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JURISPRUDENCE

LAW AND ETHICS

PROFESSIONAL ETHICS

BY

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PREFACE.

THE lectures comprised in this volume were prepared for the class room, with no thought of their publication. They appear in the form, substantially, as given to classes. The purpose has been to develop and discuss primary and elementary principles for beginners. The lectures may furnish the groundwork for a more elaborate discussion of the various topics covered, for those engaged in instructional work. Lawyers, too, may find a perusal of the pages interesting and useful. The writer is confident that, if those participating in the work of administration of justice, should carry the principles found expressed in these pages into daily practice, they would then be properly exercising the functions of the important offices which have been conferred upon them by the state.

The writer does not wish to be understood as entertaining radically different views from the eminent jurists and scholars who have expressed themselves upon the subjects covered, his purpose being rather to urge a closer affinity between Law and Ethics in actual practice, and to insist upon the adoption of a middle ground in a consideration of the Sciences of Law and Ethics in the hope that it might bring about better results. The basis of the entire discussion is the claim as aptly expressed by Dr. James Bryce that the sum and substance of the Philosophy of Law is the relation of Law and Ethics. To develop this idea it was necessary to give something of the history of Law. Consequently, familiar lines of history pertaining to

Roman Law, Common Law and American Law are furnished. Culling these matters from the records of history and weaving them into the discussion should be a beneficial aid to the student of Jurisprudence. For the same reason some of the primary elements of Ethics are brought into the lectures.

Some important suggestions are made concerning the marked distinction between American and English Governmental forms as bearing upon the relation of law and morals. Reference is made to the constitutional mandates to governmental officials to exemplify the principles of religion and morality in official action, as a reason for a difference in view respecting Jurisprudence than that entertained by some Englishmen. Adherence to morality on the part of legislators and judges is mandatory in America. If they do not obey the Constitution their acts are void. It is suggested, too, that the form of our government, so far as concerns the relation of our states to each other furnishes the basis of still another distinction between English and American Jurisprudence.

The lectures on this branch of the subject close with a consideration of concrete Jurisprudence in which reference is made to actual work of the courts showing how they have been obedient to the principles which have become a part of our imperative fundamental law.

Lastly, some extracts from lectures on Professional Conduct have been added, in the belief that after having displayed the character of the subject with which lawyers have to deal, it is an appropriate sequel to point out some of the essential characteristics of Professional Conduct.

E. B. K.

Columbus, Ohio, October, 1905.

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JURISPRUDENCE

LAW AND ETHICS

INTRODUCTION

I.

LAW AS A SCIENCE.

Law as a Science was not early comprehended by Englishmen. Many there may be now who regard it as a mere heterogeneous set of rules and precedents scattered throughout the hoards of decided cases. One lawyer will find two or three cases which decide a point in controversy his way, and another not discouraged by this fact, exclaims: "I can find cases announcing diametrically the opposite doctrine," and with undaunted courage proceeds upon his searching tour, being rewarded at the end of his journey, by finding the authority he wants. Between these two lawyers it becomes an argument of cases, the court announcing a decision in favor of one or the other, and in conformity to one line of the cases or the other, and legal discord prevails.

The interested layman or metaphysician looks on and pokes the law in the ribs, complaining of the "uncertainties of the law."

The practical lawyer takes no heed of these complaints, but proceeds in his mad rush for temporal gain, and wins the battle if he can, having no time or

desire to think of the law as a science. Some there may be who are willing to stand for the comparison that Law is like a duel: Both are right, both go in to win, neither will give up until the heart is pierced.

No experienced practical lawyer lays down his legal battles long enough to enlighten the world on Law as an applied science, nor to prevent the metaphysician from:

"Threading (his) way through, or, as some would say, playing at hide-and-seek in a forest of shadowy abstractions (which) method keeps too far away from the field of concrete law to throw much light on the difficulties and controversies which the student of any given system encounters. . . . "

"A student who has experienced many disappointments will not lightly abandon the hope, that some lawyer with a gift for speculation will one day employ this method . . . to produce a book nearer to the realities of the subject than any which the last two centuries have seen. Higher and rarer gifts are no doubt needed for metaphysics than for law. . ."

"But the lawyer who rises into metaphysics has at any rate his body of practical knowledge to keep him in the path of sense; and the metaphysician dealing with law may easily lose himself in mere words." (Bryce's Studies in History & Jurisprudence, 611.)

Dr. James Bryce in his recent valuable work on "History and Jurisprudence" says: "There is no trace that any lawyer ever composed a treatise on that which we, in England, call General Jurisprudence, and which the Germans call Rechtsphilosophie or Naturecht." (*Id.* 607.)

Such an eminent authority as Sir. Frederick Pollock has observed that lawyers do not have to become philosophers. He and his collaborator in their elaborate history of English Law, state that:

"The philosophical analysis and definition of law belongs . . . neither to the historical nor to the dogmatic science of law, but to the theoretical part of politics. A philosopher who is duly willing to learn from lawyers the things of their own art is full as likely to handle the topic with good effect as a lawyer, even if that lawyer is acquainted with philosophy, and has used all due diligence in consulting philosophers. The matter of legal science is not an ideal result of ethical or political analysis; it is the actual result of facts of human nature and history." (Pollock & Maitland, Intro. xxiii.)

And again:

"Law, such as we know it in the conduct of life, is matter of fact; not a thing which can be seen or handled, but a thing perceived in many ways of practical experience. . . . Law may be taken for every purpose, save that of strictly philosophical inquiry, to be the sum of the rules administered by the courts of justice."

It would seem to be the correct view that analysis of law and its definition is a matter of philosophy, and that such processes clearly come within the science of law. And while the mode of enacting and promulgating law may pertain to politics or civil government, it will mar or detract from the science of law to eliminate the philosophical analysis and definition of law from consideration.

To say merely that the matter of legal science is the result of facts of human nature and history, and not of ethical or political analysis, comes short of the goal; it ignores the phenomena and data of law.

The philosophy and science of the law will fare far better in the hands of a philosopher, who is a lawyer, than in the hands of one who is not.

Reference has been made to the tardiness of English

lawyers to come to the science of the law. It has been said that it did not receive attention until Blackstone reduced it to a system (although the claim that Blackstone systematized the law is ridiculed by some).

Professor Holland claims that the law of England, as expounded by Coke and Blackstone was little more than a collection of isolated rules, strung together only by some slender thread of analogy; that practitioners must be content to find their way through it as best they might by the help of indices. This writer makes reference to the efforts of Smith, Broom, Maine, Austin, Bentham and Markby, to develop a definite legal system, but evidently concludes that there had been no systematic treatise upon legal ideas, as he declares his purpose to do it himself. It will be conceded that he has done it better, in some respects, than his predecessors, but there is scanty consideration of the relation of morality and law, which Dr. Bryce deems to be the *sum total of the science of law.*

The great difficulty in the way of perceiving the contents and boundaries of that which is termed the "Science of the Law," has been the want of books treating directly and specifically its data, pointing them out in a simple manner, so that one can know what is comprehended therein.

Blackstone in spite of all the criticism of his work, did more than any other writer for the law, as a science. He arranged and classified it; he deduced the rules and doctrines from their original sources and stated them concisely; he discussed the nature of law, its sources and its history.

Let us consider the science of law apart from the great body of rules and doctrines, look behind these, and look upon it as knowledge systematized and formulated with reference to the means of discovering general truths.

There *is* a science and philosophy of law. There are certain fundamental, immutable truths and principles, upon which we proceed in the determination of law. To this extent it is an exact science.

The science consists in the knowledge of the rules and doctrines, their phenomena and data, their origin and history, and the power and ability to demonstrate and apply them; it relates chiefly to the Systems of Law, its modes, its processes and history.

Juristic history is matter of philosophy, and ethical or political analysis comes into play after history is made.

But we are told that English lawyers disclaim any philosophy of law in their system of laws, and give but little attention to the origin of laws. (Pollock & Maitland History English Laws, 168.)

A learned American writer has stated that, "the criterions of law are not those of other sciences. . . . You cannot, as in other sciences, resolve these questions by analysis or induction. You cannot apply to them the principles of mathematical demonstration. They cannot be reached by reasoning *a priori*. Nor can you, as in ethics, appeal to the monitor within. Conscience may inform you what the moral law is and what the municipal law ought to be; but it might greatly mislead you as to what the municipal law actually is." (Walker's American Law, sec. 1, p. 6.)

Is it an Exact Science?

Law is not an exact science in the geometrical sense. It is true that in order to determine what the law is, search must be made in the numerous reports of decisions until some positive rule is found. But this rule or doctrine had to be adopted for the first time, and by certain processes of reasoning and deductions the principles upon which the rule rests were discovered. May not it be claimed that these principles are as certain and as sure to be discovered and applied by the

educated and analytical mind as is the result of the mathematical problem?

Professor Lorimer calls attention to a remark made by his colleague, Dr. Robert Lee, to the effect that, "when argued out, natural law assumes the precision of mathematics," himself adding: "Would that the same could be said of the concrete factor of positive law." Lorimer's Institutes of Law, 327. President Hadley seems to regard Jurisprudence as an exact science. (Hadley, Education American Citizen, 137.)

Joel Prentiss Bishop in one of his masterpieces approaches the point in the following pertinent language, calling attention to one of the most fundamental truths:

"In truth, God, who reigns in nature by laws which the eye does not see, reigns thus invisibly yet equally in the human mind and in society. Each particular custom, each just decision of a court such as binds it in future causes, each statute embodying what mankind commends as worthy of preservation, is but the outward manifestation of some principle of justice organic in our individual and social being. Men who discern what is right in a particular instance, or as legislators enact what is right, or as judges pronounce what is right, may fail to see truly the underlying reason, but it just as much exists as did the laws of gravitation and of the centripetal and centrifugal forces before the human mind discovered them." (Bishop's Non-Contract Law, sec. 84.)

This learned author suggests that it is the imperative and acknowledged duty of a writer upon our law to look beyond the mere words of the books into the nature of his subject, and to set down what is, by him seen, for the first time equally with what others discerned before. This especially is true in a treatment of the Science of Law.

But its fundamental truths and principles are not numerous or extensive. One needs only to discover the general theories, learn how to apply them in particular instances, being content with the discussions found in the texts upon the various subjects. The principal lesson to be learned is how to proceed in the application of the correct methods in dealing with practical matters. *What is a Philosophic Discussion of Law?*

To enter the domain of the philosophy of any branch of law, it is not essential to constitute a philosophic discussion that there be a consideration of the psychological or metaphysical phenomena. It will come up to this standard, if the general laws, or principles under which all the subordinate phenomena or facts relating to the subjects are comprehended and are discussed; so also if causes and reasons are considered and rules are deduced from first principles.

Analytical and orderly classification of a subject of law, arrangement and treatment of general rules and doctrines, with their causes, reasons and history, into a system, may properly be considered as part of the philosophy and science of the law.

For these reasons many of our treatises may be considered philosophic discussions. (Walker's American Law, sec. 1.) "I shall endeavor to imbue you with the spirit, and philosophy of law, as a science, consisting of principles arranged into a system."

Some may not clearly appreciate what philosophy, as applied to law, is. Writers of treatises upon law, or the opinions of courts, need not always discuss "first principles," nor enter the field of abstraction in order to approach philosophical discussion. It is necessary only to disclose an appreciation, and mastery if possible, of the general principles of law, the tools with which practical problems are solved, and to blend these

fundamentals into one complete partitionless whole, showing harmony, symphony and logical exactness. If such are the results, in legal discussion, there is philosophical discussion.

We look in vain into the Roman Law for any show or display of philosophical phenomena peculiar to the law, but we find the philosophy, or the underlying science of their system standing out in bold relief.

Dr. James Bryce says: "This excellence of the Romans in the sphere of concrete law confirms the view we are led to take that the contents of a Philosophy or Science of Law in general are not large, being indeed confined to the defining of the relation of Law to Ethics and other cognate branches of philosophy, and to the examination of some fundamental legal conceptions, important, no doubt, but not very numerous. The sole and essential value of legal science begins in the manipulation of the material presented by an actual system of law, in the moulding of the old customs, so as to reconcile them with the always changing needs of the people." (Bryce's Studies in History and Jurisprudence, 633.) "It is reasonableness, simplicity, self consistency that make the excellence of a legal system, and the best methods of study are those which attune the lawyer's mind to seek after these qualities." (*Id.* 637.)

The origin of law, its nature, its connection with the other phenomena which enter into and concern society, what the law is and has been, and what it should be, if its principles are properly applied, are all a part of the philosophy or science of law. The sum total is the science of human duty, which is morality defined. Every problem of organized society resolves itself into one of morals. The law of right is the controlling force in or out of the law, and is determined by the same principles wherever a question arises.

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II.

JURISPRUDENCE.

ITS PROVINCE AND FIELD.

Jurisprudence Defined and Explained.

It is a notable fact that Jurisprudence receives little attention among lawyers, and students of law. For many years it has occupied a conspicuous place in leading American and English Universities, in the English Inns of Court, and in some American Law Schools.

The philosophy of conduct as embodied in the unwritten law, or as Pollock puts it "Case Law" in all the ramifications of human affairs has not been extensively covered by any writer. Such a task would perhaps be useless. For our conceptions of Jurisprudence we look to Holland's Jurisprudence, Austin's Lectures, Pollock's Jurisprudence, Lorimer's Institutes of the Law, and a few other works, from which we gather the elements or first principles to guide us throughout our investigations into the larger field of law.[1]

Looking to the principles of Jurisprudence as the Science of what the law is, as the controlling element in the ascertainment of the rule of conduct, we should apply them to the practical problems of life.

Jurisprudence is more nearly to be regarded as the means or process by which we arrive at the correct rule of conduct which finds expression in the law.

Jurisprudence contemplates philosophizing upon the principles of human conduct.

[1] Dillon's Laws and Jurisprudence is one of the most satisfactory works on the subject.

It is defined as the science of what the law is or means, and its practical application to cases as they arise. (Sharswood, Ethics, 10.)

Or again: The science of juridicial law; the knowledge of the laws, customs and rights of men in a state or community, necessary for the due administration of justice.

The meaning of jurisprudence has expanded somewhat beyond its Roman conception. Originally it meant nothing more than a knowledge of law, but it came finally to express the idea of a legal science, and always sustained a close relation to philosophy. Professor Holland directs attention to the teaching of Cicero, who held that the study of law must be derived from the depths of philosophy, and that, by an examination of the human mind and of human society, principles may be discovered in comparison with which the rules of positive law are of but trivial importance. (Holland Jur. 3.)

According to the prevailing English view it is regarded as a formal or analytical science, dealing with various relations of men to which are attached legal consequences.

Jurisprudence deals with law, its reasons and sources. Mackeldy defines the term as follows: "The science of compulsory law with their reasons and sources combined with their philosophy and history. The simple knowledge of laws without these lacks the scientific requisite of jurisprudence." (Mackeldy's Roman Law, p. 3.)

It is a science that "embraces not only a view of positive law and government as they exist in any particular system, but embraces the theories upon which private rights depend." (Andrews' American Law, sec. 54.)

The science consists chiefly of a knowledge of Sys-

tems of Law, their modes and processes, which are shown by history.

It is regarded as a political science which has reached a high degree of exactitude, so much so as to be regarded as an exact science. (Hadley American Citizen, 137.)

Law and Jurisprudence.

If "Jurisprudence" is to be regarded as the science of what the law is, it follows that "Law" and "Jurisprudence" are not synonymous, but as already stated the latter is the means or denotes the process by which the former is determined. So it would not be entirely proper to say "American Jurisdiction," when we want to speak of "American Law," or "Equity Jurisprudence" when we mean nothing more than Chancery law.

Regarding Law as the entire body or system of rules, regulations, principles and enactments which are recognized and protected by the State, Judge Dillon, uses the word "jurisprudence" as synonymous broadly with the whole science of law, as law is thus defined, "and as embracing not only legal relations but the entire body of legal doctrines whencesoever derived, applicable to such relations. . . . Jurisprudence is concerned with the whole body of the law, and signifies the science of law, or the scientific knowledge of jural relations and the legal principles, doctrines, and rules which govern such relations." (Dillon's Laws & Jurisprudence, 21.)

Another American writer holds that: "Law cannot be treated intelligently apart from jurisprudence. Jurisprudence is not a practical science apart from law." (Andrew's American Law, sec. 54.)

As a science jurisprudence is to be considered historical and progressive.

Jurisprudence and History.

The needs of mankind are determined by looking to present conditions, and differentiating them from the conditions of former times.

New things, new processes and new conditions come into existence with advancement of civilization.

In the application of established rules and doctrines regard must be had for the present as compared with the past.

Professor Holland recognizes this theory in the following language: "Its generalizations must keep pace with the movement of systems of actual law. Its broader distinctions, corresponding to deep seated human characteristics, will no doubt be permanent, but as time goes on, new distinctions must be constantly developed; with a view to the co-ordination of the ever increasing variety of legal phenomena." (Holland Jurisprudence, 9.)

A recent writer on American Law has stated that jurisprudence is "a historical science, and consequently not confined to an investigation merely of what the law is, but what its development has been, and why and how existing things came to be." (Andrew's American Law, sec. 54.)

It is claimed, however, by the analytic, that it is no part of the task of jurisprudence to consider history. Putting it in exact language Holland says: "The facts can only be presented by History, and History may be studied with the sole view of discovering this class of facts. But this is not the task of Jurisprudence which only begins when these facts begin to fall into an order other than the historical, and arrange themselves in groups." (Holland Jur. 11.)

Historical considerations in the science of law are absolutely indispensable. It may be true that History is one thing and Law another, but infrequently law can not be determined without the aid of history. Neither can Jurisprudence be properly appreciated and understood without historical consideration of systems of law. Upon this theory the history of the legal systems

will be traced to lay the foundation or to furnish the facts for the study of jurisprudence.

All will no doubt admit that jurisprudence has a philosophical side.

Jurisprudence and Philosophy.

But English analytics while recognizing that it has a side which is closely allied to Ethics and Methaphysics, do not attach much importance to this fact, especially as furnishing a ground for a division of the science. It may be conceded that it is a practical rather than a metaphysical science as contended by some, (Andrew's American Law, sec. 54,) yet the principles of philosophy, especially of moral philosophy, constitute some of the basic principles of Jurisprudence. This will readily appear in the course of subsequent discussion.

Jurisprudence is a universal term of equal application to all Systems of Law, its fundamentals being found in all countries in whatsoever system prevails.

A Universal term applicable to Systems of Law.

Because of these common features and elements historical consideration of systems is essential. In this way we find how much is drawn by one system from another, and what principles of one system permeate another.

According to Holland, however, "jurisprudence is wrongly applied to actual systems of law, or to current views of law, or to suggestions for its amendment." (Holland Jur. 12.)

Jurisprudence, according to analytical conceptions, is the science of positive law as it is, and not of positive law as it ought to be. Such a view marks it off from legislation. According to Austin, "the science of ethics is the science of law and morality as they respectively ought to be; as they respectively must be if they conform to their measure or test. That department of the science of ethics, which is concerned

Jurisprudence and Legislation.

with positive law as it ought to be, is styled the science of legislation." (1 Austin's Jurisprudence [Campbell's Ed.], 9.)

"Legislation belongs to or is a branch of ethics." (Dillon's Jur. 19.) And "Law" and "Legislation" are not considered synonymous. (*Id.* 9.) Sharswood says that legislation is a nobler work than even jurisprudence. "It is the noblest work," he says, "in which the intellectual powers of man can be engaged." It is employed in determining what is right or wrong and in enforcing what is useful and expedient. (Sharswood, Ethics, 10.)

It is true that there is a marked distinction between Legislation and Jurisprudence; the former prescribes with a view to future conduct, while the latter defines rights and duties in connection with past conduct. But under the common-law system the decisions of courts in a certain sense prescribe a well-defined rule of conduct with nearly as much binding force as legislation.

The controlling forces in both legislation and jurisprudence which prescribe rules of conduct and define rights and duties are the same.

Jurisprudence not infrequently sets the standard for legislation, and as often points out the errors and defects in legislation.

In course of time in the field covered by jurisprudence and legislation the two become so blended or commingled as to become inseparable.

The two sciences have jointly played such a part in the formation of "Our Law," that they are entitled to take shelter under the same roof.

In making a comparison of the relative parts played it will be found that legislation has occupied small space as compared with the functions of jurisprudence.

An examination of the legislative enactments will demonstrate that "most of them relate to positive reg-

ulations of expediency, and not to the great and permanent doctrines of general or universal justice or jurisprudence." (Dillon's Laws and Jurisprudence, 15.)

Legislation must receive its proportion of attention in a consideration of jurisprudence. "Jurisprudence is the science of positive law, the art of legislation, and the practice of law." (Heron on Jurisprudence, p. 66: Andrew's Am. Law, § 54.)

Austin admits that: "It is impossible to consider Jurisprudence quite apart from Legislation; since the inducements or considerations of expediency which lead to the establishment of laws, must be adverted to in explaining their origin." (Austin's Jur. 217.)

Are there Divisions of Jurisprudence?

Whether Jurisprudence is to be divided or classified into "General" and "Particular Jurisprudence" is debatable ground among the authorities.

John Austin was of the opinion that it may be so divided. He interpreted "General Jurisprudence" as the science which was concerned with the principles, notions and distinctions which are common to systems of law. He gives attention to the systems of two or three nations, viz: Roman, English, French and Prussian. As matter of fact there have been practically but two systems; viz: The Roman and English systems, the former being followed generally by the continental countries and Scotland. Austin contended that the proper subject of General Jurisprudence was a description of such subjects and ends of law as are common to all systems.

Particular jurisprudence he held was the science of any system of law or any portion of it; that the only practical jurisprudence was particular.

Holland is of the opinion that the division into "general" and "particular" jurisprudence is improper. (Holland Jur. 10, 11.)

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for, and the means by which the State resolves to lend its power for its protection or enforcement. Hence the duty springing from the moral obligation is within the scope and limits of Jurisprudence, and is the source of the authority of the State in the exercise of its function. But for the might of the State the right would not become legal; then why not give credit to the moral duty as one of the psychological reasons, and as the means and the true basis by which the State makes law?

Rights concern Persons and Things, and are appendent to the person, either as a member of society, or by contract or by reason of ownership of property.

We arrive at these rights by considering what rights a person has as an individual, what rights he has as a member of society.

It is the province of Jurisprudence to discover the reasons for the rights which one has as an individual, or as a member of society, or by reason of ownership of property, or by the formation of contracts.

Jurisprudence deals with the Sources of Law, the Reasons and Principles thereof; it comprehends a search for, and knowledge of phenomena as explained by, and resolved into causes and reasons, powers and laws. It embraces one of the highest types of Philosophical reasoning, because it relates to human conduct. It is the process of reasoning by which we arrive at the law of a given case.

In short it deals with "Duty, Right, Liberty, Injury, Punishment, Redress, with their various relations to one another, and to Law, Sovereignty, and Independent Political Society." (Austin, p. 213.)

Sir Frederick Pollock expresses a fear that Jurisprudence, so vaguely understood, may confine itself to the pure theory of legal classification. He does not deny that the scientific arrangement of the law is a subject

worthy of the most careful discussion, but contends that "the best and most profitable way to prove the value of jurisprudence would perhaps be to show it in that specific application." (Pollock Jur. 6.)

He does not contend that the study of legal ideas in their most abstract form is not useful and necessary, but expresses a preference for a scientific exposition of English law, as the end to which our provisional study of abstract jurisprudence is to lead up, that "A general view of the field of Positive Law, with only just so much concrete illustration as is needed to make it intelligible, may do much to clear the heads of learners, and beget in them a just discontent with the crude and formless condition in which the details of almost every topic are still left." (Pollock Jur. 8, 9.)

The work entitled "Andrews' American Law" is timely. This writer states that it is now in order to scientifically classify American Law.

"As a science, jurisprudence is analytical: . . . it deals with the various relations which are regulated by legal rules, rather than with the rules themselves, abstractly speaking. Andrews' American Law, sec. 54. Scientific analysis and classification is a part of the philosophy of the Law.

Reference has elsewhere been made to the claim of a learned writer that lawyers do not necessarily have to become moral philosophers any more than any other class of persons. Why teach moral philosophy at all, why expend so much money in our colleges or in our pulpits, if the doctrines expounded by Professors of Moral Philosophy and Ministers of the Gospel, do not tend to make men observe their duties and obligations to their fellows. If the pupils of all such teachers heed their teachings, then lawyers would have lost their means of livelihood, for law exists for the purpose of compelling the enforcement of duties and obligations when the

conscience of the individual does not impel him to do so, and it is the province of the lawyer to see that right and justice is done.

In Jurisprudence we study the philosophy of the law. As has been before stated, in substance, the great fundamentals are not numerous, the benefit to be chiefly derived from this course of thinking being, rather, in the training to use the right methods in the right way. We must familiarize ourselves with the tools of thought and of reason to enable us to apply them in searching for principles to be used in the solution of problems.

As the Philosophy of the Romans beautified Roman Law, so if our Judges, lawyers and legal writers, hug the principles of philosophy and ethics close to their bosom, so much violence will not be done to the symmetry of our legal system.

The Contents and Boundaries of Jurisprudence.

Regarding Jurisprudence not merely as a formal or analytical science, nor as a science whose limitations confine it to actual and existing positive law or to an investigation of what the law is, but considering it, as in fact it is, an historical science, we are ready with such conceptions to mark off its boundaries and state its contents.

First, it has to do with the methods of determining what the law is. This involves, therefore, a consideration of the so-called schools of jurisprudence. In the next three succeeding lectures this subject will receive attention.

Second, in discussing schools of jurisprudence, or the methods of determining what the law is, it occurs to the inquirer that the methods of acquiring legal knowledge are essential. Therefore the subject of "Legal Education—Methods and Study," will be discussed.

Third. Jurisprudence being regarded as a historical science, its province is an investigation of the development of law, why and how existing things came to be.

We are justified, according to the tenets of the analytical faith, in conducting an historical investigation to produce historical matter for consideration and treatment according to analytical methods.

A discussion of comparative jurisprudence is particularly essential, and therefore the Systems of Law, the Roman Law, the Common Law and American law will next be considered.

Fourth. For the purpose of discovering the true data and phenomena of Law a comparison of the sciences is necessary. Under this topic Law in its relation to the Sciences, and Ethics as a distinct science, will be discussed.

Fifth. After the foregoing, the usual courses of law will be considered from the usual legal standpoint.

III.

SCHOOLS OF JURISPRUDENCE.

ENGLAND AND CONTINENTAL EUROPE.

In a discussion of the science of law the first inquiry naturally is into the processes or methods by which we attain a knowledge of its principles.

As a science, jurisprudence classifies into a system the body of our knowledge acquired by a study of its actual development and history, and traces the principles which connect its various results.

We cannot appreciate the Science until we have traveled over the isolated parts and fragments of "laws" extracting here and there, the principles which are stored away in the various cases for future use, finally reaching a point in our journey when we may safely look backward with confidence that we know something of the "Science."

We cannot acquire a knowledge of the Science from the cases solely, but must consult other evidences of law.

So many of the principles are hidden away in old and musty cases, and have become familiar as our alphabet.

There is so much dependent upon history; history of people, of country, of government and of conditions which are not found in the cases, the latter being decided for the immediate benefit of the parties, and not for posterity.

Again much depends upon statutes, and statutory changes, which cannot always be fully explained or even set forth in the cases.

By relying solely upon one method of study, all these features do not readily appear, and have to be supplied in some other way.

The primary purpose should be to demonstrate to the searcher after knowledge of the Law, that it is a Science and System, and to dispel from his mind what might be the first impression, viz.: that law is a set of single instances.

The Methods of Study.

There are four methods of Study of Law, or Schools of Jurisprudence, viz.: 1. Metaphysical; 2. Analytical; 3. Historical; and 4. Comparative.

There is another school of jurisprudence designated as the Philosophical, which really is embraced in the first above named, and may more appropriately be styled Philosophical. We first hear of this in Germany where it has stood in contrast with the Historical method. The latter method is said to have had its origin in Germany, although I have somewhere seen the statement that it originated in Rome.

Contests have been waged between "theorists" and "practicalists." The English Analytics look with scorn upon the German philosophical stronghold, while the philosophists cling with tenacity to their creeds and tenets.

The English Analytic had much to disturb his equilibrium in the palmy days of the Romanists and popery, and since Church and State have assumed their proper stations, and early popish deception in respect to law has ceased, he has looked at law with a single idea, as an independent science.

The words of Sir Henry Finch in the seventeenth century seem to have left no lasting impression upon the slavish following of English precedent when he said: "The Law of Reason is of such singular and incomparable use that it rules as lord paramount over

the law, and even overrules the positive law; and rather than any of these established rules should fail, the very maxims and principles of the positive law will yield as a higher and more perfect law." . . . "Of the first sort are the principles and sound conclusions from foreign learning; out of the best and very bowels of divinity, grammar, logic; also from philosophy natural, political, economics, moral, though in our reports and year books they come not under the same terms, yet the things which there you find are the same; for the sparks of all sciences in the world are raked up in the ashes of the law." (Sir Henry Finch's Discourse on Law.) Andrews' American Law, 39, 40.

Professor James Lorimer of the University of Edinburgh in his Institutes of Law seems to bear the brunt of the philosophical school in England in recent years. The Analytics praise his literary attainments but condemn his theories. Some parts of his work have been found interesting and useful, but most of it is too theoretical for the practical lawyer.

In Germany, Thibaut occupied conciliatory ground between the philosophical and historical.

"Nothing," he says "is more to be wished than that the philosophical and the elegant jurists should soon cease to regard themselves as two hostile parties. Each side must abate somewhat of its pretentions, and reciprocally take what is good from the other. Without philosophy there is no complete history; without history, no safe application of philosophy. Both must unite as aids to Interpretation, and must exercise a continual influence on each other. The jurist who aspires after perfection will therefore endeavor to combine profound historical knowledge with philosophical views; for the historical part of jurisprudence can never be separated by a sharp line from the philosophical. In each are gaps, which can only be filled by the

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come philosophers, not of the transcendental kind, but genuine practical ones.

There is no science which is purely theoretical; no science can exist unless it rests on facts.

We know that we have feelings, motives, intention and the ability to discriminate between right and wrong, and know that it is our duty to do the right towards our fellows; and the law wills no differently.

The Roman Conception of the Principles of the Philosophical School.

In the legal literature of the Romans we find no traces of theories of law such as were evolved in subsequent ages in Continental Europe and England. We must simply take the Roman Law as it was, and draw our own deductions.

The fact that Romans made no distinction between law and morality, and in accordance with Greek philosophy considered the Law of Nature as binding on them because it was a *lex*, and that it was applied so that no strong moral claims should be disregarded, clearly demonstrates that Roman Law is the source of inspiration to the Philosophical School. And few scholars have escaped its impressions.

Cicero considered the law of nature as the highest law and standard of morality, as inborn in men, older than all ages, everywhere the same, and which could not be altered and repealed; that it furnished the basis of all morality, and ought to prescribe the provisions of "positive law," far more extensively than it does, and to give that law a higher and more truly moral character. (Bryce's Studies in History and Jurisprudence, 577.)

And Equity meant to the Romans fairness, right feeling, the regard for the substantial as opposed to formal and technical justice, the kind of conduct which would approve itself to a man of honor and conscience. (*Id.* 581.)

The opening paragraphs of Justinian's Institutes

discloses the fundamental basis of Roman law, viz.:

"Justice is the Constant and perpetual wish to render every one his due."

The term "*jus*" was taken by the Roman jurists to include all the commands laid upon men that they are bound to fulfill, both the commands of morality and of law. In speaking of the elementary principles and divisions of jurisprudence, they did not keep law and morality distinct. They adopted the Greek conception of the law of nature, giving effect to its principles not only because they considered it morally right to do so, but also because the law of nature was a law. (Hammond's Sandars Justinian, 15.)

The commands of morality and of law, the definitions and principles governing the rights of persons and things, have been the same throughout the development of the Roman Civil and Common law.

"Jurisprudence" in the Civil Law, near the time of Christ, was regarded as "the knowledge of things divine and human; the science of the just and the unjust."

As expressed in Justinian's Code, so ought it to be now:

"The maxims of law are these: to live honestly, to hurt no one, to give every one his due." (Hammond's Sandars Justinian, 68.)

Stoic Philosophy.

Beyond question the germ of the Philosophical school of jurisprudence had its origin in Stoic philosophy. All historians bear upon the influences of Grecian philosophy on Roman law. Sandars speaks of the *juris prudentes*, a body of men in the days of the republic who studied the principles of law, and expounded them for the benefit of others, whose opinions were used before magistrates. This class of persons were among the first men of the State, men of learning and acquainted with Greek

philosophy. "By far the most important addition to the system of Roman Law which the jurists introduced from Greek philosophy," this writer states, "was the conception of *lex naturæ*," which came from the Stoics, *natura* with them meaning the universe of things, which, according to their construction, was guided by reason. (Sandars Justinian, sec. 13, 14. Introduction.)

Austin states that *jus gentium* of Justinian is the natural *jus* found in the writings of Cicero, which the Classical Jurists borrowed from the "natural rule of right" as conceived by Greek speculators on Law and Morals. (2 Austin's Jurisprudence, sec. 819.)

A brief notice of the Stoics may therefore be in order at this point.

Zeno founded the so-called school of the Stoics in about the third century before the Christian era, teaching at Athens in a public porch (in Greek, *stoa*), and hence it is sometimes referred to as the philosophy of the Porch.

The tenets of their creed in so far as pertinent here are briefly as follows:

They inculcated virtue for virtue's sake alone.

They believed that "man's chief business here is to do his duty."

"The Stoics were eminently practical; they strongly held that knowledge is for the sake of action, and the worth of philosophy consists in its power to guide the conduct of life."

"They likened philosophy to a fertile field, logic to the fence round it, and ethics to the crop grown in it. They further said that the knowledge by which action is to be guided is a knowledge derived from experience." (Pollock, Jurisprudence and Ethics, 318.) "A virtuous life is the same thing as a life agreeable to experience of what happens in the course of nature; for the

nature of each of us men is part of the nature of the world." (Chrisyppus. *Id.*) "A life according to nature."

The knowledge by which actions are to be controlled is founded on an observed order of things, which is something belonging to the whole world, and equally present in every part of it. "This is exactly such a general conception of knowledge as in these times is growing upon us as we become more familiar with the methods and results of science." "The Stoics asserted that the world is a product of reason, and that all the laws of nature aim in the long run at reasonable ends." "Righteousness consists in fulfilling the duties imposed by it with a cheerful obedience of discipline." (Pollock Jur. p. 335.)

The Roman conception of natural law and morality found lodgment in Continental countries, Germany becoming its particular stronghold, where law was scientifically studied earlier than in England, and where[1] it held full sway until a new school—The Historical—sprung up. Leibnitz in 1668 first pointed out the unity and the organic character of law.

Thomasius and Kant—two German philosophers—contributed largely to maintaining a distinction between the classes of obligations into perfect and imperfect, the one enforceable and the other not; the one a legal obligation, the other a moral, separating law from ethics.

It is said that this distinction originated with Christian Thomasius, who lived in Leipzig and wrote in 1705. (Warkonig Delineatio, p. 6: Lorimer's Institutes of Law p. 286.) It is said that "The doctrine of Kant completes the distinction established by Thomasius between morality and law."

[1] See Sandars Jur. XXVIII.

Another German writer, Ahrens, says: "Law and morals lend each other mutual support; separated or confounded, they produce social disorder, but, distinguished and united, they are the two most powerful of all real progress." (Quoted in Lorimer's Institutes of Law, 298–9.)

The doctrines of Thomasius and Kant were adhered to for about a century.

Thibaut was a leader of the philosophical school, adhering to the older methods of study, friendly to the Roman law, strongly favoring the reduction of law to legislation. But the quotation from his writings above given (*ante*, p. 24) shows that he occupied middle ground, having due regard for the good in both the historical and philosophical.

In 1860, Trendelberg [1] gave to Germany a work on Natural Law, his avowed purpose being to restore the connection between law and ethics, upon which the historical school had made strong inroads.

For many years the philosophical Germans have been strong supporters of natural law, merging the scientific treatment of law in the larger region of general ethical inquiry, and are accused by their English neighbors of contributing to popular confusion by their reluctance to abstract, even provisionally, law from its moral surroundings. It is also said that "instead of the science of law making an even and independent progress of its own, it has undulated with every wave of ethical speculation, and has consequently suffered the retardation incident to the growth of the most involved because the most composite branch of intellectual research." (Amos, Science of Law, New York, chs. I. II. III.)

[1] Trendelburg, *Naturrecht und dem Grunde der Ethik.* Lorimer's Institutes of Law, 304. The latter refers to the various German writers from 1828 to 1860, who opposed the Kantian school.

English Tendencies to Philosophical School.

The general nature of law from a scientific standpoint seems not to have occupied the attention of Englishmen until after Blackstone wrote his Commentaries. Many critics have appeared upon the literary field since his day, some of whom have been unreasonable. If he had not written the short chapter on Nature of Laws, in which he displayed Roman tendency in respect to Natural Law, he more than likely would have escaped with fewer scars. Not one of his critics accomplished half so much, and if Bentham and Austin had been strong enough to have brought about direct results from their ideas of law, it would have been all legislation—strongly Roman indeed.

Blackstone committed the unpardonable sin, according to some, of mixing law and ethics, in his preliminary chapter. Professor Hammond observes:

"Had Blackstone confined himself to the treatment of municipal law as a rule of civil conduct, and thus distinguished from the natural or revealed, the former of which is the rule of moral conduct, and the latter not only the rule of moral conduct but also the rule of faith, as he has done in the body of the commentaries, and not prefixed the pages in which he makes these also a part of the municipal law, we probably should not have found Austin and his disciples following so blindly in the same direction. Had Austin accepted the doctrines of the historical school to explain the growth and form of the common law, it would not have been left, for the most part, to German scholars and their few followers in England, of whom Sir Henry Maine has been the leader, to point out the only way in which that law can be successfully studied." (Hammond's Notes to Blackstone, vol. 1, p. 235–6.)

Blackstone cannot be classed in the philosophical school, because he showed greater respect for historical methods than any previous writer.

He undoubtedly occupied neutral ground considering the merits in both the philosophical and historical, as did Thibaut in Germany, whose views have been previously stated. (*Ante*, p. 24.)

The pervading sentiment in Blackstone's Commentaries was "Natural law" as found in Roman law, which was the current view in England during the 17th and 18th centuries, "a theory," says Professor Hammond, "which has expiated its undeserved popularity at one time, by a great deal of undeserved abuse and ridicule since." (Hammond's Sandar's Justinian, LIX.)

The Commentaries of Blackstone were first published in 1765, and his views were in harmony with the spirit of his time.

True and substantial happiness, he states, is the foundation of ethics, or natural law, The law of nature being a creation of God, human laws, he contends, are not valid if inconsistent therewith. But this doctrine did not take root in England, so as to live long after his life. Lord Coke, however, in Bonham's case, 8 Rep. 118, said that "when an act of Parliament is against common Right and Reason, or repugnant or impossible to be performed, the common law will control it, and adjudge such act void." Some other *dicta* are found of like effect.

Blackstone again follows the Roman idea in his reference to the immutable laws of good and evil which the creator has enabled human reason to discover so far as they are necessary for the conduct of human actions. The full passage is quoted in the note.[1]

[1] "For as God, when he created matter, and endued it with a principle of mobility, established certain rules for the perpetual direction of that motion; so, when he created man, and endued him with free will to conduct himself in all parts of life, he laid down certain immutable laws of human nature, whereby that free will is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws. (Cited 3 Oh. St. 582.)

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obvious reasons it does not attempt to enforce, and on this alone, as I conceive, is founded the division of perfect and imperfect rights, which is so favourite a division with writers on jurisprudence and with those ethical writers whose systems, from the prevailing studies and habits of the time were in a great measure vitiated by the technicalities of law. . . . All rights are morally perfect; because wherever there is a moral duty to another living being, there is a moral right in that other, and when there is no duty there is no right. There is as little aim in perfect right, in a moral sense, as there is in logic an imperfect truth or falsehood." (Lorimer's Inst. of Law 301. Brown lectured in 1810.) Professor Pollock states that Lorimer's book is the only work known to him which adequately sets forth in English a view of the nature

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

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

"But in order to apply this to the particular exigencies of each individual, it is still necessary to have recourse to reason; whose office it is to discover . . . what the law of nature directs in every circumstance of life; . . . And if our reason were always, . . . clear and perfect, unruffled by passions, unclouded by prejudice, unimpaired by disease or intemperance; the task would be pleasant and easy; we should need no other guide but this. But every man now finds the contrary in his own experience; that his reason is corrupt, and his understanding full of ignorance and error. (Cited 40 Ala. 481.)

Then speaking of the revealed or divine law, he concludes:

"As then the moral precepts of this law (Divine law) are indeed of the same original with those of the law of nature, so their intrinsic obligation is of equal strength and perpetuity. Yet undoubtedly the revealed law is of infinitely more authenticity than that moral system, which is framed by ethical writers, and denominated the natural law. . . . Upon these two foundations, the law of nature and the law of revelation, depend all human laws; *no human laws should be suffered to contradict these.*" (Quoted 1 Swan, 44; 5 Heisk. 472; 33 Ga. 367.) 1 Blackstone's Commentaries, 39–43.

of jurisprudence diametrically opposed to the English Analytical School. (Pollock Jurisp. 18–19.)

Other English Opinion.

Sir Thomas Hobbes observes that : "The law of nature, and the civil law contain each other, and are of equal extent. For the laws of nature consist in equity, justice, gratitude, and other moral virtues on these depending, in the condition of mere nature. The civil law is part of the dictates of nature." (Hobbes English Works, Vol. 2, p. 16.)

Locke contended for a law which is founded on Reason, which he states is prior to all governments and being superior to them entitles men to vindicate their natural rights.

And this is the position taken by Sir Henry Finch from whose work quotation has previously (*ante*, p. 23) been made. He held that the Law of Reason overrules positive law, that the maxims and principles of law must yield to this higher law.

Attention has elsewhere been called to the opinion of Mr. James Bryce to the effect that law would have developed more rapidly if Roman ideas had been followed. These were along philosophical lines.

And this closes our consideration of the Philosophical school among Englishmen. Its doctrines seemed to have been the prevailing sentiment until about the middle of the eighteenth century, or at least until some time after the appearance of Blackstone's Commentaries.

Historical School.

Of the older schools of jurisprudence next in order, is the Historical, which, as claimed by some, had its origin in Germany. The contest between this new school and the philosophical, had widespread influence upon jurisprudence in Continental Europe, but made slight impressions in England.

The modern critical Analytical adherents have been quick to appreciate the place of History in Jurispru-

dence, conceding that the subjects of Analytical jurisprudence are furnished by History and existing conditions. As observed by Holland: "The facts can only be presented by History, and History may be studied with the sole view of this class of facts." (Holland's Jurisprudence, 11.)

I would lay special stress on the merits of the historical collections in Blackstone's Commentaries, and of other writers who have contributed materials for legal history, but it is claimed that they remained unfruitful for the best part of a century, and until fertilized by the ideas of the analytical school. (Pollock's Jurisprudence, IX. Preface.)

