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BLACKSTONE'S COMMENTARIES,

REDUCED TO

QUESTIONS AND ANSWERS.

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INTRODUCTION.

SECTION II.

OF THE NATURE OF LAWS IN GENERAL.

1. *What is law in its most general and comprehensive sense?*—38.

It signifies a rule of action, dictated by some superior, and which the inferior is bound to obey. It is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational. Thus we say, the laws of motion, of gravitation, of optics, or mechanics, as well as the laws of nature and of nations.

2. *What is law in its more confined sense?*—39.

It denotes the rules, not of action in general, but of human action or conduct; that is, the precepts by which man, a creature endowed with both reason and free will, is commanded to make use of those faculties in the general regulation of his behavior.

comportamento.

3. *Why must man conform entirely to his Maker's will?*—39.

Because he is entirely dependent upon the will of his Maker.

4. *What is this will of our Maker?*—39.

It is the law of nature, so called.

5. *In what is the law of nature founded?*—40.

In those relations of justice that existed in the nature of things antecedent to any positive precept.

6. *Is the Creator subject to this law of nature?*—40.

It is the eternal, immutable law of good and evil, to which the Creator himself in all his dispensations conforms.

7. *How do we discover this law?*—40.

The Creator has enabled human reason to discover the law of nature, so far as it is necessary for the conduct of human actions.

8. *What are the principles of that law?*—40.

That we should live honestly; should hurt nobody; should render to every one his due, are general precepts of the law of nature.

9. *Does the discovery of these first principles of the law of nature depend only upon the due exercise of right reason?*—40.

No: The Creator has been pleased so to contrive the constitution and frame of humanity, that we should want no other prompter to enquire after and pursue the rule of right, but our own self-love, that universal principle of action.

10. *What is the foundation of ethics or natural law?*—41.

The paternal precept, "that man should pursue his own true and substantial happiness."

11. *Is the law of nature of superior obligation?*—41.

It is superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity if contrary to it, and they derive all their force and authority from it.

12. *What is revelation?*—42.

Divine Providence hath been pleased, at sundry times and in divers manners, to discover and enforce its laws by an immediate and direct revelation. The doctrine thus delivered we call the revealed or divine law, and it is to be found only in the Holy Scriptures.

13. *How is revelation connected with the law of nature?*—42.

Its precepts are a part of the original law of nature, as they tend in all their consequences to man's felicity, and are as to intrinsic obligation of equal strength and perpetuity with that law.

14. *Has the moral system denominated the natural law and the revealed law equal authority?*—42.

No. The revealed law is of infinitely more authenticity than that system framed by ethical writers and called the natural law. One is the law of nature expressly declared so to be by God himself; the other is only what, by the assistance of human reason, we imagine to be that law.

15. *Upon what foundations depend all human laws?*—42.

The law of nature, and the law of revelation.

16. *If man were to live in a state unconnected with other individuals, what laws only would there be occasion for?*—43.

The law of nature, and the law of God. Nor could any other law exist: for a law always supposes some superior who is to make it; and in a state of nature we are all equal, without any other superior but Him who is the author of our being.

17. *As mankind form separate states, is there not a third kind of law?*—43.

Yes; and it is called the law of nations.

18. *Upon what does the law of nations depend?*—43.

Entirely upon the rules of natural law, and upon mutual compacts, treaties, leagues, and agreements between the several communities.

19. *With reference to the law of nations, to what rule, or law, only, can we resort in the construction of compacts?*—43.

In the construction of national compacts we have no other rule to resort to but the law of nature; because it is the only one to which all the communities are equally subject; and therefore the civil law very justly observes, *quod naturalis ratio inter omnes homines constituit vocatur jus gentium*.

20. What is that law by which particular nations are governed called?—44.

Municipal or civil law.

21. How does the commentator define that law?—44.

He defines it to be "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right, and prohibiting what is wrong."

