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1911.

509TH ORDINARY GENERAL MEETING.

MONDAY, DECEMBER 5TH, 1910.

ARCHDEACON BERESFORD POTTER, MEMBER OF COUNCIL,  
IN THE CHAIR.

The Minutes of the previous Meeting were read and confirmed.

Mrs. G. F. Whidborne was elected a Member and Miss E. Zöl Johnson, Miss P. M. Bishop and Miss Lisa Bishop were elected Associates of the Institute.

The CHAIRMAN said: It was an interesting coincidence that while the paper, by a member of the Institute resident in the U.S.A., was being read here, the officers of the American Fleet were being entertained in London. It was gratifying to see these evidences of the strong bond of union between the two peoples.

The following paper, in the absence of the Author, was read by the Secretary :

*THE THEORY OF JURISPRUDENCE.\**

By Judge GEORGE H. SMITH, Los Angeles, California.

PROBLEM TO BE CONSIDERED.

THE problem I propose to consider upon this occasion, is to determine "the relation of *Jurisprudence to the Law*."

This will involve the definition of these terms; and, it will be proper to say—as indicating the method upon which I shall proceed—that my view of the matter is, that, in the successful accomplishment of this task, the problem must find its solution.

Of the two terms, the definition of *Jurisprudence* is sufficiently simple, and will be considered presently. But the definition of "*the Law*" is a problem of more difficulty; and it has even

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\* The first Essay written by Judge Smith was too long to be read or printed *in extenso* in this Journal. He kindly submitted the following outline of his paper instead.—Ed.

been thought that its solution "is not possible unless and until we have a complete theory of the nature and functions of human society." (Sir Frederick Pollock, *First Book of Jurisprudence*, p. 4.)

In this I agree, except that I think we already have such a theory sufficiently complete to serve our purposes; and that the definition of "the Law" is, even now, quite practicable. But for the present, the task must be deferred, in order that the necessary preliminary matters (all of which fall within the province of Jurisprudence) be first considered. In the meanwhile, it will be understood, when not otherwise indicated, that the term, *the Law*, will be used to denote merely the aggregate of the rules and principles *customarily* observed by the courts in the exercise of jurisdiction; which is the sense now, perhaps, the most familiar.

## I. OF JURISPRUDENCE.

### *Jurisprudence Defined.*

Three definitions of Jurisprudence obviously suggest themselves:

- (1) In the first, as suggested by the etymology of the term—Jurisprudence may be defined as *the science of Jus or the Law, i.e., of the content of the Law.*
- (2) In the second, which is the sense in which the term was universally received by jurists prior to the advent of Bentham and Austin, it is defined simply as the *Science of Justice (justi atque injusti scientia)*. This, I conceive, is to be taken as the proper sense of the term.
- (3) In the third, Jurisprudence is defined as the *Science of Rights*; or substituting for the plural, the corresponding collective term, the *Science of Right*.

These several senses of the term, have been thought by Mr. Holland, and jurists of his school, to be essentially different. But obviously, with regard to the second and third of the definitions given, this is not the case. For according to the received definition, and the universal acceptance of the terms, *Justice* consists merely *in the observance of rights (jus suum cuique tribuere)*; and Jurisprudence may, therefore, be defined as the Science of Rights.

So, if we have regard to the terms used, and assume the term, *jus*, to retain, in the composite term, its original sense,

we must admit an essential identity, more or less complete, between Jurisprudence *as the science of justice or rights*, and the same *as the science of jus or the Law*.

This is, at least, a legitimate sense of the term, *the Law*, and I conceive it to be the proper sense to be used in Jurisprudence. How far the Law in this sense can be identified with the Law in the more familiar sense, as denoting the aggregate of the rules by which the courts are customarily governed in the exercise of jurisdiction, will be considered in the sequel.

The definition of Jurisprudence as the Science of Rights is the most specific, and pregnant of results; and from it it follows that, to acquire an adequate notion of Jurisprudence, an adequate analysis of the notion expressed in the term, *rights*, is essential.

#### *Rights defined.*

The term, *a right*, is but a special use of the more abstract word, *right*, which is used in many senses. Of these, three only are material to our present purpose, according to which, the term is used to denote: (1) A liberty or power of acting (*facultas agendi*), as when we speak of a *right*; (2) the quality of rightness or rectitude, as when we speak of *right* as opposed to *wrong*; and (3) the rule or standard in conformity to which the quality of rectitude consists (*norma agendi*).

Of these several senses, the last is involved only indirectly as implied in the others, and will be considered in the sequel. Of the other two senses, the second is involved in the first—that is to say: the term, "*a right*," according to its universal use and acceptation, connotes the quality of *rightness*.

This is no less admitted by Austin and jurists of his school than by others. Their definition of *a right* is that it is a power or liberty created by the will of the State. But to maintain this, they are compelled to invent a new kind of rightness or rectitude, consisting in conformity to the will of the State.

A right may, therefore, be regarded as constituted of the two elements—the faculty of acting, and the quality of rectitude, and may be defined *as a rightful or jural liberty to act*.

#### *An "Unjust Right" an "Insignificant Sound."*

Hence, to speak of an *unjust right* would be an expression belonging to the category of what Hobbes calls "*insignificant sounds*," as when men make a name of two names whose significations are contradictory and inconsistent; as, "an incorporeal body," and a great number more, or as if we should

speak of a crooked straight line, or round square. "For," as he says, "whenever an affirmation is false, the two names of which it is composed, put together and made one, signify nothing at all."

