PART II

SOURCES OF THE LAW

CHAPTER VIII

STATUTES

We have hitherto been considering the Nature of the Law. I have defined the Law as the rules laid down by the courts for the determination of rights and duties, and I have endeavored to point out the difference between the Law and the Sources from which the Law is drawn, and the confusion and errors which have arisen from not distinguishing between them.[1] We will now take up the consideration of these Sources.

Legislatures

The first Sources from which the courts of any human society draw the Law are the formal utterances of the legislative organs of the society. We can conceive of a society with judicial but no legislative organs. The courts of such a society would follow rules derived by them from other sources, say, from former decisions of their own, or from custom. But all modern civilized political societies have, in fact, legislatures.

In any organized society there may be, and, in political societies particularly, there often are, several bodies which,

[1] P. 84, *ante*.

within the limits marked out by the organization of the society, or by the orders or tolerance of the supreme legislative body, have legislative functions. In a country with a written constitution, the body of persons which enacts the constitution is the supreme legislature; all other bodies and persons having legislative powers, including the ordinary Legislature, Congress, Assembly, Cortes, are subordinate to it.

In most modern societies the chief legislative functions are given not to individuals, but to assemblies. In political societies these assemblies are now usually representative, but sometimes all the persons considered as having political power have met and voted, as, for instance, in the ancient Greek cities, in some of the Swiss cantons, and in the town meetings of New England. And in societies not political the legislatures are often composed of all the members of the society, as in the meetings of the stockholders of corporations and of the members of clubs.

Although at the present day the chief legislative functions are vested in bodies more or less numerous, whether representative or not, yet many legislative powers are given to individuals. Such is the power of the King or other head of the government to issue proclamations, of a Secretary of the Treasury or Postmaster-General to make regulations, of a Commander-in-chief to issue general orders; and so down, through all grades of officials, to a subaltern of infantry commanding a post.

Various designations of statutes

The variety of names given to the legislative acts of these bodies is great: constitutions, statutes, laws, acts, ordinances, proclamations, regulations, orders; among the Romans, *leges, plebiscita, senatus-consulta, edicta, consti-*

tutiones; among the Germans, *gesetze, verordnungen.* There is, unfortunately, no word recognized as the name of the *genus.* I know of no better way than to take the name which is given to the utterances of the highest ordinary legislature in a political society, apply it to the whole *genus,* and call them all *statutes.*

This variety of names has given rise to a notion that there is an essential difference between a statute and a proclamation, for example; and, of course, there may be the gravest distinction so far as politics are concerned, but from the point of view of Jurisprudence, the difference between statutes and proclamations is immaterial. They both set forth general rules which are equally binding, and binding in the same way, on the courts. The fact that in countries without a written constitution the power of the highest legislature is practically unlimited, while officials having legislative functions are generally closely limited in their use, tended to put the former into a separate class; but now that the existence of governments with written constitutions has familiarized us, at least in the United States, with frequent and strict limitations upon the powers of the highest ordinary legislative bodies, there seems small reason for distinguishing between statutes and proclamations. Every utterance of the most subordinate official, if it be within the legislative powers given to him, directly or indirectly, by the organization of the State, is as binding on the courts as any act of the supreme parliament or assembly, while every utterance of the highest legislative body which is beyond its constitutional competence is as invalid as an unauthorized order of the lowest official.[1]

[1] See pp. 110-112, *ante.*

The possession of legislative power is not confined to political bodies; every organized body of men may have a legislative organ, and most of such bodies do, in fact, have one, be they churches, business corporations, charitable societies, or social clubs.

The formal utterances of the legislatures of non-political organized bodies are not commonly called statutes; thus, we speak of the canons of a church, or the by-laws of a business corporation. But this is a matter of nomenclature only; for the purposes of Jurisprudence they are identical in character with the statutes of a State; that is, they are binding upon the courts of the organization of which they are the canons or by-laws.

A distinction should be noticed among organized bodies which are not States. Some of these bodies, although not States, are yet political; they are organs of the State, and are formed for carrying out its purposes; some of its powers are delegated to them for these purposes; and, if these bodies have legislatures, the general rules declared by such legislatures are really declared by the State; they are its statutes. Municipal bodies, like cities, are such political bodies, and the ordinances issued by them are, in truth, statutes of the State. So when legislative power is granted to an individual, as to a King, President, Secretary, or General, and he puts forth proclamations or regulations containing general rules, the rules are, in truth, put forth by the State; and for juristic purposes they are identical with the statutes of the ordinary supreme Legislature.

Rules of bodies other than the State

But a church, or a business corporation, or a charitable society, or a club, is not an organ of the State; it is not a political body created for political purposes; and its

canons or by-laws or rules are not statutes of the State. It is true that such bodies often owe their existence to the State, and can legislate only on the subjects and within the limits prescribed by it, but the meeting of the stockholders of an automobile manufacturing company is not an organ of the State to carry out its purposes; it is the organ of the company to carry into effect the objects of the company. The State merely allows the company to carry out its objects; it does not make these objects its own.

If we should call the by-laws of a corporation the statutes of the State, because the State, if it saw fit, could prevent their being passed by the stockholders, and because it will open its courts to enforce the observance of them by the members of the corporation, we should have to call every general rule issued by a person whom the State permits to issue it, and which it will regard in its courts, a statute of the State. Thus, a general rule by the head of a household that the children shall go to bed at eight o'clock, or that the cook shall always boil eggs for two minutes and a half, would be a statute of the State.

Indeed, this would not be confined to general rules: every particular order given by any person who has a right to give such an order, although, from its lack of generality, it could not be called a statute or a law, would yet be a command of the State. A master has a right to tell a servant to bring him the mustard. Should she refuse, he has a right to dismiss her, and the State will protect him in this right; and, therefore, on the theory we are considering, the order to bring the mustard is a com-

mand of the State.[1] Even Austin, I think, would shrink from such a conclusion.

Though courts of the State often have occasion to enforce the legislation of non-political organizations, it is not a source of Law to them. Thus, suppose a member of a club is charged with improper conduct, and a committee is chosen, in accordance with the by-laws, to try him, the by-laws are the sources of Law to the committee as the judicial organ of the club; they are commands of the club to them and binding upon them; but suppose the peccant member is expelled and sues for reinstatement in a court of the State: in that case the by-laws do not come as commands to the judge from the State; they are simply facts, one of the elements of the contract which the member made with the club on joining it. The distinction would generally be brought out by the procedure. The club committee would take judicial cognizance of the club's by-laws; the court of the State would require them to be proved.

It should be observed that though the nature of that which is a source of Law for a non-political body but not for the State, is brought out with the most clearness in considering legislative enactments, it is also true that other sources of Law for a non-political body, precedents in a church court, for instance, cannot properly be considered sources of Law for the State.[2]

To put the whole matter in another way. A distinction is to be made between the general rules which the

[1] See p. 107, *ante*.

[2] Of course this has no application to courts which, while called church courts, are simply part of the State machinery, as is the case with the ecclesiastical courts in England. See p. 109, note, *ante*.

courts of a State lay down, that is, the Law, and the decisions which they make. In making the decisions they apply the Law to the facts. Among the facts may be the rules established by non-political bodies, and these rules are then elements or, if you please, sources of the *decisions,* but they are not sources of the Law.

It is convenient to distinguish those rules made by the State, either directly or through its agents, from those made by other bodies or persons by permission of the State, and to regard the former as sources of Law, and the latter as facts; but (except as to matters of proof, which are likely to be different in the two classes, but may be subject to a great number of artificial rules), there is little practical difference whether we say that the State has commanded children to obey their teacher's orders and that Mr. Barlow has ordered Tommy Merton to take his finger out of his mouth, or whether we say that the State has commanded Master Tommy to remove the misplaced member. In the suit of *Merton* v. *Barlow* for trespass *quia vi et armis,* the court would reach the same result on the one theory as it would on the other.

