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The Law of Reason

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THE LAW OF REASON[1]

A. The Law of Nature and of Nations

IF there is one virtue that our books of authority claim for the Common Law more positively than another, it is that of being reasonable. The law is even said to be the perfection of reason. Not that the meaning of that saying is exhausted by the construction which a layman would naturally put upon it. For, as Coke had to tell King James I., much to his displeasure, there is an artificial reason of the law. Certainty is among the first objects of systematic justice. General principles being once fixed, the only way to attain certainty is to work out and accept their consequences, unless there is some very strong reason to the contrary. In hundreds of cases it is possible to suggest several rules of which, at first sight, any one would serve as well as another; and if we are asked why we have chosen one and rejected the others the answer is that the one we have preferred is deducible from our larger established principles, or at least consistent with and analogous to them, and the others are not. It is not good to choke rules with exceptions, merely for the sake of some small apparent convenience in the result, and at the risk of finding later that the exception, if not qualified by a second order of exceptions, is on the whole, less just than the rule. The sound method, as Parke laid down in an opinion given to the House of Lords seventy years ago, is to apply the settled rules of the law, where the application is not plainly unreasonable or inconvenient, to all cases which arise. But this very dictum assumes the existence, besides the reason which guides us in fixing the letter of the law, of a larger reason which informs the spirit of the law, and must, in the last resort, be the justification

[1] Two lectures delivered by Sir Frederick Pollock at the University of Michigan, October 8th and 9th, 1903. See last number MICHIGAN LAW REVIEW, pp. 128-133, for an outline of three lectures preceding these.

of the controlling rules themselves. Of this primary reason, too, not only book learning but every day's practice has much to tell us. Reasonable price and reasonable time are among the most familiar elements in our law of contract. Oftentimes no more definite instruction can be given to a jury than to award reasonable damages. "Natural reason and the just construction of the law," as Blackstone said, have given us the various applications of the common counts, extending to the whole field of what we now call Quasi-contract. In Lord Mansfield's hands the principles of natural equity were an enchanter's wand to call a whole new world of justice into being. The test of what a reasonable man's conduct would be in the circumstances governs our modern law of negligence and underlies those branches of it which have been specialized into groups of definite rules. Almost in our own time a simple and wholly untechnical conception of the same kind has been developed into the doctrine of estoppel "in pais," perhaps the most powerful and flexible instrument to be found in any system of civil jurisprudence. The scientific importance of this external standard of reasonableness, which enables the law to keep in close touch with the moral and practical sense of mankind in the affairs of life, was demonstrated once for all, more than twenty years ago, by my friend Mr. Justice Holmes; and if my own endeavors to pursue its application in detail have any value, it is largely due to his example.

What is the origin, and what are the doctrinal affinities, of this pervading ideal, of which it would be hardly too much to say that it is the life of the modern Common Law? It may seem paradoxical to answer that we owe it to the Greeks; and yet it goes near to be true. Christopher St. German, the very able and learned author of the "Doctor and Student," touched the right clue early in the sixteenth century. The Student of the laws of England, being asked by the Doctor of Divinity what he has to say of the Law of Nature, makes answer that among common lawyers the term is not in use, but they speak of reason where a canonist or civilian would speak of the Law of Nature. "It is not used among them that be learned in the laws of England, to reason what thing is commanded or prohibited by the Law of Nature, and what not, but all the reasoning in that behalf is under this manner. As when anything is grounded upon the Law of Nature, they say that Reason will that such a thing be done; and if it be prohibited by the Law of Nature, they say it is against Reason, or that Reason will not suffer that to be

done."[1] It is curious that this passage should have been, so far as I know, completely overlooked; but the medieval tradition of the Law of Nature was broken up by the controversies of the Reformation, and seventeenth century writers are quite confused about it. This, however, does not alter the reality of the parallel as it stood in the sixteenth century, nor diminish the probability of a real connection with the scholastic doctrine, which was as much philosophical and political as legal. That doctrine rested partly on the Aristotelian distinction between natural and conventional justice, partly on the Latin expositions by Cicero and others of the same distinction as developed by the later Greek schools, and partly on the technical adaptation of it by the classical Roman jurists, who identified *lex naturalis* or *jus naturale* with the *jus gentium* of the praetorian law, subject to one or two theoretical exceptions, which we have not to consider here. Directly or indirectly, therefore, the Law of Nature, as accepted throughout the Middle Ages, was derived from Greek theories of ethics.[2]

Now the term *jus naturae*, not in use among English lawyers in St. German's time, does occur in our books, though not frequently, from the seventeenth to the nineteenth century, and we have a recent judicial interpretation of it. "The foundation of the right" [to water courses], says Farwell, J., "as stated throughout all the cases is *jus naturae*. * * * * I have come to the conclusion that *jus naturae* is used in these cases as expressing that principle in English law which is akin to, if not derived from, the *jus naturale* of Roman law. English law is, of course, quite independent of Roman law, but the conception of *aequum et bonum*, and the rights flowing therefrom which are included in *jus naturale* underlie a great part of English Common Law; although it is not usual to find 'the law of nature' or 'natural law' referred to in so many words in English cases. * * * * I am not, therefore, introducing any novel principle if I regard *jus naturae*, on which the right to running water rests, as meaning that which is *aequum et bonum* between the upper and lower proprietors."[3]

The Roman conception involved in "*aequum et bonum*" or "*aequitas*" is identical with what we mean by "reasonable," or very nearly so. Such has been the result obtained, in modern times, by the application of historical scholarship to the

[1] Doct. and St. Dial. 1. c. 5.

