A TREATISE

ON THE

PRINCIPLES OF PLEADING

IN CIVIL ACTIONS:

COMPRISING

A SUMMARY VIEW OF THE WHOLE

PROCEEDINGS IN A SUIT AT LAW.

BY HENRY JOHN STEPHEN,

SERGEANT AT LAW.

. . . . Res antiquæ laudis et artis
Ingredior, sanctos ausus recludere fontes.--Vide.

THIRD AMERICAN

FROM THE SECOND LONDON EDITION:

WITH A PREFACE, AN INTRODUCTION, A DISSERTATION ON PARTIES TO ACTIONS, AND NOTES.

BY SAMUEL TYLER, LL. D.,

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WASHINGTON, D. C.:
WALTER C. MORRISON,
LAW-BOOK PUBLISHER AND SELLER.

TO THE

ALUMNI

OF THE

LAW DEPARTMENT OF COLUMBIAN COLLEGE,

THIS EDITION OF A WORK, THE STUDY OF WHICH IS SO WELL FITTED TO
SHARPEN AND INVIGORATE THE MIND OF THE LAWYER AND IMPART
TO IT A PRACTICAL FACILITY, IS, WITH THE BEST WISHES
FOR THEIR PROFESSIONAL SUCCESS,

***Respectfully Suscribed*.**

BY SAMUEL TYLER, LL. D.,

INTRODUCTION.

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OF THE CIVIL LAW AND THE COMMON LAW.

There have grown up in the history of nations only two great systems of law, the civil law of ancient Rome, and the common law of England. All the most civilized nations in the world are governed by either of these two great schemes of justice. Though the civil law and the common law have much in common, yet in many important particulars they are the opposites of each other. In the course of his studies, the student of law finds so much said, in an incidental way, about the civil law, that is calculated to mislead his judgment in regard to the true character of that scheme of justice, that it is important, at the outset of his walks over the fields of the common law, to give him some account of the civil law, and point out in what it differs essentially from the common law. This is a matter of much importance to every student who aspires to a comprehensive and enlightened knowledge of jurisprudence.

Rome is the grandest empire presented in the great spectacle of the history of nations. From the limits of a few square miles, on the southeast bank of the lower course of the Tiber, Rome extended her territorial dominions to the Pillars of Hercules on the west, to the Euphrates on the east, to the German ocean and the Grampian hills on the north, and to the cataracts of the Nile and the great African desert on the south. Over his vast territory Rome extended her government, her laws, and her language. To preserve these immense territories, as the natural and legitimate heritage of Rome, was the one great end of Roman policy. And any of the many peoples subject to Roman sway, who attempted to throw off the imperial authority, were treated as rebels against a lawful dominion.

The law which regulated the affairs of such a vast and various empire of high civilization is a wonderful scheme of human justice, attracting, with uncommon interest, the student of jurisprudence.

The political history of Rome is divided into the period of the kings, the period of the republic, and the period of the emperors. Its legal history corresponds with these political periods.

In the period of the kings, the administration of justice was in the royal hands. The law was at that epoch very much a matter of royal discretion. During the period of the republic, the administration of justice was in the hands of the consul, pretors, and inferior magistrates. It was during the epoch of the republic that most of the fundamental rules for the regulation of private rights and peaceful pursuits were introduced into Roman law. The law was gradually developed by the peculiar modes of administering justice. In the later days of the republic the praetor urbanus was the magistrate chiefly concerned in the administration of justice. But neither he nor any other Roman judicial magistrate ever decided directly the matter brought before him. He only allowed the action upon a statement made by the plaintiff, and regulated the proceedings to a point in which the matter in dispute was reduced to a proper form for investigation and decision. The case thus prepared was then referred by him, with directions, to a *judex*, chosen by the parties themselves from amongst their fellow-citizens, whose function it was to investigate the facts and pronounce judgment upon the issue. This judicial reference and direction by the pretor to the *judex* was called an edict. It contained a statement, in a certain formula, of the matter in dispute and the general rules of law applicable to it, with a direction to the *judex* to make his decision conform to the facts as he might find them. The ownership of land was excepted from this mode of trial. It was decided by the court of one hundred men.

