CHAPTER IX

JUDICIAL PRECEDENTS [1]

Precedents in general

THE second source of the Law, that is, of the rules by which the courts govern their action, is to be found in Precedents. Precedent has a very wide meaning. It covers everything said or done which furnishes a rule for subsequent practice, especially in matters of form or ceremony. Thus, at the Lord Mayor's Election Dinner, it is a precedent that "upon the Lady Mayoress retiring from the dinner table the senior alderman below the chair conducts Her Ladyship to the drawing-room"; and in the Law, "precedent" is often used to mean a paper employed as a model in drawing other papers; thus, we have precedents in conveyancing and pleading; but the precedents of which we have to speak here, Judicial Precedents, are former decisions which courts respect and follow because made by judicial tribunals.

As the weight attached to precedents in every department of life is closely connected with the force of habit, and has its roots deep in human nature, it is more than probable that Judicial Precedents have exercised great influence in all systems of Law; the feeling that a rule is morally right has often arisen from the fact that it has long been followed as a rule; but the degree in which

[1] This chapter is partly taken from the author's article in 9 Harvard Law Rev. 27, which contains a fuller citation of cases on some points.

judicial decisions have been openly recognized as authoritative, simply because they are judicial decisions, has varied very greatly in different systems. Judges are everywhere largely influenced by what has been done by themselves or their predecessors, but the theories to explain and control such influence have been diverse, and the development of the Law has not been unaffected by them.

Two things should be borne in mind. In the first place, the functions of courts are not in practice confined to the decision of particular causes. Either by authority expressly delegated, or of their own motion, courts have undertaken to legislate with regard to the conduct of litigation before themselves; they have published general rules, in the form of command or permission, setting forth the manner in which they will proceed. The most striking example is the Edict of the Roman prætor, which became a chief instrument in the development of the Roman Law. Doubtless special cases gave rise to many of its provisions, but, none the less, it was in form a legislative, not a judicial, act.[1] The Scotch Court of Sessions, in its Acts of Sederunt, assumed extensive powers of enacting laws,[2] and in our days, governments have frequently intrusted to courts a wide authority to make rules of procedure.[3] All this lies outside of our present limits. Such rules are not Judicial Precedents.

[1] The prætor, who was the principal judicial officer in the Roman republic, on assuming office made a proclamation, *edictum*, of the rules which he proposed to follow. These edicts affected not only the procedure but the substantive law. It was the custom for each prætor to adopt the edict of his predecessor with additions and amendments. This permanent body of rules was called the perpetual edict.

[2] Erskine, Inst. Bk. 1, tit. 1, § 40.

[3] As to the extent to which this has been done, and the advantages of it, see an article by Professor Pound, in 10 Illinois Law Rev. 163.

Judicial Precedents as sources of Law

Again, the peculiar quality and effect of a Judicial Precedent as a source of Law should be noted. It may be a source of Law as expressing the opinion of learned men, or as stating sound moral doctrine, but its peculiar force as a Judicial Precedent does not lie in its accordance with the opinion of the learned, or in the fact that it is right; it is a Judicial Precedent, not because it *ought* to have been made, but because it *has* been made. The decision of a court may unite the character of a Judicial Precedent with the character of an expression of wise thought or of sound morals, but often these characters are separated. To go no farther than our own Law, there is no difficulty in finding decisions standing as precedents, at which, like the Rule in *Dumpor's Case*,[1] "the profession have always wondered," [2] or which, at any rate, are no expression of present opinion and would never be made for the first time to-day.

Roman Law

Of Judicial Precedents as a source of Law, we find nothing at Rome in the time of the Republic, except as far as the rulings of the Pontifical College had this character.[3] The manner in which the *pontifices* intervened in lawsuits between individuals is very obscure, but there is reason to believe that their position was an authoritative one, and it is likely enough that in the archives of the college were recorded decisions which they

[1] 4 Co. 119 b (1603). The decision was that where there was a condition in a lease that the lessee should not assign his interest without the lessor's consent, and the lessor consented to one assignment, the condition was gone, so that a second assignment could be made without his consent.

[2] Chief Justice Mansfield, in *Doe* v. *Bliss*, 4 Taunton, 735. Compare Lord Eldon, in *Brummell* v. *McPherson*, 14 Ves. Jr. 173.

[3] See Dig. I, 2, 2, 6.

followed as binding precedents;[1] but this remains largely a matter of conjecture.[2] At any rate, before the end of the Republic, their power of controlling litigation appears to have greatly diminished, and the practice of giving opinions had passed to the unofficial body of jurisconsults, *jurisprudentes,*[3] who seem to have enjoyed great public consideration; but the opinions of these jurisconsults, however worthy of respect, were not binding on the magistrates and judges. The jurisconsults did not form a judicial body.

But Augustus gave to certain persons *jus respondendi* by the authority of the Emperor.[4] All that we know of the *jus respondendi* is contained in three passages.[5] These three passages have called forth much comment, and given birth to many theories.[6]

From our present point of view the important question is, whether the *responsa* of those jurisconsults who had the *jus respondendi* were of effect only in the particular case in which they were given, or whether they were obligatory upon the courts as precedents in later cases. The probable opinion appears to be that they had the character of true Judicial Precedents.

By the time of Diocletian (A.D. 284-305) the *jus respondendi* seems to have ceased to be given, and, gradually, all the writings of the great jurists of the earlier years of the Empire came to be considered as authorities,

[1] Esmarch, Röm. Rechtsgeschichte, § 44.
[2] Ihering, 1 Geist des röm. Rechts, § 18 *a*.
[3] But see Cicero, Topica, 5, with commentaries of Boethius.
[4] The common opinion has been that the *responsa* of these persons were made binding upon the courts by Augustus, but some writers think that it was Hadrian who first gave them this binding character.
[5] Dig. I, 2, 2, 49; Gai. I, 7; Inst. I, 2, 8 *et* 9.
[6] See Glasson, Étude sur Gaius, 84-119.

without any distinction being made between their *responsa* and their treatises. It was as if Judge Story's judgments and treatises were to be considered of like weight. The power of adding to the Law or modifying it by judicial decisions had passed away. The Law, like the Empire, had reached a period of degradation and sterility. It had no vitality, and could only nourish itself indiscriminately on the past.[1]

Such was the state of things when Justinian began his legislation. But before speaking of this, we must consider another class of judicial utterances—those emanating from the Emperors themselves. The legal utterances of the Emperors were of two kinds, legislative and judicial. They were all classed together as *constitutiones*. Of the legislative sort were the *edicta* and *mandata;* it is unnecessary here to consider their special character; they were in their nature statutes.

The judicial acts of the Emperor were *decreta* and *rescripta*. The *decreta* were decrees, final or interlocutory, in a cause. The *rescripta* were letters sent to the judge or to a party in a suit, giving the decision which

[1] "The writings of jurists who had not possessed the *jus respondendi* were cited as entitled to an authority in no way inferior to that of the writings of privileged jurists, provided only they were supported by the same *literary* prestige which distinguished the writings of the illustrious privileged jurists. . . . Considering that, in the case of the privileged jurists, their other writings which, of course, had nothing to do with their *jus respondendi*, were ranked on a par with the writings on the *responsa*, it was altogether absurd to insist on the *jus respondendi* as a condition of judicial authority. The practice of not discriminating between the different kinds of writings necessarily led to the practice of not discriminating between the authors themselves—which is only another way of saying that the transfer of the authority of the *responsa* to juristic literature in general had become an accomplished fact." Sohm, Institutes, § 17, Ledlie's trans. p. 83; see also the Law of Citations (A.D. 426), Cod. Theod. I, 4, 3; p. 264, *post*.

ought to be rendered. There seems to have been no substantial difference in their effect upon a suit; unquestionably they were alike obligatory upon the judges in the cases in which they were given. But the question arises, as with the *responsa prudentium*, were they binding as precedents?

