CHAPTER IV

THE LAW

Definition of the Law

THE Law of the State or of any organized body of men is composed of the rules which the courts, that is, the judicial organs of that body, lay down for the determination of legal rights and duties. The difference in this matter between contending schools of Jurisprudence arises largely from not distinguishing between the Law and the Sources of the Law. On the one hand, to affirm the existence of *nicht positivisches Recht*, that is, of Law which the courts do not follow, is declared to be an absurdity; and on the other hand, it is declared to be an absurdity to say that the Law of a great nation means the opinions of half-a-dozen old gentlemen, some of them, conceivably, of very limited intelligence.

The truth is, each party is looking at but one side of the shield. If those half-a-dozen old gentlemen form the highest judicial tribunal of a country, then no rule or principle which they refuse to follow is Law in that country. However desirable, for instance, it may be that a man should be obliged to make gifts which he has promised to make, yet if the courts of a country will not compel him to keep his promise, it is not the Law of that country that promises to make a gift are binding. On the other hand, those six men seek the rules which they follow not in their own whims, but they derive them from sources

often of the most general and permanent character, to which they are directed, by the organized body to which they belong, to apply themselves. I believe the definition of Law that I have given to be correct; but let us consider some other definitions of the Law which have prevailed and which still prevail.

Of the many definitions of the Law which have been given at various times and places, some are absolutely meaningless, and in others a spark of truth is distorted by a mist of rhetoric. But there are three theories which have commended themselves to accurate thinkers, which have had and which still have great acceptance, and which deserve examination. In all of them it is denied that the courts are the real authors of the Law, and it is contended that they are merely the mouthpieces which give it expression.

Law as the command of the Sovereign

The *first* of these theories is that Law is made up of the commands [1] of the sovereign. This is Austin's view. "Every Positive Law," he says, "obtaining in any community, is a creature of the Sovereign or State; having been established immediately by the monarch or supreme body, as exercising legislative or judicial functions; or having been established immediately by a subject individual or body, as exercising rights or powers of direct or judicial legislation, which the monarch or supreme body has expressly or tacitly conferred." [2]

In a sense, this is true; the State can restrain its courts from following this or that rule; but it often leaves them free to follow what they think right; and it is certainly a forced expression to say that one commands things to be

[1] See p. 24, *ante*.
[2] 2 Jur. (4th ed.) 550, 551.

done, because he has power (which he does not exercise) to forbid their being done.

Mr. A. B., who wants a house, employs an architect, Mr. Y. Z., to build it for him. Mr. Y. Z. puts up a staircase in a certain way; in such a case, nine times out of ten, he puts it up in that way, because he always puts up staircases in that way, or because the books on construction say they ought to be so put up, or because his professional brethren put up their staircases in that fashion, or because he thinks to put it up so would be good building, or in good taste, or because it costs him less trouble than to put it up in some other way; he seldom thinks whether Mr. A. B. would like it in that way or not; and probably Mr. A. B. never thinks whether it could have been put up in any other fashion. Here it certainly seems strained to speak, as Austin would do, of the staircase as being the "creature" of Mr. A. B.; and yet Mr. A. B. need not have had his staircase put up in that way, and indeed need never have had any staircase or any house at all.

When an agent, servant, or official does acts as to which he has received no express orders from his principal, he may aim, or may be expected to aim, *directly* at the satisfaction of the principal, or he may not. Take an instance of the first,—a cook, in roasting meat or boiling eggs, has, or at any rate the ideal cook is expected to have, *directly* in view the wishes and tastes of her master. On the other hand, when a great painter is employed to cover a church wall with a picture, he is not expected to keep constantly in mind what will please the wardens and vestry; they are not to be in all his thoughts; if they are men of ordinary sense, they will not wish to be; he is to seek his inspiration elsewhere, and the picture when done

is not the "creature" of the wardens and vestry; whereas, if the painter had adopted an opposite course, and had bent his whole energies to divining what he thought would please them best, he would have been their "tool," and the picture might not unfairly be described as their creature.

Now it is clear into which of these classes a judge falls. Where he has not received direct commands from the State, he does not consider, he is not expected to consider, *directly* what would please the State; his thoughts are directed to the questions—What have other judges held? What does Ulpian or Lord Coke say about the matter? What decision does *elegantia juris* or sound morals require?

It is often said by hedonistic moralists that, while happiness is the end of human life, it is best attained by not aiming directly at it; so it may be the end of a court, as of any other organ of a body, to carry out the wishes of that body, but it best reaches that object by not directly considering those wishes.

Austin's statement that the Law is entirely made up of commands directly or indirectly imposed by the State is correct, therefore, only on the theory that everything which the State does not forbid its judges to do, and which they in fact do, the State commands, although the judges are not animated by a direct desire to carry out the State's wishes, but by entirely different ones.