The praetor urbanus was elected annually. It was the working of his jurisdiction that chiefly developed Roman law. The old forms of action, contained in the twelve tables, required every suitor to bring his case within their strict terms; else he was without remedy, no matter how just was his complaint. These forms, so narrow and technical, were, in the course of progress, abolished, so as to enlarge legal remedies. There was given to the praetor urbanus authority to devise new rules and orders applicable to special cases which might be brought before him. If a person complained of an injury for which the old law afforded no remedy, the praetor urbanus could, upon a statement of facts by the party, allow him an action, and put the facts, with the prop0er judgment upon them, into a certain formula, for the direction of the *judex* to whom he referred the matter. In this way, through the jurisdiction of the praetor urbanus, new actions, enforcing claims not before recognized by the law, and new rules of law applicable to the changing wants of society, were established. But the new remedies were made to take the form of those which had been long observed; and thus progress was made to conform to the Roman spirit of conservatism. Customs, as they grew up in the various new business and changing conditions of society, were allowed as law in these new actions.

It was the custom for pretors, on entering upon their office, to publish an edict, declaring the principles upon which they intended to administer justice during the year of their pretorship. This was called a continuous edict. By this practice, the pretor would appear to the suitors to be governed by pre-established general rules, and not to be influenced by the special interests of any particular case. His administration would, therefore, be felt as more impartial and just. The pretor also passed special edicts, as cases, not anticipated in the continuous edicts, were brought before him. These continuous edicts had authority only during the year of the pretor who declared them. But in time, successive pretors came to adopt, in their own edicts, the rules declared by their

predecessors. In this way, a body of edictal law became as well established and as authoritative as if it had received the express sanction of positive legislation. As the edicts of the pretors embraced new usages and customs, as well as any special rules that might occur to the minds of the respective pretors, which grew up in the changing business of a progressive society like that of Rome, the edictal law was the purest sort of legislation, springing from the spontaneous acts and opinions of the people. Society, in the modes of its working, declared the rules of its actions; and the pretors gave them judicial sanction, and thereby made them law.

The edictal direction to the *judex* was not the only mode in which the pretor discharged the function of justice. He also, in certain cases, passed edicts, ordering specific things to be produced or restitution of them to be made. And he also sometimes, by interdict, forbade certain things to be done. These acts of the pretor might be final, or merely preliminary to further proceedings, in which the rights of the parties would be settled.
The law was still further developed, and that into a more ample justice, because of relations to Rome to foreign states, especially to those with which she had formed treaties, giving their citizens certain civil rights, such as the right to acquire and hold property within the Roman dominion. In order to administer justice, in cases growing out of foreign relations, a special magistrate having jurisdiction over them was annually elected, called praetor peregrinus. As in the cases brought before this pretor the parties were never both Roman citizens and the transactions involved were hardly ever entered into with reference to Roman law, the principles common to all systems of law were applied as dispensing, in such cases, a more adequate justice. Through this liberal form of administering justice between Romans and aliens, a practical acquaintance with the laws of foreign states was acquired by the Roman magistrates, and such rules as seemed common to all systems of laws were recognized as a law of nations, and were made a part of the civil law of the Romans. And thereby the law of nations, because of its universal acceptance as a standard of right and justice, became a part of the positive law of the Romans. Under this law the rights and obligations of foreigners, as well as of Roman citizens, were recognized and judicially enforced. According to the teachings of Roman jurists, it was from the law of nations that the law of contracts, such as buying and selling, letting and hiring, loans and bailments, partnership, and the law of slavery so far as it gave the right of property in man, and many other matters, were introduced into the Roman civil law.
This mere judicial development of the law left it in a shapeless and unwieldy mass. Magistrates annually elected, as the Roman pretors were, could hardly know what had been decided by their predecessors. Consequently there could be very little like fixed principle in the law, if it were left to mere judicial development; especially, too, as the subsequent pretor was not bound by the decisions of his predecessors, but could exercise his judgment untrammeled by precedent. Therefore it was that a class of men arose by the side of the administration of justice, who became connected with it in a very peculiar relation, and supplied the defects in the judicial system, and by their very writings reduced the law into shape. These were the Roman jurists, so celebrated in the history of European law. They made their first appearance in the time of Cicero. Quintus Mucius Scaevola was the first of them, and Servius Sulpicius was the second. These jurists must not be confounded with the mere practitioners of the law. The mere practicing lawyer held a lower position in the legal profession than the jurist. The business of the mere practicing lawyer was to give legal advice, and to draw up

testaments, contracts, and other instruments in legal form. He had nothing to do with the management of causes before a court. The orator, though his great vocation was in the senate and before the assemblies of the people, was the advocate in criminal trials and in important civil cases. The jurists, in the time of Cicero, besides doing the business of practitioners of law, also appeared in public, at certain times and places, to give their advice orally to those who asked it, and also opened their own houses for the same purpose. Young men who wished to acquire a knowledge of the law were present when the jurists gave their advice, and saw the mode in which they transacted legal business. Cicero was a pupil of Scaevola. He was admitted to the intimacies of his accomplished family, and learned, as he said, elegant conversation from his refined daughters.

