

**THE SCIENCE OF LEGAL JUDGMENT;  
A TREATISE DESIGNED TO SHOW THE  
MATERIALS WHEREOF, AND THE  
PROCESS BY WHICH, THE COURTS  
OF WESTMINSTER HALL**

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The Science of Legal Judgment; A Treatise Designed to Show the Materials Whereof, and the Process by Which, the Courts of Westminster Hall by James Ram

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**JAMES RAM**

**THE SCIENCE OF LEGAL JUDGMENT;  
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*J. Heath Howland*

*1<sup>st</sup> Sep 1845*

THE SCIENCE

OF

LEGAL JUDGMENT;

A Treatise

DESIGNED TO SHOW THE MATERIALS WHEREOF,

AND

THE PROCESS BY WHICH,

THE COURTS OF WESTMINSTER HALL,

CONSTRUCT THEIR JUDGMENTS;

AND

ADAPTED TO PRACTICAL AND GENERAL USE IN THE DISCUSSION,  
AND DETERMINATION, OF QUESTIONS OF LAW.

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BY JAMES RAM,

OF THE INNER TEMPLE, BARRISTER AT LAW.

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"The judgments of the Courts of Westminster Hall are the only authority that we have for by far the greatest part of the law of England." *Lord Wynford.*

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FROM THE LONDON EDITION.

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THE SCIENCE  
OF  
LEGAL JUDGMENT.

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CHAPTER I.

INTRODUCTORY.

THE subject of the present Treatise leads to the observation, that there are three kinds of legislation, by which the laws of England are made.

One manner of making law is prospective, legislating on facts which it is considered will or may exist, and for which the legislature accordingly provides a written law. The statute law of England is an example of this kind of legislation.

A second manner of making law is prospective and adoptive, legislating on facts which it is considered will or may exist, and for which the legislature therefore provides a written law. This sort of legislation takes place, when any country adopts the laws, or a branch of the laws, of another state. It is known therefore in England, since a part of the Roman civil law is adopted by the Court of Chancery, and the Ecclesiastical and Admiralty Courts, of this country.

A third manner of making law is, to wait for facts that shall \*occasion a lawsuit; on which facts, when the suit [ \*2 ] arises, a Court of Law gives judgment; a judgment that is constructed of certain materials which are law, and is when delivered part of the law of the land.

Those materials consist of the "divers laws within the realm of England," mentioned by Coke; and of which, among others, he enumerates,—the law of the Crown; the law and custom of Parliament; the law of Nature; the Common law of England; the Statute law; Customs reasonable; Ecclesiastical or Canon law; Civil law; the law of Merchants.<sup>(a)</sup> They consist also of the several "fountains or places," from which the same learned writer observes, the "proofs and arguments" of Littleton are drawn;—as, maxims, principles, rules, intendment and reason of the common law; books, records, and other authorities of law; the form of good pleading; approved precedents and use; common

(a) Co. Litt. 11 b. See also Doct. & St. Dial. l.



opinion of the sages of the law; and the arguments, *ab inconvenienti*; *à majore ad minus*, from the greater to the lesser, or from the lesser to the greater; *à simili*; *à pari*; *ab utili vel inutili*; and *ex absurdo*.(b)

When, with reference to the Courts of Westminster Hall, it is said, "the judges are to declare the law, not to make the law," "*jus dicere et non jus dare*,"(c) the proposition is not, it is apprehended, in all senses, correct. A Court, when it constructs a judgment, forms it of certain materials, which are law; those materials the Court does not make, and so far the judgment is not creative of law. But the judgment or body, into which the materials are wrought, is law; and is law, although the materials are ill chosen, or improperly applied:(d) in some degree, therefore, it would seem, a judgment is creative of law. And this opinion is upheld by the known truth, that so long as a judgment, which a Court of Westminster Hall has delivered, stands unreversed, [ \*3 ] "the case is law, although it is a "shocking decision,"(e) or is an "extraordinary" case,(f) or "has produced considerable mischief," and "ought not to have been decided as it was,"(g) or even has the effect partly to repeal an Act of Parliament.(h) And although, while newly in existence, that judgment may be disregarded or set aside,(i) yet, from probably a variety of reasons, and on one ground in particular, namely, the expediency that the law be fixed or certain,(j) it may in time become so fast settled, that the Courts of Westminster Hall may not be able to overturn, or even to shake, it, and on the contrary may be bound to follow and establish it;(k) and the force of an Act of Parliament may be required to root it out of the law of the land.(l)

The circumstance that the Courts of Westminster Hall, through the judgments which they give, exercise in some degree a legislative power, augments the interest and importance, which, as dispensing justice, otherwise belong to those judgments. And a knowledge of the materials of which these judgments are constructed, and of the process used to construct them, appears to be a matter that much concerns both lawyers and the public.

