Masonic Jurisprudence

POUND

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LECTURES ON

Masonic Jurisprudence

BY

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REPRINTED FROM
THE BUILDER
THE OFFICIAL JOURNAL OF THE
NATIONAL MASONIC RESEARCH SOCIETY
ANAMOSA, IOWA

TO

MELVIN MAYNARD JOHNSON, 33°

PAST GRAND MASTER OF MASONS IN MASSACHUSETTS

TE SEQVOR O GRAIAE GENTIS DECVS INQVE TVIS NVNC
FICTA PEDVM PONO PRESSIS VESTIGIA SIGNIS,
NON ITA CERTANDI CVPIDVS QVAM PROPTER AMOREM.

PREFACE

My chief purpose in the following lectures is to show the relation of Masonic law to law in general, to point out the universal aspects of Masonic legal problems, and to demonstrate that we have in truth and not merely in name a science of Masonic law well worthy of study as such. In my endeavor to develop the relation of the problems of Masonic law to general legal problems, I may seem to have stressed this universal extra-Masonic element unduly. But it is my belief that here, as in the philosophy of Masonry and in Masonic symbolism, the Masonic scholar may not hope to achieve the best that his task offers unless he goes outside of the purely Masonic materials and perceives their setting, their relation to general human problems and their place in a scheme of human activities.

It remains to say that these lectures were delivered originally before the Harvard Chapter of the Acacia Fraternity in the school-year 1911-1912. Afterwards, at the instance of Most Worshipful Brother Johnson, who had done me the honor of attending the course, they were delivered under the auspices of the Grand Lodge of Massachusetts and printed in its proceedings for 1916. They were also printed in THE BUILDER, from which they are now reprinted. I have added some notes and bibliographies.

Cambridge, Massachusetts,
August 26, 1919.

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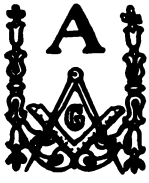

AT the outset we may well ask ourselves why do we say Masonic Jurisprudence? Why not simply Masonic Law? Is there a science of Masonic law as distinct from Masonic law itself? For in its original and etymological meaning and in the best usage, jurisprudence means the science of law. It is true there are two other uses of the term. The French use it to mean the course of decision in the courts as contrasted on the one hand with legislation and on the other hand with doctrine or the consensus of opinion of learned writers and commentators. To some extent this French usage has been received with us, particularly in the phrase "equity jurisprudence," signifying the course of decision in Anglo-American courts of equity, which has gained currency through the classical work of Judge Story. But it must be obvious that Masons do not employ the word in this sense. Although the course of decision in Masonic tribunals in the form of rulings of the Grand Masters and action of Grand Lodges thereon and of review of trials in or by Grand Lodges, is an important form of Masonic law, it furnishes but a part, and relatively a modern part, of the materials of what we are wont to style Masonic jurisprudence.

By a not unnatural transition from the French use of the term it has come to be used also, chiefly in this country, simply as a polysyllabic synonym for law. Medical jurisprudence, for the forensic applications of

medicine, has much vogue. Dental jurisprudence for the law of interest to dentists, engineering jurisprudence for the law of interest to engineers, architectural jurisprudence for the law of interest to architects, are heard occasionally. These seem quite indefensible. But even if they were not to be criticized, they would not warrant Masonic jurisprudence, for the latter term calls to mind not that part of the general law of the land which has special interest for the Mason, but the internal law of the fraternity itself. We come back, therefore, to our question whether Masonic jurisprudence is simply a grandiose name for Masonic law or whether, on the other hand, there is a science of Masonic law distinct from the law of each Masonic jurisdiction? Is there, in other words, an organized body of knowledge above and behind each particular local Masonic law upon which the latter rests as fully and truly as the particular legal rules of one of our commonwealths rest upon the principles of general legal science and the principles of Anglo-American legal tradition? For the moment I shall assume that there is, and my purpose in this course will be, not to expound dogmatically the rules of Masonic law which obtain here or elsewhere, but to show, if I may, that there is a science of Masonic law, to examine its material and its methods, and to set forth its principles.

In studying the law of politically organized society we say that it may be expounded dogmatically, that is, the content and application of its several rules and principles may be investigated and set forth, or it may be studied by one of the methods of jurisprudence—analytical, historical, or philosophical. In truth dogmatic study is of little value except as it makes use of and rests upon these methods of legal science. They justify themselves in the end by making for effective understanding and criticism and improvement of the law of each state. But they are methods of legal

science generally, while the dogmatic method is applicable not to jurisprudence but to a particular body of law. We may study a particular body of law analytically, that is, we may investigate the structure, subject-matter and rules of a legal system in order to reach by analysis the principles and theories which it logically presupposes. As a method of jurisprudence, however, the analytical method is comparative. It involves a comparative study of the purposes, methods and ideas common to developed systems of law by analysis of such systems and of their doctrines and institutions in their matured forms. Again, a particular body of law may be studied historically. That is, investigation may be made of the historical origin and development of the legal system and of its institutions and doctrines, looking to the past of the law to disclose the principles of the law of today. But here also, as a method of jurisprudence the historical method must be comparative. It involves a comparative study of the origin and development of law, of legal systems, and of particular doctrines and institutions in order to draw therefrom universal principles of legal science. Finally, a particular body of law may be studied philosophically. That is, investigation may be made of the philosophical bases of the institutions and doctrines of a legal system in order to reach its fundamental principles through philosophical speculation. When this method is pursued comparatively and the philosophical basis of law generally and of general legal institutions and universal legal doctrines is sought, in order to reach universal principles, the philosophical method becomes a method of jurisprudence. Formerly these three methods, the analytical, the historical and the philosophical, contended for the mastery. Today we recognize that no one of them is self-sufficient and that jurisprudence must employ each of them in order to achieve a well-rounded science.

If we apply these ideas to Masonic law, we may say that a dogmatic exposition of the law of any jurisdiction would, indeed, very likely be profitable. But it would be relatively of little value, certainly of little permanent value, unless it made use of and rested upon the analytical, the historical and the philosophical methods. Moreover these methods should be developed comparatively, as methods of a Masonic legal science, if they are to give their best results. On the other hand these methods are not to be pursued for their own sake. In the end they must justify themselves by making the law of each Masonic jurisdiction more scientific, better organized, more easy of comprehension and of application and more effective for the purposes for which it exists. Unless he can give us principles of systematization, of criticism and of improvement in those parts of our law which are subject to change, the jurist has no claim upon the attention of a craft of workmen.

Another preliminary question confronts us. How far are we justified in speaking of Masonic law? Is the body of rules to which we give that name law in any proper sense of the term? Are we warranted in applying to it the methods and in attaching to it the ideas which are appropriate when treating of the law of politically organized society?

There are three common uses of the term "law": (1) Law as used in the natural and physical sciences; (2) natural law or law of nature as the term has been used by writers on ethics, politics and the philosophy of law; (3) law in the juridical sense. In the sciences, law is used to mean deductions from human experience of the course of events. Thus the law of gravitation is a record of human observation and experience of the manner in which bodies which are free to move do in fact move toward one another. Similarly Grimm's law in philology is a record of the observations of philologists as to the manner in which consonantal changes

have taken place in the several Aryan languages. By natural law ethical, philosophical and political writers mean the principles which philosophy and ethics discover as those which should govern human action and the adjustment of human relations, and hence as those with respect to which obligatory rules of human conduct ought to be framed. Law in the juridical sense is said to be the body of rules, principles and standards recognized or enforced by public or regular tribunals in the administration of justice. Obviously there is an idea in common here, namely, the idea of a rule or principle, underlying a sequence of events, whether natural or moral, or judicial. In this wide sense, therefore, we may speak of the rules or principles which underly a sequence of events in a fraternal organization as law, just as we should so style the rules or principles underlying a sequence of events in a political society. But this wide use of the term law has been the subject of much objection and much dispute and we may put ourselves on firmer ground by looking at certain analogies between the rules which govern the decision of controversies and the adjustment of relations in a politically organized society and those which govern disputes and adjust relations in religious organizations and in fraternal organizations.

At bottom we must rest the whole structure of state and law upon the hard fundamental fact that in a finite world, human demands are infinite. If there were enough material goods to go around and enough room so that each of us might move in the widest orbit his fancy could picture or his desires could dictate without coming into collision with his fellow men, we should not need any elaborate system of balancing conflicting interests nor any elaborate machinery for putting into effect the standards for delimiting and enforcing interests which result from such balancing. Unhappily the material goods of existence do not suffice to give to

each everything which he may claim or which he does claim. Hence to conserve the values of life and to eliminate waste men organize themselves and organize or invent rules and standards and principles by which to eliminate waste and make the available stock of values go as far as possible. In the beginning these organizations are simply groups of kindred. Presently religious and fraternal organizations develop. Subsequently political organizations arise. In time trade and professional associations are added. All these seek in one way or another to secure to men values which might otherwise be dissipated. They have their justification in the necessity of conserving what would otherwise be lost in the struggle of individuals to satisfy infinite claims upon a limited store. Accordingly, if we look for a moment at the state, we see that it eliminates waste by means of the law in several ways. For one thing it furnishes a rule of decision in case of dispute and thus obviates resort to private war when controversies arise. One has only to consider what happens today in case of an industrial dispute in order to see what this means.

In an ordinary dispute between man and man today we have a measure of conduct which is ascertainable within reasonable limits in advance. If the dispute becomes acute, one party or the other may summon his adversary before a public tribunal and may have the dispute adjudicated upon the basis of settled rules, according to a settled procedure, and with reference to settled modes of redress. When the judgment is pronounced, it is not optional with the defeated party to adhere to it or not. The whole power of the state is behind it and the force of organized society may be invoked to carry it out. In an industrial dispute on the other hand, we have no clear measure of conduct. Each party is referred to his individual sense of fairness and to the general sense of fairness of the public

at large. But in a highly diversified community in which groups and classes with apparently divergent interests understand each other none too well and have conflicting ideas of justice, general public opinion is seldom sufficiently definite and consistent to serve as a restraint upon the partisan notions of justice entertained by the contending parties and hence each is left to be the judge of its own case. With no clear predetermined measure of adjustment of such controversies, with no settled mode of procedure, with no settled mode of redress and no strong, permanent tribunal, backed by the moral sense of the community, long tradition, and the force of the state, to pronounce and give effect to a judgment, there is no way to satisfy or to coerce the disputants and in practice, as like as not, the interests of each and the interests of society suffer equally. Society struggles to maintain its interest in the general security and to prevent waste under such circumstances by seeking peace at whatever sacrifice. It is not a question of equal and exact justice. The paramount demands of peace and good order are to be met first. The policy is not "let justice be done though the heavens fall," but "peace at any price." Hence society endeavors to put pressure upon the disputants, directly, indirectly, openly or covertly, to submit to arbitration and to abide the award. A public service company may be threatened with forfeiture of franchise. A private owner may be threatened with extra-legal sequestration of his property. Both parties may be threatened with a report as to the causes of the dispute and the issues involved to be made public after an official inquiry. Press, pulpit and platform may exhort and rebuke. Thus in one way or another a compromise or an arbitration may be brought about. But when such a result has been achieved, no guide has been provided for the next dispute. No precedent has resulted. Nothing has been accomplished beyond averting or terminating

a condition of private war in that one case. The whole process is crude and wasteful. Every time that this happens we act over again the inception of law. The Roman magistrate who stepped between the contending litigants and called out, "Let go, both of you," the praetor who pronounced the interdict, "I forbid that violence take place," and the indirect devices whereby a case for arbitration was formulated, not upon direct statement of their claims by the parties but through indirectly inducing or coercing a reference or an arbitration, testify to a general condition of which the special condition that obtains in a modern industrial dispute is perhaps the last remnant. By furnishing a rule for decision and by furnishing a guide to conduct the law enables society to reconcile conflicting interests, to conserve values and to eliminate waste.

This same problem of reconciling conflicting interests, of conserving values and of eliminating waste arises in every group—in religious and fraternal organizations no less than in political organizations. And it is met in the same way. By slow and painful development of customs through experience, followed by deliberate formulation of rules invented for the purpose, men select out of the great mass of possible claims those which seem to call most urgently for security, define them, weigh them against other recognized interests and devise means for giving them effect. This process of recognizing, delimiting and securing interests when carried on by a political society is called lawmaking and the rules and standards of conduct and rules and principles of decision thereby set up are called law. In like manner the rules and standards of conduct and the rules and principles of decision developed or devised to secure interests and conserve values in the universal medieval church are called the canon law. No less justly may we apply to the rules and standards of conduct and the rules and principles of decision

evolved or devised to secure interests and conserve values in our universal fraternal organization the name of Masonic law. For if it is said that we cannot enforce our law as the state enforces its law—that the sheriff and his posse looms in the background of the latter while the former is but hortatory—the answer must be that our law has behind it the same sanction that was behind the law of the medieval church, namely, excommunication, and that this is essentially nothing else than the sanction of the earlier stages of the law of politically organized society—namely, outlawry. The group in each case casts out the individual who, through defiance of its law threatens a waste of the values which it seeks to secure.

Assuming, then, that we are justified in speaking of Masonic law, what are the component parts of our Masonic legal system; what are the jural materials with which the Masonic lawyer must work? I venture to distinguish three types of rules: (1) The landmarks; (2) the Masonic common law; (3) Masonic legislation. I cannot deny that in so classifying the jural materials of Masonry I am influenced by our Anglo-American distinction of constitutional rules, common law and legislation. And one should not turn to such an analogy hastily or unadvisedly. For I shall endeavor to show in another connection that Masonic jurisprudence has suffered in this country from overzealous attempts to mould our law by the analogies of the political law of the time and place and from the hasty assumption that our American legal and political institutions might be relied upon to furnish principles of law for a universal fraternity. Nevertheless the craft has engaged the hearty service of great lawyers for at least two centuries and the revival from which we date the Masonry of today took place in a time and in a country in which certain legal and politic ideas were universally entertained and were almost taken to

inhere in nature. Hence we have more than analogy—we have, if not a causal relation, at least a relation of great influence.

Presupposing this three-fold division, we have first, the landmarks, a small not clearly defined body of fundamentals which are beyond reach of change. They are the prescriptive or unwritten constitution (using constitution in the purely American sense) by which every thing must be judged ultimately and to which we must all conform. Second, we have Masonic common law—the body of tradition and doctrine, which falling short of the sanctity and authority of the landmarks, nevertheless is of such long standing, and so universal, and so well attested, that we should hesitate to depart from it and are perforce wont to rely upon it whether to apply our own law or to appreciate the law of our neighbors.

These first two elements of Masonic law rest in tradition and in doctrinal writing. They take the form of: (a) Tradition—the mode of conducting Masonic affairs which has been handed down from master to master, from lodge to lodge for centuries and embodies the experience of countless sincere, zealous, well-informed brothers; (b) treatises, of which Oliver's Institutes of Masonic Jurisprudence and Mackey's Masonic Jurisprudence are the best types; (c) decisions of Grand Masters and review thereof by Grand Lodges, recorded in the published proceedings of Grand Lodges, chiefly in America; and (d) reports of the committees on correspondence of our American Grand Lodges, in which the decisions in other jurisdictions are reviewed and criticized and a comparative and universal element is introduced which is of the highest value to the Masonic jurist. These committees on correspondence have been much kicked at and it cannot be denied that the work of some of them at times has been crude. Yet for the present purpose their work has been inval-

uable. No one who has studied Masonic jurisprudence attentively can fail to testify to the unifying force exerted by these committees. The stimulus of their criticism, even when ill directed has made our local Masonic jurists pause to think of the rest of the Masonic world; it has exerted the scientific influence which is always involved in comparison; it has worked everywhere for universality in our welter of independent local jurisdictions, each ambitious to make its own law.

The two main elements just enumerated make up the unwritten law of Masonry. A third element, namely, Grand Lodge legislation, of which our American Grand Lodges have been exceedingly prolific, constitutes the written law of Masonry.

A moment's digression is required to explain these terms. As soon as legal systems attain any degree of maturity, they are made up of two elements: A traditional element and an imperative element. Following the Roman jurists, the traditional element is generally known in jurisprudence by the name of the unwritten law—**jus non scriptum**—and the imperative element by the name of the written law—**jus scriptum**; not that we do not find the principles and rules of each today only in writings, but because the latter was deliberately and authoritatively reduced to writing at its inception.

Our main interest is in the unwritten law—the traditional element—which, except as local decisions interpret or apply local legislation, proceeds or purports to proceed on universal lines and is or seeks to be in principle permanent and general, even as legislation is ephemeral and local.

Let me develop this point a bit. As has been said, a developed legal system is made up of two elements, a traditional element and an enacted or imperative element. Although at present the balance in our law is shifting gradually to the side of the enacted element, the traditional element is still by far the more im-

portant. In the first instance, we must rely upon it to meet all new problems, for the legislator acts only after they attract attention. But even after the legislator has acted, it is seldom if ever that his foresight extends to all the details of his problem or that he is able to do more than provide a broad, if not a crude outline. Hence even in the field of the enacted law, the traditional element of the legal system plays a chief part. We must rely upon it to fill the gaps in legislation, to develop the principles introduced by legislation and to interpret them. Let us not forget that so-called interpretation is not merely ascertainment of the legislative intent. If it were, it would be the easiest instead of the most difficult of judicial tasks. Where the legislator has had an intent and has sought to express it, there is seldom a question of interpretation. The difficulties arise in the myriad cases with respect to which the law maker had no intention because he had never thought of them—indeed perhaps he could never have thought of them. Here under the guise of interpretation the court, willing or unwilling, must to some extent make the law, and our security that it will be made as law and not as arbitrary rule lies in the judicial and juristic tradition from which the materials of judicial law-making are derived. Accordingly the traditional element of the legal system is and must be used even in an age of copious legislation, to supplement, round out and develop the enacted element, and in the end it usually swallows up the latter and incorporates its results in the body of tradition. Moreover a large field is always unappropriated by enactment, and here the traditional element is supreme. In this part of the law fundamental ideas change slowly. The alterations wrought here and there by legislation, not always consistent with one another, do not produce a general advance. Indeed they may be held back at times in the interests, real or supposed, of uniformity and consist-

ency, through the influence of the traditional element. It is obvious, therefore, that above all else the condition of the law depends upon the condition of this element of the legal system.