The historical mode originating in Germany, is said to have sprung from the labors of historians upon Rome and Roman law, due to the efforts of Hugo, Savigny and others in the earlier part of the nineteenth century. Professor Hammond mentions the coincidence of John Austin's visit to Germany in 1827 for the study of law and his falling in with the philosophical school rather than the historical, as having important bearing upon English law, making the following observation in this connection:

"Had Austin accepted the doctrines of the historical school to explain the growth and the form of the common law, it would not have been left, for the most part, to German scholars and to their few followers in England, of whom Sir Henry Maine has been the leader, to point out the only way in which that law can be successfully studied."

This writer after referring to the study of the Roman law and its history, observing that its history has "given the grandest opportunity for the growth and development of law that the world has ever known," concludes as follows:

"It has given to the theories of the historical school

not merely a triumph over their opponents, but the character of a well-grounded and definite science. It has enabled recent students to understand English law better by tracing the strong analogies between the mode of development of both, instead of confining their attention to the accidental coincidences in particular rules, as was formerly the custom. . . . And finally it has shown us how to answer, with some approach of finality, the long disputed question as to the indebtedness of the English law to the Roman, by a careful historical study of both systems." (Hammond's Notes to Blackstone's Com. v. 1 p. 237.)

The study of the history of law is of inestimable gain in its mastery. The common law is of historical growth. We often are compelled to determine what the law is by ascertaining how it came to be.

In concluding this subject the suggestion is offered that as History, in part, furnishes the predicate for the generalizations of Jurisprudence, this constitutes the reason for, and justifies the historical treatment of, the "Roman System," the "Common Law System" of Law, and its offspring "The American System," hereafter found, as systems of law lay the foundation for the discussion of principles of Jurisprudence.

The subject matter of these systems, not the systems themselves, is the basis of Jurisprudence, or science of Law.

The Analytical School of Jurisprudence is English.

The Analytical School.

This method or process deals with Law in the concrete, proceeding sometimes by pure analysis from existing facts and conditions, and sometimes from present facts and historical facts combined. And again followers of this way of thinking resort to expediency or utility, contenting themselves with such rules and doctrines as necessity and utility may demand.

They affiliate to some extent with the Historical followers, but reject entirely the theories of the Philosophical school. They do not believe that it is the province of the jurist to consider the quality of virtue, nor to "decide whether the criterion of virtue be conduciveness to utility, or accordance with nature; nor need he profess his belief, or disbelief, either in an innate moral sense, or in a categorical imperative of the practical reason. These are the hard questions of Metaphysics. The business of the jurist is, in the first place, to accept as an undoubted fact the existence of moral principles in the world, differing in many particulars in different nations and at different epochs, but having certain broad resemblances; and in the second place, to observe the sort of sanction by which these principles are made effective. He will then be in a position to draw unswervingly the line which divides such moral laws from the laws which are the subjects of his proper science." (Holland's Jurisprudence. 27–8.)

It is said that up to the time of the adoption of this method, no idea of philosophical arrangement, much less of literary finish, had begun to work upon the mass.

When did the so-called Analytical School of Jurisprudence come into existence?

Reference has been made to Blackstone's commingling Law and Ethics in the introductory chapter to his commentaries, which was evidently intended to bring English law as a science under the theories of the continental jurists.

The cause of the change or awakening of the opinion in England in respect to the nature of Law is unquestionably due to the views expressed by Edward Christion, Esq., Barrister at Law and Professor of the Laws of England in the University of Cambridge. He prepared the Twelfth, Thirteenth, Fourteenth and Fif-

teenth Editions of Blackstone's Commentaries, published respectively in 1793, 1795, 1796, 1803, 1809.

Christian opposed the reference of what was right or wrong, by law, to Ethics, which he regarded as a separate science; he contended that what is right or wrong by ethical law, is not necessarily or always wrong according to municipal law.

With respect to Christian's views Professor Hammond states: "His position, indeed, marks a profound change which had come over men's minds in the eighteenth century, more strongly than any express statement could. It was the beginning of that alienation between ethical and jural law which has since widened into an entire divorce, at least scientifically regarded." (Hammond's Notes to Blackstone, V. 1, p. 124.)

Mr. James Bryce, in his History and Jurisprudence, calls attention to the fact that English jurists of the seventeenth and eighteenth centuries became imbued with ideas and habits different from those of the Romans.

Bentham did not agree with Blackstone, his theory of law being that it was a command of the State, resting solely upon the physical force of the State, through the threat of punishment to those who transgress the law, regarding fear as the sole motive of obedience. (See Bryce's Studies in History and Jurisprudence, 499.)

It is a fact worthy of note that Bentham had been a pupil of Blackstone, having attended the delivery of the latter's lectures. Bentham died in 1832.

John Austin wrote his "Jurisprudence" in 1832. He is the most severe critic of Blackstone of any writer, and saw but few things good in him.

Austin is the most analytic of all analytics. Much praise has been bestowed on that part of his work entitled: "The Province of Jurisprudence," for his

marking off and defining the boundaries of jurisprudence, and separating it from the domain of ethics or morality. (Dillon, Laws and Jurisprudence, 6.)

Austin, however, said many things in recognition of the close affinity of jurisprudence and ethics, going so far at one place as to state that "the divine law is the measure or test of positive law and morality." (Austin Jur. sec. 14.) Again he says: "Positive laws, the appropriate matter of jurisprudence, are related in the way or resemblance, or by close or remote analogy to the following objects: 1. In the way of resemblance, to the laws of God. 2. In the way of resemblance, they are related to those rules of positive morality which are laws properly so called. 3. By a close or strong analogy, they are related to those rules of positive morality which are merely opinions or sentiments held or felt by men in regard to human conduct. Sec. 138.[1]

Professor Amos, an English scholar, barrister, and writer, in his "Science of Law" (1876) deprecates the confusion caused by the reluctance of the philosophical school to abstract, even provisionally, law from its moral surroundings. He belongs to the analytics. (Amos "Science of Law" [New York, 1876], Chs. 1, 2, 3, referred to by Dillon, Laws and Jur. 7, quotation found *ante*, p. 30.)

[1] "The science of jurisprudence is concerned chiefly with positive laws, or with laws strictly so called, as considered without regard to their goodness or badness.

"Positive morality considered without regard to its goodness or badness, might be the subject of a science closely analogous to Jurisprudence. . . . The Science of ethics . . . affects to determine the test of positive law and morality. In other words, it affects to expound them as they ought to be; as they would be if they were good or worthy of praise; or if they conformed to an assumed measure.

"The science of ethics consists of two departments; the one affects to determine the test of positive law, and is styled the science of legislation, or briefly, legislation; the other affects to determine the test of positive morality, and is styled the science of morals, or briefly, morals." 1 Austin Jur. 85, 86, § 136.

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tinuing, he says: "I do not see that a jurist is bound to be a moral philosopher more than other men; though I do think it quite possible that a lawyer who happens to study moral philosophy may find a legal habit of mind and legal analogies of considerable use in clearing up his ethical conceptions."

He holds that a system of ethics is a scientific hypothesis for the explanation of existing facts: That moral feelings and perceptions of a community are just as much facts in its natural history as any other. That a science of ethics comes into existence only when society is sufficiently civilized to produce men who think systematically; that morality and its precepts are not dependent on ethics, and that a right-minded man does not want ethics to make him know right from wrong; that righteous men are not they who obey moral precepts, but they whose conduct is the foundation of moral precepts. (Pollock's Jurisprudence, 289, 294, 295, 298.)

The foregoing statements carry the analytical to the most extreme stage of pure analysis. Pausing for some observations in respect to them, it may be conceded: 1. That transcendental ethics are to be entirely rejected.

2. That Ethics is the science, and morality is one of the existing facts.

3. That the science only comes into existence when conduct and facts give occasion for deduction of moral precepts.

It may be contended with equal force that:

1. In the pure Science of Ethics there are no imaginary theories.

2. Philosophizing upon the well-defined principles of ethics and morality tends to make better men.

3. Knowledge of the principles of ethics and morality, or rather of deontology, makes better lawyers and

judges, and its acquirement should be a chief aim of lawyers.

And lastly the principles of ethics, morality, and of deontology should, and will, if the lawyers and judges do their duty, be the basis of law.

Comparative School.

The comparative school is given as another mode of viewing the law. This involves comparisons between systems and between laws of different countries and states. By this means it is sought to discover what has been done in other jurisdictions, and if rules and doctrines be found suitable and applicable to conditions, they may be adopted and followed. See for Schools of Jurisprudence. (Bryce Studies in History and Jurisprudence, 609, 617.)

This method finds frequent application in American states because our law was drawn from the English system, although the two systems are of the same family.

The Historical and Comparative Methods are thus frequently jointly used in this country in its relation with English common law, and as between our states.

IV.

SCHOOLS OF JURISPRUDENCE.

(Continued.)

UNITED STATES.

As the English common law was transplanted with the first settlement of this country, and was claimed as the birthright by the colonists, it was accompanied in a large measure with the opinions of English scientists. There is, however, some controversy about this, and well there may be in view of various opinions which we find expressed by courts and writers, and, especially by reason of certain provisions in our written constitutions. The many radical reforms and improvements in American law, as compared with the common law, is a significant transition. Dr. James Bryce says that natural law or right, with freedom as the offspring, was the basis of the Declaration of Independence in 1776, that "Liberty, Equality, Fraternity are virtually implied in the Law of Nature." Bryce's History and Jurisprudence.

Some of our English friends have claimed that Americans have taken up with the Continental school rather than with the English conception or theory of law.

Mr. Pollock in his Oxford Studies (1890) makes the following observations in reference to the American view.

"We find a marked tendency in American authors to take a continental rather than an English view of

the general theory of jurisprudence. Not only our positive and analytical method finds little favor with them, and their theoretical work is mostly akin to that of the German philosophical and historical schools, but they treat the common law itself as an ideal system to be worked out with great freedom and speculation and comparatively little regard for positive authority. Decided cases are treated by them as not settling questions, but as offering new problems for criticism. There are even one or two American writers of great ability, for whom, as for the German expounders of Naturrecht, "legal science appears to consist in a perpetual flux of speculative ideas."

Judge Dillon disclaims knowledge of any American writers who adhere to the German view, stating that Mr. Pollock "is mistaken in the general statement that American authors display a tendency to take a Continental rather than an English view of our Jurisprudence, and to adopt German and Continental rather than English methods in the study and prosecution of legal science or the decision of legal problems." (Dillon's Laws and Jurisprudence, 144.)

It is true that individual scholars, both in and out of the profession have been strong in expressing their sentiments in favor of the English view.

Professor Hammond in his Notes To the Nature of Laws, in his edition of Blackstone, claims that the common law courts "usually held that the common or customary law did not embrace ethics or religion, though it might be subordinated to them; it would conform its rulings to their requirements, so far as human imperfection allowed, but would not enforce those requirements as necessarily a part of the law of the land." He states, further, that dicta by some of the courts may doubtless be found, in harmony with the views of individual writers, in the

recognition of ethical rules as part of the law. (1, Hammond's Blackstone, 122.)

Recurring to the opinion of Judge Dillon as shown in the first Storr's Lecture at Yale, we find that he deems the separation of jurisprudence and morality "essential to the advancement of legal science." He further says:

"It is considerations of justice and right that make up the web and woof and form the staple of a lawyer's life and vocation. The lawyer's work and business are, it is true, with human laws; but let me repeat, the lawyer makes a grievous mistake who supposes law to be the mere equivalent of written enactments or judicial decisions. Theoretically, and for many purposes practically, lawyers must discriminate law from morality, and define and keep separate and distinct their respective provinces. But these provinces always adjoin each other; *and ethical considerations can no more be excluded from the administration of justice,* which is the end and purpose of all civil laws, than one can exclude the vital air from his room and live. A thousand times have I realized the force of this truth. . . . In the practice of the profession I always feel an abiding confidence that if my case is morally right and just, it will succeed, whatever technical difficulties may stand in the way. . .

"The subject of the relations of law and ethics is full of delicate and difficult considerations. It is more easy to be lured than to avoid a field of unprofitable speculation. . . .

"Legislation belongs to or is a branch of ethics. . . So far as the separation of the judicial and legislative functions is actually complete, it is easy to distinguish the provinces of law and morality.

"But in so far as the judges are compelled . . . to exercise what is a creative power and to make a new

rule, . . it seems to me that they are rightfully, because necessarily, within the domain of ethics, and that in such cases the domain of ethics and law are not and cannot be delimited in advance, nor until the line is drawn by the judges in and by the opinion and judgment which are given in the particular case." (Dillon's Laws and Jurisprudence, 19, 20.)

There has been a scarcity of discussion of this question, scientifically, among lawyers. Judge Cooley in his edition of Blackstone seems to reject the idea of a law of nature, or of making the law of God, the test of human law, because it is impracticable. (1 Cooley Bl. 40.)

The theory of Blackstone that no human laws can be of any validity if opposed to the law of nature, though receiving some support in one or two decisions in England, was exploded long ago in England and in this country. And the Supreme Court of the United States has declared it impracticable as a rule of action to be administered by the Courts. (Andrews' American Law, p. 86: Allen v. Ferguson, 18 Wall, 1.)

A book entitled "An Essay on The Growth of Law" (Published by Callahan & Co., Chicago, 1882.) by Morris M. Cohn contains an interesting discussion of the subject, the conclusion of the writer being that "The distinction between laws and practical morality is not philosophically safe."

The question has been discussed by noted lawyers at meetings of Bar Associations, but these discussions will not be pursued.

The general consensus of opinion of legal men on this side of the continent appears to be in accord with the analytical conception, that the study of the science of law can only be properly pursued by keeping it apart from the science of Ethics.

Attention is briefly directed to some extra-jural views. Some educators have considered the question in their writings, and no doubt the general conception of scholars in our colleges and universities is in accord with the analytical view.

President Hadley of Yale says that the study of Ethics "has been divorced from the study of law. We have accustomed ourselves to think of law and morals as subjects wholly separate. We have been taught to look to our feeling, to our conscience, to our reason, as sources of moral authority; to the courts and to the legislatures as sources of legal authority; and above all, as a matter of cardinal importance, to keep these two things sharply distinguished."

"In the decision of most of the practical questions, which come up in every day life, this separation is most salutary. But in judging the past history of morals, or in formulating theories of moral development, we are in danger of carrying this habit too far. *The practice of drawing a hard and fast line between law and morals* is something peculiar to the nineteenth century; and even in the nineteenth century it has not been quite so universal as we have supposed. The separation which we deem to exist as a matter of necessity is more or less confined to our own time and to our own country. There is less of it in Europe than in America; less in Catholic nations than in Protestant ones; less and less of it as we go farther back in the world's history. Even in our own country to-day the ruder communities show a tendency to revert to the time when law and morals were not thus separate." (Hadley, Education American Citizen, 106, 107.)

Professor Palmer of the chair of Philosophy in Harvard University, in his work entitled, "The Field of Ethics"—says:

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V.

SCHOOLS OF JURISPRUDENCE.

(Continued.)

A MIDDLE GROUND.

HAVING considered and quoted extensively the opinions of those who have written upon the schools of jurisprudence, we are ready to look backward and express our preference.

In this connection I feel like making a comparison of religious creeds and doctrines of the middle eighteenth century, when the separation of law and ethics originated, with those of the early twentieth century.

As the dawn of reason appeared to the lawyers of the eighteenth century, they properly objected to commingling the prevailing supernatural religious creeds or doctrines, or moral precepts springing therefrom, with legal doctrines and rules.

They were not consistent with each other.

But how much easier is it now to think of the legal precept, the religious or moral precept in the same breath, since men have so universally come to regard the latter in the light of reason, and according to nature, as opposed to the unnatural or supernatural.

Cannot this change of heart form the basis of a more perfect bond of unity between law and ethics.

It may be conceded that technically, perhaps, the sciences of Law and Ethics will continue to occupy their separate stations, but there must always exist

such a working arrangement between them as that injury may not be done to either.

All no doubt can occupy this universal ground. If we can, would it not be better to cease laying so much stress upon the distinction.

Individually we cannot perceive the distinction so clearly, in view of the claim conceded by so many, that the decisions of our courts are to be regarded as evidence of the law. If this position be sound it takes us to the field of morality for the sanction of rules of law.

The rule of *stare decisis* is not so potent as to keep the courts of one jurisdiction from passing the boundary lines of its decisions and entering the field of social ethics in search for the *Law*.

Englishmen have the advantage over Americans in so far as concerns *Uniformity* of decision. Their courts, wherever located, may always turn to the rules pronounced by the court of last resort, which all are bound to observe.

But with us the different states are not only not bound to follow the decisions of other states, but the state courts are at liberty to adopt a different rule or doctrine than that of the United States Supreme Court, unless the decision made by the latter, be in a case which came to it from the particular state.

This being true there cannot be that exactness and uniformity of "Case Law" in America, which is the pride of Englishmen in their system of case law.

Such being the situation in the United States it magnifies the relation of law and morality with us. Our judges have more liberty to follow the moral bent of their own minds, and to ignore the decisions of other states.

This is no doubt what Pollock had in mind when he directed attention to the tendency in America to-

wards the Continental disregard for decisions. But we are not guilty of this charge, because the course pursued by our courts is due to the structure of our government, and not to a general disregard of decisions as authority.

If the Law could receive the support of the educators of our youth in the Universities and Colleges, and the ministry, along the lines suggested in these lectures, there would be greater rapidity towards its perfection.

Civil law is the product of human minds. This mind is trained in our institutions of learning. Here young men are taught to do the things which they afterwards are compelled to learn more slowly in practical life. (See Hadley, American Citizen, 150.)

Instead of teaching the doctrine that there is a wide divergence between Law and Morality, it would be better to instill into the minds of the younger generation the doctrine that Law and the principles of Ethics should rest upon the same ground, and that enlightened modern thought and civilization is bringing morality and the laws of society, and the consequent law of State and Nation into closer union.

There is a Middle ground to be taken between the Historical and the Analytical, and between these two and the philosophical.

From what has already been said it seems to be conceded that the historical school fills gaps which are in the analytical, and *vice versa*. This is admitted by all scholars in jurisprudence if they fully appreciate the scope and extent of the Science.

Nothing is more helpful in the mastery of law than its scientific arrangement with due regard to all its parts. The chief mark of the so-called analytical followers is the rejection of all consideration of the ideas of the philosophical sect. This leads them away

from the sources of law, and ignores the great responsibility that rests upon the legal profession in the formation of law.

In undertaking the study of law in this age the tendency is first to learn what the law now is, without stopping to discover how it came to be, and without considering it deeply as a science. The law is made up of numerous precedents, statutes and constitutions. Common law and equity is a collection of judicial decisions, throughout which are found certain fundamental truths, which when extracted and set forth systematically display the science of law.

It is true that to determine what the law is, the lawyer must search the voluminous records of law, until some positive regulation is found, and that of this constant searching chiefly consists his labor. It is true that the law embraces a vast compass of study, and that it is difficult if not impossible to discover the limits of jurisprudence.

But it must be remembered that while engaged in this almost endless search for cases, the lawyer is in reality seeking after the truths of life which have been followed and adopted by the courts and are embodied in the reports of cases. These truths or principles being drawn from life were in existence before the decision was made, so that the latter contains nothing new. The State has simply announced its sanction of the rule, put its processes of compulsion into motion, and compelled the observance of rights. The lawyer who merely hunts for precedents upon which to rely, and who fails to extract therefrom the principle and make his own logical deductions and applications therefrom, falls short of appreciation of the law as a science. He must be acquainted with the science or philosophy of the law, as the pilot of the boat is with the channel of the stream, so as to be

able to safely conduct his case into the harbor of success.

Touching the point that the law lies back of the decision the following is offered from an eminent authority:

"The combined decisions and statutes are often, for convenience and without practical misleading, spoken of as the law. Yet, in truth, behind them may lie, invisible except to the illumined understanding, what in more accurate language is termed the law, whereof there are but particular manifestations. The instances proceed from the mind of men, as vegetation does from the earth. Yet the law of the growth of each is a thing quite distinguishable from the growth itself. So the law of the motions of the physical heavens is simply invisible to the unillumined sight; but, since it has become a part of human knowledge, it is contemplated as quite separable from the motions themselves. In our jurisprudence, not in everything have the students of it, in its present state of development, learned to discriminate between the outward manifestations,—that is, the decisions and statutes, which are thus distinguishable from the law itself, and the real law as thus explained; but they have proceeded in this field of discovery far enough to render their conclusions accepted verities, and to furnish abundant stimulants to future investigations and discoveries." (Bishop Non Contract Law, sec. 85.)

We cannot rely upon any one of the methods exclusively, but have occasion for resort to all of them.

The followers of the English Analytical System condemn the metaphysical because it is said: "Some soar so high through the empyrean of metaphysics that it is hard to connect their speculations with any concrete system at all," and because it is insepar-

ably connected with a system of transcendental ethics.

There is great merit in the common sense and practical views of the adherents of the English Analytical School. But in its establishment it is a mistake to erect a barrier between the sciences which will lead men to give too little heed to the sources of law. Jurisprudence and Ethics sustain the closest possible relation; they are of the same family and their offspring is Law and Morality. In the study of law, it is well to keep this in mind. In view of the antipathy of the English school to the blending of law and ethics it is comforting to read what the eminent authority, Dr. James Bryce says upon the subject.

"The blending of the notion of Natural Law, as the ethical standard of conduct and the ideal of good legislation, with the notion of the law formed by the usages and approved by the common sense of all nations as embodying what was practically useful and convenient, satisfied both the philosophical and the historical instincts of the jurists. Had there been a similar combination of ideas and habits in the English jurists of the seventeenth and eighteenth centuries, our legal process would have been more rapid, and, if the phrase be permissible, more ordered and rhythmical." (Bryce's Studies in History and Jurisprudence, p. 582.)

But Dr. Bryce's preference for this affinity has not received much encouragement in England. The want of practicability found in the writings of men on the philosophy of law, would naturally tend to drive men in the opposite direction. It has been said of the work of some of the philosophers. "The foliage is luxuriant, but the fruit scanty." Lawyers will find it greatly to their advantage if they come early to know the few practical fundamentals of the science of the

law. The road to this knowledge, however, is difficult and circuitous, and the guide posts few.

In our travels among the books and looking to the opinions of those who have spoken or written upon the subject, we find them all taking middle ground. No attempt will be made to give these expressions excepting one or two.

Professor Amos, though opposing the merging of the scientific treatment of law in the larger region of general ethical theory, makes the following pertinent statement.

"Ethical science," he says, "has a still profounder and less easily separable relation to the Science of Jurisprudence. The history of the growth of Law, and an account of its Sources, involves a recognition of some of the most embarrassing facts in the moral world. . . . The jurist must at the very outset of his work, have recourse to the teachings of a highly elaborated Ethical Science. It is impossible to understand the intrinsic nature of law, and to ascertain its relation to all other social facts, without having a firm hold on the main facts, which it is the special province of the ethical inquirer to elucidate. The recurrent phenomena designated under such expressions as 'equity,' 'fictions,' 'laws of nature,' 'law, the perfection of reason,' 'natural justice,' and the the like, are unmistakable tokens of the incessant operation of ethical facts upon systems of Positive Law, and of the universal recognition of the truth of such operation.

"It is desirable to warn the juridicial student that the fact of Law is so intimately interwoven in the way of cause and effect with the most apparently alien regions of human life and interest, that nothing can save him from endless embarrassments and practical errors but a clear mapping out, at the very

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In this great march of progress it must be remembered that Lawyers are the leaders, the courts follow and approve. Therefore, lawyers must be acquainted with all the sciences that "may be raked up in the ashes of the law."

VI.

LEGAL EDUCATION.

METHODS AND HISTORY.

The Study and Practice of Jurisprudence

SAMUEL Warren inquired: "Is it a light matter . . . to encounter the study and practice of Jurisprudence—a science which, in the opinion of the great Edmund Burke, 'is the pride of the human intellect; a science which, with all its defects, redundancies and errors, is the collected reason of ages, combining the principles of eternal justice with the infinite variety of human concerns.'"

The profession of Law, properly understood and practiced, is one of the most important of men's occupations.

No better conception of its responsibilities can be found than in the time honored language of Blackstone who said that "the law is a science which distinguishes the criterions of right and wrong; which teaches to establish the one, and to prevent, punish or redress the other; which employs in its theory, the noblest faculties of the soul, and exerts, in its practice, the cardinal virtues of the heart; a science which is universal in its use and extent, accommodated to each individual, yet comprehending the whole community."

Edmund Burke says in his opinion, "law is one of the first and noblest of human sciences; one which does more to quicken and invigorate the understand-

ing, than all the other kinds of learning put together."

This statement has merit in it, because all the other sciences, formal and physical, penetrate the law. Law deals with and governs all human and artificial actions, whether it be conflict with individuals, whether it involves complicated questions of science, or mechanical art, or the many diversified economic questions of the present age; questions of transportation on land or water, questions of local, state or national government, these, and many others, the lawyer is expected to deal with in a practical manner.

An eminent divine once preached a sermon the text of which was: "Call Zenas the Lawyer." Among other things in the discussion of his topic he said that a successful lawyer must know two things: "1st, The law, and 2nd, Everything else."

Considering education by what it really means, there is no class of persons who have superior advantages and opportunities to harvest and husband the greater field of education than a busy, industrious and intelligent practitioner of law. None has a broader range or field than the lawyer of extensive and varied practice; if of the correct type, he may continue onward and upward until the highest pinnacle of intelligence and education is reached.

There is now no hesitancy as to the plan of securing the legal education. It is in the law school.

Of the Methods of Legal Education and its History.

A glance into the early history of legal education will disclose the origin of the popular notion that has always attended the profession of law, as an honored profession. In earlier times there were degrees of advocates, barristers and sergeants at law, and attorneys and solicitors. According to Blackstone, it was not until the fourteenth century that we find attor-

neys who make a business of appearing for all who employed them. (3 Hammond's Blackstone, 45.)

Other authority states that "before the end of the thirteenth century there already exists a legal profession, a class of men who make money by representing litigants before the courts and giving legal advice. The evolution of this class has been slow, for it has been withstood by certain ancient principles."(Pollock & Maitland, History of Law, 211.)

It was necessary that all who desired to become barristers or sergeants at law should attend colleges or societies where opportunity for instruction in law was afforded, which were designated as Inns of Court, of which there were four, Lincoln's Inn, Gray's Inn, Inner Temple and Middle Temple. The history of these institutions and the methods pursued in imparting instruction in law is most fascinating and interesting. It is pretty definitely settled that the oldest—Lincoln's Inn—was established in 1423. But they did not assume the form of colleges exercising the function of conferring degrees in law until the sixteenth century. (Dillon's Laws & Jur. 44.)

They were located outside of London near the King's Palace at Westminster, where the Courts of Law were held. This was because of an order of the King, the purpose of which has been much disputed, though the generally accepted view was that the schools were suppressed in the city so as to encourage their establishment in the suburbs. As Fortescue puts it: "The place of study is not in the heart of the City itself, where the great confluence and multitude of the inhabitants might disturb them in their studies, but in a private place, separate and distinct by itself in the suburbs, near to the Courts of Justice . . . Here in Term-time the students of the law attend in great numbers, as it were to public schools, and are

instructed in all sorts of Law Learning, and in the practice of the Courts." (Quoted in Dillon's Laws & Jur. 63.)

The cost of maintenance of students in these Inns, where they both dined and lodged, was such that only "sons of persons of quality" could attend, "those of an inferior rank not being able to bear the expenses of maintaining and educating their children in this way." "So that there is scarce to be found . . . an eminent lawyer who is not a gentleman by birth and fortune: consequently they have a greater regard for their character and honour than those who are bred in another way. . . . Out of term, the greater part apply themselves to the study of the law. Upon festival days, and after the offices of the church are over, they employ themselves in the study of sacred and profane history; here everything which is good and virtuous is to be learned; all vice is discouraged and banished." *Id.*

Blackstone states that the fixing of the courts stationary at Westminster's Hall had much to do with the cause of education.

Mode of Instruction at the Inns of Court.

The manner of legal instruction at the Inns consisted only of what were designated as "Readings," and "Mootings." Certain distinguished persons were selected to conduct the reading, which consisted of a discussion of some subject of law, and which was carried on but a very short period in each year. There was no particular method in the selection of the branch or topic of the law to be considered, and as a matter of fact it generally had little relation to the instruction of the students gathered there, but more frequently was for display and entertainment.

The mootings were arguments of disputed questions by barristers in the presence of the students.

Necessarily the knowledge of law acquired by those in attendance at the Inns must have been obtained by their own personal efforts, in a manner similar to that acquired by reading in the office of a lawyer.

In later years commencing in the year 1852 a new and definite system of legal education was inaugurated, by the creation of professorships, providing for a course of lectures, attendance thereon being compulsory.

Finally the matter of Legal Education in the Inns of Court was placed in charge of the Council of Legal Education, consisting of twenty benchers, five from each Inn of Court, and to this body is entrusted the power and duty of superintending the education and examination of students for the purpose of being called to the bar.

The Analytical practical mode of legal education has ever been the pervading English sentiment. The tendency of the instruction at the Inns has been along practical and useful lines, sending forth good lawyers and good judges. It may be said of both English and American modes of legal education, that the chief aim is to turn out practical lawyers who can take up the practice of their profession as a livelihood.

Attention given the Science of Law.

The science or philosophy of law receives not special but incidental attention, though more recently there has been an avowed purpose on the part of the Inns of Court, Universities and Law Colleges to give Jurisprudence the attention it deserves.

In view of the liberal spirit of the English bar the statement is not surprising that Jurisprudence "may confine itself to making out a catalogue of blank forms; in other words, to the pure theory of classification," which is the view of Sir Frederick Pollock. He further states: "I do not for a moment deny that

the scientific arrangement of the law is a subject worthy of the most careful discussion. But I do not think it a good subject to be dwelt upon by students at an early stage." (Pollock's Jurisprudence, 5, 6.)

I believe, on the contrary, that orderly classification and arrangement of legal rights and their violations should be brought to the attention of students early in their course; presentation in this manner greatly facilitates the mastery of a knowledge of law from the beginning of its study. Classification of rights and wrongs is not a matter of individual opinion, but it is one of the fundamentals of the philosophy of law. In the city of M. the violation of a right may be vindicated by the decision of a court, while in the distant county of K. another wrong may be redressed by another court, while in still another jurisdiction another grievance may find its way in the grist of adjudicated cases. The student or lawyer may find it necessary to study the individual cases and the experiences of the parties involved, but when he has done with them and brings the principles involved in each case together, he finds that they are not mere individual isolated cases, but that they are all integral parts of a whole subject or science. He finds that Case Law irregularly develops, and that it takes time to formulate a complete system. The good to be derived from the knowledge thus so obtained, is its use in applying it to future unsettled cases. And as no two reported cases are exactly alike, he may find that the principles announced in the three cases are component parts of one great body of principles which are to be applied to the living unsettled problems.

Scientific classification with the beginner in law is just as necessary as are proper plans and specifications for the housebuilder.

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It is a singular fact that the matter of Science or Philosophy of Law is left largely to the Universities, to be considered briefly and by persons who have not the broad comprehensive and practical knowledge of law essential to a just and thorough appreciation of its practical purposes.

It is the purpose here directly to refer to the work of these persons. Before doing so, however, I want to consider the work of our modern law schools along this line.

Jurisprudence in Law and Schools.

The opinion is expressed that "the actual course of instruction in our law schools is too intensely practical and technical; that law if not taught too much as an art is taught too little as a science; and that the course of instruction can have and should have a broader scope than it has when the student is confined to the usual text-books written for practising lawyers, and the designated illustrative cases, since the oral instruction rarely goes beyond this range." (Dillon's Laws & Jur. 86.)

To an interested person the different expressions of opinion, as to the methods of work in law schools are interesting if not amusing. Practical lawyers will complain that the work is too theoretical and not sufficiently practical. On the other hand there are those, (though few in number) who, having a comprehensive knowledge of law, as well as a deep appreciation of it as a science, will say that the latter receives too little attention.

The tendency appears to be towards the practical because it meets popular favor. But undoubtedly the effort of the experienced instructor of law is to distribute the principles of the science along with the practical. The endeavor should ever be to combine with a knowledge of the "practicals" of the law, genuine scholarship, knowledge of history, of the

sources and phenomena of rules and doctrines, of logic and reason, of the right as dictated by the immutable laws of morals emanating from the Supreme Judge.

More time should be given to the study of the Systems of Law, which can be reached only by the historical road. "It is history which teaches us what the law is, it is science which teaches us to use it."

The science of law is the product of continuous development. Savigny said: "The entire system of legal science which governs our actions can only be thoroughly mastered by historical study, going back to its first beginning and following it into all later ramifications." (Savigny Vol. V. p. 474.)

There seems to be little ground for controversy as

Methods of Study.

to methods of instruction; the so-called "case-system," and "Text-Book System" are both good and essential. And so are the Metaphysical, Analytical, Comparative and Historical methods all useful and necessary.

I maintain that there is occasion for the use of them all. To determine upon the proper course to be pursued, one must have a knowledge of the "Systems of Law," and their development. There are but two, the Roman Civil Law and the English Common Law.

Study of Roman Law in England.

A great effort was made by the clergy and others to introduce the Roman law in England, but it was as strongly resisted by English lawyers, judges and the English Parliament. Early English writers, Glanvill, Fleta and Bracton injected principles of the Roman law into their treatises. But with all the efforts, in the language of Sir Frederick Pollock: "Rude and obscure in its beginnings, unobserved or despised by the doctors and glossators, there arose in this Island a home-grown stock of laws."

The same authority admits that "broadly speaking whatever is not of England in the forms of modern

jurisprudence is of Rome or of Roman Mould." (Oxford Lectures pp. 46, 47, 48.)

Professor Hammond in reference to the adoption of Roman ideas and the teachings of Bracton, suggests that there is no difficulty when there is a true conception of the nature of *jus*. That, "the law being regarded as a science of human action, the chief purpose of which is to study those actions in the principles that govern them, and to deduce from them the necessary rules by which they are and must be governed,to analyze them into their elements, and to construct from these elements the institutions which are the generalized statements of all possible legal action . . . it is easy to see with what regard a body of observations and reasonings on their science such as the *corpus juris* presented." (1 Hammond's Bl. 48.)

The Roman law was ready made and expressed in due form, but it was rejected except in parts. Evidences of Roman doctrines are found in Blackstone. The common law was made first hand by the judges, its lessons were drawn from life and its experiences, and rested upon custom.

It thus becomes plain that the study of any principle embodied in either case or text, involves a consideration of the history of the conditions, and for use as a precedent, a comparison with present circumstances. Perhaps this comparison may be made from the case without looking further.

The aim of law school instruction should be to enable students to construct out of the bulk of rules and principles a system of law, and not simply learn how to make use of them as mere tools.

The Science of Law in Legal Instruction.

Having spoken of the methods of Instruction in the law schools, I revert to the topic mentioned, but not followed out, viz: that the 'Science,' or 'Systems of Law,' appears to have been left to the Universities.

An example was set by the establishment of the Vinerian professorship at Oxford filled first by Sir William Blackstone in October 1758, which resulted in his Commentaries on the Laws of England, said by some to have been the first step toward the demonstration of the Science of Law. This work is still chiefly consulted when desirous of learning something of the law as a science. Blackstone's suggestion as to the course to be pursued in the study of law, *i. e.* that "he should consider his course as a general map of the law" is a good twentieth century direction.

It was at Oxford where an academic study of the common law was first inaugurated. And as Blackstone said, the theoretical, elementary parts had hitherto received a very moderate share of cultivation. In other European countries the education of no gentleman or scholar was deemed complete until he had attended a course of lectures upon the institutes of Justinian and the local constitutions of his native soil, under the very eminent professors that abound in the several Universities. But up to the time of the establishment of the Vinerian chair the science of the laws and constitution of England had not either in the Inns of Court or in the Universities received attention. In Blackstone's language "it has been the peculiar lot of our admirable system of laws, to be neglected, and even unknown, by all but one practical profession." There was hitherto no adequate means of instruction in the common law as a science because there were no suitable texts. It could only be studied in the form of decided cases, oral instruction being essential to master the system, its history, its development, and its sources. Professor Holland well expresses the difficulty in the following language: "An uncodified system of law, can be mastered

Academic Study of Law.

only by the student whose scientific equipment enables him to cut a path for himself through the tangled growth of enactment and precedent, and so to codify for his own purposes." (Holland's Jurisprudence, 1.)

This aptly discloses the difficulties involved in acquiring knowledge of law by the route of the decided cases. That which is lacking in this method must be supplied by oral instruction.

"The law," says one of the most competent American authorities, "or any other science, must be reduced to a form adapted to school instruction before it can be studied in the schools. The simplest and easiest form of this kind is a written text, which the student is expected to accept as a final and authoritative statement of the law he studies. If there is no such text, the unwritten law must be stated in the form to which any other human knowledge is reduced for the same purpose, that is in general terms and propositions composed of these general terms, so that the student may know how to apply to the subject the same rules that govern every other process of human thought." [1]

The knowledge of the common law as a liberal science having been adopted for the first time by academical authority, Blackstone, sensible of the necessity of a masterly acquaintance with the general spirit of laws and the principles of universal jurisprudence, produced a work which has lived through the centuries, withstanding the attacks of his critics, as a monument to the science of the law.

The work of Blackstone completely overshadowed that of any of his successors in the Vinerian Professorship, although the work of Dr. Richard Wooddeson,

[1] Professor Hammond's Notes to Blackstone Vol. 1 p. 42. "One has only to study the year books carefully to see how impossible it would have been to teach the law so administered by the ordinary process of university education."

entitled a Systematical View of the laws of England, published in 1792 is said to have been a fitting supplement.

Scientific instruction in the Laws of England was given in the University of Cambridge in 1793–1795, by Edward Christian, Esq., Barrister at Law and Professor of the Laws of England, who found fault with Blackstone's conceptions of law, his teachings being pretty generally followed thereafter.

Bentham it was who favored revolutionizing English law by sweeping it off the Islands, and the planting of a new system in the form of a code, selecting from the decided cases such parts as may have been useful. While Bentham left some lasting impressions, his ideas never took definite shape. He was twenty-five years younger than Blackstone and attended the lectures of the latter at Oxford. (Dillon Laws & Jur. 299.)

He was a legal recluse, his life being devoted to the working out of such reforms as he thought ought to have been made in the laws of England. It has been said of him that there is hardly a single reform made in the law since his day which cannot be traced to his influence.[1]

Blackstone's treatment of Law as a science was perhaps most bitterly attacked by Austin who found fault with his conception of Law, and particularly with his ideas of its sources.

Having spoken of Blackstone's contribution to the science of English law, and of his critics, let us give attention to the work in this direction in more recent years.

The work of practical instruction in law, with added interest in its science goes forward in the Inns of Court

[1] Sir Henry Maine's "Early History of Institutions," Lecture XIII, Dillon's Laws & Jur. 318, where a full account of his work may be found.

under the direction of the Council of Legal Education, while scientific jurisprudence receives attention at Oxford, Cambridge, and Edinburgh.

The result of the labors of Professors Holland, Pollock, Markby and Lorimer at these institutions have been valuable contributions in literature upon law as a Science; the two former on Analytical Jurisprudence, while the later tends towards the continental school.

The work of Holland is perhaps the most popular of any extant upon General Jurisprudence. The only suggestion that comes to mind in reference to it is that the subject, "The Sources of Law" might have received more extended consideration. His analysis of a Right can hardly be improved upon. The fact that much of the work is "hard reading" does not in the least detract from its merit. The work of Markby on the Elements of Law, considered with reference to Principles of General Jurisprudence, is of a more practical character and may be more readily understood and appreciated by the average reader.

Doubtless the early tendency of our law schools was to prepare its students for the bar examination, with little thought of a thorough training in the principles, and this class still exists.

American Methods of acquiring knowledge of Laws and the Science of Law

In the earlier days law school instruction in this country was almost as crude as it was in England, there being no effort to teach law as a science or system. It was deemed necessary to instruct in the science of government, and the work of Kent at Columbia and Walker at Cincinnati touching our governmental system stands as a monument to their names. (Kent's Commentaries; Walker's American Law.)

The lecture system first pursued in this country resulted in much good to the profession and to future

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prosecution, we will turn to one case that will define the right injured, another to see what kind of an action, (whether criminal or civil, or both,) there must be to cause the injury; to another case to see when the injury is complete, whether an acquittal by jury is necessary, or whether a *nolle prosequi* be sufficient; to still another case to see what kind of grounds the person instituting the action must have had to justify him; in other words what constitutes probable cause. Again, malice being an essential, we look to other cases to see what constitutes malice. The person bringing the action may have taken the advice of counsel, so we want to know what the decided cases hold as to this. And lastly we consult the cases to ascertain the rule as to the measure of damages. It is not likely or possible even that any one case decides all these points, and courts do not write treatises in their opinions but only decide the points at issue. After all these rules have been extracted from the cases, scattered here and there, we can set them down in logical order, and then and not until then, may we know all about the wrong of malicious prosecution.

So might each and every wrong be taken up with like demonstration.

But there is so much history, so much about our "Rights," (the starting point in law,) so much modification by statute that are not found in the cases, which must be supplied.

There is much, too, in the Law of Contracts, in the law of property, that is not to be found in the cases. If judges had written for future generations, instead of for the immediate parties, the cases would have been self-explanatory.

Again we want to have everything in mind at the time we are seeking knowledge of a particular part of law which is essential, and therefore many mat-

ters peculiar to procedure may not be found in the case.

A case in Equity may be assigned for reading. The report will not likely disclose the facts or data which make it necessary to appeal to the Court of Equity. These are to be found in the decisions of the common law courts, and therefore we must go outside of the case for information that will enable us to understand it.

In criminal law it must undoubtedly be admitted that because of our Statutory Crimes, and the history of the common law which is a part thereof, the exclusive study of cases is inadvisable.

The advocates of the methods are contending with each other over the merits or demerits of each as often as opportunity is offered. A strong sentiment prevails among some of our best men, that the Elements of the Law must be gathered from the text. Emperor Justinian charged the illustrious professors of law who composed his Institutes to compose them "so that you may no more learn the first elements of law from old and erroneous sources."

I fully share in this view, and would add that the Philosophy or Science of the law is to be likewise learnt.

Enough as to methods of knowledge. In the curriculum of most of our leading schools may be found evidence of a purpose to give the Science and System of Law the attention which it demands. This, however, may most frequently be found at the end of the course, or in the Post Graduate Course, which escapes many.

Jurisprudence should receive attention as an undergraduate study.

The Moral Principle to be Studied.

No better addition can be made to the cause of higher and more thorough training of those seeking a place in the ranks of the legal

profession, than to hold up to view the fact that Morality, or the science of what is right and just between men, is the basis or foundation, of law, and to urge upon young men the necessity of carrying this thought, this principle, into their daily studies.

The main purpose will be to bring out and emphasize this one element involved in the acquirement of a legal education, which is too often lost sight of by many. The basic moral principle must be discovered and studied in every case.

As constitutional, legislative and judicially made law, to be perfectly sound should rest upon the moral principle, law students and practitioners in mastering the law, and in determining litigated controversies, should search for, ascertain and apply to the transaction the basic moral principle underlying the same.

Those who can best appreciate morality, or who can best form proper conceptions of human duty, will make better lawyers.

To become good lawyers, the principles of Legal Ethics must be thoroughly instilled in the mind of the law student from the beginning, as his success as a practitioner will be due to their practice and exemplification more than to any one cause. How can it be otherwise when true Interpretation of law depends entirely upon the proper application of moral principles. Every question must be studied from this standpoint, and, therefore, the student should give this part of his training proper attention.

When these principles become a part of the lawyer, he can maintain the dignity and honor of his profession, and defend it against the calumny of men.

