

ON THE ORIGIN AND NATURE OF LAW.

Writers on jurisprudence have found great difficulty in defining the word law. Sir Frederick Pollock, in his First Book of Jurisprudence, says: "We find in all human sciences that those ideas which seem to be most simple are really the most difficult to grasp with certainty and express with accuracy. * * * Any tolerably prepared candidate in an English or American law school will not hesitate to define an estate in fee simple; on the other hand, the greater have been a lawyer's opportunities of knowledge and the more time he has given to the study of legal principles, the greater will be his hesitation in answering this apparently simple question, What is Law?"

And Judge Dillon, in his "Laws and Jurisprudence of England and America," says: "One might *a priori*, think it were easy to define law. Grave mistake. Whoever has studied this subject feels the overpowering sense of its difficulties—difficulties which seem to be beyond the reach of the most enlightened and trained intellects, and to overwhelm them with a consciousness of their own insufficiency. It requires a bolder man than I to propound a definition of the law of the land which shall be at once comprehensive and accurate. Volumes have been written on this precise subject with, to me, at all events, no satisfying result."

I shall not attempt to do what these masters confess is beyond their power, and shall therefore abstain from attempting precise definition and content myself with endeavoring to give some idea of the origin and nature of law by description and illustration.

The word "law," with its plural "laws," is used in many different senses, some more or less closely related, and some almost totally opposite. Sometimes there is an ethical sense, as when we say the moral law, or the laws of morality, or the law of nature. In others there is rather the idea of uniformity of cause and effect, of like conditions producing like results, as when we say the laws of trade, the laws of political economy, the laws of history, the laws of health, and others of like nature. The students of physical science speak of the laws of gravitation, of motion, of mechanics, meaning the qual-

ities that inhere in matter, the uniform action of given forces. It is not for the lawyer as such to say that in these cases the word "law" is improperly used; I do not know that we could establish a right of preemption to the word; but we can say that when the word "law" is thus used it does not mean what it does when used by lawyers. There is in these uses of the word no implication of constraint or obligation pressing upon rational beings which is of the very essence of the law with which lawyers are concerned—municipal law, as it is styled by Blackstone. Thus we see the word "law" is used to describe properties, relations or conditions existing everywhere in the physical, mental and moral world; in the exact sciences as well as in the mental and moral.

One theory of the nature and origin of municipal or civil law is that it is a series of commands addressed by a superior to inferiors. Thus Blackstone tells us it is "a rule of civil conduct prescribed by the supreme power in the state, commanding what is right and prohibiting what is wrong." Of this it may be said in the first place that it is not at all a definition of "law," but only of "a law," an Act of Parliament, of Congress, of the Legislature; a definition of what was called by the Romans *lex* and not a definition of *jus*. This is apparent, not only from the express terms of the definition, but in what Blackstone says in his "endeavor to explain its several properties as they arise out of this definition." This explanation refers almost exclusively to Acts of Parliament. Being this, it does not at all explain or account for the origin or nature of law, except so far as it can be found expressed in laws enacted by legislatures. For if law be "a rule of civil conduct prescribed by the supreme power in a state," then until the supreme power prescribe there is no law. And if there be any laws prescribed they will be found in the printed laws, and all we need do to learn what is the law is to look them up and read them. There are many such laws, but they do not separately or together answer the proper definition of law. They are separately examples of single laws, and collectively a more or less complete collection of the whole body of legislative enactments on the particular subjects to which they relate.

That this theory that law is a series of commands addressed by a superior to inferiors is untenable is, I think, shown by Mr. James C. Carter in his excellent address delivered before the American Bar Association in 1890 on "The Ideal and the Actual in Law." As Judge Dillon correctly says in his admirable work above referred to, page 13, "Law, even municipal or civil law, is vastly more than

Blackstone's and Austin's stereotyped and imperfect definition makes it—a command of the sovereign—a rule of civil conduct prescribed by the supreme power in a state—if by this is meant something always originating with and created *de novo* by the legislature—a mere product of sovereignty of the legislature—and which therefore the legislature can determine, fix and mould as clay in the potter's hand at his pleasure."

