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1 Statute law and common law

1. LAW AND LAWS. We commonly speak of both law and laws—the English Law, or the Laws of England; and these terms, though not used with precision, point to two different aspects under which legal science may be approached. The laws of a country are thought of as separate, distinct, individual rules; the law of a country, however much we may analyse it into separate rules, is something more than the mere sum of such rules. It is rather a whole, a system which orders our conduct; in which the separate rules have their place and their relation to each other and to the whole; which is never completely exhausted by any analysis, however far the analysis may be pushed, and however much the analysis may be necessary to our understanding of the whole. Thus each rule which we call *a* law is a part of the whole which we call *the* law. Lawyers generally speak of *law*; laymen more often of *laws*.

There is also a more precise way in which we use this distinction between law and laws. Some laws are presented to us as having from the beginning a separate and independent existence; they are not derived by any process of analysis or development from the law as a whole. We know when they were made and by whom, though when made they have to take their place in the legal system; they become parts of *the* law. Such laws in this country are for the most part what we call Acts of Parliament, or, as they are called generally by lawyers, statutes; collectively they are spoken of as Statute Law. On the other hand, putting aside for the present the rules of Equity, the great body of law which is not Statute Law is called the Common Law. The Common Law has grown rather than been made. We cannot point to any definite time when it began; as far back as our reports go we find judges assuming that there is a Common Law not made by any legislator. When we speak of an individual law we generally mean a statute; when we speak of *the* law we are thinking of the system

of law which includes both Statute and Common Law, perhaps more of the latter than of the former. A rule of the Common Law would rarely, if ever, be spoken of as a law.

This distinction between law as a system and law as enactments is brought out more clearly in those languages which use different words for each: the French *droit*, the German *Recht*, mean 'law': *loi* and *Gesetz* mean 'a law'.

2. THE RELATIONS BETWEEN STATUTE LAW AND COMMON LAW. (1) In spite of the enormous bulk of the Statute Law—our statutes begin with the reissue of Magna Carta in 1225 in the reign of Henry III, and a large volume is now added every year—the most fundamental part of our law is still Common Law. No statute, for instance, yet prescribes in general terms that a man must pay his debts or perform his contracts or pay damages for trespass or libel or slander. The statutes assume the existence of the Common Law. Except in so far as they restate in the form of a code some particular branch of the law, they are the addenda and errata of the book of the Common Law; and they would have no meaning except by reference to the Common Law. If all the statutes of the realm were repealed, we should still have a system of law, though, it may be, an unworkable one; if we could imagine the Common Law swept away and the Statute Law preserved, we should have only disjointed rules torn from their context, and no provision at all for many of the most important relations of life. The Law Commissions Act 1965, however, establishes a body of Commissioners whose task it is to prepare legislation which shall reform and simplify the law, and the Commissioners stated, in announcing their first programme of work, that they intended to prepare a codification of the laws of contract and of landlord and tenant. These major codes have not yet been completed (the Annual Report of the Law Commission for 1972–3 states that work on the preparation of a code of the law of contract has been suspended, and so it is now doubtful whether it will ever be completed), but certain codes dealing with more restricted areas of law have been enacted in recent years, e.g. the Theft Act 1968, the Animals Act 1971 and the Forgery and Counterfeiting Act 1981. The work of the Law Commission has in recent years also led to much obsolete legislation being repealed. For example, much of the old Sunday Observance legislation was swept away by the Statute Law (Repeals) Act 1969.

(2) Where Statute Law and Common Law come into competition, it is the former that prevails. Our law sets no limits to the power of Parliament. 'The sovereignty of Parliament is (from a legal point of view) the dominant characteristic of our political institutions.'¹ No court or judge can refuse to enforce an Act of Parliament, though in the exercise of its duty to interpret an Act a court may sometimes alter considerably the effect that the legislators had intended the Act to have. No development of the Common Law can repeal an Act of Parliament. The Common Law cannot even correct its own defects by taking away what it has once finally laid down. Thus large parts of the Common Law have from time to time been abolished by Act of Parliament, and their place has been taken by statutory rules.

