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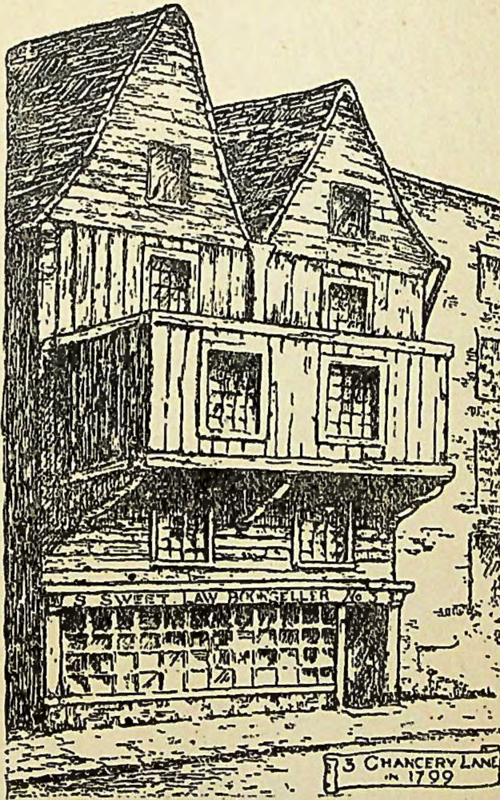

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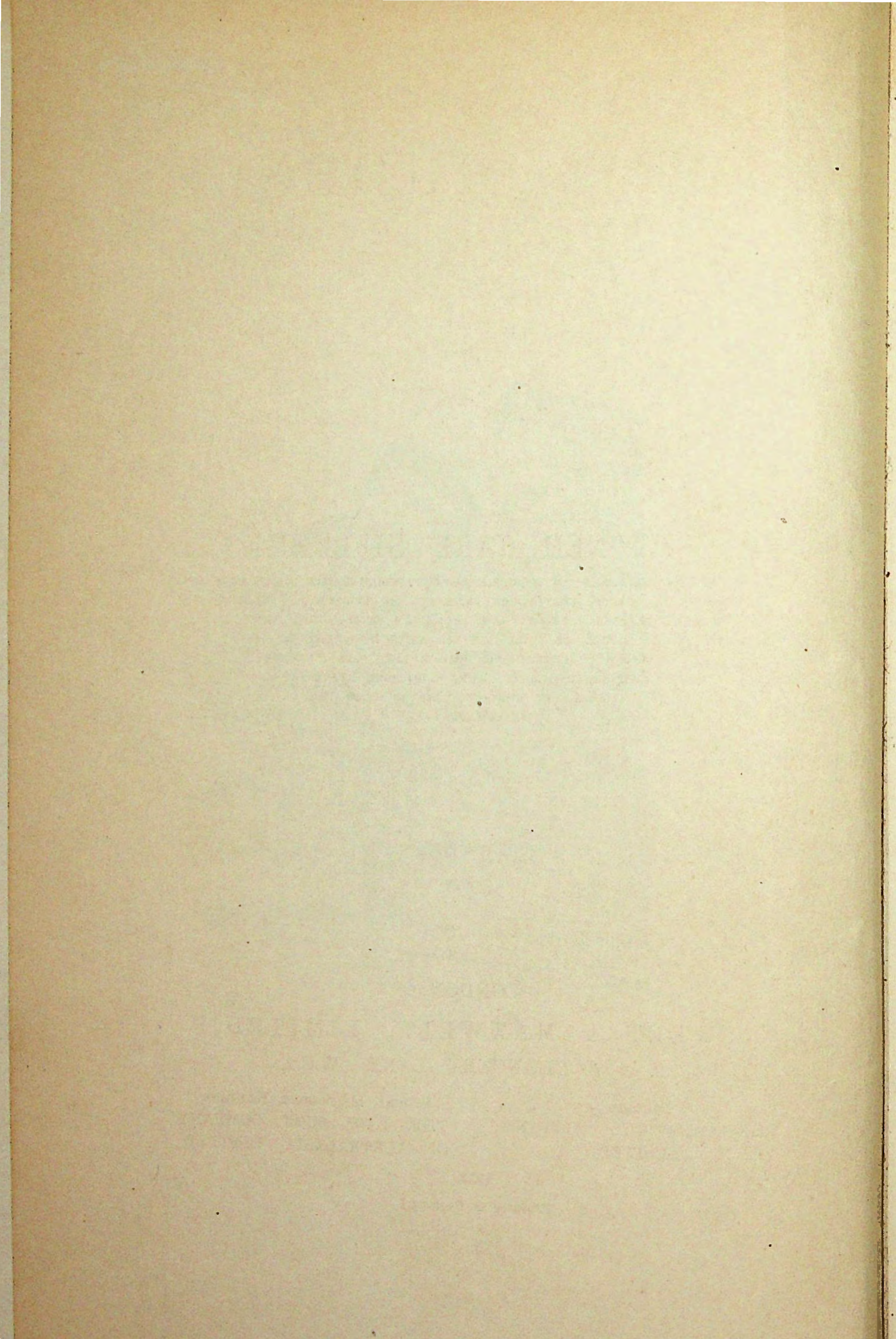

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JURISPRUDENCE

BY

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PREFACE.

THIS work is the result of more than thirty years of teaching this subject for the University of London. It aims at setting forth the opinions of the many writers on the various branches of the science, the author's criticisms, and his own views. Though an Austinian by training the author is not a bigot, as will appear from his many criticisms of Austin's views. Nevertheless we ought not to lose sight of the value of Austin's teaching as to the necessity of accuracy of terminology and of a true appreciation of the actual nature and value of National Law. In these times, when we get appeals to "the unwritten law," it seems most important to impress on people the real nature and value of law. As Cicero said "We are the slaves of the law so that we may be free" *i.e.*, free from the partiality of a bench left to administer justice according to each Judge's opinion as to what is right or wrong.

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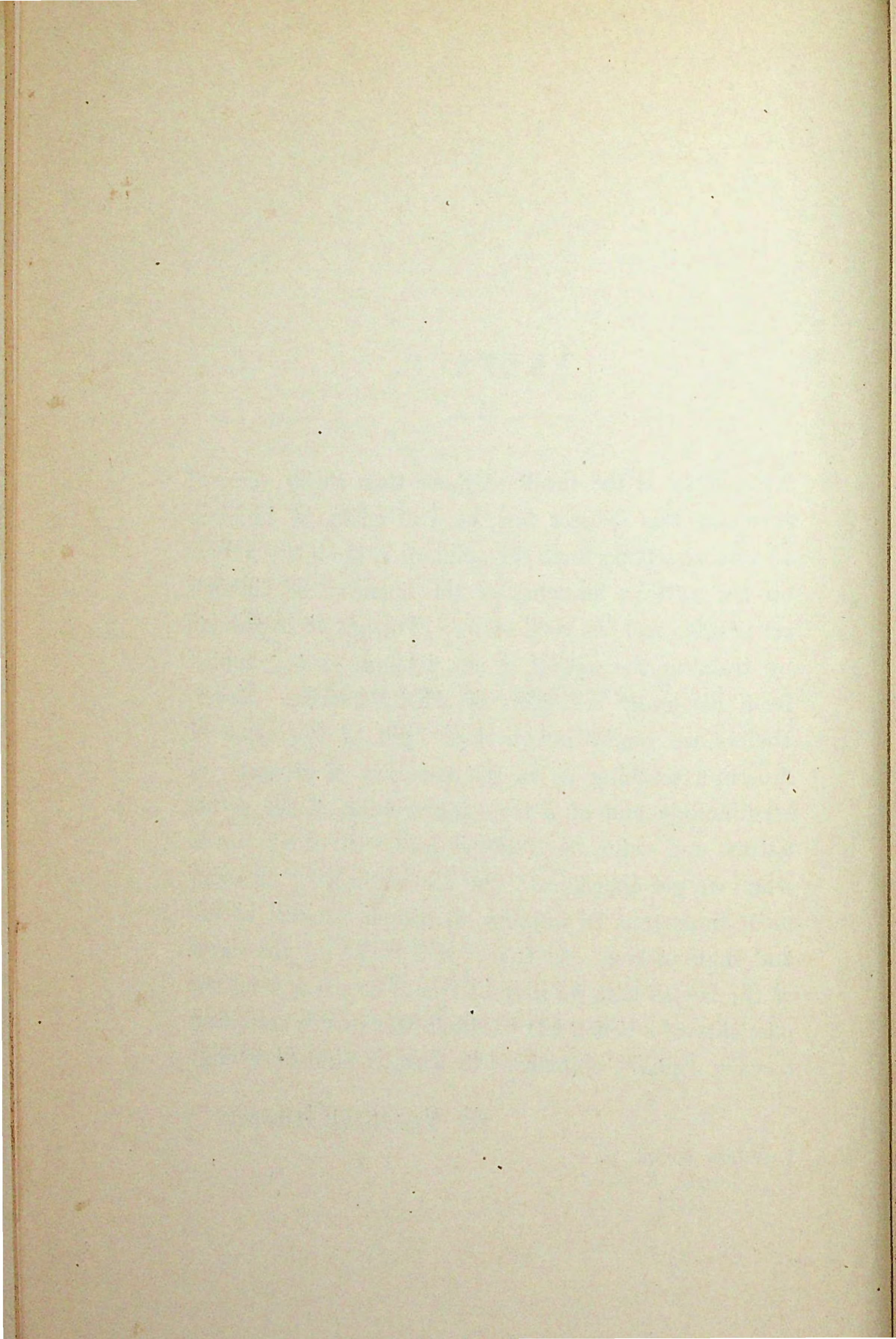

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CORRIGENDUM.

Page 153, line 7. *For* Bacon *read* Baron.

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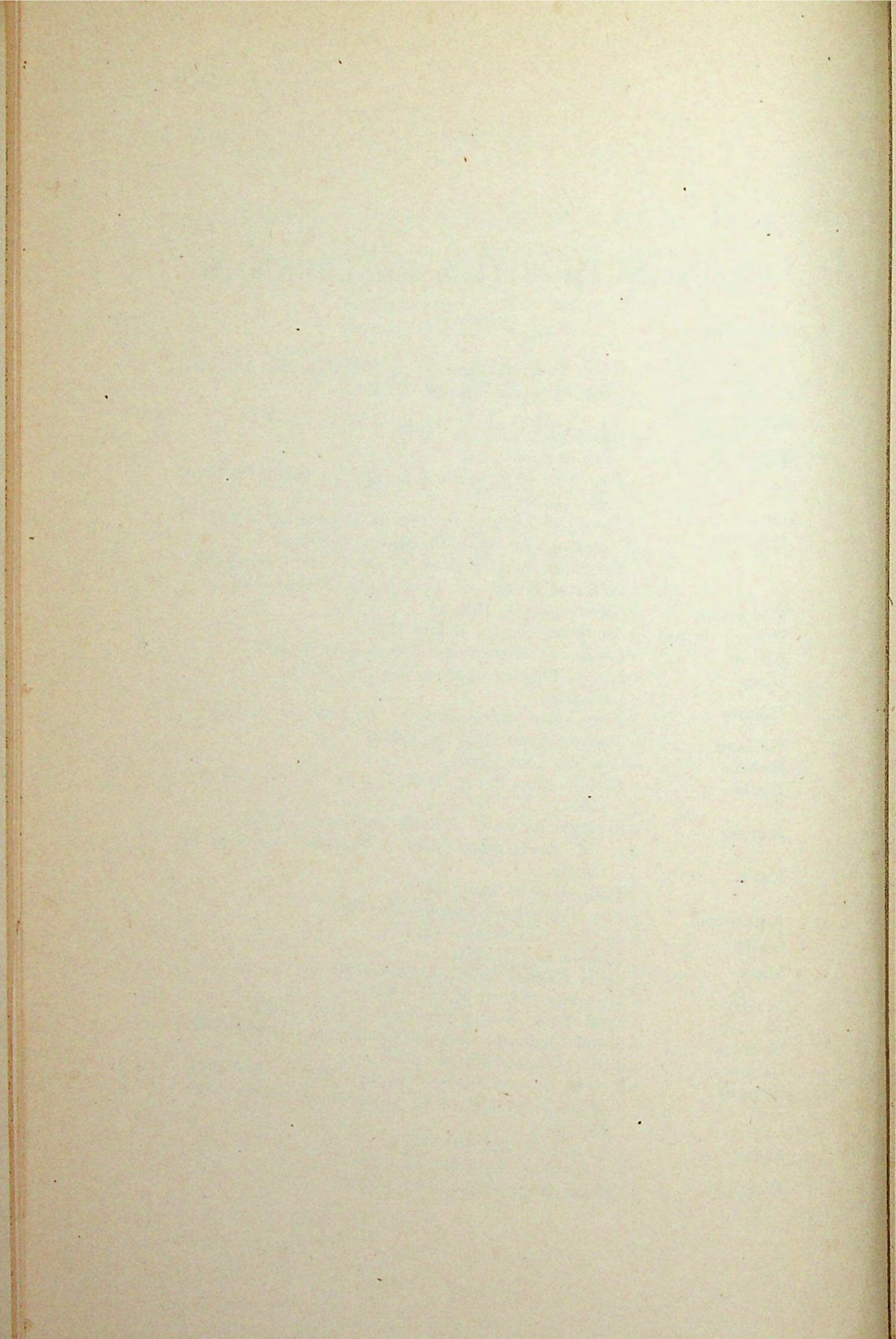

JURISPRUDENCE.

CHAPTER I.

NATURE AND HISTORY OF JURISPRUDENCE.

JURISPRUDENCE may be defined as the "Science of National Law." In respect of this definition there are three points of importance:—

First, what is meant by a "Science"?

Secondly, what is meant by "National Law"?

Thirdly, why should the science be restricted to "National Law"?

As regards the first point, a "Science" must be distinguished from an "Art."

An Art may be defined as "a body of rules for the government of action"; a Science as "a body of abstract principles underlying Art."

An Art lays down what is to be done; a Science lays down the reason for which it is required to be done. Art precedes Science, for experience teaches that certain results follow certain courses of conduct; the scientist then ascertains the reason why these results follow these courses of conduct and formulates by a process of induction a general rule or principle from which more results are obtained by those engaged in the Art and from these new results the scientist induces new principles, and thus Art

and Science are ever acting and reacting on each other. Lightwood (Nature of Positive Law, p. 5) indicates this distinction when he states that " Jurisprudence starts from a basis of actual rules—these are learnt by heart, or recorded in books. At that time a lawyer has a knowledge of law, just as a practical engineer has a knowledge of the rules of engineering, but neither can be said to possess any smattering of Science. This does not arise until there is a desire to explain the principles on which the rules rest."

Similarly, in the infancy of law it was apparent that there were certain rules which were commonly observed and a certain person or body of persons obedience to whose commands was compulsory and who was considered responsible for the well-being of the community. As regards the exact nature of national law—the criterion by which to determine which of the rules acted on by members of the community were national law and which of them were not—the test by which to determine whether any person or body of persons was entitled to be recognised as the sovereign power, or whether any particular community was entitled to be called a sovereign State—the methods by which the sovereign exercised his State functions—these matters were hardly considered by the legal class in the infancy of law. But as soon as men began to look beyond the mere rules of law and to consider the essential constituent elements of law these matters become of prime importance, and Jurisprudence—the Science of National Law—was added to the realm of the Sciences.

For an interesting account of the evolution of the Sciences reference should be made to Holland's Jurisprudence, Chap. II.

Jurisprudence is therefore concerned with the elementals

of national law—with those conceptions which are essential to the existence of national law, not with the actual rules of law prevailing in any particular State. Nor is it concerned with the history of the various changes which have been effected in the legal rules of any particular State—a branch of knowledge falling within the domain of "Legal History." Moreover, it is not concerned with the resemblances or differences between different systems of national law—a branch of knowledge falling within the domain of "Comparative Law." Again, it is not concerned with the principles on which the rules of law of any particular community may be improved—a branch of learning falling within the domain of "the Science of Legislation," of which Bentham was the pioneer.

But although Jurisprudence is not concerned with the legal history, yet as it deals with the essential elements of national law and therefore necessarily with the various agencies by which national law is made effective, it must take account of the nature of these agencies at various epochs in the development of communities. This branch of the subject is known as Historical or Comparative Jurisprudence, as being concerned with a comparison of the lines on which various communities have approximated to the present standard of national law and national sovereignty. In this branch of the Science, of course, the study of comparative law and the legal history of different systems is of inestimable value.

Jurisprudence, then, appears to be of two kinds:—

(1) Elementary or analytical: dealing with the nature of national law as now existing;

(2) Historical or comparative: dealing with the resemblances or differences between the lines of development of national law in different communities.

The present treatise being concerned with Elementary or Analytical Jurisprudence, it will tend to clarity to set out the matters which it is submitted fall within its domain.

They are the following:—

(1) The nature of law and the differences between the various kinds of law. And hereunder the essential elements of law—*i.e.*, rule of conduct—duty—sanction. This is for the purpose of distinguishing national law from other kinds of law. Incidentally a reference will be necessary to the improper uses of the term "law."

(2) The nature of national law, and hereunder of its essential concomitant—sovereignty.

(3) The various sources whence national law arises.

(4) The methods by which national law operates, *i.e.*, by imposing duties, conferring rights and powers; and hereunder of the nature of liberty as contrasted with duties, rights and powers.

The nature of duties, rights and powers requires an exposition of the involved terms: Person, Thing, Act, Forbearance—for duties and rights are respectively imposed on and vested in persons, and are to be observed towards persons, and many of them are exercised in respect of things, and all of them require acts or forbearances. In connection with the above matters it will be necessary to deal with the various kinds of duties and rights, and the difference between criminal and civil obligations. In connection with acts and forbearances it will be necessary to deal with the nature of the will and of intention.

(5) The essentials to constitute infringements of legal duties and rights, and hereunder of the nature of

intention, negligence, heedlessness, rashness and cases of liability independent of the mental element, and also of liability for a mere unlawful intent without any consequent act.

(6) The methods of acquiring, transferring and extinguishing rights and duties—a matter dealt with under the heading of Titles.

(7) Classification of national law with reference to its subject-matter, and hereunder of codification.

As Holland points out, Jurisprudence deals with those relations of mankind which are regarded as having legal consequences, but not with the rules which create those relations. For instance, though the periods of prescription (*i.e.*, the acquisition of rights by long user) and the essentials for a valid marriage have varied in different countries and so do not fall within the scope of Jurisprudence, yet the nature of prescription and the legal aspect of marriage do. Likewise the nature of contract, ownership and possession are proper subjects for the science, though not the rules of law relating to them.

As regards the second and third points referred to at the commencement of this chapter, the nature of national law will be dealt with in the two following chapters, and the reason for restricting Jurisprudence to national law will then be fully explained, though it will be convenient to point out at once that national law is that kind of law which is enforced by a political superior called a sovereign and is the kind of law generally meant when people speak about "the law."

(Positive Law)

Its nature and methods of operation and its agencies are so different from those of other kinds of law that it appears improper to include the latter in the same science, the other kinds of law falling rather under the science of morals.

(defective)

Other theories as to the Nature of Jurisprudence.

Ulpian

One of the earliest definitions of Jurisprudence is that of Ulpian, a jurist who flourished in the reigns of Septimus Severus and Caracalla, 211 A.D., and it is as follows: "Jurisprudentia est divinarum atque humanarum rerum notitia, justi atque injusti scientia": "Jurisprudence is the knowledge of things divine and human, the science of right and wrong." The definition is wide enough to embrace all branches of moral philosophy.

Right and wrong are relative terms dependent on the standard with which one is making a comparison.

That is religiously right which is in accordance with Divine law; legally right which is in accordance with national law; morally right which is in accordance with the opinion of the majority, if one uses the term morality in its strict and proper sense as distinct from religion. The term morality is derived from the Latin *mores*, *i.e.*, customs of man. Austin very properly points out (p. 60) that the term morality alone is rather too vague since it may mean the standard to which public opinion ought to conform, in which sense it is synonymous with the dictates of religion; or it may mean, on the other hand, public opinion as it is. He therefore suggests the use of the term Positive Morality to indicate public opinion as it is, whether it is sound or not. However, morality as distinct from religion means the body of principles determining what is proper according to public opinion; or as Lightwood puts it (Nature of Positive Law, p. 19), justice means that which is in accord with the sense of right which resides in the people at large, *i.e.*, the national conscience. Using "justice" in the sense of moral justice, the statement is undoubtedly correct. Whichever view one adopts, Ulpian's definition of Jurisprudence

appears certainly to deal with moral philosophy or ethics, and theology as well as law, and appears therefore to be defective.

Austin (Jurisprudence, p. 5) states: "The matter of Jurisprudence is positive law." The editor of the Students' Austin, p. xi, states that the science deals with the notions, principles and distinctions common to the maturer systems of law; he points out that many of these principles are common to all systems of law, to the scanty and crude systems of rude societies and to the ampler systems of refined societies, but insists that if the science were limited to the principles common to all systems it would be unduly restricted since the greater the number of systems dealt with the less will be the number of principles common to all of them.

There appear to be two objections to the Austinian definition.

First, the term "Positive Law" is not synonymous with "National Law," though Austin uses it as indicating national law. The term "positive" means human as opposed to divine, and got that meaning as follows: Positive law was originally the antithesis to the law of nature, the term "positive" indicating that the rule had been expressly set or declared, whereas the law of nature had not. When the law of nature became identified with the law of God, positive law came to mean human law. Now, as will appear later (pp. 15 *et seq.*) some human laws are enforced by a political superior called a sovereign, and others by a superior who is not a political superior; the former are national laws, the latter not, and therefore the term "positive law" does not appear to be an appropriate term by which to indicate national law.

Other terms have been suggested to indicate what we call national law.

The term " law " alone is insufficient since it applies to Divine law, national law, and human law which is not national, *i.e.*, which is not enforced by a political superior.

The term " civil law " is useless as the term is used with so many different meanings; for instance, the term " the civil law " means Roman law—civil law as opposed to ecclesiastical law means all national law except ecclesiastical—as opposed to military law, all national law except military law.

The term " municipal law," which has been suggested, is unsatisfactory, since it usually means a particular branch of national law—*i.e.*, that portion relating to local government.

The term " national " appears unobjectionable, since it carries its own meaning with it, namely, the law of a nation.

The second objection to the Austinian definition of Jurisprudence is that, as the science is concerned with the essential features of national law, there is no need to distinguish between the systems of crude societies and of refined ones. If any system designated as a system of national law lacks the essential elements it is not a system of national law, and therefore Jurisprudence is not concerned with it; if it has those essential elements, then the science must deal with it. The object of the science is to indicate what are the characteristics of national law.

Professor Holland (Jurisprudence, Chap. I) defines Jurisprudence as " the formal science of Positive Law." By the term " formal " he indicates that the science deals with the purposes, methods, and ideas common to every system of law, as distinct from a " material " science, which would deal with the rules of law common to different systems; he points out that the science deals with the relations of mankind which are regarded as having legal

consequences, but not with the rules which create those relations, pointing out that though the *rules* of prescription —*i.e.*, the acquisition of rights by long exercise—and the essentials for a valid marriage have varied in different countries and do not fall within the scope of the science, yet the meaning of prescription and its relationship to ownership and possession, and the legal aspect of marriage and its connection with property and the family, are similar more or less everywhere, and therefore do fall within the scope of the science. Professor Holland limits the science to positive law, probably meaning national law, but nevertheless deals with public international law in his work on Jurisprudence.

(4) Markby

Sir William Markby entitles his work dealing with Jurisprudence "The Elements of Law"; it is purely analytical and devoid of historical reference. It disregards history and ethics.

(5) Salmond

Professor Salmond (Salmond, Jurisprudence, p. 1) apparently is of opinion that the term "Jurisprudence" may be applied to all aspects of law. He defines it as "the science of law," meaning the law of the land, and classifies it as follows:—

(1) Expository or systematic, which deals with law as it now is. It appears to be the same as the Art of Law.
(2) Legal history, which is concerned with a legal system in its process of historical development—and, in other words, is legal history and not Jurisprudence.
(3) The science of legislation, the purpose of which is to set forth law as it ought to be.

Finally, Professor Salmond (p. 2) indicates another sense in which the term is used, namely, as meaning the science of the first principles of the civil law; this he calls Theoretical or General Jurisprudence, and it apparently is

Jurisprudence properly so called, as appears when one considers the subjects which the writer states fall within its purview, which are those already indicated as being the subjects with which Jurisprudence is concerned.

The writer in question points out that Theoretical Jurisprudence does not deal with the rules of law of any particular system, nor with the rules of law common to different systems. He states (p. 4) that Jurisprudence in this sense is analytical—*i.e.*, the philosophical part of systematic legal exposition; historical, legal history; ethical, science of legislation. It is submitted with regard to this writer's views that there is a science of national law to which the name "Jurisprudence" is properly applied, and that it is unscientific, unnecessary, and confusing to apply the term to other domains of knowledge such as the Art of Law, Public International Law, and the Science of Legislation, which already have names by which they are well known and differ so entirely from Jurisprudence as to make it improper to apply the term to them even with a qualifying adjective.

It is submitted that the only scientific treatment of this or any other subject is to use a word in a particular sense and in no other sense; and that it is unscientific to use the same word, even qualified by an adjective, to indicate subjects which are so different in nature as national law, public international law, the science of legislation, and Jurisprudence.

The following uses of the word appear, therefore, to be improper:—

Ethical or philosophical Jurisprudence, which indicates the science of legislation.

Medical Jurisprudence, which indicates the subjects in which law and medicine have common ground—a branch of national law

Equity Jurisprudence, which merely means that branch of national law which is administered in Courts of Equity—a branch of national law.

The height of absurdity was attained by a writer on architecture, who entitled his treatise "Architectural Jurisprudence."

While considering the various classifications of Jurisprudence it is necessary to refer to a curious aberration of Austin, who classifies the science into General and Particular. By General he clearly means Jurisprudence in the proper sense of the term. By Particular, as pointed out by Holland, he may have meant Jurisprudence founded on the observation of one particular system, in which case the particularity would apply to the exponent's knowledge of the science, not to the science itself; moreover, if the observer's deductions were correct the principles must be of general application and true of all similar systems of law. General principles applicable to plants everywhere could be ascertained from a study of English plants.

If, however, by the term "Particular" Austin meant a knowledge of the law of one nation, then that, of course, is not Jurisprudence but the art of law.

History of the Evolution of the Science.

The earliest English writer who treated the subject of Jurisprudence scientifically is undoubtedly Hobbes, whose Elementiæ Philosophiæ, published in 1642, dealt in the chapter "De cive" with the nature of national law and political governments and sovereignty. He has been called the apologist of tyranny owing to his enunciation of the principle that the sovereign is above law and not subject to its rules, and therefore nothing he does can be legally wrong, and though his object was probably to vindicate the doctrine of divine right, yet his propositions

really would justify a republican sovereign body as well as a monarchy.

Blackstone, who flourished in the eighteenth century, whenever he ventured into the science of law, was guilty of confusing law as it ought to be with law as it is. He denied that any law is valid if contrary to the law of God—that a master can have any right to his slave even though the law recognised such right.

These fallacies called forth the critical talents of Bentham and Austin, who emphasised the point that man's law is binding on man so far as temporal punishment can make it effective, even though it is in contradiction to the law of God. What Blackstone meant was that the law of man ought to be in accord with the law of God, but one may with all reverence point out that in the face of so many different opinions as to what the rules of Divine law are, it would be extremely unsafe to leave it to individual judgment to determine whether man's law should be obeyed or not according to whether in the judgment of the individual it was in harmony with the law of God or not.

Bentham, in his Fragment of Government, published in 1776, apparently agrees with Salmond that Jurisprudence relates to all aspects of law, whether the Art, or the Science, or the Science of Legislation.

Austin, who lectured from 1828 to 1832, may be said to have completed the work of Hobbes and Bentham, and to have brought to a conclusion one of the stages in the development of the science. He proposed to limit his labours to national law as it is, but was unable at times to refrain from straying into the realm of ethics and, as will appear later, was inclined to lay down propositions which could only be tenable if law were a scientifically constructed system instead of a human growth. Particu-

larly is this noticeable in his postulate that "sovereignty is illimitable and indivisible," a proposition which is impossible of application to federal constitutions to which the separation of powers is essential.

Moreover, Austin's theory that all laws are commands set by a sovereign is difficult to reconcile with the fact that many rules of national law have never been set in the ordinary sense of the word, but have evolved, notably the rules of customary law and the laws established by judicial decisions. The enforcement of a rule by the sovereign is a much safer criterion for national law than express enactment. Austin also rigorously excludes the history of law from Jurisprudence. Now although the main purpose of analytical Jurisprudence is to treat of law as it is, yet it is not altogether safe to disregard what it has been in the past as it is sometimes only by the light of history that one can truly understand and judge institutions as now existing.

As pointed out already there is an historical branch of the subject. Since Austin's day a reaction seems to have set in against the analytical school as a natural result of the extreme rigidity of the Austinian school. Sir Henry Maine may be considered as the leader of the movement in England and as the founder of the historical school (see Ancient Law; Early Law and Custom; and Early History of Institutions).

This sketch would not be complete without a reference to the works of Holland and Salmond and their criticisms on various portions of Austin's work, which will be dealt with in their appropriate place in this work.

The Uses of Jurisprudence.

The following are the uses of Jurisprudence:—

(1) By an understanding of the nature of law and

of legal conceptions and distinctions the student is amply equipped for the study of the actual rules of law—he knows the language, grammar and basis of treatment.

(2) As some logical training is essential to the education of a lawyer it is submitted that the best kind is that which is based on a legal foundation. Amongst the many purposes of jurisprudence is the training of the critical faculties so that fallacies may be detected and accuracy in legal terminology and expression be ensured.

Austin suggests that by studying different systems of law we shall be better able to detect the faults in our own. This appears rather the purpose of Comparative Law than of Jurisprudence.

From the above considerations it also follows that the place of Jurisprudence in legal study is in the preliminary stages and before the study of the actual rules of any particular system.

There are some who think that the science could be culled from a study of law itself; this appears to be the most laborious way of acquiring a knowledge of the science and the most uncertain. Indeed it appears impossible to construct a science in such a way, since those engaged in the practice of the law appear disinclined and too engrossed to construct a science, nor should they be required to do so; the practical and the theoretical are the complement of each other, but the practical tinctured with the theoretical seems the best fitted to ensure progress on the right lines—yet theory or general principles must precede practice.

CHAPTER II.

OF THE NATURE OF LAW AND OF THE DIFFERENT KINDS OF LAW.

JURISPRUDENCE being the science of National Law, it is necessary to determine the nature of national law, and as it is a species of law, to determine first the meaning of the term "law" as used with its proper signification. For this purpose it is essential to consider the various senses in which the term "law" has been used, and, by a process of comparison, to ascertain which of the conceptions to which the term has been applied possess the essential element that entitles them to be classed as species of the same genus—*i.e.*, as species of law.

In this enquiry it will be of much assistance to bear in mind that the uniformity of conduct which is the normal result of law has induced many writers to apply the term "law" to every cause of such uniformity, although the causes are entirely different in nature in many cases. The term "law," it is submitted, should be restricted to such of the causes as have the same essential characteristics.

Austin, in Chap. V of his Lectures on Jurisprudence, has classified the subjects to which the term "law" has been applied from the point of view of the person who, as he says, "sets the law"; and from this point of view he classifies them as follows:—

I. Divine law; *i.e.*, set by God.

II. Human law; *i.e.*, set by human beings—

(A) Positive law; set by three classes of persons—

(i) A sovereign—*i.e.*, a supreme political

superior. The example of this is an Act of Imperial Parliament.

(ii) A political subordinate, including a private person acting in pursuance of legal duties. Examples are: a regulation made by the London County Council, which body is a political subordinate; a rule set by a guardian to his ward, a guardian being a private person whose duty it is to direct the conduct of his ward.

(iii) Private persons acting in pursuance of legal rights though not in pursuance of legal duties. Such persons are not under any obligation to prescribe rules for the conduct of others but may do so if they please, and any rules so prescribed will be enforced by the State. An example of this kind of law is a rule of conduct set by a master to his servant; the master is not bound to set any rule of conduct to his servant but may do so if he pleases, and if he does, obedience thereunto will be enforced by the State. Austin calls these laws **autonomic**, as there is no legal duty to set them.

These three classes of rules are species of national law because the State enforces obedience thereunto.

(B) Positive morality, properly called law, being set by a determinate person or body of persons, though obedience to the rules is not enforced by the State, directly or indirectly.

These rules are set by three classes of persons—

(i) By one sovereign to another sovereign.

These rules form such part of public international law as does not rest merely on the general opinion of nations. They are laws being set and enforced by a determinate superior, but not national law, for they are not set by a sovereign to a subject.

(ii) By men to men living in a state of nature *i.e.*, not being politically organised. In such case, there being no sovereign, the rules are not rules of national law.

Under this head fall all rules of conduct obtaining in communities not sufficiently developed politically to entitle them to claim membership in the fellowship of nations. Examples are the laws of a savage tribe, obedience to which laws is enforced by certain members to whom obedience is rendered through fear that disobedience will entail evil consequences of a supernatural nature through the medium of such member.

Being set and enforceable by a determinate person or body of persons, these rules are laws; but the person or body of persons not being a political superior the rules are not rules of national law.

(iii) By private persons in a political community neither in pursuance of legal duties nor rights. Obedience to these rules will not be enforced by the State and therefore they are not rules of national law; but being set and enforceable by a determinate superior they are laws.

Examples of these are rules set by parents to children to which, in most systems, the State

will not enforce obedience, leaving it to the parents to ensure compliance to such rules by the usual means.

These three species of rules may be called positive moral laws.

III. Rules of positive morality improperly called law. Austin is here referring to the rules set by opinion, meaning thereby the opinion of an unascertained number of a class of persons, it being presumed that such number constitutes a majority in the class.

The class may be any particular body in a community, or may be a particular community or nation, or may be the community of nations. As there is no ascertainable number of persons who can be deemed to have formulated the rules or who can be appealed to to enforce obedience thereto, the rules lack the fundamental characteristics of the conceptions to which the term " law " has generally been applied, *i.e.*, a rule enforced by a determinate superior. These rules may be called " positive moral rules " as distinct from the last preceding class, *i.e.*, " positive moral laws."

Examples of positive moral rules are the laws of honour and the laws of fashion. The rules of professional etiquette also fall under this head unless enforceable by a determinate body, such as the Benchers of an Inn of Court, the Law Society and the Medical Council. These three bodies have power to make rules of national law, since the Judges recognise and enforce obedience to rules made by them; a barrister who has been disbarred or a solicitor who has been struck off the Rolls is no longer accorded recognition by the Judges nor allowed to appear in Court for others; and an unqualified person acting as a solicitor or holding himself out as a medical practitioner is liable

to legal penalties. Another example of positive moral rules is that portion of public international law which consists merely of the opinion of the majority of nations. As there is no determinate body of persons to enforce obedience thereto the rules are not rules of law or of positive moral law.

IV. Laws metaphorically so called.

Of these there are three kinds according to Austin.

(i) The laws of art. These are merely instructions and guides founded on experience as to the best methods by which to attain successful results. They lack the imperative quality which is one of the essential elements of law. They are merely suggestions, not orders.

(ii) Self-prescribed rules of conduct. These again lack the imperative quality and may be disregarded with impunity.

(iii) The laws of nature in one particular sense of the term, *i.e.*, the cause of the uniform conduct of inanimate nature such as the motions of the planets and also of such of the uniform conduct of animate nature as is not referable to the exercise of will power, such as the growth of animals and plants.

The cause of the uniform conduct in the above cases may, it is submitted, be attributed to physical compulsion applied by a supernatural agency, a method so different from that by which law operates, using the term in its usually accepted meaning, as to render it unscientific and improper to use the same term to indicate both such agencies.

One of the characteristics of law, using the term in its usually accepted meaning, is that it is addressed to an

intelligent being who has the option to obey or disobey; in the case of the law of nature, using the term in the sense now under discussion, there is no such option. The ancients, noting the uniform course of nature and that uniformity of conduct was a consequence of law, ascribed the uniform course of nature to a law, oblivious of the fact that the same result may be obtained by different means, and that the cause was not the same in the two cases.

It must be pointed out that this law of nature is totally different from Divine law, properly called law in that the latter is set to intelligent beings who have a free will and power to obey or disobey.

In connection with the Austinian classification of the different uses of the term " law " the following four points should be noted :—

First. Austin insists on the importance of ascertaining who " sets the rule," *i.e.*, originates it, whereas the matter of real import is " who enforces obedience to it ? " Many rules have never been " set " in the ordinary acceptation of the term, for instance, many have grown up through custom. The enforcement of the rule by a determinate authority, no matter how the rule originated, is the matter of real importance for the purpose of determining whether the rule is a rule of law or not.

Secondly. No doubt the Austinian use of the word " morality " will come as a shock to many persons, since the word " morality " is usually associated with ethical rectitude. Yet what is ethical rectitude ?—it is either that which is in accordance with Divine law or with public opinion. Austin, pointing out this ambiguous meaning of " morality," prefixes the term " positive " to morality in order to indicate that he means the standard set up by

public opinion. According to Austin the two standards of morality are either Divine law or the law of positive morality. For practical purposes this appears correct, since the only possible third standard is that founded on the predilections or prejudices of the individual who when he says a thing is right or wrong merely means that he approves of it or does not approve of it.

Even the term " Divine law " is not free from difficulty as is apparent from the existence of hundreds of different religions in the world, by the rules of some of which prohibition of alcohol is a Divine precept, though not by the rules of others.

It has been said that Austin derived law from ethics. Jurisprudence is not concerned with ethics further than to distinguish the rules of ethics which are rules of law from those which are not rules of law and from the rules of national law.

It may be well to point out that opinion may be the cause of a rule of national law, as where through the pressure of public opinion an Act of Parliament is passed; or it may be the cause of a positive moral law, as where the general opinion of a club induces the committee to formulate a rule giving expression to it; or it may result in a positive moral rule, as where the fear of offending the feelings of a majority of the community or of a class thereof influences the conduct of individuals; in the last case only is the rule a positive moral rule; in the two former opinion has found a more definite and forcible expression.

Lightwood (Nature of Positive Law, p. 387) says that Austin's use of the word " morality " is open to the gravest objection, and that a mere conventional rule upon a frivolous matter of etiquette cannot, except by an absurd misuse of language, be called a rule of morality.

According to Lightwood " morality " means the sense of right residing in the people at large. But it may be observed that the sense of right is the result of public opinion, and Lightwood gives no test for determining which parts of public opinion are morality and which are not.

When minorities have withstood majorities on matters of moral righteousness they have generally based their opposition on the eternal superiority of Divine law to the temporal authority of man's law.

Thirdly. Austin limits the term law to rules of conduct or to what he designates " general commands " as distinct from " particular commands." Opinions have differed as to what is the true ground of distinction between a " general command " and a " particular command," but it is submitted that the only rational basis of distinction is that a " general command " requires something to be done or not done more than once, and a " particular command " requires it to be done or not done once only—the former enjoins a rule of conduct. The number of persons to whom the command is addressed is immaterial; for instance, a command of the sovereign that one particular day in one particular year shall be observed as a public holiday is a particular command although addressed to the whole community; on the other hand a command by a master to his servant to do some particular thing every week is a general command. It was in this particular respect that Blackstone was guilty of a fallacy when he propounded the doctrine that a general command is one addressed to people generally, and a particular command to one individual.

More difficulty is encountered in determining whether the term " general command " is properly defined as one

requiring something to be done or not done more than once, or, if not, what is the proper meaning of the term.

According to Jethro Brown (Austinian Theory of Law, pp. 17, 18), the generality of a command depends on circumstances. He suggests that a command to a servant to call his master at 8 a.m. for the next three weeks would be a particular command, but if it were for a year it would be a general command. This does not appear to supply any sure criterion nor any basis on which to found the distinction.

Esmein (Elements de droit constitutionnel, p. 9) submits that a general command must require something to be done or not done for an indefinite period. This would put the Army and Air Force (Annual) Act, 1925, which is only in force for a year, outside the category of law. It is submitted that a course of conduct may be prescribed for a definite or for an indefinite period. The only possible ground of distinction appears to be between acts to be done or not done once only or more than once.

Fourthly. As Austin insists on the necessity of law being *set* by a determinate person or body of persons, it may be well to indicate the meaning of the word "determinate." A determinate person means a person or body of persons who or whose members can be identified specifically or generically, or partly specifically and partly generically. For example, Oliver Cromwell was a person answering to a specific description, for he did not attain to his position as being a member of a class of persons, but by conquest. The members composing the sovereign body now under the English constitution are determined generically, the King as being a descendant of Sophia of Hanover, the members of the House of Lords as answering to the description of peers of the realm, the members of

the House of Commons as answering to the description of persons chosen by the electorate. Laws can only emanate from a determinate person or body of persons, as it is only they who can enforce obedience to laws, they alone being able to issue the necessary orders. It is only a determinate body that is capable of corporate conduct, for it is only in respect of such a body that it is possible to ascertain the wishes of the majority by counting the number of those who are "in favour of" and those who are "against" any particular proposition. Therefore "public opinion," which is the opinion of an unknown number of the members of an indeterminate body, is incapable of creating a law, since there is no body of persons capable of enforcing obedience to its wishes, for an indeterminate body cannot issue orders.

Substituting the word "enforced" for the word "set" used by Austin, we find that the various meanings with which the term "law" has been used fall under one of the four heads indicated by him. A comparison of the characteristics of each kind will enable us to determine which of them have such common essential characteristics as to justify one on scientific principles in applying the term "law" to them. The four heads are:—

I. Divine law;

II. Human law, of two kinds;
  (*a*) National law;
  (*b*) Positive moral law;

III. Positive moral rules;

IV. Law metaphorically so called.

Of each of these in turn:—

I. Divine law has the following seven characteristics:—

(*a*) It is a rule of conduct.

(*b*) It is enforceable by a determinate superior, *i.e.*, by God.

(*c*) It is imposed on intelligent human beings who have the option of obeying of disobeying.

(*d*) The sanction or penalty for breach is some evil to be suffered in a future life.

(*e*) The sanction is unavoidable and irresistible.

(*f*) The rule causes uniformity of conduct.

(*g*) The rules claim to be of universal application.

Of each of these points in turn.

(*a*) The meaning of a " rule of conduct " has already been explained. Whether particular commands of Divine origin still occur is a matter for the theologian; recent alleged instances of individual communication with the Almighty have not been such as to inspire confidence in the existence of such.

(*b*) The term " enforceable by a determinate superior " indicates that disobedience will be punished by a person who has the power to inflict evil or pain. According to Austin for the purpose of law " superiority signifies might," *i.e.*, the capacity of inflicting evil or pain on others. The term " superiority " in relation to law is not used to indicate mental or material superiority.

(*c*) This characteristic distinguishes Divine law properly called law from certain supernatural causes of the uniform conduct of inanimate nature and of animate nature not referable to the exercise of will power, which causes are called law improperly but by way of metaphor. These causes operate by way of physical compulsion.

Divine law properly called law is addressed to human beings who have the option of obeying or disobeying. Whether it is addressed to the lower animals is a matter of opinion.

(*d*) The exact nature of the sanction or punishment for

breach of Divine law may be a matter of opinion. Some may think that the punishment or a portion of it is suffered in this world in certain evil consequences which follow certain lines of conduct. Whether these be punishments or not is a matter which will be dealt with when dealing with what are called physical sanctions (*post*, p. 54).

Characteristic (*e*) will be readily admitted—no human being can deceive the Almighty nor escape His wrath.

As regards (*f*) the amount of uniformity of right conduct has varied with the rise and fall of nations.

As regards (*g*) it is written in Leviticus, ch. 24, v. 22: "Ye shall have one manner of law, as well for the stranger as for your own country"; which is rather contrary to the practices of ancient communities, and some modern ones who exclude the alien from the benefits of their law.

Here it is proper to point out a general distinction between Divine law and national law, that whereas in the case of the former he who makes the law also determines whether it has been infringed, and inflicts the penalty, in the case of the latter these three functions are generally performed by different persons, the sovereign legislature makes the law, the Judge determines whether it has been infringed, the executive officers inflict the punishment; and the administration of national law is subject to all the uncertainty of things human.

It is in connection with the difference between Divine and human law that Austin indulges in the much-criticised digression into the ethical theories of moral sense, utility and the compound theory, partly for the purpose, he states, of distinguishing the unrevealed law of God from human law, and partly to explain certain distinctions which although no longer playing any part in our system of law were formerly of importance. Now, although the

theories may be necessary to enable one to ascertain the actual rules of Divine law they are not necessary to enable one to distinguish between the nature of Divine law and human law which is all the jurist is concerned with; still less is the jurist concerned with the arguments for and against the theories. Even for the purpose of explaining certain legal distinctions, formerly of importance, all that is necessary to be known is the nature of the compound theory, *i.e.*, that some rules of law are supposed to emanate from an inborn sense of right called the moral sense and to be existent in all systems of law, and infringements of these are called "*mala in se*" or "crimes *jure gentium*"; other rules of law are supposed to have been devised by mankind on considerations of utility to meet the particular requirements of particular communities and therefore are not found existent everywhere; infringements of these are called "*mala prohibita*" or "crimes *jure civile.*"

In respect of "*mala in se*" it is thought that human nature unaided could not have devised the same rules for all communities. The unfortunate part of the theory is that it is impossible to point to any rule of universal application, for even "murder" is not universally prohibited since killing in a duel was not deemed murder in all countries even though the Christian religion prevailed.

II. Human law. The characteristics of this will be dealt with under two heads:—

(*a*) National law;

(*b*) Positive moral law.

(*a*) National law has the following characteristics, some of which are common to it and to Divine law:—

(1) It is a rule of conduct.

Particular commands issued by a sovereign

are not laws. So an Act of Indemnity whereby unlawful conduct of one or more persons is subsequently made dispunishable is not a law but a particular command to State officials not to punish such person or persons for that particular misconduct. It does not create a rule of conduct any more than a royal pardon does. Likewise Acts of Attainder whereby conduct which was not unlawful when indulged in is subsequently made punishable in respect of some particular misconduct is not a law but a particular command.

(2) National law is enforceable by a determinate political superior called a sovereign, which term includes a sovereign body. Any rule enforced by such a superior is national law, no matter how the rule originated—*i.e.*, by statute, precedent, custom, or agreement. The problems connected with sovereignty will be dealt with subsequently.

(3) It is enforceable against sentient human beings, who have the option of obeying or disobeying. Herein the mode of operation of law is distinct from that of physical compulsion, since in the latter case there is no option.

(4) The sanction is punishment in this world.

(5) The sanction annexed to human law may be avoided in two ways:—

(*a*) by the wrongdoer escaping detection;

(*b*) by the wrongdoer overcoming the sovereign power as in the case of a successful revolution.

(6) It causes uniformity of conduct.

(7) The rules claim to bind only the subjects of the sovereign whose law it is, or, to a certain extent, any person who is in his territory.

Finally, it is to be remarked that for the enforcement of national law the machinery of the Courts and the help of executive officials are necessary, agencies which are absent from all other kinds of law.

(*b*) Positive moral law.

The three classes of this kind of law have been already pointed out (*ante*, p. 18). These laws have all the characteristics of national law, save that the rules are not enforced directly nor indirectly by a sovereign, nor is the machinery of the Law Courts nor of any legal agency invoked in dealing with breaches of such laws.

It is well to note that all the above rules are rules of law, being enforced by a determinate superior.

III. Positive moral rules.

Obedience to these rules, as already stated (*ante*, p. 18), results from a fear of incurring the displeasure of an uncertain number of persons presumed to form the majority of a class of persons; for, as Locke says, "No man escapes the punishment of their censure who offends against the fashion and opinion of the company he keeps and would recommend himself to it." But of course the sanction can be deprived of all effect if the party will steel himself against it, which in the case of a sanction attached to a law is much more difficult as such sanction is physical pain.

Positive moral rules are rules of conduct and affect the conduct of human beings and cause uniformity of conduct. As a rule they only apply to particular classes in the community. They differ from law in that there is no determinate superior who sets them or can enforce obedience.

IV. Laws metaphorically so called. The different kinds of these have already been described (*ante*, p. 19), *i.e.*,

the laws of art—self-prescribed rules of conduct—the Law of Nature in one of its many meanings. (For other meanings, see *post*, p. 36.)

The only characteristic these have in common with the other subjects to which the term " law " has been applied is the uniformity of conduct.

Comparing the above different subjects to which the term " law " has been applied we find that Divine law, national law and positive moral law have the following basic characteristics in common.

(1) They are rules of conduct.

(2) They are enforced by a determinate superior.

(3) They are addressed to intelligent human beings who have the option of obeying or disobeying.

(4) They are made obligatory by means of a sanction, *i.e.*, some pain or evil suffered in consequence of disobedience.

(5) They produce uniformity of conduct.

Possessing these common characteristics they may be properly said to form a genus which may be called " law " and to differ in essence so considerably from positive moral rules and laws metaphorically so called that the same term " law " cannot properly be applied to the two last named. Law may be defined as " an obligatory rule of conduct enforced by a determinate superior and against human beings."

But although Divine law, national law and positive moral law are all properly called law yet for the following reasons it appears advisable to limit Jurisprudence to national laws. As regards Divine law there appear so many disputes and such uncertainty as to its nature, and, moreover, the agencies by which it operates are so different from those by which national law operates that the whole subject appears more appropriate for the theologian than

for the jurist, and Jurisprudence having differentiated it appears to be no further concerned with it. In the quaint words of St. Thomas Aquinas, "let the jurist beware how he sets his sickle in the dread field of theology."

As regards positive moral law, though its sanction is similar to that of national law, yet the agencies by which it operates are few and simple and are totally different from those by which national law operates, namely, by imposing duties and conferring rights and powers on people, generally through the complicated machinery of legislation, precedent and custom, and rendering the same effective through the medium of judicial and executive officers. It appears, therefore, unnecessary for Jurisprudence to do more than call attention to the nature of positive moral law and the respects in which it differs from national law.

Positive moral rules and laws metaphorically so called not being in any sense entitled to be called law, Jurisprudence is clearly not concerned with them.

For the above reasons it appears proper to limit Jurisprudence to national law and to define it as "the Science of National Law."

Before proceeding further with this subject it will be convenient to deal with two conceptions which have played an important part in Jurisprudence as certain portions of them are national law; these two conceptions are: (1) public international law, (2) the law of nature.

It will also be convenient to deal with some other definitions of law before explaining in detail the meaning of law in its proper signification as an "obligatory rule of conduct."

First, of Public International Law.

This is the law usually referred to when the expression "International Law" is used; it must be carefully distin-

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guished from International Private Law, which is that branch of national law that determines which system of national law shall be applied to the determination of a litigation where the circumstances are such that the national law of the State in whose Court the dispute is being litigated may not necessarily apply, as in case of a contract made or a wrong committed abroad. This subject is a branch of national law and is sometimes designated by the term "conflict of laws," as there is supposed to be a conflict between the different systems which claim to determine the case—and sometimes by the term "comity," as the Courts of one State are supposed to apply the laws of another State out of courtesy. Sometimes the term "private international law" is used, which appears inappropriate for the following reason: the term "international" immediately preceding the term "law" suggests rules regulating the conduct of States, a body of rules of a public nature, so that the term "private" is a contradiction in terms. The expression "international private law" appears preferable, the word "private" indicating that the law deals with private individuals, and the term "international" indicating that it deals with the national law of different States.

Public International Law consists of a body of rules which it is claimed govern the relations between different nations. It has been variously defined as follows:—

"The aggregate of rules to which nations have agreed to conform in their conduct towards one another": Lord Russell of Killowen.

"The collection of usages which civilised States have agreed to observe in their dealings with each other": Coleridge, L.C.J.

Lord Esher, M.R., laid down the principle that the

consent of nations is necessary to make any rule a part of the law of nations.