22. For what reasons is municipal law called a rule?—44, 45.

transitoria repentina 1st. It is not a transient or sudden order from a superior to, or concerning a particular person; but something permanent, uniform, and universal.

2d. It is called a rule to distinguish it from advice or counsel.

3d. It is called a rule to distinguish it from a compact or agreement; for a compact is a promise proceeding from us, law is a command directed to us.

23. How does he define the difference between counsel and law?—44.

Counsel is matter of persuasion only, law is matter of injunction; counsel acts upon the willing, law upon the unwilling also.

24. What is the language of a compact, what of law?—45.

The language of a compact is, "I will, or will not do this;" that of law is, "thou shalt, or shalt not do it."

25. Why is municipal law called "a rule of civil conduct"?—45.

To distinguish it from the natural and revealed law.

26. Why is municipal law said to be a rule prescribed?—45.

desmunda Because a bare resolution confined in the breast of the legislator, without manifesting itself by some external sign, can never be properly a law. It is requisite that this resolution be notified to the people who are to obey it.

27. By what means may law be notified or prescribed?—45, 46.

It may be notified by universal tradition and long practice,

which supposes a previous publication, and is the case with the common law of England. It may be notified *viva voce*, by officers appointed for that purpose, as is done with regard to proclamations and such acts of parliament as are appointed to be publicly read in churches and other assemblies. It may lastly be notified by writing, printing, or the like; which is the general course taken with acts of parliament. Yet whatever way is made use of, it is incumbent on the promulgators to do it in the most public and conspicuous manner; not like Caligula, who, (according to Dio Cassius,) wrote his laws in a very small character, and hung them upon high pillars, the more effectually to ensnare the people. There is a still more unreasonable method than this, which is making of laws *ex post facto*; when, after an action (indifferent in itself) is committed, the legislator then for the first time declares it to have been a crime and inflicts a punishment upon the person who has committed it. All laws should be made to commence *in futuro*, and be notified before their commencement, which is implied in the term prescribed.

28. Why is municipal law prescribed by the supreme power in a state?—46.

Because legislation is the greatest act of superiority that can be exercised by one being over another. Therefore it is requisite to the very essence of law that it be prescribed by the supreme power in the state.

29. What are the only true and natural foundations of society?—47.

necesidades The wants and fears of individuals. Not that we can believe, with some theoretical writers, that there ever was a time when there was no such thing as society, either natural or civil; and that, from the impulse of reason, and through a sense of their wants and weaknesses, individuals met together in a large plain, entered into an original contract, and chose the tallest man present to be their governor. This notion of an actual existing unconnected state of nature, is too wild to be seriously admitted. *temores tal debilidades salvaje*

But, though, society had not its formal beginning from any convention of individuals, actuated by their wants and their fears; yet it is the sense of their wants and weaknesses that keeps man- *sin embargo*

kind together; that demonstrates the necessity of this union; and that therefore is the solid and natural foundation as well as the cement of civil society. This is what we mean by the original contract of society.

30. *When civil society is once formed what, of course, results?*
—48.

Government; as necessary to preserve and to keep that society in order.

31. *As all the members which compose this society were naturally equal, to whose hands are the reins of government to be entrusted?*
—48.

genero humano In general, all mankind will agree that government should be reposed in persons in whom those qualities are most likely to be found, the perfection of which is among the attributes of him who is emphatically styled the Supreme Being; the three grand requisites of wisdom, of goodness, and of power. These are the natural foundations of sovereignty, and these are the requisites that ought to be found in every well constituted frame of government.

32. *What must there be in every form of government?*—49.

A supreme, irresistible, absolute, uncontrollable authority, in which the rights of sovereignty reside.

33. *What three forms of government are there?*—49.

The political writers of antiquity do not allow more than three regular forms of government—democracy, aristocracy, and monarchy. All other species of government, they say, are either corruptions of, or reducible to these three.

