where the person has his legal home. In a State with no political subdivisions and where the citizen has no power to transfer his allegiance or his legal residence to another State, the *lex ligeantia* and the *lex domicilii* would be the same. But in a State composed of minor States or of

municipalities endowed with delegated sovereignty, or under laws which recognize the right to change allegiance or to acquire a domicile in States to which the person owes no permanent allegiance, the law of the domicile is superadded to the law of allegiance and governs the person in particulars to which the law of allegiance does not extend. This close relation between the *lex ligeantiae* and the *lex domicilii*, and the possibility that States may exist in which they would become identical, has made it difficult to assign to each, where they are really separate, its distinct jurisdiction, and modern courts and writers thus frequently impute to the law of domicile control over many or all of the matters which have been here referred to the law of allegiance, especially those concerning personal capacities and disabilities. This diversity of views, however, indicates no practical difficulty in the application of the law, since whether the law to which a person is subject be and be called the *lex ligeantiae* or the *lex domicilii* there is rarely or never any doubt as to what system of laws it is by which his personal rights and duties are determined. If domiciled in a simple State, uncompounded of political subdivisions, the entire law of that State is his law of domicile. If domiciled in a State with such subdivisions the law of the State is the law of his domicile as to all matters not specifically regulated by the local laws of the political subdivision in which he resides, and as to these his law of domicile is the local law. Thus the domiciliary law of any particular person may be derived from several domiciliary systems — from that of the city, that of the dependent State, that of the nation — and the totality of rules attaching to the person because of the locality of his legal home will constitute for him the law of domicile. By this law, coincident or coupled with his *lex ligeantiae*, are governed all matters which in the eye of the law are so connected with his person as to be inseparable from it, — such as capacity, status, domestic relationship and their incidental rights. (a) Questions concerning personal property, its character, capability of ownership, transfer by gift or contract or will, susceptibility to trusts and their administration are also

settled by the law of the owner's domicile in whatever domestic or foreign tribunal they may arise, unless the State where it is located has by its own laws expressly asserted an exclusive dominion over it. (*b*)

Read Story, Conf. L. §§ 40-49 d, 55-106, 125-230 c, 374-423 h, 464-473 c, 480-482, 490-491 d.

(*a*) 28 D. 132; 12 D. 475; 14 D. 201; 65 D. 109; 43 R. 669.

(*b*) 3 Cranch, 319; 90 D. 390; 9 Pet. 483; 28 D. 142; 14 How. 400 (424-426); 35 D. 472, note.

§ 198. Of the *Lex Rei Sitæ*.

The *Lex Rei Sitæ*, or the law of the place where the thing in controversy is situated, always governs real property, whether corporeal or incorporeal. It would be contrary to reason that any portion of the territory of a sovereign should be subject to the laws of a foreign State, and, therefore, whatever he prescribes concerning it must everywhere be recognized as its controlling rule. Thus the distinctions between real property and personal; the number and character of estates in realty and their mode of creation and transfer; the forms, validity, interpretation, and effect of contracts, deeds, wills, mortgages, and judgments relating to real property, are fixed by the *lex rei sitæ*. (*a*) All suits at law by which the possession of the realty is to be directly influenced or the ownership of it permanently settled must be brought before the courts of the same State and decided according to its laws. The authority of a court in any other State in reference to it is limited to a declaration of the rights of the contesting claimants and a decree against their persons compelling them to take such action in the State *rei sitæ* as will there adjust their rights according to its declaration. (*b*) The *lex rei sitæ* will likewise, if the State of *situs* so determines, govern all personal property within its borders, notwithstanding the foreign domicile or allegiance of its owner; and the State of the *forum* will then recognize and enforce the

lex rei sitæ of the personal estate instead of the *lex domicilii* or *lex ligeantiae* which it would otherwise sustain. (c)

Read Story, Conf. L. §§ 363-373 h, 424-464, 474, 479 o, 483-489 c, 492-504 a.

(a) 33 D. 147; 22 D. 41; 94 U. S. 315; 10 Wheat. 192; 165 U. S. 566.

(b) 67 D. 89, note.

(c) 7 Wall. 139; 12 D. 468; 5 Pet. 518; 5 Wall. 307.

§ 199. Of the *Lex Loci Actus*.

The *Lex Loci Actus*, or the law of the place where some matter involved in the controversy transpired, controls every transaction which is begun, continued, and completed according to its laws. A transaction valid according to the law of the State where it occurs is, as to the transaction itself, valid everywhere. Thus, for example, a marriage between parties competent to marry, contracted in accordance with the local law, is valid in all other States unless because of its polygamous or incestuous character it is contrary to their fundamental policy or morals. (a) The appointment and official acts of public officers, the proceedings and judgments of courts, the conduct of business affairs and the rights and obligations thence arising, the organization and direction of corporate enterprises, always provided that the mandates of the local law are faithfully obeyed, are respected and accepted in all other jurisdictions. (b) Some authorities indeed go even farther than this, and assert that the capacity of the parties to enter into the transaction is also to be measured by the *lex loci actus*, and hence that the transaction will be valid although the parties were incapable according to the laws of their allegiance or domicile; but while this may be held true in the State where the event occurred other States can hardly be expected to admit its right to set aside the general principle that personal capacity depends upon the law of domicile or of allegiance and to bind the whole world by its assumption of such authority. (c) The question is, however, a very difficult one, especially in such cases as that of a marriage between parties who under the *lex loci actus* had a right to

marry, but one or both of whom was incapacitated by the law of domicile, where the refusal by the courts of other States to recognize the marriage must not only disgrace the parties, who may have acted in good faith, but render their descendants illegitimate.

Read Story, Conf. L. §§ 107-124 b ; 2 Whart. I. L. Dig. § 261.

(a) 8 D. 131 ; 23 D. 549 ; 77 D. 598 ; 21 D. 743 ; 18 R.

509 ; 60 St. 936, note.

(b) 39 St. 196 ; 38 St. 536.

(c) 46 St. 439, note.

§ 200. Of the *Lex Loci Contractus*.

The *Lex Loci Contractus* or law of the place where the contract in controversy was made, with some exceptions hereafter to be mentioned, regulates the form, execution, proof, authentication, interpretation, and validity of the contract, and consequently the rights and duties which it creates. (a) The place where a contract is made is the State in which the agreement is completed and becomes legally binding, where-soever the negotiations may have been carried on or the documents which express the terms of the contract may have been drawn. (b) Whatever enters into the contract even as an accessory, like the promise to pay interest if the principal debt remains unpaid or a legal defence to its enforcement or an excuse for its non-performance, is governed by the same law; if valid there, it is valid everywhere; if invalid there, it is valid nowhere. (c) But the *lex loci contractus* cannot override the *lex rei sitæ* as to its subject-matter nor the *lex domicilii* as to the capacity of the parties to contract; though as to the latter point the same difficulty occurs as in reference to the *lex loci actus* of which the *lex loci contractus* is a subordinate division. (d)

Read Story, Conf. L. §§ 231-279 a, 362-362 b.

(a) 30 D. 472.

(b) 13 D. 281 ; 99 D. 663, note.

(c) 37 St. 186 ; 28 R. 241 ; 47 St. 456 ; 1 Wall 298 ; 13
Pet. 65.

(d) 10 St. 690, note.

§ 201. Of the *Lex Solutionis*

The *Lex Solutionis*, or law of the place where the contract in controversy was to be performed, supersedes the *lex loci contractus*, in whole or in part, where the contract though made in one State was to be performed in another, and where the parties had in view the laws of the latter State and intended to be governed by them. This limitation of the *lex loci contractus* is an endeavor to make the contract conform as far as possible to the real intent and purpose of the parties. Where the contract is made in the same State in which it is to be performed, the parties are presumed, unless they have expressly stated otherwise, to have had in mind the laws of that State and to have so framed their contract that under those laws they would obtain the benefits they had desired. But where the contract was to be performed in a State other than that in which it was made, it is in many cases probable, and in some cases certain, that they have contemplated the advantages which could be secured only under the laws of the State of performance and have agreed, at least tacitly, to be governed by those laws. Fulfilling their intention as nearly as it may, which the law always does, the State of the *forum* adopts the law of the State of performance as its guide in all matters pertaining to the contract as it would have adopted and followed the *lex loci contractus* if the contract were to have been performed in the same State where it was made. Thus, for example, a promissory note executed and delivered in one State, but expressly made payable in another, is enforceable according to the laws of the latter State, whatever may have been its legal status in the former. Some authorities, however, consider this rule as too broadly stated, and insist that the *lex solutionis* should control only such matters as concern the performance of the contract, leaving to the decision of the *lex loci contractus* all questions as to its existence, interpretation, and validity. (a)

Read Story, Conf. L. § 280.

(a) 37 R. 583, note ; 106 U. S. 124 ; 142 U. S. 101 ; 46 St. 439, note ; 91 U. S. 406.

§ 202. Of the Lex Loci Pacti.

The *Lex Loci Pacti*, or the law of the place by whose laws the parties to a contract have expressly agreed that their rights under it should be determined, will be followed by the courts in preference to the *lex loci contractus* or the *lex solutionis* whenever it is proved that such an agreement has actually been made. This rule is a mere recognition of the legal right of the parties to incorporate into their contract whatever elements they please, provided it contains nothing contrary to the public policy of the State where it is made or where its obligations are to be enforced. Thus the jurisdiction of the *lex loci pacti* seems to rest its claim for recognition by other States, not so much on the comity due to the State from which the law originated, as on the ordinary principle of law that contracts shall be construed and carried into effect according to the true intention of the parties so far as that can be ascertained. (a)

Read (a) 129 U. S. 397.

§ 203. Of the Extent of Comity and its Subordination to Law.

To what an extensive investigation of foreign laws a single legal controversy may lead, and by the rules of how many sovereignties its various contentions may require to be decided, it is now easy to perceive. An action to recover the price of land may raise the question of the validity of the contract to be determined by the *lex loci contractus* and the *lex solutionis* or the *lex loci pacti*; this in turn may involve the ownership of the vendor to be settled by the *lex rei sitæ*, and this again may call into dispute his legitimacy under his *lex domicilii* or the validity of the marriage of his parents under the *lex loci actus* or their capacity to marry under their *lex ligeantia*; and thus the inquiry may develop, step by step, until the jurisdiction of the laws of nearly all the civilized nations of the earth has been invoked. To all these rules the courts administering the *lex fori* give such recognition as the laws of their own State will permit, for comity yields in

every case to express local law, and no State is required by the common courtesy of nations to give effect to laws which contradict its political theories or violate its established moral or religious principles. (*a*)

Read (*a*) 32 D. 307; 48 D. 706; 61 D. 617; 66 D. 502; 89 D. 643; 103 U. S. 261; 129 U. S. 355; 159 U. S. 113.

SECTION II.

OF THE JURISDICTION OF LAWS AS DEPENDENT UPON TIME.

§ 204. Of the Stability of Rights under Necessary Changes in the Laws.

Every right, duty, wrong, and remedy is presumed to be governed by the laws prevailing at the time when the question as to its existence, character, or availability is raised in the courts of the *forum*; and any party to the controversy who seeks protection from the provisions of laws formerly in force but now repealed must show affirmatively that by them, and not by present laws, his interests are to be determined. That he should have this privilege is necessary to good government. The power of the State to make new laws as the welfare of the people may require, and thereby to supersede or modify the old, cannot be restricted without destroying the essential attribute of sovereignty. Some laws are intended to be temporary and are so expressed, and when the time fixed for their duration ends they expire by their own limitation, and except as to such transactions under them as are completely closed they have no more authority than if they had never been enacted. Other laws, intended to be permanent, are found in practice to be inconvenient, and are curtailed, extended, or abolished according to the judgment of the State. The evolution of new social conditions demands other laws to meet them, whose rules thenceforth apply to subjects which are wholly new or have been previously governed, in part at least, by different laws. Thus the laws of every living State are constantly changing — the more rapidly in proportion to the civilization and progressiveness of the State — substitut-

ing for old systems of law under which rights have been asserted, duties imposed, wrongs forbidden, and remedies provided, new systems under which other rights, duties, wrongs, and remedies will obtain legal recognition, and in their time these systems too will pass away and others take their place. Manifestly, if with this inevitable disappearance of a legal system the rights and duties, wrongs and remedies, existing under it also vanished that very stability of rights which it is the principal purpose of civil government to secure could never be attained. To preserve these inviolate the laws from which they sprang must be regarded as still in force so far as they are concerned, and courts must, therefore, in reference to them, have recourse to the laws prevailing in the period when the right accrued. This privilege of a party to appeal to former laws, and the corresponding obligation of the courts to notice and apply them, are measured by the following rules.

§ 205. Of the Validity of Transactions Completed under Laws Since Repealed.

The first of these rules is that every transaction, valid according to the laws under which it was commenced and completed, remains valid though such laws are subsequently modified or repealed. Thus a marriage, a contract, a conveyance, a judgment, legally sufficient at the time of their occurrence, are not rendered insufficient by future legislation, though if occurring under the later law they would have been entirely null and void. (*a*) But this immunity does not attach to transactions commenced and not completed under former laws, nor to the incidental consequences of completed transactions. A change in the law during the progress of an act brings the remainder of the act under the new law, and by this law its legality and effect when completed must be judged; and the legal aspects of the results flowing from the act may be varied by new laws introduced after the act is finished. (*b*) If, for example, while a suit were pending an alteration were made in the law concerning the form and effect of civil judgments, the judgment in the suit would be subject to the new

law, not the old; or if, after a judgment in satisfaction of which the body of the execution-debtor could have been imprisoned, a statute is enacted abolishing imprisonment for debt, the remedy against the body is no longer available. But though no change of laws can impair the validity of past transactions, new laws may clothe with due validity transactions which, under the laws in force when they occurred, were invalid on account of the omission of prescribed formalities or because the parties labored under legal disabilities, provided no vested rights of other persons are disturbed. A marriage defective because the parties were of insufficient age, a conveyance lacking a witness or a seal, may thus be healed by later laws, unless to legalize this marriage would attack the validity of one afterwards contracted, or to heal this conveyance would impair the title of a later *bona fide* purchaser. (c) But acts entirely null and void, such as the marriage of a party already lawfully united to another wife or husband or the judgment of a court having no jurisdiction over the subject-matter of the suit, cannot be cured by any future legislation. (d)

Read (a) 96 U. S. 627; 79 D. 236.

(b) 25 R. 513.

(c) 16 D. 516; 23 Wall. 137; 17 D. 635; 10 D. 121, note; 76 D. 521, note; 98 D. 237.

(d) 68 D. 587; 80 D. 718, note; 87 D. 240.

§ 206. Of the Impregnability of Vested Rights of Property.

A second rule is that no repeal or change of laws can defeat a vested property right. This rule is based upon essential principles of justice and is specifically declared in the Constitutions of many of our States. (a) Vested rights are distinguished from expectant rights and contingent rights. A vested right is one which already exists in a definite person and now entitles him to possess and enjoy some object either at once or in the future. An expectant right is one which, though not now residing in any definite person, will, if the laws continue unchanged, eventually vest in him. A contingent right is one which does not, and except in certain future

contingencies will not, vest in the particular person under consideration. Instances of expectant or contingent rights are those of the probable heirs of an ancestor not yet deceased; of a devisee under the will of a living testator; of a husband to his curtesy before the birth of issue: of a wife to her dower while her husband still survives: of the grantee of a statutory privilege, such as exemption from taxes or from civil arrest, to its continuance; of the owner of an estate to the perpetuation of its peculiar legal character. Such rights as these are always subject to changes in the law. Rules of descent may be altered, the requisites of valid wills increased, curtesy and dower restricted, statutory privileges withdrawn, the nature and relations of estates transformed, and the parties affected by these changes must abide the consequences. (*b*) But where these rights are once vested they become impregnable. As soon as the estate has descended to the heir or passed into the ownership of the devisee, or the right to curtesy has been perfected by the birth of issue or that to dower by the survival of the wife, or the statutory privilege has been exhaustively enjoyed, no future alteration in the law can imperil the titles of the widow, husband, heir, or devisee, or enforce the obligations from which the exempted party has already been relieved. (*c*) Thenceforth the law existing when the right vested is the law to whose jurisdiction all questions concerning the character, extent, and ownership of the right must be referred.

Read Cooley, C. Law, Ch. xvi, pp. 345-353; Austin, Lect. liii, pp. 856-869.

(*a*) 11 Pet. 420 (539, 540); 2 Pet. 380.

(*b*) 10 How. 395; 16 D. 715.

(*c*) 11 D. 79; 5 D. 291; 23 D. 478; 66 D. 148 (149, 150); 96 D. 613.

§ 207. Of the Inviolability of Contract Obligations.

The third rule is that the obligation of a valid contract cannot be impaired by any subsequent legislative act. This rule is but the statement in another mode, and with a particular application, of the first and second rules and is expressly

formulated in the Constitution of the United States. (a) The obligation of a contract is that legal duty which the law imposes on the parties when the contract is made, and includes not only the duty to perform the contract but the duty to make such compensation for a failure to perform it as the law may at that time provide. It presupposes a valid contract, possessing all the essential requisites of a true contract and conformable in all respects to law, and the existence of an adequate legal remedy whereby the fulfilment of the contract may be enforced or its breach may be redressed. Wanting in these, there is no obligation which under this rule is entitled to protection. Thus a gratuitous release by the State from some legal duty, or an election or appointment to public office, or a corporate charter under which no obligation rests upon the incorporated body, are not contracts, and consequently the release may be rescinded or the office abolished or the charter altered or repealed at the pleasure of the State. (b) But when a valid contract has been made either between the State and individuals, or between private parties, no law can be enacted which releases either party from its duty to the other or in any material degree changes the obligation in extent or character, or substantially diminishes or delays the remedy to which upon its breach the other party is entitled. (c) By the law in reference to whose provisions it was originally made the validity, interpretation, and effect of the contract must be decided, and its obligation as thus ascertained must be enforced against the parties by every court to which a controversy concerning it may be submitted, whatever might be its judgment if these questions were to be determined by the present laws.

Read Cooley. C. Law. Ch. xvi, pp. 328-345, 358-363; Cooley, Const. Lim. Ch. ix, pp. 273-294.

(a) 6 Cranch, 87.

(b) 24 How. 300; 22 Wall. 527.

(c) 90 D. 311; 88 D. 622; 1 How. 311; 4 Wall. 535; 96 U. S. 595; 91 D. 245; 14 D. 722; 92 D. 56; 79 D. 490; 6 D. 531, note; 12 R. 507; 45 D. 246; 115 U. S. 650.

§ 208. Of Ex Post Facto Laws.

A fourth rule is that no *ex post facto* law is valid. An *ex post facto* law relates to public wrongs alone. It is a law which either makes criminal an act that when committed by the party was no offence against the State, or creates a higher crime out of a lower one already perpetrated, or aggravates the punishment which was attached to past offences by the law at the time of their occurrence, or changes rules of evidence or procedure to the disadvantage of an accused person after the completion of the act for which he is to be tried. (a) Such laws are in themselves dangerous to the liberties of citizens, are liable to work grave injustice, and consequently are disfavored in all enlightened States, and in this country are expressly prohibited by Constitutional provisions. Under this fourth rule, coupled with the first, a criminal enactment can be invoked against a person only in reference to acts committed and penalties to be inflicted while it remains part of the current law; the repeal of a criminal law, without a saving clause in reference to offences perpetrated while it was in force, rendering all future prosecution for such acts impossible. (b)

Read Cooley, C. Law, Ch. xv, pp. 312-314; Cooley, Const. Lim. Ch. ix, pp. 264-273.

(a) 3 Dall. 386; 4 Wall. 277; 7 St. 674; 9 D. 608; 134 U. S. 160; 171 U. S. 380; 107 U. S. 221; 45 R. 531; 170 U. S. 343; 39 R. 558; 37 St. 572, note; 64 St. 376, note.

(b) 34 D. 492; 25 R. 760.

§ 209. Of Retrospective Laws.

Subject to the foregoing rules the character and scope of legislation rests in the discretion of the State. Retrospective laws concerning civil rights and duties, wrongs and remedies, may be enacted provided they do not invalidate past transactions, nor disturb vested rights of property, nor impair contract obligations. The law of remedies may be changed to any extent which does not materially hinder litigants from

obtaining the same redress, or its equivalent, to which the law entitled them at the time their rights accrued. New forms of action, new methods of trial, new rules of evidence, new modes of satisfaction, may be substituted for the old. (*a*) Statutes of limitation may be passed, narrowing but not unreasonably diminishing the period within which suits must be commenced. (*b*) Avenues of escape from the incidental consequences of transactions completed under former laws may be opened by Bankruptcy Acts or other statutes of repose. (*c*) For though the State may not divest a vested right, nor invalidate a valid act, it is not bound to maintain perpetually the same system for protecting rights nor to furnish to all injured parties in all ages the same measure and species of compensation for their wrongs. Nor would it be possible that while following in its law of remedies the changes in the social and political conditions of its people it should preserve in detail every remedy that it had once adopted and apply it at the present day according to the laws in force when the duty was imposed or the wrong committed. For the same reason, therefore, that the *lex fori* regulates all matters pertaining to the remedy, must these matters be controlled by the laws of the present and not of any former time.

Read Cooley, C. Law, Ch. xvi, pp. 354-358; Cooley, Const. Lim. Ch. xi, pp. 369-389.

(*a*) 58 D. 66.

(*b*) 17 Wall. 596; 95 U. S. 628.

(*c*) 38 D. 317; 3 How. 534; 45 St. 700 (715-718).

§ 210. Of the Standard of the Jurisdiction of Laws as Dependent upon Time.

The jurisdiction of laws as dependent upon time is thus determined by the nature of the subject-matter to which the laws relate and concerning which the question of jurisdiction has arisen. Transactions completed under laws no longer existing and valid according to those laws, rights vested or contract obligations imposed in pursuance of laws since re-

pealed, acts and omissions to which the laws then current attached no liability, are to be judged, sustained, enforced, or vindicated, whenever made the subject of dispute, as if the former laws were still in operation. All other matters, whether incidental or remedial, are governed by the present law.

SECTION III.

OF THE PROOF OF LAWS.

§ 211. Of the Mode of Proving Domestic and Foreign Laws.

Courts are presumed to be familiar with all the current provisions of the *lex fori* and to refresh their recollection, if necessary, by consulting the statute-books and other reliable authorities. They also take notice of the past laws of their own State when their attention is directed to them as they appear in the ancient legislative records and the decisions of the courts of former generations. The laws of foreign States, however, must be specially pleaded by the party who invokes their aid, and their existence, genuineness, authenticity, and meaning must be proved, like any other facts, by sufficient evidence. Persons learned in the laws of the State in question may testify upon these points, or properly authenticated copies of the statutes and decisions may be produced. (a)

Read (a) 89 D. 658, note; 49 R. 200, note; 16 D. 738, note; 11 D. 779, note; 2 Cranch. 187; 14 How. 400 (426-430); 116 U. S. 1; 129 U. S. 397 (445, 446); 32 D. 143, note.

§ 212. Of the Proof of International, Federal, and English Law.

The courts of every civilized country take judicial notice of the rules of international law and of all the treaties and compacts into which its own nation has entered. (a) In this country the courts of every State are bound to know the provisions of the Federal Constitution and the laws of the United States, and the Constitutions of sister States, and to apply them in the cases over which those laws have jurisdiction. (b)

There is also a general presumption that such portions of the English Law as still prevail in other States are identical with the English part of the *lex fori*, and unless the contrary is claimed no proof to support the presumption need be offered. (c)

Read (a) 159 U. S. 113 (163).

(b) 9 Pet. 607 (625).

(c) 56 D. 318.

§ 213. Of the Proof of Special Legislative Enactments.

Where rights arise out of a legislative act affecting particular individuals only, and on their behalf departing from or adding to the general law, such act, though having all the force of law in this particular case, is not regarded as a part of the *lex fori* of which the courts must take judicial notice. Even in the State of its enactment it must be pleaded and proved as strictly as if it were a foreign law. The usual evidence in its support is an authenticated copy, written or printed, of the legislative act. The charter of a private corporation is an instance of such enactment, and is proved by its production and submission to the court. Laws of this character passed by foreign States must be established in a similar manner.

CHAPTER VIII.

OF THE FORMS OF LAW.

§ 214. *Of the Causes of the Variety in the Forms of Law.*

A State may exercise its legislative powers through many agencies, and corresponding to these agencies the rules of law may be enunciated in many forms. Where the entire sovereignty of the State resides in a single individual, as in an absolute monarchy, his edict is the only form of law. In a pure democracy, where all authority is lodged in the assembly of the whole people, the rules which they adopt by popular vote thereby become their laws. In complicated governments where the three functions — legislative, judicial, and executive — are widely distributed, and more or less commingled in the same official personages, commands and prohibitions are prescribed sometimes directly in words referring to the future, sometimes by acquiescence in present action and acceptance of results, sometimes by express sanction given to conduct already past. In our own country and in England, and wherever else the Common Law prevails, all these methods are employed. Laws are enacted by the whole people framing or amending State or Federal Constitutions, by special legislative bodies entering into treaties or formulating statutes, by administrative officers making rules for the control of departmental business, by judicial tribunals erecting standards, to which future action must conform, through their approval or repudiation of actions hitherto committed. Some of these forms of law are more authoritative than the rest and in the event of conflict supersede all others. Each is governed by its own rules as to the validity of its enactment and the mode of its interpretation. Hence the necessity of

distinguishing between them and of giving to each class its appropriate discussion. (*a*)

Read (*a*) 6 Pet. 691 (714, 715).

§ 215. Of the Unwritten Law and the Written Law.

The primary division of our laws, as to their form, is into the Written Law and the Unwritten Law. The difference between these forms of law does not consist in the fact that one has been reduced to writing and the other not, but that the Written Law has been put into writing by the legislative authority itself with the intent that the written words when lawfully interpreted shall measure the precise limits of the rule, while the Unwritten Law, although contained in manuscripts and printed books, has been there placed by private persons or by public officers for preservation and convenient reference and not for promulgation as verbally authoritative law. Historically, at least so far as known in our own jurisprudence, Written Law is of later origin than the Unwritten Law, the Written Law serving rather to remedy the defects and extend the application of the principles and precepts of the Unwritten Law than to prescribe new rules of action. In their discussion the Unwritten Law, therefore, logically as well as chronologically, precedes the Written Law, and will be first subjected to investigation.

Read Amos, Ch. i. p. 5; Austin, Lect. xxviii-xxix, pp. 512-533; Clark, Book ii, Ch. i, ii, xii-xv.

SECTION I.

OF THE UNWRITTEN LAW.

§ 216. Of the Origin of the Unwritten Law.

The Unwritten Law consists in part of primary self-evident principles of action whose truth and justice no rational human being would dispute, and which are spontaneously recognized and enforced by all the governmental agencies of the State.

Except for these it is composed of customs which, having received the sanction of the State, have been thereby transmuted into law. For this reason the Unwritten Law is often called the "Customary Law;" not that the Written Law also did not originate in custom, but that while it has assumed the form of positive enactments the Unwritten Law still preserves the form of its progenitor and is the law which the people are accustomed instinctively and habitually to observe. (*a*) The Unwritten Law is a universal form of law, prevailing in all countries and in all ages, of slow and permanent development, working out its rules by gradual experience, seeking no fixed methods of expression, immutable in its principles but varying in its details to meet the convictions and requirements of each passing generation. (*b*) It manifests at all times the innate genius of the people, and the determinations of the popular will. It is emphatically the "common law," the law emanating from the common wisdom of all the members of the commonwealth; the "law of the land," the law which grows up out of the social needs created by the union of the people with the soil. It constitutes by far the most important portion of our law at the present time, and its nature, source, and method of development ought, therefore, to be clearly understood.

Read 1 Kent, Lect. xxi. p. 472; Dillon, Lect. i, pp. 5-20;
Maine, Ancient Law, Ch. i, pp. 1-13.

(*a*) 3 Dall. 386 (395, 398); 39 D. 611.

(*b*) 12 Pet. 410 (437).

§ 217. Of the Nature and Obligation of Customs.

A custom is a usage or a habitual mode of acting, adopted between related parties by express or tacit agreement, and continued long enough to be rightly relied on as a rule of conduct in their dealings with each other. Such usages inevitably arise whenever two or more human beings of sufficient mental capacity to govern their own actions are brought into persisting relations with one another. The character of

these usages is determined by reason and instinct which lead men to adjust their relations in the manner most beneficial to themselves and to correct them in whatever particulars experience may have demonstrated to be necessary. Justice requires that once adopted and perfected they should not be changed except by mutual consent, and thus their recognition by the parties at the outset grows by continuance into an obligation which neither is at liberty to ignore. In every degree and condition of society these usages abound—in friendship, in business, in the family, in the church, in the State—and social life is made up of these observances and social peace secured through their authority. (*a*)

Read (*a*) 13 Wall. 363; 111 U. S. 412 (421).

§ 218. Of the Mode in which the Obligation of Customs is Enforced.

So long as all the parties obligated by a custom comply with its requirements they remain unconscious of its force and authority as a rule of action. (*a*) But if the custom is infringed the inconvenience thence resulting at once calls their attention to its existence and awakens their sense of the injustice caused by its transgression. Reason affirms that wrong has been committed, right been violated, and duty unfulfilled; and if a supreme authority exists to which the injured party can appeal for protection and redress the remedy is sought, and through its allowance or refusal by the supreme authority the usage itself is either repudiated or sustained. A usage thus repudiated disappears, but if sustained it becomes to all the parties whose relations it controls a manifest and no longer disputable rule. This process of evolution from simple voluntary usage into authoritative obligation takes place continually in every family, in every State, in every other social organization; and in the course of centuries vast bodies of rules are thus developed out of customs leaving still undeveloped even vaster groups of equally important customs which, having never yet been challenged or infringed, remain

unsanctioned save by the reason of the people and their mutual good-will.

Read Holland, Ch. v, pp. 50-56.

(a) 10 St. 819.

§ 219. Of the Transmutation of Customs into Retrospective Laws.

The act by which a custom is transformed into a rule of positive law is its judicial sanction by the courts. This can occur only when the existence or obligation of the custom is made a matter of legal controversy between the parties to it, and the court upholds the custom and sustains its obligation. This is, in effect, the enactment of a retrospective law enforcing upon the parties, as to a past transaction, a rule hitherto unrecognized as law. (a) Whether before the rule received this sanction and announcement it was, in any proper sense, a part of the unwritten law and by the court has now been simply recognized and published, or whether it was then a mere dictate of reason and justice which has now been elevated into law by the legislative authority residing in the court, is a question which has long been strenuously contested. But it is a question rather speculative than practical. Every decision of a court holding the parties bound by a custom which never till that moment had been promulgated as law is, according to the latter theory, an act of judicial legislation, resulting in a new though retrospective law. Under the former theory it is but the announcement that the law had previously been and still continues to be what the custom had expressed. But whatever be the truth on this point, it is certain that the courts take notice of no custom, as a matter of law, until it has thus passed judicial scrutiny and received judicial approbation, but in the first instance treat the existence of the usage as a matter of fact to be established by evidence, and its obligation as an open question to be determined by reason, justice, and experience. (b) If this implies the residence in the courts of actual legislative

power, their inherent right to it is one of their essential attributes and has been too long acknowledged to be now seriously disputed.

Read *Holland*, Ch. v, pp. 57-66; *Markby*, §§ 76-80, 93-100; *Austin*, Lect. xxx, pp. 534-547, Lect. xxxviii-xxxix, pp. 642-659; *Dillon*, Lect. x, pp. 267, 268.

(a) 7 Pet. 1; 30 D. 578.

(b) 55 D. 163; 10 R. 407.

§ 220. Of the Transmutation of Customs into Prospective Laws.

A custom having received judicial sanction in a controversy between the related parties, and being thus made a retrospective law governing the transaction out of which the controversy has arisen, becomes a prospective law, controlling the future conduct of these and other parties similarly related, by a process equally spontaneous and inevitable. There is a natural tendency in the human mind to accept the decision of a competent tribunal as correct upon any question not involving personal interest or prejudice, and to follow it on subsequent occasions if the same question should arise; and where there is a relation of dependence between one tribunal and another the judgment of the superior tribunal necessarily determines that of the inferior in all controversies of the same character, and obliges it to maintain and apply the doctrines which the superior has proclaimed. This obligation in some cases, and this natural tendency in all, to stand by previous decisions (*stare decisis*) results in the accumulation by slow degrees of so many judgments sustaining the same custom that no doubt can exist as to the affirmation of the custom in any future case in which it may be contested. Thus all parties, now or hereafter occupying toward one another the precise relations out of which the custom has originated, are forewarned of the judgment that will be pronounced upon them by any tribunal whose interference they may invoke, and are consequently furnished with a standard to which their conduct must conform if they would escape an adverse decision. In this manner, without prescribing any formal rule,

but confining their utterances strictly to the controversies and the parties in the cases brought before them, the courts do actually promulgate and establish prospective laws which are of the same practical efficiency as if they had been specifically enacted by a legislative body. (a)

Read 1 Bl. Com., pp. 69-71; 1 Kent, Lect. xxi, pp. 473-478; Dillon, Lect. viii, pp. 229-235, 261; Amos, Ch. iv-v, pp. 47-76; Black, Ch. xvii, §§ 150-152; Clark, Book ii, Ch. iii-vi; Pollock, Lect. ii, pp. 50-59.

(a) 27 D. 628, note; 1 Pet. 547 (692); 2 Black, 544; 3 Wall. 332; 58 D. 575, note.

§ 221. Of the Customs Entitled to Judicial Sanction.

