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LEGAL HISTORY-JOSEPH STORY'S ANONYMOUS LAW ARTICLE

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COMMENTS

LEGAL HISTORY—JOSEPH STORY'S ANONYMOUS LAW ARTICLES—The first edition of the *Encyclopedia Americana** (1829-1833) contains numerous articles on a wide variety of legal subjects, including

* The first edition of the ENCYCLOPEDIA AMERICANA is not now immediately accessible to lawyers. Rarely will it be found in the working collection of a law library. Colleges and universities, fortunate enough to have acquired a set, generally regard it as a rare book item. These law articles, therefore, are practically unknown to the members of the bench and the bar. (In subsequent footnote references, the ENCYCLOPEDIA will be cited ENCY. AM.—Ed.)

such topics as Common Law, Jury, Equity, etc. The identity of the author of these articles is not disclosed. There is an occasional footnote, however, which declares: "this article prepared by an eminent American jurist."[1] This suggested the possibility of a lively and interesting manhunt—a search for the "eminent American jurist" who agreed to submit articles on law for the *Encyclopedia,* but who preferred to remain anonymous.

I

From the tone of the articles it is clear that they were written by someone schooled in the common law; their richness in Latin phraseology suggested a scholar; their depth of reasoning and learning, a judge; their fluent literary diction, an educator, perhaps a law teacher; and their subject matter, a man with a wide and varied judicial experience. The author, therefore, might be a common lawyer, a scholar with judicial experience, a fluent lawyer-writer, a judge or college teacher or, perhaps, both. Few men in 1833, or since that time, have been endowed with all these characteristics.

The title page of the *Encyclopedia* discloses that Dr. Francis Lieber, a distinguished German scholar who had recently settled in America, was the editor of the work, and that he was assisted by Professor E. Wigglesworth of Harvard. Concerning the articles on law, the Introduction says only that "numerous entire articles of American and English law have been introduced, and large additions made to the original articles on Jurisprudence, which, in the German work, are mostly confined to subjects of Roman, German, and French law."[2]

The idea of compiling an American encyclopedia was suggested to Francis Lieber by the works of F. A. Brockhaus, the celebrated German encyclopedist. The seventh edition of Brockhaus's internationally famous encyclopedia, the *Conversations Lexicon,* was adopted as the basis of the new American encyclopedia.[3] A group of prominent American educators, jurists, and businessmen were encouraged to support the endeavor. Wigglesworth the educator, Bancroft the historian, Godman the scientist and Walsh the biographer, became advisers and contributors. The firm of Carey, Lea, and Carey of Philadelphia agreed, in 1828, to publish the work.[4]

[1] 7 ENCY. AM. 278n (1831).
[2] 1 id., vi (1829).
[3] BROCKHAUS, ALLGEMEINE DEUTSCHE REAL-ENCYKLOPEDIE FUR DIE GEBILDTEN STANDE (1827-1829).
[4] FREIDEL, FRANCIS LIEBER: NINETEENTH CENTURY LIBERAL 66 (1947).

Translations were made of select articles from the German edition of the *Conversations Lexicon.* On topics of particular interest to American readers, articles were written entirely anew. In the fields of law, especially because of the differences between the German and American legal systems, the translated articles had to be modified and extended to include the common law.[5] Many new articles had to be written on those topics which were unknown to Germanic law. For this task, Lieber and his associates sought the foremost legal authority in America, a leader of the bar, a jurist, a teacher, and a prolific law treatise writer. The man they found was all of these; he agreed to write the articles, but requested that his identity be withheld until after they had appeared in print.

The plan, as originally announced, was to write an encyclopedia in twelve volumes.[6] When the twelfth volume appeared in 1832, there still remained articles on topics beginning with the letters "V" to "Z" to be accommodated. The publication of an additional volume, therefore, became necessary, and a thirteenth volume was published in 1833.

The editors introduced this final volume with a partial list of the contributors, especially those whose articles appeared in the later volumes of the work. The list included such prominent figures as George Ticknor of Boston, Chief Justice Charles Ewing of New Jersey, Governor Lewis Cass of Michigan, John D. Palfrey of Boston, James K. Paulding of New York, and Joseph Story of Washington.[7]

The author of the unsigned articles on law in the first edition of the *Encyclopedia Americana* was an associate justice of the United States Supreme Court—Joseph Story.[8]

Years later, Lieber referred to the writing of these articles, in a footnote to his book, *On Civil Liberty and Self Government,* when he said:

> "I shall never forget the offer he made to contribute some articles when I complained of my embarrassment as to getting

[5] A few of the law articles are in two parts, the first a translation from the CONVERSATIONS LEXICON, and the second an entirely new article on the same topic written by the "eminent American jurist." See Jury, Criminal Law, etc.