First, as to *Decreta*. That in the classical period of the Roman Law *decreta* had sometimes at least the force of precedents, seems the more probable opinion; Justinian says that the binding force as precedents of the Imperial decrees had been doubted by some, adding, "*Eorum quidem vanam scrupulositatem tam risimus quam corrigendam esse censuimus*";[1] and he declared that a decree made by the Emperor in a cause should be a rule (*lex*) not only in that cause, *sed omnibus similibus*.

Secondly, as to *Rescripta*, with their sub-varieties of *adnotationes, subscriptiones, epistulæ, pragmaticæ sanctiones*. These, as I have said (though the word may have been sometimes used more loosely), were answers to requests of a party or of the judge in a suit for instructions how the case should be decided. These rescripts were obligatory on the court in that suit. Originally they seem, in some cases at least, to have been binding as precedents.[2]

The danger which there was that a case would not be fully or fairly presented to the Emperor brought rescripts into disfavor. Trajan (A.D. 98-117) is said to have refused to issue rescripts in answer to requests, "*ne ad alias causas facta præferrentur, quæ ad gratiam composita*

[1] "Their foolish over-nicety we laugh at, as well as order to be amended." Cod. I, 14, 12.
[2] Krüger, Quellen, § 14, pp. 97, 98.

viderentur," and Macrinus (A.D. 217, 218), referring to this, gave orders, *"omnia rescripta veterum Principum tollere, ut jure, non rescriptis, ageretur,"* saying, *"nefas esse leges videri Commodi et Caracalli et hominum imperitorum voluntates."* [1] Still later, it was ordered by Arcadius and Honorius (A.D. 398) that rescripts should not be regarded as precedents;[2] and they were forbidden by Justinian (541).[3]

The idea of Judicial Precedents was therefore familiar to the Roman Law, at least at some periods of its development.

The form of Justinian's Digest was peculiar: a mass composed of the decisions of judges and the opinions of jurisconsults in particular cases was taken up bodily into it and enacted as a statute; but in spite of this, it was impossible, in interpreting them, to treat them as if they had been enunciated in the usual statutory form; they had to be dealt with as if they were precedents, and the mode of reasoning adopted in their exposition had, to a considerable extent, to be that applicable to precedents;[4] and it would have been well if this had been carried to a greater extent.

A similar state of things is to be found in the Codes passed by the Legislative Council of India for that country. Macaulay set the example, which has been followed

[1] "Lest decrees which were evidently made as a favor should be brought forward in other cases." "To eliminate all the rescripts of former Emperors, in order that suits might be conducted according to law, not rescripts." "It is not right that the whims of Commodus and Caracalla and unskilled men should be regarded as laws." Capitolinus, Life of Macrinus, c. 13.

[2] Cod. Theod. I, 2, 11.

[3] Nov. 113, 1; see 1 Savigny, Heut. röm. Recht, § 24.

[4] P. 186, *ante.*

by his successors, of inserting illustrative cases in the body of the statutes. The character of such parts of the Law, their resemblance to and their difference from cases decided in the courts, are well given in the introduction of Macaulay to his Criminal Code.[1]

German Law

In Germany during the Middle Ages the Courts were composed of a judge (Richter) and Schöffen.[2] The Richter presided, kept order, and gave judgment, but on a doubtful point of law he took the opinion of the Schöffen, who were the Urtheiler,[3] and often the Schöffen sought the opinion of the Schöffen of another city or town, either because of their reputation as depositaries of the Law, or because such city or town stood in the relation of mother city to that from which the request came.[4]

The opinions of the Schöffen were generally called Weisthümer. There is a great collection of them by Grimm, the publication of which covered the interval between 1840 and 1878.[5] They took a variety of forms; sometimes they were put as general rules, sometimes as answers to hypothetical cases, and sometimes as opinions in particular real cases. These last availed, it would

[1] Cited 1 Stokes, Anglo-Indian Codes, xxiv *et seq.*

[2] Sheriffs, or Assessors.

[3] Doomsmen, Deciders.

[4] The court to whose Schöffen the request was sent was called the Oberhof, but the relation was not at all the same as that which prevails between a court of first instance and the appellate court, for the Schöffen of the Oberhof were not bound to answer. See 1 Stobbe, Geschichte d. deutsch. Rechtsquellen, § 27; 1 Planck, Deutsche Gerichtsverfahren im Mittelalter, §§ 15-19, 43; Gaupp, Das alte Magdeburgische und Hallische Recht; Schultze, Privatrecht und Process, §§ 6-14.

[5] Others will be found in Gaupp's little book, cited in the preceding note, in Wasserschleben, Deutsche Rechtsquellen, and in Tomaschek, Der Oberhof Iglau und seine Schöffengesprüche. A list of books containing Weisthümer will be found at the beginning of Planck's book, above cited, and in 1 Stobbe, Geschichte d. deutsch. Rechtsquellen, § 56, note (2).

seem, not only in the cases in which they were delivered, but also as binding in future cases in the same court, and as having a weight beyond their intrinsic merits in other courts.[1]

The introduction of the Roman Law into Germany and the driving out of the ancient Law were due mainly to the doctors of the Civil Law acquiring judicial position. This seems to be the conclusion reached by all late writers.[2] But the modern German civilians have rather ungratefully kicked down the ladder by which they themselves climbed, and exhibit a great repugnance to recognize judicial decisions, or *Gerichtsgebrauch*, in any form, as a source of Law. Perhaps the dislike felt toward the old Schöffen courts may have something to do with this attitude.[3]

At the beginning of the last century, Thibaut indeed stated the doctrine of Judicial Precedent in a form nearly as strong as prevails in the Common Law. "If in a court a rule has been frequently and constantly followed as Law, *that* court must follow these hitherto adopted rules as Law, whether they relate to simple forms or to the substances of controversies, if they do not contradict

[1] 1 Stobbe, Handbuch d. deutsch. Privatrechts, § 24; Gaupp, 90-94. So in the Imperial Court, in 1235, the Emperor Frederick II. established a standing judge and decided: "*Idem scribet omnes sententias coram nobis in majoribus causis inventas maxime contradictorio judicio obtentas, quæ vulgo dicuntur* gesamint urteil, *ut in posterum in casibus similibus ambiguitas rescindatur, expressa terra secundum consuetudinem cujus sententiatum est.*" "He shall write down all the opinions delivered in our court in the more important cases, especially where there was dissent, which in the vulgar tongue are called 'The body of dooms', in order that for the future in similar cases doubt may be resolved,—express statement being made of the district according to whose custom the sentence was pronounced." 1 Stobbe, Geschichte, § 48.

[2] See article by W. S. Holdsworth in 28 Law Quart. Rev. 39, 49.