*Juridical and Non-Juridical Rights.*

Hence, also, the distinction sometimes made between *moral* and *legal* rights is to be regarded as inadmissible. For a *legal* right, if it be a right at all, must also be a *moral* right; and such a right would be nothing more than what is more appropriately called a *juridical*, as distinguished from a *non-juridical* right. (Authorities cited R. & L., pp. 161, 185.) But, in fact, as the distinction is commonly used, the quality of rectitude is ignored, and *legality* regarded as the sole essential element. But this is not merely to vary the sense of a term, which is often legitimate, but to *substitute* a new and contradictory sense, with the effect, or proposed effect, of displacing the proper sense, and thus eradicating the notion expressed by the term. Accordingly, to those who use this distinction, the *jus primae noctis*, referred to by Blackstone (2 Com. 283), would, if allowed, be a true *right*; or, to vary the expression, the execution of Socrates, and of the innumerable martyrs who have suffered under cruel laws, would be *just*.

*Natural and Legal Rights.*

So, too, I regard the distinction between *natural* and *legal* rights as at least inappropriate. For, as will presently be more fully explained, all rights originate in *events*, of which human *acts* constitute the most conspicuous class; and among these are included the acts of government officials, legislative, judicial and administrative. But these are but acts, not differing from others except in the *rights* vested in their authors; and, therefore, like other human acts, they constitute mere facts or elements of the problems presented in Jurisprudence. From the standpoint of Jurisprudence, therefore, all rights are *natural rights*; and there cannot be a right of any other kind. Thus, for example, a right arising from the contract, grant, tort, or other act, of a private individual, is admittedly a natural right. But between such a right, and a right arising from an act or acts of legislation, which are but the acts of men vested with the right of legislation, there is, in this regard, no discernible essential difference. In either case, the right has its origin in the act, and its cause in the right of

the actor. Rights originating in legislation, or otherwise in the process of social evolution, are, therefore, no less natural rights than those originating in private acts. For, as we are told by Aristotle, man is "a political animal," and hence the State is his natural State, or the State of Nature.

Hence, as is acutely and profoundly observed by Hobbes: "The law of nature and the civil law contain each other, and are of equal extent.

"The law of nature therefore is a part of the civil law in all commonwealths of the world. Reciprocally also, the civil law is a part of the dictates of nature. For justice, that is to say, performance of covenant, and giving to every man his own, is a dictate of the law of nature. But every subject in a commonwealth hath covenanted to obey the civil law; and, therefore, obedience to the civil law is part also of the law of nature. Civil and natural law are not different kinds, but different parts of law; whereof, one part being written is called civil; the unwritten, natural."

*Of the Nature and of the Several Kinds of Rights.*

The several kinds of rights may be conveniently epitomized as follows:

Rights are of two kinds, radically different in their nature, namely: Rights of *Ownership*, and Rights of *Obligation*; which correspond to what are technically called rights *in rem*, and rights *in personam*.

The former kind include:

- (1) The Right of *Self-Ownership*, or, as it is commonly called, of *Personal Liberty*.
- (2) The Family Rights, or Rights of Ownership growing out of the family relations.
- (3) Property Rights.

These are all essentially of the same nature as the right of property; and, in the Law, are subjects of vindication by the same class of actions, *i.e.*, by actions *in rem*.

The several kinds of obligations, and the corresponding rights, are presented in the familiar classification in use; according to which they are of these kinds, namely:

- (1) Obligations *ex contractu*.
- (2) Obligations *ex delicto*.
- (3) Obligations *ex mero jure*; the last of which are sometimes again divided into, obligations *quasi ex contractu*, and *quasi ex delicto*.

It is to be observed that rights of Ownership cannot be directly enforced by actions, but only indirectly, by enforcing the obligations for restitution or compensation. Hence it is said, and the observation is of fundamental importance: "*Obligations are the mothers of actions.*"

Here it is observed, that a right, whether *in rem* or *in personam*, is defined by Thibaut, and, in effect, by Austin, Amos, Holland, and others of their school, as "*neither more nor less than a legal power to compel.*" But this definition can apply only to *rights of obligation* or rights *in personam*; which alone are susceptible of being directly enforced.

A right *in personam* or of *obligation*, therefore, would seem to consist in the *power* of coercing the obligor, and in fact, it may be so defined. But in another aspect of the case, *i.e.*, if we have regard to the owner of the right, *power* is but another name for *liberty*; for the power, and the liberty to act are the same thing; or rather both terms express the same essential notion, namely: the faculty of acting (*facultas agendi*). The specific difference between the two classes of rights is, therefore, that in the case of rights of obligation, the act which the owner has the right to do, or refrain from doing, is to coerce the obligor; whereas, with regard to rights of ownership, this is not the case. Hence, in either case, the right may be said to consist in the liberty to act (*facultas agendi*), and both classes of rights, therefore, come within the definition of a right as the rightful or jural liberty to act in a specific case, or class of cases. Or in place of the term *liberty*, we may use indifferently the term *power*; which, in this connection, is equivalent.

The distinction between rights *in rem* and rights *in personam*, corresponds to the more familiar distinction made by the Roman jurists between *dominium* and *obligatio*.

I use the expression "Rights of Ownership" in place of "Rights *in rem*," as the more appropriate term. Accordingly, Jurisprudence may be regarded as including two principal subjects, namely: *Ownership* and *Obligation*; to which, for the lawyer, there is to be added the subject of *Actions*.