"A Law" and "The Law"

In this connection, the meaning of "Law," when preceded by the indefinite, is to be distinguished from that which it bears when preceded by the definite, article. Austin, indeed, defines the Law as being the aggregate

of the rules established by political superiors;[1] and Bentham says, "*Law,* or *the Law,* taken indefinitely, is an abstract and collective term; which, when it means anything, can mean neither more nor less than the sum total of a number of individual laws taken together." [2] But this is not, I think, the ordinary meaning given to "the Law." *A* law ordinarily means a statute passed by the legislature of a State. "*The* Law" is the whole system of rules applied by the courts. The resemblance of the terms suggests the inference that the body of rules applied by the courts is composed wholly of the commands of the State; but to erect this suggestion into a demonstration, and say:—The system administered by the courts is "the Law," "the Law" consists of nothing but an aggregate of single laws, and all single laws are commands of the State,—is not justifiable.

It is to Sir Henry Maine that we owe the distinct pointing out that Austin's theory "is founded on a mere artifice of speech, and that it assumes courts of justice to act in a way and from motives of which they are quite unconscious. . . . Let it be understood that it is quite possible to make the theory fit in with such cases, but the process is a mere straining of language. It is carried on by taking words and propositions altogether out of the sphere of the ideas habitually associated with them." [3]

Austin's theory was a natural reaction against the views which he found in possession of the field. Law had been defined as "the art of what is good and equitable"; "that which reason in such sort defines to be good

[1] 1 Jur. (4th ed.) 89.
[2] 1 Benth. Works, 148.
[3] Maine, Early Hist. of Inst. 364, 365.

that it must be done"; "the abstract expression of the general will existing in and for itself"; "the organic whole of the external conditions of the intellectual life." [1] If Austin went too far in considering the Law as always proceeding from the State, he conferred a great benefit on Jurisprudence by bringing out clearly that the Law is at the mercy of the State.

Law in the consciousness of the people

The *second* theory on the nature of Law is that the courts, in deciding cases, are, in truth, applying what has previously existed in the common consciousness of the people. Savigny is the ablest expounder of this theory. At the beginning of the *System des heutigen römischen Rechts,* he has set it forth thus: "It is in the common consciousness of the people that the positive law lives, and hence we have to call it *Volksrecht.* . . . It is the *Volksgeist,* living and working in all the individuals in common, which begets the positive law, so that for the consciousness of each individual there is, not by chance but necessarily, one and the same law. . . . The form, in which the Law lives in the common consciousness of the people, is not that of abstract rule, but the living intuition of the institute of the Law in its organic connection. . . . When I say that the exercise of the *Volksrecht* in single cases must be considered as a means to become acquainted with it, an indirect acquaintance must be understood, necessary for those who look at it from the outside, without being themselves members of the community in which the *Volksrecht* has arisen and leads its continuous life. For the members of the community, no such inference from

[1] Celsus; Hooker; Hegel; Krause. See Holland, Jur. (11th ed.) 20.

single cases of exercise is necessary, since their knowledge of it is direct and based on intuition." [1]

Savigny is careful to discriminate between the common consciousness of the people and custom: "The foundation of the Law," he says, "has its existence, its reality, in the common consciousness of the people. This existence is invisible. How can we become acquainted with it? We become acquainted with it as it manifests itself in external acts, as it appears in practice, manners, and custom: by the uniformity of a continuous and continuing mode of action, we recognize that the belief of the people is its common root, and not mere chance. Thus, custom is the sign of positive law, not its foundation." [2]

Opinions of jurists

Savigny is confronted by a difficulty of the same kind as confronted Austin. The great bulk of the Law as it exists in any community is unknown to its rulers, and it is only by aid of the doctrine that what the sovereign permits he commands, that the Law can be considered as emanating from him; but equally, the great bulk of the Law is unknown to the people; how, then, can it be the product of their "common consciousness"? How can it be that of which they "feel the necessity as law"?

Take a simple instance, one out of thousands. By the law of Massachusetts, a contract by letter is not complete until the answer of acceptance is received.[3] By the law of New York, it is complete when the answer is mailed. Is the common consciousness of the people of Massa-

[1] 1 Savigny, Heut. röm. Recht, § 7, pp. 14, 16; § 12, p. 38.
[2] Heut. röm. Recht, § 12, p. 35.
[3] This used to be the Law in Massachusetts. I am not so sure that it is now. (See 1 Williston, Contracts, § 81.)

chusetts different on this point from that of the people of New York? Do the people of Massachusetts feel the necessity of one thing as law, and the people of New York feel the necessity of the precise opposite? In truth, not one in a hundred of the people of either State has the dimmest notion on the matter. If one of them has a notion, it is as likely as not to be contrary to the law of his State.