Another theory is that law originates in custom, or, as expressed by Mr. Carter, that "Our unwritten law—which is the main body of our law—is not a command or body of commands, but consists of rules springing from social standard of justice or from the habits or customs from which that standard has itself been derived; that law is custom and opinion." Thus he says: "The parties arguing a case before a judge talk of principles and rules. But these are nothing but customs. The plaintiff seeking to enforce payment for goods sold tacitly relies upon the rule or principle that purchasers must pay for the goods they buy. But why is this a principle? Plainly for no other reason than that it is the universal custom. If such were not the custom there would be no such principle."

There can be no doubt that the law is often evidenced by custom and that the courts frequently decide cases in accordance with the custom found to exist among those engaged in the particular business with respect to which the question arises. But I think the part that custom plays in the origin of law is not so important as it is said to be by Mr. Carter, and that he is seriously in error in declaring that "law is custom and opinion," and that the principles of law are merely "universal custom." In my opinion the principle does not follow from the custom, but the custom is the outcome of the principle. Organized society could not exist, men could not deal with each other if "purchasers did not pay for what they buy." But as it was intended by their Maker that men living in organized society should buy and sell to each other, He fitted them for this by writing on their consciences the principle that they should pay for what they buy. Therefore they do—usually—pay for what they buy, and thus arises the custom so to do. But the principle does not exist because of the custom; the latter is the product of the former, and if a place could be found where it was the custom of the majority of purchasers not to pay for what they buy, and a court were established there and the question came before it whether the defendant should or

not pay, the decision would inevitably be against the custom and in favor of the principle.

For these reasons I could not say with Mr. Carter that "law is the mere expression of the universal habits and customs of the people in their jural relations." I believe rather that it is the body of principles and rules recognized and enforced by the courts by which the relations of the members of the community with each other are regulated. Many of these principles and rules are evidenced by customs and usages, but these are only evidences and products of the principles and not the principles themselves, nor identical with them. The difference between these two points of view is perhaps more important than might be at first realized. If the custom be the law, all we need do to ascertain what the law of a particular case is would be to find what is the custom. But in many cases it would be found that the custom was not in accordance with legal principles and could not be recognized by the courts, because not in accordance with legal principles, nor with the dictates of sound morality upon which these legal principles are based.

A pertinent illustration of the ethical quality of the law is afforded by the case of *Grant vs. The Gold Exploration Syndicate*, reported in (1900) 1 Queen's Bench, 233, C. A., where it was decided that the purchaser of a tract of land could recover from his agent whom he had employed to purchase the land for him the amount of a secret commission which the seller had paid to the agent to induce him to get the purchaser to take the land, and was intimated that if the money had not already been paid over to the agent, but only agreed to be paid, the purchaser could recover it from the seller.

Commenting on this case, Sir Frederick Pollock says what is undoubtedly true, that "the morality of the law as regards the duties of agents is absolutely sound and rises far above the morality of the business world." The correctness of this statement is shown by the fact, which appeared in some recent proceedings in the courts of England, that it is a very common custom for agents to take secret commissions from parties with whom they are dealing on behalf of their principals; so common, indeed, that if, as Mr. Carter maintains, custom makes the law, it would be the law that such commissions might be taken, when in fact the law does not permit this to be done.

At the same time we must not forget that law and morality are not identical, and that in the strict sense of the term only the morality that is enforced by the power of the state through the courts is law. When Jesus was explaining to the Jews of his time the essential prin-

ciples of the marriage relation, He referred to the fact that the law of Moses permitted divorce because it had to be adapted to the "hardness of the hearts" of the Hebrews. So the law now cannot exact a higher degree of morality from the citizen than can be realized and attained by those to whom it applies. The seller of goods must be allowed to indulge to a certain degree in praising his wares without being held to a warranty, and the purchaser may to some extent say "it is naught," and then go away and boast without incurring any legal penalty.

We must not, therefore, make the mistake of confounding law with morality. The latter is on a broader and a higher plane than the former. The state does not and cannot undertake to prescribe or regulate the relation of the citizen with his Maker. It does not and cannot attempt to interfere with or prevent his thoughts; or, usually, even his actions, so long as they merely affect himself. Only when they effect his fellow citizens can the state take cognizance of them. And those acts only of which the state does take notice and the performance of which it does enforce or prohibit are the subjects of law.