But it was under the empire, when the glory of the republic was gone, that the jurists attained their eminence, and in fact became the architects of the great system of Roman law. Though Scaevola and Sulpicius wrote treatises on the law, these treatises had no authority beyond the opinions of men learned in the law. But Augustus Caesar gave to a certain number of jurists the privilege of giving opinions in cases which might be referred to them by a *judex*; and if the jurists were unanimous, the judex was bound by their opinion; if they were not unanimous, the judex was left to adopt what opinion seemed to him best. Tiberius Caesar, during his reign, adopted the practice of authenticating, under his seal, the opinions of certain jurists. This class o privileged jurists, whose unanimous opinion made rules o flaw, became an established institution. Some of these jurists, were advisors of the emperors in al matters of legislation, as well as in matters of law referred to them either immediately or by appeal. As the military power, which during the republic was kept in the strictest subordination to the civil, could, under the empire, at any time be put above the civil authority by the emperor, his very title being military, Septimus Severus appointed Papinian, the greatest of all the Roman jurists, pretorian prefect, which placed him at the head of the army and of the law. And Ulpian and Paulus, only a little, if at all, less eminent as jurists than Papinian, were successively appointed praetorian prefect by Alexander Severus.

The jurists wrote innumerable treatises on the law, which came to be of as much authority as their privileged opinions. It was these writings that exerted a paramount influence in developing and bringing into system Roman jurisprudence. The law contained in the twelve tables, the edictal law, and established usage, were the materials upon which the jurists labored in their writings with great honesty of purpose, remarkable good sense, and fine dialectical skill. Oratory was no longer, as it had been during the glorious period of the republic, the great art by which men rose to eminence in the state. Its voice was now silent; when to speak of the rights of Roman citizens was treason. Therefore, to the silent and obscure labor of building up jurisprudence the greatest minds devoted themselves. The writing of the jurists became in time so numerous, that, in order to help the incapacity of those who administered law, at a time when, amidst general degradation, the great jurists had no successors, the Emperor Valentinian III, by a constitution, declared that the writings of Papinian, Paulus, Gaius, Ulpian, and Modestinus should have the force of law when they were unanimous; when they were not unanimous; the opinion of the majority was to be followed; and when they were equally divided, the opinion in which Papinian concurred was to be adopted.

Thus, according to a tendency common to all systems of law, the Roman, in the new application of principles required by the ever-changing conditions of society, gradually, through the offices of the two pretors and afterwards through the writings of the great

jurists, emerged from the narrow rules which originated in the early peculiarities of Roman society, and gradually expanded itself into a more ample scheme of justice, fitted for a universal dominion. It became in time, allowing local differences, the common law of all the provinces.

This system of jurisprudence was closely connected with the imperial theory and form of government, both by the manner of its growth and the political doctrines introduced into it by the writings of the jurists. The jurists were, in politics, imperialists; and they made their legal opinions support the imperial authority at all points of doctrinal application and administrative contact between it and the law. For though the theory of the republic was forgotten, and the right of revolution, so often exerted in the early history of Rome, was hardly even a matter of tradition, still it was deemed necessary, by the jurists, to vindicate to human intelligence, by some theory of right, an authority so stupendous as that of a Roman emperor. Therefore it was that the jurists invented the fiction of the *lex regia,* by which it was pretended that all the authority of the Roman people was irrevocably granted to the emperor. And, to complete their theory of absolutism, the jurists introduced into their writings, as a constitutional principle, the dogma, *Whatever pleases the prince has the force of law*.

Thus the jurisprudence which had been recast in an imperial mold became a part of the imperial system; and as the chief functionaries under the empire were generally selected from the profession of the law, they entered upon their official functions thoroughly imbued with imperial ideas and trained to principles of imperial policy. The administration of the law, too, was subordinate to the imperial authority, not only in theory but in practice, the courts being organized accordingly. Under the republic, the courts were open to the public in both civil and criminal trials. Under the empire, open courts disappeared, and an appeal lay in all cases to the emperor in his imperial court. Thus a perfect system of despotism, disguised under forms of law, was built up on the ruins of the republic.