Lord Cockburn said: "To be binding the law must have received the assent of the nations who are to be bound by it. This assent may be express as by treaty, or implied from established usage." In *R.* v. *Keyn*, L. R. 2 Ex D. 63, it was held that a rule of public international law to the effect that a State has criminal jurisdiction to a distance of three miles from its shores was not so commonly recognised and acted on as to render it part of the law of England so as to give an English Court jurisdiction over a crime committed by an alien on a foreign ship within three miles from the English shore, though almost immediately thereafter such jurisdiction was conferred on English Courts by the Territorial Waters Jurisdiction Act, 1878. In the *West Rand Central Mining Co.* v. *The King*, [1905] 2 K. B. 39, it was laid down that if any rule of public international law was recognised and acted on in this country, or was of such a nature so widely and generally accepted that it could hardly be supposed that any civilised State would repudiate it, then it would be part of our law.

Applying the above essential of consent, Salmond describes this kind of law as a species of conventional law; *i.e.*, law resulting from agreement. However, it may be as well to at once point out that though much of this kind of law does derive its force from consent, yet many of its principles have been established by the practices of some one or more nations which have predominant interests in certain matters. For instance, maritime usages have been established by the usages of the more important maritime States and yet are enforced against non-maritime States. One must also bear in mind that the rules in some matters —*e.g.*, as to capture at sea, and what is valid prize—are

not the same in all nations, some requiring merely capture and others condemnation by a proper Prize Court. It should also be remembered that some of the rules form part of the national law of particular States and are enforced by their Courts; for instance, the rules as to capture and as to the position of alien enemies.

Many of the rules are merely based on that vague foundation known as the opinion of nations.

Bearing the above points in mind, it appears that the rules of public international law fall under one of the three following heads:—

(1) If enforced by the Courts of any particular State they are rules of national law.

(2) If enforced by a definite sovereign or number of sovereigns against another sovereign or other sovereigns, they fall under the category of positive moral law.

(3) If the rules are dependent for their force on the opinion of nations they are positive moral rules, but not law.

Mr. Hall (International Law, pp. 2 *et seq.*) advances the following argument in favour of the theory that public international law is law proper, apparently meaning thereby national law. Arguing on the basis that no final definition of law has yet been arrived at, he points out in respect of the rules of public international law—

(1) That it is habitually treated as law.

(2) That certain portions of what is acknowledged to be [national] law are indistinguishable from it; *i.e.*, rules of national law derived from custom.

(3) That many of its doctrines have been evolved by a course of legal reasoning and with the aid of

precedent, a process found active in the evolution of national law.

(4) That some of its rules are enforceable by a party other than the party affected by the breach. (?)

(5) That even if most of its rules have to be enforced by the injured party, yet there are some rules of national law which are so enforced.

Bearing in mind the three classes of rules which constitute public international law, it is obvious that the above remarks apply to some one or more of them, but it must be observed as regards point (1) that it is questionable whether this is capable of proof. As regards point (2), the fact that a rule originated in custom does not prove it is a rule of national law nor even a rule of law. It is not a rule of national law unless enforced by a sovereign, nor a rule of law unless enforced by a determinate superior.

The same remark applies to point (3).

As regards point (4), this may prove it is a rule of law, as is admitted in respect of some of the rules of public international law, but does not prove it is a rule of national law, which apparently is Mr. Hall's contention.

As regards point (5), where national law authorises self-redress it prohibits interference with the exercise of such right and punishes such interference, which is not the case in respect of the rules of public international law, as Mr. Hall himself admits.

Westlake (International Law, pp. 96-7) opines that public international law is law, as being enforceable through the action, regular or irregular, of society by such means as exist. He says that States obey from a presumption that such rules are law. It may be pointed out, however, that it is not enough to prove that States do obey, even if that is capable of proof; it must also be shown, in order

to prove that the rules are rules of law, that a determinate superior is able to punish disobedience, which in respect of many of the rules of public international law cannot be proved.

Inter. law is a law struggling for existence

Professor Jethro Brown (Austinian Theory of Law, p. 52) suggests that the term "international law" is only a little previous and that it is law struggling for existence, with which opinion there will be general agreement.

The Law of Nature.

The term "Law of Nature" has been used with the following meanings:—

(1) As indicating the cause of the uniform conduct of inanimate nature and such of the uniform conduct of animate nature as is not referable to the exercise of will power. This was probably the earliest meaning of the term.

(2) An underlying body of principles to which all law ought to conform, which appears identical with Divine law properly called law. This is the law indicated by the Grecian "lost code of nature," which was supposed to be a perfect system of law applicable to all communities, and therefore of Divine origin, it being presumed that fallible human nature could not have devised such a system. The Greeks assumed that there had once been such a system, but that the knowledge of its provisions had been lost to mankind, and the efforts of Greek philosophers were directed to recovering the lost knowledge. As will appear later, this theory had an important bearing on the Roman Jus Gentium.

This idea of an underlying body of principles to

which all laws ought to conform is still of practical importance. The Indian Civil Procedure Act, 1882, provides that a foreign judgment may be impeached if contrary to natural justice; and an Order in Council for Rhodesia provides that the Government is to apply native law if not contrary to natural justice. The Codes of France, Germany and Italy refer to the same body of law as "natural jurisprudence."

(3) The term "Law of Nature" was used by the Romans to indicate rules of law common to Rome and other nations. See Gaius, Institutes, Book 1, para. 1: "Quod vero naturalis ratio inter omnes homines constituit, hic apud omnes populos peræque custoditur, vocatur Jus Gentium quasi quo omnes gentes utuntur." The Institutes of Justinian (Bk. 1, Tit. 2) reproduce a use of the term "Law of Nature" by Ulpian in the sense first above indicated, as being a law common to man and the lower animals, but the use of the term in this sense obtained no permanent place in Roman law.

(4) Rules of law and morality common to different nations. These rules are supposed to have a Divine origin for the same reason as that for which such origin was claimed for the Grecian Code of Nature. This is the law of nature referred to by the Stoics when they say "Justice is by nature, not by imposition." Jeremy Taylor refers to the same law when he says: "The law of nature is the universal law of the world, or the law of mankind concerning common necessities, to which we are inclined by nature, invited by consent, prompted by reason, but is bound upon us only by the law of God."

History of the Law of Nature.

An excellent history of the Law of Nature will be found in Lord Bryce's "Studies in History and Jurisprudence," Vol. II, pp. 112-171. The following is a short abstract:—

Birth and growth being *common* to animate and inanimate nature are supposed to result from some power operating on both, and the term "nature" is used to indicate such power, the term being derived from "nascere," a Latin word indicating birth.

Common rational will, being common, is therefore supposed to result from nature.

Common usages or customs are therefore deemed to result from common rational will, and therefore to be derived from nature and to constitute the law of nature.

Early law consists of customs, and such customs as are found existent in different communities are deemed to originate from nature, and the same principle was subsequently applied to rules of national law common to different nations. Aristotle divided justice into natural justice and legal justice, thus anticipating Austin, and the Stoics developed the idea and maintained that natural justice rested on reason.

The most important aspect for the jurist of the theory of the law of nature is the development of the theory by the Romans through the medium of the Jus Gentium. The ancient Roman civil law, administered amongst Roman citizens by the Praetor Urbanus, was not applicable to the various communities which Rome from time to time conquered, and yet some system of law had to be provided for the administration of justice among them. About 246 B.C. a magistrate called the Praetor Peregrinus was appointed to administer justice to aliens, and of course had to deal with disputes between aliens and citizens, as well

as between aliens of different provinces. Now in cases of disputes between Roman citizens and aliens or between aliens of different provinces he had to judge arbitrarily at first, but in the case of disputes between aliens of the same province he would apply the law of that province. From constant contact with the laws of different provinces he would become acquainted with their laws and no doubt would observe resemblances between them, and might well be inclined to apply such rules as he found common to different provinces in cases in which he had no other guide. This new body of law thus evolved was called Jus Gentium because it was administered to the Gentes or aliens, and according to Sir H. Maine and Hunter this body of law was originally deemed inferior to Roman civil law, the privileged inheritance of the Roman citizen, but the Romans changed their attitude towards it when they identified it with the Grecian lost Code of Nature, and thereafter looked upon it as a superior body of principles, and it became the instrument for the subsequent reform and expansion of the Roman civil law. The Grecian theory of the lost Code of Nature was that there once existed a body of law perfect in all its provisions and of universal application, but that knowledge of the rules had been lost, and the efforts of Grecian philosophers were directed to discovering the rules of this code of law. The rules being of universal application, and the rules of the Jus Gentium being common to different communities, it was thought that the provisions of the Jus Gentium were portions of the lost Code of Nature. This is the meaning of Sir H. Maine's *dictum* that "The Jus Naturale at Rome was simply the Jus Gentium seen in the light of a peculiar theory" (Ancient Law, p. 55). As soon as this view obtained the Praetor Urbanus who administered justice to the citizens at Rome began to modify and reform Roman civil law on principles

based on the Jus Gentium, the Roman Civil Law proving insufficient for the needs of a growing community and being hampered by an extreme regard for technicalities. After Caracalla (211 A.D.) had conferred the citizenship on all free-born inhabitants of the Roman Empire there was no longer any such class as the Gentes, and Jus Gentium came to mean rules common to Rome and other nations, including therefore such parts of Roman Civil Law as were so common.

It must be mentioned that Moyle disputes that the Romans ever looked upon the Jus Gentium as an inferior body of law, and denies that the Grecian philosophic theories ever had any effect in modifying the Roman view as to the Jus Gentium. He states that the Greek teaching was not acceptable to the Romans and that in B.C. 161 the Greek Stoic teachers were expelled from the city. He points out that the Stoics first obtained influence at Rome in B.C. 129 and that there is nothing to show the Romans were adverse to the Jus Gentium up to that date. It may be pointed out, however, that the Praetor Peregrinus was not appointed until 246 B.C., and that even in the time of Gaius, about 117 A.D., an alien could only sue by bringing a fictitious action, in which the Judex was required to assume that the alien was a Roman citizen (Gaius, Institutes, IV, 37), which seems to show that Roman civil law was even then deemed the special privilege of the citizen. We do not know when the Jus Gentium was first applied by the Praetor Urbanus to relax the strictness of the civil law, nor does Maine assign any date. The latest meaning in Rome of the Law of Nature seems to be that it is a body of rules of law common to Rome and other nations, though, as Lord Bryce points out, it differs from the Grecian theory in three respects :—

(1) It is limited to national law;

(2) There is still a distinction as to slavery which is a rule of the Jus Gentium but not of the Jus Naturale;

(3) Some principles of the Roman Jus Gentium were not found in the laws of all nations;

but of course it must be remembered that no generalisation is entirely correct, and that the Jus Gentium, even to the end, bore some trace of its origin. It merely remains to add that according to Sir H. Maine (Ancient Law, pp. 99 *et seq.*) the greatest function of the theory of the law of nature was performed in giving birth to Public International Law as a body of rules binding on nations, and in consequence many of the rules of this body of law so called, such as those relating to acquisition of territory by discovery, are based on the Roman Jus Gentium.

With a view to arriving at a definition of law and national law it is useful to examine some definitions of law which have been propounded.

The earlier definitions of law betray a tendency to represent law as it ought to be rather than as it is.

Hooker defines it as "that which reason in such sort defines to be good that it must be done."

Altius Capito defines it as identical with a Roman statute, *i.e.*, "Lex est generale jussum populi aut plebis rogante magistratu."

Blackstone defines it under the title of Municipal Law as "a rule of civil conduct prescribed by the supreme power in the State." He states that by "a rule" he means not a transient particular order from a superior to or concerning a particular person, but something permanent, uniform and universal. As already pointed out (*ante*, p. 22) the number of persons to whom an order is addressed is immaterial. By the word "civil" he distinguishes such laws from the rules of morals or faith.

By "prescribed" he means notified, stating that notification may be by universal tradition as in the case of common law or by statutory enactment. It will be noticed that this leaves no place for "precedent," but in Blackstone's day the fiction obtained that the Judges never made law but merely discovered and applied an existing rule.

Austin (p. 86) defines a law as follows: It is a rule laid down for the guidance of an intelligent being by an intelligent being having power over him. According to Austin's theory laws are species of commands, *i.e.*, they are general commands. He states that there are three exceptions to the proposition, *i.e.*,

(1) declaratory statutes;

(2) statutes repealing rules of law;

(3) laws of imperfect obligation.

Before dealing with these it is well to state what Austin means by "general commands."

By the word "general" he indicates a command laying down a rule of conduct which has been sufficiently explained (*ante*, p. 22).

By the word "command" he means an intimation that something is to be done or not done coupled with an intimation that disobedience will render the disobedient party liable to some pain or evil, which pain or evil Austin designates a sanction.

It is immaterial in what terms a command is couched; it may be in the form of a request, as where one says to a domestic: "Please lay the table." As was once said by an ancient authority: "Preces erant sed quibus contradici non poterat." The party to whom a command is addressed is under a duty or obligation, which terms mean liability to a sanction. As pointed out by Austin,

each of the words " command," " duty " and " sanction " denote one part and connote the other two—the term " command " necessarily implies duty and sanction and each of these necessarily imply the other two.

Such laws as do not appear to have been expressly enacted or commanded by the sovereign, such as customary law and judiciary law are, according to Austin, impliedly commanded inasmuch as the sovereign allows them and enforces obedience thereto.

It may be pointed out before dealing with Austin's three exceptions to his proposition that laws are commands, that one objection to his theory is that it appears to limit law to rules which have been expressly enacted and to attribute undue importance to the enactment of a rule, whereas the point of importance is whether a rule is enforceable or not, no matter how it originated: *i.e.*, by express enactment, custom, adjudication, or by any other means. Maine indicates this idea when he says: " The once popular definition of law as a command of the State is an instance of the danger of forgetting the past, for the fact that it would have been palpably untrue in certain stages of political development shows it does not rest on a sufficiently broad foundation." To this statement one may, however, legitimately reply that analytical Jurisprudence is only concerned with law as it is, and is not concerned with its past to a greater extent than is necessary for a proper understanding of it in its present condition.

As regards the three exceptions which Austin admits to his theory that laws are general commands, declaratory laws are statutes which merely put in an authoritative manner rules which have been already established either by custom or adjudication. Inasmuch as no new obligation or duty is created such laws amount at most to a repeti-

tion of a command, but are of value as giving undeniable authority to rules to which a degree of uncertainty formerly attached. The most frequent modern examples of such laws are codes, but most of these, besides declaring the existing law, contain some new provisions.

As regards repealing statutes, whether they amount to commands or not depends on the law which is repealed and the provisions of the repealing statute. A statute repealing a rule of criminal law, it is submitted, is not a command. It merely releases persons from absolute duties, *i.e.*, duties owed to the sovereign, and renders them immune from criminal punishment in respect of conduct formerly so forbidden; but the statute leaves the legal relationship of the party to persons other than the sovereign in precisely the same position as it was before; such statute therefore imposes no new legal duty, and therefore gives the party released from the absolute duty no new legal right. For instance, if theft were declared no longer criminal, that would give no right to take other people's goods in a way formerly amounting to theft, and parties whose goods were so taken would still be entitled to their return or to compensation, though the delinquent could not be punished criminally. At most such statute might be held a command to the officers concerned with the enforcement of criminal justice not to proceed criminally against such delinquents, though it appears a more reasonable view to hold that such statute is a revocation of a command rather than a command. Where, however, a rule of civil law is repealed, parties formerly under legal relative duties, *i.e.*, duties to persons other than the sovereign, are released from those duties and may be in one of two positions.

First, they may be merely at liberty to indulge in conduct formerly forbidden, as is the case if the law gives

no remedy, civil or criminal, against persons hindering them in their indulgence in conduct formerly forbidden; as, for example, if it were provided by statute that no remedy, civil or criminal, should lie against a person preventing another forcibly retaking possession of his own property. Such person would merely be at liberty to so retake his property if he were able, and the statute would not be a command nor impose a duty on anyone.

Secondly, such persons may be given a legal right by the statute to indulge in conduct formerly forbidden; in such case the parties so relieved from their former duties of forbearance would have a remedy against those interfering with them in the exercise of their newly conferred right, and all other persons would be under a duty not to infringe such right and the statute would command all persons to respect such rights. However, it may well be contended that such statutes are not only repealing statutes but also statutes conferring rights, which appears the more reasonable view. As regards laws of imperfect obligation, these are laws without any sanction. There are none such in the English system, since whenever an act or forbearance is declared criminal but no punishment is prescribed the breach is punishable by fine or imprisonment: *R. v. Dunn*, 12 Q. B. 1026. In the reign of Victoria, when the Pope divided England into Roman Catholic dioceses under bishops, a Bill (the Clerical Titles Bill) was introduced into Parliament to prohibit the use of ecclesiastical titles by Roman Catholics, and it was suggested no penalties should be prescribed, but the Bill was lost. In the case of statutes conferring rights but specifying no sanction, the party injured by breach would be entitled to the appropriate civil remedy. In any system of law where there is no sanction for breach of a rule of conduct such rules are not laws and therefore not an

exception to the Austinian proposition that "Laws are general commands."

Before dealing with various criticisms of the Austinian theory of law it may be well to point out that Austin's early life was spent in the Army—which tinctured his views on the nature of law with the idea that a law must be enacted by a determinate person, whereas, as has already been emphasised, many laws have never been enacted in the ordinary sense of the word; they have been the growth of years and the rules have never been expressly commanded at any particular point of time.

The Austinian theory of law has been subjected to the following criticisms:—

Professor Jethro Brown (Austinian Theory of Law, p. 332) suggests that Austin defined "a law," not "the law," and that failing to recognise that both rules and subjects are part of a larger unity attributed the origin and authority of all law to the former. He suggests that the State is bound by the law, and defines law as "an expression of the general will, affirming an order which will be enforced by the organised might of the State and directed to the realisation of some real or imagined good" (p. 354). The latter part of the definition hardly seems necessary, since the validity of law is not dependent on its object.

Lord Bryce (Studies in History and Jurisprudence, Vol. II, pp. 44 *et seq.*) suggests that the Austinian theory of law is not universally true and represents a false view of the origin of law—*i.e.*, custom; and he adds that in modern States most law does not consist of commands; he instances administrative law, the law of contract as to form and interpretation, the law of succession to property on death.

Lord Bryce's statement that in modern States most

law does not consist of commands hardly appears well founded, for the following reasons:—

First. In England, and probably in most modern States, the matters referred to by him are provided for by statute, and a statute is undoubtedly a species of law which squares with Austin's definition of a command.

Secondly. Administrative law, the laws as to interpretation and form of contracts and as to succession to property on death appear, if carefully examined, to be as obligatory as any other kind of law, and therefore to be commands. The Act of Parliament creating an executive department and giving powers to administrative officers are, it is submitted, not laws, but are particular commands constituting the delegation of powers by the sovereign to his subordinate. The rules laid down by such officers, if amounting to rules of conduct for the citizen, are laws made by a political subordinate, and disobedience to them will be punished, and the order to obey such officers is similarly obligatory. The rules for the interpretation of contracts are rendered effectual in the same way as the other rules of civil as opposed to criminal law—namely, that the interpretation put on the contract by the Courts will be given effect to by the usual means for enforcing obedience to the Court's orders; in fact, the rules for interpreting a contract are part of the language by which the law's commands are intimated through the agency of the parties to the contract. As regards the obligation to make a contract with certain formalities without which the contract cannot be proved, and, indeed, as regards all rules of evidence, one of two views may be held. It may be contended that unless the formalities are complied with the law does not come into operation at all, and therefore the parties are at liberty to make the contract without such formalities and are under no obligation to comply

with the formalities, but no question of legal duty arises. On the other hand, it may be contended that where a contract or other transaction is made without the requisite formalities the sanction is what is called a nullity—*i.e.*, the party has had the trouble of making the contract and basing expectations on it, and is entitled to no return for such trouble and suffers the disappointment of unfulfilled expectations, and governmental protection to which the party would otherwise be entitled is withdrawn. This is the Austinian view and appears the more correct, since the law does issue a direction in such cases, whereas in the sphere of liberty the voice of the law is silent.

The rules for succession to property are laws declaring what facts shall constitute this particular kind of title, and are part of the command to persons generally not to interfere with the use and enjoyment of the property by the person entitled to the same.

Holland (Chap. III, p. 41) defines law as follows: "A law in the proper sense of the word is a general rule of human action taking cognisance only of external acts, enforced by a determinate authority, which authority is human, and among human authority is that which is paramount in a political society." Another definition by the same writer is: "A law is a general rule of external human action enforced by a sovereign political authority." The above definitions are really definitions of national law, the sense in which the term "law" is usually used, whereas as shown already there are other rules of conduct which possess the characteristics of law though not of national law. As regards Divine law this author says (p. 41): "Laws the author and upholder of which is superhuman are within the province of quite a different science, and the jurist may be warned in the quaint words of Thomasius 'not to put his sickle into the dread field of theology.'"

Salmond (p. 39) defines law as " the body of principles recognised and applied by the State in the administration of justice " or " the rules recognised and acted on in Courts of justice." By " the administration of justice " he states (p. 40) he means " the maintenance of right within a political community by the physical force of the State."

Criticising the Austinian theory he suggests (p. 51) that the imperative theory takes law as it is and is correct as regards the formal source, but disregards the material source and the ethical source and the idea that law is justice speaking to men through the voice of the State. He also suggests (p. 54) that the rules of procedure present difficulties from the Austinian point of view. As regards the supposed difference between law and justice, this appears to be a confusion between what is law and what ought to be law, a confusion which Austin is careful to avoid, and which it is suggested everyone should be careful to avoid. As pointed out before (p. 6) justice is a relative term depending entirely on the standard with which one is comparing a matter. The endeavour of the maker of national law is undoubtedly to give effect to his ideas of what is ethically right, but Jurisprudence is only concerned with law as it is, and a law is binding whether it is ethically sound or not. In connection with this point one may well bear in mind the answer given by a lawyer to a layman who asked him whether our law Courts were the Courts of justice. The answer was " No ! they are the Courts of law." As regards the alleged difficulty as to the rules of procedure we must refer our readers to our remarks as to the legal position of the rules of evidence (p. 47), though Professor Jethro Brown (p. 27) suggests that rules of procedure are like rules of interpretation as entering into the substantive commands which are law—they are descriptions of the sanction and its working.

It has been suggested that a criminal statute is the only example of a law in the Austinian sense of the word. It is true that in a criminal statute the sanction most in evidence is of the most potent kind, *i.e.*, physical pain or restraint or exaction of a monetary penalty, but, as pointed out already (p. 35), there are other sanctions besides these, and a general rule enforceable by a sanction is a law.

Professor Salmond suggests that justice precedes law, but in fact until there is some system of national law there can be no legal justice, so that they are contemporaneous in origin. Historically "law may be the creature of moral justice," as is sometimes stated, for before the establishment of political government the only rules existing to control the actions of men were such rules as were based on custom, and justice meant such conduct as was in accordance with such rules; when Courts of law, in the modern sense of the term, were established, the Courts busied themselves in ascertaining and enforcing the rules of customary law, and thus in the case of the English system established the common law of England, and even the efforts of the early legislatures seem to have been directed more to putting on record the ancient customs of the realm than to making new laws. See the early English Charters, and also the Twelve Tables at Rome, both of which in nature were merely declaratory bodies of law, and so historically, justice preceded law.

Lightwood (Nature of Positive Law, p. 55) states that Austin's ideas of law, property and contract are not of universal application, for in early Rome there was no legislation, in ancient Ireland self-redress was the remedy for wrong and in India custom rules. The answer to this appears to be that Austin dealt with law as it now is and the above matters are matters of history, though in reply

to this Lightwood very properly points out that there are some savage States even now with whom we have to deal. The position in such cases depends upon whether one is to apply the term " law " or " morality " to the rules obtaining in such communities. Austin, it is true, differentiated between law and morality and, as some think, divorced them. Lightwood (p. 126) suggests that they are inextricably related and that law is merely the supplement of morality, giving precision and definitiveness to the general principles of morality. He points out that morality says " thou shall not steal " and law defines what is theft. It might be more correct to say that law limits the meaning of theft to reasonable and certain bounds.

Lightwood says (p. 52) that it may be necessary that sovereign power should retain a more or less direct control over law, but that should not blind us to the true nature of law and the true purpose of Jurisprudence, *i.e.*, to seek to regulate the relations between man and man so that they may best be brought into harmony with the common sense of right. He says (p. 89) that it is the essence of law that it should govern all parties in the State and that it is more proper to look for its *origin* in custom than in command. With this statement as to the *origin* of law everyone will agree.

According to Savigny and most German jurists law is not a command but is a rule of conduct founded on the assent of the people as expressed by their customs and, when custom fails to provide adequately for the increasing needs of society, expressed through their Legislature.

He defines law (System, s. 5) as a rule existing for the purpose of regulating the actions of the individual in the interests of the whole—the original source is that whole for which it exists, hence if the people as a whole can in any way frame general rules of action these are law. The

Nature of Law and Purpose of Jurisprudence

Savigny's definition of law. Compare with Austin's.

people are the original sources of law and legislation is only introduced when custom becomes inadequate to regulate the increasing needs of society.

The view of Savigny and the school he represents as to law is, of course, tinctured by the nature of law in Germany, resulting from its method of development. It was originally customary law, as the primeval law of most, if not all, States has been; but in Germany, as in Rome, the expansion was due to the labour of jurists—to what Lightwood calls the agency of science—there being no centralisation of legislative power as in England. The jurists ascertained the principles underlying the mass of custom, expressed them in intelligible language, and expanded them and finally introduced openly the system of Roman law to meet the growing needs of the nation. The jurists were the means of expressing the wishes of the community, being the only persons sufficiently skilled to do so. Legislation was the final means when the nation became too large for the powers of the jurists.

In England we had no jurists, and the common or customary law was originally expanded only by the efforts of the Judges, who, being merely concerned with deciding actual cases, made no effort to push existing principles to their logical conclusion beyond the actual requirements of the case they were engaged in deciding, and, moreover, always disclaimed any power to make law, ascribing that power solely to the sovereign.

In consequence, equity as a body of law came into being in England to supply the deficiency, whereas there was never in Germany a system of equity in the English sense, since the development of law was by the writings of jurists, not by the decisions of Judges, case law having no authority in Germany.

Another school in Germany, represented by Ihering,

represents law as the command of the sovereign but a command which binds the sovereign as well as the subject, the sovereign being content to be bound through selfishness —*i.e.*, fear of revolution. Law, he says, has two elements, force and rule, and law only deserves its name when force is subject to the rule.

According to Lightwood (Nature of Positive Law), generally speaking the English view is that law is necessary to restrain a refractory people, the German theory that law exists only to ensure due liberty of the individual; it springs from the customs of the people and a sanction is only an occasional necessity, or, as Savigny says, the sanction is the physic of the law.

If one may add to the numerous definitions of law, law generally may be defined as an obligatory rule of conduct. The term "rule of conduct" has already been explained. The term "obligatory" means that disobedience to the rule is followed by some pain or evil inflicted on the party disobeying. This pain or evil is called a sanction, and it is submitted that no law is effective without such sanction, though, of course, many persons obey the law from habit, or from considerations of utility, without any reference to or fear of the evil consequent on disobedience thereto. The motive inducing obedience is an element quite distinct from that which renders a law binding.

Particular as well as general commands are rendered effective by sanctions. The operation of a sanction is on the aversions, for, as everyone wishes to avoid pain and suffering, the law offers a choice of evils—*i.e.*, a choice between the pain caused by forbearing from breaking the law on the one hand, and the pain which the law will inflict if it is disobeyed on the other hand. In fact, laws operate by giving the party a choice of evils, and herein the operation of law differs from that of physical compulsion, since

in the latter case the party, not being a free agent, has no choice of evils. Of course, the sanction of a law is applied to wrongdoers by physical compulsion.

According to Professor Jethro Brown (Austinian Theory of Law, p. 7) there must be a real chance of evil, and, if there is but the smallest chance, such chance is not a sanction. It is submitted that the smallest chance of evil is enough, though, of course, the sanction would be but weak.

The pain or evil constituting the sanction of a law may be of various kinds; *e.g.*, corporal punishment, imprisonment, fine, the obligation of compensating the party injured by the breach, or the sanction may be a nullity, as pointed out before in respect of the rules of evidence: see p. 47. Sanctions may operate vicariously, *i.e.*, where the property of a convicted criminal who has been executed is confiscated by the State, whereby his relatives, who would otherwise have succeeded to it, are punished.

The term "sanction" has also been applied in the following two cases, though, it is submitted, for reasons given hereafter, improperly :—

(1) By Bentham and Paley to certain evil consequences which follow naturally and invariably on certain conduct, *e.g.*, pain from burning, ill-health from excesses. These writers call such evils physical or natural sanctions. If they are sanctions at all they are Divine ones and Jurisprudence is not concerned with them; but, as Austin points out, to apply the term "sanction" to them would necessitate applying it to all evil consequences flowing from misconduct—*i.e.*, loss of business through conviction for crime, and the term would then have no precise meaning. Moreover, these consequences being so far as we know inevitable and natural results differ from sanctions properly so called, since sanctions properly so called are not

inevitable consequences and do not follow immediately on a breach of law; they are not natural consequences and may be remitted by the person imposing them. The laws of nature are immutable, though, of course, the consequence of disobeying one law may be avoided by bringing another law into operation, as where one cures illness by medicine.

(2) Bentham suggests that rewards are sanctions because a reward offered for an act or forbearance induces a party to act or forbear and thus has a similar effect to a sanction.

There appear to be three objections to classing rewards with sanctions:—

(*a*) The party who does not earn the reward suffers no evil; he is in the same position and in no worse one than he was before he made up his mind not to earn the reward. It may be thought that rewards operate by way of nullity, but this is not so, for in case of a nullity the party is in a worse position, since he has had the trouble of entering into a transaction from which he can claim no benefit.

(*b*) Where a sanction operates the persons subject to it are thereby put under a duty or obligation to pursue the course of conduct enjoined thereby. No one, however, is under a duty to earn a reward.

(*c*) If the term "sanction" is to be applied to rewards because they induce to acts or forbearances, then the term should be applied to inducements of all kinds, and it would cease to have any precise meaning.

Usage has attributed to the word "sanction" the meaning of an evil to be suffered in consequence of disobeying a law or command, and it appears unscientific to apply it to other and dissimilar inducements to conduct.

Classification of Sanctions.

Sanctions may be classified into—

(1) Divine or religious, which are inflicted by God, operate in a future life, are irresistible and unavoidable.

(2) Human, which are inflicted by human beings, may be under certain circumstances successfully resisted or avoided.

Human sanctions are of different kinds—

(*a*) Legal, which are inflicted by a political superior.

(*b*) Positive moral, inflicted by a definite superior who is not political.

(*c*) Moral, inflicted by an indefinite body of persons by means of the censure of public opinion.

As a law with its sanction allows a party an option to obey or disobey it will be obvious that there can be no law operating in cases where there is no such option and therefore that laws can only affect human beings who have a free will; so, as stated before, the so-called law of nature, which is supposed to govern the conduct of inanimate nature and such conduct of animate nature as is not referable to the action of will power, is non-existent.

Whether laws can be set to the lower animals may be a matter of opinion, but no national law is in fact set to them, though in the olden days animals who had killed persons were themselves killed more as a punishment than as a preventive.

Every person on whom a rule of conduct is obligatory is under a duty to obey; duty or obligation merely means "liability to a sanction." Every law, therefore, implies the existence of a duty and a sanction. There are, there-

fore, no such things as permissive laws, using the term "permissive" as meaning a law which merely gives a right without imposing a duty: for the existence of a right there must be an obligation on others to respect that right and therefore such others are under the duty. An example of a permissive law is one which enables a local authority to do certain things which they would not be otherwise empowered to do. That such law imposes a duty is apparent if one examines the position, for as the authority is empowered to do the particular thing in question it will have a remedy against anyone interfering to prevent it exercising such power, therefore all other persons are under a duty not to interfere.

Laws may be classified by reference to the person who enforces the sanction; if such person is God, the law is Divine; if a sovereign, the law is national; if a private person, the law is a positive moral one.

The person who can enforce a sanction is called in Austinian language a superior, for, as he says, "superiority signifies might." Might means the power of inflicting pain or evil on others and excludes intellectual superiority, and the superiority which results from the possession of riches.

God's superiority is absolute, for, as pointed out before in dealing with the characteristics of Divine law, the sanction by which such law is enforced is irresistible, but man's superiority is not absolute, for though the sovereign body is superior to each individual subject, yet the whole of the subjects *en masse* if they acted in unison would, of course, be superior to the sovereign.

As already stated Jurisprudence is only concerned with the law which is enforced by a sovereign which we have called national law and we now have to deal in detail with the nature of such law.

CHAPTER III.

NATIONAL LAW; AND HEREUNDER OF SOVEREIGNTY.

NATIONAL law is law which is enforced by a sovereign against his subjects and in some cases against persons who, though not his subjects, are within his territory. The term "sovereign" means a political superior who is not subject to any other political superior. The sovereign is he who enforces the law, not necessarily he who made it, for, as Hobbes says: "The sovereign is he not by whose authority law was first made, but by whose authority it continues to be law." Westlake (Private International Law, p. 2) points out: "A prominent feature of national law is that it is a body of rules to be uniformly applied to the cases which fall within them and of which the breach is redressed or punished by a force irresistible to the individual subject and regularly applied through Courts of justice." It is generally held that there can be no national law without a sovereign to enforce it, but Sir Henry Maine (Early History of Institutions, p. 380) suggests that national law can exist without a sovereign, and instances the case of the Punjaub under Runjeet Singh, of whom Sir Henry Maine says: "he was absolutely despotic . . . he could have commanded anything . . . yet I doubt whether once in all his life he issued a command which Austin would call a law. . . . The rules which regulated the life of his subjects were derived from their immemorial usages and these rules were administered by domestic tribunals in family or village communities." Sir Henry submits that the rules were laws because Runjeet Singh permitted the heads of households

and the village elders to prescribe—*i.e.*, determine—what they were, but he points out that it is doubtful whether Runjeet Singh could have interfered if he had wanted to, and that the sanction of these rules was in its nature religious, since no one thought of disputing or disobeying a rule declared valid by a person invested with authority as such head of a family or of a village community. Professor Holland (p. 53) points out that these rules are in one of two positions; if disobedience to them is habitually repressed by local force, then that force must in the last resort be supported by the whole force of the Empire, and in such case the rules are undoubtedly rules of national law; if, however, disobedience to them is habitually acquiesced in, then they are not law. This hardly meets the point that obedience may be habitually rendered to them because of their supposed supernatural nature, even though Runjeet Singh would not enforce obedience; in such case it is difficult to determine their exact nature, but they are certainly not rules of national law.

National law being enforced by a sovereign, it is necessary to determine the nature of sovereignty and also of the entity resulting from the relationship between a sovereign and his subjects; *i.e.*, what Austin calls the Independent Political Society, or what is generally now called a Sovereign State.

Sovereignty, being a human institution and the result of historical development, does not admit of an absolute definition. It results from the habits of mankind, and therefore can only be defined by reference to such habits; and Austin has emphasised this in his definition of it, which may be paraphrased as follows. A sovereign one or body is a determinate human superior not in the habit of obeying any other human superior, and who is habitually obeyed by the bulk of his subjects.

There are two aspects of sovereignty :—

(1) The Negative aspect ; *i.e.*, the sovereign is not in the habit of obeying any other human superior ;

(2) The Positive aspect ; the sovereign is habitually obeyed by the bulk of his subjects.

(1) As regards the *negative* aspect, it may be observed that it in no way derogates from the position of a sovereign as such that he occasionally obeys another who may have obtained temporary domination over him. If one were to restrict the term " sovereign " to persons or bodies of persons who never obeyed any other person, it would be almost impossible to find any person or body of persons who possessed the requisite essentials of sovereignty. The negative aspect also distinguishes a sovereign from a private person or a political subordinate who sets a law to another, for as such persons are in the habit of obedience to another they are not themselves sovereign. Sovereignty is a matter of fact, not of theory. The fact that a State could not offer effective resistance to other States if they chose to enforce their will does not prevent the former State being sovereign if in fact it is not in the habit of obeying those other States. So Switzerland and Holland are sovereign States. Again, mere deference by a sovereign to the opinions of a class within the community does not deprive him of sovereignty, for if it did the class would be sovereign and the sovereignty would reside in an indeterminate body of persons, which, as has been already shown, is impossible : see p. 24. The wishes of the class supply an inducement to the sovereign to exercise his sovereign powers on certain lines, but there are, of course, various other causes which influence the actions of a sovereign. Viceroys and other political subordinates said to be invested with sovereign powers over the community they are sent to govern are not themselves sovereign, since

they habitually obey the sovereign who appointed them to the office. The fact that the subjects, if they rebelled, might prove stronger than the sovereign does not prevent him being sovereign so long as he is not in the habit of obeying; for the fact that a person may be deprived of a thing does not prove that it is not his so long as he actually owns it.

It has been suggested that sovereigns may be classified as follows:—

(1) Those *de jure*; *i.e.*, who ought to be sovereign though they are not actually exercising sovereign powers;

(2) Those *de facto*; *i.e.*, who are actually exercising sovereign powers though they ought not to be so doing;

(3) Those *de jure et de facto*; *i.e.*, who are actually exercising sovereign powers and ought to be so doing.

However interesting such distinctions may be from the point of view of history and morality, they are immaterial from the point of view of Jurisprudence, for the only sovereign the jurist is concerned with is the sovereign *de facto*. From the point of view of Jurisprudence there is only one kind of sovereign; *i.e.*, the one *de facto*, and the statute De Facto (11 Hen. 7. c. 1) seems an unconscious anticipation of this doctrine. This statute declared that obedience to an actual reigning sovereign should not be deemed treason to any other person who might be ultimately proved to have a better right to the throne. Of course, from the point of view of morality, or of Divine law, the above distinctions may be justified, but from the point of view of national law, a sovereign is neither lawful nor unlawful, for, not being subject, *ex hypothesi*, to his own law nor to the law of any other sovereign, there is no national law by which one can judge his conduct.

As soon as a sovereign is overthrown the conduct of the new sovereign is not subject to any legal standard, so from this point of view the execution of Charles I was neither lawful nor unlawful, though, of course, it must be remembered that the conduct of Charles I himself may have been unlawful, since he never was sovereign, but only a member of the sovereign body, and of course each member of the sovereign body may be subject to laws made by the whole sovereign body. The question as to whether a sovereign can be subject to the law he makes will be dealt with subsequently (see p. 197) when we come to deal with the Austinian theory of sovereignty.

(2) *The Positive Aspect.*—This, like the negative aspect, is a matter of habit and degree. It is not necessary that the *whole* of the subjects should *always* or *habitually* obey, nor that the *bulk* of them should *always* obey; it is sufficient if the *bulk habitually* obey. There are certain classes of persons who habitually break the law, and there may be occasions of popular tumult when the bulk of the subjects break the law for a short period, though order is ultimately restored by the means of comparatively small bodies of organised Government forces, but the fact that order is restored shows that the disobedience has not become habitual. Of course, during the intermediate stages of successful rebellion it is difficult to say where the sovereignty is. Austin suggests that either there is a state of anarchy, or two sovereign communities, or a sovereign community and a body of rebels.

Forms of Sovereignty.

Austin has classified forms of sovereignty as follows:—

(1) *Monarchy*: where the sovereign power is vested in one person. There are few, if any, examples of this form

now existing, and even when it did exist the sovereign was only able to maintain his position by allying himself with some predominant class in the State, *e.g.*, the priests, or the army, or the lawyers, and shaping his conduct conformably to what he thought their desires were. This does not prevent the one individual being sovereign, for if it did the class itself would be sovereign and the sovereignty would reside in an indeterminate body, which, as already shown (p. 24), is not possible.

(2) *Aristocracy* (using the term in a generic sense): where the sovereign powers are vested in two or more persons. Aristocracies are of three kinds according to Austin :—

(*a*) *Oligarchy*: where the proportion of the sovereign number to the number of the whole community is extremely small.

(*b*) *Aristocracy* (using the term in the specific sense): where such proportion though not extremely small is still small.

(*c*) *Democracy*: where such proportion is large.

As Austin points out, these three forms of aristocracy cannot be distinguished with precision, and they have only been mentioned here for the purpose of pointing out a difficulty existing in cases where the sovereign body or a portion of the sovereign body consists of elected representatives, as in the English constitution. In such cases the distinctions must, it is submitted, depend on the number of persons who have the right of electing the representatives. For instance, it will be readily admitted that the form of government in England became a democracy by the first Reform Act, 1867, and yet the numbers of representatives in the House of Commons from 1832 until

1918 remained at 670. Of course, one way out of the difficulty is to attribute to the electors a portion of the sovereign power, as Austin does, but it is submitted that this is not a sound view. The power of nominating a person who shall be entitled to property is not at all the same thing as owning that property oneself, and so the power of nominating a person who shall have sovereign power is not at all the same thing as possessing sovereign power. Moreover, as the only power the electorate have in England is to nominate one member of the sovereign body, it is clear that they do not vest sovereign power in the other two members thereof, nor have the electorate any of the powers of legislation, adjudication or administration which are essential to a sovereign.

Dicey (p. 70) says: " That body is politically sovereign the will of which is ultimately obeyed by the citizens of the State. . . . That body is legally sovereign in which resides the power of law-making unrestricted by any legal limit." This seems to suggest that there may be two sovereigns, in which case the legal sovereign appears to be merely the agent of the political one, and, as Lightwood points out (p. 278), the organisation by which the wishes of all can be ascertained—the representative of the people; as Jethro Brown says (p. 286), the sovereign organ.

According to Professor Jethro Brown (Austinian Theory of Law, p. 286) the sovereign is the power whose authority is regarded by law as unlimited and as the source both of all law and of the authority of all law-making or governmental institutions. He suggests that in England the State itself is sovereign and the Parliament of Great Britain is the sovereign organ, or as Lightwood says, the servant of the national will; but Professor Brown suggests (p. 277) that the sovereign may be (1) the dominating power in

Government, or (2) the electoral body, or (3) the popular majority, or (4) the State as a moral organism.

Grotius (De Jure Belli ac Pacis, Whewell's translation, Vol. I, p. 113) indicates the distinction between the sovereign and the sovereign organ when he says: "Let us see in what subject sovereign power resides. The subject in which power resides is either common or special, as the common subject in which the sight resides is the body, but the special subject is the eye. And in like manner the common subject in which the sovereignty resides is the State . . . the special subject is one or more persons according to the laws and customs of each nation."

According to Burgess (Political Science and Constitutional Law, I, 52-8; II, 7) sovereignty is original, absolute, unlimited, universal power over the individual subject, and over all associations of subjects, is absolutely essential to the State and is either entire or not at all. This appears to be in harmony with the views of Austin, though as will appear later, it is only accurate of simple States, not of composite States. (See pp. 70 *et seq.*)

The sound view is, it is submitted, that the sovereign power in States where representative government is in operation is vested in the representative body with the assent of the electorate, though the sovereign power was not originally derived from the electorate. In the British constitution sovereignty appears to reside in the King in Parliament, and when Parliament is not in existence the legislative powers are dormant. According to the English doctrine the delegation of power to the Parliamentary representatives is absolute, and not capable of being legally fettered by any undertaking as to the manner in which it shall be exercised. So in *Osborne* v. *The Amalgamated Society of Railway Servants* ([1911] 1 Ch. 546, C. A.) it was laid down that any agreement by which a Member

of Parliament undertakes to vote in a prescribed manner is void at law. See also Locke's Civil Government: "Thus to regulate candidates and electors and new model the ways of election, what is it but to cut up the government by the roots and poison the very fountain of public security."

As regards the comparative merits of monarchies, aristocracies, and democracies Blackstone suggests that monarchies are strong but despotic, since there is no other depositary of the sovereign power to consider and so no risk of divided counsels; aristocracies are wise, being as a rule composed of experienced persons, but are not honest, as they endeavour to further the interests of the class to which they belong instead of the nation as a whole. It may be pointed out, however, that under party government democracy is not free from this defect. Democracies, he suggests, are weak owing to many counsellors, but are honest. In the English constitution he says we have the best parts of the three.

As regards the difference between *free* and *despotic* governments Austin points out that all sovereign governments are both free, as being free from control from without, and despotic as being free from control from within, and that as the term "free" is meant to import praise this cannot be the meaning of the term in such connection; again a free government does not necessarily mean one which leaves more liberty to its subjects than another government, for if that were so a government which let all its subjects do just as they like would be the most free and therefore the best, which is manifestly false. A free government means one which leaves more useful liberty to its subjects than a despotic one.

Austin predicates of sovereignty that it is illimitable and indivisible. See p. 257 of his Lectures, where he says:

"It results from positions which I shall try to establish hereafter that *the power of a sovereign is incapable of legal limitation*. It also results from positions which I have tried to establish already that *in every society, political and independent, the sovereign is one individual or body of individuals*: that unless the sovereign be one individual or one body of individuals the given independent society is either in a state of nature, or is split into two or more independent political societies."

It is proposed to show that the above statement is not sound in the case of a complex State or what Austin calls a composite State.

States or sovereign Governments are either—

(1) Simple;

(2) Complex, which are sometimes called semi-sovereign, a designation which Austin says is a contradiction in terms, though Professor Jethro Brown approves of it, for he says the term represents real facts and States are the creatures not of logic but of history.

A simple State is one in which all the sovereign powers are vested in one person or body of persons. The Russian Government was an example, and, it is submitted that, prior to the Statute of Westminster, 1931, the British Constitution was another. The only difficulty about the British Constitution then was that owing to the autonomy granted to the self-governing Colonies it might appear that they had been granted sovereign powers, but one must remember the right of Imperial Parliament to legislate for all parts of the British Empire (see the Colonial Laws Validity Act, 1865), and the power of the Crown to appoint a Governor for a Colony, which Governor might veto Colonial legislation, and one must also bear in mind the power of the English Executive to disallow Colonial legislation and

of the Privy Council to reverse Colonial judicial decisions; these powers, which were actually exercised, showed that the King in Parliament and in Council still possessed sovereign powers over all parts of the Empire. It is interesting to note that an Act of Imperial Parliament (British North America Act, 1916) was necessary in 1916 to extend the duration of the Canadian Parliament. It is true that many branches of sovereign power had been delegated to persons or bodies of persons who were on the spot, but not surrendered. In the case of a simple State the sovereignty is in fact undivided and without legal limitations.

The Statute of Westminster, 1931, has given the Dominions, *i.e.*, Canada, Australia, New Zealand, South Africa, Newfoundland, and the Irish Free State sovereign powers, though still remaining parts of the British Empire and yet not related to Imperial Parliament on the terms of federation. As regards the Dominions the position appears to be that of a system of confederated estates. No doubt the Dominions rely upon the forces of the United Kingdom to protect them in time of war, and the United Kingdom is no doubt entitled to claim their support in such case, but, as they are not bound by Acts of Imperial Parliament unless made at their request and with their consent and may pass statutes having exterritorial effect, it appears that Imperial Parliament is not sovereign over the Dominions though it is over the Colonies.

(2) Complex States are either federal or protectorates or under suzerainty or mandate territories.

A federal State is one in which the various powers of sovereignty are vested in different persons or bodies in such a way that none of them can intrench on the powers of the others, nor can all acting together vary the powers of any of them. This is the doctrine of the separation or

distribution of powers, an essential of federalism, and to be carefully distinguished from the delegation of powers, since in the latter case there is one sovereign body who has all the sovereign powers and may vary the relations of the others to whom the powers have been delegated or may even deprive them of such powers.

In a federal State the complex nature of the government affects the internal constitution of the State as well as its external relations, whereas in the case of a protectorate or state under suzerainty it is only in its external relations that the complex nature of the State has any effect.

That this is so will become apparent when one examines some examples of each. The most important examples of federal government are presented by the constitution of the United States of America and Switzerland.

In the United States of America the legislative power is vested in Congress, consisting of the Senate and the House of Representatives, but Congress can legislate only on a certain number of subjects specified in the Constitution; legislation on all other subjects is the prerogative of each individual State in the Union. The Senate has the power of making war, peace, and treaties. The President has the executive powers. The Supreme Court has the judicial powers, and can refuse to enforce any statute passed by Congress if it thinks that body has exceeded its powers. The President can also refuse to enforce any decree of the Supreme Court. General Jackson, the President, said *re* a decision of Marshall, C.J.: "John Marshall has declared the law—now let John Marshall enforce it," and it could not be enforced. The Constitution can be altered only by a three-fourths majority of States and voters. It is clear that the Legislature, Executive, and Judiciary are independent of each other, and that even acting together they cannot alter their relationships, whereas in a simple State,

such as the British Empire, Imperial Parliament, which is the Legislature, can readjust the relations between the different depositaries of the various branches of the sovereign Power.

Switzerland is the simplest of complex Constitutions. The Federal Assembly has supreme power within the constitution, subject to the veto of the people, as federal legislation which 30,000 citizens think of importance cannot become law unless sanctioned by a majority of voters. The constitution can be altered only by the assent of a majority of Swiss citizens and of the cantons. Where a State is under the protection or under the suzerainty of another, the State has perfect freedom except that it cannot enter into relations with other states without the consent of the State protecting it or having suzerainty over it. It is not deemed part of the State protecting or having suzerainty; so in the case of the Ionian Ships in 1857, the fact that England, who had a protectorate over the Ionian Islands, was at war with Russia, was held not to involve the Ionian islanders, nor to render trade between them and Russia illegal. In the case of States under suzerainty the same rule would apply. It may be considered that such States are sovereign States who have entered into permanent undertakings with other States; or, on the other hand, they may be considered examples of divided sovereignty.

A mandate territory is a community subjected to receiving administrative advice and assistance from the nation having the mandate, and which is excluded from annexation by any other State.

In the case of complex States we have divided sovereignty, and attempts to explain the position on any other basis are doomed to failure. Austin attempts the following explanation. He says as regards federal States

that "the sovereignty resides in the several united societies together with the government common to those several societies. As compacted by the common government which they have concurred in creating and to which they have severally *delegated* portions of their several sovereignties, the several governments of the several united societies are jointly sovereign in each and all." This is a typical example of Austinian language and assumes that the whole problem is a mathematical one. It may be at once pointed out that in such cases there is something more than delegation, since, if there were only delegation, those who had delegated could resume the power, which they cannot. He goes on to say that the sovereignty of each of the States and also of the larger State arising from the federal union resides in the States' government as forming one aggregate body; meaning by a State's government not its ordinary Legislature but the body of its citizens which appoints its ordinary Legislature and which, the Union apart, is properly sovereign therein.

Now inasmuch as the constitution in the United States of America can be altered by a three-fourths' majority of States and voters, it may be contended that what they do not alter they allow and that therefore they are really sovereign. Professor Jethro Brown seems to agree, for he says (Austinian Theory of Law, p. 154) the sovereignty is in the organisation of the Republic behind the national and provincial Governments. It is difficult to rouse to action, but when once aroused its will is omnipotent.

One must remember, however, that the problem is concerned with the jural aspect of things as they are, not as they may become in future, and also that the constitution of all sovereign bodies can be altered by a sufficiently large majority acting through the medium of a revolution. The power of changing the location of sovereignty does not

necessarily determine where the sovereignty now is, which is the object of the inquiry. As Lord Bryce points out (Essays on Politics and Jurisprudence), "a legal sovereign is no less sovereign because he reigns by the choice of others —the appointing body, even though it can recall the appointment, is not sovereign over him while the appointment lasts." It is submitted that the Austinian attempt to locate the federal sovereignty in an aggregate body is inaccurate, and that in such cases there is no one body in which it can be located, because it is divided up between several bodies. As regards protected States, Austin's theory is that such States are either wholly sovereign or wholly subject, or together with the protecting State are jointly sovereign. This does not appear helpful in locating sovereignty in cases that are of a generic nature, and the theory suggested above seems a much more rational method of dealing with the problem.

As regards States under suzerainty, Austin says that they are completely sovereign, which appears, as already stated, to be a rational view.

Professor Holland's method of dealing with the problem is as follows (Chap. IV, pp. 50 *et seq.*):—

He predicates that sovereignty is External on the one hand or Internal on the other. External sovereignty relates apparently to the position of the State as a member of the family of nations; Internal sovereignty relates to the relationship between the sovereign part of the State and the subject part; in other words, to forms of government.

Professor Holland lays down that External sovereignty is enjoyed most obviously by what is technically known as a simple State; *i.e.*, by one which is not bound in a permanent manner to any foreign political body.