Another feature of the twofold composition of developed legal systems is of no less importance. The traditional element rests at first upon the traditional mode of advising litigants on the part of those upon whom tribunals rely for guidance or upon the usage and practice of tribunals. Later it rests upon juristic science and the habitual modes of thought of a learned profession. Thus the ultimate basis of its authority is reason and conformity to ideals of right. On the other hand the imperative element rests upon enactment. It rests upon the expressed will of the sovereign. The basis of its authority is the power of the state.

The parallel with Masonic law is exact. With us, the most important of our jural materials are in the traditional element.

First, we must rely upon the traditional element to meet all new problems, and the normal course of growth in Masonic law is: (1) A new application of a traditional principle by the decision of a Grand Master; (2) review thereof in a Grand Lodge; (3) comment thereon by the various committees on correspondence; (4) the growth of a consensus of opinion on the subject among Masonic jurists; and (5) incorporation in some text book of Masonic law or in declaratory legislation. Secondly, we must rely on the traditional element to fill all gaps in Masonic legislation. Thirdly, we must rely on it to interpret legislation and to develop legislation. Fourthly, above all, as we are a universal institution and ought to legislate cautiously, we must rely on the traditional element to furnish the principles of legislation and a critique of legislation. We are not like a political organization—mere will has no place in any theory of Masonic law-making.

Accordingly it is of the first importance to have a theory of the unwritten law of Masonry and an organized, systematic science of this traditional element of our law—in other words, to have a science of Masonic jurisprudence.

What are the data of this science? What are the materials which we may use in constructing it?

I take it they are five: (1) History; (2) general Masonic tradition; (3) philosophy; (4) logical (or systematic) construction on the basis of history, philosophy and tradition; and (5) authentic modern materials of Masonic common law.

Let me take these up in order. First as to history. Here there are two questions: (a) What materials does Masonic history furnish which are important for Masonic jurisprudence; (b) what is the function of history in Masonic jurisprudence—how and for what purpose should we use history in this connection? On such an occasion one can only speak summarily. In a few words, the historical materials which are important for the Masonic jurist seem to be five:

(1) The manuscript constitutions of British Freemasons—a series of manuscripts the oldest of which go back to the fourteenth century, which are the foundation of authentic Masonic history. These are of especial importance on the subject of the landmarks. Thus, when we trace in the manuscripts the old charge to be true to God and holy church and the new charge of 1738 that if the Mason understands his art aright he will never be a stupid atheist, history reinforces the tradition contained in the master's obligation.

(2) Seventeenth and eighteenth-century notices of English Masonry prior to 1717. From these materials we are able to see how Masons met and what they meant by a lodge prior to the rise of Grand-Lodge Masonry and are enabled to distinguish between the landmarks and the common law as to Masonic organization.

(3) Old lodge records in England and Scotland. These also throw great light upon the organization of the Craft prior to 1717. When we find presidents and wardens and deacons as the highest officers of lodges, we see again what was from the beginning and what is simply common law.

(4) Eighteenth-century writers who had or purported to have access to traditions current among Masons at and prior to the organization of the Grand Lodge of England in 1717 and to old manuscripts not now extant. Even if some or much of the information which they purport to give on the basis of such traditions and such manuscripts is apocryphal, it has entered into the stream of subsequent Masonic tradition and may not be overlooked.

(5) Grand Lodge records, beginning in England in 1723, which show the settled practice of the formative period of Masonry as we know it today.

Of these five classes of historical materials, the fourth calls for some special notice. It is made up of three well-known books which have exerted an almost controlling influence upon our ideas of Masonic history and have largely determined Masonic tradition. These books are: Anderson's Constitutions (1723, second edition 1738), Preston's Illustrations (1772) and Dermott's Ahiman Rezon (1756, second edition 1764). It would be out of place to attempt an appraisal of their historical value here. Moreover the thorough-going critique of Gould, which has definitely overthrown much which had long been accepted on the authority of these books has not wholly destroyed their importance for Masonic jurisprudence. As Hobbes puts it, "authority not truth makes the law." It may well happen that historical mistakes may become fixed in the legal fabric. For example, Lord Coke very likely erred in much that he laid down in his Second Institute

as to the history of our Anglo-American constitutional doctrine of the supremacy of law. Yet his writing is the foundation of our public law and his results have amply justified themselves. It is no fatal objection in practical affairs that the conclusions must sustain the premises. Hence if Anderson and Preston and Dermott cannot be vouched for landmarks, they must be read diligently in order to reach the sources of much of our Masonic common law.

Let us turn now to the other question, what are the uses of Masonic history? One use is to correct tradition, as for example, in the case of the apocryphal long list of royal and noble Grand Masters. Another is to hold philosophy in bounds, as for example, in the case of the controversy which raged once in one of our American Grand Lodges as to the wearing of white gloves, on the theory that gloves were unknown at the time of the building of the temple, or, again, in the rejection of the letter G on philosophical grounds by another of our Grand Lodges. Another use is to test doctrinal (systematic, logical) exposition, as in the case of Mackey's twenty-five landmarks. But this correction by history should not be pressed too far. It should not be used as the basis of rejecting settled Masonic common law, shown by universal practice since the end of the eighteenth century. For example, nothing is better settled than the doctrines of territorial jurisdiction in Craft Masonry and the impropriety of invasion of jurisdiction. If there are no landmarks here, there are settled principles of Masonic conflict of laws which are a part of the universal law of the Craft.

Our second main source of law is tradition. Today this is set forth in the form of doctrinal exposition and Grand-Lodge decision. Much of it is declared by Grand-Lodge legislation. It is of the highest value in fixing the principles of Masonic common law. But elsewhere it is dangerous. It must always be corrected by

careful historical consideration of whether the tradition in question is authentic, immemorial and pure.

Our third main source of law is philosophy, that is, deduction from principles found by philosophical study of the ends and purpose of Masonry—for example, deduction from the principle of universality, from the principle of organization of the moral sentiments of mankind, from the principle of furthering human civilization. It may be compared with the metaphysical method in jurisprudence which seeks to deduce all legal rules from or correct them by a fundamental principle of human freedom. Philosophy is chiefly useful as a check on Masonic history. For example, if one were to look only to history, he might make a strong argument that the dinner or banquet following the work on important occasions was a landmark. Certainly as far back as we have accounts of Masonic work we find the brethren sitting about the board in this way. But consideration of the purposes and ends of the order shows us at once that we have here but an incident of ordinary human social intercourse. So in the case of the objection to white gloves above referred to. The Masonic philosopher perceives at once that we have here a traditional symbol and that purely historical considerations cannot be suffered to prevail.

Our fourth main source of law is logical construction. It has the same place with us as juristic science has in the law of the state. It is of the first importance if the data are sound and are well used. Mackey's famous text book of Masonic jurisprudence (1859) is still the best example of the use of logical construction.

The fifth main source of Masonic law is to be found in authentic modern materials of Masonic customary law and in settled Masonic usage since the last half of the eighteenth century. Indeed the general principles of this settled usage have all but the force of land-

marks. Thus Mackey recognizes: (1) Landmarks; (2) general laws or regulations; (3) local laws or regulations. Here the second is substantially what I call Masonic common law and the third what I call Masonic legislation. Mackey says of the second: "These are all those regulations that have been enacted by such bodies as had at the time universal jurisdiction. They operate, therefore, over the Craft wheresoever dispersed; and as the paramount bodies which enacted them have long ceased to exist, it would seem that they are unrepealable. It is generally agreed that these general or universal laws are to be found in the old constitutions or charges, so far as they were recognized and accepted by the Grand Lodge of England at the revival in 1717 and adopted previous to the year 1726." This would receive Anderson's first edition without question as a conclusive exposition of the principles of the traditional element. Today it is clear that we cannot accept it. But the idea at the bottom of Mackey's system is sound.

I take it we must distinguish two things. (a) We may perceive certain settled principles adhered to by all regular and well-governed lodges since the last quarter of the eighteenth century. For example, with one exception it has always been recognized that at least three lodges are required to set up a Grand Lodge. But we must be cautious here. It will be noticed that Mackey assumes that fluidity is at an end by 1721. We cannot accept this proposition. We must recognize a great deal of fluidity till much later. But Masonry is not bound to retain forever the fluidity of the first half of the eighteenth century. (b) Next we must differentiate from the principles themselves the development of these principles (i) by logical deduction and juristic speculation, and (ii) by judicial empiricism in the decisions of Grand Masters and the review thereof by Grand Lodges.

The latter is almost wholly American and much of it is worthy to rank with the best achievements of legal development in any political organization. If the law of the medieval church became for a time the law of the world and gave ideas and doctrines to the law of the state which are valuable for all time, it is not at all impossible that our universal organization, coming much later to the work of law-making, may in its turn develop legal ideas of universal value and thus contribute indirectly to the furtherance of civilization while contributing directly thereto in its ordinary work.

NOTES TO LECTURE I.

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1. JURISPRUDENCE. On the science of law in general, reference may be made to Holland, Elements of Jurisprudence (12 ed. 1916); Salmond, Jurisprudence (4 ed. 1913); Korkunov, General Theory of Law (transl. by Hastings, 1909).

2. METHODS OF LEGAL SCIENCE IN GENERAL. See Bryce, Studies in History and Jurisprudence, Essay XII; Pollock, Essays in Jurisprudence and Ethics, Essay 1; Pollock, Oxford Lectures, 1-36; Munroe Smith, Jurisprudence, 30-42; Pound, The Scope and Purpose of Sociological Jurisprudence, 24 Harvard Law Rev. 591. Morris's Code of Masonic Law is a striking example of the analytical method in Masonic jurisprudence.

3. THE NATURE OF LAW. See Gray, The Nature and Sources of the Law, 1909; Carter, Law: Its Origin, Growth and Function, 1907; Maine, Early History of Institutions, Lect. 13; Miller, The Data of Jurisprudence, chap. 4.

4. THE LEGAL ORDERING OF SOCIETY. See Ross, Social Control (1908). Also: Green, Lectures on the Principles of Political Obligation, 29-48; Spencer, Justice, particularly chap. 5; Ritchie, Natural Rights, chaps. 1-5; Willoughby, Social Justice (1900); Kohler, Philosophy of Law, transl. by Albrecht, chaps. 3-4.

5. WRITTEN AND UNWRITTEN LAW. See Austin, Jurisprudence, Lects. 28-29; Clark, Practical Jurisprudence, chap. 7; Blackstone, Commentaries, I, 62.

6. MASONIC HISTORY. Perhaps it is no longer necessary to say that this must mean authentic history. If there are unwary still to be warned, they should turn to Gould's History of Freemasonry, chap. 12.

7. THE MANUSCRIPT CONSTITUTIONS. See Gould, Concise History of Freemasonry, chap. 5; Hughan, The Old Charges of British Freemasons, Ars Quatuor Coronatorum, VI, 198 (1893).

8. ANDERSON, DERMOTT, PRESTON. See Gould, Concise History of Freemasonry, chap. 7; Robbins, A. F., Dr. Anderson of the Constitutions, Ars Quatuor Coronatorum, XXIII, 6 (1910); Thorp, J. T., The Rev. James Anderson, Id. XVII, 9 (1904).

II. THE LANDMARKS

BY landmarks in Freemasonry we are generally supposed to mean certain universal, unalterable and unrepealable fundamentals which have existed from time immemorial and are so thoroughly a part of Masonry that no Masonic authority may derogate from them or do aught but maintain them. Using constitution in the American political sense, as I said in the first lecture, they may be said to be the prescriptive constitution of Freemasonry.

Not long ago it was a general article of Masonic belief that there were such landmarks. The charge to the Master Mason taken by our American monitors from Preston's Illustrations, seemed to say so. The first and second charges to the master in the installation service (numbered 10 and 11 in Webb's version)—also taken from Preston's Illustrations—seemed to say so. The books on Masonic jurisprudence in ordinary use and Masonic cyclopedias told us not only that there were landmarks but exactly what the landmarks were in great detail. Probably any master of an American lodge of a generation ago, who was reasonably well posted, would have acquiesced in the confident dogmatism of Kipling's Junior Deacon, who "knowed the ancient landmarks" and "kep' 'em to a hair." Hence it may well shock many even now, to tell them that it is by no means certain that there are any landmarks at all—at least in the sense above defined. For myself, I think there are such landmarks. But I must confess

the question is not so clear as to go without argument in view of the case which has been made to the contrary. Accordingly I conceive that there are two questions which the student of Masonic jurisprudence must investigate and determine: (1) Are there landmarks at all; (2) if so, what are the landmarks of the Craft? And in this investigation, as I conceive, he will find his path made more straight if he attends carefully to the distinction between the landmarks and the common law of Masonry, which I attempted to explain in my former lecture.

It is well to approach the question whether there are landmarks historically. The first use of the term appears to have been in Payne's "General Regulations," published with Anderson's Constitutions of 1723. Payne was the second Grand Master after the revival of 1717. If **entirely** authentic, these regulations, coming from one who took a prominent part in the revival would be entitled to the very highest weight. But many believe that Anderson took some liberties with them, and if he did, of course to that extent the weight of the evidence is impaired. There is no proof of such interpolation or tampering—only a suspicion of it. Hence in accord with what seem to me valid principles of criticism, I must decline to follow those who will never accept a statement of Anderson's, credible in itself, without some corroboration, and shall accept Anderson's Constitutions on this point at their face value.

How then does Payne (or Anderson) use the term "landmark"? He says: "The Grand Lodge may make or alter regulations, provided the old landmarks be carefully preserved." It must be confessed this is not clear. Nearly all who have commented on the use of the term in Payne's Regulations, as reported by Anderson, have succeeded in so interpreting the text as to sustain their own views. Perhaps there could be no

better proof that the text is thoroughly ambiguous. Three views as to what is meant seem to have support from the text.

One view is that Payne used the word landmark in the sense in which we now commonly understand it. This is consistent with the text and has in its favor the uniform belief of Masons of the last generation, the Prestonian charge to the Master Mason and the Prestonian installation ceremony. I should have added tradition, were I sure that the tradition could be shown to antedate the end of the eighteenth century, or indeed to be more than a result of the writings of Dr. Mackey, in combination with the charges just referred to. A second view is that Payne used the word landmark in the sense of the old traditional secrets of the operative Craft and hence that for use today the term can mean no more than a fundamental idea of secrecy. This interpretation is urged very plausibly by Bro. Hextall, P. Prov. G. M. of Derbyshire, in an excellent paper on the landmarks—entitled The Old Landmarks of the Craft—in the Transactions of Quatuor Coronati Lodge, vol. 25, p. 91.

A third view is that Anderson, finding the term in Payne's Regulations, where the word was used in an operative sense—for Payne undoubtedly used operative manuscripts—used it without inquiry into its exact meaning, and without troubling himself as to how far it had a concrete meaning, and so made it available as a convenient and euphonious term to which others might attach a meaning subsequently as Masonic law developed. This last view, which eminent authorities now urge, is a fair specimen of the uncharitable manner in which it is fashionable among Masonic scholars to treat the father of Masonic history. But it should be said that such a phenomenon would have an exact counterpart in the law of the land under which we live. Historians are now telling us of the "myth of Magna

Charta," and it is undoubtedly true that the immemorial rights and privileges of Englishmen which our fathers asserted at the Revolution were at least chiefly the work of Sir Edward Coke in the seventeenth century and that he succeeded in finding warrant therefor in what we have since regarded as the charters of civil liberty. Nevertheless Coke was right in finding in these charters the basis for a fundamental scheme of individual rights. And may we not say that Mackey was equally right in insisting upon a scheme of Masonic jural fundamentals and finding warrant therefor in his books in the references to the landmarks, even if Payne and Anderson were not very clear what they meant by that word?

Next we may inquire how the term has been used since Anderson's Constitutions.

In 1775 Preston, in his Illustrations of Masonry, clearly uses the word landmarks as synonymous with established usages and customs of the Craft—in other words as meaning what I have called Masonic common law. This is indicated by the context in several places. But it is shown conclusively by two passages in which he expressly brackets "ancient landmarks" with "established usages and customs of the order" as being synonymous. He does this in referring to the ritual of the Master Mason's degree, which in each case he says preserves these ancient landmarks. Preston's Illustrations of Masonry was expressly sanctioned by the Grand Lodge of England. Hence we have eighteenth-century warrant for contending that every thing which is enjoined in the Master Mason's obligation is a landmark. But, if this means landmark in the sense of merely an established custom, we are no better off. Perhaps one might argue that the Grand Lodge of England was more concerned with sanctioning the proposition that the Master's degree preserved ancient landmarks than with Preston's definition of a landmark!

However this may be, it is manifest that here, as in the case of Anderson, there is very little basis for satisfactory argument.

Some further light is thrown on Preston's views by the charge to the Master Mason and the charges propounded to the Master at installation, as set forth in the Illustrations of Masonry. The former may well refer to the landmarks contained in the Master Mason's obligation. The proposition in the latter, however, suggests the idea of an unalterable prescriptive fundamental law. The Master-elect is required to promise to "strictly conform to every edict of the Grand Lodge or General Assembly of Masons that is not subversive of the principles and groundwork of Masonry." Also he is required to testify "that it is not in the power of any man or body of men to make alterations or innovations in the body of Masonry." These principles, this groundwork, this body of Masonry, whether we use the term landmarks or not, convey the very idea which has become familiar to us by that name.

The next mention of landmarks is in Ashe's Masonic Manual, published in 1813. But Ashe simply copies from Preston.

In 1819 the Duke of Suffolk, G. M. of England, issued a circular in which he said: "It was his opinion that so long as the Master of the lodge observed exactly the landmarks of the Craft he was at liberty to give the lectures in the language best suited to the character of the lodge over which he presided." The context here indicates clearly that he meant simply the authorized ritual.

