

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

and used by some particular courts of pretty general and extensive jurisdiction.

7. *How are maxims and customs of the common law to be known, and how is their validity to be determined?*—69.

By the judges in the several courts of justice. They are the depositaries of the laws, the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land.

8. *What is the doctrine of the law as to following precedents?*—70.

They must be followed, unless flatly absurd or unjust; for though the reason be not obvious at first view, yet we owe such a deference to former times, as not to suppose that they acted wholly without consideration.

9. *Does this rule admit of exception?*—69, 70

Yes; where the former determination is most evidently contrary to reason; much more, if it be clearly contrary to the divine law.

10. *What do the rules relating to particular customs regard?*—75.

Either the proof of their existence, their legality, when proved, or their usual method of allowance.

11. *Wherein do the customs of London differ from all others, as to the mode of trial?*—76.

If the existence of a custom be brought in question, it shall not be tried by a jury, but by a certificate from the lord mayor and aldermen by the mouth of their recorder; unless it be such a custom as the corporation is itself interested in, as a right of taking toll, &c., for the law permits them not to certify on their own behalf.

12. *What are the seven necessary requisites to make a particular custom good?*—77, 78.

1st. That it hath been used so long that the memory of man runneth not to the contrary.

2d. It must have been continued. Any interruption would cause a temporary ceasing; the revival would give it a new be-

ginning, which will be within time of memory, and thereupon the custom will be void.

3d. It must have been peaceable, and acquiesced in; not subject to contention and dispute.

4th. Customs must be reasonable; or rather, taken negatively, they must not be unreasonable.

5th. Customs ought to be certain.

6th. Customs, though established by consent, must be (when established) compulsory, and not left to the option of every man, whether he will use them or not.

7th. Lastly, customs must be consistent with each other: one custom cannot be set up in opposition to another.

13. *To what, however, must all special customs submit?*—79.

To the king's prerogative.

14. *What are understood by those peculiar laws which, by custom, are adopted and used only in certain peculiar courts and jurisdictions?*—79.

The civil and canon laws.

15. *What is understood by each of these laws absolutely taken?*—80-82.

By the civil law is generally understood the civil or municipal law of the Roman empire, as comprised in the Institutes, the Code, and the Digest of the Emperor Justinian, and the novel constitutions of himself and some of his successors.

The canon law is a body of Roman ecclesiastical law, relative to such matters as that church either has, or pretends to have, the proper jurisdiction over.

16. *What are the courts in which the civil and canon law are permitted to be used?*—83.

1st. The courts of the Archbishops and Bishops, and their derivative officers.

2d. The military courts.

3d. The courts of admiralty.

4th. The courts of the two universities.

17. *Under what superintendency are all these courts?*—84.

Under that of the courts of common law.

18. *To whom does an appeal lie in the last resort?*—84.

To the King; which proves that the jurisdiction exercised in courts is derived from the crown of England alone.

19. *Of what do the leges scriptæ consist?*—85.

Of statutes, acts, or edicts, made by the king's majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in parliament assembled.

20. *Of what kinds are statutes?*—85, 86.

They are either general or special, public or private.

21. *How are statutes connected with the common law?*—86.

They are declaratory of the common law, or remedial of small defects therein.

22. *What rules are to be observed with regard to the construction of statutes?*—87-91.

1st. There are three points to be considered in the construction of all remedial statutes:—the old law; the mischief; and the remedy.

2d. A statute which treats of things or persons of an inferior rank cannot, by any general words, be extended to those of a superior.

3d. Penal statutes must be construed strictly.

4th. Statutes against frauds are to be liberally and beneficially expounded.

5th. One part of a statute must be so construed by another, that the whole may (if possible) stand.

6th. A *saving*, totally repugnant to the body of the act, is void.

7th. Where the common law and a statute differ, the common law gives place to the statute; and an old statute gives place to a new one.

8th. If a statute that repeals another, is itself repealed afterwards, the first statute is thereby revived, without any formal words for that purpose.

9th. Acts of parliament derogating from the power of subsequent parliaments, bind not.

10th. Lastly; acts of parliament that are impossible to be performed, are of no validity.

23. *For what purposes are our courts of equity established, and in what matters are they only conversant?*—92.

To detect latent frauds and concealments, which the process of the courts of law is not adapted to reach; to enforce the execution of such matters of trust and confidence as are binding in conscience, though not cognizable in a court of law; to deliver from such dangers as are owing to misfortune or oversight; and to give a relief, more specific and better adapted to the circumstances of the case, than can always be obtained by the generality of the rules of the positive, or common law.

They are only conversant in matters of property.