"Autonomy" in German law

The fact that the distinction is not of vital importance explains, perhaps, the persistence in Germany of what is called autonomy, and on which there has been much discussion. Autonomy is the legislative power of a body other than the State to make orders which are sources of Law to the courts of the State. On two things all late writers seem agreed. First, that the orders put forth by officials of the State are not autonomic; they are simply the commands of the State issued through these officials instead of through the ordinary legislature. Secondly, that the by-laws of ordinary private corporations

are not autonomic; such by-laws are properly sources of Law to the corporation, but they are not sources of Law to the courts of the State; to them they are simply facts.

The truth seems to be that the whole conception of autonomy is an historical and not a logical one; that it springs from a lack of clearness of perception. In the loose political organization of the Middle Ages, many towns and other communities, though situated in a kingdom or duchy, were largely self-governed, and had written laws which were called *statuta*. Such communities were originally separate political bodies with independent organizations, but in a state of subjection, more or less well defined, to the feudal lord on whose territory they were situated. At present this condition of things has passed away, the towns have become simply municipal agents of the larger State, the kingdom or duchy, and any rules passed by them are to be considered as emanating from such larger State. During this process of degeneration, or at least of change, while these towns had ceased to be independent States, but were not yet recognized as simply organs of the larger State, these ideas of autonomy arose.[1]

Form of statutes

The form of a statute is, for the purposes of the Law, immaterial. Whether it is committed to writing or whether it is pronounced orally is indifferent, though, of course, for the sake of preservation, it is in fact always committed to writing.

[1] It is not impossible that a similar change is going on in the relation of the States of the American Union to the Federal Government; such changes are apt to be hidden from the eyes of contemporaries.
On autonomy see, further, Appendix IV.

The Romans made a distinction between *jus scriptum* and *jus non scriptum,* and took the phrases literally, including in the *jus scriptum* not only the statutes of the supreme legislative bodies, but also the *edicta magistratuum* and even the *responsa prudentium.*[1] As Savigny says,[2] it was the form of the Law at its origin that determined its name.

In France, during the Middle Ages, *jus scriptum* was used for the Roman Law as opposed to the customary Law, as in the Register of a Parliament of 1277, cited by Ducange (*sub voc. Jus scriptum*), *"Li Advocat ne soient si hardi de eux mesler d'aleguer Droit escrit, là û Coustumes ayent leu, més usent de Coustumes."*

Sir Matthew Hale, in his History of the Common Law, confines the term *lex scripta* to Acts of Parliament, "which in their original formation are reduced into writing, and are so preserved in their original form, and in the same style and words, wherein they were first made." The rest of the English Law he calls *leges non scriptæ,* including the Civil and Canon Law, so far as they are in force in England.[3] Blackstone follows Hale.[4]

Thibaut says that *jus scriptum* is made up of the commands proceeding directly from the supreme power of a State, whether it be actually written or not;[5] and Austin gives this as the meaning of the word in the mouths of the modern Civilians, but justly remarks that "nothing can be less significant or more misleading than the language in which it is conveyed"; and that it is

[1] See p. 201, *post.*
[2] 1 Heut. röm. Recht. § 22.
[3] Hale, Hist. Com. Law (4th ed.) 23; (5th ed.) 27.
[4] 1 Bl. Com. 63.
[5] Thibaut, Pand. § 10.

unsuited to express any distinction of importance.[1] The terms *jus scriptum* and *jus non scriptum* seem to have been given up by the late German writers.

In view of the uncertainty of the meaning of the phrases "written law," and "unwritten law," of the inaptness of these phrases to any of the supposed meanings except that of the Romans, and of the unimportance of the distinction which they denoted among the latter, the best way is to follow the modern German practice, and discontinue the use of the terms altogether.

Generality of statutes

A statute is a general rule. A resolution by the legislature that a town shall pay one hundred dollars to Timothy Coggan is not a statute. This mark of generality which distinguishes a statute from other legislative acts does not seem to establish a very important distinction; both the statute and the resolution or other particular enactment emanate from the same authority, and both alike are binding on the courts. In a suit by Coggan against the town for not paying the one hundred dollars, or by the town against its treasurer's bondsmen for paying it without authority, the resolution would be as binding on the court as if it had been a statute which concerned every citizen. The difference between statutes and other legislative acts, though of little importance practically, is, however, of consequence in Jurisprudence, for Jurisprudence is a systematic and scientific arrangement of general rules; isolated particular commands are ordinarily no proper subjects for it.

The generality necessary in order that a legislative enactment be recognized as a statute, may come either from its applying to a whole community or class, or per-

[1] 2 Jur. (4th ed.) 530.

haps from its applying as a permanent (though not necessarily perpetual) rule to the conduct of an individual; for instance, an enactment that A. should never pay any taxes would perhaps be properly called a statute. There are some sensible remarks on the subject in Mr. Hammond's note to the first volume of Blackstone's Commentaries,[1] but it seems a trifling matter on which to spend much thought.

Foreign statutes

It is only the Acts of the legislative organs of a court's own State that come under the head of statutes as sources of Law for such courts. The Law of a State may direct that in certain contingencies the statutes of foreign States shall be taken account of by its courts, but such statutes are no more sources of the Law of the State than are the provisions of a contract or will which may be brought in question.[2]

Enactment of statutes

What is necessary for a statute to have power as a source of law? It must, of course, be passed by the legislative body, but, beyond this, is any publication required? The practice in the matter greatly varies.

Civil Law

In the republican period of Roman history the word *"promulgare"* meant to bring forward a project of a law; later it seems to have been used in the sense of issuing a law.[3] During the republic, no publication apart from

[1] P. 126, note 15.

[2] "Where foreign statutes are cited as authorities, as is done frequently, for instance, by Swiss courts with regard to German statutes, the foreign law is treated not as a statute but as 'written reason,' just as the opinions of an author might be cited." Eugen Ehrlich, Freie Rechtsfindung, Judicial Freedom of Decision, Ch. I, § 9. Transl. in Science of Legal Method, p. 59. (Modern Legal Philosophy Series.) The same sort of thing is occasionally done in the United States, when a court refers, for instance, to the terms of a Negotiable Instrument Law enacted in another State.

[3] Cicero, Phil. I, 10; V, 3; Livy, III, 9; Festus, De signific. verb. (ed. Müller), p. 224.

the passage of a statute appears to have been required as a condition precedent to its going into effect. Under the Empire, the Emperor had both the legislative and executive power; but in addition to the expression of his will as legislator, there does not seem to have been any further step necessary to be taken by him as an executive officer to make a statute a valid one. I am aware of no theory in the Roman Law that any "publication" in the sense of the modern Civilians was necessary to make a statute operative.[1]

According to the theory which now prevails generally on the Continent of Europe, four things are necessary in order for a statute to become a source of Law. It must be (1) passed by the legislature, (2) declared to be a law by a proper document, (3) ordered to be published, and (4) published. The first of these acts is performed by the legislative department of the Government, and the other three by the executive department. The name commonly used to indicate the performance of the second and third acts in France and in those countries which have taken their modern Jurisprudence from France is *promulgation;* in Germany it has usually been called *Ausfertigung.*

The distinction between promulgation and publication has been well put thus: *"On a quelquefois consideré ces deux termes comme synonymes; leur signification est cependant loin d'être identique. La promulgation est l'acte par lequel le roi en sa qualité de chef du pouvoir executif, atteste au corps social l'existence de la loi et en ordonne l'exécution; la publication, au contraire, est le mode de publicité à l'aide duquel la loi est portée a la*

[1] Krüger, Geschichte der Quellen, § 33, pp. 266, 267.

connaissance des citoyens." The distinction, however, seems often to be disregarded, and promulgation to be used as including publication.[1]

In some of the Continental countries, the chief executive officer has no part in legislation. This is the case with the Emperor of Germany and the President of the French Republic. In such countries he has no concern with the first of the acts mentioned; but generally in the monarchical countries of Europe he takes part in legislation and therefore shares in the performance of the first act. What he does as legislator is called "sanctioning," to distinguish it from the promulgation which is his act as administrator. Thus in the Constitutional Charter of the Bourbons on their return, in 1814, it was provided: "*Le Roi seul sanctionne et promulgue les lois,*" while in the Constitution of the French Republic for 1848 we read: "*Le Président de la République promulgue les lois au nom du peuple français.*"

A corollary from the doctrine of the need of promulgation and publication arises from the promulgation being made known in different places and at different times. The Code Napoléon,[2] for instance, provides as follows: "*Les lois sont exécutoires dans tout le territoire français, en vertu de la promulgation qui en est faite par l'Empereur. Elles seront exécutées dans chaque partie de l'Empire du moment où la promulgation en pourra être connue. La promulgation faite par l'Empereur sera réputée connue dans le département où siégera le gouvernement, un jour après celui de la promulgation; et, dans chacun des autres*

[1] See 1 Aubry et Rau, Cours de droit, § 26; 1 Planiol, Traité élémentaire, § 173.

