



THE
ELEMENTS
OF
JURISPRUDENCE

BY

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Amplissimum Iuris Oceanum ad paucos revocare fontes limpidos rectae rationis.—LEIBNITZ, *Ep. ad Magl.*, xxvii.

Das bedarf heutzutage keiner Bemerkung, dass das System, ebensowenig beim Recht wie bei jedem andern Gegenstande, keine Ordnung sein soll, die man in die Sache hineinbringt, sondern eine solche, die man herausholt.—JHERING, *Geist des R. R.*, i. p. 36.

P R E F A C E

TO THE FIRST EDITION.

THE legal systems of the continent owe to their common derivation from the law of Rome, not only a uniform legal nomenclature, but also a generally accepted method, which at once assigns any newly developed principle to its proper place, and has greatly facilitated the orderly exposition of those systems in the form of codes.

In England, on the other hand, legal nomenclature is a mosaic of many languages, and the law itself, as expounded by Coke and Blackstone, except so far as it has been deduced with much logical punctiliousness from the theory of feudal tenure, is little more than a collection of isolated rules, strung together, if at all, only by some slender thread of analogy. The practitioner has been content to find his way through it, as best he might, by the help of the indices of

text-books, or by means of 'Abridgments,' or so-called 'Digests,' arranged under alphabetical titles.

It was a step in advance when it occurred to Mr. J. W. Smith to publish a series of 'Leading Cases,' selected almost at random, and to group round each a collection of subordinate decisions, in which the rule recognised in the principal case is deviously tracked in its various applications. Of a somewhat similar nature is Dr. Broom's 'Selection of Legal Maxims,' which explains the workings in different departments of law of a string of principles, such as those which are collected in the title of the Digest 'de Regulis Iuris.' It may be remarked that the principles to which reference is made, alike in the 'Leading Cases' and in the 'Maxims,' are but what Bacon would call 'media axiomata,' which neither work attempts to exhibit in their mutual relations, or to deduce from the higher principles of which they are corollaries; also that the search for these principles is an enquiry into the ethical reasons by which English law ought to be moulded, not an analysis and classification of legal categories.

There have been of late years signs of a change in the mental habit of English lawyers. Distaste for comprehensive views, and indifference to foreign modes of thought, can no longer be said to be national characteristics. The change is due partly to a revival of the study of Roman law, partly to a growing familiarity with continental life and literature, partly to such investigations as those of Sir H. Maine into the origin of legal ideas, but chiefly to the writings of Bentham and Austin. To the latter especially most Englishmen

are indebted for such ideas as they possess of legal method. The 'Province of Jurisprudence Determined' is indeed a book which no one can read without improvement. It presents the spectacle of a powerful and conscientious mind struggling with an intractable and rarely handled material, while those distinctions upon which Austin after his somewhat superfluously careful manner bestows most labour are put in so clear a light that they can hardly again be lost sight of.

The defects of the work are even more widely recognised than its merits. It is avowedly fragmentary. The writer is apt to recur with painful iteration to certain topics; and he leaves large tracts of his subject wholly unexplored, while devoting much space to digressions upon questions, such as the psychology of the will, codification, and utilitarianism, which have no necessary connection with his main argument. It may be asserted, without injustice either to Bentham or to Austin, that works upon legal system by English writers have hitherto been singularly un-systematic.

It is long since the author formed the hope of attempting to write a treatise upon legal ideas which should at least be free from this particular fault, and the objects which he proposed to himself differed so considerably from those aimed at in Mr. Justice Markby's 'Elements of Law' that the appearance of that very valuable work did not dissuade him from the prosecution of his design. In carrying it out he has not gained so much assistance as he expected from the legal literature of the continent. He soon discovered

not only that the name of Austin was unknown in Germany, but that very little had been written in that country with a direct bearing upon analytical jurisprudence. The latter fact is not so surprising as it may appear, if it be remembered that the continental jurists find in Roman law a ready-made terminology and a typical method, upon which they are little inclined to innovate. From treatises upon 'Naturrecht,' which may be described as 'Jurisprudence in the air,' he has derived next to nothing; and works upon 'Encyclopädie' and 'Methodologie' are generally too brief, and too much infected with *a priori* conceptions, to have been consulted with much profit. More help has been found, where it might not at first be looked for, in the numerous works, usually entitled 'Pandekten,' in which the Germans have set forth the Roman law as it has been modified with a view to modern convenience. Foremost among these must be mentioned von Savigny's 'System des heutigen Römischen Rechts.'

Still less has been derived from the other modern literatures; and after a general survey of the subject the author set to work to think it out for himself, resolving to traverse the whole of it, and to hold a straight course through it, turning neither to the right hand nor to the left into any digression however tempting. He now offers the result of his labours, which has been much delayed by other and more pressing engagements, to the indulgence of those who best know the extent and difficulty of the topic of which he has attempted to give a complete and consistent view.

T. E. H.

OXFORD, March 20, 1880.

PREFACE TO THE SECOND EDITION.

