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**SIR THOMAS ERSKINE HOLLAND\***

(1835-1926)

W. S. HOLDSWORTH

Sir Thomas Erskine Holland was born July 17, 1835, at Brighton, England. His grandfather had married a daughter of Lord Chancellor Erskine, who gave him the living of Poynings, Sussex; and his father held the same living. He was educated at Brighton College; and, in fact, was one of the first and one of the most distinguished of its alumni. In 1854 he went from Brighton to Balliol College, Oxford. In the following year he became a Demy of Magdalen College. He obtained a first in Litteræ Humaniores in 1858, and was elected a Fellow of Exeter College in 1859. In 1860 he obtained the Chancellor's prize for an English Essay. He was called to the Bar by Lincoln's Inn in 1863; and, in 1874, after a short period of practice, interspersed with reporting and lecturing on law, he was made Chichele Professor of International Law and Fellow of All Souls College. He soon found that this necessitated the abandonment of any attempt to conduct a general practice at the bar. But he never quite retired from the bar. He still continued to do some consulting

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\*In writing this memoir I have relied on the following sources of information: HOLLAND'S VALEDICTORY RETROSPECT (1910); articles by Professor Pearce Higgins and Professor Brierly, (1926) 42 LAW Q. REV. 471, 475; letters and papers lent to me by Lady Holland.

practice on topics which were connected with the subject of his chair.

As Professor of International Law, Holland soon made his influence felt. He made himself a master of the history of his subject; and, as a Professor of International Law ought to do, he kept in constant touch with all the latest developments of international questions. He became an *Associé de L'Institut de droit International* in 1875, a full member in 1880, and a *Membre Honoraire* in 1925. Throughout his career he took an active part in all the activities of the *Institut*, both attending its meetings, and assisting on its Commissions. He also did important work for the Admiralty, the War Office, and the Foreign Office; he served on the Royal Commission on the supply of food and raw materials in time of war in 1903; and he was one of the British delegates to Geneva in 1906, when a reversion of the Geneva Convention of 1864 for the amelioration of the condition of wounded soldiers was undertaken. These activities, and the many decorations which he received from foreign sovereigns, are the best evidence of his European reputation in the field of international law.

While he was thus making his name as a Professor of International Law he did not neglect other branches of legal learning. From the first he was interested in projects for the formal amendment of the law, and had published a pamphlet on the subject in 1867. He was an active supporter of Lord Westbury's scheme for a Digest of the law, and submitted to the Commissioners, appointed in 1866 to consider this subject, a specimen of the manner in which such a Digest might be composed. It is clear from these and other essays, which he published in 1870 under the title of *Essays Upon the Form of the Law*, that he was much interested in the theoretical and scientific aspects of the law; and that his mind was definitely in sympathy with the formal and analytical aspects of legal theory. The extent of his interest, the thoroughness of his studies in legal theory and comparative law, and his sympathy with the formal and analytical point of view, were shown by the publication in 1880 of his book on *Jurisprudence*. That book has long held the position of a standard text book on the subject. It gained the Swinney prize in 1894, and its thir-

teenth edition, corrected by the author in his eighty-ninth year, was published in 1924.

Throughout the tenure of his professorship Holland played a considerable part both in the establishment of the Oxford Law School, and in the life of the University. He helped to found the University Law Club, which has done much to promote both the social and intellectual life of the teachers of law in the University; and he was one of the founders of the *LAW QUARTERLY REVIEW*, which was made by Sir Frederick Pollock a medium for the production of good work on all aspects of legal learning, unsurpassed by any other legal periodical in the world. He acted for thirty-four years as assessor to the Chancellor's court and, while holding this office, he reformed its procedure. He made some careful researches into the origin of the University, and carried through a reform of its statute book.

His work as a jurist and a literary lawyer was recognized by his election to the Athenæum as a distinguished person in 1883, by his election as one of the original members of the British Academy, and by his election as a Bencher of Lincoln's Inn in 1907.

He resigned his chair at Oxford and his post as assessor to the Chancellor's court in 1910. The extent of his achievement is most strikingly illustrated by the letters which he received on that occasion from Lord Bryce and Lord Curzon. Lord Bryce wrote:

"Your Valedictory was very interesting to me in many ways, both as respects the progress of international law during our time, and also in its reference to Oxford and the progress made there towards an adequate law school. We may I think say—you and Dicey and to some extent I—that we did give law teaching which was of the right level and quality, though there was not nearly enough provision made by the University for the subjects that ought to constitute a proper legal curriculum. But England is an odd country; and I fear that neither the University nor the Government appreciates either what law needs as a subject of the first magnitude, nor what are the services which are rendered by men like yourself. Learning *qua* learning receives little recognition in England: a platform politician or a wealthy brewer is far more likely to be honored than one who develops science and enlarges knowledge, unless he happens to catch the public eye by some discovery."