[2] Art. 1.

départements, après l'expiration du même délai, augmenté d'autant de jours qu'il y aura de fois dix myriamètres entre la ville où la promulgation en aura été faite et le chef-lieu de chaque département"; and, save by the changes called for by successive revolutions or restorations, the Law has so remained, except so far as it is modified by an ordinance of the year 1816, which provides that the promulgation of laws shall result from their insertion in the *Bulletin des Lois*,[1] and that the promulgation shall be considered known in the Capital, in accordance with the Code, the day after the *Bulletin des Lois* is received from the government printer by the Ministry of Justice, the time in the departments being calculated from this according to the Code.

The fact of a statute going into effect in different parts of a country on different days would seem likely to produce difficult questions of the same kind as those which arise in the Conflict of Laws; in the case of the latter there being a conflict between the laws of different places, and in the case of the former a conflict between the laws of different times. Thus, suppose two Frenchmen, the *chefs-lieux* of whose departments are one ten, and the other thirty, myriametres from Paris should make a contract on September 20 by telegraph, and that on September 17 the *Bulletin des Lois*, containing a statute which affects the contract, has been received at the Ministry of Justice, —does the statute govern the contract?

The provision shows a striking difference between the French and the English mind. A Frenchman says a man cannot know the law until he has heard or seen it; it is

[1] The *Journal Officiel* was substituted for the *Bulletin des Lois* by decree of Nov. 5, 1870.

unjust to hold a man bound by a statute which he could not know; the further a man lives from the seat of Government the longer will it be before the news of the making of a statute reaches him; and not to have a provision like that of the Code Napoléon would be the greatest injustice. An Englishman would be likely to say: Who reads the *Bulletin des Lois?* If it contains a statute which is of great importance, the whole country will know that such a statute has been passed by the legislature long before it is promulgated. If the statute is not one that has excited public interest, the arrival of the *Bulletin des Lois* at the *chef-lieu* of a department is one of the most insignificant factors in the general knowledge. Is it immediately known by one in a thousand or one in twenty thousand of the inhabitants? It is foolish to worry about one or more grains of sand in such a heap of ignorance. Does any man know all the Law governing his actions? It is a serious evil to complicate the Law, and offer tempting opportunities for litigation by making a statute applicable to some citizens on one day and to other citizens on another.

The Scotch Statute of 1581, *c.* 128, recited "that oftentimes doubtes and questions arisis, touching the Proclamation of the Actes of Parliament, and publication thereof: It being sumtime alledged to be the lieges, that they are not bound to observe and keepe the samin as lawes, nor incur ony paines conteined therein, quhill the same be proclamed at the mercat croces of the head Burrowes of all Schires," and then proceeded to enact that all acts and statutes of Parliament "sall be published and proclamed at the mercat-croce of Edinburgh onely, Quhilk publication . . . to be als valiable and sufficient as the samin

were published at the head burrowes of the haill Schires within this Realme. . . . The haill Lieges to be bounden and astricted to the obedience of the saidis Actes as Lawes, fourtie dayes, after the publication of the samin, at the said mercat-croce of Edinburgh, being by-past." [1] Since the Union there have, of course, been no Scottish Parliaments.

Enactment of statutes: English Law

In England the King assents to the passing of Acts of Parliament as one of the members of the legislature; to use the nomenclature common on the European continent, he "sanctions" them; but no "publication" is required for them. Those who are satisfied with the reason given by Blackstone can accept it; it is, he says, "because every man in England is, in judgment of law, party to the making of an act of parliament, being present thereat by his representatives." [2]

The reason indeed is much older than Blackstone. In early times the laws of each Parliament were transcribed on parchment and sent by the King's writ to the sheriff of every county, to be there proclaimed. Lord Coke [3] gives copies of a writ in the tenth year of Edward III., and another in the first year of Richard II., and says that the like writs continued until the beginning of the reign of Henry VII. But in the case of *Rex* v. *Bishop of Chichester*,[4] which was *præmunire* on a statute, upon Serjeant Cavendish, of counsel with the defendant, objecting that the statute had never been published in the county, Sir Robert Thorpe, C. J., said: "Although the proclama-

[1] See 1 Erskine, Inst. Bk. 1, tit. 1, § 37.
[2] 1 Bl. Com. 185. See Austin's sneer, 2 Jur. (4th ed.) 542, 543.
[3] 4th Inst. 26.
[4] Year Book, 39 Edw. III. 7 (1365).

tion be not made in the county, every one is bound to know it [the statute] as soon as it is made in Parliament; for as soon as the Parliament hath concluded anything, the Law intends that every person hath notice thereof, for the Parliament represents the body of the whole realm, and, therefore, it is not requisite that any proclamation be made, seeing the statute took effect before."

The distinction in England between public statutes and private statutes is well known. The courts take judicial cognizance of public statutes, and may consult any means of information they please;[1] and the reason which Dwarris gives may well be the true one, namely, the impossibility of proving important ancient public statutes by anything that would be legal evidence in cases of a private nature. In fact, there are several early English statutes which do not appear on the rolls of Parliament, and of which there is no official transcript or exemplification, and which yet have been constantly recognized as binding.[2]

The existence of private statutes must be proved in England by record evidence.

Enactment of statutes in the United States

In the United States the same doctrine as to public and private statutes would seem, at first sight, to have been laid down. Thus the Supreme Court of the United States in 1868 [3] called attention to the impropriety of speaking of "extrinsic evidence" in reference to public statutes, and ruled "that whenever a question arises in a court of law of the existence of a statute, or of the time

[1] 2 Dwarris, Statutes (2nd ed.), 465-473.
[2] See Hale Hist. Com. Law, 12-15; Cooper, Public Records, 163-184; cf. *Rex* v. *Jefferies*, 1 Str. 446.
[3] *Gardner* v. *The Collector*, 6 Wall. 499.

when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such a question; always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule."

But the meaning of the words "always seeking for that which in its nature is most appropriate" is ambiguous. If they merely mean that the court is morally bound to weigh the information like reasonable men, and give credence to that which ought to convince such a man, the proposition, though somewhat unnecessary, is innocuous and suggests nothing new. But if they mean that the court, in reaching its conclusion, is bound by legal rules to consider certain facts to the exclusion of other facts, then a novel element is introduced in the mode of conveying knowledge of the existence of public statutes to the courts.

And this second meaning seems to be that which has generally, if not universally, prevailed in this country. It is true that the Supreme Court of California, in 1852,[1] recognized the power of the court to seek information from any sources as to the existence of a public statute, but this was disapproved and overruled by the same court fourteen years later,[2] and there appears to be no other like decision in this country. It seems to be generally conceded that with us the existence of both public and private statutes must be established, just as the existence of a private statute must be established in England, by

[1] *Fowler* v. *Peirce*, 2 Cal. 165.
[2] *Sherman* v. *Story*, 30 Cal. 253.

record evidence; and the only matter ordinarily discussed is what records are admissible and controlling. The principal question which has come up is how far the enrolled bill can be controlled by the journals of the Houses.[1]

Interpretation of statutes

It may be urged that if the Law of a society be the body of rules applied by its courts, then statutes should be considered as being part of the Law itself, and not merely as being a source of the Law; that they are rules to be applied by the courts directly, and should not be regarded merely as fountains from which the courts derive their own rules. Such a view is very common in the books. And if statutes interpreted themselves, this would be true; but statutes do not interpret themselves; their meaning is declared by the courts, and *it is with the meaning declared by the courts, and with no other meaning, that they are imposed upon the community as Law.* True though it be, that, of all the sources from which the courts draw the Law, statutes are the most stringent and precise, yet the power of the judges over the statutes is very great; and this not only in countries of the Common Law, but also on the Continent of Europe, where the office of judge is less highly esteemed.