This supremacy of the statute-making power is not a logical or even a practical necessity. It is well known that under the Constitution of the United States neither Congress nor the State Legislatures have an unlimited power of legislation. The unlimited legislative power of Parliament is a rule of our Constitutional Law. It is quite conceivable, and it was at one time supposed to be the case, that there were principles of the Common Law which would control an Act of Parliament. We read in a seventeenth-century report:

It appears in our books that in many cases the Common Law will control Acts of Parliament and sometimes adjudge them to be utterly void; for whenever an Act of Parliament is against right and reason or repugnant or impossible to be performed, the Common Law will control it and adjudge such Act to be void.

There is a faint echo of this view in Blackstone's *Commentaries* (1765), i, p. 41; but this passage in the *Commentaries* is hardly consistent with what the author later says about the legislative power of Parliament (*ibid.*, i, pp. 160–1). In fact the lawyers have, from an early period, recognized and acquiesced in the sovereignty of Parliament.²

There are of course obvious practical limitations upon the power of Parliament, and in particular it is doubtless highly desirable since the United Kingdom's entry to the European Communities in 1973 that Parliamentary legislation should accord with the needs, not only of this country, but also of our European partners. The courts will also not infrequently interpret statutes in such a way as to be in line with modern needs, which may differ

from those in existence when the Acts were passed. But there is no modern instance of any court denying that it is in fact and in law absolutely bound by any Act which has not been repealed by Parliament itself.

(3) How do we know the law? Here there is a great difference between Statute and Common Law. A statute is drawn up in a definite form of words, and these words have been approved by Parliament and have received the Royal assent. In general there is no difficulty in ascertaining the words of a statute. At the present day two identical printed copies are made, each bearing a certificate of the Clerk of Parliaments that the Royal assent has been given, and in the last resort reference can be made to these copies for the purpose of ascertaining the true words of the statutes. For practical purposes any copy made by the King's printer is sufficient. In the case of some old statutes there is a possible doubt not only as to the exact words of a statute, but even whether such a statute was ever made; but in practice such doubts hardly ever arise.

Still the words of the statute are not the statute itself; the law expressed by the words is not the same thing as the words which express it. Thus a person imperfectly acquainted with English may know the words of the statute, but he will not know the law. The same is true to a greater or less degree of anyone who comes to the reading of a statute without sufficient legal knowledge. The interpretation of a statute requires not only a knowledge of the meaning of legal technical terms, but also of the whole system of law of which the statute forms a part; in particular it requires a knowledge of the legal rules of interpretation, which are themselves rules of law. Some of these are Common Law rules; some are themselves statutory. Thus there is a Common Law rule that in interpreting a statute no account must be taken of anything said in debate while the statute was passing through its various stages in Parliament; as far as possible the words of the statute must speak for themselves. So there is a statutory rule that in Acts made since 1850, unless a contrary intention appears, masculine words shall include the feminine, words in the singular shall include the plural, words in the plural shall include the singular.

Even lawyers may differ as to the meaning of a statute. If such a question arises for the first time in a lawsuit, the judge will have to decide the meaning in accordance with the recognized rules of

interpretation, and his decision will be a binding authority for all future cases in which the same question arises, just as we shall see that a judge's decision is a binding authority for future cases where a question arises as to the Common Law. In this way many statutes—especially the older ones—have become overlaid with a mass of judicial interpretation which cannot be departed from.

On the other hand, we have no authoritative text of the Common Law. There is no one form of words in which it has as a whole been expressed at any time. Therefore in a sense one may speak of the Common Law as unwritten law in contrast with Statute Law, which is written law. Nevertheless, the sources from which we derive our knowledge of the Common Law are in writing or print. First among these come the reported decisions of the judges of the English courts. Ever since the reign of Edward I there have been lawyers who have made it their business to report the discussions in court and the judgements given in cases which seemed of legal interest. The earliest of these reports are the Year-Books. They are reports of cases made by anonymous reporters from the time of Edward I to that of Henry VIII. These are followed by reports produced by lawyers reporting under their own names. They were at first published (like textbooks) only as and when the author, or the representatives of a deceased author, saw fit to do so. It was not till the end of the eighteenth century that reports began to be regularly published contemporaneously with the decisions of the cases reported. At the beginning these reports seem to have served mainly the purpose of instruction and information. The fact that a judge had stated that such and such was the law was evidence, but not more than evidence, that such was the law. He might have been mistaken; another judge might perhaps decide differently. But in course of time we find a change in the attitude of judges and lawyers towards reported decisions. The citation of decided cases becomes more frequent; greater and greater weight is attached to them as authorities. From the sixteenth century onwards we may say that decided cases are regarded as a definite authority, which, at least in the absence of special reasons to the contrary, must be followed for the future. For the last 350 years, at any rate, the decisions of judges of the higher courts have had a binding force for all similar cases which may arise in the future.