A custom is not entitled to judicial sanction unless it possesses certain attributes. *First*, it must be Immemorial; that is, it must have existed for a sufficient period of time to have become established as a rule of action in that class of cases of which it is henceforth to be regarded as the law. This attribute is of the essence of a custom which cannot exist as a custom until the instances of its observance have so multiplied as to make it an habitual mode of action. *Second*, it must be Continued; that is, it must not have been alternated with antagonistic modes of action but must have been constantly followed whenever any of this class of cases has arisen. This also is essential to a custom, since habit implies uniformity of conduct, and out of a series of contradictory actions, however long, no customary mode of acting can arise. *Third*, it must be Peaceable; that is, it must not have been subject to contention or dispute, but have been acquiesced in by all parties to whom it pertained. This likewise is essential to a custom, which is always founded in agreement, tacit or expressed. *Fourth*, it must be Reasonable; that is, it must not be opposed to any fundamental principle of justice, nor in its practical operation be injurious to the public or to that class of persons to whose conduct it relates. This attribute is not of the essence of a custom, for it is conceivable that modes of

action which are contrary to reason and justice may become habitual even in entire communities to the ultimate subversion of the commonwealth. But such customs ought not to receive the sanction of the State, which, in enacting laws, is bound to follow reason and consult the interest of its citizens; and though they are sometimes embodied in statutes or judicial decisions they fall within that class of invalid laws which a wiser second thought or a sad experience of their consequences soon repudiates. *Fifth*, it must be Certain; that is, it must not either in the rights which it confers or in the duties it imposes be indefinite or open to conjecture, but must furnish to all persons interested in such cases a reliable and intelligible rule of action. This attribute distinguishes a custom which is perfect and complete from one still in process of formation. Not every custom springs into existence as a matured habit containing all its elements in due proportion. On the contrary, it begins often by accident or chance, varies in content and in details as experience illustrates their value, and only after many vacillations acquires its permanent and unmistakable form. Until it has arrived at this stage of development it cannot serve as a rule of conduct. A rule is in its very nature fixed not variable, apparent not obscure, and equally impossible would it be for a court to define a rule which was incapable of definition and to apply a rule which it could not define. *Sixth*, it must be Compulsory; that is, its observance must not have been optional with individuals, but it must have been regarded by those persons generally to whose relations it pertains as a rule which in honesty and good faith they were under an obligation to obey. This attribute is also characteristic of a completed custom, for there can be no obligation to obey a varying or unintelligible rule. The compulsion constituting this attribute is not a legal but a moral one, imposed only by reason, justice and the common consent of the parties to the relation, since the legal obligation proper does not accrue until the custom has received judicial sanction, although it is then retroactively enforced against the parties as if it had always been a rule of law. *Seventh*, it must be Consistent with other customs; that

is, it must not contradict nor limit the observance of any other judicially established custom by which this class of cases is already governed. This is not an attribute essential to a custom, for customs may and do arise which are contrary to existing laws as a result of those natural changes in society which render sanctioned customs inconvenient and necessitate the formation of new customs which contravene the old. In such cases, when the new custom seeks the sanction of the courts it can be granted, and the sanction previously given to the custom now obsolete can be withdrawn; but both cannot stand together as inconsistent rules of law. Customs adopted in defiance of laws still suited to the conditions of society are not entitled to recognition and will not receive it. (*a*)

Read 1 Bl. Com., pp. 76-79.

(*a*) 35 D. 268; 79 D. 656; 93 D. 155; 8 How. 83 (102);
93 D. 184; 83 D. 656; 88 D. 761; 18 R. 200, note;
25 D. 363; 45 D. 199; 51 D. 206.

§ 222. Of the Antiquity of Customary Law.

Not every custom which has become a part of the Unwritten Law can now be traced historically through all the stages of development which have just been described. By far the greater part of them had been evolved before the dawn of history and first appear to us as laws whose origin no then existing State could claim, but whose authority no person ventured to deny. In the primeval ages of our race, in the family, in the village, in the tribal forms of social life, they gradually emerged from actions dictated by good sense, and by consideration for the rights of others, into habits in which all men acquiesced, and finally under the sanction of whatever political authority then ruled the infant State into its permanent and binding laws. The knowledge acquired by studying the processes which have produced the Unwritten Law in later days we read back by analogy into that undiscoverable past, and trace its genesis with the same certainty as that of animals and plants known to us only through the indelible impressions they have left upon the rocky tablets of the earth.

§ 223. Of the Rise and Sanction of New Customs.

Not all the customs which compose existing rules of action are, however, of ancient origin. With the advancement of society new relations constantly come into being, new modes of life, new business enterprises, new political institutions are added to or supersede the old, and by these new relations new usages are generated adapted to their needs. These also by continued acquiescence become in time established, and through controversies concerning their character and obligations are transmuted into rules, and so pass into the great body of the Unwritten Law to enrich it and adorn it from the inexhaustible resources of human wisdom and experience. It is one of the exalted functions of the lawyers of every age to watch over and direct this ceaseless growth of custom and development of Unwritten Law. Under their care the closing century has thus witnessed the evolution of important branches of the Law of Contracts and the entire law of Telegraphs and Railroads. (*a*)

Read (*a*) 169 U. S. 366.

§ 224. Of the History of the Unwritten Law.

Many of the rules of our own Unwritten Law have descended to us through the traditions of the ages from the earliest known nations of Asia, Africa, and Eastern Europe. The customs of the Teutonic races in the time of Tacitus, inherited by them from a remote Oriental ancestry, and carried by them into England there to meet and merge with other customs of the aborigines and later immigrants, form the foundation on which has been built the superstructure of the Customary Law erected during the past nine hundred years. Before the Norman Conquest these had been collected into three principal systems; the Mercian Laws, in force in the midland counties which bordered upon Wales; the Danish Laws, which prevailed in the other midland counties and in the eastern coasts; and the Laws of the West Saxons, which governed the counties in the west and south. Of these laws King Edward the Confessor in A. D. 1065, imitating his

predecessor King Alfred, caused a compilation to be made, constituting one uniform body of laws to be observed throughout the entire kingdom. These are the famous "Laws of the Confessor," to maintain which the Saxons struggled for so many generations with the Norman kings, which were reasserted in Magna Charta and after six centuries of conflict were at last recognized by the government and people of England as the real substratum of their law. Upon these laws were temporarily imposed the customs of Norman feudalism, modifying in many respects the law of personal and property rights, especially those relating to real property, but these foreign customs, though vigorously enforced under the earlier Norman monarchs, soon yielded to the reviving doctrines of the ancient Saxon laws and with the reign of Cromwell almost wholly disappeared. Meantime the growth of popular power manifested particularly through the House of Commons, with the consequent recognition by the sovereign of popular rights and individual liberties, the development of trade and commerce and of new industrial and agricultural conditions, the increasing value and importance of personal property, and the extension and improvement of the law of remedies introduced new customs which the courts sanctioned and transmuted into law, until the era of our Revolution found the English-speaking races on both sides of the Atlantic in possession of a body of unwritten law, the product of the labors of a long line of learned lawyers and judges gathering and refining and formulating the results of the practical wisdom of all former epochs, a body of law vast enough to meet all the requirements of their social and political conditions, reasonable enough to have been the guide and governor of the foremost nations of the modern world, just enough to have made equity and freedom synonymous with English Law.

Read 1 Bl. Com., pp. 17-26, 63-68; 2 Bl. Com., pp. 44-58, 75-77; 4 Bl. Com., pp. 407-443; Dillon, Lect. i, pp. 27-33, Lect. v, p. 157-Lect. vi, p. 173; Walker, Lect. iv, pp. 53, 54; Wilson, Part i, Ch. xii; Pollock, Lect. viii; Reeve, Introd., Ch. i, pp. 159-175, Ch. ii, pp. 230-244, Ch. iv, pp. 464-489; Pollock and Maitland, Book i.

§ 225. **Of the Unwritten Law of the States of the American Union.**

The Unwritten Law of such of the States of the American Union as were formed out of the original thirteen colonies, or out of territory where no legal system previously prevailed, consists in part of so much of the English law as has been adopted by the State and in part of customs which have since arisen and received the formal sanction of its courts. In States where systems other than the English law were prevalent before the cession of the territory to the United States, the rules embodied in those systems, and the sanctioned customs since developed, constitute the Unwritten Law. Whether the law thus derived from former systems was, in those systems, written or unwritten does not affect its character in ours as part of our Unwritten Law. The Written Law of one State can never take effect as written law in any other until it has been re-enacted by the legislature of that other State, and it then obtains its force as written law solely from such legislative action and not from any authority in the State from which it sprang. Thus English statutes passed before the Revolution, and now, though never re-enacted in this country, comprised within the English portion of our law, are as to us unwritten law and derive their validity not from the act of Parliament but from their adoption by our people and their sanction by our courts.

§ 226. **Of the Unwritten Law of the United States.**

It is sometimes asserted that the United States, as a nation has no Common or Unwritten Law. This assertion must be taken with some qualifications. It is true that the United States originated in a written Constitution from whose express grants or necessary implications all its powers are derived. It is also true that not having existed prior to the framing of its Constitution it could, at that date, neither have developed for itself nor borrowed from other sources any customary or unwritten law. It is also true that having no being or authority except by virtue of its written Constitu-

tion it can have no recourse to the Unwritten Law of England in order to extend its jurisdiction beyond the limits established in its Constitution, nor assert rights, prescribe duties, prohibit wrongs, nor provide remedies, however well known to the customary law, unless these acts are within its delegated powers. It is also true that in every State in the Union questions concerning the persons and property within its borders, unless involving matters of a national character, are determined by its written and unwritten laws, and that the legislative and judicial acts of the United States in reference to such questions are governed by those local laws. But this exclusion of the English customary law as an original source of jurisdiction to the United States, and this obligation of the national courts and legislature to respect the common law of the respective States, by no means banishes from our Federal Jurisprudence the element of customary or unwritten law. Since the adoption of the Constitution many customs have arisen concerning national affairs which by judicial sanction have been elevated into law. In the interpretation of the Constitution itself and of the written laws made under its authority, in the application of judicial remedies, in the government of the Territories and the District of Columbia, in the administration of the Patent, Copyright, and Revenue systems, the definitions, principles, and precepts of the English customary law have been invoked, accepted, and confirmed as indispensable portions of our national Unwritten Law. Moreover, the entire body of International Law is of the same character. Its rules are nowhere specifically prescribed, but rest upon custom and usage, sanctioned by the consent of the whole family of nations and by the wholesome fear of armed compulsion in case of disobedience.

Read 1 Kent, Lect. xvi, pp. 331-343; Cooley, C. Law, Ch. vi, pp. 149-152.

§ 227. **Of the Expression of the Unwritten Law in Maxims, Definitions, and Judicial Decisions.**

The Unwritten Law is verbally expressed in maxims, definitions, and judicial decisions. A maxim is a short and

formal statement of an established principle of law. A definition is an enumeration of the distinguishing characteristics of some person, thing, condition, action, or default. A judicial decision is the affirmance or recognition of a new rule of law or the application of a known rule to a certain state of facts. The maxims and definitions, though occupying an inconsiderable space in legal literature, are among the most important and valuable portions of our Unwritten Law. They were framed, for the most part, in an age when writing was comparatively unknown, and when all knowledge was communicated orally in set forms of speech and treasured in the memory from generation to generation. For this purpose their language was selected with the greatest care, intended to convey exactly and with all its limitations the precise rule prescribed or attribute defined; and those which have been added to them in subsequent and more learned ages have emulated and attained the same perfection. To commit these to memory and to examine the conclusions which have been deduced from them by the courts is still one of the most profitable tasks engaged in by ambitious students of the law.

§ 228. **Of the Number and Nature of the Maxims.**

The number of the maxims is indefinite, but nearly three thousand of them are current in the courts and in the modern literature of the law. A few of them express the primary principles from which all other legal rules, written or unwritten, are derived. A larger number contain secondary principles deduced immediately from the primary, and a still greater multitude present the rules which in more remote degrees of lineal descent are related to the first. Of the maxims which express the primary principles the following are the chief: (1) *Salus Populi Suprema Lex*: The Safety of the People is the Supreme Law; (2) *Sic Utere Tuo ut Alienum Non Ledas*: So Use your own Powers and Property as not Unjustly to do Injury to Another; (3) *Actus Dei Nemini*

Facit Injuriam: The Act of God Injures no one; that is, no legal wrong can be inflicted by events in which human agency does not co-operate and which human power could not control. In these three maxims reside in embryo all the rules of public and private law. As an example of the mode in which the secondary principles are derived from these the first maxim yields the following deductions: (1) *Rex non potest peccare*: The King can do no wrong; the Sovereignty of the State cannot be exercised unjustly; (2) *Rex non moritur*: The King never dies; the Sovereignty of the State is perpetual and uninterrupted; (3) *Rex non debet esse sub homine sed sub Deo et lege, quia lex facit regem*: The King ought not to be subject to any man but to God and the law, because the law makes the King; the Sovereignty of the State over its citizens is supreme but is nevertheless limited in its action by divine and human laws; (4) *Quando jus Domini Regis et Subditi concurrunt jus Regis proferri debet*: In a conflict between public and private rights the public right must prevail. Subordinate deductions from the first of the secondary principles — *Rex non potest peccare* — are these: (1) *Actus legis nemini est damnosus*; the act of the law never inflicts a legal wrong; (2) *Actus curiæ neminem gravabit*: The act of a court shall prejudice no man; (3) *Executio juris non habet injuriam*: The execution of the law does not work a legal injury; (4) *In fictione juris semper equitas existet*: Every presumption of the law must be in aid of justice; (5) *Leges posteriores priores contrarius abrogant*: Former laws inconsistent with later laws are by the later laws repealed; (6) *Communis error facit jus*: A custom adopted by the people in contravention of law must, when universally established, be recognized as law. These examples illustrate the position which the different grades of maxims occupy in the logical system of the law and the method by which courts and lawyers, through the constant application of those maxims to practical affairs, have developed a few great principles into numberless specific rules.(a)

Read Morgan, Legal Maxims.

(a) 47 D. 254; 2 St. 305; 37 St. 552.

§ 229. Of the Legal Scope of the Maxims.

The vastness of the field of rights and obligations which may be covered by deductions from a single primary principle is also worthy of attention. On the first principle, expressed in the maxim, *Salus Populi Suprema Lex*, are based the following rights of the State: (1) The right to require the civil and military services of its citizens; (2) The right to place restraints upon the locomotion, speech, and acts of citizens; (3) The right to take private property for public use; (4) The right of taxation; (5) The right to destroy property in public emergencies; (6) The right to protect the public health or trade or morals at any sacrifice of individual interest or convenience; (7) The right to control the education of the citizen; (8) The right to control divorce and marriage; (9) The right to enact and enforce pauper laws; (10) The right to enact and enforce criminal laws; (11) The right to enact and enforce industrial laws; (12) The right to protect religious institutions; (13) The right to delegate its powers to cities, boards of health, and other public and *quasi* public bodies; (14) The right to protect public officers in the discharge of their executive and judicial duties; (15) The right to protect private citizens in the enjoyment of their rights against the State and one another; (16) The right to assert and maintain its own rights against other States at whatever cost to the persons and property of its own citizens. Equally pregnant with legal truth and rule are the other primary maxims, of which the second is the foundation of all laws which govern private rights and duties, while the third defines the limits within which persons, natural or artificial, are responsible for legal wrongs, though neither perhaps could yield such large and important results; and to a lawyer or a judge, gifted with sufficient logical ability and an adequate familiarity with the facts in any controverted case, the knowledge of these primary maxims and the principles which they embody would afford a guide by which in most instances correct legal conclusions might be reached without the exploration of innumerable reports and treatises.

Read Broom, Legal Maxims.

§ 230. Of the Definitions of the Unwritten Law.

The definitions of the Unwritten Law are *prescriptive* as distinguished from *descriptive* definitions. A descriptive definition is an attempt, more or less successful, to portray in words the characteristics of some actual or possible object. It contemplates the object as subsisting independently of the definition, and its correctness is measured by its correspondence with the attributes of the object as they really exist. Consequently the definition may be perfect or imperfect, and may lead or mislead the mind of the investigator. A prescriptive definition is one which of itself determines the characteristics of the object, so that the object cannot be the object defined unless it corresponds with the terms of the definition. Such a definition is necessarily perfect and can never mislead. It is the norm or standard of being for the object. It is a rule prescribing conditions upon compliance with which alone the object can exist. It is, therefore, a law, which a mere descriptive definition never can be, not only establishing a criterion by which present objects may be judged, but fixing in advance the nature and attributes of objects yet to be. Of this accurate and authoritative character are the definitions of the Unwritten Law. The definitions of an artificial person, of an heir-at-law, of an estate in remainder, of the crime of burglary, for example, are compact and comprehensive bodies of law, capable like the maxims of being expanded into voluminous treatises which after all would contain nothing that was not expressed or necessarily implied by the language of the definition itself. Moreover, these definitions of the Unwritten Law have by long usage and general acceptance become inseparably connected with the technical names of the defined objects, so that whenever in any rule of law, written or unwritten, or in any legal document, the name is used the definition is adopted with the name. Thus where a statute limits the powers of corporations, or provides a punishment for the offence of larceny, every organization which falls within the legal definition of a corporation is affected by the limitation; only those offences which precisely correspond to the legal definition of

a larceny are subject to the penalty. So where a will devises an "estate in common," or a contract creates a "partnership" relation, the definition which the law attaches to the phrase "estate in common" in the one case or to the word "partnership" in the other is incorporated into the devise or contract, and constitutes the rule of law by which its interpretation and application are controlled. To frame a statute or to construct a legal document without employing such defined names and phrases is almost impossible; to employ them without a thorough understanding of their legal meaning is extremely dangerous.

§ 231 Of Judicial Decisions.

A judicial decision is the adjudication of a competent court, in a case within its jurisdiction, upon some controverted rule of law. The controversy concerning the legal rule may relate to its existence or to its interpretation; a controversy concerning its application to the state of facts involved in the litigation being, as to the rule itself, only another form of the question whether it exists and what it signifies. Sometimes a judicial decision expressly states the rule or gives its formal explanation; sometimes it merely renders judgment in favor of one of the contending parties, leaving the rule and its interpretation to be inferred from the conclusions to which it has led. In ancient times the latter method almost universally prevailed; until the invention of printing, and the general cultivation of the art of writing, the decisions of the courts being as short as possible and entered in their records in the most abbreviated form. In modern times, in all the higher courts, it has become the custom for the judges to prepare written decisions, often setting forth at great length the logical processes by which they attained to their conclusions, the rules by which they were governed and the principles which underlie the rules, stating, explaining, and qualifying them far beyond the actual requirements of the case at bar. Many of these decisions are among the most excellent of all the expositions of the Un-

written Law, and are accepted in the States whose laws they elucidate, and in other States whose laws are similar to theirs, as of the highest value, both by subsequent tribunals and by the community at large. Judicial decisions do not, however, have the force of legislative acts, either as making or as declaring law, except within the State by whose courts they are delivered, and even then only when emanating from courts of superior jurisdiction, and upon points necessarily involved in the controversy before them; nor do they ever become final in the sense that upon further research or consideration they could not be modified or overruled. But conflicting decisions in other States do not weaken their authority in their own. Such decisions show either that the legal institutions and traditions of those other States are different from theirs, or, possibly, that the legal questions determined have not yet been so far examined as to be freed from all equivocation and capable of but a single answer. In either case the judicial legislation of each State must stand unchallenged until it chooses to amend it, and as to that State the decisions of its courts must be regarded as the true statement of its Unwritten Law. At the same time judicial legislation is the one flexible and progressive agency through which the Unwritten Law adapts itself to the demands of the advancing age. Maxims and definitions long since became crystallized in language and interpretation beyond the reach of change. It is in the constant modification of the Unwritten Law by judicial decisions — adding, curtailing, altering, explaining, affirming their former utterances where neither reason nor justice demand a change, departing from them without hesitation where a clearer understanding of the subject or a variation in conditions renders the old rule inexpedient — that the development of the Unwritten Law consists, without which the great body of its practical rules would soon become but an effete tradition, an historical phenomenon, left far behind us in the rapid march of social evolution, only its fundamental principles remaining to guide the State in the formation of its Written Laws.

Read Pollock, Lect. ix.

§ 232. Of the Treatises and Reports.

Maxims, definitions, and judicial decisions are preserved and accessible in the Treatises of jurists and in the Reports of cases. Each of these divisions of our legal literature embraces all these forms of the Unwritten Law. The treatises discuss the decisions of the courts as well as the fixed and fundamental rules of law; the courts in their decisions employ, explain, and affirm the maxims and the definitions. Thus the reports and treatises cannot be distinguished from each other by their subject-matter, but only by its mode of presentation, each mode appropriate to that class of students who find in it the readiest avenue to knowledge. Historically, the appearance of the treatise preceded that of the report. Numerically, the report now far outstrips the treatise and forms the major part of all our libraries.

§ 233. Of the Principal Treatises before the Revolution.

The earliest known treatise upon our Unwritten Law was the *Dom-Boc*, or *Liber Judicialis*, of King Alfred, prepared about A. D. 878. It contained a compilation of all the laws and customs of his kingdom, and acquired for him the name of *Conditor Legum Anglicanarum*. It long since disappeared, and that it ever existed is now sometimes denied. Another lost book is the *Laws of Edward the Confessor*, a reproduction of King Alfred's *Dom-Boc*, with additions, about A. D. 1065. The existence of this book also is disputed, although a body of laws under that name was recognized by the Conqueror and his successors as the common law and folkright of the English people. The *Domesday Book* of William I., in A. D. 1080, consisting of an enumeration of the land-holdings and tenants of his newly acquired realm, contains also the law of tenures by which such lands were held. These three treatises were the work of kings; but during the century which followed the Conquest legal institutions became settled, courts were established, formal methods of procedure were adopted, the English bench and bar became an influential body in the kingdom, the cultivation of legal learning

increased, and the demand for legal treatises inspired private authors to produce them. In A. D. 1179 appeared the *Dialogus de Scaccario*, or Dialogue on the Exchequer, a treatise in detail on the machinery of government and a manual of administrative and fiscal law, supposed to have been written by Richard Fitz-Nigel, Bishop of London and Treasurer of the realm. By order of King Henry II., Ranulph de Glanville, Chief Justiciar of England, who died at the siege of Acre in A. D. 1190, composed his famous *Tractatus de Legibus et Consuetudinibus Angliæ* or Treatise on the Laws and Customs of England, the most ancient book extant upon the laws of England. It treats the law from the standpoint of actions for wrongs, in fourteen books, with forms of papers and proceedings. About A. D. 1244 Henry Bracton, an LL.D. of Oxford, said to have been a judge and chancellor of Exeter Cathedral, wrote his *Tractatus de Legibus et Consuetudinibus Angliæ*, a book of great reputation and merit which has been called "the crown and flower of English mediæval jurisprudence." In it the English law is illuminated by an infusion of Roman law, and illustrated by more than five hundred decisions. Two of its five divisions are devoted to personal and property rights; the remaining three to public and private wrongs and remedies. *Fleta*, written about A. D. 1287 by an unknown author, who gave this title to his work because it was composed in the Fleet prison in which he was then confined, is a commentary upon English law and appears to be a compendium of the work of Bracton with such additions to the law as had arisen since his time. Another brief compendium of Bracton, under the name of Britton, of about the same period, and written in the Norman-French, which was then the technical language of the law, purports to have been composed under the immediate supervision of King Edward I. This book is of especial interest since it immediately preceded the first published reports of cases—the Year Books—in which the same language is employed. Another book in Norman-French, of the same epoch, is the *Mirroure of Justices*, which professed to be "a summary of the law for the common people," and in which Lord Coke de-

clared that "you may perfectly discern the whole body of the common law of England." Its authorship is imputed to Andrew Horne, Chamberlain of London, but it is doubted whether it was not originally written before the Conquest and expanded and corrected by subsequent editors. It treats of all branches of law, civil and criminal, but many of its historical assertions are regarded by the most recent critics as unreliable. An interval of nearly two centuries then elapsed, during which the foregoing treatises and the cases published in the Year Books seem to have met the requirements of the legal profession and the courts, although the law itself steadily developed in scope and precision. At length, in A. D. 1471, Sir John Fortescue, the Chief Justice of King's Bench and Lord Chancellor of England, being in exile in France with the Lancastrian party, wrote for the use of young Prince Edward the treatise *De Laudibus Legum Angliæ*, or of the Praises of the Laws of England, in which he sets before the future sovereign the excellencies of the common law of England as compared with that of Rome and other countries. It is our first book on Comparative Jurisprudence and seems to have been intended as an introduction to a larger work on the whole body of the law which never was completed. Littleton's *Tenures*, a treatise on the law of Real Property and the foundation of the works of Coke and Blackstone, written by Thomas de Littleton, a judge of the Common Pleas and the most distinguished lawyer of the reign of Edward IV., for the instruction of his son, was printed in A. D. 1481. It soon became the text-book of all students of the law, and the statements and definitions of its author were accepted as of the same authority as a judgment of the courts. Under the reign of Henry VIII. the principal law-writer was Anthony Fitzherbert, also a judge of the court of Common Pleas. His first work, published A. D. 1514, was a "Grand Abridgement of the Law," a work "of singular learning and utility." His second and more famous one was the *Natura Brevium*, or Nature of Writs, printed in A. D. 1534, a treatise on the different writs by which actions could be commenced and the grounds on which they should be is-

sued. It is a discussion of the law from the point of view of wrongs and remedies, and was a book of very high authority. Doctor and Student, consisting of two dialogues concerning the grounds of our law and tracing its rules to the dictates of reason and conscience, was a popular work of the same period by an author bearing the name of St. Germain, but of whose personality little is now known. In the same reign appeared the Register of Writs, printed in A. D. 1531, a collection of the authorized forms of writs. These forms were very early settled by the courts, and the matter in this Register is the oldest formulated matter in our law. It contains writs adapted to every species of legal wrong and to every step in judicial procedure. Great learning was expended in framing these writs. They were regarded as "the measure of legal rights" and the Register itself as a manual of the greatest authority. The period of seventy-eight years between the reign of Henry VIII. and that of Charles the First witnessed many changes in the social and political conditions of the English people and many corresponding alterations in the law, forerunners of the disappearance of the Norman feudal system under Cromwell and the second Charles, and the substitution of the sovereignty of commerce for that of arms. The connecting link between the older legal institutions and the new is the Institutes of Sir Edward Coke, a work which is the foundation of the literature of our modern law. Lord Coke was born in A. D. 1551, and died A. D. 1634. He was law lecturer of the Inner Temple and Chief Justice first of Common Pleas and afterward of King's Bench. His Institutes were published in A. D. 1628. The First Institute is a Commentary on Littleton's Tenures. The Second treats of the Statutes from Magna Charta till the reign of Henry VIII. with explanations drawn from the decisions of the courts. The Third is on the Pleas of the Crown, or Criminal Law. The Fourth discusses the Jurisdiction of the Courts. Coke's Institutes still occupy a high position among the treatises on English law, especially the First Institute, which has been often published as a separate work by various editors with copious notes and explanations.

Sir Matthew Hale, a judge of Cromwell's reign in A. D. 1653, and of whom it was said that "what was not known by him was not known by any person," and "that what he knew he knew better than any other person," produced, among a variety of works, a History of the Law, and an Analysis of the Civil Part of our Law. The latter seems to have been intended as a refutation of the critics of the common law who complained that it was not a rational science "by reason of the indigestiveness of it and the multiplicity of the cases in it." This analysis supplied Sir William Blackstone with the plan of his Commentaries, and was probably the first attempt to give a logical harmony and sequence to the Unwritten Law. One hundred years afterwards, in A. D. 1753, Blackstone, at the age of thirty, began his lectures at Oxford on the common law, which were published in A. D. 1768 under the name of Blackstone's Commentaries. These Commentaries reproduce, explain, and supplement the works of Hale, Coke, Bracton, and Glanville and all other previous writers on the English law. Appearing on the eve of our Revolution they represent the laws of England as they stood when the separation of the colonies from the mother country made them sovereign States, and when they adopted as their own so much of that law as they deemed suitable to their condition. Blackstone thus contains the English portion of our law, of course with much beside that is not law for us, and therefore always has been and must always be a treatise of great practical importance to the American Bar. The earlier lawyers of the United States acquired their learning from its pages, and no other book has yet appeared which ventures to compete with it as an exposition of that part of our Unwritten Law. With Blackstone's Commentaries this description of our ante-Revolutionary legal treatises may close, although from it have been omitted a number of abridgments, digests, and text-books upon special topics which once earned and were worthy of their fame.

Read 1 Bl. Com., p. 72; 1 Kent, Lect. xxii, pp. 499-514; Ram, Leg. J. Ch. xii; Reeve, Ch. i, pp. 209-224; Clark, Book ii, Ch. vii-x.

§ 234. **Of the Principal Reports before the Revolution.**

The Year Books contain the earliest published reports of the judicial decisions of the English courts. They were commenced by royal authority in A. D. 1324 under the reign of Edward II., and continued without interruption for about two hundred years, when in the reign of Henry VIII. through motives of a false economy they were suspended. Private commercial enterprise or literary ambition then assumed the task, and until the reign of Queen Victoria carried it forward with varying success. The names of the collectors and publishers of cases decided in the courts of common law and equity during these three centuries constitute a formidable array, among them being judges of the highest eminence who thus preserved their own decisions, and their work was sometimes well and sometimes ill performed. The principal common law reporters before and during the epoch of the Revolution were Dyer (1513-1582), Plowden (1550-1580), Coke (1572-1616), Hobart (1603-1625), Croke (1582-1641), Yelverton (1603-1613), Saunders (1666-1673), Vaughan (1665-1674), T. Jones (1667-1685), Levinz (1660-1697), Palmer (1619-1629), Pollexfen (1669-1685), W. Jones (1620-1641), Lord Raymond (1694-1734), Salkeld (1689-1712), Strange (1716-1749), Comyns (1695-1741), Willes (1737-1760), Wilson (1742-1774), Burrow (1757-1771), Cowper (1774-1778), Douglass (1778-1784), Durnford and East (1785-1800), East (1801-1812), Henry Blackstone (1788-1796), William Blackstone (1746-1780), Bosanquet and Puller (1796-1807). The reported decisions of the courts of equity for the same period are found in Chancery Cases (1557-1606), Dickens (1559-1798), Vernon (1681-1720), Precedents in Chancery (1689-1723), Peere Williams (1695-1736), Mosely (1726-1731), Talbot (1734-1738), Vesey and Atkins (1747-1756), Ambler (1737-1784), Eden (1757-1767), Brown (1778-1794), Cox (1783-1796), Vesey 2d (1789-1796). The cases in these Reports are of authority in this country on such rules of the English law as have become incorporated into our own.

Read 1 Bl. Com., pp. 72, 73: 1 Kent, Lect. xxi, pp. 479-497;
Ram, Leg. J. Ch. xiii.

§ 235. **Of Treatises and Reports in England and the United States since the Revolution.**

Of the reports and treatises published in this country and in England since the Revolution, and of the minor treatises which ever since the invention of printing have been prepared upon subordinate topics of the Unwritten Law, it would be impossible here to speak in detail. Such of them as can be of practical service to him the student will find readily accessible in legal libraries, and his selection of them will be determined by the demands of business and the customs of his local bar. But so great is their total number, and among multitudes of an inferior character there are so many of distinguished merit, that none of them enjoy such a predominance over the rest as to rival in renown the noted treatises and reports of former generations. Whatever learning the student may derive from later works he should not be contented to be ignorant of those rich storehouses of the Unwritten Law to which his attention has just been directed, and in which its principles and precepts are treated with a reverence and enthusiasm worthy of the source from whence it sprang. For it is the Unwritten Law of which the "judicious" Hooker said, "whose seat is in the bosom of God, whose voice is the harmony of the world;" and to which Coke refers when he declares in the beginning of his Institutes, that "reason is the life of the law, . . . which hath been so fined and refined by an infinite number of grave and learned men, and brought to such perfection by long experience, that no man or group of men out of their own private reason can ever be wiser than the law."

Read 1 Kent, Lect. xix, pp. 442-444; Dillon, Lect. iv, pp. 134-138.

SECTION II.

OF THE WRITTEN LAW.

§ 236. **Of the Nature of the Written Law.**

The Written Law is a rule of conduct prescribed in a specific form of words by the legislative authority of the State. In

the Unwritten Law the essence of the rule is the idea or mental concept, or the ethical or political principle, without reference to the words in which it is expressed, and this may be stated in any language which will adequately convey the idea. But in the Written Law both words and concept are of the essence of the rule, and no other form of words, howsoever accurately it may represent the same idea, can be its legal equivalent or partake of its authority. The adoption into the Written Law of a rule previously unwritten, while it may render the rule more precise and definitely ascertainable, thus tends to limit its scope, impair its flexibility, and narrow its application, unless it be a rule which can be adequately expressed by the words selected to convey it, and by those words alone.

Read Holland, ch. v, pp. 66, 67; Austin, Lect. xxxvii, pp. 620-623.

§ 237. Of the Origin of the Written Law.

Written Law has its origin, like the Unwritten Law, in universal principles of reason and justice, and in usages whose utility has been demonstrated by experience. In most instances, probably, the rules of the Written Law have, before their formal enactment by the legislative body, become already established among the precepts of the Unwritten Law. Seldom has it occurred that an entirely new idea or principle or custom has been adopted by the State until it has been tested by the people, or prescribed in words before it was accepted and obeyed in act; and where such experiments have been tried the errors of the lawgiver in misinterpreting social conditions or misjudging social needs have only too often affirmed the folly of one who would be wiser than the Unwritten Law. The fabric of the Written Law is built out of the materials and on the foundation of the Unwritten Law, as temples and palaces and dwellings are framed out of the substance and on the surface of the earth, both special adaptations of special portions of the original mass to special purposes but never wholly separated from it and returning into it whenever the

special form it has received may be dissolved. This relation of the Written Law to the Unwritten Law underlies many of the rules by which the validity, interpretation, and effect of Written Law are governed.