[3] See A. Duck, De Auth. Jur. Civ. II. *c.* 2, §§ 10-19.

the statutes, but yet only on the points on which the former judgments agreed. Coördinate courts do not bind each other with their judgments, but upper courts do bind the lower, so far as an earlier practice has not formed itself in the latter; and one ought not to treat the opinions of jurists as equal to the practice of the courts, although the former may, under certain circumstances, be of importance as authorities." [1]

But Thibaut's opinion does not seem to be followed, and Jordan, in a long and much-cited article,[2] summed up his own theory thus:—

A. Judicial usage (*Gerichtsgebrauch*) as such, that is, by reason of its being judicial usage, has formally no binding force, and materially, only so much value as on the principles of a sound jurisprudence belongs to it by reason of its inner nature; that hence—

B. A court cannot be bound to follow its own usage or the usage of another court as a rule of decision, but rather has the duty to test every question with its own jurisprudence, and ought to apply usage only when it can find no better rule of decision; that again—

C. Judicial usage makes binding law for the parties as soon as a judgment based on it has taken effect; that hence—

D. Many judicial usages have in this way come gradually to be accepted and practised, notwithstanding they have met with theoretical disapproval; that again—

E. On the other hand, on account simply of their real excellence, in so far as they by means of this have acquired not only a hold in approved courts, but also the

[1] Thibaut, Pand. § 16.
[2] 8 Arch. f. civ. Pr. 191, 245 *et seq.* (1825).

approval of theorists, and, on the theory that for cases not provided for in the statutes, they give the rules of decision which best correspond to the presumptive will of the legislature, many of these judicial usages become pretty generally recognized legal principles which cannot be left out of account. The fact that the legislature prescribes no other rules for future cases may be considered an approval of them by the legislature; that finally—

F. The lower courts act in accordance with the will of the legislature, if they follow the clear usage of the higher courts, although they are not bound to do so absolutely, but are only held to such following so far as they find it grounded in the will of the legislature according to their own examination, from which they are never excused.

Later writers seem generally to deny that *Gerichtsgebrauch* is a source of Law at all, and consider judicial decisions to be merely evidence (just as many other things might be evidence) of Customary Law. This seems to have been Savigny's opinion.[1] Such are the views of Wächter;[2] and of Keller.[3] So Stobbe,[4] "Practice is in itself not a source of Law; a court can depart from its former practice, and no court is bound to the practice of another." "Departure from the practice hitherto observed is not only permitted, but required, if there are better reasons for another treatment of the question of Law."

Dernburg is the only recent author whom I have observed fairly to admit that *Gerichtsgebrauch* is a source of law; and even he says, "Single decisions of a court,

[1] See 1 Heut. röm. Recht, § 29.
[2] 23 Arch. f. civ. Pr. 432.
[3] In his Pandekten, § 4.
[4] 1 Handb. d. deutsch. Privatrechts, § 24, pp. 144, 146.

even of the highest, do not make *Gerichtsgebrauch,*" which he defines as "the general, uniform, and long-continued exercise of a legal tenet by the courts of the country." [1]

Nor are these views as to *Gerichtsgebrauch* confined to the text-writers. They are shared by the courts themselves. As is shown, for instance, by an interesting decision of the Imperial Court.[2] In New Hither Pomerania there had for a long time prevailed a doctrine of the courts (*Gerichtsgebrauch*), supported by decisions of the earlier Tribunal in Wismar and of the later Oberappellationsgericht in Greifswald, and recognized as binding by the Prussian Obertribunal, that discontinuous servitudes (*e.g.*, rights of way) are not acquired by a ten or twenty years' user, but only by immemorial prescription. The Imperial Court reversed a judgment founded on this view, on the ground that the doctrine was not based upon rules peculiar to the law of the special locality, but upon an erroneous interpretation of the Roman Law.[3]

One point especially in the views of the German writers seems very strange to those brought up in a different school. To a Common Law lawyer, the duty of a lower court to follow the precedents set by the court of appeal seems one of the clearest of judicial obligations. To delay a party of what will be declared his right in the end and to put him to the expense and trouble of an appeal seems wrong; but the German writers are all express in denying the duty of following the precedents set by

[1] 1 Dernburg, Pand. § 29.
[2] 3 Entscheidungen des Reichsgerichts, Civilsachen, Nr. 59, p. 210; S. C. 36 Seuffert, Arch. Nr. 254, p. 385 (1880).
[3] See another case, 7 Entscheid. d. Reichsg. Civ. Nr. 50, p. 154; S. C. 40 Seuf. Arch. Nr. 86, p. 130.

the court of appeal, even Thibaut[1] conceding that the upper courts bind the lower only so far as an earlier practice has not established itself in the latter. And Maurenbrecher, who at one time held the contrary,[2] appears to have weakened on his first statement. Gengler is the only writer cited by Stobbe as maintaining unconditionally the duty of following the precedents set by an upper court.[3]

At various times and places in Germany statutes have been passed on this subject; some of the statutes direct that courts shall follow their own precedents, and others that decisions of the highest court shall be followed by the lower courts. An account of several of these statutes will be found in Stobbe;[4] and that practically *Gerichtsgebrauch* is having an increased influence on the development of German Law is shown by the increasing publication of decisions of the courts, which in England has gone on for hundreds of years, but in Germany began only in the latter part of the nineteenth century.

French Law

In France, as in Germany, it would seem that decisions of courts are not binding precedents, even on inferior courts. Collections of decisions have, however, been for a long time published in France and are cited by counsel and judges.[5]

Scotch Law

In Scotland the position assigned to Judicial Precedents appears to be intermediate between that occupied by them on the Continent and that to which they are raised

[1] *Loc. cit.* p. 207, *ante.*
[2] See 1 Stobbe, Handb. § 24, p. 144.
[3] See pp. 119-120, *ante.*
[4] 1 Handb. §24, pp. 144-146.
[5] Aubry et Rau, Cours de droit, §§ 39 *bis.*, 51, E; 1 Planiol, Traité élémentaire, §§ 205-206.

in England. The example of the courts, and indeed the whole tone of the Law, in England, may have had an influence in elevating the reliance on precedents, as it is now found in Scotland, beyond the condition in which we find it on the Continent; and the power given to the Court of Session to formally legislate by means of Acts of Sederunt, may have aided in giving weight to their expressed judgment in litigated cases.[1] On the other hand, the fact that the court of ultimate appeal, the House of Lords, was a tribunal composed entirely of English judges, for I believe no one was ever called from the Scotch bench or bar to the House of Lords until the Appellate Jurisdiction Act of 1876 (except Lord Colonsay in 1867) and the irritation which prevailed in Scotland over this state of affairs, has had probably considerable effect in maintaining the view that precedents do not make Law which seems to have prevailed in the earlier times.[2]

English Law

In England, and in the countries where the English Common Law prevails, a very different theory as to Judicial Precedents exists.

While on the Continent of Europe jurists have insisted and still insist that a decision by a court has, apart from its intrinsic merit, no binding force on a judicial tribunal, even on a tribunal from which an appeal lies to the court rendering the decision, it is Law in England and in the United States that, apart from its intrinsic merits, the decision of a court is of great weight in that court and all coördinate courts in the same jurisdiction, and that it is absolutely binding on all inferior courts.[3]

[1] P. 199, *ante*.
[2] See Erskine, Inst. Bk. I, tit. 1, § 47.
[3] Cf. p. 124, *ante*.

The cause of this distinction between the English and the Continental Law is one of the unsolved problems of Comparative Jurisprudence. Is it due to a difference in race, or in political organization, or to the presence on the Continent of the systematic body of the Roman Law? Apparently, there was originally in the English Law no special regard for Judicial Precedents. If there had been, there would be more traces to be found of it in the earlier treatises and reports.