[2] See Journ. Soc. Comp. Legisl, 1900, p. 418 ——.

[3] Bradford Corporation *v.* Ferrand [1902], 2 Ch. 655, 661.

Roman authorities on their own ground. On the whole, the natural justice or "reason of the thing" which the Common Law recognizes and applies does not appear to differ from the law of nature which the Romans identified with *jus gentium*, and the medieval doctors of canon and civil law boldly adopted as being divine law revealed through man's natural reason. I do not assume that our Germanic customary law, set free from the fetters of its original archaic procedure, was not capable of striking out an equivalent guiding principle for itself. But we have to remember that the whole of medieval thought was pervaded by a craving for authority, or at least a plausible show of it. Best of all was the text of scripture, whether taken in the natural sense or not. Aristotle was next best. Cicero was very well. Ovid, or Virgil, or almost any Roman author, was well enough in the absence of any more commanding name. Is it too fanciful to connect this habit of mind with the deeply rooted Germanic custom of vouching a warrantor? I know not; but it is certain that the medieval author who had nobody to vouch appeared to his contemporaries either to display indecent arrogance or to confess discreditable ignorance. In the present case the Law of Nature was there; not merely a doctrine or note of the imperial law, to which English lawyers could not be openly beholden, but a principle sanctioned by the church as fundamental and paramount. The Roman lawyers, in search of a rational sanction for the authority of the *jus gentium*, had gone to the Greek philosophy of natural justice; the medieval publicists, twelve centuries later, found in their revived learning this fabric of natural reason claiming respect by the triple authority of Aristotle, Cicero, and the Corpus Juris; this last, be it observed, being no pagan document, but the legislation of the orthodox emperor Justinian. Evidently the Law of Nature must have its place in the Christian system of Church and State, and no mean place. The problem was solved in the Decretum of Gratian by identifying the Law of Nature with the Law of God, as the Roman jurists had identified the *jus gentium* with the Law of Nature. According to the canonical doctors, the law revealed to man in natural reason is no less truly revealed and no less divine than any specific precept of scripture; it is of paramount and universal obligation, and no positive precept of any law, human or divine, can be set up against it. If any specific revelation appears to contradict the Law of Nature, it must have been wrongly interpreted.

Our founders of the thirteenth century, Raleigh, and Pateshull, and Henry of Bratton, were themselves ecclesiastics. They were more or less learned in the Canon Law; they must have known what the professed canonists were doing. It is not credible that a doctrine which pervaded all political speculation in Europe, and was assumed as a common ground of authority by the opposing champions of the Empire and the Papacy, should have been without influence among learned men in England. If it be asked why common lawyers did not expressly refer to the Law of Nature, the answer is that at no time after, at latest, the Papal interference in the English politics of the first half of the thirteenth century, was the citation of Roman canonical authority acceptable in our country, save so far as it was necessary for strictly technical purposes. Besides, any such citation might have been construed as a renunciation of independence, or a submission of questions of general policy to the judgment of the Church. These considerations appear sufficient to explain why "it is not used among them that be learned in the laws of England to reason what thing is commanded or prohibited by the Law of Nature."

Since the Middle Ages the Law of Nature, or of Reason, besides its distinct manifestations in foreign systems, has been a principal or influential factor in developing the following branches of jurisprudence: Equity, the Law Merchant, the Law of Nations, the general application, within the sphere of municipal law, of the principles of natural justice and reasonableness, and the body of rules for the choice of law and jurisdiction, and the application of foreign law, which we sum up under the head of Conflict of Laws or Private International Law. These are all of frequent importance in our daily practice. It is becoming less and less possible for the man who would be an accomplished common lawyer to neglect any of them. We are now concerned not to trace the leading principles into their various consequences, which is the office of special treatises, but to observe how the Common Law has not only adopted but assimilated them, and has thereby enriched its resources for doing justice without losing anything of its individual character. It was with our law as with a young commonwealth growing in wealth and strength. At first we lived in fear of surprises and usurpations; we were suspicious of foreign influence, not because it might be bad, but because it was foreign; we were jealously insular and held strangers at arm's length. When we had assured our existence and independence, we opened our gates. We wel-

comed new settlers with their arts and industries; we became willing and eager to make their accomplishments our own. But we held fast to our national genius, and gave our fullest welcome to those who would enter into our national life no longer as strangers, but as citizens. Natural justice is good for the emergencies of unsettled times and extraordinary occasions, but precarious. It is made a permanent possession, secured against caprice and degeneration, only when it is embodied in legal justice.

