

HOME UNIVERSITY LIBRARY
OF MODERN KNOWLEDGE

COMMON-SENSE IN LAW

BY PAUL VINOGRADOFF
D.C.L., LL.D., D.HIST., DR.JUR., F.B.A.

LONDON
WILLIAMS & NORGATE, LTD.

HENRY HOLT & Co., NEW YORK
CANADA: RYERSON PRESS, TORONTO
INDIA: BURNS, OATES & WASHBOURNE, LTD.



HOME
UNIVERSITY
LIBRARY
OF
MODERN KNOWLEDGE

Editors :

RT. HON. H. A. L. FISHER, M.P.

PROF. GILBERT MURRAY, D.LITT.,
LL.D., F.B.A.

PROF. J. ARTHUR THOMSON, M.A.,
LL.D.

PROF. WILLIAM T. BREWSTER, M.A.
(Columbia University, U.S.A.)

NEW YORK
HENRY HOLT AND COMPANY



COMMON SENSE
IN LAW

PAUL WINOGRADOFF
D.C.L., LL.D., D.HIST., DR.JUR., F.B.A.

CORPUS PROFESSOR OF JURISPRUDENCE
IN THE UNIVERSITY OF OXFORD

LONDON
WILLIAMS & NORGATE, LTD.

First printed December 1913
First Impression March 1920
Reprinted September 1923
" *July 1925*

PRINTED IN GREAT BRITAIN

CONTENTS

CHAP.		PAGE
I	SOCIAL RULES	7
II	LEGAL RULES	28
III	LEGAL RIGHTS AND DUTIES	61
IV	FACTS AND ACTS IN LAW	87
V	LEGISLATION	116
VI	CUSTOM	148
VII	JUDICIAL PRECEDENTS	169
VIII	EQUITY	208
IX	THE LAW OF NATURE	234
	BIBLIOGRAPHICAL NOTE	249
	INDEX OF CASES	250
	GENERAL INDEX	253

*The following volumes of kindred interest have already
been published in this Library:*

- 30. Elements of English Law. By Prof. W. M. Geldart.
- 33. The History of England: A Study in Political Evolution.
By Prof. A. F. Pollard.
- 42. Rome. By W. Warde Fowler, M.A.
- 1. Parliament. By Sir C. P. Ilbert.

COMMON-SENSE IN LAW

CHAPTER I

SOCIAL RULES

1. WHEN Blackstone began his Oxford lectures on English law (1753), he felt himself under the obligation of justifying a new academic venture. "Advantages and leisure," he said, "are given to gentlemen not for the benefit of themselves only, but also of the public, and yet they cannot, in any scene of life, discharge properly their duty either to the public or to themselves, without some degree of knowledge in the laws."

Things have moved fast since Blackstone's day, and significant changes have certainly occurred in the educational aspects of law. To begin with, the circle of "gentlemen" who ought to give some thought to laws has been greatly widened: it comprises now all educated persons called upon to exercise the privileges and to perform the duties of

citizenship. One need not be a barrister or a solicitor, a member of parliament, a justice of the peace, or even an elector, to take an interest in and feel responsibilities towards laws: all those who pay taxes and own property of any kind, who hire and supply labour, who stand on their rights and encounter the rights of others, are directly concerned with laws, whether they realize it or not. Sometimes a knowledge of law may help directly in the matter of claiming and defending what belongs to one; on other occasions it may enlighten a juror or an elector in the exercise of his important functions; in any case, every member of the community takes his share in the formation of public opinion, which is one of the most potent factors in producing and modifying law.

Again, we must try nowadays not only to acquire some knowledge of the legal rules obtaining in England, but also to understand the aims and means of law in general, to obtain some insight into the processes by which it is formed and administered: for it is only in this way that the meaning of enactments can be realized in a rational and comprehensive manner. Nobody would think it possible to obtain a reasonable view of the causes and

conditions which govern economic facts without some knowledge of economic theory. And similarly it would be preposterous to reason on juridical subjects without some insight into jurisprudence.

