OUTLINES OF LECTURES
ON
JURISPRUDENCE

BY
ROSCOE POUND

THIRD EDITION

CAMBRIDGE
1920

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OUTLINE OF THE COURSE

1. JURISPRUDENCE.
   - I. What is jurisprudence?
   - II. History of jurisprudence: schools of jurists.

2. THE END OF LAW.
   - III. Theories of justice.

3. THE NATURE OF LAW.
   - IV. Theories of law.
   - V. The nature of law.
   - VI. Law and ethics.
   - VII. Law and the state.
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4. THE SCOPE AND SUBJECT-MATTER OF LAW.
   - IX. Interests.
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5. SOURCES, FORMS, MODES OF GROWTH.
   - XI. Sources and forms of law.
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6. APPLICATION AND ENFORCEMENT OF LAW.
   - XV. Application and enforcement of law.

7. ANALYSIS OF FUNDAMENTAL CONCEPTIONS.
   - XVI. Jural relations.
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   - XX. Duties and liabilities.
   - XXI. Persons.
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8. The System of Law.

THEORY OF LAW AND LEGISLATION

1

JURISPRUDENCE

I

WHAT IS JURISPRUDENCE?

Holland, Jurisprudence, chap. 1; Salmond, Jurisprudence, §§ 1–4; Gray, The Nature and Sources of the Law, §§ 288–321; Amos, Science of Law, chap. 2; Austin, Jurisprudence (student's edition), Lect. 11; Lee, Historical Jurisprudence, 6–11; Bryce, Studies in History and Jurisprudence, Essay 12; Pollock, Essays in Jurisprudence and Ethics, Essay 1; Gareis, Science of Law (Kocourek's transl.), § 3; Korkunov, General Theory of Law (Hastings' transl.), §§ 2–4; Brown, The Austinian Theory of Law, §§ 640–669.

A developed system of law may be looked at from four points of view:

1. *Analytical.* — Examination of its structure, subject-matter, and rules in order to reach its principles and theories by analysis.

2. *Historical.* — Investigation of the historical origin and development of the system and of its institutions and doctrines.

3. *Philosophical.* — Study of the philosophical bases of its institutions and doctrines.

4. *Sociological.* — Study of the system functionally as a social mechanism and of its institutions and doctrines with respect to the social ends to be served.

Applied to the study of legal systems generally, these methods are called the "methods of jurisprudence." The propriety of naming a comparative method as a method of jurisprudence may

be doubted. The analytical, historical, and philosophical methods, as methods of jurisprudence, must be comparative. When these methods are applied in the study of any particular system, the mode of treatment may be *dogmatic*, the practical exposition of its principles and rules, or *critical*, consideration of what its principles and rules ought to be in the light of analysis, history, philosophy, and the social ends to be served. On this side, sociological jurists insist that account must be taken of all the social sciences.

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2. Analytical

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(*b*) *German.*

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(a) *The forerunners of modern legal science.*

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II. The Forerunners of the Analytical School

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IV. The English Utilitarians

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(c) *Social-philosophical.*

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[8. Sociological]

(*a*) *Mechanical and Positivist.*

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Cf. also *ante*, 4, (*d*), III.

(*b*) *Biological and Ethnological.*

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(*c*) *Psychological.*

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9. Materials for Analytical Jurisprudence

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1. The Roman or Civil law, beginning as the law of the city of Rome, became the law of the Roman empire and thus of the ancient world, and eventually, by absorption or reception from the twelfth to the eighteenth century, the law of modern Continental Europe. It is now the foundation or a principal ingredient of the law in Continental Europe (including Turkey), Scotland, Egypt, Central and South America, Quebec and Louisiana, and all French, Dutch, Spanish, or Portuguese colonies or countries settled by those peoples.

(*a*) *Roman Law.*

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(*c*) *Austrian Law.*

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(*d*) *Modern French Law.*

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10. Materials for Historical Jurisprudence

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Pollock, Oxford Lectures, 1–36; Pollock, Essays in Jurisprudence and Ethics, 1–30; Bryce, Studies in History and Jurisprudence, Essay 12; Munroe Smith, Jurisprudence, 30–42; Brown,

The Austinian Theory of Law, Excursus F; Korkunov, General Theory of Law, transl. by Hastings, 23–30, 116–138; Lightwood, The Nature of Positive Law, chaps. 12–13; Lorimer, Institutes of Law, 2 ed., 38–54; Miller, Lectures on the Philosophy of Law, Appendix E; Leonhard, Methods Followed in Germany by the Historical School of Law, 7 Columbia Law Review, 573; Pound, The Scope and Purpose of Sociological Jurisprudence, 24 Harvard Law Review, 591; Pound, The Philosophy of Law in America, Archiv für Rechts- und Wirthschaftsphilosophie, VII, 213, 385.

Clark, Practical Jurisprudence, 1–6; Amos, Systematic View of the Science of Jurisprudence, 40–43 (1872); Holland, Elements of Jurisprudence, 12 ed., 1–13; Puchta, Cursus der Institutionen, I, §§ 33–35 (1841), English transl. by Hastie, Outlines of Jurisprudence, 124–132; Fichte, Grundlage des Naturrechts, Introduction, § 2 (1796), English transl. by Kroeger (as Fichte's Science of Rights), 16–21; Hegel, Grundlinien der Philosophie des Rechts, §§ 1–3 (1820), English transl. by Dyde (as Hegel's Philosophy of Right), 1–10; Boistel, Cours de philosophie du droit, §§ 1–2 (1899); Miller, Data of Jurisprudence, 1–2 (1902).

2. The Social-Philosophical Schools

Pound, The Scope and Purpose of Sociological Jurisprudence, 25 Harvard Law Review, 140; Munroe Smith, Four German Jurists, 10 Political Science Quarterly, 664, 11 Political Science Quarterly, 278, 12 Political Science Quarterly, 21; Jhering, Law as Means to an End, 330–332; Stammler, Die Lehre von dem richtigen Rechte, 3–11; Kohler, Rechtsphilosophie und Universalrechtsgeschichte, §§ 8–10; Pound, Political and Economic Interpretations of Jurisprudence, Proceedings American Political Science Association, 1912, 95; Burdick, Is Law the Expression of Class Selfishness? 25 Harvard Law Review, 349.

Croce, Historical Materialism and Karl Marx; Croce, Riduzione della filosofia del diritto alla filosofia dell' economia, 30–46 (1907); Brooks Adams, The Modern Conception of Animus, 19 Green Bag, 12, 33 (1907).

3. The Sociological School

Pound, The Scope and Purpose of Sociological Jurisprudence, 25 Harvard Law Review, 489; Pound, The Need of a Sociological Jurisprudence, 19 Green Bag, 107; Kantorowicz, Rechtswissenschaft und Soziologie, 1–15, 21–30, 30–34; Tanon, L'évolution du droit et la conscience sociale, 3 ed., 143–176, 196–202; Brugeilles,

Le droit et la sociologie, Introduction and chaps. 1–2, 6; Vander Eycken, Méthode positive de l'interprétation, 109–112; Rolin, Prolégomènes à la science du droit, 1–9; Ehrlich, Erforschung des lebenden Rechts, Schmoller, Jahrbuch für Gesetzgebung, XXV, 109; Ehrlich, Grundlegung der Soziologie des Rechts, chap. 21; Page, Professor Ehrlich's Czernowitz Seminar of Living Law, Proceedings Fourteenth Annual Meeting of the Association of American Law Schools, 46.

4. History of Jurisprudence

The beginnings of legal analysis — the "taking of differences."

Jhering, Geist des römischen Rechts, III, §§ 49–50; The Hedaya (Hamilton's transl.), bk. 16, chap. 1, Grady's ed., p. 244; Picot's Case, Y. B. 33 Ed. I (Horwood ed.), 22–23; The Executors' Case, Id. 63; Note, Keilway, 41; Note, 2 Dyer, 111*b* in margin; 2 Dyer, 143*b* (pl. 57).

The beginnings of a general science of law.

Dareste, La science du droit en Grèce; 1–18, 29–31; Cicero, De Oratore, I, 41, § 189.

The *ius gentium* — "a combination of comparative jurisprudence and rational speculation."

Muirhead, Historical Introduction to the Private Law of Rome, § 12; Sohm, Institutes of Roman Law (transl. by Ledlie), §§ 13–17; Girard, Short History of Roman Law (transl. by Lefroy and Cameron), 7–8; Voigt, Das Ius Naturale, Aequum et Bonum und Ius Gentium der Römer, I, §§ 13–15, 42, 43, 79–88, 103; Karlowa, Römische Rechtsgeschichte, I, §§ 59–60; Kuhlenbeck, Entwickelungsgeschichte des römischen Rechts, I, 205–235.

The *ius naturale* — a speculative body of principles, serving as the basis of lawmaking and criticism, of potential applicability to all men, in all ages, among all peoples, derived from reason and worked out philosophically.

Muirhead, § 55; Bryce, Studies in History and Jurisprudence, Essay 11; Maine, Ancient Law, chaps. 3 and 4 and Sir Frederick Pollock's notes E and G; Ritchie, Natural Rights, chap. 2; Pollock, History of the Law of Nature, 1 Columbia Law Review, 11; Salmond, The Law of Nature, 11 Law Quarterly Review, 122; Cuq, Institutions Juridiques des Romains, II, 47–53; Voigt, Das Ius Naturale, Aequum et Bonum und Ius Gentium der Römer, I, §§ 15–41, 52–64, 98.

The history of modern legal science begins with the revival of the study of Roman law in the twelfth century.

Continental Legal History Series, I (General Survey), 128 (§ 38)–175, 178 (§ 77)–199; Sohm, Institutes of Roman Law (transl. by Ledlie), Grueber's Introduction (in first [illegible] only), i–xxvi; Sohm, Institutes of Roman Law (transl. by Ledlie, 3 ed.), §§ 1–28; Westlake, Chapters on the Principles of International Law, 17–51; Lee, Historical Jurisprudence, 386–398; Hastie, Outlines of Jurisprudence, 237–253, 260–271.

The Glossators.

Savigny, Geschichte des römischen Rechts im Mittelalter, V, 222–240; Stintzing, Geschichte der deutschen Rechtswissenschaft, I, 102–105; Landsberg, Die Glosse des Accursius und ihre Lehre vom Eigenthum, 1–81.

The Commentators.

Savigny, Geschichte des römischen Rechts im Mittelalter, V, 225–228, 353–356, VI, 1–25; Stintzing, Geschichte der deutschen Rechtswissenschaft, I, 106–133; Continental Legal History Series, II (Great Jurists of the World), 45–57.

The Humanists.

The French School.

Jacobus Cuiacius (Jacques Cujas, 1522–1590).

Hugo Donellus (Doneau, 1527–1591).

Continental Legal History Series, I (General Survey), 252–259; Continental Legal History Series, II (Great Jurists of the World), 58–108; Stintzing, Geschichte der deutschen Rechtswissenschaft, I, 133–154.

Emancipation of Jurisprudence from Theology.

The Protestant jurist-theologians.

Hugo Grotius (De Groot, 1583–1645).

See *post*, III, B, 2. As to Grotius, see Continental Legal History Series, II (Great Jurists of the World), 169–184; Vreeland, Hugo Grotius (1917).

Hemmingsen (Hemmingius), De lege naturae apodictica methodus (1562), preface (this may be found conveniently in Kaltenborn, Die Vorläufer des Hugo Grotius, II, 31); Grotius, De Iure belli et pacis (1625), Prolegomena, § 11.

Emancipation of Law from the text of the Corpus Iuris.

Hermann Conring (1606–1681).

Conring, De Origine iuris Germanici (1643), chaps. 21–27, 32–34; Stintzing, Geschichte der deutschen Rechtswissenschaft, II, 1–31, 165–188; Brunner, Grundzüge der deutschen Rechtsgeschichte, § 64; Stobbe, Hermann Conring, Der Begründer der deutschen Rechtsgeschichte (1870).

The Law-of-Nature School.

Grotius, De Iure belli et pacis (1625),—Whewell's transl. (1853) is convenient; Pufendorf, De Iure naturae et gentium (1698)—Kennet's transl. (1703) may be found in several editions. See also the abridged transl. by Spavan (1716). Burlamaqui, Principes du droit naturel (1747)—Nugent's

transl. is convenient; there are several editions. Wolff, Institutiones iuris naturae et gentium (1750); Rutherforth, Institutes of Natural Law (1754–56); Vattel, Le droit des gens, Préliminaires (1758). There are many translations of Vattel.

Burlamaqui, Principes du droit naturel, pt. I, chap. 8, §§ 1–2, English transl. by Nugent, I, 76–78; Continental Legal History Series, II (Great Jurists of the World), 305–344, 447–476; Blackstone, Commentaries, 1, 38–43.

The Law-of-Nature School in the nineteenth century.

(a) *Neo-Rousseauists.*

Acollas, Introduction à l'étude du droit (1885), 1, 2, 7; Acollas, L'Idée du droit (1889), 29; Beaussire, Les principes du droit (1888), Introduction, especially 1, 7, but cf. 25 ff.

(b) *The Law of Nature in America.*

Bishop, Non-Contract Law (1889), § 85; Smith, The Law of Private Right (1890), pt. 3, chap. 3; Andrews, American Law (2 ed., 1908), I, §§ 103–104; Haines, The Law of Nature in State and Federal Decisions (1916), 25 Yale Law Journal, 617.

The nineteenth-century schools represent different phases of a reaction from the philosophical method of the seventeenth and eighteenth centuries.

Bluntschli, Die neueren Rechtsschulen der deutschen Juristen (1862); Bekker, Ueber den Streit der historischen und der filosefischen Rechtschule (1886).

(1) *The Historical School.*

Friedrich Carl von Savigny (1779–1861).

Savigny, Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft (1814), chaps. 1, 2 (use 3 ed., 1840, or Hayward's transl.); Berolzheimer, System der Rechts- und Wirthschaftsphilosophie, II, 230–231 (World's Legal Philosophies, 204); Dernburg, Pandekten, 8 ed., § 12; Continental Legal History Series, II (Great Jurists of the World), 561–589.

For critiques of the historical school, see Korkunov, General Theory of Law (Hastings' transl.), 116–122; Charmont, La renaissance du droit naturel, 74–94; Stammler, Ueber die Methode der geschichtlichen Rechtstheorie; Bekker, Recht des Besitzes, § 1; Kantorowicz, Lehre von dem richtigen Rechte, 8.

The English Historical School is partly a development of the foregoing and partly a reaction from the English Analytical School.

Sir Henry Maine (1822–1888). See bibliography, *ante*, p. 4.

Duff, Sir Henry Maine (1892); Vinogradoff, The Teaching of Sir Henry Maine (1904), 20 Law Quarterly Review, 119.

(2) *The English Analytical School.*

Precursors: Thomas Hobbes (1588–1679).
Jeremy Bentham (1748–1832).
Founder: John Austin (1790–1859).

See bibliography, *ante*, p. 3.

Preface (by Sarah Austin) to 3d and subsequent editions of Austin, Lectures on Jurisprudence; Gray, Nature and Sources of the Law, §§ 1–19; Berolzheimer, System der Rechts- und Wirthschaftsphilosophie, II, 18–20 (World's Legal Philosophies, 9–11); Bergbohm, Jurisprudenz und Rechtsphilosophie, 12–20; Somlo, Juristische Grundlehre, 33–37 (1917).

In the nineteenth century the philosophical method was continued by:

(3) *The Metaphysical School.*

Hegel, Grundlinien der Philosophie des Rechts, § 1; Ahrens, Cours du droit naturel, 8 ed., I, 1, II, 17–20; Lorimer, Institutes of Law, 2 ed., 353; Miller, Lectures on the Philosophy of Law, 9, 71–73; Geyer, Geschichte und System der Rechtsphilosophie, § 2; Boistel, Cours de philosophie du droit, §§ 1–2; Prins, La philosophie du droit et l'école historique (1882).

See Gray, Nature and Sources of the Law, §§ 7–9; Bryce, Studies in History and Jurisprudence, American ed., 631–634; Pollock, Essays in Jurisprudence and Ethics, 28–30; Korkunov, General Theory of Law (Hastings' transl.), § 4; Bergbohm, Jurisprudenz und Rechtsphilosophie, §§ 6–15; Berolzheimer, System der Rechts- und Wirthschaftsphilosophie, I, vii.

In the latter part of the nineteenth century there was a tendency to bring the different methods together and to broaden the basis of both the historical and the philosophical schools.

Dahn, Rechtsphilosophische Studien, 288; Schuppe, Rechtswissenschaft und Rechtsphilosophie, Jahrbuch der internationalen Vereinigung für vergleichende Rechtswissenschaft, I, 215; Kohler, Rechtsphilosophie und Universalrechtsgeschichte, § 8.

The "comparative method."

Meili, Institutionen der vergleichenden Rechtswissenschaft (1908) — a bibliography only.

See also Maine, Village Communities, Lect. 1; Bryce, Studies in History and Jurisprudence, Essay 11; Berolzheimer, System der Rechts- und Wirthschaftsphilosophie, II, 21; Schuppe, Die Methoden der Rechtsphilosophie, Zeitschrift für vergleichende Rechtswissenschaft, V, 209.

Compare Savigny, System des heutigen römischen Rechts, I, preface (Holloway's transl., p. vii).

At the end of the nineteenth century a revolt from the histo ical school, which had all but supplanted philosophical jurispru dence, and a development of the philosophical school, resulted i

(*a*) *The Social-Philosophical School.*

There are three varieties:

(1) The Social Utilitarians

Continental Legal History Series, II (Great Jurists of the World), 59 599; Jhering, Law as a Means to an End (transl. by Husik), Appendix I (t original may be found in Merkel, Gesammelte Abhandlungen, II, 733 Berolzheimer, System der Rechts- und Wirthschaftsphilosophie, II, § 43 (Th World's Legal Philosophies, 337–351); Berolzheimer, Rechtsphilosophisch Studien, 143–148; Stammler, Wirthschaft und Recht, 2 ed., 578–584; Stamm ler, Lehre von dem richtigen Rechte, 191 ff.; Korkunov, General Theory Law (transl. by Hastings), §§ 13–14; Jhering, Law as a Means to an En (transl. by Husik), Appendix II.

(2) The Neo-Kantians

Stammler's writings: Ueber die Methode der geschichtlichen Rechts theorie (1888); Wirthschaft und Recht (1896, 2 ed., 1905); Die Gesetzmässig keit in Rechtsordnung und Volkswirthschaft (1902); Lehre von dem richtige Rechte (1902); Wesen des Rechts und der Rechtswissenschaft (in Die Kultu der Gegenwart), 1906; Systematische Theorie der Rechtswissenschaft (1911) Rechts und Staatstheorien der Neuzeit (1917).

Critiques of Stammler: Berolzheimer, System der Rechts- und Wirth schaftsphilosophie, II, § 48, iii (The World's Legal Philosophies, 398–422) Kantorowicz, Zur Lehre vom richtigen Recht; Croce, Historical Materialism and the Economics of Karl Marx, chap. 2; Geny, Science et technique en droit privé positif, II, 127–130; Binder, Rechtsbegriff und Rechtsidee (1915).

Compare the Neo-Critical social philosophy of Renouvier. Picard, La philosophie sociale de Renouvier, chap. 3 (1908).

(3) The Neo-Hegelians

Kohler's writings on jurisprudence and philosophy of law: Shakespeare vor dem Forum der Jurisprudenz (1883); Recht, Glaube und Sitte (1892) Zur Urgeschichte der Ehe (1897); Einführung in die Rechtswissenschaft (1902, 5 ed., 1919); Rechtsphilosophie und Universalrechtsgeschichte, in Holtzendorff, Encyklopädie der Rechtswissenschaft, 6 ed. (1904), 7 ed (1915); Moderne Rechtsprobleme (1907, 2 ed. 1913); Lehrbuch der Rechts philosophie (1908, transl. by Albrecht, 1914, 2 ed., 1917).

Berolzheimer, System der Rechts- und Wirthschaftsphilosophie, II, § 48 iv (The World's Legal Philosophies, 422–431); Berolzheimer, Zum Method enstreit in der Rechtsphilosophie der Gegenwart, Archiv für Rechts- und Wirthschaftsphilosophie, IV, 56.

For critique, see Geny, Science et technique en droit privé positif, II 111–126.

(*b*) *The Revival of Natural Law in France.*

Salleilles, L'École historique et droit naturel d'après quelques ouvrages récents, Revue trimestrielle de droit civil, 1, 80 (1902); Charmont, La renaissance du droit naturel (1910) — see Modern French Legal Philosophy, §§ 43–103, for translation of part of this book; §§ 78–103 are important in the present connection. Geny, Science et technique en droit privé positif, II, §§ 134–140; Demogue, Notions fondamentales du droit privé, 22. See also Jung, Das Problem des natürlichen Rechts (1912).

(*c*) *The Economic Interpretation.*

(i) As to interpretation of history generally, see Seligman, The Economic Interpretation of History, 2 ed.; Small, General Sociology, 44–62; Barth, Die Philosophie der Geschichte als Soziologie, 200–346, 2 ed., 483–809; Croce, Historical Materialism and the Economics of Karl Marx, chap. 2.

(ii) As to interpretations of jurisprudence and legal history, see Pound, Political and Economic Interpretations of Legal History, Proceedings, American Political Science Ass'n, 1912, 95.

(iii) Idealistic interpretations:

(*a*) Ethical. Hastie, Outlines of Jurisprudence, 152–153 (Friedländer, Juristische Encyklopädie, 65).

(*b*) Religious. Stahl, Philosophie des Rechts, 5 ed., II, § 5 (p. 4); DeZulueta, The Girard Testimonial Essays, 30 Law Quarterly Review, 214, 216–217; Pound, Puritanism and the Common Law, 45 American Law Review, 811.

(*c*) Political. Lorimer, Institutes of Law, 2 ed., 353–356; Hastie, Outlines of Jurisprudence, 5, 7, 24–28 (Puchta, Cursus der Institutionen, §§ 2, 3, 9); Maine, Ancient Law, last two paragraphs of chap. 5.

(iv) Ethnological interpretations.

(*a*) Idealistic. Jhering, Geist des römischen Rechts, I, § 19; Muirhead, Historical Introduction to the Private Law of Rome, § 1. But see Voigt, Römische Rechtsgeschichte, I, § 2; Cuq, Institutions juridiques des Romains, I, 29–30; Kuhlenbeck, Entwickelungsgeschichte des römischen Rechts, I, 31–40. Compare Hegel, Grundlinien der Philosophie des Rechts, §§ 346–347 (Dyde's transl., 343–344).

(*b*) Psychological. Carle, La vita del diritto, 2 ed., bk. V; Fouillée, L'Idée moderne du droit, 6 ed., bk. I, introduction and chap. 5 (Modern French Legal Philosophy, chaps. I and II).

(*c*) Positivist. Post, Die Grundlagen des Rechts, 8–9.

(v) Economic interpretations.

(*a*) Idealistic — the realization of an economic idea. Croce, The Philosophy of Hegel, 201–202.

(*b*) Mechanical-Positivist. Centralization and Law, 23, 31–35, 63–64, 132–133; Adams, The Modern Conception of Animus, 19 Green

Bag, 12, 17, 32–33. See also Bohlen, The Rule in Rylands *v.* Fletcher, 59 University of Pennsylvania Law Review, 298, 318–329.

(*c*) Economic realism. Berolzheimer, System der Rechts und Wirthschaftsphilosophie, II, § 40 (The World's Legal Philosophies, 298–307).

At the same time, beginning under the influence of the positivist philosophy, there arose:

(*d*) *The Sociological School.* See bibliography, *supra.*

Precursor: Montesquieu (1689–1755).

See Continental Legal History Series, II (Great Jurists of the World), 417–446; Ehrlich, Montesquieu and Sociological Jurisprudence, 29 Harvard Law Review 582.

(1) The Mechanical Stage

For critiques, see Berolzheimer, System der Rechts- und Wirthschaftsphilosophie, II, § 44 (The World's Legal Philosophies. 351–374); Charmont, La renaissance du droit naturel, chap. 5 (Modern French Legal Philosophy, 65–73); Korkunov, General Theory of Law (transl. by Hastings), 265–266.

(2) The Biological Stage

Post, Der Ursprung des Rechts, 7; Richard, Origine de l'idée de droit, 5, 54–55; Vaccaro, Les bases sociologiques du droit et de l'état, 450–452.

For critiques, see Berolzheimer, System der Rechts- und Wirthschaftsphilosophie, II, §§ 47, 51 (The World's Legal Philosophies, 387–391, 456–466); Tourtoulon, Principes philosophiques de l'histoire du droit, 80–173.

(3) The Psychological Stage

Gabriel Tarde (1843–1904).

Berolzheimer, System der Rechts- und Wirthschaftsphilosophie, II, § 49 (The World's Legal Philosophies, 431–446); Tarde, Les transformations du droit; Tourtoulon, Principes philosophiques de l'histoire du droit; Tanon, L'évolution du droit et la conscience sociale, 3 ed., 143–176.

Gierke, Deutsche Genossenschaftsrecht, I, 1; Gierke, Das Wesen der menschlichen Verbände, 33–34; Gierke, Die Genossenschaftstheorie und die deutsche Rechtsprechung, 10 ff.; Gierke, Die Grundbegriffe der Staatsrecht und die neueste Staatstheorien, Zeitschrift für die gesammte Staatsrechtswissenschaft, XXX, 304.

Ward, Dynamic Sociology, I, 468–472, 704–706, II, 11–17; Ward, The Psychic Factors of Civilization, 120; Ward, Applied Sociology, 13.

Tarde, Laws of Imitation (transl. by Parsons), 2–3, 11–13, 14–15, 310–320.

Brugeilles, Le droit et la sociologie, chap. 6.

Legal method: Science of Legal Method (Modern Legal Philosophy Series, vol. 9); Les méthodes juridiques (lectures by French jurists, 1910); Wurzel, Das juristische Denken; Bozi, Die Weltanschauung der Jurisprudenz.

(4) The Stage of Unification

Roguin, La règle de droit, 8; Vander Eycken, Méthode positive de l'interprétation, 112; Kantorowicz, Rechtswissenschaft und Soziologie, 8; Brugeilles, Le droit et la sociologie, 160 ff.

