

**Duhaime.org | Learn Law** • In about 1240, **Henri de Bracton** (1210-1268), wrote, in Latin, *De legibus et consuetudinibus Angliae*, one of the very first and very influential encyclopedia of the English common law. *De legibus* was translated into English and re-titled **On The Laws And Customs of England**, which was then one of the first books on the common law, and described as "the first great book on English law" and "the crown and flower of English jurisprudence". This is an extract (first few pages only) from the translation of Samuel Thorne, footnotes being those of the translator.

## INTRODUCTION

I ask the reader, if he finds in this work anything superfluous or erroneous, to correct and amend it, or pass it over with eyes half closed,<sup>1</sup> for <sup>2</sup>to keep all in mind and err in nothing is divine rather than human.<sup>3</sup>

### *The author's preamble.*

<sup>4</sup>In this tractate, as in others, these must be considered: <sup>5</sup>the matter with which it deals, its intention, its utility, the end it serves and the division of learning into which it falls.

### *The matter with which it deals.*

<sup>6</sup>Its matter consists of the judgments and the cases that daily arise and come to pass<sup>7</sup> in the realm of England.<sup>8</sup>

### *The intention of the author.*

<sup>9</sup>The intention of the author is to treat of such matters<sup>10</sup> and to instruct and teach all who desire to be taught what action lies and what writ, [and], according as the plea is real or personal,<sup>11</sup> how and by what procedure, /by suing and proving, defending and excepting, replicating and the like,/ suits and pleas are decided according to English laws and customs, and [the art] of preparing records and enrollments according to what is alleged and denied,<sup>12</sup> and to treat of these so that <sup>13</sup>those who err may be instructed and set right and those who obstinately do otherwise punished. The general intention is to treat of law that the unskilled may be made expert, the expert more expert,<sup>14</sup> <sup>15</sup>the bad good and the good better, as well by the fear of punishment as by the hope of reward,<sup>16</sup> according to this [verse]:

Good men hate to err from love of virtue;  
The wicked from fear of pain.<sup>17</sup>

### *The utility.*

<sup>18</sup>The utility [of this work] is that it <sup>19</sup>ennobles apprentices and doubles their honours and profits and enables them to rule in the realm and sit in the royal chamber, on the very seat of the king, on the throne of God, so to speak, judging tribes and nations, plaintiffs and defendants, in lordly order,<sup>20</sup> in the place of the king,<sup>21</sup> as though in the place of Jesus Christ, since the king is God's vicar.<sup>22</sup> For judgments are not made by man but by God,<sup>23</sup> which is why the heart of a king who rules well is said to be in the hand of God.<sup>24</sup>

### *The end served.*

<sup>25</sup>The end of this work is to quiet disputes and avert wrongdoing,<sup>26</sup> that peace and justice may be preserved in the realm. <sup>27</sup>It must be set under ethics, moral science, as it were, since it treats of customary principles of behaviour.<sup>28</sup>

<sup>1</sup>Azo, *Summa Inst.* proe. Just., no. 2: 'conniventibus oculis' <sup>2-3</sup>C. 1.17.2.14; Azo, *Summa Cod.*, summarium, no. 3; 1.17, no. 4; Drogheda, 3 <sup>4</sup>Br. and Azo, 5, 13, 15, 18; Richardson in *E.H.R.*, lix, 26; *Traditio*, vi, 65 <sup>5-8</sup>Drogheda, xxxiv, 2: 'casus de facto' <sup>6</sup>Br. and Azo, 5, 15; Richardson, *supra* n. 4 <sup>7</sup>'eveniunt,' all MSS.; *supra* i, 50 <sup>8</sup>The remainder of this paragraph, which supplements the next section, transposed below <sup>9</sup>Br. and Azo, 5, 7, 15, 18; Richardson, *supra* n. 4 <sup>9-10</sup>Drogheda, 2; 'de hiis,' as Drogheda <sup>11</sup>'quae competat...personale,' from lines 11-12; *om*: 'ut sciatur,' a connective <sup>12</sup>et [ars] super...obiecta,' from lines 12-13; 'ars conficiendi,' as Drogheda, 2 <sup>13-16</sup>Azo, *Summa Inst.*, proe. Just., no. 5 <sup>14</sup>Drogheda, 2 <sup>15-17</sup>Azo, *Summa Cod.*, materia ad Cod., no. 2; Horace, *Epist.*, i, 16, 52 <sup>15</sup>Br. and Azo, 2, 7, 15; Richardson, *supra* no. 4 <sup>19-20</sup>Azo, *Summa Inst.* proe. Azonis, no. 1, with alterations <sup>21</sup>*Infra* 304 <sup>22</sup>*Infra* 38, 166, 305; E. Kantorowicz, 160 <sup>23</sup>*Infra* 305 <sup>24</sup>Prov. 21:1: 'cor regis in manu Domini'; *infra* 305 <sup>25-28</sup>Azo, *Summa Inst.* proe. Just., no. 5 <sup>27-28</sup>Azo, *loc. cit.*; *Summa Cod.* materia ad Cod., no. 25; the words 'moralis scientiae' are from Drogheda, 2