Lord Curzon wrote:

"I see that you are going to resign your professorship, after holding it with so much personal distinction, and so greatly to the credit and honour of the University for so many years. No man living is more entitled to a holiday, and no living professor can look back upon a term of office better filled with sound and durable work. You have made the professorship what it should be—a recognized power in international diplomacy and jurisprudence, and from your chair you have spoken *urbi et orbi* to the statesmen and jurists of all nations."

That these and other testimonials to Holland's work spoke the simple truth can be seen from the fact that the University conferred on him the title of Professor Emeritus, that his college at once re-elected him to a fellowship, that his friends and colleagues presented him with his portrait, and that a few years later he received the honor of knighthood. Though, after the war, he ceased to be able to take an active part in the field of international law, his interest in his subject remained unabated; and, as we have seen, he re-edited his *Jurisprudence* in his eighty-ninth year.

This short survey of Holland's career shows us that he made his influence felt in three main directions: (1) international law, (2) jurisprudence, and (3) university affairs. Of his work in each of these three fields I must say a few words.

(1)

As an international lawyer Holland both contributed to the history of his subject, and guided its modern development. He took as the subject of his inaugural lecture one of the neglected precursors of Grotius—Alberico Gentili,<sup>1</sup> whose book *De Jure Belli* he edited and published in 1877. Never before or since has an inaugural lecture had such striking consequences. The story is best told in Holland's own words:<sup>2</sup>

"An English committee formed, under the presidency of Prince Leopold, to do honour to the long forgotten jurist, placed a handsome monument over his rediscovered grave in

<sup>1</sup> HOLLAND, *STUDIES IN INTERNATIONAL LAW* (1898) 1-39.

<sup>2</sup> HOLLAND, *VALEDICTORY RETROSPECT* (1910) 17-18.

the Church of St. Helen's, Bishopgate, and commissioned me to re-edit his rare work on the Law of War. Abroad the movement was still more extraordinary. Not only were Sanginesio, the birth place of Gentili, and the University of Perugia, in which he graduated, stirred to enthusiasm, but a general Italian committee was formed at Rome, with Prince Humbert, afterward King, as President, for the purpose of erecting a statue of the national hero. Streets and institutions were named after him; while the Italian government approached that of this country with a request that his ashes (which, however, could not be identified) should be transferred to Santa Croce. But all this glorification of a heretic was vastly displeasing to the ultra-montane press, and, by way of counter-demonstration, a subscription was started, under Papal and Episcopal patronage, for placing in the Vatican a bust of one Garcia Morena. The formation of a Netherlands Gentili Committee was bitterly resented by some over-patriotic admirers of Grotius, and a controversy was carried on which led, not indirectly, to a proposal for a statue of the great Dutchman, which was, accordingly, inaugurated at Delft, with much international oratory, in 1886. The long planned statue of Gentili was unveiled in the principal piazza of San Sanginesio, in 1908, the three hundredth year after his death, by the Minister of Public Instruction."

Two years after his edition of Gentili's *De Jure Belli*, Holland published a paper on *The Early Literature of the Law of War*.<sup>3</sup> In that paper he connected the work of Gentili with the early literature which took its rise at Bologna in the thirteenth century.

Holland's other important piece of work on the early history of international law is his edition for the Carnegie Institution of Zouche's *Juris et Judicii Feccialis, sive, Juris Inter Gentes, et Quaestionum de Eodem Explicatio*, which was published in 1911 with a translation by Professor Brierly. Zouche, like Holland, was an authority upon Jurisprudence as well as upon international law. He was the first Englishman to write a classical treatise upon international law; and, as Holland says,<sup>4</sup> he was also "the first to conceive of the topic as a whole, and to recognize that war,

<sup>3</sup> HOLLAND, *op. cit. supra* note 1 at 40.

<sup>4</sup> 1 HOLLAND, ZOUCHE'S JURIS ET JUDICII FECCIALIS (1911) xiii.

with which his predecessors had mainly busied themselves, is but a means whereof, in the last resort, the rights which nations enjoy in time of peace may be vindicated." He also substituted for the misleading title "Jus Gentium," by which this branch of law had formerly been known, the much more accurate title of "Jus inter Gentes"—a title which has only been superseded by Bentham's anglicized form of it—International Law.