§ 238. **Of the Subordination of the Written Law to the Unwritten Law.**

Moreover, the Written Law is the servitor and subordinate of the Unwritten Law. It grows out of the Unwritten Law by a natural process of development, but it does not absorb the energy, nor exhaust the materials, nor fulfil the functions of the Unwritten Law. It is conceivable that an upright and free people in the highest stage of civilization, and with the widest degree of commercial and political prosperity, might be directed by the rules of the Unwritten Law without a single formal legislative mandate; but it is not conceivable that any legislative body could so foresee the needs of such a people, and so prejudice the availability of measures, as to provide them in advance with a perfect system of written laws. That Written Law can ever take the place of the Unwritten Law in the life of a progressive people is thus an idle dream; a dream as idle as that the enterprise of such a people will pause and wait for legal guidance before it opens for itself new pathways and walls them in with usages and customs, by and by, perhaps, to be retrodden by the lagging footsteps of the Written Law. The Written Law is necessarily incidental to the Unwritten. It can define, explain, enlarge, restrict, apply the unwritten rules, but it can never supersede them except in a condition where the King becomes the State, his personal will the law, and the people passive subjects of his imperial decrees. (*a*)

Read (*a*) 94 U. S. 113.

§ 239 **Of the Divisions of the Written Law.**

The Written Law of modern States is divisible into four classes: (1) Constitutions; (2) Treaties; (3) Codes; and (4)

Statutes. A Constitution is the organic law of the State, defining its political powers, its form and method of government, and its public rights and duties. A Treaty is a solemn compact made between two or more independent States. A Code is a formal statement of the entire law in all its details. A Statute is the formal statement of some specific rule of law governing some particular act or person. A Constitution, it is true, may be either written or unwritten; and when unwritten it may be composed in part of documents determining political conditions, and in part of maxims, usages, and principles, in accordance with which the powers of sovereignty are habitually exercised. A Treaty also may be wholly or in part unwritten. Of these what has been said of the Unwritten Law suffices; here only written Treaties and Constitutions are to be discussed.

Read Jameson, §§ 74-84; Cooley, C. Law, Ch. ii, §§ 22, 23.

ARTICLE I.

Of Constitutions.

§ 240. **Of the Nature of Constitutions.**

A written Constitution is the legislative act of the entire people, creating or modifying the political organization of the State to which they now or are hereafter to belong. A people, as the term is here employed, is not an indiscriminate multitude, but a group of persons cohering in a political society, albeit an imperfect one, and mutually recognizing one another as entitled to participate in its control. (*a*) Where such a people adopt a Constitution which creates a State, the Constitution is a formal grant of powers and the State has no authority beyond that which is expressed or necessarily implied in the Constitution which creates it. Of this character is the Federal Constitution by which the American States became united in a nation. But where an existing State modifies its ancient Constitution or prepares a new one all powers with which it had been previously endowed remain, except so far as they have been expressly or by necessary implication abolished or

restrained. Such a Constitution is a *limitation* as distinguished from a *grant* of powers, and of this character are the Constitutions of the several States of which the American Union is composed.

Read Jameson, §§ 63-69, 85-87; Cooley, C. Law, Ch. ii, pp. 26-29.

(a) 97 D. 248.

§ 241. Of the Preparation and Adoption of a Written Constitution.

A people may prepare and adopt a Constitution in an assembly of which all are acting members. But in a political society of considerable numbers this would be impracticable. Hence it becomes necessary, in all ordinary cases, to impose this duty upon a representative body called a Constitutional Convention, selected and commissioned by the people for this special purpose. (a) To this convention power may be expressly given to adopt as well as frame the Constitution, and then its action becomes conclusive on the State. (b) In the absence of such power the result of its labors must be submitted to the people by whose vote alone the proposed Constitution can be made a law.

Read Jameson, §§ 114-124, 479-486.

(a) 7 How. 1.

(b) 15 R. 563; 72 D. 74, note.

§ 242. Of the Proper Contents of Written Constitutions.

The proper contents of a written Constitution are indicated by its purpose. As a body of general rules in obedience to which the State is to exert its appropriate activity, or by which its inherent activity is to be restrained, it should define, *first*, the territorial jurisdiction of the State and the population over whom its political powers are to be exercised; *second*, the rights of the people as against the State; *third*, the form of the State, as monarchical, aristocratic, democratic, or republican; *fourth*, the system of government, or the mode

in which the governmental functions are to be distributed and the officers by whom they are to be discharged; *fifth*, the relations to the State of its various political subdivisions; *sixth*, such miscellaneous provisions as may appear to the people important enough to be embodied in their fundamental law. Rules governing conditions which are liable to frequent change necessitating alterations in the law, though found in many modern Constitutions, belong rather to the statutes whose emendation is attended with far less difficulty and delay.

Read Jameson, §§ 96-103 a.

§ 243. Of the Date at which a Written Constitution Takes Effect.

A Constitution may be so constructed as to be in itself a practically operative law, or it may simply announce principles and obligations which can be made operative only through subsequent legislative action. In the former case it takes effect immediately upon its adoption by the people, either through their popular vote or the action of their Constitutional Convention. (*a*) In the latter case each legislative enactment under it becomes a law at the time fixed by its own provisions or the general rule relating to all statutes.

Read (*a*) 74 D. 749.

§ 244. Of the Prospective Operation of Written Constitutions.

Unless a Constitution by its terms, or by the circumstances attending its adoption, clearly shows that it was intended to embrace transactions and conditions already past, it will have only a prospective operation. (*a*) It necessarily displaces whatever of existing laws and Constitutions may be actually repugnant to it, but does not disturb the rights which became vested while they were in force. The spirit of a Constitution is essentially constructive. (*b*) It contemplates a future through which the State is to be guided by rules now judged to

be expedient and reasonable, and if it operates to remove evils hitherto endured, it is by substituting for political systems, under which they were possible, a better system by which they will be excluded. Still it is competent for a people, if they deem it necessary, to give provisions in their Constitution a retroactive effect.

Read (a) 129 U. S. 36.

(b) 34 D. 81 (82).

§ 245. Of the Amendment of Written Constitutions.

A Constitution is amendable at the will of the people by whom it was adopted. An unwritten Constitution develops by formal compacts or concessions between the State and the people, by the judicial interpretation and application of admitted principles of government, and by the growth of custom. Into a written Constitution amendments are incorporated by the methods pursued in its original construction or by those which are prescribed in the Constitution itself. (a) In the absence of such methods the initiative must be taken by the legislature of the State, whose duty it is, as the representative of the entire people, to provide a mode in which they may express their will in reference to any proposed modification of their organic law.

Read Jameson, §§ 525-534.

(a) 3 St. 895.

§ 246. Of the History of the English and American Constitutions.

The written Constitutions of the several States of the American Union, as well as that of the United States, are derived, like their Unwritten Law, from that of England. The English Constitution is unwritten. Its principles and maxims have descended with the land from that Saxon ancestry whose spirit of liberty and custom of local self-government lie at the foundation of the Unwritten Law. Suppressed for a time by Norman feudalism, this spirit wrung from King John in A.D.

1215, the concessions contained in Magna Charta, by which the freedom of the people from unreasonable burdens, the equal administration of remedial justice, the liberty of commerce, and the participation of certain classes of the population in the conduct of the State, were permanently secured. Succeeding monarchs were compelled to confirm and enlarge this charter; Acts of Parliament and the judgments of the courts interpreted and applied its provisions in the interest of the people. The Petition of Right assented to by Charles the First in A.D. 1628, the Habeas Corpus Act of Charles the Second in A.D. 1679, the Bill of Rights delivered by the two Houses of Parliament to William and Mary at their accession to the throne in A.D. 1689, and the Act of Settlement in A.D. 1701, which at once conferred the crown upon the House of Hanover, and proclaimed to the new sovereign the constitutional liberties of England, defined still more clearly and elaborately the indefeasible rights of the English people, and the form and limitations of the powers and duties of the State. This unwritten Constitution crossed the Atlantic with the colonists. It guided and inspired their own political organization. It furnished them with their ideas, methods, forms of government, and to a great extent, with all the fundamental laws of their civic life. When in the course of human events it became necessary for the colonies to separate from the mother country it gave to the Declaration of Independence its causes of complaint against the sovereign, and justified the conclusions to which the American people had attained. To the new States, which this act of separation brought into existence, it served as their respective Constitutions until they promulgated new ones for themselves, and of these it still continues to supply to a great extent the substance and the form, the language and the interpretation. The Federal Constitution drew its life from the same source. Although the nation which it created had no existence before the Constitution was adopted, yet the people from whom it emanated were the same people who, as citizens of the individual States, had inherited the Constitution of their British ancestors. Into the Constitution of the new nation they car-

ried the same principles and institutions, and so far as they deemed them suitable to its condition the same form and system of government, the same methods of administration, and the same reciprocal rights and duties of the citizens and the State. Thus our Constitutions, however recent their appearance as written laws, are not the figments of a day, the venturesome experiments of political empiricism, but the natural and inevitable outgrowth of ancient and well comprehended principles, whose truth has been tried and tested by ages of practical experience and demonstrated by the freedom, enlightenment, and happiness of the people among whom they have prevailed. (a)

Read 1 Bl. Com., pp. 127, 128; Cooley, C. Law, Ch. i, pp. 3-19; Dillon, Lect. vii, pp. 196-215; Walker, Lect. iii.

(a) 110 U. S. 516.

§ 247. Of the Nature of the Written Constitutions of the States of the American Union.

The severance of the colonies from the British crown at once constituted them sovereign States, independent alike of one another and of every foreign power. (a) All political authority vested in each one of them, and it was free to adopt such a government and pursue such a national policy as it deemed best. Already possessing unwritten Constitutions originally derived from that of England, though now enlarged and modified, they proceeded, some hastily, some with more deliberation, to reduce them to writing so far as it seemed necessary to express in words their various provisions. But these written Constitutions did not confer upon them their respective statehoods nor clothe them with a new political authority. They could define, develop, and direct it, and this was their true function and effect, and hence they are called *limitations* and not *grants* of power. (b) Whatever action or omission they prohibit, from that action and omission the State must forbear. Whatever rights they guarantee to the citizen, such rights the State must constantly preserve. But they did not and they could not so portray the

present and anticipate the future as to exhaust in their provisions every actual and possible governmental power. Behind their formal statements always lies that vast, undefined sovereignty whose possession is the essential and inseparable characteristic of every independent State, whose only measure is the right and obligation to do whatever the welfare of the people may demand, whether or not that right and obligation have been enumerated in its Written Law. (c)

Read 1 Kent, Lect. x; Cooley, C. Law, Ch. xviii, pp. 381-392; Cooley, Const. Lim. Ch. iii.

(a) 3 Dall. 54; 3 Dall. 189; 4 Cranch, 209; 16 Pet. 367; 19 R. 765; 8 Wheat. 644.

(b) 35 D. 44; 60 D. 581 (583).

(c) 11 Pet. 102.

§ 248. Of the Unwritten Constitutions of the States of the American Union.

By uniting in one nation under the Federal Constitution these independent States transferred to the new nation certain specific governmental powers. The rest they still retained, and among those retained was this residual and inexhaustible sovereignty which no written Constitution ever did or could enumeratively define. (a) Whatever power it becomes necessary to exert, which is not mentioned in the written Constitutions either of the State or the United States, is therefore vested solely in the State, and the possession of this power imposes on the State the obligation to assert it. Thus both before and since the formation of the Federal Union, the Constitutions of the States of which it was at first composed have been to a considerable, but not a uniform extent, unwritten, the unwritten serving to define the meaning and supply the defects of that which had been verbally expressed. (b) To the Constitutions of the States which have from time to time been added to the Union the same conditions are imputed, not because such States possessed an inherent independent sovereignty before their admission to the Federal Union, but because the fundamental theories and

principles of that Union require an absolute political equality between the States which are its members.

Read Jameson, §§ 88-92.

(a) 35 D. 326; 1 R. 399.

(b) 59 D. 759; 2 Pet. 627.

§ 249. Of the Nature of the Federal Constitution.

The written Constitution of the United States differs entirely in its nature from the written Constitutions of the individual States. It is not like them a limitation of pre-existing powers. It is a grant of powers which created the grantee, and which until the grant was made the grantee never had in any degree enjoyed. (a) The United States had no inherent sovereignty, no political organization, no statehood, not even an existence, before its Constitution was adopted, and still possesses none which that Constitution did not confer. Beyond the powers enumerated in its various provisions, and such as are necessarily implied therefrom, the United States therefore has no powers. Nor is there in it any residual fund of sovereignty out of which new powers can be developed at the demand of national progress or emergency. Such was the almost superhuman wisdom by which the Federal Constitution was devised, so comprehensive is its language, and so liberal has been its interpretation, that few exigencies are likely to arise which the nation does not have the constitutional authority to meet. But when they do occur the States alone can solve the difficulty, either by their individual or collective action, or by an amendment to the Federal Constitution.

Read Cooley, C. Law, Ch. ii, pp. 29-31, Ch. iv, pp. 105-110.

(a) 12 Pet. 657; 1 Wheat. 304.

§ 250. Of the Supremacy of the Federal Constitution in its own Field of Jurisdiction.

But though historically derived from the sovereignty of the States, and thus intimately related thereto, the sover-

eighty of the United States is still distinct from and superior to theirs. *(a)* As to all matters exclusively confided to it by the Federal Constitution it occupies a field into which State authority cannot enter; and where its powers and theirs are concurrent they are not co-equal, and to the fiat of the United States the State must yield. The Federal Constitution is the supreme law of the land. No Act of Congress, no State Constitution, no local statute can prevail against it. It enters into and forms a part of all subordinate laws. It binds all courts, both State and Federal. *(b)* It modifies and supersedes all treaties. Its amendments repeal and abrogate every inconsistent law and Constitution. *(c)* Conflict, however, between the Federal Constitution and the laws and Constitutions of the States is never presumed, nor is its existence recognized unless it clearly appears. *(d)* On the contrary, interpretations of the Constitution which avoid such conflict are favored in the law. No power of the United States is held to be exclusive unless so declared or evidently implied. *(e)* No exercise of its concurrent powers forestalls the action of the State beyond the exact jurisdiction assumed by the United States. No limitation placed by the Constitution upon the assertion of governmental authority applies to any State unless it be expressly named.

Read Jameson, §§ 93, 94; Cooley, C. Law, Ch. ii, pp. 31-33.

(a) 6 Wheat. 264.

(b) 4 Wheat. 316.

(c) 103 U. S. 370.

(d) 12 Pet. 72 (75, 76).

(e) 70 D. 151; 92 D. 468.

§ 251. Of the Contents of the Federal and State Constitutions.

The general contents of the State and Federal Constitutions are as similar as the natures of the Constitutions will permit. Each contains in some form a definition or description of the State, declares the rights of its citizens, prescribes the character and frame of its government, the distribution of its functions, the method of making and administering its

laws, and its relation to its various subdivisions. Some embrace many matters of detail which others leave to be determined by the action of the legislature. In several of the State Constitutions the Bill of Rights, substantially as declared in England in A. D. 1689, is inserted, and as a limitation on the sovereignty of States in favor of the citizen it properly belongs in all. The Federal Constitution, being a grant of powers, did not contain this limitation, but the same end has been attained by subsequent amendments. (a)

Read Cooley, *Const. Lim.*, Ch. ix, pp. 256-264; Cooley, *C. Law*, Ch. i, p. 17, Ch. ii, pp. 38-40, Ch. xii, pp. 218-223; Walker, *Lect.* xi.

(a) 7 Pet. 243; 116 U. S. 252.

§ 252. Of the Interpretation of the Federal and State Constitutions by the Unwritten Law.

In the interpretation of all these Constitutions recourse is constantly had to the Unwritten Law. The meaning of words, the nature of the privileges granted and of the limitations imposed, the character and mode of exercising governmental powers, and many other subjects are, as intended by these Constitutions, precisely what they were under the Unwritten Law, and from it alone their true signification can be ascertained. (a) Omissions in State Constitutions may be supplied from that reserved sovereignty which remains in the State after the limitations imposed upon it by the Federal Constitution or its own have been respected. Omissions in the Federal Constitution can be cured only by amendment.

Read Cooley, *Const. Lim.*, Ch. iv.

(a) 49 D. 697; 169 U. S. 649 (653-655).

§ 253. Of the Constitutionality of Treaties and Statutes.

Treaties and statutes, State or Federal, are unconstitutional in reference to the Federal Constitution whenever they conflict with its provisions either as to the mode in which they are enacted, the subject-matter to which they relate, or

the rules which they prescribe. (*a*) This conflict must exist between the written Constitution itself and the objectionable law, for the United States has no unwritten Constitution between which and its laws collision could arise. (*b*) An Act of Congress, or the rules prescribed by the Federal authorities, are also unconstitutional when they exceed the powers conferred by the Constitution upon the enactor of the rules. The statutes of a State, or the acts of its officials, are unconstitutional in reference to its Constitution whenever they transgress the limits imposed either by the express provisions of the Constitution or by the principles of justice and good government which, though not expressed, are still a part of its fundamental law. (*c*) The constitutionality of all acts is presumed until the contrary appears (*d*), and acts whose separate parts are capable of independent application may be sustained as to the constitutional parts while those in conflict with it are repudiated. (*e*) Courts are reluctant to support objections on this ground to current laws unless the defect is evident and no other question is presented on which the case can be decided in favor of the party raising this objection. (*f*) In England questions of this character are not entertained. Its unwritten Constitution is interpreted by Parliament, and every Act of Parliament passed in accordance with its own rules is valid, either as an expression of the Constitution or as an amendment to it. This is the sense in which Parliament is omnipotent; there being no superior by whose judgments its enactments can be overruled.

Read Cooley, Const. Lim. Ch. vii; Cooley, C. Law. Ch. ii, p. 24, Ch. vii, pp. 163-174.

(*a*) 44 D. 593; 54 D. 379; 15 Wall. 610; 19 St. 374.

(*b*) 1 Cranch, 137; 120 U. S. 97; 31 D. 72 (75).

(*c*) 87 D. 52; 97 D. 575; 20 St. 123; 15 St. 460.

(*d*) 19 Wall. 666; 120 U. S. 678; 41 St. 109 (113).

(*e*) 41 St. 278 (293).

(*f*) 63 D. 487 (506); 12 St. 183 (185, 186).

ARTICLE II.

Of Treaties.§ 254. **Of the Nature of Treaties.**

A Treaty is a compact between two or more independent States. In its form, and in its primary effect upon the parties by whom it is made, it is not a law, there being no superior authority who could prescribe or can enforce it. It depends for its sanction upon the honor and interest of the parties and the danger that its infraction may become the cause of war. The power to make a treaty is a necessary element of sovereignty. In this country it can be exercised only by the United States which, under the present provisions of the Federal Constitution, must act through the President with the concurrence of two-thirds of the Senate, the lower House of Congress not participating in the treaty except by aiding in whatever legislation may be required to carry its provisions into effect. (a)

Read Vattel, Book ii, Ch. xii-xvii, Book iv, Ch. ii-iv; Woolsey, §§ 101-113; Cooley, C. Law, Ch. v, pp. 117-118.

(a) 112 U. S. 580 (598, 599); 2 Pet. 253 (314).

§ 255. **Of the Preparation and Adoption of Treaties.**

The preliminary negotiations for a treaty are usually conducted by authorized agents of the parties, by whom also its contents and final form are determined and the completed treaty signed, subject to ratification or rejection by their respective States. Whether such agents acted with due authority, and whether the matters stipulated in the treaty were within the jurisdiction of the stipulating State, are political questions into which the courts of neither State, after the ratification of the treaty, are competent to inquire. A treaty thus negotiated, signed and ratified is valid as against the parties and their citizens until its formal abrogation.

Read 2 Whart. I. L. Dig. §§ 130-131 a.

§ 256. Of the Contents of Treaties.

Any affairs in which the treaty-making States are interested may be made the subject of the treaty and to any one of these, whether political, social, or commercial, however narrow may be its limits, the treaty may be confined. Alliances aggressive and defensive may be formed, territory and population ceded, immunities of trade or citizenship reciprocally conferred, or the practical jurisdiction of the laws of either State extended. In short, no matter seems to be beyond the scope of such a compact unless it be the abdication by one of the contracting States of its own sovereignty or an essential change in its internal constitution. (*a*)

Read 1 Kent, Lect. ii, p. 31, Lect. viii, pp. 165-179.

(*a*) 114 U. S. 525; 133 U. S. 258; 1 Pet. 511.

§ 257. Of the Effect of Treaties.

Subject to the contingency of its future ratification or rejection a treaty takes effect between the parties from the date when it is signed, though as to private rights, if any are involved, it does not become operative until its final ratification. (*a*) A treaty cannot impair previously vested property rights, nor transfer territory or privileges which the granting State does not possess. (*b*) The cession of territory by one sovereign to another does not disturb the titles of estates belonging to private individuals (*c*), nor are the local laws which governed them abolished until the new sovereign has provided others. (*d*)

Read 1 Whart. I. L. Dig. § 4; 2 Whart. I. L. Dig. § 132.

(*a*) 9 How. 280; 9 Wall. 32; 81 D. 530, note.

(*b*) 9 Pet. 711.

(*c*) 7 Pet. 51 (86, 87); 9 Pet. 117; 12 Pet. 410; 20 How. 176 (177, 178); 5 Wall. 211.

(*d*) 11 How. 570 (577-580); 114 U. S. 542.

§ 258. Of the Supremacy of Treaties.

A treaty is of supreme authority in all the States which become parties to it and binds the courts and all subordinate

legislative bodies. (a) In this country it is subject only to the Federal Constitution, is of the same force as an Act of Congress, and overrides all State Constitutions and local laws. (b) When treaties made by the United States conflict with Acts of Congress the latest must prevail, since of two equal inconsistent rules the earlier by the later is repealed.

Read 2 Whart. I. L. Dig. §§ 138, 139.

(a) 3 Dall. 199; 100 U. S. 483; 1 Cranch, 103; 6 Wheat. 1.

(b) 124 U. S. 190; 130 U. S. 581 (600, 601).

§ 259. Of Treaties as Portions of the Written Law.

A treaty, though primarily a compact, may indirectly impose duties upon the citizens of the respective States and thus become to them a rule of conduct. These duties may be specifically enumerated by the treaty itself, or its stipulations may render some legislative action necessary in which they will be formally prescribed. (a) It is in this mode that a treaty enters into the body of our Written Law, forming at once a portion of the international law by which the States are governed and of the national or municipal law by which their citizens are controlled. (b) Of treaty-laws courts take the same judicial notice as of every other, and interpret and administer them in the customary modes.

Read (a) 6 Pet. 691 (735).

(b) 2 Pet. 253 (314); 119 U. S. 407.

§ 260. Of the Amendment and Abrogation of Treaties.

A treaty can be abrogated or amended only by the concurrent action of the parties by whom it was made. Its violation by either party does not dissolve it until the other, in some unequivocal manner, accepts and ratifies the dissolution. It is not nullified by war between the parties, but remains suspended and revives with the return of peace. (a) The remedies for a breach of treaty rights are retorsion, or the

refusal of the aggrieved party to perform its corresponding treaty duties; reprisal, or an act of retaliation by the injured party commensurate with the injury received; or, in the last resort, a war. The amendment of a treaty is conducted by preliminary negotiations through accredited agents, and their final agreement, subject to its ratification by their respective States.

Read Vattel, Book ii, Ch. xviii; 2 Whart. I. L. Dig. §§ 135-137 a; 3 Whart. I. L. Dig. §§ 315-321.

(a) 8 Wheat. 464.

ARTICLE III.

Of Codes.

§ 261. *Of the Nature of Codes.*

A Code is a formulated statement of the entire body of the law of a State in all its details as applicable to all persons and all subjects. It emanates directly from the supreme legislative body of the State and is intended to set forth in systematic form all the rules of public and private law, whether hitherto they have been written or unwritten. It constitutes a new law, covering the whole field of jurisprudence, and supersedes and abolishes every former rule. It leaves no margin of principles or subjects to be governed by customary law or by judicial precedent, but where the Code is silent there is no law. Rights which it does not assert, duties which it does not impose, wrongs which it does not prohibit, remedies which it does not apply, do not legally exist. It differs from all other forms of Written Law in that these, however complete, are imbedded in a vaster body of Unwritten Law from which their defects can be supplied, while a Code stands alone, the solitary and exclusive law, sufficient or insufficient for the needs of the State as the case may be, but in either case unaided by precepts or doctrines drawn from any other source, and unamendable except by the authority by which it was originally framed.

Read Amos, Ch. xiii. pp. 360-395.

§ 262. Of the Legal Importance of Codes.

Codes are a form of law occasionally attempted both in ancient and modern times. It was natural that with the invention of writing the existing laws of a State should be collected, arranged, and stated in this permanent form either by private or public writers, and that the laws thus expressed, if complete and satisfactory to the sovereign, should be imposed by him upon his people and occupy the place of all other forms of law. It was also natural that such a body of Written Law, being complete and sufficient for the time, should be then regarded as sufficient likewise for the future, and therefore the final utterance of legislative authority, irrevocable and unamendable, to which thereafter nothing would be added and from which no subsequent law-giver would ever take away. But it was equally natural, rather it is the inexorable law of nature, that every State should gradually outgrow its laws, unless indeed under the dead weight of their changeless rules it sank into decay and disappeared. The living State must grow: the stagnant State must die: and growing States cannot remain confined within the legal systems of the past. Expansion and amendment irresistibly occur either through direct legislation or a new development of the Unwritten Law, and though code follow code in the same State at intervals of generations or of centuries it comes to the same result at last — if the State survives, the code is left behind and finally loses its authority as law, or becomes a nucleus around which clusters and accumulates a constantly increasing multitude of later statutes and customary laws. While, therefore, codes properly prepared have always an historical and literary value, and perhaps a temporary legal importance, they are not suited to the genius of progressive States, nor can they take the place or fulfil the functions of the systems in which the Written and Unwritten Laws combine.

Read Markby, §§ 69-71; Clark, Book ii, Ch. xvi; Maine, Ancient Law, Ch. i, pp. 13-19; Austin, Lect. xxxix, pp. 660-681, Frag. pp. 1021-1039, 1092-1100; Dillon, Lect. vi, pp. 179-183, Lect. ix, pp. 256-260, Lect. xii, pp. 342, 343.

ARTICLE IV.

Of Statutes.§ 263. **Of the Nature of Statutes.**

A Statute is a formulated statement of some specific rule governing some particular object, act, or person. It differs from the Unwritten Law in that its words as well as its idea or principle have a definite legal character and value, from treaties and Constitutions in the modes in which they are enacted and the purposes which they fulfil, from codes in that Statutes always presuppose the co-existence of the Unwritten Law in aid of which they are themselves prescribed. The latter difference requires especial emphasis in reference to certain groups of Statutes which are sometimes miscalled codes. A compilation of statutory and unwritten rules on any subject, arranged in scientific order and promulgated by the legislature, is not a code but merely a new Statute, unless it is intended to exclude thereafter all resort to the Unwritten Law. The propriety of the names "Code Pleading," "Civil Code," "Code of Civil Procedure," and similar titles in our legal nomenclature may be determined by this test.

§ 264. **Of Legislative Authority and the Public Bodies in which it Resides.**

All acts of any legislative body prescribing rules of civil conduct, and not creating a complete code of laws, are comprehended under the name and definition of statutes. Legislative authority is lodged in various bodies according to the organic form of the State, and may be confided to different bodies in the same State — some superior and some subordinate. (a) In this country under both the national and State forms of government there is one supreme assembly — the Congress of the United States, the Legislatures of the several States — which by its own immediate action prescribes written laws. Inferior to this and deriving from it all their legislative powers are local bodies, such as counties, cities,

and boroughs, which are endowed with the authority to make laws concerning details not embraced within the general legislation of the State. Within still narrower limits a private corporation has legal jurisdiction over its own members and can define their rights and control their conduct as such members by its lawfully adopted rules. Judges to whose direction the course of legal procedure is committed and administrative officers responsible for the transaction of governmental business, where the supreme legislature has not provided with sufficient minuteness for the proper guidance of affairs, may in their turn impose regulations upon their inferior officers and other persons participating in their judicial or ministerial operations. All such rules, being the result of legislative action on the part of the State through some one of its numerous governmental agencies and determining legal rights and obligations are truly and properly called laws; and, being expressly formulated by the authority from which they proceed, are Written Laws; and, embracing but a portion of the whole law of the State, they are Statutes.

Read Cooley, C. Law, Ch. iii, pp. 44-46.

(a) 99 U. S. 700 (761); 46 St. 98 (100-108).

§ 265. Of the Validity of Legislative Acts.

A legislative body can perform a legislative act only in the mode appointed by the written or unwritten Constitution of the State. (a) An apparent statute is invalid and has no force as law unless the legislative body which enacted it was legally constituted and observed all the rules and forms which the Constitution has prescribed. This matter is always open to inquiry in litigations dependent upon statutes and presents a question of law for the judgment of the court, not one of fact for the decision of the jury. (b) Upon this point the oral evidence of witnesses cannot be received. In some courts the official journals of the legislature have been presented and examined; in others it has been asserted that the statute-roll itself alone is competent testimony, and that if duly promulgated as law according to constitutional forms no further

investigation into the constitutionality of the mode of its enactment can be made. (c) The motives of a legislative body in making rules of law are never open to investigation. (d)

Read Cooley, Const. Lim. Ch. vi.

(a) 58 D. 571, note; 88 D. 377; 8 R. 602; 94 U. S. 260;
85 D. 348, note; 51 D. 611, note.

(b) 20 R. 69.

(c) 66 D. 673; 89 D. 93; 13 R. 640; 47 St. 801, note;
143 U. S. 649.

(d) 25 St. 230; 7 Wall. 506.

§ 266. Of the Contents and Different Parts of Statutes.

A statute, formally complete, contains a title, a preamble, the enacting clause or clauses, and the necessary provisos and exceptions. The title of a statute is a brief statement of its name and legal character, showing to what class or general body of rules it belongs. (a) The preamble is a recital of the circumstances and conditions which prompted the legislature to enact the statute. The enacting clause sets forth the rule prescribed. A proviso is a qualification grafted upon the enacting clause taking some special matter out of its operation and making a different rule concerning it. An exception is a limitation attached to the enacting clause, preventing it from operating on some matter which it would otherwise include. Not all these parts are found in every statute. Provisos and exceptions are employed only when the form of the statute and its subject-matter make them necessary. (b) The preamble is often wanting. The title, though generally present, is not essential. The enacting clause alone, with its qualifications and limitations, is the law. The other parts are useful for convenience of reference and classification, and to aid in the interpretation of the law. In order to avoid confusion, a statute should properly embrace but a single subject, to which all its enacting clauses should be confined.

Read Cooley, Const. Lim. Ch. vi, pp. 141-151.

(a) 64 St. 64, note.

(b) 128 U. S. 174 (181).

§ 267. Of the Date when Statutes Take Effect.

Unless otherwise provided a statute takes effect and becomes a binding rule of law from the date of its passage. (a) But the legislative body may appoint a different date, such as the date of its own adjournment or of the publication of the statute, or a date occurring a specified number of days after its passage, in the reckoning of which the day of its passage will be excluded. A statute may be made to take effect upon a future contingency, like the enactment of a similar statute by another State or the formal acceptance of the statute by some local subdivision of the State; or different dates may be assigned for the commencement of the operation of its different provisions.

Read 1 Kent, Lect. xx, pp. 454-459.

(a) 46 St. 98 (114).

§ 268. Of the Division of Statutes into Declaratory and Remedial, Affirmative and Negative.

Statutes are divided into many classes upon many different bases of division. In their relation to the other forms of law they are either Declaratory or Remedial. A Declaratory statute is intended to remove a doubt as to the existence or the meaning of some rule of the Unwritten Law or as to the interpretation of a prior statute, or to carry into effect some provision of the Constitution or a treaty. It does not make a new law, but more specifically affirms the old. A Remedial statute is intended to extend or to restrict the operation of some existing rule of law or to establish a new rule. (a) A remedial statute extending the operation of a former rule is called an *enlarging* statute; one restricting its operation is known as a *restraining* statute. Remedial statutes establishing new rules are further divided into Affirmative statutes and Negative statutes. Affirmative statutes are those which affirm a new rule without prohibiting the observance of the old. The rights and remedies conferred by such a statute do not supersede those already in existence, but are cumulative and concurrent with them, and where they cannot both be made available

by any person he can elect between them. But Negative statutes, on the contrary, repeal the former law and confer exclusive rights and remedies. (*b*) The character of a statute, as affirmative or negative, is determined not by its language but by its effect.

Read 1 Bl. Com., pp. 86, 87, 89; Black, Ch. xv, §§ 139-141.

(*a*) 45 St. 700 (715-718).

(*b*) 12 D. 257; 15 D. 462, note; 56 D. 331, note; 28 D. 525, note.

§ 269. Of the Division of Statutes into Public and Private.

In reference to the persons to whom statutes are directed they are divided into Public and Private. A Public statute concerns the government, or the public interest, or all persons, or the whole of any class of persons. (*a*) A Private statute relates to a single person or a few persons of a class and has no special reference to the community at large. (*b*) In legal authority and dignity public statutes are superior to private statutes. Courts of the same State take judicial notice of their contents and effect; they need not be pleaded nor proved; they are evidence of the facts which they recite. Private statutes, on the other hand, must be pleaded and proved (*c*), and their recitals are evidence only between the parties. (*d*) A private statute, whatever its real character, may be declared by the legislature which enacts it to be a public statute and thus become entitled to the same recognition from the courts.

Read 1 Bl. Com., p. 86; 1 Kent, Lect. xx, pp. 459, 460; Cooley, Const. Lim., Ch. xi, pp. 389-397.

(*a*) 23 D. 537, note.

(*b*) 5 Wall. 268; 20 D. 360 (369).

(*c*) 6 Pet. 317.

(*d*) 17 Wall. 32.