# INTRODUCTION

## *The needs of a king.*

<sup>1</sup>To rule well a king requires two things, arms and laws, that by them both times of war and of peace may rightly be ordered. For each stands in need of the other, that the achievement of arms be conserved [by the laws], the laws themselves preserved by the support of arms.<sup>2</sup> If arms fail against hostile and unsubdued enemies, then will the realm be without defence; if laws fail, justice will be extirpated; nor will there be any man to render just judgment.<sup>3</sup>

[*England alone uses within her boundaries unwritten law and custom.*]

Though in almost all lands use is made of the *leges* and the *jus scriptum*, England alone uses unwritten law and custom. There law derives from nothing written [but] from what usage has approved.<sup>4</sup> Nevertheless, <sup>5</sup>it will not be absurd to call English laws *leges*, though they are unwritten, since whatever has been rightly decided and approved with the counsel and consent of the magnates and the general agreement of the *res publica*,<sup>6</sup> the authority of the king or prince having first been added thereto,<sup>7</sup> has the force of law.<sup>8</sup> <sup>9</sup>England has as well many local customs, varying from place to place, for the English have many things by custom which they do not have by law, as in the various counties, cities, boroughs and vills, where it will always be necessary to learn what the custom of the place is and how those who allege it use it.

## *If an unwise and unlearned man ascends the judgment seat.*

<sup>10</sup>Since these laws and customs are often misapplied by the unwise and unlearned who ascend the judgment seat before they have learned the laws<sup>11</sup> and stand amid doubts and the confusion of opinions, and frequently subverted by the greater [judges] who decide cases according to their own will rather than by the authority of the laws,<sup>12</sup> I, Henry de Bracton, to instruct the lesser judges,<sup>13</sup> if no one else, have turned my mind to the ancient judgments of just men,<sup>14</sup> examining diligently, not without working long into the night watches,<sup>15</sup> their decisions, *consilia* and *responsa*, and have collected whatever I found therein worthy of note into a *summa*, putting it in the form of titles and paragraphs,<sup>16</sup> without prejudice to any better system, by the aid of writing to be preserved to posterity forever.

<sup>1</sup>Br. and Azo, 3, 6, 11, 13    <sup>1-2</sup>Inst. proe.; Glanvill, prol.; Azo, *Summa Inst.* proe., no. 1: 'tam militaris res legibus est in tuto collocata, quam ipsae leges armorum praesidio servatae sunt, ut C. de Iustiniano cod. confirmando,' where the same words appear    <sup>3</sup>Infra 23, 25    <sup>4</sup>Inst. 1.2.9; infra 21  
<sup>5-8</sup>Glanvill, prol.; cf. Schulz in *E.H.R.*, lx, 171; infra 305. Supplemented infra 21, nn. 1-2    <sup>9</sup>D. 1.3.1; Azo, *Summa Cod.*, 1.14. no. 1; infra 21    <sup>7</sup>Br. uses 'praecedente' (infra 305 'praestante') for Glanvill's 'accedente,' but the idea is the same: infra 85, line 1; 223, iv, 213: 'praeducat'; cf. McIlwain, *Constitutionalism, Ancient and Modern*, 71-2; Hoyt in *E.H.R.*, lxxi, 359 n.; Lewis in *Speculum*, xxxix, 250  
<sup>9</sup>Br. and Azo, 3, 13    <sup>10</sup>Br. and Azo, 5, 10, 18, 16    <sup>11</sup>Infra 21, n. 13; 307    <sup>12</sup>Supplemented infra 21, nn. 3-5    <sup>13</sup>Infra iv, 99 also iii, 321    <sup>14</sup>Azo, *Summa Inst.* proe Just., no. 5: 'erexit itaque Justinianus animum suum ad immensa volumina veteris prudentiae,' for the last words of which Br. substitutes 'ad vetera iudicia iustorum'; Fesefeldt, 88    <sup>15</sup>Inst. proe.; Azo, *Summa Inst.* proe. Just., no. 2 'cum summis vigiliis'    <sup>16</sup>Cf. Richardson in *Traditio* vi, 64; Tancred (89) contrasts the form of a 'summa' with an arrangement 'sub paragraphis'

