LECTURE XXIV.

OF THE ABSOLUTE RIGHTS OF PERSONS.

1. *What are the rights of persons in private life?*—1.

They are either absolute, being such as belong to individuals in a single, unconnected state; or relative, being those which arise from the civil and domestic relations.

2. *Which are the absolute rights of individuals?*—1.

The absolute rights of individuals may be resolved into the right of personal security, the right of personal liberty, and the right to acquire and enjoy property. These rights have been justly considered and frequently declared, by the people of this country, to be natural, inherent and inalienable.

3. *When was the principal Declaration of Rights made in this country?*—5–7.

In October, 1765, a convention of delegates from nine colonies assembled at New York, and made and published a declaration of rights, in which they insisted that the people of the colonies were entitled to all the inherent rights and liberties of English subjects, of which the most essential were, the exclusive right to tax themselves, and the privilege of trial by jury. The sense of America was, however, more fully ascertained, and more explicitly and solemnly promulgated, in the memorable Declaration of Rights of the first Continental Congress, in October, 1774, and which was a representation of all the colonies except Georgia. That declaration constituted the basis of those subsequent bills of rights which, under various modifications, pervade all our constitutional charters. It was declared, "that the inhabitants of the English colonies in North America, by the immutable laws of nature, the principles of the English constitution, and their several charters or compacts, were entitled to life, liberty, and property; and that they had never ceded to any sovereign power whatever, a right to dispose of either without their consent; that their ancestors, who first settled in the colonies, were, at the time of their emigration from the mother country, entitled to all the rights, liberties, and immunities of free and natural-born subjects; and by such emigration they by no means forfeited, surrendered or lost any of these rights; that the foundation of English liberty, and of all free government, was the right of the people to participate in the legislative power, and they were entitled to a free and exclusive right of legislation, in all matters of taxation and internal policy, in their several provincial legislatures, where their right of representation could alone be preserved; that the respective colonies were entitled to the common law of England, and more especially to the great and incontestable privilege of being tried by their peers of the vicinage, according to the course of that law; that they were entitled to the benefit of such English statutes as existed at the time of their colonization, and which they had by experience found to be applicable to their several local and other circumstances; that they were likewise entitled to all the immunities and privileges granted and confirmed to them by royal charters, or secured by their several codes of provincial laws." On the formation of the several State constitutions, after the colonies had become independent States, it was, in most instances, thought proper to collect, digest, and declare, in a precise and definite manner, and in the shape of abstract propositions and elementary maxims, the most essential articles appertaining to civil liberty and the natural rights of mankind.

4. *What are the principal provisions to be found in our constitutions, for guarding the right of personal security?*—12–16.

That no person, except on impeachment, and in the cases arising in the military and naval service, shall be held to answer for a crime above petit larceny, unless he shall have been previously charged, on the presentation or indictment of a grand jury.

No person shall be subject, for the same offense, to be twice put in jeopardy of life or limb.

Nor be compelled, in any criminal case, to be a witness against himself.

In all criminal prosecutions, the accused is entitled to a speedy and public trial by an impartial jury.

And upon the trial he is entitled to be confronted with the witnesses against him.

To have compulsory process for witnesses in his favor.

To have the assistance of counsel in his defense.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

No bill of attainder, nor *ex post facto* law can be passed.

No person can be deprived of life, liberty, or property, unless by the law of the land, or the judgment of his peers.

Every person, in case of impending danger, is entitled to the protecting arm of the magistrate, and may require his adversary to be bound to keep the peace.

If violence has been actually offered, the offender is not only liable to a public prosecution and punishment, but is bound also to render the party injured compensation in damages.

Every man may exercise the natural right of self-defense, in those cases where the law is either too slow, or to feeble, to stay the hand of violence.

Homicide is justifiable when necessary for self-defense, or in defense of near relations, against persons attempting to commit a known felony, with force, against one's person, habitation or property.

Every one is entitled to the enjoyment of his reputation.

5. *Into what two kinds does the law distinguish injuries affecting the reputation of individuals?*—16.

Into slander spoken, and slander by writing, signs, or pictures, the latter of which is commonly called a libel. The Roman law took this distinction between slander spoken and written, and the same distinction prevails in our law, which considers the slander of a private person by words, in no other light than as a civil injury, for which a pecuniary compensation may be obtained.

6. *In what does this injury consist?*—16, *n.* 1.