Vinogradoff, The Crisis of Modern Jurisprudence, 29 Yale Law Journal, 312.

Ward, Pure Sociology, 12–14; Small, General Sociology, 91; Small, The Meaning of Social Science, 87.

The Philosophical Schools Compared

Law-of-Nature	*Metaphysical*	*Social-Philosophical*
Sought to deduce a complete system of principles, of universal validity, from the nature of man in the abstract, and to develop these principles into an all-sufficient code of legal rules.	Sought to deduce from some single fundamental idea a complete system of principles of universal validity to which jurists should endeavor to make the actual law conform.	Seeks the ideal side of the actual law and the materials for criticism and for constructive law-making on the basis of some form of social philosophy.

The Types of the Social-Philosophical School

	Social-Utilitarians	*Neo-Kantians*	*Neo-Hegelians*
Tendency	Analytical and social-philosophical	Philosophical and sociological	Historical and sociological
Leading Representative	Rudolf von Jhering (1818–1892)	Rudolf Stammler (1856-)	Josef Kohler (1849–1919)
Achievements	(1) Overthrow of the "jurisprudence of conceptions." (2) Insistence upon the interests which the legal system secures rather than upon the rights by which it secures them. (3) The theory of punishment as something to be adjusted to the criminal rather than to the nature of the crime. (4) Recognition in recent Continental thought of the imperative idea of law.	(1) Turning attention from the relations of morals and ethics to abstract rules and directing it to the relation of these matters to the administration of justice through rules. (2) The theory of the social ideal as the criterion of justice through rules. (3) Adding a theory of the just decision of causes to the theory of making just rules.	(1) The theory of law as the product of the civilization of a people. (2) The theory of the relation of comparative legal history and the philosophy of law. (3) Theory of the sociological interpretation and application of legal rules.

The Principal Schools of Jurists Compared

Analytical	*Historical*	*Philosophical*	*Sociological*
Consider developed systems only.	Consider the past rather than the present of law.	Seek ideal standards by which to criticise the law that exists.	Consider the working of law more than its abstract content.
Regard law as something made consciously by lawgivers, legislative or judicial.	Regard law as something that is not and in the long run cannot be made consciously.	Agree with the historical jurist that law is not made, but is found.	Regard law as a social institution which may be improved by intelligent human effort, and hold it their duty to discover the best means of furthering and directing such effort.
See chiefly the force and constraint behind legal rules; conceive that the sanction of law is enforcement by the judicial organs of the state, and that nothing which lacks an enforcing agency is law.	See chiefly the social pressure behind legal rules; find sanction in habits of obedience, displeasure of one's fellow men, public sentiment or opinion, or the social standard of justice.	Look at the ethical bases of rules rather than at their sanction.	Lay stress upon the social purposes which law subserves rather than upon sanction.
Take statute as the typical law.	Take custom or those customary modes of decision that make up a body of juristic tradition or of case law as the type of law.	Have no necessary preference for any form of law.	Look upon legal doctrines, rules and standards functionally and regard the form as a matter of means only.
Their philosophical views are utilitarian or teleological.	As a rule they have been Hegelians.	Hold very diverse philosophical views. In the nineteenth century, Hegelians or Krauseans. Today, some form of the Social-Philosophical School.	Their philosophical views are very diverse. Chiefly (*a*) Social-Philosophical of one type or another, (*b*) Positivists, (*c*) Pragmatists.

The Programme of the Sociological School

The Sociological jurists insist upon six points:

(1) Study of the actual social effects of legal institutions and legal doctrines.

Ehrlich, Grundlegung der Soziologie des Rechts, chap. 21; Ehrlich, Die Erforschung des lebenden Rechts, Schmoller's Jahrbuch für Gesetzgebung, XXV, 190; Page, Professor Ehrlich's Czernowitz Seminar of Living Law, Proceedings of Fourteenth Annual Meeting of the Association of American Law Schools, 46; Kantorowicz, Rechtswissenschaft und Soziologie, 7–8; Vander Eycken, Méthode positive de l'interprétation, 109.

(2) Sociological study in preparation for law-making.

Kantorowicz, Rechtswissenschaft und Soziologie, 9; Tanon, L'évolution du droit et la conscience sociale, 3 ed., 196–198.

(3) Study of the means of making legal rules effective.

Pound, The Need of a Sociological Jurisprudence, 19 Green Bag, 607; Pound, Law in Books and Law in Action, 44 American Law Review, 12; Pound, The Limits of Effective Legal Action, 27 International Journal of Ethics, 150; Parry, The Law and the Poor, 248–249; Smith, Justice and the Poor.

(4) A sociological legal history.

Brugeilles, Le droit et la sociologie, 160; Kantorowicz, Rechtswissenschaft und Soziologie, 33–34; 1 Wigmore, Evidence, § 865.

(5) The importance of reasonable and just solutions of individual cases.

Hollams, Jottings of an Old Solicitor, 160–162; Pound, Enforcement of Law, 20 Green Bag, 401; Gnaeus Flavius (Kantorowicz), Der Kampf um die Rechtswissenschaft; Kantorowicz, Rechtswissenschaft und Soziologie, 11 ff.

(6) That the end of juristic study, toward which the foregoing are but some of the means, is to make effort more effective in achieving the purposes of law.

Kohler's Introduction in Rogge, Methodologische Vorstudien zu einer Kritik des Rechts, viii.

Definitions of Jurisprudence for Discussion in Connection with the Foregoing

The formal science of positive law.—Holland, Elements of Jurisprudence, 12 ed., 13.

Scientific knowledge of the history and system of right (law). — Puchta, Cursus der Institutionen, I, § 33.

The ultimate object of jurisprudence is the realization of the idea in the ideal of humanity, the attainment of human perfection, and this object is identical with the object of ethics. . . .

The proximate object of jurisprudence, the object which it seeks as a separate science (i.e. from ethics), is liberty. But liberty, being the perfect relation between human beings, becomes a means towards the realization of their perfection as human beings. Hence jurisprudence, in realizing its special or proximate object, becomes a means towards the realization of the ultimate object which it has in common with ethics. The relation in which jurisprudence stands to ethics is thus a subordinate one, the relation of species to genus. — Lorimer, Institutes of Law, 2 ed., 353, 355.

The science of the human will, in the distinction of the particular from the universal, and in the relation of the particular to the universal. — Herkless, Jurisprudence, 1.

Jurisprudence has for its subject law, that is, an aggregate of norms which determine the mutual relations of men living in a community. — Arndts, Juristische Encyklopädie, § 1.

Juristic encyclopedia, accordingly, is a systematic, unified survey of the means of peaceable adjustment of the external relations of mankind and social communities. — Gareis, Science of Law (transl. by Kocourek), 26.

It is at once a philosophy, a science, and an art. As a philosophy, its desire is to understand justice; as a science, its purpose is to explain the evolution of justice; as an art, its aim is to formulate those rules of conduct essential to the realization of justice. Conceived in this manner, jurisprudence forms the background of all associated activity; it provides the framework that limits and controls the exercise of liberty; it reflects the color and resounds the tone of those unconscious premises of action which give character to a civilization. The law is neither a schoolmaster for instruction nor a guardian for command; it is rather the expression of the ethical sense of a community crystallized about the problem of common living. — Adams, Economics and Jurisprudence, 8.

The science of law in the wider sense is our whole knowledge

of law. But this knowledge is on the one hand practical, on the other hand philosophical. Accordingly it may be divided into the science of law in its narrower and more proper sense, called jurisprudence, and the philosophy of law. — Sternberg, Allgemeine Rechtslehre, I, § 12.

General theory of law investigates the formal (constructive) side of fundamental juristic conceptions and legal institutions; the philosophy of law investigates their material kernel and basis. — Berolzheimer, System der Rechts- und Wirthschaftsphilosophie, II, 20.

The Science of Justice as practiced in civilized nations. — Beale, The Development of Jurisprudence during the Nineteenth Century: Select Essays in Anglo-American Legal History, I, 558.

2
THE END OF LAW

III
THEORIES OF JUSTICE

Miller, The Data of Jurisprudence, chap. 6; Salmond, Jurisprudence, § 9; Pulszky, Theory of Law and Civil Society, § 173; Bentham, Theory of Legislation, Principles of the Civil Code, part I, chaps. 1–7; Holland, Jurisprudence, chap. 6.

Kant, Philosophy of Law (Hastie's transl.), 45–46 (§ C); Spencer, Justice, chaps. 5, 6; Willoughby, Social Justice, chap. 2; Sidgwick, The Methods of Ethics, chap. 5; Paulsen, Ethics (Thilly's transl.), chap. 9; Gareis, Vom Begriff Gerechtigkeit; Demogue, Notions fondamentales du droit privé, 119-135; Picard, Le Droit Pur, liv. IX (Le but du droit: La justice); Pound, Social Justice and Legal Justice, 75 Central Law Journal, 455.

A
Historical: The End of Law as Developed in Legal Rules and Doctrines

Pound, The End of Law as developed in Legal Rules and Doctrines, 27 Harvard Law Review, 195.

1. PRIMITIVE LAW

Holmes, Common Law, Lect. I; Post, Ethnologische Jurisprudenz, II, bk. IV; Fehr, Hammurapi und das Salisches Recht, 135–138.

Jenks, Law and Politics in the Middle Ages, chap. 4; Maine, Ancient Law, chap. 10; Strachan-Davidson, Problems of the Roman Criminal Law, chap. 3; Leist, Graeco-Italische Rechtsgeschichte, §§ 28–53; Amira, Grundriss des Germanischen Rechts, chaps. 4, 6.

Code of Hammurabi, §§ 196–214 (Harper's transl.); Laws of Manu, VIII, 279–280 (Bühler's transl.); Twelve Tables of Gortyna, II, 4–5, and IX (Roby's transl. in 2 Law Quarterly Review, 125); Law of Draco, quoted by Demosthenes against Aristocrates, § 96 — "If any one is killed violently, reprisals by seizing men (τὰς ἀνδροληψίας) to be a right of his nearest relatives

until justice is done for the murder or the murderers are surrendered. But this right of reprisal to extend to three men and no more;" Law of Draco, quoted by Plutarch, Life of Solon, — "He [Draco] likewise enacted a law for the reparation of damage received from beasts. A dog that had bit a man was to be delivered up bound to a log four cubits long;" Twelve Tables, VIII, 2–3, 12–13, XII, 2a (transl. in Goodwin, XII Tables, 13, 14); Gaius, III, §§ 183–192, 222–223, IV, §§ 75–78 (transl. by Abdy and Walker, and by Poste); Salic Law, XIV, 1–3, XXX, 4–7, XL (transl. in Henderson, Historical Documents of the Middle Ages); Laws of Ethelbert, §§ 33–61 (transl. in Thorpe, Ancient Laws of England, I, 13–18); Laws of Alfred, § 24 (transl. in Thorpe, I, 79); Evans, Mediaeval Welsh Law (Laws of Howel the Good), 185–187, 190–191; Abdur Rahim, Muhammadan Jurisprudence, 358–359.

Dareste, Le droit des représailles, Nouvelles études d'histoire du droit, 38; Leist, Altarisches Jus Gentium, § 68; Maurer, Altnordische Rechtsgeschichte, V, pt. I; Maine, Early History of Institutions, Lect. 2; Dareste, Le prix du sang, Nouvelles études d'histoire du droit, 1; Strachan-Davidson, Problems of the Roman Criminal Law, chap. 1; Wilda, Strafrecht der Germanen, 278–280; Jhering, Geist des römischen Rechts, 5 ed., I, §§ 18–18a; Danz, Der Sakrale Schutz im römischen Rechtsverkehr, 47 ff.; Greenidge, Infamia, chaps. 3, 4; Thayer, Preliminary Treatise on Evidence, 9–10.

2. THE STRICT LAW

Jhering, Geist des römischen Rechts, 5 ed., §§ 44–47d.

Gaius, III, § 168, IV, §§ 116–117; Heusler, Institutionen des deutschen Privatrechts, I, § 12; Justinian, Institutes, II, 23 (transl. by Abdy and Walker and by Moyle); Doctor and Student, Dial. II, chaps. 6, 7, 11, 24; Hargrave, Law Tracts, 324–325; Finch, Law, chap. 3; Coke, Fourth Institute, 82–84; Kerly, History of Equity, 113–115; Ames, Specialty Contracts and Equitable Defenses, 9 Harvard Law Review, 49.

Pollock, Genius of the Common Law, 36; Danz, Lehrbuch der Geschichte des römischen Rechts, II, § 142; Gray, Restraints on the Alienation of Property, § 74b; Coke on Littleton, 214b; Spence, History of the Equitable Jurisdiction of the Court of Chancery, I, 629, 654.

Aristotle, Politics, bk. II, chap. 8 (Jowett's transl., vol. I, 47–49, Welldon's transl., 71–72); Mirror of Justices, chap. 5, §§ 1, 19; Letter of Thomas Jefferson to John Tyler, Tyler, Letters and Times of the Tylers, I, 35; Loyd, Early Courts of Pennsylvania, 162–163, 189–190, 193–195, 196–197, 209–210.

3. EQUITY: NATURAL LAW

Voigt, Das Jus Naturale, Aequum et Bonum und Jus Gentium der Römer, I, 321–323.

Holland, Jurisprudence, 12 ed., 31–40; Markby, Elements of Law, 6 ed., §§ 116–124; Miller, Data of Jurisprudence, 381–387, 391–407; Salmond, Jurisprudence, § 13; Korkunov, General Theory of Law (transl. by Hastings), § 17; Pulszky, Theory of Law and Civil Society, § 220; Goadby, Introduction to the Study of Law, 2 ed., 127–134; Siegel, Deutsche Rechtsgeschichte, § 53;

Maine, Ancient Law, chaps. 2, 3; Buckley, Equity in Roman Law; Maitland, Equity, Lects. 1, 2; Erdmann, History of Philosophy (transl. by Hough), I, 190; Zeller, Stoics, Epicureans and Sceptics (transl. by Reichel), 287–290; references under *ius naturale*, *ante*.

(*i*) Identification of Law with Morals.

Digest of Justinian, I, 1, 1, § 1 (transl. by Monro); Id., I, 1, 11; Institutes of Justinian, II, 7, 2; Code of Justinian, VIII, 56, 1 and 10; Id., IV, 44, 2; Planiol, Traité élémentaire du droit civil, III, § 2638; Grueber, Introduction to Sohm, Institutes of Roman Law, 1 ed., xxv; Russell, International Law, 19 Rep. Am. Bar Ass'n, 253–268; Year Book, 4 Hen. VII, 5; Drew *v.* Hansen, 6 Ves. 675, 678; Lambe *v.* Eames, L. R. 6 Ch. App. 597; Story, Equity Jurisprudence, I, § 247; Maitland, Equity, 104.

Pound, The Decadence of Equity, 5 Columbia Law Review, 20.

(*ii*) Human beings as subjects of legal rights.

Institutes of Justinian, I, 3, § 2, 8, §§ 1, 2; Digest, I, 5, 17 (transl. by Monro); Salkowski, Institutes of Roman Law (transl. by Whitfield), 160, 162, 248–253, 280–285; Gaius, I, §§ 144–145; Grotius, bk. 2, chap. 5, §§ 1–7; Maine, International Law, American ed., 126–127.

(*iii*) Substance rather than form.

Digest of Justinian, IV, 5, 2, § 1 (transl. by Monro); Gaius, I, § 158; II, §§ 40–41, 101–104, 115–117, 119; IV, § 36; Muirhead, Historical Introduction to the Private Law of Rome, 3 ed., 216; Phelps, Juridical Equity, §§ 194–204.

(*iv*) Good faith.

Gaius, IV, §§ 61–62; Muirhead, Historical Introduction to the Private Law of Rome, 3 ed., 256–257; Sohm, Institutes of Roman Law (transl. by Ledlie, 2 ed.), 106–108; Gaius, II, § 43; Sohm, Institutes of Roman Law (transl. by Ledlie, 2 ed.), 222–223; Digest of Justinian, XXII, 1, 25, § 1, XLI, 1, 40, XLI, 1, 48, pr. and § 1; Code of Justinian, III, 32, 22; Digest of Justinian, XLI, 3, 4, § 20; Gaius, II, § 43; Digest, L, 17, 84, § 1; Sext, I, 18; Grotius, bk. III, chap. 11, §§ 3–4 (transl. by Whewell); Pufendorf, Law of Nature and Nations (Kennet's transl.), bk. III, chap. 4; Burlamaqui, Principles of Natural and Politic Law (Nugent's transl.), bk. II, pt. 4, chap. 10, § 4, bk. I, pt. I, chap. 7; Maine, Ancient Law, chap. 9; Ames, Law and Morals, 22 Harvard Law Review, 97, 106.

(*v*) Unjust enrichment.

Digest, L, 17, 206, XII, 6, 1, XII, 6, 66; Moses *v.* Macferlan, 2 Burr. 1005; Ames, Law and Morals, 22 Harvard Law Review, 97, 106.

4. THE MATURITY OF LAW

Progress of Continental Law in the Nineteenth Century, Continental Legal History Series, vol. XI, chaps. 1, 2 (Alvarez).

(*i*) Equality.

Digest, I, 1, 4; Bentham, Theory of Legislation, Principles of the Civil Code, pt. I, chap. 2; Clark, Practical Jurisprudence, 110–114; Austin, Jurisprudence, 3 ed., 97–98; Stephen, Liberty, Equality, Fraternity, 189–255; Maine, Early History of Institutions, American ed., 398–400; Miller, Data of Jurisprudence, 379–381; Lorimer, Institutes of Law, 2 ed., 375–414; Röder, Grundzüge des Naturrechts, II, §§ 106–119; Lasson, System der Rechtsphilosophie, 376–377; Ritchie, Natural Rights, chap. 12; Demogue, Notions fondamentales du droit privé, 136–142.

(*ii*) Security.

Bentham, Theory of Legislation, Principles of the Civil Code, pt. I, chaps. 2, 7; Lorimer, Institutes of Law, 2 ed., 367–374; Gareis, Science of Law (transl. by Kocourek), 33; Demogue, Notions fondamentales du droit privé, 63–110; Massachusetts Bill of Rights, art. 10 (1780).

5. THE SOCIALIZATION OF LAW

Jhering, Scherz und Ernst in der Jurisprudenz (10 ed., 1909), 408–425; Charmont, Le droit et l'esprit démocratique, chap. 2; Stein, Die soziale Frage im Lichte der Philosophie, 2 ed., 457 ff.; Pound, Social Justice and Legal Justice, Proc. Mo. Bar Ass'n, 1912, 110, 75 Central Law Journal, 455; Duguit, Les transformations générales du droit privé depuis le code Napoléon, transl. in Continental Legal History Series, vol. XI, chap. 3.

(*i*) Limitations on the use of property: anti-social exercise of rights.

German Civil Code, § 226; Cosack, Lehrbuch des deutschen bürgerlichen Rechts, I, § 77; Planiol, Traité élémentaire du droit civil, II, §§ 870–871; Walton, Motive as an Element in Torts in the Common and in the Civil Law, 22 Harvard Law Review, 501; Charmont, L'Abus du droit, Revue trimestrielle de droit civil, I, 113; Porcherot, De l'abus du droit; Salanson; De l'abus du droit; Huffcut, Percolating Waters; The Rule of Reasonable User, 13 Yale Law Journal, 222; Ames, How Far an Act May be a Tort Because of the Wrongful Motive of the Actor, 18 Harvard Law Review, 411, 414 ff.; Stoner, The Influence of Social and Economic Ideals on the Law of Malicious Torts, 8 Michigan Law Review, 468; Wigmore, Cases on Torts, II, app. A, §§ 262, 271–272; Dunshee *v.* Standard Oil Co., 152 Ia. 618.

Jenks, Governmental Action for Social Welfare, 81; Advertisement Regulations Act, [1907] VII Edw. 7, ch. 27; Terry, Constitutionality of Statutes Forbidding Advertising Signs on Property, 24 Yale Law Journal, 1; Billboard and Other Forms of Outdoor Advertising, Chicago City Club Bulletin V, no. 24; St. Louis Advertisement Co. *v.* City, 235 Mo. 99, 249 U. S. 269, 274,

People *v.* Oak Park, 266 Ill. 365; Bill Posting Co. *v.* Atlantic City, 71 N. J Law, 72; Bryan *v.* City, 212 Pa. St. 259.

(*ii*) Limitations on freedom of contract.

Goodnow, Social Reform and the Constitution, 242–258; Wyman, Public Service Corporations, I, § 331; Dicey, Law and Public Opinion in England Lect. 8; Pound, Liberty of Contract, 18 Yale Law Journal, 454; Jastrow, Was ist Arbeiterschutz, Archiv für Rechts- und Wirthschaftsphilosophie, VI, 133 317, 322, 501; Brown, Underlying Principles of Modern Legislation, 316-321; Noble State Bank *v.* Haskell, 219 U. S. 104; Chicago, B. & Q. R. Co. *v.* McGuire, 219 U. S. 549, 566–575.

(*iii*) Limitations on the *jus disponendi*.

Gray, Restraints on the Alienation of Property, 2 ed., viii-ix; Thompson, Homesteads and Exemptions, § 465; Mass. Acts of 1908, chap. 605; Ill. Rev. St. 1909, chap. 95, § 24; New Zealand Family Protection Act, 1908; Allardice *v.* Allardice, [1911] A. C. 730; Huber, System und Geschichte des Schweizerischen Privatrechts, III, §§ 82–83.

(*iv*) Limitations on the power of the creditor or injured party to exact satisfaction.

Thompson, Homesteads and Exemptions, §§ 40, 379; German Civil Code, §§ 528–529, 829; Zivilprozessrecht (German Code of Civil Procedure), § 850; Bureau, Le Homestead.

Compare Digest, XLII, 3, 4, pr.; Code, VII, 71, 1; Code, II, 11, 11; Digest, XLII, 1, 16–17; Digest, XLII, 1, 19, § 1; Digest, L, 17, 173; Roby, Roman Private Law, II, 125, n. 1; Baudry-Lacantinerie, Précis de droit civil, 11 ed., I, § 529.

(*v*) Liability without fault; responsibility for agencies employed.

Wambaugh, Workmen's Compensation Acts, 25 Harvard Law Review, 129; Opinion of the Justices, 209 Mass. 607; State *v.* Clausen, 65 Wash. 156; Borgnis *v.* Falk, 147 Wis. 327. See Ives *v.* Railroad Co., 201 N. Y. 271.

Pilotage Act, 1913 (England), § 15.

Compare 1 Bishop, Criminal Law, 7 ed., §§ 285–291, with Hobbs *v.* Winchester Corporation, [1910] 2 K. B. 471, 482 ff.; State *v.* Keller, 8 Idaho, 699; State *v.* Turner, 54 Ohio Law Bulletin, 409, 410.

(*vi*) Change of *res communes* and *res nullius* into *res publicae*.

See statutes in 1 Wiel, Water Rights, 3 ed., §§ 6, 170, 347; *Ex parte* Bailey, 155 Cal. 472; Greer *v.* Connecticut, 161 U. S. 519; Gallatin *v.* Corning I. Co., 163 Cal. 405; Graves *v.* Dunlap, 87 Wash. 648; Water Code of Washington (1913), §§ 1–2.

(*vii*) Interest of society in dependent members of the household.

Mack, The Juvenile Court, 23 Harvard Law Review, 104; Flexner, Juvenile Courts and Probation, 9, 68; Eliot, The Juvenile Court, 89, 90.

B

Philosophical: The End of Law as Developed in Juristic Thought

Pound, The End of Law as Developed in Juristic Thought, 27 Harvard Law Review, 605, 30 Harvard Law Review, 201.

1. GREEK

Berolzheimer, System der Rechts- und Wirthschaftsphilosophie, II, §§ 13–16 (World's Legal Philosophies, 46–77).

Aristotle, Nicomachaean Ethics, bk. V (convenient transl. by Browne, in Bohn's Libraries), bk. VIII, 7, 2–4; Aristotle, Politics, I, 1, 9, I, 13, III, 1, III, 4–5, IV, 12 (convenient transl. by Welldon); Erdmann, History of Philosophy (transl. by Hough), I, 37, 52, 123, 190–191; Hildenbrand, Geschichte und System der Rechts- und Staatsphilosophie, §§ 1–121; Dunning, Political Theories, Ancient and Mediaeval, 28, 105; Zeller, Aristotle and the Earlier Peripatetics (transl. by Costelloe and Muirhead), II, 175, 197.

Shall we not then find that in such a city . . . a shoemaker is only a shoemaker, and not a pilot along with shoemaking, and that the husbandman is only a husbandman, and not a judge along with husbandry; and that the soldier is a soldier, and not a money-maker besides; and all others in the same way? He admitted it. And it would appear that if a man, who through wisdom were able to become everything and to imitate everything should come into our city and should wish to show us his poems, we should honor him . . . but we should tell him that there is no such person with us in our city, nor is there any such allowed to be, and we should send him to some other city. — Plato, Republic, III, 397–398.

Compare St. Paul in Eph. v, 22 ff., and vi, 1–5.

2. ROMAN

Berolzheimer, System der Rechts- und Wirthschaftsphilosophie, II, §§ 17–20 (World's Legal Philosophies, 78–92).

Institutes of Justinian, I, 1, pr. and § 3; Cicero, De Officiis, II, 12, De Republica, I, 32; Hildenbrand, Geschichte und System der Rechts- und Staatsphilosophie, §§ 131–135, 143–147; Voigt, Das Ius Naturale, aequum et bonum und Ius gentium der Römer, I, §§ 16, 35–41, 44–64, 89–96; Savigny, System des heutigen römischen Rechts, I, 407–410.

3. MEDIAEVAL

Berolzheimer, System der Rechts- und Wirthschaftsphilosophie, II, §§ 21–23 (World's Legal Philosophies, 93–111).

Thomas Aquinas, Summa Theologiae, prima secundae, qu. 90–97, secunda secundae, qu. 57–80, 120,122; Erdmann, History of Philosophy (transl. by Hough), I, 229; Dunning, Political Theories, Ancient and Mediaeval, 158, 196.

4. THE REFORMATION

Berolzheimer, System der Rechts- und Wirthschaftsphilos phie, II, § 24 (World's Legal Philosophies, 112–114).