§ 270. Of the Division of Statutes into General and Local.

According to the extent of the territory which they affect statutes are divided into General and Local. A General

statute is in force throughout the entire territory of the State. A Local statute governs only the persons and property within a limited area. The charter of a public corporation, a statute regulating elections in certain cities, laws prohibiting fishing in particular rivers, are instances of local statutes. Local statutes are not necessarily private statutes. They may be of a public character in themselves, or may be declared public statutes by the legislature. (*a*)

Read (*a*) 69 D. 642, note; 21 St. 772, note.

§ 271. Of the Division of Statutes into Perpetual and Temporary.

As to their duration statutes are divided into Perpetual and Temporary. A Perpetual statute has no period fixed during which it shall continue to be law. Most statutes are of this description, although, of course, they may be at any time repealed. A Temporary statute is one whose duration is limited either by its express language or by the nature of the subject to which it relates. The duration of a Bankrupt Act, or other statute intended to meet a transient emergency, may be thus predetermined. Such statutes may be either public or private. (*a*)

Read (*a*) 26 D. 631 (640).

§ 272 Of the Division of Statutes into Mandatory and Directory.

In reference to the obligations they impose statutes may be Mandatory or Directory. A Mandatory statute commands that certain things shall be done or be forborne. It is imperative, and the persons to whom it is addressed have no option as to its obedience; and where it prescribes a mode of acting, acts not conforming to that mode are void. A Directory statute points out methods in which legal acts may be performed, but does not oblige any one to follow them, and if other methods previously existed these may still be observed. A statute permitting service of process to be made

by publication, for example, does not deprive an officer of the right to make a personal service if he has the opportunity, but a statute commanding publication would leave him no alternative. This distinction in some respects resembles that between affirmative and negative statutes, but applies rather to statutes which impose an obligation than to those which confer a right. Whether a statute is mandatory or directory is frequently ascertainable from the auxiliary verbs which it employs, such as "may," "must," or "shall;" but these are not always conclusive. When the tenor and purpose of the law requires it "shall" will signify a permission, and "may" will import a command. (a)

Read Black, Ch. xii, §§ 123-129.

(a) 33 D. 320; 76 D. 736; 28 St. 333; 4 Wall. 435; 156 U. S. 353.

§ 273. Of the Division of Statutes into Prospective and Retrospective.

As to the period in reference to which they exercise control over persons and property statutes are either Prospective or Retrospective. A Prospective statute contemplates only the future and commands or directs what is thereafter to be done or to be forborne. All statutes are presumed to be of this character unless they are clearly retrospective. (a) A Retrospective statute changes the legal conditions which have resulted from past acts or forbearances, either depriving the parties interested of advantages which if the law remained unchanged they would enjoy, or relieving them from obligations which under the former law they had incurred. That within certain limits legislative bodies have the power to enact retrospective statutes is undeniable. But they cannot defeat vested rights of property nor impair contract obligations. So long as these forbidden effects are not produced, they may confirm past public grants, ratify the unauthorized acts of public officers and agents, remit legal penalties, perfect informal titles, and change the methods of applying legal remedies. Strictly construed, such statutes,

though dangerous in principle, rarely work injustice. On the contrary, they prevent the evils which would otherwise result from human ignorance or inadvertence.

Read (*a*) 20 Wall. 179 (187).

§ 274. Of the Validity of Statutes in General.

The validity of a statute depends not merely on the fact of its enactment by a lawfully constituted legislative body acting according to the modes prescribed by the Constitution of the State, but also on the character of its subject-matter. The powers of a legislative body are not unlimited. Statutes which it enacts with every due solemnity may nevertheless be utterly invalid because they contain matter over which it has no jurisdiction or prescribe duties which it has no authority to impose. Statutes must, therefore, always be considered in view of these limitations upon legislative powers. Such limitations are twofold: (1) Those which grow out of the inherent character of legislative bodies, and their relations to the State; (2) Those which arise out of the State or Federal Constitution. (*a*)

Read (*a*) 1 R. 215.

§ 275. Of the Validity of Statutes as Affected by the Relations of the Legislative Body to the State.

A legislative body is not the State, nor does it possess inherent sovereignty. It is a mere agency through which the organized people undertake to discharge certain governmental functions whose final purpose is their mutual advancement and security. (*a*) It cannot transcend the authority which has been conferred upon it by the State either expressly or by implication from the nature of the State and its own office as a legislative body, nor can it do any act which tends to defeat the purposes for which the State was formed. (*b*) Thus in all States where the ultimate sovereignty resides in the people their supreme legislative bodies are themselves controlled by a higher law which, whether

written or unwritten, constitutes the test by which the validity of their own enactments is to be determined. This is not precisely the same question as that concerning the constitutionality of a legislative act unless the word "constitution" is extended to embrace the whole framework and all the underlying principles and objects of the State. Where a State is created by a written Constitution which confers upon it all its powers its legislature can perform every legislative act enumerated in the Constitution, and can perform no more. The fact that acts enumerated may prove detrimental to the State may be a reason why the Constitution should be changed, but cannot limit legislative power. The fact that other acts, not enumerated in the Constitution, would be beneficial to the State does not authorize the legislature to perform them. In such a State the higher law is written in the Constitution, and the Constitution thus becomes the sufficient and the only test by which the validity of legislative acts is measured. This is the case with the United States — the nation — whose Constitution fixes the exact limits within which legislative power may be exerted and in which all invalid laws are also unconstitutional. But in a State whose written Constitution is a limitation of pre-existing powers, under which all unasserted governmental powers retain their former comprehensiveness and vigor, the acts of legislative bodies may be invalid although they are not mentioned or referred to in the Constitution. Prior to the adoption of the written Constitution the legislative power was not without its limits, established by the nature of the State and those fundamental principles of the social compact which underlie all governmental action irrespective of constitutional provisions. These unwritten and irremovable limitations are not destroyed or superseded by the written Constitution, though many of them may be expressed therein, and legislative enactments which exceed them are no less invalid than if they violated the words as well as spirit of the Constitution. The Constitutions of our individual States, being such limitations of pre-existing powers, therefore do not present the sole test of the invalidity of statutes promulgated by their several

legislatures, but in addition to their written Constitutions there is still in force the unwritten higher law to whose necessary and unchanging principles the enactments of the legislative body must also conform. (c)

Read (a) 31 D. 313 (329-331); 87 D. 52; 27 St. 106; 31 St. 284, note; 36 St. 668.

(b) 20 D. 360; 97 D. 575; 15 St. 460 (463-465); 48 D. 178; 74 D. 572; 79 D. 236.

(c) 48 D. 248, note; 35 D. 326, note.

§ 276. Of the Validity of Statutes as Affected by the Inherent Limitations of Legislative Bodies.

A legislative body, in that it is a legislative body, is subject to certain fundamental limitations, from which no legislative body can depart, among which are: (1) That a legislature cannot exert executive or judicial powers. The distinction between judicial, executive, and legislative functions is inherent in the nature of things, and where the people, in organizing the State, have distributed these among different governmental agencies neither can intrude into the dominion of the others. The creation of a legislative body and its endowment with legislative powers excludes it from participating in executive or judicial powers. Not that the same group of persons may not be constituted a judicial body, an executive body, and a legislative body, and exercise now one and then another of these different functions, its own legal capacity and its relations to the State changing as it transfers its attention from one of these duties to another. But as a legislative body it cannot even then sit in judgment upon controverted questions nor administer the laws which it enacts. (a) Thus while a legislature may amend or repeal one of its own former statutes it cannot interpret or explain its meaning, for this is a judicial function confided only to the courts. (b) Nor can it by a recital in a later statute testify that an earlier statute has been repealed, though it may now formally repeal the statute, if it will. (c) (2) That a legislature cannot delegate its powers. Legislative power does not

originate with the legislative body. Its source is in that sovereignty which resides in the State alone, and every legislative body holds and exercises it only as the delegate and agent of the State. Its right to be a legislative body and to discharge legislative functions does not include the right to call into existence other legislative bodies and strip itself of any portion of its own power in order to confer it upon them. It may use them as instruments through whose aid it fulfils its own duties, as where the legislature of a State makes laws for local subdivisions of the State through the agency of public corporations. It may ordain that the operation of its own enactments shall be contingent upon their acceptance or rejection by the people of the whole State or of any part thereof, but it cannot give to such acceptance or rejection the character and authority of an independent legislative act. (*d*)

(3) That a legislature cannot by any act limit the powers of succeeding legislatures. It is of the essence of sovereignty that it should exist at all times complete, absolute, and supreme. If it were possible that sovereignty could lapse or be suspended even for a moment the State would in that moment cease to be. But the State exercises sovereignty principally and primarily through its legislative bodies, whose acts are, therefore, supreme and absolute save for the limitations put upon them by the organic law or Constitution of the State itself. That the supreme and absolute authority of a legislative body should be controlled by any restrictions laid upon it by a past legislative body of a jurisdiction not superior to its own involves a contradiction of terms. Hence no legislative act which would restrict the freedom of subsequent co-equal legislative bodies is or can be valid. Subordinate legislatures are, of course, controlled by the superior legislatures which created them, and which may modify, diminish or withdraw their powers. (*e*)

(4) That a legislature cannot enact a law which palpably infringes any of those rights to assert and defend which the State has been established. The sovereignty of the State, although unlimited in measure or degree, exists only for specific purposes which taken together constitute the welfare and advancement of the people of the State, and any

action of its governmental agencies which is subversive of these purposes is necessarily beyond their powers. What the State itself could not do without a violation of its highest obligations to its citizens no institution of the State can lawfully perform. Whenever, therefore, a statute enacted by the legislature is so absurd, unjust, or impracticable as to defeat the objects for which the government was organized the statute is invalid. In cases where this question is in doubt the law must stand, since it is for the legislative body alone to judge in doubtful cases whether its acts are expedient and wise; and hence a statute which merely contravenes the individual conscience or imposes severe burdens on the citizen is not on that account without authority. But where the enforcement of the law must inevitably deprive the citizen of rights which it is the purpose of the State to protect, or must commit the State to policies which are in contradiction of its own principles of government, the legislature has transcended its inherent limitations and the law is null and void. (*f*) (5) That a legislature cannot lose its powers by failing to assert them. The sovereignty of the State, whose authority the legislative body exercises and in whose name it speaks, never is suspended and never dies. The powers confided to it are to be exerted by it at the time and in the mode provided by the State's organic law, and, when this is silent, at its own discretion. Its acquiescence in existing conditions, therefore, does not sanction them nor bar it from interfering with them whenever in its judgment the time for action has arrived. (*g*)

Read 1 Bl. Com., pp. 90, 91; Cooley, Const. Lim., Ch. v; Cooley, C. Law, Ch. iv, pp. 111, 112.

(*a*) 33 D. 346; 36 D. 543; 55 D. 499; 75 D. 616; 24 D. 517; 82 D. 583; 98 D. 237; 4 Dall. 14.

(*b*) 2 Cranch, 272; 104 U. S. 668 (677-679).

(*c*) 97 U. S. 546 (548, 549).

(*d*) 47 D. 480; 59 D. 506; 61 D. 508 (516); 17 R. 425; 29 R. 407; 37 R. 6; 45 St. 650; 72 D. 664.

(*e*) 56 D. 723; 111 U. S. 746.

(*f*) 20 Wall. 655; 113 U. S. 1; 37 St. 206; 58 D. 786; 30 D. 430; 40 D. 274; 40 St. 17.

(*g*) 94 U. S. 155.

§ 277. Of the Validity of Statutes as Affected by the State and Federal Constitutions.

In addition to those limitations upon legislative power which grow out of the inherent nature of a legislative body and its relations to the State are those imposed expressly or by necessary implication by the written Constitution of the State. The character of these depends upon the nature of the Constitution as a limitation or a grant of powers. No act of Federal legislation can be valid unless within the powers conferred upon the legislative body by the Federal Constitution. All acts prohibited by the State or Federal Constitutions are likewise null and void. (a) Of the latter three are of especial moment, namely: (1) Statutes defeating vested rights of private property; (2) Statutes impairing the obligation of contracts; (3) *Ex post facto* laws. The ownership of public property and the regulation of the use of private property are always within legislative control. (b) But with the ownership of private property the legislature cannot interfere so far as to deprive its owner of rights in it which already have accrued, unless it becomes necessary to destroy the property in order to protect the public health or safety, or to appropriate it to the public use upon making suitable compensation to its owner. (c) Over the obligation which the law imposes by virtue of a contract upon the contracting parties at the time the contract is made, future legislation also has no power. While it may change the indirect consequences flowing from the execution of the contract or from the failure to perform it, or may vary the remedies open to the parties injured by its breach, provided a substantial remedy which existed at the making of the contract still remains, the rights and duties created by the contract as between the parties cannot be disturbed. (d) This constitutional limitation does not apply to contracts concerning public property or to marriage, nor to incorporeal statutory rights, nor prohibit laws affecting future contracts. (e) Nor can a legislative body by any contract of its own, on behalf of the State, incur an obligation which will prevent it or a future legislature from taking any action necessary to protect the

lives or health or property of citizens. *Ex post facto* laws, by which, subsequently to their commission, innocent acts are made crimes, or the gravity of offences is increased, or penalties are aggravated, or disabilities imposed on the offender, are always void. (*f*)

Read 1 Kent, Lect. xix, pp. 407-439.

(*a*) 41 St. 109 (113); 46 St. 315.

(*b*) 36 D. 441; 97 D. 82.

(*c*) 4 St. 172.

(*d*) 10 St. 266.

(*e*) 38 D. 317; 25 R. 513; 125 U. S. 190; 91 D. 262; 121 U. S. 282.

(*f*) 124 U. S. 200.

§ 278. Of the Jurisdiction of Courts over Questions concerning the Constitutionality and Validity of Statutes.

The constitutionality and validity of statutes are questions which the courts only can decide, and these questions they will not consider unless essential to the decision of the controversy in which they arise. (*a*) Nor can these questions be raised except by litigating parties upon whose rights the disputed statutes might exercise a prejudicial influence. (*b*) When in the course of regular proceedings these questions come before the courts for judgment the statutes are sustained unless the conflict between them and the fundamental law is evident. (*c*) That the court might deem them inexpedient, impolitic, severe, is not sufficient. (*d*) The remedy for such legislation is in the hands of the people and their representatives, not of the courts. Where a statute separable into distinct and independent rules of conduct is clearly invalid as to some and may be valid as to others, the court must give effect to those provisions which are valid although it is compelled to declare the others void.

Read 1 Kent, Lect. xx, pp. 447-454.

(*a*) 13 D. 484; 44 D. 593 (603-605); 54 D. 379.

(*b*) 26 D. 631 (634, 635); 4 St. 147.

(*c*) 36 D. 543 (545).

(*d*) 62 D. 424.

§ 279. Of the Suspension and Expiration of Statutes.

A statute may expire by its own limitation, or may be at any time suspended or repealed. The suspension of a statute may result either from a direct act of the legislature operating on that statute, or from some general rule of law affecting all statutes of that class under similar conditions. Thus the local Bankrupt Laws of the individual State may be suspended during the existence of a National Bankrupt Act, or Statutes of Limitation be inoperative while war prevails between the countries of the creditor and debtor. A suspended statute is not abrogated even temporarily, but still governs all those cases which are not excluded from its jurisdiction by the suspending act or condition. (*a*)

Read (*a*) 3 Dall. 365.

§ 280. Of the Repeal of Statutes.

A statute may be repealed either by the express words or by the necessary implications of a subsequent statute. (*a*) An express repeal terminates the existence and the force of the repealed statute to the precise extent which the language of the repealing statute may require. Repeal by implication is never favored in the law and will take place only so far as the repugnancy between the earlier and the later statute is evident and irreconcilable. (*b*) Thus a statute is not repealed by a subsequent affirmative statute if both can stand, nor by the re-enactment of the same statute with additions; (*c*) nor is a particular or special statute rescinded by a later general statute unless it is specifically mentioned. (*d*) But a negative statute, or a new statute covering the whole subject, or the adoption of a code or a revision from which the former statute is excluded, or a legislative act removing the reason of the statute, or its re-enactment with the portions now claimed to be repealed omitted, or the passage of a statute evidently intended by the legislature as a substitute for former legislation on the subject, or the entrance of the State into treaty relations which are inconsistent with existing

statutes, operate to the extent of the repugnancy as a repeal. (e) A penal statute is repealed by any legislative change in the nature of the offence or the degree of punishment, but not necessarily by an alteration in the kind of penalty to be inflicted (f); though as to past offences such an alteration would give the statute an *ex post facto* aspect, and render it invalid. The recital in a statute that a former statute was repealed is neither its repeal nor evidence that it has been repealed.

Read 1 Bl. Com., p. 90; 1 Kent, Lect. xx, p. 466.

(a) 15 D. 156; 14 D. 206, note; 1 D. 488 (496).

(b) 16 Pet. 342; 79 D. 490; 82 D. 163.

(c) 11 Wall. 652; 106 U. S. 596; 137 U. S. 682; 157 U. S. 46.

(d) 17 Wall. 425; 109 U. S. 556.

(e) 58 D. 100; 11 Wall. 88; 97 U. S. 546; 143 U. S. 18 (26, 27).

(f) 34 D. 492; 70 D. 302; 25 R. 760.

§ 281. Of the Effect of the Repeal of a Statute.

The repeal of a statute cannot affect rights which had previously become vested under it, though inchoate rights will be destroyed. (a) If the repealed statute conferred jurisdiction upon courts or other public officers, with its repeal this jurisdiction ceases, and all incomplete proceedings before them become null and void. (b) The repeal of a penal statute without conditions abrogates all the penalties which it inflicted except those which have been already imposed upon convicted criminals by the sentence of the courts. (c) When a repealing statute is itself repealed the law which it abrogated is revived, unless a contrary intention of the legislature is apparent or the abrogated law is inconsistent with other statutes passed since it was repealed. (d)

Read (a) 23 D. 478; 39 D. 601, note; 56 D. 688.

(b) 12 D. 479, note; 36 D. 185; 5 Wall. 541; 7 Wall. 506; 98 U. S. 398; 101 U. S. 433; 137 U. S. 141.

(c) 94 D. 214, note; 13 How. 429.

(d) 36 D. 228.

§ 282. **Of the Validity of the Legislative Acts of Subordinate Legislative Bodies.**

The foregoing doctrines apply not merely to statutes passed by the legislature of a State or nation, but, so far as the matters subject to their jurisdiction will permit, to the subordinate forms of Written Law, such as municipal ordinances, corporate by-laws, and the rules of courts. The validity of these depends not only upon their correspondence with the fundamental principles of law and the written Constitution of the State, but upon the provisions of the charters of these different corporations and the authority conferred by the State upon its courts. Such ordinances, rules, and by-laws may be declaratory or remedial, public or private, affirmative or negative, temporary or perpetual, general or special, mandatory or directory, prospective or retrospective. They must be enacted according to the methods determined by the law, and may be suspended or repealed by the legal authority from which they proceed, or be abrogated by the legislature of the State.

CHAPTER IX.

OF THE INTERPRETATION OF LAW.

§ 283. Of the Necessity for an Authoritative Interpretation of the Law.

The words in which a rule of law is expressed convey, more or less accurately, its true meaning and intent. When both the language and the mental concept which it clothes proceed from the same legislative authority the correspondence between the words of the law and its true intent should be the closest possible, and what the words as used by the legislative body actually mean or imply must be accepted as the rule of law. Such is the case with Written Law in all its forms, — Constitutions, Treaties, Statutes, Codes. When the ideas embodied in the law have been enunciated in phraseology selected by persons not possessing legislative authority but of great legal skill and learning, and in this verbal form have become established by long usage and general recognition among the duly formulated rules of law, or when the form of words was chosen by persons now unknown but has been universally and immemorially adopted by past generations of lawyers and judges, while it cannot be assumed with the same certainty as in the former case that the words do express the precise intent of the law-giver, yet custom endows them with an authority only less than that of legislative choice itself. Such expressions of the law are found in the maxims and definitions of the Unwritten Law, and in those utterances of great judges and law-writers, upon whose statements of the law succeeding ages have not attempted to improve. Where the language in which the rule is couched was framed without legislative authority, and has not received the sanction which general and prolonged acceptance may confer, there is no special presumption in favor of its correctness, and

the accuracy with which it expresses the rule is always subject to investigation. Such are the propositions of the Unwritten Law contained in the decisions of the courts and the treatises of modern legal authors. It is the function of interpretation to discover in all these cases the real intent and meaning of the law, in order that the actual will and purpose of the law-giver in reference to rights and duties, wrongs and remedies, may be accomplished. The power to exercise this function is, under our own political system and that of most other civilized States, lodged in the courts, whose application of a rule of law to any state of facts presupposes that they have first ascertained the true significance and purport of the rule. (a) By what principles they are guided in this investigation the present chapter will explain.

Read Holland, Ch. xviii, p. 371; Markby, §§ 72-75; Black, Ch. i, §§ 1-6; Austin, Lect. xxxvii, pp. 624-633.

(a) 69 D. 450, note.

SECTION I.

OF THE INTERPRETATION OF THE UNWRITTEN LAW.

§ 284. Of the Variety of the Standards Employed in the Interpretation of the Unwritten Law.

Except where rules of the Unwritten Law have acquired authoritative expression an inquiry as to their meaning differs but little from the inquiry as to the essential character of the rule. Strictly speaking, interpretation is an effort to derive from fixed and known verbal premises an abstract and ideal conclusion, as where the positive and unchangeable language of a statute guides the interpreter to a knowledge of the legislative will. But in the unauthoritative statements of the rules of the Unwritten Law there is no such fixed and changeless verbal standard. Some judges and authors express the rule in one way, some in other ways; some by deciding in a single word the issues of a controverted case; some by elaborate explanations and discussions; and from these and from other sources the investigator must ascertain as best he may,

by one and the same process of research, the existence and the meaning of the rule. For this reason, while the field of his investigation is extensive, the methods by which he pursues it are numerous and varied; sometimes proceeding along the lines of logical inference from universal principles, sometimes adopting conclusions demonstrated by experience, sometimes guided by examples and analogies, sometimes deducing general rules from the comparison of many particular propositions. Any attempt to classify these sources and methods would be ineffectual. The most useful of the standards to which the interpreter resorts are these: (1) Judicial Decisions; (2) Self-Evident Principles; (3) Suggestions of Legal Reason and Instinct; (4) Customs; (5) Opinions of Acknowledged Jurists; (6) Cognate Doctrines of the Unwritten Law; (7) Laws of Foreign States.

§ 285. Of Judicial Decisions as Interpreters of the Unwritten Law.

A judicial decision is an adjudication by a competent tribunal upon a legal question arising out of a controversy submitted to its judgment and necessary to the determination of the controversy. The judgment of an incompetent tribunal is not a judicial decision. The judgment of a competent tribunal upon a question which is not involved in controversy before it, is not a judicial decision. The judgment of any tribunal upon a question involved in the controversy before it, but which it is not necessary to decide in order to decide the controversy, is not a judicial decision. But those propositions of law, whether one or many, whether principal or subordinate, which the court was compelled to pass upon in order to reach the conclusion by which the rights of the contending parties were eventually adjusted and established, taken collectively, constitute the decision. These propositions may be expressly stated, or may be left to be inferred from the claims of the litigants and the final disposition of the case. When expressly stated they may be enumerated in didactic formulæ or imbedded in an overwhelming mass of explanations and examples. They

may be obvious to the ordinary reader of the case as published in the Reports, or may require laborious research through all the facts and records of the cause for their discovery. But when discovered they present to the investigator the law of the case, the *ratio* or *rationes decidendi* which governed its determination, the rules of law which the court in deciding the case at once obeyed and proclaimed. Then all the illustrations and discussions which accompany these propositions in the opinions of the judges or the arguments of counsel; all the affirmations, admissions, and contradictions in the pleadings; all the facts in controversy and the decision of the jury or the judge concerning them, serve to explain the meaning of these rules of law and give to them a practical interpretation through their application to the circumstances of the individual case. It is in this way that reported cases authoritatively promulgate the law; and the art of analyzing cases so as to discern the *rationes decidendi*, to distinguish between these and all the other matter which the case contains, and which, however valuable it may be for purposes of explanation, is not as there stated authoritative law, is an art which the student should endeavor early to acquire.^(a)

Read Black, Ch. xvii, §§ 146-149; Wambaugh, Book i, Ch. ii, iii, v-viii.

(a) 6 Wheat. 264 (399); 27 D. 623, note; 73 D. 565; 62 D. 424 (454); 169 U. S. 649 (679).

§ 286. Of the Comparative Value of Different Judicial Decisions as Interpreters of the Unwritten Law.

A judicial decision may occupy toward the rule of law which it promulgates and explains any one of three relations: (1) Its promulgation of the rule may have the force of legislation and make the rule the law for future cases as well as for the one in which it has been stated: (2) Its recognition and construction of the rule may raise a strong presumption, not to be departed from without grave reasons, that the rule as promulgated by it is correct; (3) It may be accepted as conclusive in the case to which the rule has been applied, and as

suggesting a rule which subsequent tribunals are at liberty to follow or reject. When the decision emanates from the supreme court in a State it becomes a law governing all future cases arising in the same State until it is superseded by a statute or over-ruled by a new decision of the same court. (*a*) When it is rendered by an inferior court it is presumed to be correct and is of great, though not conclusive, authority in all courts of an equal or inferior grade in the same State, until the rule is finally settled by the supreme court of the State or by a statute. A decision proceeding from the courts of one State has no force as law in any other State except when it becomes the duty of that State, under a treaty or the comity of nations or the provisions of a confederate Constitution, to carry into effect the laws of the State in which the decision has been made; but still may have great weight where the customs and traditions of both States are the same, or where the decision was rendered by a court composed of judges distinguished for their legal learning, or when it has been generally accepted and followed in other States where the same question has arisen. Decisions of the courts of foreign States, except under the circumstances just mentioned, may be of great utility as suggestive of the rule of law but possess no authority.

Read *Ram*, Leg. J. Ch. iii, v, xiv-xvi, xviii; *Black*, Ch. xvii, §§ 153-161.

(*a*) 37 D. 761 (767).

§ 287. Of the Value of Judicial Decisions upon Analogous Cases as Interpreters of the Unwritten Law.

In addition to the service rendered by judicial decisions through their direct promulgation of law, they perform another of scarcely inferior consequence. In connection with the rule of law which they announce there is, in most instances, a state of facts to which the rule applies. This state of facts not only serves, like an object lesson, to interpret the meaning of the rule, but forms a connecting link between the rule and every other state of facts in any degree resembling these, thus sug-

gesting to the legal mind such modifications of the rule as reason and justice might require in order to adapt it to new states of fact varying in some respects but not altogether from the old. This is the process by which the courts advance with certainty and confidence into hitherto untrodden ground, reasoning by analogy from a decided case to cases which must evidently be governed by rules differing from that already promulgated just in proportion to the difference between the former and the present state of facts. The practical importance of this process and its influence upon the evolution of the law cannot be overestimated. As every new state of facts is necessarily a development from a former state of facts, so does the rule of law which governs the new facts grow out of the rule by which the old facts were controlled. As the new state of facts comes into existence the new rule of law, not yet indeed discerned and formulated, springs by logical necessity out of the ancient rule, waiting to be perceived and promulgated by legislative or judicial authority whenever the occasion for it may arise. Thus the courts are never without rules which they can apply to whatever cases may be brought before them. If no rule previously established will adequately meet the facts, investigation properly conducted will disclose the new rule which the analogies between the former and the present facts evolve out of the old, and enable the courts to define, declare, and apply it to the controversy which they now are to decide. The logical certainty of this process and the reliability of its results depends upon the correctness of the decision in which the previous rule has been directly promulgated and the accuracy with which the legal difference between the old and the new state of facts is measured. (*a*)

Read Austin, *Frag.* pp. 989-1020.

(*a*) 28 D. 70.

§ 288. Of Judicial Decisions as Interpreters of the Authoritative Verbal Expressions of the Unwritten Law.

Of the judicial decisions contained in the reports of England and America many are occupied with the interpretation

and application of those rules of the Unwritten Law which have received authoritative expression in maxims, definitions, and the like, and to the meaning of which their language, therefore, furnishes a controlling guide. The effect of these decisions, as well as the process by which they are reached, is different from those just described in reference to rules of the Unwritten Law which are by the decision of the court not simply interpreted but for the first time declared. The method and effect of these decisions is the same as if they were devoted to the construction of a rule formulated by a legislative body, and consequently their discussion finds its place hereafter when the sources from which the meaning of the Written Law is to be derived will be explained.

§ 289. Of Self-Evident Principles and Popular Customs as Interpreters of the Unwritten Law.

In aid of the foregoing method of ascertaining and interpreting the Unwritten Law the self-evident and fundamental principles which underlie all rules of law, and with which every rule of law must necessarily agree, may be considered, both for the interpretation of existing rules and as a source from which new rules may be derived. The highly trained legal reason and instinct of the lawyer who is thoroughly grounded in these principles furnishes one of the best standards by which what the law ought to be and consequently what the law must be may be accurately judged. Where rules are open to more than one mode of statement or more than one interpretation, or where it is doubtful which of two or more conflicting rules truly represents the law, a comparison of their respective probable results if carried into practical operation discloses which is most in harmony with public policy or the principles and purposes of civil government, and therefore which must be the true expression and interpretation of the law. (a) The custom of the people acting, as they suppose, in accordance with the law may, when the custom is evidently reasonable, just, and beneficial, give to the law its real intent and meaning, since the custom of the people is, to a large

extent, the source of the Unwritten Law, and what it may create it can, of course, construe.

Read *Ram*, Leg. J. Ch. i, ii, iv, vi, vii, xvii.

(a) 166 U. S. 290 (340).

§ 290. Of the Writings of Jurists as Interpreters of the Unwritten Law.

The writings of jurists learned in the law afford a further guide to its rules and their interpretation. Not every judge who writes opinions, not every text-book author even if of exuberant fertility, is an authority in whom the student of the law can safely place his trust. But where such writers have demonstrated their ability to grasp great principles and draw from them their logical conclusions, to analyze and distinguish cases, to comprehend states of fact and their analogies, to weigh and compare authorities, in a word, to be competent investigators as well as intelligible reciters of the law, their opinions are often of the highest value; although of few of them can it be stated as Lord Chief Justice Hobart said of Littleton on Tenures: "The sayings of Mr. Littleton are adjudged for law and are judgments."

Read *Markby*, §§ 101-103.

§ 291. Of the Reciprocal Interpretative Value of Cognate Branches of Law.

The relations between the different branches of the law are such that an examination of the rules embraced in one may often throw light upon the nature, scope, and meaning of the rules pertaining to another. There is a certain analogy and also an antithesis between the law of torts and the law of crimes, between the law of personal property and the law of real property, between the law of contract and the law of family rights, and the rules of either may thus tend to show what those of the other ought or ought not to be. In the same manner the laws of foreign States of kindred political theories and traditions, the condition of whose people

does not differ materially from our own, illuminate and indicate our law by virtue of the presumption that universal human wisdom will in similar circumstances dictate similar rules. Thus have the Unwritten Laws of England and America since the separation of the colonies from the mother country continually enriched themselves from one another, and among all civilized nations the process is in some degree in constant operation. The influence which the Civil Law of Rome has exercised upon our own within the present century has been exerted chiefly in this manner, our courts and jurists borrowing unhesitatingly from it whenever the foregoing methods of interpretation left in doubt the character and meaning of our own Unwritten Law.

§ 292. Of Finality in the Interpretation of the Unwritten Law.

The declaration and interpretation of a rule of the Unwritten Law reaches no final result until the rule receives a permanent verbal form either by its enactment as a statute or by its universal and continued recognition as a maxim or a definition of the Unwritten Law. Up to that time the rule is subject to reannouncement, and to enlarging or restrictive interpretations, as different judicial officers may be affected in different ways or to a different extent by the considerations heretofore discussed. The uncertainty as to the scope and application of the rule which this implies is more than compensated for by the perfection in which such a prolonged and critical elaboration of the rule results, and by its flexibility until such perfection is attained. A court confronted with a rule which it can legitimately and logically expand, contract, or modify to fit the justice of the case at bar, offers a happy contrast to a court whose only rule is fixed in permanent, unequivocal language, within whose natural meaning it must find the law appropriate to the facts, or leave the case unjudged.

SECTION II.

OF THE INTERPRETATION OF THE WRITTEN LAW.

§ 293. **Of the Function of Interpretation in reference to the Written Law.**

A rule of law once clothed in authoritative words supercedes all unauthoritative statements of the rule, and thenceforth becomes, according to its true verbal interpretation, the only rule upon the point which it assumes to cover. If the words are susceptible of but one meaning, that meaning fixes the precise limits of the rule. (a) If the words have no meaning, or if their only possible meaning renders the rule as stated utterly absurd and impracticable, the rule is null and void. But where the words are capable of two or more interpretations, between which a selection must be made in order to determine the scope and application of the rule, an exercise of judicial powers becomes necessary whereby that meaning of the rule which accurately expresses the legislative will may be ascertained and authoritatively declared.

Read Black, Ch. iii, §§ 24-28.

(a) 130 U. S. 662; 55 D. 376; 175 U. S. 414 (419-421).

§ 294. **Of the Interpretation of Ordinary Words.**

The words of a law are to be interpreted according to their common acceptance by the people of the State at the time of their enactment or other authoritative expression. This rule is based on the self-evident truth that as the legislative authority has employed these words, as a means of conveying to the people a knowledge of its will, it must have chosen them because, as commonly understood by the people, they expressed its will. If the words thus interpreted are clear, the interpreter cannot go beyond them. They constitute the law; nothing can be added to them nor subtracted from them. The operation of the law extends to whatever its letter may embrace, but matters not within the letter are not within its spirit, nor can the interpreter inquire into its

wisdom or utility or into the motives of the legislative body which prescribed it. That legislative body had the power to make the law as it has made it; it is presumed to have intended just exactly what it has expressed; and therefore the interpreter can have no other duty but to give its language full effect. (*a*)

Read 1 Bl. Com., p. 59; 1 Kent, Lect. xx, pp. 462, 463; Black, Ch. v, § 56.