## INTRODUCTION

### *Laws command and forbid.*

<sup>1</sup>[And because] in truth these English laws and customs, by the authority of kings, sometimes command, sometimes forbid, sometimes castigate and punish offenders.<sup>2</sup> <sup>3</sup>Since they have been approved by the consent of those who use them<sup>4</sup> and confirmed by the oath of kings, they cannot be changed without the common consent of all those by whose counsel and consent they were promulgated.<sup>5</sup> They cannot be nullified without their consent,<sup>6</sup> but may be changed for the better, for to change for the better is not to nullify. If new and unusual matters arise which have not before been seen<sup>7</sup> in the realm, [If like matters arise let them be decided by like,<sup>8</sup> since the occasion is a good one for proceeding *a similibus ad similia.*]<sup>9</sup> <sup>10</sup>and their judgment is difficult and unclear, let them be adjourned to the great court to be there determined by counsel of the court,<sup>11</sup> [though there are some who, presuming on their own knowledge, as though nothing connected with the law were beyond their competence, are unwilling to seek the counsel of anyone,] [since] it is more becoming and more lawyer-like to take counsel rather than to determine anything rashly, nor is it discreditable to be in doubt as to individual cases.<sup>12</sup>

### *He who judges ought to be wise.*

<sup>13</sup>Let no one, unwise and unlearned, presume to ascend the seat of judgment,<sup>14</sup> which is like unto the throne of God, lest for light he bring darkness and for darkness light,<sup>15</sup> and, with unskilful hand, even as a madman, he put the innocent to the sword and set free the guilty, and <sup>16</sup>lest he fall from on high, as from the throne of God, in attempting to fly before he has wings.<sup>17</sup> And though one is fit to judge and to be made a judge, let each one take care for himself lest, by judging perversely and against the laws, because of prayer or price, for the advantage of a temporary and insignificant gain, he dare to bring upon himself sorrow and lamentation everlasting,

### *What the punishment for evil judging is.*

<sup>18</sup>and lest in the day of the wrath of the Lord he feel the vengeance of Him who said, 'Vengeance is mine, I will repay,'<sup>19</sup> on that day when kings and princes of the earth shall weep and bewail<sup>20</sup> when they behold the Son of Man, because of fear of his torments,<sup>21</sup> where gold and silver will be of no avail to set them free. Who shall not fear that trial, where the Lord shall be the accuser, the advocate and the judge? From his sentence there is no appeal, for the Father has committed all judgment to the Son;<sup>22</sup> he shuts and there is none to open; he opens and there is none to shut.<sup>23</sup> O how strict shall that judgment be, where we shall give account not only of our acts but even of every idle word

<sup>1</sup>*Br. and Azo*, 7, 15-17; a supplement to 19, n. 8    <sup>2</sup>*Azo, Summa Inst.*, proe. Azonis, pr.: 'omnium imperatorum auctoritate iubet, vetat, vindicat, punit . . .'; D. 1.3.7: 'Legis virtus haec est, imperare, vetare, permittere, punire'    <sup>3</sup>A supplement to 19, n. 12    <sup>4</sup>D. 1.3.33, 35; *Inst.* 1.2.9: 'diuturni mores consensu utentium comprobati'; *infra* 22, 27    <sup>5</sup>*Infra* iv, 285    <sup>6</sup>*Infra* iv, 289    <sup>7</sup>'visitata'  
<sup>8</sup>*B.N.B.*, no. 409 (margin)    <sup>9</sup>D. 1.3.12: 'ad similia procedere'; 1.3.13: 'bona occasio'; *infra* iv, 357  
<sup>10</sup>*Om.*: 'Si autem ... e venerint,' a connective    <sup>11</sup>*Infra* iii, 73    <sup>12</sup>*Azo, Summa Cod.* 1.1, no. 8: 'Item Aristotle ait: Dubitare de singulis non est inutile.'    <sup>13</sup>*Br. and Azo*, 9, 17; this and the following paragraph a supplement to 19, n. 11    <sup>14</sup>*Infra* 307    <sup>15</sup>*Isai.* 5:20    <sup>16-17</sup>*Azo, Summa Inst.*, proe. Azonis, no. 2    <sup>18</sup>*Br. and Azo*, 9-11, 17    <sup>19</sup>*Rom.* 12:19; *infra* iii, 43    <sup>20</sup>*Apoc.* 18:9    <sup>21</sup>*Apoc.* 18:10  
<sup>22</sup>*Joan.* 5:22    <sup>23</sup>*Apoc.* 8:7

that men utter.<sup>24</sup> Who can escape his impending wrath?<sup>25</sup> For the Son of Man shall send His angels and they shall gather out of His kingdom all things that offend and them that do iniquity<sup>26</sup> and bind them into bundles to be burnt,<sup>27</sup> and shall cast them into the fiery furnace, where there will be wailing and gnashing of teeth,<sup>28</sup> groans and screams, outcries, lamentation and torment, roaring and shouting, fear and trembling, sorrow and suffering, fire and stench, doubt and anxiety, violence and cruelty, ruin and poverty, distress and dejection, oblivion and confusion, tortures and woundings, troubles and terrors, hunger and thirst, cold and heat, brimstone and burning fire for ever and ever. Therefore let each beware of that judgment where the judge is terribly strict, intolerably severe, offended beyond measure and vehemently angered, whose sentence none can commute, from whose prison there is no escape, whose punishments are without end, his tormentors horrible, who never grow weary, never pity, whom fear does not disturb, conscience condemn, thoughts reproach, and who may not flee. Hence the blessed Augustine, 'O how far too great are my sins, wherefore when one has God as a rightful judge and his conscience as witness, let him fear nothing except his cause.'<sup>29</sup>