To judges (it is advanced with respect) this knowledge is important, because it is a guide, which it is their duty to take in forming the judg-

(b) Co. Litt. 11 a.

(c) 7 Durn. & E. 696; 1 Brod. & B. 563; 1 Atk. 363; 4 Ves. 382; 4 Bro. C. C. 458; 1 Mylne & K. 290, 294; Hale's Hist. Com. L. ch. iv. 6th ed. pp. 89, 90; 1 Bl. Com. 69, 70.

(d) 1 Taunt. 292; 14 Ves. 176; 19 Ves. 479; 4 Burr. 2564, 2565.

(e) 1 Taunt. 292.

(f) 14 Ves. 175; 4 Taunt. 736.

(g) 19 Ves. 479; 1 Meriv. 9; 2 Ross, 329.

(h) "The great operation of the statute *De Donis* was destroyed by the revival of *Common Recoveries*." 5 Durn. & E. 179; 7 Durn. & E. 415. The Statute of Frauds, 29 Ch. II., c. 3, s. 3, is in effect repealed by *Russel v. Russel*, 1 Bro. C. C. 269, cited 9 Ves. 117, 19 Ves. 212, 479, 2 Ves. & B. 83, 1 Cox, 312. Certain statutes relative to a be-

quest of stock are in effect repealed by cases in Chancery; 7 Ves. 440, 15 Ves. 577, 578, 1 Russ. 589, 597, 598. On judges lending their assistance to repeal an Act of Parliament, by a strict interpretation of it, see *Smith v. Armourers' Comp.* 1 Peake, 199, 201, 3d ed.

(i) *Emanuel v. Constable*, 3 Russ. 436; *Smith v. Compton*, 3 Barn. & Adol. 189.

(j) 14 Ves. 425.

(k) On the doctrine of *Dumpey's case*, 4 Co. 119 b, see 4 Taunt. 736, and 14 Ves. 175. On the doctrine of *Russel v. Russel*, 1 Bro. C. C. 269, see 1 Cox, 312; 9 Ves. 117; 12 Ves. 198; 19 Ves. 212, 479; 1 Meriv. 9; 2 Ves. & B. 83.

(l) Examples of such Acts of Parliament are—1 Will. IV., ch. 40, on undisposed Residues of the Effects of Testators; and 1 Will. IV., ch. 46, on Illusory Appointments.

ments which they give: to counsel the same "knowledge is [ \*4 ] important, because, on questions of law, this knowledge is the only foundation, on which they are able to advise in chambers, or to sustain in Court the cause of their client: to attornies and solicitors the same knowledge is important, because it is to them that persons, who seek legal advice, first apply for it; often it is the only advice taken or needed; and, on questions of law, this advice must be founded on the knowledge mentioned.

Many materials, of which a judge may construct a judgment which he gives, have already been mentioned and referred to.

Process, which a judge may use to construct a judgment which he gives, depends very much on the nature of the case, in which it is required to deliver that judgment. Such process is the exercise of a variety of duties. A judge's general duties so exercised are,—to gather the materials, as facts, law, and authorities, of which to form his judgment; to set on authorities their just value, and to take them as guides in the formation of his judgment; to hear the arguments of counsel; to contend with difficulties presented by the subject of the suit or by authorities, and, aided by his own knowledge and arguments, and the arguments of counsel, with a single and unbiassed mind to deliberate on his judgment; and in so doing to heed the nature of the case, as a case that is new, or that falls within some rule, or is concluded by precedent or is distinguishable from precedent, or is a case fit to be adjudged on its own particular circumstances only; and, in most instances, to look forward to the consequences of the judgment contemplated.

