The Elements of every Legislative Expression.

THE EXPRESSION of every law essentially consists of,

-1st, the description of *the legal subject*;

-2dly, the enunciation of *the legal Action*.

To these, when the law is not of universal application, are be added,

-3dly, the description of *the Case* to which the legal section is confined; and,

-4thly, *the Conditions* on performance of which the legal action operates.

*Some general explanation will perhaps be here allowed. If the statements appear too elementary, it will be borne in mind that these elementary matters are as much disregarded in practice as if they were unknown, and that it is therefore allowable to recur to them as things not altogether obvious nor universally admitted; and this more especially in a matter in which a distinct recognition of first elements conduces so much, an it will here be seen to do, to clearness and certainty in the most remote and complicate practical combinations.

The purpose of the law in all cases is to secure some benefit to some person or persons. When this benefit is secured to the public generally, or when it may be acquired by any person independently of the will of any other, the benefit secured is a Right; where it is confined to a class of persons into which any other person cannot enter, or into which he can only be admitted by the permission of some person or persons, the benefit secured is a Privilege. Privileges conferred for the purpose of being used, not for the benefit of the privileged person, but for the benefit and on behalf of some other person or persons, are Powers.

It is only possible to confer a Right, or Privilege, or Power, on one set of persons, by imposing corresponding Liabilities or Obligations on other persons, compelling these to afford the benefit conferred, or to abstain from invading it. Though the imposition of an Obligation is never the ultimate purpose of a law, it is very often (especially whenever the corresponding Right, Privilege, or Power is already recognised) the only thing which a given law does in fact, express.

A law, then, can operate in two ways: it can confer the Right, Privilege or Power directly, and it can impose the corresponding Obligation directly[1]. It is rarely, however, that both are done in the same law. Either the Right or Privilege, or Power, is created, as that A may enjoy the Rights of a natural born subject, or may marry again; that B shall have the Privilege of trading exclusively the East Indies, or of measuring all the cloth brought to certain market, taking a fee for it; or that C shall have the Power, in a certain case, to imprison another; and the corresponding Obligation are implied, that it, they are left to result from the declaration of the Right, Privilege, or Power: or more ordinarily the Obligation is done expressed, and the resulting Right, Privilege, or Power is left to be enjoyed through the practical operation of the Obligation.

But the law can only perform the one or the other of these process or both. No single sentence

[1] When a right has existed before, and the immediate object of the law is to restrict that right, the effect is still to create a new right; but the right here created consists in the new liberty communicated to those who were before under an obligation to respect the former unrestricted right.

in a law can do anything else than one or both of these.[2]

It would follow, therefore, that if the modes of expression appropriate to these processes could be clearly defined, and simple and natural rules be given for their use, those rules would comprise all that is essential to the matter of this paper,—the expression of the will of the lawgiver.

The Legal Subject.

Now no Right, Privilege, or Power can be conferred, and no Obligation or Liability imposed, otherwise than on some person.

The person who may or may not, or shall or shall not do something or submit to something, is *the legal subject* of the legal action.

The importance of just discrimination and correct expression of the legal subject cannot easily be exaggerated. The description of *the legal subject* determines *the extent* of the law. On this portion of every legal sentence it depends whether a right or privilege shall be limited to too few persons or extended to too many; whether an obligation is imposed on more persons than is necessary or it not extended to sufficient persona in order to secure the correlative right; whether powers are reposed in right or wrong persons; whether sanctions are or are not made to fall on the proper subjects. Generally, be the law in itself good or bad, it is on this portion the description of the legal subject, that its equal or unequal incidence upon persons depends. It is here that exemptions are filched by undetected omissions of persons, and encroachments effected by incautious insertions.

Hence the importance of the rules for securing the highest possible degree of clearness in the description and enumerations of *the legal subjects*.

The Legal Action.

The legal action is that part of every legislative sentence in which the Right, Privilege, or Power, or the Obligation or Liability, is defined, wherein it is said that a person *may* or *may not* or *shall* or *shall not* do any act, or *shall* submit to some act.

