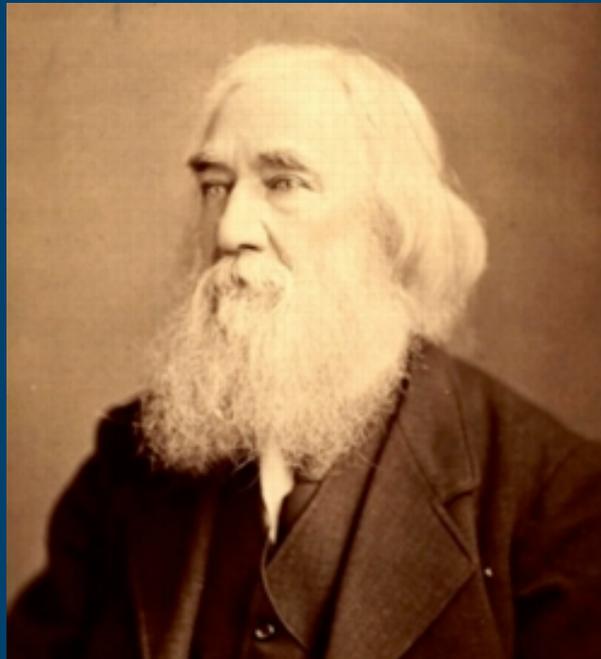


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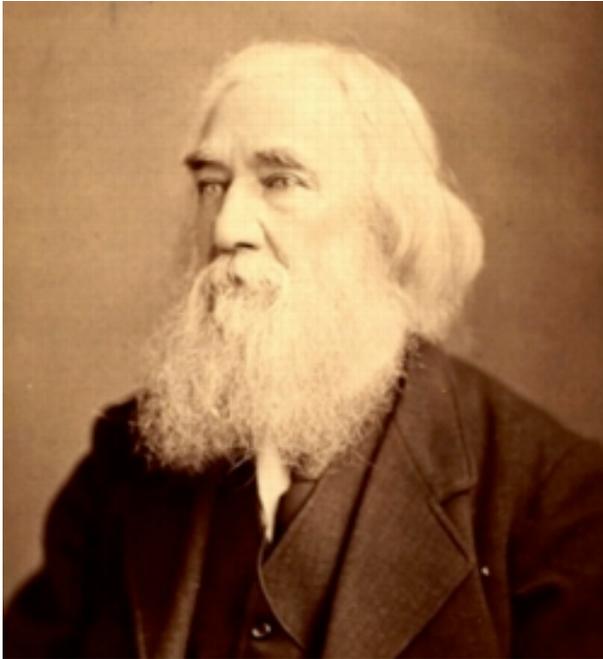
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ABOUT THE AUTHOR



Lysander Spooner (1808-1887)

Lysander Spooner (1808-1887) was a legal theorist, abolitionist, and radical individualist who started his own mail company in order to challenge the monopoly held by the US government. He wrote on the constitutionality of slavery, natural law, trial by jury, intellectual property, paper currency, and banking.

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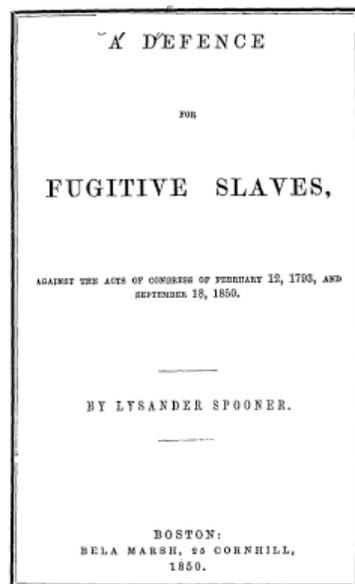
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NOTE.

This volume, it is presumed by the author, gives what will generally be considered satisfactory evidence,—though not all the evidence,—of what the Common Law trial by jury really is. In a future volume, if it should be called for, it is designed to corroborate the grounds taken in this ; give a concise view of the English constitution ; show the unconstitutional character of the existing government in England, and the unconstitutional means by which the trial by jury has been broken down in practice ; prove that, neither in England nor the United States, have legislatures ever been invested by the people with any authority to impair the powers, change the oaths, or (with few exceptions) abridge the jurisdiction, of juries, or select jurors on any other than Common Law principles ; and, consequently, that, in both countries, legislation is still constitutionally subordinate to the discretion and consciences of Common Law juries, in all cases, both civil and criminal, in which juries sit. The same volume will probably also discuss several political and legal questions, which will naturally assume importance if the trial by jury should be reëstablished.

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TRIAL BY JURY.

CHAPTER I.

THE RIGHT OF JURIES TO JUDGE OF THE JUSTICE OF LAWS.

SECTION I.

FOR more than six hundred years—that is, since Magna Carta, in 1215—there has been no clearer principle of English or American constitutional law, than that, in criminal cases, it is not only the right and duty of juries to judge what are the facts, what is the law, and what was the moral intent of the accused; *but that it is also their right, and their primary and paramount duty, to judge of the justice of the law, and to hold all laws invalid, that are, in their opinion, unjust or oppressive, and all persons guiltless in violating, or resisting the execution of, such laws.*

Unless such be the right and duty of jurors, it is plain that, instead of juries being a “palladium of liberty”—a barrier against the tyranny and oppression of the government—they are really mere tools in its hands, for carrying into execution any injustice and oppression it may desire to have executed.

But for their right to judge of the law, *and the justice of the law*, juries would be no protection to an accused person, *even as to matters of fact*; for, if the government can dictate to a jury any law whatever, in a criminal case, it can certainly dictate to them the laws of evidence. That is, it can dictate what evidence is admissible, and what inadmissible, *and also what force or weight is to be given to the evidence admitted.* And if the government can thus dictate to a jury the laws of evidence, it can not only make it necessary for them to convict on a partial exhibition of the evidence rightfully pertaining to the case, but it can even require them

to convict on any evidence whatever that it pleases to offer them.

That the rights and duties of jurors must necessarily be such as are here claimed for them, will be evident when it is considered what the trial by jury is, and what is its object.

“The trial by jury,” then, is a “trial by the country” — that is, by the people — as distinguished from a trial by the government.

It was anciently called “trial *per pais*” — that is, “trial by the country.” And now, in every criminal trial, the jury are told that the accused “has, for trial, put himself upon the *country*; which *country* you (the jury) are.”

The object of this trial “by the country,” or by the people, in preference to a trial by the government, is to guard against every species of oppression by the government. In order to effect this end, it is indispensable that the people, or “the country,” judge of and determine their own liberties against the government; instead of the government’s judging of and determining its own powers over the people. How is it possible that juries can do anything to protect the liberties of the people against the government, if they are not allowed to determine what those liberties are?

Any government, that is its own judge of, and determines authoritatively for the people, what are its own powers over the people, is an absolute government of course. It has all the powers that it chooses to exercise. There is no other — or at least no more accurate — definition of a despotism than this.

On the other hand, any people, that judge of, and determine authoritatively for the government, what are their own liberties against the government, of course retain all the liberties they wish to enjoy. *And this is freedom.* At least, it is freedom *to them*; because, although it may be theoretically imperfect, it, nevertheless, corresponds to *their* highest notions of freedom.

To secure this right of the people to judge of their own liberties against the government, the jurors are taken, (or must be, to make them lawful jurors,) from the body of the people, *by lot*, or by some process that precludes any previous knowledge, choice, or selection of them, on the part of the government.

This is done to prevent the government's constituting a jury of its own partisans or friends; in other words, to prevent the government's *packing* a jury, with a view to maintain its own laws, and accomplish its own purposes.

It is supposed that, if twelve men be taken, *by lot*, from the mass of the people, without the possibility of any previous knowledge, choice, or selection of them, on the part of the government, the jury will be a fair epitome of "the country" at large, and not merely of the party or faction that sustain the measures of the government; that substantially all classes of opinions, prevailing among the people, will be represented in the jury; and especially that the opponents of the government, (if the government have any opponents,) will be represented there, as well as its friends; that the classes, who are oppressed by the laws of the government, (if any are thus oppressed,) will have their representatives in the jury, as well as those classes, who take sides with the oppressor — that is, with the government.

It is fairly presumable that such a tribunal will agree to no conviction except such as *substantially the whole country* would agree to, if they were present, taking part in the trial. A trial by such a tribunal is, therefore, in effect, "a trial by the country." In its results it probably comes as near to a trial by the whole country, as any trial that it is practicable to have, without too great inconvenience and expense. And as unanimity is required for a conviction, it follows that no one can be convicted, except for the violation of such laws as substantially the *whole* country wish to have maintained. The government can enforce none of its laws, (by punishing offenders, through the verdicts of juries,) except such as substantially the whole people wish to have enforced. The government, therefore, consistently with the trial by jury, can exercise no powers over the people, (or, what is the same thing, over the accused person, who represents the rights of the people,) except such as substantially the whole people of the country consent that it may exercise. In such a trial, therefore, "the country," or the people, judge of and determine their own liberties against the government, instead of the

government's judging of and determining its own powers over the people.

But all this "trial by the country" would be no trial at all "by the country," but only a trial by the government, if the government could either declare who may, and who may not, be jurors, or could dictate to the jury anything whatever, either of law or evidence, that is of the essence of the trial.

If the government may decide who may, and who may not, be jurors, it will of course select only its partisans, and those friendly to its measures. It may not only prescribe who may, and who may not, be eligible to be drawn as jurors; but it may also question each person drawn as a juror, as to his sentiments in regard to the particular law involved in each trial, before suffering him to be sworn on the panel; and exclude him if he be found unfavorable to the maintenance of such a law.*

So, also, if the government may dictate to the jury *what laws they are to enforce*, it is no longer a "trial by the country,"

* To show that this supposition is not an extravagant one, it may be mentioned that courts have repeatedly questioned jurors to ascertain whether they were prejudiced against the government—that is, whether they were in favor of, or opposed to, such laws of the government as were to be put in issue in the then pending trial. This was done (in 1851) in the United States District Court for the District of Massachusetts, by Peleg Sprague, the United States district judge, in empanelling three several juries for the trials of Scott, Hayden, and Morris, charged with having aided in the rescue of a fugitive slave from the custody of the United States deputy marshal. This judge caused the following question to be propounded to all the jurors separately; and those who answered unfavorably for the purposes of the government, were excluded from the panel.

"Do you hold any opinions upon the subject of the Fugitive Slave Law, so called, which will induce you to refuse to convict a person indicted under it, if the facts set forth in the indictment, and constituting the offence, are proved against him, and the court direct you that the law is constitutional?"

The reason of this question was, that "the Fugitive Slave Law, so called," was so obnoxious to a large portion of the people, as to render a conviction under it hopeless, if the jurors were taken indiscriminately from among the people.

A similar question was soon afterwards propounded to the persons drawn as jurors in the United States Circuit Court for the District of Massachusetts, by Benjamin R. Curtis, one of the Justices of the Supreme Court of the United States, in empanelling a jury for the trial of the aforesaid Morris on the charge before mentioned; and those who did not answer the question favorably for the government were again excluded from the panel.

It has also been an habitual practice with the Supreme Court of Massachusetts, in empanelling juries for the trial of capital offences, to inquire of the persons drawn as jurors whether they had any conscientious scruples against finding verdicts of guilty

but a trial by the government; because the jury then try the accused, not by any standard of their own—not by their own judgments of their rightful liberties—but by a standard dictated to them by the government. And the standard, thus dictated by the government, becomes the measure of the people's liberties. If the government dictate the standard of trial, it of course dictates the results of the trial. And such a trial is no trial by the country, but only a trial by the government; and in it the government determines what are its own powers over the people, instead of the people's determining what are their own liberties against the government. In short, if the jury have no right to judge of the justice of a law of the government, they plainly can do nothing to protect the people against the oppressions of the government; for there are no oppressions which the government may not authorize by law.

The jury are also to judge whether the laws are rightly expounded to them by the court. Unless they judge on this point, they do nothing to protect their liberties against the oppressions that are capable of being practised under cover of a corrupt exposition of the laws. If the judiciary can authoritatively dictate to a jury any exposition of the law, they can dictate to them the law itself, and such laws as they please; because laws are, in practice, one thing or another, according as they are expounded.

in such cases; that is, whether they had any conscientious scruples against sustaining the law prescribing death as the punishment of the crime to be tried; and to exclude from the panel all who answered in the affirmative.

The only principle upon which these questions are asked, is this—that no man shall be allowed to serve as juror, unless he be ready to enforce any enactment of the government, however cruel or tyrannical it may be.

What is such a jury good for, as a protection against the tyranny of the government? A jury like that is palpably nothing but a mere tool of oppression in the hands of the government. A trial by such a jury is really a trial by the government itself—and not a trial by the country—because it is a trial only by men specially selected by the government for their readiness to enforce its own tyrannical measures.

If that be the true principle of the trial by jury, the trial is utterly worthless as a security to liberty. The Czar might, with perfect safety to his authority, introduce the trial by jury into Russia, if he could but be permitted to select his jurors from those who were ready to maintain his laws, without regard to their injustice.

This example is sufficient to show that the very pith of the trial by jury, as a safeguard to liberty, consists in the jurors being taken indiscriminately from the whole people, and in their right to hold invalid all laws which they think unjust.

The jury must also judge whether there really be any such law, (be it good or bad,) as the accused is charged with having transgressed. Unless they judge on this point, the people are liable to have their liberties taken from them by brute force, without any law at all.

The jury must also judge of the laws of evidence. If the government can dictate to a jury the laws of evidence, it can not only shut out any evidence it pleases, tending to vindicate the accused, but it can require that any evidence whatever, that it pleases to offer, be held as conclusive proof of any offence whatever which the government chooses to allege.

It is manifest, therefore, that the jury must judge of and try the whole case, and every part and parcel of the case, free of any dictation or authority on the part of the government. They must judge of the existence of the law; of the true exposition of the law; *of the justice of the law*; and of the admissibility and weight of all the evidence offered; otherwise the government will have everything its own way; the jury will be mere puppets in the hands of the government; and the trial will be, in reality, a trial by the government, and not a "trial by the country." By such trials the government will determine its own powers over the people, instead of the people's determining their own liberties against the government; and it will be an entire delusion to talk, as for centuries we have done, of the trial by jury, as a "palladium of liberty," or as any protection to the people against the oppression and tyranny of the government.

The question, then, between trial by jury, as thus described, and trial by the government, is simply a question between liberty and despotism. The authority to judge what are the powers of the government, and what the liberties of the people, must necessarily be vested in one or the other of the parties themselves—the government, or the people; because there is no third party to whom it can be entrusted. If the authority be vested in the government, the government is absolute, and the people have no liberties except such as the government sees fit to indulge them with. If, on the other hand, that authority be vested in the people, then the people have all liberties, (as against the government,) except such as substan-

tially the whole people (through a jury) choose to disclaim; and the government can exercise no power except such as substantially the whole people (through a jury) consent that it may exercise.

SECTION II.

The force and justice of the preceding argument cannot be evaded by saying that the government is chosen by the people; that, in theory, it represents the people; that it is designed to do the will of the people; that its members are all sworn to observe the fundamental or constitutional law instituted by the people; that its acts are therefore entitled to be considered the acts of the people; and that to allow a jury, representing the people, to invalidate the acts of the government, would therefore be arraying the people against themselves.

There are two answers to such an argument.

One answer is, that, in a representative government, there is no absurdity or contradiction, nor any arraying of the people against themselves, in requiring that the statutes or enactments of the government shall pass the ordeal of any number of separate tribunals, before it shall be determined that they are to have the force of laws. Our American constitutions have provided five of these separate tribunals, to wit, representatives, senate, executive,* jury, and judges; and have made it necessary that each enactment shall pass the ordeal of all these separate tribunals, before its authority can be established by the punishment of those who choose to transgress it. And there is no more absurdity or inconsistency in making a jury one of these several tribunals, than there is in making the representatives, or the senate, or the executive, or the judges, one of them. There is no more absurdity in giving a jury a veto upon the laws, than there is in giving a veto to each of these other tribunals. The people are no more arrayed against themselves, when a jury puts its veto upon a statute, which the other tribunals have sanctioned, than they are when the

* The executive has a qualified veto upon the passage of laws, in most of our governments, and an absolute veto, in all of them, upon the execution of any laws which he deems unconstitutional; because his oath to support the constitution (as he understands it) forbids him to execute any law that he deems unconstitutional.

same veto is exercised by the representatives, the senate, the executive, or the judges.

But another answer to the argument that the people are arrayed against themselves, when a jury hold an enactment of the government invalid, is, that the government, and all the departments of the government, *are merely the servants and agents of the people*; not invested with arbitrary or absolute authority to bind the people, but required to submit all their enactments to the judgment of a tribunal more fairly representing the whole people, before they carry them into execution, by punishing any individual for transgressing them. If the government were not thus required to submit their enactments to the judgment of "the country," before executing them upon individuals—if, in other words, the people had reserved to themselves no veto upon the acts of the government, the government, instead of being a mere servant and agent of the people, would be an absolute despot over the people. It would have all power in its own hands; because the power to *punish* carries all other powers with it. A power that can, of itself, and by its own authority, punish disobedience, can compel obedience and submission, and is above all responsibility for the character of its laws. In short, it is a despotism.

And it is of no consequence to inquire how a government came by this power to punish, whether by prescription, by inheritance, by usurpation, or by delegation from the people? *If it have now but got it*, the government is absolute.

It is plain, therefore, that if the people have invested the government with power to make laws that absolutely bind the people, and to punish the people for transgressing those laws, the people have surrendered their liberties unreservedly into the hands of the government.

It is of no avail to say, in answer to this view of the case, that in surrendering their liberties into the hands of the government, the people took an oath from the government, that it would exercise its power within certain constitutional limits; for when did oaths ever restrain a government that was otherwise unrestrained? Or when did a government fail to determine that all its acts were within the constitutional and authorized

limits of its power, if it were permitted to determine that question for itself?

Neither is it of any avail to say, that, if the government abuse its power, and enact unjust and oppressive laws, the government may be changed by the influence of discussion, and the exercise of the right of suffrage. Discussion can do nothing to prevent the enactment, or procure the repeal, of unjust laws, unless it be understood that the discussion is to be followed by resistance. Tyrants care nothing for discussions that are to end only in discussion. Discussions, which do not interfere with the enforcement of their laws, are but idle wind to them. Suffrage is equally powerless and unreliable. It can be exercised only periodically; and the tyranny must at least be borne until the time for suffrage comes. Besides, when the suffrage is exercised, it gives no guaranty for the repeal of existing laws that are oppressive, and no security against the enactment of new ones that are equally so. The second body of legislators are liable and likely to be just as tyrannical as the first. If it be said that the second body may be chosen for their integrity, the answer is, that the first were chosen for that very reason, and yet proved tyrants. The second will be exposed to the same temptations as the first, and will be just as likely to prove tyrannical. Who ever heard that succeeding legislatures were, on the whole, more honest than those that preceded them? What is there in the nature of men or things to make them so? If it be said that the first body were chosen from motives of injustice, that fact proves that there is a portion of society who desire to establish injustice; and if they were powerful or artful enough to procure the election of their instruments to compose the first legislature, they will be likely to be powerful or artful enough to procure the election of the same or similar instruments to compose the second. The right of suffrage, therefore, and even a change of legislators, guarantees no change of legislation — certainly no change for the better. Even if a change for the better actually comes, it comes too late, because it comes only after more or less injustice has been irreparably done.

But, at best, the right of suffrage can be exercised only periodically; and between the periods the legislators are wholly

irresponsible. No despot was ever more entirely irresponsible than are republican legislators during the period for which they are chosen. They can neither be removed from their office, nor called to account while in their office, nor punished after they leave their office, be their tyranny what it may. Moreover, the judicial and executive departments of the government are equally irresponsible *to the people*, and are only responsible, (by impeachment, and dependence for their salaries), to these irresponsible legislators. This dependence of the judiciary and executive upon the legislature is a guaranty that they will always sanction and execute its laws, whether just or unjust. Thus the legislators hold the whole power of the government in their hands, and are at the same time utterly irresponsible for the manner in which they use it.

If, now, this government, (the three branches thus really united in one), can determine the validity of, and enforce, its own laws, it is, for the time being, entirely absolute, and wholly irresponsible to the people.

But this is not all. These legislators, and this government, so irresponsible while in power, can perpetuate their power at pleasure, if they can determine what legislation is authoritative upon the people, and can enforce obedience to it; for they can not only declare their power perpetual, but they can enforce submission to all legislation that is necessary to secure its perpetuity. They can, for example, prohibit all discussion of the rightfulness of their authority; forbid the use of the suffrage; prevent the election of any successors; disarm, plunder, imprison, and even kill all who refuse submission. If, therefore, the government (all departments united) be absolute for a day — that is, if it can, for a day, enforce obedience to its own laws — it can, in that day, secure its power for all time — like the queen, who wished to reign but for a day, but in that day caused the king, her husband, to be slain, and usurped his throne.

Nor will it avail to say that such acts would be unconstitutional, and that unconstitutional acts may be lawfully resisted; for everything a government pleases to do will, of course, be determined to be constitutional, if the government itself be permitted to determine the question of the constitutionality of its own acts. Those who are capable of tyranny, are capable of perjury to sustain it.

The conclusion, therefore, is, that any government, that can, *for a day*, enforce its own laws, without appealing to the people, (or to a tribunal fairly representing the people,) for their consent, is, in theory, an absolute government, irresponsible to the people, and can perpetuate its power at pleasure.

The trial by jury is based upon a recognition of this principle, and therefore forbids the government to execute any of its laws, by punishing violators, in any case whatever, without first getting the consent of "the country," or the people, through a jury. In this way, the people, at all times, hold their liberties in their own hands, and never surrender them, even for a moment, into the hands of the government.

The trial by jury, then, gives to any and every individual the liberty, at any time, to disregard or resist any law whatever of the government, if he be willing to submit to the decision of a jury, the questions, whether the law be intrinsically just and obligatory? and whether his conduct, in disregarding or resisting it, were right in itself? And any law, which does not, in such trial, obtain the unanimous sanction of twelve men, taken at random from the people, and judging according to the standard of justice in their own minds, free from all dictation and authority of the government, may be transgressed and resisted with impunity, by whomsoever pleases to transgress or resist it.*

The trial by jury authorizes all this, or it is a sham and a hoax, utterly worthless for protecting the people against oppression. If it do not authorize an individual to resist the first and least act of injustice or tyranny, on the part of the government, it does not authorize him to resist the last and the greatest. If it do not authorize individuals to nip tyranny in the bud, it does not authorize them to cut it down when its branches are filled with the ripe fruits of plunder and oppression.

Those who deny the right of a jury to protect an individual in resisting an unjust law of the government, deny him all

* And if there be so much as a reasonable doubt of the justice of the laws, the benefit of that doubt must be given to the defendant, and not to the government. So that the government must keep its laws *clearly* within the limits of justice, if it would ask a jury to enforce them.

legal defence whatsoever against oppression. The right of revolution, which tyrants, in mockery, accord to mankind, is no *legal* right *under* a government; it is only a *natural* right to overturn a government. The government itself never acknowledges this right. And the right is practically established only when and because the government no longer exists to call it in question. The right, therefore, can be exercised with impunity, only when it is exercised victoriously. All *unsuccessful* attempts at revolution, however justifiable in themselves, are punished as treason, if the government be permitted to judge of the treason. The government itself never admits the injustice of its laws, as a legal defence for those who have attempted a revolution, and failed. The right of revolution, therefore, is a right of no practical value, except for those who are stronger than the government. So long, therefore, as the oppressions of a government are kept within such limits as simply not to exasperate against it a power greater than its own, the right of revolution cannot be appealed to, and is therefore inapplicable to the case. This affords a wide field for tyranny; and if a jury cannot *here* intervene, the oppressed are utterly defenceless.

It is manifest that the only security against the tyranny of the government lies in forcible resistance to the execution of the injustice; because the injustice will certainly be executed, *unless it be forcibly resisted*. And if it be but suffered to be executed, it must then be borne; for the government never makes compensation for its own wrongs.

Since, then, this forcible resistance to the injustice of the government is the only possible means of preserving liberty, it is indispensable to all *legal* liberty that this *resistance* should be *legalized*. It is perfectly self-evident that where there is no *legal* right to resist the oppression of the government, there can be no *legal* liberty. And here it is all-important to notice, that, *practically speaking*, there can be no *legal* right to resist the oppressions of the government, unless there be some *legal* tribunal, other than the government, and wholly independent of, and *above*, the government, to judge between the government and those who resist its oppressions; in other words, to judge what laws of the government are to be

obeyed, and what may be resisted and held for nought. The only tribunal known to our laws, for this purpose, is a jury. If a jury have not the right to judge between the government and those who disobey its laws, and resist its oppressions, the government is absolute, and the people, *legally speaking*, are slaves. Like many other slaves they may have sufficient courage and strength to keep their masters somewhat in check; but they are nevertheless *known to the law* only as slaves.

That this right of resistance was recognized as a common law right, when the ancient and genuine trial by jury was in force, is not only proved by the nature of the trial itself, but is acknowledged by history.*

This right of resistance is recognized by the constitution of the United States, as a strictly legal and constitutional right. It is so recognized, first by the provision that "the trial of all crimes, except in cases of impeachment, shall be by jury"—that is, by the country—and not by the government; secondly, by the provision that "the right of the people to keep and bear arms shall not be infringed." This constitutional security for "the right to keep and bear arms," implies the right to use them—as much as a constitutional security for the right to buy and keep food would have implied the right to eat it. The constitution, therefore, takes it for granted that

* *Hallam* says, "The relation established between a lord and his vassal by the feudal tenure, far from containing principles of any servile and implicit obedience, permitted the compact to be dissolved in case of its violation by either party. This extended as much to the sovereign as to inferior lords. * * If a vassal was aggrieved, and if justice was denied him, he sent a defiance, that is, a renunciation of fealty to the king, and was entitled to enforce redress at the point of his sword. It then became a contest of strength as between two independent potentates, and was terminated by treaty, advantageous or otherwise, according to the fortune of war. * * There remained the original principle, that allegiance depended conditionally upon good treatment, and that an appeal might be *lawfully* made to arms against an oppressive government. Nor was this, we may be sure, left for extreme necessity, or thought to require a long-enduring forbearance. In modern times, a king, compelled by his subjects' swords to abandon any pretension, would be supposed to have ceased to reign; and the express recognition of such a right as that of insurrection has been justly deemed inconsistent with the majesty of law. But ruder ages had ruder sentiments. Force was necessary to repel force; and men accustomed to see the king's authority defied by a private riot, were not much shocked when it was resisted in defence of public freedom."—3 *Middle Ages*, 240-2.

the people will judge of the conduct of the government, and that, as they have the right, they will also have the sense, to use arms, whenever the necessity of the case justifies it. And it is a sufficient and *legal* defence for a person accused of using arms against the government, if he can show, to the satisfaction of a jury, *or even any one of a jury*, that the law he resisted was an unjust one.

In the American *State* constitutions also, this right of resistance to the oppressions of the government is recognized, in various ways, as a natural, legal, and constitutional right. In the first place, it is so recognized by provisions establishing the trial by jury; thus requiring that accused persons shall be tried by "the country," instead of the government. In the second place, it is recognized by many of them, as, for example, those of Massachusetts, Maine, Vermont, Connecticut, Pennsylvania, Ohio, Indiana, Michigan, Kentucky, Tennessee, Arkansas, Mississippi, Alabama, and Florida, by provisions expressly declaring that the people shall have the right to bear arms. In many of them also, as, for example, those of Maine, New Hampshire, Vermont, Massachusetts, New Jersey, Pennsylvania, Delaware, Ohio, Indiana, Illinois, Florida, Iowa, and Arkansas, by provisions, in their bills of rights, declaring that men have a natural, inherent, and inalienable right of "*defending* their lives and liberties." This, of course, means that they have a right to defend them against any injustice *on the part of the government*, and not merely on the part of private individuals; because the object of all bills of rights is to assert the rights of individuals and the people, *as against the government*, and not as against private persons. It would be a matter of ridiculous supererogation to assert, in a constitution of government, the natural right of men to defend their lives and liberties against private trespassers.

Many of these bills of rights also assert the natural right of all men to protect their property — that is, to protect it *against the government*. It would be unnecessary and silly indeed to assert, in a constitution of government, the natural right of individuals to protect their property against thieves and robbers.

The constitutions of New Hampshire and Tennessee also declare that "The doctrine of non-resistance against arbitrary power and oppression is absurd, slavish, and destructive of the good and happiness of mankind."

The legal effect of these constitutional recognitions of the right of individuals to defend their property, liberties, and lives, against the government, is to legalize resistance to all injustice and oppression, of every name and nature whatsoever, on the part of the government.

But for this right of resistance, on the part of the people, all governments would become tyrannical to a degree of which few people are aware. Constitutions are utterly worthless to restrain the tyranny of governments, unless it be understood that the people will, by force, compel the government to keep within the constitutional limits. Practically speaking, no government knows any limits to its power, except the endurance of the people. But that the people are stronger than the government, and will resist in extreme cases, our governments would be little or nothing else than organized systems of plunder and oppression. All, or nearly all, the advantage there is in fixing any constitutional limits to the power of a government, is simply to give notice to the government of the point at which it will meet with resistance. If the people are then as good as their word, they may keep the government within the bounds they have set for it; otherwise it will disregard them — as is proved by the example of all our American governments, in which the constitutions have all become obsolete, at the moment of their adoption, for nearly or quite all purposes except the appointment of officers, who at once become practically absolute, except so far as they are restrained by the fear of popular resistance.

The bounds set to the power of the government, by the trial by jury, as will hereafter be shown, are these — that the government shall never touch the property, person, or natural or civil rights of an individual, against his consent, (except for the purpose of bringing them before a jury for trial,) unless in pursuance and *execution* of a judgment, or decree, rendered by a jury in each individual case, upon such evidence, and such law, as are satisfactory to their own understandings and consciences, irrespective of all legislation of the government.

CHAPTER II.

THE TRIAL BY JURY, AS DEFINED BY MAGNA CARTA.

THAT the trial by jury is all that has been claimed for it in the preceding chapter, is proved both by the history and the language of the Great Charter of English Liberties, to which we are to look for a true definition of the trial by jury, and of which the guaranty for that trial is the vital, and most memorable, part.

SECTION I.

The History of Magna Carta.

In order to judge of the object and meaning of that chapter of Magna Carta which secures the trial by jury, it is to be borne in mind that, at the time of Magna Carta, the king (with exceptions immaterial to this discussion, but which will appear hereafter) was, constitutionally, the entire government; the sole *legislative, judicial, and executive* power of the nation. The executive and judicial officers were merely his servants, appointed by him, and removable at his pleasure. In addition to this, "the king himself often sat in his court, which always attended his person. He there heard causes, and pronounced judgment; and though he was assisted by the advice of other members, it is not to be imagined that a decision could be obtained contrary to his inclination or opinion."* Judges were in those days, and afterwards, such abject servants of the king, that "we find that King Edward I. (1272 to 1307) fined and imprisoned his judges, in the same manner as Alfred the Great, among the Saxons, had done before him, by the sole exercise of his authority."†

* 1 Hume, Appendix 2.

† Crabbe's History of the English Law, 236.

Parliament, so far as there was a parliament, was a mere *council* of the king.* It assembled only at the pleasure of the king; sat only during his pleasure; and when sitting had no power, so far as *general* legislation was concerned, beyond that of simply *advising* the king. The only legislation to which their assent was constitutionally necessary, was demands for money and military services for *extraordinary* occasions. Even Magna Carta itself makes no provisions whatever for any parliaments, except when the king should want means to carry on war, or to meet some other *extraordinary* necessity.† He had no need of parliaments to raise taxes for the *ordinary* purposes of government; for his revenues from the rents of the crown lands and other sources, were ample for all except extraordinary occasions. Parliaments, too, when assembled, consisted only of bishops, barons, and other great men of the kingdom, unless the king chose to invite others.‡ There was no House of Commons at that time, and the people had no right to be heard, unless as petitioners.§

* Coke says, "The king of England is armed with divers councils, one whereof is called *commune concilium*, (the common council,) and that is the court of parliament, and so it is *legally* called in writs and judicial proceedings *commune concilium regni Angliæ*, (the common council of the kingdom of England.) And another is called *magnum concilium*, (great council;) this is sometimes applied to the upper house of parliament, and sometimes, out of parliament time, to the peers of the realm, lords of parliament, who are called *magnum concilium regis*, (the great council of the king;) * * Thirdly, (as every man knoweth,) the king hath a privy council for matters of state. * * The fourth council of the king are his judges for law matters."

1 Coke's Institutes, 110 a.

† The Great Charter of Henry III., (1216 and 1225,) confirmed by Edward I., (1297,) makes no provision whatever for, or mention of, a parliament, unless the provision, (Ch. 37,) that "Escuage, (a military contribution,) from henceforth shall be taken like as it was wont to be in the time of King Henry our grandfather," mean that a parliament shall be summoned for that purpose.

‡ The Magna Carta of John, (Ch. 17 and 18,) defines those who were entitled to be summoned to parliament, to wit, "The Archbishops, Bishops, Abbots, Earls, and Great Barons of the Realm, * * and all others who hold of us *in chief*." Those who held land of the king *in chief* included none below the rank of knights.

§ The parliaments of that time were, doubtless, such as Carlyle describes them, when he says, "The parliament was at first a most simple assemblage, quite cognate to the situation; that Red William, or whoever had taken on him the terrible task of being King of England, was wont to invite, oftentimes about Christmas time, his subordinate Kinglets, Barons as he called them, to give him the pleasure of their company for a week or two; there, in earnest conference all morning, in freer talk over Christmas

Even when laws were made at the time of a parliament, they were made in the name of the king alone. Sometimes it was inserted in the laws, that they were made with the *consent* or *advice* of the bishops, barons, and others assembled; but often this was omitted. Their consent or advice was evidently a matter of no legal importance to the enactment or validity of the laws, but only inserted, when inserted at all, with a view of obtaining a more willing submission to them on the part of the people. The style of enactment generally was, either "*The King wills and commands*," or some other form significant of the sole legislative authority of the king. The king could pass laws at any time when it pleased him. The presence of a parliament was wholly unnecessary. Hume says, "It is asserted by Sir Harry Spelman, as an undoubted fact, that, during the reigns of the Norman princes, every order of the king, issued with the consent of his privy council, had the full force of law."* And other authorities abundantly corroborate this assertion.†

The king was, therefore, constitutionally the government; and the only legal limitation upon his power seems to have been simply the *Common Law*, usually called "*the law of the land*," which he was bound by oath to maintain; (which oath had about the same practical value as similar oaths have always had.) This "law of the land" seems not to have been regarded at all by many of the kings, except so far as they found it convenient to do so, or were constrained to observe it by the fear of arousing resistance. But as all people are slow in making resistance, oppression and usurpation often reached a great height; and, in the case of John, they had become so intolerable as to enlist the nation almost universally against him; and he was reduced to the necessity of complying with any terms the barons saw fit to dictate to him.

It was under these circumstances, that the Great Charter of

cheer all evening, in some big royal hall of Westminster, Winchester, or wherever it might be, with log fires, huge rounds of roast and boiled, not lacking malmsey and other generous liquor, they took counsel concerning the arduous matters of the kingdom."

* Hume, Appendix 2.

† This point will be more fully established hereafter.

English Liberties was granted. The barons of England, sustained by the common people, having their king in their power, compelled him, as the price of his throne, to pledge himself that he would punish no freeman for a violation of any of his laws, unless with the consent of the peers—that is, the equals—of the accused.

The question here arises, Whether the barons and people intended that those peers (the jury) should be mere puppets in the hands of the king, exercising no opinion of their own as to the intrinsic merits of the accusations they should try, or the *justice* of the laws they should be called on to enforce? Whether those haughty and victorious barons, when they had their tyrant king at their feet, gave back to him his throne, with full power to enact any tyrannical laws he might please, reserving only to a jury (“the country”) the contemptible and servile privilege of ascertaining, (under the dictation of the king, or his judges, as to the laws of evidence), the simple *fact* whether those laws had been transgressed? Was this the only restraint, which, when they had all power in their hands, they placed upon the tyranny of a king, whose oppressions they had risen in arms to resist? Was it to obtain such a charter as that, that the whole nation had united, as it were, like one man, against their king? Was it on such a charter that they intended to rely, for all future time, for the security of their liberties? No. They were engaged in no such senseless work as that. On the contrary, when they required him to renounce forever the power to punish any freeman, unless by the consent of his peers, they intended those peers should judge of, and try, the whole case on its merits, independently of all arbitrary legislation, or judicial authority, on the part of the king. In this way they took the liberties of each individual—and thus the liberties of the whole people—entirely out of the hands of the king, and out of the power of his laws, and placed them in the keeping of the people themselves. And this it was that made the trial by jury the palladium of their liberties.

The trial by jury, be it observed, was the only real barrier interposed by them against absolute despotism. Could this trial, then, have been such an entire farce as it necessarily

must have been, if the jury had had no power to judge of the justice of the laws the people were required to obey? Did it not rather imply that the jury were to judge independently and fearlessly as to everything involved in the charge, and especially as to its intrinsic justice, and thereon give their decision, (unbiased by any legislation of the king,) whether the accused might be punished? The reason of the thing, no less than the historical celebrity of the events, as securing the liberties of the people, and the veneration with which the trial by jury has continued to be regarded, notwithstanding its essence and vitality have been almost entirely extracted from it in practice, would settle the question, if other evidences had left the matter in doubt.

Besides, if his laws were to be authoritative with the jury, why should John indignantly refuse, as at first he did, to grant the charter, (and finally grant it only when brought to the last extremity,) on the ground that it deprived him of all power, and left him only the name of a king? *He* evidently understood that the juries were to veto his laws, and paralyze his power, at discretion, by forming their own opinions as to the true character of the offences they were to try, and the laws they were to be called on to enforce; and that "*the king wills and commands*" was to have no weight with them contrary to their own judgments of what was intrinsically right.*

The barons and people having obtained by the charter all the liberties they had demanded of the king, it was further

* It is plain that the king and all his partisans looked upon the charter as utterly prostrating the king's legislative supremacy before the discretion of juries. When the schedule of liberties demanded by the barons was shown to him, (of which the trial by jury was the most important, because it was the only one that protected all the rest,) "the king, falling into a violent passion, asked, *Why the barons did not with these exactions demand his kingdom?* * * and with a solemn oath protested, that he would never grant such liberties as would make himself a slave." * * But afterwards, "seeing himself deserted, and fearing they would seize his castles, he sent the Earl of Pembroke and other faithful messengers to them, to let them know *he would grant them the laws and liberties they desired.*" * * But after the charter had been granted, "the king's mercenary soldiers, desiring war more than peace, were by their leaders continually whispering in his ears, *that he was now no longer king, but the scorn of other princes; and that it was more eligible to be no king, than such a one as he.*" * * He applied "to the

provided by the charter itself that twenty-five barons should be appointed by the barons, out of their number, to keep special vigilance in the kingdom to see that the charter was observed, with authority to make war upon the king in case of its violation. The king also, by the charter, so far absolved all the people of the kingdom from their allegiance to him, as to authorize and require them to swear to obey the twenty-five barons, in case they should make war upon the king for infringement of the charter. It was then thought by the barons and people, that something substantial had been done for the security of their liberties.

This charter, in its most essential features, and without any abatement as to the trial by jury, has since been confirmed more than thirty times; and the people of England have always had a traditional idea that it was of some value as a guaranty against oppression. Yet that idea has been an entire delusion, unless the jury have had the right to judge of the justice of the laws they were called on to enforce.

SECTION II.

The Language of Magna Carta.

The language of the Great Charter establishes the same point that is established by its history, viz., that it is the right and duty of the jury to judge of the justice of the laws.

Pope, that he might by his apostolic authority make void what the barons had done. * * At Rome he met with what success he could desire, where all the transactions with the barons were fully represented to the Pope, and the Charter of Liberties shown to him, in writing; which, when he had carefully perused, he, with a furious look, cried out, *What! Do the barons of England endeavor to dethrone a king, who has taken upon him the Holy Cross, and is under the protection of the Apostolic See; and would they force him to transfer the dominions of the Roman Church to others? By St. Peter, this injury must not pass unpunished.* Then debating the matter with the cardinals, he, by a definitive sentence, damned and cassated forever the Charter of Liberties, and sent the king a bull containing that sentence at large." — *Echard's History of England*, p. 106-7.

These things show that the nature and effect of the charter were well understood by the king and his friends; that they all agreed that he was effectually stripped of power. *Yet the legislative power had not been taken from him; but only the power to enforce his laws, unless juries should freely consent to their enforcement.*

The chapter guaranteeing the trial by jury is in these words:

“Nullus liber homo capiatur, vel imprisonetur, aut disseisetur, aut utlagetur, aut exuletur, aut aliquo modo destruat; nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum, vel per legem terræ.”*

The corresponding chapter in the Great Charter, granted by Henry III., (1225,) and confirmed by Edward I., (1297,) (which charter is now considered the basis of the English laws and constitution,) is in nearly the same words, as follows:

“Nullus liber homo capiatur, vel imprisonetur, aut disseisetur de libero tenemento, vel libertatibus, vel liberis consuetudinibus suis, aut utlagetur, aut exuletur, aut aliquo modo destruat, nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum, vel per legem terræ.”†

The most common translation of these words, at the present day, is as follows:

“No freeman shall be arrested, or imprisoned, or deprived of his freehold, or his liberties, or free customs, or outlawed, or exiled, or in any manner destroyed, *nor will we (the king) pass upon him, nor condemn him*, unless by the judgment of his peers, or the law of the land.”

“*Nec super eum ibimus, nec super eum mittemus.*”

There has been much confusion and doubt as to the true meaning of the words, “*nec super eum ibimus, nec super eum mittemus.*” The more common rendering has been, “*nor will we pass upon him, nor condemn him.*” But some have translated them to mean, “*nor will we pass upon him, nor commit him to prison.*” Coke gives still a different rendering, to the effect that “No man shall be condemned at the king’s suit, either before the king in his bench, nor before any other commissioner or judge whatsoever.”†

But all these translations are clearly erroneous. In the first

* The laws were, at that time, all written in Latin.

† “No man shall be condemned at the king’s suit, either before the king in his bench, where pleas are *coram rege*, (before the king,) (and so are the words *nec super eum ibimus*, to be understood,) nor before any other commissioner or judge whatsoever, and so are the words *nec super eum mittemus*, to be understood, but by the judgment of his peers, that is, equals, or according to the law of the land.”—2 *Coke’s Inst.*, 46.

place, "*nor will we pass upon him,*" — meaning thereby to decide upon his guilt or innocence *judicially* — is not a correct rendering of the words, "*nec super eum ibimus.*" There is nothing whatever, in these latter words, that indicates *judicial* action or opinion at all. The words, in their common signification, describe *physical* action alone. And the true translation of them, as will hereafter be seen, is, "*nor will we proceed against him,*" *executively.*

In the second place, the rendering, "*nor will we condemn him,*" bears little or no analogy to any common, or even uncommon, signification of the words "*nec super eum mittemus.*" There is nothing in these latter words that indicates *judicial* action or decision. Their common signification, like that of the words *nec super eum ibimus,* describes *physical* action alone. "*Nor will we send upon (or against) him,*" would be the most obvious translation, and, as we shall hereafter see, such is the true translation.

But although these words describe *physical* action, on the part of the king, as distinguished from *judicial,* they nevertheless do not mean, as one of the translations has it, "*nor will we commit him to prison;*" for that would be a mere repetition of what had been already declared by the words "*nec imprisonetur.*" Besides, there is nothing about prisons in the words "*nec super eum mittemus;*" nothing about sending *him* anywhere; but only about sending (something or somebody) *upon* him, or *against* him — that is, *executively.*

Coke's rendering is, if possible, the most absurd and gratuitous of all. What is there in the words, "*nec super eum mittemus;*" that can be made to mean "*nor shall he be condemned before any other commissioner or judge whatsoever?*" Clearly there is nothing. The whole rendering is a sheer fabrication. And the whole object of it is to give color for the exercise of a *judicial* power, by the king, or his judges, which is nowhere given them.

Neither the words, "*nec super eum ibimus, nec super eum mittemus,*" nor any other words in the whole chapter, authorize, provide for, describe, or suggest, any *judicial* action whatever, on the part either of the king, or of his judges, or of anybody, *except the peers, or jury.* There is nothing about

the king's *judges* at all. And there is nothing whatever, in the whole chapter, *so far as relates to the action of the king*, that describes or suggests anything but *executive* action.*

But that all these translations are certainly erroneous, is proved by a temporary charter, granted by John a short time previous to the Great Charter, for the purpose of giving an opportunity for conference, arbitration, and reconciliation between him and his barons. It was to have force until the matters in controversy between them could be submitted to the Pope, and to other persons to be chosen, some by the king, and some by the barons. The words of the charter are as follows:

"Sciatis nos concessisse baronibus nostris qui contra nos sunt quod nec eos nec homines suos capiemus, nec disseisimus nec super eos per vim vel per arma ibimus nisi per legem regni nostri vel per iudicium parium suorum in curia nostra donec consideratio facta fuerit," &c., &c.

That is, "Know that we have granted to our barons who are opposed to us, that we will neither arrest them nor their men, nor disseize them, nor will we proceed against them by force or by arms, unless by the law of our kingdom, or by the judgment of our peers in our court, until consideration shall be had," &c., &c.

A copy of this charter is given in a note in Blackstone's Introduction to the Charters.†

Mr. Christian speaks of this charter as settling the true meaning of the corresponding clause of Magna Carta, on the principle that laws and charters on the same subject are to be construed with reference to each other. See 3 *Christian's Blackstone*, 41, note.

* Perhaps the assertion in the text should be made with this qualification — that the words "*per legem terre*," (according to the law of the land,) and the words "*per legale iudicium parium suorum*," (according to the legal judgment of his peers,) imply that the king, before proceeding to any *executive* action, will take notice of "the law of the land," and of the *legality* of the judgment of the peers, and will *execute* upon the prisoner nothing except what the law of the land authorizes, and no judgments of the peers, except *legal* ones. With this qualification, the assertion in the text is strictly correct — that there is nothing in the whole chapter that grants to the king, or his judges, any *judicial* power at all. The chapter only describes and *limits* his *executive* power.

† See Blackstone's *Law Tracts*, page 294, Oxford Edition.

The true meaning of the words, *nec super eum ibimus, nec super eum mittemus*, is also proved by the "Articles of the Great Charter of Liberties," demanded of the king by the barons, and agreed to by the king, under seal, a few days before the date of the Charter, and from which the Charter was framed.* Here the words used are these:

"Ne corpus liberi hominis capiatur nec imprisonetur nec disseisetur nec utlagetur nec exuletur nec aliquo modo destruat^r nec rex eat vel mittat super eum vi nisi per iudicium parium suorum vel per legem terræ."

That is, "The body of a freeman shall not be arrested, nor imprisoned, nor disseized, nor outlawed, nor exiled, nor in any manner destroyed, nor shall the king proceed or send (any one) against him WITH FORCE, unless by the judgment of his peers, or the law of the land."

The true translation of the words *nec super eum ibimus, nec super eum mittemus*, in Magna Carta, is thus made certain, as follows, "nor will we (the king) proceed against him, nor send (any one) against him WITH FORCE OR ARMS."†

It is evident that the difference between the true and false translations of the words, *nec super eum ibimus, nec super eum mittemus*, is of the highest legal importance, inasmuch as the true translation, *nor will we (the king) proceed against him, nor send (any one) against him by force or arms*, represents the king only in an executive character, carrying the judgment of the peers and "the law of the land" into execution; whereas the false translation, *nor will we pass upon him, nor condemn him*, gives color for the exercise of a judicial power, on the

* These Articles of the Charter are given in Blackstone's collection of Charters, and are also printed with the *Statutes of the Realm*. Also in Wilkins' *Laws of the Anglo-Saxons*, p. 356.

† Lingard says, "The words, 'We will not destroy him, nor will we go upon him, nor will we send upon him,' have been very differently expounded by different legal authorities. Their real meaning may be learned from John himself, who the next year promised by his letters patent . . . *nec super eos per vim vel per arma ibimus, nisi per legem regni nostri, vel per iudicium parium suorum in curia nostra*, (nor will we go upon them by force or by arms, unless by the law of our kingdom, or the judgment of their peers in our court.) Pat. 16 Johan, apud Drad. 11, app. no. 124. He had hitherto been in the habit of going with an armed force, or sending an armed force on the lands, and against the castles, of all whom he knew or suspected to be his secret enemies, without observing any form of law."—3 Lingard, 47 note.

part of the king, to which the king had no right, but which, according to the true translation, belongs wholly to the jury.

“*Per legale iudicium parium suorum.*”

The foregoing interpretation is corroborated, (if it were not already too plain to be susceptible of corroboration,) by the true interpretation of the phrase “*per legale iudicium parium suorum.*”

In giving this interpretation, I leave out, for the present, the word *legale*, which will be defined afterwards.

The true meaning of the phrase, *per iudicium parium suorum*, is, according to the sentence of his peers. The word *iudicium*, judgment, has a technical meaning in the law, signifying the decree rendered in the decision of a cause. In civil suits this decision is called a *judgment*; in chancery proceedings it is called a *decree*; in criminal actions it is called a *sentence*, or *judgment*, indifferently. Thus, in a criminal suit, “a motion in arrest of *judgment*,” means a motion in arrest of *sentence*.*

In cases of sentence, therefore, in criminal suits, the words *sentence* and *judgment* are synonymous terms. They are, to this day, commonly used in law books as synonymous terms. And the phrase *per iudicium parium suorum*, therefore, implies that the jury are to fix the sentence.

The word *per* means according to. Otherwise there is no sense in the phrase *per iudicium parium suorum*. There

* “*Judgment, iudicium.* * * The sentence of the law, pronounced by the court, upon the matter contained in the record.” — 3 *Blackstone*, 395. *Jacob's Law Dictionary*. *Tomlin's do.*

“*Judgment* is the decision or sentence of the law, given by a court of justice or other competent tribunal, as the result of the proceedings instituted therein, for the redress of an injury.” — *Bouvier's Law Dict.*

“*Judgment, iudicium.* * * Sentence of a judge against a criminal. * * Determination, decision in general.” — *Bailey's Dict.*

“*Judgment.* * * In a legal sense, a sentence or decision pronounced by authority of a king, or other power, either by their own mouth, or by that of their judges and officers, whom they appoint to administer justice in their stead.” — *Chambers' Dict.*

“*Judgment.* * * In law, the sentence or doom pronounced in any case, civil or criminal, by the judge or court by which it is tried.” — *Webster's Dict.*

Sometimes the punishment itself is called *iudicium, judgment*; or, rather, it was at the time of Magna Carta. For example, in a statute passed fifty-one years after

would be no sense in saying that a king might imprison, disseize, outlaw, exile, or otherwise punish a man, or proceed against him, or send any one against him, *by force or arms, by* a judgment of his peers; but there is sense in saying that the king may imprison, disseize, and punish a man, or proceed against him, or send any one against him, *by force or arms, according to* a judgment, or *sentence*, of his peers; because in that case the king would be merely carrying the sentence or judgment of the peers into execution.

The word *per*, in the phrase "*per judicium parium suorum*," of course means precisely what it does in the next phrase, "*per legem terræ*;" where it obviously means *according to*, and not *by*, as it is usually translated. There would be no sense in saying that the king might proceed against a man by force or arms, *by* the law of the land; but there is sense in saying that he may proceed against him, by force or arms, *according to* the law of the land; because the king would then be acting only as an executive officer, carrying the law of the land into execution. Indeed, the true meaning of the word *by*, as used in similar cases now, always is *according to*; as, for example, when we say a thing was done by the government, or by the executive, *by law*, we mean only that it was done by them *according to law*; that is, that they merely executed the law.

Or, if we say that the word *by* signifies *by authority of*, the result will still be the same; for nothing can be done *by authority of law*, except what the law itself authorizes or directs

Magna Carta, it was said that a baker, for default in the weight of his bread, "*debeat ameriari vel subire judicium pillorie*;" that is, ought to be amerced, or suffer the punishment, or judgment, of the pillory. Also that a brewer, for "*selling ale contrary to the assise*," "*debeat ameriari, vel pati judicium tumbrelli*"; that is, ought to be amerced, or suffer the punishment, or judgment, of the tumbrel. — 51 *Henry 3, St. 6.* (1266.)

Also the "*Statutes of uncertain date*," (but supposed to be prior to Edward III., or 1326,) provide, in chapters 6, 7, and 10, for "*judgment of the pillory*." — See 1 *Ruffhead's Statutes*, 187, 188. 1 *Statutes of the Realm*, 203.

Blackstone, in his chapter "*Of Judgment, and its Consequences*," says,

"*Judgment* (unless any matter be offered in arrest thereof) follows upon conviction; being the pronouncing of that punishment which is expressly ordained by law." — *Blackstone's Analysis of the Laws of England, Book 4, Ch. 29, Sec. 1. Blackstone's Law Tracts*, 126.

Coke says, "*Judicium . . . the judgment is the guide and direction of the execution.*" 3 *Inst.* 210.

to be done; that is, nothing can be done by authority of law, except simply to carry the law itself into execution. So nothing could be done *by authority of* the sentence of the peers, or *by authority of* "the law of the land," except what the sentence of the peers, or the law of the land, themselves authorized or directed to be done; nothing, in short, but to carry the sentence of the peers, or the law of the land, themselves into execution.

Doing a thing *by law*, or *according to law*, is only carrying the law into execution. And punishing a man *by*, or *according to*, the sentence or judgment of his peers, is only carrying that sentence or judgment into execution.

If these reasons could leave any doubt that the word *per* is to be translated *according to*, that doubt would be removed by the terms of an antecedent guaranty for the trial by jury, granted by the Emperor Conrad, of Germany,* two hundred years before Magna Carta. Blackstone cites it as follows:— (3 *Blackstone*, 350.)

"Nemo beneficium suum perdat, nisi *secundum* consuetudinem antecessorum nostrorum, et iudicium parium suorum." That is, No one shall lose his estate, † unless *according to* ("*secundum*") the custom (or law) of our ancestors, and (*according to*) the sentence (or judgment) of his peers.

The evidence is therefore conclusive that the phrase *per iudicium parium suorum* means *according to the sentence of his peers*; thus implying that the jury, and not the government, are to fix the sentence.

If any additional proof were wanted that juries were to fix the sentence, it would be found in the following provisions of Magna Carta, viz.:

"A freeman shall not be amerced for a small crime, (*delicto*), but according to the degree of the crime; and for a great crime in proportion to the magnitude of it, saving to him his *contene-*

* This precedent from Germany is good authority, because the trial by jury was in use, in the northern nations of Europe generally, long before Magna Carta, and probably from time immemorial; and the Saxons and Normans were familiar with it before they settled in England.

† *Beneficium* was the legal name of an estate held by a feudal tenure. See Spelman's Glossary.

ment;* and after the same manner a merchant, saving to him his merchandise. And a villein shall be amerced after the same manner, saving to him his waynage,† if he fall under our mercy; and none of the aforesaid ameracements shall be imposed, (or assessed, ponatur,) but by the oath of honest men of the neighborhood. Earls and Barons shall not be amerced but by their peers, and according to the degree of their crime.”‡

Pecuniary punishments were the most common punishments at that day, and the foregoing provisions of Magna Carta show that the amount of those punishments was to be fixed by the jury.

Fines went to the king, and were a source of revenue; and if the amounts of the fines had been left to be fixed by the king, he would have had a pecuniary temptation to impose unreasonable and oppressive ones. So, also, in regard to other punishments than fines. If it were left to the king to fix the punishment, he might often have motives to inflict cruel and oppressive ones. As it was the object of the trial by jury to protect the people against all possible oppression from the king, it was necessary that the jury, and not the king, should fix the punishments.§

“*Legale.*”

The word “*legale*,” in the phrase “*per legale iudicium*”

* *Contentement* of a freeman was the means of living in the condition of a freeman.

† *Waynage* was a villein's plough-tackle and carts.

‡ Tomlin says, “The ancient practice was, when any such fine was imposed, to inquire by a jury *quantum inde regi dare valeat per annum, salva sustentatione sua et uxoris et liberorum suorum*, (how much is he able to give to the king per annum, saving his own maintenance, and that of his wife and children). And since the disuse of such inquest, it is never usual to assess a larger fine than a man is able to pay, without touching the implements of his livelihood; but to inflict corporal punishment, or a limited imprisonment, instead of such a fine as might amount to imprisonment for life. And this is the reason why fines in the king's courts are frequently denominated ransoms, because the penalty must otherwise fall upon a man's person, unless it be redeemed or ransomed by a pecuniary fine.” — *Tomlin's Law Dict.*, word *Fine*.

§ Because juries were to fix the sentence, it must not be supposed that the king was obliged to carry the sentence into execution; but only that he could not go beyond the sentence. He might pardon, or he might acquit on grounds of law, notwithstanding the sentence; but he could not punish beyond the extent of the sentence. Magna Carta does not prescribe that the king shall punish according to the sentence of the peers; but only that he shall not punish “unless according to” that sentence. He may acquit or pardon, notwithstanding their sentence or judgment; but he cannot punish, except according to their judgment.

parium suorum," doubtless means two things. 1. That the sentence must be given in a legal manner; that is, by the legal number of jurors, legally empanelled and sworn to try the cause; and that they give their judgment or sentence after a legal trial, both in form and substance, has been had. 2. That the sentence shall be for a legal cause or offence. If, therefore, a jury should convict and sentence a man, either without giving him a legal trial, or for an act that was not really and legally criminal, the sentence itself would not be legal; and consequently this clause forbids the king to carry such a sentence into execution; for the clause guarantees that he will execute no judgment or sentence, except it be *legale iudicium*, a legal sentence. Whether a sentence be a legal one, would have to be ascertained by the king or his judges, on appeal, or might be judged of informally by the king himself.

The word "*legale*" clearly did not mean that the *iudicium parium suorum* (judgment of his peers) should be a sentence which any law (of the king) should *require* the peers to pronounce; for in that case the sentence would not be the sentence of the peers, but only the sentence of the law, (that is, of the king); and the peers would be only a mouthpiece of the law, (that is, of the king,) in uttering it.

"Per legem terræ."

One other phrase remains to be explained, viz., "*per legem terræ*," "*by the law of the land.*"

All writers agree that this means the *common law*. Thus, Sir Matthew Hale says:

"The common law is sometimes called, by way of eminence, *lex terræ*, as in the statute of *Magna Carta*, chap. 29, where certainly the common law is principally intended by those words, *aut per legem terræ*; as appears by the exposition thereof in several subsequent statutes; and particularly in the statute of 28 Edward III., chap. 3, which is but an exposition and explanation of that statute. Sometimes it is called *lex Angliæ*, as in the statute of Merton, cap. 9, "*Nolumus leges Angliæ mutari*," &c., (We will that the laws of England be not changed). Sometimes it is called *lex et consuetudo regni* (the law and custom of the kingdom); as in all commissions of oyer and terminer; and in the statutes of 18 Edward I., cap. —, and *de quo warranto*, and divers others. But most

commonly it is called the Common Law, or the Common Law of England; as in the statute *Articuli super Chartas*, cap. 15, in the statute 25 Edward III., cap. 5, (4,) and infinite more records and statutes." — 1 *Hale's History of the Common Law*, 128.

This common law, or "law of the land," *the king was sworn to maintain*. This fact is recognized by a statute made at Westminster, in 1346, by Edward III., which commences in this manner:

"Edward, by the Grace of God, &c., &c., to the Sheriff of Stafford, Greeting: Because that by divers complaints made to us, we have perceived that *the law of the land, which we by oath are bound to maintain*," &c. — *St. 20 Edward III.*

The foregoing authorities are cited to show to the unprofessional reader, what is well known to the profession, that *legem terræ*, *the law of the land*, mentioned in Magna Carta, was the common, ancient, fundamental law of the land, which the kings were bound by oath to observe; and that it did not include any statutes or laws enacted by the king himself, the legislative power of the nation.

If the term *legem terræ* had included laws enacted by the king himself, the whole chapter of Magna Carta, now under discussion, would have amounted to nothing as a protection to liberty; because it would have imposed no restraint whatever upon the power of the king. The king could make laws at any time, and such ones as he pleased. He could, therefore, have done anything he pleased, *by the law of the land*, as well as in any other way, if his own laws had been "*the law of the land*." If his own laws had been "*the law of the land*," within the meaning of that term as used in Magna Carta, this chapter of Magna Carta would have been sheer nonsense, inasmuch as the whole purport of it would have been simply that "no man shall be arrested, imprisoned, or deprived of his freehold, or his liberties, or free customs, or outlawed, or exiled, or in any manner destroyed (by the king); nor shall the king proceed against him, nor send any one against him with force and arms, unless by the judgment of his peers, or *unless the king shall please to do so*."

This chapter of Magna Carta would, therefore, have imposed not the slightest restraint upon the power of the king, or

afforded the slightest protection to the liberties of the people, if the laws of the king had been embraced in the term *legem terræ*. But if *legem terræ* was the common law, which the king was sworn to maintain, then a real restriction was laid upon his power, and a real guaranty given to the people for their liberties.

Such, then, being the meaning of *legem terræ*, the fact is established that Magna Carta took an accused person entirely out of the hands of the legislative power, that is, of the king; and placed him in the power and under the protection of his peers, and the common law alone; that, in short, Magna Carta suffered no man to be punished for violating any enactment of the legislative power, unless the peers or equals of the accused freely consented to it, or the common law authorized it; that the legislative power, *of itself*, was wholly incompetent to require the conviction or punishment of a man for any offence whatever.

Whether Magna Carta allowed of any other trial than by jury.

The question here arises, whether "*legem terræ*" did not allow of some other mode of trial than that by jury.

The answer is, that, at the time of Magna Carta, it is not probable, (for the reasons given in the note,) that *legem terræ* authorized, in criminal cases, any other trial than the trial by jury; but, if it did, it certainly authorized none but the trial by battle, the trial by ordeal, and the trial by compurgators. These were the only modes of trial, except by jury, that had been known in England, in criminal cases, for some centuries previous to Magna Carta. All of them had become nearly extinct at the time of Magna Carta, and it is not probable that they were included in "*legem terræ*," as that term is used in that instrument. But if they were included in it, they have now been long obsolete, and were such as neither this nor any future age will ever return to.* For all practical purposes of

* *The trial by battle* was one in which the accused challenged his accuser to single combat, and staked the question of his guilt or innocence on the result of the duel. This trial was introduced into England by the Normans, within one hundred and fifty years before Magna Carta. It was not very often resorted to even by the Normans

the present day, therefore, it may be asserted that Magna Carta allows no trial whatever but trial by jury.

Whether Magna Carta allowed sentence to be fixed otherwise than by the jury.

Still another question arises on the words *legem terræ*, viz., whether, in cases where the question of guilt was determined by the jury, the amount of *punishment* may not have been fixed by *legem terræ*, the Common Law, instead of its being fixed by the jury.

I think we have no evidence whatever that, at the time of Magna Carta, or indeed at any other time, *lex terræ*, the com-

themselves; probably never by the Anglo-Saxons, unless in their controversies with the Normans. It was strongly discouraged by some of the Norman princes, particularly by Henry II., by whom the trial by jury was especially favored. It is probable that the trial by battle, so far as it prevailed at all in England, was rather tolerated as a matter of chivalry, than authorized as a matter of law. At any rate, it is not likely that it was included in the "*legem terræ*" of Magna Carta, although such duels have occasionally occurred since that time, and have, by some, been supposed to be lawful. I apprehend that nothing can be properly said to be a part of *lex terræ*, unless it can be shown either to have been of Saxon origin, or to have been recognized by Magna Carta.

The trial by ordeal was of various kinds. In one ordeal the accused was required to take hot iron in his hand; in another to walk blindfold among red-hot ploughshares; in another to thrust his arm into boiling water; in another to be thrown, with his hands and feet bound, into cold water; in another to swallow the *morsel of excretion*; in the confidence that his guilt or innocence would be miraculously made known. This mode of trial was nearly extinct at the time of Magna Carta, and it is not likely that it was included in "*legem terræ*," as that term is used in that instrument. This idea is corroborated by the fact that the trial by ordeal was specially prohibited only four years after Magna Carta, "by act of Parliament in 3 Henry III., according to Sir Edward Coke, or rather by an order of the king in council." — 3 *Blackstone* 345, note.

I apprehend that this trial was never forced upon accused persons, but was only allowed to them, as an appeal to God, from the judgment of a jury.*

The trial by compurgators was one in which, if the accused could bring twelve of his neighbors, who would make oath that they believed him innocent, he was held to be so. It is probable that this trial was really the trial by jury, or was allowed as an appeal from a jury. It is wholly improbable that two different modes of trial, so nearly resembling each other as this and the trial by jury do, should prevail at the same time, and among a rude people, whose judicial proceedings would naturally be of the simplest kind. But if this trial really were any other than the trial by jury, it must have been nearly or quite extinct at the time of Magna Carta; and there is no probability that it was included in "*legem terræ*."

* Hallam says, "It appears as if the ordeal were permitted to persons already convicted by the verdict of a jury." — 2 *Middle Ages*, 446, note.

mon law, fixed the punishment in cases where the question of guilt was tried by a jury; or, indeed, that it did in any other case. Doubtless certain punishments were common and usual for certain offences; but I do not think it can be shown that the *common law*, the *lex terræ*, which the king was sworn to maintain, required any one specific punishment, or any precise amount of punishment, for any one specific offence. If such a thing be claimed, it must be shown, for it cannot be presumed. In fact, the contrary must be presumed, because, in the nature of things, the amount of punishment proper to be inflicted in any particular case, is a matter requiring the exercise of discretion at the time, in order to adapt it to the moral quality of the offence, which is different in each case, varying with the mental and moral constitutions of the offenders, and the circumstances of temptation or provocation. And Magna Carta recognizes this principle distinctly, as has before been shown, in providing that freemen, merchants, and villeins, "shall not be amerced for a small crime, but according to the degree of the crime; and for a great crime in proportion to the magnitude of it;" and that "none of the aforesaid amerancements shall be imposed (or assessed) but by the oaths of honest men of the neighborhood;" and that "earls and barons shall not be amerced but by their peers, and according to the quality of the offence."

All this implies that the moral quality of the offence was to be judged of at the trial, and that the punishment was to be fixed by the discretion of the peers, or jury, and not by any such unvarying rule as a common law rule would be.

I think, therefore, it must be conceded that, in all cases, tried by a jury, Magna Carta intended that the punishment should be fixed by the jury, and not by the common law, for these several reasons.

1. It is uncertain whether the *common law* fixed the punishment of any offence whatever.

2. The words "*per judicium parium suorum*," according to the sentence of his peers, imply that the jury fixed the sentence in *some* cases tried by them; and if they fixed the sentence in some cases, it must be presumed they did in all, unless the contrary be clearly shown.

3. The express provisions of Magna Carta, before adverted to, that no ameracements, or fines, should be imposed upon freemen, merchants, or villeins, "but by the oath of honest men of the neighborhood," and "according to the degree of the crime," and that "earls and barons should not be amerced but by their peers, and according to the quality of the offence," *proves* that, at least, there was no common law fixing the amount of *fines*, or, if there were, that it was to be no longer in force. And if there was no common law fixing the amount of *fines*, or if it was to be no longer in force, it is reasonable to infer, (in the absence of all evidence to the contrary,) either that the common law did not fix the amount of any other punishment, or that it was to be no longer in force for that purpose.*

Under the Saxon laws, fines, payable to the injured party, seem to have been the common punishments for all offences. Even murder was punishable by a fine payable to the relatives of the deceased. The murder of the king even was punishable

* Coke attempts to show that there is a distinction between ameracements and fines—admitting that ameracements must be fixed by one's peers, but claiming that fines may be fixed by the government. (2 *Inst.* 27, 8 *Coke's Reports* 38.) But there seems to have been no ground whatever for supposing that any such distinction existed at the time of Magna Carta. If there were any such distinction in the time of Coke, it had doubtless grown up within the four centuries that had elapsed since Magna Carta, and is to be set down as one of the numberless inventions of government for getting rid of the restraints of Magna Carta, and for taking men out of the protection of their peers, and subjecting them to such punishments as the government chooses to inflict.

The first statute of Westminster, passed sixty years after Magna Carta, treats the fine and amercement as synonymous, as follows:

"Forasmuch as the common fine and amercement of the whole county in Eyre of the justices for false judgments, or for other trespass, is unjustly assessed by sheriffs and baretors in the shires, * * it is provided, and the king wills, that from henceforth such sums shall be assessed before the justices in Eyre, afore their departure, by the oath of knights and other honest men," &c.—3 *Edward I.*, Ch. 18. (1275.)

And in many other statutes passed after Magna Carta, the terms *fine* and *amercement* seem to be used indifferently, in prescribing the punishments for offences. As late as 1461, (246 years after Magna Carta,) the statute 1 *Edward IV.*, Ch. 2, speaks of "*fines, ransoms, and amerciaments*" as being levied upon criminals, as if they were the common punishments of offences.

St. 2 and 3 *Philip and Mary*, Ch. 8, uses the terms, "*fines, forfeitures, and amerciaments*" five times. (1555.)

St. 5 *Elizabeth*, Ch. 13, Sec. 10, uses the terms "*fines, forfeitures, and amerciaments.*"

That ameracements were fines, or pecuniary punishments, inflicted for offences, is proved by the following statutes, (all supposed to have been passed within one hundred

by fine. When a criminal was unable to pay his fine, his relatives often paid it for him. But if it were not paid, he was put out of the protection of the law, and the injured parties, (or, in the case of murder, the kindred of the deceased,) were allowed to inflict such punishment as they pleased. And if the relatives of the criminal protected him, it was lawful to take vengeance on them also. Afterwards the custom grew up of exacting fines also to the king as a punishment for offences.* And this latter was, doubtless, the usual punishment at the time of Magna Carta, as is evidenced by the fact that for many years immediately following Magna Carta, nearly or quite all statutes that prescribed any punishment at all, prescribed that the offender should "be grievously amerced," or "pay a great fine to the king," or a "grievous ransom," — with the alternative in some cases (perhaps *understood* in all) of imprisonment, banishment, or outlawry, in case of non-payment.†

and fifteen years after Magna Carta,) which speak of ameracements as a species of "judgment," or punishment, and as being inflicted for the same offences as other "judgments."

Thus one statute declares that a baker, for default in the weight of his bread, "ought to be amerced, or suffer the judgment of the pillory;" and that a brewer, for "selling ale contrary to the assize," "ought to be amerced, or suffer the judgment of the tumbrel." — 51 *Henry III.*, *St.* 6. (1266.)

Among the "*Statutes of Uncertain Date*," but supposed to be prior to Edward III., (1326,) are the following:

Chap. 6 provides that "if a brewer break the assize, (fixing the price of ale,) the first, second, and third time, he shall be amerced; but the fourth time he shall suffer judgment of the pillory without redemption."

Chap. 7 provides that "a butcher that selleth swine's flesh measled, or flesh dead of the murrain, or that buyeth flesh of Jews, and selleth the same unto Christians, after he shall be convict thereof, for the first time he shall be grievously amerced; the second time he shall suffer judgment of the pillory; and the third time he shall be imprisoned and make fine; and the fourth time he shall forswear the town."

Chap. 10, a statute against *forestalling*, provides that,

"He that is convict thereof, the first time shall be amerced, and shall lose the thing so bought, and that according to the custom of the town; he that is convicted the second time shall have judgment of the pillory; at the third time he shall be imprisoned and make fine; the fourth time he shall abjure the town. And this judgment shall be given upon all manner of forestallers, and likewise upon them that have given them counsel, help, or favor." — 1 *Ruffhead's Statutes*, 187, 188. 1 *Statutes of the Realm*, 203.

* 1 Hume, Appendix, 1.

† Blackstone says, "Our ancient Saxon laws nominally punished theft with death, if above the value of twelve pence; but the criminal was permitted to redeem his life

Judging, therefore, from the special provisions in Magna Carta, requiring *finēs*, or amercements, to be imposed only by juries, (without mentioning any other punishments;) judging, also, from the statutes which immediately followed Magna Carta, it is probable that the Saxon custom of punishing all, or nearly all, offences by *finēs*, (with the alternative to the criminal of being imprisoned, banished, or outlawed, and exposed to private vengeance, in case of non-payment,) continued until the time of Magna Carta; and that in providing expressly that *finēs* should be fixed by the juries, Magna Carta provided for nearly or quite all the punishments that were expected to be inflicted; that if there were to be any others, they were to be fixed by the juries; and consequently that nothing was left to be fixed by "*legem terræ*."

But whether the common law fixed the punishment of any offences, or not, is a matter of little or no practical importance at this day; because we have no idea of going back to any common law punishments of six hundred years ago, if, indeed, there were any such at that time. It is enough for us to know — *and this is what it is material for us to know* — that the jury fixed the punishments, in all cases, unless they were fixed by the *common law*; that Magna Carta allowed

by a pecuniary ransom, as among their ancestors, the Germans, by a stated number of cattle. But in the ninth year of Henry the First, (1109,) this power of redemption was taken away, and all persons guilty of larceny above the value of twelve pence were directed to be hanged, which law continues in force to this day." — 4 *Blackstone*, 238.

I give this statement of Blackstone, because the latter clause may seem to militate with the idea, which the former clause corroborates, viz., that at the time of Magna Carta, fines were the usual punishments of offences. But I think there is no probability that a law so unreasonable in itself, (unreasonable even after making all allowance for the difference in the value of money,) and so contrary to immemorial custom, could or did obtain any general or speedy acquiescence among a people who cared little for the authority of kings.

Maddox, writing of the period from William the Conqueror to John, says :

"The amercements in criminal and common pleas, which were wont to be imposed during this first period and afterwards, were of so many several sorts, that it is not easy to place them under distinct heads. Let them, for method's sake, be reduced to the heads following: Amercements for or by reason of murders and manslaughters, for misdemeanors, for disseisins, for recreancy, for breach of assize, for defaults, for non-appearance, for false judgment, and for not making suit, or hue and cry. To them may be added miscellaneous amercements, for trespasses of divers kinds." — 1 *Maddox's History of the Exchequer*, 542.

no punishments to be prescribed by statute — that is, by the legislative power — nor in any other manner by the king, or his judges, in any case whatever; and, consequently, that all statutes prescribing particular punishments for particular offences, or giving the king's judges any authority to fix punishments, were void.

If the power to fix punishments had been left in the hands of the king, it would have given him a power of oppression, which was liable to be greatly abused; which there was no occasion to leave with him; and which would have been incongruous with the whole object of this chapter of Magna Carta; which object was to take all discretionary or arbitrary power over individuals entirely out of the hands of the king, and his laws, and entrust it only to the common law, and the peers, or jury — that is, the people.

What lex terræ did authorize.

But here the question arises, What then did "*legem terræ*" authorize the king, (that is, the government,) to do in the case of an accused person, if it neither authorized any other trial than that by jury, nor any other punishments than those fixed by juries?

The answer is, that, owing to the darkness of history on the point, it is probably wholly impossible, at this day, to state, *with any certainty or precision*, anything whatever that the *legem terræ* of Magna Carta did authorize the king, (that is, the government,) to do, (if, indeed, it authorized him to do anything,) in the case of criminals, *other than to have them tried and sentenced by their peers, for common law crimes*; and to carry that sentence into execution.

The trial by jury was a part of *legem terræ*, and we have the means of knowing what the trial by jury was. The fact that the jury were to fix the sentence, implies that they were to *try* the accused; otherwise they could not know what sentence, or whether any sentence, ought to be inflicted upon him. Hence it follows that the jury were to judge of everything involved in the trial; that is, they were to judge of the nature of the offence, of the admissibility and weight of testimony, and of everything else whatsoever that was of the essence of

the trial. If anything whatever could be dictated to them, either of law or evidence, the sentence would not be theirs, but would be dictated to them by the power that dictated to them the law or evidence. The trial and sentence, then, were wholly in the hands of the jury.

We also have sufficient evidence of the nature of the oath administered to jurors in criminal cases. It was simply, that they *would neither convict the innocent, nor acquit the guilty*. This was the oath in the Saxon times, and probably continued to be until Magna Carta.

We also know that, in case of *conviction*, the sentence of the jury was not necessarily final; that the accused had the right of appeal to the king and his judges, and to demand either a new trial, or an acquittal, if the trial or conviction had been against law.

So much, therefore, of the *legem terræ* of Magna Carta, we know with reasonable certainty.

We also know that Magna Carta provides that "No bailiff (*balivus*) shall hereafter put any man to his law, (put him on trial,) on his single testimony, without credible witnesses brought to support it." Coke thinks "that under this word *balivus*, in this act, is comprehended every justice, minister of the king, steward of the king, steward and bailiff." (2 Inst. 44.) And in support of this idea he quotes from a very ancient law book, called the Mirror of Justices, written in the time of Edward I., within a century after Magna Carta. But whether this were really a common law principle, or whether the provision grew out of that jealousy of the government which, at the time of Magna Carta, had reached its height, cannot perhaps now be determined.

We also know that, by Magna Carta, amercements, or fines, could not be imposed to the ruin of the criminal; that, in the case of a freeman, his *contenement*, or means of subsisting in the condition of a freeman, must be saved to him; that, in the case of a merchant, his merchandise must be spared; and in the case of a villein, his *waynage*, or plough-tackle and carts. This also is likely to have been a principle of the common law, inasmuch as, in that rude age, when the means of getting employment as laborers were not what they are

now, the man and his family would probably have been liable to starvation, if these means of subsistence had been taken from him.

We also know, *generally*, that, at the time of Magna Carta, *all acts intrinsically criminal*, all trespasses against persons and property, were crimes, according to *lex terræ*, or the common law.

Beyond the points now given, we hardly know anything, probably nothing *with certainty*, as to what the "*legem terræ*" of *Magna Carta* did authorize, in regard to crimes. There is hardly anything extant that can give us any real light on the subject.

It would seem, however, that there were, even at that day, some common law principles governing arrests; and some common law forms and rules as to holding a man for trial, (by bail or imprisonment;) putting him on trial, such as by indictment or complaint; summoning and empanelling jurors, &c., &c. Whatever these common law principles were, Magna Carta requires them to be observed; for Magna Carta provides for the whole proceedings, commencing with the arrest, ("no freeman shall be *arrested*," &c.,) and ending with the execution of the sentence. And it provides that nothing shall be done, by the government, from beginning to end, unless according to the sentence of the peers, or "*legem terræ*," the common law. The trial by peers was a part of *legem terræ*, and we have seen that the peers must necessarily have governed the whole proceedings at the trial. But all the proceedings for arresting the man, and bringing him to trial, must have been had before the case could come under the cognizance of the peers, and they must, therefore, have been governed by other rules than the discretion of the peers. We may *conjecture*, although we cannot perhaps know with much certainty, that the *lex terræ*, or common law, governing these other proceedings, was somewhat similar to the common law principles, on the same points, at the present day. Such seem to be the opinions of Coke, who says that the phrase *nisi per legem terræ* means *unless by due process of law*.

Thus, he says:

"*Nisi per legem terræ. But by the law of the land. For*

the true sense and exposition of these words, see the statute of 37 Edw. III., cap. 8, where the words, *by the law of the land*, are rendered *without due process of law*; for there it is said, though it be contained in the Great Charter, that no man be taken, imprisoned, or put out of his freehold, *without process of the law; that is, by indictment or presentment of good and lawful men, where such deeds be done in due manner, or by writ original of the common law.*

"Without being brought in to answer but by due process of the common law.

"No man be put to answer without presentment before justices, or thing of record, or by due process, or by writ original, *according to the old law of the land.*" — 2 *Inst.* 50.

The foregoing interpretations of the words *nisi per legem terræ* are corroborated by the following statutes, enacted in the next century after Magna Carta.

"That no man, from henceforth, shall be attached by any accusation, nor forejudged of life or limb, nor his land, tenements, goods, nor chattels, seized into the king's hands, against the form of the Great Charter, *and the law of the land.*" — *St. 5 Edward III., Ch. 9.* (1331.)

"Whereas it is contained in the Great Charter of the franchises of England, that none shall be imprisoned, nor put out of his freehold, nor of his franchises, nor free customs, *unless it be by the law of the land*; it is accorded, assented, and established, that from henceforth none shall be taken by petition, or suggestion made to our lord the king, or to his council, *unless it be by indictment or presentment of good and lawful people of the same neighborhood where such deeds be done in due manner, or by process made by writ original at the common law*; nor that none be put out of his franchises, nor of his freehold, *unless he be duly brought into answer, and forejudged of the same by the course of the law*; and if anything be done against the same, it shall be redressed and holden for none." — *St. 25 Edward III., Ch. 4.* (1350.)

"That no man, of what estate or condition that he be, shall be put out of land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought in answer *by due process of law.*" — *St. 28 Edward III., Ch. 3.* (1354.)

"That no man be put to answer without presentment before justices, or matter of record, or by due process and writ original, according to the *old law of the land.* And if anything from henceforth be done to the contrary, it shall be void in law, and holden for error." — *St. 42 Edward III., Ch. 3.* (1368.)

The foregoing interpretation of the words *nisi per legem terræ*—that is, *by due process of law*—including indictment, &c., has been adopted as the true one by modern writers and courts; as, for example, by Kent, (2 *Comm.* 13,) Story, (3 *Comm.* 661,) and the Supreme Court of New York, (19 *Wendell*, 676; 4 *Hill*, 146.)

The fifth amendment to the constitution of the United States seems to have been framed on the same idea, inasmuch as it provides that “no person shall be deprived of life, liberty, or property, *without due process of law.*”*

Whether the word VEL should be rendered by OR, or by AND.

Having thus given the meanings, or rather the applications, which the words *vel per legem terræ* will reasonably, and perhaps must necessarily, bear, it is proper to suggest, that it has been supposed by some that the word *vel*, instead of being rendered by *or*, as it usually is, ought to be rendered by *and*, inasmuch as the word *vel* is often used for *et*, and the whole phrase *nisi per iudicium parium suorum, vel per legem terræ*, (which would then read, unless by the sentence of his peers, *and* the law of the land,) would convey a more intelligible and harmonious meaning than it otherwise does.

Blackstone suggests that this may be the true reading. (*Charters*, p. 41.) Also Mr. Hallam, who says :

“*Nisi per legale iudicium parium suorum, vel per legem terræ.* Several explanations have been offered of the alternative clause; which some have referred to judgment by default, or demurrer; others to the process of attachment for contempt. Certainly there are many legal procedures besides trial by jury, through which a party's goods or person may be taken. But one may doubt whether these were in contemplation of the framers of Magna Carta. In an entry of the Charter of 1217 by a contemporary hand, preserved in the Town-clerk's office in London, called *Liber Custumarum et Regum antiquarum*, a various reading, *et per legem terræ*, occurs. *Blackstone's Charters*, p. 42 (41.) And the word *vel* is so frequently used for *et*, that I am not wholly free from a suspicion that it

* Coke, in his exposition of the words *legem terræ*, gives quite in detail the principles of the common law governing *arrests*; and takes it for granted that the words “*nisi per legem terræ*” are applicable to *arrests*, as well as to the indictment, &c. — 2 *Inst.*, 51, 52.

was so intended in this place. The meaning will be, that no person shall be disseized, &c., except upon a lawful cause of action, found by the verdict of a jury. This really seems as good as any of the disjunctive interpretations; but I do not offer it with much confidence." — 2 *Hullam's Middle Ages*, Ch. 8, Part 2, p. 449, note.*

* I cite the above extract from Mr. Hallam solely for the sake of his authority for rendering the word *vel* by *and*; and not by any means for the purpose of indorsing the opinion he suggests, that *legem terræ* authorized "judgments by default or demurrer," *without the intervention of a jury*. He seems to imagine that *lex terræ*, the common law, at the time of Magna Carta, included everything, even to the practice of courts, that is, at *this day*, called by the name of *Common Law*; whereas much of what is *now* called *Common Law* has grown up, by usurpation, since the time of Magna Carta, in palpable violation of the authority of that charter. He says, "Certainly there are many legal procedures, besides *trial* by jury, through which a party's goods or person may be taken." Of course there are *now* many such ways, in which a party's goods or person are taken, besides by the judgment of a jury; but the question is, whether such takings are not in violation of Magna Carta.

He seems to think that, in cases of "judgment by default or demurrer," there is no need of a jury, and thence to infer that *legem terræ* may not have required a jury in those cases. But this opinion is founded on the erroneous idea that juries are required only for determining contested *facts*, and not for judging of the law. In case of default, the plaintiff must present a *prima facie* case before he is entitled to a judgment; and Magna Carta, (supposing it to require a jury trial in civil cases, as Mr. Hallam assumes that it does,) as much requires that this *prima facie* case, both law and fact, be made out to the satisfaction of a jury, as it does that a contested case shall be.

As for a demurrer, the jury must try a demurrer (having the advice and assistance of the court, of course) as much as any other matter of law arising in a case.

Mr. Hallam evidently thinks there is no use for a jury, except where there is a "trial" — meaning thereby a contest on matters of *fact*. His language is, that "there are many legal procedures, besides *trial* by jury, through which a party's goods or person may be taken." Now Magna Carta says nothing of *trial* by jury; but only of the *judgment*, or sentence, of a jury. It is only *by inference* that we come to the conclusion that there must be a *trial* by jury. Since the jury alone can give the *judgment*, or *sentence*, we *infer* that they must *try* the case; because otherwise they would be incompetent, and would have no moral right, to give *judgment*. They must, therefore, examine the grounds, (both of law and fact,) or rather *try* the grounds, of every action whatsoever, whether it be decided on "default, demurrer," or otherwise, and render their judgment, or sentence, thereon, before any judgment can be a legal one, on which "to take a party's goods or person." In short, the principle of Magna Carta is, that no judgment can be valid *against a party's goods or person*, (not even a judgment for costs,) except a judgment rendered by a jury. Of course a jury must try every question, both of law and fact, that is involved in the rendering of that judgment. They are to have the assistance and advice of the judges, so far as they desire them; but the judgment itself must be theirs, and not the judgment of the court.

As to "process of attachment for contempt," it is of course lawful for a judge, in his character of a peace officer, to issue a warrant for the arrest of a man guilty of a contempt, as he would for the arrest of any other offender, and hold him to bail, (or, in default of bail, commit him to prison,) to answer for his offence before a jury. Or he

The idea that the word *vel* should be rendered by *and*, is corroborated, if not absolutely confirmed, by the following passage in Blackstone, which has before been cited. Speaking of the trial by jury, as established by Magna Carta, he calls it,

“ A privilege which is couched in almost the same words

may order him into custody without a warrant when the offence is committed in the judge's presence. But there is no reason why a judge should have the power of *punishing* for contempt, any more than for any other offence. And it is one of the most dangerous powers a judge can have, because it gives him absolute authority in a court of justice, and enables him to tyrannize as he pleases over parties, counsel, witnesses, and jurors. If a judge have power to punish for contempt, and to determine for himself what is a contempt, the whole administration of justice (or injustice, if he choose to make it so) is in his hands. And all the rights of jurors, witnesses, counsel, and parties, are held subject to his pleasure, and can be exercised only agreeably to his will. He can of course control the entire proceedings in, and consequently the decision of, every cause, by restraining and punishing every one, whether party, counsel, witness, or juror, who presumes to offer anything contrary to his pleasure.

This arbitrary power, which has been usurped and exercised by judges to punish for contempt, has undoubtedly had much to do in subduing counsel into those servile, obsequious, and cowardly habits, which so universally prevail among them, and which have not only cost so many clients their rights, but have also cost the people so many of their liberties.

If any *summary* punishment for contempt be ever necessary, (as it probably is not,) beyond exclusion for the time being from the court-room, (which should be done, not as a punishment, but for self-protection, and the preservation of order,) the judgment for it should be given by the jury, (where the trial is before a jury,) and not by the court, for the jury, and not the court, are really the judges. For the same reason, exclusion from the court-room should be ordered only by the jury, in cases when the trial is before a jury, because they, being the real judges and triers of the cause, are entitled, if anybody, to the control of the court-room. In appeal courts, where no juries sit, it may be necessary — not as a punishment, but for self-protection, and the maintenance of order — that the court should exercise the power of excluding a person, for the time being, from the court-room; but there is no reason why they should proceed to sentence him as a criminal, without his being tried by a jury.

If the people wish to have their rights respected and protected in courts of justice, it is manifestly of the last importance that they jealously guard the liberty of parties, counsel, witnesses, and jurors, against all arbitrary power on the part of the court.

Certainly Mr. Hallam may very well say that “one may doubt whether these (the several cases he has mentioned) were in contemplation of the framers of Magna Carta” — that is, as exceptions to the rule requiring that all judgments, that are to be enforced “*against a party's goods or person*,” be rendered by a jury.

Again, Mr. Hallam says, if the word *vel* be rendered by *and*, “the meaning will be, that no person shall be disseized, &c., *except upon a lawful cause of action*.” This is true; but it does not follow that any cause of action, founded on *statute only*, is therefore a “*lawful cause of action*,” within the meaning of *legem terra*, or the *Common Law*. Within the meaning of the *legem terra* of Magna Carta, nothing but a *common law cause of action* is a “*lawful*” one.

with that of the Emperor Conrad two hundred years before: 'nemo beneficium suum perdat, nisi secundum consuetudinem antecessorum nostrorum, *et* iudicium parium suorum.'” (No one shall lose his estate unless according to the custom of our ancestors, *and* the judgment of his peers.) — 3 *Blackstone*, 350.

If the word *vel* be rendered by *and*, (as I think it must be, at least in some cases,) this chapter of Magna Carta will then read that no freeman shall be arrested or punished, “unless according to the sentence of his peers, *and* the law of the land.”

The difference between this reading and the other is important. In the one case, there would be, at first view, some color of ground for saying that a man might be punished in either of two ways, *viz.*, according to the sentence of his peers, *or* according to the law of the land. In the other case, it requires both the sentence of his peers *and* the law of the land (common law) to authorize his punishment.

If this latter reading be adopted, the provision would seem to exclude all trials except trial by jury, and all causes of action except those of the *common law*.

But I apprehend the word *vel* must be rendered both by *and*, and by *or*; that in cases of a *judgment*, it should be rendered by *and*, so as to require the concurrence both of “the judgment of the peers *and* the law of the land,” to authorize the king to make execution upon a party's goods or person; but that in cases of arrest and imprisonment, simply for the purpose of bringing a man to trial, *vel* should be rendered by *or*, because there can have been no judgment of a jury in such a case, and “the law of the land” must therefore necessarily be the only guide to, and restraint upon, the king. If this guide and restraint were taken away, the king would be invested with an arbitrary and most dangerous power in making arrests, and confining in prison, under pretence of an intention to bring to trial.

Having thus examined the language of this chapter of Magna Carta, so far as it relates to criminal cases, its legal import may be stated as follows, *viz.* :

No freeman shall be arrested, or imprisoned, or deprived of his freehold, or his liberties, or free customs, or be outlawed,

or exiled, or in any manner destroyed, (harmed,) nor will we (the king) proceed against him, nor send any one against him, by force or arms, unless according to (that is, in execution of) the sentence of his peers, *and* (or *or*, as the case may require) the Common Law of England, (as it was at the time of Magna Carta, in 1215.)

CHAPTER III.

ADDITIONAL PROOFS OF THE RIGHTS AND DUTIES OF JURORS.

If any evidence, extraneous to the history and language of Magna Carta, were needed to prove that, by that chapter which guaranties the trial by jury, all was meant that has now been ascribed to it, *and that the legislation of the king was to be of no authority with the jury beyond what they chose to allow to it*, and that the juries were to limit the punishments to be inflicted, we should find that evidence in various sources, such as the laws, customs, and characters of their ancestors on the continent, and of the northern Europeans generally; in the legislation and customs that immediately succeeded Magna Carta; in the oaths that have at different times been administered to jurors, &c., &c. This evidence can be exhibited here but partially. To give it all would require too much space and labor.

SECTION I.

Weakness of the Regal Authority.

Hughes, in his preface to his translation of Horne's "*Mirror of Justices*," (a book written in the time of Edward I., 1272 to 1307,) giving a concise view of the laws of England generally, says:

"Although in the Saxon's time I find the usual words of the acts then to have been *edictum*, (edict,) *constitutio*, (statute,) little mention being made of the commons, yet I further find that, *tum demum leges vim et vigorem habuerunt, cum fuerunt non modo institutæ sed firmatæ approbatione communitatis*." (The laws had force and vigor only when they were not only enacted, but confirmed by the approval of the community.)

The *Mirror of Justices* itself also says, (ch. 1, sec. 3,) in speaking "Of the first Constitutions of the Ancient Kings:"

"Many ordinances were made by many kings, until the time of the king that now is (Edward I.); the which ordinances were abused, or not used by many, nor very current, because they were not put in writing, and certainly published." — *Mirror of Justices*, p. 6.

Hallam says:

"The Franks, Lombards, and Saxons seem alike to have been jealous of judicial authority; and averse to surrendering what concerned every man's private right, out of the hands of his neighbors and equals." — 1 *Middle Ages*, 271.

The "judicial authority," here spoken of, was the authority of the kings, (who at that time united the office of both legislators and judges,) and not of a separate department of government, called the judiciary, like what has existed in more modern times.*

Hume says:

"The government of the Germans, and that of all the northern nations, who established themselves on the ruins of Rome, was always extremely free; and those fierce people, accustomed to independence and inured to arms, were more guided by persuasion than authority, in the submission which they paid to their princes. The military despotism, which had taken place in the Roman empire, and which, previously to the irruption of those conquerors, had sunk the genius of men, and destroyed every noble principle of science and virtue, was unable to resist the vigorous efforts of a free people, and Europe, as from a new epoch, rekindled her ancient spirit, and shook off the base servitude to arbitrary will and authority under which she had so long labored. The free constitutions then established, however impaired by the encroachments of succeeding princes, still preserve an air of independence and legal administration, which distinguished the European nations; and if that part of the globe maintain sentiments

* Hale says:

"The trial by jury of twelve men was the usual trial among the Normans, in most suits; especially in assizes, *et juris utrum*." — 1 *Hale's History of the Common Law*, 219.

This was in Normandy, before the conquest of England by the Normans. See *Ditto*, p. 218.

Crabbe says:

"It cannot be denied that the practice of submitting causes to the decision of twelve men was universal among all the northern tribes (of Europe) from the very remotest antiquity." — *Crabbe's History of the English Law*, p. 32.

of liberty, honor, equity, and valor, superior to the rest of mankind, it owes these advantages chiefly to the seeds implanted by those generous barbarians.

“The Saxons, who subdued Britain, as they enjoyed great liberty in their own country, obstinately retained that invaluable possession in their new settlement; and they imported into this island the same principles of independence, which they had inherited from their ancestors. The chieftains, (for such they were, more than kings or princes,) who commanded them in those military expeditions, still possessed a very limited authority; and as the Saxons exterminated, rather than subdued the ancient inhabitants, they were, indeed, transplanted into a new territory, but preserved unaltered all their civil and military institutions. The language was pure Saxon; even the names of places, which often remain while the tongue entirely changes, were almost all affixed by the conquerors; the manners and customs were wholly German; and the same picture of a fierce and bold liberty, which is drawn by the masterly pen of Tacitus, will suit those founders of the English government. The king, so far from being invested with arbitrary power, was only considered as the first among the citizens; his authority depended more on his personal qualities than on his station; he was even so far on a level with the people, that a stated price was fixed for his head, and a legal fine was levied upon his murderer, which though proportionate to his station, and superior to that paid for the life of a subject, was a sensible mark of his subordination to the community.” — 1 Hume, Appendix, 1.

Stuart says:

“The Saxons brought along with them into Britain their own customs, language, and civil institutions. Free in Germany, they renounced not their independence, when they had conquered. Proud from victory, and with their swords in their hands, would they surrender their liberties to a private man? Would temporary leaders, limited in their powers, and unprovided in resources, ever think to usurp an authority over warriors, who considered themselves as their equals, were impatient of control, and attached with devoted zeal to their privileges? Or, would they find leisure to form resolutions, or opportunities to put them in practice, amidst the tumult and confusion of those fierce and bloody wars, which their nations first waged with the Britons, and then engaged in among themselves? Sufficiently flattered in leading the armies of their countrymen, the ambition of commanders could as little suggest such designs, as the liberty of the people could submit to them. The conquerors of Britain retained their independ-

ence; and this island saw itself again in that free state in which the Roman arms had discovered it.

“The same firmness of character, and generosity of manners, which, in general, distinguished the Germans, were possessed in an eminent degree by the Saxons; and while we endeavor to unfold their political institutions, we must perpetually turn our observation to that masterly picture in which the Roman historian has described these nations. In the woods of Germany shall we find the principles which directed the state of land, in the different kingdoms of Europe; and there shall we find the foundation of those ranks of men, and of those civil arrangements, which the barbarians everywhere established; and which the English alone have had the good fortune, or the spirit, to preserve.” — *Stuart on the Constitution of England*, p. 59-61.

“Kings they (the Germans) respected as the first magistrates of the state; but the authority possessed by them was narrow and limited.” — *Ditto*, p. 134.