After the seat of the Roman empire had been transferred by Constantine to the borders of Asia, and the unity of the Roman dominion had been broken into a western and an eastern empire, the Emperor Justinian, in the first half of the sixth century of the Christian era, had all the constitutions which had been promulgated by the successive emperors compiled into a code. And afterwards, at the suggestion of Tribonian, a distinguished lawyer who had been one of the compilers of the code, a commission was appointed, with Tribonian at its head, to make a selection from the writings of the elder jurists, which should comprehend all that was most valuable in them, and should be a compendious exposition of Roman law. The commissioners, in the very short period of three years, produced their compilation, called the Pandects or Digest, containing literal extracts from thirty-nine jurists, those from Ulpian and Paulus constituting about one half of the whole work. The Pandects or Digest, besides being designed as a book for the practitioner, was designed also to form a necessary part of legal education in the schools of jurisprudence at Constantinople and Berytus. But it was too vast a work, and required for its comprehension too great a previous knowledge of law, to admit of its being mad an introduction to a course of legal study. Justinian, therefore, appointed Tribonian, in conjunction with Theophilus and Dorotheus, respectively professors in the law schools of Constantinople and Berytus, to compose an elementary law book. The produced the Institutes.

The code, the Pandects or Digest, and the Institutes contain the civil law as it has come down to modern times, and are the sources from which the modern jurists have derived

their knowledge of Roman jurisprudence. They embody principles and ideas of law which were the slow growth of ages, and which, beginning with the origin of the Roman people, had been gradually unfolded, modified, and matured.

During the progress of Roman jurisprudence the forms of legal procedure had undergone an entire change. As soon as the republic was overthrown and the empire was established by Augustus, changes in the law began to be contemplated; and two schools of law reformers arose, one school in favor of adhering to the strict technical forms of the law under the republic, and the other in favor of substituting for them simple and general forms, more accommodated, as they said, to the larger equity, the more ample justice of the jurisprudence required by the enlightened spirit of the age. At the head of the republican school stood Labeo, and at the head of the other stood Capito. Both were eminent lawyers. But the first, though in favor of liberalizing the principles of the old jurisprudence, was utterly averse from changing the strict technical forms of procedure, as he believed they afforded the only protection to the rights of the citizen. Capito, on the contrary, a time-serving adherent of the new order of things, maintained that the forms of legal procedure, as well as the jurisprudence itself, must be changed to suit the spirit of progress. The controversy between these schools of lawyers lasted nearly a century, the imperial party gaining ground all the time, until the Emperor Hadrian, by the perpetual edict, exercised uncontrolled legislative authority, and fixed forever the character of the imperial jurisprudence. From this epoch the civil law and its procedure assumed that pretorian form and spirit which were consummated in the Code, the Pandects, and the Institutes of Justinian. The old forms of law procedure of the republic, and the respect for precedent when the law was an emanation from the manners and spirit of the people, gave way to the more simple forms of the empire. Thus was consummated what has sometimes been considered an advance in jurisprudence. But in this opinion things wholly different have been confounded: the machinery for carrying law into effect has been confounded with the law itself. There can be no doubt that the law itself was so improved, under the empire, as to make it almost a new creation; but there should be as little doubt that the mode of procedure was changed from one suited to the liberty of the citizen to one suited to arbitrary power, by its enlarging the discretion of judges.

If we now turn to the common law of England, we will find that, as far as administrative principles and forms of procedure are concerned, it is the opposite of the Roman civil law as it was molded under the empire. The principle which, in the practical administration of the two systems, marks the primary essential distinction between them, is the relative obligatory force under them of precedent or former decisions. Under the common law, former decisions control the court unconditionally. It is deemed by the common law indispensable that there should be a fixed rule of decision, in order that rights and property may be stable and certain, and not involved in perpetual doubts and controversies. Under the civil law the principles is different. Former decisions have not so fixed and certain an operation, but are considered as only governing the particular case, without establishing as a settled rule the principle involved in it. When a similar case occurs, the judge may decide it according to his personal views of the law, or according to the opinion of some eminent jurist. The civil law, as administered at the present time on the continent of Europe, possesses all the uncertainty and fluctuations of doctrine that results from the little respect paid by it to precedent. The commentaries of the doctors, who have succeeded to the jurists, are as various as the diversity of human judgment can make them. The late United States Attorney General, Legare, who