#### *What law is and what custom.*

<sup>30</sup>We must see what law is. Law is a general command, the decision of judicious men, the restraint of offences knowingly or unwittingly committed, the general agreement of the *res publica*.<sup>31</sup> <sup>32</sup>Justice proceeds from God, assuming that justice lies in the Creator,<sup>33</sup> [*jus* from man], and thus *jus* and *lex* are synonymous.<sup>34</sup> And though law (*lex*) may in the broadest sense be said to be everything that is read (*legitur*) its special meaning is a just sanction, ordering virtue and prohibiting its opposite.<sup>35</sup> Custom, in truth, in regions where it is approved by the practice of those who use it,<sup>36</sup> is sometimes observed as and takes the place of *lex*. For the authority of custom and long use is not slight.<sup>37</sup>

#### *What justice is.*

<sup>38</sup>Since from justice, as from a fountain-head, all rights arise and what justice commands *jus* provides, let us see what justice is and whence it is so called.<sup>39</sup> Also what *jus* is and whence it is so called and what its precepts are, and

<sup>24</sup>Matth. 12:36    <sup>25</sup>Matth. 3:7    <sup>26</sup>Matth. 18:41    <sup>27</sup>Matth. 13:30    <sup>28</sup>Matth. 13:42; *infra* 110

<sup>29</sup>*Br. and Azo*, 17; C. 11, qu. 3, c. 54    <sup>30</sup>*Br. and Azo*, 19-21, 24, 29, 31; belongs *infra* 24, following the portions on *justitia* and *jus*, as 23, line 1; cf. *Br. and Azo*, 29, but a number of sections are misplaced

<sup>31</sup>D. 1.3.1    <sup>32-35</sup>*Azo, Summa Inst.* 1.1, no. 4    <sup>33</sup>*Infra* 23; E. Cortese, *Norma Giuridica*, ii, 11

<sup>34</sup>*Azo*: 'auctor iuris est homo, auctor iustitiae est deus, et secundum hoc ius et lex idem significant. Licet autem largissime ...'    <sup>36</sup>*Supra* 21, *infra* 27    <sup>37</sup>C. 8. 52. 2.; X. 1.4.9    <sup>38</sup>*Br. and Azo*, 18, 20-23, 31

<sup>38-39</sup>*Azo, Summa Inst.* 1.1, pr.; Cortese, ii, 24 ff.

what law is and what custom, without which one cannot be just, so as to do justice and give just judgment between man and man. <sup>1</sup>'Justice is the constant and unailing will to give to each his right.' This definition may be understood in two ways, according as justice is taken to be in the Creator or in the created. If in the Creator, that is, in God, the matter is clear, since justice is the disposition of God which in all things rightfully orders and justly disposes. God himself gives to each man in accordance with his deserts. He is neither variable nor inconstant in his dispositions and wills, but is constant and unailing. For he had no beginning, nor has nor will have any end. The definition may be understood in another way, that justice is in the created, that is, in the just man. The just man has the will to give to each his right, and thus that will is called justice. His will to give each his right refers to what is intended not to what is done, as the emperor is called Augustus not because he always augments his empire but because it is his intention to do so [and] as matrimony is said to be an inseparable conjoining because the parties intend never to be separated though they may afterwards be separated for just cause. Thus justice is said to be constant, in accord with the definition.<sup>2</sup> [Justice may also be understood in another way, according to the definition] which defines justice as in the created: by the word 'will,' 'mind' may be understood, and by 'constant,' 'good,' for constancy is always taken to be good; hence the saints are said to have been constant,<sup>3</sup> and<sup>4</sup> we say 'O the constancy of the martyrs!' <sup>5</sup>By the word 'unailing,' 'habit' may be understood [also by the word 'constant'], <sup>6</sup>'Be ye constant,' for constancy does not admit of variation,<sup>7</sup> as though the definition read<sup>8</sup> 'justice is a good habit of mind' or 'the habit of a mind well constituted'<sup>9</sup> or 'justice is a willed good,' for it cannot properly be called good unless will plays a part. Remove will and every act will be indifferent. It is your intent that differentiates your acts, nor is a crime committed unless an intention to injure exists; it is will and purpose which distinguish *maleficia*.<sup>10</sup> As for the words 'his right,' they mean his merited right, for because of delict or a pact broken or the like one is [*de jure*]<sup>11</sup> deprived of his right. Or say<sup>12</sup> 'to each' means to him, that he live virtuously, and to God, that he love God, and to his neighbour, that he not harm him.<sup>13</sup> Or say<sup>14</sup> 'suum jus' means 'her right,' that is, [to each what justice entitles him to]; she is called justice<sup>15</sup> because in her all rights reside.<sup>16</sup>