States which are not simple are combined with others on equal or unequal terms. In the former case they form

an Incorporate Union such as the United Kingdom of Great Britain and Ireland; or an État Fédératif such as the United States of America and the Swiss Confederation. In the latter case—*i.e.*, where combined on unequal terms—the States occupying the inferior position are known as mi-souverain, and may be protected like the Republics of Andorre and San Marino, or may be under suzerainty, as Egypt formerly was.

If the States are equally united, then, according to Professor Holland, their external sovereignty resides in the government which results from their combination; if unequally united, the external sovereignty is to be looked for in the State which is suzerain or protector. It may be remarked on the above theory that it may well be contended that there is no real difference between external and internal sovereignty, the former merely indicating the State as viewed from without and the latter as viewed from within. The State is the same whether viewed from within or without; nor does the theory enable one to solve the difficulty of locating the sovereignty in a federal State, since the difficulty is not limited to locating it with a view to the relation of the State to other States, for the complex nature of a federal State affects its internal sovereignty so called. See the United States of America.

One may also point out that British sovereignty is not limited to sovereignty over Great Britain and Ireland, but applies to the whole of the British Empire, and, as has been pointed out already, appears to be localised in Imperial Parliament. This proposition does not appear to be modified by the fact that some of the subject States of the British Empire are federal as regards their form of local government.

The real point of importance as regards External sovereignty so called is to determine what person or body

of persons can speak authoritatively of the State to other States, but as such person or body only represents the sovereign, the determination of who that person is does not of itself enable one to locate the sovereign body whence he or it derives the authority.

According to Lord Bryce (Essays on History and Jurisprudence, Essay X, vol. II, p. 49), sovereignty is either Legal or Practical.

The Legal sovereign is the person or body of persons to whose directions the law attributes legal force, the person or body in whom resides as of right the ultimate power of laying down general rules or issuing isolated commands —the highest ultimate source of law.

The Practical sovereign is the strongest force in the State—he whose will will prevail whether with or against the law, or, as Sir James Fitzjames Stephen calls it, "dormant anarchy." It comes into play when legal sovereignty is in dispute or has disappeared; in cases where the time during which obedience has been rendered to the practical sovereign is not sufficiently long to enable one to say whether such obedience is habitual or not. The fear that the practical sovereign may emerge into active life constitutes what Professor Dicey calls the external limit on sovereign power since the fear of calling it into activity under the dread personality of Revolution influences the exercise of the powers of every sovereign. Really Jurisprudence has no concern with practical sovereignty, since it is only the legal sovereign who is the source of law, and the consideration of who might ultimately emerge as sovereign in the event of a contest is a matter for the politician, not for the jurist. Lord Bryce points out that in a rigid constitution, *i.e.*, one which cannot be altered by the ordinary methods of legislation, legal sovereignty is divided between two authorities, the one in constant,

the other in occasional, action, the former being the authority that carries on the government, the latter the body which can alter the constitution. Lord Bryce agrees that in a federal constitution legal sovereignty is, moreover, divided and partial.

According to Salmond, pp. 157—160, States may be classified as follows:—

Internally they are Unitary or Composite. Externally they are Independent or Dependent. Independent States are Sovereign or Semi-Sovereign, the latter being under the protection or suzerainty of another sovereign State. He points out that the semi-sovereign State and the protecting or suzerain State are two distinct States bearing to each other a relation which is international and external, not merely constitutional and internal. This is an important distinction.

For a State to be dependent he predicates that it must be a constituent part of the State under whose control it is, so that the acts of the latter are imputed to the former.

Internally States are unitary or composite, terms synonymous with the distinction between simple and complex States.

He suggests that the British Empire is a composite State, since many of its constituents are possessed of such autonomy as to be States themselves. The reasons for deeming the British Empire prior to 1931 a simple State, not a composite one, have already been pointed out (p. 67), though, as Professor Salmond points out, the Constitution of many of its constituent States are federal; *e.g.*, the Australian Commonwealth. It must be noted, however, that these States were merely delegates of sovereign power, there was no separation of powers, Imperial Parliament being supreme in the British Empire.

Salmond classifies composite States as follows :—

(*a*) Imperial, such as the British Empire, where one State is predominant over the rest, though many of its constituents are possessed of such autonomy as to be States themselves;

(*b*) Federal, such as the United States of America, where no State is predominant.

From the above different views as to the nature of sovereignty it appears that the Austinian theory of the indivisibility of sovereignty is unsound, and that in cases where there is a separation as distinct from a delegation of powers the sovereignty is effectively divided. One must also admit that in such cases the sovereignty is limited since there is no one person or body of persons with unlimited sovereign powers.

Of course, in a simple State the sovereignty is undivided and unlimited, but as appears from the above considerations sovereignty itself is not necessarily indivisible or illimitable.

It is submitted that the only way in which sovereignty can be legally limited is by dividing it up, though Professor Salmond suggests that a sovereign body might provide that no law could be repealed save by a fixed majority and thereby limit its own powers—but unless such fixed majority was some body outside the sovereign body such provision would be ineffective, since no part of the sovereignty having been assigned to any other person or body, Parliament would still retain it and could repeal such law. The Act of Union with Ireland, 1800, provided that the Church of Ireland should be for ever established, yet it was disestablished in 1869. If such fixed majority were some body outside the so-called sovereign body then there would have been a surrender of a portion of sovereign

power and the creation of a new constitution with divided sovereignty.

Note on the Effect of the Parliament Act, 1911, on the British Constitution.

Before the Act of 1911 it is submitted that the sovereignty under the English constitution was vested in the King, Lords and Commons, since no change in the law could be effected without their joint action. The Act of 1911 has provided that the King and House of Commons can enforce their will against the House of Lords except as regards extending the duration of Parliament, and the Act may seem to have introduced a separation of powers and a divided sovereignty, but inasmuch as the King, Lords and Commons can together modify the powers and position of any of them it really amounts to a case of delegation, not separation, for, as pointed out already (p. 68), in the case of *separation of powers* the bodies possessing the various branches of the sovereign power cannot, even if acting in concert, modify their relationship to each other.

It is submitted that on consideration of the above matters it is obvious that sovereignty is divisible and where it is divided is limited. But it is suggested that one is not bound, therefore, to accept Lord Bryce's theory that sovereignty is legal or practical, nor to deny that in a simple State sovereignty is in fact legally undivided and unlimited.

Professor Dicey has pointed out that sovereignty is always subject to two limits—the external one, *i.e.*, fear of revolution if its conduct is too repugnant to the wishes of its subjects, and the internal limit resulting from the disposition of the sovereign one or body which

Limitations of sovereignty

in a government by an elected body is to an extent a reflection of the disposition of the electing body.

Professor Jethro Brown (Austinian Theory of Law, p. 158) classifies the limitations as follows: I. Limitations in fact, *i.e.*, the character of the rulers—the resistance of the subjects—international relations, *i.e.*, the fear of offending other States—physical impossibilities. II. Limitations in theory, *i.e.*, conflict with prevailing doctrine of the sphere of State action—conflict with ordinary positive law—conflict with a superior law, *i.e.*, Divine, natural, customary or constitutional.

Some Erroneous Definitions of Sovereignty.

Bearing in mind that sovereignty is a question of fact and that it has two aspects—the negative and the positive aspect—the defects in the following definitions of sovereignty will be readily perceived.

Bentham describes sovereignty as follows: "When a number of persons, whom one may style subjects, *are supposed* to be in the habit of paying obedience to a person or assemblage of persons of a *known and certain description* whom we may call governor (*sic*), such persons altogether are said to be in a State of political society." This definition does not state that the governor so-called must not be in the habit of obeying any other superior; moreover, sovereignty is not a question of supposition but of fact.

Hobbes predicates that a society is not independent unless it can maintain its independance against attacks from without by its own intrinsic strength.

This, of course, can never be predicated of any State, for no State could withstand a combination of all other States. The only possible definition of sovereignty is one

which represents it as it actually exists, and the highest at which one can put it is that a sovereign one or body is one which is not in the habit of obeying any other person or body of persons; whether it can withstand them is immaterial.

Grotius defines sovereign power as follows: "Summa potestas civilis illa dicitur cujus actus alterius juri non subsunt." Sovereign power is that of a person whose conduct is not subject to the control of another.

[Grotius]

This does not set out the positive work at all, nor does it imply it, for though a sovereign could hardly exist without subjects, still the fact that it is not subject to the control of another does not *per se* prove that others are subject to its control since all might be independent of each other.

by itself

The negative mark is not correctly described, since the point that there is no habitual obedience to the control of another is not emphasised, the definition seeming to imply that there is never such obedience.

Von Martens defines a sovereign government as one which ought not to receive commands from a foreign or external government.

[Von Martens]

This definition suffers from the following defects:—

(1) It applies to a subordinate political society, since that ought not to receive commands from any external government save that to which it is subordinate.

(2) Sovereignty depends on what in fact exists, not on what ought to exist.

(3) It cannot be said of any sovereign person or body that it ought *never* to receive commands from another.

(4) The positive mark is wanting.

Theories as to the Origin of Political Society.

Before dealing with theories as to the origin of political society it may be well to call attention to the difference between a People and a State as pointed out by Professor Holland (Chap. IV, p. 46). He defines a People as

> "A large number of human beings united together by a common language and by similar customs and opinions resulting usually from common ancestry, religion and historical circumstances. It is a natural unit. The members owe allegiance to an ideal, which is either a deified ancestor or some other cause of their common religion."

A State or Nation is

> "A numerous assemblage of human beings generally occupying a certain territory and among whom the will of the majority or of an ascertainable class of persons is by the strength of such majority or class made to prevail against any of their number who oppose. It is an artificial unit. The members of a State owe allegiance to a sovereign."

A State may be co-extensive with a people, as France was formerly, whence the King was called the King of the French (Maine); or it may embrace several peoples, as in the case of the British Empire.

According to Austin, to constitute a State, which he calls an Independent Political Society, the number must be considerable, and, as Professor Jethro Brown points out (Austinian Theory of Law, p. 111), small groups of men may live according to one law without much organisation. Larger groups necessarily imply a high degree of organisation, and the existence of a type of society with more or less distinct organs for the various purposes

of government—*i.e.*, separate Legislature, Executive, and Judiciary.

It may be pointed out that no community would be recognised as a State now unless it had a certain territory. So the Jews do not constitute a State.

The term "Commonwealth" is sometimes used instead of "State," but the term has various meanings.

It indicates the purpose for which government should exist—*i.e.*, the common welfare, whatever the form of government may be.

It means also a State whose government is republican.

Another sense in which the word is used is to indicate a State, whether independent or dependent, whose constitution is federal, such as the Commonwealth of Australia.

Theories as to the Origin of Sovereignty.

Bodin, who wrote in 1576 A.D., predicated of sovereignty that it was above all law, indivisible, illimitable, subject only to the law of God and of nature.

Althusius, who lived from 1557 to 1638 A.D., based sovereignty on a contract between the people and the sovereign, and contended that the people might resume the sovereign power if they so pleased.

Hobbes, who wrote about 1640 A.D., defined the Commonwealth as follows:—

> "The Commonwealth is one Person of whose acts a great multitude by mutual covenants one with another have made themselves every one the author to the end he may use the strength and means of them all as he shall think expedient for their peace and common defence."

He states that men were formerly in a state of war with each other, and that in order to get peace each surrendered

his liberty to a monarch. Sovereignty resulted from the covenant of each member with every other to surrender such liberty, but inasmuch as the sovereign does not covenant, but merely receives the surrender, he is not bound by any obligation, nor can the subjects annul the surrender and regain their liberty. In consequence sovereign power is illimitable and permanent (The Leviathan, Chap. XXVIII).

Grotius, who wrote about 1660 A.D., enunciated a somewhat similar view of the origin of sovereign power. He says: "Qui se coetui alicui aggregaverunt aut homini hominibusque subjecerant, hi aut expresse promiserant aut ex negotii natura tacite promisisse debebant intelligi secuturos se id quod aut cœtus pars major aut hi quibus delata potestas erat constituissent." Those who have formed a community have subjected themselves to some person or body of persons, and it may be taken that they have either expressly or impliedly promised obedience to the wishes of the major portion of the community or of those to whom the sovereignty has been delegated.

This statement makes no reference to any promise or undertaking by the sovereign nor to mutual promises on the part of the subjects *inter se*.

Finally, in Rousseau's Social Contract (Book 1, Chap. VI), written about 1762, the theory of the original pact as an explanation of the origin of sovereignty took its final form.

According to this theory, sovereignty resulted from a contract between the sovereign and his subjects by which the sovereign promised to govern the subject with a view to the welfare of the community, and the subjects agreed to obey the sovereign so long as he so governed them; if either side committed a breach of such contract the other side was thereby released.

Austin has given an elaborate account of the three stages through which the negotiations passed to their final stage; and also has demonstrated that such pact would not be binding either religiously, legally, or morally. Whether it would be binding appears immaterial in a discussion as to whether such pact was the cause of the origin of sovereignty. If the pact were made the parties would probably conform to its requirements until something caused a revolution, and when that stage was arrived at would cease to conform to it whatever its obligatory force might be. There are several reasons which militate against the existence of such a pact:—

(1) There is no historical evidence that any such pact was ever made. Even in the case of the United States of America political government had been in existence for many centuries before the American constitution was drafted and agreed to; and Austin points out that the American Constitution was forced by a number of States who were predominant on the rest.

(2) The drafting of the pact presupposes a knowledge of the requirements of political organisation which could only be derived from experience, which itself presupposes that political organisation was in existence before the pact.

Austin suggests that if it is claimed that a pact of this nature can be binding on sovereigns succeeding the one who made the pact, then it would be pernicious, since the needs of future communities could not be anticipated. It may be pointed out, however, in answer to this objection that by mutual agreement between the parties bound by the pact its provisions could be modified. As pointed out before there is no historical foundation for such pact.

The origin of sovereignty differed in different

communities. It undoubtedly developed from tribal chieftainship, which in its turn developed from family supremacy. The head of the family contained the germ of sovereignty. The Roman *Patria potestas* was absolute monarchy in embryo. The chief of the tribe or conglomeration of families was probably some man of extraordinary skill in the hunt or in battle. See Mitford's Greece, citing Herodotus: "The provinces bordering on the river Euphrates, supposed to have been the first settled after the Flood, were certainly among the first that became populous. There from the climate the wants of man were comparatively few, and those with little labour plentifully supplied by a soil of exuberant fertility and level to a vast extent. Cattle thus being invited to it, beasts of prey would follow, and for relief to his people against injury from these the first man noticed in history as a monarch is described as a mighty hunter—Nimrod. Intertribal war decides which is the strongest tribe, and the chief of the conquering tribe becomes the king of the conquering tribe and of the conquered ones. In some countries some person attains supremacy by establishing a claim to supernatural attributes—the divinity of the King is no doubt in some cases the basis of the kingship.

A monarch always has to ally himself with some predominant party in the State, be it the Church, the Army or the Law. As Sir Henry Maine points out (Ancient Law, p. 85): "The lawyers of France formed a strict alliance with the Kings of the houses of Capet and Valois and it was as much through their assertions of the royal prerogative and through their interpretation of the rules of feudal succession, as by the power of the sword, that the French monarchy at last grew out of the conglomeration of provinces and dependencies."

The theory of the original pact, besides attempting to

explain the origin of sovereignty, also suggested a reason for the obedience which is rendered to a sovereign and the laws he enforces.

There have been various theories held as to the reason for such obedience and in examining them one must always remember that the reason or motive inducing obedience is quite a different thing from the method by which obedience is enforced. For instance, probably the majority of people obey the law from habit and without reference to the consequences of disobedience and because their desires do not run counter to the law, and many of them pass through the world without ever having been parties to a lawsuit or ever having had a legal sanction applied to them. The importance of the nature of law and sovereignty becomes apparent in the case of those who want to break the law and will consequently incur the sanction. The reasons inducing people to obey the law in no way detract from the truth of the theory that the law acts by compulsion, not by appeals to ethical or religious or even rational considerations.

Hobbes, Bentham and Austin all agree in holding that obedience to law is ensured by force and fear.

Rousseau holds that reason or perceptions of utility induce obedience, and Austin (p. 294) agrees with this point of view with the addition of custom as a cause without in any way derogating from his position as to whence the obligatory force of law comes.

Lord Bryce (Studies in Politics and Jurisprudence, Vol. II, pp. 1—43) states that political obedience is a form of compliance based on some one or more of the following reasons, *i.e.*, indolence, deference, sympathy, fear, and reason, the first three resulting from the human tendency to imitate, and that in the sum total of obedience the percentage due to fear and reason respectively is much less

than that due to indolence, and less also than that due to deference or to sympathy.

He further suggests that obedience started in the family life and was based on—

(1) Reverence for ancient lineage. In this respect he forcibly points out that from the seventh century the Mervin kings were merely the tools of the mayors of the palace, but that when a mayor deposed a Mervin and put his own son on the throne in 638 A.D. the Franks rose in revolt.

(2) Instinctive reverence for persons of marked gifts.

(3) Associative tendencies uniting members of a group or tribe.

It has been suggested that even if government did not originate by consent of the people still it continues by their consent. This statement is true in the sense that everyone consents to their own acts, for one cannot act at all unless one so consents; but it is not true if it means that everyone willingly renders obedience, for the motives inducing to obedience are various, as pointed out above, and it is not possible to say that the majority would obey if there were no penalties annexed to disobedience.

The Object of Law and the Purposes for which Sovereign Government and Law Exist, and the Means by which each Carries Out Those Purposes.

Various views have been held as to the objects for which government should exist; some of these views are expressed in terms relating to the object for which law should exist, but inasmuch as law is the means by which government carries out its objects, they are obviously views as to the purposes for which government should exist.

Hobbes says that law was brought into the world for

nothing else but to limit the natural liberty of particular men in such manner as they might not hurt but assist one another and join together against a common enemy (Leviathan, p. 138). Kant (Rechtslehre, Werke VII, p. 27) and Savigny (System, 1, p. 114) make the function of the law to be the preservation from interference with the freedom of the will. This appears too narrow a view to take and makes law a purely negative system, whereas, as one knows, many of the law's injunctions are positive. According to Holland (p. 79), Krause and Ahrens hold that the object of government is to harmonise the conditions under which the human race accomplishes its destiny by realising the highest good of which it is capable. This sets an ethical ideal for all States.

Bacon suggests that the object of government is to enable citizens to live happily.

Locke (Civil Government, i, § 57) says: "Law in its true notion is not so much the limitation as the direction of a free and intelligent agent to his proper interest, and prescribes no further than is for the general good of those under the law—so the end of the law is not to abolish or restrain but to preserve or enlarge freedom."

Bentham (Works, ii, p. 6) points out that the object is the maximisation of the happiness of the greatest number of the members of the community.

Austin points out (Students' Edition, p. 123) that the purpose of government is to advance as far as possible the common weal or happiness.

Lightwood (Nature of Positive Law) says "the object of law is to regulate the relations existing between men in such a way as to satisfy the sense of right residing in the community; and also to assign the province within which each individual may exercise his free will, and thus it supplements morality."

It has been suggested that the purpose of government is to institute and protect property, meaning thereby legal rights of every description. This is really only one of the means by which government seeks to achieve its real purpose, the common weal, but it is not the only means, for it also imposes absolute duties in respect of which there are no rights. It is logically possible that government could achieve its ends without the institution, and consequently without the protection, of property in this sense. The subject might be fed, clothed, housed and amused by the State in return for the performance of duties imposed by the State, and non-performance of those duties or interference with the performance of them or with things possessed by a subject might render the party liable to a criminal punishment only, in which case no one would have any property, *i.e.*, legal rights, but the members of the State would be subject to absolute duties only.

This appears to be the logical result of the doctrines of the most advanced school of Socialists.

For the purpose of attaining its object the State must maintain peace from without and from within, for, as Hobbes says, " the Leviathan carries the sound of war and of justice " (English Works, II, 76).

So the State must on the one hand be prepared for war and on the other hand must maintain justice between its subjects. For the former it must levy taxation and in many countries imposes the obligation of military service. For the latter, in addition to taxation it must exercise its legislative, judicial and executive functions. The difference between these functions is that by legislation the sovereign lays down general rules to be observed by his subjects; by adjudication it is determined whether these rules or any of them have been broken in any particular case, and if there has been judicial declaration of a breach, the executive

officers, among their other functions, then carry out the orders of the judiciary as to how the breach shall be remedied. The judiciary and the executive generally have delegated to them the power of legislating as well, so far as that is necessary to enable them to exercise their judicial and executive powers. In virtue of this delegation the judiciary enact rules of procedure and the executive enact rules for the carrying into effect of the general principles laid down by the Legislature. This shows, as Austin points out, that these powers are not necessarily vested in different bodies, as Blackstone thought. It is well, however, that the legislative and judicial functions should be vested in different bodies and that the judicial functions should be exercised by persons specially skilled in the ascertainment of facts and the interpretation of Acts of the Legislature. If the Legislature were also the authority to determine the meaning of its legislation it might read into the statute the intention to which it desired to give expression rather than the meaning the words of the statute bore in their ordinary sense; the latter is, of course, the proper meaning, since that is the meaning which the subjects to whom the statute is addressed would put on the words thereof.

Professor Salmond suggests (p. 40) that the primary purpose of the administration of justice is that which its name implies—to maintain right, to uphold justice, to protect rights, to redress wrongs. Law, he says, is secondary and unessential. The primary purpose of the judiciary, he says, is not to enforce law but to maintain justice.

It is submitted that this propounds the mischievous doctrine that the Courts may decree what they think is right irrespective of law, a principle which would place everyone at the mercy of any occupant of the Bench and would reintroduce the "justice of an Eastern King sitting

Purpose of Judiciary

in the gate." The real purpose of the judiciary is to administer justice according to law. The danger of leaving the determination of what is right and wrong to the individual judgment of the Judges is pointed out by Salmond at p. 102, where the uses of law are indicated, and in view of the fact that Professor Salmond himself agrees with the propositions hereinafter laid down (p. 181) as to the uses of law, his statement that the primary purpose of the judiciary is not to enforce law but to maintain justice is the more remarkable.

Professor Jethro Brown seems of the same opinion as Salmond, for he says (Austinian Theory of Law, p. 312) that justice which it is the function of the Courts to administer is wider than law, and refers to Markby's instances of the functions of a jury in determining whether calling out the name of a station before the train reaches it is reasonable. It may be pointed out, however, that the law is (1) that a party must behave reasonably, and (2) that it is a question for the jury whether he has acted reasonably or not. So no conflict between law and justice arises in such a case.

The inadequacy of law in giving justice gave rise to the law of equity.

CHAPTER IV.

THE SOURCES OF NATIONAL LAW.

As pointed out already the Austinian definition of law, insisting on the importance of a law being set rather than on the importance of its obligatory nature no matter how the rule originated, tends to leave out of consideration the historical aspect, and also occasions difficulties in bringing certain rules of law under the category of rules set by the sovereign; whereby Austin has to do some violence to the ordinary meaning of the word " set,". by suggesting that rules which are not expressly set are impliedly set, since that which the sovereign permits his ministers to enforce he impliedly commands. This is not always true, as he may not always know what his ministers are doing. And, moreover, customs which are law independently of and before any adjudication on their validity can hardly be said to have been set by the sovereign.

Austin attempts to meet this difficulty by suggesting that customs are not law until embodied in an Act of Parliament or declared valid by the Court, but, as will appear later, this view is not correct.

As a fact, although all rules of national law derive their obligatory force from the sovereign, who is therefore the source of all law from this point of view, yet the rules themselves actually come into existence or are formulated in various ways which may also be called the sources of the law.

Apart from the sovereign, who is the legal source or, as Salmond calls him, the formal source whence the law

derives its force, the term "source of law" has other meanings. Austin points out no less than three of them :—

(1) The immediate author of the law, *i.e.*, the person or persons by whom the rule was originally formulated as a rule.

The immediate sources are the following :—

(*a*) The sovereign one or body acting either as a legislature or judiciary.

(*b*) A political subordinate acting either as a legislature or judiciary.

(*c*) The persons whose conduct forms a custom.

(*d*) The persons who by contract submit themselves to a rule of conduct towards each other.

(2) The earliest extant document in which the rule can be found.

For instance, the Digest and Code of Justinian are sources in this sense, though not the Commentaries on them written in the Middle Ages, nor those of the Civilians who followed them, for they derived their knowledge from documents which are still accessible.

In England the writings of Bracton, Coke and Littleton are authoritative, being the earliest record of what the law was in their day; as also is Michael Foster's Crown Law, written in 1762, though Blackstone's Commentaries, written in 1763, are not authoritative.

Professor Salmond calls the above "literary sources," being the literature whence we get our knowledge of the law. They are treated as authoritative apparently for want of any better means of ascertaining the law.

(3) Causes to which the laws owe their existence, such

as: Legislation, Adjudication, Custom, Scientific discussion, Religion, Equity.

As Professor Holland points out, laws sometimes owe their existence as rules and their validity as laws to one and the same source, as in the case of Acts of Parliament and adjudication.

Professor Salmond classifies the sources of law as follows:—

I. The Formal sources by which he means the source whence the law derives its force and validity which he says is the will and power of the State (as manifested in Courts of Justice). It may be pointed out that the bracketed qualification hardly appears essential since Acts of Parliament are legally binding although they may never have been the subject of judicial decision.

II. The Material sources, meaning the agency by which any particular rule first came into existence.

Material sources, he points out, are either—

(1) Legal or authoritative;

(2) Historical or unauthoritative.

He explains the distinction as follows: A judicial decision is a legal material source, assuming, of course, that it creates a new rule of law, but the source whence the Court drew the matter of its decision such as the writings of some lawyer of authority or the Digest or Code are the historical sources.

The legal or authoritative sources according to Professor Salmond are:—

(1) Legislation;
(2) Precedent;
(3) Custom;
(4) Professional opinion or scientific discussion;
(5) Agreement.

To these he might have added that in some countries

(6) Religion, and

(7) Equity are also sources.

It is proposed to deal with the above *seriatim.*

1.—Legislation.

Legislation means the enactment of a rule of law intended to apply to cases which have not necessarily yet arisen. It creates statute law.

It differs from judiciary law in respect of—

(*a*) The mode in which it originates and the object it has in view.

(*b*) The form in which it is expressed.

(*c*) The rules for its interpretation.

(*a*) Legislation which produces statute law originates in an express declaration by the State of its commands to its subjects as to their course of conduct in future. It originates as a result of opinions as to the best method of remedying evils—its object is to remedy a general evil, not to provide for the evils of one particular case. Its object is also to lay down a certain guide for future conduct, and it rarely attempts to deal with past events, since "*ex post facto* or retrospective legislation" is almost universally condemned. The argument that *ex post facto* legislation operates as a warning is obviously fallacious, since the caprice of a sovereign who indulges in such legislation can rarely be anticipated. In England statutes are effective from the date on which the Royal Assent is given, unless, as is generally the case, some other date is mentioned, though in Blackstone's time (1760) they took effect from the commencement of the session in which they were passed on the theory that the people were there all the time by their representatives, a far from convincing reason, since very few persons had the vote in those days.

(*b*) As regards the form of law established by legislation, it is always expressed in general terms and free from the complexity and limitations of the facts of any particular case, although, of course, with a view to avoiding the uncertainty resulting from a command expressed in too general terms, it is expedient for the statute to particularise with a certain amount of detail the different classes of cases which it is intended shall fall within its operation. For instance, the Corrupt and Illegal Practices Act, 1883, specifies what acts shall be deemed to amount to corrupt or illegal practices; and the tendency of modern statutes appears to be to particularise in this manner owing, no doubt, to the increasing complexity of modern life.

(*c*) Statute law differs from Judiciary in respect of its interpretation.

The prime rule for the interpretation of a statute is to give to the words thereof their ordinary meaning if the language is clear, irrespective of what the Judges may think the Legislature meant, and irrespective of what pernicious results may flow therefrom.

This kind of interpretation Professor Salmond calls the grammatical interpretation. It must be applied even though the statute has produced the result it aimed at. So if a statute provides that dogs are to be muzzled for the purpose of stamping out rabies they must continue to be muzzled so long as the statute is in force, even though rabies has been stamped out. The maxim "Cessante ratione legis cessat lex ipsa" is inapplicable to statute law. In respect of judiciary law the "ratio legis" is equivalent to the "ratio decidendi" or the rule of law contained in the decision; and of course the maxim in respect of judiciary law merely means that the rule should not be applied to a case not falling within its provisions. If, however, there is any doubt as to what the Legislature meant,

then recourse may be had to the history of the statute—the preamble to ascertain its object, and other statutes dealing with like matters and judicial interpretation of such other statutes.

Doubt may arise, as Professor Salmond points out, in the following respects:—

(1) The language may be ambiguous, *i.e.*, capable of two meanings. In such case the Judge may adopt the obvious meaning, *i.e.*, the one consonant with the ordinary meaning of language, in which case the statute may be said to be interpreted literally; or he may adopt a meaning conformable to the object the Legislature had in view, which is an equitable interpretation. It is submitted that the former is the proper interpretation, since it serves one of the great purposes of statute law—certainty, and it is better that the intent of the Legislature should be sacrificed than that the citizen should be punished for disobeying a law interpreted in a doubtful manner. The Legislature must make its meaning plain if it desires its subject's obedience to its commands. The ordinary meaning is all it ought to expect its ordinary subjects to attach to its words.

(2) The statute may be inconsistent with itself or with another statute. In the former case, where two clauses are inconsistent with each other, the Court must endeavour to ascertain the intention of the Legislature. An instance of such ambiguity occurs in the Bankruptcy Act, 1913, s. 15, which provides that a sheriff selling goods in execution which do not belong to the debtor shall not be liable if he had no notice who the true owner was, and that the purchaser shall have a good title, but this shall be without prejudice to the claim of the true owner against anyone other than the sheriff. Does this mean he can sue the purchaser? Apparently not, as the statute provides that

the purchaser shall get a good title. It probably means that the true owner still has his common law remedy against the solicitor or client, who, if at all, directed the sheriff to seize those particular goods.

In the latter case the later statute will be deemed to overrule the earlier one, subject to the exception that where a statute making provisions for particular cases is followed by a statute making contrary provision for cases generally the former is not deemed overruled (*Lennard* v. *Vera Cruz* (1885), A. C. 59; *Barker* v. *Edger*, [1898] A. C. 748) in the absence of anything showing an intention to overrule it: *Garnett* v. *Bradley* (1873), 3 A. C. 944.

(3) The statute may be incomplete, *i.e.*, may provide for some only of the cases falling within its spirit. Now if it is obvious that the Legislature has not provided for some particular case then the statute cannot be applied to it; but if it is doubtful, then if the case falls within the spirit of the statute the statute must be applied to it. For instance, under the provisions of the Criminal Appeal Act, 1907, it is provided that in case of an appeal against sentence the Court may impose any other sentence which the verdict of the jury warrants. It was held in *R.* v. *Mead*, 25 T. L. R. 359, that the Court may act similarly in cases where there has been no verdict of a jury, *i.e.*, in cases where the accused has pleaded guilty.

In cases of purely clerical error the Court must interpret the sentence so as to make sense of it. For instance, Lord Tenterden's Act, 9 Geo. 4, c. 14, provides in effect that no action shall be brought on a representation as to another's character . . . trade or dealings to the intent that such person may obtain credit money or goods upon unless it is in writing. The missing words are obvious and the Court, in interpreting the statute, has supplied them.

Professor Salmond suggests that whenever a case falls

within the spirit of the statute but is not included within its terms the Court ought to try to find the latent intention of the Legislature and, if it thinks the Legislature meant to provide for the case, should apply the statute to the case. This is what Austin calls spurious extensive interpretation and it is submitted that it is not permissible. The ordinary subject cannot be expected to be able to ascertain the spirit of the statute except from its language and therefore is entitled to have his conduct judged according to such language and not according to that vague shadowy thing called the spirit of the statute.

There is another kind of spurious interpretation called restrictive whereby a statute is not applied to a case which falls within its provisions because it is assumed not to fall within its spirit. This kind of interpretation is to be condemned equally with the other.

If a statute is clear it must be applied to the cases falling within it and to those only; any shortcoming should be remedied by the Legislature.

Judiciary Law.

Judiciary law is law made by judicial decisions, whether such decisions are given by the sovereign one or body or by subordinates.

It is submitted that until the Parliament Act, 1911, the House of Lords was the sovereign judicial authority in England since it could not be deprived of its judicial powers nor its decisions reversed by statute without its own consent. Professor Salmond is also of the same opinion (Jurisprudence, p. 629—31). Under the Act. however, as laws altering its powers or the law established by its decisions may be passed without its assent it has

been relegated to the position of a subordinate judicial body.

Bentham uses the term "judicial or judge-made law" instead of judiciary law, which has called down Austin's censure inasmuch as he suggests that

(1) The term "judge-made" savours of contempt for such kind of law;

(2) The term points to the person who makes the law rather than to the method by which it is made, and inasmuch as Judges in this country can make statute law under powers delegated to them by Parliament, "judiciary" seems the preferable term.

The term "judiciary law" is limited to judicial decisions which make new law, and does not include such decisions as apply existing law to the facts of any particular case.

Judiciary law differs from statute law in three respects :—

(1) As regards the mode in which it originates and its objects.

(2) As regards the form in which it is expressed.

(3) As regards the rules for its ascertainment or interpretation.

(1) Judiciary law originates in the necessity of devising some rule to meet the requirements of some particular case not falling within the provisions of some existing rule, though falling within the spirit of such rule. The avowed object is the decision of a particular case, not the enunciation of a general principle.

(2) The form of judiciary law is a consequence of the mode in which it originates. Being concerned with the decision of a particular case it is implicated with the facts of such case, and its language is applicable to such case and not to the enunciation of a general rule of law.

(3) The rules for interpreting or ascertaining judiciary

law result from the mode in which it originates and the form in which it is expressed.

The rule of law contained in a judicial decision is to be ascertained by a process of induction.

Austin has analysed the process as follows:—

(*a*) One must consider the particular circumstances of the case and the general propositions which the Judge lays down.

(*b*) One must reject such general propositions as are not called for by the peculiar circumstances of the case; these are *obiter dicta* and irrelevant.

(*c*) All general propositions left must be freed from all modifications suggested by the peculiar circumstances of the case.

There is then left a general rule applicable to cases of a class which may be called the *ratio decidendi.* This is a process that is in fact applied in the ascertainment of a rule of judiciary law, although perhaps unconsciously. For instance, if one is desirous of ascertaining the law relating to contracts made with infants from a decision on some particular contract made with an infant, one will disregard any general propositions laid down as to contracts generally; next, one will consider the general propositions laid down as to contracts with infants and then free them from any modifications resulting from the peculiar nature, if any, of the particular contract in question. One will then have a general rule dealing with contracts made with infants.

As Austin points out, every case has features of its own and every judicial decision is a decision on the specific case, and therefore a judicial decision *as a whole* can have no application to another and different case, though, of course, instances do occur where two cases exactly

resemble or, as it is said, are on all fours with each other; in such circumstances the former decision is simply applied to the latter case.

Salmond points out (pp. 176—180) that legislation can increase, decrease, and alter law, is better in form than judiciary law, and also allows a division of labour, since the Judge merely has to ascertain the facts of a particular case and, if they bring it within the rule, to apply the rule, whereas in judiciary law he has to devise the rule also.

Moreover, legislation is not of necessity *ex post facto*, as the rule, in the absence of a provision to the contrary, only operates on transactions taking place after the rule was made.

Judiciary law can only fill up vacancies, it cannot alter nor repeal statute law.

Judiciary law is also *ex post facto* in its operation, so that if parties have acted on a Court of Appeal decision and the principle of such decision is subsequently overruled by the House of Lords such parties will find that they have been acting on that which is not law.

Austin severely criticises what he calls the childish fiction that the Judges do not make law but only apply existing law, and Professor Jethro Brown points out (Austinian Theory of Law, p. 293) that this fiction prevents them finding a place for a theory of the relative value of those external sources of law from which, as a matter of fact, rules have often been drawn, *e.g.*, the opinions of jurists, considerations of public policy, rules of foreign law, rules of international private law.

2.—The Value Attaching to Precedents.

In England and the British Empire generally, as Blackstone said, "it is the duty of the judge to abide by the precedents," and each Court is bound by the decision

of a higher Court. The House of Lords has, moreover, laid down the principle that it will abide by its own decisions. The Court of Appeal is apparently bound by its own decisions. Other Courts of equal standing are not bound by each other's decisions, but where a decision has been acted on for many years it has been laid down in many cases that it ought to be followed even though manifestly erroneous in law, the principle being " communis error facit jus," since expectations have been founded on the decisions and transactions entered into on the basis of such: see *Fauntleroy* v. *Beebe*, [1911] C. A., following decisions of 1874 and 1884, although the Court did not agree with them, and *Wright* v. *Robinson*, 109 L. T. 590, where a case of 1830 followed subsequently in 1850 and 1875 was followed. But in *Pate* v. *Pate*, 113 L. T. 939, the Court refused to follow a decision of forty years' standing, being of opinion that it was erroneous and that no expectations or transactions, or very few, had been based on it.

In the United States of America precedents are apparently authoritative (Holland, Jurisprudence).

In Prussia and Austria authority is expressly denied to judicial decisions, and though the Codes of France, Italy and Belgium are silent on the point the rule is the same.

At Rome Cicero enumerated *res judicata* as a source of law and Severus attributed binding force to " Rerum perpetuo similiter judicatorum auctoritas "; Professor Clark states that this maxim merely referred to the interpretation of statutes and meant that where a certain interpretation had frequently been given to the provisions of a statute such interpretation should be continued to be applied, and did not mean that precedents were otherwise a source of law at Rome. Justinian, in his Code, 7.45.13, enacted that precedents should have no binding force.

3.—Custom as a Source of Law.

Custom means the habitual conduct of a number of persons. Where a number of persons have been in the habit of observing certain principles in their dealings with each other it is presumed that they mean those principles to apply to such dealings, that they will be bound by them themselves and expect others to be so bound.

One may predicate that the number of persons constitute the majority of those usually concerned in the matter in question.

For instance, the conduct of the majority of merchants settles the custom of merchants; and the majority of landowners settled the customary land laws and the rules for descent of land on death intestate.

The usages of the majority of a nation settle the customary laws of that nation, and in England the common or customary law was evolved from the customs common to the three bodies of local customary law, *i.e.*, the Mercian Law, Dane Law and Wessex Law.

According to English law a *valid* custom binds everyone who comes within its domain, whether they know of it or not, so that persons dealing on the London Stock Exchange are bound by its customs, if valid (*Grisell* v. *Bristowe* (1868), L. R. 4 C. P. 36), and similarly those dealing in a particular market are bound by the customs of such market.

Customs may be General or Particular, the former prevailing throughout the State, the latter in particular localities only. In English law the rule that a deed required to be sealed and delivered was a general custom. It now requires to be signed: Law of Property Act, 1925.

The customs of Gavelkind and Borough English govern-

ing the descent of land on death intestate if the land was situate in particular localities were local customs.

According to Blackstone (Stephen's Commentaries, p. 26) the custom of merchants and the usages of particular trades are part of the general law of the land and are not particular customs.

According to Blackstone, another classification of customs is into those which are notorious and those which need proof. Notorious ones are those whose validity has been established by judicial decisions; they form part of the common law of England, and, of course, have more certainty than those which need proof, though notorious customs, until established by the judgment of the Court of ultimate appeal, cannot be said to be absolutely free from doubt; and it is not certain how many decisions in favour of a custom are necessary to establish its validity. Customs which need proof are those whose validity has not been established by judicial decisions; nevertheless, if they conform to the rules of law for the validity of customs they are as binding as those whose validity has been established by judicial decisions, yet, of course, there is not the same amount of certainty as to their binding force in the minds of the community.

It must be remembered that the difference between notorious customs and those needing proof is not the same as that between general and particular customs; for though in English law the general customs of the realm are notorious, yet some particular customs were also notorious, such as the custom of Gavelkind and Borough English. According to Stephen's Commentaries (pp. 28 *et seq.*), particular customs, to be binding, must be immemorial—*i.e.*, existent from 1 Rich. 1—continuous, undisputed, reasonable, certain, obligatory, consistent with other customs and not contrary to any Act of Parliament.

Trade customs and customs of the country—*i.e.*, agricultural customs—need not now be immemorial.

There are two theories as to the binding force of customs :—

I. There are those who hold that custom is law of itself and derives its binding force from its own nature.

Binding force of custom

Of this opinion are (*inter alios*) Maine, Julianus, Hermogenianus, Blackstone, and Hale, and the German jurists such as Savigny, the last-named holding that in the practice of the custom is the conviction of the people apparent that what they do is law, and in this conviction lies its binding force as customary law.

Maine (Early History of Institutions, Lect. XIII), remarking on the position in the Punjaub in the time of Runjeet Singh, who, as he points out, was absolutely despotic and could have commanded anything he liked, states that the rules which guided Runjeet Singh's subjects were derived from their immemorial customs and were administered by domestic tribunals in families or village communities, *i.e.*, in groups no larger or little larger than those to which Austin denied the title of political communities. Maine admits that these rules were laws because Runjeet Singh permitted the heads of the households and village elders to prescribe them. There still remains the difficulty that although Runjeet Singh never attempted to enforce them nor to alter or repeal them, and it is questionable whether he could have altered or repealed them. The sanction of these rules was a religious one, obedience being ensured by fear of supernatural pains and penalties: and they were not rules of national law. The same remarks apply to the laws of the Assyrian, Babylonian, Medean, and Persian Empires, there being no temporal authority with power to alter them—" the law of the Medes and Persians altereth not." In tribes where

tribal disapprobation ensured obedience instead of fear of supernatural punishment, such rules would correspond to rules of morality improperly called laws—what we have called positive moral rules (*ante*, p. 18). In all these cases the solemn declaration of the custom by a person of recognised authority was sufficient to ensure it being observed, the sanction being, if not a religious one, at least a sanction with a religious or moral influence at the back of it.

If society thus organised can be deemed to have any national law, then custom is law *per se*. As a fact there are the customs which a society on emerging into political existence changes into national law either by enforcing them through its Courts of justice or embodying them in its statutes. So the common law of England was made law beyond all doubt by the decisions of the King's Court on the validity of various customs and also by the embodiment of the ancient customs of the realm in Charters of Liberties such as those of Henry I and Magna Carta. To this extent Austin appears to be right in his theory that custom is not law until adjudicated on or embodied in an Act of Parliament, but he does not limit his theory to customs of this kind, but makes the statement as regards all customs, modern as well as ancient. Julianus suggests that custom is law by the implied assent of the sovereign people, for he says: "Quid interest an suffragio populus voluntatem suam declaret an rebus ipsis et factis?" (Dig. i.3.32). "What does it matter whether the people enact law by their votes or by their habits? This maxim is based on two propositions, neither of which is necessarily true:—

(*a*) That what is not prohibited is authorised. It may well be, however, that a majority of the community may know nothing of some of the

customs, such as local ones, which only affect certain classes or localities.

(*b*) That the community has the power of prohibiting customs of which they disapprove.

The only way to exercise such power would be through some recognised body representing the community, such as an elected Legislature, and in the days when customary laws originated there were in many cases no such bodies.

II. The second theory is that of which Austin (Lect. XXX) is the chief exponent—namely, that custom is not law until its validity has been established by a judicial decision, or by an Act of Parliament, and that its validity dates from such decision or Act.

Austin's theory as to custom

He bases his theory on two propositions:—

(*a*) It is not every custom that is legally binding, but only those which conform to the rules for the validity of customs—*i.e.*, those which are reasonable, undisputed, certain, compulsory, continued, consistent, and not contrary to any Act of Parliament.

(*b*) Customs are often abolished by Act of Parliament; consequently Parliament is superior to custom and therefore custom is only law because allowed to be so by the Sovereign.

The weakness in Austin's theory is that most valid customs have in fact been declared valid by judicial decision before being embodied in an Act of Parliament, and the judicial decisions establishing them have not merely decided that they are valid from the date of such decision, but that they have been valid from the time they became customs.

The truth about customs seems to lie between the two theories and can only be arrived at by drawing a distinction between customs of ancient societies and of modern ones. The customs of ancient societies which are not

If a custom becomes law only when established by a judicial decision, then no person violating it can be rightly convicted since he violated a custom which, at the time of its violation, was not law.

politically organised are generally positive moral rules, though, if enforced by any determinate human superior, they would be positive moral laws, but not rules of national law, there being no political sovereign. Such customs are undoubtedly transmuted into national law when the community, after it has become politically organised, first intimates that it will enforce them by declaring their validity either by adjudication or by legislation.

The customs which originate in a politically organised society, which may be called modern customs, are a source of law in the same way as contracts are, as will appear later, namely, if they conform to the rules as to the validity of customs, which rules themselves are founded on judicial customs. They are legally binding from the time they originate as customs, and are similar in nature to the law which a subordinate legislature enacts within the powers delegated to it. Before any adjudication, a *legal* custom may be acted on with knowledge that obedience to it will be enforced by the State.

It is good policy to enforce such customs, for, as Salmond (p. 144) points out, most of them are founded on experience of what is most useful, "via trita via tuta"; and, moreover, expectations having been founded on customs they form the basis of transactions falling within the scope of their operation.

4.—Professional Opinion or Scientific Discussion as a Source of Law.

So far as is known there was only one community, *i.e.*, Rome, in which professional opinion was recognised officially as an authoritative source of law, though in Germany it has played a large part in the development of law. In the Roman system under Augustus provision

was made for the creation of a class of persons whose statements as to law were to be received as authoritative. On application to the Emperor a jurist might, if the Emperor so pleased, be given a licence to pronounce such authoritative opinions, though according to an account in the Digest, i.2.48, no jurist applied for such licence until Masurius Sabinus in the reign of Tiberius, 30 A.D. Hadrian, 117 A.D., gave binding force to the opinions of the licensed jurists if they were in accord. Theodosius II and Valentinian III, by the Law of Citations, 426 A.D., gave binding force to the opinions of five deceased jurists, or, if they differed, to the opinions of the majority of them, or if equally divided, as where any of them gave no opinion, to the opinion of Papinian. Such professional opinion was undoubtedly a source of law.

The nearest approach to anything of the kind in the English system is the respect paid to the opinions of certain writers of ancient authority, such as Glanville, who wrote in the reign of Henry II, and Bracton, who wrote in the reign of Henry III, and Littleton, who wrote in the reign of Edward IV, and Coke, who wrote in the reign of James I, and some others. Their writings are accepted as evidence of what the law was in their day, probably for want of any better means of ascertaining it, but there has never been any express enactment establishing the authority of these writers. The last of such writers seems to have been Sir Michael Foster, whose Crown Law published in 1762 is deemed authoritative. Blackstone's Commentaries, published in 1765, are not authoritative (Pollock, First Book of Jurisprudence, p. 286), but were referred to and the law laid down therein accepted by the Court of Appeal in *Fanshaw and another* v. *Knowles* (1916), 115 L. T. 840.

Nevertheless, professional opinion has always had a

great influence on the development of English law, and the practice of conveyancers was stereotyped in the Conveyancing Act, 1881, which enabled the provisions, which in the case of a sale of land were formerly set out at length in deeds of conveyance, to be implied by the use of appropriate and short terms, which terms the parties are entitled to have inserted in the conveyance in the absence of agreement to the contrary.

Pomponius suggests that law cannot continue without the aid of a professional class to help its development. "Constare non potest jus nisi sit aliquis jusperitus per quem possit quotidie in melius produci": Digest, 1.2.2.12.

That law can exist without a class of professional lawyers is beyond denial, for in the earlier stages of the political existence of both Rome and, before the Conquest, in England there were laws and Judges, though no advocates, and Sir F. Pollock (First Book of Jurisprudence, p. 9) points out that before the Conquest there existed in Iceland a highly technical system of law Courts and two or three persons with a reputation for legal skill, but no counsellors or Judges in the ordinary sense of the word. He adds that it is the administration of justice with some sort of regularity that marks the existence of law, not the completeness of the rules administered, nor any official character of those who administer them.

Although the above is so, yet no doubt Pomponius was right in his belief that legal reforms cannot be effected without the aid of those skilled in the law, for law being a machine, and a complicated one, it can only be improved by those cognisant of the mechanism.

According to Lightwood (Nature of Positive Law, p. 290) the work of the jurist is either—

I. Logical, *i.e.*, the arrangement of rules of law in systematic order, and the filling up of gaps by

inducing fresh rules. The Judge decides in each case according to what is customary . . . from these judgments the jurists induce rules.

II. Creative, *i.e.*, making new rules for which work they are specially fitted to represent the wishes of the people in legal matters. In this respect they either express ideas actually existing among the people, or they act on sentiments which correspond generally to the temper and disposition of the people.

They also create rules upon special technical matters with which they alone are capable of dealing.

In cases where jurists differ, legislation must decide between them as was done by the Law of Citations at Rome.

5.—Agreement.

Such legal rules as result from agreement arise from a contract because the only agreement which the law will enforce is a contract.

But a contract does not engender a rule of law unless it provides for a course of conduct.

For instance, a contract for sale of goods, as it only requires one or more particular things to be done once and for all, *e.g.*, the goods to be delivered and the price paid, does not create a law but is merely a title to a right or rights. But a contract of service whereby a servant is to observe a course of conduct and obey orders in reference to his employer, or the articles of association of a company whereby the company and its members are to observe a course of conduct towards each other, do each of them create law. The rules of a club constitute similarly a contract and a rule of law so far as the obligation to pay

the subscriptions is concerned (*Lyttleton* v. *Blackburn*, 45 L. J. Ch. 223). This kind of law is called by Professor Salmond "conventional law," a term which received judicial recognition in *Manchester Brewery Co.* v. *Coombs*, [1901] 2 Ch. 608. By Austin it is classed with law autonomic, *i.e.*, law made in pursuance of a legal right, though not under a legal duty. Professor Jethro Brown (Austinian Theory of Law, p. 46) submits that a contract makes no new law but merely brings into operation the existing rule of law that contracts are binding; but it is well to remember that parties who are subject to the effect of a contract have become so by their own consent, whereas parties subject to national law have not always become so by consent, so the term "conventional" appears an accurate and convenient term.

6.—RELIGION.

It may be truly said that in the early stages of most communities religion was a source of law, and the source from which the law drew its authority. The earliest law-givers and administrators were men of the priestly class who acted as legislators and Judges and claimed Divine inspiration for their codes of law and judgments. Sir Henry Maine has pointed out how the origin of law in Greece was the Themistes or alleged divinely inspired judgments of the priest Judges, and we know that the Pontiffs were the Judges at Rome at its earliest stage and the sole repositories of legal knowledge. One can also instance Moses, the lawgiver of the Ten Commandments, and the Laws of Manu. As late as 1867 it was laid down by Kelly, C.B., in *Cowan* v. *Milbourn*, L. R. 2 Ex. 230, that "Christianity is part of the law of England," and even now it is a crime known as blasphemy to ridicule the tenets of the Christian faith (*R.* v. *Ramsay and Foote*

(1883), 48 L. T. 733), although any purely ethical theory may be subjected to any amount of ridicule without any risk of legal consequences. So that even now religion is a source of law as being a cause of certain rules of national law, but it is no longer a source in the old sense, *i.e.*, the State or community no longer relies on the supernatural sanction nor calls it in aid to ensure obedience to religious principles.

7.—Equity as a Source of Law.

The body of principles known as Equity in the English system and as Æquitas at Rome has been a prolific source of legal rules accepted and acted on as authoritative in these two systems. Sir H. Maine (Ancient Law, p. 32) defines it as "Any body of rules existing by the side of the original civil law, founded on distinct principles, and claiming incidentally to supersede the civil law in virtue of superior sanctity inherent in those principles." The origin and object of Equity in both systems were the same, namely, the necessity of devising some means to bring law into harmony with the needs of a growing community. Austin (p. 584) has pointed out that "the distinction between Law and Equity is not deducible from the universal principles of Jurisprudence, but is accidental and anomalous"; that, in other words, it is an historical, not a necessary, distinction, meaning thereby that law reform might have been effected by other means, *e.g.*, legislation. He points out that the distinction is only found in two systems, namely, the Roman and the English. Sir H. Maine (p. 29) suggests that "Equity" is a stage succeeding "Fictions" in the evolution of law, defining a fiction (p. 30) as "Any assumption which conceals or attempts to conceal the fact that a rule of law has undergone

Definition of Equity

Object

an alteration, its letter remaining unchanged, its operation being modified." So the fiction of adoption at Rome surmounted the difficulty of providing an heir for a person who was likely to die without one, and preserved the principle that the heir must be a member of the family. The fiction that the Prudentes only declared existing law and did not make any fresh law enabled the rules of law to be expanded without offending the conservative instincts of the Romans.