A chief object at which, in constructing their judgments, the Courts attentively look is, certainty in the law; and to cause their judgments to have this effect is their constant and most anxious desire. The language of the Courts is, (m)—“It is better the law should be certain, than that every judge should speculate upon improvements in it.”(n) “The decisions of our predecessors, the judges of former times, ought to be followed and adopted, unless we can see very clearly that they are erroneous, for otherwise there will be no certainty [ \*5 ] in the administration of the law.”(o) “It is of great importance in almost every case, but particularly in mercantile law, that a rule once laid down, and firmly established, and continued to be acted upon for many years, should not be changed, unless it appears clearly to have been founded upon wrong principles.”(p) “One would always wish that the law were certain upon all subjects, but it is more emphatically important that it should be so in questions concerning real property. The decisions of the law are the great landmarks for the safety and regulation of real property. And perhaps it is of less importance how the law is determined, than that it should be determined and certain; and such determinations should be adhered to, for then every man may know how the law is.”(q) “Where things are settled, and rendered certain, it will not be so material how, as long as they are so, and that all peo-

(m) See also 14 Ves. 425; 2 Barn. & Cr. 183; 9 Bing. 285; 1 Clark & Fin. 224; and 2 Burr. 887.

(n) By Lord Eldon, 8 Ves. 497.

(o) By Lord Tenterden, 3 Barn. & Adol. 17.

(p) By Lord Tenterden, 7 Barn. & Cr. 476.

(q) By Ashhurst, J., 7 Durn. & E. 419.

ple know how to act:"(r) "No matter what the law is, so it be certain:"(s) "Certainty is the mother of repose, and therefore the law aims at certainty."(t)

The result of many lawsuits must, it is feared, always remain uncertain; as, for instance, the verdict of a jury, or the interpretation of an instrument, as a deed or will. "This inconvenience belongs to the administration of justice; that the minds of different men will differ upon the result of evidence; which may lead to different decisions upon the same case:"(u) "It frequently happens, that different persons come to different conclusions from the same premises."(v)

But the principal cause of uncertainty of the result of a lawsuit ought perhaps to be referred to the state of authorities, and their power to [ \*6 ] bind the courts. Those authorities and that \*power may be represented at present to exist in the following state, productive of much confusion, uncertainty, and inconvenience.

1. Modern cases decided in Bank stand in opposition to each other; for example, the decision of the Court of King's Bench in *Binnington v. Wallis*,(w) opposes the decision of the same Court in *Gibson v. Dickie*.(x)

2. Modern cases decided at Nisi Prius stand in opposition to each other; for example, *Bromley v. Wallace*(y) opposes *Wyndham v. Lord Wycombe*;(z) and *Handey v. Henson*(a) opposes *Towne v. Lady Gresley*.(b)

3. One decision in Bank does not always bind the Courts to make the same decision in Bank on similar circumstances in another case: one such decision is often overruled by another.(c)

4. One decision at Nisi Prius does not bind the Courts to make the same decision at Nisi Prius on similar circumstances in another case: often one such decision overrules another.(d)

5. Consequently, one decision at Nisi Prius does not so settle the point decided, as to exclude all hope of a different result on a second Nisi Prius trial of the like question. Hence probably the frequent occurrence of such second trial.(e)

6. Even two or more cases decided at Nisi Prius do not so settle the point decided, as to exclude all hope of a different result on a repeated Nisi Prius trial of the like question. Hence probably the occurrence of such repeated trials.(f)

(r) By Lord Chancellor Parker, 1 P. W. 452.

(s) 2 Ch. Cas. 221.

(t) By Lord Hardwicke, 1 Dick. 245. On peace being the end of the law, see Plowd. 368.

(u) 6 Ves. 333, 334.

(v) 3 Bing. 247.

(w) 4 Barn. & Ald. 850.

(x) 3 Mauls & S. 463.

(y) 4 Espin. 237.

(z) 4 Espin. 18.

(a) 4 Carr. & P. 110.

(b) 3 Carr. & P. 561.

(c) *Williams v. Bosanquet*, 1 Brod. & B. 238, 3 Moore, 500, overrules *Eaton v. Jaques*,

*Dougl.* 438, (ed. 1783); and *The King v. Brewers' Comp.*, 3 Barn. & Cr. 172, 4 Dowl. & Ry. 492, cited 3 Barn. and Cr. 175, overrules *The King v. Rennett*, 2 Durn. and E. 197.

(d) *Lewis v. Sapio*, 1 Mood. and Malk. 39, overrules *Powell v. Ford*, 2 Stark. 164.

(e) 1. *Wyndham v. Lord Wycombe*, and *Bromley v. Wallace*, above.

2. *Powell v. Ford*, and *Lewis v. Sapio*, above.

3. *Towne v. Lady Gresley*, and *Handey v. Henson*, above.

(f) *Chorley v. Bolcot*, 4 Durn. and E. 317.