A TEXTBOOK OF
JURISPRUDENCE

BY

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PREFACE TO FOURTH EDITION

THE fourth edition has been prepared by Professor Derham and myself. Without changing the character of the book, the attempt has been made to discuss the issues of the present decade.

The most complete revision is in Chapters V and XV. There has been much recent controversy on the relationship that should exist between law and morals, and this naturally is most relevant in dealing with the question of the interests which the law should protect. Greater emphasis has also been placed on the relationship of economics and law. The chapter on the criminal law has been thoroughly revised, taking into account recent statistics and modern developments in criminology.

Many new cases and much recent writing have been noted, but as an example the following sections are mentioned: S. 5 Decisions on Rhodesian Independence with regard to Kelsen's theory; S. 8 The scope of functional jurisprudence; S. 11 Comparative law; S. 45 Precedent; S. 49 Statutes; S. 54 Law Reform; S. 68 An Act as a basis of liability; S. 90 The Bracket Theory (recent company failures); S. 96 Collective contracts and trade unions; S. 100 *Non est factum*; S. 107 Functional analysis is of the law of tort; S. 111 Exemplary damages; S. 118 Analysis of Property in the modern world.

I wish to thank Miss Judith Wilkins for assisting with typing and the checking of the proofs, and also my son, Major Frank Paton, who assisted with the proofs. I am indebted to the Clarendon Press for their courteous co-operation with an author at the other end of the world.

G. W. P.

PREFACE TO THIRD EDITION

WITH great regret I decided that the preparation of a third edition required more than the part-time energies of a somewhat preoccupied administrator. My disappointment was, however, allayed by the fact that Professor D. P. Derham was willing to undertake the task. It is fair to state that the new work is entirely his, though I have agreed with every amendment and addition.

G. W. PATON

THE main aim in the preparation of this edition has been to maintain the objectives stated in the Preface to the first edition. In particular, I have tried to preserve the usefulness of the book to undergraduates, to keep the language as simple and direct as possible, and to reveal the important questions rather than to provide dogmatic answers.

If any new major theme is introduced it is derived from the work of the linguistic analysts as exemplified, so far as lawyers are concerned, by the work of Professor Herbert Hart at Oxford. That theme is introduced in § 4 (John Austin and the Imperative School). The influence of the linguistic analysts' views is demonstrated in the revised treatment of the Definition of Law in § 18, of the Concept of Legal Personality in § 61 and Chapter XVI, of the Concept of Possession in Chapter XX, and to some extent by the revision of § 45 (Precedent).

As the above remarks indicate, some substantial changes have been made in this edition. Two new sections have been added—§ 10 (The Scandinavian Realists) and § 61 (Legal Personality—An Introductory Note). The following sections have been substantially rewritten and expanded: § 4 (John Austin and the Imperative School); § 7 (The Functional School); § 18 (The Definition of Law—Introduction); § 45 (Precedent); § 85 (The Nature of Legal Personality); § 90 (Theories of the Nature of Corporate Personality); and the whole of Chapter XXII (The Concept of Possession). The text and footnote references have been revised throughout; more than two hundred new references to cases and authorities have been made by way of replacement of old references or by way of addition; and a considerable amount of incidental new writing has been attempted interstitially.

In the preparation of this edition I am particularly indebted to the University of Chicago. The grant to me of a Senior Fellowship in Law and the Behavioural Sciences in the Chicago University Law School in 1961 made it possible for me to do the necessary background work with adequate library facilities available. I wish also to express my gratitude to Miss Deirdre Farrell who undertook endless typing tasks and assisted with the checking of proofs, and to Mrs. Barbara Hocking for her assistance in checking references and proofs, and in the preparation of the tables and index.

DAVID P. DERHAM

February 1963

PREFACE TO SECOND EDITION

THE writer is grateful to reviewers for the constructive criticisms given of the first edition. Attempt has been made to meet them without destroying the purpose for which this work was designed—a student text. To follow every attractive path would have destroyed whatever usefulness the book may possess. I am particularly grateful for the comments made by Professor Hanbury in the *Law Quarterly Review* and for friendly criticism from Professor W. F. Bowker and Professor Zelman Cowen. Much is also owed to the discussions which I have inflicted on my colleague, Professor Friedmann.