*As the *legal subject* defines the *extent of* the law, so the description of the *legal action* expresses the *nature* of the law. It expresses all that the law effects, as law. The selection of the legal subject is important; but it is on the description of the *legal action* that the whole function of legislation exercises and exhausts itself. No special rules of composition apply to it; but it peculiarly exercises the capacity for practical legislation. It is in the terms in which this *legal action* is expressed that every right, privilege, power, obligation, and sanction, is contained. It is in these terms that are to be detected the narrow definitions of rights, the authorization of licentious freedom, excessive privileges, inadequate or superfluous powers, insufficient or arbitrary obligations, inefficient, or misapplied, or cruel sanctions. It is on these terms, usually but few in number, that

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[2] Preambles and Recitals to Statutes often contain merely statements of fact or opinion, but these are no exceptions, for they are not laws, though they are intended to indicate the intention of the law. Declaratory enactments, interpretation clauses, and adaptations or extensions of former laws to new purposes, do not always display immediately the purpose of creating or the extending rights, privileges, or powers of persons, or of imposing obligations and liabilities on persons; but they always are in fact, only very comprehensive extensions or restrictions of the rights and obligations created by other provisions.
If expressions like the following do not confer a right or power, or impose an obligation, they are mere impertinences: 'unless application shall have been first made by the person so complaining to the guardian, and if he refuses redress to the visiter, (it being part of his duty to redress matters of that sort,) who shall order relief, if he thinks it necessary,'

the vigilance of the legislator is chiefly to be exercised. It is in these few words that the efficacy or inefficacy, the cause of failure or success, the safety and the danger, the sweet and the sting of the law are to be found.

To this part of every legal sentence it is therefore all important that the attention of the public and of the legislators should be certainly and easily directed. The *legal action* should immediately appear on inspection of the sentence. No good enactment requires to be covered up in deceptive language, or involved in a preamble, or got by implication from terms used in the description of the legal subject, or of the case or conditions ;—no bad legislation should be allowed the chance of passing muster in such ways.

Such are the essential elements of every legal sentence. Without both the *legal subject* and the *legal action* no law can be written; and all enactments of universal and constant operation consist of these alone. The practical importance of keeping them distinct has been adverted to. There is no conceivable case requiring any confusion of them.

*Although *the legal subject* of a legislative command, permission, or prohibition, is always some *person* or more, the words of the law are often such as not to make *person* apparent; but they seem to apply the command, or permission, or prohibition, to some *thing.* This is always only apparent. None but persons are the legal subjects of a law, however they may be verbally disguised or kept out of view. It is obviously impossible to confer in effect a right, privilege, or power, on a thing, or to impose obligations on a thing, or, in other words, to affect a thing with a command, or prohibition, or permission. All that can be done by the law in regard of things is to confer rights, privileges and powers on persons in respect of them to command, prohibit, or permit certain actions of persons in respect of certain things.

The instances in the law of imperative and permissive language, applied to things are innumerable. The obscurity produced by the form may be seen in such instances as the following.—

Legal subject .... ALL RATES founded on such valuation

shall be made, allowed, published, and recovered, in the same manner as rates for the relief of the poor,

4 & 5 Wm. 4, c. 35.

—meaning apparently, no less than that the same persons shall be liable as ratepayers; that the same persons (overseers, *qu.* guardians ?) shall make the rate; that the same persons (overseers, *qu.* guardians ?) shall publish the rate; that the same persons shall pay or be liable to be levied on; and that the same persons (overseers, *qu.* guardians ? justices, constables) *shall* enforce the payment, as are respectively liable to the like obligations in the case of poor's rate.

Again—

Legal subject .... That TRUE AND JUST COPIES of all rates hereafter to be made, *[shall] be* fairly wrote and entered in a *book or books to be provided for that purpose.

17 Geo. 2, c. 38, s. 13.

—meaning that THE 'OVERSEERS' *shall* provide books for the entry of rates, and that THE 'OVERSEERS' *shall* cause true and just copies of all rates to be fairly wrote and entered in such books.

Again—

Legal subject.... That in addition to the salary to be paid to the chief constable of the county,

REASONABLE ALLOWANCES

shall be made to him for extraordinary expenses necessarily incurred by him and by the constables under his orders in the apprehension of offenders and in the execution of his duties, &c.