Glanville, who was probably the real author of the *Tractatus de Legibus*, commonly attributed to him, died in 1190. There appears to be but one reference in his treatise to decisions of the courts.[1]

Bracton's treatise, *De Legibus et Consuetudinibus Angliæ*, was written in the middle of the thirteenth century. Bracton is an exception to what had gone before, and what came after, his time. He abounds in references to cases. But Mr. Maitland, in his remarkable book, has shown that, with trifling exceptions, the cases cited by Bracton were all decided at courts in which Martin Pateshull and William Raleigh were judges.[2] "His is a treatise on English law as administered by Pateshull and Raleigh." [3]

The exceptional character of Bracton is shown by the later history of the Law. Fleta, which was written towards the end of the thirteenth century, was largely drawn from Bracton, but in only one chapter does it, so far as I have observed, refer to particular decisions; in this chapter, which is the third of the second book, there are

[1] It will be found in Book VII, c. 1.
[2] 1 Maitland, Bracton's Notebook, 40, 45, 48, *et seq.*
[3] *Id.* § 60; and see Introduction to the Twelfth Volume of the Year Book Series of the Selden Society, p. xviii.

three cases as to the jurisdiction of the Steward of the King's Court when the King was out of England, two of them being in Gascony and one in Paris; the last being a decision of the French King's Council, that the King of England had jurisdiction over Ingelramus, caught in the English King's hotel with stolen goods; Ingelramus was tried before the Steward and *"suspensus in patibulo Sancti Germani de Pratis."* [1]

Britton also wrote about the close of the thirteenth century, and his treatise was in like manner taken to a great extent from Bracton, but there appears to be no reference whatever in it to any decision of the courts.

As to the two legal treatises of the fifteenth century: in Fortescue, *De Laudibus Legum Angliæ,* there is no reference to any decided case; and in the original text of Littleton's Treatise on Tenures, of seven hundred and forty-nine sections, some ten cases only are referred to.

The Year Books

The first of the long series of reports which have been printed begins in 1292.[2] Professor Maitland, the greatest historian whom the English Law has ever had, has shown, almost to demonstration, that the Year Books were not authoritative collections of cases to serve as precedents, but were the notebooks of students under the bar, apprentices, as they were called. What Professor Maitland says is so interesting that I will quote at length from his Introduction to the Third Volume of the Year Book Series of the Selden Society.[3]

"The term 'Law Reports' inevitably suggests to us books that are to be cited in court. It is true that our

[1] "Hanged on the gallows of St. Germain des Prés."
[2] Year Book 20 & 21 Edw. I. Rolls Series.
[3] P. ix *ad fin.*

modern reports serve more purposes than one. They have an educational value. Young men will read them in order to learn the law, and older men will read them in order to amplify their knowledge. Still on the whole we might say that to serve as 'authority,' to be the base of judgments and of 'opinions' that should forestall judgments, is in our own time the final cause of the report. Now when we turn to these earliest Year Books this final cause seems to fall far into the background and almost to vanish. If these books themselves prove anything, they prove that they are rarely, if ever, cited by counsel or justices. The voucher of a precedent is, to all appearance, an uncommon event. We shall hardly find more than a couple of instances in any one term; and when the voucher comes, it looks much more like a personal reminiscence than a reference to a book. It will begin with 'I saw,' or 'I remember,' or 'Don't you remember?' and when Chief Justice Beresford recalls a case in this way, the reporters do their best to write down the tale that he tells, for it is unknown to them but memorable. No contrast could be stronger than that which we find between these vague vouchers, if vouchers they may be called, and Bracton's precise citations of cases that stand upon the plea rolls. Having regard to what Bracton did, we may indeed say that already in his time the English common law showed a strong natural inclination to become the 'case law' that it ultimately became; but, free access to the records of the Court being impossible, a long period seems to elapse before this tendency can prevail." [1]

[1] See further Introductions to Sixth Volume of Year Book Series of the Selden Society, pp. ix-xxviii, xxxviii; to Seventh Volume, p. xxxi; and to Twelfth Volume, p. xviii.

And in a later place in the same Introduction, Professor Maitland adds.[1]

"And let us not explain this by saying that the men of the time could do no better. On the contrary, we must remember that the educated men of the time were great citators of 'authorities.' The medieval scholar, were he divine, philosopher, canonist, or civilian, could give you a text for everything, and a text that you could find without much labor if you had a copy of the book to which he referred."

I have gone down through the time covered by the Year Books,[2] taking the cases of a whole year at intervals of fifty years, and the result quite bears out the accuracy of Professor Maitland's statement as to the scarcity of the references of judicial decisions. In the later years they are slightly increased, but only slightly.[3]

Early reporters

Coming down a generation after the close of the Year Books, we find one of the most famous and accurate of reporters, and one of those who reports what passes in court at the greatest length, Plowden. Taking the first ten cases in his second part, we find they occupy seventy-four quarto folios, or, leaving out the pleadings, which Plowden gives at length, over fifty folios, or one hundred pages. An examination of the use of precedents shows that about thirty cases are cited and stated as authority by court or counsel.

It must be remarked that in other reporters of about the same period a somewhat larger number of references will be found, but, with every allowance, the contrast

[1] P. lx.
[2] See 9 Harvard Law Rev. 27, 36-38.
[3] See Introduction to Sixth Volume of the Year Book Series of the Selden Society, p. xxix.

between all or any of the earlier reporters and Lord Coke is enormous, for with Lord Coke the citation of cases reached a height which it has never equalled since. Opening in the middle of his reports, we find in the first twenty-five folios of the seventh volume two hundred and forty citations of cases, or sixteen times as many as in Plowden. And although English judges and lawyers of modern times are not so prolific in their citations as Lord Coke, the weight attached to precedents has not diminished since his time.

There are four questions under the English Law as to Precedents to consider:—

1. How great is the authority of a decision in the court which made it, or in a court of coördinate jurisdiction?
2. Is there any court which is absolutely bound by its own decisions?
3. Does a lower court ever decide in opposition to a higher court of appeal?
4. Can decisions of the courts be properly considered as sources of Law?

Decisions in same or coördinate court

First. It is impossible to answer the first question with precision; precedents, in the English Law, have *great* weight but they have not irresistible weight; decisions can, I mean can according to the theory of the English Law, be overruled or not followed. Any attempt at a more exact determination would simply be a theory of the particular writer as to what would be desirable rules, and not as to what rules do in fact actually govern. The best statement of the circumstances which add to or diminish the weight of precedents is to be found in Ram on Judgments. The fact that precedents in the English Law

are to be *generally* but not *always* followed, and that no rules have been, or apparently ever can be, laid down to determine the matter precisely, shows how largely the Law in England is the creation of the judges, for they not only make precedents, but determine when the precedents shall be departed from.

House of Lords bound by its own decision

Second. The only English court which is absolutely bound by its own prior decision is the highest, the House of Lords.[1] No such doctrine governs, however, the Judicial Committee of the Privy Council, which is also for Colonial and certain other matters a court of ultimate appeal. Thus the decision that a colonial legislature had a Common Law power to punish contempts, which was made in *Beaumont* v. *Barrett*,[2] was overruled in *Kielley* v. *Carson*,[3] the same judge, Baron Parke, delivering the opinion in both cases.

The theory that the House of Lords is bound to follow its own precedents is not an ancient one. As late as 1760, in *Pelham* v. *Gregory*,[4] the House of Lords decided contrary to a previous decision of its own. But the prevailing view now seems to be that the House of Lords cannot depart from its own precedents in judicial matters.[5]

Decision in higher court

Third. Does a lower court in England ever decide in opposition to a precedent furnished by a court of appeal? Never, unless there has been an obvious blunder made by the upper court. I can recall but two instances in the

[1] See the author's article in 9 Harv. Law Rev. 27, 39. But see also Pollock, First Book of Jur. (3d ed.) 328-334.