In England the fiction that the Judges did not make new law but only applied existing rules enabled English common law to be similarly expanded.

But fictions, having a very limited operation owing to their being based on analogy to existing rules, were not capable of producing any great expansion of law, and it seems as though either equity or legislation was essential for this purpose in a society developing comparatively rapidly. There is probably some basic reason why Equity only made its appearance in the systems of England and Rome. The reason may well be that both these systems developed rapidly as compared with other systems such as the Continental, and Eastern ones such as the Indian and Persian. On the Continent continual war and the effect of the Continental feudal system, with its *imperia in imperio*, prevented the advent of a body of men capable of fostering and developing legal principles. The Indian and Persian systems, being chiefly compounded of religious ordinances, were by their nature incapable of alteration by any means.

The English and Roman systems of law were mainly secular. The legislative assemblies of these two nations were more concerned with providing money to carry on foreign war than with private legislation, and such legislation as was passed was more concerned at Rome

with remedying some evil of public importance than with reforming matters of purely private law.

In England most of the early statutes dealt with matters of public concern, *e.g.*, the Constitutions of Clarendon, 1164 A.D., settling the relations between the Church and State, and also De Donis (13 Edw. 1) and Quia Emptores (18 Edw. 1), dealing with land which, owing to the feudal system, was also a matter of public import. Other statutes, such as Magna Carta and Confirmatio Cartarum, were chiefly records of existing law somewhat similar in nature to the Twelve Tables. In fact there was practically no legislation in matters of a private nature until the reign of Henry VIII. Nevertheless the Roman and English nations were developing, and new needs were growing up—needs which fictions could not provide for; and so systems of equity grew up in the two nations, where the study of a secular system of law bred a body of professional lawyers who held a powerful and pre-eminent place, and equity did that which fictions could not and the Legislature would not do. It must be remembered that the introduction of equity into the Roman system, though it was not by way of adjudication as in England, still neither was it by way of legislation. The Prætor introduced it by the indirect method of his Edict, the Edict being merely a body of rules of procedure. This method becomes intelligible if one bears in mind the principle underlying ancient systems of law, summed up in the maxim "Ubi remedium ibi jus." The existence of a legal remedy established the existence of a legal right; the number of forms of action being limited, the number of legal rights was correspondingly limited. The official who had the contract of legal remedies could expand the law by increasing the number of forms of action to meet the requirements of such new principles as appealed to his sense of what was just and equitable.

The Prætor at Rome, having done this originally by fictions under the guise of applying existing law, had less compunction subsequently in so acting in order to give effect to admittedly new principles.

A consideration of the growth of equity in Rome and England will enable one to appreciate better the force of the above remarks.

Roman Equity or Æquitas.

For a proper understanding of Roman equity it is necessary to know something of the Roman judicial establishment under the formulary system or system of written reference. There were originally two officials concerned in judicial work at Rome—the Prætor and the Judex. The litigants came before the Prætor in the first instance and each stated his contentions, whereby the Prætor ascertained the exact point or points in dispute; he embodied this in a written statement called a formula directed to a Judex, whose duty it was then to hear the evidence and, according to the result thereof, to give judgment as directed by the formula. The Judex was absolutely bound by the terms of the formula. Formerly the reference was an oral one and the Judex was bound by the technicalities of the old procedure to decide according to the civil law—the formulary system introduced about 148 B.C. had the effect of abolishing all preliminary technicalities and placed the Judex absolutely under the control of the Prætor: see Poste, § 37.

The Prætor, on entering on his office, always published a list of rules of procedure, called his Edict, by which he was bound to abide during his term of office (Lex Cornelia de Edictes, 81 B.C.). By modifying these rules of procedure he was able to alter the substantive law, because of the maxim " Ubi remedium ibi jus "—" Where there is a legal

remedy there is a legal right "—so that, having the control of remedies, he had the means of reforming the law.

It will be remembered that as already pointed out (p. 38) the Roman civil law not being applicable to the alien communities whom Rome conquered, it became necessary to appoint a special magistrate to administer justice among them in addition to the existing Prætor Urbanus who administered justice between citizens, and the Prætor Peregrinus was appointed in 246 B.C. He gradually collected a body of rules which were common to the different communities with whose members he had to deal, and this body of law was called the Jus Gentium. Later on the provincial governors adopted this law and the whole body became known as Æquitas because it dealt equally with different peoples and was not the exclusive possession of one community. Subsequently the term "Æquitas" meant the principle of fairness underlying these rules. The Prætor Urbanus, in order to extend the old civil law to meet the needs of the growing Roman State and also to prevent justice being defeated by extreme adherence to technicalities, incorporated some of the rules of the Jus Gentium into his Edict and also added fresh rules founded on considerations of Æquitas.

This new body of law contained in the Edict of the Prætor Urbanus was called sometimes Jus Prætorium and sometimes Jus Gentium. It was not really the same as the Jus Gentium, being less in some respects since it did not include all the rules of the Jus Gentium and greater in other respects since it included fresh rules not found in the Jus Gentium. The incorporation of all the new rules in the Edict of the Prætor Urbanus being caused by considerations of Æquitas, the term "Æquitas" finally came to mean the new law contained in the Edict of the Prætor Urbanus, and there is no doubt but that its principles

were often resorted to by the jurists to expand the law under the guise of interpreting it. It must always be remembered, however, that the Edict was merely a body of rules of procedure issued by each Prætor when he entered on his office and observed by him during his term of office, and Æquitas was embodied in Roman law by the Prætor proclaiming in his Edict, for instance, that he would give a formula for an action in certain circumstances for which up till then there had been no formula. It is not easy in Roman law to trace the distinction between fictions and equity as stages in development of law since many equitable principles were introduced into Roman law by the medium of the *actio fictitia.* But there were fictions which were not introduced by the Edict but originated before the Edict such as the fiction of adoption, and Gaius mentions a fictitious action enabling an alien to sue as though he were a citizen, which without creating any fresh cause of action merely extended an existing one to a person who otherwise would not have had it.

However, undoubtedly at a later stage in Roman law reforms were introduced founded on Æquitas by creating new causes of action such as the *actio in factum* or action founded on the facts of the case. The Prætor was able to act in this way because, as already stated, all cases were referred to a Judex to hear the evidence and give judgment according to the terms of the formula, and therefore by modifying the terms of such formula the Prætor could alter the law. The Judex was absolutely bound by the terms of the formula and could not question its validity.

An example or two of a formula may make the matter clearer.

For instance, a formula *in jus* would state certain facts

in law

which were in dispute and require the Judex to determine whether the defendant ought by law to pay the plaintiff. The Judex here would inquire into the facts, and if he found they were as the plaintiff alleged he would then have to decide whether in law the plaintiff was entitled to the sum claimed. A formula *in factum*, however, would state certain facts which were in dispute and require the Judex, if he found the facts to be as alleged by the plaintiff, to order the defendant to give or pay something to the plaintiff. Here the Judex had no law to inquire into, and the Prætor by granting a formula *in factum* could expand the substantive law, though he only did so on principles of Æquitas.

It must be borne in mind that at Rome with the exception of trusts the same official administered both civil law and Æquitas, so that there could be no conflict between them as there was in England between common law and equity till 1873, as will presently appear: see pp. 123 *et seq*.

Equity in England.

Equity originated in England in a different way from that in which it did at Rome.

Before the advent of equity English law, like Roman law, was based on the principle "Ubi remedium ibi jus," and adjective law set the bounds to substantive law.

There were a certain number of writs, and unless the facts of a case brought it within the ambit of one of these writs there was no remedy however great the hardship.

For the recovery of property known as real property, and for the vindication of rights known as real rights, a real action would lie and the thing or the right itself was restored to the plaintiff. The remedy for all other wrongs

was one of the four personal actions: *i.e.*, Debt for recovery of a fixed sum of money; Covenant for damages for the breach of any agreement made by deed—*i.e.*, a written document sealed and delivered; Detinue for recovery of a specific chattel wrongfully detained by the defendant, who had, however, the option of paying its value instead of returning it; and Trespass for damage caused by violence directly injuring person or property.

With the exception of cases in which a real action would lie the plaintiff could not insist on the return of his own property wrongfully detained, as the defendant had the option of paying its value instead, and similarly in contract a plaintiff could not get specific performance, his only remedy being damages for breach. There were many injuries which were without a remedy, such as damage caused by negligence without violence; failure to perform agreements which had not been made by deed and did not fall within the category of debt; and lastly, but not least, there was no means by which failure to carry out a trust could be remedied. The Chancellor was in the habit of framing new writs in cases where the common law was inadequate until the Provisions of Oxford, 1258 A.D., forbade his doing this without the consent of the Council, and apparently the practice ceased.

Accordingly, in these cases where there was no available writ or adequate remedies, it became customary to petition the King as the fountain of justice; and in 1280 A.D. King Edward I directed the Chancellor to sort the petitions and send to the Courts those proper for them to deal with, and reserve the others, called "matters of grace," for the King himself. The Chancellor was an official first appointed by Edward the Confessor; he was chief of the King's secretaries, and when the office of Justiciar was abolished by Edward I, became the chief man in the kingdom. He was generally,

until 1529 A.D. an ecclesiast, learned in Roman law, whence he probably derived his notions of equity and whence the term " equity " was derived. Being the chief secretary he naturally was concerned with the issue of the King's writs, and thus became connected with judicial matters. In 1285 A.D. an attempt was made to remedy the narrowness of the common law by the enactment of the statute In Consimili Casu (13 Edw. 1), directing the issue of writs to meet the requirements of new cases, but to be founded on analogy to existing writs. But, with one or two exceptions, the common law Courts refused to recognise the new writs as creating any new cause of action, and refused to give any remedy. Consequently the practice of petitioning the King continued, and in 1348 A.D. Edward III directed the Chancellor to deal with matters of grace himself, and thus brought into existence the Court of Chancery and the English system of equity.

The subsequent history of the Court of Chancery is for our purpose immaterial, but what is material is that the Court was one existing side by side with the common law Courts, incapable of repealing the common law, but able not only to give a remedy in cases where the common law Courts gave none, but also to render nugatory the decrees of the common law Courts by forbidding a successful plaintiff to enforce his judgment obtained at common law if the defendant had some equitable defence which he could not plead in the common law Courts; and sometimes the Court would prevent an intending plaintiff instituting proceedings where it would be inequitable for him to do so.

The method by which the Court of Chancery acted was by issuing an injunction against the plaintiff, acting on the maxim " Equity acts *in personam.*" The Court could not, of course, prohibit the common law Courts from hearing a case or giving judgment or issuing execution, but it could

act against the plaintiff personally by injunction. Disobedience to injunctions was punished by imprisonment.

If a plaintiff instituted an equitable action in Chancery the defendant could be compelled to submit to the jurisdiction by being served with a writ of subpœna calling on him to appear under penalty of a fine; and also by a writ of *venire facias* ordering the sheriff to arrest him and bring him to be examined on oath.

The exact nature of English equity will best be made apparent by a consideration of the ancient threefold jurisdiction and of one or two of the maxims of equity.

The ancient threefold jurisdiction of equity was as follows:—

Jurisdiction of Equity

(1) Exclusive: dealing with matters in which common law gave no remedy, such as trusts, the redemption of mortgages, and the enforcement of many other purely equitable doctrines.

(2) Concurrent: where common law gave a remedy, but equity gave a better one. Under this head we have specific performance and injunctions. Specific performance required a party to a contract to perform a contract instead of paying damages for breach. An injunction required a party to do or not do some act. These remedies were only given where damages would be an inadequate remedy.

(3) Auxiliary: where equity helped parties in their common law action, as by discovery, whereby before trial each party could call on the other to answer on oath written questions, called interrogatories, on matters relevant to the case.

As regards the maxims of equity, which were formulated by Lord Nottingham, *temp.* Car. 2, they are aphoristic statements of the principles on which equity acts; they

are illustrative of the fact that equity was, and is, a Court of conscience derived from the ecclesiastical character of the early Chancellors.

Thus a plaintiff seeking the help of the Court of equity must on his part be prepared to do what is right and fair, for "He who seeks equity must do equity"; so if a husband had to go to equity to enforce his common law rights to his wife's property, as where such property was held by a trustee for her, but not to her separate use, equity would only help him on the terms that he settled half the property on her in virtue of her equity to a settlement.

Again, the plaintiff's conduct in the past in respect of the particular transaction which was the subject of the action must have been beyond reproach, for "He who comes into equity must come with clean hands."

Until Lord Eldon's Chancellorship (1801) equity was an elastic system and new principles were added from time to time by various Chancellors to meet the requirements of new cases, which, of course, affected it with the vice of uncertainty, and it was said that it varied with the length of the Chancellor's foot; but Lord Eldon, on taking up office, intimated his intention of refusing to extend the jurisdiction, since when it has been as rigid and inelastic as common law; and equity as a means for the expansion of law has practically ceased to exist, its place being taken by legislation.

Owing to the fact that common law and equity were in England administered in different and competing Courts there was for many centuries a conflict between law and equity which in many cases was very prejudicial to the administration of justice. As an equitable defence could not be pleaded in a Court of common law, such a defence to a common law action involved a fresh proceeding on the

England — There was conflict between equity & law.

defendant's part to obtain an injunction to prevent the plaintiff enforcing his judgment. The costs of the common law action had to be paid by the defendant, and, of course, he had to find the money to institute the equity proceedings. Again, if an equitable claim was brought in a common law Court the plaintiff would be nonsuited and have to pay the costs and start again in equity. Again, if a plaintiff had a common law and an equitable claim against the same defendant this would involve two separate actions. These were a few of the disadvantages of the conflict between law and equity, a conflict which, however, always terminated in favour of equity. Although at Rome there was a conflict in theory between civil law and equity, there was none in fact and none of the disadvantages of the English system, for the conflict was fought out before the Prætor at the very commencement of the action, and the actual principle on which the case was to be decided, whether of civil law or equity, was incorporated in the formula or reference to the Judex, who then heard the evidence and gave the appropriate remedy, civil or equitable.

The conflict between law and equity in England was ended to a great extent by the Judicature Act, 1873, which enabled equitable claims, with certain exceptions, and equitable defences to be pleaded in any Court, and provided that in case of conflict between the rules of law and equity the latter was to prevail except in cases of practice or procedure in which the more convenient is to prevail. In case a claim which the Act allocated to Chancery is commenced in the King's Bench Division, which represents the former common law, it will be transferred and the plaintiff will not have to commence a fresh action. With one or two exceptions a common law claim may be joined with an equitable one against the same defendant in the

same writ. But the difference between common law and equity has not otherwise disappeared, and equitable claims and remedies are still dealt with on the equitable principles which governed when the two systems were completely distinct; so if a party claims an equitable remedy the maxims of equity apply—the plaintiff must "have clean hands," must "do equity," and "make no delay."

From what has been said it will be apparent that, as Austin says, Roman and English equity resemble in certain respects and differ in others.

They resemble in that—

(1) They both leave the old law unrepealed.

(2) They both claim to override the old law by virtue of an inherent superiority of principle.

(3) As both were devised as occasion required to meet the hardships of particular cases, both were characterised by a lack of consistent lines of development as regards the relationship of their principles *inter se*, though each particular principle was developed consistently to its logical consequences.

(4) The intent of each was the same—namely, to correct the rigours and deficiencies of the old law.

(5) Both Roman and English equity were in certain matters founded on analogy to the old law.

For instance, at Rome old civil law remedies were extended to persons other than citizens by means of *actiones fictitiæ*, whereby the Judex had to assume for the purpose of the action that the alien plaintiff was a citizen.

Again, in case of damage caused to property by direct bodily force of the defendant an action would lie at civil law under the Lex Aquilia *de damno injuria*; where, however, the injury was not caused by direct bodily contact,

as where the plaintiff's sheep rushed over a precipice and were killed, being wilfully or negligently frightened by the defendant, the Prætor gave a fictitious formula wherby if the above facts were proved the Judex had to condemn the defendant as though there had been direct bodily contact.

However, the Praetor did not always act on analogy, for he often created a fresh form of action for which there was no precedent, the action being called "*in factum*" because the Judex was directed to inquire whether certain facts existed, and, if he found they did, was to give the plaintiff judgment without reference to any principle of law. Thus an agreement to exchange was enforced if the plaintiff had performed his part, it being equitable then to make the defendant perform his part.

In English equity we find some few rules based on analogy to those of the common law; so equitable property in most cases devolved on death of the owner intestate on the same persons on whom it would have devolved if it had been legal property, the maxim being "Equity follows the law"; but there were not many departments in which the maxim prevailed, and it was easily displaced by facts showing a contrary intention of the parties, on the maxim "Equity looks to the spirit not the letter."

English equity, however, differed from Roman equity in three important respects:—

(1) English equity, as pointed out already, was administered by a different official from the common law, which led to all the hardships and inconveniences flowing from the conflict between law and equity. Roman equity was administered by the same official as the civil law—*i.e.*, the Praetor—and the conflict at Rome between equity and civil law was devoid of practical inconveniences.

(2) English equity was judiciary law, and in many

cases *ex post facto* in nature. Roman equity was in nature and form statute law embodying general principles to meet defects which had become apparent in the past.

(3) Originally the main subject of English equity was the enforcement of trusts. A trust is a confidence reposed by one person in another that the latter will exercise his powers of ownership for the benefit of a third party or of the person reposing such confidence. The trustee having obtained the property in virtue of such confidence, the Chancellor made him keep faith and carry out the trust although the common law took no notice of it.

Roman equity did not recognise the binding nature of trusts, and Augustus (31 B.C.) had to appoint a special magistrate, called the Praetor Fideicommissarius, to enforce them. On the other hand, while almost the largest portion of Roman equity dealt with ameliorating the law relating to wills and intestate succession, English equity steadfastly refused to have anything to do with such matters.

In conclusion it may be remarked that the term "equity" is often used without reference to Roman or English equity, but as indicating some general underlying principle of justice to which all law should conform. It is with this meaning that it is used in the phrase "Equity is the spirit of the law": Montesquieu.

We have now completed the consideration, from the point of view of Jurisprudence, of the classification of law according to its source; it merely remains briefly to note some other classifications to which reference is sometimes made, namely: Common Law and Equity, Common Law and Statute Law, Written and Unwritten Law.

The term "common law," which is a purely English

term, varies in meaning with the law to which it is opposed.

As opposed to the civil law it meant the general customs of the realm as opposed to the Roman law which the Normans unsuccessfully attempted to introduce into England. Later on with the rise of equity it meant the judiciary law of the common law Courts as opposed to the judiciary law of the Chancellor. With the advent of statute law dealing with equitable principles it came to mean all law whether judiciary or statute administered by the Courts of common law as opposed to all law, judiciary or statute, administered by the Chancery Courts.

When common law is opposed to statute law it indicates the judiciary law of the common law Courts.

Written and Unwritten Law.

It has been stated by Austin (p. 533) that all law is statute or judiciary on the one hand, and written or unwritten on the other.

The difference between statute and judiciary law has already been pointed out (pp. 94 *et seq.*), and it remains to deal with the difference between written and unwritten law. The terms " written " and " unwritten " are used by Austin in what is called the juridical sense, and from the juridical point of view written law is that made by the sovereign one or body, whether acting as legislator or as Judge; unwritten law is that made by a political subordinate, either in the capacity of legislator or in that of Judge. The meaning of Austin's *dictum* is obvious from a consideration of these facts, for the sovereign may act as legislator or as Judge and a political subordinate may act in similar capacities.

As examples of the sovereign acting in a judicial

capacity one may instance the Roman Quæstio or special committee of the sovereign body appointed as occasion required to try criminals, and until the Parliament Act, 1911, the House of Lords might be deemed a sovereign judicial body, since its decisions could not be abrogated without its own consent. Since the Act of 1911 this is no longer so, and the House of Lords is a subordinate judiciary body. Blackstone used the term " written law " as meaning Acts of Parliament, and " unwritten " as meaning customary law, and Austin pertinently asks, Where does Blackstone place the laws of subordinate legislatures—the law contained in the Reports and Year Books?

But it is only fair to Blackstone to point out that there were no subordinate legislatures in his day, 1760, and that he regarded the Reports and Year Books as mere records of the customs of the realm as formulated in judicial decisions, so that according to Blackstone's view all law was statute or customary.

It may be pointed out that Austin's classification leaves no place for customary law, though it must be admitted that according to his view custom only becomes law when embodied in a judicial decision or in an Act of Parliament.

At Rome the terms " written " and " unwritten " were used in their grammatical sense, and the term " Jus scriptum " meant any law which was in writing when it originated, and included statutes, whether Leges or Senatusconsulta, the Edicts of the Prætor and the Responsa Prudentium.

" Jus non scriptum " was customary law.

It has been suggested that the terms " promulged " and " unpromulged " should replace " written " and " unwritten " in the juridical sense, but the term " promulge " may mean either to enact or to publish any kind of law, and generally means the latter.

Now many laws are in force and effective before they are published in the ordinary sense of the word.

In the English system statutes are, in the absence of any provision to the contrary, effective from the date of the royal assent being given.

At Rome they were not effective till published by being exhibited in a public place, though Caligula used to have them hung so high that no one could read them, and then punish those who unwittingly committed a breach of them. In Japan until 1870 laws were never published to the public generally, they were addressed to the officials whose duty it was to administer them in accordance with the Chinese maxim, "Let the people abide by but not be apprised of the law."

aware

CHAPTER V.

THE USES AND DEFECTS OF LAW.

PROFESSOR SALMOND has pointed out the uses and defects of law as follows :—

THE USES OF LAW.

Firstly. It ensures uniformity and certainty. The Judges, knowing what the rules are, can enforce them uniformly. The citizens, knowing them, can shape their conduct accordingly. A mere injunction to do what is right would be useless to Judge and citizens, since opinions on questions of ethics vary so much that it would be improper to punish anyone for doing what he thought not immoral, even though the majority of the community thought it was immoral. If the State has laid down clearly what may be done and what is to be forborne, then, as persons may acquaint themselves therewith, they have no ground of complaint if punished for not complying with the rules. This being so, of course *ex post facto*—*i.e.*, retrospective—legislation is indefensible, since it cannot even act as a warning, for no one can anticipate what the caprice of such legislation may declare illegal.

However, *ex post facto* legislation which merely alters rules of procedure is free from reproach, since the State may without restriction adopt the best system for bringing any delinquent to justice; and so it was held in *R.* v. *Chandra Dharna* (unreported) that a statute extending the period within which a party must be prosecuted from three to six months applied to crimes committed before

the statute was passed, and even though the three months had elapsed before the statute came into force.

Some rules of law are based on reasons of particular utility, others on the necessity of having some rule. For instance, for the purpose of uniformity and certainty, any rules for the devolution of property on death intestate would suffice; nevertheless the law in such cases bases its rules on considerations of particular utility and reasonableness. So on death intestate the law, as a rule, gives the deceased's property to the nearer relative in preference to the more remote. Some rules are, of course, purely arbitrary, such as rules as to the precise period within which legal proceedings must be instituted.

Secondly. Law keeps legal justice clean and impartial. The rules being publicly known, any departure from them by the Judges is subject to the censure of public opinion, especially that of the practitioner; whereas if what is right or wrong were left to the opinion of Judges, then, as within the sphere of individual judgment the differences of honest opinion are so manifold and serious, dishonest opinion might pass in great part unchallenged and undetected, so it would not be safe to leave the matter to be decided according to the opinion of the Judge. So, as Cicero says, "We are the slaves of the law that we may be free"—*i.e.*, free from the partiality of a bench left to administer justice according to each Judge's opinion of what is right or wrong. The justice of an Eastern king sitting in the gate, even if sufficient for the needs of a community in its infancy, is certainly insufficient for the complicated needs of a modern and highly civilised community.

Thirdly. Law protects the administration of justice from individual error.

The rules of law represent the collective wisdom of the

community and its carefully thought-out opinion as to what is most expedient, which is much more likely to produce sound principles than one devised by a Judge to meet the requirements of one particular case. Of course, judiciary law based on analogy to existing rules is to an extent free from this danger.

The Defects of Law.

Professor Salmond suggests that law is subject to the following defects :—

Firstly, Rigidity. By this he means that as the law must proceed on general principles it must lay down general rules without regard to the numberless variations of fact which differentiate cases falling under the general rule. The same rule must be applied to them all if they fall within its principle. This position may be summed up in the maxim " Summum jus summa injuria," for few general rules can be pushed to their utmost logical conclusion without working injustice in individual cases.

However, it is not a difficulty impossible of remedy, since it is possible to lay down a general rule and then to qualify it by a series of exceptions and modifications to meet the circumstances of particular cases, though this method, of course, tends to complicate the law.

Secondly, Conservatism. Law is by nature stationary, and so a rule founded on a particular reason is still law even though the reason no longer exists. The maxim " Cessante ratione legis cessat lex ipsa " is devoid of truth. A statute providing for the muzzling of dogs, passed with a view to stamping out rabies, must still be obeyed even though rabies has been completely stamped out. We had, prior to 1926, some few rules in English law which were founded on reasons no longer existing, but are still in

force, such as the descent of real property on death intestate on the eldest male, a rule derived from the feudal system which, so far as this requirement was concerned, was abolished by 11 & 12 Car. 2, c. 24.

There seems no cure for this defect save legislation repealing the law for, as pointed out already, fictions and equity have a very limited sphere of action.

Thirdly, Formalism. Law has a tendency to attach too much importance to form and not enough to the merit of a case.

This was undoubtedly a reproach to ancient systems where the remedy was everything and substantive law of small importance, and failure to comply with the preliminary technicalities of procedure might cause the action to fail; but in modern systems the Court has ample power of amending immaterial defects in procedure. Substantive law is now of chief importance, and, as Lord Holt said in *Ashby* v. *White* (Ld. Raym. 938) when counsel complained that no such action had ever been brought before: " If men will multiply injuries actions must be multiplied too."

Fourthly, Professor Salmond complains that law is characterised by unnecessary complexity. Now it is true that modern law is a complex subject like most other branches of learning in these modern times, but the multitude of rules is necessary owing to the complexities of modern life. If the law did not lay down rules for possible contingencies it would suffer from that uncertainty which results from attempting to provide for a multitude of varying circumstances by one general rule.

CHAPTER VI.

THE DIFFERENT STAGES IN THE DEVELOPMENT OF LAW.

LAW, as now existing, is not the product of a carefully devised scheme, nor did it originate all at once. It is the result of a slow and lengthy process of evolution, the stages of which have been variously described by different writers.

According to Austin (p. 636), the stages in the development of law were as follows:—

(1) Rules of positive morality, which may be taken to represent the era of ancient customary law, if it can be called law.

Stages as to Austin

(2) The adoption and enforcement of these rules by judicial tribunals when such tribunals were created. This stage is well illustrated by the growth of English common law, which grew out of the judicial decisions establishing as law the rules common to the three systems of custom: *i.e.*, the Dane law, Mercian law, and Wessex law.

(3) The addition of other rules drawn from the former by consequence or analogy. This may be taken to represent the subsequent extension of English common law by judicial decisions based on the fiction that the Judges were not making new law but only applying the existing rules.

At Rome it was represented by the extension of the civil law by fictions.

(4) The introduction of new rules by the Judge on his own initiative, without any pretence of applying existing

rules. This may, perhaps, represent the stage known as Equity.

(5) Legislation. The addition of new rules and the amendment or abolition of old ones by the sovereign's express commands.

(6) The action and reaction of statute and judiciary law resulting from judicial interpretation of the statutes.

(7) A code: *i.e.*, the embodiment of all existing rules of law in an orderly and authoritative exposition thereof.

According to Sir Henry Maine (Ancient Law, Chaps. I—III), the steps in the evolution of law were the following:—

(1) Themistes: *i.e.*, judgments on particular cases alleged to be divinely inspired.

This theory is borne out by the fact that the Judges in early times were always priests, *i.e.*, the Pontiffs at Rome.

(2) Dike: a series of such decisions making a judicial custom.

(3) A code: meaning thereby the reduction of the existing rules to writing.

This stage has been reached in most societies at the same point of development. The Ten Commandments, the Twelve Tables, and the Laws of Manu well illustrate this.

(4) Legal fictions. As already pointed out, this method was introduced to get over the inelasticity of the codified law, and to extend it to meet the requirements of a growing nation, under the guise of applying the existing law.

Sir Henry Maine defines a fiction as "Any assumption which conceals or attempts to conceal the fact that a rule of law has undergone an alteration, its letter remaining unchanged but its operation being modified." As examples, we have adoption at Rome whereby a new member was introduced into the family on the fiction that he was really a natural-born member thereof.

The judiciary law in England is another example, the Judges introducing new rules under the guise of administering existing law.

(5) Equity. This stage seems to have followed fictions in English law, and probably in Roman law.

Sir Henry Maine defines equity as "Any body of rules existing by the side of the original civil law, founded on distinct principles, and claiming incidentally to supersede the civil law in virtue of superior sanctity inherent in those principles." This stage was certainly reached in England and Rome, but there is no evidence that it appeared in any other system, nor is it obvious that it followed fictions; it seems to have been contemporaneous with them.

(6) Legislation. This is a method of law-making where the obligatory force of the law is independent of its principles, as distinct from equity, and whose introduction is open and not under the guise of administering existing law as distinct from fictions.

According to Lightwood (Nature of Positive Law), custom is expanded by the jurists until the community becomes too large and too highly developed for that method, when legislation has to make the necessary developments.

CHAPTER VII.

THE METHODS BY WHICH THE LAW OPERATES.

INTRODUCTORY.

As pointed out already the sovereign or State cannot supervise the conduct of each individual and therefore must lay down general rules for the guidance of people generally. By means of these rules the State enforces obedience to its will and gives protection to persons whose conduct conforms to its canons of what is just and expedient.

With these ends in view the State imposes absolute duties, and confers rights and also vests powers in officials to enforce the law; there is also a certain sphere of action in which the law does not operate and which may be called the realm of liberty; so that the four conceptions which form the basis of a legal system are: Duty; Right; Powers; Liberty.

It is proposed to deal with each of these in turn, merely premising that Professor Holland's statement (Jurisprudence, Chap. VI, p. 81) that "the immediate objects of law are the creation and protection of legal rights" does not appear wide enough, since law often attains its object by the imposition of absolute duties, *i.e.*, duties owed to the State in respect of which, as will appear in due course, it is submitted there are no legal rights. It is only fair to state, however, that Holland does not agree with the Austinian proposition that duties owed

to the State are absolute (Chap. IX, p. 129), nor does he appear to admit that there are any absolute duties.

DUTY.

The term "legal duty or obligation" means liability to a legal sanction, *i.e.*, to some evil to be suffered in consequence of infringing a rule of national law.

It does not mean the act or forbearance which the law commands, for these are the objects of the duty.

Duties are imposed on Persons, require Acts or Forbearances which are their objects, relate generally to Persons or Things which according to Austin are their subjects, and are made binding by Sanctions.

Some legal duties are owed only to the person imposing them, *i.e.*, the State, and are called absolute duties. By the expression "owed" is meant that the person imposing them is the only one who may determine whether disobedience to them shall be redressed or not. They are not necessarily owed to the person for whose benefit they are imposed. Absolute legal duties are owed to the sovereign imposing them and a breach thereof is generally a crime and the remedy is punishment of the wrongdoer not compensation to the party injured.

Other duties, called relative duties, are owed to a person other than the one imposing them and correlate with rights vested in the party to whom they are owed. The party in whom a legal right is vested can alone determine, "according to law," whether a breach shall be redressed or pardoned. The importance of the expression "according to law" lies in the fact that the sovereign could in fact refuse redress for breach of such duties, since no legal duty can be enforced without recourse to the sovereign, but if he refused redress he would not then be acting "according to law"; at the same time even if

he did he would not be acting illegally, since, as will appear later (p. 197), the sovereign is not subject to his own or any other law. The distinction between absolute and relative duties, being a legal one, only exists "according to law," and the fact that the sovereign may at times act not "according to law" in no way affects the existence or importance of the distinction.

A breach of a relative duty is called a civil injury, and the remedy is compensation or restitution to the injured party.

It is well to remember that all legal duties, whether absolute or relative, regard ultimately the welfare of the community at large as they provide for the peaceful pursuit by men of their vocations and security of life, limb and property.

Relative duties, of course, particularly and immediately regard the welfare of the individual in whom is vested the correlative right; but many absolute duties also regard particularly the welfare of particular individuals, *e.g.*, the duty not to assault people or steal their property. The distinction between absolute and relative duties depends not on the purpose for which such duties are imposed but on the different persons to whom each kind is owed.

As already pointed out, duties, whether absolute or relative, are imposed on Persons, relate many of them to Things, are to be observed towards Persons, require Acts or Forbearances, and are rendered compulsory by Sanctions.

It is therefore necessary to deal with these conceptions before dealing with duties and rights fully.

Having dealt with duties and rights it will then remain to deal with infringement of duties and rights and then with titles or the methods by which they are acquired, transferred and extinguished.

SECT. 1.—PERSONS.

Persons in law are either

(A) Natural or physical; or

(B) Artificial.

(A) A natural person is defined by Professor Holland (Chap. VIII, p. 95) as "(1) A living human being, (2) recognised as a person by the State."

As regards (1), a monster is not a person in law, nor is an animal or a dead human being. As regards animals, it has been suggested that they are in certain respects persons, for inasmuch as the law prohibits cruelty towards them and also enforces trusts of property in their favour, the obligations which the law enforces in these respects seem to correlate with rights vested in the animals, which are therefore persons, as rights can only be vested in persons.

Now as regards the obligation not to be cruel to animals, this is imposed by the criminal law; and the duty is an absolute one owed to the sovereign and not correlating with any right. That this is so is apparent from the fact that if it correlated with a right vested in the animal then a duty not to deface public monuments would correlate with a right vested in the monument, which on the above argument would be a person also. It is true that the immediate purpose of the duties relating to animals and public monuments is the welfare of each, but, as already pointed out, the purpose for which a duty is imposed will not always indicate the person to whom the duty is owed. Even those who contend that duties imposed by criminal law, being imposed with a view to the welfare of the public at large, correlate with rights vested in the public at large, are not prepared to admit that animals can have legal rights or claim to be classed with persons: see Salmond, Jurisprudence, p. 274.

As regards trusts of property for animals, they stand

in the same position as trusts for the maintenance of buildings. The ownership of the fund is in the trustee, not in the animal or building, and there is no legal right in respect of it vested in the animal or building; and in English law the only method by which such trust can be made effectual, if the trust is not for a charitable purpose, is by giving the property to one person on trust that he will maintain the animal or building, with a proviso that if he fails to do so the property shall go over to another person on similar trusts. No proceeding will lie to enforce the actual application of the funds to the maintenance of the animal or building. Such trusts are called in English law illusory trusts, or trusts of imperfect obligation, since they are not really enforceable. Where the trust is for a purpose which is charitable, then if the trustee will not carry out such purpose the State will assume control and appoint another trustee to do so.

As already pointed out, if the fact that property may be held in trust for an animal constitutes the animal a person, then a similar trust for the maintenance of a building would constitute the building a person.

It has been suggested that the dead are persons and that they possess legal rights in respect of their body, reputation, and estate. It is suggested that they may give binding directions as to the disposal of their body after death, but it is obvious that they can take no steps to enforce compliance with such directions, so that any obligation in respect thereof cannot correlate with any right vested in such party. At most the obligation would be enforceable at the instance of the relatives against the party who had possession of the corpse, in which case the right would be vested in the relatives, not in the deceased.

In English law the directions of a person since deceased as to the disposal of his body are not binding (*Williams*

v. *Williams*, 20 Ch. D. 659), though by statute (2 & 3 Will. 4, c. 75, s. 7) he may prevent its use for anatomical purposes.

As regards the reputation of a deceased person, since no proceedings can be instituted by him or on his behalf to recover damages for him in case such reputation is defamed, it is obvious he has no rights in respect of it. If his relatives could recover damages for such defamation they would have the right, not he. In English law only criminal proceedings will lie for defamation of the dead, and as a crime is a breach of an absolute duty and absolute duties have no right correlating with them, there appear to be no conceivable conditions under which a dead person can be deemed to have any right in respect of his reputation. As regards the property or estate of a dead person, it is suggested he has legal rights in it because he may by will or other instrument give binding directions as to its disposition after his death. The fact is that such directions amount to a disposition or transfer of the property and constitute a title to it. The deceased has no longer any rights over it, though the persons in whose favour the directions are given, and they alone, have legal rights in it. For instance, A, in his lifetime, settles property on B for life and directs that on B's death the property is to go to C absolutely. A has parted with the property and no longer has any rights in it, nor can he take any steps to enforce the carrying out of his directions; such steps can only be taken by B and C. The same principles apply if such directions are given by will; and in neither case can A reserve any rights to himself to take effect after his death.

Professor Holland suggests that a human being must be born alive to be entitled to rank as a person in law. Although this may be necessary by the law of some States

it does not appear an essential element from the point of view of Jurisprudence, the essential point being from what date the child can be deemed to come into existence as a legal entity. The date fixed by most legal systems seems to be the date of conception.

So by the Civil Code of France, Art. 906, it is provided that gifts *inter vivos* may be made to persons if conceived at the date of the gift, and they may receive legacies if conceived at the date of the testator's death. By the Prussian Landrecht, Part I, Vol. I, § 10, "the general rights of humanity attach to a child from the moment of conception." In Roman law a human being must be born alive to rank as a person (Dig., L.16.129), though a guardian might be appointed to a child *en ventre sa mère* (Dig., 37, 9).

In English law a child *en ventre sa mère* may have property assigned to it *inter vivos* without the intervention of a trustee (Blackstone, Comm., 1—130); and persons may be appointed to represent unborn children in judicial proceedings relating to property in which they may ultimately become interested. English criminal law, however, does not recognise a child as being a person until it has completely issued in a living form from its mother (*R.* v. *Poulton*, 5 C. & P. 330), and therefore to kill a child in the womb is not murder. Of course, a child not yet conceived cannot in any circumstances be deemed a person since a non-existent entity does not exist, and the soundness of the proposition is in no way shaken by the fact that provision may be made for such beings contingently on their coming into existence by vesting property in trustees for them, for which reason Salmond thinks that unborn persons possess a legal personality (p. 277).

(2) The living human being must be recognised as a person by the law.

Such recognition may be accorded by the law either conferring legal rights or by it merely imposing duties on the party. The modern Civilians and Holland (Chap. VIII, pp. 93-4) and Pollock (First Book of Jurisprudence, p. 108) are of opinion that such recognition can only be accorded by conferring rights and that the mere imposition of duties is not sufficient. It is well settled that some persons may possess rights and be free from duties, *e.g.*, lunatics and foreign sovereigns and ambassadors; but it is submitted that there may be persons who are under duties but not possessed of rights, *i.e.*, persons who are in a position of disability.

Whether a slave is a person depends on which of the above views one adopts. There has been some controversy as to whether the Roman lawyers considered a slave to be a person or not. The modern Civilians and Holland (Chap. VIII, p. 96) and Pollock are of opinion, for the reasons given above, that the slave was not a person in Roman law, but there are good grounds for believing this view is inaccurate and that he was deemed a person by Roman law. His position is dealt with in the Law of Persons and he is described as one of the species *homo* and of persons. Title III, Book 1, of Justinian's Institutes state that all men are free or slaves and Title VIII that of those persons who are in *potestas* slaves are in *potestas* of their masters.

The master's right over the slave is called *potestas* not *dominium*, and the term "*potestas*" is similarly applied to the rights of a *paterfamilias* over those free persons who are in his power. Sohm points out also that a slave could take a religious vow, belong to a religious corporation and that his grave was a *locus religiosus*.

(B) Artificial persons. There are three kinds of entities to which the term "artificial person" has been applied:—

(1) corporations;

(2) certain things which are deemed invested with rights and subject to duties;

(3) certain collections of rights and duties composing the *persona* of a deceased.

Of each of these in turn.

(1) *Corporations.*—A corporation is a legal entity whose active life depends on there being one or more natural persons who, as it is said, constitute the corporation, though the entity nevertheless continues to exist even when there are no such natural persons in existence and is deemed to be an entity distinct from the natural persons who constitute it.

There are two kinds of corporations: (*a*) Corporations Sole; (*b*) Corporations Aggregate.

(*a*) A corporation sole is constituted of one natural person. The King, a bishop, and the Public Trustee are examples of such kind of corporation. The King embodies the corporate existence of the State in the British Empire, and the office continues without intermission even on the death of any particular occupant, and, indeed, by the theory of our law, cannot be without an occupant, for on the constitutional maxim "The King never dies," as soon as one occupant dies his successor *ipso facto* commences to reign.

In the United States of America the corporate nature of the State is not embodied in any particular individual or office, but is constituted of and designated by "the people." The corporate nature of the State is a growth, not the creation of a statute, as most other corporations are, and, as will appear later (p. 197), unlike all other corporations, is not subject to any legal limitations on its powers.

Bishops and the Public Trustee differ from the King,

so far as their corporate nature is concerned, only in this—that on the death of the occupant the successor does not commence his corporate existence until actually appointed, though the corporate entity continues its corporate existence; and when the successor is appointed his rights and privileges date back to the death of his predecessor; nevertheless in the interim the corporate life has been passive, except so far as its agents continue to act for it within the scope of the powers conferred on them by the occupant who appointed them.

(*b*) A corporation aggregate has the same characteristics as a corporation sole, except that it is constituted of two or more natural persons. It continues its corporate existence even though all the members are dead.

The best example of a corporation aggregate is the limited liability company of English law, a conception whereby a number of persons are able to contribute or promise to contribute money for the furtherance of a common object and limit their liability to the amount of their contribution paid or promised. The company, being an entity distinct from the members, is not their agent, nor are they responsible for its acts; and herein a partnership differs from a company, for in English law the firm has no legal existence as apart from its members and each member is, except in a limited partnership, liable on all the dealings of the other members acting within the scope of the firm's business, as each partner is deemed the agent of the rest to that extent.

There are two great advantages connected with the principle of incorporation:—

(1) On the advent of a new member it is unnecessary to effect any transfer of the corporate property in order to give such member the benefits thereof, for the property is vested in the corporation; whereas

in the case of co-partners or co-trustees, if a new partner or trustee is appointed he has no legal interest in the property until the necessary steps have been taken to vest such interest in him.

Similarly, if a partner or trustee retires, he must take proper steps to divest himself of his ownership in the property.

Now the Public Trustee being a corporation sole, on the appointment of a new occupant of the office, as the property is continuously vested in the corporation no transfer is necessary.

(2) Notwithstanding changes in the membership of a corporation, the authority of its agents is not affected thereby, since the existence of their principal—the corporation—is unaffected thereby. So, strictly speaking, the Demise of the Crown Act, 1901, which was expressed to be declaratory, and provided that the death of the sovereign should not affect the holding of any office under the Crown nor render reappointment necessary, was unnecessary, as the King's office continued notwithstanding the death of the occupant. The Act is expressed to be declaratory.

We now have to deal with the two other kinds of artificial persons, which are conceptions only found in Roman law.

(2) *The prædium dominans and serviens of Roman law.*—A *prædium dominans* was a piece of land the ownership or occupation of which gave the party certain rights over another piece called the *prædium serviens*, and whoever was owner or occupier for the time being of the latter was subject to these rights.

By a fiction it was supposed that the rights were vested

in the *prædium dominans* and the corresponding duties imposed on the *prædium serviens*, and therefore these *prædia* were deemed to be persons. Really it is unnecessary to do violence to language in this way, since a perfectly simple explanation is that the ownership or occupation of them is the title of the party to the rights and duties.

(3) *The hereditas jacens of Roman law.*—This was the legal *persona* of a deceased person until the heir had entered, and consisted of all the rights, duties, and privileges of the deceased which were deemed existing as though he was still alive. In virtue of this fiction rights could be acquired by the *hereditas jacens* for the benefit of the person who was heir and who ultimately entered, though the rights must not be of a purely personal nature. So a legacy could vest in an *hereditas jacens*, but not a usufruct, since the law required a living person to use and enjoy it.

When the heir did enter then the *hereditas* ceased to exist and the heir was under the old civil law personally liable to the creditors of the deceased, and no difference was made between such creditors and the creditors of the heir.

In English law we have never had the fiction of the *hereditas jacens.* The property of a deceased person vests *ipso facto* in a party called the Legal Personal Representative, who is liable for the debts of the deceased only to the extent of the property; and Roman law ultimately arrived at the same result as regards the liability of the heir if he made an inventory of the assets, though it never gave up the fiction of the *hereditas jacens.*

In conclusion of the subject of artificial persons it may be pointed out that corporations differ from natural persons in the following respects:—

(1) They can only act through an agent.

(2) They cannot die in the ordinary sense of the word.

(3) Their legal capacity is generally limited by the instrument which gave them birth, *e.g.*, in English law many corporations cannot own land without a licence from the Crown. Any act done by them outside their powers is void and said to be "*ultra vires.*"

(4) They cannot commit crimes which require a criminal intention, though corporations may be fined for the misdeeds of their servants in some few cases.

As Denman, L.C.J., said in *R.* v. *Great North of England Ry. Co.*, 9 Q. B. 315: "There are some *dicta* in old cases that a corporation cannot be guilty of treason or felony, and it might be added, of perjury, nor of offences against the person. These plainly derive their character from the corrupted minds of the persons committing them and are violations of the social duties that belong to men and subjects. A corporation as such has no such duties."

It was formerly the doctrine that an indictment would lie against a corporation for nonfeasance, *i.e.*, non-repair of a highway, but not for a misfeasance, *i.e.*, obstructing a highway, but in the case quoted above a corporation was held liable for such obstruction; and now by the Interpretation Act, 1889, in the construction of every statutory enactment the word "person" shall, unless a contrary intention appears, include a body corporate, so apparently a corporation can be guilty of any statutory offence. However, as a corporation cannot be imprisoned, its liability seems limited to crimes punishable by fine and does not extend to those punishable only by imprisonment. Of course the members of the corporation who actually authorise the commission of a crime by the servants of the corporation can be made responsible as also can the servants.

Corporations come into existence—

(1) Under some general rule of law, such as the Companies Act, 1929, by filing at the Companies Registry a Memorandum of Association with some other documents.

(2) Under some special authorisation such as a special Act of Parliament or a royal charter.

(3) By prescription, *i.e.*, by acting as a corporation from time immemorial, *i.e.*, ever since 1 Ric. I.

In the first two cases the powers of the corporation are defined and limited by the memorandum, Act of Parliament or charter respectively, and anything done outside those powers is *ultra vires* and void.

In the third case the powers would probably be those usually possessed by a corporation of the kind in question, *i.e.*, those necessary to enable it to carry out its purposes. As already pointed out corporations cannot die in the ordinary sense of the word, but their existence may be put an end to in the following ways:—

(1) By a judicial proceeding, such as in the case of a limited company, a winding-up order, or by an order declaring it defunct where it has ceased to carry on business.

(2) By forfeiture of its charter, which Charles II threatened against the Corporation of London.

(3) By surrender of its corporate privileges, as was done by the College of Advocates, and also occurs in the case of the voluntary winding-up of a company.

Sect. 2.—Things.

Things are defined by Austin (p. 358) as "permanent objects, not being persons, which are perceptible through

the senses," or as "permanent external causes of sensation, not being persons."

The term "permanent" does not mean everlasting; it means capable of being perceived more than once and being deemed the same on each occasion. Austin does not explain the import of the term "external," but he doubtless means perceptible while still outside the body, whereas the causes of sensation on the organs of hearing and smell can only act when within the body.

Things are only capable of being perceived through the senses of sight and touch; the causes acting on the senses of taste, smell, and hearing are not permanent, so far as we know; they are similar causes, but not the same. The sounds emitted from a gramophone are not the same sounds; they are similar. Nor is everything which is perceptible through the sight or touch a thing; *e.g.*, light and air are not things, not being permanent causes of sensation; yet light is perceptible through the sight and air through the touch.

It appears that things are permanent objects, not being persons, which are perceptible through the senses of both sight and touch. So colour is not a thing, for, apart from the question as to whether it is permanent, it cannot be perceived through the sense of touch.

As Austin points out (pp. 358—359), "one cannot define a thing more precisely without entering into a metaphysical discussion, which would be out of place. Those who are ignorant of metaphysics are liable to run into ill-timed metaphysical speculation. Those who are versed in metaphysics know the occasions for abstaining from it as well as the occasions on which it can be applied to advantage."

Professor Holland (Chap. VIII, p. 101) defines a thing as "The object over which one person exercises a right and with reference to which another person lies under a

duty." The objection to this definition is that rights are often existent over persons and yet persons are not things, for their nature is not altered by the fact that rights are exercised over them. Some rights exist over rights, but that does not make the latter rights things.

A thing has also been defined as "a locally limited portion of volitionless nature": Baron, Pandekten, § 37. The objection to this definition is that it excludes animals, who, so far as we know, have will power and yet are things, and are always treated as such in law.

The Various Ways of Classifying Things.

Things have been variously classified. Some of these classifications are purely legal and have no reference to the nature of the things themselves. Other classifications are founded on differences based on the nature of the things themselves. The former may be called purely legal classifications, the latter natural ones.

(A) *Purely Legal Classifications.*

(I) (1) *Res corporales*, or material or physical things.
(2) *Res incorporales*, or artificial things.

This classification is, it is submitted, unsound, for the term "*res corporales*" in Roman law meant:—

(1) Things in the proper signification of the term;
(2) Persons as the subjects of rights; *i.e.*, over whom rights are exercised; and
(3) Acts and forbearances.

The position of persons as the subject of rights will be dealt with later: see p. 205.

As regards acts and forbearances, not being permanent, they lack one of the essential elements of things. Moreover, the terms "act" and "forbearance" sufficiently indicate them, and it is unscientific to distort the meaning of the word "thing" in order to make it designate them. The

term "*res incorporales*" indicates rights and duties looked at either singly or, as in the case of the Roman *hereditas jacens*, collectively.

The terms "rights" and "duties" being already sufficient, it is unscientific to distort the meaning of the term "thing."

The suggested distinction between *res corporales* and *res incorporales* is really a distinction between things and rights over things, and therefore is not a classification of things.

In English law there existed before 1926 a somewhat similar classfication of a certain class of rights called hereditaments.

A hereditament meant a right which, being a real right, on death of the owner intestate devolved beneficially on a person called the *heir*, as distinct from other rights called personal which devolved beneficially on other relatives, called the next-of-kin, *i.e.*, those nearest related. (For the meaning of the term "real" see p. 214.) The heir, if a male, was generally one person, such as the eldest son, whereas the next-of-kin were all those in equal degree of relationship to the deceased, such as all the sons and daughters.

Now hereditaments were either corporeal or incorporeal. If corporeal they were coupled with possession of the thing over which the right existed, so the right of an owner in fee simple in possession was corporeal. If incorporeal they were not coupled with possession, so if land was given to A for life with remainder to B absolutely, so long as A lived B had an incorporeal hereditament.

The classification was a classification of rights and was convenient, the only objection to which it was open being that all rights are incorporeal, but of course an adjective often qualifies the meaning of a word; however, unlike

the classification of *res corporales* and *incorporales* it does not purport to distinguish things from rights.

One important distinction between *res corporales* and *incorporales* so called is pointed out by the late Professor Westlake.

Between corporeal and incorporeal things there is this inevitable difference, that while property in the former is the legal regulation of an enjoyment existing independently of the law, property in the latter presupposes the creation by law of the thing of which it is the regulated enjoyment, and that thing is a right but not property.

(II) (1) *Res fungibiles.*
(2) *Res nec fungibiles.*

Res fungibles are things determined generically, *e.g.*, A orders a motor car of a certain make from B, not specifying any particular one. The motor car is a *res fungibiles,* and any one of the quality ordered will suffice for performance of the contract.

The term itself is a Latin derivative, since such things " mutua vice funguntur " (Digest, xii.1.6)—they replace and represent each other.

