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I

SOURCES AND FORMS OF LAW

SOURCES AND FORMS—MEANING OF TERMS.—For a long time there was much confusion in the use of the term “source of law.” Indeed, the term is still used in a number of senses, often without distinguishing the different things called by the same name. No less than five senses are to be found in the books. First, it has been used to mean what might be called from the analytical standpoint (remembering the phrase that the King is the fountain of justice) the fountain of law, that is, the immediate practical source of the authority of legal precepts. In other words, the state. Austin so uses it. Second, it is often used to mean the authoritative texts which are the basis of juristic and doctrinal development of the traditional element of a legal system. In the civil law the term *fontes iuris* is used in this sense. The German jurists speak of *Rechtsquellen*. For the Continental jurists, the sources in this sense are the Roman

texts. For us, they would be the authoritative reports. Third, Gray uses "source" to mean the raw material, as it were, both statutory and traditional, from which the judges derive the grounds of deciding the cases brought before them. Fourth, the term is used to mean the formulating agencies by which rules or principles or conceptions are shaped so that legislation and judicial decision may give them authority. Fifth, the term is used to mean the literary shapes, as it were, in which legal precepts are found; the forms in which we find them expressed.

Austin was the first to call attention to the ambiguity of the phrase "sources of law" and to insist on clearness. But his discussion is not very satisfactory. Salmond in 1902 distinguished "formal source" from "material source"; the latter determining the content of a legal precept, the former giving it the guinea stamp of the state's authority. That is, the agency of politically organized society which stamps the precept as authoritative is the formal source. This differs from Austin in that he speaks of the state as the source whereas Salmond thinks of the judicial tribunals of the state as the agency of making the precept functionally authoritative. The way for the distinction which, on the whole, seems most satisfactory was pointed out by E. C. Clark. He put three questions: (1) Whence do legal precepts derive their binding force? (2) What determined the content of the particular precepts in question? What enabled the lawmaking or law declaring agency to express them as it did? If the state gave them authority, what gave them content? (3) Where, if one wishes to know the law must he go to find it? In what forms is it expressed? The answer to each of these questions had been expressed by the phrase "source of law." Of those who have distinguished, Austin preferred to apply the term "source" to the answer to the first question. Markby applied it to the answer to the third question, but he pointed out the distinction between the first and the third, which Austin had overlooked.

Clark gave the answer to the second question the name "source" and called the answer to the third "forms of law." This was followed by Pollock and has come into more or less general use.

Of these three ideas we need not discuss the first, the immediate practical source of the authority of legal precepts, to which Austin thought the term "source" best applied. We must recognize that the state is the legal source of such authority. If we ask as to the ultimate practical or ultimate moral source of that authority, we merely ask once more questions which come up sufficiently in other connections. Salmond's point, that the tribunals ultimately fix the content and give legal precepts the authority of the state through application of them in actual controversies, is an adaptation of what I have called the third stage of the English analytical definition of law to the question of what are to be called sources of law.

We may turn our attention, then, to the other two questions: To what, I think, we may well call the sources of law, answering the question how and by whom the content of legal precepts has been worked out, whence they got their content as distinguished from their force and authority; and to what are best called the "forms of law," the literary shapes in which legal precepts and doctrines are authoritatively expressed, the authoritative forms of expression to which courts are referred in the decision of controversies and to which counselors must resort for the bases of prediction when called on to advise.

SOURCES OF LAW. The factors to which legal precepts owe their content, the agencies that develop them and formulate them as something behind which the lawmaking and law administering authorities may put the power of the state may be said to be six.

1. *Usage.* Legislatures or courts may take up a matter of usage and give the authority of law to a rule or principle

or standard which has been worked out and formulated by usage. For example, the usages of business were taken over by the courts and banks were allowed to enter into legal transactions without using the corporate seal. The usage of merchants as to collection of checks through the clearing house was given effect. The English courts gave effect to the usage of business men as to crossing of checks, and to the usage of bankers and dealers in securities as to scrip certificates entitling the holder to certain definitive securities when ready for delivery.

2. *Religion*. In earlier stages of legal development this is a principal formulating agency. Examples may be seen in the Hindu law of inheritance, adoption, and liability for an ancestor's debts, and in the older Roman law as to inheritance, marriage, and possibly contract. In modern law, the influence of the canon law as to pacts upon the Continental law as to contracts may be noted.

3. *Moral and philosophical ideas, especially in equity and natural law*. The moral and philosophical tenets of the time not only affect old precepts, they shape or help shape new ones. But they are active direct sources chiefly in the stage of equity and natural law, when the identification of morals and law leads to a notion of the superior sanctity of a body of ideal precepts putting in ideal form the morality of the time.

4. *Adjudication*, giving rise to a custom or tradition of judicial action, as usage is a custom of popular action. In the civil law a settled course of decision of a question of law in a certain way became a form of law. In the common-law system judicial decision is a form of law. Even those which are only of "persuasive authority" are among the authoritative grounds of or guides to decision from which a court is held bound to choose its starting point and so a form rather than a source. But judicial decisions which have no authority may formulate propositions of law so well reasoned

that the higher courts may adopt them and give them authority. In that event the decisions are a source of law.

5. *Scientific discussion* — what the French call doctrine, that is, discussions by text writers and commentators, which courts or legislators may give formal authority by embodying them or their results in decisions or in statutes. The great bulk of Roman law was the work of jurists from the second century B. C. to the fourth century A. D. — chiefly from Augustus, 29 B. C. to about the middle of the third century A. D. They wrote commentaries on the XII Tables and the old law of the city, wrote commentaries on the praetor's edict, published opinions on controverted questions of law, edited or wrote notes or commentaries on the writings of preceding jurists, wrote institutional books for students, and dogmatic treatises on particular subjects. In the civil, or modern Roman, law doctrinal writing has been the most important formulating agency. It began as gloss or later commentary upon the codification of Justinian. It grew into dogmatic exposition of the system of law as a whole or of particular departments of the law. Voet's commentary on the Pandects is a book of authority for the Roman-Dutch law of South Africa. Pothier's treatises made straight the paths of the framers of the French civil code and have been used wherever the influence of French law extends. The German writers on the Pandects prepared the way for the twentieth-century codes. Likewise, under the modern codes juristic writing usually begins with commentaries and develops into systematic treatises on the whole law or on particular subjects on the basis of the codes.

Doctrinal writing has been a much more active and important formulating agency in Anglo-American law than our theory leads us to admit. Coke formulated the medieval law authoritatively for the classical era, the seventeenth to the nineteenth century. Nor did doctrinal writing stop. On the contrary, it gained in importance in the nineteenth century. While in form our law is chiefly the work of judges,

in great part judges simply put the guinea stamp of the state's authority upon propositions which they found worked out for them in advance. Their creative work was often a work of intelligent selection. The most creative of judges have seldom made legal precepts out of their own heads. Text books have had much influence. The English had formerly some strict rules as to citation. In order to be citable the writer must have been or have become a judge, and the living were not to be cited. Today English judges frequently refer to or even discuss the views of living text writers not on the bench. One hundred years ago Byles on Bills (1829), Sugden on Vendor and Purchaser (1805), and Sugden on Powers (1808), could be cited in court for what had been written before the authors went upon the bench. Later, Lindley on Partnership (1863) and its outgrowth, Lindley on the Law of Companies, could be cited. But one would deceive himself much if he supposed that Jarman on Wills (1844) or Lewin on Trusts (1837) or Preston on Estates (1826) whose authors did not become judges did no more than serve as collections of the authorities.

In the United States, Blackstone's Commentaries (1765-1769), as a statement of English law on the eve of independence long had a *quasi* authority and Kent's Commentaries (1826-1830) as a statement of the common law applicable to American conditions, as we received it, exercised much influence on our formative law. To name but a few outstanding books, the writings of Judge Story helped make the law, and Greenleaf on Evidence (1842-1853), Bishop on Marriage and Divorce (1852) and on Criminal Law (1856-1858), Parsons on Contracts (1853-1855), and Washburn on Real Property (1860-1862) had much to do with developing a common law for the whole country. So much were these books used by the profession and by the judges that an indignant practitioner is said to have demanded of one court whether there was any statute making one of them an authority.

6. *Legislation*; the formulation of precepts directly and immediately by the lawmaking organ of the state. . But here it should be noted that legislation is usually the basis of further development by commentary or by judicial decision and that many agencies of preparation for legislation present ready formulated measures to the lawmaking body. Thus legislation may be a source of law and statutes a form.

Custom as a source of law — customary law. It has been urged that as legislation, the process, is a source of law and legislation, the product, is a form of law, so custom is both source and form. Controversy has raged about the subject in England since Austin and on the Continent since the rise of the historical school. In this controversy the term "customary law" has been used to include (1) law formulated through custom of popular action, (2) law formulated through custom of judicial decision, (3) law formulated by doctrinal writing and scientific discussion of legal principles. Moreover, the second and third have been treated as if they were forms of the first, whereas the first is in modern times relatively the least important and, indeed, usually affects the law as it is taken up by the second and third rather than by directly determining the legislative or judicial or administrative processes. Why are all three called customary? It seems to be because down to the seventeenth century the *Corpus Iuris* was in the universities supposed to have legislative authority in western Europe, thought of as "the empire." When it was shown to have only the authority of long usage in the courts, all that was not legislative in origin was called customary.

This subject may be looked at historically or philosophically or analytically. But I will leave the historical side until I come to take up the traditional element in systems of law.

Turning to the philosophical side, the philosophical basis of customary law, the historical jurists in the nineteenth con-

tury, following Savigny, considered that customary law, i.e. law which got its content from habits of popular action recognized by courts, or from habits of judicial decision, or from traditional modes of juristic thinking, was merely an expression of the jural ideas of a people, of a people's conviction of right — of its ideas of right and of the rightful social control. Hence, as Savigny saw it, customary observance of any of the three kinds, was not the cause of law but was evidence of the existence of law. The genius or spirit of a people, said Savigny, expresses itself in certain ideas of right, which in turn are expressed in certain habits of action. These habits of action, popular, judicial, or juristic, with respect to the relations of man with man and man with the state, are law, that is, from the historical standpoint are forms of social control, from which the historical jurists like contemporary sociologists do not differentiate law. It is considered that the jurist or the judge or the legislator simply gives these habits of action the dress of doctrines or precedents or statutes. The metaphysical jurists in the last century held a similar doctrine. As they usually put it, custom is one of the modes by which the community expresses its rational will. Where Savigny spoke of the *Völkgeist* in action, they spoke of the will in action; the will of a people expressed not arbitrarily in arbitrary decisions but rationally in principles of action by which the customary course of popular action, judicial action, and juristic thinking is determined. This is a theory of what might be called the justice element; of the part of the law which seeks to maintain the ideal relation between men. It would explain all law in terms of that element. But there is also the security element. Sir Frederick Pollock tried to put the whole in terms of that element.

His theory is psychological. He tells us that two sorts of cases present difficulty of choosing on principle, i.e. on a moral basis, on a basis of justice, what to do. One sort is cases where the choice is between two or more ways of do-

ing something in itself indifferent. The other sort is cases where the question of substance is such that no wholly reasonable solution proves attainable. Many examples of each may be vouched. As to the first consider the formal modes of conveyance devised to assure publicity and prevent fraud, that is, to give effect to the social interest in the security of acquisitions and in the security of transactions. Compare, for example, in conveyance of land, the proceeding in the land court and certificate under the Torrens, system, and the American system of deeds acknowledged and recorded; or in the older law the Roman *mancipatio*, the common-law livery of seisin, and the formal ceremony of the Salic law. As to the second, compare the rules as to specification in Roman law, the common law, the French Civil Code, and the German Civil Code. When once the choice is made, he says, it becomes natural, if only to save trouble, to do the same thing, or as near as may be when a like case comes up. He adds, significantly, that the fact of having taken a similar course once will, on renewal of the circumstances, give rise to a certain expectation of its being done again, and that experience of that course having been done by others will give rise to the like expectation. This is an ordinary psychological phenomenon. It means, as he puts it, that a habit of deciding in a particular way is formed. It is put in the way of the association psychology. But it could be put as well in the behaviorist way. One should notice, however, the significance of the reasonable expectations, created by a decision of an ultimate tribunal, for the general security. The economic order calls for fulfilment of such expectations, as is shown by the growth in all lands in the present century of a practice of treating the decisions of the final court of appeal as a form of law. This process is furthered by the conservatism and the timidity of primitive man who fears to do anything otherwise than in the appointed way lest he offend the gods. If some course of action has been pursued without offending them

it is to be adhered to. It is furthered later by the demand of the strict law and of the maturity of law for certainty and uniformity.