Sources: Oldendorp, Iuris naturalis gentium et ciuilis εἰσαγώγη (1539 Hemmingius (Hemmingsen), De lege naturale apodictica methodus (1562 Winckler, Principiorum iuris libri V (1615). These may be found conveniently in Kaltenborn, Die Vorläufer des Hugo Grotius. Hinrichs, Geschichte de Rechts- und Staatsprincipien seit der Reformation, 1–60; Gierke, Johannes Althusius, 2 ed., 18–49, 142–162, 321; Dunning, Political Theories from Luther to Montesquieu, chaps. 1–3.

5. THE SPANISH JURIST–THEOLOGIANS

Figgis, Studies of Political Thought from Gerson to Grotius Lect. VI.

Sources: Soto, De iustitia et iure (1589); Suarez, De legibus ac deo legislatore (1619).

Suarez, De legibus, I, 8, §§ 1–2, I, 9, § 2, II, 12, II, 19, § 9, III, 9, § 4, III, 11, III, 35, § 8; Soto, De iustitia et iure, I, q. 5, art. 2, III, q. 3, art. 2; Franciscus de Victoria, Relectiones theologicae (1557), I, 354, 375.

Dunning, Political Theories from Luther to Montesquieu, 132–149; Westlake, Chapters on the Principles of International Law, 25–28.

6. THE SEVENTEENTH CENTURY

Berolzheimer, System der Rechts- und Wirthschaftsphiloso phie, II, §§ 25–27 (World's Legal Philosophies, 115–134).

Sources: Grotius, De iure belli et pacis (1625); Hobbes, Leviathan (1651); Pufendorf, De iure naturae et gentium (1672).

Grotius, I, 1, 3–6, 8–11, II, 1, 1, II, 1, 11, II, 10, 1, II, 17, 2, § 1; Pufendorf, De iure naturae et gentium, I, chap. 7, §§ 6–17, IV, 4; Hobbes, Leviathan, chap. 15; Rutherforth, Institutes of Natural Law, I, 2, § 3.

Stintzing, Geschichte der deutschen Rechtswissenschaft, II, 1–111; Hinrichs, Geschichte der Rechts- und Staatsprincipien seit der Reformation, I, 60–274, II, III, 1–318; Dunning, Political Theories from Luther to Montesquieu, 164–171, 318–325; Duff, Spinoza's Political and Ethical Philosophy, chap. 22.

That is unjust which is contrary to the nature of rational creatures. — Grotius, I, 1, 3, § 1.

From that law of nature by which we are obliged to transfer to another such rights as being retained hinder the peace of mankind, there followeth a third, which is this: "that men perform their covenants made;" without which covenants are in vain

and but empty words, and the right of all men to all things remaining, we are still in a condition of war. And in this law of nature consisteth the fountain and original of justice. For where no covenant hath preceded, there hath no right been transferred and every man has right to everything, and consequently no action can be unjust. But when a covenant is made, then to break it is unjust; and the definition of injustice is no other than the not performance of covenant. And whatsoever is not unjust is just. . . . And therefore where there is no "own," that is no property, there is no injustice; and where there is no coercive power erected, that is where there is no commonwealth, there is no property, all men having right to all things; therefore where there is no commonwealth, there nothing is unjust. So that the nature of justice consists in keeping of valid covenants; but the validity of covenants begins not but with the constitution of a civil power sufficient to compel men to keep them; and then it is also that property begins. — Hobbes, Leviathan, chap. 15.

Again, in the state of nature no one is by common consent master of anything, nor is there anything in nature which can be said to belong to one man rather than another. Hence in the state of nature we can conceive no wish to render to every man his own or to deprive a man of that which belongs to him; in other words, there is nothing in the state of nature answering to justice and injustice. Such ideas are only possible in a social state, when it is decreed by common consent what belongs to one man and what to another. — Spinoza, Ethics, pt. IV, pr. 37, n. § 2 (Elwes' transl.).

7. THE EIGHTEENTH CENTURY

Berolzheimer, System der Rechts- und Wirthschaftsphilosophie, II, § 29 (World's Legal Philosophies, 141–156); Korkunov, General Theory of Law (transl. by Hastings), § 7; Ritchie, Natural Rights, chap. 3; Charmont, La renaissance du droit naturel, 10–43.

Burlamaqui, Principles of Natural and Politic Law (Nugent's transl.), pt. I, chap. 5, § 10, and chap. 10, §§ 1–7; Rousseau, Social Contract, bk. II, chap. 6 (transl. by Barrington and by Tozer); Montesquieu, Spirit of Laws, bk. I (Nugent's transl., ed. by Prichard, vol. I, 1–7); Vattel, Law of Nations, bk. I, chap. 2, §§ 15–17 (there are several English versions); 1 Blackstone, Commentaries, 38–43; Rutherforth, Institutes of Natural Law, bk. II, chap, 5, §§ 1–3; Wolff, Institutiones juris naturae et gentium, §§ 74–102.

I shall close this chapter and this book with a remark which ought to serve as a basis for the whole social system; it is that instead of destroying natural equality, the fundamental pact, on the contrary, substitutes a moral and lawful equality for the physical inequality which nature imposed upon men, so that though unequal in strength or intellect, they all become equal by convention and legal right. — Rousseau, Social Contract, bk. I, chap. 9 (Tozer's transl.).

8. THE NINETEENTH CENTURY

(*i*) Metaphysical Jurists.

Berolzheimer, System der Rechts- und Wirthschaftsphilosophie, II, §§ 35–36 (World's Legal Philosophies, 215–259); Korkunov, General Theory of Law (transl. by Hastings), 320–322; Gray, Nature and Sources of Law, § 58.

Lasson, System der Rechtsphilosophie, §§ 24–25; Herkless, Lectures on Jurisprudence, chap. 4; Hegel, Philosophy of Right (Dyde's transl.), §§ 29–33.

Every action is right which in itself, or in the maxim on which it proceeds, is such that it can coexist along with the freedom of the will of each and all in action according to a universal law. — Kant, Rechtslehre, xxxv (Hastie's transl.).

I must in all cases recognize the free being outside of me as such, that is, must limit my liberty by the possibility of his liberty. — Fichte, Grundlage des Naturrechts, I, 49.

This is right: that an existence in general is existence of the free will. Accordingly it is in general liberty as an idea. — Hegel, Grundlinien der Philosophie des Rechts, 61.

We may define right as a principle . . . governing the exercise of liberty in the relations of human life. — Ahrens, Cours du Droit Naturel, 8 ed., I, 107.

Right is the sum of those universal determinations of action through which it happens that the ethical whole and its parts may be preserved and further developed. — Trendelenburg, Naturrecht, § 46.

The fundamental Axiom which forms the basis of the whole system of Natural Justice I conceive to be, that one human being has *no* right to control for his own benefit the volition of another. — Phillipps, Jurisprudence, 80–81 (§ 1).

The ultimate object of positive law is identical with the proximate object of natural law — viz. liberty. But being realizable only by means of order, order is the proximate object of positive law. — Lorimer, Institutes of Law, 2 ed., 523.

Reduced to these terms, the difference between morality and right is a difference in degree and not of essence. Yet it is a very important difference, as it *reduces the power of coercion to what is absolutely necessary for the harmonious coexistence of the individual with the whole.* — Lioy, Philosophy of Right (trans. by Hastie), I, 121.

Fundamental principles of justice:

1. The first and highest fundamental principle of justice provides that every one hold every good which he has unhindered by the acts of any other.

2. That for every value transferred, one receive in return an equal value.

3. Every newly produced value belongs to the producer.

4. Every destroyed good is to be destroyed to the destroyer, and if the destroyed good is another's, the destroyer suffers a subtraction from his own good until the injured person is compensated for his injury by an equivalent value. — Lasson, System der Rechtsphilosophie, § 24.

Right . . . [is] the correspondence or harmony of the will of the individual with the universal will. — Herkless, Lectures on Jurisprudence, 69.

The moral principle which protects the right is the inviolability of the human person. . . . This is the fundamental axiom upon which every doctrine of law may be and ought to be established. — Boistel, Cours de philosophie du droit, 1, 72.

(*ii*) English Utilitarians.

Berolzheimer, System der Rechts- und Wirthschaftsphilosophie, II, § 28 (World's Legal Philosophies, 134–141); Markby, Elements of Law, §§ 51–59; Mill, On Liberty, chap. 4; Bentham, Theory of Legislation, Principles of the Civil Code, chaps. 1, 7; Dicey, Law and Public Opinion in England, Lect. 6.

Bentham, Principles of Morals and Legislation (1780, reprinted by the Clarendon Press, 1879); Bentham, Traité de législation (ed. by Dumont, 1802, transl. as Bentham's Theory of Legislation by Hildreth, 10 ed., 1904);

Bentham, Principles of the Civil Code, Works, I, 295–364; Mill, On Liberty (1859).

See Albee, History of English Utilitarianism; Stephen, The English Utilitarians; Solari, L'idea individuale e l'idea sociale nel diritto privato, §§ 31–36.

The ideas which underlie the Benthamite or individualistic scheme of reform may conveniently be summarized under three leading principles and two corollaries.

1. Legislation is a science. . . .

2. The right aim of legislation is the carrying out of the principle of utility, or, in other words, the proper end of every law is the promotion of the greatest happiness of the greatest number. . . .

3. Every person is in the main and as a general rule the best judge of his own happiness. Hence legislation should aim at a removal of all those restrictions on the free action of an individual which are not necessary for securing the like freedom on the part of his neighbors. . . .

From these three guiding principles of legislative utilitarianism, — the scientific character of sound legislation, the principle of utility, faith in *laissez faire*, — English individualists have in practice deduced the two corollaries, that the law ought to extend the sphere and enforce the obligation of contract, and that, as regards the possession of political power, every man ought to count for one man and no man ought to count for more than one. — Dicey, Law and Public Opinion in England 2 ed., 134–149.

(*iii*) The Historical School.

In virtue of freedom man is the subject of right and law. His freedom is the foundation of right and all real relations of right emanate from it. . . .

In thus founding right upon the possibility of an act of will, the essential principle of right is indicated as that of equality. Right implies the recognition of freedom as belonging equally to all men as subjects of the power of will. It receives its material and contents from the impulse of man to refer to himself what exists out of himself. The function of right, as manifested in law, is to apply the principle of equality to the relations which arise from the operation of this impulse. — Puchta, Cursus der Institutionen, I, § 4 (Hastie's transl.).

Law exists for the sake of liberty; it has its basis in this, that men are beings endowed with a disposition to free exertion of will. It exists to protect liberty in that it limits caprice. — Arndts, Juristische Encyklopädie, § 12.

Justice is thus the condition of social equilibrium, both with reference to the domain of the rule of the will of persons, that is with regard to the harmony of law and [individual] right, and with reference to the maintenance of the limits of action of different persons, or, in other words, to the mutual accommodation to each other of the several and distinct existing rights. — Pulszky, Theory of Law and Civil Society, § 173.

There is a guide which, when kept clearly and constantly in view, sufficiently informs us what we should aim to do by legislation and what should be left to other agencies. This is what I have so often insisted upon as the sole function both of law and legislation, namely, to secure to each individual the utmost liberty which he can enjoy consistently with the preservation of the like liberty to all others. Liberty, the first of blessings, the aspiration of every human soul, is the supreme object. Every abridgment of it demands an excuse, and the only good excuse is the necessity of preserving it. Whatever tends to preserve this is right, all else is wrong. To leave each man to work out in freedom his own happiness or misery, to stand or fall by the consequences of his own conduct, is the true method of human discipline. — Carter, Law: Its Origin, Growth, and Function, 337.

(*ii*) The Positivists.

Hence that which we have to express in a precise way is the liberty of each limited only by the like liberties of all. This we do by saying: — Every man is free to do that which he wills provided he infringes not the equal freedom of any other man. — Spencer, Justice, § 27.

Our theory reconciles the idea of liberty with those of superior power and superior interest: right, concrete and complete, at the same time ideal and real, becomes the maximum of liberty, equal for all individuals, which is compatible with the maximum of liberty, of force and of interest for the social organism. — Fouillée, L'Idée moderne du droit 6 ed., 394.

Courcelle-Seneuil's parallel:

Ancient Ideal	*Nineteenth-Century Ideal*
1. Property founded on conquest.	1. Property founded on labor and saving.
2. Absolute power founded on military force.	2. Empire of laws freely assented to by all.
3. Classification by privilege founded on tradition and the will of the government.	3. Classification founded on personal merit, tested by competition.
4. A stationary society, corrected from time to time by reversion to the ancient type.	4. A progressive society, constantly improving itself by labor and invention.
5. A society ruled by laws, under the supervision of a public authority invested with compulsory powers.	5. A society living by the free initiative of its citizens, regulated by the observance of the moral law.

See Courcelle-Seneuil, Préparation à l'étude du droit, 99, 396.

(*v*) Economic Realists.

Berolzheimer, System der Rechts- und Wirthschaftsphilosophie, II, §§ 37–40 (World's Legal Philosophies, 260–307); Brown, The Underlying Principles of Modern Legislation, Prologue (The Challenge of Anarchy).

(a) Anarchist Individualism

Proudhon, Qu'est-ce que la propriété? (1840); Proudhon, Idée générale de la révolution au dix-neuvième siècle (1851); Proudhon, De la justice dans la révolution et dans l'église (1858); Stirner, Der Einzige und sein Eigenthum (1845, transl. as The Ego and His Own); Grave, La société future, 7 ed., 1895. See Basch, L'individualisme anarchiste: Max Stirner (1904).

Free association, liberty, which is confined to the maintaining of equality in the means of production and of equivalence in exchanges, is the only possible just and true form of society. Politics is the science of liberty; under whatever name it may be disguised, the government of man by man is oppression. The highest form of society is found in the union of order and anarchy. Proudhon, Qu'est-ce que la propriété?, Œuvres Complètes, 1873 ed., I, 224.

(b) Socialist Individualism

(See *supra*, pp. 10–11.)

Socialism in all its forms leaves intact the individualistic ends, but resorts to collective action as a new method of attaining them. That socialism is through and through individualistic in tendency, with emotional fraternalism superadded, is the point I would especially emphasize. Adler, "The Conception of Social Welfare," Proceedings of the Conference on Legal and Social Philosophy, 1913, 9.

It is the function of the state to further the development of the human race

to a state of freedom. . . . It is the education and evolution of the human race to a state of freedom. Lassalle, Arbeiterprogram (1863), Werke (ed. by Blum), I, 156.

9. THE SOCIAL-PHILOSOPHICAL AND RECENT SOCIOLOGICAL SCHOOLS

Berolzheimer, System der Rechts- und Wirthschaftsphilosophie, II, §§ 43–48, 52 (World's Legal Philosophies, 336–431, 466–477); Stammler, Wesen des Rechts und der Rechtswissenschaft (in Systematische Rechtswissenschaft, i–lix); Kohler, Lehrbuch der Rechtsphilosophie, 38–43; Kohler, Rechtsphilosophie und Universalrechtsgeschichte (in Holtzendorff, Encyklopädie der Rechtswissenschaft, 7 ed., Vol. I), §§ 13–16, 33–34, 51; Ehrlich, Grundlinien der Soziologie des Rechts, chaps. 9, 10.

Take any demand, however slight, which any creature, however weak, may make. Ought it not for its own sole sake to be satisfied? If not, prove why not. The only possible kind of proof you could adduce would be the exhibition of another creature who should make a demand that ran the other way. . . . Any desire is imperative to the extent of its amount; it makes itself valid by the fact that it exists at all. Some desires, truly enough, are small desires; they are put forward by insignificant persons, and we customarily make light of the obligations which they bring. But the fact that such personal demands as these impose small obligations does not keep the largest obligations from being personal demands. . . . After all, in seeking for a universal principle, we inevitably are carried onward to the most universal principle — that *the essence of good is simply to satisfy demand.* . . . Since everything which is demanded is by that fact a good, must not the guiding principle for ethical philosophy (since all demands conjointly cannot be satisfied in this poor world) be simply to satisfy at all times *as many demands as we can?* That act must be the best act, accordingly, which makes for the *best whole*, in the sense of awakening the least sum of dissatisfactions. In the casuistic scale, therefore, those ideals must be written highest which *prevail at the least cost*, or by whose realization the least number of other ideals are destroyed. . . . The course of history is nothing but the story of men's struggle from generation to generation to find the more inclusive order. Invent some

manner of realizing your own ideals which will also satisfy the alien demands, — that and that only is the path of peace! . . . Though some one's ideals are unquestionably the worse off for each improvement, yet a vastly greater total number of them find shelter in our civilized society than in the older savage ways. . . . As our present laws and customs have fought and conquered other past ones, so they will in their turn be overthrown by any newly discovered order which will hush up the complaints that they still give rise to without producing others louder still. — James, The Will to Believe, 195–206.

Justice to the individual, then, must according to these principles consist in the rendering to him, so far as possible, all those services, and surrounding him with all those conditions, which he requires for his highest self, for the satisfaction of those desires which his truest judgment tells him are good. Conversely, opportunity for fulfilment of highest aims is all that may be justly claimed as a right. — Willoughby, Social Justice, 20–21.

The satisfaction of every one's wants so far as they are not outweighed by others' wants. — Adapted from Ward, Applied Sociology, 22–24.

The old justice in the economic field consisted chiefly in securing to each individual his rights in property or contracts. The new justice must consider how it can secure for each individual a standard of living, and such a share in the values of civilization as shall make possible a full moral life. — Dewey and Tufts, Ethics, 496.

Justice . . . may be described as the effort to eliminate from our social conditions the effects of the inequalities of nature upon the happiness and advancement of man, and particularly to create an artificial environment which shall serve the individual as well as the race and tend to perpetuate noble types rather than those which are base. — Kelly, Government or Human Evolution: Justice, 360.

Fundamental principles of just law:

1. One will must not be subject to the arbitrary will of another.

2. Every legal demand can exist only in the sense that the person obliged can also exist as a fellow creature.

3. No one is to be excluded from the common interest arbitrarily.

4. Every power of control conferred by law can be justified only in the sense that the individual subject thereto can yet exist as a fellow creature. — Stammler, Lehre von dem richtigen Rechte, 208–211.

3

THE NATURE OF LAW

IV

THEORIES OF LAW

Pound, Theories of Law, 22 Yale Law Journ. 114.

The two ideas of law, illustrated by two sets of words:

Latin	*ius*	*lex*
German	*Recht*	*Gesetz*
French	*droit*	*loi*
Italian	*diritto*	*legge*
Spanish	*derecho*	*ley*

Compare English, law, *a* law.

1. Greek Definitions

What the ruling part of the state enacts after considering what ought to be done, is called law. — Xenophon (B.C. c. 429–c. 356), Memorabilia, I, 2, § 43.

Law is a definite statement according to a common agreement of the state giving warning how everything ought to be done. — Anaximenes (B.C. c. 560–c. 500), quoted by Aristotle, Rhetoric to Alexander, i.

Law seeks to be the finding out of reality. — [?] Plato (B.C. 427–347), Minos, 315A.

The common law, going through all things, which is the same with Zeus who administers the whole universe. — Chrysippus (B.C. 287–209), quoted by Diogenes Laertius, vii, 88.

This is law, which all men ought to obey for many reasons, and chiefly because every law is both a discovery and a gift of God and a teaching of wise men and a setting right of wrongs, intended and not intended, but also a common agreement of the state, according to which every one in the state ought to live. — Demosthenes (B.C. 384–322), Against Aristogeiton, 774.

2. Roman Definitions

Law (*lex*) is the highest reason, implanted in nature, which commands what ought to be done and prohibits the contrary. — Cicero (B.C. 106–43), De Legibus, I, 6.

Law (*lex*) is the right reason of commanding and prohibiting. —Id., I, 5.

For law (*lex*) is nothing else than a right reason derived from the gods commanding what is honorable and forbidding the contrary. — Id., Philippic. XI, 12.

Compare: A *lex* is a general command of the people or of the *plebs* upon question by a magistrate. — Capito (ob. A.D. 22), quoted by Aulus Gelius, X, 20, 2.

Moreover the laws (*iura*) of the Roman people consist of statutes (*leges*), enactments of the plebeians (*plebiscita*), resolves of the senate (*senatus consulta*), enactments of the emperor, edicts of those who have authority to issue them, and the answers of those learned in the law (*responsa prudentium*). — Gaius, I, § 2.

When about to study law we ought first to know whence comes the word law (*ius*). Moreover it is called law (*ius*) from justice (*iustitia*), for, as Celsus [a jurist of the end of the first or beginning of the second century, A.D.] well defines it, law (*ius*) is the art of what is right and equitable. — Ulpian (third century, A.D.) in Digest, I, 1, 1, § 1.

3. The Earlier Middle Ages

As to the use of *lex* to mean law in general in this period, see Savigny, Geschichte des römischen Rechts im Mittelalter, I, § 37 (Catheart's transl., 115–121).

Fas is divine law (*lex*), *ius* is human law (*lex*). . . . *Lex* is a written enactment. *Mos* is usage approved by time or unwritten law (*lex*). . . . Moreover usage is a certain law (*ius*) instituted by observance which is held for enactment (*lex*) when enacted law (*lex*) is wanting. — Isidore of Seville (ob. 636), Bruns, Fontes Iuris Romani Antiqui (6 ed.), II, 83.

Ius is the art of what is right and equitable. *Lex* is *ius* enacted by wise princes. — Petri Exceptiones Legum Romanorum, App. I; Fitting, Juristische Schriften des früheren Mittelalters, 164 (11th century).

Ius is the general term, so called because just; *lex* moreover

is a species of *ius* and is so called from *legere* (to read) because it is written. Now all *ius* consists of *leges* and customs. *Lex* is an enactment of princes written down for the common good; custom is ancient usage derived from conduct (*moribus*), or unwritten *lex*. — Libellus de Uerbis Legalibus, 1, appended to the foregoing; Fitting, 181.

4. Development of the Conception and Definition of Law from the Revival of Legal Study at Bologna (Twelfth Century) to the Time of Grotius (Seventeenth Century)

Corpus iuris ciuilis believed to be binding statute law, and hence *lex*.

Law made up of the *corpus iuris* as interpreted by jurists and contemporary enactment, on the one hand, and of customary law of various peoples on the other.

Ius is the genus and *lex* the species. All *ius* consists of enactments and customs. *Lex* is a written enactment. Custom is long usage. Usage is a certain kind of law (*lex*), instituted by observance, which is held for enactment (*lex*) when enacted law (*lex*) is wanting. — Gratian, cc. 2–5, dist. I (about 1150).

For the English laws (*leges*), although not written, may as it should seem, and that without any absurdity, be termed laws (since this itself is a law — that which pleases the prince has the force of law). . . . For if from the mere want of writing only they would not be considered as laws, then unquestionably writing would seem to confer more authority upon laws themselves than either the equity of the persons constituting or the reason of those framing them. — Glanville, De Legibus et Consuetudinibus Regni Angliae, Preface, Beames' transl., xi (about 1189).

Theory of St. Thomas Aquinas (1225 or 1227–1274):

The old *ius naturale* divided into

lex aeterna (eternal law), the "reason of the divine wisdom, governing the whole universe."

lex naturalis (natural law), the law of human nature proceeding ultimately from God, but immediately from human reason, and governing the actions of men only.

Positive law a mere recognition of the *lex naturalis*, which is above all human authority.

A law is an ordinance of reason for the common good, promulgated by him who has charge of the community. — Thomas Aquinas, Summa Theologiae, 1, 2, S, 90, art. 1.

Law (*lex*) is a holy sanction, commanding what is right and prohibiting the contrary. — Fortescue, De Laudibus Legum Angliae, cap. 3 (bet. 1463–1471).

As natural law was discoverable by reason, the obvious effect was to require all rules of positive law to be tested by reason. Hence: "The first is the law eternal. The second is the law of nature of reasonable creatures, the which, as I have heard say, is called by them that be learned in the law of England, the law of reason." — Doctor and Student (Temp. Henry VIII), Intr.

A law (*lex*) of nature is a rule of reason; wherefore a human law (*lex*) partakes of the reason of law (*lex*) in so far as it is derived from a law of nature. And if they disagree in anything, there is no law but a corruption of law. — R. Suarez, Repetitiones, 272–273 (1558).

The proper signification of *ius* is one, namely, when *ius* is used to mean an enactment directing on behalf of the government those things which are right. . . . From this signification other less proper meanings have sprung. — Donellus, De iure civili, I, 3, § 2 (1589).

Ius from *iussum*. And hence the word *ius*. For I agree with those who consider that we say *ius* from *iubere* so that *ius* is as if you should say *iussum*. . . . For all law (*ius*) commands as is expressed in the definition of *ius*. . . .

Some [he cites Alciatus] hold that *ius* is said by metathesis, so that *ius* is, as it were, *uis* with the letters reversed. This does not agree with the fact. — Id., I, 4, §§ 1–2.

5. Development of the Conception and Definition from Grotius to Kant (Seventeenth and Eighteenth Centuries)

Grotius puts natural law on a rational instead of a theological basis.

Conring (1643) overturns the mediaeval notion of the statutory authority of the *corpus iuris*.

Thus natural law became once more *ius naturale*, the dictates of reason in view of the exigencies of human constitution and human society, no longer *lex naturalis*, the enactments of a supernatural legislator.

And positive law became the application of reason to the civil relations of

men, of which the *corpus iuris* was an exponent only because and to the extent of its inherent reasonableness.

[After defining *ius* in the ethical sense, that which is right, and *ius* in the sense of a right]. There is also a third signification in which it means the same as *lex* when that word is used in its broadest sense, so that it is a rule of moral actions obliging to that which is right. — Grotius, De iure belli et pacis, I, 1, 9, § 1 (1625).

Law (*la loi*) in general is human reason. — Montesquieu, L'esprit des lois, I, 3 (1748).

A rule to which men are obliged to make their moral actions conformable. — Rutherforth, Institutes of Natural Law, I, 1, § 1 (1754).

In England following the period of legislative energy during the Commonwealth, Hobbes saw chiefly the imperative element.

Civil law is to every subject those rules which the commonwealth hath commanded him . . . to make use of for the distinction of right and wrong; that is to say of what is contrary and not contrary to the rule. — Hobbes, Leviathan, chap. 26 (1651).

With the rise of a national law on the Continent, *lex* begins to stand for the rules of the civil law in each state.