A statute is the expressed will of the legislative organ of a society; but until the dealers in psychic forces succeed in making of thought transference a working controllable force (and the psychic transference of the thought of an artificial body must stagger the most advanced of the ghost hunters), the will of the legislature has to be expressed by words, spoken or written; that is, by causing sounds to be made, or by causing black marks to be im-

[1] On this question see *Field* v. *Clark*, 143 U. S. 649 (1891).

pressed on white paper. "Only in an improper sense can we speak of a communication or transfer of thought; the thought itself is not transferred, but the word gives only the impulse and the possibility of a *like process of thought*, the reproduction of a like spiritual movement in the mind of the hearer, as in that of the speaker. . . . The principle of communication by words is wholly the same as of that by signs; one means is complete, the other incomplete, but they *work* in the same way; neither gives the thought itself, however exact the expression of it may be; it gives only the invitation and the point of departure for it to *reconstruct* itself." [1]

A judge puts before himself the printed page of the statute book; it is mirrored on the retina of his eye and from this impression he has to reproduce the thought of the law-giving body. The process is far from being merely mechanical; it is obvious how the character of the judge and the cast of his mind must affect the operation, and what a different shape the thought when reproduced in the mind of the judge may have from that which it bore in the mind of the law-giver. This is true even if the function of the judge be deemed only that of attempting to reproduce in his own mind the thought of the law-giver; but as we shall see in a moment, a judge, starting from the words of a statute, is often led to results which he applies as if they had been the thought of the legislature, while yet he does not believe, and has no reason to believe, that his present thought is the same as any thought which the legislature really had.

The Judge has the last word

As between the legislative and judicial organs of a society, it is the judicial which has the last say as to

[1] 2 Ihering, Geist des röm. Rechts (4th ed.), § 44, pp. 445, 446.

what is and what is not Law in a community. To quote a third time the words of Bishop Hoadly: "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." [1] And this is now recognized even in Germany: "A judicial decree is as much as a statute the act of the law-making power of the State. Like the legislative determination of the Law, so the judicial determinations are filled with the power and compulsive force of the State. A judgment of a court has the force of Law; it carries the whole force of the Law with it. A judicial determination of Law has, in the region belonging to it, the power of a fixed, legally binding order, more fully, with stronger, more direct working, than the statutory, merely abstract statements of the Law. The power of Law is stronger than the power of Legislation, a legal judgment maintains itself if it contradicts a statute. Not by its legislative, but by its judicial determinations, the law-regulating power of the State speaks its last word." [2]

Legislative intent frequently non-existent

But the matter does not rest here. A fundamental misconception prevails, and pervades all the books as to the dealing of the courts with statutes. Interpretation is generally spoken of as if its chief function was to discover what the meaning of the Legislature really was. But when a Legislature has had a real intention, one way or another, on a point, it is not once in a hundred times that any doubt arises as to what its intention was. If that were all that a judge had to do with a statute, interpreta-

[1] See p. 125, *ante*.
[2] Bülow, Gesetz und Richteramt, 6, 7.

tion of statutes, instead of being one of the most difficult of a judge's duties, would be extremely easy. The fact is that the difficulties of so-called interpretation arise when the Legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine what the Legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present. If there are any lawyers among those who honor me with their attention, let them consider any dozen cases of the interpretation of statutes, as they have occurred consecutively in their reading or practice, and they will, I venture to say, find that in almost all of them it is probable, and that in most of them it is perfectly evident, that the makers of the statutes had no real intention, one way or another, on the point in question; that if they had, they would have made their meaning clear; and that when the judges are professing to declare what the Legislature meant, they are in truth, themselves legislating to fill up *casus omissi*.[1]

Rules of construction for deeds and wills

In statutes any rules of interpretation ever suggested have been of the most general character, and the same

[1] "The intent of the Legislature is sometimes little more than a useful legal fiction, save as it describes in a general way certain outstanding purposes which no one disputes, but which are frequently of little aid in dealing with the precise points presented in litigation. Moreover, legislative ambiguity may at times not be wholly unintentional. It is not to be forgotten that important legislation sometimes shows the effect of compromises which have been induced by exigencies in its progress, and phrases with a convenient vagueness are referred to the courts for appropriate definition, each group interested in the measure claiming that the language adopted embodies its views." Mr. Justice Hughes, in 1 Mass. Law Quart. (No. 2), pp. 13, 15. On the point that the legislature sometimes deliberately leaves its intention doubtful, see Sir Courtenay Ilbert, Mechanics of Law Making, pp. 19-23.

is true of legal writings generally; but in two classes of instruments, deeds of real estate and wills, particularly the latter, the limited character of provisions, probable or possible, causes language of a similar nature to be often employed, and thus gives opportunity for the establishment of rules of construction.

The making of these rules was at one time carried too far in the Common Law; they were often pushed into such refinement that they lost their practical value, and, what is more, they sometimes attributed to a testator the very opposite of the intention which he was likely to have had, as with the rule that the words "dying without issue" meant an indefinite failure of issue.[1] Against this disposition there has of late years been a decided reaction on the part of the courts. Judges have spoken with contempt of the mass of authorities collected in Mr. Jarman's bulky treatise on Wills, have declared that the mode of dealing with one man's blunder is no guide as to the mode of dealing with another man's blunder, and especially have said that each will is to be determined according to the intention of the testator, and that the judicial mind should apply itself directly to that problem, and not trouble itself with rules of construction.

And yet it may be doubted whether the pendulum of judicial theory and practice has not swung too far in this direction. It undoubtedly sounds very prettily to say that the judge should carry out the intention of the testator. Doubtless he should; but some judges, I venture to think, have been unduly influenced by taking a fiction as if it were a fact. As is said above with reference to

[1] *I.e.* a failure of descendants at any time, even long after the death of the ancestor.

the legislature, when a testator has a real intention, it is not once in a hundred times that he fails to make his meaning clear. For instance, if a testator should have present to his mind the question whether a legacy to his wife was to be in lieu of dower, it is almost incredible that he should not make what he wished plain. When the judges say they are interpreting the intention of a testator, what they are doing, ninety-nine times out of a hundred, is deciding what shall be done with his property on contingencies which he did not have in contemplation. Now for cases in which a testator has not provided, it may be well that there should be fixed rules, as there are for descent in cases of intestacy.

It would seem that the first question a judge ought to ask with regard to a disputed point under a will should be: "Does the will show that the testator had considered this point and had any actual opinion upon it?" If this question be answered in the affirmative, then there is no doubt that the solution of the testator's intention must be sought in the will. But in the vast majority of cases this is not what has happened. What the judges have to do is, in truth, to say what shall be done where the testator has had no real intention; the practice of modern judges to which I have alluded is to guess from the language used in the particular will what the testator would have meant had he had any meaning, which he had not; the older practice was to look for an established rule of construction. In the modern practice the reasoning is often of the most inconclusive character, but the judges have got to decide the case somehow, and having turned their backs upon rules of construction, have to catch at the slightest straw with which to frame a guess.

Take, for instance, the word "heirs," so often, indeed almost always, put into a will to fill out the final limitations. There are jurisdictions where no counsel dares to advise on what is to be done with property that is bequeathed to "heirs." The judging of each will by itself leads necessarily to the bringing up of each will to be judged, and is responsible for a great deal of family dissension and litigation.