But though the boundaries of the regions covered by moral law and municipal law are not the same, much of the same region is covered by both, and the fundamental principles of the latter are found in the former. And it cannot be too strongly emphasized that in neither do the principles originate or derive their existence or date their commencement from the fact of their promulgation. The relative duties between man and man recorded on the tables of stone by the finger of God did not originate from the fact that they were thus recorded. Murder was as much both a sin and a crime before that solemn transaction as afterwards. Cain was a murderer even though when he committed the crime of fratricide it had no name. Jesus did not originate a moral principle when he announced the golden rule; He merely made it known. I do not mean of course that the obligation to live up to the requirements of this rule did not rest more heavily on the consciences of men after it was made known to them, but I do mean that as a principle of morals it existed in the nature of things before it was announced as well as after; that a perfect human society can never be attained until the observance of this rule becomes universal, and therefore that it is implied in the idea of such a society.

This is merely an illustration of what I believe to be a general truth; namely, that all the fundamental principles of both the moral

law and municipal law exist as much in the nature of things in the moral world as does the principle of gravitation in the physical world. And no one supposes that Newton did anything more than discover the principle that had inhered in matter ever since it was created.

Heron on Jurisprudence, page 59, quoting, says: "Edmund Burke has said that we are all born in subjection—all born equally, high and low, governor and governed—in subjection to one great, immutable, pre-existent law, prior to all our devices and prior to all our contrivances, paramount to all our ideas and all our sensations, antecedent to our very existence, by which we are knit and connected with the eternal frame of the universe, out of which we cannot stir. And he has described the science of jurisprudence as the pride of the intellect, the collected wisdom of ages, combining the principles of original justice with the infinite variety of human concerns."

This is what I understand is meant by Hooker when he says: "Of law there can be no less acknowledged than that her seal is the bosom of God, her voice the harmony of the world; all things in Heaven and earth do her homage, the very least as feeling her care and the greatest as not exempt from her power; both angels and men and creatures of what condition whatever, though each in different sort and manner, yet all with uniform consent admiring her as the mother of their peace and joy."

It must of course be understood clearly that, as I have already stated, the field of municipal law is not as broad as that of moral law. The jurist does not attempt to enforce the laws of morality in the abstract. As a jurist he has nothing to do with the private morals of his fellow citizens. It is only their relations with each other and the relation of each to all that he attempts to regulate and control. But when he does attempt this regulation and control, if it is to be beneficent and helpful, it must be done not by an arbitrary law and not merely by enforcing such usages and practices as the people are inclined to adopt, but so far as possible those that are based on the immutable principles of justice and right.

My conception of municipal law is that it exists at all times and everywhere as much as do the physical laws by which matter is governed. The principal difference between these is that the latter inhering in inanimate matter are fixed and certain, and always operative. The laws of electricity have existed ever since the world was created, though until recently they were unknown. So the laws that ought to govern men and regulate their relations with each other ex-

isted as part of the moral order of the universe before men came into social relations with each other, but they are called into operation only when these relations are established.

If five thousand human beings were landed together on an uninhabited island and made their home there, they would at once establish a tribunal to administer the "law." And this tribunal would not wait for the enactment of "laws" by a legislative body, nor for customs to be adopted by common consent, but it would be prepared at once to decide the cases brought before it. It would not wait for a definition of larceny before it would punish one shown to have taken his neighbor's goods; nor for a definition of debt or consideration before it would compel a man to pay for what he had bought from his fellow. In other words, such a tribunal would be prepared with a principle or rule for the decision of every case that was brought before it. Whence would come these principles? Manifestly they would be deduced from the view that the members of the tribunal held of what was right in the given case. If the judge had been trained in a system of laws in the country whence he came and knew what had been held to be right under like circumstances there, he would no doubt be influenced by that knowledge in coming to his conclusions, but that would simply be paying deference to the opinions of others as to what was right and adding their judgment to his own to aid him in determining what was right and just; in other words, in agreeing with an ideal "law." And this is what occurs as the system of law of a country becomes established. Precedents multiply, and when a case is brought to a lawyer for advice or to a judge for decision, he examines the precedents created by the prior decisions in similar cases. But in doing this the soundest judgment and discrimination must be exercised. The cases may be similar in many of their elements and yet not be alike, and the difference may be such that a different principle of decision should be applied. Or it may be, and often is, assumed that the law of the case is in the decision, whereas it is not there, but in the principle upon which the decision is based. It therefore becomes of the utmost importance for the lawyer and the judge not only to be thoroughly grounded in legal principles and skilled in applying them, but also in the principles of a sound morality, if he would escape being misled by the apparent authority of decisions that seem at first sight to apply, but really do not, to the case with which he is concerned.