Res nec fungibiles are things determined specifically, *e.g.*, A agrees to buy from B a specific motor car. B must deliver that particular one to comply with the contract, and that particular one is a *res nec fungibiles.* Professor Holland (Chap. VIII, p. 107) seems to suggest that the distinction depends on the nature of the thing itself, but this does not appear to be so.

Strictly speaking the classification is not a classification of things, since the distinction depends entirely on the nature of the agreement; nevertheless, from a legal point of view the legal position of the thing may have been altered by the contract made with reference to it. For instance, in English law an unconditional contract for the

purchase of a *res nec fungibiles* or a specific thing if in a deliverable state has the effect of transferring the ownership therein to the purchaser irrespective of delivery or payment of the price, though this was not the law at Rome.

It must, however, be borne in mind that the fact that the subject-matter of a contract is a *res nec fungibiles* does not always ensure that the Court will order delivery of it instead of damages for non-delivery. Such order for delivery, called specific performance, will only be ordered if the remedy of damages would be inadequate, as where the same kind of thing cannot be procured elsewhere.

(III) (1) Things capable of private ownership; *in commercio* or *in nostro patrimonio.*

(2) Things not capable of private ownership; *extra commercium,* such as the air and the sea.

The distinction is a legal one based, in some cases, on the nature of the thing itself, though not always; for instance, the air and the open sea are hardly capable of appropriation by private individuals, though States claim and exercise dominion over the sea for a distance of three miles from the shore: yet the seashores and rivers and theatres are subjects of private ownership in English law, though they were not in Roman law.

(IV) (1) *Res mancipi.*

(2) *Res nec mancipi.*

This distinction was only existent in Roman law and depended entirely on whether the thing could be transferred by a certain method called mancipation or not. If it could, it was a *res mancipi*; if not, it was a *res nec mancipi.* The method was a ceremony with scales, held by a person called the *libri pens,* and a piece of copper with which a purchaser struck the scales, stating that he bought some particular thing with the copper. Five other persons witnessed the

transaction. It originated undoubtedly in an age when money was weighed, not counted, and is of great antiquity. There is a record of such transaction in Genesis, ch. 23, v. 16, where it is recorded that Abraham bought a piece of land in which to bury his deceased wife Sarah, and the money was weighed out and the land marked out in the presence of the sons of Heth. The approximate date of this is 1860 B.C.

The *res mancipi* of Roman law were land, slaves, horses and oxen, and rural servitudes, the earliest forms of property, and, according to Sir Henry Maine (Ancient Law, pp. 283 *et seq.*), these were deemed a superior class of property, and, therefore, new forms of property were refused admittance to the class and became *res nec mancipi,* they being deemed of little worth, and they could be transferred by delivery; and even later on, when their value was appreciated, they still remained outside the class of *res mancipi* through the conservative habits of early societies, a phenomenon which for centuries excluded English leaseholds from being considered property or anything more than a contract between the landlord and tenant giving rights against the landlord only. Later on, the Roman lawyers excluded new kinds of porperty from the class of *res mancipi,* because of the restrictions on their transfer owing to the formalities attendant thereon; *res nec mancipi* were capable of transfer by mere delivery, which was more suitable to the needs of a community which had developed like the Roman Empire, as allowing greater freedom of transfer. In Justinian's reign all things were transferable by delivery and the distinction between *res mancipi* and *res nec mancipi* disappeared. As Sir Henry Maine says (Ancient Law, p. 283), "the history of Roman property law is the history of the assimilation of *res mancipi* to *res nec mancipi.*"

(B) *Natural Classification of Things.*

(I) (1) Things principal.
(2) Things accessory.

An accessory thing is a part of another thing, though not the main part, yet it contributes towards the utility of the other thing. The main part is the principal, and, in many systems of law, the owner of the principal is entitled to the accessory also, even though he did not supply it.

For example, in English law, with many exceptions, the owner of a house is entitled to the fixtures annexed thereto by the party in possession.

In Roman law, if A built a house on B's land, even in mistake as to the ownership, the house belonged to B, being deemed accessory to the land.

(II) (1) Things divisible.
(2) Things indivisible.

A divisible thing is one which can be divided without destroying its nature or impairing its value, such as a piece of cloth, a heap of coins. A picture would be indivisible. Of course, different persons may own shares in an indivisible thing, but in such case it may be held that either the thing is the subject of distinct rights over it possessed by different persons, or that the right over the thing is itself divided among different persons. In such case, on the death of one his share may devolve on the survivors, in which case in English law the ownership of the parties in the thing is called "joint," and is said to be subject to the *jus accrescendi*; or, on the other hand, it may devolve on the representatives of the deceased, in which case the ownership is called "in common."

Of course, in one sense all things are divisible, since one can bisect them; but, by so doing, we destroy the thing as indivisible. In common parlance, divisible things are those which can be divided without being destroyed.

(III) (1) Things which are consumed by being used.

(2) Things which are not consumed by being used.

Strictly speaking, successive interests cannot be created in things which are consumed by being used, though in Roman law a life interest, called a quasi-usufruct, could be created in them by will, subject to the usufructuary giving security that a similar quantity and quality should be restored on his death.

(IV) (1) Things simple.

(2) Compound things.

(3) Aggregate things.

A simple thing is one which it is not deemed necessary to regard from the point of view of its component parts—for example, a beam.

A compound thing is one composed of two or more simple things permanently united together, such as a house or a ship.

An aggregate thing is composed of several simple things not united but yet considered as one, such as a flock of sheep.

(V) (1) Things movable.

(2) Things immovable.

Movable things are those which can be moved without destroying their nature. This is, of course, a question of fact; and, owing to improved mechanical methods, a thing formerly immovable may be put in the category of movables, as, for instance, houses which can now be moved intact.

In many systems of law, however, movables which are accessory to immovables are themselves deemed immovables, so houses and title deeds of land are immovables in law though title deeds are certainly not immovable in fact. Title deeds being deemed immovable in English law were not the subject of theft at common law, since only movables could be stolen. By statute, however, misappro-

priation of title deeds can be punished as larceny : 24 & 25 Vict. c. 96, s. 28.

According to Sir H. Maine (Ancient Law, p. 283), " The only natural classification of the objects of enjoyment, the only classification which corresponds with an essential difference in the subject-matter is that which divides them into Movables and Immovables."

A consideration of the classification which we have called natural ones shows, it is submitted, that this statement cannot be supported.

SECT. 3.—ACTS AND FORBEARANCES.

Although for our present purpose, *i.e.*, the explanation of the nature of legal duties and rights, it is only necessary to deal with the nature of acts and forbearances, yet it will tend to clearness if we also deal briefly with other related phenomena, such as intention, heedlessness, etc.

Now the phenomena of human action and inaction may be summed up as follows :—

An *act* is a bodily movement caused by a volition. A *volition* is a desire for a bodily movement which is immediately and invariably followed by such movement provided the bodily member is in a normal condition. A forbearance is an intentional refraining from action as distinct from an omission, which is an unintentional inaction. All desires except volition which produce acts or forbearances are *motives*. A motive is a desire causing a volition or a forbearance. The results flowing from acts, forbearances and omissions are *consequences*.

If such consequences are expected and desired by the party acting or forbearing he is said to *intend* them, so intention may be defined in the words of Salmond (p. 393) as " Foreknowledge of the act coupled with the desire of it, such foreknowledge and desire being the cause of the

act." According to Salmond the term "act" includes the consequences of the bodily movement: see *post*, p. 166.

If a party acts without adverting to the consequences he is said by Austin to be *heedless.*

If a party acts and adverts to the consequences but hopes they will not ensue when it is natural that they should ensue he is *rash.*

If a party *omits* to do an act which he is under a duty to do, using the word "omit" in its strict sense as being an unintentional inaction, he omits because he does not advert to the duty and is *negligent.*

If he intentionally refrains from performing some legal duty though he adverts to the duty he is guilty of *unlawful forbearance*, generally designated as wilful neglect.

In English law heedlessness, rashness and negligence are all grouped under the head of negligence, although as is apparent they represent different states of mind.

As already pointed out, unlawful forbearance is generally called wilful neglect, which is, strictly speaking, a contradiction in terms, for in case of neglect there is no intention.

It is not proposed to deal further at this stage with intention, negligence, etc., as those matters relate more to liability for breach of legal duties and rights. All that we are concerned with at present is the nature of acts and forbearances, as they are essential elements of legal duties and rights.

There seems to be some difference of opinion as to the phraseology appropriate to describe the place of acts and forbearances.

According to Austin (p. 365) they are species of events. An event is a transient cause of sensation. Events are of two kinds:—

(1) Facts, *i.e.*, acts and forbearances.

(2) Incidents, all other events.

According to Holland (p. 105) acts are species of facts. A fact is a transient cause of sensation.

Facts are either—

(1) acts;

(2) events;

and Holland (p. 105) included under events "acts of a human being other than the human being whose rights or duties are under consideration." This seems an untenable view since an act is the same in nature whoever performs it. There seems no place in Holland's classification for forbearances, though he includes them in the term "act," yet defines "act" as "a determination of the will producing an effect in the sensible world." As will appear later, it is submitted that a forbearance, however, produces no effect in the sensible world.

It seems difficult to say with what meaning the terms "fact," "incident" and "event" are ordinarily used, probably they are deemed synonymous.

From the point of view of the jurist the matter is immaterial, since the meaning of the term "act and forbearance" is fairly well settled. A forbearance, however, is scarcely cognisable through any of the five senses, but is cognisable through the understanding and knowledge.

The term "act" as commonly understood is capable of being analysed into no less than five operations:—

(1) Some desire for an object which is the motive for the act.

(2) A volition or desire for a bodily movement which is immediately and invariably automatically followed by the bodily movement if the bodily member is in a normal condition.

(3) An accompanying state of consciousness.

(4) A bodily movement resulting from the volition, which is an act strictly so called.

(5) Certain results ensuing which are the consequences of the act.

The only one of the above operations which is an act strictly so called is the bodily movement, and inasmuch as there are apt terms to indicate the other operations it seems inappropriate to group them all under the term "act." English law does not do so, for one of its maxims is that "everyone is responsible for the natural consequences of his acts." The exact meaning of this maxim will be explained when dealing with the term "consequences." It is now proposed to deal with each of the above operations in turn.

(1) The term "motive" means a desire which precedes and causes a volition or a forbearance. The term "motive" is not applicable to a desire which is not followed by action or forbearance with a view to satisfying such desire, though if the party expects that in the future he will take steps to accomplish such desire he is by some writers said to have a future intention.

Most consequences are attained through a series of motives and volitions, since few, if any, ends are attainable otherwise than through a series of means, and the desire for the attainment of each successive means is the motive for the act or forbearance causing such means, but the ultimate motive of all human action or forbearance is the attainment of pleasure, either by increasing the objects of enjoyment or diminishing or ending causes of pain.

(2) A volition is a desire for a bodily movement which is immediately followed by that movement if the bodily member is in a normal state.

Desires which do not so consummate themselves, as already explained, are motives. It is supposed by some

that there is an instrument called "the will" through which volitions operate, and the will has been defined as "the psychical cause by which the motor nerves are immediately stimulated": Zitelmann, Irrthum, p. 36. Austin suggests (p. 419) that there is no such thing as the will and that the term "will" is merely a convenient expression for the customary antecedence and sequence of volitions and acts. However, so far as the jurist is concerned it is sufficient to note the distinction between volition and act; any more detailed examination of the phenomena may be left to the psychologist.

Holland (p. 105) and Salmond (p. 323) propose to designate volitions as internal acts; this, however, appears unnecessary and objectionable, since it clouds the meaning of the term "act"; moreover, the term "volition" is ample.

The sphere of operation of volitions is limited to certain bodily members; for instance, the beating of the heart cannot be stopped by a volition, nor can the memory be acted on by it, since an absent thought cannot be recalled by such means nor a present thought be banished thereby.

These results can only be attained by a series of means commencing with a volition.

Whether one person's volitions can by hypnotism act on the bodily members of another is a matter for the psychologist, but such contention has never been acted on in an English Court of law.

(3) As regards consciousness of the bodily movement, this essential, being absent in the case of a somnambulist, no acts or responsibility for his conduct is attributed to such person.

(4) For a bodily movement to be an act, it must result from a volition, and therefore involuntary muscular movements are not deemed acts, nor is any responsibility for

them attributed to the party; and the same applies to an accidental movement, as where one slips up on a piece of orange peel and injures another. Nor would a bodily movement caused by physical compulsion applied by another be deemed an act, as where A pushes B; but movements caused by threats are acts. Herein lies the difference between physical compulsion and duress.

(5) All the results ensuing from acts or forbearances are the consequences thereof. These consequences are not willed or caused directly by a volition; they are caused through the intervening agency of acts or forbearances.

If such consequences are expected and desired by the party acting or forbearing they are intended. Of course, acts are always intended as well as willed, but consequences can only be intended, not willed.

According to Austin, consequences may be intended without being desired, such intention being called "indirect intention," as when I kill a man to get his money but do not actually desire his death. In such case, however, I do desire his death, though only as a means to an end, and in English law I should be guilty of murder. According to Salmond, intention must be accompanied by desire; and he defines intention as foreknowledge coupled with desire.

A forbearance, as already pointed out, is an intentional inaction, as distinct from an omission, which is an unintentional inaction. Where a party forbears from an act he may have taken one of two courses—*i.e.*, he may do nothing at all, or he may do something different from the act which he is forbearing from doing.

According to Austin (p. 366) a forbearance consists of two elements:—

(1) A determination of the will not to do a certain act.

(2) The consequent refraining from performing such act.

It is, however, scarcely accurate to describe forbearances

as resulting from a determination of the will, for a determination of the will is a volition, and a volition, as already stated, is followed by an act or acts.

A forbearance consists of :—

(1) A motive or desire to attain an end which can be obtained by inaction.

(2) Expectation that one will forbear.

(3) The consequent inaction.

A forbearance being intentional, inaction caused by physical compulsion is not a forbearance, so if A is locked in a room whereby he cannot get out, he does not forbear from coming out but is physically prevented from so doing. But if the door is left open but he is threatened with penalties in the event of coming out, and he therefore stays in the room, he does forbear.

Bentham (Traités de Legislation, 1, p. 154) has suggested that forbearances are negative services, to which Austin has objected that A can scarcely be said to do B a service if he refrains from assaulting him. Nevertheless, a forbearance may be a negative service, as where A forbears from enforcing legal rights which he may have against B.

The latest theory on the subject of acts and forbearances appears to be that of Salmond (p. 381), and is as follows :—

Acts are internal or external.

Internal acts are volitions or determinations of the will.

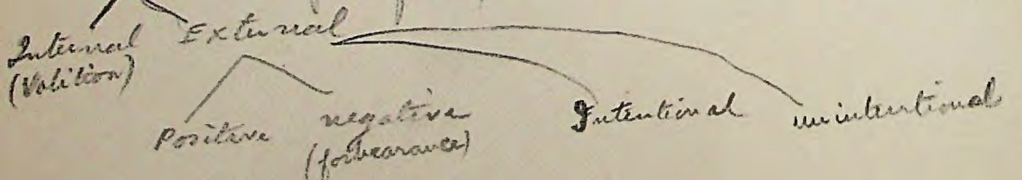
External acts are :—

(1) Either positive or negative, the latter being forbearances.

(2) Either intentional or unintentional.

It is enough to say as regards internal acts and negative acts that the terms "volition" and "forbearance" respectively appear ample, and, moreover, that the phrase "negative act" seems a contradiction in terms.

As regards the terms "intentional" and "uninten-



tional " they are only intelligible in the light of Professor Salmond's theory that the term " act " indicates not only the bodily movement, but also its consequences; and, of course, if those consequences are intended, the act is intentional, and if they are not intended it is unintentional.

No doubt in common parlance the word " act " does include the consequences of the bodily movement, but that, of course, does not prove that there is no distinction between an act and its consequences, nor will the above ordinary meaning attached to the word " act " square with the legal view, since it is a well-known legal maxim that " a person is responsible for the natural consequences of his acts," a maxim which shows that the law recognises a distinction between an act and its consequences. Professor Salmond does not state which of the consequences are included in the term " act " and which are not. It is, nevertheless, only proper to point out that the consequences referred to by the above maxim are the ultimate ones which constitute a breach of law, and not the intervening ones the means by which the ultimate ones are attained. The Austinian act and the intervening consequences are considered one act by the law.

Such being the popular and legal meanings respectively, it does not seem improper for the jurist to analyse acts and forbearances and to distinguish definitely their various parts; for, after all, no amount of popular or legal terminology can alter the true nature of phenomena. Lawful acts the legal consequences of which are intended are called by Holland (Chap. VIII) juristic acts, and by Pollock (Contract, Chap. I) acts in the law; these are what are commonly called titles.

Having now dealt with Persons, Things, Acts, and Forbearances, it may be well to point out their essential differences.

Persons and Things are permanent, but the former are capable of rights and duties; the latter, save by a fiction of law, are not.

Acts and Forbearances are transient, but, like Things, are incapable of rights and duties.

SECT. 4.—SANCTIONS.

A legal sanction is an evil annexed to and suffered in consequence of disobedience to a law, and, as has been already explained (p. 58), may consist of corporal punishment, imprisonment, fine, damages, or may operate by way of nullity or vicariously or by association of ideas, which last was formerly the case with suicides whose bodies were buried at the cross-roads with a stake driven through them. According to Austin a sanction is an essential point and element in law; but Lightwood (Nature of Positive Law, p. 386) suggests that it is no more essential than physic is essential to the health of the body. Austin's abstraction, he says, supposes a permanently unhealthy condition of society. In its normal state its ultimate support is the approval of all, not the power of a sovereign.

Savigny expresses the same idea when he says that force is the physic of law, not its proper substance, and it is doubtful whether law could ever have been reared and brought to maturity if its only food had been the physic which so many prescribe for it.

According to Lightwood law is a rule explanatory of a rule of morality, ascertained by proper authority, and resting upon the assent of the community. He suggests that the chief purpose of law is to define morality. Morality says "Thou shalt not steal." Law defines stealing. In fact he holds that law is an authoritative guide rather than imperative directions.

According to Austin (p. 507) the word "sanction" is derived from *sagmina*, the name of certain herbs which Roman ambassadors carried to secure inviolability; the term was then transferred to punishment as being a cause of inviolability.

Holland defines a legal sanction as "the intervention of the State" (Chap. VII, p. 89).

As pointed out already, the operation of sanctions is on the desires, for the desire of avoiding the sanction is opposed to the desire of pursuing the forbidden course of conduct. And herein the operation of a sanction differs from that of physical compulsion, for in the latter case the party has no option nor is any appeal made to conflicting desires. If a party is locked in a room he is physically compelled to stay there and has no option. On the other hand physical compulsion has a limited scope of action—it cannot affect the mind, though the convincing truth of certain views may compel a party to assent to them even though he dislikes them, in which case he is said to be "convinced against his will and to be of the same opinion still": though really he is convinced against his desires.

According to Austin, as the desire to avoid pain or suffering is ever present, sanctions are always operating even though the party disobey the law and incur the sanction, but in such case the sanction is not effective: there is a conflict of desires and the stronger desires prevail. Austin adds "we habitually desire to avoid a sanction even though we may forget it." However, it seems evident that we have no present desire to avoid a particular sanction unless we advert to that particular sanction, though if we do advert to it we shall certainly desire to avoid it, and to that extent it will be operative, though if we disobey the law it will not be effective.

If the duty is a positive one, *i.e.*, a duty to do an act, then the sanction will operate on the will if we perform the duty; but where the duty is negative, *i.e.*, to forbear, then, if we comply, the sanction does not operate on the will, since we either do nothing, in which case the will does not come into operation at all, or we do something other than the act to be forborne, in which case, not being obliged to do that other act, the sanction does not operate on the will.

Sanctions can neither compel nor oblige us to change our desires, for our desires, like our appetites and instincts, are not immediately responsive to our will or to external compulsion, though, of course, if through fear of punishment we habitually obey the law we may ultimately, through habit, desire to obey it and so obey without reference to the sanction. In such case we are just persons, whereas before our conduct was just though we ourselves were not morally just. A morally just person is one whose desires accord with his duties.

Hobbes indicates the above moral change by his celebrated aphorism: "the fear of punishment maketh men just." The statement is true in the above sense, but is not true if it merely indicates a person who habitually obeys the law through fear of punishment.

Sanctions cannot oblige us to suffer, *i.e.*, to feel pain, for sanctions can only operate on our desires, and whether we feel pain or not depends not on our desires; sanctions cause us to feel pain by physical compulsion.

Classification of Legal Sanctions.

Legal sanctions are either civil or criminal, corresponding with the distinction between civil and criminal law.

(I) *Civil sanctions.* These are annexed to a law imposing

a relative duty, *i.e.*, a duty correlating with a right vested in another; they are enforceable and remissible at the option of the party whose right has been infringed. The immediate object, as a rule, of such sanctions is compensation to the injured party, although, of course, they also punish the wrongdoer, and, inasmuch as the welfare of a community is made up of the sum total of the welfare of the individual members, they ultimately also tend to procure the welfare of the community at large.

The different kinds of civil sanctions are:—

(1) Damages, which may be—

(A) (1) Liquidated: *i.e.*, a fixed amount; or an amount capable of being fixed by a mathematical process.

(2) Unliquidated: an uncertain amount the determination of which rests with the Court or jury.

(B) (1) Nominal or contemptuous: where, although a legal right has been infringed, the plaintiff has suffered no real damage. These may be awarded in contract or tort. In defamation they are awarded where the plaintiff's reputation is poor.

(2) Ordinary or general: *i.e.*, such loss as the Court thinks is a fair compensation for the harm flowing naturally from the wrong complained of, though the amount is not a liquidated one.

(3) Special damage: *i.e.*, such actual pecuniary or proprietary loss as the plaintiff can prove results naturally from the wrong complained of.

(4) Vindictive: damages intended to punish

the defendant, not being limited to the loss suffered by the plaintiff. These are awarded in cases of tort where there has been insult or malice, or other element of a personal nature (*Merest* v. *Harvey*, 5 Taunt. 442), or wilful invasion of a principle of constitutional law (see *Huckle* v. *Money*, 2 Wils. 205); also in seduction: *Terry* v. *Hutchinson*, L. R. 3 Q. B. 599. Exemplary damages may be given in contract in breach of promise of marriage: *Finlay* v. *Chirney*, 20 Q. B. D. 494. In these cases the damages are unliquidated.

(2) Nullity; whereby, as pointed out already (p. 48) the rules of evidence and procedure are enforced.

(3) Costs; whereby the unsuccessful party is required to reimburse the successful one the expenses to which he has been put in vindicating his rights.

Other civil remedies which may perhaps be deemed sanctions are:—

(*a*) Restitution of property of which the defendant has wrongfully deprived the plaintiff.

(*b*) Specific performance of a contract, by which the defendant is made to carry out the terms of a contract instead of paying damages for breach of it. In English law this is only decreed where damages would be an inadequate remedy, *e.g.*, in sale of goods where no other goods of a similar kind could be obtained.

(*c*) Injunctions, which may be—

(1) Prohibitory; forbidding the defendant from

doing something under pain of fine or imprisonment for disobedience.

(2) Mandatory; ordering the defendant to restore the *status quo ante*, as where he is ordered to pull down a building which obstructs the plaintiff's right to light.

(II) *Criminal sanctions.* The object of these was originally punishment, and so far as is known in all communities criminal sanctions are exigible and remissible solely at the discretion of the sovereign "acting according to law." Of course, as the sovereign is above the law and not subject to it he can in fact remit all sanctions whether criminal or civil, but inasmuch as the distinction between the two kinds of legal sanctions is one founded on law therefore the position of the sovereign with reference to the distinction must be judged according to law, and if he remitted a civil sanction, which he might do so far as law is concerned, he would not be acting according to law.

In English law, though any person may as a rule institute criminal proceedings, yet, once having commenced them, he may not discontinue them without the leave of the Crown (*R.* v. *Wood*, 3 B. & Ad. 657), so in effect the criminal sanction is exigible or remissible by the sovereign. Again, in English law there are certain crimes which the Crown according to law may not pardon, for by common law a public nuisance, whilst still unabated, cannot be pardoned, and by the Habeas Corpus Act, 1679, the offence of sending a man to prison outside England cannot be pardoned lest politicians obnoxious to the Crown should be kidnapped by Crown servants with impunity.

In some cases in English law the sovereign has delegated the exaction of the criminal sanction to the subject as in the case of what are called penal actions, in which cases

the first person to sue, who is designated in English law "a common informer," may claim payment of a pecuniary penalty to himself, but such proceeding once commenced cannot be abandoned without leave of the sovereign (18 Eliz. c. 5), and the penalty is not necessarily recovered by the injured party, or if it is such recovery in no way prejudices his right to recover also damages for any injury he has suffered. Herein a penalty differs from vindictive damages, for the latter are only recoverable by the injured party who may remit such sanction if he pleases; such damages resemble a criminal sanction in being intended to punish the wrongdoer as well as to compensate the injured party; but it must be remembered that the sole purpose of a criminal sanction is punishment or reform, never compensation. It is well to mention, however, that in some systems, such as the French one, the Court can in a criminal proceeding not only impose the criminal sanction but also the civil one; this is not the rule in England except in a few cases.

It has been suggested that the object of a criminal sanction is prevention and that of a civil one redress to the injured party, but prevention is the ultimate object of each, though the immediate object of the former is punishment and of the latter compensation or redress to the injured party.

Criminal sanctions are of the following kinds:—

(1) Capital punishment.
(2) Imprisonment.
(3) Corporal punishment.
(4) Fine.
(5) Deprivation of civil rights, such as of voting or holding office.

Two or more of the above may be imposed in respect of the same wrong, though in English law capital punish-

ment is never accompanied by any other sanction, in some other systems it was, as prisoners were often scourged before being executed.

Imprisonment may be purely punitory or may be reformative, as in the case of industrial schools and reformatories and the modern preventive detention whereby prisoners are kept in an institution and taught a trade.

Professor Salmond (p. 121) points out that the ends of criminal justice are four, and in respect of the purpose so served criminal sanctions may be distinguished as follows: (1) Deterrent; (2) Preventive; (3) Reformative; (4) Retributive.

(1) Deterrent punishment operates by making every offence in the words of Locke "an ill bargain to the offender."

(2) Preventive punishment prevents a repetition of the crime by the offender. So capital punishment is preventive, and deprivation of office prevents future peculation in such office. Imprisonment is preventive for the length of its duration.

(3) Reformative. This endeavours to reform the character of the wrongdoer so that he will desire to do what is right instead of fearing to do what is wrong. The most extreme advocates of reformative methods treat crime as a disease and therefore to be remedied not punished, but, as Professor Salmond points out, crime is a profitable industry which will flourish exceedingly and be by no means left as a monopoly to the feebler and less efficient members of society, *i.e.*, the diseased. Reformative treatment may be and is applied to particular cases where weak or abnormal intellect is clearly shown, but to act on the presumption that all criminals are abnormal intellectually would be to undermine the foundations on which the security of society rests. Reformative punishment is

applied in industrial schools, reformatories and the modern Borstal institution, where lengthy detention free from the more severe rigours of ordinary imprisonment is accompanied by instruction in some trade or calling.

(4) Retributive. This was undoubtedly the most ancient aspect of criminal punishment which was formerly inflicted out of revenge by the injured party or his relatives at a time when the distinction between tort and crime had not been evolved. Professor Salmond points out that the idea that a crime is an affront to the community in respect of which the outraged feelings of the community should be avenged is receding into the background and that "a morbid sentimentality has made the criminal an object of sympathetic interest rather than of healthy indignation." He says that the best attitude when fitting justice is done upon the evil-doer is not pity but solemn exultation. It is difficult to say whether his view as to the state of public opinion with regard to criminals is correct or not, but with his final conclusion all will agree.

Recent legislation has all tended in the direction of mitigating punishment and of treating the criminal as a public nuisance whose activities must be curbed in the manner most likely to protect the public whilst at the same time leaving every opportunity open for the reform of the evil-doer and his restoration to society.

From the above remarks it will be obvious that it is inaccurate to state that the scope or object of a criminal sanction is prevention and that of a civil one compensation, since civil sanctions also operate as a deterrent, but the immediate object of a criminal sanction is undoubtedly punishment and of a civil one compensation or restitution to the injured party.

This would seem an appropriate place at which to deal generally with the distinction between civil injuries and

crimes and the theories on the subject, but inasmuch as the matter involves an acquaintance with the distinction between absolute and relative duties it will be well to deal with this latter distinction first.

Section 5.—Duties.

As pointed out already (p. 138), the government carries out its function through the medium of the law by imposing duties absolute or relative; and the elements of which a duty is composed—namely, Persons, Things, Acts, Forbearances, and Sanctions—these having been dealt with in detail, we proceed to deal with the term "duty."

Duty or obligation means liability to a sanction. A party who will incur a sanction if he omits or forbears or if he acts is under a duty to act or forbear as the case may be. The act or forbearance is the object of the duty, but is not the duty itself.

Obligation is to be distinguished from physical compulsion on the one hand, and from voluntary conduct on the other. As pointed out already (p. 53), in cases of physical compulsion there is no place for the operation of a sanction, nor is there any act or forbearance. Voluntary conduct consists of acts or forbearances not induced by the operation of any obligation or sanction.

A duty is said to be owed to the party who according to law may enforce a remedy for breach thereof. An absolute duty is owed to the sovereign, as he is the only one who may enforce the remedy for breach thereof. A relative duty is owed to the party possessing the correlating right, as he is the only one who may enforce the remedy for breach thereof.

Classification of Duties.

Duties may be classified into Religious, Legal, and Moral, according to the nature of the sanction. Jurisprudence is only concerned with legal duties.

Legal duties are:—

(A) (1) Positive; *i.e.*, a duty to do something.
    (2) Negative; *i.e.*, a duty to forbear.

(B) (1) Absolute; owed to the State.
    (2) Relative; owed to the party in whom the correlating right is vested.

(A) *Positive and Negative Duties.* Strictly speaking, duty, being a liability to a sanction, is neither positive nor negative, but the terminology is convenient and unobjectionable as indicating whether the object of the duty is an act or forbearance: especially as some important legal principles depend on the distinction. For instance, the performance of positive duties cannot as a rule be specifically enforced: one may take a horse to the water but one cannot make him drink; the law is powerless as a rule to make a party actually *do* anything, though it can prevent him from acting by imprisoning him; and, moreover, if the law attempted to compel a person to carry out a positive duty, that would involve an amount of supervision to ensure its being efficiently done disproportionate to the benefit obtainable. Where, however, the positive duty consists of a single act such as the delivery of a thing, the act not being of the nature of a personal service, the law can and will enforce it by imprisoning the party until he complies; and in some cases the law sends its officers to seize the thing and deliver it to the party entitled thereto, though strictly speaking this does not make the defaulting party do anything. In some cases the Court, by an order called in English law a vesting order, effects a transfer of ownership irrespective

of delivery. But where positive duties involve a course of conduct, the only remedy generally for breach is damages, though in English law if a party has agreed to serve someone and not to serve anyone else the Court may grant an injunction preventing him serving anyone else and thereby attempt to induce him to carry out his agreement in order to earn the remuneration incidental thereto. Compliance with negative duties can always be enforced by injunction subject to imprisonment for breach of the same, there being no physical difficulty in compelling a forbearance, or, as a rule, in ascertaining whether a party has committed the forbidden act or not.

(B) *Absolute and Relative Duties.* This distinction is of great importance, as for the most part it tallies with the distinction between crimes and civil injuries, for, as will appear later, breaches of absolute duties are generally crimes.

Absolute Duties.

As already pointed out, the term "absolute duty" is used to indicate a duty owed to the sovereign, and consequently, in cases of breach, the sanction is exigible or remissible only by the sovereign acting according to law. As a rule, obedience to absolute duties is enforced criminally, though not always, for breach of a contract made with the State is remedied in the same way as breach of a contract made with a private individual, *i.e.*, by compensatory damage.

All crimes are breaches of absolute duties, though all breaches of absolute duties are not crimes.

It is only the sovereign who, according to law, can remit the sanction attached to an absolute duty. An absolute duty does not correlate with any right, since the sovereign is incapable of having legal rights.

A relative duty is owed to a person in whom is vested the correlating right, and such person is the only one who, according to law, may determine whether in case of breach the sanction shall or shall not be exacted, and such person receives compensation by means of the sanction for the injury he has suffered. A breach of a relative duty is always a civil injury.

The same act, omission, or forbearance may be a breach of both an absolute and relative duty, or, as it is said, the same conduct may be both a crime and a civil injury, though, as far as English law is concerned, a civil injury is not as a rule a crime, since for criminal liability, as will appear later (see p. 261), *mens rea* is required, whereas this is not so as regards civil liability. For instance, if A takes B's horse thinking it is his own, A is guilty of a civil injury but not of a crime, since he had no criminal intention. On the other hand, most crimes which directly injure an individual or his property are civil injuries in respect of which the individual injured may claim compensation.

In Rome much the same principles applied, for theft and robbery were not crimes but merely civil injuries remediable by vindictive damages, though certain kinds of thefts were crimes, such as horse-stealing. Although absolute duties are all of one kind in one respect as being owed to the sovereign, yet, as Austin points out, in respect of their *immediate* object or purpose they may be classified as follows:—

(1) Self-regarding or concerning immediately the welfare of the individual to whom they are set; such, for instance, as the duty to keep sober and the duty to refrain from committing or attempting to commit suicide.

Austin contends rather unnecessarily that such duties are absolute because a party cannot have a right against

himself. If the sovereign prohibits attempted suicide and will punish it, there is an absolute duty not to commit it, and, as the sovereign punishes a breach thereof, then the sanction being punishment exacted by the sovereign, therefore the breach of such duty is a crime.

Dealing with Austin's contention, Pollock (First Book of Jurisprudence, p. 65) suggests that a party may have a right against himself, as where a person goes into a home for inebriates and agrees to stay there for a certain length of time. It does not appear, however, that he has a right against himself but that he has given another a right against him, *i.e.*, the right to keep him there; or if the party under restraint would have a claim against the other in case he let him out too soon and thus defeated the object of the detention then he would have a right against such other, but in neither case would he have a right against himself. At most, he would have a right against another of which he himself is the subject, *i.e.*, a right over himself.

(2) Advantageous to persons generally, such as the duty of military service. Pollock (First Book of Jurisprudence, p. 62) suggests that all negative duties owed to persons generally have no determinate right correlating with them and therefore are absolute. He says that the duty not to trespass on land is one duty and not as many duties as there are landowners. The proposition seems true only to a certain extent. If trespass to land is only punished criminally then of course there is one duty not to trespass—an absolute one—owed to the sovereign.

But as regards the relative duty not to trespass there must be as many duties as there are landowners, for A is under no duty to landowner B not to trespass on the land of C nor would permission to do so given by B be any answer to a claim by C, so it is apparent that the duty to C is distinct from the duty to B.

(3) Not regarding the advantage of any person, *e.g.*, duties to God and to the lower animals.

(4) Duties for the advantage of the sovereign setting them, such as those arising from the position of the sovereign as contractor or as owner of property and also the duties imposed by criminal law not to commit offences against the person of the sovereign and indeed all duties owed to the sovereign for the purpose of enabling him to carry out his functions as the supreme governor.

(5) To these specified by Austin may also be added duties which have for their immediate object the welfare of each particular individual in the State, such as the duty not to steal, not to assault, etc.

These were not mentioned by Austin apparently owing to his opinion that the distinction between crimes and civil injuries is merely a matter of procedure, and that crimes of this kind are violations of duties owed to and rights vested in such individuals. Reasons for believing that this view is fallacious will be submitted when the difference between civil injuries and crimes is dealt with (see pp. 185, 189).

Austin suggests that some relative duties regard persons generally in respect of their remote purposes, such as the duties one owes the Judges; and he suggests that the Judge is clothed with the corresponding right in trust for the Government: p. 195. The reference here is to the duty to show respect to the Judge, breach of which is punishable by fine or imprisonment.

It is submitted that in this case these are absolute duties, but, like all duties, whether absolute or relative, are made actually enforceable by giving the State officials *powers*, not RIGHTS, to enforce compliance with them. Duties, if absolute, are owed to the sovereign; if relative, to the party having the correlating right: but in neither

case to the officials who may be entrusted with powers for the purpose of redressing breaches. The officials are the servants of the State and can no more be said to have legal rights in this respect than a servant whose duty it is to protect his master's property can be said to have rights over that property. If the officials were invested with rights in respect of their official duties they would be entitled to damages for breach of the duties correlating with such rights, whereas they are not, for the sanction is punitory in respect of breaches of absolute duties which are crimes, and compensation to the sovereign, not to the official, in respect of breaches of absolute duties which are not crimes, such as breach of a contract made with the State. In case of contempt of Court the Judge has power to fine or imprison but no right to compensation.

contempt of Court

Holland appears to hold that there are no absolute duties, except, perhaps, those owed to God and to the lower animals, for he says (Chap. IX, p. 129): "We deny that there can be no relative duties to persons indefinitely or . . . to the sovereign. In other words, we assert that an indefinite number of persons or the sovereign may be clothed with a right." Reasons for thinking these propositions are fallacious will be found in p. 23 and below, and p. 229.

According to Salmond (p. 240), there are no absolute duties, for "there are no duties without rights." Yet he admits that there are duties towards the lower animals, and that the lower animals cannot have rights. Duties towards the public, he says, correspond with rights vested in the public, and, with Holland, is of opinion that a right can be vested in an indeterminate body. Now the public is an indeterminate body, and it is submitted that such a body cannot possess rights, since, having no corporate existence, it has no means of enforcing them. If by the

public the State or sovereign is meant, then the duty is owed to the State; and it is submitted that the State is incapable of legal rights in its own territory (see *post*, p. 197), but can only enforce its claims by its own might; therefore the duty is an absolute one. Nor is the difficulty obviated by suggesting that the State, in respect of absolute duties, acts on behalf of the public, for the State is the author of all rights and duties, and whatever the State does it does by virtue of its might; and if, as in the case of absolute duties, the State, acting according to law, can alone determine whether a breach of a duty shall be redressed, then no person injured by such breach can be said to have any legal right infringed. It is true that the same act may amount to a breach of a relative as well as of an absolute duty, but *qua* breach of the absolute duty no right is infringed. And in many cases a breach of an absolute duty is not also a breach of a relative one. For instance, A forges B's name to a cheque and the forgery is discovered before the cheque is cashed. Although A can be punished criminally, yet B can claim no compensation, nor can he insist on A's being punished, because the Crown may pardon A. How can it be said that any legal right of B's has been infringed? The confusion appears to have arisen from a failure to appreciate the distinction between the object for which a duty is imposed and the person to whom the duty is owed. A duty may well be imposed by A on B for the benefit of C, but the duty is owed to A, not to C, if A is the only person who can enforce the remedy for breach of the duty. Absolute duties for the benefit of the public at large are owed to the State. Of course the State could refuse to give redress for the infringement of a legal right, *i.e.*, breach of a relative duty; but it would not then be acting according to law, and the distinction between absolute and relative duties is a legal distinction.

Notwithstanding the opinions of Holland and Salmond, it is suggested that the distinction between absolute and relative duties is logical and convenient, since it harmonises with the distinction between might and right; for the State can only redress infringement of absolute duties by its own might, whereas persons invested with legal rights do not redress infringements by their own might but by appealing to the sovereign for protection of their rights, which is quite a different method of redress. The weakest can enforce their rights, but only the strong can enforce might.

Crimes and Civil Injuries.

In dealing with the distinction between crimes and civil injuries the distinction between criminal and civil sanctions and between absolute and relative duties must be borne in mind. (See pp. 170, 173, 179, 180.)

A crime is a breach of an absolute duty the sanction of which is punishment exigible or remissible at the discretion of the sovereign acting according to law.

A civil injury is a breach of a relative duty the sanction of which is compensation exigible or remissible at the discretion of the party whose right has been infringed.

Intermediate between these two wrongs are what one may call quasi-civil injuries, *i.e.*, breaches of absolute duties for which the remedy is compensation not punishment. Unlike crimes the remedy is not punishment, unlike civil injuries they are not breaches of legal rights, since the sovereign is incapable of legal rights. Examples of these would be a breach of a contract made with the State or injury to property of the State if not a crime.

It is submitted that non-payment of income tax and breaches of stamp laws are crimes in English law, since they subject the party to payment of increased duties which are punishments enforced by the State. It may be suggested

that these increased duties are vindictive damages and that therefore such breaches are quasi-civil injuries; but it must be pointed out that vindictive damages are not awarded for non-payment of a fixed sum of money and that, unless the distinction between punishment and compensation be adopted, it seems impossible to fix on any basic distinction between breaches of absolute duties which are crimes and those breaches which are quasi-civil injuries. In English law the test is whether the object of the proceedings is punitive or not, and any proceedings which may terminate in the infliction of a penalty on prosecution by the State, even though such penalty is merely a pecuniary fine, are deemed criminal. Conduct may be criminal without involving any moral turpitude, as where a limited company omits to send to the Registrar of Joint Stock Companies the annual list of its members: *Robson* v. *Biggar*, [1908] 1 K. B. 672, and 25 & 26 Vict. c. 89.

To sum up, though all breaches of absolute duties are not crimes, yet all crimes are breaches of absolute duties, since the sovereign is the only one who is authorised to inflict a punitory sanction: the essence of a criminal sanction is that it is punitory and exacted by the State. The punitory nature of a sanction will not alone mark it as criminal, for if that were so vindictive damages would constitute a criminal sanction, but inasmuch as the exaction of such damages is at the discretion of the injured party such sanction is a civil one.

The reason why the sovereign now declares certain wrongs crimes is that he deems a civil sanction insufficient as a preventive; for instance, if a thief merely ran the risk of having to restore the stolen property or pay its value, thefts would certainly be much more common. And in case of breach of stamp and income tax laws, if the only

remedy was the recovery of the amount, even with interest, evasions would be much more frequent. Salmond suggests that non-payment of income tax is not a crime, but it is submitted that in addition to being as immoral as defrauding a railway company by travelling without a ticket with intent to defraud, the delinquent who does not pay his income tax is liable to a criminal sanction, *i.e.*, is liable to pay an increased amount, which cannot be deemed vindictive damages, for, as already pointed out (p. 171), vindictive damages are only applicable in the case of unliquidated claims.

There have been other views as to the distinction between crimes and civil injuries. Historically the matter stands as follows :—

In Greece and Rome crimes were offences against the State and were breaches of duties owed to the State, and were punished by the State itself. As Sir Henry Maine points out (Ancient Law, Chap. X), "The primitive penal law of Athens intrusted the castigation of offences partly to the Archons, who seem to have punished them as torts, and partly to the Senate of Areopagus, which punished them as sins. Both jurisdictions were substantially transferred in the end to the Heliæa, the High Court of popular justice, and the functions of the Archons and of the Areopagus became either purely ministerial or quite insignificant . . . the Heliæa was simply the popular assembly convened for judicial purposes."

At Rome many of the wrongs which are crimes now in most systems—*e.g.*, theft and robbery—were civil injuries entailing vindictive damages, but some wrongs were not capable of being dealt with in that way, and the first stage of criminal justice was reached at Rome by the appointment by the popular assembly of a Quæstio or Committee to inquire into and punish in a particular instance of wrong-

doing—the State, acting through its delegate, itself undertaking to remedy the wrong; subsequently Quæstiones were appointed yearly to try any of certain crimes, such as parricide, which might occur. In 149 B.C. a Perpetua Quæstio was appointed by the Lex Calpurnia de repetundis to try all cases of extortion by Roman governors, and this Quæstio was to continue until abolished and was the first permanent criminal Court at Rome. Now trials before the Quæstiones were called Publica Judicia, and hence the Blackstonean fallacy that crimes are public wrongs and injurious to the community and civil injuries are private wrongs injuring the individual only. That this is a fallacy is apparent—

Firstly. From a consideration of the various wrongs which are crimes and civil injuries respectively.

Secondly. From the fact that the same wrongful act may be both a crime and a civil injury. For instance, stealing, libel, and many other wrongs.

In dealing with the Blackstonean fallacy one must bear in mind the distinction between the direct or immediate tendency of an act and its indirect or ultimate tendency. All unlawful conduct injures the State indirectly and ultimately, since the welfare of the State is made up of the sum total of the welfare of the individual members thereof. So there is no difference between crimes and civil injuries in respect of their ultimate tendency. Therefore the supposed difference between crimes and civil injuries must have reference not to the indirect or ultimate tendency of each, but to the direct or immediate tendency. Now it is quite obvious that it is not every crime that directly injures the State, as, for instance, stealing, libel, assault, and battery; though some, such as treason, breach of military duty, and some few others, do. The Blackstonean fallacy is completely refuted, however, by the fact that,

as already stated, the same acts are often both crimes and civil injuries.

In English law the history of the distinction between crimes and civil injuries is the history of the evolution of the bootless offence. Originally self-redress or revenge by the injured party or his relatives was not only a right but a duty, whence the vendetta. Then the injured party or his relatives were first allowed, and then compelled, by the King to take compensation, called *bote*, from the wrongdoer, who was said to buy off the feud; the King took one-third, called *wite*, and the injured party the rest, called *were*. But in certain cases, which were called bootless offences, such as killing a man who was asleep or in church, no compensation was allowed, and the wrongdoer was originally outlawed, but the King, being unwilling to lose a warrior, allowed him to remain on paying a fine to the King. These offences, which the King alone could pardon, were crimes, and were therefore deemed offences against the King or State, though they were not necessarily more injurious directly or indirectly to the State than the other offences for which compensation was payable. As Sir H. Maine points out (Ancient Law, p. 378), " the more archaic a Code the fuller and the minuter is its penal legislation." This is well illustrated by the law of Rome and the early Saxon laws, which contain minute provisions as to the damages payable for delicts but very few provisions as to crime. In fact, in ancient law vindictive damages represent modern criminal law.

Austin (pp. 197 *et seq.*) states the difference between civil injuries and crimes as follows: " All offences affect the community, and all offences affect individuals. But though all affect individuals, some are not offences against rights and are therefore of necessity pursued directly by the sovereign, or by some subordinate representing the

sovereign. Where the offence is an offence against a right it might be pursued (in all cases) either by the injured party or those who represent him. But for reasons which I shall explain . . . it is often thought expedient that the pursuit of it should not be left to the discretion of the injured party or his representatives, but should be assumed by the sovereign or the subordinates of the sovereign. In this difference of procedure, and not in any distinction between the tendency of the acts, lies the distinction between Crimes and Civil Injury. An offence which is pursued at the discretion of the injured party or his representative is a Civil Injury. An offence which is pursued by the sovereign or by the subordinates of the sovereign is a Crime. . . . All absolute obligations are enforced criminally."

It is submitted that the Austinian position as here portrayed is open to the three following objections:—

Firstly. The difference between crimes and civil injuries is more than one of procedure; it depends on the nature of the duty infringed, on the punitory character of the sanction, and on the fact that the sanction is enforceable and remissible only at the discretion of the sovereign acting according to law, also on the *mens rea.*

Secondly. A breach of a relative duty is not a crime, unless the same conduct or omission is also a breach of an absolute one; as pointed out already (p. 184), where the same act or omission is a breach of a relative and an absolute duty it is only a crime in respect of being a breach of an absolute duty.

Thirdly. It is not every breach of an absolute duty that is a crime, for as has been pointed out already (p. 185) a breach of a contract made with the State is not a crime. The fact that only the sovereign can enforce or

remit the sanction does not make it a crime unless the sanction is punitory.

The unsoundness of Austin's view as to the difference between crimes and civil injuries becomes apparent when he, in suggesting the classification of law, proposes to deal with crime under the heading of "Sanctioning Rights," whilst agreeing that crimes are breaches of absolute duties in respect of which, of course, there are no rights.

Salmond appears to agree with Austin's view. He says (p. 119): "The distinction between criminal and civil wrongs is based not on any difference in the nature of the right infringed but on a difference in the nature of the remedy applied." — whether it is punitive or compensatory.

Salmond's view

Distinctions.

Blackstone — Public wrong or Private wrong.

Austin — Sanction remissible by state or by the injured

Salmond — Object of Sanction is punitive or compensatory.

Real distinction is historical.

CHAPTER VIII.

RELATIVE DUTIES AND HEREIN OF RIGHTS.

Relative duties correlate with rights vested in some other person, and as before explained (p. 177) breach of them is remediable and liability for breach is enforceable or remissible only at the discretion of the injured party.

For a full understanding of relative duties it is necessary to appreciate fully the import of the term "right."

Right must be distinguished from Might. Might means the capacity of obliging others to do or forbear in virtue of one's own physical superiority, *i.e.*, one's own power of inflicting pain or evil.

Right is one person's capacity of obliging others to do or forbear by means not of his own strength but by the strength of a third party. If such third party is God the right is Divine. If such third party is the public generally acting through opinion the right is moral. If such third party is the State acting directly or indirectly the right is legal.

The distinction between might and right is of importance since only the strong can enjoy might whereas the weakest can enjoy rights.

Right must also be distinguished from Liberty, for the law will remedy any interference with a legal right, but will not remedy interference with a liberty. Liberty may be defined as freedom of action allowed but not protected by law. For a full discussion of the nature of liberty, see p. 295.

A legal right has been defined by Holland (Chap. VII, p. 82) as "a capacity residing in one man of controlling with the assistance and assent of the State the actions of others." The term "assent" refers to cases in which a party is entitled to redress a wrong himself instead of seeking the help of the State, such as a landlord's right to distrain for rent, and a party's right to abate a nuisance. Inasmuch as the law will remedy any interference with the landlord's exercise of his power of distraint, he has a legal right to distrain. Limiting the term "controlling" to cases where the party alone can determine whether to enforce liability for breach or not, the definition appears adequate.

Salmond (p. 237) defines a legal right as "an interest recognised and protected by a rule of legal justice." It may be pointed out that the definition is wide enough to include the protection given by such absolute duties as are enforced criminally, in respect of which, for reasons already given (pp. 139, 141), it is submitted there is no right vested in anyone.

Paradoxical as it may appear, if robbery were only remediable criminally no one would have a right not to be robbed, for if he had he could claim damages for such robbery, whereas, *ex hypothesi*, if robbery were only a crime he could not claim damages. On the other hand, no one would have a right to rob, since everyone would be under an absolute duty not to do so.

Austin (p. 398) defines a right in the following terms: "A person may be said to have a right when another or others are bound or obliged by law to do or forbear towards or in regard of him." This is rather a description than a definition, and even as a description appears too wide, since it would include the advantages accruing to an individual from the imposition of absolute duties. For

instance, according to this definition a person sentenced to death would have in English law a right to be hanged, since if the executioner carries out the sentence of death in any other way, he himself, in English law, is guilty of murder. But the obligation to hang is an absolute one and a breach thereof is a crime and no one has any right to a civil remedy for such breach.

The Austinian definition misses the point that for a duty to be relative it must be enforceable at the discretion of the party who will be injured by the breach thereof. At the same time, in fairness it must be pointed out that according to Austin some crimes are breaches of rights, the difference between crimes and civil injuries being, according to Austin, merely a question of procedure; reasons for thinking this view erroneous have been already given (p. 190).

Austin has stated and criticised other definitions of rights, such as: "Rights are powers over or powers to deal with things or persons."—"A right is a security for the enjoyment of a good or advantage which one man derives from a duty imposed upon another or others." Neither of these definitions indicates whence the power or security comes and are applicable to the power or security which accrues from the possession of might and from the imposition of absolute duties; and as regards the first of the above two definitions it may be pointed out that some rights, *e.g.*, copyright and patent right, do not exist over persons or things.

Salmond points out that the fact that one has a legal right does not always mean that one has a legal remedy. For complete accuracy the dictum should have said "a remedy by action." It refers to certain rights which in English law are said to be unenforceable by action. For instance, in English law if a debt is not sued for within

a certain period after it falls due the debtor, if sued, may escape liability by pleading the Statutes of Limitation; but if the creditor has any other way of getting his money he may avail himself of it; so also if he owes the debtor money he can set off the statute-barred claim against his own liability. He may also have in his possession a pledge or security. Such rights are called imperfect because the creditor has not all legal remedies open to him to enforce such rights.