That the unsatisfactory character of many of the rules for the interpretation of wills is largely responsible for their present unpopularity with the courts cannot be denied; but I only wish to point out that what many judges are setting up against the rules of construction of wills is, not their opinion of what testators really intended, but their guess at what the testators would have intended if they had thought of the point in question, which they did not, a guess resting often upon the most trifling balance of considerations.

Methods of interpretation of statutes

The process by which a judge (or indeed any person, lawyer or layman, who has occasion to search for the meaning of a statute) constructs from the words of a statute-book a meaning which he either believes to be that of the Legislature, or which he proposes to attribute to it, is called by us "Interpretation," by the Germans "*Auslegung.*"[1]

Interpretation is of two kinds, grammatical and logical. (Savigny's division into grammatical, logical, historical, and systematic[2] has not been generally followed.) Grammatical interpretation is the application to a statute of

[1] 1 Savigny, Heut. röm. Recht, § 32.
[2] *Id.* § 33.

the laws of speech; logical interpretation calls for the comparison of the statute with other statutes and with the whole system of Law, and for the consideration of the time and circumstances in which the statute was passed.[1]

It is sometimes said that the rules of interpretation applicable to statutes are in no way different from those applicable to other writings, and this, in a sense, is true, since statutes, like all writings, are intended to express in language the thoughts of human minds; but the statement needs some qualification, for a difference in the application of the rules for interpreting different writings must arise from the greater precision, definiteness, and accuracy with which a writer is speaking or purporting to speak; and so the rules of interpretation for an Act of Parliament may be very unsuitable to the Mécanique Céleste of La Place, or the Apocalypse of St. John, or the Frogs of Aristophanes.[2]

The dependence of the statutes upon the will of the

[1] The so-called "legal interpretation," as has been often remarked, is no interpretation at all. It contains two parts, authentic and usual interpretation. Authentic interpretation is defining the meaning of an earlier statute by a later. Usual interpretation is the attaching of a meaning to a statute by usage, or, with us, more commonly, by a judicial precedent. A judge, in adopting a meaning for a statute in accordance with its authentic or usual interpretation, is not ascertaining its meaning from the statute itself, but is adopting a meaning for it from some other authority.

[2] It may, by the way, be observed that the most remarkable results of attempting to apply to works of one class rules of interpretation adapted for those of a totally different class have been reached in the domain of theology. To interpret the poems and prophecies of Scripture as if they were the market ordinances of the City of New York, to deal with the fourth verse of the one hundred and tenth Psalm of David, as if it were the fourth section of the one hundred and tenth chapter of the 17 & 18 Victoria, has produced marvels of ingenuity, but of ingenuity wofully misplaced. On the other hand the statement often met with that "the Bible must be interpreted like any other book" is based upon the fallacy that all books are to be interpreted alike, and begs the question, "To what class of books does the Bible belong?"

judges for their effect is indicated by the expression often used, that interpretation is an art and not a science; that is, that the meaning is derived from the words according to the feeling of the judges, and not by any exact and foreknowable processes of reasoning. Undoubtedly rules for the interpretation of statutes have been sometimes laid down, but their generality shows plainly how much is left to the opinion and judgment of the court. Thus Savigny's three aids to interpretation are: *First*, the consideration of the law as a whole; *Second*, the consideration of the reasons of the statutes; *Third*, the excellence of the result reached by a particular interpretation.[1] But their lack of precision he himself notes, saying that the application of the second rule calls for much reserve, and that the third must be kept within the narrowest limits.[2]

Rules of the Common Law

The rules of the Common Law, as laid down in *Heydon's Case*,[3] are not more precise. "For the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the Common Law) four things are to be discerned and considered: 1st. What was the Common Law before the making of the Act. 2nd. What was the mischief and defect for which the Common Law did not provide. 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth. And 4th. The true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inven-

[1] 1 Savigny, Heut. röm. Recht, §§ 33-37.
[2] See 1 Windscheid. Pand. § 21.
[3] 3 Co. 7 (1584).

tions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*."

Of other rules of the Common Law, the principal seems to be that penal statutes are to be construed strictly, but this merely gives a turn to the judicial mind, and furnishes no clear rule where it shall go.

Yet some bounds on the power of interpretation there must be. How far can a judge go? Windscheid answers the question thus: "However clearly interpretation may recognize the real thought of the law-giver, it can recognize it as establishing Law only under the supposition that in the statement given by the legislator, an expression, if not a complete expression, of his real thought can be found. Therefore its principal, if not sole, activity will consist in quantitative extension and limitation of the Statute." [1] Suppose, for instance, in a country where the Common Law prevails, that a statute is passed providing that any person setting fire to a house shall be liable to a certain punishment, no court would so construe that statute as to include children under seven years of age, and yet the legislature has not excluded them, it never thought about them. The judge is clear that it would have excluded them had it thought about the matter, and so he attributes to it the actual intention to exclude them.

Plenty of instances where statutes have been so interpreted can be found at the Common Law; the instance which I have given was of a limiting interpretation; here is an instance of an extensive one. Originally the right

[1] 1 Windscheid, Pand. § 22.

to recover for a wrong did not generally survive the death of the person entitled to recover, but the St. 4 Edw. III. (1330), *c.* 7, reciting that "in times past executors have not had actions for a trespass done to their testators, as of the goods and chattels of the same testators carried away in their life," enacted "that the executors in such cases shall have an action against the trespassers." Under this statute the English courts have held that the survival is not confined to cases where executors sue trespassers who have carried away the goods of testators in the lifetime of the latter, but extends to suits by administrators; to actions for the misappropriation of goods; to an action against a sheriff for making a false return on legal process; to an action for wrongful disposition by an executor, or for removing goods taken on legal process before the testator, who was the debtor's landlord, had been paid a year's rent.[1] And the Court of King's Bench were equally divided on the question whether it did not extend to an action against a bailiff for allowing the escape of one arrested on preliminary legal process.[2]

But, on the other hand, it has been said over and over again, both in the Civil and in the Common Law, that the courts must not undertake to make the legislature say what it has not said. Is not the true rule that the judge should give to the words of a statute the meaning which they would have had, *if he had used them himself*, unless there be something in the circumstances which makes him believe that such was *not* the *actual* meaning of the legislature?

Interpretation of the Twelve Tables

The most remarkable instance of the growth of Law

[1] 1 Wms. Saund. 217.
[2] See *Le Mason* v. *Dixon*, W. Jones, 173.

by interpretation of statutes is to be found in the Roman Law. The Twelve Tables [1] formed in theory the foundation of the Law, but they were so extended, limited, and altered by *interpretatio*, that they retained but little of their original force. "A formal setting aside of the Law of the Twelve Tables (as statute) by an altering customary law must have appeared inconceivable to a Roman of that time. Down to the end of the Roman legal development, down to the Corpus Juris Civilis of Justinian, that is, for a whole thousand years, when finally, for already a long period, no stone of the Law of the Twelve Tables stood upon another, yet in theory the legal authority of the Twelve Tables was still the source of the collected Roman Law. This corresponded to the conservative, and in all legal matters, far-seeing judgment of the Romans. No letter of the Twelve Tables was to be altered, and yet it was possible to read a new spirit into the old letters. After the completion of the legislation of the Twelve Tables, the questions dealt with were of an *'interpretatio'* which developed, yes, changed the Law, while it left the letters of the Law undisturbed." [2]

Power of courts over statutes

Perhaps the best way to illustrate how much statutes are at the mercy of the courts is to take some one statute, and to see how different courts have attributed to the legislature entirely different meanings, so that the people of different communities are living under totally different Law, although there be the same enactments on their respective statute-books. Let us select the Statute of Frauds, an Act which requires certain transactions to be in writ-

[1] See p. 31, *ante*.
[2] Sohm, Inst. § 11. See 2 Ihering, Geist des röm. Rechts, 461 *et seq.*

ing, and of this only one section, the fourth, which has generally been reënacted in much the same terms in the several United States.

