JOHN AUSTIN

LECTURES ON JURISPRUDENCE

OR THE PHILOSOPHY OF POSITIVE LAW

VOLUME TWO

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LECTURE XXVIII.

ON THE VARIOUS SOURCES OF LAW.

In the ensuing lectures I shall treat of the following subjects:—

Lect. XXVIII. Prospective view of the remainder of the course.

1st, The *sources* of law, and the various modes in which it originates: under which head I shall treat of the distinctions between law written and unwritten; law positive and natural; *jus civile* and *jus gentium*: *law* and *equity*: touching on various other topics which are suggested by them.

2ndly, From the sources of law, and the modes in which it originated, I shall proceed to the distinction between the law of things and the *law of persons*; and in endeavouring to analyse that distinction, I shall examine the notion of *status* or condition, and the distinction between public and private law: for the term public law, unless it be used in a sense which would include all law, denotes, as it appears to me, a particular department of the law of persons.

3rdly, I shall examine the arrangement of the Roman lawyers in their institutional and elementary writings; an arrangement which I believe to be just in the main, and which is unquestionably the groundwork of most of the modern attempts to give a systematic shape to the whole body of any system of law.

And this I am afraid will be nearly all which I shall be enabled to accomplish within the present course. I have thought it better to explain fully, and with passable distinctness, a few leading topics, than to touch on a great number lightly and hastily. The gentlemen who have so kindly come forward to support me in my first attempt, will, I am sure, make the due allowance for the imperfections unavoidable in a commence-

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ment, and for the occasional interruptions which have been caused by inevitable illness. If I am able to get through thes topics before the expiration of the session, I will then touch upon some of the details of the science, such as the various species of rights *in rem;* dominium, servitus, and so on: the distinction between contracts and quasi-contracts, and an outline of the various species of contracts. I am extremely sorry to be obliged to leave off in this lame manner, but I hope that I shall meet with the indulgence due to a first attempt.

Meanings of the phrase 'Sources of the law.' 1. The direct or immediate author of the law.

In many legal treatises, and especially in treatises which profess to expound the Roman law, that department or division which regards the *origin* of laws, is frequently entitled '*De juris fontibus.*' The expression *fontes juris,* or *sources* of law, is ambiguous.

In one of its senses, the source of a law is its direct or immediate author. For either directly or remotely, the sovereign, or supreme legislator, is the author of all law; and all laws are derived from the same source; but immediately and directly laws have different authors. As proceeding from *immediate* authors of different characters or descriptions, laws are talked of (in the language of metaphor) as if they arose and flowed from different fountains or sources: in other words, the *immediate* author of a given Rule (whether that author be the sovereign or any individual or body legislating in subordination to the sovereign), is styled the fountain, or the source, from which the rule in question springs and streams. But this talk is rather fanciful than just; for, applying the metaphor with the consistency which even poetry requires, rules established immediately by the supreme legislature are the only rules springing from a *fons* or *source.* Individuals or bodies legislating in subordination to the sovereign, are more properly *reservoirs* fed from the source of all law, the supreme legislature, and again emitting the borrowed waters which they receive from that Fountain of Law.

Taken in the sense to which I have now adverted, the fountains or sources of laws are their *immediate* authors or makers. Thus the supreme legislature is the author or source of the laws which it publishes directly. A corporate body, or a subordinate legislature (like those of our colonies), is the source of those laws which it makes and publishes with the sovereign's consent. Courts of justice are a source of law, in so far as the law consists of judicial decisions, binding upon subsequent judges. And admitting for the present that customs

2. The earliest documents by which the existence of law is evidenced.

constitute a distinct species of law, custom, or the persons with whom the custom originated, are authors or sources of law.

In another acceptation of the term, the fountains or sources of laws are the original or earliest extant monuments or documents by which the existence and purport of the body of law may be known or conjectured.

Taken in this acceptation, the fountains or sources of *laws* are properly sources of the *knowledge* which is conversant about laws: 'fontes e quibus juris *notitia* hauritur.'