#### *Of the Subject-Matter of Rights.*

To complete our analysis of the subject, it will be necessary to explain certain other notions essentially involved in the notion of a right, namely, the notions of *Person*, *Thing* and *Event*. These, together with the notions of *liberty to act*, and *rectitude*, embodied in the definition of a right, constitute the *Subject-matter* of *Jurisprudence*, and under that title have been treated



at length in the essay cited in the note ; of which, so far as may be necessary, I propose here to avail myself. But, as the subject is an extensive one, only those points will be touched upon which are essential to the consideration of the problems proposed for discussion.

The first two subjects (*Persons* and *Things*) are adequately treated in the works of the classical jurists, whose views have been generally adopted. "But," it is said by Ortolan, "the idea of the share of the last mentioned (*i.e.*, Events), is the work of modern analysis," and this, I suppose, is true. The three notions are described by the same author, as "*the elements producing law*"; and in this he is right. For there is implied in the notion of a right three things: A *person* in whom the right is vested, or the *owner* of the right; the *thing* in, or over which the right exists, which constitutes what may be called the *subject* of the right; and the *event*, or series of events in which the right originated. For all rights originate in some event or events; nor can they be terminated or modified by any other means. Hence the three notions, Persons, Things, and Events, together with the notions of Liberty, and of Rightness or Rectitude, involved in the definition of a *right*, constitute the peculiar subject-matter of Jurisprudence; and from these notions and their mutual relations, all the principles of Jurisprudence are to be derived.

The subjects of Persons and that of Things are sufficiently familiar, and further remarks on them may be omitted.

The subject of Juridical Events is less familiar, but their nature and kinds may be sufficiently presented by the following Table:

"TABLE OF JURIDICAL EVENTS,"

"Accidents:

*Actus Dei.*  
*Res inter alios acta.*

"Acts:

*Public Acts.*  
*Customs.*  
*Political Acts.*  
*Legislative.*  
*Judicial.*  
*Administrative.*

*Private Acts.**Acts of Original Acquisition.**Transactions.**Contracts.**Torts."*

Of Juridical Events, however, there are two kinds that will particularly require our attention, namely, *Customs*, and *Political Acts*.

*Of Custom.*

This subject is of fundamental importance. . . . But the efficacy of custom rests mainly upon a more profound principle. For it is part of the nature and constitution of man, that his actions shall in the main, be immediately determined by custom; and hence, using the term in its widest sense, as including not only ordinary customs, but also those which are accompanied by a conviction of their moral rectitude (*mores consuetudinemque*)—Morality itself, and Jurisprudence as a branch of Morality, depend mainly upon custom for their practical operation. Yet the received Morality is accepted by men, not on account of its mere prevailment, but from a conviction of its rectitude; and hence the conception of Morality, though as commonly entertained, but an embodiment of that which is commonly received, involves in it, the conception of a true Morality, of which the received Morality is but an attempted application.

*Instituted and Positive Morality Distinguished.*

We thus have denoted by the same term, two essentially different notions, which are commonly confounded. Nor can the resulting confusion be obviated, otherwise than by assigning to each notion an appropriate name. We will, therefore, assign to the received or customary Morality, the name of "Instituted Morality," and to the true Morality in its logical application to circumstances of time and place, the name of "Positive Morality."

*Of Political Acts.*

This also, though much neglected, is a subject of fundamental importance.

These are commonly divided into three kinds, namely: Administrative, Judicial and Legislative. To all of these, the principle will apply, that they are but the acts of men, and, like

private acts, derive their jural validity wholly from the right or power vested in their authors. If within the power or right of the officer, the act is jurally valid; otherwise not.

This is obviously true with regard to administrative acts, which therefore need not be further considered. It is equally true of *judicial*, and *legislative* acts. But it is to be observed that the distinction between these two classes of acts, as commonly received, does not conform to the nature of things. For, in fact, the courts commonly exercise the function of *legislation*, and the Legislature, the function of *jurisdiction*. Thus the judgments of the courts operate, not only as *res judicata* in the suit or proceeding before the court, but also, under our system, as precedents to be followed in the future, thus establishing rules of law. On the other hand, statutes intended to serve as rules for the decision of *questions of right*, are enacted by the legislature, and thus the judicial function, or function of jurisdiction, is exercised. For the judicial function of the state is simply that of justly determining controversies between men as to their rights; and the case is essentially the same, whether these be determined, either by the courts or by the legislature, in particular controversies, or by classes by means of rules previously established by either. In either case the function of the state is essentially that of judge or umpire, and, whether with regard to particular cases or classes of cases, justice constitutes the only admissible rule of decision.

Accordingly, with regard to the subject under discussion, a more appropriate classification of political acts other than administrative, would be to divide them into: Judicial or Juridical *Acts*, or Acts of Jurisdiction; and acts of Policy or Police. With regard to acts of the latter class, the maxim applies: *Voluntas stet pro ratione*. But to judicial acts, whether exercised by the courts or by the legislature, the maxim is: *Judicis est jus dicere non dare*.

#### *Of the Rule or Standard of Right (Norma Agendi).*

To complete our view of the nature of rights, some reference must be made to the standard or rule of right (*norma agendi*), connoted in the term. In this, however, it will be unnecessary to enter upon the metaphysical aspects of the subject; between which, and the science of Morality, as pointed out by Whewell, there exists the same distinction as between Geometry and the Metaphysics or Philosophy of Geometry. As in the case of Geometry, so in Morality, there is practically no difficulty in determining our first principles, and in deducing from them the

proper rules of conduct. This is peculiarly true of the principles of Jurisprudence, as will be seen as we proceed; and this may be at least provisionally admitted, until we come to consider more particularly the Method and Principles of Jurisprudence; when the matter may be judged.