Next we find the term used by Dr. George Oliver in a sermon before the Provincial Grand Lodge of Lincolnshire in 1820. In this sermon Oliver tells us that our "ancient landmarks" have been handed down by oral tradition. But he does not suggest what they are nor does he tell us the nature of a landmark. After-

wards in 1846 Oliver published his well-known work in two large volumes entitled "Historical Landmarks of Freemasonry." One will look in vain to this book, however, for any suggestion of Dr. Oliver's views on the matter we are now discussing. The book is an account of the history of the Craft, and the word landmark in the title is obviously used only in the figurative sense of important occurrences—as the phrase "beacon-light," for example, is used in Lord's "Beacon Lights of History." Oliver does not use the term again till his Symbol of Glory, in 1850. In that book he asks the question: "What are the landmarks of Masonry, and to what do they refer"—in other words, the very thing we are now discussing. His answer is most disappointing. He begins by telling us that what landmarks are and what are landmarks "has never been clearly defined." He then explains that in his book, "Historical Landmarks," just spoken of, he is speaking only of "the landmarks of the lectures," and adds—obviously referring to the sense in which we are now using the term—that there are other landmarks in the ancient institution of Freemasonry which have remained untouched in that publication, and it is not unanimously agreed to what they may be confined.

Next (1856) occurred the publication of Dr. Mackey's epoch-making exposition of the term and his well-known formulation of twenty-five landmarks. I shall return to these in another connection. But it is interesting to see the effect of this upon Oliver. In 1863, in his Freemason's Treasury, Oliver classifies the "Genuine landmarks of Freemasonry" into twelve classes, of which he enumerates some forty existing, and about a dozen others as obsolete (nota bene) or as spurious. But he admits that we "are grovelling in darkness" on the whole subject, and that "we have no actual criterion by which we may determine what is a landmark and what not." Nevertheless, Oliver's ideas were beginning

to be fixed, as a result of Mackey's exposition, and it is significant that in 1862, Stephen Barton Wilson, a well-known English Masonic preceptor of that time, published an article in the Freemason's Magazine entitled "The Necessity of Maintaining the Ancient Landmarks of the Order" in which he takes landmarks to mean those laws of the Craft which are universal and irrevocable—the very sense which Mackey had adopted. After this, Mackey's definition of a landmark, his criteria of a landmark, and his exposition of the twenty-five landmarks obtained for a time universal acceptance. The whole was reprinted without comment in England in 1877 in Mackenzie's Royal Masonic Cyclopædia. In 1878, Rev. Bro. Woodford, one of the best of the Masonic scholars of the time, questioned the details of Mackey's list, but without questioning his definition or his criteria. In the same way Lockwood, accepting the definition and the criteria, reduced Mackey's list of twenty-five to nineteen.

Presently Masonic scholars reopened the whole subject. Today three radically different views obtain. The first I should call the legal theory, the second the historical theory, the third the philosophical theory. The legal theory accepts Mackey's idea of a body of universal unalterable fundamental principles which are at the foundation of all Masonic law. But the tendency has been to reduce Mackey's list very considerably, although two of our jurisdictions greatly extend it. Nine American Grand Lodges tell us that the old charges contain the ancient landmarks. Seven Grand Lodges have adopted statements of their own, varying from the seven of West Virginia and the noteworthy ten of New Jersey to the thirty-nine of Nevada and fifty-four of Kentucky. These declaratory enactments—exactly analogous to the attempts to reduce the fundamental rights of man to chapter and verse in the bills of rights in American constitutions—are highly significant for

the study of Masonic common law, and deserve to be examined critically by one who would know the received doctrines of the traditional element in the Masonic legal system. But since the admirable report in New Jersey in 1903 and the careful examination of Mackey's list by Bro. George F. Moore in his papers in the New Age in 1910-12, it is quite futile to contend for the elaborate formulations which are still so common. If, however, we distinguish between the landmarks and the common law, we may still believe that there are landmarks in Mackey's sense and may hope to formulate them so far as fundamental principles may be formulated in any organic institution.

The historical theory, proceeding upon the use of the word landmark in our books, denies that there is such a thing as the legal theory assumes. The skeptic says, first, that down to the appearance of Mackey's Masonic Jurisprudence "landmark" was a term floating about in Masonic writing without any definite meaning. It had come down from the operative Craft where it had meant trade secrets, and had been used loosely for "traditions" or for "authorized ritual" or for "significant historical occurrences," and Oliver had even talked of "obsolete landmarks." Second, he says, the definition of a landmark, the criteria of a landmark, and the fixed landmarks generally received in England and America from 1860 on, come from Mackey. Bro. Hextall says: "It was more because Mackey's list purported to fill an obvious gap than from any signal claims it possessed that it obtained a rapid circulation and found a ready acceptance." Perhaps this is too strong. But it must be admitted that dogmatism with respect to the landmarks cannot be found anywhere in Masonic writings prior to Mackey and that our present views have very largely been formed—even if not wholly formed—by the influence of his writings.

Granting the force of the skeptic's argument, how-

ever, it does not seem to me that the essential achievement of Mackey's book is overthrown. I have already shown that a notion of unalterable, fundamental principles and groundwork and of a "body of Masonry" beyond the reach of innovation can be traced from the revival to the present. This is the important point. To seize upon the term landmark, floating about in Masonic literature, and apply it to this fundamental law was a happy stroke. Even if landmark had meant many other things, there was warrant for this use in Payne's Regulations, the name was an apt one, and the institution was a reality in Masonry, whatever its name. The second theory seems to me to go too much upon the use of the word landmark and not enough upon the thing itself.

Under the influence of the second theory, and in a laudable desire to save a useful word, a philosophical theory has been urged which applies the term to a few fundamental ethical or philosophical or religious tenets which may be put at the basis of the Masonic institution. Thus, Bro. Newton in a note to the valuable paper of Bro. Shepherd in volume one of THE BUILDER, proposes as a statement of the landmarks: "The fatherhood of God, the brotherhood of man, the moral law, the Golden Rule, and the hope of a life everlasting." This is admirable of its kind. The Masonic lawyer, however, must call for some legal propositions. Either we have a fundamental law or we have not. If we have, whether it be called the landmarks or something else is no great matter. But the settled usage of England and America since Mackey wrote ought to be decisive so long as no other meaning of the term can make a better title.

Next then, let us take up Mackey's theory of the landmarks, and first his definition. He says the landmarks are "those ancient and universal customs of the order, which either gradually grew into operation as

rules of action, or if at once enacted by any competent authority, were enacted at a period so remote that no account of their origin is to be found in the records of history. Both the enactors and the time of the enactment have passed away from the record, and the landmarks are therefore of higher authority than memory or history can reach." In reading this we must bear in mind that it was written in 1856, before the rise of modern Masonic history and before the rise of modern ideas in legal science in the United States. Hence it is influenced by certain uncritical ideas of Masonic history and by some ideas as to the making of customary law reminiscent of Hale's History of the Common Law, to which some lawyer may have directly or indirectly referred him. But we may reject these incidental points and the essential theory will remain unaffected—the theory of a body of immemorially recognized fundamentals which give to the Masonic order, if one may say so, its Masonic character, and may not be altered without taking away that character. It is true Mackey's list of landmarks goes beyond this. But it goes beyond his definition as he puts it; and the reason is to be found in his failure to distinguish between the landmarks and the common law.

Next Mackey lays down three requisites or characteristics of a landmark—(1) immemorial antiquity; (2) universality; (3) absolute irrevocability and immutability. He says: "It must have existed from time whereof the memory of man runneth not to the contrary. Its antiquity is an essential element. Were it possible for all the Masonic authorities at the present day to unite in one universal congress and with the most perfect unanimity to adopt any new regulation, although such regulation would while it remained unrepealed be obligatory on the whole Craft, yet it would not be a landmark. It would have the character of universality, it is true, but it would be wanting in that

of antiquity." As to the third point, he says: "As the congress to which I have just alluded would not have the power to enact a landmark, so neither would it have the prerogative of abolishing one. The landmarks of the order, like the laws of the Medes and the Persians, can suffer no change. What they were centuries ago, they still remain and must so continue in force till Masonry itself shall cease to exist."

Let me pause here to suggest a point to the skeptics—for though I am not one of them, I think we must recognize the full force of their case. The point as to the regulation unanimously adopted by the universal Masonic congress is palpably taken from one of the stock illustrations of American law books. The legal futility of a petition of all the electors unanimously praying for a law counter to the constitution or of a resolution of a meeting of all the electors unanimously proclaiming such a law is a familiar proposition to the American constitutional lawyer. One cannot doubt that Mackey had in mind the analogy of our American legal and political institutions. Yet to show this by no means refutes Mackey's theory of a fundamental Masonic law. The idea of an unwritten fundamental law existing from time immemorial is characteristic of the Middle Ages and in another form prevailed in English thought at the time of the Masonic revival. To the Germanic peoples who came into western Europe and founded our modern states, the Roman idea of law as the will of the sovereign was wholly alien. They thought of law as something above human control, and of law-making as a search for the justice and truth of the Creator. In the words of Bracton, the king ruled under God and the law. To Coke in the seventeenth century even Parliament was under the law so that if it were to enact a statute "against common right and reason, or repugnant, or impossible to be performed" the common law would hold that statute void. In the

reign of Henry VII the English Court of Common Pleas actually did hold a statute void which attempted to make the king a parson without the consent of the head of the church and thus interfered with the fundamental distinction between the spiritual and the temporal. In 1701, Lord Holt, Lord Chief Justice of England, repeated Coke's doctrine and asserted that there were limitations upon the power of Parliament founded on natural principles of right and justice. This idea took form in America in our bills of rights and our constitutional law. But it is not at all distinctively American. On the contrary the accidents of legal history preserved and developed the English medieval idea with us although it died in the eighteenth century at home. In the whole period of Masonry in England prior to the revival and in the formative period after the revival, this idea of an unwritten, immemorial fundamental law would have been accepted in any connection in which men spoke or thought of law at all.

When presently I come to the subject of Masonic common law I shall have to take up Mackey's twenty-five landmarks in detail. For I take it his list may still stand in its main lines as an exposition of our common law. But are there any of his twenty-five which we may fairly accept as landmarks? Perhaps it is presumptuous, after the labors of Lockwood, of Robbins, of the New Jersey committee, and of Moore to venture a formulation of the landmarks simply on my own authority. But the matter is too important to be allowed to rest in its present condition without some attempt to set off what is fundamental on the one hand and what is but established custom on the other hand. Moreover there is less disagreement at bottom than appears upon the surface. To a large extent the difficulties besetting this subject are due to reluctance on the one hand to reject established usages and on the other hand to admit those usages to the position of uni-

versality and unalterability involved in putting them in the category of landmarks. When, therefore, we recognize an important category of established customary law, not indeed wholly unalterable, but entitled to the highest respect and standing for the traditional element of our Masonic legal system, we are able at once to dispose of many subjects of controversy and to reduce the matter to a footing that eliminates the most serious features of disagreement.

For myself, I should recognize seven landmarks, which might be put summarily as follows: (1) Belief in God; (2) belief in the persistence of personality; (3) a "book of the law" as an indispensable part of the furniture of every lodge; (4) the legend of the third degree; (5) secrecy; (6) the symbolism of the operative art; and (7) that a Mason must be a man, free born, and of age. Two more might be added, namely, the government of the lodge by master and wardens and the right of a Mason in good standing to visit. But these seem doubtful to me, and doubt is a sufficient warrant for referring them to the category of common law.

"Belief in God, the G. A. O. T. U.," says Bro. Moore, "is the first landmark of Freemasonry." Doubtless Mackey would have agreed, though in his list it bears the number nineteen. For this landmark we may vouch:

(1) The testimony of the old charges in which invariably and from the very beginning there is the injunction to be true to God and holy church. Anderson's change, which produced so much dispute, was directed to the latter clause. As the medieval church was taken to be universal, the addition was natural. In eighteenth-century England there was a manifest difficulty. But the idea of God is universal and there seems no warrant for rejecting the whole of the ancient injunction.

(2) The resolution of the Grand Lodge of England that the Master Mason's obligation contains the ancient landmarks.

(3) The religious character of primitive secret societies and all societies and fraternities founded thereon.

(4) The consensus of Masonic philosophers as to the objects and purposes of the fraternity.

(5) The consensus of Anglo-American Masons, in the wake of the Grand Lodge of England, in ceasing to recognize the Grand Orient of France after the change in its constitutions made in 1877.

The second landmark, as I have put them, is number twenty in Mackey's list. He says: "Subsidiary to this belief in God, as a landmark of the order, is the belief in a resurrection to a future life. This landmark is not so positively impressed on the candidate by exact words as the preceding; but the doctrine is taught by very plain implication, and runs through the whole symbolism of the order. To believe in Masonry and not to believe in a resurrection would be an absurd anomaly, which could only be excused by the reflection that he who thus confounded his skepticism was so ignorant of the meaning of both theories as to have no foundation for his knowledge of either."

Perhaps Mackey's meaning here is less dogmatic than his words. Perhaps any religious doctrine of persistence of personality after death would satisfy his true meaning, so that the Buddhist doctrine of transmigration and ultimate Nirvana would meet Masonic requirements. Certainly it is true that our whole symbolism from the entrance naked and defenseless to the legend of the third degree is based on this idea of persistence of personality. Moreover this same symbolism is universal in ancient rites and primitive secret societies. True in the most primitive ones it signifies only the passing of the child and the birth of the man. Yet

even here the symbolism is significant. I see no reason to reject this landmark.

We come now to an alleged landmark about which a great controversy still rages. I have put it third. In Mackey's list it is number twenty-one. I will first give Mackey's own words: "It is a landmark that a 'book of the law' shall constitute an indispensable part of the furniture of every lodge. I say advisedly book of the law because it is not absolutely required that everywhere the old and new testaments shall be used. The book of the law is that volume which, by the religion of the country, is believed to contain the revealed will of the Grand Architect of the Universe. Hence in all lodges in Christian countries, the book of the law is composed of the old and new testaments. In a country where Judaism was the prevailing faith, the old testament alone would be sufficient; and in Mohammedan countries and among Mohammedan Masons, the Koran might be substituted."

Perhaps the point most open to criticism here is that it must be the book accepted as the word of God by the **religion of the country.** For example, in India, lodges in which Englishmen sit with Hindus and Mohammedans, keep the Bible, the Koran and the Shasters among the lodge furniture, and obligate the initiate upon the book of his faith.

The essential idea here seems to be that Masonry is, if not a religious institution, at least an institution which recognizes religion and seeks to be a co-worker with it toward moral progress of mankind. Hence it keeps as a part of its furniture the book of the law which is the visible and tangible evidence of the Mason's adherence to religion. In so doing we are confirmed by the evidence of primitive secret societies; for religion, morals, law, church, public opinion, government were all united in these societies at first and gradually differentiated. The relation of Masonry with re-

ligion, in its origin, in its whole history, and in its purposes, is so close that there is a heavy burden of proof on those who seek to reject this tangible sign of the relation, which stood unchallenged in universal Masonic usage till the Grand Orient of France in 1877 substituted the book of Masonic constitutions. In view of the universal protest which that action brought forth, of the manifest impossibility of accepting the French resolution as fixing the ends of the order, of the uniform practice of obligating Masons on the book of the law, as far back as we know Masonry, and as shown uniformly in the old charges, it seems impossible not to accept Mackey's twenty-first landmark in the sense of having a recognized book or books of religion among the furniture of the lodge and obligating candidates thereon. Indeed the English Grand-Lodge resolution that the Master Mason's obligation includes the landmarks of Masonry, seems fairly to include the taking of that obligation upon the book of the law, as it was then taken.

Fourth I have put the legend of the third degree. This is Mackey's third landmark. "Any rite," he says, "which should exclude it or materially alter it, would at once by that exclusion or alteration cease to be a Masonic rite." Here certainly we have something that meets the criteria of immemorial antiquity and of universality. The symbolism of resurrection is to be found in all primitive secret rites and in all the rites of antiquity, and the ceremony of death and re-birth is one of the oldest of human institutions.

Fifth I have put secrecy. Mackey develops this in his eleventh and twenty-third landmarks. The exact limits must be discussed in another connection. But if anything in Masonry is immemorial and universal and if the testimony of ancient and primitive rites counts for anything at all, we may at least set up the requirement of secrecy as an unquestioned landmark.

Sixth I should recognize as a landmark employment of the symbolism of the operative art. This is Mackey's twenty-fourth landmark. Perhaps one might say that it is a fundamental tenet of Masonry that we are Masons. But it is worthy of notice that this symbolism is significantly general in ancient and primitive teaching through secret rites.

Finally I should put it as a landmark that the Mason must be a man, free born, and of full age according to the law or custom of the time and place. This is in part Mackey's eighteenth landmark, though he goes further and requires that the man be whole. I shall discuss the latter requirement in connection with Masonic common law. As to the form for which I contend, perhaps I need only vouch (1) the vote of the Grand Lodge of England that the Master Mason's obligation contains the landmarks; (2) universal, immemorial and unquestioned usage; and (3) the men's house of primitive society and its derivatives.

A special question may possibly arise in connection with the proposition that it is a landmark that no woman shall be made a Mason. No doubt all of you have heard of the famous case of Miss St. Leger, or as she afterwards became, the Hon. Mrs. Aldworth, the so-called woman Mason. Pictures of this eminent sister in Masonic costume, labelled "The Woman Mason" are not uncommon in our books. The initiating of Mrs. Aldworth is alleged to have taken place in 1735 in lodge No. 44 at Doneraile in Ireland. She was the sister of Viscount Doneraile who was Master, and as the lodge met usually at his residence, Doneraile House, the story is she made a hole in the brick wall of the room with scissors and so watched the first and second degrees from an adjoining room. At this point she fell from her perch and so was discovered. After much debate, so the story goes, the Entered Apprentice and Fellowcraft obligations were given her. This transaction was

first made known in a memoir published in 1807—seventy-two years afterwards. Modern English Masonic historians have examined the story critically and have proved beyond question that it must be put among the Masonic apocrypha. The proof is too long to go into here, where in any event it is a digression. But I may refer you to Gould's larger work where you will find it in full.