But the term '*fontes*' (as thus understood) is restricted to the original, or to the earliest extant, documents. Documents which are copies of these, or which give at second-hand the evidence contained in these, are not *fontes* or sources of knowledge, but *rivi* or conduits through which it emanates from the sources. For example: Considered in mass, all the relics of antiquity, which regard the Roman law, are '*fontes* juris Romani;' '*fontes* e quibus juris Romani *notitia* hodie hauritur.' For (speaking generally) the extracts from the classical jurists contained in Justinian's Digest, the Imperial Constitutions contained in his Code, with such other relics of antiquity as regard the Roman law, are the earliest evidence, or the earliest extant evidence, for the several parts of the system to which they respectively relate. These, therefore, are 'fontes.'

But the works of the Glossators and Commentators who wrote in the Middle Ages, with the works of Civilians who have written in subsequent periods, are not fountains or sources of that knowledge of the system which may be gotten at the present hour. For the countless authors of those countless volumes derived their own knowledge of the Roman Law from ancient documents or monuments which are still extant and accessible. Accordingly, the works of the Glossators and Commentators who wrote in the Middle Ages, with the works of Civilians who have written in subsequent periods, are by the German writers on jurisprudence distinguished from the documents which constitute the *fontes* or sources by the general and collective name of '*Literatura.*'

The term 'fontes juris' has, therefore, a double signification. As proceeding from immediate authors, of various characters or descriptions, laws are said to emanate from various *sources* or *springs*: whilst the earliest extant documents which attest their being or purport are also entitled 'sources or springs of law,' or source or springs of the knowledge which is conversant about it.

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And so (in regard to the *English* law), the statutes, the reports of judicial decisions with the old and authoritative treatises which are equivalent to reports, may be deemed sources of English jurisprudence; whilst the treatises on the English law, which merely expound the matter of those statutes and reports, are not sources of English jurisprudence, but are properly a legal literature drawn or derived from the *sources*.

Law written and unwritten. As understood by the modern Civilians, and by Hale and Blackstone.

Law considered with reference to its sources, is usually distinguished into law written and unwritten.

The distinction between written and unwritten law in the modern acceptation of the term, is this: *Written* law is law which the supreme legislature establishes directly. Unwritten law is not made by the supreme legislature, though it owes its validity, or *is law* by the authority, expressly or tacitly given, of the sovereign or state. Accordingly the modern Civilians, with whom the distinction as thus understood originated, commonly ranked under *jus scriptum*, laws made by the *populus* or *plebs*, *senatus-consulta* and the constitutions of the emperors. Laws enacted by the people assembled in centuries, were made by the supreme legislature, and were therefore *jus scriptum* in the sense above explained; and the same may be said of the constitutions or orders of the emperors after they openly assumed the style of sovereignty. How the plebs or the senate came to be held equivalent to the populus assembled in centuries will be considered in a subsequent part of this lecture.

According to the same division, the edicts of the Prætors and other judicial functionaries, the rules introduced by the practice of the tribunals, the writings and opinions of jurisconsults, and laws established by custom, were unwritten law, or *jus non scriptum*. For although law originating in any of these sources, owed its validity to the assent of the supreme legislature, it was not made by the supreme legislature, directly and immediately.

The distinction between written and unwritten law, as drawn by the modern Civilians, was adopted by Hale, and imported by Blackstone into his Commentaries. Both Hale and Blackstone restrict *leges scriptæ*, or written laws of this kingdom, to statute acts or edicts made by the king, by and with the consent of the lords spiritual and temporal and commons in Parliament assembled. General and partial customs, and laws established by the practice and usage of the Courts, they rank under *leges non scriptæ*, or unwritten laws.[25]

[25] The foregoing part of this lecture is not contained in the former edition,

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Written and unwritten law *sensu* Roman Lawyers.[26]

By the Roman Lawyers themselves, little importance was attached to the distinction between written and unwritten law. And, in every instance in which they take the distinction, they understand it in its literal sense. When they talk of *written* law, they do not mean law proceeding directly from the supreme Legislature, but law which was committed to writing at its origin: *quod ab initio literis mandatum est.* And accordingly they include in written law, not only the laws of the *Populus* and *Plebs*, with the Senatus-consulta and Constitutions of the Emperors, but also the Edicts of the Prætors and other Magistrates, and the Responses of the Jurisconsults.