As Pollock puts it, then, every decision is an incipient habit and imitation leads to the following of the decisions of others. However, this is only true in part. Conscious search for principle, conscious endeavor to decide not arbitrarily but on reasoned principles, and to make each decision an expression of a principle is a powerful force in legal thinking. Hence the next decision is expected to carry the process forward.

Recently the social philosophical jurists have sought to construct new versions of the nineteenth-century metaphysical theory. For example, Kohler speaks of customary law as a resultant of the pressure of the civilization of the present upon habits of action, decision, and thought which grew out of and expressed the civilization of the past. Stammler spoke of it as the conscious or subconscious attempt to express the ideals of the epoch in action, decision, and juristic thinking.

As analytical jurists take the precept element in law to be the law, theories of sources of law are theories of the formulation of legal precepts. But whatever affects or shapes the ideal element is in a very real sense a source of law even if indirectly rather than immediately. Thus ultimately we get back into the domains of economics, psychology, and sociology. In the present connection we are looking only at legal precepts.

From the analytical side we must start from the proposition that both in source and in form a system of legal precepts in any stage of development as such, i.e. beyond what I have called primitive law, is made up of two elements, a traditional element and an enacted or imperative element. That is, one is referred both to tradition and to legislatively prescribed precepts when he wishes to know what is the law;

and the precepts and doctrines which he finds were some formulated by judicial and juristic working over of traditional materials derived from experience and some by law-givers or legislatures. Therefore, when we talk about the nature of customary law we are really talking about the nature of the traditional element of a legal system. The enacted or imperative element obviously came from the state. It purports expressly to derive its authority from the sovereign. Hence jurists saw that this element, analytically considered, proceeded from and rested on the authority of the state. But for a long time they conceived that the traditional element — customary law, as they called it — had an independent validity beyond and without respect to the state. On the Continent this resulted from the seventeenth-century idea of Roman law as embodied reason. In the seventeenth-century the modern Roman law (the *usus modernus*) was in legal theory customary law. It was in force because it had been received by the usage of tribunals. In the reign of natural law, however, after the academic theory of Roman law as binding legislation of an empire embracing all Christendom had been given up and the basis of the authority of Roman law was found in reason, it was easy to think of customary law as in force because of its intrinsic reason, quite apart from the state. Hence all sorts of theories of the intrinsic binding force of customary law grew up, which were really theories of what seemed to be the intrinsic binding force of the modern Roman law in seventeenth and eighteenth-century Continental Europe and in the nineteenth-century in those European countries which did not adopt in substance the French Civil Code of 1804.

It was easy for common-law lawyers, after they had read civilian treatises to say that the English common law had a similar intrinsic binding force as customary law in England and the United States. There were three contributing causes behind this mode of thought in addition to the authority of the writers on the civil law who had much vogue as late as

the second third of the nineteenth-century. In the first place, an idea of the common custom of England was the means by which the King's Courts made the common law, superseded local usage and local jurisdictions, and so gave us our strict law. Second, Fortescue, Hale, and Blackstone had asserted a continuity of the common custom of England from the time of the Britons. Third, the medieval (Germanic) idea of the force of custom was reinforced by the Roman texts as to long usage having the authority of statute (*lex*). Moreover, from the reading which was prescribed for law students in the formative era of American law, American lawyers came to think of the common law of England in an ideal form as declaratory of natural law. So, calling the common law customary law, customary law seemed to have an intrinsic validity.

Like ideas in England, derived from Blackstone, explain why Austin felt bound to show that the basis of the authority of the traditional element and of the enacted or imperative element analytically is the same, namely, the stamp which the lawmaking or law-declaring organs of the state has put upon each. Much criticism of Austin fails to take account of the theories he had to combat. He did a real service in showing that the difference is in the formulating agency not in the source of legal obligation.

Four types of so-called customary law may be noted: (1) a customary course of popular action, (2) a customary course of administrative action, (3) a customary course of advice to litigants or to tribunals by those learned in the law, and (4) a customary course of judicial action. The second may be called administrative custom. It may grow into administrative law as has tended to happen in at least some American administrative agencies. But it has not become sufficiently settled to be counted more than a source. The third might be called professional custom. It may develop into a traditional mode of dogmatic teaching and doctrinal writing, as at Rome. The fourth might be called

judicial custom. It is a form of law in the common-law system and has been becoming one in civil-law countries.

The three last named may grow up entirely apart from and independent of the first. In fact, they often grow up with respect to matters as to which there is and can be no customary course of popular action. An example may be seen in customs of practice in courts both of first instance and of review. In some of our larger states there are many curious variations of minor details of practice among the different circuits or districts. This has been particularly true in our different appellate courts. In 1792, the Supreme Court of the United States adopted the practice of the Court of King's Bench in England. But in a number of states different usages had grown up in colonial courts and in legislative review of judgments of the courts, and when reviewing jurisdiction passed from legislatures to appellate courts, the latter sometimes followed the model of review in the House of Lords. In our newer states these fused in all sorts of combinations, depending largely on where the judges who first sat in the highest court of the new jurisdiction chanced to have come from.

Likewise, judicial or administrative usage may grow up quite apart from popular usage. But they may, on the other hand, recognize and apply such usage where no applicable legal precept is at hand. Thus there may be a progress from custom of popular action to law. The course of action followed by the public may be a source of law. We must note, however, that while popular usage seized upon by the courts as a rule of decision may get the form of law, it is no less true that repeated and well known decisions may give rise to popular usages based on and in recognition thereof.

An example of formulation of law by a customary course of popular action may be seen in American mining law. An example of the effect of a course of judicial decision upon the course of popular action may be seen in the law merchant.

At the time of the discovery of gold in California in 1849, there was no law on the public domain. The Cornish miners brought with them some mining customs as to following a vein and claim to so much of the strike. For the rest, customs grew up of claims to water by diversion, notice, and record, and of claims to placer and lode locations by discovery, notice, record, and annual labor. These mining customs are the basis of our American mining law and of the law of irrigation in the part of the country west of the hundredth meridian. Federal legislation recognized them in 1866 and 1872 and judicial decision has given them systematic development.

On the other hand, while the law merchant was built at first on the custom of merchants, the common-law courts came to hold that what was the custom of merchants was a question of law, not one of fact. They took judicial notice of the law merchant. In other words, they made a body of case law by logical development of those principles which had come to be well recognized. In consequence, instead of merchants giving law to the courts as experts in mercantile custom, the courts began to give law to the merchants. Mercantile usage has often had to adjust itself to the course of judicial decision.

We may perceive, then, both progress from custom, in the sense of customary course of popular action, to law and from law to custom. Custom and law react upon each other, custom formulating rules for the courts, though usually by way of the legislature, but on the other hand, rules of law molding popular usages or giving rise to new ones. Moreover, as in the case of law and morals, law and custom, in the sense of customary course of popular action, are not identical in scope and extent. Much custom of popular action is quite outside of the field of the law. Much is parallel with law but not legally recognized as binding — for example, constitutional usage such as that presidential electors vote for the candidate of the party on whose ticket they

were elected or the formerly well established custom as to eligibility of the President to a third term. Also much is local or custom of some particular trade. Yet there have been customs of wider scope than the state, such as the customs of knights, customs of sea traders, and customs of merchants, which were or tended to be universal over medieval Christendom. Indeed, there are international mercantile usages today. As it has been put, a sale in international trade is a sale whether made at Amsterdam or at New York. It was largely because of this that New York importers demanded an arbitration law assuring them of a tribunal for commercial disputes which would give expert effect to the usages of trade.

Analytical theories of formulation of law by custom. This has been one of the most discussed problems of analytical jurists. As was pointed out above, much of the difficulty has come from treating the traditional course of judicial action and the traditional course of juristic thinking as if they were the same as the customary course of popular action. The first theory on this point is found in Cicero. He says of justice: "Its beginning has proceeded from nature. Thence some things have become custom from reasons of utility. Afterwards fear of the laws and religion have given sanction to things which have proceeded from nature and been approved by custom." That is, he says, we have (1) the principle of reason; (2) the customary course of popular action which realizes this principle; and (3) the sanction which law and (in archaic systems) religion put behind the precept formulated by custom but expressing the principle. Historical and metaphysical jurists in the nineteenth-century did not much improve this.

Austin was chiefly concerned to show that what was called customary law had no intrinsic legal authority as such, independent of the state. Hence he distinguished precepts of what he called "positive morality," resting simply on the ethical custom of the community, and legal precepts resting

on the authority of the state. When, he said, the state, through legislation or judicial decision, takes up the precept, adopts it, and puts sanction behind it, then for the first time it becomes law. But, he says, if it is not promulgated by legislation but rests in judicial decision or judicial usage, we call it customary law. The truth in Austin's doctrine here is in his insistence that customary law (in the sense of the traditional element in legal systems) is not a distinct kind of law of greater sanctity or resting on a different basis of authority. It has the state behind it, and depends on the state just as does the imperative element. The weak point in Austin's theory is that courts apply retroactively these precepts which, to use his phrase, they adopt from positive morality. They apply them as if they had existed as binding legal precepts prior to their adoption. They do not merely announce them as precepts which will be applied as legally binding for the future. They "find the law" in these customary precepts. They recognize, it is said, the custom as binding law. Many have been led by this consideration to reject Austin's proposition that customary law (i.e. the traditional element of a legal system) rests upon the authority of the state and to insist that custom of popular action as such is inherently legally binding, whence it is gratuitously inferred that a received legal tradition is equally inherently morally binding and so legally binding for that reason. Carter insists upon this particularly. He says that the judge is neither the molder of the legal precept nor the agency by which the state gives it authority; that it is "formulated by the social standard of justice" and is found by the court in its search for the binding rule, and is binding because of its intrinsic force as an expression of a principle discovered by human experience.

Later analytical jurists have met the difficulty in Austin's theory in a better way. They say that it is a precept of the law, sometimes traditional but sometimes enacted and in either case having the authority of the state, that where

no express legal precept exists judges are referred for the basis of their decision to custom. Hence when they apply the customary precept retroactively they do it by virtue of a precept recognized or provided by a lawmaking organ of the state which authorizes and directs this. Express provisions of this sort are in a number of modern codes. They name custom among the subsidia to which courts are to resort in order to decide cases not provided for. It is a superficial answer to this to say, as has been said, that it reasons in a circle; that it amounts to this: "Custom is law in virtue of custom." In this epigrammatic statement the word "custom" is used in two senses. Differentiating the two meanings, it becomes another thing to say that there is an authoritative legal precept, either enacted or recognized by received tradition, refer to unrecognized custom, where no established precept is at hand, and if it meets the legal requirements of recognition of a custom, apply it to an appropriate case. When by so applying it the custom has been adopted and given form as a legal precept, as takes place in our common-law system, a gap has been filled. Law has been made. But the case has been decided by law — according to the precept of law which referred the court to the customary precept to fill the gap provided it met the legal requirements of valid custom. Kelsen puts it that though the decision is outside of law in the sense of the body of authoritative materials of decision it is not outside of the law in the sense of the legal order. I question its being outside of the law in the sense of a body of authoritative guides to determination of controversies. But the sort of thing presupposed in such discussions seldom happens in a well developed system of law. What usually happens is that the gap is filled not by any pre-existing definite precept of custom or morality but by analogical development of materials found in the legal system or borrowed from some other legal system, selected and shaped with reference to an ideal of the end of law and hence of the legal order.

Custom in the common (Anglo-American) law. Four different things got the name of custom in our law:

(i) One is the general body of our case law; the whole traditional element of our legal system. This goes back to the time when the King's courts purported to administer the common custom of England. It goes back to the archaic condition in which law was thought of as authoritative declaration of custom; as custom declared by decisions, the same as declared by legislation in the *Twelve Tables* or the *Leges Barbarorum*, or in the early English theory of legislation when it was supposed law could not be made. So England had *leges*, authoritative declarations of custom, and *consuetudines*, customs not so declared but ascertained by the tribunals. We may leave this until we come to take up the traditional element in our law more in detail.