Of course the action of a single lodge in 1735 would not be conclusive—against (1) the terms of the Master Mason's obligation; (2) the resolution of the Grand Lodge of England in the eighteenth century; (3) the weighty circumstance that all secret societies of primitive man and the societies among all peoples in all times that continue the tradition of the men's house were exclusively societies of men. But it is after all a relief in these days of militant feminism, to know that we are not embarrassed by any precedent.

Such are the landmarks as I conceive them. But much remains to be said about other institutions or doctrines which have some claim to stand in this category when we come next to consider Masonic common law.

NOTES TO LECTURE II.

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Parvin, Old Landmarks of Masonry, THE BUILDER, I, 38 (1915).

Poignant, The Landmarks, Ars Quatuor Coronatorum, XXV, 151 (1911).

Shepherd, The Landmarks of Masonry, THE BUILDER, I, 183, 197 (1915). [This paper has a good bibliography with references to pronouncements of American Grand Lodges. To Bro. Shepherd's list we must now add Massachusetts which has declared at least seven landmarks in the Constitutions of 1918.]

Wilson, The Importance of Maintaining the Ancient Landmarks of the Order, Freemasons' Magazine, n. s., VI, 445 (1862), reprinted in Moore, Freemasons' Monthly Magazine, XXI, 304 (1862).

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1. PAYNE'S GENERAL REGULATIONS. These were first printed in Anderson's Constitutions, 1 ed., 1723. They may be found conveniently in Mackey, Masonic Jurisprudence, 7 ed. 63 ff. See Gould, Concise History of Freemasonry, chap. 6.

2. COMMON LAW AS LEGISLATION WORN DOWN BY TIME. This idea seems indirectly taken, through Blackstone, from chap. 1 of Hale, History of the Common Law, 1713. Sir Matthew Hale suggests that a great part, if not all, of the unwritten law is made up of ancient statutes which have ceased to be remembered as such.

3. REGULATION OF A UNIVERSAL MASONIC CONGRESS IN CONTRAVENTION OF THE LANDMARKS. Compare Blackstone, Commentaries, I, 161-164.

4. THE COMMON LAW OF ENGLAND AND PARLIAMENT. See Coxe, Judicial Power and Unconstitutional Legislation, chaps. 13-17.

5. THE IDEA OF AN UNWRITTEN FUNDAMENTAL LAW IN THE XVIII CENTURY. This was given currency in England and America by the dicta of Lord Coke in Bonham's Case, 8 Coke's Reports 118, in which he declared that the common law would control acts of Parliament and adjudge them void when against common right and reason. This was quoted by

Lord Chief Justice Holt at the opening of the eighteenth century in City of London v. Wood, 12 Modern Reports 669 at 687. Before the latter case Chief Justice Hobart had said in Day v. Savage, Hobart's Reports 87, that "an act of Parliament made against natural equity so as to make a man judge in his own cause" was void. Blackstone stated the proposition in a modified form, Commentaries, I, 91. In the eighteenth century legal and political thinking there was a tendency to identify the immemorial common-law rights of Englishmen, guaranteed by a fundamental unwritten law, with the natural rights of man deduced by philosophers from the nature of man in the abstract. Thus although the revolution of 1688 had made Parliament supreme, the idea of an unwritten fundamental law persisted, and in America, where legislative power had always been limited by the terms of colonial charters, and after the Revolution was limited by the terms of state constitutions, the idea persisted.

6. THE GRAND ORIENT OF FRANCE. I leave this as it was written in 1912. See Gould, History of Freemasonry, IV, 191. The subject has now become highly controversial. See Report of California Grand Lodge Committee, THE BUILDER, V, 11 (1919); Goodwin, American Grand Lodges and French Masonry, THE BUILDER, V, 153 (1919)—with a good bibliography.

7. THE BOOK OF THE LAW AND THE GRAND ORIENT OF FRANCE. I leave this as it was written in 1912. But see the Report of M. W. Bro. Gallagher, Proc. Grand Lodge of Massachusetts, 1914, 168-176, especially on 171-173; Ramsey, The Grand Orient of France and the Great Lights, THE BUILDER, IV, 6 (1918).

8. MISS ST. LEGER. See Chetwode Crawley, Notes on Irish Freemasonry, Ars Quatuor Coronatorum, VIII, 53; Conder, The Hon. Miss St. Leger and Masonry, Id. 16 (1895); Gould, History of Freemasonry, III, 43, Concise History of Freemasonry, chap. 6.

III. MASONIC COMMON LAW

PART I.

IN England, the common law, using the term to mean the traditional element of the legal system, is the customary course of decision in the English courts from the thirteenth century to the present, as developed and applied to the conditions of the present by jurists and judges in the nineteenth century. In America, the common law, using the term in the same sense, has four chief constituents: (1) the course of decision in the English courts prior to colonization, or at least prior to the Revolution, so far as applicable to the social, political, economic, and physical conditions in America; (2) the course of decision in American courts since the Revolution; (3) the course of decision in England and other countries with English legal institutions since the Revolution; and (4) international law, or the body of rules governing the relations of individuals with foreign states and citizens of one state with those of other states which has been received by general agreement of the community of nations in modern times. Thus it will be seen there are two types of rules which go to make up the common law of the lawyer—universal principles, upon which English and American courts alike have proceeded since the Revolution, and local American usages, of a general and permanent nature, which have developed in this country since our independence.

In the same way we may recognize two types of usages in our Masonic common law: on the one hand

a universal body of usage, developed in eighteenth-century Masonry after the revival of 1717, and on the other hand a general body of usage developed in the United States, chiefly in the nineteenth century, through decisions of Grand Masters and the review thereof in Grand Lodges, in which the former is developed and applied. In this lecture I shall speak only of the former.

Masonic common law, in the stricter sense, I take to be the body of tradition and doctrine, developed in eighteenth-century Masonry, which is of such long standing, is so universal, and is so well attested, that, although it lacks the absolute authority of the landmarks, it stands at the foundation of our Masonic legal system. It is to be used to interpret and supply gaps in Masonic legislation and it is never lightly to be set aside. Our fathers used to say that statutes in derogation of the common law were to be strictly construed. Whether or not this is true in the everyday law of the state it may well be true in Masonry where these settled customs have entered into the very structure of the Order.

The foundation of all study of Masonic common law is in Mackey's exposition of the landmarks. We may grant that not more than one-third of his twenty-five landmarks are to be accepted as such. Nevertheless he succeeded wonderfully in putting his finger on the significant points in generally accepted Masonic usage. Everything that has been done since has been done in the light of his exposition and on more than one point he said all that was to be said. Hence the most effective mode of treating Masonic common law is to take up his list of landmarks **seriatim** and expound those which seem to be rather doctrines or institutions of our common law as such, showing that they are not to be classed as landmarks.

Dr. Mackey puts as the first landmark the modes of recognition. These, he says, are the most legitimate and unquestioned of the landmarks. To use his own words, "They admit of no variation; and if ever they have suffered alteration or addition, the evil of such a violation of the ancient law has always made itself subsequently manifest." Indeed at first sight, nothing might seem more fundamental, and yet Masonic history gives us pause.

For one thing, there is Preston's version of the causes of the great schism in Masonry in the eighteenth century. Even if we do not accept this—and I take it Gould has shown that we should not—it is highly significant as to the development of the important Masonic institution in question.

Preston's narrative is that in consequence of the expose of Masonry in Prichard's Masonry Dissected, a change was made in the mode of communication of the degrees, so that the words of the Entered Apprentice and Fellowcraft degrees were exchanged. This change, he gives us to understand, took place in 1739. But there is pretty conclusive evidence that the order of the Moderns, which Preston tells us, represents a change made in 1739, was the order which obtained in 1737 and the assertion that there was a change, made by Dermott and by Preston a generation later, seems traceable to two sources: (1) The change from two parts to three degrees definitely established in 1738, which was the cause of much discontent at the time and was one of the causes of a revolt from the Grand Lodge of England in 1739; and (2) a statement of a spurious ritual of 1766, one of a crop of spurious rituals and exposés of which the decade 1760 to 1770 was prolific, that such a change was made in consequence of Prichard's Masonry Dissected. What the author knew was that Prichard's order and that of the Grand Lodge of England were not the same. Of course

Prichard could not be wrong! That Prichard's book had a considerable influence on Masonic ritual is a significant as well as a curious fact, showing how fluid the Masonry of the period really was. The conclusion that the order of 1737 was what it remained till the union with the ancients in 1813 might at first seem to sustain Mackey's view. But how can we adhere to it when we find that the prevailing order today is not that of 1737 and that two distinct systems of recognition prevailed in England from 1747 to 1813?

Again, we are taught not to be dogmatic when we note that a distinct substitute word has prevailed in many parts of the world and may possibly go back to Jacobite Masons in the first quarter of the eighteenth century. Even if we do not accept the view that "macbenac" is mac benach (blessed is the son) and is an allusion to the Pretender, the prevalence of this distinct word puts a heavy burden of proof upon those who would assert the immemoriality and universality of our present modes of recognition. If we suppose it to be a corruption, analogus to "Peter Gower" and "Naymus Graecus," when we put our substitute word of four syllables (pronounced as three) beside "macbenac" and the mysterious "maughbin" of operative manuscripts, we may well wonder whether we have anything more than a clever working into Hebrew of a corrupt word hopelessly lost or an eighteenth-century endeavor to make a word worthy of the occasion. At any rate, such reflections compel modesty in laying down landmarks. Perhaps the card or receipt for dues now required of the visitor in more than one jurisdiction is not so counter to fundamental principles as has been asserted.

Yet one cannot doubt that the established modes of recognition are upon a much firmer basis than the ephemeral creatures of Grand-Lodge legislation and Grand-Lodge decision. As far as anything can be

established short of the landmarks these are established. They are a part of our common law and deserve to be cherished as such.

Dr. Mackey's second landmark is the division of Craft Masonry into three degrees. Here he has support in the English pronouncement of 1813 "that ancient Craft Masonry consisted of the three degrees of Entered Apprentice, Fellowcraft, and Master Mason, including the Holy Royal Arch." But, he adds, "that disruption has never been healed, and the landmark, although acknowledged in its integrity by all, still continues to be violated." A landmark universally violated since 1813 may indeed excite our suspicion. And here again history compels us to take a different stand. For whether 1717 was a revival or a beginning in Craft Masonry, there can be no doubt that the middle of the eighteenth century did not preserve our high degrees —it created them. The first known reference to the Royal Arch is in 1741. In that year the records of a lodge (No. 21) set forth that in a procession the Master was "preceded by the Royal Arch carried by two excellent Masons." In 1744 Dassigny, an Irish Mason, tells us that there was an assembly of Royal Arch Masons at York, that the degree had been brought from York to Dublin, and that it had been practised in London "some small space before." He also tells us that the Royal Arch Assembly at York was "an organized body of men who have passed the chair." The evidence seems clear that this was the first additional or high degree. On the whole we may be pretty sure it was worked in England at least from 1740 and Gould thinks it has its origin in the alteration of the Master's creed in the constitutions of 1723. The Past Master's degree does not appear till the Grand Lodge of the so-called Ancients in 1751, and this was not admitted by the regular or so-called Modern Grand Lodge till 1810. But gradually, as the thirst for high degrees grew,

probably influenced not a little by the growth of elaborate "systems" of high degrees on the Continent, a practice arose of conferring the Royal Arch upon Masons not qualified to receive it by a fictitious or constructive passing them through the chair, and thus a Past Master's degree arose and in effect a new rite. For this a new ceremony was evolved which, it is shown clearly enough, has no relation to the simple communication of secrets known to Payne, Desaguliers, and Anderson. This rite or these degrees were worked in the Craft lodges, and during the schism both the Modern and the Ancient Grand Lodges came to permit them indifferently. Thus at the union it was possible to recognize the Royal Arch as a component part of ancient Freemasonry. By this time, however, it had achieved an independent existence. One might say, of course, that this is but the tale of the disruption of which Mackey speaks. But there is clear testimony to the contrary. In 1757, Manningham, Deputy Grand Master of the Grand Lodge of England (Modern), in a letter on the subject of the high degrees, said: "These innovations are of very late years, and I believe the brethren will find a difficulty to produce a Mason acquainted with any such forms twenty, nay ten years ago. My own father has been a Mason these fifty years and has been at Lodges in Holland, France and England. He knows none of these ceremonies. Grand Master Payne, who succeeded Sir Christopher Wren, is a stranger to them, as is also an old brother of ninety I conversed with lately. This brother assures me he was made a Mason in his youth and has constantly frequented lodges till rendered incapable by advanced age, and never heard or knew of any other ceremonies or words than those used in general amongst us." This is not conclusive. But it is very suggestive that the Royal Arch was attributed by Ireland to distant York, and yet has no warrant in York records till 1761. A

priori, one must feel the true word is an essential part of Masonry; that it is, as Dermott put it, "The root, heart, and marrow of Masonry." Yet in the face of history this is no warrant for pronouncing it a landmark that communication of the true word is a part of Craft Masonry. On the contrary it is notorious Masonic common law that this is a matter for rites that build on Craft Masonry and vary infinitely in the details.

So also with the division into three degrees. I discussed the evidence upon this point in a lecture last year upon the causes of divergence in ritual. Perhaps it is enough to say that there seems indubitable proof that originally there were two "parts" and that our present system of working the two parts in three degrees arose in some way between 1723 and 1728 and was not accepted universally for many years after the latter date. And yet nothing in Masonry short of a landmark could be better established. If the system of three degrees cannot claim the immemorial existence that characterizes a landmark, it can claim to be of such long standing, to be so universal, and to be so well attested—in that it is the common element in every rite that has ever been devised—as to be a fundamental institution of Masonic common law.

The third landmark in Mackey's exposition, namely, the legend of the third degree, was considered in the last lecture.

Next Mackey puts, as his fourth landmark, to use his own words, "The government of the fraternity by a presiding officer, called a Grand Master, who is elected from the body of the Craft." Here again history gives us pause. Tradition does indeed tell us of Grand Masters prior to 1717 and Anderson, in 1738, gave us a long and palpably apocryphal list. As to Sir Christopher Wren, whom Anderson has taught us to consider

the last Grand Master prior to the so-called revival, there is at least much doubt whether he was a Mason at all. And there is every reason to hold that there were no Grand Masters prior to the election of Sayer on St. John the Baptist's day, 1717. It might be said that the name is not important if it may be shown that some such officer, elected from the body of the Craft, has existed from time immemorial. But this cannot be shown and evidently is not true.

We have abundant evidence as to speculative lodges in England at least as far back as 1646, and have good reason to believe that speculative Masonry was widely diffused in seventeenth-century England and that persons of the first rank were joining eagerly. Had there been such an institution as a Grand Mastership with the dignity and authority which it involves, it could not possibly have left no trace in the voluminous writings and loquacious diaries of the time. Moreover, we have actual written minutes of the Masons at York from 1712 and minutes from 1705 were once extant and are authentically established. These show that there was no Grand Lodge and no Grand Master at York till 1725. Prior to that time there was an annual assembly of Masons presided over by a "President" for the time being. But this President was a mere chairman of what was really a sort of convention. In 1778 when a claim of priority was made for the Grand Lodge at York, these presidents were made into Grand Masters. But the contemporary records show they were nothing of the sort and that the Grand Lodge organization at York in 1725 was fashioned upon the model of the London Grand Lodge of 1717. Likewise in Scotland we have abundance of evidence, including lodge records, covering the whole of the seventeenth century. Nowhere is anything disclosed at all like a Grand Mastership, unless it be the appointment by the crown of a "Warden-General" for

the Masons at the end of the sixteenth century. This obviously proves too much.

It must be concluded, therefore, that the institution of the Grand Master is no landmark. Yet here also is an undoubted and fundamental institution of Masonic common law. From the revival in 1717 to the present the Grand Mastership has been the cornerstone of Masonic organization. It has established itself as a universal institution and is as thoroughly a part of Masonry as anything short of a landmark may be. Hence one must needs feel some pain in reading in the proceedings of American Grand Lodges that "the office of Grand Master is a constitutional office"—meaning that it is derived from, gets its powers by virtue of, and has its prerogatives determined by Masonic legislation. One may suspect, indeed, that those who so speak confound the "constitution" of an American state and the "constitutions" of Freemasonry. The latter, let us ever bear in mind, are but statutes. So far as we have a "constitution" in the sense of American public law, it is to be found in the landmarks. The Grand Master is not the creature of Masonic legislation. To that extent Mackey was absolutely right. If his office and his prerogatives are not landmarks, then we may grant that Masonic legislation in any jurisdiction may impair the office and shear it of its time-honored prerogatives. In the same way the ruthless hand of the legislator may, as a mere display of power, alter any of our established usages short of a handful of landmarks. But unless and until this is clearly and expressly done, the common law of Masonry prevails. Surely the mouth of the Masonic legislator is speaking great things when he tells us that we are to look to the pages of his codes to tell us the full measure of the powers and prerogatives of the Grand Master, who is older than legislation. For the Grand Master dates from 1717, while the first Masonic legislation—itself

only declaratory—is the compilation of General Regulations by Grand Master Payne in 1720, approved by the Grand Lodge of England in 1721. Legislation may alter and take away, but is not the source and will not be until ignorance or innovation go so far as to lead some jurisdiction to set up a "constitution" in the sense of American public law in the place of the "constitutions" (as a body of legislation) which alone are known to Masonic law.

Mackey's fifth, sixth, seventh and eighth landmarks have to do with prerogatives of the Grand Master and hence cannot be admitted to be landmarks for the reasons above set forth. If the office of Grand Master did not exist in form or in substance prior to 1717 it is obvious that the prerogatives of that office cannot be of immemorial antiquity. Some of these prerogatives, however, are undoubted common law. Thus Mackey's fifth landmark reads: "The prerogative of the Grand Master to preside over every assembly of the Craft, wheresoever and whensoever held." As he is Grand Master only within his jurisdiction, this means that he may assume the chair at any and every communication not only of the Grand Lodge but of any subordinate or constituent lodge. This is certainly Masonic common law and is not a power derived from legislation, although constitutions may have declared it. Until constitutions add or subtract something we may not concede that they are sources. When they merely declare we may look to the universal practice of Masons since the eighteenth century and to the established customs of the Craft since the Grand Lodge system became established as the real sources of Masonic law.