Holland, from the time that he became a professor, kept a close watch on all international controversies and incidents, on the literature of international law, and on all the proposals suggested by the *Institut* or elsewhere for the advancement of the study of the subject, or for the improvement of its rules. How industrious he was in these matters, and how little escaped him, can best be seen from the following passage in his valedictory lecture:<sup>5</sup>

"A glance at the long series of commonplace books, in which I have been in the habit of noting up these [international] controversies, recalls to memory such topics as the Fugitive Slave Commission of 1874; the Treaty of Berlin of 1878, and the nonobservance of certain of its provisions; The foundation of the Congo State in 1885; the Slave Trade Act of 1890; the *Franconia* case (1876), the Behring Sea Fisheries (1893), and the Fisheries in the Moray Firth (these three as all illustrative of jurisdiction over Territorial waters), also the rise of the novel terms 'spheres of influence,' 'leases of sovereignty,' 'cession and usufruct,' 'grant of occupation and administration,' as suggestive of the scramble for Africa, and of concessions in China. The questions which have arisen in time of peace have been greatly outnumbered by those suggested by the numerous wars which have been waged in recent years (between Great Britain and the Soudan, Japan and China, the Powers and China, the United States and Spain, Great Britain and the Boer Republics, Japan and Russia), relating *inter alia* to declaration of war; treatment of prisoners and wounded; expanding bullets; floating mines; bombardment of undefended coast towns; private property afloat; visit and search; destruction of prizes; contraband; "continuous voyages"; belligerent use of neutral ports; projectiles from balloons."

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<sup>5</sup> HOLLAND, VALEDICTORY RETROSPECT (1910) 4, 5.

The result of this activity was a great deal of valuable literary work on many aspects of modern international law. In 1885 he published *The European Concert in the Eastern Question*. This book is a collection of treaties and other public acts relating to the process of the disintegration of the Ottoman Empire during the preceding sixty years. "Though," says Professor Pearce Higgins,<sup>6</sup> "the process has continued since, the book has still a great value, and its contents help to an understanding of what has happened, and may afford some guidance to future developments in the Near East." In 1888 he drew up *A Manual of Naval Prize Law* for the Admiralty; and a simplified form of this Manual entitled *The Confidential Manual* was issued in 1903. In 1904 he drew up for the War Office *A Handbook of the Laws and Customs of War on Land*. In 1898 he issued, under the title of *Studies in International Law*, a collection of his miscellaneous articles, lectures, reviews, and letters to the press, which deal with the laws of war, illustrations of the system of international law, the Eastern Question, and biographical sketches of famous international lawyers who had passed away. In 1905 and 1911 he gave two most instructive lectures to the British Academy. The first deals with *Neutral Duties in a Maritime War*, and was called forth by some of the events of the Russo-Japanese War. The second deals with *Proposed Changes in Naval Prize Law*. In it he submitted the Prize Court Convention and the Declaration of London to an acute criticism, the wisdom of which has been illustrated by the events of the Great War.

Throughout his career Holland was in the habit of expressing his opinions on current international affairs in letters to the *Times*. He published an edition of these letters in 1909, a second edition in 1914, and a third in 1921. These letters were always clear, accurate, and strictly relative to the point at issue. They gave sound information to the public; and, as Professor Pearce Higgins has said,<sup>7</sup> they "were frequently of assistance in steady-ing public opinion in times of excitement, as was evidenced by his exposition of the Law of Nations in reference to the sinking

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<sup>6</sup> *Sir Thomas Erskine Holland*, (1926) 42 LAW Q. REV. 471, 473.

<sup>7</sup> *Ibid.* at 472.

by the Japanese of the British vessel *The Kowshing*, and the destruction of neutral prizes by Russian cruisers in the Russo-Japanese war.”

## (2)

Holland's book on *Jurisprudence* is the classical book of the English analytical school, of which Austin is the founder. The extent of the influence which Austin has exercised upon English juridical history is obvious. J. S. Mill never said anything which was more true about Austin than when he remarked that “he has been in nothing more useful than in forming the minds by which he is, and will hereafter be judged.”<sup>8</sup> So much is this the case that teachers on jurisprudence still very generally begin with Austin, and introduce more modern ideas in the form of criticisms of his views. It is for this reason that students at the present day read Austin mainly in order that they may criticize his theories. But, whatever his critics may say, it is useless to deny that the work of the man who has founded a school of juristic thought has many merits—even a touch of genius. It would be a useful corrective to some current views if, in these days, when criticism of Austin is the fashion, some one were to write an appreciation of his work.