A law (*lex*) is an enactment by which a superior obliges one subject to him to direct his actions according to the command of the former. — Pufendorf, Elementa iurisprudentiae universalis, def. 13 (1672).

In the eighteenth century the effect of an age of absolute governments in reviving the conception of law as enactment becomes marked.

A rule prescribed by the sovereign of a society to his subjects. — Burlamaqui, Principes de droit naturel, I, 8, 2 (1747).

Law is the expression of the general will. — Rousseau, Contrat Social, II, 6 (1762).

Blackstone attempted to combine the two ideas.

A rule of civil conduct, prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong. — Blackstone, Commentaries, I, 44 (1765).

See Blackstone, I, 41, 43, 47, 123, 160–161; Finch, Law, bk. I, chap. 6 (1613).

6. Further Development from Kant to Jhering

(1) *Metaphysical*

The sum of the circumstances according to which the will of one may be reconciled with the will of another according to a common rule of freedom. — Kant, Metaphysische Aufangsgründe der Rechtslehre, 27 (1797).

Man stands in the midst of the external world, and the most important element in his environment is contact with those who are like him in their nature and destiny. If free beings are to coexist in such a condition of contact, furthering rather than hindering each other in their development, invisible boundaries must be recognized within which the existence and activity of each individual gains a secure free opportunity. The rules whereby such boundaries are determined and through them this free opportunity is secured are the law. — Savigny, System des heutigen römischen Rechts, I, § 52 (1840).

The organic whole of the external conditions of life measured by reason. — Krause, Abriss des Systemes der Philosophie des Rechtes, 209 (1828).

The recognition of the just freedom which manifests itself in persons, in their exertions of will and in their influence upon objects. — Puchta, Cursus der Institutionen, I, § 6 (1841).

An aggregate of rules which determine the mutual relations of men living in a community. — Arndts, Juristische Encyklopädie, § 1 (1850).

The rule or standard governing as a whole the conditions for the orderly attainment of whatever is good, or assures good for the individual or society, so far as those conditions depend on voluntary action. — Ahrens, Philosophische Einleitung, in Holtzendorff, Encyklopädie der Rechtswissenschaft (1 ed., 1871). Transl. by Pollock.

The expression of the idea of right involved in the relation of two or more human beings. — Miller, Philosophy of Law, 9 (1884).

The aggregate of the rules which provide for the employment of the force of society to restrain those who infringe the liberty of others. — Acollas, Introduction à l'étude du droit, 2 (1885).

The sum of the conditions of social coexistence with regard to the activity of the community and of individuals. — Pulszky, Theory of Law and Civil Society, 312 (1888).

The sum of moral rules which grant to persons living in a community a certain power over the outside world. (Ledlie's transl.) — Sohm, Institutes of Roman Law (1 ed., 1889), § 7.

(2) *Eighteenth century and Neo-Rousseauist.*

Those rules of intercourse between men which are deduced from their rights and moral claims; the expression of the jural and moral relations of men to one another. — Woolsey, International Law, § 3 (1871).

The recognition of the law of nature by special enactments and its vindication in special circumstances and relations. — Lorimer, Institutes of Law, 9 (1880).

The aggregate of received principles of justice. — Smith, Elements of Right and of the Law, § 231 (1887).

The will of the state concerning the civic conduct of those under its authority. — Woodrow Wilson, The State, § 1415 (1898).

A rule agreed upon by the people regulating the rights and duties of persons. — Andrews, American Law, § 72 (1900).

Law is a body of rules for human conduct within a community which by common consent of this community shall be enforced by external power. — Oppenheim, International Law, 1, § 5 (1905).

(3) *Later Historical.*

The sum of the rules which fix the relations of men living in society, — or at least of the rules which are sanctioned by the society, — imposed upon the individual by a social constraint. — Brissaud, Manuel d'histoire du droit Français, 3 (1898).

The rule of conduct to which a society gives effect in respect to the behavior of its subjects toward others and toward itself and in respect to the forms of its activity. — Merkel in Holtzendorff, Encyklopädie der Rechtswissenschaft (5 ed., 1890), 5.

A rule expressing the relations of human conduct conceived as subject to realization by state force. — Wigmore, Cases on Torts, II, App. A, § 3 (1911).

(4) *Analytical.*

(i) *French. Influence of the French Code*

The civil law is, therefore, a rule of conduct upon a subject of common interest prescribed to all citizens by their lawful sovereign. It is the solemn declaration of the legislative power, by which it

commands, under certain penalties or subject to certain rewards, what each citizen ought to do or not to do or to permit for the common good of society. — Toullier, Droit civil Français, I, § 14 (1808).

A law (*loi*) is a rule established by the authority which, according to the political constitution, has the power of commanding, or prohibiting, or of permitting throughout the state. A law truly and properly so-called, therefore, . . . is a rule sanctioned by the public power, a rule civilly and juridically obligatory. Law (*droit*) is the result, or better, the aggregate or totality of these rules. — Demolombe, Cours de Code Napoléon, I, § 2 (1845).

Law (*loi*) . . . is a rule established by a superior will in order to direct human actions. . . . The law (*droit*) . . . sometimes the rules of law (*lois*) seen in their aggregate, or more often the general result of their dispositions. — Demante, Cours analytique de code civil, I, §§ 1–2 (1849).

What is law (*droit*)? It is the aggregate, or rather the resultant, of the dispositions of the laws (*lois*) to which man is subjected, with the power of following or of violating them. . . . Now these laws (*lois*) are rules of conduct established by a competent authority. — Marcadé, Explication du Code Napoléon (5 ed., 1859), I, § 1.

One may say with Portalis that law (*la loi*) is a solemn declaration of the will of the sovereign upon an object of common interest. — Laurent, Principes du droit civil Français, I, § 2 (1878).

Obligatory rules of conduct, general and permanent, established for men by the temporal sovereign. — Vareilles-Sommières, Principes fondamentaux de droit, 12 (1889).

Law (*droit*) is the aggregate of precepts or laws (*lois*) governing the conduct of man toward his fellows, the observance of which it is possible, and at the same time just and useful, to assure by way of external coercion. — Baudry-Lacantinerie, Précis de droit civil (10 ed., 1908), I, § 1.

The *ensemble* of the rules to which the external conduct of man in his relations with his fellows is subjected, and which, under the inspiration of the natural idea of justice, in a given state of the collective consciousness of humanity, appearing susceptible of a social sanction where coercion is required, are or tend to be provided with such a sanction and thenceforth take the form of cate-

gorical injunctions governing particular wills for the purpose of assuring order in society. — Gény, Science et technique en droit privé positif, I, 51 (1914).

The *ensemble* of precepts, rules, or laws which govern human activity in society, the observance whereof is sanctioned in case of need by social constraint, otherwise called public force. — Colin et Capitant, Droit civil Français, I, 1 (1914).

(ii) *Anglo-American*

First Stage. — The imperative theory perfected; eighteenth-century ideas eliminated.

Of the laws or rules set by men to men, some are established by *political* superiors, sovereign and subject: by persons exercising supreme and subordinate *government* in independent nations or independent political societies. The aggregate of the rules thus established, or some aggregate forming a portion of that aggregate, is the appropriate matter of jurisprudence, general or particular. To the aggregate of the rules thus established, or to some aggregate forming a portion of that aggregate, the term *law*, as used simply and strictly, is exclusively applied. — Austin, The Province of Jurisprudence Determined, 2 (1832).

A command proceeding from the supreme political authority of a state and addressed to the persons who are the subjects of that authority. — Amos, Science of Law, 18 (1874).

The general body of rules which are addressed by the rulers of the political society to the members of that society, and which are generally obeyed. — Markby, Elements of Law, § 9 (1871).

A law is a command; that is to say it is the signification by a lawgiver to a person obnoxious to evil of the lawgiver's wish that such person should do or forbear to do some act, with an intimation of, an evil that will be inflicted in case the wish be disregarded. — Poste, Gaius, 2 (1871).

Second Stage. — Influence of the Historical School: Enforcement substituted for enactment.

A general rule of external human action enforced by a sovereign political authority. — Holland, Jurisprudence, chap. 3 (1880).

Rules of conduct defined by the state as those which it will enforce, for the enforcement of which it employs a uniform con-

straint. — Anson, Law and Custom of the Constitution, I, 8 (1886).

The sum of the rules of justice administered in a state and by its authority. — Pollock, First Book of Jurisprudence, 17 (1896).

The aggregate of rules administered mediately or immediately by the state's supreme authority, or regulating the constitution and functions of that supreme authority itself; the ultimate sanction being in both cases disapproval by the bulk of the members of that state. — Clark, Practical Jurisprudence, 172 (1883).

Third Stage. — Enforcement by tribunals substituted for enforcement by the sovereign.

The Law of every country . . . consists of all the principles, rules, or maxims enforced by the courts of that country as being supported by the authority of the state. — Dicey, Private International Law as a Branch of the Law of England, 6 Law Quart. Rev. 3 (1890).

The law or laws of a society are the rules in accordance with which the courts of that society determine cases, and by which, therefore, the members of that society are to govern themselves; and the circumstance which distinguishes these rules from other rules for conduct, and which makes them the law, is the fact that courts do act upon them. — Gray, Definitions and Questions in Jurisprudence, 6 Harvard Law Rev. 24 (1892).

The sum of the rules administered by courts of justice. — Pollock and Maitland, History of English Law, Introduction (1895).

The rules recognized and acted on in courts of justice. — Salmond, Jurisprudence, § 5 (1902).

The rules and principles recognized and applied by the state's authorities, judicative and executive. — Clark, Roman Private Law: Jurisprudence, I, 75 (1914).

7. German Definitions since Jhering. Influence of German Legislation

The sum of the rules of constraint which obtain in a state. — Jhering, Der Zweck im Recht, I, 320 (1877).

The rule armed with force first gives us the conception of law. That which does not possess the guarantee lying in force

cannot be called law. — Lasson, System der Rechtsphilosophie, 207 (1882).

Law is a peaceable ordering (*Friedensordnung*) of the external relations of men and their communities to each other. It is an ordering (*norma agendi*), a regulating through the setting up of commands and prohibitions. — Garcis, Encyklopädie der Rechtswissenschaft, § 5 (1887).

The purpose of all law is a determinate external behavior of men toward men. The means of attaining this purpose, wherein alone the law consists, are norms or imperatives. — Bierling, Juristische Prinzipienlehre, I, § 3 (1894).

The legal order is an adjustment through coercion of the relations of human life arising in a social manner from the social nature of man. — Kohler, Einführung in die Rechtswissenschaft, § 1 (1902.)

Law is the ordering of the relations of life guaranteed by the general will. — Dernburg, Das bürgerliches Recht des deutschen Reichs und Preussens, I, § 16 (1903).

Law is the ordering (*Ordnung*) based upon autonomous government in a state of civilization. — Berolzheimer, System der Rechts- und Wirthschaftsphilosophie, III, § 17 (1906).

V

THE NATURE OF LAW

Austin, Jurisprudence, Analysis of Lects. 1–6 (4 ed., 81–87), Lect. 1; Hobbes, Leviathan, pt. II, chap. 26, to 6; Holland, Jurisprudence, chaps. 2, 3; Markby, Elements of Law, §§ 1–26; Pollock, First Book of Jurisprudence, chap. 1; Salmond, Jurisprudence, §§ 5, 16, 17; Brown, The Austinian Theory of Law, §§ 552–639; Clark, Roman Private Law: Jurisprudence, I, § 2.

Clark, Practical Jurisprudence, pt. I, chaps. 7, 11–16; Clark, Roman Private Law: Jurisprudence, I, § 5; Maine, Early History of Institutions, Lect. 13; Carter, Law: Its Origin, Growth, and Function, Lects. 1–8.

Jenks, Law and Politics in the Middle Ages, 1–6; Rattigan, Science of Jurisprudence, §§ 8–11*a*.

Miller, Data of Jurisprudence, chaps. 4, 5; Miller, Lectures on the Philosophy of Law, Appendix A; Lorimer, Institutes of

Law, 255–259; Korkunov, General Theory of Law (transl. by Hastings), 40–165.

Gray, Nature and Sources of the Law, §§ 191–247; Gareis, Science of law (transl. by Kocourek), § 5; Dicey, Law and Public Opinion in England, 2 ed., 483–494.

Binding, Die Normen und ihre Uebertretung, 2 ed., §§ 5–20; Thon, Rechtsnorm und subjektives Recht, 1–11; Bierling, Juristische Principienlehre, I, § 3; Jellinek, Allgemeine Staatslehre, 3 ed., 332–337; Geny, Science et technique en droit privé positif, I, § 22; Lévy-Ullman, La définition du droit.

1. Analytical.

Austin's Analysis:

(1) Commands set by a sovereign to subjects.
(2) Rules set by a determinate authority.
(3) Rules of general application.
(4) Rules dealing with external human action.
(5) Sanction.

Modification by later analytical jurists:

Law is that which is *enforced* by the state or by its judicial organs, not what is *set* by the state.

Recent German analysis.

Law is a body of norms established or recognized by the state in the administration of justice.

(a) Rules
(b) Principles (i.e. premises from which to deduce rules and measure the application of standards
(c) Standards

} of { Decision / Conduct

Characteristics of law in a developed system:

(1) Generality.
(2) Universality.
(3) Predicability.

The body of rules, principles, and standards in accordance with which justice is administered by the authority of the state.

2. Historical.

Results of philological investigation.
Results of legal history.
Primitive law (1) has no imperative element.
(2) is not set by a determinate authority.
(3) has no sanction, or at least sanction is feebly developed.
(4) is recognized rather than enforced.

Historical view of sanction:

The habit of obedience (Maine, International Law, 50–52).
The displeasure of one's fellow men (Clark, Practical Jurisprudence, bk. 1, chap. 16).
Public sentiment and opinion (see Lightwood, The Nature of Positive Law, 362, 389).
The social standard of justice (Carter, The Ideal and Actual in Law, 13 Rep. Am. Bar Ass'n, 217, 224–225).

3. Philosophical.

Law as an expression of ideas of right.
Law as a securing of interests.
Law as a delimitation of interests.
The "jural postulates" of civilization.

Philosophical jurists regard the sources of law rather than the nature of law.

4. Sociological.

The functional view of law — law as a social mechanism.
The legal order.

The body of rules, principles, and standards established or recognized by organized human society for the delimitation and securing of interests.

5. Bodies or types of rules with reference to which theories of the nature of law must be tried.

(1) "Municipal" (civil) private law.

(2) Public law.

(a) Constitutional law.

(b) Administrative law.

See Dicey, Law and Custom of the Constitution, 8 ed., 1–34, 324–401, 413–434; Berthélemy, Traité élémentaire de droit administratif, 8 ed., 1–8.

(3) International law.

See Austin, Jurisprudence, 4 ed., 177; Holland, Jurisprudence, 12 ed., 133–135; Savigny, System des heutigen römischen Rechts, I, § 11; Zorn, Völkerrecht, 2 ed., § 2.

Maine, International Law, 47–53; Hall, International Law, Introductory chapter; Westlake, International Law, I, 5–13.

Liszt, Völkerrecht, 10 ed., 8–10; Mérignhac, Droit public international, I, 18–26; Bonfils, Droit international public, 7 ed., §§ 26–31.

What have these in common?

How far are some of these to be called "law"?

6. Analogous uses of the term "law."

Laws of nature or of science.

Laws of grammar, etc.

Laws of morals, fashion, etc.

Laws of games.

Analogies to legislation in rules governing modern games.

VI

LAW AND ETHICS

Austin, Jurisprudence, Lect. 5; Bentham, Theory of Legislation, Principles of Legislation, chap. 12; Pollock, First Book of Jurisprudence, pt. I, chap. 2; Gray, Nature and Sources of the Law, §§ 642–657; Clark, Roman Private Law: Jurisprudence, I, § 3. Carter, Law: Its Origin, Growth, and Function, Lect. 6; Amos, Science of Law, chap. 3; Green, Principles of Political Obligation, §§ 11–31; Korkunov, General Theory of Law (transl. by Hastings), §§ 5–7; Gareis, Science of Law (transl. by Kocourek), § 6; Lorimer, Institutes of Law, 2 ed., 353–367; Kohler, Philosophy of Law (transl. by Albrecht), 58–60; Del Vecchio, The Formal Bases of Law (transl. by Lisle), §§ 96–111; Modern French

Legal Philosophy (Modern Legal Philosophy Series, vol. 7), §§ 190, 206–207.

Ames, Law and Morals, 22 Harvard Law Rev. 97; Rattigan, Science of Jurisprudence, §§ 4–4*a*; Dillon, Laws and Jurisprudence of England and America, 12–20; Woodrow Wilson, The State, §§ 1449–1456; Lightwood, The Nature of Positive Law, 362–368; Miraglia, Comparative Legal Philosophy (transl. by Lisle), §§ 119–127; Hegel, Philosophy of Right (transl. by Dyde), §§ 105–114; Miller, Philosophy of Law, Lect. 13; Hastie, Outlines of Jurisprudence, 17–20.

Jhering, Zweck im Recht, II, 3 ed., 15–94, 135–351; Stammler, Theorie der Rechtswissenschaft, 450–481; Binder, Rechtsbegriff und Rechtsidee, 214–229.

1. Historical View.

Law and morals have a common origin, but diverge in their development.

Four stages in the development of law in this respect may be noted:

(1) The stage of custom identical with morality.
(2) The stage of strict law — codified or crystallized custom which in time is outstripped by morality
(3) The stage of infusion of morality.
(4) The stage of conscious law-making.

2. Philosophical View.

Older views.

Natural law and positive law.

Practical results of this notion in legal history.

The theory can be held with safety only at a time when absolute theories of morals obtain.

Newer views:

Teleological (Jhering).

The ideals of an epoch (Stammler).

Evolutionary (Kohler).

3. Analytical view:

Contact of law and morality in

(a) judicial law-making.
(b) interpretation and application of law.
(c) judicial discretion.

So far as a complete separation of judicial and legislative functions is possible, the distinction is —

Law is for the judge.

Morality is for the law-maker.

Distinction between law and morals in respect of application and subject-matter:
The latter looks to thought and feeling.
The former looks to acts.
Ethics aims at perfecting the individual character of men.
Law seeks only to regulate the relations of individuals with each other and with the state.
Moral principles must be applied with reference to circumstances and individuals.
Legal rules are typically of general and absolute application.
Law must act in gross, and so more or less in the rough.
Law does not necessarily approve what it does not condemn.
Resistance to law may be moral, but cannot be legal.
Developed law is and must be scientific.

VII

LAW AND THE STATE

Austin, Jurisprudence, Lect. 6; Salmond, Jurisprudence, §§ 59–69; Holland, Jurisprudence, chap. 4; Bryce, Studies in History and Jurisprudence, Essay 10; Markby, Elements of Law, §§ 31–38; Maine, Early History of Institutions, Lect. 12; Jenks, Law and Politics in the Middle Ages, 68–71; Gray, Nature and Sources of the Law, §§ 169–183; Korkunov, General Theory of Law (transl. by Hastings), §§ 43–48; Garcis, Science of Law (transl. by Kocourek), § 46; Pollock, First Book of Jurisprudence, 4 ed., 261–279; Clark, Roman Private Law: Jurisprudence, I, § 4; Duguit, The Law and the State, 31 Harvard Law Rev. 1.

Clark, Practical Jurisprudence, 157–176; Carter, Law: Its Origin, Growth, and Function, 187–190; Amos, Science of Law, 2 ed., 118–123; Hegel, Philosophy of Right (transl. by Dyde), §§ 257–360; Miller, Philosophy of Law, Lect. 7; Kohler, Recht und Staat, in Handbuch der Politik, 2 ed., 120.

1. The Legal Theory of the State.

The purpose is to set forth the legal theory of the state.

Not political theories of the state.

Not philosophical theories of the state.

The legal theory has reference to the immediate practical source of rules and sanctions.

Political theories have reference to the ultimate practical source of rules and sanctions.

Philosophical theories have reference to the ultimate moral source of rules and sanctions.

A state is a permanent political organization, supreme within and independent of *legal* control from without.

The state as a person.

2. Anglo-American Theory of Sovereignty.

The state is the whole of the political society in its corporate aspect.

The sovereign is that organ or that complex of organs which exercises its governmental functions.

"Consent of the governed" is a political, not a legal theory.

Sovereignty is the aggregate of powers possessed by the ruler or the ruling organs of a political society.

It may be:

(a) Internal — the sovereign is legally paramount over all action within.

(b) External — the sovereign is independent of all legal control from without.

Powers of internal sovereignty.

The separation of powers.

Aristotle, Politics, IV, 14 (Jowett's transl., I, 133; Welldon's transl., 292); Goodnow, Comparative Administrative Law, I, chap. 3; Sidgwick, Elements of Politics, 363; Bondy, The Separation of Governmental Powers, Columbia University Studies in History, Economics and Public Law, V, No. 2 (p. 133); Fuzier-Hermann, La séparation des pouvoirs, 181 ff.; Hauriou, Principes de droit public, 446; Esmein, Éléments de droit constitutionnel, 6 ed., 451–466; Duguit, Traité de droit constitutionnel, I, §§ 63-64 (346–361); Jellinek, Recht des modernen Staates, 3 ed., 496–504, 595–624; Schmidt, Allgemeine Staatslehre, I, 209–217.

The sovereign is incapable of legal limitation, but separate organs may be held to certain spheres or modes of action.

The mandate theory.

See Vattel, bk. I, chap. 3, § 4; Coxe, Judicial Power and Unconstitutional Legislation, 114–121; Brown *v.* Leyds, 14 Cape Law Journ. 94.

Legal and political sovereignty must be distinguished.

Sovereignty is a modern development.

3. Recent French Theories of Sovereignty.

[r] Duguit, Les transformations du droit public, chaps. 1, 2, and conclusion (Laski's transl., "Law and the Modern State," 1–67, 243–245); Brown, The Jurisprudence of M. Duguit, 32 Law Quarterly Rev. 168; Laski, The Problem of Sovereignty, chap. 1; Jèze, Cours de droit public, liv. 2; Gavet, Individualism and Realism, 29 Yale Law Journ. 523.

VIII

JUSTICE ACCORDING TO LAW

Pound, Justice according to Law, 13 Columbia Law Rev. 696, 14 Columbia Law Rev. 1, 103.

Pollock, First Book of Jurisprudence, pt. I, chap. 2; Salmond, Jurisprudence, §§ 6, 7, 9, 10, 18–20, 26–29; Markby, Elements of Law, § 201; Amos, Science of Law, chap. 14; Korkunov, General Theory of Law (transl. by Hastings), §§ 41, 49; Demogue, Les principes fondamentales du droit privé, pt. I, chaps. 2–3.

1. The administration of justice — the legal order.

Regulative systems for maintaining right by external control:

(a) Religion.

(b) Public opinion.

(c) Administration of justice by the state.

2. Justice without law.

Law is not theoretically essential to the administration of justice.

Examples of justice without law:

In legal history.

In modern states.

Salmond, First Principles of Jurisprudence, 89–90; Grotius, De Jure Belli et Pacis (Whewell's transl.), II, 26, 1; Ahrens, Cours de droit naturel, 8 ed., I, 177; Lasson, Rechtsphilosophie, 238–239; Garcis, Science of Law (transl.

by Kocourek), § 6; Pulszky, Theory of Law and Civil Society, § 174; Stammler, Theorie der Rechtswissenschaft, 134–136. See Laws of Kansas, 1913, chap. 170.

3. Justice according to law.

Law means uniformity of judicial and magisterial action, — generality, equality, and certainty in the administration of justice.

Advantages of law:

(1) Law makes it possible to predict the course which the administration of justice will take.
(2) Law secures against errors of individual judgment.
(3) Law secures against improper motives on the part of those who administer justice.
(4) Law provides the magistrate with standards in which the settled ethical ideas of the community are formulated.
(5) Law gives the magistrate the benefit of all the experience of his predecessors.
(6) Law prevents sacrifice of ultimate interests, social and individual, to the more obvious and pressing but less weighty immediate interests.

Disadvantages of law:

(1) Rules must be made for cases in gross and men in the mass and must operate impersonally and more or less arbitrarily.
(2) Science and system carry with them a tendency to make law an end rather than a means.
(3) Law begets more law, and a developed system tends to attempt rules where rules are not practicable and to invade the legitimate domain of justice without law.
(4) As law formulates settled ethical ideas, it can not, in periods of transition, accord with the more advanced conceptions of the present; there is always an element, greater or less, that does not wholly correspond to present needs or to present conceptions of justice.

Salmond, First Principles of Jurisprudence, 90–92; Korkunov, General Theory of Law (transl. by Hastings), 326–327, 394–395; Pound, Causes of Popular Dissatisfaction with the Administration of Justice, Rep. Am. Bar Ass'n, XXIX, 395, 397–402.

4. Legislative justice.

Sidgwick, Elements of Politics, 355–356, 360, 482–484.

Examples of legislative justice:

(1) Greek trials before popular assemblies.
(2) Roman capital trials before the people and appeals to the people in criminal causes.

(3) Germanic administration of justice by assemblies of free men.
(4) Judicial power of the English parliament.
    (a) Relief against duress and fraud.
        See Rogers, Protests of the Lords, I, 17, 19, 22, 30, 39.
    (b) Error and appeal in the House of Lords.
    (c) Impeachments.
    (d) Bills of attainder and of pains and penalties.
    (e) Divorce bills.
(5) Jurisdiction of the French senate to "pass judgment upon the President of the Republic and the ministers and to take cognizance of attacks upon the security of the state."
(6) Judicial powers of American colonial legislatures and state legislatures immediately after the Revolution.
    (a) Bills of attainder.
    (b) Bills of pains and penalties.
    (c) Appeal and error.
    (d) Legislative granting of new trials.
        See Merrill *v.* Sherburne, 1 N. H. 199, 216.
    (e) Divorce.
    (f) Insolvency.
(7) Legislative justice in America today.
    (a) Impeachment.
    (b) Claims against the state.

Defects of legislative justice.