In falsely and maliciously charging another with the commission of some public offense, or the breach of some public trust, or with any matter in relation to his particular trade or vocation, and which, if true, would render him unworthy of employment; or, lastly, with any other matter or thing, by which special injury is sustained. And certain words are actionable in themselves, without showing other special damage than that they deeply wound the feelings, and bring the party charged into contempt and disgrace. There may also be slander of title to property, which consists in falsely and maliciously denying the plaintiff's title, whereby he suffers some injury.

7. *What is a libel?*—17.

A libel, as applicable to individuals, has been well defined to be a malicious publication, expressed either in printing or writing, or by signs or pictures, tending either to blacken the memory of one dead, or the reputation of one living, and expose him to public hatred, contempt, or ridicule. A malicious intent toward government, magistrates, or individuals, and an injurious or offensive tendency, must concur to constitute the libel.

8. *In what light does the law consider this grievance?*—17.

As a public as well as a private injury; and it has rendered the party not only liable to a private suit at the instance of the party libeled, but answerable to the State by indictment, as guilty of an offense tending directly to a breach of the public peace. But though the law be solicitous to protect every man in his fair fame and character, it is equally careful that the liberty of speech and of the press should be duly preserved. The liberal communication of sentiment, and entire freedom of discussion, in respect to the character and conduct of public men, and of candidates for public favor, is deemed essential to the judicious exercise of the right of suffrage, and of that control over their rulers, which resides in the free people of the United States. It has, accordingly, become a constitutional principle in this country, that "every citizen may freely speak, write, and publish his sentiments, on all subjects, being responsible for the abuse of that right, and that no law can rightfully be passed to restrain or abridge the freedom of speech, or of the press."

9. *When is the first private suit for slanderous words to be met with in the English law?*—18.

In the reign of Edward III., and for the high offense of charging another with a crime which endangered his life.

10. *What is the general rule of evidence in prosecutions for injuries to private reputation?*—18–24.

That in a private action of slander for damages, even in the action of *scandalum magnatum*, the defendant may justify, by showing the truth of the fact charged. But in the case of a public prosecution for a libel, it became the established principle of the English law, as declared in the Court of Star Chamber, about the beginning of the reign of James I., that the truth of the libel could not be shown by way of justification. The weight of judicial authority is, that the English common law doctrine of libel is the common law doctrine of this country, in all cases in which it has not been expressly controlled by constitutional or legislative provisions. The act of Congress of 14th July, 1798, made it an indictable offense to libel the government, or Congress, or President of the United States; and made it lawful for the defendant to give in evidence, upon the trial, the truth of the matter contained in the publication charged as a libel. And in many, if not most of the States, special provisions have been made in favor of allowing the truth to be given in evidence in public prosecutions for libel.

11. *What are the principal statute provisions in New York, on the writ of* habeas corpus?—29–31.

That all persons restrained of their liberty, under any pretense whatsoever, are entitled to prosecute this writ, unless they be persons detained: 1. By process from any court or judge of the United States, having exclusive jurisdiction in the case. 2. Or by final judgment or decree, or execution thereon, of any competent tribunal of civil or criminal jurisdiction, other than in a case of commitment for any alleged contempt. The application for the writ must be to the Supreme Court, or chancellor, or a judge of the court, or other officer having the powers of a judge at Chambers; and it must be by petition in writing, signed by, or on behalf of the party; and it must state the grounds of the application, and the facts must be sworn to. The penalty of one thousand dollars is given in favor of the party aggrieved, against every officer and against every member of the court assenting to the refusal, if any court or officer authorized to grant the writ shall refuse it when legally applied for. If the person to whom the writ is directed, or on whom it is served, shall not promptly obey the writ, by making a full and explicit return, and shall fail to produce the party, without a sufficient cause, he is liable to be forthwith attached and committed, by the person granting the writ, to close custody, until he shall have obeyed the writ. The party suing out the writ is to be remanded, if detained: 1. By process of any court of the United States having exclusive jurisdiction. 2. Or by virtue of a final decree, or judgment, or process thereon, of any competent court of civil or criminal jurisdiction. 3. Or for any contempt specially and plainly charged, by some court or person having authority to commit on such a charge, and when the time for which the party legally detained has not expired. But no inquiry is to be made into the legality of any process, judgment or decree, or the justice or propriety of the commitment in the case of persons detained under process of the United States, where the court or officer has exclusive jurisdiction; nor where the party is detained under the final decree or judgment of a competent court; nor where the commitment, made by any court, officer or body, according to law, is for a contempt, and duly charged. The remedy, if the case admits of one, is by *certiorari*, or writ of error. The court or officer awarding the writ may, in other cases, examine into the merits of the commitment, and hear the allegations and proof arising thereon in a summary way, and dispose of the party as justice may require. A person discharged upon *habeas corpus* is not to be re-imprisoned for the same cause, and if any person solely, or as a member of any court, or in execution of any order, knowingly re-imprison such party, he forfeits a penalty of twelve hundred and fifty dollars to the party aggrieved, and is to be deemed guilty of a misdemeanor, and liable to fine and imprisonment.