studied law in Germany, with all his strong predilections for the civil law, said, "One who was initiated in this study, as we happened to be, under the old plan of the eighteenth century, with Heineccius for a guide, will find himself in the schools of the present day in almost another world - new doctrines, new history, new methods, new textbooks, and, above all, new views and a new spirit." The diversity of doctrine in the schools signalized by Mr. Legare descends into the courts to perplex and bewilder the administration of justice. Let anyone, who wishes to examine a specimen of this perplexity in regard to a fundamental classification which the civilians make of laws into personal statutes and real statutes, refer to the opinion of the supreme court of Louisiana, by Mr. Justice Porter, in *Saul v. His Creditors*, in 17 *Martins' Reports*. After referring to the jurists of the different European countries who have treated of this distinction, Justice Porter says: "The moment we attempt to discover from these writers what statutes are real and what personal, the most extraordinary confusion is presented. Their definitions often differ; and, when they agree in their definitions, they dispute as to their application." And Mr. Justice Story, in his "Conflict of Laws," when speaking of the civilians who have treated of the subject of his book, says: "The civilians of continental Europe have examined the subject in many of its bearings with a more comprehensive philosophy, if not with a more enlightened spirit. Their works, however, abound with theoretical distinctions, which serve little purpose than to provoke idle discussions and metaphysical subtleties, which perplex, if they do not confound the inquirer. * * * * Precedents, too, have not, either in the courts of continental Europe or in the judicial discussions of eminent jurists, the same force and authority which we, who live under the influence of the common law, are accustomed to attribute to them; and it is unavoidable that many differences of opinion will exist amongst them, even in relation to leading principles." Such is the fluctuating wind of doctrine with which the judicial mind is liable to veer under the civil-law institutions where precedents have but little force.

The common law, in broad contrast to the civil law, has always wholly repudiated anything as authority but the judgments of courts deliberately given in causes argued and decided. "For (says Lord Coke, in the preface to his 9th Report) it is one amongst others of the great honors of the common law that cases of great difficulty are never adjudged or resolved *in tenebris* or *sub silentio suppressis reationibus*, but in open court: and there upon solemn and elaborate arguments, first at the bar by the counsel learned of either party, (and if the case depend in the court of common pleas, then by the sergeants at law only;) and after at the bench by the judges, where they argue (the presiding judge beginning first) *seriatim*, upon certain days openly and purposely prefixed, delivering at large the authorities, reasons, and causes of their judgments and resolutions in every such particular case, (*habet enim nesio quid energia viva vox*:) a reverend and honorable proceeding in law, a grateful satisfaction to the parties, and a great instruction and direction to the attentive and studious hearers." Nothing less elaborately learned and cautiously considered than such a judgment of a court has a legitimate place in the common law. By such adjudication has that great system of jurisprudence been built up. The opinion of no lawyer has a place in the system of common law. And this wise principle of the common law is never lost sight of by those bred in its spirit. When Lord Coke wrote his commentaries upon certain statutes of England, from Magna Charta to Henry VIII, which are called his II Institutes, he did not give his personal opinions of their meaning, but gave the judicial interpretations of them, which had been made. In the conclusion of the preface to the II Institutes he says: "

Upon the text of the civil law there be so many glosses and interpretations, and again upon those so many commentaries, and all written by doctors of equal degree and authority, and therein so many diversities of opinions, as they rather increase than resolve doubts and uncertainties, and the professors of that noble science say that *it is like see full of waves*. The difference, then, between those glosses and commentaries are written by doctors, and which be advocates, and so in a great manner private interpretations; and our expositions or commentaries upon Magna Charta and other statutes are resolutions of judges in courts of justice in judicial courses of proceeding, either related and reported in our books or extant in judicial records, or in both, and therefore, being collected together, shall (as we conceive) produce certainty, the mother and nurse or repose and quietness." Such is the doctrine of the common law! Nothing but the solemn voice of the law itself, speaking through its constituted tribunals, is of any judicial authority. And how august is that authority, reposing as it does upon the solemn decisions of courts which have administered justice in the very same halls for nearly eight hundred years! In vain shall we search the history of nations for a parallel to this stability of law amidst the fluctuating vicissitudes of empire. It is this stability of law, ruling over the prerogative of the crown and administering equal justice to the high and the low through so many centuries, that vindicates the "frame and ordinary course of the common law" to the consideration of the present times.

It is this primary difference in the principles of practice, under the two systems of law, which gives to the common law its great superiority over the civil law, as a practical jurisprudence regulating the affairs of society. It has the great advantage of producing certainty in regard to all rights and obligations which are regulated by law. But, above all, it excludes private interpretations and controls the arbitrary discretion of judges. In the common law the principles of interpretation are fixed and certain. Rules of interpretation were early adopted, and have never been departed from. Other rules from time to time have been adopted, but when once introduced into practice they become precedents.

But it is far otherwise in the civil law. Different schools of interpretation have existed in countries where it is administered in modern times, called respectively the historical and philosophical schools. And the law is subject to all the fluctuation in practice which grows out of the different principles of interpretation of these schools. By the different principles of interpretation, and by the principle that former decisions may be disregarded, much certainty in the law is lost; so that often the decision of the plainest case, unless it depends upon some fundamental positive rule, can hardly be confidently foretold.