### *What jus is.*

<sup>17</sup>*Jus* is derived from justice and is used in a number of different

<sup>1-3</sup>Azo, *Summa Inst.*, 1.1, nos. 1-2    <sup>2</sup>For the problem and the solutions supplied by the glossators, Cortese, ii, 9-16    <sup>4</sup>'et'    <sup>5-16</sup>Azo, *Summa Inst.* 1.1, no. 2    <sup>6-7</sup>'Item Constantes ... variationem,' from lines 22-3    <sup>8</sup>'quasi diceret,' as Azo    <sup>9</sup>E. Kantorowicz, 108 n.; Cortese, ii, 7-9, 20-23  
<sup>10</sup>*Infra* 289, 290, 375, 384; Cortese, ii, 36, 246 n.    <sup>11</sup>As Azo    <sup>12</sup>'vel dic,' as Azo    <sup>13</sup>Placentinus, *Summa Inst.* 1.1: 'quod dicitur ius suum cuique intelligi debet non individualiter, sed generaliter, id est, Domino et sibi et proximo ...'    <sup>14</sup>'vel dic,' as Azo    <sup>15</sup>*Om.*: 'ius,' as Azo, MB    <sup>17</sup>*Supra* i, 113-15 (full collation); *Br. and. Azo*, 23-25, 81; the first sentence transposed above, as Azo

senses. For it is sometimes used for the *ars boni et aequi* itself, or for the written body of *jus*. It is called the art of what is fair and just, of which we are deservedly called the priests, for we worship justice and administer sacred rights.<sup>18</sup> <sup>19</sup>*Jus* is sometimes used for natural law which is always fair and right; sometimes for the civil law only; sometimes for praetorian law only; sometimes for that which results from a judgment, for the praetor is said to do *jus* even<sup>20</sup> when he does it unjustly, the word referring not to what he in fact did but what he ought to do. *Jus* is sometimes used for the place in which law is administered, sometimes for the tie of personal connexion, as when we speak of the *jus cognationis* or *affinitatis*. *Jus* is sometimes used for an action, sometimes for an obligation, sometimes for an inheritance, as for the *proprietas* of a thing, sometimes for the possession of goods. Sometimes it signifies *potestas*, as when it is said 'He is *sui juris*.' Sometimes it stands for law in all its rigor, as when we distinguish between law and equity.<sup>21</sup> <sup>22</sup>*Jus* is [here] put for the art as such, not for everything contained within it, for not all *jus* enjoins since some permits. Or it is here used for all the *jus* that enjoins, [for all the *jus* that enjoins enjoins] us to live virtuously, to harm no one and to give each his right.<sup>23</sup>

#### *Addicio.*

<sup>24</sup>[Rights are of various kinds],<sup>25</sup> for there is proprietary right and possessory right: possessory right, as of fee, where the assise of mortdancestor is applicable; and as of free tenement, as where one holds only for life, no matter in what way. Proprietary right is termed the mere right. Thus one may well have both. The proprietary right may sometimes be separated from the possessory, for immediately after the death of his ancestor the *proprietas* descends to the nearer heir, whether he is a minor or of full age, a male or a female, a madman or a fool, as an idiot, one who is deaf and dumb, present or absent, ignorant of the matter or apprised of it.<sup>26</sup> Possession, however, is not at once acquired by such persons, though possession and the possessory right ought always to follow the *proprietas*.<sup>27</sup> The possessory right may descend by itself to other persons and through other degrees, as where, when the proprietary right descends to the eldest brother, the nearer heir,

<sup>17-18</sup>Azo, *Summa Inst.* 1.1, no. 3; Cortese, ii, 26      <sup>19-21</sup>*Ibid.*, no. 5      <sup>20</sup>'etiam' for 'et,' as Azo

<sup>22-23</sup>Azo, *Summa Inst.* 1.1, no. 9. Azo is explaining the use of the word 'jus' in the *tria praecepta iuris*: *infra* 25, n. 9; *Br. and Azo*, 31      <sup>24</sup>*Supra* i, 115-16 (full collation), 333, 372; *Br. and Azo*, 25, 27, 31, 33

<sup>25</sup>As *infra* iv, 350-51, where this passage appears again      <sup>26</sup>*Infra* iv, 177      <sup>27</sup>*Infra* 184

a younger brother puts himself into seisin and dies so seised; he transmits to his heirs with the possessory right a certain proprietary right which should follow the principal proprietary [right], and so from heir to heir. The heirs of the first brother have a greater right than those of the second, but possession must always be preferred until the heirs of the first recover their right. If the younger brother has several sons and a younger son puts himself in seisin, what was said above is true of him. Thus proprietary right may descend to several different heirs [and to their heirs] *ad infinitum*, in such a way that though several have proprietary rights<sup>1</sup> one or several may have a greater right.><sup>2</sup>

*What jurisprudence is.*

<sup>3</sup>Jurisprudence is the knowledge of things divine and human, the science of the just and unjust.<sup>4</sup>