3. THE BINDING FORCE OF PRECEDENTS. This binding force is not, however, in all cases an irresistible one. The decisions of the highest appellate court in the country for the overwhelming majority of English cases—the House of Lords—are absolutely binding on all lower courts, and usually upon itself. (The House of Lords, like all other municipal courts, is subordinate on matters of European law to the Court of Justice of the European Communities.) But in 1966 the House decided that it would in future consider itself able to depart from any previous decision of the House when it appeared right to do so. There have been several notable instances when it has exercised this new-found power, and the general result has been a relaxation of the former strict binding nature of precedent. So, too, the decisions of the Court of Appeal, which stands, for civil cases and for some criminal cases, next below the House of Lords, are binding declarations of the law for all lower courts, and even for itself. There are, however, certain circumstances in which a decision of the Court of Appeal, e.g. when given in conflict with what it had previously decided, has not been followed, even by a lower court.

Decisions rendered by Divisional Courts, which consist of two or three judges of the High Court sitting usually to review the proceedings of an inferior tribunal or to hear an appeal from the decision of magistrates in a summary criminal trial, rest to a large extent on the same footing as those of the Court of Appeal. A decision, however, of one High Court judge, though treated by another as of high persuasive authority, is not absolutely binding on him.

On the other hand, a decision of a lower court is not, in the first instance, binding on any court ranking above it. But in the course of time it may acquire an authority which even a higher court will not disregard. It may happen that a question has never been carried up to the Court of Appeal or to the House of Lords, but that the lower courts have repeatedly decided it in the same way; or it may be that even a single decision of a lower court has remained for a long time unquestioned. In such a case the necessary result will be that lawyers and the public have come to regard such a decision as law, and have acted as if it was law. People will have made contracts, carried on business, disposed of their property, on the faith of such a decision, and the reversal of the rule would involve enormous hardship. It is sometimes more

important that the law should be certain than that it should be perfect. The consequence is that even a higher court, though it may think a decision of a lower court wrong in principle, may refuse to overrule it, holding that the evil of upsetting what everyone has treated as established is greater than the evil of allowing a mistaken rule to stand. The best cure in such a case is an alteration of the law by statute, for an alteration by statute does not work the same hardship as a reversal by a higher court of what was supposed to be the law. A statute need not, and as a rule does not, affect anything done before it was passed. Previous transactions remain governed by the law in force at the time they were made. But the theory or fiction of our case law is that the judge does not make new laws, but only declares what was already law; so that if a higher court overrules the decision of a lower court, it declares that what was supposed to be law never really was law, and consequently past transactions will be governed by a rule contrary to what the parties believed to be law.

4. *RATIO DECIDENDI AND OBITER DICTUM*. If you open a volume of the Law Reports and read the report of a case, how will you discover the law which the decision lays down? How will you find what is called the *ratio decidendi*—the principle on which the decision is based? Remember that the judge is not a legislator. It is not his business—in form at any rate—to *make* rules of law; his first duty is to decide the dispute between the parties. The dispute may be largely a question of fact. In some cases the questions of fact will have been already answered by a jury; in others the judge himself will have to decide questions of fact. At any rate, the judgement will involve the application of principles of law to concrete facts. The reader of a Law Report must therefore first disentangle the law stated in a judgement from the facts to which it is applied. That may be a difficult matter. No form is prescribed in which judgements must be delivered, and it may often be a matter of doubt how far a decision turns on the view which the judge took of the facts, and how far on a rule of law which he considered applicable. The headnote which is put at the beginning of a report of a case generally contains a statement of the rule supposed to be involved. But this headnote is not part of the report; it is merely the reporter's own view of the effect of the judgement. In using a Law Report, therefore, everyone is free, where there is room for doubt, to hold his own view of what

was the law laid down in any particular case, unless and until the doubt has been settled by a subsequent decision.