The section is as follows: "No action shall be brought (1) whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or (2) whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person; or (3) to charge any person upon any agreement made upon consideration of marriage; or (4) upon any contract or sale of land, tenements, or hereditaments, or any interest in or concerning them; or (5) upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized." [1]

In some jurisdictions the courts interpret "a special promise to answer for the debt, default, or miscarriage of another person" as including a promise by A. to B. to indemnify the latter for becoming surety to C. In other jurisdictions the courts put the contrary construction on the provision. Again, some courts interpret this clause as covering an indorsement of a note before delivery by one not a party thereto. Others hold the other way. Some courts again, interpret "land" as including a crop of growing grass; others do not. Some courts, further, interpret contracts "not to be performed within a year" as contracts either side of which cannot be performed in a year, while others construe the words as meaning contracts

[1] 29 Car. II, c. 3, sec. 4.

of which the part to be performed by the defendant cannot be performed within a year; and, so again, a memorandum in writing of an agreement is interpreted by some courts as meaning a memorandum containing not merely the promise but the consideration, while others interpret it as meaning a memorandum containing the promise only.[1]

One more case to illustrate the power of the courts. In Maine and Massachusetts there is a statute requiring three competent witnesses to a will, and providing that any legacy to a witness shall be void. In each State arose a case where a will containing a gift to a man had been witnessed by his wife. The Maine Supreme Judicial Court interpreted the statute extensively, and held the legacy bad and the will good, while the Supreme Judicial Court in Massachusetts, interpreting the statute strictly, held the whole will bad.[2]

When amendment is difficult, interpretation is free

One thing, however, is clear,—when legislation is rare, and can be procured with difficulty, the judges will allow themselves a freedom in interpreting statutes which they will not exercise when any ambiguous or defective statute can be easily remodelled by the Legislature. The history of the Law shows this to be so, and it is perhaps well that it should be so; but for this reason the practice of the courts, when legislation is difficult, will form an imperfect index of what is or ought to be their practice when legislation is readily attainable.

Perhaps the most striking instance in modern times

[1] Within a single jurisdiction, *e.g.* England, this section of the Statute of Frauds, and many other statutory enactments, "have been the subject of so much judicial interpretation as to derive nearly all their real significance from the sense put upon them by the Courts." Dicey, Law & Opinion, 2d ed., p. 362.

[2] *Winslow* v. *Kimball*, 25 Maine, 493; *Sullivan* v. *Sullivan*, 106 Mass. 474.

of the freedom of interpretation exercised by a court to modify legislation which could be altered only with great difficulty,—indeed the last modern instance of a fiction which, in its barefaced character, seems a late survival of the practice of the early Roman prætors [1]—is the doctrine of the Supreme Court of the United States on the right of corporations to sue in the Federal Courts. Had the question arisen under an Act of Congress, the Court would have left the difficulty which was felt to be dealt with by Congress, and not sought to mend an inconvenient state of affairs by a fiction; but the question arose under the Constitution, which could be altered only with great trouble and elaborate machinery. The action of the Supreme Court furnishes an excellent example of the extent to which courts will go when they despair of the amendment of defective legislation.

The history of the matter is this: The Constitution provides that the judicial power of the United States "shall extend . . . to controversies between citizens of different States," and under the statutes passed to give effect to this provision, it has been, from early times, uniformly held that if there are citizens of the same State on opposite sides of a controversy, the jurisdiction of the Federal courts on the ground of citizenship is ousted.[2] And it has also been held that a corporation is not a citizen of any State so as to be entitled to the privileges of citizenship.[3]

[1] See p. 31, *ante*.

[2] *Strawbridge* v. *Curtiss*, 3 Cr. 267 (1806); *Smyth* v. *Lyon*, 133 U. S. 315 (1890).

[3] *Bank of Augusta* v. *Earle*, 13 Pet. 519 (1839); *Paul* v. *Virginia*, 8 Wall. 168 (1868).

In *Hope Insurance Co.* v. *Boardman,*[1] it was held that a plaintiff described as a company incorporated by a State could not sue the citizens of another State under the clause in question, the plaintiff not being a citizen of any State. But this was followed in the same year by *Bank of the United States* v. *Deveaux,*[2] in which the Supreme Court decided that a petition by a corporation established by the United States which averred that the petitioners were citizens of Pennsylvania could be maintained in a Federal Court against citizens of Georgia. That is, the Court extended the meaning of citizen of a State in this clause to a corporation all of whose members were citizens of that State.

This was going a good way, but the court has gone much further, and now holds that the stockholders of a corporation will, for the purposes of jurisdiction, be conclusively presumed to be all citizens of that State by which the corporation was established, no evidence to the contrary being admissible.

This ruling leads to most extraordinary results. The Federal courts take cognizance of a suit by a stockholder who is a citizen, say, of Kentucky, against the corporation in which he owns stock, which has been incorporated, say, by Ohio. Since he is a stockholder of an Ohio corporation, the court conclusively presumes that he is a citizen of Ohio, but if he were a citizen of Ohio, he could not sue an Ohio corporation in the Federal courts. Therefore the court considers that he is and he is not at the same time a citizen of Ohio, and it would have no jurisdiction unless it considered that he both was and was not

[1] 5 Cr. 57 (1809).
[2] *Ib.* 61.

at the same time a citizen both of Ohio and Kentucky.[1]

Interpretation of compilations

The special character of a particular body of legislation will sometimes call for special rules of interpretation. The most marked instance is to be found in the legislation of Justinian: the main parts of this, the Digest and the Code, are composed almost entirely of what was originally not legislation; the Code is made up mainly of rescripts and decrees by the Emperors in particular cases, while the Digest contains some such rescripts and decrees, but is composed chiefly of extracts from the writings of jurists. In fact, therefore, to interpret rightly a passage in the *Corpus Juris*, it is necessary first to consider what it meant as used by its original author, and then how that meaning has been modified by reason of the passage being incorporated into the *Corpus*, where it has to be considered in connection with other passages which have also been appropriated by Justinian.[2]

It is obvious that in many ways a body of legislation thus made up must have its own rules of interpretation. For instance, when a statute declares that written instruments shall have a certain effect if made in a certain way, the *argumentum a contrario*, that instruments not so made will not have that effect, is much stronger than in the case of a judgment in which it has been declared that an instrument so made shall have the effect in question.

Whenever a code of laws is published and put forth as one new thing, it is to be interpreted very differently from a collection of statutes which is merely a revision and orderly arrangement of statutes already existing. Of this

[1] *Dodge* v. *Woolsey*, 18 How. 331 (1855).

[2] 1 Windscheid, Pand. § 25; 1 Savigny, Heut. röm. Recht, §§ 42-46.

latter sort are many, though not all, of the collections of statutes in the several States of the Union, and in them the original dates and context of the separate parts will influence the mode in which the courts construe their provisions. Any one familiar with the revisions of the statutes in any of the United States has had frequent proof of this.[1]

Legislative interpretation

The legislature can repeal a statute; it can pass a new statute saying what shall be the meaning of an old statute (although the new statute must be in turn interpreted by the courts), and it can, in the absence of any Constitutional prohibition, even make the new statute retroactive; this is simply an instance of its law-making power; but how far have legislatures undertaken to reserve to themselves the power, apart from new legislation, of interpreting statutes, a power which is ordinarily confided to the judicial organs of a community?

Justinian forbade any commentaries to be written upon the product of his legislation and added: *"Si quid vero ambiguum fuerit visum, hoc ad imperiale culmen per judices referatur et ex auctoritate Augusta manifestetur, cui soli concessum est leges et condere et interpretari."*[2] If this provision was ever of any practical force, it forms no part of the Roman Law as received in the modern world.[3]

So far as Sovereigns during the Middle Ages inter-

[1] See an article by H. W. Chaplin on Statutory Revision, 3 Harvard Law Rev. 73.

[2] "But if anything shall seem doubtful, let it be referred by the judges to the Imperial Throne and it shall be made plain by Imperial authority, to which alone is given the right both to establish and to interpret laws." Cod. I, 17, 2, 21. See also Cod. I, 14, 12.