Not seldom the decision may be correct and the correct principle may be found in the opinion when at the same time an erroneous

principle may be made so prominent that on the surface it appears to be the ground of the decision. Thus it has been so often said in judicial opinions that "a mistake in law is no ground of relief," or that "no relief can be had in equity from a mistake in law," that it comes to be cited in opinions as a "well settled general rule." But when the principle of the decisions is carefully examined it will be found that where one had paid money or done some act that he was not obliged to do, thinking he was so obliged, he cannot recover the money or be relieved from the consequences of the act if the person who received the money or the benefit of the act was in good conscience entitled to it, even if he could not have by law compelled it. But if the person who received it has no right to it the other can recover it, even though he paid it because he thought he was bound by law to pay. In other words, the principle that "Every man is bound to know the law," or "That ignorance of the law excuses no one," gives way to the higher principle that no one shall be allowed by law to keep another's money, to which he has no right and which was paid to him by mistake.

If the relations between the members of organized society are regulated by law, and if there are principles of right and wrong that belong to the moral universe, whether called moral laws or natural laws, according to which these relations should be regulated, then theoretically at least these principles must form the groundwork of the municipal law. This has often been recognized by judges and lawyers. Thus it was said by Judge Yeates, of the supreme court of Pennsylvania, in *Steinhowe vs. Whitman*, 1 *Sergeant & Rawle*, 448: "I have been taught to believe in the language of an old chief justice of England that nothing can be law which is not founded on common sense or common honesty; I agree with him fully in what he has said upon another occasion that laws are never so well directed as when they are made to enforce religious, moral and social duties between man and man." And he further added, as he says in the words of the learned Judge Wills, in 4 *Burr.*, 2313, that "private justice, moral fitness and public convenience, when applied to a new subject, make common law without a precedent; much more so when received and approved of by usage."

So in the case of *Forbes vs. Cochrane*, 2 *Barn. & Cr.*, 448, where it was decided that when certain persons who had been slaves in a foreign country where slavery was tolerated by law escaped thence and got on board a British ship of war on the high seas that the British subject, resident in that country, who claimed the slaves as his

property, could not maintain an action against the commander of the ship for harboring the slaves after notice. Mr. Justice Best, speaking of the comity of nations, said: "It is a maxim that cannot prevail in any case where it violates the law of our own country, the law of nature, or the law of God. The proceedings in our courts are founded upon the law of God, and that law is again founded upon the law of nature and the revealed law of God. If the right sought to be enforced is inconsistent with either of these, the English municipal courts cannot recognize it. I take it that that principle is acknowledged by the laws of all Europe. It appears to have been recognized by the French courts in the celebrated case alluded to by Mr. Hargrave in his book as *Sommersett's case*. Mr. Justice Blackstone, in his commentaries, volume one, page forty-two, says that upon the law of nature and the law of revelation depend all human laws; that is to say, no human law should be suffered to contradict these. Now, if it can be shown that slavery is against the law of nature and the law of God, it cannot be recognized in our courts. Slavery is an anti-christian law, and one that violates the law of nature, and therefore ought not to be recognized in England."