We lay special stress upon "morality" in its relation to the student in the acquirement of his Legal Education. If all law students who are now being

educated in the country could be directed towards this way of thinking, we should, in the course of years, rapidly turn the tide of the opinions of men in favor of the view that Ethics and Law are united.

If the teachers of Moral Philosophy had a knowledge of Law they would not then be compelled to acknowledge their unfitness for the task of discovering the boundary line between Ethics and Jurisprudence; nor will they regard it as "a matter of toil and subtlety." (Palmer's Field of Ethics.)

They would teach men that the rule of human conduct as embodied in the legal precept rests upon the moral principle. Educators who are not lawyers can hardly be censured for laying so much stress upon the line that marks the transition between morality and law, because the lawyers are primarily responsible for starting the trend of thought this way. The object of these lectures will be to magnify the grandeur of the law, because of the fact that the customary rules of morality should and do in nearly all instances receive the sanction of the state.

VII.

COMPARATIVE JURISPRUDENCE.

SYSTEMS OF LAW. THE ROMAN LAW.

THE purpose of a treatise on Jurisprudence being an investigation of the methods of making law, and of the establishment and development of Systems of Law, its scope and breadth cannot well be understood without an examination into the prevailing systems of the world. If there are fundamental, immutable and everlasting principles pervading the laws of all nations, such an examination becomes particularly important. As our people become more enlightened, the more fully do they realize and appreciate the truth spoken by Apostle Paul when he proclaimed: "God hath made of one all the nations." In the language of a divine; "We are recognizing to-day, as never in the past, that we are members one of another and debtors one to another; that neither languages nor customs, widely as they may vary, can destroy the strange oneness of communities and nations. Even we of this splendid twentieth century of enlightenment and progress are acknowledging our indebtedness to far away nations—to Rome for the principles that underlie our system of laws, to Greece for our ideals of art, and to Judea for the inspirations of our highest faith. It is the great truth of universal dependence and interdependence, no man living to himself, no nation living to itself: . . . though the

oceans may divide nations, still the deeps are undergirded by bands of solid rock." [1]

These truths are particularly forceful when applied to Systems of Law. There is a "oneness" a "dependence and interdependence," in the laws of countries.

It is not, therefore, strange that we find on the globe but two systems of law, the Common Law and the Roman Law. Study them as much as .we may, and there will be found many points of "oneness" of "dependence and interdependence," which has permeated the laws prevailing in all countries.

After the decline of the Roman Empire, France, Italy, Austria, Germany, Holland and Spain adopted the Roman law as their general or common law, departing from it only as occasion required, by some legislation or the adoption of some special custom. (Markby's Elements of Law, sec. 85.)

And it seems strange that Scotland has pursued Roman lines, and has not affiliated with the Common Law.

The municipal or civil law of Rome as a system never obtained a footing among English speaking nations, although it made certain inroads. Contest was waged in England between the adherents of Roman law and its resistents until the common law obtained the mastery. The Roman Empire with its long history, had accumulated a mass of unsystematic adjudged customs, until the need of simplification and systematization was felt. Consequently they reduced this mass into a system. The elements of the whole science of law were brought together in the Institutes, so that it would be unnecessary to resort to the original sources to obtain a mastery thereof.

The law of nature, as embodied in the Institutes, *meant right reason inherent in man* having the force

[1] Dr. Kerr Boyce Tupper, of Philadelphia, in a Baccalaureate Address.

of law, which was common to all nations, and which found its way into the common law.

A late learned American educator who gave the history of law, and systems of law studious attention, contended "that the main processes and methods of the Roman law are strictly analogous to those of the common law of England and America."[1]

A prominent feature of Roman Law is its classification. Some legal writers, whose names it is unnecessary to mention, have entertained the opinion that a too refined classification of law is not conducive to its understanding, that it does not grow in this way, that the classification or arrangement of any branch of law, is a matter of individual choice.

We adopt the weapon of Dr. Hammond's argument upon this question. He stated that:

"In the classification of law there are peculiar difficulties. The student of most other sciences has its external arrangement entirely under his control, and can conform it to the true and natural order of the science, as fast as he discovers the latter. But the external arrangement of a large part of the positive law is something which the scientific jurist must accept as he finds it. It is in itself the chief mark of its own existence as positive law. The form cannot, as in other sciences, be separated from the matter, because it is the form that gives to the matter its most important character." (Hammond's Intro. to Sandar's Justinian XXIX.)

The matter of the existence of rights and classification thereof, is a further illustration of the "oneness," and the interdependence in our system of laws.

In the history and development of Roman law, there was builded a natural classification of law, and of rights, which has permeated every other system.

[1] William G. Hammond, Introduction to Sandar's Justinian, XXII.

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jurisprudence is an understanding of the law as a science. Our knowledge is sadly deficient if we do not pursue such a course. The great difficulty in the way is the lack of opportunity, of time, and of ready access to suitable books.

In the preparation of the fifty volumes of Digest of the Roman law, the sixteen jurists appointed by Justinian for the work, divided it into three classes and separated themselves into three bodies, students of law being required to pursue the three classes respectively in their order in acquiring a knowledge of law.

But knowledge of the system, now acquired by the average inquirer, is usually derived second hand, from treatises on the Roman law.

Every person who expects to follow the study of law should take all the Latin available to him in his literary course, and should thereafter in his law course keep his Latin "tools" in good working order, so that when he encounters in the various treatises Latin quotations from the Institutes or from the Pandects which have material bearing on modern jurisprudence, he may be able to readily read and understand them. Many have never realized the great advantage thus derived until their Latin has become obsolete with them, and also because in the course pursued they have not been led into Jurisprudence and its history as they ought.

At the time of the compilation of the Institutes, Code and Pandects under the direction of Justinian, the form of the Roman law was analogous to the later Common law. There were at this period two thousand ancient law books, in the form of treatises and cases.

To understand conditions at the date of Justinian's work a brief glance at the law prior thereto will be helpful.

Until about the close of the third century, law had been variously made in the form of legislation by the Populus, Plebs, and Senate, and by the Praetors, and by the decisions and opinions of the Praetors and Judices.

Subsequent to this and until Justinian's time under the rule of the monarchs or autocrators the law was made up by General and Special Constitutions of the Emperors or Princes, and the writings of the Jurisconsults whose opinions were deemed authoritative.

Thus it becomes necessary to examine the nature of the law promulgated by the praetors, the judices and the Jurisconsults.

Praetorian Law

First as to Praetorian Law: The office of Praetor was of two kinds: (1) Praetor Urbanus, and (2) Praetor Peregrinus. To understand the nature of the law promulgated by each, we must know what their power and jurisdiction was.

The original Praetor was a magistrate exercising jurisdiction in civil cases arising between Roman citizens having his location fixed immovably in the City of Rome. He was styled Praetor Urbanus in contradistinction to the praetors who were later appointed for the outlying provinces, the latter of whom were called Praetor Peregrinus.

The procedure before the Praetor was of the simplest and most natural sort, being conducted *viva voce*, first without pleadings, although at a later period something like written pleadings were introduced. The praetor determined both questions of law and fact, except when doubtful questions were presented, when the praetor put the disputed questions into form which was then submitted to a Judex or Arbiter.

The Judex decided the questions, gave judgment, which was then taken back to the praetor who enforced the same.

Judex

At a later period the two offices, Praetor and Judex, were consolidated into one. We find at this early date power exercised by the praetors analogous to the modern temporary restraining orders or injunctions, in the form of "provisional commands," granted on *ex parte* statements.

Austin says this form of jurisdiction was exercised until about the end of the third century; that it was in force in the time of Gaius. (2. Austin's Jurisprudence, [Campbell's Ed.] 70.)

Pretorian law—*Jus Praetorium*—continued until the reign of Hadrian (A. D. 117) when there was a complete change made, which will be directly noticed.

Each praetor issued an Edict which was the law during his term of office, which it seems was not long. This edict contained the aggregate of rules of the several praetors.

Nature and Form of Pretorian Law

At the time of the compilation by Justinian there were numerous cases or decisions. These were made by the praetors, and the jurisconsults. Nearly all of the civil causes came within the jurisdiction of the Praetors, so that the *jus civile* could as well be designated "praetorian law."

We have seen how causes were presented to and decided by the praetors, and how their decisions or opinions are found in the Edicts, and may readily perceive the analogies between Roman and English decisions, which will be more particularly discussed later.

Aside from the decisions of the praetors, praetorian law assumed the form of legislation, which constituted by far the greater portion of the Roman law.

Pretorian or other Legislation

Jus Edicendi

Jus Honorarium

Legislative power was not alone exercised by the Praetors but by all magistrates of elevated rank, by high priests, by surveyors and curators of public buildings, roads and markets. This branch of law was called *jus honorarium*.

It seems remarkable that though the original functions of the Praetors were those of a judge merely, that they should assume to exercise a sort of a legislative power. The Edicts of the Praetors were in fact of statutory form consisting of either general Edicts, which was a body of statute law, or Special Edicts which were orders made in particular instances.

The Edict, of each succeeding Praetor usually contained all those rules of his predecessor which had met popular favor.

There was no particular system or arrangement in the Edicts being nothing more than a set of heterogeneous rules.

The data or materials which furnished the basis of praetorian legislation were: (1) Customary or merely moral rules; (2) The jus gentium, or that æqual or common law, which had been formed by the Praetores Peregrini, and (3) The praetors supplied the defects in the *jus civile*, or proper Roman Law, and even abolished portions of it, agreeably to their own notions of public or general utility. (2. Austin's Jurisprudence, 76.)

It is said that the legal history of Rome began with the Twelve Tables.

The Twelve Tables

Cicero considered the legislation found in the Twelve Tables the perfection of human wisdom. (De Orat. I. 43, 44.) These Tables contained for the most part short enunciations of points of law which the conduct of the affairs of daily life required to be settled and publicly announced. Each of the tables treated separate topics of the law in statutory or treatise form, the application and exposition being left to the magistrates and judges. The Twelve Tables left untouched much of the customary law, and were themselves the outgrowth of customs. Those

whose business it was to interpret and apply the law as found in the Twelve Tables did it in such a way as to bring all such matters within its spirit, if they were not within the letter.

Perpetual Edict

The "Perpetual Edict" took the place of the Twelve Tables, as the chief authority. Up to the reign of Hadrian, A. D. 117, we have had the annual Edicts of the praetors, the perpetual rules being carried forward by each successive praetor by a process of translation as it was called, but in fact it was by copying and transferring the Edicts of the preceding praetor.

The Edicts of the individual Praetor, it has been noted, only had the force of law during his term, there being no obligation on the part of subsequent praetors to follow edicts of former ones.

At first, the Praetors exercised their powers merely by the tacit acquiescence of the sovereign Roman people. Under the Monarchs they were expressly delegated and authorized.

Praetorian law previous to monarchial times might be classed as unwritten law.

At the close of the third century legislative power was no longer exercised by the praetors, but by the monarchs. From this on until Justinian's time Roman law is found in the form of the Constitutions of the Emperors or Princes, and the writings of the jurisconsults, whose opinions were considered authority, and may in reality be considered as "cases."

Under the direction of Hadrian, Julian, a jurisconsult, prepared the "Perpetual Edict," being a general compilation of rules and Edicts, which was published by the sovereign.

Jurisconsults

Jurisconsults were a body of men learned in the law whose opinions were sought and had great influence in the formation of law.

In the year A. D. 528 under the direction of Em-

Justinian's Code

peror Justinian, a Code was prepared and completed in April A. D. 529. It was found to be imperfect, and was revised in November A. D. 534. It was divided into twelve books, arranged substantially as the original twelve tables.

The code contained in part general constitutions, which meant statutes, which had been made and published by Emperors, and also special constitutions (or judicial decretes and orders) issued by Roman Emperors as sovereign administrators.

In December A. D. 530, Emperor Justinian in-

Justinian's Pandects

structed Tribonian and sixteen co-adjudicators, to make a selection from the writings of the elder jurists, which should comprehend all that was most valuable in them, and should form a compendious exposition of the law. The commissioners completed their work in three years' time, viz, on the thirtieth of December A. D. 533. The compilation was termed *Digesta* or *Pandectae*, and consisted of fifty books, and was given the force of law by the Emperor.

In addition to this, and because of many disputed

Decisions

questions, Justinian had published a book of fifty decisions.

The chief part of the Roman Law left by Justinian were the Code and Pandects, which were intended to comprise the whole of the law which should thereafter prevail in the Empire.

The Perpetual Edict furnished the order and ar-

Order and Arrangements

rangement of the Code and Pandects, and this was, as already observed, not systematically arranged. Austin in his usual critical mood, says of it: "The order of the Praetorian Edict which, though a shapeless mass of occasional and insulated rules, was, at least, a collection of

rules, was the only known model for the arrangement of the projected compilations. And, Tribonian and his associates being uninventive and servile copiers, ordered the matter of their compilations according to the solitary pattern which the Edict presented to their imitation." (2 Austin's Jurisprudence, 81, sec. 874.)

Justinian's Institutes

As the Digest or Pandects were so extensive as to be pursued with difficulty by students the emperor had prepared an elementary work, which was called Institutes; Austin called it, "a hornbook for the instruction or institution of students." (2 Austin's Jurisprudence, sec. 871, p. 80.)

This was prepared under the direction of Tribonian a professor in the schools of Constantinople. It is claimed that the Institutes "followed Gaius in the scientific or systematic method pursued by that most eminent classical jurist in his elementary treatise for the instruction of students. In this, too, they were servile copiers. And as this scientific method had never in fact been observed by any but institutional writers, they never thought of pursuing it in the composition of those larger compilations which were destined to embrace the detail of Justinian's legislation." (2 Austin's Jurisprudence, sec. 874.)

Many have drawn from the Introductory of the Institutes, "Institutionum Justiniani Proemium" instructive lessons in American legal education.

With reference to the work of Tribonian, Theophilus and Dorotheus, professors of law, Justinian addressing the "youth desirous of studying law," said:

"And we specially charged them to compose, under our authority and advice, Institutes, so that you may no more learn the first elements of law from old and erroneous sources, but apprehend them by the clear light of imperial wisdom; and that your minds and

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to a method for the administration of justice, which has proven one of the most beneficent features of English and American jurisprudence.

It may be supposed by many that what we call "Equity" had its origin in the Courts of Chancery of England. As a separate and independent court administering this branch of law it did, but the theory underlying this sort of legal relief had its origin in Rome, as stated.

In Rome, the *jus gentium* arose from extraordinary conditions confronting the government by reason of the subjection by the Commonwealth of communities which had formerly been independent. These communities while under the dominion of the Roman government, were left with their own government and laws.

There was no law either in Rome or in any of the particular subdued provinces by which controversies between citizens of Rome and of the Provinces, or between citizens of the different provinces could be determined.

The citizens in the Provinces, while not exactly aliens, were nevertheless not Roman citizens nor entitled to the rights of the latter.

It was therefore necessary for the Roman Government to provide some mode of redress of grievances arising between such persons. Consequently a new sort of a Praetor was created which was called "*Praetor Peregrinus*," who was stationed at Rome, but who went into the conquered States whenever it was necessary to the performance of his duties.

This officer exercised civil jurisdiction over all "controversies between Roman citizens and members of Italian states which were vassals and dependents of the Roman people; between members of any one of these vassal states and members of any other; between

members of subject states when residing in Rome itself." (2 Austin's Jurisprudence, 41.)

This was analogous to our Federal Court jurisdiction.

Peregrinus though meaning an alien was not so strictly used in this connection, although this Praetor was much engaged in hearing disputes between citizens of the different Provinces.

Gentes as distinguished from *cives* means foreigners. And thus the law promulgated by this class of Praetors came to be *Jus Gentium.*

As Sandar, in his Justinian's Institutes, says:

"When the jurists came to examine different systems of laws, they found much in each that was common to all. The common part they termed the *jus gentium;* and the residue, the part peculiar to each state, they called *jus civile.*" (Sandar's Justinian, [Hammond] 71 notes.)

The Praetor having no law to guide him used his own judgment, acted arbitrarily, and yet in accord with natural justice, gathering his ideas by a comparison of the laws of Rome and the other Provinces. There was nothing then in existence approaching the modern conception of "Systems of Law." As Austin's Editor observes: "The phrase 'systems of law' seems here used (referring to Austin's use of it) as a short expression for what might perhaps be more accurately described as a heterogeneous mass of rules of positive law and positive morality." (2 Austin's Jur. 42 note.)

The superiority of the *Jus gentium* over the law as emanating from the old Praetors, soon came to be recognized, the *Praetors Urbani* soon came to borrow from it and incorporate it into Roman law proper, in the administration of justice between citizens of Rome, until it had all been practically absorbed.

The *jus gentium* came to be styled "aequitas," a name, says Austin, "which was extended to it the rather for the reason—that *aequitas* had become synonymous with general utility; and that the *jus praetorium*, when contrasted with the old law, to which it was corrective and supplement, was distinguished by a spirit of impartiality or fairness, etc.," (2 Austin's Jur. sec., 811.)

Sources of Roman Law

The *jus civile*, or the civil law of the Roman State, was the earliest kind of law, and was based on custom. This customary law was supplemented and added to by different methods, such as the decisions of the *prætors*, by the interpretations of the codes by the *juris prudentes*, who were a class of persons who studied the forms, and, in time, the principles of law, and expounded them for the benefit of others. These men were among the foremost of the State, men of great learning and ability, familiar with Greek philosophy which they brought into play in their opinions upon questions of law. These opinions were furnished to the magistrates and are recorded in history as among the sources of law.

Law of Nature

It was this class of men who introduced into Roman law from Greek philosophy the so-called law of nature as a source of law. *Natura* was interpreted to mean "the universe of things," which was supposed to be entirely controlled and governed by "reason," which they considered synonymous with law. And as *lex naturæ*, or the law of reason, controlled the operations of the universe, so likewise man being possessed with reason, this law of nature, this law of reason will govern the actions of men. They considered that moral conduct was the direct result of acting in accord with the law of reason.

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wrong, and produce a result that was not equitable, there the *lex naturæ* was supposed to operate, and the prætor, in accordance with its dictates, provided a remedy by means of the pliant forms of the prætorian actions. Gradually the cases, as well as the modes in which he would thus interfere, grew more and more certain and recognized, and thus a body of equitable principles was thus introduced into the Roman law. The two great agents in modifying and extending the old, rigid, narrow system of the *jus civile* were thus the *jus gentium* and the *lex naturæ*." (Sandar's Justinian, Introduc. p. 15.)

The Roman Civil law as collected and promulgated by Justinian was in force for a short period. As Blackstone said it "fell soon into neglect and oblivion, till about the year 1130, when a copy of the digests was found at Amalfi in Italy, which accident, concurring with the policy of the Roman ecclesiastics, suddenly gave new vogue and authority to the civil law. (1 Blackstone, 81.)

Continuance of the Roman Law.

Professor Hammond calls attention to the work of Savigny—"History of the Roman Law in the Middle Ages,"—"in which he carefully traced the continued use of that law in some parts of Italy, and elsewhere, during the whole period intervening between the fall of the western empire, and the revival of the law in the twelfth century, and of its study by the glossators and their successors down to the fifteenth century." (Hammond's Notes to Blackstone, Vol. 1, p. 234.)

In the seventh century the Roman and Gothic laws were formed into one body, called the Gothic Roman Code. It superseded the former laws and went under the name of the Roman or Theodosian law, and became the only work of authority. (An-

drews' American Law, sec. 12, quoting from Butler's Horæ Juridicæ, 55.)

The principles of the Roman law were not forgotten, according to the views of some early writers, even during the period of its disuse. Perhaps more is due to German scholars and writers for perpetuation of its principles, as there is where the historical school of jurisprudence had its growth. Here was waged a strenuous contest between the historical and philosophical school of jurisprudence. The historical school had its origin in the sixteenth century, "Cujas being considered the real founder of the historical method by his studies in the history of Roman law. The services rendered to jurisprudence in these two centuries (16th and 17th) were immense, and laid the basis of nearly all that has since been done in civil law." (Hammond's Intro. to Sandar's Justinian, XXVI.)

The historical school was inaugurated in Germany by Hugo, and carried on by Thomasius. (See Lorimer's Institutes, pp. 50, 287–8.)

The chief point of difference between these two schools in Germany was that the philosophical mode, rested upon the theory of natural law, and a union of law and morality, while the historical school, repudiates both ideas. This matter is explained further elsewhere in connection with the history of this special question. (See p. 25.)

Classification of the Law

The classification of law in Justinian's compilations still holds with us, in substance. Different writers in England and America have contended that the divisions of law or its classification is no part of the science. The division into Public and Private law descends from the Roman system finding lodgment in all countries, being accepted with Roman conceptions; public law was that body of law

which concerns the people at large, while private law was that in which individuals are interested.[1]

Modern terms "public law," "private law" as applied to statutes, is a Roman idea.

The idea of a distinction between public and private law may be illogical, but it has been followed so long, and is so well understood that it is not likely it will be departed from. The people generally are interested in all law, whether it relates to person, to personal rights, or to contracts, crimes, etc.

This classification being found as characteristics of law in all systems, demonstrates that it is a feature of the science.

Having thus briefly traced the outlines of the history of the Roman law, so far as relates to the final compilation by Justinian, the point is reached in the discussion when our attention may be directed to the good that may be derived from its study.

In our consideration of the common law we speak of some of these advantages. It is there urged that there were analogies between the two systems. The fact that the principles set forth in the work of Gaius at the beginning of the Christian era, formed the basis of the science of the Roman law; the fact that the fundamentals of the Roman law were revived after so many years and have received the attention of modern scholars, and form the basis of the Law of Continental nations, and are found to be good by Americans in the possessions of its new ward—the Philippines,—is a sufficient testimonial of their worth.

We ought to have, however, something more tangible than generalities in argument, which we will undertake to furnish.

The first benefit to be derived from a perusal of the

[1] In the language of the Institutes: "Jus publicum est quod ad statum rei Romanæ spectat, jus privatum quod, ad singulorum utilitatem pertinet."

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and it is exactly this possession upon which the greatness of the Roman Jurists rests. The notions and maxims of their science do not appear to them to be creatures of their own will; they are actual beings, with whose existence and genealogy they have become familiar from long and intimate intercourse. Hence their whole method has a certainty which is found nowhere else except in mathematics; and it may be said without exaggeration that they calculate with their ideas. If they have a case to decide, they begin by acquiring the most vivid and distinct perception of it, and we see before our eyes the rise and progress of the whole affair, and all the changes it undergoes. It is as if this particular case were the germ whence the whole science was to be developed."

Falck says: "The permanent value of the Corpus Juris Civilis does not lie in the Decrees of the Emperors, but in the remains of juristical literature which have been preserved in the Pandects. Nor is it so much the matter of these juristic writings, as the scientific method employed by the authors in explicating the notions and maxims with which they have to deal, that has rendered them models to all succeeding ages," etc. (Quoted 1 Austin Jur., 383, 384.)

Opinions differ, some regarding the Roman law as clumsy, bombastic in language, while others regard it as a model.

Our own Professor Hammond was of the opinion that those who wish to comprehend law as a science could find no better employment than to work out the details of the Roman system.

It is not the purpose here to go into details but it may be observed that it is a most interesting fact to be noted, that in addition to our inheritance of modes and processes, there are many of the doctrines and rules found in the Pandects, and especially in the Insti-

tutes, that are among the fundamentals of twentieth century law.

Two points naturally attract and interest the reader of the Roman law and its history, viz.: How does it resemble the Common law, and what is to be gained by its study in this the twentieth century?

Our knowledge is gained generally from treatises touching its elements and history rather than by reading the great mass of matter contained in the Pandects or Digest, though the elementary principles may easily be gathered by a perusal of the Institutes.

The principal gain consists in a study of the history of legal ideas and methods.

Sir William Markby has said that "scarcely any portion of our law has wholly escaped the influence of the Roman law. But it is easy to exaggerate this influence." (Markby's Elements of Law, sec., 251.)

It is an interesting and useful process to trace the development and history of legal ideas back through the common law into the Roman law. The matter of chief interest, however, is the mode of making law. The "Code" versus the "Case System" has been debatable ground for many years, but with little progress in the direction of a code among English-speaking people.

The pride of the English law is that it is made by the judges rather than by sovereigns and parliaments. The body of principles which constitute the common law is found throughout the reports of cases expressed in legal technique.

In France, Germany and other European countries codes were adopted after Roman methods. But in England "it would surprise any one not accustomed to such inquiries to find how little of the law which regulates our daily life is to be found in the Statute Book." (Markby's Elements of Law, sec., 202.)

No attempt will be made to discuss the merits or demerits of a Code. One suggestion in this connection will be offered. We have reached a stage in our legal development when the great body of fundamental or elementary principles, those which prescribe our chief rights and duties, are so well settled as to need no decision or case to serve as security therefor. Consequently they might well be expressed in statutory form or in a treatise. Many of them in the United States are to be found in the statutes. But what are to be appropriately styled the elementary principles of law are to be found in treatises of recognized authority, Kent's Commentaries; Walker's American Law, Andrews' American Law; Wilson's Lectures; Robinson's Elementary Law, and are best learned from this source by beginners, just as they are demonstrated by the practitioner, when necessary by reference to these receptacles of authority.

Roman Case-Law and English Case-Law

It is said that there is the following mark of distinction between the English system of Case-Law, and that which prevailed in Rome before the work of Justinian reduced it to a code. It is said that the cases decided by courts rested rather upon the opinions of the judges, which became so unmanageable that violent remedies of legislation had to be called in; that the resulting "Digest" "is a kind of petrified case-law." (Pollock's Jurisprudence, 245.)

Roman case-law as of the date referred to was no doubt crude and may illy be compared with English Case-Law as of the time when Professor Pollock wrote the above statement.

Austin has the following upon this point: "A part of the Roman law, like much of the Law of England, was made by judicial decisions, on specific or particular cases. For in the Roman Law, as in our

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for the invasion of the church upon civil government and in the administrations of justice, we may never have been led so far away from this idea.

Blackstone's theory that decisions rested on custom, though perhaps crude, was but another way of expressing the proper conception of the science of case-law. The judges look to the facts, to the conditions and circumstances of the case, determine what in their judgment is right by resort to reason and the dictates of natural justice, and record their decision, which becomes a guide for future cases. Uniformity of decision chiefly constitutes the science of case-law, according to Mr. Pollock. But it would seem that the sources or basis of decisions was of greater consequence.

A slavish following of Cases is one of the characteristics of English case-law, and it is the chief mark of the ability of their judges. A sound and just decision should be followed, otherwise not.

Many of the Roman ideas affecting the status of persons and the family relation did not survive, but the rules affecting marriage, adoption, etc. are not radically dissimilar to modern law.

The law regulating rights of the public and individuals, in waters, ownership of wild animals, ownership of alluvial soil, accession, confusion, the division of things into corporeal and incorporeal, these and many others are substantially the same as the common law doctrines.

Throughout Blackstone we constantly find analogies between the common law and Roman law.

VIII.

COMPARATIVE JURISPRUDENCE.

(*Continued.*)

THE COMMON LAW.

With the thought expressed in the words of Professor Stubbs in mind, viz.: "Nothing in the past is dead to the man who would learn how the present came to be what it is," (Stubbs' Constitutional History,) we enter upon a brief outline of the Law of England for the purpose of coming to an understanding of the system designated the "Common Law," to know when it came into existence, how it developed, and to learn its essential elements.

It is a matter of much more difficulty to trace the history of the law of England than it is the law of the Roman Empire. It was no doubt a far more difficult task to create and form the common law system, because of the mixture of races occupying the islands during the different periods, the numerous changes in monarchs, and because of the efforts of sympathizers with the Romans to introduce Roman methods.

Some historians assume that the ancient customs by which cases were tried and decided during the Saxon or Early English period from 499 to 1066 formed the basis of the later common law, as well as of the modern system of justice in England and America. But this is not altogether true. Sir Frederick Pollock in addressing an American audience said: "In the thirteenth century it was by no means ob-

vious, and indeed, I think it might have seemed improbable to an impartial observer, that the realm of England would have a custom and a common law of its own."

Fortescue insisted that the customs, which constituted the unwritten law of England were as old as the primitive Britons, and continued down through the changes of government and in its inhabitants, unchanged. (Fortescue c 17, 1 Bl. Com., 64.)

Other writers claimed that there was never any exchange of one system of laws for another. This is shown by the radical changes introduced by the Norman kings, after the Norman Conquest, and also by the repudiation by the Danes upon their conquest, of the laws promulgated by Alfred.

The reigns of the Norman Kings, and the changes wrought by the "chicanes and subtilities of Norman jurisprudence" were the darker ages in the laws of England. Law during this period became a science of the greatest intricacy, these rulers transmitting their dialect and fineness to posterity, and some fictions as well.

In the closing chapter on the Rise, Progress and Gradual Improvements of the laws of England, Blackstone outlines English juridical history into six periods: (1) From the earliest times to the Norman conquest: (2) From the Norman conquest to the reign of King Edward the first: (3) From thence to the reformation: (4) From the reformation to the restoration of King Charles the Second: (5) From thence to the revolution in 1688: (6) From the revolution to the present time.

And from Blackstone's time, 1765, immediately commenced a new era in so far as concerned the basis of the common law.

In this brief discussion it is the purpose merely to

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out the time when the "slavish following" of precedent first began; it was no doubt not until the publication of the printed reports of the decisions of courts that the modern notion of adherence to precedent began fully to develop. Prior to this period the function of the judges was, as portrayed by Blackstone, the ascertainment and the determination of the validity of customs, a process materially different from a consideration of the reported decisions, and the reason of the law.

Blackstone's conception of the origin and foundation of the common law was that it was the maxims and customs collected in the Codes promulgated first by Alfred, and the digest issued during the reign of Edward the Confessor.

The work of these two rulers marks an important era in the history of the development of the law of England, whether it be called Common law or not. Blackstone constantly points out features in the common law which had their origin in Alfred's time. Alfred came to the throne in 871. It is said of him that he was the embodiment of whatever was best and bravest in the English character. His own words at the close of his reign is an index to this character, viz: "So long as I have lived, I have striven to live worthily." As a ruler he gave general satisfaction to his people, and he was a law-giver and teacher as well as a ruler. His reign was marked with intelligence and progress. Blackstone recites that the local customs of the several provinces of the Kingdom had grown so various, that King Alfred found it expedient to compile his *dome-book*, or *liber judicialis* for the general use of the whole kingdom. Evidently appreciative of the divine precepts in matters of civil government, he prefaced his code by the Ten Commandments, and closed it with the Golden Rule.

Alfred's Code did not prevail long, because of the Supremacy of the Danes, the Mercian Laws, the West Saxon Laws and the Danish Laws superseding it. King Edward came to the throne in 1042 and ruled until 1053, during which time he extracted from the three systems a uniform system and digest of law to be observed throughout the whole kingdom, but which was patterned after the Code of Alfred.

These are the laws, according to Blackstone, which so rigorously withstood the repeated attacks of the civil law; "these in short," he says, "are the laws which gave rise and original to that collection of maxims and customs, which is now known by the common law. A name given to it, in contradistinction to other laws, as the statute law, the civil law, and the like; or, more probably, as a law common to all the realm, the *jus commune* or folcright mentioned by King Edward the elder, after the abolition of the several provincial customs and particular laws before mentioned." (Intro. Blackstone, 67.)

"This book is said to have been extant as late as the reign of Edward the Fourth, but is now unfortunately lost. It contained, we may probably suppose the principal maxims of the law, the penalties for misdemeanors, and the forms of judicial proceedings." (*Id.*, 65.)

If by the expression, that these laws were common to all the realm or kingdom, is meant, as it would seem, that they merely operated equally upon all subjects of the Kingdom, the *jus commune* of Alfred's time do not of necessity bear resemblance to the common law of the fourteenth century.

If the maxims and the customary law contained in Alfred's *dome-book* found their way into the body of the common law contained in the Year Books and subsequently, then Blackstone's statement will, in a

measure, be true; but his mere statement, without particular demonstration, does not prove it.

It must be conceded, however, that there is nothing to be found in the annals of history that will show us that the courts, either during the Saxon times, (prior to 1066) nor during the Norman occupancy (1066–1154) pursued the methods of the common law or "case law" which came into existence following the thirteenth century.

One thing is certain that no permanent adjustment of laws could be made until the wars and conquests ceased, and the government became stable and settled.

Alfred's laws compiled in his *dome-book* was short lived because of radical changes in government. In 1013, Sweyn, the Dane, conquered England, the Danes holding sway until 1042 when discord sprang up and the Saxons and Danes combined to restore the Saxon line. This resulted in Edward the Confessor becoming King in 1042, ruling until 1053, though in fact until 1066.

Beginning with the Danish King Sweyn, 1013, and during the reign of his son Canute, England was divided into four districts, Wessex, Mercia, East Anglia, and Northumbria, each of which district was ruled by an earl invested with almost royal power.

This was the cause of an introduction of new customs, and the disuse of Alfred's laws, resulting in the promulgation of the three distinct systems of laws, already mentioned prevailing in this new division of the country viz.: (1) Mercian laws; (2) West Saxon-laws—and the (3) Danish laws.

When the Danes were ejected, Edward the Confessor became ruler, followed by Harold, his son, who was crowned January 16th, 1066, and ruled until William the Norman Conqueror defeated Harold and was crowned King Christmas Day, 1066.

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what the Law was when Edward undertook his reforms, we must know what were the substance and contents of the *dome-book* of Alfred the Great, and of the laws issued by Edward the Confessor, and then note the changes wrought by the Norman jurisprudence.

Alfred's Laws or the Saxon Laws Their Contents

We may consider Saxon Laws of all periods, that which prevailed during Saxon rule, and that which survived the Normans. The custom of the enactment and promulgation of laws of the nature of statutes by the King, began with Alfred in 871–901, and continued for about a century and a half, each successive ruler during that period continuing the work. The custom of enacting territorial statutes originated with the Kings of Italy, although it is claimed that the Saxon and Danish rulers learned to legislate not outside England. (Pollock & Maitland, History of Law, 20–1.)

Historians note the fact that it is difficult to obtain information about Anglo-Saxon laws and customs, because written laws were written for present use, and not for the purpose of enlightening future historians. Many of the points or features which the historical inquirer may desire to know must be reasoned out and assumed from those established facts which seem strange and unnatural to us.

The scope of the Saxon Domesday Book which was first promulgated by Alfred from which is to be gathered information of the early Saxon laws prior to the eleventh century, and which Blackstone said furnished the basis of the later common law, covered the following subjects:—

1. The condition of persons. 2. The establishment of Courts, and the process of justice. 3. Breaches of the peace, wrongs and offenses. 4. The law of property.

Getting our information second hand, not having the opportunity of looking upon the pages of the domes-day book, (perhaps we would not understand it if we could,) drawing upon our imagination some, the query comes to mind whether the Saxon Kings caught the inspiration of a code from Rome. But learned legal historians of English law note the fact that the Danish King Canute, son of the Danish invader, who closed the list of capitularies, visited Rome and saw an Emperor crowned, followed only the example of Alfred the Great. (Pollock & Maitland History of Law, 20.)

We shall not go much into detail as to the provisions of the laws touching the three classes of subjects which the laws of Alfred and Edward covered.

Under the head of Condition of Persons, there is to be found, as in early Roman law, the free man and the slave. And there were ranks and degrees among the freemen, some being lords and others followers. It also deals with the family.

From what may be gathered from the laws, under this head, the customs do not resemble those of the later common law.

The surroundings of the courts of justice were crude and inadequate, direct evidence as to which appears to be wanting. From what can be gathered it is safe to say that there is little likeness to the courts administering the common law of the fourteenth century. It was not until after the Norman conquests that the Kings' Courts of Justice became organized and regular. (*Id.*, 41.)

Laws were found in the dooms punishing various crimes, providing for compensation for injuries to the person and the like.

In the Anglo-Saxon law, the law of property depended upon custom; possession rather than owner-

ship was the point to be considered in the early Saxon law. There was no such thing recognized as a contract.

Blackstone sets forth several features of the Saxon laws, a glance at which demonstrates the correctness of his statement, (which was the purpose of mentioning the subjects of some of the laws,) that they were the rise of the unwritten laws known by the name of the common law. They are: (1) The constitution of parliaments; (2) Election of magistrates by the people; (3) Descent of the Crown; (4) Paucity of capital punishments; (5) Customs as to military customs in proportion to every man's land; (6) Forfeiture of estates for treason; (7) Descent of lands to all males equally without any right of primogeniture; (8) The courts of justice consisted principally of the county courts, and in cases of weight and nicety the King's court; (9) Trials by *ordeal*, by *wager of law*, and frequently by jury. (4 Blackstone's Com. 413, 414.)

This completes the enumeration of the Saxon laws, a comparison of which, with those after Edward I, no doubt shows that many of these matters were taken up by the Courts and Parliament and adopted as law.

So far, let it be noted that we hear nothing about courts following precedents.

Under the Norman reign, from 1066 to 1154, came a separation of the ecclesiastical courts from the civil, a narrowing of the remedial influence of the county courts, and an extension of the jurisdiction of the King's courts, and the creation of the *aula regis*. The most important and far reaching change was in the introduction of the fiction of feudal tenure, which so long clung to English law.

The Norman reign cast a cloud upon the laws in many respects, and repeated efforts were made by

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advantages of comparative jurisprudence, in the failure to adopt the Roman law, in the following:

"It is hardly too much to say that the possibility of comparative jurisprudence would have been in extreme danger; for, broadly speaking, whatever is not of England in the forms of modern jurisprudence, is of Rome or of Roman method." (Oxford Lectures 1890, Lecture II p. 46. See Dillon's Laws and Jurisprudence, 24, 25.)

At this period there was a revival in the study of the Roman law, due as Blackstone relates to an accident in discovering a copy of Justinian's Pandects in the middle of the twelfth century (about the end of Stephen's reign, 1154) at Amalfi. (1 Bl. Intro. p. 18.)

This story is absolutely disproved by historians. (1 Pollock & Maitland, p. 96: Hammond's Notes to Blackstone's Com. p. 43 v. 1.)

The time had come when there was a general feeling of the need of a better system of law. And again the "common law" of England, not being in writing, being handed down by tradition, use and experience did not appeal to the foreign clergy who were then assuming important functions in the administration of the laws.

The struggle in this matter was chiefly between the bishops and clergy, and the nobility and laity, the latter being strongly committed to the common law of the Islands. These Englishmen desired to make their own legal history, and to construct their own legal system. Hence at every stage the introduction of the doctrines, modes and principles of the Roman law was met by the stubborn resistance on the part of courts and Parliament.

It may readily be conceded that the efforts to transplant Roman ideas served as a strong incentive to

improve the laws of England. Up to this time they had been dealing with their own traditions and customs, and had not been able to indulge in that most useful process in making law, viz.,—comparative jurisprudence. Their method of law making continued its operation with more or less influences and absorptions from the revival of the Roman law (in about 1150), until the law took definite shape and system under Edward the First (who reigned 1272–1307), which will be directly considered. It is no doubt now generally conceded among historians that the revival of the study of the Roman law at this period was due to the then universal desire for a more extensive and refined system of jurisprudence than had existed up to that time.

The Kings of England had up to this period been issuing books of laws, but nothing of any kind in any country had appeared equal to the Roman law. Writers differ in their opinions as to the regard or disregard of Englishmen as well as of other Nations for the Roman law. So far as relates to form it may have been regarded as "the best written system then extant." In Spain and Germany it was even more bitterly resisted than in England, though obtaining supremacy there ultimately. When it was sought to introduce Roman doctrines into English law by means of some statute it was met by the most bitter opposition. This is illustrated by the controversy over the effort of the prelates to procure an act to declare all bastards legitimate in case the parents intermarried at any time afterwards. The nobility would not agree to change the laws of England which had hitherto been used and approved. And on another occasion the nobility declared that the realm of England had never been, nor ever would be ruled or governed by the civil law. (1 Blackstone, Introd., 19.)

The struggle was uneven between clergy and nobility because of the lack of familiarity with the laws of England, the common law not being taught in any part of the kingdom. The law promulgated by King John (reigning 1199–1216) and King Henry the Third, (reigning 1216–1272) that the courts of common pleas should be stationary at Westminster, was one of the most potent steps towards the unification of the common law and the consequent overthrow of the Roman law. The study of law as a science then began under the direction of a society formed for that purpose which purchased the buildings near Westminster Hall, and which afterwards became the Inns of Court.

But the work of Romanists went on, and the comparative processes in the hands of common law adherents were still used until the final victory under Edward the First.

Before coming to this final period in the construction of the common law, some additional points as to the influences of the Roman system are necessary. As a separate topic will be considered the Canon law. There it will be seen that in spite of the resistance to the civil law, English tolerance of ecclesiastical administration of Canon law unconsciously resulted in great inroads in the common law by Roman methods. Canon law was entirely Roman, in form, language, spirit and doctrine.

The claim is frequently made that Bracton Romanized English law. So strong was the feeling of prejudice of some of the later judges against him on this account that they flatly disavowed him as an authority.

It is self-evident that Bracton did Romanize English law to some extent, as did also Glanville, and other writers of earlier periods. But opinions of eminent authority minimize the effects of Roman law

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common law. It is said: "It is by our 'popish clergyman' that our English common law is converted from a rude mass of customs into an articulate system; and when the 'popish clergymen' yielding at length to the pope's commands no longer sit as the principal justices of the king's court, the creative age of our medieval law is over." (1 Pollock & Maitland, History of Law, 133, p. 112, old ed. where it reads "the golden age of the common law is over.")

A learned American writer makes strong acknowledgement of the indebtedness of the common law to the Roman law, and the influence of the clergy, observing that the clergy possessed all the learning of the times, that they were students of the Roman law; that the earliest justices of the common-law courts, as well as the chancellors, were generally taken from the higher orders of ecclesiastics, that they naturally had recourse to the code with which they were familiar, borrowed many of its doctrines, and adopted them as the ground of their judgments. (1 Pomeroy's Equity Jurisprudence, 14.)

The dials of history point to the reign of Edward the First when the Law of England took permanent form. He reigned from 1272–1307. It was at this period that the common law as developed in later ages had its inception.

Edward I 1272-1307 Reforms By

Blackstone has said that the Code of Alfred and Edward the Confessor formed the original of the common law. Considering the great lapse of time between these Codes and the commencement of the year books, it is reasonable to suppose that many of the customs of former times had become stale and unsuitable at the beginning of the thirteenth century.

The time had now come when a definite system of law was to be formulated. The contest between Roman law adherents and native Englishmen was

now on. The Anglo-Saxon had far less knowledge of law than had the Romanist. Just at this time Roman law was receiving much attention in Continental Europe as well as in Britain. "The professors of Roman law were the only lawyers in Europe who had any scientific equipment; and the name of the Roman Empire was still a great power upon men's minds. It must have been tempting for an English King (Edward I) who perhaps could hardly speak English, and who it is certain habitually did not, to seek his inspiration from the rising scholarship of Italian lawyers, rather than from the still rude traditions of the Germanic institutions which he found in England. . . . It might well have seemed to Edward I to be both a politic and enlightened course to adopt wholly or to some considerable extent the methods of Roman law."

(Address of Sir F. Pollock, at Cincinnati Law School, 1903.)

The lessons to be drawn from English tradition pointed rather in the direction of a Code. The courts had not been systematized, and there was no system of reported decisions. Here was a System, ready made, Justinian's Code, the Pandects and the Institutes which might readily be followed, and strong influences were brought to bear in this direction.

