

found it in the customs of his people. What they had been accustomed to do was right for them, however it might be for another people.

Some customs there were which it was not thought by the people worth while to enforce, some virtues which were left in the realm of conscience. Even yet we have no law to enforce courtesy or charity<sup>2</sup>; we leave the cad to the reprobation of those whose opinion is worth having and the ungenerous to his own conscience.

But customs which the people thought worth enforcing became the rules of law. These depended upon the people themselves. An illogical people had illogical customs, a generous people generous customs; but whatever the custom was, that was the law.

This is what is meant by such maxims as "custom is the life of the law," "custom becomes law," "*mos regit legem*," "*mos pro lege*," "*leges moribus serviunt*," "*consuetudo est optimus interpres legum*," etc., etc.

An advancing community grows out of its old customs. What satisfied and suited the early folk irked their descendants. The law was unsatisfactory. In an advancing community the law is always unsatisfactory. Now law, to be law, should be fixed and certain; *Misera est servitus ubi jus est vagum aut incertum*.<sup>3</sup> Where a custom has once been determined to be law it would not do to permit a mere individual to say that it shall no longer be the law. In every society except the very most backward there is a law-making person or body, and that person or body has the duty of making the law fit the needs of the society. The legislator abolishes so much of the common law—that is, the body of customs—as is necessary, and thus modifies the common law.

England and those countries which derive their legal system from England (among them ourselves) have carried out this idea consistently. The customs which have been laid down as law remain law unless and until modifying legislation is passed; and the law is modified only so much and so far as the legislation says, either in express terms or by necessary implication.

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<sup>2</sup> There are and always will be duties of imperfect obligation, which the law will not think it worth while to enforce. The sneering backbiter will be allowed to pursue his dirty way unchecked by law till his slander does someone harm or he accuses someone of actual crime.

What the law will and will not prevent, depends on the people. In our country anyone is at liberty to malign the dead so long as he says nothing about the living. That is because we have not thought it worth while to protect the reputation of one who has gone where he cannot be harmed by detraction. Other peoples have the same regard for the dead as for the living; with them, *de mortuis nil nisi bonum—aut justum*; with us *de mortuis omnia*.

<sup>3</sup> This well-known legal maxim may be stated thus: Obedience to law becomes a hardship where the law is vague or uncertain. "The glorious uncertainty of the law"—really a blot not a glory—does not obtain in one case out of a thousand. In almost every case the real dispute is one of fact, not of law.