THIS edition has been carefully revised, and contains a good deal of new matter. The author has to thank several of his reviewers, whose articles form in themselves valuable contributions to the literature of the subject, especially Mr. A. V. Dicey and Mr. F. Pollock. He is also indebted to previously unknown correspondents, such as Mr. R. Foster of the New York Bar, who have been good enough to favour him with private communications upon points suggested by their reading of the book. He takes this opportunity of explaining, with particular reference to an able article by Mr. A. Tilley, that the method which he has followed, as best exhibiting the scientific order of legal ideas, is not, in his opinion, necessarily that which would be found most convenient for the arrangement of a Code. He has elsewhere pointed out that logical division should be to the codifier what anatomy is to the painter. Without obtruding itself upon the surface, it should underlie and determine the main features of every systematic exposition of law.

T. E. H.

OXFORD, *August 25, 1882.*

PREFACE TO THE THIRD EDITION.

IN preparing this edition for the press, the author has throughout taken account of the development both of positive law and of legal theory, in this and other countries, during the last three years, so far as he has been able to follow it. He has also worked out in greater detail than before, though it is hoped without detriment to the general proportions of the book, the difficult topics dealt with in Chapter VIII, and what he ventures to think the important question, raised in Chapter XII, as to the necessity of agreement in contract.

Upon many points he has found help in the elaborate reports upon foreign law which some of the governments of the continent are careful to have drawn up before proposing serious legislative changes. No one can consult these reports without wishing that something of the kind were more usual in this country, where a legal principle which has elsewhere long been discussed from every point of view, is not unfrequently treated in Parliament, and even by the Courts, as a novelty.

T. E. H.

OXFORD, *January 31, 1886.*

PREFACE TO THE FOURTH EDITION.

IN revising this edition, care has been taken to introduce as much illustration as possible from recent English cases, in which one seems to remark a growing tendency towards scientific generalisation. The author has reason to be more than ever convinced of the truth of what may perhaps be described as the 'objective' theory of Contract, maintained in Chapter XII. He has seen with pleasure that the method of this work has been followed 'as the most logical and most exact,' by Mr. Stimson in compiling his *American Statute Law: an Analytical and Compared Digest of the Constitutions and civil public Statutes of all the States and Territories, relating to persons and property*; and that much of its terminology has been adopted in the able treatise of Professor Terry, of Tokio, *Some Leading Principles of Anglo-American Law, expounded with a view to its Arrangement and Codification*.

T. E. H.

OXFORD, December 1, 1887.

PREFACE TO THE EIGHTH EDITION.

No pains have been spared to make this edition an improvement upon its predecessors. The Prefaces to the editions of 1890, 1893, and 1895 have not been reprinted, but it may be worth while to repeat the statement, made in 1893, that 'in compliance with a wish expressed in many quarters, especially by Oriental students, the author has translated the German and Greek definitions which occur in the earlier chapters, though well aware how much of the meaning of the former at any rate must perish in the process.' Many references have now been made to the new Civil Code for Germany, which became law last month. This great work, the result of twenty years of well-directed labour, differs materially from the draft Code, to which allusions will be found in the sixth and seventh editions. Few more interesting tasks could be undertaken than a comparison in detail of this finished product of Teutonic legal science with the Code Civil, which has so profoundly affected the legislation of all the Latin Races.

T. E. H.

OXFORD, September 15, 1896.

PREFACE TO THE TENTH EDITION.

THE preparation of this edition has been delayed by more pressing engagements of the author, which have obliged him to resort to the temporary expedient of a reprint of the previous edition. He has now carefully revised the work, adding much new matter suggested, in more than usual abundance, by recent decisions and discussions. While rejoicing that increased attention is now devoted, on both sides of the Atlantic, to the subject of legal method, he cannot help thinking that the order of the German Civil Code, which has been unavoidably followed in Mr. Jenks's interesting attempt to exhibit English law also in the form of a Code, in so far as it treats of Obligations before Rights *in rem*, is less convenient, as well as less scientific, than that derived from the Roman institutional writers.

It may be desirable to repeat that this book has been copyright in the United States since 1896, and that an unauthorised edition, issued in the same year at St. Paul, Minnesota, was taken, not, as is stated in the 'Publishers' Preface,' from a (then non-existent) ninth English edition, but, as indeed appears from the title-page, from the seventh edition, published in 1895.

T. E. H.

OXFORD, June 1, 1906.

PREFACE TO THE TWELFTH EDITION.

IN the preparation of this edition the author has aimed at producing a text which may be regarded as practically final, although future issues of the work may be illustrated by annotations chronicling the movement of legislation and case-law, British and foreign.

The task thus undertaken has required an expenditure of time and labour exceeding, probably, that demanded by any preceding new edition. The old adage 'silent leges inter arma' needs some qualification. The reader will, indeed, find that a considerable amount of new matter has been suggested to the author by the gigantic struggle now in progress.

T. E. H.

OXFORD, November 30, 1916.

PREFACE TO THE THIRTEENTH EDITION.

THIS edition has received careful revision, especially with reference to changes which have occurred in English law during the eight years last past.

Of these the most notable are unquestionably those effected by the statutes of 1918 and 1919 removing disabilities of women, and by Lord Birkenhead's great statute of 1922, passed 'to assimilate and amend the law of real and personal property.'

T. E. H.

OXFORD, *March* 1, 1924.

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