This difference in the administrative principles of the common law and the civil law is intimately connected with their different modes of procedure and with the different degree of respect paid to technical forms. Under the common law, forms are as sacred as the principles they embody. They are precedents. The precise form being a precedent, the certainty of the principle which it embodies is thereby fixed. There can be no more dispute about the principle than about the form which embodies it. Every new case must conform to it, there can be no dispute about its import.

The great instrument by which certainty has been given to precedents in the common law is special pleading. This is the mainspring and the regulative force of the whole machinery of the common law as a practical jurisprudence. By it every step, from the original writ to the judgment, is kept in specific undeviating forms. There can be no dispute about the specific import of every step in the procedure. And when the decision

is made, no matter how loosely the opinion of the court may be expressed, the pleadings in the case give definiteness to the point or points decided, and preserve them forever as a precedent for future judges to follow.

The object of judicial proceedings is to ascertain and to decide upon disputes between parties. In order to do this, it is indispensable that the point or points in controversy be evolved and distinctly presented for decision. The common law and the civil law have different modes for accomplishing this purpose. The rules of common law pleading are designed to develop and present the precise point in dispute upon the record itself, without requiring any action on the part of the court for the purpose. The parties are required to plead alternately in writing, until their respective allegations of affirmation and denial terminate in a single material issue, either of law or of fact, the decision of which will dispose of the cause.

By the civil law the parties are not required to plead in such a way as to evolve upon the written record, by the allegations of the respective parties, the point in dispute, but are permitted to set forth all the facts which constitute the cause of action or defense at large; the questions of law not being separated from the questions of fact, as in the common law pleadings, but the whole case is presented in gross to the court for its determination. Under this practice, the court has the labor of reviewing the complex allegations of the respective parties, and methodizing them, and evolving for adjudication the material points on which the controversy turns.

When the court of chancery in England began to take cognizance of disputes between parties, it adopted the civil law mode of procedure. This court assumed to eschew the strict technical rules of the common law, and to proceed upon the broad equities of the case; and therefore, naturally required the statement of the facts at large. As the trial by jury did not pertain to this court, the inconvenience of mingling questions of law and of fact was not felt, as they were both decided by the court, and therefore needed not to be separated on the record, as in courts of law, where they are decided by different tribunals. And, besides, the chancellor, from the nature of his court, can take all the time required for the examination of the questions of law and of fact involved in the allegations of the opposite parties. There is, therefore, nothing in the organization of the court of chancery, which forbids the use of the civil law mode of pleading. Indeed, the court of chancery is, in form, a civil law tribunal. Its whole practice is modeled after the edict law of the Roman pretor.

But the civil law mode of pleading is not applicable to the common law courts. In these courts questions of law are determined by the judges, while questions of law are determined by the judges, while questions of fact are determined by the jury. It is therefore manifest that it is at least convenient that these questions, which are to be decided by different tribunals, should be separated upon the written record before the case is presented for trial. The material points, about which the parties are in dispute, cannot be so easily evolved from the complicated mass of facts in the hurry of a trial as they can be by pleadings carefully framed beforehand by experienced lawyers, in accordance with rules which require all issues to be single, involving only one question, and to be stated upon the written record itself. And certainly it facilitates the administration of justice to have the record of every case disencumbered of all extraneous matters, and of everything irrelevant and immaterial, and nothing but the naked points in dispute, whether of fact or of law, presented distinctly to the judges and the jury, as is done by the special pleading of the common law.

Nothing is more important, in the administration of justice, than a distinct theory and law of evidence. Without it there can be no certainty in administrative justice. For it matters not how clearly a system of jurisprudence may define obligations and rights, if in judicial investigations improper evidence is admitted, and proper evidence is rejected, there can be no security. The system of common law pleading is framed with reference to this point, making issues of fact simple, so that the relevancy of evidence can be easily perceived. The common law is greatly superior to the civil law on this point. In the loose, detailed statements of civil law pleadings the exact point in dispute will often be left in so much doubt that the evidence will be various, latitudinous, and vague; and many topics will be introduced at the trial which have nothing to do with the real questions in dispute. It has been said that the whole government of England is but a contrivance to bring twelve men into the jury box. Trial by jury is, therefore, in connection with the court, the great end of the government; and special pleading is the great instrument by which that peculiar form of judicature is made efficient. It presents the precise points to be determined, and thereby indicates the character of the evidence required, which is all that any contrivance can accomplish.