(ii) The canon law and civil law administered in the ecclesiastical courts and now to some extent in courts of probate and matrimonial jurisdiction and the universal sea law administered in admiralty have been called customary. These were customary in England only in the sense that they were in force because prior to the Reformation the ecclesiastical courts administered the universal law of the universal church and the Roman law thought of as universal, and admiralty administered the universal sea law, not the local law of England. After the Reformation they were law by the settled practice of the tribunals. Hale followed by Blackstone called this part of the law administered in England custom because it derived its authority from observance and did not depend on its "own intrinsic authority" such as that of acts of Parliament or the custom of the English people. But the same might be said of the common law administered by the King's courts. Before the rise of nationalism in the sixteenth-century, courts of the church in probate and matrimonial causes and a court of admiralty would not have thought of following any other body of law than what was recognized through all Christendom. Moreover, there was

nothing else at hand than the well developed, well systematized, and well taught Roman law and canon law.

(iii) There were certain local or special customs recognized legally and enforced in England because observed time out of mind in particular localities. They were customary rules of inheritance or customary tenures such as gavelkind (inheritance of land by sons equally instead of by the eldest son only) and borough English (inheritance by the youngest son only). They are now extinct in English law and no such things have ever existed in the United States.

(iv) There are particular usages, general and well understood practices in a particular place or in a particular trade or business, which may be established as other facts are pleaded and proved in interpreting legal transactions or determining the relations of persons who are presumed to do business with reference to the usage. The requisites of a custom of the type last above considered have been adapted to these usages. The usage must have existed long enough to have become generally known; must be certain and uniform as to the persons claiming under it and as to what is claimed; must be regarded as compulsory and not something left to one's option to obey; consistent; so general that knowledge of it may be presumed; must be peaceable and acquiesced in by those acting within its scope; must be reasonable; and must not be contrary to law or good morals. For the most part usages are invoked in connection with contracts and are resorted to in order to ascertain the intention of the parties. If a contrary intention appears in some other way the custom is not part of the contract nor can its express terms be contradicted or varied by proof of the usage. Thus we have here in reality a canon of interpretation rather than a source or form of law. But there are customs of a trade or industry, legally recognized and enforced, of which this cannot be said.

Custom in international law. In international law, as it has been at least in the immediate past, we may see law in the sense of a legal order in process of development and repeating something of the history of civil or municipal law as it emerged from undifferentiated social control into a regime operating through a system of law such as we understand it today. We may see habitual courses of action in the relations of states come to be regarded as authoritative and binding and we can see those customs developed by commentaries and doctrinal formulations of what it is considered ought to be custom just as in Hindu law or the Roman law as a taught tradition of the juriconsults, or the law merchant in the hands of common-law courts and common-law text writers. A habitual course of action which has not come to be regarded as obligatory is called usage and is taken to be a source of law in that it may become recognized as binding and so give content to what is regarded as a legal precept. When it has become so recognized it is called a custom, and is regarded as a form of law. Hence Hall speaks of international law as "authoritative international usage." But here again the habitual practice of nations in their relations with each other is not always a spontaneous product of experience such as the historical jurists postulated. Much that we think of as established custom of diplomatic relations and of national conduct in international relations is a tradition from the Spanish foreign office which set the pace in the sixteenth-century when international law was formative. Spain was then the leading country in Europe. The customs of the Spanish foreign office did not arise spontaneously as something analogous to custom of popular action. On the contrary, when new questions of international morality or ethics arose, the Spanish officials took the opinions of the doctors, teachers of theological morals, at Salamanca, and acted accordingly and thus established a tradition which came to be followed and was developed by writers on natural law.

Sources in general. (a) *In archaic law.* To quote a lecturer on Hindu law: "The 'roots' or sources of law, according to Manu, are four in number: Revelation or the uttered words of inspired seers; the Institutes of revered sages, handed down by word of mouth from generation to generation; the approved and immemorial 'usage' of the people; and that which satisfies our sense of equity, and is acceptable to reason." The distinction between "inspired" seers and "revered" sages should be noted and it should be noted also that the "institutes" handed down orally refer to commentaries upon the revealed words, both the revelation and the commentaries long ago reduced to writing. So the sources are (1) religion giving forms in the shape of revealed precepts, (2) juristic development on the basis of religion; (3) custom of popular action approved by the commentators and so becoming a form; and (4) general moral and philosophical ideas. If the first and third are the older and original sources, as we know the texts, the second and fourth, working upon the older materials, have become the more significant.

In the introduction to the *Senchus Mor* (the great book of the Brehon or old Irish law) Dubhthach, the royal bard, recited to St. Patrick "the judgments of true nature which the Holy Ghost had spoken through the mouths of the Brehons and just poets of the men of Erin from the first occupation of this island down to the reception of the faith." What did not clash with the word of God "in the written law and in the New Testament and with the consciences of the believers" was confirmed by St. Patrick and the ecclesiastics and the chieftains of Erin, since "the law of nature had been quite right except the faith and its obligations and the harmony of the church and the people." As Maine pointed out, "the law of nature" here refers to the well known text of St. Paul: "For when the gentiles which have not the law do by nature the things contained in the law, these, having not the law, are a law unto themselves."

Here the law was a tradition in the memory of the bards founded on judgments of the Brehons and this tradition is confirmed so far as consistent with Scriptures and Christian faith. So religion and customary course of decision stand as the sources. There is little of what might be called juristic commentary; not much beyond some glossing of the texts.

(b) *In Roman law.* Here religion and custom had long ago done their work and were substantially negligible as active formulating agencies by the time we have authentic materials to tell us much about the system. Simply remnants remind us of the part they had once played. The sources which are important in Roman law are: (1) magisterial formulation of procedure partly to ethical ideas and partly to experience; (2) general moral and philosophical ideas, particularly the *ius naturale*; (3) scientific development, juristic writing; and (4) legislation, here as elsewhere both a source, as the basis of juristic development, and a form. Juristic writing is the great formulating agency. It gave character to the whole system and put its stamp on the Roman legal tradition so thoroughly that Roman-law countries regard text writers in a way the common-law lawyer finds it hard to understand. Until recently civilians compared and weighed and discussed opinions of commentators and text writers as we compare and weigh and discuss the opinions of courts in adjudicated cases.

(c) *In the law of Continental Europe.* At bottom, the modern codes represent legislative adoption of juristic development of the *Corpus Iuris* and of materials of Germanic law which were in force as local customary law. The formulating agencies have been (1) general moral and philosophical ideas. In the seventeenth and eighteenth-centuries, in the reign of the law-of-nature school, these were significant influences. (2) Scientific discussion; juristic writing has been a formulating agency from the twelfth century to the present day. Till recently juristic writing on the basis of the Roman texts and the modern codes was the

chief source. As a formulating agency it almost held the field alone. Today it has been encroached on by (3) adjudication, which is now a very active formulating agency and not merely the settled course of decision but single decisions of the highest courts are at least strongly tending to be forms of law. (4) Legislation is also an active source as well as the dominant form.

(d) *Sources in the common law.* As to usage, in the United States we have had a conspicuous instance in our western mining and water law already spoken of. Commercial usage also has been spoken of in another connection. General moral and philosophical ideas were an important source in England in seventeenth and eighteenth-century equity and as classical economics in nineteenth-century decisions as to policy and contracts. Moreover, the economics of the last century as economic and political philosophy took an important if not decisive part in application of the constitutional standard of due process of law. As to Bentham's utilitarianism and law, reference to Dicey's full exposition suffices. While scientific discussion and juristic writings, have played a subordinate part in comparison with their role in the civil law, we may easily underestimate their influence in shaping Anglo-American law. Littleton and Coke on Littleton are books of authority. They are forms of law. But Coke's writings have been a quarry for common-law courts. Even the occasional errors of Blackstone passed into American law. Many books not of authority are responsible for rules and even some chapters of our law. In our commercial law, the seventeenth-century English and earlier nineteenth-century American courts had a tendency to use the treatises of civilians freely, and extensive use of civilian treatises by our text writers for a time reinforced that tendency. Adjudication has been the most conspicuous formulating agency, but legislation and administrative rules and orders have been taking the lead in the present century. These three are both sources and forms and will be considered more fully later.

FORMS OF LAW. By forms of law, as explained heretofore, we mean the forms in which legal precepts are to be found authoritatively expressed. In general, they may be classified as (1) legislation; (2) case law, i.e. law expressed in the form of judicial decisions of past controversies; and (3) text book law, i.e. law expressed authoritatively in juristic writings.

Forms in archaic law. In the beginnings of law, source and forms are undifferentiated. As law develops, there comes to be a body of declared custom which may become text book law or may become legislation. Hindu law is wholly in the form of text book law except as under British rule it has been overlaid by a body of case law. Except for the case law which has grown up about it in the modern courts and recent legislation in British India, it is made up, in form, of (a) *smriti*, the writings attributed to "revered sages" having independent authority, and now regarded as declaratory of religious precepts, custom of popular action, custom of decision, and precepts of morals; (b) commentaries on the *smriti* under the auspices of rulers or attributed to rulers, not in the form of legislation, however, but interpretations or supplementary declarations of custom; (c) treatises using the foregoing materials, but not by public authority. The older commentaries and treatises have authority and are forms of law, while the later treatises, written in English, are at most no more than source. Under British rule all the old authoritative texts are tending to become sources of a body of case law and there has come to be much recent legislation.

Reduction of customary law to writing authoritatively by the agencies of a politically organized society, as in the Roman *Twelve Tables* or the *Leges Barbarorum* and dooms of the Anglo-Saxon Kings will be considered in another place.

In Mohammedan law there are two chief schools, the Sunni and the Shiah, both basing the law ultimately on the

Koran but differing as to the authority of tradition as to the oral precepts of the Prophet. The Sunni school, which has had the fuller development and has the larger following recognizes as sources: "(1) The Koran, (2) The *Hadis* or *Sunnat* (traditions handed down from the Prophet), (3) the *Ijmaa-ul Ummat* (concordance among the followers), and (4) the *Kiyas* (analogical reasoning)." But "though the Mohammedan law purports to be founded essentially on the Koran, most of the rules and principles which now regulate the lives of Moslems are not to be found there." Juristic writing has built the law by analogical reasoning from the sources above enumerated. Hence as to form there is a body of text book law, a considerable number of treatises being recognized as books of authority. In British India, however, these treatises tend to become sources on which the courts have been building a body of case law and there has been some important legislation. For this reason, as it obtains there, it has been called Anglo-Mohammedan law.

Forms in Roman law. According to the Roman institutional books, the forms of law were: *Leges* (statutes), *plebiscita* (enactments of the plebeians), *senatus consulta* (resolves of the senate), *constitutiones principum* or *principum placita* (enactments of the emperors), edicts of the magistrates, and *responsa prudentium* (answers of those learned in the law).

Of these, the edicts of the magistrates are in origin largely a sort of case law. In form (magisterial declaration of the way in which the magistrate will exercise his office) they are nearer to legislation. Analytically they are a sort of magisterial lawmaking, since through molding procedure they had the practical effect of making the substantive law even if indirectly. The *responsa* of the jurisconsults in a way are also in origin case law. In truth, historically there is a case law element and a text book law element. But in form in the classical law they come to be text book law. Beginning with advice to litigants and opinions to tribunals, they de-

velop into a great body of juristic literature parts of which in the maturity of the law are given legislative authority as the opinions of jurists licensed by the emperor had been made binding on tribunals in the early empire. Thus in Roman law the chief forms are legislation and text book law, as in the common law they are legislation and case law.

Forms in the modern Roman law and under modern codes. In the modern Roman law down to the codes the text of the *Corpus Iuris* alone was regarded as authoritative. All else was explanatory. It was interpretation or logical deduction from the text. But in practice the gloss of Accursius (middle of the thirteenth century) got equal authority with the text and largely superseded it. Later the writings of the commentators became in practice the form of the law, especially as it was taken over at the "reception." Also *usus fori*, the course of decision in the courts, had subordinate authority as customary law, theoretically on the basis of certain texts of the Institutes and Digest.