[6] A prospectus issued in 1829 announced that the ENCYCLOPEDIA would be completed in "Twelve Large Volumes" to be issued at "intervals of three months." In some sets, this prospectus will be found bound at the end of the first volume.

[7] 13 ENCY. AM. 3-4 (1833).

[8] "To the Hon. Judge Story, and to John Pickering, Esq. of Boston, they [the editors] are under peculiar obligations. The longest and most elaborate articles in the law department are from the pen of the former gentleman; and it is needless to say how much these add to the value of the work." Ibid.

> proper articles on the main subjects of law for my work intended for the general reader. Many of them were sent from Washington while he was fully occupied with the important business of the Supreme Court. He himself made out the list of articles to be contributed by him. . . . the only condition this kind-hearted man made was that I should not publish the fact that he had contributed the articles in the work until some period subsequent to their appearance. . . ."[9]

Story prepared articles for the *Encyclopedia* on the following topics: Common Law, Congress of the United States, Conquest, Contracts, *Corpus Delicti*, Courts of England and the United States, Criminal Law, Death Punishment, Domicil, Equity, Evidence, Jury, Lien, Law, Legislation and Codes, Natural Law, National Law, Prize, and Usury. William Wetmore Story has observed that his father's contributions "comprise more than one hundred and twenty pages, closely printed in double columns. . . ."[10]

Joseph Story was in the prime of his judicial and writing career at the time he prepared these law articles.[11] He was not yet fifty years of age, and had been a Supreme Court justice for seventeen years. Written during the "formative" period of the commentaries, the articles seem like a preface to the great works that were soon to come: *Commentaries on the Law of Bailments*, published in 1832; *Commentaries on the Constitution*, in 1833; *Commentaries on the Conflict of Law*, in 1834; *Commentaries on Equity Jurisprudence*, in 1836; *Commentaries on Equity Pleadings*, in 1838; and *Commentaries on the Law of Agency*, in 1839.

At the time these articles were being written, Story was also occupied with the business of the Supreme Court in Washington and of the circuit court in Maine. As a justice of the Supreme Court, it was necessary for him to "ride circuit." The roads were bad and traveling was difficult. While most of the justices disliked this duty, such was not the case with Story; he deemed it fortunate to be able to spend six months of the year in the great maritime districts of Maine, New Hampshire, Massachusetts, and Rhode Island. In addition, he lectured at Harvard Law School (when the Court was not in session), assisted with the organization of the school,[12] and de-

[9] LIEBER, ON CIVIL LIBERTY AND SELF-GOVERNMENT 213, n. 3 (1883).

[10] 2 W. W. STORY, THE LIFE AND LETTERS OF JOSEPH STORY 27 (1851).

[11] A brief survey of the works published by Story, his speeches, articles, etc., is found in 1 CARSON, THE SUPREME COURT OF THE UNITED STATES 237-238 (1892).

[12] The Dane Professorship at Harvard was accepted by Story in 1829, and he became one of the first law teachers at that school.

livered public discourses before such learned bodies as the Boston Mechanic's Institute,[13] the Families of the Professors of Harvard College,[14] and others. Add to this his vast correspondence with the outstanding men of his time, all carefully and thoughtfully written, and it seems more than one man could accomplish.

The ability to attend to such wide and varied activities has been attributed to Story's remarkable technical memory in law. It is said:

> "His knowledge of the law had scarcely any boundaries . . . he had read nearly everything of any value in the range of jurisprudence. And he remembered with wonderful accuracy what he had read. It did not, however, lie in his mind like a dull, cumbrous load of facts, cases, rules, and precedents, but like a living organization held together and vivified by principles. But not only this; he remembered all the leading cases in every branch of the law, by name and volume, and many of them by page. . . . His mind was not a lumber-room, with all sorts of things tumbled into it without classification or order, but everything there was completely arranged and in its place."[15]