It is thus seen how the common law pleading gives certainty to trials at law, making the questions to be decided precise, the admission and rejection of evidence definite, and retaining on the record, after the trial, precision in everything, from the summons to the judgment, sot that it can be know what was in dispute, what was proved, and what was adjudged.

It must not be inferred from what has been said that I undervalue any influence which the civil law has exerted in liberalizing any too narrow principles of the common law in that long sweep of ages through which they both have governed the affairs of men; though I think that this influence has been exaggerated by some of the ablest writers on the common law. It is not as systems of principles of justice that I have contrasted the common and the civil law. It is only their respective modes of procedure in administering justice that I have contrasted. We must, in such a discussion, e careful not to confound what Sir Henry Spelman calls "the course and frame of justice" with the principles of justice.

In concluding the contrast between the common law and the civil law, as a juridical question, it will be profitable to consider the two systems of law in their political aspects.

The march which the civil law has made over the continental European nations has carried its forms of procedure with it; and it cannot be pretended that either liberty or property has been as well protected in these countries as in England. The people of these countries are of the same race with those of England, and had originally the same institutions. "When we peruse, " says Sir Francis Palgrave, "the annals of the Teutonic nations, the epithet Teutonic being used in its widest sense, the first impression which we receive results from the identity of their ancient laws and modes of government which prevailed amongst them. Like their various languages, which are in truth but dialects of one mother tongue, so their laws are but modifications of one primeval code. In all their wanderings from their parent home the Teutons bore with them that law which was their birthright and their privilege; and even now we can mark the era when the same principles and doctrines were recognized at Upsula and at Toledo, in Lombardy and in England. But, descending the stream of time, the tokens of relationship diminish, and at length disappear. Amongst the cognate races of the continent of Europe political freedom was effaced by the improvement of society. England alone has witnessed the concurrent development of liberty and civilization.

From whatever causes it may have originated, a beneficial impulse was given by the Anglo-Saxon and the Anglo-Norman governments to the courts of justice, which, though emanating from the crown, were interposed between the sovereign and his subjects in such a manner as to tend towards a limited monarchy. And if this tendency had not continued and increased, the share of authority possessed by the people or their representatives would have been as feebly established here as in other countries, which, starting from the same point, proceeded in a less fortunate career. Deprived of the security afforded by the institutions which became the strongholds of liberty and the stations of defense, from which the patriot could not be dislodged, the Parliament of England, like the Cortes of Spain or the States-General of France, would long since have declined into inefficiency and extinction."

It was the civil law of imperial Rome which gradually undermined the Teutonic institutions on the continent of Europe. The fundamental text of that law, as we have seen, is, "the will of the prince has the force of law." This gradually became the fundamental doctrine of the governments of continental Europe; and the juridical principles and the modes of procedure made it efficient in practice. The palatial courts, to which appeals lay from all inferior tribunals, enabled the prince to control the whole administration of justice. The prerogative of the crown could not, therefore, be resisted by the courts, as it has been at important junctures by the courts of England. It is the law, and the law only, which can successfully resist the encroachments of despotism. In the absence of defined laws, and an independent judiciary to enforce them, the only check upon arbitrary power is popular insurrection; and the people, after they have overthrown by force one despotism, are liable, by their excesses, as all history shows, to succumb to another.

In the great contest between the civil law and the Teutonic laws and institutions, which occurred all over Europe after the fall of the Roman empire, the Teutonic, under the name of Anglo-Saxon, prevailed in England. King John was compelled, while that contest was going on, to sign Magna Charta, proclaiming the great fundamental principles of the common law. Soon afterwards, under the influence of the spirit of the common law, the representative system of government, composed of democracy, monarchy, and aristocracy, was established; which has served as a model for our form of government, and that of every nation that aspires after freedom. At that epoch Bracton wrote his treatise, "On the laws and customs of England." In it he asserted the supremacy of the law over the king. His words are, "*Rex non debet esse sub hominc sed sub Deo et lege*." This work was afterwards translated into French by Houard, an eminent Norman lawyer, and he avowedly suppressed that passage as too inconsistent with French constitutional law to be circulated in France. Such was the difference, at that early period, in the principles of constitutional law in England, where the common law prevailed, and in France, where the civil law prevailed.

In the beginning of the reign of Edward I the foundations of the common law were laid. The clergy, who favored the civil law, no longer monopolized legal knowledge. A school of common law had been established. Laymen had gradually formed themselves into societies called "inns of court," where they devoted their lives to the study of the common law. Edward selected his judges from this body of professional men. Then it was that the principles of the common law and the modes of procedure were systematized, and the courts, as they have subsisted for nearly six centuries, were framed and established; and the statutes which were passed during the reign for

reforming the law were framed with reference to the principles of Magna Charta and the common law.