On this point I have no apprehensions. But when we speak of *right*, as denoting a quality, it is important to determine the standard or rule of right referred to. For, as we have seen, there is in fact, in this term, a very subtle ambiguity; and this, indeed, is the principal, or one of the principal sources of the confusion reigning over the subject of Jurisprudence and of Morality generally. For, as has been explained, there are, in fact, two standards or rules referred to, namely: the *Instituted* and the *Positive* Morality. But these are commonly conceived as the same, and thus the essential difference between them, overlooked. Hence, in using the terms, *right*, in this general sense, the two standards are commonly confused, and it cannot be determined which of the two referred to, is regarded as paramount. But in the accurate observance of this distinction, I am persuaded, is to be found the key to the serious problems with which we are confronted.

*Positive and Instituted Jurisprudence, and Positive and Instituted Law Distinguished.*

In this connection it is to be observed that, as Jurisprudence is a part of Morality, it follows there must be also a corresponding distinction between *Positive* and *Instituted* Jurisprudence. Also, if we regard the term, *the Law*, as the appropriate English equivalent of the Latin *Jus*, as used in the composite term *Jurisprudence*, there must be a corresponding distinction between the *Positive*, and the *Instituted* Law, or *Jus*.

The Positive Law consists of the principles of justice or right, with their logical applications to circumstances of place and time; or, as it has been otherwise expressed, it is the "local and temporal realization" of those principles.

The Instituted Law is the attempted, but necessarily imperfect realization of the principles of justice or right, or, in other words of the Positive Law, in a particular community at a given time, with all its inevitable defects and errors.

In this distinction, however, it will be observed that the term Law is used in the sense appropriate to Jurisprudence, regarded as a science; in which sense, it is simply equivalent to *Justice* or *Right*. It remains therefore, to consider the relation of "the Law" in this sense, or Jurisprudence, to "the Law" in the

more familiar sense as denoting the phenomenon known to us by that name.

In the above disquisition upon Jurisprudence, we have sought to express dogmatically the matured results of human thought (operating during a period of some twenty-five centuries)—as these have been, more or less clearly expressed by *jurists*, from the time of Aristotle, including the classical jurists, and the modern civilians, and especially the great jurists of our own Law.

## II. OF THE LAW.

### *Of the Relation of Jurisprudence to the Law.*

We now use the term Law, it will be remembered, in the more familiar sense, as denoting the aggregate of rules and principles by which the Courts are governed in the exercise of Jurisdiction.

In this sense of the term, the Law consists of several heterogeneous parts, but these may all be distributed into two categories: The first, being the Doctrine of Rights; the second, the Doctrine of Actions; under which last head will be included, both *civil* and *penal* actions, and *civil* and *penal* procedure.

With actions and procedure, Jurisprudence, regarded as a science, is not concerned. But unless in the Law, we use the term *Rights* in a sense entirely inadmissible, the Doctrine of Rights must be regarded as but another name for the Science of Rights, or Jurisprudence. And this, in fact, as we have stated, is the way the subject has been viewed, more or less clearly, and always more or less explicitly asserted, by the jurists of our own Law, as well as by those of the Roman Law and the Modern Civilians. The relation of Jurisprudence to the Law is, therefore, apparent; it constitutes, simply, the *substantive*, as distinguished from the *adjective part* of the Law.

Certain apparent objections to this view, indeed, present themselves, but these are clearly explained, and removed, by the consideration of the distinction between the Positive and the Instituted Law. To the mere practitioner, the Doctrine of Actions, constitutes the more prominent aspect of the Law; and to him, Jurisprudence or the Doctrine of Rights is merely subsidiary. But though subsidiary, it is none the less essentially necessary to make the complete Lawyer or Judge; a fact of which, at least here in America, we have had a very melancholy experience.

To the Jurist, however, the important aspect of the Law is the Theory of Rights; and this can be scientifically treated only by disregarding all rules and supposed principles which run counter to the common natural rule of Right; or in other words, by disregarding what is called by the Roman Jurors *jus singulare*; or if he be also a practitioner, by simply noting such abnormal elements as exceptions.

By the term "jurists," I do not mean to exclude all Lawyers; for in fact it is among them that all the great jurists are to be found. But I include in the term, all Lawyers who set themselves to study the Law *as a science*. For of the actually Instituted Law, taken as a whole, as including these accidental and arbitrary rules, there cannot be any science.

*Definition of the Law.*

The relation of Jurisprudence to the Law, in the wider sense of the latter term, as we have seen, is simply that of a theory to its attempted application.

Hence, as in other cases of a science and its practical application (*Episteme* and *Practike*, *ἐπιστήμη* et *πρακτική*), the Law cannot be defined otherwise than as what it is in theory. For the Law is, in its essential nature, a *theory* of what *ought* to be observed, and hence, however we may define it, a *theory of right*.

Hence, also, follows the necessary and essential distinction, which must always exist between the Instituted and the Positive Law.

To this usage, the popular use of the term, the Law, in effect, though confusedly, conforms. For such is the constitution of the human mind that we can hardly conceive of a phenomenon merely as such, without more or less consciously conceiving of its cause or nature. Hence, when we refer to the Law we commonly, if not universally, form a conception also of its nature, as being right or justice, or legislation, or custom, or something else more or less clearly defined.

Hence, for the lawyer, as well as for the jurist, this is the true definition, and the Instituted Law, in so far as it cannot be brought under this definition, is to be regarded as *quasi* law only. And so, in fact, the Law has been commonly regarded, more or less consciously, by the great jurists of our own, as of the Civil Law.