But England was not to become, like the Continental Countries, a "country of the written law." Historians claim that the substance of English law was as modern and enlightened as was that of the system with which it could be compared. (Pollock & Maitland History of Law, 224.)

This would seem to be sound, when the age of the body of the Roman law at its revival is to be considered. Even the Code of Alfred, the Domesday-book, which was a sort of a code, was obsolete at the beginning of the thirteenth century.

What English law needed at this time was system and proper methods. Their law had previously been rather of a Code form, which they no doubt perceived soon wore out, so that there was nothing to be gained by resort to Justinian's Code and Pandects which were much more ancient than their own Domesday book.

System and Method being what they wanted, the fathers of the Common law in the thirteenth century adopted their own, reserving the right to draw what was useful from the other, system.

They perfected Parliament and classified and systematized their courts in such a way as to insure liberty and uniformity of decision.

Their law was to be both statutory and in the form of decisions. The fundamental features of the law were to be embodied in statutory form, placed beyond attack of either monarch or parliament, while the great body of rights was to be committed to the common law, as found in the decisions of the courts.

There was to be found in the reign of Edward the First a large body of enacted law, viz.: The Great Charter, the Provisions of Merton, issued by the King with the consent of the prelates and nobles in 1236; and Marlborough issued in 1267 (statutes 1, 19) and the minor ordinances. (1 P. & M. Hist. of Law, 158.)

And from thenceforward statutory law gradually expanded and broadened, sometimes encroaching upon and modifying the common law.

The chief things which Edward the First accomplished which were the causes leading up to the establishment of the common law, were these:—

He prescribed the limits of the courts, the King's Bench, common pleas, and exchequer, so that they would not interfere with each other's proper business. He settled the boundaries of the inferior courts in

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umes, written in law French, and extend from the beginning of the reign of Edward II (1307) to the latter end of Henry VIII, (1509). . . . There are a few broken cases, which may be gleaned from the old abridgements, and particularly from Fitzherbert, which go back to the reign of Henry III (1216–1272). The year books were first printed in the reign of James I (1603–1625) and were again printed by subscription in 1679." . . . "So great have been the changes . . . that the mass of curious learning and technical questions contained in the year books have sunk into oblivion; and it will be no cause of regret if that learning be destined never to be reclaimed. The Year Books have now become nearly obsolete, and they are valuable only to the antiquary and historian, as a faithful portrait of ancient customs and manners." (1 Kent's Com. 481.)

Printed copies of Year Books in five volumes, covering the Reign of Edward I, 1292–1307, and from 1307–1422, in seven volumes are found in our libraries of the present day.

The Year Books were prepared by reporters regularly appointed for that purpose. But from the year 1307–1765 there were no official reporters, the work being carried on by private enterprise. Thus originated the custom of designating reports by the name of the reporters.

Language of the Law.

There is no particular interest in a consideration of the language of the law farther back than when the Common Law began to develop by means of Case Law, and by adherence to precedents found in reports. It is doubtful whether many stop to consider why it has been so frequently said that the study of Latin is so essential for lawyers.

It may be that it has been so many years since the common law was expressed in any other than the

English language that a history of the language of the law may not awaken much interest.

The fact must not be overlooked that the languages of the people of the British Islands left their impression upon the laws of England, because the habits and customs of the races which inhabited Britain found expression in the different languages.

Three or four centuries away we cannot appreciate the difficulties surrounding the adjustment of the law language. No doubt each race stood for its own language. Lord Bacon it was, who said that the Law of England was as varied as the language of its people.

Americans can at the present time see an example of the difficulty involved in adjusting the language of the law, in the work of inaugurating reforms in the laws of our ward,—The Philippines. Americans are endeavoring to equip the people of these islands for self-government at some future day, and are introducing American ideas into the laws of the Archipelago. They did not disturb the substantive law already in vogue there, but they did improve the adjective law. Closely associated with the latter branch of the law is the language in which it will be expressed. It was deemed unwise to introduce the English language, because it would thus render more difficult the task of bringing about the desired improvements, and retard the progress of the work of educating and equipping the natives for self-government. They did not disturb the language of the law which is Spanish.

Law language in England fluctuated between Latin and French. Saxon law was in Latin. Under Norman rule it was French.

When Edward the Third rescued the crown from the French, in the sixth year of his reign (1333) a statute was enacted requiring that the English language

was to be used in court, but that the records were to be made in Latin, which continued in use for four centuries thereafter. (3 Bl. Com. 318–19). The reason assigned for this change was, that by selecting a dead language in which to preserve their records, it would give them permanency and durability. As Blackstone observed: "The truth is, what is generally denominated law Latin is in reality a mere technical language, calculated for eternal duration, and easy to be apprehended, both in present and future times; and on those accounts best suited to preserve those memorials which are intended for perpetual rules of action." (3 Bl. Com. 320.)

In the reign of Cromwell the language of the records was changed to English (1649–1660) and again in the reign of Charles II (1660–1685) it was changed back to Latin. And finally in 1730 by statute it was changed back to English.

The reason furnished for this final change was that the common people, those not familiar with the Latin might read and understand the court language.

This change caused some confusion because of the radical difference in the languages, it being quite impossible to find apt language in English by which to express certain technical terms. Consequently a statute was passed allowing technical words to continue in the Latin language.

The language of the Year Books and of the other reports until the seventeenth century was French. Between 1688 to Blackstone's time it was provided that all legal proceedings should be translated into the English language.

Judicial Precedent.

The chief characteristic of the common law system is its regard for judicial precedent. It stands alone in this respect. In other Continental countries judicial precedent is not regarded as authority in sub-

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peared to the Romans who were older and who had in their time followed customs, building their system of law, its elements, its fundamentals, in this way, step by step.

Custom as a source of law has always occupied a conspicuous place. Justinian regarded it as *jus non scripta*. Hale took the same view, and Blackstone followed, regarding customs which had been used immemorially as positive law, the decisions based thereon being considered as merely expounding and declaring them.

Canon Law.

A full understanding and knowledge of the history and development of the Common Law cannot be had and obtained without giving some attention to the history of the Canon Law, as well as to the reception and study of Roman Law in England.

The influence of the English Canon Law in the formation of the common law was of a potential character. The two systems, walked side by side, at times operating harmoniously, while at other times a fierce war was waged. It was the desire of the Roman Church that the civil law should be subordinated to that of the church.

The ecclesiastical theory was that by divine indefeasible right the pope and all of his inferior tribunals had sole and exclusive jurisdiction over all ecclesiastical persons and of all ecclesiastical causes.

This was an established maxim of the Canon Law but did not receive any support in England until the reign of William the Conqueror (1066–1087) when he was prevailed upon by the papal clergy to establish a separate Ecclesiastical Court. Blackstone states that subsequent monarchs brought spiritual and civil courts into union again, but Professor Hammond contends that the jurisdiction of the courts

Christian over the testamentary and matrimonial cases of laymen lasted from the time of the conqueror to the nineteenth century. That the return of these matters to the lay courts and Common Law is one of the several reforms for which the mother country is indebted to her eldest daughter. (Hammond's Notes to Blackstone, V. 3. p. 97.)

It was at this period, about 1154, as has been previously noted (*ante*, 115–16) that the contest between the Roman and the common law began. At this time many were giving their attention to the study of the revived and resurrected Roman law, which was regarded by some as living law. Historians say:

"Of all the centuries the twelfth is the most legal. In no other age, since the classical days of Roman Law, has so large a part of the sum total of intellectual endeavor been devoted to jurisprudence." (1 Pollock & Maitland, History of Law, 111.)

They tell us of the flocking of students from all western Europe to study this system at Bologna, the oldest school of law.

But the papal clergy were now rapidly developing a system of law for their own purposes. The pope was desirous of drawing within his jurisdiction many matters claimed to be spiritual. The Church claiming universal preëminence and authority, established a court of last resort—the Roman curia—and was developing a common law of its own. The pope was the supreme authority. He designated the English prelates who should try the cases, and completely controlled their every action.

The canon law was constructed in a manner similar to the common law. The decretals of the prelates resemble the cases decided by the courts. "Many of the decretals are mandates issued to these judges delegate, mandates which deal with particular cases.

Others are answers to questions of law addressed to the pope by English or other mandates." (P. & M. History of Law, 115.)

The Decretum, first prepared by a monk at Bologna, became the authoritative text book among the canonists, and became the basis of the later English canon law. There were a number of publications of decretals, until finally in 1234 there was a complete collection to that date which assumed the form of a statute book, and consisted of five books. Other subsequent collections and additions were made until in 1500 the *Corpus Juris Canonici* was completed by still another collection, but without authority, which was in the closing days of the system. (P. & M. History of Law 114.)

The habit of patterning after others was observed by the canonists so that the maxims and principles, forms and language of the civil law found their way into canon law.

The contest between the Canonists and the Government as to the rights of the ecclesiastics to hear and determine matters deemed of spiritual concern, was the source of constant annoyance from the first half of the twelfth century. The interests of the churchmen were not intrusted to the clergy alone, but were placed in the hands of skilled lawyers.

The famous dispute between Henry II and Beckett over the rights of the church resulted in much good, furnishing the basis for the anti-papal statutes which came later. (Pollock & Maitland, History of Law, 126.)

The church claimed exclusive cognizance (1) of all affairs of ecclesiastical economy; (2) of the whole law of ecclesiastical status; (3) of the decision of all causes concerning lands given to the church; (4) of the exaction of spiritual dues, tithes, mortuaries,

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the popish clergy yielding at length to the Pope's commands, no longer sit as the principal justices of the King's Court, the creative period of our medieval law is over." (Pollock & Maitland, History of Law, 133.)

Be this praise deserved or not never were more selfish purposes displayed, or such a travesty upon religion, as the acts of the clergy in connection with the settlements of the estates of testates. They preached that it was a sin to die without a will, and by the influence of the doctrine that the last will was connected with the confession, the clergy could participate to the advantage of the church in the settlement of deceased persons' affairs. They made themselves doubly secure by demanding the right of interpretation of wills, and to exercise jurisdiction over all gifts to the church.

Among the reforms of Edward I were limitations upon ecclesiastical courts which mortally offended the Pope and Clergy.

The statutes of *præmunire* requiring all persons who procure from Rome any translations, processes, excommunications, bulls, instruments, or other things which touch the king, against him, his crown, and realm, shall be put out of the King's protection, their lands forfeited, and their bodies attached to answer the King (4 Bl. Com. 113; 16 Ric. II, c. 5), forcibly recall to our minds the great outrages perpetrated under papal direction and authority under the cloak of religion, all leading to the acquirement of wealth and power.

Ecclesiastical or Canon Law has been considered inapplicable in this country, and therefore was not regarded as part of the Common Law adopted here. (Jones v. Jones, 90 Hun., 414; Burtes v. Burtes, Hopk., chapter 557.)

Final Product the Common Law.

We have finished tracing some of the outlines of the Law of England, and come now to the final product,—The Common Law System. What is the Common Law?

It is a system of both Elementary and General principles, of general juridical truths and doctrines, capable of being variously applied and expanded according to the exigencies of the occasion and the demands of advanced civilization; which may be adapted to the gradual changes of trade and commerce and the mechanic arts, and the exigencies and usages of the country. (Pierce v. Swan Point Cemetery, 10 R. I. 227; 14 Am. Rep. 667.)

It develops new principles and extends old ones by analogy and interpretation.

It is a body of ideas, of modes, a way of doing things.

One thoroughly acquainted with the system and well versed in its precepts, may gather its truths, its principles, its rules, its doctrines, from all available sources, mould them into shape, for use in solving problems newly arising.

The modern conception of the Common Law is that it is a body of principles general in their application, which are extracted from the cases, and which illustrate the same, and constitute evidence of what the rule of law is when desired in the solution of other cases.

If this be the proper view to be taken of our law, there is a substratum of ideas and principles which must be mined, polished and put into shape in order to display "Our System of Law." This process of discovering the basis of rules and doctrines, setting them forth in logical order in such a manner as to display the entire portion of law, or separate branches thereof in their entirety, discloses the Science or Phil-

osophy of the Law, and with equal reason, we may say, its Art.

Westminster Hall to The Royal Courts of Justice.

An account of the Common Law would hardly seem complete without some attention to the building in which the system had been formulated and housed. The name Westminster Hall is as familiar as the name of the system.

It appears to be historically settled that this place though not the same building, was first applied to legal uses by William Rufus when that monarch held his court there for the first time in 1099. (Dillon's Laws & Jur. 3; Foss Judges of England, vol. 1.)

By virtue of the clause in the Magna Charta, June 15th, 1215, it was ordained "that the Court of Common Pleas should not follow the Court (the King) but be held in some certain place." And the place selected was Westminster Hall which had long been a part of the King's palace at Westminster. Many reverential expressions, have been offered in respect to the venerable hall, the place where so many great events in the juridical history of England have occurred.

The original building was destroyed by fire, but was reconstructed, being completed in the year 1399, and was used for legal purposes until the construction of the new judiciary building, designated as the Royal Courts of Justice. The latter building was completed in 1882, and was located in the neighborhood of the Inns of Court.

"But," as observed by a writer, "Westminster Hall, notwithstanding such removal, will remain in the lawyer's memory as the Mecca of English law and justice. Its antiquity, the great events of which it has been the theatre, above all, the objects to which for so many ages it has been devoted, and the splendid and enduring results which have been attained

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IX.

COMPARATIVE JURISPRUDENCE.

(*Continued.*)

THE AMERICAN SYSTEM.

THE Common Law, with its Parliamentary modifications, either by general acquiescence or statutory enactment, became the basis of American Laws and Jurisprudence. Some there perhaps may be, who will say, that "American Jurisprudence" is improper, because in all English speaking nations there is but one jurisprudence, which rests upon the Common Law. Be that as it may "Our Law" has its history which is interwoven with the History of our Government, its people and the topography of the country. Those states which adopted the Common Law by some general statute were less fortunate than those which left it optional with the courts to follow or not its doctrines. Consequently frequent instances of the adoption of the Historical and Comparative methods are found.

The radical reforms in methods of Government necessarily introduced new methods and moulds for making law. The situation of our people, the vast extent of the country and its resources rendered innovations and extensions in the law necessary. Much of American law in its twentieth century dress, would little resemble English law in its sixteenth, seventeenth or eighteenth century garb.

Constitutional notions of England little resemble Constitutional law of America. Blackstone's claims that the courts of England could disregard or nullify acts of Parliament which were not good law, is idle speculation, as compared with the power of our courts to declare laws unconstitutional. This is considered further elsewhere.

Legislative power has been frequently exercised to bring about needed reforms in law and to correct serious defects in the Common Law. What there is of the Common Law, and of Common Law methods, would hardly look natural in the mirror of English seventeenth or eighteenth century law.

Our colonists knew no other law than the system prevailing in the mother country. They lived in its midst, inhaled it at every breath, imbibed it at every pore. They could not learn another system without learning another language. (1 Kent's Commentaries, 343.)

Common Law the basis of American Law.

The Congress of the united colonies, in 1774, claimed it as a branch of those "indubitable rights and liberties to which the respective colonies are entitled." *Id.*

The Supreme Court of the United States declared that the practice in the United States Courts was to be "according to the principles of common law and equity, as distinguished and defined in that country from which we derived our knowledge of those principles." (*Id.* 342.)

Chancellor Kent says: "In this view of the subject, the common law may be cultivated as part of the jurisprudence of the United States. In its improved condition in England, and especially in its improved and varied condition in this country, under the benign influence of an expanded commerce, of enlightened justice, of republican principles, and of sound philosophy, the common law has become a

code of matured ethics and enlarged Civil wisdom, admirably adapted to promote and secure the freedom and happiness of social life. It has proved to be a system replete with vigorous and healthy principles, eminently conducive to the growth of civil liberty; and it is in no instance disgraced by such a slavish political maxim as that on which the Institutes of Justinian are introduced." (*Id.*)

While in the strict sense, except as relates to the Constitution of the United States, we do not have any American Common Law, it must be conceded that there is a marked improvement in the law of this country over the Common law.

It will be observed that the founders of the American government recognized the great advantages of education, and imposed the duty upon the state to make ample provision therefor. Education makes better citizens, renders them more appreciative of the relative rights of others, a quality in man essential to social harmony. The uneducated member of society is more apt to regard self interest as of the first necessity, whose mind is clouded with prejudice and caprice, which are a great menace to the social welfare. It is a singular fact in history that during the period when the masses were not so far advanced in education Church and State were united, and law was synonymous with morality. Says one authority: "The separation of law and morals . . . made it possible to change the theories of conduct without dissolving the foundations of social order. . . . Where moral authority and legal authority were but slightly distinguished, any change in the one was sure to endanger the other. But when the two stood apart in men's minds we could alter our theories of conduct without wrecking the whole structure of civil society. . . . The separation of church

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No education is complete unless the moral attributes of man are quickened, unless the mind and heart of man are so trained that his conscience will point out to him the laws of right and wrong: The education of the conscience is an essential part of one's general education.

Character of American Law as Compared with Other Systems.

Inspired by a spirit of patriotism, if for no other reason, Americans should lay claims of superiority to its governmental and legal systems. This claim, however, does not need rest upon such a basis, but on facts. As a nation we are not only leaders in the science of government but in a system of law as well. The human race throughout the world turn to this nation, as a country of freedom and liberty. And are we not taught that the proximate object of Law, of Jurisprudence, is *liberty*, which is the perfect relation between men? In the language of another: "The object of jurisprudence, in so far as it is a science separate from the great science of human life, may be embraced in a single word—a word dear and venerable to us—"Liberty." (Lorimer's Institutes of Law, 355.)

So do other countries turn to us for guidance in the matter of reformation of the system of law. We not only have made Liberty and Morality the polar star of our constitutional government, but we have so entrenched all fundamental rights of persons by constitutional safeguards as to be beyond attack of courts and legislatures, and have made adequate provision for the happiness and welfare of the people. In the introduction and formulation of our law, it was natural to adopt that of the parent country. But we did not deem it necessary to use it all just as it was, so in many instances we have made selections from either the Roman or Common law, whichever

best suited our purpose. If any of it were not adapted to our needs or conditions, we made new moulds and dyes and manufactured our own law. Some there are who take pleasure in turning back into ancient history for the purpose of magnifying the beauty of other systems. After looking all the systems over, we will return to American Jurisprudence as the collected wisdom and reason of all others, "combining" as Burke said of the science, "the principles of eternal justice with the infinite variety of human concerns."

The term "American Jurisprudence," is used; we may rightly lay claim to a new system, because our moulds are newly manufactured.

When we reflect upon the history of the country during which so much of the common law was adopted, it becomes apparent that much of it had to be rejected as inconsistent with our needs. The late American reformer, David Dudley Field, in speaking of that part of the law which was of a public nature, and that which is private, as it existed at the time of the Revolution, said that the public law was good; but that which was private, that which related to land and private relations, was but little advanced beyond the region of semi-barbarism. That most of the good which it had, and of which it has since accumulated, was the contribution of the Romans. (American Bar Association, 1889 Rep. p. 233.)

An object lesson as to the relative merits of the Common Law and the Roman Law may now be found in the Philippine Islands. The work of instituting a new form of government and installing a system of Law has fallen to the lot of a few American lawyers who were brought up under the American system, schooled in the Common Law. Biased as their minds naturally would be in favor of this system, their

desire was to introduce Common Law methods. They found the Roman Law in full operation in the Archipelago, and after an experience under this system as well as an extensive and careful study thereof, they came to the conclusion that the substantive part of the Roman Law was superior to the Common Law, and hence concluded not to disturb it. Consequently, their work of reforming the law was confined to the reorganization of the courts and the introduction of a new system of procedure, patterned after that of the Common Law.

This is a striking example of twentieth century views upon systems of Law.

The fact has been noted that in the formulation of

American Modifications.

our Law, our Jurisprudence—we drew from the Common Law. Why not say "Our Law" "Our Jurisprudence"? While it has been stated over and over again that America has no "Common Law" of its own, we have nevertheless a system of law peculiarly our own, builded upon our ideas of government, as well as upon the peculiar or particular conditions which confronted us in this country. Therefore, let us patriotically speak of "American Law," "American jurisprudence." We have at times, according to the conditions, failed to adopt the Common Law, though at a later period of history we may have returned to its rules. To enumerate all of these instances would be a difficult task, but an attempt will be made to direct attention to some of them.

The chief innovation has been brought about by our written constitutions. The supremacy of parliament, or of the legislative department was repudiated, the highest courts of states and nation being considered the supreme power. We have as a consequence of these facts a branch of law called constitutional law unknown to the parent country. Nowhere is

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among other sciences. In other words the law is law because the judges and legislature have made it; you can best understand it as it stands.

The character and form of the government reflects much upon a system of law, so that an examination into the history of American Institutions and form of government, as well as our geographical situation, is necessary to appreciate "Our Law in its New Home." (Judge Dillon's expression in Laws & Jurisprudence.)

It is no light matter to consider the origin of governments. For our purpose it is sufficient to assume that they have always existed. It must be granted, too, that Governments are God's institutions. Existing government,—the Roman—was recognized in the scriptural doctrine of St. Paul in which it was enjoined that every man must submit himself to the authorities of the government because all authority comes from God, and "the authorities of government are officers of God's will, and His service is the end of their daily work." (Romans, Chapter XIII.)

In the establishment of a new government on the western continent our forefathers, imbued with this spirit, made Religion, Morality and Knowledge the structural basis of our government.

The history of American Institutions and government, as well as our geographical situation must be considered in order to appreciate "Our Law" in its new home.

The fundamental principles that entered into the organic law of this country and its states must be considered. The causes which led to the establishment of this nation bore no relation to those which caused the immigration of the American colonists. They raised no objection to the system of laws, but on the contrary claimed the common law as their birthright. They claimed the privileges and immuni-

ties of the common law as colonists, rebelled against the right of the British parliament to legislate for them, or to bind them by legislation. They claimed all of the rights guaranteed by the charters, and the right of self-government. They renounced their allegiance to the king because of many arbitrary acts committed by him, and finally because he "combined with others (parliament) to subject us to a jurisdiction foreign to our constitution and unacknowledged by our laws by giving his assent to their (parliament's) acts of pretended legislation." (Declaration of Independence. See Andrews' American Law, sec. 43.)

It had been stated by Montesquieu and by Blackstone "that the English was the only nation in the world in which political or civil liberty was the direct end of its constitution."

But the Colonists were not enjoying that political liberty which befitted their station. Laws could not be enacted which were repugnant to the laws of England, and were subject to ratification of the Crown.

So the American colonies relying upon the self-evident truth that all men are created equal, endowed by their creator with the inalienable rights of life, liberty, and the pursuit of happiness, to secure these rights, assumed, among the powers of the earth, the separate and equal station to which the *laws of nature and of nature's God* entitled them.

The ultimate purpose of our written Constitution, as well as the science of law, is to "secure the blessings of liberty to ourselves and our posterity, and to establish justice, and insure domestic tranquillity."

In the constitutions of the States the Bill of Rights surrounds and protects all the inalienable rights protected by the English charters, as well as making extensions; viz.: life, liberty, acquiring, possessing and protecting property, seeking and obtaining happi-

ness and safety; conferring the right upon the people to assemble together, to consult for their common good, to bear arms for their defense and security; preserving the right of trial by jury, the natural and indefeasible right of worship, the inviolability of property; security of persons, houses, papers, and possessions; freedom of speech; the non-impairment of contracts.

America became a model government, and a leader of nations in the science of government.

"America holds dominion over the civilized world by the silent empire of her laws." The distinguished jurist, Judge Cooley, said: "In matters of government, America has become the leader and the example for all enlightened nations."

This is because she is fulfilling her scriptural mission. Society is formed to promote the public welfare, public morals, and to provide ways and means for enforcing the laws of morality. So the State must adopt the moral law as its law. Its paramount duty is to maintain order, by protecting rights and enforcing the performance of duties, whenever men are found violating rights of individuals and obligations owing to society in general. The mission of the State is—"The Public Welfare,"—which it carries out by laws enacted for the public good, compelling as it does observance of individual rights.

The State follows the example of the Divine Master, prescribing a penalty for the violation of its laws. Penalties and Punishment are of Divine origin; they were not invented by the State.

In the structural framework of the State, "Morality," was the corner stone. This is shown by various constitutions.

The Constitution of Arkansas, Article 2, sec., 25 provides as follows:

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Article 18 of the Constitution of Massachusetts goes further in respect to the duties of its officers than other States. It provides—

"A frequent recurrence to the fundamental principles of the Constitution, and a constant adherence to those of piety, justice, moderation, temperance, industry, and frugality, are absolutely necessary to preserve a free government. The people ought, consequently, to have a particular attention to all those principles in the choice of their representatives, and they have a right to require of their law givers and magistrates an exact and constant observance of the laws necessary for the administration of the commonwealth."

Chapter 5, sec., 2 of the same constitution also provides:

"Wisdom and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties, and as these depend on spreading the opportunities and advantages of education in the various parts of the country and among the different orders of the people, it shall be the duty of the Legislatures and magistrates to cherish the interests of literature and the sciences, . . . to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings; sincerity, good humor, and social affections and generous sentiments among the people."

Article I, sec., 4 of the Constitution of Nebraska reads:

". . . . Religion, morality and knowledge, . . . being essential to good government, it shall be the duty of the Legislature to pass suitable laws to . . . encourage schools and the means of instruction."

Article 6, of the New Hampshire Bill of Rights reads:

"As morality and piety rightly grounded on evangelical principles will give the best and greatest security to government, and will lay on the hearts of men the strongest obligations to due subjection . . ." It then authorizes the Legislature to provide for the support and maintain "public Protestant teachers of piety, religion and morality."

North Carolina Constitution, Article 9, sec., 1. provides:

"Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and means of education should be forever encouraged."

The Ohio Constitution, Article 1, sec. 7, reads:

"Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the General Assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship and to encourage schools and the means of instruction." Taken from Ritter's Moral & Civil Law, 25.

Thus we see Morality is made the basis of our fundamental law.

In Stanton v. Allen, 5 Denio, 434, the New York Court said:

"Sound morality is the corner stone of the social edifice,—whatever disturbs that is condemned under the fundamental rule."

We broke the shackles of so much of the English law as infringed our liberty and freedom, and retarded the development of law, and which rendered laws and morality strangers. We took so much of the common law as seemed suited to the new conditions, but we left that which was inconsistent with liberty and

justice on the other side. America became a leader in reforms in legal system, while England followed. Inadequate laws of procedure retarded the development of substantive law. We put on a new dress, and England followed in our footsteps.

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history leading up to positive law as historical accidents. (*Id.* 8.)

They hold that while resort must be had to history to ascertain the facts or the phenomena, still the science only begins when these facts begin to fall into an order other than the historical, and arrange themselves in groups which have no relation to the varieties of the human race. (*Id.* 11–12.)

While recognizing the close alliance to the historical and philosophical sciences, the analytics contend that Law as a Science begins only when the facts are furnished from the other sciences.

If law is a progressive science, it is the business of lawyers to be fully equipped in the field of the other sciences yet to be invaded by the law, so as to be prepared to perform their part in the making of law.

The analyties may argue until doomsday for the separation of the science of law from all other sciences, and discuss the great good to be derived from this way of thinking, yet the fact still will remain, that the science of case law has important elements other than its uniformity, and the like.

Along down the progress of time it will be found that the science of law is so dependent upon the science of ethics, of sociology, as to make knowledge of these sciences, and their mutual operations absolutely essential on the part of lawyers and judges.

"The field of ethics is the raw material out of which positive law is made. Positive law encroaches upon ethics. Ethics grows in advance of positive law. It follows that the fact that positive law is not coextensive with ethics, is a fact arising out of our being at some stage of a partial evolution towards a goal of a relatively perfect adjustment." (Clarke, Law & Law Making, 418.)

In so far as our "Laws" cover the same field as does

the moral law, it will be found that the precepts of modern law are in accord with those of morals. By "laws" we mean both "adjudication" and "legislation."

In the field of Ethics which has not yet been approached or covered by "laws," the legislator or judge will turn to "social ethics," and ascertain from past or existing conditions and circumstances, what rule or principle is to be adopted and applied. Professor Pollock observes that "though much ground is common to both, the subject-matter of Law and of Ethics is not the same. The field of legal rules of conduct does not coincide with that of moral rules, and is not included in it; and the purposes for which they exist are distinct. Law does not aim at perfecting the individual character of men, but at regulating the relations of citizens to the commonwealth and to one another." (Pollock, First Book of Jurisprudence, 44.)

It is contended that "there are many actions and kinds of conduct condemned by morality which for various reasons law can either not deal with at all or can deal with only in an incidental and indirect manner." (*Id.* 47.)

And there are acts or courses of conduct, it is said, which are indifferent in moral law, but which are arbitrarily regulated by law. One course or another may satisfy morality, but the law must adopt a definite course.

The law of the road, the liability of a master for the acts of his servants, the responsibility of owners of buildings in an unsafe condition, questions between two innocent persons, are mentioned as indifferent in morals.

Whatever rules may be adopted by the law in such matters, which do not come within the class of acts *malum in se*, are based upon that which appears right and best for the good of people generally.

Morality has no limitations and embraces acts *malum prohibita* as well as those *malum in se.*

Hobbes expressed the view that nothing was right or wrong in itself and independently of positive law. He identified the fields of morals and law more completely than many other writers. (Palmer's Ethics, 42.)

In the task of separation of ethics and jurisprudence, the theories of the former science are said to be too transcendental to be practical.

It may safely be asserted that courts and legislatures in drawing from the field of Ethics do not deal in imaginary theories; they do not look to anything but tangible things, or historical events, comparing them with present times to determine what is right or wrong.

Transcendental ethical theories may be found on paper, but are not present when lawyers and judges are called upon to act.

The only theories which cannot be seen, and absolutely known are the mysteries of religion, which have a potent influence upon the conduct of men, and finally upon Law. And these are becoming reasonable in the modern conceptions.

Standard of Duty Fixed by Law.

The standard of duty adopted in law, either in the field of adjudication or legislation, is the same as that which receives the sanction of the science of Ethics. Civil government applies this standard and compels full and exact compliance thereto.

Conditions, circumstances and exigencies of occasions give rise to legal doctrines, and demand rules peculiarly and naturally adapted thereto, that is, each subject has its own natural laws.

As natural law is "that science which teaches men their duty and the reason of it," so do courts look to the nature of the subject, and deduce therefrom the

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The term "justice" in legal language has always had a significant meaning, from Justinian's time to the present. It matters not in what language it may be expressed it has always had an ethical meaning, and justice administered by our courts has had no aims or purposes other than moral.

If justice and morals have not quite agreed it is due to faulty administration, but the loadstone of ethics has in the end attracted the better feelings and sentiments, resulting in the production of law in accord with morals.

An apt illustration of the misapplication of the moral precept may be found in the stock argument of the moralist in the law of slavery. The right to hold a human being as a slave is contrary to the law of nature, and yet such a right prevailed for many years, until enlightened civilization took hold of the question and settled it. It took the strong arm of the judiciary in England, unhampered by any restraint, guided only by conscience, to settle it.

In 1770, James Somerset became the slave of Charles Stewart. As the slave learned something of the world and became enlightened by education, he refused to obey his master and denied the relationship of master and slave. Whereupon he was seized and put in chains, when some good Quakers made an affidavit in the Court of the King's Bench, the highest Court in England, that Somerset was unlawfully imprisoned. A writ of habeas corpus was issued and the case came up before Lord Mansfield, Chief Justice. All legal precedents were in favor of the master, and none could be found on the side of the slave; but the laws of nature, humanity and Christian sentiment were on his side, and upon these principles Lord Mansfield proceeded and set the slave free. He said in his opinion:

"The state of slavery is of such a nature that it is impossible of being introduced on any reason, moral or political."

In this country, we are well aware that slavery was upheld by legislative action as well as by judicial sanction. One of the most pathetic instances of conflict between individual sentiment and opinion, and what appeared to the court to be judicial duty is found in the famous case of Ex-parte Bushell, 9 Ohio State Reports, 77, 198, where the validity of the fugitive slave law was called in question. The Ohio court refused to declare it unconstitutional because the Supreme Court of the United States had recognized and acquiesced in such legislation. Judge Joseph R. Swan delivering the opinion said: "As a citizen, I would not deliberately violate the constitution or the law by interference with fugitives from service. But if a weary, frightened slave should appeal to me to protect him from his pursuers, it is possible I might momentarily forget my allegiance to law and constitution, and give him a covert from those who were on his track. There are, no doubt, many slaveholders who would thus follow the impulses of human sympathy; and if I did it, and were prosecuted, condemned, and imprisoned, and brought by my counsel before this tribunal on a habeas corpus, and were then permitted to pronounce judgment in my own case, I trust I should have the moral courage to say, before God and the country, as I am now compelled to say, under the solemn duties of a judge, bound by my official oath to sustain the supremacy of the constitution and the law, '*The prisoner must be remanded.*'"

Public sentiment found expression in the defeat of this able and distinguished judge, and it finally took war and bloodshed and the political power wielded

by a martyred president, followed by a constitutional amendment to settle the same question.

The expression of the Supreme Court of New York found elsewhere, in which it was said that it would hold a contract not founded on morality void even if but one moral man could be found in the community, is a further illustration where public morals of the time and law are not the same, and of how morality will be upheld by the courts.

The "police" or the arms of law, are needed only for those who violate the commands of the law. Because there is a considerable number of citizens who, by reason of heredity and education are true disciples of the public conscience, and obey the precepts of morality for conscience sake alone, is no argument that the law and the conscience are not identical.

The Penalty of the Law.

One of the stock arguments of the extreme moralists for a separation of the moral and civil law, is that the enforcement of law by means of a penalty does not tend to the purity of conduct so readily as that produced alone by the conscience. If there be no penalty, there is no law; nothing but a mere piece of advice. This is where ethics and law divide. "Every crime," it is said, "has its cost marked in plain figures, precisely like goods in a grocer's catalogue." (Palmer's Ethics, 56.)

Our thoughts are carried back into ancient times when there could not exist a moral precept disassociated from physical enforcement. Legal precepts are expounded as the head master who relied on the rod in expounding Scripture: "'Blessed are the pure in heart.' Mind that, boys. The Bible says, it's your duty to be pure in heart. If you are not pure in heart, I'll flog you." The enforcement of morals by the rod, it is said, would have been satisfactory to the

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rights are not safe without protection. If all would obey the law of their conscience, and perform their duties, then the State would not be a necessity. But as they do not we must have governments. The true basis of the State is found in this country to be that of a social compact between the governing and the governed, although it may be said that our written constitutions assume the existence of the State as a fact. The State is the embodiment of the authority and power of a community, organized to enforce right and to prevent wrong. Rights and duties must be created by the State or exist independently of it.

Men possessed certain inalienable rights as members of the community, and the theory is that these cannot be taken away or infringed upon by the State. In constitutional forms of governments they are secured in the written compact.

It may be said that the State can have no morality, in fact it is so claimed. True, perhaps, but it is organized for the express purpose of compelling those who do not observe their duties to their fellow men, to perform them; the state, therefore, is organized to promote morality.

St. Paul's doctrine in Romans, Chapter XIII, was: "Let every man submit himself to the authorities of the government, for all authority comes from God: therefore he who sets himself against the authority, resists the ordinances of God, and they who resist, will bring judgment on themselves. For the magistrate is God's minister to thee for good. But if thou art an evil doer, be afraid: for not by chance does he bear the sword (of justice) being a minister of God, appointed to do vengeance upon the guilty. Wherefore, you must needs submit, not only for fear, but also for conscience sake; for this also is the cause why you pay tribute, because the authorities of government

are officers of God's will, and His service is the end of their daily work."

What further justification need be offered for the "penalty of the law." St. Paul teaches submission to the law for *conscience sake*.

Penalties are prescribed in all legislation. When there are infractions of private rights not covered by legislation, the courts either compel performance or award compensation.

It is said that law treats only cases which are easily measurable, and in support of this proposition it is said that the small and ordinary gambler only is punished, while in its larger phases gambling is little interfered with; "that a gambling-house for these larger purposes may be built conspicuously in any city, the sign 'Stock Exchange' be set over its door, influential men be appointed its officers, and the law will protect it and them as it does the churches. How infamous to forbid gambling on a small scale and almost to encourage it on a large scale." (Palmer's Field of Ethics, 67, 68.)

This criticism of the law by an eminent scholar of philosophy justifies the claim that philosophers unacquainted with law are not qualified to philosophize upon law.

The law condemns all forms of gambling large or small, both in its civil and criminal relations.

The law denies relief to any whose claims are based upon what is termed "dealing in margins," because it is a species of gambling; and if you can install officers in our municipal governments who will do their duty, any persons who buy or sell "margins" through the stock exchange may be brought before the law and punished. I have but recently witnessed in our own local courts, a case brought by the loser against the proprietor of the stock exchange, where recovery was

had, and the court said the case should be taken to the grand jury, as it was gambling.

The laws are adequate, and the courts have full power. The force behind the law is moral, and if results are not always up to the standard, it is due to neglect and failure of those to whom its administration is committed to properly enforce it.

Monopolistic combinations which are permitted to go on are pointed to as another lame place in the law. (Palmer, Ethics, 70.)

Notwithstanding the great hue and cry about the evils resulting from the misnamed "Trusts," it may be confidently asserted that the common law has always been adequate to remedy the evils resulting from conspiracies against trade. The modern statutes covering the subject do not embrace new ideas or principles, but are in reiteration of the Golden rule principles which have always formed part of our jurisprudence.

Again, it may be said that the fault is not in the law, and if evils go unremedied it is due to maladministration.

Much is said about miscarriage of justice and popu-

Some Causes of Miscarriage of Justice.

lar opinion lays the blame on the law. If lawyers were permitted to relate their experiences with the deceptions and misrepresentations of their clients, and some of them the most reputable citizens, the story would be an interesting one.

The client will misrepresent in the vicious form of concealment, dodge and hedge about matters of vital importance, and the lawyer believing that he is in possession of all the facts, proceeds, only to find at the crucial test his client breaks and is compelled to confess the truth. The lawyer and the law receive the blame. A lawyer sometimes has as much trouble to make the client tell the truth and do right, as he does to maintain the right in court.

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lawyers have to do with making law and its interpretation. Hence, the ethical obligation rests harder upon his shoulders.

Again, courts have the power to supervise the conduct of lawyers. If a lawyer violates the ethics of his profession he may be called upon to suffer the consequences by forfeiting his rights as a member of the profession. The court which admits one to practice law retains an inherent supervisory control over his professional conduct, and without the aid of positive law, may disbar him.

Legal ethics may have another meaning than that above mentioned.

It may be adopted as a convenient name to mark off ethics as we have it, practically, in law.

Lawyers are inclined to assign to their profession a certain field of Ethics, distinctly based upon the duties which they owe primarily to society in aid of a true ascertainment and determination of law.

This field of Ethics may be considered as embracing that body of rules drawn from the science of Ethics, which relate to the duties of men in their social intercourse with each other and with the government (or in legal relations) from which courts draw the precepts or principles which form the basis of judicial decisions, and from which the state draws, in the enactment of legislation.

This may more appropriately be designated as "Ethics of the Law."

If there are any theories in Ethics, to be classed as "transcendental," they are outside of the region covered by the Law. In law the principles of Ethics constitute the measure of conduct, and form the basis for the enforcement of duty by the sovereign government. Outside of law the precepts are enforceable by the individual conscience. The law has occasion for

operation only when the conscience does not compel right action. Case law deals only with wrongs arising from the absence of conscience.

That a true conception of the relative functions of law and ethics when operating in the same field, may be formed, Ethics, as an individual science will be considered.

XI.

ETHICS AND THE LAW.

THE PLACE OF ETHICS AMONG THE SCIENCES.

THE proposition, as a principle of jurisprudence, that the moral precept is a source of law, is generally admitted by all who have written upon the subject.

The Moral and Civil Law.

Those who belong to the historical and analytical school concede this point, but when it receives the stamp of Law, there is a transformation of some sort; an abstract thing becomes a concrete.

In the study of the science of law we must not go beyond its limits; if we lose our way and get on the philosophical by-path of ethics, it is claimed that we are in danger of loss of appreciation of the science.

A broad minded jurist will not lose his tenets in law, while investigating the truths of the related sciences; he will be able to hold in his mind the boundaries of his science.

The scientific study of law demands a correlation of the ideas of morality and law, rather than a separation of jurisprudence from the domain of ethics, as contended by the analytic. The admission that the phenomena of ethics become the phenomena of law, by its own force carries with it the conclusion that ethical considerations cannot be excluded from the administration of the law. Theoretically and for scientific purposes law, as a science, must be separated

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3. Epistemology is the science or the method or ground of knowledge, or that branch of logic which undertakes to explain how knowledge is possible.

4. Psychology is the science of the human soul, involving a scientific study of the mind. (See Palmer's Field of Ethics, p. 13.)

Ethics Compared With the Philosophical Sciences.

It will be seen that the field of Ethics lies outside the philosophical sciences just enumerated, though the principles or doctrines of nearly all of the latter must in a measure come nto play in the Science of Ethics. If we clearly mark the province of ethics we shall have many of the difficulties encountered in its comparison with law out of the way.

A person cannot be an ethical being or appreciate human duty, without "pure thinking," without observing correct "methods or grounds of knowledge," without culture, without proper feelings and emotions. He must possess all these attributes, to enable him to arrive at correct conceptions as to his responsibility and duty under particular circumstances, and conscious of his duty he must possess the qualities that will enable him to perform the same. Knowledge and will power are of equal potence to ethical persons.

The will is largely dependent upon the physical make up, being affected by the nervous system, by the past experiences of ancestry, and developed and strengthened by education. Men are frequently endowed by nature with the qualities necessary to create moral beings.

"A being might have been created fully endowed with consciousness but altogether contemplative and incapable of action. He might be aware of everything that happens without and within, yet over these clearly observed transactions exercise no control. A

psychological being of this sort would not be a moral one." (Palmer's Ethics, 12, 13.)

While each one of the philosophical sciences may in a large part contribute to what may be *formative ethics*, as the ascertainment of the moral duty, there is a field beyond all of them, consisting in actual performance. Some writers class Ethics with Psychology. (Hadley, Education American Citizen, 106.)

But Ethics diverges from Psychology, because the science of human duty is to be determined by the outward acts of men, though they may parallel in so far as it may be necessary to resort to well settled theories.

We next consider its relation to Religion but finally place it in the field of Sociology where we think it belongs.

There is still one other matter to consider in forming a conception of Ethics, in addition to the fundamental principles of Philosophy, which it will be conceded have a potential influence in shaping conduct.

Ethics and Religion.

Religion has much to do with the establishment of morals, and the idea that there is a clear boundary line between religion and morality is in some respects theoretical.

Says one writer: "There is a general belief that the religious man is, as a matter of course, moral, and the moral man fundamentally religious. The moral man need not, indeed, be religious according to a specified type. . . . Religion in general, religion manifested in its highest forms, is commonly supposed to be undivorcible from morality." (Palmer, Field of Ethics, p. 139.)

It is contended by some that a truly moral man is of necessity a religious man, because ethics and religion are inseparable. Some Philosophical and legal

writers take this view holding that the observance of religious precepts and moral duties is controlled by the same power. "Religion in general, religion manifested in its highest forms, is commonly supposed to be undivorcible from morality. No doubt it is easy so to misconceive both religion and morality that they may be set far asunder." (Palmer's Field of Ethics, p. 139.)