“Did he, (the king,) at any time, relax his activity and martial ardor, did he employ his abilities to the prejudice of his nation, or fancy he was superior to the laws; the same power which raised him to honor, humbled and degraded him. The customs and councils of his country pointed out to him his duty; and if he infringed on the former, or disobeyed the latter, a fierce people set aside his authority. * * *

“His long hair was the only ornament he affected, and to be foremost to attack an enemy was his chief distinction. Engaged in every hazardous expedition, he was a stranger to repose; and, rivalled by half the heroes of his tribe, he could obtain little power. Anxious and watchful for the public interest, he felt every moment his dependence, and gave proofs of his submission.

“He attended the general assembly of his nation, and was allowed the privilege of harangue it first; but the arts of persuasion, though known and respected by a rude people, were unequally opposed to the prejudices and passions of men.” — *Ditto*, p. 135-6.

“*The authority of a Saxon monarch was not more considerable. The Saxons submitted not to the arbitrary rule of princes. They administered an oath to their sovereigns, which bound them to acknowledge the laws, and to defend the rights of the church and people; and if they forgot this obligation, they forfeited their office.* In both countries, a price was affixed on kings, a fine expiated their murder, as well as that of the meanest citizen; and the smallest violation of ancient usage,

or the least step towards tyranny, was always dangerous, and often fatal to them." — *Ditto*, p. 139-40.

"They were not allowed to impose taxes on the kingdom." — *Ditto*, p. 146.

"Like the German monarchs, they deliberated in the general assembly of the nation; *but their legislative authority was not much respected*; and their assent was considered in no better light than as a form. This, however, was their chief prerogative; and they employed it to acquire an ascendant in the state. To art and insinuation they turned, as their only resource, and flattered a people whom they could not awe; but address, and the abilities to persuade, were a weak compensation for the absence of real power.

"They declared war, it is said, and made peace. In both cases, however, they acted as the instruments of the state, and put in execution the resolutions which its councils had decreed. If, indeed, an enemy had invaded the kingdom, and its glory and its safety were concerned, the great lords took the field at the call of their sovereign. But had a sovereign declared war against a neighboring state, without requiring their advice, or if he meant to revenge by arms an insult offered to him by a subject, a haughty and independent nobility refused their assistance. These they considered as the quarrels of the king, and not of the nation; and in all such emergencies he could only be assisted by his retainers and dependents." — *Ditto*, p. 147-8.

"Nor must we imagine that the Saxon, any more than the German monarchs, succeeded each other in a lineal descent,* or that they disposed of the crown at their pleasure. In both countries, the free election of the people filled the throne; and their choice was the only rule by which princes reigned. The succession, accordingly, of their kings was often broken and interrupted, and their depositions were frequent and groundless. The will of a prince whom they had long respected, and the favor they naturally transferred to his descendant, made them often advance him to the royal dignity; but the crown of his ancestor he considered as the gift of the people, and neither expected nor claimed it as a right." — *Ditto*, p. 151-3.

In Germany "It was the business of the great to command in war, and in peace they distributed justice. * * *

* "The people, who in every general council or assembly could oppose and dethrone their sovereigns, were in little dread of their encroachments on their liberties; and kings, who found sufficient employment in keeping possession of their crowns, would not likely attack the more important privileges of their subjects."

“The *princes* in Germany were *earls* in England. The great contended in both countries in the number of their retainers, and in that splendor and magnificence which are so alluring to a rude people; and though they joined to set bounds to regal power, they were often animated against each other with the fiercest hatred. To a proud and impatient nobility it seemed little and unsuited to give or accept compositions for the injuries they committed or received; and their vassals adopting their resentment and passions, war and bloodshed alone could terminate their quarrels. What necessarily resulted from their situation in society, was continued as a *privilege*; and the great, in both countries, made war, of their private authority, on their enemies. The Saxon earls even carried their arms against their sovereigns; and, surrounded with retainers, or secure in fortresses and castles, they despised their resentment, and defied their power.

“The judges of the people, they presided in both countries in courts of law.* The particular districts over which they exerted their authority were marked out in Germany by the council of the state; and in England their jurisdiction extended over the fiefs and other territories they possessed. All causes, both civil and criminal, were tried before them; and they judged, except in cases of the utmost importance, without appeal. They were even allowed to grant pardon to criminals, and to correct by their clemency the rigors of justice. Nor did the sovereign exercise any authority in their lands. In these his officers formed no courts, and his *writ* was disregarded. * * *

“They had officers, as well as the king, who collected their revenues, and added to their greatness; and the inhabitants of their lands they distinguished by the name of *subjects*.

“But to attend the general assembly of their nation was the chief prerogative of the German and Saxon princes; and as they consulted the interest of their country, and deliberated concerning matters of state, so in the *king's court*, of which also they were members, they assisted to pronounce judgment in the complaints and appeals which were lodged in it.”—*Ditto*, p. 158 to 165.

Henry says:

“Nothing can be more evident than this important truth; that our Anglo-Saxon kings were not absolute monarchs; but

* This office was afterwards committed to sheriffs. But even while the court was held by the lord, “the Lord was not judge, but the Peers (peers) only.”—*Gilbert on the Court of Exchequer*, 61-2.

that their powers and prerogatives were limited by the laws and customs of the country. Our Saxon ancestors had been governed by limited monarchs in their native seats on the continent; and there is not the least appearance or probability that they relinquished their liberties, and submitted to absolute government in their new settlements in this island. It is not to be imagined that men, whose reigning passion was the love of liberty, would willingly resign it; and their new sovereigns, who had been their fellow-soldiers, had certainly no power to compel them to such a resignation." — *3 Henry's History of Great Britain*, 358.

Mackintosh says: "The Saxon chiefs, who were called kings, originally acquired power by the same natural causes which have gradually, and everywhere, raised a few men above their fellows. They were, doubtless, more experienced, more skilful, more brave, or more beautiful, than those who followed them. * * A king was powerful in war by the lustre of his arms, and the obvious necessity of obedience. His influence in peace fluctuated with his personal character. In the progress of usage his power became more fixed and more limited. * * It would be very unreasonable to suppose that the northern Germans who had conquered England, had so far changed their characteristic habits from the age of Tacitus, that the victors became slaves, and that their generals were converted into tyrants." — *Mackintosh's Hist. of England*, Ch. 2. *45 Lardner's Cab. Cyc.*, 73-4.

Rapin, in his discourse on the "Origin and Nature of the English Constitution," says:

"There are but two things the Saxons did not think proper to trust their kings with; for being of like passions with other men, they might very possibly abuse them; namely, the power of changing the laws enacted by consent of king and people; and the power of raising taxes at pleasure. From these two articles sprung numberless branches concerning the liberty and property of the subject, which the king cannot touch, without breaking the constitution, and they are the distinguishing character of the English monarchy. The prerogatives of the crown, and the rights and privileges of the people, flowing from the two fore-mentioned articles, are the ground of all the laws that from time to time have been made by unanimous consent of king and people. The English government consists in the strict union of the king's prerogatives with the people's liberties. * * But when kings arose, as some there were, that aimed at absolute power, by changing the old, and making new laws, at pleasure; by imposing illegal

taxes on the people; this excellent government being, in a manner, dissolved by these destructive measures, confusion and civil wars ensued, which some very wrongfully ascribe to the fickle and restless temper of the English."—*Rapin's Preface to his History of England.*

Hallam says that among the Saxons, "the royal authority was weak."—*2 Middle Ages, 403.*

But although the king himself had so little authority, that it cannot be supposed for a moment that his laws were regarded as imperative by the people, it has nevertheless been claimed, in modern times, by some who seem determined to find or make a precedent for the present legislative authority of parliament, that his laws were authoritative, *when assented to* by the *Witena-gemote*, or assembly of wise men—that is, the bishops and barons. But this assembly evidently had no legislative power whatever. The king would occasionally invite the bishops and barons to meet him for consultation on public affairs, *simply as a council*, and not as a legislative body. Such as saw fit to attend, did so. If they were agreed upon what ought to be done, the king would pass a law accordingly, and the barons and bishops would then return and inform the people orally what laws had been passed, and use their influence with them to induce them to conform to the law of the king, and the recommendation of the council. And the people no doubt were much more likely to accept a law of the king, if it had been approved by this council, than if it had not. But it was still only a law of the king, which they obeyed or disregarded according to their own notions of expediency. The numbers who usually attended this council were too small to admit of the supposition that they had any legislative authority whatever, to impose laws upon the people against their will.

Lingard says :

"It was necessary that the king should obtain the assent of these (the members of the *Witena-gemotes*) to all legislative enactments; *because, without their acquiescence and support, it was impossible to carry them into execution.* To many charters (laws) we have the signatures of the *Witan.* *They seldom exceed thirty in number; they never amount to sixty.*"—*1 Lingard, 486.*

It is ridiculous to suppose that the assent of such an assembly gave any *authority* to the laws of the king, or had any influence in securing obedience to them, otherwise than by way of persuasion. If this body had had any real legislative authority, such as is accorded to legislative bodies of the present day, they would have made themselves at once the most conspicuous portion of the government, and would have left behind them abundant evidence of their power, instead of the evidence simply of their assent to a few laws passed by the king.

More than this. If this body had had any real legislative authority, they would have constituted an aristocracy, having, in conjunction with the king, absolute power over the people. Assembling voluntarily, merely on the invitation of the king; deputed by nobody but themselves; representing nobody but themselves; responsible to nobody but themselves; their legislative authority, if they had had any, would of necessity have made the government the government of an aristocracy merely, *and the people slaves, of course*. And this would necessarily have been the picture that history would have given us of the Anglo-Saxon government, *and of Anglo-Saxon liberty*.

The fact that the people had no representation in this assembly, and the further fact that, through their juries alone, they nevertheless maintained that noble freedom, the very tradition of which (after the substance of the thing itself has ceased to exist) has constituted the greatest pride and glory of the nation. to this day, *prove* that this assembly exercised no authority which juries of the people acknowledged, except at their own discretion.*

* The opinion expressed in the text, that the Witan had no legislative authority, is corroborated by the following authorities :

“From the fact that the new laws passed by the king and the Witan were laid before the shire-mote, (county court,) we should be almost justified in the inference that a second sanction was necessary before they could have the effect of law in that particular county.” — *Dunham's Middle Ages, Sec. 2, B. 2, Ch. 1.* 57 *Lardner's Cab. Cyc.*, 53.

The “second sanction” required to give the legislation of the king and Witan the effect of law, was undoubtedly, I think, *as a general thing, the sanction of a jury*. I know of no evidence whatever that laws were ever submitted to popular vote in the county courts, as this author seems to suppose possible. Another mode, sometimes re-

There is not a more palpable truth, in the history of the Anglo-Saxon government, than that stated in the Introduction to Gilbert's History of the Common Pleas,* viz., "*that the County and Hundred Courts,*" (to which should have been added the other courts in which juries sat, the courts-baron and court-leet,) "*in those times were the real and only Parliaments of the kingdom.*" And why were they the real and only parliaments of the kingdom? Solely because, as will be hereafter shown, the juries in those courts tried causes on their intrinsic merits, according to their own ideas of justice, irrespective of the laws agreed upon by kings, priests, and barons; and whatever principles they uniformly, or perhaps generally, enforced, *and none others*, became practically the law of the land as matter of course.†

Finally, on this point. Conclusive proof that the legislation of the king was of little or no authority, is found in the fact *that the kings enacted so few laws*. If their laws had been received as authoritative, in the manner that legislative enactments are at this day, they would have been making laws continually. Yet the codes of the most celebrated kings are very small, and were little more than compilations of immemorial customs. The code of Alfred would not fill twelve

sorted to for obtaining the sanction of the people to the laws of the Witan, was, it seems, to persuade the people themselves to swear to observe them. Mackintosh says :

"The preambles of the laws (of the Witan) speak of the infinite number of *liegemen* who attended, as only applauding the measures of the assembly. But this applause was neither so unimportant to the success of the measures, nor so precisely distinguished from a share in legislation, as those who read history with a modern eye might imagine. It appears that under Athelstan expedients were resorted to, to obtain a consent to the law from great bodies of the people in their districts, which their numbers rendered impossible in a national assembly. That monarch appears to have sent commissioners to hold *shire-gemotes* or county meetings, where they proclaimed the laws made by the king and his counsellors, which, being acknowledged and sworn to at these *folk-motes* (meetings of the people) became, by their assent, completely binding on the whole nation."—*Mackintosh's Hist. of England, Ch. 2.* 45 *Lardner's Cab. Cyc.*, 75.

* Page 31.

† Hallam says, "It was, however, to the county court that an English freeman chiefly looked for the maintenance of his civil rights."—*2 Middle Ages*, 392.

Also, "This (the county court) was the great constitutional judicature in all questions of civil right."—*Ditto*, 395.

Also, "The liberties of these Anglo-Saxon thanes were chiefly secured, next to their swords and their free spirits, by the inestimable right of deciding civil and criminal suits in their own county courts."—*Ditto*, 399.

pages of the statute book of Massachusetts, and was little or nothing else than a compilation of the laws of Moses, and the Saxon customs, evidently collected from considerations of convenience, rather than enacted on the principle of authority. The code of Edward the Confessor would not fill twenty pages of the statute book of Massachusetts, and, says Blackstone, "seems to have been no more than a new edition, or fresh promulgation of Alfred's code, or *dome-book*, with such additions and improvements as the experience of a century and a half suggested." — 1 *Blackstone*, 66.*

* "Alfred may, in one sense, be called the founder of these laws, (the Saxon,) for until his time they were an *unwritten* code, but he expressly says, 'that I, Alfred, collected the good laws of our forefathers into one code, and also I wrote them down' — which is a decisive fact in the history of our laws well worth noting." — *Introduction to Gilbert's History of the Common Pleas*, p. 2, note.

Kelham says, "Let us consult our own lawyers and historians, and they will tell us * * that Alfred, Edgar, and Edward the Confessor, were the great compilers and restorers of the English Laws." — *Kelham's Preliminary Discourse to the Laws of William the Conqueror*, p. 12. *Appendix to Kelham's Dictionary of the Norman Language*.

"He (Alfred) also, like another Theodosius, collected the various customs that he found dispersed in the kingdom, and reduced and digested them into one uniform system, or code of laws, in his *som-bec*, or *liber judicialis* (judicial book). This he compiled for the use of the court baron, hundred and county court, the court-leet and sheriff's tourn, tribunals which he established for the trial of all causes, civil and criminal, in the very districts wherein the complaints arose." — 4 *Blackstone*, 411.

Alfred himself says, "Hence I, King Alfred, gathered these together, and commanded many of those to be written down which our forefathers observed — those which I liked — and those which I did not like, by the advice of my Witan, I threw aside. For I durst not venture to set down in writing over many of my own, since I knew not what among them would please those that should come after us. But those which I met with either of the days of me, my kinsman, or of Offa, King of Mercia, or of Æthelbert, who was the first of the English who received baptism — those which appeared to me the justest — I have here collected, and abandoned the others. Then I, Alfred, King of the West Saxons, showed these to all my Witan, and they then said that they were all willing to observe them." — *Laws of Alfred, translated by R. Price, prefixed to Mackintosh's History of England*, vol. 1. 45 *Lardner's Cab. Cyc.*

"King Edward * * projected and begun what his grandson, King Edward the Confessor, afterwards completed, viz., one uniform digest or body of laws to be observed throughout the whole kingdom, being probably no more than a revival of King Alfred's code, with some improvements suggested by necessity and experience, particularly the incorporating some of the British, or, rather, Mercian customs, and also such of the Danish (customs) as were reasonable and approved, into the *West Saxon Laws*, which was still the ground-work of the whole. And this appears to be the best supported and most plausible conjecture, (for certainty is not to be expected,) of the rise and original of that admirable system of maxims and unwritten customs which is now known by the

The Code of William the Conqueror* would fill less than seven pages of the statute book of Massachusetts; and most of the laws contained in it are taken from the laws of the preceding kings, and especially of Edward the Confessor (whose laws William swore to observe); but few of his own being added.

The codes of the other Saxon and Norman kings were, as a general rule, less voluminous even than these that have been named; and probably did not exceed them in originality.† The Norman princes, from William the Conqueror to John, I think without exception, bound themselves, and, in order to maintain their thrones, were obliged to bind themselves, to observe the ancient laws and customs, in other words, the "*lex terræ*," or "*common law*" of the kingdom. Even Magna Carta contains hardly anything other than this same "*common law*," with some new securities for its observance.

name of the *common law*, as extending its authority universally over all the realm, and which is doubtless of Saxon parentage." — 4 *Blackstone*, 412.

"By the *Lex Terræ* and *Lex Regni* is understood the laws of Edward the Confessor, confirmed and enlarged as they were by William the Conqueror; and this Constitution or Code of Laws is what even to this day are called '*The Common Law of the Land*.'" — *Introduction to Gilbert's History of the Common Pleas*, p. 22, note.

* Not the conqueror of the English people, (as the friends of liberty maintain,) but only of Harold the usurper. — See *Hale's History of the Common Law*, ch. 5.

† For all these codes see *Wilkins' Laws of the Anglo-Saxons*.

"Being regulations adapted to existing institutions, the Anglo-Saxon statutes are concise and technical, alluding to the law which was then living and in vigor, rather than defining it. The same clauses and chapters are often repeated word for word, in the statutes of subsequent kings, showing that enactments which bear the appearance of novelty are merely declaratory. Consequently the appearance of a law, seemingly for the first time, is by no means to be considered as a proof that the matter which it contains is new; nor can we trace the progress of the Anglo-Saxon institutions with any degree of certainty, by following the dates of the statutes in which we find them first noticed. All arguments founded on the apparent chronology of the subjects included in the laws, are liable to great fallacies. Furthermore, a considerable portion of the Anglo-Saxon law was never recorded in writing. There can be no doubt but that the rules of inheritance were well established and defined; yet we have not a single law, and hardly a single document from which the course of the descent of land can be inferred. * * Positive proof cannot be obtained of the commencement of any institution, because the first written law relating to it may possibly be merely confirmatory or declaratory; neither can the non-existence of any institution be inferred from the absence of direct evidence. Written laws were modified and controlled by customs of which no trace can be discovered, until after the lapse of centuries, although those usages must have been in constant vigor during the long interval of silence." — 1 *Palgrave's Rise and Progress of the English Commonwealth*, 58-9.

How is this abstinence from legislation, on the part of the ancient kings, to be accounted for, except on the supposition that the people would accept, and juries enforce, few or no new laws enacted by their kings? Plainly it can be accounted for in no other way. In fact, all history informs us that anciently the attempts of the kings to introduce or establish new laws, met with determined resistance from the people, and generally resulted in failure. "*Nolumus Leges Angliæ mutari,*" (we will that the laws of England be not changed,) was a determined principle with the Anglo-Saxons, from which they seldom departed, up to the time of Magna Carta, and indeed until long after.*

SECTION II.

The Ancient Common Law Juries were mere Courts of Conscience.

But it is in the administration of justice, or of law, that the freedom or subjection of a people is tested. If this administration be in accordance with the arbitrary will of the legislator—that is, if his will, as it appears in his statutes, be the highest rule of decision known to the judicial tribunals,—the government is a despotism, and the people are slaves. If, on the other hand, the rule of decision be those principles of natural equity and justice, which constitute, or at least are embodied in, the general conscience of mankind, the people are free in just so far as that conscience is enlightened.

That the authority of the king was of little weight with the *judicial tribunals*, must necessarily be inferred from the fact already stated, that his authority over the *people* was but weak. If the authority of his laws had been paramount in the judicial tribunals, it would have been paramount with the people; of course; because they would have had no alternative

* Rapin says, "The customs now practised in England are, for the most part, the same as the Anglo-Saxons brought with them from Germany." — *Rapin's Dissertation on the Government of the Anglo-Saxons*, vol. 2, Oct. Ed., p. 138. See *Kalbar's Discourse* before named.

but submission. The fact, then, that his laws were *not* authoritative with the people, is proof that they were *not* authoritative with the tribunals — in other words, that they were not, as matter of course, enforced by the tribunals.

But we have additional evidence that, up to the time of Magna Carta, the laws of the king were not binding upon the judicial tribunals; and if they were not binding before that time, they certainly were not afterwards, as has already been shown from Magna Carta itself. It is manifest from all the accounts we have of the courts in which juries sat, prior to Magna Carta, such as the court-baron, the hundred court, the court-leet, and the county court, *that they were mere courts of conscience, and that the juries were the judges, deciding causes according to their own notions of equity, and not according to any laws of the king, unless they thought them just.*

These courts, it must be considered, were very numerous, and held very frequent sessions. There were probably seven, eight, or nine hundred courts *a month*, in the kingdom; the object being, as Blackstone says, "*to bring justice home to every man's door.*" (3 *Blackstone*, 30.) The number of the *county* courts, of course, corresponded to the number of counties, (36.) The *court-leet* was the criminal court for a district less than a county. The *hundred court* was the court for one of those districts anciently called a *hundred*, because, at the time of their first organization for judicial purposes, they comprised (as is supposed) but a hundred families.* The *court-baron* was the court for a single manor, and there was a court for every manor in the kingdom. All these courts were holden as often as once in three or five weeks; the county court once a month. The king's judges were present at none of these courts; the only officers in attendance being sheriffs, bailiffs, and stewards, merely ministerial, and not judicial, officers; doubtless incompetent, and, if not incompetent, untrustworthy, for giving the juries any reliable information in matters of law, beyond what was already known to the jurors themselves.

* Hallam says, "The county of Sussex contains sixty-five ('hundreds'); that of Dorset forty-three; while Yorkshire has only twenty-six; and Lancashire but six." — 2 *Middle Ages*, 391.

And yet these were the courts, in which was done all the judicial business, both civil and criminal, of the nation, except appeals, and some of the more important and difficult cases.* It is plain that the juries, in these courts, must, of necessity, have been the sole judges of all matters of law whatsoever; because there was no one present, but sheriffs, bailiffs, and stewards, to give them any instructions; and surely it will not be pretended that the jurors were bound to take their law from such sources as these.

In the second place, it is manifest that the principles of law, by which the juries determined causes, were, as a general rule, nothing else than their own ideas of natural equity, *and not any laws of the king*; because but few laws were enacted, and many of those were not written, but only agreed upon in council.† Of those that were written, few copies only were made, (printing being then unknown,) and not enough to supply all, or any considerable number, of these numerous courts. Beside and beyond all this, few or none of the jurors could have read the laws, if they had been written; because few or none of the common people could, at that time, read. Not only were the common people unable to read their own language, but, at the time of Magna Carta, the laws were written in Latin, a language that could be read by few persons except the priests, who were also the lawyers of the nation. Mackintosh says, "the first act of the House of Commons composed and recorded in the English tongue," was in 1415, two centuries after Magna Carta.‡ Up to this time, and for some seventy years later, the laws were generally written

* Excepting also matters pertaining to the collection of the revenue, which were determined in the king's court of exchequer. But even in this court it was the law "*that none be amerced but by his peers.*" — *Mirror of Justices*, 49.

† "For the English laws, *although not written*, may, as it should seem, and that without any absurdity, be termed *laws*, (since this itself is law — that which pleases the prince has the force of law,) I mean those laws which it is evident were promulgated by the advice of the nobles and the authority of the prince, concerning doubts to be settled in their assembly. For if from the mere want of writing only, they should not be considered 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's Preface*, p. 38. (Glanville was chief justice of Henry II., 1180.) 2 *Turner's History of the Anglo-Saxons*, 280.

‡ Mackintosh's *History of England*, ch. 3. Lardner's *Cabinet Cyclopædia*, 266.

either in Latin or French; both languages incapable of being read by the common people, as well Normans as Saxons; and one of them, the Latin, not only incapable of being read by them, but of being even understood when it was heard by them.

To suppose that the people were bound to obey, and juries to enforce, laws, many of which were unwritten, none of which *they* could read, and the larger part of which (those written in Latin) they could not translate, or understand when they heard them read, is equivalent to supposing the nation sunk in the most degrading slavery, instead of enjoying a liberty of their own choosing.

Their knowledge of the laws passed by the king was, of course, derived only from oral information; and "*the good laws*," as some of them were called, in contradistinction to others—those which the people at large esteemed to be good laws—were doubtless enforced by the juries, and the others, as a general thing, disregarded.*

That such was the nature of judicial proceedings, and of the power of juries, up to the time of Magna Carta, is further shown by the following authorities.

"The sheriffs and bailiffs caused the free tenants of their bailiwics to meet at their counties and hundreds; *at which justice was so done, that every one so judged his neighbor by such judgment as a man could not elsewhere receive in the like cases*, until such times as the customs of the realm were put in writing, and certainly published.

"And although a freeman commonly was not to serve (as a juror or judge) without his assent, nevertheless it was assented unto that free tenants should meet together in the counties and hundreds, and lords courts, if they were not specially exempted to do such suits, *and there judged their neighbors.*"
— *Mirror of Justices*, p. 7, 8.

* If the laws of the king were received as authoritative by the juries, what occasion was there for his appointing special commissioners for the trial of offences, without the intervention of a jury, as he frequently did, in manifest and acknowledged violation of Magna Carta, and "the law of the land?" These appointments were undoubtedly made for no other reason than that the juries were not sufficiently subservient, but judged according to their own notions of right, instead of the will of the king—whether the latter were expressed in his statutes, or by his judges.

Gilbert, in his treatise on the Constitution of England, says:

“In the county courts, if the debt was above forty shillings, there issued a *justicies* (a commission) to the sheriff, to enable him to hold such a plea, *where the suitors (jurors) are judges of the law and fact.*” — *Gilbert's Cases in Law and Equity, &c., &c.*, 456.

All the ancient writs, given in Glanville, for summoning jurors, indicate that the jurors judged of everything, *on their consciences only*. The writs are in this form:

“Summon twelve free and legal men (or sometimes twelve knights) to be in court, *prepared upon their oaths to declare whether A or B have the greater right to the land (or other thing) in question.*” See Writs in Beames' Glanville, p. 54 to 70, and 233–306 to 332.

Crabbe, speaking of the time of Henry I., (1100 to 1135,) recognizes the fact that the jurors were the judges. He says:

“By one law, every one was to be tried by his peers, who were of the same neighborhood as himself. * * By another law, *the judges, for so the jury were called*, were to be chosen by the party impleaded, after the manner of the Danish *nembas*; by which, probably, is to be understood that the defendant had the liberty of taking exceptions to, or challenging the jury, as it was afterwards called.” — *Crabbe's History of the English Law*, p. 55.

Reeve says:

“The great court for *civil* business was the *county court*; held once every four weeks. Here the sheriff presided; *but the suitors of the court, as they were called, that is, the freemen or landholders of the county, were the judges*; and the sheriff was to execute the judgment. * * *

“The *hundred court* was held before *some bailiff*; the *leet* before the lord of the manor's *steward*. † * *

“Out of the county court was derived an inferior court of *civil* jurisdiction, called the *court-baron*. This was held from three weeks to three weeks, *and was in every respect like the county court;*” (*that is, the jurors were judges in it;*) “only the lord to whom this franchise was granted, or *his steward*,

† Of course, Mr. Reeve means to be understood that, in the hundred court, and court-leet, *the jurors were the judges*, as he declares them to have been in the county court; otherwise the “*bailiff*” or “*steward*” must have been judge.

presided instead of the sheriff." — 1 *Reeve's History of the English Law*, p. 7.

Chief Baron Gilbert says :

" Besides the tenants of the king, which held *per baroniam*, (by the right of a baron,) and did suit and service (served as judges) at his own court; and the burghers and tenants in ancient demesne, that did suit and service (served as jurors or judges) in their own court in person, and in the king's by proxy, there was also a set of freeholders, that did suit and service (served as jurors) at the county court. These were such as anciently held of the lord of the county, and by the escheats of earldoms had fallen to the king; or such as were granted out by service to hold of the king, but with particular reservation to do suit and service (serve as jurors) before the king's bailiff; because it was necessary the sheriff, or bailiff of the king, should have suitors (jurors) at the county court, that the business might be despatched. These suitors are the *pares* (peers) of the county court, and indeed the judges of it; as the *pares* (peers) were the judges in every court-baron; and therefore the king's bailiff having a court before him, there must be *pares* or judges, for the sheriff himself is not a judge; and though the style of the court is *Curia prima Comitatus E. C. Militi' vicecom' Comital' præd' Tent' apud B., &c.* (First Court of the county, E. C. knight, sheriff of the aforesaid county, held at B., &c.); by which it appears that the court was the sheriff's; yet, by the old feudal constitutions, the lord was not judge, but the *pares* (peers) only; so that, even in a *justicies*, which was a commission to the sheriff to hold plea of more than was allowed by the natural jurisdiction of a county court, the *pares* (peers, jurors) only were judges, and not the sheriff; because it was to hold plea in the same manner as they used to do in that (the lord's) court." — *Gilbert on the Court of Exchequer*, ch. 5, p. 61-2.

" It is a distinguishing feature of the feudal system, to make civil jurisdiction necessarily, and criminal jurisdiction ordinarily, coëxtensive with tenure; and accordingly there is inseparably incident to every manor a court-baron (*curia baronum*), being a court in which the freeholders of the manor are the sole judges, but in which the lord, by himself, or more commonly by his steward, presides." — *Political Dictionary*, word *Manor*.

The same work, speaking of the county court, says: "*The judges were the freeholders who did suit to the court.*" See word *Courts*.

" In the case of freeholders attending as suitors, the county

court or court-baron, (as in the case of the ancient tenants *per baroniam* attending Parliament,) *the suitors are the judges of the court, both for law and for fact*, and the sheriff or the under sheriff in the county court, and the lord or his steward in the court-baron, are only presiding officers, *with no judicial authority.*" — *Political Dictionary*, word *Suit*.

"COURT, (*curtis, curia aula*); the space enclosed by the walls of a feudal residence, in which the followers of a lord used to assemble in the middle ages, to administer justice, and decide respecting affairs of common interest, &c. It was next used for those who stood in immediate connexion with the lord and master, the *pares curiæ*, (peers of the court,) the limited portion of the general assembly, to which was entrusted the pronouncing of judgment," &c. — *Encyclopedia Americana*, word *Court*.

"In court-barons or county courts *the steward was not judge, but the pares (peers, jurors)*; nor was the speaker in the House of Lords judge, but the barons only." — *Gilbert on the Court of Exchequer*, ch. 3, p. 42.

Crabbe, speaking of the Saxon times, says: ·

"The sheriff presided at the *hundred court*, * * and sometimes sat in the place of the alderman (earl) in the *county court*." — *Crabbe*, 23.

The sheriff afterwards became the sole presiding officer of the county court.

Sir Thomas Smith, Secretary of State to Queen Elizabeth, writing more than three hundred years after Magna Carta, in describing the difference between the *Civil Law* and the English Law, says:

"*Judex* is of us called Judge, but our fashion is so divers, that they which give the deadly stroke, and either condemn or acquit the man for guilty or not guilty, *are not called judges, but the twelve men.* And the same order as well in *civil matters and pecuniary, as in matters criminal.*" — *Smith's Commonwealth of England*, ch. 9, p. 53, Edition of 1621.

Court-Leet. "That the *leet* is the most ancient court in the land for *criminal matters*, (the court-baron being of no less antiquity in *civil*,) has been pronounced by the highest legal authority. * * Lord Mansfield states that this court was coeval with the establishment of the Saxons here, and its activity marked very visibly both among the Saxons and Danes. * * The *leet* is a court of record for the cognizance of criminal matters, or pleas of the crown; and necessarily belongs to the king; though a subject, usually the lord

of the manor, may be, and is, entitled to the profits, consisting of the essoign pence, fines, and amerçiements.

"It is held before the steward, or was, in ancient times, before the bailiff, of the lord." — *Tomlin's Law Dict.*, word *Court-Leet*.

Of course the jury were the judges in this court, where only a "steward" or "bailiff" of a manor presided.

"No cause of consequence was determined without the king's writ; for even in the county courts, of the debts, which were above forty shillings, there issued a *Justicies* (commission) to the sheriff, to enable him to hold such plea, *where the suitors are judges of the law and fact.*" — *Gilbert's History of the Common Pleas, Introduction*, p. 19.

"This position" (that "the matter of law was decided by the King's Justices, but the matter of fact by the *pares*") "*is wholly incompatible with the common law, for the Jurata (jury) were the sole judges both of the law and the fact.*" — *Gilbert's History of the Common Pleas*, p. 70, note.

"We come now to the challenge; and of old *the suitors in court, who were judges*, could not be challenged; nor by the feudal law could the *pares* be even challenged, *Pares qui ordinariam jurisdictionem habent recusari non possunt*; (the peers who have ordinary jurisdiction cannot be rejected;) "*but those suitors who are judges of the court*, could not be challenged; and the reason is, that there are several qualifications required by the writ, viz., that they be *liberos et legales homines de vincineto* (free and legal men of the neighborhood) of the place laid in the declaration," &c., &c. — *Ditto*, p. 93.

"*Ad questionem juris non respondent Juratores.*" (To the question of law the jurors do not answer.) "The Annotist says, that this is indeed a maxim in the Civil-Law Jurisprudence, *but it does not bind an English jury, for by the common law of the land the jury are judges as well of the matter of law, as of the fact*, with this difference only, that the (a Saxon word) or judge on the bench is to give them no assistance in determining the matter of *fact*, but if they have any doubt among themselves relating to matter of *law*, they may then request him to explain it to them, which when he hath done, and they are thus become well informed, they, and they only, become competent judges of the matter of *law*. And this is the province of the judge on the bench, namely, to show, or *teach* the law, but not to take upon him the trial of the delinquent, either in matter of fact or in matter of law." (Here various Saxon laws are quoted.) "In neither of these funda-

mental laws is there the least word, hint, or idea, that the earl or alderman (that is to say, the *Prepositus* (presiding officer) of the court, which is tantamount to *the judge on the bench*) is to take upon him to judge the delinquent in any sense whatever, the sole purport of his office is to *teach* the secular or worldly law." — *Ditto*, p. 57, *note*.

"The administration of justice was carefully provided for; it was not the caprice of their lord, *but the sentence of their peers, that they obeyed. Each was the judge of his equals, and each by his equals was judged.*" — *Introd. to Gilbert on Tenures*, p. 12.

Hallam says: "A respectable class of free socagers, having, in general, full rights of alienating their lands, and holding them probably at a small certain rent from the lord of the manor, frequently occur in Domes-day Book. * * They undoubtedly were suitors to the court-baron of the lord, to whose *soc*, or right of justice, they belonged. *They were consequently judges in civil causes, determined before the manorial tribunal.*" — *2 Middle Ages*, 481.

Stephens adopts as correct the following quotations from Blackstone:

"The *Court-Baron* is a court incident to every manor in the kingdom, to be holden by the steward within the said manor." * * *It "is a court of common law, and it is the court before the freeholders who owe suit and service to the manor,"* (are bound to serve as jurors in the courts of the manor,) "*the steward being rather the registrar than the judge.* * * The freeholders' court was composed of the lord's tenants, who were the *pares* (equals) of each other, and were bound by their feudal tenure to assist their lord in the dispensation of domestic justice. This was formerly held every three weeks; and its most important business was to determine, by writ of right, all controversies relating to the right of lands within the manor." — *3 Stephens' Commentaries*, 392-3. *3 Blackstone*, 32-3.

"A *Hundred Court* is only a larger court-baron, being held for all the inhabitants of a particular hundred, instead of a manor. *The free suitors (jurors) are here also the judges, and the steward the register.*" — *3 Stephens*, 394. *3 Blackstone*, 33.

"The *County Court* is a court incident to the jurisdiction of the sheriff. * * *The freeholders of the county are the real judges in this court, and the sheriff is the ministerial officer.*" — *3 Stephens*, 395-6. *3 Blackstone*, 35-6.

Blackstone describes these courts, as courts "*wherein injuries were redressed in an easy and expeditious manner, by the suffrage of neighbors and friends.*" — 3 Blackstone, 30.

"When we read of a certain number of *freemen* chosen by the parties to decide in a dispute — all bound by oath to vote *in foro conscientia* — and that *their* decision, *not the will of the judge presiding, ended the suit*, we at once perceive that a great improvement has been made in the old form of compurgation — an improvement which impartial observation can have no hesitation to pronounce as identical in its main features with the trial by jury." — *Dunham's Middle Ages*, Sec. 2, B. 2, Ch. 1. 57 *Lardner's Cab. Cyc.*, 60.

"The bishop and the earl, or, in his absence, the *gerefa*, (sheriff,) and sometimes both the earl and the *gerefa*, presided at the *schyre-mote* (county court); the *gerefa* (sheriff) usually alone presided at the *mote* (meeting or court) of the hundred. In the cities and towns which were not within any peculiar jurisdiction, there was held, at regular stated intervals, a *burgh mote*, (borough court,) for the administration of justice, at which a *gerefa*, or a magistrate appointed by the king, presided." — *Spence's Origin of the Laws and Political Institutions of Modern Europe*, p. 444.

"The right of the plaintiff and defendant, and of the prosecutor and criminal, to *challenge the judices*, (judges,) or *assessors,* appointed to try the cause in civil matters, and to decide upon the guilt or innocence of the accused in criminal matters*, is recognized in the treatise called the *Laws of Henry the First*; but I cannot discover, from the Anglo-Saxon laws or histories, that before the Conquest the parties had any general right of challenge; indeed, *had such right existed, the injunctions to all persons standing in the situation of judges (jurors) to do right according to their conscience*, would scarcely have been so frequently and anxiously repeated." — *Spence*, 456.

Hale says:

"The administration of the common justice of the kingdom seems to be wholly dispensed in the county courts, hundred courts, and courts-baron; except some of the greater crimes reformed by the laws of King Henry I., and that part thereof which was sometimes taken up by the *Justitarius Angliæ*.

* The jurors were sometimes called "assessors," because they assessed, or determined the amount of fines and ameracements to be imposed.

This doubtless bred great inconvenience, uncertainty, and variety in the laws, viz.:

“First, by the ignorance of the judges, which were the freeholders of the county. * *

“Thirdly, a third inconvenience was, that all the business of any moment was carried by parties and factions. For the freeholders being generally the judges, and conversing one among another, and being as it were the chief judges, not only of the fact, but of the law; every man that had a suit there, sped according as he could make parties.” — 1 *Hale's History of the Common Law*, p. 246.

“In all these tribunals,” (county court, hundred court, &c.,) “the judges were the free tenants, owing suit to the court, and afterwards called its peers.” — 1 *Lingard's History of England*, 488.

Henry calls the twelve jurors “assessors,” and says:

“These assessors, who were in reality judges, took a solemn oath, that they would faithfully discharge the duties of their office, and not suffer an innocent man to be condemned, nor any guilty person to be acquitted.” — 3 *Henry's History of Great Britain*, 346.

Tyrrell says:

“Alfred cantoned his kingdom, first into *Trihings* and *Lathes*, as they are still called in Kent and other places, consisting of three or four Hundreds; in which, the freeholders being judges, such causes were brought as could not be determined in the Hundred court.” — *Tyrrell's Introduction to the History of England*, p. 80.

Of the *Hundred Court* he says:

“In this court anciently, one of the principal inhabitants, called the *alderman*, together with the barons of the Hundred* — *id est* the freeholders — was judge.” — *Ditto*, p. 80.

Also he says:

“By a law of Edward the Elder, ‘Every sheriff shall con-

* “The barons of the Hundred” were the freeholders. Hallam says: “The word *baro*, originally meaning only a man, was of very large significance, and is not unfrequently applied to common freeholders, as in the phrase *court-baron*.” — 3 *Middle Ages*, 14–15.

Blackstone says: “The *court-baron* * * is a court of common law, and it is the court of the barons, by which name the freeholders were sometimes anciently called; for that it is held before the freeholders who owe suit and service to the manor.” — 3 *Blackstone*, 33.

vene the people once a month, and do equal right to all, putting an end to controversies at times appointed.” — *Ditto*, p. 86.

“A statute, emphatically termed the ‘Grand Assize,’ enabled the defendant, if he thought proper, to abide by the testimony of the twelve good and lawful knights, chosen by four others of the vicinage, and whose oaths gave a final decision to the contested claim.” — 1 *Palgrave’s Rise and Progress of the English Commonwealth*, 261.

“From the moment when the crown became accustomed to the ‘Inquest,’ a restraint was imposed upon every branch of the prerogative. *The king could never be informed of his rights, but through the medium of the people.* Every ‘extent’ by which he claimed the profits and advantages resulting from the casualties of tenure, every process by which he repressed the usurpations of the baronage, depended upon the ‘good men and true’ who were impanelled to ‘pass’ between the subject and the sovereign; and the thunder of the Exchequer at Westminster might be silenced by the honesty, the firmness, or the obstinacy, of one sturdy knight or yeoman in the distant shire.

Taxation was controlled in the same manner by the voice of those who were most liable to oppression. * * A jury was impanelled to adjudge the proportion due to the sovereign; and this course was not essentially varied, even after the right of granting aids to the crown was fully acknowledged to be vested in the parliament of the realm. The people taxed themselves; and the collection of the grants was checked and controlled, and, perhaps, in many instances evaded, by these virtual representatives of the community.

The principle of the jury was, therefore, not confined to its mere application as a mode of trying contested facts, whether in civil or criminal cases; and, both in its form and in its consequences, it had a very material influence upon the general constitution of the realm. * * The main-spring of the machinery of remedial justice existed in the franchise of the lower and lowest orders of the political hierarchy. Without the suffrage of the yeoman, the burgess, and the churl, the sovereign could not exercise the most important and most essential function of royalty; from them he received the power of life and death; he could not wield the sword of justice until the humblest of his subjects placed the weapon in his hand.” — 1 *Palgrave’s Rise and Progress of the English Constitution*, 274-7.

Coke says, "The court of the county is no court of record,* and the suitors are the judges thereof." — 4 *Inst.*, 266.

Also, "The court of the Hundred is no court of record, and the suitors be thereof judges." — 4 *Inst.*, 267.

Also, "The court-baron is a court incident to every manor, and is not of record, and the suitors be thereof judges." — 4 *Inst.*, 268.

Also, "The court of ancient demesne is in the nature of a court-baron, wherein the suitors are judges, and is no court of record." — 4 *Inst.*, 269.

Millar says, "Some authors have thought that jurymen were originally *compurgators*, called by a defendant to swear that they believed him innocent of the facts with which he was charged. . . . But . . . compurgators were merely witnesses; *jurymen were, in reality, judges*. The former were called to confirm the oath of the party by swearing, according to their belief, that he had told the truth, (in his oath of purgation;) *the latter were appointed to try, by witnesses, and by all other means of proof, whether he was innocent or guilty*. . . . Juries were accustomed to ascertain the truth of facts, by the defendant's oath of purgation, together with that of his compurgators. . . . Both of them (jurymen and compurgators) were obliged to swear that they would *tell the truth*. . . . According to the simple idea of our forefathers, guilt or innocence was regarded as a mere matter of fact; and it was thought that no man, who knew the real circumstances of a case, could be at a loss to determine whether the culprit ought to be condemned or acquitted." — 1 *Millar's Hist. View of Eng. Gov.*, ch. 12, p. 332-4.

Also, "The same form of procedure, which took place in the administration of justice among the vassals of a barony, was gradually extended to the courts held in the *trading towns*." — *Same*, p. 335.

Also, "The same regulations, concerning the distribution of justice by the intervention of juries, . . . were introduced into the *baron courts of the king*, as into those of the nobility, or such of his subjects as retained their allodial property." — *Same*, p. 337.

Also, "This tribunal" (the *aula regis*, or king's court, afterwards divided into the courts of King's Bench, Common

* The ancient jury courts kept no records, because those who composed the courts could neither make nor read records. Their decisions were preserved by the memories of the jurors and other persons present.

Pleas, and Exchequer) "was properly the ordinary baron-court of the king; and, being in the same circumstances with the baron courts of the nobility, it was under the same necessity of trying causes by the intervention of a jury." — *Same*, vol. 2, p. 292.

Speaking of the times of Edward the First, (1272 to 1307,) Millar says :

"What is called the petty jury was therefore introduced into these tribunals, (the King's Bench, the Common Pleas, and the *Exchequer*,) as well as into their auxiliary courts employed to distribute justice in the circuits; and was thus rendered essentially necessary in determining causes of every sort, whether civil, criminal, or *fiscal*." — *Same*, vol. 2, p. 293-4.

Also, "That this form of trial (by jury) obtained universally in all the feudal governments, as well as in that of England, there can be no reason to doubt. In France, in Germany, and in other European countries, where we have any accounts of the constitution and procedure of the feudal courts, it appears that lawsuits of every sort concerning the freemen or vassals of a barony, were determined by the *pares curie* (peers of the court;) and that the judge took little more upon him than to regulate the method of proceeding, or to declare the verdict of the jury." — *Same*, vol. 1, ch. 12, p. 329.

Also, "Among the Gothic nations of modern Europe, the custom of deciding lawsuits by a jury seems to have prevailed universally; first in the allodial courts of the county, or of the hundred, and afterwards in the baron-courts of every feudal superior." — *Same*, vol. 2, p. 296.

Palgrave says that in Germany "The Graff (gerefa, sheriff) placed himself in the seat of judgment, and gave the charge to the assembled free Echevins, warning them to pronounce judgment according to right and justice." — 2 *Palgrave*, 147.

Also, that, in Germany, "The Echevins were composed of the villanage, somewhat obscured in their functions by the learning of the grave civilian who was associated to them, and somewhat limited by the encroachments of modern feudality; but they were still substantially the judges of the court." — *Same*, 148.

Palgrave also says, "Scotland, in like manner, had the laws of Burlaw, or Birlaw, which were made and determined by the neighbors, elected by common consent, in the Burlaw or Birlaw courts, wherein knowledge was taken of complaints between neighbor and neighbor, *which men, so chosen, were judges and arbitrators*, and called Birlaw men." — 1 *Palgrave's Rise, &c.*, p. 80.

But, in order to understand the common law trial by jury, as it existed prior to Magna Carta, and as it was guaranteed by that instrument, it is perhaps indispensable to understand more fully the nature of the courts in which juries sat, and the extent of the powers exercised by juries in those courts. I therefore give in a note extended extracts, on these points, from Stuart on the Constitution of England, and from Blackstone's Commentaries.*

* Stuart says :

"The courts, or civil arrangements, which were modelled in Germany, preserved the independence of the people; and having followed the Saxons into England, and continuing their importance, they supported the envied liberty we boast of. * *

"As a chieftain led out his retainers to the field, and governed them during war; so in peace he summoned them together, and exerted a civil jurisdiction. He was at once their captain and their judge. They constituted his court; and having inquired with him into the guilt of those of their order whom justice had accused, they assisted him to enforce his decrees.

"This court (the court-baron) was imported into England; but the innovation which conquest introduced into the fashion of the times altered somewhat its appearance. * *

"The head or lord of the manor called forth his attendants to his hall. * * He inquired into the breaches of custom, and of justice, which were committed within the precincts of his territory; and with his followers, *who sat with him as judges*, he determined in all matters of debt, and of trespass to a certain amount. He possessed a similar jurisdiction with the chieftain in Germany, and his tenants enjoyed an equal authority with the German retainers.

"But a mode of administration which intrusted so much power to the great could not long be exercised without blame or injustice. The German, guided by the candor of his mind, and entering into all his engagements with the greatest ardor, perceived not, at first, that the chieftain to whom he submitted his disputes might be swayed, in the judgments he pronounced, by partiality, prejudice, or interest; and that the influence he maintained with his followers was too strong to be restrained by justice. Experience instructed him of his error; he acknowledged the necessity of appealing from his lord; and the court of the Hundred was erected.

"This establishment was formed both in Germany and England, by the inhabitants of a certain division, who extended their jurisdiction over the territory they occupied.* They bound themselves under a penalty to assemble at stated times; *and having elected the wisest to preside over them, they judged, not only all civil and criminal matters*, but of those also which regarded religion and the priesthood. The judicial power thus invested in the people was extensive; they were able to preserve their rights, and attended this court in arms.

"As the communication, however, and intercourse, of the individuals of a German community began to be wider, and more general, as their dealings enlarged, and as disputes arose among the members of different hundreds, the insufficiency of these

* "It was the freemen in Germany, and the possessors of land in England, who were *suitors* (jurors) in the hundred court. These ranks of men were the same. The alteration which had happened in relation to property had invested the German freemen with land or territory."

7*

That all these courts were mere *courts of conscience*, in which the juries were sole judges, administering justice according to their own ideas of it, is not only shown by the extracts

courts for the preservation of order was gradually perceived. The *shyre mote*, therefore, or *county court*, was instituted; and it formed the chief source of justice both in Germany and England.

"The powers, accordingly, which had been enjoyed by the court of the *hundred*, were considerably impaired. It decided no longer concerning capital offences; it decided not concerning matters of liberty, and the property of estates, or of slaves; its judgments, in every case, became subject to review; and it lost entirely the decision of causes, when it delayed too long to consider them.

"Every subject of claim or contention was brought, in the first instance, or by appeal, to the *county court*; and the *earl*, or *eorldorman*, who presided there, was active to put the laws in execution. He repressed the disorders which fell out within the circuit of his authority; and the least remission in his duty, or the least fraud he committed, was complained of and punished. He was elected from among the great, and was above the temptation of a bribe; but, to encourage his activity, he was presented with a share of the territory he governed, or was entitled to a proportion of the fines and profits of justice. Every man, in his district, was bound to inform him concerning criminals, and to assist him to bring them to trial; and, as in rude and violent times the poor and helpless were ready to be oppressed by the strong, he was instructed particularly to defend them.

"His court was ambulatory, and assembled only twice a year, unless the distribution of justice required that its meetings should be oftener. Every freeholder in the county was obliged to attend it; and should he refuse this service, his possessions were seized, and he was forced to find surety for his appearance. The neighboring earls held not their courts on the same day; and, what seems very singular, no judge was allowed, after meals, to exercise his office.

"The druids also, or priests, in Germany, as we had formerly occasion to remark, and the clergy in England, exercised a jurisdiction in the *hundred* and *county* courts. They instructed the people in religious duties, and in matters regarding the priesthood; and the princes, earls, or *eorldormen*, related to them the laws and customs of the community. These judges were mutually a check to each other; but it was expected that they should agree in their judgments, and should willingly unite their efforts for the public interest.*

"*But the prince or earl performed not, at all times, in person, the obligations of his office.* The enjoyment of ease and of pleasure, to which in Germany he had delivered himself over, when disengaged from war, and the mean idea he conceived of the drudgery of civil affairs, made him often delegate to an inferior person the distribution of justice in his district. The same sentiments were experienced by the Saxon nobility; and the service which they owed by their tenures, and the high employments they sustained, called them often from the management of their counties. The progress, too, of commerce,

* It would be wholly erroneous, I think, to infer from this statement of Stuart, that either the "priests, princes, earls, or *eorldormen*" exercised any authority over the jury in the trial of causes, in the way of dictating the law to them. Henry's account of this matter doubtless gives a much more accurate representation of the truth. He says that *anciently*

"The meeting (the county court) was opened with a discourse by the bishop, explaining, out of the Scriptures and ecclesiastical canons, their several duties as good Christians and members of the

already given, but is explicitly acknowledged in the following one, in which the *modern "courts of conscience"* are compared with the *ancient hundred and county courts*, and the preference

giving an intricacy to cases, and swelling the civil code, added to the difficulty of their office, and made them averse to its duties. *Sheriffs, therefore, or deputies, were frequently appointed to transact their business; and though these were at first under some subordination to the earls, they grew at length to be entirely independent of them. The connection of jurisdiction and territory ceasing to prevail, and the civil being separated from the ecclesiastical power, they became the sole and proper officers for the direction of justice in the counties.*

"The hundred, however, and county courts, were not equal of themselves for the purposes of jurisdiction and order. It was necessary that a court should be erected, of supreme authority, where the disputes of the great should be decided, where the disagreeing sentiments of judges should be reconciled, and where protection should be given to the people against their fraud and injustice.

"The princes accordingly, or chief nobility, in the German communities, assembled together to judge of such matters. The Saxon nobles continued this prerogative; and the king, or, in his absence, the chief *justiciary*, watched over their deliberations. But it was not on every trivial occasion that this court interested itself. In smaller concerns, justice was refused during three sessions of the *hundred*, and claimed without effect, at four courts of the county, before there could lie an appeal to it.

"So gradually were these arrangements established, and so naturally did the varying circumstances in the situation of the Germans and Anglo-Saxons direct those successive improvements which the preservation of order, and the advantage of society, called them to adopt. The admission of the people into the courts of justice preserved, among the former, that equality of ranks for which they were remarkable; and it helped to overturn, among the latter, those envious distinctions which the feudal system tended to introduce, and prevented that venality in judges, and those arbitrary proceedings, which the growing attachment to interest, and the influence of the crown, might otherwise have occasioned."—*Stuart on the Constitution of England*, p. 222 to 245.

"In the Anglo-Saxon period, accordingly, *twelve* only were elected; and these, together with the judge, or presiding officer of the district, being sworn to regard justice, and the voice of reason, or conscience, all causes were submitted to them."—*Ibid.*, p. 260.

"Before the orders of men were very nicely distinguished, the jurors were elected from the same rank. When, however, a regular subordination of orders was established, and when a knowledge of property had inspired the necessitous with envy, and the rich with contempt, *every man was tried by his equals*. The same spirit of liberty which gave rise to this regulation attended its progress. Nor could monarchs assume a more arbitrary method of proceeding. 'I will not' (said the Earl of Cornwall to his

church. After this, the alderman, or one of his assessors, made a discourse on the laws of the land, and the duties of good subjects and good citizens. *When these preliminaries were over, they proceeded to try and determine, first the causes of the church, next the pleas of the crown, and last of all the controversies of private parties.*"—3 *Henry's History of Great Britain*, 348.

This view is corroborated by *Tyrrell's Introduction to the History of England*, p. 83–84, and by *Spence's Origin of the Laws and Political Institutions of Modern Europe*, p. 447, and the note on the same page. Also by a law of Canute to this effect, *in every county let there be twice a year an assembly, whereat the bishop and the earl shall be present, the one to instruct the people in divine, the other in human, laws.*—*Wilkins*, p. 136.

given to the latter, on the ground that the duties of the jurors in the one case, and of the commissioners in the other, are the same, and that the consciences of a jury are a safer and purer

sovereign) 'render up my castles, nor depart the kingdom, but by judgment of my peers.' Of this institution, so wisely calculated for the preservation of liberty, all our historians have pronounced the eulogium." — *Ditto*, p. 262-3.

Blackstone says :

"The policy of our ancient constitution, as regulated and established by the great Alfred, was to bring justice home to every man's door, by constituting as many courts of judicature as there are manors and towns in the kingdom; *wherain injuries were redressed in an easy and expeditious manner, by the suffrage of neighbors and friends.* These little courts, however, communicated with others of a larger jurisdiction, and those with others of a still greater power; ascending gradually from the lowest to the supreme courts, which were respectively constituted to correct the errors of the inferior ones, and to determine such causes as, by reason of their weight and difficulty, demanded a more solemn discussion. The course of justice flowing in large streams from the king, as the fountain, to his superior courts of record; and being then subdivided into smaller channels, till the whole and every part of the kingdom were plentifully watered and refreshed. An institution that seems highly agreeable to the dictates of natural reason, as well as of more enlightened policy. * * *

"These inferior courts, at least the name and form of them, still continue in our legal constitution; but as the superior courts of record have, in practice, obtained a concurrent original jurisdiction, and as there is, besides, a power of removing plaints or actions thither from all the inferior jurisdictions; upon these accounts (among others) it has happened that these petty tribunals have fallen into decay, and almost into oblivion; whether for the better or the worse may be matter of some speculation, when we consider, on the one hand, the increase of expense and delay, and, on the other, the more able and impartial decisions that follow from this change of jurisdiction.

"The order I shall observe in discoursing on these several courts, constituted for the redress of *civil* injuries, (for with those of a jurisdiction merely *criminal* I shall not at present concern myself,*) will be by beginning with the lowest, and those whose jurisdiction, though public and generally dispersed through the kingdom, is yet (with regard to each particular court) confined to very narrow limits; and so ascending gradually to those of the most extensive and transcendent power." — 3 *Blackstone*, 30 to 32.

"The *court-baron* is a court incident to every manor in the kingdom, *to be holden by the steward within the said manor.* This court-baron is of two natures; the one is a customary court, of which we formerly spoke, appertaining entirely to the copy-holders, in which their estates are transferred by surrender and admittance, and other matters transacted relative to their tenures only. The other, of which we now speak, is a court of common law, and it is a court of the barons, by which name the freeholders were sometimes anciently called; *for that it is held by the freeholders who owe suit and service to the manor, the steward being rather the registrar than the judge.* These courts, though in their nature distinct, are frequently confounded together. *The court we are now considering, viz., the freeholders court, was composed of the lord's tenants, who were the pares (equals)*

* There was no distinction between the civil and criminal courts, as to the rights or powers of *jurica*.

tribunal than the consciences of individuals specially appointed, and holding permanent offices.

“But there is one species of courts constituted by act of Parliament, in the city of London, and other trading and populous districts, which, in their proceedings, so vary from the course of the common law, that they deserve a more particular consideration. I mean the court of requests, or *courts of conscience*, for the recovery of small debts. The first of these was established in London so early as the reign of Henry VIII., by an act of their common council; which, however, was certainly insufficient for that purpose, and illegal, till confirmed by statute 3 Jac. I., ch. 15, which has since been explained and amended by statute 14 Geo. II., ch. 10. The constitution is this: two aldermen and four commoners sit twice a week to hear all causes of debt not exceeding the value of forty shillings; which they examine in a summary way, by the oath of the parties or other witnesses, and *make such order therein as is consonant to equity and good conscience.* * * * Divers trading towns and other districts have obtained acts of Parlia-

of each other, and were bound by their feudal tenure to assist their lord in the dispensation of domestic justice. This was formerly held every three weeks; and its most important business is to determine, by writ of right, all controversies relating to the right of lands within the manor. It may also hold plea of any personal actions, of debt, trespass in the case, or the like, where the debt or damages do not amount to forty shillings; which is the same sum, or three marks, that bounded the jurisdiction of the ancient Gothic courts in their lowest instance, or *fiending courts*, so called because four were instituted within every superior district or hundred.”—3 *Blackstone*, 33, 34.

“A *hundred court* is only a larger court-baron, being held for all the inhabitants of a particular hundred, instead of a manor. *The free suitors are here also the judges, and the steward the registrar, as in the case of a court-baron.* It is likewise no court of record, resembling the former at all points, except that in point of territory it is of greater jurisdiction. This is said by Sir Edward Coke to have been derived out of the county court for the ease of the people, that they might have justice done to them at their own doors, without any charge or loss of time; but its institution was probably coeval with that of hundreds themselves, which were formerly observed to have been introduced, though not invented, by Alfred, being derived from the polity of the ancient Germans. The *centeni*, we may remember, were the principal inhabitants of a district composed of different villages, originally in number a *hundred*, but afterward only called by that name, and who probably gave the same denomination to the district out of which they were chosen. Cæsar speaks positively of the judicial power exercised in *their hundred courts and courts-baron.* ‘*Principes regionum atque pagorum*’ (which we may fairly construe the lords of hundreds and manors) ‘*inter suos jus dicunt, controversias que minuunt.*’ (The chiefs of the country and the villages declare the law among them, and abate controversies.) And Tacitus, who had examined their constitution still more attentively, informs us not only of the authority of the lords, but that of the *centeni*, the hundreders, or jury, *who were taken out of the common freeholders, and had themselves a share in the determination.* ‘*Eliguntur in conciliis et principes, qui jura per pagos vicisque reddunt, centeni*

ment, for establishing in them *courts of conscience* upon nearly the same plan as that in the city of London.

“The anxious desire that has been shown to obtain these several acts, proves clearly that the nation, in general, is truly sensible of the great inconvenience arising from the disuse of the ancient county and hundred courts, wherein causes of this small value were always formerly decided with very little trouble and expense to the parties. But it is to be feared that the general remedy, which of late hath been principally applied to this inconvenience, (the erecting these new jurisdictions,) may itself be attended in time with very ill consequences; as the method of proceeding therein is entirely in derogation of the common law; and their large discretionary powers create a petty tyranny in a set of standing commissioners; and as the disuse of the trial by jury may tend to estrange the minds of the people from that valuable prerogative of Englishmen, which has already been more than sufficiently excluded in many instances. *How much rather is it to be wished that the proceedings in the county and hundred courts could be again*

singulis, ex plebe comites concilium simul et auctoritas adsunt.’ (The princes are chosen in the assemblies, who administer the laws throughout the towns and villages, and with each one are associated an hundred companions, taken from the people, for purposes both of counsel and authority.) This hundred court was denominated *hæreda* in the Gothic constitution. But this court, as causes are equally liable to removal from hence as from the common court-baron, and by the same writs, and may also be reviewed by writ of false judgment, is therefore fallen into equal disuse with regard to the trial of actions.”—3 *Blackstone*, 34, 35.

“The *county court* is a court incident to the jurisdiction of the *sheriff*. It is not a court of record, but may hold pleas of debt, or damages, under the value of forty shillings; over some of which causes these inferior courts have, by the express words of the statute of Gloucester, (6 Edward I., ch. 8,) a jurisdiction totally exclusive of the king’s superior courts. * * The county court may also hold plea of many real actions, and of all personal actions to any amount, by virtue of a special writ, called a *justicie*, which is a writ empowering the sheriff, for the sake of despatch, to do the same justice in his county court as might otherwise be had at Westminster. *The freholders of the county court are the real judges in this court, and the sheriff is the ministerial officer.* * * * In modern times, as proceedings are removable from hence into the king’s superior courts, by writ of *pone* or *recordari*, in the same manner as from hundred courts and courts-baron, and as the same writ of false judgment may be had in nature of a writ of error, this has occasioned the same disuse of bringing actions therein.”—3 *Blackstone*, 36, 37.

“Upon the whole, we cannot but admire the wise economy and admirable provision of our ancestors in settling the distribution of justice in a method so well calculated for cheapness, expedition, and ease. By the constitution which they established, all trivial debts, and injuries of small consequence, were to be recovered or redressed in every man’s own county, hundred, or perhaps parish.”—3 *Blackstone*, 59.

revived, without burdening the freeholders with too frequent and tedious attendances; and at the same time removing the delays that have insensibly crept into their proceedings, and the power that either party has of transferring at pleasure their suits to the courts at Westminster! *And we may, with satisfaction, observe, that this experiment has been actually tried, and has succeeded in the populous county of Middlesex,* which might serve as an example for others. For by statute 23 Geo. II., ch. 33, it is enacted:

1. That a special county court shall be held at least once in a month, in every hundred of the county of Middlesex, *by the county clerk.*

2. *That twelve freeholders of that hundred, qualified to serve on juries, and struck by the sheriff, shall be summoned to appear at such court by rotation; so as none shall be summoned oftener than once a year.*

3. *That in all causes not exceeding the value of forty shillings, the county clerk and twelve suitors (jurors) shall proceed in a summary way, examining the parties and witnesses on oath, without the formal process anciently used; and shall make such order therein as they shall judge agreeable to conscience."* — 3 Blackstone, 81–83.

What are these but courts of conscience? And yet Blackstone tells us they are a *revival of the ancient hundred and county courts*. And what does this fact prove, but that the ancient common law courts, in which juries sat, were mere courts of conscience?

It is perfectly evident that in all these courts the jurors were the judges, and determined all questions of law for themselves; because the only alternative to that supposition is, *that the jurors took their law from sheriffs, bailiffs, and stewards*, of which there is not the least evidence in history, nor the least probability in reason. It is evident, also, that they judged independently of the laws of the king, for the reasons before given, viz., that the authority of the king was held in very little esteem; and, secondly, that the laws of the king (not being printed, and the people being unable to read them if they had been printed) must have been in a great measure unknown to them, and could have been received by them only on the authority of the sheriff, bailiff, or steward. If laws were to be received by them on the authority of these officers,

the latter would have imposed such laws upon the people as they pleased.

These courts, that have now been described, were continued in full power long after Magna Carta, no alteration being made in them by that instrument, *nor in the mode of administering justice in them.*

There is no evidence whatever, so far as I am aware, that the juries had any *less* power in the courts held by the king's justices, than in those held by sheriffs, bailiffs, and stewards; and there is no probability whatever that they had. All the difference between the former courts and the latter undoubtedly was, that, in the former, the juries had the benefit of the advice and assistance of the justices, which would, of course, be considered valuable in difficult cases, on account of the justices being regarded as more learned, not only in the laws of the king, but also in the common law, or "law of the land."

The conclusion, therefore, I think, inevitably must be, that neither the laws of the king, nor the instructions of his justices, had any authority over jurors beyond what the latter saw fit to accord to them. And this view is confirmed by this remark of Hallam, the truth of which all will acknowledge:

"The rules of legal decision, among a rude people, are always very simple; not serving much to guide, far less to control the feelings of natural equity."—*2 Middle Ages*, ch. 8, part 2, p. 465.

It is evident that it was in this way, *by the free and concurrent judgments of juries, approving and enforcing certain laws and rules of conduct, corresponding to their notions of right and justice*, that the laws and customs, which, for the most part, made up the *common law*, and were called, at that day, "*the good laws, and good customs,*" and "*the law of the land,*" were established. How otherwise could they ever have become established, as Blackstone says they were, "*by long and immemorial usage, and by their universal reception throughout the kingdom,*"* when, as the Mirror says, "*justice was so done, that every one so judged his neighbor, by such judgment as a man could not elsewhere receive in the like cases, until such*

* 1 Blackstone, 63-67.

times as the customs of the realm were put in writing and certainly published?"

The fact that, in that dark age, so many of the principles of natural equity, as those then embraced in the *Common Law*, should have been so uniformly recognized and enforced by juries, as to have become established by general consent as "*the law of the land*;" and the further fact that this "law of the land" was held so sacred that even the king could not lawfully infringe or alter it, but was required to swear to maintain it, are beautiful and impressive illustrations of the truth that men's minds, even in the comparative infancy of other knowledge, have clear and coincident ideas of the elementary principles, and the paramount obligation, of justice. The same facts also prove that the common mind, and the general, or, perhaps, rather, the universal conscience, as developed in the untrammelled judgments of juries, may be safely relied upon for the preservation of individual rights in civil society; and that there is no necessity or excuse for that deluge of arbitrary legislation, with which the present age is overwhelmed, under the pretext that unless laws be *made*, the law will not be known; a pretext, by the way, almost universally used for overturning, instead of establishing, the principles of justice.

SECTION III.

The Oaths of Jurors.

The oaths that have been administered to jurors, in England, and which are their *legal* guide to their duty, *all* (so far as I have ascertained them) corroborate the idea that the jurors are to try all cases on their intrinsic merits, independently of any laws that they deem unjust or oppressive. It is probable that an oath was never administered to a jury in England, either in a civil or criminal case, to try it *according to law*.

The earliest oath that I have found prescribed by law to be administered to jurors is in the laws of Ethelred, (about the year 1015,) which require that the jurors "*shall swear, with their hands upon a holy thing, that they will condemn no man*

that is innocent, nor acquit any that is guilty." — 4 *Blackstone*, 302. 2 *Turner's History of the Anglo-Saxons*, 155. *Wilkins' Laws of the Anglo-Saxons*, 117. *Spelman's Glossary*, word *Jurata*.

Blackstone assumes that this was the oath of the *grand jury* (4 *Blackstone*, 302); but there was but one jury at the time this oath was ordained. The institution of two juries, grand and petit, took place after the Norman Conquest.

Hume, speaking of the administration of justice in the time of Alfred, says that, in every hundred,

"Twelve freeholders were chosen, who, having sworn, together with the hundreder, or presiding magistrate of that division, *to administer impartial justice*, proceeded to the examination of that cause which was submitted to their jurisdiction." — *Hume*, ch. 2.

By a law of Henry II., in 1164, it was directed that the sheriff "*faciet jurare duodecim legales homines de vicineto seu de villa, quod inde veritatem secundum conscientiam suam manifestabunt,*" (shall make twelve legal men from the neighborhood to swear that they will make known the truth according to their conscience.) — *Crabbe's History of the English Law*, 119. 1 *Reeves*, 87. *Wilkins*, 321-323.

Glanville, who wrote within the half century previous to Magna Carta, says :

"Each of the knights summoned for this purpose (as jurors) ought to swear that he will neither utter that which is false, nor knowingly conceal the truth." — *Beames' Glanville*, 65.

Reeve calls the trial by jury "*the trial by twelve men sworn to speak the truth.*" — 1 *Reeve's History of the English Law*, 87.

Henry says that the jurors "took a solemn oath, that they would faithfully discharge the duties of their office, and not suffer an innocent man to be condemned, nor any guilty person to be acquitted." — 3 *Henry's Hist. of Great Britain*, 346.

The *Mirror of Justices*, (written within a century after Magna Carta,) in the chapter on the abuses of the Common Law, says :

"It is abuse to use the words, *to their knowledge*, in their oaths, to make the jurors speak upon thoughts, *since the chief words of their oaths be that they speak the truth.*" — p. 249.

Smith, writing in the time of Elizabeth, says that, in *civil* suits, the jury "be sworn to declare the truth of that issue according to the evidence, and their conscience." — *Smith's Commonwealth of England*, edition of 1621, p. 73.

In *criminal* trials, he says:

"The clerk giveth the juror an oath to go uprightly betwixt the prince and the prisoner." — *Ditto*, p. 90.*

* This quaint and curious book (Smith's *Commonwealth of England*) describes the *minutiae* of trials, giving in detail the mode of impanelling the jury, and then the conduct of the lawyers, witnesses, and court. I give the following extracts, *tending to show that the judges impose no law upon the juries, in either civil or criminal cases, but only require them to determine the causes according to their consciences.*

In *civil* causes he says:

"When it is thought that it is enough pleaded before them, and the witnesser have said what they can, one of the judges, with a brief and pithy recapitulation, reciteth to the twelve in sum the arguments of the sergeants of either side, that which the witnesses have declared, and the chief points of the evidence showed in writing, and once again putteth them in mind of the issue, and sometime giveth it them in writing, delivering to them the evidence which is showed on either part, if any be, (evidence here is called writings of contracts, authentical after the manner of England, that is to say, written, sealed, and delivered,) and biddeth them go together." — p. 74.

This is the whole account given of the charge to the jury.

In *criminal* cases, after the witnesses have been heard, and the prisoner has said what he pleases in his defence, the book proceeds:

"When the judge hath heard them say enough, he asketh if they can say any more: If they say no, then he turneth his speech to the inquest. 'Good men, (saith he,) ye of the inquest, ye have heard what these men say against the prisoner. You have also heard what the prisoner can say for himself. *Have an eye to your oath, and to your duty, and do that which God shall put in your minds to the discharge of your consciences, and mark well what is said.*'" — p. 92.

This is the whole account given of the charge in a criminal case.

The following statement goes to confirm the same idea, that jurors in England have formerly understood it to be their right and duty to judge only according to their consciences, and not to submit to any dictation from the court, either as to law or fact.

"If having pregnant evidence, nevertheless, the twelve do acquit the malefactor, which they will do sometime, especially if they perceive either one of the justices or of the judges, or some other man, to pursue too much and too maliciously the death of the prisoner, * * the prisoner escapeth; but the twelve (are) not only rebuked by the judges, but also threatened of punishment; and many times commanded to appear in the Star-Chamber, or before the Privy Council for the matter. But this threatening chanceth ofener than the execution thereof; and the twelve answer with most gentle words, they did it according to their consciences, and pray the judges to be good unto them, they did as they thought right, and as they accorded all, and so it passeth away for the most part." — p. 100.

The account given of the trial of a peer of the realm corroborates the same point:

"If any duke, marquis, or any other of the degrees of a baron, or above, lord of the Parliament, be appeached of treason, or any other capital crime, he is judged by his peers and equals; that is, the yeomanry doth not go upon him, but an inquest of the Lords of Parliament, and they give their voice not one for all, but each severally as they do in Parliament, being (beginning) at the youngest lord. And for judge one lord sitteth, who is constable of England for that day. The judgment once given, he breaketh his staff, and abdicateth his office. In the rest there is no difference from that above written," (that is, in the case of a freeman.) — p. 95.

Hale says :

"Then twelve, and no less, of such as are indifferent and are returned upon the principal panel, or the *tales*, are sworn to try the same according to the evidence." — 2 *Hale's History of the Common Law*, 141.

It appears from Blackstone that, even *at this day, neither in civil nor criminal cases*, are jurors in England sworn to try causes *according to law*. He says that in *civil suits* the jury are

"Sworn well and truly to *try the issue* between the parties, and a true verdict to give according to the evidence." — 3 *Blackstone*, 365.

"*The issue*" to be tried is whether A owes B anything; and if so, how much? or whether A has in his possession anything that belongs to B; or whether A has wronged B, and ought to make compensation; and if so, how much?

No statute passed by a legislature, simply as a legislature, can alter either of these "*issues*" in hardly any conceivable case, perhaps in none. No *unjust* law could ever alter them in any. They are all mere questions of natural justice, which legislatures have no power to alter, and with which they have no right to interfere, further than to provide for having them settled by the most competent and impartial tribunal that it is practicable to have, and then for having all just decisions enforced. And any tribunal, whether judge or jury, that attempts to try these issues, has no more moral right to be swerved from the line of justice, by the will of a legislature, than by the will of any other body of men whatever. And this oath does not require or permit a jury to be so swerved.

In criminal cases, Blackstone says the oath of the jury in England is :

"Well and truly to try, and true deliverance make, between our sovereign lord, the king, and the prisoner whom they have in charge, and a true verdict to give according to the evidence." — 4 *Blackstone*, 355.

"The issue" to be tried, in a criminal case, is "*guilty*," or "*not guilty*." The laws passed by a legislature can rarely, if ever, have anything to do with this issue. "*Guilt*" is an

intrinsic quality of actions, and can neither be created, destroyed, nor changed by legislation. And no tribunal that attempts to try this issue can have any moral right to declare a man *guilty*, for an act that is intrinsically innocent, at the bidding of a legislature, any more than at the bidding of anybody else. And this oath does not require or permit a jury to do so.

The words, "*according to the evidence*," have doubtless been introduced into the above oaths in modern times. They are unquestionably in violation of the Common Law, and of Magna Carta, if by them be meant such evidence only as the government sees fit to allow to go to the jury. If the government can dictate the evidence, and require the jury to decide according to that evidence, it necessarily dictates the conclusion to which they must arrive. In that case the trial is really a trial by the government, and not by the jury. *The jury cannot try an issue, unless they determine what evidence shall be admitted.* The ancient oaths, it will be observed, say nothing about "*according to the evidence.*" They obviously take it for granted that the jury try the whole case; and of course that *they* decide what evidence shall be admitted. It would be intrinsically an immoral and criminal act for a jury to declare a man guilty, or to declare that one man owed money to another, unless all the evidence were admitted, which *they* thought ought to be admitted, for ascertaining the truth.*

Grand Jury. — If jurors are bound to enforce all laws passed by the legislature, it is a very remarkable fact that the oath of grand juries does not require them to be governed by the laws in finding indictments. There have been various forms of oath administered to grand jurors; but by none of them that I recollect ever to have seen, except those of the States

* "The present form of the jurors' oath is that they shall 'give a true verdict according to the evidence.' At what time this form was introduced is uncertain; but for several centuries after the Conquest, the jurors, both in civil and criminal cases, were sworn merely to *speak the truth*. (Glanville, lib. 2, cap. 17; Bracton, lib. 3, cap. 22; lib. 4, p. 287, 291; Britton, p. 135.) Hence their decision was accurately termed *verdictum*, or verdict, that is, 'a thing truly said'; whereas the phrase 'true verdict' in the modern oath is not an accurate expression." — *Political Dictionary*, word *Jury*.

of Connecticut and Vermont, are they sworn to present men *according to law*. The English form, as given in the essay on Grand Juries, written near two hundred years ago, and supposed to have been written by *Lord Somers*, is as follows :

“ You shall diligently inquire, and true presentment make, of all such articles, matters, and things, as shall be given you in charge, and of all other matters and things as shall come to your knowledge touching this present service. The king’s council, your fellows, and your own, you shall keep secret. You shall present no person for hatred or malice; neither shall you leave any one unrepresented for favor, or affection, for love or gain, or any hopes thereof; but in all things you shall present the truth, the whole truth, and nothing but the truth, to the best of your knowledge. So help you God.”

This form of oath is doubtless quite ancient, for the essay says “ our ancestors appointed ” it. — *See Essay*, p. 33-34.

On the obligations of this oath, the essay says :

“ If it be asked how, or in what manner, the (grand) juries shall inquire, the answer is ready, *according to the best of their understandings*. They only, not the judges, are sworn to search diligently to find out all treasons, &c., within their charge, and they must and ought to use their own discretion in the way and manner of their inquiry. *No directions can legally be imposed upon them by any court or judges*; an honest jury will thankfully accept good advice from judges, as their assistants; but they are bound by their oaths to present the truth, the whole truth, and nothing but the truth, to the best of their own, not the judge’s, knowledge. Neither can they, without breach of that oath, resign their consciences, or blindly submit to the dictates of others; and therefore ought to receive or reject such advices, as they judge them good or bad. * * Nothing can be more plain and express than the words of the oath are to this purpose. The jurors need not search the law books, nor tumble over heaps of old records, for the explanation of them. Our greatest lawyers may from hence learn more certainly our ancient law in this case, than from all the books in their studies. The language wherein the oath is penned is known and understood by every man, and the words in it have the same signification as they have wheresoever else they are used. The judges, without assuming to themselves a legislative power, cannot put a new sense upon them, other than according to their genuine, common meaning. They cannot magisterially impose their opinions upon the jury, and make them forsake the direct

words of their oath, to pursue their glosses. The grand inquest are bound to observe alike strictly every part of their oath, and to use all just and proper ways which may enable them to perform it; otherwise it were to say, that after men had sworn to inquire diligently after the truth, according to the best of their knowledge, they were bound to forsake all the natural and proper means which their understandings suggest for the discovery of it, if it be commanded by the judges." — *Lord Somers' Essay on Grand Juries*, p. 38.

What is here said so plainly and forcibly of the oath and obligations of grand juries, is equally applicable to the oath and obligations of petit juries. In both cases the simple oaths of the jurors, and not the instructions of the judges, nor the statutes of kings nor legislatures, are their legal guides to their duties.*

SECTION IV.

The Right of Juries to fix the Sentence.

The nature of the common law courts existing prior to Magna Carta, such as the county courts, the hundred courts, the court-leet, and the court-baron, all prove, what has already been proved from Magna Carta, that, in jury trials, the juries fixed the sentence; because, in those courts, there was no one but the jury who could fix it, unless it were the sheriff, bailiff, or steward; and no one will pretend that it was fixed by them. The juries unquestionably gave the "judgment" in both civil and criminal cases.

That the juries were to fix the sentence under Magna Carta, is also shown by statutes subsequent to Magna Carta.

A statute passed fifty-one years after Magna Carta, says that a baker, for default in the weight of his bread, "*debeat ameriari vel subire judicium pilloræ*," — that is, "*ought to be amerced, or suffer the sentence of the pillory.*" And that a brewer, for "selling ale, contrary to the assize," "*debeat ameriari, vel pati judicium tumbrelli*," that is, "*ought to be*

* Of course, there can be no legal trial by jury, in either civil or criminal cases, where the jury are sworn to try the cases "*according to law.*"

amerced, or suffer judgment of the tumbrel." — 51 *Henry III.*, st. 6. (1266.)

If the king (the legislative power) had had authority to fix the punishments of these offences imperatively, he would naturally have said these offenders *shall* be amerced, and *shall* suffer judgment of the pillory and tumbrel, instead of thus simply expressing the opinion that they *ought* to be punished in that manner.

The statute of Westminster, passed sixty years after Magna Carta, provides that,

"No city, borough, nor town, *nor any man*, be amerced, without reasonable cause, and according to the quantity of the trespass; that is to say, every freeman saving his freehold, a merchant saving his merchandise, a villein his waynage, *and that by his or their peers.*" — 3 *Edward I.*, ch. 6. (1275.)

The same statute (ch. 18) provides further, that,

"Forasmuch as the *common fine and amercement* of the whole county in Eyre of the justices for false judgments, or for other trespass, is unjustly assessed by sheriffs and baretors in the shires, so that the sum is many times increased, and the parcels otherwise assessed than they ought to be, to the damage of the people, which be many times paid to the sheriffs and baretors, which do not acquit the payers; it is provided, and the king wills, that from henceforth such sums shall be assessed before the justices in Eyre, afore their departure, *by the oath of knights and other honest men*, upon all such as ought to pay; and the justices shall cause the parcels to be put into their estreats, which shall be delivered up unto the exchequer, and not the whole sum." — *St. 3 Edward I.*, ch. 18, (1275.)*

The following statute, passed in 1341, one hundred and twenty-five years after Magna Carta, providing for the trial of peers of the realm, and the king's ministers, contains a re-

* Coke, as late as 1588, admits that amercements must be fixed by the peers (8 *Coke's Rep.* 38, 2 *Inst.* 27); but he attempts, wholly without success, as it seems to me, to show a difference between fines and amercements. The statutes are very numerous, running through the three or four hundred years immediately succeeding Magna Carta, in which fines, ransoms, and amercements are spoken of as if they were the common punishments of offences, and as if they all meant the same thing. If, however, any technical difference could be made out between them, there is clearly none in principle; and the word *amercement*, as used in Magna Carta, must be taken in its most comprehensive sense.

cognition of the principle of Magna Carta, that the jury are to fix the sentence.

“Whereas before this time the peers of the land have been arrested and imprisoned, and their temporalities, lands, and tenements, goods and cattels, asseized in the king’s hands, and some put to death without judgment of their peers: It is accorded and assented, that no peer of the land, officer, nor other, because of his office, nor of things touching his office, nor by other cause, shall be brought in judgment to lose his temporalities, lands, tenements, goods and cattels, nor to be arrested, nor imprisoned, outlawed, exiled, nor forejudged, nor put to answer, nor be judged, but by *award (sentence)* of the said peers in Parliament.”—15 *Edward III.*, st. 1, sec. 2.

Section 4, of the same statute provides,

“That in every Parliament, at the third day of every Parliament, the king shall take in his hands the offices of all the ministers aforesaid,” (that is, “the chancellor, treasurer, barons, and chancellor of the exchequer, the justices of the one bench and of the other, justices assigned in the country, steward and chamberlain of the king’s house, keeper of the privy seal, treasurer of the wardrobe, controllers, and they that be chief deputed to abide nigh the king’s son, Duke of Cornwall,”) “and so they shall abide four or five days; except the offices of justices of the one place or the other, justices assigned, barons of exchequer; so always that they and all other ministers be put to answer to every complaint; and if default be found in any of the said ministers, by complaint or other manner, and of that attainted in Parliament, he shall be punished by judgment of the peers, and put out of his office, and another convenient put in his place. And upon the same our said sovereign lord the king shall do (cause) to be pronounced and made execution without delay, *according to the judgment (sentence)* of the said peers in the Parliament.”

Here is an admission that the peers were to fix the sentence, or judgment, and the king promises to make execution “*according to*” that sentence.

And this appears to be the law, under which peers of the realm and the great officers of the crown were tried and sentenced, for four hundred years after its passage, and, for aught I know, until this day.

The first case given in Hargrave’s collection of English State Trials, is that of *Alexander Nevil*, Archbishop of York,

Robert Vere, Duke of Ireland, *Michael de la Pole*, Earl of Suffolk, and *Robert Tresilian*, Lord Chief Justice of England, with several others, convicted of treason, before "the Lords of Parliament," in 1388. The sentences in these cases were adjudged by the "Lords of Parliament," in the following terms, as they are reported.

"Wherefore the said *Lords of Parliament*, there present, as judges in Parliament, in this case, *by assent of the king, pronounced their sentence*, and did adjudge the said archbishop, duke, and earl, with Robert Tresilian, so appealed, as afore-said, to be guilty, and convicted of treason, and to be drawn and hanged, as traitors and enemies to the king and kingdom; and that their heirs should be disinherited forever, and their lands and tenements, goods and chattels, forfeited to the king, and that the temporalities of the Archbishop of York should be taken into the king's hands."

Also, in the same case, Sir *John Holt*, Sir *William Burgh*, Sir *John Cary*, Sir *Roger Fulthorpe*, and *John Locton*, "*were by the lords temporal, by the assent of the king*, adjudged to be drawn and hanged, as traitors, their heirs disinherited, and their lands and tenements, goods and chattels, to be forfeited to the king."

Also, in the same case, *John Blake*, "of council for the king," and *Thomas Uske*, under sheriff of Middlesex, having been convicted of treason,

"*The lords awarded, by assent of the king*, that they should both be hanged and drawn as traitors, as open enemies to the king and kingdom, and their heirs disinherited forever, and their lands and tenements, goods and chattels, forfeited to the king."

Also, "*Simon Burleigh*, the king's chamberlain," being convicted of treason, "*by joint consent of the king and the lords*, sentence was pronounced against the said Simon Burleigh, that he should be drawn from the town to Tyburn, and there be hanged till he be dead, and then have his head struck from his body."

Also, "*John Beauchamp*, steward of the household to the king, *James Beroverse*, and *John Salisbury*, knights, gentlemen of the privy chamber, *were in like manner condemned.*" — 1 *Hargrave's State Trials*, first case.

Here the sentences were all fixed by the peers, *with the assent of the king*. But that the king should be consulted, and his assent obtained to the sentence pronounced by the peers,

does not imply any deficiency of power on their part to fix the sentence independently of the king. There are obvious reasons why they might choose to consult the king, and obtain his approbation of the sentence they were about to impose, without supposing any legal necessity for their so doing.

So far as we can gather from the reports of state trials, peers of the realm were usually sentenced by those who tried them, *with the assent of the king*. But in some instances no mention is made of the assent of the king, as in the case of "Lionel, Earl of Middlesex, Lord High Treasurer of England," in 1624, (four hundred years after Magna Carta,) where the sentence was as follows :

"This High Court of Parliament doth adjudge, that Lionel, Earl of Middlesex, now Lord Treasurer of England, shall lose all his offices which he holds in this kingdom, and shall, hereafter, be made incapable of any office, place, or employment in the state and commonwealth. That he shall be imprisoned in the tower of London, during the king's pleasure. That he shall pay unto our sovereign lord the king a fine of 50,000 pounds. That he shall never sit in Parliament any more, and that he shall never come within the verge of the court."—2 *Hovell's State Trials*, 1250.

Here was a peer of the realm, and a minister of the king, of the highest grade; and if it were ever *necessary* to obtain the assent of the king to sentences pronounced by the peers, it would unquestionably have been obtained in this instance, and his assent would have appeared in the sentence.

Lord Bacon was sentenced by the House of Lords, (1620,) *no mention being made of the assent of the king*. The sentence is in these words :

"And, therefore, this High Court doth adjudge, That the Lord Viscount St. Albans, Lord Chancellor of England, shall undergo fine and ransom of 40,000 pounds. That he shall be imprisoned in the tower during the king's pleasure. That he shall forever be incapable of any office, place, or employment in the state or commonwealth. That he shall never sit in Parliament, nor come within the verge of the court."

And when it was demanded of him, before sentence, whether it were his hand that was subscribed to his confession, and

whether he would stand to it; he made the following answer, which implies that the *lords* were the ones to determine his sentence.

“My lords, it is my act, my hand, my heart. *I beseech your lordships to be merciful to a broken reed.*” — 1 *Hargrave's State Trials*, 386-7.

The sentence against Charles the First, (1648,) after reciting the grounds of his condemnation, concludes in this form :

“For all which treasons and crimes, *this court doth adjudge*, that he, the said Charles Stuart, as a tyrant, traitor, murderer, and public enemy to the good people of this nation, shall be put to death by the severing his head from his body.”

The report then adds :

“This sentence being read, the president (of the court) spake as followeth: ‘This sentence now read and published, is the act, sentence, judgment and resolution of the whole court.’” — 1 *Hargrave's State Trials*, 1037.

Unless it had been the received “*law of the land*” that those who tried a man should fix his sentence, it would have required an act of Parliament to fix the sentence of Charles, and his sentence would have been declared to be “*the sentence of the law*,” instead of “*the act, sentence, judgment, and resolution of the court.*”

But the report of the proceedings in “the trial of Thomas, Earl of Macclesfield, Lord High Chancellor of Great Britain, before the House of Lords, for high crimes and misdemeanors in the execution of his office,” in 1725, is so full on this point, and shows so clearly that it rested wholly with the lords to fix the sentence, and that the assent of the king was wholly unnecessary, that I give the report somewhat at length.

After being found guilty, the earl addressed the *lords*, for a *mitigation of sentence*, as follows :

“‘I am now to expect your lordships’ judgment; and I hope that you will be pleased to consider that I have suffered no small matter already in the trial, in the expense I have been at, the fatigue, and what I have suffered otherways. * * I have paid back 10,800 pounds of the money already; I have lost my office; I have undergone the censure of both houses of Parliament, which is in itself a severe punishment,’” &c., &c.

On being interrupted, he proceeded :

“My lords, I submit whether this be not proper in *mitigation of your lordships’ sentence* ; but whether it be or not, I leave myself to your lordships’ justice and mercy ; I am sure neither of them will be wanting, and I entirely submit.’ * * *

“Then the said earl, as also the managers, were directed to withdraw ; and the House (of Lords) ordered Thomas, Earl of Macclesfield, to be committed to the custody of the gentleman usher of the black rod ; and then proceeded to the consideration of what *judgment*,” (that is, *sentence*, for he had already been found *guilty*,) “to give upon the impeachment against the said earl.” * * *

“The next day, the Commons, with their speaker, being present at the bar of the House (of Lords), * * * the speaker of the House of Commons said as follows :

“My Lords, the knights, citizens, and burgesses in Parliament assembled, in the name of themselves, and of all the commons of Great Britain, did at this bar impeach Thomas, Earl of Macclesfield, of high crimes and misdemeanors, and did exhibit articles of impeachment against him, and have made good their charge. I do, therefore, in the name of the knights, citizens, and burgesses, in Parliament assembled, and of all the commons of Great Britain, demand *judgment (sentence)* of your lordships against Thomas, Earl of Macclesfield, for the said high crimes and misdemeanors.’

“Then the Lord Chief Justice King, Speaker of the House of Lords, said : ‘Mr. Speaker, the Lords are now ready to proceed to judgment in the case by you mentioned.

“‘Thomas, Earl of Macclesfield, the Lords have unanimously found you guilty of high crimes and misdemeanors, charged on you by the impeachment of the House of Commons, and do now, according to law, proceed to *judgment* against you, which I am ordered to pronounce. Their lordships’ *judgment* is, and this high court doth adjudge, that you, Thomas, Earl of Macclesfield, be fined in the sum of thirty thousand pounds unto our sovereign lord the king ; and that you shall be imprisoned in the tower of London, and there kept in safe custody, until you shall pay the said fine.’” — 6 *Hargrave’s State Trials*, 762-3-4.

This case shows that the principle of Magna Carta, that a man should be *sentenced* only by his peers, was in force, and acted upon as law, in England, so lately as 1725, (five hundred years after Magna Carta,) so far as it applied to a *peer of the realm*.

But the same principle, on this point, that applies to a peer of the realm, applies to every freeman. The only difference between the two is, that the peers of the realm have had influence enough to preserve their constitutional rights; while the constitutional rights of the people have been trampled upon and rendered obsolete by the usurpation and corruption of the government and the courts.

SECTION V.

The Oaths of Judges.

As further proof that the legislation of the king, whether enacted with or without the assent and advice of his parliaments, was of no authority unless it were consistent with the *common law*, and unless juries and judges saw fit to enforce it, it may be mentioned that it is probable that no judge in England was ever sworn to observe the laws enacted either by the king alone, or by the king with the advice and assent of parliament.

The judges were sworn to "*do equal law, and execution of right, to all the king's subjects, rich and poor, without having regard to any person;*" and that they will "*deny no man common right;*"* but they were *not* sworn to obey or execute any statutes of the king, or of the king and parliament. Indeed, they are virtually sworn *not* to obey any statutes that are against "*common right,*" or contrary to "*the common law,*" or "*law of the land;*" but to "*certify the king thereof*" — that is, notify him that his statutes are against the common law; — and then proceed to execute the *common law*, notwithstanding such legislation to the contrary. . . . The words of the oath on this point are these :

"That ye deny no man common right by (virtue of) the king's letters, nor none other man's, nor for none other cause; and in case any letters come to you contrary to the law, (that is, the common law, as will be seen on reference to the entire oath given in the note,) that ye do nothing by such letters, but

* "*Common right*" was the *common law*. 1 *Coke's Inst.* 142 a. 2 do. 55, 6.

certify the king thereof, and proceed to execute the law, (that is, the common law,) notwithstanding the same letters."

When it is considered that the king was the sole legislative power, and that he exercised this power, to a great extent, by orders in council, and by writs and "letters" addressed oftentimes to some sheriff, or other person, and that his commands, when communicated to his justices, or any other person, "by letters," or writs, *under seal*, had as much legal authority as laws promulgated in any other form whatever, it will be seen that this oath of the justices *absolutely required* that they disregard any legislation that was contrary to "*common right*," or "*the common law*," and notify the king that it was contrary to common right, or the common law, and then proceed to execute the common law, notwithstanding such legislation.*

If there could be any doubt that such was the meaning of this oath, that doubt would be removed by a statute passed by the king two years afterwards, which fully explains this oath, as follows:

"Edward, by the Grace of God, &c., to the Sheriff of *Stafford*, greeting: Because that by divers complaints made to us, we have perceived that *the Law of the Land, which we by our oath are bound to maintain*, is the less well kept, and the execution of the same disturbed many times by maintenance and procurement, as well in the court as in the country; we

* The oath of the justices is in these words:

"Ye shall swear, that well and lawfully ye shall serve our lord the king and *his people*, in the office of justice, and that lawfully ye shall counsel the king in his business, and that ye shall not counsel nor assent to anything which may turn him in damage or disherison in any manner, way, or color. And that ye shall not know the damage or disherison of him, whereof ye shall not cause him to be warned by yourself, or by other; and that ye shall do equal law and execution of right to all his subjects, rich and poor, without having regard to any person. And that ye take not by yourself, or by other, privily nor apertly, gift nor reward of gold nor silver, nor of any other thing that may turn to your profit, unless it be meat or drink, and that of small value, of any man that shall have any plea or process hanging before you, as long as the same process shall be so hanging, nor after for the same cause. And that ye take no fee, as long as ye shall be justice, nor robe of any man great or small, but of the king himself. And that ye give none advice or counsel to no man great or small, in no case where the king is party. And in case that any, of what estate or condition they be, come before you in your sessions with force and arms, or otherwise against the peace, or against the form of the statute thereof made, to disturb execution of the common law," (mark the term, "*common law*,") "or to menace the people that they may not

greatly moved of conscience in this matter, and for this cause desiring as much for the pleasure of God, and ease and quietness of our subjects, as to save our conscience, and for to save and keep our said oath, by the assent of the great men and other wise men of our council, we have ordained these things following:

"First, we have commanded all our justices, that they shall from henceforth *do equal law and execution of right* to all our subjects, rich and poor, without having regard to any person, *and without omitting to do right for any letters or commandment which may come to them from us, or from any other, or by any other cause. And if that any letters, writs, or commandments come to the justices, or to other deputed to do law and right according to the usage of the realm, in disturbance of the law, or of the execution of the same, or of right to the parties, the justices and other aforesaid shall proceed and hold their courts and processes, where the pleas and matters be depending before them, as if no such letters, writs, or commandments were come to them; and they shall certify us and our council of such commandments which be contrary to the law,* (that is, "the law of the land," or common law,) *as afore is said.*"* And to the intent that our justices shall do even right to all people in the manner aforesaid, without more favor showing to one than to another, we have ordained and caused our said justices to be sworn, that they shall not from henceforth, as long as they shall be in the office of justice, take fee nor robe of any man, but of ourself, and that they shall take no gift nor reward by themselves, nor by other, privily nor

pursue the law, that ye shall cause their bodies to be arrested and put in prison; and in case they be such that ye cannot arrest them, that ye certify the king of their names, and of their misprison, hastily, so that he may thereof ordain a convenable remedy. And that ye by yourself, nor by other, privily nor apertly, maintain any plea or quarrel hanging in the king's court, or elsewhere in the country. *And that ye deny no man common right by the king's letters, nor none other man's, nor for none other cause; and in case any letters come to you contrary to the law,* (that is, the "common law" before mentioned,) *"that ye do nothing by such letters, but certify the king thereof, and proceed to execute the law,"* (the "common law" before mentioned,) *"notwithstanding the same letters. And that ye shall do and procure the profit of the king and of his crown, with all things where ye may reasonably do the same. And in case ye be from henceforth found in default in any of the points aforesaid, ye shall be at the king's will of body, lands, and goods, thereof to be done as shall please him, as God you help and all saints."* — 18 Edward III., st. 4. (1344.)

* That the terms "Law" and "Right," as used in this statute, mean the *common law*, is shown by the preamble, which declares the motive of the statute to be that "*the Law of the Land, (the common law,) which we (the king) by our oath are bound to maintain,*" may be the better kept, &c.

apertly, of any man that hath to do before them by any way, except meat and drink, and that of small value; and that they shall give no counsel to great men or small, in case where we be party, or which do or may touch us in any point, upon pain to be at our will, body, lands, and goods, to do thereof as shall please us, in case they do contrary. And for this cause we have increased the fees of the same, our justices, in such manner as it ought reasonably to suffice them." — 20 *Edward III.*, ch. 1. (1346.)