Holland, at any rate, was under no illusion as to Austin's merits. “To Austin,” he wrote in the preface to the first edition of his *Jurisprudence*,

“most Englishmen are indebted for such ideas as they possess of legal method. The *Province of Jurisprudence Determined* is indeed a book which no one can read without improvement. It presents the spectacle of a powerful and conscientious mind struggling with an intractable and rarely handled material, while those distinctions upon which Austin, after his somewhat superfluously careful manner, bestows most labour, are put in so clear a light that they can hardly again be lost sight of.”

But Austin's work was fragmentary and full of digressions; and the painful elaboration of some of his theories and definitions

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<sup>8</sup> DISSERTATIONS AND DISCUSSIONS iii, 246.

makes it as difficult to read as an Act of Parliament. Holland, adopting in the main Austin's views as to the nature of jurisprudence, wrote a complete book on the subject in terse, clear, and vigorous English. He has thus, to use the phrase which Bentham applied to Blackstone's work, "put a polish upon that rugged science."

To Holland jurisprudence was "not the material science of those portions of the law which various nations have in common, but the formal science of those relations of mankind which are generally recognized as having legal consequences."<sup>9</sup> He makes his meaning clearer by an illustration:

"Suppose, as is the case, that the laws of every country contain a common element; that they have been constructed in order to effect similar objects, and involve the assumption of similar moral phenomena as everywhere existing; then a person might proceed to frame out of his accumulated materials a scheme of the purposes, methods, and ideas, common to every system of law. Such a scheme would be a formal science of law; presenting many analogies to Grammar, the science of those ideas of relation which, in greater or less perfection, and often in the most dissimilar ways, are expressed in all the languages of mankind."<sup>10</sup>

The book was received with acclamation. Sir Frederick Pollock said:<sup>11</sup>

"A general view of the field of Positive Law, with only just so much concrete illustration as is needed to make it intelligible, may do much to clear the heads of learners, and beget in them a just discontent with the crude and formless condition in which the details of almost every topic are still left. To make a cosmos out of this chaos of disjointed particulars is a task which a later generation, prepared by such teaching as Professor Holland's in this book, and Mr. Markby's in his *Elements of Law*, may be able to attempt with good hope of success."

Frederick Harrison, in a letter to Holland, said of the tenth edition of the book:

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<sup>9</sup> HOLLAND, JURISPRUDENCE (12th ed. 1917) 9.

<sup>10</sup> *Ibid.* at 7.

<sup>11</sup> ESSAYS IN JURISPRUDENCE AND ETHICS (1882) 8, 9.

"It is a rare and almost unique triumph to have issued within twenty-six years no less than ten editions of a severe law text book. It seems to show that English law will not for the generations to come remain in that Cimmerian darkness which wrapped it up in the eighteen fifties, when I began to read 'Real Property' with Joshua Williams, and listened to Maine's Ancient Law in the Middle Temple Hall."

Maine once remarked that "we are in danger of overestimating the stability of legal conceptions"; and that Bentham and Austin "sometimes write as if they thought that, although obscured by false theory, false logic, and false statement, there is somewhere behind all the the delusions which they expose a framework of permanent legal conceptions which is discoverable by a trained eye, looking through a dry light, and to which a rational code may always be fitted."<sup>12</sup> That was in truth the underlying fallacy of the school of analytical jurisprudence. As Vinogradoff has said,<sup>13</sup> its claim to construct a general jurisprudence, independent of national, geographical, and political peculiarities, "seems rather odd on the part of writers who have renounced the conception of a law of nature and pin their faith to positive laws. Though Wolff and Kant could map out schemes of universal jurisprudence, Austin and Holland have no right to do so." "A scientific treatment of the subject ought to aim not at absolute and universal, but at relative constructions."<sup>14</sup> In fact, this general jurisprudence of the analytical school really analyzes the juridical principles which are at the root of a particular form of society—individualistic society; and, as Vinogradoff says,<sup>15</sup> "in this sense it deserves full attention, because it expresses the tendency of the legal mind to coordinate and to harmonize its concepts into a coherent and reasonable whole on a given basis—the basis of individualism." Holland's book is, and will I think remain, the best exposition of this school of juristic thought.

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<sup>12</sup> MAINE, *EARLY LAW AND CUSTOM* (1901) 360.

<sup>13</sup> I VINOGRAOFF, *HISTORICAL JURISPRUDENCE* (1920) 153.

<sup>14</sup> *Ibid.* at 154.

<sup>15</sup> *Ibid.* at 153.