The sixth and seventh landmarks in Mackey's system have to do with the prerogative of the Grand Master to grant dispensations for conferring degrees at irregular times and for opening and holding lodges.

Here again we have undoubted institutions of Masonic common law. For we have here an idea perfectly familiar to the formative period of Masonic institutions however alien to the political and legal ideas of today. The dispensing power was part of the royal prerogative in England down to 1688 and a dispensing power for special occasions upon special reasons was regarded—and perhaps must to some extent be regarded always—as inherent in all magisterial office. Adaptation and application of general rules to actual cases which are sometimes particular rather than general in their significant characteristics is the essence of administration.

As laws are general rules the process of making them involves elimination of elements of particular controversies which are special to those controversies. In eliminating immaterial factors to reach a general rule, in view of the infinite variety of controversies and the almost imperceptible differences of degree in their approximation to recognized types, it is not possible entirely to avoid the elimination of factors which will be more or less material in some particular controversy. To take account of all these variations an over-wide discretion in the magistrate would be required. On the other hand, if exceptions and qualifications and provisos are appended to legal rules to any great extent the system of law becomes cumbrous and unworkable. A compromise must be made; a middle course must be found between over-wide discretion and over-minute law making. Necessarily, therefore, legal standards are more or less artificial. In the law of the state we meet this difficulty by discretion of judges and magistrates, by the pardoning power of the supreme executive, by a certain extra-legal power of juries to run away with the law in bringing in a general verdict. All these are but phases of a dispensing power that is inevitable if lifeless rules are to be made to govern

creatures of flesh and blood. Hence the equitable powers of the Roman praetor, the interference of the Roman emperor in cases of shocking breach of confidence that led to the law of testamentary trusts, the power of the Frankish king to decide **secundum aequitatem,** the power of the Anglo-Saxon king to mitigate the law, the power of the king's chancellor to deal with particular cases of great hardship in accordance with equity and good conscience. Hence we commit the regulation of public utilities today to administrative commissions rather than to courts. Hence the ecclesiastical law recognized a dispensing power in the pope and to less extent in the bishops. Thus the dispensing power of the Grand Master is inherent in his office. It has its origin in the nature of things and is but recognized and declared by Masonic legislation where such legislation purports to confer it.

More serious question arises with respect to the eighth of Mackey's list, namely, the alleged prerogative of the Grand Master to make Masons at sight. This has been the subject of much debate and clearly is not a general institution of Masonic common law. Brother Hughan, indeed, styled it an "American pretension." But much misapprehension has prevailed in the discussion of the subject. Some tell us that the power has not existed "since 1717," apparently reasoning that it is incompatible with the Lodge and Grand-Lodge system that has prevailed since that date. On the other hand we are told that it is a landmark which has been suffered to fall into disuse by some while others have vindicated it in its integrity. Neither position can be maintained. When we are dealing with a question of Masonic common law our only criterion is long-standing, general, well attested usage. And authorities and jurisdictions will necessarily differ as to the application of this criterion and will reach different results, exactly as the courts of our states differ as to what are prin-

ciples of the common law under which we live, and reach different results so frequently that, with a common foundation in each, the details of the traditional law differ in all our states. Certainly one may say with confidence that the power in question is not a general much less a universal institution of Masonic common law. But if it is recognized and obtains anywhere by custom or declaratory legislation, there is no reason why Masonic jurists elsewhere should hurl argumentative thunderbolts at the authorities of that jurisdiction. The nine American Grand Lodges that accept Mackey's twenty-five landmarks in their entirety are at least entitled to claim that **with them** this prerogative is Masonic common law and rests in their law on a higher basis than such purely legislative rules as those which in some American jurisdictions preclude those who follow certain occupations from becoming Masons. For a logical argument may be made for the power as an incident of the common-law prerogative of the Grand Master to dispense with the law for grave reasons or on important occasions and it is at least disputable whether some such power was not exercised by eighteenth-century Grand Masters.

Mackey's ninth landmark is thus stated: "The necessity of Masons to congregate into lodges." He adds: "It is not to be understood by this that any ancient landmark has decreed that permanent organization of subordinate lodges which constitutes one of the features of the Masonic system as it now prevails. But the landmarks of the order always prescribe that Masons should from time to time congregate together for the purpose of either operative or speculative labor and that these congregations should be called lodges. Formerly these were extemporary meetings called together for special purposes and then dissolved, the brethren departing to meet again at other times and other places according to the necessity of circum-

stances. But warrants of constitution, by-laws, permanent officers, and annual arrears are modern innovations entirely outside the landmarks and dependent entirely on the special enactment of a comparatively recent period."

The comment of Brother George F. Moore in this connection is very pertinent. He says: "This amounts to saying that a society of men must be a society—that an association of men must associate, that a fraternity of men must fraternize. A common definition of a Freemason is 'one of a secret association composed of persons united for social enjoyment and mutual assistance.' But it is not so clear that the meeting of Freemasons were to be called 'lodges' nor is there any evidence of a landmark prescribing the use of the word 'lodge'."

We must remember that the lodges of seventeenth-century England were often mere occasional assemblies of Masons and indeed were called "assemblies" at York. Often any number of Masons who find themselves in a convenient place at a convenient time are seen holding a lodge. As a landmark, therefore, this must fail. Yet nothing is more undoubted in Masonic common law than the system of regular and permanent lodges that grew up in England after 1691, became an established part of the Grand Lodge system of 1717, and obtained universal authority in the Masonic world.

Mackey states his tenth landmark thus: "The government of the Craft when so congregated [i. e. in a lodge] by a Master and two Wardens is also a landmark. A congregation of Masons meeting together under any other government, as that for instance of a president and vice-president, or a chairman and subchairman, would not be recognized as a lodge. The presence of a Master and two Wardens is as essential to a valid organization of a lodge as a warrant of constitution is at the present day. The names, of course,

vary in different languages; but the officers, their number, prerogatives and duties are everywhere identical."

A few points are noteworthy in connection with the organization of a Masonic lodge: (1) The organization with a Master and two Wardens is analogous to that of a parish in England, with the rector and two wardens. (2) It is the same as that of the Craft gilds in England, where there was a Master or governor (or some such title) and two wardens. (3) We know the title **Master** was not always used. In York the chief officer was called President. In Scotland he was called Warden. But this is not decisive and is no proof that there were not three officers. (4) The Master and Wardens were recognized and their duties defined in the old ordinances of the **Steinmetzen** of the fifteenth century. (5) The relation of the number three to the numerical symbolism so universal in Masonry suggests strongly the antiquity of the Master and Wardens.

On the whole this tenth of Mackey's landmarks comes very near to fulfilling the requirements. In a former article I indicated my reasons for not so recognizing it. But Brother Moore accepts it as a landmark. At any rate its place as an unquestioned institution of our common law is secure.

We come next to Mackey's eleventh landmark. His language is: "The necessity that every lodge when congregated should be duly tiled is an important landmark of the institution which is never neglected. The necessity of this law arises from the esoteric character of Masonry. The duty of guarding the door and keeping off cowans and eavesdroppers is an ancient one which constitutes, therefore, a landmark."

I suppose if there is such a thing as a landmark, we should have to agree that **secrecy** is a landmark. But notice that Mackey claims not only secrecy as a landmark, but also the mode of maintaining secrecy by purgation of the lodge and by tiling. Notice also

the way he proves this, not historically, but logically or analytically. This is a good example of the analytical method in Masonic jurisprudence. Mackey's argument may be put thus: Masonry is a secret institution in its very nature. Hence secrecy is an unalterable fundamental. But the traditional incidents of secrecy, which are necessary to the maintenance of this fundamental institution of secrecy, are logically inseparable from secrecy and therefore they also are landmarks. Consequently in his Encyclopædia, under the word "tiler," Mackey says that the name tiler and the office itself are based "not on any conventional regulation, but on the landmarks of the Order." In other words, not only secrecy, but the tiling of the lodge and the tiler, as a means of maintaining secrecy, are landmarks.

Undoubtedly we must agree that secrecy is a landmark. We do not need analysis or logic for this. It is an immemorial, universal characteristic not merely of Masonry, but of all the like societies which, as I told you in another connection, have existed among all men in all times. But how far are the means of preserving secrecy landmarks? How far are they fundamental and immutable, and how far are they but Masonic common law? This is not so easy to answer. For myself, I should say they are not a landmark. One might say that where there is nothing against tradition in such a case we should accept it. And here we have, so far as there is evidence, the evidence of universal and immemorial usage. So one might say that the tiling of the lodge and the doorkeeper, sentinel, outside guard, or tiler are landmarks. But this is only saying that secrecy is a landmark. As to the name—"tiler"—we cannot be sure. It is hard to say what the word means. Some think it means one who lays tiles and is symbolical of the building roofed or completed. And in justification of this we are cited to the old practice that

when a clandestine or a cowan got into the lodge a brother called out—"It rains"—signifying that the roof leaked for want of proper tiling. This is ingenious, and may be so. Others derive tiler from "tailleur," stone-cutter. This is philologically erroneous. There is some philological evidence that it may mean only guard. If so, the whole is clear. The symbolism of the roofed building is not well enough established to make it safe to rely on this for a landmark. Probably recognition of secrecy and of purgation and tiling as a landmark is as far as we can go. Brother Moore accepts Mackey's view entirely.

Mackey states his twelfth landmark thus: "The right of every Mason to be represented in all general meetings of the Craft and to instruct his representatives is a [twelfth] landmark. Formerly these general meetings, which were usually held once a year, were called General Assemblies, and all the fraternity, even to the youngest Entered Apprentice, were entitled to be present. Now they are called Grand Lodges and only the Masters and Wardens of the subordinate lodges are summoned. But this is simply as the representatives of their members. Originally each member represented himself; now he is represented by his officers."

This is certainly Masonic common law, but I am confident it cannot be maintained as a landmark.

(1) In the first place it contains a refutation in itself. If prior to 1717 all Masons had a right to attend, what warrant was there in that year for changing a right of personal attendance into a right to attend by representatives? This shows that we are hardly dealing here with a landmark.

(2) As I showed in other lectures, the existence of these general assemblies prior to 1717 is involved in great doubt historically. I think there is evidence of such assemblies in the seventeenth century. But I do

not believe there is evidence of regular assemblies, much less of a system of periodical assemblies prior to 1717. To dispose of the matter in a few words, Masonic history is against this alleged landmark, and Mackey's argument for it as a landmark is in conflict with his assertion. But as a bit of Masonic common law, it is undoubted.

In passing it should be noted that here, as in so many cases of Masonic common law, we have a purely English idea. Representation of every Englishman in Parliament through the knights of the shire and the burgesses is the obvious analogy. Indeed Mackey's very language is taken from Blackstone. A very large part of Masonic common law is English. But when we have an idea so peculiarly English we may well pause and ask ourselves whether we are sure that we have a landmark.

Two matters of some practical importance are involved in the question as to the existence of this supposed twelfth landmark. One is the question, once much mooted, of the right of the Entered Apprentice to ballot for candidates for the Entered Apprentice degree. This was the subject of a characteristically able report by Albert Pike in 1854. As is well known, the question has been settled in the negative. The other point is one still controverted in many jurisdictions, namely, whether a lodge of Master Masons is opened on the Entered Apprentice degree or a lodge of Entered Apprentices is opened. This is really, it is submitted, but a matter of local law. One may think that the local law should be this or that on general principles of Masonic common law. But it cannot be that any landmark is violated by a jurisdiction which takes the one view or the other.

Mackey states his thirteenth landmark thus: "The right of every Mason to appeal from the decision of his brethren in lodge convened to the Grand Lodge

or General Assembly of Masons is a landmark highly essential to the preservation of justice and the prevention of oppression. A few modern Grand Lodges, in adopting a regulation that the decision of subordinate lodges in cases of expulsion cannot be wholly set aside upon appeal, have violated this unquestioned landmark as well as the principles of just government."

Notice how Mackey proves this landmark. He says the right of appeal is essential to justice: therefore it is a landmark. It is a fundamental notion in justice that there shall be a review of a decision; therefore it is fundamental in Masonic justice. But unappealable decisions are known to all legal systems. For example: Criminal appeals were not allowed in England till a few years ago; judgments and decrees for less than $5,000 in our federal courts were not appealable prior to 1891; petty judgments are unappealable in many states, and judgments were not appealable in Roman law prior to the empire. Hence it is by no means clear that Mackey's premises are maintainable. Moreover, as he admits, the practice has not been universal in modern times. But the conclusive objection is that this alleged Landmark assumes the existence of Grand Lodges prior to 1717, which we cannot concede. Nevertheless this is clearly a doctrine of Masonic common law.

Mackey states his fourteenth landmark in these words: "The right of every Mason to visit and sit in every regular lodge is an unquestioned landmark of the Order. This is called the right of visitation. This right of visitation has always been recognized as an inherent right which inures to every Mason as he travels through the world and this is because lodges are justly considered as divisions for convenience of the universal Masonic family. This right may of course be impaired or forfeited on special occasions by various circumstances; but when admission is refused to a

Mason in good standing who knocks at the door of a lodge as a visitor, it is to be expected that some good and sufficient reason shall be furnished for this violation of what is in general a Masonic right founded on the landmarks of the order."

This is a matter of great difficulty, not merely as to the existence of a landmark of visitation, but also with respect to the limits of the right, whether founded on a landmark or on common law. That there is a landmark that Masons have a right of visitation is quite possible. There are several good reasons for asserting this. (1) Originally lodges were not necessarily permanent. The Masons present at the time and place opened a lodge. A striking illustration of this may be found in Ashmole's well known account of his initiation. Under such circumstances all who were there had a right to take part. But there were also permanent lodges in Scotland, at least, in the sixteenth century. (2) The right of visitation, it may be said, inheres in the ideas of fraternity and universality. So far as we can use logic and philosophy they sustain Mackey on this point. (3) Visitation exists in all brotherhoods and societies in all time, so far as not purely local. It is said to have been a maxim of the Pythagoreans. (4) The old charges uniformly prescribe a duty of receiving "strange fellows"—that is, foreign Masons—and of treating them well. This is a very strong argument.

We might, then, accept a landmark of visitation. What, however, are its limits? This is one of the most difficult and vexed questions in Masonic jurisprudence. Hence I prefer to regard visitation as a common law right, the limits and scope whereof must be considered in the next lecture.

NOTES TO LECTURE III.

1. THE COMMON LAW. See Dillon, Laws and Jurisprudence of England and America, Lects. 4-10.

2. LEGISLATION IN DEROGATION OF THE COMMON LAW. See Carter, Law: Its Origin, Growth and Function, 308; Pound, Common Law and Legislation, 21 Harvard Law Rev. 383.

3. THE XVIII CENTURY SCHISM. See Gould, The Grand Lodge of Schismatics or Ancients, Ars Quatuor Coronatorum, VI, 44 (1893); Gould, Concise History of Freemasonry, chap. 7.

4. THE "ASSEMBLY." See Begemann, The Assembly, Ars Quatuor Coronatorum, V, 169; Gould, The Assembly, Id., 203 (1892).

5. THE THREE DEGREES. See Gould, A Digression on Degrees, Concise History of Freemasonry, chap. 6; Gould, The Degrees of Pure and Ancient Freemasonry, Ars Quatuor Coronatorum, XVI, 28 (1903); Hughan, The Three Degrees of Freemasonry, Id., 127 (1897); Speth, The Two-Degree Theory, Id. XI, 47 (1878).

6. PETER GOWER. The reference is to the apocryphal Leland MS. See Preston, Illustrations of Masonry, book 3; Gould, History of Freemasonry, I, 356.

7. NAYMUS GRAECUS. See Dring, The Naymus Graecus Legend, Ars Quatuor Coronatorum, XVIII, 179 (1905), XIX, 45 (1906); Howard, Naymus Graecus Identified, Id. IV, 201 (1891); Papworth, Naymus Graecus, Id. III, 162 (1890).

8. ORIGIN OF THE ROYAL ARCH. See Kelly, The Advent of Royal Arch Masonry, Ars Quatuor Coronatorum, XXX, 7 (1917); Chetwode Crawley, Notes on Irish Freemasonry, Id. IX, 4 (1896); Whythead, The Grand Lodge at York, Id. II, 110 (1889); Gould, Concise History of Freemasonry, chap. 6.

9. DIVERGENCES IN RITUAL. See Hawkins, The Evolution of Masonic Ritual, Ars Quatuor Coronatorum, XXVI, 6 (1913); Pound, The Causes of Divergence in Ritual, Proc. Grand Lodge of Massachusetts, 1915, 143, THE BUILDER, III, C. C. B. 4 (Nov., 1917).

10. SIR CHRISTOPHER WREN. See Gould, History of Freemasonry, III, 1-55.

11. THE DISPENSING POWER. (a) In English law prior to 1688. See Coxe, Judicial Power and Unconstitutional Legislation, 165-171. (b) In Roman law. See Sohm, Institutes of Roman Law (transl. by Ledlie), 3 ed., 28; Salkowski, Roman Private Law (transl. by Whitfield), 12-13. (c) In the canon law: "A dispensation, or relaxation of law in a special case, may be granted by the authority that lays down the law, by his successor or superior, or by one to whom they have granted the power of dispensation." Codex Iuris Canonici, can. 80. (d) In

general legal theory, see Grotius, De Iure Belli et Pacis, II, 16, 26, §1 ("the correction of that wherein the law by reason of its universality is deficient"); Blackstone, Commentaries, I, 61.

12. LODGES IN THE XVII CENTURY. See Conder, The Masons' Company of the City of London and the Lodge of Accepted Masons Connected with it, Ars Quatuor Coronatorum, IX, 28 (1896).

13. MASTER AND WARDENS. (a) An English parish. See Halsbury, Laws of England, XI, 462. (b) The Gilds. See Gould, Concise History of Freemasonry, chap. 4; Gross, The Gild Merchant, I, 26 ff; Smith, English Gilds, cxiv-clxiv. (c) At York. See Gould, History of Freemasonry, II, 370 ff. (d) In Scotland. See Gould, Concise History of Freemasonry, chap. 6.