Equity, as is well known, grew out of the king's special authority and duty to supplement the defects of the ordinary law and reinforce the weakness of its procedure. The early Chancellors did not disclose the sources of their inspiration; probably they had as good grounds of expediency for not talking about the Law of Nature as the common lawyers. Certainly they intended and endeavoured to follow the dictate of natural reason; and if their version of natural justice was somewhat artificial in its details, and bore a decided civilian or canonical stamp, this was only to be expected. Some centuries later, when British judicial officers in India were instructed to decide, in the absence of any native law applicable to both parties, according to "justice, equity, and good conscience," the results bore, even more manifestly, the stamp of the Common Law. But of this we shall have to say a word later. The Court of Chancery, having passed through its early stage of doing battle with obstinate oppressors of the poor and deniers of right, found itself charged, by means of its jurisdiction over trusts, with the administration of estates and the adjustment of intricate conflicting claims to property. Valiant in the cause of good conscience, the court made the attempt to attain perfect justice, and, lest any form of fraud should escape, spread its nets with infinite ingenuity. Some of you may remember the terribly multifarious contents of the heading "Constructive Fraud" in the old-fashioned books on equity. Logically, nothing could be less defensible than such a catalogue, or more bewildering to young students. Thirty years ago I was so bewildered, at any rate, that I could see no way out of the tangle unless I cleared my head by writing a book myself—and I did. Historically, this jumble of diverse matters did more or less faithfully represent an actual process. A's conduct, let us say, is admitted to be fraudulent, and fit to be restrained by the court. B's conduct is rather like A's, and C's is rather like B's; therefore let B and C be restrained, though fraud cannot be proved. So was natural reason driven to work by sap and mine rather than by direct

attack, the leaders of the common law not being yet bold enough to aid it openly. The court's operations, carried out under these conditions, were too much apart from common understanding, and ran into excessive refinement. The natural reason of just men was overlaid with elaborate artifices, and safeguards were multiplied at a cost out of all proportion to the substance of what was to be preserved. It was forgotten that a fairly good working decision rendered within a moderate time is better than an ideal decision postponed for an indefinite time, and that decisions which are to be respected by the community at large should be intelligible as well as just. Not content with requiring integrity, the court sought to impose a standard of prudence and vigilance beyond the powers of ordinary mortals, and barely compatible with the ordinary conduct of business. Thus, with the best intentions, it deposed the reasonable man of the Common Law or the *bonus paterfamilias* of the Civil Law to set up a monster of impossible caution, and put many really innocent persons in situations of great hardship. More than once in recent times legislation was found necessary to abolish or mitigate these inconveniences. In England the fusion of legal and equitable jurisdiction under the Judicature Acts since 1875, worked out in the judgments of a single Court of Appeal wielding comprehensive powers and including judges trained in both systems, has saved our equity jurisprudence, not too soon, from being righteous overmuch. Conscientiousness is good; the standard of the Common Law itself is in many respects higher than what commonly passes muster among men of good business repute, and it would be disastrous if it were lowered. Still the conscience of the court, if it is to be an effective power, must not run away from the common sense of mankind.

Perhaps the best example of the sound and legitimate work of equity, proceeding on broad principles of justice and convenience, and giving permanent definition to reasonable practice tried by long experience, is to be found in the law of partnership. That law is modern and self-contained; it owes very little to early precedents and hardly anything to legislation; in about a century it grew to a condition so settled and so acceptable as to be ripe for codification. In 1890 it was codified in England, and no material fault has been found with the result. The commissioners on uniformity of legislation who have already done such excellent work in the United States are now turning their attention to the same subject, and it may not be many years before we see a

substantially identical law of partnership enacted for the English-speaking world; enacted as was the Negotiable Instruments Law, not by the invention of any one man or generation, but on the firm base of the combined legal and commercial reason of several generations.

The Law Merchant, as it existed through the Middle Ages, was undoubtedly a body of cosmopolitan custom, resting its claim to allegiance not on any express reception by municipal authority, but on its intrinsic reasonableness evidenced by the general consent and usage of the persons concerned. It was recognized and constantly described as being part of the Law of Nature. Thus Sir John Davies, writing in the first quarter of the seventeenth century, said: "The Law Merchant, as it is a part of the law of nature and nations, is universal and one and the same in all countries in the world." Much earlier, in 1473, in the celebrated case of the fraudulent carrier which is the ultimate authority for the doctrine of larceny by breaking bulk, Bishop Stillington, Edward IV.'s Chancellor, had laid down that suits between merchant strangers ought to be determined by the law of nature in the Chancery. The king has jurisdiction by the fact of the stranger's coming into the realm, but he must exercise it according to the law of nature which some call the law merchant, and which is universal throughout the world. We learn from Malines, in his *Lex Mercatoria*, that in practice the Chancellor referred such causes to be determined by a commission of merchants, and that this did not conduce to expedition. Meanwhile the Common Law had gone very near to recognizing the custom of merchants, it would seem rather as a kind of personal law, than on any more general ground.