In Calvin's case, 7 Co. 12, it is said that "the law of nature is that which God, at the time of the creation of the mind of man, infused into his heart for his preservation and protection." It needs but the slightest reflection to see that in the language of Mr. Bishop, in his *First Book of the Law*, Sec. 43, "there can be no society of man dwelling with man unless there is also some law by which the association is regulated." Therefore as soon as men began to associate themselves together, law had to appear. For, as Mr. Bishop further says, "we can conceive of no such thing, and no such thing can be, as man in society without law;" and he adds in another place, Sec. 87, "that the rules of right and of rightful association given by God to man are, so far as they are applicable in judicial proceedings, and so far as they have not been contradicted or modified by technical rules established by legislation, by judicial decision, and the like, operations of the authority which binds our tribunals."

This extract suggests the limitations which the doctrine that municipal law is based on the moral law must be received. This doctrine does not imply that every judge or lawyer may advise on a case or decide it according to his own ideas of natural or moral law. But it does suggest that in the infancy of the law a case might have been so decided. It suggests that the original source of law was, and in a sense still is, the moral law as it is impressed on the minds and con-

sciences of men. That is, to quote from Mr. Bishop again, Sec. 85, "if we suppose a court to have been established in the beginning by God before man had made any new law, it is plain that the judge must have decided the first cause on the authority of the law of God as ordained for the use of man." This decision would in the next case be a precedent and when brought to the attention of another judge would tend in some degree to modify and control his own idea of what was demanded by natural law, and hence what was the proper decision in the case before him. And thus as the body of decisions grew and precedents increased there would be less conscious reference to moral law as a source of municipal law, while yet there would be really such reference, the difference being that the precedents would be accepted as evidence of the requirements of the moral law.

The effect of this is that as the legal system of a given country becomes more and more developed there is less and less recurring to first principles and a decreasing consciousness in the mind of the lawyer or the judge that he is basing his opinion or his decision on the fundamental or immutable principles of justice and right. But in so far as he follows precedent, he is simply adopting the judgment of his predecessors as to what is right and in accordance with the fundamental principles of justice.

The intimate relation between law as administered in our courts—including equity within its meaning—and the moral law may be seen by comparing with each other the fundamental maxims of each. For instance, we may compare the golden rule, "Do unto others as you would they should do unto you," and "Thou shalt love thy neighbor as thyself," which latter is as Jesus tells us the essence of all the law relating to the duties of men towards each other, with the equitable principles that "He who seeks equity must do equity," and "He who comes into equity must come with clean hands." It appears to me that these maxims are practically the same up to the point where necessarily the moral law and the municipal law cease to march together. The latter cannot control the emotions and affections. It can take notice of only a few of a man's actions which terminate upon himself. But when he invokes its aid and asks it to compel another to do right to him it says, "Do right yourself, or you shall not have right. Love your neighbor as yourself; do to him as you wish him to do to you." Here, in my opinion, we have the source and nature of law, the municipal as well as the moral law, existing from the first and in the very nature of things as much as the laws of gravitation, of electricity, or any others pertaining to the material universe ante-

rior to custom or legislation, or any forms in which these laws are now manifested. There are many other legal principles that show the same origin, such, for instance, as that which forbids an agent to have an interest adverse to the interest of his principal, that forbids a trustee to purchase at a sale by him of property for which he is trustee.

The doctrine of estoppel rests on the same basis. When a person has asserted that a certain state of facts exist and has led another to act on that basis, he will not afterwards to the detriment of the other be permitted to show that what he asserted was false. The reason for this is that it would be contrary to good faith and fair dealing to permit him to do so. If through the dishonest actions of a third person the conditions are such that a loss must fall on one of two innocent persons, the law will compel him to bear it whose fault—even if free from moral turpitude—made the dishonesty of the third person possible.

Many other illustrations to the same effect might be given did space permit, but these suffice to show how sound legal principles have their origin and root in good morals.

There is no part of the law that bears such evident marks of having its source in moral and religious conceptions as the criminal law, but it is not within my present purpose to discuss this.

There is, as we all know, an extensive region with which lawyers have to deal relating to the interpretation and construction of written laws and contracts where the moral element is not especially presented, but this interpretation and construction is only a preliminary process which prepares the lawyer and the judge to ascertain and apply the law.