*What equity is.*

<sup>5</sup>Equity is the bringing together of things, that which desires like right in like cases and puts all like things on an equality. Equity is, so to speak, uniformity, and turns upon matters of fact, that is, the words and acts of men. Justice, [on the other hand], lies in the minds of the just. Hence it is that if we wish to speak properly we will call a judgment equitable, not just, and a man just, not equitable. But using these terms improperly, we call the man equitable and the judgment just.<sup>6</sup>  
<sup>7</sup>Jurisprudence therefore differs in many ways from justice. For jurisprudence discerns, justice awards to each his due. Justice is a virtue, jurisprudence a science. Justice is a certain *summum bonum*; jurisprudence a *medium*.<sup>8</sup>

*What the praecepta iuris are.*

<sup>9</sup>The *praecepta iuris* are three: to live virtuously, to injure no one, to give to each man his right.<sup>10</sup> <sup>11</sup>[Rights are infinite], because men are infinite and things are infinite, but the kinds of law are [not] infinite, for we would then speak of equine and of asinine law, of the law of vineyards and that of fields, the law of Peter and that of John.<sup>12</sup> <sup>13</sup>There is public law, which pertains to the common welfare<sup>14</sup> of the Roman *res publica* and deals with religion, priests and public officers. For it is in the interest of the *res publica* that it have churches

<sup>1</sup>'iura' for 'ius', as *infra* iv, 351    <sup>2</sup>*Infra* iv, 351: 'maius ius aliis'    <sup>3</sup>*Br. and Azo*, 27    <sup>3-4</sup>*Azo Summa Inst.* 1.1, no. 6    <sup>5</sup>*Br. and Azo*, 27    <sup>5-6</sup>*Azo, Summa Inst.* 1.1, no. 7, from Placentinus, *Summa Inst.* 1.1; Carlyle ii, 8-10; Wohlhaupter, *Aequitas Canonica*, 13; Lange in *Zeit. d. Sav. Stift. f. Rechtsgeschichte* (Rom. abt.) lxxi, 321; Cortese, i, 306, ii, 30-31, 245 ff.    <sup>7</sup>*Br. and Azo*, 27    <sup>7-8</sup>*Azo, Summa Inst.* 1.1, no. 8; Cortese, ii, 5-8, 29-30    <sup>9</sup>*Br. and Azo*, 27-29, 33    <sup>9-10</sup>*Azo; Summa Inst.* 1.1, no. 9    <sup>11-12</sup>*Azo, Summa Inst.*, 1.1, no. 10: reading: '[Infinita sunt iura], quia infiniti sunt . . . res; infinitae vero [non] sunt iuris species, nam et sic diceretur'; cf. Kantorowicz, 82-5; Fesefeldt, 147 n.; Vinogradoff, *Coll. Pap.*, i, 243; 'infinita sunt iura': *infra* iii, 165, 166    <sup>13-15</sup>*Azo, Summa Inst.* 1.1, no. 11  
<sup>14</sup>G. Post in *Speculum*, xxix, 421

in which men may seek pardon for their sins. There must also be priests, from whom we may receive penance for our sins, who may pray on our behalf and obtain for us the aid of God and His providence. The public interest also requires that there be magistrates appointed in the state, for through such persons, men pre-eminent in the doing of justice, the law is given effect. For it is of little value that law exists in the state if there are none to administer it.<sup>15</sup>

*What private law is.*

<sup>16</sup>Private law is that which pertains primarily to the welfare of individuals and secondarily to the *res publica*. Hence we say that it is in the public interest that no one misuse his own. And so conversely, that which is primarily public looks secondarily to the welfare of individuals. Private law has a threefold division: it is deduced partly from the rules of natural law, partly from those of the *jus gentium* and partly from those of the civil law.<sup>17</sup> <sup>18</sup>We have spoken above of public law and private law. Now we must explain <sup>19</sup>what natural law is, what the *jus gentium* is, and what civil law (which may sometimes be called custom) is. For whom and when, by custom or by a *constitutio* of the prince, the law may be curtailed is discussed hereafter.<sup>20</sup>

*What natural law is.*

<sup>21</sup>Natural law is defined in many ways. It may first be said to denote a certain instinctive impulse arising out of animate nature by which individual living things are led to act in certain ways. Hence it is thus defined: Natural law is that which nature, that is, God himself, taught all living things. The word 'quod' is then in the accusative case and the word 'natura' in the nominative. On the other hand, it may be said that the word 'quod' is in the nominative case, so that the definition will be this: Natural law is that taught all living things by nature, that is, by natural instinct. The word 'natura' will then be in the ablative case.<sup>22</sup> This is what is meant when we say that our first instinctive impulses are not under our control, but our second impulses are. That is why, if a matter proceeds only as far as simple sensual pleasure, not beyond, only a venial sin is committed. But if it proceeds farther, to the contriving of something, as where one puts into practice what he has shamefully thought, it will then be called a third impulse and a mortal sin is committed.<sup>23</sup> And note that for the reason that justice is will, taking into account natural beings only, natural law is impulse, regard being had to