(1) In practice legislative justice has proved unequal, uncertain, and capricious.
    Wooddesson, Lectures, II, Lect. 41; Tucker's Blackstone, I, 292–294; Thompson, Anti-Loyalist Legislation During the American Revolution, 3 Ill. Law Rev. 81, 147, 171; Eaton, The Development of the Judicial System in Rhode Island, 14 Yale Law Journ. 148, 153.
(2) The influence of personal solicitation, lobbying, and even corruption has been very marked.
    Eaton, The Development of the Judicial System in Rhode Island, 14 Yale Law Journ. 148, 153; Pierce *v.* State, 13 N. H. 536, 557; Debates of Pennsylvania Constitutional Convention (1873), III, 5–20.
(3) Legislative justice has always proved highly susceptible to the influence of passion and prejudice.
    Thompson, Anti-Loyalist Legislation During the American Revolution, 3 Ill. Law Rev. 147, 157, 162; Tucker's Blackstone, I, 293; Trial of Judge Addison, 7–15; Loyd, Early Courts of Pennsylvania, 143, 146; Trial of Andrew Johnson (Official ed.), I, 674, 693, 696–697, 698–700; Stephen, History of the Criminal Law, I, 160; Lovat-Fraser, The Impeachment of Lord Melville, 24 Juridical Rev. 235.

(4) Purely partisan or political motives have preponderated as grounds of decision.

See the last three citations next above; Atlay, Victorian Chancellors, I, 144–145; Campbell, Lives of the Lord Chancellors, VIII, 144–146; Browne, The New York Court of Appeals, 2 Green Bag, 277–278.

(5) Legislators who have not heard all the evidence have habitually participated in argument and decision; and those who have not heard all the arguments have habitually taken part in the decision.

See the record of attendance and voting in the Impeachment of Cox (Minnesota, 1881).

On the psychology of legislative justice, see Ross, Social Psychology, 57; Le Bon, The Crowd, chap. 5; Sidis, Psychology of Suggestion, 299.

5. Executive justice.

Pound, Executive Justice, 55 Am. Law Reg. 137; Pound, The Revival of Personal Government, Proc. N. H. Bar Ass'n, 1917, 13; Goodnow, The Growth of Executive Discretion, Proc. Am. Pol. Sci. Ass'n, 11, 29; Powell, Judicial Review of Administrative Action in Immigration Proceedings, 22 Harv. Law Rev. 360.

In legal history.

In the Anglo-American polity.

Law and Administration in nineteenth-century America.

The Reaction in America.

Boards of Health, etc.

Public Utility Commissions.

Boards of Engineers, etc.

Industrial Commissions.

Probation Commissions.

Pure Food Commissions.

Administrative powers in immigration.

The Trade Commission.

As to the same movement in England, see Local Government Board v. Arlidge, [1915] A. C. 120, [1914] 1 K. B. 160; Dicey, Law and Opinion in England, 2 ed., xli–xliv; Dicey, Law and Custom of the Constitution, 8 ed., xxxvii–xlvii.

Analogy in English law in the sixteenth century.

See Maitland, English Law and the Renaissance, 21 ff.

The balance between law and administration.

The advantages claimed for executive justice are those claimed for justice without law.

(1) Directness.
(2) Expedition.
(3) Conformity to popular will for the time being.
(4) Freedom from the bonds of purely traditional rules.
(5) Freedom from technical rules of evidence and power to act upon the every-day instincts of ordinary men.

The defects of executive justice are those of justice without law.

Forms and rules, by compelling deliberation, guard against suggestion and impulse and insure the application of reason to the cause.

In time administrative tribunals have always turned into ordinary courts.

6. Judicial justice.

Bluntschli, Theory of the State, 3 Oxford ed., 523; Lieber, Civil Liberty and Self-Government, chaps. 18, 19; Burgess, Political Science and Constitutional Law, II, 356–366; Baldwin, The American Judiciary, 1–98; Brown, Judicial Independence, Rep. Am. Bar Ass'n, XII, 265; Root, Judicial Decisions and Public Feeling, Addresses on Government and Citizenship, 445; Pound, Social Problems and the Courts, 18 Am. Journ. Sociol. 331.

Setting off of the judicial function has been a gradual process.

Objections urged against judicial justice:

(1) That it is too rigid and does not allow sufficient play to the non-legal conscience in the ascertaining or in the applying of the law.
(2) That the premises employed in judicial justice are too narrow and pedantic and the fundamental principles too fixed, so that judicial justice is too slow in responding to the environment in which it must operate.
(3) That it is characterized by a tendency to reduce to rule, along with those things which demand rule, those with respect to which detailed rules are not practicable.

See Lord Shaw in Local Government Board *v.* Arlidge, [1915] A. C. 120, 137–138; Crownhart, Labor Law Enforcement through Administrative Orders, 4 American Labor Legislation Rev. 13.

These objections amount to this: That judicial justice realizes justice according to law most completely and so brings out its defects as well as its excellencies.

Advantages of judicial justice:

(1) It combines the possibilities of certainty and of flexibility better than any other form of administering justice.
(2) There are checks upon the judge which do not obtain or are ineffective in case of legislative and executive officers.
(3) Because of training in and habit of seeking and applying principles when called on to act and because their decisions are subject to expert criticism, judges will stand for the law against excitement and clamor.

Rutgers *v.* Waddington, 1 Thayer, Cas. Const. L. 63; Bayard *v.* Singleton, 1 Martin (N. C.), 42; Brown *v.* Leyds, 14 Cape Law Journ. 71, 84; Littleton *v.* Fritz, 65 Ia. 488; Sims' Case, 7 Cush. 285; The Case of Thomas Sims, 14 Monthly Law Reporter, 1; The Removal of Judge Loring, 18 Monthly Law Reporter, 1.

4

THE SCOPE AND SUBJECT-MATTER OF LAW

IX

INTERESTS

A

Interests to be Secured

Ritchie, Natural Rights; Spencer, Justice, chaps. 9–18; Paulsen, Ethics (Thilly's transl.), 633–637; Green, Principles of Political Obligation, §§ 30–31; Lorimer, Institutes of Law, chap. 7; Demogue, Notions fondamentales du droit privé, 405–443.

Ahrens, Cours de droit naturel, 8 ed., II, §§ 43–88; Hegel, Philosophy of Right (Dyde's transl.), §§ 34–104; Fichte, Science of Rights (Kroeger's transl.), 298–343, 391–469; Beaussire, Les principes du droit, bk. III; Lasson, System der Rechtsphilosophie, §§ 48–56; Boistel, Philosophie du droit, I, §§ 96–241; Kohler, Lehrbuch der Rechtsphilosophie, 91–142.

1. *Individual*

Jethro Brown, The Underlying Principles of Modern Legislation, chaps. 7, 8.

Lioy, Philosophy of Right (Hastie's transl.), II, chap. 1. "The public good is in nothing more essentially interested than in the protection of every individual's private rights." — 1 Blackstone, Commentaries, 139. "Two fundamental tendencies, which are characteristic of English thinking with respect to the relation of the individual to the state and have found more marked expression in English law making than in any other, put their stamp upon Locke's philosophy of law and of the state: unlimited high valuing of individual liberty and respect for individual property." — Berolzheimer, System der Rechts- und Wirthschaftsphilosophie, II, 160 (The World's Legal Philosophies, 137).

"Man *in abstracto*, as assumed by philosophies of law, has never actually existed at any point in time or space." — Wundt, Ethics (transl. by Titchener and others), III, 160.

(i) *Personality*

Pound, Interests of Personality, 28 Harvard Law Rev. 343, 445.

Gareis, Science of Law (Kocourek's transl.), 122–135; Adler, Die Persönlichkeitsrechte im allgemeinen bürgerlichen Gesetzbuch (in the Festschrift zur Jahrhundertsfeier des allgemeinen bürgerlichen Gesetzbuches); Geyer, Geschichte und System der Rechtsphilosophie, 137–142; Stahl, Philosophie des Rechts, 5 ed., 312–350.

a. *The Physical Person*

Green, Principles of Political Obligation, §§ 148–156.

Miller, Lectures on the Philosophy of Law, Lect. XI; Amos, Systematic View of the Science of Jurisprudence, 287–297; Post, Ethnologische Jurisprudenz, II, § 102; 1 Blackstone, Commentaries, 129–138.

b. *Honor—Reputation*

Dewey and Tufts, Ethics, 85–89; Westermarck, Origin and Developmei. of the Moral Ideas, chap. 32; Post, Ethnologische Jurisprudenz, II, §§ 17, 103; Institutes of Justinian, IV, 4; Sohm, Institutes of Roman Law (Ledlie's transl.), 2 ed., § 36.

c. *Belief and Opinion*

Pollock, Essays in Jurisprudence and Ethics, 144–175; Mill, On Liberty, chap. 2; Stephen, Liberty, Equality, Fraternity, chap. 2.

(ii) *Domestic relations*

Pound, Individual Interests in the Domestic Relations, 14 Michigan Law Rev. 177.

Miller, Philosophy of Law, Lect. 6; Lioy, Philosophy of Right (Hastie's transl.), II, chap. 2; Kohler, Rechtsphilosophie und Universalrechtsgeschichte, §§ 17–24; Kohler, Lehrbuch der Rechtsphilosophie, 66–81; Post, Zur Entwickelungsgeschichte des Familienrechts.

(iii) *Substance*

Berolzheimer, System der Rechts- und Wirthschaftsphilosophie, vol IV.

Kant, Metaphysische Anfangsgründe der Rechtslehre, §§ 1–21 (Hastie's transl., 62–107); Gareis, Science of Law (Kocourek's transl.), §§ 19–23; Schuppe, Grundzüge der Ethik und Rechtsphilosophie, §§ 87–96; Demogue, Notions fondamentales du droit privé, 383–404.

a. *Property*

Green, Principles of Political Obligation, §§ 211–231; Ely, Property and Contract in their Relation to the Distribution of Wealth, I, 51–93, 132–258, 295–443, II, 475–549.

Property, Its Duties and Rights, Historically, Philosophically, and Religiously Considered, 2 ed., Essays, 1–3, 5–8; Miller, Philosophy of Law,

Lect. 5; Herkless, Jurisprudence, chap. 10; Amos, Systematic View of the Science of Jurisprudence, chap. 10; Grasserie, Les principes sociologiques du droit civil, chap. 13; Kohler, Lehrbuch der Rechtsphilosophie, 81–91 (Albrecht's transl., 129–134).

Letourneau, Property, Its Origin and Development; Coulanges, Ancient City, bk. 2, chap. 6; Maine, Ancient Law, American ed., 237–294; Maine, Early History of Institutions, American ed., 98–118; Maine, Early Law and Custom, American ed., 335–361; Jenks, Law and Politics in the Middle Ages, 148–184, 188–241.

Reference may be made to Felix, Entwickelungsgeschichte des Eigenthums, 3 vols., 1883–1899.

The literature of this subject is of enormous extent. For discussions from various points of view, see:

Proudhon, What is Property (trans. by Tucker, 1876); George, Progress and Poverty, 1881; George, A Perplexed Philosopher, 1892; Cathrein, Champions of Agrarian Socialism (transl. and ed. by Heinzle, 1889); Beer, History of British Socialism, vol. I, 1919.

Sinclox, Primitive Civilizations; or Outlines of the History of Ownership in Archaic Communities, 1897; Laveleye, Primitive Property (trans. by Marriott, 1878; the original, "De la propriété et de ses formes primitives," is in a later edition—4 ed., 1891).

Cosentini, La réforme de la législation civile (1913), 371–422; Acollas, La propriété, 1886; Budin, La propriété privée et le droit fiscal, 1905; Dugast, La propriété devant le droit naturel, 1901; Fouillée, La propriété social et la démocratie, 1884; Hayem, Essai sur le droit de propriété et ses limites, 1910; Landry, L'utilité sociale de la propriété individuelle, 1901; Marguery, Le droit de propriété et le régime démocratique, 1905; Meyer, L'utilité publique et la propriété privée, 1903; Parthenin, Le droit social sur les choses: Essai sur la nature des propriétés collectives, 1903; Petrucci, Les origines naturelles de la propriété, 1905; Tarbouriech, Essai sur la propriété, 1901; Thézard, La propriété individuelle: Etude de philosophie historique du droit, 1872; Thomas, L'utilité publique et la propriété privée, 3 vols., 1904.

Bernstein, Gesellschaftliches und Privateigenthum, 1891; Berolzheimer, System der Rechts- und Wirthschaftsphilosophie, IV, § 1–13; Karner, Die sociale Funktion der Rechtsinstitute, besonders des Eigenthums, 1904.

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Succession and Testamentary Disposition

Kohler, Rechtsphilosophie und Universalrechtsgeschichte, §§ 25–27; Kohler, Lehrbuch der Rechtsphilosophie, 132–142 (Albrecht's transl., 192-206); Grasserie, Les principes sociologiques du droit civil, chaps. 11, 12.

Coulanges, Ancient City, bk. 2, chap. 7; Maine, Early Law and Custom, American ed., 78–121; Maine, Ancient Law, American ed., 166–208, 209–236; Gaius, III, § 1 and §§ 9–26; Salic Law (transl. in Henderson, Historical Documents of the Middle Ages), tit. 59; Pollock and Maitland, History of English Law, bk. II, chap. 6, §§ 1, 3.

On inheritance by illegitimate children, see Castberg, Children's Rights Laws and Maternity Insurance in Norway, Journ. Soc. Compar. Leg., N. S., XVI, 283, 285 ff.; Laws of N. Dak. 1917, chap. 70; Freund, Illegitimacy Laws of the United States, 1919.

b. *Freedom of industry and contract*

Green, Principles of Political Obligation, § 210; Pound, Liberty of Contract, 18 Yale Law Journ. 454.

c. *Promised advantages*

Ely, Property and Contract, II, 576–751.

Amos, Systematic View of the Science of Jurisprudence, chap. 11; Herkless, Jurisprudence, chap. 12; Kohler, Lehrbuch der Rechtsphilosophie, 91-132 (Albrecht's transl., 134–191); Grasserie, Les principes sociologiques du droit civil, chap. 6.

d. *Advantageous relations with others*

- Contractual,
- Social,
- Business,
- Official,
- Domestic.

The "Right of Association"

Dicey, Law and Opinion in England, 95–102, 190–200, 266–272, 465–475; Duguit, Le droit social et le droit individuel, 107–143.

2. *Public*

Jellinek, System der subjektiven öffentlichen Rechte, 2 ed.; Jellinek, Allgemeine Staatslehre, 3 ed., 169–173; Salmond, Jurisprudence, § 119; Gareis, Science of Law (transl. by Kocourek), § 47; Duguit, Manuel de droit constitutionel, 3 ed., § 15.

- Interests
  - Of the state as a juristic person
    - personality
    - substance
  - Of the state as guardian of social interests

Fleischmann, The Dishonesty of Sovereignties, 33 Rep. N. Y. State Bar Ass'n (1910), 229; Singewald, The Doctrine of Non-suability of the State in the United States (Johns Hopkins University Studies, ser. XXVIII, no. 3); Laski, The Responsibility of the State in England, 32 Harvard Law Rev. 447; Maguire, State Liability for Tort, 30 Harvard Law Rev. 20; Moffatt *v.* United States, 112 U. S. 24; Borchard, State Indemnity for Errors of Criminal Justice (62d Congress, 3d Session, Senate Document, no. 974).

3. *Social*

Pound, Legislation as a Social Function, Publications of the American Sociological Society, VII, 148; Starr, Individualist and Social Conceptions of the Public, 12 Illinois Law Rev. 1; Green, Principles of Political Obligation, §§ 207–209, 233–246; Jhering, Der Zweck im Recht, 3 ed., I, 452–466 (Law as Means to an End, 332–347).

(i) *General security*

{ Safety,
Health,
Peace and order,
Security of transactions,
Security of acquisitions.

Grotius, III, 20, 7; Montesquieu, L'esprit des lois, liv. 26, ch. 23; Stat. Westm. I, preamble; Coke, Second Institute, 158; Noy, Maxims, no. 26; 1 Hale, Pleas of the Crown, 53–55; Governor *v.* Meredith, 4 T. R. 794–797; 4 Blackstone, Commentaries, 166–168; Com. *v.* Alger, 7 Cush. 53, 84; Thorpe *v.* Rutland R. Co., 27 Vt. 140, 149; Slaughter House Cases, 16 Wall. 36, 61; 1 Blackstone, Commentaries, 349–354; 4 Blackstone, Commentaries, 142–153; Rogers *v.* Goodwin, 2 Mass. 475, 477; Harrow *v.* Myers, 29 Ind. 469; Rothschild *v.* Grix, 31 Mich. 150, 152; Kneeland *v.* Milwaukee, 15 Wis. 691, 692; Lozon *v.* Pryse, 4 My. & Cr. 600, 617; Ralston *v.* Hamilton, 4 Macqueen, 397, 405; Black, Judicial Precedents, §§ 76–80; *In re* Airey, [1897] 1 Ch. 164, 169; Bank *v.* Dandridge, 12 Wheat. 64, 69–70.

Gaius, II, § 44; Pufendorf, De Iure naturae et gentium, IV, 12, 1–3; Colin et Capitant, Droit civil français, I, 875–876; Bell *v.* Morrison, 1 Pet. 351, 360.

Institutes, II, 7, § 2; French Civil Code, § 931; German Civil Code, § 518; Moeneclacy, De la renaissance du formalisme dans les contrats en droit civil et commercial français; Stat. 29 Car. II, ch. 3.

Case of Market Overt, 5 Co. 83 *b*; French Civil Code, §§ 2279–2280; German Civil Code, § 931.

Torrens, Essay on the Transfer of Land by Registration; Dumas, Registering Title to Land, 94–102; Yerger *v.* Young, 9 Yerg. (Tenn.) 37, 42.

English Bills of Exchange Act, § 38 (2); Negotiable Instruments Law, § 57; Thaller, Traité élémentaire de droit commercial, 5 ed., §§ 900–917; Cosack, Lehrbuch des Handelsrechts, 7 ed., § 28 (II).

Huston, Enforcement of Decrees in Equity, 124–131.

(ii) *Security of social institutions*

{ Domestic,
Religious,
Political.

1 Story, Equity Jurisprudence, §§ 274–291; 2 Story, Equity Jurisprudence, §§ 1427–1428; 2 Bishop, New Commentaries of Marriage, Divorce, and Separation, §§ 249–266; Muirhead, Historical Introduction to the Private Law of Rome, 3 ed., 274–276; Rudorff, Römische Rechtsgeschichte, I, § 27.

Institutes, I, 10, §§ 12–13; Code, V, 27, 11, § 3; Colin et Capitant, Droit civil français, I, 253–304; German Civil Code, § 1699; Schuster, German Civil Law, §§ 425–427; 1 Blackstone, Comm., 446, 454–458; Stimson, American Statute Law, §§ 6631–6632; *In re* De Laveaga's Estate, 142 Cal. 158; Pederson *v.* Christofferson, 97 Minn. 491; Watts *v.* Owens, 62 Wis. 512.

Maine, Early History of Institutions, Lect. 11; Dicey, Law and Public Opinion in England, 2 ed., 371–398; Colin et Capitant, Droit civil français, I, 601–639; Barbey, French Family Law, 34 Reports American Bar Ass'n, 431; Schuster, German Civil Law, §§ 413–419.

Hegel, Philosophy of Right (transl. by Dyde), §§ 158–181; Ahrens, Cours de droit naturel, 8 ed., II, §§ 96–102, 127; Kohler, Philosophy of Law (transl. by Albrecht), 98–119; Miller, Lectures on the Philosophy of Law, 150–175.

Devine, Pensions for Mothers, American Labor Legislation Review, III, 191.

Hegel, Philosophy of Right (transl. by Dyde), § 270; Kohler, Philosophy of Law (transl. by Albrecht), 221, 223; Miller, Lectures on the Philosophy of Law, 365–371; Lioy, Philosophy of Right (transl. by Hastie), I, 151–198; Ahrens, Cours de droit naturel, 8 ed., II, §§ 130–131; Haring, Grundzüge des katholischen Kirchenrechts, 2 ed., §§ 24–25; Gareis und Zorn, Staat und Kirche in der Schweiz, I, §§ 2-3; Duguit, Traité de droit constitutionnel, II, §§ 110–112; Desdevises du Désert, L'église et l'état en France (1907–1908); Guerlac, The Separation of Church and State in France, Political Science Quarterly, XXIII, 258; Stammler, Recht und Kirche (1917); 4 Blackstone, Comm., 42–64; Vidal *v.* Girard, 2 How. 127, 198; Bloom *v.* Richards, 2 Ohio St. 387, 390–392; Zeisweiss *v.* James, 63 Pa. St. 465, 470; Bowman *v.* Secular Society, [1917] A. C. 406 (see comment in 31 Harvard Law Rev. 289).

Kant, Philosophy of Law (transl. by Hastie), 174–182; Figgis, Divine Right of Kings, 2 ed., 219–266.

Strachan-Davidson, Problems of the Roman Criminal Law, I, 11–19; Liszt, Lehrbuch der deutschen Strafrechts, 20 ed., §§ 104–165; Garraud, Droit pénal français, 3 ed., III, § 215; Donogh, History and Law of Sedition and Cognate Offences (1917); Liberty of Speech, Papers and Proceedings of American Sociological Society, vol. 9 (1914); Chafee, Freedom of Speech in War Time, 32 Harvard Law Rev. 932; Chafee, Freedom of Speech (1920); Nelles,

Espionage Act Cases (1918); 4 Blackstone, Comm., 74-93, 103-118, 119, 126; State *v.* Haffer, 94 Wash. 136 ["Libel" on George Washington].

(iii) *General morals*

1 Bishop, New Criminal Law, §§ 500-506; Liszt, Lehrbuch des deutschen Strafrechts, 20 ed., § 103; Garraud, Droit pénal français, 2 ed., V, §§ 1795-1800; Stockdale *v.* Onwhyn, 7 Dowl. & Ry. 625; Greenhood, Public Policy, 136-177, 201-210, 222-237, 292-296, 306-315, 357-367; Code of Justinian, VIII, 38, 4; Digest, XLV, 1, 26; French Civil Code, arts. 1133, 1965; German Civil Code, § 138 (1); Phelps, Juridical Equity, §§ 256-259; Savigny, System des heutigen römischen Rechts, I, 407-410 (Holloway's transl., 332-334); Salkowski, Roman Private Law (transl. by Whitfield), § 57.

(iv) *Conservation of social resources*

{ Use and conservation of natural resources,
Protection and education of dependents and defectives,
Reformation of delinquents,
Protection of the economically dependent.

Digest, XLIII, 12, 1, §§ 3-4; Digest, XLIII, 14, 1, pr. and §§ 1-6; Digest, XLIII, 20, 1, pr. and §§ 1-12; French Civil Code, arts. 538, 642-645; Planiol, Traité élémentaire de droit civil, 6 ed., I, § 2428; Wulff und Herold, Wassergesetz vom 7 April, 1913.

Embrey *v.* Owen, 6 Ex. 353; Lux *v.* Haggin, 69 Cal. 255; Const. Ariz., art. 17, §§ 1-2; Const. Col., art. 16, §§ 5-6; Const. Idaho, art. 15, § 3; Const. Mont., art. 3, § 15; Const. N. D., § 210; Const. N. M., art. 16, §§ 1-2; Const. Utah, art. 17; Const. Wash., art. 1, § 16, art. 21, § 1; Const. Wyo., art. 8, §§ 1-3. See Swain, Conservation of Water by Storage, chaps. 3-5, and review in 28 Harvard Law Rev. 824.

Ohio Oil Co. *v.* Indiana, 177 U. S. 190; Manufacturers Gas Co. *v.* Indiana Natural Gas Co., 155 Ind. 461, 468-474.

Case of Mines, Plowd. 310; 1 Lindley, Mines, 3 ed., §§ 200-200c.

Geer *v.* Connecticut, 161 U. S. 519; American Express Co. *v.* People, 133 Ill. 649; Haggerty *v.* Storage Co., 243 Mo. 238; State *v.* Dow, 70 N. H. 286.

1 Blackstone, Commentaries, 460-467; Spence, History of the Equitable Jurisdiction of the Court of Chancery, I, 611-615; Institutes, I, 13, 15, 18, 20, 22, 23, pr. and § 1; French Civil Code, arts. 388-487.

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Alarming Increase of Juvenile Delinquency in the Metropolis, 1916; Missouri Code Commission, Complete Revision of the Laws for the Welfare of Missouri Children, 2 ed., 1917; Annual Reports of the Society for the Reformation of Juvenile Delinquents; Baernreither, Jugendfürsorge und Strafrecht in den Vereinigten Staaten, 1905; Stammer, Strafvollzug und Jugendschutz in Amerika, 1911.

See Goldmark, Child Labor Legislation, Handbook (in Annals of the American Academy of Political and Social Science, vol. 31, 1908); Scott, Child Labor (Summary of Laws in Force, 1910), American Association for Labor Legislation, Legislative Review, no. 5 (1910); Meyer and Thompson, List of References on Child Labor (United States Children's Bureau, 1916).

Aristotle, Politics, VIII, 1–2 (Jowett's transl. I, 244–245); Lioy, Philosophy of Right (Hastie's transl.), I, 224–226; Lorimer, Institutes of Law, 2 ed., 225–226; Miller, Lectures on the Philosophy of Law, 182–184; Ahrens, Cours de droit naturel, 8 ed., II, § 133; Spencer, Social Statics, 153–184; Spencer, Principles of Ethics, I, §§ 236–237; Wilson, The State, § 1534; Dicey, Law and Public Opinion in England, 2 ed., 276–279.

1 Blackstone, Commentaries, 302–306; Spence, History of the Equitable Jurisdiction of the Court of Chancery, I, 618-620; Institutes, I, 23, §§ 3–4; Colin et Capitant, Droit civil français, I, 559-600; Schuster, German Civil Law, §§ 28–31; Henderson, Dependents, Defectives, and Delinquents, 169–209.

See Barrows, Indeterminate Sentence and the Parole Law, 1899; Barrows, Reformatory System in the United States, 1900; Miner, Probation Work in the Magistrates' Courts of New York City, 1909; Henderson, Penal and Reformatory Institutions, 1910; Brockway, Fifty Years of Prison Service, 1912; Ives, History of Penal Methods, 1914; Leeson, The Probation System, 1914; Lewis, The Offender, 1917; Herr, Das moderne amerikanische Besserungssystem, 1907.