Savigny meets the difficulty thus: "The Law, originally the common property of the collected people, in consequence of the ramifying relations of real life, is so developed in its details that it can no more be mastered by the people generally. Then a separate class of legal experts is formed which, itself an element of the people, represents the community in this domain of thought. In the special consciousness of this class, the Law is only a continuation and peculiar development of the *Volksrecht*. The last leads, henceforth, a double life. In its fundamental principles it continues to live in the common consciousness of the people; the exact determination and the application to details is the special calling of the class of jurisconsults." [1]

But the notion that the opinions of the jurisconsults are the developed opinions of the people is groundless. In the countries of the English Common Law, where the judges are the jurists whose opinions go to make up the Law, there would be less absurdity in considering them as expressing the opinions of the people; but on the Continent of Europe, in Germany for instance, it is difficult to think of the unofficial and undeterminate class of jurists,

[1] 1 Heut. röm. Recht, § 14, p. 45.

past and present, from whose writings so great a part of the Law has been derived, as expressing the opinions of the people. In their reasonings, it is not the opinions of the people of their respective countries, Prussia, or Schwartzburg-Sonderhausen, which guide their judgment. They may bow to the authority of statutes, but in the domain of Law which lies outside of statute, the notions on Law, if they exist and are discoverable, which they are mostly not, of the persons among whom they live, are the last things which they take into account. What they look to are the opinions of foreign lawyers, of Papinian, of Accursius, of Cujacius, or at the *elegantia juris*, or at "juristic necessity." [1]

The jurists set forth the opinions of the people no more and no less than any other specially educated or trained class in a community set forth the opinions of that community, each in its own sphere. They in no other way set forth the *Volksgeist* in the domain of Law than educated physicians set forth the *Volksgeist* in the matter of medicine. It might be very desirable that the conceptions of the *Volksgeist* should be those of the most skilful of the community, but however desirable this might be, it is not the case. The *Volksgeist* carries a piece of sulphur in its waistcoat pocket to keep off rheumatism, and thinks that butchers cannot sit on juries.

Not only is popular opinion apart from professional opinion in Law as in other matters, but it has been at times positively hostile. Those who hold that jurists are the mouthpieces of the popular convictions in matters of law have never been able to deal satisfactorily with the

[1] See an article by Professor Pound, in 31 Harvard Law Rev. 1047.

reception of the Roman law in Germany, for that Law was brought in not only without the wishes, but against the wishes, of the great mass of the people.[1]

Judges as discoverers of the Law

A *third* theory of the Law remains to consider. That theory is to this effect: The rules followed by the courts in deciding questions are not the expression of the State's commands, nor are they the expression of the common consciousness of the people, but, although what the judges rule is the Law, it is putting the cart before the horse to say that the Law is what the judges rule. The Law, indeed, is identical with the rules laid down by the judges, but those rules are laid down by the judges because they are the law, they are not the Law because they are laid down by the judges; or, as the late Mr. James C. Carter puts it, the judges are the discoverers, not the creators, of the Law. And this is the way that judges themselves are apt to speak of their functions.[2]

Only what the Judges lay down is Law

This theory concedes that the rules laid down by the judges correctly state the Law, but it denies that it is Law because they state it. Before considering the denial, let us look a moment at the concession. It is a proposition with which I think most Common-Law lawyers would agree. But we ought to be sure that our ideas are not colored by the theories or practice of the particular system of law with which we are familiar. In the Common Law, it is now generally recognized that the judges have had a main part in erecting the Law; that, as it now stands, it is largely based on the opinions of past generations of judges; but in the Civil Law, as we shall see hereafter, this has been true to a very limited extent. In

[1] See Appendix III.
[2] See pp. 218-240, *post*.

other words, judicial precedents have been the chief material for building up the Common Law, but this has been far otherwise in the systems of the Continent of Europe.[1] But granting all that is said by the Continental writers on the lack of influence of judicial precedents in their countries to be true, yet, although a past decision may not be a source of Law, a present decision is certainly an expression of what the Law now is. The courts of France to-day may, on the question whether a blank indorsement of a bill of exchange passes title, care little or nothing for the opinions formerly expressed by French judges on the point, but, nevertheless, the opinion of those courts to-day upon the question is the expression of the present Law of France, for it is in accordance with such opinion that the State will compel the inhabitants of France to regulate their conduct. To say that any doctrine which the courts of a country refuse to adopt is Law in that country, is to set up the idol of *nicht positivisches Recht*;[2] and, therefore, it is true, in the Civil as well as in the Common Law, that the rules laid down by the courts of a country state the present Law correctly.

The great gain in its fundamental conceptions which Jurisprudence made during the last century was the recognition of the truth that the Law of a State or other organized body is not an ideal, but something which actually exists. It is not that which is in accordance with religion, or nature, or morality; it is not that which ought to be, but that which is. To fix this definitely in the Jurisprudence of the Common Law, is the feat that Austin accomplished. He may have been wrong in treating

[1] P. 205, *et seq. post.*
[2] P. 84, *ante.*

the Law of the State as being the command of the sovereign, but he was right in teaching that the rules for conduct laid down by the persons acting as judicial organs of the State, are the Law of the State, and that no rules not so laid down are the Law of the State.