After the codes the theory was that the text of the code alone had authority and only the legislature could give an authoritative interpretation. But the codes often expressly provide that where there is no text of the code to control a case, decision of the particular case shall be referred to doctrine (i.e. treatises and commentaries) and jurisprudence (i.e. the uniform course of decision in the courts). These provisions go back to statements in the discussions on the project of the code and in lectures on the French Civil Code by some of the commission which drew it up and contemporary jurists, delivered at the time of its adoption, in which these are included in a list of subsidia to be resorted to where the code was silent. Hence Continental writers have insisted that doctrine and jurisprudence are not forms of law because, it was said, they did not furnish general binding rules, to be followed by any court in any case to which they were applicable, but each court was to be guided by them as and to the extent it saw fit in passing on a case

not covered by the code. In truth, however, the courts do follow judicial decisions today very much as we adhere to precedents. It is said that single decisions have only persuasive authority, while a uniform course of decision is held theoretically to be equivalent to custom and have force as such and so to be a form of law. But single decisions of the highest courts are now cited and followed by the courts and by text writers and the latter now cite and discuss not only decisions of the Court of Cassation and Courts of Appeal but even those of courts of first instance. A like story may be told as to the course of judicial decision and even single decisions in Germany.

Application of the code provisions and development of them by analogical reasoning has commonly been called interpretation. It is not genuine interpretation, but is given the name in order to satisfy an idea that the code covers every possible case either expressly or by a principle which by logical development will afford a pre-existent rule. Thinking of interpretation in this sense, the theory of the Continental codes has been "that the legislator alone may explain laws in a manner generally binding." Except where there is "authentic interpretation" by the same authority that enacts a law, the Continental codes contemplate that the judge shall have full liberty of interpretation; but only for the case in hand. No one else is bound by his interpretation and he himself need not follow it another time. Until there is authentic interpretation, the point remains open for other cases.

In the old French law, following the Roman law, only the King could interpret his ordinances. If the sense was doubtful the judges were forbidden by an ordinance of 1667 to interpret. The case was continued and the parties were directed to apply to the King to fix the sense of the text. This practice no longer exists. Down to 1837 there was a practice of reference to the legislature to settle conflicts between the Court of Cassation and the other courts. But a

law of that year provided that in such cases all the chambers of the Court of Cassation should sit together and the decision rendered should bind the lower court for the case in hand. Referencés to the legislature are no longer made, but declaratory laws are enacted from time to time. The Prussian Civil Code of 1794 provided that if the judge found the sense of a code provision doubtful he must certify his doubt to the Code Commission and request its decision. The appendix to the code provided instead that the judge should decide the case according to the rules for the interpretation of statutes, but should then notify the head of the department of justice of the supposed ambiguity so that there might be further legislation. The code provided a like rule for cases to which no code provision was applicable. But these provisions soon ceased to be followed and became obsolete. The German Civil Code of 1900 contains no provisions as to interpretation, thus leaving the matter in the hands of the courts.

For practical purposes the *communis opinio doctorum*, consensus of text writers, and *usus fori*, course of decision of the courts, have been forms of law. The former was dominant until recently. The latter is now superseding it.

Forms in the common law. In the common-law system there are three forms of law: (1) Legislation, under which, using the term in its wider sense, we have in the United States three varieties, (a) constitutions, (b) federal treaties, (c) statutes, which may be federal or state; (2) judicial decisions, the decisions of the superior courts in England and the corresponding tribunals in other common-law jurisdictions; and (3) books of authority. Just what effect the development of administrative rule-making and adjudication will have upon this traditional scheme of forms of law is something for the future. By the federal constitution, the constitution and the laws of the United States made in pursuance thereof and all treaties of the United States are made "the supreme law of the land" and the judges in every

state are to be bound thereby, and the several state constitutions likewise declare themselves the supreme law of the land for the state, subject of course to the powers delegated to the general government. At least from the fourteenth-century, judicial decisions have been the most significant form of the common law. As to books of authority, very few text books, commentaries or juristic discussions have the authority of law in and of themselves. Theoretically they are regarded only to the extent that they expound accurately the judicial decisions which they cite and deduce correctly the principles of law to be derived from those decisions. Of those which are truly books of authority, a treatise on tenures by Sir Thomas Littleton (Justice of the Court of Common Pleas in the reign of Edward IV) is an absolute common-law authority on questions of the law of real property. But very little remains applicable because of changes by legislation. A commentary on Littleton by Sir Edward Coke (Solicitor General, afterward Attorney General to Elizabeth; Chief Justice of the Common Pleas, afterward Chief Justice of the King's Bench under James I) is regarded as an authoritative statement of the common law as it stood in his time. As the fourth year of the reign of James I (1607) is taken legally to mark the era of colonizing of America, Coke's writings have special authority for us in defining the law which came to us in the seventeenth-century. Besides the Commentary on Littleton (First Institute), Coke's Second Institute, a commentary on Magna Carta and the old statutes of Edward I, his Third Institute, treating of pleas of the crown (i.e. criminal law), and his Fourth Institute, treating of the jurisdiction of courts, have much, though perhaps in case of the last two less, authority. Littleton's Tenures and Coke's Institutes are books of authority wherever the common law obtains.

In addition, two other books stand very near to them in authority in the United States because they state the common law, in one case as it stood just before and in the other

as it stood just after it had been received definitely in this country. Sir William Blackstone's Commentaries on the Laws of England (1765-1769) was much used in America in the contests between the colonies and the crown which culminated in the Revolution, and was accepted by the courts after the Revolution as a statement of the law which we received. Kent's Commentaries on American Law (1826-1830), the great American institutional book, while not strictly a book of authority, is so clear and accurate an exposition of our common law as received after the Revolution that it has generally stood for a decisive statement of it.

Seven elements go to make up the common law in the United States: (1) The decisions of the old English courts; (2) American decisions, almost entirely since the Revolution; (3) judicial decisions in England and the other common-law jurisdictions since the Revolution; (4) the Law Merchant; (5) the Canon Law (law of the church in the Middle Ages) so far as it was received at the time of the Revolution in the ecclesiastical courts, which had jurisdiction over probate and divorce and entered into our law in the form of traditions of the practice and decisions of those courts in probate and divorce causes; (6) International Law, to the extent that it is a common element in the law of all civilized states; (7) English statutes before the Revolution applicable to or received in this country.

(1) More than half of the states provide by statute (and elsewhere except in Louisiana the same doctrine exists by custom, coming down in older states from colonial charters, recognized by judicial decision) that the common law of England shall be the rule of decision in their courts, so far as applicable, except in so far as cases are governed by constitutions or by statutes. The most significant part of this received common law is made up of decisions of the English courts. But two questions arise: first, when are English decisions of binding authority and when persuasive only, and, second, what is meant by applicable in this connection?

Statutes sometimes provide expressly that decisions before the fourth year of James I (1607) shall be authoritative so that subsequent English decisions are only persuasive as to what is the received common law. In some statutes the decisive point is fixed at the Revolution, and hence English decisions before the Revolution have binding force. In others, mostly western states, particularly those carved from the Louisiana purchase, where the potentially applicable civil law was superseded by statutory adoption of the common law, it is held that the statute does not require adherence to the decisions of the English common-law courts before colonization or before the Revolution if the courts consider subsequent decisions, either in England or America, better expositions of the general principles of the common-law system. In such jurisdictions the authority of all English decisions is the same. They are persuasive only.

In order to be part of our American common law, these English decisions, or rather the rules and principles they lay down, must be applicable to the social, political, economic, and physical conditions in this country. But this does not mean that the question of applicability is open for all time, as often as and whenever a court is called upon to apply a received precept established by the old cases. It means that the precepts must have been applicable at the time the courts were called upon to determine whether they had been received into our common law. If they were applicable and were received and adopted as such, subsequent changes in conditions, which may make some change expedient, call for legislative rather than judicial alteration of the established law. As to how applicability (or rather inapplicability) was determined, sometimes the inapplicability to our geographical conditions was obvious. In other cases the courts determined what was applicable and what was not by reference to an idealized picture of pioneer, rural America of our formative era and this picture became a received ideal.

(2) Judicial decisions in the several states of the Union and in the federal courts are of binding authority in the jurisdictions which they are rendered in and of persuasive authority in other American jurisdictions.

(3) Judicial decisions in England and in other common-law jurisdictions since the Revolution have only persuasive authority. But the influence of the nineteenth-century English decisions has been very great. The exceptionally high order of ability of the English judges and of the bar which argued before them made the persuasive authority of those decisions decisive on many questions which arose in England before they had to be passed upon in America.

(4) The law merchant, so far as it was not already incorporated in the common law at the time of the Revolution, is part of our received law. But codification of the principal subjects of commercial law, which has gone on since 1895 under the auspices of the Conference of Commissioners on Uniform State Laws, seems to have done away with the creative force of business custom on those subjects.

(5) It would be perhaps more accurate to say that the canon law is a source, and that the decisions and the practice of the English ecclesiastical courts on marriage, separation, annulment and divorce and on probate of wills, are a form of our common law. Probate jurisdiction has generally been given to separate courts in this country, while divorce jurisdiction has usually been given to courts of equity and courts with equity powers. For such courts, in such cases, the canon law, as received and administered by the custom of English courts was part of our legal inheritance.

(6) International law is in a sense a universal law in the modern world as the canon law and the sea law were in medieval England, and as the Roman law was in Continental Europe. The part of it applicable to determination of private controversies in the courts is a common element in the law of all civilized states. In the absence

of treaty or controlling rule of the national law governing a point, the courts look to the received usages of civilized states as they are set forth in treatises and commentaries recognized as authoritative throughout the world.

(7) English statutes before the Revolution which were in furtherance, development, or amendment of the common law, are, so far as applicable to America, a part of our common law. All such statutes enacted before colonization were received by us with the general body of seventeenth-century law. But the colonies had their own legislatures, which were active in the eighteenth-century, and English statutes after colonization were not always enacted to apply also to America. Hence whether English statutes enacted after colonization and before the Revolution are part of our common law depends upon whether the particular statute was received as such. Most of the important statutes of that period, e.g. the Statute of Limitations (1623) and the Statute of Frauds (1677) have been re-enacted in the several states. There are, however, a few which without re-enactment are recognized as having been received. It should be added that the old English statutes were received as construed and applied in the decisions of the courts and, in the case of those before the seventeenth century, as expounded in the writings of Sir Edward Coke.

Forms in international law. "International law" is made up of precepts which courts can and do recognize and apply, which are a common element in the municipal law of modern states; of precepts recognized and applied in international tribunals and arbitrations; and of precepts with which courts and tribunals have nothing to do, which are recognized in conduct, not in decision, and are matters for foreign offices and departments of state. One may distinguish forms of law from sources more confidently as to the first and second than as to the third. Perhaps international law has not reached a stage of development in which such a distinction can be made with assurance. Hence what from an ana-

lytical standpoint one would be inclined to call forms of law are called "evidence" of law. This presupposes that international law is recognized custom and that its forms are evidence of such custom. It is comparable to the mode of thought in the first stage of legal development in which legislation is taken to be wholly declaratory and judicial decisions are taken to be determinations of a pre-existent custom.

In the absence of any organ of international society competent to legislate, such legislation as there is must proceed by treaties. Treaties may be declaratory of law already established or may be intended to make new law. In the former case the declaration must be accepted or acquiesced in by states not parties to it. In the latter case until it has been received as obligatory by states generally it can at most be regarded only as a source of law. Text-book law has been the chief form. International law developed when the theory of natural law was dominant and under the auspices of that theory. It was a time when the modern Roman law was in the form of commentaries and treatises. A certain number of books have been universally recognized as books of authority, some of very high authority, others of lesser rank. As to that part of international law which is addressed to foreign offices and to diplomats, there are compilations of pronouncements of statesmen and of diplomatic correspondence which are constantly referred to. Finally, in international arbitrations and in litigation before international tribunals there is a growing tendency to rely upon decided cases, comparable to the weight given in the civil law today to the course of decision in the courts. Recent text books in international law increasingly cite and discuss decisions of international tribunals. In that part of international law which is a common element in the municipal law of modern states, books of authority and reported decisions of the courts are regarded as forms exactly as in municipal law.