Other statutes of similar tenor have been enacted, as follows:

"It is accorded and established, that it shall not be commanded by the great seal, nor the little seal, to disturb or delay *common right*; and though such commandments do come, the justices shall not therefore leave (omit) to do right in any point." — *St. 2 Edward III.*, ch. 8. (1328.)

"That by commandment of the great seal, or privy seal, no point of this statute shall be put in delay; nor that the justices of whatsoever place it be shall let (omit) to do the *common law*, by commandment, which shall come to them under the great seal, or the privy seal." — 14 *Edward III.*, st. 1, ch. 14. (1340.)

"It is ordained and established, that neither letters of the signet, nor of the king's privy seal, shall be from henceforth sent in damage or prejudice of the realm, nor in disturbance of the law" (the common law). — 11 *Richard II.*, ch. 10. (1387.)

It is perfectly apparent from these statutes, and from the oath administered to the justices, that it was a matter freely confessed by the king himself, that his statutes were of no validity, if contrary to the common law, or "common right."

The oath of the justices, before given, is, I presume, the same that has been administered to judges in England from the day when it was first prescribed to them, (1344,) until now. I do not find from the English statutes that the oath has ever been changed. The Essay on Grand Juries, before referred to, and supposed to have been written by *Lord Somers*, mentions this oath (page 73) as being still administered to judges, that is, in the time of Charles II., more than three hundred years after the oath was first ordained. If the oath has never been changed, it follows that judges have not only never been sworn to support any statutes whatever of

the king, or of parliament, but that, for five hundred years past, they actually have been sworn to treat as invalid all statutes that were contrary to the common law.

SECTION VI.

The Coronation Oath.

That the legislation of the king was of no authority over a jury, is further proved by the oath taken by the kings at their coronation. This oath seems to have been substantially the same, from the time of the *Saxon* kings, down to the seventeenth century, as will be seen from the authorities hereafter given.

The purport of the oath is, that the king swears *to maintain the law of the land*—that is, *the common law*. In other words, he swears “*to concede and preserve to the English people the laws and customs conceded to them by the ancient, just, and pious English kings, * * and especially the laws, customs, and liberties conceded to the clergy and people by the illustrious king Edward;*” * * and “*the just laws and customs which the common people have chosen, (quas vulgus elegit).*”

These are the same laws and customs which were called by the general name of “*the law of the land,*” or “*the common law,*” and, with some slight additions, were embodied in *Magna Carta*.

This oath not only forbids the king to enact any statutes contrary to the common law, but it proves that his statutes could be of no authority over the consciences of a jury; since, as has already been sufficiently shown, it was one part of this very common law itself,—that is, of the ancient “*laws, customs, and liberties,*” mentioned in the oath,—that juries should judge of all questions that came before them, according to their own consciences, independently of the legislation of the king.

It was impossible that this right of the jury could subsist consistently with any right, on the part of the king, to impose any authoritative legislation upon them. His oath, therefore,

to maintain the law of the land, or the ancient "laws, customs, and liberties," was equivalent to an oath that he would never *assume* to impose laws upon juries, as imperative rules of decision, or take from them the right to try all cases according to their own consciences. It is also an admission that he had no constitutional power to do so, if he should ever desire it. This oath, then, is conclusive proof that his legislation was of no authority with a jury, and that they were under no obligation whatever to enforce it, unless it coincided with their own ideas of justice.

The ancient coronation oath is printed with the Statutes of the Realm, vol. i., p. 168, and is as follows :*

TRANSLATION.

"Form of the Oath of the King of England, on his Coronation.

(The Archbishop of Canterbury, to whom, of right and custom of the Church of Canterbury, ancient and approved, it pertains to anoint and crown the kings of England, on the day of the coronation of the king, and before the king is crowned, shall propound the underwritten questions to the king.)

The laws and customs, conceded to the English people by the ancient, just, and pious English kings, will you concede and preserve to the same people, with the confirmation of an oath? and especially the laws, customs, and liberties conceded to the clergy and people by the illustrious king Edward?

* The following is a copy of the original :

"Forma Juramenti Regis Angliæ in Coronacione sua :

(*Archiepiscopus Cantuariæ, ad quo de jure et consuetudine Ecclesiæ Cantuariæ, antiqua et approbata, pertinet Reges Angliæ inungere et coronare, die coronacionis Regis, antequam Rex coronetur, faciet Regi Interrogationes subscriptas.*)

Si leges et consuetudines ab antiquis justis et Deo devotis Regibus plebi Anglicano concessas, cum sacramenti confirmacione eidem plebi concedere et servare (volueris :) Et præsertim leges et consuetudines et libertates a glorioso Rege Edwardo clero populoque concessas ?

(*Et respondeat Rex,)* *Concedo et servare volo, et sacramento confirmare.*

Servabis Ecclesiæ Dei, Cleroque, et Populo, pacem ex integro et concordiam in Deo secundum vires tuas ?

(*Et respondeat Rex,)* *Servabo.*

Facies fieri in omnibus Judiciis tuis equam et rectam justiciam, et discrecionem, in misericordia et veritate, secundum vires tuas ?

(*Et respondeat Rex,)* *Faciam.*

Concedis justas, leges et consuetudines esse tenendas, et promittis per te eas esse protegendas, et ad honorem Dei corroborandas, quas vulgus elegit, secundum vires tuas ?

(*Et respondeat Rex,)* *Concedo et promitto."*

(And the king shall answer,) I do concede, and will preserve them, and confirm them by my oath.

Will you preserve to the church of God, the clergy, and the people, entire peace and harmony in God, according to your powers?

(And the king shall answer,) I will.

In all your judgments, will you cause equal and right justice and discretion to be done, in mercy and truth, according to your powers?

(And the king shall answer,) I will.

Do you concede that the just laws and customs, *which the common people have chosen*, shall be preserved; and do you promise that they shall be protected by you, and strengthened to the honor of God, according to your powers?

(And the king shall answer,) I concede and promise."

The language used in the last of these questions, "Do you concede that the just laws and customs, *which the common people have chosen*, (*quas vulgus elegit*,) shall be preserved?" &c., is worthy of especial notice, as showing that the laws, which were to be preserved, were not necessarily *all* the laws which the kings enacted, *but only such of them as the common people had selected or approved*.

And how had the common people made known their approbation or selection of these laws? Plainly, in no other way than this — *that the juries composed of the common people had voluntarily enforced them*. The common people had no other *legal* form of making known their approbation of particular laws.

The word "concede," too, is an important word. In the English statutes it is usually translated *grant* — as if with an intention to indicate that "the laws, customs, and liberties" of the English people were mere *privileges*, *granted* to them by the king; whereas it should be translated *concede*, to indicate simply an *acknowledgment*, on the part of the king, that such were the laws, customs, and liberties, which had been chosen and established by the people themselves, and of right belonged to them, and which he was bound to respect.

I will now give some authorities to show that the foregoing oath has, *in substance*, been the coronation oath from the times of William the Conqueror, (1066,) down to the time of James the First, and probably until 1688.

It will be noticed, in the quotation from Kelham, that he says this oath (or the oath of William the Conqueror) is "in sense and substance the very same with that which the *Saxon* kings used to take at their coronations."

Hale says :

"Yet the English were very zealous for them," (that is, for the laws of Edward the Confessor,) "no less or otherwise than they are at this time for the Great Charter; insomuch that they were never satisfied till the said laws were reënforced, and mingled, for the most part, with the coronation oath of king William I., and some of his successors." — 1 *Hale's History of Common Law*, 157.

Also, "William, on his coronation, had sworn to govern by the laws of Edward the Confessor, some of which had been reduced into writing, but the greater part consisted of the immemorial customs of the realm." — *Ditto*, p. 202, note L.

Kelham says :

"Thus stood the laws of England at the entry of William I., and it seems plain that the laws, commonly called the laws of Edward the Confessor, were at that time the standing laws of the kingdom, and considered the great rule of their rights and liberties; and that the English were so zealous for them, 'that they were never satisfied till the said laws were reënforced, and mingled, for the most part, with the coronation oath.' Accordingly, we find that this great conqueror, at his coronation on the Christmas day succeeding his victory, took an oath at the altar of St. Peter, Westminster, *in sense and substance the very same with that which the Saxon kings used to take at their coronations.* * * And at Barkhamstead, in the fourth year of his reign, in the presence of Lanfranc, Archbishop of Canterbury, for the quieting of the people, he swore that he would inviolably observe the good and approved ancient laws which had been made by the devout and pious kings of England, his ancestors, and chiefly by King Edward; and we are told that the people then departed in good humor." — *Kelham's Preliminary Discourse to the Laws of William the Conqueror*. See, also, 1 *Hale's History of the Common Law*, 186.

Crabbe says that William the Conqueror "solemnly swore that he would observe the good and approved laws of Edward the Confessor." — *Crabbe's History of the English Law*, p. 43.

The successors of William, up to the time of Magna Carta,

probably all took the same oath, according to the custom of the kingdom; although there may be no historical accounts extant of the oath of each separate king. But history tells us specially that Henry I., Stephen, and Henry II., confirmed these ancient laws and customs. It appears, also, that the barons desired of John (what he afterwards granted by Magna Carta) "*that the laws and liberties of King Edward, with other privileges granted to the kingdom and church of England, might be confirmed, as they were contained in the charters of Henry the First; further alleging, that at the time of his absolution, he promised by his oath to observe these very laws and liberties.*"—*Echard's History of England*, p. 105-6.

It would appear, from the following authorities, that since Magna Carta the form of the coronation oath has been "*to maintain the law of the land,*"—meaning that law as embodied in Magna Carta. Or perhaps it is more probable that the ancient form has been still observed, but that, as its substance and purport were "*to maintain the law of the land,*" this latter form of expression has been used, in the instances here cited, from motives of brevity and convenience. This supposition is the more probable, from the fact that I find no statute prescribing a change in the form of the oath until 1688.

That Magna Carta was considered as embodying "the law of the land," or "common law," is shown by a statute passed by Edward I., wherein he "grants," or concedes,

"That the Charter of Liberties and the Charter of the Forest * * shall be kept in every point, without breach, * * and that our justices, sheriffs, mayors, and other ministers, which, under us, have the *laws of our land** to guide, shall allow the said charters pleaded before them in judgment, in all their points, that is, to wit, *the Great Charter as the Common Law*, and the Charter of the Forest for the wealth of the realm.

"And we will, that if any judgment be given from henceforth, contrary to the points of the charters aforesaid, by the justices, or by any other our ministers that hold plea before them against the points of the charters, it shall be undone, and holden for naught."—*25 Edward I.*, ch. 1 and 2. (1297.)

* It would appear, from the text, that the Charter of Liberties and the Charter of the Forest were sometimes called "*laws of the land.*"

Blackstone also says :

“It is agreed by all our historians that the Great Charter of King John was, for the most part, *compiled from the ancient customs of the realm, or the laws of Edward the Confessor ; by which they usually mean the old common law which was established under our Saxon princes.*” — *Blackstone's Introduction to the Charters.* See *Blackstone's Law Tracts*, 289.

Crabbe says :

“It is admitted, on all hands, that it (Magna Carta) contains nothing but what was confirmatory of the common law, and the ancient usages of the realm, and is, properly speaking, only an enlargement of the charter of Henry I., and his successors.” — *Crabbe's History of the English Law*, p. 127.

That the coronation oath of the kings subsequent to Magna Carta was, in substance, if not in form, “*to maintain this law of the land, or common law,*” is shown by a statute of Edward Third, commencing as follows :

“Edward, by the Grace of God, &c., &c., to the Sheriff of Stafford, Greeting : Because that by divers complaints made to us, we have perceived that *the law of the land, which we by oath are bound to maintain,*” &c. — *St. 20 Edward III.* (1346.)

The following extract from Lord Somers' tract on Grand Juries shows that the coronation oath continued the same as late as 1616, (four hundred years after Magna Carta.) He says :

“King James, in his speech to the judges, in the Star Chamber, Anno 1616, told them, ‘That he had, after many years, resolved to renew his oath, made at his coronation, concerning justice, and the promise therein contained for *maintaining the law of the land.*’ And, in the next page save one, says, ‘*I was sworn to maintain the law of the land, and therefore had been perjured if I had broken it. God is my judge, I never intended it.*’” — *Somers on Grand Juries*, p. 82.

In 1688, the coronation oath was changed by act of Parliament, and the king was made to swear :

“To govern the people of this kingdom of England, and the dominions thereto belonging, *according to the statutes in Parliament agreed on, and the laws and customs of the same.*” — *St. 1 William and Mary*, ch. 6. (1688.)

The effect and legality of this oath will hereafter be considered. For the present it is sufficient to show, as has been already sufficiently done, that from the Saxon times until at least as lately as 1616, the coronation oath has been, in substance, *to maintain the law of the land, or the common law*, meaning thereby the ancient Saxon customs, as embodied in the laws of Alfred, of Edward the Confessor, and finally in Magna Carta.

It may here be repeated that this oath plainly proves that the statutes of the king were of no authority over juries, if inconsistent with their ideas of right; because it was one part of the common law that juries should try all causes according to their own consciences, any legislation of the king to the contrary notwithstanding.*

* As the ancient coronation oath, given in the text, has come down from the *Saxon* times, the following remarks of Palgrave will be pertinent, in connection with the oath, as illustrating the fact that, in those times, no special authority attached to the laws of the king :

“The Imperial Witenagemot was not a legislative assembly, in the strict sense of the term, for the whole Anglo-Saxon empire. Promulgating his edicts amidst his peers and prelates, the king uses the language of command; but the theoretical prerogative was modified by usage, and the practice of the constitution required that the law should be accepted by the legislatures (courts) of the several kingdoms. * * The ‘Basilicus’ speaks in the tone of prerogative: Edgar does not merely recommend, he commands that the law shall be adopted by all the people, whether English, Danes, or Britons, in every part of his empire. Let this statute be observed, he continues, by Earl Osric, and all the host who dwell under his government, and let it be transmitted *by writ* to the ealdormen of the other subordinate states. And yet, in defiance of this positive injunction, the laws of Edgar were not accepted in Mercia until the reign of Canute the Dane. It might be said that the course so adopted may have been an exception to the general rule; but in the scanty and imperfect annals of Anglo-Saxon legislation, we shall be able to find so many examples of similar proceedings, *that this mode of enactment must be considered as dictated by the constitution of the empire.* Edward was the supreme lord of the Northumbrians, but more than a century elapsed before they obeyed his decrees. The laws of the glorious Athelstano had no effect in Kent, (county,) the dependent appanage of his crown, until sanctioned by the *Witen* of the *shire* (county court). And the power of Canute himself, the ‘King of all England,’ does not seem to have compelled the Northumbrians to receive his code, until the reign of the Confessor, when such acceptance became a part of the compact upon the accession of a new earl.

Legislation constituted but a small portion of the ordinary business transacted by the Imperial Witenagemot. The wisdom of the assembly was shown in avoiding unnecessary change. *Consisting principally of traditional usages and ancestral customs, the law was upheld by opinion. The people considered their jurisprudence as a part of their inheritance.* Their privileges and their duties were closely conjoined; *most frequently, the statutes themselves were only affirmances of ancient customs, or declaratory enactments.* In the Anglo-Saxon commonwealth, therefore, the legislative functions of the Witenagemot were of far less importance than the other branches of its authority. * * The members of the Witenagemot were the ‘*Pares Curie*’ (Peers of Court) of the kingdom. How far, on these occasions, their opinion or their equity controlled the power of the crown, cannot be ascertained. But the form of inserting their names in the ‘*Testing Clause*’ was retained under the Anglo-Norman reigns; and the sovereign, who submitted his Charter to the judgment of the *Proceres*, professed to be guided by the

opinion which they gave. As the '*Pares*' of the empire, the Witenagemot decided the disputes between the great vassals of the crown. * * The jurisdiction exercised in the Parliament of Edward I., when the barony of a *Lord-Marcher* became the subject of litigation, is entirely analogous to the proceedings thus adopted by the great council of Edward, the son of Alfred, the Anglo-Saxon king.

In this assembly, the king, the prelates, the dukes, the caldormen, and the optimates passed judgment upon all great offenders. * *

The sovereign could not compel the obedience of the different nations composing the Anglo-Saxon empire. Hence, it became more necessary for him to *conciliate their opinions*, if he solicited any service from a vassal prince or a vassal state beyond the ordinary terms of the compact; still more so, when he needed the support of a free burgh or city. And we may view the assembly (the Witenagemot) as partaking of the character of a political congress, in which the liegemen of the crown, or the communities protected by the '*Basileus*,' (sovereign,) were *asked or persuaded* to relieve the exigencies of the state, or to consider those measures which might be required for the common weal. The sovereign was compelled to *parley* with his dependents.

It may be doubted whether any one member of the empire had power to legislate for any other member. The Regulus of Cumbria was unaffected by the vote of the Earl of East Angliæ, if he chose to stand out against it. These dignitaries constituted a congress, in which the sovereign could treat more conveniently and effectually with his vassals than by separate negotiations. * * But the determinations of the Witan bound those only who were present, or who concurred in the proposition; and a vassal denying his assent to the grant, might assert that the engagement which he had contracted with his superior did not involve any pecuniary subsidy, but only rendered him liable to perform service in the field."—1 *Palgrave's Rise and Progress of the English Commonwealth*, 637 to 642.

CHAPTER IV.

THE RIGHTS AND DUTIES OF JURIES IN CIVIL SUITS.

THE evidence already given in the preceding chapters proves that the rights and duties of jurors, in civil suits, were anciently the same as in criminal ones; that the laws of the king were of no obligation upon the consciences of the jurors, any further than the laws were seen by them to be just; that very few laws were enacted applicable to civil suits; that when a new law was enacted, the nature of it could have been known to the jurors only by report, and was very likely not to be known to them at all; that nearly all the law involved in civil suits was *unwritten*; that there was *usually* no one in attendance upon juries who could possibly enlighten them, unless it were sheriffs, stewards, and bailiffs, who were unquestionably too ignorant and untrustworthy to instruct them authoritatively; that the jurors must therefore necessarily have judged for themselves of the whole case; and that, *as a general rule*, they could judge of it by no law but the law of nature, or the principles of justice as they existed in their own minds.

The ancient oath of jurors in civil suits, viz., that "*they would make known the truth according to their consciences,*" implies that the jurors were above the authority of all legislation. The modern oath, in England, viz., that they "*will well and truly try the issue between the parties, and a true verdict give, according to the evidence,*" implies the same thing. If the laws of the king had been binding upon a jury, they would have been sworn to try the cases *according to law*, or according to the laws.

The ancient writs, in civil suits, as given in Glanville, (within the half century before Magna Carta,) to wit, "Summon twelve free and legal men, (or sometimes twelve knights,) to be in court, *prepared upon their oaths to declare whether A*

or *B* have the greater right to the land in question," indicate that the jurors judged of the whole matter on their consciences only.

The language of Magna Carta, already discussed, establishes the same point; for, although some of the words, such as "outlawed," and "exiled," would apply only to criminal cases, nearly the whole chapter applies as well to civil as to criminal suits. For example, how could the payment of a debt ever be enforced against an unwilling debtor, if he could neither be "arrested, imprisoned, nor deprived of his freehold," and if the king could neither "proceed against him, nor send any one against him, by force or arms"? Yet Magna Carta as much forbids that any of these things shall be done against a debtor, as against a criminal, *except according to, or in execution of, "a judgment of his peers, or the law of the land,"* — a provision which, it has been shown, gave the jury the free and absolute right to give or withhold "judgment" according to their consciences, irrespective of all legislation.

The following provisions, in the Magna Carta of John, illustrate the custom of referring the most important matters of a civil nature, even where the king was a party, to the determination of the peers, or of twelve men, acting by no rules but their own consciences. These examples at least show that there is nothing improbable or unnatural in the idea that juries should try all civil suits according to their own judgments, independently of all laws of the king.

Chap. 65. "If we have disseized or dispossessed the Welsh of any lands, liberties, or other things, without the legal judgment of their peers, they shall be immediately restored to them. And if any dispute arises upon this head, the matter shall be determined in the Marches,* *by the judgment of their peers,*" &c.

Chap. 68. "We shall treat with Alexander, king of Scots, concerning the restoring of his sisters, and hostages, and rights and liberties, in the same form and manner as we shall do to the rest of our barons of England; unless by the engagements, which his father William, late king of Scots, hath entered into with us, it ought to be otherwise; *and this shall be left to the determination of his peers in our court.*"

* *Marches*, the limits, or boundaries, between England and Wales.

Chap. 56. "All evil customs concerning forests, warrens, and foresters, warreners, sheriffs, and their officers, rivers and their keepers, shall forthwith be inquired into in each county, by twelve knights of the same shire, chosen by the most creditable persons in the same county, and upon oath; and within forty days after the said inquest, be utterly abolished, so as never to be restored."

There is substantially the same reason why a jury ought to judge of the justice of laws, and hold all unjust laws invalid, in civil suits, as in criminal ones. That reason is the necessity of guarding against the tyranny of the government. Nearly the same oppressions can be practised in civil suits as in criminal ones. For example, individuals may be deprived of their liberty, and robbed of their property, by judgments rendered in civil suits, as well as in criminal ones. If the laws of the king were imperative upon a jury in civil suits, the king might enact laws giving one man's property to another, or confiscating it to the king himself, and authorizing civil suits to obtain possession of it. Thus a man might be robbed of his property at the arbitrary pleasure of the king, In fact, all the property of the kingdom would be placed at the arbitrary disposal of the king, through the judgments of juries in civil suits, if the laws of the king were imperative upon a jury in such suits.*

* That the kings would have had no scruples to enact laws for the special purpose of plundering the people, by means of the judgments of juries, if they could have got juries to acknowledge the authority of their laws, is evident from the audacity with which they plundered them, without any judgments of juries to authorize them.

It is not necessary to occupy space here to give details as to these robberies; but only some evidence of the general fact.

Hallam says, that "For the first three reigns (of the Norman kings) * † the intolerable exactions of tribute, the rapine of purveyance, the iniquity of royal courts, are continually in the mouths of the historians. 'God sees the wretched people,' says the Saxon Chronicle, 'most unjustly oppressed; first they are despoiled of their possessions, and then butchered.' This was a grievous year (1124). Whoever had any property, lost it by heavy taxes and unjust decrees."—2 *Middle Ages*, 435-6.

"In the succeeding reign of *John*, all the rapacious exactions usual to these Norman kings were not only redoubled, but mingled with outrages of tyranny still more intolerable. * * *

"In 1207 *John* took a seventh of the movables of lay and spiritual persons, all murmuring, but none daring to speak against it."—*Ditto*, 446.

In Hume's account of the extortions of those times, the following paragraph occurs:

"But the most barefaced acts of tyranny and oppression were practised against the

Furthermore, it would be absurd and inconsistent to make a jury paramount to legislation in *criminal* suits, and subordinate to it in *civil* suits; because an individual, by resisting the execution of a *civil* judgment, founded upon an unjust

Jews, who were entirely out of the protection of the law, and were abandoned to the immeasurable rapacity of the king and his ministers. Besides many other indignities, to which they were continually exposed, it appears that they were once all thrown into prison, and the sum of 66,000 marks exacted for their liberty. At another time, Isaac, the Jew, paid alone 5100 marks; Brun, 3000 marks; Jurnet, 2000; Bennet, 500. At another, Licorica, widow of David, the Jew of Oxford, was required to pay 4000 marks." — *Hume's Hist. Eng., Appendix 2.*

Further accounts of the extortions and oppressions of the kings may be found in Hume's History, Appendix 2, and in Hallam's Middle Ages, vol. 2, p. 425 to 446.

By Magna Carta John bound himself to make restitution for some of the spoiliations he had committed upon individuals "without the legal judgment of their peers." — See *Magna Carta of John*, ch. 60, 61, 65 and 66.

One of the great charges, on account of which the nation rose against John, was, that he plundered individuals of their property, "without legal judgment of their peers." Now it was evidently very weak and short-sighted in John to expose himself to such charges, if his laws were really obligatory upon the peers; because, in that case, he could have enacted any laws that were necessary for his purpose, and then, by civil suits, have brought the cases before juries for their "judgment," and thus have accomplished all his robberies in a perfectly legal manner.

There would evidently have been no sense in these complaints, that he deprived men of their property "without legal judgment of their peers," if his laws had been binding upon the peers; because he could then have made the same spoiliations as well with the judgment of the peers as without it. Taking the judgment of the peers in the matter, would have been only a ridiculous and useless formality, if they were to exercise no discretion or conscience of their own, independently of the laws of the king.

It may here be mentioned, in passing, that the same would be true in criminal matters, if the king's laws were obligatory upon juries.

As an illustration of what tyranny the kings would sometimes practise, Hume says:

"It appears from the Great Charter itself, that not only John, a tyrannical prince, and Richard, a violent one, but their father Henry, under whose reign the prevalence of gross abuses is the least to be suspected, were accustomed, from their sole authority, without process of law, to imprison, banish, and attain the freemen of their kingdom." — *Hume, Appendix 2.*

The provision, also, in the 64th chapter of Magna Carta, that "all unjust and illegal fines, and all amercoings, imposed unjustly, and contrary to the Law of the Land, shall be entirely forgiven," &c.; and the provision, in chapter 61, that the king "will cause full justice to be administered" in regard to "all those things, of which any person has, without legal judgment of his peers, been dispossessed or deprived, either by King Henry, our father, or our brother, King Richard," indicate the tyrannical practices that prevailed.

We are told also that John himself "had dispossessed several great men without any judgment of their peers, condemned others to cruel deaths, * * * insomuch that his tyrannical will stood instead of a law." — *Echard's History of England*, 106.

Now all these things were very unnecessary and foolish, if his laws were binding

law, could give rise to a *criminal* suit, in which the jury would be bound to hold the same law invalid. So that, if an unjust law were binding upon a jury in *civil* suits, a defendant, by resisting the execution of the judgment, could, *in effect*, convert the civil action into a criminal one, in which the jury would be paramount to the same legislation, to which, in the *civil* suit, they were subordinate. In other words, in the *criminal* suit, the jury would be obliged to justify the defendant in resisting a law, which, in the *civil* suit, they had said he was bound to submit to.

To make this point plain to the most common mind — suppose a law be enacted that the property of A shall be given to B. B brings a civil action to obtain possession of it. If the jury, in this *civil* suit, are bound to hold the law obligatory, they render a judgment in favor of B, that he be put in possession of the property; *thereby declaring that A is bound to submit to a law depriving him of his property.* But when the execution of that judgment comes to be attempted — that is, when the sheriff comes to take the property for the purpose of delivering it to B — A acting, as he has a *natural* right to do, in defence of his property, resists and kills the sheriff. He is thereupon indicted for murder. On this trial his plea is, that in killing the sheriff, he was simply exercising his *natural* right of defending his property against an unjust law. The jury, not being bound, in a *criminal* case, by the authority of an unjust law, judge the act on its merits, and acquit the defendant — thus declaring that he was *not* bound to submit to the same law which the jury, in the *civil* suit, had, by their judgment, declared that he *was* bound to submit to. Here is a contradiction between the two judgments. In the *civil* suit, the law is declared to be obligatory upon A; in the *criminal* suit, the same law is declared to be of no obligation.

upon juries; because, in that case, he could have procured the conviction of these men in a legal manner, and thus have saved the necessity of such usurpation. In short, if the laws of the king had been binding upon juries, there is no robbery, vengeance, or oppression, which he could not have accomplished through the judgments of juries. This consideration is sufficient, of itself, to prove that the laws of the king were of no authority over a jury, in either civil or criminal cases, unless the juries regarded the laws as just in themselves.

It would be a solecism and absurdity in government to allow such consequences as these. Besides, it would be practically impossible to maintain government on such principles; for no government could enforce its *civil* judgments, unless it could support them by *criminal* ones, in case of resistance. A jury must therefore be paramount to legislation in both civil and criminal cases, or in neither. If they are paramount in neither, they are no protection to liberty. If they are paramount in both, then all legislation goes only for what it may chance to be worth in the estimation of a jury.

Another reason why Magna Carta makes the discretion and consciences of juries paramount to all legislation in *civil* suits, is, that if legislation were binding upon a jury, the jurors — (by reason of their being unable to read, as jurors in those days were, and also by reason of many of the statutes being unwritten, or at least not so many copies written as that juries could be supplied with them) — would have been necessitated — at least in those courts in which the king's justices sat — to take the word of those justices as to what the laws of the king really were. In other words, they would have been necessitated to *take the law from the court*, as jurors do now.

Now there were two reasons why, as we may rationally suppose, the people did not wish juries to take their law from the king's judges. One was, that, at that day, the people probably had sense enough to see, (what we, at this day, have not sense enough to see, although we have the evidence of it every day before our eyes,) that those judges, being dependent upon the legislative power, (the king,) being appointed by it, paid by it, and removable by it at pleasure, would be mere tools of that power, and would hold all its legislation obligatory, whether it were just or unjust. This was one reason, doubtless, why Magna Carta made juries, in civil suits, paramount to all instructions of the king's judges. The reason was precisely the same as that for making them paramount to all instructions of judges in criminal suits, viz., that the people did not choose to subject their rights of property, and all other rights involved in civil suits, to the operation of such laws as the king might please to enact. It was seen that to allow the king's judges to dictate the law to the jury would be equiva-

lent to making the legislation of the king imperative upon the jury.

Another reason why the people did not wish juries, in civil suits, to take their law from the king's judges, doubtless was, that, knowing the dependence of the judges upon the king, and knowing that the king would, of course, tolerate no judges who were not subservient to his will, they necessarily inferred that the king's judges would be as corrupt, in the administration of justice, as was the king himself, or as he wished them to be. And how corrupt that was, may be inferred from the following historical facts.

Hume says :

"It appears that the ancient kings of England put themselves entirely upon the footing of the barbarous Eastern princes, whom no man must approach without a present, who sell all their good offices, and who intrude themselves into every business that they may have a pretence for extorting money. Even justice was avowedly bought and sold; the king's court itself, though the supreme judicature of the kingdom, was open to none that brought not presents to the king; the bribes given for expedition, delay, suspension, and doubtless for the perversion of justice, were entered in the public registers of the royal revenue, and remain as monuments of the perpetual iniquity and tyranny of the times. The barons of the exchequer, for instance, the first nobility of the kingdom, were not ashamed to insert, as an article in their records, that the county of Norfolk paid a sum that they might be fairly dealt with; the borough of Yarmouth, that the king's charters, which they have for their liberties, might not be violated; Richard, son of Gilbert, for the king's helping him to recover his debt from the Jews; * * Serlo, son of Terlavaston, that he might be permitted to make his defence, in case he were accused of a certain homicide; Walter de Burton, for free law, if accused of wounding another; Robert de Essart, for having an inquest to find whether Roger, the butcher, and Wace and Humphrey, accused him of robbery and theft out of envy and ill-will, or not; William Buhurst, for having an inquest to find whether he were accused of the death of one Godwin, out of ill-will, or for just cause. I have selected these few instances from a great number of the like kind, which Madox had selected from a still greater number, preserved in the ancient rolls of the exchequer.

Sometimes a party litigant offered the king a certain por-

tion, a half, a third, a fourth, payable out of the debts which he, as the executor of justice, should assist in recovering. Theophania de Westland agreed to pay the half of two hundred and twelve marks, that she might recover that sum against James de Fughleston; Solomon, the Jew, engaged to pay one mark out of every seven that he should recover against Hugh de la Hose; Nicholas Morrel promised to pay sixty pounds, that the Earl of Flanders might be distrained to pay him three hundred and forty-three pounds, which the earl had taken from him; and these sixty pounds were to be paid out of the first money that Nicholas should recover from the earl." — *Hume, Appendix 2.*

"In the reign of Henry II., the best and most just of these (the Norman) princes, * * Peter, of Blois, a judicious and even elegant writer, of that age, gives a pathetic description of *the venality of justice*, and the oppressions of the poor, * * and he scruples not to complain to the king himself of these abuses. We may judge what the case would be under the government of worse princes." — *Hume, Appendix 2.*

Carte says:

"The crown exercised in those days an exorbitant and inconvenient power, ordering the justices of the king's court, in suits about lands, to turn out, put, and keep in possession, which of the litigants they pleased; to send contradictory orders; and take large sums of money from each; to respite proceedings; to direct sentences; and the judges, acting by their commission, conceived themselves bound to observe such orders, to the great delay, interruption, and preventing of justice; at least, this was John's practice." — *Carte's History of England*, vol. 1, p. 832.

Hallam says:

"But of all the abuses that deformed the Anglo-Saxon government, none was so flagitious as the sale of judicial redress. The king, we are often told, is the fountain of justice; but in those ages it was one which gold alone could unseal. Men fined (paid fines) to have right done them; to sue in a certain court; to implead a certain person; to have restitution of land which they had recovered at law. From the sale of that justice which every citizen has a right to demand, it was an easy transition to withhold or deny it. Fines were received for the king's help against the adverse suitor; that is, for perversion of justice, or for delay. Sometimes they were paid by opposite parties, and, of course, for opposite ends." — *Middle Ages*, 438.

In allusion to the provision of Magna Carta on this subject, Hallam says :

“A law which enacts that justice shall neither be sold, denied, nor delayed, stamps with infamy that government under which it had become necessary.” —2 *Middle Ages*, 451.

Lingard, speaking of the times of Henry II., (say 1184,) says :

“It was universally understood that money possessed greater influence than justice in the royal courts, and instances are on record, in which one party has made the king a present to accelerate, and the other by a more valuable offer has succeeded in retarding a decision. * * But besides the fines paid to the sovereigns, *the judges often exacted presents for themselves*, and loud complaints existed against their venality and injustice.” —2 *Lingard*, 231.

In the narrative of “The costs and charges which I, Richard de Anesty, bestowed in recovering the land of William, my uncle,” (some fifty years before Magna Carta,) are the following items :

“To Ralph, the king’s physician, I gave thirty-six marks and one half; to the king an hundred marks; and to the queen one mark of gold.” The result is thus stated. “At last, thanks to our lord the king, and by judgment of his court, my uncle’s land was adjudged to me.” —2 *Palgrave’s Rise and Progress of the English Commonwealth*, p. 9 and 24.

Palgrave also says :

“The precious ore was cast into the scales of justice, even when held by the most conscientious of our Anglo-Saxon kings. A single case will exemplify the practices which prevailed. Alfric, the heir of ‘Aylwin, the black,’ seeks to set aside the death-bed bequest, by which his kinsman bestowed four rich and fertile manors upon St. Benedict. Alfric, the claimant, was supported by extensive and powerful connexions; and Abbot Alfwine, the defendant, was well aware that there would be *danger* in the discussion of the dispute in public, or before the Folkmoot, (people’s meeting, or county court); or, in other words, that the Thanes of the shire would do their best to give a judgment in favor of their compeer. The plea being removed into the Royal Court, the abbot acted with that prudence which so often calls forth the praises of the monastic scribe. He gladly emptied twenty marks of gold into the sleeve of the Confessor, (Edward,) and five marks of gold presented to Edith, the Fair, encouraged her to aid the

bishop, and to exercise her gentle influence in his favor. Alfric, with equal wisdom, withdrew from prosecuting the hopeless cause, in which his opponent might possess an advocate in the royal judge, and a friend in the king's consort. Both parties, therefore, found it desirable to come to an agreement." — 1 *Palgrave's Rise and Progress, &c.*, p. 650.

But Magna Carta has another provision for the trial of *civil* suits, that obviously had its origin in the corruption of the king's judges. The provision is, that four knights, to be chosen in every county, by the people of the county, shall sit with the king's judges, in the Common Pleas, in jury trials, (assizes,) on the trial of three certain kinds of suits, that were among the most important that were tried at all. The reason for this provision undoubtedly was, that the corruption and subserviency of the king's judges were so well known, that the people would not even trust them to sit alone in a jury trial of any considerable importance. The provision is this:

Chap. 22, (of John's Charter.) "Common Pleas shall not follow our court, but shall be holden in some certain place. Trials upon the writ of *novel disseisin*, and of *Mort d'Ancester*, and of *Darrein Presentment*, shall be taken but in their proper counties, and after this manner: We, or, if we should be out of our realm, our chief justiciary, shall send two justiciaries through every county four times a year;* *who, with four knights chosen out of every shire, by the people, shall hold the assizes (juries) in the county, on the day and at the place appointed.*"

It would be very unreasonable to suppose that the king's judges were allowed to *dictate* the law to the juries, when the people would not even suffer them to sit alone in jury trials, but themselves chose four men to sit with them, to keep them honest. †

* By the Magna Carta of Henry III. this is changed to once a year.

† From the provision of Magna Carta, cited in the text, it must be inferred that there can be no legal trial by jury, in *civil* cases, if only the king's justices preside; that, to make the trial legal, there must be other persons, chosen by the people, to sit with them; the object being to prevent the jury's being deceived by the justices. I think we must also infer that the king's justices could sit only in the three actions specially mentioned. We cannot go beyond the letter of Magna Carta, in making innovations upon the common law, which required all presiding officers in jury trials to be elected by the people.

This practice of sending the king's judges into the counties to preside at jury trials, was introduced by the Norman kings. Under the Saxons it was not so. *No officer of the king was allowed to preside at a jury trial; but only magistrates chosen by the people.**

But the following chapter of John's charter, which immediately succeeds the one just quoted, and refers to the same suits, affords very strong, not to say conclusive, proof, that juries judged of the law in civil suits—that is, *made the law*, so far as their deciding according to their own notions of justice could make the law.

Chap. 23. "And if, on the county day, the aforesaid assizes cannot be taken, *so many knights and freeholders shall remain, of those who shall have been present on said day, as that the judgments may be rendered by them, whether the business be more or less.*"

* "The earls, sheriffs, and head-boroughs were annually elected in the full folmote, (people's meeting)." — *Introduction to Gilbert's History of the Common Pleas*, p. 2, note.

"It was the especial province of the earldomen or earl to attend the shyre-meeting, (the county court,) twice a year, and there officiate as the county judge in expounding the secular laws, as appears by the fifth of Edgar's laws." — *Same*, p. 2, note.

"Every ward had its proper alderman, who was *chosen*, and not imposed by the prince." — *Same*, p. 4, text.

"As the aldermen, or earls, were always *chosen*" (by the people) "from among the greatest thanes, who in those times were generally more addicted to arms than to letters, they were but ill-qualified for the administration of justice, and performing the civil duties of their office." — 3 *Henry's History of Great Britain*, 343.

"But none of these thanes were annually elected in the full folmote, (people's meeting,) *as the earls, sheriffs, and head-boroughs were*; nor did King Alfred (as this author suggests) deprive the people of the election of those last mentioned magistrates and nobles, much less did he appoint them himself." — *Introd. to Gilbert's Hist. Com. Pleas*, p. 2, note.

"The sheriff was usually not appointed by the lord, but elected by the freeholders of the district." — *Political Dictionary*, word *Sheriff*.

"Among the most remarkable of the Saxon laws we may reckon * * the election of their magistrates by the people, originally even that of their kings, till dear-bought experience evinced the convenience and necessity of establishing an hereditary succession to the crown. But that (the election) of all subordinate magistrates, their military officers or heretochs, their sheriffs, their conservators of the peace, their coroners, their portreeves, (since changed into mayors and bailiffs,) and even their tithing-men and borsholders at the last, continued, some, till the Norman conquest, others for two centuries after, and some remain to this day." — 4 *Blackstone*, 413.

"The election of sheriffs was left to the people, according to ancient usage." — *St. West*, 1, c. 27. — *Crabbe's History of English Law*, 181.

The meaning of this chapter is, that so many of the *civil* suits, as could not be tried on the day when the king's justices were present, should be tried afterwards, *by the four knights before mentioned, and the freeholders, that is, the jury*. It must be admitted, of course, that the juries, in these cases, judged the matters of law, as well as fact, unless it be presumed that the *knights* dictated the law to the jury — a thing of which there is no evidence at all.

As a final proof on this point, there is a statute enacted seventy years after Magna Carta, which, although it is contrary to the common law, and therefore void, is nevertheless good evidence, inasmuch as it contains an acknowledgment, on the part of the king himself, that juries had a right to judge of the whole matter, law and fact, in civil suits. The provision is this:

“It is ordained, that the justices assigned to take the assizes, shall not compel the jurors to say precisely whether it be disseisin, or not, so that they do show the truth of the deed, and seek aid of the justices. But if they will, of their own accord, say that it is disseisin, or not, their verdict shall be admitted at their own peril.” — 13 *Edward I.*, st. 1, ch. 3, sec. 2. (1285.)

The question of “disseisin, or not,” was a question of law, as well as fact. This statute, therefore, admits that the law, as well as the fact, was in the hands of the jury. The statute is nevertheless void, because the king had no authority to give jurors a dispensation from the obligation imposed upon them by their oaths and the “law of the land,” that they should “make known the truth according their (own) consciences.” This they were bound to do, and there was no power in the king to absolve them from the duty. And the attempt of the king thus to absolve them, and authorize them to throw the case into the hands of the judges for decision, was simply an illegal and unconstitutional attempt to overturn the “law of the land,” which he was sworn to maintain, and gather power into his own hands, through his judges. He had just as much constitutional power to enact that the jurors should not be compelled to declare the *facts*, but that they might leave *them* to be determined by the king's judges, as he had to enact that they

should not be compelled to declare the *law*, but might leave *it* to be decided by the king's judges. It was as much the legal duty of the jury to decide the law as to decide the fact; and no law of the king could affect their obligation to do either. And this statute is only one example of the numberless contrivances and usurpations which have been resorted to, for the purpose of destroying the original and genuine trial by jury.

CHAPTER V.

OBJECTIONS ANSWERED

THE following objections will be made to the doctrines and the evidence presented in the preceding chapters.

1. That it is a *maxim* of the law, that the judges respond to the question of law, and juries only to the question of fact.

The answer to this objection is, that, since Magna Carta, judges have had more than six centuries in which to invent and promulgate pretended maxims to suit themselves; and this is one of them. Instead of expressing the law, it expresses nothing but the ambitious and lawless will of the judges themselves, and of those whose instruments they are.*

2. It will be asked, Of what use are the justices, if the jurors judge both of law and fact?

The answer is, that they are of use, 1. To assist and enlighten the jurors, if they can, by their advice and information; such advice and information to be received only for what they may chance to be worth in the estimation of the jurors. 2. To do anything that may be necessary in regard to granting appeals and new trials.

3. It is said that it would be absurd that twelve ignorant men should have power to judge of the law, while justices learned in the law should be compelled to sit by and see the law decided erroneously.

One answer to this objection is, that the powers of juries

* Judges do not even live up to that part of their own maxim, which requires jurors to try the matter of fact. By dictating to them the laws of evidence, — that is, by dictating what evidence they may hear, and what they may not hear, and also by dictating to them rules for weighing such evidence as they permit them to hear, — they of necessity dictate the conclusion to which they shall arrive. And thus the court really tries the question of fact, as well as the question of law, in every cause. It is clearly impossible, in the nature of things, for a jury to try a question of fact, without trying every question of law on which the fact depends.

are not granted to them on the supposition that they know the law better than the justices; but on the ground that the justices are untrustworthy, that they are exposed to bribes, are themselves fond of power and authority, and are also the dependent and subservient creatures of the legislature; and that to allow them to dictate the law, would not only expose the rights of parties to be sold for money, but would be equivalent to surrendering all the property, liberty, and rights of the people, unreservedly into the hands of arbitrary power, (the legislature,) to be disposed of at its pleasure. The powers of juries, therefore, not only place a curb upon the powers of legislators and judges, but imply also an imputation upon their integrity and trustworthiness; and *these* are the reasons why legislators and judges have formerly entertained the intensest hatred of juries, and, so fast as they could do it without alarming the people for their liberties, have, by indirection, denied, undermined, and practically destroyed their power. And it is only since all the real power of juries has been destroyed, and they have become mere tools in the hands of legislators and judges, that they have become favorites with them.

Legislators and judges are necessarily exposed to all the temptations of money, fame, and power, to induce them to disregard justice between parties, and sell the rights, and violate the liberties of the people. Jurors, on the other hand, are exposed to none of these temptations. They are not liable to bribery, for they are unknown to the parties until they come into the jury-box. They can rarely gain either fame, power, or money, by giving erroneous decisions. Their offices are temporary, and they know that when they shall have executed them, they must return to the people, to hold all their own rights in life subject to the liability of such judgments, by their successors, as they themselves have given an example for. The laws of human nature do not permit the supposition that twelve men, taken by lot from the mass of the people, and acting under such circumstances, will *all* prove dishonest. It is a supposable case that they may not be sufficiently enlightened to know and do their whole duty, in all cases whatsoever; but that they should *all* prove *dishonest*, is not within

the range of probability. A jury, therefore, insures to us — what no other court does — that first and indispensable requisite in a judicial tribunal, integrity.

4. It is alleged that if juries are allowed to judge of the law, *they decide the law absolutely; that their decision must necessarily stand, be it right or wrong*; and that this power of absolute decision would be dangerous in their hands, by reason of their ignorance of the law.

One answer is, that this power, which juries have of *judging* of the law, is not a power of *absolute decision in all cases*. For example, it is a power to declare imperatively that a man's property, liberty, or life, shall *not* be taken from him; but it is not a power to declare imperatively that they *shall* be taken from him.

Magna Carta does not provide that the judgments of the peers *shall be executed*; but only that *no other than their judgments* shall ever be executed, *so far as to take a party's goods, rights, or person, thereon*.

A judgment of the peers may be reviewed, and invalidated, and a new trial granted. So that practically a jury has no absolute power to take a party's goods, rights, or person. They have only an absolute veto upon their being taken by the government. The government is not bound to do everything that a jury may adjudge. It is only prohibited from doing anything — (that is, from taking a party's goods, rights, or person) — unless a jury have first adjudged it to be done.

But it will, perhaps, be said, that if an erroneous judgment of one jury should be reëffirmed by another, on a new trial, it must *then* be executed. But Magna Carta does not command even this — although it might, perhaps, have been reasonably safe for it to have done so — for if two juries unanimously affirm the same thing, after all the light and aid that judges and lawyers can afford them, that fact probably furnishes as strong a presumption in favor of the correctness of their opinion, as can ordinarily be obtained in favor of a judgment, by any measures of a practical character for the administration of justice. Still, there is nothing in Magna Carta that *compels* the execution of even a second judgment of a jury. The only injunction of Magna Carta upon the

government, as to what it *shall do*, on this point, is that it shall "do justice and right," without sale, denial, or delay. But this leaves the government all power of determining what is justice and right, except that it shall not consider anything as justice and right—so far as to carry it into execution against the goods, rights, or person of a party—unless it be something which a jury have sanctioned.

If the government had no alternative but to execute all judgments of a jury indiscriminately, the power of juries would unquestionably be dangerous; for there is no doubt that they may sometimes give hasty and erroneous judgments. But when it is considered that their judgments can be reviewed, and new trials granted, this danger is, for all practical purposes, obviated.

If it be said that juries may *successively* give erroneous judgments, and that new trials cannot be granted indefinitely, the answer is, that so far as Magna Carta is concerned, there is nothing to prevent the granting of new trials indefinitely, if the judgments of juries are contrary to "justice and right." So that Magna Carta does not *require* any judgment whatever to be executed—so far as to take a party's goods, rights, or person, thereon—unless it be concurred in by both court and jury.

Nevertheless, we may, for the sake of the argument, suppose the existence of a *practical*, if not *legal*, necessity, for executing *some* judgment or other, in cases where juries persist in disagreeing with the courts. In such cases, the principle of Magna Carta unquestionably is, that the uniform judgments of *successive* juries shall prevail over the opinion of the court. And the reason of this principle is obvious, viz., that it is the will of the country, and not the will of the court, or the government, that must determine what laws shall be established and enforced; that the concurrent judgments of successive juries, given in opposition to all the reasoning which judges and lawyers can offer to the contrary, must necessarily be presumed to be a truer exposition of the will of the country, than are the opinions of the judges.

But it may be said that, unless jurors submit to the control of the court, in matters of law, they may disagree among

themselves, and *never* come to any judgment; and thus justice fail to be done.

Such a case is perhaps possible; but, if possible, it can occur but rarely; because, although one jury may disagree, a succession of juries are not likely to disagree — that is, *on matters of natural law, or abstract justice*.* If such a thing should occur, it would almost certainly be owing to the attempt of the court to mislead them. It is hardly possible that any other cause should be adequate to produce such an effect; because justice comes very near to being a self-evident principle. The mind perceives it almost intuitively. If, in addition to this, the court be uniformly on the side of justice, it is not a reasonable supposition that a succession of juries should disagree about it. If, therefore, a succession of juries do disagree on the law of any case, the presumption is, not that justice fails of being done, but that injustice is prevented — *that* injustice, which would be done, if the opinion of the court were suffered to control the jury.

For the sake of the argument, however, it may be admitted to be possible that justice should sometimes fail of being done through the disagreements of jurors, notwithstanding all the light which judges and lawyers can throw upon the question in issue. If it be asked what provision the trial by jury makes for such cases, the answer is, *it makes none; and justice must fail of being done, from the want of its being made sufficiently intelligible*.

Under the trial by jury, justice can never be done — that is, by a judgment that shall take a party's goods, rights, or person — until that justice can be made intelligible or perceptible to the minds of *all* the jurors; or, at least, until it obtain the voluntary assent of all — an assent, which ought not to be given until the justice itself shall have become perceptible to all.

* Most disagreements of juries are on matters of fact, which are admitted to be within their province. We have little or no evidence of their disagreements on matters of natural justice. The disagreements of courts on matters of law, afford little or no evidence that juries would also disagree on matters of law — that is, *of justice*; because the disagreements of courts are generally on matters of *legislation*, and not on those principles of abstract justice, by which juries would be governed, and in regard to which the minds of men are nearly unanimous.

The principles of the trial by jury, then, are these:

1. That, in criminal cases, the accused is presumed innocent.
2. That, in civil cases, possession is presumptive proof of property; or, in other words, every man is presumed to be the rightful proprietor of whatever he has in his possession.
3. That these presumptions shall be overcome, in a court of justice, only by evidence, the sufficiency of which, and by law, the justice of which, are satisfactory to the understanding and consciences of *all* the jurors.

These are the bases on which the trial by jury places the property, liberty, and rights of every individual.

But some one will say, if these are the principles of the trial by jury, then it is plain that justice must often fail to be done. Admitting, for the sake of the argument, that this may be true, the compensation for it is, that positive *injustice* will also often fail to be done; whereas otherwise it would be done frequently. The very precautions used to prevent *injustice* being done, may often have the effect to prevent *justice* being done. But are we, therefore, to take no precautions against injustice? By no means, all will agree. The question then arises — Does the trial by jury, *as here explained*, involve such extreme and unnecessary precautions against injustice, as to interpose unnecessary obstacles to the doing of justice? Men of different minds may very likely answer this question differently, according as they have more or less confidence in the wisdom and justice of legislators, the integrity and independence of judges, and the intelligence of jurors. This much, however, may be said in favor of these precautions, *viz.*, that the history of the past, as well as our constant present experience, prove how much injustice may, and certainly will, be done, systematically and continually, *for the want of these precautions* — that is, while the law is authoritatively made and expounded by legislators and judges. On the other hand, we have no such evidence of how much justice may fail to be done, *by reason of these precautions* — that is, by reason of the law being left to the judgments and consciences of jurors. We can determine the former point — that is, how much positive injustice is done under the first of these two

systems — because the system is in full operation; but we cannot determine how much justice would fail to be done under the latter system, because we have, in modern times, had no experience of the use of the precautions themselves. In ancient times, when these precautions were *nominally* in force, such was the tyranny of kings, and such the poverty, ignorance, and the inability of concert and resistance, on the part of the people, that the system had no full or fair operation. It, nevertheless, under all these disadvantages, impressed itself upon the understandings, and imbedded itself in the hearts, of the people, so as no other system of civil liberty has ever done.

But this view of the two systems compares only the injustice done, and the justice omitted to be done, in the individual cases adjudged, without looking beyond them. And some persons might, on first thought, argue that, if justice failed of being done under the one system, oftener than positive injustice were done under the other, the balance was in favor of the latter system. But such a weighing of the two systems against each other gives no true idea of their comparative merits or demerits; for, possibly, in this view alone, the balance would not be very great in favor of either. To compare, or rather to contrast, the two, we must consider that, under the jury system, the failures to do justice would be only rare and exceptional cases; and would be owing either to the intrinsic difficulty of the questions, or to the fact that the parties had transacted their business in a manner unintelligible to the jury, and the effects would be confined to the individual or individuals interested in the particular suits. No permanent law would be established thereby destructive of the rights of the people in other like cases. And the people at large would continue to enjoy all their natural rights as before. But under the other system, whenever an unjust law is enacted by the legislature, and the judge imposes it upon the jury as authoritative, and they give a judgment in accordance therewith, the authority of the law is thereby established, and the whole people are thus brought under the yoke of that law; because they then understand that the law will be enforced against them in future, if they presume to exercise their rights, or

refuse to comply with the exactions of the law. In this manner all unjust laws are established, and made operative against the rights of the people.

The difference, then, between the two systems is this: Under the one system, a jury, at distant intervals, would (not enforce any positive injustice, but only) fail of enforcing justice, in a dark and difficult case, or in consequence of the parties not having transacted their business in a manner intelligible to a jury; and the plaintiff would thus fail of obtaining what was rightfully due him. And there the matter would end, *for evil*, though not for good; for thenceforth parties, warned of the danger of losing their rights, would be careful to transact their business in a more clear and intelligible manner. Under the other system — the system of legislative and judicial authority — positive injustice is not only done in every suit arising under unjust laws, — that is, men's property, liberty, or lives are not only unjustly taken on those particular judgments, — but the rights of the whole people are struck down by the authority of the laws thus enforced, and a wide-sweeping tyranny at once put in operation.

But there is another ample and conclusive answer to the argument that justice would often fail to be done, if jurors were allowed to be governed by their own consciences, instead of the direction of the justices, in matters of law. That answer is this:

Legitimate government can be formed only by the voluntary association of all who contribute to its support. As a voluntary association, it can have for its objects only those things in which the members of the association are *all agreed*. If, therefore, there be any *justice*, in regard to which all the parties to the government *are not agreed*, the objects of the association do not extend to it.*

* This is the principle of all voluntary associations whatsoever. No voluntary association was ever formed, and in the nature of things there never can be one formed, for the accomplishment of any objects except those in which *all* the parties to the association are agreed. Government, therefore, must be kept within these limits, or it is no longer a voluntary association of all who contribute to its support, but a mere tyranny established by a part over the rest.

All, or nearly all, voluntary associations give to a majority, or to some other portion of the members less than the whole, the right to use some *limited* discretion as to the

If any of the members wish more than this,— if they claim to have acquired a more extended knowledge of justice than is common to all, and wish to have their pretended discoveries carried into effect, in reference to themselves,— they must either form a separate association for that purpose, or be content to wait until they can make their views intelligible to the people at large. They cannot claim or expect that the whole people shall practise the folly of taking on trust their pretended superior knowledge, and of committing blindly into their hands all their own interests, liberties, and rights, to be disposed of on principles, the justness of which the people themselves cannot comprehend.

A government of the whole, therefore, must necessarily confine itself to the administration of such principles of law as *all* the people, who contribute to the support of the government, can comprehend and see the justice of. And it can be confined within those limits only by allowing the jurors, who represent all the parties to the compact, to judge of the law, and the justice of the law, in all cases whatsoever. And if any justice be left undone, under these circumstances, it is a justice for which the nature of the association does not provide, which the association does not undertake to do, and which, as an association, it is under no obligation to do.

The people at large, the unlearned and common people, have certainly an indisputable right to associate for the establishment and maintenance of such a government as *they themselves* see the justice of, and feel the need of, for the promotion of their own interests, and the safety of their own rights, without at the same time surrendering all their property, liberty, and rights into the hands of men, who, under the pretence of a superior and incomprehensible knowledge of justice, may dispose of such property, liberties, and rights, in a manner to suit their own selfish and dishonest purposes.

means to be used to accomplish the ends in view; but *the ends themselves to be accomplished* are always precisely defined, and are such as every member necessarily agrees to, else he would not voluntarily join the association.

Justice is the object of government, and those who support the government, must be agreed as to the justice to be executed by it, or they cannot rightfully unite in maintaining the government itself.

If a government were to be established and supported *solely* by that portion of the people who lay claim to superior knowledge, there would be some consistency in their saying that the common people should not be received as jurors, with power to judge of the justice of the laws. But so long as the whole people (or all the male adults) are presumed to be voluntary parties to the government, and voluntary contributors to its support, there is no consistency in refusing to any one of them more than to another the right to sit as juror, with full power to decide for himself whether any law that is proposed to be enforced in any particular case, be within the objects of the association.

The conclusion, therefore, is, that, in a government formed by voluntary association, or on the *theory* of voluntary association, and voluntary support, (as all the North American governments are,) no law can rightfully be enforced by the association in its corporate capacity, against the goods, rights, or person of any individual, except it be such as *all* the members of the association agree that it may enforce. To enforce any other law, to the extent of taking a man's goods, rights, or person, would be making *some* of the parties to the association accomplices in what they regard as acts of injustice. It would also be making them consent to what they regard as the destruction of their own rights. These are things which no legitimate system or theory of government can require of any of the parties to it.

The mode adopted, by the trial by jury, for ascertaining whether all the parties to the government do approve of a particular law, is to take twelve men at random from the whole people, and accept their unanimous decision as representing the opinions of the whole. Even this mode is not theoretically accurate; for theoretical accuracy would require that every man, who was a party to the government, should individually give his consent to the enforcement of every law in every separate case. But such a thing would be impossible in practice. The consent of twelve men is therefore taken instead; with the privilege of appeal, and (in case of error found by the the appeal court) a new trial, to guard against possible mistakes. This system, it is assumed, will ascertain the sense of

the whole people — “the country” — with sufficient accuracy for all practical purposes, and with as much accuracy as is practicable without too great inconvenience and expense.

5. Another objection that will perhaps be made to allowing jurors to judge of the law, and the justice of the law, is, that the law would be uncertain.

If, by this objection, it be meant that the law would be uncertain to the minds of the people at large, so that they would not know what the juries would sanction and what condemn, and would not therefore know practically what their own rights and liberties were under the law, the objection is thoroughly baseless and false. No system of law that was ever devised could be so entirely intelligible and certain to the minds of the people at large as this. Compared with it, the complicated systems of law that are compounded of the law of nature, of constitutional grants, of innumerable and incessantly changing legislative enactments, and of countless and contradictory judicial decisions, with no uniform principle of reason or justice running through them, are among the blindest of all the mazes in which unsophisticated minds were ever bewildered and lost. The uncertainty of the law under these systems has become a proverb. So great is this uncertainty, that nearly all men, learned as well as unlearned, shun the law as their enemy, instead of resorting to it for protection. They usually go into courts of justice, so called, only as men go into battle — when there is no alternative left for them. And even then they go into them as men go into dark labyrinths and caverns — with no knowledge of their own, but trusting wholly to their guides. Yet, less fortunate than other adventurers, they can have little confidence even in their guides, for the reason that the guides themselves know little of the mazes they are threading. They know the mode and place of entrance; but what they will meet with on their way, and what will be the time, mode, place, or condition of their exit; whether they will emerge into a prison, or not; whether *wholly* naked and destitute, or not; whether with their reputations left to them, or not; and whether in time or eternity; experienced and honest guides rarely venture to predict. Was there ever such fatuity as that of a nation of men

madly bent on building up such labyrinths as these, for no other purpose than that of exposing all their rights of reputation, property, liberty, and life, to the hazards of being lost in them, instead of being content to live in the light of the open day of their own understandings?

What honest, unsophisticated man ever found himself involved in a lawsuit, that he did not desire, of all things, that his cause might be judged of on principles of natural justice, as those principles were understood by plain men like himself? He would then feel that he could foresee the result. These plain men are the men who pay the taxes, and support the government. Why should they not have such an administration of justice as they desire, and can understand?

If the jurors were to judge of the law, and the justice of the law, there would be something like certainty in the administration of justice, and in the popular knowledge of the law, and men would govern themselves accordingly. There would be something like certainty, because every man has himself something like definite and clear opinions, and also knows something of the opinions of his neighbors, on matters of justice. And he would know that no statute, unless it were so clearly just as to command the unanimous assent of twelve men, who should be taken at random from the whole community, could be enforced so as to take from him his reputation, property, liberty, or life. What greater certainty can men require or need, as to the laws under which they are to live? If a statute were enacted by a legislature, a man, in order to know what was its true interpretation, whether it were constitutional, and whether it would be enforced, would not be under the necessity of waiting for years until some suit had arisen and been carried through all the stages of judicial proceeding, to a final decision. He would need only to use his own reason as to its meaning and its justice, and then talk with his neighbors on the same points. Unless he found them nearly unanimous in their interpretation and approbation of it, he would conclude that juries would not unite in enforcing it, and that it would consequently be a dead letter. And he would be safe in coming to this conclusion.

There would be something like certainty in the administra-

tion of justice, and in the popular knowledge of the law, for the further reason that there would be little legislation, and men's rights would be left to stand almost solely upon the law of nature, or what was *once* called in England "the *common law*," (before so much legislation and usurpation had become incorporated into the common law,)—in other words, upon the principles of natural justice.

Of the certainty of this law of nature, or the ancient English common law, I may be excused for repeating here what I have said on another occasion.

"Natural law, so far from being uncertain, when compared with statutory and constitutional law, is the only thing that gives any certainty at all to a very large portion of our statutory and constitutional law. The reason is this. The words in which statutes and constitutions are written are susceptible of so many different meanings,—meanings widely different from, often directly opposite to, each other, in their bearing upon men's rights,—that, unless there were some rule of interpretation for determining which of these various and opposite meanings are the true ones, there could be no certainty at all as to the meaning of the statutes and constitutions themselves. Judges could make almost anything they should please out of them. Hence the necessity of a rule of interpretation. *And this rule is, that the language of statutes and constitutions shall be construed, as nearly as possible, consistently with natural law.*

The rule assumes, what is true, that natural law is a thing certain in itself; also that it is capable of being learned. It assumes, furthermore, that it actually is understood by the legislators and judges who make and interpret the written law. Of necessity, therefore, it assumes further, that they (the legislators and judges) are *incompetent* to make and interpret the *written* law, unless they previously understand the natural law applicable to the same subject. It also assumes that the *people* must understand the natural law, before they can understand the written law.

It is a principle perfectly familiar to lawyers, and one that must be perfectly obvious to every other man that will reflect a moment, that, as a general rule, *no one can know what the written law is, until he knows what it ought to be*; that men are liable to be constantly misled by the various and conflicting senses of the same words, unless they perceive the true legal sense in which the words *ought to be taken*. And this true legal sense is the sense that is most nearly consistent with

natural law of any that the words can be made to bear, consistently with the laws of language, and appropriately to the subjects to which they are applied.

Though the words *contain* the law, the *words* themselves are not the law. Were the words themselves the law, each single written law would be liable to embrace many different laws, to wit, as many different laws as there were different senses, and different combinations of senses, in which each and all the words were capable of being taken.

Take, for example, the Constitution of the United States. By adopting one or another sense of the single word "*free*," the whole instrument is changed. Yet the word *free* is capable of some ten or twenty different senses. So that, by changing the sense of that single word, some ten or twenty different constitutions could be made out of the same written instrument. But there are, we will suppose, a thousand other words in the constitution, each of which is capable of from two to ten different senses. So that, by changing the sense of only a single word at a time, several thousands of different constitutions would be made. But this is not all. Variations could also be made by changing the senses of two or more words at a time, and these variations could be run through all the changes and combinations of senses that these thousand words are capable of. We see, then, that it is no more than a literal truth, that out of that single instrument, as it now stands, without altering the location of a single word, might be formed, by construction and interpretation, more different constitutions than figures can well estimate.

But each written law, in order to be a law, must be taken only in some *one* definite and distinct sense; and that definite and distinct sense must be selected from the almost infinite variety of senses which its words are capable of. How is this selection to be made? It can be only by the aid of that perception of natural law, or natural justice, which men naturally possess.

Such, then, is the comparative certainty of the natural and the written law. Nearly all the certainty there is in the latter, so far as it relates to principles, is based upon, and derived from, the still greater certainty of the former. In fact, nearly all the uncertainty of the laws under which we live, — which are a mixture of natural and written laws, — arises from the difficulty of construing, or, rather, from the facility of misconstruing, the *written* law; while natural law has nearly or quite the same certainty as mathematics. On this point, Sir William Jones, one of the most learned judges that have ever lived, learned in Asiatic as well as European law, says, — and

the fact should be kept forever in mind, as one of the most important of all truths: — “*It is pleasing to remark the similarity, or, rather, the identity of those conclusions which pure, unbiassed reason, in all ages and nations, seldom fails to draw, in such juridical inquiries as are not fettered and manacled by positive institutions.*”* In short, the simple fact that the written law must be interpreted by the natural, is, of itself, a sufficient confession of the superior certainty of the latter.

The written law, then, even where it can be construed consistently with the natural, introduces labor and obscurity, instead of shutting them out. And this must always be the case, because words do not create ideas, but only recall them; and the same word may recall many different ideas. For this reason, nearly all abstract principles can be seen by the single mind more clearly than they can be expressed by words to another. This is owing to the imperfection of language, and the different senses, meanings, and shades of meaning, which different individuals attach to the same words, in the same circumstances.†

Where the written law cannot be construed consistently with the natural, there is no reason why it should ever be enacted at all. It may, indeed, be sufficiently plain and certain to be easily understood; but its certainty and plainness are but a poor compensation for its injustice. Doubtless a law forbidding men to drink water, on pain of death, might be made so intelligible as to cut off all discussion as to its meaning; but would the intelligibility of such a law be any equivalent for the right to drink water? The principle is the same in regard to all unjust laws. Few persons could

* Jones on Bailments, 133.

† Kent, describing the difficulty of construing the written law, says:

“Such is the imperfection of language, and the want of technical skill in the makers of the law, that statutes often give occasion to the most perplexing and distressing doubts and discussions, arising from the ambiguity that attends them. It requires great experience, as well as the command of a perspicuous diction, to frame a law in such clear and precise terms, as to secure it from ambiguous expressions, and from all doubts and criticisms upon its meaning.” — *Kent*, 460.

The following extract from a speech of Lord Brougham, in the House of Lords, confesses the same difficulty:

“There was another subject, well worthy of the consideration of government during the recess, — the expediency, or rather the absolute necessity, of some arrangement for the preparation of bills, not merely private, but public bills, in order that legislation might be consistent and systematic, and that the courts might not have so large a portion of their time occupied in endeavoring to construe acts of Parliament, in many cases unconstruable, and in most cases difficult to be construed.” — *Law Reporter*, 1848, p. 525.

reasonably feel compensated for the arbitrary destruction of their rights, by having the order for their destruction made known beforehand, in terms so distinct and unequivocal as to admit of neither mistake nor evasion. Yet this is all the compensation that such laws offer.

Whether, therefore, written laws correspond with, or differ from, the natural, they are to be condemned. In the first case, they are useless repetitions, introducing labor and obscurity. In the latter case, they are positive violations of men's rights.

There would be substantially the same reason in enacting mathematics by statute, that there is in enacting natural law. Whenever the natural law is sufficiently certain to all men's minds to justify its being enacted, it is sufficiently certain to need no enactment. On the other hand, until it be thus certain, there is danger of doing injustice by enacting it; it should, therefore, be left open to be discussed by anybody who may be disposed to question it, and to be judged of by the proper tribunal, the judiciary.*

It is not necessary that legislators should enact natural law in order that it may be known to the *people*, because that would be presuming that the legislators already understand it better than the people, — a fact of which I am not aware that they have ever heretofore given any very satisfactory evidence. The same sources of knowledge on the subject are open to the people that are open to the legislators, and the people must be presumed to know it as well as they.

The objections made to natural law, on the ground of obscurity, are wholly unfounded. It is true, it must be learned, like any other science; but it is equally true that it is very easily learned. Although as illimitable in its applications as the infinite relations of men to each other, it is, nevertheless, made up of simple elementary principles, of the truth and justice of which every ordinary mind has an almost intuitive perception. *It is the science of justice*, — and almost all men have the same perceptions of what constitutes justice, or of what justice requires, when they understand alike the facts from which their inferences are to be drawn. Men living in contact with each other, and having intercourse together, *cannot avoid* learning

* This condemnation of written laws must, of course, be understood as applying only to cases where principles and rights are involved, and not as condemning any governmental arrangements, or instrumentalities, that are consistent with natural right, and which must be agreed upon for the purpose of carrying natural law into effect. These things may be varied, as expediency may dictate, so only that they be allowed to infringe no principle of justice. And they must, of course, be written, because they do not exist as fixed principles, or laws in nature.

natural law, to a very great extent, even if they would. The dealings of men with men, their separate possessions, and their individual wants, are continually forcing upon their minds the questions, — Is this act just? or is it unjust? Is this thing mine? or is it his? And these are questions of natural law; questions, which, in regard to the great mass of cases, are answered alike by the human mind everywhere.

Children learn many principles of natural law at a very early age. For example: they learn that when one child has picked up an apple or a flower, it is his, and that his associates must not take it from him against his will. They also learn that if he voluntarily exchange his apple or flower with a playmate, for some other article of desire, he has thereby surrendered his right to it, and must not reclaim it. These are fundamental principles of natural law, which govern most of the greatest interests of individuals and society; yet children learn them earlier than they learn that three and three are six, or five and five, ten. Talk of enacting natural law by statute, that it may be known! It would hardly be extravagant to say, that, in nine cases in ten, men learn it before they have learned the language by which we describe it. Nevertheless, numerous treatises are written on it, as on other sciences. The decisions of courts, containing their opinions upon the almost endless variety of cases that have come before them, are reported; and these reports are condensed, codified, and digested, so as to give, in a small compass, the facts, and the opinions of the courts as to the law resulting from them. And these treatises, codes, and digests are open to be read of all men. And a man has the same excuse for being ignorant of arithmetic, or any other science, that he has for being ignorant of natural law. He can learn it as well, if he will, without its being enacted, as he could if it were.

If our governments would but themselves adhere to natural law, there would be little occasion to complain of the ignorance of the people in regard to it. The popular ignorance of law is attributable mainly to the innovations that have been made upon natural law by legislation; whereby our system has become an incongruous mixture of natural and statute law, with no uniform principle pervading it. To learn such a system, — if system it can be called, and if learned it can be, — is a matter of very similar difficulty to what it would be to learn a system of mathematics, which should consist of the mathematics of nature, interspersed with such other mathematics as might be created by legislation, in violation of all the natural principles of numbers and quantities.

But whether the difficulties of learning natural law be

greater or less than here represented, they exist in the nature of things, and cannot be removed. Legislation, instead of removing, only increases them. This it does by innovating upon natural truths and principles, and introducing jargon and contradiction, in the place of order, analogy, consistency, and uniformity.

Further than this; legislation does not even profess to remove the obscurity of natural law. That is no part of its object. It only professes to substitute something arbitrary in the place of natural law. Legislators generally have the sense to see that legislation will not make natural law any clearer than it is. Neither is it the object of legislation to establish the authority of natural law. Legislators have the sense to see that they can add nothing to the authority of natural law, and that it will stand on its own authority, unless they overturn it.

The whole object of legislation, excepting that legislation which merely makes regulations, and provides instrumentalities for carrying other laws into effect, is to overturn natural law, and substitute for it the arbitrary will of power. In other words, the whole object of it is to destroy men's rights. At least, such is its only effect; and its designs must be inferred from its effect. Taking all the statutes in the country, there probably is not one in a hundred, — except the auxiliary ones just mentioned, — that does not violate natural law; that does not invade some right or other.

Yet the advocates of arbitrary legislation are continually practising the fraud of pretending that unless the legislature *make* the laws, the laws will not be known. The whole object of the fraud is to secure to the government the authority of making laws that never ought to be known."

In addition to the authority already cited, of Sir William Jones, as to the certainty of natural law, and the uniformity of men's opinions in regard to it, I may add the following:

"There is that great simplicity and plainness in the Common Law, that Lord Coke has gone so far as to assert, (and Lord Bacon nearly seconds him in observing,) that 'he never knew two questions arise merely upon common law; but that they were mostly owing to statutes ill-penned and overladen with provisos.'" — 3 *Eunomus*, 157-8.

If it still be said that juries would disagree, as to what was natural justice, and that one jury would decide one way, and another jury another; the answer is, that such a thing is hardly credible, as that twelve men, taken at random from the people

at large, should *unanimously* decide a question of natural justice one way, and that twelve other men, selected in the same manner, should *unanimously* decide the same question the other way, *unless they were misled by the justices*. If, however, such things should sometimes happen, from any cause whatever, the remedy is by appeal, and new trial.

CHAPTER VI.

JURIES OF THE PRESENT DAY ILLEGAL.

It may probably be safely asserted that there are, at this day, no legal juries, either in England or America. And if there are no legal juries, there is, of course, no legal trial, nor "judgment," by jury.

In saying that there are probably no legal juries, I mean that there are probably no juries appointed in conformity with the principles of the *common law*.

The term *jury* is a technical one, derived from the common law; and when the American constitutions provide for the trial by jury, they provide for the *common law* trial by jury; and not merely for any trial by jury that the government itself may chance to invent, and call by that name. It is the *thing*, and not merely the *name*, that is guaranteed. Any legislation, therefore, that infringes any *essential principle* of the *common law*, in the selection of jurors, is unconstitutional; and the juries selected in accordance with such legislation are, of course, illegal, and their judgments void.

It will also be shown, in a subsequent chapter,* that since Magna Carta, the legislative power in England (whether king or parliament) has never had any constitutional authority to infringe, by legislation, any essential principle of the common law in the selection of jurors. All such legislation is as much unconstitutional and void, as though it abolished the trial by jury altogether. In reality it does abolish it.

What, then, are the *essential principles* of the common law, controlling the selection of jurors?

They are two.

* On the English Constitution.

1. That *all* the freemen, or adult male members of the state, shall be eligible as jurors.*

Any legislation which requires the selection of jurors to be made from a less number of freemen than the whole, makes the jury selected an illegal one.

If a part only of the freemen, or members of the state, are eligible as jurors, the jury no longer represent "the country," but only a part of "the country."

If the selection of jurors can be restricted to any less number of freemen than the whole, it can be restricted to a very small proportion of the whole; and thus the government be taken out of the hands of "the country," or the whole people, and be thrown into the hands of a few.

That, at common law, the whole body of freemen were eligible as jurors, is sufficiently proved, not only by the reason of the thing, but by the following evidence :

1. Everybody must be presumed eligible, until the contrary be shown. We have no evidence, that I am aware of, of a prior date to Magna Carta, to *disprove* that all freemen were eligible as jurors, unless it be the law of Ethelred, which requires that they be *elderly* † men. Since no specific age is given, it is probable, I think, that this statute meant nothing more than that they be more than twenty-one years old. If it meant anything more, it was probably contrary to the common law, and therefore void.

2. Since Magna Carta, we have evidence showing quite conclusively that all freemen, above the age of twenty-one years, were eligible as jurors.

The *Mirror of Justices*, (written within a century after Magna Carta,) in the section "*Of Judges*" — that is, *jurors* — says :

"All those who are not forbidden by law may be judges

* Although all the freemen are legally eligible as jurors, any one may nevertheless be challenged and set aside, at the trial, for any special *personal* disqualification; such as mental or physical inability to perform the duties; having been convicted, or being under charge, of crime; interest, bias, &c. But it is clear that the common law allows none of these points to be determined by the court, but only by "*triers*."

† What was the precise meaning of the Saxon word, which I have here called *elderly*, I do not know. In the Latin translations it is rendered by *seniores*, which may perhaps mean simply those who have attained their majority.

(jurors). To women it is forbidden by law that they be judges; and thence it is, that feme covert are exempted to do suit in inferior courts. On the other part, a villein cannot be a judge, by reason of the two estates, which are repugnants; persons attainted of false judgments cannot be judges, nor infants, nor any under the age of twenty-one years, nor infected persons, nor idiots, nor madmen, nor deaf, nor dumb, nor parties in the pleas, nor men excommunicated by the bishop, nor criminal persons. * * And those who are not of the Christian faith cannot be judges, nor those who are out of the king's allegiance." — *Mirror of Justices*, 59-60.

In the section "*Of Inferior Courts*," it is said :

"From the first assemblies came consistories, which we now call courts, and that in divers places, and in divers manners; whereof the sheriffs held one monthly, or every five weeks, according to the greatness or largeness of the shires. And these courts are called county courts, *where the judgment is by the suitors*, if there be no writ, and is by warrant of jurisdiction ordinary. The other inferior courts are the courts of every lord of the fee, to the likeness of the hundred courts. * * There are other inferior courts which the bailiffs hold in every hundred, from three weeks to three weeks, *by the suitors of the freeholders of the hundred*. All the tenants within the fees are bounden to do their suit there, and that not for the service of their persons, but for the service of their fees. But women, infants within the age of twenty-one years, deaf, dumb, idiots, those who are indicted or appealed of mortal felony, before they be acquitted, diseased persons, and excommunicated persons are exempted from doing suit." — *Mirror of Justices*, 50-51.

In the section "*Of the Sheriff's Turns*," it is said :

"The sheriffs by ancient ordinances hold several meetings twice in the year in every hundred; *where all the freeholders within the hundred* are bound to appear for the service of their fees." — *Mirror of Justices*, 50.

The following statute was passed by Edward I., seventy years after Magna Carta :

"Forasmuch also as sheriffs, hundreders, and bailiffs of liberties, have used to grieve those which be placed under them, putting in assizes and juries men diseased and decrepit, and having continual or sudden disease; and men also that dwelled not in the country at the time of the summons; and summon also an unreasonable number of jurors, for to extort

money from some of them, for letting them go in peace, and so the assizes and juries pass many times by poor men, and the rich abide at home by reason of their bribes; it is ordained that from henceforth in one assize no more shall be summoned than four and twenty; and old men above three score and ten years, being continually sick, or being diseased at the time of the summons, or not dwelling in that country, shall not be put in juries of petit assizes.³⁷ — *St. 13 Edward I.*, ch. 38. (1285.)

Although this command to the sheriffs and other officers, not to summon, as jurors, those who, from age and disease, were physically incapable of performing the duties, may not, of itself, afford any absolute or legal implication, by which we can determine precisely who were, and who were not, eligible as jurors at common law, yet the exceptions here made nevertheless carry a seeming confession with them that, at common law, all male adults were eligible as jurors.

But the main principle of the feudal system itself shows that *all* the full and free adult male members of the state — that is, all who were free born, and had not lost their civil rights by crime, or otherwise — *must*, at common law, have been eligible as jurors. What was that principle? It was, that the state rested for support upon the land, and not upon taxation levied upon the people personally. The lands of the country were considered the property of the state, and were made to support the state *in this way*. A portion of them was set apart to the king, the rents of which went to pay his personal and official expenditures, not including the maintenance of armies, or the administration of justice. War and the administration of justice were provided for in the following manner. The freemen, or the free-born adult male members of the state — who had not forfeited their political rights — were entitled to land *of right*, (until all the land was taken up,) on condition of their rendering certain military and civil services to the state. The military services consisted in serving personally as soldiers, or contributing an equivalent in horses, provisions, or other military supplies. The civil services consisted, among other things, in serving as jurors (and, it would appear, as witnesses) in the courts of justice. For these services

they received no compensation other than the use of their lands. In this way the state was sustained; and the king had no power to levy additional burdens or taxes upon the people. The persons holding lands on these terms were called *freeholders*— in later times *freemen*— meaning free and full members of the state.

Now, as the principle of the system was that the freeholders held their lands of the state, on the condition of rendering these military and civil services as *rents* for their lands, the principle implies that *all* the freeholders were liable to these rents, and were therefore eligible as jurors. Indeed, I do not know that it has ever been doubted that, at common law, *all* the freeholders were eligible as jurors. If all had not been eligible, we unquestionably should have had abundant evidence of the exceptions. And if anybody, at this day, allege any exceptions, the burden will be on him to prove them. The presumption clearly is that *all* were eligible.

The first invasion, which I find made, by the English statutes, upon this common law principle, was made in 1285, seventy years after Magna Carta. It was then enacted as follows:

“Nor shall any be put in assizes or juries, though they ought to be taken in their own shire, that hold a tenement of less than the value of *twenty shillings yearly*. And if such assizes and juries be taken out of the shire, no one shall be placed in them who holds a tenement of less value than forty shillings yearly at the least, except such as be witnesses in deeds or other writings, whose presence is necessary, so that they be able to travel.”— *St. 13 Edward I.*, ch. 38. (1285.)

The next invasion of the common law, in this particular, was made in 1414, about two hundred years after Magna Carta, when it was enacted:

“That no person shall be admitted to pass in any inquest upon trial of the death of a man, nor in any inquest betwixt party and party in plea real, nor in plea personal, whereof the debt or the damage declared amount to forty marks, if the same person have not lands or tenements of the yearly value of *forty shillings above all charges of the same*.”— *2 Henry V.*, st. 2, ch. 3. (1414.)

Other statutes on this subject of the property qualifications of jurors, are given in the note.*

* In 1493 it was enacted, by a statute entitled "Of what credit and estate those jurors must be which shall be impanelled in the Sheriff's Turn."

"That no bailiff nor other officer from henceforth return or impanel any such person in any shire of England, to be taken or put in or upon any inquiry in any of the said Turns, but such as be of good name and fame, and having lands and tenements of freehold within the same shires, to the yearly value of *twenty shillings* at the least, or else lands and tenements holden by custom of manor, commonly called *copy-hold*, within the said shires, to the yearly value of *twenty-six shillings eight pence* over all charges at the least." — 1 *Richard III.*, ch. 4. (1483.)

In 1486 it was enacted, "That the justices of the peace of every shire of this realm for the time being may take, by their discretion, an inquest, whereof every man shall have lands and tenements to the yearly value of *forty shillings* at the least, to inquire of the concealments of others," &c., &c. — 3 *Henry VII.*, ch. 1. (1486.)

A statute passed in 1494, in regard to jurors in the city of London, enacts:

"That no person nor persons hereafter be impanelled, summoned, or sworn in any jury or inquest in courts within the same city, (of London,) except he be of lands, tenements, or goods and chattels, to the value of *forty marks*;* and that no person or persons hereafter be impanelled, summoned, nor sworn in any jury or inquest in any court within the said city, for lands or tenements, or action personal, wherein the debt or damage amounteth to the sum of *forty marks*, or above, except he be in lands, tenements, goods, or chattels, to the value of *one hundred marks*." — 11 *Henry VII.*, ch. 21. (1494.)

The statute 4 *Henry VIII.*, ch. 3, sec. 4, (1512) requires jurors in London to have "goods to the value of one hundred marks."

In 1494 it was enacted that "It shall be lawful to every sheriff of the counties of *Southampton, Surrey, and Sussex*, to impanel and summons *twenty-four* lawful men of such, inhabiting within the precinct of his or their turns, as owe suit to the same turn, whereof every one hath lands or freehold to the yearly value of *ten shillings*, or copyhold lands to the yearly value of *thirteen shillings four pence*, above all charges within any of the said counties, or men of less livelihood, if there be not so many there, notwithstanding the statute of 1 *Richard III.*, ch. 4. To endure to the next parliament." — 11 *Henry VII.*, ch. 26. (1494.)

This statute was continued in force by 19 *Henry VII.*, ch. 16. (1503.)

In 1521 it was enacted, "That every person or persons, being the king's natural subject born, which either by the name of citizen, or of a freeman, or any other name, doth enjoy and use the liberties and privileges of any city, borough, or town corporate, where he dwelleth and maketh his abode, being worth in *movable goods and substance* to the clear value of *forty pounds*, be henceforth admitted in trials of murders and felonies in every sessions and gaol delivery, to be kept and holden in and for the liberty of such cities, boroughs, and towns corporate, albeit they have no freehold; any act, statute, use, custom, or ordinance to the contrary hereof notwithstanding." — 23 *Henry VIII.*, ch. 13. (1531.)

In 1585 it was enacted, "That in all cases where any jurors to be returned for trial of any issue or issues joined in any of the Queen's majesty's courts of King's Bench, Common Pleas, and the Exchequer, or before justices of assize, by the laws of this realm now in force, ought to have estate of freehold in lands, tenements, or hereditaments, of the clear yearly value of *forty shillings*, that in every such case the jurors that shall be returned from and after the end of this present session of parliament, shall every of them have estate of freehold in lands, tenements, or hereditaments, to the clear yearly value of *four pounds* at the least." — 27 *Elizabeth*, ch. 6. (1585.)

In 1664-5 it was enacted, "That all jurors (other than strangers upon trials *per medietatem linguæ*) who are to be returned for the trials of issues joined in any of (his)

* A mark was thirteen shillings and four pence.

From these statutes it will be seen that, since 1285, seventy years after Magna Carta, the common law right of all free British subjects to eligibility as jurors has been abolished, and the qualifications of jurors have been made a subject of arbitrary legislation. In other words, the government has usurped the authority of *selecting* the jurors that were to sit in judgment upon its own acts. This is destroying the vital principle of the trial by jury itself, which is that the legislation of the government shall be subjected to the judgment of a tribunal, taken indiscriminately from the whole people, without any choice by the government, and over which the government can exercise no control. If the government can select the jurors, it will, of course, select those whom it supposes will be favorable to its enactments. And an exclusion of *any* of the freemen from eligibility is a *selection* of those not excluded.

It will be seen, from the statutes cited, that the most absolute authority over the jury box — that is, over the right of the people to sit in juries — has been usurped by the govern-

majesty's courts of king's bench, common pleas, or the exchequer, or before justices of assize, or nisi prius, oyer and terminer, gaol delivery, or general or quarter sessions of the peace, from and after the twentieth day of April, which shall be in the year of our Lord one thousand six hundred and sixty-five, in any county of this realm of England, shall every of them then have, in their own name, or in trust for them, within the same county, *twenty pounds by the year*, at least, above reprises, in their own or their wives' right, of freehold lands, or of ancient demesne, or of rents in fee, fee-tail, or for life. And that in every county within the dominion of Wales every such juror shall then have, within the same, *eight pounds by the year*, at the least, above reprises, in manner aforesaid. All which persons having such estate as aforesaid are hereby enabled and made liable to be returned, and serve as jurors for the trial of issues before the justices aforesaid, any law or statute to the contrary in any wise notwithstanding." — 16 and 17 Charles II., ch. 3. (1664-5.)

By a statute passed in 1692, jurors in England are to have landed estates of the value of *ten pounds a year*; and jurors in Wales to have similar estates of the realm of *six pounds a year*. — 4 and 5 William and Mary, ch. 24, sec. 14. (1692.)

By the same statute, (sec. 18,) persons may be returned to serve upon the *tales* in any county of England, who shall have, within the same county, *five pounds by the year*, above reprises, in the manner aforesaid.

By St. 3 George II., ch. 25, sec. 19, 20, no one is to be a juror in London, who shall not be "an householder within the said city, and have lands, tenements, or personal estate, to the value of *one hundred pounds*."

By another statute, applicable only to the county of *Middlesex*, it is enacted,

"That all leaseholders, upon leases where the improved rents or value shall amount to *fifty pounds or upwards per annum*, over and above all ground rents or other reservations payable by virtue of the said leases, shall be liable and obliged to serve upon juries when they shall be legally summoned for that purpose." — 4 George II., ch. 7, sec. 3. (1731.)

ment; that the qualifications of jurors have been repeatedly changed, and made to vary from a freehold of *ten shillings yearly*, to one of "*twenty pounds by the year at least above reprises.*" They have also been made different, in the counties of Southampton, Surrey, and Sussex, from what they were in the other counties; different in Wales from what they were in England; and different in the city of London, and in the county of Middlesex, from what they were in any other part of the kingdom.

But this is not all. The government has not only assumed arbitrarily to classify the people, on the basis of property, but it has even assumed to give to some of its judges entire and absolute personal discretion in the selection of the jurors to be impanelled *in criminal cases*, as the following statutes show.

"Be it also ordained and enacted by the same authority, that all panels hereafter to be returned, which be not at the suit of any party, that shall be made and put in afore any justice of gaol delivery or justices of peace in their open sessions to *inquire for the king, shall hereafter be reformed by additions and taking out of names of persons by discretion of the same justices before whom such panel shall be returned; and the same justices shall hereafter command the sheriff, or his ministers in his absence, to put other persons in the same panel by their discretions; and that panel so hereafter to be made, to be good and lawful.* This act to endure only to the next Parliament." — 11 *Henry VII.*, ch. 24, sec. 6. (1495.)

This act was continued in force by 1 *Henry VIII.*, ch. 11, (1509,) to the end of the then next Parliament.

It was reënacted, and made perpetual, by 3 *Henry VIII.*, ch. 12. (1511.)

These acts gave unlimited authority to the king's justices to pack juries at their discretion; and abolished the last vestige of the common law right of the people to sit as jurors, and judge of their own liberties, in the courts to which the acts applied.

Yet, as matters of law, these statutes were no more clear violations of the common law, the fundamental and paramount "law of the land," than were those statutes which affixed the property qualifications before named; because, if the king, or the government, can select the jurors on the ground of property, it can select them on any other ground whatever.

Any infringement or restriction of the common law right of the whole body of the freemen of the kingdom to eligibility as jurors, was legally an abolition of the trial by jury itself. The juries no longer represented "the country," but only a part of the country; that part, too, on whose favor the government chose to rely for the maintenance of its power, and which it therefore saw fit to select as being the most reliable instruments for its purposes of oppression towards the rest. And the selection was made on the same principle, on which tyrannical governments generally select their supporters, viz., that of conciliating those who would be most dangerous as enemies, and most powerful as friends — that is, the wealthy.*

These restrictions, or indeed any one of them, of the right of eligibility as jurors, was, in principle, a complete abolition of the English constitution; or, at least, of its most vital and valuable part. It was, in principle, an assertion of a right, on the part of the government, to *select* the individuals who were to determine the authority of its own laws, and the extent of its own powers. It was, therefore, *in effect*, the assertion of a right, on the part of the government itself, to determine its own powers, and the authority of its own legislation, over the people; and a denial of all right, on the part of the people, to judge of or determine their own liberties against the government. It was, therefore, in reality, a declaration of entire absolutism on the part of the government. It was an act as purely despotic, *in principle*, as would have been the express abolition of all juries whatsoever. By "the law of the land," which the kings were sworn to maintain, every free adult male British subject was eligible to the jury box, with full power to exercise his own judgment as to the authority and obligation of every statute of the king, which might come

* Suppose these statutes, instead of disfranchising all whose freeholds were of less than the standard value fixed by the statutes, had disfranchised all whose freeholds were of greater value than the same standard — would anybody ever have doubted that such legislation was inconsistent with the English constitution; or that it amounted to an entire abolition of the trial by jury? Certainly not. Yet it was as clearly inconsistent with the common law, or the English constitution, to disfranchise those whose freeholds fell below any arbitrary standard fixed by the government, as it would have been to disfranchise all whose freeholds rose above that standard.

before him. But the principle of these statutes (fixing the qualifications of jurors) is, that nobody is to sit in judgment upon the acts or legislation of the king, or the government, except those whom the government itself shall select for that purpose. A more complete subversion of the essential principles of the English constitution could not be devised.

The juries of England are illegal for another reason, viz., that the statutes cited require the jurors (except in London and a few other places) to be *freeholders*. All the other free British subjects are excluded; whereas, at common law, all such subjects are eligible to sit in juries, whether they be freeholders or not.

It is true, the ancient common law required the jurors to be freeholders; but the term *freeholder* no longer expresses the same idea that it did in the ancient common law; because no land is now holden in England on the same principle, or by the same tenure, as that on which all the land was held in the early times of the common law.

As has heretofore been mentioned, in the early times of the common law the land was considered the property of the state; and was all holden by the *tenants*, so called, (that is, *holders*,) on the condition of their rendering certain military and civil services to the state, (or to the king as the representative of the state,) under the name of *rents*. Those who held lands on these terms were called free *tenants*, that is, *free holders*—meaning free persons, or members of the state, holding lands—to distinguish them from villeins, or serfs, who were not members of the state, but held their lands by a more servile tenure, and also to distinguish them from persons of foreign birth, outlaws, and all other persons, who were not members of the state.

Every freeborn adult male Englishman (who had not lost his civil rights by crime or otherwise) was entitled to land *of right*; that is, by virtue of his civil freedom, or membership of the body politic. Every member of the state was therefore a freeholder; and every freeholder was a member of the state. And the members of the state were therefore called freeholders. But what is material to be observed, is, that a man's right to

land was an incident to his *civil freedom*; not his civil freedom an incident to his right to land. He was a freeholder because he was a *freeborn* member of the state; and not a freeborn member of the state because he was a freeholder; for this last would be an absurdity.

As the tenures of lands changed, the term *freeholder* lost its original significance, and no longer described a man who held land of the state by virtue of his civil freedom, but only one who held it in fee-simple—that is, free of any liability to military or civil services. But the government, in fixing the qualifications of jurors, has adhered to the term *freeholder* after that term has ceased to express the *thing* originally designated by it.

The principle, then, of the common law, was, that every freeman, or freeborn male Englishman, of adult age, &c., was eligible to sit in juries, by virtue of his civil freedom, or his being a member of the state, or body politic. But the principle of the present English statutes is, that a man shall have a right to sit in juries because he owns lands in fee-simple. At the common law a man was *born* to the right to sit in juries. By the present statutes he *buys* that right when he buys his land. And thus this, the greatest of all the political rights of an Englishman, has become a mere article of merchandise; a thing that is bought and sold in the market for what it will bring.

Of course, there can be no legality in such juries as these; but only in juries to which every free or natural born adult male Englishman is eligible.

The second essential principle of the common law, controlling the selection of jurors, is, that when the selection of the actual jurors comes to be made, (from the whole body of male adults,) that selection shall be made in some mode that excludes the possibility of choice *on the part of the government*.

Of course, this principle forbids the selection to be made *by any officer of the government*.

There seem to have been at least three modes of selecting the jurors, at the common law. 1. By lot.* 2. Two knights, or other freeholders, were appointed, (probably by the sheriff,)

* *Lingard* says: "These compurgators or jurors * * were sometimes * * drawn by lot."—1 *Lingard's History of England*, p. 300.

to select the jurors. 3. By the sheriff, bailiff, or other person, who held the court, or rather acted as its ministerial officer. Probably the latter mode may have been the most common, although there may be some doubt on this point.

At the common law the sheriffs, bailiffs, and other officers *were chosen by the people, instead of being appointed by the king.* (4 Blackstone, 413. *Introduction to Gilbert's History of the Common Pleas*, p. 2, note, and p. 4.) This has been shown in a former chapter.* At common law, therefore, jurors selected by these officers were legally selected, so far as the principle now under discussion is concerned; that is, they were not selected by any officer who was dependent on the government.

But in the year 1315, one hundred years after Magna Carta, the choice of sheriffs was taken from the people, and it was enacted:

“That the sheriffs shall henceforth be assigned by the chancellor, treasurer, barons of the exchequer, and by the justices. And in the absence of the chancellor, by the treasurer, barons and justices.” — 9 *Edward II.*, st. 2. (1315.)

These officers, who appointed the sheriffs, were themselves appointed by the king, and held their offices during his pleasure. Their appointment of sheriffs was, therefore, equivalent to an appointment by the king himself. And the sheriffs, thus appointed, held their offices only during the pleasure of the king, and were of course mere tools of the king; and their selection of jurors was really a selection by the king himself. In this manner the king usurped the selection of the jurors who were to sit in judgment upon his own laws.

Here, then, was another usurpation, by which the common law trial by jury was destroyed, so far as related to the *county* courts, in which the sheriffs presided, and which were the most important courts of the kingdom. From this cause alone, if there were no other, there has not been a legal jury in a *county* court in England, for more than five hundred years.

In nearly or quite all the States of the United States the juries are illegal, for one or the other of the same reasons that make the juries in England illegal.

* Chapter 4, p. 120, note.

In order that the juries in the United States may be legal — that is, in accordance with the principles of the common law — it is necessary that every adult male member of the state should have his name in the jury box, or be eligible as a juror. Yet this is the case in hardly a single state.

In New Jersey, Maryland, North Carolina, Tennessee, and Mississippi, the jurors are required to be *freeholders*. But this requirement is illegal, for the reason that the term *freeholder*, in this country, has no meaning analogous to the meaning it had in the ancient common law.

In Arkansas, Missouri, Indiana, and Alabama, jurors are required to be “freeholders or householders.” Each of these requirements is illegal.

In Florida, they are required to be “householders.”

In Connecticut, Maine, Ohio, and Georgia, jurors are required to have the qualifications of “electors.”

In Virginia, they are required to have a property qualification of one hundred dollars.

In Maine, Massachusetts, Vermont, Connecticut, New York, Ohio, Indiana, Michigan, and Wisconsin, certain civil authorities of the towns, cities, and counties are authorized to select, once in one, two, or three years, a certain number of the people — a small number compared with the whole — from whom jurors are to be taken when wanted; thus disfranchising all except the few thus selected.

In Maine and Vermont, the inhabitants, by vote in town meeting, have a veto upon the jurors selected by the authorities of the town.