WHICH ALLOWANCES

shall be examined and audited, by the justices of the county in quarter sessions assembled.

2 & 3 Vic., c. 93, s. 18.

—meaning, to judge by other parts of the Act, that 'the treasurer shall pay such allowances out of the County Rate;' but leaving it wholly impossible to tell who is bound to make the account. It would seem to be the treasurer's proper duty to do so when once the allowance has been made; and yet it would seem to be hard that he should be subject to loss, if the allowance should not be approved. Perhaps the meaning was, that the chief constable's account of 'extraordinary expenses' was to be 'examined and allowed,' not that the allowances should be examined and audited; but this reasonable meaning is wholly conjectural, while no reasonable meaning is apparent.

In the first of these examples, the whole of a most important set of provisions are rendered doubtful, perhaps inoperative, by the neglect to determine whether it is the overseers of the individual parish, or the guardians of the whole Union, who are to make, publish, and levy the rate. The example is a fair one of the frequent *mischief produced by the practice of naming things instead of naming the persons who really are intended to be the legal subjects of the enactment.

The avoiding the definition of the person is often a mask for ignorance, or the resource of indolence; often it is the result merely of carelessness. As it is a disguise, it should never be adopted without a special reason.

The only legitimate occasion for naming a thing as the legal subject, is when the persons to be affected have been already ascertained, and the relations of those persons to the thing named have been already clearly determined. In such cases, if the persons to be affected in relation to that thing are very numerous, it will sometimes save a troublesome enumeration of persons to name the thing as the legal subject; thus to say that 'the rate shall be made and levied in the right manner as the poor's rate,' may save the enumeration of three sets of persons, the true legal subjects of the enactment, for it is equivalent to saying that the persons liable to be rated to the relief of the poor shall be rated to this rate in like manner as to the poor's rate; that the persons (overseers and justices) authorized to make the poor's rate make this rate in like manner as the poor's rate; and that the persons (justices, constables, overseers, &c.) empowered to levy poor's rates, may levy this rate in like manner as a poor's rate. Again, where a certain term has been used in relation to certain persons, these persons can often be extensively affected, or others included very conveniently, by

using such term as the legal subject; thus, the word 'overseers' shall be construed to include overseers, churchwardens, assistant-overseers, and all other subordinate officers,[3] &c.

*It may sometimes be convenient, instead of naming the legal subjects, to use an impersonal form, as, 'IT shall be lawful' where it is intended to confer a right, privilege, or power, on many undefined persons, but not universally on all persons. The form, however, has no advantage, but is needlessly indefinite where the persons on whom the right, power or privilege is to be conferred are easily denoted; thus, 'it shall be lawful for any two justices' may be better expressed by 'ANY TWO JUSTICES *may*,' 'IT *shall* be lawful for any person to,' or 'IT *shall not* be lawful for any person to,' are more clearly expressed by 'EVERY PERSON *may,*' 'NO PERSON *shall.*'

The rules of most effect as to the expression of the legal subject, are,

First, to keep the *legal subject* distinct in form and in place from other parts of the legal sentence.

Secondly, not to permit it to be withdrawn from view, or disguised by the non-description of *persons,* or by the substitution of *things* instead of persons, or by the use of impersonal forms of expression.

The legal subject of an enactment is always conceived as existing before *the legal action* can operate[4]. It is in fact merely the name or description of some existing object on which the law is about to act, and the use of the words to describe such an object is to be governed by the ordinary rules of composition. Therefore, in describing the legal subject, and the same thing applies whenever any existing object is to be named or described in other parts of a legal sentence,—the business of a draftsman of a statute has nothing distinguishing it from the work of other writers in naming or in accurately describing the same objects.

The legal subjects having been determined by the ordinary processes of naming or of definition, the intended *action of the law upon those subjects* comes to be described. In this some special rules of composition, modified by the peculiar attributes of the law, do apply.