(*a*) 58 D. 272; 63 D. 139; 71 D. 559 (563); 74 D. 522, note; 94 D. 115 (116, 117); 16 How. 251.

§ 295. Of the Interpretation of Technical Words.

Technical words, or those peculiar to some science, art, or trade, or intended and understood to be used by the legislative body in a special sense, are to receive the meaning which their technical character requires. This meaning may be ascertained from persons familiar with the art or trade or science to which the words pertain, or from books relating to the subject, or from the contemporaneous circumstances which indicate the purpose of the legislative body in selecting these particular words in which to formulate its will.

Read Black, Ch. v, §§ 57-58.

§ 296. Of the Interpretation of Ambiguous Words by the Context.

Where any of the words in which a rule of law is clothed are ambiguous, recourse must be had to extrinsic standards to ascertain their true interpretation. The first of these to be resorted to is the *context*. Every word of a law bears to every other word of the law the relation of context, and may serve as an aid to the elucidation of its meaning. (*a*) Sometimes a rule of law expressly defines its own words, and in such a case these definitions determine the interpretation of the words. Where in any portion of a law the meaning of a given word is obvious it must have the same meaning wher-

ever else in the law it may occur, unless there is some manifestation of a legislative intent to bestow upon it a different meaning. Doubtful words may be explained by other words with which they are grammatically connected, as adjectives by their nouns or nouns by their verbs. General words may be restricted by particular ones which are used elsewhere in the same rule as their equivalents, and narrow words may be enlarged by broader ones when evidently intended to express the same ideas. (b) But an indefinite general expression following a particular and definite one never extends its operation, nor is interpreted to include things or persons of superior dignity, value, or jurisdiction to those particularly named. Thus the phrases "dogs or other animals," "yachts and other vessels," "haywards and other officers," "idiots or other persons," refer only to dogs, yachts, haywards, and idiots, and do not embrace any other and higher animals, vessels, officers, or persons within the meaning of the law. (c) Moreover, the entire rule of law must be considered, and all its words and necessary implications must receive such an interpretation as to render its construction, as a whole, harmonious and consistent. (d) Language which in its literal meaning would make the rule impracticable or absurd, or would defeat the evident intention of the rule, must be presumed to have been used in some other one of its possible applications. Thus "may" which ordinarily implies only permission means "shall" or "must" in rules of law which impose duties upon public officers or affect public interests or the rights of third persons; while "shall" though mandatory in ordinary use becomes directory only if no right or benefit depends upon the act described. (e)

Read 1 Bl. Com., pp. 88, 89; 1 Kent, Lect. xx, p. 462; Black, Ch. iii, §§ 32-40, Ch. v, §§ 59-69, Ch. vi, §§ 74, 75, 82, 84, Ch. xiii, §§ 130-134.

(a) 96 U. S. 153 (159, 160).

(b) 36 D. 723; 120 U. S. 678 (690-692).

(c) 13 Wall. 162; 2 St. 373.

(d) 58 D. 389.

(e) 15 D. 464.

§ 297. Of the Interpretation of Ambiguous Words by the Title, Preamble, Provisos, or Punctuation.

The title and preamble of a statute, as well as its chapter and section headings, though no part of the rule of law and unable to restrict or extend its positive provisions, may still have an interpretative value when in spite of the investigation of the context the statute, as a whole, remains obscure. (*a*) Resort may also be had to its mode of punctuation, although this is usually of slight importance, the punctuation being determined by the sense rather than the meaning by the punctuation. (*b*) Where the enacting clauses are coupled with provisos, these may modify but can neither extend nor repeal the enacting clauses and must be confined, if possible, to what immediately precedes them. (*c*)

Read 1 Bl. Com., p. 89; 1 Kent, Lect. xx, pp. 460-461; Black, Ch. vi, §§ 76-81, Ch. x, §§ 107-112.

(*a*) 30 D. 574; 41 St. 304; 2 Cranch, 358 (386); 3 Wheat. 610 (631); 5 Wall. 107; 143 U. S. 457 (462, 463); 23 D. 471 (473, 474); 46 D. 100 (102, 103); 15 D. 633.

(*b*) 105 U. S. 77 (84, 85).

(*c*) 15 Pet. 141 (165); 15 Pet. 423.

§ 298. Of the Interpretation of Ambiguous Words by Statutes In *Pari Materia*.

A rule of law is its own best interpreter, and unless it proves insufficient for the purpose no exterior aid can be employed. Where it is insufficient recourse must next be had to other rules of law *in pari materia*, that is, relating to the same subject. Here opens usually a wide field for investigation. All the rules of the Unwritten Law and all the provisions of the Constitutions, treaties, and statutes relating to the same subject are *in pari materia*, whether they are general or special in their application, whether they are prior or subsequent to the rule of law under consideration, whether they are now current or have been repealed. (*a*) Emanating from the same political authority they are all of equal force and taken together they constitute but one law which must, if possible, be so interpreted

as to be at all times consistent with itself. For the purpose of interpreting the ambiguous words of any portion of this law, all the other portions may be regarded as a context. The same meaning which attaches to them in that portion of the law in which they first appeared follows them through all their subsequent appearances unless a contrary intent is evident; and where the courts have once construed a term or phrase, the same construction is given to it whenever it is afterwards employed. (b) Should all these laws be gathered into one and in this form be re-enacted by the legislature as a partial code or a Revision, although the original rules would be thereby repealed, the policy and meaning of the law would not be changed unless expressly so declared, and in interpreting the law in its new form the prior laws would still be taken as a guide. (c)

Read 1 Bl. Com., p. 60; 1 Kent, Lect. xx, pp. 463, 464; Black, Ch. vii, § 86, Ch. xiv, §§ 135-138.

(a) 38 D. 317 (319); 51 D. 746 (750, 751); 10 St. 48, note; 41 St. 630; 3 How. 556; 109 U. S. 556 (561); 121 U. S. 278.

(b) 3 D. 265; 22 D. 203; 34 D. 116 (117, 118); 62 D. 714; 98 U. S. 440.

(c) 15 D. 156; 100 U. S. 508; 110 U. S. 619 (628, 629).

§ 299. Of the Interpretation of Ambiguous Words by Judicial Decisions, Popular Custom, or General Opinion.

If what the legislative authority of the State has formally prescribed in reference to the subject-matter of a rule of law does not remove all doubt as to the verbal meaning of the rule, the general opinion or custom of the people or the judgment of the courts concerning it may be considered. When the statute of a State has once been authoritatively interpreted by the highest judicial tribunal of that State the interpretation becomes part of the statute and it must thereafter be held to mean precisely what the court has thus declared. When courts of other States apply this statute, not as their own law, but as the law of the State where it has been interpreted, they

cannot give it any other meaning but must follow that which it has already received. When other States adopt this law into their own they adopt also its construction, but not the additions or interpretations which may be subsequently made. Thus English statutes re-enacted in this country after their meaning has been settled by the British courts, or statutes of a State adopted by the United States and made Acts of Congress, have the same meaning which the English courts in one case or the State courts in the other may have given them. (*a*) When no judicial interpretation of a statute has yet been attempted the mode in which it has been understood and applied by public officers and the people of the State may answer the same purpose. (*b*) While public usage cannot alter the law, it furnishes evidence of the construction given it by those to whom it was prescribed and by whom it must be presumed to have been properly understood and faithfully observed. (*c*) The universal contemporaneous interpretation given to a law by those whose duty it was to execute it or obey it is thus justly regarded as among the most reliable indications of its true intent and meaning. (*d*)

Read Black, Ch. v, § 70, Ch. vii, §§ 85, 88-90, Ch. xvi, §§ 142-145.

(*a*) 8 St. 613 (615); 32 St. 656, note; 42 St. 627 (638); 84 D. 532; 5 Pet. 264; 133 U. S. 216; 161 U. S. 591.

(*b*) 46 D. 447 (449-451); 110 U. S. 219; 142 U. S. 615.

(*c*) 26 D. 379.

(*d*) 19 D. 722; 107 U. S. 402; 114 U. S. 411; 124 U. S. 236.

§ 300. Of the Interpretation of Ambiguous Words by the Apparent Intent of the Legislative Body in Employing Them.

The essence of a law is the legislative intent which it embodies, and its words interpreted by the context and by other laws on the same subject, or by the courts or even by the common opinion of the people, are supposed to manifest clearly that intent. But it is possible that with all these aids

the words may still be obscure and that it may be necessary to look to the intent through other media in order to ascertain the meaning of the words. Among these media are certain legal presumptions, the circumstances attending the enactment of the law, and its apparent general purpose and effect. Some things a legislative body is presumed not to intend. These are: to transcend its legislative powers, to prescribe laws which are unconstitutional or absurd or unjust or contrary to the fundamental principles of the social compact, to impose legal obligations or liabilities upon the State, to limit the authority of future legislatures, to give protection to fraud, to alter the jurisdiction of the courts, or unnecessarily change the existing laws. Its legislative acts must be interpreted in harmony with these presumptions, unless the unmistakable language of its laws compels a contrary construction. Again, the occurrences which attended the enactment of the law may more or less reveal the attitude of the legislative mind toward its various provisions. The minds of individual legislators are not the legislative mind and their utterances in speeches and debates have little bearing on this question. (*a*) But the contemporaneous circumstances relating to the proposal of the law for legislative action, its history, its amendments, and final adoption, as these appear upon the authenticated journals of the legislature may be consulted, and from them conclusions may be drawn as to the ideas which its language was intended to convey. (*b*) The legislative intent thus ascertained gives their true meaning to the words, restricts them when too general, extends them when too narrow, defines them when uncertain. (*c*) Cases within the spirit of the law but not within its letter are made subject to its operation, and cases not within its spirit but to which its letter might apply are excluded from its influence. (*d*) Again, the general purpose and effect of the law as a whole, the mischief it was expected to suppress, the benefit it was supposed to confer, the subject-matter which it undertakes to regulate, the natural consequences which attend its practical application, considered in connection with the presumed intention of the legislature to enact just, reasonable, and useful laws, may indicate the meaning

which the legislative mind must have endeavored to express and give its language an interpretation consistent with the purpose which the law was evidently intended to fulfil. (*e*)

Read 1 Bl. Com., pp. 60, 61; 1 Kent, Lect. xx, p. 465; Black, Ch. iii, §§ 29-31, Ch. iv, §§ 41-55, Ch. vii, §§ 87, 91-93.

(*a*) 58 D. 589; 3 How. 9 (24); 91 U. S. 72; 166 U. S. 290.

(*b*) 148 U. S. 490; 23 Wall. 307.

(*c*) 99 U. S. 48; 3 How. 556 (564, 565); 144 U. S. 47.

(*d*) 12 St. 819, note; 54 D. 639; 69 D. 181.

(*e*) 25 D. 677 (678, 679); 43 St. 127 (131); 7 Wall. 482; 93 U. S. 634; 171 U. S. 30.

§ 301. Of the Rule that Certain Statutes must be Strictly Interpreted.

In further aid of the foregoing methods of ascertaining the meaning of a law there is a positive but reasonable rule that laws of certain classes shall be strictly interpreted while laws of other classes shall be liberally construed. A strict interpretation, in this sense of the phrase, excludes from the operation of the law everything which is not clearly embraced within its letter. When liberally construed the letter is enlarged, if necessary, to meet the general intent and purpose of the law. The laws to which a strict interpretation must be given are these: (1) Penal laws, or those which impose a penalty in favor of the public upon a person guilty of a public wrong; and these must be so construed in favor of the alleged offender as not to subject him to the penalty unless he comes within the necessary meaning and intent of the law (*a*); (2) Laws entailing forfeitures or punitive damages, or in derogation of the customary rights of security, liberty, or property; these if possible must be interpreted to prevent the forfeiture and preserve the right; (3) Laws in derogation of any right existing under the Unwritten Law; these are not to be suffered to suspend or modify the right beyond the requirements of the letter of the law (*b*); (4) Laws conferring

police powers on public officers by virtue of which they are enabled to interfere peremptorily with persons and property in order to protect the public health and safety; and these can never be extended to cases not specifically mentioned in the law (*c*); (5) Laws exempting special persons from general liabilities or imposing special liabilities upon particular individuals (*d*); (6) Laws in pursuance of the sovereign rights of taxation and eminent domain; (7) Laws creating monopolies or other exclusive privileges; these are to be construed most strongly against the grantee; (8) Laws delegating or surrendering or suspending governmental powers (*e*); (9) Laws conferring the right to sue the State; (10) Laws instituting statutory remedies or proceedings, or in any manner affecting the jurisdiction of the courts (*f*); (11) Laws having a possible retrospective operation; these are to be confined to cases clearly within the words of the law (*g*); (12) Laws apparently repealing previous laws; these are not supposed to operate as a repeal beyond the irreconcilable repugnancy between the old law and the new; (13) Laws specially enacted to promote some private interest or remove some private disability; these, like other concessions of the sovereign, are limited to the words and necessary implications of the grant; (14) Provisos restricting the enacting clauses of statutes, except in penal statutes where a strict construction of the entire law as a whole may require that the proviso should be liberally interpreted.

Read 1 Bl. Com., p. 88; Black. Ch. ix, §§ 100-104, Ch. xi, §§ 113-116, 119-122.

(*a*) 48 St. 800; 10 D. 100; 74 D. 522; 10 St. 23, note; 6 Wall. 385 (395, 396); 131 U. S. 624 (628, 629).

(*b*) 97 D. 425.

(*c*) 123 U. S. 623.

(*d*) 18 Wall. 206 (225, 226); 116 U. S. 665.

(*e*) 138 U. S. 287.

(*f*) 3 Wall. 51; 97 U. S. 659.

(*g*) 87 D. 210; 88 D. 622; 17 Wall. 596; 20 Wall. 179 (187).

§ 302. **Of the Rule that Certain Statutes must be Liberally Interpreted.**

The rule of liberal construction applies to all remedial legislative acts, to which class a large proportion of all laws belong. Such acts, being intended to remove existing obstacles to public welfare, are to be given their full force and effect in view of the nature of the evil, the causes of the inability of the former law to cope with it, and the character of the remedy which the new law apparently endeavors to apply. So far as the language of the law, without violence to its plain and necessary signification, can be interpreted to cover the purpose of the legislative body, it must be done. (*a*) Words used in an erroneous sense must be corrected, superfluous and misleading words must be eliminated, and necessary omitted words must be supplied, until its language, as interpreted, becomes intelligible and complete according to the measure of the spirit of the law. But no interpretative process, however liberal, can make or change a law. A clear rule of a legislative body stands precisely as it is expressed, neither narrowed by a strict nor extended by a liberal construction. (*b*)

Read 1 Bl. Com., pp. 87, 88; 1 Kent, Lect. xx, p. 465; Black, Ch. ix, §§ 105, 106, Ch. xi, §§ 117, 118.

(*a*) 21 D. 608.

(*b*) 51 D. 142; 22 How. 290; 130 U. S. 662.

§ 303. **Of the Applicability of the Foregoing Rules to all Verbal Forms of Law.**

The foregoing methods of interpretation are applicable to all rules of law which have received a permanent and authoritative verbal form, so far as the extrinsic facts exist from which conclusions as to them may be derived. All of them are useful and most of them are available for the construction of statutes, many of them for the interpretation of Constitutions and treaties, and of the maxims and definitions of the Unwritten Law. (*a*) Few rules of law have a context so meagre, are so isolated in subject-matter, so peculiar in purpose, so

untried in application, that some guide cannot be found to their true meaning, unless they are so unintelligible as to be altogether void.

Read Black, Ch. ii, §§ 7-23; 2 Whart. I. L. Dig. § 133.

(a) 100 U. S. 483; 133 U. S. 258.

CHAPTER X.

OF THE APPLICATION OF LAW.

§ 304. **Of the Practical Administration of Law.**

The law becomes an active social force through its practical application to the conduct and affairs of men. Its enactment and interpretation leave it still an abstract rule, a standard and expression of rights and duties, but inoperative either to protect the one or to enforce the other. The abstract rule must be transmuted into life and be embodied in actions and forbearances before society can reap its benefits or the purposes for which it is ordained can be accomplished. The agencies through which this practical application of the law is made are these: (1) The people of the State at large; (2) Its legislative bodies; (3) Its executive officers; (4) Its courts. Of these the latter is to the student of law the most important, and the only one here requiring an extended notice. Undoubtedly by far the greater number of instances in which the rules of law are practically applied occur in the spontaneous, unintermitting correspondence of the conduct of well disposed and intelligent citizens with the rules of action established by the State. Legislative bodies in the performance of their constitutional functions carry into effect a portion of the laws they have themselves prescribed. Executive officers in all departments of the government are constantly engaged in interpreting and applying the rules by which their various official acts are governed. But though the sphere occupied by these three agencies is vastly greater than that filled by the courts, and is of special interest to the statesman and economist, yet it is in the courts that through the open redress and punishment of wrongs the laws defining and asserting rights and imposing their correlative duties are publicly expounded and their sanctions visibly and irresistibly applied.

The courts are the common ground on which the State and the citizen meet together, the one to exert, the other to submit to, that supreme political authority which is expressed in the enactment and enforcement of the laws; and as historically the law has been developed in all its elaborate details from crude and general ideas through the action of the courts in applying remedies to wrongs, so are they still the source from which the lawyer and the citizen must derive their knowledge and imbibe their spirit of obedience to the law.

SECTION I.

OF COURTS IN GENERAL.

§ 305. Of the Nature of Courts.

A court is a tribunal created by the State for the decision of controversies concerning legal rights and for the prevention, redress, or punishment of legal wrongs. *(a)* It consists of one or more judges together with such other officers, clerks, sheriffs, jurors and the like as may be necessary for the transaction of its business according to law. *(b)* It originates in a constitutional provision or statute of the State by which its authority is conferred and its powers are defined. *(c)* It exists as a court only while its necessary members are assembled and in actual session at the time and place prescribed by law. *(d)* It can take judicial action only upon a controversy between contesting parties presented to it in due form of law for its adjudication. *(e)* Tribunals of this character are said to have been organized in Egypt in prehistoric ages, from whence they were adopted into Athens prior to B. C. 1500, and have thence been copied throughout the civilized world.

Read 3 Bl. Com., pp. 23-25; Wilson. Part ii, Ch. iii, pp. 75-87.

(a) 35 D. 51 (65-69).

(b) 24 D. 517; 20 R. 50; 84 D. 114, note.

(c) 10 St. 143; 31 St. 350; 118 U. S. 425 (441-449).

(d) 86 D. 643 (646); 16 St. 221.

(e) 82 D. 418; 48 D. 349, note.

§ 306. Of the General Jurisdiction of Courts.

The judicial powers of a court are known as its jurisdiction. Jurisdiction is the authority to hear and adjudge a controversy and to carry the judgment into practical effect. *(a)* This jurisdiction is conferred by the State and is defined by law. Over matters outside its jurisdiction a court has no control, and all its acts in reference to such matters are wholly void. *(b)* As to matters within its jurisdiction its judgments are valid and are binding upon the persons and property concerned. Jurisdiction may be made dependent either upon the subject or the parties to the controversy. *(c)* Where it depends upon the subject, no other subject can be brought within the jurisdiction of the court by the agreement of the parties or the direction of the judge. *(d)* Where it depends upon the parties, they may waive personal privileges exempting them from its control, but cannot impute to themselves jurisdictional qualifications which they do not possess. *(e)*

Read Cooley, Const. Lim., Ch. xi, pp. 398-413.

(a) 86 D. 643 (646); 24 St. 366 (369); 76 D. 662, note.

(b) 47 D. 242; 11 St. 808; 1 Pet. 328 (340).

(c) 12 Pet. 524 (623); 17 How. 424; 24 How. 195; 93 U. S. 274; 95 U. S. 714; 106 U. S. 350.

(d) 3 St. 106; 103 U. S. 11; 14 St. 138; 22 Wall. 322.

(e) 72 D. 319 (320); 42 St. 121.

§ 307. Of the Special Jurisdiction of Courts.

Jurisdiction dependent upon the subject may be conditioned either upon its character, its quantity, or its situation. To some courts are entrusted controversies concerning crimes, to others controversies in reference to estates held in trust or to maritime torts and contracts, to others claims within certain fixed limits of value, to others litigation involving property within a given territory. No State can confer upon its courts jurisdiction over subjects beyond its own borders *(a)*, nor can the parties by any fictitious change in the nature or the quantity of the subject bring it within

the jurisdiction of a court to which it does not legally belong. *(b)* In like manner jurisdiction dependent on the person may be conditioned either upon the status of the person or his domicile or his temporary presence within the territorial jurisdiction of the court. The control of infants or insane persons and their property, the authority to determine questions arising in the course of official business, the right to decide controversies between the residents of certain districts, may vest in different tribunals, while any court may acquire jurisdiction over persons upon whom its process may be lawfully served within the region to which its judicial power extends. *(c)*

Read *(a)* 54 D. 630; 79 D. 440; 36 St. 750; 18 Wall. 350.

(b) 12 D. 568, note; 15 D. 632.

(c) 15 D. 39; 53 St. 165, note.

§ 308. Of the Indirect Jurisdiction of Courts.

Jurisdiction, whether dependent upon the person or the subject, may indirectly affect subjects and persons over which the court has no immediate authority. When property is within its jurisdiction it may take cognizance of controversies concerning it, although the owner is beyond its reach, and may deprive him of his alleged rights therein notwithstanding that the force of its judgment is exhausted when the property is disposed of according to its decrees. *(a)* On the other hand, when it has jurisdiction over the person of the owner, it may compel him to employ or convey the property in obedience to its orders, although the property itself is situated in a district over which it has no control. *(b)* An action may be brought in any court having jurisdiction over the subject and the parties. Where there are two or more tribunals of identical authority, the one to which the controversy is first submitted retains exclusive jurisdiction over it. *(c)* After a court has rendered judgment in a controversy its jurisdiction over the subject and the parties is presumed, but this presumption is not conclusive and may at any time be overcome by proof that the subject was beyond its judicial

authority or that the parties were not legally, and could not by consent have placed themselves, within its jurisdiction. (*d*)

Read Story, Conf. L. § 30.

(*a*) 10 Wall. 308; 95 U. S. 714; 7 R. 147; 20 R. 695.

(*b*) 16 How. 1 (13); 10 Wall. 464 (475); 94 U. S. 444 (448-450).

(*c*) 9 Wheat. 532; 112 U. S. 294; 47 D. 377; 2 R. 581; 23 R. 412.

(*d*) 10 Pet. 449; 18 Wall. 350 (365-368); 83 D. 446, note; 94 D. 742, note.

§ 309. Of the Inherent Powers of Courts.

In addition to its judicial powers or jurisdiction every court has certain inherent powers which are necessary to its administration of justice within its jurisdiction and to prevent the failure or abuse of its process. Among these are the power to establish rules for the conduct of the business which may be brought before it, and to enforce, repeal, or suspend them at its discretion (*a*); the power to appoint, supervise and remove clerks, attorneys, and other officers (*b*); the power to make, preserve, correct, and replace the records of its proceedings (*c*); the power to preserve order during its sessions; the power to enforce its decrees (*d*); and the power to punish for contempt. A contempt of court is an offence against the sovereignty of the State as represented by the court, and consists in any acts or words which tend to derogate from the dignity of the court or to interrupt the course of justice, or in wilful and pertinacious disobedience to its lawful commands. Publications calculated to prejudice the people against the court or its judges or to influence the jury in a pending case, trifling with witnesses or jurors, attempts to mislead the court by false averments in the pleadings or to forestall its action by obtaining its opinion on a controversy about to be submitted to its judgment, a breach of the peace or other misconduct in the presence of the court or in the place set apart for its use and that of its officers, are examples showing the nature of this offence. A court can proceed to try the offender without a jury and on

its own knowledge of the contempt, and may punish it by fine and imprisonment to such an extent as to vindicate the dignity of the court and secure obedience to its orders. Persons charged with contempt have a right to purge themselves upon oath of any intentional disrespect, and this purgation may be accepted by the court in satisfaction for the offence, or it may take such further action as the rights of other parties and the interests of public justice may require.(e)

Read (a) 41 St. 634, note.

(b) 19 How. 9.

(c) 12 D. 350, note; 70 D. 100; 73 D. 565; 80 D. 189; 1 St. 191; 6 St. 587.

(d) 49 D. 509.

(e) 90 D. 671, note; 98 D. 404, note; 56 R. 360, note; 13 Wall. 335; 19 Wall. 505; 107 U. S. 265; 167 U. S. 409; 50 St. 568, note.

§ 310. Of the Terms or Sessions of Courts.

Judicial functions can be exercised by courts only while they are in actual session at the times and places and in the manner prescribed by law. Proceedings at another time or place or in another manner, though in the personal presence and under the direction of the members of the court, are *coram non judice* and void. The period fixed by law during which a court must be in session is called a *term*. The term begins on the first day of the prescribed period, at the hour when the court is organized and opened for the transaction of judicial business, and continues until the court is formally adjourned without day.(a) The customary limits of the term may be extended when necessary by temporary adjournments until the business of the term is finished

Read (a) 47 D. 365.

§ 311. Of the Proceedings and Judgments of Courts.

The methods of investigation adopted by a court in examining the merits of a controversy and the mode in which it reaches and enforces its judgments vary with the character of the court.

The final judgment of a court of competent jurisdiction over the parties and the subject is conclusive upon the parties and their privies in reference to the same subject-matter, in any action in which the same object is sought and the same questions are raised, until the judgment is reversed or modified upon a writ of error or appeal. (*a*) The original demand concerning which the controversy arose is merged in the judgment, and no suit on it can thereafter be maintained. (*b*) The judgment becomes the foundation of any future claim, and may be directly enforced by further process of the court or made the subject of a new suit to recover the amount awarded to the victorious party. (*c*) A judgment cannot be collaterally attacked except for want of jurisdiction, or for fraud practised by means of it upon third parties or by the prevailing party on the court; but a direct proceeding to vacate or reverse it may be instituted according to the modes provided by the local law. (*d*) The judgments of the courts of one State or sovereignty may be made binding upon those of other States by comity or constitutional provisions, as is the case between the State and Federal courts (*e*), and the courts of one State of the American Union and the others (*f*), or between the courts of a foreign nation and our own. (*g*)

Read Story, Conf. L. §§ 584-618 l.

(*a*) 39 St. 156; 15 St. 138; 53 D. 350, note; 60 D. 426, note; 62 D. 546; 41 D. 675; 26 St. 91; 37 St. 228; 26 D. 131; 77 D. 651; 81 D. 626, note.

(*b*) 15 D. 78, note.

(*c*) 83 D. 350; 92 D. 410.

(*d*) 22 St. 611; 23 St. 95; 3 St. 616; 6 D. 88; 79 D. 244; 21 Wall. 398 (426, 427); 98 U. S. 61.

(*e*) 15 R. 660.

(*f*) 44 D. 562; 55 D. 494; 73 D. 683; 169 U. S. 432 (459-462).

(*g*) 1 D. 316.

§ 312. Of Courts of Record and Courts not of Record.

Courts are divisible into courts of record and courts not of record. A court of record is a tribunal exercising judicial

functions under an authority from the State which is independent of any personal privilege or official power residing in the magistrate appointed to hold it, proceeding according to the provisions of the general law of the land, and recording its determinations in official rolls whose statements import absolute verity and cannot be contradicted by any evidence, nor amended except by the order of the court itself or by a writ of error or an appeal. A court not of record is a tribunal whose judicial power is commensurate with that of the person appointed to hold it, of whose proceedings no official record is kept, or whose records are not indisputable but may be examined both as to their existence and the truth of their contents by subsequent tribunals. In England the King's courts were all courts of record, the manor courts and other courts of inferior jurisdiction were courts not of record. In this country, whether a court is of one class or the other depends upon the terms of the statute or the constitutional provision which creates it. (a)

Read 3 Bl. Com., pp. 24, 25.

(a) 31 D. 760.

§ 313. Of Courts of Superior, Inferior, General, or Limited Jurisdiction.

Another division of courts is into courts of inferior and superior jurisdiction. An inferior court is one whose judgments are open to review by a higher tribunal through some form of error or appeal. Such courts have no power by implication except what may be necessary to the exercise of their expressly granted powers. A court of superior jurisdiction is one whose judgments are final, and whose jurisdiction over all matters upon which it undertakes to act, though not expressed, is presumed until the contrary appears. This second classification of courts closely resembles, and in some respects involves the same distinctions as the third, which is into courts of general jurisdiction and courts of limited jurisdiction. A court of general jurisdiction is endowed with judicial authority over controversies of various and indefinite species, and

controversies of every kind are presumed to be within its jurisdiction unless they have been specifically and exclusively entrusted to some other tribunal. The records of such courts import absolute verity, and need not contain recitals of the facts upon which the jurisdiction of the court in any given case depends. A court of limited jurisdiction is one to which certain defined and enumerated species of controversies are committed. Over any other cases it has no jurisdiction, and even as to these its records must recite the facts on which its judicial authority over them is based. (*a*)

Read (*a*) 5 Cranch, 173; 12 Pet. 657 (718-720); 48 D. 194; 54 D. 217.

§ 314. Of Appellate, Civil, Criminal, or Provisional Courts.

A superior court before which the decision of an inferior court may be brought for re-examination and adjudication is called an *appellate court*. A *civil* court is one in which the prevention or redress of private wrongs is sought through actions instituted by private parties who apprehend or have already suffered injury. A *criminal* court is one before which the State prosecutes, in its own name and behalf, persons who are accused of public wrongs. *Provisional* courts are temporary tribunals established by military commanders in conquered territories pending the pacification of the country and the organization of the customary courts of the State. These are courts of record and may be courts of general jurisdiction.

§ 315. Of Legal Controversies.

To every controversy submitted to a court for its decision there must be at least two parties, — the claimant and his antagonist, — and this is equally true whether the claim is made by or against the public, or against an article of property, or against a private individual. The claimant is variously known in different courts as the *plaintiff*, the *petitioner*, the *libellant*, the *proponent*, the *prosecutor*, while his antag-

nist is called the *defendant*, the *respondent*, the *libellee*, the *opponent*; their relations to one another under all these different names being substantially the same. The methods through which they make known their adverse claims to the court are styled the *pleadings*. The examination of the questions of law and fact raised by the pleadings constitutes the *trial*, resulting in the *judgment* by which the issues between the parties are determined and the controversy is permanently settled. The number of parties is not, however, necessarily confined to two. Controversies may arise in which many conflicting interests may be involved, and where each must be separately represented in order that justice may be meted out to all. In such cases the parties may be as numerous as the interests involved, and each may participate in the pleadings, trial, and judgment according to the nature of his claim. (*a*)

Read (*a*) 81 D. 626.

§ 316. Of the Various Systems of Courts.

Were States created with deliberate forethought by a people gifted with sufficient political wisdom and experience, it might be expected that their judicial as well as their legislative and executive systems would be unitary and homogeneous. But States formed like our own, by gradual and almost imperceptible development from antecedent political societies, naturally accumulate concurrent and sometimes conflicting institutions through their efforts to meet new conditions by adding new governmental agencies without abolishing the old. Concurrent and conflicting legislative and executive bodies, operating as they do directly to the public detriment, cannot be tolerated, and their reconciliation and co-ordination is necessarily and speedily effected. But difficulties of this character in the judicial system, being prejudicial mainly to private individuals and obscurely understood and often believed to be inevitable by the public at large, may continue indefinitely. And thus it happens that our own judicial system, inherited from England where before the Revolution it had already become an

aggregation of heterogeneous and sometimes conflicting members, is composed of various species of courts, differing from one another not merely in jurisdiction but in their methods of procedure and in the nature of the protection or redress which they afford. Eventually this multiplicity and diversity of tribunals must undoubtedly disappear, but it is still necessary to consider them as subordinate systems, a knowledge of whose peculiar rules and practices is essential to the student. These subordinate systems are: (1) The Courts of Common Law; (2) The Courts of Equity; (3) The Courts of Probate; (4) The Courts of Admiralty; and (5) The Extraordinary Courts. A glance at the historical origin and present condition of each of these will not only account for their existence, but also manifest their relations toward one another.

SECTION II.

OF THE COURTS OF COMMON LAW.

§ 317. Of the Origin of the Courts of Common Law.

During the Saxon period of English history the kingdom became politically subdivided into counties, hundreds, and tithings; the tithing consisting of ten families, the hundred of ten tithings, and the county of an indefinite number of hundreds. In each of these subdivisions courts were established having jurisdiction over local controversies, with a right of appeal from the lower tribunals to the higher, and from the highest to the witenagemote or general assembly of the chief men of the kingdom, over which the sovereign, either personally or by a delegate, presided. After the Conquest the supreme judicial power resided in the Norman monarch and his assembly of councillors, called the *aula regis*, to which appeals from other courts became so numerous as practically to divest them of all authority and make the *aula regis* the resort of all suitors. In this court the king was the legal fount of justice, though represented by a chief justiciar, — a magistrate learned in the law and one of the principal dignitaries of the kingdom. Prior to Magna

Carta, A. D. 1215, the *aula regis* followed the person of the king in his migrations through the kingdom, but by that royal concession one branch of it, the Court of Common Pleas, having jurisdiction over all controversies concerning land and all private injuries between subject and subject, was permanently established at Westminster. Another branch of the *aula regis*, the Court of Exchequer, before which controversies concerning the royal revenue and incidentally concerning private injuries by which the king's debtors were incapacitated to fulfil their obligations to the crown were brought, also became separated from the rest; while the remaining branch, known as the Court of King's Bench, retained its jurisdiction over public wrongs and ultimately acquired civil jurisdiction over many cases involving merely private injuries. These, with various subordinate courts, relics or reproductions of the minor Saxon tribunals, constituted at the date of the American Revolution the system of courts called the Courts of Common Law, to distinguish them from courts of equity and admiralty, and have continued under different names and powers to exercise judicial functions over criminal and civil cases, both in England and this country, to the present day.

