

OF THE ORIGIN, EARLY HISTORY, AND GENERAL PRINCIPLES OF THE COMMON LAW.

15. "Sometimes 'tis called *Lex Angliæ*, as in the Statute of Merton; sometimes it is called *Lex et Consuetudo Regni*, as in all commissions of oyer and terminer, and in the statute *de quo warranto*, &c., but, most commonly, it is called 'The Common Law,' or The Common Law of England, as in the statute of *Articuli super chartas*, cap. 15; in the statute Edw. 5, c. 5, and in infinite more records and statutes." Ibid. 53. It was called by William the Conqueror, in his confirmation of it, *Lex Communis* and *Lex Patriæ*. It is also called *Lex Non Scripta* (the unwritten law), to distinguish it from the *Lex Scripta*, or statute law: 1 Blk. Com. 63; 1 Steph. Com. 10, 45. This last-named designation, however, is not to be considered strictly accurate, for, as has been seen, much of the common law has been repeatedly collected and promulgated by royal authority, and the whole of it is to be found in the various treatises on the common law, and in the reports of the decisions of the courts from very early ages down to the present time. The term is also understood in a wider sense, as distinguishing the great body of law, whether statutory or otherwise, administered in common-law courts, as distinguished from the system of equity administered in courts of chancery. It has various other appellations, but in American jurisprudence the common law is chiefly used in the two last-named senses: per STORY, J., in *Lessee of Levy v. McCuttee*, 6 Peters 102, 110; 1 Kent Com. 471. As equity has no criminal jurisdiction, the term is only sensible, in connection with the subject of this treatise, in the sense of being distinguished from the statute law; although, as will be hereafter more fully seen (see post, Part III., §§ 1-5), the term, in this sense, has even less force here than in England, as the common law of this country consists not only of the common law of England, but of such English statutes, also passed before the emigration of our ancestors, as were in amendment of the common law, and as were applicable to the circumstances of the country. And even some English statutes that have been passed since the settlement of this country, have been adopted, and are in force, to a greater or less extent, in different states, as part of the American common law.

16. The common law, as the *Lex Non Scripta*, consists, then, in England, of those laws which are not comprised under the title of Acts of Parliament, but which are, for the most part, extant in records of pleas, proceedings, and judgments; in books of reports and judicial decisions; in treatises of learned men's arguments and opinions, preserved from ancient times and still extant in writing. But the authoritative and original institutions are not set down in writing in that manner, or with that authority, that Acts of Parliament are, but they are grown into use, and have acquired their binding power, and the force of laws, by a long and immemorial usage, and by the strength of custom and reception in the

kingdom. A part of the common law, in this acceptation, is that by which proceedings and determinations in the ordinary courts of justice are directed and guided, and by which the processes, proceedings, judgments, and executions, of the ordinary courts of justice; the limits, bounds, and extents of courts, and their jurisdictions,—the several kinds of temporal offences and punishments at common law, and the manner of the application of the several kinds of punishments, with other particulars, extending as far as the many exigencies, in the distribution of ordinary justice, may require: See Hale's Hist. of Com. Law, p. 23 *et seq.*

17. Mr. Reeves also defines the common law in this sense. He says that the common law is the custom of the realm, on which courts of justice exercise their judgment, declaring, by their interpretation, what is, and what is not, that common law. Many of the statutes that have been enacted prior to the *Magna Charta* of 9 Hen. 3, have been blended with the custom of the realm, and have gone to make up the English common law, which common law or custom of the realm, consists of those rules and maxims concerning the persons and property of men, that have obtained by the tacit assent and usage of the people of England; being of the same force with acts of the legislature. The consent and approbation of the people, with respect to the common law, being signified by their immemorial use and practice of it: 1 Reeve's Hist. of Eng. Law 1.

18. The nature of the common law is to be accommodated to the condition, exigencies, and conveniences of the people, for, or by whom they are appointed, as those exigencies and conveniences insensibly grow upon the people. Thus, though it may be said of the common law of England, that it was otherwise in the time of Henry II., when Glanville wrote, or in the time of Henry III., when Bracton wrote, than it is now administered, yet it is not possible to assign the time when the change began; nor have we all the Acts of Parliament, or judicial resolutions, which might have induced or occasioned such alterations. The true constituents of the common law are the common usage or custom and practice of the kingdom in matters lying in usage or custom. The custom is not simply an unwritten one, as has been seen, nor orally derived down from one age to another, but it is a custom that is derived down in writing and transmitted from age to age, especially since the beginning of the reign of Edward I.; a monarch, whose wisdom in connection with the English laws, has aptly caused him to be designated the English Justinian. Secondly: The judicial decisions of courts of justice, consonant to one another in the series and successions of times. And, thirdly: The authority of Parliament manifested in introducing such laws. Much of that which is used and taken as common law is undoubtedly derived from old Acts of Parliament, the record of which, in its origi-