The Germans have been singularly inappreciative of Bentham and Austin, and, as so often happens, the arrival at a sound result has been greatly hampered by nomenclature. Ethics is, in Continental thought, divided into two parts, one dealing with matters which can be enforced by external compulsion, and the other with those which cannot. The former of these is called *Rechtslehre*. According to Kant, Moral philosophy (*Metaphysik der Sitten*) is divisible into two parts: (1) the metaphysical principles of Jurisprudence (*Rechtslehre*), and (2) the metaphysical principles of ethics (*Tugendlehre*).[1] Jurisprudence has for its subject-matter the aggregate of all the laws which it is possible to promulgate by external legislation.[2] All duties are either duties of justice (*Rechtspflicht*) or duties of virtue (*Tugendpflicht*). The former are such as *admit* of external legislation; the latter are those for which such legislation is not possible.[3] *Rechtslehre*, that is, deals not only with the rules which the State has actually imposed upon conduct, but also with all conduct which can be *potentially subjected* to such

[1] Kant, Rechtslehre, (Philosophy of Law), Preface, at beginning. Hastie's trans. p. 3.

[2] *Ib.* Introduction to Jurisprudence, A, What is Jurisprudence?, at beginning. Hastie, p. 43.

[3] *Ib.* Introduction to Moral Philosophy, III, Divisions of the Metaphysic of Morals, at beginning. Hastie, p. 24. I owe the reference to these passages of Kant to an article by John W. Salmon, in 11 Law Quarterly Rev., 121, 140, on the Law of Nature. See also Willoughby, Nature of the State, 113, note.

rules; and this has tended to obscure the distinction between the rules which have actually been laid down from those which might have been laid down. But of late years, the Germans, in their own way, have been coming round to Austin's view; and now the abler ones are abjuring all *"nicht positivisches Recht."* [1]

Questions not previously decided

To come, then, to the question whether the judges discover preëxisting Law, or whether the body of rules that they lay down is not the expression of preëxisting Law, but the Law itself. Let us take a concrete instance: On many matters which have come in question in various jurisdictions, there is no doctrine received *semper, ubique, et ab omnibus.* For instance, Henry Pitt has built a reservoir on his land, and has filled it with water; and, without any negligence on his part, either in the care or construction of his reservoir, it bursts, and the water, pouring forth, floods and damages the land of Pitt's neighbor, Thomas Underhill. Has Underhill a right to recover compensation from Pitt? In England, in the leading case of *Rylands* v. *Fletcher*,[2] it was held that he could recover, and this decision has been followed in some of the United States—for instance, in Massachusetts; but in others, as, I believe, in New Jersey, the contrary is held.[3]

Now, suppose that Pitt's reservoir is in one of the newer States, say Utah, and suppose, further, that the question has never arisen there before; that there is no statute, no decision, no custom on the subject; the court has to decide the case somehow; suppose it should follow *Rylands*

[1] See Bergbohm, Jurisprudenz et Rechtsphilosophie, *passim.*
[2] L. R. 3 H. L. 330.
[3] *Wilson* v. *New Bedford,* 108 Mass. 261; *Marshall* v. *Welwood,* 38 N. J. Law, 339.

v. *Fletcher* and should rule that in such cases the party injured can recover. The State, then, through its judicial organ, backed by the executive power of the State, would be recognizing the rights of persons injured by such accidents, and, therefore, the doctrine of *Rylands* v. *Fletcher* would be undoubtedly the present Law in Utah.

Suppose, again, that a similar state of facts arises in the adjoining State of Nevada, and that there also the question is presented for the first time, and that there is no statute, decision, or custom on the point; the Nevada court has to decide the case somehow; suppose it should decline to follow *Rylands* v. *Fletcher*, and should rule that in such cases the party injured is without remedy. Here the State of Nevada would refuse to recognize any right in the injured party and, therefore, it would unquestionably be the present Law in Nevada that persons injured by such an accident would have no right to compensation.

Let us now assume that the conditions and habits of life are the same in these two adjoining States; that being so, these contradictory doctrines cannot both conform to an ideal rule of Law, and let us, therefore, assume that an all-wise and all-good intelligence, considering the question, would think that one of these doctrines was right and the other wrong, according to the true standard of morality, whatever that may be. It matters not, for the purposes of the discussion, which of the two doctrines it is, but let us suppose that the intelligence aforesaid would approve *Rylands* v. *Fletcher*; that is, it would think the Law as established in Nevada by the decision of its court did not conform to the eternal principles of right.

The fact that the ideal theory of Law disapproved the

Law as established in Nevada would not affect the present existence of that Law. However wrong intellectually or morally it might be, it would be the Law of that State to-day. But what was the Law in Nevada a week before a rule for decision of such questions was adopted by the courts of that State? Three views seem possible: *first*, that the Law was then ideally right, and contrary to the rule now declared and practised on; *second*, that the Law was then the same as is now declared practised; *third*, that there was then no Law on the matter.