Read 3 Bl. Com., pp. 30-46, 55-60; Reeve, Ch. i, pp. 175-180, Ch. ii, pp. 259-278; Maine, Early Law and Custom, pp. 167-189.

§ 318. Of the Topical Jurisdiction of the Courts of Common Law.

According to the methods of procedure early adopted in these courts a civil action must be commenced by the service of a *writ* upon the defendant, commanding him to appear in court at a day named and answer to the claim of the plaintiff. This writ was prepared in the office of the secretary or chancellor of the sovereign and was issued under royal authority. Its statement of the claim of the plaintiff was intended not merely to give notice of its character to the defendant, but to manifest to the court to which the writ was

made returnable that the controversy was within its jurisdiction, and for this purpose was made technically exact and perfect to the highest degree. The private wrongs of which the law took cognizance at this period were the exclusion from land of its true owner, the failure to pay a definitely ascertainable debt, the breach of a contract under seal, and the forcible injury of persons and property. Writs suited to all species of these wrongs were gradually devised by the clerks in chancery as occasion for them arose, and were elaborated with great care and skill, and when perfected their forms and contents were adhered to with extreme rigidity. When an injured party applied for a writ, if the facts in his case corresponded with the statement of facts in any known writ, that writ was issued in his favor; if not, no writ could issue and redress was consequently denied him. The effect of this rigid practice was to confine within narrow limits the topical jurisdiction of the common law courts and to leave many meritorious suitors without legal relief. Therefore in A. D. 1285 a statute was enacted which provided that when a case was presented to the clerks in chancery for which no form of writ could be found, but which was an invasion of a right already recognized by the courts and required a remedy similar to those customarily applied, the clerks should devise a new writ to meet it, and if they were unable to do this, the matter should be laid before the next Parliament, by which a suitable writ should be prepared. This statute was carried into effect in such a manner as to introduce actions for breaches of contract not under seal and for certain injuries without force to persons and property, but left many wrongs equally grievous to the sufferer unredressed, and to this day unredressable in the courts of common law.

§ 319. Of the Number of the Parties Litigant in the Courts of Common Law.

The trial of a civil case in the courts of common law ordinarily takes place before a jury of the common people, not

learned in the law nor highly skilled in the investigation of intricate questions of fact. To bring the case within their comprehension the pleadings were so framed as to result in a single affirmation and denial, enabling the jury to decide the controversy by simply finding the issue for one party or the other. Under this system the court could take no cognizance of controversies involving more than two parties; cases in which three or more conflicting interests must be adjusted remaining, so far as these courts were concerned, without redress.

Read Walker, Lect. xxxvii, pp. 587-675.

§ 320. Of the Redress Obtainable in Courts of Common Law.

The redress afforded by the courts of common law rested entirely upon the theory of compensation for a completed wrong. No suit could be brought until an injury had been committed, and if the plaintiff obtained a judgment the court could award him only the restoration of the property of which he had been deprived, or money-damages collectable out of the property of the defendant or enforceable against his person by his imprisonment until the amount was paid. Against threatened injuries these courts furnished no protection; for injuries which could not be compensated by the restitution of property or the payment of damages they offered no redress.

§ 321. Of the Limitations upon the Jurisdiction of the Courts of Common Law.

The ordinary jurisdiction of the courts of common law over civil cases is thus confined within the comparatively limited area of controversies between two parties, which arise out of completed wrongs consisting in a breach of contract or the dispossession of lands or goods or the forcible or consequential injury of persons or property, and which can be adequately remedied by the restoration of the property or the payment of money. Extraordinary jurisdiction they may

exercise over special cases by virtue of a statute, but the instances of this have hitherto been few and the judicial authority of these courts remains substantially as it was established under the Act of Parliament of A. D. 1285, leaving to other courts hereafter described the application of remedies to those injuries to which these methods of redress do not extend.

SECTION III.

OF THE COURTS OF EQUITY.

§ 322. Of the Origin of the Courts of Equity.

The Courts of Equity are a natural outgrowth of social conditions, coupled with the limited jurisdiction and the methods of procedure in the courts of common law. Injuries demanding redress beyond the power of the common law courts to furnish always have occurred; and relief for these was necessarily sought directly from the sovereign by petition, upon which he or his delegate awarded such compensation or protection as his sense of justice prescribed. The delegate to whom such petitions were ordinarily referred was his chancellor, who was not only his secretary, issuing his writs to the courts of common law, but also his chaplain, the keeper of his conscience and the administrator of justice in his name. Thus upon the denial of a common law writ on the ground that no precedent existed for it, or the failure of the courts of common law to fully meet the exigencies of the controversy, an immediate resort to the chancellor was available, by whom the rights of the contending parties could be ascertained and declared.

Read 3 Bl. Com., pp. 46-55, 429-443; Reeve, Ch. ii, pp. 279-281; Walker, Lect. iv, pp. 55-57.

§ 323. Of the Development of Courts of Equity.

For a long period the power of the chancellor over these cases was advisory rather than judicial, and extended at the

farthest to the infliction of ecclesiastical censures which the parties might, if they chose to do so, disregard. But in the reign of Richard II. (A. D. 1377-99) Chancellor Waltham, in the endeavor to oblige a trustee to discharge his duties to his *cestui que trust*, invented a writ of *subpœna* by which the parties could be brought before his tribunal and compelled to remain in attendance upon it until his orders were obeyed. The assertion of this authority, which was finally recognized by the sovereign and the people, gave to the chancellor direct jurisdiction over the persons of all the parties to the controversy, and enabled him to enforce his decrees, if necessary, by their perpetual detention in the custody of the court. In this manner relief for any kind of legal wrong became practically attainable. Threatened injuries could be prevented as well as completed injuries could be redressed by the mandate of the court. Controversies in which numerous parties were involved could be as readily adjusted as if two alone were concerned. Instead of an inadequate compensation in money for a breach of duty, the performance of the duty itself could be secured. Even the judgment of a court of common law, if inequitable between the parties, could be rendered nugatory by prohibiting the victorious party from carrying it into effect. And if no court but this of the chancellor had then existed it would seem as if this alone, from the scope of its jurisdiction, the flexibility of its proceedings, and the efficiency of its remedies, would have been sufficient for all the purposes of remedial justice in any political or social condition to which the people of England might have attained.

§ 324. **Of the Conflict between the Courts of Equity and the Courts of Common Law.**

This growth of equity jurisdiction was not, however, without strenuous opposition on the part of the common law courts, their attorneys and other officers, and many adherents of the ancient customs of the realm. In A. D. 1616 the contest culminated in a question of the gravest character, in which the authority of the chancellor to grant relief against a judgment

of the courts of common law was fully established by a decision of the crown. From this time forward the line of demarcation between the two systems of courts became more and more clearly defined, the modes of proceeding in courts of equity were coördinated and improved, and their judicial business and juridical influence constantly increased. For the past century, at least, both in England and America they have overshadowed, and in some of our States have almost superseded, the courts of common law, partly through statutory reforms in pleadings and procedure and partly through their gradual assumption of control over controversies which once were unhesitatingly referred to the courts of common law.

§ 325. Of the Line of Demarcation between the Jurisdictions of Courts of Equity and Courts of Common Law.

Where the original normal distinction between courts of equity and courts of common law is still preserved, the test of equity jurisdiction is the existence of an adequate remedy at law. If the courts of common law can under their methods of procedure take as complete a cognizance of the controversy and its parties as a court of equity could do, and can afford a remedy as sufficient and as practically adapted to the ends of justice as a court of equity could give, the jurisdiction of the case is in the courts of common law, and equity tribunals cannot interfere. (a) But where these conditions cannot be fulfilled the courts of equity are open to the parties seeking for relief. The application of this test brings within their jurisdiction the following classes of cases: (1) Cases requiring a preventive remedy on account of the irreparable nature of the threatened injury or the multiplicity of suits to which its probable repetition would lead; (2) Cases requiring a disclosure by the adverse party of matters known only to himself or unprovable by witnesses, and whose presentation to the court is necessary to a correct decision of the controversy; (3) Cases involving the interests of more than two distinct parties to such an extent or in such a manner that the controversy cannot be finally adjusted as to any two of them without

an adjudication as to others; (4) Cases where complete relief can be obtained only by the performance by one or more of the parties of some act other than the restoration of dispossessed property or the payment of money; (5) Cases involving rights of property which were unknown to the law when the remedies provided by the common law courts were devised, and for whose protection and enforcement those remedies are not available; (6) Cases where parties are absolved from duties ordinarily enforceable at law by conduct of the other parties which is not available as a defence at law, but which renders it inequitable that in this particular case the performance of the duty or compensation for its non-performance should be decreed.

Read (*a*) 16 D. 606; 43 D. 53; 24 St. 678; 19 How. 271; 119 U. S. 347.

§ 326. Of the Topical Jurisdiction of the Courts of Equity.

The principal instances of the application of the powers of courts of equity in the foregoing classes of cases are these: (1) The prevention by an injunction, or judicial prohibition under threatened penalties, of fraudulent practices, of actions or omissions likely to result in injuries for which no money damages will compensate, of wrongs against physical health and comfort, or of the invasion of family rights (*a*); (2) The enforcement of the specific performance of contracts whose breach would work irreparable injury (*b*); (3) The correction of the language of written contracts and conveyances in cases of verbal error through accident or mutual mistake, in order that their contents may conform to the actual intentions of the parties (*c*); (4) The abrogation of agreements obtained by fraud (*d*); (5) The settlement of accounts between three or more partners or between two or more claimants of a debt due from a third party (*e*); (6) The foreclosure and redemption of mortgages; (7) The partition of property between co-tenants; (8) The protection of the separate property of married women; (9) The appointment and supervision of receivers; (10) The regulation of trusts and trustees (*f*); (11) The perpetuation

of evidence; (12) The enforcement of a discovery or disclosure of facts or writings by the parties (*g*); (13) The setting aside or carrying into effect of awards of arbitrators; (14) Relieving against inequitable though legal forfeitures and penalties (*h*); (15) Aiding a court of common law to execute its judgments by compelling the defeated parties to submit their property to its process (*i*); (16) Preventing the victorious party in a suit at law from enforcing his judgment when it would be contrary to justice and conscience so to do (*j*); (17) Granting a new trial to the defeated party where it is apparent that on the former trial he was prevented from obtaining the hearing to which he was entitled (*k*); (18) Removing a cloud from a title to land (*l*); (19) Preventing a multiplicity of possible suits by finally determining the state of facts out of which the controversies might arise. (*m*) These instances indicate the vast range of the judicial power of courts of equity, and the facility with which their methods of relief can be adapted to every kind of legal wrong.

Read Walker, Lect. xxxviii, pp. 700-720.

(*a*) 69 D. 728; 53 R. 342, note.

(*b*) 23 D. 417, note.

(*c*) 55 D. 137, note; 65 St. 475, note.

(*d*) 45 D. 621, note.

(*e*) 35 D. 690, note.

(*f*) 95 D. 572, note; 63 St. 241, note; 64 St. 745, note

(*g*) 22 D. 279, note.

(*h*) 50 D. 593, note; 68 D. 73, note.

(*i*) 90 D. 287, note; 66 St. 267, note.

(*j*) 19 D. 595, note; 53 St. 437, note; 54 St. 216, note.

(*k*) 20 D. 158, note.

(*l*) 67 D. 106, note.

(*m*) 32 D. 689, note; 50 D. 445, note.

§ 327. Of the Indirect Jurisdiction of Courts of Equity.

The topical jurisdiction of the courts of equity receives an indirect but wide extension from the doctrine that where a court of equity once acquires jurisdiction of a case for any purpose it may retain jurisdiction of the case for all purposes,

and therefore has authority to decide all its issues whether, standing alone, they would or would not be within its topical jurisdiction. Thus if a controversy has a single aspect on account of which either of its parties may and does invoke the interference of a court of equity, although in every other aspect it would be cognizable by a court of common law, the court of equity to which it is presented is not confined in its adjudication to the single aspect on which its direct jurisdiction rests, but may consider and determine all its aspects, and exercise with reference to them the same judicial functions as a court of common law. (*a*) This doctrine leaves within the exclusive cognizance of the common law courts only such of those cases which were within their original jurisdiction as may happen to be free from any incidental features on which a claim for equitable interference might be based, and enables suitors to invoke the aid of courts of equity in controversies which substantially belong within the jurisdiction of the courts of law.

Read (*a*) 51 D. 584; 26 St. 523.

§ 328. Of the Limitations of the Jurisdiction of the Courts of Equity.

Wide, however, as equity jurisdiction is, it nevertheless has its limitations. It can take cognizance only of private civil rights, and of these only as they have been already defined and settled by the law. It accepts the same classifications and distinctions of persons and property, actions and forbearances, duties and injuries, which are recognized by the courts of common law. (*a*) It cannot create new rights, nor declare future rights otherwise than by construing contracts and conveyances, nor entertain a question concerning abstract rights where no controversy concerning actual legal rights exists. (*b*) It cannot introduce new remedies in violation or without the authority of law. It has no jurisdiction over public rights or crimes, nor can it interfere in private contests simply because a party has been defeated in his effort to obtain redress at law. (*c*) In adjudicating upon controversies it is

obliged to follow the fundamental maxims in which the principles of equity have been authoritatively expressed by former chancellors, and at the same time to administer the remedies at its command in accordance with the principles and precepts of the law. (*d*)

Read (*a*) 15 How. 281.

(*b*) 1 Wall. 1.

(*c*) 5 St. 494; 124 U. S. 200; 19 R. 310.

(*d*) 31 D. 238 (241, 242); 19 Wall. 107 (121, 122).

§ 329. Of the Proceedings in Courts of Equity.

The proceedings in a court of equity are simplicity itself as compared with those in courts of common law. They are commenced by a petition in which the claimant states in ordinary language the facts on which his claim is based, and prays for the relief to which he deems himself entitled. (*a*) Upon the presentation of this petition to the court notice is given to all other parties in interest to appear and show cause, if they can, why the prayer of the petition should not be granted. (*b*) On their appearance they make such objections or denials or new affirmations as their claims require. (*c*) The questions of law and fact arising upon these assertions and denials are investigated by the chancellor through the oral or written testimony of witnesses and the arguments of counsel, or, if he deems it necessary, with the assistance of a jury, and the various parties are ordered to do or to forbear whatever in his judgment the equity and justice of the case requires. (*d*) Compliance with these orders adjusts the controversy and the case is at an end. Refusal to obey them is followed by the attachment of the disobedient party for contempt of court, and the imposition of such penalties of fine and imprisonment as are calculated to induce him to submit.

Read 3 Bl. Com. pp. 442-455; Walker, Lect. xxxviii, pp. 675-700.

(*a*) 14 Pet. 156 (164); 104 U. S. 658; 113 U. S. 756.

(*b*) 17 How. 130 (139, 140).

(*c*) 17 How. 91; 83 D. 249, note.

(*d*) 1 D. 121; 97 D. 51.

§ 330. Of the Special Jurisdiction of Courts of Equity over Infants, Insane Persons, and Incapables.

In addition to the controversies between adverse parties which in the manner just described fall within the jurisdiction of the courts of equity, they are charged with many other judicial and administrative duties which also grow out of the ancient relations between the chancellor and the king. The king, according to the doctrine of the common law, is *parens patriæ*, the father of his country, the guardian of all persons who are incapable of caring for themselves, the custodian of all property which has no other owner able to manage and protect it. The numerous and important functions attached to this high office the monarch found it also convenient to transfer to his chancellor, and thus vest in chancery, and finally in the courts of equity, jurisdiction over orphaned infants and insane persons, over property appropriated to charitable uses, and over other interests of a similar character which might properly be regarded as a royal charge. More or less of these duties have, as time went on, been distributed to special courts, particularly in this country; but equity still exercises over them a supervisory or appellate jurisdiction, and furnishes the principles and methods upon which they are everywhere administered. (*a*)

Read (*a*) 18 D. 684, note.

§ 331. Of the Merger of the Courts of Equity and the Courts of Common Law.

In their origin and for many generations the courts of common law and courts of equity were entirely distinct tribunals as to the persons of their judges and other officers, as well as in their jurisdiction and methods of procedure and relief. But during the past century an increasing tendency to the consolidation of these tribunals has manifested itself, and in many of our American States both common law and equity jurisdiction are exercised by the same courts, some preserving the distinction between forms of procedure as well as between modes of relief, while others, though retaining the diverse

methods of relief appropriate to different states of fact, have assimilated their entire procedure to that which always has prevailed in courts of equity. By many of our modern jurists a complete fusion of the two systems is regarded as not only practicable, but desirable and probable; but the Supreme Court of the United States has held that in the Federal Courts, although the persons constituting the tribunal may be the same, yet the distinctions between common law and equity jurisdiction, as to the facts on which they are based and the nature of the remedies they can apply, are under the Federal Constitution permanent and ineradicable. The Judicature Acts of Parliament in A. D. 1873 exhibit the same tendency as operating upon the judicial systems of Great Britain, not, however, as yet to the union of the tribunals by which law and equity powers are exercised.

SECTION IV.

OF THE COURTS OF PROBATE.

§ 332. Of the Nature and Origin of Probate Jurisdiction.

The principal purpose for which courts of probate are established is the settlement of the estates of deceased persons. Every species of property which can survive the death of its owner must necessarily vest in new owners, and these new owners must be designated either by the act of the former owner or by the operation of law. The act by which an owner of property designates the persons who are to become its owners after his death is the making and execution of a will or testament, and the legal right to make a will having this effect has been recognized by most civilized States in all ages of the world. To ascertain whether or not a valid will has been made, and if so to superintend the carrying out of its provisions, and if not to dispose of and distribute the property of the deceased according to law, is the proper function of a court, since it involves the duty of interpreting and applying law, of adjudicating upon conflict-

ing claims, and of enforcing the fulfilment of judicial decrees. In the Saxon period this function was discharged by the county courts in which the bishop of the diocese and the chief secular magistrate of the county sat together as judges. With the separation of ecclesiastical and civil tribunals which took place under the early Norman kings jurisdiction over these probate matters was lodged in the ecclesiastical courts, partly because their methods of procedure were better suited to such cases than those of the common law courts, and partly because the *ordinary*, or bishop of the diocese, was entitled under the law to all the personal property of which its deceased owner might have made disposition by his will and failed to do so. Later the duty of paying the debts of the deceased out of this property was imposed upon the ordinary, and later still the duty of appointing the next of kin to the deceased as an administrator to collect the assets, ascertain and pay the debts, and distribute the remainder to the persons legally entitled to receive it, was prescribed. This jurisdiction continued in the ecclesiastical courts in England until A. D. 1857, when a new secular court of probate was created by statute before which all such matters must be brought.

Read 3 Bl. Com., pp. 61-67, 95-98; Reeve, Ch. ii, pp. 283-288, 312-314; Markby, §§ 803-820.

§ 333. Of the Courts of Probate in the United States.

In this country ecclesiastical courts having authority in civil matters have always been unknown, and as the same affairs required the same judicial supervision here as in England, it became necessary to provide by direct legislation such tribunals and to clothe them with the proper jurisdiction. This was accomplished in some States by conferring probate powers upon existing common law or equity courts, in others by creating new courts of limited and special jurisdiction to which the control of these and kindred matters was confided. Such courts are variously called "probate courts," "surrogates' courts," "orphans' courts," or some equivalent

name indicating the character of the duties they are commissioned to discharge. The scope of the probate powers lodged in these courts is measured by the constitutional or statutory provisions in which they originate, and they have no authority except what has thus been expressly or impliedly bestowed. (*a*)

Read (*a*) 33 D. 227; 58 D. 488, note; 90 D. 122, note.

§ 334. Of the Ordinary and Special Jurisdiction of the Courts of Probate.

The territorial area over which the jurisdiction of these courts extends is generally small. The nature of their transactions is such that every citizen sooner or later becomes pecuniarily interested in them, and they are consequently brought within the reach of all by multiplying their number and giving to each one of them a narrow field of operation. A probate district, as this area is called, is frequently a single township, at most perhaps a county. The methods of procedure in these courts is simple, following very nearly those in use in courts of equity, and are as expeditious and inexpensive as the proper conduct of their business will permit. Moreover, in addition to their probate powers they often have control of lunatics and infants and their guardians, of trust estates, estates in bankruptcy, and other matters formerly included in the administrative jurisdiction of the courts of equity, and which in modern conditions of society require the speedy, economical, and convenient settlement which the probate courts are able to afford.

§ 335. Of the Primary and Ancillary Jurisdiction of the Courts of Probate.

In probate matters the primary jurisdiction of a probate court is confined to the estates of such deceased persons as at the time of their death had their domicile within its territorial jurisdiction. A secondary or ancillary jurisdiction they may exercise over property situated within their territorial

jurisdiction but belonging to the estates of deceased persons who were domiciled in other States and whose estates are being settled in the probate court of their domicile. This ancillary jurisdiction is always in aid of and subordinate to the primary jurisdiction of the court of domicile, and in the absence of such primary jurisdiction the acts of the ancillary court will be invalid. The principal duties of the ancillary court are to ascertain the authority of the foreign executor or administrator to receive the property and to superintend its collection and delivery to him. A probate court may have the same ancillary jurisdiction in reference to extra-territorial guardians and trustees. (*a*)

Read Story, Conf. L. §§ 508-529.

(*a*) 35 D. 472, note.

§ 336. Of the Jurisdiction of the Courts of Probate over Testate Estates.

In the exercise of their primary probate jurisdiction these courts are concerned chiefly with the probate of wills and the settlement of testate estates. The validity of a will depends upon the mode of its execution, the mental capacity of the testator, and the conformity of its provisions to the law. The purpose of the probate of a will is to subject the question of its validity to a judicial inquiry, and if found valid to establish it by a conclusive judgment against all objections to its legal sufficiency. A will must be offered for primary probate to the court in whose jurisdiction the testator had his domicile at the time of his death, and being established there it may afterwards be presented for ancillary probate in any other State in which the property of the deceased may be discovered. (*a*) Upon the probate of a will the executor named therein, or a substitute appointed for him by the court, proceeds to settle the estate according to its terms, receiving such guidance from the court and rendering to it such accounts and returns as his duties under the will or under the provisions of the general law may require.

Read (*a*) 54 D. 515, note.

§ 337. Of the Jurisdiction of the Courts of Probate over Intestate Estates.

An intestate estate is one of which the deceased owner has made no testamentary disposition. The law provides for the distribution of such estates among the creditors and relatives of the deceased, and for the purpose of securing this distribution vests in the probate court of his domicile authority to appoint an agent or administrator to collect, preserve, and, if necessary, to sell the property, and to apply it to its designated uses. This administrator is the servant of the probate court and acts under its direction, reporting to it his various proceedings and filing among its records an account of his disbursements and receipts. (a) The acceptance and approval of these accounts and reports by the court is in the nature of a judgment as to their correctness and cannot be collaterally attacked. (b)

Read 2 Kent, Lect. xxxvii, pp. 408-436; Walker, Lect. xviii.

(a) 18 D. 110, note; 30 R. 746, note; 47 R. 458, note; 52 St. 116, note.

(b) 14 D. 642; 48 D. 742, note; 60 D. 335, note; 24 St. 399.

§ 338. Of the Jurisdiction of the Courts of Probate over Guardians and Trustees.

As a general rule, when a probate court has jurisdiction over guardianships and trusts its jurisdiction in particular cases is determined by the domicile of the ward or the location of the property. In the appointment of trustees and guardians it is its duty to select persons of ability and integrity, to hold them to a strict performance of their duties, and to preserve their returns and accounts among its records. It may remove them for misconduct, or permit them to resign and appoint others in their stead. In some States it may enforce their compliance with its orders by an attachment for contempt; in others only by their removal and by suit upon their bonds. (a)

Read (a) 73 D. 555, note.

§ 339. Of the Importance of Courts of Probate.

The probate courts, although of limited and special jurisdiction, are among the most important of our judicial tribunals. Eventually all property passes through their hands, and every person having or acquiring property becomes subject to their decrees. At any given moment a large proportion of the interests of the entire community are under their control, and to their successful management is due in a great measure the security of estates and the stability of families. Their records, in connection with the land records of the country, furnish a detailed history of the accumulation and transmission of real and personal property, of great value to the lawyer, of deep interest to the economist, and full of unexplored secrets for the genealogist and statistician.

SECTION V.**OF THE COURTS OF ADMIRALTY.****§ 340. Of the Nature of Admiralty Jurisdiction.**

The courts of admiralty have jurisdiction over controversies arising out of maritime affairs. So far as the essential nature of these affairs is concerned they might, equally with any others, be within the cognizance of local courts of law or equity. A ship and its cargo are personal property, and as such might be governed by the same law which controls other personal property. An agreement between the master of a vessel and his crew, or between its owner and the shippers or consignees of its freight, or a wrong by one of these against the others, does not differ as a mere tort or contract from similar transactions relating to commerce upon land. But maritime affairs, being conducted upon the sea, often involve the interests of citizens of divers countries whose local laws are quite unlike to one another, and these must have some common standard by which their reciprocal rights and duties can be measured, and some common tribunal to which they can

all resort and with whose methods of procedure all can be familiar. Moreover, the redress for injuries which these tribunals can afford must take some other form than decrees and orders against persons who, being inhabitants of foreign States, are beyond the reach of any process by which such orders and decrees can be enforced. Most maritime affairs relate to vessels and their cargoes, — the navigation of the one, the transportation of the other, — and it is only when, by treating the vessel or the cargo as a party to the tort or contract, the courts in any port into which she enters, and where she may conduct her maritime affairs, can acquire jurisdiction by seizing her, and can enforce their judgments by her sale and the appropriation of her proceeds to the satisfaction of the injured parties, that any adequate and certain remedy for their wrongs can be obtained. But such proceedings are unknown in courts of common law, and can be resorted to in equity only in the rarest cases and when some sort of jurisdiction over the parties interested in the property can be obtained. For these two reasons, — the necessity in all commercial countries for courts of universal jurisdiction and of uniform procedure, and for a remedy against the *res* or thing out of whose use the controversy grows, — the admiralty courts have been established with powers by which they are enabled to administer justice between the parties to a maritime controversy in whatever portion of the globe they may reside. (*a*)

Read (*a*) 12 D. 508, note; 62 D. 214, note.

§ 341. Of the Origin and Development of Admiralty Jurisdiction.

The law of shipping and admiralty had its origin in the customs of the early navigators of the ancient world. These usages, resulting from sound reason and sagacious instinct applied to maritime affairs, were recognized and accepted by one nation after another until they have become the law wherever commerce on the sea prevails. These usages were first collected, digested, and promulgated as laws by the mariners of

Rhodes, who were the masters of the seas nine hundred years before the birth of Christ. Athens and Rome received the Rhodian laws as part of the law of nations, and by them for many centuries all the maritime transactions of the Mediterranean and Atlantic coasts were governed. After the destruction of the Roman Empire new codes of sea-laws were compiled; one by the republic of Amalfi in Italy about the close of the eleventh century and called the Amalphytan Table; another at Barcelona known as the Consolato del Mare; another at the Island of Oléron in France, thence styled the Laws of Oléron; another at Wisbuy, a commercial city on the Baltic, about A. D. 1288; and still another by the Hanseatic League in A. D. 1614. All these codes were built upon the foundation of the Rhodian laws, with alterations and additions necessary to adapt them to the needs of mediæval commerce. In A. D. 1681 they were in a great measure superseded by the French "Marine Ordinance," which was framed and published under the auspices of Louis XIV. In it the whole law of shipping was systematically arranged, and it has always been regarded as a perfect code of maritime jurisprudence. In England and the United States no such formal statement of the law has ever been attempted. Their admiralty courts have followed the principles and rules contained in the continental codes so far as these appeared consistent with the commercial interests of their respective nations, and the decisions of those courts in connection with the Acts of Congress relating to maritime affairs now form the body of our admiralty law. The maritime law thus has a written history of nearly three thousand years, and from that early date still reaches backward into an unknown past. In spite of its mutations and development its great principles and usages have undergone no substantial change. It does not lie within the power of any nation to vary its essential provisions. It rests on the common consent of all commercial States, and is presumed to be binding on every vessel until the contrary is proved. In its administration it is treated by the admiralty courts of all civilized countries with the respect due to the law of nations, to which class it properly belongs, since, though it affects mainly private in-

terests, these interests are within the immediate protection of the State under whose flag the commerce is conducted. (*a*)

Read 3 Bl. Com., pp. 69, 70; 3 Kent, Lect. xlii, pp. 2-21.

(*a*) 14 Wall. 170 (187, 188); 105 U. S. 24; 130 U. S. 527; 141 U. S. 1.

§ 342. Of Maritime Torts and Contracts.

Maritime affairs, over controversies arising out of which admiralty courts have jurisdiction, are affairs directly connected with commerce upon waters forming a highway between different States. The civil injury in which the controversy originates must be a marine tort or the breach of a marine contract. A marine tort is a wrongful action or omission occurring on the waters over which the commerce is carried on. (*a*) A marine contract is a contract concerning the commerce itself. (*b*) Contracts relating to something hereafter to be employed in commerce, like a contract to build a ship, or relating to the results of past commerce, like the agreement of the owners of a vessel to account to one another for the profits of a voyage, are not marine contracts, and a breach of these is actionable only in courts of equity or common law. (*c*) But a contract to repair a ship already engaged in commerce in order to enable her to proceed to her destination, or a contract between the master and the crew who are to navigate the ship, are maritime in character, and are within the cognizance of admiralty courts. Admiralty jurisdiction is sometimes spoken of as extending over certain waters, and again is said to embrace the controversies, not the waters. Its jurisdiction over torts, and, where it has jurisdiction over crimes, of these also, is determined by locality, and in reference to these is therefore measured by the waters; over contracts it is determined by the maritime subject-matter of the contract wherever the contract itself may have been executed. The waters which in this sense are within the jurisdiction of the admiralty courts include every body of water which in its natural state is large enough to afford passage for vessels suitable for use in commerce, and is so connected with other waters as to provide an

uninterrupted highway from one State to another, together with such artificial waters as may form the connecting links between them. In England only tidal waters answer this description, and in this country also admiralty jurisdiction was at first confined to waters affected by the tides, but now extends to inland lakes and rivers not connected with the sea. Any commerce in such waters, though it be confined to ports of the same State, gives to the contracts which it involves a marine character, and brings them within the cognizance of admiralty courts. (*d*)

Read 3 Bl. Com. pp. 106-108.

- (*a*) 23 How. 209 (215, 216); 13 D. 564, note; 95 D. 722; 105 U. S. 626; 1 Black, 574; 114 U. S. 355.
- (*b*) 7 Wall. 624; 20 How. 162; 13 R. 270, note.
- (*c*) 21 Wall. 532; 20 How. 393; 11 Pet. 175; 22 How. 330.
- (*d*) 20 Wall. 430; 11 Wall. 411; 12 Pet. 72; 20 How. 296; 8 Wall. 15; 4 Wall. 555.

§ 343. Of the Concurrent Jurisdiction of the Courts of Admiralty and the Courts of Equity and Common Law.

The jurisdiction of the admiralty courts over maritime affairs is not, however, necessarily exclusive of that of the courts of equity and common law. A marine tort or contract is in its tort or contract character like any other tort or contract, and when process issuing from an ordinary court can bring all the parties within its jurisdiction, and a judgment for damages or an enforced decree in equity would meet the requirements of the situation, the suitors are not compelled to institute proceedings in the admiralty courts merely because the contract was connected with commercial operations or the tort was committed upon waters within the admiralty jurisdiction. (*a*) But when no adequate relief can be obtained without a suit against the ship itself, this proceeding must be brought before the admiralty courts, no other courts being capable of entertaining such an action. (*b*)

Read (*a*) 26 D. 507; 32 D. 54, note; 16 Wall. 522; 74 D. 463.

(*b*) 11 Wall. 185; 16 St. 292.

§ 344. Of the Topical Jurisdiction of Courts of Admiralty.

The principal classes of actions brought before the admiralty courts are the following: (1) Prize cases, for the determination of the title to vessels captured in war (*a*); (2) Cases arising out of the seizure of vessels or cargoes for the violation of revenue laws (*b*); (3) Cases of collision between vessels on navigable waters (*c*); (4) Cases concerning the possession or ownership of vessels already engaged in commerce (*d*); (5) Cases involving a maritime lien, that is, a lien upon the movable property employed in commerce and to the existence and continuance of which, unlike a common law lien, the possession of the property subject to the lien is unnecessary (*e*); (6) Cases arising out of charter-parties, or contracts for the hiring of vessels (*f*); (7) Cases based on contracts for the navigation, provisioning, repair, custody, loading or unloading of vessels; (8) Cases of marine insurance (*g*); (9) Cases of salvage, or claims for compensation for the voluntary rescue of ships and cargoes from marine perils (*h*); (10) Cases concerning claims for pilotage, wharfage, towage, freight, passenger fares, and demurrage or pay for the unreasonable detention of a vessel at the port of discharge through the failure of the consignee to take away her cargo (*i*); (11) Cases growing out of injuries of any kind, by violence, negligence, or otherwise, to persons or property while actually upon the water, — as an assault on board a vessel, or injury to the vessel from collision with a pier, but not when the wharf is damaged by the vessel or the assault takes place on shore, or any other harm is done on the land by causes which commence but do not produce injurious effects upon the sea. (*j*)

Read (*a*) 2 D. 634.

(*b*) 9 Wheat. 421.

(*c*) 114 U. S. 355.

(*d*) 18 How. 267.

(*e*) 7 Wall. 624; 10 Wall. 204; 6 Wall. 213.

(*f*) 23 How. 491.