In view of these obvious considerations, I should like to explain as briefly and simply as possible the main principles which underlie legal arrangements. Although the details of legal rules are complicated and technical, the operations of the mind in the domain of law are based on common sense, and may be followed without difficulty by persons of ordinary intelligence and education. Jurisprudence may be likened in this respect to political economy, which also is developed from simple general principles and yet requires a great deal of special knowledge when it comes to particulars.

In order to realize the aims and characteristics of jurisprudence, it may be useful to consider, in the first instance, what place it occupies as a branch of study. Now study is knowledge co-ordinated by reflection, and as such it is peculiar to mankind; for the most fundamental difference between man and animals consists in man's power of reflection. A dog feels pain and pleasure, is moved

to anger and joy, remembers blows and caresses, may exercise cunning in achieving its ends, *e.g.* in opening a gate or in pursuing game. But its notions, desires and acts spring directly from its emotions or from their association by memory. With man it is different. We also are subject to the direct impulses of our emotional nature, but by the side of this direct driving apparatus in our mind we are conscious of an entirely different mental process. We are always, as it were, holding up the mirror to our emotions, ideas and resolves, and as a result of such self-consciousness we are living through the events and actions of our existence not only in their direct sequence, but also as through a reflected series. In a direct way the chords of our spirit are touched from the outside by the various impressions made by the objects we meet on our way, as well as by the physiological and spiritual happenings of our own organism. The process of reflection makes it possible for us to rearrange our stores of impressions and memories, to co-ordinate them in accordance with conscious aims and deliberately selected standards. It is from this reflective element that men draw their immense superiority over animals, that

speech, religion, art, science, morality, political and legal order arise.

This observation, drawn from the experience of individuals, is no less apparent in the experience of societies, as recorded by history. Even the most primitive of savages, *e.g.* the Veddas of Ceylon, or the Patagonians, manifest a good deal of reflection in their habits when compared with apes or dogs: only by such means can they build up some rude forms of speech, some notions of supernatural guidance, some account of the order of the surrounding world, some customs of mutual intercourse. Yet the connecting links of their reflection hardly reach beyond the immediate needs and promptings of their rudimentary life. With other tribes the accumulation of knowledge, and its rearrangement and co-ordination by reflection, are the results of a long and arduous struggle in the course of barbaric epochs. It is only comparatively late, in a civilized state of society, that reflective speculation masters every branch of knowledge by the help of science and harmonizes the different sciences by comprehensive philosophy. And as a primitive savage infinitely excels animals through rudimentary reflection, civilized man stands

high above the savage by the help of scientific and philosophical speculation. Instead of naively responding to primary needs, he surveys and summarizes the experience of innumerable lives of toil and wisdom. The barbarian works out the forms of speech in order to communicate with his neighbours; the modern linguist analyzes the structure of language and the laws of its formation; the barbarian worships mysterious agencies in nature; the modern student of religion tries to account for the evolution of myth and sacrifice, for the mutual influence of creed and morals, for the growth of Church organization. ✓

In the same way, in contrast to the simple rules and divisions of positive law which stretch across the history of all nations, there arises a science of law, a jurisprudence which aims at discovering the general principles underlying legal enactments and judicial decisions. It speculates on the processes of thought which take place in the minds of legislators, judges, pleaders and parties. This theory of law enables men to frame and use their laws deliberately and scientifically, instead of producing them more or less at random under the stress of circumstances. The study of jurisprudence is therefore by

no means a mere expedient of the schools, contrived in order to introduce beginners to the terms and principal distinctions of their art, though of course jurisprudence does help in this respect while on its way towards the solution of scientific problems. Nor does our study exist chiefly for the purpose of classifying and cataloguing scattered notices as to rules and remedies : the most perfectly systematized chapters and paragraphs of a code would not render a general theory of law superfluous, for the prime consideration is not so much to establish the sequence of laws as to discover their rational interdependence and ultimate significance. For the intricate maze of a common law which, like the Anglo-American, is based on judicial decisions, the help rendered by jurisprudential classification is especially welcome, nay, necessary ; but even apart from that, a theory of jurisprudence is needed to strengthen and complete scattered arguments by treating them as parts of a coherent body of legal thought. Observations and rules which may seem casual and arbitrary when memorialized for practice obtain their justification or call forth criticism when examined in the light of a general theory.