We have two examples in the late Year Books of Edward I. of suits between merchants being in the king's courts pleaded according to the law merchant. It does not appear why this practice was discontinued. Later we find allegations of local customs which look very much as if they were part of the general law merchant, and were pleaded in that special form only to compel the court to take notice of them.[1]

Perhaps it was as well that the reception of the Law Merchant into the Common Law was deferred until it could be received deliberately and in a mature form. In the eighteenth century the law

[1] References in "The History of the Law of Nature," Journ. Soc. Comp. Legisl. 1900; Pollock' Principles of Contract, 7th ed. Ch. III Form of Contract.

of nature had been recast by Grotius and his successors in a shape fitted for modern use, and without prejudice to its permanently valuable elements. The adoption of the Law Merchant, under the directing genius of Lord Mansfield, was really a development of the same process, as was also the introduction of equitable methods into our ordinary legal procedure through the machinery of the common counts. No further comment on Lord Mansfield's work is called for here; it is as well known as anything in the history of our law, and its praise is recorded in judgments which are themselves classical. But it is important to observe that the Law Merchant was not incorporated into our system, as some have contended, as a fixed body of rules incapable of addition. It is still in part a living body of custom, and English decisions have quite lately recognized the fact. We now hold that a new general mercantile usage may be proved, and that, once proved, the courts will thenceforth take judicial notice of it. On the other hand, as there is a complete incorporation of the Law Merchant in the Common Law, so there must be a certain conformity. The Law Merchant is not a foreign law, or the custom of a particular class, to be recognized and applied, in substitution of the Common Law, in appropriate circumstances; it is an integral part of our law itself. Therefore the settled principles applicable to men's ordinary affairs cannot be displaced, or settled forms dispensed with, merely for the supposed convenience of business. The seventeenth section of the Statute of Frauds may be a wise enactment or not; but we are not free to disregard it in a court of justice because it is the custom of a particular trade to rely on bare spoken words or unsigned notes. Lord Mansfield himself endeavored to reduce the requirement of consideration for informal contracts to a mere rule of evidence inapplicable to commercial transactions in writing, but the attempt was unsuccessful. It is useless to speculate on what might have happened if there could have been a Lord Mansfield in the fifteenth century. The Law Merchant has had to pay something for the rights of full citizenship, but the price was moderate and inevitable.

The history of the other great cosmopolitan offshoot of the Law of Nature, namely international law, is not within our present scope. But I cannot refrain from pointing out the fallacy of one reason confidently given by English jurists of the so-called analytical school, any time during the last half century, for not allowing the law of nations to be truly law at all. It is said that a system of rules cannot be law when it lacks the sanction of a tribunal and of regular

decisions: and the view that international law depends merely on convention (which Lord Stowell declared to be fit only for Barbary pirates) may be found not only in text-books, but in reported judgments given in cases of great importance. I do not admit the validity of the argument, if the fact were as alleged; but the supposed fact is in truth subject to large exceptions. Not only international questions of allegiance and territorial jurisdiction, of the existence and consequences of war between foreign powers, (whether officially recognized as Sovereign States or not) of blockade and its incidents, and the like may be and frequently have been the subjects of decision in municipal courts; but a material part of the law of war, namely the law of prize, has been administered, and still may be, by courts of admiralty, and expressly as an international and not as a local law. Prize courts administer the law of nations and have never purported to administer anything else. "The seat of judicial authority is locally here, in the belligerent country, according to the known law and practice of nations, but the law itself has no locality." This is only a sample of Lord Stowell's utterances. No doubt is possible that he conceived himself to be administering a law that was *jus gentium* in the fullest sense, a rule not of local but of universal obligation. The same view has been consistently held and applied in the Supreme Court of the United States; I should rather think, indeed, that American jurists regard it as elementary. Thus although it is true that for some parts of the law of nations there is at present no tribunal, or none with coercive jurisdiction, it is equally true that a considerable part of it is actually within the sphere of positive jurisprudence.

In our system the Law of Nature has formally retreated from one untenable position; but the position, as we shall immediately see, had never been effectively occupied. It was a current opinion among the medieval doctors that rules of positive municipal law were controlled by the law of nature, and not binding if they were contrary to it; though some advocates of the Emperor's independent authority in secular matters, as against the claim of universal supremacy for the Pope, avoided inconvenient consequences by tempering the general proposition with a rather strong presumption that the acts of the lawful sovereign were right. Opposition to princes and rulers in vindication of the law of nature was possible, but at the opposer's peril if he were mistaken, and not to be lightly entered upon. So limited, this natural right can hardly be distinguished from the ultimate