<sup>15</sup>D.1.2.2.13: *infra* 166, 305; Lewis in *Speculum*, xxxix, 262 n. <sup>16</sup>*Br. and Azo*, 29, 30, 32 <sup>16-17</sup>Azo, *Summa Inst.* 1.1, no. 12 <sup>18</sup>*Br. and Azo*, 32, 33 <sup>19-20</sup>Azo, *Summa Inst.* 1.1, no. 12 <sup>21</sup>*Br. and Azo*, 32-5, 39 <sup>21-25</sup>Azo, *Summa Inst.* 1.2, nos. 1-2 <sup>22</sup>Cortese, i, 53-4, 56-9; Tierney in *Jour. of the Hist. of Ideas*, xxiv, 307-22 <sup>23</sup>'contrahitur,' as Azo. For the last three sentences: O. Lottin, *Psychologie et morale au xii et xiii siècles*, ii, 1, 493-589; A. M. Landgraf, *Dogmengeschichte der fr̄hcholastik*, iv, 2, 36-47

all creatures, rational and irrational. There are some who say that neither will nor impulse may be called *jus*; *jus naturale* or *jus gentium*, for they exist in [the realm of] fact; will or impulse are the means by which natural law or justice disclose or manifest their effect, for virtues and *jura* exist in the soul.<sup>24</sup> This perhaps is said more clearly, that natural law is a certain due which nature allows to each man. Natural law is also said to be the most equitable law, since it is said that erring minors are to be restored in accordance with [natural] equity.<sup>25</sup>

*What the civil law is.*

<sup>26</sup>Civil law,<sup>27</sup> which may be called customary law,<sup>28</sup> has several meanings. It may be taken to mean the statute law of a particular city. Or for that kind of law which is not praetorian; it sometimes detracts from or supplements natural law or the *jus gentium*,<sup>29</sup> for law different from that outside sometimes prevails in cities by force of custom approved by those who use it, since such custom ought to be observed as law.<sup>30</sup> <sup>31</sup>Civil law may also be called all the law used in a state [or the like], whether it is natural law, civil law or the *jus gentium*.<sup>32</sup>

*What the jus gentium is.*

<sup>33</sup>The *jus gentium* is the law which men of all nations use, which falls short of natural law since that is common to all animate things born on the earth in the sea or in the air. From it comes the union of man and woman, entered into by the mutual consent of both, which is called marriage. Mere physical union is [in the realm] of fact and cannot properly be called *jus* since it is corporeal and may be seen;<sup>34</sup> all *jura* are incorporeal and cannot be seen. From that same law there also<sup>35</sup> comes the procreation and rearing of children. The *jus gentium* is common to men alone, as religion observed toward God, the duty of submission to parents and country, or the right to repel violence and *injuria*. For it is by virtue of this law that whatever a man does in defence of his own person he is held to do lawfully; since nature makes us all in a sense akin to one another it follows that for one to attack another is forbidden.<sup>36</sup>

*What manumission is.*

<sup>37</sup>Manumissions also come from the *jus gentium*. Manumission is the giving of liberty, that is, the revelation of liberty, according to some, for liberty, which proceeds from the law of

<sup>24</sup>Cortese, i, 54, 59, ii, 29-30; *infra* 282    <sup>25</sup>*Ibid.*, i, 47 ff.    <sup>26</sup>*Br. and Azo*, 35-6, 39    <sup>28-27</sup>Azo, *Summa Inst.* 1.2, no. 3    <sup>28-29</sup>*Ibid.*    <sup>30</sup>*Inst.* 1.2.9; *Decretum*: D. 12, ca. 6; *supra* 22, *infra* iii, 182

<sup>31-32</sup>Azo, *Summa Inst.* 1.2, no. 3    <sup>33</sup>*Br. and Azo*, 85, 87, 89, 41    <sup>33-36</sup>Azo, *Summa Inst.* 1.2, nos. 4-5

<sup>34</sup>Accursius, gl. on v. 'coniunctio,' *Inst.* 1.2: 'animorum non corporum'; Cortese, i, 69-71    <sup>35</sup>'etiam' for 'tamen,' as Azo    <sup>37</sup>*Br. and Azo*, 37, 38, 40, 41, 42. This portion should follow without interruption

nature, cannot be taken away by the *jus gentium* but only obscured by it,<sup>38</sup> for natural rights are immutable. But say that he who manumits does properly give liberty, though he does not give his own but another's, for one may give what he does not have, as is apparent in the case of a creditor, who [may alienate a pledge though the thing is not his,<sup>39</sup> and in that of one who] constitutes a usufruct in his property.<sup>40</sup> For natural rights are said to be immutable because they cannot be abrogated or taken away completely, though they may be restricted or diminished in kind<sup>41</sup> or in part. <sup>42</sup>It was by virtue of this *jus gentium* that wars were introduced (that is, when declared<sup>43</sup> by the prince for the defence of his country<sup>44</sup> or to repel an attack) and nations separated, kingdoms established and rights of ownership distinguished. Individual ownership was not effected *de novo* by the *jus gentium* but existed of old, for in the Old Testament things were already mine and thine, theft was prohibited<sup>45</sup> and it was decreed that one not retain his servant's wages.<sup>46</sup> By the *jus gentium* boundaries were set to holdings, buildings erected next to one another, from which cities, boroughs and vills were formed.<sup>47</sup> And generally, the *jus gentium* is the source of all contracts<sup>48</sup> and of many other things. What long custom is will be explained below.<sup>49</sup>