In Massachusetts, the inhabitants, by vote in town meeting, can strike out any names inserted by the authorities, and insert others; thus making jurors elective by the people, and, of course, representatives only of a majority of the people.

In Illinois, the jurors are selected, for each term of court, by the county commissioners.

In North Carolina, “*the courts of pleas and quarter sessions* * * shall select the names of such persons only as are freeholders, and as are well qualified to act as jurors, &c.; thus giving the courts power to pack the juries.” — (*Revised Statutes*, 147.)

In Arkansas, too, "It shall be the duty of the *county court* of each county * * to make out and cause to be delivered to the sheriff a list of not less than sixteen, nor more than twenty-three persons, qualified to serve as *grand jurors*;" and the sheriff is to summon such persons to serve as *grand jurors*.

In Tennessee, also, the jurors are to be selected by the *county courts*.

In Georgia, the jurors are to be selected by "the justices of the inferior courts of each county, together with the sheriff and clerk, or a majority of them."

In Alabama, "the sheriff, judge of the county court, and clerks of the circuit and county courts," or "a majority of" them, select the jurors.

In Virginia, the jurors are selected by the sheriffs; but the sheriffs are appointed by the governor of the state, and that is enough to make the juries illegal. Probably the same objection lies against the legality of the juries in some other states.

How jurors are appointed, and what are their qualifications, in New Hampshire, Rhode Island, Pennsylvania, Delaware, South Carolina, Kentucky, Iowa, Texas, and California, I know not. There is little doubt that there is some valid objection to them, of the kinds already suggested, in all these states.

In regard to jurors in the courts of the United States, it is enacted, by act of Congress :

"That jurors to serve in the courts of the United States, in each state respectively, shall have the like qualifications, and be entitled to the like exemptions, as jurors of the highest court of law of such state now have and are entitled to, and shall hereafter, from time to time, have and be entitled to, and shall be designated by ballot, lot, or otherwise, according to the mode of forming such juries now practised and hereafter to be practised therein, in so far as such mode may be practicable by the courts of the United States, or the officers thereof; and for this purpose, the said courts shall have power to make all necessary rules and regulations for conforming the designation and empanelling of jurors, in substance, to the laws and usages now in force in such state; and, further, shall have power, by rule or order, from time to time, to conform the same to any change in these respects which may be hereafter adopted by the legislatures of the respective states for the state courts." — *St.* 1840, ch. 47, *Statutes at Large*, vol. 5, p. 394.

In this corrupt and lawless manner, Congress, instead of taking care to preserve the trial by jury, so far as they might, by providing for the appointment of legal juries — incomparably the most important of all our judicial tribunals, and the only ones on which the least reliance can be placed for the preservation of liberty — have given the selection of them over entirely to the control of an indefinite number of state legislatures, and thus authorized each state legislature to adapt the juries of the United States to the maintenance of any and every system of tyranny that may prevail in such state.

Congress have as much constitutional right to give over all the functions of the United States government into the hands of the state legislatures, to be exercised within each state in such manner as the legislature of such state shall please to exercise them, as they have to thus give up to these legislatures the selection of juries for the courts of the United States.

There has, probably, never been a legal jury, nor a legal trial by jury, in a single court of the United States, since the adoption of the constitution.

These facts show how much reliance can be placed in written constitutions, to control the action of the government, and preserve the liberties of the people.

If the real trial by jury had been preserved in the courts of the United States — that is, if we had had legal juries, and the jurors had known their rights — it is hardly probable that one tenth of the past legislation of Congress would ever have been enacted, or, at least, that, if enacted, it could have been enforced.

Probably the best mode of appointing jurors would be this : Let the names of *all* the adult male members of the state, in each township, be kept in a jury box, by the officers of the township; and when a court is to be held for a county or other district, let the officers of a sufficient number of townships be required (without seeing the names) to draw out a name from their boxes respectively, to be returned to the court as a juror. This mode of appointment would guard against collusion and selection; and juries so appointed would be likely to be a fair epitome of "the country."

CHAPTER VII.

ILLEGAL JUDGES.

It is a principle of Magna Carta, and therefore of the trial by jury, (for all parts of Magna Carta must be construed together,) that no judge or other officer *appointed by the king*, shall preside in jury trials, *in criminal cases*, or "pleas of the crown."

This provision is contained in the great charters of both John and Henry, and is second in importance only to the provision guaranteeing the trial by jury, of which it is really a part. Consequently, without the observance of this prohibition; there can be no genuine or *legal*—that is, *common law*—trial by jury.

At the common law, all officers who held jury trials, whether in civil or criminal cases, were chosen by the people.*

* The proofs of this principle of the common law have already been given on page 120, *note*.

There is much confusion and contradiction among authors as to the manner in which sheriffs and other officers were appointed; some maintaining that they were appointed by the king, others that they were elected by the people. I imagine that both these opinions are correct, and that several of the king's officers bore the same official names as those chosen by the people; and that this is the cause of the confusion that has arisen on the subject.

It seems to be a perfectly well established fact that, at common law, several magistrates, bearing the names of aldermen, sheriffs, stewards, coroners and bailiffs, were chosen by the people; and yet it appears, from Magna Carta itself, that some of the king's officers (of whom he must have had many) were also called "sheriffs, constables, coroners, and bailiffs."

But Magna Carta, in various instances, speaks of sheriffs and bailiffs as "*our* sheriffs and bailiffs;" thus apparently intending to recognize the distinction between officers of the king, bearing those names, and other officers, bearing the same official names, but chosen by the people. Thus it says that "no sheriff or bailiff of *ours*, or any other (officer), shall take horses or carts of any freeman for carriage, unless with the consent of the freeman himself."—*John's Charter*, ch. 36.

In a kingdom subdivided into so many counties, hundreds, tithings, manors, cities

But previous to Magna Carta, the kings had adopted the practice of sending officers of their own appointment, called justices, into the counties, to hold jury trials in some cases; and Magna Carta authorizes this practice to be continued so far as it relates to *three* kinds of *civil* actions, to wit: "novel disseisin, mort de ancestor, and darrein presentment;"* but specially forbids its being extended to criminal cases, or pleas of the crown.

This prohibition is in these words:

"Nullus vicecomes, constabularius, coronator, *vel alii balivi nostri*, teneant placita coronæ nostræ." (No sheriff, constable, coroner, or other our bailiffs, shall hold pleas of our crown.)—*John's Charter*, ch. 53. *Henry's ditto*, ch. 17.

Some persons seem to have supposed that this was a prohibition merely upon officers bearing the specific names of "sheriffs, constables, coroners and bailiffs," to hold criminal trials. But such is not the meaning. If it were, the name

and boroughs, each having a judicial or police organization of its own, it is evident that many of the officers must have been chosen by the people, else the government could not have maintained its popular character. On the other hand, it is evident that the king, the executive power of the nation, must have had large numbers of officers of his own in every part of the kingdom. And it is perfectly natural that these different sets of officers should, in many instances, bear the same official names; and, consequently that the king, when speaking of his own officers, as distinguished from those chosen by the people, should call them "*our* sheriffs, bailiffs," &c., as he does in Magna Carta.

I apprehend that inattention to these considerations has been the cause of all the confusion of ideas that has arisen on this subject,—a confusion very evident in the following paragraph from Dunham, which may be given as an illustration of that which is exhibited by others on the same points.

"Subordinate to the ealdormen were the *gerefas*, the sheriffs, or reeves, of whom there were several in every shire, or county. There was one in every borough, as a judge. There was one at every gate, who witnessed purchases outside the walls; and there was one, higher than either,—the high sheriff,—who was probably the reeve of the shire. This last appears to have been appointed by the king. Their functions were to execute the decrees of the king, or ealdormen, to arrest prisoners, to require bail for their appearance at the sessions, to collect fines or penalties levied by the court of the shire, to preserve the public peace, and to preside in a subordinate tribunal of their own."—*Dunham's Middle Ages*, sec. 2, B. 2, ch. 1. 57 *Lardner's Cab. Cyc.*, p. 41.

The confusion of duties attributed to these officers indicates clearly enough that different officers, bearing the same official names, must have had different duties, and have derived their authority from different sources,—to wit, the king, and the people.

* *Darrein presentment* was an inquest to discover who presented the last person to a church; *mort de ancestor*, whether the last possessor was seized of land in demesne of his own fee; and *novel disseisin*, whether the claimant had been unjustly disseized of his freehold.

could be changed, and the *thing* retained; and thus the prohibition be evaded. The prohibition applies (as will presently be seen) to all officers of the king whatsoever; and it sets up a distinction between officers of the king, ("our bailiffs,") and officers chosen by the people.

The prohibition upon the king's *justices* sitting in criminal trials, is included in the words "*vel alii balivi nostri*," (or other our bailiffs.) The word *bailiff* was anciently a sort of general name for *judicial officers* and persons employed in and about the administration of justice. In modern times its use, as applied to the higher grades of judicial officers, has been superseded by other words; and it therefore now, more generally, if not universally, signifies an executive or police officer, *a servant of courts*, rather than one whose functions are purely judicial.

The word is a French word, brought into England by the Normans.

Coke says, "*Baylife* is a French word, and signifies an officer concerned in the administration of justice of a certain province; and because a sheriff hath an office concerning the administration of justice within his county, or bailiwick, therefore he called his county *baliva sua*, (his bailiwick.)

"I have heard great question made what the true exposition of this word *balivus* is. In the statute of Magna Carta, cap. 28, the letter of that statute is, *nullus balivus de catero ponat aliquem ad legem manifestam nec ad juramentum simplici loquela sua sine testibus fidelibus ad hoc inductis.*" (No bailiff from henceforth shall put any one to his open law, nor to an oath (of self-exculpation) upon his own simple accusation, or complaint, without faithful witnesses brought in for the same.) "And some have said that *balivus* in this statute signifieth *any judge*; for the law must be waged and made before the judge. And this statute (say they) extends to *the courts of common pleas, king's bench, &c.*, for they must bring with them *fideles testes*, (faithful witnesses,) &c., and so hath been the usage to this day." — 1 *Coke's Inst.*, 168 b.

Coke makes various references, in his margin to Bracton, Fleta, and other authorities, which I have not examined, but which, I presume, support the opinion expressed in this quotation.

Coke also, in another place, under the head of the chapter

just cited from Magna Carta, that "*no bailiff shall put any man to his open law,*" &c., gives the following commentary upon it, from the *Mirror of Justices*, from which it appears that in the time of Edward I., (1272 to 1307,) this word *balivus* was understood to include *all judicial*, as well as all other, officers of the king.

The *Mirror* says: "The point which forbiddeth that no *bailiff* put a freeman to his oath without suit, is to be understood in this manner, — *that no justice, no minister of the king, nor other steward, nor bailiff, have power to make a freeman make oath, (of self-exculpation,) without the king's command,* nor receive any plaint, without witnesses present who testify the plaint to be true.*" — *Mirror of Justices*, ch. 5, sec. 2, p. 257.

Coke quotes this commentary, (in the original French,) and then endorses it in these words :

"By this it appeareth, that under this word *balivus*, in this act, is comprehended *every justice, minister of the king, steward, and bailiff.*" — 2 *Inst.*, 44.

Coke also, in his commentary upon this very chapter of Magna Carta, that provides that "*no sheriff, constable, coroner, or other our bailiffs, shall hold pleas of our crown,*" expresses the opinion that it "*is a general law,*" (that is, applicable to all officers of the king,) "*by reason of the words vel alii balivi nostri, (or other our bailiffs,) under which words are comprehended all judges or justices of any courts of justice.*" And he cites a decision in the king's bench, in the 17th year of Edward I., (1289,) as authority; which decision he calls "*a notable and leading judgment.*" — 2 *Inst.*, 30—1.

And yet Coke, in flat contradiction of this decision, which he quotes with such emphasis and approbation, and in flat contradiction also of the definition he repeatedly gives of the word *balivus*, showing that it embraced *all ministers of the king whatsoever*, whether high or low, judicial or executive, fabricates an entirely gratuitous interpretation of this chapter

* He has no power to do it, *either with, or without, the king's command.* The prohibition is absolute, containing no such qualification as is here interpolated, viz., "*without the king's command.*" If it could be done *with* the king's command, the king would be invested with arbitrary power in the matter.

of Magna Carta, and pretends that after all it only required that *felonies* should be tried before the king's *justices*, on account of their superior learning; and that it permitted all lesser offences to be tried before inferior officers, (meaning of course the king's inferior officers.) — 2 *Inst.*, 30.

And thus this chapter of Magna Carta, which, according to his own definition of the word *balivus*, applies to all officers of the king; and which, according to the common and true definition of the term "pleas of the crown," applies to all criminal cases without distinction, and which, therefore, forbids any officer or minister of the king to preside in a jury trial in any criminal case whatsoever, he coolly and gratuitously interprets into a mere senseless provision for simply restricting the discretion of the king in giving names to his own officers who should preside at the trials of particular offences; as if the king, who made and unmade all his officers by a word, could not defeat the whole object of the prohibition, by appointing such individuals as he pleased, to try such causes as he pleased, and calling them by such names as he pleased, *if he were but permitted to appoint and name such officers at all*; and as if it were of the least importance what name an officer bore, whom the king might appoint to a particular duty.*

* The absurdity of this doctrine of Coke is made more apparent by the fact that, at that time, the "justices" and other persons appointed by the king to hold courts were not only dependent upon the king for their offices, and removable at his pleasure, but that the usual custom was, not to appoint them with any view to permanency, but only to give them special commissions for trying a single cause, or for holding a single term of a court, or for making a single circuit; which, being done, their commissions expired. The king, therefore, could, and undoubtedly did, appoint any individual he pleased, to try any cause he pleased, with a special view to the verdicts he desired to obtain in the particular cases.

This custom of commissioning particular persons to hold jury trials, in criminal cases, (and probably also in civil ones,) was of course a usurpation upon the common law, but had been practised more or less from the time of William the Conqueror. Palgrave says:

"The frequent absence of William from his insular dominions occasioned another mode of administration, which ultimately produced still greater changes in the law. It was the practice of appointing justiciars to represent the king's person, to hold his court, to decide his pleas, to dispense justice on his behalf, to command the military levies, and to act as conservators of the peace in the king's name.* . . . The justices who were

* In this extract, Palgrave seems to assume that the king himself had a right to sit as Judge, in jury trials, in the county courts, in both civil and criminal cases. I apprehend he had no such power at the common law, but only to sit in the trial of appeals, and in the trial of peers, and of civil suits in which peers were parties, and possibly in the courts of ancient demesne.

Coke evidently gives this interpretation solely because, as he was giving a general commentary on Magna Carta, he was bound to give some interpretation or other to every chapter of it; and for this chapter he could invent, or fabricate, (for it is

assigned in the name of the sovereign, and whose powers were revocable at his pleasure, derived their authority merely from their grant. . . . Some of those judges were usually deputed for the purpose of relieving the king from the burden of his judicial functions. . . . The number as well as the variety of names of the justices appearing in the early chirographs of 'Concords,' leave reason for doubting whether, anterior to the reign of Henry III., (1216 to 1272,) a court, whose members were changing at almost every session, can be said to have been permanently constituted. It seems more probable that the individuals who composed the tribunal were selected as suited the pleasure of the sovereign, and the convenience of the clerks and barons; and the history of our legal administration will be much simplified, if we consider all those courts which were afterwards denominated the Exchequer, the King's Bench, the Common Pleas, and the Chancery, as being originally committees, selected by the king when occasion required, out of a large body, for the despatch of peculiar branches of business, and which committees, by degrees, assumed an independent and permanent existence. . . . Justices itinerant, who, despatched throughout the land, decided the 'Pleas of the Crown,' may be obscurely traced in the reign of the Conqueror; not, perhaps, appointed with much regularity, but despatched upon peculiar occasions and emergencies."—1 *Palgrave's Rise and Progress*, &c., p. 289 to 293.

The following statute, passed in 1354, (139 years after Magna Carta,) shows that even after this usurpation of appointing "justices" of his own, to try criminal cases, had probably become somewhat established in practice, in defiance of Magna Carta, the king was in the habit of granting special commissions to still other persons, (especially to sheriffs, — his sheriffs, no doubt,) to try particular cases :

"Because that the people of the realm have suffered many evils and mischiefs, for that sheriffs of divers counties, by virtue of commissions and general writs granted to them at their own suit, for their singular profit to gain of the people, have made and taken divers inquests to cause to indict the people at their will, and have taken fine and ransom of them to their own use, and have delivered them; whereas such persons indicted were not brought before the king's justices to have their deliverance, it is accorded and established, for to eschew all such evils and mischiefs, that such commissions and writs before this time made shall be utterly repealed, and that from henceforth no such commissions shall be granted."—*St. 28 Edward III.*, ch. 9, (1354.)

How silly to suppose that the illegality of these commissions to try criminal cases, could have been avoided by simply granting them to persons under the title of "justices," instead of granting them to "sheriffs." The statute was evidently a cheat, or at least designed as such, inasmuch as it virtually asserts the right of the king to appoint his tools, under the name of "justices," to try criminal cases, while it disavows his right to appoint them under the name of "sheriffs."

Millar says : "When the king's bench came to have its usual residence at Westminster, the sovereign was induced to grant special commissions, for trying particular crimes, in such parts of the country as were found most convenient; and this practice was gradually modelled into a regular appointment of certain commissioners, empowered, at stated seasons, to perform circuits over the kingdom, and to hold courts in particular towns, for the trial of all sorts of crimes. These judges of the circuit, however, never obtained an ordinary jurisdiction, but continued, on every occasion, to derive their authority from two special commissions : that of oyer and terminer, by which they were appointed to hear and determine all treasons, felonies and misdemeanors, within certain districts; and that of *gaol delivery*, by which they were directed to try every prisoner confined in the gaols of the several towns falling under their inspection."—*Millar's Hist. View of Eng. Gov.*, vol. 2, ch. 7, p. 282.

The following extract from Gilbert shows to what lengths of usurpation the kings

a sheer fabrication,) no interpretation better suited to his purpose than this. It seems never to have entered his mind, (or if it did, he intended that it should never enter the mind of anybody else,) that the object of the chapter could be to deprive the king of the power of putting his creatures into criminal courts, to pack, cheat, and browbeat juries, and thus maintain his authority by procuring the conviction of those who should transgress his laws, or incur his displeasure.

This example of Coke tends to show how utterly blind, or how utterly corrupt, English judges, (dependent upon the crown and the legislature), have been in regard to everything in Magna Carta, that went to secure the liberties of the people, or limit the power of the government.

Coke's interpretation of this chapter of Magna Carta is of a piece with his absurd and gratuitous interpretation of the words "*nec super eum ibimus, nec super eum mittemus,*" which was pointed out in a former article, and by which he attempted to give a *judicial* power to the king and his judges, where Magna Carta had given it only to a jury. It is also of a piece with his pretence that there was a difference between

would sometimes go, in their attempts to get the judicial power out of the hands of the people, and entrust it to instruments of their own choosing :

"From the time of the *Saxons*," (that is, from the commencement of the reign of William the Conqueror,) "till the reign of Edward the first, (1272 to 1307,) the several county courts and sheriffs courts did decline in their interest and authority. The methods by which they were broken were two-fold. First, by granting commissions to the sheriffs by writ of JUSTICES, whereby the sheriff had a particular jurisdiction granted him to be judge of a particular cause, independent of the suitors of the county court," (that is, without a jury;) "and these commissions were after the Norman form, by which (according to which) all power of judicature was immediately derived from the king."—Gilbert on the Court of Chancery, p. 1.

The several authorities now given show that it was the custom of the *Norman* kings, not only to appoint persons to sit as judges in jury trials, in criminal cases, but that they also commissioned individuals to sit in singular and particular cases, as occasion required; and that they therefore readily *could*, and naturally *would*, and therefore undoubtedly *did*, commission individuals with a special view to their adaptation or capacity to procure such judgments as the kings desired.

The extract from Gilbert suggests also the usurpation of the *Norman* kings, in their assumption that *they*, (and not the people, as by the common law,) were the fountains of justice. It was only by virtue of this illegal assumption that they could claim to appoint their tools to hold courts.

All these things show how perfectly lawless and arbitrary the kings were, both before and after Magna Carta, and how necessary to liberty was the principle of Magna Carta and the common law, that no person appointed by the king should hold jury trials in criminal cases.

fine and *amercement*, and that *finés* might be imposed by the king, and that juries were required only for fixing *amercements*.

These are some of the innumerable frauds by which the English people have been cheated out of the trial by jury.

Ex uno disce omnes. From one judge learn the characters of all.*

I give in the note additional and abundant authorities for

* The opinions and decisions of judges and courts are undeserving of the least reliance, (beyond the intrinsic merit of the arguments offered to sustain them,) and are unworthy even to be quoted as evidence of the law, *when those opinions or decisions are favorable to the power of the government, or unfavorable to the liberties of the people.* The only reasons that their opinions, *when in favor of liberty*, are entitled to any confidence, are, first, that all presumptions of law are in favor of liberty; and, second, that the admissions of all men, the innocent and the criminal alike, *when made against their own interests*, are entitled to be received as true, because it is contrary to human nature for a man to confess anything but truth against himself.

More solemn farces, or more gross impostures, were never practised upon mankind, than are all, or very nearly all, those oracular responses by which courts assume to determine that certain statutes, in restraint of individual liberty, are within the constitutional power of the government, and are therefore valid and binding upon the people.

The reason why these courts are so intensely servile and corrupt, is, that they are not only parts of, but the veriest creatures of, the very governments whose oppressions they are thus seeking to uphold. They receive their offices and salaries from, and are impeachable and removable by, the very governments upon whose acts they affect to sit in judgment. Of course, no one with his eyes open ever places himself in a position so incompatible with the liberty of declaring his honest opinion, unless he do it with the intention of becoming a mere instrument in the hands of the government for the execution of all its oppressions.

As proof of this, look at the judicial history of England for the last five hundred years, and of America from its settlement. In all that time (so far as I know, or presume) no bench of judges, (probably not even any single judge,) dependent upon the legislature that passed the statute, has ever declared a single *penal* statute invalid, on account of its being in conflict either with the common law, which the judges in England have been sworn to preserve, or with the written constitutions, (recognizing men's natural rights,) which the American judges were under oath to maintain. Every oppression, every atrocity even, that has ever been enacted in either country, by the legislative power, in the shape of a criminal law, (or, indeed, in almost any other shape,) has been as sure of a sanction from the judiciary that was dependent upon, and impeachable by, the legislature that enacted the law, as if there were a physical necessity that the legislative enactment and the judicial sanction should go together. Practically speaking, the sum of their decisions, all and singular, has been, that there are no limits to the power of the government, and that the people have no rights except what the government pleases to allow to them.

It is extreme folly for a people to allow such dependent, servile, and perjured creatures to sit either in civil or criminal trials; but to allow them to sit in criminal trials, and judge of the people's liberties, is not merely fatuity, — it is suicide.

the meaning ascribed to the word *bailiff*. The importance of the principle involved will be a sufficient excuse for such an accumulation of authorities as would otherwise be tedious and perhaps unnecessary.*

The foregoing interpretation of the chapter of Magna Carta now under discussion, is corroborated by another chapter of

* Coke, speaking of the word *bailiffs*, as used in the statute of 1 *Westminster*, ch. 35, (1275,) says :

"Here *bailiffs* are taken for the *judges of the court*, as manifestly appeareth hereby." — 2 *Inst.*, 223.

Coke also says, "It is a maxim in law, *aliquis non debet esse judex in propria causa*, (no one ought to be judge in his own cause;) and therefore a fine levied before the *baylives of Salp* was reversed, because one of the *baylives* was party to the fine, *quia non potest esse judex et pars*," (because one cannot be judge and party.) — 1 *Inst.*, 141 a.

In the statute of Gloucester, ch. 11 and 12, (1278,) "the mayor and *bailiffs* of London (undoubtedly chosen by the people, or at any rate not appointed by the king) are manifestly spoken of as *judges*, or magistrates, holding *jury* trials, as follows :

Ch. II. "It is provided, also, that if any man lease his tenement in the city of London, for a term of years, and he to whom the freehold belongeth causeth himself to be impleaded by collusion, and maketh default after default, or cometh into court and giveth it up, for to make the termor (lessee) lose his term, (lease,) and the demandant hath his suit, so that the termor may recover by writ of covenant; *the mayor and bailiffs may inquire by a good inquest, (jury),* in the presence of the termor and the demandant, whether the demandant moved his plea upon good right that he had, or by collusion, or fraud, to make the termor lose his term; and if it be found by the inquest (jury) that the demandant moved his plea upon good right that he had, the judgment shall be given forthwith; and if it be found by the inquest (jury) that he impleaded him (self) by fraud, to put the termor from his term, then shall the termor enjoy his term, and the execution of judgment for the demandant shall be suspended until the term be expired." — 6 *Edward I.*, ch. 11, (1278.)

Coke, in his commentary on this chapter, calls this court of "the mayor and *bailiffs*" of London, "the court of the *hustings, the greatest and highest court in London*;" and adds, "other cities have the like court, and so called, as York, Lincoln, Winchester, &c. Here the city of London is named; but it appeareth by that which hath been said out of *Fleta*, that this act extends to such cities and boroughs privileged, — that is, such as have such privilege to hold plea as London hath." — 2 *Inst.*, 322.

The 12th chapter of the same statute is in the following words, which plainly recognize the fact that "the mayor and *bailiffs* of London" are *judicial* officers holding courts in London.

"It is provided, also, that if a man, impleaded for a tenement in the same city, (London,) doth vouch a foreigner to warranty, that he shall come into the chancery, and have a writ to summon his warrantor at a certain day before the justices of the bench, and another writ to the mayor and *bailiffs* of London, that they shall surcease (suspend proceedings) in the matter that is before them by writ, until the plea of the warrantee be determined before the justices of the bench; and when the plea at the bench shall be determined, then shall he that is vouched be commanded to go into the city," (that is, before "the mayor and *bailiffs*" court,) "to answer unto the chief plea; and a writ shall be awarded at the suit of the demandant by the justices unto the mayor and *bailiffs*, that they shall proceed in the plea," &c. — 6 *Edward I.*, ch. 12, (1278.)

Coke, in his commentary on this chapter, also speaks repeatedly of "the mayor and *bailiffs*" as *judges holding courts*; and also speaks of this chapter as applicable not only to "the city of London, specially named for the cause aforesaid, but extended by equity to all other privileged places," (that is, privileged to have a court of "mayor and *bail-*

Magna Carta, which specially provides that the king's justices shall "go through every county" to "take the assizes" (hold jury trials) in three kinds of *civil* actions, to wit, "novel disseisin, mort de ancestor, and darrein presentment;" but makes no mention whatever of their holding jury trials in *criminal* cases, — an omission wholly unlikely to be made, if it were

iffs,") "where foreign voucher is made, as to Chester, Durham, Salop," &c. — 2 *Inst.*, 325-7.

BAILIE. — In Scotch law, a municipal magistrate, corresponding with the English *alderman*.* — *Burrill's Law Dictionary*.

BAILIFFE. — *Baillif*. Fr. A bailiff: a ministerial officer with duties similar to those of a sheriff. . . *The judge of a court*. A municipal magistrate, &c. — *Burrill's Law Dict.*

BAILIFF. . . The word *bailiff* is of Norman origin, and was applied in England, at an early period, (after the example, it is said, of the French,) to the chief magistrates of counties, or shires, such as the alderman, the reeve, or sheriff, and also of inferior jurisdictions, such as hundreds and wapentakes. — *Spelman, voc. Balivus*; 1 *Bl. Com.*, 344. See *Bailli, Ballivus*. The Latin *ballivus* occurs, indeed, in the laws of Edward the Confessor, but *Spelman* thinks it was introduced by a later hand. *Balliva* (balliwick) was the word formed from *ballivus*, to denote the extent of territory comprised within a bailiff's jurisdiction; and *balliwick* is still retained in writs and other proceedings, as the name of a sheriff's county. — 1 *Bl. Com.*, 344. See *Balliva*. The office of bailiff was at first strictly, though not exclusively, a judicial one. In France, the word had the sense of what *Spelman* calls *justitia tutclaris*. *Ballivus* occurs frequently in the *Regiam Majestatem*, in the sense of a judge. — *Spelman*. In its sense of a deputy, it was formerly applied, in England, to those officers who, by virtue of a deputation, either from the sheriff or the lords of private jurisdictions, exercised within the hundred, or whatever might be the limits of their balliwick, certain judicial and ministerial functions. With the disuse of private and local jurisdictions, the meaning of the term became commonly restricted to such persons as were deputed by the sheriff to assist him in the merely ministerial portion of his duty; such as the summoning of juries, and the execution of writs. — *Brande*. . . The word *bailiff* is also applied in England to the chief magistrates of certain towns and jurisdictions, to the keepers of castles, forests and other places, and to the stewards or agents of lords of manors. — *Burrill's Law Dict.*

"BAILIFF, (from the Lat. *ballivus*; Fr. *baillif*, i. e., *Prefectus provincia*,) signifies an officer appointed for the administration of justice within a certain district. The office, as well as the name, appears to have been derived from the French," &c. — *Breuster's Encyclopedia*.

Millar says, "The French monarchs, about this period, were not content with the power of receiving appeals from the several courts of their barons. An expedient was devised of sending royal bailiffs into different parts of the kingdom, with a commission to take cognizance of all those causes in which the sovereign was interested, and in reality for the purpose of abridging and limiting the subordinato jurisdiction of the

* *Alderman* was a title anciently given to various judicial officers, as the Alderman of all England, Alderman of the King, Alderman of the County, Alderman of the City or Borough, alderman of the Hundred or Wapentake. These were all judicial officers. See *Law Dictionaries*.

designed they should attend the trial of such causes. Besides, the chapter here spoken of (in John's charter) does not allow these justices to sit *alone* in jury trials, even in *civil* actions; but provides that four knights, chosen by the county, shall sit

neighboring feudal superiors. By an edict of Phillip Augustus, in the year 1190, those *bailiffs* were appointed in all the principal towns of the kingdom."— *Millar's Hist. View of the Eng. Gov.*, vol. ii., ch. 3, p. 126.

"*BAILIFF-office*.—Magistrates who formerly administered justice in the parliaments or courts of France, answering to the English sheriffs, as mentioned by Bracton."— *Bouvier's Law Dict.*

"There be several officers called *bailiffs*, whose offices and employments seem quite different from each other. . . The chief magistrate, in divers ancient corporations, are called *bailiffs*, as in Ipswich, Yarmouth, Colchester, &c. There are, likewise, officers of the forest, who are termed bailiffs."—1 *Bacon's Abridgment*, 498-9.

"*BAILIFF* signifies a keeper or superintendent, and is directly derived from the French word *bailli*, which appears to come from the word *balivus*, and that from *bagalus*, a Latin word signifying generally a governor, tutor, or superintendent. . . The French word *bailli* is thus explained by Richelet, (*Dictionnaire*, &c.): *Bailli*.— *He who in a province has the superintendance of justice, who is the ordinary judge of the nobles, who is their head for the ban and arriere ban,* and who maintains the right and property of others against those who attack them. . . All the various officers who are called by this name, though differing as to the nature of their employments, seem to have some kind of superintendance intrusted to them by their superior.*"— *Political Dictionary*.

"*BAILIFF, balivus*. From the French word *bayliff*, that is, *prefectus provincia*, and as the name, so the office itself was answerable to that of France, where there were eight parliaments, which were high courts from whence there lay no appeal, and within the precincts of the several parts of that kingdom which belonged to each parliament, there were several provinces to which justice was administered by certain officers called *bailiffs*; and in England we have several counties in which justice hath been, and still is, in small suits, administered to the inhabitants by the officer whom we now call *sheriff*, or *viscount*; (one of which names descends from the Saxons, the other from the Normans.) And, though the sheriff is not called *bailiff*, yet it was probable that was one of his names also, because the county is often called *balliva*; as in the return of a writ, where the person is not arrested, the sheriff saith, *infra-nominatus, A. B. non est inventus in balliva mea*, &c.; (the within named A. B. is not found in my balliwick, &c.) And in the statute of Magna Carta, ch. 28, and 14 Ed. 3, ch. 9, the word *bailiff* seems to comprise as well sheriffs, as bailiffs of hundreds.

"*Bailies*, in Scotland, are magistrates of burghs, possessed of certain jurisdictions, having the same power within their territory as sheriffs in the county. . .

"As England is divided into counties, so every county is divided into hundreds; within which, in ancient times, the people had justice administered to them by the several officers of every hundred, which were the *bailiffs*. And it appears by Bracton, (*lib. 3, tract. 2, ch. 34*.) that *bailiffs* of hundreds might anciently hold plea of appeal and approvers; but since that time the hundred courts, except certain franchises, are swallowed in the county courts; and now the *bailiff's* name and office is grown into contempt, they being

* "*Ban and arriere ban*, a proclamation, whereby all that hold lands of the crown, (except some privileged officers and citizens,) are summoned to meet at a certain place in order to serve the king in his wars, either personally, or by proxy."— *Boyer*.

with them to keep them honest. When the king's justices were known to be so corrupt and servile that the people would not even trust them to sit alone, in jury trials, in *civil* actions,

generally officers to serve writs, &c., within their liberties; though, in other respects, the name is still in good esteem, for the chief magistrates in divers towns are called *bailiffs*; and sometimes the persons to whom the king's castles are committed are termed *bailiffs*, as the *bailiff* of Dover Castle, &c.

"Of the ordinary *bailiffs* there are several sorts, viz., *bailiffs* of liberties; sheriffs' *bailiffs*; *bailiffs* of lords of manors; *bailiffs* of husbandry, &c. . .

"*Bailiffs* of liberties or franchises are to be sworn to take distresses, truly impanel jurors, make returns by indenture between them and sheriffs, &c. . .

"*Bailiffs* of courts baron summon those courts, and execute the process thereof. . .

"Besides these, there are also *bailiffs* of the forest. . ." — *Jacob's Law Dict. Tomlin's do.*

"**BAILIWIck**, *ballivá*, — is not only taken for the county, but signifies generally that liberty which is exempted from the sheriff of the county, over which the lord of the liberty appointeth a *bailiff*, with such powers within his precinct as an under-sheriff exerciseth under the sheriff of the county; such as the *bailiff* of Westminster." — *Jacob's Law Dict. Tomlin's do.*

"A *bailiff* of a *Leet*, *Court-baron*, *Manor*, *Balivus Leta*, *Baronis*, *Manerii*. — He is one that is appointed by the lord, or his steward, within every manor, to do such offices as appertain thereunto, as to summon the court, warn the tenants and residents; also, to summon the *Leet* and *Homage*, levy fines, and make distresses, &c., of which you may read at large in *Kitchen's Court-leet and Court-baron*." — *A Law Dictionary, anonymous, (in Suffolk Law Library.)*

"**BAILIFF**. — In England an officer appointed by the sheriff. Bailiffs are either special, and appointed, for their adroitness, to arrest persons; or bailiffs of hundreds, who collect fines, summon juries, attend the assizes, and execute writs and processes. *The sheriff in England is the king's bailiff.* . .

"*The office of bailiff formerly was high and honorable in England, and officers under that title on the continent are still invested with important functions.*" — *Webster.*

"**BAILLI**, (Scotland.) — An alderman; a magistrate who is second in rank in a royal burgh." — *Worcester.*

"*Baili*, or *Bailiff*. — (Sorte d'officier de justice.) A bailiff; a sort of magistrate." — *Boyer's French Dict.*

"By some opinions, a *bailiff*, in *Magna Carta*, ch. 28, signifies any judge." — *Cunningham's Law Dict.*

"**BAILIFF**. — In the court of the Greek emperors there was a grand *bajulos*, first tutor of the emperor's children. The superintendent of foreign merchants seems also to have been called *bajulos*; and, as he was appointed by the Venetians, this title (*balio*) was transferred to the Venetian ambassador. From Greece, the official *bajulos* (*ballivus*, *bailli*, in France; *bailiff*, in England,) was introduced into the south of Europe, and denoted a superintendent; hence the eight *ballivi* of the knights of St. John, which constitute its supreme council. In France, the royal bailiffs were commanders of the militia, administrators or stewards of the domains, and *judges of their districts*. In the course of time, only the first duty remained to the bailiff; hence he was *bailli d'épée*, and laws were administered in his name by a lawyer, as his deputy, *lieutenant de robe*. The seigniories, with which high courts were connected, employed bailiffs, who thus consti-

how preposterous is it to suppose that they would not only suffer them to sit, but to sit alone, in *criminal* ones.

It is entirely incredible that Magna Carta, which makes such careful provision in regard to the king's justices sitting in *civil* actions, should make no provision whatever as to their sitting in *criminal* trials, if they were to be allowed to sit in them at all. Yet Magna Carta has no provision whatever on the subject.*

tuted, almost everywhere, *the lowest order of judges*. From the courts of the nobility, the appellation passed to the royal courts; from thence to the parliaments. In the greater bailiwicks of cities of importance, Henry II. established a collegial constitution under the name of *presidial courts*. . . . *The name of bailiff was introduced into England with William I.* The counties were also called *bailiwicks*, (*ballivz*), while the subdivisions were called *hundreds*; but, as the courts of the hundreds have long since ceased, the English bailiffs are only a kind of subordinate officers of justice, like the French *huissiers*. These correspond very nearly to the officers called *constables* in the United States. Every sheriff has some of them under him, for whom he is answerable. In some cities the highest municipal officer yet bears this name, as the high bailiff of Westminster. In London, the Lord Mayor is at the same time bailiff, (which title he bore before the present became usual,) and *administers, in this quality, the criminal jurisdiction of the city, in the court of old Bailey*, where there are, annually, eight sittings of the court, for the city of London and the county of Middlesex. *Usually, the recorder of London supplies his place as judge*. In some instances the term *bailiff*, in England, is applied to the chief magistrates of towns, or to the commanders of particular castles, as that of Dover. The term *baillie*, in Scotland, is applied to a judicial police-officer, having powers very similar to those of justices of peace in the United States." — *Encyclopædia Americana*.

* Perhaps it may be said (and such, it has already been seen, is the opinion of Coke and others) that the chapter of Magna Carta, that "no *bailiff* from henceforth shall put any man to his open law, (put him on trial,) nor to an oath (that is, an oath of self-exculpation) upon his (the bailiff's) own accusation or testimony, without credible witnesses brought in to prove the charge," is itself a "provision in regard to the king's justices sitting in criminal trials," and therefore implies that they are to sit in such trials.

But, although the word *bailiff* includes all *judicial*, as well as other, officers, and would therefore in this case apply to the king's justices, if they were to sit in criminal trials; yet this particular chapter of Magna Carta evidently does not contemplate "*bailiffs*" while acting in their *judicial* capacity, (for they were not allowed to sit in criminal trials at all,) but only in the character of *witnesses*; and that the meaning of the chapter is, that the simple testimony (*simplici loquela*) of "no bailiff," (of whatever kind,) unsupported by other and "credible witnesses," shall be sufficient to put any man on trial, or to his oath of self-exculpation.*

It will be noticed that the words of this chapter are *not*, "no bailiff of ours," — that is, *of the king*, — as in some other chapters of Magna Carta; but simply "no bailiff," &c. The prohibition, therefore, applies to all "*bailiffs*," — to those chosen by the peo-

* At the common law, parties, in both civil and criminal cases, were allowed to swear in their own behalf; and it will be so again, if the true trial by jury should be reestablished.

But what would appear to make this matter absolutely certain is, that unless the prohibition that "no bailiff, &c., of ours shall hold pleas of our crown," apply to all officers of the king, justices as well as others, it would be wholly nugatory for any practical or useful purpose, because the prohibition could be evaded by the king, at any time, by simply changing the titles of his officers. Instead of calling them "sheriffs, coroners, constables and bailiffs," he could call them "*justices*," or anything else he pleased; and this prohibition, so important to the liberty of the people, would then be entirely defeated. The king also could make and unmake "*justices*" at his pleasure; and if he could appoint any officers whatever to preside over juries in criminal trials, he could appoint any tool that he might at any time find adapted to his purpose. It was as easy to make justices of Jeffreys and Scroggs, as of any other material; and to have prohibited all the king's officers, *except his justices*, from presiding in criminal trials, would therefore have been mere fool's play.

We can all perhaps form some idea, though few of us will be likely to form any adequate idea, of what a different thing

ple, as well as those appointed by the king. And the prohibition is obviously founded upon the idea (a very sound one in that age certainly, and probably also in this) that public officers (whether appointed by king or people) have generally, or at least frequently, too many interests and animosities against accused persons, to make it safe to convict any man on their testimony alone.

The idea of Coke and others, that the object of this chapter was simply to forbid *magistrates* to put a man on trial, when there were no witnesses against him, but only the simple accusation or testimony of the magistrates themselves, before whom he was to be tried, is preposterous; for that would be equivalent to supposing that magistrates acted in the triple character of judge, jury and witnesses, *in the same trial*; and that, therefore, *in such cases*, they needed to be prohibited from condemning a man on their own accusation or testimony alone. But such a provision would have been unnecessary and senseless, for two reasons; first, because the bailiffs or magistrates had no power to "hold pleas of the crown," still less to try or condemn a man; that power resting wholly with the juries; second, because if bailiffs or magistrates *could* try and condemn a man, without a jury, the prohibition upon their doing so upon their own accusation or testimony alone, would give no additional protection to the accused, so long as these same bailiffs or magistrates were allowed to decide what weight should be given, *both to their own testimony and that of other witnesses*; for, if they wished to convict, they would of course decide that *any* testimony, however frivolous or irrelevant, *in addition to their own*, was sufficient. Certainly a magistrate could always procure witnesses enough to testify to something or other, which *he himself* could decide to be corroborative of his own testimony. And thus the prohibition would be defeated in fact, though observed in form.

the trial by jury would have been *in practice*, and of what would have been the difference to the liberties of England, for five hundred years last past, had this prohibition of Magna Carta, upon the king's officers sitting in the trial of criminal cases, been observed.

The principle of this chapter of Magna Carta, as applicable to the governments of the United States of America, forbids that any officer appointed either by the executive or *legislative* power, or dependent upon them for their salaries, or responsible to them by impeachment, should preside over a jury in criminal trials. To have the trial a legal (that is, a *common law*) and true trial by jury, the presiding officers must be chosen by the people, and be entirely free from all dependence upon, and all accountability to, the executive and legislative branches of the government.*

* In this chapter I have called the justices "*presiding officers*," solely for the want of a better term. They are not "*presiding officers*," in the sense of having any authority over the jury; but are only assistants to, and teachers and servants of, the jury. The foreman of the jury is properly the "*presiding officer*," so far as there is such an officer at all. The sheriff has no authority except over other persons than the jury.

CHAPTER VIII.

THE FREE ADMINISTRATION OF JUSTICE.

THE free administration of justice was a principle of the common law; and it must necessarily be a part of every system of government which is not designed to be an engine in the hands of the rich for the oppression of the poor.

In saying that the free administration of justice was a principle of the common law, I mean only that parties were subjected to no costs for jurors, witnesses, writs, or other necessities for the trial, *preliminary to the trial itself*. Consequently, no one could lose the benefit of a trial, for the want of means to defray expenses. *But after the trial*, the plaintiff or defendant was liable to be amerced, (by the jury, of course,) for having troubled the court with the prosecution or defence of an unjust suit.* But it is not likely that the losing party was subjected to an amercement as a matter of course, but only in those cases where the injustice of his cause was so evident as to make him inexcusable in bringing it before the courts.

All the freeholders were required to attend the courts, that they might serve as jurors and witnesses, and do any other service that could legally be required of them; and their attendance was paid for by the state. In other words, their attendance and service at the courts were part of the rents which they paid the state for their lands.

The freeholders, who were thus required always to attend

* 2 *Sullivan Lectures*, 234-5. 3 *Blackstone*, 274-5, 376. Sullivan says that both plaintiffs and defendants were liable to amercement. Blackstone speaks of plaintiffs being liable, without saying whether defendants were so or not. What the rule really was I do not know. There would seem to be some reason in allowing defendants to defend themselves, *at their own charges*, without exposing themselves to amercement in case of failure.

the courts, were doubtless the only witnesses who were usually required in *civil* causes. This was owing to the fact that, in those days, when the people at large could neither write nor read, few contracts were put in writing. The expedient adopted for proving contracts, was that of making them in the presence of witnesses, who could afterwards testify to the transactions. Most contracts in regard to lands were made at the courts, in the presence of the freeholders there assembled.*

In the king's courts it was specially provided by Magna Carta that "justice and right" should not be "sold;" that is, that the king should take nothing from the parties for administering justice.

The oath of a party to the justice of his cause was all that was necessary to entitle him to the benefit of the courts free of all expense; (except the risk of being amerced after the trial, in case the jury should think he deserved it.†)

This principle of the free administration of justice connects itself necessarily with the trial by jury, because a jury could not rightfully give judgment against any man, in either a civil or criminal case, if they had any reason to suppose he had been unable to procure his witnesses.

The true trial by jury would also compel the free administration of justice from another necessity, viz., that of preventing private quarrels; because, unless the government enforced a man's rights and redressed his wrongs, *free of expense to him*, a jury would be bound to protect him in taking the law into his own hands. A man has a natural right to enforce his own rights and redress his own wrongs. If one man owe another a debt, and refuse to pay it, the creditor has a natural right to seize sufficient property of the debtor, wherever he

* When any other witnesses than freeholders were required in a civil suit, I am not aware of the manner in which their attendance was procured; but it was doubtless done at the expense either of the state or of the witnesses themselves. And it was doubtless the same in criminal cases.

† "All claims were established in the first stage by the oath of the plaintiff, except when otherwise specially directed by the law. The oath, by which any claim was supported, was called the fore-oath, or 'Præjuramentum,' and it was the foundation of his suit. One of the cases which did not require this initiatory confirmation, was when cattle could be tracked into another man's land, and then the foot-mark stood for the fore-oath."—2 *Palgrave's Rise and Progress*, &c., 114.

can find it, to satisfy the debt. If one man commit a trespass upon the person, property or character of another, the injured party has a natural right, either to chastise the aggressor, or to take compensation for the injury out of his property. But as the government is an impartial party as between these individuals, it is more likely to do *exact* justice between them than the injured individual himself would do. The government, also, having more power at its command, is likely to right a man's wrongs more peacefully than the injured party himself could do it. If, therefore, the government will do the work of enforcing a man's rights, and redressing his wrongs, *promptly, and free of expense to him*, he is under a moral obligation to leave the work in the hands of the government; but not otherwise. When the government forbids him to enforce his own rights or redress his own wrongs, and deprives him of all means of obtaining justice, except on the condition of his employing the government to obtain it for him, *and of paying the government for doing it*, the government becomes itself the protector and accomplice of the wrong-doer. If the government will forbid a man to protect his own rights, it is bound to do it for him, *free of expense to him*. And so long as government refuses to do this, juries, if they knew their duties, would protect a man in defending his own rights.

Under the prevailing system, probably one half of the community are virtually deprived of all protection for their rights, except what the criminal law affords them. Courts of justice, for all civil suits, are as effectually shut against them, as though it were done by bolts and bars. Being forbidden to maintain their own rights by force, — as, for instance, to compel the payment of debts, — and being unable to pay the expenses of civil suits, they have no alternative but submission to many acts of injustice, against which the government is bound either to protect them, *free of expense*, or allow them to protect themselves.

There would be the same reason in compelling a party to pay the judge and jury for their services, that there is in compelling him to pay the witnesses, or any other *necessary* charges.*

* Among the necessary expenses of suits, should be reckoned reasonable compensation to counsel, for they are nearly or quite as important to the administration of justice,

This compelling parties to pay the expenses of civil suits is one of the many cases in which government is false to the fundamental principles on which free government is based. What is the object of government, but to protect men's rights? On what principle does a man pay his taxes to the government, except on that of contributing his proportion towards the necessary cost of protecting the rights of all? Yet, when his own rights are actually invaded, the government, which he contributes to support, instead of fulfilling its implied contract, becomes his enemy, and not only refuses to protect his rights, (except at his own cost,) but even forbids him to do it himself.

All free government is founded on the theory of voluntary association; and on the theory that all the parties to it *voluntarily* pay their taxes for its support, on the condition of receiving protection in return. But the idea that any *poor* man would voluntarily pay taxes to build up a government, which will neither protect his rights, (except at a cost which he cannot meet,) nor suffer himself to protect them by such means as may be in his power, is absurd.

Under the prevailing system, a large portion of the lawsuits determined in courts, are mere contests of purses rather than of rights. And a jury, sworn to decide causes "according to the evidence" produced, are quite likely, *for aught they themselves can know*, to be deciding merely the comparative length of the parties' purses, rather than the intrinsic strength of their respective rights. Jurors ought to refuse to decide a cause at all, except upon the assurance that all the evidence, necessary

as are judges, jurors, or witnesses; and the universal practice of employing them, both on the part of governments and of private persons, shows that their importance is generally understood. As a mere matter of economy, too, it would be wise for the government to pay them, rather than they should not be employed; because they collect and arrange the testimony and the law beforehand, so as to be able to present the whole case to the court and jury intelligibly, and in a short space of time. Whereas, if they were not employed, the court and jury would be under the necessity either of spending much more time than now in the investigation of causes, or of despatching them in haste, and with little regard to justice. They would be very likely to do the latter, thus defeating the whole object of the people in establishing courts.

To prevent the abuse of this right, it should perhaps be left discretionary with the jury in each case to determine whether the counsel should receive any pay — and, if any, how much — from the government.

to a full knowledge of the cause, is produced. This assurance they can seldom have, unless the government itself produces all the witnesses the parties desire.

In criminal cases, the atrocity of accusing a man of crime, and then condemning him unless he prove his innocence at his own charges, is so evident that a jury could rarely, if ever, be justified in convicting a man under such circumstances.

But the free administration of justice is not only indispensable to the maintenance of right between man and man; it would also promote simplicity and stability in the laws. The mania for legislation would be, in an important degree, restrained, if the government were compelled to pay the expenses of all the suits that grew out of it.

The free administration of justice would diminish and nearly extinguish another great evil, — that of malicious *civil* suits. It is an old saying, that "*multi litigant in foro, non ut aliquid lucrentur, sed ut vexant alios.*" (Many litigate in court, not that they may gain anything, but that they may harass others.) Many men, from motives of revenge and oppression, are willing to spend their own money in prosecuting a groundless suit, if they can thereby compel their victims, who are less able than themselves to bear the loss, to spend money in the defence. Under the prevailing system, in which the parties pay the expenses of their suits, nothing but money is necessary to enable any malicious man to commence and prosecute a groundless suit, to the terror, injury, and perhaps ruin, of another man. In this way, a court of justice, into which none but a conscientious *plaintiff* certainly should ever be allowed to enter, becomes an arena into which any rich and revengeful oppressor may drag any man poorer than himself, and harass, terrify, and impoverish him, to almost any extent. It is a scandal and an outrage, that government should suffer itself to be made an instrument, in this way, for the gratification of private malice. We might nearly as well have no courts of justice, as to throw them open, as we do, for such flagitious uses. Yet the evil probably admits of no remedy except a free administration of justice. Under a free system, plaintiffs could rarely be influenced by motives of this kind; because they could put their victim to little or no expense, *neither*

pending the suit, (which it is the object of the oppressor to do,) nor at its termination. Besides, if the ancient common law practice should be adopted, of amercing a party for troubling the courts with groundless suits, the prosecutor himself would, in the end, be likely to be amerced by the jury, in such a manner as to make courts of justice a very unprofitable place for a man to go to seek revenge.

In estimating the evils of this kind, resulting from the present system, we are to consider that they are not, by any means, confined to the actual suits in which this kind of oppression is practised; but we are to include all those cases in which the fear of such oppression is used as a weapon to compel men into a surrender of their rights.

CHAPTER IX.

THE CRIMINAL INTENT.

IT is a maxim of the common law that there can be no crime without a criminal intent. And it is a perfectly clear principle, although one which judges have in a great measure overthrown in practice, that *jurors* are to judge of the moral intent of an accused person, and hold him guiltless, whatever his act, unless they find him to have acted with a criminal intent; that is, with a design to do what he knew to be criminal.

This principle is clear, because the question for a jury to determine is, whether the accused be *guilty*, or *not guilty*. *Guilt* is a personal quality of the actor, — not *necessarily* involved in the act, but depending also upon the intent or motive with which the act was done. Consequently, the jury must find that he acted from a criminal motive, before they can declare him *guilty*.

There is no moral justice in, nor any political necessity for, punishing a man for any act whatever that he may have committed, if he have done it without any criminal intent. There can be no *moral justice* in punishing for such an act, because, there having been no *criminal motive*, there can have been no other motive which justice can take cognizance of, as demanding or justifying punishment. There can be no *political necessity* for punishing, to warn against similar acts in future, because, if one man have injured another, however unintentionally, he is liable, and justly liable, to a *civil* suit for damages; and in this suit he will be compelled to make compensation for the injury, notwithstanding his innocence of any intention to injure. He must bear the consequences of his own act, instead of throwing them upon another, however innocent

he may have been of any intention to do wrong. And the damages he will have to pay will be a sufficient warning to him not to do the like act again.

If it be alleged that there are crimes against the public, (as treason, for example, or any other resistance to government,) for which private persons can recover no damages, and that there is a political necessity for punishing for such offences, even though the party acted conscientiously, the answer is, — the government must bear with all resistance that is not so clearly wrong as to give evidence of criminal intent. In other words, the government, in all its acts, must keep itself so *clearly* within the limits of justice, as that twelve men, taken at random, will all agree that it is in the right, or it must incur the risk of resistance, without any power to punish it. This is the mode in which the trial by jury operates to prevent the government from falling into the hands of a party, or a faction, and to keep it within such limits as *all*, or substantially *all*, the people are agreed that it may occupy.

This necessity for a criminal intent, to justify conviction, is proved by the issue which the jury are to try, and the verdict they are to pronounce. The "issue" they are to try is, "*guilty*," or "*not guilty*." And those are the terms they are required to use in rendering their verdicts. But it is a plain falsehood to say that a man is "*guilty*," unless he have done an act which he knew to be criminal.

This necessity for a criminal intent — in other words, for *guilt* — as a preliminary to conviction, makes it impossible that a man can be rightfully convicted for an act that is intrinsically innocent, though forbidden by the government; because guilt is an intrinsic quality of actions and motives, and not one that can be imparted to them by arbitrary legislation. All the efforts of the government, therefore, to "*make offences by statute*," out of acts that are not criminal by nature, must necessarily be ineffectual, unless a jury will declare a man "*guilty*" for an act that is really innocent.

The corruption of judges, in their attempts to uphold the arbitrary authority of the government, by procuring the conviction of individuals for acts innocent in themselves, and forbidden only by some tyrannical statute, and the commission

of which therefore indicates no criminal intent, is very apparent.

To accomplish this object, they have in modern times held it to be unnecessary that indictments should charge, as by the common law they were required to do, that an act was done "*wickedly*," "*feloniously*," "*with malice aforethought*," or in any other manner that implied a criminal intent, without which there can be no criminality; but that it is sufficient to charge simply that it was done "*contrary to the form of the statute in such case made and provided*." This form of indictment proceeds plainly upon the assumption that the government is absolute, and that it has authority to prohibit any act it pleases, however innocent in its nature the act may be. Judges have been driven to the alternative of either sanctioning this new form of indictment, (which they never had any constitutional right to sanction,) or of seeing the authority of many of the statutes of the government fall to the ground; because the acts forbidden by the statutes were so plainly innocent in their nature, that even the government itself had not the face to allege that the commission of them implied or indicated any criminal intent.

To get rid of the necessity of showing a criminal intent, and thereby further to enslave the people, by reducing them to the necessity of a blind, unreasoning submission to the arbitrary will of the government, and of a surrender of all right, on their own part, to judge what are their constitutional and natural rights and liberties, courts have invented another idea, which they have incorporated among the pretended *maxims*, upon which they act in criminal trials, viz., that "*ignorance of the law excuses no one*." As if it were in the nature of things possible that there could be an excuse more absolute and complete. What else than ignorance of the law is it that excuses persons under the years of discretion, and men of imbecile minds? What else than ignorance of the law is it that excuses judges themselves for all their erroneous decisions? Nothing. They are every day committing errors, which would be crimes, but for their ignorance of the law. And yet these same judges, who claim to be *learned* in the law, and who yet could not hold their offices for a day, but for the

allowance which the law makes for their ignorance, are continually asserting it to be a "maxim" that "ignorance of the law excuses no one;" (by which, of course, they really mean that it excuses no one but themselves; and especially that it excuses no *unlearned* man, who comes before them charged with crime.)

This preposterous doctrine, that "ignorance of the law excuses no one," is asserted by courts because it is an indispensable one to the maintenance of absolute power in the government. It is indispensable for this purpose, because, if it be once admitted that the people *have* any rights and liberties which the government cannot lawfully take from them, then the question arises in regard to every statute of the government, whether it be law, or not; that is, whether it infringe, or not, the rights and liberties of the people. Of this question every man must of course judge according to the light in his own mind. And no man can be convicted unless the jury find, not only that the statute is *law*, — that it does *not* infringe the rights and liberties of the people, — but also that it was so clearly law, so clearly consistent with the rights and liberties of the people, as that the individual himself, who transgressed it, *knew it to be so*, and therefore had no moral excuse for transgressing it. Governments see that if ignorance of the law were allowed to excuse a man for any act whatever, it must excuse him for transgressing all statutes whatsoever, which he himself thinks inconsistent with his rights and liberties. But such a doctrine would of course be inconsistent with the maintenance of arbitrary power by the government; and hence governments will not allow the plea, although they will not confess their true reasons for disallowing it.

The only reasons, (if they deserve the name of reasons), that I ever knew given for the doctrine that ignorance of the law excuses no one, are these :

1. "The reason for the maxim is that of necessity. It prevails, 'not that all men know the law, but because it is an excuse which every man will make, and no man can tell how to confute him.'—*Selden*, (as quoted in the 2d edition of *Starkie on Slander*, Prelim. Disc., p. 140, note.)" — *Law Magazine*, (*London*,) vol. 27, p. 97.

This reason impliedly admits that ignorance of the law is, *intrinsically*, an ample and sufficient excuse for a crime; and that the excuse ought to be allowed, if the fact of ignorance could but be ascertained. But it asserts that this fact is incapable of being ascertained, and that therefore there is a necessity for punishing the ignorant and the knowing — that is, the innocent and the guilty — without discrimination.

This reason is worthy of the doctrine it is used to uphold; as if a plea of ignorance, any more than any other plea, must necessarily be believed simply because it is urged; and as if it were not a common and every-day practice of courts and juries, in both civil and criminal cases, to determine the mental capacity of individuals; as, for example, to determine whether they are of sufficient mental capacity to make reasonable contracts; whether they are lunatic; whether they are *compotes mentis*, "of sound mind and memory," &c. &c. And there is obviously no more difficulty in a jury's determining whether an accused person knew the law in a criminal case, than there is in determining any of these other questions that are continually determined in regard to a man's mental capacity. For the question to be settled by the jury is not whether the accused person knew the particular *penalty* attached to his act, (for at common law no one knew what penalty a *jury* would attach to an offence,) but whether he knew that his act was *intrinsically criminal*. If it were *intrinsically criminal*, it was criminal at common law. If it was not intrinsically criminal, it was not criminal at common law. (At least, such was the general principle of the common law. There may have been exceptions in practice, owing to the fact that the opinions of men, as to what was intrinsically criminal, may not have been in all cases correct.)

A jury, then, in judging whether an accused person knew his act to be illegal, were bound first to use their own judgments, as to whether the act were *intrinsically criminal*. If their own judgments told them the act was *intrinsically and clearly criminal*, they would naturally and reasonably infer that the accused also understood that it was intrinsically criminal, (and consequently illegal,) unless it should appear that he was either below themselves in the scale of intellect, or had

had less opportunities of knowing what acts were criminal. In short, they would judge, from any and every means they might have of judging; and if they had any reasonable doubt that he knew his act to be criminal in itself, they would be bound to acquit him.

The second reason that has been offered for the doctrine that ignorance of the law excuses no one, is this:

“Ignorance of the municipal law of the kingdom, or of the penalty thereby inflicted on offenders, doth not excuse any that is of the age of discretion and compos mentis, from the penalty of the breach of it; because every person, of the age of discretion and compos mentis, *is bound to know the law*, and presumed to do so. *Ignorantia eorum, quæ quis scire tenetur non excusat.*” (Ignorance of those things which every one is bound to know, does not excuse.)—1 *Hale's Pleas of the Crown*, 42. *Doctor and Student, Dialog. 2*, ch. 46. *Law Magazine*, (London,) vol. 27, p. 97.

The sum of this reason is, that ignorance of the law excuses no one, (who is of the age of discretion and is compos mentis,) because every such person “*is bound to know the law.*” But this is giving no reason at all for the doctrine, since saying that a man “is bound to know the law,” is only saying, *in another form*, that “ignorance of the law does not excuse him.” There is no difference at all in the two ideas. To say, therefore, that “ignorance of the law excuses no one, *because* every one is bound to know the law,” is only equivalent to saying that “ignorance of the law excuses no one, *because* ignorance of the law excuses no one.” It is merely reasserting the doctrine, without giving any reason at all.

And yet these reasons, which are really no reasons at all, are the only ones, so far as I know, that have ever been offered for this absurd and brutal doctrine.

The idea suggested, that “the age of discretion” determines the guilt of a person, — that there is a particular age, prior to which *all* persons alike should be held incapable of knowing *any* crime, and subsequent to which *all* persons alike should be held capable of knowing *all* crimes, — is another of this most ridiculous nest of ideas. All mankind acquire their knowledge of crimes, as they do of other things, *gradually*. Some they learn at an early age; others not till a later one. One individ-

ual acquires a knowledge of crimes, as he does of arithmetic, at an earlier age than others do. And to apply the same presumption to all, on the ground of age alone, is not only gross injustice, but gross folly. A universal presumption might, with nearly or quite as much reason, be founded upon weight, or height, as upon age.*

This doctrine, that "ignorance of the law excuses no one,"²² is constantly repeated in the form that "every one is bound to know the law." The doctrine is true in *civil* matters, especially in contracts, so far as this: that no man, who has the *ordinary* capacity to make reasonable contracts, can escape the consequences of his own agreement, on the ground that he did not know the law applicable to it. When a man makes a contract, he gives the other party rights; and he must of necessity judge for himself, and take his own risk, as to what those rights are, — otherwise the contract would not be binding, and men could not make contracts that would convey rights to each other. Besides, the capacity to make reasonable con-

* This presumption, founded upon age alone, is as absurd in civil matters as in criminal. What can be more entirely ludicrous than the idea that all men (not manifestly imbecile) become mentally competent to make all contracts whatsoever on the day they become twenty-one years of age? — and that, previous to that day, no man becomes competent to make any contract whatever, except for the present supply of the most obvious wants of nature? In reason, a man's *legal* competency to make *binding* contracts, in any and every case whatever, depends wholly upon his *mental* capacity to make *reasonable* contracts in each particular case. It of course requires more capacity to make a reasonable contract in some cases than in others. It requires, for example, more capacity to make a reasonable contract in the purchase of a large estate, than in the purchase of a pair of shoes. But the mental capacity to make a reasonable contract, in any particular case, is, in reason, the only legal criterion of the legal competency to make a binding contract in that case. The age, whether more or less than twenty-one years, is of no legal consequence whatever, except that it is entitled to some consideration as *evidence of capacity*.

It may be mentioned, in this connection, that the rules that prevail, that every man is entitled to freedom from parental authority at twenty-one years of age, and no one before that age, are of the same class of absurdities with those that have been mentioned. The only ground on which a parent is ever entitled to exercise authority over his child, is that the child is incapable of taking reasonable care of himself. The child would be entitled to his freedom from his birth, if he were at that time capable of taking reasonable care of himself. Some become capable of taking care of themselves at an earlier age than others. And whenever any one becomes capable of taking reasonable care of himself, and not until then, he is entitled to his freedom, be his age more or less.

These principles would prevail under the true trial by jury, the jury being the judges of the capacity of every individual whose capacity should be called in question.

tracts, *implies and includes* a capacity to form a reasonable judgment as to the law applicable to them. But in *criminal* matters, where the question is one of punishment, or not; where no second party has acquired any right to have the crime punished, unless it were committed with criminal intent, (but only to have it compensated for by damages in a civil suit;) and when the criminal intent is the only moral justification for the punishment, the principle does not apply, and a man is bound to know the law *only as well as he reasonably may*. The criminal law requires neither impossibilities nor extraordinaries of any one. It requires only thoughtfulness and a good conscience. It requires only that a man fairly and properly use the judgment he possesses, and the means he has of learning his duty. It requires of him only the same care to know his duty in regard to the law, that he is morally bound to use in other matters of equal importance. *And this care it does require of him*. Any ignorance of the law, therefore, that is unnecessary, or that arises from indifference or disregard of one's duty, is no excuse. An accused person, therefore, may be rightfully held responsible for such a knowledge of the law as is common to men in general, having no greater natural capacities than himself, and no greater opportunities for learning the law. And he can rightfully be held to no greater knowledge of the law than this. To hold him responsible for a greater knowledge of the law than is common to mankind, when other things are equal, would be gross injustice and cruelty. The mass of mankind can give but little of their attention to acquiring a knowledge of the law. Their other duties in life forbid it. Of course, they cannot investigate abstruse or difficult questions. All that can rightfully be required of each of them, then, is that he exercise such a candid and conscientious judgment as it is common for mankind generally to exercise in such matters. If he have done this, it would be monstrous to punish him criminally for his errors; errors not of conscience, but only of judgment. It would also be contrary to the first principles of a free government (that is, a government formed by voluntary association) to punish men in such cases, because it would be absurd to suppose that any man would voluntarily assist to establish or support a govern-

ment that would punish himself for acts which he himself did not know to be crimes. But a man may reasonably unite with his fellow-men to maintain a government to punish those acts which he himself considers criminal, and may reasonably acquiesce in his own liability to be punished for such acts. As those are the only grounds on which any one can be supposed to render any voluntary support to a government, it follows that a government formed by voluntary association, and of course having no powers except such as *all* the associates have consented that it may have, can have no power to punish a man for acts which he did not himself know to be criminal.

The safety of society, which is the only object of the criminal law, requires only that those acts *which are understood by mankind at large to be intrinsically criminal*, should be punished as crimes. The remaining few (if there are any) may safely be left to go unpunished. Nor does the safety of society require that any individuals, other than those who have sufficient mental capacity to understand that their acts are criminal, should be criminally punished. All others may safely be left to their liability, under the *civil* law, to compensate for their unintentional wrongs.

The only real object of this absurd and atrocious doctrine, that "ignorance of the law (that is, of crime) excuses no one," and that "every one is bound to know the *criminal* law," (that is, bound to know what is a crime,) is to maintain an entirely arbitrary authority on the part of the government, and to deny to the people all right to judge for themselves what their own rights and liberties are. In other words, the whole object of the doctrine is to deny to the people themselves all right to judge what statutes and other acts of the government are consistent or inconsistent with their own rights and liberties; and thus to reduce the people to the condition of mere slaves to a despotic power, such as the people themselves would never have voluntarily established, and the justice of whose laws the people themselves cannot understand.

Under the true trial by jury all tyranny of this kind would be abolished. A jury would not only judge what acts were really criminal, but they would judge of the mental capacity of an accused person, and of his opportunities for understand-

ing the true character of his conduct. In short, they would judge of his moral intent from all the circumstances of the case, and acquit him, if they had any reasonable doubt that he knew that he was committing a crime.*

* In contrast to the doctrines of the text, it may be proper to present more distinctly the doctrines that are maintained by judges, and that prevail in courts of justice.

Of course, no judge, either of the present day, or perhaps within the last five hundred years, has admitted the right of a jury to judge of the *justice* of a law, or to hold any law invalid for its injustice. Every judge asserts the power of the government to punish for acts that are intrinsically innocent, and which therefore involve or evince no criminal intent. To accommodate the administration of law to this principle, all judges, so far as I am aware, hold it to be unnecessary that an indictment should charge, or that a jury should find, that an act was done with a criminal intent, except in those cases where the act is *malum in se*,—criminal in itself. In all other cases, so far as I am aware, they hold it sufficient that the indictment charge, and consequently that the jury find, simply that the act was done “contrary to the form of the statute in such case made and provided;” in other words, contrary to the orders of the government.

All these doctrines prevail universally among judges, and are, I think, uniformly practised upon in courts of justice; and they plainly involve the most absolute despotism on the part of the government.

But there is still another doctrine that extensively, and perhaps most generally, prevails in practice, although judges are not agreed in regard to its soundness. It is this: that it is not even necessary that the jury should see or know, *for themselves*, what the law is that is charged to have been violated; nor to see or know, *for themselves*, that the act charged was in violation of any law whatever;—but that it is sufficient that they be simply *told by the judge* that any act whatever, charged in an indictment, is in violation of law, and that they are then bound blindly to receive the declaration as true, and convict a man accordingly, if they find that he has done the act charged.

This doctrine is adopted by many among the most eminent judges, and the reasons for it are thus given by Lord Mansfield:

“They (the jury) do not know, and are not presumed to know, the law. They are not sworn to decide the law;* they are not required to do it. . . . The jury ought not to assume the jurisdiction of law. They do not know, and are not presumed to know, anything of the matter. They do not understand the language in which it is conceived, or the meaning of the terms. They have no rule to go by but their passions and wishes.”—3 *Term Rep.*, 428, note.

What is this but saying that the people, who are supposed to be represented in juries, and who institute and support the government, (of course for the protection of their own rights and liberties, *as they understand them*, for plainly no other motive can be attributed to them,) are really the slaves of a despotic power, whose arbitrary commands even they are not supposed competent to understand, but for the transgression of which they are nevertheless to be punished as criminals?

This is plainly the sum of the doctrine, because the jury are the peers (equals) of the accused, and are therefore supposed to know the law as well as he does, and as well as it is known by the people at large. If *they* (the jury) are not presumed to know the

* This declaration of Mansfield, that juries in England “are not sworn to decide the law” in criminal cases, is a plain falsehood. They are sworn to try the whole case at issue between the king and the prisoner, and that includes the law as well as the fact. See *juror's oath*, page 86.

law, neither the accused nor the people at large can be presumed to know it. Hence, it follows that one principle of the *true* trial by jury is, that no accused person shall be held responsible for any other or greater knowledge of the law than is common to his political equals, who will generally be men of nearly similar condition in life. But the doctrine of Mansfield is, that the body of the people, from whom jurors are taken, are responsible to a law, *which it is agreed they cannot understand*. What is this but despotism?—and not merely despotism, but insult and oppression of the intensest kind?

This doctrine of Mansfield is the doctrine of all who deny the right of juries to judge of the law, although all may not choose to express it in so blunt and unambiguous terms. But the doctrine evidently admits of no other interpretation or defence.

CHAPTER X.

MORAL CONSIDERATIONS FOR JURORS.

THE trial by jury must, if possible, be construed to be such that a man can rightfully sit in a jury, and unite with his fellows in giving judgment. But no man can rightfully do this, unless he hold in his own hand alone a veto upon any judgment or sentence whatever to be rendered by the jury against a defendant, which veto he must be permitted to use according to his own discretion and conscience, and not bound to use according to the dictation of either legislatures or judges.

The prevalent idea, that a juror may, at the mere dictation of a legislature or a judge, and without the concurrence of his own conscience or understanding, declare a man "*guilty*," and thus in effect license the government to punish him; and that the legislature or the judge, and not himself, has in that case all the moral responsibility for the correctness of the principles on which the judgment was rendered, is one of the many gross impostures by which it could hardly have been supposed that any sane man could ever have been deluded, but which governments have nevertheless succeeded in inducing the people at large to receive and act upon.

As a moral proposition, it is perfectly self-evident that, unless juries have all the legal rights that have been claimed for them in the preceding chapters, — that is, the rights of judging what the law is, whether the law be a just one, what evidence is admissible, what weight the evidence is entitled to, whether an act were done with a criminal intent, and the right also to *limit* the sentence, free of all dictation from any quarter, — they have no *moral* right to sit in the trial at all, and cannot do so without making themselves accomplices in any injustice that they may have reason to believe may result from their

verdict. It is absurd to say that they have no moral responsibility for the use that may be made of their verdict by the government, when they have reason to suppose it will be used for purposes of injustice.

It is, for instance, manifestly absurd to say that jurors have no moral responsibility for the enforcement of an unjust law, when they consent to render a verdict of *guilty* for the transgression of it; which verdict they know, or have good reason to believe, will be used by the government as a justification for inflicting a penalty.

It is absurd, also, to say that jurors have no moral responsibility for a punishment inflicted upon a man *against law*, when, at the dictation of a judge as to what the law is, they have consented to render a verdict against their own opinions of the law.

It is absurd, too, to say that jurors have no moral responsibility for the conviction and punishment of an innocent man, when they consent to render a verdict against him on the strength of evidence, or laws of evidence, dictated to them by the court, if any evidence or laws of evidence have been excluded, which *they* (the jurors) think ought to have been admitted in his defence.

It is absurd to say that jurors have no moral responsibility for rendering a verdict of "*guilty*" against a man, for an act which he did not know to be a crime, and in the commission of which, therefore, he could have had no criminal intent, in obedience to the instructions of courts that "ignorance of the law (that is, of crime) excuses no one."

It is absurd, also, to say that jurors have no moral responsibility for any cruel or unreasonable *sentence* that may be inflicted even upon a *guilty* man, when they consent to render a verdict which they have reason to believe will be used by the government as a justification for the infliction of such sentence.

The consequence is, that jurors must have the whole case in their hands, and judge of law, evidence, and sentence, or they incur the moral responsibility of accomplices in any injustice which they have reason to believe will be done by the government on the authority of their verdict.

The same principles apply to civil cases as to criminal. If a jury consent, at the dictation of the court, as to either law or evidence, to render a verdict, on the strength of which they have reason to believe that a man's property will be taken from him and given to another, against their own notions of justice, they make themselves morally responsible for the wrong.

Every man, therefore, ought to refuse to sit in a jury, and to take the oath of a juror, unless the form of the oath be such as to allow him to use his own judgment, on every part of the case, free of all dictation whatsoever, and to hold in his own hand a veto upon any verdict that can be rendered against a defendant, and any sentence that can be inflicted upon him, even if he be guilty.

Of course, no man can rightfully take an oath as juror, to try a case "according to law," (if by law be meant anything other than his own ideas of justice,) nor "according to the law and the evidence, *as they shall be given him.*" Nor can he rightfully take an oath even to try a case "*according to the evidence,*" because in all cases he may have good reason to believe that a party has been unable to produce all the evidence legitimately entitled to be received. The only oath which it would seem that a man can rightfully take as juror, in either a civil or criminal case, is, that he "will try the case *according to his conscience.*" Of course, the form may admit of variation, but this should be the substance. Such, we have seen, were the ancient common law oaths.

CHAPTER XI.

AUTHORITY OF MAGNA CARTA.

PROBABLY no political compact between king and people was ever entered into in a manner to settle more authoritatively the fundamental law of a nation, than was Magna Carta. Probably no people were ever more united and resolute in demanding from their king a definite and unambiguous acknowledgment of their rights and liberties, than were the English at that time. Probably no king was ever more completely stripped of all power to maintain his throne, and at the same time resist the demands of his people, than was John on the 15th day of June, 1215. Probably no king ever consented, more deliberately or explicitly, to hold his throne subject to specific and enumerated limitations upon his power, than did John when he put his seal to the Great Charter of the Liberties of England. And if any political compact between king and people was ever valid to settle the liberties of the people, or to limit the power of the crown, that compact is now to be found in Magna Carta. If, therefore, the constitutional authority of Magna Carta had rested solely upon the compact of John with his people, that authority would have been entitled to stand forever as the supreme law of the land, unless revoked by the will of the people themselves.

But the authority of Magna Carta does not rest alone upon the compact with *John*. When, in the next year, (1216,) his son, Henry III., came to the throne, the charter was ratified by him, and again in 1217, and again in 1225, in substantially the same form, and especially without allowing any new powers, legislative, judicial, or executive, to the king or his judges, and without detracting in the least from the powers of the jury. And from the latter date to this, the charter has remained unchanged.

In the course of two hundred years the charter was confirmed by Henry and his successors more than thirty times. And although they were guilty of numerous and almost continual breaches of it, and were constantly seeking to evade it, yet such were the spirit, vigilance and courage of the nation, that the kings held their thrones only on the condition of their renewed and solemn promises of observance. And it was not until 1429, (as will be more fully shown hereafter,) when a truce between themselves, and a formal combination against the mass of the people, had been entered into, by the king, the nobility, and the "*forty shilling freeholders*," (a class whom Mackintosh designates as "*a few freeholders then accounted wealthy*,"*) by the exclusion of all others than such freeholders from all voice in the election of knights to represent the counties in the House of Commons, that a repetition of these confirmations of Magna Carta ceased to be demanded and obtained.†

The terms and the formalities of some of these "confirmations" make them worthy of insertion at length.

Hume thus describes one which took place in the 38th year of Henry III. (1253):

"But as they (the barons) had experienced his (the king's) frequent breach of promise, they required that he should ratify the Great Charter in a manner still more authentic and solemn than any which he had hitherto employed. All the prelates and abbots were assembled. They held burning tapers in their hands. The Great Charter was read before them. They denounced the sentence of excommunication against every one who should thenceforth violate that fundamental law. They threw their tapers on the ground, and exclaimed, *May the soul of every one who incurs this sentence so stink and corrupt in hell!* The king bore a part in this ceremony, and subjoined, 'So help me God! I will keep all these articles inviolate, as I am a man, as I am a Christian, as I am a knight, and as I am a king crowned and anointed.' " — *Hume*, ch. 12. See also

* *Mackintosh's Hist. of Eng.*, ch. 3. 45 *Lardner's Cab. Cyc.*, 354.

† "*Forty shilling freeholders*" were those "people dwelling and resident in the same counties, whereof every one of them shall have free land or tenement to the value of forty shillings by the year at the least above all charges." By statute 8 *Henry 6*, ch. 7, (1429,) these freeholders only were allowed to vote for members of Parliament from the counties.

Blackstone's Introd. to the Charters. Black. Law Tracts, Oxford ed., p. 332. Mackintosh's Hist. of Eng., ch. 3. Lardner's Cab. Cyc., vol. 45, p. 233-4.

The following is the form of "the sentence of excommunication" referred to by Hume :

"The Sentence of Curse, Given by the Bishops, against the Breakers of the Charters.

"The year of our Lord a thousand two hundred and fifty-three, the third day of May, in the great Hall of the King at Westminster, *in the presence, and by the assent, of the Lord Henry, by the Grace of God King of England,* and the Lords Richard, Earl of Cornwall, his brother, Roger (Bigot) Earl of Norfolk and Suffolk, marshal of England, Humphrey, Earl of Hereford, Henry, Earl of Oxford, John, Earl of Warwick, and other estates of the Realm of England: We, Boniface, by the mercy of God Archbishop of Canterbury, Primate of all England, F. of London, H. of Ely, S. of Worcester, E. of Lincoln, W. of Norwich, P. of Hereford, W. of Salisbury, W. of Durham, R. of Exeter, M. of Carlisle, W. of Bath, E. of Rochester, T. of Saint David's, Bishops, apparelled in Pontificals, with tapers burning, against the breakers of the Church's Liberties, and of the Liberties or free customs of the Realm of England, and especially of those which are contained in the Charter of the Common Liberties of the Realm, and the Charter of the Forest, have solemnly denounced the sentence of Excommunication in this form. By the authority of Almighty God, the Father, the Son, and the Holy Ghost, and of the glorious Mother of God, and perpetual Virgin Mary, of the blessed Apostles Peter and Paul, and of all apostles, of the blessed Thomas, Archbishop and Martyr, and of all martyrs, of blessed Edward of England, and of all Confessors and virgins, and of all the saints of heaven: We excommunicate, accurse, and from the thresholds (*liminibus*) of our Holy Mother the Church, We sequester, all those that hereafter willingly and maliciously deprive or spoil the Church of her right: And all those that by any craft or wiliness do violate, break, diminish, or change the Church's Liberties, or the ancient approved customs of the Realm, and especially the Liberties and free Customs contained in the Charters of the Common Liberties, and of the Forest, conceded by our Lord the King, to Archbishops, Bishops, and other Prelates of England; and likewise to the Earls, Barons, Knights, and other Freeholders of the Realm: And all that secretly, or openly, by deed, word, or counsel, *do make statutes, or observe them being made,* and that bring in Customs, or keep them when they be brought in, against the said

Liberties, or any of them, the Writers and Counsellors of said statutes, and the Executors of them, and all those that shall presume to judge according to them. All and every which persons before mentioned, that wittingly shall commit anything of the premises, let them well know that they incur the aforesaid sentence, *ipso facto*, (i. e., upon the deed being done.) And those that ignorantly do so, and be admonished, except they reform themselves within fifteen days after the time of the admonition, and make full satisfaction for that they have done, at the will of the ordinary, shall be from that time forth included in the same sentence. And with the same sentence we burden all those that presume to perturb the peace of our sovereign Lord the King, and of the Realm. To the perpetual memory of which thing, We, the aforesaid Prelates, have put our seals to these presents." — *Statutes of the Realm*, vol. 1, p. 6. *Ruffhead's Statutes*, vol. 1, p. 20.

One of the Confirmations of the Charters, by Edward I., was by statute, in the 25th year of his reign, (1297,) in the following terms. The statute is usually entitled "*Confirmatio Cartarum*," (Confirmation of the Charters.)

Ch. 1. "Edward, by the Grace of God, King of England, Lord of Ireland, and Duke of Guyan, To all those that these presents shall hear or see, Greeting. Know ye, that We, to the honor of God, and of Holy Church, and to the profit of our Realm, have granted, for us and our heirs, that the Charter of Liberties, and the Charter of the Forest, which were made by common assent of all the Realm, in the time of King Henry our Father, shall be kept in every point without breach. And we will that the same Charters shall be sent under our seal, as well to our justices of the Forest, as to others, and to all Sheriffs of shires, and to all our other officers, and to all our cities throughout the Realm, together with our writs, in the which it shall be contained, that they cause the aforesaid Charters to be published, and to declare to the people that We have confirmed them at all points; and to our Justices, Sheriffs, Mayors, and other ministers, which under us have the Laws of our Land to guide, that they allow the same Charters, in all their points, in pleas before them, and in judgment; that is, to wit, the Great Charter as the Common Law, and the Charter of the Forest for the wealth of our Realm.

Ch. 2. "And we will that if any judgment be given from henceforth contrary to the points of the charters aforesaid by the justices, or by any others our ministers that hold plea before them, against the points of the Charters, it shall be undone and holden for naught.

Ch. 3. "And we will, that the same Charters shall be sent, under our seal, to Cathedral Churches throughout our Realm, there to remain, and shall be read before the people two times in the year.

Ch. 4. "And that all Archbishops and Bishops shall pronounce the sentence of excommunication against all those that by word, deed, or counsel, do contrary to the foresaid charters, or that in any point break or undo them. And that the said Curses be twice a year denounced and published by the prelates aforesaid. And if the same prelates, or any of them, be remiss in the denunciation of the said sentences, the Archbishops of Canterbury and York, for the time being, shall compel and distrain them to make the denunciation in the form aforesaid." — *St. 25 Edward I., (1297.) Statutes of the Realm, vol. 1, p. 123.*

It is unnecessary to repeat the terms of the various confirmations, most of which were less formal than those that have been given, though of course equally authoritative. Most of them are brief, and in the form of a simple statute, or promise, to the effect that "The Great Charter, and the Charter of the Forest, shall be firmly kept and maintained in all points." They are to be found printed with the other statutes of the realm. One of them, after having "again granted, renewed and confirmed" the charters, requires as follows:

"That the Charters be delivered to every sheriff of England under the king's seal, to be read four times in the year before the people in the full county," (that is, at the county court,) "that is, to wit, the next county (court) after the feast of Saint Michael, and the next county (court) after Christmas, and at the next county (court) after Easter, and at the next county (court) after the feast of Saint John." — *28 Edward I., ch. 1, (1300.)*

Lingard says, "The Charter was ratified four times by Henry III., twice by Edward I., fifteen times by Edward III., seven times by Richard II., six times by Henry IV., and once by Henry V.;" making thirty-five times in all. — *3 Lingard, 50, note, Philad. ed.*

Coke says Magna Carta was confirmed thirty-two times. — *Preface to 2 Inst., p. 6.*

Lingard calls these "thirty-five successive ratifications" of the charter, "a sufficient proof how much its provisions were

abhorred by the sovereign, and how highly they were prized by the nation."—3 *Lingard*, 50.

• Mackintosh says, "For almost five centuries (that is, until 1688) it (Magna Carta) was appealed to as the decisive authority on behalf of the people, though commonly so far only as the necessities of each case demanded."—*Mackintosh's Hist. of Eng.* ch. 3. 45 *Lardner's Cab. Cyc.*, 221.

Coke, who has labored so hard to overthrow the most vital principles of Magna Carta, and who, therefore, ought to be considered good authority when he speaks in its favor,* says :

"It is called Magna Carta, not that it is great in quantity, for there be many voluminous charters commonly passed, specially in these later times, longer than this is; nor comparatively in respect that it is greater than *Charta de Foresta*, but in respect of the great importance and weightiness of the matter, as hereafter shall appear; and likewise for the same cause *Charta de Foresta*; and both of them are called *Magnæ Chartæ Libertatum Angliæ*, (The Great Charters of the Liberties of England.) . . .

"And it is also called *Charta Libertatum regni*, (Charter of the Liberties of the kingdom;) and upon great reason it is so called of the effect, *quia liberos facit*, (because it makes men free.) Sometime for the same cause (it is called) *communis libertas*, (common liberty,) and *le chartre des franchises*, (the charter of franchises.) . . .

"It was for the most part declaratory of the principal grounds of the fundamental laws of England, and for the residue it is additional to supply some defects of the common law. . . .

"Also, by the said act of 25 Edward I., (called *Confirmatio Chartarum*,) it is adjudged in parliament that the Great Charter and the Charter of the Forest shall be taken as the common law. . . .

"They (Magna Carta and Carta de Foresta) were, for the most part, but declarations of the ancient common laws of England, to the observation and keeping whereof, the king was bound and sworn. . . .

"After the making of Magna Charta, and Charta de Foresta, divers learned men in the laws, that I may use the words of the record, kept schools of the law in the city of London, and taught such as resorted to them the laws of the realm,

* He probably speaks in its favor only to blind the eyes of the people to the frauds he has attempted upon its true meaning.

taking their foundation of Magna Charta and Charta de Foresta.

“And the said two charters have been confirmed, established, and commanded to be put in execution by thirty-two several acts of parliament in all.

“This appeareth partly by that which hath been said, for that it hath so often been confirmed by the wise providence of so many acts of parliament.

“And albeit judgments in the king’s courts are of high regard in law, and *judicia* (judgments) are accounted as *jurisdictia*, (the speech of the law itself,) yet it is provided by act of parliament, that if any judgment be given contrary to any of the points of the Great Charter and Charta de Foresta, by the justices, or by any other of the king’s ministers, &c., it shall be undone, and holden for naught.

“And that both the said charters shall be sent under the great seal to all cathedral churches throughout the realm, there to remain, and shall be read to the people twice every year.

“The highest and most binding laws are the statutes which are established by parliament; and by authority of that highest court it is enacted (only to show their tender care of Magna Carta and Carta de Foresta) that if any statute be made contrary to the Great Charter, or the Charter of the Forest, that shall be holden for none; by which words all former statutes made against either of those charters are now repealed; and the nobles and great officers were to be sworn to the observation of Magna Charta and Charta de Foresta.

“*Magna fuit quondam magnæ reverentia chartæ.*” (Great was formerly the reverence for Magna Carta.) — *Coke's Proem to 2 Inst.*, p. 1 to 7.

Coke also says, “All pretence of prerogative against Magna Charta is taken away.” — *2 Inst.*, 36.

He also says, “That after this parliament (52 *Henry III.*, in 1267) neither Magna Carta nor Carta de Foresta was ever attempted to be impugned or questioned.” — *2 Inst.*, 102.*

* It will be noticed that Coke calls these confirmations of the charter “acts of parliament,” instead of acts of the king alone. This needs explanation.

It was one of Coke’s ridiculous pretences, that laws anciently enacted by the king, at the request, or with the consent, or by the advice, of his parliament, was “an act of parliament,” instead of the act of the king. And in the extracts cited, he carries this idea so far as to pretend that the various confirmations of the Great Charter were “acts of parliament,” instead of the acts of the kings. He might as well have pretended that the original grant of the Charter was an “act of parliament;” because it was not only granted at the request, and with the consent, and by the advice, but on the compulsion even, of those who commonly constituted his parliaments. Yet this did

To give all the evidence of the authority of Magna Carta, it would be necessary to give the constitutional history of England since the year 1215. This history would show that Magna Carta, although continually violated and evaded, was still acknowl-

not make the grant of the charter "an act of parliament." It was simply an act of the king.

The object of Coke, in this pretence, was to furnish some color for the palpable falsehood that the legislative authority, which parliament was trying to assume in his own day, and which it finally succeeded in obtaining, had a precedent in the ancient constitution of the kingdom.

There would be as much reason in saying that, because the ancient kings were in the habit of passing laws in special answer to the *petitions* of their subjects, therefore those *petitioners* were a part of the legislative power of the kingdom.

One great objection to this argument of Coke, for the legislative authority of the ancient parliaments, is that a very large — probably much the larger — number of legislative acts were done *without* the advice, consent, request, or even presence, of a parliament. Not only were many formal statutes passed without any mention of the consent or advice of parliament, but a simple order of the king in council, or a simple proclamation, writ, or letter under seal, issued by his command, had the same force as what Coke calls "an act of parliament." And this practice continued, to a considerable extent at least, down to Coke's own time.

The kings were always in the habit of consulting their parliaments, more or less, in regard to matters of legislation, — not because their consent was constitutionally necessary, but in order to make influence in favor of their laws, and thus induce the people to observe them, and the juries to enforce them.

The general duties of the ancient parliaments were not legislative, but judicial, as will be shown more fully hereafter. The *people* were not represented in the parliaments at the time of Magna Carta, but only the archbishops, bishops, earls, barons, and knights; so that little or nothing would have been gained for liberty by Coke's idea that parliament had a legislative power. He would only have substituted an aristocracy for a king. Even after the Commons were represented in parliament, they for some centuries appeared only as *petitioners*, except in the matter of taxation, when their *consent* was asked. And almost the only source of their influence on legislation was this: that they would sometimes refuse their consent to the taxation, unless the king would pass such laws as they petitioned for; or, as would seem to have been much more frequently the case, unless he would abolish such laws and practices as they remonstrated against.

The *influence* or power of parliament, and especially of the Commons, in the *general* legislation of the country, was a thing of slow growth, having its origin in a device of the king to get money contrary to law, (as will be seen in the next volume,) and not at all a part of the constitution of the kingdom, nor having its foundation in the consent of the people. The power, *as at present exercised*, was not fully established until 1688, (near five hundred years after Magna Carta,) when the House of Commons (falsely so called) had acquired such influence as the representative, *not of the people, but of the wealth*, of the nation, that they compelled the king to discard the oath fixed by the constitution of the kingdom; (which oath has been already given in a former chapter,* and was, in substance, to preserve and execute the Common Law, the Law of the Land,

* See page 101.

edged as law by the government, and was held up by the people as the great standard and proof of their rights and liber-

— or, in the words of the oath, “*the just laws and customs which the common people had chosen;*”) and to swear that he would “govern the people of this kingdom of England, and the dominions thereto belonging, according to the statutes in parliament agreed on, and the laws and customs of the same.”*

The passage and enforcement of this statute, and the assumption of this oath by the king, were plain violations of the English constitution, inasmuch as they abolished, so far as such an oath could abolish, the legislative power of the king, and also “those just laws and customs which the common people (through their juries) had chosen,” and substituted the will of parliament in their stead.

Coke was a great advocate for the legislative power of parliament, as a means of restraining the power of the king. As he denied all power to *juries* to decide upon the obligation of laws, and as he held that the legislative power was “*so transcendent and absolute as (that) it cannot be confined, either for causes or persons, within any bounds,*” † he was perhaps honest in holding that it was safer to trust this terrific power in the hands of parliament, than in the hands of the king. His error consisted in holding that either the king or parliament had any such power, or that they had any power at all to pass laws that should be binding upon a jury.

These declarations of Coke, that the charter was confirmed by thirty-two “acts of parliament,” have a mischievous bearing in another respect. They tend to weaken the authority of the charter, by conveying the impression that the charter itself might be *abolished* by “act of parliament.” Coke himself admits that it could not be revoked or rescinded by the king; for he says, “All pretence of prerogative against Magna Carta is taken away.” (2 *Inst.*, 36.)

He knew perfectly well, and the whole English nation knew, that the king could not lawfully infringe Magna Carta. Magna Carta, therefore, made it impossible that absolute power could ever be practically established in England, *in the hands of the king*. Hence, as Coke was an advocate for absolute power,—that is, for a legislative power “so transcendent and absolute as (that) it cannot be confined, either for causes or persons, within any bounds,”—there was no alternative for him but to vest this absolute power in parliament. Had he not vested it in parliament, he would have been obliged to abjure it altogether, and to confess that the people, *through their juries*, had the right to judge of the obligation of all legislation whatsoever; in other words, that they had the right to confine the government within the limits of “those just laws and customs which the common people (acting as jurors) had chosen.” True to his instincts, as a judge, and as a tyrant, he *assumed* that this absolute power was vested in the hands of parliament.

But the truth was that, as by the English constitution parliament had no authority at all for *general* legislation, it could no more confirm, than it could abolish, Magna Carta.

These thirty-two confirmations of Magna Carta, which Coke speaks of as “acts of parliament,” were merely acts of the king. The parliaments, indeed, by refusing to grant him money, except on that condition, and otherwise, had contributed to oblige him to make the confirmations; just as they had helped to oblige him by arms to grant the charter in the first place. But the confirmations themselves were nevertheless constitutionally, as well as formally, the acts of the king alone.

* St. 1 *William and Mary*, ch. 6, (1688.)

† 4 *Inst.*, 36.

ties. It would show also that the judicial tribunals, *whenever it suited their purposes to do so*, were in the habit of referring to Magna Carta as authority, in the same manner, and with the same real or pretended veneration, with which American courts now refer to the constitution of the United States, or the constitutions of the states. And, what is equally to the point, it would show that these same tribunals, the mere tools of kings and parliaments, would resort to the same artifices of assumption, *precedent*, construction, and false interpretation, to evade the requirements of Magna Carta, and to emasculate it of all its power for the preservation of liberty, that are resorted to by American courts to accomplish the same work on our American constitutions.

I take it for granted, therefore, that if the authority of Magna Carta had rested simply upon its character as a *compact* between the king and the people, it would have been forever binding upon the king, (that is, upon the government, for the king was the government,) in his legislative, judicial, and executive character; and that there was no *constitutional* possibility of his escaping from its restraints, unless the people themselves should freely discharge him from them.

But the authority of Magna Carta does not rest, either wholly or mainly, upon its character as a compact. For centuries before the charter was granted, its main principles constituted "the Law of the Land,"—the fundamental and constitutional law of the realm, which the kings were sworn to maintain. And the principal benefit of the charter was, that it contained a *written* description and acknowledgment, by the king himself, of what the constitutional law of the kingdom was, which his coronation oath bound him to observe. Previous to Magna Carta, this constitutional law rested mainly in precedents, customs, and the memories of the people. And if the king could but make one innovation upon this law, without arousing resistance, and being compelled to retreat from his usurpation, he would cite that innovation as a precedent for another act of the same kind; next, assert a custom; and, finally, raise a controversy as to what the Law of the Land really was. The great object of the barons and people, in demanding from the king a written description and ac-

knowledge of the Law of the Land, was to put an end to all disputes of this kind, and to put it out of the power of the king to plead any misunderstanding of the constitutional law of the kingdom. And the charter, no doubt, accomplished very much in this way. After Magna Carta, it required much more audacity, cunning, or strength, on the part of the king, than it had before, to invade the people's liberties with impunity. Still, Magna Carta, like all other written constitutions, proved inadequate to the full accomplishment of its purpose; for when did a parchment ever have power adequately to restrain a government, that had either cunning to evade its requirements, or strength to overcome those who attempted its defence? The work of usurpation, therefore, though seriously checked; still went on, to a great extent, after Magna Carta. Innovations upon the Law of the Land are still made by the government. One innovation was cited as a precedent; precedents made customs; and customs became laws, so far as practice was concerned; until the government, composed of the king, the high functionaries of the church, the nobility, a House of Commons representing the "forty shilling freeholders," and a dependent and servile judiciary, all acting in conspiracy against the mass of the people, became practically absolute, as it is at this day.

As proof that Magna Carta embraced little else than what was previously recognized as the common law, or Law of the Land, I repeat some authorities that have been already cited.

Crabbe says, "It is admitted on all hands that it (Magna Carta) contains nothing but what was confirmatory of the common law and the ancient usages of the realm; and is, properly speaking, only an enlargement of the charter of Henry I. and his successors."—*Crabbe's Hist. of the Eng. Law*, p. 127.