Elements or Characteristics of legal right

The following are the characteristics of a legal right:—

(1) It is vested in a definite person or persons, called by Holland the person of inherence. He is the owner of the right.

(2) It avails against a person or persons who are under the correlating duty, and are called by Holland the persons of incidence.

(3) It requires some act or forbearance from the person of incidence, which act or forbearance is called by Austin the object of the right and of its correlating duty.

(4) Some rights are exercisable over persons, some over things. Such persons or things are called by Austin the subject of the right, and by Holland and Salmond the object. It is proposed to adopt the Austinian terminology.

Some rights have no subjects, *i.e.*, are not exercisable over any person or thing, *e.g.*, patent rights and copyright.

The difference between a right available against a person and a right exercisable over a person must be carefully distinguished. Where a right is exercisable over a person, the right is not available against that person any more than a right exercisable over a thing is a right available against that thing. It does happen not infrequently that a right against a person is also accompanied by a right over such

person, and that the latter right exists for the purpose of protecting the former one.

For instance, a master has a right against his servant arising from the contract of service; he also has a right over the servant available against people generally, of which the servant is the subject, that others shall not wrongfully induce his servant to leave him. The former right avails against the servant only, the latter one against all who are subject to the law protecting the right. On the other hand, although a parent has a right over his child up to a certain age that others shall not wrongfully deprive him of the custody of the child, yet he has no legal right against the child, unless the Courts will give him a civil remedy, if the child disobeys him, though the parent is generally at liberty to enforce obedience *manu parentale.*

According to Salmond, a right may be vested in an indeterminate body of persons, such as the public, for he says (p. 184), " every duty has a right, and duties towards the public correspond with rights vested in the public."

For reasons given already (p. 183), it is submitted that rights cannot reside in the public at large, and that there are duties without rights, *i.e.*, absolute duties.

The same author also contends (§ 73) that every right has a subject; as regards patents and copyright, he submits that the idea protected by the patent or copyright is the subject, as regards the right to reputation the reputation is the subject, as regards right to personal security life is the subject. As regards the right to the services of another, the subject is the person of him who is bound to render the service.

It appears more convenient, with a view to classification, to limit the term " subject " to the person or thing over which a right exists, and to treat the rest as having no subject and forming one class; for, with the exception of

a right to services, they are all similar in nature in requiring merely forbearances from others not in respect of any person or thing. The rights to the services of another may be either a right against that other that he shall perform services, or a right against the world at large that no one shall unlawfully prevent him performing such services, and in the latter case it is a right over his person and falls under the head of rights having a person as the subject, and is a combination of right *in personam* and right *in rem*: see *ante*, p. 196. The exact position of a right to services will be dealt with more fully in due course: see p. 206.

Having dealt with the nature of duties and rights, we may now deal with the position of the sovereign one or body in law.

The Position of the Sovereign in Respect of Law.

It is part of the Austinian theory of sovereignty that the sovereign is above his own law, *i.e.*, can get no legal benefit from its protection nor be under any legal obligation in virtue of its rules; in other words, the sovereign can have no legal rights nor be under any legal duties by virtue of his own law. For a proper appreciation of this theory and the criticisms on it one must remember the distinction between might and right (see *ante*, p. 185), and also between absolute and relative duties: see *ante*, p. 139.

Now the methods of compulsion in the above cases being so different in nature, the difference is indicated by the terms above mentioned. As a consequence, since the sovereign can only enforce obedience to his commands by his own physical force, it is clear that the method of compulsion open to him is "might" not "right," and therefore that he can have no legal rights under his own law. Of course he can sue anyone in a foreign State and

avail himself of the benefits of the foreign law. Professor Jethro Brown (p. 193) suggests that, according to the Austinian definition of a right, the sovereign has a legal right, and the suggestion is unanswerable; but the Austinian definition of a right is, it is submitted, open to objection: see *infra*, p. 194. Professor Jethro Brown admits that there are spheres of activity in respect of which a sovereign does not act within legal rights. He says (Austinian Theory of Law, p. 193): "If the sovereign passes a law imposing a tax he has a right to the tax but no legal right to pass the law."

For reasons already stated, it is submitted that the sovereign has no legal right to the tax, but the subject is under an absolute duty to pay it; and if non-payment is punishable non-payment is a crime, but if it gives rise merely to a claim for the money non-payment may be conveniently designated as a *quasi civil injury*.

Again, the sovereign can be under no legal duty by his own law, since it rests with himself whether he will punish his own disobedience or not. No one can set a law to himself. Nor can he be under a legal duty by the law of another sovereign, for, if so, he would be in subjection to another person and therefore not sovereign; and, indeed, it is a recognised principle of international law that a sovereign is not amenable to the jurisdiction of any other sovereign: *Mighell* v. *The Sultan of Johore*, [1894] 1 Q. B. 149.

It has been objected by Holland (p. 129) to the above theories that it is usual for a sovereign to observe the ordinary rules of law and procedure in order to enforce any claim he has against his subject, and also that it is usual for a claim by a subject against his sovereign to be dealt with in the same way as disputes between subjects. But it may be pointed out that what is habitual is not necessarily

legally compulsory, and if the sovereign chose to adopt a method of self-redress instead of applying to the Courts, the subject would have no redress, and, similarly, if the sovereign refused to appear in the Courts in answer to a claim, he could not be forced to do so, nor could any judgment given against him be enforced as he could refuse to let his person or property be touched. Even in English law, in case of a Petition of Right, which is the only method by which the Crown can be sued, no such petition will lie unless the Crown gives its consent, which is within its discretion, and even if judgment is obtained on the petition, there is no method of enforcing it against the sovereign. The essence of national law is not what is habitual but what is obligatory.

Salmond (p. 255) suggests that the State can be under legal duties and that therefore a subject can have legal rights against his sovereign and says that it is not to the point to say that these rights are held at the pleasure of the State for all rights are so held. The proposition appears fallacious, for if one subject, X, has a legal right against another subject, Y, he does not hold that right at Y's pleasure, and the position in which he stands as regards Y is quite different from that in which he stands as regards any rights so-called which he may be said to have against the State. The question of legal rights against a sovereign must be looked at from the standpoint of law, and as the sovereign is not subject to the law there can be no legal right against him.

It is sometimes said that the sovereign is bound by constitutional law and that certain acts of his are unconstitutional.

Constitutional law may be defined as the body of rules governing the relations between the sovereign and his subjects and the different parts of the sovereign body.

The nature of constitutional law differs according to the nature of the constitution.

In a monarchy, so far as it purports to bind the sovereign, it can only consist of positive moral rules (*i.e.*, public opinion), but so far as it purports to bind the subject it is national law if its rules are enforceable by the State.

In an aristocracy, in so far as it purports to bind the whole sovereign body, it can only consist of positive moral rules, but in so far as it purports to bind the subject to the whole sovereign body or any part thereof, or to bind the different parts of the sovereign body to each other or to the sovereign body as a whole, it is national law if it is enforceable by the State.

The King in Parliament can make a law binding the subjects or binding himself or the House of Lords or the House of Commons. But any law purporting to bind the King in Parliament would be void, for otherwise it could never be repealed. For instance, in the Act of Union with Ireland it was provided that the Irish Church should be maintained for ever, yet that Church was disestablished in 1869 and no Court or executive official could legally have refused to enforce the provisions of the Act disestablishing it.

In fact a sovereign cannot put a limit to sovereign power, though he may, of course, surrender it to another, but then he ceases to be sovereign.

It may be urged that a statute purporting to bind the sovereign is binding until repealed, but the answer is that there is no way of enforcing the provisions of the statute in case of breach. It is not to the point to suggest that such statutes are sometimes passed and their provisions acquiesced in. As pointed out already, the test of law is not what is habitual but what is compulsory.

Test of law.

CHAPTER IX.

CLASSIFICATION OF RIGHTS.

RIGHTS may be classified into Divine, Legal and Moral. The jurist is concerned only with legal rights, which may be classified as follows :—

(A) (1) Legal.
    (2) Equitable.
(B) (1) Vested.
    (2) Contingent.
(C) (1) *In rem.*
    (2) *In personam.*

(A) Legal and equitable rights.

The classification into legal and equitable is only found in systems of law in which there exists the distinction between law and equity, *i.e.*, in the Roman and English systems.

The distinction depends on the nature of the principles on which the existence of the right depends. If the right is one recognised only by the Roman civil law or the English common law it is a legal right; but if recognised only by Roman or English equity it is an equitable right.

The nature of equitable rights varies according to whether the right is *in rem* or *in personam,* and it is therefore proposed to deal fully with the subject when treating of rights *in rem* and *in personam* respectively.

(B) Vested and contingent rights.

A vested right is one in respect of which all events

necessary completely to vest it in the owner have happened, as where X by deed conveys a piece of land to Y, a living person. Y has a vested right. A contingent right is one in respect of which only some of the events necessary to vest it in the contingent owner have happened, as where property is given to an infant contingently on his attaining twenty-one years of age.

The nature of contingent rights varies according to whether the right is *in rem* or *in personam*, so the subject will be fully dealt with when treating of rights *in rem* and *in personam*.

(C) Rights *in rem* and *in personam*.

This distinction, as Austin points out, depends not on the subject of the right but on its compass; that is to say, a right *in rem* does not mean a right over a thing, since many rights *in rem*, such as a copyright and right to reputation, have no thing as a subject, and many rights *in rem*, such as those of parents over children, exist over persons; nor does a right *in personam* mean a right availing against a person, for all rights avail against a person or persons; nor does it mean a right over a person, *i.e.*, with a person as a subject, for that may well be, and generally is, a right *in rem*: *e.g.*, a right of a father over his son is a right that no one shall interfere with the father's parental rights. A right *in rem* is one which avails against people generally, *i.e.*, against everyone who is subject to the law giving the right, or everyone subject to such law except certain persons. For instance, ownership is a right availing against everyone who is subject to the law under which the right of ownership exists; possession, on the other hand, avails against every such person except the true owner. Both are rights *in rem*. This distinction will be developed more fully subsequently. A right *in personam* is one which avails only against a certain person or persons,

such as the right A has against B in virtue of a contract he has entered into with B. Such right avails against B only and gives no rights against anyone else.

For instance, if A is owner of a thing his right avails against everyone who is subject to the law, and A has a remedy against any person who interferes with his enjoyment of it; whereas if A agrees to buy a thing from B and the ownership has not passed to A, he has merely a right *in personam* against B and has no remedy against any third person who damages the thing, and, moreover, if B subsequently sells and delivers the article to C, A cannot recover it from C, but merely has a claim for damages for breach of contract against B. According to Austin (p. 786), a right *in rem* avails against the world at large; but, of course, no right can avail against a party who is not subject to the law protecting the right, and a right of possession, which is a right *in rem* as not availing against a certain person or persons, does not avail against everyone, but against everyone except the owner.

The difference between rights *in rem* and rights *in personam* depends entirely on the persons against whom the right avails.

Duties correlating with rights *in personam* may be positive or negative.

Duties correlating with rights *in rem* must, according to Austin, be negative, for an attempt to enforce positive ones would, according to him, be an attempt to set the whole world in motion. The argument does not appear altogether satisfactory, because a legal right, whether *in rem* or *in personam*, can only avail against persons who are subject to the law conferring the right—the argument, of course, is based on the Austinian proposition that a right *in rem* is one availing against the whole world, whereas, as already stated, the true criterion is that it avails against

people generally. The element of truth in the Austinian theory is that it is possible for anyone to infringe a right *in rem*, whereas a right *in personam* can only be infringed by a specific person or persons. Batey (Laws of Law, p. 26) suggests that the duty correlating with a right *in rem* may be positive, as where a mandarin is entitled to a salute from every passer-by; it may well be contended, however, that this is a right *in personam* availing against a certain person or persons answering to the generic description of "passers-by." It is practically impossible for one person to enforce the performance by everyone of a positive duty towards him, though there is no difficulty in enforcing the observance of a negative duty, since a breach is only possible by the limited number of persons who will have an opportunity of committing such breach. There appears to be only one example of a right *in rem* with which a positive duty seems to correlate—namely, the "jus oneris" of Roman law, whereby the owner of a piece of land on which was a pillar or wall supporting his neighbour's wall was under the duty of keeping the pillar or wall in repair. In fact, such duty of repair could only be enforced against the owner for the time being of the lands on which the pillar or wall stood, and though *anyone* interfering with such pillar or wall could be proceeded against, yet only the owner of the land on which the pillar stood could be compelled to keep it in repair; the truth seems to be that the owner of the wall had a right *in personam* as regards repair against the owner of the land on which the pillar or wall stood, and a right *in rem* against other people generally that they should not interfere with the pillar or wall.

CHAPTER X.

CLASSIFICATION OF RIGHTS IN REM.

RIGHTS *in rem* may be classified with reference to their subject-matter as follows:—

(I) Rights *in rem* with a person as a subject.

(II) Rights *in rem* without a subject, *i.e.*, not exercisable over any person or thing.

(III) Rights *in rem* with a thing as a subject.

(I) A right *in rem* over a person may exist in the case of parents and children—guardian and ward—master and servant—husband and wife.

Parent & child

The right *in rem* of a parent over his child, which is a right that no one shall interfere with his parental control, must be distinguished from the right *in personam* which a parent may have against the child that the child shall obey him and remain in his custody. If a child be taken away from the parent's custody the parent has, in English law, a legal remedy to recover possession (*Earl of Westmeath's Case*, Jacob 251), and in some systems, such as the English, the parent has a remedy if the child is injured, provided that such injury deprives the parent of services the child was performing for him. Such remedy is in enforcement of the right *in rem*.

If the child refuse to remain in the parent's custody the parent may have the help of the law to compel him to return, in virtue of the parent's right *in personam* against the child.

If the child otherwise disobey the parent the parent

may have a legal remedy against the child, but in most systems it is left to the parent to enforce his claim to obedience by parental chastisement, and in such case the parent has no legal right in this respect against the child, but is at liberty to enforce obedience. The age at which parental rights cease has varied in different communities; at Rome it continued irrespective of age so long as the child remained under what was called the *potestas* of the parent; in England parental control is determined at twenty-one, though if the child lives at the parent's house and performs services for him the parent may have an action against anyone injuring the child and thus depriving him of the services.

The position of a guardian is similar to that of a parent except that in English law the Courts have compelled the ward to obey the guardian, and in one case Lord Macclesfield sent the ward back to the school chosen by the guardian: cited in *Hall* v. *Hall*, 3 Atk. 721.

There is no record in English law of an action for damages by a parent against a child or by a guardian against a ward for disobedience by the child or ward.

A master has complete protection in most systems for his right to the services of the servant; for wrongful interference by third parties inducing his servant to leave him or injuring the servant, he may have an action for damages; and for any breach of the contract of service he has his remedy in damages against the servant, though in the English system he cannot, except in the case of apprentices, get an order compelling the servant to remain in his service.

If a party induces either spouse to desert the other an action will lie by the deserted spouse.

(II) Rights *in rem* without a subject.

Under this head fall the right to reputation and personal

security, whereby others are prohibited from defaming or assaulting one—patent rights and copyright, whereby others are prohibited from using a patented idea or a copyrighted one—franchises, such as a right to hold a market whereby others are prohibited from holding a market or buying in a market within a certain distance of that held by the owner of the market.

The right to an inheritance is also a right without a subject, for although the inheritance itself includes rights over things forming part of the deceased's estate, yet the inheritance itself consists of all the rights of the deceased looked at as a whole and the right to the inheritance is a right to those rights so looked at.

(III) Rights *in rem* over things.

These may be classified in three ways:—

I (*a*) Legal; (*b*) Equitable.

II (*a*) Giving right of indefinite user, which may be—

(i) Ownership, a right availing against everyone who is subject to the law protecting the right.

(ii) Possession, a right availing against everyone who is subject to the law protecting the right, except the owner.

(*b*) Giving a right to put the thing to some definite use or to prevent the owner putting it to some definite use. The party who has such right is said to be invested with an Incumbrance. This right is sometimes called a *Jus in re aliena*, as opposed to ownership, sometimes called *Jus in re sua.*

III (*a*) Vested rights, where all the events necessary to vest the right have happened.

(*b*) Contingent rights, where only some of the

events necessary to vest it in the owner have happened.

I. Legal and equitable ownership.

The difference between legal and equitable rights has already been explained (see p. 201), and it only remains to point out a difference between the English and Roman conceptions.

In English law, where legal and equitable ownership exists over the same thing, the legal owner is, as a rule, called a trustee, and his ownership is recognised to the extent that he can take legal proceedings for the protection of the thing, though the equitable owner is entitled to all benefits resulting from the legal ownership. The remedies of the equitable owner, or *cestui que trust*, are available against the trustee for any neglect of his duties as such, whereby the equitable beneficial ownership of the *cestui que trust* is prejudicially affected, and he may also recover the thing from anyone to whom the trustee has disposed of it in breach of trust, unless such person is a *bona fide* transferee for value who acquired the legal estate without notice of the trust; a transfer, however, to such transferee puts an end to the equitable ownership. The position of an English trustee results from the fact that by English law trusts of a continuing nature—*i.e.*, involving the performance of duties extending over a period of time—may be created, and also from the conflict between law and equity already pointed out, in consequence of which there can be concurrent legal and equitable ownership in the same thing. At Rome, on the other hand, wherever there existed Quiritarian and Prætorian ownership in the same thing the quiritary owner had no enforceable rights against anyone; the prætorian or equitable owner had all necessary remedies. For instance, if A sold B a *res mancipi*, but transferred it by *traditio*, B had the prætorian or equitable

ownership, A had the bare quiritary ownership. B had all necessary remedies by interdicts, A had no interest to protect either for himself or B, and so had no remedies. Again, there were no continuing trusts in Roman law. The only trust recognised was that imposed on an heir or legatee to transfer an inheritance or some particular thing to the fideicommissarius. Until the transfer the fideicommissarius had no proprietary rights in the thing; after the transfer the transferor had no longer any proprietary or other rights in it. In fact there was for all practical purposes no double ownership at Rome, for in any case where there was quiritarian and prætorian ownership over the same thing the former had no effective existence.

A trust may be defined from THREE points of view:—

From the point of view of the settlor; *i.e.*, the party creating it: it is a confidence reposed by the settlor in another (the trustee) that the latter will use his powers of ownership, whether legal or equitable, for the benefit of the settlor or of a third party.

From the point of view of the trustee it is an equitable obligation on the trustee to use his powers of ownership for the benefit of another.

From the point of view of the beneficiary or *cestui que trust*, it is the equitable beneficial ownership of property of which another has the bare ownership. A trust may be created of equitable property, as where A holds legal ownership of property in trust for B and B transfers his equitable interest to C in trust for D; in which case A has the bare legal interest, C the bare equitable interest, and D the beneficial equitable interest. Of course, at Rome such a condition could not exist, as the only trust recognised was one imposing an obligation on the heir to transfer the ownership to the *cestui que trust*, and, until such transfer.

the *cestui que trust* had no right *in rem* over the subject of the trust.

II (*a*) (i) Ownership. The fullest ownership consists of four rights, *i.e.*, the right of—

(1) using the thing;

(2) excluding others from using it;

(3) disposing of the thing;

(4) destroying the thing.

As land cannot be destroyed, since in law the term "land" includes all underneath the surface to the centre of the earth, one cannot in English law have absolute ownership in land in the sense above mentioned but only an estate in it; an estate being defined as the legal interest of a party in land measured by duration and entitling the party to put the land to uses of an indefinite nature.

In movables one can have absolute ownership since one can destroy them.

Absolute ownership is, according to Austin (p. 412) a right indefinite in user, *unlimited in duration* (*i.e.*, capable of going over to a series of successors *ab intestato* which may possibly last for ever), and alienable by the actual owner from every successor who in default of alienation by him might take the right. It should be added that it also includes the right of destroying the thing. This latter attribute is not included in the Austinian definition, but appears a necessary incident of absolute ownership. The Austinian definition given above is a definition of an estate in fee simple, the largest estate in land recognised by English law.

As Austin states, "all property is a concession from the State," for inasmuch as the State being sovereign can if it likes and so far as the law is concerned appropriate the property of any of its subjects without legal liability, therefore each property-owner holds his property by permis-

sion and protection of the State. Accordingly, where any property-owner dies leaving no person who will be entitled by law to his property, then the State is entitled to resume possession, so that the State is the *ultimus heres* of the property of all its subjects.

Absolute ownership, however, is subject to certain limitations, as follows:—

(1) Every owner must exercise his rights in such a way as not to infringe the rights of other owners, for the maxim is "Sic utere tuo ut alienum non lædas," so a landowner must not accumulate manure on his land in such a way as to annoy his neighbours.

(2) Officers of justice have a right to enter on the premises of anyone for the purposes of justice, which is a limitation on the power of exclusion of owners.

(3) Where there are joint owners the rights of each owner are limited by the rights of the other co-owners. The limits vary in different systems; for instance, in English law the co-owner of a chattel who has possession of it may apparently use it as he likes so long as he does not depreciate it; with that limit he may retain possession and deprive his fellow co-owner of the use of it. See Lindley on Partnership, p. 27 *et seq*. But if he makes any profit out of it he must account for the share to which the other is entitled, but with a liberal allowance for expenses. In respect of co-ownership of land one may not exclude the other.

(4) Ownership may be subject to incumbrances vested in others, such as servitudes and securities which others may have over the property. If such servitudes are vested in the State Austin terms them quasi-servitudes, inasmuch as the State is incapable of owning legal rights, and therefore of owning legal servitudes.

(5) There are certain restrictions imposed by most

legal systems on the powers of disposal of an owner. Both in Roman and English law transfers of property made with intent to defeat or delay creditors may be set aside. In English law transfers of land to corporations involve confiscation of the property by the State unless the corporation is authorised specially by the Crown or by some Act of Parliament to acquire the land.

(6) Infants and lunatics are under disabilities as regards things they own.

MODES OF PROPERTY.

As Austin states, "property is capable of various modes"; *i.e.*, modifications of the powers of the absolute owner whereby persons whom we may call limited owners may not use the thing to the same extent as an absolute owner might.

The modifications all have reference to the duration of the interest of the person who has such modified ownership and ownership of things may be classified from this point of view as follows:—

(1) Unlimited in duration, such as absolute ownership in goods, and an estate in fee simple in land.

(2) Limited in duration—

(*a*) Indefinitely:

(i) For the life of the owner, such as the English life estate and the Roman *usufruct*.

(ii) For the life of another.

(iii) Until the owner becomes bankrupt or attempts to alienate, though in English law there must be a gift over to another in such events.

(iv) In tail, *i.e.*, to last as long as the owner has descendants alive.

(v) A tenancy from year to year; the tenant can retain possession until his interest

is determined by notice given either by himself or his landlord.

(vi) A tenancy at will; where a person is in possession of the property with the consent of the owner, which consent may be withdrawn at any moment. This is a species of possession and the tenant can enforce his rights against everyone, but must give up possession to the landlord when required by him to do so; but his possession being lawful he is not liable to the landlord for the fruits he has gathered, nor for damages for possession, so his right avails against everyone so long as it lasts.

(*b*) Definitely; for a term of years.

These interests in land are called " estates " in English law; an estate is an interest in land measured by duration and entitling the owner thereof to put the land to uses of an indefinite nature.

Notes on Above.

A fee simple and cases (i) (ii) (iii) and (iv) are called freehold estates in English law for the reason that they were originally the only kinds of ownership in land recognised in the King's Court and were limited to land of freehold tenure, *i.e.*, held on services of a free nature as distinct from villein tenure where the services were of a base kind, for formerly all land was held of the King or some intermediate lord on terms of performing services for him. When leasehold interests, *i.e.*, interests for a term of years originated they were considered as a contract between landlord and tenant, but not as giving the tenant any right *in rem* either of possession or ownership in the property, so that if the tenant was evicted by anyone his

only remedy was to call on his landlord to get him reinstated. Later on he could get damages against anyone who evicted him, and from the reign of Edward IV could recover the land itself from such person so that in effect the leaseholder was practically in as good a position as the freeholder, but leaseholds were still excluded by lawyers from the category of freeholds and are so to this day; they are a species of personalty whereas freeholds are a species of realty, the latter being so called because at all times of their existence they were recoverable in specie, *i.e.*, the *res* itself was recoverable. It may also be remarked that realty on death intestate of the owner before 1926 devolved on a person called the heir, who if a male was usually a single individual; whereas personalty devolved on any number of persons answering the description of next-of-kin, meaning, with one or two exceptions, those nearest related.

Of course the distinction between realty and personalty and between freehold and leasehold is purely an English one, but the peculiar position of leaseholds formerly was the same as the position of the letting out of things at Rome whereby even in the reign of Justinian the hirer was not deemed to have ownership or possession and had no proprietary remedies against third persons, his only remedy in case of eviction being against his landlord to get him reinstated. Now, by the Law of Property Act, 1925, with one or two exceptions, there is practically no difference between real property and personal property.

The different kinds of interests above mentioned may be, but are not commonly found, existing over property other than land, though goods may be let out or may be settled on different persons in succession. Of course there may be a bailee at will or for a term of goods similar to the tenant at will or for a term of land.

A bailment in English law is the delivery of goods to a party for a certain purpose or term, the same goods to be returned when the purpose or term is complete. A loan of money is not a bailment unless the same coins are to be returned.

Where the duration of a party's ownership is limited he is generally restricted as to his rights of using the thing by being prohibited from using it in such a way as to deteriorate its usefulness to his successor. This was the rule at Rome relating to the *usufructuary*, *usuary*, *emphyteuta* and person having the right of *habitatio*, and in England as to all limited owners expressed in English law by the rule that they must not commit waste.

Such limited owners cannot as a rule make a disposition of the thing for a period exceeding the duration of their own interest, though by English statutes (the Settled Land Acts, 1882-90, now 1925) such owners of land are given powers to dispose of the land as though they were absolute owners. They may sell it for an absolute interest, the purchase-money being paid to trustees who pay the income to the limited owner holding the *corpus* in trust for the successor. They may lease it for a term which will not terminate with the termination of their own interest. The policy of such statutes is that of preventing land becoming inalienable.

In some cases the instrument conferring the right over the thing prohibits the owner from disposing of it by directing that, on any attempt to alienate it, it shall pass to some other person. Such provision is ineffective by English law to prevent the alienation of land under the provisions of the Settled Land Act, though it may bind the money produced by sale under the said Act. In one sense the greatest interest one can have in anything is a life interest, since one can only actually enjoy the use of

a thing for such period, but if one can also give effective directions as to the disposition of the thing after one's death, one's interest is deemed to be greater than a life interest.

A particular mode of property is that which entitles a party merely to dispose of the thing though not in virtue of his ownership thereof if he has any ownership. Such mode is called "a power," which may be defined as "a capacity of disposing of a thing which is not incident to the ownership of it." For instance, property may be vested in trustees for A for life, and after his death for such persons as he may appoint. Here A, having only a life interest, cannot in virtue thereof dispose of the thing for a greater interest than his life interest, but in virtue of his power may do so. Of course, a power may be given to a person who has no interest in the thing; for instance, in the above example the trust after A's life estate might have been for such persons as C should appoint.

Some writers denominate certain of those interests which Austin calls modes of property as incumbrances, or *jura in re aliena* (Markby, § 316; Salmond, p. 393); but, inasmuch as the term "incumbrances," as used by these writers, includes leases, securities, and servitudes, and so includes rights of definite and indefinite user, one loses sight of the very important distinction between rights of definite and indefinite user, and, moreover, one limits the term "ownership," as opposed to incumbrances or *jura in re aliena*, to absolute ownership. For this reason the distinction between rights of definite and indefinite user appears preferable for purposes of classification.

Conditions.

A condition may be a condition precedent or a condition subsequent.

A condition precedent is one which must happen before

an estate vests in a party; *e.g.*, land is left by will to A conditionally on his attaining twenty-one.

A condition subsequent is one on the happening of which a party will lose his estate; *e.g.*, land is left to A with a condition that if he marries it shall go to B.

Of course, the condition subsequent as regards A is the condition precedent as regards B.

Possession.

II (*a*) (ii) Ownership, as distinct from possession, is a right availing against everyone. Remembering the four characteristics of ownership—*i.e.*, using, excluding, disposing, and destroying—and remembering that the actual exercise of any of the four by the absolute owner may be temporarily postponed in favour of anyone who has a modified ownership in the thing, it will be apparent from an example that ownership, absolute or qualified, avails against everyone; for example, if A is absolute owner, and B tenant for life, the exercise of A's powers is only postponed for a time; he still has them and they avail against everyone, including the life tenant, and because of them the tenant for life is restricted in respect of his own powers of using and disposing of the thing. On the other hand, the life tenant has modified ownership with powers, such as they are, availing for the duration of his life against everyone, including the absolute owner; and so modified ownership avails against everyone, and is distinct from possession.

Possession is a right to the exclusive use of a thing availing against everyone except the owner. It must be distinguished—

Definition of Possession

(1) From the right to possess which an owner, whether an absolute owner or a modified one, has if entitled to the present exercise of the power of using the thing.

(2) From possession of a *res nullius*, which gives ownership by occupation, and is a title to ownership.

(3) From mere *detentio*, or custody, such as that of a servant who is looking after his master's things in the master's house. Such servant lacks the "*animus possidendi*" which is essential for possession, nor, as will appear later, can he, by merely changing his intention and making up his mind to possess for himself, begin to acquire possession for himself, since he must do something inconsistent with his master's possession, the maxim being, "Nemo potest sibi causam possessionis mutare": Dig. 41.2.19.1. The *animus possidendi* is the intent to exclude all others including the owner, either permanently or for a time.

It is well to remember that owners, whether absolute or modified, if in possession, have possession; but they have also a better title—*i.e.*, ownership—though, of course, they are at liberty to rely on their possession where that will give them sufficient protection, and, of course, in many cases a possessory title is much easier to prove than a proprietary one. For instance, if an owner is in possession and someone evicts him, he can recover the property by merely proving that he was in possession and has been evicted, unless, indeed, the defendant can prove that the ownership is in him, for it is not lawful for anyone except an owner to oust a possessor, even though such possessor is an unlawful one. In fact, as Austin points out, possession, properly so called, is that of the adverse or unlawful possessor, since all other possessors have absolute or modified *ownership*—*i.e.*, a right availing against everyone.

There are two essential elements constituting possession:—

(I) The detention or custody of the thing, commonly

called the corpus, or fact of possession, or the physical element.

(II) The *animus possidendi*, or mental element; *i.e.*, the intention of excluding everyone else.

(I) The detention or custody means the *actual* exclusion of everyone else from the use of the thing.

This may be secured by:—

(1) The actual continued physical prehension of the thing resulting from actual physical grasp or from control of the means of access to the thing, as where it is locked up in a safe of which one has the key.

(2) Presence near the thing.

(3) Exclusive knowledge of the situation of the thing.

(4) The continuance of a possession once commenced, until it is disturbed by someone else. Under this head may be classed things in one's house apart from any physical power of preventing others coming in to take them; also things, such as animals, which are in the habit of coming and going, so long as they continue the habit; also things which have been mislaid, as regards which custody continues until someone else has found and appropriated them.

According to Savigny, possession requires a continuance of the actual physical power of exclusion; but this does not appear necessary for legal possession, which is the only kind with which law and Jurisprudence are concerned, for any of the above elements, coupled with the *animus possidendi*, is sufficient to ensure the protection of the law.

Inasmuch as mere legal rights are not capable of actual manual prehension nor of detention in any of the above ways, they are not, strictly speaking, capable of possession;

but where exercised adversely with the *animus possidendi*, they are said to be in quasi possession—*e.g.*, rights of way.

(II) The *animus possidendi*.

By this is meant the intention to exclude all persons, including the owner, from the use of the thing either permanently or for a time.

As Professor Salmond points out, the intention need not be a claim of absolutely excluding all claims of others in respect of the thing; for the possessor is subject to the maxim "Sic utere tuo ut alienum non lædas," and may also be subject to servitudes vested in others. Again, the intention need not be to possess for one's own benefit, so agents and trustees may possess though for the benefit of their principal and *cestui que trust* respectively; one may also possess a thing without knowing what it is, if one means to possess it whatever it is; so if one takes a bag full of things meaning to possess them although not knowing what they are, one has possession in law; but in English law, apparently, if one is under a misapprehension as to what a thing is, one does not possess it until one knows what it actually is: so in *R.* v. *Ashwell*, 16 Q. B. D. 190, where A received from B a sovereign in mistake for a shilling, and, on finding out the mistake, kept it, seven Judges held he did not possess the sovereign until he knew it was one, as until then he only had the *animus possidendi* to the extent of a shilling, though seven Judges were of the contrary opinion. It is questionable what the position would be if he had received a shilling instead of a sovereign, desiring to receive a sovereign; though the matter is hardly likely to become of practical importance. A person who does not know of the existence of a thing which is on his premises does not possess it, as where one takes a lease of a house without knowing that there are banknotes under the flooring.

Salmond (p. 309) draws a distinction between mediate and immediate possession; by the former meaning possession maintained through the possession of another, by the latter meaning the possession of that other. If one examines the examples given by Salmond it is not clear that the distinction in question is established.

Salmond gives three examples of immediate possession:—

(1) The possession of an agent or servant. This example may be discussed from three points of view—

(*a*) As regards things which are in my possession but of which my servant has the care they are only in his custody, not possession, since he has not the *animus possidendi*, nor can he, unless he does something amounting to the fact of possession, by merely intending to hold them for himself commence possessing them, because of the maxim "nemo potest sibi causam possessionis mutare." Of course, if he does do something amounting to the fact of possession, as where he takes them away, then he possesses and I cease to possess.

(*b*) There may be some difficulty where I deliver a thing to my servant to take to a market to sell for me and he misappropriates it, but in English law the better opinion seems to be that he merely has custody, and so is guilty of stealing the thing if instead of selling it he misappropriates it: *R.* v. *Hawkins*, 4 Cox 224.

(*c*) In cases where I employ my servant to receive something for me it is well settled that I do not possess the thing until he has either delivered it to me or put it within my control, as where he puts into the till money received for me.

(2) A bailee for a term. In such case the bailee has possession, not the bailor, and can alone sue for interference with his possession: *Gordon* v. *Harper*, 7 T. R. 9.

(3) A bailee at will, *i.e.*, a person to whom a thing has been lent for an indefinite time, the thing being returnable on demand. In such case in English law both the bailee and the bailor have possession and can both sue for injury by a trespasser: Y.B. 48 Edw. III, f. 20, pl. 8.

As pointed out already, cases (2) and (3) are also cases of modified ownership: see p. 212.

In Roman law there seems to have been no consistent principle applicable in the above cases, for though the *precarium tenens*, the *emphyteuta*, the *usufructuary*, *usuary*, and the party having a right of *habitatio*, all had possession, yet the *commodatarius*, *depositarius*, and the *conductor rei* had not possession. But both Roman and English law are consistent in this, that two persons cannot be in possession of the same thing at the same time adversely to each other, "plures eandem rem in solidum possidere non possunt," for if one party has the fact of possession with the *animus* of excluding the other that other cannot have possession, for although he may have the *animus* he has no possession in fact. The bailee does intend to exclude the owner for the term of the bailment and so has possession; the servant does not mean to exclude the master and so has not possession.

But it is submitted that the case of the bailee cannot be distinguished from that of the tenant for life or other limited term (see *ante*, p. 215); and that inasmuch as it is desirable to distinguish ownership from possession, the bailee should be classed with persons having modified ownership, since their rights are forms of modified owner-

ship. They have a greater right than possession, for their rights avail against everyone.

Of course ownership, whether absolute or modified, may be coupled with possession of the thing over which the right avails or may not be so coupled; in the latter case the owner would not have possession, and therefore would not have the remedies arising from interference with possession, but would have a real remedy if such interference also injured the proprietary right. So in English law, with the exception of a bailor at will, an owner not in possession cannot sue a trespasser, though if the trespass injures his ownership, or, according to English legal phraseology, "injures the reversion," he has an action on the case.

Before dealing with some peculiarities of possession from the point of view of Roman law it may be well to point out—

Firstly, that it was not until the reign of Edward IV, 1460, that the lessee of land was recognised as having possession and the consequent remedies against anyone who interfered with it; until then he was treated as the *conductor rei* in Roman law, his only remedy in case of eviction by a third party being against his landlord, and the landlord was therefore liable to him in case he was evicted even without lawful reason.

Secondly, that in English law the term "seisin" is used to indicate possession of freehold interests in land. Freehold interests are those of indefinite duration, and, as pointed out before (p. 213), were the only interests of a proprietary nature in land formerly recognised. When leaseholds were finally recognised as property the term seisin, which was anterior in origin of possession, was deemed inapplicable and the term "possession" was used for such interests, and so a party is seised of freeholds, and possessed of leaseholds and movables.

Lessee

Thirdly, although two persons cannot be possessed of the same thing adversely to each other, yet co-owners may be jointly possessed, neither intending to exclude the other from the enjoyment of the use of the thing, although intending to exclude all others including the true owner.

Possession in Roman Law.

For an understanding of possession in Roman law one must remember that there were originally four kinds of rights *in rem* over things in that system :—

(1) Quiritarian ownership, which was the only one originally recognised, was limited to Roman citizens, and, as regards land, to Italian soil, and was protected by the *vindicatio* or civil action *in rem.*

(2) Prætorian ownership, which was a right availing against all, including the quiritarian owner, if one. This arose in two cases :—

(*a*) Where anything was acquired lawfully by an alien. Inasmuch as he could not be a quiritarian owner nor acquire such ownership by long possession or usucapion, he could not avail himself of the remedies of the civil law to enforce his rights.

(*b*) Where *solum provinciale* was acquired lawfully by anyone. As this was not the subject of quiritarian ownership, no one could be quiritarian owner of it.

The rights of such parties were protected as against the former owner in case (*a*) by the "exceptio rei emptæ et traditæ" or other appropriate exception in case the quiritarian owner had transferred the thing to the alien and then brought an action to recover the thing based on his quiritarian ownership; in case (*b*) by interdicts which protected the possession of the party who had last had the

thing *nec clam, vi, aut precario ab altero.* In this case there could of course be no action by a quiritarian owner.

In cases (*a*) and (*b*) the rights of the party were protected as against all others by the interdicts where they were applicable.

(3) *Civilis possessio*, or possession capable of ripening into ownership by *usucapio.*

This applied originally to things capable of quiritary ownership acquired by a party who could be a quiritarian owner in circumstances in which usucapion could operate, *i.e.*, the thing, being acquired *bona fide.* It applied:—

(*a*) Where a party acquired the thing *bona fide* from a person not entitled to transfer it, provided the other essentials for acquisition by usucapion were present.

(*b*) Also where the owner of a *res mancipi* transferred it to another by *traditio.*

In each case, if the party lost possession before the requisite period had run, he could, by the *actio Publiciana*, recover the thing from all save the true owner, and probably, if he had acquired it lawfully from the quiritarian owner, *e.g.*, by purchase, he could recover from him, for if to an *actio Publiciana* the quiritarian put in an *exceptio* or defence that he was quiritarian owner, the plaintiff might plead a *replicatio* or answer that he had bought and taken delivery of the thing, a *replicatio rei emptæ et traditæ.*

The *actio Publiciana* was based on the fiction that the party had possessed the thing for the requisite length of time for usucapion to operate. The right of such possessor is called by Hunter (p. 263) bonitarian ownership. The *actio Publiciana* was afterwards extended to provincial soil (D. 6.2.12.2), but, it is submitted, originally only applied to Roman citizens, as the formula was only applicable to cases in which, had usucapion run, the party would have been entitled *ex jure quirite*: G. 4, 36. There

appears to have been no protection originally for aliens in such cases. Hunter suggests that the *actio* was of later origin than the interdict, and this is probably so; for the action was probably introduced by the Prætor Quintus Publicius about 66 B.C. The necessity for the action was to give protection where the interdicts did not apply; for example, A buys something from C which C is not entitled to sell, loses it, and D finds it and sells it to E, but for this action A would have no remedy against E, as E had obtained the thing *nec clam, vi, aut precario* as regards A.

(4) *Possessio.*

This indicates the position of a party whose right availed against all save the true owner; in other words, the position of the adverse or unlawful possessor, provided the possession could not ripen into ownership by usucapion.

As regards land, the party was protected by the interdict *uti possidetis*, provided he had obtained possession neither by stealth, violence, or request from the other party. As regards goods, originally the party was protected by the interdict *utrubi*, provided he had had possession the greater part of the preceding year neither by stealth, violence, or request as regards the other party, though later on the same principle was applied to goods as to land.

From the time of Caracalla (211 A.D.) all free-born subjects of the Roman Empire were Roman citizens, and by the reign of Justinian all corporeal property could be transferred by *traditio*, and quiritarian ownership had disappeared, so that in Justinian's reign there was only—

(1) Ordinary ownership;

(2) Bonitary ownership, or *Possessio civilis* protected by the *actio Publiciana*, which was applicable to everyone, and even applied where the thing was tainted with vice or where the possessor was *mala*

fide, for thirty years' possession gave title by usucapion even in those cases;

(3) Possession, protected by interdicts against all save the true owner.

The Importance of Possession.

Possession is of importance legally in the following respects :—

The party in possession is deemed owner and can maintain his possession, even if unlawful, against everyone save the owner—long possession gives ownership by usucapion—by delivery of possession ownership can be transferred—the actual possession of a *res nullius* confers ownership by *occupatio*.

INCUMBRANCES.

II (*b*). The term "incumbrance," or *Jus in re aliena*, is used to indicate a right of *definite* user over a thing over which another has a right of *indefinite* user, or a right to prevent the owner putting the thing to some definite use.

Sometimes the term "servitude" is used to indicate such rights, but inasmuch as the term "servitude" only indicates one kind of such rights, the term "incumbrance" appears preferable.

Incumbrances are of two kinds :—

(1) SECURITIES.

(2) SERVITUDES.

(1) SECURITIES.

A Security is a right to have recourse to a thing as a means of securing performance of some obligation, the obligation generally being the repayment of money which has been lent to the owner of the thing. The lender is called the mortgagee, and the borrower the mortgagor.

Securities are of three kinds, though one of them is a Security and something more:—

(*a*) A charge, or hypothec, over the thing which entitles the mortgagee (if the obligation secured thereby is not performed) to either call for a transfer of the thing to him or to have the thing sold and the amount due to him for breach of the obligation paid out of the proceeds.

The mortgagor remains in possession and retains the ownership.

(*b*) A pledge or lien which entitles the mortgagee to retain *possession* of the thing until the obligation is performed. As a rule he is not entitled to use the thing except where such use is necessary in order to preserve it; so a person who has a lien over cows may milk them. The ownership remains with the mortgagor, but the mortgagee generally has a power of sale.

(*c*) In certain cases, a security is created by transferring the ownership of the thing to the mortgagee, with a proviso for re-transfer on fulfilment of the obligation. This kind of security is not only an incumbrance but also a mode of property, since the mortgagor has no ownership and the mortgagee has for a time the whole of the ownership.

As regards the above three kinds of securities it may be pointed out that the first automatically ceases on repayment; the second requires redelivery of possession on repayment, but till such redelivery the possession continues. The third giving ownership entitles the mortgagee if he takes possession to use the thing subject to accounting for profits, whereas in cases (*a*) and (*b*) the mortgagee has no right to the use of the thing.

In English law the first may be defeated by the mort-

It cannot be done in Palestine after Settlement since the charge is also registered unless it is for a period of less than 3 years.

gagor transferring the legal estate to a *bona fide* purchaser for value without notice of the charge.

(2) SERVITUDES.—A servitude is a right either to use a thing belonging to another in some definite way or to prevent the owner thereof making some particular use of it, such right being unaccompanied by ownership or any right to ownership or possession of the thing over which such right avails is called the *res serviens* or servient tenement.

Austin points out that in one case it is not a right over the property of another, *i.e.*, in case of servitudes over property of the State, since the State, strictly speaking, cannot own property. He calls these quasi-servitudes and also those exercised by the State.

A servitude must be distinguished from a privilege exercisable by the public at large, for, since no rights can be vested in the public, it can have no servitudes; in case of such privileges, *i.e.*, a public right of way, the position is that the owner is under an absolute duty to allow members of the public to put his property to certain uses; that this is so is evident from the fact that in English law, for infringement of the privileges of the public of this kind, the remedy is a criminal prosecution, no member of the public being entitled to bring an action for damages if the privilege is interfered with, unless at the same time some right of his is also infringed, *e.g.*, A obstructs a highway whereby B has a longer walk home, B cannot recover damages; but if B falls over the obstruction and is injured, then he has a claim for damages, for his right of personal security has been infringed.

Servitudes in English law are known as either "easements" or "*profits à prendre*." An easement is "A privilege without profit which one man hath in respect of his tenement over the tenement of another for the benefit

of the former tenement." A profit is "A right to take some profit from the soil of another."

The distinction existed in Roman law, but was not indicated by distinctive terms.

It is well to remember that these rights are only found existing over land or buildings, for the reason that as they bind the property over which they exist in the hands of all who own it for the time being it would be practically impossible to annex them to movables which are constantly changing their situation and are difficult of identification. Attempts have been made to do so in English law but have always failed. See *Taddy* v. *Sterious Co.* (1904), 73 L. J. Ch. 19; *Dunlop* v. *Selfridge*, [1915] A. C. 847; 84 L. J. K. B. 1680. The quasi-usufruct of Roman law, though by some authorities considered a servitude, was not a servitude because it was not a right over the property of another, for the usufructuary had the ownership of the thing, subject to a personal obligation to restore a similar quantity and quality on death; such usufruct totally deprived the *dominus* of the use of the thing, and was itself a right of indefinite user; it was a mode of property similar to the English life estate. Examples of servitudes are—a right to walk or drive over another's land; a right to prevent a neighbour building his house higher than that of the owner of the servitude, a right to prevent a neighbour building so as to darken one's rooms, a right to have river water unpolluted and undiminished.

Servitudes may be classified in two ways:—

(A) (1) Prædial, or real.
(2) Personal.

(B) (1) Positive.
(2) Negative.

(A) (1) A prædial, or real, servitude is one enjoyed by the owner for the time being of a piece of land or a house

called the dominant tenement, and as the dominant tenement is transferred from time to time so the servitude passes with it; in English law the servitude is said to be appurtenant to the dominant tenement. Whoever is for the time being entitled to the dominant tenement is entitled to exercise the servitude. A real servitude cannot be severed from its dominant tenement, and by a fiction the dominant tenement is often considered as a person possessing the right.

A real servitude does not mean one availing *over* land or a house, for all servitudes avail over a servient tenement.

A personal servitude is one vested in an individual as such and not as owning a dominant tenement.

In English law "*profits à prendre*" may be real or personal, but "easements" must be real or, as it is sometimes stated, "there cannot be an easement in gross"; this is also apparent from the definition of an easement as a right existing for the benefit of the dominant tenement. If a landowner attempted to attach to his land a right which was not for the benefit of a dominant tenement such right could only be enforced by him; no transferee of the land could successfully claim to exercise it.

At Rome, Urban Servitudes, being attached to and for the benefit of buildings, were real, such as rights to light; but Rural ones, such as a right of way, might be real or personal.

(A) (2) A personal servitude is one exercisable by an individual.

(B) Positive and negative servitudes.

A positive servitude is one which entitles the owner of the servitude to DO something, such as a right to walk across the land of another, whereas a negative one only entitles the owner thereof to prevent the servient owner

doing something, such as a right to prevent him building his house higher than the dominant house, or to prevent him building so as to darken the windows of the dominant house.

From the point of view of the servient tenement all servitudes are negative because they all prevent the servient owner from doing something, so the distinction is one based on the rights of the owner of the servitude.

Positive servitudes are intermittent and may be lost by not being exercised; negative servitudes are continuous and cannot be lost by non-user, but may be lost by the servient owner infringing and the owner of the servitude acquiescing therein, by which he may be deemed to have abandoned his right.

In English law *profits à prendre* are positive, but easements may be positive or negative, *i.e.*, may be a right of way, or a right that a neighbour shall not excavate his land so as to cause your land to subside.

In English law easements are classified into natural easements and acquired easements. Natural easements are those which are possessed by every owner of land, such as the right of a landowner to have his land supported in its natural state by the lateral support of his neighbour's land, and the right of a riparian owner to have the water passed on to him without substantial pollution or diminution. Acquired easements are those which may be acquired by grant or prescription, *e.g.*, the right to have one's buildings supported, the right to light through a defined passage, the right to air through a defined passage.

It may be thought that a servitude is a right *in personam* since it appears to be only available against the owner of the servient tenement, but in fact the owner of the servitude has a remedy against anyone who interferes with his enjoyment, though, of course, in many cases

only the servient owner would have an opportunity of doing so

Servitudes, being rights *in rem*, never impose a positive duty on the servient owner. An apparent exception to this principle was the *Jus oneris* of Roman law, whereby the owner of the servitude had a right to support for his building from a pillar on the land of the servient owner, and the servient owner was under an obligation to keep the pillar in repair. This was a combination of *jus in rem* and *jus in personam*, since the duty of repair was only incumbent on a certain person, *i.e.*, the owner for the time being of the servient tenement, whereas everyone was under the duty not to prevent the dominant owner from enjoying the servitude.

A servitude being a *jus in re aliena* a party cannot have a servitude over his own property—" nulli res sua servit "—whatever the owner does in respect of his own property he does as owner. As a servitude confers neither ownership nor possession of the *res serviens* the owner of the servitude cannot give another a servitude over it—" servitus servitutis esse non potest "—but of course a prædial servitude can be transferred by transferring the *prædium dominans*, though a personal servitude cannot be transferred.

Vested and Contingent Rights in rem.

III (*a*). A vested right is one in respect of which all the events necessary to bring it into existence and vest it in a party have happened.

A contingent, or future, right is one in respect of which only some of the events necessary to bring it into existence and vest it in a party have happened.

Vested, or present, rights are of two kinds:—

(1) Coupled with possession of the thing over which the right exists.

(2) Not coupled with such possession, as where property is settled on A for life with remainder to B, a living person. Here A has a vested right coupled with possession of the thing; B has a vested right not coupled with possession.

In each case the right is vested and completely constituted, though, of course, in respect of user B's right is contingent on B outliving A. B, however, has an indefeasible right and can freely dispose of it to a person who cannot be deprived of the right.

III (*b*). Contingent rights are limited either :—

(1) To an uncertain person; *i.e.*, to the eldest surviving son of A, A being a living person; or

(2) To a certain person on an uncertain event; *e.g.*, to A, a living person, contingently on him attaining twenty-one.

Owing to the shadowy nature of a contingent right it was some centuries before a party entitled to such right could by English law alienate it.

It is submitted that the term "contingent right" must be limited to rights relating to some specific thing and to cases where some of the events constituting the title have happened, and to cases where there is some definite person in whom the right can vest, and therefore that the term will not include the following :—

(1) A mere capacity to acquire property.

(2) A hope of succeeding to property under a will made in one's favour where the testator is still alive, for until his death his will is not an effective instrument.

(3) A *spes successionis*, or hope of succeeding on the death intestate of an ancestor; in this case no one fact has yet happened constituting the title which in any way derogates from the complete power of disposal of the present owner; and, moreover, there

is no specific property over which the right can be said to exist, since it cannot be said of what property the present owner will die possessed, nor can it be said who his heir will be, for "nemo est heres viventis."

It has been held in English law that a limitation of property to the next-of-kin of A, a living person, gives no disposable interest to anyone during the lifetime of A, since it is impossible to indicate during the lifetime of A who will be his next-of-kin when he dies; so if any of the next-of-kin attempt to dispose of their expectant right the disposition is void: *Re Mudge*, 58 S. J. 117; *Re Lind* to contrary, 138 L. T. Jo. 248.

And there are dicta in other cases supporting the view that in case of the interest so-called of an heir, the uncertainty as to the property also prevents there being in such case any right recognisable by law: see *Re Parsons*, 45 Ch. D. 51. A gift to whomsoever is the eldest surviving son of A is, however, good and confers a contingent right on the first and other sons so soon as born, though not till then.

Austin suggests that a *spes successionis* is a contingent right, but obviously feels the difficulty of the position; for, in dissenting from the proposition that the Legislature should show more care in interfering with vested than with contingent rights, he states that it may freely deal with a *spes successionis*, for, as the present owner may defeat it, why may not the Legislature? and that therefore changes in the law of intestate succession are untrammelled by any fear of interfering with existing rights.