Law originating in custom, or *ex disputatione fori*, they style *jus non scriptum.* For law originating in custom, or floating traditionally amongst lawyers (as in England it is well known that there is much law constantly manufacturing at the bar, which in time is adopted by the judges, and by them again emitted to the bar), is not committed in writing *ab initio*, although it may afterwards be recorded in legal treatises, or may be adopted by the supreme legislature and promulged in a written form. Justinian, in the second title of the first book of his Institutes, mentions the distinction in the sense last adverted to. Gaius, in his enumeration of the sources of Law, passes over the distinction in silence. The latter says, 'Constant autem jura ex legibus, plebiscitis, senatus-consultis, constitutionibus Principum, edictis eorum qui jus edicendi habent, responsis prudentium.' [27] He afterwards speaks of Customary Law, or of the 'jus quod consensu receptum est;' and also of *Mos* as a source of law. But he nowhere adverts to writing, or to the absence of writing, as forming a ground of distinction between the species of laws.

The distinction (if such it can be termed) which was taken by the Roman Lawyers, is altogether insignificant: Insignificant, inasmuch as commission to writing, *by, or by authority of immediate author*, is an accident; though no considerable body of law can be preserved and known, unless written, with or without authority.

Written and *unwritten* law, according to the im-

That which has been taken by the moderns is important. But nothing can be less significant or more misleading than the language in which it is conveyed. For, first, law, though it originate with the supreme legislature, is not necessarily writ-

the corresponding part of the MS. having (as it appears) been missing. It is here supplied from J. S. M.'s notes.—R. C.

[26] Dig. I. 1, 6.

[27] Gaii Comm. I. 2.

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ten. It may be, and in many nations has been, established and promulged without writing. And, on the other hand, law flowing from another source, though obtaining as law with the consent of the supreme legislature, may be committed to writing at its origin. Such, for instance, are the laws of Provincial and Colonial Legislatures. And such especially (as I shall shew hereafter) were the edicts of the prætors.

proper and juridical meaning of the terms, is an important distinction.

Laws, then, are distinguished in respect of their sources, or of their direct or immediate authors, into laws which are made directly and immediately by the supreme legislature, and laws which are not made directly and immediately by the supreme legislature, although they derive their validity from its express or tacit authority. I shall now proceed to give examples of these two kinds of laws.

The distinction stated in appropriate terms.

Examples of laws made directly by the sovereign. 1. Acts of the British Parliament.

An example of laws made by the sovereign body directly and immediately, is that of our own Acts of Parliament, which are made directly by the supreme legislature in its three branches, the King, the House of Lords, and the House of Commons.

2. Ordinances made by the Etats Généraux in old France, while they subsisted, and by the King afterwards.

Another example is that of the enactments passed by the Etats-Généraux in France, while that body continued to exist and to be recognised as the supreme legislature. When the Kings of France became constitutionally the sovereigns, or when the French Government became a monarchy, the royal ordinances were laws of the same kind.

3. The *leges, plebiscita,* and *senatus-consulta* of the Romans.

In Rome under the Commonwealth, or *in liberâ* republicâ, laws established by the supreme legislature were of three kinds: there were three distinct bodies whose decrees were considered as made by the sovereign or supreme legislature. These were 1st—the *populus,* assembled in *curiæ,* according to the most ancient form, or, according to the manner subsequently introduced, in *centuries;* 2ndly, the *plebs,* assembled in tribes; and 3rdly, the *senate.*

Strictly speaking, the sovereignty resided in the *populus;* which included every Roman invested with political powers, and therefore included members of the *senate,* as well as citizens who were not senators. To laws made by the *populus* (whether assembled in *curiæ,* according to the more ancient manner; or in *centuries,* according to the more recent fashion), the term *'leges'* or *'statutes'* (when used with technical exactness) was exclusively applied. But as the term *'leges'* or *'statutes'* was afterwards extended improperly to laws made by the *plebs,* *'leges'* strictly so called, or laws made by the *populus,* were