Blackstone says, "It is agreed by all our historians that the Great Charter of King John was, for the most part, compiled from the ancient customs of the realm, or the laws of Edward the Confessor; by which they mean the old common law which was established under our Saxon princes."—*Blackstone's Introd. to the Charters*. See *Blackstone's Law Tracts*, Oxford ed., p. 289.

Coke says, "The common law is the most general and an-

cient law of the realm. . . . The common law appeareth in the statute of *Magna Carta*, and other ancient statutes, (which for the most part are affirmations of the common law,) in the original writs, in judicial records, and in our books of terms and years." — 1 *Inst.*, 115 b.

Coke also says, "It (*Magna Carta*) was for the most part declaratory of the principal grounds of the fundamental laws of England, and for the residue it was additional to supply some defects of the common law. . . . They (*Magna Carta* and *Carta de Foresta*) were, for the most part, but declarations of the ancient common laws of England, *to the observation and keeping whereof the king was bound and sworn.*" — *Preface to 2 Inst.*, p. 3 and 5.

Hume says, "We may now, from the tenor of this charter, (*Magna Carta*,) conjecture what those laws were of King Edward, (the Confessor,) which the English nation during so many generations still desired, with such an obstinate perseverance, to have recalled and established. They were chiefly these latter articles of *Magna Carta*; and the barons who, at the beginning of these commotions, demanded the revival of the Saxon laws, undoubtedly thought that they had sufficiently satisfied the people, by procuring them this concession, which comprehended the principal objects to which they had so long aspired." — *Hume*, ch. 11.

Edward the First confessed that the Great Charter was substantially identical with the common law, as far as it went, when he commanded his justices to allow "the Great Charter as the Common Law," "in pleas before them, and in judgment," as has been already cited in this chapter. — 25 *Edward I.*, ch. 1, (1297.)

In conclusion of this chapter, it may be safely asserted that the veneration, attachment, and pride, which the English nation, for more than six centuries, have felt towards *Magna Carta*, are in their nature among the most irrefragable of all proofs that it was the fundamental law of the land, and constitutionally binding upon the government; for, otherwise, it would have been, in their eyes, an unimportant and worthless thing. What those sentiments were I will use the words of others to describe, — the words, too, of men, who, like all modern authors who have written on the same topic, had utterly inadequate ideas of the true character of the instrument on which they lavished their eulogiums.

Hume, speaking of the Great Charter and the Charter of the Forest, as they were confirmed by Henry III., in 1217, says :

“Thus these famous charters were brought nearly to the shape in which they have ever since stood; and they were, during many generations, the peculiar favorites of the English nation, and esteemed the most sacred rampart to national liberty and independence. As they secured the rights of all orders of men, they were anxiously defended by all, and became the basis, in a manner, of the English monarchy, and a kind of original contract, which both limited the authority of the king and ensured the conditional allegiance of his subjects. Though often violated, they were still claimed by the nobility and people; and, as no precedents were supposed valid that infringed them, they rather acquired than lost authority, from the frequent attempts made against them in several ages, by regal and arbitrary power.” — *Hume*, ch. 12.

Mackintosh says, “It was understood by the simplest of the unlettered age for whom it was intended. It was remembered by them. . . . For almost five centuries it was appealed to as the decisive authority on behalf of the people. . . . To have produced it, to have preserved it, to have matured it, constitute the immortal claim of England on the esteem of mankind. Her Bacons and Shakspeares, her Miltons and Newtons, with all the truth which they have revealed, and all the generous virtues which they have inspired, are of inferior value when compared with the subjection of men and their rulers to the principles of justice; if, indeed, it be not more true that these mighty spirits could not have been formed except under equal laws, nor roused to full activity without the influence of that spirit which the Great Charter breathed over their forefathers.” — *Mackintosh's Hist. of Eng.*, ch. 3.*

Of the Great Charter, the trial by jury is the vital part, and the only part that places the liberties of the people in their own keeping. Of this Blackstone says :

“The trial by jury, or the country, *per patriam*, is also that trial by the peers of every Englishman, which, as the grand bulwark of his liberties, is secured to him by the Great Charter; *nullus liber homo capiatur, vel imprisonetur, aut exuletur, aut aliquo modo destruat, nisi per legale iudicium parium suorum, vel per legem terrae.* . . .

The liberties of England cannot but subsist so long as this palladium remains sacred and inviolate, not only from all

* Under the head of “John.”

open attacks, which none will be so hardy as to make, but also from all secret machinations which may sap and undermine it." *

"The trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law. . . It is the most transcendent privilege which any subject can enjoy or wish for, that he cannot be affected in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbors and equals." †

Hume calls the trial by jury "An institution admirable in itself, and the best calculated for the preservation of liberty and the administration of justice, that ever was devised by the wit of man." ‡

An old book, called "English Liberties," says:

"English Parliaments have all along been most zealous for preserving this great Jewel of Liberty, trials by juries having no less than fifty-eight several times, since the Norman Conquest, been established and confirmed by the legislative power, no one privilege besides having been ever so often remembered in parliament." §

* 4 *Blackstone*, 349-50.

† 3 *Blackstone*, 379.

‡ *Hume*, ch. 2.

§ Page 203, 5th edition, 1721.

CHAPTER XII.

LIMITATIONS IMPOSED UPON THE MAJORITY BY THE TRIAL BY JURY.

THE principal objection, that will be made to the doctrine of this essay, is, that under it, a jury would paralyze the power of the majority, and veto all legislation that was not in accordance with the will of the whole, or nearly the whole, people.

The answer to this objection is, that the limitation, which would be thus imposed upon the legislative power, (whether that power be vested in the majority, or minority, of the people,) is the crowning merit of the trial by jury. It has other merits; but, though important in themselves, they are utterly insignificant and worthless in comparison with this.

It is this power of vetoing all partial and oppressive legislation, and of restricting the government to the maintenance of such laws as the *whole*, or substantially the whole, people *are agreed in*, that makes the trial by jury "the palladium of liberty." Without this power it would never have deserved that name.

The will, or the pretended will, of the majority, is the last lurking place of tyranny at the present day. The dogma, that certain individuals and families have a divine appointment to govern the rest of mankind, is fast giving place to the one that the larger number have a right to govern the smaller; a dogma, which may, or may not, be less oppressive in its practical operation, but which certainly is no less false or tyrannical in principle, than the one it is so rapidly supplanting. Obviously there is nothing in the nature of majorities, that insures justice at their hands. They have the same passions as minorities, and they have no qualities whatever that should be expected to prevent them from practising the same tyranny

as minorities, if they think it will be for their interest to do so.

There is no particle of truth in the notion that the majority have a *right* to rule, or to exercise arbitrary power over, the minority, simply because the former are more numerous than the latter. Two men have no more natural right to rule one, than one has to rule two. Any single man, or any body of men, many or few, have a natural right to maintain justice for themselves, and for any others who may need their assistance, against the injustice of any and all other men, without regard to their numbers; and majorities have no right to do any more than this. The relative numbers of the opposing parties have nothing to do with the question of right. And no more tyrannical principle was ever avowed, than that the will of the majority ought to have the force of law, without regard to its justice; or, what is the same thing, that the will of the majority ought always to be presumed to be in accordance with justice. Such a doctrine is only another form of the doctrine that might makes right.

When *two* men meet *one* upon the highway, or in the wilderness, have they a right to dispose of his life, liberty, or property at their pleasure, simply because they are the more numerous party? Or is he bound to submit to lose his life, liberty, or property, if they demand it, merely because he is the less numerous party? Or, because they are more numerous than he, is he bound to presume that they are governed only by superior wisdom, and the principles of justice, and by no selfish passion that can lead them to do him a wrong? Yet this is the principle, which it is claimed should govern men in all their civil relations to each other. Mankind fall in company with each other on the highway or in the wilderness of life, and it is claimed that the more numerous party, simply by virtue of their superior numbers, have the right arbitrarily to dispose of the life, liberty, and property of the minority; and that the minority are bound, by reason of their inferior numbers, to practise abject submission, and consent to hold their natural rights,— any, all, or none, as the case may be,— at the mere will and pleasure of the majority; as if all a man's natural rights expired, or were suspended by the operation of

a paramount law, the moment he came into the presence of superior numbers.

If such be the true nature of the relations men hold to each other in this world, it puts an end to all such things as crimes, unless they be perpetrated upon those who are equal or superior, in number, to the actors. All acts committed against persons *inferior* in number to the aggressors, become but the exercise of rightful authority. And consistency with their own principles requires that all governments, founded on the will of the majority, should recognize this plea as a sufficient justification for all crimes whatsoever.

If it be said that the majority should be allowed to rule, not because they are stronger than the minority, but because their superior numbers furnish a *probability* that they are in the right; one answer is, that the lives, liberties, and properties of men are too valuable to them, and the natural presumptions are too strong in their favor, to justify the destruction of them by their fellow-men on a mere balancing of probabilities, *or on any ground whatever short of certainty beyond a reasonable doubt*. This last is the moral rule universally recognized to be binding upon single individuals. And in the forum of conscience the same rule is equally binding upon governments, for governments are mere associations of individuals. This is the rule on which the trial by jury is based. And it is plainly the only rule that ought to induce a man to submit his rights to the adjudication of his fellow-men, or dissuade him from a forcible defence of them.

Another answer is, that if two opposing parties could be supposed to have no personal interests or passions involved, to warp their judgments, or corrupt their motives, the fact that one of the parties was more numerous than the other, (a fact that leaves the comparative intellectual competency of the two parties entirely out of consideration,) might, perhaps, furnish a slight, but at best only a very slight, probability that such party was on the side of justice. But when it is considered that the parties are liable to differ in their intellectual capacities, and that one, or the other, or both, are undoubtedly under the influence of such passions as rivalry, hatred, avarice, and ambition,—passions that are nearly certain to pervert their

judgments, and very likely to corrupt their motives,—all probabilities founded upon a mere numerical majority, in one party, or the other, vanish at once; and the decision of the majority becomes, to all practical purposes, a mere decision of chance. And to dispose of men's properties, liberties, and lives, by the mere process of enumerating such parties, is not only as palpable gambling as was ever practised, but it is also the most atrocious that was ever practised, except in matters of government. And where government is instituted on this principle, (as in the United States, for example,) the nation is at once converted into one great gambling establishment; where all the rights of men are the stakes; a few bold bad men throw the dice—(dice loaded with all the hopes, fears, interests, and passions which rage in the breasts of ambitious and desperate men,)—and all the people, from the interests they have depending, become enlisted, excited, agitated, and generally corrupted, by the hazards of the game.

The trial by jury disavows the majority principle altogether; and proceeds upon the ground that every man should be presumed to be entitled to life, liberty, and such property as he has in his possession; and that the government should lay its hand upon none of them, (except for the purpose of bringing them before a tribunal for adjudication,) unless it be first ascertained, *beyond a reasonable doubt*, in every individual case, that justice requires it.

To ascertain whether there be such reasonable doubt, it takes twelve men *by lot* from the whole body of mature men. If any of these twelve are proved to be under the influence of any *special* interest or passion, that may either pervert their judgments, or corrupt their motives, they are set aside as unsuitable for the performance of a duty requiring such absolute impartiality and integrity; and others substituted in their stead. When the utmost practicable impartiality is attained on the part of the whole twelve, they are sworn to the observance of justice; and their unanimous concurrence is then held to be necessary to remove that reasonable doubt, which, unremoved, would forbid the government to lay its hand on its victim.

Such is the caution which the trial by jury both practises

and inculcates, against the violation of justice, on the part of the government, towards the humblest individual, in the smallest matter affecting his civil rights, his property, liberty, or life. And such is the contrast, which the trial by jury presents, to that gambler's and robber's rule, that the majority have a right, by virtue of their superior numbers, and without regard to justice, to dispose at pleasure of the property and persons of all bodies of men less numerous than themselves.

The difference, in short, between the two systems, is this. The trial by jury protects person and property, inviolate to their possessors, from the hand of the law, unless *justice, beyond a reasonable doubt*, require them to be taken. The majority principle takes person and property from their possessors, at the mere arbitrary will of a majority, who are liable and likely to be influenced, in taking them, by motives of oppression, avarice, and ambition.

If the relative numbers of opposing parties afforded sufficient evidence of the comparative justice of their claims, the government should carry the principle into its courts of justice; and instead of referring controversies to impartial and disinterested men,—to judges and jurors, sworn to do justice, and bound patiently to hear and weigh all the evidence and arguments that can be offered on either side,—it should simply *count* the plaintiffs and defendants in each case, (where there were more than one of either,) and then give the case to the majority; after ample opportunity had been given to the plaintiffs and defendants to reason with, flatter, cheat, threaten, and bribe each other, by way of inducing them to change sides. Such a process would be just as rational in courts of justice, as in halls of legislation; for it is of no importance to a man, who has his rights taken from him, whether it be done by a legislative enactment, or a judicial decision.

In legislation, the people are all arranged as plaintiffs and defendants in their own causes; (those who are in favor of a particular law, standing as plaintiffs, and those who are opposed to the same law, standing as defendants); and to allow these causes to be decided by majorities, is plainly as absurd as it would be to allow judicial decisions to be determined by the relative number of plaintiffs and defendants.

If this mode of decision were introduced into courts of justice, we should see a parallel, and only a parallel, to that system of legislation which we witness daily. We should see large bodies of men conspiring to bring perfectly groundless suits, against other bodies of men, for large sums of money, and to carry them by sheer force of numbers; just as we now continually see large bodies of men conspiring to carry, by mere force of numbers, some scheme of legislation that will, directly or indirectly, take money out of other men's pockets, and put it into their own. And we should also see distinct bodies of men, parties in separate suits, combining and agreeing all to appear and be counted as plaintiffs or defendants in each other's suits, for the purpose of ekeing out the necessary majority; just as we now see distinct bodies of men, interested in separate schemes of ambition or plunder, conspiring to carry through a batch of legislative enactments, that shall accomplish their several purposes.

This system of combination and conspiracy would go on, until at length whole states and a whole nation would become divided into two great litigating parties, each party composed of several smaller bodies, having their separate suits, but all confederating for the purpose of making up the necessary majority in each case. The individuals composing each of these two great parties, would at length become so accustomed to acting together, and so well acquainted with each others' schemes, and so mutually dependent upon each others' fidelity for success, that they would become organized as permanent associations; bound together by that kind of honor that prevails among thieves; and pledged by all their interests, sympathies, and animosities, to mutual fidelity, and to unceasing hostility to their opponents; and exerting all their arts and all their resources of threats, injuries, promises, and bribes, to drive or seduce from the other party enough to enable their own to retain or acquire such a majority as would be necessary to gain their own suits, and defeat the suits of their opponents. All the wealth and talent of the country would become enlisted in the service of these rival associations; and both would at length become so compact, so well organized, so powerful, and yet always so much in need of recruits,

that a private person would be nearly or quite unable to obtain justice in the most paltry suit with his neighbor, except on the condition of joining one of these great litigating associations, who would agree to carry through his cause, on condition of his assisting them to carry through all the others, good and bad, which they had already undertaken. If he refused this, they would threaten to make a similar offer to his antagonist, and suffer their whole numbers to be counted against him.

Now this picture is no caricature, but a true and honest likeness. And such a system of administering justice, would be no more false, absurd, or atrocious, than that system of working by majorities, which seeks to accomplish, by legislation, the same ends which, in the case supposed, would be accomplished by judicial decisions.

Again, the doctrine that the minority ought to submit to the will of the majority, proceeds, not upon the principle that government is formed by voluntary association, and for an *agreed purpose*, on the part of all who contribute to its support, but upon the presumption that all government must be practically a state of war and plunder between opposing parties; and that, in order to save blood, and prevent mutual extermination, the parties come to an agreement that they will count their respective numbers periodically, and the one party shall then be permitted quietly to rule and plunder, (restrained only by their own discretion,) and the other submit quietly to be ruled and plundered, until the time of the next enumeration.

Such an agreement may possibly be wiser than unceasing and deadly conflict; it nevertheless partakes too much of the ludicrous to deserve to be seriously considered as an expedient for the maintenance of civil society. It would certainly seem that mankind might agree upon a cessation of hostilities, upon more rational and equitable terms than that of unconditional submission on the part of the less numerous body. Unconditional submission is usually the last act of one who confesses himself subdued and enslaved. How any one ever came to imagine that condition to be one of freedom, has never been explained. And as for the system being adapted to the main-

tenance of justice among men, it is a mystery that any human mind could ever have been visited with an insanity wild enough to originate the idea.

If it be said that other corporations, than governments, surrender their affairs into the hands of the majority, the answer is, that they allow majorities to determine only trifling matters, that are in their nature mere questions of discretion, and where there is no natural presumption of justice or right on one side rather than the other. They *never* surrender to the majority the power to dispose of, or, what is practically the same thing, to *determine*, the *rights* of any individual member. The *rights* of every member are determined by the written compact, to which all the members have voluntarily agreed.

For example. A banking corporation allows a majority to determine such questions of discretion as whether the note of A or of B shall be discounted; whether notes shall be discounted on one, two, or six days in the week; how many hours in a day their banking-house shall be kept open; how many clerks shall be employed; what salaries they shall receive, and such like matters, which are in their nature mere subjects of discretion, and where there are no natural presumptions of justice or right in favor of one course over the other. But no banking corporation allows a majority, or any other number of its members less than the whole, to divert the funds of the corporation to any other purpose than the one to which *every member* of the corporation has legally agreed that they may be devoted; nor to take the stock of one member and give it to another; nor to distribute the dividends among the stockholders otherwise than to each one the proportion which he has agreed to accept, and all the others have agreed that he shall receive. Nor does any banking corporation allow a majority to impose taxes upon the members for the payment of the corporate expenses, except in such proportions as *every member* has consented that they may be imposed. All these questions, involving the *rights* of the members as against each other, are fixed by the articles of the association,—that is, by the agreement to which *every member* has personally assented.

What is also specially to be noticed, and what constitutes a

vital difference between the banking corporation and the political corporation, or government, is, that in case of controversy among the members of the banking corporation, as to the *rights* of any member, the question is determined, not by any number, either majority, or minority, of the corporation itself, *but by persons out of the corporation*; by twelve men acting as jurors, or by other tribunals of justice, of which no member of the corporation is allowed to be a part. But in the case of the political corporation, controversies among the parties to it, as to the rights of individual members, must of necessity be settled by members of the corporation itself, because there are no persons out of the corporation to whom the question can be referred.

Since, then, all questions as to the *rights* of the members of the political corporation, must be determined by members of the corporation itself, the trial by jury says that no man's *rights*,—neither his right to his life, his liberty, nor his property,—shall be determined by any such standard as the mere will and pleasure of majorities; but only by the unanimous verdict of a tribunal fairly representing the whole people,—that is, a tribunal of twelve men, taken at random from the whole body, and ascertained to be as impartial as the nature of the case will admit, *and sworn to the observance of justice*. Such is the difference in the two kinds of corporations; and the custom of managing by majorities the mere discretionary matters of business corporations, (the majority having no power to determine the *rights* of any member,) furnishes no analogy to the practice, adopted by political corporations, of disposing of all the *rights* of their members by the arbitrary will of majorities.

But further. The doctrine that the majority have a *right* to rule, proceeds upon the principle that minorities have no *rights* in the government; for certainly the minority cannot be said to have any *rights* in a government, so long as the majority alone determine what their rights shall be. They hold everything, or nothing, as the case may be, at the mere will of the majority.

It is indispensable to a "*free government*," (in the political sense of that term,) that the minority, the weaker party, have

a veto upon the acts of the majority. Political liberty is liberty for the *weaker party* in a nation. It is only the weaker party that lose their liberties, when a government becomes oppressive. The stronger party, in all governments, are free by virtue of their superior strength. They never oppress themselves.

Legislation is the work of this stronger party; and if, in addition to the sole power of legislating, they have the sole power of determining what legislation shall be enforced, they have all power in their hands, and the weaker party are the subjects of an absolute government.

Unless the weaker party have a veto, either upon the making, or the enforcement of laws, they have no power whatever in the government, and can of course have no liberties except such as the stronger party, in their arbitrary discretion, see fit to permit them to enjoy.

In England and the United States, the trial by jury is the only institution that gives the weaker party any veto upon the power of the stronger. Consequently it is the only institution, that gives them any effective voice in the government, or any guaranty against oppression.

Suffrage, however free, is of no avail for this purpose; because the suffrage of the minority is overborne by the suffrage of the majority, and is thus rendered powerless for purposes of legislation. The responsibility of officers can be made of no avail, because they are responsible only to the majority. The minority, therefore, are wholly without rights in the government, wholly at the mercy of the majority, unless, through the trial by jury, they have a veto upon such legislation as they think unjust.

Government is established for the protection of the weak against the strong. This is the principal, if not the sole, motive for the establishment of all legitimate government. Laws, that are sufficient for the protection of the weaker party, are of course sufficient for the protection of the stronger party; because the strong can certainly need no more protection than the weak. It is, therefore, right that the weaker party should be represented in the tribunal which is finally to determine what legislation may be enforced; and that no legislation shall

be enforced against their consent. They being presumed to be competent judges of what kind of legislation makes for their safety, and what for their injury, it must be presumed that any legislation, which *they* object to enforcing, tends to their oppression, and not to their security.

There is still another reason why the weaker party, or the minority, should have a veto upon all legislation which they disapprove. *That reason is, that that is the only means by which the government can be kept within the limits of the contract, compact, or constitution, by which the whole people agree to establish government.* If the majority were allowed to interpret the compact for themselves, and enforce it according to their own interpretation, they would, of course, make it authorize them to do whatever they wish to do.

The theory of free government is that it is formed by the voluntary contract of the people individually with each other. This is the theory, (although it is not, as it ought to be, the fact,) in all the governments in the United States, as also in the government of England. The theory assumes that each man, who is a party to the government, and contributes to its support, has individually and freely consented to it. Otherwise the government would have no right to tax him for its support,—for taxation without consent is robbery. This theory, then, necessarily supposes that this government, which is formed by the free consent of all, has no powers except such as *all* the parties to it have individually agreed that it shall have; and especially that it has no power to pass any *laws*, except such as *all* the parties have agreed that it may pass.

This theory supposes that there may be certain laws that will be beneficial to *all*,—so beneficial that *all* consent to be taxed for their maintenance. For the maintenance of these specific laws, in which all are interested, all associate. And they associate for the maintenance of those laws *only*, in which *all* are interested. It would be absurd to suppose that all would associate, and consent to be taxed, for purposes which were beneficial only to a part; and especially for purposes that were injurious to any. A government of the whole, therefore, can have no powers except such as *all* the parties consent that it may have. It can do nothing except what *all* have con-

sented that it may do. And if any portion of the people,—no matter how large their number, if it be less than the whole,—desire a government for any purposes other than those that are common to all, and desired by all, they must form a separate association for those purposes. They have no right,—by perverting this government of the whole, to the accomplishment of purposes desired only by a part,—to compel any one to contribute to purposes that are either useless or injurious to himself.

Such being the principles on which the government is formed, the question arises, how shall this government, when formed, be kept within the limits of the contract by which it was established? How shall this government, instituted by the whole people, agreed to by the whole people, supported by the contributions of the whole people, be confined to the accomplishment of those purposes alone, which the whole people desire? How shall it be preserved from degenerating into a mere government for the benefit of a part only of those who established, and who support it? How shall it be prevented from even injuring a part of its own members, for the aggrandizement of the rest? Its laws must be, (or at least now are,) passed, and most of its other acts performed, by mere agents,—agents chosen by a part of the people, and not by the whole. How can these agents be restrained from seeking their own interests, and the interests of those who elected them, at the expense of the rights of the remainder of the people, by the passage and enforcement of laws that shall be partial, unequal, and unjust in their operation? That is the great question. And the trial by jury answers it. And how does the trial by jury answer it? It answers it, as has already been shown throughout this volume, by saying that these mere agents and attorneys, who are chosen by a part only of the people, and are liable to be influenced by partial and unequal purposes,—shall not have unlimited authority in the enactment and enforcement of laws; that they shall not exercise *all* the functions of government. It says that they shall never exercise that ultimate power of compelling obedience to the laws by punishing for disobedience, or of executing the laws against the person or property of any man, without first

getting the consent of the people, through a tribunal that may fairly be presumed to represent the whole, or substantially the whole, people. It says that if the power to make laws, and the power also to enforce them, were committed to these agents, they would have all power,— would be absolute masters of the people, and could deprive them of their rights at pleasure. It says, therefore, that the people themselves will hold a veto upon the enforcement of any and every law, which these agents may enact, and that whenever the occasion arises for them to give or withhold their consent,— inasmuch as the whole people cannot assemble, or devote the time and attention necessary to the investigation of each case,— twelve of their number shall be taken by lot, or otherwise at random, from the whole body; that they shall not be chosen by majorities, (the same majorities that elected the agents who enacted the laws to be put in issue,) nor by any interested or suspected party; that they shall not be appointed by, or be in any way dependent upon, those who enacted the law; that their opinions, whether for or against the law that is in issue, shall not be inquired of beforehand; and that if these twelve men give their consent to the enforcement of the law, their consent shall stand for the consent of the whole.

This is the mode, which the trial by jury provides, for keeping the government within the limits designed by the whole people, who have associated for its establishment. And it is the only mode, provided either by the English or American constitutions, for the accomplishment of that object.

But it will, perhaps, be said that if the minority can defeat the will of the majority, then the minority *rule* the majority. But this is not true in any unjust sense. The minority enact no laws of their own. They simply refuse their assent to such laws of the majority as they do not approve. The minority assume no authority over the majority; they simply defend themselves. They do not interfere with the right of the majority to seek their own happiness in their own way, so long as they (the majority) do not interfere with the minority. They claim simply not to be oppressed, and not to be compelled to assist in doing anything which they do not approve. They say to the majority, "We will unite with you, if you

desire it, for the accomplishment of all those purposes, in which we have a common interest with you. You can certainly expect us to do nothing more. If you do not choose to associate with us on those terms, there must be two separate associations. You must associate for the accomplishment of your purposes; we for the accomplishment of ours."

In this case, the minority assume no authority over the majority; they simply refuse to surrender their own liberties into the hands of the majority. They propose a union; but decline submission. The majority are still at liberty to refuse the connection, and to seek their own happiness in their own way, except that they cannot be gratified in their desire to become absolute masters of the minority.

But, it may be asked, how can the minority be trusted to enforce even such legislation as is equal and just? The answer is, that they are as reliable for that purpose as are the majority; they are as much presumed to have associated, and are as likely to have associated, for that object, as are the majority; and they have as much interest in such legislation as have the majority. They have even more interest in it; for, being the weaker party, they must rely on it for their security,—having no other security on which they can rely. Hence their consent to the establishment of government, and to the *taxation* required for its support, is *presumed*, (although it ought not to be presumed,) without any express consent being given. This presumption of their consent to be taxed for the maintenance of laws, would be absurd, if they could not themselves be trusted to act in good faith in enforcing those laws. And hence they cannot be presumed to have consented to be taxed for the maintenance of any laws, except such as they are themselves ready to aid in enforcing. It is therefore unjust to tax them, unless they are eligible to seats in a jury, with power to judge of the justice of the laws. Taxing them for the support of the laws, on the assumption that they are in favor of the laws, and at the same time refusing them the right, as jurors, to judge of the justice of the laws, on the assumption that they are opposed to the laws, are flat contradictions.

But, it will be asked, what motive have the majority, when

they have all power in their own hands, to submit their will to the veto of the minority?

One answer is, that they have the motive of justice. It would be *unjust* to compel the minority to contribute, by taxation, to the support of any laws which they did not approve.

Another answer is, that if the stronger party wish to use their power only for purposes of justice, they have no occasion to fear the veto of the weaker party; for the latter have as strong motives for the maintenance of *just* government, as have the former.

Another answer is, that if the stronger party use their power *unjustly*, they will hold it by an uncertain tenure, especially in a community where knowledge is diffused; for knowledge will enable the weaker party to make itself in time the stronger party. It also enables the weaker party, even while it remains the weaker party, perpetually to annoy, alarm, and injure their oppressors. Unjust power,—or rather power that is *grossly* unjust, and that is known to be so by the minority,—can be sustained only at the expense of standing armies, and all the other machinery of force; for the oppressed party are always ready to risk their lives for purposes of vengeance, and the acquisition of their rights, whenever there is any tolerable chance of success. Peace, safety, and quiet for all, can be enjoyed only under laws that obtain the consent of all. Hence tyrants frequently yield to the demands of justice from those weaker than themselves, as a means of buying peace and safety.

Still another answer is, that those who are in the majority on one law, will be in the minority on another. All, therefore, need the benefit of the veto, at some time or other, to protect themselves from injustice.

That the limits, within which legislation would, by this process, be confined, would be exceedingly narrow, in comparison with those it at present occupies, there can be no doubt. All monopolies, all special privileges, all sumptuary laws, all restraints upon any traffic, bargain, or contract, that was naturally lawful,* all restraints upon men's natural

* Such as restraints upon banking, upon the rates of interest, upon traffic with foreigners, &c., &c.

rights, the whole catalogue of *mala prohibita*, and all taxation to which the taxed parties had not individually, severally, and freely consented, would be at an end; because all such legislation implies a violation of the rights of a greater or less minority. This minority would disregard, trample upon, or resist, the execution of such legislation, and then throw themselves upon a jury of the whole people for justification and protection. In this way all legislation would be nullified, except the legislation of that general nature which impartially protected the rights, and subserved the interests, of all. The only legislation that could be sustained, would probably be such as tended directly to the maintenance of justice and liberty; such, for example, as should contribute to the enforcement of contracts, the protection of property, and the prevention and punishment of acts intrinsically criminal. In short, government in practice would be brought to the necessity of a strict adherence to natural law, and natural justice, instead of being, as it now is, a great battle, in which avarice and ambition are constantly fighting for and obtaining advantages over the natural rights of mankind.

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APPENDIX.

TAXATION.

It was a principle of the Common Law, as it is of the law of nature, and of common sense, that no man can be taxed without his personal consent. The Common Law knew nothing of that system, which now prevails in England, of *assuming* a man's own consent to be taxed, because some pretended representative, whom he never authorized to act for him, has taken it upon himself to consent that he may be taxed. That is one of the many frauds on the Common Law, and the English constitution, which have been introduced since Magna Carta. Having finally established itself in England, it has been stupidly and servilely copied and submitted to in the United States.

If the trial by jury were reestablished, the Common Law principle of taxation would be reestablished with it; for it is not to be supposed that juries would enforce a tax upon an individual which he had never agreed to pay. Taxation without consent is as plainly robbery, when enforced against one man, as when enforced against millions; and it is not to be imagined that juries could be blind to so self-evident a principle. Taking a man's money without his consent, is also as much robbery, when it is done by millions of men, acting in concert, and calling themselves a government, as when it is done by a single individual, acting on his own responsibility, and calling himself a highwayman. Neither the numbers engaged in the act, nor the different characters they assume as a cover for the act, alter the nature of the act itself.

If the government can take a man's money without his consent, there is no limit to the additional tyranny it may practise upon him; for, with his money, it can hire soldiers to stand over him, keep him in subjection, plunder him at discretion, and kill him if he resists. And governments always will do this, as they everywhere and always have done it, except where the Common Law principle has been established. It is therefore a first principle, a very *sine qua non* of political freedom, that a man can be taxed only by his personal consent. And the establishment of this principle, *with trial by jury*, insures freedom of course; because: 1. No man would pay his money unless he had first contracted for such a government as he was willing to support; and, 2. Unless the government then kept itself within the terms of its contract, juries would not enforce the payment of the tax. Besides, the agreement to be taxed would probably be entered into but for a year at a time. If, in that year, the government proved itself either inefficient or tyrannical, to any serious degree, the contract would not be renewed.

The dissatisfied parties, if sufficiently numerous for a new organization, would form themselves into a separate association for mutual protection. If not sufficiently numerous for that purpose, those who were conscientious would forego all governmental protection, rather than contribute to the support of a government which they deemed unjust.

All legitimate government is a mutual insurance company, voluntarily agreed upon by the parties to it, for the protection of their rights against wrong-doers. In its voluntary character it is precisely similar to an association for mutual protection against fire or shipwreck. Before a man will join an association for these latter purposes, and pay the premium for being insured, he will, if he be a man of sense, look at the articles of the association; see what the company promises to do; what it is likely to do; and what are the rates of insurance. If he be satisfied on all these points, he will become a member, pay his premium for a year, and then hold the company to its contract. If the conduct of the company prove unsatisfactory, he will let his policy expire at the end of the year for which he has paid; will decline to pay any further premiums, and either seek insurance elsewhere, or take his own risk without any insurance. And as men act in the insurance of their ships and dwellings, they would act in the insurance of their properties, liberties and lives, in the political association, or government.

The political insurance company, or government, have no more right, in nature or reason, to *assume* a man's consent to be protected by them, and to be taxed for that protection, when he has given no actual consent, than a fire or marine insurance company have to assume a man's consent to be protected by them, and to pay the premium, when his actual consent has never been given. To take a man's property without his consent is robbery; and to assume his consent, where no actual consent is given, makes the taking none the less robbery. If it did, the highwayman has the same right to assume a man's consent to part with his purse, that any other man, or body of men, can have. And his assumption would afford as much moral justification for his robbery as does a like assumption, on the part of the government, for taking a man's property without his consent. The government's pretence of protecting him, as an equivalent for the taxation, affords no justification. It is for himself to decide whether he desires such protection as the government offers him. If he do not desire it, or do not bargain for it, the government has no more right than any other insurance company to impose it upon him, or make him pay for it.

Trial by the country, and no taxation without consent, were the two pillars of English liberty, (when England had any liberty,) and the first principles of the Common Law. They mutually sustain each other; and neither can stand without the other. Without both, no people have any guaranty for their freedom; with both, no people can be otherwise than free.*

* Trial by the country, and no taxation without consent, mutually sustain each other, and can be sustained only by each other, for these reasons: 1. Juries would refuse to enforce a tax against a man who had never agreed to pay it. They would also protect men in forcibly resisting the collection of taxes to which they had never consented. Otherwise the Jurors would authorize the government to tax themselves without their consent, — a thing which no jury would be likely to do. In these two ways, then, trial by the country would sustain the principle of no taxation without consent. 2. On the other hand, the principle of no taxation without consent would sustain the trial by the country, because men in general would not consent to be taxed for the support of a

By what force, fraud, and conspiracy, on the part of kings, nobles, and "a few wealthy freeholders," these pillars have been prostrated in England, it is designed to show more fully in the next volume, if it should be necessary.

government under which trial by the country was not secured. Thus these two principles mutually sustain each other.

But, if either of these principles were broken down, the other would fall with it, and for these reasons: 1. If trial by the country were broken down, the principle of no taxation without consent would fall with it, because the government would then be able to tax the people without their consent, inasmuch as the legal tribunals would be mere tools of the government, and would enforce such taxation, and punish men for resisting such taxation, as the government ordered. 2. On the other hand, if the principle of no taxation without consent were broken down, trial by the country would fall with it, because the government, if it could tax people without their consent, would, of course, take enough of their money to enable it to employ all the force necessary for sustaining its own tribunals, (in the place of juries,) and carrying their decrees into execution.

THE
L A W
OF
INTELLECTUAL PROPERTY;

OR
AN ESSAY ON THE RIGHT OF AUTHORS AND INVENTORS
TO A PERPETUAL PROPERTY IN THEIR IDEAS.

VOL. I.

BY LYSANDER SPOONER.

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NOTE.

In the second volume of this work, it is the intention of the author to discuss the following topics, viz. :—

1. The Common Law of England, relative to Intellectual Property—reviewing the English decisions.

2. The Constitutional Law of the United States—reviewing the acts of Congress and the judicial decisions.

3. International Law.

4. Various other topics of minor importance connected with the subject.

He expects to prove, among other things, that it is the present constitutional duty of courts, both in England and America—any acts of parliament or of congress to the contrary notwithstanding—to maintain the principle of perpetuity in intellectual property, and also to give to such property the protection of the criminal law

THE LAW OF INTELLECTUAL PROPERTY.

THE
LAW OF INTELLECTUAL PROPERTY.

CHAPTER I.

THE LAW OF NATURE IN REGARD TO INTELLECTUAL
PROPERTY.

SECTION I.

The Right of Property in Ideas to be proved by Analogy.

IN order to understand the law of nature in regard to intellectual property, it is necessary to understand the principles of that law in regard to property in general. We shall then see that the right of property in *ideas*, is at least as strong as—and in many cases identical with—the right of property in material things.

To understand the law of nature, relative to property *in general*, it is necessary, in the first place, that we understand the distinction between *wealth* and *property*; and, in the second place, that we understand how and when wealth becomes property.

We shall therefore consider :

1. *What is Wealth?*
2. *What is Property?*
3. *What is the Right of Property?*
4. *What Things are Subjects of Property?*

5. *How is the Right of Property Acquired?*
6. *What is the Foundation of the Right of Property?*
7. *How is the Right of Property Transferred?*
8. *Conclusions from the Preceding Principles.*

SECTION II.

What is Wealth?

Wealth is any thing, that is, or can be made, valuable to man, or available for his use.

The term *wealth* properly includes every conceivable object, idea, and sensation, that can either contribute to, or constitute, the physical, intellectual, moral, or emotional well-being of man.

Light, air, water, earth, vegetation, minerals, animals, every material thing, living or dead, animate or inanimate, that can aid, *in any way*, the comfort, happiness, or welfare of man, are wealth.

Things intangible and imperceptible by our physical organs, and perceptible only by the intellect, or felt only by the affections, are wealth. Thus liberty is wealth; opportunity is wealth; motion or labor is wealth; rest is wealth; reputation is wealth; love is wealth; sympathy is wealth; hope is wealth; knowledge is wealth; truth is wealth; for the simple reason that they all contribute to, or constitute in part, a man's well-being.

All a man's faculties, physical, intellectual, moral, and affectional, whereby he either procures, or enjoys, happiness, are wealth.

Happiness itself is wealth. It is the highest wealth. It is *the ultimate wealth*, which it is the object of all other wealth to procure.

Inasmuch as any given thing is wealth, *because*, and *solely because*, it may contribute to, or constitute, the happiness or

well-being of man, it follows that *every thing*, that can contribute to, or constitute, his happiness or well-being, is necessarily wealth.

The question whether a given thing be, or be not wealth, does not therefore depend at all upon its being tangible or perceptible by our *physical* organs; because its capacity to contribute to, or constitute, the happiness of man, does not depend at all upon its being thus tangible or perceptible. Things intangible and imperceptible by our physical organs, as liberty, reputation, love, and truth, for example, have as clearly a capacity to contribute to, and constitute, the happiness and well-being of man, as have any of those things that are thus tangible and perceptible.

Another reason why tangibility and perceptibility by our physical organs, are no *criteria* of wealth, is, that it really is not our physical organs, but the *mind*, and *only the mind*, that takes cognizance even of *material* objects. We are in the habit of saying that the *eye* sees any material object. But, in reality, it is only the *mind* that sees it. The mind sees it *through the eye*. It uses the eye merely as an instrumentality for seeing it. An eye, without a mind, could see nothing. So also it is with the hand, as it is with the eye. We are in the habit of saying that the *hand* touches any material thing. But, in reality, it is only the mind, that perceives the contact, or takes cognizance of the touch. The hand, without the mind, could feel nothing, and take cognizance of nothing, it should come in contact with. The mind simply uses the hand, as an instrument for touching; just as it uses the eye, as an instrument for seeing. It is, therefore, only the *mind*, that takes cognizance of any thing *material*. And every thing, of which the mind does take cognizance, is equally wealth, whether it be material or immaterial; whether it be tangible or perceptible, through the instrumentality of our physical organs, or not. It would be absurd to say that one thing was wealth, because the mind was obliged to use such material instruments as the hand, or the eye, to perceive it; and that another thing, as an *idea*, for example, was *not* wealth,

simply because the mind could perceive it *without using any material instruments*.

It is plain, therefore, that an *idea*, which the mind perceives, without the instrumentality of our physical organs, is as clearly wealth, as is a house, or a horse, or any *material* thing, which the mind sees by the aid of the eye, or touches through the instrumentality of the hand. The capacity of the thing, whether it be a horse, a house, or an idea, to contribute to, or constitute, the well-being of man, is the only criterion by which to determine whether or not it be wealth; and not its tangibility or perceptibility, through the agency of our physical organs.

An *idea*, then, is wealth. It is equally wealth, whether it be regarded, as some ideas may be, simply as, in itself, an object of enjoyment, reflection, meditation, and thus a *direct* source of happiness; or whether it be regarded, as other ideas may be, simply as a means to be used for acquiring other wealth, intellectual, moral, affectional, or material.

An idea is self-evidently wealth, when it imparts happiness *directly*. It is wealth, *because* it imparts happiness. It is also equally wealth, when it is used as an instrument or means of creating or acquiring other wealth. It is then as clearly wealth, as is any other instrumentality for acquiring wealth.

The idea, after which a machine is fashioned, is as clearly wealth, as is the material of which the machine is composed. *The idea is the life of the machine*, without which, the machine would be inoperative, powerless, and incapable of producing wealth.

The plan after which a house is built, is as much wealth, as is the material of which the house is constructed. Without the plan, the material would have failed to furnish shelter or comfort to the owner. It would have failed to be a house.

The idea, or design, after which a telescope is constructed, is as much wealth, as are the materials of which the telescope is composed. Without the idea, the materials would have failed to aid men in their examination of the heavens.

The design, after which a picture is drawn, is as clearly wealth, as is the canvas on which it is drawn, or the paint with which it is drawn. Without the design, the canvas and the paint could have done nothing towards producing the picture, which is now so valuable.

The same principle governs in every department and variety of industry. An idea is every where and always the guide of labor, in the production and acquisition of wealth; and the idea, that guides labor, in the production or acquisition of wealth, is itself as obviously wealth, as is the labor, or as is any other instrumentality, agency, object, or thing whatever, whether material or immaterial, that aids in the production or acquisition of wealth.

To illustrate — The compass and rudder, that are employed in guiding a ship, and without which the ship would be useless, are as much wealth, as is the ship itself, or as is the freight which the ship is to carry. But it is plain that the mind, that observes the compass, and the thought, that impels and guides the hand that moves the rudder, are also as much wealth, as are the compass and rudder themselves.

So the thought, that guides the hand in labor, is *ever* as clearly wealth, as is the hand itself; or as is the material, on which the hand is made to labor; or as is the commodity, which the hand is made to produce. But for the thought, that guides the hand, the commodity would not be produced; the labor of the hand would be fruitless, and therefore valueless.

Every thing, therefore — whether intellectual, moral, or material, however gross, or however subtile; whether tangible or intangible, perceptible or imperceptible, by our *physical* organs — of which the human *mind* can take cognizance, and which, either as a means, occasion, or end, can either contribute to, or of itself constitute, the well-being of man, is wealth.

Mankind, in their dealings with each other, in their purchases, and in their sales, both tacitly and expressly acknowledge and act upon the principle, that a *thought* is wealth; that it is a wealth whose value is to be estimated and paid for, like other

wealth. Thus a machine is valuable in the market, according to the idea, after which it is fashioned. The plan, after which a house is built, enters into the market value of the house. The design, after which a picture is drawn, and the skill with which it is drawn, enter into, and mainly constitute, the mercantile value of the picture itself. The canvas and the paint, as simple materials, are worth—in comparison with the thought and skill embodied in the picture—only as one to an hundred, a thousand, or ten thousand.

Mankind, ignorant and enlightened, savage and civilized, with nearly unbroken universality, regard ideas, thoughts, and emotions, as the most valuable wealth they can either possess for themselves, or give to their children. They value them, both as direct sources of happiness, and as aids to the acquisition of other wealth. They are, therefore, all assiduously engaged in acquiring ideas, for their own enjoyment and use, and imparting them to their children, for their enjoyment and use. They voluntarily exchange their own material wealth, for the intellectual wealth of other men. They pay their money for other men's thoughts, written on paper, or uttered by the voice. So self-evident, indeed, is it that ideas are wealth, in the universal judgment of mankind, that it would have been entirely unnecessary to assert and illustrate the fact thus elaborately, in this connection, were it not that the principle lies at the foundation of all inquiries as to what is *property*; and, at the same time, it is one that is so universally, naturally, and *unconsciously*, received and acted upon, in practical life, that it is never even brought into dispute; men do not stop to theorize upon it; and therefore do not form any such definite, exact, or clear ideas about it, as are necessary to furnish, or constitute, the basis, or starting point, of the subsequent inquiries, to which this essay is devoted. For these reasons, the principle has now been stated thus particularly.

SECTION III.

What is Property?

Property is simply wealth, *that is possessed*—*that has an owner*; in contradistinction to wealth, that has no owner, but lies exposed, *unpossessed*, and ready to be converted into property, by whomsoever chooses to make it his own.

All property is wealth; but all wealth is not property. A very small portion of the wealth in the world has any owner. It is mostly unpossessed. Of the wealth in the ocean, for example, only an infinitesimal part ever becomes property. Man occasionally takes possession of a fish, or a shell, leaving all the rest of the ocean's wealth without an owner.

A somewhat larger proportion, but still a small proportion, of the wealth that lies in and upon the land, is property. Of the forests, the mines, the fruits, the animals, the atmosphere, a small part only has ever become property.

Of intellectual wealth, too, doubtless a very minute portion of all that is susceptible of acquisition, and possession, has ever been acquired—that is, has ever become property. Of all the truths, and of all the knowledge, which will doubtless sometime be possessed, how little is now possessed,

SECTION IV.

What is the Right of Property?

The right of property is simply *the right of dominion*. It is the right, which one man has, *as against all other men*, to the exclusive control, dominion, use, and enjoyment of any particular thing.

The principle of property is, that a thing belongs to one man, and not to another—*mine*, and *thine*, and *his*, are the terms that convey the idea of property.

The word *property* is derived from *proprius*, signifying *one's own*. The principle of property, then, is the principle of one's personal ownership, control, and dominion, of and over any thing. The *right* of property is one's *right* of ownership, enjoyment, control, and dominion, of and over any object, idea, or sensation.

The proprietor of any thing has the *right* to an exclusive ownership, control, and dominion, of and over the thing of which he is the proprietor. The thing *belongs* to him, and not to another man. He has a *right*, as against all other men, to control it according to *his own* will and pleasure; and is not accountable to others for the manner in which he may use it. Others have no *right* to take it from him, against his will; nor to exercise any authority, control, or dominion over it, without his consent; nor to impede, nor obstruct him in the exercise of such dominion over it, as he *chooses* to exercise. It is not *theirs*, but *his*. They must leave it entirely subject to his will. *His* will, and not *their* wills, must control it. The only limitation, which any or all others have a right to impose upon his use and disposal of it, is, that he shall not so use it as to invade, infringe, or impair the equal supremacy, dominion, and control of others, over what is *their own*.

The legal idea of property, then, is, that one thing belongs to one man, and another thing to another man; and that neither of these persons have a right to any voice in the control or disposal of what belongs to the other; that each is the sole lord of what is his own; that he is its sovereign; and has a right to use, enjoy, and dispose of it, at his pleasure, without giving any account, or being under any responsibility, to others, for his manner of using, enjoying, or disposing of it.

This right of property, which each man has, to what is his own, is a right, not merely against any one single individual, but

it is a right against *all* other individuals, singly and collectively. The right is equally valid, and equally strong, against the will of all other men combined, as against the will of every or any other man separately. It is a right against the whole world. The thing is *his*, and is *not* the world's. And the world must leave it alone, or it does him a wrong; commits a trespass, or a robbery, against him. If the whole world, or any one of the world, desire anything that is an individual's, they must obtain his free consent to part with it, by such inducements as they can offer him. If they can offer him no inducements, sufficient to procure his free consent to part with it, they must leave him in the quiet enjoyment of what is his own.

SECTION V.

What Things are Subjects of Property?

Every conceivable thing, whether intellectual, moral, or material, of which the *mind* can take cognizance, and which *can* be possessed, held, used, controlled, and enjoyed, by one person, and not, *at the same instant of time*, by another person, is rightfully a subject of property.

All the *wealth*, that has before been described—that is, all the things, intellectual, moral, emotional, or material, that *can* contribute to, or constitute, the happiness or well-being of man; and that can be possessed by one man, and not at the same time by another, is rightfully a subject of property—that is, of individual ownership, control, dominion, use, and enjoyment.

The air, that a man inhales, is his, *while it is inhaled*. When he has exhaled it, it is no longer his. The air that he may inclose in a bottle, or in his dwelling, is his, *while it is so inclosed*. When he has discharged it, it is no longer his. The sun-light, that falls upon a man, or upon his land, or that comes

into his dwelling, is his; and no other man has a right to forbid his enjoyment of it, or compel him to pay for it.

A man's *body* is his own. It is the property of his mind. (It is the mind that owns every thing, that is property. Bodies own nothing; but are themselves subjects of property — that is, of dominion. Each body is the property — that is, is under the dominion — of the mind that inhabits it.) And no man has the right, as being the proprietor, to take another man's body out of the control of his mind. In other words, no man can *own* another man's body.

All a man's enjoyments, all his feelings, all his happiness, *are his property*. They are his, and not another man's. They belong to him, and not to others. And no other man has the right to forbid him to enjoy them, or to compel him to pay for them. Other men may have enjoyments, feelings, happiness, *similar*, in their nature, to his. But they cannot own *his* feelings, *his* enjoyments, or *his* happiness. They cannot, therefore, rightfully require him to pay them for them, as if they were theirs, and not his own.

A man's *ideas* are his property. They are his for enjoyment, and his for use. Other men do not own his ideas. He has a right, as against all other men, to absolute dominion over his ideas. He has a right to act his own judgment, and his own pleasure, as to giving them, or selling them to other men. Other men cannot *claim* them of him, as if they were *their* property, and not his; any more than they can claim any other things whatever, that are his. If they desire them, and he does not choose to give them to them gratuitously, they must buy them of him, as they would buy any other articles of property whatever. They must pay him his price for them, or not have them. They have no more right to *force* him to give his ideas to them, than they have to force him to give them his purse.

Mankind universally act upon this principle. No sane man, who acknowledged the right of individual property in *any* thing, ever claimed that, as a natural or general principle, he was the

rightful owner of the thoughts produced, and exclusively possessed, by other men's minds; or demanded them on the ground of their being *his* property; or denied that they were the property of their possessors.

If the ideas, which a man has produced, were not rightfully his own, but belonged equally to other men, they would have the right *imperatively to require him* to give his ideas to them, without compensation; and it would be just and right for them to punish him as a criminal, if he refused.

Among civilized men, ideas are common articles of traffic. The more highly cultivated a people become, the more are thoughts bought and sold. Writers, orators, teachers, of all kinds, are continually selling their thoughts for money. They sell their thoughts, as other men sell their material productions, for what they will bring in the market. The price is regulated, not solely by the intrinsic value of the ideas themselves, but also, like the prices of all other commodities, by the supply and demand. On these principles, the author sells his ideas in his volumes; the poet sells his in his verses; the editor sells his in his daily or weekly sheets; the statesman sells his in his messages, his diplomatic papers, his speeches, reports, and votes; the jurist sells his in his judgments, and judicial opinions; the lawyer sells his in his counsel, and his arguments; the physician sells his in his advice, skill, and prescriptions; the preacher sells his in his prayers and sermons; the teacher sells his in his instructions; the lecturer sells his in his lectures; the architect sells his in his plans; the artist sells his in the figure he has engraven on stone, and in the picture he has painted on canvas. In practical life, these ideas are all as much articles of merchandize, as are houses, and lands, and bread, and meat, and clothing, and fuel. Men earn their livings, and support their families, by producing and selling ideas. And no man, who has any rational ideas of his own, doubts that in so doing they earn their livelihood in as legitimate a manner as any other members of society earn theirs. He who produces food for men's minds, guides for their hands in

labor, and rules for their conduct in life, is as meritorious a producer, as he who produces food or shelter for their bodies.

Again. We habitually talk of the ideas of particular authors, editors, poets, statesmen, judges, lawyers, physicians, preachers, teachers, artists, &c., as being worth less than the price that is asked or paid for them, in particular instances; and of other men's ideas, as being worth more than the price that is paid for them, in particular instances; just as we talk of other and material commodities, as being worth less or more than the prices at which they are sold. We thus recognize ideas as being legitimate articles of traffic, and as having a regular market value, like other commodities.

Because all men *give* more or less of their thoughts gratuitously to their fellow men, in conversation, or otherwise, it does not follow at all that their thoughts are not their property, which they have a natural *right* to set their own price upon, and to withhold from other men, unless the price be paid. Their thoughts are thus given gratuitously, or in exchange for other men's thoughts, (as in conversation,) either for the reason that they would bring nothing more in the market, or would bring too little to compensate for the time and labor of putting them in a marketable form, and selling them. Their market value is too small to make it *profitable* to sell them. Such thoughts men give away gratuitously, or in exchange for such thoughts as other men voluntarily give in return — just as men give to each other material commodities of small value, as nuts, and apples, a piece of bread, a cup of water, a meal of victuals, from motives of complaisance and friendship, or in expectation of receiving similar favors in return; and not because these articles are not as much property, as are the most valuable commodities that men ever buy or sell. But for nearly all information that is specially valuable, or valuable enough to command a price worth demanding — though it be given in one's private ear, as legal or medical advice, for example — a pecuniary compensation is demanded, with nearly the same uniformity as for a material commodity.

And no one doubts that such information is a legitimate and lawful consideration for the equivalent paid. Courts of justice uniformly recognize them as such, as in the case of legal, medical, and various other kinds of information. One man can sue for and recover pay for ideas, which, as lawyer, physician, teacher, or editor, he has sold to another man, just as he can for land, food, clothing, or fuel.

SECTION VI.

How is the Right of Property acquired.

The right of property, in *material* wealth, is acquired, *in the first instance*, in one of these two ways, viz.: first, by simply taking possession of natural wealth, or the productions of nature; and, secondly, by the artificial production of other wealth. Each of these ways will be considered separately.

1. The *natural* wealth of the world belongs to those who *first* take possession of it. The right of property, in any article of natural wealth, is *first* acquired by simply taking possession of it.

Thus a man, walking in the wilderness, picks up a nut, a stick, or a diamond, which he sees lying on the ground before him. He thereby makes it his property — *his own*. It is thenceforth *his*, against all the world. No other human being, nor any number of human beings, have any right, *on the ground of property*, to take it from him, without his consent. They are all bound to acknowledge it to be *his*, and *not theirs*.

It is in this way that all natural wealth is *first* made property. And any, and all natural wealth whatsoever, that *can* be possessed, becomes property in consequence, and solely in consequence, of one's simply taking possession of it.

There is no limit, fixed by the law of nature, to the amount of property one may acquire by simply taking possession of natural wealth, not already possessed, except the limit fixed by his power

or ability to take such possession, without doing violence to the person or property of others. So much natural wealth, remaining unpossessed, as any one *can* take possession of *first*, becomes absolutely his property. *

This mode of acquiring property, by taking possession of the productions of nature, is a *just* mode. Nobody is wronged — that is, nobody is deprived of any thing that is his own — when one man takes possession of a production of nature, which lies exposed, and unpossessed by any one. The first comer has the same right, and all the right, to take possession of it, and make it his own, that any subsequent comer can have. No subsequent comer can show any right to it, different in its nature, from that, which the first comer exercises, in taking the possession. The wealth of nature, thus taken, and made property, was provided for the use of mankind. The only way, in which it can be made useful to mankind, is by their taking possession of it individually, and thus making it private property. Until it is made property, no one can have the right to apply it to the satisfaction of his own, or any other person's, wants, or desires. The first comer's wants and desires are as sacred in their nature, and the presumption is that they are as necessary to be supplied, as those of the second comer will be. They, therefore, furnish to him as good

* Some persons object to this principle, for the reason that, as they say, a single individual might, in this way, take possession of a whole continent, if he happened to be the first discoverer; and might hold it against all the rest of the human race. But this objection arises wholly from an erroneous view of what it is, to take possession of any thing. To simply stand upon a continent, and declare one's self the possessor of it, is not to take possession of it. One would, in that way, take possession only of what his body actually covered. To take possession of more than this, he must bestow some valuable labor upon it, such, for example, as cutting down the trees, breaking up the soil, building a hut or a house upon it, or a fence around it. In these cases, he holds the land in order to hold the labor which he has put into it, or upon it. And the land is his, so long as the labor he has expended upon it remains in a condition to be valuable for the uses for which it was expended; because it is not to be supposed that a man has abandoned the fruits of his labor so long as they remain in a state to be practically useful to him.

an authority for taking possession of the wealth of nature, as those of the second comer will furnish to him. They may chance to be either less, or more, violent, in degree; but whether less, or more, (if that were important to his comparative right,) the first comer cannot know. It is enough for *him*, that his own wants and desires have their origin in his own human-nature, in the same way that those of the second comer will have theirs. And such wants and desires are a *sufficient* warrant for him to take whatever nature has spread before him for their gratification, unless it have been already appropriated by some other person.

After he has taken possession of it, it is his, by an additional right, such as no other person can have. He has bestowed his labor upon it—the labor, at least, of taking it into his possession; and this labor will be lost to him, if he be deprived of the commodity he has taken possession of. It is of no importance how slight that labor may have been, though it be but the labor of a moment, as in picking up a pebble from the ground, or plucking a fruit from a tree. Even that labor, trifling as it is, is more than any other one has bestowed upon it. And it is enough for him, that *that* was *his* labor, and not another man's. He can now show a better right to the thing he has taken possession of, than any other man can. He had an equal right with any other man before; now he has a superior one, for he has expended his labor upon it, and no other person has done the like.

It cannot be said that the first comer is bound to leave something to supply the wants of the second. This argument would be just as good against the right of the second comer, the third, the fourth, and so on indefinitely, as it is against the right of the first; for it might, with the same reason, be said of each of these, that he was bound to leave something for those who should come after him. The rule, therefore, is, that each one may take enough to supply his own wants, if he can find the wherewith, unappropriated. And the history of the race proves that under this rule, the last man's wants are better supplied than were those of the first, owing to the fact of the last man's having the

skill and means of *creating* more wealth for himself, than the first one had. He has also the benefit of all the accumulations, which his predecessors have left him. The first man is a hungry, shivering savage, with all the wealth of nature around him. The last man revels in all the luxuries, which art, science, and nature, working in concert, can furnish him.

Moreover, the wealth of nature is inexhaustible. The first comer can, at best, take possession of but an infinitesimal portion of the whole; not even so much, probably, as would fall to his share, if the whole were equally divided among the inhabitants of the globe. And this is another reason why a second comer cannot complain of the portion taken by the first.

There are still two other reasons why the first comer does no wrong to his successors, by taking possession of whatever natural wealth he can find, for the gratification of his wants. One of these reasons is, that when the wealth taken is of a perishable nature, as the fruit of a vine or tree, for example, it is liable to perish without ministering to the wants of any one, unless the first comer appropriate it to the satisfaction of his own. The other reason is, that when the wealth taken, is of a permanent nature, as land, for example, then the first comer, by taking possession of it—that is, by bestowing useful labor upon it—makes it more capable of contributing to the wants of mankind, than it would have been if left in its natural state. It is of course right that he should enjoy, during his life, the fruits of his own labor, in the increased value of the land he has improved; and when he dies, he leaves the land in a better condition for those who come after him, than it would have been in, if he had not expended his labor upon it.

Finally, the wealth of nature can be made available for the supply of men's wants, only by men's taking possession of portions of it individually, and making such portions their own. A man *must* take possession of the natural fruits of the earth, and thus make them his property, before he can apply them to the sustenance of his body. He must take possession of land, and

thus make it his property, before he can raise a crop from it, or fit it for his residence. If the first comer have no right to take possession of the earth, or its fruits, for the supply of his wants, the second comer certainly can have no such right. The doctrine, therefore, that the first comer has no natural right to take possession of the wealth of nature, make it his property, and apply to his uses, is a doctrine that would doom the entire race to starvation, while all the wealth of nature remained unused, and unenjoyed around them.

For all these reasons, and probably for still others that might be given, the simple taking possession of the wealth of nature, is a just and natural, as it is a necessary, mode of acquiring the right of property in such wealth.

2. The other mode, in which the right of property is acquired, is by the creation, or production, of wealth, by labor.

The wealth created by labor, is the rightful property of the creator, or producer. This proposition is so self-evident as hardly to admit of being made more clear; for if the creator, or producer, of wealth, be not its rightful proprietor, surely no one else can be; and such wealth must perish unused.

The *material* wealth, created by labor, is created by bestowing labor upon the productions of nature, and thus adding to their value. For example—a man bestows his labor upon a block of marble, and converts it into a statue; or upon a piece of wood and iron, and converts them into a plough; or upon wool, or cotton, and converts it into a garment. The additional value thus given to the stone, wood, iron, wool, and cotton, is a *creation* of new wealth, by labor. And if the laborer own the stone, wood, iron, wool, and cotton, on which he bestows his labor, he is the rightful owner of the additional value which his labor gives to those articles. But if he be not the owner of the articles, on which he bestows his labor, he is not the owner of the additional value he has given to them; but gives or sells his labor to the owner of the articles on which he labors.

Having thus seen the principles, on which the right of prop-

erty is acquired in *material* wealth, let us now take the same principles, and see how they will apply to the acquisition of the right of property in ideas, or intellectual wealth.

1. If ideas be considered as productions of nature, or as things existing in nature, and which men merely discover, or take possession of, then he who does discover, or first take possession of, *an idea*, thereby becomes its lawful and rightful proprietor; on the same principle that he, who first takes possession of any *material* production of nature, thereby makes himself its rightful owner.* And the first possessor of the *idea*, has the same right, either to keep that idea solely for his own use, or enjoyment, or to give, or sell it to other men, that the first possessor of any *material* commodity has, to keep it for his own use, or to give, or sell it, to other men.

2. If ideas be considered, not as productions of nature, or as things existing in nature, and merely *discovered* by man, but as entirely new wealth, *created* by his labor—the labor of his mind—then the right of property in them belongs to him, whose labor created them; on the same principle that any other wealth, created by human labor, belongs rightfully, as property, to its creator, or producer.

It cannot be truly said that there is any intrinsic difference in the two cases; that material wealth is created by physical labor, and ideas only by intellectual labor; and that this difference, in the mode of creation, or production, makes a difference in the rights of the creators, or producers, to the products of their respective labors. Any article of wealth, which a man creates or produces, by the exercise of any one portion of his wealth-producing faculties, is as clearly his rightful property, as is any other article of wealth, which he creates or produces, by any other portion of his wealth-producing faculties. If his mind

* "To discover," and "to take possession of," *an idea*, are one and the same act; while to discover, and to take possession of, a material thing, are separate acts. But this difference in the two cases cannot affect the principle we are discussing.

produces wealth, that wealth is as rightfully his property, as is the wealth that is produced by his hands. This proposition is self-evident, if the fact of creation, or production, by labor, be what gives the creator or producer a right to the wealth he creates, or produces.

But, secondly, there is no real foundation for the assertion, or rather for the distinction assumed, that material wealth is produced by *physical* labor, and that ideas are produced by *intellectual* labor. All that labor, which we are in the habit of calling *physical* labor, is in reality performed wholly by the mind, will, or spirit, which uses the bones and muscles merely as tools. Bones and muscles perform no labor of themselves; they move, in labor, only as they are moved by the mind, will, or spirit. It is, therefore, as much the mind, will, or spirit, that lifts a stone, or fells a tree, or digs a field, as it is the mind, will, or spirit, that produces an idea. There is, therefore, no such thing as the *physical* labor of men, independently of their intellectual labor. Their intellectual powers merely *use* their physical organs, as tools, in performing what we call physical labor. And the physical organs have no more merit in the production of material wealth, than have the saws, hammers, axes, hoes, spades, or any other tools, which the mind of man uses in the production of wealth.

All wealth, therefore, whether material or intellectual, which men produce, or create, by their labor, is, in reality, produced or created by the labor of their minds, wills, or spirits, *and by them alone*. A man's rights, therefore, to the *intellectual* products of his labor, necessarily stand on the same basis with his rights to the *material* products of his labor. If he have the right to the latter, on the ground of production, he has the same right to the former, for the same reason; since both kinds of wealth are alike the productions of his intellectual or spiritual powers.

The fact, that the mind uses the physical organs in the production of *material* wealth, can make no distinction between such wealth, and ideas — for the mind also uses a material organ, (the

brain,) in the production of ideas; just as, in the production of material wealth, it uses both brain and bone.

So far, therefore, as a man's right to wealth, has its origin in his production or creation of that wealth by his labor, it is impossible to establish a distinction between his right to material, and his right to intellectual, wealth; between his right to a house that he has erected, and his right to an idea that he has produced.

If there be any possible ground of distinction, his right is even stronger to the idea, than to the house; for the house was constructed out of that general stock of materials, which nature had provided for, and offered to, the whole human race, and which one human being had as much natural right to take possession of, as another; while the idea is a pure creation of his own faculties, accomplished without abstracting, from any common stock of natural wealth, any thing whatever, which the rest of the world could, in any way, claim, as belonging to them, in common with him.

SECTION VII.

What is the Foundation of the Right of Property?

The right of property has its foundation, first, in the natural right of each man to provide for his own subsistence; and, secondly, in his right to provide for his general happiness and well-being, in addition to a mere subsistence.

The right to live, includes the right to accumulate the means of living; and the right to obtain happiness in general, includes the right to accumulate such commodities as minister to one's happiness. These rights, then, to live, and to obtain happiness, are the foundations of the right of property. Such being the case, it is evident that no other human right has a deeper foundation in the nature and necessities of man, than the right of property. If, when one man has dipped a cup of water from the

stream, to slake his own thirst, or gathered food, to satisfy his own hunger, or made a garment, to protect his own body, other men can rightfully tell him that these commodities are not *his*, but *theirs*, and can rightfully take them from him, without his consent, his right to provide for the preservation of his own life, and for the enjoyment of happiness, are extinct.

The right of property in intellectual wealth, has manifestly the same foundation, as the right of property in material wealth. Without intellectual wealth—that is, without ideas—material wealth could neither be accumulated, nor fitted to contribute, nor made to contribute, to the sustenance or happiness of man. Intellectual wealth, therefore, is indispensable to the acquisition and use of other wealth. It is also, of itself, a direct source of happiness, in a great variety of ways. Furthermore, it is not only a thing of value, for the owner's uses, but, as has before been said, like material wealth, it is a merchantable commodity; has a value in the market; and will purchase, for its proprietor, other wealth in exchange. On every ground, therefore, the right of property in ideas, has as deep a foundation in the nature and necessities of man, as has the right of property in material things.

SECTION VIII.

How is the Right of Property Transferred?

From the very nature of the right of property, that right can be transferred, from the proprietor, only by his own consent. What is the right of property? It is, as has before been explained, a right of control, of dominion. If, then, a man's property be taken from him without his consent, his right of control, or dominion over it, is necessarily infringed; in other words, his right of property is necessarily violated.

Even to *use* another's property, without his consent, is to violate his right of property; because it is for the time being,

assuming a dominion over wealth, the rightful dominion over which belongs solely to the owner.

These are the principles of the law of nature, relative to all property. They are as applicable to intellectual, as to material, property. The *consent*, or *will*, of the owner alone, can transfer the right of property in either, or give to another the right to use either.

If it be asked, how is the consent of a man to part with his intellectual property to be proved? The answer is, that it must be proved, like all other facts in courts of justice, by evidence that is naturally applicable to prove such a fact, and that is sufficient to satisfy the mind of the tribunal that tries that question.

SECTION IX.

Conclusions from the Preceding Principles.

The conclusions, that follow from the principles now established, obviously are, that a man has a natural and absolute right — and if a natural and absolute, then necessarily a *perpetual*, right — of property, in the ideas, of which he is the discoverer or creator; that his right of property, *in ideas*, is intrinsically the same as, and stands on identically the same grounds with, his right of property in material things; that no distinction, *of principle*, exists between the two cases.

CHAPTER II.

OBJECTIONS ANSWERED.

The objections that will be urged to the principles of the preceding chapter, are the following.

SECTION I.

Objection First.

It will be said there can be no right of property in ideas, for the reason that an idea has no *corporeal substance*.

This is an ancient argument, but it obviously has no intrinsic weight or soundness; for *corporeal* substances are not the only things that have value; they are not the only things that contribute to the welfare of man; they are not the only things that can be possessed by one man, and not by another; they are not the only things that can be imparted by one man to another; nor are they the only things that are the products of labor. Indeed, correctly speaking, *corporeal* substances are never the *products*, (that is, the *creations*,) of human labor. Human labor cannot create corporeal substances. *It can only change their forms, qualities, adaptations, and values.* These forms, qualities, adaptations, and values are all *incorporeal* things. Hence, as will be more fully shown hereafter, all the products—that is, all the *creations*—of human labor, are incorporeal.

To deny the right of property in incorporeal things, is equivalent to denying the right of property in labor itself; in the products of labor; and even in those corporeal substances, that are acquired by labor; as will now be shown.

1. To deny the right of property in incorporeal things, is equivalent to denying the right of property in labor, because labor itself is incorporeal. It is simply motion; an *action* merely of the faculties. It has no corporeal substance. To deny, therefore, that there can be any right of property in incorporeal things, is denying that a man can have any right of property in his labor; and, of course, that he can have any right to demand pay for it, when he labors for another. Yet we all know that labor is a subject of property. A man's labor is his own. It also has value. It is the great dependence of the human race for subsistence. It is of ten thousand thousand kinds. Each of these kinds, too, has its well understood market price; as much so as any corporeal substance whatever. And each of these various kinds of labor is constantly bought and sold as merchandise.

Labor, therefore, being incorporeal, and yet, by universal confession, a subject of property, the principle of the right of property in incorporeal things is established.

2. To deny the right of property in incorporeal things, is equivalent to denying the right of property in the *products*, (that is, in the *creations*,) of human labor: for these products, or creations, are *all* incorporeal. Human labor, as has already been said, cannot *create* corporeal substances. It can only create, and give to corporeal substances, new forms, qualities, adaptations, and values. These new forms, qualities, adaptations, and values are *all* incorporeal things. For example—The new forms, and new beauties, which a sculptor, by his labor, creates, and imparts to a block of marble, are not corporeal substances. They are mere *qualities*, that have been imparted to a corporeal substance. They are qualities, that can neither be weighed nor measured, like corporeal substances. Scales will not weigh them, nor yard sticks measure them, as they will weigh and measure corporeal substances. They can be perceived and estimated only by the mind; in the same manner that the mind perceives and estimates an idea. In short, these new forms and new beauties, which

human labor has created, and imparted to the marble, are incorporeal, and not corporeal things. Yet they have value; are the products of labor; are subjects of property; and are constantly bought and sold in the market.

So also it is with all the new forms, qualities, adaptations, and values, which labor creates, and imparts to the materials, of which a *house*, for example, is composed. These new forms, qualities, adaptations, and values, are *all* incorporeal. They can neither be weighed, nor measured, as corporeal substances. Yet without them, the corporeal substances, out of which the house is constructed, would have failed to become a house. They, therefore, have value. They are also the products of labor; are subjects of property; and are constantly bought and sold in the market.

The same principle holds good in regard to all corporeal substances whatsoever, to which labor gives new forms, or qualities, adapted to satisfy the wants, gratify the eye, or promote the happiness of man — whether the substances be articles of food, clothing, utensils for labor, books, pictures, or whatever else may minister to the desires of men. The new forms and qualities, given to each and all these corporeal substances, to adapt them to use, *are themselves incorporeal*. Yet they have value; are the products of labor; and are as much subjects of property, as are the substances themselves. And the destruction or injury of these forms and qualities, by any person not the owner, is as clearly a crime, as is the theft or destruction of the substances themselves. In fact, correctly speaking, it is only the incorporeal forms, qualities, and adaptations of corporeal substances, that can be destroyed. The substances themselves are incapable of destruction. To destroy or injure the incorporeal forms, qualities, and adaptations, that have been given to corporeal substances by labor, destroys or injures the market value of the substances themselves; because it destroys or impairs their utility, for the purposes for which they are desired. How absurd then to say that incorporeal things are not subjects of property.

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The examples already given, of labor, the products, or creations of labor, (by which is now meant those forms, qualities, adaptations, and values, imparted by labor to corporeal substances,) would be sufficient to prove that incorporeal things are subjects of property. But, saying nothing as yet of ideas, there are still other kinds of incorporeal things, that are subjects of property. For example. A man's pecuniary credit, or reputation for pecuniary responsibility, has value; is the product of labor; and is a subject of property. Various other kinds of reputation are also subjects of property. A magistrate's reputation for integrity; a soldier's reputation for courage; a woman's reputation for chastity; a physician's reputation for skill; a preacher's reputation for sincerity, &c., &c., are all subjects of property. They have value; and they are the products of labor. Yet they are not corporeal substances.

Health is incorporeal. Strength is incorporeal. So also the senses, or faculties, of sight, hearing, taste, smell, and feeling are incorporeal. A person might lose them all without the loss of any corporeal substance. Yet they are all valuable possessions, and subjects of property. To impair or destroy them, through carelessness or design, is an injury to be compensated by damages, or punished as a crime.

Melody is incorporeal. Yet it has value; is the product of labor; is a subject of property; and a common article of merchandise.

Beauty is incorporeal. Yet it is a subject of property. It is a property, too, that is very highly prized—whether it be beauty of person, or beauty in those animals or inanimate objects, which are subjects of property. And to impair or destroy such beauty, is acknowledged by all to be a wrong, to be compensated in damages, — or a crime, to be visited with penalties.

A ride, and the right or privilege of riding, or of being carried, as, for example, on railroads, in steamboats, and public conveyances of all kinds, are incorporeal things. They cannot be seen by the eye, nor touched by the hand. They can only be per-

ceived by the mind. Yet they have value; are subjects of property; and are constantly bought and sold in the market.

The right of going into a hotel, or a place of public amusement, is not a corporeal substance. It nevertheless has value, and is a subject of property, and is constantly bought and sold.

Liberty is incorporeal. Yet it has value; and if it be not sold, it is because no corporeal substance is sufficiently valuable to be received in exchange for it.

Life itself is incorporeal. Yet it is property; and to take it from its owner is usually reckoned the highest crime that can be committed against him.

Many other kinds of property are incorporeal.

Thus it will be seen that *thoughts* are by no means the only incorporeal things that have value, and are subjects of property. Civilized society could not exist without recognizing incorporeal things as property.

3: To deny the right of property in *incorporeal* things, is equivalent to denying the right of property even in *corporeal* things.

What is the foundation of the right of property in *corporeal* things? It is not that they are the products, or *creations*, of human labor; for, as has already been said, human labor never produces — that is, it never *creates* — corporeal substances. But it is simply this — that human labor has been expended *upon them* — that is, in *taking possession of them*. The right of property, therefore, in *corporeal things*, has its foundation *solely* in human labor, *which is itself incorporeal*. Now it is clear that if labor, which is *incorporeal*, were not itself a subject of property, it could give the laborer no right of property in those *corporeal* substances, upon which he bestows his labor. A right cannot arise out of no right. It is absurd, therefore, to say that a man has no right of property in his labor, for the reason that labor is *incorporeal*, and yet to say that that same labor, (which is not his,) can give him a right to a *corporeal* substance, to which he confessedly has no other right, than that he has

expended labor upon it. If labor itself be not a subject of property, it follows, of necessity, that it can give the laborer no right of property in any thing else.

The necessary consequence, therefore, of denying the right of property in *incorporeal* things, as labor, for example, is to deny the right of property in *corporeal* things; because the right to the latter is only a *result*, or *consequence*, of a right to the *former*. If, therefore, we deny the right of property in incorporeal things, we must deny all rights of property whatsoever.

The idea, therefore, that incorporeal things cannot be subjects of property, is simply absurd, since it goes necessarily to the denial of all property; and since also it is itself denied by the common sense, the constant practice, and, above all, by the universal necessities, of mankind at large. On the other hand, if we admit a right of property in incorporeal things at all, then *ideas* are as clearly legitimate subjects of property, as any other incorporeal things that can be named. They are, in their nature, necessarily personal possessions; they have value; they are the products of labor; they are indispensable to the happiness, well-being, and even subsistence of man; they can be possessed by one man, and not by another; they can be imparted by one man to another; yet no one can demand them of another, as a right; and, as has before been said and shown, they are continually bought and sold as merchandise.

The doctrine, however, that *corporeal* substances *only* could be subjects of property, was a somewhat natural one in the infancy of thought; when men's theories about property were superficial and imperfect, partaking more of the character of instinct, than of reason, and when things visible by the eye, and tangible by the hand, would naturally be regarded, by unreasoning minds, as of a very different character, in respect of susceptibility of ownership, from such incorporeal things as ideas, of which few men had any worth setting a price upon. The distinction, however, between corporeal and incorporeal things, as subjects of property, is one entirely groundless in itself, and entirely unworthy of the

advanced reason of the present day; or even of any modern day; although modern days have seen the argument urged.*

Mankind have doubtless *never consistently* adhered to the theory that only corporeal things could be subjects of property. Probably in the darkest barbarism — certainly since the earliest history of civilization — incorporeal things, of various kinds, have been subjects of purchase and sale. The illiterate have sold their labor, which is incorporeal; and the learned, powerful, and artful, as, for example, the law-givers, magistrates, priests, physicians, astrologers, and necromancers, have sold their ideas. And the nature of men assures us, that there was never a time known among them, when the injury or destruction of various kinds of incorporeal property, as, for example, strength, sight, health, beauty, liberty, and life, was not considered and treated as a wrong to be avenged.

In modern times, with the advance of civilization, incorporeal things in a thousand forms, ideas included, have come to be among the most common articles of traffic; and contracts, based solely upon the ground of property in incorporeal things — as, for example, contracts to pay lawyers, physicians, preachers, teachers, editors, &c., for their ideas — are continually enforced by courts of justice, with the same uniformity as are contracts for corporeal things; while at the same time, the very tribunals, who enforce these contracts — tribunals composed, too, of men, who earn their official salaries only by giving their ideas in exchange for them — deny the principle of property in ideas. Such has been, and still is, the inconsistency of men's opinions on this subject — an inconsistency that strikingly illustrates the immaturity of reason, the low state of legal science, and the imperfection of political and judicial institutions.

One obstacle to the universal acknowledgment of property in ideas, has been this. Mankind *freely give away* so large a portion of their ideas, and so few of their ideas are of sufficient

* *Justice Yates, in the case of Millar vs. Taylor, 4 Burrows 2303.*

value to bring anything in the market, (except in the market of common conversation, where men mutually exchange their ideas,) that persons, who have not reasoned on the subject, have naturally *fallen into the habit of thinking*, that ideas were not subjects of property; and have consequently been slow to admit that, as a matter of sound theory or law, men had a strict right of property in *any* of their ideas. And yet these same doubters have themselves been, and now are, in the constant practice of buying ideas, in various ways, of magistrates, lawyers, physicians, preachers, teachers, editors, &c., and paying their money for them, without once dreaming that there was any more hardship or injustice in their being necessitated to do so, than in their being necessitated to buy their food or clothing.

Another reason, why the absolute right of property in ideas, has not been earlier, more consistently, and universally acknowledged, has been that, in the infancy of civil society, and even until a comparatively recent date, owing to the general ignorance of letters, and the want of records for that purpose, there has been a nearly or quite insuperable difficulty in maintaining that right in practice, by reason of there being *no means of proving one's property* in an idea, after the idea itself had gone out among men. But that difficulty is now removed by the invention of records, by which a man may have his idea registered, and his right to it established, before it is disclosed to the public.

But what must settle, absolutely and forever, this question of the right of property in incorporeal things, is this—*that the right of property itself is an incorporeality. The right of property is a mere incorporeal right of dominion, or control, over a thing.* It is neither tangible by the hand, nor visible by the eye. It is a mere abstraction, existing only in contemplation of the mind. Yet this incorporeal *right* of dominion or control over a thing, *is itself a subject of property—of ownership*; one that is continually bought and sold in the market, *independently of possession of the thing to which it relates.*

To make this point clear to the unprofessional reader. There

are two *kinds* of property, which pertain to every corporeal thing that is owned. One is the *right* of property, or ownership, in the thing owned — that is, the *right* of dominion or control over the thing. The other is the *possession* of the thing owned. These two kinds of property are the only *kinds* of property, that any man *can have* in any corporeal thing. Yet these two kinds of property can exist, and often do exist, separately from each other. Thus one man may *own* a thing — that is, have the *right of property* in a thing — as a house, for example — and another man have the possession of it. One man has the abstract incorporeal *right* of dominion, or control, over the house; the other has, for the time being, the *actual* dominion — that is, the possession — which he holds, either with, or without, the consent of the owner, as the case may be.

Now, any one can see that this *incorporeal right* of the true owner, *is itself a subject of property*. It is a thing that may be owned, bought, and sold, independently of the other kind of property, viz.: possession. It often *is* owned, bought, and sold, independently of possession. For example, a man often buys, pays for, and owns, a house to-day, which he is not to have possession of until next week, next month, or next year. Yet, though out of possession of the house, his *incorporeal right* of property in it, is itself a legal and *bona fide* property, of which he *is* possessed. It is a property, which he himself may sell, if he so choose.

This *incorporeal right* of property is *the* property, that is principally regarded by the laws. Possession is comparatively of little importance. It is comparatively of little importance, because if a man own the *right* of property in a thing, he can then claim the possession, solely by virtue of that right, *and the law will give it to him*. On the other hand, if a man have *possession* of a thing, without the *right* of property in it, the law will compel him to surrender the possession to the one who owns the *right* of property. Hence, in nearly all controversies, in law, about property, the question is, Who has the *right* of property?

Not, Who has the possession? These facts show that the *right of property*, in any corporeal thing, is *itself a subject of property, of ownership, independently of possession*; and is so regarded by the laws. *Yet it is but an incorporeality.*

This incorporeal *right of property* is also *the property*, which is of chief consideration in the minds of men, in all their dealings with each other. It is what one man buys, and the other sells. They care little for possession; because they know that the *right* will, sooner or later, give them the *possession*. On the other hand, they know that possession, without the right, will be insecure, and of little value. For these reasons, in all legitimate traffic, the purchaser is careful to know that he buys the *right of property*—that is, that he buys of one, who really *owns* the property—has the *abstract incorporeal right to it*; and not of one who merely has the possession of it. This fact, too, shows that the *right of property is itself a subject of property—of ownership—independently of possession* of the commodity to which it relates; and is universally so recognized by mankind, in their every day dealings. *Yet it is but an incorporeality.*

To accumulate evidence on this point. That this *right of property* is itself a *subject of property, and an incorporeality*, is proved by the fact, that it is transferred from one man to another, *simply by consent—by a mere operation of the mind*—without any corporeal delivery of the thing, to which the right attaches. Thus two men, in New York, may exchange their respective *rights of property*, in two ships, that are, at the time, in the Pacific ocean. And this *incorporeal* transfer, of the *incorporeal right of property*, in the ships, enables each purchaser afterwards to claim the possession, dominion, and control of the ship itself, that he has purchased. Here it is clear that the *incorporeal right of property, or dominion, is a legal entity, and a subject of property, of ownership*; one, which is transferred, from one man to another, by an *incorporeal* act, a simple operation of the mind, viz.: the act of consent. Manifestly this *incorporeal right of property, or dominion, is, of itself, independently of possession*

of the commodity to which it relates, a subject of property, of *ownership*.

Again. This *incorporeal right* of property, being, of itself, a *subject of property*, it follows that no man can assert that he has a *right* of property even in a *corporeal* thing, without, at the same time, asserting, that an *incorporeality* is a subject of property, of ownership.

To conclude. The *right of property* being *incorporeal*, and being itself a *subject of property*, it demonstrates that the right of property may attach to still *other incorporeal things*; for it would be plainly absurd to say, that there could be an *incorporeal right* of property to a *corporeal* thing, but could be no *incorporeal right* of property to an *incorporeal* thing. Clearly an *incorporeal right* of property could attach to an *incorporeal thing*—*a thing of its own nature*—as easily as to a *corporeal* thing, a thing of a different nature from its own. The attachment of this *incorporeal right* of property, to a *corporeal* thing, is not a phenomenon visible by the eye, nor tangible by the hand. It is perceptible only by the mind. And the mind can as easily perceive the same attachment to an *incorporeal* thing, as to a *corporeal* one.

It will now be taken for granted, that this point is established, namely, that on principles of natural law, *incorporeal things* are subjects of property. If that point be established, it is self-evident that *ideas* are naturally subjects of property; that their *incorporeality* is no objection whatever to their being owned as property.

SECTION II.

Objection Second.

The second objection, that is urged against the right of property in ideas, is, that, admitting, (what cannot with the least reason be denied,) that a man is the sole proprietor of an idea,

so long as he retains it in his exclusive possession, he nevertheless loses all exclusive right of property in it the moment he communicates the idea to another person, *because that other person thereby acquires as complete possession of the idea, as the original proprietor.*

This is a very shallow objection, since it is founded wholly on the assumption, that if a man once intrust his property in another man's keeping, he thereby loses his own right of property in it; whereas men are constantly intrusting their property in other men's hands, in many different ways, and for many different purposes, as for inspection, for hire, for sale, for safe keeping, for the purpose of having labor performed upon it, and for purposes of kindness and accommodation, without their *right of property* being in the least affected by it. Possession has nothing to do with a man's *right of property*, after that right has once been acquired. He can then lose his *right of property*, only by his own *consent* to part with it.

This impossibility of losing one's *right of property*, otherwise than by his own *consent*, is involved in the very nature of the right of property, which is a right of *dominion* — that is, a right to have a thing *subject to one's will*. It is an absurdity, a contradiction, to say that a man's *right* to have a thing *subject to his will*, can be lost *against his will*; or can be separated from him by any other process than his own will that it shall be separated from him. Hence a man can never sell, or give away, any thing that is his, by any other process than an act of his will, namely, his *consent* to part with his *right of property* in it. Otherwise a man would lose his right of property in a thing, every time he suffered another to take possession of that thing. He could not intrust an article of property in another man's hand for a moment, for any purpose whatever, without losing his right to it forever. Yet men habitually intrust their property in each other's keeping, with perfect freedom, without their ownership, or *right of property*, being in the least impaired thereby.

No assertion could be more utterly absurd, in regard to any

corporeal thing, than that a man loses his *right of property* in it, by simply parting with his possession of it; for every day's and every hour's experience, both in business and in law, would give the lie to it. And yet the assertion is equally absurd, when made in respect to *incorporeal* things, as when made in respect to *corporeal* things. There is not so much as an infinitesimal difference between the two cases.

The admission, therefore, that a man owns an idea, as property, while it is in his *exclusive* possession, is an admission that he owns it forever after, in whosoever possession it may be, until he has *consented* to part, not merely with his exclusive possession, but also with his *right of property* in it.

The only question, then, on this point, is, whether it is to be *presumed*, simply from the fact that a man voluntarily parts with the exclusive *possession* of his idea, that he therefore *consents* to part also with his exclusive *right of property* in it? In other words, whether it is to be presumed that a man *consents* to part with his exclusive right of property in his idea, simply from the fact that he makes that idea *known* to another person?

To answer this question requires a little analysis of the nature of the act, on which the presumption, if it exist at all, is founded.

In the case of a *corporeal commodity*, the act of making it *known*, and the act of giving *possession* of it, are distinct acts — the first not at all implying the last. But in the case of an *idea*, the act of making it *known*, and the act of giving *possession* of it, are necessarily one and the same act; or at least one necessarily involves the other. Yet, although the act of making an idea *known*, and the act of giving *possession* of it, are, in reality, one and the same act, still the act has two distinct *aspects*, in which it may be viewed, viz.: first, that of *simply* making the idea *known* (as in the case of making known a *corporeal commodity*); and, secondly, that of giving *possession* of it. And the question proposed will be simplified, and more easily and conclusively

answered, by considering the act in each of these aspects separately.

The first question, then, is, whether it is to be presumed that a man *intends* to part with his exclusive right of property in an idea, simply because he makes the idea *known* to another person?

Obviously there is no more ground, in nature, or in reason, for presuming that a man intends to part with his right of property, *in an idea*, simply because he describes it, or makes it known, to another person, than there is for presuming that he intends to part with his right of property, in any corporeal commodity, simply because he describes it, or makes it known, to another person. If a man describe his horse to another person; nobody presumes therefrom that he intends to part with his right of property in his horse. And it is the same of every other corporeal commodity. What more reason is there for presuming that he intends to part with his right of property in an idea, simply from the fact that he describes the idea, or makes it known, to his neighbor? Certainly there is none whatever, if we but regard the act, (as we are now attempting to do,) *simply as making known the idea, and not as giving possession of it*. On any other principle than this, men could not talk about their property to their neighbors, without losing their exclusive right to it.

Nothing, therefore, could be more entirely farcical, than the notion, that a man loses his exclusive right of property, in an idea, simply by making the idea *known* to other persons—provided, always, that the act of making the idea known, be regarded *simply as such, and not as giving possession of it*.

Let us now look at the act of making *known* an idea, in its other aspect, viz.: that of giving *possession* of it.

Here the question is, whether it is to be presumed that a man *intends* to part with his right of property in an idea, simply because he puts the idea into the *possession* of another person?

Here, too, there is manifestly no more ground, in nature, or in reason, for presuming that a man intends to part with his right

of property, in a *valuable idea* — that is, an idea having an important *market value* — simply because he gives it into the *possession* of another person, (without receiving any equivalent, or otherwise indicating any intention to part with his right of property in it,) than there is for presuming that he intends to part with his right of property, in any corporeal commodity, *of the same market value with the idea*, simply because he gives such commodity into the *possession* of another person (without receiving any equivalent, or otherwise indicating any intention to part with his right of property in it). It is just as improbable, in reason, and in nature, that a man would *gratuitously* part with his right of property in an idea, that was worth in the market a hundred, a thousand, or a hundred thousand dollars, as it is that he would gratuitously part with his right of property, in a corporeal commodity, of the same market value.

The legal presumption, therefore, as to whether a man does, or does not, *intend* to part with his right of property in an idea, when he puts that idea into the possession of another person, will depend very much upon the *market value* of the idea. In short, the legal presumption will be governed by precisely the same principles, as in the case of a corporeal commodity.

To illustrate these principles. If one man give to another the possession of a corporeal commodity, of so small value as a nut, an apple, or a cup of water, for example, without saying whether he also gives the right of property in it, the legal presumption clearly is that he *does* intend to give the right of property. Such is the legal presumption, because such is clearly the moral probability, as derived from the general practice of mankind. But if a man were to give to another the possession of a corporeal commodity, of so large value as a horse, a house, or a farm, without receiving any equivalent, and without *especially* making known that he also gave the right of property in it, the legal presumption clearly would be, that he did *not* intend to give the right of property. Such would clearly be the legal presumption, solely because such would clearly be the moral probability, as derived

from the general practice of mankind. But where the value of a corporeal commodity is neither so great, on the one hand, nor so small, on the other, as to furnish any clear rule of probability, as to whether the owner intended to reserve his right of property in it, or not, no *absolute* legal presumption, as to his intentions, can be derived *solely* from the fact of his giving possession of the thing itself; and consequently his intention, as to parting with his right of property, or not, may need to be proved by other evidence.

In the case of intellectual property, the legal presumption would follow the same rules of moral probability, as in the case of material property — that is, it would follow the rule of probability, where the probability, as derived from the general practice of mankind, was *clear*. But where the probability was not clear, the intention of the owner would be a fact to be proved by circumstances. If, for example, one man gave possession to another of an idea, that either had a merely trivial market value, or no market value at all, (like the ideas which men usually give freely to each other in conversation,) without otherwise indicating any intention as to parting with his right of property in it, the legal presumption, like the moral probability, would be, that he *did* intend to part with his exclusive right of property in it. But if, on the other hand, he gave possession of an idea, that had a *large* market value, without otherwise indicating his intention as to parting with his right of property in it, the legal presumption, like the moral probability, would be that he did *not* intend to part with his right of property. But where the value of the idea was neither so small, on the one hand, nor so large, on the other, as to furnish a clear rule of probability as to the owner's intentions, the fact of his intention would be open to be proved by circumstances.

Of course a man could always reserve his right of property, in ideas of the smallest value, or part with his right of property, in ideas of the largest value, by *specially* making known that such were his intentions.

Whether, therefore, the act of making *known* an idea, be regarded *simply as making it known*, (as in the case of making known a corporeal commodity,) or as also giving *possession* of it, it affords no ground for presuming that the owner *intended* to part with his exclusive right of property in it, *provided the idea be a valuable one for the market*; because it is naturally as improbable, that a man would gratuitously part with his right of property, in an *idea*, that would bring him an important sum in the market, as it is that he would gratuitously part with his right of property, in a corporeal commodity, that would bring the same sum in the market.

If it were possible for the law to regard the act of making an idea known, *simply as making it known*, (as in the case of making known a corporeal commodity,) and *not* also as giving *possession* of it, it would clearly be the duty of the law so to regard it, *whenever the idea was one that had an important value in the market*. And *why* should the law so regard it? First, because such would clearly be the intention of the owner of the idea. When he describes his idea to his neighbor, he no more *intends* to convey to him any valuable property right in the idea itself, *beyond a mere knowledge of it*, than he intends to convey a valuable property right in a corporeal commodity, *beyond a mere knowledge of it*, when he describes such commodity to his neighbor. His intention, in either case, is simply to convey a bare knowledge of the idea, or of the corporeal commodity, *and nothing more*. And his intention should be taken for what it really is, *and for nothing else, if that be possible*.

A second reason to the same point is this. The one, to whom the owner communicates an idea, *had no claim to it*. He did not produce it. He pays nothing for it. He had no claim upon the owner to furnish it to him. *The owner did him a kindness, by giving him a simple knowledge of the idea, without any other right*. These are sufficient reasons why, after the idea is made known to him, he should claim no further rights in it, than the owner intended to convey to him. They are also sufficient rea-

sons why the law should, *if it be possible*, give such a construction, and only such a construction, to the act making known the idea, as the owner intended.

But since the act of making an idea *known*, necessarily involves the giving *possession* of it, the law *must, perhaps*, necessarily regard it as giving *possession* of it. If so, the owner, when he makes an idea *known*, must take all the consequences that *necessarily* follow from giving *possession* of it. We have seen what those consequences are, to wit. Where the idea has a merely trivial market value, the presumption clearly is, that the owner *intends* to part with his exclusive right of property in it. Where the idea has a large market value, the presumption clearly is, that he does *not* intend to part with his exclusive right of property in it. But where the market value of the idea is neither very important, nor really unimportant, no very strong presumption either way can arise from the simple fact of giving possession; and the owner's intention will be open to be determined by other circumstances.

But there are very weighty reasons of policy, as well as of justice, why the fact, that a man makes known an idea, or gives possession of it, should, in no case, where his intentions are at all doubtful, be construed unfavorably to his retaining his right of property in it; and why the rule should at least be as stringent, in favor of the owner, in the case of ideas, as in the case of material commodities of the same market value. These reasons are as follows.

First. Because it is manifestly contrary to reason and justice to presume that a man intends any thing, adverse to his own rights and his own interests, where no cause is shown for his doing so. This reason is as strong in the case of an idea, as in the case of a material commodity.

Secondly. Because men will be thereby discouraged from producing valuable ideas; from making them known; from offering them for sale; and from thereby enabling mankind to purchase, and have the benefit of them. The law should as much

encourage men to produce and make known valuable ideas, and offer them for sale, as it does to produce and make known valuable material commodities, and offer them for sale. It should therefore as much protect a man's right of property in a valuable idea, after he has produced it, and made it known to the public, and offered it for sale, as it should his right of property in a valuable material commodity, after he has produced it, and advertised it to the public. It would be no more absurd or atrocious, in policy, or in law, to deprive a man of his right of property in a valuable material commodity, as a penalty for exhibiting or offering that commodity to the public, than it is to deprive a man of his right of property in a valuable idea, as a penalty for bringing that idea to the knowledge of the public. If men cannot be protected in bringing their valuable ideas into the market, they will either not produce them, or will keep them concealed as far as possible, and strive to realize some profit by using them as far as they can, in private. In short, they will do just as men would do with their material commodities, if they were not protected in making them known to the public — that is, either not produce them, or keep them concealed, and use them in private, instead of offering them for sale to those who would purchase and use them, for their own benefit, and the benefit of the public. The law cannot *compel* men to produce valuable ideas, and disclose them to the world; it can only *induce* them to do it. And it can induce them to do it, only by protecting their right of property in them, or by making some other compensation for them.

Thirdly. The law ought not only to encourage mankind to trade with each other, but it ought to encourage them to trade honestly, intelligently, and therefore beneficially; and not knavishly, blindly, or injuriously. It ought, therefore, to encourage them to exhibit their commodities, and make known their true qualities in the fullest manner, to those who propose to become purchasers. If, therefore, a man have an *idea* to sell, he should be encouraged to make its true character and value fully known to the intended purchaser. But this he can do only by putting

the idea into the *possession* of the proposed purchaser. This act, then, which the interests of the proposed purchaser require, and which the owner consents to for the satisfaction, safety, and benefit of the proposed purchaser, certainly ought not to be construed against the rights of the owner; any more than the fact, that the owner of any material commodity gives it into the hands of a proposed purchaser, in order that the latter may inspect it, and judge whether it be for his interest to purchase it, ought to be construed unfavorably to the rights of the owner.