12. *Is the writ* ne exeat *in force in this country?*—33, 34.

In England, the king, by the prerogative writ, *ne exeat*, may prohibit a subject from going abroad without license, but with us this writ is not in use, except for civil purposes, between party and party, to prevent debtors escaping from their creditors. It amounts, in ordinary civil cases, to nothing more than process to

hold to bail, or compel a party to give security to abide the decree.

13. *What has the Constitution of the United States ordained upon the subject of religion?*—35.

That Congress shall make no law respecting the establishment of a religion, or prohibiting the free exercise thereof, and the same principle appears in all the State constitutions. The principle is generally (though not universally) announced in them without any kind of qualification or limitation annexed, and with the exclusion of every species of religious test.

LECTURE XXV.

OF ALIENS AND NATIVES.

1. *Who are natives?*—39, *n.* (*a*).

All persons born within the jurisdiction and allegiance of the United States. If they were resident citizens at the time of the Declaration of Independence, though born elsewhere, and deliberately acceded to it an express or implied sanction, they became parties to it, and are to be considered as natives; their social tie being coeval with the existence of the nation.

That all persons born within the jurisdiction are citizens, is the rule of the common law, without any regard or reference to the political condition or allegiance of their parents, with the exception of the children of ambassadors, who are in theory born within the allegiance of the foreign power they represent. In New York, the doctrine relative to the distinction between aliens and citizens in the jurisprudence of the United States, was extensively and learnedly discussed,* and it was adjudged that the subject of alienage, under our national compact, was a national subject, and that the law on this subject, which prevailed in all the United States, became the common law of the United States

* See 1 Sandf. Chan. R., 584, 639.

when the union of the States was consummated; and the general rule above stated is, consequently, the governing principle or common law of the United States, and not of the individual States separately considered. The right of citizenship, as distinguished from alienage, is a national right, character, or condition, and does not pertain to the individual States separately considered. The question is of national and not individual sovereignty, and is governed by the principles of the common law which prevail in the United States, and became, under the Constitution, to a limited extent, a system of national jurisprudence It was accordingly held in that case that the complainant, who was born in New York of alien parents during their temporary sojourn there, and returned while an infant, during the first year of her birth, with her parents to their native country, and always resided there afterwards, was a citizen of the United States by birth. This was the principle of the English common law in respect to all persons born within the king's allegiance, and was the law of the colonies, and became the law of each and all of the States when the Declaration of Independence was made, and continued so until the establishment of the Constitution of the United States, when the whole exclusive jurisdiction of this subject of citizenship passed to the United States, and the same principle has there remained.

2. *What is the doctrine of the English law as to the allegiance of natural-born subjects?*—42, 43.

That they owe an allegiance which is intrinsic and perpetual, and which can not be divested by any act of their own. In the case of Macdonald, who was tried for high treason, before Chief Justice Lee, and who, though born in England, had been educated in France, and spent his riper years there, his counsel spoke against the doctrine of natural allegiance as slavish, and repugnant to the principles of their revolution. The court, however, said, that it had never been doubted, that a subject born, taking a commission from a foreign prince, and commiting high treason, was liable to be punished as a subject for that treason. They held, that it was not in the power of any private subject to shake off his allegiance and transfer it to a foreign prince; nor was it in the power of any foreign prince, by naturalizing or

employing a subject of Great Britain, to dissolve the bond of allegiance between the subject and the crown. Entering into foreign service without the consent of the sovereign, or refusing to leave such service, when required by proclamation, is a misdemeanor at common law.