As regards the propriety of the Legislature depriving parties of their rights on grounds of public policy the exercise of such power can only be limited by considerations of the disappointment of expectations founded on the old

law, and in this respect there anpears to be no difference between vested and contingent rights.

Note on the Different Meanings which have been Attached to the Term "Property."

The term "property," used in its widest sense, means legal rights of every description, and this is its meaning in the expression "The Institution of Property."

As opposed to servitudes, it means a right *in rem* conferring indefinite powers of user.

As opposed to possession it means a right availing against everyone.

As opposed to *obligatio* it means a right *in rem.*

Origin of Ownership or Property.

According to Blackstone, property had its original foundation in "occupancy confirmed and strengthened by labour"; a man occupies a piece of land and tills it, therefore he ought to be protected in his possession. But, as Austin points out, this theory rests on ideas that were much later in origin than the commencement of property. In the earliest state of society under the village community system there was no individual ownership of land; the land was held by families and the produce thereof often put into the common stock, and property in movables originates before property in land. According to Lightwood (Nature of Positive Law, Chap. VII) the first right recognised over things was that over movables captured in war which were looked upon as different from land, a commodity everyone had, though he had it only for a time. Plundering an enemy was morally right—plundering a clan was not. Lightwood draws an interesting inference

in support of this theory from the fact that in Roman law the spear was the sign of ownership and that the earliest forms of property at Rome were called *res mancipi*; *i.e.*, *res manu capta*, *i.e.*, captured land belonged to the State.

The right to things captured was a moral right at first and was protected by the law afterwards. Later on, the protection of the law is extended to movables required by industry, and ultimately to land.

This seems a very much more tenable theory than that of Blackstone.

(that of Lightwood)

CHAPTER XI.

RIGHTS IN PERSONAM.

A RIGHT *in personam* is a right availing against a definite person or number of persons, and obliges that person or those persons to do or forbear, and although it may relate to a thing it is not a right over a thing: for instance, if A agrees to buy a certain horse from B, A has no right over the horse until the ownership in it has passed to him; until then he merely has a right that B shall transfer the ownership of the horse to him, and if B disposes of it to someone else, A's only remedy is against B for damages for breach of contract. It is true that in English law if the agreement is unconditional the ownership in the horse passes to A as soon as the agreement is made, but then A has two rights in consequence of the agreement, a right *in rem* over the horse and a right *in personam* that B shall deliver possession of it to him—even in this case English law enables B whilst in possession to defeat A's right over the thing by delivering it to a *bona fide* purchaser for value: Sale of Goods Act, 1893, s. 25.

In respect of their purpose rights *in personam* may require—

(1) The delivery of a specific thing, as in the case given above, or where a judgment is given for delivery of a particular thing.

(2) The delivery of a generic thing, *i.e.*, any one of a particular kind, as where A agrees to buy a pound

of sugar from B, or a judgment orders A to pay money to B.

(3) Some act or forbearance not involving delivery of anything, as where A hires B as his servant or an order is made by the Court that B do something or refrain from doing it, or A contracts to buy B's copyright in which case A is entitled to have a right *in rem* transferred to him.

Rights *in personam* may be legal or equitable, the right of a *cestui que trust* against his trustee being an example of the latter, though the *cestui que trust's* right over any specific trust property is also an equitable right *in rem.*

Rights *in personam* may also be vested or contingent, an option to purchase being an example of the latter, as where A agrees with B that if B wishes to buy something from him, B shall have the first opportunity in preference to others. B has no actual right in respect of the thing until he exercises the option, though some of the facts constituting that right have happened. Another example would be the right of a creditor to recover from a surety on the principal debtor's default.

The most important classification of rights *in personam* is that into—

(1) Primary.

(2) Sanctioning.

This is a distinction depending on the facts giving rise to the rights.

A sanctioning right is one arising *directly* from the breach of another right, such as rights arising from breach of a right *in rem*, or from a breach of contract. A primary right *in personam* does not arise directly from breach of another right though it may arise indirectly from such breach, as, for example, a right arising from a judgment.

Rights *in rem* are all primary.

Primary rights *in personam* arise from—

(1) Contract, express or implied.

(2) Quasi-contract.

(3) A judgment. Inasmuch as rights arising from a judgment do not arise directly from breach of other rights they are not sanctioning but primary.

(4) Status, *e.g.*, the rights of a parent against his child.

Sanctioning rights are all *in personam* and arise directly—

(1) From breaches of rights *in rem*, which breaches are called delicts in Roman law and torts in English law.

(2) From breaches of primary rights *in personam*.

Sanctioning rights should be dealt with in that part of the law allocated to Procedure, and the method of enforcing a judgment should also be treated there, for it is only on refusal to obey a judgment that the law of procedure again comes into play, and the rights flowing from disobedience to a judgment are therefore sanctioning and should be dealt with in the law of procedure. Rights arising from judgments are in English law dealt with in the law of contract, being said to arise from contracts of record; they are primary in nature; but the procedure to be adopted on non-compliance with a judgment is dealt with in the law of procedure under the heading of execution, for rights arising from such breach are sanctioning.

Bentham indicates the distinction between primary and sanctioning rights by the terms "substantive" and "adjective" law, meaning by substantive law the law of rights and duties which are not means for rendering others available, and by adjective the law of rights and duties which are the means of rendering others available. The

objections to this scheme are, *firstly*, that the classification under consideration is one of *rights and duties*, not of *law*, and *secondly*, that there are many primary rights which exist solely for the purpose of rendering others available, such as the rights of trustees, which are primary. The distinction is between the facts giving rise to the rights, not between the purposes for which the rights exist. It may also be pointed out that there is no place for absolute duties under Bentham's scheme since no rights flow from absolute duties or breaches of such duties. The whole matter of classification of legal topics will be dealt with later.

Holland suggests the use of the terms " antecedent " and " remedial " to indicate the classification of rights into primary and sanctioning.

Correality, or Joint Rights and Obligations, and Solidarity, or Joint and Several Rights and Obligations.

It may happen that a right or an obligation may be respectively vested in or incumbent on two or more parties, as where A promises to pay B and C, or where A and B promise to pay C, or where B and C, acting together, injure A.

Now in such cases the right or obligation may be correal, or, in English terminology, joint, or it may be solidary, *i.e.*, in English terminology, joint and several.

A correal or joint right or obligation exists where two or more persons are entitled to the same right or bound by the same obligation, there being only one right or obligation. In contract this depends entirely on the wording of the contract; for instance, where A promises to pay £10 to B and C, or A and B promise jointly to pay C. As

regards tort or delict in English law, if A and B, acting together, assault C, they are jointly liable. There being but one right or obligation in the above cases, anything extinguishing such right or obligation extinguishes the right and liability of all. So a release given by one co-creditor extinguishes the right of the other and a release given to one co-debtor extinguishes the liability of the other; and if an action is brought against one such co-debtor and judgment is obtained, no fresh action can be brought against the other debtor, for the original right and obligation are merged in the judgment and no longer exist, and the judgment can only be enforced against the party against whom it was obtained: see *Kendall* v. *Hamilton* (1879), 4 A. C. 504, for contract, and *Brinsmead* v. *Harrison* (1872), L. R. 7 C. P. 547, for tort.

A solidary or joint and several right or obligation exists where two or more persons are entitled to separate rights or bound by separate obligations but in respect of the same transaction, as where A and B jointly and severally promise to pay C. In a case of a solidary right or obligation only performance releases all, and a release given by one or to one or a judgment for or against one will not prejudice or benefit the rest, for the rights and obligations are distinct.

Primary rights *in personam* arise from :—

(I) Contract, express or implied.

(II) Quasi-contract.

(III) Judgments.

(IV) Status.

It is proposed to treat of each of the above.

(I) Contract.

A contract may be defined as an agreement enforceable at law either by action, such as an agreement for the sale of goods, or by way of defence, such as an agreement not to sue. As will appear later, in English law the essentials

for both kinds of contracts are the same, though this was not so in Roman law.

The two essentials of a contract are:—

Firstly, the agreement.

Secondly, the *vinculum juris* or legal obligation; if the law attaches no legal obligation to the agreement it remains a bare agreement and does not become a contract.

Firstly. As regards the agreement, this is constituted by:—

(1) An offer and acceptance; and

(2) The parties must be agreed on the subject-matter and intend to deal with each other.

Re (1). An offer is a promise by one party to another that the former will do or forbear; *e.g.*, will deliver something, or will not sue the other.

An acceptance is an intimation by a party to whom an offer has been made that he expects that the former will perform his promise.

An agreement may be express or implied: It is express where by word of mouth or by writing the offer is conveyed to the offeree and is accepted by him by word of mouth or writing. It is implied where agreement is inferred from the conduct of the parties, as where a party agrees to buy goods without saying how much he will pay for them, in which case it is implied he agrees to give a reasonable price.

The reason for which the law enforces certain agreements and thus deems them contracts is that it appears just that the expectation founded on the offer should not, if reasonably founded, be disappointed. Hence, in case there is any dispute as to what was meant to be offered the rule laid down by Paley as to the interpretation of contracts is followed, namely, the offer is not taken in the sense in which the offeror actually meant it, as this might disappoint the

reasonable expectations of the offerer, nor is it taken in the sense in which the offeree actually received it, as that might put a greater obligation on the offeror than he ought to be asked to bear; it is taken in the sense in which the offeror apprehended that the offeree received it, or to be quite accurate with the meaning which an ordinarily reasonable man would have put on it.

Agreements may be unilateral as where only one party makes a promise, or bilateral as where both parties promise.

According to Savigny for an agreement there must be "A union of several persons in an accordant expression of will with the object of creating an obligation between them." Apart from the misuse of the term "will," it may be pointed out that it is sufficient if from the parties' words or conduct it can be inferred that there was an offer by one party and an acceptance by the other, because in law people are deemed to intend the natural consequence of their words or conduct.

Holland suggests (Chap. XII, p. 258) that Savigny's dictum is incorrect for the following reason: he says, "If I make a contract not intending to keep it I am still bound." It is suggested that the example is not altogether a satisfactory one since in the case propounded by Holland there is an agreement intended to be made, though one of the parties does not intend to carry it out. Of course, if the parties are under a mistake as to the subject-matter, as where one party is thinking of one thing and the other party of another, there is no agreement; and, similarly, a mistake as to the party with whom you are dealing will prevent any agreement.

Secondly. For an agreement to constitute a contract there must be a legal obligation or *vinculum juris* annexed to it. This will not be annexed unless the rules of law for the validity of contracts are complied with.

Generally speaking the rules require in addition to the agreement or *assensus ad idem*—

(1) Parties capable.

(2) Legality of purpose.

(3) Proper evidence of the terms of the contract.

(4) Intent to make a contract.

(5) In some systems, such as the English and systems founded on it, valuable consideration, or as an alternative a formal document called a deed, *i.e.*, a writing sealed, signed and delivered; in other systems, such as the Roman and those founded on it, what is called *causa*, *i.e.*, something to show that the parties meant to enter into a legally binding agreement.

A contract made by deed is called in English law a specialty contract.

(1) The capacity of parties is a matter to be dealt with under the Law of Persons.

(2) As regards legality of purpose an illegal agreement—often described as an illegal contract, though not being a legally binding agreement it is not a contract—is one which having regard to its purpose the law prohibits. Examples are:—

(*a*) Agreements interfering with the course of justice, such as agreeing not to prosecute for crime, and contracts of maintenance and champerty whereby a party helps another in a law suit in which one has no interest, in the case of champerty, on the terms of sharing the proceeds. These agreements are discouraged since they induce to the making of bogus claims.

(*b*) Interfering with marital or parental rights, such as an agreement by man and wife for future separation—an agreement to give up the control of

children to others—an agreement that the children of a marriage shall be brought up in the mother's religion—an agreement that after the death of a spouse the survivor will marry someone else.

(c) Immoral contracts.

The above agreements are deemed contrary to public policy, but, as a learned Judge once said, "You have this paramount public policy to consider, not lightly to interfere with the freedom of contract."

(3) Illegal agreements—sometimes designated as illegal contracts, which is a contradiction in terms, for not being legally binding they are not contracts—must be distinguished from void agreements which though not protected by law yet are not prohibited by law; examples of void agreements are those in respect of which there has been a mistake as to the subject-matter or the identity of the parties. Some contracts are by English law designated as unenforceable, *i.e.*, unenforceable by action, though if there is any other means of obtaining benefit from them, such as by a set-off or enforcing a lien, the party may avail himself of such means.

In different systems of law various rules exist as to the evidence necessary to prove that a contract has been made, but the following principles relating thereto appear to be of general application.

Some contracts require to be evidenced by a written record of the agreement; the object of the writing is to obviate the difficulty of ascertaining whether an agreement has been made if one party alleges it has been made and the other denies it, or where although it is admitted that an agreement has been made there is a dispute as to its terms, and in English law the general rule is that where an agreement has been reduced to writing the writing is the only evidence of its terms. The Statute of Frauds,

29 Car. 2, c. 5, expressly states (section 1) that certain contracts are required to be in writing in order to prevent perjury.

Other contracts require to be made with some special formality, such as the *Stipulatio* in Roman law and the deed in English law. The *Stipulatio* at Rome was a contract made by question and answer, the promisee saying to the promisor, "Do you promise to give me so much or to do so and so," and the promisor replying, "I do promise." Sir H. Maine suggests that the question diverts the promisor's attention from other matters and gives him pause before he enters into the undertaking, so that he knows what he is doing and can consider whether he is prepared to enter into a legally binding undertaking. It marks the stage at which negotiations have ended and an agreement has been come to.

A deed is a writing, generally in formal language, sealed, signed and delivered by the promisor, and is not binding until actually delivered, *i.e.*, handed over to the promisee or his agent.

In English law certain contracts are void unless by deed, such as a lease for over three years, or at less than the full yearly value, and a contract of service for life; and no gratuitous promise, *i.e.*, one for which the promisee gives no consideration, is valid unless made by deed.

Earnest, *i.e.*, something given to bind the bargain, is sometimes required to show that the parties have finished negotiating and come to terms. Other contracts, if in writing, require to be stamped, the object of this being to obtain revenue for the State. As Austin points out, some solemnities such as "earnest" are merely evidence that a contract has been made, but are not evidence of its terms; other solemnities, such as "writing," are evidence of the contract and of its terms.

(4) Intent to make a contract.

A party is not as a rule legally bound by an agreement unless he has by his words or conduct shown his intent to be so bound; so the offer of a mere voluntary courtesy such as an invite to dinner does not amount to a contract, even though the other party has suffered loss by relying on it. If the parties state that their agreement is meant to be one not enforceable at law but merely an honourable arrangement it will not be a contract: *Rose & Frank Co.* v. *Compton Bros., Ltd.*, 94 L. J. K. B. 120.

(5) In some systems, such as the English one and those derived from it, a promise to be legally binding must be supported by what is called valuable consideration, which must proceed from the promisee.

Consideration means some benefit given by the promisee to the promisor or some disadvantage suffered by the promisee in reliance on the promise or a counter-promise.

When the benefit has been actually conferred or the disadvantage has been actually undergone the consideration is said to be executed, as where A pays B £10 for a horse which B is to deliver, or where A has done work for B for an agreed sum.

If the benefit is still to be conferred or the disadvantage is still to be undergone the consideration is said to be executory and the consideration is a promise. It may be suggested that a mere promise is no disadvantage and therefore not consideration, but as a rule a party who has made a binding promise takes steps to enable himself to perform it.

The history of the evolution of consideration in English law is shortly as follows. Originally there were only three actions on contract—

(1) Debt, for a fixed sum of money due.

(2) Covenant, for breach of an agreement made under seal, *i.e.*, by deed. Deeds need no consideration.

(3) Detinue, to recover specific goods of which the defendant was in unlawful possession, the action being based on a fictitious promise to deliver the goods to the plaintiff.

No other agreements were legally enforceable.

In Tort, *i.e.*, for breach of a right *in rem*, an action for trespass would lie if damage had been *directly* caused by *violence* either to the person or to property.

The Statute In Consimili Casu (13 Edw. 1) authorised the issue of writs to meet the requirements of new cases, based on the analogy of the old writs.

In virtue of this statute, a writ of trespass on the case was issued where the damage flowed indirectly from the violence, or where damage was caused neither by violence nor by deprivation of possession; for instance, A agreed to carry B's horse across a river and negligently let it fall in, whereby it was drowned: 22 Edw. 3. The principle was that he had undertaken to do a thing and had done it badly. This principle was extended in 42 Edw. 3 to cases where a party had been induced to do something by the other party's promise to do something, in which case the latter was liable because of the former's wasted effort. This is an exact analogue to the Roman innominate contract. In Henry VII's reign the principle was extended under the name of assumpsit, meaning "he has undertaken," to cases where a party had promised, though not by deed, to do something and the other party was put in a worse position by doing or promising to do something—which is the modern doctrine of consideration.

Roman law never evolved the doctrine of consideration, nor have those systems founded on the Roman one. In Roman law there was a law of contracts but no law of

contract, *i.e.*, no general principle on which the validity of agreements at law could be ascertained. At Rome "causa civilis" was the essential element for a legally enforceable agreement. *Causa civilis* meant some ground or reason for the agreement. Originally such *causa* was only deemed to exist in four classes of contracts:—

(1) Real contracts, which consisted of an obligation to return something which had been delivered to a party for a certain purpose, the thing, or sometimes its equivalent, being returnable.

(2) Literal contracts, which were constituted by entries in the ledgers which it was the duty of every Roman citizen to keep.

(3) Contracts *verbis*, which were entered into by question and answer and created only a unilateral obligation, *i.e.*, bound one party only. If it was desired to bind the other he had to enter into a stipulation also, and the two promises being distinct, non-performance by one party was no excuse for non-performance by the other.

(4) Consensual contracts created by mere agreement, of which there were only four, *i.e.*, sale, letting and hiring, partnership, and mandate, the last-named being constituted by A giving B an order to do something for him whereby A could make B hand over benefits obtained thereby and was bound to indemnify B against liability incurred in connection therewith, but B was not entitled to remuneration for his efforts.

There was formerly a contract called "nexom," of which practically nothing is known, save that it was entered into by copper and scales in the presence of a libripeas, who held the scales, and witnesses who, in case of dispute, could be called to prove that the formalities

had been observed. It was of limited application, and there is nothing to show that its binding force depended on any doctrine of consideration. It may be well surmised that had the doctrine of consideration ever existed at Rome it would certainly have been extended to all agreements.

It is obvious from the fact that there were originally only the classes of contract mentioned above that Roman law did not originally possess the doctrine of consideration, for had it done so any promise given in return for a benefit would have been enforceable, whereas this was not so. It is true that subsequently other agreements were made enforceable, such as the inanimate contracts enforced on the ground of part performance, of which there were only the following:—

A gives B something that B may give A something or may do something; or

A does something that B may give or do something.

In these cases A must have given or done the thing to entitle him to call on B to perform his part.

There were also four informal promises which were actionable, namely, the so-called Pacta Vestita—*i.e.*, a promise to give—a promise of dowry—a promise to pay a debt due from another—a promise creating a hypothec or mortgage of property. There were also Pacta *Nuda*, which merely afforded a defence, such as an agreement not to sue; no consideration was necessary for this, though by English law such agreement must comply with the rules for the validity of contracts.

The innominate contracts constituted the nearest approach to the doctrine of consideration, but even then the consideration had to be an executed one; a bare promise or what is called executory consideration, had no binding force as consideration in Roman law, except in sale, letting, and partnership.

That the Romans never recognised a true doctrine of consideration is also apparent from the fact that at the latest development of Roman law an informal agreement not to sue and an informal agreement to give was binding, as also was a bare promise to pay money already due from another, whereas such promises are not binding in English law unless there is consideration to support them or they are made by deed.

In the parts of South Africa where Roman-Dutch law prevails, there is to this day no doctrine of consideration—any promise supported by *civilis causa* being binding.

Holmes (The Common Law) suggests that a contract is a " taking of a risk," because a party who is entitled to benefits under a contract knows that he may never get those benefits but may have to put up with damages for non-performance.

It is submitted, however—

Firstly. That a party contracting looks more to performance than breach and enters into the contract in the expectation that it will be performed, though some contracts provide for the amount of damages to be paid on breach.

Secondly. In some cases, a party does not have to be satisfied with damages for breach, since he may often get what is called a decree for specific performance, whereby the Court orders the defendant actually to carry out the contract instead of paying damages for the breach thereof.

(II) Quasi-contract.

A quasi-contract must be distinguished from an implied contract.

An implied contract is a true contract, the obligation being founded on the intention of the parties as implied from their conduct though they have not stated such intention by express declaration: see p. 248.

A quasi-contract is not a true contract, but is an

obligation imposed on a party by law without any regard to an express or implied intention, but because in the circumstances it is just and equitable that such obligation should be imposed. For instance, if A pays B money which he does not owe him, it is just and equitable that B should return it, and in certain circumstances the law puts B under a quasi-contractual obligation to return it. The term is convenient, for the obligation is more akin to contract than to tort, since B did not come by the property unlawfully.

Salmond (p. 490) suggests that the idea of quasi-contract arose in English law—

(1) Because of the traditional classification of personal actions into contract and tort.

(2) Because it was desired to supply a theoretical basis for new forms of obligation, and it was easier to allege that a party had promised than to say he was liable even though he had not promised.

(3) Because in English law it was preferable to sue in contract than in tort, since in the latter the defendant could wage his law, *i.e.*, clear himself and secure a verdict by compurgation, *i.e.*, by calling twelve witnesses to say that the oath he had sworn that he was not liable was clean and unperjured, whereby the suit was decided in his favour mechanically. For this reason, if goods were wrongfully detained a plaintiff would sue in detinue, which was contract, rather than in trespass, which was tort. In contract the case was determined by a jury of witnesses who knew the facts by a method called recognition.

Salmond (p. 490) suggests that a rational system may get rid of the notion of quasi-contract, but does not suggest by what term the obligation may be designated.

It has been suggested that the law should look at the incident as begetting an obligation and the refusal to perform the obligation as a delict.

It may be pointed out, however, that such method of treatment does not state under which head the obligation itself is to be classed, nor by what term it is to be indicated. It may be also pointed out that a delict or tort is a breach of a right *in rem*, whereas a breach of a quasi-contractual obligation is a breach of a right *in personam*.

Austin suggests that the term "quasi-contract" is useless inasmuch as there is no contract.

It is submitted that the term "quasi-contract" is useful and descriptive of the nature of the obligation, which is a contractual obligation as being *in personam*, the term "quasi" sufficiently showing that there has been no actual contract.

(III) Judgments.

Rights *in personam* arising from judgments are primary since they do not directly arise from breaches of other rights, though they do indirectly arise from such breaches.

In English law judgments are classed with contracts and are called contracts of record. In Roman law they have no specific place assigned to them.

In most systems of law the obligation in respect of which a judgment is obtained is extinguished by and merged in it and no fresh action can be brought on the original cause of action.

A breach of an obligation arising from a judgment gives rise to the sanctioning right called execution.

(IV) Rights *in personam* arising from a status are those arising from the relationship of parent and child and guardian and ward, and their nature has already been

sufficiently dealt with under "rights *in rem* over persons": see *ante*, p. 205.

Rights *in personam* may be—

(1) Alienable;

(2) Inalienable.

In the early stages of legal development rights *in personam* were not alienable.

As regards rights *in personam* arising under contract, including judgments, they were not originally alienable either in Roman or English law, being deemed to create a purely personal relationship between the parties.

At Rome such rights first became capable of being transferred by *novatio*, a process by which the debtor, at the creditor's request, promised to pay to the transferee the debt he owed the transferor, which really was not a transfer but the creation of a new contract extinguishing the old one; later on the creditor was able to transfer his right by giving the transferee a direction, called a mandate, to sue the debtor in the name of the creditor; the Prætor was able to effectuate this by granting a special formula called Rutiliana, by which the Judex was directed that if he found that the debtor owed the creditor the money he was to order him to pay it to the transferee, who was the plaintiff. The mandate was not revocable ultimately after the transferee had given the debtor notice of it. Antoninus Pius allowed the transferee to sue by an *actio utilis*, the formula being "If the plaintiff were the original creditor and would then be entitled to the money, order the defendant to pay." In English law the fact that rights *in personam* were not alienable was expressed in the maxim "Choses in action are not assignable." The process of relaxation of this rule was somewhat similar to that at Rome. If there was a written transfer or, *semble*, an oral one, of which notice came to the debtor, the transferee

could sue in equity in the name of the transferor. Now by the Judicature Act, 1925, repealing and re-enacting the Judicature Act, 1873, he can sue in his own name in any Court if there has been a written transfer of which written notice has been given to the debtor. But even now in English law rights of action in tort cannot be transferred, nor can rights under contracts of a personal nature.

Rights *in personam* are not susceptible of possession nor subject to the problems connected therewith.

Notes on Origin of the Terms "In rem" and "In personam."

As Professor Holland points out, the term "*in rem*" was used in Roman law to indicate something operating generally, and the Romans so used it in connection with actions, pacts, exceptions, and interdicts.

The term "*in personam*" was used to indicate something operating against a particular person only. The terms have been applied in modern times to indicate the two kinds of rights.

Other Terminology Suggested.

Other terms have been suggested instead of *in rem* and *in personam* as follows; the objections to the suggested terminology are appended to each :—

(1) *Dominium* and *obligatio.*

Objections.

Dominium is generally opposed to servitude, and then means only one kind of right *in rem*, and the term is never used for a right *in rem* over a person. *Obligatio* means duty, not right, and may be annexed to a right *in rem* or *in personam.*

(2) *Potestas* and *obligatio.*

Objection.

Potestas is only applied to one kind of right *in rem*, *i.e.*, over persons.

(3) *Jus reale* and *jus personale.*

Objection.

The term "*jus reale*" is synonymous with real property, which only applies to certain rights *in rem* in English law.

(4) Absolute and relative rights.

Objection.

All rights are relative, *i.e.*, correlate with some duty; there are no absolute rights.

(5) Law of property and law of contract.

Objection.

It is desired to classify rights, not law, and some rights *in personam* do not arise from contract, and the term "property" in its widest sense includes rights of all kinds.

(6) *Jus in re* and *jus ad rem.*

Objections.

The term "*jus in re*" has already a meaning of its own, *i.e.*, it is synonymous with *jus in re aliena* or a right of definite user over the property of another.

Jus ad rem also means a particular kind of right *in personam*, *i.e.*, a right *in personam* to have a right *in rem* transferred to one; it includes a right to have a specific thing transferred, or a generic thing, or a right *in rem* that has no thing as its subject, *e.g.*, a right to have copyright transferred. It does not include a right *in personam* to personal services.

Perfect and Imperfect Rights.

By a perfect right is meant one clothed with *all* legal remedies, whereas an imperfect right is clothed with some

only of such remedies; for instance, if a debt has become statute barred by lapse of time, the remedy by action is no longer available, but if the creditor has any other method of obtaining his money he may avail himself of it, as, for instance, by setting off money his creditor owes him against the money he owes his creditor and only paying the surplus, and if he has any security for the debt he may avail himself of it by retaining such security. It does not appear quite accurate to state, as some writers do (Salmond, for instance), that in such cases there is a legal right without a remedy. It is merely a case of a legal right without a remedy by action.

Rights alleged to exist against the Crown are sometimes included under the category of imperfect rights. Reasons for holding that these are not rights at all have been already given: p. 198.

Duties at Rest and in Motion.

A distinction is made by Holland (Chap. IX, p. 147) between rights at rest and in motion, and the distinction is convenient as a basis on which to complete the treatment of duties.

A right at rest means one considered with reference to its orbit and infringement, and a right in motion is one considered with reference to its origin, transfer, and extinction; in other words, it deals with titles to rights. The classification, however, leaves no place for the treatment of absolute duties; it is therefore proposed to substitute the term "duty" for "right" and to deal with duties at rest and then duties in motion. Duties at rest have been dealt with except as regards their breach, of which it is now proposed to treat.

CHAPTER XII.

OF GUILT OR LIABILITY FOR INFRINGEMENT OF LEGAL DUTIES.

In dealing with guilt one must observe the distinction between crimes and civil injuries, the breach of an absolute duty being generally a crime, and the breach of a relative duty being a civil injury: see p. 185. Civil injuries may be either breaches of rights *in rem*, which are called Torts in English law and Delicts in Roman law; or they may be breaches of primary rights *in personam*, which are generally breaches of contract, the term "contract" including judgments; breaches of those rights *in personam* which result from status have no identifying name.

Whether the duty infringed be absolute or relative, to put a party in the predicament of guilt there must as a rule be (*a*) some act, forbearance or omission referable as to (*b*) the party's state of mind as cause. The state of mind may be either intention, malice, negligence, heedlessness, or rashness.

It may be well to remind the reader that intention is "foreknowledge coupled with desire" (Salmond, p. 335); negligence means the omission to do an act through not adverting to the duty of doing it, a forbearance being intentional, not negligent; heedlessness is the doing of something through not adverting to the consequences; and rashness the doing of something where the party adverts to the consequences but hopes that they will not follow.

In intent the party adverts to the consequences and hopes they will follow.

In English law negligence, heedlessness and rashness are treated as negligence and are not differentiated; nevertheless they are different states of mind. Intent may be of various kinds, *e.g.*, intent to defraud, intent to injure, intent to deceive.

Negligence is of three degrees:—

(1) Gross. In so far as this has any meaning at all it appears to mean the lack of the care a man shows in his own affairs; the *culpa levis in concreto* of Roman law.

(2) Ordinary, or the lack of the care shown by the ordinarily prudent man; the *culpa lata* of Roman law. If a party represents that he has any special skill, such, for instance, as a medical man, he must use the care usually shown by persons of that class, " Spondes peritiam artis." If he actually has such skill and does not use it he is guilty of gross negligence.

(3) Slight, or the lack of the care shown by the most careful man; the *culpa levis in abstracto* of Roman law, the lack of the care of the *bonus paterfamilias*.

It is frequently said that a person has acted negligently, which appears inconsistent with the definition of negligence; the phrase merely means that the party has acted heedlessly or rashly or has done something and omitted to protect people from being injured thereby, the negligence being in respect of the omission.

So we find that the state of mind essential for guilt in most cases is either intent, malice, negligence, heedlessness, or rashness.

CRIMINAL LIABILITY.

The general principle underlying criminal liability is summed up in the maxim "Actus non facit reum nisi mens rea sit," *i.e.*, conduct does not make a party criminally liable unless his mind is criminal. *Mens rea* may be defined as "the mental element necessary to constitute criminal liability." *Mens rea* may be criminal intention, malice, negligence, heedlessness, or rashness.

Criminal intention means an intent to do an act whose natural and probable ultimate consequences are criminal, whether the party intended those ultimate consequences or knew they were criminal or not. If it be proved that the party did certain acts and that the natural and probable consequences of them are criminal, the party is presumed to have intended those consequences and he cannot be heard to say that he did not intend them, though extrinsic evidence may be given to show that he could not have intended them, *i.e.*, proof of lunacy, accident, and other similar excuses from liability. Everyone is presumed to know the law, so it is not necessary that the party should know that the consequences of his conduct constitute a crime.

Malice means an actual intent to produce the ultimate criminal consequences of one's act, and has to be proved in certain cases in English law, *e.g.*, in arson it must be proved that the party meant to set fire to the building, in malicious wounding it must be proved that the party meant to wound; so if A throws a lighted lamp at B and thereby sets the house on fire he will not be guilty of arson as his intent was to injure B, not to set fire to the house.

Malice in English law has two other meanings: (1) for the purpose of rebutting a defence of qualified privilege

in defamation it means ill-will or other improper motive. Qualified privilege is a defence that the words were uttered under a moral or legal duty, or by a party having an interest in the matter to which the words relate, to another party having a corresponding interest. (2) In the phrase "malitia supplet ætatem" it means that the party knew he was doing wrong. The phrase itself applies to cases in which a crime is committed by an infant above seven years of age but under fourteen; in such cases he is presumed free from criminal intention, but the presumption may be rebutted by proof that he possessed such intention.

In some cases intent to defraud must be proved, as in the crime of obtaining goods by false pretences with intent to defraud.

As regards negligence, heedlessness or rashness, in English law it must as a rule be gross in order to subject a party to criminal liability.

As already stated, there must be both "*actus*" and "*mens rea*" in order to constitute criminal liability, but to this rule there are the following exceptions:—

(A) No mental element is necessary in the following cases:—

(1) For non-repair of a highway a party is criminally liable in English law even though he had not the means to enable him to repair it, unless he is an infant, when he is not liable even though he had means, because he has not control of them.

(2) Certain things are absolutely prohibited by law, e.g., in England the possession of a colorado beetle by anyone, the possession by a beer retailer of liquorice, and there are some few other instances.

(3) In English law a master is, in a few cases, criminally liable for the acts of his servants, for instance, the

proprietor of licensed premises is liable for breaches of the licensing laws by his servants, the law acting on the principle that the only effective way to prohibit such things is to ensure that the proprietor will provide adequate supervision. The cases in which a master is criminally liable for the acts of his servants are exceptional and are limited to cases in which the master would himself be liable if he committed them even without any *mens rea.*

(B) The mere intention apart from anything done renders a party liable in English law in the following three cases only :—

(1) In compassing the King's death, which means merely forming an intent to kill him even though one has taken no steps towards carrying out such intent; but inasmuch as the thought of man is not triable, for as Bryan, C.J., said in an old case, "the thought of man is not triable for the devil himself knoweth not the thought of man," the law requires the intention to be manifested by some overt act. An overt act is something said or done evidencing the unlawful intent, but it need not in any way help to carry out the intent; so telling a crowd of people that one is going to kill the king would be an overt act of compassing.

(2) In English law a person who has been once convicted may, if found in circumstances giving rise to a suspicion that he is about to commit a felony, be arrested and charged with being so found.

(3) In case of conspiracy there is a criminal liability even though the parties have done nothing beyond conspiring.

Attempts.

In cases where a party has not achieved the result he desired he may be liable for an attempt if such result would have been a crime.

An attempt may be defined as "some act or acts committed with a view to producing a result which is not in fact produced, which acts would be legally capable, if uninterrupted, of producing such results, and are such as themselves evidence the intention of the party doing them."

Where such results would be a crime the attempt is generally a crime and the punishment varies according to the gravity of the crime intended to be committed.

There are two matters worthy of note in respect of attempts:—

(1) The acts must be legally capable, if uninterrupted, of producing the desired result; the fact that in the particular circumstances of the case the crime could not actually have been committed is immaterial. So though in English law one cannot be guilty of attempting to steal a house, since a house is not legally subject to larceny, yet one may be guilty of attempting to pick a pocket although there was nothing in the pocket at the time.

(2) The acts must of themselves be such as to evidence an unlawful intent. So buying poison to put into X's coffee is not an attempt since it might have been bought for a lawful purpose, *e.g.*, to poison rats; but putting the poison in X's coffee is an attempt, since it can only have been put there for one purpose.

Attempts, of course, are overt acts, but overt acts are not always attempts; since an overt act need not have been

capable of producing the desired result, it is sufficient if it evidences unlawful intent. An overt act is never made the subject of a substantive charge: it is only evidence of the intent and the party is punished in respect of his intent. So in case of compassing the King's death the overt act is evidence of the compassing and the party is punished for what he intended to do, *i.e.*, by sentence of death; whereas in case of attempted murder the party is only punished for the attempt, not for the murder.

It has been said that there cannot be a *culpose* attempt; the dictum is a truism, for as *culpa* means unintentional, of course it is obvious that there cannot be an unintentional attempt.

Finally, in the English system of law there is no civil liability incurred in respect of an attempt unless damage is caused thereby.

Civil Liability.

To incur civil liability there must of course be a breach of a relative duty, a statement which, looked at from the point of view of the correlating right, is summed up in the maxim: "Damnum sine injuria is not actionable." So whatever harm one has inflicted on another there is no liability if there has been no infringement of any legal right of such other. So in *Chasemore* v. *Richards*, 7 H. L. C. 349, the Croydon local authority were held not liable where, by taking percolating water for their waterworks, they had caused material diminution in the flow of the plaintiff's mill stream, for he had no right to the percolating water which fed the stream until it reached the stream, and the local authority were at liberty to prevent it reaching the said stream.

On the other hand, if there is *injuria*—*i.e.*, infringement of a legal right—there is no need to show damage resulting

therefrom; so in *Ashby* v. *White*, 2 Ld. Raym. 938, where a returning officer maliciously refused to take the plaintiff's vote, it was held the plaintiff was entitled to damages, although the party for whom he was going to vote was nevertheless elected.

In respect of civil liability a distinction must be drawn between liability for breach of contract and liability for tort or breach of a right *in rem*.

The mental element never has any bearing on liability for breach of contract; what a party has contracted to do he must do, or pay damages in default, irrespective of whether the default was intentional or the result of negligence or even caused by a change of circumstances rendering performance impossible. If a party desires to be excused from performance on any particular grounds, provision must be made therefor in the contract: *Thornborow* v. *Whitacre*, 2 Ld. Raym. 1164.

The only exceptions in English law are:—

(1) Where performance of the contract is subsequently rendered illegal, as, for instance, where by the outbreak of war the contract becomes one with an alien enemy: *Ertel Bieber & Co.* v. *Rio Tinto Co.*, [1918] A. C. 260.

(2) If the contract is one for personal service and performance is rendered impossible by illness or death: *Robinson* v. *Davison*, L. R. 6 Ex. 269.

(3) Where the existence of a certain state of things is the basis on which the contract is made and that state of things never comes into existence or ceases to exist without either party's fault: *Taylor* v. *Caldwell*, 3 B. & S. 826; *Krell* v. *Henry*, [1903] 2 K. B. 740.

As regards torts, there is no liability unless there is some act or neglect of the party causing the infringement

of a legal right, but, on the other hand, it need not, as a rule, be shown that the party intended to infringe another's right, or even that he knew of the existence of such right. For instance, if A walked onto B's land thinking it was his own he would be liable for trespass.

Again, it is not necessary in tort that a party should actually intend the consequences of his acts; if they are the direct consequences he is presumed to intend them and is liable accordingly. So in *Scott* v. *Shepherd*, 2 W. Bl. 892, where A threw a lighted squib into the market house when it was crowded and it fell on B's stall, who, to protect himself, threw it onto C's stall, who similarly passed it on, and it then exploded and injured X, A was held liable to X.

As regards torts arising from negligence, there must, of course, be a duty to take care before there can be any question of neglect of such duty. Everyone must show the care which an ordinarily prudent man would show, and is liable for any damage caused by failure to show such care.

In many cases, however, a party is liable unless he shows the utmost care. For instance, if I have brought or caused to be on my premises a dangerous thing or animal and damage results to a third party therefrom, I am liable unless I can show that no amount of care could have prevented it. So if I keep lions and they get out because the cage is not strong enough I am liable; and, similarly, if I store up water in a reservoir and the reservoir bursts I am liable for damage resulting therefrom. The only defence in such cases is act of God or *vis major*, the latter being applicable, for instance, if a mob broke in and let the lions out or damaged the reservoir.

The above cases are said to fall under the maxim "Res ipsa loquitur," because whereas in an ordinary case of negligence the onus is on the plaintiff to prove negligence,

in these cases it is on the defendant to rebut the presumption of negligence, but, as Mr. Justice Darling once said, for "res ipsa loquitur" to apply the facts must speak with no uncertain voice and in a language to be understanded by the Court. In some cases of tort actual damage is necessary to constitute liability; for instance, in English law, I may dig in my land so long as I do not thereby cause my neighbour's land to subside; I may, with a few exceptions, make oral defamatory statements about my fellow-citizens so long as I do not thereby cause them material, as apart from moral, damage. I may engage in a conspiracy to injure them without incurring liability unless actual damage flows therefrom, although I may be criminally liable without such damage.

In some cases in English law malice is necessary to render the party liable in tort, as in malicious prosecution and conspiracy.

A mere intent to commit a tort is not, strictly speaking, a breach of any right, though preventive measures may be taken and an injunction obtained to prevent the party carrying out the unlawful purpose.

Attempts to commit torts are not actionable if no damage results therefrom, though criminal liability may result: see pp. 264—5.

In some cases a party is liable in tort although the tort is not attributable to any act or neglect of his. Under this head we get liability for acts and neglects of one's servants.

The principle on which such liability rests is that, having employed the servant to do the work, the person who is going to reap the benefit thereof should be responsible for the way in which the servant does it; accordingly the master is not responsible for the defaults of the servant unless they occurred while he was engaged on the master's

work. It has been suggested that negligence in employing careless servants is the ground on which such liability rests, but it may be pointed out that the greatest care in choosing one's servant will not relieve a party from liability for such servant's negligence.

Note on Presumptions.

In discussing the principles underlying liability there has been frequent occasion to refer to presumptions. A presumption strictly so called, *i.e.*, *a presumptio juris*, or of law, is an inference drawn by the law from the circumstances of a case, which inference stands until the party against whom it is drawn rebuts it. So in English law if A has in his custody a dangerous animal and it escapes and does damage there is a presumption it was A's fault, and unless A proves that its escape was due to accident or act of God he is liable, whereas in ordinary actions for damages for negligence the plaintiff must prove that the defendant has been guilty of negligence. From the above remarks it will be obvious that presumptions shift the burden of proof, as wherever there is a presumption against a party the burden of rebutting such presumption lies on such party. The presumptions dealt with above are commonly called presumptions of law or *presumptiones juris*. There are supposed to be two other kinds of presumptions.

(1) *Presumptiones hominis* or *facti*. These are presumptions on which the Court may act, though it is not bound to do so. They are what is called sufficient evidence. For instance, in an action for negligence where "*res ipsa loquitur*" does not apply, the plaintiff must give such evidence as will raise a "*presumptio hominis*" of negligence against the defendant: in default the plaintiff will be non-suited; but even if the plaintiff does give such

evidence the Court is not bound to act on it and may find for the defendant even if the defendant does not give rebutting evidence; whereas in cases where "*res ipsa loquitur*" applies there is a *presumptio juris* against the defendant, and the Court is bound to find for the plaintiff unless the defendant rebuts the presumption against him.

(2) *Presumptiones juris et de jure.* These are irrebuttable and are therefore not presumptions at all but rules of law. For instance, there is an irrebuttable presumption in English law that a child under seven years of age has no criminal intention, and no evidence can be given to prove he had such intention, and he is immune from criminal liability.

CHAPTER XIII.

EXCUSES FROM LIABILITY FOR BREACH OF DUTIES.

In certain cases, although all the elements necessary to constitute liability are existent, the party is immune on certain grounds with which it is now proposed to deal.

(I) Excuses founded on considerations of public policy. Foreign sovereigns are in most systems of law immune from civil and criminal liability, and the same applies to foreign ambassadors while in the country to which they are accredited. The only remedy in such cases is to require such parties to quit the realm. The immunity accorded to a sovereign in his own State varies in different countries; the position of the English sovereign has already been dealt with (p. 197). An official is free from liability for anything he does which amounts to an act of State, *i.e.*, things he does within the scope of his official duties as ordered by his sovereign or where the sovereign ratifies them: *Buron* v. *Denman*, 2 Ex. 167. In English law such defence cannot be pleaded by a British official against a British subject: *Entick* v. *Carrington*, 19 S. T. 1030.

(II) Cases in which the law thinks that there could have been no mental element, or is prepared to act on the assumption that the party was ignorant of the law.

The following cases fall under this head:—

(*a*) *Lunacy*. As regards criminal liability in English law insanity is a defence if the accused was so insane when he committed the crime that either he did not know what

he was doing or, if he did know, did not know it was wrong: *M'Naughten's Case*, 10 Cl. & Fin. 200. A party suffering from delusions is to be regarded in the same position as though the facts as to which he was under a delusion actually existed. So if A is under a delusion that B is about to attack him and therefore kills B, A is free from liability, for he is treated as having acted in self-defence; but if A's delusion is that B has libelled him and he kills B he is guilty of murder, since even if B had libelled him it would not justify killing B: *M'Naughten's Case*. Irresistible impulse is, however, no defence if there is full possession of reasoning powers: *R.* v. *Haynes*, 1 F. & F. 666.

In English law a party is not entitled to be acquitted on the ground of insanity; the verdict, if the jury think he is guilty, will be: "Guilty, but so insane as not to be responsible for the consequences of his acts." This is quite an illogical verdict.

As regards civil liability in English law contracts made with lunatics are generally voidable by the lunatic unless made in a lucid interval, or for necessaries, or the other party did not know of the insanity.

As regards torts there appears no authority as to the liability of lunatics in such cases, but it appears reasonable to apply the principles which determine the criminal liability of such persons.

(*b*) *Infancy*. In English law infancy continues until the party attains twenty-one. As regards criminal liability in English law, up to seven years of age infants are irrebuttably presumed to be free from criminal intention; from seven to fourteen there is a *presumptio juris* that they have no criminal intention, rebuttable by evidence that they had such intent, as in the case of a boy of ten who killed a companion and buried the body.

From fourteen to twenty-one a party is liable for all crimes except non-repair of a highway and omissions to do other acts for the performance of which acts the control of property is necessary. As regards civil liability an infant is not as a rule liable for contracts except contracts for necessaries and other contracts which are clearly for his benefit.

An infant is liable for tort, though there is no authority as to the age at which he becomes so liable—probably as soon as he has sufficient intelligence to know whether he is doing right or wrong.

In Roman law full age was not attained until twenty-five. Males up to fourteen had tutors without whose authority they could not bind themselves; from fourteen to twenty-five they had curators, and any transaction entered into without the curator's consent could be set aside if unfair.

Women were originally in tutelage all their lives, though by the reign of Justinian they had been placed in the same position as men in this respect.

It may be mentioned that Blackstone gives the following reason for the immunity of lunatics and infants: "Wrong is the effect of a wicked will and in infants and madmen the act goes not with the will." As Austin points out, and as will be apparent from what has already been said about the will, an act must be preceded by the action of the will. Probably Blackstone used the word "will" as synonymous with intention.

(c) *Drunkenness.* In English law voluntary drunkenness is no defence to a criminal charge except in cases where some particular intent is necessary to found liability. So it would be no defence to a charge of assault, but might be if the charge were assault with intent to rob, as drunkenness would probably negative any *particular* intent:

R. v. *Thomas*, 7 C. & P. 817. Involuntary drunkenness, as where a man is drugged, is a defence: 1 Hale P. C. 32.

Contracts made with drunkards are voidable by the drunkard unless they are for necessaries or the other party was unaware of the drunkenness. As regards tort there is no authority.

In Roman law drunkenness *was* an excuse unless the party got drunk with a view to get the necessary courage to enable him to commit the crime.

The English doctrine seems sounder than the Roman one, since everyone knows that in a state of intoxication he has to an extent put it out of his power to control his actions.

(*d*) *Sudden anger*. This is no excuse from criminal liability in English law, though, like drunkenness, it may negative the existence of any particular intention and thus reduce the gravity of the crime. For instance, if A, being drunk or moved by sudden anger, kills B he will probably only be liable for manslaughter,. there being no sufficient evidence of the malice necessary to constitute murder.

In tort sudden anger is no defence; in contract it obviously plays no part.

(*e*) *Mistake*. This may be (1) mistake of law, or (2) mistake of fact.

(1) As a rule, mistake of law is no excuse: " ignorantia juris haud excusat." Even aliens, when here, are bound by our criminal law. The reason for the rule is that were such ground of exemption to be allowed at all it would nearly always be pleaded, and, where pleaded, the Court would have to inquire whether the party did know the law and, therefore, what opportunities he had had of learning the law and whether he had taken due advantage of them. Blackstone's reason, " that everyone is bound

to know the law," is, of course, merely a restatement of the rule.

The reason given by the Pandects, "Jus finitum possit esse et debeat, interpretatio facti prudentissimos fallat," is so far from representing the actual state of facts in any country that it is useless as a basis for the rule.

There are certain exceptions to the rule that ignorance of law is no excuse. In English law such ignorance may negative particular criminal intention; so if a poacher sets wires for game which are taken by a gamekeeper under the authority of an Act of Parliament, of the existence of which the poacher is ignorant, and the poacher forcibly takes them from the gamekeeper, his ignorance of the Act is relevant to show that he had no criminal intention (*R.* v. *Hale*, 3 C. & P. 409), for "if a person takes what he believes to be his own it is impossible to say he is guilty of felony": Coleridge, C.J., in *R.* v. *Reed*, Car. & Mar. 308.

In tort mistake of law is no excuse except as negativing the existence of malice where malice is essential to liability.

The chief cases in which ignorance of law plays a part in English civil law as apart from criminal law are cases where it is sought to recover property which has been transferred under such mistake. As a rule the property is not recoverable, but the following exceptions exist:—

(i) If transferred under mistake of foreign law.

(ii) If transferred to a party who stands in a fiduciary relationship to the transferor, *i.e.*, is his trustee, parent or guardian.

(iii) If transferred to an officer of the Court, as in *Re Rhoades*, [1899] 2 Q. B. 347, where, an executrix having paid over moneys of the estate to an official receiver without deducting a debt due to her from the estate, it was held she could recover the

amount of such debt in priority to other creditors of the estate.

In Roman law ignorance of law was no excuse, so money paid under such mistake could not be recovered except by the following persons: *i.e.*, women, soldiers, and persons under twenty-five years of age, and even they could not plead ignorance of the Jus Gentium.

(2) Mistake of fact is a defence to criminal liability, provided the party's intent was lawful. For instance, if A, intending to kill B, kills C in mistake for B, he has no defence; but if A shoots his servant in mistake for a burglar A will be guiltless.

In respect of liability in tort such mistake is no excuse, and if A goes onto B's land thinking it is his own he will be liable for trespass.

As regards contract, a mistake as to the party with whom one is contracting, as where one in the gloaming promises marriage to the wrong sister, prevents any contract coming into existence; and, similarly, a mistake as to the subject-matter of a contract prevents any contract being formed, as where A agrees to buy from B a ship named *Ajax* and B has two ships of that name and is thinking of a different one from A.

A mistake as to the quality of the subject-matter of the contract is no defence unless one party knows that the other thinks he is being offered something different from that which he is actually being offered. For instance, A agrees to sell B a watch which A says is brass and B says is gold. Here B has no remedy if it is really brass, but if A sold it to B as a gold watch B would have a remedy.

(*f*) *Accident*. Accident means some event happening from natural causes directly and exclusively without human intervention and which could not have been prevented by any amount of foresight or care reasonably to have been

expected. It is sometimes called act of God: *Nugent* v. *Smith*, 1 C. P. D. 423. Strictly speaking, it is not an excuse from liability, but shows that no liability ever existed, since there is no act or omission referable to any mental action.

There is, as a rule, no criminal liability in such cases, provided that if an accident supervenes on something done by a party the act done was a lawful act done in a proper manner; so if I dig a hole unlawfully in the highway and someone slips up on a piece of orange peel and falls into it and breaks his neck, I shall be guilty of manslaughter.

In tort, accident would be a defence to the same extent as in criminal law.

In contract, accident preventing performance is no defence unless provided for by the contract, for if one undertakes absolutely to do a thing he only has himself to blame for the extent of his undertaking.

(g) *Physical compulsion.* This is always a defence to criminal liability and liability in tort, since there can be no act, neglect, or default in such case.

As regards liability in contract, the same considerations apply as in the case of accident.

(h) *Impossibility of performance.* This is no defence to liability for breach of contract except in the cases stated on p. 266. It should be an excuse for non-performance of an absolute duty, though in English law it will not excuse from liability for non-repair of a highway, even though the non-repair arises from lack of means.

(III) Where the inducement to commit a breach of duty is such that no one could be expected to resist it.

Under this head we get "duress," which may be defined as force or threats used to induce a party to act or forbear. Unlike physical compulsion, the party in this case acts or forbears.

In criminal law duress is no defence as a rule, since one must not purchase one's own safety at the expense of another's. So if A points a pistol at B and threatens to kill him unless he will kill C, if B kills C he will be guilty of murder; B should attempt to disarm A.

There are two cases in English criminal law where duress or presumed duress is a defence:—

(1) A wife might formerly be acquitted of crimes committed in the presence of her husband, other than treason, murder, manslaughter, and offences connected with the management of the house, on the presumption that she committed them under his coercion, though the jury were not bound to acquit her if it were shown that she was acting independently.