No law could be more absurd in itself, or hardly more fatal to honesty in trade, or even more destructive to trade itself, than a law, that should forbid the owner of a commodity to exhibit it, submit it freely to inspection, or even give it into the *possession* of a proposed purchaser, for examination and trial, except under penalty of thereby forfeiting his right of property in it. Commercial society could not exist a moment under such a principle. In fact, neither civil, social, nor commercial society could exist under it. And the principle is just as absurd, fatal, and destructive, when applied to ideas, as it would be if applied to material commodities.

In the traffic in *material* commodities, the law encourages honesty, confidence, disclosure, examination, inspection, and intelligence, by protecting the rights of the true owner, even though he surrender the commodity into the *exclusive* possession of a man, who proposes to purchase it. This is more than is *ever* necessary in the case of an *idea*; for there the owner *always* retains an *equal possession*, with the individual to whom he communicates the idea. How absurd and inconsistent, then, is it to say that the owner of the *idea*, loses his right of property in it, by allowing another *simply to participate with himself in its possession*, while the owner of a material commodity retains his right of property, notwithstanding he surrender to another the *exclusive* possession.

If the owner of a house admit a person into his house, either on business, or as a friend, or for inspection as a proposed pur-

chaser, he thereby as much admits such person to an *equal possession with himself of the house*, as the owner of an idea, admits a man to an equal possession of it, when he admits a friend, neighbor, or proposed purchaser, to a knowledge of that idea. And there is as much foundation, in justice, and in reason, for saying that the owner of the house thereby loses his exclusive right of property in his house, as there is for saying that the owner of the idea thereby loses his exclusive right of property in his idea.

So also, if the owner of a farm admit a man upon his farm, in company with himself, *for any purpose whatever*, he as much admits such person to an *equal possession* of it, *for the time being*, as the owner of an idea admits a man to an equal possession with himself, when he admits such person to a knowledge of that idea. And there is as much foundation, in justice, and in reason, for saying that the owner of the farm thereby loses his exclusive right of property in his farm, as there is for saying that the owner of the idea thereby loses his right of property in his idea.

It cannot be said that there is any want of analogy between these cases of the house and the farm, on the one hand, and of the idea on the other, for the reason that, in the cases of the house and the farm, the joint possession is *temporary*, but that, in the case of the idea, the joint possession is necessarily *perpetual*—(inasmuch as a man *cannot* at will be dispossessed, or dispossess himself, of an idea, after he has once become possessed of it). This difference in the cases is wholly immaterial to the principle, for the reason that, if equal possession were to give equal right of property, *it would give it on the first moment of possession*; and the one, who should thus acquire an equal right of property, would have *thenceforth* as much right to *make his possession perpetual*, as would the original owner.

This conclusion is so obvious and inevitable, and would be so fatal to all rights of property, that where one man thus admits another upon his premises, the law does not even consider it a

case of joint possession, *for any legal purpose whatever, except to protect the person admitted from violence during, and on account of, such occupation as he has been voluntarily admitted to. But for any purposes of property, control, use, ownership, or dominion, against the will of the true owner, it is not, in law, a case even of joint possession.* And if this be a sound principle, in the case of the house, or the farm—as it unquestionably is—and one indispensable to the co-existence of social life and the rights of property—it is an equally sound principle, when applied to an idea.

On this principle, then, a person admitted, by its owner, to the knowledge or possession of an idea, without any intention, on the part of the owner, to part with any right of property in it, is not entitled even to be considered a joint possessor of the idea, *for any legal purpose whatever, beyond the intention of the owner, except for the simple purpose of giving him a lawful protection from violence during, and on account of, such a possession as the owner has voluntarily admitted him to.* For any of the purposes of property, control, use, or dominion, *against the will of the true owner,* he is no more in the *legal possession* of the idea, than, in the cases before supposed, the man admitted by the owner into a house, or upon a farm, is in legal possession of such house or farm.

In short, the general principle of law is, that where one man intrusts his property in another man's possession, the latter has no right whatever to *use it, otherwise than as the owner consents that he may use it.* Not being the owner of it, he can exercise no kind of dominion over it, except such as the owner has given him permission to exercise. If he do use it, without the owner's permission, and any inconvenience be occasioned to the owner thereby, or the property come to any harm in consequence, he becomes legally liable to pay the damages. Or if he use the property for purposes of profit, without the owner's permission, the profits belong to the owner of the property, and not to the one having possession of it.

These are the general principles of the law of nature in regard to property intrusted by one man to the keeping of another. And they are as applicable to incorporeal property — ideas, for example — as they are to corporeal property.

The only exception to these principles, that is of sufficient importance to be noticed here, is where the keeping of another's property is attended with expense, as a horse, for example, which must be fed. In such a case, if the owner have made no provision for the support of the horse, the man having possession of him may use him enough to pay for his keep. But the principle of this exception would not apply at all to intellectual property — an idea, for example — which one man had intrusted to another; because the keeping of it would be attended with no expense. The man having it in his possession, therefore, would have no right to use it, without the owner's consent.

The conclusion, therefore, is, that when one man communicates a *valuable* idea to another, without any intention of parting with his exclusive right of property in it, the latter receives a simple knowledge, or naked possession, of the idea, without any right of property, use, control, or dominion whatever, beyond what the true owner intended he should have.

To conclude the argument on this point. There is one monstrous inconsistency, or more properly one monstrous absurdity, in the laws, *as at present administered*, relative to intellectual property. It is this — that *unknown* ideas are legitimate objects of property and sale; but that *known* ideas are not.

Thus the law, as now administered, holds, that if a man can make a contract, for the sale of his ideas, *without first making them known, or enabling the purchaser to judge of their value, or of their adaptation to his use*, they are a sufficient consideration for the contract, and consequently legitimate objects of property and sale; and the contract is binding upon the purchaser; and the seller, upon the delivery of the ideas, can compel the payment of the price agreed upon for them. But if he first make his ideas known, so as to enable the proposed purchaser to see what

he is buying, and judge of their value, and their adaptation to his uses, they are no longer legitimate objects of property or sale; are an insufficient consideration for a contract; and the owner thereby loses his power of making any binding contract for the sale of them; and loses his exclusive property in them altogether.

Thus the principle of the law, *as now administered*, clearly is, that if a man buy ideas, *without any knowledge of them*, he is bound to pay for them. But if he buy them, *after full inspection, and proof of their value*, he is not bound to pay for them. They are then no longer merchandise. In short, the principle acted upon is, that *unknown* ideas are objects of property and sale; but *known* ideas are not.

To illustrate. If a man contract with the publisher of a newspaper, to furnish him a sheet of ideas, daily or weekly, for a year, for a given sum — the ideas themselves being of course unknown at the time of the contract, and their intrinsic value being necessarily taken on trust — *such* ideas are legal objects of property and sale, and a sufficient consideration for the contract; and the contract is therefore binding upon the purchaser, even though the ideas, when they come to be delivered, should prove not to be worth half the price agreed upon. So, too, if a man contract with a lawyer to furnish him legal ideas; or with a preacher to furnish him religious ideas; or with a physician to furnish him medical ideas — the ideas themselves being upknown at the time of the contract, and their value therefore necessarily taken on trust — *such* ideas are a sufficient consideration for a contract; and consequently legitimate objects of property and sale; and must be paid for, on delivery, even though they should prove to be not half so valuable as the purchaser had anticipated they would be. But if a man have a mechanical idea to sell, and for the satisfaction of the proposed purchaser, exhibit it to him, and demonstrate its value, and its adaptation to his purposes, before asking him to purchase it, the law, *as now administered*, holds that it is no longer the exclusive property of the original

owner; no longer an object of sale between these parties; but has already become the joint property of both, without any consideration for it having passed between them.

Now, it is plain that this principle is as false in policy, as false in ethics, and as false in reason, as would be the same principle, if applied to corporeal commodities — making them lawful objects of property and sale, provided contracts for them be entered into before the purchaser sees them, or knows what they are; but no longer objects of property or sale, after those, who wish to purchase and use them, shall have inspected them, and become satisfied of their value, and adaptation to their purposes.

It cannot be said that there is a difference between the two classes of cases — that in the case of the lawyer, the preacher, and the physician, they sell *not their ideas, but the labor of producing them, and of making them known, or delivering them*; whereas in the case of the inventor, he seeks to sell, *not the labor of producing, or making known, or delivering his idea, (for that labor has already been performed on his own responsibility,) but the idea itself*. This cannot consistently be said, because it is really the idea only that is paid for, or for which pay is claimed in either case. The labor, neither of producing, nor of making known, or delivering ideas, has any intrinsic value, independently of its products — that is, independently of the ideas produced, made known, or delivered, by it. We pay for labor, whether intellectual or physical, only for the sake of its products. We do indeed *call* it paying for *labor*, instead of paying for its *products*. And, in one sense, we do pay for the *labor*, rather than for its *products*; because we pay for the labor, taking our risk whether its products will be of any value. Yet, in reality, it is only the *products* of the labor, that we have in view, when we buy the labor. No one buys labor *for its own sake*; nor for any other reason than that he may thereby become the owner of its products. By buying the labor, one makes himself the owner of its products; and this is the whole object of buying the labor itself. The difference, therefore, between buying labor, and buy-

ing the products of labor, is a difference of *form* merely, and not of substance. The products of labor are all that make labor of any value, and all that are really had in view when the labor is purchased.

This difference in the two cases — that is, between selling ideas themselves, and selling the labor of producing, and making known, or delivering, ideas — is immaterial for still another reason, viz. : that it would be absurd to say that the intellectual labor of producing ideas, or the physical labor of speaking, printing, or otherwise delivering them, was a legitimate object of property or sale, unless the ideas themselves, thus produced and delivered, were also legitimate objects of property and sale. To say this would be as absurd as to say that the labor of producing or delivering corporeal commodities, was a proper object of property and sale; but that those commodities themselves were *not* proper objects of property or sale.

To be consistent, therefore, the law should either hold, that the labor of producing, and making known, or delivering, ideas, is not an object of property and sale; or else it should hold that the ideas themselves are objects of property and sale.

The object of buying *known* ideas, and of buying the labor that produces, and makes known, or delivers *unknown* ideas, is the same, viz. : *to get ideas for use*. And to say that an idea is not as legitimate an object of property and sale, as is the labor of producing or delivering it, is just as absurd as it would be to say that wheat is not itself a legitimate object of property or sale, but that the labor of producing and delivering wheat *is* a legitimate object of property and sale.

All intellectual labor, therefore, that is employed in producing ideas, and all physical labor, (including manuscript writing, and printing, as well as speaking,) that is employed in making known ideas, should be held to be no subjects of property or sale, and no sufficient considerations for a contract; or else all the ideas produced by intellectual labor, or delivered or made known by physical labor, should also be held to be legitimate subjects of

property and sale, and sufficient considerations for contracts. And if they are legitimate subjects of property and sale, and sufficient considerations for contracts, *before* they are made known to a proposed purchaser, and *before* he can see what they are, or judge of their value, or of their adaptation to his use, it is absurd and inconsistent to say that they are not at least equally legitimate subjects of property and sale, and quite as valid considerations for contracts, *after* they have been made known to a proposed purchaser, and he has examined them, seen what they are, and ascertained their value, and their adaptation to his use.

The argument of *possession* is of no force against this view of the case, because, as we have seen, the possession given, is simply the knowledge, or *naked possession*, of the idea, without any *right* of use, property, contract, or dominion, beyond what the true owner *intended* to convey, when he made the idea known.

SECTION III.

Objection Third.

A third objection, that has been urged against a right of property in ideas, any longer than they remain in the exclusive possession of the originator, is, that ideas are of the nature of wild animals, which, being once let loose, fly beyond the control of man; thus interposing an obstacle, *in a law of their own nature*, to the maintenance of any dominion over them, after they have once been liberated.

This objection is utterly fanciful and unfounded. The resemblance between a flying thought, and a flying bird, may be sufficiently striking for purposes of poetry and metaphor, but has none of the elements of a legal analogy. A thought never flies. It goes only as it is carried by man. It never escapes beyond the power of men; but is always wholly under their control; having no existence, nor habitation, except in their minds.

Renouard, in his argument against the right of property in ideas, asks, "Who can doubt that thought, *by its own essence*, escapes exclusive appropriation?"* I answer the question by asking, Who can pretend, for an instant, that thought *does*, "*by its own essence*," or *by any law of its own nature*, escape exclusive appropriation? Nothing is, by its own essence and nature, more perfectly susceptible of exclusive appropriation; than a thought. It originates in the mind of a single individual. It can leave his mind only in obedience to his will. It dies with him, if he so elect. And, as matter of fact, doubtless ninety-nine out of every hundred of every man's thoughts do really die with him, without having ever been in the possession of any other than his single mind.

When a thought does go beyond the mind of its original possessor, it goes only to such minds as he wills to have it go to. And it can then leave their minds only in obedience to their wills; and can go only to such minds as they choose to deposit it with.

A thought, then, *never*, "*by its own essence*," or *by any law of its own nature*, goes out of the exclusive possession of the mind that originated it. It never "*escapes*" from the custody, either of its first owner, or of any subsequent owner or possessor. If it be regarded as a living creature, it is no *wild* animal; but one thoroughly domesticated; neither capable of going, *by its own powers*, nor ever seeking to go, beyond the limits assigned for its habitation.

Is not a thought, then, "by its own essence" and nature, a subject of "exclusive appropriation?" Nothing is more self-evident than that it is. Neither wood nor stone is more susceptible of "exclusive appropriation," than a thought. And if it be susceptible of exclusive appropriation, it is a legitimate subject of property.

* There is a translation of *Renouard's* Argument in the *American Jurist*, No. 43, (Oct. 1839,) p. 39.

This conclusion is not impaired at all by the fact, that, if the owner of an idea do but once give it into the possession of another person, it is then liable and likely, *not to go of itself, but to be carried*, to millions of minds. The owner understands all this when he makes his thought known; and in many, perhaps most, cases desires and intends it—knowing that no right of property or use will go with the idea; but that the more extensive the knowledge or possession of it, the more numerous will be those, who will come to him to buy the idea itself, or the right of using it.

But perhaps it will be said that an idea, once disclosed, *though in confidence*, to a single individual, may be given by him, *against the will of the true owner*, into the possession of mankind at large. This is true, but it can only be done *wrongfully*; and then no right of property or use goes with the idea, unless in the case of what the law calls an innocent purchaser for value. And the wrong-doer is responsible for the wrong, if any injury accrue to the owner in consequence of it. The principle is precisely the same as in the case of a corporeal commodity, intrusted by its owner to the keeping of another. If the person thus intrusted, prove false to his trust, and deliver the commodity over to a third person, against the will of the owner, no right of property goes with it, (unless to an innocent purchaser for value,) and the wrong-doer is responsible for his wrong, if the owner of the commodity sustain any loss in consequence. And this principle is just as sound, when applied to an idea, as when applied to a corporeal commodity.

SECTION IV.

Objection Fourth.

It is said that ideas have no ear-marks, by which their ownership may be known. And hence it has been inferred that ideas cannot be subjects of ownership; though it would doubtless

puzzle any one to show any connexion between the premises and the conclusion.

This objection is as frivolous as the others; for neither has corporeal property *usually*, if ever, any ear-marks by which the world *at large* can know *who* is the owner. Nevertheless, when mankind see corporeal wealth, as a horse, a house, or a farm, for example, which bears evidence of human labor, and which has too much market value to justify the idea that the owner would voluntarily abandon it, they *infer* that it *has* an owner, though he may be at the time unknown to them. So it should be with an idea. When a man has communicated to him an idea, or a device, that he never knew before, — as that of a steam engine, for example — or any other that has such market value, that he cannot reasonably suppose the owner would gratuitously part with his right of property in it, he ought, as a rational man, to infer that it *has* an owner, though it have no proprietary mark, by which its owner can be known to a stranger. On the other hand, if the idea be one that has so little market value, that the author would not be likely to make it an article of merchandise, or to set any value upon it as an exclusive property, he may reasonably infer that it is free to any one who chooses to use it.

If it be said that an idea has no mark, by which its own producer or proprietor can know it, the objection is unfounded; since a man *does* know his own ideas, as well as he knows either the faces of his children, the animals he has reared, or the house he has built. In this respect ideas have the advantage over very many kinds of corporeal commodities. For example, a man cannot distinguish his own piece of *coin*, from the hundreds of thousands of others stamped in the same mould. Neither can a man often, if ever, identify his own wheat, oats, or other grain, by a simple inspection of the grain itself. He can identify it only by circumstances. And it is the same with a very great variety of corporeal commodities.

If it be said that, for want of ear-marks, the producer of an idea cannot establish his authorship of it, *to the satisfaction of*

the legal tribunals, the answer is, that, notwithstanding the want of ear-marks, that very thing is now done every day; partly by means of records, where men sometimes register their ideas, and thus *make* the evidence, before making the ideas known to the world; and partly by a great variety of other evidence, which such cases generally admit of.

If, however, either from the nature of ideas, or any other cause, a man fail to identify an idea as his, to the satisfaction of the tribunal that tries the question, he must lose his right of property in it; the same as men must do, when they lack evidence to establish their right to corporeal commodities, which are really theirs. But because a man may *sometimes*, for want of evidence, fail to identify an idea as his, when it really is his, that is no reason why he should not hold his property in all those ideas, which he *can* prove, to the satisfaction of the legal tribunals, to be his. In short, the same rules, on this point, are applicable to ideas, that are applicable to corporeal commodities.

SECTION V.

Objection Fifth.

A fifth objection, that is urged to a man's having a right of property in his inventions, is, that the course of events, and the general progress of knowledge, science, and art, suggest, point to, contribute to, and aid the production of, certain inventions; and that it would therefore be wrong to give to a man an exclusive and perpetual property, in a device, or idea, which is not the unaided production of his own powers; but which so many circumstances, external to himself, have contributed and aided to bring forth.

This objection is as short-sighted as the others. If sound, it would apply as strongly against the right of property in material,

as in intellectual wealth. But has a man no right of property in the gold he finds and gathers in California, because the course of events pointed him thither? and the general progress of knowledge, science, and art supplied railroads and steamboats to carry him there? and tools to work with after he arrived? As well might this be said, as to say that a man should have no property in his idea, because the course of events, and the progress of knowledge, pointed him to it, and enabled him to reach it.

The course of events, and the general progress of knowledge, science, and art, as used in this objection, have no other meaning than this—They mean simply all the various kinds of knowledge that have come down to us from the past—(including in the *past*, not merely the *ancient* time, but all past time up to the present moment).

The sum of this argument, therefore, is, that authors and inventors have the benefit of all the knowledge that has come down to us, to aid them in producing their own writings and discoveries; and therefore they should have no right of property in their writings and discoveries.

If this objection be sound, against the rights of authors and inventors to their *intellectual* productions, then it will follow that other men have no right of property in any of those *corporeal* things, which the knowledge, that has come down to us, has enabled them to produce, or acquire. The argument is clearly as applicable to this case as the other.

It is no doubt true, that the course of events, and the general progress of knowledge, science, and art, *do* suggest, point to, contribute to, and aid the productions of, *many*, possibly *all*, inventions. But it is equally true that the course of events, and the general progress of knowledge, science, and art, suggest, point to, contribute to, and aid the production and acquisition of, all kinds of *corporeal* property. But that is no reason why *corporeal* things should not be the property of those, who have produced or acquired them. Yet the argument is equally strong against the right of property in *corporeal* things, as in intellectual

productions. If, because authors and inventors, in producing their writings and discoveries, had the advantage of the course of events, and the general progress of knowledge, in their favor, they are to be denied the right of property in the fruits of their labors, then every other man, who has the course of events, and the progress of knowledge, science, and art in his favor, (and what man has not?) should, on the same principle, be denied all ownership of the fruits of his labor—whether those fruits be the agricultural wealth he has produced, by the aid of the ploughs, and hoes, and chains, and harrows, and shovels, which had been invented, and the agricultural knowledge which had been acquired, before his time; or whether they be the houses or ships he has built, through the aid of the axes, and saws, and planes, and hammers, which had been devised, and the mechanical knowledge and skill that had been acquired, before he was born.

But has the farmer no right of property in his crops, because in producing them, he availed himself of all the agricultural implements, and agricultural knowledge, which other men had devised, and left for his use? Has a man no right of property in his house, or his ship, because, in building it, he availed himself of all the axes, and wheels, and saws, and planing machines, which other men had invented? Have the manufacturers of cloths no right of property in their fabrics, because, in the manufacture of them, they use all the looms, and spindles, and other machinery, which were invented and furnished to their hands by others? Has the printer no right of property in his books or newspapers, because, in producing them, he had the aid of the arts of paper making, the inventions of letters, of types, and of printing presses? Or because the public demand for books and papers, the course of events, and the progress of knowledge, suggested, pointed to, and enabled him to command capital for, the production of such articles as he manufactures?

The course of events and the progress of knowledge, science, and art—in other words, all the various kinds of knowledge that have come down to us—are mere tools, which the past has put

into the hands of the present, for doing the work that is now to be done. These tools, so far as they are now common property, are free to all; and each one avails himself of such as he finds best adapted to the work he has in hand; whether that work be the growing of agricultural products, the building of houses or ships, the manufacture of clothing, the printing of books, or the invention of steam engines, or electric telegraphs. And no one, of the present day, can be justly denied his right of property in the fruits of his labor, because, in producing them, he used any or all these tools which the past has supplied for the benefit of those who are now alive. The dead have no right of property in either the intellectual or material things they have left to the living; yet *they* only could have the right to object to the use of what once was theirs. The living all stand on the same level, in regard to their right to use these now common tools, for the production of wealth. And their individual rights, to the products of their labor, are not at all effected by their use of these tools.

SECTION VI.

Objection Sixth.

A sixth objection is, that *since* "the course of events, and the general progress of knowledge, science, and art, suggest, point to, contribute to, and aid the production of, certain inventions," as mentioned in the preceding section, it is to be presumed that, if a particular invention were not produced by one mind, it soon would be by another; and that, because one man happens to be the first inventor, is no reason why he should have an exclusive and perpetual property in a device, or idea, which would have been brought forth, before a very long time, by some other mind, if it had not been done by him.

Admitting, for the sake of the argument, that B would have

produced a certain idea, if A had not done it before him, the objection is of no more weight, in the case of intellectual property, than in the case of material property. If A had not taken possession of a certain tract of wild land, and converted it into a farm, some one would have come after him, and done it. But that is no reason why the farm does not now belong to A.

If A had not produced certain commodities for the market—agricultural commodities, for example—the market would have been supplied by some one else. But that plainly is no reason why the commodities produced by the labor of A, should not be held to be his property.

If a man is to be denied any right of property in the fruits of his labor, merely because it is presumed that, if he had not performed the labor, some other person would, no man would be entitled to property in the fruits of his labor; for in few cases, if any, could he prove that no other person would ever have performed the labor, if he had left it undone.

The same principle, that applies to material things, in this respect, applies to ideas.

The principle goes to the destruction of all rights of property in the fruits of man's labor, because if A, as first producer, is to be deprived of the fruits of his labor, merely for the reason that B would have produced the same things, if A had not, then B certainly, as second producer, ought to have no property in them, for the reason that, if he had not produced them, C would have done so. Admitting that B would have produced the same things that A has done, he could have no better right to them than A now has. So that the principle goes to the destruction of all rights of property in nearly or quite all material, as well as intellectual, things.

But is it at all true, or at all to be presumed, that if A had not produced a certain invention, B would have done it? It may, in a few cases, seem highly *probable*, though it cannot in the nature of things be certain, that particular inventions would have been made, within a short period, if they had not been made at the

times they were. Nevertheless, these things are, *in general*, matters resting wholly in vague conjecture, and not at all on proof. It may be reasonably certain that, under favorable conditions, mankind at large will progress in the arts and sciences; that many new and valuable inventions will be made *by somebody*. But what those inventions will be, cannot be known beforehand. It surely is not easy, even if it be possible, to determine that any given invention would have been produced in a hundred, or a thousand years, if it had not been produced by the particular individual, who actually produced it. Hundreds and thousands of years have rolled away *without* its being produced; and how can it be known, or even confidently asserted, that hundreds and thousands more might not have rolled away, without its being produced, had it not been for the existence of the single mind that actually brought it into existence? Who can suppose that the poems of Homer, Shakespeare, and Milton, or the orations of Demosthenes, Cicero, and Burke, would ever have seen the light, had not Homer, Shakespeare, Milton, Demosthenes, Cicero and Burke themselves existed? Certainly no one can imagine such things to have been within the range of any rational probability. Each mind produces its own work; and who can say that any other mind would have produced the same work that one mind has produced, if the latter had not preoccupied the field?

The same theory no doubt holds good to a considerable extent, (who can say it does not hold good to all extent?) in all other fields of intellectual labor, as well as in poetry and eloquence? Perhaps it will be said that some devices are so simple, and lie so on the surface of things, that they *must* soon have been discovered by somebody, if the actual discoverer had never existed. But simple ideas, that seemed to have lain on the surface of things, almost within the sight of every one, have been passed by unseen for ages. Who can say that they would not have continued to be passed by for ages more, but for the fortunate, ingenious, or keen-sighted discoverers, who actually first laid their eyes directly upon them? It certainly seems to be the *general*

order of nature, in regard to intellectual productions, that each individual of the human race has his peculiar work allotted to him; not that one is created to do what another has left undone. *

Who can say, or believe, that if Alexander, and Cæsar, and Napoléon had not played the parts they did in human affairs, there was another Alexander, another Cæsar, another Napoléon, standing ready to step into their places, and do their work? Who can believe that the works of Raphael and Angelo could have been performed by other hands than theirs? Who can *affirm* that any one but Franklin would ever have drawn the lightnings from the clouds? Yet who can say that what is true of Alexander, and Cæsar, and Napoléon, and Raphael, and Angelo, and Franklin, is not equally true of Arkwright, and Watt, and Fulton, and Morse? Surely no one.

It is no doubt both easy and truthful to say, that certain events point the way to, and prepare the way for, certain other events — to discoveries, as to all other things. But it is also no doubt equally true that the course of events, and the progress of knowledge have, through all time, pointed the way to, and prepared the way for, countless thousands of other inventions that have never been made; inventions, that have not been made, *simply because the right man was not there to make them; or he had not the proper facilities, or the necessary inducements, to make them.* If ten thousand times as many discoveries had been made, as have been actually made, we should have said, with equal reason, and with equal truth, that the course of events, and the progress of knowledge, had pointed the way to *them*, and prepared the way for *them*, as we now say that the course of events, and the progress of knowledge, pointed the way to, and prepared the way for, the discoveries already made; and that, if they had not been made at the time they were, they would no doubt soon have been

* There are doubtless exceptions to this rule, for two men have been known to invent the same thing, without any aid from each other. But such cases are very rare.

made by others? What, then, is the value of any such objection as this, to the rights of authors and inventors?

But even if a second man would have made a certain invention, if the first had not — what of it? May not the invention as well be the property of the first man, as of the second?

The first man having done the work, the second man has no need to do it; but is left free to perform some other labor, of which he will enjoy the fruits, in the same way that the first enjoys the fruits of *his* labor. Where, then, is the injustice?

SECTION VII.

Objection Seventh.

It is said that two men sometimes make the same invention; and that it would therefore be wrong to give the whole invention to one.

The answer to this objection is, that the fact that two men produce the same invention, is a very good reason why the invention should belong to both; but it is no reason at all why both should be deprived of it.

If two men produce the same invention, each has an equal right to it; because each has an equal right to the fruits of his labor. Neither can deny the right of the other, without denying also his own. The consequence is, that they must either use and sell the invention in competition with each other, or unite their rights, and share the invention between them. These are the only alternatives, which their relations to each other admit of. And it is for the parties themselves, and not for the government, to determine which of these alternatives they will elect. Each holds the whole invention by the same title — that of having produced it by his labor. Neither can say that the title of the other is defective, or in any way imperfect. Neither party has

any right, therefore, to object to the other's using or selling the invention at discretion. And each, therefore, can lawfully and freely use and sell the invention, (and give a good title to the purchaser,) without any liability to answer to the other as an infringer. In short, the parties stand in the relation of *competitors* to each other; each having an equal and perfect right to use and sell the invention, in competition with, and in defiance of, the other. But as such competition would probably not be so profitable to either of the parties, as a union of their competing rights, such a union would doubtless generally be agreed upon by the parties themselves, without any interference from the government.

SECTION VIII.

Objection Eighth.

It may be urged that, however just may be the principle of the right of property in ideas, still the difficulty of determining who is the true author of an invention, or idea, after that invention or idea has become extensively known to mankind, interposes a *practical* obstacle to the maintenance of any individual right of property in any thing so subtle, intangible, and widely diffused, as such an invention, or idea.

This was unquestionably a very weighty and serious objection, in ruder times, when letters were unknown to the mass of the people, and when a thought was carried from mind to mind, unaccompanied by any reliable proof of the first originator. The facilities and inducements thus afforded to fraudulent claims in opposition to those of the true owner, and the difficulty of combatting such frauds, by the production of authentic and satisfactory proofs, *must* have made it nearly or quite impossible to maintain, *in practice*, the principle that a man was the owner of the thoughts he had produced, after he had once divulged them

to the world. And this, doubtless, is the *great* reason, perhaps the only reason, why the right of property in ideas was not established, in whole, or in part, thousands of years ago.

But this obstacle is now removed by the invention of records, whereby a man can have his discovery registered, before he makes it public, and thus establish his proprietorship, and make it known, both to the people, and the judicial tribunals.

SECTION IX.

Objection Ninth.

It is generally, if not universally, conceded that an inventor has a good *moral* claim for compensation for his invention; that he ought to be *suitably*, and even *liberally*, paid for his labor. At the same time, many, who make this concession, will say that to allow him an exclusive and perpetual property in his invention, would be transcending all reason in the way of compensation.

This view of the case, it will be seen, denies to the inventor all exclusive *right of property* in his invention. It asserts that the invention really belongs to the public, and *not* to himself. And it only advocates the morality and equity of *allowing* him such compensation for his time and labor as is *reasonable*. And it maintains that such compensation should be determined, *in some measure at least*, by the compensation which other men than inventors obtain for their time and labor. And this is the view on which patent laws generally are founded.

The objection to this theory is, that it strikes at all rights of property whatsoever, by denying a man's right to the products of his labor. It asserts that government has the *right, at its own discretion*, to take from any man the fruits of his labor, giving him in return such compensation only, for his labor, as the government deems reasonable.

If this principle be a sound one, it should be carried out towards all other persons, as well as inventors. A man, who has converted wild land into a productive farm, should be allowed to enjoy that farm only until the government thinks he is *reasonably* paid for his labor. Then it should be taken from him. There is no reason why the greatest benefactors of mankind should be made the victims of an arbitrary discretion, destructive of their natural rights to the fruits of their labor, when the rule is applied to no one else. Other men, who have never added one thousandth part so much to the general stock of wealth, are allowed to amass large fortunes, without the liability of having it all taken from them, except so much as the government may chance to think will be a *reasonable compensation* for the labor expended in acquiring it. What right has government to make any such distinction as that?

But what is "reasonable compensation" for a man's labor? It is what the labor is really worth, is it not? Most certainly it is. And what is any and all labor worth? *It is worth just what it produces, and no more.* This is the precise value of all labor. Labor that produces nothing, is worth nothing. Labor that produces much, is worth much. The labor, which it costs a man to pick up a pebble, is just worth a pebble, and no more. The labor, which it costs a man to pick up a diamond, is worth the diamond, by the same rule that the other labor was worth the pebble, and only a pebble. Each kind of labor is worth the thing it produces, *because it produces that thing.* There is no other way of determining the value of labor. There is no arbitrary standard of the value of labor; although when labor itself is sold in the market, (instead of the products of labor,) an arbitrary price is fixed upon it, either because the necessities of the laborer compel him to sell his labor at an arbitrary price, or because it is not known beforehand how much his labor will be worth. In such case, the purchaser of the labor takes his risk whether the labor will prove to be worth more or less than the price he pays for it. If it produce more than he pays for it, he

makes a profit. If it produce less, he makes a loss. But this price that he pays has nothing to do in fixing the real value of the labor. The *exact* value of the labor cannot be known until its products are known. Then the true value of the labor is determined and measured by the value of its products.

Labor has no value of itself. If it produced nothing, it would be worth nothing. Of necessity, therefore, every separate act of labor is worth precisely what it produces — be it little or much. A man, therefore, does not receive the full value of his labor, unless he receive the whole of its products.

Those, who talk about the justice of the government's *allowing* an inventor *reasonable compensation* for his labor, talk as if the government had *employed* the inventor to labor for it for wages — the government taking the risk whether he invented any thing of value, or not. In such a case, the government would be entitled to the invention, on paying the inventor his stipulated, or reasonable, wages. But the government does not *employ* an inventor to invent a steamboat, or a telegraph. He invents it while laboring on his own account. If he succeed, therefore, the whole fruits of his labor are rightfully his; if he fail, *he* bears the loss. He never calls upon the government to pay him for his labor that was *unsuccessful*; and the government never yet undertook to pay for the labor of the hundreds and thousands of unfortunate men, who attempted inventions, and failed. With what force, then, can it claim to seize the fruits of their *successful* labor, leaving them only what *it* pleases to call a *reasonable compensation, or reasonable wages*, for their labor? If the government were to do thus towards other men generally than inventors, there would be a revolution instantly. Such a government would be universally regarded as the most audacious and monstrous of tyrannies.

If a man, while laboring for himself, and at his own risk, have produced *much* wealth, with *little* labor, it is *his good fortune*, or the result of his good judgment, and superior powers. No one

but himself has any claim upon the products of his labor; and it is the sheerest robbery to take them from him without his consent.

SECTION X.

Objection Tenth.

Another theory, advocated by some persons, is, that abstractly, and on principles of natural justice, men have the same right of property in their ideas, that they have in any other products of their labor; but that this property requires peculiar and extraordinary protection; and that the present laws on the subject are in the nature of a compromise between the government and the inventor; the government giving extraordinary protection for a time, and the inventor, in consideration of that protection, giving up his property at the end of that time.

There is plainly no foundation for this theory. In the first place, the government, instead of giving extraordinary protection, does not give even ordinary protection, to intellectual property, during the time for which it pretends to protect it. The only protection, that can be claimed to be extraordinary, is the benefit of records. But this certainly is not extraordinary, for it is enjoyed in common with landed property universally. Besides, the expenses of these records are paid, not by the government, but by those who are to derive a benefit from them. They are therefore no boon, no privilege, no token of extraordinary favor, on the part of the government.

But even if intellectual property were allowed extraordinary protection, that would be no excuse for taking from the owners the property itself, at the end of a limited period. Merchandise in cities is allowed an extraordinary protection, in the shape of a night police. But no one ever conceived that that was any reason why the owners should not have a perpetual property in that

kind of wealth. Merchandise on the ocean also enjoys an extraordinary protection, in the shape of a navy to guard it against pirates and other enemies. But no one ever deemed that to be any reason for making such property free plunder, after the owners had enjoyed it for fourteen years. Yet there would be as much reason and justice in outlawing such property, after a specified time, as there are in outlawing intellectual property.

Various kinds of property, such as cotton and woollen manufactures, coal, iron, sugar, hemp, wool, breadstuffs, &c., &c., have, at different times, enjoyed not only all the ordinary protection against wrong-doers, but also an extraordinary protection against competition, by means of tariffs on imported commodities of like nature; whereby their prices were raised ten, twenty, thirty, and fifty per cent. above what would otherwise have been the regular market rates. The government has thus made it necessary that these advanced prices should be paid, by the people at large, to the holders of these kinds of property. Yet nobody ever proposed that, as a consideration for this extraordinary and unequal protection, the property itself, or a dollar of the capital invested in the production of it, should ever be confiscated to the government or people, at the end of fourteen years, or any other specified time. American merchant ships, in addition to being protected by an armed navy against pirates and other enemies, have been protected against the competition of foreign vessels, by laws designed to give them the monopoly of the coasting trade, and some other branches of navigation. Yet no one ever proposed that, as an offset for this extraordinary protection, all these ships should become public property at the end of fourteen years. Combustible property of all kinds is allowed an extraordinary protection, in the shape of fire companies maintained at the public expense. Yet no one ever suggested that as a consideration for this extraordinary protection, the property should be forfeited at a time fixed by law. All the property, that floats on the ocean, is allowed an extraordinary protection against shipwreck, in the shape of lighthouses and buoys, estab-

lished and maintained at the public expense, also of coast surveys and charts made at the public charge. But no one ever claimed that these were any reasons why the property itself should ever be forfeited by its owners. Yet intellectual property, which never enjoyed, for a moment, the slightest extraordinary protection whatsoever, is confiscated to the public, after being enjoyed for only a brief period by its honest owners and producers.

But, in the second place, intellectual property is not allowed even *ordinary* protection, during the time for which the government pretends to protect it. It is not allowed, like other property, the protection of criminal laws, under which the government not only pays the expense of prosecutions, but punishes violators by imprisonment. All property, except intellectual, is allowed the benefit of these criminal laws. But intellectual property is permitted the protection only of civil suits, in which the parties pay their own expenses, and in which, if judgment be obtained, it must often be against irresponsible men, who can make no satisfaction for their wrongs. In this case, the injured party has expended his money, without either obtaining redress against the individual wrong-doer, or procuring the infliction of any punishment to operate as a warning to others.

Intellectual property neither enjoys, nor requires, extraordinary protection. It asks simply to be placed on the same footing with other property, and to be allowed the benefit of any and all those ordinary contrivances for the protection of property, which are adapted to its needs, and calculated to give it security.

SECTION XI.

Objection Eleventh.

It is said that ideas are unlike corporeal commodities in this respect, namely, that a corporeal commodity cannot be completely and fully possessed and used by two persons at once, without

collision between them; and that it must therefore necessarily be recognized as the property of one only, in order that it may be possessed and used in peace; but that an idea may be completely and fully possessed and used by many persons at once, without collision with each other; and therefore no one should be allowed to monopolize it.

This objection lays wholly out of consideration the fact, that the idea has been produced by one man's labor, and not by the labor of all men; as if that were a fact of no legal consequence; whereas it is of decisive consequence; else there can be no exclusive right of property, in any of the productions or acquisitions of human labor. If one commodity, the product of one man's labor, can be made free to all mankind, without his consent, then, by the same rule, every other commodity, the product of individual labor, may be made free to all mankind, without the consent of the producers. And this is equivalent to a denial of all individual property whatsoever, in commodities produced or acquired by human labor.

In truth, the objection plainly denies that any exclusive rights of property whatsoever, can be acquired *by labor or production*; because it says that a man, who produces an idea—(and the same principle would apply equally well to any other commodity)—has no better right of property in it, or of dominion over it, than any and all the rest of mankind. That is, that he has no rights in it at all, *by virtue of having produced it*; but has only *equal rights in it with men who did not produce it*. This certainly is equivalent to denying, that any exclusive right of property, *can be acquired by labor or production*. It is equivalent to asserting, that all our rights, to the use of commodities, depend simply upon the fact *that we are men*; because it asserts that *all men* have equal rights to use a particular commodity, *no matter who may have been the producer*.

This doctrine, therefore, goes fully to the extent of denying all rights of property whatsoever, *even in material things* (exterior to one's person); because all rights of property in such

material things, have their *origin* in labor; (that is, either in the labor of production, or the labor of taking possession of the products of nature;) not necessarily in the labor of the present possessor; but either in his labor, or the labor of some one from whom he has, mediately or immediately, derived it, by gift, purchase, or inheritance.

The doctrine of the objection, therefore, by denying that any right of property can originate in labor or production, virtually denies all rights of property whatsoever, not merely in ideas, but in all material things, exterior to one's body; because if no rights of property in such things can be derived from labor or production, there can be no rights of property in them at all.

The ground, on which a man is entitled to the products and acquisitions of his labor, is, that otherwise he would lose the benefit of his own labor. He is therefore entitled to hold these products and acquisitions, in order to hold the labor, or the benefit of the labor, he has expended in producing and acquiring them.

The right of property, therefore, *originates* in the natural right of every man to the benefit of his own labor. If this principle be a sound one, it necessarily follows that every man has a natural right to *all* the productions and acquisitions of his own labor, be they intellectual or material. If the principle be not a sound one, then it follows, necessarily, that there are no rights of property at all in the productions or acquisitions of human labor.

The principle of the objection, therefore, goes fully and plainly to the destruction of all rights of property whatsoever, in the productions or acquisitions of human labor.

The right of property, then, being destroyed, what principle does the objection offer, as a substitute, by which to regulate the conduct of men, in their possession and use of all those commodities, which are now subjects of property? It substitutes only this, *viz. : that men must not come in collision with each other, in the actual possession and use of things.*

Now, since this actual possession and use of things, can be

exercised, only by men's bringing their bodies in immediate contact with the things to be possessed or used, it follows that the principle laid down, of men's avoiding collision in the possession and use of things, amounts to but this, viz. : that men's *bodies* are sacred, and must not be jostled ; but nothing else *is* sacred. In other words, men *own* their bodies ; but they *own* nothing else. Every thing else belongs, *of right*, as much to one person as to another. And the only way, in which one man can possess or use any thing, in preference to other men, is by keeping his hands constantly upon it, or otherwise interposing his body between it and other men. These are the only grounds, on which he can *hold* any thing. If he take his hands off a commodity, and also withdraw his body from it, so as to interpose no obstacle to the commodity's being taken possession of by others, they have a right to take possession of it, and hold it against him, by the same process, by which he had before held it against them. This is the legitimate and necessary result of the doctrine of the objection.

On this principle a man has a right to take possession of, and freely use, any thing and every thing he sees and desires, which other men may have produced by their labor — provided he can do it without coming in collision with, or committing any violence upon, the persons of other men.

This is the *principle*, and the only *principle*, which the objection offers, as a rule for the government of the conduct of mankind towards each other, in the possession and use of material commodities. And it seriously does offer this principle, as a substitute for the right of individual and exclusive property, in the products and acquisitions of individual labor. The principle, thus offered, is really communism, and nothing else.

If this principle be a sound one, in regard to material commodities, it is undoubtedly equally sound in relation to ideas. But if it be preposterous and monstrous, in reference to material commodities, it is equally preposterous and monstrous in relation to ideas ; for, if applied to ideas, it as effectually denies the right

of exclusive property in the products of one's labor, as it would if applied to material commodities.

It is plain that the principle of the objection would apply, just as strongly, against any right of exclusive property in corporeal commodities, as it does against a right of exclusive property in ideas; because, 1st, many corporeal commodities, as roads, canals, railroad cars, bathing places, churches, theatres, &c., can be used by many persons at once, without collision with each other; and, 2d, all those commodities — as axes and hammers, for example — which can be used only by one person at a time without collision, may nevertheless be used by different persons at different times without collision. Now, if it be a true principle, that labor and production give no exclusive right of property, and that every commodity, by whomsoever produced, should, without the consent of the producer, be made to serve as many persons as it can, without bringing them in collision with each other, that principle as clearly requires that a hammer should be free to different persons at different times, and that a road, or canal should be free to as many persons at once, as can use it without collision, as it does that an idea should be free to as many persons at once as choose to use it.

On the other hand, if it be acknowledged that a man *have* an exclusive right of property in the products of his labor, *because they are the products of his labor*, it clearly makes no difference to this right, whether the commodity he has produced be, *in its nature*, capable of being possessed and used by a thousand persons at once, or only by one at a time. *That* is a wholly immaterial matter, so far as *his* right of property is concerned; because *his* right of property is *derived from his labor in producing the commodity; and not from the nature of the commodity when produced*. If there could be any difference in the two cases, his right would be stronger, in the case of a commodity, that could be used by a thousand persons at once, than in the case of a commodity, that could be used only by one person at a time; because a man is entitled to be rewarded for his labor, according to the

intrinsic value of its products; and, other things being equal, a commodity, that can be used by many persons at once, is intrinsically more valuable, than a commodity, that can be used only by one person at a time.

Again. The principle of the objection is, that all things should be free to all men, so far as they can be, without men's coming in collision with each other, in the actual possession and use of them; and, consequently, that no one person can have any rightful control over a thing, any longer than he retains it in his actual possession; that he has no right to forbid others to possess and use it, whenever they can do so without personal collision with himself; and that he has no right to demand any equivalent for such possession and use of it by others. From these propositions it would seem to follow further, that for a man to withhold the possession or use of a thing from others, *for the purpose* of inducing them, or making it necessary for them, to buy it, or rent it, and pay him an equivalent, is an infringement upon their rights.

The principle of property is directly the reverse of this. The principle of property is, that the owner of a thing has absolute dominion over it, *whether he have it in actual possession or not, and whether he himself wish to use it or not*; that no one has a right to take possession of it, or use it, without his consent; and that he has a perfect right to withhold both the possession and use of it from others, from no other motive than to induce them, or make it necessary for them, to buy it, or rent it, and pay him an equivalent for it, or for its use.

Now it is plain that the question, whether a thing be susceptible of being used by one only, or by more persons, at once, without collision, has nothing to do with the principle of property; nor with the owner's right of dominion over it; nor with his right to forbid others to take possession of it, or use it. If he have a right to forbid one man to take possession of, or use, a certain commodity, he has the same right to forbid a thousand, or the whole world. And if he have a right to forbid a man to take

possession of, or use, a commodity, that is susceptible of being possessed and used by one person only at a time, he has the same right to forbid him to take possession of, or use, a commodity, that is susceptible of being possessed and used by a hundred, or a thousand, persons at once. The fact that men would, or would not, come in collision with each other, in their attempts to possess and use a commodity, *if* he were to surrender his dominion over it, and leave all equally free to possess and use it, is clearly a matter which does not at all concern his *present* right of dominion over it; nor in any way affect his *present* right to forbid any and all of them to possess or use it.

It is, therefore, wholly impossible that the circumstance, that one commodity — as a hammer, for example — is in its nature susceptible of being possessed and used by but one person at a time without collision, and that another commodity — as a road, a canal, a railroad car, a ship, a bathing place, a church, a theatre, or an idea — is susceptible of being possessed (*i. e.* occupied), and used by many persons at once without collision, can affect a man's right to have complete dominion over the fruits of his labor. A man's exclusive right of property in — or, in other words, his right of absolute dominion over — any one of these various commodities, depends entirely upon the fact, that such commodity was either a product or acquisition of his own labor, (or of the labor of some one, from whom, either mediately, or immediately, he has derived it, by purchase, gift, or inheritance;) and not at all upon the fact, that such commodity can, or cannot, be possessed and used by more than one person at a time, without collision:

The right of property, or dominion, does not depend, as the objection supposes, upon either the political or moral necessity of men's avoiding collision with each other, in the possession and use of commodities; for if it did, it would be lawful, as has already been shown, for men to seize and use all manner of *corporeal* commodities, whenever it could be done without coming in personal collision with the persons of other men. But the right

of property, or dominion, depends upon the necessity and right of each man's providing for his own subsistence and happiness; and upon the consequent necessity and right of every man's exercising exclusive and absolute dominion over the fruits of his labor.

Now, this right of exercising exclusive and absolute dominion over the fruits of one's labor, is not, *as the objection assumes*, a mere right of possessing and using them, in peace, and without collision with other men; but it includes also the right of making them subservient to his happiness *in every other possible way*, (not inconsistent with the equal right of other men, to a like dominion over whatever is theirs,) *as well as by possessing and using them.*

Now a man may make a commodity subservient to his welfare, in a variety of ways, *other* than that of himself possessing and using it—*provided always his absolute dominion over it be first established.* For example, if his absolute dominion over it be first established, so that he can forbid other men to use it, except with his consent, he can then sell it, or rent it, to those who wish to use it, and thus obtain from them, in exchange, other commodities which he desires; or he can confer it, or its use, *as a favor*, upon some one whose happiness he wishes to promote. But unless he be first secured in his absolute dominion over it, so as to be able to forbid other men using it, except with his consent, he is deprived of all power to make it subservient to his happiness, by selling it, or renting it, in exchange for other commodities; because, if other men can use it without his consent, they will have no motive to buy it, or rent it, paying him any thing valuable in exchange. He cannot even give it, *as a favor*, to any one, because it is no favor, on his part to give to another a commodity, which that other already has without his consent.

The right of property, therefore, is a right of absolute dominion over a commodity, whether the owner wish to retain it in his own actual possession and use, or not. *It is a right to forbid others to use it, without his consent.* If it were not so, men could never sell, rent, or give away those commodities, which

they do not themselves wish to keep or use; but would lose their right of property in them — that is, their right of dominion over them — the moment they suspended their personal possession and use of them.

It is because a man has this right of absolute dominion over the fruits of his labor, *and can forbid other men to use them without his consent, whether he himself retain his actual possession and use of them or not*, that nearly all men are engaged in the production of commodities, which they themselves have no use for, and cannot retain any actual possession of, and which they produce solely for purposes of sale, or rent. In fact, there is no article of corporeal property whatever, exterior to one's person, which owners are in the habit of keeping in such actual and constant possession or use, as would be necessary in order to secure it to themselves, if the *right* of property, originally derived from labor, did not remain in the absence of possession.

But further. The question, whether a particular commodity can be used by two or more persons at once, without collision with each other, is obviously wholly immaterial to that *right* of absolute dominion, which the producer of the commodity has over it by virtue of his having produced it; and to his consequent right to forbid any and all other men to use it, without his consent.

A man's right of property in the fruits of his labor, is an absolute right of controlling them — so far as *the nature of things* will admit of it — so as to make them subservient to his welfare in every possible way that he can do it, without obstructing other men in the equally free and absolute control of every thing that is theirs. Now, the nature of things offers no more obstacles, to a man's exclusive proprietorship and control of a commodity, which is, in its nature, capable of being possessed and used by many at once without collision, than it does to his exclusive proprietorship and control of a commodity, which is, in its nature, *incapable* of being possessed and used by more than one at a time without collision. His right of property, therefore, is

just as good, in the case of one commodity, as in the case of the other.

The absurdity of any other doctrine than this is so nearly apparent, as hardly to deserve to be seriously reasoned against. One man produces a commodity—a hammer, for example—which can be used but by one person at a time without collision; and this commodity is his exclusively, *because he produced it by his labor*. Another man produces another commodity—as a road, a canal, or an idea, for example—which can be used by thousands at once without collision; and this commodity, forsooth, is *not* his exclusively, although he produced it solely by his own labor! Of what possible consequence is this difference, in the nature of the two commodities, that it should affect the producer's exclusive right of property in either one or the other? Manifestly it is not of the least conceivable importance.

As a matter of abstract natural justice, there is no difference whatever, in a man's demanding and receiving pay for a commodity, or the use of a commodity, which can be used by thousands at once without collision, and his demanding and receiving pay for a commodity, or the use of a commodity, which can be used by but one person a time. In the first case, he as much gives an equivalent for what he receives, as he does in the latter; an equivalent too, that is as purely a product of labor, as is the commodity he receives in exchange.

As a matter of abstract natural justice too, a man is as much entitled to be paid for his labor in producing commodities, that can be used by many persons at once without collision, as he is to be paid for producing commodities, that can be used by but one person at a time. For example, one man produces an *idea*, which is worth, *for use*, a dollar to each one of a thousand different men. Another man produces a thousand axes, worth a dollar each for the use of a thousand different men. Is there any difference in the intrinsic merit or value of the labor of these two producers? Or is there any difference, in their abstract right to demand pay of those who use the products of their labor? Is

not the producer of the idea as honestly entitled to demand a thousand dollars for the use of his single idea, as the other is to demand a thousand dollars for his thousand axes? The producer of the idea supplies a thousand different men with as valuable a tool to work with, as does the producer of the axes. Why, then, is he not entitled to demand the same price for his ideas, as the other does for his axes? Does the fact that, in the one case, a thousand different men use the *same* commodity, (the idea,) and that, in the other, a thousand different men use a thousand *different* commodities, (axes,) *all of one kind*, make the least difference in the merits of the respective producers? Other things being equal, is not one single commodity, that can be used by a thousand men at once without collision, just as valuable, for all practical purposes, as a thousand other commodities, that can each be used only by one person at a time? Are not a thousand men as effectually supplied with the commodity they want, in the first case, as in the latter? Certainly they are. Why, then, should they not pay as much for it? And why should not the producer receive as much in the first case, as in the last? No reason whatever, in equity, can be assigned.

If there be no difference in the justice of these two cases, is there any way, in which the producer of the idea can get his thousand dollars for *it*, other than that, by which the producer of the axes gets his thousand dollars for *them*, to wit, by first securing to him his absolute dominion over it, or absolute property in it, and thus enabling him to forbid others to use it except on the condition of their paying him his price for it? If there be no other way, by which he can get pay for his idea, then he is as well entitled to an absolute property in it, and dominion over it, as the producer of the axes is entitled to an absolute property in, or dominion over, *them*.

Still further. A thousand separate individuals, can as well *afford* to pay a thousand dollars, (one dollar each,) for the use of a *single* commodity, that can be used by them all at once without collision, as they can to pay a thousand dollars, (one

dollar each,) for the use of a thousand different commodities, each of which can be used only by *one* person at a time. A man can just as well afford to pay a dollar for an idea, that is worth a dollar to him, for use, *though it be used also by others*, as he can to pay a dollar for an axe, that is worth but a dollar to him for use, though it be *not* used by others. Its being used by others, or not, makes no difference at all in his capacity to pay for whatever value it is really of to himself.

A thousand different men can also as well afford to pay a dollar each, for the use of a commodity, which they can all use at once without collision, as they can to pay a dollar each for the use of a single commodity, which can be used only by one person at a time, and which can therefore be used by them all, only by their using it singly, successively, and at different times. For example. A thousand men can as well afford to pay a thousand dollars, (one dollar each,) for the use of a vessel, which will carry them all at once, as they can to pay a thousand dollars, (one dollar each,) for the use of a boat so small as to carry but one person at a time, and which must therefore make a thousand different trips to carry them all. How absurd it would be to say that the owner of the large boat had *no* right to charge a dollar each for his thousand passengers, *merely because his vessel was so large that it could carry them all at once, without collision with each other, or with himself*; and yet that the owner of the small boat had a right to charge a dollar each, to a thousand successive passengers, *merely because his boat was so small that it could carry but one at a time*.

The same principle clearly applies to an idea. Because it can be used by thousands and millions at a time, without collision, it is none the less the exclusive-property of the producer; and he has none the less right to charge pay for the use of it, than if it could be used by but one person at a time.

There is, therefore, no ground whatever, of justice or reason, on which the producer of the idea can be denied the right to demand pay for it, according to its market value, any more than

the producer of any other commodity can be denied the right to demand pay for it, according to its market value. And the market value of every commodity is that price, which men will pay for it, rather than not have it, when it is forbidden to them by one who has an absolute property in it, and dominion over it.

The objection, now under consideration, is based solely upon the absurd idea, that the producer of a commodity has no right of property in it, nor of dominion over it, beyond the simple right of *using it himself* without molestation; that he has therefore no right to forbid others to use it, whenever they can get possession of and use it, without collision with himself; that he must depend solely upon his own use of it to get compensated for his labor in producing it; that he can never be entitled to demand or receive any compensation whatever *from others*, for the use of it, or for his labor in producing it, however much they may use it, or enrich themselves by so doing; and that he therefore has no right to withhold its use from others, with any view to induce or compel them to buy it, or rent it, or make him any compensation for the labor it cost him to produce it. In short, the principle of the objection is, that when a man has produced a commodity by his own sole labor, he has no right of dominion over it whatever, except the naked right to *use* it; and that all other men have a perfect right to use it, without his consent, and without rendering him any compensation, whenever he is not using it, or whenever the nature of the thing is such as to enable both him and them to use it at the same time, without collision.

The objection clearly goes to this extent, because the whole principle of it consists in this single idea, viz.: that men must avoid collision with each other in the possession and use of commodities.

This principle would not allow the producer so much even as a *preference* over other men, in the possession and use of a commodity, unless he preserved his first actual possession unbroken. To illustrate. If, when he was not using it, he should let go his

hold of it, and thus suffer another to get possession of it, he could not reclaim it, even when he should want it for actual use. To allow him thus to demand it of another, for actual use, on the ground that he was the producer of it, would be acknowledging that labor and production *did* give him at least *some* rights to it over other men. And if it be once conceded, that labor and production do give him *any* rights to it, over other men, then it must be conceded, that they give him all rights to it, over other men; for if he have any rights to it, over other men, then no limit can be fixed to his rights, and they are of necessity absolute. And these absolute rights to it, as against all other men, are what constitute the right of exclusive property and dominion. So that there is no middle ground between the principle, that labor and production give the producer *no* rights at all, over other men, in the commodity he produces; and the principle, that they give him absolute rights over all other men, to wit, the right of exclusive property or dominion. There is, therefore, no middle ground between absolute communism, on the one hand, which holds that a man has a right to lay his hands on any thing, which has no other man's hands upon it, no matter who may have been the producer; and the principle of individual property, on the other hand, which says that each man has an absolute dominion, as against all other men, over the products and acquisitions of his own labor, whether he retain them in his actual possession, or not.

Finally. The objection we have now been considering, seems to have had its origin in some loose notion or other, that the works of man should be, like certain works of nature—as the ocean, the atmosphere, and the light, for example—free to be used by all, so far as they can be used by all without collision.

There is no analogy between the two cases. The ocean, the atmosphere, and the light, so far as they are free to all mankind, are free simply because the author of nature, their maker and owner, is not, like man, dependent upon the products of his labor for his subsistence and happiness; he therefore offers them freely to all mankind; neither asking nor needing any compensation for

the use of them, nor for his labor in creating them. But if the ocean, the atmosphere, and the light had been the productions of *men* — of beings dependent upon their labor for the means of subsistence and happiness — the producers would have had absolute dominion over them, to make them subservient to their happiness; and would have had a right to forbid other men either to use them at all, or use them only on the condition of paying for the use of them. And it would have been no answer to this argument, to say, that mankind at large could use these commodities, without coming in collision with the owners; that there were enough for all; and that therefore they should be free to all. The answer to such an argument would be, that those, who had created these commodities, had the natural right to supreme dominion over them, as products of their labor; that they had a right to make them subservient to their own happiness in every possible way, not inconsistent with the equal right of other men, to a like dominion over whatever was theirs; that they could get no adequate compensation for their labor in creating them, unless they could control them, forbid other men to use them, and thus induce, or make it necessary for, other men to pay for the use of them; that they had created them principally, if not solely, for the purpose of selling or renting them to others, and not merely for their own use; and that to allow others to use them freely, and against the will of the owners, on the simple condition of avoiding personal collision with them, would be virtually robbing the owners of their property, and depriving them of the benefits of their labor, and of their right to get paid for it, by demanding pay of all who used its products for their own benefit. This would have been the legal answer; and it would have been all-sufficient to justify the owners of these commodities, in forbidding other men to use them, except with their consent, and on paying such toll or rent as they saw fit to demand.

The principle is the same in the case of an idea. An idea, produced by one man, is enough for the use of all mankind (for the purposes for which it is to be used). It is as sufficient for

the actual use of all mankind, as for the actual use of the producer. It may be used by all mankind at once, without collision with each other. But all that is no argument against the right of the producer to absolute dominion over an idea, which he has produced by his own labor; nor, consequently, is it any argument against his right to forbid any and all other men to use that idea, except on the condition of first obtaining his consent, by paying him such price for the use of it as he demands.

But for this principle, the builders of roads and canals, which may be passed over by thousands of persons at once, without collision, could maintain no control over them, nor get any pay for their labor in constructing them, otherwise than by simply passing over them themselves. Every other person would be free to pass over them, without the consent of the owners, and without paying any equivalent for the use of them, provided only they did not come in personal collision with the owners, or each other.

Do those, who say that an *idea* should be free to all who can use it, without collision with the producer, say that the builders of roads and canals have no rights of property in them, nor any right of dominion over them, except the simple right of themselves passing over them unmolested? That they have no right to forbid others to pass over them, without first purchasing their (the owners') consent, by the payment of toll, or otherwise? No one, who acknowledges the right of property at all, will say this. Yet, to be consistent, he should say it.

But the analogy, which the objector would draw, between the works of nature and the works of man, in order to prove that the latter should be as free to all mankind as the former, is defective, not only in disregarding the essential difference between the works of man and the works of nature, to wit, that the former are produced by a being who labors for himself, and not for others; and who *needs* the fruits of his labor as a means of subsistence and happiness; while the latter are produced by a Being, who neither needs nor asks any compensation for his labor; but it is defective in still another particular, to wit, that it disregards

the fact, that the works of nature themselves are no longer free to all mankind, after they have once been taken possession of by an individual. It is not necessary that he should *retain his actual* possession of them, in order to retain his right of property in them, and his right of dominion over them; but it is sufficient that he has *once* taken possession of them. They are then forever *his* against all the world, unless he *consent* to part, not merely with his possession, but with his *right* of property, or dominion, also. They are his, on the principle, and for the reason, that otherwise he would lose the labor he had expended in *taking possession* of them. Even this labor, however slight it may be, in proportion to the value of the commodity, is sufficient to give him an absolute title to the commodity, against all the world. And he may then part with his *possession* of it at pleasure, without at all impairing his *right* of dominion over it.

If, then, a man's labor, in simply taking *possession* of those works of nature, which no *man* had produced, and which were therefore free to all mankind, be sufficient to give him such an absolute dominion over them, against all the world; who can pretend that his labor, in actually *creating* commodities — as ideas, for example — which before had no existence, does not give him at least an equal, if not a superior, right to an absolute dominion over them?

SECTION XII.

Objection Twelfth.

It is said that a man, by giving his ideas to others, does not thereby part with them himself, nor lose the use of them, as in the case of material property; that he only adds to other men's wealth, without diminishing his own; that his giving knowledge to other men is only lighting their candles by his, thereby giving

them the benefit of light, without any loss of light to himself; and that therefore he should not be allowed any exclusive property in his ideas, nor any right to demand a price for that, which it is no loss to him to give to others.

This objection is really the same as the next preceding one; and is only stated in a different form. The answers given to that objection, will apply with equal force to this.

The fallacy of both objections consist, *primarily*, in this — that they deny the fundamental principle, on which all rights of property are founded, namely, that labor and production give, to the laborer and producer, a right of exclusive property in, and of exclusive and absolute dominion over, the acquisitions and products of his labor.

The fallacy of both objections consists, *secondarily*, in this — that they deny to the laborer the right and power of obtaining any compensation for his labor, other than such as he may chance to obtain, from his own personal possession and use of the commodities, which he produces or acquires by his labor. They assert the right of all other men to use those commodities, without his consent, and without making him any compensation — provided only that they can do it without coming in personal collision with him. They thus deny that he has any right to forbid other men to use the commodities he has produced, or to demand pay of them for such use. They thus virtually deny his right to sell or rent the products of his labor, or to obtain in exchange for them such other commodities as he desires. They assert that, after a man has himself incurred the whole labor and expense of producing a commodity — a commodity that is capable of accommodating others, as well as himself; and that will be of as much, perhaps more, value, *for use*, to others, than to himself — he is bound to give them as free use of it, as he has himself, without requiring them to bear any part of the burden, or compensate him for any portion of the labor and expense, incurred by him in producing it. They thus virtually assert that labor, *once performed*, is no longer entitled to be rewarded, however

beneficial it may be to others than the laborer; that commodities, *once produced*, are no longer entitled to be paid for, by those who use them, (other than the producers,) however valuable they may really be to them; that a man, therefore, has no such right of property in, nor of control over, the products of his labor, as will enable him to forbid other men to use them, or to demand pay of other men, for them, or for the use of them; that all men, consequently, have a perfect right to seize, and appropriate to their own use, the products of each other's labor, without the consent of the producers, and without making any compensation, provided only that they do it without coming in personal collision with the producers; that if a man have produced enough of any particular commodity, (as wheat, for example,) to supply the world, he can rightfully control only so much of it, as he needs for his own consumption, and can maintain his actual possession of; that he can withhold the surplus from no one, with a view to getting an equivalent for it; that every man's surplus, of any particular commodity, is not his property, to be exchanged for the surplus commodities of other men, by voluntary contract, but is rightfully free to be seized, by any one, to the extent of his particular needs for his own consumption; consequently that the exchanges, which take place among men, of their respective surpluses of the different commodities they severally produce, all proceed upon false notions of men's separate rights of property in the products of their separate labor, and upon a false denial of the right of all men to participate equally with each man in the products of his particular labor; that men have no right to produce any thing *for sale, or rent*, but only to *consume*; and that if any one man be so foolish as to produce more, of any specific commodity, than he himself can use — as for example, more food than he himself can eat, more clothes than he himself can wear, more houses than he himself can live in, more books than he himself can read, and so on to the end of the catalogue — such folly is his own, committed with his eyes open, and he has no right to complain if all such surpluses be taken from him, against

his will, and without compensation, by those who *can* consume them; that it is not the labor of *producing* commodities, but the will and power to *consume* them, that gives the right of property in, and dominion over, them; that the right of property, therefore, *depends*, not upon production, but upon men's appetites, desires, wants, and capacities for *consumption*; and consequently that all men have equal rights to every thing they desire for consumption, whoever may have been its producer — provided only they can seize upon it without committing an actual trespass upon the body of such producer.

This is clearly the true meaning of the objections; because the same principle would apply as well to a surplus of food, clothing, or any other commodity, as to a surplus of ideas, or — what is the same thing — to the surplus *capacity* of a single idea, beyond the personal use of the producer — by which I mean the capacity of a single idea to be used by other persons simultaneously with the producer, without collision with him. The capacity of a single idea to supply a large number of persons at once without collision, is, *in principle*, precisely like the capacity of a large quantity of food to supply a large number of persons at once, without collision. In the case of the food, as in the case of the idea, there is more than one can use, and is enough for all; and that is the reason given, why the idea should not be monopolized by the producer, but be made free to all who can use it advantageously for themselves. If this argument be good, in the case of the idea, it is equally good in the case of the food; for there is more of *that* than the producer can consume, and therefore the surplus should be free to others. The argument is the same, in one case as in the other; and if it be good in one case, it is good also in the other.

The capacity of an idea to be used by many persons at once, is also the same, *in principle*, as the capacity of a road, a canal, a steamboat, a theatre, or a church, to be used by many persons at once. And the producer or proprietor of the idea, has as clear a right to demand pay from all who use his idea, simulta-

neously with himself and with each other, as the producer or proprietor of a road, a canal, a steamboat, a theatre, or a church, has, to demand pay of all who use one of those commodities, simultaneously with himself and with each other. How absurd it would be to deny the right of the proprietors of these last named commodities, to demand pay of the thousand users of them, on the grounds that they all used them simultaneously! that there was room for all! that the users did not come in collision with each other! that the commodities were susceptible of being used by a thousand or more at a time! and that the use of them, by others, did not prevent the proprietors from using them also at the same time!

Is a passage on a steamboat of no value to a man, if there be other men on board? Is it not just as legitimate a subject for compensation, when he enjoys it simultaneously with others, as when he enjoys it alone? Are not the performances in a theatre, a church, or a concert room, just as legitimate subjects for compensation, by each person who enjoys them, though they be enjoyed simultaneously by a thousand others beside himself, as they would be if enjoyed by himself alone? Certainly they are. And on the same principle, the use of an idea, which may be used by the whole world at once, without collision with each other, is just as legitimate a subject for compensation to the producer, as though the idea were capable of being used by but one person at a time.

But further. Why is it *claimed* that a man is bound, in the case of an idea, any more than in any other case, to give a product of his labor to others, without requiring them either to compensate him for his labor in producing it, or pay him any equivalent for *its value to them*? He has produced, at his own cost, a commodity, which can be used by others, as well as by himself; and the use of which, by others, will bring as much wealth to them, as his own use of it will bring to himself. Why has he no right, in this case, as in all others, to say to other men, you shall not use, for *your* profit, a commodity produced by my labor,

unless you will pay me my price for it, or — what is the same thing — for my labor in producing it? Can any rational answer be given to such a question as that? What claim have *they* upon a product of his labor, that they should seize it without paying for it? Is it theirs? If so, by what right, when they did not produce it? and have never bought it? and the producer has never freely given it to them? Self-evidently it can be theirs by no right whatever.

On the principle of these objections, Fulton could get no compensation for his labor and expense, in inventing the steam-engine, other than such as he might derive from actually operating one of his own ~~engines~~ in competition with all other persons, who might choose also to operate them. If he did not choose himself to ~~operate an engine~~ for a living, the world would get the whole benefit of his invention for nothing, and he go wholly unrewarded for his labor in producing it. On the same principle, Morse could get no pay for the labor and expense incurred by him in inventing the telegraph, other than such as he could obtain by himself operating a telegraph, in competition with all other persons who should choose to do the like. If he did not choose to operate a telegraph for a living, or could not make a living by so doing, the world would get the whole benefit of his invention for nothing, and he go wholly unrewarded for his labor in producing it. On the same principle, a man, who should build, at his own cost, a road, or a canal, would have no right to forbid others to pass over it, nor to demand pay of them for passing over it; and could consequently get no pay for his labor in constructing it, other than such as he could obtain by simply passing over it himself. If he did not wish to pass over it, he would wholly lose his labor in constructing it; and the world would get the whole benefit of it for nothing. On the same principle too, if a man should build and run, at his own charge, a steamboat, large enough to carry a thousand passengers beside himself, he could neither forbid the thousand to come on board, nor demand pay of them for their passage. He could get no pay

for his outlay, in building and running the boat, otherwise than by simply taking a passage on board of it himself. If this should not be an adequate compensation, he would have to submit to the loss, while the other thousand passengers would enjoy a *free* passage, on *his* boat, at *his* cost, and without *his* consent, *simply because the boat was large enough to carry him and them too, and because their passage on it did not prevent him from taking passage on it also, simultaneously with themselves!*

But it is said that giving knowledge to a man, is simply lighting his candle by ours; whereby we give him the benefit of light, without any loss of light to ourselves. And because we are not in the *habit* of demanding pay, for so momentary a labor, or so trivial a service, as that of simply lighting a man's candle, it is inferred that we have no *right* to demand pay of a man, for our *intellectual* light, to be used as an instrumentality in labor, though it be such, that he will derive great pecuniary profit from it.

Admitting, for the sake of the argument, that the cases are analogous, the illustration wholly fails to prove what is designed to be proved by it; because, *legally speaking*, we have as perfect a right to the absolute control of our candles, as of any other property whatever, and as perfect a right to refuse to light another man's candle, as to refuse to feed or clothe his body. We have also as perfect a right to forbid *him* to light his candle by ours, or in any way to *use* our light, as we have to forbid him to use our horse, or our house. And the *only* reason we do not, *in practice*, demand a price for lighting a man's candle, is, that the lighting of a *single* candle is so slight a labor, and is so easily done by any body, and every body, that it will command no price in the market; since every man would sooner light his own candle, than pay even the smallest sum to another for doing it. But whenever the number of candles to be lighted is so large, as to enable the service to command a price in the market, men as habitually demand pay for lighting candles, as for any other service of the same market value. For example, those who light

the lamps, in the streets of cities, in churches, theatres, and other large buildings, as uniformly demand pay for so doing, as for any other service done by one man for another. And no lawyer was ever yet astute enough to discover that such lamplighters were entitled to no pay, either for the reason that they parted with none of their own light, or for the reason that they enjoyed, in common with others, the light given forth by the candles they lighted.

We do not *now* demand pay for lighting a *single* candle, simply because the service is too trivial to command a price worth demanding. But if the production of a light, in the first instance, were—like the invention of a valuable idea—a work of great labor and difficulty, such as few persons could accomplish, and those few only by a great expenditure of money, time, and study, the producers of a light would then demand pay for lighting even a *single* candle by it, the same as they now do for the use of an idea by a single individual. And it would be no argument against their right to do so, to say, that they part with no light themselves; that they have as much light left as they had before, or as they can use in their own business, &c., &c. The answer would be, that the light was the product of their labor, and as such was rightfully their exclusive property, and subject to their exclusive control; that therefore no one had a right to use it without their consent; that they had as good right to produce a light, with a view to sell it to others, or to light other men's candles by it for pay, as to produce it for their own use in labor; that if they were to give the benefits of their light to others gratuitously, or if others could avail themselves of it, without making compensation, the producers would get no adequate compensation for the labor of producing it; that the light was valuable to others, as well as to the producers, and therefore others, if they wished to use the light, could afford, and should be required, to bear a part of the cost of producing it; and that if they refused to bear any part of the cost of the light, they ought not to participate in the benefits of it.

But the case of lighting another man's *candle* by ours, is not *strictly* analogous to the case of our furnishing him a valuable *idea*, for his permanent use and profit. There is indeed a sort of analogy, between giving a man light for his eyes, and light for his mind; especially if he use both kinds of light in his labor. But the important difference between lighting a candle, and furnishing an *idea*, is this. When we simply light a man's candle for him, we do *not* supply him, *at our own cost*, with a *permanent* light for use. We only ignite certain combustible materials *of his own*; and from *them* alone he derives the *permanent* light, which he uses in labor. It is therefore only from the combustion of *his own property*, that he obtains that *permanent* light, which alone will suffice for his uses. All the service, therefore, which *we* render him, is the exceedingly trivial one of simply *igniting* those materials by a momentary contact with our flame. We supply *none* of the materials themselves, from the combustion of which his permanent and useful light is derived. But in the case of the *idea*, we *do* furnish him with the *permanent* light itself, by the aid of which alone he performs his labor. We do not, as in the other case, simply ignite *his* combustible materials. We furnish the *permanent* light, and the whole light, at our own sole cost.

Now the simple ignition of his combustible materials, as in the case of the candle, is too trivial a service to be worth demanding pay for it; and too trivial also to command a price, if it were demanded. But the furnishing him a perpetual light, as in the case of the *idea*, is a service sufficiently important to be worth demanding a price for it; and also sufficiently important to command a price in the market. And this is the difference, or at least one of the differences, between the two cases.

To make the case of the material light analogous to that of the intellectual light, it would be necessary that we produce, *at our own cost*, a *permanent* material light, such as will be of practical utility in labor. Having done this, a stranger, who had no share in the production of the light, claims the right *to come into our*

light, and to use it for the purposes of *his* labor, without *our* consent, against *our* will, and without making us any compensation. We deny his right to do so; we tell him the light is our property, the product of our labor; that, as such, we have a right to control it, and its use; that we produced it with a view to sell so much of it as we did not wish to use; and that we will permit him to use it only on his paying us such a price as we see fit to demand. But he replies, that within the sphere of our light, there is room, which we do not occupy, and where the light goes to waste; that his occupying this vacant space, and using this waste light, will not interfere with the light we are using; that the light will be just as strong, *where we are at work*, as it was before; that he denies our right to demand pay for the use of our surplus light; and that therefore he *will* use it, and pay us nothing for it.

Which party here has the law on his side, the producers of the light, or the intruder? Certainly there can be no doubt that the light is the property of the producers, and that no one can claim the right to use it, for the purposes of his labor, without their consent. And the principle is the same in the case of the intellectual light.

To make the analogy still closer, between the cases of the material and the intellectual light, and especially to make the wrong of the intruder more palpable, we must suppose that we have produced a *peculiar material* light; and that this peculiar light is *indispensable* for the manufacture of a *peculiar* commodity, that is of value in the market. We, being the sole producers and possessors of this peculiar light, enjoy a monopoly of the manufacture and sale of the peculiar commodities manufactured by the aid of it. The intruder now claims the right, without our consent, to come into our light, and use it for the manufacture of the same kind of commodities, which we are manufacturing, and which can be manufactured only by our light; and then to offer those commodities in the market in competition with ours. He thus claims, not only to use our light, against our

will, and without making us any compensation, but also to use it for a purpose which is prejudicial to us, by reducing the market value of the commodities, which we ourselves manufacture by it. He thus does us a double wrong; for he not only uses, without our consent, and without making us any compensation, the light which we alone have produced; but he also reduces the practical value of the light *to us, for our own uses*, by selling, in competition with ours, the commodities he manufactures by its aid.

Is there no injustice, no intrusion, no usurpation, in such conduct as this? Most clearly there is. If, I being an innholder, a stranger were to come into my house, seize upon my stores of provisions, cook them by my fire, and then sell them, to my customers, in competition with those which I have provided for them, the intrusion, usurpation, injustice, and robbery would be no more flagrant than in the case supposed. Yet neither of these cases is any more than a parallel to that of a man, who, without my consent, uses my invention, my intellectual light, and manufactures commodities by it, which he otherwise could not manufacture, and then sells them in competition with mine.

Finally. If the doctrine be true, that a man should have no pay for imparting knowledge to others, because he retains the same knowledge himself, then a lawyer should have no pay for the knowledge he imparts to his client, to a jury, or to a judge; a physician should have no pay for the knowledge he imparts to his patient, or to his patient's nurse; a preacher should have no pay for the knowledge he imparts to his congregation; a lecturer should have no pay for the knowledge he imparts to his audience; a teacher should have no pay for the knowledge he imparts to his scholars; a master should have no pay for the knowledge he imparts to his apprentice; a legislator should have no pay for the knowledge he imparts to his fellow legislators, or to the country, by his speeches; a judge should have no pay for the knowledge he imparts by his judicial opinions or decisions; authors and editors should have no pay for the knowledge they impart by their writings; and so on indefinitely.

By the same principle too, a musician should charge nothing for his music, because he loses none of it himself. He hears it all, and enjoys it all, the same as if no one else were hearing it, or enjoying it. A painter should have no pay for a view of his picture, because he does not thereby lose the view of it himself. A sculptor should have no pay for exhibiting a statue, because he does not thereby lose the sight of it himself. A soldier should have no pay for achieving the liberties of his country, because he enjoys all those liberties himself, and none the less because his fellow countrymen, who stayed at home while he was fighting, enjoy them too. Such are some of the absurdities to which the doctrine leads.

The argument on this point might be extended still farther. But I apprehend it has already been extended farther than was really necessary. The objections have no soundness in them; yet they have probably as much plausibility as any of the objections that were ever brought against one's right of property in his ideas. And this is the reason I have felt it excusable to expend so many words upon them.

SECTION XIII.

Objection Thirteenth.

It is said that *society* have *rights* in ideas, that have been once made known to them; that a perpetual monopoly in the producer, destroys the rights of society; and that society have a right to perpetuate ideas once made known.

Hence it is inferred that society have a right to confiscate ideas, and make them free to all, *in order to prevent the producer's withholding them from the public, and thus causing them to perish unused.*

The primary assumption here is, "that society have *rights* in

ideas once made known to them." From this assumption, the other assumptions and the inference naturally follow. They depend solely upon it, and are nothing without it. If, then, the first assumption be baseless, the others and the inference are equally so.

What rights society have, in ideas, which they did not produce, and have never purchased, it would probably be very difficult to define; and equally difficult to explain *how* society became possessed of those rights. It certainly requires something more than assertion, to prove that by simply coming to a knowledge of certain ideas—the products of individual labor—society acquires any valid title to them, or, consequently, any *rights* in them.

There would clearly be just as much reason in saying that society have rights in *material* commodities—the products of individual labor—because their existence had become known to the public, as there is in saying that they have rights in ideas—the products of individual labor—simply because their existence had become known to the public. There would, for example, be just as much reason in saying, that society have rights in a thousand, or a hundred thousand, bushels of wheat—the product of individual labor—on the ground that the existence of this wheat had become known to them, as there is in saying that they have rights in a mechanical invention—the product of individual labor—on the ground that its existence has become known to them. And there would be just as much reason in saying, that society have a right to confiscate this wheat, and distribute it gratuitously among the people, *in order to prevent the producer's withholding it from market, and suffering it to rot*, as there is in saying that society have a right to confiscate a mechanical invention, and make it free to the public, *in order to prevent the inventor's withholding it from market, and suffering it to be lost*.

If, however, this doctrine be true, in favor of society, it must be equally true in favor of single individuals; for society is only a number of individuals, who have no rights except as individuals.

The consequence of the doctrine, therefore, would be, that every private individual would have *rights* in every commodity, *the existence of which should come to his knowledge!* He would also, of course, have the right, (now claimed for society,) of preserving such commodities from loss and decay. And this right would involve the still further right, (now claimed for society,) of taking such commodities out of the hands of the producers, and appropriating them to his own use, *in order to prevent the producer's withholding them from him, and suffering them to perish unused by him!* This is the legitimate result of the principle contended for.

This doctrine, that society have rights in all commodities, in consequence of the commodities becoming known to them; and that they have a right to confiscate them, and apply them to the public use, in order to prevent the producer's withholding them from market, and suffering them to perish unused, would certainly afford a very convenient and efficacious mode of destroying all private property, and throwing every thing into common stock. But what other purpose it could serve, it is not easy to see. If the doctrine be a sound one, in regard to material commodities, it is undoubtedly sound also in regard to intellectual commodities. But if it be the height of absurdity and tyranny, in regard to material commodities, it is equally absurd and tyrannical in regard to ideas.

The doctrine is also as unsound in policy, as it is in law; since it would cause a thousand commodities to perish unused, or prevent their ever being produced, as often as it would save one from thus perishing. If a man be allowed an absolute property in the products of his labor; and can forbid others to use them, except with his consent, he then has a motive to preserve them, and bring them to market; because, if they are valuable, they will command a price. Hence he will suffer few or none of them to be lost. But if the products of his labor are to be confiscated, he is, in the first place, dissuaded from producing nearly as many as he otherwise would; and, secondly, such as he does produce,

he will keep concealed as far as possible, in order to save them from confiscation; and the consequence will be that very many of them will perish unused.

SECTION XIV.

Objection Fourteenth.

Another objection is, that after the author of an idea has once made it known to others, it is impossible for him ever to recover the *exclusive* possession of it.

This objection is of no validity—and why? Because it is wholly unnecessary that he should have the *exclusive possession* of his idea, in order to *practically exercise* his right to the *exclusive use* of it.

The objection assumes that it is practically impossible for a man to *exercise* his right to the “exclusive use” of an idea, unless he also have the *exclusive possession* of it.

The objection rests *solely* on that assumption. Yet such an assumption is a self-evident absurdity; for the *exclusive possession* of an idea is not, *in practice*, at all necessary to the *exclusive use* of it. An idea, *unlike a corporeal commodity*, can be as fully and completely *used*, by a single individual, when it is possessed by all the world, in common with himself, as when it is possessed by himself alone. Their possession of it, jointly with himself, offers no natural impediment whatever to his exclusive use of it. The practical exercise of his right of exclusive use, is, therefore, in no manner whatever, naturally contingent or dependent upon his exclusive possession. And this fact alone is self-evidently an ample and unanswerable reason why, *in law*, it is wholly unnecessary that he should retain his exclusive possession, in order to retain the right of exclusive use.

Here, no doubt, the argument, on this point, might be safely

left. But, perhaps, some further illustration of it may be allowable.

The law never makes any requirements, that are *practically* unnecessary to the exercise of one's rights. The only reason, why a man's right to the exclusive use of a *corporeal* commodity, is *ever*, in law, dependent upon his right to the exclusive possession of it, is, that the *practical exercise* of his exclusive right of use, is *naturally and necessarily* dependent on his exclusive possession of the commodity. It is naturally impossible that he *can* use it—that is, the *whole* of it, fully and completely—unless he have exclusive possession of it. But it is wholly otherwise in the case of an idea, which, from its immateriality, can be as fully and completely used, by a single individual, when it is possessed by all other men, in common with himself, as when possessed by himself alone.

Whenever the *practical exercise* of the exclusive right of use, is, *naturally and necessarily*, dependent on the exclusive possession, there a man must have an exclusive right of possession, in order to have an exclusive right of use. But whenever the *practical exercise* of an exclusive right of use, is naturally possible, *without* the exclusive possession, there the two may be separated, and a man may have an exclusive right of use, with only a *common* right of possession.

For the law to require an exclusive possession, to sustain the right of exclusive use, when a *common* possession is just as good for the *practical exercise* of that right, would be interposing an unnecessary obstacle to the enjoyment of one's rights.

When a man parts with the *exclusive possession* of an idea, he parts with what it is *naturally impossible* he should ever recover. And if the practical exercise of his exclusive right of use, were, *naturally and necessarily*, dependent upon his exclusive possession, his right of exclusive use would be forever lost, *with* his right of exclusive possession. But since the practical exercise of his exclusive right of use, is not in any way dependent upon his *exclusive* possession, the question of exclusive possession has

legally nothing to do with his right to the exclusive use; and the owner of an idea may, consequently, give to all mankind, a perpetual and irrevocable *possession* of it, in common with himself, without his own right to the exclusive *use* of it, being at all impaired thereby.

The case of the owner of an idea, after he has given to others a knowledge or possession of it, in common with himself, is nearly or quite similar to that of a man, who should grant to others the perpetual, but naked, right, *to come personally upon his farm, and enjoy the prospect, doing no damage, and offering no impediment to his labor; but without any right themselves to cultivate the farm, or to take the crops.* In this case, the individuals, so admitted upon the farm, would hold *possession* of it, in common with the owner, *to the precise extent, and for the specific purpose, to which, and for which, he had granted it to them; and they would hold it to no greater extent, and for no other purpose.* Now, it certainly could never be said, in such a case, that the owner had lost his *exclusive right to cultivate his farm, and take the crops*, because he could never recover the *exclusive possession of it.*

The principle is the same in the case of the idea. The owner admits other men to a simple knowledge of the idea — that is, to a naked *possession* of it — in common with himself; but without any right to *use* it, for any industrial or pecuniary purpose. They receive the possession of it, *subject to these limitations.* Here plainly the owner's right to the *exclusive use* of it, for industrial and pecuniary purposes, is no more impaired, than in the case of the farm.

Since, then, the owner of the idea has never parted with his own possession of it, nor with his original right to the exclusive *use* of it, he has no *need* to recover the *exclusive possession* of it; because the possession of it by others, in common with himself, offers no practical impediment to his exclusive *use* of it. The exclusive possession of the idea, being *practically unnecessary* to his exclusive use of it, it is *legally unnecessary.* Consequently

the fact, that he can never recover it, is a fact of no legal importance whatever, as affecting his right to the exclusive use of it.

SECTION XV.

Objection Fifteenth.

Another objection is, that ideas cannot be seized, on any legal process.

Admitting, for the sake of the argument, what is probably true, that no way can be devised, by which a man's property, in ideas, can be taken on legal process, that fact interposes no obstacle whatever to their being treated, by the law, as property. There are many kinds of property, which the law protects, but which, nevertheless, the law cannot seize. For example. Reputation is property, and is protected by the law; yet it cannot be seized and sold, to pay a fine, or satisfy a debt. A man's health, strength, and beauty are property; and the law punishes an injury done to them; yet they cannot be seized and sold, on legal process. All a man's intellectual faculties and powers, are property; yet they cannot be taken for a debt, or confiscated for crime. Music is property; and a single hour's melody will often bring thousands of dollars in the market. Yet it cannot be taken in execution for a debt. Labor, of all kinds, is property; but no kind of labor whatever can be seized by the law.

This objection, like all the others, is therefore without foundation.

I have thus answered, or attempted to answer, every objection, worthy of an answer, (except two — one to be noticed in the next, and the other in the succeeding, chapter,) that I remember ever to have read or heard, against the right of a man, on principles of natural law, to an absolute and perpetual property in his ideas.

CHAPTER III.

PERPETUITY AND DESCENT OF INTELLECTUAL PROPERTY.

SECTION I.

Perpetuity of Intellectual Property.

If men have a natural right of property, in their intellectual productions, it follows, of necessity, that that right continues *at least during life*. Nature has certainly fixed no limit *short of life*, to the right of property. Limitation to a less period, would be contrary to the very nature of the right of property, which, as has been before repeatedly mentioned, is an *absolute* right of dominion; a right of having a thing *entirely* subject to one's will. If a man's right to exercise this dominion, were limited in duration, it would not be absolute. If, therefore, his *will* to exercise it, continue through his life, his *right* to exercise it, continues for the same length of time — for his will and his right go hand in hand. The property is, therefore, necessarily his, *during his life*, unless he *consent* to part with it.

SECTION II.

Descent of Intellectual Property.

There is the same reason, and as strong reason, why a man's intellectual property should descend to his relatives, as there is why his material property should do so.

What is the ground, on which the law allows any man's property to go, at his death, to his wife, children, or other relatives? This, and nothing else, viz.: the law presumes that he acquired it for them, *and intended it for their benefit*. In short, it presumes that it was his *will* that it should go to *them*, rather than to mankind at large. And this is a reasonable presumption, (in the absence of express evidence to the contrary,) because, during life, men *usually* labor for, and devote their property to the support and welfare of, their immediate families and relatives, in preference to strangers. And it is natural that, at death, they should wish their property still to be devoted to the same ends, for which they produced and employed it while living. This presumption is so natural and reasonable, so well grounded in the nature and experience of mankind at large, and withal so consistent with a man's moral duties, that nothing is suffered to overcome it, in law, except undoubted evidence that a man expressed a different will, while living, and in the possession of his reason.

Although men sometimes will that, at their death, their property shall go to others than their nearest relatives, it is nevertheless nearly or quite an unheard of event, that a man should wish his property to go to mankind at large, in preference to his immediate friends. There is, therefore, no ground, in law, for such a presumption, in the absence of express evidence. And there is no more reason why a man's intellectual property should go to the public, at his death, than there is why his material property should go to them.

It has been said, that, admitting a man to have an absolute property in his ideas, *during life*, it is a wrong to society to allow the transmission of this right by inheritance, for this reason, viz.: It is said that the right of property *naturally* terminates with the life of the proprietor; that, in the case of *material* property, society *allow* the right to be transmitted to relatives, for the reason that, otherwise, the property, being left without an owner, would become the property of those who should first seize upon

it; that it would thus give rise to violent scrambles among those who should be attempting to seize upon it; that, *to prevent this violence*, society decrees that the property shall go to the immediate family of the deceased; but that, as there could be no scramble or violence to get possession of an *idea*, at the death of the proprietor, there is no necessity, and therefore no justification, for allowing the principle of inheritance to apply to intellectual property; and that, consequently, such property should become free to all.

This objection is entirely fallacious; and the reason assigned, why *material* property is allowed to go to the relatives of the deceased, is not the true one. Society do *not* establish the principle of inheritance *arbitrarily*, as the objection supposes, to avoid occasions for violent scrambles for the property of the dead; for such scrambles could as well be averted by decreeing that the property should escheat to the government, as by decreeing that it should go to the relatives of the deceased. And if the property have no rightful owner, it perhaps ought to go to the public, and to the government as the representative of, and trustee for, the public. But the principle of inheritance is a principle of *natural law*, founded on the presumption that, where a deceased person has left no evidence to the contrary, it was his *will*, (so long as he had his reason, and therefore so long as his will was of any legal importance,) that in that moment, (whenever it might arrive,) in which his property could no longer be useful to, nor be controlled by, himself, all his rights in it should vest in his family. And such a will, or consent, is, *in its nature*, as valid and sufficient, and the law justly holds it to be as effectual, to convey the right of property, as any consent which a man gives, when in full health, to the conveyance of his right of property for a pecuniary consideration.

The universal nature of mankind, and their nearly or quite universal conduct, throughout life, and in their latest moments of reason, furnish so strong evidence that such is the will of all men, in regard to their property, that governments *dare not dis-*

regard it — *dare not* confiscate the property of a deceased person, who left relatives living within any reasonable limit of consanguinity. And mankind in general would as soon rebel against a government, which they knew would confiscate their property at their death, and thus plunder their families of the provision they had made for them, as they would against one that should confiscate it while they were living. There is no species of robbery, which the general sense of mankind would consider more atrocious, on the part of government, than that of confiscating the property of the dead.

“The property of the dead.” That is not an accurate expression. It is not the property of the dead, but of the living; for the right of property passed to the living at or before the moment of the death of the original proprietor.

If, then, the principle of inheritance be a principle of natural law, it is as applicable to intellectual, as to material, property.

CHAPTER IV.

THE SALE OF IDEAS.

There remain to be considered some important questions, in regard to the sale of ideas, in connexion with books, machines, statues, pictures, &c. We will first speak of the sale of them in connexion with *books*; and of the other cases afterward.

When an author sells a copy of his book, does that sale carry with it the right to reprint the book? Or does he reserve that right *exclusively* to himself?

If he reserve that right exclusively to himself, how does that reservation *legally appear*, when no express stipulation of the kind is shown?

If the purchaser of a book do *not* buy with it the right to reprint it, what right of property or *use* does he buy, in the *ideas* which the book communicates? And how are legal tribunals to know *what right of property*, in the ideas, which the book communicates, is conveyed by the sale of the book itself?

Questions of this kind have been proposed, by those who deny that any exclusive right of multiplying copies, can remain with the author, after he has sold copies of his book unreservedly in the market. These persons say that, by selling his book unreservedly, the author *necessarily* sells the right to make any and all possible uses of the ideas communicated by the book; that the reprinting of the book is only one of the *uses*, to which the copy sold is capable of being applied; and that the right to use the copy for this purpose, is as much implied in the sale of the book, as is any other use of it whatever.

These questions and arguments were forcibly presented by Justice Yates, and by Lord Chief Justice De Grey, as follows.

Justice Yates said, "Every purchaser of a book is the owner of it; and, as such, he has a right to make what use of it he pleases.

"Property, according to the definition given of it by the defendant's counsel, is '*jus utendi, et fruendi*' [the right of using and enjoying]. And the author, by empowering the bookseller to sell, empowers him to convey this general property; and the purchaser makes no stipulations about the manner of using it.

"The publisher himself, who claims this property, sold these books, without making any contract whatever. What color has he to retrench his own contract? or impose such a prohibition?" [a prohibition upon reprinting the book.]

"If the buyer of a book may not make what use of it he pleases, what line can be drawn, that will not tend to supersede all his dominion over it? He may not lend it, if he is not to print it; because it will intrench upon the author's profits. So that an objection might be made even to his lending the book to his friends; for he may prevent those friends from buying the book; and so the profits of such sale of it will not accrue to the author. I do not see that he would have a right to copy the book he has purchased, if he may not make a print of it; for printing is only a method of transcribing.

"With regard to books, the very matter and contents of the books are, by the author's publication of them, irrevocably given to the public; they become common; all the sentiments contained therein, rendered universally common; and when the sentiments are made common by the author's own act, every use of those sentiments must be equally common.

"To talk of restraining this gift, by any mental reservation of the author, or any bargain he may make with his bookseller, seems to me quite chimerical.

"It is by legal actions that other men must judge and direct their conduct; and if such actions plainly import the work being made common; much more, if it be a necessary consequence of the act, 'that the work is actually thrown open by it;' no private transaction, or secretly reserved claim of the author, can ever control that necessary consequence. Individuals have no power, (whatever they may wish or intend,) to alter the fixed constitution of things; a man cannot retain what he parts with. If the author will voluntarily let the bird fly, his property is gone; and it will be in vain for him to say 'he meant to retain' what is absolutely flown and gone." *

* *Millar vs. Taylor*, 4 Burrows 2364 — 5.

Lord Chief Justice De Grey said :

“ But it is said, that the sale of a printed copy is a qualified or conditional sale, and that the purchaser may make all the uses he pleases of his book, except that one of reprinting it. But where is the evidence of this extraordinary bargain? or where the analogy of law to support the supposition? In all other cases of purchase, payment transfers the whole and absolute property to the buyer; there is no instance where a legal right is otherwise transferred by sale; an example of such a speculative right remaining in the seller. It is a new and metaphysical refinement upon the law; and the laws, like some manufactures, may be drawn so fine as at last to lose their strength with their solidity.” *

These questions and arguments are of vital importance to the principle of intellectual property. They are worthy of being answered. They *must* be answered, before the principle of exclusive copyright can be maintained, as a part of the law of nature. Yet, I apprehend, they have never been adequately answered.

The common, and I believe the only, answers, that have ever been made to these arguments, have been, 1st. That it is only by the multiplication of copies, that an author can expect to get paid for the labor of producing his book; and therefore it would be *unreasonable* to suppose that he intends to part with his exclusive right to multiply copies, for so trivial a price as the profit made upon a single book. 2d. That if an author were to part with his exclusive right to multiply copies, his ideas might be misrepresented, mutilated, and attributed to other persons than himself; and thus his reputation suffer, without his having any means of redress; and that it is therefore unreasonable to suppose he intends to subject himself to the liability of such injustice, for so small a consideration as the profit on a single copy of his book.

These are no doubt weighty considerations; but they do not fully meet the question. A man, who gratuitously gives away his ideas in conversation, loses all chance of reaping any pecuniary profit from them. He is also liable to have his views misrepresented, mutilated, and attributed to others than himself. But the law does not, for these reasons, *uniformly* imply that he

* Donaldson vs. Becket, 17 Parliamentary Hist. 991.

reserved any exclusive right of property in, or control over, them. And if it will not imply this, in the case of a man, who gives his ideas gratuitously to the public, why should it do it for a man who has sold, and received a price for, his ideas?

The argument of inadequacy of price is an insufficient one, for various reasons, as follows.

1. Inadequacy of price is, *of itself*, no objection to the validity of a sale, where no fraud is alleged.

2. Inadequacy of price is oftentimes, in practice, a very difficult thing to be proved; and would be especially so in the case of the copyrights of books. Men's opinions differ so much as to the intrinsic merits of particular books; and the *market* value of a copyright often depends so little upon the book's intrinsic merits, that inadequacy of price could seldom or never be proved. Milton, assuming that he had a perpetual copyright in his *Paradise Lost*, sold it for five pounds. Yet this was a legal sale, and its validity could not be impeached for inadequacy of price.