<sup>37-40</sup>Azo, *Summa Inst.*, 1, 2, no. 6    <sup>38</sup>Cortese, i, 75-8    <sup>39</sup>Inst. 2.8.1: 'qui pignus, quamvis eius res non sit, alienare potest'    <sup>40</sup>Om: 'non'; D. 7.1.63: 'Quod nostrum non est transferemus ad alios: veluti is qui fundum habet, quamquam usum fructum non habeat, tamen usum fructum cedere potest.' Azo: 'in creditore et in eo qui constituit usumfructum in re sua, ut D. 7.1.63 et Inst. 2.8 in principio.' Cf. *Br. and Azo*, 37, n. 8, 41; Kantorowicz, 85-6, Schulz in *L.Q.R.*, lix, 172 n.    <sup>41</sup>Cortese, i, 77, 118-20  
<sup>42-49</sup>Azo, *Summa Inst.* 1.2, no. 7    <sup>43</sup>'indicuntur,' as Azo; *Br. and Azo*, 37, n. 9, 40, n. 2    <sup>44</sup>'ad tuitionem patriae,' is Br's addition    <sup>45</sup>Lev. 19:11    <sup>46</sup>Lev 19:13; for this problem: Cortese, i, 86-90  
<sup>47</sup>*Infra* iii, 137    <sup>48</sup>Azo: 'comercium est inductum [ex hoc iure] quod generale est nomen ad omnes contractus'; cf. Kantorowicz, 107-8    <sup>49</sup>Not dealt with as such in treatise

## OF PERSONS

*That all law relates either to persons, things or actions.*

<sup>1</sup>We have spoken above of natural law, the *jus gentium*, and the civil law, but since the whole of the law with which we propose to deal relates either to persons or to things or to actions,<sup>2</sup> according to English laws and customs, <sup>3</sup>and since persons, because of whom all rights are established, are of the greater dignity, therefore let us first look to them and their conditions, which are various and diverse, and then to the law of persons which is directed to them.<sup>4</sup>

*The first classification of persons.*

<sup>5</sup>The first and shortest classification of persons is this, that all men are either free or bond, that is, every man is either free or bond, that the plural number may so be reduced to the singular. Against this can be cited the *ascripticius*, so it seems, for he is truly free though bound to a certain service.<sup>6</sup> But to this a brief answer may be given, for from him who is free a villeinage or villein service detracts in no way,<sup>7</sup> [this] distinction [only] being taken, whether such persons are villeins or<sup>8</sup> [free men who] hold in villein socage of the demesne of the lord king, of whom more will be said below.<sup>9</sup> <sup>10</sup>Nor is what is said of *statuliberi* an objection,<sup>11</sup> for though a bondsman is in possession of his freedom he is in truth bond, though against his lord claiming him as his villein he sometimes can defend himself and his goods by an exception based upon his privilege.<sup>12</sup> Since, then, every man is either free or bond, <sup>13</sup>we must see what freedom and bondage are, and how bondage comes about.<sup>14</sup>

*What freedom is.*

<sup>15</sup>'Freedom is the natural power of every man to do what he pleases, unless forbidden by law or force.' But if so, it then appears that bondsmen are free, for they have free power [to act] unless forbidden by force or law. But freedom is defined by that law by which it is created, by virtue of which they are called free.<sup>16</sup>

<sup>1</sup> *Br. and Azo*, 42-3    <sup>1-2</sup> *Azo, Summa Inst.* 1.3, pr.    <sup>3-4</sup> *Ibid.*    <sup>5</sup> *Br. and Azo*, 44-5, 49, 51    <sup>6-8</sup> *Azo, Summa Inst.* 1.3, nos. 1-2    <sup>7</sup> *Infra* 85, 89    <sup>8</sup> 'vel'    <sup>9</sup> *Infra* 37    <sup>10-11</sup> *Azo, Summa Inst.* 1.3, no. 2; *infra* iii, 102; Kantorowicz, 108-11    <sup>12</sup> *Infra* 36-7    <sup>13-14</sup> *Azo, loc. cit.*    <sup>15</sup> *Br. and Azo*, 44-46, 49, 51  
<sup>15-16</sup> *Azo, Summa Inst.* 1.3, no. 3; Cortese, i, 74 ff.