(*g*) 11 Wall. 1.

(*h*) 59 D. 431.

(*i*) 13 Wall. 236.

(*j*) 3 Wall. 20; 5 How. 441; 6 How. 344.

§ 345. Of Admiralty Jurisdiction in Rem.

The chief peculiarity and advantage of courts of admiralty is the proceeding *in rem* by which the vessel itself is made a party to the suit and subjected to the claims of creditors and other injured parties. (a) This proceeding may be instituted in any admiralty court where the vessel may be found. (b) It requires that the vessel be within reach of process and be actually taken into the custody of the law. (c) With it may be joined a proceeding *in personam* against the owners or other parties whenever they also can be brought within the jurisdiction of the court. All parties in interest are entitled to such notice of the seizure of the property as the court is able to give, and if any of them appear the property may be released upon the substitution of sufficient security. If judgment is rendered against the vessel it is conclusive everywhere and against all persons who have any interest in her or claim upon her, and when she is sold her proceeds are deposited in the *register*, or record office of the court, for distribution among those to whom the court may find that they belong. (d) The title of the purchaser at such a sale is absolute, and not embarrassed by any liens or obligations existing prior to the sale. (e)

Read (a) 75 D. 714, note.

(b) 4 Cranch, 2; 4 Cranch, 241; 1 Black, 574 (580, 581).

(c) 23 Wall. 458; 99 D. 556.

(d) 3 How. 568.

(e) 2 D. 61; 16 D. 199; 48 D. 590.

§ 346. Of Proceedings in Admiralty.

The pleadings and procedure in admiralty courts are very similar to those in equity. They are commenced by filing with the clerk a petition or libel in which the libellant sets forth his cause of action in distinct propositions or articles and in ordinary language, and prays for process against the vessel or the libellees or both and for such relief as his cause demands. The adverse parties, if any appear, present their answer in a similar way; the libellant amends his libel to

meet the answer if he so desires; and on the issues thus created the cause is tried and decided by the court. Any persons interested in the property as lienors, lessees, or otherwise may apply to the court for the protection of their interests, and will be permitted to become parties to the suit so far as may be necessary to secure their rights. (a) The decisions of admiralty courts are guided by broad principles of equity and justice rather than any technical rules, and the flexibility of their procedure enables them to apply their remedies to any aspect which cases may present. From such decisions in inferior courts of admiralty an appeal lies to higher courts in which the merits of the case can be reviewed. (b)

Read Walker, Lect. xxxix.

(a) 1 Pet. 517.

(b) 5 Cranch, 281 ; 19 Wall. 73.

§ 347. Of the Courts Exercising Admiralty Jurisdiction in England and the United States.

In England before the Revolution admiralty jurisdiction was vested in a special court established in the reign of Edward III., and presided over by the Lord High Admiral. In the American colonies at the same time vice-admiralty courts existed with similar jurisdiction, but from which parties could appeal to the High Admiral's court in the mother country. By the Constitution of the United States all cases of admiralty and maritime jurisdiction were made judicially cognizable by the Federal courts, and this jurisdiction has been uniformly held to be exclusive as to all cases of prize and all marine torts and contracts when the proceeding is *in rem*. Congress in establishing the Federal courts and distributing among them the judicial powers of the United States, has confided these cases to the District Courts, with appellate jurisdiction in the Circuit Courts, and in these tribunals all purely admiralty jurisdiction in this country now resides. (a)

Read (a) 13 Wall. 389 ; 21 Wall. 558.

SECTION VI.

OF COURTS MARTIAL, MILITARY COURTS, AND PROVISIONAL
COURTS.

§ 348. Of Courts of Extraordinary Jurisdiction.

The foregoing courts afford effective and abundant remedies for the redress of public and private wrongs in civil life and in the times of peace. But for the punishment of offences against the rigid rules by which the military and naval forces of the State are governed, and for the administration of justice in those periods of political disturbance when in the presence of arms all laws are silent, other tribunals become necessary which, being clothed with extraordinary powers and guided by the judicial discretion of the moment rather than by settled principles of law, will be able to meet the emergency, however great it may be, and hold the scales of justice even until peace can be restored. These courts as recognized and exercising jurisdiction in this country are known as Courts Martial, Military Courts, and Provisional Courts.

§ 349. Of Courts Martial.

Courts Martial are tribunals established for the trial of offences committed by persons connected with the army or navy in violation of the provisions of military law. Military Law is the law governing the military forces as a separate community. Its rules are prescribed by the State and become obligatory upon the individual when he enlists or is conscripted into the public service. (a) They are necessarily burdensome and imperative, and any offence against them requires a punishment at once summary and severe. The trial of persons accused of such offences must often be immediate and be conducted at the place where the offence occurred, and by such competent judges as can be trusted with the infliction of the penalty of death. Courts Martial com-

posed of military or naval officers selected by the commander in pursuance of the Military Law, conversant from long experience with the rules against which the alleged offence has been committed, easily convened whenever the occasion may arise, pursuing their investigations by direct and expeditious methods, are the tribunals to which such cases are committed by modern nations. These courts are of limited and special jurisdiction. In this country they rest wholly upon Acts of Congress, and have no jurisdiction over persons not enrolled or liable to be enrolled in the army or navy of the United States. Their action is subject to the approval of the commanding officer and sometimes of the President, whose authority to ratify or set aside their judgment is judicial and therefore cannot be delegated. (b) Where a Court Martial assumes unwarrantable jurisdiction over any person he may be released by *habeas corpus*, the judgment of the court may be reversed by the civil courts, and damages recovered against all parties who participated in the wrong. (c) But its determinations within its jurisdiction are conclusive and cannot be collaterally attacked on the ground that no offence existed or was proved. (d)

Read 1 Bl. Com., pp. 408-421; Cooley, C. Law, Ch. vi, p. 156.

(a) 137 U. S. 147.

(b) 122 U. S. 543; 97 U. S. 509.

(c) 20 How. 65.

(d) 165 U. S. 553.

§ 350. Of Military Courts.

Military Courts are temporary tribunals organized to try offences against Martial Law and the Laws of War in periods of public disturbance when the ordinary courts become unable on account of the disturbance to perform judicial duties. Martial Law is the body of rules established by a military commander at the actual theatre of military operations or in any other district where the popular sentiment in favor of peace and order is so far destroyed that the courts cannot

exercise their usual jurisdiction, and consequently the ordinary provisions of the law cannot be enforced. Martial Law binds all persons within the disturbed district whether they are citizens or soldiers, and may include any rules which in the judgment of the military commander who declares it may be necessary for the protection and preservation of the community or for the prevention of acts of hostility against the State. (a) The Laws of War are those provisions of international law which control the conduct of military operations and the reciprocal relations of an invading army and the inhabitants of the hostile territory into which it has advanced. The jurisdiction of a Military Court over offences against Martial Law is measured by the same necessity which justifies the promulgation of the law. Any offence, not purely of a military character, of which the civil courts are then able to take cognizance falls within their exclusive authority, and in proportion as order is restored and judicial tribunals can again discharge their functions the scope of Martial Law and the authority of Military Courts must be restricted until they wholly disappear.

Read Cooley, C. Law, Ch. vi, pp. 156, 157.

(a) 42 D. 51, note; 92 D. 159, note; 4 Wall. 2.

§ 351. Of Provisional Courts.

Provisional Courts are temporary courts established by a conquering State in conquered territory occupied by its military forces, for the purpose of preserving order and protecting persons and property until the normal operations of the civil government can be resumed. These tribunals closely resemble military courts, and the laws which they administer depend largely for their character and obligation upon the military authority within whose grasp the territory is held. The municipal laws of the region may be respected and their application may be entrusted to the local magistrates, or other laws and other courts may be created in their place; or civil rights and remedies may be entirely suspended and for them martial

law and military tribunals may be substituted. The commander of an army of occupation is always for the time being a *de facto* government, the institutions erected by him depend upon his own discretion, and his acts are subject to be reversed only by his military superiors or their common sovereign. (a)

Read (a) 22 Wall. 276.

SECTION VII.

OF THE FEDERAL AND STATE COURTS.

§ 352. Of the Federal Courts.

The courts in this country are politically divisible into two groups: (1) The Federal Courts; and (2) The Courts of Individual States and Territories. The Federal Courts administer justice in the name and under the authority of the United States. They are established by the Federal Constitution or, in pursuance of the Constitution, by the Acts of Congress, and are wholly independent of the laws of any of the individual States. (a) The jurisdiction of these courts, according to the Constitution, extends to all cases in law and equity arising under the Constitution or the laws of the United States and treaties made under their authority; to all cases affecting ambassadors, public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States, or between a State and citizens of another State, or between citizens of different States, or between citizens of the same State claiming lands under grants of different States, or between a State or the citizens thereof and foreign States, citizens, or subjects. This general jurisdiction has been distributed by successive Acts of Congress through a system now composed of six courts: (1) The Supreme Court of the United States; (2) The Circuit Courts of Appeals; (3) The Circuit Courts; (4) The District Courts; (5) The Court of Claims; (6) The Courts of the District of Columbia. The jurisdiction of the Supreme Court is fixed by the Consti-

tution ; that of the inferior courts is changed from time to time by statute as public convenience may require.

Read 1 Kent, Lect. xiv, pp. 290-297, 306-311, Lect. xvi, pp. 343-352; Cooley, C. Law, Ch. iii, pp. 52-54, Ch. vi, pp. 123-128, 129-130, 145-148; Walker, Lect. viii, pp. 10), 115-120.

(a) 9 Pet. 632; 6 Wall. 247; 5 Cranch, 115; 11 Pet. 175; 18 How. 517; 20 How. 170 (175); 100 U. S. 257.

§ 353. Of the Supreme Court of the United States.

The Supreme Court of the United States has original jurisdiction over all cases affecting ambassadors, public ministers, and consuls, and those in which a State may be a party. In other cases its jurisdiction is appellate only. It may entertain appeals directly from the Circuit and District courts in controversies concerning the jurisdiction of the court, in prize cases, in criminal cases involving the infliction of capital or infamous punishment, in cases necessitating the construction and application of a provision of the Constitution or a treaty or an Act of Congress, or where antagonism appears between a State law and the laws of the United States. From the Circuit Court of Appeals an appeal lies to the Supreme Court where the amount in controversy exceeds one thousand dollars except in patent, revenue, admiralty, and criminal cases and cases where the only ground of Federal jurisdiction is the different citizenship of the parties. Any question, however, may be presented by the Circuit Court of Appeals to the Supreme Court for final decision when its difficulty and importance warrant such an application.

Read 1 Kent, Lect. xiv, pp. 298-301, 312-330; Walker, Lect. viii, pp. 120-122; Cooley, C. Law, Ch. vi, pp. 128, 129.

§ 354. Of the Circuit Courts of Appeals.

The Circuit Court of Appeals is a tribunal established by the Act of 1891 to relieve the Supreme Court from the heavy burdens imposed upon it by the rapidly increasing number of appeals from lower courts, both State and Federal. It has no

original jurisdiction. All appealed cases except those within the exclusive cognizance of the Supreme Court may come before it, and in reference to many of these its decision is final.

§ 355. Of the Circuit Courts.

The Circuit Courts have original jurisdiction over all cases at common law or equity in which the amount in controversy exceeds two thousand dollars besides the interest and costs, and in which the interpretation of the Federal Constitution or an Act of Congress or a treaty is required (*a*); or in which the United States is the plaintiff, or the parties are citizens of different States (*b*) or are citizens of the same State claiming the same land under grants from different States; or where the suit is brought by a citizen of the United States against a foreign State or its citizens; or where any person has a cause of action against the United States in which the claim exceeds one thousand dollars and is less than ten thousand dollars; or where a suit in equity is necessary to protect a trust and the case is otherwise within Federal jurisdiction; or where the case arises under the patent, copyright, or revenue laws or other special statutes; or where crimes have been committed against the laws of the United States; provided always that the controversy is not within the exclusive jurisdiction of any other Federal court. The appellate jurisdiction of these courts was formerly extensive, but has now been transferred to the Circuit Court of Appeals.

Read 1 Kent, Lect. xiv, pp. 301-303; Walker, Lect. viii, pp. 123, 124.

(*a*) 128 U. S. 586; 153 U. S. 411 (424).

(*b*) 119 U. S. 469.

§ 356. Of the District Courts.

The District Courts have original jurisdiction over all admiralty and maritime controversies; over all suits at common law by the United States or its officers; over actions by aliens for violations of international law; over equitable proceedings to enforce liens of the United States for revenue

taxes; over suits for penalties and forfeitures due to the United States; over torts committed against the civil rights of persons of color in violation of Constitutional Amendments; over claims against the United States not exceeding one thousand dollars; over all matters in bankruptcy under the Bankrupt Acts of Congress; over crimes against the United States which do not incur capital or infamous punishment; and over the capital offence of piracy when there is no Circuit Court in the District. (*a*)

Read 1 Kent, Lect. xiv, pp. 303-305, Lect. xvii, pp. 353-384;
Walker, Lect. viii, pp. 124, 125.

(*a*) 8 Wheat. 391; 3 Dall. 6.

§ 357. Of the Court of Claims, and the Courts of the District of Columbia.

The Court of Claims is a court established for the investigation and adjustment of claims against the United States. Its jurisdiction is confined to cases based on express contracts, or on circumstances from which a promise to pay money is implied, or on statutes which provide for compensation from the Federal government to parties by whom injuries have been sustained. (*a*) The Courts of the District of Columbia bear the same relation to that portion of the United States as the courts of individual States do to their respective territories. They exercise both common law and equity jurisdiction over all cases of contract, tort, or crime in which the persons or property within the District are involved. They also exercise judicial powers in special cases of a wider character arising under Federal laws without reference to the residence of parties or the situs of the property.

Read (*a*) 5 Wall. 419; 11 Wall. 199; 14 Wall. 531; 91 U. S. 270; 112 U. S. 193; 174 U. S. 373.

§ 358. Of the Concurrent Jurisdiction of Federal Courts and State Courts.

Except where controversies are placed by the Federal Constitution, or the Acts of Congress in pursuance of the Con-

stitution, within the exclusive jurisdiction of the Federal courts the State courts have concurrent jurisdiction over them, and to whichsoever jurisdiction the controversy may be first submitted it must be there determined unless removed by proper legal methods to the other. (*a*) The field of this concurrent jurisdiction is still extensive, although it is within the constitutional powers of Congress to restrict it or even to confer exclusive jurisdiction on the Federal courts over all matters in reference to which the Constitution bestows judicial authority on the United States.

Read 1 Kent, Lect. xviii, pp. 395-404.

(*a*) 85 D. 316, note; 139 U. S. 240; 6 Wall. 166; 9 Wall. 415; 11 Wall. 136; 57 D. 65, note; 67 D. 89, note.

§ 359. Of the Common Law and Equity Powers of the Federal Courts.

All Federal courts possess both common law and equity powers commensurate with the subjects-matter which are within their jurisdiction. In applying to the controversies brought before them the principles of Unwritten Law they follow, so far as their view of a sound public policy will permit, those rules and doctrines which are recognized in the State where the controversy arose and by whose law it would have been determined had not the matter been within the jurisdiction of the Federal courts. (*a*) In equity proceedings they adopt the remedies and methods of the English courts of chancery, irrespective of the departures therefrom of the equity systems of the different States: (*b*) In the trial of causes at common law they observe, when reasonable and convenient, the forms of pleadings, rules of evidence, and general procedure which are current in the State where the Federal court is held. (*c*)

Read (*a*) 140 U. S. 106.

(*b*) 3 Wheat. 212; 13 How. 518 (563); 21 How. 481; 150 U. S. 202.

(*c*) 10 Wheat. 1; 10 Wheat. 51; 113 U. S. 713; 146 U. S. 202; 12 How. 361; 2 Black, 535.

§ 360. **Of the Limited Topical Jurisdiction of the Federal Courts.**

All Federal courts are courts of limited but not inferior jurisdiction. (*a*) They have no cognizance of controversies outside the classes of cases enumerated in the Federal Constitution. Their jurisdiction, therefore, does not extend to probate matters, nor to questions concerning divorce and alimony, nor to any suit arising under the penal laws of any State, nor to any prosecution for an offence against the Unwritten Law, unless in some manner the interpretation and application of a provision of the Federal Constitution or an Act of Congress or a treaty enters into the case as an essential feature, necessary to its judicial determination. (*b*) The spheres of the State Courts and the Federal Courts are and were intended to be entirely distinct. Neither can trench upon the jurisdiction of the other, and even where they have concurrent jurisdiction they are still entirely independent courts, and after one of them has once obtained judicial cognizance of any case which might, had the plaintiff chosen, been brought before the other, that other cannot interfere with the proceedings instituted in the first court nor take any action in the controversy until the case has, by a regular process of removal, been submitted to its jurisdiction. (*c*)

Read (*a*) 10 Wheat. 192 (193, 200); 94 U. S. 455.

(*b*) 18 How. 470; 21 How. 582; 7 Cranch, 32.

(*c*) 24 How. 450; 3 Wall. 334; 111 U. S. 176; 112 U. S. 294.

§ 361. **Of the Territorial Jurisdiction of the Federal Courts.**

The Federal Constitution and the Acts of Congress also define the territorial jurisdiction of the Federal Courts. The Supreme Court and the Court of Claims sit only at Washington, and their territorial jurisdiction is coextensive with the United States. The Circuit Courts of Appeals, the Circuit Courts, and the District Courts exercise their functions with reference to more limited areas; the District Courts in small judicial subdivisions of the United States, sometimes iden-

tical in area with a single State, the Circuit Courts of Appeals and Circuit Courts in groups of contiguous districts, of which groups or circuits there are at present nine. Except in special classes of cases a Circuit Court or District Court has no original jurisdiction unless the property in question is located or the adverse party resides within its territorial jurisdiction. (*a*)

Read (*a*) 139 U. S. 240.

§ 362. Of the State Courts and Territorial Courts.

Among the individual States of the American Union there is no uniformity either as to the number or the organization of their courts. In every State there is some supreme tribunal by which all questions as to the interpretation of its laws, and their applicability to given states of fact, are finally and conclusively determined. Under these are one or more inferior courts in which all cases, civil or criminal, at law or in equity, which are not within the exclusive jurisdiction of the Federal courts, may be heard and decided. The mode in which these courts may be created, their particular jurisdiction, the appointment or election of their judges, their terms of office and their duties, are matters upon which each State has legislated for itself, and still from time to time exercises its reorganizing powers. The courts of Territories not yet developed into States resemble those of individual States, except that they are established and their officers are appointed by the Federal authorities. (*a*)

Read 1 Kent, Lect. xvii, pp. 384-386; Cooley, C. Law, Ch. vi, pp. 155, 156.

(*a*) 9 How. 235; 18 Wall. 648.

§ 363. Of Writs of Error, and the Removal of Causes, from the State Courts to the Federal Courts.

Although in territorial jurisdiction and in jurisdiction over persons and subjects the Federal Courts and State Courts are entirely independent of one another, yet in reference to all

controversies to which the judicial power of the United States extends, and as to which the State courts exercise concurrent jurisdiction only by the concession or the acquiescence of the Federal government, the State courts are in such a manner inferior to the Federal courts that their action in these controversies may be reviewed or superseded by the action of the courts of the United States. Congress has provided two methods for this reviewal or substitution of authority: (1) By a writ of error from the decision of the State court to the Supreme Court of the United States; (2) By the removal of the case, after its institution and before judgment, from the State court to the proper Federal court at the suggestion of the parties. The writ of error to the Supreme Court lies where the controversy has been submitted to the highest court of the State, and that court has rendered a judgment which necessarily involves a denial of the validity of some treaty, statute, or official authority of the United States, or of some title, right, privilege, or immunity claimed under the Constitution, statutes, treaties, commissions, or concessions of the United States, or asserts the validity of some State statute or authority which is alleged to be repugnant to the Constitution, treaties, or statutes of the United States. The removal of the case from the State to the Federal court takes place as a matter of right where the controversy arises under the Constitution, statutes, or treaties of the United States and is within the original jurisdiction of the Circuit Courts; or where the controversy is within the original jurisdiction of the Circuit Courts and the defendant is not a resident of the State in which the suit is brought; or where none of the defendants are citizens of the same State as the plaintiff; or where some of the defendants are citizens of a different State from the plaintiff, and the controversy is severable as to them, and they affirm that a fair trial is impossible in the State court in which the suit has been commenced (*a*); or where the controversy relates to the title to land claimed by the adverse parties under grants from different States; or where the suit arises out of the denial or violation of the equal civil rights guaranteed by the Constitution and laws of the United States:

or where the official acts of revenue officers of the United States and the rights of persons claiming title under them are so attacked as to call in question the validity of the laws under which they acted; or where an alien sues a civil officer of the United States who at the institution of the suit was not a resident of the State in which the suit was brought. The facts which confer the right to remove being made apparent on the face of the papers, the State court cannot hinder the removal, but must forthwith transmit the case to the proper Federal court which thereafter exercises over it an exclusive jurisdiction.

Read Cooley, C. Law, Ch. vi, pp. 139, 145.

(a) 120 U. S. 223; 127 U. S. 322; 130 U. S. 230.

§ 364. Of the Future Development of the Judicial Systems of the United States.

The judicial systems of this country have apparently by no means reached their final stage of development. Great changes have taken place in the organization and jurisdiction of both State and Federal courts during the past generation, and many further changes must be made before the administration of justice through these judicial tribunals reaches that perfection of simplicity, expedition, economy, and certainty which the political and social interests of a great commercial people like our own demand. With exclusive jurisdiction lodged in the Federal courts over all matters to which the judicial authority of the United States extends, with the reduction of the laws and courts of all the States to one homogeneous system differing only as to the territorial area within which their legislative and judicial powers were exercised, and with an improved procedure framed upon true business models, the hope for such perfection might not be long unrealized.

CHAPTER XI.

OF FICTIONS AND PRESUMPTIONS

§ 365. Of the Meeting of Law and Fact in the Borderland of Fictions and Presumptions.

The application of law to facts constitutes government, or the enforcement upon the subject of the rules of conduct dictated by the reason and imposed by the will of the sovereign. Government is the transmutation of law into life, the embodiment of the wisdom and authority of the State in the acts and forbearances of the citizen. The dividing line between law and fact across or through which this transmutation takes place, however sharp and clear it may be in theory, is not capable in practice of exact demarcation. The law as a vital force flows over into and permeates the realm of fact, forming a borderland of legal doctrine in which the elements of law and fact are so commingled that neither can be contemplated separately from the other. This borderland is the field of fictions and presumptions in which facts recognized by law may not exist, and rules of law, no longer pure commands or prohibitions, create the conditions to which they themselves apply.

§ 366. Of the Necessity for Fictions and Presumptions.

The interposition of this middle ground between the spheres of simple fact and simple law has sometimes been regarded as arbitrary and absurd. But on reflection it will easily be seen to be both natural and necessary. There are many states of fact which in their character and extent are so invariable and so easily comprehended as to be within the common knowledge of mankind. They need no explanation; they require no proof. To facts like these the law annexes inflexible and universal rules, and to avoid foolish disputation and unending

controversies neither permits the rules to be questioned nor the facts to be denied. Other states of fact occur which in so large a proportion of instances are uniform in nature and effect that, although subject to possible exceptions, they are for the same reasons regarded as possessing their usual characteristics and leading to their ordinary legal results until their exceptional features have been affirmatively shown. Still other states of fact exist which are so difficult of comprehension by any human lawgiver, or in their real character are so incapable of being brought within the influence of practicable rules, that no rule at all can be devised to meet them unless an artificial character is imputed to them by the law, in view of which a just and reasonable rule to govern them can be made. Thus is the law compelled, in the last state of facts by necessity and in the two former by expediency, to take possession of these portions of the field of fact, and either to substitute its own conceptions for them, or to incorporate itself with them in rules which cannot be gainsaid or can be departed from only where the objector is permitted and is able to demonstrate that they are exceptions to the general nature of the class of facts to which they belong. These are the assumptions and conclusions of the law to which are given the names of Fictions and Presumptions. They constitute a necessary and essential ingredient in the law. They form the connecting medium between pure law and pure fact, through which the former enters into and controls the latter with an efficiency, economy, and certainty that in no other manner yet conceived could be attained.

Read Best, Part i, Ch. i. pp. 1-16.

SECTION I.

OF LEGAL FICTIONS.

§ 367. Of the Nature of Legal Fictions.

A legal fiction is a conclusion of law necessitated by justice though contrary to truth, which is adopted because the actual condition of the facts places them beyond the reach of law,

or because the law if applied to their actual condition would inevitably work a wrong.^(a) Thus, for example, no law not proceeding from divine wisdom could fitly regulate the multitudinous relations, rights, and obligations of husbands and wives, if they were regarded as the independent, self-directing personalities which they truly are. The law therefore grapples with the problems which the marital relation presents by assuming at the outset what is certainly untrue, namely, that by the act of marriage the personality of the wife is merged in that of the husband, and thenceforth treats them as a single though fictitious person whose rights and duties are definable by comparatively few and simple rules. Again, the ownership of land by several disconnected parties presents questions which are practically insoluble if the land itself, as a unitary physical object, is considered as the subject-matter in which the rights of the various parties inhere. By assuming that the subject-matter of each individual ownership is not the land but an abstract estate or interest which, although a unit in reference to its owner, attaches to the land collectively with all the other estates or interests in its due legal order and subordination, the law is able to control and protect the rights of all the parties, however numerous and varied their estates or interests may be.

Read Best, Part i, Ch ii, p. 24.

(a) 38 D. 644.

§ 368. Of the Falsehood and Possibility of the Facts Assumed in a Legal Fiction.

The facts assumed in a legal fiction, although the assumption is avowedly untrue, must be in their nature possible. That which is always and in every case impossible the law cannot stultify itself by treating in any case as true. Hence if the fiction be a physical fact it must not be opposed to the known laws of nature, though it may never yet have fallen within the limits of human experience; if it be an abstraction, a mere legal entity, it must not be unreasonable and absurd.

Thus in the two examples already given, where the fictions are not physical facts, it is not contrary to reason to impute a single personality — that is, a unitary controlling mind and will — to the husband and his wife, or various separate estates to the independent owners of interests in land, although corporeally the wife and husband are necessarily distinct and the assumed estates can exist only in contemplation of law. But if these fictions were extended to embrace the physical identity of married persons, or the subjection of estates to manual dominion, they would assert impossible conditions, and in reference to such conditions they would not be allowable in law.

Read Best, Part i, Ch. ii, p. 26.

§ 369. Of the Subordination of Legal Fictions to Essential Justice.

The purpose of a legal fiction is the advancement of justice. It must, therefore, be innocent and beneficial, preventing inconvenience and remedying evils, and never be permitted to work an injury. In fabricating them the principles of equity are always to be recognized, and in interpreting and applying them they must not be extended beyond the ends for which they were invented. Within these limits the facts assumed cannot be contradicted; beyond them the fiction ceases and the actual truth may be affirmed.^(a) Thus the fiction that a husband and wife are one person was intended for the protection of the person and property of the wife, as well as for the general advantage of the husband and of society at large. But when a wife has property over which the law forbids her husband to exert control, and which unless she has a separate personality can therefore have no owner, the fiction lapses and she is treated, so far as that property is concerned, as an independent person with the same rights and privileges as if she were unmarried.

Read Best, Part i, Ch. ii, p. 25.

(a) 26 D. 232.

§ 370. Of Fictions as Substitutes for Legislation.

A legal fiction serves in many instances as a substitute for legislation. New states of fact, to which in their real character no existing rule of law can be precisely applicable, are frequently assumed to be identical in all their legally essential features with states of fact already known, and therefore to be subject to the same rules. The letter of the law in such a case of course remains unchanged, but in its actual operation it acquires a wider and perhaps a different meaning. Such instances occur most frequently in the law of remedies, by the extension of old methods of procedure to new forms of controversy, as has in recent times occurred in the prevention by injunction of many wrongs for which, considered in themselves, an adequate remedy exists at law but which, by the fiction that their continuous or frequent repetition will lead to innumerable lawsuits or irreparable damage, have been brought within the cognizance of courts of equity. All such extensions of the law might, of course, be as effectually made by legislative action; but legislative reform is necessarily slow, and when the justice of a case at bar demands it the invention of a legal fiction, which makes the existing law sufficient for the case, is a far more speedy and convenient remedy. The precedent thus established becomes a guide for future cases of a similar character, and the extended or amended rule enters into and thereafter forms a part of the Unwritten Law. So constantly does this occur that legal fictions have long been recognized by jurists as one of the chief instrumentalities in the development of law.

§ 371. Of the Classes of Legal Fictions.

Fictions are divisible according to their form into two classes: Affirmative and Negative. An affirmative fiction assumes the existence of that which does not exist. A negative fiction assumes the non-existence of that which does exist. That a husband and wife are one person is an instance of the former; that a disseisee who has regained possession was never out of possession is an example of the latter. Fictions are

further divisible according to their extent into Substantive and Relative. A substantive fiction is one in which the entire state of facts is fictitious, as that the owner of land does not own the land, but merely an estate therein. A relative fiction is one in which the substance of the state of facts is true, but its assumed relation to other facts is false. The relative fictions are of four classes: (1) Those where the act of one person is assumed to be the act of another, as in all cases of agency, conspiracy, and the like; (2) Those where an act done by or to a thing is regarded as done by or to another thing, as when a trespass by animals is treated as a trespass by their owner, or the acceptance by the buyer of a portion of a lot of goods is considered to be the acceptance of the whole, or the payment of part of a debt is taken as an admission of continued liability for the entire obligation, or the possession of land is transferred by livery of seisin; (3) Those where an act performed at one place is presumed to have been done at another, as where a transaction arising at sea is assumed to have happened on shore in order to give jurisdiction to the local courts; (4) Those where an event occurring at one time is regarded as occurring at another, as when the title of an administrator relates back to the date of the death of his intestate, or a judgment rendered at a subsequent term of court is imputed to the previous term when the case was tried. (a)

Read Best, Part i, Ch. ii, pp. 26-28.

(a) 15 D. 242, note.

§ 372. Of the Invention and Abandonment of Fictions.

The number of legal fictions is very great and subject to continual accessions and subtractions. Created whenever the justice of a case requires it, they are abandoned whenever the same end is attainable by more definite means or when the necessity in which they originated has expired. Legislation, by providing a new rule, dispenses with the old as well as with the fiction on which it was based; and a judicial decision, though led to its results by a pure fiction of law, often becomes an established rule which supersedes the fiction and

thenceforth governs the facts without its aid. The more perfectly the rules of written and unwritten law correspond with the actual conditions of society the less occasion have the courts to create assumed conditions to which the rules already established may apply; and it is thus conceivable, though scarcely possible, that the law may by and by become so perfect that legal fictions will wholly disappear.

SECTION II.

OF PRESUMPTIONS.

§ 373. Of the Nature of Presumptions.

A Presumption is a conclusion as to the existence or non-existence of disputed facts derived from the consideration of facts already known. (a) This conclusion may be reached by logical inference from the known facts, or may be authoritatively assumed by the law, without reference to logical processes, whenever the facts from which it is derived appear. Where the conclusion is the result of reasoning from the known facts it is called a *presumption of fact*. (b) Where it is established by legal authority it is called a *presumption of law*. Presumptions of fact are in their nature identical with the inferences which men in ordinary life draw from the objects and events within their knowledge. Presumptions of law resemble fictions in that they are pure legal assumptions, but differ from them in that the assumed facts in the fiction are admitted to be false, while in the legal presumption they may be and probably are true. These presumptions are created or recognized by the law from motives of economy and public policy; from economy when the fact presumed is so universally and uniformly the consequence or concomitant of the known fact that the presence of the latter makes the former probable or certain, and therefore renders proof of it superfluous; from public policy when the presumed fact is so essential to the attainment of justice in all cases where the known facts exist that the law is forced to attach the former

to the latter as its legal consequence, independently of any actual or logical relation between them. But whether presumptions of law or presumptions of fact, their common basis is a known state of facts, for presumptions cannot be derived from other presumptions, thereby subjecting the conclusion to liability to double error, but must rest on the impregnable foundation of matters actually known.

Read (a) 85 D. 327 (330).

(b) 83 D. 712 (717); 105 U. S. 614 (617).

§ 374. Of the Distinctions between Presumptions of Law and Presumptions of Fact.

Presumptions of law and presumptions of fact are distinguished from one another by differences so numerous and radical as to leave them little in common except the cause of their existence and their name. (1) A presumption of law is a rule of law, established by statute or judicial legislation, and applied by the court directly to the facts like any other rule of law. A presumption of fact is a logical deduction which derives no force from the enactments of positive law and is applied by the judge or jury to the facts according to the customary methods of reasoning. (2) A presumption of law does not rest on probability nor require it, though it generally possesses it. A presumption of fact depends entirely upon the probability or certainty that if the known fact exists the disputed fact also exists. (3) A presumption of law arises only from the states of fact to which the law attaches it, and applies only to conditions which are subjected to it by the law, and consequently is uniform in origin and influence so long as it exists. A presumption of fact arises out of any circumstances from which it is the logical conclusion, and governs every fact which naturally lies within the scope of that deduction. (4) A presumption of law can be changed at any time by legislation or judicial decision, establishing a different presumption from the same facts or withdrawing from them all legal effect and leaving them to be the basis of such presumptions of fact as the rules of logic

may require. A presumption of fact, if logically correct, is unchangeable, the derivation of the conclusion from the premises depending upon laws and relations which no human authority is able to disturb. (5) A presumption of law is imperative upon the court whenever the facts to which it is attached appear. A presumption of fact is binding upon the judge or jury only in proportion to the certainty or probability with which it logically follows from the facts already known, and may be wholly disregarded when the probability is weak. (6) A presumption of law ignored or contradicted by the court gives to the defeated party in the suit a right to a new trial. A presumption of fact excluded from consideration by the judge or jury constitutes no ground for the grant of a new trial to the defeated party, unless the court is satisfied that in discarding the presumption the obvious and necessary rules of logic have been violated.