The first theory seems untenable on any notion of discovery. A discoverer is a discoverer of that which is, —not of that which is not. The result of such a theory would be that when Underhill received the injury and brought his suit, he had an interest which would be protected by the State, and that it now turns out that he did not have it,—a contradiction in terms.

No Law previous to decision

We have thus to choose between the theory that the Law was at that time what it now is, and the theory that there was then no law at all on the subject. The latter is certainly the view of reason and common sense alike. There was, at the time in question, *ex hypothesi*, no statute, no precedent, no custom on the subject; of the inhabitants of the State not one out of a hundred had an opinion on the matter or had ever thought of it; of the few, if any, to whom the question had ever occurred, the opinions were, as likely as not, conflicting. To say that on this subject there was really Law existing in Nevada, seems only to show how strong a root legal fictions can strike into our mental processes.

When the element of long time is introduced, the absurdity of the view of Law preëxistent to its declaration

is obvious. What was the Law in the time of Richard Cœur de Lion on the liability of a telegraph company to the persons to whom a message was sent? It may be said that though the Law can preëxist its declaration, it is conceded that the Law with regard to a natural force cannot exist before the discovery of the force. Let us take, then, a transaction which might have occurred in the eleventh century: A sale of chattels, a sending to the vendee, his insolvency, and an order by the vendor to the carrier not to deliver. What was the Law on stoppage *in transitu* in the time of William the Conqueror?

The difficulty of believing in preëxisting Law is still greater when there is a change in the decision of the courts. In Massachusetts it was held in 1849, by the Supreme Judicial Court, that if a man hired a horse in Boston on a Sunday to drive to Nahant, and drove instead to Nantasket, the keeper of the livery stable had no right to sue him in trover for the conversion of the horse. But in 1871 this decision was overruled, and the right was given to the stable-keeper.[1] Now, did stable-keepers have such rights, say, in 1845? If they did, then the court in 1849 did not discover the Law. If they did not, then the court in 1871 did not discover the Law.

Courts make *ex post facto* Law

And this brings us to the reason why courts and jurists have so struggled to maintain the preëxistence of the Law, why the common run of writers speak of the judges as merely stating the Law, and why Mr. Carter, in an advance towards the truth, says of the judges that they are discoverers of the Law. That reason is the unwillingness to recognize the fact that the courts, with the consent

[1] *Gregg* v. *Wyman*, 4 Cush. 322; *Hall* v. *Corcoran*, 107 Mass. 251.

of the State, have been constantly in the practice of applying in the decision of controversies, rules which were not in existence and were, therefore, not knowable by the parties when the causes of controversy occurred. It is the unwillingness to face the certain fact that courts are constantly making *ex post facto* Law.[1]

The unwillingness is natural, particularly on the part of the courts, who do not desire to call attention to the fact that they are exercising a power which bears so unpopular a name, but it is not reasonable. Practically in its application to actual affairs, for most of the laity, the Law, except for a few crude notions of the equity involved in some of its general principles, is all *ex post facto*. When a man marries, or enters into a partnership, or buys a piece of land, or engages in any other transaction, he has the vaguest possible idea of the Law governing the situation, and with our complicated system of Jurisprudence, it is impossible it should be otherwise. If he delayed to make a contract or do an act until he understood exactly all the legal consequences it involved, the contract would never be made or the act done. Now the Law of which a man has no knowledge is the same to him as if it did not exist.

Again, the function of a judge is not mainly to declare the Law, but to maintain the peace by deciding controversies. Suppose a question comes up which has never been decided,—and such questions are more frequent than persons not lawyers generally suppose,—the judge must decide the case somehow; he will properly wish to de-

[1] Technically the term "*ex post facto* Law" is confined with us to statutes creating crimes or punishments. I use the term here in its broader sense of retroactive Law.

cide it not on whim, but on principle, and he lays down some rule which meets acceptance with the courts, and future cases are decided in the same way. That rule is the Law, and yet the rights and duties of the parties were not known and were not knowable by them. That is the way parties are treated and have to be treated by the courts; it is solemn juggling to say that the Law, undiscovered and undiscoverable, and which is finally determined in opposite ways in two communities separated only by an artificial boundary, has existed in both communities from all eternity. I shall recur to this matter when we come to consider the topic of Judicial Precedents.

Law and the Natural Sciences

It may be said that there are reasons, based on the highest welfare of the human race, why the Law should be so or otherwise, and that it is one of the functions and duties of a judge to investigate those reasons; that he is an investigator as much as, in his sphere, was Sir Isaac Newton; that he may make mistakes, just as Newton did; and yet that truth is largely discovered by his means. But the difference between the judges and Sir Isaac is that a mistake by Sir Isaac in calculating the orbit of the earth would not send it spinning round the sun with an increased velocity; his answer to the problem would be simply wrong; while if the judges, in investigating the reasons on which the Law should be based, come to a wrong result, and give forth a rule which is discordant with the eternal verities, it is none the less Law. The planet can safely neglect Sir Isaac Newton, but the inhabitants thereof have got to obey the assumed pernicious and immoral rules which the courts are laying down, or they will be handed over to the sheriff.