II

THE TRADITIONAL ELEMENT

LAW AS TRADITION. Systems of legal precepts, as soon as they attain any great degree of development, are, as has been said heretofore, made up of two elements: A traditional element and an enacted or imperative element. The traditional element has generally been known in jurisprudence by the name of *ius non scriptum*, and the imperative element by the name of *ius scriptum*. These terms, written law and unwritten law, have long and generally been criticised, and deservedly so since taken literally they are wholly misleading and there has been little agreement as to their exact meaning. They are taken from the Roman law, in which they had reference to the mode in which legal precepts came into being as such, the *ius scriptum* through authorities having legislative power, the *ius non scriptum* through usage developed by private editing. Accordingly, for the purposes of today *ius scriptum* is used for enacted law and *ius non scriptum* for what is generally called customary law, that is, the part of a body of law which is not enacted. But, as pointed out heretofore, the term customary law, used in this sense, also is misleading because it suggests law as a mode of popular action, as a product of the customary modes of conduct of individuals in their relations with each other, whereas it is used to mean not modes of popular action but a mode of judicial action, professional thinking, and juristic writing and teaching. It is not a product of customary modes of conduct but of customary modes of professional or juristic handling of controversies, developed by writing and teaching. I prefer, therefore, to style this part of a legal system "the traditional element."

This traditional element may appear (1) as a tradition of priests or a religious tradition, as in Hindu law, in the beginnings of Roman law, and in the Mohammedan law until learned commentators became truly jurists; or (2) as a

popular tradition, as in the Germanic law; or (3) as a juristic tradition, as in all systems which reach any high degree of development.

1. *Law as a priestly or religious tradition.* In tracing the rise of juristic tradition, we have to remember that the judge precedes the law; justice without law (using the term in the analytical sense — sense 2) precedes justice according to law; judgments precede customary law. This proposition, urged by Maine, is disputed by Ehrlich, who is followed by Vinogradoff and by Malinowski, who find the origin of law in non-litigious custom. Social control by ethical custom may well go on before the appearance of the judge. But the judge goes before law in the lawyer's sense. Law as a differentiated social control grows out of litigious custom. Ehrlich and Vinogradoff think of social control as a whole as law, and non-litigious custom as a great part of undifferentiated social control. Maine's proposition is disputed by Malinowski, who sees a differentiation in ethical custom from the beginning. Part is felt as obligatory and part is not. But that is far from the specialization and differentiation involved in a definitely set-off legal order and body of authoritative grounds of or guides to decision. Maine is confirmed by the introduction to the *Senchus Mor*, the great book of the Brehon or old Irish law. It tells that Dubhthach, the royal bard, recited to St. Patrick the "judgments of the Brehons and just poets" from the first occupation of Ireland till conversion to Christianity. The traditional course of decision, based on judgments, was a tradition of the bards. It is confirmed by the study of social control among the Cheyenne Indians and, indeed, demonstrated by Llewellyn's analysis and exposition of the origin of law through adjudication of disputes which would, if conflicting demands could not be adjusted, disrupt a society.

2. *Law as a popular tradition.* It has been usual to speak of the Germanic law as a popular tradition. But the freemen of the locality, in whom the tradition rested, were

a class. It might well be called a secular class tradition. One phase of a desire for general knowledge of the customary law is to be seen in the reduction of that law to writing in books attributed to divine or inspired origin, as in Hindu law. Another phase is to be seen in ancient codes, such as those of Greek city-states. The monopoly of knowledge of the customary law which the patricians possessed at Rome led to the Twelve Tables as part of a political revolution. The possibility of juristic development comes when the traditionally formulated customary law is reduced to writing. If, as at Rome, it is enacted, growth comes by unconscious changes through interpretation and through conscious changes through fictions and equity. But if, as in India, it is expounded by sages in sacred or quasi sacred writings, growth is still possible. We are told that the Hindu writers fashioned usage or the texts to their ideas of right, much as common-law judges in the formative era made the custom of decisions, which was taken to be declaratory of the custom of the realm, conform to their ideas of right.

3. *Law as juristic tradition.* At this point we come upon a new phase of customary law. As soon as the traditional law escapes from the exclusive possession of a sacerdotal or political oligarchy it begins to come more and more under the influence of professional jurists. It comes to be a juristic tradition. At first certain of those who have a monopoly of legal knowledge specialize in this part of the class monopoly. They give advice as to the solemnities to be observed in legal transactions or in case of dispute. Next we find them drawing up manuals to guide others in such cases. Next they begin to teach and to write treatises, and in so doing to deal with the juristic tradition, as it has become, speculatively and theoretically. Under their influence a technique is developed, ideals are formulated and received, decisions come to be reasoned out, and the law acquires a scientific character. Thus we pass from customary law in a strict sense to a traditional element in a system of law; into case law

(judicial tradition) and text-book law (juristic tradition). But these are forms of a general professional tradition, since both judge and doctrinal writer are recruited from a profession with a common training and common modes of thought.

MODES OF GROWTH THROUGH THE TRADITIONAL ELEMENT. Not the least of Sir Henry Maine's contributions to jurisprudence is his proposition as to the "agencies by which law is brought into harmony with society." These, he says, are three: Legal fictions, equity, and legislation. Legislation is an instrumentality of altering and supplementing through the imperative element. It operates by amending rules and adding new rules. But it also furnishes a starting point for further development by the traditional element, and juristic tradition and legislation often go on parallel. Moreover, the traditional element is decisive as to technique and received ideals and gives and shapes doctrines and principles, conceptions, and standards. The modes of growth through the traditional element are eight; (1) Fictions, (2) interpretation, (3) equity, (4) natural law, (5) juristic science, (6) judicial empiricism, (7) comparative law, and (8) sociological study.

1. *Fictions*. After the law has been put in writing, whether authoritatively or not, legal fictions are the first agency through which the traditional element of a legal system is enabled to grow. Indeed, in the earlier stages of development of law in the second sense, fictions are the characteristic mode of growth. Legal fictions are three classes: (a) Particular fictions, that is, fictions employed to meet a particular type of case or to change or avoid a particular rule or effect a particular isolated result. They are at first, and chiefly, procedural. (b) General fictions, fictions, having a more sweeping operation to alter or create whole departments of the law, introducing principles and methods rather than isolated rules. Examples are what Austin calls spurious interpretation, equity, natural law.

(c) Dogmatic fictions, that is, fictions worked out after the event by juristic thinking in order to give or appear to give a rational explanation of existing precepts. Examples are representation as an explanation of liability for the tort of a servant, and constructive trust.

It need hardly be said that particular fictions come first in legal history and are long the chief instrument of growth. The competing instrument is unconscious legislation by interpolation of glosses in or alteration of the text. In its beginnings legislation is almost wholly an authoritative publication of the traditional law, and it soon exhausts itself. For a long period in all systems legislation is resorted to only rarely and on great occasions, leaving to lawyers and to tribunals the brunt of the work of developing the law. But lawyers and tribunals have no authority to change or add to the law directly. They change and develop it unconsciously at first by so-called interpretation, and then, as traditional modes of legal thinking grow up, they make the legal system over more or less completely by general fictions, such as analogical reasoning under the guise of interpretation, equity, and natural law. They appear first and for the most part in adjective law.

This terminology of fiction in substantive law has served its purpose and is beginning to be given up. Wherever it has not been laid aside it ought to be, for today it causes nothing but confusion. As Sir Frederick Pollock has said, we ought not to "shrink from stating in affirmative terms what are the duties which we consider to attach to an office or undertaking once voluntarily assumed." He continues that we ought not to arrive at the conception of a trustee's or an executor's duties by the circuitous method of saying that such and such must be the duty because the act or omission complained of is more or less analogous to other acts of people in other situations which have been held to be fraud. Constructive possession is a procedural fiction to make possessory actions available to secure ownership. Constructive

fraud is a dogmatic fiction to explain the results of growth of the doctrines of equity as to the duties of a fiduciary. Others of the fictions above noted were instruments of analogical reasoning which enabled achievement of more liberal results. They made possible expansion of the sphere of effectively secured interests. But therein lies the difference between older and newer methods of legal thinking. In all our writing and thinking of the first half of the nineteenth century the endeavor is to explain everything by finding implied terms in legal transactions. It is only in the last generation that common-law lawyers began to think straight upon these matters instead of circuitously through dogmatic fictions. In the profession at large this improvement has been going on very slowly.

It has been said heretofore that the formalism of the beginnings of law and of the strict law is to be traced in part to two causes: (1) a feeling that forms were a safeguard against arbitrary action of magistrates and tribunals and consequent fear of changes which would alter or do away with them, and (2) lack of general ideas. The first, due in its origin partly to the supposed sanctity of customary rules, as having divine approval, and to the form of law as a body of fixed and unchangeable rules replacing private war by a legal order, results in an extreme reluctance to alter a rule even for good cause when once fixed. When, therefore, the pressure of newly asserted interests compels change, those who administer the law seek to make the change as slight as possible. This characteristic of the earlier stages of law is not only a cause in part of the extreme formalism of the strict law, but it also operated as one of the agents in producing the first solvent of formalism, namely, fictions.

It may be that some rule of law is still held in part or more or less sacred. The law may not have passed out of a religious or semi-religious stage. Or it may be that the rule has a specially solemn form, such as a law of the XII Tables, having been incorporated in a permanent memorial

of the settled customs of the community. Or, without coming under either of these heads, a rule or a body of rules may be protected against change by a widespread fear of return to a condition of justice without law still remembered with dread. Probably the hostility of American states toward equity was chiefly due to memory of the high-handed administrative tribunals of the Tudors and Stuarts. In any of these cases a tribunal will feel that a rule cannot be changed avowedly and consciously. It will persuade itself that it is making no change. Where the circumstances of administering justice require a change the change will come indirectly and almost unconsciously in the form of a fiction.

The other causes operating to produce fictions, namely, poverty of general ideas in the times and places in which fictions arise, is connected with the development of juristic thinking. For a long time men do not so much reason as they associate. They are moved by association of this or that which is new with this or that with which they are familiar. Thus when a new political community was set up in antiquity it was formed on the model of a group of kindred. When a political organization of a society is set up today it is made to the model of the Middle Ages. Its legislative organ is made up of representatives of localities. In a city council there are representatives of wards. In the state legislature there is a territorial basis. There are representatives of soil more than of persons. So when changed circumstances and pressure of unrecognized or inadequately secured interests compel changed rules of law or new rules, men are not equal to the working out of a new legal doctrine, or of any legal doctrine, but endeavor to assimilate the new phenomenon in the administration of justice to something with which they are familiar. Thus, in a sense, it might be said that dogmatic fictions represent first attempts of a legal system at classification and generalization. When the exigencies of a developing economic order make it necessary to recognize contract, it is associated with real transactions

(transactions creating rights against every one generally) and is conducted under the fiction of a real transaction. When more advanced ideas of justice lead to recognition of a primary obligation independent of contract, it is associated with contract, therefore the sole basis of a primary right *in personam* in private law, and we get a right of restitution as based upon a fictitious contract, as the name quasi contract long bore witness.

Perhaps another contributing factor should be noted, namely, the so-called *vis inertiae*, the disinclination to do away with anything established, so long as it does no visible harm or no harm to speak of, although the reasons for its existence may have ceased long ago. Historical remnants or rudiments tend in time to become mere fictions, retained because it is worth no one's while to disturb them. In this category belong tenure, seisin, and the legal title where there is a substantial equitable ownership in some one else. Tenure lost its significance in the seventeenth century. There is no longer any incident or consequence of it that may not be explained in a better way. Seisin has long been moribund, although it led to some curious results in the last century. It still makes some difference in connection with acquisition of title to land by adverse possession whether a court thinks in terms of seisin or of adverse possession. But the difference is between thinking in terms of history and thinking in terms of realities of the law of today. The legal title of a trustee has ceased to be ownership. It has become merely power. Yet so strong is the *vis inertiae* that when in New York after the Revolution tenure was abolished and all lands were declared to be allodial, seisin and the legal title of the trustee were left undisturbed. The toughness of a taught tradition has kept the terminology and theory of tenure alive along with them.

An example of how this *vis inertiae* may give rise to a fiction by keeping up a form after the reason has ceased to exist, may be seen at any time in our legislative assemblies.