Read Best, Part i, Ch. ii, pp. 17, 19, Ch. iii, pp. 31-36.

§ 375. Of the Classes of Presumptions of Law.

Presumptions of law are divided into two classes: Presumptions *juris et jure*; and Presumptions *juris tantum*. A presumption *juris et jure* is a presumption which the law not only attaches to the facts but whose truth it rigidly maintains, and which it employs as a basis for the establishment of fixed legal rights. Such a presumption is conclusive and cannot be rebutted by any contrary proof however strong. Thus the presumptions that a final judgment by a competent court has done exact justice to the parties and has thereby extinguished the cause of controversy, that every person knows the law, that infants under seven years of age are incapable of criminal intent, cannot be contradicted by evidence and are not open to discussion. A presumption *juris tantum* is a presumption which the law attaches to the facts and maintains as their necessary legal consequence until it is proved by sufficient testimony that the consequence does not in fact exist. This is a true presumption of law because it is made by the law, and so long as it continues it possesses

all the attributes of other presumptions of law. It differs from a presumption *juris et jure* in that the law will not maintain it to the exclusion of evidence to the contrary or after proof establishing its falsehood has been adduced. Instances of presumptions *juris tantum* are: that all human beings are sane; that all accused persons are innocent; that every one intends the natural consequences of his own acts; and that all public officers are presumed to have done their duty. Though presumptions *juris et jure* are sometimes necessary and often advantageous, yet the tendency in modern law is to make all legal presumptions, so far as possible, presumptions *juris tantum*, and therefore inoperative when contrary to demonstrable truth.

Read Best, Part i, Ch. ii, pp. 20-23, 29, 30; Austin, Lect. xxvi, pp. 491-494.

§ 376. Of the Classes of Presumptions of Fact.

Presumptions of fact are of almost endless variety and may be based on any premises whether physical or psychological. The field they occupy is the same in law as in ordinary life, except that the law refuses to notice those in common use whose influence is too remote or whose basic facts could easily be fabricated. They are sometimes classified for the purpose of estimating their juridical value into (1) Strong presumptions; (2) Probable presumptions; and (3) Slight presumptions: the strong existing, where the basic facts are certain and the logical deduction is clear; the probable, where the premises are certain and the inference is probably correct; the slight, where the connection between the known facts and the disputed facts is so remote that the existence of the former is entirely consistent with the non-existence of the latter. Where the basic facts are uncertain no presumption whatever can arise. Slight presumptions have no probative value. The probable are of weight in proportion to their probability and can be rebutted only by showing that their falsehood is as probable as their truth. The strong are

conclusive unless the contrary is established by direct and overwhelming evidence.

Read Best, Part i, Ch. iii, pp. 36-44.

§ 377. Of Mixed Presumptions.

There are certain conclusions of fact which the law requires a judge or jury to draw whenever the proper basic facts are present, either because the logical deduction is so apparent and inevitable that only crass ignorance or wilful error could avoid it, or because public policy requires that in connection with the known facts other facts which are not their direct logical consequence should be assumed to exist. These conclusions are called *mixed presumptions*. They are true presumptions of fact, not presumptions of law, but differ from other presumptions of fact in that the law reinforces by its own authority the evident logical deduction, or where the deduction is not evident authoritatively supplies its place. Cases in which authority may thus take the place of logic in presumptions of fact are chiefly those in which rights long enjoyed and recognized are liable to be defeated on account of technical defects of title or for want of evidence which may have been obliterated by lapse of time. In these cases the law may compel an inference to be drawn in favor of the right from its enjoyment, as it does in instances of title by prescription or in assuming the validity of ancient deeds. Mixed presumptions rank as to their probative value with strong presumptions of fact and can be rebutted only by direct and convincing evidence.

Read Best, Part i, Ch. iii, pp. 45-51.

§ 378. Of the Number and Variety of Presumptions.

Presumptions of law and fact pertain to almost every aspect of human affairs and are employed to some extent in every judicial investigation. Any attempt to enumerate them would be futile not only on account of their multitude but because they are subject to continual change in number by the addition or withdrawal of individual presumptions of law. Nor can

they be grouped in such a manner as to assign each presumption to its proper species as a presumption *juris et jure*, a presumption *juris tantum*, a presumption of fact, or a mixed presumption, for the reason that the laws of our different States or the law of the same State at different times may alter the legal status of a presumption by removing it from one of these species to another. To arrange the principal presumptions, whether of law or fact, according to the nature of the basic facts out of which they arise is, however, practicable, and will afford the student a clearer view of their character and variety.

§ 379. Of Presumptions against Ignorance and Wrong.

Presumptions against ignorance and wrong are based upon the fact that reasonable and upright men, which all citizens are supposed to be, inform themselves as to their duties and conscientiously perform them. From this fact arise the following presumptions: (1) That every one knows such rules of law as it is his legal duty to obey (*a*); (2) That all acts and forbearances are lawful; (3) That every person discharges his legal obligations; (4) That no one commits fraud or tort or crime; (5) That persons who cohabit are married; (6) That all children are legitimate; (7) That corporations confine their acts within their powers; (8) That all persons adhere to the customary religion of the community in which they live; (9) That every public officer was rightfully appointed; (10) That every official act is properly performed (*b*); (11) That all public records are correct; (12) That the deeds, wills, and other instruments made by past generations — that is, more than thirty years old — were lawfully executed; (13) That every person interested to know what the public land records or court rolls contain does know it; (14) That every person knows what he is interested to know and could find out by ordinary inquiry. (*c*)

Read Best. Part ii, Ch. i, ii, pp. 63-86, Ch. viii, pp. 211-215.

(*a*) 55 St. 488, note.

(*b*) 10 D. 232.

(*c*) 9 D. 736; 38 D. 124; 23 D. 36, note; 74 D. 169.

§ 380 Of Presumptions that Persons Assert their Rights.

Presumptions that persons assert their known rights against invaders are based upon the facts that human reason and instinct prompt such assertion, that the law can protect rights only when its aid is invoked by their owner, and that the failure to assert them when they are invaded results practically in their loss. These presumptions are: (1) That one possessing and using the property of another does so by his permission; (2) That every beneficial enjoyment of property is coupled with a legal right; (3) That every apparent title is a true title; (4) That every long continued privilege in the land of another must have originated in a grant; (5) That a highway across private land which has been for a considerable period in public use was once dedicated to the public by its owner; (6) That rights long unasserted are extinguished. Many of these presumptions occupy the same field as those provisions of the Statute of Limitations which forbid the courts to interfere on behalf of parties whose claims, however just in their inception, have become stale through lapse of time. (*a*)

Read Best, Part ii, Ch. iii, pp. 87-169.

(*a*) 6 Wheat. 481; 111 U. S. 395.

§ 381. Of Presumptions that the Course of Nature is Observed.

Presumptions that events happen according to the ordinary course of nature are based on universal human experience. Such presumptions are: (1) That all the phenomena of nature occur in their usual order and method; (2) That children are born at the end of the usual period of gestation; (3) That all persons reach the normal term of human life (*a*); (4) That infants under seven are mentally incapable of crime; (5) That males under fourteen and females under twelve cannot unite in the duties of the marriage relation; (6) That persons intend the natural consequences of their acts and omissions (*b*); (7) That voluntary wrong springs from malice;

(8) That every one accepts a proffered benefit; (9) That all persons are sane; (10) That when the desire and the opportunity to do an act concur the act will be done; (11) That the silence or falsehood of one who is accused of wrong indicates guilt; (12) That the fabrication or suppression of evidence indicates guilt; (13) That flight or concealment indicates guilt; (14) That confessions of guilt and admissions against interest are true.

Read Best, Part ii, Ch. iv, pp. 170-178, Ch. vii, pp. 203-210,
Part iii, Ch. i, ii, pp. 246-344.

(a) 58 D. 740.

(b) 21 Wall. 325 (337, 338).

§ 382. Of Presumptions that the General Usages of Society are Observed.

Presumptions that the current usages and habits of society are observed are based on the fact that the usages voluntarily adopted by society are generally reasonable and suitable to their condition, and that conformity to them is necessary for those who would participate in its advantages and operations. These presumptions are of great variety, some commercial, some domestic, some purely civic. Of these the following are examples: (1) That the customs of a trade are observed by all parties engaged in it; (2) That the knowledge of an agent is communicated to his principal (*a*); (3) That parties to written contracts read and understand them before they execute them; (4) That a deed in the possession of a grantee was delivered on the day of its date; (5) That erasures and interlineations in a deed were made before its delivery (*b*); (6) That the holder of a note or bill took it before maturity (*c*); (7) That a bill or note in the possession of the maker has been paid; (8) That a sealed instrument imports a consideration; (9) That a letter or telegram properly forwarded reaches its destination (*d*); (10) That all residents in a State are citizens; (11) That identity of name is identity of person; (12) That a person absent from home for seven years,

without being heard from, is dead (*e*); (13) That public officers transact their business in the customary manner.

Read Best, Part ii, Ch. v, pp. 179-185; Markby, §§ 281, 290.

(*a*) 11 Wall. 356.

(*b*) 10 Wall. 26.

(*c*) 94 U. S. 753; 95 U. S. 16.

(*d*) 7 R. 536; 53 R. 22.

(*e*) 8 D. 658; 58 D. 740; 92 D. 248.

§ 383. Of Presumptions in Reference to Time.

Presumptions as to time originate partly in the usages of society and partly in the construction given by the courts to the language of statutes and other documents. The law recognizes a year as a calendar year, a month as a calendar month, and a day as the ultimate unit of time, all more minute subdivisions being arbitrary and variable. (*a*) Hence it refuses to take notice of fractions of a day except in special cases where justice requires it, and presumes that an act done or to be done on a given day was done or may be done at any moment in the day between midnight and midnight. (*b*) In computing time from or to a given date the day of the date is presumed to have been excluded. (*c*) The law also regards Sunday as a *dies non* on which no private contract can be made nor an avoidable official act be legally performed. (*d*)

Read Black, Ch. v, §§ 71-73.

(*a*) 7 D. 240, note; 21 D. 492; 32 R. 86, note; 46 R. 406, note; 139 U. S. 137 (143-146).

(*b*) 26 D. 232, note; 52 D. 156; 104 U. S. 469; 147 U. S. 640.

(*c*) 59 R. 326; 50 D. 249.

(*d*) 111 U. S. 597; 140 U. S. 118 (131); 12 D. 287, note; 49 D. 608, note.

§ 384. Of Presumptions that Existing States of Fact Continue.

Presumptions that states of fact, once existing, continue indefinitely are based on experience and on the necessity for a rule determining upon whom rests the duty of proving that they

have or have not changed. (*a*) Among these presumptions are: (1) That a person once living, and whose natural term of life has not expired, is still alive (*b*); (2) That a domicile once acquired remains unchanged; (3) That a relation, marital, commercial, or official, once established, still exists; (4) That debts once due are still due; (5) That opinions once adopted are still maintained; (6) That the known habits of men and animals still persist.

Read Best, Part ii, Ch. vi, pp. 186-202.

(*a*) 50 R. 296, note.

(*b*) 5 D. 727.

§ 385. Of Presumptions in Reference to Rights, Duties, and Liabilities.

Presumptions as to the legal status and liabilities of persons and property are based on the rules of law prevailing in the State where the presumption is raised, and there applied to states of fact similar to those as to which the presumption is adopted. Such are the presumptions: (1) That the laws of States of the same origin and traditions are identical (*a*); (2) That the Common Law prevails in all the States of the American Union; (3) That the bed of navigable tidal waters belongs to the State; (4) That the boundary between private and public ownership in tidal waters is high-water mark; (5) That the soil beneath unnavigable streams belongs to the riparian proprietors; (6) That the owner of land adjoining a highway owns to the centre of the highway; (7) That surface and subjacent owners of land have mutual rights of support; (8) That the possessor of personal property is the owner of it; (9) That the *lex loci contractus* is part of the contract; (10) That a marriage valid where performed is valid everywhere; (11) That a wife committing felony or misdemeanor in company with her husband acts under his coercion; (12) That a common carrier losing goods otherwise than by act of God or the public enemy was guilty of negligence; (13) That innkeepers are at fault if the property of their guests is missing.

Read Best, Part ii, Ch. x, pp. 235-245.

(*a*) 5 R. 510.

§ 386. Of Conflicting Presumptions.

Presumptions *juris tantum* or presumptions of fact may occasionally conflict with one another owing to the existence in the controversy of states of fact which afford contrary presumptions. This is, of course, impossible with presumptions *juris et jure* which are imperative rules of law incapable of contradiction. Where such conflict arises between presumptions of equal intrinsic weight, that presumption is maintained which is most consonant with justice and equity. Those which impute validity to acts and instruments overcome those which would invalidate them. Those which assert the integrity and innocence of the parties outweigh those which point to their fraud or guilt. Those which are in harmony with the course of nature are followed as against the casual and extraordinary. General presumptions give way to special ones, and where there is no other guide, and the justice of the case is equal under either presumption, that one whose logical necessity or legal authority is the strongest will prevail.

Read Best, Part i, Ch. iv, pp. 52-61.

§ 387. Of the Relation of Legal Fictions and Presumptions to the Law of Evidence.

The doctrine of legal fictions and presumptions which thus performs so important a function in the administration of law, is interwoven with every great division of the law, and is encountered by the student in every sphere of his investigations. From its relation to the methods of judicial inquiry, its effect upon the burden of proof both in criminal and civil cases, and the partial or complete substitution of presumptions and fictions for actual testimony, it is, however, generally comprehended under the law of Evidence, and in treatises upon that subject receives its fullest explanation and discussion.

Read Morey, p. 411.

CHAPTER XII.

OF THE DEPARTMENTS OF LAW.

§ 388. *Of the Practical Classification of Laws.*

The application of the law to practical affairs results in the distribution of its rules into classes somewhat different from those into which it logically divides. Statutes and decisions are evoked by special needs arising out of current social conditions, and thus the law in force at any given period consists of those commands and prohibitions only which are required for the immediate direction and protection of the people of the State in the enjoyment and vindication of their political, personal, and property rights. In one social condition these rights assume certain forms and attach to certain objects, to meet which in their numerous details the rules of law are framed. At a later period, and under changed social conditions, other objects fall within these rights and the rights vary in form to correspond with them, and the law, following the course of nature, manifests itself in new rules adapted to the new states of affairs. Thus in the history of our own law successive social epochs have been marked by the development of successive bodies of law, or groups of rules pertaining to different subjects and conditions which take their names and general character from the conditions and the subjects under their control, and are known as "branches" or "departments" of the law. In each of them the rules of substantive law and adjective law, of public law and private law, of national law and international law, of Federal law and State law, of English law and American law may be commingled. They are the corn and wheat and herbage emerging from the social soil into which those logical ingredients of the law have entered, and where uniting with its varying elements they have produced

that concrete legal pabulum by which political society is fed. It is in the forms resulting from this final evolution of the law that the student is confronted with it as a subject of investigation when he endeavors to prepare himself to participate in its administration, and with their brief description a work on Jurisprudence may appropriately close.

§ 389. Of the Law of Real Property.

Until the present century the most important affairs of the Anglo-Saxon races on both sides of the Atlantic were identified with land. The land itself and interests in land constituted not only the wealth of the people and the sum of their material resources, but gave its form to their social organization and moulded their political institutions. Its settled modes of ownership and use, the relations into which its occupation by a tenant brought him with its lord, the methods of its transfer during the life or at the death of its possessor, were among those customs brought by the earliest Saxon immigrants to England, and had been observed for ages before the laws of Alfred and of the Confessor gave them permanent expression. To these customs Norman feudalism added many others which Acts of Parliament corrected or affirmed, and judgments of the courts interpreted and applied, until the law of landed property became by far the most complete and intricate of all the legal systems which our political history has ever known. Meanwhile, in response to the demands of social conditions which have practically assimilated to the land other objects not essentially connected with it, this law has been extended to embrace these objects also, and it is now no longer possible to draw a line of physical demarcation between those which are governed and those which are not governed by its rules. The Law of Real Property has thus always been and still is, though in a less comparative degree, the bed-rock of our law, the earliest and most stable as well as the most comprehensive of all the groups of rules into which the law has been divided through its practical application to concrete affairs.

Naturally it engrossed for many centuries a major part of the attention of our courts and jurists, whose writings and decisions form to-day a large proportion of the literature of our law, while its subordinate branches of Conveyancing and Wills have furnished generations of practitioners with responsible and lucrative employment.

§ 390. Of the Law of Civil Actions.

Dating back to the same prehistoric period of Teutonic custom the crude beginnings of our present method of judicially applying remedies to private wrongs appear; as early as King Alfred's time, at least, developing into an established system of superior and inferior courts, with well-defined original and appellate jurisdiction, with orderly proceedings and all the essential features of our modern courts of common law. Under the social conditions which prevailed in that and many subsequent generations the principal controversies which required judicial settlement were those concerning land, or those arising out of injuries by violence or the breach of an express agreement for which an adequate compensation in money could be made. The importance of the interests at stake in landed controversies, and the difficulties encountered in the effort to comprehend, define, and adjudicate upon the questions which those controversies involved, necessitated methods of procedure which under the Norman kings and their justiciars became exact and technical in the last degree, and in which any error, however trivial, imperilled the judgment that the party making the mistake might afterwards obtain. Under these circumstances the Law of Civil Actions stood side by side in consequence and intricacy with the law of real property and shared with it the studies and the expositions of the judges and law-writers of that day. Most of the treatises before the Commentaries of Blackstone are either wholly occupied with one of these great subjects or are divided almost equally between them, while those chapters of his own incomparable work which display the profoundest learning and the

highest powers of explanation are those devoted to the rules governing real property and the remedies for private wrongs. The simplifying processes of later days, intended though they are to make this subject both in theory and practice less obscure, do not and never can emancipate it from those difficulties which render the efforts of the student to explore it laborious and irksome, and in its practical administration demand of the lawyer and the judge the keenest perception and the most cautious application of its rules.

§ 391. Of the Laws of Practice, Pleading, and Evidence.

Embraced in the law of civil actions are three subordinate groups of rules known as the Law of Practice, the Law of Pleading, and the Law of Evidence. Apart from these the law of civil actions is devoted mainly to the definition of actionable wrongs, with the forms of action and the modes of compensation provided for them by the law. The Law of Practice includes the rules by which the courts and their various officers are guided in the conduct of judicial business from the inception of an action until the final satisfaction of the judgment and its entry on the records of the court. This group of rules is of the highest practical importance. According to an ancient maxim "the practice of the courts is the law of the courts," and it is evident that the ultimate result of every legal controversy must depend to a great extent upon the justice and the wisdom of the rules by which the court is governed in conducting its investigations and in forming its conclusions. These rules run out into an almost infinite detail, and it is by his thorough knowledge of them and ability to follow them, and his inflexible enforcement of their observance upon his antagonists, that the skilfulness of a practitioner is measured. The Law of Practice is often called "the law of civil procedure," and sometimes, especially in England, "the law of *nisi prius*" after a common appellation of the courts by which its rules were generally prescribed. The Law of Pleading is the group of rules by which the mutual written alterca-

tions of the parties to an action, whereby they make known to the court and one another their respective claims, are so regulated that eventually they terminate in one or more specific issues, each containing the affirmation and denial of some single proposition material to the decision of the cause, and therefore capable of a definite endorsement or repudiation by a judge or jury. These rules prescribe not only the substance which these mutual altercations must contain, but the modes of its arrangement and the forms of its expression, in order that the necessary completeness, accuracy, and brevity of each may be secured. The Law of Evidence governs the various methods by which the truth of the allegations contained in the pleadings of the parties is investigated, and determines the competence and credibility of witnesses, the probative value of the different species of written and objective testimony, and the conclusiveness or *prima facie* weight of fictions and presumptions.

§ 392. Of the Law of Crimes.

The Law of Crimes is that group of rules which defines and prohibits public wrongs and prescribes the methods of their prosecution and punishment. As all public wrongs are offences against the State, or as it would anciently have been expressed "against the Crown," the Law of Crimes was long known in England as "Crown Law," and the treatises concerning it were entitled "Of Pleas of the Crown." This branch of law is also of extreme antiquity. In primitive conditions of society few offences against the community at large are possible, while injuries to private persons unless of the most atrocious character are rarely noticed by the State. But as society becomes more complex, especially as the prerogatives of sovereignty are enumeratively defined and concentrated in a single individual, acts and omissions which invade his royal rights increase in variety and frequency, and private wrongs which find no adequate redress in civil actions, yet in the improving moral judgment of the community de-

mand at least the punishment of the offender by the strong arm of the State, are recognized as indirect violations of the sovereign's rights and proper subjects of his penal laws. More perhaps than any other branch of law the Law of Crimes reflects the current sentiment of the people of the State, and for this reason its prohibitive provisions change and fluctuate with every passing wave of popular convictions. For the same reason also the substantive Law of Crimes is principally of statutory origin; but few crimes being of such a character as to attack fundamental rights in every stage and condition of society and therefore capable of becoming subjects of the customary law. Such has been the history of our Criminal Law, from the age when the "blood-wite" exacted by the public from the slayer in a case of voluntary homicide formed almost the only instance of punishment for crime down through the periods of multitudinous forms of treason, of numerous offences against the established religion, of forest laws and trade laws, until our own in which crimes against the State itself are few while nearly every private injury from which the citizen can suffer, either in person, property, or reputation, is prosecuted and punished by the State. But the adjective law of Crimes, called the Law of Criminal Procedure, has not shared in these mutations. Fashioned by custom on the same general plan as civil actions, its rules of practice, pleading, and evidence have gradually but steadily developed from the rude trial before the village freemen presided over by the headman of the community, with the injured party or his family for prosecutor and the accused backed by his blood-relations as his own defender, into the present orderly, complete, and usually successful method of investigating and determining the guilt of persons charged with crime. The Law of Criminal Procedure is thus the stable and persistent portion of our Law of Crimes, and this explains the fact that, taking all the treatises upon the Law of Crimes together, so large a proportion of their contents is devoted to the subject of Procedure, and so incomplete the information which they give concerning substantive offences, compelling the student for his knowledge of the public wrongs which the State in its own name will prosecute and punish

to have recourse to his own local statutes, interpreting their language by the definitions of the Unwritten Law and the decisions of the courts.

§ 393. **Of the Law of Torts.**

The Law of Torts is that group of rules which determines the nature of those private wrongs, other than breaches of contract, for which the courts in civil actions will afford redress. Its history commences with that of society itself, when injured parties in obedience to a natural instinct made personal reprisal on the violators of their rights by seizing property as compensation or inflicting a commensurate loss. The interference of the sovereign power with this mode of redress, at first to regulate it in the interest of public peace and order, later to act through its official agents on behalf of the complainant, and finally to take entire charge of the controversy and decide it and enforce against both parties its decrees, were the steps by which in the course of ages compulsory redress for private wrongs, except in a few instances of great emergency, was taken altogether out of the hands of private persons and administered entirely by the courts. Obviously, this interference by the State in private controversies could and would at first occur only where the injurious act was evident and its consequences grave, and hence the field of actionable wrongs was limited to those in which the right of the injured party was apparent and its invasion by the wrongful act of the defendant could be easily established. Wrongs committed by violence against person and property were of this character; acts and omissions producing loss, not as their immediate result but through new causes which they set in operation, were not; and of the latter the courts for a long period assumed no jurisdiction. But when the statute of A. D. 1285 compelled the courts to notice and adjust the controversies growing out of consequential injuries, the number of these actionable wrongs was vastly multiplied and the Law of Torts expanded to take in slander and libel and malicious prosecu-

tion, all wrongful usurpations of dominion over property, and every form and degree of negligence by which a legal damage to another party can be caused. The scope of the Law of Torts has thus been determined by the law of civil actions, and still enlarges or contracts with the limits to which for the time being the State confines the jurisdiction of its courts.

§ 394. Of the Law of Domestic Relations.

The Law of Domestic Relations is that group of rules which defines the rights and obligations of the parties to the relations of husband and wife, parent and child, guardian and ward, and master and servant. In the period when the family was the ultimate unit of society and the housefather exercised almost supreme control over his wife and children, wards and servants, being himself responsible to the community for their misconduct and support, the sphere of these rules was confined almost exclusively to the privileges and duties which the headship of his family devolved upon the father in reference to third parties. The rights of the husband to the society of his wife, of the father to the presence and services of his children, of the guardian to the custody of his ward, of the master to the labor of his servant, as against all abductors, assailants, and seducers, and the corresponding obligation to compensate all persons who had suffered actionable wrongs through his failure to maintain and properly control them, constituted the greater portion of this law until within the past three generations. Social development has, however, given to this branch of the law, as to most others, a wider field and more numerous details, and the internal rights and duties of the parties to the relation toward one another have thus at last obtained some recognition from the law. The appointment of guardians by the courts or by the wills of deceased persons under the supervision of the courts, the establishment of the relation of master and servant by specific contracts, the emancipation of the personality of the wife from its entire submergence in that of the husband, have

been among the causes of this change, and account for many of the differences which appear between the statements of the law contained in the earlier treatises and those of the present day.

§ 395. Of the Law of Personal Property.

The Law of Personal Property is a title applied to a selection from the numerous groups of rules relating to all property that is not real. Personal property is of such great variety, and is so involved in all the affairs of life, that any statement of all the rules which govern it would necessarily include the law of contracts, the law of crimes, the law of civil actions, the law of torts, and every other branch of law except the single one pertaining to real property. But a discussion of the essential characteristics of personal property, an enumeration and description of the various classes into which it is divided and of the different species of objects comprised within each class, a general outline of the methods of its creation, use and transfer with the rules which govern them, and a definition of the wrongs to which it is susceptible and the modes in which such wrongs may be redressed, are practicable apart from other details of the subject, and of these the treatises upon the Law of Personal Property are usually composed. To this branch of the law also belong all such subordinate departments as the Law of Shipping, or the Law of Patents, Copyrights, and Trademarks, with the exception of their contract aspects which fall more properly under a different division of the law.

§ 396. Of the Law of Estates.

The Law of Estates is a name given to a group of rules governing the administration of property under the supervision of the courts by a person not its owner in the interest of other persons who are lawfully entitled to its benefits. It embraces many subdivisions, such as the law of guardians of estates whether of infants or incapables, the law of decedents'

estates whether testate or intestate, the law of trusts whether private or charitable, the law of insolvents' estates, and the law of receivers. In all these cases, while the rights of the beneficiaries are determined by the laws of real or personal property, or the laws of contracts, equity, or corporations, as the case may be, the general duties of the persons charged with the administration of the property are practically the same, consisting in the collection, custody, sale, or investment of the assets and the payment of the income or the principal to the parties who may be entitled to receive it. In each of these duties the details vary with the character of the estate and the subordinate divisions of the law under which it is to be administered, as well as with the tribunals by whom the administrators are appointed or confirmed, under whose direction they perform their official duties, to whom their accounts are rendered, and on whose records a recital of their action is preserved. This branch of our law is not yet adequately represented in our legal literature as a distinct department, its rules being still scattered through the treatises on real property, wills, domestic relations, personal property, equity, corporations, and contracts, though long since meriting a separate investigation and discussion.

§ 397. Of the Law of Contracts.

The Law of Contracts is a body of law composed of many subordinate groups of rules, and in its vast scope and almost supreme importance is of very recent origin. Agreements of various kinds between one person and another have, of course, been frequent ever since society has itself existed. But in our legal history the law concerning them assumed no great proportions until within the past three hundred years. Under the feudal system, whether of the Saxon or the Norman period, contracts concerning land were rare, were confined mainly to the cities, and when existing were enforced rather by forfeitures between the parties than by decisions of the courts. Personal property consisted principally of cattle, agricultural imple-

ments, wearing apparel, weapons of war or of the chase, and household furniture, except for the commodities involved in trade, contracts concerning which followed the special customs of the merchants and when disputed were settled in their local guilds. Thus the law of contracts remained for many ages in a comparatively inferior condition, and received slight attention from the English jurists. But when the discoveries in the East and West opened up new worlds to British navigators with the consequent extension of commerce and increase of trade, when the customs of merchants began to be recognized and adopted by the courts as part of the common law, when the awakening of inventive genius gave a resistless impulse to the development of manufactures and the creation of private business corporations, when contract relations were spontaneously substituted for all others as far as possible in church and State, the Law of Contracts sprang into great importance and now overshadows all the other branches of the law. Logically as well as practically this law divides into two lesser groups: (1) The Law of Contracts in General, comprising all the rules defining the nature, essential elements, and legal consequences of a contract as such; (2) The Laws of Particular Contracts, each of which differs from the others according to the subject-matter to which it relates. This second minor group includes the law of Sales, the law of Bailments, the law of Agency, the law of Partnership, the law of Insurance, the law of Bills and Promissory Notes, and the law of Guaranty and Suretyship.

§ 398. Of the Law of Corporations.

The Law of Corporations is the group of rules by which the organization of corporate bodies and the management of corporate affairs, both public and private, are controlled. Eleemosynary corporations have long been known to our law, but public corporations and private business corporations with the laws which regulate them are almost entirely the product of the past three centuries. In our own age these artificial per-

sons have been multiplied beyond all computation. The local government of nearly every great centre of population has been confided to their charge, while the property interest which they represent is often stated to outvalue all other property within the jurisdiction of our laws. That in elaborating the rules directing these momentous enterprises the wisdom and sagacity of the great lawyers of the present day find constant occupation, and that their labors have produced and are still steadily improving the branch of the law to which those rules belong, would alone be sufficient, were all other causes wanting, to give the Law of Corporations one of the highest and most prominent positions among the practical divisions of our modern law.

§ 399. Of the Law of Equity.

The Law of Equity, being a law of remedies for private wrongs, is essentially a subdivision of the law of civil actions, and might logically be treated in connection with the rules which govern suits at common law. But as it had a separate origin, a separate history, a separate literature, and generally has been administered by separate tribunals, it has acquired a place of its own in our legal system from which it is not likely, in any proximate future, to be dislodged. Moreover, by the application of its remedies it has brought into view so many new aspects of existing legal rights, which courts of common law because they could not enforce them were accustomed to ignore, as to have added largely to the rules which enter into our substantive law. It is the province of Equity Jurisprudence, as this branch of the law is sometimes called, to define these new aspects of legal rights with their corresponding duties, to describe the injuries to which they are liable, and to point out the relief, preventive or remedial, which the courts of equity can furnish and the procedure by which such relief can be obtained. The Law of Equity Pleading and Practice comprises the rules which govern the parties in seeking and the court in awarding the appropriate redress.

§ 400. Of the Law of Admiralty.

The Law of Admiralty is, like the law of equity, a branch of law both substantive and adjective, defining rights, describing wrongs, applying remedies. Although it shares one portion of its field with the law of torts, another with the law of contracts, and still another with the law of civil actions, that residue which is peculiarly its own embraces many of the most important rules which govern commerce on the sea. Among these are the laws which regulate those reciprocal relations between the owner, master, crew, and passengers arising from the nature of marine transportation; the doctrine of maritime liens in all their various phases; and that procedure *in rem* against the vessel and her cargo which alone renders the enforcement of commercial obligations possible. These features of the Law of Admiralty, together with its international authority, must always make it a separate as well as indispensable department of our law.

§ 401. Of Constitutional Law.

Constitutional Law as a distinct group of rules defining the nature of the State, and asserting the mutual obligations of itself and its own citizens, occupies the same position in the practical as in the logical divisions of the law. But as the final test of the validity of both the Written and Unwritten Laws, it enters into every other group of rules to be their confirmation if they agree with its provisions, their destruction if they exceed or contradict it; and thus it permeates the entire body of the law like the vital force which animates the sound, heals the diseased, and purges away the dead portions of the human frame. In this aspect Constitutional Law becomes a subject of investigation whenever any portion of the law is studied, and every decision which sustains a controverted rule adds another to its numberless precedents and extends still more widely its conservative authority. As a distinct group of rules it has been the subject of constant research and exposition ever since the independence of this

country was assured. Treatises of the highest merit have discussed the various clauses of the Federal Constitution; to its interpretation the most elaborate and profound decisions of our greatest judges have been devoted; and still the wealth of legal doctrine which it holds is not exhausted, nor does a constitutional question, however difficult or novel, go without reply. The Constitutions of the several States have been subjected to a similar scrutiny though in a less degree, each State accumulating for itself by multiplied decisions of the courts a local Constitutional Law. In this field of research there is room for even more extended efforts, particularly in the comparative analysis of the State Constitutions and their reduction to a body of homogeneous Constitutional Law.

§ 402. Of International Law.

International Law, like Constitutional Law, is both a separate division of the law, and a legal energy pervading many other departments of the law. In its former character it is logically and practically the same; in its latter character, especially through treaties and the laws of war and the restrictions placed upon belligerents and neutrals, it affects the personal liberty, the commercial privileges, the property rights and contract obligations of the private citizen. As intercourse between the subjects of the family of nations grows more intimate and varied, and their relationships by marriage or by community of interests become so close that scarcely any difference except that of political allegiance subsists between them, the influence of International Law upon their happiness and welfare must increase until it may perhaps become a factor in the private lives of individuals only less potent and universal than Constitutional Law itself. Hence the doctrine that International Law forms a part of every National law is no mere abstract proposition but a practical truth of the gravest import, imposing on every lawyer, who assumes to understand and to defend and vindicate the rights of private citizens, the duty of acquiring a knowledge of this depart-

ment of the law so far at least as it can qualify individual privileges and obligations. There is no dearth of learning on this subject, accessible in treatises, decisions, public documents, examples; and in the rapid movements of the nations and the interplay of vast world-forces there is every day some new object-lesson in which the vigilant student may discern the application of great principles long familiar to his mind, or the enunciation and enforcement of new doctrines which new conditions make it necessary to incorporate into the body of our International Law.

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