34. *What peculiar quality is each of these forms of government likely to possess?*—49, 50.

In a Democracy, it is probable, more public virtue, or goodness of intention exists, than in either of the other forms of government; but it may be deficient in wisdom to contrive, and strength to execute.

fuero A Monarchy is the most powerful, and the most dangerous, of governments.

In Aristocracies it is supposed there is more wisdom than in the other forms of government, but less honesty than in a republic, and less strength than in a monarchy.

35. *What is the nature of the British form of government?*—50.

It partakes of the advantages of monarchy, aristocracy, and democracy. The legislature of the kingdom is entrusted to three distinct powers, entirely independent of each other:—First, the King; secondly, the Lords spiritual and temporal, who are persons selected for their piety, their birth, their wisdom, their valor, or their property; and thirdly, the House of Commons, freely chosen by the people from among themselves. Here is lodged the sovereignty of the British constitution.

36. *With whom lies the right to make laws, in every government?*—52.

With the legislature resides the authority to make laws, i. e. to prescribe the rule of civil action.

37. *Is it the duty, as well as the right, of the legislature to make laws?*—52, 53.

Since the respective members are bound to conform themselves to the will of the state, it is expedient that they receive directions from the state declaratory of that its will.

38. *Of what four parts should every law consist?*—53, 54.

Every law should be declaratory, directory, remedial, and vindicatory.

39. *What part of a law is said to be declaratory?*—53.

That whereby the rights to be observed and the wrongs to be eschewed are clearly defined and laid down.

40. *What the directory; what the remedial; and what the vindicatory?*—54.

The directory is that whereby the subject is instructed and enjoined to observe rights, and to abstain from the commission of wrongs. The remedial is that whereby a method is pointed out to recover private rights, or redress private wrongs. The sanction or vindicatory part, is that whereby it is signified what evil

or penalty shall be incurred by such as commit any public wrongs and transgress or neglect their duty.

41. *What is the most effectual part of a law?*—55.

The vindictory part: The main strength and force of a law consist in the penalty annexed to it.

42. *Wherein consists the difference between those things which are mala in se, and those which are mala prohibita?*—54-58.

mala con-
ducta
prohibita
Crimes and misdemeanors, as murder, theft and perjury, *robo* forbidden by the superior laws, are styled *mala in se*. But with regard to things in themselves indifferent, they become either right or wrong, just or unjust, duties or misdemeanors, according as the municipal legislator sees proper, for promoting the welfare of society, and more effectually carrying on the purposes of civil life.

obligam
43. *What municipal laws bind the conscience?*—57, 58.

Human laws, as to *rights*, are binding upon men's consciences. So, also, in regard to *natural duties* and such *offences* as are *mala in se*: here we are bound in conscience, because we are bound by superior laws, before those human laws were in being, to perform the one and abstain from the other. But, in relation to those laws which enjoin only *positive duties*, and forbid only such things as are not *mala in se*, but *mala prohibita* merely, without any intermixture of moral guilt, annexing a penalty to non-compliance, here conscience is no further concerned than by directing a submission to the penalty, in case of avowed breach of those laws.

44. *How is the intention of the legislator to be gathered?*—59.

The fairest and most natural method to interpret his will, is by exploring his intentions from the words, the context, the subject-matter, the effects and consequences of the law, or the spirit and reason of them all.

45. *In relation to the interpretation of laws, how are words generally to be understood, and how are terms of art or technical terms to be taken?*—59.

Words are, generally, to be understood in their usual and

most known signification; not so much regarding the propriety of grammar, as their general and popular use. Thus the law mentioned by Puffendorf, which forbade a layman to lay hands on a priest, was adjudged to extend to him who hurt a priest with a weapon. Again, terms of art, or technical terms, must be taken according to the acceptance of the learned in art, trade, and science. So in the act of settlement, where the crown of England is limited "to the princess Sophia, and the heirs of her body, being protestants," it becomes necessary to call in the assistance of lawyers, to ascertain the precise idea of the words, "heirs of her body," which in a legal sense, comprise only certain of her lineal descendants.