See Frankfurter and Goldmark, Brief in Oregon Minimum Wage Cases, 1917; Brown, Minimum Wage, with Particular Reference to the Legislative Minimum Wage under the Minnesota Statute of 1913 (1913); Andrews, Minimum Wage Legislation, 1914; Tawney, Establishment of Minimum Rates in the Chainmaking Industry, 1914; Tawney, Establishment of Minimum Rates in the Tailoring Industry, 1915; Bulkley, Establishment of Legal Minimum Rates in the Boxmaking Industry, 1915; Andrews and Hobbs, Economic Effects of the War upon Women and Children in Great Britain, 1918; California Industrial Welfare Commission, Report on Wage Board in the Fruit and Canning Industry, 1916; Connecticut State Bureau of Labor, Report on Conditions of Wage Earning Women and Girls, 1916; Massachusetts Minimum Wage Commission, Reports and Bulletins; Minnesota Minimum Wage Commission, Biennial Report for 1913–1914.

Stettler *v.* O'Hara, 69 Or. 519; State *v.* Crowe, 130 Ark. 272; Williams *v.* Evans, 165 Minn. 495.

Dicey, Law and Public Opinion in England, 2 ed., 220–240; Ruegg, Changes in the Law of England Affecting Labour, in A Century of Law Reform, 1901; Commons and Andrews, Principles of Labor Legislation, 1916; Annual Reviews of Labor Legislation in American Labor Legislation Review,

1911—. See also Bulletins of the International Labour Office; Massachusetts State Board of Labor and Industries, Reports and Bulletins; New York State Department of Labor, Reports and Bulletins; Pennsylvania Department of Labor and Industry, Reports.

Rehabilitation legislation—"Act to create a Commission for the Rehabilitation of Physically Handicapped Persons," Laws of New Jersey, 1919, chap. 74, p. 138.

(v) *General progress*

{ Economic progress,
Political progress,
Cultural progress.

Economic progress:

{ Freedom of property from restrictions on sale or use,
Free trade,
Free industry,
Encouragement of invention.

Scrutton, Land in Fetters, 1886; 2 Blackstone, Commentaries, 269–274; Digest, VIII, 1, 8, pr.; Digest, VIII, 1, 15, § 1; Haywood *v.* Building Society, 8 Q. B. D. 403; International Tea Stores Co. *v.* Hobbes, [1903] 2 Ch. 165, 172; Brown *v.* Burdett, 21 Ch. D. 667; Dawkins *v.* Penrhyn, 4 App. Cas. 51; Gray, Restraints on Alienation, 2 ed., § 4; Dr. Miles Medical Co. *v.* Park, 220 U. S. 373; Park *v.* Hartman, 153 Fed. 24, 39; Hogg, Tulk *v.* Moxhay and Chattels, 28 Law Quarterly Rev. 73.

Coke, Second Institute, 47; Darcy *v.* Allen, Moore, 671; Mitchell *v.* Reynolds, 1 P. Wms. 181; Act July 2, 1890, 26 U. S. St. L. 209.

Jacobs *v.* Cohen, 183 N. Y. 207, 219; Erle, Law Relating to Trade Unions (1869), chap. 1, § 3.

Story, Commentaries on the Constitution, II, §§ 1151–1152; Bauer *v.* O'Donnell, 229 U. S. 1.

Political progress:

{ Free criticism,
Free opinion.

Cooley, Constitutional Limitations, chap. 12; Liberty of Speech, Papers and Proceedings, American Sociological Soc., vol. 9 (1914); Chafee, Freedom of Speech in War Time, 32 Harvard Law Rev. 932; Chafee, Freedom of Speech (1920); Wason *v.* Walker, L. R. 4 Q. B. 73, 93–94.

Cultural progress:

{ Free science,
Free letters,
Encouragement of arts and letters,
Encouragement of higher education.

Bury, History of Freedom of Thought, 1913; 2 Blackstone, Commentaries, 406–407; Const. Mass., chap. 5, § 1, art. 1 (1780).

(vi) *The individual life*
See III, A, 5, *supra*.

Schemes of Interests to be Secured by Law

Hippodamus of Miletus (B. C. c. 408)

He [Hippodamus] also divided his laws into three classes and no more, for he maintained that there are three subjects of lawsuits, — insult, injury, and homicide. — Aristotle, Politics, II, 8 (Jowett's transl., I, 47).

Bacon (1629)

The use of the law consisteth principally in these three things: 1. To secure men's persons from death and violence. 2. To dispose of the property of their goods and lands. 3. For preservation of their good names from shame and infamy. — Use of the Law, 1 [As to the authorship of this book and its date, see Spedding, Bacon's Works, VII, 453–457].

Bentham (1802)

In the distribution of rights and obligations the legislator . . . should have for his end the happiness of society. Investigating more distinctly in what that happiness consists, we shall find four subordinate ends:

Subsistence,
Abundance,
Equality,
Security.

The more perfect enjoyment is in all these respects, the greater is the sum of social happiness: and especially of that happiness that depends upon the laws.

We may hence conclude that all the functions of law may be referred to these four heads: To provide subsistence; to produce abundance; to favor equality; to maintain security. — Theory of Legislation, Principles of the Civil Code, chap. 2 (Hildreth's transl.).

X

THE SECURING OF INTERESTS

A

Balancing of Interests

Korkunov, General Theory of Law (Hastings' transl.), § 25; Kantorowicz, Rechtswissenschaft und Soziologie, 17–23; Demogue, Notions fondamentales du droit privé, 170–200; Charmont, The Conflict of Interests Legally Protected in French Law, 13 Illinois Law Rev. 461.

Geny, Méthode d'interprétation, 2 ed., II, § 220.

B

Means of Securing Interests

Salmond, Jurisprudence, chaps. 4, 10, 11; Saleilles, The Individualization of Punishment (Mrs. Jastrow's transl.), chaps. 2–7; Bryce, Studies in History and Jurisprudence, Essay 9; Stammler, Wirthschaft und Recht, §§ 92–98.

Bentham, Theory of Legislation (Hildreth's transl.), Principles of Legislation, chaps. 7–11, Principles of the penal Code, pt. 3; Austin, Jurisprudence, 4 ed., I, 91 ff.; Pollock, First Book of Jurisprudence, 4 ed., 21–27; Salmond, Jurisprudence, § 32.

(1) Legal personality (see *post*, XXI).
(2) Legal rights (see *post*, XVII).
(3) Powers (see *post*, XVIII).
(4) Privileges (see *post*, XIX).
(5) Punishment.
(6) Redress (see *post*, XXIX).
  (*i*) Specific
  (*ii*) Substitutional
(7) Prevention (see *post*, XXIX).

C

Limits of Effective Legal Action

1. *Limits in respect of application and subject-matter*

Bentham, Theory of Legislation, Principles of Legislation, chap. 12; Pollock, First Book of Jurisprudence, pt. 1, chap. 2; Amos, Science of Law, chap. 3; Green, Principles of Political Obligation, §§ 11–31; Korkunov, General Theory of Law (Hastings' transl.), §§ 5–7; Gareis, Science of Law (Kocourek's transl.), § 6. See VI, *supra*.

2. *Social-psychological limitations upon enforcement of legal rules*

Spinoza, Tractatus Politicus, chap. 10, § 5 (Elwes' transl., p. 381); Duff, Spinoza's Political and Ethical Philosophy, chap. 22; Markby, Elements of Law, §§ 48–59; Salmond, Jurisprudence, § 30; Jellinek, Allgemeine Staatslehre, 2 ed., 89 ff., 524 ff.; Pound, The Limits of Effective Legal Action, Rep. Pa. Bar Ass'n, XXII, 221, American Bar Ass'n Journal, III, 55, International Journ. of Ethics, XXVII, 150.

SOURCES, FORMS, MODES OF GROWTH

XI

SOURCES AND FORMS OF LAW

Austin, Jurisprudence, Lect. 28; Holland, Jurisprudence, chap. 5 to I; Salmond, Jurisprudence, §§ 31-36; Amos, Science of Law, 2 ed., table facing page 76; Pollock, First Book of Jurisprudence, 4 ed., 231–246; Gray, Nature and Sources of the Law, §§ 322–597; Gareis, Science of Law (transl. by Kocourek), §§ 8–12; Korkunov, General Theory of Law (transl. by Hastings), §§ 51–54.

Carter, The Ideal and the Actual in the Law, 9–11; Carter, Law: Its Origin, Growth, and Function, Lect. 5; Miraglia, Comparative Legal Philosophy (transl. by Lisle), §§ 152–165.

Austin, Jurisprudence, Lect. 30; Holland, Jurisprudence, chap. 5, subdiv. I; Clark, Practical Jurisprudence, 196–201, 324–334; Salmond, Jurisprudence, §§ 42, 43, 46–48; Pollock, First Book of Jurisprudence, 4 ed., 280–290; Gray, Nature and Sources of the Law, §§ 598–641.

Rattigan, Science of Jurisprudence, §§ 72–74; Jenks, Law and Politics in the Middle Ages, 56–63; Hastie, Outlines of Jurisprudence, 37–39.

1. Sources and forms of law in general.

   Ambiguity of "sources of law" as used in the books.

   The source of authority of legal rules.

   The methods and agencies by which rules are formulated.

   The authoritative shapes which legal rules assume; the forms in which they are expressed and to which courts are referred in the decision of controversies.

2. Sources of law.

   A. Custom as a source of law -- customary law.

Geny, Méthode d'interprétation, 2 ed., I, §§ 109–137; Ehrlich, Grundlegung der Soziologie des Rechts, 352–380.

(1) Historical.

The judge precedes the law; judgments precede customary law.

Historical development of customary law.

Relation of customary law to the development of the state.

Bryce, Studies in History and Jurisprudence, 280–284; Markby, Elements of Law, §§ 79–85.

(2) Philosophical.

The philosophical basis of customary law.

Lorimer, Institutes of Law, 2 ed., 515–516; Pollock, Essays in Jurisprudence and Ethics, 53–59; Kohler, Einführung in die Rechtswissenschaft, § 5; Stammler, Theorie der Rechtswissenschaft, 114–136.

(3) Analytical.

Nature of "customary law."

Customary course of popular action.

Customary course of magisterial action.

Customary course of advice to litigants by those learned in the law.

Customary course of judicial action.

Reaction of law and custom.

Theories of the formulation of law by custom.

Relation of custom to legislation.

Relation of custom to judicial decision.

Customary law and democracy.

Amos, Science of Law, 2 ed., 390.

(4) Customary law in the several legal systems.

(a) In Roman law.

(b) In the common law.

Brown, The Austinian Theory of Law, §§ 569–605; Markby, Elements of Law, §§ 90–91; Clark, Practical Jurisprudence, 316–323.

(c) Custom in international law.

Oppenheim, International Law, I, §§ 16–17.

B. Sources in general.

Sources in archaic law.
Sources in the Roman law.
Sources in the law of Continental Europe.
Sources in Anglo-American law.

Enacted law.
Not enacted.
Judicial.
Non-Judicial.

Books of authority.
Writings not of authority.

3. Forms of law.

1. Legislation.
2. Case law.
3. Text-book law.

Forms in the Roman law.

Legislation { *leges.* *plebiscita.* *senatus consulta.* constitutions of the emperors (*principum placita*).

Edicts of the Magistrates.
Responsa of the jurisconsults.
Treatises of the jurisconsults.

Forms in the law of Continental Europe.

Legislation.
Jurisprudence (*Gerichtsgebrauch*).
Doctrine.

Forms in Anglo-American law.

Legislation — with us, constitutions, treaties, statutes.
Judicial decisions.
Authoritative books.

XII

THE TRADITIONAL ELEMENT

A

Law as a Priestly Tradition

Maine, Ancient Law, chap. 1, and Sir Frederick Pollock's notes B and C; Maine, Early Law and Custom (American ed.), 45–49; Coulanges, Ancient City, bk. 3, chap. 11; Mayne, Hindu Law, §§ 14–40; Kent, Israel's Laws and Legal Precedents, 8–15; Hirzel, Themis, Dike und Verwandtes.

B

Law as a Popular Tradition

Brunner, Deutsche Rechtsgeschichte, §§ 13, 37; Siegel, Deutsche Rechtsgeschichte, § 2.

C

Law as a Juristic Tradition

Clark, Practical Jurisprudence, 273–339; Muirhead, Historical Introduction to the Private Law of Rome, §§ 50, 61–64; Maitland, English Law and the Renaissance, 24–35; Holdsworth, History of English Law, II, 405–431; Grueber, Introduction to Ledlie's Translation of Sohm, Institutes of Roman Law (1 ed.); Dernburg, Pandekten, I, §§ 16–17; Windscheid, Pandekten, I, §§ 7–10; Brissaud, Manuel d'histoire du droit civil Français, 348–361, 388–400; Stintzing, Geschichte der deutschen Rechtswissenschaft.

D

Modes of Growth

1. *Fictions*

Maine, Ancient Law, chap. 2, and Sir Frederick Pollock's note; Austin, Jurisprudence, 3 ed., 629–631; Gray, Nature and Sources of the Law, §§ 74–89; Phelps, Juridical Equity, § 150.

Jhering, Geist des römischen Rechts, § 58; Bernhöft, Zur Lehre von den Fiktionen; Demogue, Notions fondamentales du droit privé, 238–251; Stammler, Theorie der Rechtswissenschaft, 328–333; Lecocq, Fiction comme procédé juridique.

Gaius, IV, §§ 32–38; 3 Blackstone, Commentaries, 43, 44–45, 152–153, 159–165, 200–206, 274–275, 283, 284–287; Gaius, I, §§ 111, 114–115, 119–123, 132, 134, II, §§ 24, 103–105; Ulpian, Rules, I, §§ 7, 8; 2 Blackstone, Commentaries, 348–363, particularly 360, 363; Curtis, Jurisdiction of the United States Courts, 127–133.

2. *Interpretation*

Clark, Practical Jurisprudence, 235–244; Austin, Jurisprudence, 3 ed., 1023–1036; Pound, Spurious Interpretation, 7 Columbia Law Rev. 379; Gray, Nature and Sources of the Law, §§ 370–399; Geny, Méthode d'interprétation, 2 ed., I, §§ 92–108, II, §§ 177–187; Stammler, Theorie der Rechtswissenschaft, 558–652.

Salkowski, Roman Private Law (Whitfield's transl.), § 5; Walton, Introduction to Roman Law, 2 ed., 110–111; 2 Blackstone, Commentaries, 333–337.

3. *Equity*

Maine, Ancient Law, chap. 3, and Sir Frederick Pollock's note F; Clark, Practical Jurisprudence, 340–379.

Austin, Jurisprudence, Lect. 36; Salmond, Jurisprudence, § 15; Sohm, Institutes of Roman Law (Ledlie's transl., 2 ed.), §§ 15–17; Markby, Elements of Law, §§ 120–122; Pound, The Decadence of Equity, 5 Columbia Law Rev. 20. Buckland, Equity in Roman Law.

4. *Natural law*

Bryce, Studies in History and Jurisprudence, Essay 11; Maine, Ancient Law, chaps. 3, 4, and Sir Frederick Pollock's notes F, G, and H; Pollock, The Expansion of the Common Law, 107–138; Holland, Jurisprudence, chap. 3, subdiv. I; Korkunov, General Theory of Law (transl. by Hastings), §§ 14–17.

Pollock, History of the Law of Nature, 1 Columbia Law Rev. 11; Salmond, The Law of Nature, 11 Law Quart. Rev. 121; Grueber, Einführung in die Rechtswissenschaft (in Birkmeyer, Encyklopädie der Rechtswissenschaft), § 2; Grotius (Whewell's transl.), I, 1, §§ 10–11; Markby, Elements of Law, §§ 116–117; Rattigan, Science of Jurisprudence, §§ 13, 20*b*.

5. *Juristic science*

Austin, Jurisprudence, 3 ed., 653–659; Gray, The Nature and Sources of the Law, §§ 551–597*a*; Korkunov, General Theory of Law (Hastings' transl.), § 64; Bierling, Juristische Prinzipienlehre, IV, §§ 53–58; Stammler, Theorie der Rechtswissenschaft, 262–363; Demogue, Notions fondamentales du droit privé, 225–238.

Gareis, Science of Law (Kocourek's transl.), § 12*c*; Sohm, Institutes of Roman Law (Ledlie's transl., 2 ed.), §§ 18–20; Beseler, Volksrecht und Juristenrecht, 299–364; Windscheid, Pandekten, I, §§ 23–24; Dernburg, Pandek-

ten, I, § 38; Cosack, Lehrbuch des deutschen bürgerlichen Rechts, I, § 11; Geny, Les procédés d'élaboration du droit civil (in Les méthodes juridiques); Del Vecchio, Il sentimento giuridico.

6. *Judicial empiricism*

Austin, Jurisprudence, Lects. 38 and 39, pt. I; Pollock, Essays in Jurisprudence and Ethics, 237–261; Gray, Nature and Sources of the Law, §§ 420–550; Clark, Practical Jurisprudence, 223–226, 255–265; Dillon, Laws and Jurisprudence of England and America, 229–237, 242–253; Thayer, Judicial Legislation: Its Legitimate Function in the Development of the Common Law, 5 Harvard Law Rev. 172.

Markby, Elements of Law, §§ 95–99; Cruet, La vie du droit et l'impuissance des lois; Carter, Law: Its Origin, Growth, and Function.

7. *Comparative law*

Bryce, Studies in History and Jurisprudence (American ed.), 619–623; Maine, Village Communities (American ed.), 3–6; Demogue, Notions fondamentales du droit privé, 268–285.

Meili, Institutionen der vergleichenden Rechtswissenschaft; Lambert, La fonction du droit civil comparé; Bernhöft, Ueber Zweck und Mittel der vergleichenden Rechtswissenschaft; Jitta, La substance des obligations dans le droit international privé, § 7.

8. *Sociological study*

Holmes, The Path of the Law, 10 Harv. Law Rev. 456, 467 ff.; Keasbey, The Courts and the New Social Questions, 24 Green Bag, 114; Kantorowicz, Rechtswissenschaft und Soziologie, 8 ff.; Ehrlich, Grundlegung der Soziologie des Rechts, 393–409; Geny, Méthode d'interprétation, 2 ed., II, § 221.

: Wüstendorfer, Zur Hermeneutik der Soziologischen Rechtsfindungstheorie, Archiv für Rechts und Wirthschaftsphilosophie, IX, 170.

XIII
THE IMPERATIVE ELEMENT

A
Legislative Lawmaking

Korkunov, General Theory of Law (Hastings' transl.), § 54; Salmond, Jurisprudence, §§ 50–54; Miller, Data of Jurisprudence, 238–258.

Maine, Early History of Institutions (American ed.), 386–393, 398–400; Clark, Practical Jurisprudence, 202–213.

1. *Unconscious legislation*

Maine, Village Communities (American ed.), 75, 116.

2. *Declaratory legislation*

Maine, Early History of Institutions (American ed.), 26 ff.

Laws of Manu (Bühler's transl.), I, §§ 58–60; Introduction to the Senchus Mor, Ancient Laws and Institutes of Ireland, I, 3–41; Prologue to the Lex Salica (Hessels and Kern, Lex Salica, 422–423); Jenks, Law and Politics in the Middle Ages, 7–13.

3. *Selection and amendment*

Carter, Law: Its Origin, Growth, and Function, 255 ff.

Prologue to Alfred's Laws (Thorpe, Ancient Laws and Institutes of England, 59); Laws of Howel the Good, Introduction (Evans, Welsh Mediaeval Law, 145–146).

4. *Conscious constructive lawmaking*

Jenks, Law and Politics in the Middle Ages, 18–21; Dicey, Law and Opinion in England, 45 ff., 48–61; Miller, Philosophy of Law, 38 ff.; Pulszky, Theory of Law and Civil Society, § 245.

5. *Codification*

See Lecture XIV., *post*.

B

Agencies of Legislation

1. *Roman law*

Gaius, I, §§ 3–7; Institutes, I, 2, §§ 3–10.

2. *English law*

Pollock, First Book of Jurisprudence, pt. 2, chap. 7.

Thring, Practical Legislation; Ilbert, Legislative Methods and Forms; Ilbert, The Mechanics of Lawmaking.

3. *American law*

Jones, Statute Lawmaking in the United States.

McCarthy, The Wisconsin Idea, chaps. 8, 9; Parker, The Congestion of Law, 29 Rep. Am. Bar Ass'n, 383; Parker, Address as President of the American Bar Ass'n, 1907, 19 Green Bag, 581; Burges, Address as President of the Texas Bar Ass'n, Proc. Tex. Bar Ass'n, 1910, 113–131.

4. *The civil law*

Gareis, Science of Law (Kocourek's transl.), § 11; Bekker, Grundbegriffe des Rechts und Misgriffe der Gesetzgebung, chap. 8; Geny, La technique législative dans la codification civile moderne, Livre du centennaire du code civil Français, II, 989–1038; Moreau, La revision du code civil et la procédure législative, Id., 1041–1071.

C

Relation of the Imperative to the Traditional Element

Savigny, On the Vocation of Our Age for Legislation and Jurisprudence (Hayward's transl.); Carter, Law: Its Origin, Growth, and Function, 204–220; Dicey, Law and Opinion in England, 393–396; Pound, Common Law and Legislation, 21 Harv. Law Rev. 383; Holland, Jurisprudence, 12 ed., 76–78.

1. *Mutual reaction of the traditional and imperative elements*

Dicey, Law and Opinion in England, 369–392, 396. See Smart *v.* Smart, [1892] A. C. 425, 432.

2. *The traditional element as a means of interpretation*

Carter, Law: Its Origin, Growth, and Function, 309 ff.; Baldwin, The American Judiciary, 81–97; Charmont et Chausse, Les Interprètes du code civil, Livre du centennaire du code civil Français, II, 133–172; Endemann, Lehrbuch des bürgerlichen Rechts, I, § 12.

Commercial Nat. Bank *v.* Canal Bank, 239 U. S. 520.

3. *Analogical reasoning from legislation*

Schuster, German Civil Law, § 17; Stammler, Theorie der Rechtswissenschaft, 633–641; Capitant, Introduction à l'étude du droit civil, 81–85.

4. *Adjustment of the traditional element to legislation and vice versa*

Gray, Nature and Sources of Law, §§ 369–399; Gény, Méthode d'interprétation, 2 ed., II, §§ 138–154.

XIV

CODIFICATION

Austin, Jurisprudence, Lect. 39, and Notes on Codification (3 ed., pp. 1056–1074); Carter, Law: Its Origin, Growth, and Function, Lects. 11, 12; Clark, Practical Jurisprudence, 380–394; Dillon, Laws and Jurisprudence of England and America, 178–187; Goadby, Introduction to the Study of Law, chap. 4.

Amos, Science of Law, chap. 13; Amos, Systematic View of the Science of Jurisprudence, 471–490; Bryce, Studies in History and Jurisprudence (American ed.), 103–105; Clarke, The Science of Law and Lawmaking (this whole book is an argument against codification); Danz, Die Wirkung der Codificationsformen auf das materielle Recht; Bethmann-Hollweg, Ueber Gesetzgebung und Rechtswissenschaft als Aufgaben unserer Zeit; Demogue, Notions fondamentales du droit privé, 207 ff., and recent French literature cited in note 2; Geny, Méthode d'interprétation, 2 ed., I, §§ 37–50; Livre du centennaire du Code Civil Français; Festschrift zur Jahrhundertsfeier des allgemeinen bürgerlichen Gesetzbuches; Goudy, Mackay, and Campbell, Addresses on Codification of Law; Gregory, Benthamite Codification, 13 Harv. Law Rev. 374; Holland, Essays in the Form of the Law; Hearn, Theory of Legal Rights and Duties, chap. 17; Pollock, First Book of Jurisprudence, 4 ed., 365 ff.; Pulszky, Theory of Law and Civil Society, §§ 246–247; Salmond, Jurisprudence, § 53; Bentham, Letters to the Citizens of the Several American United States (on codification); Report of Joseph Story, Theron

Metcalf, Simon Greenleaf, Charles E. Forbes, and Luther S. Cushing, Commissioners "to take into consideration the practicability and expediency of reducing to a written and systematic code the common law of Massachusetts or any part thereof," 1836 (reprinted by David Dudley Field, 1882); Fowler, Codification in the State of New York, 2 ed., 1884; Bacon, Proposition to His Majesty Touching the Compilation and Amendment of the Laws of England, Spedding, Letters and Life of Bacon, VI, 61–71; Terry, Leading Principles of Anglo-American Law, §§ 606–612.

Sharswood, Law Lectures, Lect. 9; Pollock, Essay on Codification (prefaced to 4 ed. of his Digest of the Law of Partnership); Amos, An English Code: Its Difficulties and the Mode of Overcoming Them; Bower, Code of Actionable Defamation, Preface; Warren, History of the American Bar, chap. 19; Hoadly, Annual Address before the American Bar Ass'n, Rep. Am. Bar Ass'n (1889), XI, 219; Sherman, One Code for all the United States, 25 Green Bag, 460; Boston, Law — Anachronistic, Progressive, Rep. Pa. Bar Ass'n (1918), XXIV, 315, 344–345; Chalmers, An Experiment in Codification, 2 Law Quart. Rev. 125; Acharyya, Codification in British India.

Schuster, The German Civil Code, 12 Law Quart. Rev. 17; Maitland, The Making of the German Civil Code, Collected Papers, III, 474; Endemann, Lehrbuch des bürgerlichen Rechts, I, §§ 3, 4. Reference should be made also to the various papers in the Livre du centennaire du code civil Français; De Colyar, Jean Baptiste Colbert and the Codifying Ordinances of Louis XIV, Journ. Soc. Comp. Leg. (N. S.), XIII, 56; Lobingier, Codification in the Philippines, Journ. Soc. Comp. Leg. (N. S.), X, 239; Progress of Continental Law in the Nineteenth Century (Continental Legal History Series, vol. 11) chaps. 5–9.

1. The so-called ancient codes, more or less authoritative publications of traditional law, are generically distinct. They come before a period of legal development. Codes in the modern sense come after a full legal development and simplify the form of the law.

2. Codification in Roman law.

   The compilations of Gregorius and Hermogenianus (fourth century A.D.).

   The Theodosian Code (A.D. 429–438. Took effect 439).

   The Codification of Justinian (A.D. 528–534).

      The Code (529, revised and re-enacted 534)
      The Digest (533)
      The Institutes (533)
      The Novels.

3. Modern Codes.

   The Constitutio Criminalis Carolina (1532).
   Partial codification under Louis XIV in France.