14. THE NUMBER THREE. See Pike, Morals and Dogma, 57 ff.; Erdmann, History of Philosophy, I, 34; Inge, The Philosophy of Plotinus, I, 86; Goudy, Trichotomy in Roman Law, 1-23.

15. REPRESENTATION IN ENGLISH PUBLIC LAW. "Everyone . . . has a voice in Parliament, either personally or by his representative." Blackstone, Commentaries, I, 158.

16. GENERAL ASSEMBLIES. See Gould, History of Freemasonry, III, 55-89.

17. SUPPOSED RIGHT OF THE ENTERED APPRENTICE TO BALLOT. See Proc. Grand Lodge of Arkansas, 1854, appendix, p. 60 ff.

IV. MASONIC COMMON LAW
PART II.

S I said in the last lecture, there is much to be said for a landmark of visitation. On the other hand, four points may be urged against such a landmark: (1) The serious differences among Masonic writers of authority as to the existence of an absolute right of visitation; (2) The pronouncements of important Grand Lodges to the contrary; (3) The obvious necessity of restraints upon visitation under the conditions of today, which give great force in this connection to what lawyers call the argument **ab inconvenienti**; (4) The difficulties growing out of legislation in Grand Lodges with respect to membership in clandestine bodies conferring higher degrees and the effect thereof upon one's right as a Craft Mason.

Let us look at these in order.

(1) While Mackey lays down the right of visitation as a landmark and says in his Principles of Masonic Law: "Every Master Mason who is an affiliated member of a lodge has the right to visit any other lodge as often as he may desire to do so," Doctor Morris lays down the contrary with equal positiveness, saying: "There is no question in our mind but that a lodge has the right to prohibit intrusion from visitors at any and all times at its own discretion." Likewise Brother Moore, whose excellent papers on the landmarks have been referred to heretofore, says: "The very custom of asking permission to visit implies the power to refuse the visitor admission." He concludes,

therefore, that there is a duty of hospitality, but not a right of visitation, that the duty is moral rather than legal, and hence that there is no unchangeable landmark. In other words, visitation is an old institution of Masonic common law. But, since it falls short of a landmark, the subject is open to regulation, and the circumstances of today call urgently for the regulation which has sprung up through Masonic legislation.

(2) Masonic decision and legislation have not regarded the right of visitation as a landmark. Thus, in 1857, the Grand Lodge of England decided that "the Master and Wardens may refuse admission to any visitor of known bad character." According to Mackey's view the sole question would be whether he was in good standing in a regular lodge. Brother Moore asks why he remains a Mason if he is of known bad character? No doubt a strong presumption arises from his good standing in another lodge. Still a lodge may not do its duty and such persons may remain unchallenged. If so, when we are told that another lodge may refuse to receive them, the result is to deny Mackey's landmark. In Massachusetts and in Kentucky visitation has been held not to be an absolute right, but to be a favor which the Master may grant or may refuse in his discretion. Michigan also rests the whole matter on discretion, holding that a lodge may admit or exclude visitors as it sees fit. These holdings are wholly incompatible with the alleged landmark and amount to a recognition of the proposition for which Brother Moore contends, namely, that there is no more than a moral duty of hospitality.

(3) This view of the so-called right of visitation becomes almost imperative under the conditions of visitation today. With the best of intention toward the honest Masonic traveler, we are compelled today, in view of the enormous increase in the number of Masons, to restrict more and more the hospitality we ex-

tend to the visiting brother. Imposters and Masons for revenue only, traveling about the country, have not only required us to adopt elaborate precautions in the way of boards of relief, extending even to an international Masonic relief association, but have also driven our Grand Lodges to enact somewhat strict rules as to visitation. Moreover, nearly everywhere, with the great growth of the Order, clandestine Masonry has grown also. And this growth of clandestine Masonry, rendered inevitable by the prosperity of legitimate American Masonry, has been aggravated by controversies as to the legitimacy of Scottish Rite bodies and by attempts of Masonic charlatans to peddle high degrees of other rites, with which our Grand Lodges in many jurisdictions have felt it necessary to deal by legislation. Thus in one of the great states of the union—a state which took an honorable part in the spreading of Masonry over the country—there is a so-called Grand Lodge made up entirely of clandestine and irregular particular lodges, having for their sole raison d'etre a claim that the legitimate Grand Lodge had violated the ancient landmarks by declaring the Scottish Rite bodies of Cerneau origin to be clandestine. The propriety of such legislation has been much controverted and is not relevant in the present connection. It is enough to say here that the competency of Grand Lodges to enact it seems indisputable. Nothing with any degree of pretension to be a landmark is violated and the question is simply one of expediency. Hence such schisms have no legitimate basis. None the less they do exist, and elsewhere clandestine so-called Grand Lodges exist with even less justification. Obviously some barriers beyond the ordinary examination by a committee become necessary under such conditions.

But the Grand Lodge legislation last referred to leads to greater difficulties in that as a result a Mason may be in good standing in one of two jurisdictions,

each recognizing the other, and yet, if he were a member in the jurisdiction where he seeks to visit he would not be eligible to sit in lodge. For example, in Iowa, if a Mason joins a Cerneau Scottish Rite body, the law of his Grand Lodge pronounces him a clandestine Mason. Also in Pennsylvania an adherent of the Cerneau Scottish Rite is not permitted to visit a Craft lodge. Many other states have like legislation. In view of such legislation, Brother George F. Moore puts this case: "There is, we will say for example, a symbolic lodge in session in the District of Columbia, where there is no law forbidding a regular Mason to sit with a Cerneau Scottish Rite Mason. Seated in this lodge are two or three 'Cerneauites' and brethren are present from Pennsylvania, Ohio, Iowa, and other states which have declared Cerneaus to be clandestine Master Masons. The visiting brethren from Pennsylvania, Ohio, and Iowa are prohibited by the Masonic laws of their own states from sitting in a lodge with the Cerneaus. They are not aware of the presence of the clandestine Masons in the Washington City lodge, and sit with them. Afterwards one of the Cerneaus meets one of the Iowa brethren who had sat with him in the Washington lodge, and the latter vouches for the Cerneau who is admitted because of this voucher in a lodge in another state. Has not the vouching brother violated his obligation and the laws of his Grand Lodge?"

Clearly the Iowa brother has violated his obligation, and the laws of Masonry in his own state by vouching for a "clandestine Mason."

That such a situation may arise innocently and may very easily arise is unfortunate. It puts the Masonic visitor in a most awkward position, and seems to require him either to be offensively discourteous, or to know thoroughly the Masonic legislation both of his own jurisdiction and of that in which he seeks to visit,

or else to abstain from visiting. As Brother Moore justly observes in the paper already quoted from, we can hardly expect the visitor from a state where a Cerneau Scottish Rite Mason is deemed clandestine also in the Craft lodges, to say publicly, if he visits in a jurisdiction without such legislation: "If there are any Cerneaus present I must not sit here with you because I make myself liable to Masonic laws of my own state." Very likely those who deny the concern of the Craft lodge with the higher degrees would suggest to him that he inform himself at his peril before he visits. But what becomes of the right of visitation under such circumstances? What shall we say of the Cerneau in good standing as a Master Mason at home who claims by virtue of Mackey's alleged landmark an absolute right to visit a Craft lodge in a jurisdiction which pronounces him clandestine?

We have here a question similar to the class of questions now very common in the law of the state to which we give the name of Conflict of Laws. Some explanation is necessary. In most of the cases which come before the courts in Massachusetts, for example, the parties are American citizens residing in Massachusetts and the transaction or occurrence out of which the controversy arises took place in this commonwealth. But an increasing number of cases are coming before tribunals which involve a foreign element. One or both of the parties may be foreign; the transaction or some part of it may have taken place abroad; or one or both of the parties may reside in another state of the union or the transaction may have taken place in another state or with reference to the laws of another state. In such cases the court must ask whether and how far it is to apply the law of the foreign country or of the other state, and the principles by which it answers these questions are said to belong to the subject of Conflict of Laws. When the law was substantially the

same in our several states and interstate business was not extensive the subject was of no great importance. Today, however, in view of the great volume of interstate business and of foreign trade, and in view of the increasing divergence in the laws of the several states due to the huge output of legislation and judicial decision in recent years, the subject has become one of great consequence as well as one of much difficulty. A like situation has arisen in Masonry. When Masonic law and custom was simple and alike in all substantial details in each of our states conflict of laws was not an item in Masonic jurisprudence. Today Masons are so numerous and so peripatetic and the law in most of our jurisdictions is becoming so minute, so detailed, and hence often so diverse, that serious questions of what the lawyer would term Conflict of Laws arise continually. Doubtless, so far as the lawyer's theories of Conflict of Laws are grounded on natural reason and not merely upon historical accident, they are available to the Masonic jurist where not in conflict with the landmarks or with Masonic common law.

In general the lawyer holds that a man's status, or position before the law, is governed by the law of his home. Yet if his home law puts him in a position unknown to the local law, it may not recognize the status, and even if the local law does recognize the status it does not follow that effect will be given to the legal results which it involves at home. If we may apply this analogy—on the theory that it represents natural reason and formulates human experience of the just way of solving a difficult problem—we may say that in the case put the Mason's standing as a Master Mason is determined by the law of his home jurisdiction, and yet the jurisdiction where he seeks to visit, recognizing this standing, is not bound to give effect to the legal result involved at home, namely, the right to visit. He is in good standing by the law of his home jurisdiction,

whose Masonic competency is admitted. But the policy of the local law requires that we refuse to give to that standing all the results which it involves at home. If such a solution is admissible under Masonic law, it is surely expedient, and the practical necessity of some such solution is a strong argument against an absolute right of visitation.

Mackey's fifteenth landmark is thus stated: "No visitor unknown to the brethren present or to some one of them as a Mason can enter a lodge without first passing an examination according to ancient usage." In commenting upon this supposed landmark he adds that it "refers only to the cases of strangers who are not to be recognized unless after strict trial, due examination, or lawful information." Hence the visitor may be vouched for and the examination may be dispensed with. There is some warrant for the claim of a landmark here in the pronouncement of the Grand Lodge of England that the landmarks are contained in the Master Mason's obligation. But after all the requirement of voucher or examination is a necessary consequence of the fundamental principle of secrecy. If we put secrecy as the landmark, voucher or examination are but common-law or customary modes of giving it effect. It is important to recognize this not only because the practice of American jurisdictions varies, but because the great increase in the number of clandestine organizations in recent times and the ever-growing tribe of imposters render legislation on the subject expedient if not imperative, and it would be unfortunate if we were hampered by a landmark. As to the first point, it may be enough to say that some jurisdictions take the phrase "lawful information" to mean that he who vouches for another must have sat with the other in a regular lodge, while in other jurisdictions satisfactory evidence will suffice although the brothers vouching and vouched for have never sat together in lodge.

This divergence is not inconsistent with Mackey's claim of a landmark. But the continually increasing reliance upon cards, receipts for dues, or diplomas is not unlikely to encroach upon it very materially and emphasizes the desirability of confining the absolute and unalterable requirement to the broad principle of secrecy. Nevertheless, examination or voucher are the established customary practice and, as in other matters of Masonic common law, legislative innovation ought to proceed cautiously and with assurance of sound reason for any change.

Doctor Mackey states his sixteenth landmark in these words: "No lodge can interfere in the business of any other lodge nor give degrees to brethren who are members of other lodges." As in so many other cases, Mackey seeks to make a case for this landmark analytically. "It is," he says, "undoubtedly an ancient landmark founded on the great principles of courtesy and fraternal kindness which are at the very foundation of our institution." But landmarks cannot be deduced from general principles in this way. Philosophy and logic may confirm history, but they cannot demonstrate a landmark in the face of history. The conclusive objection to this supposed landmark is that it assumes the established system of permanent lodges with local jurisdiction which dates only from the eighteenth century. The second argument which Mackey brings forward is universal recognition in Masonic legislation. He says: "It has been repeatedly recognized by subsequent statutory enactment of all Grand Lodges." The remarks of Brother Moore in this connection are very pertinent: "It is the 'statutory enactments' which have made the so-called landmark, and not the landmark which has produced the statutes." In other words, the legislation of our Grand Lodges on this subject is not declaratory of a landmark, but Doctor Mackey after studying the legislation was able to

deduce a general principle underlying it, which he sought to set up as a landmark. Together with all other rules that presuppose our modern lodge system, it can only be a rule of Masonic common law.

We have here, however, a very important and difficult series of questions of Masonic Conflict of Laws. Although courtesy and fraternal spirit obviate many difficulties that might else arise, it is evident that they may not be relied upon entirely. Legislation has dealt with the matter everywhere as between the particular lodges of the same jurisdiction. But as men move about so frequently and in such large numbers and as the volume and detail of Masonic legislation increases, conflict between the legislation or usage of different Grand Lodges becomes inevitable. Such controversies as those which have raged over the question of perpetual jurisdiction illustrate the possibilities involved. There must be some general principles by which we may be governed in the absence of legislation and by which we may be guided in shaping, interpreting, and applying legislation. The nature of the case calls for something more than courtesy and comity, and Mackey's principle of non-interference and of keeping hands off of those who are members of other lodges while giving us some guidance is not sufficiently definite. No doubt it is dangerous to turn to the law of the land for analogies. If this is done too much an alien element may creep into Masonry which would be undesirable. But the problems of law are often the same, whether we look to the law of the state, the law of the church, or the law of a fraternal order. And, so far as the answers proceed on natural reason and not on history, so far as they are universal and not the results of special circumstances of the society in which they originated, the solutions arrived at in the one society, embodying experience in the attainment of justice—in the elimination of waste and conservation of values by

means of a rule—these solutions, I say, arrived at in one type of society may well afford valuable suggestions for the law giver in another type. Thus we may well supplement the principle of Masonic common law contained in Mackey's fifteenth landmark with the further principles of exclusive competence of a sovereign to determine the status or legal position of those subject to its authority, of the independence of legal control from without involved in the very idea of sovereignty, and of recognition of rights duly acquired under the law of other sovereigns as a matter of comity, which human experience has established in connection with the legal regulation of the everyday affairs of life. But we must not be dogmatic. These are but principles by the light of which independent Masonic sovereignties may co-exist, as independent political sovereignties co-exist. Details are subject to legislation in which every jurisdiction ultimately must decide what it deems expedient.

The seventeenth landmark in Mackey's system is thus stated: "Every Freemason is amenable to the laws and regulations of the Masonic jurisdiction in which he resides, and this although he may not be a member of any lodge." In other words, it is said to be a landmark that all Masonic bodies have jurisdiction over all Masons residing within their territorial limits, whether affiliated or unaffiliated, and if affiliated, no matter where they hold their Masonic membership. This alleged landmark, as a landmark, is open to the conclusive objection that it presupposes a territorial jurisdiction in lodges, something which did not come into existence till well along in the eighteenth century. Brother Moore goes further and denies that territorial jurisdiction over foreign and unaffiliated Masons is Masonic law at all. He says: "If a Mason in good standing in a lodge chartered by one of our American Grand lodges were guilty of a Masonic offense in France made

so by the French law, he would not and could not be tried by a lodge under the Grand Orient of France for the offense. Nor would a member of a lodge under the Grand Orient of France, who has been guilty of a Masonic offense made so by our law, here be tried in one of our lodges, and much more so is it the case where unaffiliated Masons are concerned. The status of the Mason is determined not alone by the fact of his having been a Mason and becoming unaffiliated, but also by the relations between the jurisdictions under which he became a Mason, and that where he resides and has committed some Masonic offense. Some years ago nearly all the Grand Lodges in the United States broke off fraternal relations with the Grand Lodge of the State of Washington, because the latter had recognized certain negro lodges. While that condition existed does anyone for a moment suppose that an unaffiliated Mason made in Washington state but residing in Massachusetts, who had committed a Masonic offense in the latter state, would have been tried for it in a Bay State lodge?"

Perhaps a follower of Mackey might answer the last question by saying that it might depend on whether, after the severance of relations, the Washington-made Mason was recognized as a Mason at all. As the point was that the Washington Masons were communicating Masonically with clandestine Masons, such an answer might well be returned. But in any event Brother Moore's next observation must be conceded: "This alleged landmark," he says, "illustrates very forcibly the danger of generalizing without noticing all the facts which go to make up the problem."

As a matter of common law, how far is there such a territorial jurisdiction over resident Masons, regardless of where made?

To understand Mackey's position and the position of Brother Moore, who criticizes Mackey and not only

rejects the alleged landmark—which undoubtedly we must do—but also denies that there is any such jurisdiction by virtue of territory at all—to understand the two positions, I say, we must turn to a burning question in jurisprudence generally as to jurisdiction over crimes.

There are four theories of criminal jurisdiction in the modern world. The first is the territorial theory, the theory of the **forum delicti commissi**, the theory that offenses are punishable and only punishable by the sovereign of the place where the offense is committed, without regard to the allegiance of the offender. This is the theory of Anglo-American law, and it is one to which our law has thus far adhered very obstinately so that it has given rise to some curious cases.

Two examples of the territorial theory of criminal jurisdiction as applied in Anglo-American law may be of interest in the present connection. In one well-known case, an American editor in Texas wrote a libellous article concerning a Mexican. Afterward, going into Mexico, where his paper circulated, the editor was taken under process from a Mexican court and required to go before a Court of Conciliation and enter into a settlement with the person he had libelled. Thereafter he again libelled the Mexican in his paper and going once more into Mexico was prosecuted criminally for the libel. The American government insisted upon his release, asserting the principle of English and American law that crimes are only to be prosecuted in the territorial jurisdiction in which they are committed as a principle of universal law. In another well-known case, one person, standing upon the North Carolina side of the line between North Carolina and Tennessee, shot and killed another, who stood in Tennessee. The crime being complete in Tennessee according to the common law could only be prosecuted in that state. There could be no prosecution in North Carolina because the

act did not take effect there. On the other hand, as the murderer was never in Tennessee, he could not be regarded as a fugitive from Tennessee justice and therefore could not be taken from North Carolina to Tennessee on extradition. This case shows strikingly the type of difficulties involved in the Anglo-American theory, difficulties which indeed are compelling our several states by legislation to adopt more liberal views of criminal jurisdiction.