Decisions as conclusive evidence of the Law

It is possible to state the facts in the terms of dis-

covery by use of a device familiar enough in the Common Law. We may say that the rule has always existed, and that the opinions and consequent action of the judges are only conclusive evidence that such is the rule; but this is merely a form of words to hide the truth. Conclusive evidence is not evidence at all; it is something which takes the place of evidence and of the thing to be proved, as well. When we say that men are conclusively presumed to know the Criminal Law, we mean that men are to be punished for certain acts without regard to whether they know them to be against the Law or not; when we say that the registration of a deed is conclusive evidence against all the world, we mean that all the world are bound by a registered deed whether they know or not of its existence.[1]

Rules of conduct laid down and applied by the courts of a country are coterminous with the Law of that country, and as the first change, so does the latter along with them. Bishop Hoadly has said: "Whoever hath an *absolute authority* to *interpret* any written or spoken laws, it is *he* who is truly the *Law-giver* to all intents and purposes, and not the person who first wrote or spoke them";[2] *a fortiori*, whoever hath an absolute authority not only to interpret the Law, but to say what the Law is, is truly the Law-giver. *Entia non multiplicanda.* There seems to be nothing gained by seeking to discover the sources, purposes, and relations of a mysterious entity called "The Law," and then to say this Law is exactly expressed in the rules by which the courts decide cases. It is better to consider directly the sources, purposes, and relations

[1] Cf. p. 36, *ante.*

[2] Benjamin Hoadly, Bishop of Bangor, Sermon preached before the King, 1717, p. 12.

of the rules themselves, and to call the rules "The Law."

There is a feeling that makes one hesitate to accept the theory that the rules followed by the courts constitute the Law, in that it seems to be approaching the Law from the clinical or therapeutic side, that it is as if one were to define medicine as the science of the rules by which physicians diagnose and treat diseases; but the difference lies in this, that the physicians have not received from the ruler of the world any commission to decide what diseases are, to kill or to cure according to their opinion whether a sickness is mortal; whereas, this is exactly what the judges do with regard to the cases brought before them. If the judges of a country decide that it is Law that a man whose reservoir bursts must pay the damage, Law it is; but all the doctors in town may declare that a man has the yellow fever, and yet he may have only the German measles. If when a board of physicians pronounced that Titius had the colic, *ipso facto* Titius did have the colic, then I conceive the suggested definition of medicine would be unobjectionable.

To sum up. The State exists for the protection and forwarding of human interests, mainly through the medium of rights and duties. If every member of the State knew perfectly his own rights and duties, and the rights and duties of everybody else, the State would need no judicial organs; administrative organs would suffice. But there is no such universal knowledge. To determine, in actual life, what are the rights and duties of the State and of its citizens, the State needs and establishes judicial organs, the judges. To determine rights and duties, the judges settle what facts exist, and also lay down rules

according to which they deduce legal consequences from facts. These rules are the Law.[1]

Law distinguished from other rules for conduct

There are one or two other matters connected with the Law which remain for consideration: *First*, The rules which constitute the Law of a community are distinguished from the other rules by which members of the community govern their conduct by the fact that the former are the rules laid down by the courts of the community in accordance with which they make their decrees. Very often these rules are overridden in the mind of a member of a community by other rules, of supposed morality, for instance, or of fashion, as where a man aids a runaway slave, or fights a duel. And again, when the conduct prescribed by the rules of Law is followed, the fact that those rules are laid down by the courts is not always, nor generally, the chief or predominant motive in the minds of those who follow them. The motive that restrains Titius from killing Balbus, or deters John Doe from taking Richard Roe's handkerchief out of his pocket, is not primarily that the one fears being hanged or the other fears being sent to jail; it is some other reason, religious, moral, social, sentimental, or æsthetic, which moves him. There is generally no occasion for the courts to apply their rules, but the fact that the courts will apply them, if necessary, makes them the Law.

[1] The Law has sometimes been said to be the rules which the courts *will* follow. See Judge Holmes's article, 10 Harvard Law Rev. 457; Collected Legal Papers, 167; and his opinion in *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 356. When this form of expression is used, we must not say in reference to a case like that suggested at p. 96, *ante*, that there was then no law on the subject in Nevada, but we must say that it was not then known what the Law *would* be.

Further, when persons do not voluntarily act in accordance with the rules laid down by the courts, but are compelled thereto by force, the force is often applied, not in consequence of a judicial order, but by the persons directly interested in having the rules followed or by some administrative officer not acting under judicial authority,—as when Stiles expels Batkins as a trespasser from his domestic castle, or policeman X. arrests Watkins for being drunk and disorderly.[1] But in all such cases, the rules are Law, because, in the ultimate resort, the judges will apply them in protecting Stiles and the policeman against any violent acts or any prosecution in the courts by the intrusive Batkins or the vagabond Watkins.