Some religious beliefs are mentioned to show the divergence of religion and ethics, such as fear which controls actions of men, which is absent in ethics. All men, however, are not impelled by the same theories even in religion; some there are who claim that love rather than fear is the controling element in right doing. It is likely that which of the two exerts greater influence, depends upon the intelligence and the disposition of the person. Another argument in favor of the separation of morality and religion is "that a good many persons are, . . . sincerely religious when not quite responsive to the demands of the moral code. At . . . times of greatest religious exaltation small duties do not appeal to (the person) most urgently. There seems to be a kind of separation, as if there were something in the nature of the religious emotion which removes (one) from earthly duties. When the religious impulse is strongest, (one is) obliged to be especially careful . . . not to be blind to the plain duties of the day." (Palmer, Ethics, 177.)

It would not seem that such a person properly conceived religious principles. Christ's life was not so lived. It is too much like the person who leaves his stock at home uncared for, while away attending revival meetings.

There is a double aspect of religion and the Divine

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Attention is directed to the view which Sir Frederick Pollock takes of Morality.

Does Moral Conduct Depend Upon Theory or Come in the Region of Precept and Command?

He contends that Moral Philosophy is the easiest to maintain plausible arguments upon but that it is also the most perplexed, and that it is liable to infinite confusion because of prejudice and bias. He refers to the assumption on the part of some that our character and conduct are materially determined by the theories we may adopt concerning the origin and nature of moral duties, but expresses the view that those who proceed upon such assumptions fall into extravagant apprehensions, and waste their power on appealing to the terrors of the ignorant. He seems to prefer making *experience* a test of morality, contending that: "The moral feelings and perceptions that prevail in a community are really just as much facts in its natural history as the temperance, health, and length of life of its members; that they will not be altered by our ability or inability to find adequate reasons for them."

He further argues that "Ethics" should be confined or limited "to the scientific analysis and exposition of conduct, whether it be on historical, physiological, or psychological grounds; and on the other hand to keep 'morality' . . . for the region of precept and command;" that "A science of Ethics comes into existence, . . . only when the society becomes sufficiently civilized to produce men who think systematically." "And," he says, "ethical speculation arises just because morality is there as a subject-matter to be accounted for. Morality and its precepts are not dependent on Ethics, and the practical success of mankind in developing morality cannot depend on the amount of success that may attend philosophers in their endeavors to give an account of the process."

He says further in substance that the science of Ethics arises only in a moral community and that a right minded man does not want ethics to make him know right from wrong. He expresses the opinion that Morality does not necessarily come about by obedience to certain precepts, determined by sanctions expressed in current ethical theories; that, "Righteous men are not they who obey moral precepts, but they whose conduct is the foundation of moral precepts."

This writer discourages the considerations of fictitious precepts of morality as the basis of conduct, claiming that a discussion of the sanctions of morality is apt to unsettle people's moral convictions, but adds "that the man whose moral convictions are liable to be thus unsettled has not attained real morality, at all." His final conclusion is that the real ground of Morality is the common experience of men, and that its natural sanction is public opinion. (Pollock's Jurisprudence, 288 *et seq.*)

Granting all that this learned writer says to be true, are we not brought back to the fact that the average consciences of the right minded members of society constitutes the real sanction of morality. And does not the approval of past conduct by the general consensus of opinion constitute the measure of future conduct. And the processes by means of which this public opinion is formed, based as it is upon past conduct or existing facts, is but an exercise of the philosophical reasons leading to the formation of such opinion. This is to be regarded as a discovery merely of the theories of past conduct or events, forming the basis of the precepts of Morality, which is to be the law of future conduct. Thus the theories of Ethics become established, and it may safely be asserted that there are none which are formulated otherwise,

excepting such as owe their origin to religion. And the latter are founded upon past history and that Law which is above and over all. Morality is the result of a scientific analysis and exposition of past conduct to which we look for the purpose of arriving at a standard of duty. Ethics is the science which discovers Morality. The one cannot exist without the other. Morality becomes the basis of law, while Ethics is the means by which both become established. Ethics bears the same relation to Morality as Jurisprudence does to Law. And Ethics may be said to sustain the same relation to Jurisprudence as the latter does to law, Ethics being the common parent.

A man who unconsciously observes his duties towards his fellows in the ordinary affairs of life, is carrying into effect or practice, the precepts of Ethics, and we might say religion as well, whether he does it with a consciousness of religious belief at the time, or in observance of ethical theory.

Moral practice may or may not be brought about by intentional observance of ethical theories, but the man who practices Morality, unconscious of ethical theories, is entitled to as much credit, as the one who intentionally carries the ethical theory into practice. A person who begins to philosophize upon the theories of Ethics, most likely does not depart from his former habits and experience, and govern his future conduct according to his philosophical reasonings, but on the contrary will merely find the reasons for his past conduct, if he has been proceeding upon correct lines.

As Sir Frederick Pollock says: (Pollock's Essays) "When man reaches the stage of philosophical questioning, and communes with himself concerning morals as of other things in general, he comes to the task with Morality ready-made and in full operation. His real object is not to find speculative principles and

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how they ought to behave." (Palmer on Ethics, 14–15).

Moral conceptions depend largely upon the condition of civilization. It is a singular fact that in ruder societies, stronger religious feelings prevailed, but because education was at a low ebb, the morals were of a low order.

It is a singular fact to be observed in the history of races that when religious precepts held greater sway in the minds of men, all their acts were largely controlled by their influence. This more than any other thing tended to bring Ethics and Law into closer union. It may be observed that up until about the twelfth century in England the clergy were the only lawyers, and the ecclesiastics assumed the administration of some civil matters. To this fact no doubt is attributable the close association of morality and law. The tendency of the teachings of the clergy would necessarily be towards parallelism of law and morality.

When the profession of law as an independent avocation came into existence the thoughts of those engaged in this work turned exclusively to the law as a distinct and separate science. It is a singular fact, however, that theories of law as an independent science were not developed until about the seventeenth century, at least so far as was manifested in book-form.

It is a notable historical fact that when English-men became more enlightened, better educated in all the sciences, they put their religion behind them, and repudiated all imaginative theories. It was conceived that there was a field of Ethics or morality clearly apart or distinguishable from law, the controlling power in shaping human conduct being conscience, rather than the penalty prescribed by law.

The sphere of the conscience, it is said, is very different when moved by its own influence, than when conduct is shaped by the mandates of law.

True morality or conscience may play its part in the obedience of law, but there are so many persons whose consciences do not impel them to observe the precepts of law, resort to law being necessary only in such cases.

The Conscience.

The theory has ever been that *conscience* is the prompter of correct conduct; that men possess this special faculty, which decides unerringly between right and wrong. Psychologists claim that this theory has been practically abandoned, putting forward instead thereof the idea that there is within us a moral feeling which should be classed as an emotion; that what is called *conscience* is a compound of intellectual action and of feeling, that this emotion is a product of education developed as civilization gradually advances.

This may be true in theory, but we have so long denominated this moral feeling or emotion as conscience, that it is too well established and understood to be abandoned.

In the language of another: "The internal standard by which we determine right and wrong we call *conscience*, and, generally, the prevailing views of a community, with respect to morals, are created by the concurring consciences of all or a majority of the people that constitute such community. Now, whatever else may be said concerning it, this something which we call conscience is largely a matter of education, association and environment. This is evident from the fact that morality, or at least the popular conception of moral duties, is different among different peoples at the same time and among the same people at different times." (Warvelle on Ethics. 14–15.)

"As a light is set in a lantern," spoke St. Germain, "that all that is in the house may be seen thereby; so Almighty God has set conscience in the midst of every reasonable soul as a light whereby he may divine and know what he ought to do and what he ought not to do. Wherefore, forasmuch as it behooveth thee to be occupied in such things as pertain to the law, it is necessary that thou ever hold a pure and clean conscience."

Conscience is the supreme law; "it is the voice which pronounces for man the distinctions of right and wrong, of moral good and evil; and when he has done all that he can to enlighten and instruct it by the aid of religion, as well as morality, it is, for him the voice of God. To disobey the commands and prohibitions of conscience, under any circumstances, is utterly immoral. It is the very essence of immorality. In order to be moral, a man must be thoroughly conscientious; he must be careful to satisfy himself what the decision of his conscience is, and must be resolved to follow the course thus prescribed, at any rate and at any sacrifice. Nothing can be right, which he does not do with a clear conscience. . .

"A man is bound in conscience to do what he thinks is right; but he is bound to employ his faculties in ascertaining what is right. . . . Every case of moral action is, for the person who acts, a case of conscience." (Quotation found in Warren's Law Studies, 132.)

The common behavior of men which comes up to the true measure or standard is bottomed upon a moral faculty, call it what we may, conscience, moral reason, moral sense; or whether it is a sentiment of the understanding, or as a perception of the heart, there is a psychological phenomena in the make up of the man produced by heredity or education, or both, that enables him to distinguish between right and

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lished interest of society, it must be against morality as thus defined. The morals of the time may be vicious. Public sentiment may be depraved; the people may have all gone astray, so that not one good man can be found. Sound morals as taught by the wise men of antiquity, as confirmed by the precepts of the Gospel, and as explained by Paley and Horne, are unchangeable; they are the same yesterday and to-day."

What more striking example can come from the temple of justice to refute the claims of some that the ministers of justice do not apply the principles of morality, even in disregard of the prevailing morals, if bad? It demonstrates the truth that courts resort to the science of Ethics to discover the rule of conduct, and apply the same, despite the fact that public sentiment may point in a different direction.

Does the Standard of Morality Change?

The standard of morality has changed from age to age. Although it ought not to be so, morality is frequently based upon utility. We are too apt to think that a thing is right according as it best suits our purpose.

The necessities of war in England produced strange and unnatural ideas as to the ownership of land, and of descent.

In Rome the idea of enslaving a fellow Roman was abhorrent to the minds of Romans, but they thought it justifiable to treat an alien as a slave. In England and this country for a time slavery was consistent with the morals of the times. This is an instance where the argument that there is a field of morality where the *conscience* and not the *law* holds full sway and impels the actions and conduct of men in such a different way than does the law, is a two-edged sword. It is said also that: "When conscience and the police were undistinguished, the sphere of authority of con-

science was very different from what it became when the two—(moral precepts and judicial ones) were separated. The people that relies on its conscience as a means of enforcing public sentiment, and is able to maintain that authority stoutly and strongly, can do hundreds of things impossible to the tribe which can conceive of no law except one whose infractions are repressed by violence." (Hadley, Education of American Citizen, 113.)

Conclusion—the true Conception.

Enough has been said to show that the philosophical sciences play an important part in human conduct, the subject matter of law. While fully comprehending the boundaries and limits of all the sciences, we must have a firm grasp upon the part all of them play in the affairs of men.

The close practical relation of law and ethics must be appreciated in order to fully comprehend the law as a science.

The science of human duty is the sum and substance of both law and ethics.

With morality and education as the corner stone of our American government, by solemn constitutional compact, (See pp. 144–9) in this advanced era of civilization there ought not to be any law that is inconsistent with morality. We should discontinue preaching the doctrine that law and morals are separate, but instead insist that law to be sound must be consistent with morality.

XII.

JURISPRUDENCE.

LAW DEFINED.

Conception of Law.

THE term "law" may be used as meaning a rule of human action without regard to the manner in which it is prescribed, whether by legislation, by adjudication, or as a rule which will rightly impel men to perform their duty to, fulfill their obligation with, their fellow-men, in the absence of specific legislation or of particular adjudication.

Technically, Law embraces only such rules or precepts as have been laid down. Judge Dillon claims that "Law" and "Legislation" are by no means synonymous. (Dillon's Laws & Jur. 9.)

The nature of legislation is considered at another place. See 233 *post*.

Practically to lawyers engaged in solving problems of their clients for the purpose of advising a course of action, the "law" has a more comprehensive meaning than is contemplated by "legislation" or "adjudication." Grave are the responsibilities of the lawyer betimes, when, after searching all available sources, he finds no "law prescribed;" but his client must act, and he must point out the way. He must foresee the "legal right." He studies the facts of the case and forms an opinion of what the law ought to be for the client. The law to him means such rules as ought to govern the actions of men in the absence of statute or decision. The mental processes of his

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courts, which have adopted the salutary rule of *stare decisis*.

Now that the picture has been finished, again the *quære* may be propounded. What is the law? The decision of the court, or the moral principle contained in the opinion of the lawyer to his client which formed the basis of action?

It is sufficient to state that this only magnifies the relative importance of the data of the decisions of our courts, the so-called "law," which is morality.

Much has been written in respect to a definition of law. It is easier to criticise definitions than to frame them. Blackstone's definition of municipal law has been a fruitful field of controversy, notwithstanding it has generally been conceded that he wrote according to the spirit of his time and in accord with prevailing opinion. It began with his kinsmen and acquaintances, and even pupils (Edward Christian). It would appear that within a short period after the publication of his work a new era was marked off in the opinions of Englishmen in respect to their conception of law.

Law Defined.

A definition of Law in its general sense as well as in a limited sense, was furnished by Blackstone.

"Law, in its most general and comprehensive sense," he says "signifies a rule of action; and is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational."

In its confined sense, it denotes the rules of human action and conduct.

"Municipal law" he defines as "a rule of civil conduct, prescribed by the supreme power in a State, commanding what is right and prohibiting what is wrong." [1]

[1] 1 Blackstone's Com. 44. Judge Dillon says that he followed Hobbes' definition. Dillon's Laws & Jur. 9.

Erskine said: "Law is the command of a sovereign containing a common rule of life for his subjects."

"Positive Law may be described as consisting of commands set, as rules of conduct, by a sovereign to a member or members of the Independent Political Society wherein the author of the law is supreme." (Campbell's Introduction to Austin.)

"The rules and methods by which society compels or restrains the action of its members."

Holland says: "Every law is a proposition, announcing what course will be taken by the state in certain cases; that is to say, what advantages will be protected by the power of the state, as being legal rights, and the burden of what disadvantages will be enforced by the state as being legal duties." (Holland, Jur. p. 60.)

"That it is the general body of rules which are addressed by the rules of a political community to the members of that society, and which are generally obeyed." (Markby's Elements of Law, Chapter 1, sec. 9, p. 3.)

Montesquieu's Spirit of the Law, says:

"Laws in the most extensive signification are the necessary relations which flow from the nature of things; and in this sense all things have their laws; the Deity has his laws; the material world has its laws; the intelligences superior to man have their laws; the beasts have their laws; man has his laws."

The word "laws" is not co-extensive with "law." The term "law" may be used to designate a science.

"The laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long-established local customs having the force of laws." It is said that, "in the ordinary use of language it will hardly be contended that the decisions of courts constitute

laws." (Justice Story in Swift v. Tyson, 16 Peters, 1, 18.)

"Law . . . is the collective and appropriate name for the entire body of rules, regulations, principles, and enactments which are recognized and protected by the State, and which the State will compulsorily enforce when required." (Dillon's Laws & Jur. 21.)

Law as Commanding What is Right and Prohibiting What is Wrong.

Writers have generally differed from Blackstone in his definition of municipal law that it is a rule of civil conduct, "commanding what is right and prohibiting what is wrong." (1 Bl. Com. 44.)

It is claimed that if right and wrong are to be referred to the law of nature, then the definition is deficient or erroneous, because it may forbid what is right.

Those differing from Blackstone's definition based their contention upon a different criteria of rights and wrongs. It is claimed that what is right or wrong under the municipal law, is not what is right or wrong under ethical law.

Walker, for example, says that the definition is imperfect, because it does not clearly distinguish between *moral right and wrong* and *legal or civil right and wrong*. "Every law," he says, "commands something to be done, or regulates the manner of doing it, or forbids it. If it so happen that religion or morality forbids the same thing which the law forbids, we call the thing *malum in se* or *wrong in itself;* otherwise, *malum prohibitum*, or wrong because prohibited. This very distinction shows that municipal law and moral law do not necessarily command or forbid the same things. In fact, many things are morally right which the law does not command; and many things are morally wrong which the law does not forbid. It must, indeed, generally happen that these will corre-

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" . . . . That the rights and the wrongs (Hammond in a personal comment says,) of municipal law must necessarily be consistent with the law of nature is merely a logical corollary to the doctrine of this section (of Blackstone). Modern courts hold, on the other hand, that the rights and wrongs of municipal law (*jus*) are measured by that law alone, and not by ethics. They repudiate the notion of the enforcibility of moral rules, as moral, altogether." (1 Hammond Bl., 125.)

Of course, municipal law is to be measured by that law alone. By municipal law as here used, is meant the common law. But the courts in the formulation of law either consciously or unconsciously follow ethical precepts.

With legislation much the same principles govern, although legislation is arbitrary, and not so flexible. But it is supposed to be founded upon the same rule.

One objection made to Blackstone's definition of Law was that it was not a command.

Law as a Command.

Among the earlier Christians, however, the view has generally obtained that the whole system of the universe, as well as all of its laws, has its origin in the direct command of the creator. In more recent years a theory is advanced that law is without a lawgiver.

It has been a favorite notion that the monitor, or conscience of man, is the light by means of which he may know what is right and what he ought to do, or not to do. If the conscience is pure and clean, it will lead one to the good and from the evil, to maintain the truth, to live peaceably with his neighbors, to observe equity.

Why be troubled with the origin of Law further than to remember that the principles which emanate from the conscience control all human action. Human

law is a principle of order, which pervades human societies, governing the mutual intercourse of their members. Professor Hammond said: "No man looks into the statute-book, or the reports or treatises upon law, to determine whether he ought to do a particular act, except in a sense such as that in which he consults the almanac or the market reports for the same purpose. The commands of the law are not rules of personal conduct, and never would have been supposed to be so but for the theories that identified law with morality. The law tells us not what we ourselves must do, but what we can require other men to do, or they can require of us, *i. e.* what results of a given course of action we can count upon. It does not control our freedom of will: it really increases it, because it enables us to see with certainty the outcome of our own choice, and to plan intelligently for the future." (Hammond's Bl. 98.)

In a consideration of the origin of law there is danger of confusion concerning its basis. Tracing its origin, however, is an absolute necessity to its true ascertainment. But, when too much prominence is given to its origin as being a command from a superior to an inferior, we are liable to lose sight of the fact that law is not necessarily law because it is a command, but rather because it is builded upon sound and correct principles, drawn from the nature of the thing to which it is directed. The chief function of the superior power, the state or government, is to draw from "social ethics" the correct rule or "command," enact the law, and provide ways and means for its enforcement. The power of the state lies not so much in the prescribing as in the enforcement of the consequences which in the usual and lawful course of things will flow from its violation.

It may be granted that the idea contained in Black-

stone's definition of law that it is a command prescribed by a superior to an inferior is not in harmony with correct notions of law, in so far as it may convey the view that the command by a superior to an inferior is an essential to the definition. It may properly be considered faulty, if we are to conclude from this definition that there is no law unless it be a law commanded by a superior to an inferior. It may be faulty too, if we are to consider all law which is commanded by the superior to the inferior as sound law.

Law is to be regarded merely as a rule of conduct, or of human action prescribed by the legislative branch of the government, or announced by the judiciary.

It is in no sense a command; it only attaches consequences to violations. Laws relating to execution and recording of instruments, to wills and administration, to limitation of actions, rules of procedure, and many other subjects, are not to be considered as commands. The legislative branch of the state simply prescribes a rule of action with certain penalties for its violation, leaving it to the moral sense of the citizen, whether he will observe it or not. The state when it adopts the Divine law, "Thou shalt not Kill," recognizes the moral principle that a man who will take the life of another must be a man of a depraved nature, who has a wicked heart fatally bent on mischief, who is devoid of all social relations and duties.

American Conception of Law.

While it may be true that when the United States ceased to be a part of the British empire, and assumed the position of an independent nation, the colonists claimed as their birthright that system of rules which reason, morality, and custom had established among the civilized nations of Europe, as their public law, it must be remembered that in our consideration of Law, in its broad sense,

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tent;" it is not limited by a written constitution defining and restricting its powers, so that its enactments constitute the supreme law of the land. In the United States the power and duty of determining whether particular enactments are in conformity with Constitutional provisions, is committed to the courts and if it is adjudged that they are not within such limitations, such laws are pronounced null and void either in whole or in part. (Civil Rights Cases, 100 U. S., 3.)

It may be possible that the legislature may in some instances enact unjust laws which are not inimical to the constitution. If it does, such laws are supreme, and can be remedied only by further legislative action.

It would seem, therefore, that there is more likelihood of attaining or securing greater perfection, at least in legislation enacted in this country under written constitutions, than in monarchial governments.

When the rule of conduct is prescribed by the legislature, or receives the sanction of the judiciary, and hence becomes Law, it would seem that there was no serious objection to the expression that it was prescribed by a superior, which the inferior is bound to obey, because it may be figuratively used to denote the superior power of the state. But such a designation is not essential to a correct definition.

XIII.

DIVISIONS OR FORMS OF LAW.

STATUTORY AND CASE LAW.

THE divisions or forms of Law, as anciently expressed, were into written and unwritten. In modern jurisprudence it has put on a new garb of "Statutory" and "Case Law." Statutory is written, and "Case Law" is unwritten. Modern juristic scholars prefer "Case Law" rather than unwritten law, distinct scientific aims and purposes being ascribed to Case Law, the new form of designation.

Sir Matthew Hale styled those parts of law *lex non scriptæ* because their authoritative and original institutions were not set down in writing as were acts of Parliament. (Hale History Com. Law, Chapter 2, p. 21.) And Blackstone followed in his footsteps. (1 Bl. Com. 64.)

Written law means, not necessarily law expressed in writing, but an express precept which both declares and contains the law in its precise language.

Unwritten law is not made directly by the legislative branch of government, but is declared and promulgated by representatives, and receives the sanction of the state.

Little importance was attached by the Romans to the distinction between these forms of law.

Austin was of the opinion that the distinction was inappropriate and misleading. His contention was that

"The terms proper to the English law are not written and unwritten law, but statute and common law." (2 Austin's Jur. sec., 765.)

We are accustomed in America to regard the changes wrought in the Common law by act of Parliament before our time as part of the Common law.

Our knowledge of law is not complete until we have assimilated Hale's and Blackstone's conceptions of written and unwritten law. With them the written meant statute law 6 (Smedes & M. 596), while the unwritten meant the common law, embracing general and particular customs.

No doubt the name of unwritten was ascribed to these customs because for so long they were purely traditional, though in Blackstone's time they were found in books of reports and judicial decisions, and in treatises of learned sages of the profession, preserved and handed down from times of highest antiquity.

We can clearly appreciate the transition of custom into Case law when the processes of modern judge-made law are considered. It is plain to us now that "wherever, in any course of business, a particular usage obtains, which is general, uniform, notorious, reasonable, and consistent with the rules of law, such usage will be presumed to have entered into the contemplation of all parties contracting in reference to the subject matter as to which it prevails, unless the contrary is shown." (Rogers v. Mech. Ins. Co., 1 Story, 608.)

"Written" law is enacted law; unwritten is not enacted. Written law is the work of statesmen, members of the legislative branch of government, public officers, or executive officers.

"Unwritten law is the work of trained lawyers, and its character is necessarily professional and scientific. It deals largely in technical terms, terms of art, as

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the opinions of those who have worked out problems before us, whether it be in law or in any other branch of science? This habit of following commences with the youth and is found throughout life in all avocations.

But it is said of the common law that the decisions are law and must be followed as precedents, that is, that there is an obligation imposed on the judges to follow them, while in countries where the common law does not prevail it is optional with the judges whether decisions shall be followed or not.

I have sought to ascertain how, where, and when this obligation was imposed in English law, whether there is anything to be found further than the rule of *stare decisis*, a doctrine of a natural evolution by the judges, having the same existence as the decisions themselves.

With reference to the use of the term common law it may be observed that Blackstone and Hale used it as comprehending the body of laws, before the idea of following precedent became prevalent. *Jus omnium gentium* of the Roman law is a synonymous term when used in this sense.

But when the common law is used to distinguish English law as a system, it is with a view of characterizing its processes; it is Case-law—embracing the idea of *stare decisis*.

It is said that common law as a term signifying a system became the common term in the days of Edward the First; and was frequently used during his reign; it was there used in contrast with royal prerogative and with local custom.

Binding Authority of decisions.

It is also stated that there was no "case law in the thirteenth Century; a previous judgment was not then regarded as a binding authority." (Pollock & Maitland, History of Law, 177, 183.)

We find, however, that with the commencement of the Year Books, from 1307–1509, the judges were occasionally insisting upon strict adherence to former precedent.

Prisot, C. J., 33 Henry VI, 41 (1455) said: "If we judge against former precedents it will be a bad example to the barristers and students at law, and they will not give any credit to the books, or have any faith in them."

And the Court of King's Bench during the reign of James I, Cro. Jac. 527 (1620) said that a point which had often been adjudged ought to rest in peace. In Horwood's Year Book, 32 Edward I, p. 32 (1304), Herle, J., said: "But see whether he shall be received to aver these three causes for the judgment to be by you given will be hereafter an authority in every quare admissit in England."

The citation of precedents was not frequent in the Year Books, it being difficult to discover the source from which the judges derived the rules upon which their decisions were based. But an examination of the Year Books discloses the fact that there was but little innovation in the decisions. Records of the proceedings were kept as early as 1194 which no doubt afforded a guide for future cases. And in the reign of Edward I "the practice was begun of drawing up, in addition to these records, reports of cases heard and determined, the main, and apparently the sole object of which was to furnish judges with precedents to guide them in their future decisions." (Markby, Elements of Law, sec., 90.)

It was recited in the patent of King James I, by which the official reporters of the Years Books were appointed, that the common law of England is declared by the judges upon cases that come before them, and that doubts and questions arising in the exposition of

statutes are likewise explained and cleared up. *This is a distinct royal recognition of decisions as law.* This act has been construed by some as bringing about a very important change in the view held by judges as to the force of prior decisions, being after this regarded as authority which successive judges were not at liberty to disregard. For this reason Blackstone is criticized for saying that the first ground and chief corner stone of the laws of England is general and immemorial custom. (Markby, Elements of Law, sec. 91.)

When complaint was made about the hardship of a rule announced, the judges replied: "Sue, then, to the parliament to have a new law made."

From the beginning of the Year Books the doctrine of the common law has been that judicial precedents are to be followed in subsequent like causes. An English writer has said, "the life and soul of English law has ever been precedent." (Freeman, Growth English Constitution, Chapter II.)

In the six hundred years and more since Case law came into existence, it has assumed such proportions and become so bulky, that the minds of some scholars in the common law are turning to the methods of continental systems, where Codes prevail, and where precedents do not have the same force and effect as they do in English and American jurisprudence, and hence reports of decisions are not so numerous. A learned writer has observed: "Case law is a necessary and indestructible part of every jural system, and peculiarly of our system, the publication of reports of adjudged cases will probably continue in the future, as in the past, without substantial restriction." (Dillon, Laws & Jurisprudence, 287.)

In the development of case law, the question has often been mooted:—Is the decision of the judges

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The "slavish" following of judicial precedent by English Common law judges in earlier periods had a marked influence in the development of English law. It retarded the development of the common law, and caused the creation of a new and independent system known as Equity.

It is said that the judges showed "unreasoning" respect for the decisions merely as precedents, that: "The history of civilized jurisprudence can show nothing of the same kind, comparable with the blind conservatism with which the common-law judges were accustomed to regard the rules and doctrines which had once been formulated by a precedent, and the stubborn resistance which they interposed to any departure from or change in either the spirit or the form of the law which had been thus established." 1 Pomeroy's Equity, 16.)

The judges refused to follow Roman methods such as were pursued by the praetors, and refused to do as Bracton asserted they should, viz., be guided by equity even in questions of strict law. (*Id.* p. 19, note.)

By some writers the statement is made that the decisions under the Roman system were mere opinions of the judges, having no binding authority as among the common law judges.

Upon this the following is quoted from Austin:

"A part of the Roman law, like much of the Law of England, was made by judicial decisions on specific or particular cases. For in the Roman Law as in our own, decided cases exerted by way of precedent an influence upon subsequent decisions, provided there was a sufficient train of uniform decision. This influence was styled '*auctoritas rerum perpetuo similiter judicatarum.*" (2 Austin's Jurisprudence, sec. 958.)

The truth of this statement is readily apparent when it is remembered that the *Prætores Urbani* incorporated into the *jus civile* all that part of the *jus gentium* which was formulated by the *Prætores Peregrini*, which could only have been by following precedents.

Blackstone's explanation of the rule of *stare decisis* may not be just as we would express it now, but it means the same thing. "For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was not law; that is, that it is not the established custom of the realm, as has been erroneously determined. And hence, it is that our lawyers are with justice so copious in their encomiums on the reason of the common law; they tell us, that the law is the perfection of reason, that it always intends to conform thereto, and that what is not reason is not law." (1 Blackstone, Com. 70.)

The Rule of Stare Decisis.

Precedents and rules must be followed, unless flatly absurd and unjust. (*Id.*)

Blackstone also said somewhere, as did the American commentator—Kent—that a decision is the highest evidence of the law—the evidence of what the common law is, and is to be followed so long as it is unreversed, unless it can be shown that the law was misunderstood or misapplied in the particular case. When a decision has once been deliberately adopted and declared, it ought not to be disturbed, unless by a court of appeal or review, and never by the same court, except for very cogent reasons, and upon a clear manifestation of error. (1 Kent's Commentaries, *476: Andrews' American Law, sec. 210.)

"A precedent flatly unreasonable and unjust may be followed if it has been for a long period acquiesced in, or if it has become a rule of property, so that titles have been acquired in reliance upon it, and vested

rights will be disturbed by overruling it. In such case it will be proper to leave the correction of the error to the legislature etc." (Andrews' American Law, sec. 210: Day v. Munson, 14 O. S., 488.)

And this brings us to a much mooted question: Do the judges make the Law?

Are Judicial Decisions the Source or Evidence of a Pre-existing Law?

The philosophical idea is that the Judicial decision is merely the evidence of a preëxisting law. And this is the historical conception according to Blackstone. During his period, and prior thereto, the function of the judges was to ascertain the existence of the custom and determine its validity.

And in spite of analytical predominance we find this habit of thinking practiced by such eminent jurists as Story; when he finds a particular usage obtaining which is consistent with the rules of law, it is sanctioned and adopted. (Rogers v. Mech. Ins. Co., 1 Story, 608.)

Reason has always been the pride of the common law; law has been considered the perfection of reason, and what is not reason is not law. In treating of the authority of judicial precedent Blackstone observes that the judges are not delegated to pronounce new law, but to maintain and expound the old one, "yet," he says, "this rule admits of exception, where the former determination is most evidently contrary to reason; much more if it be contrary to the divine law. . . . If it be found that the former decision is manifestly absurd or unjust, it is declared, not that such sentence was *bad law*, but that it was *not law;* that is, that it is not the established custom of the realm, as has been erroneously determined." (1 Bl. Com., 69, 70.)

It has no doubt long been generally agreed that some of the requisites of customary law, according to

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and study is made of former precedents, resulting in finding them manifestly and clearly unsound, they are not followed, and are therefore overruled.

While the judges make the law, in a sense, their reported decisions are evidences of rules of action, or of human duty, dictated by a sense of right and justice, which principle is what actuates and controls the court. The expression of the judge in the old Year Books (8 Edward III, 6, pl. 35, fol. 327,): "It was law before we were born," is suggestive of the science of human duty that lies back of, and yet walks alongside of the law, controlling courts and legislatures.

Blackstone's notion of Customs, and of all their essentials, seems to us now, somewhat crude;—but such was the beginning of the common law. The science of the law, in all its force, had not then been opened up to Englishmen, as it had appeared to the Romans who were older, and who had in their time also followed customs, building their system of law, its elements, its fundamentals, in this way step by step.

The law of reason embodied in the law of nature entered into the earlier decisions quite as much as it does now. It is gratifying to see strong advocates of the analytical school giving credit to natural reason, the product of the law of nature, as the life of modern Common Law. (Pollock, Expansion of Common Law, 108, 109.)

Acknowledgement of allegiance and obedience to the law of Reason is frequent in modern decisions. (Bradford Corporation v. Ferrand [1902], 2 Ch. 655, 661.)

The whole controversy over the relation of Law and Ethics, and the true basis or source of Law, hinges upon the proposition whether judicial decisions are the sources of Law, or are but evidences of preëxisting laws.

Some early writers,—Austin and Digby,—oppose the theory that judicial decisions are not the source of law but evidence of a preëxisting law. Austin characterizes the theory that judges do not make the law as "childish fiction," sarcastically observing that "judiciary or common law is not made by them, but is a miraculous something made by nobody, existing, I suppose, from eternity, and merely declared from time to time by the judges." (2 Austin, Jurisprudence, p. 102, sec. 919. [Campbell's Ed.] Digby, History Real Property, p. 53.)

Some American writers are of the opinion that the decisions are not the mere evidence of the law, but are the law themselves. (Pomeroy, Municipal Law, secs. 284, 295, 298. Dillon, Laws & Jur. p. 237.)

From the earliest times the courts have given expression to views such as are found in the Year Book of 8 Edward III, 6 pl. 35, fol. 327 as follows: "It was law before we were born that one who comes at the expense of a party shall not be put on the inquest; and we will not change that law."

The question whether the decisions of the courts of last resort were to be considered rules of decision in the trials of cases in the Federal Courts has been decided by the Supreme Court of the United States, that court holding that they were not, Mr. Justice Story stating as follows:

"In the ordinary use of language it will hardly be contended that the decisions of courts constitute laws. They are at most only evidences of what the laws are, and are not of themselves laws. They are often reexamined, reversed, and qualified by the courts themselves, whenever they are found to be either defective or ill-founded, or otherwise incorrect." (Swift v. Tyson, 16 Peters, 1; Railroad Co., v. Bank, 102 U. S., 14, 29; See Kosh No Nong v. Burton, 104 U. S., 678.)

Bishop says: "One who, as author, practitioner, or judge, should forget for a moment that the words of judicial decisions and the law are things quite diverse, would be pretty likely to find himself stumbling." (Bishop's Non-Contract Law, sec. 39, note 7.)

The following is quoted from an eminent authority:

"The existing body of English case law has been mainly the work, the stupendous work, of judges and lawyers extending in almost unbroken reach through several hundred years. It has not been excogitated by any single brain; it is not the product of any determinate number of minds, but it has been the slow work of ages, constantly growing and ever changing. It is never stationary, and never can be. It can never reach a fixed and final form. English law in the shape in which we have it, is thus essentially a growth, a historical development,—the work, I repeat, chiefly of the lawyers and judges of England through a succession of centuries." (Dillon's Laws & Jurisprudence, 27, 28.)

And from another authority:—

"Historically considered, it is true that our judges make law. Looking over the long series of their decisions, we can see that almost every great name has made the law different from what it was before; has enlarged or narrowed a rule, introduced a new distinction, recognized a principle not before obvious, or in some way left the mark of his own reasoning upon the cases submitted to him. In many instances such individual work has been accepted for a time as law, and subsequently rejected as due to a mistake or the idiosyncrasy of a peculiar mind. (Hammond's Notes to Blackstone, Vol. 1, p. 215.)

It is a familiar rule that the decisions of state courts are not binding on the federal courts. And it is also undisputed that decisions of courts outside and be-

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Not infrequently is found in decisions statements that: "A precedent flatly unreasonable and unjust may be followed if it has been for a long period acquiesced in. . . . In such a case it will be proper to leave the correction of the error to the legislature." (Emerson v. Atwater, 7 Mich. 12: Day v. Munson, 14 O. S. 488.)

XIV.

SOURCES OF LAW.

CUSTOM AND USAGE.

Customs and usages have been considered the principal sources of law as well as the oldest form of law making; they mark the transition between morality and law. Holland says: "Morality and customary rules were the same thing, but the distinction between the two was more and more sharply drawn as time went on." (Holland Jur. 50, 51.)

The early theory was that the common law consisted of those principles, usages and rules of action and immemorial customs which were embodied in the decisions of courts, and which were not dependent upon the express declaration of the legislature. When once the custom or usage became the rule of the common law, it had the same force and effect, practically as acts of Parliament, and was not subject to change by later decisions, unless for urgent reasons.

The customs upon which it was considered that the common law was bottomed, were of two kinds: (1) General and (2) Particular. The general customs constituted the law by which the courts were directed and guided, and related to various subjects, such as descent of lands, transfer of property, execution of contracts, rules for expounding wills, deeds and the like.

The customs were to be known, and their validity was to be determined by the judges who were, according

to Blackstone, the depositaries of the laws. When once a decision was made it was to be followed in subsequent decisions unless it be found that the former decision was manifestly absurd or unjust, in which case it was not to be regarded as law. The law and the opinion of the judge, Blackstone contended, were not always convertible terms, or one and the same thing, since it sometimes may happen that the judge may mistake the law. Blackstone lays down certain rules as to the foundation of a custom; it must have been followed so long that the memory of man runneth not to the contrary; it must have been continuous; it must have been peaceable; it must be reasonable, certain, etc.

Custom or habit at one time undoubtedly did constitute the basis of the common law, but not merely because of usage, immemorial or otherwise, but because the usage rested upon the public conscience, and received the sanction of the general run of right minded citizens, and appealed to their common sense and convictions. As an early writer puts it: "It is not the custom itself that we respect as law, but it is the rule or contract or other obligation, the existence of which is presumed from the usage." The customary rule is adopted as the rule of law only when there is a conviction of right or duty formed from the custom before we can deduce a law. As Professor Hammond states: "We must look for some other element than the mere custom to constitute law; it is the conviction of right, often vaguely termed natural reason, right reason, etc., which converts certain customs into the form of legal rights and duties or of maxims and rules." (1 Hammond's Blackstone, 213.)

The principal and most authoritative evidence of the existence of customs, according to Blackstone, were the judicial decisions.

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doctrines which constitute the common law, though we may locate the time and place when they were made use of or applied.

We first saw common reason which now forms the basis of the common law budding out in the Roman flower—*lex naturæ*.

We may commence at the beginning of the judgment rolls, and ascertain what order was made in particular cases, but we will not likely find written therein the reasons therefor.

We may, by consulting the Year Books and reports of cases, locate the original inception of particular rules and doctrines. But these rules and doctrines are either worn out, or are varied from time to time, by reason of historical changes in customs, conditions of government, and finally disappear.

Binding Force of Customs.

The binding force of the custom, whether embodied in a judicial decision or not, does not come from immemorial usage, nor from its adoption by courts, but rather from the soundness or justness thereof, determinable by appeal to common sense or reason, and convictions of the people. It is not reasonable to consider a custom obligatory in itself; the mere observance of a custom or usage cannot give rise to an obligation to continuance of the same; it is on the contrary the conviction of right which arises from such usage which leads men to observe, and the courts to adopt the custom as the basis of a rule founded thereon.

Customs as Evidence of Law.

Early writers proceed upon the theory that custom made law directly, but in course of time the view became prevalent generally that customs were to be regarded merely as the source or evidence of the law. It is this theory, no doubt, which laid the foundation for the contention that decisions of courts were to be regarded as mere

evidences of law rather than the law itself. And this view of judge-made law finds expression in modern adjudications. This subject has been discussed (*ante*, p. 200), but it may here be remarked that since Case Law took on scientific aims and characteristics, there are, as has been previously shown (*ante*, p. 200) instances or phases of case law where rules expressed in the abstract in cases, are not to be regarded as mere evidence, but the law itself, as much so as if expressed in statutory form. In some states the syllabi are written by the judges themselves and are to be regarded as the law. The rules embodied in the syllabi, are written in the form of abstract propositions, though in fact they are based upon the facts embodied in the statement of the case by the judge. The individual opinion of the judge contains the reasons, arguments and principles upon which the law, or abstract rule rests.

The custom or usage then, it may be said, is to be found in the facts of the case as appears in the statement.

This view of Case Law will be found illustrated in individual states in America, and in England, where the decisions by the courts of last resort are in fact to be regarded as the law, until changed or modified.

As observed by one writer, "when these judicial decisions are examined, it is plain that the legal part of them, as distinct from findings of fact, rests not upon proof of general usage, but upon appeals to the common sense and convictions of the community." (Hammond's Notes, 1 Bl. Com. 210.)

Just as the early writers upon law deduced the rule or contract or obligation from usage or custom, rather than regarding the custom as law, so do we now regard the abstract proposition of law found stated in the judicial decision, disassociated from the facts, as the law.

It is the same idea in different form. The theory that the custom or the decision is but the evidence of the rule, seems to be an essential characteristic of the common law and American system so as to permit courts to act upon conviction of right and justice, or right reason, and change and modify former decisions so as to conform thereto.

The common law is a system of elementary principles and of general judicial truths which are continually expanding with the progress of society, and adapting themselves to the gradual changes of trade and commerce and mechanic arts, and the exigencies and usages of the country. (Pierce v. Proprietors, etc. 10 R. I. 227.)

The rules and doctrines of the common law change as conditions of persons and things change. But the fundamental processes and principles have remained the same throughout the development of the civil law. We cannot locate the time or place of the adoption of these fundamental and everlasting principles of the common law, but we can without difficulty trace the origin and history of many rules and usages of the system. In tracing the history of law we can see where particular rules had their birth, how long they continued, and when they ceased to exist. But the system with its essential characteristics lives on and its fundamentals may be truly considered of immemorial antiquity.

Customs die, but principles and reason live on.

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equitable principles. (Sandar's Justinian [By Hammond] Introd. sec. 14, pp. 13, 69.)

The Roman conception of *lex naturæ* was somewhat crude, the predominating principle viz., "reason," however, was later taken up by continental scholars and developed into a philosophy of law. Much has been written in respect to "natural law," comparing the analogies of cause and effect found in nature with human affairs. So has much condemnation been heaped upon what is conceived to be moral and political philosophy. Professor Hammond in his Introduction to Sandar's Justinian says: "However baseless in itself as a theory of the whole system of law, it undoubtedly gave a great impulse to human thought and led to the correction of a host of venerable errors and fallacies."

Professor Lorimer in reference to the subject says:

"Natural law, when treated as a science, is often called the philosophy of the law. . . .

"The science of the law of nature, or the philosophy of law, professes to furnish us with the doctrines of natural law in the abstract. . . . There is a law of nature which governs the human life of man, whether we discover it and follow it, or blindly and ignorantly set it at defiance. . . . The science of jurisprudence differs from the science of natural law, and from the philosophy of law, in this respect, that, in addition to the discovery of the doctrines of natural law and their general and permanent action, it includes their local and temporal realization—*i. e.* positive law, properly so called in all its branches. Jurisprudence thus embraces legislation, whether the subjects with which it deals be political, economical, social, national, or international, civil or ecclesiastical, public or private, general or particular, as well as jurisdiction and execution; whilst the study of an academical Faculty of

Law extends to the study of the whole human relations."

This is the language of James Lorimer, Professor of Public Law and the Law of Nature in the University of Edinburgh.

This writer considers jurisprudence wholly from the viewpoint of nature. God is regarded by him as the one Primary source of natural law—the inevitable postulate of jurisprudence, as of all other sciences. The jurist is beholden to the metaphysician for the primary source of his science, he contends. His maxim is to "follow nature"; he insists that conscience is not a separate faculty but a revelation of our whole nature, constituting moral consciousness; that it is this view of the indivisibility of our moral nature which warrants our repudiation of the distinction between perfect and imperfect obligations. Nature, he says, reveals our rights and duties, all of our subjective rights resolving themselves into the right of liberty.

Lorimer's Institutes of the Law.

He treats jurisprudence as a branch of the science of nature.

Practical lawyers are unable to appreciate the theorizing of such moralists. (Dillon on Laws & Jur., 7, 8, note.)