[2] 1 Moore, P. C. 59 (1836).

[3] 4 Moore, P. C. 63 (1482); and see *Read* v. *Bishop of Lincoln*, [1892] A. C. 644, 654.

[4] 3 Bro. P. C. (Toml. ed.) 204.

[5] *London Street Tramways Co.* v. *County Council*, [1898] A. C. 375. In Peerage Cases, the House of Lords is not bound by its previous decisions. *St. John Peerage Claim*, [1915] A. C. 282, 308.

English books. The first is *Hensman* v. *Fryer*,[1] where the court of appeal held that legatees of sums of money and legatees of specific articles or pieces of land must contribute *pro rata* to the payment of a testator's debts, contrary to the well-settled rule that the legatees of money must bear the burden. The lower courts have repeatedly refused to follow this decision, saying that it was clearly a mistake. The other instance is a ruling of Lord Westbury, when Chancellor, in *Cookney* v. *Anderson*,[2] made in ignorance of a statute.

Are decisions sources of Law?

Fourth. Can decisions of the courts be properly considered as sources of Law? If the object of asking this question is to ascertain the fact, there can be but little doubt of the answer. Certainly the judges, in deciding cases, draw rules from precedents. They decide cases otherwise than they would have decided them had the precedents not existed, and they follow the precedents, although they may think that they ought not to have been made. Why has any question, therefore, been raised on this? It is because the judges have been unwilling to seem to be law-givers, because they have liked to say that they applied Law, but did not make it, while, if the decisions of courts were sources of Law, it could not be denied that the judges, to that extent, did make Law.[3]

Sir Matthew Hale, in his History of the Common Law, which was first published in 1713, after his death, says:—

"The decisions of courts of justice . . . do not make a law properly so called (for that only the King and Parlia-

[1] L. R. 2 Eq. 627; 3 Ch. 420 (1867).
[2] De G. J. & S. 365 (1863). See *Tompkins* v. *Colthurst*, 1 Ch. D. 626, and *Dugdale* v. *Dugdale*, L. R. 14 Eq. 234.
[3] See p. 99, *ante*.

ment can do); yet they have a great weight and authority in expounding, declaring and publishing what the law of this kingdom is. . . . And though such decisions are less than a law, yet they are a greater evidence thereof, than the opinion of any private persons, *as such,* whatsoever. . . . Because they [the judges] do *sedere pro tribunali,* and their judgments are strengthened and upheld by the laws of this kingdom, till they are by the same law reversed or avoided." [1]

But the classical passage is in Blackstone's Commentaries:—

Blackstone's theory

"As to general customs, or the common law, properly so called; this is that law, by which proceedings and determinations in the king's ordinary courts of justice are guided and directed. . . . How are these customs or maxims to be known, and by whom is their validity to be determined? The answer is, by the judges in the several courts of justice. They are the depositaries of the laws; the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land. . . . These judicial decisions are the principal and the most authoritative evidence that can be given of the existence of such a custom as shall form a part of the common law. . . . For it is an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a per-

[1] Hale, Hist. Com. Law (4th ed.) 67; (5th ed.) 141.

manent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments, he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one. Yet this rule admits of exceptions where the former determination is most evidently contrary to reason; much more if it be clearly contrary to the divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law,* but that it was *not* law; that is, that it is not the established custom of the realm, as has been erroneously determined. . . . The doctrine of the law then is this: that precedents and rules must be followed, unless flatly absurd or unjust: for though their reason be not obvious at first view, yet we owe such a deference to former times as not to suppose they acted wholly without consideration. To illustrate this doctrine by examples. It has been determined, time out of mind, that a brother of the half blood shall never succeed as heir to the estate of his half brother, but it shall rather escheat to the king, or other superior lord. Now this is a positive law, fixed and established by custom, which custom is evidenced by judicial decisions; and therefore can never be departed from by any modern judge without a breach of his oath, and the law. For herein there is nothing repugnant to natural justice; though the artificial reason of it, drawn from the feodal

law, may not be quite obvious to everybody. And therefore, though a modern judge, on account of a supposed hardship upon a half brother, might wish it had been otherwise settled, yet it is not in his power to alter it. But if any court were now to determine, that an elder brother of the half blood might enter upon and seize any land that were purchased by his younger brother, no subsequent judges would scruple to declare that such prior determination was unjust, was unreasonable, and therefore was *not law*. So that *the law* and the *opinion of the judge* are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may *mistake* the law. Upon the whole, however, we may take it as a general rule 'that the decisions of courts of justice are the evidence of what is common law': in the same manner as, in the civil law, what the emperor had once determined was to serve as a guide for the future." [1]

Blackstone's statement, in short, is this: The Common Law consists of general customs, but what these customs are must be known from the decisions of the courts; former precedents must be followed, a decision of a court makes what was before uncertain and indifferent a permanent rule, which subsequent judges must follow; but precedents are not absolutely binding, they can be disregarded when flatly absurd or unjust.

There seems little occasion to find fault with this statement, so far as it concerns the force and effect of precedents as a source of Law, but Blackstone's attempt to carry back further the source of Law into general cus-

[1] 1 Bl. Com. 68-71.

tom, and make the decisions only evidence of that custom, is unfortunate.

The notion that judicial decisions are only evidence of a preëxisting law was fallen foul of by Bentham;[1] but in Austin it found its most influential opponent. It may be questioned whether he has not devoted himself too exclusively to this part of Blackstone's remarks, and neglected the substantially accurate view of the force and effect of precedents which the commentator gives. Austin speaks of "the childish fiction employed by our judges, that judiciary or common law is not made by them, but is a miraculous something made by nobody, existing, I suppose, from eternity, and merely *declared* from time to time by the judges." [2]

Austin's views have met general acceptance.[3] But Blackstone has not wanted defenders. One of the latest attempts to rehabilitate him is by his editor, Professor Hammond. As perhaps the most serious attempt, it is worth while to examine it in detail. It is contained in a note to the passage of Blackstone quoted above.[4]

Professor Hammond begins by saying that "no passage of Blackstone has been the object of more criticism and even ridicule than this," and he refers to Austin, to Digby's History of the Law of Real Property, to Pomeroy's Municipal Law, and "to the swarms of minor writers who have held Blackstone up to ridicule in small books and legal periodicals." "Such writers," he goes on to say, "may not think themselves answered by the

[1] *E.g.* Benth. Works (1843), vol. 5, p. 546; vol. 6, p. 552.
[2] 2 Jur. (4th ed.) 655.
[3] See Holland, Jur. (11th ed.) 65.
[4] Hammond's ed. of Blackstone, pp. 213-226.

unbroken testimony of the judges themselves, who from the earliest Year-books to the latest reports of the highest courts have unanimously agreed that they neither made nor could make new law in deciding cases which come before them for adjudication." Though it is doubtless true that judges have often disclaimed the authority to make law, Professor Hammond's two citations are not felicitous. In *Abbot of Everwike* v. *Abbot of Selby,* 8 Edw. III. 69, pl. 35 (not 8 Edw. III. 6, pl. 35, fol. 327 as cited) Herle, J., speaking of a point as "law before we were born," says, "we *will* not change that law," which is certainly no proof that on a point not settled he could not make law. The other passage is a remark in 1304 by the same man (but not by the same judge, as stated by Professor Hammond, for he was not a judge till sixteen years later) in argument to the court: "The judgment to be by you now given will be hereafter an authority in every *quare non admisit* in England," [1] which, so far as it goes, asserts that a decision of the judges does make Law.