The project of Colbert (1667–1670).
The Prussian Code.

The draft code of Frederick the Great (1749)
The Allgemeines Landrecht (1780–1794)

The French Civil Code (1800–1804).

Adopted in Belgium, Egypt, and Polish Russia.
Taken as the model in
Italy (1865)
Spain (1889)
Portugal (1865)
Holland (1838)
Russia (1835. A project on German lines was pending in 1914)
Louisiana (1808, rev. 1824, 1870)
Quebec (1866)
Rumania (1864)
Montenegro (1873–1886)
Mexico (1870, rev. 1884)
Costa Rica (1886)
Guatemala (1886)
Bolivia (1830, rev. 1903)
Peru (1851)
Chili (1855)
Colombia (1857)
Argentina (1869)
Uruguay (1869)
Ecuador (1887)
Venezuela (1897)

The Austrian Civil Code (1713–1811).

Projected 1713, draft 1767, partial new draft 1787, put in force 1811.
Taken as a model in
Servia (1844)

The German Civil Code (1874–1900).

First commission appointed 1874, first draft published 1887, new commission 1890, new draft 1896, took effect 1900.
Taken as a model in
Japan (1896, took effect 1900)

The Swiss Federal Codes.

The Civil Code (1907)
The Code of Obligations (1901)

The Civil Code of Brazil (1917).

As to the history of this code, see Lacerda, Codigo civil Brasileiro, pp. iv–lxiv.

Two classes of countries have adopted codes:

(a) Countries with well-developed legal systems which had exhausted the possibilities of juristic development through the traditional element and required a new basis for a new juristic development.

(b) Countries which had their whole legal development before them, which required an immediate basis for development.

Conditions which have led to codification:

(1) The possibilities of juristic development on the basis of the traditional element were exhausted for the time being, or a new basis was required for a country with no juristic past.

(2) The law was unwieldy, full of archaisms and uncertain.

(3) The growing-point had shifted to legislation and an efficient organ of legislation had developed.

(4) Usually, there was a need for one law in a political community whose several subdivisions had developed divergent local laws.

4. Codification in Anglo-American law.

In England:

The project under Henry VIII

Bacon's project (1614)

Lord Westbury's plan (1860–1863)

Gradual codification in England:

The Bills of Exchange Act (1882)

The Partnership Act (1890)

The Sale of Goods Act (1894)

The Marine Insurance Act (1906)

"Private codification".

The Anglo-Indian Codes (1837–1882)

In Australia:

The project in Victoria (1878–1882)

See Hearn, Theory of Legal Duties and Rights, 378–382, and appendix, 385.

In the United States:

The New York Codes (1847–1887)
The Code of Civil Procedure (1848)
Codes based on this are in force in 30 jurisdictions
The draft Civil Code (1862)
The Penal Code (1864, enacted 1887)
The draft Political Code (1865)
The Code of Criminal Procedure (1865)
Throop's Code of Civil Procedure (1876–1880)
All of Field's drafts were adopted in California, North and South Dakota, and Montana
The Massachusetts commission (1835)
The Civil Code of Georgia (1860)
The Conference of Commissioners on Uniform State Laws
The Negotiable Instruments Law
The Warehouse Receipts Act
The Sales Act
The Stock Transfer Act
The Bills of Lading Act
The Partnership Act
See Williston, The Uniform Partnership Act, With Some Remarks on Other Uniform Commercial Laws, 63 University of Pennsylvania Law Rev. 196; Vold, Some reasons why the Code States should adopt the Uniform Sales Act, 5 California Law Rev. 400, 471; Terry, Uniform State Laws in the United States.

5. Objections to Codification:

(1) Defects of codes in the past.

(a) The codifiers too often had but superficial knowledge of much of the law they attempted to codify.

(b) Most codes in the past have been drawn too hurriedly.

(2) Savigny's objections:

(a) That the growth of the law is likely to be impeded or diverted into unnatural directions.

(b) That a code made by one generation is likely to project directly or indirectly the intellectual and moral notions of the time into times when such notions have become anachronisms.

(3) Austin's objections to the French code:

(a) That it makes no adequate provision for the incorporation of judicial interpretation from time to time.

(b) That it was not complete and was intended to be eked out by pre-existing law.

6. Purposes of Codification:

The eighteenth-century idea.
Bentham's idea.
The idea of a code as the basis of a juristic new start.
What a code should attempt.

7. Defects of form in American law:

(a) Want of certainty.

(b) Waste of labor entailed by unwieldy form of the law.

(c) Lack of means of knowledge on the part of those who seek to amend the law.

(d) Irrationality, due to partial survival of obsolete rules.

8. The need of new premises in American law.

6

APPLICATION AND ENFORCEMENT OF LAW

XV

APPLICATION AND ENFORCEMENT OF LAW

Pound, The Enforcement of Law, 20 Green Bag, 401; Pound, Courts and Legislation, 7 American Political Science Review, 361–383; Science of Legal Method (Modern Legal Philosophy Series, vol. 9), 202–228; Science of Legal Method, chaps. 1–5.

Geny, Méthode d'interprétation, 2 ed. (1919); Van der Eycken, Méthode de l'interprétation juridique; Mallieux, L'exégèse des codes.

Ehrlich, Freie Rechtsfindung und freie Rechtswissenschaft; Gnaeus Flavius (Kantorowicz), Der Kampf um die Rechtswissenschaft; Fuchs, Recht und Wahrheit in unserer heutigen Justiz; Fuchs, Die gemeinschädlichkeit der konstruktiven jurisprudenz; Oertmann, Gesetzeszwang und Richterfreiheit; Rumpf, Gesetz und Richter; Brütt, Die Kunst der Rechtsanwendung; Gmelin, Quousque? Beiträge zur soziologischen Rechtsfindung; Kantorowicz, Rechtswissenschaft und Soziologie, 11 ff.; Reichel, Gesetz und Richterspruch; Jellinek, Gesetz, Gesetzesanwendung und Zweckmässigkeiterwägung; Somlo, Juristische Grundlehre, § 110–122; Stammler, Rechts und Staatstheorien der Neuzeit, § 18.

Pound, The German Movement for Reform in Legal Administration and Procedure (with full bibliography), Bull. Comp. Law Bureau Am. Bar Ass'n, I (1908), 31.

Kübl, Das Rechtsgefühl.

Endemann, Lehrbuch des bürgerlichen Rechts, I, §§ 12, 13; Kohler, Lehrbuch des bürgerlichen Rechts, I, §§ 38–40; Planiol, Manuel élémentaire du droit civil, I, §§ 199–225.

Aristotle, Politics, bk. III, chap. 15 (Welldon's transl., pp. 148 ff.); Selden, Table Talk. tit. Equity.

Doctor and Student, pt. 1, chaps, 16, 45; Spence, History of the Equitable Jurisdiction of the Court of Chancery, bk. ii, chap. 1.

Ahrens, Cours de droit naturel (8 ed.), I, 177; Lasson, Rechtsphilosophie, 238–239.

Chalmers, Trial by Jury in Civil Cases, 7 Law Quart. Rev. 15; Phelps, Juridical Equity, § 157 and note.

Pound, Introduction to English Translation of Saleilles, Individualization of Punishment; Saleilles, The Individualization of Punishment (transl. by Mrs. Jastrow), chap. 9.

Pound, Administrative Application of Legal Standards, 44 Rep. Am. Bar Ass'n, 445.

1. Analysis of the judicial function:
   (1) Finding the law, ascertaining the legal rule to be applied.
   (2) Interpreting the rule so chosen or ascertained, that is, determining its meaning by genuine interpretation.
   (3) Applying to the cause in hand the rule so found and interpreted.

2. The technical and the discretionary in judicial administration: Agencies in legal history for restoring or preserving the balance of the administrative element:
   (1) Fictions.
   (2) Executive dispensing power.
   (3) Interposition of praetor or chancellor on equitable grounds.
   (4) Judicial individualization.

3. Law in books and law in action.

   Pound, Law in Books and Law in Action, 44 Am. Law Rev. 13; Wiel, Public Policy in Western Water Decisions, 1 Cal. Law Rev. 11; Harvey, Some Records of Crime, II, 6–7, note 1; Pound Inherent and Acquired Difficulties in the Administration of Punitive Justice, Proc. Am. Pol. Sci. Ass'n, 1967, 223, 234–238; Stammler, Theorie der Rechtswissenschaft, 130–131.

4. The modes of applying legal rules.
   (1) Analytical.
   (2) Historical.
   (3) Equitable.

5. Individualization of application in Anglo-American law.
   (1) In equity.
   (2) Through the jury.
   (3) Through latitude of application under the guise of choice or ascertainment of a rule.

(4) In criminal law.

(a) Through judicial discretion in sentence.

(b) Through assessment of punishment by juries.

(c) Through nominal sentence and leaving the duration of punishment, etc., to an administrative board.

(5) In petty courts.

Smith, Justice and the Poor, 56–59.

(6) Through administrative tribunals.

On administrative discretion, see Laun, Das freie Ermessen und seine Grenzen (1910), containing full bibliography.

7

ANALYSIS OF FUNDAMENTAL CONCEPTIONS

XVI

JURAL RELATIONS

Wigmore, Summary of the Principles of Torts, §§ 4–8; Pound, Legal Rights, 26 Int. Journ. Eth. 92; Hohfeld, Fundamental Legal Conceptions as applied in Judicial Reasoning (Reprint of papers in 23 Yale Law Journ. 16, 30, and 26 Yale Law Journ. 712); Kocourek, The Hohfeld System of Fundamental Legal Concepts, 15 Ill. Law Rev. 24; Kocourek, Various Definitions of Jural Relation, 20 Columbia Law Rev. 394.

Stammler, Theorie der Rechtswissenschaft, 203–207; Savigny, System des heutigen römischen Rechts, I, §§ 52–53; Bierling, Kritik der juristischen Grundbegriffe, II, 128–149; Bierling, Juristische Prinzipienlehre, I, § 12 (pp. 183–206); Puntschart, Die fundamentalen Rechtsverhältnisse des römischen Privatrechts, §§ 7–8.

Korkunov, General Theory of Law (transl. by Hastings), § 22; Windscheid, Pandekten, I, § 37*a*; Regelsberger, Pandekten, § 13.

XVII

RIGHTS

Austin, Jurisprudence, Lects. 12, 14–16; Gray, Nature and Sources of the Law, §§ 22–62; Holland, Jurisprudence, chaps. 7, 8, to subdiv. I; Salmond, Jurisprudence, §§ 70–74, 78–85; Pollock, First Book of Jurisprudence, 4 ed., 61–72; Markby, Elements of Law, §§ 73, 146–158; Wigmore, Summary of the Principles of Torts (Cases on Torts, vol. 2, App. A), §§ 4–8; Korkunov, General Theory of Law (transl. by Hastings), §§ 27–29; Gareis, Science of Law (transl. by Korourek), 31–35; Hearn, Theory of Legal Duties and Rights, chap. 8; Terry, Leading Principles of Anglo-American Law, §§ 113–138.

Amos, Science of Law, 89–97; Rattigan, Science of Jurisprudence, §§ 11*a*–20*b*; Miller, The Data of Jurisprudence, 131–132; Brown, The Austinian Theory of Law, 192–193.

Schuppe, Begriff des subjektiven Rechts, chap. 2; Bierling, Kritik der juristischen Grundbegriffe, II, 49–73; Somlo, Juristische Grundlehre, §§ 125–126, 131–135; Affolter, Untersuchungen über das Wesen des Rechts, 36–43; Dernburg, Pandekten, I, § 33; Windscheid, Pandekten, I, § 37; Kohler, Lehrbuch des bürgerlichen Rechts, I, §§ 44–46; Cosack, Lehrbuch des deutschen bürgerlichen Rechts, I, §§ 16–20.

Duguit in Progress of Continental Law in the Nineteenth Century (Continental Legal History Series, vol. 11), 68–75.

Definitions for Discussion and Reference

A power over an object which, by reason of the right, is subjected to the will of the person entitled. — Puchta, Cursus der Institutionen, II, § 207.

That quality in a person which makes it just or right for him either to possess certain things or to do certain actions. — Rutherforth, Institutes of Natural Law, bk. I, chap. 2, § 3.

A moral power over others residing in one's self. — Stahl, Philosophie des Rechts, 5 ed., II, 279.

The capacity or power of exacting from another or others acts or forbearances.

A party has a right when another or others are bound or obliged by the law to do or to forbear towards or in regard of him. — Austin, Jurisprudence, Lect. 16.

A capacity in one man of controlling, with the assent and assistance of the state, the actions of others. — Holland, Jurisprudence, chap. 7.

An interest protected by law. — Jhering, Geist des römischen Rechts, III, § 60.

A moral or natural right is an interest recognised and protected by the rule of natural justice — an interest the violation of which would be a moral wrong, and respect for which is a moral duty. A legal right . . . is an interest recognised and protected by the rule of legal justice — an interest the violation of which would be a legal wrong to him whose interest it is, and respect for which is a legal duty. — Salmond, Jurisprudence, § 72.

A permission to exercise certain natural powers, and upon certain conditions to obtain protection, restitution, or compensation

by the aid of the public force. Just so far as the aid of the public force is given a man, he has a legal right. — Holmes, Common Law, 214.

A relation between persons, concerning an object, created by a particular fact, determined by a principle or rule of law, for an end of human life. — Ahrens, Cours de droit naturel, I, § 23.

A relation sanctioned and protected by the legal order. — Kohler, Einführung in die Rechtswissenschaft, § 6.

There has been a controversy whether right is power or interest. The word suggests both; a power to exact a particular act or forbearance, service, or benefit, and a particular interest on account of which the power exists, from which it derives its value, with respect to which its form is determined, and which it serves to protect. But the right in itself is power. It is related to the interest as the fortification to the protected land. — Merkel, Juristische Encyklopädie, 2 ed., § 159, note.

XVIII

POWERS

Salmond, Jurisprudence, § 76; Miller, The Data of Jurisprudence, 63–70.

Kohler, Lehrbuch des bürgerlichen Rechts, 1, § 48.

Ius disponendi.

Power of Assignee to sue.

Powers to create or transfer title to another's property:

- Powers under the Statute of Uses.
- Power of pledgee to sell pledged property where he has possession but not ownership.
- Sale of chattels { of tenant / of third person } taken under distress for rent.
- Sale by disseisor of chattel severed from land.
- Sale by mortgagor of chattel severed from mortgaged land.
- Power of tenant without impeachment of waste to become owner of wood cut.
- Sale in market overt.
- Transfer after unrecorded conveyance.

Powers to create or transfer title to another's property
- Transfer by legatee under probated subsequent will where prior will is afterwards probated.
- Transfer by agent who has apparent general authority.
- Sale by trustee or by one who has legal but not equitable ownership.
- Power of cutting off equitable defenses by sale to purchaser for value.
- Power of promisor to transform duty to perform into duty to pay damages.

Powers of representation.

Powers of acceptance.

Powers of rejection (election), termination (forfeiture), and revocation.

XIX

CONDITIONS OF NON-RESTRAINT OF NATURAL POWERS

Salmond, Jurisprudence, § 75; Miller, The Data of Jurisprudence, 96–100, 103–108; Bigelow, Torts, 8 ed., 13–16; Brown, The Austinian Theory of Law, 180–181 (note); Bentham, Works (Bowring's ed.), II, 217–218; Hearn, Theory of Legal Duties and Rights, 133–134.

Somlo, Juristische Grundlehre, §§ 128–129.

1. *Recognized by law immediately.*

Self-defense.

Self-help.

Self-redress.

Prevention of felony.

Arrest for felony, affray, etc.

Privileges as to speech and writing.

In legal proceedings.

In administrative matters.

In legislative assemblies.

Reports of public proceedings.

Comment on and criticism of public affairs, public officers and candidates.

Private communications on privileged occasions.

Prevention of or defense against public peril — fire, flood, disease.
Defense against the public enemy.
Deviation where highway is impassable.

2. *Arising from legal transactions.*
License.
Estate without impeachment of waste.

On necessity, see: Moriaud, Du délit nécessaire et de l'état de nécessité; De Hoon, De l'état de nécessité en droit pénal et civil, Rev. de droit Belge, VI, 29, 79; Titze, Notstandsrechte; Oetker, Ueber Notwehr und Notstand; Neubecker, Zwang und Notstand in rechtsvergleichender Darstellung, I, 1–14, 107–133; Goldschmidt, Der Notstand, ein Schuldproblem.

XX

DUTIES AND LIABILITIES

Austin, Jurisprudence, Lects. 17, 22–26; Holland, Jurisprudence, chap. 7; Salmond, Jurisprudence, § 77; Gray, Nature and Sources of the Law, §§ 45, 46, 59–61; Korkunov, General Theory of Law (transl. by Hastings), § 29; Hearn, Theory of Legal Duties and Rights, chap. 4; Miller, The Data of Jurisprudence, chap. 3; Terry, Leading Principles of Anglo-American Law, §§ 108–112; Bierling, Juristische Prinzipienlehre, I, § 11 (pp. 109–183).

Markby, Elements of Law, §§ 181–190; Pollock, First Book of Jurisprudence, 4 ed., 57–61; Rattigan, Science of Jurisprudence, § 20.
Somlo, Juristische Grundlehre, §§ 123–124.

XXI

PERSONS

1. The { subjects / holders } of rights.

(a) In general.
Gray, Nature and Sources of the Law, §§ 63–148; Salmond, Jurisprudence, §§ 109–114; Korkunov, General Theory of Law (transl. by Hastings), § 28; Pollock, First Book of Jurisprudence, 4 ed., 111–129;

Sohm, Institutes of Roman Law (transl. by Ledlie, 2 ed.), § 30; Duguit in Progress of Continental Law in the Nineteenth Century (Continental Legal History Series, vol. 11), 87–100.

Demogue, Notions fondamentales du droit privé, 320–382; Bierling, Juristische Prinzipienlehre, I, § 13; Bierling, Kritik der juristischen Grundbegriffe, II, 74–85; Somlo, Juristisches Grundlehre, §§ 139–143; Windscheid, Pandekten, I, § 49.

Miller, Lectures on the Philosophy of Law, Lect. 11; Lasson, System der Rechtsphilosophie, § 41.

(b) Natural persons.

Holland, Jurisprudence, chap. 8, subdiv. I to ii; Markby, Elements of Law, §§ 131–135; Capitant, Introduction à l'étude du droit civil, 3 ed., 103–142; Dernburg, Pandekten, I, § 50; Cosack, Lehrbuch des deutschen bürgerlichen Rechts, I, §§ 24–39.

(c) Juristic persons.

Salmond, Jurisprudence, §§ 115–120; Holland, Jurisprudence, chap. 8, subdiv. I, ii; Markby, Elements of Law, §§ 136–145; Gierke, Political Theories of the Middle Age, Maitland's Introduction, pp. xviii-xliii; Gareis, Science of Law (transl. by Kocourek), 104–106; Machen, Corporate Personality, 24 Harvard Law Rev. 253, 347; Freund, The Legal Nature of Corporations; Laski, The Personality of Associations, 29 Harv. Law Rev. 404.

Bierling, Kritik der juristischen Grundbegriffe, II, 85–118; Zitelmann, Begriff und Wesen der sogenannten juristischen Personen; Hölder, Natürliche und juristische Personen; Binder, Das Problem der juristischen Persönlichkeit; Rümelin, Methodisches ueber juristische Personen; Meurer, Die juristischen Personen nach Deutschen Reichsrecht; Meurer, Der Begriff und Eigentümer der heiligen Sachen; Karlowa, Zur Lehre von den juristischen Personen, Grünhut, Zeitschrift für das privat und öffentliches Recht, XV, 381; Dernburg, Pandekten, I, §§ 47–50; Windscheid, Pandekten, I, § 57; Kohler, Lehrbuch des deutschen bürgerlichen Rechts, I, § 131.

Capitant, Introduction à l'étude du droit civil, 3 ed., 158–184; Vareilles-Sommières, Les personnes morales; Jusserand, Essai sur la propriété collective, Livre du centennaire du code civil, I, 357; Saleilles, De la personalité juridique, histoire et

théorie; Michoud, Théorie de la personnalité morale, I, §§ 1–74; Lévi, La société et l'ordre juridique, 245–343.

2. Personality.

Savigny, Jural Relations (transl. by Rattigan), § 75; Sohm, Institutes of Roman Law (transl. by Ledlie, 2 ed.), §§ 35–36; Blackstone, Commentaries, I, 132; Town of Baltimore *v.* Town of Chester, 53 Vt. 315; *In re* Nerac, 35 Cal. 392; Avery *v.* Everett, 110 N. Y. 317.

3. Capacity.

Maine, Ancient Law (Pollock's ed.), 172–174, and Sir Frederick Pollock's note L (pp. 183–185); Holland, Jurisprudence, chap. 14, subdiv. II; Ehrlich, Die Rechtsfähigkeit.

(a) Status.

Austin, Jurisprudence, Lects. 40–42; Kohler, Lehrbuch der Rechtsphilosophie, 62—66.

(b) Capacity for { rights, / legal transactions, / civil liability for acts, / criminal responsibility.

Gareis, Science of Law (transl. by Kocourek), 103; Dernburg, Pandekten, I, §§ 39–45; Windscheid, Pandekten, I, §§ 54–56; Capitant, Introduction à l'étude du droit civil, 3 ed., 143–156.

XXII

ACTS

Austin, Jurisprudence, Lects. 19–21; Holland, Jurisprudence, chap. 8, subdiv. III; Salmond, Jurisprudence, §§ 120–124, 133–144; Pollock, First Book of Jurisprudence, 4 ed., 140–170; Markby, Elements of Law, §§ 213–274.

Rattigan, Science of Jurisprudence, §§ 29-63; Hegel, Philosophy of Right (transl. by Dyde), §§ 115–126.

1. Conception and definition.

Salmond, Jurisprudence, § 128; Terry, Leading Principles of Anglo-American Law, §§ 77–81; Kohler, Lehrbuch des deutschen bürgerlichen Rechts, I, § 216.

2. Elements.

Salmond, Jurisprudence, § 128.

3. Representation.

Dernburg, Pandekten, I, §§ 117–119; Windscheid, Pandekten, I, §§ 73–74; Capitant, Introduction à l'étude du droit civil, 3 ed., 330–337.

See Baty, Vicarious Liability.

4. Legal transactions.

Salmond, Jurisprudence, §§ 121–123; Terry, Leading Principles of Anglo-American Law, §§ 172–180; Dernburg, Pandekten, I, §§ 79–84; Kohler, Lehrbuch des deutschen bürgerlichen Rechts, I, §§ 217–225; Capitant, Introduction à l'étude du droit civil, 3 ed., 245–259.

(a) Conception.

Karlowa, Das Rechtsgeschäft; Windscheid, Pandekten, I, § 69; Enneccerus, Das Rechtsgeschäft.

Will-theory and Declaration-theory: Holland, Jurisprudence, 12 ed., 262–268; 1 Williston, Contracts, §§ 18–21; Savigny, System des heutigen römischen Rechts, III, § 140; Henle, Vorstellungstheorie und Willenstheorie; Deveux, L'interprétation des actes juridiques privés.

(b) Form.

Dernburg, Pandekten, I, §§ 85–86; Windscheid, Pandekten, I, § 72; Kohler, Lehrbuch des deutschen bürgerlichen Rechts, I, §§ 235–237.

(c) Avoidance.

Dernburg, Pandekten, I, §§ 87–92, 107–109; Windscheid, Pandekten, I, §§ 78–80; Kohler, Lehrbuch des deutschen bürgerlichen Rechts, I, §§ 227–234; Capitant, Introduction à l'étude du droit civil, 3 ed., 260–275, 284–309.

(d) Qualifications.

Dernburg, Pandekten, I, §§ 93–104; Windscheid, Pandekten, I, §§ 86–100; Kohler, Lehrbuch des deutschen bürgerlichen Rechts, I, §§ 249–252; Capitant, Introduction à l'étude du droit civil, 3 ed., 309–330.

On conditions, see particularly Langdell, Summary of the Law of Contracts, §§ 26–31.

5. Wrongful acts.

Salmond, Jurisprudence, §§ 133–141; Salmond, The Principles of Civil Liability, Essays in Jurisprudence and Legal History, 123–170; Holmes, Common Law, Lects. 3, 4.

See Hasse, Die Culpa des römischen Rechts; Binding, Die Normen und ihre Uebertretung, I, §§ 50–51; Egger, Kommentar zum Schweizerischen Zivilgesetzbuch, V, 4–5; Schreiber, Schuld und Haftung als Begriffe der privatrechtlichen Dogmatik; Rümelin, Schadenersatz ohne Verschuldung; Duguit in Progress of Continental Law in the Nineteenth Century (Continental Legal History Series, vol. 11), 124–128; Thayer, Liability Without Fault, 29 Harvard Law Rev. 801; Smith, Tort and Absoulte Liability, 30 Harvard Law Rev. 241, 319, 409.

(a) Causation.

Wigmore, Summary of the Principles of Torts, §§ 160–201; Smith, Legal Cause in Actions of Tort, 25 Harv. Law Rev. 103, 223, 303; Beale, The Proximate Consequences of an Act, 33 Harv. Law Rev. 633.

Müller, Der Kausalzusammenhang; Horn, Kausalitätsbegriff im Straf- und Zivilrecht; Rümelin, Verwendung der Kausalbegriffe im Straf und Zivilrecht; Endemann, Lehrbuch des bürgerlichen Rechts, I, § 129.

(b) Responsibility: Imputation.

Salmond, Jurisprudence, § 149; Terry, Leading Principles of Anglo-American Law, §§ 87–88.

Baty, Vicarious Liability.

XXIII

THINGS

Austin, Jurisprudence, Lect. 13; Holland, Jurisprudence, chap. 8, subdiv. II; Markby, Elements of Law, §§ 126–130; Pollock, First Book of Jurisprudence, 4 ed, 130–140; Korkunov, General Theory of Law (transl. by Hastings), § 30; Gareis, Science of Law (transl. by Kocourek), § 19.

Dernburg, Pandekten, I, § 55; Windscheid, Pandekten, I, §§ 42, 137–144; Birkmeyer, Das Vermögen im juristischen Sinn; Bierling, Juristische Prinzipienlehre, I, § 14 (pp. 239–273); Capitant, Introduction à l'étude du droit civil, 3 ed., 215–240.