There are, however, certain truths in philosophy which are helpful in law; knowledge gained in its study and used as a guide in the conduct of human actions, results in practical good.

It must be conceded that there is not much benefit to be derived from an extensive pursuit of natural law. A study of the history of the question ought always to be interesting as well as instructive, because here and there we may gather some useful thought. In modern times we hear much said about the reason of the law. That was mainly all there was in *lex naturæ*.

In every condition or transaction of life, where a controversy arises, the very nature thereof suggests the application of the rule of law which the thing in the light of reason demands.

The indulgencies in the numerous "analogies" between the law of nature and positive law, and between the theories of transcendental ethics and law do not often seem practical or beneficial. They may constitute beautiful figures in moral philosophy but in real life they vanish.

Lessons Drawn from Natural Law.

There are useful lessons to be drawn from the obsolete natural law, which we daily apply unmindful of its origin, viz: when the already existing law was likely to endanger the moral right, resort was had to reason and common sense and justice, then called natural law, and relief accordingly granted. Remove the crude shell, and we have the law of reason, morality and good sense, which has contributed much toward the development of a considerable portion of our modern law. The Courts of Equity adopted and followed the dictates of natural reason. Lord Mansfield injected good conscience and equity into the common law by means of the common counts.

The basis of the Law Merchant was based on its intrinsic reasonableness evidenced by the general consent and usage of the persons concerned. It was a part of the law of nature and nations, universal and one and the same in all countries in the world. (Pollock, Expansion Common Law, 117.)

A considerable part of our law has been made since the theories of some of the earlier writers about Natural law have been abandoned. But in spite of all that may be offered in opposition to the Natural Law which originated in the Roman System, and which found its way into England, the ideas or principles which crept

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relied on in default of positive authority. . . . These general considerations are nothing else than what our ancestors of the Middle Ages . . . understood by the Law of Nature." (Pollock, Expansion of Com. Law, 125, 130, 131.)

This is a full and complete admission of the claims of the philosophical adherents, and it seems to me that we might as well proceed upon this theory or basis without further argument or controversy. And this is what the courts do.

In a recent English case, 1902, the court said: "The foundation of the right [to watercourses] as stated throughout all the cases is *jus naturæ*. . . . I have come to the conclusion that *jus naturæ* is used in these cases as expressing that principle in English law which is akin to, if not derived from, the *jus naturale* of Roman law. English law is quite independent of Roman law, but the conception of *æquum et bonum*, and the rights flowing therefrom which are included in *jus naturale* underlie a great part of English Common Law; although it is not usual to find 'the law of nature' or 'natural law' referred to in so many words in English cases. . . . I am not, therefore, introducing any novel principle if I regard *jus naturæ*, on which the right to running water rests, as meaning that which is *æquum et bonum* between the upper and lower proprietors."

Hobbes' Views.

Sir Thomas Hobbes (vol. 2, English works, 16) says that the Law of Nature is the dictate of right reason; that the laws of nature are immutable and eternal; what they forbid, can never be lawful; what they command, can never be unlawful; that the natural law is the same with the moral; that the laws of nature are the sum of moral philosophy.

A law of nature is a precept or general rule, found

out by reason, by which a man is forbidden to do that which is destructive of his life, or taketh away the means of preserving the same. Right and law ought to be distinguished, because right consisteth in liberty to do, or to forbear; whereas law determineth, and bindeth to one of them. The law of nature and the civil law contain each other, and are of equal extent. For the laws of nature consist in equity, justice, gratitude, and other moral virtues on these depending, the condition of mere nature. The civil law is a part of the dictates of nature.

Civil Law is to every subject, those rules which the commonwealth hath commanded him, by word, writing, or other sufficient sign of the will, to make use of, for the distinction of right and wrong; that is to say, of what is contrary, and what is not contrary to the rule. (Hobbes' Works, vol. 3, p. 251.)

XVI.

SOURCES OF LAW.

(*Continued.*)

SCRIPTURAL LAW.

In earlier times, for civil purposes, the rules of human conduct were considered to be enjoined by the precepts of Christian religion and morality. The early lawgivers drew from these sources, believing that the commands of religion and morality should likewise be the commands of the civil law in regulating and controlling human conduct.

Judicial expressions are to be found to the effect that religion is a source of law. (Cowen v. Milbourne, L. R. 2 Exch. Cases, 230; Baltimore &c. Ry. Co. v. Church, 108 U. S. 317, 331; Holland Jur. p. 56; Andrews' Am. Law, sec. 68.) But Chief Justice Coleridge in a charge to the jury completely explodes this idea. (Rex v. Foote, 48 L. T. N. S. 733.)

Some consider the laws of God as the starting point of the science of morality, while others adopt utility as the guide.

We shall not discuss this question further than to remark that we should fear to trust utility as the test of what is right or wrong, and to express an abiding faith in the theory that the Supreme Ruler of the Universe contemplated governmental agencies to further His will, for the peace and happiness of mankind.

Furthermore a comparison of scriptural and civil law will demonstrate that they prescribe the same rules.

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the laws by observing them outwardly, and attempting nothing against their prohibition.

The temporal powers command and forbid only what relates to the outward man; maintain every one in his rights; dispossess usurers; chastise the guilty, and punish crimes, by the use of penalties and punishments, proportioned to what the public peace requires. (Domat's Civil Law.)

It is the office of the Civil Law to carry into effect the precepts of the Divine Law and the Moral Law, against those persons whose consciences do not impel them to observe the law.

We have noted some points of similarity in the Divine and Civil Law, but as to all matters not commanded or forbidden by the Divine law, the State has full power, within the limits of the fundamental law, to interpose, and to make that action unlawful which before was not so.

But after all towering above all law, is the command of the Divine law, that you shall do wrong to no man, and give every one his due (Matt. 7, 12; Luke, 6, 31), requiring sincerity and honesty in all engagements (Phil. 1, 10; Prov. 12, 22), fidelity in all engagements, avoidance of all double dealing, deceit and wrong doing (1 Thess. IV, 6), which precepts enter into and furnish the foundation of the greater portion of the Civil Law.

Following up this line of argument it may be readily demonstrated how the criminal law provides for punishing offenses condemned by the Divine law; how in the law of contract and tort, the precepts of Divine law as to honesty and fidelity are upheld. But this will not be further pursued now. To do so would be to consider the whole body of law.

Austin in considering the origin or sources of the law says (p. 9), that "the Divine law is the measure or

test of positive law and morality. That is to say, law and morality in so far as they are what ought to be, conform, or are not repugnant, to the law of God."

And in St. Germain's Doctor and Student (Dial. 1, ch. 4), it is stated that the *law of reason* and the *law of God* are the first two of the principal grounds of the law of England.

Puffendorf (Law of Nature and Nations, ch. 7, p. 3, sec. 2), says:

"God as the author of the Law of Nature must also be looked upon as the founder of civil societies, and consequently also of sovereign power, without which they cannot exist. For we must refer to a divine origin, not only the establishments made directly by God's order, and without the intervention of any human act, but also those which men have invented themselves by the light of reason, according as circumstances of time and place required it, in order to acquit themselves of obligations imposed by some divine law. Therefore, as the duties of natural law could not conveniently be performed, since the great multiplication of mankind, without civil government, it is clear that God, who has prescribed that law to men, has thereby commanded them to form civil societies." This is in accord with the scriptural doctrine. (Romans Chap. XIII.)

When the power of making statutes regulating the status of men came into full recognition, it covered a wide scope in the law, and throughout the Middle Ages the theory of the union of law and morality prevailed. "When all law came to be considered as the direction of human conduct toward virtue and heaven, its character as legislation by a higher power was the logical consequence; and this once established, the law that could not be regarded as the revealed or

natural legislation of God was explained in analogy with it by attributing to it an earthly sovereign." (1 Hammond's Bl., p. 105.)

Blackstone followed the theory of the Middle Ages, contending that all law is the command of the legislator. Other writers, among whom were Bentham, adopted the same view, rejecting natural law as a wholly different kind of law.

The theory of the Divine right of the King no doubt had much to do with this conception of the law. King James' favorite saying was: "God makes the King, the King makes the law."

The standard of duty which is adopted for use in law, is the same standard which receives the sanction of the Christian religion. The State applies this standard and compels compliance therewith. The purpose of law and civil government is the enforcement of morality and civil duty. The State being ordained for a moral purpose it follows that every officer and citizen must act under a high moral responsibility.

The State cannot divest a man of a right with which God has endowed him, nor relieve him of a duty required of him by the moral law.

A distinct characteristic of our American form of government is that Church and State are separate. This means that the State maintains, or requires, no form of religion, or demands no religious tests, but allows perfect freedom in matters of religious and moral beliefs.

While it allows absolute freedom of thought, the State will not permit its citizens by act or deed, though under the influence of moral or religious beliefs, to commit invasions upon Christian morality.

As observed by Mr. Justice Field: "However free the exercise of religion may be, it must be subordinate

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have been fostered and nurtured at our firesides, in our schools, and in our churches.

The State has done its part; it has passed ample and sufficient laws to promote the interests of morality. The laws are adequate. Their provisions harmonize with the Divine Law, and conform to the standard of morality.

If they are not observed or enforced, it is the fault of the people and their public servants.

I want to speak of the vice of gambling.

Adequate provision is made against gambling, large and small. The newspapers report that Professor Lord of Columbia University, and Professor Kirby of the Catholic University, in public addresses advocate that gambling is not wrong in itself. Professor Palmer of Harvard complains that the law punishes gambling in small forms, but not in the larger fields of dealing in margins in stock exchanges. If he had been a lawyer he would not have made that statement, because the law has and does condemn this form of gambling. These transactions, that is, dealing in margins commonly so called, are within the purview of the criminal statutes against gambling; and courts will not enforce contracts growing out of such dealings. The law provides for the punishment of all violations of the Sabbath, and all the vices condemned by the moral code.

The force behind the law and in its administration is morality, but if results are not always up to the standard, it is not the fault of statutory or common law, but it is due to the influences of his satanic majesty sojourning in the soul of the individual connected with particular cases of maladministration.

The State or government being one of God's agencies, and its officers being His ministers, it follows that the best men should be selected to fill public places.

Citizens, as well as officials, have important duties to perform.

When the day comes when all public stations are occupied by none but pure men, and there is full, active and hearty coöperation by the citizens, then the Majesty of the Civil Law will he upheld and maintained according to the Law of God.

XVII.

SOURCES OF LAW.

(*Continued.*)

EQUITY.

In its primary sense, Austin contends, equity is Law,

Equity—Its Meaning.

universal or general, and not particular or partial, and is synonymous with universality. In this sense, he states, it was applied to the *jus gentium* of the Roman law which branch of law was common and not particular. "The *jus gentium* to which it was applied being distinguished by comparative fairness, equity came to denote, in a secondary sense, impartiality. And impartiality being good, equity is often extended, as a vague name of praise, to any system of law, or to any principle of direct or judicial legislation, which, for any reason, is supposed to be worthy of commendation."

"Equity signifies judicial impartiality; that virtue which is practiced by judges, when they administer the law, agreeably to its spirit or purport."

"Equity is often synonymous with the performance of imperfect obligations. An equitable man is a man who, though not compelled by the legal sanction, performs the obligations imposed by the moral and religious sanctions. In like manner equity is often used as synonymous with morality." (2 Austin's Jurisprudence [Campbell's Ed.], par. 832, 833, 836, 839.)

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accordance with natural justice and the rules of Christian morality." (*Id.* § 15.)

According to the views of Mr. Spence the great difficulty arose from the binding authority of common law precedents, which rendered it impossible to make new precedents without interfering with those already established, so that the rule of justice could not accommodate itself to every case according to the exigency of right and justice. (1 Spence's Eq. Jur. pp. 321, 322.) The English common law judges set themselves with an iron determination against any modification of the rule once established by precedent, (Pomeroy's Eq. § 17,) though there were a few notable exceptions, such as Lord Holt and Lord Mansfield who occasionally refused to submit to the bondage of precedent.

The establishment of a separate tribunal to administer Equity is directly attributable to the exclusion of Roman modes and principles from the common law tribunals, but in spite of this resistance Roman principles of Equity were eventually introduced into the English system by the Court of Chancery.

And in course of time the Court of Chancery invoked such a change in the common law system that the new and more efficacious actions of Case, Trover and Assumpsit were introduced.

In no other country has the distinction between law and equity been administered as in England, by distinct and separate tribunals until in recent years.

It is a fact worthy of note, however, that after many years of operation of a separate Court of Chancery, both in England and in America, we returned to Roman principles, law and equity being administered by the same court. America took the lead, and England followed in the abolishment of separate courts

of equity. There are still some who are not satisfied with the change. In New York, where it is claimed that their code practice has become complicated, lawyers turn to the New Jersey practice where law and equity are administered by separate courts, as the preferable method.

The history of equity jurisdiction is a familiar subject, and it is not the intention to recount it here, the purpose being merely to consider it as a source of law.

There is no controversy between lawyers and scientists as to what constitutes the basic principle of Equity. Professor Holland well puts it: "It consists . . . of such of the principles of received morality as are applicable to legal questions, and commend themselves to the functionary in question." (Holland, Jurisprudence, 62.) Are the principles applied differently than are the principles of law, it may be asked? In the following respect they are. The adaptability of legal remedies, both under the Roman and Common law systems was confined to the forms of action, which did not permit judges to reach out into new fields at will. In Rome if adherence to the rigid forms of *jus civile* would produce inequitable results, the praetor provided a new remedy by means of the pliant forms of praetorian actions. The praetors drew from the law of nature, and from the principles of law from other nations, "and morality looked on according to the philosophy of the Stoics as sanctioned by law." (See Sandar's Justinian by Hammond, 16.)

In time, therefore, there grew up in Roman law a body of equitable principles.

In England, the Chancellor was named by the King and empowered to hear and decide the cases of conscience which did not fall within the jurisdiction of the common law courts. The opinions of the

Chancellors were based upon considerations of equity and justice, determinable by the immediate feelings of the chancellor. He decided each case in accordance with what seemed to him to be its merits.

In spite of the opposition it had its influence on the English system and did much towards its perfection. It has been said: "Equity may well be deemed the conductor of law towards a state of refinement and perfection." (Wilson's Works, [Andrews' ed. 1896], 124 *et seq.*; Andrews' American Law, 1039, 1040.)

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"When the legislature, within the powers conferred by the constitution, has declared the public policy, and fixed the rights of the people by statute, the courts cannot declare a different policy or fix different rights, In this regard the legislature is supreme, and the presumption is that it will do no wrong, and will pass no unjust laws. The remedy, if any is needed, is with the people and not the courts."

The common law most frequently furnishes the "public policy," but wherever it is deficient or inadequate to meet the conditions, then it is supplied by the legislative opinion.

Departure from Common Law.

Sometimes objection is made to legislation which departs from the common law. There can, however, be no valid objection to a new policy, so long as constitutional rights are not invaded.

The Supreme Court of Missouri thus well expresses the measure of the rights of citizens in respect to the right to contract:

"While power does not exist with the whole people to control rights that are purely and exclusively private, government may require each citizen to so conduct himself and so use his own property as not unnecessarily to injure another. *The rights of the individual must yield to the public wants, and his conduct and all property held by him, is subject to the control of the State, to the end that he shall so demean himself and use his property with as little hurt and injury to the public as possible.*

"There is no such thing in civilized society as the unrestrained power to contract.

"Every man surrenders some of his individual rights when he associates with and becomes a part of any society or government, and the power of the

government is complete to legislate so that, while according to every man the fullest possible liberty to do what he pleases with his own, he must not interfere with the similar rights of others. This principle underlies and runs through all governments and societies, and is the corner stone of the police power of the State." (State *ex rel.* v. Fireman Fund Ins. Co., 52 S. W. 595. [Mo. Supreme Court.])

Public Sentiment as the Basis of Legislative Public Policy.

It is an axiom of the law that the standard of duty which men owe each other as members of society is that which is generally conceded by a majority of reasonable minds to be the measure of duty. Any standard by which the law can undertake to compel the people to regulate their conduct must be one generally and spontaneously accepted, so that their approving judgment shall accompany the endeavor to enforce conformity. (Cooley on Torts, 3–4.)

The opinions or sentiments of eccentric persons or those entertaining extreme views are not to be considered.

These are the controlling principles in all judicially made laws, and as we must have judges "so perfectly constituted in their mental and moral natures, and so perfectly trained and disciplined, as to be capable at all times of perceiving" their application and of applying them, and so entirely in harmony with the same as to be habitually disposed to do so, so in the selection of the persons whose duty it shall be to legislate, we should be careful to select persons who have the same qualifications.

Lawyers more than any other class exercise great influence upon legislation, in and out of legislative halls. Most legislation either national or state originates with lawyers, who are better qualified for the work than any other class of persons.

The source of legislation is a fruitful field of study.

Source of Legislation. Public Sentiment.

The true theory is, that it springs from public opinion or public sentiment, or the greatest good of the greatest number. Members of the legislative branch of government are selected from different counties or districts, and while there may be in each locality a local public sentiment as to some matters, yet the twentieth century facilities in the way of steam and electric railway transportation, telegraph and telephone communication, newspapers daily reaching the people either by railway or rural mail deliveries, what is said or done in one community on one day, is known to all other communities the next day. The different communities are thus equally educated upon questions affecting the vital interests of the public in general.

A learned educator and economist calls attention to the essential function of the earlier English Parliaments which was the creation of a united public sentiment brought about or created by an interchange of views as to the state of the nation, at Westminster. "Each member," he says, "reported to the others the feelings and wants of his locality; each received from his fellow members enlightened views as to the condition of the country as a whole, which he was able to report at home and make the basis of practical action in his section of the community." "Parliament, as its name implied, was essentially a place for discussion." (Hadley, Education American Citizen, 93.) This writer further says that it was intended that the legislative departments of other countries should preserve the same function as debating bodies.

It is next contended that "in the course of the present century our representative assemblies have ceased to be places for debate;" that they "have become bodies for the making of laws rather than

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the regulation of railway transportation. As the tariff laws, in addition to the element of revenue, were designed to foster the industries of the country, so were the laws regulating transportation intended to adjust and protect conflicting interests for the welfare of the whole people and represent the public sentiment of the nation.

When other methods of oppression and schemes were designed by one class of interests for their personal aggrandizement, at the expense and to the injury of another class, further legislation was enacted to prevent the combinations of railroads and of capital, known and designated as the national anti-trust law. This law was an embodiment of the common law, the United States Supreme Court has said, in United States v. Joint Traffic Association, 171 U. S. 505.

It has been a public sentiment from the earliest times, finding early expression in the common law, that combinations or conspiracies in general restraint of trade are inimical to the public good. These subjects bring us in close touch with individual interests. It certainly cannot be claimed otherwise than that such legislation rests upon moral principles long established, and cannot be said to be in favor of individual or class interests.

The power of the national legislative department of the government is limited in so far as it may operate directly upon individual rights and interests. Such legislation comes within the province of state legislatures, and will be considered. Enough has been said in respect to national legislation to minimize the charge that the United States Congressional legislation is not the result of compromise in the interest of localities, nor "a patchwork of private demands." (Hadley, Education American Citizen, pp. 94-5.)

In the consideration of legislation emanating from the legislatures of states, it will be conceded that there are too many instances "where the character of modern statutes is a patchwork of private demands."

State Legislation. Its Basis.

Legislation of a political or governmental nature is eliminated from this discussion. Only that affecting private or individual interests in the relations of men as members of society will be noticed, the object being to discover whether it be founded upon moral conceptions or is repugnant thereto.

The principles of morality which *should* govern legislative action will first be examined, after which some practical questions will be taken up.

Judge Cooley has said: "No government has undertaken to give redress whenever an act was found to be wrong, judged by the standard of strict morality; nor is it likely that any government ever will." (Cooley, Torts, p. 4.)

An inquiry into the usual scope of state legislation will be helpful in this investigation. It is made up in large part of state, county, township, municipal, and school governmental legislation. This is the structural basis of society. It can hardly be contended that legislation which is confined to the limitations of the constitutions, is inconsistent with the morals of society.

Statutes relating to criminal law are conducive to the welfare of society by punishing infractions of its laws.

Laws regulating the descent and distribution of an intestate's estate, and the devolution by will, are founded in recognition of natural domestic ties of blood.

Statutes prescribing substantive private rights and interests are few in number, the great bulk of such

rights being still dependent upon the unwritten or Case law.

Codification.

There has been no concerted action in the direction of codification of substantive law, in America, as in other countries.

Germany, France, Austria, Switzerland, Italy and Spain, have followed the Roman law, while England, Australia, South Africa (except with some modifications at Cape Colony by the Roman Dutch Law) and America follow the unwritten law. (19 Law Mag. & Review, 94; Clarke on Law & Law Making, 17.)

Such men as Bentham, and Austin in earlier times favored complete codification. More recently, Professor Amos was of the opinion that there would be great advantages in codification. Sir Frederick Pollock is in favor of complete codification of Commercial law. This has been done in some states. Judge Dillon believes in partial codification, because, he says, "there comes a time when the law becomes so voluminous and vast" that a systematic compilation and restatement is necessary. (See Dillon, Laws & Jur.) There has been partial codification in a number of states, in regard to many subjects.

Methods, Principles and Considerations Entering into Legislation.

Having in mind the scope of legislation in the states of this country, let us conduct an inquiry into the methods of, and the principles and considerations entering into, state legislation.

Legislation, unfortunately, may be divided into that which is of a political nature, with reference to which the representatives of political parties may, and usually do, differ, and that which is not.

Legislation which does not affect political opinions, or appeal to machinations of political parties, ought to and does receive due consideration of all members of the legislature.

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terests if they will bear hard upon the rights of others.

They consider both the need of the legislation for the establishment and protection of rights prescribing a rule of conduct, as well as the effect which it will have upon the rights of others.

The processes of the mind of the legislator in passing upon legislation is analogous to that of the judicial mind in passing upon litigated controversies, his conscience controlling his action.

The legislator, true to his trust, studies the question from the moral standpoint, endeavoring to discover the public sentiment, and acts accordingly. Opinions of men based upon selfish interests, and maintained to the disadvantage or prejudice of others, are not to be considered; these, the discriminating legislator will discover and disregard.

Self interest is not necessarily inconsistent with public opinion. Whenever such interest demands legislative aid, which will not prejudice others, it may form the basis of public sentiment.

Whenever it becomes necessary to yield personal interest, or to bear burdens, in order to recognize the correlative rights of others, then public opinion is based upon this view of forbearance.

Finally, cannot it be said that there is a science or process which even a few persons may follow in determining what is right and just, without regard to public sentiment, and that this is really the controlling element in all legislation?

Legislation, a Branch of Ethics.

Judge Dillon has said that: "Legislation belongs to or is a branch of ethics; the legislator in the exercise of the function of legislation not only regards ethical considerations, but such considerations are generally the foundation or animating principle of his enactment." (Dillon's Laws & Jur., 19.)

NOTE ON REFORMS IN LEGISLATION.

Upon the topic of Reforms in Legislation I may be permitted to add here extracts from my discussion before the Ohio State Bar Association (1903) upon the proposition to have a "Joint Committee to Revise," and report upon the necessity, effect and validity of every bill, before it shall be put upon its passage.

"I will propose as the basis of my discussion, that a non-partisan commission of either two or four members, shall be appointed by the Governor, which shall be known and styled as Legislative Counsel, whose duties shall be to draft all bills which it may be requested to frame, by members of the Legislature, and that all bills drafted by others shall be submitted to this commission, to correct or revise, as may be necessary, upon consultation with those interested in the measure, before introduction, and that they shall examine the law bearing upon the subject of the proposed bill, both common law and statutory, and report either in writing or in consultation, upon the necessity, effect and validity thereof, to the Committee of the Legislature, to which the bill, from its nature and subject, will be referred. That the functions of this Commission shall be wholly of an advisory character. Its power being thus prescribed, such a scheme cannot be inimical to the Constitution, which vests all legislative power in a General Assembly. The powers and duties of such a Commission, being as I have enumerated, do not therefore partake of a legislative character.

"The evils arising from careless and slipshod legislation have been the subject of complaint for many years, both in this country and in England. The

only difference between the two countries in reference to the subject is, that in this country it has mainly consisted of talk without action, while in England there have been some results.

"In England the institution of a Department of Justice was advocated, one of the duties of which would be to prepare all the bills introduced, and to which such measures and all others affecting the jurisprudence of the country should be referred.

"Again it was suggested that there be a Parliamentary Board, or officer and staff, whose duty it would be to advise on the legal effect of every bill, and in particular on its relations to the existing state of the law, and its language and structure; and also to point out what statutes it repeals, alters or modifies, and whether any statutes or clauses on the same subject matter are left unrepealed in their reciprocal relation. This was the plan of the Select Committee of 1857.

"Another recommendation was the appointment by the government of a legal council, consisting of three persons, whose duty it would be to examine every bill passing through Parliament, at such a stage as should be directed by either House, in order to see that the bill did not contravene any existing law not contemplated by its framers, and that its language was accurate and proper for the subject intended to be accomplished.

"An opinion was expressed by an English lawyer to the effect that all the useful work which is required might be done by a revising clerk, to whom every public bill should be submitted before being moved in committee.

"All the movements towards reform resulted in the establishment of the office of Parliamentary Counsel February 12, 1869, who is the legislative draughtsman.

"And still the talk of reform in the methods went on.

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mentality for any legislation for which the country, through Parliament, might express its desire. Parliamentary instructions to draw a bill would be imperative.

"Mill also said: 'The proper office of a representative active Assembly is to watch and control the government; to throw the light of publicity on its acts; and in addition to this, to be at once the nation's Committee of Grievances and its Congress of Opinions; an arena in which not only the general opinion of the nation, but that every section of it, can produce itself in full light and challenge discussion.'

"In this country at various times, at different meetings of the bar Associations, this question has been discussed many times, without results.

"At the Annual Meeting of the American Bar Association, held at Saratoga Springs, New York, August, 1886, the Committee on Jurisprudence and Law Reform reported one form of a bill to remedy the evils of Legislation, as follows:

"'An Act to Create a Joint Standing Committee for the Revision of Bills.

"'Sec. 1. Within the first ten days of every stated or special session, the president of the Senate shall appoint five senators, and the speaker of the House shall appoint five members, who shall together constitute a joint standing committee for the revision of bills. Said Committee shall have power to require the assistance of the Attorney General and his presence at their sessions, or, in case of his inability to act, to employ counsel and to fix, subject to the written approval of the Governor, the compensation to be paid such counsel.

"'Sec. 2. Every bill shall, after the same shall have passed the legislature, and before it is signed by the presiding officer of either house, be submitted

to said joint committee for report thereon, and said committee shall report the same back to the house in which it originated. Said report shall contain such suggestions for amendments as may by said committee be regarded as necessary to make the bill express clearly the intention of the legislature, and harmonize with existing statutes and constitutional provisions, or shall state that in the opinion of the committee no amendments are necessary. Said bill shall then be considered and acted upon as to its final passage.'

"A third section provided for a division to be made between public and private legislation.

"The committee consisted of Simeon E. Baldwin, Henry Hitchcock, Simeon Sterne.

"An independent advisory commission, the members of which are selected because of their fitness, and their knowledge of the law both statutory and common law, would be the best watchman for the State Treasury and the best safeguard of the rights of the people, that could be provided.

"My reason for preferring a separate and independent commission, rather than placing such duties upon some already constituted officer, is because I think when we employ a man to do certain work, we want him to give his undivided attention to the work, and so should we want a committee, learned in the law, to give the questions presented by proposed legislation their sole attention.

"Salmon P. Chase in the Preface to his (Ohio) Statutes of 1833, speaking of the confusion in the statutes that then existed, said:

"'Under such circumstances, what wonder if the mind shrunk from the labor of research, and if an accurate knowledge was a rare attainment, even among lawyers? . . . No lawyer, nor any intelligent

legislator, ought to be satisfied with knowing what the law is, unless he knows what the law has been.'

"Lord Coke said, more than three hundred years ago, that he would be ashamed not to be able instantly to answer any question that might be put to him relating to the common law, but would answer no question of statutory law without first having made a careful examination of the acts of parliament.

"With each session of the Legislature comes some dissatisfied lawyer, either as a member of the General Assembly, or through the medium of the member from his locality, with a single purpose to meet his own grievance, and has some amendment to be made, which changes a word, or phrase in a section, or supplements it with new matter, without regard to the symmetry, or the science of the law, and perhaps without a proper conception of the science of human duty under the particular circumstances. This, without proper safeguards, tends to confusion.

"And again, though a bill may be ably and carefully drafted, yet in the heated contest over its passage, motions may be made to amend it, by inserting clauses, which in fact destroy its effect, or clauses may be stricken out, which change or destroy the meaning of that which is left.

"Hence, there ought to be some check, before the bill finally becomes a law, to avoid such dangers.

"The defects which are generally found in statutes are either (1) in the language, (2) in the arrangement, or in the uniformity, (3) or in the frequent disregard of the existing Common and Statutory law. . . .

"Men appointed specially for this work, of large experience and knowledge of affairs and the law, who will give it their undivided attention, is the better method.

"Very much of the time of our courts is taken up

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Law theretofore applying to the subject matter, and the effect which other statutes and other related principles of Common Law will have upon it, not only affords the counsellor the desideratum of certainty in his conclusions, but through that very certainty of the law, the public comes to respect both the law and its expositors, and to turn more frequently and willingly to his counsellor for advice.

"But with our statutes involved in a mass of phrases, ill-arranged, expressed in words of doubtful legal import and conflicting with correlated statutes and principles of the Common Law, we find the public driven to unnecessary litigation, our courts often wrestling with obscure meanings, and counsellors uncertain as to the rights and remedies of clients. Under such conditions men lose respect for the law, and dread the need which often compels them to seek the expositors who are often forced to give opinions with expressions of doubt. The lawyer himself, than whom no class of men delight more in certainty and the triumph of victory for an expressed opinion, turns with disgust from the study of such a statute.

"In closing, the following observations are made as to the qualifications which the persons should have, who should be called upon to frame, or advise as to the necessity, effect and validity of every bill before it is put upon its passage.

"The person who frames a law should be a man not only well versed in the fundamental principles of law, Common and Statutory, its history, together with the constitutional history of his country, but he should have a thorough knowledge of human affairs, and be able to look into the future and see how it may operate upon future events, under the varying conditions that may arise. He must remember that 'so long as a society progresses in industry, arts, science and

ethics, so long must the rules of law change and grow to keep pace with the moving equilibrium.'

"One who frames a law must be so trained *in the law*, that he can construe it as he writes it, or after he has completed it, in the light of the old law, and the light of existing conditions demanding the enactment. Knowledge as to what the existing laws are, in what directions the need for alteration is felt, and the manifold results likely to arise from such changes; intellect, forethought, prudence, and clearness of view; all these are legislative qualifications; and the scope and freedom for the exercise of such qualities should be the essential qualification of the legislative body."

JURISPRUDENCE AND ETHICS.

PROVINCE AND LIMITS OF LEGISLATION.

The Judiciary in its Relation to the Constitution and Legislation.

THE Judicial branch of the State government, in the field of jurisprudence, deals with outward acts of men, weighing them by the standard of morality.

Checks on Legislation. Right of Courts to Declare Unconstitutional.

One of its greatest responsibilities lies in the consideration of Legislation enacted by the legislative branch. This is peculiar to American Jurisprudence, and is one of the best checks against vicious laws provided by our form of government. The power to declare laws unconstitutional is not expressly declared by the Constitution. We can readily imagine how wrought up the minds of men were, in view of the hitherto prevailing sentiment as to the supremacy of Parliament, when in 1786, in Trentt v. Weedon, the Superior Court of Rhode Island, (Arnold's History of Rhode Island, Vol. 2, c. 24; 7 Green Bag, 107, 108) and in 1805, the Supreme Court of Ohio, (7 Green Bag, 107) looking far into the future, fully comprehending the danger to the American Constitution, took the stand, that it was the judicial duty to determine whether or not acts of the legislature were within constitutional limitations. These judges did not have the benefit of the learning of those masters of constitutional law, Marshall, Kent and Story.

The right of the judiciary to declare legislative enactments unconstitutional is not based upon the

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vindicated, and its general welfare promoted; a duty to the state in which we live, to see that its constitution and laws are not violated, that all just rights of our fellow-citizens are acknowledged and enforced, and that peace, good order, and harmony are preserved."

It must be admitted, too, that legislation of the Federal Congress which is beyond its powers cannot stand. A more serious question arises when such legislation has received the sanction of the highest Federal Court of the land, which in the opinion of the courts of the States is unsound. Justice Brinkerhoff in the case last referred to denied "that the decisions of a usurping party in favor of its own assumptions, can settle anything; that courts following such decisions, are decisions of acquiescence rather than of original and independent inquiry."

The argument of the Attorney General in the case of Bushnell, *supra*, involving a question of conflict between Federal and State Court concerning the validity of enactment, comes up to the moral conception. He says:

"No question which concerns constitutional freedom can ever be settled till it is settled absolutely right. You may pile decision on decision, till from the summit of the mass you scale the heavens, but it will avail nothing against the inherent, irrepressible power of the Constitution to vindicate, even against judicial chicane, the guaranties with which it has fortified the liberties of the citizen. At some time—I know not when, . . . there will be found some judge, some court . . . which shall, by a few fit words, so fitly spoken as to carry conviction to all hearts and heads, establish the right at once and for all ages."

There can be no claim that our written constitu-

tions do not surround the rights of persons and of property with all the protection demanded by morality. It will then be readily conceded that there is no danger that the legislative and judicial branches of the state when complying with the provisions of the Constitution will do violence to the rules of morality.

Inherent Powers of State.

There are, however, certain inherent powers which the government of the State may exercise, viz., the Police Power, the Power to Tax, and the power to exercise the right of Eminent Domain.

The State possesses great power by virtue of its police power, which has been described as "The law of overruling necessity, (Lake View v. Rose Hill Cemetery Co., 70 Ill. 191) to enact whatever laws, within constitutional limits, it deems best for the "Public Welfare." This covers a wide range, and is an inherent power. It may enact laws to promote the public health, or the public morals, the public peace, or the public safety.

But if the Legislature should enact a law that "has no real or substantial relation to these subjects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the court to so declare, and thereby give effect to the Constitution." (Mugler v. Kansas, 123 U. S. 205.)

The constitutions have also placed certain restrictions upon the inherent power to tax, and upon the exercise of the right of eminent domain.

Thus we see how the Judiciary and Legislature may operate under the Constitution, and how the courts may see that the State by its legislature observes the precepts of morality in its relations with its citizens.

There is such a vast field of law, yet outside the

limits of the constitutions, resting for its authority, not upon the Constitution, and not depending, in anywise, upon legislative action; a branch of law which the legislature has yet but scarcely approached or considered, known and designated as the Common law, the rules of which are dependent upon the decisions of the courts. This we will speak of in due time.

It is now our purpose to consider the duties which the State owes to foster the practice of morality, pursuing the inquiry rather in the light of what it has done by the different arms of her government, viz., (1) the Executive Department, (2) the Legislative Department, and (3) the Judicial Department.

The Executive Department of the State.

With the Executive we are not much concerned in this investigation, though the power of a Governor for good is extensive in the matter of his recommendations to the legislature. In States where the veto power exists a Governor can wield unmeasured influence over legislation. The Executives of the subordinate governmental agencies have a more direct influence upon the enforcement of Morality than any other. The legislature may have done its part in the way of enacting laws for the suppression of vice and the promotion of morality, but they remain a dead letter in the hands of many of our municipal executives. This should not be charged to the law; it has enough to bear. If a correct solution of the cause of the failure of municipal authorities to enforce the law be desired, we need only to look to the votes at municipal elections, when candidates "for" and "against" law are opposing each other, and we will find public sentiment against the enforcement of certain of the laws.

The Province of the Legislature.

It lies directly with the legislature to provide ways and means whereby the State shall enforce the rules of morality. It provides

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social obligations is to induce men to yield obedience to law because of self interest, and not because the disobedience will tend to injure society, do not appreciate the province of legislation.

True, one ought to do right for right's sake, and to obey law for his own welfare, but if all but one of the citizens of the state were made up of that kind of people, we must have the law for that one.

Many self respecting men, even men who desire and hold the respect of their fellows, have no doubt seen the time, when some section of the criminal code has deterred them.

In pursuance of the police power of the State, that vast and indescribable power possessed by the legislature to legislate for the public good, the State may compel an owner to so use his property, or to so conduct himself, that he will not endanger the lives or the material prosperity and happiness of the people.

To discuss the vast domains of this field would be to discuss a branch of law without limit, save only by the constitutional rights of persons and property. Our criminal law prescribes the rule of public morality, punishing all acts of immorality which affect society in general, on an average of three to four hundred offences in the different states.

The criminal code covers pretty fully the Religious and Moral Code, providing for the punishment of all acts which shock the public conscience, or disturb the tranquillity and peace of society.

Procedural Law.

In this country and in Modern England the legislative department has entered upon the work of simplifying and perfecting the law governing the procedure in the courts for the redress of wrongs. It is a well known fact that nothing retarded the progress of the law more than the inadequacy of adjective law. It is hardly true, however, that: "The

law, to put the matter in modern terms, was adjective before it was substantive. The definition of the means of getting one's legal rights was antecedent to the definition to those rights themselves." (Hadley, Education of American Citizen, 109.)

It is true that for a long period in the history of the common law procedure, there was no redress for the vast field of wrongs which consisted in the violation of Implied Contracts, the recovery of the value of personal property wrongfully detained or converted, and the recovery of damages for injury caused indirectly by the use of force, or from negligence.

Rather than blame adjective law, the fault should be attributed to those who failed to build up the law of procedure, as fast as ideas concerning the substantive law developed and assumed shape.

Perfect codes of procedure, furnishing adequate means of redress, are now in operation in all the States.

The Law of Evidence.

The codes of evidence have materially departed from the common law doctrines. The latter prohibited parties in interest from testifying, as well as preventing husband and wife from testifying for or against each other in criminal causes. These reforms, those relating to interest disqualifying one as a witness, were inaugurated in America. Upon the change of the status of married women, the change in the rules of evidence also came about. These reforms have greatly benefited parties litigant, facilitating the ascertainment of truth.

Devolution of Property.

The matter of the Devolution of the Property of a deceased person lies exclusively within the legislative province.

The laws of descent and distribution found in the Statutes is a recognition of the ethical union of the

sexes which is designed for the continuance and perpetuation of the human race. To accomplish this end the institution of the marriage relation, with the resultant family relation, is necessary.

Statutes of Descent and Distribution are therefore based upon the sacred ties of the family relation. They are liberal in the interest of the widow and minor children. The American statutes are in the main modelled after and mostly approximate in the general results, the English Statute of Distributions, which in its turn was borrowed from the civil law. (1. Woerner Law of Admn. p. 131.)

It is true that in the earlier history of England the necessities of war gave rise to unnatural and non-ethical rules of ownership of property, and of descent.

But these gave way in time to the recognition of the natural ties.

The Family Relation—Law Concerning.

It was necessary for the legislature to put its foot forward in making the law concerning some features of the family relation conform to the moral standard. Under the common law the rights of the wife were radically different from those which she has under modern statutes. It is familiar history that all the rights which naturally she ought to have, and her existence, were formerly merged in her husband. The husband even had such control of her person as that, during sometime in the common law, he had the right to chastise her.

The legislature interceded first by enacting separate property acts, next by giving to her a complete independent existence as a *feme sole*.

Again in recognition of the family relation, but rather more in the interest of society in general, exemption laws have been enacted.

It is the right of the head of the family to take ad-

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light, as an unjust and discreditable defense, should have received such support from courts of justice as would have made them what they were intended emphatically to be, statutes of repose." (Bell v. Morrison, 1 Peters, 360.)

But the courts hold that the statutes only affect the remedy, and do not cancel the debt. (Kinkead's Ohio Practice, § 6; Taylor v. Thorn, 29 O. S. 569; Allen v. Smith, 129 U. S. 465.) And how does this affect the moral obligation to pay the debt? There is still a moral obligation to pay. (Marshall v. Holmes, 68 Wis. 555.)

The only theory that can be advanced for the destruction of the moral obligation, is that the general welfare of society demands the application of the rule of limitation. Can there be a moral obligation in the face of such salutary rule? The general good demands that individual interests be surrendered.

But we discover that the moral law and the law of procedure here, are in conflict; and as the statute does not extinguish the debt, there is still a moral, though not a legal, obligation to pay it. But the justification of the suspension of this legal obligation is because of the greater interests of society. With reference to the duty of counsel to his client, we express the view that it is his duty to advise the client as to his rights, and let him do as he chooses.

This is the first clear separation between the moral and civil law which we have thus far encountered, but for good reasons as above stated.

With reference to the Statute of Frauds it may be asked, if A makes a contract with B, not in writing, and which is not to be performed in one year, is A bound morally to carry out the contract although it is invalid by the Statute?

Statute of Frauds.

It is said that the statute of frauds stands on a different footing; it goes to the legal creation and existence of the contract and does not affect its justness.

But how stands the promise morally? It would seem that as the policy of the law is to require certain essentials in the formation of contracts, that compliance with those essentials should be the measure of the moral obligation as well as the legal.

Liquor Laws.

There has been great clamor for and against legislation affecting the sale of intoxicating liquors. The clamor for legislation along this line has been in the interest of morality. The clamor against such legislation has been prompted by self-interest.

Looking at the question from a moral standpoint, as well as a "cold" proposition of law, if we are honest and conscientious in our judgments, the inevitable conclusion must be that the State owes a duty to place stringent restrictions upon the sale of certain kinds of liquors in a public resort, and that it violates its moral duty if it enacts a law providing for the license of saloons. It is claimed by some that the business is inherently immoral. (Ritter, Moral & Civil Law, 183.) By many the sale of pure beer is claimed to be in violation of no law of nature.

By virtue of the police power of the State, it will be conceded that it lies within the power of the legislature to place such limitations upon the business as will best protect the interests of society. A tax, however, upon the sale of liquor is almost as iniquitous as a license, for it is an implied recognition of the business as a legitimate business. The legislature would have the power to pass a law making it a crime for one to treat another in a public saloon. It has enacted laws regulating the hours of closing of saloons,

but history shows that public sentiment is generally against the enforcement of such laws.

The subject of Legislation might be carried forward at great length for the purpose of demonstrating how the State provides for the enforcement of the moral duty on its part and between its citizens. In the illustrations furnished we have found that it falls short only in a few particulars, in the matter of the statute of limitations, and in the sale of intoxicating liquors.

The remaining portion of the law which we desire to consider for the purpose of making practical deductions, is the Common Law.

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contracts, or in the failure to perform certain duties which violate the rights of persons, affecting person, reputation, family or business relation, or property rights.

These are generally determined by the common law, aided in some instances by statutes.

It will be found upon minute examination of the law of Contracts and Torts that the rules under these branches of law come up to the full measure of the moral precepts, with but few exceptions.

In the few instances in which the moral obligation or duty does not receive legal sanction, it will be found that there is an overshadowing duty tending to the general good of society which suspends the moral obligation or duty.

The benefit which society thus derives more than counterbalances the evil done by destroying the moral obligation.

Morality in the Common Law.

If custom is to be regarded as the source of the common law, it certainly must be admitted that the customs which had received the sanction of the people and the stamp of approval by the courts, can be no other than the expression of the moral sentiment of the people. The sum and substance of all we can gather from our study of this matter is: That so long as all the people will act in their social intercourse with each other in accordance with the usual custom, which is approved by the general consensus of opinion, such custom probably passes the test of morality. But the very moment that the conscience of a wayfaring citizen does not impel him to perform his duty to, or observe the right of his fellow, who in turn appeals to the law for redress, the court then applies the rule of the custom as the rule of his decision, and then there is a transition of morality to law.