3. *What is the rule on this subject, in the United States?*—43–49 *notes.*

The better opinion would seem to be, that a citizen can not renounce his allegiance to the United States without the permission of government, to be declared by law; and that, as there is no existing legislative regulation in the case, the rule of the English common law remains unaltered. This rule has been expressly declared by the Supreme Court of the United States, which held* that the marriage of a *feme sole* with an alien produced no dissolution of her native allegiance, and that it was the general doctrine that no person could, by any act of their own, without the consent of the government, put off their allegiance and become aliens. The naturalization laws of the United States are, however, inconsistent with this general doctrine, for they require the alien who is to be naturalized to abjure his former allegiance, without requiring any evidence that his native sovereign has released it.

4. *What is the law of France on this point?*—50.

The French law will not allow a natural-born subject of France to bear arms, in time of war, in the service of a foreign power, against France; and yet, subject to that limitation, every Frenchman is free to abdicate his country.

5. *Who is an alien?*—50–52.

An alien is a person born out of the jurisdiction of the United States. There are, however, some exceptions to this rule, as the children of ambassadors (and other citizens temporarily absent), born abroad. By an act of Congress of the 14th of April, 1802, it is declared that "the children of persons duly naturalized under any of the laws of the United States, or who, previous to the passing of any law on the subject by the government of the

* 3 Peters' U. S. R. 242.

United States, may have become citizens of any one of the States, under the laws thereof, being under the age of twenty-one years at the time of their parents being so naturalized, or admitted to the rights of citizenship, shall, if dwelling in the United States, be considered as citizens of the United States." This provision has been adjudged to be prospective in its operation. And by an act passed February 10th, 1855, persons theretofore born or hereafter to be born out of the limits and jurisdiction of the United States, whose fathers were or shall be at the time of their birth citizens of this country, shall be deemed and are declared to be citizens of the United States. But the rights of citizenship shall not descend to persons whose fathers never resided in the United States. By the same act, a woman who might be naturalized under the existing laws, and who is or shall be married to a citizen of the United States, shall be deemed a citizen.

6. *What is the rule of the common law as to an alien's right to hold real estate?*—53.

That an alien can not acquire title to real property by descent, or created by other mere operation of law.

7. *What is the common law rule, if an alien purchase land, or if land be devised to him?*—54.

That he may take and hold, until an inquest of office has been had; but upon his death, the land would instantly, and of necessity (as the freehold can not be kept in abeyance), without any inquest of office, escheat and vest in the State, because he is incompetent to transmit by hereditary descent.

8. *May natural-born subjects inherit, through an alien, the estates of their ancestors?*—56.

They may now in most, if not all, of the States.

9. *Has the distinction between* antenati *and* postnati, *in reference to our Revolution, been judicially considered since the establishment of our independence?*—56, 57.

Yes, frequently; and the principle of the common law contained in Calvin's case,* viz., that the division of an empire

* 7 Co. 1, 27.

worked no forfeiture of previously vested rights of property, has been often acknowledged in our American tribunals.

10. *What is the prevailing doctrine on this subject, in regard to the treaty of peace in* 1783, *between Great Britain and the United States?*—60, 61.

That by that treaty Great Britain and the United States became respectively entitled, as against each other, to the allegiance of all persons who were at the time adhering to the governments respectively; and that those persons became aliens in respect to the government to which they did not adhere. This is the meaning of the treaty of 1783, and it put an end to all conflicting and double allegiance growing out of the Revolution.

11. *What property may aliens acquire under the common law?*—61–64.

They may take a lease for years of a house for the benefit of trade; and they are capable of acquiring, holding, and transmitting personal property in like manner as our citizens, and they can bring suits for the recovery and protection of that property. They may take a mortgage upon real estate, by way of security for a debt, and are entitled to come into a court of equity, and have the mortgage foreclosed.

And now by statutory provisions in nearly all of the States of the Union, the common law disabilities of aliens, in regard to real property, have been essentially removed. In New York, Virginia, and other States, resident aliens are now vested with nearly the same rights of property as native citizens.

12. *In what manner, under the act of May,* 1828, *may an alien become a citizen of the United States?*—64, 65.

