

and conclusions, which, however, have the value, and only the value, that their reason, soundness, and justice give to them.

The ancient mere-stones of the law must not be removed, but reverently preserved and regarded. It is, however, a mistake and a delusion to suppose that they either do or can permanently mark the actual or necessary boundaries of our jurisprudence. "In all forms of government," said Mr. BURKE, "the people is the true legislator; there are only two foundations of law,—equity and utility." This is especially true of the American States. The wants and welfare, the usages, customs, and settled notions of our people and their collected will necessarily find expression in our constitutions, statutes, and jural system. While the function of the judge is pre-eminently declarative, it is also necessarily, though subordinately, legislative; that is, he inevitably makes law in and by the very process of administering it. Whatever is of worth in this or in any legal work comes mainly from the judgments of the courts. The author desires to add that the work is purely technical, and is intended for the legal profession in every part of the country,—for lawyers who have no access to full libraries, as well as for those who have. For these reasons he has made the notes as full as practicable within the space allotted. If any shall complain of undue elaboration in this respect swelling the size of the book, the author craves leave to state it as his opinion that they probably constitute its most valuable and useful feature.

J. F. D.

NEW YORK, May, 1890.

PREFACE TO THIRD EDITION.

A REVISION of this Treatise has for some time been needed, but the pressure of other duties has, until recently, prevented its preparation. During the seven years that have elapsed since the last edition an unusual number of cases has been decided upon the various topics embraced in the work. The reported decisions to December 1, 1880, have all been diligently examined, and the results of such examination wrought into the texture of the present edition. This has necessarily increased its size, and correspondingly, it is hoped, its value. More than two hundred new sections have been written, and over three thousand additional cases cited. Every part has been gone over with conscientious care, and there is scarcely a section in which, either in the text or the notes, additions and changes have not been made. It has been necessary to *sectionize* the work anew, but the numbers of the former sections are enclosed in parentheses.

In consulting the Reports the author has been surprised and pleased to see the extent to which this Treatise has been used by lawyers and judges as an aid to their labors; and in again presenting it, in its new and altered shape, he gladly expresses once more his sincere and profound gratification for the favor with which it has been received.

J. F. D.

COLUMBIA COLLEGE LAW SCHOOL, NEW YORK,
January 1, 1881.

PREFACE TO SECOND EDITION.

THE favor accorded to this Treatise by the profession is gratifying to the author, and compensates for the great labor of its preparation. Nothing can be more pleasing to an author than the knowledge that the studious care given to a work is appreciated by those for whom it was written: their approving opinion is the reward he covets and enjoys.

The First Edition, published about twelve months ago and of nearly double the usual size, has been exhausted, and at the request of the publishers the Second Edition has been prepared. As before, this has been the personal labor of the author. All reported cases, decided since the first publication, have been examined, and the text and notes prepared without the assistance of others. While this edition embraces a summary of recent cases to the latest date, and contains substantial additions, the structure of the work is unaltered. Some new sections have been added, and others re-written. The principal changes have been made in the chapters which treat of Municipal Securities, Taxes, and Assessments. The amount of negotiable bonds of municipalities largely exceeds the sum of the indebtedness of all the States, and it has been the earnest endeavor herein to exhibit accurately the American law upon this important subject.

In conclusion, it is deemed fitting to express to the Bench and Bar of the country a sincerely grateful appreciation of the favorable judgment already pronounced, and a hope that the same, upon further examination of the work, may be neither reversed nor modified.

J. F. D.

DAVENPORT, IOWA, 1873.

PREFACE TO FIRST EDITION.

THE necessity for a work upon Municipal Corporations was so seriously felt by the author when holding a seat on the Supreme Bench of a State where questions relating to the powers, duties, and liabilities of municipalities were presented at almost every term, that he resolved, eight years ago and more, to endeavor to supply the want. Although the subject is one of unsurpassed practical importance, since nearly every considerable city and town in the United States is incorporated, no American work upon it has ever appeared. A careful examination of the English treatises satisfied the author that they were, in a great measure, inapplicable here, and that they fail to cover a large portion of the existing field of the law upon the subject as enlarged by American legislation and practice. True, our municipal system, like the body of our jurisprudence, was derived from England, but it is remarkable how many changes were necessary to adapt it to our system of government and mode of administration, and to the wants and situation of our people. Accordingly, if the municipalities of the one country be closely compared with those of the other, it will be found that, in their structure, powers, and workings, they present quite as many points of difference as of similarity.

We have popularized and made use of municipal institutions to such an extent as to constitute one of the most striking features of our government. It owes to them, indeed, in a great degree, its decentralized character. When the English Municipal Corporations Reform Act of 1835 was passed, there were in England and Wales, excluding London, only two hundred and forty-six places exercising municipal functions; and their aggregate popu-

lation did not exceed two millions of people. In this country our municipal corporations are numbered by thousands, and the inhabitants subjected to their rule by millions.