Story corresponded frequently with Lieber while the articles were being written. The contents of these letters reveal the agility and promptness with which he was able to compose and deliver an article on a selected topic, in spite of the other affairs that occupied and divided his attention.[16]

From Salem, on May 21, 1828, Story informed Lieber that "I can prepare an article on the *Supreme Court* as soon as my circuit is over."[17] In November he wrote, "I have at this moment on my hands some very urgent business, which will occupy me a week or ten days; after which I hope to have leisure to write the article which you desire."[18]

A sheet from the forthcoming *Encyclopedia*, sent for Story's comments, was acknowledged, in April 1829 with the reply, "I will cheerfully comply with your request in writing short articles on *Conquest, Occupancy,* and *Congress,*" and he added: "The first sheet of the

[13] JOSEPH STORY, MISCELLANEOUS WRITINGS 112-133 (1835).

[14] Id. at 134-146.

[15] 2 W. W. STORY, CONVERSATIONS IN A STUDIO 448-450 (1890). "My father had a very remarkable memory. . . . I don't remember in the same way, nor do I remember the same kind of things. It is really too bad that one cannot inherit the accumulated learning stored up by one's parents, as well as their goods and chattels. . . . it seems terrible to see it vanish with the breath." Id. at 445-446.

[16] The letters will be found in the Francis Lieber Manuscript Collection, Henry E. Huntington Library, San Marino, California. Hereafter the collection will be cited FLC.

[17] Story to Lieber, May 21, 1828, FLC.

[18] Story to Lieber, November 22, 1828, FLC.

Lexicon looks well. Might it not be well on important subjects to refer to the best works on each by a short reference?"[19] This suggestion was only partly adopted by Lieber, and unlike the articles found in later editions of the *Encyclopedia Americana,* the law articles of the first edition did not always include references to the best works in each field.

The first volume of the *Encyclopedia* appeared in the fall of 1829. On October 17, Story informed Lieber that: "I will finish the article *Congress* which is already begun, in a few days, within *ten* days, unless an earlier day is important to you."[20] There were delays, however, and the article was not ready until December 16, when Story wrote: "I now enclose you the article *Congress of the United States of America.* You will please to take notice that it includes a full account of all the powers of the Legislature. Still to give a full view of the Constitution of the United States it will be necessary to give under other articles, say, Constitution of the United States, President of the United States, Courts of the United States, etc., etc., a like description of all the other Departments."[21]

At Story's request, the Reverend McCharles (a Baptist minister) prepared a biographical sketch of Rev. Robert Hall. Story sent Lieber this sketch, on July 22, 1830, and added: "In a few days, I shall be able to write and sent you the article *Domicil.*"[22] A week later, he sent the article, saying: "I have compressed it as much as I could. I wish to have all your Law Articles as complete as possible, and especially in the *civil* law." Story then added: "I think you will do well occasionally to transcribe from . . . the Encyclopedia Moderne, those articles which are not exact and full in the Conversations Lexicon on the Civil Law, and I will aid in giving them the dress of the *common law* as an accompaniment when they are sufficiently important to require any such accompaniment."[23]

The published volumes of the *Encyclopedia,* by this time, had already passed the topic Bailment, which had been treated in less than one-half column printed page.[24] Aware of the inadequate discussion given to this important topic, Story asked: "How are your articles on Deposit, Mandates, commodatum, *locatio rei et operis,* and in short on all the topics of Bailments? Pothier is admirable

[19] Story to Lieber, April 17, 1829, FLC.
[20] Story to Lieber, October 17, 1829, FLC.
[21] Story to Lieber, December 16, 1829, FLC.
[22] Story to Lieber, July 22, 1830, FLC.
[23] Story to Lieber, July 29, 1830, FLC.
[24] 1 ENCY. AM. 528 (1829).

on all these. I wish there might be a good article on the *Lex Loci;* and I wish I had leisure to write one, with all the continental books before me."[25] The subjects mentioned by Story are not given separate treatment in the *Encyclopedia,* and the inadequate article on Bailment was obviously written by some other gentleman.

In August 1830, Story agreed to prepare articles on Equity and Evidence. He wrote Lieber, "I regret there is not more time, as I could make them more exact and more brief."[26]

The article on Jury is mentioned first in a letter dated February 23, 1831. Story said: "I have no objection to write the article *Jury,* if you can wait until my return home. The Court will adjourn about the 18th or 19th of March. I shall be home by the 27th of the same month. And I can furnish it by the 10th of April, if you can wait so long. I should be glad to see the translated article as it now stands. . . . I do not see any 'way or means' for me to write the article earlier than I have stated (10th of April). If therefore you are driven for time, you must refer it to some other gentleman."[27] Lieber elected to await the time when Story would be able to prepare the article. "Jury" is more fully treated than some of the other law topics.