It is usual in constitutions to require bills to be read *in extenso* three times before each house of the legislature. This practice grew up before the days of cheap printing, when repeated reading was the only means by which it could be made sure that the legislators knew what they were voting on. Today, when every bill is before every member in printed form, the reason for *viva voce* reading *in extenso* is obsolete and in consequence in many places, at least, it has degenerated into a mere form of reading as rapidly as possible in an unintelligible sing-song, often turning two pages over at a time. Indeed, I have been told of one legislature before which six readings clerks used to read six different bills on first reading at the same time. Suppose a further step of entering on the journal that the bill was duly read without more, and we should have an actual fiction where there has been an incipient fiction. The same thing may be seen in learned societies in which provisions in constitutions or by-laws as to publishing only papers read before them are evaded by "reading by title," and formerly in Congress where at one time delivery of a speech might take the form of obtaining "leave to print." Many fictions in law arose in the same way. Formal compliance with a formal requirement soon degenerates into fictitious compliance.

One result of this process is that form and substance are thereby gradually differentiated. As soon as a form is felt to be a form only, and is treated as such by a fictitious use of it, a great advance has been made. Discovery of substance, that is, of the substance of interests, as something to be protected, and of the substance of the system of legal precepts as something to be adhered to rather than the form, is one of the landmarks in legal history. In every system the recognition of the substance, as distinguished from the form, is a criterion of its stage of development.

From consideration of the causes which have brought about legal fictions we may see they are not to be scoffed at.

They have played an important part in legal history. But while this is true, we must not forget that they are a clumsy device appropriate only to periods of growth in a partially developed political organization of society in which legislation on any large scale is not possible. They are not suited to later times and developed systems. In a period of growth, when ideas are few and crude, they enable a body of law to be molded gradually, without legislative action, to meet immediate wants as they arise and to conform to the requirements of cases as they arise. They enable legal precepts to be applied so as to give results in accord with ideals of the end of law. Legislative overhauling of the legal system is neither possible nor desirable in such a period. It demands a thorough understanding of the old law, the mischief and the remedy and a stock of systematic legal ideas beyond the archaic legal order. Moreover, the energies of a politically organized society are for a long period absorbed in the work of establishing the political system and the law must largely shift for itself. We may see this condition in England from Edward I to Henry VIII, and even later until the time of the Commonwealth, and also at Rome from the Twelve Tables to the Empire. In the one case, the judges, and in the other, the *pontifices*, and later the praetor and the juriconsults built up the law during these long periods with little legislative assistance of consequence.

After a certain stage of legal development, on the other hand, fictions retard growth and clog development. In a rational age, an age of substance rather than form, when legal doctrines are logically worked out and a body of learned jurists is at hand to apply and develop them, fictions may confuse and conceal the substance of legal precepts. In a sense they were devised to conceal the substance when the substance was not regarded as of legal consequence. They may operate still to conceal the substance after later ideas have made the substance almost the only thing of legal consequence.

For example: Restitution, or, as it used to be called quasi contract, was a confused and often arbitrary subject in our law until recent writers pulled away the fiction of "promise implied in law" and disentangled it from contract. Even worse than this, fictions easily become starting points for legal reasoning. As they are not always readily distinguishable from legal doctrines generally, they are taken as premises from which to reason and are used as the basis for constructing and developing anomalous and unfortunate propositions. Thus the courts had trouble in the last century about the "implied contract" of a lunatic to whom necessaries had been furnished. A judgment was argued to be a "contract" within the purview of the provision of the federal constitution as to impairing the obligation of contracts. Unjust enrichment of a corporation which retained what it had obtained under a *ultra vires* transaction seemed to the highest English court in the present century, if relief by way of restitution was granted, to involve implying a contract which, if made expressly, was not permissible. It is because of such collateral consequences that fictions are most objectionable today.

2. *Interpretation.* As an agency of growth, interpretation has to do with the imperative element of a system of law. But it builds a juristic or a judicial tradition upon the imperative element and in time assimilates it to and incorporates it in the traditional element. For example, English statutes before the reign of James I, and some at least down to the Revolution, are common law in America, and others, such as the Statute of Frauds, have been re-enacted in our state legislation so universally as to have been largely incorporated in the traditional element of our legal system. The same might be said of homestead and of mining laws in the states where mining is carried on upon the public domain of the United States. Interpretation is also an agency of growth of the traditional element of law in that it is one of the points of contact between law and morals.

In an analysis of the judicial process we may set off, first, ascertainment of the facts upon which the determination must proceed. Next, the facts having been found, judicial decision according to law involves (1) finding the legal precept to be applied, (2) interpreting the precept, (3) applying the precept to the cause. In the common-law system there may be the further duty, resting on the reviewing courts, of providing a well considered precedent to furnish a legal precept for like cases in the future. We are not concerned here with ascertainment of the facts nor with the shaping of a precept through the precedent, although these may affect somewhat the process of decision according to law upon the facts.

(1) Finding the law, ascertaining what legal precept is to be applied, may consist merely in laying hold of a prescribed text of a code or statute, or a settled precept of the traditional law — e.g. the rule that the words “bearer” or “order” are required in order to make a negotiable instrument — in which case it remains only to determine the meaning of the precept and to apply it. There may be at hand a fixed precept of determined content, as where a court looks at a conveyance to see whether it contains the formal covenant of warranty without which at common law one may not hold his grantor. In such case there is no need of interpretation and application may be a mechanical process of ascertaining whether the facts fit the rule. But frequently the process of finding the law involves choice from among competing texts or selection from competing analogies urged by the respective parties as the grounds of decision. Here, as one might put it, there is to be an inductive selection. Or the process may involve selection by logical development of authoritative principles or conceptions. Then there is, one might say, a deductive selection. Not infrequently no existing established precept is wholly adequate to the case and one has to be supplied by judicial selection from outside of the legal system in whole or in part

— from custom, from comparative law, from morals, or from economics. Providing of a rule by which to determine the cause is a necessary element in a considerable proportion of the cases which come before appellate courts. Hence the term “finding the law” (*Rechtsfindung*) is very appropriate.

Not uncommonly the three steps in decision according to law have been confused or undifferentiated under the name of interpretation. The whole process, called interpretation, has been thought of as involving the three steps. Perhaps the reason is that in the beginnings, when the law was taken to be unchangeable, the most that might be permitted to magistrates or to tribunals was to interpret the sacred or authoritative text. Later, in the formative era of the modern Roman law, the *Corpus Juris* as legislation of “the empire” was beyond anything but logical drawing out of the content of the text. The analytical jurists first pointed out that finding a new rule and interpreting an existing rule were distinct processes, and Austin distinguished them as spurious interpretation and genuine interpretation respectively, since his belief in a complete body of enacted rules led him to regard the former as out of place in modern law. Indeed, he was quite right in insisting that spurious interpretation *as a fiction* was out of place in legal systems of today. But experience has shown, what reason ought to tell us, that this fiction was devised to cover a real need in the judicial administration of justice and that providing of a rule by which to decide the case is a necessary element in the determination of all but the simplest controversies. More recently discussions as to juridical treatment of the materials afforded by the modern codes have led Continental jurists to distinguish application of rules to particular causes from the more general problem of interpretation. It is important to distinguish the three steps in decision according to law. But the first and second run into each other, if only because in case of competing precepts they must be interpreted in order that intelligent selection may be made, and both in

that selection and in interpretation a determining element is reference to received ideals and measuring of the result thereby.

Austin's analysis of interpretation, which is in part an analysis of the judicial process, is to be found in the fragment of his essay on interpretation and excursus on analogy. In substance it is this. The difficulty calling for interpretation may be: (a) which of two or more coordinate rules to apply; (b) to determine what the lawmaker intended to prescribe by a given rule; (c) to meet deficiencies or excesses in rules imperfectly conceived or enacted. The first two are cases for genuine interpretation. Austin holds that the third case, when treated as a matter of interpretation, calls for spurious interpretation. Really it is a judicial finding or making of law where legislation or the judicial or juristic tradition is deficient, and ought to be recognized as such.

It should be noted that Austin here unconsciously assumes natural law. He assumes an ideal or perfect principle which the lawmaker imperfectly conceives, and so imperfectly declares, or imperfectly declares for some other reason. Note also that Austin adopts civilian theories of interpretation of the Digest. Where one uses the Digest as a law book for the modern world, his difficulties will be: (a) to determine which of two or more texts of coordinate authority to apply (compare the problem of a common-law court, which of two cases or lines of cases to apply); (b) to determine what was intended to be prescribed by a given text of the Digest; (c) to meet what, from the standpoint of the end of the law, are deficiencies or excesses in texts of the Digest when used as a law book for the modern world.

As Austin puts it, the object of genuine interpretation is to discover the rule which the lawmaker intended to establish; to discover the intention with which the lawmaker made the rule, or the sense which he attached to the words in which the rule is expressed. It belongs to situations for

which rules are fully provided in advance. Its object is to enable others to derive from the language used "the same idea which the author intended to convey." But it happens frequently that the lawmaker's idea was imperfectly conceived. He did not work it out with sufficient completeness or with sufficient exactness, so that supplementary lawmaking becomes necessary. This also is commonly called interpretation. But it is quite another thing than the type of interpretation first spoken of. It is not in a strict sense interpretation at all. Austin named it spurious interpretation. But, as said above, Austin's genuine interpretation and his spurious interpretation do run into one another to a certain extent.

As Austin sees it the object of spurious interpretation is to make, unmake, or remake, and not merely to discover. It puts a meaning into the text as a juggler puts coins, or what not, into a dummy's hair, to be pulled forth presently with an air of discovery. Analytically it is a legislative rather than a judicial process, made necessary in formative periods by the poverty of principles, feebleness of legislation, and rigidity of rules characteristic of the earlier stages of development of a legal system. So long as law is regarded as sacred, or for any reason as incapable of alteration, such a process is necessary to growth. But surviving into periods of legislation it may become a source of confusion. Such survival, however, like the survival of fictions, of implications in law, and of such terms as "constructive fraud," is inevitable in any system. While it is a chief mode of growth in the formative period, in the period of growth by juristic speculation, which is the classical period in a legal system, it becomes a settled doctrine, and passes into succeeding periods of legislation as an undoubted judicial attribute. As legislation becomes stronger and more frequent, examples of this type of so-called interpretation become less common. But where there are century-old codes which have to be applied to wholly new situations, there has to be much of

it. The case is not unlike that which arose when the Digest had to serve as the common law for Continental Europe from the twelfth to the seventeenth century. With us, on the other hand, no theory of interpretation is needed in order to overhaul our traditional case law from time to time. The most conspicuous example of spurious interpretation in recent American case law is the attempt in some jurisdictions to read into the statutes governing descent an exception excluding the heir who murders his ancestor. But this result is better and now generally reached by imposing a constructive trust, without resorting to so-called interpretation. None the less, the genuine character of this so-called interpretation remains to a great extent unquestioned. Law books continue to discuss it as a form of interpretation *ex ratione legis*, and courts have often confused the two.

It is often said that our constitutional law is a field of spurious interpretation. But the instances vouched for this are cases of application rather than of interpretation. The interpretation of the provisions as to due process of law in the Fifth and Fourteenth Amendments, construing them as prohibiting arbitrary and unreasonable executive and legislative action, is an example of historical interpretation. The decisions complained of involve application of the standard of reasonableness and raise questions of the measure and limits of application of legal standards.

Spurious interpretation as interpretation is an anachronism in an age of legislation in the maturity of a system of law. When new subjects which are not covered by century-old codes arise we might as well recognize that judicial decision has to find and make law outside of the codes, even if by analogical use of materials in the codes. But this is not a logical process of drawing out the content of the text or finding the actual intention of those who formulated it. That is the significant point of Geny's book. As interpretation it is a fiction. Jhering called the process, when applied in a period of growth by juristic speculation "juristic

chemistry." Savigny, considering it with reference to the adaptation of authoritative texts to new circumstances, calls it "the correction of an incorrectly expressed law." This assumes the eighteenth-century idea. The law incorrectly expresses the idea of natural law which it seeks to declare, so that the process of judicial treatment of it is very like reformation of an instrument in equity for errors of expression. But Savigny would probably have said, if pressed, that it incorrectly expressed the people's conviction of right. Lieber points out that it is essentially legislation. Bryce calls it "evasion," which is from Bentham's standpoint and is too strong. It is what I have called a general fiction. It belongs in a class of fictions under which a general course of procedure or general doctrines have grown up, as contrasted with particular or special fictions; fictions which have enabled new rules to grow up for particular cases. Moreover, it is in large part a fiction which has done its legitimate work. It has long been seen that special fictions are unnecessary in and unsuited to a developed system of law. But general fictions tend to become so deep-rooted that eradication is very difficult. What Austin calls spurious interpretation and genuine interpretation are so commonly confused by institutional writers that it is seldom brought home to the student of law that there is a difference. So long as the bulk of a legal system is in the form of case law, this is no great matter. When the growing point shifts to legislation and judicial lawmaking, being interstitial, is confined within relatively narrower limits, the confusion becomes a serious matter because it obscures the real and legitimate lawmaking power of courts and brings about neglect to study the principles of judicial law finding and lawmaking.