There has been a wealth of writing since the first edition went to press. Professor Stone has published the *Province and Function of Law in Society* and (with Professor Simpson whose untimely death we deplore) the three volumes of *Law and Society*. Professor Friedmann has produced a second edition of *Legal Theory* and Professor Keeton of *Elementary Jurisprudence*. American writing has maintained its flow and the *Twentieth Century Legal Philosophy Series* is making accessible the writings of other lands. Dr. Huntington Cairns has written on *Legal Philosophy from Plato to Hegel*. It is not possible to acknowledge in detail the debt owed to these works.

The substantial changes in this edition are as follows. Firstly, the material has been reorganized. What was Book V, 'Analysis of Law on the Basis of Interests', has been entirely rewritten and transferred to Book II dealing with the purpose of law. This links the two approaches to the problem of teleology—the historic natural law and the modern jurisprudence of interests. New sections have been added as follows: Bentham (§ 3), Comparative Law (§ 10), Post-Classical Law (§ 16), Custom (§§ 39–40, now treated in its proper place under the sources of law), Statute Law (§ 52), Sale and Hire-purchase (§ 96), Bailment (§ 124). In some sections gaps have been filled, e.g. a short discussion of Hobbes and Locke appears in § 31. In other sections the material has been recast. Judge Frank has convinced me that I was not altogether fair to the realists or constructive sceptics as he prefers to call them (§ 7). The war trials necessitate a different treatment of international law (§ 20). A more sympathetic treatment is given of the Catholic doctrine of natural law (§§ 30, 33)—I must confess gratitude to my friend, Mr. Frank Maher, who has

helped me to fill the gaps of my learning. The treatment of void acts (§ 67) has been modified in deference to the views of E. J. Cohn and Cheshire and Fifoot. The passing of the Criminal Justice Act has led to changes in § 79. The analysis of the criminal liability of corporations (§ 89) takes account of the article by R. S. Welsh. The treatment of mistake (§ 98) is recast after reconsidering the views of Cheshire and Fifoot. The decision in *Read* v. *J. Lyons & Co.* and the Law Reform (Personal Injuries) Act, 1948, bring into relief the conflict between the older theories of tort and the modern principles of insurance (§ 102). *Hannah* v. *Peel* is more fully considered in connection with possession (§ 122). The writer has also attempted to be more positive in the general part of the work and not merely to confine the treatment to the formulation of the problems involved. There has also been a thorough revision of the text.

My wife, Miss F. M. Scholes, and Mr. A. R. Brown have assisted me with the proofs and the checking of references, and I express my gratitude to them. The publishers have succeeded in adding much new matter without increasing the size of the book and of their many courtesies to me I am appreciative.

G. W. P.

February 1951

PREFACE TO FIRST EDITION

THE writer of a textbook on Jurisprudence is faced with more difficult problems of method and of matter than is the case in any other legal subject. Whatever the result, criticism is inevitable, for it would not be easy to discover two persons who would solve in the same way the problem of what a textbook on Jurisprudence should contain.

The writer confesses frankly to using a somewhat pragmatic test. This work is the outcome of teaching in a Dominion law school and is based on what are considered to be the needs of students. It is also limited by considerations springing from the capacity of the undergraduate mind. Severe restraint has been exercised to keep the discussion within reasonable limits, and every endeavour has been made to avoid using the traditional and imposing quadrisyllables which give a superficial impression of learning. The easiest way to achieve fame in jurisprudence is to write a learned tome which is so baffingly obscure that it reposes on the shelves unread. It is the conviction of the writer that, while solutions in jurisprudence are extraordinarily few, the fundamental questions may be stated in reasonably simple language. As the purpose of teaching is not to dictate dogmatic answers but to stimulate thought, the important thing is to make clear exactly what the problems are.

It must be admitted that to deal with the problem of content satisfactorily three volumes would be necessary. The pure science of law, functional jurisprudence, teleological jurisprudence—each demands separate treatment at length. There is, however, a wealth of literature on particular aspects of jurisprudence. There is little which attempts to discuss modern views in a compass within the reach of students. For such a purpose it is absurd to attempt to cover the whole field of literature, or to load the text with multitudinous references to works which are either inaccessible or in a language which the reader has not mastered. Some knowledge of the great names of the past is necessary in order to set the problem in perspective, but otherwise the literature of jurisprudence should be used merely as a peg on which to hang a discussion of such problems as are thought important.