The seventh volume of the *Encyclopedia* appeared during the summer of 1831. A copy was received by Story on the eve of his departure for the circuit court in Maine, and he informed Lieber in October from Cambridge that: "I have not forgotten my promise respecting the articles *National* and *Natural* law. Notwithstanding my very pressing engagements during this month (the circuit court being in almost constant session), I hope to be able to give you both articles by the first of November, which is the earliest period I can promise." And he added: "I must write, indeed, under all the pressure which my official and professional duties are capable of imposing upon me."[28]

Having recently recovered from an attack of influenza, Story wrote Lieber from Cambridge on December 13, 1831: "I do not see how I could execute the article *Prize,* in the short time before I go to Washington. . . . If the article were not wanted until my return from Washington, I could write it in a fortnight." The volume containing the letter "P" might be reached and passed before Story could

[25] Story to Lieber, July 29, 1830, FLC.
[26] Story to Lieber, August 5, 1830, FLC.
[27] Story to Lieber, February 23, 1831, FLC.
[28] Story to Lieber, October 6, 1831, FLC.

compose an article on this important law topic. He therefore asked Lieber: "Could it not be put into an appendix to your next volume? You could postpone it to the article War, if you chose, making a reference under Prize. I regret this occurrence because prize law constitutes a proper sequel to National Law."[29] Later, however, Story was able to establish a more exact date for this article, and he wrote Lieber on December 19: "I shall not return from Washington earlier than about the 25th of March. I could furnish the Article *Prize* within *ten* days, after my return. It is even possible that I could furnish it earlier."[30] "Prize" is one of the longest articles that Story prepared for the *Encyclopedia*. A note explains that "the importance of this subject to a commercial community is our apology for the length of the following article."[31]

II

Members of the bar will be interested in the practical legal topics that these articles discuss. Judges will find in their frequent references to the works of Blackstone, etc., the origins of certain law principles that they are called upon to apply. The clear, readable literary style of the articles makes them interesting and understandable even to persons only slightly familiar with the law. Although more than a century has passed since they were written, these articles still represent accurate statements of the basic principles of law on the topics that they discuss.

Common Law. The various significations which attach to the term "common law" are discussed in the article on that topic.[32] Story says that the term "common law," as used in Anglo-American jurisprudence, has both a limited and an enlarged sense. In the enlarged sense, the term refers to the entire body of English law, including legislation and the general customary law. In this sense, common law is to be distinguished from Roman law—the civil law. The term is also used in a limited sense to refer to that portion of English jurisprudence which is unwritten—the *lex non scripta*—as distinguished from legislative enactments or written laws—the *lex scripta*. This distinction is made more clear when we observe that a certain remedy

[29] Story to Lieber, December 13, 1831, FLC.
[30] Story to Lieber, December 19, 1831, FLC.
[31] 10 ENCY. AM. 351n (1832).
[32] 3 id. at 393-395 (1830).

is given at common law for a wrong, yet another remedy—by way of penalty—is often given for the same wrong by statute. The first remedy is founded on "immemorial usage" or general principles, while the second rests upon a positive act of the legislature. The term "common law" is used in a still more limited sense to refer to that portion of the law of England which is the "custom of the realm"—local and municipal in origin as distinguished from the law of nations, maritime law, or commercial law, which are founded on the principles and general usages of civilized nations. Today, the term common law also includes both the law of nations and the law merchant.

Congress of the United States. The constitutional provisions respecting the national legislature are outlined and explained in the article on the Congress of the United States.[33] The rights and restrictions secured by the constitutional amendments are discussed. "The enumeration in the Constitution of certain rights," says Story, "is not to be construed to deny or disparage others retained by the people. The powers *not* delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

Contract. The original basis of the common law as to contracts was the civil or Roman law, but it has undergone considerable modification in its incorporation into the jurisprudence of England and America.[34] A contract, at common law, is defined by Story as "an agreement made in one form, between parties capable of contracting, for a legal object or purpose, and upon a sufficient consideration. It must be an agreement or mutual bargain, voluntary, and without force or fraud; and therefore it includes an assent given *bona fide.*" The principal elements of a contract as thus defined—mutual assent, parties capable of contracting, legal object, consideration, etc., are discussed. The provisions of the statute of frauds respecting the conveyance of title to land, contracts for the debts of another, and contracts for the sale of goods beyond a certain value are mentioned. Many of the regulations referred to here as a part of the common law, says Story, have been variously modified in different American jurisdictions by local jurisprudence and by statutes.

