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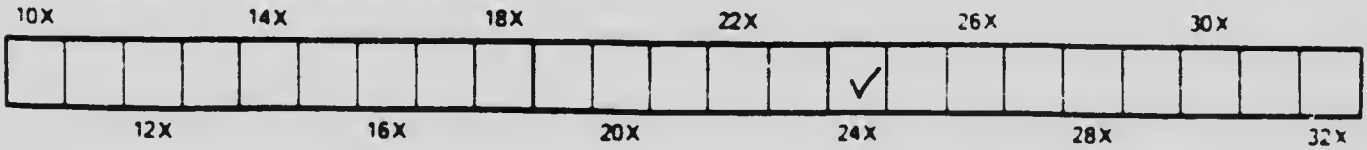

JURISPRUDENCE

BY

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JURISPRUDENCE.

THE main object of the present article is no less ambitious than to give at least, one clear meaning to the word 'Jurisprudence'. I have, however, ventured to add a few tentative and diffident observations upon the German and English Schools of Historical Jurisprudence respectively.

Jurisprudence is the science of positive law, but to say that is to do little more than substitute a longer name for a shorter. We want to know what is a science, and what is positive law; and then what are the contents and scheme of this science; how does it treat its subject-matter, and what is the end it professes to achieve?

Now, when we say that jurisprudence is a science, we mean something more than that it is knowledge co-ordinated, arranged and systematized, to quote a dictionary definition of a 'science'. We mean, further, that the legal phenomena which are its subject-matter may be traced, and are by it traced, to ultimate laws of human nature; and that, to adopt words of Professor Holland, its generalizations will hold good everywhere by virtue of the fact that these legal phenomena possess everywhere the same characteristics.[1] 'Positive law' means, in Austin's words, 'law established or *positum* in an independent political community, by the express or tacit authority of its sovereign or supreme government';[2] that is to say, actual law, as distinguished from any ideal or imaginary law.

Jurisprudence, then, is such a knowledge, or such a system of generalizations about the actual laws of one or more countries.

But this still leaves us in the dark, for we want to know what is the nature of the contents of this science of positive law, what does it aim at teaching us, and what does it accomplish? Austin replies that Jurisprudence, or, as he prefers to call it, 'General Jurisprudence,' is 'the science concerned with the exposition of the principles, notions and distinctions which are common to systems of law; understanding by systems of law, the ampler and maturer systems which by reason of their amplitude and maturity, are pre-eminently pregnant with instruction': And again—

'The proper subject of General or Universal Jurisprudence (as distinguished from Universal Legislation) is a description of such

[1] Holland's Jurisprudence, 9th ed., p. 10. [2] Lectures, 5th ed., vol. ii, p. 1072.

subjects and ends of law as are common to all systems; and of those resemblances between different systems which are bottomed in the common nature of man, or correspond to the resembling points in their several positions.'[1]

But this is still so vague and general that it leaves us yet in the dark as to what is the scope of our science. We want to know the nature of these principles, notions, and distinctions, subjects and ends of law, with which Jurisprudence is concerned, and how it deals with them. Austin gives us a partial answer, saying—

'Of the principles, notions, and distinctions, which are the subjects of general jurisprudence, some may be esteemed necessary. For we cannot imagine coherently a system of law (or a system of law as evolved in a refined community) without conceiving them as constituent parts of it. Of these necessary principles, notions, and distinctions I will suggest briefly a few examples: first the notions of Duty, Right, Liberty, Injury, Punishment, Redress; with their various relations to one another, and to law, sovereignty, and independent political society; secondly, the distinction between... law proceeding from a sovereign or supreme maker, and law proceeding immediately from a subject or subordinate maker with the authority of a sovereign or supreme-maker; thirdly, the distinction of rights, into rights availing against the world at large (as, for example, property or dominion) and rights availing against persons specifically determined (as, for example, rights from contracts); fourthly, the distinction of rights availing against the world at large, into property or dominion, and the various restricted rights carved out of property or dominion; fifthly, the distinction of obligations... into obligations which arise from contracts, obligations which arise from injuries, and obligations which arise from incidents that are neither contracts nor injuries...But it will be impossible or useless to attempt an exposition of these principles, notions and distinctions, until by careful analysis we have accurately determined the meaning of certain leading terms which we must necessarily employ; terms which recur incessantly in every department of the science; which whithersoever we turn ourselves, we are sure to encounter. Such, for instance, are the following:—Law, Right, Obligation, Injury, Sanction; Person, Thing, Act, Forbearance.'[2]

In what sense, indeed, Austin used the words 'principles' in this passage is not so clear. He certainly does not mean principles of law in the sense in which ordinary lawyers use that expression.