It is required that he declare, on oath, before a State court, being a court of record, with a seal and clerk, and having common law jurisdiction, or before a Circuit or District Court of the United States, or before a clerk of either of said courts, two years, at least, before his admission, his intention to become a citizen, and to renounce his allegiance to his own sovereign. This declaration need not be previously made, if the alien resided here before the 18th June, 1812, and has since continued

to reside here; provided such residence be proved to the satisfaction of the court, and provided it be proved by the oath or affirmation of two witnesses, citizens of the United States, that he has resided, for at least five years immediately preceding the time of such application, within the limits and under the jurisdiction of the United States. The names of the witnesses, and the place or places where the applicant has resided for at least the five years, are to be set forth in the record of the court. And if the applicant shall have been a minor, under twenty-one years of age, and shall have resided in the United States three years next preceding his arrival to majority, he may also be admitted a citizen without such previous declaration; provided he has arrived at the age of twenty-one years, and shall have resided five years in the United States, including the three years of his minority, and shall make the declaration aforesaid at the time of his admission, and shall declare on oath, and prove, to the satisfaction of the court, that for three years next preceding it had been his *bona fide* intention to become a citizen, and shall in all other respects comply with the laws in regard to naturalization. In all other cases the previous declaration is requisite, and at the time of his admission, his country must be at peace with the United States, and he must, before one of these courts, take an oath to support the Constitution of the United States, and likewise an oath to renounce and abjure his native allegiance. He must, at the time of his admission, satisfy the court, by other evidence than his own oath, that is, by the oath of at least two citizens of the United States,* that he has resided five years at least within the United States, and one year at least within the State where the court is held; and if he have arrived after the peace of 1815, his residence must have been continued for five years next preceding his admission, without being at any time, during the five years, out of the territory of the United States.† He must satisfy the court, that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well-disposed to the good order and happiness of the same. He must, at the same time, renounce any title, or order of nobility, if any he hath. The law provides that the children of persons duly naturalized, being minors at the time, shall, if dwelling in

* See Appendix, note A. † See Appendix, note B.

the United States, be deemed citizens. It is further provided that if any alien shall die after his declaration, and before actual admission as a citizen, his widow and children shall be deemed citizens.

13. *What is the effect of naturalization?*—66.

A person, thus duly naturalized, becomes entitled to all the privileges and immunities of natural-born subjects, except that a residence of seven years is necessary to enable him to hold a seat in Congress, and no person except a natural-born citizen is eligible to the office of Governor in some of the States, or President of the United States.

14. *How will the personal property of an alien, who dies before taking any steps toward naturalization, go?*—67.

According to his will, if he have made any; or if he died intestate, then according to the law of distribution of the place of his domicil at the time of his death.

15. *To whom does the act of Congress confine the description of aliens capable of naturalization?*—72.

To "free white persons."* It is supposed this excludes the inhabitants of Africa, and their descendants, and it may become a question to what extent persons of mixed blood are to be excluded, and what shades and degrees of mixture of color disqualify an alien from application for the benefits of the act of naturalization. Perhaps there might be difficulties also as to the copper-colored natives of America, or the yellow or tawny races of Asiatics, and it may well be doubted whether any of them are "white persons," within the purview of the law. It is the declared law of New York and South Carolina, and probably so understood in other States, that Indians are not citizens, but distinct tribes, living under the protection of government, and, consequently, never can be made citizens under the act of Congress.

* By the Act of July 14, 1870, ch. 254, the privileges of the naturalization laws are extended to aliens of African nativity and to persons of African descent.

The phrase, "free white persons," has been omitted. U. S. Revised Statutes, section 2165.

LECTURE XXVI.

OF THE LAW CONCERNING MARRIAGE.

1. *What is the primary and most important of the domestic relations?*—75.

That of husband and wife.

2. *In what has it its foundation?*—75.

In nature, and it is the only lawful relation by which Providence has permitted the continuance of the human race.

3. *What is its moral influence?*—75.

In every age it has had a propitious influence on the moral improvement and happiness of mankind. It is one of the chief foundations of social order. We may justly place to the credit of the institution of marriage a great share of the blessings which flow from refinement of manners, the education of children, the sense of justice, and the cultivation of the liberal arts.

4. *Who are capable of contracting marriage?*—75–79.

1. All persons who have not the regular use of their understanding, sufficient to deal with discretion in the common affairs of life, as idiots and lunatics (except in their lucid intervals), are incapable of agreeing to any contract, and of course to that of marriage. A marriage procured by force or fraud is also void, *ab initio*, and may be treated as null by every court in which its validity may be incidentally drawn in question. The basis of the marriage contract is the consent of the parties, and the ingredient of fraud or duress is fatal in this as in any other contract, for the free assent of the mind is wanting. The common law allowed divorces *à vinculo, causa metus, causa impotentiæ*, and those were cases of a fraudulent contract. It is proper in all these cases that the objection to the marriage should be judicially investigated in a suit to annul the marriage; and jurisdiction in the case properly belongs to the ecclesiastical courts in England, and to the courts of equity in this country. It is de-