The learned editor then goes on to say that the effect of the contradiction of Blackstone's doctrine "in making the rule of law identical with the mere point decided in the given case, and relieving the student or practitioner from any attempt to seek for underlying principles, will always make it popular with busy attorneys and students incapable of abstract thought." That is one way of putting the matter. Another way of putting it would be to say that the effect of Blackstone's doctrine in denying

[1] *Prior of Lewes* v. *Bishop of Ely,* Y. B. 32 Edw. I. (Horwood's ed.) p. 32. "*Quare non admisit*" is the title of a writ concerning church patronage.

to judicial decisions the effect of making law, and relieving the student or practitioner from any attempt to find out from them the law which they have made, will always make it popular with lazy attorneys and students too weak in intellect to grasp the real significance of facts. But perhaps remarks of this sort, on the one side or the other, do not tend to aid in the search for truth.

Historically Judges make Law

"The position of Austin and his followers rests upon a confusion between the historical and scientific aspect of that doctrine. Historically considered, it is true that our judges make law." Here Professor Hammond gives away his whole case. "Historically true," means really true, that a thing is a fact. To say that a thing is historically true but scientifically false means that it is a fact, but that it cannot be logically fitted into a certain system; and that is undoubtedly the case here. That judges make the Law is a fact, and it is true that this fact cannot be logically deduced from Blackstone's doctrine. Austin and his followers have said, "so much the worse for Blackstone's doctrine." Professor Hammond says, "so much the worse for the facts."

The learned editor then proceeds, in the strongest and most emphatic manner, to declare the law-making work of the judges. He says: "In the historical aspect of the system they have actually made new law." And then he spoils it all. "So it is in every science. We can trace historically the growth of creeds, the development of theological, philosophical, or scientific truths in the utterances of successive thinkers and students. No one infers from this that these men have made theological or scientific truth." But it is not true that we can trace historically the development of theological, philosophical,

or scientific truths in the utterances of successive thinkers; what we can trace is the development of human knowledge and belief of those truths; but the truths themselves are entirely independent of human knowledge and belief, and therefore "no one infers from this that these men have made theological or scientific truth." Take the doctrine of Transubstantiation: the origin or growth or decline of belief in it has been doubtless dependent on the declarations of eminent men, but whether the doctrine is true, whether the mysterious change in the consecrated elements occurs, is independent of the opinion of Loyola or Luther or Zwingli. So the laws of light do not depend upon the ideas of Sir Isaac Newton or any other physicist with regard to them.

"We do not infer that philosophers make the laws of nature; how then can we infer that judges make the law of the land?" is what Professor Hammond says. Because philosophers do not make the laws of nature, but, as Professor Hammond has just said, judges do make "historically" the laws of the land. Because the laws of nature are independent of human opinion, while the Law of the land *is* human opinion. The heavenly bodies have been governed by the same laws after the birth of Ptolemy and Copernicus and Newton that they were before, but the English people have not been governed by the same Law since Lord Mansfield's time that they were before. His decisions have made that to be Law which was not Law before, and the Law of England since his time is different from what it would have been, had he been a man of a different cast of mind.[1]

[1] Compare the part of Lord Stowell in the creation of prize law. Roscoe's Life of Stowell, pp. 49-52.

Or, to take an instance from the Constitutional Law of the United States, suppose Chief Justice Marshall had been as ardent a Democrat (or Republican, as it was then called) as he was a Federalist. Suppose, instead of hating Thomas Jefferson and loving the United States Bank, he had hated the United States Bank and loved Thomas Jefferson,—how different would be the Law under which we are living to-day.

It is quite true, as Professor Hammond goes on to say, that the courts will sometimes refrain from making new law. No one has ever dreamed of denying that in their law-making power they are confined by statutes and by the decisions of their predecessors, and no one has ever thought the existence of such confining limits to be "a childish fiction," as the editor complains.

Consequences of Blackstone's theory

The examples which Professor Hammond employs to show the scientific soundness of Blackstone's theory, and the advantages of carrying it into practice, will hardly seem to most persons to have been happily selected. Suppose that A., in New York, makes a note payable in New York to the order of B.; that B., in New York, in fraud of A., transfers the note to C., as collateral security for a preëxisting debt; and that C. sues A. in New York. If C. is a citizen of New York, he will fail; if he is a citizen of New Hampshire, he can go into the Federal Court and succeed.

Again, suppose that A., living in Newport in the State of Rhode Island, gives property to B., to pay the income to C., A.'s son, for life, without any power of anticipation on C.'s part or any liability for his debts; and that C. makes a contract with D., a Newport butcher, to furnish him with meat, and then refuses to pay him. D.

gets a judgment in the Rhode Island courts against C. and tries to enforce it against the trust fund. If B. or C. are citizens of Rhode Island, D. can get paid for his meat, but if they are both citizens of New York, they can remove the case into the Federal Court, and C. can then, according to the *dictum* in *Nichols* v. *Eaton,*[1] cheat his creditor with impunity.

Now I am not here considering any practical advantages resulting from this state of things, nor how far it is the natural or necessary consequence of our complex form of government. But certainly, from a "scientific" point of view, nothing could be more shocking. It seems a recurrence to barbarism, to the time when Burgundians, Visigoths, and Romans, living beside each other, had their own separate and tribal laws.

And how did this state of things have its origin? Professor Hammond truly says that it was by *Story,* J., in *Swift* v. *Tyson,*[2] adopting the Blackstonian theory: "In the ordinary use of language it will hardly be contended that the decisions of Courts constitute laws." These particular consequences of Blackstone's theory are hardly such as to recommend the theory itself.

Municipal bond cases

But the Supreme Court of the United States has, since this state of things was established, been compelled, by what Professor Hammond would call the aspect of historical as against that of scientific truth—that is, by the stress of the real facts of life—to abandon the theory of Blackstone in a most important class of cases, those concerning municipal bonds. I do not undertake to establish the court's consistency, but it is interesting as an

[1] 91 U. S. 716.
[2] 16 Pet. 1, 18. See p. 251, *post.*

example of how an elaborate theory, sustained by great names, will break down when it is in irreconcilable conflict with facts.

In several of the United States, bonds were issued by towns and cities, generally in aid of railroads; the Supreme Courts of the States declared that the bonds were validly issued; on the faith of these decisions the bonds were sold: and then new judges were elected and the bonds were declared invalid. Blackstone's theory was urged with great force, that the decisions of the courts did not make Law; and that the Law must be taken to have been always what the latest decisions declared it to be. But the Supreme Court ruled otherwise, and has always held firmly to the doctrine that if a contract, when made, was valid by the Law as then laid down by the courts, its obligation could not be impaired by any subsequent decision. I will consider these cases more fully later.[1]

Professor Hammond then points out a supposed inconsistency in Austin, and his tacit adoption of Blackstone's views while criticizing Blackstone himself. Blackstone,[2] speaking of the rescripts of the Roman Emperors, and describing their character, says: "In like manner the canon laws, or decretal epistles of the popes, are all of them rescripts in the strictest sense. Contrary to all true forms of reasoning, they argue from particulars to generals." [3]

Austin, in his unmannerly fashion, adverts to this as

[1] P. 256, *post*.
[2] 1 Com. 59.
[3] Austin takes Blackstone as if speaking of the Emperor's *decreta* or judgments on appeals, and not of their rescripts or interlocutory advice (p. 203, *ante*), but for the argument this seems immaterial.

a foolish remark (and indeed it is not a very wise one, nor does Professor Hammond seek to defend it) and he goes on: "The truth is, that an imperial decrete of the kind to which Blackstone alludes is a judicial decision establishing a new principle. Consequently, the application of the new principle to the case wherein it is established is not the decision of a general by a particular, but the decision of a particular by a general. If he had said that the principle applied is a new principle, and, therefore, an *ex post facto* law with reference to that case, he would say truly. But the same objection (it is quite manifest) applies to our own precedents." [1]

Here, says Professor Hammond, is a logical fallacy, for in assuming that the principle established by the decision or decrete is a new one, Austin contradicts his own statement that the process is "the decision of a particular by a general," for, "if these latter words mean anything, it is that the principle must have existed before the decision, so that the decision may have been made by it."