What shall we say of Austin's doctrine? Three postulates underlie our technique of interpretation: (1) That the statutory formula provides one or more rules, that is, provides for definite legal consequences which are to attach to

definite detailed states of fact, (2) that the formula was prescribed by a determinate lawmaker, that the lawmaking collectivity of modern states is analogous to the individual sovereign lawmaker of the later Roman Empire, and hence had a will or intention the content of which is discoverable and to be discovered; (3) that the formula prescribed was meant to cover a certain definite area of fact discoverable and to be discovered, and hence that when that area is fined the formula is meant to cover all detailed situations of fact within it and the intended rule for any such situation of fact within it is discoverable and to be discovered. What Austin calls spurious interpretation results from the third postulate.

It is easy to attack these postulates as not in accord with reality. Yet for practical purposes they come as close to the phenomena of finding the law as the phenomena come to the postulates of any practical activity, as to which there is organized knowledge. For example, Einstein may have proved that we live in a curved universe in which there are no planes or straight lines or right angles. But we do not on that account give up surveying since the results on the basis of the postulates are near enough to reality for our practical purposes.

As to the first postulate, it is seldom that a legislative body in a common-law jurisdiction attempts more than rules for definite detailed states of fact. When it purports to do more it usually simply declares the pre-existing law. Of late, legislation has more and more set up standards. But here, again, the standards are not of general application throughout the field of law, as, for example, in case of the common-law standard of due care, but are imposed with reference to particular defined subjects or situations. In effect, the first postulate expresses the attitude of the common-law lawyer toward legislation.

As to the second postulate, the formula was drawn up by some one to some end, and agreed upon by at least a

majority of the members of a legislative assembly. To think of a collective lawmaking body in terms of an individual lawmaker, for such cases, is something very different from postulating such a lawmaker with reference to a body of traditional law or with reference to general provisions of a bill of rights formulating a long course of legal and political experience of English-speaking peoples. It is for the latter sort of provision that Kohler's theory of sociological interpretation is useful. The second postulate comes close to the facts for ordinary statutes. They are usually drafted by some one person to meet some one grievance in some one way and then given the guinea stamp of the legislative body.

The third postulate has chiefly to do with statutes covering a whole field, not a particular situation of fact, and so designed to cover that field completely, such as the Negotiable Instruments Law. It puts everyday situations in generalized form. Where legislation in common-law jurisdictions is not of the usual type, dealing with one question or situation only, it commonly formulates or restates authoritatively the results of judicial and doctrinal development of some subject with occasional substitution or interpolation of new rules. It is chiefly the latter which call for interpretation in such cases.

Gray pointed out the chief difficulty in connection with the third postulate. Frequently those who framed a formula to cover some field to the exclusion of the traditional law did not have in mind some particular state of fact which none the less is included in the field covered and so is within the purview of the formula. Often they could not have had it in mind. Thus there was no intent as to the legal result to be attached to that state of facts. Yet the postulate requires courts to assume that the lawmaker had it in mind, and had in mind a legal result appropriate thereto. It requires them to work out the application of the formula to the facts in question on that basis.

In such cases what Austin calls spurious interpretation is legitimate and necessary. Like all postulates of application of organized knowledge to practical action, the third postulate is a generalized expression of a practical means of meeting the problem presented. In the application of statutes we have to take account of the needs of those who must advise and of those who must decide. Those who must advise require predictability. They require certain fixed assumptions from which they may proceed with reasonable assurance whenever a legislative formula is not to be adhered to strictly. On the other hand, those who decide demand a margin for doing justice in the particular case. They seek a freedom to mold application of the formula to exigencies of unique as contrasted with generalized states of fact. On the whole, we have sought to maintain the general security and uphold the economic order by postulating a legislative intent to be derived from the given text by a known technique, and to secure the individual life by the scope of adjustment to particular situations afforded by the technique.

There is, however, another type of spurious interpretation resulting from the confusion of ascertainment of an actual intent and determining a postulated intent under the one name of "interpretation." As a result of this confusion an idea grows up that interpretation means affixing to a legal formula any meaning which is required to bring about a result dictated by convenience or expediency or individually conceived policy. This idea was urged vigorously during the agitation for recall of judges and recall of judicial decisions at the beginning of the present century. Such "interpretation" suggests the story of the waiter who, on an order for beefsteak, brought in mutton and explained that it was a mutton beefsteak.

(2) Interpreting the legal precept — genuine interpretation. The means of genuine interpretation are direct and indirect. The direct means are (a) the literal meaning of the language used, and (b) the context. As to this it has

been said: "We do not inquire what the legislature meant; we ask only what the statute means." But what the statute means is arrived at on the basis of the first and second of the postulates set forth above. The first of the direct means of interpretation, the literal meaning, assumes that the statute means and hence the legislature meant what the statute says. However, cases are met with continually where the literal meaning could not have been meant. The simplest cases are those of rank absurdities where the real meaning is none the less palpable, such as the statute forbidding discharge of loaded firearms in a public road or highway "except for the purpose of killing some noxious or dangerous animal or an officer in the pursuit of his duty." Such things used to result from addition of clauses at the hurried end of a session or after conference between the houses. Also ambiguity is not unlikely to be involved in almost all use of words. Bentham's ideal of legislative use of language such that one word shall always mean one thing is not likely ever to be realized. Changes in the meaning of technical terms have to be reckoned with, as, for example, in the word "contract" as used in the clause of the federal constitution as to the obligation of contracts and the meaning which that word has come to have in the present century. In the case of constitutional provisions historical interpretation is often necessary. Hence courts have had to caution against too much dependence on the plain meaning of plain words. On the other hand, a counter caution against spurious interpretation is no less necessary. Thus a number of canons of interpretation have arisen as a result of experience of difficulties as to literal meaning.

When, as often happens, the primary indices to the intention of the lawmaker fail to lead to a satisfactory result recourse must be had to the indirect means, which are: (a) The reason and spirit of the rule and (b) the intrinsic merit of the possible competing interpretation. Here the line between a genuine ascertaining of the meaning of a law and

a making over or restriction of or adding to it, under the guise of interpretation, becomes difficult to draw. Strictly used, both of these indirect means are means of genuine interpretation. They are not covers for the making of a new precept. They are means of arriving at the intent of the maker of an existing precept. The first of these indirect means, by considering the reason and spirit of the precept, seeks to find out what the lawmaker meant by assuming his position, in the surroundings in which he acted, and endeavoring to gather from the mischiefs he had to meet and the remedy by which he sought to meet them his intention as to the particular point in controversy.

Austin, following the civilians, distinguishes interpretation *ex ratione legis* as extensive or restrictive. The lawmaker, in formulating the precept in a statute, may conceive the intended end imperfectly and so may not follow out its reason with logical completeness or may not follow it with logical exactness. Hence, as formulated, the statute may fail to cover some case or class of cases which are within the reason, or it may include some case or class of cases which would be excluded by logical adherence to the reason. Here there is a creative so-called interpretation which is a judicial lawmaking. But it may be that looking at the statute as a whole with reference to its reason and spirit the language is broader or narrower than what the lawmaker may reasonably be taken to have meant when we come to apply it to some particular state of facts. In such case we have a genuine interpretation, restrictive or extensive of the literal meaning of the text, reached from the text when applied to cases without or within its reason as disclosed by the text, looked at in its relation to the pre-existing law and the situations of fact it failed to meet adequately. As Austin sees it, the difference is between extension or restriction of the meaning of the words in which the statute is expressed and extension or restriction of the statute itself. Such a line is not easily drawn. Indeed, it cannot be drawn with

precision. In the Roman and modern Roman law, where the received technique is one of reasoning from the analogy of legislation, there is no need of it. The common-law technique, which develops judicial decisions by analogy but does not reason from the analogy of statutes, logically requires the distinction. But the medieval judges and Coke in his commentary on the great statutes of Edward I used extensive interpretation freely, and to some extent judicial finding of law by restriction or extension of the legislative text is established in our law. At common law we may say that when interpretation with reference to the intention of the lawmaker, as drawn from the reason of a statute, stretches the words to cover what is regarded as their clear meaning, it is extensive. When it does not give the words their full meaning so as not to go beyond what is held to be the lawmaker's intention, it is restrictive.

According to the classical statement, interpretation should take into account the old law, that is, what the law was before the statute, the mischief against which the law did not provide or provide adequately, the remedy intended, and the reason of the remedy. In the leading case the word "reversions" was held to include remainders. But this canon of interpretation seems to have been more used for restrictive than for extensive interpretation. The one received canon which might be vouched for extensive interpretation beyond the fair purview of the text is Blackstone's fourth rule, that "statutes against frauds are to be liberally and beneficially expounded." It should be noted, however, that the American case commonly cited for this canon involved the Statute of Elizabeth against fraudulent conveyances which had been re-enacted in Virginia, so that the settled English interpretation was taken to have been adopted. The courts have often refused to apply the canon to extend the text, using it rather to negative narrowly literal interpretations. What it comes to is that the strict interpretation appropriate to penal statutes does not apply to those providing remedies for fraud.

As to restrictive interpretation, the leading American case uses the doctrine of the reason and spirit of the law and the canon as to the old law the mischief and the remedy, to restrict a broad general word. There is also the rule that penal statutes are to be strictly construed, a rule referred to the common-law policy favorable to liberty, which has been generally received in America, but has been abrogated by statute in some states. The doctrine that statutes in derogation of the common law are to be strictly construed must be considered fully in another connection. Behind much of this is the traditional attitude of the common-law lawyer toward statutes.

Certain indicia to the reason and spirit of a law remain to be considered. At common law the preamble was considered not a part of the act, but was "a good mean for collecting the intent and showing the mischiefs which the makers of the act intended to remedy." It has been used both to restrict the text and to extend it. But courts have refused to allow a restricted preamble to limit a clear text, although it may be used to explain an equivocal expression. The preamble may be useful, however, to show the legislative policy behind a statute. Indeed, it is sometimes needed today when legislation on a newer ideal must meet constitutional objections based on an older professionally and judicially received ideal. On the other hand, the preamble may be, as Coke puts it, "a specious frontispiece" to give color of constitutionality or of public good to measures which are *ultra vires* or in real intention harmful. What is said in the debates on a bill is not considered, nor statements of members at hearings before committees; much less testimony of members before a court seeking to interpret an ambiguous statute. But the remarks of the chairman of a committee in charge of a bill which he has reported, explaining its scope and purpose, may be referred to in order to resolve an ambiguity. Even more may reports of legislative committees be resorted to where the meaning is not clear;

yet only to "solve not to create ambiguities." In a striking case a badly expressed and contradictory statute was interpreted by reference to the legislative journals, where it appeared that the language giving rise to the difficulty was due to an amendment at a conference between the houses which was drawn without reference to the bill as originally drawn. Such "legislative history" may be referred to in order to reinforce the plain meaning, but not by way of interpretation where the meaning of the text is clear. All this is genuine interpretation. But there is of late a tendency, especially in administrative agencies, to extend the idea of "legislative history" to the debates and the remarks of individual legislators and use some speech of some one member as the basis of spurious interpretation in order to get away from the plain meaning of unambiguous language. Some explanation is to be found in the strictness of courts in the last century. But departure from the established rules as to legislative debate and as to the use of "legislative history" leads to what Lieber called "extravagant" interpretation.