## (3)

Though Holland's work on jurisprudence, and his *Essays Upon the Form of Law*, show that he was deeply interested in the formal side of the law, he was also interested, as much of his work on international law shows, on the historical side of the law. He did good work, as we have seen, on the history of international law; he did valuable historical work on the origins of Oxford University; and, at one time, he contemplated a history of the court of the Chancellor of Oxford University. But, as in the large fields of international law and jurisprudence, so in his university work, his two greatest achievements were on the formal side of the law. The first of these achievements was the reform of the statutes of the University. He says: <sup>16</sup>

"Any one who should turn back to the volume for 1882 ought to be distressed to see the amorphous condition to which the Laudian Code had been reduced by subsequent legislation. To give only one instance, many Titles had been wholly repealed, but their numeration was retained; supplemented, in the case of Titles still operative, by a duplicate numeration. The confusion became worse confounded in the following year, when the new statutes, made by the Commissioners, were dumped down *en masse* in a volume to the rest of the contents of which they stood in no relation. Impelled by a perhaps morbid hatred of disorder, I explained the grievance to Mr. Jowett, then Vice-Chancellor, and by his cordial support, was enabled, with the help of a strong committee, to interweave the work of the Commissioners with the older statutes, taking care to fill up the blank Titles in the latter with new materials, and to expressly repeal provisions which the Commissioners had repealed by implication; thus constructing for the University the orderly volume which, from 1884 onwards, it has been privileged to receive."

The second of these achievements was his reform of the court of the Chancellor of Oxford University. He says: <sup>17</sup>

"Besides discharging my regular duties as Judge of the Court, I have had the satisfaction, during my connection

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<sup>16</sup> HOLLAND, *supra* note 2 at 22.

<sup>17</sup> *Ibid.* at 19-20.

with it, of redrafting its Rules and Orders, in consultation with the Rule Committee of the Supreme Court, of bringing about the issue of an Order in Council which transferred the appeal from miscellaneous bodies, described as Delegates of Appeals, to a Divisional Court of the High Court, and by so remodelling the University Statute '*De Judiciis*' as to require the Judge to be a barrister of some standing, and the Registrar and Practitioners to be solicitors, instead of possessing qualifications which were appropriate only during the period closed by Act of Parliament in 1851, in which the court was governed by the civil law, as modified by Acts of Parliament."

What were the intellectual qualities of the man who could achieve so much in so many different fields of legal learning?

His legal learning was cosmopolitan; and the clarity of his literary style, which reflected the clarity of his mind, enabled him to make the best use of it. His clear logical mind, and his passion for order and system, made him, all through his career, an advocate of codification; and I have no doubt that he would have excelled in this very difficult sphere of the lawyer's art. But his leaning toward the formal aspects of law sometimes made him too meticulous upon points of form, which others considered to be immaterial, so that, as he once said, he knew "what it was to be in a minority of one." As Professor Brierly has said:<sup>18</sup> "He would make his protest or his appeal with all the earnestness he could, and having done so, he would accept defeat with a humorous complacency, but without conviction." Similarly his passion for order and system led naturally to a desire to settle finally the problems in which he was interested. Having addressed his mind to a problem of law or jurisprudence, having brought to bear on it all the learning at his command, having solved it to his satisfaction, and expressed his solution in the clearest possible terms, he was reluctant to change his opinion—*ita scriptum est*. He refused, for instance, to consider any of those interesting continental speculations on the nature of corporate personality to which Maitland introduced the lawyers of this country.<sup>19</sup> Professor Brierly

<sup>18</sup> *Sir Thomas Erskine Holland*, (1926) 42 LAW Q. REV. 475, 476.

<sup>19</sup> HOLLAND, JURISPRUDENCE (13th ed.) 99.

has very truly said that "in jurisprudence, as in other matters, Holland formed his own opinions after full consideration; he used the acute reasoning power of his fine mind in working out and checking their implications, and having done so, he did not resent, but he was not easily disturbed by criticisms of his conclusions."<sup>20</sup> In the sphere of international law Professor Pearce Higgins has said that, excellent though his work is on its history and modern principles, it sometimes has "the defect of too great rigidity."<sup>21</sup>

But to have the defects of one's qualities is inevitable. It is not often that a mind so clear, so logical, and so precise has been applied to the two subjects of international law and jurisprudence. Both these subjects have sometimes fallen into the hands of thinkers whose speculations testify rather to their mental agility, to the excellence of their intentions, or to their political prepossessions, than to their logical ability or their acquaintance with facts or law. It was because Holland's cosmopolitan learning was accompanied by a clear logical mind, and by great powers of expressing his conclusions in an orderly and systematic form, that he accomplished so much for international law, for jurisprudence, for his country, and for his university.

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<sup>20</sup> *Op. cit. supra* note 18 at 476, 477.

<sup>21</sup> *Ibid.* at 474.