moral right, admitted by all modern publicists, of resisting an intolerably bad government. However, the doctrine, without its politic justification, found an echo in England, where the king's judges always looked on legislative interference with some jealousy—a jealousy too often warranted by the unworkmanlike manner in which Parliament has laid hands on the Common Law. We find a series of dicta, extending to the early part of the eighteenth century, to the effect that statutes contrary to "natural justice" or "common right" may be treated as void. This opinion is most strongly expressed by Coke, but, like many of his confident opinions, is extra-judicial. Although Coke was no canonist, we may be pretty sure that it was ultimately derived from the canonist doctrine prevailing on the Continent of Europe. In England it was never a practical doctrine. The nearest approach to real authority for it is a case of the 27th year of Henry VI., known to us only through Fitzherbert's Abridgment, where the court held an Act of Parliament to be inoperative, not because it was contrary to natural justice, but because they could make no sense of it at all. At this day the courts have expressly disclaimed any power to control an Act of Parliament. Blackstone characteristically talks in the ornamental part of his introduction about the law of nature being supreme and, when he comes to particulars, asserts the uncontrollable power of Parliament in the most explicit terms, following herein Sir Thomas Smith, a civilian whose political insight was much greater than that of the common lawyers of his time. It hardly needs to be pointed out that, in states where there is a distinction between a written constitution, or fundamental constitutional laws however called, and ordinary legislation, the question whether any particular act of the legislature is or is not in accordance with the Constitution depends not on any general views of natural justice, but on the interpretation of the constitutional provisions which are the supreme law of the land. But I may remind you in passing that such a distinction, while it is necessary in a federal constitution, is also quite possible in a state having a single centralized government, and exists at this day in a majority of the civilized commonwealths of the world. The omnipotence of the British Parliament, on which English jurists have been too apt to build their theories of sovereignty and legislation, is really exceptional. On its own ground, however, it is established beyond any doubt.

B. Natural Justice in the Common Law

The real and fruitful conquests of the principle of natural justice or reasonableness in our law belong to its modern growth. Stu-

dents fresh from striving with the verbal archaism of our law-books must find it hard to realize that the nineteenth century, after the thirteenth, has been the most vital period of the Common Law. The greater part of our actual working jurisprudence was made by men born in the early years of that century, the contemporaries of Darwin and Emerson. A hundred years ago the law of contract was, to say the least, very far from complete, and the law of negligence and all cognate subjects was rudimentary. No such proposition could then have been enunciated as that every lawful man is bound (exceptions excepted) to use in all his doings the care and caution, at least, of a man of average prudence to avoid causing harm to his neighbors, and is entitled in turn to presume that they will use reasonable care both for him and for themselves. Now it has become a commonplace, and the wayfarer who reads, as he approaches a railroad crossing, the brief words of warning, "Stop, look, listen," little thinks that they sum up a whole history of keen discussion. The standard of a reasonable man's conduct has been taken by courts from the verdicts of juries, and consolidated into judicial rules; and we have a body of authority covering all the usual occasions of men's business and traffic, and already tending to be, if anything, too elaborate. All this owes very little indeed to early precedents. The medieval feeling seems to have been rather that, outside a few special and stringent rules, a man should be held liable only for default in what he had positively undertaken; and, in days when mechanical arts were few and simple, and the determination of disputed facts was still a rude and uncertain process, this may have served well enough. But the law was capable of growing to the demands of new times and circumstances; its conclusions in detail were not dogmas, but flexible applications of living and still expanding principles. The knowledge and resources of a reasonable man are far greater in the twentieth than in the sixteenth or the eighteenth century, and accordingly so much the more is required of him. A defendant must clear himself by showing, not that he acted to the best of his own judgment, or with a degree of prudence that would have been sufficient in the Middle Ages, but that his action was such as is to be expected here and now from a man competent, so far as any special competence was required in the business he was about, and otherwise not below the general standard of a capable citizen's information, intelligence, and caution. A plaintiff, on the other hand, is not free to neglect obvious opportunities of avoiding harm, though the defendant's negligence may

have put him in danger in the first instance. He must not charge the defendant with consequences which he himself had the means of averting, and could finally have averted by the exercise of ordinary prudence. This is, broadly stated, the doctrine of contributory negligence, a doctrine in no way formal or technical, notwithstanding ingenious attempts to make it so, and founded solely on general principles of reason and convenience, and on the inherent power of the Common Law to mould its rules in accordance with those principles as the habits of men's life are modified by new inventions, and new cases, produced by such modifications, arise for determination. It may be supported by the analogy, so far as that goes, of some opinions of the classical Roman lawyers in their interpretations of the *lex Aquilia*, themselves resting on like grounds of natural reason; but its growth has been quite independent.

Even more remarkable is the formation, dating from less than forty years ago (though one or two eminent judges threw out hints of it earlier), of a rule or body of rules demanding a special and intensified caution from the occupiers of what we call, for this purpose, fixed property. The term is not quite adequate for some of the later developments of the doctrine, but is sufficiently understood. I have ventured to group these rules, which are still increasing in importance, under the rubric of "Duties of Insuring Safety." The justification of their existence lies not in any ancient maxims or forms of pleading, but in the intrinsic and indefeasible competence of the law to stand in the forefront of social morality. We have powers of controlling the material world, and holding its various energies ready to be directed to our ends, which were wholly unknown to our forefathers. With those powers have come risks which were equally unknown to them. Going beyond the letter of their books, we have extended the old remedies to meet those risks; and yet we are faithful to the spirit of the medieval sages, and something more, for we have called on the archaic strictness of the law of trespass to give a hand to the deliberate exigency of our modern policy. Probably there was nothing in the early rules of cattle trespass and the like more politic or subtle than the common archaic assumption that a given set of external facts, if they do not make a man liable conclusively and without qualification, will not make him liable at all.