If the law confers a right, privilege, or power on the legal subject, its language is properly facultative; if it imposes an obligation to do or to abstain, its language is properly imperative or prohibitory. In this the language of the law is, or rather ought to be, confined to modes of speech peculiarly expressive of its facultative or restrictive functions. Language taking indicative or descriptive, or narrative or passive forms, or any other than authoritative forms, is totally out of place and character. The words *may* and *shall*, with their negatives, are exclusively the proper auxiliaries of the enacting verb. These auxiliaries with their negations, serving as they do peculiarly

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[3] Nevertheless in these provisions for arbitrary constructions the true legal subject is most usually disguised without necessity. Even in the instance given, the more proper expression is thus:-
The case Whenever the word 'overseer' is used in this Act,
Legal subject overseers, churchwardens, assistant-overseers, and other subordinate officers, &c.
Legal action shall be held to be included.

[4] It is most frequently some natural person. But sometimes the legal subjects of one enactment may have been created by some other legal action preceding the present enactment. Thus an enactment may take a man of a given description, and declare that he shall be a magistrate; in this enactment the man described is the legal subject, and the investiture with magisterial powers the legal action. Having thus by one legal action created the magistrate, he may now become the legal subject of some new legal action, as where it is said, that ANY JUSTICE OF THE PEACE may commit an offender, &c.

to join *the legal subject to the legal action*, and denoting peculiarly the facultative or restrictive character of the legal action, may be called *modal copulæ*, or simply the *copulæ* of a legal sentence.

If a right, privilege, or power is conferred, the appropriate *copulæ* is *may* or *may not*; if a right, power, or privilege is to be abridged, the appropriate *copulæ* is *may not;* if an obligation is imposed to render any duty, the appropriate *copula* is *shall*; if the obligation is to abstain, the appropriate *copula* is *shall not;* again, if the purpose is to affect the legal subject with a liability or sanction, the appropriate *copula* is still *shall,* only when the subject is to be active, the whole enacting verb will be active, '*shall* forfeit,' &c., and where the subject is to submit, or be passive, the whole enacting verb will be passive, as '*shall* be imprisoned,' &c.

All such descriptive and narrative expressions as 'it is hereby allowed, authorized, and permitted,' instead of *may;* 'is hereby commanded and required to,' or, 'shall, and 'is hereby required to' instead of simply '*shall;'* and all such passive expressions where the legal subject is intended to be active, as 'notice *shall* be given,' leaving the person to give it unascertained, instead of 'THE SURVEYOR (?) *shall* give notice;' 'THE RATES *shall* be made, allowed,' &c., leaving it impossible to ascertain by whom, as in the 4 & 5 Wm. IV., c. 76, s. 35; instead of 'THE GUARDIANS (?) OR THE OVERSEERS (?) *shall* make the rates;' 'THE ALLOWANCES *shall be* examined and audited' instead of 'THE CHIEF CONSTABLE (*qu.* THE TREASURER?) *shall* account for the allowances, and THE JUSTICES *shall* examine and audit such account'&c., are at the best weak and inexpressive, and are very frequently, as in some of the above instances, wholly unintelligible.

Not one case can be imagined, in which it is necessary or convenient to use any other than permissive or imperative language in the enacting verb; and these two rules, therefore, ought never to be allowed to be infringed;

1st. That the copula, which joins the *legal subject* and the *legal action* is to be *may,* or *may not,* or *shall,* or *shall not,* as, 'ANY PERSON *may,' 'NO* PERSON *may,' 'EVERY* PERSON *shall,'* or 'NO PERSON *shall;'*

2nd. That the whole of the enacting verb is always to be an active verb, excepting only where the legal subject is to submit or suffer, as where executory force, or punishment, (sanctions) are directed to be submitted to by the person described in the legal subject.