It is easy for a textbook of jurisprudence, as Dr. Allen has said, to become a treatise 'in which the subjects are *dully* classified and

subordinated'. This is a question on which the reader will have strong feelings.

It is impossible to acknowledge adequately the debt which one owes to others. Frequently the greatest debts are not consciously realized by the writer. Readers will discover the clear influence of Justice Holmes and of Dean Roscoe Pound. Much is owed to Dr. C. K. Allen for encouragement and the force of example. I am grateful to Professor Goodhart for reading the manuscript and to Professor Brierly for scanning the proofs. I have gladly accepted the suggestions made. My wife and Miss F. M. Scholes have assisted me with the proofs and preparation of the indexes. The publishers have willingly assumed the extra burden caused by the presence of the author at the other end of the world. I appreciate the skill used to minimize these difficulties.

G. W. P.

February 1946

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INTRODUCTION

I

THE NATURE OF JURISPRUDENCE

§ 1. Introduction

The writer on jurisprudence is in the fortunate (or unfortunate) position of being able to determine the boundaries of his subject with rather more freedom than remains in other legal courses. Stern conflicts rage concerning its nature and scope. This certainly introduces a liveliness into what many consider a dull pursuit, but it has corresponding disadvantages, for controversy absorbs much of the energy that should be spent in pursuing the subject itself.

Modern jurisprudence trenches on the fields of the social sciences and of philosophy; it digs into the historical past and attempts to create the symmetry of a garden out of the luxuriant chaos of conflicting legal systems. The breadth of its scope, covering a voluminous literature written in many tongues, makes it a difficult subject to master. There is a danger that excessive learning may obscure the real problems that must be faced. Too many works contain such a wealth of reference to the learning of the past and present that they become tedious and unintelligible save to one who is as erudite as the author of the work concerned.

Moreover, even if the work is written in a tongue with which we are familiar, we are sometimes tempted to repeat the old quip that language was given to us to conceal our thoughts. It is true that it is difficult for any system of knowledge to use the terms of popular speech, for, unless the vague meaning given to his terms by the average man is made precise, confusion results. It is not easy to preserve a balance between the use of common words in a strange sense and the invention of terminology which baffles the reader. Thus one writer may use such a common term as *possession* in a sense entirely

his own, causing confusion to all save the most acute; another invents such a technical apparatus that it is necessary to furnish a glossary of eighteen pages.[1] As in modern politics, *-isms* abound. Some difficulties of terminology there must be, for even such a term as *law* has many meanings. But the besetting sin of jurists is to conceal threadbare thoughts in elaborate and difficult language. In spite of the difficulties inherent in the subject, the problems of jurisprudence can be expressed in fairly simple language, though, of course, opinions may well differ as to the real solution.

Jurisprudence is sometimes used merely as an imposing synonym for law, as when we speak of medical jurisprudence. This is not the use to which the term is put in this work. Jurisprudence[2] is a particular method of study, not of the law of one country but of the general notion of law itself. Holland describes it as the formal science of positive law,[3] Allen as the scientific synthesis of the essential principles of law.[4] However it may be defined it is a study relating to law, and although the term *law* may seem to the uninitiated a simple one, analysis reveals that there are many uses of this word. Hence one of the first tasks of jurisprudence is to attempt to throw light on the nature of law. At first sight it would seem to be the most logical procedure first to define *law* and then to discuss the scope of jurisprudence. But there are various ways of approaching the problem, and each 'school' of jurisprudence tends to set up its own definition. Thus, to take only one point for purposes of illustration, law has a twofold aspect: it is an abstract body of rules and also a social machinery for securing order in the community. The sensible approach is to admit that both these sides of law must be considered. But some schools put an exaggerated emphasis on the first, others on the second. Clearly, a jurisprudence which considers only the theoretical rules of the books will be very different from one which attempts to study law in action. Hence a short discussion of the schools of jurisprudence seems to be the clearest way to approach the question. To cover the learning of many centuries is impossible, but it is also unnecessary as the problems remain the same though the answers may differ. In the chapter on natural law[5] certain aspects of the history of jurisprudence will be discussed; for the present we shall concentrate on the problem as it appears today.

[1] Kocourek, *Jural Relations* (2nd ed.), 427.
[2] In France *la jurisprudence* covers what we should term case law.
[3] *Jurisprudence*, ch. i. [4] *Legal Duties*, 19. [5] *Infra*, Ch. IV.