

BAALMAN'S OUTLINE OF LAW IN AUSTRALIA

FOURTH EDITION

G. A. FLICK



OUTLINE OF LAW IN AUSTRALIA

by

JOHN BAALMAN

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by

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PREFACE TO THE FIRST EDITION

Although the subject of this book is elementary law, it was not designed merely as a primer for law students. Its main object is to reach those members of the community who, without any intention of adopting law as a profession, regard some knowledge of the rules which regulate their daily conduct as a sheer cultural necessity.

The seeker after general knowledge finds that, of all sciences, law is, perhaps, the least accessible. There is probably no technical subject on which more books have been written. Yet there is possibly no subject in whose literature there has been a greater degree of specialization and a less degree of generalization. That is why it is so difficult of access for the general reader. A work on any one branch of law presupposes a knowledge of others. Moreover, it usually contains a wealth of detail which, though valuable to lawyers is out of proportion to its value in the general scheme. The general reader requires perspective rather than detail. He would expect to learn the relation of law to history, and of history to law, and the relation of both to our general social structure. In this small volume it is quite impossible, of course, to satisfy that broad requirement. The aim has been simply to provide a conspectus of modern law with an historical background, using detail only so far as it was considered necessary to illustrate some fundamental rule of principle.

The question of documentation provided much food for thought. In a legal text-book, omission to quote authorities would be inexcusable. A lawyer measures the value of any statement of law by the source from which it has been taken. He would expect to find it substantiated, preferably by a reference to some high judicial authority. Equally, a text-writer would never neglect the conventional opportunity available in the form of footnotes, for shifting the responsibility for his statements on to somebody else. For those reasons, legal text-books invariably abound in footnotes. As previously explained, however, this is not a legal text-book. It is meant to be read rather than to be made the basis either for detailed study or for tendering legal advice. And as all readers (as distinct from persons engaged on research) experience a feeling of irritation at the staccato effect of interspersed references to authorities, those impedimenta have, in the interests of fluency, been omitted. To a lawyer, most of the statements of law are too elementary to need the support of authorities; while readers who are not lawyers will have neither the intensity of interest nor the ready access to books of reference, to be seriously concerned about documentation. To any reader who might wish to pursue further the study of a particular subject the bibliography at p. xv will serve as a guide.

Technical works of a cyclopædic nature are not usually undertaken by a single author. That is particularly so where the subject is law, the reason being that normally it takes one individual all his time to keep sufficiently abreast of one subject to be able to write authoritatively on it.

The scope of this work could be justified only on the ground that the matter has been condensed to a stage of elementary principle at which specialization is not required. Even at that, the existence of a separate body of law in each State amounted to a serious problem; and it became apparent, both to the publishers and to the author, that some authoritative interstate reconciliation was desirable. With that end in view the publishers sought, and readily obtained, the co-operation of distinguished men of letters in the various States. Professor G. W. Paton, MA., B.C.L., Dean of the Faculty of Law and Professor of Jurisprudence, University of Melbourne, together with Mr. G. Sawyer, LL.M., Senior Lecturer in Law at the University; Mr. W. N. Harrison, B.A., LL.B., University of Brisbane; Mr. D. S. Hogarth, LL.B., Barrister-at-Law and Solicitor, of Adelaide; and Professor F. R. Beasley, B.A., LL.B., Professor of Law, University of Perth—all of these learned gentlemen perused either the typescript or the proofs, not with any intention of accepting responsibility for the text, but to indicate disparities between the laws of their respective States. In most cases, however, their comment extended to the detection of numerous errors and omissions in statements of the law common to all States. For this generous display of interest, and for the support derived from it, the author is heavily indebted.

It is desired, in particular, to pay tribute to the kindly assistance received from Professor James Williams, LL.M., Ph.D., of Victoria College University, Wellington, New Zealand, and onetime Dean of the Faculty of Law, University of Sydney, whose criticism, always constructive, resulted in the elimination or correction of many inaccuracies.

Lastly, the author's thanks are extended to Mr. W. Makin, B.A., LL.B., Examiner of Titles, Sydney, who with his customary generosity made a number of useful suggestions, and who lent a keen eye to the detection of literal and grammatical errors in the proofs.

J. BAALMAN

*Sydney,
December 1946.*

PREFACE

In the Fourth Edition of this book I have endeavoured to retain its prior format and yet at the same time to bring the statutory law and case law up to date. Some areas of the law, however, have changed to such an extent since the Third Edition was published in 1969 that a complete re-writing of the relevant sections have been called for (e.g., family law). Other developments since 1969 have necessitated the inclusion of completely new material (e.g., Commonwealth legislation in the field of administrative law and Trade Practices).

A number of people have assisted me in the preparation of this edition and I would like to express my appreciation to the following: Ms. J. R. Terry, Ms. E. Johnstone, Mr. P. J. Butt, Mr. C. S. Phegan, Mr. J. Wade, Mr. G. D. Woods, and Mr. L. Katz. I also wish to express my appreciation of the help in the typing of the manuscript provided by the secretarial staff on the Faculty of Law, University of Sydney, and, in particular, by Ms. Susan Emmett and Ms. Susanne Donato.

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Chapter I

THE SOURCES OF LAW

WHAT IS LAW?

1. A work on jurisprudence cannot proceed very far without ascribing a meaning to the word "law." Analysis being the basis of a work on jurisprudence, its author no doubt feels impelled to exercise some originality in defining his terms. Whether or not that surmise is correct, it certainly seems to be borne out by the diversity to be found in the definitions of "law" adopted by famous authors; although if these analyses were analysed it would probably be found that the diversity is more in the choice of words than in the actual meanings.

This book does not purport to be a work on jurisprudence. Its function is to epitomize—not to analyse. That being so, the author, while being under the necessity to have a definition of "law," feels himself free to select one from the collections of the famous analytical writers, without any pretence of originality. For the purpose of this outline, then, law will be taken to mean "a system of rules, imposed by the supreme authority in a politically organized society, and recognized by the members of that society as governing or regulating their conduct and intercourse, one with another."

The definition requires that, to answer the test of being law, a rule must be recognized by those to whom it is addressed. Recognition, in the sense of having knowledge of a rule, is, of course, a condition precedent to obedience. Men cannot be expected to obey a rule of which they are not aware. It follows, therefore, that obedience may vary according to the extent to which the rules have been made apparent. The science of law, when it passes from the abstract or philosophical stage of jurisprudence, becomes a study of the degree to which the rules regulating human intercourse have been made recognizable or apparent to those to whom they are directed.

The word "recognized" may connote not only awareness on the part of individuals, but also, in a sense, submission. Recognition in that sense is a factor influencing obedience; and it will vary not only with the degree of authority to make laws possessed by the law-maker, but also with his ability and willingness to enforce them. Pursuit of that aspect of the subject, however, would be approaching the sphere of strict jurisprudence, and outside the scope of a work dealing with law in outline. It would be necessary only to commence to analyse the reasons why a large section of mankind treats so offhandedly the Laws of God, to be convinced of the futility of such