It would almost seem unnecessary to add that the cases for facultative and for imperative language ought not to be confounded. Yet it is so often, said in statutes that it shall be lawful to do something, where it is in fact meant that certain parties 'shall' do the act, that the greatest misapprehensions are constantly caused, people believing that they have an option to do the act or not as they may think proper; and the courts of law have been obliged to frame a special rule of construction, an exceedingly indefinite one however, and quite incapable of application in a multitude of instances, that wherever an act is authorized for the sake of justice, or wherever an act is authorized which is for the public benefit, 'may,' or 'it shall be lawful,' must be construed to mean, 'shall,' or 'it is hereby required.' To avoid this difficulty apparently, the absurd formul*æ*, 'shall and may;' 'may and is hereby required;' 'it shall be lawful, and it is hereby required and a variety of others have been adopted, all equally amounting, however, to a simple command, and properly

expressed by the simple word *shall.* There could arise no difficulty if these rules were observed—

—whenever an act is allowed *as a right* or as *a privilege,* that is to all the members of the community, or to certain persons for their own benefit, the proper *copula* is '*may;*'

—whenever the act is authorized *as a power,* that is to certain persons to perform, not for their own benefit, but for the benefit of others on whose behalf the power is given, the proper *copula* is *shall.*

The combinations of these elements are necessarily simple, and may be multiplied to any extent without rendering the expression of the law intricate or confused.

There may be a single *legal subject* and a single *legal action*; in which case there can be properly but one *copula,* inasmuch as the enunciation of one single action must either be facultative, or obligatory, or afflictive, cannot be more than one of these; as,

THE PARISHIONERS

may

as they may think fit, order an abstract of the accounts to be printed and published.

THE OVERSEERS or the greater part of them

shall

take orders from time to time, with the consent of two justices, to raise the rate—

or there may be many *legal subjects,* to be operated upon by one *legal action ;* in this case also there can be properly but one *copula;* as,

EVERY CLERK, COLLECTOR, RECEIVER and OTHER OFFICER appointed by any Court of Sewers

shall,

as often as is required by such Court, render a true, exact, and perfect account in writing under his hand—

or there may be one *legal subject* to be operated upon by many *legal actions,* in which case there may be several *copulæ,* inasmuch as some of the legal actions may be facultative, some obligatory, and some afflictive; as,

THE OVERSEERS of every parish *shall* provide a book or books

and *shall* take care that true and just copies of all rates for the poor be fairly written and entered therein.

THE TENANT,

may deduct the money so paid out of his rent

and *shall* be acquitted and discharged for so much money as he has so paid.

or there may be many *legal subjects,* and many *legal actions,* applied to all the same subjects: in this case also there may be several *copulæ;* as,

EVERY SURVEYOR, DISTRICT SURVEYOR, and ASSISTANT SURVEYOR *shall*

within 14 days after the appointment of the new surveyor, make up his accounts for the year preceding, in writing,

and *shall* sign and balance them,

and *shall* within one calendar month sign and lay them before the justices at a special session,

and *shall,* within 14 days after leaving his office, deliver his accounts, verified before justices

at special sessions;

but if the *legal subjects* are all expressed and kept together, the extent of the law can never be difficult to express, and if right words be used, can never be mistaken. If the *copula* of each enacting verb are joned immediately to their enacting verbs, and not thrown in a heap together to be afterwards discriminated and distributed to their proper subjects and actions, *referendo singula singulis,* each legal action will, as a consequence, stand out singly and simply, and the whole law will be as easy to compose, as it will be, when composed, easy of comprehension and terse in style.

The Case.

IF ALL LEGISLATION were as simple as that instanced above, there would be but little use in making the foregoing distinctions. But it is now comparatively rare that rules of universal and constant operation are laid down by statutes. If such rules constituted a considerable part of the modern law, no great, or at least no very frequent, complication of expression would occur. The simplicity of the matter would secure a general simplicity of expression.