[33] Id. at 435-439.
[34] Id. at 503-506.

Courts of England and the United States. The system of courts of England is described at some length.[35] The discussion of inferior courts includes the following: the pipowders court, the manors and hundreds, the coroner's court, the sheriff's court, the court leet, the justice's court, the quarter sessions, the court of assize and nisi prius, the hustings court, the court of conscience, the court of stannaries, courts of the forest, and others. A more particular account is given of the superior courts, i.e., the exchequer, common pleas, king's bench, and House of Lords. The jurisdiction of the British admiralty is considered in a separate discussion of admiralty courts.

The constitutional source of the judicial power in the United States is first traced and then explained. A summary view of the American system of circuit and district courts is followed by an extended description of the organization and jurisdiction of the United States Supreme Court. Story explains that "the general mass of business, which employs the supreme court, consists of private controversies respecting property, or personal rights and contracts. . . . Its most important function, however, in a practical view, is the decision of the great constitutional questions, which, from time to time, arise in the different parts of the Union." The significant differences and similarities between the United States Supreme Court and the highest courts of England are enumerated. There is also a discussion of the judicial system as it operates on the state level.

Conquest. The term "conquest" is used by Story to refer to the right over property acquired by capture in war, or by a superior force.[36] Conquest may concern persons or things, movable or immovable property, a whole nation or a single town, and it may be temporary or permanent. The right of conquest, says Story, has been deduced as an inference of natural law, from the right to weaken the enemy, to compel him to make compensation for injuries, to force him to an equitable peace, and to deter or prevent him from future injuries.

Corpus Delicti. The term "corpus delicti" is a figurative expression used to denote those external marks, facts, or circumstances which accompany a crime, and without the proof of which the crime is not supposed to be established.[37] Story says that there is no corresponding expression in the English language of the law. "Certain

[35] Id. at 588-601.
[36] Id. at 443-445.
[37] Id. at 550-551.

proofs are indispensable to establish a crime . . . unless they exist, there is no legal ground to convict the party; so that *corpus delicti* is equivalent to the proofs essential to establish a crime."

Criminal Law. Story did much toward the advancement of the field of criminal law, although his contributions are not generally recognized. This article is a survey of crimes and the punishments for crimes.[38] The principles of law applicable to crimes committed by infants, lunatics, or idiots; to injuries committed without intention through misfortune or chance, ignorance or mistake; and to crimes committed by compulsion or force are discussed and explained. A distinction is made between statutory crimes and common law crimes.

Punishment of Death. This article deals with a topic related to criminal law.[39] The right of society to punish capital offenses is explained and defended. Concerning the expediency of capital punishment, Story declares that "the frequency of a crime is not, of itself, a sufficient reason for resorting to such a punishment. It should be a crime of great atrocity and danger to society, and which cannot otherwise be effectually guarded against." Punishment by death can have no effect to reform the offender himself, but it ordinarily does have the effect to deter others from committing a like offense. The crimes to which capital punishment ought properly to be limited are discussed. The *manner* of infliction of punishment of death is considered, and Story says, "tearing the criminal to pieces, piercing his breast with a pointed pole, breaking his limbs upon the wheel, pressing him to death in a slow lingering manner, burning him at the stake, crucifixion, sawing him to pieces, quartering him alive, exposing him to be torn to pieces by wild beasts, and other savage punishments, have been sometimes resorted to for the purposes of vengeance, or public example, or public terror." A review of modes of inflicting death punishment in modern states is given. Frederic the Great's practice to have all death sentences written on blue paper so that he might be constantly reminded of them as they lay upon his desk is suggested as an excellent example to sovereigns of their duty.