46. *As to the subject matter, how are words always to be understood?*—60.

As to the subject-matter, words are always to be understood as having regard thereto, for that is always supposed to be in the eye of the legislator, and all his expressions directed to that end.

47. *What is the rule, as to the effects and consequences?*—60.

As to effects and consequences, the rule is, that when words bear either none, or a very absurd signification, if literally understood, we must a little deviate from the received sense of them. Therefore the Bolognian law, mentioned by Puffendorf, which enacted, "that whoever drew blood in the street should be punished with the utmost severity," was held, after a long debate, not to extend to the surgeon who opened the vein of a person that fell down in the street with a fit.

48. *What is the most universal and effectual way of discovering the true meaning of law, when words are dubious?*—61.

By considering the reason and spirit of it, or the causes which moved the legislature to enact it. For when the reason ceases, the law itself ought to cease. An instance of this is given by Cicero, or whoever wrote the treatise inscribed to Herennius. There was a law, that those who in a storm forsook the ship, should forfeit all property therein; and that the ship and lading should belong entirely to those who staid in it. In a dangerous

tempest all the mariners forsook the ship, except only one sick passenger, who by reason of his disease, was unable to get out and escape. By chance the ship came safe to port. The sick man kept possession, and claimed the benefit of the law. Now here all the learned agreed, that the sick man is not within the reason of the law, for the reason of making it was to give encouragement to such as should venture their lives to save the vessel; but this is a merit which he could never pretend to, who neither staid in the ship upon that account, nor contributed any thing to its preservation.

From this method of interpreting the laws, by the reason of them, arises what is called equity.

49. *How is equity defined by Grotius?*—61.

He says it is "the correction of that wherein the law (by reason of its universality) is deficient."

50. *Why is a court of equity necessary?*—61.

Because it is necessary that when the general decrees of the law come to be applied to particular cases, there should be vested somewhere a power of defining those circumstances, which (had they been foreseen) the legislator himself would have expressed.

51. *Upon what does equity essentially depend?*—62.

Upon the particular circumstances of each case. Hence there can be no established rules and fixed precepts of equity laid down, without destroying its very essence, and reducing it to a positive law.

52. *Should or should not all cases be considered in an equitable light?*—62.

The liberty of considering all cases in an equitable light must not be indulged too far, lest thereby we destroy all law, and leave the decision of every question entirely in the breast of the judge.

SECTION III.

OF THE LAWS OF ENGLAND.

1. *How may the municipal law of England be divided?*—63.

Into two kinds; the *lex non scripta*, the unwritten or common law—and the *lex scripta*, the written or statute law.

2. *What does the first kind include?*—63.

The *lex non scripta*, or unwritten law, includes not only *general customs*, or the common law properly so called, but also the *particular customs* of certain parts of the kingdom; and likewise those *particular laws* that are, by custom, observed only in certain courts and jurisdictions.

3. *Where is it to be found?*—63, 64.

In the records of the several courts of justice, in books of reports and judicial decisions, and in the treatises of learned sages of the profession, preserved and handed down to us from the times of highest antiquity.

4. *From whence is its binding power?*—64.

The *leges non scriptæ* receive their binding power, and the force of laws, by long and immemorial usage, and by their universal reception throughout the kingdom.

5. *Of what degree of antiquity must customs be to entitle them to weight and authority?*—67.

They must have been used time out of mind; or in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary.

6. *Into what three kinds is the unwritten or common law distinguishable?*—67.

1st. General customs, or the common law properly so called; which are the universal rule of the whole kingdom, and form the common law, in its stricter and more usual signification.

2d. Particular customs; which for the most part affect only the inhabitants of particular districts.

3d. Certain particular laws; which by custom are adopted