3. The difference in price between a book, of which the copyright is reserved, and one of which the copyright is not reserved, is too slight to afford any sufficient evidence, *of itself*, to a judicial tribunal, whether the copyright was, or was not, reserved.

4. If, as the opponents of an exclusive copyright contend, every purchaser of a book purchases with it the right of reprinting it, no one purchaser could afford to pay but a trivial price above the value of the book, independently of that right; because he would buy no *exclusive* right; but only a right to be held in common with all other purchasers of copies. He could therefore secure no monopoly in the publication of the book; but could only print it in competition with all others, who should choose to print it. For *such* a right he could, of course, afford to pay but a merely trivial price, independently of the value of the book for other uses. How then could it *ever* be proved that he had paid an inadequate price *for such a right as he has purchased?*

5. If the author, by selling each copy of his book unreservedly, sells with it the right of multiplying copies, then the

presumption would be, that he received a price at least *somewhat* higher, *for each copy*, than he could have sold it for, if he had expressly stipulated that it should *not* be used for multiplying copies; and from this presumption it would follow, as a legitimate inference, that he had chosen to adopt this mode of getting paid for his copyright — that is, by a slightly additional price on each copy sold — rather than by the sale of the exclusive copyright to any one individual.

The original question, then, necessarily returns, viz.: *What right has the purchaser of the book obtained?* Has he purchased the right to multiply copies? Or only the right to use, *in other ways*, the particular copy that he has purchased? And, especially, how can *legal tribunals know* what right has been bought and sold?

It evidently will not do for an author, after he has sold a book unreservedly, to say, *arbitrarily*, that he did not *intend* to part with his exclusive copyright; since it is clear that, in law, every man must be held to have intended every thing that is *necessarily* implied in his voluntary act.

The whole question, then, resolves itself into this, viz.: What, on legal principles, is *necessarily* implied in the sale of a book, by an author, when no *express* stipulation is entered into, as to the use that is to be made of it? In other words, What rights, in the *ideas* communicated by the book, does the author *necessarily* convey, when the sale of the book itself is qualified by no *express* restriction upon its use?

I shall offer an answer to this question, by attempting to prove, what seems almost too nearly self-evident to need to be proved, viz.: That a book, and the ideas it describes, are, *in fact, and in law, distinct commodities*; and that an unqualified sale of the book does not, therefore, *of itself alone*, imply *any sale whatever* of the ideas it describes, nor the conveyance of any right whatever to the *use* of those ideas.

By this I mean that the sale of the book conveys, *of itself*, no right of property or use in the ideas, *beyond that merely mental*

possession and mental enjoyment of them, which are indeed a species of property and use; and necessarily, or at least naturally, follow from reading the book; but which, for the sake of brevity and clearness in this discussion, I shall leave out of consideration. *

It will therefore be understood, when, *in the remainder of this chapter*, I speak of "*property*" in, and "*use*" of, ideas, that I mean a property and use *beyond, or additional to*, this merely *mental* possession and enjoyment of them.

To state more precisely the point to be proved. Suppose the author of a valuable mechanical invention were to write, and sell unreservedly in the market, a book describing his machine so fully that a reader would be able, from the description given, to construct and operate a similar machine. The purchaser of the book would, in this case, acquire a right to the mental possession, and mental enjoyment, of all the knowledge communicated by the book; but he would acquire, *simply by virtue of his purchase of the book*, no right whatever to *use* that knowledge in constructing or operating a machine like the one described. And the same principle applies to all other ideas described in books. *This is the point to be proved.*

If the first of the foregoing propositions be true, viz.: "That a book, and the ideas it communicates, are, in fact, and in law, distinct commodities," the truth of the succeeding proposition, viz.: "That an unqualified sale of the book does not, *of itself alone*, imply any sale whatever of the ideas it describes, nor the conveyance of any right whatever to the *use* of those ideas," would seem to follow of course; because the sale of one thing

* When it is said, in chapter first, page 19, that "an author sells his ideas in his volumes," that "an editor sells his in his sheets," &c., it is not meant that they necessarily sold an *entire and unqualified* right of property in their ideas; but only a partial or qualified right, viz.: a right to the *mental* possession and *mental* enjoyment of them. Whether the purchaser acquires any *further* right of property than this, *in the ideas* described in the volumes and papers, will depend on the principles laid down in this chapter.

can, perhaps, *never, of itself*, imply the sale of another thing, that has a separate and distinct existence.

That a book, and the ideas it communicates, are, in fact and in law, separate and distinct commodities, is apparent from the following considerations, *viz.*

1. What is an *idea*? It is a production of the *mind*. It is wholly *immaterial*. It has no existence, except in the mind. It *can* exist only in the mind. It no more exists in a *book*, than it does in a stone, or a tree. It *can* no more exist in a book, than in a stone, or a tree.

2. What is a *book*? It is mere paper and ink. It is entirely *material*. In its nature, it differs as much from an *idea*, as a stone or a tree differs from an idea. There is no more *natural* affinity between a book and an idea, than there is between a stone, or a tree, and an idea. That is, an idea will no more inhere in, or adhere to, a book, than it will inhere in, or adhere to, a stone or a tree.

When, therefore, a man buys a book, he does not buy any ideas; because ideas themselves are no part of the book; nor are they in any way *attached* to the book. They exist only in the mind.

A book, therefore, does not, as, in common parlance, is habitually asserted, *contain*, any ideas. The most that can be said, is, that it represents, describes, or perhaps more properly still, *suggests*, or brings to mind, ideas. And how does it do this? In this way only. The book consists of paper, with certain characters, in ink, stamped upon it. These characters were devised to be used as arbitrary signs, or representatives, of certain sounds uttered by the human voice. And by common consent among those, who are acquainted with these arbitrary significations, that have been attached to them, they *are* used to represent those sounds. The vocal sounds, which these characters arbitrarily represent, are, by common consent, used by mankind, as the *names* of certain ideas. These *names* of the ideas are not the ideas themselves, any more than the name of a man is the

man himself. But when we hear the names of these ideas, the ideas themselves are brought to our minds; just as, when we hear the name of a man, the man himself is brought to mind. In this way the characters printed, in ink, in a book, are used as the signs, representatives, or names, *at second hand*, of men's ideas; that is, they represent certain sounds, which sounds stand for, represent, and thus call to mind, the ideas. This is all the resemblance a book has to the ideas, which it is employed to communicate.

The most, therefore, that can be said of a book, is, that it consists of, or contains, certain *material* things, to wit, characters in ink, stamped on paper, which, by common consent among mankind, are used to represent, *describe, suggest*, or carry to one's mind, certain *immaterial* things, to wit, ideas.

It is, therefore, only by a figure of speech, that we say that a book *contains ideas*. We mean only that it contains, or consists of, certain *material* things, which suggest ideas. It contains only such *material* signs, symbols, or arbitrary representatives of ideas, as one mind employs in order to suggest or convey its ideas to other minds.

Now, unless the sale of a *material* symbol, or representative, be legally and *necessarily* identical with the sale of the *immaterial* idea, which that symbol represents, or suggests, it is clear that the sale of a book is not, legally or necessarily, identical with the sale of the ideas, which that book may suggest to the reader.

The ideas themselves are not *contained* in the book; they constitute no part of the book; they have their whole existence entirely separate from the book — that is, in the mind; the whole object, design, and effect of the book are, to suggest certain ideas to the mind of the reader, and thereby act as a *vehicle*, or instrumentality, for conveying the ideas from one mind to another.

What ground is there, then, for saying that the sale of the book is necessarily or legally identical with the sale of the ideas, which it communicates, describes, or suggests? None whatever.

Suppose a man make a book, containing such drawings, pictures, and written descriptions, of his house, his farm, his horses, and his cattle, as are sufficient to bring those commodities to the mind of the reader. And suppose he then sell that book unre-servedly in the market. Does the purchaser of the book acquire, *by virtue of that purchase*, any right of property or use in the commodities described in the book? Certainly not. And why not? Simply because the book, and the things it describes, are, in fact, and in law, separate and distinct commodities; and the sale of the one does not, therefore, at all imply the sale of the other.

The same principle applies to a book, that describes *ideas*, instead of houses and lands. The book, and the *ideas* it describes, are as much separate and distinct commodities, in the one case, as are the book, and the houses and lands it describes, in the other. And the sale of the book, that describes the *ideas*, no more implies the sale of the ideas, than the sale of the book, that describes the houses and lands, implies the sale of the houses and lands.

The only difference between the two cases, is this wholly immaterial one, viz. : that the written descriptions, of the *ideas*, are sufficient to put the reader in actual *possession* of the ideas described — that is, in *mental* possession of them, which is the only possession, of which they are susceptible; whereas the written descriptions, of the houses and lands, are not sufficient to put the reader in actual possession of those commodities; since the *possession* of houses and lands must be a *physical*, instead of a mental one. But this difference, in the two cases, is wholly immaterial to the right of property *for use*; because simple *possession* of the ideas, (and this is all the book gives,) is of no importance, in law, without the right of property *for use* — as has been already explained in chapter 2d, section 2. *

* It is perhaps worthy of notice, in this connexion, that a man can acquire, from a written description, the same *mental* possession of *houses* and *lands*, that he can of *ideas*. That is, he can acquire the same *knowledge* of houses and lands,

The conclusion, therefore, that the sale of a book, describing *ideas*, gives no right of property in the ideas, *for use*, is just as valid and inevitable, as is the conclusion, that the sale of a book, describing houses and lands, gives no right of property in the houses and lands, *for use*.

An author, in selling a book, sells nothing but the book itself; the right to *use* the book itself; and the right to all the benefits, which necessarily or naturally result to the reader from the use of the book *alone*. He sells nothing that the book describes; nor the right to *use* any thing that the book describes.

The question arises, then, what is necessarily, naturally, or legally involved in the *use* of the *book alone*? The answer is this.

The whole object and effect of the *book itself*, as a representative of ideas, are accomplished, when it has suggested to its readers all the ideas which it can suggest. Every possible *use* and power of the book itself, in relation to the ideas it describes, are exhausted in the execution of that single function. After that function is performed, *the book itself is thrown aside*, and has no part nor lot whatever in any of the *uses*, to which the ideas, it has suggested, may be applied. How, then, can it be said that the *use* of the book involves the *use* of the ideas it communicates, when the *use* of the ideas is a wholly separate act from the *use* of the book itself; and the *use* of the book itself is a wholly separate act from the *use* of the ideas? There would be just as much reason in saying that the *use* of a book, that described a farm, involved the *use* of the farm, as there is in saying that the *use* of a book, describing ideas, involves the *use* of those ideas.

Plainly, then, an author, by describing his ideas in a book, and then selling the *book for use*, gives no more right to the *use*

that he can of ideas; and this *knowledge* of ideas is all the *possession* of them that he can, *in any way*, acquire. It would seem, therefore, that if this merely *mental* possession of things, which is acquired by reading about them, were of any importance, in law, it ought to have the same importance and effect, in the case of houses and lands, as in the case of ideas.

of his *ideas*, than a man, who describes his farm in a book, and then sells the book *for use*, gives a right to the use of his farm.

Certainly, too, every purchaser of a book, that describes ideas, is as much bound to know, that the book and the ideas are separate and distinct commodities, as the purchaser of a book, that describes a farm, is bound to know that the book and the farm are separate and distinct commodities. And the purchaser of a book is also bound to know, that he no more acquires a right to *use* the ideas, by simply buying a description of them, than he acquires a right to use a farm, by simply buying a description of it.

But perhaps it will be said that the whole object, in buying a book, is to get possession of the ideas it describes; and that the whole object, in getting possession of the ideas it describes, is to *use* them for our benefit, as in the case of any *material* commodities, which we seek to get possession of; that the author knows all this when he sells the book; and that the law will consequently imply that he consented to it; inasmuch as otherwise it would impute to him the fraud of making a sale, *in form*, without intending that the real benefits of the sale should be enjoyed by the purchaser.

But there is no such analogy, between material and immaterial things, as is here assumed. The possession of *material* things, without the right of *use*, is a burden, because it imposes labor, without profit. Men therefore do not desire the possession of *material* things, unless they have also the right of *using* them. But it is wholly different with ideas. The simple *possession* of them is necessarily a good. They are no burden. They impose no profitless labor upon the possessor. They furnish food and enjoyment for his mind, and promote its health, strength, growth, and happiness, even though he be *not* permitted to *use* them, in competition with their owner, as a means of procuring subsistence for his body.

A very large proportion of all the books, that are purchased, are purchased *solely* for the mental enjoyment and instruction to

be obtained by reading them; and *not* for the purpose of reprinting them, nor of *using* the ideas for any pecuniary end.

There is, therefore, no ground for saying that the whole object of buying books, is to get the ideas, to be *used* for pecuniary purposes; and that, unless they can be so *used*, the author has practised a fraud on the purchaser. The mental enjoyment and instruction, which the reading of books affords, are sufficient motives for the purchase of books, even though the right to *use* the ideas described in them, for pecuniary ends, be no part of the purchase.

Taking it for granted that it has now been established, that a book itself *contains* no ideas; that a book, and the ideas it describes, are, in fact, and in law, distinct commodities; and that the sale of the book legally implies no sale of the ideas *for use* (beyond the simple mental possession and enjoyment of them); I stop to anticipate an objection, viz.: It will be asked how one man can trespass upon another man's right of property, in *ideas*, by simply printing and selling a book, *that contains no ideas?*

The answer to this question is, that a book cannot be printed without *using* the author's ideas; *inasmuch as those ideas are an indispensable guide to the work of printing a book that shall describe them. They are an indispensable guide to the work of setting the type that are to represent those ideas.* It is impossible, therefore, that a book can be printed, without *using* the ideas which the book is to describe. This *use*, therefore, of an author's ideas, unless with his consent, expressed or implied, is a trespass upon his right of property in them. The use of his ideas, without his consent, in making a valuable book, is as much a trespass upon his right of property in those ideas, as the use of a man's printing press, without his consent, in printing the book, would be a trespass upon the owner's right of property in the printing press.

But not merely the printing of a book, without the author's consent, is a trespass upon his right of property in his ideas, but the sale, and even the reading, of a book thus printed, is also a

trespass upon the same right of property — and why? Because the right of property is a right of absolute dominion. The owner of ideas, therefore, has a right to inhibit — and, where he reserves his copyright, he does inhibit — the communication of his ideas, from one mind to another, through the instrumentality of any books whatever, *except such as he himself prints, or licenses to be printed.* Any body, therefore, who either sells or reads a book, not printed by the author, nor licensed by him to be printed, is an accomplice and agent in taking the author's ideas out of his control, and in communicating them through a channel or instrumentality, which he has inhibited to be used in the communication of his ideas.

So absolute is an author's right of dominion over his ideas, that he may forbid their being communicated even by the human voice, if he so please. And such prohibition would be as perfectly legal, as any other act of dominion over them.

An author may, if he please, *by express contract,* restrict the communication of his ideas, beyond the *first* purchasers of the books, which he himself prints, or licenses to be printed; and thus make it necessary for every man to buy a book, and pay tribute on it to the author, in order to become-acquainted with the ideas. And there may, perhaps often, arise cases where it would be for the interest of an author to do so. But without such an *express* contract, the presumption of law would be, that the purchaser of a book had the consent of the author to sell it, lend it, or dispose of it, at his pleasure, as he would any other *material* property; and that every one, into whose hands it should thus lawfully come, might read it.

But here another question will be raised, *viz.*

If a book, and the ideas it describes, are distinct commodities; and if the sale of the book do not imply the sale of any right of property in the ideas described in it, (beyond the mere possession and mental enjoyment of them;) how is it that men can *ever* have a right to *use any* of the ideas described in books, without making a special purchase of them, *separately from the book?*

It is important that this question be answered; because, although the productions of every man's mind are theoretically his property, yet we see that, in practice, *not all, but nearly all*, the ideas, that are described in books, are *freely* used by mankind at large, in any and every way in which they please to use them — (except the single one of reprinting the author's descriptions of them) — without making any special purchase of them from the author, separately from the purchase of the books describing them. It may seem, at first view, that this practice must be illegal. But I shall attempt to show that mankind have a *legal right* to use, in this way, *not all, but nearly all*, the ideas that are described in books. And the question now is, *how can they have this right, consistently with the principles hitherto laid down in this essay?*

The answer to this question is to be obtained by applying, to each case, these general rules, *viz.*

When an author sells a book, describing his ideas, the law presumes that he intends to retain *all such* of his original *exclusive* rights of property in them, *as may be practically valuable to him*; and that he intends to *abandon* — not to *sell*, but to *abandon* — *all such* of his original *exclusive* rights of property in them, *as would not be of any value to him, if retained.*

The law raises these presumptions, on his part, because they are abstractly reasonable, and conformable to the principles of action, that generally govern mankind — that is, mankind generally *wish* to preserve *all* their rights of property, that will be practically valuable to them; and they generally *wish not* to look after, watch over, or consequently to preserve, *any* rights of property, that are too insignificant to be of any practical value to them.

These rules also, when applied to ideas, are only the synonyms or equivalents of the general principles, on which the administration of justice proceeds in all cases, *viz.*: that the government is established and maintained for practical, and not for merely theoretical, purposes; and that it will therefore protect a man in the

possession of every thing that is his, *and that is of any real appreciable value to him*; but that it will incur neither the trouble nor expense of protecting him in that, which, though it may be theoretically his, *is of no real appreciable value to him*.

This, too, is, practically speaking, *all* the protection, which the law *can* give to a man's rights of property, *in any case*; whether the property be material or immaterial; because the law can award no damages for the invasion of rights, unless the injury suffered be large enough to be capable of being measured by at least *some* legal standard of value, as a cent, a farthing, a penny, or some measure of that kind.

These principles are usually expressed by the legal maxim, *de minimis non curat lex* [the law takes no care of trifles;] (which maxim, by the way, implies that the law *does* take care of every thing that is of any real appreciable value).

The result of these principles, then, when applied to ideas, is simply this, *viz.*: wherever an author's *exclusive* rights of property in them, can be of any real appreciable value to him, the law will protect him in them; inasmuch as it will presume that he desires to retain them. But wherever his *exclusive* rights of property in them, can be of *no* real appreciable value to him, the law will not protect them; but will presume that he *voluntarily* abandons them.

In other words, wherever an *exclusive* right of use would be more profitable to the author, than a right *in common with the rest of mankind*, there his *exclusive* right is presumed to be retained. But wherever a right of use, *in common with the rest of mankind*, would be just as profitable to the author, as an *exclusive* right, there his *exclusive* right is presumed to be abandoned, and only a *common* right retained.

Now, in order to determine *what exclusive* rights of property, in his ideas, can be made more valuable to the author, than a *common* right, we must determine, *in the case of each idea, or collection of ideas*, what *profitable* use he could make of an *exclusive* right, over a *common* right; or, on the other hand, what

profits he would *lose*, by suffering his *exclusive* right to become common to all. And this question is one, which, in practice, could *generally* be very easily settled.

In the case of the most important labor-saving inventions, for example, the *exclusive* right of using them, is evidently more valuable than a right in common with the rest of mankind; because an *exclusive* right will sell for a price in the market; whereas a common right will not. An *exclusive* right will also be more profitable for the inventor, if he wish to use it himself, than a common right; because it will enable him to avoid competition, and thus obtain a higher price for his labor. For these reasons the law will presume, in the case of such inventions — however fully they may be described in books, and however unreservedly such books may be sold in the market — that the authors choose to retain their *exclusive* right in them, *for purposes of labor*. At the same time, perhaps, the law will *not* presume that the inventors retain the *exclusive* right to their inventions, *for literary purposes* — that is, for the purpose of writing books describing them — because the profits, on the sale of such books, may be insignificant; and because also it may be for the interest of the inventors to have their inventions described by others than themselves, and thus more widely advertised *for sale*.

Nevertheless, in the case of *most* of the ideas described in books, the only *exclusive* right, that *can* be of any profit to the author, over a *common* right, is the right of using them *for literary purposes*. This, therefore, is the only *exclusive* right, which the law will *ordinarily* presume that the author wishes to retain.

The ideas, described in print, may be classed — with reference to the rights retained, and the rights abandoned, by the authors — under three heads.

In the first class may be reckoned those labor-saving, and other valuable, inventions, of which the authors retain the *exclusive* use, *for the particular purposes for which the inventions are specially designed*; but of which the authors do *not*, ordinarily,

retain the exclusive use, *for literary purposes* — that is, for the purpose of writing descriptions of them.

In the second class may be reckoned those ideas, of which the authors retain the exclusive use, *for literary purposes*, but not for any other purpose.

In the third class may be reckoned those ideas, of which the authors retain no exclusive use whatever.

But let us explain, a little more particularly, the principles of law applicable to each of these classes of ideas.

1. As an example of the first class of ideas, take the invention of the steam engine. The invention itself is of immense value, *for purposes of labor*; but a book, describing it, would probably yield little or no profit, *as a merely literary enterprise*. If, therefore, the inventor of the steam engine were to write a book, making the invention fully known to the public, the law would nevertheless presume that he reserved his *exclusive* right to the invention, *for use as a motive power*; but, at the same time, it would probably presume that he *abandoned* his *exclusive* right to it, *for literary purposes*; and that he was willing it should be freely written about, by all who might choose to write about it. And even if other men should reprint his own description of it, without his consent, very likely the law would not say that any wrong had been done him; but rather a benefit, inasmuch as his invention would thus be more widely advertised, *for sale*, than it otherwise would be.

But if any other man, than the inventor, were to write a book describing the steam engine, the law would most likely presume that he wrote it solely as a literary enterprise; and that he therefore wished to retain his exclusive right of property in it.

2. In the second class of ideas — those, in which the authors retain an *exclusive* right, *for literary purposes*, but *not* for any other use — may be reckoned an infinite number of ideas, that are really useful to mankind, as guides for their conduct, under various circumstances in life; but which, nevertheless, have *singly* no appreciable *market* value, *for use*. Take, for example,

the ideas, that the earth is a globe; that it turns on its axis; that it revolves round the sun; that honesty is the best policy; that industry and economy are the roads to wealth; that certain kinds of labor are injurious to the health; that certain kinds of food are more nutritious than others; that certain diseases are contagious, and others not; that certain animals are untamable and dangerous; that other animals are harmless, susceptible of being domesticated, and made subservient to the uses of man; that certain systems of philosophy and religion have more truth in them than others; and an infinite number of other ideas, which are valuable to mankind *for use*; but which, nevertheless, if offered for sale *singly* in the market, would not bring a farthing apiece, from one man in a thousand.

The only way, then, in which any *exclusive* property, in ideas of this kind, can be made valuable to the authors, is by using them for literary purposes, instead of attempting to sell the ideas themselves *singly for use*.

Since, then, this right to *use* one's ideas, of this kind, *for literary purposes*, is the only *exclusive* right of property, that can be of any practical value to the author, it is the only *exclusive* right that the law will presume that he intends, or desires, to retain, when he sells a book describing them.

This exclusive right of using¹ ideas for literary purposes, is what we call the copyright. And this is the only *exclusive* right of property, which authors *usually* retain, or wish to retain, in the ideas they describe in their books.

But, because a man has the *exclusive* right of using his own *original* ideas, for literary purposes, it must not be inferred that authors have any *exclusive* right of property of this kind, except in those *particular* ideas, which they themselves originate. Now it is only a *very few* of the *leading, primary, and most important* ideas, described in books, that are original with the authors of the books; inasmuch as the *elementary* truths, in nearly all departments of knowledge, have been long known to mankind. An author's *originality* is, therefore, generally confined to *secondary*

and *subsidiary ideas*, such as the combination, arrangement, and application of the leading or elementary ideas, and the style of the composition describing them. And it is only in these *original ideas of his own*, that the law gives him a copyright, or any exclusive property.

3. Among the examples of the third class of ideas — in which no *exclusive* right whatever is retained — may be reckoned a large proportion of the ideas, which appear in newspapers; especially the accounts of passing events, and comments thereon; which ideas have an interest to-day, but will be stale to-morrow; and an *exclusive* right in them will never be of any appreciable value to the author, either for the purpose of being reprinted, or for any other use. In this case the law presumes that the author retains no *exclusive* right of property in them; simply because such *exclusive* right would be of no practical value to him.

If, however, these ideas have any particular *intellectual* merit, which would add to the author's reputation, the law will presume that he wishes to retain his *exclusive* right of property in them, *so far as is necessary to secure to himself the reputation of authorship*, even though no *direct pecuniary* advantage is to be derived from them. The law, therefore, will require that those, who reprint such ideas, should ascribe them to the true author, instead of printing them as their own. Of course this requirement applies only to such ideas, as have such an essential and important merit, as the authors may *reasonably* desire the credit of. It would not apply to ideas too trivial to be worthy of a reasonable man's consideration. To such, the principle, that the law does not take care of trifles, would apply.

I shall now take it for granted, that it has been sufficiently shown, that a book, and the ideas described in it, are, in fact, and in law, distinct commodities; that the sale of the former implies no sale of any right of property in the latter, beyond the mere possession and mental enjoyment of them; that, with these exceptions, the law presumes that an author desires to retain his *exclusive* right in all his *original* ideas, for all purposes whatso-

ever, for which such *exclusive* right will have an appreciable value, pecuniarily or otherwise, over a right in common with the rest of mankind.

This presumption of law, in favor of the author, arises, *without any special notice being given, in the book*, that he wishes to retain his copyright, or any other *exclusive* right, in the ideas described. It arises, in the case of ideas, on the same principles, and for the same reasons, as in the case of material property, viz.: that the ideas are the products of labor; that they are *naturally* the property of the producer; and that it is as unreasonable to presume that he would gratuitously part with any *valuable* rights in them, as it is that he would gratuitously part with any equally valuable rights in his material property.

It is not *legally necessary*, therefore, that an author should give notice, *in his book*, that he retains his copyright, or any other right in the ideas described. Indeed it might, *in some cases*, be dangerous to give the notice "*copyright reserved*," that is, in cases where still other rights, than the copyright, were intended to be reserved; because such notice, unaccompanied by any other special reservation, might imply that no other rights, than the copyright, were reserved.

But although it might be dangerous to give notice, *simply* of a reservation of "*copyright*," where still other rights were intended to be reserved — as in the case of books describing valuable mechanical inventions, and also in the case of dramatic and musical compositions, where the right of *performing* the pieces was intended to be reserved — it might, nevertheless, be highly judicious, to give notice of the reservation, *both of the copyright, and of all other rights intended to be reserved*, in order to guard against any presumption of abandonment, in doubtful cases, against the will of the author.

Taking it for granted that the question, "Whether the sale of a book unreservedly, implies a sale, *for use*, of the ideas described in it?" has now been sufficiently answered, I proceed to answer another question, very similar in character and importance, to

wit: Whether if an inventor make an unreserved sale of a machine, constructed in accordance with his invention, such sale will include the sale of a right to construct other similar machines? or only a right to use the particular machine sold?

It will be seen at once that much of the same reasoning, that is applicable to books, and the ideas described in them, is applicable also to machines, and the ideas, after which they are constructed. For example, the machine, and the idea, after which it is constructed, are, in fact and in law, separate and distinct commodities; as much so as are a book, and the ideas described in it. The machine does not *literally contain* the idea, after which it was constructed; although we are in the habit of speaking of machines in this manner. The idea does not exist *in the machine*; it exists only in the mind. The machine consists only of wood, iron, and other corporeal substances. The forms and shapes, given to those substances, are only *effects*, produced upon them by a combination of causes, to wit, the idea of the inventor, and the physical labor of the machinist; just as the order, arrangement, and collocation of the printed letters in a book, are *effects* produced by a combination of causes, to wit, the ideas of the author, and the physical labor of the printer. In both cases — that of a machine, and that of a book — we can *ascertain* the nature of the causes, (that is, the ideas, and the physical labor,) by an examination of their *effects*. But the *causes* and their *effects* are not, therefore identical. They are, in fact and in law, distinct entities; as much so as are any other causes and their effects. The machine, too, *as a whole* — that is, the wood, iron, or other corporeal substances, with the effects produced upon them, or the shapes given to them, by the idea of the inventor and the labor of the machinist — is clearly, in fact and in law, a distinct entity from the idea of the inventor, which can exist only in the mind. And the sale of the machine, therefore, implies no sale of the inventor's idea, any farther or otherwise than this, to wit. The sale of the machine implies a right to use *it*; and the right to use *it*, implies a right to use the idea of the

inventor, so far as it may be necessary to use it, in order to use the machine; but no farther.

The same question, in substance, may now be asked, in regard to a machine, that was before suggested in regard to a book, viz. : If a machine, and the inventor's idea, after which it was constructed, be, in fact, and in law, distinct commodities; and if the machine do not literally *contain* the inventor's idea; how can his rights of property, *in that idea*, be trespassed upon, by another person, in constructing or using a similar machine — that is, a machine which does not *contain* any idea whatever?

The answer is the same as in the case of the book, viz. : that, although the machine do not literally *contain* the inventor's idea, yet the machine cannot be constructed without *using* his idea. That idea is an *indispensable guide* to the construction of the machine. And this *use* of the inventor's idea, without his consent, is a violation of his rights of property in it.

So, also, in *operating* a machine, the operator *uses* the inventor's idea; for he designs and *endeavors* to produce the same results, as those intended by the inventor, and by the same process, as that devised by the inventor. This, therefore, is a *use* of the inventor's idea, and is consequently a trespass upon his rights.

The same principles apply to sculpture, painting, drawing, &c. A statue, and the design after which it was sculptured, are distinct commodities; and the sale of the statue does not convey any right to use the sculptor's design, for the purpose of making a copy. The same is true of paintings and drawings, the designs of which can be made of sufficient practical value to the authors, to be entitled to be recognized, by law, as objects of private property.

It is not *legally necessary* to give notice, *on a machine*, that the invention is reserved; because, if the invention be such, as that the exclusive use of it will be of any really appreciable value to the author, every body is bound to presume that it is reserved. But where the fact of value is at all doubtful, it may be of utility to give the notice, in order to guard against the doubt.

CHAPTER V.

THE POLICY OF PERPETUITY IN INTELLECTUAL PROPERTY.

As a matter of public policy, the expediency of allowing a man a perpetual property in his ideas, is as clear as is that of allowing him a perpetual property in material things.

What is the argument of policy *against* a perpetual property in ideas? Principally this — that the world will get ideas cheaper, if they get them for nothing, than if they pay for them.

This argument would be just as good in favor of abolishing the right of property in the material products of men's labor, as it is for abolishing it in intellectual ones. Take wheat, for example. If the right of property in wheat were abolished, the world would get the stock of wheat, *that is now on hand*, for nothing. But the next crop of wheat would be a small one; and people would then learn, that in the long run, the cheapest mode, and the only mode, of procuring a constant and ample supply of wheat, is to acknowledge that wheat is the property of the producers, and then to buy it of them by voluntary contract. Under the system of a right of property in wheat, there will be a perpetual supply of wheat; because men have a sufficient motive to produce it; and a man can always procure enough for his uses, by giving a reasonable proportion of the products of his own labor in exchange. But under the system of no right of property in wheat, he would be able to get wheat at no price whatever, after the present stock should be consumed; simply because men would have no sufficient motive to produce wheat, unless their right of property in it were acknowledged.

The principle is the same in regard to valuable ideas. We can get the free use of the *present stock* of ideas, by destroying the

rights of the producers to their property in them. But if we do, the next crop of ideas will be a small one, as in the case of the wheat.

If we want no new ideas, but only wish to get the use of the present stock for nothing, without regard to justice, the true way undoubtedly is, to abolish all rights of property in them. But if we wish to induce men of inventive minds to go on producing new ideas, the true way certainly, if not the only way, is to respect their rights of property in those they have already produced.

But governments have the idea that intellectual men — especially authors and inventors — can be induced to work, if they can but be permitted to enjoy a *partial* or *temporary* property in the products of their labor; while it is conceded that all the rest of mankind should enjoy a full and perpetual property, in the products of theirs. But there are the same reasons of policy, for allowing men a *perpetual* property in their ideas, that there are for allowing them a perpetual property in the material products of their labor.

What are the great incentives to enterprise and industry in the production of *material* wealth? Plainly these — the thoughts that whatever a man acquires, will be his during life, or during pleasure, and that, at his death, whatever he leaves, will go to those whom he wishes to provide for. These are the all-powerful springs, and almost the only springs, that keep all physical industry in motion, and supply the world with wealth.

The policy of nature, for supplying mankind with subsistence, is, that each man shall labor, first and principally, for himself, and those most dear to him; and only secondarily and discretionally, for mankind in general; unless, indeed, his labors for mankind at large, can be made productive of support to himself, and those naturally dependent on him. In this way, each man laboring for, and supplying, those nearest to him, all are labored for, and supplied. This policy is dictated and impelled by the natural strength of the human affections, which are uncontrollable by

human statutes; and no adverse policy, devised or dictated by lawgivers, such as that of requiring a man to work for mankind at large, instead of working for himself and his friends, can either stifle these natural motives, or supply others of any thing like equal power over the energies of men.

But how would these motives be weakened, and nearly deadened, by the knowledge that, at the end of a brief period, the products of a man's labor would be taken from him, against his will, and given to men, whom he never knew, or knowing, does not love? And how would the general production of wealth be checked, and nearly paralyzed, by the establishment of such a principle, as a universal law? How many fruitful farms, for example, would ever have been reclaimed from their wilderness state, if those, who felled the trees, and subdued the soil, had known that, after a period of fourteen years, the fruits of their labors would be taken from them and their families, and be made the common property of the world? How many substantial, comfortable, and elegant dwellings would ever have been erected, if those, who built them, had known that, after occupying them, with their families, for fourteen years, they would be required to admit the world at large to an equal occupancy with themselves? The universal, and the universally known, nature of man answers these questions; and tells us that, with such a prospect before them, mankind, as a general rule, would labor only for the production of such things, as they and theirs could actually *consume* within the time they were allowed to possess them; *that they would not labor for the benefit of robbers, intruders, or strangers*; that they would therefore attempt none of those accumulations for the future, which each man and each generation of men now attempt, under the inducements furnished by the principle of perpetual property, in one's self and his descendants.

The consequence, therefore, of such a principle would be universal poverty. Men would produce only as they consumed. And this state of poverty would continue so long as the right of individual and permanent property was denied. But let the right

of individual and perpetual property, in the products of one's labor, be acknowledged, and the whole face of things changes at once. Each man, secured in his right to what he produces, commences to accumulate for the benefit of himself, and those whom he desires to protect. He controls and enjoys his accumulations during life, and at death leaves an important portion of them to his children, to aid them in making still greater accumulations, which they, in turn, leave to their children. And this process continues, until the world arrives at that state of wealth, in which we now find it; the whole world enriched by the wealth of individual proprietors; instead of the whole world being impoverished, as in the other case, through the impoverishment of the individual producers of wealth.

Such being the law of man's nature, imperatively controlling his motives and energies, there is no reason why the true policy indicated by it—that is, the policy of perpetual property—should not be applied as well to the producers of intellectual, as of material, wealth. There is no reason why the principle of individual and perpetual property, in ideas, will not prove as beneficent towards the whole human family, by stimulating the production of valuable ideas, as does the same principle when applied to corporeal things. Men produce valuable ideas just in proportion as they are furnished with the necessary facilities, and stimulated by adequate motives. This they do under the influence of the same law, which stimulates them to the production of material wealth. And the increase of intellectual wealth would be as much accelerated, by the adoption of the principle of perpetuity, in reference to intellectual property, as is the increase of material wealth, by the adoption of the same principle, in reference to material property. On the other hand, the production of intellectual wealth is as much checked, and discouraged, by the systematic plunder of the producers, as the production of material wealth would be, by the systematic plunder of its producers. The production of intellectual and of material wealth obeys the same laws in these particulars. And these laws are utterly

irrevocable by human enactments. Government cannot *compel* the Arkwrights, and Fultons, and Morses to invent their great ideas, and give them to mankind. It can only *induce* and *enable* them to do it. And *this* the government must do, or mankind must lose the benefits of the ideas themselves.

Such, then, being the inevitable conditions, on which alone these valuable ideas can be obtained, the questions for society to settle are, simply, whether government shall encourage the production of these ideas, by protecting them as property to their producers? And whether, when the public want them, they shall be necessitated to buy them, and pay for them, as for other property? Or whether the production of them shall be discouraged and suppressed, by the systematic and legalized robbery of the producers?

At present, the United States, England, and some other nations say, by their laws, "we will give this property a *partial* protection — that is, the protection of civil, but not of criminal, laws; and even that protection it shall have *only for a brief period*; after which, it shall be a subject for free plunder by all."

What effect this system has upon the production of valuable ideas, may be judged of, by the effect, which a similar system confessedly *would have*, upon the production of wealth, by the physical industry of men. If such a system would discourage all physical industry, it now discourages all intellectual effort, *in a corresponding degree*. And, consequently, we now have a correspondingly less number of valuable inventions, than we otherwise should have. Under a system of *full* protection — that is, the protection of both civil and criminal laws — and of perpetual property in the producers, we should doubtless have five, ten, twenty, or more times as many valuable inventions, as we now have. This may be safely predicated, both from the general principles governing the production of all valuable commodities, namely, that they are produced in quantities corresponding to the protection afforded them, and the prices paid for them; and also from an observation of the present condition of inventors gener-

ally, and of the difficulties they encounter in bringing out their ideas. What is that condition? And what are those difficulties? In the first place, the *general* condition, of both authors and inventors, is that of poverty. Doing incomparably more to enlighten and enrich mankind, than any other persons, they are probably, as a class, poorer than any other *industrious* class in the community. This is all owing, especially in the case of inventors, to the miserable protection afforded to their property, and the consequently small price they obtain for their labor. In the second place, the difficulties they experience in bringing out their ideas, arise solely from their poverty, and their inability to obtain the necessary capital with which to make their experiments, and upon which to live while making them. This inability to obtain capital, results wholly from the want of protection given to such property; whereby the value of each inventor's *prospective* property, in his inventions, is rendered so precarious as to be a wholly inadequate security for investments. The *natural risks* of an inventor's failure to *make* an invention, interpose such an obstacle to the procuring of capital, as can be overcome only by the prospect of large profits in case of success. But when this prospect of large profits, in case of success, is cut off by the inadequate protection afforded to the property to be produced, and the brief period for which even that protection is afforded, there is *no*-adequate security left, as a basis for investments. And nearly all capitalists view the matter in this light. Inventors, therefore, as a general rule, are unable to procure capital. The consequence of this want of capital is the same, in the case of inventors, that it is in the case of any of the other industrial classes; for an inventor can no more produce ideas, *without a money capital*, than other men can produce houses, ships, or railroads, without a similar capital. The result is, that a large portion of the inventions, that otherwise would be made, are never brought out; and the world loses the benefit of them. The operation of these causes, in crippling the powers of inventors, is so general, so nearly universal, and so severe, as to have

become a matter of the most public notoriety. Yet the true remedy, and what must, in the nature of things, be the only true and practicable remedy, is seldom proposed, and has never been adopted.

If the property of inventors were fully protected, and made perpetual, they would find no more difficulty in obtaining the capital necessary for their purposes, than other men do in finding it for theirs; because, although there may be more risk as to the success of a *single* experiment of theirs, than there is of the success of the ordinary operations of business, yet, *in the long run*, their labors would be much more lucrative, than the business of other men; and this prospect of superior profit, would enable them easily to command the necessary capital. Invention would become a regular business, a distinct profession, on the part of large numbers of men who have a talent for it, instead of being, as now, little more than the merely occasional occupation of here and there an individual. The number of inventors would thus, not only be greatly increased, but individual inventors would produce many more inventions than they now do. The number of persons, who have a natural capacity for invention, is probably as great as the number of those, who have a natural capacity for poetry, painting, sculpture, or oratory. And doubtless as many have been disabled and dissuaded, by want of means and inducements, from becoming inventors, as have been disabled and dissuaded, by the same causes, from becoming poets, painters, sculptors, or orators. But under a system of full protection, and perpetual property in their inventions, these naturally born inventors would nearly all devote themselves to invention, as their most congenial and lucrative pursuit. And the result doubtless would be, that we should have ten, twenty, and most probably fifty, or one hundred times as many, valuable inventions, as we now have.

Mankind do not perceive their true interests on this subject; and they are paying the penalty for their blindness, in the heavy toil, and the lack of wealth, which so large a portion of them

endure. They have not yet fully learned that their brains, and not their hands, were designed for the performance of all heavy and rapid labor — that is, through the medium of labor-performing inventions. Yet such is the truth, as witness the water wheels, the steam engines, the electric telegraphs, the power looms, the spinning machines, the cotton gins, the carding machines, the sewing machines, the planing machines, the printing presses, the railroads, the vessels propelled by wind and steam, and the thousands of other inventions, (very many of which are so old, and in such common use, that we are apt to forget that they *are* inventions,) by means of which the power and speed of labor are so wonderfully, and almost miraculously, increased. Compare the speed, and the amount of the labor, performed by these instrumentalities, with the speed, and the amount of the labor, performed by men, without the use of these or other inventions; in other words, compare the labors of civilized men, accomplished through the instrumentality of labor-performing inventions, with the labor of savages, accomplished with the hands, unaided by such inventions; and we shall see at once the difference between men's brains and their hands, as instruments of labor. If, now, the products of men's brain labor, were as fully secured to the producers, as are the products of their hand labor, we should see such a development of brain labor, (in the shape of labor-performing inventions,) and of consequent wealth, as the wildest dreams of men have doubtless never conceived of.

Another consideration, that specially commends these inventions to the protection of the law, is, that the wealth, that results from them, cannot be monopolized by the owners of the inventions; but is generally distributed, with great impartiality, among all classes of society, from the richest to the poorest. How is this done? In this way. If the inventor becomes the manufacturer of the thing invented, he, like all other men, finds it for his interest to make quick sales, at small profits, rather than slow and small sales, at large profits; because he will thereby derive the greatest aggregate income from his invention. If, on the

other hand, he chooses to license others to manufacture the thing he has invented, the same principle operates; and he finds it for his interest to license a large number of manufacturers, at low prices, rather than a small number, at high prices. He thereby insures such a competition between them, as will compel *them* to make quick and large sales, at small profits, rather than slow and small sales, at large profits.

If the thing invented be of much importance, and one for which there is a large demand in the community, the inventor generally finds it for his interest to license others to manufacture it, rather than become the manufacturer himself; because he thereby derives a greater profit from his invention, and also finds leisure and means for the more agreeable and lucrative employment of making still other inventions, the use of which he will sell or rent in like manner.

Thus, in all cases, the necessary operation of the laws of trade, or the principles of self-interest, on the part of the inventor, is to induce him, (either directly, as his own manufacturer, or indirectly, through those whom he licenses,) to insure a supply of the commodity to the whole community, at moderate prices. And this depression of prices is, in most cases, still further enforced by rival inventions, which accomplish the same results by different processes. In this way, the wealth produced by an invention, is spread abroad amongst the people at large, at such low rates of compensation, that the inventor secures but a very small portion of that wealth to himself, to wit: that portion only, which is paid him for the privilege of manufacturing and using the thing he has invented. *And that portion, I presume, is certainly, on an average, not more than one per centum of the wealth actually created by his invention. **

* I shall assume in this chapter, for purposes of argument, that not more than one per centum of the wealth produced by labor-performing inventions, goes into the pockets of the inventors; or would go into their pockets, under a system of perpetual property, on their part, in their inventions. How near the truth this estimate may be, others can judge as well as myself. It is obviously sufficiently near the truth for the purposes of fair illustration.

Thus, in effect, an inventor really gives, outright to society, ninety-nine one-hundredths of all the wealth, which his invention produces. Yet society are so unwise, impolitic, ungenerous, and unjust, as to wish to deprive him even of the one per centum, which he wishes to retain, of the products of his labor. And after a period of fourteen years, they do deprive him of it.

Other producers, in their exchanges with their fellow men, give only dollar for dollar ; and yet the government, by both civil and criminal laws, protects the products of their labor to them in perpetuity — that is, to them and their heirs and assigns forever. But inventors, who produce incomparably more than other men, and who, in their exchanges with their fellow men, are habitually accustomed to give one hundred for one, are systematically discouraged, disabled, and even deterred from producing inventions, by being denied all but an imperfect protection, and allowed even that only for a brief period ; after which their property is made free plunder for all.

To ask if this be *justice*, would be an insult to the reason of all. The question now is, whether it be *good policy for the public themselves*, to discourage and suppress, by this systematic and wholesale robbery, those producers, who, if protected like other men, will give them an hundred for one? Whether the people at large can afford thus to impoverish themselves, by discouraging and suppressing the production of those inventions, which do nothing but enrich them? Can they afford to deprive themselves of the benefits of those inventions, which they otherwise might have, by refusing to inventors even *one per centum* of the wealth they produce? Can they, in other words, afford to lose the ninety-nine per centum themselves, to avoid paying the one per centum to the producers? These inventions cannot, and will not, be produced in adequate numbers, unless adequately paid for. *That* is a fixed principle in the natural law of production. How much clear gain, then, (for that is the true question to be solved by them,) will mankind realize, *in the long run*, from refusing to trade with, or encourage, a class of producers, who offer them, in

exchange, a hundred for one? The world has long ago decided, that it is the wisest policy to protect the property of, and thereby encourage, those merely ordinary producers of material wealth, who, in their exchanges with their fellow men, demand dollar for dollar. Yet, strange to say, the world has not yet learned, that it is an unwise policy, to systematically plunder, and thereby systematically discourage, those extraordinary producers, (the inventors,) who, in their exchanges with their fellow men, ask but one dollar in exchange for a hundred! The fabled folly of starving the hen, that laid the golden eggs, is fully realized in the conduct of society in plundering and starving their inventors. These labor-saving and labor-performing inventions are the great fountains of wealth, without which mankind, (if the race could subsist at all,) would be only a few wretched savages, scarcely elevated, either in mental development, or physical comfort, above the condition of wild beasts. Yet they pretend to regard it as an act of both policy and justice, to outlaw, plunder, and treat as an enemy, every man who dares to open one of these fountains for their benefit—as if it were a moral duty, and would be a pecuniary profit, to deter and prevent him, and all others like him, from ever doing for them again a deed of such transcendent beneficence! To be consistent in this policy, they should make it a capital offence, for any man to supply the wants, relieve the toil, multiply the comforts, promote the health, prolong the life, enlighten the minds, or increase the happiness, of his fellow men.

The impolicy and inconsistency of governments, on this subject, are as palpable and enormous as their injustice. Take, for example, the governments of England and the United States. The so called statesmen of England have heretofore attempted to improve the *agriculture* of their country. And how did they proceed? Did they encourage chemists to prosecute their researches, and make experiments, to discover new processes or substances, by which the soil might be cheaply fertilized, and made more productive? Did they encourage ingenious men to invent new implements, by the use of which men and animals

might perform more agricultural labor than they could before? Did they encourage either of these classes of inventors, by securing to them, by adequate laws, their just and perpetual property in their inventions? Such laws as would enable them to secure to themselves even *one per centum* of the wealth their inventions would create? No. They did nothing of this. On the contrary, they nearly outlawed their property, by giving it only the partial protection of civil laws, and that for a period of but fourteen years. This is all the encouragement they gave, to those extraordinary wealth producers, the inventors, who were willing and ready to give to the people of England an hundred pounds worth of agricultural products, in exchange for one pound in money. But, in place of thus giving any further or better encouragement to inventors, they proceeded to improve the agriculture of the nation, by laying duties of, say, fifty per centum, on an average, upon all breadstuffs imported from foreign countries; the effect of which was to enable the domestic agriculturalist to demand and obtain, of his fellow men, for all his agricultural productions, fifty per centum more than their just market value. In other words, the government virtually levied, upon the people at large, a tax equal to fifty per centum upon the true value of all the agricultural commodities produced and sold in the kingdom, and gave that enormous amount of money annually, as a gratuity, to those merely ordinary agriculturalists, whose industry was no more meritorious or productive, than the industry of those other people, who were thus taxed, or rather robbed, for their benefit. In still other words, the government, under pretence of promoting and improving the agriculture of the nation, virtually compelled the people at large to pay, to the merely ordinary agriculturalists of England, a pound and a half in money, for every pound's worth of food produced and sold in the kingdom; while, at the same time, it discouraged, outlawed, plundered, and thus in a great measure drove out of market, those extraordinary agricultural producers, the chemists and inventors, who were anxious and ready to furnish food to the people of

England, at the rate of a hundred pounds worth of food, in exchange for one pound in money.

It is quite easy to see how this system of wholesale robbery was adapted to fill the pockets of the merely ordinary agriculturalists, at the expense of men, whose industry was equally deserving and laborious with their own. But it is not so easy to see what extraordinary adaptation it had, to advance either the art, or the science, of agriculture itself. Yet this was the mode, in which the so called statesmen of England attempted to improve the agriculture of their country. And they persisted in the attempt until the fear of civil war compelled them to abandon the system. But there is still equal, and indeed vastly more, need of a civil war, (if the object cannot be otherwise attained,) to compel the government to protect the property of, and thereby encourage, those extraordinary agriculturalists, the inventors, (including chemists,) who virtually offer to feed the people of England for one per centum of the existing prices.*

The statesmen of the United States of America attempted to promote the manufacturing arts in their country, by a system of legislation, similar to that adopted in England for the promotion of agriculture. They, in a great measure, outlawed the property of, and thereby discouraged, those inventive men, who would have devised new processes in the mechanic arts, whereby great wealth could be produced by a small amount of human labor; and who, as a compensation for their inventions, would have demanded but one per centum of the wealth those inventions would create. Having done this, they levied such duties on imported manufactures, as would make it necessary for the people at large to purchase their manufactured commodities, of the domestic manufacturer, (a mere ordinary producer, whose industry was no more meritorious than that of other men generally,) at the rate of,

* I say the inventors, *as a class*, virtually offer to feed the people of England at one per centum upon existing prices, because I assume that each individual inventor asks, for his invention, not more than one per centum of the agricultural wealth it produces.

say, fifty per centum above their true market value. In other words, they compelled the people of the country, to buy their manufactured commodities of the mere ordinary producers, and pay them one dollar and a half in money, for every dollar's worth of goods; and at the same time outlawed, plundered, and thus discouraged, and in a great measure drove out of market, those extraordinary manufacturers, the inventors, who would have supplied the people with the same commodities, at the rate of *one per centum* on existing prices.* And they persisted in this policy until, as in England, the imminent danger of civil war compelled them, not to abandon the system, (for the system is not yet abandoned,) but to mitigate its severity. But a civil war is needed still more now, than then, (if the object cannot otherwise be secured,) to compel the government to protect the property of, and thereby encourage, those extraordinary manufacturers, the inventors, who in their exchanges with their fellow men, virtually give a hundred dollars worth of manufactured commodities, for one dollar in money.

The system of policy thus enforced upon the people, in England and the United States, is an example of that pretended wisdom, by which the affairs of nations are managed; and which, it is claimed, *is far superior to the wisdom of justice!* When will mankind learn — and compel their governments to conform to the knowledge — that justice is better policy than any scheme of robbery, that was ever devised? And that the true way of stimulating equally, justly, and to the utmost, both the physical and mental industry of all men, in the production of wealth, is simply to protect each and every man equally, in the exclusive and perpetual right to the products of his labor — whether those products be ideas, or material things?

If one tenth, (doubtless I might say one hundredth,) of those

* I say the inventors offer to supply the people with manufactured commodities, at the rate of one per centum on existing prices, because I assume, as before, that inventors would sell the use of their inventions, for one per centum of the wealth, which those inventions would create.

immense sums, which government has robbed from the people of England, and given, as a gratuity, to those ordinary agriculturalists, whose industry had no merit above that of other men, had been paid to chemists, who should have discovered new processes and substances for cheaply fertilizing the soil, and making it more productive; and to those mechanical inventors, who should have devised superior implements and instrumentalities for agricultural labor; who can rationally doubt, that the agriculture of England, both as a science and an art, would have been immeasurably in advance of what it is now? Or if one tenth, (I think I might say one hundredth,) of those many hundreds of millions of money, which in the United States, the government has plundered from the people, and given, as a gratuity, to those ordinary manufacturers, whose industry had no merit above that of other men, had been paid to those inventors, who should have devised new processes of manufacture, new machinery, new motive forces, and other instrumentalities for performing manufacturing labor, new articles to be manufactured, and new materials susceptible of manufacture; what rational man can doubt, that the manufacturing arts would, at this day, have been immeasurably in advance of what they now are?

But, with a considerable portion of mankind, robbery has been the favorite mode of acquiring wealth in all ages. All men desire exemption from severe toil; and the strong have usually sought to obtain it by robbing the weak. Thus strong nations have always been in the habit of making war upon weak nations, really from motives of plunder, though other motives may have been assigned. So also the rich and strong classes in a nation, have always been in the habit of combining, for the purpose of plundering the weaker classes of the same nation, by unequal and rapacious modes of taxation, and numerous other devices. In both cases the robbers seem not to have been aware, and probably have not been aware, that if all mankind were permitted to live in peace, and each individual to enjoy the fruits of his own labor, (including ideas, as well as material property,) the wealth of the

world would increase at a rate that would enrich substantially *all* its inhabitants, incomparably faster even, than the strong can now enrich themselves, by the robbery of the weak. Take, for example, the cost, to the conquerors, of any war, ancient or modern, that has been carried on for purposes of plunder. Suppose *one tenth* of that cost, instead of being expended in war, had been paid to inventors; does any one doubt that, for that sum, inventions could have been produced, that would have added more to the wealth of the nation, than was gained by the conquest? And these inventions would not only have enriched the nation that produced them, but would have been also communicated to other nations. Thus many nations would have been enriched, at one tenth of the cost, at which one nation enriched itself, by the subjection and robbery of another.

At the present day, this policy of robbery is still predominant in the world; so much so, that nearly all the civilized nations of the world, keep immense armies, or navies, or both, for the double purpose of robbing other nations, and of protecting themselves against similar robbery. If one tithe of the money, that is annually paid for these purposes, by the several nations of Europe, were paid to inventors, these several nations might not only live in peace with each other, but each and all would very speedily attain to a wealth, greater than conquest ever aimed at, or conquerors ever conceived of.

To sustain the literal truth of this calculation, let us consider the wealth acquired by conquest, compared with that created by mechanical inventions. Of course, neither can be estimated with any thing like precision; but I apprehend it would be entirely within the limits of truth to say, that all the wars of Europe and America, in the last thousand years, have not brought as much net wealth to the conquerors, as has been created by the steam engine, and its subsidiary inventions, in the last ten, or even five, years. I apprehend also that all the British conquests in India, within the last hundred years, and all the oppressions practised, within that time, upon 100,000,000 of people, have not succeeded

in extracting so much net wealth from that country, as has been created by the spindles and looms of England, in the last ten, or perhaps even five, years.

If these conjectures be true, or any thing like the truth, they ought to do something towards opening men's eyes to the comparative policy of encouraging inventors, and supporting soldiers. And when it is considered that all these wars have been carried on, at the instigation and dictation of so called statesmen, we have an opportunity to judge, whether statesmen and soldiers, or inventors, are the real benefactors of mankind, and deserving of their support.

I imagine that few people stop to consider how large a proportion of the wealth, now existing in the world, is the product of labor-performing inventions. I recently saw it estimated, by a most respectable authority, that the steam engine had quadrupled the wealth of the United States. How near the truth this estimate may be, I do not venture to assert. But it is probably sufficiently near the truth for the purposes of this discussion. Now it is hardly fifty years, since the steam engine was brought to such perfection, and put into such extensive operation, in the United States, as to contribute very materially to the wealth of the country. Yet it is now said that it has quadrupled that wealth!

And how much have the people of this country ever paid to the inventors of the steam engine, in return for the immense wealth, which it has created? How much! It can hardly be said that they have paid any thing. If they have paid any thing, the amount has been so utterly contemptible, as that no one, who has any sense of shame, or any sentiment of justice, could hardly wish to see the amount put in print. But has such meanness and injustice been a wise policy for the people themselves? No. If they had paid to the inventors of the steam engine but one per centum annually of the wealth that invention was creating, they would thereby have given such a stimulus to invention, that we should doubtless, long before now, have had in

use other motive forces far cheaper, safer, and better than steam. And what would have been good policy towards the inventors of the steam engine, would be good policy towards all other inventors. The amounts, that would be paid them, under a system of perpetual property, and full protection, would be, as we have before supposed, but one per centum of the wealth created by them. This one per centum is certainly but a trifle, a mere bagatelle, for the people to pay, out of the wealth created for them, and given to them, by the inventors. Yet this trifle, paid by the people, would be fortunes to those receiving it; and would give such encouragement to inventors generally, that inventions would be multiplied with a rapidity, of which we have now little conception. And the people would have the benefit of them. But so long as they refuse to pay even one per centum of the wealth produced, for the inventions they now have, it is reasonable to conclude they will have the benefit of but few new ones, compared with the number they otherwise might have.*

* A day or two before handing this chapter to the printer, my eye fell upon the following article, in the *New York Tribune*, of Sept. 15, 1854, which fairly illustrates the wretched economy of the imperfect protection afforded to inventors. It would appear, from this article, that if the rights of inventors had been justly protected in 1824, the world would have had the benefit of an improved reaping machine, some twenty years before it did have it. If any man can tell how many thousands of millions of dollars worth of human labor would have been saved, taking the civilized world together, during those twenty years, by the use of such a machine, he will perhaps be able to form some tolerable estimate of the *net profit*, which the world has realized, from its ignorance, meanness, and dishonesty, in practically denying that Mr. May had any right of property in his invention. And when the calculator shall have ascertained how much clear gain the world has thus made, by keeping back, for twenty years, the use of the reaping machine, he will perhaps be able to make some conjectural computation, (if he can find figures in which to write it,) of the aggregate loss it has suffered from keeping back, in like manner, the use of, and perhaps forever suppressing, thousands, and tens of thousands, of other important inventions, which it might have had the use of during the same period, and for ages before, if its legislation had but adopted the principles of common honesty, instead of open knavery, towards inventors.

The editor of the *Tribune* has acquired a high reputation as a political econo-

Let us now consider the reasons of policy, other than cheapness, *against* giving, to the property of inventors, that full and perpetual protection, which is given to the property of other men.

1. It is objected that the property of inventors ought not to have the protection of the *criminal* laws.

What foundation there is for this objection, I have never heard. And I apprehend that no reason whatever, worthy of a moment's consideration, can be offered, why the property of inventors should

mist, by his unwearied advocacy of restrictions on trade, as the grand instrumentality for stimulating production. Is there no sarcasm on the political economy of the age, in the fact, that such a man should draw no more important inferences, from the incident he relates, than the merely personal one, that the Messrs. May, father and son, lost the chance of "an ample independence for them both;" and the additional one, that somebody ought to "write that most interesting and instructive of all unwritten books—the Romance and Reality of Invention," "not only as a deserved memento of world-acknowledged merit, due as well to living as to dead, but as a stimulant to the hearts and labors of a class existing every where around us?" "Strange indeed is it, that it should never occur to him that there could be any more fitting "memento of acknowledged merit," nor any more proper or necessary "stimulant to the hearts and labors" of inventors, than a book, descriptive of their struggles and adversities. Yet, ludicrous, if not heartless and insulting, as are these inferences of the editor of the *Tribune*, it should be mentioned, that he is probably in advance of most public men, both in his sympathies and principles, in behalf of inventors. I submit, however, that it is not in entirely good taste for one, whose own ideas are no farther advanced on this subject, to talk quite so contemptuously of those "boorish minds," who "refused to be convinced" by "demonstration," and who, in its infancy, could even "nickname" a valuable invention as "Harvey's Folly," and "Harvey's Great Amazement."

"THE VICISSITUDES OF INVENTORS.

"The private history of many inventions, if fully written out, would form a volume of abundant dimensions. Its chapters would unfold a world of practical romance; the struggles of ingenious poverty, which no discouragement could paralyze; the undying perseverance of minds conscious of colossal strength; the hopes, the fears, the bitter disappointments of commanding genius; the triumphs that have sometimes crowned the labors of these patient toilers in their solitary work-shops; the brilliant recompense of mere luck or accident; the villany of confidential friends—in fact a measureless catalogue of contingencies, which seem peculiar to inventors as a class. Authors—of books only—have had *their*

not have the protection of these laws, as fully as any other property. The wilful invasion of another man's property, from motives either of malice or gain, *is a crime*; and if crimes against property are to be punished at all, crimes against the property of inventors should be punished as well as others. What security would there be for *material* property, if the owner had no remedy for trespasses against it, except the privilege of bringing a civil suit for damages, at his own expense? Every one can see that,

calamities collected and amplified with a touching pathos. The Pursuit of Knowledge under Difficulties, gathered up into a volume too small to embody more than a meagre fraction of its heart-depressing experiences, has fixed the attention and touched the sympathies of kindred minds, wherever its collected records have become known. Some careful hand should also gather up the Vicissitudes of Inventors, not only as a deserved memento of world-acknowledged merit, due as well to living as to dead, but as a stimulant to the hearts and labors of a class existing everywhere around us, and enlarging as the circle of the arts and sciences extends.

“Let us take a solitary instance, unknown to fame, but illustrative of the common difficulties which obstruct the path of poor and ingenious men. The whole world has become familiar with the great American Reaper, which the London Exhibition first introduced to European observation. Yet as long ago as 1824, a young boy in Washington County, New York — Harvey May, by name — conceived the idea of a machine for similar purposes. He tried his first experiment with shears, the blades of which were so curved as to present nearly the same angles of edge, from heel to point, while cutting. The following year he tried again, using a reel and sickle edge, but returned to the vibrating edges. Continuing these trials, amid a world of difficulties and opposition, the sneers and ridicule of a community of boorish minds, he at last succeeded completely. His crudely-built machine — for no one awarded him the cheap aid of sympathetic encouragement, much less practical mechanical help — extended into the grain to the right, and was mounted on the hind wheels of his father's lumber-waggon. With large wheels and simple gearing, a single horse drew the inventor and his brother on the machine, and it actually cut heavy rye at the rate of an acre an hour. Those who looked on and witnessed its marvellous performance, refused to be convinced. The science of demonstration was unknown to their vocabulary. His neighbors did condescend to grant that the whole affair was quite original, but complimented him by calling it ‘Harvey's Folly.’ Further trials, however, only rendered the machine even more perfect, whereupon it received the further nickname of ‘Harvey's Great Amazement.’ Mr. May, in writing recently of this promising germ of what has since unfolded into a great industrial improvement, says, with touching simplicity, that he intended taking out a

in that case, property would be overrun with trespassers, who were irresponsible in damages, and who would commit their trespasses with the intent of getting what they could by them, and consuming it, so as to have nothing left, with which to answer the judgments, that might be obtained against them. It would therefore be an utter farce to pretend to protect property at all, without the aid of criminal laws. It would be equivalent to granting a free license to all irresponsible trespassers. Men might as well surrender their property at once, as to think of protecting it by civil suits merely; for they would consume their property in expenses, and would get protection, only when they had no property left to be protected. Yet this is the kind of protection, and substantially all the protection, which our laws, as at present administered, give to the property of inventors. And the consequence generally is, that the expenditure of time and money, required to protect an inventor in his rights, is such as to impoverish him, and make it impossible for him to protect himself to any considerable degree, even during the brief period, for which the government professes to protect him.

Cannot the public see that such things are a discouragement to invention and inventors? And can they not see that, if they wish to encourage inventors, and have the benefit of their inventions, it is plainly for their interest to give, to the property of

patent, but 'My father refused to help me in this; for he said the patent laws were only calculated to draw men into ruinous lawsuits. I tried to get help from others, but all refused to help me when they learned my father's views on the patent laws.' Thus, with the evidence of success before him, this youthful genius was compelled to see his great invention perish. Other inventors in the same prolific field, have gathered in abundant harvests of gold from the profits of *their* reapers. Had the over-cautious father stimulated, with judicious sympathy and advice, the genius of his promising son, the product would in all probability have been an ample independence for them both.

"We might illustrate the same course of thought by a thousand other instances equally touching, but the suggestion is sufficient. Who will write that most interesting and instructive of all unwritten books — the Romance and Reality of Invention?"

inventors, the same protection of the criminal laws, which is accorded to material property?

2. It is objected that inventions, if secured to their authors, become monopolies, and therefore ought not to be perpetual.

The answer to this objection is, that all property is a monopoly. The very foundation and principle of the right of property are, that each man has a right to monopolize what he produces, and what is his own. The right of all men to their property, rests on this foundation alone. Monopolies are unjust and impolitic, only when they give to one what belongs of right to others. And it is only to *such* monopolies that the word *monopoly* is usually applied. It is an abuse of the term to apply it to a man's legitimate and rightful property. If an invention do not rightfully belong to him alone, who produced it, he of course should not be allowed to monopolize it. But if it do rightfully belong to him alone, then he has a right to monopolize it; and other men have no more right or reason to complain that he is allowed to monopolize it, than *he* has to complain that *they* are allowed to monopolize whatever is their own.

There is no more reason or justice, in applying the word *monopoly*, in an odious sense, to an invention, which one man has produced, and therefore rightfully owns, than there would be in applying the same term to any other wealth whatever, which one man has produced, and therefore rightfully owns. There is no resemblance at all between such monopolies, and those monopolies, which are arbitrarily created by legislatures; whereby they give to one man, or to a few men, an exclusive privilege to exercise a right, or practice an employment, which other men have naturally and justly the same right to exercise and practice. All such monopolies are plain violations of natural justice; because they take from one man a right that belongs to him, and give it to another. But an invention is the product of individual labor, and of right belongs to him who produces it; and therefore there is no injustice in saying that he alone shall have a right to it—the same right that he has to any other property he has produced

— that is, the right to exercise absolute dominion over it, and to do with it as he pleases, whether it be to keep it, sell it, or give it away.

This objection of *monopoly*, when applied to inventions, is mere sound without meaning. It has neither reason nor justice to sustain it. It is simply an odious name, wrongfully applied to a just and natural right, by those who want a pretext for taking a man's property from him, and applying it to their own use.

3. A third objection is, that if inventors were allowed a perpetual property in their inventions, *they would become too rich.*

This objection, if good against any inventors, can be good only against a very few, in comparison with the whole number; for but a few, if any, could ever acquire *inordinate* wealth by their inventions. It is certainly unjust to deprive the whole of their rights, simply to guard against extravagant fortunes on the part of a few. But our laws make no distinctions of this kind. On the contrary, they condemn nearly all to indiscriminate poverty, under pretence of preventing *any* from accumulating immoderate wealth.

If any are to be deprived of their right to a perpetual property in their inventions, clearly it should be those few, *and only those few*, whose wealth would otherwise become enormous. And even those few, it would be unjust to deprive of their property, the products of their honest labor, *until their fortunes had actually reached the utmost limit, to which society sees fit to allow private fortunes to go.* To deprive them of their property, *before their fortunes have attained the legal limit*, simply through fear that they may *sometime* go beyond it, would be a very absurd and premature robbery.

But what right has society to set limits to the fortunes, that individuals shall acquire? Certainly it has no such right; and it attempts to exercise no such power, except in the case of inventors. To all other persons it says, go on accumulating to the extent of your ability, subject only to this restriction, *that you use only honest means in acquiring.* Why should any other

restriction be imposed upon the accumulations of inventors, than is imposed upon the accumulations of other men? Who has such a right to be rich as an inventor? Who gives such wealth to mankind as he? Certainly, if a man, who not only produces wealth as honestly as any other man, but who produces incalculably more than other men, and who virtually gives ninety-nine per centum of it, as a gratuity, to the public, cannot be allowed to become rich, who are the men who are entitled to that privilege? Other men, who produce hardly any thing, compared with an inventor, and who, if they can avoid it, give never a dollar of their earnings to mankind, without receiving a full dollar in return, are nevertheless allowed to acquire their millions, and indeed to accumulate without restriction, so long as they accumulate honestly. But an inventor, who creates immeasurably more wealth than any other man, and who reserves but one per centum of it to himself, giving the rest to the public, must be limited by law in his acquisitions, and deprived even of that one per centum of his own earnings, *lest he become too rich!*

Every valuable invention ought to give certain wealth to the inventor; the more valuable the invention, the more wealth should it bring to him. The most valuable inventions, should bring *great* wealth to the inventors. It is not only just to the inventors, *but it is for the interest of society at large*, that it should be so; because the production of inventions is stimulated, substantially in the ratio of the wealth of the inventors.

But is there really any danger that, if inventors were allowed a perpetual property in their ideas, any very enormous or immoderate wealth would accumulate in their hands? There are many, and probably insuperable, obstacles to such a result. Let us look at the subject somewhat closely.

In the first place, wealth, in the aspect in which we are now considering it, is *relative*. A man is rich, or poor, in proportion as he has more or less than an average share of the wealth of the world. A man, who, in England, would have been very rich, relatively with his neighbors, five hundred years ago, would now,

with property of the same nominal value, as then, be very poor, relatively with his neighbors; because his neighbors have now increased so much in wealth. In judging, therefore, whether inventors would become immoderately rich, under a system of perpetual property in their inventions, we must consider what would be the general state of wealth around them, under the same system.

We are to consider, then, that under that system, (of perpetual property in inventions,) the number of inventions would be very greatly augmented, and consequently the general wealth of society astonishingly increased. And it would consequently require vastly more actual wealth, to make a man *relatively* rich, than it does now. This single consideration will probably be sufficient, with most minds, to reduce the bugbear of enormous wealth, (on the part of inventors,) to about half its original dimensions.

In the second place, few inventions are very long lived. By this I mean that few inventions are in practical use a very long time, before they are superseded by other inventions, that accomplish the same purposes better. A very large portion of inventions live but a few years, say, five, ten, or twenty years. I doubt if one invention in five, (of sufficient importance to be patented,) lives fifty years. And I think it doubtful if five in a hundred live a hundred years.*

Under a system of perpetuity in intellectual property, inventions would be still shorter lived than at present; because, owing to the activity given to men's inventive faculties, one invention would be earlier superseded by another.

I think these considerations alone ought to diminish the bugbear again to one half its already reduced dimensions — that is, to one fourth its original size.

In the third place, the danger of overgrown fortunes is obviated by still another consideration, to wit, that few or no *impor-*

* I have no *special* knowledge on the point mentioned in the text, and only give my opinion as a matter of conjecture.

tant inventions are brought to perfection by a single mind. One man brings out an invention in an imperfect state; another improves upon it; another improves upon the improvement, and so on, until the thing is perfected only by the labor of two, three, five, or ten different minds. The complete invention thus becomes the joint property of several different persons, who share in the income from it in such proportions respectively as they can agree upon. The obvious presumption is, that no single individual will ever derive a sufficient income from it, to give him a fortune immoderately, or grossly, disproportioned to the wealth of others.

I think it must be safe now to say, that the bugbear, that was at first so frightful, is no longer a thing to be seriously dreaded.

But a fourth consideration, which must absolutely annihilate the phantom, is this — that if any particular invention should be found to be a source of immoderate wealth to its possessors, that fact would be sufficient, *of itself*, to turn the minds of inventors, in the direction of that invention; and the result would soon be the production of one or more competing inventions, that would accomplish the same end by a different process; and either supersede the first invention altogether, or at least divide with it the profits of the business, to which it was applied.

I now take it for granted that the objection of inordinate wealth, on the part of inventors, has been fairly disposed of.

4. A fourth objection is, that if inventors were allowed a perpetual property in their inventions, their power would become dangerous to the liberties of the people at large.

This idea, although one that might naturally enough occur to an objector, will yet, on reflection, be seen to be wholly without foundation in reason. Political power depends principally upon the command of wealth; and therefore the considerations, that have just been stated, in answer to the objection of enormous wealth, on the part of inventors, are sufficient to show, that it would be the farthest thing from possibility, for an individual to

monopolize enough of any one or more inventions, to give him any dangerous political power.

Another consideration, sufficient of itself to dissipate this danger, is, that the number of inventors would be great, and if any one of them should prove ambitious of a dangerous political supremacy, the power of the others would be sufficient to hold him in check.

Still another consideration is, that, in the nature of things, *the people*, who receive ninety-nine per centum of all the wealth created by inventions, can be in no danger from the power of inventors, who retain but one per centum of it. Every inventor, therefore, puts into the hands of the people, ninety-nine times more power than he retains in his own hands. How long a time would be requisite for him, to acquire absolute power over the people, by such a process ?

A last reflection, worthy of notice, on this head, is, that inventors are not constitutionally ambitious of political power. Such a thing as a *great* inventor, ambitious of political power, was probably never known. Their ambition is of a far less depraved and vulgar kind. The triumphs, of which they are ambitious, are triumphs over nature, for the benefit of mankind ; not over mankind, for the benefit of themselves.

Inventions, instead of tending to the enslavement of mankind, tend to their liberation, by putting wealth and power into the hands of all, and thus liberating each from his dependence upon others.

5. The fifth objection to the principle of perpetuity in intellectual property, is the objection of inconvenience.

It is no doubt an inconvenience, for a man to be under the necessity to buy an idea, when he wants it. But on the other hand, it is a great convenience to the producer of the idea, that he can command pay for it, from those who wish to use it. The inconvenience and the convenience to these parties respectively, are precisely the same, and no other, than they are to the buyer and seller of any other property. And the argument from

inconvenience is just as strong, against allowing any right of property in *material* commodities, as it is against allowing any right of property in intellectual commodities.

But because a man has a natural right of property in every idea he originates, it is not therefore to be inferred, that every man would *wish* to retain his exclusive right to every idea, however unimportant, that he might originate, and demand pay of every one who wished to use it. It is only a few ideas, that have sufficient market value, to make it worth a man's while to make them articles of merchandise. It is only a few ideas, that would find *any* purchasers, if a price were set on them by the owner. If a man were to set a price on merely trivial ideas, he would find no purchasers. The result would be, that a man would retain his exclusive property, only in those ideas, that would sell in the market for such prices, as would make it worth his while to sell them. And for such ideas men can as well afford to pay, as for material things of the same market value.

A few words as to the effects of the principle of perpetuity upon *literature*.

Literary labor is controlled by the same law as other intellectual labor—that is, the nature of the market determines, in a great measure, the character of the supply. If the law allow an author but a brief property in his works, literature will be mostly of a superficial, frivolous, and ephemeral character; such as ministers to the appetite of the hour, and finds a rapid, but temporary sale—as, for example, romances and other works, which naturally have a short life, and which it requires but little thought or labor to produce. The prevailing literature will be of this kind, for the reason that this is the only kind which can be *afforded*. If, on the other hand, a perpetual property be allowed, encouragement is given to the production of a widely different class of works, namely, those profound, scientific, and philosophical works, which are written, not merely for the present, but for the future; and which, instead of pandering to the frivolities, fancies, appetites, or errors of the hour, seek to supplant and correct

them, by creating and supplying a demand for more valuable knowledge. These works find fewer readers at first, than the others; and the prospect of a more lasting demand for them, is the only chance their authors have of remuneration for the greater labor required for their production. Under the present system, few such works are produced at all; and those generally at great sacrifices to their authors. But if a perpetual property in them were allowed, men, competent to produce them, *could afford* to produce them; for the reason that their copyrights, if sold, would bring a higher present price, or, if retained, would be good estates for them to leave to their children.

These profound works, which it requires great powers, great patience, and great labor, to produce, are the only works that really do much for the progress of the race, or the advancement of knowledge among men. They are indispensable to the rapid intellectual growth of mankind. Yet, like other things, the products of human labor, they can, as a general rule, be had only for money. The greatest minds inhabit bodies, that must be fed and clothed, like the bodies of other men. The wisest men, too, as well as the less wise, have families whose wants must be supplied. If these wants cannot be supplied by authorship, there is no alternative for these men, but to engage in some of the ordinary avocations of society. The consequence is, that many of the greatest minds, those, who ought to do, and who, under the principle of perpetuity in intellectual property, would do, much for the permanent enlightenment, and the lasting intellectual advancement of mankind, are now, from necessity, occupied in pursuits, for which smaller minds are amply competent—such as the common routine of professional and political life—in which pursuits, they passively adopt, act upon, and thereby promulgate, at best, only such common knowledge, and with it such common ignorance, as the public demand calls for in those labors. This they do, simply because the laws deprive them of the natural and just rewards of those higher labors; for which their capacities and their aspirations naturally qualify them. And they conse-

quently pass through the world, doing little or nothing for its permanent welfare; and really living upon, and assisting to perpetuate, the ignorance, follies, crimes, and sufferings of mankind, solely because the laws virtually forbid them to live by removing them.

It would be easy to follow out this idea, and show more in detail what effect the perpetuity of intellectual property would have upon the progress of knowledge; but the principle is so self-evident, that it can hardly need any further illustration.

No objection can be made to the perpetuity of literary property, on the ground that authors would become extravagantly rich. The great competition among themselves; the short life, which most works would have; and the slow sale of those having a longer life, would all conspire to make it impossible for authors to acquire great wealth. In this respect they would differ from inventors.

Enough has probably now been said, to show that authors will enlighten, and inventors enrich, mankind, if they can but be paid for it, *and not otherwise*.

Manifestly it cannot be for the interest of mankind, to starve and discourage authors and inventors, if science and art, like all other marketable commodities, are really produced just in proportion to the demand for them, and the prices they bear in the market. Mankind have abundant need of all the knowledge, and all the wealth, which authors and inventors can furnish them. And they can certainly afford to pay for them, at the low prices, at which knowledge is offered by authors, and wealth by inventors; for there are no other means by which such knowledge and such wealth can be obtained so cheaply. Why, then, do not mankind purchase and pay for them at these prices, instead of striving to live upon such a supply only, as they can obtain by niggardly purchases, and dishonest plunder? There is certainly as little sound economy, as sound morality, in the course they pursue on this subject. Why, then, do they continue in it? My own opinion is this.

It is not that mankind at large are so wilfully dishonest, as to

wish to deprive authors and inventors, any more than other men, of the fruits of their labors. It is contrary to nature, that mankind at large should be, either so unjust, or so ungenerous, to their greatest benefactors. Neither is it because they are *wilfully* ignorant of their own true interests in the matter; for it is contrary to nature that any man, honest, or dishonest, should be *wilfully* ignorant of his own true interests. But it is because they are deceived, both as to their own interests, and as to the just rights of authors and inventors, by those who are interested to deceive them.

Who, then, are the parties, who are interested to deceive the people at large, as to the true interests of the latter, and as to the just rights of authors and inventors? There are at least three classes. First, the whole class of pirates, who have a direct and powerful pecuniary interest, in plundering authors and inventors; because they thereby put into their own pockets some portion, at least, of that wealth, which would otherwise go to the authors and inventors themselves. Secondly, men ambitious of the reputation and influence of wealth, who fear that their wealth may be eclipsed by the wealth of inventors. Thirdly, political men, ambitious of intellectual reputations, who fear that their own would be eclipsed, as they really would be, by the reputations of both authors and inventors. The services rendered to mankind by great authors, and great inventors, are so incomparably superior, in brilliancy, permanency, and value, to any that can be performed by political men, (with possibly here and there a rare exception,) that it is not to be expected that the latter, with whom ambition is a ruling passion, should look with favor on such rivals as the former.

There are, then, three classes of men, who have a special and selfish interest to decry the rights of authors and inventors; and to deceive the people at large in regard to them. And they do it by such bugbears and sophistry, as have been exposed in the preceding pages. The influence of the two latter classes is especially powerful; for they have a direct, and nearly absolute, control

over legislation. And it is probably owing to the jealousy of these two classes, more than to all other causes, that the rights of authors and inventors have not been already acknowledged. The nobility of England, for example, whose wealth and power are hereditary, and founded on no personal merit or service, compose one branch of the legislative power of England, and have great influence in the election and control of the other; and they doubtless have sagacity enough to see, that the principle of perpetuity in intellectual property, would soon raise up a generation of authors and inventors, the latter of whom would rival them in wealth, and both of whom would wholly eclipse them in deeds commanding public admiration and gratitude; and both of whom also would contribute powerfully, and probably irresistibly, to prostrate their usurped and iniquitous political power. It is not therefore to be expected that the House of Lords, or those whom they can control in the House of Commons, will ever legislate for the principle of perpetuity in intellectual property. And the principle may perhaps triumph, in England, only on the ruins of existing political institutions. On the continent of Europe, there are obstacles to be overcome, in the jealousies of wealth, and of hereditary and tyrannical rulers, of a similar nature to those in England. In the United States, the obstacles are not so palpable, and probably not so great. But they are nevertheless such as are not to be despised. In all countries, they are doubtless such, as can be overcome, only by disseminating widely among the people the true principles of law, and the true principles of political economy, applicable to the question.

P A R T I I

CHAPTER VI.

THE COMMON LAW OF ENGLAND RELATIVE TO
INTELLECTUAL PROPERTY.

SECTION I.

What is the Common Law of England?

In order to determine whether the Common Law of England sustains the right of authors and inventors to an absolute and perpetual property in their ideas, it is only necessary to determine what the Common Law of England really is.

To many unprofessional readers, the term *Common Law* will convey no very certain or precise idea; and as I am anxious that they should fully understand this discussion, at every step, I shall define the term more at length than would otherwise be necessary.

The Common Law of England, then, *with a few exceptions, which are wholly immaterial to the question of intellectual property*, consists of, and is identical with, *the simple principles of natural justice*. In ancient times, it was often called "*right*," "*common right*," and sometimes "*common justice*." Magna Charta calls it "*justice and right*." It is what unprofessional men have in mind when they speak of their "*rights*;" of "*justice*;" of men's "*natural rights*," &c. It is the principle, or rule, which rightfully determines what is one man's property, and what is another's. It is often called the science of *mine and thine*; meaning thereby the science, by which we ascertain what is rightfully one man's, and what is rightfully another's. It is the principle, which an honest man appeals to, when he says, this

thing is *mine*, and such are my "*rights*." It is that rule of judgment and decision, which impartial men usually, naturally, and intuitively perceive to be *just*, for the settlement of controversies between individuals in regard to their *rights*. It is the same principle, which writers on law usually call the *law of nature*, and the *universal law*. It is that natural law of justice, which Cicero says is the same at Rome and at Athens, the same to-day and to-morrow, and which neither the senate nor the people can abrogate. It is that natural and universal law of justice, which, over all the world, among civilized and savage men alike, is acknowledged as the obligatory rule of adjudication, in all legal controversies whatsoever, *except those few, in regard to which some special or peculiar institution or enactment has been arbitrarily established to the contrary, by particular governments or people*. It is the law, of which Sir William Jones speaks, when he says, "It is pleasing to remark the similarity, or rather the identity, of those conclusions, which pure unbiassed reason, in all ages and nations, seldom fails to draw, in such juridical inquiries as are not fettered and manacled by positive institutions."* Kent says of it, "The Common Law includes those principles, usages, and rules of action, applicable to the government and security of person and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature. A great proportion of the rules and maxims, which constitute the immense code of the Common Law, grew into use by gradual adoption, and received the sanction of the courts of justice, *without any legislative act or interference*. It was the application of the dictates of natural justice and cultivated reason to particular cases." †

The Common Law, or the law of nature, is often called "the perfection of reason;" meaning thereby the conclusions, to which the highest reason has arrived, in its searches after the true principles of justice.

* Jones on Bailments 133.

† 1 Kent 522. 7th edition.

It will be seen from what has been stated, that, *with the exceptions before alluded to,** the Common Law, or, what is the same thing, the law of nature, is a *science*, as much so as any of the other sciences. *It is the science of justice*, as mathematics is the science of numbers and quantities. As a science, it is applicable to all the infinity of relations, in which men can stand to each other, and to each other's properties; and determines what are their respective *rights*, or what, in justice, belongs to one, and what to another. Like mathematics, it consists of certain elementary principles, the truth and justice of which are so nearly self-evident as to be readily perceived by nearly all persons of common understandings. And all the difficulty of settling new questions at Common Law, arises from the fact that every new law question depends upon a new state of facts, which call for new combinations, or applications, of these elementary principles; just as the solution of every new mathematical problem requires new combinations of the elementary principles of mathematics.

In the progress of the human race from savagism to civilization, and from brutish ignorance to the present state of enlightenment, this *science of justice*, which in England is called the Common Law, has of necessity made great progress; and this progress has been made from the same causes, by which the science of numbers and quantities has made progress — that is, from the fact that the circumstances and necessities of mankind have continually *compelled* them to such inquiries; and thus knowledge has been ever accumulating, in one science, as in the other. In the darkest periods of the human mind, doubtless men

* Among the exceptions referred to, are these — that a woman, on marriage, shall lose the control of her property, her natural right of making contracts, &c.; that a child, born out of wedlock, shall not inherit the father's estate; and some others not necessary to be named. These exceptions to the principles of natural law, are of such antiquity, that the time and mode of their establishment are now unknown. And no laws whatever, contrary to the law of nature, are parts of the Common Law, *unless they have been in force from time immemorial*. It will be shown hereafter that no immemorial law has existed in England, adverse to the rights of authors and inventors to a perpetual property in their ideas.

hardly knew that two and two were equal to four; or that two halves were equal to one whole. Now they can measure the size of planets, and the distances of stars. So in matters of justice — there was doubtless a time, when men were so nearly on a level with the brutes, as hardly to know that one man had not a right to kill his fellow man at pleasure. Now men have learned that they have separate, individual, and sacred rights of property in, and dominion over, things invisible by the eye, intangible by the hand, and perceptible only by the mind. And they have also learned at least the elementary principles, by which men's separate rights to these invisible and intangible commodities can be determined.

The Common Law of England is often called *the unwritten law*; by which is meant that it was never enacted, in the form of statutes, by parliaments, or any other legislative body whatever. And for the most part it necessarily must have been so, since no legislative body could ever foresee the infinite relations of men to each other, so as to be able to enact a law beforehand for each case that might arise. The Common Law, therefore, does not depend at all, for its authority, upon the will of any legislative assembly. It depends, for its authority, solely upon its own *intrinsic* obligation — that is, *the obligation of natural justice*. And it ought always to have been held to be of superior authority to any legislative enactments opposed to it; because it is intrinsically of infinitely higher obligation than any legislative enactments, contrary to it, can be. In fact, legislative enactments are *intrinsically* of no obligation at all, when in conflict with it; because governments are as much bound by the principles of justice as are private individuals. Nevertheless, kings and parliaments have long assumed the prerogative of setting aside the Common Law, and setting up their own will in its stead, whenever their discretion or selfishness has prompted them to do so. And having judges and soldiers at their service, they have succeeded in having their arbitrary enactments declared to be law, in place of the Common Law, and carried into effect as such,

against the natural rights of men. All this, however, has been done in violation of the English constitution, as well as of natural right.

Having thus shown, perhaps sufficiently, what the Common Law of England is, *in theory*, let us look, for a moment, at what it has been *in practice*. And this, it is evident, must have depended wholly upon the degree of civilization, and the nature of the legal questions arising from adjudication; and also upon the degree of enlightenment, on the part of the tribunals appointed to administer it.

In the earlier times of the Common Law—say six hundred to one thousand years ago—the state of society in England was very rude and simple, such as we should now call barbarous. Agriculture, carried on in a very ignorant and clumsy manner, was the principal employment of the people. Wealth, knowledge, and the arts had made very little progress; and the legal questions arising were correspondingly few and simple, being such as related to the little properties, the common rights, and every day concerns of the common people; and such also as the common people would generally understand, almost instinctively, or rather intuitively, without the aid of any elaborate processes of reasoning.

The tribunals for deciding these questions were of a correspondingly simple and unsophisticated character. They consisted of twelve men, taken from the common people, almost or entirely at random. These juries sat alone, and were the real judges in every cause; civil and criminal. It was seldom that any other judge, learned, or supposed to be learned, in the law, sat with them. And when such was the case, he had no authority over them, and could dictate nothing to them, either of law or evidence. He could only offer them his opinion, which they adopted or rejected, as they thought proper.

Very few laws were enacted in those days. There was no such body in existence as the modern parliament, nor any other legislative assembly. What few laws were enacted, were enacted by the king alone. But none of them could be enforced against

the people, without the consent of the juries; and the juries were under no legal obligation to enforce them, and did not enforce them, unless they considered them *just*. *The jurors were never sworn to try causes according to law, but only according to justice, or according to their consciences.* Indeed, they could try them by no other law than their own notions of natural justice; for they could not read the king's laws, since few or none of the common people could at that time read. Besides, printing being then unknown, very few copies of the laws were made. The laws, passed by the king, were generally made known, only by being proclaimed or read to such of the people, as might chance to be assembled on public occasions. Both theoretically and practically, they were simply *recommendations*, on the part of the king to the people, promulgated in the *hope* that the latter, as jurors, would enforce them.

Juries fixed the sentence in all criminal cases; and rendered the judgment in all civil cases; and no judgments could be given, except such as the twelve jurors unanimously concurred in as being just.

The decision of every jury was not *necessarily* enforced. An appeal was allowable to the king's court, consisting of the king and certain of the nobility, who were assisted in their adjudications, by the king's judges, or legal advisers. But this king's court could *enforce* no decisions of its own, adversely to those given by the juries. It could only invalidate the judgment of a jury, and refer the cause to a new jury for a new trial. So that no judgment could be enforced against the person, property, or civil rights of any one, except such as had been unanimously agreed to by twelve of the common people, acting independently, according to their own ideas of justice.

The consequence of this state of things was, that while the Common Law, (with the exceptions which have before been alluded to,) was, *in theory, a science*, applicable, from its nature and intrinsic obligation, to the settlement of every possible question of justice, that could ever arise among men, in the most

advanced and enlightened state of which humanity is capable, it was, *in practice*, confined to the determination of such few and simple questions, as a very rude and uncultivated state of society gave rise to, and *such also as tribunals, composed of twelve simple and unlearned men, could all understand, and would all concur in.*

Why this law of nature, or natural justice, thus administered, was called, in England, the "*Common Law*," is a matter of some dispute; although the probability altogether is, that it was called the Common Law, because it was the law of the *common people*, as distinguished from the nobility, or military class of society.

This military class had both rights and duties different, in some particulars, from those of the common people. The law applicable to them was therefore somewhat different from the law of the common people. And individuals of each class were entitled to be tried by their "*peers*," or equals — that is, individuals of the military class were to be tried by tribunals of their own order, and the common people by tribunals (*juries*) of their own order. The Common Law, then, was the law which the *common people* administered to *each other*, as distinguished from the law, which the military class administered to each other; and there is little doubt that this is the true origin of the name. The ancient coronation oath strongly corroborates this idea, for one part of that oath was, that "*the just laws and customs, which the common people have chosen, shall be preserved.*" By "*the just laws and customs, which the common people have chosen,*" were meant those principles, which *juries* of the "*common people*," acting independently, and on their own consciences, were in the habit of enforcing as law — for the "*common people*," had no other *legal* mode of making their wishes, on matters of law, authoritatively known.

It was this Common Law, and the right of the "*common people*" to be judged by it, and to have their rights determined by it, in all civil and criminal cases, in the manner that has now been described — that is, by *juries* acting according to their own

notions of justice, and independently of all legislative authority on the part of the government—that constituted the ancient boasted liberties of Englishmen, and the very essence and life of the English Constitution. *

The reader will now be able to judge for himself whether the Common Law of England does, or does not, *in theory*, sustain the right of authors and inventors to a perpetual property in their ideas. In order to settle this question, he has only to decide whether it be *just*, and according to those principles of natural law, by which mankind hold their rights of property in all the other products of their labor, that they should also have the same rights of property in their ideas. If it were *just*, that men should have a right of property in their ideas, then the Common Law authorized it, and it was the duty of all Common Law tribunals to maintain that principle in practice.

Taking it for granted that the reader will have no doubt that the right of property in ideas came within the *theory*, and was embraced in the *principles*, of the Common Law, I shall now proceed to show why this right has not been hitherto more fully acknowledged.

SECTION II.

Why the Common Law Right of Property in Ideas has not been more fully Acknowledged.

It will, I think, be hereafter rationally shown, that the non-establishment, in England, of the right of property in ideas, is to be attributed *solely* to the overthrow of the ancient; constitutional, Common Law government, and to the establishment of

* For the historical proofs that the Common Law and the English Constitution were such as have here been described, I refer the reader to my "Essay on the Trial by Jury."

arbitrary power in its stead. But to understand how such a cause has been productive of such an effect, we must attend somewhat to events and dates.

The Great Charter — which was at once the embodiment and guarantee of the Common Law form of government, and which, within about two hundred years from the grant of it in 1215, was confirmed more than thirty times, was confirmed for the last time in 1415. It had been much encroached upon before; but from this time the government degenerated rapidly into absolutism. And such has now been its character for some four hundred years.

In saying this, I do not mean that absolute power has been vested in the hands of the king alone; although at times his power has, in practice, very nearly approximated to absolutism. But I mean that there has existed in England a self-constituted, and *unconstitutional legislative power*, which has arbitrarily assumed the prerogative of setting aside the Common Law, or law of nature, and setting up its own will in its stead.

This legislative power, which was wholly unknown to the English Constitution, and which had its origin solely in a conspiracy between the king, the nobility, and the wealth of the kingdom, to rule and plunder the mass of the people, has consisted of the king and the parliament united; the parliament consisting of the higher orders of nobility, as one branch, and of a few representatives of the cities, boroughs,¹ and wealthy freeholders, as a second branch, called the House of Commons.

The relative influence of the king, the nobility, and the House of Commons, in controlling legislation, has greatly fluctuated. Each House of Parliament has at times been the tool or confederate of the king against the other. At other times the king would call a parliament only at long intervals; exercising nearly absolute power meanwhile. But since 1688, the power of the crown has been effectually broken. Nevertheless the government has hardly been less arbitrary or tyrannical, *as against the mass of the people*, than it was before. The nobility, of course, have

represented only their own interests. The House of Commons, (falsely so called,) has, in its best estate, represented, at most, only the *wealth* of the kingdom, instead of the *people*. In its worst estate, it has been made up of tools of the king, tools of the nobility, and the representatives and tools of wealth. The suffrage has been so limited, and otherwise arranged, as designedly to secure these results.

One of the first acts of parliament, on obtaining its ascendancy, in 1688, was to impose upon the king an oath, "To govern the people of this kingdom of England, and the dominions thereto belonging, *according to the statutes in Parliament agreed on*, and the laws and customs of the same;" in the place of the ancient and constitutional oath, that "the just laws and customs, *which the common people* [acting as jurors] *had chosen*, should be preserved;" thus formally abolishing the authority of the Common Law, as compared with the will of parliament.

To give more certain effect to the arbitrary legislation of the king, and of the king and the parliament, the Common Law juries have been abolished, for some five hundred years last past, by laws fixing such property qualifications for jurors as would exclude a large, probably much the largest, portion of the people, and include generally only such as were represented in the House of Commons; and also by laws authorizing the king's sheriffs and other officers to select the jurors; thus enabling them to secure those favorable to the government.

The judges too have always been appointed by the king; and until 1688, were removable by him at pleasure. But for five hundred years they have also been liable to impeachment and punishment by parliament. The consequence has been that they have always been mere tools of the king, or of parliament, or of both; so much so that, notwithstanding since 1344, (without any exception, so far as I know,) they have been sworn to maintain the Common Law, and deny it to no man for any cause, they have for a long period unanimously adopted and acted upon the doctrine, that parliament is omnipotent, and its statutes obligatory

in all cases whatsoever, the Common Law to the contrary notwithstanding. And they have also been the instruments of the government for imposing this doctrine upon juries. When the truth all the while was, that, by the English Constitution, both Houses of Parliament, as legislative bodies, were purely usurpers, and never had the slightest particle of authority to legislate for, or bind the people.

In addition to all these usurpations, for the overthrow of the Common Law, the king, for the two or three hundred years ending in 1640, maintained an extraordinary and unconstitutional court, of the most arbitrary character, called the Star-chamber court, composed wholly of his ministers and instruments, who exercised the power of summoning before them, and punishing at discretion, any one who had been guilty of any thing, which they chose to consider a contempt of the royal authority. Members of parliament were not exempt from this usurped jurisdiction. Jurors were often brought before it, and reprimanded or punished for the verdicts they had rendered. Private citizens, who had violated the king's authority in any way, were brought before it, summarily tried, and punished at discretion. Under some reigns the audacity and tyranny of this court were such as to make it the terror of the kingdom.

Such, in general terms, has been the absolute and unconstitutional character of the English government for some four hundred years. And the consequence has been, that there has been no Common Law in force in England, during that time, except such as this arbitrary legislative power has seen fit to spare.

But we are now to show how this state of things has operated to prevent the acknowledgment of the Common Law right of property in ideas.

It is within four hundred years that the art of printing was introduced into England. But it was then in so rude a state, and the people in a condition of such ignorance, that little printing was done for many years. Consequently few persons were engaged in it. And very few persons wrote books. Under such

circumstances, no questions of copyright would be likely to arise. At length the art attracted the attention of the government, from its being foreseen that it might prove dangerous both to the church and the state. And from this time the government assumed unlimited authority over the press, prohibiting the publication of every thing heretical in politics or religion, and enforcing its restrictions by means of the Star-chamber court and otherwise, in the most summary and tyrannical manner. These restrictions continued, with no important interruptions, down to 1694; and were effectual in confining the liberty of printing to such books as the government approved. One mode of restriction, which prevailed for about one hundred years, was that of requiring *each book* to be specially *licensed by the government*, before it could be printed. When a book was allowed to be printed at all, the permission was without limitation as to time; and was usually, if not universally, confined to authors and their assigns. *These restrictions upon the press, therefore, necessarily operated as a perpetual copyright upon the books allowed to be published*; and so long as they were continued, no question of copyright at Common Law would be likely to arise in the courts. If any unlicensed person published a book, he was punished, not for infringing the author's copyright, but for printing without the king's permission; which answered the same purpose for the author.