From the *ratio decidendi* we must carefully distinguish what are called *dicta* or *obiter dicta*—‘things said by the way’.

An *obiter dictum*, strictly speaking, is a statement of the law made in the course of a judgement, not professing to be applicable to the actual question between the parties, but made by way of explanation or illustration or general exposition of the law. Such *dicta* have no binding force, though they have an authority which is entitled to respect and which will vary according to the reputation of the particular judge.

We sometimes find that a judge in deciding a case will profess to decide it on a principle really wider than is necessary for the purpose, when it might have been decided on some already recognized but much narrower ground. In such a case the supposed principle is in effect equivalent to an *obiter dictum*; it will not be treated as the true *ratio decidendi* of the case.

But a reason given by a single judge for his decision is not to be regarded as *obiter* merely because he has given an additional reason in the same judgement. Where there are several judges, and they agree in the result, but give different reasons, the matter is left open for a judge in a subsequent case to decide which reason is the right one.

5. HOW FAR DO THE JUDGES MAKE THE LAW? I have spoken hitherto of judicial decisions, not only as the source from which we get our knowledge of the Common Law, but also as binding authorities. But this is consistent with two different views of the relation of the judges to the law. First, and this is the older theory, we may suppose that a judicial decision is no more than a declaration and evidence—but conclusive evidence—of what already exists; the Common Law, as a whole, it is said, has existed from time immemorial in the minds of judges and lawyers—perhaps in the minds of the people at large so far as they could understand it—and every decision is merely a manifestation of it. We find this view in Hale’s *History of the Common Law* (1713) and in Blackstone (1765). Secondly, we find Bentham and Austin speaking of

the childish fiction employed by our judges that Judiciary or Common Law is not made by them, but is a miraculous something made by

nobody, existing I suppose from eternity and merely declared from time to time by the judges.

According to the view of these writers and others who have followed them, for instance Salmond and Gray, judges are really law-makers, and in laying down the law exercise a function almost, if not exactly, like that of the legislator in making new law from time to time. The two points of view are admirably stated in Maine’s *Ancient Law*:

With respect to that great portion of our legal system which is enshrined in cases and recorded in Law Reports, we habitually employ a double language, and entertain, as it would appear, a double and inconsistent set of ideas. When a group of facts come before our English court for adjudication, the whole course of the discussion between the judge and the advocates assumes that no question is, or can be raised which will call for the application of any principles but old ones, or of any distinctions but such as have long since been allowed. It is taken absolutely for granted that there is somewhere a rule of known law which will cover the facts of the dispute now litigated, and that, if such a rule be not discovered, it is only that the necessary patience, knowledge, or acumen is not forthcoming to detect it. Yet the moment the judgement has been rendered and reported, we slide unconsciously or unavowedly into a new language and a new train of thought. We now admit that the new decision has modified the law. The rules applicable have—to use the very inaccurate expression sometimes employed—become more elastic; in fact, they have been changed. A clear addition has been made to the precedents, and the canon or law elicited by comparing the precedents is not the same with that which would have been obtained if the series of cases had been curtailed by a single example.³

I think that neither of these views is the whole truth. On the one hand, it is, of course, untrue that our Common Law has always been the same, even if we disregard the changes made by statute. No one can seriously imagine that the Common Law of 600 years ago would have had an intelligible answer to many of the legal questions of modern life. We know, as a matter of fact, that it answered some questions in the opposite sense to that in which we now answer them, e.g. a simple executory contract had no legal effect then, and we can trace the steps by which it acquired legal effect. On the other hand, to say that a judge in deciding is ever doing anything analogous to legislation is really doing violence to the facts. In the majority of cases where a new