If the means of genuine interpretation already considered are not available or fail to yield sufficient light, interpretation with reference to the intrinsic merit of the possible interpretations seeks to reach the intent of lawmaker still more indirectly. It assumes that the lawmaker thought as we do on general questions of morals, policy, and fair dealing. Hence it assumes that of a number of possible interpretations the one that appeals most to our sense of right and justice for the time being is most likely to give the meaning of the framer of the rule. In truth, this is a phenomenon we meet on every hand in the judicial process. The decisive element is received ideals of the end of law and of what legal precepts should be in consequence; and it is this measuring by authoritative received ideals which gives a reasonable stability and certainty to interpretation. It may come very close to the line of making rather than interpreting. Dif-

difficulties of expression and want of care in drafting require continual resort to this means of interpretation for the legitimate purpose of ascertaining what the lawmaker in fact meant or must be taken to have meant. But it departs so far from the primary indicia of legislative intent that caution in resorting to it has been insisted on.

(3) Applying the precept. Application of the abstract grounds of decision to the facts of the particular case may be purely mechanical. The court may have to do no more than ask, did title pass on a particular sale, was possession given in a particular gift of a chattel, did a particular possession comply with the requisites of acquiring title by adverse possession? Or application may be theoretically and in appearance mechanical but with a greater or less latent margin of something else. For example, take the cases with respect to acquisition of an easement by adverse user. As one reads these cases he cannot help seeing how much beneath the surface depends on the feeling of the tribunal as to what is right in the particular case and how this is covered up by a margin of choice between competing starting points for reasoning. Where it seems the better solution to hold that an easement was acquired a court will speak only of adverse user. Where it seems a preferable solution to hold that an easement was not acquired, the court speaks of permissive user. As like as not in each case there was a known user not objected to or not prevented, which may be construed either way to meet the exigencies of justice between the parties.

But there is a more important form of application which is of a wholly distinct type. Frequently application of the legal precept, as found and interpreted is intuitive. This is conspicuous when a court of equity judges of the conduct of a fiduciary, or exercises its discretion in enforcing specific performance, or passes upon a hard bargain, or where a court sitting without a jury determines a question of negligence. However repugnant to the nineteenth-century ideas

it may have been to think of anything anywhere in the judicial administration of justice as proceeding otherwise than on rule and logic, we cannot conceal from ourselves that the trained intuition of the judge does play an important role in the judicial process. It is an everyday experience of those who study judicial decisions that the results are usually sound, whether the reasoning from which the results purport to flow is sound or not. The trained intuition of a judge continually leads him to right results for which he is puzzled to give unimpeachable legal reasons. This is not interpretation. But the law may grow through the process of application.

On the whole, the common-law canons of interpretation are grounded in experience developed by reason and tend to a better administration of justice than leaving interpretation in each case to feelings of policy on the part of the tribunal, which may or may not be those of the legislators. If the canons were sometimes applied too rigidly in the last century, it was rather because of a tendency to mechanical handling of all law at that time than because of any intrinsic unsuitableness of the canons themselves. Interpretation in all of its senses is no mean agency of growth in all stages of legal development.

3. *Equity*, in the sense of a body of precepts of obligation superior to that of the positive law, governing the exercise of legal powers and assertion of legal rights, is a second agency of growth which I have characterized above as a general fiction. But equity is such a fiction only in its origin and in its earlier stages. It is an infusion of morality and morals into the legal system.

4. *Natural Law*. Here, also, as an agency of growth, we have had a general fiction under which the traditional element of a legal system has been made over from time to time to conform to reason. In periods of growth in the past it has been a chief agency of development. The reality be-

hind natural law is that there is an ideal element in the law — not a superior law but a part of the law. I spoke of it fully in a former series of lectures.

5. *Juristic science.* In the maturity of law, juristic science becomes strong enough to be recognized as a legitimate mode of legal development and general fictions are no longer required to bolster it up. It becomes a chief agency of growth. By historical study the principles of the traditional element of the legal system are discovered and by analytical study its logical content is fully developed. In the maturity of a legal system the traditional element becomes a scientific element.

Two dangers have to be guarded against in a scientific legal system, one of them in the direction of the effect of its scientific and artificial character upon the public, the other in the direction of its effect upon the courts and the legal profession. As to the first danger, the law should not be suffered to become too scientific for the public to appreciate its workings. The legal order has a practical task of adjusting everyday relations so as to meet current ideas of fair play. It must not become so wholly artificial that the public look on it as arbitrary. English judges have generally borne this in mind and there has been a real advantage to English law in that its development has been chiefly judicial rather than juristic. When Lord Esher said, "The law of England is not a science," he meant to protest against a pseudo-science of rules and doctrines existing for their own sake, subserving supposed ends of science, while defeating the ends of law. It is the importance of the role of jurors in tempering the administration of justice with common sense and preserving a due connection of the rules governing everyday relations with everyday needs of ordinary men that has made up for the many defects of trial by jury and does much to keep that system alive. On the Continent a generation ago it was thought to be one of the problems of

law reform how to achieve a like tempering of the justice administered by highly trained specialists.

In the other direction, the effect of a scientific legal system upon the courts and upon the legal profession is more subtle and far-reaching. One effect of system is not unlikely to be petrification of the subject systematized. Perfection of scientific system and exposition tends to cut off individual spontaneous initiative, to stifle independent consideration of new problems and of new phases of old problems, and to impose the ideas of one generation upon another. This is so in all departments of learning. One of the obstacles to advance in every science is the domination of the ghosts of departed masters. Their sound methods are forgotten while their unsound conclusions are taken for gospel. Legal science has not escaped this tendency. Legal systems have their periods in which system decays into technicality, in which a scientific jurisprudence becomes a mechanical jurisprudence.

I have referred to mechanical jurisprudence as scientific because those who developed and adhered to it believed it such and so called it. But in truth it was not science. We no longer hold anything scientific merely because it exhibits a rigid scheme of deductions from *a priori* conceptions. In the philosophy of today, theories are "instruments, not answers to enigmas in which we can rest." The idea of science as a system of deductions has given way and the revolution which has taken place in other sciences in this respect has been taking place in jurisprudence also.

A purely juristic development of law (in the second sense) is not desirable. But juristic science does an indispensable work of organizing and systematizing the results of experience of administration of justice, subjecting them to the scrutiny of reason, thus eliminating or refining crudities, working out analogies and formulating principles and conceptions. If law is experience developed by reason and

reason tested by experience, while the experience comes through the courts the reason is applied to it by jurists, and the development of experience in juristic writing gives the reason element which is then tested in the courts by further experience.

6. *Judicial empiricism.* Judicial finding out by experience of decision the practicable legal precepts which will attain the ends of law when applied to particular cases has been the active agency in making and shaping the traditional element of the common-law system and has played a much greater part in the civil-law system than jurists in the last century were willing to admit. Logic does not give starting points. They are given by reason applied to experience. It systematizes, develops, and directs experience of decision. The call for elimination of the reason element, which has been heard so much of late, was in reaction from the nineteenth-century doctrine of a fixed body of historically given conceptions or a complete codification from which decisions were to be deduced by a purely logical process. There is not the irreducible contradiction between Coke's saying that reason is the life of the law and the saying of Mr. Justice Holmes that "the life of the law has not been logic; it has been experience" which has been assumed. Coke wrote in the transition from the strict law to equity and natural law. The rigidity, technicality and disregard of the moral aspects of controversies characteristic of the strict law were giving way to reason and this was the life of law in a stage of liberalization. Holmes wrote in the maturity of law, when there was a certain going back to the strict law and experience seemed to show the path to the liberalization which was to come in what I have called the socialization of law. In this connection "reason" and "logic" are not synonymous. The reasoned critique of legal precepts and adjustment of them to morals and a philosophical ideal which characterized the seventeenth and eighteenth centuries and the logical application of established precepts and deduction from re-

ceived conceptions which were believed in in the nineteenth century are not identical. Finding of principles behind adjustments of relations and orderings of conduct by experience, and developing those principles by reason, has been quite as much the agency of growth as the experience itself. Experience of how to make workable particular adjustments is organized and made available for new cases by reason, which formulates starting points for working out new adjustments for new situations of fact.

Creative judicial empiricism has been notably evident in Anglo-American equity. One example may be seen in the way in which Lord Eldon, who, if ultra-conservative in politics, was often very bold as a judge, opened the path for equitable securing of interests of personality. Sir George Jessel put the matter well: "Take such things as these: the separate use of a married woman, the restraint on alienation, the rule against perpetuities, and the rules of equitable waste. We can name the chancellors who first invented them, and state the date when they were first introduced into equity jurisprudence." The case in which he said this is a landmark in the law of trusts. In the law of torts one may vouch *Pasley v. Freeman*, *Davies v. Mann*, *Lumley v. Gye*, and *Rylands v. Fletcher* for like judicial establishing of new starting points. Indeed, in *Rylands v. Fletcher* judicial empiricism has on the whole succeeded in establishing a category of liability in spite of vigorous juristic opposition. It should be noted also how judicial empiricism could work out escape from dogmas developed from the the common-law forms of action, from procedure, and from reasoning from badly chosen premises.

But there are limitations on judicial empiricism growing out of what Mr. Justice Holmes called the interstitial character of judicial lawmaking. This has two effects. Sometimes it narrows the application of experience and instead of "broadening down from precedent to precedent" narrows a principle down through a series of decisions till a large part

of it may be lost. The blame for this must rest partly upon a type of text writers who announce a narrow rule upon the basis of some particular case and partly upon the idea in the stage of strict law and in the maturity of law that law is a body of laws thought of as rules in the strict sense. Second, there is an effect of the need of stability and certainty and uniformity, sometimes leading to obstinate adherence to an ill-conceived precept when its results in application are unfortunate although often a way round by resort to established principles is not difficult. This requires consideration of the doctrine of *stare decisis*, now under severe attack. But that subject would require at least a lecture, if not a course of lectures, by itself. There are real difficulties in the judicial process which I do not pretend to deny nor seek to ignore. But those which give rise today to attacks upon *stare decisis* have to do more with interpretation of statutory and constitutional precepts and with application of standards than with the following in private law of authoritative precepts established by judicial decision.

7. *Comparative law.* Commercial law has been the field in which comparative law has chiefly served as an agency of developing the traditional element of legal systems. In the development of the Roman law of legal transactions Greek commercial custom played an important part. In the development of commercial law in England in the seventeenth and eighteenth centuries, Lord Holt in particular often referred to the Roman law and to civil-law treatises. In one case he went so far as to justify his citation of such authorities by saying that "the principles of our law are borrowed from the civil law, and therefore grounded upon the same reason in many things." Lord Mansfield, who, after Lord Holt, is regarded as the founder of English commercial law, also made free use of the civil law. As a result, English law books of the latter part of the eighteenth century and the fore part of the nineteenth century make copious reference to civilian texts and effective use of them.

At the same time in America the exigencies of commercial law, on which there was no useful material in Coke and Blackstone, led to an increasing resort by the courts to the civil-law treatises. Kent's Commentaries on American Law did not appear till 1826-1830. The first of Story's treatises appeared in 1832. For over a generation the civilians had this field to themselves. The decisions of the Supreme Court and of the Court of Errors and Appeals in New York in the first two decades of the nineteenth century constantly cite the Continental treatises, particularly Pothier. From commercial law this tendency to rely upon the civilians spread for a time to private law generally and civilians were cited on purely common-law questions as late as 1854, although the state constitution made the common law the rule of decision in the courts. Examples might be drawn, though to a less extent, from the whole country.

In effect, the result was a conception of comparative law as declaratory of natural law, a conception which is especially marked in the writings and judgments of Kent and Story. It was not merely creative, it made for stability and gave direction both to judicial decision and to doctrinal writing. It was the most efficient of the instruments by which the great text writers of the formative era were able to bring it about that the English common law should be the basis of the law in all but one of the United States.

8. *Sociological study.* This is something which might well be a leading agency of growth of the traditional element in the law of today. But as things are it is available for legislation rather than for the judicial finding of law. Courts are not organized to carry it on nor is it something that ought to be carried on by them or immediately under their auspices. The need of it as an aid to the courts has been well put by Mr. Justice Cardozo. Until we get a ministry of justice to do this work as it ought to be done, it can only be the task of private foundations and research institutes and of societies interested in social work, and must

lack the continuity, comprehensiveness and authority which it ought to have. Study by individual administrative agencies for their own purposes cannot supply what is needed for the everyday tasks of the private law in the society of today.

Roscoe Pound.