[3] 1 Windscheid, Pand. § 25; 1 Savigny, Heut. röm. Recht, § 49.

fered with the decisions of the courts it would seem to have been as supreme judges rather than as legislators interpreting their own statutes.[1]

In countries where the English Common Law prevails, no references have ever been made by judicial tribunals to legislatures to furnish them with interpretations of statutes.[2] In England and in some of the United States, legislative bodies can ask the opinion of the judges on the interpretation of statutes as on any other questions of Law, remaining free to follow or not to follow such opinion, as they see fit, but the reverse practice does not exist.[3]

The Prussian Code at one time directed the judges to submit their doubts on the interpretation of statutes to a legislative commission,[4] but this has now been done away with, and the judges have full and exclusive powers of interpretation.

It is in France that the idea of reserving to the legislature the power of interpretation has been most developed. Its history is interesting, but it will be sufficient to say

[1] See account of Henry II as judge, 1 Pollock & Maitland, Hist. of Eng. Law, 2d ed. 156-160.

[2] But see Y. B. 40 Edw. 3, p. 34. Thorpe, C. J., and Green, J., on a disputed question as to the construction of recent statute about amending pleadings, went "to the Council, and there were 24 bishops and earls, and we asked of them who made the statute, if the record could be amended." In the middle ages, however, the functions of Parliament as a legislature and as a court were not clearly distinguished, so that such applications might be regarded as being made to a higher court. See also McIlwain, High Court of Parliament, 115, 326; Pike, Constitutional History of the House of Lords, pp. 50 *et seq.;* 2 State Trials, Case of the Postnati, p. 675.

[3] *Attorney-General* v. *Attorney-General,* [1912] A. C. 571; and see J. B. Thayer, Legal Essays, 42.

[4] 2 Austin, Jur. (4th ed.), 659, 681; Prussian Landrecht, 1794, §§ 47, 48.

here that, at present, the legislature is not charged with this judicial function.[1]

Desuetude of statutes

A statute once enacted continues to be a source of law until it comes to an end. Sometimes a statute itself provides that it shall be in force for only a limited time. But the usual way in which a statute ceases to be a source of Law is its repeal by the legislature which enacted it or by a legislature of higher powers. A legislature cannot bind subsequent legislatures, and therefore cannot pass an irrepealable statute. This is true of a supreme legislative body having an unlimited power of enacting statutes, but to an inferior legislative body may be delegated the power of making ordinances once for all, and when it has made them, it may be *functum officio;* and from the circumstance that the legislatures of the several States in the United States are limited by the Constitution of the United States has arisen another interesting class of statutes which the legislatures that passed them cannot repeal. That has come about in this way. The Constitution of the United States prohibits a State from passing any law impairing the obligation of contracts, and the prohibition was interpreted in the Dartmouth College Case[2] to cover not only executory contracts, but also grants, and therefore statutes of a State which are grants cannot be repealed by a subsequent legislature of that State. The statutes which have in this way become irrepealable are mainly those which have granted certain privileges, such as exemption from taxation, to corporations.

[1] 1 Laurent, Principes du droit civil, §§ 254-256; 1 Planiol, Traité élémentaire, §§ 208-214.
[2] 4 Wheat. 518.

Civil Law

The Civilians base their doctrine as to abrogation by desuetude upon a passage of the jurist Julianus, who flourished in the first half of the second century, which is taken up into the Digest.[1] *"Inveterata consuetudo pro lege non immerito custoditur, et hoc est ius quod dicitur moribus constitutum. Nam cum ipsæ leges nulla alia ex causa nos teneant quam quod judicio populi receptæ sunt, merito et ea, quæ sine ullo scripto populus probavit, tenuerunt omnes; nam quid interest suffragio populus voluntatem suam declaret an rebus ipsis et factis? Quare rectissime etiam illud receptum est, ut leges non solum suffragio legislatoris, sed etiam tacito consensu omnium per desuetudinem abrogentur";*[2] and there are other passages in the *Corpus Juris* which seem to be to the same effect.[3] On the other hand, a rescript of Constantine (A.D. 319), to be found in the Code, reads as follows: *"Consuetudinis ususque longævi non vilis auctoritas est, verum non usque adeo sui valitura momento, ut aut rationem vincat aut legem."* [4]

On the attempted reconcilement of these passages, and on the existence and extent of the doctrine that statutes may be abrogated by disuse, there is a whole literature.

[1] D. I, 3, 32, 1.

[2] "Long continued custom is not improperly regarded as equivalent to a statute, and what is pronounced to be established by usage is law. For since the statutes themselves are binding on us for no other reason than that they are accepted by the people, it is proper also that what the people have approved without any writing shall bind everyone; for what difference is there whether the people declares its will by a vote or by its very acts and deeds? Wherefore very rightly this also is held, that statutes may be abrogated not only by a vote of the legislator, but also by desuetude with the tacit consent of all."

[3] Inst. IV, 4, 7; Cod. I, 17, 1, 10; Cod. VI, 51, 1, 1.

[4] "Custom and long usage have no slight weight, but not so great that they will prevail of themselves, or overcome either reason or a statute." Cod. VIII, 52 (53), 2.

Placentinus[1] taught that statutes could no longer be abrogated by disuse. But he has found few followers among the civilians. Of the divers theories held as to Constantine's rescript by those who allow that statutes may be abrogated by desuetude, Guyet [2] enumerates fourteen of the "weightiest," besides his own.

One of these theories is that the doctrine of abrogation by desuetude should be confined to those statutes which provide what is to be done in transactions where the parties have expressed no will of their own (*Dispositivgesetze*), and ought not to be extended to statutes which positively forbid or order certain acts. Thus, a statute directing that, in the absence of agreement, six per cent shall be the legal rate of interest can be abrogated by disuse, but a statute forbidding that more than six per cent shall be taken, cannot.[3] But this limitation of the power of abrogation by desuetude to the case of *Dispositivgesetze* has not met with general approval.[4]

Abrogation by desuetude is not merely a doctrine of the schools, but has been applied in practice in modern times. Thus, the following case was decided in the Court of Appeals at Darmstadt in 1827. The defendant had alleged that the provision of the statute Law (the Land Law of the Upper County of Katzenelnbogen) in relation to the formalities of a will had undergone modification through

[1] In his gloss to Cod. VIII, 52 (53), 2, just quoted. See 2 Puchta, Gewonheitsrecht, 204.

[2] In an article on *Das particuläre Gewonheitsrecht*, in 35 Arch. für civ. Pr. 12, 23-25.

[3] Seuffert, 11 Arch. für civ. Pr. 357.

[4] See 2 Puchta, Gewonheitsrecht, 208, 209; Busch, 27 Arch. für civ. Pr. 197. On the question of desuetude, see also Windscheid, Pand. § 18; 2 Puchta, Gewonheitsrecht, 203-215; 1 Savigny, Heut. röm. Recht, § 25; *Id.* Beylage 2, in 1 Heut. röm. R., p. 420; Gesterding, 3 Arch. für civ. Pr. 259.

customary Law. When the question came before the Court of Appeals, that tribunal held that the defendant should be allowed to prove the superiority of the customary Law which derogated from the provisions of the Land Law, for that through usage a positive statute could be abrogated or modified, and that this was good even in reference to the formalities for making wills.[1]

The practical use of a formal doctrine allowing the abrogation of statutes by desuetude is likely to be greatly limited by the freedom which the courts permit themselves to exercise in interpretation. It is not as speedy or as simple a process to interpret a statute out of existence as to repeal it, but with time and patient skill it can often be done. And the desire not to seem to disturb ancient landmarks has often occasioned a resort to "interpretation" rather than to a repeal to get rid of the weight of a statute which has become burdensome. Particularly was this the case in Rome. Referring again to the passage from Sohm,[2] a formal repeal of the Law of the Twelve Tables by customary Law would have appeared inconceivable to a Roman, and when for a long period no stone of the Law of the Twelve Tables had stood upon another, still, in theory, that legislation was regarded as the source of the collected Roman Law.[3]

Another circumstance which affects the practical employment of the doctrine of desuetude is the comparative ease of obtaining new legislation; when the legislative organ of a community is with difficulty called into action,