The Law not always obeyed

Second. Suppose, however, that the bulk of the community habitually act contrary to certain rules laid down by the courts,—will you call such rules Law? The question is the same when asked with regard to those rules which the judges lay down in compliance with statutes passed by the legislative organ of the State, as in regard to those which they frame of their own motion. Suppose the Legislature enacts a statute which is so odious to the inhabitants of the State that the bulk of the community disobey it from the start, and yet the judges declare that it has been duly and constitutionally enacted. In countries where statutes can be abrogated by disuse (a matter which we shall afterwards consider [2]), the courts may, after a space of time, declare that such a statute is no longer to be considered binding, but we are here considering a case where the courts lay down a rule in accordance with the statute. Is such a rule Law? I submit

[1] See p. 21, *ante.*
[2] Pp. 189, *et seq. post.*

that it is most in accordance with usage, and most convenient in practice, to consider the declaration of the courts following the action of the Legislature as being "the Law." If there is a statute recognized by the courts forbidding the sale of wine, and yet wine is sold publicly and with impunity, it seems best to say, not that the Law allows the sale of wine, but that the Law against the sale of wine is disregarded. And it must be the same, as I have said, whether the declaration of the court is founded on a statute or is derived from any of the other sources of the Law.[1]

In certain of these cases, an unnecessary difficulty arises from misunderstanding what the Law is. Let us take such a case as I have suggested: Suppose that in one of the United States there is a statute providing that whoever sells wine shall be punished by fine or imprisonment, and suppose, further, that the statute is so hated that juries will not convict. This statute, being followed by the courts, is an element of the Law in the State, but it is not the whole of the Law. It is also doubtless Law in the State that no one shall be punished for crime except after being found guilty by a jury. The whole Law must be taken together. We say the Law is that a man selling wine shall be punished, but in truth the Law is, that a man selling wine *and convicted thereof by a jury* shall be punished. If there has been no conviction by a jury, one of the elements which the Law declares necessary for the infliction of the punishment does not exist. In old statutes this essential element is often expressed, *e.g.* St. 14 Eliz. *c.* 3: "If any person or persons" shall counterfeit coin,

[1] See, however, what is said on the limits of judicial power, pp. 121 *et seq. post.*

"the offenders therein, being convict according to the laws of this realm of such offenses, shall be imprisoned," etc.

The Law consists of rules made by the State

Third. To say that the Law of an organized body is composed of the rules *acted on* by its courts would be too broad. It is only the rules which the courts lay down of their own motion, or which they follow as being prescribed for them by the body of which they are the courts, that, according to the ordinary usage of language, can be called the Law of that body.

Take, for instance, the courts of a political society. They have constantly, in the causes brought before them, to apply general rules of conduct which are yet not laws. Thus, A. and B. may enter into an agreement by which A., for a consideration, expressly or impliedly promises to obey the commands of B. on certain matters; those commands may take the form of general rules; and the existence and validity of such a rule may be brought in question in a court of law. In most cases where the legal relation of master and servant is established there are such general rules. Gladys, who has hired Norah for a housemaid, dismisses her for misconduct; Norah sues for her wages; the alleged misconduct is the not wearing of a cap; the existence of a rule requiring the wearing of a cap, its legality and scope, may all have to be determined by the court, yet Gladys's household ordinance is not the Law of the land.

It may be said that such rules are made by agreement of the parties, and are given by them to the court as rules by which, in controversies between them, it is to decide. But such rules do not always spring from contract. In many communities, the relations between master and

slave have formed an important topic in the Law; and at the present day, in all countries, a father has authority to make rules on many subjects for his children, *e.g.* that they are to live in such a place, or are to go to bed at a certain hour. But these rules are no part of the Law, as commonly understood, though they can conceivably come before a court, and the court must pass in its decision upon their existence and validity.

A class of these rules forming no part of the Law of a country, and yet daily discussed and applied by its courts, are the by-laws of corporations. It would seem as if Austin [1] counted the by-laws of corporations as part of the Law of the land existing as Law by the express or tacit authority of the supreme legislature. He makes them a part of the Law in the same manner in which he brings judicial precedents under that head. He considers both by-laws and judicial precedents to be commands of the sovereign, by virtue of the doctrine that what the sovereign permits he commands.

But there seems to be no distinction between the valid regulations of a corporation and the valid regulations of a *paterfamilias*. I should suppose Austin would hardly make these last part of the Law of the land. To do so would amount to saying that all commands not directed to particular acts which the State allows to be made and enforced by any reward or punishment are part of the Law of the land,—a nomenclature, to say the least, very inconvenient, and a wide departure from usage, both popular and professional.

Laws of bodies other than the State

It should be borne in mind that rules, although not

[1] 2 Jur. c. 28 (4th ed.) p. 538.

the Law of the State, may yet be the Law of another organized body. Thus, the by-laws of a private corporation may be part of the Law of the organized body which that corporation is, and yet not be part of the Law of the land. So the rules by which Titius governs his children are no part of the Law of Titius's State, but they may all the same be part of the Law of Titius's family.