This was substantially the view taken of the law by the Classical Roman Jurists.

For Americans it is obviously the only possible view that can

be taken of the Law, as we understand the term. For by that term we commonly have in view not the Law of any particular State, but the Common Law of all the States, in which there is no Doctrine of *Actions*, nor any Common Legislature or Judiciary.

This conception of the Law does not deny the doctrine of Absolute Sovereignty (though for myself, with Burke, I regard this as a simple absurdity). For, accepting this theory, the doctrine will still remain true; and accordingly it is substantially adopted and lucidly explained by Hobbes. On this point Hobbes' views have been generally misunderstood, though all his evil principles have been adopted by some modern English Jurists, thus verifying the saying: "The evil which men do lives after them; but the good is oft interred with their bones."

This view of the nature of Jurisprudence and of the Law is essential and necessary to the scientific exposition and study of the Law.

Nor is the theory altogether inconsistent with the theory of Austin, as modified by Mr. Markby and Mr. Holland, but all that is required to make a perfect synthesis of the two theories is simply to correct the definitions of the terms used, by confining the terms, *right* and *Jurisprudence*, to the Doctrine of *Rights*, and leaving the term "the Law" to express only the doctrine of *Actions*.

We may, therefore, conclude with Coke and other great jurists of our Law, that "the common Law is nothing else but reason"; or, in other words, that reason is not merely part of the Law, but, as applied to the Jural relations of men, is the Law itself.

#### DISCUSSION.

Mr. J. O. CORRIE, B.A., F.R.A.S., said: It has been suggested to me by the Chairman of Council, Colonel Mackinlay, that I should, in our discussion, touch on Law, as mentioned in the Bible.

Law and Covenant are leading biblical subjects and themes, too extensive for a short speech.

I will, therefore, merely deal with one cardinal principle of

morality, which animates Mosaic Civil Law, and, clearly asserted, uniquely distinguishes it.

It is laid down in Leviticus xix, 18, "Thou shalt love thy neighbour as thyself." This "saying" is quoted by St. Paul in the thirteenth chapter of his Epistle to the Romans (that juridical people), as briefly comprehending all commandments.

I have noted, in the Mosaic Civil Code, some instances specially referable to this principle.

1. Thou shalt not avenge, or bear grudge against the children of thy people. Lev. xix, 18.

2. The third year's tithes to be given in charity. Deut. xiv, 28, 29.

3. A sheaf of corn, that may have been forgotten, not to be garnered, but left for the needy. Deut. xxiv, 19.

Gleanings of the field, and also its corners to be left for the needy. Lev. xix, 9.

The olive not to be twice beaten, nor the vine twice gathered; but the leavings to be for the needy. Deut. xxiv, 20, 21.

4. The millstone not to be taken in pledge, nor pledged raiment to be kept after sundown, nor widow's raiment to be taken in pledge. Deut. xxiv, 6.

5. To relieve one waxen poor, though a stranger, or sojourner; and not to take interest from him. Lev. xxv, 35.

6. A brother waxen poor not to be compelled to serve as a bondman, but as a hired servant. "Thou shalt not rule over him with rigour." Lev. xxv, 39, 43.

7. The stranger dwelling with you to be as one born among you. "Thou shalt love him as thyself." Lev. xix, 34.

8. The Law of Release every seventh year of debtors, and of Hebrew bondmen; and the command to lend freely even if the seventh year be near. Deut. xv, 1, 2, 7-11, and Exod. xxi, 2.

9. To bring back another's stray cattle, or lost property; and to help his fallen beast of burden, even if he be an enemy. Deut. xxii, 1-4; Exod. xxiii, 4, 5.

10. A woman, taken in war, and desired as a wife, to be allowed a month of mourning for slain relatives before marriage. Deut. xxi, 13.

Hence an altruistic principle, strange to the *jus commune*, was asserted in Hebrew law, and in some instances markedly carried out.



The laws of Hammurabi, though not devoid of humane touches, form a striking contrast to those of Moses.

The principle of love to the neighbour is, of course, fundamental in Christian morals; it increasingly affects our own laws.

For instance, the Poor Laws, the Old Age Pensions Act, and the feeding of necessitous children. We have recognized in our law, that the indigent have a claim on the well-to-do.

Hence the old jurisprudence (in the sense of the essay) tends to become inadequate as a moral basis for modern (English) law.

It is interesting to compare a Hebrew pattern of a righteous man:—

“He hath dispersed, he hath given to the poor, his *righteousness* endureth for ever” (Ps. cxii, 9),

with the Roman model—

“Vir bonus est quis?”

Qui consulta patrum, qui leges juraque servat.”

Mr. BALFOUR BROWNE, K.C., said:—It was difficult to criticise the paper because he was in substantial agreement with the writer. He took it that the judge's view was that law, positive law, or jurisprudence was another name of the Science of Justice or right. In this, he was in antagonism to the obsolete theory of Laws of Austin, who found in them nothing but Legislation and Sanctions. That theory left us still to determine by what right legislation exists, and upon what ground its sanctions or compulsions were just.