We saw in Roman law recognition of the principles of Morality. According to Blackstone, Natural law, that law partially based upon the revealed law, and partially upon the law of reason, is the corner stone of the common law. Even the strongest Analytics of our times recognize the same principle. (Pollock, Expansion of the Common Law, 107, *et seq.*) Blackstone recognized Ethics as the foundation of that part of the law of nature which it is necessary to observe to insure true and substantial happiness, and contended that it is of universal application, that laws not in conformity thereto are invalid. Looking at Law and Ethics, from his standpoint they are undivorceable. Recurring to the history of the question heretofore considered, the fact that in the seventeenth century a new theory was adopted, in the minds of men, that Law and Ethics were far asunder, which continues to be a favorite theory of some eminent legal scholars and moralists to the present time, is not conclusive of the question. The only way to demonstrate the truth is by a full consideration of the law, and its history, in all its ramifications, a task which no one will likely ever undertake merely for the purpose of convincing the extreme moralists or the analytics, of their errors.

We propose, however, to go into the matter to some extent for the purpose of showing that Laws *do* embrace the moral precept in nearly all cases. Great regard must be had for the opinions of the eminent men which have been heretofore quoted. It is with great diffidence that the least evidence of disagreement from their views is here shown. We are at a loss to know why so much stress is laid upon the marking off of the two sciences as essential to the advancement of legal science, when in the same breath acknowledgment is made that the judges must necessarily enter

the domain of ethics in search for the data for the rules of law; and more especially when statutes and judicial precedents do in fact come up to the standard of morality. Hence it would seem that the data of ethics and the data of jurisprudence are communistic. Philosophical theories sometimes lead us to high peaks where walking is dangerous, where the road is stony, dark and dreary for the honest, common, everyday lawyer. He does not have time to stop and say to himself: Here is the fence that divides law from morality; but his keen sense of right and justice, which he very likely did not acquire by a study of either the Science of Law or of Ethics, points out to him the law of morals and the consequent civil law. His study has been limited to the common law which is the collected wisdom of ages. He may not have explored the mysteries of the sciences, and may be unfamiliar therewith, but he has within him a something—(he has not looked into psychology to see if conscience is the correct name [*ante*, p. 175.])—which teaches him right from wrong, and he knows that this should be the controlling principle of every law.

Despite the theories which have been so unanimously followed for well-nigh three centuries it is no doubt true, that all of our judges have been applying the natural law of reason determinable by what is just and right under the circumstances, and by what is best conducive to the peace and happiness of individuals. As Pollock observes: "Our courts have gone on making a great deal of new law which is natural law, without realizing it." (Pollock, Expansion of the Common Law, 107, *et seq.*) When the natural inherent rights of persons are observed they are satisfied and happy; when they are not heeded resort to law is necessary.

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ment, *ante*, p. 144, *et seq*. See Penalty of the Law, *ante*, p. 156) that governmental authority comes from God and that the officers of government are officers of His service, is the end of their daily work (Romans Chap. XIII). We should have the same abiding faith as had our forefathers who signed the Declaration of Independence, when they placed "a firm reliance on the protection of Divine Providence."

The fact that "Morality" is placed in our written constitutions is also a potent argument. Religion at one time was a part of the government, the authorities turning to it for aid. For a long time in England it was held to be the basis of law. (Holland Jur., p. 56; Andrews' American Law, § 68; 1 Cooley's Bl., p. 50.) Some dictum of courts are found to this effect. (Cowan v. Millbourne, L. R. 2 Ex. 230.) This theory is lately repudiated in strong terms. (Lord Coleridge, R. v. Foote, 48 L. T. N. S. 733.) Judge Baldwin of Connecticut states that: "Modern government began when the state withdrew from its long alliance with Christianity." (American Bar. Ass'n Rep., 1889, p. 242; Andrews' American Law 18, 19.) Rather should we say, when the state and church separated, for religion will no doubt contribute to laws throughout the progress of time.

The Supreme Court of the United States has lately said: "The great principle of the common law which is equally the teaching of Christian morality, so to use one's own property as not to injure others, forbids any other application or use of the rights and powers conferred." (Baltimore & Potomac Ry. v. Baptist Church, 108 U. S. 317, 331.) Here then is an application of morality fostered by Christianity.

Again, the Supreme Court of Tennessee recognizes the same principle in the following:

"Regarding Christianity as part of the law of the

land, it respects and protects its institutions; and it assumes likewise to regulate the public morals and decency of the community." The court remarks that human laws can be expected to enforce only social and relative duties; that it does not punish wickedness or vices excepting only when they are made public, when by reason of the bad example they set they become injurious to society, in which event it is the business of human laws to correct them. (Bell v. State, 1 Swan, 42, 43.)

The Kentucky Supreme Court has recently said in respect to this question:

"Honesty, morality, religion and education are the main pillars of the State and for the protection and promotion of which government was instituted among men." (Commonwealth v. Douglas, 24 S. W. 233.)

Austin said: "A human law is good or bad as it does or does not agree with the law of God; that is to say, with the law of God as indicated by the principle of utility, or with the law of God as indicated by the moral sense."

The relation of morality and law is thus well expressed by one writer:

"Let it not be forgotten, let it be emphasized, repeated, emblazoned in the halls of every legislative body, that morality is a fundamental principle in legislation; but for this principle, this law of nature, this law of God, this law of man, . . . popular government would fail. Morality cannot be disregarded by the legislature, it must be regarded, or the action of the body is void. Moral law was not created by a legislative body. It was never enacted. It was never created by the Constitution of the state or of the nation. Neither the Constitution itself nor the legislature can disregard it and the action be valid." (Ritter's Moral & Civil Law, 83.)

In Webb's Pollock on Torts (1894), p. 12, the following topic is discussed:

"Relation of the Law of Torts to the semi-Ethical Precept, 'Thou shalt do no harm to thy neighbor.'"

The author then discusses the three main divisions of the law of torts, calling attention to the strong ethical, moral element in one of them. He then turns to the Introductory chapter of Justinian giving the maxims of the law, which have heretofore been quoted.

Speaking of the maxim: "Thou shalt give every one his due," he says it fits pretty well with the law of property and contract. As to: "Thou shalt do no hurt to thy neighbor" he says:

"Our law of torts, with its irregularities, has for its main purpose nothing less than the development of this precept. This exhibits it, no doubt, as the technical working out of a moral idea by a positive law, rather than the systematic application of any distinctly legal conception. But all positive law must presuppose a moral standpoint, and at times more or less openly refer to it, and the more so in proportion as it has, or approaches to having, a penal character."

"At common law, indictability and immorality are convertible terms." (Leiber on Penal Law; 2 Leiber's Miscel. Works, 471.)

Piggott on Torts (208), speaking of Fraud says: "It will be noticed that we have ignored the distinction between legal and moral fraud sometimes drawn." He then quotes Bromwell, L. J., in Weir v. Bell, 3 Ex. D. 243, where he says: "I am of the opinion that to make a man liable for fraud, moral fraud must be proved against him. I do not understand legal fraud. To my mind, it has no more meaning than legal heat or legal cold, legal light or legal shade. There never, never can be a well-founded complaint of legal fraud,

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and for considering individual and national morality as parts of one and the same science."

Joel Prentiss Bishop in his work on Criminal Law, sec. 495, says:

"Morality, religion, and education are the three main pillars of the State and the substance of all private good. A community from which they are banished represents more than the gloom of original chaos. Therefore, they should be objects of primary regard by the law."

"But however uncertain may be the precise extent to which the common law protects Christianity, there is no question that it practically and fully cherishes the public morals. And it punishes as a crime every act which it deems sufficiently evil and direct, tending to impair the public morals." . . . "Prominent among the interests which the law protects are the public morals." (Bishop on Criminal Law, secs. 495, 500, 505.)

In the case of Grisham v. State, 2 Yerger (Tenn.), 589, the court declared that:

"The common law is the guardian of the morals of the people, and their protection against offences notoriously against public decency and good morals."

The books of Reports in England, and in some of the States in this country, where common law crimes were recognized, abound with cases where, upon these principles of the common law, convictions have been enforced for various offenses against public morality and decency, without the aid of any statutory enactment.

And so it would seem, notwithstanding all contentions to the contrary, that it must be conceded that morality is a fundamental principle of the common law, and chancery law; and so it is with constitutional and statutory law.

The civil law carries into effect the precepts of morality and parts of the Divine law. It demands either by statutory or judicially made law, that we shall fulfill all our contractual obligations to each other, and all our duties and obligations which naturally should be required of us in our relations with each other. It is the conditions and circumstances, and the exigencies of the occasion which makes law. There is a law of nature applicable to every situation which is presented, which is arrived at by the fair minded, honest expression of the conscience of the judiciary by applying the general consensus of public opinion as determined by the consciences of men.

Substantive law has passed through several stages of development, and at times true principles of right and justice have not always found expression by the judiciary or the legislature, but sooner or later the eternal principle of right and justice finally prevails and becomes firmly established. It has sometimes taken years of hardship, and acts of cruelty, and even wars and bloodshed, but finally we have the satisfaction of knowing that the true standard of morality becomes established in nearly all, if not all, instances.

It may be safely stated that although a judicial precedent may sometimes be pronounced, or a statute passed, in violation of moral principles, time will right the matter. The rule of *stare decisis* is not greater or more powerful than the moral principle, which is the root of all law.

Has not enough now been said to show that Morality is the basis of law?

To use the lawyer's argument we may confidently claim that the weight of authority heretofore cited, clearly sustains the view that Ethics and Law are parts of the same thing. We have thus demonstrated

the falsity of the moralist's theory that there is a dividing line between them. The line is formal and not real.

But they will say that there are so many laws that are not founded on morality. The law as announced by our judges is not so liable to this objection as is statutory law. Yet both are supposed to reflect the general consensus of opinion. But so long as laws are declared by man, so long as the minds of men are clouded by passion and prejudice, we cannot always be sure of perfection, because it is human to err. These errors, however, are sure to be rectified in time.

If we, therefore, by careful thought and sober study, reach the conclusion that the principles of Ethics and Jurisprudence are necessarily interwoven with, and dependent upon, each other; and if in the study of law, we seek to discover the truth according to the Science of Jurisprudence and Ethics, endeavoring in each case to enter the domain of general jurisprudence and ethics in search of the correct principle, we will become better lawyers; we will, in the language of another, become "a more ready and correct manipulator both of Inductive and of Deductive processes of thought. A more keen discriminator of the nature of Moral Distinctions, and of the relations to each other of the true fields of Moral and Legal Duty, . . . a wiser and better-balanced investigator of the great, leading facts of human life in all their forms." (Amos on Jurisprudence, 499.)

The business of the legal profession, therefore, lies exclusively in carrying Ethical theories and principles into practical operation.

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conducts himself that a reasonable man would believe he was assenting to the terms proposed by the other party, and that the other party on that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms." (*Id.*; Smith v. Hughes, L. R. 6 Q. B. 607.)

This has reference to implied contracts. Where one by means of deception obtains the property or money of another, with the avowed intention of personal gain to himself and loss to the other party, the law imposes upon him the obligation to make good the loss.

Consideration.

The existence of a consideration is one of the essential requisites of a contract. Without it there is no binding force in an agreement. An empty promise does not create a legal obligation. One good turn deserves another has been the universal immemorial rule the world over. It was necessary to adopt some standard of validity of contracts for the good of society, and the essentials which the law prescribes, are, it is agreed, conducive to the good of society, and ought for this reason to satisfy the theories of morals. It may be contended that the fact that a consideration is essential to a legal promise, marks it off from a moral obligation. It is sometimes asserted "that every man is, by the law of nature, bound to fulfil his engagements," but "that the law . . . supplies no means nor affords any remedy to compel the performance of an agreement made without consideration." (Rann v. Hughes, 8 T. R. 550.)

There was adopted very early in the history of the law of contracts, the essential element-*consideration*, which became the basis of their enforcement by the courts. The history of consideration is traced by Holmes' Common Law, 253, *et seq.*

Consideration is defined to be any act from which one derives a benefit or advantage, "or any labour, detriment, or inconveniences sustained, . . . however small." (Laythoarp v. Bryant, 3 Scott, 238; Holland Jur. 249.) Consideration is of two kinds, good and valuable, the latter consisting in some right, interest, profit, or benefit accruing to one party, or some loss, responsibility given, suffered or undertaken by the other, while good consideration rests upon blood, or natural love or affection.

Contracts in Contravention of Morals Illegal.

In the law of contracts the principles of morality are upheld and maintained by the condemnation of all kinds of contracts deemed illegal because contrary to good morals.

No action arises out of a wicked cause (*Ex turpi causa non oritur actio*) has ever been a maxim of the law. And it is not even essential that parties to an action plead in terms that a contract is *contra bonos mores*, it is the duty of the court to make the objection in its own behalf. "Courts owe it to public justice and to their own integrity to refuse to become parties to contracts, essentially violating morality or public policy, by entertaining actions upon them. It is judicial duty always to turn a suitor upon such a contract out of court, whenever and however the character of the contract is made to appear." (Wright v. Rindeskopf, 43 Wis. 348; Pape v. Standard Oil Company, 5 Ohio C. C. [N. S.] 252.)

Examples of illegal contracts are contracts in restraint of trade, lobbying contracts, contracts to obstruct justice, unlawful agreements relative to marriage, immoral contracts, and contracts by the terms of which the parties undertake to deceive the public. There are various other forms.

It is said that "Since the promotion of public and

private virtue is one of the chief purposes of the law, no countenance can be given to agreements which would defeat that end under legal forms. If the object of the agreement be to induce immorality, no technical nicety in the instrument, no stipulation of moneyed consideration, no observance of the usual essentials of a contract can give it validity; such agreements are wholly void. (9 Am. & Eng. of Law [1st ed.], 921.) Where the object is to induce immorality, the contract is void. (Forsythe v. State, 6 Ohio, 19.) A contract to bring about a fraudulent marriage, or to procure a divorce, is illegal. (Cole v. People, 84 Ill. 216; Com. v. Waterman, 122 Mass. 43.) An agreement not to defend a divorce suit is illegal. (Weeks v. Hill, 38 N. H. 199.) A contract to relieve a parent from the care of his child is void. (Farnsworth v. Richardson, 35 Me. 267.) The general rule is, that a contract against good morals can have no aid from the courts, either to enforce it in the first instance, or to grant relief from it after it has been executed. (9 Am. & Eng. Enc. of Law, 922.) Contracts of sales which contravene public decency and good morals, are void. (*Id.*, 926.)

It may be safely asserted that the courts apply the rule of strict morality in all actions *ex contractu*. And the rule is of universal application that when a contract is immoral, or opposed to public policy, and the parties are in *pari delicto*, the courts will not give aid to either one, but will leave them where it finds them.

The Moral Obligation in Contracts.

We hear a great deal about moral obligation in the law of contract. This is about the only feature in contractual obligations specially deserving of consideration, in this discussion. Outside of *moral* obligations which are not *legal* obligations, in the law of contracts it will

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that a moral obligation would support a subsequent promise. But this view was thereafter exploded because under such a rule every promise would be legally binding, as every promise carries with it a moral obligation. It is now generally held that to render a subsequent promise valid some act must have been done or service rendered on the faith of an express or implied request, and that when this element is wanting it will not be enough to show that the defendant was morally bound to remunerate the plaintiff, and ratified the obligation by an express promise. (*Id.*, Eastwood v. Kenyon, 11 A. & E. 438; Hamor v. Moore, 8 Ohio St. 239.) "A promise . . . to perform an already existing legal duty is no consideration; and a past fact, although it may be an influencing motive, can never be a good consideration, which must always be either present or future." (Holland Jur. 249.)

It is said in a Kentucky case: "That a man is under an obligation to perform his lawful engagements is a proposition which none pretend to controvert. While moralists differ and casuists dispute about the cause of such an obligation, they all agree, that, even in a state of nature, man is bound to fulfil his contracts. In such a state, without the aid of civil laws, the obligation addresses itself to the *moral* faculty, and operates upon the conscience of men, and is denominated the moral obligation of a contract." (Lapsley v. Brashears, 4 Litt. [Ky.] 54.)

It seems that the courts of England early marked a distinction between a moral obligation and a valuable consideration, and held that a moral consideration will not support a promise. (Eastwood v. Kenyon, 11 Ad. & El. 438; Beaumont v. Reeve, 82 B. 438.) It is also said that this has been approved and made the basis of judicial decision quite generally by the courts

in this country. (Freeman v. Smalley, 38 N. J. L. 383, and other cases cited in Beach on Contracts, § 153, note 1.)

It is unquestioned that a simple moral obligation has never been regarded as sufficient ground to support a promise. (Allen v. Bryson, 67 Iowa, 591, 56 Am. Rep. 358.) Such statements as the following, are found among the English decisions:

In Hawkes v. Saunders, 1 Cowp. 289, 294, Butler, J., stated, that "whenever a defendant is under a moral obligation, or is liable in conscience and equity to pay, that is a sufficient consideration."

Again, Lord Mansfield, in Lee v. Muggeridge, 5 Taunt. 36, 46, said that it had "been long established rule that where a person is bound morally and conscientiously to pay a debt, though not legally bound, a subsequent promise to pay will give a right of action."

It may be safely asserted that a moral consideration has only been looked to as a sufficient basis to support a right of action upon a subsequent promise resting thereon.

But even upon this proposition there has been conflict among the cases. Both in England and in this country the rule is adopted that an express promise can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise. (Wennall v. Adney, 3 Bos. & P. 249; Eastwood v. Kenyon, 11 Ad. & E. 438.) "A moral obligation is also a good consideration for a promise—but that holds only in cases where a prior legal obligation had existed, which by reason of some existing rule of law, can not now be enforced." (Holley v. Adams, 16 Ver. 206; 42 Am. Dec. 508; Cook v. Bradley, 7 Conn. 57, 18 Am. Dec. 79; Hamor v. Moore, 8 Ohio St. 239; Allen v. Bryson, 67 Iowa, 591, 56 Am. Rep. 358.)

There is a line of decisions in this country, however, which hold that a moral obligation to pay money or to perform a duty, is a good consideration for a subsequent express promise to do so, even if there was originally no legal obligation to perform. It is claimed in support of such a rule that all the authorities admit that where an action to recover a debt is barred by the statute of limitations, or by a discharge in bankruptcy, a subsequent promise to pay the same can be supported by the moral obligation to pay, although the legal obligation is gone forever; that there is no just distinction between such a case and one in which there never was a legal, but only a moral, obligation to pay. In the one case, the legal obligation is gone as effectually as if it had never existed. In both cases, at the time the promise sought to be enforced is made, there is nothing whatever to support it except the moral obligation, and why the fact that, because in the one case there was once a legal obligation, which, having utterly disappeared, is as if it had never existed, should affect the question, is difficult to conceive. Courts adopting this doctrine say that "a moral obligation is a sufficient consideration to support an express *assumpsit* made after the obligation incurred. It is equivalent to a previous request; but it must be such an obligation as is denominated by moralists 'perfect'—an obligation of justice, and not of benevolence or piety merely." (Ferguson v. Harris, 39 So. Car. 323 [1893]; Morris v. Herndon, 2 Bail. 56; 21 Am Dec. 515; Barlow v. Smith, 4 Vt. 144; Wilson v. Burr, 25 Wend. 386; Commissioners v. Perry, 5 Ohio, 58.) Some courts in treating that class of cases where the obligation which was previously legal, but which is reviewed by a subsequent promise, seem to prefer designating the consideration as an "equitable obligation" rather than as a "moral obli-

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a promise to pay money. (Knowles v. Erwin, 43 Hun, 150.) A moral obligation supports a promise to pay a debt discharged by his bankruptcy. (Post v. Losey, 12 N. E. [Ind] 121; Wislizenus v. O'Fallon, 3 S. W. [Mo.] 837.)

It may justly be contended that, notwithstanding the fact that a past consideration may not be sufficient to support a promise, this does not remove the moral obligation to fulfill the same. But it will generally be found that the reason why the courts hold the past consideration insufficient to support the contract, is because the rights of other innocent persons have intervened and are superior to the person in whose favor the contract, supported by the past consideration, is made. In such cases justice is done as between all the parties, and hence under the circumstances there is nothing to support even a moral obligation.

So it will be found that there is but little, if anything done to the cause of morality in the law of contracts.

The Moral Principle in the Law of Torts.

The law of torts deals with violations of duty concerning Person, Reputation, Health, Family, Contract and Business Relations, and Property Rights.

In the discussion of the Moral Principles of the common law, there was occasion for references to the exemplification of the ethical principles embraced in: "Thou shalt give every one his due;" "Thou shalt do no hurt to thy neighbor," which is but the practical application of the moral idea as is found in the law of torts.

Throughout the entire field of torts, it will be found that the moral and legal duty parallel each other. It is said that: "The law of Torts abounds in moral phraseology. It has much to say of wrongs, of malice,

fraud, intent, and negligence. Hence it may naturally be supposed that the risk of a man's conduct is thrown upon him as the result of some moral shortcoming." (Holmes' Common Law, 79.)

Cheating and defrauding is condemned alike by moral and civil law. To knowingly misrepresent facts is wicked and immoral. It is claimed that the tendency of the law is to transcend moral and reach external standards. But in this subject the law refers to morality as the basis of the liability for fraud and deceit.

In torts the wrongful acts are either intentional or unintentional, and it will be found on the whole that the legal duties and liabilities of persons in respect to such acts, parallel with the moral duty.

It is said that: "The theory of torts may be summed up very simply. At the two extremes of the law are rules determined by policy without reference of any kind to morality. Certain harms a man may inflict even wickedly; for certain others he must answer, although his conduct has been prudent and beneficial to the community." (Holmes' Common Law, 161.)

All willful and intentional acts afford the injured redress at law. It is difficult to perceive where one is to be held for harms when his conduct has been prudent and beneficial to the community. There is a distinction between *damage* and *injury*. Acts of one may cause *damage* to another but will not be redressible at law, and hence will not constitute an injury. These appear to be the only "*harms*" which one may cause to property. Interference with percolating waters, in which no one has any property right, interference with light and air, may harm or damage one, yet they do not cause injury. There are many cases where the doctrine of personal liberty and personal

dominion of one over his own property enables him to do things to the annoyance of others, not causing actual, material, physical discomfort to them, which violate no legal or moral obligation. (Metzger v. Hochrein, 107 Wis. 267.)

That class of acts designated *damnum absque in-*

Damnum Absque Injuria.

juria may be specially noticed. There are numerous acts where damage is actually suffered by one through the acts of another, but no *injury* is done, because no legal right is violated or no legal duty violated. (See Week's Damnum Absque Injuria.) May objection, from the moral standpoint be made, because the law does not afford a remedy in such cases?

A few illustrations will demonstrate the truth. Percolating waters, because of their wandering character, are the property of no particular person. They may be the basis of the supply of the well of one owner, but no right is violated if an adjacent owner sinks a well upon his premises which draws off all the water from his neighbor's well. If, however, the underground waters be what is known as a subterranean stream, its course being definite and certain, then it may be the subject of ownership, and interference therewith being legally wrongful.

Every owner of property possesses certain natural rights in the use thereof. But there are certain limitations placed upon such use. The rule is well expressed in the maxim: "*Sic utere tuo ut alienum non lædas.*" If the natural uses of land cause damage to another it does not follow, necessarily, that there is a violation of a legal right with consequent injury. Legal rights are established in recognition of the rights of all persons, and moral rights and duties can rest on no different basis.

Under the common law an owner of land might

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of opinion. Common law being the basis of American law, it was natural that the courts in the majority of states should follow the doctrines of that system. But why a different rule in the common and civil law, and which is right?

Surface water accumulating and remaining upon the lands of a person may be detrimental to him, his interest requiring that it be turned off. But if he turns it off his own land onto his neighbors' land it will most likely injure the latter. The common law evidently proceeds upon the theory that an owner may do as he pleases, and that every other person must look out for himself. The civil law recognizes the injury that may be done when one in protecting his own property does it to the damage of another. This makes it imperative upon the one who desires to turn off the surface water from his own lands to do it in such a way as not to back it up or throw it on the lands of another.

The civil law would seem more consonant with right and justice. If this be true, it illustrates how we in America may draw from other systems those rules which best conform to our ideas of right.

XXII.

JURISPRUDENCE AND ITS OBJECTS.

LEGAL RIGHTS.

HAVING endeavored thus far in these discussions to display the science of law, as well as its fundamental basis and its relation to the other sciences, it is the purpose briefly to set forth its objects.

In the language of Blackstone: "The primary and principal objects of Law are rights and wrongs." (1 Blackstone Com. 122.)

It will be found that the sole province of Jurisprudence and of Laws, are Rights and Wrongs, and a study of the Science chiefly and naturally involves a classification of Rights, Wrongs and Duties. They are seldom traceable to a distinct command but are found in the reason of the common law. Although the origin of the common law has been a matter of grave inquiry, and is usually attributable to custom and usage, it will no doubt be conceded that it was shaped and moulded from the daily transactions of life, and that in its inception or formation it consisted in the application of the principles of good sense to the exigencies of each disputed case. The law which defines the Rights is thus formulated and is intended to mark off their limits, and prevent the conflicts which are continually arising in the daily life of men. The law in the form of decisions of the courts not being in the form of a command, but being merely a recognition of a preëxisting right, and the putting into motion of the compulsory process of the law, it is, therefore, necessary to keep in mind the fact that

the precedents of the courts always partook of the spirit of the times in which they were rendered.

Says a learned writer:

"We have . . . the rights and wrongs . . . originating . . . in that reason which is the common law, but rarely traceable to any distinct command. . . . They are shaped and governed by the every-day interests of men and the purposes of daily life, and that the law which defines or limits them is usually formed from them, and intended to mark off their limits, and prevent the conflicts which in actual life are constantly arising between them. So far from lying at the basis of the system and determining the form and contents of every right, the law of a given case is usually the last thing to be determined, and cannot be accurately stated until the courts of justice have measured the relative extent of the conflict rights, and drawn this line between them. . . . The entire subject-matter of law falls into a classification of rights and wrongs and duties." (Professor Hammond, quoted in Kinkead's Torts, § 11.)

"Jurisprudence is specifically concerned only with such rights as are recognized by law and enforced by the power of a State. We may, therefore, define 'legal right' . . . as a capacity residing in one man of controlling, with the assent and assistance of the State, the rights of others.

"That which gives validity to a legal right is, in every case, the force which is lent it by the State. Anything else may be the occasion, but not the cause, of its obligatory character." (Holland Jur. 72.)

Moral Right. Legal Right.

We still frequently find used, and in law have sometimes real occasion to use, the terms, "moral right," "moral duty," as distinguished from "legal right," "legal duty," the distinction being that

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as maintained before the mediation of the court, is simply recognized and protected, and is now termed a *legal right?* If it had not been legal before the action it would not have been afterwards.

After all it may justly be contended that there is no real difference between the "right" and the "legal right."

An inquiry into the grounds or basis of the "legal right" would lead into the same line of discussion found elsewhere, viz., it rests upon the moral duty. So far as the phenomena or data of rights are concerned there is no difference between those *legal*, and those which have not yet been defined and recognized by law.

The real difference between "legal rights," and "Rights," is in the power of protection or enforcement.

If one is deprived of the possession of his personal property by the wrongful act of another, who will not respect his right, and yield peaceable possession upon demand, the owner cannot resort to force and violence to protect his rights. The interests of society forbid such a course, consequently the state has provided a way for enforcing rights.

In some countries the word "right" is regarded as expressing Law in the abstract. This is true of the continental countries which adopt the principles of natural law in their system of law.

It is claimed that this tends to confusion, it being necessary to resort to such phrases as "objective" and "subjective" Right, so as to distinguish between Law in the abstract, and Law in the concrete. "Right" with the Germans, the Italians and the French, embraced the idea of compulsion, of physical power, a legally protected interest. (Holland's Jurisprudence, 73, 74.) The dividing line between the "moral

right" and the "legal right" is the physical force of the State, whose function is to recognize and protect the rights of its citizens, and thus preserve peace and order. The action of the State results in the creation of Law. The State says that a certain course of action is right, and by its processes compels parties to pursue it, by paying money, yielding up property, or doing specific things. The State by its act both "sanctions" and "commands," or more appropriately, compels.

The physical power of the State, therefore, marks the boundary between the Abstract Science of Ethics and the Concrete Science of Law. Much time and space has been occupied in discussing the problem whether laws precede Rights, or whether Rights precede laws. I suppose it must be conceded, as it has been since the Middle Ages, that the sanction of the law does not convert morality into law; but it would seem equally true that the entire history of law has been a development from rights previously conceived.

The nature of the "Legal Right" having been explained its composite parts may next be considered.

First, of necessity, there must be some one in whom the right vests capable of claiming and enforcing it; its object or purpose must be something which the law will sanction or recognize; there must be some act to be done or forborne by another, all of which is determinable by that branch of law known and designated as "Substantive Law;" and lastly, all the conditions and facts must exist that will confer the right upon the one in whose favor it exists to resort to the branch of Law called "Adjective Law." This presents a topic of importance, viz: "Rights in Substantive Law," and "Rights in Adjective Law," which will be considered.

The Person in whom the Right resides may be a Natural or Artificial one.

In modern American Jurisprudence it is perhaps needless to recount the history of the thoughts of men and nations in respect to what a "Person" in law is, in view of its fundamental law. The absolute and equal freedom of all persons at birth is a primary principle of American institutions, proclaimed with independence and incapable of abrogation.

A person while ordinarily held to embrace only a living human being, as used in our constitutions for certain purposes is held to sometimes mean artificial persons.

In the early common law an infant in *ventre sa mère* was considered capable of possessing certain rights, and hence might be classed as a person. (1 Blackstone Com. 130; Holland's Jur. 83, 84.)

With Americans the personality of the infant is not recognized until independent circulation is established. (Dietrich v. Northampton, 138 Mass. 14; 52 Am. Rep. 243.) A person is defined in juristic writings as a "human being, invested with the condition of status."

Status is an incident of Persons of which there are several kinds, in reference to which there is the following division of persons: infants, adults, male, female, married, single, compos mentis, non compos mentis, citizens, aliens.

Status then is an important matter to be considered in the ascertainment of Rights and Duties. For the purpose of the creation of contractual rights the law adopts certain rules relating to capacity. The parties to be capable of entering into a binding contract, must not only be competent but must be free to act as well. Infants, (as to some) imbeciles and insane persons are incapable of entering into con-

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conception (see Andrews' American Law, sec. 82); and in the practical application the courts make a distinction between the *Right* and the *Property*, keeping the "legal right" separate and distinct from its tangible object—viz.—Property. (Letts v. Kessler, 54 Ohio St. 73, 85; Kinkead on Torts, § 18.)

Property in its legal signification means only the rights of the owner in relation to it. It denotes a right over a determinate thing. Property is the right of any person to possess, use, enjoy and dispose of a thing. (*Id.*; Wynehamer v. People, 13 N. Y. 388, 433; Rigney v. Chicago, 102 Ill. 77.)

The proper mode of identifying and classifying rights is according to their objects, or according to the persons liable to the duties or obligations that correspond to the rights.

The matter of classification of Rights pertains to the philosophy of the law. There was no classification of rights found in Roman law, and we look to Hale and Blackstone for the division recognized in the common law.

And here we are reminded of the absolute necessity of a treatise to which neophytes in law may turn for a knowledge of its elements, rather than putting them out to sail on the vast sea of precedents, even under the guidance of a competent pilot.

According to modern views there is one great class of rights, viz: Rights of Persons, embracing civil rights which may relate or concern the Person, or his property rights. In the early history of Jurisprudence when the division of "Rights of Things" was generally acquiesced in, much importance was attached to the term "Things" which was regarded as a comprehensive term, embracing all objects of Rights indiscriminately, whether of tangible existence or not.

The term Right of Property, as already explained, is the most appropriate expression to designate that class of Rights having for their object the innumerable tangible and intangible rights.

Much confusion will be avoided if the distinction between the term "property" as comprehending the right, and the terms "land" or "chattel" as the subject of property, is observed.

Some attention may too, be given the classification of Rights into "Absolute" and "Relative" which was the product of Blackstone, and was the prevailing theory of all writers of his time as well as of those of other Continental nations.

This division or classification was the natural outgrowth of the prevailing sentiment of the times as to what was the basis of law which has already been touched upon in these discussions, viz: that natural law is the foundation of law, and is but the embodiment of the principles of ethics.

The theory was that in a state of nature, and before society was organized, men as individuals, and without regard to their relation to others possessed certain rights properly designated as "Absolute." With society as an existing "state" or fact, and no historian leaving any record of a time when there was no society, the picture of Blackstone of a condition of man in a state of nature falls short of illustration.

The Bible truth: "Man liveth not unto himself alone," has been the controlling principle, since the creation of the world, observance of which is conducive to happiness. Among the ruder tribes which had no governments, they had their own laws and their chiefs.

The golden rule has ever been to give and take, to do unto others as we would wish them to do unto us. What rights we may have then, have always

been those which we can exercise with due regard to those about us. In a crowded conveyance the seats of which are all occupied while others are standing, there is no law to prevent the one standing from occupying the seat of one who temporarily absents himself therefrom, but we rarely see it done.

Upon entering society each one gives up part of his liberty, as the purchase price of the superior advantages of society. Statesmen and judges have seriously questioned the right to do as one sees fit. The law of nature contemplated that we should live as members of society, and it is the natural duty to contribute to the necessities of societies. It is a principle of natural law, or as originating in municipal or social institutions, that the right of man in his conduct and in the use of his property is restricted by a due regard to the equal rights of others. (Snyder v. Warford, 11 Mo. 513; 49 Am. Dec. 94; Kinkead on Torts, § 12.)

Mr. Justice McKenna said in a recent opinion: "It would be trite to say that no right is absolute. *Sic utere tuo ut alienum non laedas* is of universal obligation." (Orient Ins. Co. v. Daggs, 172 U. S. 557.)

As members of society, in the relation of its members to each other and to the state, citizens have certain rights of which they cannot lawfully be deprived either by our fellow citizens or by the State. If man may assert a right against the world and against the State, and cannot be deprived therefrom, it may be called "Absolute" without great violence to the logic of Jurisprudence.

For many years the classification of Rights into "Absolute" and "Relative" has been assailed on both sides of the water as unsound.[1] But as our law was

[1] The writer has considered this at length in another work, Kinkead on Torts, § 13.

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or seizures, no imprisonment for debt except in cases of fraud. Private property shall ever be held inviolate. Contracts shall not be impaired.

No act of legislation, no act of public officials can deprive citizens of any of these rights. Is not that all that Blackstone meant when he classed the rights of Personal Liberty, Security, etc., as absolute. He meant that under no guise of power, no forms of government could these rights be taken away. With this understanding there can certainly be no objection to classing them as "Absolute," because they are.

It is contended that in a state of society all rights are relative, because one has such related rights only as regards the rights of others. But when we may assert these rights against all members of society as well as against the State or government, why may not they be called "Absolute Rights"? Neither the people nor the State can take them away. And though in England the people did not come together and enter into a compact between themselves reserving certain rights, and although under monarchial governments the King and the Parliament possess absolute power, yet the people arose in their might, asserted and demanded their natural and indefensible rights, properly classed by Blackstone as Absolute. We have the absolute right of life, liberty and security whether in or out of society.

There are other rights which have always been classed as Relative, and which only come into existence when we enter society and are to be exercised only in our relations with our fellow members, that no better word than "Relative" may be coined to express it. On this designation, in the language of the politician and statesman we feel like "standing pat."

What were termed by Blackstone, and which have since always been regarded as "Relative Rights" are

clearly distinguishable in their nature from those classed as "Absolute." They, therefore, should be differently designated. A comparison of those rights styled Relative with those which are considered Absolute demonstrates at once why they were so named. The rights which exist by virtue of the domestic relations can arise only when that relation is formed.

There are both common law and Statutory relative rights. The rights involved in the domestic relations are examples of the former, while injuries caused by death by wrongful act, and by sales of intoxicating liquor are illustrations of the latter.

An endeavor will now be made to explain and analyze Rights in Personam and Rights in Rem. These terms have been used to indicate a division of rights which are in every way complementary, one to another. By rights in rem is meant those which are available against the whole world, or at least, an indeterminate portion thereof. By rights in personam are indicated those which are available against a particular or definite person or body of persons. In the last class are found all contractual obligations; and in the other nearly all the rights a breach of which constitute a tort.

Rights in Personam. Rights in Rem.

The discovery of the Primary Right is the first essential in resorting to law. It is determined by recourse to substantive law, and when violated gives rise to a right to use the machinery of the adjective law for its redress. The two rights are clearly distinguishable and the distinction is sometimes important. A limit is placed upon the exercise of the right to resort to the processes provided by adjective law for redress of wrongs, and further, the law requires that the right shall be exercised only in such places as are provided may be,

The Primary Right.

There is a class of rights which do not need the sanction of the courts to render them legal. They may not be self-enforceable, they may need the compulsory process of the courts to compel recognition or enforcement, but they are from their inception antecedent legal rights. These are obligations resting upon contract. All such contracts as are executed in conformity to previously declared law, either statutory or judicially made, may properly be considered as giving rise to legal rights. And if there be a breach the courts simply lend the force of the government to their enforcement. All contracts falling within the operation of the statute of frauds, all negotiable instruments fall within this class.

When a contract is executed in conformity to law, and is not tainted with illegality, and a controversy arises, the court merely enforces its terms in favor of one party or the other. The law presumes the validity of such contracts.

Immediately upon the formation of such contract legal rights arise. In case of a breach on the part of one of the parties, a new right arises in favor of the other to enforce his right in the courts of law.

Rights are also discussed by jurisprudents under the head of "Obligations."

Obligations.

In Roman law are found, "Obligationes ex contractu" and "quasi ex contractu" and "obligationes ex delicto" and "quasi ex delicto."

Professor Holland makes what he terms a radical distinction of rights into those existing or not existing antecedently to wrong-doing.

An obligation and hence a legal right arises either by the direct agreement of the parties, or they arise from facts to which the law affixes certain results and imposes certain duties. The latter may consist in contract obligations, or those ex delicto.

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XXIII.

LEGAL ETHICS.

POINTS OF PROFESSIONAL CONDUCT.

Professional Ethics—Introductory.

As a fitting sequel to the discussion of Jurisprudence, Law and Ethics, in the foregoing pages, the subject of Professional Ethics will now be briefly considered. The nature of law being such as I have outlined in the first part of these pages, it would seem not foreign to the discussion to consider the subject of professional conduct. Some claim that Professional Ethics is a matter of individual conscience. This is true to some extent, but there is to be found a general sentiment among lawyers as to what course of conduct should be pursued in respect to many matters coming within the range of the profession.

Ethics in its relation to law and lawyers should receive attention in Law Schools analogous to that given Ethics in the Arts College.

In the following lectures some points of professional conduct on the part of attorneys and counsellors in their relations to the court, to their clients, and to the public, will be considered.

Qualities that Make an Ideal Lawyer.

Having considered the principles of Ethics in relation to Law, and shown what relation they bear to each other, attention will next be directed to the qualities that seem essential to constitute an ideal lawyer. By reason of the nature of the subject with which lawyers must deal, the data of law being moral principles as we have seen, it follows that no vocation or calling de-

mands men possessed of greater moral stamina than does the legal profession.

There are two points to be observed in the consideration of the characteristics and qualifications of the ideal lawyer, which are as follows:

First, His duty as a student and scholar in performing his part in the important work of the Interpretation of the Law.

The *Second*, Relates to his duties in his intercourse with society, with his clients, with the profession of which he is a member, as well as the duty which he owes as an officer of the court.

Directing attention to his duty in the matter of

Duty of Lawyers in Interpretation of Law.

the Interpretation of Law, too much stress cannot be laid upon the necessity of making a careful study of the science of Ethics and Jurisprudence. It is from these two sciences that he must draw the correct principles to be applied in the solution of practical problems. Having uppermost in his mind the truth that Morality should be the basis of law, it is plain that his duty lies in the direction of ascertaining and developing the moral precept, which should have controlled the acts of men, and which is to be adopted and followed by the court in deciding controversies.

Can it not truly be said that lawyers too frequently do not keep this in mind and do not always realize the importance of their mission in the matter of the interpretation of law?

An evenly balanced and well educated lawyer, in nearly all instances, by a careful consideration and study of the facts in the particular transaction, by resort to sound reasoning and logic, and by the application of certain fundamentals of the law, can arrive at a just conclusion respecting the rights of parties without resort to the books. When he con-

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As Justice Sharswood says: "The party has a right to have his case decided upon the law and the evidence, and to have every view presented to the minds of the judge, which can legitimately bear upon the question. This is the office which the advocate performs. He is not morally responsible for the act of the party in maintaining an unjust cause, nor for the error of the court, if they fall into error, in deciding it in his favor. The court or jury ought certainly to hear and weigh both sides; and the office of the counsel is to assist them by doing that, which the client in person, from want of learning, experience, and address, is unable to do in a proper manner." (Sharswood, Ethics, 83.)

Mr. Warvelle, in answering this charge, states that "as a matter of fact, in the great majority of litigated cases, even after a careful hearing of both sides, it is difficult to say on which side the legal right lies. Yet these self-appointed censors continue to upbraid the lawyers because they refuse to usurp the functions of the judge and decide in advance, upon *ex parte* testimony, who has the right of the cause. This is not the office of the advocate. His function is not to make decisions but to provide materials from which others may make decisions." (Warvelle, Ethics, 27.)

It is almost an impossible task to demonstrate the unsoundness of this claim to those who make it, because of their lack of knowledge of law, some knowledge being essential to enable one to properly appreciate the matter.

The claim is refuted on the part of some by the argument that "the lawyer, who refuses his professional assistance because in his judgment the case is unjust and indefensible, usurps the functions of both judge and jury."

Such an argument will answer very well in some cases but not in others. In cases where it is perfectly clear beyond dispute, either upon the facts or the law, that the client's cause is unjust, or in the wrong, then the lawyer should decline service. But in cases where there is reason for doubt, so far as the law is concerned, although counsel's opinion thereon may be rather against his clients, still he may be in the wrong, and there is no impropriety in his accepting employment and in presenting the cause.

Again, the law may be against the client upon one proposition, and upon some other phase of the case, be with him. "Every case must, to a great degree, depend upon its own circumstances; . . . and it will often be hazardous to condemn either client or counsel upon what appears only. A hard plea—a sharp point—may subserve what is at bottom an honest claim, or just defence." (Sharswood, Ethics, 89.)

Lawyers Must Have Proper Conception of Moral Duties.

It at once becomes apparent how necessary it is for lawyers to be so trained as to have a keen perception of the moral duties of life, and be able to clearly distinguish between right and wrong, as their duties lie chiefly in ascertaining and maintaining the right, and in preventing the wrong. If one is unable by reason of previous condition and education to form proper conceptions of the duties which men owe each other, and has not the moral courage to insist upon a performance of them, he had better not enter the Law. For of all professions that need pure, upright and honest men, it is the legal profession. There is no calling in which so many temptations beset the path to swerve one from the strict line of integrity, and in which so many delicate and difficult questions of duty are continually arising. A high-toned morality

is just as imperatively necessary in the profession of the law, as it is in that of the ministry; the moral courage of the lawyer must be of a substantial nature, because of the many temptations that are thrown in his way. Not only does the lawyer need to have this moral courage to keep his own soul clear, but for a still greater reason. A lawyer without principle, without conscience, and without morality is a dangerous citizen, and should not be intrusted with the important duties involved in the administration of justice. For the welfare of the general public, therefore, the lawyer should be a pure, upright and honest man.