[1] 9 Seuffert, Arch. Nr. 3; see also 40 Seuffert, Arch. Nr. 269.
[2] Cited p. 181, *ante*.
[3] But see Inst. IV, 4, 7, which seems to recognize that a provision of the Law of the Twelve Tables could be abrogated by desuetude.

the courts are pretty certain, whatever legal texts may say, to exercise the power of either interpreting statutes out of existence, or else of holding that they may be abrogated by desuetude. But when new legislation can be easily obtained, there is little occasion to apply the doctrine of desuetude.[1]

Many of the German Codes provide that no customary law shall prevail against them. But some of the German jurists go so far as to declare that an express provision in a statute that it should not be abrogated by any customary law would be null and only empty words.[2] Windscheid, while condemning this view, adopts one which leads to the same result. He says that if a statute denies derogatory power to customary law, that provision of the statute is valid, and that, as long as the statute is in force, it must prevail against customary law, but that, notwithstanding, the statute itself may be derogated from by customary law.[3]

In France, the prevailing opinion is that statutes cannot be abrogated by desuetude.[4]

In Scotland statutes may fall into desuetude.[5]

Desuetude of statutes: Common Law

The doctrine of the English Common Law is that a statute can be abrogated only by an express or implied repeal, that it cannot be done away with by any custom or usage, that it cannot fall into desuetude.

[1] See p. 183, *ante*.

[2] See Zoll, 13 Jahrb. f. Dogm. 416 (1874); Maurer, 14 Krit. Vierteljahrsschr. 49 (1872); Eisele, 69 Archiv. f. civ. Pr. 275 (1886); Wendt, 22 Jahrb. f. Dogm. 324 (1884).

[3] 1 Windscheid, Pand. (9th ed.) § 18, note 3. See Rümelin, 27 Jahrb. f. Dogm. 225 (1889); 1 Stobbe, Handbuch, § 23.

[4] 1 Aubry and Rau Cours de Droit, § 29. See 18 Merlin, Rep. "Usage," 255 *et seq.*; 7 Merlin, Quest. de Droit, "Société," § 1.

[5] Erskine, Principles (21st ed.) p. 7.

To the rule that a statute cannot fall into desuetude, Lord Coke seems to allege an exception. His words [1] are, "If a statute in the negative be declarative of the ancient law, that is, in affirmance of the common law, there as well as a man may prescribe or allege a custom against the common law, so a man may do against such a statute"; and Mr. Hargrave [2] approves the rule that one may prescribe or allege a custom against a statute declaratory of the Common Law. But the truth seems to be that there are no statutes having force as such which are older than the time of legal memory,[3] and that, therefore, all rights acquired by prescription or custom are to be considered as existing before any statutes were enacted. So that the question is this: Is a custom or prescription contrary to the Common Law put an end to by a statute confirmatory of the Common Law passed subsequently to the establishment of the custom or prescription? In other words, the question is not of the effect of prescription or custom on a statute, but of the effect of a statute upon an existing prescriptive or customary right, which is merely a question of interpretation, and does not concern us here.

The theory that a statute cannot fall out of use is undoubtedly accepted law in England to-day, and the ease with which legislation can now be obtained renders the maintenance of such a theory easy. But it is not perfectly clear that the doctrine was always held with great rigidity. St. 15 Hen. VI. *c.* 4 is to the effect that "no

[1] Co. Lit. 115 *a*.
[2] In his note to this passage of Coke's.
[3] See Hale, Hist. Com. Law, *c.* 1. The time of legal memory begins with the commencement of the reign of Richard I, 1189. See 2 Bl. Com. 31.

writ of *subpœna* be granted from henceforth until surety be found to satisfy the party so grieved and vexed for his damages and expenses." This statute was, after a time, totally disregarded in the Chancery.[1] It may be observed that this statute was passed to diminish recourse to Chancery, and must have been disliked by the officers of that court, and that if the Chancellor disregarded the statute, he could not be proceeded against at Common Law either by *mandamus* or prohibition. It may also be noted that the statute is not in any of the exemplifications formerly preserved at the Tower of the lost statute roll of this year.[2]

The St. of 1 Hen. V. *c.* 1, requiring candidates for Parliament to be resident within the counties, cities, or boroughs from which they are chosen, and other statutes in the following reign *in pari materia*,[3] were not followed by the House of Commons; and in 1774, the St. of 14 Geo. III. *c.* 58, after reciting that "several provisions contained in the said Acts have been found, by long usage, to be unnecessary, and are become obsolete," enacted that, in order "to obviate all doubts that may arise upon the same," the said Acts are repealed. It should be observed that most of the acts forbidden by these statutes could be taken cognizance of only by the House of Commons, and therefore would escape the supervision of the regular courts.

Near the beginning of the seventeenth century (1617), Ferdinando Pulton published a calendar abridgment of the Statutes, in which he marked by the letters "OB"

[1] 1 Harrison, Prac. Ch. (8th ed.) 157.
[2] 2 Sts. of the Realm (ed. 1816) 296, note.
[3] Sts. 8 Hen. VI. *c.* 7; 10 Hen. VI. *c.* 2; 23 Hen. VI. *c.* 14.

every statute which was "*obsoletum*, that is, worn out of use."

The St. of 19 & 20 Vict. *c.* 64 (1856) is entitled "An act to repeal certain statutes which are not in use." It repeals one hundred and eighteen Acts, and it is to be observed that it is only in the preamble that it speaks of the statutes not being in use.[1]

The English statute book has undergone a pretty thorough purging from Acts applicable only to a state of things which has passed away. For instance, between the Restoration of 1660 and the Revolution of 1689 there were passed two hundred and seventeen statutes (omitting the private, personal, and local). Of these, one hundred and seventy-five have been expressly and totally repealed, and doubtless the judges would be astute in searching for, and successful in finding, implied repeals of other statutes that they did not like.

English statutes in America

The position among the English colonists in what is now the United States of the statutes passed by the English or British Parliament, whether before or after their departure from the mother country, presents an interesting question. Undoubtedly the principles embodied in those statutes were largely applied as rules by the American courts, but they were applied not as commands of the English or British Parliament, for no Act of Parliament extended to the colonies unless they were expressly mentioned,[2] but as part of a body of rules,

[1] See also St. 26 & 27 Vict. *c.* 125.

[2] Between the date of the first establishment of the American colonies in the beginning of the seventeenth century and the Revolution at the end of the eighteenth, the statutes passed by the Parliament of England or of Great Britain, which were made applicable to the colonies or any of them, were few in number.

known as the Common Law, which were, in fact, applied by the English courts, and which the courts in the colonies took over from them; and they dealt with these rules much more freely than they would have felt at liberty to do, had the statutes been made by the legislatures of their own communities. They said that they would consider as furnishing rules for decision only those English statutes which were "suited to our condition," a phrase giving them a wide discretion, of which they did not hesitate to avail themselves, and there was, therefore, no occasion to consider the effect of desuetude on true statutes.[1]

In South Carolina, indeed, an Act of the General Assembly of the Province, passed in 1712,[2] provided that certain Acts of Parliament, set forth at length, should be in "as full force, power and virtue as if the same had been specially enacted and made for this Province, or as if the same had been made and enacted therein by any General Assembly thereof." But in no other colony or province was there a local reënactment of English statutes.

Desuetude of statutes in the United States

There does not seem often to have come up any question of the desuetude of the statutes of the United States or of the several States. I suppose that the courts would generally follow the English doctrine that a statute cannot be abrogated by desuetude; but, doubtless, if they found a statute troublesome as a "survival of the unfittest," they could do much to get rid of it by "interpretation," or by declaring it the victim of an "implied repeal." The only States in which the question has been discussed seem to be South Carolina, Pennsylvania, Maryland, and Iowa.[3]

[1] See article by Professor Sioussat, in 1 Select Essays in Anglo-Amer. Leg. Hist. 416.
[2] 2 Cooper, Sts. of So. Car. p. 401.
[3] See Appendix V.