[1] Lectures, 5th ed., vol. ii, pp. 1073, 1077. [2] Ibid., pp. 1074-5.

They mean simply broad general rules of law. Austin seems to mean 'essentials, fundamentals, basal ideas and conceptions.'

Apart from this, these passages give us no general and comprehensive understanding of the scope and contents of Jurisprudence, nor shall we get one until we realize that all 'notions and distinctions' of law are notions or distinctions about different relations with each other into which men are born, or grow, or enter by some form of voluntary transaction, or are placed in by the law itself; and the distinctions between these relations, and between rights and obligations implied in, arising from, or otherwise attached to them. Law is concerned only with rel. tions between persons, and consequences arising therefrom. These relations may be between one or more individuals, and people in general, as for example the relation between a man who owns a certain piece of property, and people in general who do not own it; or they may be between one or more individuals and one or more other individuals. s for example relations arising out of contract, or the relati which arises between one who has done another an injury and e man he has injured. The subject of Jurisprudence is such of these relations as the law recognizes by attaching rights or o tions to one or other, or both the parties, to them; and t n l character of such rights and obligations. These relation he ideas involved in the very conception of them, and the p or regulating them, are the common element in all mature sys s of law. Professor Holland brings this out very clearly. Ju ru-dence, he tells us, is 'the formal science of those relations of ma id which are generally recognized as having legal consequenc [1] or, again, Jurisprudence, he says, 'is a formal, or analytical opposed to a material science; that is to say, it deals rather w the various relations which are regulated by legal rules than wit the rules themselves which regulate those relations.'[2]

What, however, may puzzle the student of Professor Holland's book is, that after the first chapter in which he thus defines the subject-matter of Jurisprudence, we hear nothing more of relations *eo nomine*. What Professor Holland proceeds to do is first to define and explain what is meant by positive law, finding in the result, that it is 'a general rule of external human action enforced by a sovereign political authority'.[3] The he proceeds to enumerate and discuss the various sources from which the rules of positive law are derived. Next he explains that law exists for the definition and protection of rights; and analyses a legal right into its essential elements. He then explains the leading classifications of

[1] Jurisprudence, 10th ed., p. 9. [2] Ibid., p. 6. [3] Ibid., p. 40.

legal rights; and having selected his own fundamental line of distinction between them, proceeds in the rest of his book to enumerate and discuss the general nature of the legal rights falling under the different categories thus arrived at, not hesitating, happily, to illustrate and explain them liberally by reference to the actual rules of Roman and English law.

The matter would perhaps have been clearer to the ordinary student if it had been explained, as the fact is, that the rights thus dealt with are distinguished from one another, not as different in themselves, but as arising out of different relations. Thus the right of an owner of a piece of land to take possession of it, and the right of a leasehold tenant of a piece of land to take possession of it, are, regarded in detachment, the same kind of rights. Each is a right to take possession of land. But we do not find them classified together by Professor Holland. Why? Because they are the legal consequence of, and arise out of, two quite different relations. The one arises out of the relation between a man who owns a piece of property and people in general. The other arises out of the relation between lessor and lessee under a contract of lease.

So quite consistently with his definition of Jurisprudence, what Professor Holland really distinguishes between are the various relations between men generally recognized in mature systems of law; and legal rights are only distinguished by him as arising out of, or being 'the legal consequence' of, distinct relations.

Thus the subject-matter of Jurisprudence being these various relations between human beings and the conceptions involved in the comprehension of these relations, how does it treat this subject-matter and what does it do with it? It enumerates and defines these relations, and classifies them according to a rational and logical method; it defines the conceptions involved in them and in the legal consequences, i.e. the rights and obligations following upon them, such as 'right,' 'duty,' 'remedy,' 'ownership,' 'contract,' 'possession': and it indicates, in connexion with each, the general character of those legal consequences.

Such being the subject-matter of Jurisprudence, and the way it aims to deal with this subject-matter, what is the value of it all? What would we gain from such a science, if perfected? In the first place we should have arrived at an accurate analysis, explanation, and, consequently apprehension of the terms which lawyers have to use, and the conceptions with which they deal; and as Austin himself somewhere says: 'It really is important that men should think distinctly and speak with a meaning.' And in the second place we should have a logically consistent and complete ground-plan of the whole field of law, enabling us, as it were, so to arrange

our stores of knowledge of the actual rules of law, as we accumulate them, as to make our minds, aided by association of ideas, more retentive of them; and to render them more accessible to our memories when occasion arises to recall them; or enable us to codify the law on a complete and rational plan; and the value of this is not detracted from by the fact that, as has been pointed out, in dealing with the legal aspects of some particular department of human affairs or business, we may have to do with relations occupying different portions of the field.