At the expiration of these restrictions, still another circumstance tended to keep the law question out of the courts. The great body of the publishers were members of an ancient association, called the Stationers' company. And when they found that their copyrights were no longer protected by the licensing act of the government, they adopted an ordinance among themselves, imposing penalties upon any of their own number, who should infringe another's copyright.

Furthermore, in the year 1710, an act of parliament went into effect, securing to the proprietors of books *already printed*, a copyright for twenty-one years from the date of the operation of

the act, and to the authors of books thereafter to be printed, a copyright for fourteen years, with a right of renewal at the end of that time, for another fourteen years, if the authors should then be living. This act kept the question of copyright, at Common Law, out of the courts for still another period.

After the expiration of the terms granted by this act, some injunctions were granted against infringements, apparently upon the ground that a right existed at Common Law. These injunctions, however, were acquiesced in, and the question was not tried at law.

And the question never came before the King's Bench until the case of *Tonson vs. Collins*,* in 1760, and 1761, when the arguments were heard, but the court refused to give any decision, from a discovery of collusion between the parties. And it was not until the case of *Millar vs. Taylor*, in 1769, that the opinion of the King's Bench was obtained; when three of the justices decided in favor of the right, and one opposed it.

Although, therefore, from various causes, the question never came to a clear decision, until some three hundred years after the introduction of printing, yet it is a well known historical fact, that for some hundred and fifty or two hundred years prior to that decision, (if not from the first introduction of printing,) it was a prevailing opinion among authors, publishers, and in the government itself, that the Common Law gave to authors a perpetual property in their works. John Milton, as early as 1644, speaking in behalf of the right of authors to print their thoughts freely without getting a license for each book, alluded to the subject of copyright, and said, "That part [of an order of parliament for licensing books] which preserves justly every man's copy [right], or provides for the poor, I touch not" [do not object to]. Also, "The just retaining of each man his several copy [right], God forbid should be gainsaid."

My argument now is, that if the Common Law, and the ancient

* 1 *Wm. Blackstone* 301 and 321.

constitutional, or Common Law form of government, had been preserved, this question would have been brought to the same decision long before three hundred years from the introduction of printing should have elapsed. And why would it have been thus brought to this decision? For various reasons, as follows.

The question would, in the first instance, have come before juries; and those juries would have been free from all legislative authority, *and sworn simply to do justice*. And it is hardly probable they would ever have puzzled themselves, for a moment, with any of the abstruse objections which lawyers have raised. They would have promptly followed both their instincts and their reason, in saying that authors, like other men, should control the products of their labor. If the question had then been carried to the king's court, it would still have to be decided on natural principles, unembarrassed by any legislative interference. And it would very likely have been decided rightly from the first. But even if the judgments of the juries had at first been reversed; and the cases sent back to new juries for new trials, the new juries would most likely have repeated the original judgments, inasmuch as the opinions of the king's court was of no legal authority over them. And thus by repeated judgments in the same cases, and by new judgments in new cases, the juries would have forced upon the king's court the conclusion, that the sense of the nation was in favor of the right; and the law would consequently have been so recognized.

If, however, it shall be thought by any one, that the question could not have been so easily settled, and that juries would have been incompetent and unfavorable tribunals for adjudicating on such a matter, he will perhaps change that opinion when he reflects, that, if Common Law principles in general, and the Common Law form of government, had been preserved, the common people, living under the protection of equal laws, and in the enjoyment of such freedom as the Common Law form of government secured, would have rapidly advanced in wealth and intelligence, instead of being condemned to such poverty, ignorance,

and degradation, as the tyrannical character of the government has subjected them to. *Printing, too, would always have been free, from its first introduction*; for it is not to be supposed that juries could ever have been influenced by such motives for restraining the freedom of the press, as have influenced religious and political tyrants, who feared its effects on their power. The press being free, and the people being both free and prosperous, literature would have flourished; and the rapid enlightenment of the whole nation, the common people no less than others, would have been the result. Under these circumstances, authors would have brought the question of their rights both before the public, and into the courts, at an early period after the introduction of printing. And the question, after being once brought before the public, and the courts, could never have been laid to rest, until the rights of authors were acknowledged. And that this would have been done long before 1769, (three hundred years after the introduction of printing,) I think it would be unreasonable to doubt; because, before that time, the people would not only have sufficiently comprehended the question, as one of natural justice, but they would also have learned that it was for their own true interests to encourage literature, by protecting the property of authors in their works.

If the right-of property of authors in their works had been once established, under the Common Law form of government, the right would have been perpetual of course; because juries would never have thought of so absurd an idea, as that of acknowledging the property, and yet limiting the right in point of time; and there was no other legislative power competent to establish such a monstrosity.

Such, then, we may conclude, would have been the result, as regards the rights of *authors*.

The next question is, what would have been the fate of the rights of *inventors*, had the Common Law system of government been preserved?

But, before answering this question, let us see what their fate *has actually been*, under the arbitrary system that has prevailed.

Patents for new inventions have, in England, always been classed under the head of "*monopolies*" *arbitrarily granted by the crown*.

Now the granting of monopolies — by which I mean the granting exclusively to one what is the right of all — was plainly incompatible with the Common Law. It must also have been impossible for the king, in cases where his grants were clearly unjust and unreasonable, to maintain their inviolability, so long as the ancient constitutional form of government was preserved; because he could punish infringements upon his grants, only by the consent of juries, who would judge of the matter on its merits, independently of his authority. Nevertheless, we are told that, from a very ancient date, the kings have been in the habit of granting to individuals the exclusive right to practice new arts and manufactures, introduced by them into the kingdom. It was immaterial whether those, who introduced them, were also the inventors of them, or had learned them in foreign countries. It was enough that they were the first to introduce them into England.

How far these grants were effectual, *in the early times*, for the purposes intended by them — that is, how far they were sustained by the judgments of *juries* — I do not know. To my mind, it is not at all probable that they were *universally* sustained. Yet I think we may reasonably conclude that *some* of them were sustained; otherwise the practice of granting them would hardly have been continued. If, then, any considerable portion of them were sustained, that fact indicates that even in that rude and ignorant age, the unlearned common people — of whom the juries were composed — had some natural and just, though imperfect, appreciation, either of a man's right of property in his invention, or of their moral indebtedness to one who gave a new and valuable art to the public. And this fact tends also to show that, with the progress of knowledge, and the increased experience of the utility of new inventions, the principle of a man's right of property in his ideas, would have made its way, as a principle of

natural law, into the minds of the people, and long ere this have been acted upon, as such, by the juries, had the Common Law institutions been preserved.

English judges, as far back at least as 1366, have held that grants by the king to individuals of the exclusive privilege of practising for a time a new art or manufacture introduced by them into the kingdom, *were consistent with the Common Law*. The reason given, in a case of that date, was "that arts and sciences, which are for the public good, are greatly favored in law, and the king, as chief guardian of the common weal, has power and authority, by his prerogative, to grant many privileges, for the sake of the public good, although *prima facie* they appear to be clearly against common right."

Coke says, "The reason wherefore such a privilege is good in law, [that is, at the Common Law,] is because the inventor bringeth to and for the commonwealth a new manufacture by his invention, costs, and charges, and therefore it is reason that he should have a privilege for his reward, (and the encouragement of others in the like,) for a convenient time." *

Now, I do not cite these opinions of judges as *any proof at all*, that the Common Law recognizes a man's right of property in his inventions. No such proof is needed, for the nature of the Common Law itself establishes that point. Besides, the opinions themselves are altogether too loose and crude to be worth any thing for that purpose; for they apply as well to persons who bring inventions from other countries, as to inventors themselves; and they also absurdly assign reasons of expediency to the public, instead of reasons of right to the inventor, as the grounds on which the Common Law allows of such grants. The opinions were also given by judges, who were either the creatures of the crown alone, or of the crown and parliament, and who doubtless

* For these and various other authorities, showing the opinions of English judges, that patents for new inventions were good at Common Law, see *Hindmarch on Patents*, ch. 1 and 2. Also Coke's chapter on Monopolies, 3 *Inst.* 181.

were in the habit of sanctioning every thing which the king and the parliament desired them to sanction. But I cite them as evidence that, for at least five centuries, there have prevailed, in England, a general sense of *obligation*, or indebtedness, on the part of the public, towards one who introduces a new art, and an idea that he ought in some way to be paid. And my argument is, that if arbitrary power had never interfered to check the progress of knowledge, and to exercise absolute authority over the rights of inventors, as well as of others, this public sense of obligation, and this vague idea that an inventor should be paid, would long ago have found body and form in a well digested system of natural law, based on the principle of a man's absolute right of property in the productions of his mind.

The tendency towards this result has been greatly obstructed by the arbitrary character of the English government, for the last four or five centuries. For example, in those periods, when the power of the king was at its height, he was in the habit of granting a great variety of monopolies; *without any pretence of new inventions*, but only as a means of rewarding favorites, or of raising revenue. And these monopolies were maintained through the instrumentality of the Star-chamber court, which summarily punished infringers. These monopolies were so numerous, unjust, and oppressive, that parliament, in 1623, interfered to suppress them; and an act was passed for that purpose, *specially on the ground that they were contrary to the Common Law*. Yet, in this act, which was intended to be effectual for the suppression of all monopolies, except such as were either consistent with the Common Law, or supposed to be beneficial to the public, patents for new inventions, and licenses for printing, *were specially excepted from the general prohibition*; thus again partially recognizing the right of property in ideas, by indicating it to be the sense of the nation, that both justice and policy required that authors and inventors should receive some reward for their labors; and that the most reasonable and expedient mode of securing this end, was, by giving to authors an unlimited monopoly of their

works, and to inventors a monopoly of their inventions for a limited time.

But from all this it must not be inferred that correct scientific views of the law of nature on this subject, had made any great progress; nor could they do so, for scientific views of the law of nature, relative to any subject, make little progress in the midst of despotism and ignorance. But my argument is, that, but for the despotism, no *general* ignorance would have prevailed; *the press would have been free*; the people would have become enlightened; would have been free in the choice of their pursuits; inventions would have multiplied; their importance would have come to be more justly appreciated; the law relative to them, being left to rest, as it would have done, upon natural principles, would necessarily have become an important subject of investigation, (in connexion with the rights of authors,) and from the necessity of the case, *it would have made progress*.* And is it in the least extravagant—is it not indeed entirely within the limits of probability, to suppose that an inventor's property in his invention would long ago have been recognized as a *right*, founded in nature, instead of being regarded as that contemptible and detestable thing, which the English government persists in regarding it, to wit, *not a right, but a privilege, granted to an inventor by the crown, as a mere matter of royal grace, favor, and discretion?* †

* One reason why no more progress has been made in other branches of natural law, has been, that natural law has been superseded by arbitrary legislation; and all the legal mind of England and America, has been engrossed, for centuries, in interpreting and enforcing this legislation, instead of pursuing the study of natural law as a science. Another reason is, that the progress of natural law, *in any direction*, is dangerous to arbitrary institutions; and therefore courts, sitting under the authority of arbitrary governments, systematically ignore all discoveries in natural law, until they have first been sanctioned by the legislative power. And this last event generally happens only when the government finds that a revolution, dangerous to its existence, is impending.

† An English patent is granted in these supercilious and insolent terms. After reciting that the applicant has "*humbly petitioned*" the crown for a patent, it adds, "And we, [the queen,] being willing to give encouragement to all arts and

But I wish now to show why the rights of inventors, to a *perpetual* property in their inventions, has never come distinctly before the English courts, as a question of Common Law.

Prior to the introduction of printing, and for a considerable time after, there could have been but very few inventions, of any considerable importance, made in England.* The English were not naturally an inventive people. The Italians and Germans were much in advance of them in that respect. The English were an agricultural and military, and not a mechanical,

inventions, which may be for the public good, *are graciously pleased to condescend to the petitioner's request.* Know ye, therefore, that we, *of our especial grace*, certain knowledge, and *mere motion*, have given and granted, and by these presents, for us, our heirs, and successors, do give and grant unto the said A. B., his executors, &c., *our especial license*, full power, sole privilege, and authority, that he the said A. B., his executors, &c., shall and lawfully may make, use, exercise, and vend his said invention," &c.

Is it not nearly an infinite insult; that such men as Arkwright and Watt, who were of ten thousand times more value to mankind than all the kings and queens that time has ever produced, or ever will produce, should be necessitated to hold their natural rights to the products of their own labor, on such terms as these? If a greater insult can be conceived, it would seem to be, that authors, and such authors as John Milton, should be compelled to ask "license" of a king to print their own thoughts. This insult to authors is no longer practised; because the authors, with truth on their side, proved themselves stronger than the king. When inventors assert their rights in like manner, they will no longer be necessitated to accept them as *grants*, or *favors*, "*graciously*" bestowed on them by the government.

The Common Law never required that a freeborn Englishman should "*humbly petition*" the crown for the enjoyment of his natural rights of property; nor that he should ever accept those rights as a *grant* originating in the "*gracious pleasure and condescension*" of the king. And if the constitutional system of government had been preserved, such degradation, on the part of inventors, would not, at this day certainly, have been witnessed.

* During the first twenty years of the *present* century there were but one hundred and three patents a year, on an average, granted for both foreign and domestic inventions. (See Pritchard's list of Patents.) From this fact one can judge somewhat how few inventions could have been made in former times, when the population was comparatively small, and the arts had made so little comparative progress.

people. Most of their inventions were brought from the continent, and even those doubtless were not numerous. The art of printing, after some lapse of time, began to increase the mental activity of the people. Yet this activity, for a long time, took the directions of literature, politics, religion, colonization, commerce, and war, rather than of invention, or progress in the arts. Indeed it is only within the last hundred years, or thereabouts, that many important inventions have been made in England.

Under these circumstances, it was natural that the rights of inventors, as a question of Common Law in the courts, should lag behind those of authors; and for various reasons, as follows.

1. One's authorship of a book could much more easily be *proved*, to the satisfaction of a jury, than one's authorship of an invention. That proof could also be much more easily perpetuated, than in the case of an invention; because a book, once published, generally carried the author's name with it, whereby the latter became at once notorious, and false claims to the authorship became forever after impossible to be established. Whereas, in the case of an invention, unless the proof of authorship were made at once, *to the satisfaction of the king, and a patent obtained*, the evidence would soon either be entirely lost, or become so uncertain as to be insufficient to establish one's right.

2. The number of printers were so few, and those few so well known, that the infringement of an author's copyright was much more sure of being detected, than an infringement of one's invention. The latter could easily be concealed, if perpetrated at some distance from the locality of the inventor; because there was so little travel and intercourse in those days, among the common people, that an invention could be easily practised a long time so privately as not to become known to a person at a distance.

3. Copyrights were perpetual; whereas patents for new inventions were temporary. The former too were obtained without any important cost or trouble; whereas it was doubtless a very serious and expensive undertaking to prove, to the satisfaction of

the crown, one's authorship of an invention, and get a patent for it. There were also doubtless many more books written, than there were important inventions made. For these reasons, the copyrights of books were doubtless much more numerous than the patents for inventions. These copyrights, too, very many of them, went into the hands of printers, who were able to defend them in the courts; whereas it is likely the inventors were generally too poor to go to law for their rights.

4. Since 1623, (until 1835,) patents have been granted but for fourteen years; and (before the English became so eminently a manufacturing nation) a new manufacture could be introduced but so slowly, that unless the invention were of great importance, a patent for so short a period, would be of too little value to be worth the cost of procuring.

5. The fact, that the government made no distinction between those who imported inventions, and those who made them, tended to confuse men's notions as to the rights of real inventors. And the further fact, in this connexion, that patents granted to mere *importers* of inventions, would *justly* be regarded with odium, if prolonged for any considerable time, tended to reconcile men to the practice of protecting *original* inventors for a short period also; and this made their rights of too little value, to be worth protecting by expensive litigation.

6. A mechanical invention is much more difficult to be defined, or described, to the satisfaction of a jury, than the contents of a book; and therefore it would be much more difficult to prove, to the satisfaction of a jury, the infringement of a patent, than of a copyright.

7. A claim for copyright would meet with fewer obstacles from the prejudices of a jury, than a claim for an invention; *because a book interfered with no man's interests*; whereas labor-saving inventions were often very odious, on account of their turning large numbers of people out of employment. We, of this day, who have become accustomed to look upon a new labor-saving invention as one of the greatest blessings, can hardly fail

to be astonished at the ancient prejudices against such as superseded other labor. As an illustration of these prejudices, it may be stated, that it is less than two hundred years, since a saw-mill in England was pulled down by a mob, on account of its interfering with the employment of the splitters and hewers of timber. *Coke* also gives a curious illustration, not merely of the popular prejudice, but also of the government's prejudice, against a new invention, if it were one that would deprive many persons of their employment. He says,

“There was a new invention found out heretofore that bonnets and caps might be thickened in a fulling mill, by which means more might be thickened and fulled in one day, than by the labors of fourscore men who got their living by it. It was ordained that bonnets and caps should be thickened and fulled by the strength of men, and not in a fulling mill, for it was holden inconvenient to turn so many laboring men to idleness.”*

8. Inventors not being literary men, and perhaps often wholly illiterate men, could not advocate their own rights, as the authors could theirs. They had no John Miltons among them to speak for them. They could only let their deeds speak for themselves. Besides, they were doubtless too much engrossed in their inventions, (as most inventors are even at this day,) to give much thought to their legal rights. They naturally accepted such protection as the government offered them, without raising any further question about it.

For all these reasons, and perhaps for others, it was natural that the *perpetual* right of *inventors* should be behind the perpetual right of *authors*, in coming into the courts, as a question of *Common Law*. And such was the fact. Not only so, but, unfortunately for the *inventors*, when the rights of *authors* did finally come before the King's Bench, as a Common Law question, in 1769, *that court, while it sustained the rights of authors, gratuitously prejudged and condemned the rights of inventors without a hearing*, as we shall hereafter see. The House of Lords virtually did the same in 1774.

* *Coke's 3 Inst.* 184.

Beyond and above all this, the act of parliament of 1623, expressly forbade patents to be granted for a longer period than fourteen years. And this prohibition remained in force until the act of 1835, which allowed an extension of seven years in certain cases. So that the Common Law rights of inventors could be set up, in court, only on one or both of these two grounds, viz. :

1. That the act of parliament, limiting the duration of the patent, was constitutionally void—a ground, which is true in itself, but which no court in England would think of sustaining.
2. That the rights of inventors were not derived from, and did not depend on, their patents—a ground, which is also true in itself, but which patentees could not be expected to understand, or at least to have confidence in, as a ground of successful litigation, considering that the uniform practice of the courts had been to hold the contrary.

Besides, the task of inventors to secure to themselves even such rights as the acts of parliament intended they should enjoy, has always been too hard a one, to leave them any confidence for advancing new claims, (however just in themselves,) in manifest opposition to the intention of parliament, and the practices of courts. For the courts, persisting in the idea that a patent was, in some sort at least, an arbitrary grant of an unjust monopoly, have, until quite recently, been in the habit of exerting their ingenuity to invalidate even such patents as were granted. For example. If a specification claimed a particle too much, or was a particle deficient in the description of the art, the courts, instead of holding the patent good for whatever was good, as they were bound to do, would take advantage of the error to invalidate the patent altogether. Thus, as late as 1829, “in the case of *Felton vs. Greaves*, the title of the plaintiff’s patent described the invention to be a machine for giving a fine edge to knives, razors, scissors, and other cutting instruments; but it appeared that the invention, as described in the specification, was inapplicable for the sharpening of scissors; and Lord Tenterden, Chief Justice, therefore held the patent to be void, and nonsuited the plain-

tiff." * And in 1816, "in the case of *Cochrane vs. Smethurst*, it appeared that the plaintiff's patent was for an improved method of lighting cities, towns, and villages; but his invention really was an improved street lamp; and it was held by Mr. Justice Le Blanc that the title was too general in its terms, and the patent void."†

These cases are given merely as illustrations of the absurdities and atrocities, which the courts have habitually practised, up to a very recent date, when adjudicating upon the rights of inventors. It seems never to have entered their heads, that it was any part of the object of a patent, to secure to an inventor the quiet possession of what was exclusively his own. On the contrary, they have treated a patent as a bargain, between the public and the inventor, of this kind, to wit. They considered that the art, instead of being an honest product of the inventor's labor, and therefore his own, was one, which rightfully belonged to the public, and which had merely *happened* to become known only to the inventor; and that he, like the dog in the manger, would neither use it, nor let others use it, unless he could get something for his secret. They of course held that he really ought to give the secret *freely* to the public; and that any attempt, on his part, to get a price for it, was merely an attempt at levying black mail, and should be defeated if possible. They then considered that the public, finding themselves in this unfortunate predicament, their rights locked up in the breast of a scoundrel, acting under the force of an unjust necessity, made a contract with him, (through their representative, the king,) by which they agreed to give him a monopoly of the art for fourteen years, provided he would give the art freely to the public forever afterwards. To secure the benefits of this bargain to the public, the king required the villain to put on the king's records such an accurate description of the art, as that other men, by reading the description,

* *Hindmarch* 46. 3 *Car. and Payne* 611.

† *Hindmarch* 46. 1 *Starkie's R.* 205.

might be able to understand and practise the art. If, now, this specification have described the invention as being a particle more than it really was, the courts have said that the inventor had practised a fraud, and obtained a patent, without giving for it the full price agreed upon; and that therefore the patent was void: If, on the other hand, the specification have not so fully described the invention, as that it may be entirely known by other persons on reading the description, then the courts have said that the inventor was a cheat, because he had not made known the invention, which he agreed to make known, as the price of his patent; that he has therefore obtained his patent on false pretences, and that it is consequently void. Thus, if the courts, by splitting a hair 'twixt north and north-west side, could so construe a specification as to make the patentee to have defrauded the public, to the amount of a farthing, in the price agreed to be paid by him for his patent, they have held that the patent was void; as if the patentee were a swindler, getting unjust monopolies out of the public by false representations, instead of being, as he no doubt usually has been, a simple honest man, who wished to secure to himself the products of his honest labor, but who was not sufficiently skilled in letters, law, and the arts, to know whether or not his invention were described with the greatest possible accuracy, of which the case admitted.

This is the spirit in which English courts, up to a very recent date, if not indeed up to the present date, have adjudicated upon the rights of inventors. Whereas, if the Common Law rights of inventors were acknowledged, it would be the duty of courts to recognize the sufficiency of a specification, if it described the invention with such general accuracy, as to put second persons *reasonably* on their guard against infringing it.

When we consider for how long a period inventors have been compelled to deal with such pettifoggers, sharpers, and asses, as these courts have thus shown themselves to be, it is perhaps not to be wondered at, that they have never seen fit to ask any thing more at their hands than was given them by acts of parliament—the

only law the judges have acknowledged on this question. They have accordingly turned their attention to getting improvements in acts of parliament, rather than to asserting their Common Law rights.

Looking back, now, over the ground, for five hundred years, we see, on the one hand, the advantages, which the Common Law rights of inventors have enjoyed; and, on the other, the disadvantages under which they have labored.

Under the head of *advantages*, we may reckon, that during all that time, (five hundred years,) it has been held, by kings, courts, and parliaments, to be *consistent with the Common Law*, for the king to grant, both to actual inventors, and to the mere importers of new inventions, a temporary monopoly of the use of their inventions; and that for more than two hundred years, (since 1623,) the sentiment on this point has been so strong, and so strong also the conviction of the good policy of encouraging the arts in this way, that these monopolies have, by a special act of parliament, stood excepted out of the prohibition laid upon monopolies in general.

Under the head of *disadvantages*, we may reckon, that the English were not originally an inventive people; that it is only within a hundred years, or thereabouts, that their minds have been particularly turned in the direction of inventions; that from the first, the grant of a patent for a new invention, has been held, by the government, to be an act of grace, favor, and discretion, on the part of the crown, and not any thing which a subject could claim as a right; that the rights of a real inventor have always been placed on the same footing with the impertinent and groundless claims of a mere importer of an invention, and have, therefore, necessarily been discredited by the association; that patents for new inventions, from being always classed among arbitrary monopolies, have always had to bear, by association, more or less of the odium which *justly* attaches to those violations of common right; and, finally, that for more than two hundred years, (that is, since 1623,) there has been an imperative act of

parliament, (which judges, in violation of their oath, and their duty, always bow to, in preference to the Common Law,) prohibiting the grant of a patent for any more than a limited period.

Now, the whole object of the argument in this section, is simply this. *First*, to prove, reasonably, that if the ancient Common Law system of government had been preserved, and arbitrary power, neither that of the king, nor that of the king and parliament, had ever interfered with the question of intellectual property, the rights of *authors*, to a perpetual property in their ideas, would have been first established; and that, too, long before the decision in their favor by the King's Bench in 1769. And, *secondly*, that the establishment of the rights of actual inventors, (not of importers of inventions,) to a perpetual property in their ideas, would also have speedily followed the establishment of the rights of *authors*. *And that both these events would have occurred long before now.*

Considering, then, on the one hand, that the claims of inventors, as being founded in the Common Law, were *at least partially* recognized so long ago as five hundred years; and considering also, that the rights of authors were also, at least partially, recognized, nearly as soon after the invention of printing as there were any authors having rights to be protected; and then considering also, on the other hand, the arbitrary character of the government during all this time, the restrictions on the press, the oppression, and consequent poverty and ignorance of the people; and also the arbitrary limitations, imposed by acts of parliament, for the last two hundred and thirty years, upon the rights of inventors, and for the last one hundred and forty years, upon the rights of authors; considering all these things, I think the conclusion is certainly a reasonable one, that if the ancient constitutional Common Law form of government had been preserved, and knowledge and wealth had been, (as under such circumstances they would have been,) not only immensely increased, but more equally diffused among the people, the Common Law, as a science, would have made such progress, and literature and the arts would

have so commended themselves to the approbation and protection of the people, that the rights of both authors and inventors, to a perpetual property in their ideas, would have been long since established.

And the true method of proceeding, at this day, in order to establish the rights of authors and inventors, is to re-establish the constitutional authority of the Common Law over acts of parliament.

SECTION III.

Review of the Case of Millar vs. Taylor.

The question of an author's copyright at Common Law, first came to a decision by the court of King's Bench in 1769, in the case of *Millar vs. Taylor*.* Three of the Justices, Willes, Aston, and Lord Mansfield, decided in favor of the right; one, Justice Yates, opposed it.

Each of the judges gave a written argument on the question. The want of unanimity in the court, and the inconsistency and deficiency of the arguments of the three Justices in favor of the right, have prevented their decision from being received as a settlement of the question; and there has probably been nearly or quite as much doubt on the point, among lawyers, since that decision as before.

The Justices argued the question, both on precedent, and as an abstract one of natural, or common law. The precedents were from the court of chancery; and the most of them were encumbered with so many collateral questions, that, although they indicated very strongly, and perhaps quite clearly, that the chancellors had, in some instances at least, *assumed* that there was a Common Law copyright, still, as the decrees had never been

* 4 *Burrows* 2303.

rendered on a discussion of that point, they could not be held as decisive of the abstract question.

The objections of Yates, on abstract grounds, so far as they were worthy of notice, have been noticed, and replied to, in "*Part First*," of this Essay.

The arguments of the three Justices, *who favored the right*, were erroneous and deficient to such a degree, that it can hardly be said that they threw any light upon the points where the real difficulties lay. This is perhaps not to be wondered at. The question was essentially a new one, so far as any critical investigation of it was concerned. Being a new one, an abstruse one, and liable to objections, which could not all be answered without much reflection, it is perhaps not surprising that, in the hurried and superficial examination, which alone judges can give to new questions, their views should be, as they were, crude, inconsistent, superficial, and unsatisfactory; and that, instead of settling the questions involved, they did little or nothing more than bring to light the real questions to be settled.

Some of the most important of the errors and deficiencies of their arguments were the following.

1. While asserting that *authors* had a Common Law right of property in their works, they conceded and asserted that *inventors* had *no* Common Law right of property in their inventions; that *their* rights depended wholly on the patents granted them by the king.

So glaring an inconsistency as this was of course wholly indefensible; and it was turned against them, in the following terms, by Yates, who opposed the right. He said:

"The inventor of the air pump had certainly a property in the *machine* which he formed; but did he thereby gain a property in the *air*, which is common to all? Or did he gain the sole property in the *abstract principles* upon which he constructed his machine? And yet these may be called the inventor's ideas, and as much his sole property as the ideas of an author." 4 *Burrows* 2357:

Also, "Examples might be mentioned, of as great an exertion of natural faculties, and of as meritorious labor, in the mechanical

inventions, as in the case of authors. We have a recent instance in Mr. Harrison's time-piece; which is said to have cost him twenty years application. And might he not insist upon the same arguments, the same chain of reasoning, the same foundation of moral right, for property in *his* invention, as an author can for *his*?

"If the public should rival him in his invention, as soon as it comes out, might not he as well exclaim as an author, 'that they have robbed him of his production, and have iniquitously reaped where they have not sown?' And yet we all know, whenever a machine is published, (be it ever so useful and ingenious,) the inventor has no right to it, but only by patent; which can only give him a temporary privilege." *Same*, p. 2360.

And again, "The whole claim that an author can really make, is on the public benevolence, by way of encouragement; but not as an absolute coercive right. His case is exactly similar to that of an inventor of a new mechanical machine; it is the right of every purchaser of the instrument to make what use of it he pleases. It is, indeed, in the power of the Crown to grant him a provision for a limited time; but if the inventor has no patent for it, every one may make it, and sell it.

"Let us consider, a little, the case of mechanical inventions.

"Both original inventions stand upon the same footing, in point of property; whether the case be mechanical, or literary; whether it be an epic poem, or an orrery. The inventor of the one, as well as the author of the other, has a right to determine 'whether the world shall see it or not;' and if the inventor of the machine choose to make a property of it, by selling the invention to an instrument maker, the invention will procure him benefit. But when the invention is once made known to the world, it is laid open; it is become a gift to the public; every purchaser has a right to make what use of it he pleases. If the inventor has no patent, any person whatever may copy the invention, and sell it. Yet every reason that can be urged for the invention of an author, may be urged with equal strength and force, for the inventor of a machine. The very same arguments 'of having a right to his own productions,' and all others, will hold equally, in both cases; and the immorality of pirating another man's invention is full as great, as that of purloining his ideas. And the purchaser of a book and of a mechanical invention has exactly the same mode of acquisition; and therefore the *jus fruendi* [the right of enjoyment] ought to be exactly the same.

"Mr. Harrison (whom I mentioned before) employed at least as much time and labor and study upon his time-keeper, as Mr.

Thompson could do in writing his Seasons; for, in planning that machine, all the faculties of the mind must be fully exerted. And as far as value is a mark of property, Mr. Harrison's time-piece is surely as valuable in itself, as Mr. Thompson's Seasons.

"So the other arguments will equally apply. The inventors of the mechanism may as plausibly insist, 'that in publishing their invention, they gave nothing more to the public than merely the *use* of their machines;' 'that the inventor has the sole right of selling the machines he invented;' 'and that the purchaser has no right to multiply or sell any copies.' He may argue, 'that though he is not able to bring back the *principles* to his own sole possession, yet the property of *selling* the machines justly belongs to the original inventor.'

"Yet with all these arguments, it is well known, no such property can exist, after the invention is published.

"From hence it is plain, that the mere labor and study of the inventor, how intense and ingenious soever it may be, will establish no property in the invention; will establish no right to exclude others from making the same instrument, when once the inventor shall have published it.

"On what ground then can an *author* claim this right? How comes *his* right to be superior to that of the ingenious inventor of a new and useful mechanical instrument? Especially when we consider this island as the seat of commerce, and not much addicted to literature in ancient days; and therefore can hardly suppose that our laws give a higher right, or more permanent property, to the author of a book, than to the inventor of a new and useful machine." *Same*, p. 2386-7.

To these arguments the three Justices offered only these replies.

Willes said, "But the defendant's insist, 'that by the author's *sale* of printed books, the copy [right] necessarily becomes open; in like manner as by the inventor's communicating a trade, manufacture, or mechanical instrument, the art becomes free to all who have learnt, from such communication, to exercise it.'

"The resemblance holds only in this — As by the communication of an invention in trade, manufacture; or machines, men are taught the art or science, they have a right to use it; so all the knowledge, which can be acquired from the contents of a book, is free for every man's use; if it teaches mathematics, physic, husbandry; if it teaches to write in verse or prose; if, by reading an epic poem, a man learns to make an epic poem of his own; he is at liberty.

"But printing is a trade or manufacture. The types and press are the mechanical instruments; the literary composition is as

the material, which is always property. The book conveys knowledge, instruction, or entertainment; but multiplying copies in print is quite a distinct thing from all the book communicates. And there is no incongruity, to reserve that right, and yet convey the free use of all the book teaches." 4 *Burrows* 2381.

This argument is utterly absurd, inasmuch as it *assumes*—what is not true—that if an inventor employ a mechanic, to construct a machine, in accordance with his invention, and thereby learn him how to construct similar machines, the mechanic thereby acquires a right to construct such machines in future, without the consent of the inventor! It is true such an idea once prevailed in England, and was acted upon by courts. But there would be just as much sense in saying that, if an author employ a printer to print his book, and thereby learn him how to print similar books, the printer thereby acquires a right to print similar books, (that is, the same literary composition,) without the author's consent.

The argument is just as strong in favor of the right of the printer to print the book, as it is in favor of the right of the mechanic to construct the machine. Or, rather, the argument is just as weak, instead of strong, in one case as in the other.

Aston said, "That the comparison made betwixt a literary work and a mechanical production; and that the right to publish the one, is as free and fair, as to imitate the other; carries no conviction of the truth of that position, to my judgment. They appear to me very different in their nature. And the difference consists in this, that the property of the maker of a mechanical engine is confined to that individual thing which he has made; that the machine made in imitation or resemblance of it, is a different work in substance, materials, labor, and expense, in which the maker of the original machine cannot claim any property; for it is not his, but only a resemblance of his; whereas the reprinted book is the very same substance; because its doctrine and sentiments and its essential and substantial part are. The printing of it is a mere mechanical act; and the method only of publishing and promulgating the contents of the book.

"The composition therefore is the substance; the paper, ink, type, only the incidents or vehicle.

"The value proves it. And though the defendant may say 'those materials are mine,' yet they cannot give him a right to

the substance, [the literary composition,] and to the multiplying of the copies of it; which (on whose paper or parchment soever it is impressed) must ever be invariably the same. Nay, his *mixing*, if I may so call it, his such like materials with the author's property, does not (as in common cases) render the author's property less distinguishable than it was before; for the identical work or composition will still appear, beyond a possibility of mistake:

"The imitated machine, therefore, is a new and different work; the literary composition, printed on another man's paper, is still the same.

"This is so evident to my own comprehension, that the utmost labor I can use in expressions, cannot strengthen it in my own idea." 4 *Burrows* 2348.

This argument of Aston is equally absurd with that of Willes; because two books, of the same kind, are just as much two different things, (and *not* "the same," as Aston asserts,) as are two machines, of the same kind. The ideas also, described in a book, are just as much distinct entities from the book itself, as the idea, after which a machine is constructed, is a distinct entity from the machine itself. The ideas, described in a book, no more compose the "*substance*" of the book, and are no more "*mixed*" with the "*materials*" of the book, as Aston asserts, than the idea, after which a machine is constructed, composes the "*substance*" of the machine, or is "*mixed*" with the "*materials*" of the machine. But this point has been sufficiently explained in a previous chapter.*

The *objects* of a book and a machine are somewhat different. The object of a book is simply to communicate ideas. A machine communicates ideas equally as well as a book (to those who understand the language of mechanics); but it also has another object, which a book has not, viz.: the performance of labor. This is the most noticeable difference between them; a difference of no legal importance whatever, unless it be to prove that the mechanical idea is the more valuable of the two, and therefore the more worthy of protection as property.

* Chapter IV, pages 119 - 120 - 133.

Lord Mansfield made no argument of his own, as to the resemblance, or difference, between mechanical inventions and literary compositions; but he must be considered to have indorsed the arguments of Willes and Aston, on this point, as well as on all others; for he said he had read them (throughout), and "fully adopted them." *p.* 2395 - 6.

There can certainly, I think, be no necessity for any additional remarks on this subject. The identity of principle, in the two cases, is so perfect, and so palpable, that any theory, that excludes an inventor's ideas from the category of property, must equally exclude those of authors. And any theory, that includes the ideas of authors in the category of property, must equally include those of inventors. Aston himself, five years afterwards, in the case of *Donaldson vs. Becket*, had changed his mind so far as to say, that "He thought it would be more liberal to conclude, that previous to the monopoly statute, there existed a common law right, equally to an inventor of a machine, and an author of a work." *

We, of this day, may well feel amazed that three out of four, of the judges, occupying so high a seat as that of the King's Bench, could fall into an error so absurd in itself, and so evidently fatal to the cause they were advocating. The fact, that they did so, is one of the numberless instances, that show how the minds of judicial tribunals are fettered by the authority, or their consciences swerved by the influence, of the government, whose servants they are; and consequently how little reliance is to be placed upon the correctness of judicial decisions.

Many persons, no doubt, will think that in this case, the consciences of the judges were swerved, rather than that their judgments were fettered; that inasmuch as the granting of patents had, for hundreds of years, been held to be a branch of the royal prerogative; and in some reigns, if not in all, a somewhat lucrative branch; the judges had not the courage to strike such a

* *Parliamentary History*, Vol. 17, p. 981.

palpable blow at the authority, dignity, and revenues of the king, as they would do by declaring that inventors could hold their property independently of his "gracious pleasure and condescension."

Other persons may perhaps imagine, that an unwillingness, on the part of the judges, to impeach their own infallibility, and that of their court, by acknowledging the error of all their former decisions, in regard to inventions, was at the bottom of the absurd distinction, which they attempted to set up, between the rights of authors and inventors, to a property in their respective ideas.

Still other persons, however, of a more charitable disposition, especially if they are familiar with the unreasoning stupidity, with which courts are habituated to acquiesce in every thing, however absurd in itself, that has the odor of authority or precedent, will perhaps give these judges credit for honestly imagining, that there *must* be some difference between the rights of authors and inventors, notwithstanding they themselves (the judges) were unable to make that difference appear.

But whatever may have been the cause of so patent an inconsistency on their part, the inconsistency itself was sufficient to deprive their decision of all weight as an authority.

2. The arguments of the three Justices, in favor of the right, were imperfect for another reason, to wit: that they failed to answer the following argument of Yates against the right, viz.: That it was a supposable case that two men might produce the same ideas, independently of each other; and that, in such a case, it would be unjust to give, to the one who first produced them, an exclusive property in them.

The three judges made no reply to this argument.

I have attempted to answer this objection, in a former chapter,* and need not repeat what is there said.

3. A third error, or deficiency, in the arguments of the three Justices, in favor of the Common Law copyright, arose in this way.

* Page 68.

It is not now, and I suppose never has been, the custom in England, to make any entry — such as “*copyright reserved*,” or other equivalent expression — on the title page, or other part of a book itself, to give notice to purchasers that the copyright is retained by the author.

The act of parliament required no such entry to be made in the books themselves. It only protected the copyright of those books, whose title should be entered in the register book of the Company of Stationers. But as this was a merely arbitrary provision, the entry or non-entry of the title there, could have nothing to do with the question of copyright at Common Law.

Hence the important question arose, How is a purchaser of a book to know how much he purchases? That is, How is he to know whether, in buying a book, he also buys the right to reprint it, or only the right to read it? On what legal grounds can it be said, that there is any implied contract between the author and the purchaser, by which the former reserves the exclusive right to multiply copies?

These were important questions, which the three Justices, who favored the common law copyright, were bound to answer. But they did not answer them satisfactorily or fully. I have attempted to answer them in a former chapter.*

4. A fourth error, in the argument, of the three Justices, who favored the right, was this.

Willes said, (and it was apparently concurred in by both Aston and Mansfield,) that “All the knowledge, which can be acquired from the contents of a book, is free for every man’s use. * * * The book conveys knowledge, instruction, or entertainment; but multiplying copies in print is quite a distinct thing from all the book communicates. And there is no incongruity, to reserve that right, and yet convey the free use of all the book teaches.” p. 2331.

This is error throughout. It is, of course, generally true, that “All the knowledge that can be acquired from the contents of a

* Chapter IV, page 113.

book, is free for every man's use," *in every way except that of reprinting descriptions of it*; but it is, by no means, a *necessary* consequence of the publication of a book, that all the knowledge it conveys, is, *even thus far*, free for the use of every body, or even for the use of the purchaser of the book. Suppose a book describe a steam engine so fully, that a mechanic, from the knowledge thus conveyed, would be able to construct and operate a steam engine; does it follow, because he has obtained that knowledge from a book, (even though the book were written and sold by the inventor of the engine,) that it is therefore free for his use? Not at all. The book may have been, and most likely was, written by the inventor, simply for the purpose of conveying, to the reader, such a knowledge of the steam engine, as would induce him to *purchase* the right to construct, or use one.

If special notice be given, in the book, that the copyright is reserved, that notice *may*—and, in the absence of any ground of presumption to the contrary, perhaps *would*—imply that the author reserves *nothing else than the right of multiplying copies*; and that the knowledge conveyed by the book, is therefore free for all *other* uses. But, in England, where no notice is given, *in the book*, that the copyright is reserved, no implication can be drawn, *from the simple fact of publication alone*, that the knowledge conveyed is designed to be free. The law must infer, from the nature of the knowledge conveyed, and from other circumstances, whether the author designs the knowledge to be free, or not. In a large proportion of the books printed, the knowledge is of such trivial *market* value, that, in any other form than in a book, it would bring nothing worth bargaining for. In such cases, it would be reasonable for the law to infer that the knowledge was designed to be free for all uses, *except that of being reprinted*. But wherever the knowledge had an *important market value, independently of the book*, it would be reasonable to infer, that the object of the book was, to advertise the knowledge, with a view to its sale for use, rather than that the price of the book, was the price also for the free use of the knowledge.

This matter, however, has perhaps been sufficiently discussed in a former chapter.*

Willes says, "There is no incongruity, to reserve that right, [the right of multiplying copies,] and yet convey the *free* [unlimited] use of all the book teaches." Yes, there is a plain incongruity; because the "multiplying copies in print," *is itself one of the "uses,"* which is made of what the book teaches. We cannot multiply copies of the book, *without using the ideas it communicates*; for these ideas are an indispensable guide to the work of setting the type for the new copies. The use of the ideas, *for this purpose*, is generally the *only "use,"* from which the author derives his pecuniary profit. And it is because *this "use"* of them *is lucrative*, that he reserves it *exclusively* to himself. To say, therefore, that an author reserves to himself the copyright — that is, the exclusive right of using the ideas to multiply copies of the book — and yet that he conveys to others the *free* [unlimited] use of the same ideas, is a contradiction; because the unlimited use of the ideas, would include the use of them for multiplying copies of the book. He may, therefore, reserve the right of multiplying copies, and yet convey a right to use, *in every other way, than that of multiplying copies*, "all that the book teaches;" but he cannot reserve the copyright, "and yet convey the *free* [unlimited] use of all the book teaches."

In reprinting the book, *the ideas*, which the book teaches, or communicates, *are necessarily used as a guide to the work of printing*; and the sole right of using them, *for that purpose*, is the copyright, or right of property, which the author has reserved to himself.

But Willes says that "multiplying copies in print is quite a distinct thing from all the book communicates."

He obviously means, by this remark, that *the right* of "multiplying copies [of the book] in print, is quite a distinct thing from" *the right of property in the ideas*, "that the book com-

* Chapter 17.

municates." But in this, he is in a great error; for it is the *right of property alone, in the ideas*, "that the book communicates," that gives him the *exclusive* right to use them for the purpose of "multiplying copies [of the book] in print."

Before the book was printed, all the ideas it describes, (or so many of them as were original with him,) were the sole property of the writer. By printing the book, and selling it, with a reservation of copyright, he conveyed a *partial* property in the ideas, to his readers. That is, he conveyed to them a right of *possession*, in common with himself, of all the ideas "the book communicated;" and (in most cases) he abandons (as being worthless to himself) his *exclusive* right to the "use" of them, for every purpose, *except that of reprinting descriptions of them*. The sole right of using them, for the purpose of reprinting descriptions of them, is a part of his original *exclusive right of property, or dominion, in the ideas themselves*. It is the part, of that original exclusive right of property, or dominion, which he has reserved to himself. The rest of his original right of property in them, he has (in most cases) conveyed, or abandoned, to be enjoyed by others, in common with himself. The copyright, therefore, is a *remnant, remainder, or reserved portion*, of his original *exclusive right of property in the ideas* "that the book communicates," or describes; *and it is nothing else*.

This attempt, on the part of the three Justices, (or certainly on the part of Willes,) to make it appear, that the right of multiplying copies of a book, was "*quite a distinct thing*" from all right of property in, or dominion over, the ideas, "that the book communicates," confused and destroyed their whole argument; for it was an attempt to prove a legal impossibility, viz.: the existence of a legal right, *which attached to no legal entity*.

The idea, that an author could retain an *exclusive* right of multiplying copies of a book, after he had parted with every *vestige* of *exclusive* property in "all that the book communicated," is a perfect absurdity.

The copyright, or the right of multiplying copies, therefore,

although it is not necessarily a *sole and absolute right of property, in the ideas themselves, for all uses and purposes whatsoever*, is, nevertheless, a sole and absolute right of property, *in the ideas themselves, for a particular use and purpose*, to wit: that of printing books describing them. It is not, therefore, as these Justices assumed, a mere shadow, or phantom of a right, existing independently of all exclusive right of *property* whatever, in the ideas themselves. It is a substantial *property* right, *in the ideas themselves*, which the book describes, and which are necessarily used in reprinting the book.

If, as these Justices held, the *exclusive* right of multiplying copies of the book, were a right existing independently of all *exclusive right of property, in the ideas described in the book*, these questions would arise, viz.: Where did this anomalous right come from? How did it originate? What legal entity does it attach to? And how came it in the possession of the author of the book, in preference to any body else? And these questions, I apprehend, would be wholly unanswerable.

5. The argument of the three Justices — or rather of two of the Justices, Willes and Mansfield — in favor of the right, were imperfect for still another reason, viz.: that their definitions of Common Law were inaccurate, and indefinite.

Thus Justice Willes said, that "*private justice, moral fitness, and public convenience*, when applied to a new subject, make common law without a precedent; much more, when received and approved by usage." p. 2312.

Lord Mansfield said, "I allow them sufficient to show 'it is agreeable to the principle of right and wrong, the fitness of things, convenience, and policy, and therefore to the common law, to protect the copy [right] before publication.'"

If they had said simply that *natural justice* was common law (in all cases whatsoever, new and old, except perhaps those very few, which have before been alluded to, where some positive-institution to the contrary has been in practical efficient operation from time immemorial) — their definition would have been correct. It would also have been definite, precise, and certain, inasmuch

as natural justice is a matter of science. But when they add that "moral fitness, and public convenience," and "the fitness of things, convenience, and *policy*," *must conspire with* "private justice," and "the principles of right and wrong," in order to make Common Law, they introduce confusion and uncertainty into their definition; inasmuch as "moral fitness and public convenience," "the fitness of things, convenience, and *policy*," if considered as any thing separate from natural justice, are terms that convey no precise meaning, and open the door to an endless diversity of opinion. —No stronger proof of this last assertion need be offered than the great diversity of opinion that exists as to the *policy*, expediency, and moral fitness, of the principle of property in ideas.

These terms are also improper and unnecessary ones to be introduced into a legal definition, for the reason that, in matters of government and law, natural justice itself has the very highest degree of "moral fitness;" it subserves, in the very highest degree, the "public convenience;" and its principles are the soundest of all principles of "public *policy*." The simple definition, *natural justice*, is therefore complete and sufficient of itself; and needs no additions or qualifications.

Aston's definition of Common Law was better, for he held that "Right reason and natural principles [were] the only grounds of Common Law, originally applicable to this question;" that "the principles of reason, justice, and truth," were the principles of the Common Law; that "the Common Law, now so called, is founded on the law of nature and reason;" that it is "equally comprehensive of, and co-extensive with, these principles and grounds from which it is derived;" that "the Common Law, so founded and named, is *universally comprehensive*, commanding what is honest, and prohibiting the contrary;" that "its precepts are, in respect to mankind, to live honestly, to hurt no one, and to give to every one his own." *p.* 2337 — 8, 2343 — 4.

Justice Yates, who opposed the copyright, held nearly the same views of the Common Law, with Aston. He said:

"It was contended 'that the claim of authors to a perpetual copyright in their works, is maintainable upon the general prin-

principles of property.' And this, I apprehend, was a necessary ground for the plaintiff to maintain; for, however peculiar the laws of this and every other country may be, with respect to territorial property, I will take upon me to say, that the law of England, with respect to all personal property, had its grand foundation in natural law." p. 2855.

SECTION IV.

*Review of the Case of Donaldson and another, vs.
Becket and another.*

This case came before the House of Lords, in 1774,* on an appeal from an injunction against publishing a book, whose statutory term of copyright had expired.

The Lords directed the judges to give their opinions to the House on the following questions, viz. :

1. "Whether at common law, an author of any book or literary composition had the sole right of first printing and publishing the same for sale; and might bring an action against any person who printed, published and sold the same without his consent?"

2. "If the author had such a right originally, did the law take it away, upon his printing and publishing such book or literary composition; and might any person afterward reprint and sell, for his own benefit, such book or literary composition, against the will of the author?"

3. "If such action would have lain at common law, is it taken away by the statute of 8th Anne? And is an author, by the said statute, precluded from every remedy, except on the foundation of the said statute, and on the terms and conditions prescribed thereby?"

4. "Whether the author of any literary composition and his assigns, had the sole right of printing and publishing the same in perpetuity, by the common law?"

5. "Whether this right is restrained, impeached, or taken away by the statute 8th Anne?"

* *Parliamentary History*, Vol. 17, p. 953.

On these questions eleven of the judges delivered their opinions. Lord Mansfield, from motives of delicacy, declined giving his opinion, although it was well known that he adhered to that he had given in the case of *Millar vs. Taylor*.

On the *first* of these questions, *ten* of the judges answered in the affirmative, and *one* in the negative.

Two of the ten, however, qualified their opinion, by saying that the author of a book "could not bring an action against any person who printed, published, and sold the same, unless such person obtained the copy by fraud or violence."

On the *second* question, *four* of the judges answered in the affirmative, and *seven* in the negative.

On the *third* question, *six* of the judges answered in the affirmative, and *five* in the negative.

On the *fourth* question, *seven* answered in the affirmative, and *four* in the negative.

On the *fifth* question, *six* answered in the affirmative, and *five* in the negative.

The result, therefore, stated in brief, was as follows :

1. *Eight* of the judges (including Lord Mansfield) were of the opinion that "The author of any literary composition, and his assigns, *had* the sole right of printing and publishing the same in perpetuity, *by the common law*;" and *four* were of a contrary opinion.

2. *Six* of the judges (including Lord Mansfield) were of the opinion that this common law right was *not* taken away by the statute 8th Anne; and *six* were of a contrary opinion.

After the judges had delivered their opinions, the lords reversed the decree appealed from, by a vote of twenty-two to eleven. And this decision has since stood as the law of England.

How many of those lords, who voted for the reversal, did so in the belief that there was no copyright at common law; and how many did so in the belief that the common law copyright had been taken away by the statute, does not appear. The decision, therefore, does not stand as a decision that an author had *not* a

perpetual copyright *at common law*; but only as a decision that, *if* he had such a right at common law, that right had been taken away by the statute.

The diversity of opinion, both among the judges and the lords, deprive this decision of all weight as an authority. The only things really worthy of consideration are the arguments urged on the one side and the other. These arguments were very similar to those in the case of *Millar vs. Taylor*; and the rights of authors were lost from substantially the same errors, inconsistencies, and deficiencies, in the arguments of their advocates, that have been pointed out in that case.

To show the views that prevailed, on both sides, regarding the most prominent points in the case, I give the following extracts.

1. On the point of similarity between a mechanical invention, and a literary composition, I give the *whole* of the arguments, on both sides, so far as they are reported, as follows.

Wedderburn, counsel, speaking *for* the copyright, made the fatal concession that the author of a mechanical invention had, at common law, no property in his invention, but only in the machines he made; and for such absurd reasons as these. He said :

“It had been contended that the inventor of an orrery was in the same predicament as an author, when he published. Such an allusion came not to the point. The first sheet of an edition, as soon as it was given impression, in a manner loaded an author with the expenses of a whole edition; and if that edition was five thousand [in] number, the author was not repaid for his labor and hazard, till the last of the five thousand was sold. The maker of an orrery was at no other trouble and charge, than the time, ingenuity, and expense, spent in making one orrery; and when he had sold that one, he was amply paid. [!!] Orrery making was an invention, and the inventor reaped the profit accruing from it. Writing a book was an invention, and some profit must accrue after publication; who should reap the benefit of it? Authors, he contended, both from principles of natural justice, and the interest of society, had the best right to the profits accruing from a publication of their ideas.” p. 965.

Thurlow, counsel, in reply, *against* the copyright, said :

“With regard to the observation, that the inventor of an orrery was not at all to be compared to the inventor of a book, because he was paid for his labor when he had sold one orrery; there was not a more fallacious doctrine in the power of words. The maker of a time-piece, or an orrery, stood in the same, if not in a worse predicament, than an author. The bare invention of their machines might cost them twenty of the most laborious years in their whole life; and the expense to the first inventors in procuring, preparing, and portioning the metals, and other component parts of their machines, was too infinite to bear even for a moment the supposition that the sale of the first orrery recompensed it. And yet no man would deny that after an orrery was sold, every mechanist had a right to make another after its model.” p. 969.

Baron Eyre, giving his opinion *against* the copyright, “considered a book precisely upon the same footing with any other mechanical invention. In the case of mechanic inventions, ideas were in a manner embodied, so as to render them tangible and visible; a book was no more than a transcript of ideas; and whether ideas were rendered cognizable to any of the senses, by means of this or that art, of this or that contrivance, was altogether immaterial. Yet every mechanical invention was common, whilst a book was contended to be the object of exclusive property! So that Mr. Harrison, after constructing a time-piece, at the expense of forty years labor, had no method of securing an exclusive property in that invention, unless by a grant from the state. Yet if he was in a few hours to write a pamphlet, describing the properties, the utility, and construction of his time-piece, in such a pamphlet he would have a right secured by common law; though the pamphlet contained exactly the same ideas on paper, that the time-piece did in clock-work machinery. The clothing is dissimilar; the essences clothed were identically the same.

“The baron urged the exactitude of the resemblance between a book and any other mechanical invention, from various instances of agreement. On the whole, the baron contended, that a mechanic invention and a literary composition exactly agreed in point of similarity; the one therefore was no more entitled to be the object of common law property than the other; and as the common law was entirely silent with respect to what is called literary property, as ancient usage was against the supposition of such a property, and as no exclusive right of appropriating those other operations of the mind, which pass under the denomination of mechanical inventions, was vested in the inventor by the common law, the baron, for these reasons, declared himself against

the principle of admitting the author of a book, any more than the inventor of a piece of mechanism, to have a right at common law to the exclusive appropriation and sale of the same." p. 974.

Justice Ashurst, giving his opinion *in favor of* the copyright, said :

" Since the statute of monopolies, no questions could exist about mechanical inventions. Manufactures were at a very low ebb till queen Elizabeth's time. In the reign of James the First, the statute of monopolies was passed. Since that act no inventor could maintain an action without a patent. It is the policy of kingdoms, and preservation of trade, to exclude them." p. 977.

Justice Aston, giving his opinion *in favor of* the copyright, said :

" With regard to mechanical instruments, because the act against monopolies had rendered it necessary for the inventors of them to seek security under a patent, it could be no argument why in literary property there should be no common law copyright. He thought it would be more liberal to conclude, that previous to the monopoly statute, there existed a common law right, equally to an inventor of a machine, and an author of a book." p. 981.

Baron Perrott, speaking *against* the copyright, said :

" An inventor of a machine or mechanical instrument, like an author, gave his ideas to the public. Previous to publication, he possessed the *jus utendi, fruendi, et disponendi*, [the right of using, enjoying, and disposing of,] in as full extent as the writer of a book ; and yet it never was heard that an inventor, when he sold one of his machines, or instruments, thought the purchaser, if he choose it, had not a right to make another after its model. The right of exclusively making any mechanical invention was taken away from the author or inventor by the act against monopolies of the 21st of James the First. Which act saved prerogative copyrights, and which would have mentioned what was now termed literary property, had an idea existed that there was a common law right for an author or his assigns exclusively to multiply copies." p. 982.

Lord Chief Baron Smythe, speaking *for* the copyright, said :

" As to mechanical inventions, he did not know that, previous to the act of 21st James the First, [the statute against monopolies,]

an action would not lie against the person who pirated an invention. An error none but an astronomer could make; and he might fashion a second, as soon as he had seen a first; it was then, in a degree, an original work; whereas, in multiplying an author's copy, his name, as well as his ideas, were stolen, and it was passed upon the world as the work of the original author, although he could not possibly amend any errors which might have escaped in his first edition, nor cancel any part which, subsequent to the first publication, appeared to be improper." p. 987.

Lord Chief Justice De Grey, speaking *against* the copyright, said :

"Abridgments of books, translations, notes, as effectually deprive the original author of the fruit of his labors, as direct particular copies; yet they are allowable. The composers of music, the engravers of copper-plates, *the inventors of machines*, are all excluded from the privilege now contended for; but why, if an equitable and moral right is to be the sole foundation of it? Their genius, their study, their labor, their originality, is as great as an author's; their inventions are as much prejudiced by copyists, and their claim, in my opinion, stands exactly on the same footing. A nice and subtle investigation may, perhaps, find out some little logical or mechanical differences, but no solid distinction in the rule of property that applies to them, can be found." p. 990.

Lord Camden, speaking *against* the copyright, said :

"With respect to inventors, I can see no real and capital difference between them and authors. Their merit is equal; they are equally beneficial to society; or perhaps the inventor of some of those masterpieces of art, which have been mentioned, have there the advantage. All the judges, who have been of a different opinion, conscious of the force of the objection from the similarity of the claim, have told your lordships they did not know but that an action would lie for the exclusive property in a machine at common law, and chose to resort to the patents. It is, indeed, extraordinary that they should think so; that a right that never was heard of, could be supported by an action that never was brought. If there be such a right at common law, the crown is an usurper. But there is no such right at common law, which declares it a monopoly. No such action lies. Resort must be had to the crown [that is, to the king's patent] in all such cases." p. 999.

The foregoing extracts contain *all* that was said in the case, or at least all that is reported, relative to the similarity between the rights of authors and inventors, to a common law right of property, in their ideas. If the advocates of the rights of authors had had the courage to advocate also the rights of inventors, as stoutly as those, who resisted the rights of authors, insisted upon the similarity of rights in the two cases, a different decision of the cause might possibly have been effected. At any rate, such an impulse would have been given to inquiry in the true direction, as would very likely have resulted ere this in the full establishment of the rights of both authors and inventors.

The only argument, given *against* the copyright, that had any intrinsic weight or merit, was that of Lord Chief Justice De Grey, which has already been commented upon in a former chapter; * and need not be further noticed here.

Some of Lord Camden's arguments are worthy of notice; not however for their intrinsic weight, but because of the high judicial rank of their author; and because also they seem to have had great influence with the lords, in inducing them to vote against the copyright.

1. He held that the want of *precedent* to sustain the right, was fatal to it. Thus he said :

“That excellent judge, Lord Chief Justice Lee, used always to ask the counsel, after his argument was over, ‘Have you any case?’ [precedent.] I hope judges will always copy the example, and never pretend to decide upon a claim of property, without attending to the old black letter of our law; without founding their judgment upon some solid written authority, preserved in their books, or in judicial records. In this case I know there is none such to be produced.” p. 998.

And again, alluding to the idea, thrown out by Aston and Smythe, that but for the statute against monopolies, an action at common law might be sustained against one who should pirate a mechanical invention, he said :

* Chapter IV, page 115.

“It is, indeed, extraordinary that they should think so; that a right, that never was heard of, could be supported by an action that never was brought.” *p.* 999.

I repeat his words so far as to say, “it is, indeed, extraordinary” that an ex-Lord Chancellor should utter such opinions as these. If, as he pretends, “*a case*,” a precedent, is necessary to *make* Common Law, we are bound at once to renounce the whole body of the *acknowledged* Common Law as illegitimate, and declare the impossibility of there being any such thing as Common Law at all; because there was a time when a common law “case” had never been decided; when indeed a common law right had “never been heard of;” when a common law action “had never been brought;” and when, of course, according to Lord Camden’s argument, no common law court had any just authority “to decide upon a claim of property.” All common law decisions hitherto, have, therefore, on his theory, been mere usurpations, and of course can be no authority now; and all our common law rights of property, of every name and nature, of necessity fall to the ground. This is the legitimate conclusion of his argument.

This argument of the want of precedent is utterly worthless, where the case is a clear one on principle. New questions in common law—or, what, on this point is the same thing, in natural law—have been continually arising ever since mankind first had controversies with each other about their respective rights; and old ideas have given place to new ones, as knowledge has progressed. And such will continue to be the course of things as long as man is a progressive being, and has rights to be adjudicated upon. And the fact, that such or such a particular question has never arisen before, or that legal science has never heretofore been sufficiently advanced to decide it correctly, is no reason at all why the principles of justice and reason are not now the true and imperative rules for its decision. Neither the ignorance, nor the injustice of the past, has any innate authority over the present, or the future. They have not altered the nature of

men's rights, nor the nature of truth, nor abolished the obligations of justice. If mankind have not a right to the benefit of all *new* discoveries in law, as in the other sciences, as fast as they are made, they have no right to any *old* discoveries of the same kind; for the latter were as illegitimate in their origin as the former; and on this principle, the law of nature would stand shorn of her authority to control either the decisions of courts, or the conduct of men.

This pretence of the necessity of a precedent, is the pretence of a pettifogger, and not the argument of a lawyer. Lord Camden himself, in another part of his speech, virtually acknowledges its unsoundness; for he says, "Our law [the common law] argues from *principles*, cases, and *analogy*." (p. 995.) Yes, from "principles" and "analogy," no less than from "cases." And he should have said, "from principles and analogy," *in preference* to "cases;" for wherever previous "cases" have been decided contrary to the general "principles and analogies" of the common law, courts are bound to overrule them, in all subsequent decisions.

Lord Camden's great predecessor in the chancellorship, Lord Bacon, inculcated no such narrow and absurd ideas, as to the necessity of precedents, or their authority to deprive mankind of the benefits of whatever knowledge they might afterwards acquire. Speaking "*Of Cases Omitted in Law*," he says:

"The narrow compass of man's wisdom cannot foresee all the cases which time may produce; and therefore cases omitted and new do often arise." He then gives rules for judging of these cases; among which rules is this. "*Let reason be a fruitful, and custom a barren thing.*" *

It requires no words to prove which was the greater philosopher of the two — Lord Bacon, when he said that mankind did not know every thing from the beginning, and that, in judging of new questions, reason should be allowed to be a fruitful, and custom

* *Advancement of Learning*, B. 8, Aphorisms 10 and 11.

but a barren, source of authority; or Lord Camden, when he held it indispensable that we should have a precedent for every thing — or, what is virtually the same thing, that mankind have now a right to use only that knowledge, which was possessed at the origin of the race; and, in truth, not even that.

But, leaving these considerations of an abstract nature — sufficient reasons have already been given in this chapter, why inventors have never brought their common law rights before the *English* courts for adjudication, without supposing it to have been owing to any want of solidity in the rights themselves. And when the judges of England, for hundreds of years, have been the servile tools, and nothing but the servile tools, either of kings or parliaments, or both; and, as such, have habitually withheld all the constitutional and common law rights of the people, at the slightest bidding of arbitrary power; it ill becomes one of these judges now to offer, as an argument against the existence of one of these proscribed common law rights, the fact that the right has never been brought before themselves for adjudication, with the certainty that it would be spurned and trampled under foot by them; and with the further certainty that such a precedent, once created, would be cited, by themselves and their successors, for an indefinite period thereafter, as a sufficient warrant for similar outrages in all subsequent cases.

When English judges shall have shown sufficient reverence for that Common Law, which they have been sworn to support, to maintain it against the authority of unconstitutional legislatures and legislation, it will be quite as soon as they can, with any decency even, offer such an objection as this of Lord Camden's. And it would be but a poor compliment to their understandings, to suppose that, even then, they would seriously entertain it; inasmuch as the question of the Common Law rights of inventors, is one, which, in the nature of things, would be likely to acquire prominence, only in such an advanced state of both civilization and freedom, (especially the latter,) as can hardly be said to

have ever existed in England; certainly not until within a comparatively recent period.

2. Another of Lord Camden's arguments was this, viz.: "*If there be such a right at common law, the crown is an usurper.*" That is, if inventors have a common law right of property in their inventions, the crown is an usurper in granting them patents, on the assumption that they have no such *rights*, but can only enjoy such *privileges* as he, in his "gracious pleasure and condescension," may see fit to grant them.

This argument, that "*the crown is an usurper,*" can hardly need an answer, *in America*. It certainly is not one that need frighten an *American* court out of its senses, or even out of its integrity; although it is one that would be very likely to frighten an *English* court out of both. And especially would it be quite certain to produce these effects upon such a body as the lords, who themselves, both in their legislative and judicial capacities, are, constitutionally, nothing but usurpers. They, of course, would not dare to gibbet the king, for acting as their own accomplices in usurpation. And hence the weight, which, we may reasonably presume, this argument had, in the decision of the question before them.*

But Lord Camden need not have been alarmed at the apprehension, that if inventors were allowed their common law rights,

* I say, in the text, that "the lords, both in their legislative and judicial capacities, are, constitutionally, nothing but usurpers."

By the English constitution, an order of nobility could exist only on the foundation of the feudal system. When that system was abolished, all distinctions of political rank, inferior to that of the king, were, *constitutionally speaking*, abolished with it. And all the legislative and judicial power, since exercised by the lords, as a body, has been a sheer usurpation. This usurpation was originally accomplished by them, by means of their wealth, and by conspiring with the king, the knights, and the "*forty shilling freeholders,*" so called (originally represented in the House of Commons); a class, whom Mackintosh designates as "*a few freeholders then accounted wealthy.*" (*Mackintosh's Hist. of Eng., Ch. 3.*) The same kind of influences, which originally enabled them to accomplish this usurpation, have enabled them hitherto to sustain it. It never had the least authority in the constitution of the kingdom.

the crown would, by consequence, have been proved an usurper. The granting of patents was not, *originally*—whatever it be now—an act of usurpation on the part of the king. It was a legitimate act of legislation, at a time when the legislative power was practically, as it always was constitutionally, vested solely in himself. And it was also such an exercise of that power, as showed quite as much regard for justice, and for the constitutional and common law rights of the people, as could reasonably be expected of him, in the dark and barbarous age, in which the granting of patents originated. It was, in short, an *honest* attempt to do equity—according to the degree of knowledge then existing on the subject—towards acknowledged public benefactors; and, at the same time, to promote the interests of the people, by encouraging new inventions. *The patent was simply an authenticated copy of a statute, passed by the king, enacting that the inventor, or the introducer of an invention, should have an exclusive privilege to use the invention for a specific term, as a just reward for his labors, and for the benefits he had conferred upon the nation. This patent, or copy of the statute, authenticated by the king's seal, was given to the patentee, that he might produce it in courts or elsewhere, in proof of the existence of the statute itself; the statutes not being generally published in those days, except by proclamation. And this statute, so authenticated, was then entitled to respect and observance, by the judges and juries throughout the kingdom, so far as they should think it consistent with the common law, and no further. Such was the original, constitutional nature of a patent, for a mechanical invention.*

The statutes, or patents, therefore, which secured to inventors the exclusive use of their inventions, were perfectly consistent with the common law, *for the term for which they were in force*; and they were inconsistent with the common law only in this, that they limited the rights of the inventors to a fixed term, instead of securing them in perpetuity.

The most important—if not the only important—“usurpa-

tions" there have been in the matter, have been of a more modern date, as follows. 1. The usurpations of an unconstitutional legislature — the Houses of Lords and Commons — in prohibiting the king from granting patents to inventors for any more than a limited time. 2. The usurpations of the judiciary, in holding that patents, though granted only for a brief term, were inconsistent with the common law, and therefore to be defeated, if possible, by principles of construction, which had no just application to them, and by groundless imputations of fraud, on the part of the patentee, in cases of the slightest variation from accuracy in the specification.

So far, therefore, from the king's "usurpation" being proved, by proving the common law right of inventors, to an exclusive property in their ideas, the only way of *disproving* his usurpation, in granting such patents *at this day, is by asserting, instead of denying, that right*; and also by asserting that the patent is granted to make the right *more secure than it would otherwise be*.

The prerogative of granting such patents, is a mere *relic* of the ancient sole legislative power of the king. As such, it is perfectly constitutional. While the right, which it is used to protect, is also a perfectly constitutional one, inasmuch as it has its immutable foundations in the principles of that common, or natural law, which alone, with very few exceptions, it was the design of the English constitution to maintain.

3. Coming to the question of "policy," Lord Camden said:

"If there be no foundation of right for this perpetuity, by the positive laws of the land, it will, I believe, find as little claim to encouragement upon public principles of sound policy, or good sense. If there be any thing in the world common to all mankind, science and learning are in their nature *publici juris*, [subjects of common right,] and they ought to be free and general as air or water. They forget their Creator, as well as their fellow creatures, who wish to monopolize his noblest gifts and greatest benefits. Why did we enter into society at all, but to enlighten one another's minds, and improve our faculties, for the common welfare of the species? Those great men, those favored mortals, those sublime spirits, who share that ray of divinity which we

call genius, are intrusted by Providence with the delegated power of imparting to their fellow creatures that instruction which heaven meant for universal benefit; they must not be niggards to the world, or hoard up for themselves the common stock. We know what was the punishment of him who hid his talent, and Providence has taken care that there shall not be wanting the noblest motives and incentives for men of genius to communicate to the world those truths and discoveries, which are nothing if uncommunicated. Knowledge has no value or use for the solitary owner; to be enjoyed it must be communicated. '*Scire tuum nihil est, nisi te scire hoc sciat alter.*' [Your own knowledge is nothing, unless another know that you possess it.] Glory is the reward of science, and those who deserve it, scorn all meaner views. I speak not of the scribblers for bread, who tease the press with their wretched productions; fourteen years is too long a privilege for their perishable trash. It was not for gain, that Bacon, Newton, Milton, Locke, instructed and delighted the world; it would be unworthy such men to traffic with a dirty bookseller for so much a sheet of a letter press. When the bookseller offered Milton five pound for his *Paradise Lost*, he did not reject it, and commit his poem to the flames; nor did he accept the miserable pittance as the reward of his labor; he knew that the real price of his work was immortality, and that posterity would pay it. Some authors are as careless about profit as others are rapacious of it; and what a situation would the public be in with regard to literature, if there were no means of compelling a second impression of a useful work to be put forth, or wait till a wife or children are to be provided for by the sale of an edition? All our learning will be locked up in the hands of the Tonsons and Lintons of the age, who will set what price upon it their avarice chooses to demand, till the public become as much their slaves, as their own hackney compilers are." 17 *Parl. Hist.* 999-1000.

I doubt if such poor fustian and sophistry as this can deserve an answer, even when coming from an ex-Lord Chancellor. Yet it may not be unworthy of attention, as an index to the motives which finally controlled the decision of the Lords; for it is fair to presume that Lord Camden had at least a tolerable understanding of the intellectual and moral attributes of the body he was addressing, and of the influences most likely to determine their adjudication.

If, then, he meant to lay it down as a rule, that "*public prin-*

ciples of sound policy and good sense" require that *all* "those great men, those favored mortals, those sublime spirits, who share that ray of divinity, which we call genius," should be placed without the pale of the common principles of justice, and deprived of *all* their natural or common law rights of property, we can have no difficulty in appreciating his ideas of "public principles of sound policy and good sense." But if he do not contemplate this general destruction of *all* their common law rights of property, it is not so easy to see on what "*principle*" it is, that he selects their intellectual productions, as special objects of confiscation.

If there really were any "men" so "great," any "mortals" so "favored," any "spirits" so "sublime," that their bodies could live on the "glory" and "immortality," which "*posterity* will pay," there might be — what there is not now — some little reason why society, while being enriched and enlightened by them, should be excused for robbing them of all other means of subsistence. But since the greatest of men, the most favored of mortals, and the sublimest of spirits, will just as soon die without eating, as any of the rest of mankind, it is quite indispensable, in order that they may live, and give the world the benefit of their labors, that, while laboring, they have some nutriment more substantial than prospective "glory" and "immortality."

But Lord Camden assumes — as men more ignorant, and therefore more excusable, than himself, have often done — that valuable ideas cost their authors neither time nor labor; that the production of them interrupts none of those common pursuits, by which other men procure their subsistence; and hence he brands them as "niggards," and "rapacious," if they demand any price for the invaluable commodities they offer to mankind. Yet he well knew the injustice and falsehood of such an idea. He knew that the greatest geniuses have usually been among the greatest laborers in the world. So rarely indeed has genius produced any thing valuable without effort, that it has been a very common

opinion among men, that genius itself was only labor in its highest intensity.

More shameless meanness, injustice, or falsehood has seldom been seen, than in this attempt of Lord Camden to deprive the most useful and meritorious, as well as the most self-sacrificing individuals, of the benefit of the common principles of justice, in their efforts to live by performing for society the most valuable labors.

Perhaps, however—not to do him injustice—it may be thought that a clue to his reasons for this apparently arbitrary exception of intellectual property from the protection of the law, is to be found in his remark, that,

“If there be any thing in the world common to all mankind, science and learning are in their nature *publici juris*, [subjects of common right,] and they ought to be as free and general as air or water.”

The answer is, that there *is not* “any thing in the world”—not even “air or water”—that is, “*in its nature*,” “common to all mankind,” or “free or general,” in any such sense as he assumes it to be—that is, in any sense that forbids its being made private property to any possible extent, to which it is practicable for individuals to take exclusive possession of it.

“Air” and “water” are free and common to all mankind, only in the same sense in which land, and trees, and gold, and iron, and diamonds, and all other material things, are free and common to them. And that sense is this. Land, trees, gold, iron, and diamonds, in the state in which they originally exist in nature, to wit, *unappropriated*, are free and common to all mankind—that is, they are “free” *to be appropriated*, or made private property, by individuals; and all mankind have equal rights, and equal freedom, to appropriate them, or make them their private property. In this sense, those commodities are “free and common to all mankind,” *and in no other*. So soon as they are thus *appropriated*, they are no longer free or common to all mankind, but have become the private property of the individ-

uals so appropriating them; who thenceforth have a right of absolute and exclusive dominion over them against the world. It is precisely the same with "air and water." In their natural condition — that is, *unappropriated* — they are free and common to all mankind — that is, *free to be appropriated*, or made private property. And all mankind have equal rights and equal freedom to appropriate, or make them their private property. In this sense, air and water are free and common to all mankind, *and in no other legal sense*. So soon as they are thus appropriated, they are no longer free or common to all mankind; but have become the private property of the individuals so appropriating them; who thenceforth have a right of absolute and exclusive dominion over them, against the world, until they either consent to part with the right, or until they are deprived of it by the operation of some *physical* law of nature which they cannot resist.

There is nothing, therefore, "*in their nature*," as Lord Camden assumes, that forbids "air or water" to be made private property; and, as a matter of fact, there are perhaps no material substances in the world, that are more frequently appropriated, or made private property, than air and water. At every breath we make private property of so much air as we inhale. When we exhale it, we abandon our right of property in it. We abandon our right of property in the air we exhale, for two reasons, namely, choice, and necessity; from choice, because it is not worth preserving — air being so abundant that we have no necessity to retain any portion of it for a second use; from necessity, because we exhale it into the surrounding air, where we can no longer identify it, as that which has been ours.

We make private property of air also, when we inclose it in our dwellings, and warm it to adapt it to our comfort. We abandon our right of property in it, when we open our doors and windows to let out the air that has become impure, and to let in that which is pure.

This air, which we thus inclose in our dwellings, and, by warming or otherwise, fit for our use, is as much private prop-

erty, *while it is thus inclosed*, as the gold or the diamonds we have digged from the earth; and no man has any more right to inhale it, without our consent, or to open our doors and let it escape, than he has to steal our gold or our diamonds.

Men do not often buy and sell air, *solely* because it is so abundant, and so easy of acquisition by all, that it will seldom bring any price in the market; and *not* because, as Lord Camden assumes, there is any thing "*in its nature*," that legally forbids our making merchandise of such quantities as we can take possession of.

The same is true of water as of air. Hardly any thing, *except air*, is more frequently made private property than *water*. Every time a man dips water from a spring or a stream, he makes it his private property. It at once becomes his, against the whole world besides. And no man has a right to object to its being made private property, on the ground that it is "*in its nature*," free and common to all mankind. In its natural condition it is free and common to all mankind, only in the sense of being *unappropriated*—the property of no one—and therefore free *to be appropriated* by whomsoever pleases to take possession of it, and make it his property. It is only by being thus appropriated, and made private property, that it can be made useful to mankind.

The water in the ocean is free and common to all mankind, only in the sense that it is unappropriated—the property of no one—and therefore free to be appropriated by any one at his pleasure or discretion. And it is only by appropriating it, and making it private property, that it is made of any use to mankind. Thus that portion of the ocean, which a man, at any particular moment, occupies with his body, his vessel, his anchor, or his hook, is, *for that moment*, his private property against the world. When he removes his body, vessel, anchor, or hook, he abandons his private property in the water he once possessed. He makes this abandonment, both from choice, and from necessity; from choice, because he no longer needs that particular water for use;

and from necessity, because he can no longer identify it as that which had been his.

Water is not only a legitimate object of private property, and continually converted into private property, but it is, to a very considerable extent, made an article of merchandise. For example, large quantities of water are brought, in aqueducts, into cities for sale. Single individuals sometimes bring it in, in small quantities, for the same purpose. In its congealed state, it is sent, in large quantities, to distant parts of the world as merchandise. Yet nobody, not even Lord Camden, was ever foolish enough to object to the legitimacy of this commerce, on the ground that water was, "*in its nature,*" free and common to all mankind, in the sense of being incapable of legal appropriation.

The idea, that "air and water" — meaning thereby the *great body* of air and water — are the common *property* of all mankind — using the term *property* in its *legal* sense — is a very common, but a very erroneous one; and it is one from which many fallacious arguments are drawn, that this, that, and the other species of property ought also to be free and common to all mankind. Whereas the truth is that the great body of air and water are not *property* at all. They are neither the "common property of all mankind," nor the private property of individuals. They simply exist *unappropriated; free to be made property;* but when appropriated by one, they are no longer free to be appropriated by another.

The remark, therefore, that air and water are "free and common to all mankind," can never be used, *with truth*, to signify that one man has any more legal right to interfere with, or lay any claim to, such quantities of air or water as another man has taken possession of or appropriated, than he has to interfere with, or lay claim to, such quantities of land, gold, iron, or diamonds, as another man has appropriated.

If, therefore, when Lord Camden speaks of air and water as being, "*in their nature,*" free and common to all mankind, he mean that they cannot lawfully or rightfully be appropriated, or

made private property, he manifests a degree of ignorance, thoughtlessness, or mendacity, that is entirely disgraceful to him; since there is no legal proposition whatever, that is more entirely clear, or more universally acted upon, than that every individual has a natural right to make private property of air and water, to any possible extent that he can take possession of them, without interfering with others in the exercise of the same right. Air and water would be of no use to mankind, unless they could be made private property.

But if he only mean that air and water, *unappropriated*, are free and common *to be appropriated*, and made private property, by all mankind, then his assertion that "science and learning" ought to be *equally free* — that is, equally free *to be appropriated*, and made private property — only makes *against* the very point he was trying to establish, viz. : that science and learning ought *not* to be made private property. And there is consequently no sense whatever in his argument. It is mere idiocy.

If he mean that science and learning ought to be as free *to be appropriated*, or made private property, as air or water, neither authors nor inventors can object to the principle; for that is the very principle they themselves are contending for. They admit that the boundless fields of knowledge, like the boundless fields of air and water, are open and free to all mankind alike; and all they claim is, that each individual shall have an exclusive property in all the knowledge that he himself, by the exercise of his own powers, and without obstructing others in the exercise of theirs, can take *exclusive* possession of; that they have the same natural right to an exclusive property in their exclusive acquisitions of knowledge, which they and all other men have in their exclusive acquisitions of air, of water, of land, of iron, of gold, or of any other material commodities, which, so long as they remained *unappropriated*, were free and open to all mankind — that is, free and open *to be appropriated*; but which, when appropriated, are no longer free and open to all mankind, but are the private property of the individuals who have appropriated them. Can

Lord Camden, or any one else, deny that the principle is as sound, or as applicable, in the one case, as in the other ?

But perhaps it may be said that Lord Camden's remark is to be taken in still another, and an *economical* sense, viz.: that "science and learning" ought to be as *abundant, as easy of acquisition*, and therefore as *cheap*, as "air or water." If this be what he means, all that need be said in reply is, that the Author of Nature happened to differ from him in opinion. If He had been of Lord Camden's mind, as to what was best for mankind in this respect, He would undoubtedly have made *all* the knowledge, which men ordinarily need or desire, as abundant, as easy of acquisition by all, and consequently as cheap, as are their requisite supplies of air and water. But He has not done so. On the contrary, while He has made many kinds of knowledge very easy of acquisition, and therefore very cheap, and even valueless, as articles of merchandise, He has made other kinds attainable, in the first instance, only by great toil and effort. These being of great value to mankind, and produced only by great labor, are capable of commanding a price in the market; because it is cheaper for men to buy them than to produce them for themselves. And this price, by the laws of trade, which are but the laws of nature, will be governed — like the prices of all other commodities — by the cost of production, and the demand for use. And there is no more reason why the producers of these rare, costly, and valuable ideas, should give them to the world, and receive no compensation for the labor of producing them, than there is why the producers of any other valuable commodities should give them to the world, and receive no compensation for their labor in producing them.

But Lord Camden's principle is, that when one man has digged deep, and toiled hard, to acquire knowledge, another man should, *by law*, be free to share it with him, without his consent, and without making him any compensation. Was *he* ever willing to apply that principle to "*water*?" When *he* had digged deep, or toiled hard, to obtain *water*, was he willing that another, who

had pursued his own pleasure or interests meanwhile, should, *by law*, have equal rights in it with himself, without asking his permission, or making him any compensation for his labor? Any thing but that! His principle, in regard to "water," and to *all material* commodities, was — as he himself expressed it in regard to *land*, which is, "*in its nature*, as free and common to all mankind as air or water" — that "No man can set his foot upon my ground, without my license." *

But he says, "They forget their Creator, as well as their fellow creatures, who wish to monopolize his noblest gifts and greatest benefits."

This affectation of piety means that the producers of ideas are morally bound to give the products of their labor as freely to all mankind, as the Creator does the products of nature — that is, without money and without price. If men were like their Creator, not dependent upon their labor for subsistence, there would be some reason in such fantastical morality as this. But while the producers of ideas have bodies to be fed and clothed, it is as ridiculous to talk of their being under a moral obligation to give the products of their labor freely to all mankind, as it would be to talk of the moral obligation of the producers of food or clothing to give the products of their industry freely to all mankind. In reality, many of the producers of ideas are the greatest practical producers of food and clothing; for they supply that knowledge, which is the most efficient instrument in producing food and clothing.

Did Lord Camden, as judge or chancellor, ever act upon the principle that it was his duty to give his ideas freely to all mankind? Not he. He demanded titles, and salaries, and pensions, in exchange for his ideas; salaries and pensions too, not granted to him by voluntary contract on the part of the people who paid them — as are the prices paid to authors and inventors — but

* *Campbell's Lives of the Lord Chancellors*, Vol. 5, p. 215. *Entick vs. Carrington*, 19 *State Trials* 1066.

extorted from them by that arbitrary government, which he ought to have resisted, and, if possible, overthrown; but of which he choose rather to make himself the instrument. It was quite consonant with his ideas of law and morality, to assist this tyrannical power in actually plundering the people of their money, that it might be paid over to himself for his own false and worthless ideas; but it was, in his view, immoral and illegal for authors and inventors to sell their ideas for what they would bring, on voluntary contract, in free and open market.

Only two days after receiving his office as Lord Chancellor, this superlative moralist and judge wrote to the minister, to have his salary, pension, and equipage money, secured to himself, and a lucrative office for his son.* And the opinion he gave, in this case of *Donaldson vs. Becket*, vindicating the crown against the charge of usurpation, in denying the rights of inventors, and exhorting his own fellow usurpers, the Lords, to deny and destroy the rights of authors, is a specimen of the ideas he intended to furnish the government in return. To sell himself and all his false and tyrannical political ideas *to the government*, was, in his opinion, a perfectly legitimate commerce; but the sale of useful knowledge *to the people*, was an act interdicted by law and morality. There have been many such judges and moralists as he.

But he says that men of genius "are intrusted by Providence with the delegated power of imparting to their fellow creatures that instruction, which Heaven meant for universal benefit."

Yes, men of genius are undoubtedly designed by Providence to labor intellectually for the benefit of mankind. Yet it was

* The following is a copy of his note.

"The favors I am to request from your Grace's despatch, are as follows.

1. My patent for the salary.
2. Patent for £1500 a year upon the Irish establishment, in case my office should determine before the tellership drops.
3. Patent for tellership for my son.
4. The equipage money; Lord Worthington tells me it is £2000. This I believe is ordered by a warrant from the Treasury to the Exchequer."

Campbell's Lives of the Lord Chancellors, Vol. v, p. 221.

left for his lordship to announce the discovery of a special revelation, to the effect that it was also the design of Providence that they should live without eating; or, what is the same thing, that they should receive nothing in exchange for the products of their labor. This important revelation he thinks he has found in the parable of the slothful servant. "We know," says he, "what was the punishment of him who hid his talent." Selling ideas in the market, this sagacious lord holds to be equivalent to hiding them in the earth. They can be of no use to mankind, unless given to them "freely!"

Up to this time, the world had never, I believe, conceived this parable to be a rebuke for not giving away one's talent; but only for not trading with it, or using it, in a way to bring an income. But taken in this last sense, it would not have greatly benefitted his lordship's argument.

This new reading of the scripture, however, was quite *apropos* to the question before them, for the reason that English lords have, of course, been unable wholly to escape the taint of the common humanity, the common justice, and the common sense, of the common people; and there is no knowing how far their weaknesses, in those respects, might have carried them, in the adjudication of this question of intellectual property, if the conscientious and religious scruples, which their order have for ages entertained, against allowing mankind to enjoy the fruits of their labor, had not been appealed to, and fortified, by the authority of scripture.

Had this new interpretation of the parable, fallen from one of those dignitaries of the church, who occupy seats in the House of Lords, apparently to lend the light, as well as the sanction, of religion to the action of that body, we might have thought that it accorded perfectly, both with his profession, and his practice. But coming from a lay lord, and addressed to other lay lords, in their capacity of common law judges, and taken in connexion with the decision which followed, it is perhaps to be regarded only as an illustration of the *sense*, in which they hold Christianity to be a part of the Common Law.

But Lord Camden says further, that the producers of ideas "must not be niggards, and hoard up for themselves the common stock."

This, we are to suppose, is but another specimen of the reasonings, by which men's rights are determined in the House of Lords.

There would plainly be as much sense in saying that those who produce *wheat*, and bring it to market, and ask a price for it, are therefore "niggards to the world, and hoard up for themselves the common stock," as there is in saying it of the producers of ideas. The producer of ideas, like the producer of wheat, brings the products of his labor to market *to-day*, that he may exchange them for the means of subsistence, and thus live and be able to produce other ideas *to-morrow*; which other ideas he will bring to market in like manner. He sells his ideas, too, or at least many of them, for one per centum of their actual value for economical purposes. If this is being a "niggard to the world, and hoarding up for himself the common stock," it is unfortunate for the world that there have been so few such niggards in it; for it is only the want of a sufficient number of them, that has kept mankind in ignorance and poverty, and rendered them the easy dupes of such hypocrites as Camden, and the easy prey of such robbers as those to whom he was addressing his arguments.

But he says again, "What a situation would the public be in with regard to literature, if there were no means of *compelling* a second impression of a useful work to be put forth, or wait till a wife or children are to be provided for by the sale of an edition? All our learning will be locked up in the hands of the Tonsons and Lintons of the age, who will set what price upon it their avarice chooses to demand."

This appalling interrogatory can perhaps be best answered by presenting another, which is at least equally alarming, and equally rational, viz.: What a situation would the public be in with regard to *wheat*, if there were no means of *compelling* the producers to bring it to market, until their wives or children were to be provided for by the sale of it? All the wheat will be locked up in the hands of the owners, who will set what price upon it their avarice chooses to demand.

The only remedy for this frightful state of things, would be, according to Lord Camden's notions of "sound policy and good sense," to declare that wheat ought to be as free and common to all mankind as air or water; that men forget their Creator, as well as their fellow creatures, when they claim to own the wheat they have produced by their labor; that they must not be niggards to the world, and hoard up for themselves the common stock; that they should bear in mind the punishment of him who hid his talent; that the man who freely gives away his wheat — especially if he do it in sufficient quantities to astonish, as well as to supply, the world, will be sufficiently rewarded by the sublunary "glory" and "immortality" which "posterity will pay;" and therefore it ought to be adjudged, by a nest of usurpers and tyrants, calling themselves the House of Lords, that those who produce wheat, have no exclusive right of property in it.

All this would be carrying out Lord Camden's theory to the letter, and nothing more.

But his lordship's resources, on this question, are not yet exhausted. He has one argument left, which perhaps overtops in dignity, as much as it overbalances in weight, all that have preceded it. It is this.

"It would be unworthy such men [as Bacon, Newton, Milton, and Locke], to traffic with a dirty bookseller!"

If these great men had been living at the time, they could not have felt otherwise than grateful for the anxiety which Lord Camden manifested for the preservation of their dignity; although they might, perhaps, have thought it was carrying the point a little too far, for him to think of taking the care of it out of their own hands. So excessive a guardianship as that, they might possibly have felt constrained to decline.

It is nevertheless true, that booksellers are — at least many of them — very "dirty" fellows. Yet, even here, there may be a question, as to *who* are the dirty, and who the respectable, ones. And on this point, I apprehend the world are likely to differ from his lordship, as widely perhaps as on the true interpretation of

scripture, or the true "principles of sound policy and good sense." *He* evidently esteemed those booksellers dirty, who pay authors for their works; while the world may possibly think those the respectable, and the others the dirty ones. It will be a difficult question to settle, if it shall be found that two such authorities, as the world and his lordship, differ in regard to it.

Lord Camden doubtless thought it would be much more consistent with the true dignity of a man of genius, to live, as so many men of genius have lived, in humiliating dependence upon some lord, who should condescend to patronize him, or to become a pensioner and flatterer of the crown, than to live by selling his works to the booksellers, and through them to the people. And he attempts to screen Milton from the disgrace, which he assumes would have attached to him, if he had accepted the five pounds for his *Paradise Lost*, out of any regard to the worldly value of that sum. He evidently imagines that Milton must have accepted it in some poetic or figurative sense, rather than from any such vulgar motive as a consideration of how much bread or meat it would buy. But in this he is unquestionably mistaken. It is morally certain that the price of the immortal poem went to pay butchers and bakers, the same as it would have done, if it had been the earnings of a cobbler; and that he accepted the five pounds, solely because the poem would bring no more, and because the utility of even such a sum as that, was something which he could not afford to disregard.

We can imagine some very tolerable reasons why lords should not "patronize" Milton, nor kings grant him pensions; such reasons, for example, as that, notwithstanding he was a poet, he had a somewhat inveterate habit of expressing the homely opinion, that, when kings did not behave themselves well, the people ought to cut their heads off. Nothing is more natural than that this vulgar turn of mind should have injured his prospects with the great, and consequently made it necessary for him to live by his own labor, independently of their bounty. Perhaps if he had been a contemporary of Lord Camden, the latter might have taken pity on him, appreciated him, and offered to instruct

him in the art of living in a manner more consistent with the dignity of a gentleman. It would be interesting to know the particular way, in which his refined lordship would have introduced the subject of a royal pension, or some nobleman's "patronage," to the poor, but proud old Roundhead. Doubtless a prudent regard for his own dignity would have suggested to him, that such a proposition could be made with safety, only at a respectful distance from the poet's boots.

If the scholars and poets of England, since Milton's time, had inherited a tithe of his spirit, with but a tithe of his genius, no such body of usurpers as the House of Lords would have ever taken it upon themselves to adjudge, either that authors had no right of property in the products of their labor, or even that, if they had such rights by nature, parliament had authority to destroy them. In fact, there would, in 1774, have been no such judicial or political body as the Lords in existence.

If men ever deserved the political oppressions, to which they were subjected, there is perhaps no class of persons, who have more richly deserved to have their rights stricken down by the hand of usurpation, than those scholars of England, who have lacked the spirit and the principle to defend the constitution and liberties of their country, against the tyranny of such usurpers as the Houses of Lords and Commons.

I have now bestowed, perhaps more attention than they deserved, upon Lord Camden's arguments in favor of what he calls those "public principles of sound policy and good sense," which forbid that authors should be acknowledged to have any common law right of property in their ideas. Perhaps nothing could illustrate more forcibly the degradation of literature, and of literary men, than the fact that such false, frivolous, absurd, and shameless reasons could be gravely urged by an ex-Lord Chancellor, before the highest judicial tribunal of the kingdom, as arguments against the rights of intellectual men, and should apparently have produced the effects he designed by them, without bringing either upon himself or the tribunal, one effective retributory blow. It may reasonably be doubted whether, in five

hundred years, the House of Lords, or indeed any other judicial tribunal, have struck down a principle, that was more important, or even equally important, to the progress of mankind in wealth, civilization, and freedom. And yet the immediate victims — men too, whose attainments and habits ought to fit them peculiarly for the defence of their own and the public rights — tamely acquiesce in the wrong for four-fifths of a century.

The injustice was done, too, under circumstances of unusual insult and oppression — that is, it was done on the most palpably frivolous, false, heartless, and ridiculous pretexts — (admitting that Lord Camden's reasons of policy produced any effect;) and by a grossly and manifestly unconstitutional tribunal, sitting in a country boasting of its freedom. Still the men, who should have been aroused, by the act, to vindicate their own rights, and the rights of their nation, have ever since chosen, neither to resent the insult, nor retaliate the injury; but rather to forego their self-respect, as well as their rights, and to flatter and fawn upon those who thus trample them and their fellow men, the learned and the ignorant, the genius and the clown, indiscriminately under foot — sparing only such men as Charles Pratt, (afterwards made Lord Camden,) who could be bribed by offices, titles, salaries, and pensions, to become their tools in the work.

If the literary men of England do not hereafter set themselves to the work of writing this unconstitutional and tyrannical court out of existence, they will deserve little sympathy in any wrongs they may suffer at its hands.

By way of offset to Lord Camden's "public principles of sound policy and good sense," on this subject, I here offer a single suggestion.

It has hitherto proved as bad in policy, as it is in morals, for mankind to think of getting the use of men's ideas by robbery, instead of compensation. Men, who have ideas to impart to others, are very apt also to have ideas for their own use; and no amount of hypocritical preaching, or judicial decisions, whether they come from a Lord Chancellor, or from such a body of vampires as the English House of Lords, or from any other quarter

whatever, will be likely ever to persuade them, in any great numbers, to act upon the notion that it is their religious duty to die of starvation, in order that they may give their knowledge "*freely* to all mankind." Their consciences are rarely so tender as to be in any danger on such a point as that. They know that they have as fair a right to acquire, by their labor, the necessaries, comforts, and even luxuries of life, as other men; and—reprehensible and lamentable as it may be, and is—experience abundantly proves, that if their fellow men at large will seize the products of their intellectual toil, without making them compensation, very many of their number will sell their ideas to those who *will* pay—to kings, and lords, and tyrants—to aid in plundering, oppressing, and degrading their fellow men, instead of enlightening, enriching, and elevating them. And Lord Camden himself is by no means a very bad or remarkable example of this choice of alternatives, on the part of an intellectual man. He has generally been esteemed a good, rather than a bad man. Was a liberal man in his politics. His natural instincts, I think, would have much more strongly induced him to labor *for* mankind, than *against* them, if the labor could have been equally profitable to himself. And similar examples are every where thick around us. In fact, they constitute the *rule*, rather than the *exception*, in the case of intellectual men as a class.

It is poor economy, therefore, on the part of the common people, to attempt, by stealing their knowledge, instead of buying it; to defraud intellect of its wages. If they refuse to pay intellect for defending, enlightening, enriching, and elevating them, they will no doubt continue to find, as they ever hitherto have found, that intellect, by serving their oppressors, will compel them to pay for their own degradation and destruction.