But even the writer of the paper begins his theory of jurisprudence too late. A science of philosophy of law must deal with and discuss the principles upon which legal rights rest and are enforceable. Locke and Mill seemed to think that there was no question of “right” in the matter, and that utility was the sole basis of law. Scotch lawyers had since the time of Lord Staire based their jurisprudence upon the law of nature, and Hume, who was one of the most thorough-headed of Scotchmen, said, “the apparatus of our government has ultimately no other objective purpose but the distribution of justice, or in other words the support of the twelve judges”: which implies the existence of an antecedent “justice” which is to be “distributed.” Sir Henry Maine has gone for his *Twelve Talks of the Law* to history, and has drawn from remote ages the germs which have evolved into the whole system of law, but without

explaining or accounting for the beginning of the germ, any more than Darwin accounted for the Ascidian. Our present day Pragmatical philosophers, William James, Davey and Schiller hold that "truth" is what is good for you, and "the right" is what will wash. But I take it that Judge Smith holds with Hume that there is a "justice" to be administered—that there is a sense of right and wrong in man (sometimes obscure, sometimes bright), and that the sense of right is developed into our law, and the tendency to wrong is regarded as outside the "jural liberty" of the individual. Or in other words, that active sins against the moral sense are the acts which we call criminal and which our law of Restraints seeks to remedy.

One writer made property the foundation of government. But property must depend not merely, as the writer of the paper suggests, on the obligation of others not to disturb or interfere with my possession or enjoyment, but must rest upon some active principle in the owner, and that active principle is the exercise of Will in the act or "event" of appropriation, or in the case of land, of occupancy. That *will* which makes property must not be disturbed or interfered with. The fundamental ideas of law are, I take it, *Property*, which includes self-ownership and family ownership, *Contract* and *Penalty*. All of these involve the action of the will. Will in possession, will in exchange, and will restricting to a criminal his real moral nature by restraining his immoral tendencies by the Sanctions of the law. And the right of the State to do so rests not only in the nature of the man himself, but in what Hume called "opinion"; but that opinion is again the individual sense of Right and Wrong in man.

But we have some curious departures to-day from these principles of jurisprudence. Property, private property seems to be regarded by many as theft, and the collective will is to be substituted for the individual will. Contract, private contract, is not to count. I am not allowed to make a bargain with a tenant as to hares and rabbits or with a servant as to injuries he may sustain while in my employment. Penalty still exists, I suppose, except when the Home Office takes it upon itself to stand between the offender and the law.

Dr. PINCHES said: I rise to speak—quite as a layman—upon a section of law which interests me—legal enactments of which I was

requested to speak, namely, the laws of Babylon. I am afraid I cannot analyse them in the same way as Mr. Corrie did those of the Old Testament; and after the excellent comments which we have heard, what I have to add to the discussion will probably fall very short of its high level hitherto. These laws—the Code of Hammurabi—are very difficult to treat of, and one can only say, that they show what a remarkable book of Babylonian law has been made since the time of the earliest code—for there must have been one before that of Hammurabi, as the tablets giving exercises for those studying to be scribes show. One of the speakers has said that law is another name for Right; but the laws of Babylon, both those which go back to the earlier period, and the later codes, show one thing, namely, that there was no personal right; or, at least, that the personal right of liberty of action was invested in the freemen of Babylonia. There was a large class of serfs, who, though not slaves, apparently had no real liberty of action. They seem to have been obliged to work in various ways, and to toil on the farms, though they possessed property, and were not really slaves, whose position showed a very noteworthy difference.

One of the precepts of the Old Testament is, “an eye for an eye, and a tooth for a tooth,” and this has its parallel in Babylonian law as exhibited by the Code of Hammurabi. That a man should be made to suffer as he had made another suffer, seems natural; but to my mind it is hardly a practical thing, for to mutilate a man because he had mutilated another was simply to make two defective members of society instead of one—other means of punishing him without impairing his usefulness might easily have been found. In this matter of mutilations, there is a point concerning the old Babylonian contracts which struck me, and therefrom one gathers that the laws were sometimes regarded as not quite sufficient. According to the translation of a Babylonian contract made by a German Assyriologist Dr. Ungnad, one of the parties, in a certain contingency, agrees to submit to mutilation, or something similar, of a more severe character than that exacted by the law referring thereto. This shows the nature of social state of the Babylonians, and suggests, also, that the laws by which they set so much store were not always observed; and that something was left to the contracting parties in such a case as this. And this leads to the question of imprisonment. A man awaiting trial or punishment would naturally have to be

placed in prison, but prison as a punishment seems to have been either not at all or very rarely resorted to, which is another point of difference between our laws and those of the ancient Babylonians. We must naturally be very thankful that we live in these more merciful times. The laws, with the Babylonians, were not exactly in all cases "dictated by common sense," but, as in the case of all primitive and class-legislation, by interest—it was to the interest of the freeman to get all he could from the serf whom he employed, or the slave whom he owned, and this self-interest is probably not altogether absent from legislation even now. It is a pleasant thing to think that our own laws are so dictated by "common sense," though people have had doubts about it, as witness the oft-quoted dictum which says that "the law is a hass." With the Babylonians, however, the law was dictated by the state of society which existed there at least, that is what their codes would lead one to suppose.

What I have said embodied such thoughts as occurred to me whilst the paper was being read. It is not of the best, but I offer it for what it is worth.

DR. THIRTLE said:—That the penalty should sustain a proportional relation to the offence was assuredly recognised by the *lex talionis*. There was, moreover, another side to that manner of punishment. In unsettled social conditions it must have exercised an important restraining influence. It was "an eye for an eye"—not two eyes for one, and probably further mutilation as well, exacted in lawless vengeance. Again, it was "a tooth for a tooth"—not every tooth from the head of the hapless offender, as penalty for an act of malice or neglect, whereby some slight injury was inflicted upon his fellow. Thus there was a merciful side to the law of retaliation, as it is set out in the Mosaic code. Exod. xxi, 20–25; Lev. xxiv, 17–22; Deut. xix, 21.