But is this the meaning? Had it not been for the difficulty which so careful a reader and accurate a thinker as Professor Hammond appears to find, Austin's meaning I should have thought quite clear. What Austin says is this: These prayers for instructions were brought to the Emperors in cases where there was no existing Law which could guide the magistrate. It was necessary, therefore, to make a new Law, or the case would have been undecided, but instead of issuing a general *ex post facto* statute, the Emperor established a new prin-

[1] 2 Jur. (4th ed.) 654.

ciple in accordance with which the case ought to be decided, and directed a decision accordingly. Whether the Emperors always, in fact, acted in so logical and philosophical a manner may be reasonably doubted, but there appears to be no fallacy in Austin's reasoning.

Sense in which rule must exist before decision

In fact, Professor Hammond has, it would seem, confounded two things,—the order of the intellectual processes that go on in a judge's mind when a case is brought before him, and the succession of events outside of his mind. Suppose a matter is brought before the judge, for which, "as an historical fact," there is no Law, no rule for decision in existence; and disguise the matter as we will, such cases are not infrequent. If the judge is a sensible and conscientious man, he will not decide the case by rule of thumb, but will endeavor to establish a principle on which such cases ought to be decided, and then, having determined that principle, he will apply it to the case. But all this has no tendency to prove that, before the case was brought into court, there was a rule of law in existence governing the case; in fact, it distinctly negatives that view, and reduces it to a pure fiction, which it is.

"Plainly, his [Austin's] mistake is the common one of confounding the *principium essendi* and *principium cognoscendi.*" [1] May we not rather say that, plainly, his learned editor's mistake is to assume that, because a judge has decided a case in accordance with a general rule, the rule must have existed before the case came into court; and this mistake is strengthened, if not caused, by the misleading comparison with physical science, to which reference has been made.

[1] The existence of a thing and the fact of its being known.

Professor Hammond then sets up an adversary who says if the Law in question existed before the decision of the court, it must have existed from eternity. Over this foolish person Professor Hammond wins an easy victory. But if it be true, as it undoubtedly is, that the rule of Law on which a case is decided *may* have existed before the case comes before the court, and yet may not have existed for all time, that carries us very little way towards the proposition that the rule of Law on which a case is decided *must* have existed before the case itself.

Decisions often change the Law

"The doctrine of precedent, correctly stated, forbids the assumption that a new law was created by the prior decision—or that, in Austin's words, 'the imperial decrete established a *new* principle,' in the sense of creating a new law. If it did, and the present case arose under the law so created by the precedent, we should be deciding the later case by a different law from that under which the precedent arose." And so we are. Suppose it has been generally believed that an action will lie for verbal slander, but upon the case coming before the court of final appeal, they decide, perhaps by a majority of one, that it will not. Does not any later case come before a judge under a different state of the Law? Is a judge in the same position as he was before that decision? Is there not a new element introduced? How must the Law be the same, when there is now an element, all but necessarily conclusive, which there was not before? Professor Hammond declares we must not say that the Law is changed, because such change cannot be reconciled with the simplest rule of justice; but, say what we will, the fact is that there is a new controlling element introduced into the Law. One can understand a German jurist considering

such a state of things as unjust, and therefore refusing to give any weight to Judicial Precedents, but how a Common Law lawyer, who regards the system of precedent with complacency, can suppose that he can turn injustice into justice by inventing a fiction is a remarkable instance of the power of conventional expressions.

"The falsity of Mr. Austin's theory results also from a correct statement of the true nature of judicial power"; and Professor Hammond goes on to show that courts are charged with executive duties; but this does not in the least tend to show that they may not also be charged with legislative duties, as indeed, in the case of their power to make rules for practice, is notoriously true.[1]

I do not understand that Professor Hammond thinks that any change ought to be made in the mode of administering justice; if the judges have cases come before them which present questions for whose decisions there are no rules, I do not understand that he would have the judges leave the cases undecided, or that he would have the decisions based on whim or instinct; but he deems it important that the judges should say, and that the people should believe, that the rules according to which the judges decide these cases had a previous existence. Whether it is desirable that such remarks should be made, or whether, if made, it is desirable that they should be believed, or whether it is desirable that the judges' power and practice of making Law should be concealed from themselves and the public by a form of words, is a matter into which I do not care to enter. The only thing I am concerned with is the fact. Do the judges make Law?

[1] P. 199, *ante*.

I conceive it to be clear that, under the Common Law system, they do make Law.[1]

Mr. Carter's theory

The opinions of another writer on the question of the law-making power of the judges, a writer whose opinions deserve to be treated with the highest respect, remain to be considered. Mr. James C. Carter published an article[2] on "The Ideal and the Actual in the Law," in which he maintained that the judges were the discoverers and not the makers of the Law. That excellent man has since gone to his rest, but there has lately been published a book entitled "Law, Its Origin, Growth and Function," which he had completed before his death,[3] and which contains his matured opinion on the subject.

Mr. Carter, at an earlier period of his life, was a strenuous opponent of the adoption by the State of New York of Mr. David Dudley Field's Civil Code. In his opposition he was successful. I suppose it was largely by his endeavors that the State was saved from the threatened danger. The remembrance of this great struggle was always in his mind, and was, I feel sure, the *raison d'être* of his essay and of his book, and has affected his whole point of view.

Judge-made Law and the Sovereign

The main thesis of Mr. Carter's essay is the erroneousness of the theory that all Law proceeds from the commands of the sovereign. He admits fully "that all the knowledge which we really have of the law comes from the judge,"[4] but he shrinks from saying that the judge makes Law, because he fears that this would recognize

[1] See Maine, Anc. Law (Pollock's ed.) 34-37, 46; Dicey, Law & Opinion (2d ed.) 491; and pp. 93-99, *ante*.
[2] 24 Am. Law Rev. 752.
[3] In 1905.
[4] 24 Am. Law Rev. 758.

the theory that all Law comes from the command of the sovereign.[1] If I shared the fear, I should be equally unwilling to use the expression that judges make Law. But is this objectionable result a consequence of holding that judges make Law?