precedent is established, the process is obviously that of applying existing acknowledged principles to a new set of facts. The principles, it may be, give no explicit answer to the question put. It does not follow that they give no answer at all. By a process of deduction, by argument from analogy, the existing principles may be made to yield a new principle, which is new because never explicitly stated before, but which in another sense is not new because it was already involved in what was already acknowledged. Just in the same way the conclusions of a science may be involved in its premisses, and yet when first made constitute something new, an addition to what was before acknowledged. Even where a decision does not follow a definite logical process from acknowledged principles it has not the arbitrary character of legislation. In the absence of clear precedents which might govern a question, we find judges relying on such considerations as the opinions of legal writers, the practice of conveyancers, the law of other modern countries, the Roman Law, principles of 'natural justice' or public policy. The proper application of these may be a matter of dispute and difficulty but in any case the judge is applying a standard; he shows that he is not free to decide as he pleases, as a legislator would be; he is bound to decide according to principle. If we say that the judge really *makes* the law like a legislator, we shall be bound to say that the facts of the case were previously governed by no law;⁴ they fell outside the realm of law when they occurred, and are only brought within it when the decision is given. To argue that this is so, because before the decision no one knew with certainty what the law was, is like arguing that a piece of land is valueless until it has been sold, or until a valuer has made a valuation of it, because till then no one knows with certainty for what it will be sold or at what figure it will be valued. In truth, the parties in fixing the price, or the valuer in making the valuation, have really tried to discover something already existing. The analogy goes further; just as the price or the valuation, even though mistaken, will be a new element which will help to determine the value for the future, so the judge's decision on the law on a given question, whether right or wrong, fixes or helps to fix the law for the future.

Again the view that till a rule is laid down in a legal decision there is no law governing the facts of the case will really lead to the conclusion that no concrete set of facts is governed by any law

till a decision has been given, because in every case the process of decision involves the mental process of bringing the particular facts within some principle. Suppose, on the one hand, a question whether A's conduct amounted to an acceptance of an offer; on the other, whether a given transaction is contrary to public policy. There is an apparent, but not a real difference. In the former case the existing principles are so well defined that it looks as if the facts automatically, as it were, fall into the pigeon-hole which the law provides; in the latter the principle is so wide that in order to apply it the judge must explicitly and openly say, 'conduct which has such and such qualities is contrary to public policy', and so frame a rule which defines and develops the conception of public policy. But in the former case the same process has really been gone through. The act does not really fall automatically into the pigeon-hole; the judge must have had in his mind the qualities of an act which will make it an acceptance; the judge really says, 'conduct such as that in this case amounts to an acceptance'. The bringing of concrete facts under a rule is always a mental process, and a process of generalization. In this way every case which is decided means a development of the principle which is applied. The practical difference is that in the majority of cases the application is so easy, and the development of the existing principle is so infinitesimal, that the case is not worth reporting, and therefore, for *practical* purposes, adds nothing to the law.

A distinction is sometimes made between 'declaratory' precedents, which merely declare existing law, and 'original' precedents which lay down new law. In truth the difference is one of degree and not of kind. If we have a case which deals with certain facts by applying an acknowledged rule, we really have an addition to the rule, because we now know that a certain kind of fact falls within it, and in the nature of things we can never have two sets of facts which are precisely similar. No precedent is purely 'declaratory' or purely 'original'.

The contradiction between the view that judges merely declare the Common Law, and the view that they make new law in the same way as a legislator does, is solved by the conception of evolution of development which was not familiar either to the old lawyers, such as Blackstone, or to their critics, such as Bentham and Austin. The essence of that conception is that a thing may change and yet remain the same thing. To ask whether our law of

today is the same law as the English law of 600 years ago is, to use a phrase of Sir Frederick Pollock, 'like discussing whether the John Milton who wrote *Samson Agonistes* was really the same John Milton who wrote *Lycidas*'.⁵ It is the same and not the same. Every legal decision is a step in the process of growth. In every case it is true that there is already a law applicable to the facts; it is equally true that when the decision has been given, the law is not precisely what it was before. The 'double language' which Maine refers to as evidence of a deep-seated fiction is really an expression of a fundamental truth.

6. ADVANTAGES AND DISADVANTAGES OF CASE LAW. The system of Case Law is peculiar to England and the countries which have derived their law from England. Its essential principle is the rule that decided cases are binding authorities for the future. In other countries this is not so, or was not so till recently. In other countries the judge, in his application and interpretation both of enacted law and of the general principles which will always underlie and supplement enacted law, is not bound by previous decisions of the same or any other court, but is free and indeed is bound to decide according to the best of his own judgement.