The historical reason for this rule of law, as existing before 1926, was that when it originated, men, if they could read aloud verse 1 of Psalm 51, could plead benefit of clergy and thus escape, whereas women could not; and it was thought unfair that the woman should suffer alone. Such defence is known as the defence of coverture.

The law now is that if she commits a crime other than treason or murder in the presence of her husband she is entitled to be acquitted if she proves she committed it under his coercion: Criminal Justice Administration Act, 1925.

(2) If a person is induced to fight against his country by a continued threat of imminent death he is free from liability, but he must take the first opportunity to escape.

There is no authority as to the effect of duress on liability in tort, but contracts entered into in such circumstances are voidable at the instance of the party to whom such duress is applied.

(IV) Conduct of the party whose right has been infringed.

In some few instances the conduct, not necessarily misconduct, of the party with respect to whom a duty has been infringed, will afford a defence to a proceeding against the party who has infringed such duty; the cases fall under the following heads:—

(*a*) *Self-defence.* Where a person is attacked he may defend himself by all reasonable means and is free from liability, both criminal and civil, in respect of any harm he inflicts on the aggressor. But the force and means he uses must not be more than are reasonably necessary.

(*b*) *Consent.* Where a person has voluntarily and without mistake or fraudulent inducement given previously consented to the infringement of any duty owed either to him or in respect of him, the party infringing such duty is free from liability. The only limit on the doctrine is that in respect of criminal liability the infringement must not be such as to be also injurious to the community at large, and therefore in English law a party cannot consent to the infliction of personal injury to such an extent as to unfit him for public service, such as service in the military forces, and thereby give the wrongdoer immunity from criminal liability. Of course, in cases of necessity, such as surgical operations requisite to cure ailments, there is no such limit, and if the party is in such a condition as to be unable to signify his desire, consent may be given by his parent or guardian or other person having the care of him.

As regards criminal liability, a party can only by consent give immunity in respect of breach of duties the immediate object of which is the welfare of the party giving the consent, or of some person for whom he acts; for instance, consent given by A to an assault committed on B would afford no immunity unless A were B's parent or guardian entitled to give consent on behalf of B.

(*c*) *Release.* Where a party whose right has been

infringed releases the wrongdoer from liability in respect of such breach in a manner binding in law, the wrongdoer is free from such liability.

In English law such release must be by deed, *i.e.*, in writing sealed, or must be based on valuable consideration.

In Roman law it had to be originally by a method appropriate to that by which the obligation was incurred.

Of course, no one except the sovereign can release a party from liability for breach of an absolute duty, *i.e.*, from a criminal liability; such release is called a Pardon.

(*d*) *Accord and satisfaction.* This means an agreement after breach that an obligation shall be performed in a way other than the way originally provided, followed by performance of such substituted obligation. In English law such an agreement will, of course, be no defence to proceedings to remedy non-compliance with an absolute duty, but there appears to be no restriction as regards such agreements in respect of breaches of relative duties.

A bare agreement not to sue is of no effect in English law; such agreement must amount to a contract, *i.e.*, be by deed or be supported by valuable consideration. In Roman law a bare agreement not to sue, "pactum de non petendo," although not extinguishing the original obligation, was a valid defence to any action brought on such original obligation.

(*e*) *Misrepresentation.* Material misrepresentation, whether innocent or fraudulent, *i.e.*, made knowingly or recklessly, whereby a party is induced to enter into a *contract*, is a defence to any action on the contract brought by the party making such misrepresentation.

In Roman law recklessness was equivalent to fraud. "Culpa lata dolo equiparatur."

(*f*) *Contributory negligence.* This arises in cases of injury by negligence and means negligence on the part of

the person injured which contributes to the injury. Such contributory negligence is a defence to an action by the injured party if it was the proximate cause of the injury, *i.e.*, the real cause of it and not otherwise. So if A lies drunk in the road and B, driving furiously, sees him, but cannot stop in time and runs over him, A's contributory negligence is no defence to an action against B, since one may not take advantage of another's negligence to cast care to the winds and then claim immunity. If, on the other hand, B had been driving at a reasonable pace, then he would not have been liable as he would not have been guilty of any negligence. Moreover, if A's negligence puts B in such a position that unless he shows extraordinary skill he cannot avoid injuring A and he loses his head and fails to show such care and injures A, A has no remedy, for he cannot require others to show more than ordinary care towards him.

Contributory negligence on the part of a person injured is never in English law a defence in criminal law.

Contributory negligence has no bearing on the law of contract, though in English law a party who has an equitable estate in property may be deprived of it in favour of a subsequent transferee of an equitable interest in it without notice if the negligence of the former has contributed to the state of affairs.

(g) *Breach of duty by the other party.* In some cases a breach of duty by one party excuses a breach by the other.

This apparently only applies in case of contract where a breach of an essential part or of a condition precedent by one party will excuse the other party from performing his part of the contract.

In cases other than contract a breach by one party may minimise the gravity of a breach by the other; so if

A provokes B and B kills A, B will only be guilty of manslaughter, not of murder.

(*h*) *Duress.* This has been explained already. It only remains to point out that if A induces B by duress to contract with him B may avoid the contract.

(*j*) *Delay in taking steps to enforce the rights arising from breach.* In English law this is described as the operation of Statutes of Limitation, which limit the time within which an action must be brought. The policy of the law is to discourage stale demands as the evidence becomes less reliable. A party whose remedy by action has been thus extinguished is said to have an imperfect right: see p. 194.

Where such delay merely bars the remedy without extinguishing the right its operation is described as imperfect negative prescription (see p. 194); if it also extinguishes the right it is called perfect negative prescription (see p. 292).

(V) Misconduct of a party other than the one to or in respect of whom the duty is owed.

As a rule the fraud or duress of a third party is no excuse; the exception is that where a person is compelled by a continued threat of imminent death to fight against his country he is free from liability.

(VI) Illegality. The illegality of a contract is always an excuse from liability thereon, and where performance becomes illegal by a subsequent change of the law of the place of performance, the party is excused from performance.

CHAPTER XIV.

TITLES.

Duties and rights arise at some time or other and may be put an end to in various events, and are capable of being transferred from one party to another.

The fact or event from which any of the above results may flow may be :—

(1) An act of the sovereign relating to a particular individual or particular individuals; or

(2) Some other event which may operate in respect of anyone under some general rule of law.

As an example of (1), we may instance :—

An Act of Parliament conferring an estate on a party as a reward for public service;

An Act of Indemnity giving a certain person or persons immunity from liability for certain unlawful acts;

An Act of Attainder rendering a certain person or certain persons liable for conduct which was not previously unlawful.

As an example of (2), we may instance all the other various methods of creating, transferring, or extinguishing rights and duties : *e.g.*, Contract, Will, Intestate Succession, Invention.

Now it is obvious that, as the above two methods differ in the nature of their operation, it is convenient to indicate the difference by a distinctive terminology, and it is suggested that the first might be indicated by the term "immediate act of law" and the second by the word "title." The term "act of law" by itself is not quite

free from obscurity, since all legal rights and duties arise and are transferred or extinguished by the operation of law; the term "immediate" indicates the particular operation of law which is meant. The term "operation of law," which is sometimes used as synonymous with "act of law," is often applied to the operation of a general rule of law whereby certain rights and their correlating duties arise without any express act or provision of the parties. Such rights and duties are said to arise "*ipso jure*." For instance, if A, having absolute ownership in land, grants a life estate to B, A has the rest of the fee simple, which is called a reversion; and, inasmuch as A has made no express provision in respect of its vesting in him, it is said to arise "*ipso jure*." Similarly, as formerly an inheritance vested in the heir without any express mention, he was said to take it by "operation of law," or "*ipso jure*." Again, certain terms of a contract are said to arise "*ipso jure*" or to be "*publici juris*." For instance, in English law a person hiring a servant is bound by English law to compensate him for injuries arising out of and in the course of the employment, and also to pay part of his National Insurance contributions, and these obligations cannot be evaded by any express terms of the contract, for, in the words of the Roman law maxim, "Privatis pactis a jure publico derogari non potest."

In Rome the term equivalent to "*ipso jure*" was "*ex lege*," but in Roman law the term referred sometimes to a particular statute vesting a right, such as the Lex Pappia Poppæa, vesting lapsed legacies in co-legatees; or the Senatusconsultum Claudianum, making a free woman the slave of another in certain circumstances; sometimes it meant a title for which no particular name had been adopted. So Ulpian says, "Singulorum rerum dominium nobis adquiritur mancipatione, traditione . . . lege."

Where rights or duties arise by immediate act of law they are commonly called "privilegia," being anomalous rights or duties conferred by law on a specifically determined person as being that person and not as being a member of a class. They may be Favourable *privilegia*, consisting of rights, or Odious, consisting of duties; but, as Austin points out, a *privilegium* may arise through a title, as where it is given to a party contingently on his attaining twenty-one.

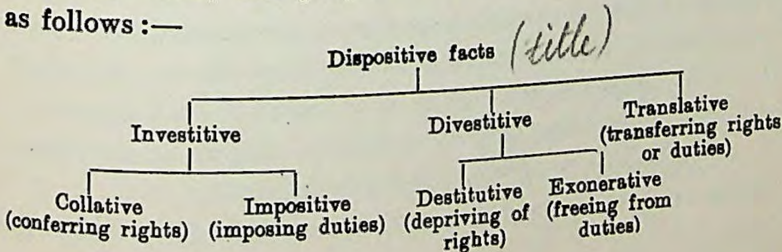
The Roman lawyers used the term "*titulus*" to indicate a particular part of a particular kind of title, and observed the distinction in two cases only:—

(1) Where a thing was transferred from one party to another in pursuance of a contract, they applied the term "*titulus*" to the contract and "*modus acquirendi*" to the actual method of transfer.

(2) Where a thing was acquired by usucapion the term "*titulus*" ("*justus titulus*") meant the method by which the thing was defectively transferred in the first instance; the usucapion which made the title of the transferee perfect was called the *modus adquirendi*.

Subject to the above, the Roman *modus adquirendi* was equivalent to title, but was limited to the acquisition of rights *in rem*.

Bentham proposed to substitute the term "dispositive fact" for title, but proposed to classify dispositive facts as follows:—



This, of course, is cumbersome, and the words "Investitive" and "Divestitive" hardly seem necessary. It may also be pointed out that Translative facts are also Divestitive as regards the transferor and Investitive as regards the transferee. Holland suggests the term "juristic acts" (Chap. VIII), and Pollock "acts in the law" (Contract, Chap. I).

The term "title," sometimes called "act in the law," sometimes "juristic act," has varied in meaning. In its narrowest sense it meant some intervening fact or event which invests a party with a right; in a wider sense it included also any such event which put an end to a right; in a still wider sense it included events imposing duties; and in its widest sense any intervening act or event on the happening of which the law invests a party with a right or imposes a duty on him or deprives him of a right or releases him from a duty, or on which rights or duties are transferred from one person to another. This is the generally accepted meaning of the term "title." The term "intervening" is used to exclude "immediate acts of law."

Now where the law confers a right or imposes a duty or divests of or exonerates from them respectively, or where rights or duties are transferred from one party to another, the law must usually act through a title, since it would be impossible for it to operate by "immediate act of law" owing to the numbers of its subjects. Hence the functions of titles are:—

(1) To mark the persons in whom rights shall be vested or on whom duties shall be imposed or who shall be deprived of rights or released from duties.

(2) To enable the law in giving or taking away rights or duties to act on general principles.

Now the above purposes could be effected by choosing

any particular fact or event as a title, *e.g.*, on death intestate property might be made to devolve on an uncle of the deceased instead of on his child; but certain facts have been chosen as titles in certain cases on principles of particular utility, the reason for any particular fact being chosen depending on the nature of the facts and circumstances.

So on death intestate the property descends in English law to the nearer relatives and those claiming through them to the exclusion of the more remote. In some cases the reason for which a particular fact was chosen as a title ceases to exist. For instance, in English law until 1926, on death intestate the realty descended to the eldest son to the exclusion of the other children. This rule was derived from the necessities of the feudal tenure, for as the ownership of real estate was dependent on the performance of services and it was impossible to divide the obligation of service among several persons, therefore the obligation of service devolved on one person who therefore took the real estate to which the obligation was annexed. After the abolition of feudal tenures by 11 Car. 2, c. 12, there was, of course, no necessity for such rule of descent, but the rule still remained in force until the Administration of Estates Act, 1925. This is another illustration of the fallacy of the maxim "Cessante ratione legis cessat lex ipsa."

As Bentham points out, titles are either Simple or Complex.

A simple title is one as to which no useful purpose would be served by analysing it into its constituent parts, although the simplest title admits of such analysis. For instance, *occupatio* consists of two parts:—

(1) The actual taking possession;

(2) The intention to own.

A complex title consists of parts which it is necessary to distinguish from each other, since they perform different functions in respect of the title.

A complex title consists of two parts :—

(1) The Principal or essential part ;

(2) The Accessory part.

(1) The principal or essential part is that which is essential to the existence of the title as such ; it is founded on principles of utility peculiar to each particular title. For instance, Consent is an essential element of the title Contract. Relationship is an essential element of the title Succession.

(2) The accessory parts are annexed for various adventitious purposes and might be annexed to all or any titles. The purposes for which they are annexed are respectively as follows :—

(*a*) As evidence of a transaction. For this reason certain transactions are required by law to be recorded in writing, which writing must set out particulars of the transaction.

Sometimes the fact required as evidence merely proves that there has been a transaction, but does not prove the terms of it—for instance, part payment as evidence of a contract of sale ; the terms of the contract can then be proved by the oral evidence of the parties.

The witnessing of a party's signature is evidence that the party signed.

(*b*) To prevent persons entering into transactions of importance without due consideration. So certain transactions have to be entered into by a deed.

(*c*) To protect third parties. This part of a title generally aims at giving notoriety to a transaction, so that an owner cannot sell his property to two or more

different purchasers. So in many countries transfers of property require to be registered; in this respect the English system is sadly behind-hand, for though transfers of goods require to be registered under the Bills of Sale Acts if the transferor is to remain in possession, yet dealings with land do not require to be registered except where the land is situated in one of a few particular counties.

(*d*) For the purpose of obtaining revenue for the State. For this purpose the majority of written transactions require to be stamped.

With the exception of the requirement of stamping, compliance with the rules relating to the accessory parts of a title is ensured by means of the sanction called Nullity. If there is no proper evidence of a contract the party cannot enforce it; and the same applies to the requirement of a seal or other formality.

In case of non-registration the title is invalid as against a subsequent transferee from the original transferor who registers.

As regards the requirement of stamping, not only is an unstamped document inadmissible in evidence, but the party who ought to have stamped it is liable to a fine.

Before dealing with the classification of titles it is necessary to point out that all primary absolute duties arise from the law and not through any intervening fact or title, and can only be extinguished by an alteration of the law, though formerly in English law the King by his dispensing power could relieve particular individuals from them, and by the suspending power could relieve people generally from them for a time. These powers the King no longer possesses as they were abolished by the Bill of Rights, 1689.

It is questionable whether there are any sanctioning ABSOLUTE duties, since the party committing a breach of an absolute duty has no option but to submit to the physical might of the State applying the punishment for such breach. Relative duties arise and are extinguished in the same way as the rights with which they correlate, and therefore, it is submitted, the classification of titles may be limited to titles to rights and their correlating duties. Duties cannot be transferred, as a rule, without the consent of the party to whom they are owed. The method for such transfer is by novation, *i.e.*, the creditor agrees to accept the liability of a new debtor in the place of the old one.

Now, as regards rights, some rights are vested in a party at their origin—such title is called original; others are vested by transfer from another, such title being called derivative.

As regards the transfer of rights, in most systems rights *in rem* have been freely transferable, whereas rights *in personam* have not: see p. 255. Bearing the above remarks in mind, the following appears a complete outline of the classification of titles:—

TITLES.

(A) Investitive; conferring rights and imposing the correlating duties.

- (I) Original; creating the right and duty.
  - (*a*) Creating rights *in rem*.
    - (1) Operating through possession.
      - Occupation.
      - *Specificatio*.
      - *Fructuum perceptio*.
      - Acquisitive prescription.

(2) Operating irrespective of possession.

Accessio.

Confusio.

Commixtio.

Invention, such as Patents, Copyrights, Trade Marks.

(*b*) Creating primary rights *in personam.*

(1) Contract and quasi-contract and judgments.

(2) Status.

(*c*) Creating sanctioning rights *in personam.*

(1) Delict or tort.

(2) Breach of contract.

(II) Derivative titles to rights *in rem* and primary and sanctioning rights *in personam.*

(*a*) *Inter vivos.*

(1) For value; *e.g.*, Sale and Marriage.

(2) Not for value.

(i) Voluntary: *e.g.*, Gift.

(ii) Involuntary: *e.g.*, Bankruptcy.

(*b*) *A mortuo.*

(1) Will.

(2) Intestacy.

(B) Divestitive.

(I) Of rights *in rem.*

(*a*) Voluntary: *e.g.*, Surrender, Abandonment.

(*b*) Involuntary: *e.g.*, Forfeiture, Merger, Lapse of Time.

(II) Of rights *in personam*.

(*a*) Of all kinds.

(1) Performance.

(2) Release.

(3) Lapse of time or perfect negative prescription.

(*b*) Of rights *in personam* arising from contract: *e.g.*, Breach by the other side: see *ante*, p. 281.

Notes on the above.

Occupation means actually taking possession of a thing of which there is no owner, and with the intention of owning it.

Specificatio means making a new kind of thing out of someone else's materials whereby the maker becomes the owner of the new thing, unless the materials can be reduced to their former condition.

Fructuum perceptio means acquiring ownership of the produce of something by gathering it.

Acquisitive prescription means acquiring a right by long possession or quasi-possession, such as the usucapion of Roman law for things, and the prescription in English law for rights; such as easements and *profits à prendre*: see p. 229. This must be distinguished from imperfect negative prescription (see pp. 194, 282) and from perfect negative prescription or lapse of time as a divestitive title; for acquisitive prescription not only deprives one party of his right but also vests it in another, whereas perfect negative prescription merely puts an end to one party's right without vesting any right in another. For instance, at Rome adverse possession could under certain conditions vest ownership in the possessor, whereas in English law adverse possession

of things never vests ownership in the possessor, though it deprives the former owner of his right; where the ownership actually is seems a matter of some difficulty to decide, but the actual possessor has a right availing against everyone.

In English law the exercise for a certain length of time of easements and *profits à prendre*, which are rights similar to the Roman servitudes, vests the right in the party exercising it and is a case of acquisitive prescription. There is another kind of prescription which is called imperfect negative prescription (Salmond), and has been dealt with already under excuses from liability under the title "lapse of time": see p. 282. It merely bars the remedy by action without depriving the party of any other means he may have of enforcing his right and does not vest any right in another: see p. 292. According to Professor Salmond, the rational basis on which prescription rests is the presumption of the coincidence of ownership and possession. The reason why English law admits lapse of time as a title is that if a party sleeps on his rights and lets others exercise them he is negligent, and through such negligence the reliability of evidence is weakened so the law discourages such delay.

Accessio is a method of acquiring something of an accessory nature by the owner of the principal thing to which it becomes annexed, such, for instance, as alluvion, *i.e.*, mud washed onto any river bank by the stream; or an island arising in a river which in Roman law belonged to the owner of the bank to which it was nearest.

Confusio is a method of acquiring a liquid by mixing it with another one, which latter belonged already to the mixer though the former did not. The mixture generally becomes the subject of co-ownership.

Commixtio applies to the mixing of solids which, if inseparable, become also the subject of co-ownership.

Invention is a means of acquiring a thing by being the inventor of the idea. This title applies to patents, copyrights and trade marks. It may be mentioned that a patent is acquired through a title, since anyone who is the first and true inventor is entitled to the protection.

Contract and Delicts have been already dealt with.

As regards derivative titles, of course, strictly speaking, a gift is not a title, since the right must be transferred by the appropriate method, but where a transferor receives no benefit in return for the right transferred the transaction is in most systems of law liable to be impeached by the creditors of the transferor. The conditions for such transfer to be effectual vary in different systems of law.

In English law a transfer of land by a person who is not the owner is void; a transfer by a modified owner passes no more interest than he has, unless there is some statute, such as the Settled Land Act, 1925, empowering him to transfer the absolute ownership. In English law a transfer by an absolute owner who is not entitled to transfer, *e.g.*, by a trustee who has and transfers the legal estate, passes a good title to a transferee for value who had no notice when he took the transfer that it was trust property, irrespective of his knowledge when he paid the price.

As regards goods, in English law a transfer by a party who is not authorised has no effect unless it is a sale in open market, or a sale by a vendor in possession where the ownership has already passed to the purchaser, or a sale by a purchaser in possession where the ownership still remains with the vendor; and there are some other exceptions based on the principle that a party lawfully in possession may be treated as owner, and there are some few other cases.

In French law, with the exception of stolen goods, a party in possession can always give a good title.

As regards transfer on death it is the general opinion that intestate succession is anterior to testamentary disposition.

The reason for the introduction of wills has varied in different countries and originally wills were only allowed a limited scope.

The Athenians, when first allowed to make a will, were forbidden to disinherit their direct male descendants.

The will in Bengal was only permitted to govern so far as consistent with certain overriding family claims.

The Jews were only allowed to make a will when all kindred under the Mosaic law were undiscoverable.

At Rome the will had originally to be made in the Popular Assembly and was only allowed when no kindred were discoverable. Gradually a dislike of intestacy grew up owing to the unfairness of the Roman law of intestate succession, whereby a child emancipated as a mark of favour would be debarred from participation in the property of his father on the father's death intestate since the oldest Roman rules of succession were based on the relationship resulting from *potestas*, not on blind relationship.

In English law testamentary succession, which was first allowed as to movables only, was introduced and encouraged by the Church, on the principle that a party should provide for the poor, through the medium of the Church, after his death.

CHAPTER XV.

LIBERTY.

Liberty means the amount of freedom allowed by law. It exists in the desert places which the law has not yet touched (Salmond).

The term "liberty" merely implies that the law does not forbid an act, whereas the term "right" implies that the law forbids interference with that which one has a right to do. For instance, I am at liberty to hire a servant, but I have no redress if someone else hires him first so that I cannot hire him. If I have hired him I have a right to his services and can claim against those who induce him to leave me without a proper notice.

It has been stated by Austin (p. 356) that liberty is synonymous with right and implies restraint, inasmuch as if A has liberty, B is by law prohibited from preventing A enjoying that liberty.

The statement appears erroneous, since in respect of liberty, as distinct from right, the law does not interfere. For instance, I am at liberty to carry on business as a shopkeeper, but the law does not in consequence prevent someone else setting up the same sort of business next door whereby my trade is diminished. In short, I have no legal redress in respect of my liberty unless others, in interfering with my liberty, also infringe my legal right. For instance, if my trade rival makes false statements about me in respect of my trade he has then infringed my legal right to reputation and I have a remedy.

CHAPTER XVI.

CODIFICATION.

By Codification is meant the embodiment of all the rules of law in a written exposition, setting them forth in an orderly arrangement based on logical principles so that each particular rule can be found in its appropriate place without the necessity of searching through a mass of statute and judiciary law as is the case in the English system. Codification appears to be the only alternative to the English system and necessitates the denial of any authority to decided cases, as otherwise all the evils of mixed statute and judiciary law would be reproduced at no very lengthy period after the publication of the code.

In Prussia and Austria authority is expressly denied to judicial decisions, and though the codes of France, Italy and Belgium are silent on the point the rule is the same.

Before discussing the subject of codification it may be well to point out the objections to judiciary law. The main differences between judiciary and statute law have already been indicated (pp. 94 *et seq.*). The objections to judiciary law appear to be the following:—

(1) The rule of law contained in a judicial decision is of very narrow application, since it is devised to meet the facts of a particular case only, and therefore it is uncertain whether it will be applied to another case similar in most respects though differing in some points. As already

pointed out, statute law can be couched in general terms to cover cases of a class.

(2) Until the decision of the highest Court has been obtained there is no certainty that a rule of judiciary law is binding. In a case within the writer's memory a party who had acted on a judicial decision found, when the decision was subsequently overruled by a higher Court in another case, that he had acted on a rule which was not law.

(3) As a corollary to the last objection, judiciary law is *ex post facto*, since it is devised to meet facts which have already taken place and for which, *ex hypothesi*, there was no existing rule.

(4) Judiciary law, being composed of a number of minute rules contained in innumerable decisions, many of which have been given without considering their effect on other decisions on cognate subjects, is, as a body, inconsistent.

Statute law may be consistent, since the draftsman, when framing a rule, will have in mind its effect on other rules, whereas a Judge, in framing a rule of judiciary law, chiefly has in mind the decision of a particular case.

(5) Lastly, judiciary law is practically a closed book to the layman, since, even with the aid of text-books to guide him to the necessary decision or decisions containing the rule of law he is desirous of ascertaining, he has not the necessary legal training to enable him to extract the *ratio decidendi* from the decision, and even if he is content with the rule of judiciary law as stated in the text-book there may be some small point of difference in his own case which takes it out of the *ratio decidendi*, and in many cases the text-book writer is only able to conjecture what the law is owing to inconsistent decisions. Of course, it must be borne in mind that it will always be difficult for

laymen to ascertain rules of law, whether judiciary or statute, for law, like all branches of learning, has and must have its technical terms and difficulties; but statute law can be expressed in clearer language and in a less complicated form than judiciary law. As Salmond points out, " Case law is gold in a mine, a few grains of precious metal to a ton of useless matter—statute law is coin of the realm ready for immediate use."

Bearing the above defects in mind, the advantages of statute law appear to be obvious and therefore also the benefits of codification, but many objections have been urged to codification.

As pointed out by Austin, codification may be considered from two points of view:—

(1) In the abstract;

(2) In the concrete.

From the first point of view one has to consider whether a perfect code would be better than a perfect system of judiciary law.

From the second point of view one has to consider whether the code likely to be produced would be better than the existing system of mixed statute and judiciary law.

The first point of view appears the important one, since in a nation capable of producing judiciary law there could certainly be found a body of men capable of expressing the existing rules in intelligible language and arranging them in a systematic order, and even if the code were not perfect one would generally know where to look for the rules.

It is submitted that, *prima facie*, codification justifies itself, but many objections have been urged against it, and

when these are disposed of there appears to be no tenable objection to it.

Before dealing with these objections, it must, however, be pointed out that codification merely involves the setting forth of existing rules in an orderly exposition, and does not involve the repeal of existing rules or the enactment of new ones, though, of course, where rules of judiciary and statute law are found to be inconsistent it will have to be determined which of them is to be retained as law.

The following are some of the chief objections which have been urged to codification :—

(1) Lord Mansfield urged the necessary incompleteness of a code and suggested that judiciary law was more able to keep abreast with the requirements of a developing society. He said: " Cases of law depend on occasions which give rise to them. All occasions do not arise at once. A statute can rarely take in all cases at once. Therefore the Common Law that keeps itself pure by rules drawn from the fountains of Justice is superior to Acts of Parliament."

As already pointed out, judiciary law is very narrow in its application and therefore is much more likely to be incomplete, and to make up for such incompleteness the community has to suffer from all the vagueness and uncertainty of the piecemeal legislation which is the characteristic of judiciary legislation.

(2) Hugo suggests:

(*a*) That if the code attempted to provide for all cases it would be impossible for the Judge to know all its provisions, and as regards the cases left unprovided for, the number of competing analogies would be in exact proportion to the number and minuteness of the provisions of the code.

It may be pointed out, however, that, as already stated, codification would not increase the number of rules of law

and would render it easier for the Judge to ascertain any particular rule, since he would know where to look for it; whereas in judiciary law there is no sure guide as to the locality of any particular rule.

It is submitted also that in a properly drawn code there would be much less risk of the competition of opposite analogies, which arises from two different rules apparently applying to the same case, for the existence of such inconsistencies would be reduced to a minimum, as the codifier, having the whole of the field of law in view, would make it one of his special duties to avoid such defect.

(*b*) Hugo also suggests that a bad code would transmit, *i.e.*, perpetuate, its faults. This assumes that a code cannot be altered, whereas, of course, it could be amended and improved, as necessity required, by the same authority as that by which it was made—*i.e.*, the Legislature. It is true that legislative legal reforms are considerably slower than judiciary ones, but the only alternative is to leave the Judges to alter the law, in which case why have any law at all—why not leave everything to the Judge's *arbitrium*? Judiciary law, being founded on analogy, is much more likely to perpetuate faults than statute law, which is the creature of a free Legislature not bound by judicial precedents.

(3) The alleged ill-success of other codes is often put forward as an objection to codification. The codes referred to are the French and German ones, and in so far as they are defective their defects are attributable to definite causes which could be well avoided in future.

The French Code was drawn up in four months, and then discussed and amended in a Council of State by men who were not even lawyers and who paid more attention to the rules of law than to the actual form of the code, whereas, of course, form is the essence of a code. Feeling

the code was incomplete, it was provided in the code that its deficiencies were to be made good by appealing to

(1) Natural law and natural equity.

(2) Roman law.

(3) Ancient custom.

(4) General principles.

Thus all the uncertainty which it is the whole object of a code to avoid was reinstated.

The haste with which the first Roman Code was drawn up led to so many doubts that the heroic method of destroying the old one and drafting a new one was resorted to. Moreover, the French Code contained no statement of definitions and no proper basis of classification; the distinction between *dominium* and *obligatio* is not observed, but *obligatio* is dealt with under *dominium*, as being one method of acquiring *dominium*. In neither the French nor German Code is there any provision for keeping the code up to date.

In France amendments of the code are by statute, but there is no method for working the amendments into the code.

On the whole, neither the French nor German are such failures as they are sometimes thought to be.

Savigny has urged many objections to codification, one or two of which are deserving of notice. He says that in an age capable of producing a code no code would be necessary, since the exposition of the law by lawyers would be sufficient. This objection seems to suggest that codification is intended to benefit lawyers, whereas it is meant to benefit the layman, and thus dispense with that expensive luxury—exposition by lawyers.

Again, he suggests that the simpler the law is made the more easy it would be for rogues to manipulate it for their own fraudulent purposes. The exact opposite, however,

appears to be the true view—it is the subtlety and obscurity of the law that prevent the person of ordinary intelligence from obtaining that knowledge of it which will protect him against the schemes of rogues who have made a special study of the parts that will serve the fraudulent purposes they have in view. If the law were simple and easily ascertainable the legal fallacies of dishonest persons could be readily discerned.

Savigny also suggests that a code would be likely to disturb the rights and duties given by existing law.

This objection proceeds on the false assumption that codification involves the making of new law, whereas its real object is the orderly exposition of existing law.

CHAPTER XVII.

CLASSIFICATION OF LEGAL TOPICS.

There are two ways of classifying law. The first is to adopt the distinction between the law of rights and relative duties, and the law of crimes, a classification which is represented in most systems by the terms "civil" and "criminal" law, sometimes by the terms "private" and "public" law. Secondly, the classification which is represented by the terms "the law of things" and "the law of persons," the law of things meaning the law governing the ordinary or normal persons, and the law of persons meaning exceptions from the law of things in respect of certain classes of persons. The term "person" is used as meaning legal persons.

Austin (p. 744) suggests that the second classification should be adopted as a basis for the classification of legal topics (pp. 66 and 764-5), and that crimes should be dealt with as a branch of sanctioning rights. As a fact, it is impossible to do this, for in the law of rights and relative duties, which must be classified from the point of view of rights, there is no place for crimes, which are breaches of absolute duties in respect of which there are no correlating rights. Austin was met by this difficulty and, as already stated (p. 191), had to deal with criminal law and procedure as a branch of the law of sanctioning rights and duties or the law of procedure. He says, with reference to sanctioning rights and duties (p. 66): "Absolute duties

like relative duties are primary or sanctioning. . . . Primary rights with the primary relative duties which respectively answer to those rights are the only subjects of the capital department to which I have given the title of 'Primary rights and duties.' But primary absolute duties ought to be placed somewhere. And though the present sub-department be a member of the capital department to which I have given the title of 'sanctioning rights and duties,' primary absolute duties may be placed commodiously here. For infringement of duties, primary and absolute, belong to the class of delicts which are styled crimes."

Now, as pointed out already (p. 290), it is not at all clear that absolute duties can be classified into primary and sanctioning, but assuming they can it is clear that there is something radically wrong if one has to do such violence to principles of classification as to force absolute primary duties into a portion of the code dealing with sanctioning duties.

The difficulty is caused by the extraordinary view held by Austin that the distinction between crimes and civil injuries is one of procedure only. It is so manifestly false, both historically and logically, as pointed out already (p. 189), that it is surprising that the difficulties into which it led Austin did not open his eyes to the fallacy of the view; and the fact that he insisted so strongly on the difference between absolute and relative duties makes his position more extraordinary still. When one bears in mind that many crimes are not also civil injuries and that where crimes are also civil injuries the criminal remedy does not exclude the civil one, it is at once obvious that the difference between civil and criminal law is fundamental and that criminal law cannot be treated as a mere sub-heading of civil law.

Another fallacy of Austin's is that all breaches of absolute duties are crimes (p. 416), whereas, as already pointed out, this is not so. To those breaches which are not crimes we have given the term "quasi-civil injuries"; they are breaches of quasi-rights; but inasmuch as they are similar to rights and relative duties subject to modifications arising from the peculiar position of the sovereign in law, their exact nature is to be ascertained from the branch of the law of persons dealing with the sovereign, and so they do not need a special chapter in the law of rights and relative duties.

Because much of criminal law is concerned with matters which form the bulk of the civil law, *e.g.*, with the legal nature of property and possession, the meaning of libel, the nature of contract, etc., it appears the proper course is to deal with the law of rights and relative duties before dealing with the law of crime in order to save repetition, for, inasmuch as the law of rights and relative duties is much larger in bulk than the law of crime and deals therefore with matters with which criminal law is concerned and also with matters which do not concern criminal law, it appears necessary to treat of the law of rights and relative duties before the law of crime, and therefore, that in a logical order of study criminal law should be a subject for final study.

Civil Law

Other terms have been suggested in place of the law of rights and relative duties and the law of crimes.

The terms "civil law" and "criminal law" have been proposed; unfortunately the term "civil law" has many different meanings. As opposed to military law it means all law except military law, and therefore would include criminal law. As opposed to ecclesiastical law it means all law save ecclesiastical law. The terms also does not

indicate the nature of the subject to which it relates, and it appears better to use a descriptive terminology if possible.

Again, the terms " private " and " public " law have been suggested.

Now public law has two meanings. Used in a wide sense it consists of the law relating to the legal position of public officials and also criminal law. The portion of public law dealing with the position of officials deals with their position in respect both of rights and relative duties and of absolute duties, and can be dealt with there for the most part under the law of procedure, since such officials are more concerned with enforcing obedience to law than with anything else; but if the position of the official in any way is such as to invest him with a status, then such position would be dealt with under the law of persons. It is absurd to take a portion of the law of rights and relative duties and that portion of the law of absolute duties relating to crime and under the name of " public law " oppose it to the rest of the law of rights and relative duties and of absolute duties.

Sometimes the term " public law " means only criminal law, in which case the division thereby suggested is, in the writer's opinion, sound, though the term " criminal law " is preferable as indicating the nature of the subject more clearly than the term " public law " does. The term has also been used to indicate certain rules of law which cannot be deprived of application by the terms of a contract between the parties, such as the liability of a master to compensate his servant for injury incurred in the course of his employment: Workmen's Compensation Act, 1925.

Austin points out the reason why the term " public law " was used to indicate the law of political condition and criminal law. At Rome crimes were called public

wrongs because they were tried by *publica judicia*, *i.e.*, by the Roman people or public. Later on the term "public" was thought to indicate that these wrongs were more injurious to the public than breaches of relative duties, and so the idea grew that crimes were wrongs against the public. Then, inasmuch as political superiors or officials do in fact look more particularly after the public welfare than after the welfare of individuals, it was thought that the law relating to such officials was part of public law.

Starting from the position that the fundamental classification of law is into the law of rights and relative duties on the one hand, and the law of crimes on the other, we next have to consider the further classification of each of these heads. Undoubtedly the best foundation for further classification is that based on the difference indicated generally by the law of things and law of persons, though a different terminology will be suggested.

The above distinction is based on the difference between the law applicable to persons generally and the exceptions from such law in respect of certain classes of persons, whereby what is law for the ordinary person is not law for members of those classes. Persons forming such classes are said to have a "status," and by determining the essential features of a status one can determine whether the legal position of any particular party should be dealt with under the law of things or under the law of persons.

Austin has pointed out certain characteristics of a status, but it has been left for Professor Holland to indicate the essential element. According to Austin (pp. 688 *et seq.*), "a status is composed of certain rights and duties which constitute it"; but he is careful to point out that the rights, etc., do not always flow from the status, though some particular condition of the party, such as lunacy or infancy, is the title to the status. The following are the character-

istics of a status given by Austin (pp. 688 *et seq.*), but they will not enable one to determine infallibly the existence of a status :—

(1) A status resides in a person as a member of a class, so that a *privilegium* or the special position conferred by the sovereign on an individual would not, according to Austin, constitute a status. Strictly speaking, it would appear to be a status, though it might be difficult, though not impossible, to allocate a place to it in the code.

(2) The rights, etc., are such as to influence extensively the social relations of the individual and give a conspicuous character to him.

The question of a party's social relations hardly seems in point, though probably by " social " is meant legal social relations.

(3) The rights, etc., constituting the status especially regard members of the class : *i.e.*, they must not be national or universal rights.

This apparently means rights that may be acquired by any member of the community ; so a banker does not possess a status : his rights and duties as a banker are limited to his position in respect of banking.

Mr. Campbell, the learned editor of the Student's Austin, mentions a fourth characteristic :—

(4) Generally the party possessing a status has little or no control over the circumstances which place him in his legal position. This is undoubtedly true as regards infants and lunatics and possibly bankrupts, but not as regards married women or any person who deliberately chooses the particular station in life constituting the status.

Markby (§ 178) points out that the term " status " is not used to include rights and duties capable of being changed, prolonged, or ended at the wish of the party;

and Anson indicates the same idea by pointing out that the rights of a status cannot be modified by contract.

To Professor Holland is due the credit of discovering the real criterion of a status; it is as follows (Chap. IX, p. 143): "Does the peculiarity of the personality arise from anything unconnected with the nature of the act itself which the person of inherence can enforce against the person of incidence?": if so, such peculiarity is a status.

For instance, a landlord has certain peculiar rights which other people have not; he may enter the premises and seize the tenant's goods if the rent is not paid, whereas ordinary creditors may not; and yet a landlord has not a status, since his peculiar rights are limited to matters arising out of the tenancy agreement, and the fact that he is a landlord does not modify his rights or duties in matters not arising out of the tenancy.

A bankrupt, on the other hand, has a status, since the fact of bankruptcy modifies his rights and duties in matters not affecting the bankruptcy, *i.e.*, he cannot retain property he acquires after he has been adjudicated bankrupt if the trustee claims it; he cannot sit in Parliament. The same principles will be found applicable to the status of infancy and lunacy.

It may be difficult at times to ascertain whether the legal position of a person falls under the law of things or the law of persons, but the distinction between the two is clear.

It may be pointed out that the Austinian characteristics of a status do not really enable one to determine whether a status exists in any particular case, for they are often found existing in classes of persons who do not possess a status. For instance, they are discernible in the case of bankers, and yet for reasons given above a banker does not possess a status. It is true that Austin's third charac-

teristic means, as he states, that the rights, etc., are such as cannot be acquired by everyone, but there are positions such as that of a bankrupt which may be acquired by anyone which nevertheless do constitute a status.

Austin's ideas on the subject do not seem altogether free from that confusion for which he calls Bentham to account; for he suggests (p. 714) that the law relating to traders should form a branch of the law of persons, whereas the peculiar position, if any, of traders relates solely to their particular trade and so does not fulfil the requirements of a status. He is probably thinking of the *dictum* that "Unus homo sustinet plures personas," which means that one man may possess several legal personalities, *i.e.*, may be a banker, trustee, executor, etc. But every personality does not constitute a status, for personality merely means the position of a person in law.

The special utility of dividing the law into the law of things and the law of persons is apparent from a consideration of the alternative method of treatment, which would be to append to each chapter of the code the modifications which exist in respect of persons possessing a status. The objections to this course are, *firstly*, that it would break into the continuity of the exposition of the law of things; and *secondly*, there would be no place for an exposition of the general principles on which the modifications in respect of the law of status rested; *thirdly*, it would involve needless repetition, since if the general principle on which the modifications in respect of a status rested were expounded they would have to be repeated in each chapter, whereas if once stated in the law of persons they could be applied by the inquirer to any particular part of the law of things; *fourthly*, any party possessing a status who desired to ascertain the whole of his legal position, would have to read through the whole of the code.

Austin suggests a second alternative, namely, to divide the whole body of the law into special codes appropriate to peculiar classes of persons. Apart from the inconveniences pointed out by him, this appears to leave no place in which to treat of the law of things and hardly appears to be a practical alternative. Convenience and the essentials of scientific classification are both met by the classification into the law of things and the law of persons, for—

(1) having all the law relating to the ordinary person in one place there is no need to repeat it when dealing with the peculiar position of the various classes of persons possessing a status;

(2) persons having a status can ascertain the whole of their legal position and the principles on which it rests in one place.

It is perhaps scarcely necessary to mention that the law of things should precede the law of persons, since, of course, the rule must always precede the exceptions.

Terminology.

Although the distinction between the law of things and the law of persons is, as pointed out already, of the utmost importance, yet the term "law of things and of persons" is far from satisfactory, since it in no way indicates the nature of the matter it deals with. Most departments of law relate to things and all departments are concerned with persons.

Various other terms have been suggested, and an examination of them may enable one to frame a terminology which will be a little more explanatory than the above.

Blondeau suggested the terms

"Law of Capables,"

"Law of Incapables";

but all persons are to an extent capable, and many status confer privileges rather than impose incapacities.

Bentham suggests

"General codes,"

"Particular codes."

The term "particular code" might, however, apply to any particular department of law, and in no way indicates the nature of the distinction.

Mr. Poste suggests

"The Law of Equals,"

"The Law of Unequals."

The latter term is rather suggestive of inferiority, whereas many status, as stated above, consist of privileges.

Professor Holland suggests

"The Law of Normal Rights,"

"The Law of Abnormal Rights."

Now, classifying law according to rights does not exhaust the whole field of law, for it does not include the law of absolute duties; and, as will appear later, the law of absolute duties admits of the division into the law of things and the law of persons; nor, as will appear later, does Professor Holland allow for the distinction between the law of things and the law of persons in respect of the law of procedure.

Blackstone, mistranslating the Roman Jus Rerum and Jus Personarum, makes the distinction the basis of a classification of rights under the terms "rights of persons" and "rights of things," and does not attempt to apply it to the law of wrongs, as he calls it, which includes the law of civil injuries and crimes. Of course the expressions "rights of persons" and "rights of things" are absurd.

It appears difficult to discover a terminology which shall be descriptive, but the terms

"The law governing normal persons,"

"The law governing abnormal persons"

appear adequate. The term "person" is used as meaning a legal person.

Bearing in mind the distinction between the law of rights and relative duties and of crimes, and the distinction between the law governing normal persons and abnormal persons, it appears that a body of law may be codified on these lines, though it is necessary to point out that minor modifications may be necessary in any particular system, inasmuch as important legal distinctions existing in some systems are not found in others, such as the difference between realty and personalty existing in English law before 1926 and the difference between *res mancipi* and *res nec mancipi* in early Roman law. The classification we now propose to suggest is based on distinctions which, it is submitted, must exist in all systems of law.

PART I.

The Law of Rights and Relative Duties.

A.

Rules governing the normal person.

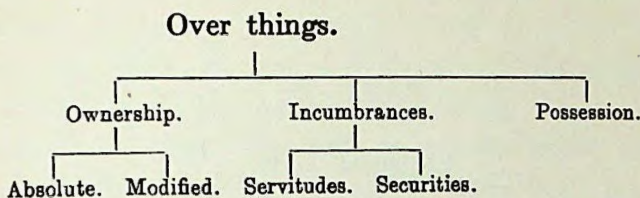
(I) Primary rights.

(i) Rights at rest, *i.e.*, regarded with respect to their orbit and infringement.

(*a*) *In rem*:

Over persons.

With no person or thing as a subject.



The law of torts, *i.e.*, infringement of rights *in rem.*

Under each heading the difference between legal and equitable ownership, if existent, should be dealt with.

(*b*) Primary rights *in personam*, arising from—
status (to be dealt with under the law relating to the abnormal person);
contract and implied and quasi-contract including judgments, and hereunder of damages for tort and breach of contract.

(ii) Rights in motion, *i.e.*, considered with regard to their origin, transfer, and extinction: *i.e.*, the branch of law dealing with titles.

(*Note.*—Rights *in rem* are all primary.)

(II) Sanctioning rights, *i.e.*, the law of procedure, including the execution of judgments.

B.

Rules governing the abnormal person.

These would be dealt with under the various classes of such persons, each class being treated, if necessary, on the same principles as A above.

The status would be either—

Political, such as the King, ambassadors, etc.;
Private, such as infants, lunatics, etc.

PART II.

Criminal Law.

A.

Rules governing the normal person.

These may be dealt with as Austin suggests :—

(i) The law of crimes.

(*a*) The general part setting out the general principles on which criminal liability rests.

(*b*) The particular part dealing with particular crimes classified according to the immediate object of the absolute duty, *i.e.*, the welfare of the sovereign under which the law of treason would be dealt with and the welfare of particular individuals under which theft, assault, etc., would be dealt with.

(ii) The law of criminal procedure and punishments.

B.

Rules governing the abnormal person.

Other Actual or Suggested Schemes for Classification.

The Roman System.

The Romans divided law into private and public first of all, meaning by public law the law of political conditions and of crime. The objections to this scheme have been already dealt with: p. 307.

Private law they then sub-divided into the law of persons, of things, and of actions.

The law of things they sub-divided into the law of *dominium* or rights *in rem* and the law of obligations or duties correlating with rights *in personam*.

These duties they classified as arising from contract and quasi-contract, delict and quasi-delict.

The following table represents the Roman system:—

- (I) Private law.
  - (*a*) Law of persons.
  - (*b*) Law of things.
    - (1) *Dominium*.
    - (2) *Obligatio*.
      - (i) *Ex contractu* and *quasi ex contractu*.
      - (ii) *Ex delicto* and *quasi ex delicto*.
  - (*c*) Law of actions.
- (II) Public law.

The Romans were undoubtedly unscientific in adopting the threefold division since the distinction between the law governing the normal person and the law governing the abnormal person is existent in the law of actions. They were also unscientific in treating of the law of persons before the law of things, and much inconvenience is experienced by students of Roman law from the frequent reference in the law of persons to matter which can only be found in the law of things.

The Method of Classification Suggested by Professor Holland (Chap. IX).

He divides law into—

Private;
Public;
International.

Private law is either	Substantive, defining rights which are	Normal	Antecedent	*In rem*
			Remedial	*In personam*
		Abnormal		
	Adjective Law			

Public law is to be dealt with under the following heads (Chap. XI, p. 165) :—

(1) Constitutional;
(2) Administrative;
(3) Criminal;
(4) Criminal procedure;
(5) The law of the State considered in its quasi-private personality.
(6) The procedure relating to the State considered as suggested in head (5) (Chap. XVI, p. 364).

Now, dealing with the distinction between private and public law, the reader is referred to p. 307 for the objections to such classification when the term is used in its wide meaning as here indicated. Professor Holland (Chap. IX, p. 145) states that the distinction between rights normal and abnormal is traceable in public law, for what is analogous to the law of persons in public law is " a description of the State as a whole, of its ruling body, of bodies or persons enjoying delegated ruling powers, and of its constituent members as such; in short, what is usually known as constitutional law. On the other hand, the residue of public law has its analogies to the law of things. It consists of (1) a description of the ways in which the different delegacies of the governing body are set in motion. This may be called administrative law. (2) . . . criminal or penal law."

The objections to the classification of law into public and private have already been dealt with: p. 307.

As regards the classification of private law, it may be pointed out that there appears to be no distinction between the law of remedial right and the law of procedure, called by Holland "adjective law," since remedial right consists of the right to take those steps which constitute procedure.

It may also be pointed out that the distinction between the law regulating the normal person and that regulating the abnormal one is found in the law of procedure, though under Professor Holland's scheme no place is assigned for such distinction in the law of procedure.

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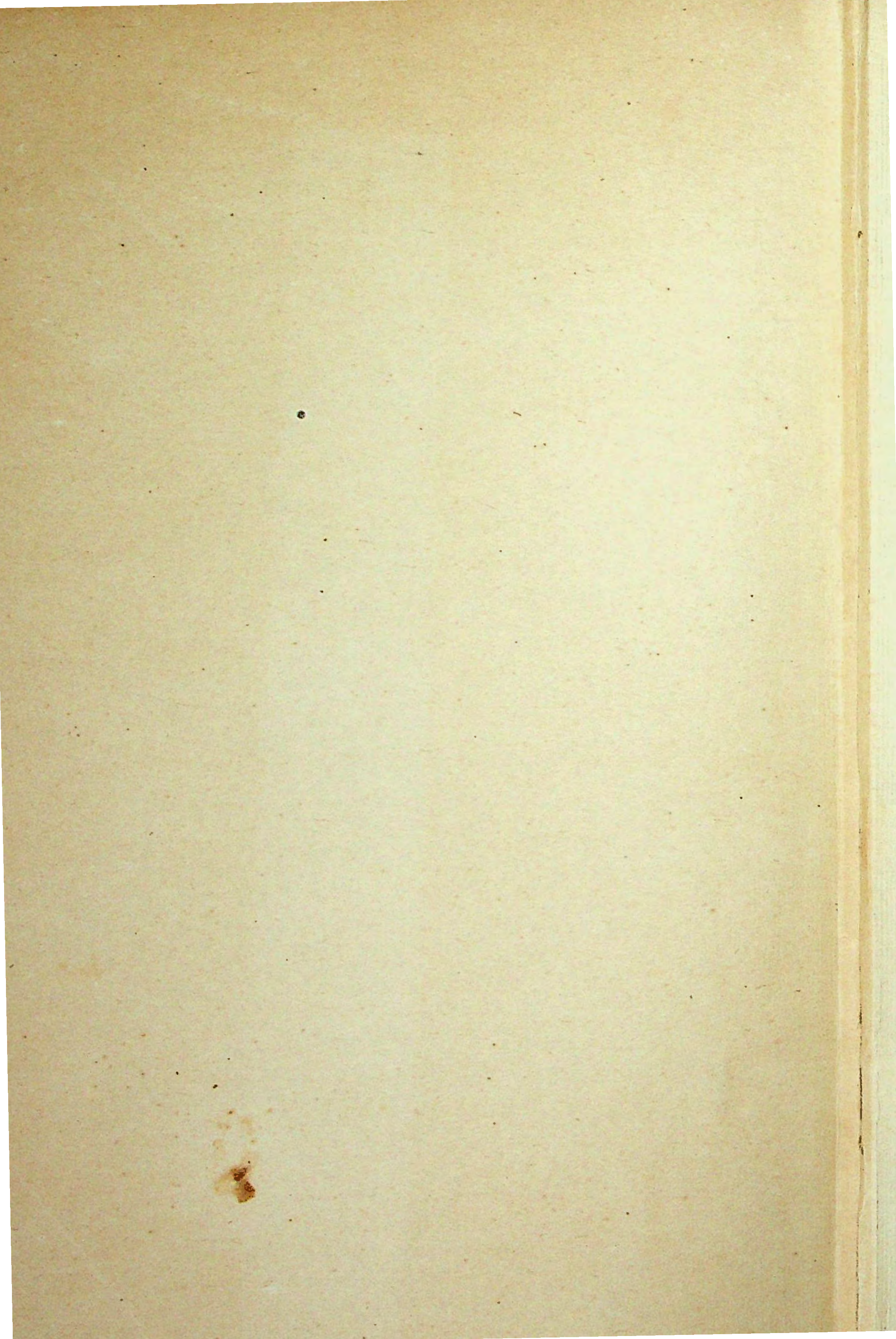

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