A DIGEST OF THE LAW OF PARTNERSHIP: WITH AN INTRODUCTORY ESSAY ON CODIFICATION

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OF THE

LAW OF PARTNERSHIP,

WITH AN

INTRODUCTORY ESSAY ON CODIFICATION

BY

FREDERICK POLLOCK,
BARRISTER-AT-LAW,
M.A., HON. LL.D. EDIN.,
PROFESSOR OF COMMON LAW IN THE INNS OF COURT,
LATE FELLOW OF TRINITY COLLEGE, CAMBRIDGE.

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INTRODUCTION.

THE present work was undertaken, in the first place, in order to supply the want of a concise work on the Law of Partnership: and if this were all, it would be needless to say much by way of introduction. But the form I have adopted invites, if it does not demand, some words of explanation; the adoption of it, moreover, commits the writer to certain opinions on matters of much wider range and importance than the subject actually handled. Those opinions are still far from being established, and one who attempts to exemplify them in practice is in some sort thereby bound to set forth his understanding of them, and to bear his part, however slight it may be, in their justification. My desire has been to follow to the best of my power the example set by Mr. Justice Stephen in his 'Digest of the Law of Evidence,' and repeated by him in the yet more weighty and difficult work of a 'Digest of the Criminal Law,' which has since been made the foundation of a Draft Code. This being said, it is almost superfluous to say that I agree with him in thinking the Indian Codes a desirable model for the exposition of English law, by authority if possible, but if and so far as that is too much to hope for, then by private endeavour; and that I likewise agree with the reasons which he has given for that opinion both in the introduction to his 'Digest of the Law of Evidence' and on various other occasions. Some of those reasons, however, I may without

presumption try to restate in my own way, this being a topic on which repetition is certainly not vain in the sense of being needless; and it seems also proper, in addition to this general statement, to explain why the subject of Partnership has appeared to me a specially fit one for an experiment of this kind.

The method of stating the law in general propositions accompanied by specific illustrations was introduced into Indian legislation by Macaulay, though not brought into operation till many years afterwards, and to him the merit of the invention is chiefly if not wholly attributable.[1] It seems to me the greatest specific advance that has been made in modern times in the art called by an ingenious writer "the mechanics of law-making." We should by no means underrate the gradual improvements of detail, the introduction of orderly arrangement and cutting down of prolix and slovenly drafting, which have made recent Acts of Parliament comparatively readable; but Macaulay's invention stands on a different level. It is an instrument of new constructive power, enabling the legislature to combine the good points of statute-law and case-law, such as they have hitherto been, while avoiding almost all their respective drawbacks.

Case-law gives particular instances and concrete analogies, from which general rules may be inferred with more or less exactness, and their application to new instances predicted with more or less certainty; but it does not, strictly speaking, lay down general propositions beyond

[1] Traces of the idea may be found in Bentham. He proposed to give in the body of a Code a running accompaniment of authoritative reasons and explanations, which might have dealt more or less in specific instances; and such instances do occur in the 'Specimen of a Penal Code' (Works, vol. i.). But this amounts at most to a very vague foreshadowing of the Anglo-Indian method. Compare Mr. Whitley Stokes's 'Anglo-Indian Codes,' Oxford, 1887, p. xxiii.

the limits which happen to be determined by the precise facts of each case. Every decided case does within those limits affirm a general proposition, with the help of the fixed understanding by which our Courts are governed, that similar decisions are to be given on similar facts. It involves, namely, the decision of all future cases exactly like it, and also of all such as, though not exactly like it, may be in the opinion of the Court so nearly like it that they ought to follow its analogy. The investigation of the likeness or unlikeness of the facts of different cases for this purpose is often a matter of great difficulty and nicety, and the power of forming a judgment on such questions can be acquired only by legal training and experience. Thus the framework of case-law consists of the statement of a great number of sets of facts, together with the legal results which have been decided to follow from them: the generalities which make it possible to state the law in a connected form are supplied by a process of discussion, inference, and comment carried on partly by the judges themselves in dealing with the cases, partly by private text-writers. The inspection of such a work as Fisher's Digest, or perusal of the reported judgments in any current case in the Court of Appeal, will give in a short time, even to a lay reader, a much better notion of the manner in which English case-law is constructed than can be given by any description. In the result, our English case-law, or any other system developed in substantially the same manner, has the great advantage of being full and detailed, and of preserving the memory of the remedies administered to the practical needs of men's affairs in a record rich in experience and fruitful of suggestions. But there is no security for completeness, and imperfect security for consistency. While in some departments no possible scrap of mint or anise or cummin seems to remain unnoted, in others we may still wait for authority to give a certain

answer on the greater matters of the law; we have decisions of the most elaborate minuteness on the construction of documents, and questions of substantive principle which are both important and elementary remain in an unsettled condition. And the system of graduated authority, an excellent one as far as it goes, which makes the decision of a Court of Appeal binding on all Courts below it, and the decision of the Court of final appeal binding on all other Courts and on itself,[1] does not prevent co-ordinate and conflicting decisions from standing side by side for an indefinite time. Case-law, moreover, is intelligible and accessible only to experts, and to them only with an ex-