Our municipalities are habitually clothed by the legislatures with extensive, important, and diversified powers, and consequently possess a much more composite character than in England or elsewhere. Strictly, a municipal corporation is an institution designed to regulate and administer the mere local or internal concerns of the incorporated place in matters pertaining to it, and not relating directly to the people of the State at large. But in this country, much more generally than in England, it is the practice to make use of the municipality, or of its officers, as agencies of the *State*, for the exercise, on its behalf, of *public*, in addition to *corporate*, duties and functions. From the difference between these two classes of powers the American courts have deduced consequences so important that it is as necessary as it is oftentimes difficult to distinguish between them. Besides, it has unfortunately become quite too common with us to confer upon our corporations extraordinary powers, such as the authority to aid in the construction of railways, or like undertakings, which are better left exclusively to private capital and enterprise, and to create in their corporate capacity indebtedness therefor, enforceable by actions in the courts, and which must be paid by taxation.

Invested, also, within certain limits, with delegated legislative authority concerning the property and conduct of their inhabitants; with capacity, more or less extensive, to acquire and dispose of property; with the power to elect their own officers; to make contracts; to incur liabilities; to exercise Eminent Domain; and the more momentous power to levy and collect taxes, general and special,—these corporate agencies are thus brought into intimate and daily contact with the most important rights and interests of their inhabitants, and as a result we have an amount and variety of litigation not to be found in the tribunals of other countries. In no English treatise on Municipal Corporations is there a chapter upon the subject of civil actions and liabilities, and no discussion of the question as to their amenability to respond civilly in damages to individuals for acts of misfeasance, or for neglect of duty; and, for reasons not material to be here stated, the occurrence of questions of this kind in the English

tribunals has been comparatively infrequent. The American Reports, however, teem with cases on this subject, and the civil liability of municipal corporations upon contracts and for torts, and the mode of enforcing it, are with us the most important practical topics requiring treatment in a work of this character.

There being no American work on this branch of the law, and the decisions in this country relating to it being scattered through the reports of the federal courts, and those of thirty-seven States, there was little to guide the author, either as to the arrangement of his subject, or as to what had been decided by the courts concerning it. Accordingly he had no resource except to delve laboriously for his materials among hundreds of volumes; but these have, one by one, been examined by him with a view to find all that could be advantageously used to illustrate the subject; and the result is given, either in the text or notes, as fully as it was practicable within the compass of a single volume. Nor has he overlooked the aid to be derived from other sources. Every English publication relating to the subject in its legal or practical relations has been subjected to examination; books which could not otherwise be had have been specially procured from abroad. And, throughout the present volume, no inconsiderable pains have been taken to set forth wherein the English and American municipalities differ, so that the applicability and precise legal value of the judicial decisions of the former country would be better understood.

When the work was resolved upon, the author hoped to proceed with the leisurely care that would enable him to avoid the faults which thorough deliberation might result in correcting. This hope has not been as fully realized as he desired, for year by year his official duties have more and more encroached upon his time, leaving for this work only the diminishing intervals between courts. In its preparation he has often envied the author by profession the opportunity for continuous and unbroken labor, and he cannot but feel that if his work had not been prepared in fragments, it would not have fallen both so far below his ideal, and what, under more auspicious circumstances, he himself might have made it. It is hoped, however, if it shall lack the symmetry and finish such an author would have given it, that it may have compensating advantages in its thoroughly *practical character*; and these it will surely owe to that experience to which the mere

student or professional writer must ever be a stranger, and which can be had only upon the Bench or at the Bar.

Some peculiarities in the *manner* of its preparation will be observed. The aim throughout has been to make a work which will be useful to the profession. Aware that in most cases access to complete law libraries cannot be had, the author has endeavored, as far as practicable, to supply this want, and to make the text and notes exhibit the substance of the adjudications. This explains why so much care has been taken to cite the cases bearing upon the subjects discussed, and accounts for the fulness of proofs and illustrations to be found in the notes.

He trustfully submits the work, which fills up the interstices between judicial duties for nearly nine years, to the profession for whose assistance it is designed, and whose final judgment on it will not be otherwise than just. If he could be assured that it has a value at all proportioned to the labor first and last bestowed upon it, he would venture to hope for a judgment not altogether unfavorable.

DAVENPORT, IOWA, 1872.

NOTE.—The first edition of this work was dedicated as follows:—

TO THE
HONORABLE SAMUEL F. MILLER, LL.D.

ASSOCIATE JUSTICE OF THE SUPREME COURT
OF THE UNITED STATES.

Whether I share in the general admiration of your judicial talents, or listen to the more persuasive suggestions of a voice that comes to me from long association at the bar and upon the bench, there is no one to whom I can inscribe, so fittingly as to yourself, a work relating to an important branch of that science which you have studied so deeply and understand so well.

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