Such is the science of law in the only sense which Professor Holland would dignify by the name of Jurisprudence. It is more usual, however, to distinguish it as 'analytical Jurisprudence,' or 'general Jurisprudence.' For, in truth, the phenomena of law may be regarded from more than one aspect; and there is another aspect so fundamentally different from that in which analytical Jurisprudence regards them that another kind of science of law, or another branch of the whole science of law, comes into sight, which seems equally entitled to the name of Jurisprudence.

Instead of considering the phenomena of law as they now exist in the maturer systems, we may apply ourselves to consider law in its development, and to arrive at such generalizations as may be discoverable concerning the growth of law. Hence arises a science of legal development, and it constitutes what is called historical Jurisprudence. Now the first thing to do is to distinguish legal history from historical Jurisprudence, and perhaps this cannot be better done than in the words of Professor Jethro Brown in his Austinian Theory of Law.

'Legal history,' he says, 'affects to describe the actual development of law as it has been at the different periods of the national history. Historical Jurisprudence should state, as far as may be, the moral, social, and economic causes which led to that development. The one answers the question "How?" the other seeks to find some answer to the question "Why?" The one describes legal development; the other explains it. The one regards the development of the law more or less in isolation; the other is compelled to bring that development into relation with the general progress of the national life.'[1]

Now the concluding words of this passage seem more suggestive of the German school of Jurisprudence, founded by Savigny, than the English school, founded by Sir Henry Maine. For I venture to suggest, with diffidence, that there is this line of distinction between the two schools, that the German school where it deals with the origin of law deals rather with the developments of legal

[1] The Austinian Theory of Law, p. 353.

systems as a whole, while the English school deals rather with the development of juridical ideas and particular institutions within the legal system.

'According to the teaching of Savigny,' writes Professor Sohm, 'law must be regarded as a product of the entire history of a people; it is not, he contends, a thing that can be made, at will, or ever has been so made; it is an organic growth which comes into being by virtue of an inward necessity, and continues to develop in the same way from within by the operation of natural forces.'[1]

And it could easily be shown that in a broad sense this is true of legislation itself.

Now Professor Vinogradoff has shown us that this German school had a political origin and explanation.

'It represented,' he says, 'a powerful social doctrine which had sprung into being in Europe's struggle against revolutionary rationalism as embodied in the French Republic and in Napoleon's Empire. Romantic in its appeals to archaic custom and national traditions, conservative in its legal creed, the first school of historical Jurisprudence entered the lists in support of a conception of law determined by historical antecedents, by a growth of national psychology hardly less instinctive than the evolution of language itself.'[2]

The English school of historical Jurisprudence, on the other hand, had a scientific origin and explanation rather than a political. As the editor of this REVIEW has said: 'The transformation of political science about forty years ago cannot be disconnected from the all but simultaneous putting forth of new and far-reaching ideas in the study of organic nature. "Ancient Law" and the "Origin of Species" were really the outcome, in different branches, of one and the same intellectual movement, that which we now associate with the word "evolution"'.[3] 'Coming soon after the publication of Darwin's great book, which had made the theory of evolution a great force in natural philosophy,' says Leslie Stephen, 'Maine's "Ancient Law" introduced a correlative method into the philosophy of institutions.'[4] 'His chief aim,' says Professor Vinogradoff, 'was to propagate in the domain of Jurisprudence the same spirit and methods which had already given such splendid results in two newly created departments of science—in comparative philology

[1] Institutes of Roman Law (Ledlie's trans.), p. 160.
[2] The Teaching of Sir H. Maine, An inaugural lecture, p. 9.
[3] Article on Comparative Jurisprudence in Journal of Society of Comparative Legislation (August, 1903).
[4] Dictionary of National Biography.
[5] The Teaching of Sir H. Maine, p. 15.

and comparative mythology.' 'Thus Sir Henry Maine 'did nothing less than create the natural history of law. He showed on the one hand that legal ideas and institutions have a real course of development as much as the genera and species of living creatures, and in every stage of that development have their normal characters.'[1]

Thus, then, to adopt once more words of Professor Vinogradoff, we have 'two methods of scientific investigation which may be applied to the study of law: the method of deductive analysis on the basis of abstractions from the present state of legal ideas and rules and the method of inductive generalization on the basis of historical and ethnographical observation.'[2]

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[1] Pollock's Notes to Maine's Ancient Law, Introd. pp. vii-ix.
[2] The Teaching of Sir H. Maine, p. 18.