Domicil. The article on Domicil is a concise statement of the principles of law on that topic.[40] Roman, French, and Anglo-American legal definitions are given and discussed. "The question of

[38] 4 id. at 34-40 (1830).
[39] Id. at 140-145.
[40] Id. at 613-616 (Appendix).

domicil," said Story, "is of very great importance, for it often regulates political and civil rights, and founds or destroys jurisdiction over the person or property." A distinction is made between political, civil, and forensic domicil. The general principles applicable, when there is no legislation applicable to the case, are discussed. A large number of authorities—both books and cases (domestic and foreign) —are cited in this article.

Equity. Equally important have been Story's contributions to the law of equity. His books *Commentaries on Equity Jurisdiction* (1835) and *Equity Pleadings* (1838) were considered great additions to the law at the time. This article is a statement of Story's thinking on that subject before publication of these books.[41] Grotius' definition of equity—as the correction of that, wherein the law, by reason of its generality, is deficient—is cited with approval. The different meanings that are attached to this term by the courts in England and in the United States are discussed. A distinction is made between legal and equitable rights. "The most general description of a court of equity," says Story, "is, that it has jurisdiction in cases where a plain, adequate and complete remedy cannot be had at law; that is, in the common law courts. At law the remedy must be *plain, adequate,* and *complete,* otherwise equity will interpose and give relief."

Evidence. The term "evidence," in its most general sense, refers to those proofs which establish, or which have a tendency to establish, any facts or conclusions.[42] Story says that evidence is of three kinds: mathematical, moral, and legal. This last kind is employed in judicial tribunals for the purpose of deciding upon the rights and wrongs of the litigant parties. The existing rules of the common law respecting evidence, recognized in England and America, are discussed. The common law rules on the subject of presumptions are enumerated. The regulations applicable to oral and to written evidence are distinguished. The statutory provisions respecting evidence, found in most modern jurisdictions, are not considered, as this discussion is focused on the common law.

Jury. This article is a statement of the reasons why trial by jury is deemed, in England and America, to be the bulwark of public

[41] Id. at 560-562.
[42] 5 id. at 6-14 (1831).

liberty and the safeguard of private rights.[43] The origin of trial by jury is briefly traced back to a very early period in English history; the different kinds of juries, i.e., grand juries and petit juries, are discussed; the modes of proceeding at common law in jury trials are explained; the safeguards against oppression, secured by jury trial, are listed and discussed. "Trial by jury," says Story, "is justly the boast of England and America; and we may hope, that by the goodness of Providence it may be perpetual." Several years later, in a letter to Lieber, Story enumerated certain defects in jury trials in America and referred to this article; he said:

> "The principal defects in the structure of our jury trials in America are (1) That the selection is too indiscriminate, and unguarded to secure intelligence, . . . talent and high character, (2) the strong tendency of our age to (question) all things, and the increasing difficulty in making jurymen feel that they ought to be bound *absolutely* by the law as the (rule) of their decisions, (3) one consequence resulting from this tendency is a disregard of the instructions of the Judge on points of law, which creates great uncertainty in the administration of the law, (4) another is, that appeals to popular prejudices are more successful and more dangerous. . . . Read especially what Blackstone says (Vol. III, p. 38-39, 383, 384, 385), and the article "Jury" in the *Encyclopedia Americana*."[44]

Law, Legislation, and Codes. The article on Law, Legislation, and Codes is one of the longest and most interesting articles contributed by Justice Story.[45] The principal topic discussed is codification. Written before the appearance of the famous Field Code of New York, this article reads like an argument favoring the adoption of a code of laws for all American jurisdictions.

Liens. The law of liens is discussed in a short article of that name.[46] Common law possessory liens—particular and general—are defined and explained. The general principles of the operation of lien law as it concerns the tailor, the common carrier, the banker, the factor, and the attorney are discussed. Common law liens are distinguished from equitable liens, the latter topic being considered beyond the scope of this article. Statutory liens, now a familiar part of the jurisprudence of most modern jurisdictions, are not discussed.

[43] 7 id. at 283-293 (1831).
[44] Story to Lieber, April 13, 1839, FLC.
[45] 7 ENCY. AM. 581-592 (1831).
[46] Id. at 540-541 (1831).