Such organizations may be the creatures of the State, as insurance or other business corporations; or they may be independent of the State, as the Roman Catholic Church; or even hostile to it, as a Nihilist club; but that is immaterial on the question whether such an organization has its own Law. It is true that an interest which a member of a club, for instance, may have that another member of the club itself should do or forbear, may be protected by the State by virtue of some rule which the courts of the State follow,—say, with regard to contracts generally,—or may be denied protection by the State by virtue of some rule which the courts of the State follow,—say with regard to gambling,—but apart from its relations with the State, if any organized body of men has persons or bodies appointed to decide questions, then that body has judges or courts, and if those judges or courts in their determinations follow general rules, then the body has Law and the members of the body may have rights under that Law. Thus, the Roman Catholic Church has courts and a Law, and by virtue of its power in inflicting excommunication and other spiritual censures, it gives rights to itself and its members.[1]

[1] The peculiar history of the Church of England, the compromise between temporal and spiritual interests which was effected at the Reformation, and the fundamental differences among its members

The Church of England

General administrative rules are laws

Fourth. One question more presents itself: Are all the general rules for conduct made by the administrative organs of a political (or other) organization to be called "laws"? Or is there a class of such rules to which the name of "laws" is to be denied?

We must bear in mind the distinction to which I have referred between *a* law and *the* Law, as those terms are generally employed.[1] *A* law is a formal general command of the State or other organized body; *the* Law is the body of rules which the courts of that body apply in deciding cases. So there are really two questions: First, is a general order of an administrative organ of an organ-

as to the grounds on which its frame of government rests, make it difficult to say whether that frame, in the opinion of its judges, has its foundation in the revealed will of God or in Acts of Parliament. The range of opinion within it extends from those dwellers in an ecclesiastical Tooley Street, who regard themselves as the remnant from which all other Christian bodies, Greek, Roman, and Protestant, are parted by schism, to that keeper of the King's conscience who said to a delegation of Presbyterians, "Gentlemen, I am against you and for the Established Church. Not that I like the Established Church a bit better than any other church, but because it *is* established. And whenever you get your damned religion established, I'll be for that too." (Lord Thurlow. See Campbell's Lives of the Chancellors (5th ed.), vol. 7, p. 319). Sir Robert Phillimore and Lord Westbury were both judges in the English Church, but it is likely that they held very different theories as to the grounds on which the hierarchy of that Church is based. But it is not easy to believe that a religious organization, whose highest court is the Judicial Committee of His Majesty's Privy Council, was ever revealed directly or impliedly from Heaven; and the true doctrine would seem to be that the English Church owes its constitution to the State, and that although, in the opinion of many of its members, it would be sinful in the State to give it any other constitution, yet the judges of the Church must look to the Law of the land, to the King's Ecclesiastical Law, to determine the nature of the organization whose judges they are, and that so long as the Church is established, it is practically impossible that it should be otherwise. The report of the Hampden Case (11 Queen's Bench Reports, 483 (1848); and full report by R. Jebb) will be found instructive on this point.

[1] P. 87, *ante.*

ized body *a* law of that body? Secondly, is such an order a source of *the* Law of that body?

Such an order certainly seems to be a command of the organized body and, therefore, a law of that body. To take cases like those which Mr. Frederic Harrison suggests as showing that there are rules of the State which are not laws; a regulation by the proper authority (or, indeed, by the supreme legislature) that all recruits for the army shall be five feet six inches high, or a direction in the infantry tactics that the goose step shall be twenty-eight inches, or an order by the commandant of a fort that a sentry shall always be posted before a certain cellar.[1] Are such regulations, directions, and orders laws? They are unquestionably commands with sanctions; they are of a general and permanent character; they are formally issued by a person empowered by the State to issue them and they are issued on behalf of and for the supposed advantage of the State. They seem to be as much laws of the State as statutes passed by its legislative organ.

Are these regulations and orders sources of the Law? It is hard to imagine any of them which may not be brought before a court for application and whose ultimate sanction is not that the courts will apply to them. Let us take one of Mr. Harrison's instances,—a regulation from the British War Office that no recruit shall be enlisted who is not five feet six inches high. Suppose a recruiting officer musters in a man who is five feet five inches only in height, and pays him the King's shilling; afterwards the officer is sued by the Government for being

[1] 30 Fortnightly Rev., 690; Jurisprudence and the Conflict of Laws, p. 49.

short in his accounts; among other items he claims to be allowed the shilling paid to the undersized recruit. The court has to consider and apply this regulation and, whatever its effect may be, that effect will be given to it by the court exactly as effect will be given to a statute providing that murderers shall be hanged, or that last wills must have two witnesses.

It is, therefore, on the best consideration I can give the subject, impossible to say that any general rule of conduct laid down by an administrative organ of a political (or other) organized body, and applied, if necessary, by its courts, is not a source of Law.