The great advantages of a system of Case Law in the English sense are four:

(1) *Certainty*. The fact that decided cases are binding or highly persuasive authorities for the future makes it certain or at least highly probable that every future case which is essentially similar will be decided in the same way. People may therefore regulate their conduct with confidence upon the law once laid down by the judges.

(2) *The possibility of growth*. Wherever the way is not closed by statute or precedent, new rules of law will from time to time be authoritatively laid down to meet new circumstances and the changing needs of society. Where there is no system of Case Law the work of the judge who decides a case leaves no lasting mark on the law for the future: it is, as far as the development of the law goes, thrown away.

(3) *A great wealth of detailed rules*. Our law is much richer in detail than any code of law (unless based on Case Law) can possibly be. The German Civil Code, for instance, consists of less than 2,500 paragraphs.

(4) *Their practical character*. Because the rules laid down by the cases are the product, not solely of academic speculation, but of difficulties which have actually arisen, they are practical rules which are in close touch with the needs of everyday life.

The great disadvantages of Case Law are:

(1) *Rigidity*. Where a rule has once been decided, even though wrongly, it is difficult and sometimes impossible to depart from it. I do not agree with those who think that *flexibility* is a characteristic of Case Law. The binding force of a precedent is a fetter on the discretion of the judge; but for precedent he would have a much freer hand.

(2) *The danger of illogical distinctions*. When a rule which is binding is felt to work hardship, a judge will often avoid applying it to cases which logically ought to fall within it, by laying hold of minute distinctions which will enable him to say that the later case is different from the earlier case in which the rule was established. Every now and then a precedent leads one into a blind alley, from which one has to escape as best one can. So, too, rules which are logically inconsistent with each other are sometimes developed along distinct lines of cases, which ultimately meet and come into conflict.

(3) *Bulk and complexity*. The wealth of detail, and the fact that the rules of law are to be found scattered over more than 2,000 volumes of law reports, make the law extraordinarily cumbersome and difficult to learn and apply.

I have no doubt that the advantages of our system far outweigh the disadvantages. Still, the disadvantages are serious. The cure for them is to be found, and has from time to time been found, in Statute Law. Where rules have been definitely laid down which produce hardship, where the rules have been made complicated and illogical by attempts to avoid hardship, Statute Law must intervene to remove the hardship or to lay down simple and intelligible rules; and the Law Commission set up in 1965 (mentioned above, p. 2) does facilitate the attainment of these objects. A Law Revision Committee was set up in 1933 (and revived after the Second World War under its present name, the Law Reform Committee) to make proposals for the reform of branches of law which, for any of these reasons, needed reconsideration; and some of its proposals have become statutes which have made salutary changes in the law (for instance,

changes as to the status of married women pp. 48-52, corporations' contracts, pp. 61-4, the survival of causes of action in tort, pp. 133-4, limitations of actions, pp. 134-5, contributory negligence, p. 131, enforcement of contracts, p. 116, liability of occupiers of premises, p. 122, misrepresentation, pp. 33, 119-20). So, again, where the law has been satisfactorily worked out in detail, but the mass of scattered decisions is unmanageable, Statute may undertake the work of codification, an orderly arrangement of the established rules in statutory form. In this way some considerable portions of the Common Law have from time to time been converted into Statute Law without material alteration of substance; the labour of searching for decisions is removed or lessened, and the law is to some extent made accessible to persons who are not professional lawyers. Examples of such codification may be found in the Bills of Exchange Act 1882, the Sale of Goods Act 1893 (now repealed and replaced by the Sale of Goods Act 1979, and added to by the Supply of Goods and Services Act 1982), and to some extent in the series of Property Acts which came into force in 1926. (For these Acts see below, p. 72, n. 2.) But these last-mentioned Acts are only partly codifying Acts. We shall see that they effect great and far-reaching changes in the Land Law. As has been mentioned above, p. 2, further major codification can be expected in due course as a result of the work of the Law Commission. Already some parts of the criminal law have been codified as a result of its efforts.