In following and enlarging such rules we have really set them on a new foundation. Responsibility to one's neighbors increases in

proportion as one's undertaking involves elements of common danger; and there comes a point of risk at which nothing short of "consummate care" will serve, and no prudence is allowed to count as such in law which has not proved sufficient to avert disaster in fact. It is not for me to discuss here, whether the Common Law, in the jurisdictions which accept this last doctrine—for it is not everywhere accepted—has not been tempted into an excess of zeal against negligence, as Equity once was against fraud. The zeal that devours is better, at any rate, than sloth that rusts. There must be fluctuations and now and then a false step in a secular process like that of our science. We think no less of the achievements of great masters in the graphic arts because they reveal to the curious eye little slips of the tool or of the brush, the traces of a changed purpose or a corrected execution which are technically known as *pentimenti*.

More direct and avowed applications of natural justice are not wanting. Powers of a judicial nature are frequently exercised by governing bodies of various kinds, trustees of public institutions, directors of companies, committees of clubs, and the like, who have a statutory or conventional authority over their officers and members, and are invested with the duty of hearing and determining complaints of misconduct. Dismissal from an office of profit, or deprivation of membership and its incidental rights in corporate or quasi-corporate property, may be the result. From such decisions the court will not entertain an appeal on the general merits. But it will not allow the rules of universal justice to be disregarded. Whatever forms are prescribed in the particular case must be observed; the person charged with misconduct must not be condemned without adequate notice and an adequate opportunity of being heard; and the decision must be rendered in good faith for the interest of the society or institution whose authority is being exercised. Exceptionally, for reasons of policy, there may be an absolute as distinguished from a judicial discretion, a purposely unlimited power to dismiss or deprive without giving any reason at all. Such a power must be expressly conferred by legislation or by the terms of a contract to which the person to be affected is a party. There may be very good cause for its existence; but such express provisions, when they exist, do not impeach the validity of the general principle.

There is a much more delicate question somewhat analogous to this, namely: whether a municipal court can disregard the judg-

ment of a foreign court of competent jurisdiction merely on the ground that the result is manifestly contrary to natural justice. On the whole the acceptable opinion would seem to be that such a power exists, but that it is a reserved power to be exercised only with the greatest caution and in an extreme case. We have learned to say that the verdict of a jury will not be set aside merely because the court does not agree with it, but only if it appears to be such as no reasonable jury could have arrived at upon the evidence. The judgment of a foreign court acting within its jurisdiction must be entitled to as much respect.

I have endeavored to show that the Law of Nature is not, as the English utilitarians in their ignorance of its history supposed, a synonym for arbitrary individual preference, but that on the contrary it is a living embodiment of the collective reason of civilized mankind, and as such is adopted by the Common Law in substance though not always by name. But it has its limits; they are pointed out in the very earliest Aristotelian exposition, and it must be admitted that attempts to overstep them have sometimes led to failure. Natural justice has no means of fixing any rule to terms defined in number or measure, nor of choosing one practical solution out of two or more which are in themselves equally plausible. Positive law, whether enacted or customary, must come to our aid in such matters. It would be no great feat for natural reason to tell us that a rule of the road is desirable; but it could never have told us whether to drive to the right hand or to the left, and in fact custom has settled this differently in different countries, and even, in some parts of Europe, in different provinces of one State.

In the eighteenth century a bold and ingenious attempt was made in England to establish copyright at common law by arguments drawn from the law of nature; and it seemed to be on the point of success. For a time the weight of opinion was in its favor. But such a right, if it existed, could not be limited in time; it must be perpetual if it was anything. Plausible reasons for what is called "property in ideas" were certainly forthcoming; they are still sometimes urged by men of letters and lay publicists. But in a later generation the tide of legal opinion had turned. In the middle of the nineteenth century both sides were ably supported among the judges, but the House of Lords was unanimous (though actual decision of the point was not called for) against the existence of the alleged right; and this on grounds of general reason and convenience—in other words of natural justice. It may be doubted

whether the law of nature be competent, in any case, within or even outside the bounds of the Common Law, to invent definite new forms of property. But, however that may be, general consent is the only practical warrant for the adoption of any suggested rule as being dictated by universal justice; and here the only general consent which could be inferred from the conflict of opinions was a concensus that authors ought to have some kind of reasonable security for enjoying the fruit of their labor. The question what the kind and amount of protection shall be, when once a limited protection is admitted in principle, can only stand remitted to legislation; and that way has in fact been taken everywhere. The problem is now not to find a philosophic basis, but to get the copyright laws of civilized countries reduced to tolerable simplicity, and brought, if possible, to an approximate uniformity. There is an antecedent right to restrain the publication of unpublished matter, often erroneously called copyright before publication, and sometimes treated as an incident of property, sometimes as arising from a presumed contract or term of a contract. This does appear to rest, in the last analysis, on considerations of natural justice more than on any satisfying deduction from positive ownership or obligation. Of this class of rights not much can be said with confidence at present. It is being slowly developed by occasional decisions, but, so far as authority goes, it is neither well defined nor adequately explained, and does not seem likely to be so for several years to come. One day the time will be ripe for clear light to be struck out from a leading judgment or series of judgments, and then a new chapter of natural reason will be added to our law, and we shall all wonder why so plain a rule was not understood sooner. The jurists of Continental Europe, not without provocation, consider our lawyers lamentably ignorant of natural law; some English writers, half a century behind their time, still maintain the obsolete Benthamite aversion to its name; meanwhile our courts have to go on making a great deal of law which is really natural law, whether they know it or not. For, as we said at the outset of these lectures, they must find a solution, with or without authority, for every case that comes before them: and general considerations of justice and convenience must be relied on in default of positive authority. There is no reason why they should not be openly invoked, for the alternative method of pretending to follow authority where there is really none is now discredited. These general considerations are nothing else than what our ancestors of the Middle Ages and the Renais-

