THE SCIENCE OF LAW

AND

LAWMAKING

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BEING

AN INTRODUCTION TO LAW, A GENERAL VIEW OF ITS FORMS AND SUBSTANCE, AND A DISCUSSION OF THE QUESTION OF CODIFICATION

BY

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"*Jus summum sæpe summa est malitia*"
(*The strictest law is often the greatest injustice*)
TERENCE, HEAUTON-TIMOROUMENOS, IV. 5. 48

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PREFACE

THIS book is an attempt to make clear to the average reader some of the truths of Law and Jurisprudence. The object is to introduce Laymen to a true conception of the system of law under which they live, a system whose rules constitute bonds restraining their activities, less palpable, yet no less effective, than the iron bars of the captive's cage. It is a curious fact that no work exists in which the general outlines of legal systems are explained in popular terms so as to be intelligible to the ordinary mind not versed in the technicalities of the subject. And it is especially strange that no work exists which explains to such readers, and to the law student just beginning his course, the fundamental truths contained in the two forms of expression in which it is possible to embody a system of law. Yet a complete knowledge of these fundamental truths lies at the base of the correct decision of a question of great importance now agitating the legal world. And this question — the question of Codification — is one whose decision will rest more in the hands of laymen than in the hands of lawyers. These facts suggested to the writer the idea of a book which, in the first instance, should be an introduction to the study of the law; and, in the second instance, should use this introduction as a groundwork on which to build up an argument on codification intelligible to the lay mind. And it was considered

that labor bestowed on a full and complete examination of the familiar truths of the subject matter, would not be thrown away, even in so far as the professional audience might be concerned. For, it is deemed that the reiteration of fundamental truths, half forgotten because assumed without clear statement and demarcation, and the contemplation of concrete instances and examples of the working out of the contradictory principles involved, will refresh the recollection of the professional reader, and aid to a clearer conception by him of the generalizations involved in the further arguments herein contained.

To what extent success has been attained in making this essay intelligible, instructive, and convincing to the two classes of readers for whom it has been written, only the future can determine.

This much, however, may be said. The attempt has been,—

First: To write an introduction to law which shall enlighten the intelligent lay reader as to the beauty and interest of its problems;

Second: To remove the discussion of the Code Question from the generalities in which it has always been obscured to the contemplation of the practical working of the two systems in concrete instances (*see* Chapters V and VI);

Third: To elaborate the idea of the fundamental and intrinsic difference between the two forms of writings, statute and case law (*see* Chapters X and XI); and

Fourth: To draw the proper conclusions and apply these principles to actual legislation, judicial or legislative, and to determine by a practical test the provinces of each and the best way to conserve them (*see* Chapter XI).

In this age when the common people, populists or otherwise, look up to the legislature as the *deus ex machina*, capable by its action of ameliorating their social, political and financial condition; and when men of mark and influence are urging the adoption of favorite schemes for social or individual advancement; and when the keen few, realizing the practical supremacy of legislation, no longer seek rights or redress in the courts, but create them by gaining in their behalf the fiat of the legislature — it is fitting that an attempt should be made to delimit the proper provinces of legislative and judicial action.

If the writer has succeeded in this, he has added his mite to the true solution of the complex problems ever presenting themselves for solution.

R. FLOYD CLARKE.

New York, August 20, 1897.

CONTENTS

CHAPTER I

THE LAW AND THE LAYMAN

CHAPTER II

THE FORMS OF LAW

CHAPTER III

THE CODE QUESTION

CHAPTER IV

AN INTRODUCTION TO THE STUDY OF LAW

CHAPTER V

THE ENGLISH LAW AS IT IS

CHAPTER VI

THE ENGLISH LAW AS IT WOULD BE IF CODIFIED

CHAPTER VII

ALL THE LAW IS WRITTEN — THE LIKENESS AND UNLIKENESS

CHAPTER VIII

THE IDEAS AND ARGUMENTS OF THE CODIFIERS

CHAPTER IX

THE PRACTICAL ARGUMENT

CHAPTER X

THE FINAL ARGUMENT

CHAPTER XI

THE PRACTICAL RESULTS — A SUGGESTION