It is no demerit of modern legislation at it applies itself minutely to special cases. It would, in fact, be the greatest merit of any system of laws that they varied exactly as every case varied in its elements. It is the indiscriminating and general rules of law at make the harshness of a system of law that make special classes of persons obnoxious to unintended and unforeseen oppression—that require for their mitigation the arbitrary modifications of judicial construction and of courts of equity. The more a legislature is civilized the more it measures and considers the differences in each class of cases, and adjusts the law to their varieties. With every fair enactment for the peculiarities of a special case, the law loses a portion of its rudeness and unbending character. The proper object of legislation is to make certain rules of the utmost possible convenience—not to propound rules of the utmost possible generality. Legislation is not a science, but a practical art. The perfection of a science is reached, when every particular proposition is resolved into or deducible from one general proposition; but the perfection of legislation is attained in proportion as every variety of right, and every corresponding obligation and liability are most specifically determined, and when the least is left to interference from extensive and remote generalities. It is most true that in adjusting its provisions to special differences, the general principles of the pre-existent law should be as far as possible adhered to; mutual consistency having a great value as well as particular aptness; and it is also true in regard to law as in regard to all other things, that a simple general rule is most easily comprehended by those who have no practical acquaintance with the particulars included by it, and this fact is also of practical importance in legislation: but to those who do know the particulars experimentally, as each man knows his own case, the more general the terms of a rule the less certain and close does its application appear, the more specific the terms of a rule, the more easily and precisely is its application seen and understood.

Generalizing the expression of the law is more the work of the scholastic professor; specializing the law the proper task of the practical legislator. In this process of modifying and adjusting the law to special cases, the constant action of the legislature and of the judiciary of England has undeniably made a greater and better progress than the institutions of any other country; and to desire a

codification or simplification which should destroy these nice adjustments, or diminish in any way the speciality of the law, or to propose arrangements to cramp or obstruct in future the further extension of specific legislation, would be to sacrifice aptness and certainty in the law to verbal generality; and to supplant the beneficent officiousness of the legislator by-the despotic formalities of the methodizer.

Nevertheless, this beneficent process of adjusting our law to the partial and various interests of the community, has unquestionably, so far as our statute law is concerned, introduced a cumbrousness, intricacy, and confusion, quite without any parallel in the legislation of any other country.

Without some rule for expressing the limitation of the law to its specific occasions, the draftsman first draws an enactment in terms too general for his purpose; he then attempts to detract from its generality by interpolated limitations, qualifications, exceptions, and by that bane of all correct composition, the Proviso. It would indeed be lamentable if the aptness and flexibility of legislation could only be attained by such intricacy and confusion in the expression of the law, as we see resulting from this clumsy process. But there is no necessary connexion in these acts. The law can universally be made, like every other matter, clearer in all its details, and more compact in all its parts, by the orderly specification of those details.

As on the due expression of the *legal subject* the *extent* of the law depends, and as on that of the *legal action* the *nature* of the law depends; so on the expression of *the case,* and of *the conditions,* do the clearness, precision, and form of our statute law mainly depend.

The rule to be observed is of such simplicity as to make its utterance appear almost- an absurdity; but simple as it is, it is the most frequently-neglected of any rule of composition.

It is, that *wherever the law is intended to operate only in certain circumstances those circumstances should be invariably described* BEFORE *any other part of the enactment is expressed.*

If this rule were observed, nine-tenths of the wretched provisoes, and after-limitations and qualifications with which the law is disfigured and confused, would be avoided, and no doubt could ever possibly arise, except through the bad choice of terms, as to the occasions in which the law applied, and those in which it did not. It is beyond a doubt that the *casus legis* which can be described in a proviso, or in a phrase interpolated into other matter by way of limitation, can be more easily expressed alone, and at the beginning of the enactment. It is equally beyond a doubt that its proper place is at the beginning, and that it is misleading the reader to commence an enactment as if it were universal, and to wind it up by a parenthetical qualification or proviso which limits it to certain occasions only.

As the law is only to operate when the supposed case arises, the proper language to express it would be *subjunctive* language, as ‘if any person be But as subjunctive language cannot be distinguished from conditional, and as conditional language is more specifically necessary for the expression of *the conditions* (to be hereafter referred to), it would appear to be better, in describing *the case,* to use the still more ordinary language of *the indicative* mood.

Where any person *is* aggrieved by any rate, or *has* any material objection, &c.

Where notice of appeal *has been given* in writing, &c. Nevertheless in any case in which no notice of appeal *has been given* in writing, &c.

This indicative language describing the case as *now* existing, or as having *now* occurred, is consistent with the supposition of *the law being always speaking* ; and its use may, on this supposition, be justified to the exclusion of subjunctive language, which is less popularly used, and is more wanted elsewhere.