sance understood by the Law of Nature. It is not within our province to show here how a term with a venerable history, and capable of perfectly rational application, came, after the disruption of the scholastic traditions, to be perverted and misconceived for nearly two centuries.

Just now there is a group of questions before courts of common law both in America and in England, arising out of the rapid modern development of trade combinations, which go to the very foundation of the law of personal liberty and of civil wrongs. Individuals, in our system of society, cannot effectually protect their common interests otherwise than by common organized action. But this very protective action, in itself legitimate, easily reaches a point where it creates powers liable to grave abuse, and, even without manifest abuse, bears hardly on dissentient individuals within the sphere of interest in question, on persons and classes having opposed interests, and, in possible and not infrequent cases, on the common weal at large. The problem is nothing less than to reconcile the just freedom of new kinds of collective action with the ancient and just independence of the individual citizen. It would be idle here to express any opinion upon the issues involved, or to attempt any forecast of the ultimate solution. Such an attempt would lead to a digression altogether disproportionate to the matter in hand, and still too brief to have any value of its own. This much is certain, that no merely technical resources of the law will suffice for the task. In whatever jurisdiction the decisive word is spoken, it will be founded on knowledge of the world, and on broad considerations of policy. Natural law will have, in other words, a large and probably a dominant part in it.

The Common Law, then, has largely enriched and is still enriching itself by associating the Law of Nature with its authority. The Law of Nature has in turn carried the spirit and much of the substance of the Common Law to regions where that law never claimed, or has ever expressly disclaimed, formal jurisdiction. A common lawyer set down in British India, without previous information, would find himself, on the whole, in the familiar atmosphere of his own law. He would observe that Asiatic suitors, living under customs intimately bound up with their religions, are judged by those customs in matters of religion, marriage and inheritance. Allowing for this exception, he would be prone to infer that the Common Law had at some time and in some way been received as governing civil relations in general. But in fact

our courts in India do not profess, outside the limited statutory jurisdiction of the High Courts of the Presidency towns over European British subjects, to administer English law as such. In the early days of our trading settlements, European merchants were presumed, according to the universal custom of Asia, which was also the custom of merchant communities in Europe in the Middle Ages, to carry their own law with them. A charter of Charles II., due to the acquisition of Bombay, seems to have contemplated the establishment of a court, or courts, to administer the law merchant to traders. It does not appear that this provision came into effect: in any case the subsequent adoption of the law merchant by the Common Law superseded it. A century later, and on the other side of India, the East India Company's Courts, in the territory which the company governed as the nominal delegate of the Mogul emperors, aimed at doing justice according to the native laws of the suitors. But the parties were often of different provinces, or religions, or both, not owing obedience to any common rule; and for many of the growing modern relations of business there was no rule at all to be found in any native law. This being so, a Bengal Regulation instructed the Company's Courts in 1793, "to act according to justice, equity and good conscience"; and this, being followed in the same or like words by the other provincial Regulations, became the general rule of the Company's jurisdiction. In terms this amounted to a comprehensive enactment of the Law of Nature. Such would be its obvious meaning to any publicist down to the end of the eighteenth century. But the Law of Nature, as we have already noted, does not provide a detailed system for the guidance of municipal tribunals. It can tell us that men ought to keep faith and perform their contracts; it can no more tell us what are the requisites of a lawfully binding contract at Benares than what they are at Providence or at New Haven. English magistrates had to do the best justice they could, and the only justice they were familiar with was the justice of the Common Law. Thus, under the name of justice, equity, and good conscience, the general law of British India, save so far as the authority of native laws was preserved, came to be so much of English law as was considered applicable, or rather was not considered inapplicable, to the conditions of Indian Society. At this day the reported decisions of the English courts are freely, perhaps too freely, cited by keen-witted native pleaders all over India, and relied on by Hindu and Mahometan judges of the Indian High Courts, of whom some would be worthy com-

panions to any of our own chiefs. There are four independent jurisdictions in India, whose decisions are reported (Allahabad, Bombay, Calcutta, and Madras); but an appeal lies from them all to the Judicial Committee of the Privy Council, and the divergences have not been very serious. All the High Courts endeavor, so far as consistent with local legislation, to keep abreast of the progress of English law at home. A somewhat analogous process took place in the Middle Ages, when, in the French provinces of customary law, the Roman law, though not received as binding, enjoyed a persuasive authority as being an embodiment of written reason, and impressed its own character on a formally independent jurisprudence.