Natural Law. Doctor Paley's definition of natural law, as the science which teaches men their duty and the reasons for it, is cited with approval in the article on Natural Law.[47] Following a discussion of the origin of property, Story declares that "whatever may be the origin of the right of property, it is very certain, that, as it is now recognized and enforced, it is a creature of Civil Government. Whatever right a man may have to property, it does not follow, that he has a right to transfer that right to another, or to transmit it, at his decease, to his children, or heirs. The nature and extent of his ownership; the modes in which he may dispose of it; the course of descent, and distribution of it upon his death; and the remedies for the redress of any violation of it, are, in a great measure, if not altogether, the result of the positive institutions of society . . . in different nations, all these subjects are regulated in very different manners."

The Law of Nations. National law—or the law of nations—is defined by Story as that portion of public law which concerns the rights, duties, and obligations of nations.[48] Vattel's definition is discussed. The rights and duties of nations are enumerated. Story observes that "in a state of nature, men have a right to employ force in self-defense; and, when they enter into society, this right is transferred to the government, and is an incident to sovereignty."

Prize. Justice Story was the authority of the Supreme Court on admiralty and maritime matters. The article on Prize is a brief outline of the more important principles of prize law, applicable to maritime captures, a distinction being drawn between prize practice in the United States and in England.[49] The article contains a discussion of the effects of a suspension of hostilities or of a treaty of peace upon prize law. The practice of nations at war to make "contracts of ransom" is explained. Normally, during war, all intercourse and right of contract between the belligerents is suspended. An exception exists, however, and is recognized in the case of "contracts of ransom." The practice in such cases has been to retain the master or some officers of the prize vessel as hostages for fulfillment of the contract.

Usury. The various significations which have been attached to the term *usury,* as distinguished from the common compensation for

[47] 9 id. at 150-158 (1832).
[48] Id. at 141-149.
[49] 10 id. at 351-366 (1832).

money lent allowed by law, which is called *interest*, are considered in this article.[50] Story declares that there is not "the slightest foundation, either in natural or revealed religion, for any prohibition against the taking of interest upon money, any more than against the taking of a profit for the use of any other thing loaned." Why should a man, dealing fairly and openly, be prevented by the laws from making as high a profit upon the sale or loan of money as upon the sale or loan of merchandise? Story replies that there is nothing in the nature of contracts for loans of money which makes it either necessary or proper to distinguish them, in this respect, from others. "So far as the object of laws is to prevent oppression and imposition, and undue advantage of the strong over the weak and credulous, the principle should apply to all contracts, not by regulating the terms of every contract *a priori*, and settling what, under all circumstances, should be just and reasonable, but by providing, by general principles of law, that unconscionable and oppressive contracts, where undue advantage is taken of the weakness, or credulity, or necessity, of the other party, shall be either wholly set aside, or reduced to moderation, upon a full trial of each particular cause, and an examination of all the facts, so as to make the decision just in itself, *ex aequo et bono*."

III

The *Encyclopedia* was a financial success and had many subscribers. The first edition—which was priced at $32.50 for the entire set—"sold phenomenally."[51] The publishers paid Lieber a flat fee rather than a royalty. As the success of the project was uncertain in the beginning, this seemed a splendid arrangement; but a short while later, when the sales began to mount, Lieber regarded his contract as almost a fraud.[52] He declared that the publishers had given him only about $20,000 for the work, and out of this he had to pay the salary of a staff of twelve translators, writers, and editorial assistants.[53] Only a few hundred dollars were left after completion of the work. Lieber later estimated that over one hundred thousand sets of the *Encyclopedia* had been sold.

It is not known whether Story received compensation for these articles. The subject is not discussed in his letters to Lieber. On

[50] 12 id. at 485-488 (1832).
[51] FREIDEL, FRANCIS LIEBER: NINETEENTH CENTURY LIBERAL 79 (1947).
[52] Id. at 66.
[53] Id. at 67n. Translations were paid for at the rate of fifty cents per German page, while some authors employed to write original articles received a dollar a page.

March 22, 1833, Story wrote Lieber, "I estimate the law articles chiefly because they have brought me the pleasure of your acquaintance and have combined my name with the success of that great work."[54] Story's son says, "They were labors dedicated purely to friendship, and illustrate a generosity which is as beautiful as it is rare."[55] The conclusion seems plausible, therefore, that Story wrote the articles not for compensation, but for the "love of the law" and to assist his friend, Dr. Frances Lieber, to make a start in America.

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[54] Story to Lieber, March 22, 1833, FLC.
[55] 2 W. W. STORY, THE LIFE AND LETTERS OF JOSEPH STORY 27 (1851).
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