In the latter part of the fifteenth century the common law received a new impulse towards development from the celebrated treatise of Sir John Fortescue, "In Praise of the Laws of England." The work was written to instruct the prince royal, who was afterwards Henry VI, in the principles of the constitution of England as a monarchy limited by law. The superiority of the common law to the civil law as a scheme of liberty is thoroughly vindicated, and the greater prosperity of the people of England, when compared with the people of France, is ascribed to the different systems of law by which the two countries are respectively governed.

It was during the Elizabethan period of English history that the character of English jurisprudence was fixed forever on the basis of common law. The great lawyers who fixed the landmarks of English jurisprudence at that climactic epoch in English civilization utterly repudiated the civil law as inapplicable to the English polity. "As for your Majesty's laws of England," said Lord Bacon, "I could say much of their dignity, and somewhat of their defect, but they cannot but excel the civil law in fitness for the government; for the civil law was not made for the countries with it governeth." Lord Coke, by his Reports and his Institutes, laid that broader foundation for the common law which the exigencies of society in the era which was opening required. From that period to the present time the common law has held on in the direction then given to it. It has within itself an inherent force of expansion and progressiveness. It consists of elementary principles capable of indefinite development in their applications to the ever-varying and increasing exigencies of society. There are certain fundamental maxims belonging to it which are never departed from. These are the immutable basis of the system. There are other maxims which are restricted by modifications or limited by exceptions. It is pre-eminently a practical system. It has broken away from the shackles of theory and technicality when, in the changing conditions of society and of property, justice and expediency required it. For a time the ancient rules and practice may have resisted the equitable demands of the new exigencies in human life; but when the new exigencies have shown themselves to be permanent interest in society, English jurisprudence has always found within its acknowledged frame of justice means of providing for the new rights and obligations which have sprung from the ever-widening sphere of civilization. The method of its progress is simple and plain. When a case is brought into a court the first question which legitimately emerges from the facts is, whether there is any statute which provides for it. If there is none, then it is inquired whether there be any clear principles of common law which fixes the rights and obligations of the parties. If the answer be again in the negative, then springs up the inquiry, whether there be any principle of the common law which, by analogy or parity of reason, ought to govern. If from neither of these sources a principle of adjudication for the case can be educed, it is recognized as a new case, and the principles of natural justice are applied to its solution. But if the principles of natural justice, on account of any technical or other impediment, cannot be applied to the settlement of the respective rights of the parties, then, by the immutable juridical principles of the common law, founded upon the jealous limitation of judicial discretion, if equity cannot relieve, the case must fail; and provision can only be made by statute for future cases of like nature. It matters not how the civil law or other foreign jurisprudence may have disposed of the question, unless, upon one of the principles which have been stated, the case can be adjudged, the party must fail of relief who seeks the aid of a court. "The Roman law,"

said Tinda, C.J., in *Acton v. Blendell*, "forms no rule, binding in itself, upon the subjects of these realms; but in deciding a case upon principle, where no direct authority can be cited from our own books, it affords no small evidence of the soundness of the conclusion at which we have arrived if it proves to be supported by that law the fruit of the researches of the most learned men, the collective wisdom of ages, and the ground-work of the municipal law of most of the countries in Europe."

Upon such principles has the common law based its practice and developed its science. From first to last, through the courts at Westminster, the common law has resisted the introduction of the civil law into the jurisprudence of England. At the very time that the Tudors and the Stuarts were grasping at high prerogative the common law was maturing its vigor in the courts. Coke, one of their judges, did more to develop and organize it for protecting the individual against arbitrary power than any man who has appeared in the progress of English society. In him the professional instinct of the common law judge reached its sublimest sense of human right. He saw that the English constitution draws its whole life from the common law, and is but the framework of its living spirit. By the common law "every man's house is called his castle. Why? Because it is surrounded by a moat or defended by a wall? NO! It may be a straw-built hut the wind may whistle through it, the rain may enter, but the king cannot."

In all the various revolutions, with their dark and dreary scenes of violence and bloodshed, through which England has passed, the people have clung to their ancient laws with a devotion almost superstitious. When our forefathers established governments in America they laid their foundations on the common law. And when difficulties grew up between them and the mother country, they acted as their English ancestors had always acted in their political troubles - interposed the common law as the shield against arbitrary power. When the United Colonies met in Congress, in 1774, they claimed the common law of England as a branch of those "indubitable rights and liberties to which the respective colonies are entitled." And the common law, like a silent providence is still the preserver of our liberties.