The territorial theory grows out of our conception that there must be a trial by a jury of the vicinage where the crime was committed. Historically it is a feudal theory. Obviously, Mackey took it without question that the doctrine he found in our American law books was a principle of universal justice and so erected it as a landmark.

A second theory is the personal theory, the theory of the **forum ligeantiae** or theory of the forum of allegiance. According to this theory, the sovereign to which the offender owes political allegiance has jurisdiction to deal with him for offenses done anywhere in the world. This is the Roman theory, and it is held very strongly in the modern world by France. Hence Brother Moore, whose studies in the Scottish Rite have led him to read the French authors, sees this principle of jurisdiction and rightly criticizes Mackey for overlooking it. But I think, with submission, Brother Moore is equally wrong in laying down that there is no territorial jurisdiction over Masonic offenses. The basis of my view that there is such a jurisdiction—not as a landmark indeed, but as a matter of Masonic common law—will appear from the other two theories of criminal jurisdiction, which I am about to explain.

A third theory is the theory of self-preservation, the theory of the **forum laesae civitatis,** or theory of the forum of the injured state. According to this theory, if an offense, wherever committed, is an injury

to any particular sovereign, if that sovereign can reach the offender, he may deal with him. For example, in a leading case a Frenchman in Switzerland forged German government securities. He then went from Switzerland into Germany. He could not be dealt with by the French on the theory of the forum of allegiance because he was not in France, and could not be dealt with by Switzerland on the theory of the forum where the crime was committed because he was no longer in Switzerland. The German authorities, however, dealt with his case on the theory of the forum of the injured state, and this solution has generally been regarded as proper in Continental Europe. I will speak of possible Masonic applications of this theory in a moment.

Finally there is the theory of cosmopolitan justice, the theory of the **forum deprehensionis**, or forum of capture, the theory that when an offense has been committed anywhere in the world, by any person, no matter what his allegiance, any sovereign in the world who happens to be able to reach him, may deal with him in order to prevent failure of justice. The Italians insist on this theory. The English and Americans cannot adopt it because of our requirement of jury trial and producing of witnesses in court. Our mode of trial is on this theory. The English and Americans cannot difficulties are in the way of Masonry, there would seem no reason why territorial jurisdiction should not be admitted, so far as the self-preservation theory or the theory of a cosmopolitan Masonic justice may require. In other words, we may agree with Brother Moore in rejecting Mackey's alleged landmark of a territorial jurisdiction and yet may claim that there is such a jurisdiction as a matter of Masonic common law, along with the personal jurisdiction for which Brother Moore contends.

Suppose, for example, a Mason made abroad or made in another state whether unaffiliated or retaining

his old membership, advertised his Masonic membership generally and thereupon so conducted himself as to bring scandal upon Masonry. Here there is an injury to the local Masonic sovereignty. There is good ground for it to interfere, and the person is before it where he can be reached. Masonic discipline can be given the same publicity which he has given his membership. Are we to say this cannot be done? Again, why should we not hold here to a doctrine of cosmopolitan justice? In such a case the Masonic sovereignty on the spot may be far the best able to try the case and to apply the remedy. Are we to take so narrow a view of Masonic justice as to deny this jurisdiction? It seems to me that, if nothing prevents, the most liberal view is perfectly open in Masonic jurisprudence and hence that Masonic common law admits of both territorial and personal jurisdiction over Masonic offenses. But, mark you, the territorial jurisdiction ought to be over **general** Masonic offenses, over offenses which injure Masonry generally and hence are either a danger to the local Masonic sovereign or are within a principle of cosmopolitan justice, and not offenses against mere local regulations. As the lawyer would say, they ought to be **mala in se**—not **mala prohibita.**

Mackey is generally very sound as to Masonic common law, where his wide experience of what actually obtained in practice, his keen sense of justice, and his sound common sense were safe guides.

But how about Mackey's proposition as to territorial jurisdiction to try for non-affiliation? Brother Moore rejects this idea wholly. His argument is "If non-affiliation is a Masonic offense as is asserted by Mackey, every Mason wherever he may be, is liable to be tried by any lodge in whose territorial jurisdiction he resides. This would, indeed, be a strange and, it would seem, unbrotherly proceeding. It is quite true that the duty of the Mason to remain a working mem-

ber may be traced to the ancient Gilds, but to raise to the dignity of a landmark the proposition that every man once initiated must keep his dues paid and thereby keep up his affiliation wherever he may be on the surface of the earth or if he does not or becomes unaffiliated by dimit, he is guilty of a Masonic offense for which he may be tried like a criminal wherever he may be found, seems quite unmasonic. The unaffiliated Mason, according to that principle, bears on him the mark of Cain and everyone who finds him can slay him! There is nothing to show this is a landmark, and against such a position is the conclusive argument that the permanent local lodge is an eighteenth-century institution."

Moreover Mackey's idea that non-affiliation is necessarily, inevitably, and unalterably a Masonic offense is not merely uncharitable, it is very unseemly. While bestirring ourselves to collect dues to meet the expenses of the lodge, we are apt to forget some things of much more importance than the merely financial side of Masonry. Every organization, no matter how high its purposes, encounters this obstacle to the attainment of its ideals as it becomes prosperous. Unhappily we cannot attain great things spiritually without a certain material foundation. And it is very easy, in our zeal for the former, to forget that the latter is but a means and to make it consciously or subconsciously an end. At the end of the Middle Ages the church, with its wonderful spiritual heritage, very nearly forgot its essential character as something not of this world in the press of temporal interests which were but the by-products of its true activities. The Reformation was the result. Let us not make the same mistake. For in our proper zeal to punish wilful evasion of the duties of membership in a lodge, we may easily fall into the grave error of measuring too much by a money standard and may easily commercialize the Fraternity. We may grant that the unaffiliated are not exempt from

Masonic discipline to the extent that their conduct, ascribed by the world at large to Masons, may endanger the good report of the Order, and yet we may not be bound to regard non-affiliation in and of itself as an offense. Mackenzie's language on this subject is noteworthy. He says: "That a Mason, by non-affiliation, does not relax his fealty to the Craft at large or exempt him[self] from censure for Masonic offenses from the Grand Lodge whence his certificate has been derived." I think we may well add that the Masonic jurisdiction where he resides may deal with him, at least in case his Masonic offenses committed in that jurisdiction are injurious in their effects to Masonry in that locality. But it is quite a different proposition to lay down that he must absolutely affiliate at all events, and that his failure to keep up the payment of dues so long as he lives is in and of itself to be branded as an offense.

Mackey's eighteenth landmark has to do with the qualifications of a candidate. Mackey states these qualifications thus: "He must be a free-born man, and of full age; . . . he must not be mutilated, a woman, an idiot, or a slave." This alleged landmark was considered in part in a former lecture. So far as it requires the candidate to be a man, free, free-born, and of the age of discretion by the law or custom of the place, we may accept it. But the requirement that the candidate be whole or unmutilated is not so clear. There is, indeed, more to be said for Mackey's position than some have perceived. It is not to be denied that primitive society looked upon the man who was not whole very differently from the way in which we now regard him. In civilized society there is a place for him. Serious physical injuries or physical defects will not prevent him from being a useful and a happy member of society. Very likely they may involve little more than inconvenience to the afflicted person. In primitive society the situation was very different. The man who

was not physically whole was at least of no use to society and was very likely to be a serious incumbrance. If he was congenitally defective society in self-defense simply put him out of the way. If the defect was acquired later the defective man, if he was able to drag out a miserable existence, very likely had to associate with the women and children through inability to take a man's part in the community. He had no place in the men's house and hence primitive rites and secret societies were not favorably inclined toward him. Thus there was an immemorial prejudice against the physically defective which left traces even in so enlightened an institution as the Roman law and even in so unworldly an institution as the canon law. This immemorial prejudice against the mutilated or defective gains additional support in Masonry from the requirements of the operative art and from logical arguments based on the requirements of our ritual. Immemorial prejudice, growing out of the circumstances of primitive society, the practice of ancient rites, the requirements of the operative art, logical deduction from our ceremonies, and a certain amount of Masonic usage combine to make a formidable case. Most jurisdictions in the United States have accepted or assumed some requirement of wholeness, and our American Grand Lodge proceedings are full of discussions as to just what degree of mutilation will disqualify. Few things have been more debated in Masonic common law. But much as may be said for some such requirement as an ancient custom of the Craft, the practice in England is conclusive that the doctrine as to wholeness is not even universal Masonic common law. So far from admitting or regarding it as a landmark, the English Masons have never insisted on physical perfection as so many jurisdictions do in America and our American distinctions and discussions are quite unknown to them. At most, therefore, this is but common law, and any juris-

diction which feels disposed to take a liberal view of the subject in the light of the conditions of modern civilized society and of the purposes and ideals of Masonry is clearly entitled so to do.

The remainder of Mackey's list of twenty-five landmarks were considered in a prior lecture, and require nothing further.

It would be unjust to close this view of the leading principles of Masonic common law without a tribute to Doctor Mackey. It has been necessary to criticize his theories at many points. But this necessity of criticism should not blind us to the permanent value of his work in formulating the main ideas that underlie Masonic law. Where he erred chiefly was in assuming too rigid a body of fundamental law. But this was a natural error for an American in the nineteenth century. American lawyers of that time believed that an ideal version of our traditional Anglo-American legal system was, as it were, ordained by nature; they believed that the sections of our American bills of rights simply declared universal and eternal principles inherent in the very idea of free government. Hence it was not unnatural for an American Mason of that time to assume that an ideal development of the generally received customs of the Craft in America was the eternal jural order in Freemasonry. We may reject this idea and yet recognize the invaluable service which Mackey performed for us by working out and formulating the leading principles of our customary law.

NOTES TO LECTURE IV.

1. VISITATION. This subject is fully discussed in the papers of Bro. Geo. F. Moore in the New Age, referred to in the bibliography to Lecture II.

2. CONFLICT OF LAWS. See Holland, Jurisprudence, 12 ed. 412-424; Beale, Treatise on the Conflict of Laws, book I, chaps. 1-3.

3. STATUS DETERMINED BY LAW OF DOMICILE. See Dicey, Conflict of Laws, chap. 19.

4. RECOGNITION OF ACQUIRED RIGHTS. See Dicey, Conflict of Laws, Introduction, sec. III.

5. JURISDICTION OVER OFFENSES. The different theories are summarized in Holland, Jurisprudence, 12 ed., 425-431.

6. THE ANGLO-AMERICAN TERRITORIAL THEORY. A striking example of conflict between this theory and the theory of the forum of the injured state may be seen in Cutting's Case, Snow, Cases on International Law, 172.

7. THE NORTH CAROLINA-TENNESSEE HOMICIDE. State v. Hall, 114 North Carolina Reports, 909.

8. MALA PROHIBITA AND MALA IN SE. See Blackstone, Commentaries, I, 54-57.

9. PHYSICAL DEFECTS IN ANCIENT LAW. "Eunuchs and outcasts, persons born blind or deaf, the dumb, and such as have lost the use of a limb, are excluded from heritage." Manu, IX, § 201. See Mayne, Hindu Law, §§ 547, 548, 552. Compare Gaius, III, § 105 (Abdy & Walker's translation may be recommended).

V. MASONIC LAW MAKING

NO idea is today more familiar than the idea of making law. Wherever any sort of sovereign authority exists, men take for granted that it will proceed to justify its existence by copious legislation and assume as a matter of course that the quantity of its legislative output is the measure of its efficiency. This was not always true. Indeed conscious law-making on any large scale is a wholly modern phenomenon not only in the state but in those human organizations which exist to conserve other than political values and secure other than political interests, but are organized along lines analogous to those which govern politically organized society. Hence by way of introduction it is worth while to give some account of the development of legislation in the legal systems of modern states.

Five stages may be perceived in the development of legislation as the everyday agency of law-making: (1) unconscious legislation in the period of customary law, (2) declaratory legislation in the period when the traditional law is reduced to writing, (3) selection and amendment when by the political union of peoples with divergent customs it becomes necessary to choose in declaring the custom of the new whole, (4) conscious constructive law-making as an occasional expedient, at first to meet political exigencies, but gradually to effect important changes here and there in the legal system in great emergencies, and (5) habitual legislation as

the ordinary agency of development, usually culminating in codification of the law as a whole.

In the first stage of legal development, the stage of traditional modes of decision based upon repeated decisions by supposed divine inspiration, there is not a little unconscious law-making. The case in hand may not be exactly like one which has arisen previously, but those who have the custody of the tradition may assimilate it thereto. Moreover the custodians of the tradition may warp it more or less unconsciously to meet new needs. The laws obeyed are regarded as having always existed. Men are not conscious of the innovations which creep in from time to time and in the best of faith confuse new usages with the old. Thus for a time law-making is a purely subconscious process.

Later we come upon a stage of declaratory legislation. In the beginnings of law all legislation, as such, is of this type. It is not an authoritative making of new law—it is an authoritative publication of law already existing. All the so-called ancient codes are of this type. Indeed the prologue to the laws of Manu, reciting how Bhrigu, who had learned the tradition from Manu, authoritatively dictated them to the sages, the prologue to the Senchus Mor, in the Ancient Laws of Ireland, telling how the bards were brought together and recited the traditional laws to St. Patrick, and the prologue to the Salic Law, telling how chosen men from the different villages were brought together and discussed among themselves the traditions, as they remembered them, till they arrived at an authoritative text to be reduced to writing—such prologues tell the story of primitive legislation.

Conscious law-making begins when it becomes necessary to make choice between conflicting traditions or when conflicting traditions must be harmonized through amendment. This necessity arises whenever attempt is made to reduce the tradition to writing or

to compare and re-edit different versions of the written tradition. It becomes acute when attempt is made to declare the common custom of a political unit formed by the union of formerly distinct tribes or peoples with customs of their own. An example is to be seen in the laws of Alfred. He tells us that he had to pick and choose and even amend, but adds "I durst not set down much of my own." From this it is an easy stage, but one taken only gradually and occasionally, to pass to conscious constructive law-making. The first step in this direction comes when men perceive that by changing the written record of the law they can change the law which theretofore had been held eternal and immutable. Even when this discovery is made, however, after a brief law-making ferment, the law settles back to a process of growth through development of tradition, and it is not until the maturity of legal systems that we enter upon a real stage of legislation.

A similar development may be seen in Masonic law-making, and it will conduce to sounder appreciation of our written law to look at its history in this way. It is true a wholly different view of the subject became classical in Masonic literature. Thus Mackey, after considering the landmarks, says:

> **"Next to the unwritten laws, or landmarks of Masonry, come its written or statutory laws. These are the 'regulations' as they are usually called, which have been enacted from time to time by General Assemblies, Grand Lodges, or other supreme authorities of the Order. They are in their character either general or local." (Jurisprudence, chapter 2.)**

We are then told that the "General Regulations are those that have been enacted by such bodies as had at the time universal jurisdiction over the Craft," and the year 1721 being fixed as the decisive point beyond which such general regulations were no longer possible because there were no longer general assemblies with

general powers, ten authentic and authoritative acts of general Masonic legislation down to 1721 are set forth as follows: (1) The "Old York Constitutions of 926" (for which he gives Oliver's abridged version of the articles and points from the Halliwell MS.); (2) the "Constitutions of Edward III" (taken from Anderson's Constitutions, 2d edition); (3) the "Regulations of 1663"; (4) the "Ancient Installation Charges" (taken from Preston's Illustrations); (5) the "Ancient Charges at Makings" (also from Preston); (6) the "Regulation of 1703" (given on the authority of Preston); (7) the "Regulations of 1717" (given on the same authority); (8) the "Regulations of 1720" (an authentic regulation, adopted at a quarterly communication of the Grand Lodge of England, June 24, 1720); (9) the "Charges Approved in 1722" (presented to the Grand Lodge of England in 1721 by Anderson and Desaguliers, adopted March 25, 1722, and published in the first edition of Anderson's Constitutions, 1723); and (10) the "General Regulations of 1721" compiled by George Payne, Grand Master in 1720, approved by the Grand Lodge of England in 1721, printed in the first edition of Anderson's Constitutions. Thus, it will be noted, we are asked to believe in a series of acts of Masonic legislation, wholly analogous to a codification of the law or the enactment of a new paragraph of the written law by a modern American Grand Lodge, extending from the tenth century to the eighteenth. It is the first step in a proper understanding of Masonic Jurisprudence to discard this idea completely. There were no such assemblies as this conception of the MS. constitutions postulates down to 1717, and it was not till the eighteenth century that men began to think of the wholesale making of laws out of whole cloth as a normal, much less a legitimate process.

Thanks to the studies of Hughan and Gould and Begemann, we know much more about the MS. consti-

tutions than was known in 1859, when Mackey's Jurisprudence was written. Today no serious Masonic scholar believes that constitutions "were framed at the City of York in the year 926" or that the constitutions so framed "were seen approved and confirmed in the reign of Henry VI." The unconfirmed authority of Anderson and Preston, moreover, will not suffice to establish legislation of the first quarter of the eighteenth century. What we find is not a uniform tract of law-making, analogous to that set forth in the statutes of the realm, but rather a written tradition from the end of the fourteenth century, obviously based on an older oral tradition, changing and developing slowly in the course of successive transcripts, and laid hold of on the rise of the Grand Lodge system in the eighteenth century as the basis of Masonic law. In other words, we may see an unconscious development in the (Masonically) pre-historic period of oral tradition, declaratory law-making when in the middle ages the traditional regulations were reduced to writing, selection and amendment from time to time as the MSS. were re-copied and re-edited, conscious constructive law-making as an occasional expedient in the fore part of the eighteenth century in the Mother Grand Lodge, and finally an era of habitual legislative law-making in the nineteenth century which has reached its highest development in America. Gould's conclusion that the earliest of our authentic MSS. shows us "a gild or fraternity which commemorated the science without practising the art of Masonry" seems well founded. It was as far back as the fourteenth century a "fraternity from whom all but the memory or tradition of its ancient trade had departed." Hence, as Gould puts it, "many of the old laws or disciplinary regulations of the earlier Masons became fossilized or petrified." "They passed out of use, though retaining their hold on the written and unwritten traditions of the society" (Con-

cise History, Am. ed. 308). When, in the eighteenth century, organized Grand Lodge Masonry became a world-wide institution, these traditions had to be put to a new use. Instead of being read to or shown to the initiate, they had to be transformed into a body of law for a society with new values to conserve and new interests to secure. In this respect Mackey's instinct was sound when he fixed upon Payne's General Regulations of 1721 as the turning point.

