# ELEMENTS OF JURISPRUDENCE

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Elements of Jurisprudence by Charles James Foster



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# PREFACE.

Now that Law is at length assuming among us the rank of a science, the principles upon which it is to be founded ought to be well settled. In the discharge of my professorial duties, I have found increasing difficulty in accepting the currently-received basis either as right or as possible. In the following pages I have stated my objections to it. Believing, at the same time, that Law is capable of scientific reduction, I have also proposed the principles upon which, as I think, it must be so reduced.

The received formula, "Law is a species of Command," reduces the bulk of the internal law of every community—its customs and popular morality—to the abnormalism of *ex post facto* legislation, and excludes international law altogether from the domain of Jurisprudence. A custom or a recognized moral principle is Law, not by virtue of its general observance among the community; but only becomes so "when it is adopted

as such by the Courts of Justice, and when the judicial decisions fashioned upon it are enforced by the power of the State." As judicial decisions are of retrospective operation, the conclusion is inevitable, that a defendant may be cast in damages in a Court of Law, only because he has not complied with requisitions which, at the time they were made upon him, it was not legal to demand. In the same way, since, for want of a "determinate common superior," International Law is not Law at all, a ship, which has been captured in war and condemned by the Prize Courts of the captor's country, cannot be transferred to a neutral purchaser, so as to vest in him a legal title valid against recapture. These unsatisfactory logical consequences are avoided, if what is called the "absurd conceit" can be established, that these customs and recognized principles are not made law by being judicially adopted, but must be judicially adopted because they are law.

I cannot suppose that the consequences I have stated have escaped the notice of the eminent jurists whose authority has established the present basis of the Science; nor that they are insensible to the forced character of the constructions by means of which the fact of the undeniable influence of public morality upon Law, is bent to their formula. They must have accepted it as a choice of scientific evils; and, although there are other grounds assignable for their adhesion to the modern Epicurean philosophy, per-

haps I shall hardly err in attributing it chiefly to its apparent superiority to its rival in a fundamental point. "It is the most palpable defect of Butler's scheme, that it affords no answer to the question—what is the distinguishing quality common to all right actions?" It simply appoints Conscience high arbiter, without either assuming that he is necessarily right or providing a rule for his guidance. This is at once the frank confession of Mackintosh, the passionate complaint of Bentham, and the almost unmerciful taunt of Austin. On the other hand, whatever the defects of the system revived by Bentham and Paley, it has supplied an answer to this question (in the theories of Divine Command and Human Happiness), to which, if in any shape, some will object, in some shape most have been found willing to accede.

No doubt it may be so presented as to satisfy many supposable assumptions. If religious belief were not a fact, the scientific propriety of the answer would be recognized in the shape in which it finally tests the rectitude of actions by their tendency to promote Human Happiness: if religious belief were universal and uniform, we should presuppose a suitableness in an answer referring actions to their conformity with the Divine Will. But when the theories are blended to meet both cases, the answer is soon seen to satisfy neither, and to lose all logical connection and even identity in the attempt.

Nothing will be done, therefore, towards creating a Science of Law by merely starting afresh the old quarrel of the Stoic and Epicurean systems. I hold, indeed, that the abandonment of Grotius has been an error, and to his principles accordingly I seek to recur. But in this attempt I have (I believe) assumed nothing as a basis which Puffendorf or Bentham need have disputed. Mackintosh's question is the *crux* not so much of the schools as of the science: and must be faced, not only in the construction of that portion of it which belongs to Jurisprudence, but in the essential preliminary, to which these pages are devoted, of laying down the principles upon which the construction must proceed.

In this enquiry one feels it to be contrary to all probable thinking that there should really be anything new to discover. It cannot be that the principles of morality are an unknown tongue to a race which has been held together, for upwards of six thousand years, by their practical assertion. It is, therefore, among the admitted truths of Morals and Jurisprudence that I have sought for such as fill up the character of necessary and universal—truths which are undeducible from any prior principle, and apply, universally, to all the circumstances under which action can be conceived as taking place. After having been at some pains to clear the field of discussion, by getting rid of the foreign elements which so universally encumber our simple ideas of Duty and Law, and thus setting out

with a distinct conception of what the words really mean, I have not hesitated to propose, as a final test of action, the simple principle of Doing as you would be done by. The ordinary truth and general practical value of this principle are admitted by all: its axiomatic character and supreme rank are almost universally forgotten if not positively denied. On the side of its express repudiation we find the authority—not often concurrent—of Leibnitz and Puffendorf. I have, however, ventured to enquire, besides availing myself of some courageous aphorisms from Samuel Clarke, what prior truth there is to which it must be referred, or what conditions of action are without the range of its influence. To have exhausted this enquiry I make no pretension: it will be something if, after the slight account which seems heretofore to have been taken of the principle, I have vindicated its claim to a far more serious attention.

Assuming, however, that we have thus obtained a final test of Duty, we have by no means done all that is needful towards laying a foundation for Jurisprudence. It is not everything morally right which is rightfully compellable. The Moral Law of Force has still to be ascertained: and if this has been less the subject of controversy than the rule of Duty, this is the case apparently, because from the common deficiency of both schools in furnishing principles, materials for controversy have been wanting. On this perplexing topic I may be thought not to have done much

more than to raise the question, Whether the necessity of preserving the *status quo*, which is of so wide an application in Law, is not the ground upon which the use of force at all must be rested. But the main difficulty arises, I take it, at a further point. What is the *status quo*, morally considered? If, as I believe, this difficulty finds its own solution in discussing the point, how far Law is binding upon the conscience, it may be more easy to advance both questions another stage. The *status quo* cannot be stated as an invariable quantity, but its value in the equation may always be deduced from the principle that Law is bound to follow as closely as possible the constantly advancing standard of public morality.

In these speculations, English students of Law as a Science, will find but little in common with those to which they have been accustomed. The reasoning, of course, is different: but even many of the formal definitions must be framed in a new set of terms. For this no advocate of the principles for which I am contending can now be held responsible. A jurist who looks upon Law as part of moral science cannot accept expressions which go to ignore our moral being. Blackstone's statement of the Rights of Nature is conceived on a purely physical basis: nor can it, I think, be safely inferred (to take an instance from a subsequent chapter), that he was prepared to acknowledge it as one of the rights of nature to worship God. There are expressions which

one would gladly accept as such a recognition: but the conditions to which these are uniformly linked are destructive of their practical value, by leaving nothing of the God-given privilege beyond the civil permission. Mere anxiety for accuracy would lead any one to avoid the possibility of a similar result.

This work might easily have been more bulky and more learned; but I doubt if either quality would have been suitable to the present state of the Science in this country. Our studies of Jurisprudence are but beginning. The time has not yet arrived for the elaborateness of disquisition, which is proper for the develop ent of principle already settled. However much I have fallen short of the settlement—and in a new effort of this kind, one must hope for every indulgence—I believe all who have reflected on the subject will agree with me, that the attempt to which I have here confined myself is the step now wanting to our prosecution of jurisprudential science. To escape the necessity of alterations at once numerous and trifling, I have preserved the form of lectures: the substance of the treatise having been delivered in that form at University College. I trust that it is improved by a somewhat anxious revision. I hope, also, that whatever value it has is increased by the appended "Bases of a Science of Law:" in which I have collected, with some attempt at logical consecutiveness, the constructive principles which, in the treatise, are necessarily dispersed through a mass