So with the whole mass of the law of procedure or practice. All this is based on expediency and is merely a means and not an end, and the only principle of morality involved in it is that it be used as a means to further, and not to obstruct or hinder, the administration of justice and right.

Laying these subsidiary branches of the law aside, it is of the great body of the law, which deals with the relative rights of the citizens towards each other, wherein are found the principles of morality that are grounded on the conscience of men, that I have been speaking. And I trust I have shown that while there are many laws that have been enacted by the legislature, which are therefore in a certain sense commands which the citizen is bound to obey, *the law* is something above and beyond and more than this; and that though there are

many customs which are recognized and enforced by the authority of the state through the courts, which have therefore the force of law, *the law* is something higher and grander and more fundamental than these, which are merely some of the evidences of what the law is. That the law which binds men together in society and regulates their intercourse with each other is a primal fact existing in the very nature of things as much as the physical laws that inhere in matter and con- There is this difference between the latter and the former. These are binding by the immutable force of their very being, and cannot be transgressed, while the former, which are addressed to men, can be disobeyed. This fact emphasizes the distinction between law as understood by the scientist and law as it is known and dealt with by the lawyer. Man is a free moral agent with reason to guide him and with freedom to choose, and therefore the law does not bind him irresistibly, but only points out the way to him, and so far as his transgression interferes with the rights of his fellows endeavors to compel him to walk in that way. And the ease with which he, if so disposed, may find the way, is beautifully stated by Judge Dillon on page 14 of his excellent work cited above, where he says: "Constitutions, statutes, judicial decisions and treatises are numbered by thousands. They are almost unknown to the mass of men; they are at best imperfectly known to lawyers; and yet so it is that any man who in good faith obeys the dictates of a pure and honest heart, whose civil conduct towards his fellow men is guided by the sense of justice and right which is graven on his heart by the supreme Law-giver—will find such a course of conduct, except in the rarest instances, to be in perfect conformity with the requirements of the laws of his country. This is to me conclusive proof of the essential ethical nature and foundation of our laws, and also conclusive proof that laws are something more than a body of commands in any real and proper sense of the word." To this we venture to add that when a man "obeys the dictates of a pure and honest heart" he does not feel the compulsory force of law; and if we can picture to ourselves a world where everyone would in all things obey these dictates in his relations to his fellow men, we can see that the love of the law would be converted into the law of love.

Until that time comes, however, law must have sway and lawyers and judges must administer it. But let us ever remember that we are priests in a holy temple, ministers at a sacred shrine, and that he who would offer here acceptable sacrifices must come with clean hands and a pure heart.

Let me conclude by recalling what Judge Dillon so eloquently and beautifully said on this subject in the first of the Storrs lectures delivered to the Alumni and students of this university, and contained on page 17 of the work above referred to: After referring to a saying of the philosopher Kant that "There are two things which the more I contemplate them the more they fill my mind with admiration—the starry heaven above me and the moral law within me," he says: "Not less wondrous than the revelation of the starry heaven and much more important, and to no class of men more so than the lawyer, is the moral law which Kant found within himself and which is likewise found within and which is consciously recognized by every man. This moral law holds its dominion by divine ordination over us all, from which escape or evasion is impossible. This moral law is the eternal and indestructible sense of justice and of right written by God on the living tablets of the human heart and revealed in His Holy Word. It is considerations of justice and right that make up web and woof and form and staple of a lawyer's life and vocation. The lawyer's work and business are, it is true, with human laws; but let me repeat the lawyer makes a grievous mistake who supposes law to be the mere equivalent of written enactments or judicial decision.

* * * Ethical considerations can no more be excluded from the administration of justice, which is the end and purpose of all civil laws, than one can exclude the vital air from his room and live. A thousand times have I realized the force of this truth. If unblamed I may advert to my own experience, I always felt, in the exercise of the judicial office, irresistibly drawn to the intrinsic justice of the case, with the inclination, and if possible the determination, to rest the judgment upon the very right of the matter. In the practice of the profession I always feel an abiding confidence that if my case is morally right and just it will succeed, whatever technical difficulties may appear to stand in the way; and the result usually justifies the confidence."

J. W. Simonton.