MR. OKE said:—Has the writer made sufficient distinction between law and morality? I think I should prefer that wonderful book of Austin. What would be the position of slavery if custom guided morality? One would like to have more clearly stated what is law and what is custom. There are difficulties of that kind which suggest themselves to my mind, and I regret that the writer of this interesting paper is not here to throw light on these subjects.

PROFESSOR LANGHORNE ORCHARD.—Our thanks are due to the able

author for this acute and thoughtful paper—a paper of which the propositions and reasoning command general assent.

But exception may be taken to some of the author's definitions. Correctly defining (page 8)\* Jurisprudence as "the Science of Rights," he makes this equivalent to "the Science of Right." This is to confound Jurisprudence with Ethics. So, too, he defines the Law (page 44)\* as "*a theory of right*," whereas the correct definition (in my judgment) is "the Theory of Rights." Right and Rights are not identical, although every true right has its basis in Right. Right is conformity with the moral standard which is the supreme law—the Law of God witnessed to by the moral faculty. On this point I am glad to find myself in agreement with Hobbes (a writer with whom accord is usually impossible), see the splendid extract from his "Leviathan" given on pp. 70-71.\* If we ask "What is a right?" the answer is "A man has a Right to whatever power or possession it is right for him to have." Natural rights and Social (or "Instituted") rights spring from the application of the Divine Law to the Natural and Social relations of men regarded as moral agents. If in any case of supposed "right" this application be erroneous, the so-called "right" is not a true right. The function and business of Jurisprudence is to make this application, to correct erroneous applications, and to investigate the relationships between rights with a view to an unified system.

May not the word "interference" on pp. 22, 23, etc.,\* be advantageously replaced by "opposition"?

With regard to the *lex talionis*, the objection has been brought that its enforcement would lessen a malefactor's physical value to society. The objection (for whatever it is worth) lies against imprisonment and fine, and generally against all punishment and suffering. The moral may, however, be held more important than the physical; and the enactment of eye for eye, and tooth for tooth, *i.e.*, *punishment in man*, does undoubtedly express the principle of abstract *Justice*.

The CHAIRMAN said: It is interesting to think, while listening to a paper on Jurisprudence by an American, that the new country guides its affairs on the basis of the old laws derived from old civilisations, but sown on new soil.

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\* These pages refer to the original essay.

I had no opportunity of reading the paper before coming into this room and do not feel able to say much on such a learned production as this. It certainly seemed to take the view that law was not law if it were not in accord with Justice, and though it did not state what right and justice were, it clearly assumed that they exist. The moral doctrine of Kant in his *Ethics* is nearly perfect, but the corollary should be added that the existence of a Power other than ourselves which makes for righteousness in the universe accounts for the sense of right and wrong in man. He held a thing to be right if it were for the benefit of the greatest number. Kant's principle was simply this: you must not selfishly make yourself the exception to a rule which is necessary for the well-being of society. Society would come to an end if everyone lied or stole, therefore we must not lie or steal. There is no law in human affairs without the action of the intellect, which frames, and carries out the law. The same must be true all through nature, therefore add this conception of a Moral Ruler to Kant's principle, and you have a clear basis for morals.

Colonel MACKINLAY proposed a hearty vote of thanks to the learned Judge for his most useful paper. This was seconded by Mr. HORNER and carried with acclamation.

Subsequently, and after reading the discussion, the AUTHOR writes,—I am much gratified by the concurrence of some of the speakers in the general views of my essay; and I feel equally obliged for the criticisms that have been made. For with these, or rather with the general views expressed in them, I am generally in accord; and I find they will serve to illustrate certain aspects of my theory; which may thus, perhaps, be made somewhat clearer.

I quite agree with Mr. Corrie that the commandment—"Thou shalt love thy neighbour as thyself,"—comprehends the whole of *the Law*; which, in the only sense of the term I regard as permissible for the jurist, it will be remembered, is but another name for *justice*. But I cannot concur, in the conclusion, apparently drawn: That "the old jurisprudence (in the sense of the essay) tends to become inadequate as a moral basis for modern (English) Law."

If, however, this be intended—as I suppose it is—merely as a protest against the theory, that the function of the state is confined to the administration of justice, and to such matters as are essential

thereto, I have nothing to say against it. For, on this point, in my own opinion—which I think accords with the better opinion of jurists—Aristotle has said the last word: “The State is founded that men may live, but is continued that they may live well.”

Assuming this to be the case, and that the functions of the state extend to the promotion of the welfare of the people in other ways than by the mere administration of justice, the power to do so will be included among *the rights of the state*; of which Jurisprudence will take cognizance as it does of the rights of individuals. Hence if it be right for the state to perform the functions alluded to by Mr. Corrie, and similar functions, *its right* to do so will be affirmed by the principles of Jurisprudence; and, thus, whatever view be taken of specific questions, it will—if rightly taken—find an adequate “moral basis,” in Jurisprudence, as conceived by the author, and indeed by jurists generally.

Mr. Browne is right in supposing that my fundamental view of Jurisprudence is, that the Law (*i.e.*, the Positive, as distinguished from the Instituted Law) is but another name for Justice or Right. This, as I have said, I regard as the only sense of the term, *the Law*, admissible for the jurist; and under the latter name, I include lawyers and all others who would treat the Instituted Law scientifically. He is also right in supposing that I assume the existence of a *Justice* paramount to Human Convention and Institution; which, according to the views expressed in the essay, is the only Justice entitled to the name. But the suggestion is made—if I understand him aright—that I have failed to explain the philosophical principles “upon which legal rights rest and are enforceable.”