A lawyer who is conscientious and understands the full measure of his duties, will not advise a client to take steps to cheat or defraud. It will be acknowledged that lawyers sometimes do things wholly at variance with principles of right and justice. But why? Because there is a lack of training before and after they have commenced the study of law. In the early stage of legal education, young men should be urged not to neglect their moral, legal training; they should always bear in mind that a high-toned moral character is an essential part of their legal education. We should have men at the bar who are pure; men of strong moral character, who cannot be swayed in their determination in right doing. We not only must have lawyers with these qualities, but we must select judges possessing the same qualifications.

Justice is the goal sought in all legal disputes. Justice is said to be the general dictate or result of the proper and well-balanced action of all the affections. Justice in action is rendering to each one his dues according to a standard determined by his character, his needs, and our power and relations to him.

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Students of law while in the pursuit of their studies lay the foundation for the reputation which they are thereafter to achieve, and should not neglect the moral side of their character. The position which the student is to assume as a member of the bar, may largely depend upon the nucleus which is formed in his student days.

Honesty and Straightforwardness.

No one can expect to succeed in any calling unless he is strictly honest in all his dealings with men. This is true especially of the legal profession. In the language of a distinguished jurist: "The law is not, as supposed by many ignorant people, a mere system of tricks and devices by which cunning succeeds, and an ability to use forms of the law prevails over honesty and justice, but it is a system devised and perfected by the wisdom of ages for the enforcement of rights and the attainment of justice." If a lawyer is not honest his clients will readily discover it and he will lose them. A dishonest lawyer cannot have the same standing or influence with the courts as will an honest one, and hence cannot have the same success in winning cases. "It (the law) is not perfect and cannot be so long as judges and juries are human, but it is the best and nearest perfect that civilized man has been able to create. In its practice and administration there is not, and never has been, anything as *cunning as straightforward truthfulness and honesty*. To one who aims at success, it is the very *essence of wisdom to adopt truthful and straightforward methods*, and they will, as they generally have, defeat cunning and falsehood."

There are unworthy members in the profession as there are in all others, but they are despised by the court and by their brethren, and only in rare instances are successful in gaining even a pecuniary

reward. Such a character and such a reputation will only attract rascals and violators of public law, who seldom have any means.

"The shortest road from the beginning of practice to complete success is the direct and straightforward one." [1]

Rules of Morality for Lawyers and Laity.

Under this topic reference is made to the familiar statement that: "The character of the bar is but a reflex of the character of the community. The lawyer is pretty much what the laity makes him." (Warvelle on Ethics, 34.) "An unscrupulous bar could not exist in a high-minded community; and if anywhere a corrupt legal profession is to be found it is to be found in the midst of a corrupt and corrupting people." (*Id.*; Commrs. Rept. N. Y. Code Civ. Pro. § 511.) We earnestly dissent from such expressions; such admissions should not come from lawyers. They are *leaders* of men, not followers. They are or should be thoroughly educated in the science of Ethics and Jurisprudence, and should be so well grounded in sound morals as not to lend their services to any cause that is not just. It is not only their duty to advise what should be done, but to insist that, if it is not done, they shall not be parties to the transaction. These principles should be bred in lawyers during the acquirement of their education. And in this twentieth century it is believed that the lawyers of the better class are controlled by these principles. There may be some weak ones who will yield to the temptations set before them by their clients, but they are in the minority.

Seeking Business.

It has long been the prevailing sentiment among lawyers that personal solicitation of business is in violation of the professional

[1] Judge J. H. Courtright, of Supreme Court of Illinois, to class of Dixon College of Law.

code of ethics. This rule came about by reason of the distinction formerly observed between "Attorneys" and "Barristers." The latter were to be sought only because of their learning and skill, it being undignified to seek employment in any manner. This feature of the code of ethics still clings to the profession, it being considered that the lawyer can do no more than to announce to the public that he holds himself out as a practitioner, by publication of a professional card in a newspaper. But this method is not followed or favored to great extent.

Mr. Warvelle takes a sensible view of the matter as follows:

"If we are to regard the profession of law as a legitimate means of livelihood and not as a mere honorary occupation, then it should be governed, in the main, by the same rules and subjected to the same tests that are applied to other honorable callings, and, if this be true, there can be no well grounded reasons for denying to the lawyer the same opportunities for acquiring practice as are offered to men in other walks of life. Nor is there any impropriety in a respectful solicitation of business from friends and acquaintances, or even from the general public." (Warvelle on Ethics, 55.)

Right of Attorney to Advertise.

"The ethics of the legal profession forbid that an attorney should advertise his talents or his skill as a shopkeeper advertises his wares." To encourage, by advertisement, divorce litigation is considered most reprehensible, because the marriage relation is too sacred; an advertisement by an attorney is calculated to encourage people to make application for divorces who might otherwise have refrained from so doing. An advertisement that divorces may be legally obtained very quietly, good everywhere, is against good morals, a false representa-

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sometimes interposed with full knowledge of its groundlessness, and with the expectation that it will be overruled, and for the purpose only of delay and to annoy the adversary. After this a general denial, without verification, may then be filed, which will require a motion to be made to strike it from the files. Such a step is improper because a general denial is a pleading of fact, requiring verification, and it is tantamount to saying that all that the plaintiff has stated is not true.

Again for counsel to delay the prosecution of a cause at the request of counsel for his adversary, if the delay be seriously prejudicial, is clearly improper.

It is said that the lawyer may assist in giving a high tone to public sentiment in the matter of the exemption laws; that he should not assist a debtor with ample means to pay, to harass and worry a creditor; that he should advise the client to give all that he can to his creditor, whether the creditor can force him to do so or not. That principle of ethics is seldom carried into practice, nor do many follow the doctrines of our Saviour when he said, in his sermon on the mount, undoubtedly referring to exemption law: "And if any man will sue thee at the law and take away thy coat, let him take thy cloak also."

Exemption Laws.

Our exemption laws are founded upon principles of public policy, not so much in the interest of him in whose favor the exemption is made, as in the interest of the public welfare and good government that its citizens should not be stripped of their last dollar, and thrown upon the mercy of public charity. It is better that a creditor should lose something rather than to throw a poor man with a family out in the cold. The lawyer should guard the exemption rights of the citizen. (Sharswood, Leg. Ethics.)

Should a lawyer by any act, word, or by any tacit acquiescence in any way counsel, aid, consent, or be a party to a fraudulent conveyance? This self-proposed interrogatory is readily answered by saying that the lawyer is violating his professional obligation by assisting in the execution of a fraudulent conveyance or in covering up property by a debtor from his creditors. The manner in which property may be conveyed fraudulently, or in which property may be secreted or covered so as to prevent creditors reaching it is as varied in its forms as the ingenuity of man may devise. It is well understood that courts, and especially courts of equity, do not undertake to define fraud because of the fact that if a definition were formulated, it could not be comprehensive enough to cover the innumerable phases of fraudulent acts. It will be well to bear in mind just what a fraudulent conveyance is so as to determine the duty of counsel with respect to transactions falling within the term. A fraudulent conveyance, such as is condemned by law, means one which is made by a debtor for the express purpose of cheating or defrauding a creditor, without valuable or adequate consideration, and sometimes even with consideration, and sometimes even as a proper consideration, to a grantee or other person who has knowledge of the fraudulent intent and purpose of the person making the conveyance or committing the fraud. In such a transaction the two minds of vendor and vendee, so called, meet in a common fraudulent purpose, and, therefore, the fraud entirely vitiates the transaction. But if the grantor or vendor of property, real or personal, sells property for an inadequate consideration, solely and expressly for the purpose of placing it beyond the reach of creditors, without any knowledge on the part of the grantee or vendee that

Fraudulent Conveyances.

such is his purpose, then there is no fraudulent conveyance, but on the contrary the grantee or vendee is an innocent person, and even though he has purchased for an inadequate consideration he is protected as a *bona fide* purchaser, and cannot be made to suffer for the fraudulent intent of a grantor or vendee.

In respect to the duty of an attorney in either of the foregoing illustrations, it is perfectly plain that he should not in any wise countenance either transaction. It is just as much a violation of his ethical duty, to aid a grantor in an illegal purpose not communicated to the grantee, as it is to aid the grantor when the fraudulent purpose is within the knowledge of the grantee.

Sometimes it is desired by clients and parties interested in making assignments by insolvent persons, for the benefit of their creditors to hold out some of their property from the assignment, and it would be a violation of the duty of counsel if he in any wise participated in such transactions.

Defense of Persons Charged with Crime.

In considering the duty of the advocate with respect to the defense of persons charged with crime, quite a different problem is presented, than in the prosecution of such persons.

Every person charged with a crime is guaranteed by our constitutions a fair and impartial trial by a jury of his peers, and that though he be innocent or guilty. This is an ancient and time-honored principle. Blackstone said: "Let the circumstances against the prisoner be ever so atrocious, it is still the duty of the advocate to see that his client is convicted according to those rules and forms which the wisdom of the legislature have established as the best protection and security of the subject." Another English writer says: "From the moment that any

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One old English case will be related. A wealthy citizen stopped at a tavern in the country, accompanied by his manservant who was the driver of his coach, both of whom put up at the tavern. The wealthy Englishman met at this tavern two other gentlemen with whom he formed an acquaintance, and spent a very pleasant evening. Upon retiring, the two gentlemen and the Englishman occupied rooms adjoining each other. After all had retired and the house was perfectly quiet, the two gentlemen who occupied the room adjoining the Englishman, were aroused by a noise in the latter's room, and rushing into it, there found the proprietor of the tavern in his night clothes with a light in one hand and a very large butcher knife in the other, which was covered with blood, bending over the bed in which the Englishman, breathing his last, lay. Suspicion of course rested at once upon the proprietor, who was found with the knife in his hands, and nothing could be more conclusive than that he was the guilty man. The extreme moralist might say that a lawyer ought not to defend the tavern keeper because he could not help but believe him guilty, the circumstances being so conclusive. Yet the result of that case showed how dangerous it sometimes is to rest on suspicion and belief. It turned out that the tavern keeper was not the guilty man although he was hanged for the crime, protesting his innocence to the last. After the execution it was found that the Englishman's manservant or coach-driver was the one who committed the murder, and had escaped from the room before anyone came in; that the tavern keeper was alarmed at hearing the groans of the dying man, and grabbing a lamp, and the only weapon of defense which he could find, viz., the butcher knife, rushed into the room, and here he was standing in amaze-

ment over the dying man, in his excitement, having dropped the knife upon the bed, which became covered with blood. The real murderer, the coachman, confessed upon his deathbed.

Another case may be given a passing notice; one which occupied much attention of the American and English worlds, namely, that of Mrs. Maybrick, convicted of the murder of her husband many years ago. Americans have justly censured English justice for what they believe to have been the wrongful conviction of one of our American subjects. A beautiful, cultured, highly connected lady was convicted of being the murderess of her husband, upon the most dangerous, conflicting and uncertain evidence. English authorities finally had sufficient courage to commute her death sentence to life imprisonment, and after many years of imprisonment finally granted absolute pardon. She was, however, almost tortured to death by solitary confinement for a crime, the conviction of which seemed unwarranted by the evidence, and to have been brought about by the tyranny of an English judge, who was in his dotage and really mentally unbalanced, and under our American form of government could not have occupied such a position. The judge was seized with a frenzy because he thought this American woman had been untrue to her marriage vows, and delivered such a charge as to convince the jury that they should find her guilty. Those who have ever given this matter any attention will remember that it was claimed that Mrs. Maybrick's husband died from the effects of arsenic. The verdict of guilty could not be sustained on any other ground. The suspicion of Mrs. Maybrick's complicity consisted of the fact that arsenic had been found in his body, that arsenic was found in his medicine, in his victuals, and it was supposed that she had poisoned

him. Such circumstances necessarily militated against her. Yet a lawyer should not hesitate upon such evidence. It turned out in her trial that the medical experts could not by a careful toxicological study of the case determine whether the death was caused by the arsenic; it was also shown that Maybrick lived on arsenic, that he had it everywhere,—in his pockets, in his house, in capsules, powders and solutions, and it was not shown in the trial that Mrs. Maybrick ever anywhere procured any arsenic. Upon such evidence it was unreasonable to render a verdict against Mrs. Maybrick unless it rested solely upon suspicion. Yet the verdict was guilty, and this once beautiful American lady, who was related to a Chief Justice of the United States, and to other prominent American people, remained for years in a solitary English prison cell for a crime the evidence of which did not prove her guilty; and this in spite of the request of the United States Government through our President, as well as petitions from many prominent American and English citizens; and in spite of the further fact that some villain had written a confession that he, aided by the servants of the house, put the arsenic in the medicine and the victuals as spite work against Mrs. Maybrick. Surely this was a travesty upon justice!

These two instances have been mentioned merely to illustrate how dangerous it sometimes is for a prominent lawyer to refuse to defend a prisoner, thus assuming the functions of judge and jury, and prejudicing the interests of the prisoner.

Another and more striking illustration of the duty of the lawyer to defend a prisoner at the bar, is the case of Czolgoz, the assassin of our late beloved President, William McKinley. This was one of the most uncalled for, heartrending, cruel murders recorded

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ferred against him. Nothing could be more pernicious or misleading. . . . What his belief may be is wholly immaterial, and while it is true that he may, under certain circumstances, enter a *nolle prosequi*, yet this is done, not because of his belief in the innocence of the accused, but as a measure of public policy and for the purpose of saving the public money, in cases where it becomes evident that the accused cannot be convicted." (Warvelle, Ethics, 141.)

On the other hand, it would seem to be a reasonable conclusion that where the prosecutor, upon investigation and from the available testimony, becomes satisfied that a conviction could not be secured, it is proper and commendable to so report to the court, and dismiss the charges.

Improper Resort to Extraordinary or Auxiliary Processes.

The effect of the extraordinary processes of the courts, improperly resorted to, are frequently disastrous to the rights of parties in interest. Among such are temporary injunctions, receiverships and attachment proceedings. Lawyers know what these are for and when they should be used, and to misuse them is unprofessional. A lawyer should not permit a client to stultify his conscience and to sue out a writ of attachment without just ground. Nor should he pursue the remedy of injunction and receivership without justifiable grounds, and when necessary to protect and preserve the rights of his clients. In such matters he should be fair with the court, laying before it all the facts fully and fairly, because he knows it to be a delicate duty for the court to change the custody of property or a business from its owner to that of the law.

A Lawyer's Duty in Development of the Testimony.

Rules for the development of the testimony are the best devices which our government has been able to create for the development of truth and to contribute to the due adminis-

tration of justice. They are placed at the disposal of the lawyer to be honestly and conscientiously used for the purposes for which they were intended. The fact has been previously noted that the American rules of evidence have been greatly improved as compared with the old common-law rules. These improvements have all been in the interest of justice; and a lawyer as a minister of justice, and as an officer of the court, should not abuse or misuse them, merely for the sake of gain to his client. If he does he is not performing his ethical obligation to the court, which can have no respect for the lawyer who willfully violates the rules of evidence. These observations apply to all parts of the examination of witnesses, improperly propounding leading questions, offering incompetent testimony, asking improper questions accompanied by an argument intended for its effect upon the jury, and the like.

Leading Questions on Direct Examination.

The purpose of excluding leading questions upon direct examination was no doubt intended in its inception to facilitate the development of truth. The existence of the rule, together with its purpose, reflects in a measure upon the professional integrity of the profession, and resembles many times in its strict application, by the unrelenting discretion of the judge, the arbitrary Canterbury rules.

The rule proceeds upon the theory that a shrewd lawyer by resorting to leading questions would be able to develop his case by leading his witnesses at his will, the result of which would be to distort the facts. No fault is found with the rule in its general operation, because in the main, it does more naturally develop the facts as they are. It would seem that the discretion of the court should be more laxative in cases where it appears difficult to extract the truth

from a poor witness by permitting the use of direct leading questions. On the other hand, it cannot be too strongly insisted upon that the examiner adhere to the rule of not leading his witness when it is unnecessary.

The Purpose of Cross-Examination.

There is no more efficacious rule of evidence than that relating to cross-examination. Its design is the development of truth. It is a powerful weapon in the cause of justice when fairly and properly used, a dangerous one when improperly used. It militates against the one who abuses it.

Development of Cause in the Testimony. Concealment of Material Matters by Either Side.

Much has been said by the moralist in respect to the concealment by either party to a lawsuit of facts material to the controversy, and which if not concealed would materially aid court or jury in arriving at the truth. It is claimed that such a concealment is as much a violation of the oath as a deliberate false statement; the oath is to tell the "whole truth," hence nothing should be concealed.[1] Mr. Warvelle in his "Ethics" considers this as "visionary and fanciful theories of the moralists," and states that it is rejected in legal practice, going so far as to state that in the manipulation of the formula for the production of testimony, "one of the delicate arts of the advocate, in the employment of such formula, is to present only those matters which tend to promote his cause and to suppress those which militate against it, and the examination of witnesses is conducted with this end in view. While the duty of counsel, in examining a witness, certainly is to elicit the truth, and nothing but the truth, yet only so much of it as, in his judgment, may be calculated to benefit the cause

[1] Mr. Warvelle, (Ethics) sec. 169, cites on this point, Paley, Moral Philosophy, b. iii, c. 17; Champlin, Ethics, 111; Wayland, Moral Science, 304.

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XXIV.

LEGAL ETHICS.

(*Continued.*)

THE BENCH AND BAR, AND THEIR RELATIONS.

The Office of Judge.

THERE is no more responsible or dignified position within the gift of the government than that of Judge of our Courts. It is, however, unfortunate that it is open to public scramble and party machination. It is likewise a misfortune that the salary is not such, generally, as to foster the ambitions of the best men. In the more populous localities where larger incomes are possible among lawyers, the best qualified men do not always seek the office. Although the men selected to occupy the bench may not always be the best qualified at the time of their election, because of lack of previous experience, they are generally good men, capable of rapid advancement. The Bench is entitled to the best work at the hands of the lawyers; the preparation should be so thorough as to lay before the court all the facts and the law necessary to enable the court to arrive at a correct conclusion.

Duty of Lawyer to Court.

It is the duty of a lawyer to use the utmost good faith and fidelity to the court. This he should do for two reasons. One because his position as an officer of the court demands it, and the other is that by observing this duty he is advancing his personal welfare, as no one can suc-

cessfully practice before the courts unless he has the personal respect and confidence of the judges. Counsel should carefully study the law of the case so as to fairly present it to the court; he should acquire the reputation of always making careful research into the law so as to gain the respect and confidence of the court; he should make no misstatements of fact or law, nor practice any deception upon, nor ever fail to keep his word with the court. If he acquires the reputation of having the respect and confidence of courts and his professional brethren, his success at the bar will be assured. An attorney should never take undue advantage of the court in social or friendly intercourse.

Criticising Judges.

It does not matter what personal opinion an attorney may entertain of a judge on the bench, as to his abilities, traits, character, or other matters; it is, nevertheless, his duty in all intercourse with him on or off the bench to show great respect for the office of judge, not out of consideration for the personality of the court, but solely of the office. It is never becoming of lawyers to find fault with or criticise the opinions and views and acts of judges upon the bench, because the propriety of the office of the judge prevents him from defending himself against any strictures upon his official conduct. And it is a great deal better when you cannot say anything good of a man, not to say anything at all. Any criticism made by the bar upon courts will tend to impair public confidence in the administration of justice, and attorneys, therefore, should refrain from publishing criticism of judicial conduct, especially in reference to cases in which they have been of counsel, or when the conduct of a judge is necessarily involved.

Sharswood, C. J., in *Ex parte* Steinman, 95 Pa. St. 220, said:

"No class of the community ought to be allowed freer scope in the expression of opinion as to the capacity, impartiality or integrity of judges than members of the bar. They have the best opportunities of observing and forming a correct judgment, and to say that an attorney can only act or speak on this subject under liability to be called to account by the very judges whom he may consider it his duty to attack and expose, is a proposition too monstrous to be entertained for a moment under our present system."

As it is the province of attorneys to aid in the interpretation of the law, they may always criticise the opinions of judges.

The Alabama and Virginia Code of Ethics provides:

"Courts and judicial officers, in the rightful exercise of their functions, should always receive the support and countenance of attorneys against unjust criticism and popular clamor; and it is an attorney's duty to give his moral support in all proper ways, and particularly by setting a good example in his own person, of obedience to law."

Candor and Fairness with Courts.

"The utmost candor and fairness should characterize the dealings with the courts and with each other. Knowingly citing an overruled case, or treating a repealed statute as in existence—knowingly misstating the contents of a paper, the testimony of a witness, or the language or argument of opposite counsel—offering evidence which it is known the court must reject as illegal, to get it before the jury, under guise of alleging its admissibility—and all kindred practices—are deceits and evasions unworthy of attorneys." (Alabama and Virginia Code of Ethics.)

The citizens must respect the dignity of courts, but members of the legal profession owe a special

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Decorum of Counsel in Court.

Passion and wisdom are not good companions in the life of a lawyer, particularly while engaged in court. Passion clouds the reason, and is in nearly all instances the cause of lawsuits. It being the province of lawyers to demonstrate the truth and right involved in controversies which have arisen out of the passion and disagreement of the parties, they cannot share in the feelings of passion and prejudice of their clients, and expect the best results. True they must be in thorough sympathy with the cause of the client, stand in his shoes and maintain his rights, but it his duty to view with discriminating care the conduct and feelings of the client. "It is only their legal rights and wrongs which concern the lawyer, and not their friendships and animosities."

"A good temper is an inestimable advantage to a lawyer, old or young; and whatever his position it will carry him, with comfort and rapidity, over all obstructions, to the end of his journey; it will lengthen his life, as well as make it happy. A *bad* one will strew his way throughout with thorns, and convert every one with whom he has to deal into an enemy, and himself, in short into his greatest."

Mr. Warren (Law Studies) relates an instance where he heard a judge in open court utter a severe and petulant sarcasm against a popular counsel. The latter, however, ready as he was, uttered not a word in reply, but fixed upon the judge, for a moment, a steadfast, unwavering look, "a cold, rebukeful eye," and then calmly proceeded with his argument, as if he had not been interrupted. He,—the judge—the whole court, felt where the triumph was.

In making an argument to court or jury it should be remembered that an ordinary conversational tone is more forceful than a sonorous voice. The lawyer

is there to convince the court or jury of the justness of his cause, and if he becomes excited and wrought up to such a degree as to present his argument in an impassioned manner, it loses its weight.

Private Interviews with Judges.

Unfortunately, the view prevails among some (and occasionally clients are found who believe) that it is proper to make statements concerning cases privately to judges, or to exert private influences upon them. No more vicious practice than this could be adopted, and it is the duty of counsel, not only not to engage in it himself, but to discourage it upon the part of clients.

If, however, the subject of a case is broached by a judge it is different. A judge of strong character, may engage in private conversation with counsel about pending matters without danger.

XXV.

LEGAL ETHICS.

(*Continued.*)

RELATION TO CLIENT.

MUCH may be said, from an ethical standpoint, with respect to the relation existing between attorney and client. There are many important and interesting questions pertaining to this topic, some of which will be briefly considered.

Formation of the Relation.

First, the relation must be formed in a legal way, which may be done by an oral or written contract. The old English method of a written contract, stipulating the retainer, the compensation, the powers and duties, is preferable, when possible; but this is not frequent with us.

The payment of a retainer is not essential (though desirable) to the creation of the relation, but it may be inferred from acts. (Lawall v. Groman, 180 Pa. St. 532; 57 Am. St. 662; 75 Hun, 188.)

Whenever the nature of the work permits it to be done, it is always better to have a definite understanding of the amount of the attorney's fees. There are, it must be conceded, many instances where this cannot be done, because the nature of the work is such that it cannot be determined in advance how much the service will be worth. In such cases it must be conceded that if the client is willing to intrust the business with the lawyer, he should also be willing to trust him with the matter of fixing the fees proportionate to the work done.

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sonably and fairly necessary in the preparation for, and in the trial of, all cases committed to him. It must always be remembered that the client and not the attorney is the litigant. The latter may so conduct himself during a trial, or in the transaction of the business, that in the end, the same feeling may exist between attorney and adversary after as before the trial, or other business. The client cannot expect a right-minded and reputable lawyer, to make the prejudices and ill feelings of the former, his own. To do so detracts from the power and ability of the attorney in the conduct of a cause. Ill temper, prejudice and bias, are not the strong weapons of a lawyer.

In the preparation of the law an attorney is expected to exercise ordinary skill, care and diligence. "There is no business in the world that so requires the exercise of intellectual honesty as the practice of the law." And this applies particularly to the examination and determination of the law of a case. Anxiety to make a case for a client, or to protect his interest, must not warp the opinion upon legal propositions. The client should be fairly and candidly advised of all doubtful or weak points in his case, and in many cases should be made to assume the responsibility of action after being fully advised in the premises.

Attorney the Keeper of the Conscience of his Client.

An attorney, it is said, is the keeper of the conscience of his client. It might be a hard task in many instances to impose this duty on counsel. But what is meant by this statement is, that the lawyer must carefully guard and protect his client, by keeping him in the path of rectitude, where lack of knowledge sometimes might lead him into difficulty.

Counsel should especially be careful as to what oaths his client takes, lest he be guilty of violating

the sanctity thereof. Counsel should never allow an affidavit to be made without full knowledge and acquiescence on the part of the client. If the client should do things shocking to the conscience, such as making misstatements, or insist on doing unjust things, counsel should reprimand him.[1]

Professional Skill to be Exercised within Limits of Morality.

A lawyer is not required to throw the influence of his personal reputation or opinion into a cause; all that he sells to his client is professional skill, and that can only be exercised within the limits of strict morality. "To raise and purify the character of the profession, so that it may answer the ends of justice without requiring insincerity in the advocate, is a proper aim for a good man who is a lawyer; a purpose on which he may well and worthily employ his efforts and influence." (1 Whewell's Elements of Morality, 259.)

Whatever the employment may be, counsel does not give up, nor does he yield, any of the qualities that go to make an honest, conscientious good man; but on the contrary these qualities must always be exerted to influence his client to do what is right and just, according to the ruling moral principle in the particular case. If the will power and moral stamina of the lawyer is not adequate to accomplish such a result, then he has mistaken his calling. If the lawyer is possessed of these qualities, and his client does not accede to the suggestions, and will not be influenced

[1] "You will have hard work at the trial to keep some of your clients from lying, but it is essential to do this, if possible. It is very seldom that a falsehood is successful. Even a prevarication in some unimportant or collateral matter will destroy the confidence of the jury in your witness. If there is any fact which is against your client which will come out upon the trial, he had better state it with his explanations. It will be safer for him to do it than to have it come from the other side. You will find that the jury represent the average feeling and impulses of the community and will be inclined to forgive a lapse of judgment or error where there has been no wrongful intention."

thereby, and be governed accordingly, then the relation of attorney and client should cease. It is said, however, that counsel cannot retire from a case without the consent of his client or the approbation of the court.[1]

Right of Counsel to Abandon Cause.

That an attorney may for good cause and upon reasonable notice to his client, abandon a cause or terminate the employment, will hardly be questioned but on the contrary is well supported.[2]

What will be a sufficient cause to justify an attorney in abandoning a case in which he has been retained has not been laid down in any general rule, and cannot be. Refusal to advance money to pay the expenses of litigation, or even if he unreasonably refuses to advance money during the progress of a long litigation to his attorney to apply upon his compensation has been held sufficient cause for abandonment. (*Id.*)

This right is denied in other cases, it being considered that an abandonment of a cause merely because a client refuses to pay a fee, is an act of bad faith, where the act of abandonment is confessedly inspired by malevolence and hostility to his client or to his cause, the effect of which is necessarily injurious to the cause intrusted to him.[3]

In an argument in People v. Pickler, 186 Ill. 64, made in the name of the District Attorney of Chicago, but which was in fact made by Frank Asbury Johnson and others, of the same place, members of the Chicago Bar Association, it was said:

[1] Sharswood, 84, 85, citing Love v. Hall, 3 Yerger, 408; United States v. Curry, 6 Howard [U. S.], 106.

[2] Tenney v. Berger, 93 N. Y. 524; 45 Am. Rep. 263, citing quite a number of cases.

[3] Nichells v. Nichells, 5 N. Dak. 125; 57 Am. St. Rep. 540; Howe v. Lawrence, 22 N. J. L. 99; Ohlquest v. Farwell, 71 Iowa, 231; Haverty v. Id., 35 Kan. 438; Simpkins v. Id., 14 Mont. 386, 43 Am. St. Rep. 641.

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to conduct an action impliedly stipulates to carry it to its termination, and is not at liberty to abandon it without reasonable cause and reasonable notice.' If he discovers upon the trial facts or law which lead him to believe that his client has no meritorious defense, there can be little question that it is his duty to stand by his client, and present his defense fairly to the court, as he may be mistaken as to the facts and the law, and it is the province of the court, or the court and jury, to determine both; but if he should become convinced before trial, and early in the case, that his client has no meritorious defense, is it not his duty, both to the court and his client, not to abandon, but to withdraw from the case, and permit another attorney, who may have a different view, to be substituted? There are, however, many circumstances under which an attorney is justified in the 'abandonment' of a case or defense. The same author, in the same section, states: 'Any conduct on the part of the client, during the progress of the litigation, which would lead to humiliate the attorney, such as attempting to sustain his case by the subornation of witnesses, or by any other unjustifiable means, would furnish sufficient cause to justify the attorney in abandoning the case.'

"A vast burden of labor is imposed upon the courts, and of expense upon the public. They were instituted by lawyers, and are being defended by lawyers, and trials will demonstrate that a large per cent. of these cases should not have been instituted, or should not have been defended, certainly to a point beyond the trial court. Lawyers first pass judgment upon the merits of a case or defense, and it is believed that the courts and public have a right to demand that, in arriving at that judgment, they shall exercise great care and diligence in ascertaining the facts, and the

law applicable to those facts, and act only in the line of their best judgment, so formed."

Duty as to Supporting Bad Cause.

The argument just referred to presents a very important problem to the practical lawyer, and there is much merit in it. It is fundamental that a lawyer should carefully consider the merits of the claim, and that he should only resort to the process of the courts, when he is well satisfied that recovery may be had. It has been said of Sir Matthew Hale: "If he saw a cause was unjust, he for a great while would not meddle further in it, but to give his advice that *it was so;* if the parties after that would go on, they were to seek another counsellor, for he would assist none in acts of injustice; if he found the cause doubtful or weak in point of law, he always advised his clients to agree their business, yet afterwards he abated much of the scrupulosity he had about causes that appeared at first unjust, upon this occasion." (Sharswood's Ethics, 88.)

Each case must depend upon its own peculiar circumstances, and the good judgment of counsel.

Professional Secrets.

As has been stated the secrets which an attorney acquires by virtue of the relation must be sacredly kept. His professional integrity will prevent his talking about them, he cannot be compelled to testify to them without the consent of his client, and he cannot be employed by the adverse party, and make use of information thus obtained. The law secures the client the privilege of objecting at all times and forever to an attorney disclosing information in a cause confidentially given while the relation exists.[1]

[1] Weidekind v. Tuolumne Water Co., 74 Cal. 386; 5 Am. St. Rep. 445; *In re* Cowdery, 69 Cal. 50; 58 Am. St. Rep. 545. "Under no circumstances are you to reveal the confidences of your client without his consent. They are his secrets not yours; and should be regarded as the revelations at the

A court has power to summarily dismiss a lawyer from a case at the trial thereof, where it appears that he at one time had acted as counsel for the opposite party in the same cause.

Counsel should be careful to scrutinize the different interests of parties, and should never undertake to represent parties where there is the slightest conflict between them.

Representing Conflicting Interests.

It would be the grossest misconduct to undertake to represent conflicting interests for the purpose of taking advantage of the situation.

But while it is generally true that adverse interests of parties should not be represented by one attorney, this does not prevent the same counsel from amicably adjusting such interests where all the parties agree. The cases in which this may be done are exceptional, and are never entirely free from danger of conflicting duties. (Lawall v. Groman, 180 Pa. St. 532; 52 Am. St. Rep. 662.)

The true lawyer will regard legal process as the last resort to enforce his client's cause. No more important duty rests upon counsel than to effect a settlement whenever it can be done. Sometimes it may be best that parties should be urged to yield to some extent in order to compromise. This is nearly always the true spirit of compromise.

Compromise and Settlement.

It is no less the duty of counsel to endeavor to bring about a friendly feeling between the parties. "Legal rights can often be most happily secured and adjusted by a policy of conciliation."

Lawyers, as such, have no power of compromise and settlement.

confessional. This obligation exists not only while the relation of counsel and client continues, but after it ceases, and is to be carried inviolate to your grave."

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to your fellow member, when it does not prejudice your client.

In the argument of causes, either orally or in brief, counsel ought to speak respectfully of each other.

It is a notable fact that there is more good will, and good fellowship, more trust and confidence placed in each other among lawyers, than in some of the other professions. "The ordinary civilities should always be studiously observed, and, in every instance, the utmost courtesy consistent with duty should be extended to an honorable opponent." (Warvelle, Ethics, 195.)

One matter deserves special mention. It is universally conceded that a client has the right at any time to terminate the employment of an attorney. (Warvelle, Ethics, p. 202, citing 10 Wall. 483; 45 N. Y. Sup. Ct. 631; 24 Minn. 479.)

It may happen that in some instances the dismissal may be unjust, it may be upon grounds which are entirely unfounded. In such cases professional courtesy may demand that the former counsel should be consulted, so as to ascertain whether it is entirely agreeable.

During the progress of arguments in court counsel on the respective sides should be extremely courteous and genteel to each other, which will add dignity in the conduct of trials. There should be no interruptions of each other.

XXVII.

LEGAL ETHICS.

(*Continued.*)

COMPENSATION AND FEES.

THERE was a distinction in England between barristers and attorneys which made a consequent difference in their compensation. The fees of attorneys, who attended to legal business out of court, were regulated by statute, while this was not true of barristers, there being a sort of an honorary character attached to their fees. This theory marked a profession which belonged to the public, in the employment and remuneration of which no law interferes, but the citizen acts as he likes, *in foro conscientiæ*. (Seeley v. Crane, 3 Green [N. J.], 35.) For this reason a barrister could not sustain an action for his fees. This theory and rule was kept on the other side of the water, and yet the idea prevailed to a considerable extent and for a time, that an attorney should resort to law for his fees only in exceptional cases, but that he should rather suffer loss. This has long since been exploded, and the old theories are entirely disregarded. There is as much reason why an attorney should sue for his fees, as there is why persons in any other profession or calling should sue for services or claims.

Another practical question under this head relates to the right of an attorney to take a suit upon contingent fees with a stipulation that he shall pay the costs. This was not permissible in England because

of the common-law crimes of maintenance or champerty. In some states in this country statutes have been enacted which make maintenance in varying forms unlawful, while in other states the doctrine is hardly recognized by the courts, but in civil controversies champerty has been the subject of judicial inquiry in many instances. The courts claim that it is difficult to reconcile the strict law of maintenance and champerty with our ideas of the rights of property, and the right of the citizen to contract. Among the fundamental rights is the right to acquire, possess and dispose of property. The right of disposition necessarily inheres in the right of ownership, and a thing which is or may be the subject of an action—a chose in action—may be disposed of and contracted about as much as any other kind of property. The same conditions are not present now as when the rules of law with reference to maintenance and champerty were first formulated.

"It will be borne in mind that great scrutiny was given in England to the acts of counsellors and attorneys, because of the peculiar relation which the law placed those officers in with regard to their clients. The former were incapacitated to make any contract for compensation with the client, though he might accept a gratuity, while the latter might make such contract only as the law had made for him in fixing for every service a corresponding fee. A contract, therefore, between a counsellor or attorney, and his client, for a share of the thing in suit, would have been invalid on this ground, as well as others. No such strictness ever obtained here. Our laws have always recognized the right of either to compensation for his legal services, in a reasonable amount, either on a *quantum meruit*, or upon special contract." (Reece v. Kyle, 49 Ohio St. 475.)

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to advance funds in payment of costs and necessary incidental expenses. "Indeed, such advances by the attorney in the progress of litigation, is so common that to denounce the practice as improper would be to condemn the daily acts of the most honorable members of the profession." (Reece v. Kyle, 49 O. S. 475, 486; Stanton v. Embrey, 93 U. S. 548; Allard v. Lamirande, 29 Wis. 502. This is questioned in late decisions.)

Our criminal statutes are broad enough to cover all conduct on the part of attorneys deemed improper, and the courts would not hesitate to hold void any contract in violation of the spirit or letter of such statutes.

Legal services rendered by an attorney in the prosecution of a suit to judgment, constitute a valid consideration for the assignment of one half of such judgment, and the contract is held not champertous. (The P. C. C. & St. L. Ry. v. Valkert, 58 O. S. 362.)

Any contract made between attorney and client by which the latter yields control over his case, and yields his right to settle or discontinue the suit, is to be regarded as void. The law encourages the amicable adjustment of disputes; parties should be allowed to settle their differences without hindrance. Hence a contract between attorney and client under which the attorney agrees to prosecute a suit for a certain percentage of the amount recovered, and the client agrees not to enter any compromise of the claim unless such attorney is present and directs the settlement, is to be regarded as void as against public policy. (Davis v. Chase, 159 Ind. 242; 95 Am. St. Rep. 294; North Chicago St. R. R. Co. v. Ackley, 171 Ill. 100; Ellwood v. Wilson, 21 Iowa, 523.)

The right of a party to compromise his cause out of court, without the knowledge or consent of his

attorney, when he acts in good faith, and when the attorney has no lien, seems to be unquestioned. (Connor v. Boyd, 73 Ala. 385; Rowe v. Fogle, 88 Ky. 105.)

Clients may compromise and settle even when the attorney has a lien or interest in the cause if he is protected. (Davis v. Webber, 66 Ark. 190; 74 Am. St. Rep. 81.)

Courts ought not to permit a dismissal of an action upon a stipulation of the parties, without the knowledge or consent of the attorney, but the party, nevertheless, has the legal right to do so. (Cameron v. Boeger, 200 Ill. 84; 93 Am. St. Rep. 165.)

XXVIII.

LEGAL ETHICS.

(*Continued.*)

TENURE OF OFFICE OF ATTORNEY.

AN attorney at law is an officer of the court, and his office is for life or during good behavior. (Case of Austin, 5 Rawle, 191; 28 Am. Dec. 657.) It is essential to their independence that this should be so, and it is equally necessary that there should rest with the courts the power to enforce the faithful performance of duty by the removal of office.

Power of Removal.

It is said that "as a class, they are supposed to be, and in fact have always been, the vindicators of individual rights, and the fearless asserters of the principles of civil liberty; existing where alone they can exist, in a government not of parties of men, but of laws. On the other hand, to declare them irresponsible to any power but public opinion and their consciences, would be incompatible with free government. Individuals of the class may, and sometimes do, forfeit their professional franchise by abusing it, and a power to exact the forfeiture must be lodged somewhere. Such a power is indispensable to protect the court, the administration of justice, and themselves. Abuses must necessarily creep in; and having a deep stake in the character of their profession, they are vitally concerned in preventing it from being sullied by the misconduct of unworthy members of it. No class of the community is more dependent on its reputation

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ble, and grossly unprofessional, which justly brings reproach upon the honorable profession to which he belongs, he may be disbarred therefrom. When it appears upon full investigation, that an attorney has forfeited his good moral character, and has by his conduct shown himself unworthy of his office, it becomes the duty of the court to revoke the authority it gave him upon his admission. "It is a duty they owe themselves, the bar and the public, to see that a power which may be wielded for good or for evil is not entrusted to incompetent or dishonest hands." (Mills Case, 1 Mich. 395; People v. Keegan, 18 Colo. 237; 36 Am. St. Rep. 274.)

"The duties imposed upon members of the bar clothe them with important fiduciary responsibilities and make them amenable to obligations that other members of the community do not share. In no other calling should so strict an adherence to ethical and moral obligations be exacted, or so high a degree of accountability be enforced." (People v. Keegan, 18 Colo. 237; 36 Am. St. Rep. 274.)

The strict integrity of, and the faithful performance of responsible trusts by the lawyer, without any formal obligation taken by him, excepting the oath of his office that he will faithfully demean himself as an attorney and counsellor at law, and his honor as a man, is the pride of the legal profession.

A lawyer may have intrusted to him thousands of dollars of his clients, with no security other than his honor and integrity as a man, and the client feels as safe as though he had secured himself by the taking of a bond in double the amount. There is no class of persons trusted so much. And if it were possible to gather accurate statistics of losses sustained through the non-performance of trusts on the part of lawyers and those who either in official life, or in private em-

ployment, are required to give bonds as security for the performance of their duties, it would be found that the per cent. of losses sustained through the misconduct of lawyers, is far below that sustained by the faithlessness in the places where bonds are required.

We must understand what the scope and extent of the moral character which the lawyer is required to maintain to insure his continuance in his office.

This question has received very careful attention by the courts, and especially in England, and the generally accepted view there and in this country is that it is not necessary that the misconduct be connected with his professional duties. As one court states the rule: "It appears to me that to hold that the jurisdiction of the court to strike off the roll extends only to professional misconduct and neglect of duty as a solicitor, would be placing too narrow a limit upon that most salutary disciplinary power that the courts exercise over its officers. To my mind the question which the court in cases like this ought always to put to itself is this: Is the court, having regard to the circumstances brought before it, any longer justified in holding out the solicitor in question as a fit and proper person to be entrusted with the important duties and grave responsibilities which belong to a solicitor." (45 Am. St. Rep. 75.)

Must Infractions or Departure from the Standard of Moral Character Required be Connected With his Profession?

It is said by the Court of Appeals of Kentucky, that:

"It would be unjust to the profession, the purity and integrity of which it is the duty of all courts to preserve, and a disregard of the public welfare, to permit an attorney who has forfeited his right to public confidence to continue the practice of his profession." (Baker v. Com., 10 Bush. 592.)

It is not necessary that the act complained of should

be such as would subject an attorney to an indictment.

The nature of the immorality or dishonesty charged must be such as will seriously affect the public good. It would be carrying the doctrine too far to hold that an attorney must be free from every vice, and responsible for irregularities affecting, to some extent, his character, when the same do not affect his professional or personal character.

The court should entertain such charges as are in their nature gross, and unfit a person for an honest discharge of the high and responsible trust reposed in an attorney. (State v. McClaugherty, 33 W. Va. 250.)

As a general rule, a conviction of a felony or other infamous crime must be accepted as a sufficient cause for disbarment. (*In re* McCarthy, 42 Mich. 71.)

Misappropriation of funds, though not in the course of business of an attorney, is held good cause of disbarment. (73 Wis. 602.)

Appropriation of money collected for a client is held in Ohio cause for disbarment, the court saying that:

"The discharge of professional duties, demands great and unreserved confidence from the client, and the connection of the attorney with courts, and his access to papers, requires unsuspected integrity. Hence general honesty and fidelity to clients, is not only necessary to his success, but even to the performance of his duties. Other good qualities may be wanting in his character, and some vices may be present, but *these are the essential virtues of his calling*, no more to be dispensed with than courage in a soldier, or modesty in a woman. The statute regulating admission to the bar requires the court to be satisfied that the applicant possesses these qualities.

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