But subjunctive language ought, at all events, to be used in preference to the ordinary absurd form—

Where any person *shall* find himself aggrieved,

If notice of appeal *shall* have been given,

a form which confounds the proper language of obligation with that of hypothesis, depriving the former (the peculiar language of the law) of its force, and often leaving a doubt whether the action described is one merely supposed as a case or condition, or one imperatively required to be performed.

It would add much to the facility of discovering; *the case* immediately in every legal sentence, if it invariably commenced with the words ‘when’ or ‘where’ or ‘in case.’

The Conditions.

A LAW universal as to its *subjects,* and restricted or not restricted to certain occasions (*cases,*) may still operate *only upon the performance by some person of certain *conditions.* It is not till something has been done that the right can be enjoyed, or that compliance with the obligation can be enforced, or that the liability can be applied.

These *conditions* are invariably conditions precedent. The action of the law never takes place till these are complied with. No such thing as the so-called conditions subsequent or executory can be conceived to apply to a legal action.

The expression of *the conditions* is of very high importance. A condition is sometimes expressed as the condition of acquiring or enjoying a right; if in this case it exceeds, by the smallest particle, what is necessary to the condition, it will so far prohibit the enjoyment of the right. Conditions are more frequently expressed as the conditions of enforcing an obligation on another; if in these cases the condition is in any respect more stringent than necessary, it so far prevents the enforcement of the obligation; on the other hand, every word by which the condition is made less stringent makes the obligation more so, and renders the law unnecessarily hard, by imposing obligations of an extent disproportionate to the value of the right to which they subserve. But conditions are still more frequently used to determine the occasions on which the powers of Courts of Justice and public officers are to be used: in this case, if the condition be expressed too widely, it paralyses the use of the power; if it be not extensive enough, it affords unnecessary occasions and pretexts for the exercise of such powers, making their intervention meddlesome and arbitrary. The absence or vagueness of conditions upon the exercise of powers is the characteristic of all arbitrary institutions. On the other hand, the imposition of unimportant formalities as the conditions of the exercise of public powers, constitutes for the most part the history of the decay of institutions, the

origin of sinecures, and, above all, the obsolescence of remedies, and with them of the rights for the protection of which the remedies had been provided. We have a lamentable example of this in the English law, in the loss of civil remedies for a large class of injuries now left to be redressed only by resorting to coarse and inefficient penal vindications.

It seems superfluous to say that the proper language of a condition is the conditional,

If he give notice, he may, &c.

Unless he give notice he shall not, &c.

but the practice in drawing bills disregards this rule much more frequently than it conforms to it—indeed defies all rule; the most common mode of expression is equally regardless of grammatical principle, popular custom, or force of expression ; it is

if *he shall insist* on the same,

if, upon the hearing, *the Court shall order* any rate to be set aside,

if it shall appear to the said Court.

This is almost the universal formula. What the '*shall'* is to effect it seems impossible to conceive. The language in all such cases becomes correct and expressive by the simple omission of the '*shall,'*

if he insist,

if the Court order, if it appear, &c.

This misuse of 'shall,' in a condition, is not only objectionable in itself, but it always deprives the obligatory language of the legal action, where the 'shall' is in its proper place, of its due force; it often does even worse inasmuch as it seems to convert a condition which, may be performed or not at the will of a party according as he wishes or not to secure the benefit of the enactment, into a positive command, as

fourteen clear days' notice in writing *shall* be given by the parties intending to appeal, &c.

—where *the meaning merely is that 'if 14 days' notice be given, the party may appeal,' or 'unless 14 days' notice be given, the appeal shall not be received.

There may be many distinct conditions imposed. In this case the conditions are never to be performed simultaneously. The order of their performances in time ought to be carefully observed in expressing them; so that the person, or several persons, on whom they are imposed, may see the order in which to proceed to realize all the conditions of the legal action, and may be in no doubt when those conditions are all complied with. For the reason that the legal action is postponed, and cannot act upon the legal subject, until these conditions are all complied with, *the expression of the conditions ought immediately to precede that of the legal subjects.*