In reply, I would say that the paper read before the Society is but an outline of the essay as originally submitted, where this aspect of the subject is treated more at length; and where, I think, or at least hope, I have made it clear that the fundamental principle of Jurisprudence is the right of Personal Liberty or Self-Ownership. From this—as I attempted to show in the original essay, and in the essays and works there cited—all other kinds of rights are logically deducible, or rather are mere applications.

The theory there developed—which may conveniently be called the “Theory of Human Autonomy”—is involved in Hobbes’ definition of *a right* as consisting in “that liberty which every man has to use his natural faculties according to right reason.”

In this definition, jurists generally seem to agree; and from it, the theory is nobly developed by Herbert Spencer in "Social Statics," though not without some serious errors, and even logical fallacies.

Kant's theory of Justice—in which Spencer admits he was anticipated by that author—is also based on the same principle, but his treatment of the subject is far less satisfactory. He tells us indeed, that: "Right, therefore, comprehends the whole of the conditions under which the voluntary actions of any one person can be harmonized in reality with the voluntary actions of every other person according to a universal Law of Freedom." But he makes no attempt to determine this *Law*—which is the real problem, which Spencer, at least, attempted to do. (See work in the Library of the Institute, entitled *Right and Law*, §§ 30–39 inclusive; to which, and to my original essay, I must, for lack of space, refer the reader.)

In the above observations I have assumed that the term "*legal rights*" is used by Mr. Brown merely as the equivalent of "*juridical rights*." Otherwise, for the reasons explained in the paper read to the Society, pp. 11 and 12, I would regard the term as inadmissible.

To the question of Mr. Oke: "Has the writer made sufficient distinction between law and morality?" I answer: "Yes." The distinction is simply between *part* and *whole*—that is to say: the Positive Law is, both in fact and in theory, a department of Morality; and this is, in theory, equally true of the Instituted Law, and true also in fact, in proportion to its successful development.

The necessary and essential connection between Law and Morality cannot, I hold, be questioned without denying the existence of moral distinctions; and hence, I think, the divorce between Law and Morality temporarily effected by Austin and others of his school, has been in the highest degree disastrous, not only to the interests of Jurisprudence, but to those of Political Science and Morality generally.

To the objection of Professor Orchard to my use of the term, "*Right*," as denoting rights in the aggregate, I have only to say that I have used the term in this sense (which is one only of its many related senses) to supply an obvious need for a collective term corresponding to *rights*. It is so used by Hobbes in the following passages, among others: "Right is that liberty which the law



leaveth us"; "For nothing is signified by the word, right, than that liberty which every man has to use his natural faculties according to right reason"; "Right consisteth in liberty to do or forbear." (*De Corpore Politico*, B. 2, Ch. 10, § 5; *Leviathan*, B. 1, Ch. 14.)

This difference of expression, however, does not indicate any substantial dissent on my part from the views of Professor Orchard, with which, if I understand him rightly, I entirely agree. "Right (as denoting conformity to the moral standard) and Rights (I agree) are not identical." But there is a clearly defined relation between them, expressed in the proposition that "every true right has its basis in Right," as thus defined; and to use the mathematical expression, the one term is a function of the other. Also I agree, that *all* rights "spring from the application of the Divine Law to the Natural and Social relations of men regarded as moral agents"; and that if in case of supposed "right," this application be erroneous, the so-called "right" is not a true "right." But this is but, perhaps, a more forcible expression of the distinction I make between *rights*, *i.e.*, *real* rights, and *quasi* rights; and the corresponding distinction between Law and *Quasi* Law.

It may be observed, also, that I use the term, Right, not only in the two senses above noted, *i.e.*, as a collective term denoting rights in the aggregate, and as denoting conformity to the moral standard, but, also, as denoting the aggregate of the principles by which rights are determined. In this sense, the term is equivalent to Justice or the Law, and this is in accord with modern usage, where the term, Right, or its equivalent, is used as the name of the Law, as, *e.g.*, when we speak of the Law, as *Common Right*, *Jus Commune*, *Recht*, *Droit*, *Diritto*, *Derecho*, etc. This implies an *essential relation* between Jurisprudence and Ethics or Morality, but does not confound the two. It simply implies that, according to the views expressed in the essay, Jurisprudence is a department, and an essential part of Morality.

In conclusion, referring to the suggestion of the Chairman, I would say that the use of a *common law*, by this country and England, and the English colonies, is not merely evidence of the strong bond of union between these peoples, but, as explained in my original essay (pp. 55 to 58 inclusive), that it is a most significant phenomenon, altogether irreconcilable with the conception of

the Law, prevailing, until recently, in the two countries, from the time of Bentham and Austin.

This, from the standpoint of Jurisprudence, I conceive to be the most important aspect of the phenomenon alluded to by the Chairman, but none the less, it must be gratifying to all of us to contemplate the close and intimate relation imposed upon us, not only by the use of a common law, but by a common language and literature, and common blood, which makes us in fact one people. In this regard, the feeling of Americans generally—excepting perhaps some of our naturalized fellow citizens and their immediate descendants—was, I think, well expressed by the American Commodore (Commodore Shubrick, I believe) when he came to the assistance of the British fleet in withdrawing from its attack upon the Chinese forts, saying: “Blood is thicker than water.” Nor do I think there are many of us who—except on the score of official propriety—would be disposed to condemn the sentiments expressed by Captain Sims, upon the occasion of his late speech in London. For myself, looking back over a more than usually long life, I do not remember the time, when I, or those with whom I have commonly associated, have ever regarded England, or rather Britain, as a foreign country.