How far the Common Law as a whole is capable of being or is likely to be codified in this way is a question which cannot be here discussed. But, at any rate, two conditions of a satisfactory codification may here be indicated: (1) It must reproduce without material loss the richness of detail which is a characteristic merit of our system of Case Law; we should not be content with a code of the brief and abstract kind which has been adopted and used with success in foreign countries; (2) the adoption of a code must not deprive us of the advantages which we at present enjoy from the principle of binding precedents: i.e. judicial decisions interpreting the code will still be binding, and will still be a means by which the law will develop, will still be capable of enriching the law by framing detailed rules.

7. OTHER SOURCES OF THE COMMON LAW. The decisions of

courts of other countries which administer a law derived from or related to our own, such as the Scottish, Irish, Commonwealth, and American courts, though not binding upon our courts, are entitled to great respect. Even the judgements given by the Judicial Committee of the Privy Council, which acts as a final Court of Appeal from those parts of the Commonwealth whose highest courts have not final authority, are not binding upon our courts; but the fact that the members of that tribunal are, to a large extent, the same persons as the members of the House of Lords when it sits as an Appeal Court, greatly increases their authority. The House of Lords is a common court of final appeal in civil matters for England and Wales, Scotland, and Northern Ireland—and for England and Wales and Northern Ireland in criminal matters; where the principles involved are substantially the same, or where the question turns on a statute common to England and one or both of these other countries, the Lords' decision on a Scottish or Irish case will be treated as binding authority for English cases.

Some of the works of the older writers such as the *Commentary* written by Coke in the seventeenth century on the fifteenth-century treatise of Littleton on *Tenures*, and Sir Michael Foster's work on *Crown Law* written in the eighteenth century; are known as 'books of authority', and have a force nearly equal in binding effect to judicial decisions. Other treatises on law have a merely 'persuasive' authority which will vary with the reputation of the writer. But the courts are more and more prepared these days to cite with approval relevant passages from major modern textbooks. The practice of conveyancers—lawyers whose business it is to draw up conveyances, wills, and other legal documents—is sometimes valuable as evidence of what the law is.

8. DELEGATED POWERS OF LEGISLATION. In many cases Parliament has conferred by statute on government departments, on public officers, and on public bodies such as local government authorities, the power of making by-laws, rules, or regulations for definite purposes and within prescribed limits; and the exercise of such a power produces rules of law which are equivalent in force to statutory enactment. In recent times Parliament has been very lavish in giving such powers to government departments—in some cases a government department has even been given power to modify an Act of Parliament.

A committee of judges and lawyers has power to make rules for the procedure in the High Court. In exercising this power they are genuinely legislating. They are not bound by precedent, but make such rules as they think proper.

2 Common law and equity

1. EQUITY AND MORALITY. Apart from Common Law and Statute Law, the most important department of our legal system is Equity. We sometimes use the term 'equity', or words corresponding to it, in popular language as if it was something altogether outside law. We speak of a judgement in a particular case or of a rule laid down in a judgement as being undoubtedly according to law, but as being 'unfair', or 'unjust', or 'inequitable'. In cases of this sort we are really passing a moral judgement upon the law. Such a moral judgement in no way affects the law. It may be a reason why the law should be altered by statute; it does not prevent it from being law, or affect its operation, as long as no alteration in the law is made by statute. But when a modern lawyer uses the terms 'law' and 'equity' he does not mean to say that equity is not law. He is speaking really of two different kinds of law—the Common Law on the one side, the rules of Equity on the other—which are equally law. They are rules which are not merely morally but legally binding: they are enforced by the courts.

2. THE RELATION BETWEEN LAW AND EQUITY. (1) The distinction between law and equity occurs in other systems. Thus the *ius honorarium*, developed by the praetor's edict, played a vital part in the development of Roman Law. But while in Rome *ius honorarium* was administered in the same courts as the *ius civile*, in England law and equity, until the Judicature Act 1873 came into effect in 1875, were administered in different courts.

(2) These two sets of rules, though distinct, must not be looked upon as two co-ordinate and independent systems. On the contrary, the rules of Equity are only a sort of supplement or appendix to the Common Law; they assume its existence but they add something further. In this way Equity is an *addendum* to the Common Law.