2. It is usual for writers on jurisprudence

to begin with a definition of the topic they propose to discuss, namely, law. But such definitions given at the very outset have this inconvenience, that they are, as it were, imposed on the readers, who as yet have only vague ideas on the subject and therefore are bound to accept more or less passively what is told them in a dogmatic manner. Moreover, a definition of law is by no means easy to give: many have been suggested from time to time, and it is only after careful consideration that one is justified in selecting from the number. It seems more advisable to proceed in a different manner—to clear the way for a definition by narrowing gradually the scope of the inquiry, first determining the class to which the subject belongs, and then marking the particulars of the species under discussion.

It is evident that legal arrangements are a variety of social organization, and that therefore jurisprudence is one of the branches of social science. Man is an essentially social being. Social intercourse is to him a dictate of nature, because he cannot satisfy his wants as an isolated individual; if left to himself, he is, as Aristotle has put it, not self-sufficient. By joining a wife he

raises a family; by joining his neighbours in the union of the village he provides for the simple requirements of economic co-operation; by joining fellow-citizens he helps to build up a state which protects him against enemies and enables him to achieve intellectual and moral progress. We can go a step further: if social intercourse is a requirement of men's nature, *order* of some kind is a necessary condition of social intercourse. If a man profits at the expense of his neighbour by snatching away his bread, it will be difficult to establish a community of interests or any amicable intercourse between them. It is only when certain rules of conduct intervene to settle the normal behaviour of men in the exchange of commodities, in the relations of the sexes, or in the regulation of services, that social intercourse becomes regular and continuous.

There are thus certain initial requirements set to those who take part in the association: they ought not to hurt each other, to take undue advantage of each other, to act as if their private wills and pleasures were everything and the wills and interests of their neighbours nothing. Even when two persons join socially for the simple purpose of playing a game of

tennis or of chess, they must conform to certain rules in their contest if they wish to achieve their immediate end. The skill or force displayed constitutes the substantive or material part of the game; the rules as to moves and scoring constitute the formal frame of this kind of intercourse. As regards married people, or the shareholders of a joint stock company, or the citizens of a state, the relations involved are much more complex and enduring, but they are substantially of the same kind.

It is evident that laws take their place among the *rules of conduct* which ensure social order and intercourse. Therefore jurisprudence appears among social sciences within the section of so-called *moral science*.

✓ 3. Human thought may take up one of two possible attitudes in regard to facts observed by it: it may either watch their relations from the outside and try to connect them with each other as causes and effects, or else it may consider them in relation to man's conscious action, and estimate the connection between ends and means. The first point of view is that of natural science. The second point of view is peculiar to moral science. Let us develop this distinction somewhat more fully.

As soon as we turn our attention to moral science, we perceive two fundamental notions which form the peculiar character of this sphere of study and place it in distinct opposition to our conceptions of surrounding external nature, namely, the notions of will and of reasonable aim. Every one of us is conscious that his acts are produced by his will, in the sense that he has to make up his mind to choose one of many possible courses of action; and this internal experience is opposed to the other way of looking at events as governed by the binding necessity of natural laws. If a connection is established between positive and negative electric elements, a current will be produced, and this event will appear as the application of a law of cause infallibly working under certain given conditions. But when an engineer sets about to arrange an electric battery, every one of his acts in the process is the result of conscious volition, and may be directed to a different end or withheld altogether at any particular moment: the will of the engineer is, of course, influenced by certain causes in a definite direction, but every single act of this will presents itself as the expression of conscious choice.