Why should the Masons of the last half of the eighteenth century and of the first three quarters of the nineteenth century have deceived themselves so completely upon a matter of such consequence? One reason, and perhaps the chief reason, is to be found in eighteenth-century ideas of codes and of law-making. For one thing, the eighteenth century was an age of absolute governments. The local, feudal, decentralized governments of medieval Europe had definitely broken down. In England the Wars of the Roses had demonstrated that the general security called for something stronger and the Tudors and Stuarts had furnished it, howbeit the struggles against the Stuarts had preserved for the modern world the sound kernel of the medieval polity. In France, which in the days of Louis XIV had furnished the model for eighteenth-century politics, centralized royal government had triumphed. The Roman **Corpus Iuris,** compiled in sixth-century Constantinople, gave us Byzantine ideas of law as the product of the sovereign will, and the Byzantine theory of law, expounded by French publicists in the seventeenth and eighteenth centuries, accorded so exactly with what men saw before their eyes that it scarcely needed the aid of an idea that Roman law was embodied reason to give it currency. The time was one of codes and legislative programs. Men spoke of the "codes" of the Anglo-Saxon kings and thought of the traditional law of English-speaking peoples as a body

of statutes worn down by time. It was the fashion among historians to attribute all legal and political institutions to the deliberate invention of this or that ruler. A sounder view came in with Hegel's philosophy and the rise of the historical school in the nineteenth century. But that view did not reach Anglo-American scholarship at once and did not become significant in American thought till some time after the Civil War.

Again we must remember that the eighteenth century thought of itself as the age of reason. Men had absolute faith in reason. They believed that they could work out everything by their own unaided reason without troubling to do the futile work of investigating details. Moreover they believed firmly in what they called "natural law." They conceived that what ought to be and what was were to be made synonymous; that whenever one could show a moral principle that ought to govern conduct he had thereby shown a legal principle that did govern it. This attitude led naturally to confusion of what ought to be and what was, and it was an easy transition from what one would like to think to what ought to be. Thus much of eighteenth-century historical writing was ultra-subjective. It is a record of what the writer thought a **priori** must have been the course of history, assuming that to show what ought to have been sufficiently demonstrated what was. When, therefore, Gould says of Preston that he was "a Masonic visionary who—untrammeled by any laws of evidence—wrote a large amount of enthusiastic rubbish, wherein are displayed a capacity of belief and capability of assertion which are hardly paralleled at the present day by the utterances of the company promoter, or even of the mining engineer," he is but saying that Preston was a child of his time. The need of fortifying the Grand Lodge system by an appeal to antiquity was strong. Men were not trained in historical method. Rather they relied on their individual rea-

sons for all things, and what they took to be reason was often no more than enthusiasm and desire.

Thus the first five of Mackey's ten forms of the old written law of Masonry take on a wholly different aspect. The sixth and seventh are Preston's generalizations from the result of the establishment of the Grand Lodge system. The principles which he formulates in these so-called regulations were thoroughly established in his day. Characteristically he assumed that they must have resulted from deliberate law-making and, fixing the terms as accurately as he could, he reported them circumstantially as to the time and place of their adoption, exactly as the eighteenth-century historian could report the precise words spoken in a council of war centuries before and report out of his own reason the details of intrigues and conspiracies, of debates of secret councils, and even of the communings of a king or commander with himself. Indeed the apocryphal character of the so-called regulation of 1703, which contradicts all that we know of Masonry from the fourteenth to the eighteenth centuries, suggested itself to Mackey, who sought to avoid the difficulty by interpretation in a footnote. The remaining four are genuine examples of legislative declaration of existing law, with minor emendations, or of legislative innovations to secure new interests and conserve new values.

Today the written law of the craft in any particular jurisdiction, which Mackey would call its local regulations, is made up commonly of four elements: (1) constitutions of the Grand Lodge, which are usually compiled and edited from time to time and thus kept in organized, systematic form exactly as a state of the Union compiles its legislation, or else after a definite compilation are held in that form by a practice of introducing new legislation in the form of amendments of or additions to this or that paragraph; (2) decisions of the Grand Lodge on appeal from the Masters of sub-

ordinate (or constituent) lodges or from the lodges themselves; (3) edicts of the Grand Master; and (4) answers of the Grand Master to inquiries as to the law submitted to him, or decisions of the Grand Master upon questions asked by Masters of lodges with reference to matters pending before them or their lodges. To understand these we must turn to the Roman law where these forms of law developed and got the names which still attach to them not only in the law of the state but in Masonic law.

A Roman emperor made or declared the law by constitution, by decision (decree), by edict, and by rescript or letter. He had this power, in legal theory, because at his accession the Roman people had specially conferred it upon him for his life by a special act of legislation. Down to the reign of Diocletian, at least, in political theory, the Roman state was a republic. Sovereignty was in the Roman people. The emperor was only "princeps," first citizen, a citizen upon whom the Roman people had devolved their sovereignty for the time being by an act of legislative authority upon an extraordinary occasion. Later, in Byzantine times, the emperor came to be thought of as the repository of sovereignty and the source of law. But in classical times he simply wielded the powers of the sovereign Roman people which had been devolved upon him. Accordingly as the Roman people in their legislative assembly could enact a statute (**lex**) the emperor, wielding the legislative power of the people, could enact a law. What he thus established (**constituit**) by virtue of the legislative authority devolved upon him, was called a constitution (**constitutio**). Thus in Roman law a constitution is a rule established by legislative act. And such precisely is a constitution in Masonry. Only with us the legislative power of the fraternity in each jurisdiction has devolved upon the Grand Lodge. Hence what the Grand Lodge establishes and promulgates as

a rule of law, by virtue of its legislative authority, is a constitution. At the end of the eighteenth century, when sovereign peoples began to adopt for themselves a fundamental law, fixing the framework of government and imposing limitations upon the several organs of government so set up, the term constitution came to be applied to such enactments of the sovereign people. Thus it has come into use in America, and to a less extent elsewhere, in the sense of a superior fundamental law, to which ordinary acts of the several departments of government or of the agencies of a society must yield, a conception growing out of the circumstances of colonial government in America prior to the Revolution, where executive and legislative acts were subject to the measure of the colonial charter. In Masonic law we preserve the older use of the term, speaking from the fore part of the eighteenth century, when the modern political written constitution was quite unknown.

Another way in which the Roman emperor made or declared law was by his decisions in causes taken to him on appeal or determined by him directly. These were called decrees. For the Roman magistrate had no power to render a judgment of the strict law. This could be done only by **judices** or arbitrators, chosen for the case in hand, somewhat as the common law demands the verdict of a jury as the foundation of a judgment. But the magistrate could decide certain things **extra ordinem** and render a decree, and this power, along with the other powers of the Roman magistrates, was especially devolved upon the emperor at his accession. In Masonry, the power of determining appeals, as an attribute of sovereignty—for so it was regarded when men forget how the Roman emperors came by it—devolved upon the Grand Lodge, to which in the eighteenth century sovereignty definitely passed.

Still another way in which the Roman emperor made or declared the law was by his edict. The power

of issuing an edict belonged originally to the superior magistrates of the Republic and was exercised chiefly by the praetors or judicial magistrates. Strictly the edict was a pronouncement by the magistrate of the course which he proposed to take in the administration of his office. It was a sort of post-election platform from which the citizen might know what to expect from the officer in question. But this easily became a law governing the administration of his office, and when the magisterial power was devolved upon the emperor the power of issuing an edict came to be in substance a power of issuing general orders governing matters of administration. The term was so used in French public law in the seventeenth and eighteenth centuries and was generally used in this sense at the time when Masonic law was formative. In this same sense we use it in Masonry. An edict is a general administrative, as distinguished from a judicial order, prescribing the conduct of some matter of administration, or prescribing the conduct of Masons in some matter of administrative cognizance. A good example may be seen in the edicts of Grand Masters in different jurisdictions against the use of cipher rituals.

Finally a Roman emperor made or declared the law by means of rescripts. The rescript or letter was an answer which the emperor returned to a question put to him by a judge or magistrate who had a cause pending before him. In the classical Roman polity the **judices** who had a cause before them were advised as to the law by the expert opinion of a jurisconsult. In the imperial polity the emperor was taken to be the most authoritative jurisconsult and the practice of submitting questions for his authoritative opinion as to the law was a natural result. This practice passed to the canon law, where the Papal rescripts had similar authority, and was well known to the law of continental Europe in the eighteenth century. Naturally it came

into Masonic practice along with other institutions of the time when, in the formative period of Grand Lodge Masonry, a universal polity had to be set up rapidly. The decisions of the Grand Master in answer to questions might very well be called rescripts, exactly as his administrative general orders are called edicts. They are not decisions in a judicial sense, they are authoritative opinions of the most authoritative jurisconsult of the craft for the time being. Being mere opinions there is no impropriety in the practice of many Grand Lodges to which the Grand Master regularly reports his opinions for review. His decision is not reviewed. Indeed Mackey seems justified in his position that the decisions of a Grand Master as such are not or at least ought not to be reviewable. In legal theory what happens might be explained thus: The opinion of the Grand Master upon the point of law involved in his answer is considered and the doctrine which it announces is given the force of a constitution by the approval of the Grand Lodge or else the doctrine is rejected as a rule for the future and some other rule given legislative authority.

It will be noted that of the four forms of making or declaring the law which were in use by the Roman emperor, two are appropriate to the Grand Lodge and two to the Grand Master. In the later Roman imperial polity all the powers of sovereignty were in the emperor. As the Institutes put it, his will had the force of law. But along with the imperial Roman conceptions, familiar to the time through the writings of publicists based on Justinian's law books, another set of conceptions were familiar to Englishmen at the time when Masonic legal institutions were formative. The memory of the contests with the Stuart kings was still fresh and in the course of that contest English lawyers had resurrected and furbished up many ideas that belonged to the polity of the Platagenets. Thus the

British constitution in the eighteenth century was a superposition, as it were, of what were then modern ideas and institutions upon the older and radically different ideas and institutions of medieval England. As a result the balance was maintained chiefly by custom and precedent and respect for traditional lines between authorities and magistracies with large potentialities of theoretical jurisdiction. Experience gradually settled the lines and respect for precedent established them. The same phenomenon is to be seen in the development of Anglo-American Masonic polity. Legislation by general regulations or constitutions and the power of judicial decision on appeal, with the incidental power of so declaring the law, became functions of the Grand Lodge. The more nearly administrative functions of issuing edicts and rendering what may fairly be called rescripts became functions of the Grand Master. They can hardly be said to be common-law powers in the same sense as those universally customary prerogatives which Mackey sought to establish as landmarks. No doubt Grand Lodge legislation may interfere, as it sometimes has done, to abridge or modify them. But it is significant that with the example of the separation of powers in American public law constantly before them, American Masonic lawyers have acquiesced in and developed a system of law-making proceeding on radically different lines and originating in the law books of Rome.

Direct, deliberate law-making by constitutions is the type of Masonic law-making that calls chiefly for our attention. Maine tells us that "the capital fact in the mechanism of modern states is the energy of legislatures." True, the lawyer is somewhat skeptical. He doubts with good reason the possibility of achieving by law more than a small fraction of what the promoters of new laws confidently expect. But the layman's faith in the efficacy of legislative law-making is unbounded

and there is no evidence of abatement of the huge annual output of our political law-making machinery. There are many causes behind this phenomenon. But one is of special significance for Masonry and is behind a similar excess of zeal for legislative law-making in too many of our jurisdictions. The theory that law is the will of the sovereign, that a sovereign democracy, or its representatives or delegates in its name, can make law by the simple process of translating its will for the time being into chapters and sections, the magic words "be it enacted" justifying all that follow, arose by applying to sovereign peoples the ideas which had been worked out with reference to absolute personal sovereigns. The will of the emperor had the force of law; hence the will of the people is to have the force of law. But a confusion was involved here. The emperor owed it to his subjects to use his will rationally when willing law. The power to give his declarations of will the force of law did not absolve him from obligation to measure the content of those declarations by reason. Our fathers were conscious of this with good reason and so sought to limit law-making and give security against arbitrary and capricious action by bills of rights. But these securities are available only within comparatively narrow limits. So long as the theory of law as will prevails, the flood of law-making will continue.

In American Masonry we have very generally a similar situation, as has been said, for a like reason. For one thing, we have all been trained in the theory that what we will collectively or in sufficient mass to make a majority is law in substance and only needs a mechanical process of receiving the legislative guinea stamp to be law in form. It is very easy to transport this conception to every other connection in which the word law appears. Is there Masonic law? Then it is to be made by the will of the Masonic sovereign. Have

we a sovereign Masonic body? Go to, let it justify its existence by making laws. Such ideas confuse exercise of the will as a means and exercise of the will as an end. The means of making law is the declared will of the sovereign. But the end of making law is not to enable the sovereign to declare his will. The end is to conserve values and to secure interests. Delicate processes of weighing values and cataloguing, appraising, and balancing interests must be gone through with before the matter is ripe for the declaring will.

Having no bills of rights in Masonry and hence nothing beyond a handful of vaguely defined landmarks to restrain him, what then are our barriers against the ravages of the zealous, energetic, ambitious Masonic law-maker? Legal barriers there are none. But some of the most sacred interests of life have only moral security and on the whole do not lose thereby. For example, the claims of husband and wife respectively to each other's society and affection are left as between the two with no other security than the moral sense of the community. It is important to ask, therefore, how far there are agencies for focusing the moral sentiment of the craft upon the Masonic legislator and making it an effective moral check. One such agency, which has been of no little service, is the report of the Committee on Correspondence, whereby in so many jurisdictions the law-making of the Masonic world is reviewed, criticized, and adjusted, if possible, to general theories of Masonic law. These reports vary greatly in value. But by and large they are inestimable repositories of Masonic law. Moreover it must needs give the Masonic innovator pause when he reflects that what he does must run the gauntlet of critical scrutiny by veteran reviewers upon the Committees on Correspondence of a majority of our jurisdictions. Another restraining influence is coming forward with the development of Masonic study. Nothing is so dogmatic as

ignorance. A better and more general acquaintance with the history, philosophy, and legal traditions of the craft is certain to make our law-makers more cautious, more intelligent, and more effective. Such comparative studies in Masonic legislation as those already begun in THE BUILDER are likely to do much for intelligent law-making where library facilities are small and law-makers are zealous. But above all things we must rely upon the principles of Masonry. Let us remember Krause's formula: "Law is the sum of the external conditions of life measured by reason." Our measure is to be reason, not will, and all the lessons and symbols of the craft are eloquent of measurement and restraint.

In conclusion, let me repeat the disclaimer with which I began. I have not sought to expound the law of the Craft at large or of any jurisdiction in particular. I have sought rather to consider how far there may be said to be such a thing as Masonic jurisprudence, what materials are at hand for an organized body of knowledge that may be called appropriately a science of Masonic law, what general principles may be found for such a science, and in particular how far the problems of legal science generally may be found in and their solutions may be applied to the law of our Craft. So studied, the subject of Masonic jurisprudence has great possibilities which are as yet scarcely opened. The ambitious Masonic student who essays any of its problems as he would a problem of the everyday law, going through our Grand Lodge proceedings as he would the legal sources, using our texts as he would a legal text book, reasoning from our traditions as he would from the body of written tradition we call the common law, will not only be abundantly repaid but will do a service in helping to make Masonic jurisprudence a reality.

NOTES TO LECTURE V.

1. EVOLUTION OF LEGISLATIVE LAW-MAKING. See Maine, Early History of Institutions, American ed., 26 ff., 386-

393, 398-400; Maine, Village Communities, American ed., 75, 116; Jenks, Law and Politics in the Middle Ages, 7-13, 18-21.

2. ROMAN IMPERIAL LEGISLATION. "A constitution of the emperor is what the emperor enacts by his decree or edict or rescript. Nor has it ever been doubted that this has the force of a statute, since the emperor himself obtains his authority by a statute." Gaius, I, § 5. See also Institutes of Justinian, I, 2, § 6.

3. THE MODERN USE OF "CONSTITUTION." See Montesquieu, Spirit of Laws, book 11, chap. 6 (1748); Blackstone, Commentaries, I, 50, 127 (1765); DeLolme, The Constitution of England, 1781.

4. LAW AS THE WILL OF THE SOVEREIGN. "The more, however, law comes to be seen to be merely positive, the command of a law-giver, the more difficult it is to put any restraints upon the action of the legislature." Figgis, Studies of Political Theory from Gerson to Grotius, 85. "When juristic speculation is merely a discovery of the supposed dictates of universal human reason and legislation is deemed an application of universal principles to particular situations, the former is free to examine its premises and the latter is bound to have premises. But once admit an imperative theory as a theory of law, it becomes also a theory of law-making. When the doctrine is **quod principi placuit legis habet vigorem**, it matters little whether the **princeps** is a Roman emperor, represented by jurisconsults who legislate in his name or the people of an American commonwealth speaking through the judiciary committees of their legislature. In either case, the feeling that a declaration of the sovereign will suffices to make law will give rise to a mass of arbitrary detail which cannot obtain the force of law in practice." Pound, The Scope and Purpose of Sociological Jurisprudence, 24 Harvard Law Rev. 591, 597.

5. COMMITTEES ON CORRESPONDENCE. As I have expressed my conviction of the importance of these committees and of the good influence of their reports, I should, perhaps, refer to the other side. See Nickerson and Titus, The Reviewers Reviewed, New England Freemason, I, 162 (1874).

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