Hegel, Philosophy of Right (transl. by Dyde), § 41–44; Ahrens, Cours du droit naturel, II, § 54; Kohler, Lehrbuch der Rechtsphilosophie, 81–86.

THE SYSTEM OF LAW

XXIV

DIVISION AND CLASSIFICATION

Austin, Jurisprudence, Lects. 43–47; Holland, Jurisprudence, chap. 9, last par. of chap. 7; Salmond, Jurisprudence, §§ 79, 81–83, 85, 86; Markby, Elements of Law, §§ 162–166; Pollock, First Book of Jurisprudence, 4 ed., 84–110; Korkunov, General Theory of Law (transl. by Hastings), §§ 32–34; Gareis, Science of Law (transl. by Kocourek), § 14.

Classifications for Discussion and Reference

Gaius.

Public law.
Private law.
Persons.
Things.
Actions.

Modern Roman law (German).

Public law.
Criminal law.
Private law.
General part.
Persons.
Things.
Legal transactions.
Exercise and protection of rights.
Self-help and self-redress.
Special part.
Law of property.
Law of obligations.

Family law.
Law of inheritance.

French Civil Code (1804).
Persons.
Property.
Modes of acquiring ownership.
Succession.
Gifts *inter vivos* and wills.
Contracts.
Quasi contract.
Delicts and quasi-delicts.
Marriage.
Sale, exchange, bailment.
Partnership.
Agency.
Pledge and mortgage.

German Civil Code (1900).
General principles.
Persons { natural. / juristic.
Things.
Legal transactions.
Computation of time.
Prescription.
Exercise of rights.
Law of obligations.
Law of things.
Family law.
Law of inheritance.

Swiss Civil Code (1912).
Law of persons.
Natural persons.
Juristic persons.
Family law.
Law of inheritance.
Law of things.
Law of obligations.

Civil Code of Brazil (1917).
- General part.
  - Persons.
  - Property.
  - Juridical facts.
- Special part.
  - Family law.
  - Law of things.
  - Law of obligations.
  - Law of successions.

Blackstone.
- Rights of persons.
- Rights of things.
- Private wrongs.
- Public wrongs.

Committee on Classification of Law, American Bar Association (1902).
- Municipal law.
  - Persons.
    - Public.
    - Private.
      - Several classes, i.e., citizens, aliens, corporations, etc.
      - Civil rights.
      - Domestic relations.
    - Things.
      - Personal.
      - Real.
    - Actions.
    - Crimes and criminal procedure.
- International law.
  - Public.
  - Private (Rep. Am. Bar Ass'n, XXV, 474–475, 1902).

Practical common-law classification (Century Digest, 1898).
- Law of
  - (1) Persons.
  - (2) Property.

(3) Contracts.
(4) Torts.
(5) Crimes.
(6) Remedies.
(7) Government.

Jenks (Digest of English Civil Law, 1910–1917).
General part.
Persons.
Things.
Legal Acts.
Time.
Limitation of actions.
Self-help.
Obligations.
Property law.
Family law.
Succession.

Garcis.
Private law.
Law of things.
Rights relating to material things.
Rights in one's own property.
Iura in re aliena.
Rights relating to incorporeal things.
Mixed law of persons and law of things.
Law of inheritance.
Law of family property, i.e., property rights between husband and wife, parent and child, etc.
Law of persons.
Family law, i.e., marriage, parent and child, etc., except as to property rights.
Law of obligations.
Public law.
Law of the state.
Constitutional law.
Administrative law.
International law (Encyklopädie der Rechtswissenschaft, 1 ed., 1887).

Kohler.

Law relating to persons.

Law of persons.

Law of obligations.

Law relating to natural objects.

Hence:

Law of persons.

Law of property (including inheritance).

Law of obligations (Einführung in die Rechtswissenschaft, § 6).

Cosack (1910).

General part.

The holder of rights.

The objects of rights.

The origination, modification, and termination of rights.

Legal transactions.

Culpability and casualty.

Lapse of time.

Exercise of governmental power.

Exercise and securing of rights.

Special part.

Law of claims to performance.

Law of things.

Law of commercial paper.

Law of associations.

Law of juristic persons.

Family law.

Law of inheritance.

XXV

PROPRIETARY RIGHTS: POSSESSION

Pollock, First Book of Jurisprudence, 4 ed., 171–206; Salmond, Jurisprudence, §§ 94–107; Holland, Jurisprudence, chap. 11, subdiv. V to "ownership"; Markby, Elements of Law, §§ 347–399; Pollock and Wright, Essay on Possession in the Common Law, Introduction; Holmes, Common Law, Lect. 6.

Dernburg, Pandekten, I, §§ 142, 145–147; Windscheid, Pandekten, I, § 148; Cosack, Lehrbuch des deutschen bürgerlichen Rechts, II, §§ 185–194.

The literature upon the nature and elements of possession is very extensive. The following are important or useful: Savigny, Recht des Besitzes (7 ed. by Rudorff); Bruns, Recht des Besitzes im Mittelalter und in der Gegenwart; Bekker, Recht des Besitzes bei den Römern; Jhering, Der Besitzwille; Kuntze, Zur Besitzlehre; Stintzing, Der Besitz; Vermond, Théorie générale de la possession; Cornil, Possession dans le droit romain.

JURAL POSTULATE I.

In civilized society men must be able to assume that others will commit no intentional aggressions upon them.

JURAL POSTULATE II.

In civilized society men must be able to assume that they may control for beneficial purposes what they have discovered and appropriated to their own use, what they have created by their own labor, and what they have acquired under the existing social and economic order.

Nature of proprietary rights in general.
- Relation of possession to ownership.
- Importance of theory of possession
  - in Roman law,
  - in the common law.

The conception of possession.
- Law or fact?

The elements of possession.
1. Physical (*corpus*).
2. Mental (*animus*).

The physical element (*naturalis possessio*, detention, custody, *Inhabung*).

The mental element (juristic possession).
- Difference between Roman and Germanic theories.
  - *Animus domini.*
  - *Animus rem sibi habendi.*
  - *Animus possidendi.*
- Must it be a claim to use on one's own behalf?
- Servants and agents.

Mediate possession.
Represent.. e — through agent or servant.
Through bailee — subject to demand.
— for fixed term or subject to condition.
Derivative possession.

Possession is a matter of law and of fact equally. . . . Possession is a matter of fact in so far as a non-juridical conception of pure fact (detention) lies at its foundation. . . . But possession is a matter of law in so far as legal rights are bound up with the bare existence of a conception of fact. — Savigny, Recht des Besitzes, § 5.

To possess a thing means to have it in one's actual control. This actual control may have a foundation in right and law or not; for the conception of po- sion this is indifferent. When we speak of possession, we loo away from the law. But while possession is no right it has legal consequences. — Windscheid, Pandekten, I, § 148.

It is merely a state of things, a fact, a mere *de facto* relation to a thing into which a man has brought himself; which, however, inasmuch as it may under certain circumstances bring about a right to the thing, enjoys in itself the protection of the law. — Wächter, Pandekten, § 122 (transl. by Moyle, Institutes, 2 ed., 336).

Possession is no right, but a matter of fact. But it may be (a) the consequence of rights . . . [e.g., ownership]; (b) the originating cause of rights . . . [e.g., usucapion, adverse possession]; (c) in certain cases the mere matter of fact of possession is protected against disturbance. — Gareis, Encyklopädie der Rechtswissenschaft, § 17.

What is the ground of this protection? Must we not say that if possession is no right, its violation is no violation of right, and hence affords no ground for its protection? — Bruns in Holtzendorff, Encyklopädie der Rechtswissenschaft, 5 ed., 473.

There has been much learned discussion of the question whether possession is a fact or a right. No doubt it differs from owner-

ship in requiring a *de facto* relation between a person and an object, and to that extent it is a fact. But there is no doubt also that it has legal consequences, and if that is so it seems to be little less than quibbling to say it is not a right as well. — Moyle, Institutes, 2 ed., 336.

Every right is a consequence attached by the law to one or more facts which the law defines, and wherever the law gives any one special rights not shared by the body of the people, it does so on the ground that certain special facts, not true of the rest of the world, are true of him. When a group of facts thus singled out by the law exists in the case of a given person, he is said to be entitled to the corresponding rights; meaning, thereby, that the law helps him to constrain his neighbors, or some of them, in a way in which it would not, if all the facts in question were not true of him. Hence, any word which denotes such a group of facts connotes the rights attached to it by way of legal consequences, and any word which denotes the rights attached to a group of facts connotes the group of facts in like manner.

The word "possession" denotes such a group of facts. Hence, when we say of a man that he has possession, we affirm directly that all the facts of a certain group are true of him, and we convey directly or by implication that the law will give him the advantage of the situation. Contract or property, or any other substantive notion of the law, may be analyzed in the same way, and should be treated in the same order. The only difference is that, while possession denotes the facts and connotes the consequence, property always, and contract with more uncertainty and oscillation, denote the consequence and connote the facts. — Holmes, Common Law, 214–215.

XXVI

PROPRIETARY RIGHTS: OWNERSHIP

1. Conception and definition.

Austin, Jurisprudence, concluding portion of Lect. 47, Lect. 48; Salmond, Jurisprudence, § 152; Markby, Elements of Law, §§ 307–314.

Dernburg, Pandekten, I, §§ 155, 161; Windscheid, Pandekten, I, §§ 167–168; Garcis, Science of Law (transl. by Kocourek), 139–144.

The common-law doctrine of estates.

Markby, Elements of Law, § 333; Terry, Leading Principles of Anglo-American Law, § 45.

2. Analysis.

Markby, Elements of Law, §§ 307–345; Hearn, Theory of Legal Duties and Rights, chap. 10, § 1; Hohfeld, Faulty Analysis in Easement Cases, 27 Yale Law Journ. 66 (reprinted in "Fundamental Legal Conceptions as Applied in Judicial Reasoning").

Incidents of ownership:

Jus possidendi.
Jus utendi.
Jus fruendi.
Jus abutendi.
Jus disponendi.
Jus prohibendi.

3. Acquisition of ownership.

Holland, Jurisprudence, 12 ed., 216–222; Salmond, Jurisprudence, §§ 175–178; Dernburg, Pandekten, I, § 164.

Roman law
- Original
  - Accretion (*alluvio*).
  - Occupation
    - *res nullius.*
    - *res derelictae.*
    - *res hostiles.*
    - *thesaurus.*
  - Confusion.
  - Accession.
  - Specification.
  - *Fructus perceptio.*
  - Adverse possession (prescription).
- Derivative
  - Delivery (*traditio*).
  - Adjudication.
  - Entry upon inheritance.
  - *Legatum* (gift by will).

- Common law
  - Original
    - Occupancy
      - [goods of an alien enemy.]
      - abandoned chattels.
      - wild animals.
      - fruits of land.
    - Accretion.
    - Sale for taxes.
    - Sale under judgment *in rem* (e.g. for forfeiture under revenue laws).
    - Adverse possession.
    - Accession.
    - Confusion.
  - Derivative
    - Judgment.
    - [Marriage.]
    - Bankruptcy.
    - Succession
      - intestate.
      - testamentary.
    - Gift.
    - Sale.
    - Conveyance.

4. Loss of ownership.

Salmond, Jurisprudence, § 162.

5. Limited real rights (*Iura in re aliena*).

Austin, Jurisprudence, Lect. 52; Salmond, Jurisprudence, § 83.

Landsberg, Das Recht des bürgerlichen Gesetzbuches, 579–583; Wieland, Das Sachenrecht des Schweizerischen Zivilgesetzbuches, I, 2, 200–201 (French transl., I, 3–4, 471–474); Endemann, Lehrbuch des bürgerlichen Rechts, 8 ed., II, § 94.

(a) Servitudes.

Austin, Jurisprudence, Lects. 49–50; Holland, Jurisprudence, 12 ed., 224–232; Salmond, Jurisprudence, § 159; Markby, Elements of Law, §§ 400–430; Dernburg, Pandekten, I, §§ 198–201.

(*i*) Personal.

Roman law
- *usus.*
- *usus fructus.*
- *habitatio.*
- *operae seruorum.*

Common law
- leases (see Salmond, § 158).
  - (In theory of our law leases belong elsewhere)
- profits in gross.

As to the advisability of classing these as servitudes, see: Plainol, Traité élémentaire de droit civil, 6 ed., I, § 2476; Colin et Capitant, Droit civil Français, I, 824–826.

(*ii*) Real.

Roman law
- civil
  - rustic
    - rights of way.
    - rights of conducting water over land.
    - rights of drawing water from land.
  - urban
    - *seruitus altius non tolendi.*
    - *tigni immittendi.*
    - *oneris ferendi.*
    - *stillicidii.*
- practorian.

Common law
- easements.
- profits appurtenant.
- covenants running with land.
- equitable servitudes.

(b) Securities (liens, pledge-rights).

Salmond, Jurisprudence, § 160; Holland, Jurisprudence, 12 ed., 232–239; Markby, Elements of Law, §§ 443–481; Dernburg, Pandekten, I, §§ 224–225; Windscheid, Pandekten, I, §§ 225–229.

Roman law
- *fiducia.*
- *pignus.*
- *hypotheca*
  - tacit.
  - conventional.
- *antichresis.*

- The civil law
  - contractual
    - pledge.
    - hypothecation
      - general.
      - particular.
  - by operation of law
    - general
      - in favor of the fisc.
      - against a guardian.
      - for *dos* and paraphernalia.
    - particular
      - landlord's lien.
      - for money loaned to rebuild a building.
      - in favor of a pupil upon a thing acquired with his money.
      - in favor of a legatee against the heir who has withheld something from the inheritance.
- Common law
  - pledge.
  - mortgage.
  - common-law liens.
  - statutory liens.
  - equitable charges or liens.

6. Rights of neighbors.

Dernburg, Pandekten, I, §§ 162–163; Hesse, Rechtsverhältnisse zwischen Grundstücksnachbarn; Cosack, Lehrbuch des deutschen bürgerlichen Rechts, II, § 210; Colin et Capitant, Droit civil Français, I, 734–736; Baudry-Lacantinerie, Précis de droit civil, I, §§ 1699–1761.

Compare the "natural right" of support at common law.

XXVII
OBLIGATIONS

JURAL POSTULATE III.

In civilized society men must be able to assume that those with whom they deal in the general intercourse of society will act in good faith, and hence

(a) will make good reasonable expectations which their promises or other conduct reasonably create;

(b) will carry out their undertakings according to the expectations which the moral sentiment of the community attaches thereto;

(c) will restore specifically or by equivalent what comes to them by mistake or unanticipated situation whereby they receive what they could not reasonably have expected to receive under the actual circumstances.

1. History.

Maine, Ancient Law, chap. 9 and Sir Frederick Pollock's note R; Kohler, Rechtsphilosophie und Universalrechtsgeschichte (in Holtzendorff, Enzyklopädie der Rechtswissenschaft, 6 or 7 ed.), §§ 28–37.

2. Conception and definition.

Holland, Jurisprudence, chap. 12 to subdiv. I; Salmond, Jurisprudence, § 165: Dernburg, Pandekten, II, §§ 1–3; Windscheid, Pandekten, II, §§ 252–253; Capitant, Introduction à l'étude du droit civil, 3 ed., 89–97.

Saleilles, Théorie générale de l'obligation, 3 ed., 7–37.

3. Classification.

Salmond, Jurisprudence, § 167; Holland, Jurisprudence, chap. 12, par. before subdiv. I; Sohm, Institutes of Roman Law (transl. by Ledlie, 2 ed.), § 77; Gareis, Science of Law (transl. by Kocourek), 175.

Roman law
- Contractual
  - *Ex contractu.*
  - *Quasi ex contractu.*
- Delictual
  - *Ex delicto.*
  - *Quasi ex delicto.*

Common law
- Arising from legal transactions
  - contract.
  - express trust.
- Arising from office or calling.
- Arising from fiduciary relations.
- Arising from unjust enrichment.

Is the Roman conception of obligations *ex delicto* expedient for our purposes?

4. Analysis of contract.

Salmond, Jurisprudence, §§ 122–124; Holland, Jurisprudence, chap. 12, subdiv. II to par. "principles of classification;" Markby, Elements of Law, §§ 603–624, 626–648, 651–658, 663; Windscheid, Pandekten, II, §§ 305–318; Dernburg, Pandekten, II, §§ 9–11.

(a) Parties.
(b) Declaration of will.
(c) Presupposition.
(d) Form.

"Abstract" promises.

Salmond, Jurisprudence, 3 ed., 321–323; Dernburg, Pandekten, II, § 22; Winsdcheid, Pandekten, II, §§ 318, 319, 364; Lorenzen, Causa and Consideration in the Law of Contracts, 28 Yale Law Journ. 621; Pound, Consideration in Equity, Wigmore Celebration Essays, 435.

Contracts for the benefit of a third person.

Hellwig, Verträge auf Leistung an Dritte, §§ 24, 40; Dernburg, Pandekten, II, § 18; Windscheid, Pandekten, II, § 316; Cosack, Lehrbuch des deutschen bürgerlichen Rechts, I, § 162; Baudry-Lacantinerie, Précis du droit civil, II, § 908.

Plurality of parties.

Salmond, Jurisprudence, § 166; Dernburg, Pandekten, II, §§ 69–75; Windscheid, Pandekten, II, §§ 292–300; Cosack, Lehrbuch des deutschen bürgerlichen Rechts, I, §§ 118–119; Baudry-Lacantinerie, Précis du droit civil, §§ 964–1002.

5. Classification of contracts.

(a) With respect to form.

- Roman law
  - Formal
    - verbal.
    - literal.
  - Real
    - *mutuum.*
    - *commodatum.*
    - *depositum.*
    - *pignus.*
  - Consensual
    - sale.
    - letting and hiring.
    - partnership.
    - mandate.
  - Innominate
    - *do ut des.*
    - *do ut facias.*
    - *facio ut des.*
    - *facio ut facias.*
  - Actionable pacts
    - *pacta adiecta.*
    - *pacta praetoria.*
    - *pacta legitima.*
- Common law
  - Formal
    - recognizances.
    - instruments under seal.
    - mercantile specialties.
  - Real
    - debt.
    - bailment.
  - Simple.

(b) With respect to subject-matter.

See Holland, Jurisprudence, chap. 12, par. "rights resulting from a contract" to par. "transfer."

6. Transfer of obligations.

Holland, Jurisprudence, chap. 12, par. "transfer" to par. "extinction;" Markby, Elements of Law, §§ 659–672; Dernburg, Pandekten, II, §§ 47–53; Cosack, Lehrbuch des deutschen bürgerlichen Rechts, I, §§ 114–117; Planiol, Traité élémentaire du droit civil, II, §§ 389–398.

7. Extinction of obligations.

Holland, Jurisprudence, chap. 12, par. "extinction" to end of chapter; Dernburg, Pandekten, II, §§ 64–68; Windscheid, Pandekten, II, §§ 341–361; Cosack, Lehrbuch des deutschen bürgerlichen Rechts, I, §§ 102–

113; Planiol, Traité élémentaire du droit civil, II, §§ 399–400, 522–523, 529–609, 617–629.

Obligation

The relation of one person to another whereby the one person is bound either to some performance or to forbear something. — Kohler, Einführung in die Rechtswissenschaft, § 28.

An obligatory right . . . is a right to require another person to do some act which is reducible to a money value. It is invariably directed against a determinate person. . . . Obligations are not designed to create any general control over all the acts of the debtor. A debtor can, in the last resort, rid himself of every obligation by sacrificing a corresponding portion of his property for the purpose of indemnifying his adversary. An obligation means a deduction, not from a man's liberty, but only from his property. — Sohm, Institutes of Roman Law (Ledlie's transl.), § 60.

Contract

An expressed agreement of the wills of two or more persons for the purpose of producing an alteration in their spheres of rights. — Gareis, Encyklopädie der Rechtswissenschaft, § 23.

The declared agreement of two or more persons who desire to enter into an obligatory relation concerning an object of right. — Ahrens, Cours de droit naturel, II, § 82.

The mutually expressed agreement of certain persons over a relation of law to be created between them. — Stahl, Philosophie des Rechts, 5 ed., II, 412.

XXVIII

WRONGS

Corollary of Jural Postulate I.

One who intentionally does anything which on its face is injurious to another must repair the resulting damage unless he can (1) justify his act under some social or public interest, or (2) as-

sert a privilege because of a countervailing individual interest of his own which there is a social or a public interest in securing.

JURAL POSTULATE IV.

In civilized society men must be able to assume that others, when they act affirmatively, will do so with due care with respect to consequences that may reasonably be anticipated.

JURAL POSTULATE V.

In civilized society men must be able to assume that others who maintain things likely to get out of hand or to escape and do damage, will restrain them or keep them within their proper bounds.

Hence one is liable in tort for

I. Intentional aggression upon the personality or substance of another (unless he can establish justification or privilege, according to the corollary of Postulate I).

II. Negligent interference with person or property — i.e. failure to come up to the legal standard of due care under the circumstances, while carrying on some affirmative course of conduct, whereby injury is caused to the person or substance of another.

III. Unintended non-negligent interference with the person or property of another through failure to restrain or prevent the escape of some dangerous agency which one maintains.

Holland, Jurisprudence, chap. 13, par. "origin" to par. "transfer;" Terry, Leading Principles of Anglo-American Law, §§ 524–541; Wigmore, Responsibility for Tortious Acts: Its History, 7 Harv. Law Rev. 315, 383, 441, The Tripartite Division of Torts, 8 Harv. Law Rev. 200, A General Analysis of Tort Relations, 8 Harv. Law Rev. 377, Cases on Torts, Preface; Bigelow, Torts, 8 ed., 35–39; Salmond, Torts, §§ 1–14.

Dernburg, Pandekten, II, § 129; Cosack, Lehrbuch des deutschen bürgerlichen Rechts, II, §§ 163–164; Baudry-Lacantinerie, Précis du droit civil, II, §§ 1346–1367.

- Roman law
  - Delicts
    - Wrongful appropriation of property
      - *furtum*
      - *rapina.*
    - Injury to corporeal property
      - *damnum iniuria datum.*
    - Injuries to personality
      - to the physical person or to honor, *iniuria.*
    - Injuries to personality whereby substance is impaired
      - *dolus*
      - *metus*
  - Quasi delicts
    - Liability of *iudex* who "makes a case his own."
    - Liability *de deiectis et diffusis.*
    - Noxal liability.
    - Liability under the aedilician edict.
- Common law
  - Intentional aggression
    - a. Upon personality —
      - (*i*) Assault and battery.
      - (*ii*) Imprisonment.
      - (*iii*) Infringement of privacy (in dispute).
    - b. Upon personality and substance.
      - (*i*) Infringement of rights in the domestic relations.
      - (*ii*) Malicious prosecution.
      - (*iii*) Defamation.
        - (1) slander.
        - (2) libel.
    - c. Upon substance.
      - (*i*) Trespass upon possession.
        - (1) of land.
        - (2) of chattels.
      - (*ii*) Conversion of chattels.
      - (*iii*) Intentional interference with advantageous relations.
      - (*iv*) Deceit.
  - Negligence
  - Failure to restrain or prevent escape of dangerous agencies.

XXIX

EXERCISE AND ENFORCEMENT OF RIGHTS

1. Exercise of rights.

See references in III, A, 5, i. Also Blümner, Lehre von böswilligen Rechtsmissbrauch.

2. Self-help, self-redress.

Dernburg, Pandekten, I, § 112; Windscheid, Pandekten, I, § 123; Cosack, Lehrbuch des deutschen bürgerlichen Rechts, I, § 78.

3. Private execution.

Demogue, Notions fondamentales du droit privé, 638–669.

4. Administrative enforcement.

Gareis, Science of Law (transl. by Kocourek), § 53; Goodnow, Comparative Administrative Law, I, 1–24, II, 127–129; Amos, Science of Law, 2 ed., 396–397.

5. Judicial Enforcement: Procedure.

Holland, Jurisprudence, chap. 15; Salmond, Jurisprudence, §§ 172–176; Markby, Elements of Law, §§ 848–863; Amos, Science of Law, chap. 11; Gareis, Science of Law (transl. by Kocourek), § 50; Hell, Systematik des römischen und deutschen Privatrechts, 46–62.

Storey, The Reform of Legal Procedure; Works, Juridical Reform; Pound, Some Principles of Procedural Reform, 4 Ill. Law Rev. 388, 491; Report of the Board of Statutory Consolidation for the State of New York on a Plan for the Simplification of the Civil Practice in the Courts of that State; Prozessreform, Vier Beiträge von A. Mendelssohn-Bartholdy, G. Chiovenda, Roscoe Pound, and A. Tissier, Rheinische Zeitschrift für Zivil- und Prozessrecht, II, Heft 4; Pound, A Bibliography of Procedural Reform, 11 Illinois Law Rev. 451.

(a) The mode of instituting the proceeding.

Windscheid, Pandekten, I, §§ 124–126.

(b) Ascertainment of the facts.

(*i*) Pleading.

Dernburg, Pandekten, 7 ed., I, §§ 151–152; Garsonnet et Cézar-Bru, Précis de procédure civile, §§ 356–392;

Hellwig, Lehrbuch des deutschen Zivilprozessrechts, III, §§ 141–146; Lewinski, Courts and Procedure in Germany, 5 Ill. Law Rev. 193.

(*ii*) Proof: Trial and finding.

Wigmore, Principles of Judicial Proof. Reference may be made to Gross, Criminal Investigation (transl. by Adam); Arnold, Psychology as Applied to Legal Evidence; de la Grasserie, La Preuve; Garsonnet et Cézar-Bru, Précis de procédure civile, §§ 401–475.

(c) Judgment.

Windscheid, Pandekten, I, §§ 128–132.

The remedy { prevention. / specific redress. / substitutional redress.

Dernburg, Pandekten, I, §§ 134–141.

As to declaratory judgments, see Sunderland, A Modern Evolution in Remedial Rights, 16 Mich. Law Rev. 69; Borchard, The Declaratory Judgment, 27 Yale Law Journ. 1; Report of Committee on Jurisprudence and Law Reform, American Bar Ass'n, 1920.

(d) Execution.

Garsonnet et Cézar-Bru, Précis de procédure civile, §§ 703–718.