Much of the Anglo-Indian law has been consolidated in codes within the last generation or thereabouts. This was not the imposition of new law by legislative authority, but, in intention at least, the affirmation of existing law and practice, with a certain number of specific amendments and the determination of a certain number of controverted points. I ought to mention, perhaps, that the history of criminal law in British India stands to some extent apart. The Company's courts attempted to administer Mahometan penal law, which they found in possession. But the experiment proved unsatisfactory, and after a variety of makeshifts and long delay, a Penal Code, being a simplified version of English Criminal Law, was enacted for British India in 1861. The original draft had been prepared many years earlier by a commission, of which Macaulay was the leading member. The text bears his mark plainly enough, and the introductory minute is now part of his collected works. This was the earliest of the Anglo-Indian Codes, and has been the most successful. It is remarkable that our criminal law, notwithstanding its conspicuous defects of form, has almost everywhere prevailed over competing systems, even where the Common Law was not received as a whole. Witness the Province of Quebec, where the Civil Code represents the old French law of the colony, modified by free use of the Napoleonic Code, and in some particulars by English influence, but the criminal law is the substantially English Criminal Code of the Dominion. The Indian Penal Code has itself become a center of influence, and a model for more or less close imitation, not only among the native states of India (with whose domestic legislation the Government of India does not interfere, provided that the essentials of good government are respected), but in Ceylon, the Sudan and some other territories under British dominion or protection.

It is curious to reflect, at this day, that a generation or two ago, when the internal expansion and the external conquests of the Common Law were in full tide, it was a prevalent opinion among thoughtful and learned persons in England that the judicial development of the law had seen its best days, and the sceptre had passed to legislation. Historical formulas about stages and periods may be useful servants; they must not be allowed to become masters. Very good of its kind, but still of that kind, is the maxim, originated, I believe, by Sir Henry Maine, that there is an age of fictions, an age of equity, and an age of legislation. The positive truth contained in it is of great value. Equity taken in a large sense, the free constructive development of law, consciously directed to ends of justice and convenience, is possible only when jurisprudence has become or is in the way of becoming a science. Again, the scale and importance of legislation in the world we now live in depend on the political conditions of modern society as a whole as well as on the existence of a formally competent legislature. But we have no right to make the negative or exclusive inference that equity, when it came in, left no room for fictions, and that legislation in turn has superseded equity. No such inference is warranted by the actual history of the law. One of the most brilliant and successful fictions of the Common Law, quite lately confirmed to the full in England by the House of Lords, is less than half a century old, I mean the implied warranty of authority which is attached to the acts of a professed agent. The activity of Equity, whether we take it in the artificial sense of the law and remedies formerly peculiar to the Court of Chancery, or in the wider sense just now mentioned, has not diminished but increased in the last generation. Legislation itself is to no small extent conditioned by the continuing evolution of professional jurisprudence. The law cannot afford to throw away any of its resources; we must hold fast to them all. Many are the books of practice, once in every lawyer's hands, that have had their day, and are stacked like the obsolete weapons of European armories, a "dumb dread people,"—if I may pervert a phrase of Mr. Swinburne's,—who sit forgotten on the upper shelves of Austin Hall and Lincoln's Inn. Forms of pleading and rules of procedure pass away like the matchlock and the pike; but our fundamental methods and traditions, like the principles of the art of war, do not pass away.[1] Julius Cæsar would know what to do with a

[1] The most remarkable function of any modern court—I mean the political power of the Supreme Court of the United States, which Mr. E. J. Phelps termed "the foundation of our government"—is a pure development of the old Germanic theory that the court finds its own law and no one else can find it.

cyclist battalion, and Gustavus Adolphus would recognize his own ideas in the machine gun. Mahan expounds the strategy of the modern battleship in the names of Raleigh and Nelson. That earlier Raleigh who was Henry of Bratton's master would not be afraid to grapple with code pleading, and the judges who framed the Statute of Wales would not be behind John Marshall in building up a federal jurisdiction.

The old flag, the old watchwords, the old discipline, the latest knowledge and the newest arms—these are the approved instruments of victory in peace as in war. For whom is the next campaign of the law? For you to whom I speak, you who are of age to take up the heritage of our fathers. The Common Law, here and in England and round the world, looks to your youth and strength to improve it as good husbandmen. Remember that you are servants of the commonwealth, and are devoted not to a trade but to a science. Remember that the law of which we are ministers is a law of the courts and of the people; remember that its vital competence to satisfy the needs of the modern state is fed from its ancient Germanic roots of publicity and independence. Remember that if writs run in the name of King Edward VII. from the North sea to the Pacific, it is largely because King Edward I. was a faithful servant of his people and of the law. Remember that it is your office as lawyers to give authentic form to the highest public morality of which you are capable as citizens, and that this office belongs of right no less to the bar than to the bench. Remember that our spiritual fellowship transcends political boundaries, and is as world-wide as our profession is honorable and its traditions venerable. Remember that our lady the Common Law is not a taskmistress but a bountiful sovereign whose service is freedom. The destinies of the English-speaking world are bound up with her fortune and her migrations, and its conquests are justified by her works. My words are over, and for any life to come they must look to your deeds. The empire of the Common Law is in your hands.