[1] Even when a decision is affirmed on appeal by reason only of the House of Lords being equally divided, the decision remains binding on the House of Lords itself in subsequent cases. This happened in the case of *R.* v. *Millis*, 10 Cl. & F. 534, which was afterwards expressly recognized as binding in *Beamish* v. *Beamish*, 9 H. L. C. 274 (see at p. 338): see also *Bright* v. *Hutton*, 3 H. L. C. at pp. 388, 391; *Attorney-General* v. *Dean and Canons of Windsor*, 8 H. L. C. 369, 391; Lord Blackburn in *Houldsworth* v. *City of Glasgow Bank*, 5 App. Ca. 335; and Lord Selborne in *Caledonian Railway Co.* v. *Walker's Trustees*, 7 App. Ca. 275. However, even a Court of ultimate appeal may reconsider questions which the non-appearance of a respondent has formerly compelled it to determine *ex parte*. This was done by the Judicial Committee in the ecclesiastical appeal of *Ridsdale* v. *Clifton*, 2 P. D. at pp. 277, 278, 305—307. It also seems doubtful whether the rule applies to criminal law (but see *R.* v. *Glyde*, 1868, L. R., 1 C. C. R. 139). And the Supreme Court of the United States does not hold itself bound by its own decisions (*The Legal Tender Cases*, 12 Wall. 457, 554, 570). But the peculiar functions of that Court in relation to the federal Constitution have to be taken into account. It is really a political as well as a judicial power. The Court of Appeal in England generally holds itself bound by the decisions of Courts of equal authority (the Court of Appeal itself as existing since the Judicature Acts, the Court of Appeal in Chancery, or the Exchequer Chamber); but it has held itself not bound by the result of a case where the Court was equally divided: *The Vera Cruz* (No. 2), 1884, 9 P. Div. 96. The policy of the course taken by the House of Lords in *Beamish* v. *Beamish* seems open to discussion.

penditure of thought and labour often utterly disproportionate to the end in view.

Statute-law, on the other hand, gives general propositions in definite terms, but is seriously deficient in omitting to give particular instances, which in our present system are wholly left to be filled in afterwards by judicial decision, so far as occasions may present themselves. Nor is it to be supposed that this want exists only in the peculiar circumstances and habits of English or English-born jurisprudence, or is felt only by English lawyers. Such a supposition, if entertained at all, may be corrected by a moderate acquaintance with the Roman commentaries on the Edict, which are partially preserved in the Digest, or still better the various modern editions and expositions of the French Codes. The closely-packed volumes of the 'Codes Annotés' present us, in fact, with a French counterpart of Fisher's Digest; the chief points of contrast being that in the French work the decisions of the Courts and the opinions of text-writers, being of equal importance, are indiscriminately mixed up, and further that, inasmuch as neither decisions nor opinions (however highly esteemed) have any binding authority, and the number of Courts of co-ordinate jurisdiction is far greater than with us, there is apparently no limit whatever to the amount of conflict that may arise. So that, whereas on simple questions the law of France is in general easier to be known than the law of England, yet on a complicated question, which for this purpose means any question on which experts may reasonably differ in their way of construing or supplementing the Code, the law of France must be, as it appears to me, almost infinitely more difficult to ascertain than the law of England, or, strictly speaking, not capable of being definitely ascertained at all. This state of things, it may be said, is in great measure due to carelessness and omis-

sions on the part of the original framers of the Codes, want of subsequent revision, and other causes which the French legislators might and ought to have foreseen. And this, indeed, is the case; nevertheless I think that on a comparison of the 'Codes Annotés' with the Anglo-Indian Acts it is impossible to resist the conclusion that if the French Codes, the text being even as it now is, had been accompanied by a moderate number of authoritative illustrations, an immense amount of discussion and litigation would have been saved. To come back nearer home, one is strongly tempted to consider how great improvements might have been effected in most of our Acts of Parliament, from the Statute of Frauds downwards, by a judicious use of the Anglo-Indian method. It would have diminished, at any rate, the risk of elaborate enactments almost fresh from the Queen's Printers being pronounced, when they came to be applied to existing facts, to be explicable on no other hypothesis than that they were intended to puzzle the Court of Queen's Bench; but this is a topic on which it is hardly safe to enlarge, lest one should unadvisedly speak of the wisdom of the Legislature more lightly than beseems an English citizen and servant of the law. This much, however, I may say, that the style peculiar to parliamentary drafting (though now to a great extent abandoned), which contrives with singular infelicity to be at the same time crabbed and nebulous, may be regarded as the natural fruit of English legal minds working in fetters, scrupulously anxious to cover all the cases which occurred to them, but debarred from distinctly pointing them out; having a specific meaning, but being forbidden to express it in a specific form.

The method of the Indian Codes escapes these evils on both hands by combining the virtues of general enactments with those of specific decisions. The illustrations, being