What is meant by judges making Law? It is meant that a decision *suo vigore,* without regard to its agreement or disagreement with some ideal, is a source of Law; not the only, not necessarily the controlling, source of Law, but something which has an independent and not merely evidential value. To decide cases is the necessary function of a judge; it is of the essence of judgeship; but whether a judge can establish precedents or not is not of the essence of judgeship. In England judges have the power; in Germany, generally, they have not. The sovereign might interfere to give them the power, or to deny them the power, but generally he has not interfered, and therefore, if they have the power, it does not arise from the command of the sovereign (unless we adopt the theory of Austin that whatever the sovereign permits he commands, a theory which I am at one with Mr. Carter in disapproving), but whether decisions shall establish precedents is left to the free action of the judicial mind, affected by ideas of public policy, by popular custom, and by professional opinion. These motives, operating on the minds of English and American judges, have led them to recognize decisions of the courts as sources of the Law. Judges, then, may make Law, *i.e.* establish precedents, and yet such Law may not be the product of the sover-

[1] See pp. 85 *et seq. ante.*

eign's command, and therefore the dilemma which Mr. Carter feels does not, it seems to me, in truth exist.

In his essay Mr. Carter does not seem to regard the effect of a judicial decision as evidential. "Inquiry," he says, "is made by the judge concerning what his predecessors have done, and if he finds that a similar state of facts has been considered by them and the law pronounced in reference to it, he declares the same rule." But he says a judge rather *discovers* than makes the Law. The expression "discovered" throws light on the processes of the judicial mind. To speak of "making" the Law suggests an arbitrary will, while to speak of "discovering" it suggests the process of reason and reflection. Indeed Mr. Carter adopts the same view substantially as to the legislature, properly so-called. "Its liberty of action so far exceeds that of the judicial tribunals as to justify, for ordinary purposes, such a designation of its functions [*i.e.* making Law]; but the deeper and more philosophical view would assimilate its office more nearly to that performed by the judicial tribunals, namely, of affixing the public mark and authentication upon customs and rules already existing, or struggling into existence, in the habits of the people." [1] But while I recognize the reason which led Mr. Carter to use the word "discover," and also the fact that the word "make" may, although improperly, carry with it a suggestion of arbitrariness, I must yet regret Mr. Carter's substitution of the term "discovery" as misleading.

Law as created by custom

But, in his posthumous treatise, Mr. Carter has pressed the idea of the evidential character of precedents farther than in his essay. The theory of his book seems to be

[1] 24 Am. Law Rev. 766.

that the Law is created by custom; that when the judges declare the Law, they are declaring that to be Law which already existed; and that the declaration is only evidence, though a high kind of evidence, of the Law. If this be his matured opinion, and I think it is, I must say, with all diffidence, I cannot agree with him. *Amicus Plato, sed magis amica veritas.*

I have already several times tried to point out the difference between a discoverer in the fields of physical science and a judge. A discoverer in chemistry does not make the natural law which he discovers. Water was composed of oxygen and hydrogen before its composition was discovered,—the discovery in no way affected the natural law; the existence of the natural law was entirely independent of human opinion,—but the Law of the land is made up of human opinion. Expressions of human opinion are its sources, and an important class of those expressions of opinions are the declarations of the judges.

It is very easy to weave plausible general theories, but there is only one test of their correctness. Do they agree with the facts? I have constantly endeavored, in these lectures, to apply that test, the only conclusive test, and to determine whether a theory is true by seeing how it fits the facts of a concrete case. Let us apply that test here.

Often no custom before decisions

In the year 1620, the court of King's Bench decided the famous case of *Pells* v. *Brown*.[1] It was this: Land was devised to Thomas Brown and his heirs, but if he died without issue in the lifetime of his brother William, the land was to go to William and his heirs; that is, Thomas

[1] Cro. Jac. 590.

took an estate in fee simple, with an executory devise, as it is called, over to William, in case Thomas should die in the lifetime of William without issue. Thomas parted with the land by a conveyance known as a common recovery,[1] and the question was whether Edward Pells, who claimed the land under this conveyance, held it subject to the executory devise to William or free from it, or, in other words, whether an executory devise after a fee simple is destructible by the holder of the fee.

The court, by three judges to one, decided that the executory devise continued, that Pells took the land subject to it, that Thomas could not destroy it; and so the Law has been held ever since. Therefore, in England and America, future contingent interests can be validly created by will. This is by no means a necessary state of things. In Germany, in France, in Louisiana, and generally, I believe, where the Civil Law prevails, future contingent interests are allowed, if at all, only to a very limited extent.[2]

Mr. Carter, I understand, would say that this doctrine as to the validity of future interests was created by custom, and was Law before the case of *Pells* v. *Brown*. Now, what is custom? Custom is what is generally practiced in a community and believed by the community generally to be a proper practice.

Now is it conceivable that in England, at the beginning of the seventeenth century, a belief was prevalent in the community that an executory devise could not be destroyed by a common recovery with a single voucher?

[1] A "common recovery" was a collusive suit at law, highly technical in its procedure, which was used as a means of conveying land. 2 Bl. Com. 357-364, 533.

[2] Gray, Rule against Perpetuities, §§ 753-772.

Why, there was not one man in England out of ten thousand, not one out of fifty thousand, who had any belief upon the question, or who would even have understood what it meant. To say that there was a custom that future contingent interests were indestructible is a baseless dream, invented only to avoid the necessity of saying that judges make Law.

But, further, before the decision in *Pells* v. *Brown,* so far was there from being a general opinion in the community that executory devises were indestructible, there was no such opinion among the judges. One judge of the four, as I have said, dissented, and the decision was far from meeting a favorable reception among the judicial brethren. In *Scattergood* v. *Edge,*[1] *Powell,* J., said that the notion that an executory devise was not barred by a recovery "went down with the judges like chopped hay"; and *Treby,* C. J., said, "These executory devises had not been long countenanced when the judges repented them; and if it were to be done again, it would never prevail"; and stronger statements were made by Latch, as counsel in *Gay* v. *Gay.*[2] But the point having been decided by the court in favor of executory devises, the Law has stood so ever since.

How, in the face of all this, is it possible to say that the judges in *Pells* v. *Brown* only declared Law which custom had previously created, or, to use an expression of which Mr. Carter is very fond, that the fair expectation of the community was that a doctrine should have in its favor three judges out of four, instead of one out of four? It is possible to make such a statement, but

[1] 12 Modern, 278.
[2] Styles, 258. See Gray, Rule against Perpetuities, § 159.

what support has it in the real facts? If Law was ever made by any one, Montagu, C. J., and Chamberlayne and Houghton, JJ., made Law.

It is hard to overestimate the importance of the Law which these three men made. It lies at the root of the Law of future interests. Millions upon millions, probably billions upon billions, of property have gone to persons to whom they would not have gone, if two of the judges of the majority had agreed with their brother Doderidge.

And this is only one case out of thousands where the Law stands as it does to-day upon the opinions of individuals in judicial position on matters as to which there was no general practice, no custom, no belief, no expectation in the community.

Part played by individual Judges

It has been a matter greatly disputed, how much or how little part is played in the development of human affairs by individuals. It is contended that the *Zeitgeist,* or the great underlying forces and instincts of human nature, will have their way without regard to, and in spite of, the acts of individuals; that such acts are but ripples upon the mighty stream of time. I do not deny that there is truth in this. It may be that the ultimate goal of human experience will be the same as if Cæsar or Napoleon or Mahomet had never existed. That may be true of the ultimate goal; but the road by which humanity, through long periods of its history, will travel towards its goal is largely determined by the beliefs, the opinions, the acts, of great men.

And not of great men alone; very small men may produce great results; it was a very small man who murdered Henry IV, a very small man who murdered President Lincoln. Especially is this true if a small man happens

to be put in a great place. I know no reason to suppose that Montagu, C. J. and Chamberlayne and Houghton, JJ. were in any way great men, but the fact that they said one thing rather than another has seriously affected the course of human affairs in an important department of the Law.