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An Introduction to the Philosophy of Law

Thomas Porter Hardman
West Virginia University College of Law

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BOOK REVIEWS

AN INTRODUCTION TO THE PHILOSOPHY OF LAW.—By Roscoe Pound, New Haven: Yale University Press; London: Humphrey Milford, Oxford University Press. 1922, pp. 307.

Philosophy has always played an important part in the development of the law. As the brilliant author says with respect to the common law, in practice judge-made law has been "moulded, consciously or unconsciously, by ideas as to what law is for; by theories as to the end of law." In the past this moulding influence has been too often unconscious, with the result that among other things the law has frequently been insufficiently responsive to the social needs of the times. In the present generation, however, we are tending to believe more and more in the efficacy of effort to improve the law. Therefore it behooves us to lay more emphasis upon a study of the influence that so largely "shapes our ends" in order that the law of the future may function better and thereby better satisfy the demands of the times. Perhaps no other book serves this purpose so admirably as does this valuable little volume.

The book contains a series of lectures delivered before the Yale Law School on the subjects of the Function of Legal Philosophy, the End of Law, the Application of Law, Liability, Property, and Contracts; and is a worthy successor to the author's recent volume on *The Spirit of the Common Law*.

In the first lecture the author broadly indicates the function of legal philosophy. A glimpse of the author's view may be obtained from the following quotation: "philosophies of law have been attempts to give a rational account of the law of the time and place, or attempts to formulate a general theory of the legal order to meet the needs of some given period of legal development, or attempts to state the results of the two former attempts universally and to make them all-sufficient for law everywhere and for all time. Historians of the philosophy of the law have fixed their eyes chiefly on the third. But this is the least valuable part of legal philosophy."

The lecture on the end of law shows that the purpose of law has been considered to be different at different periods of legal development. In the state of primitive law the "idea is that

law exists in order to keep the peace in a given society." The Greek, Roman and medieval conception of the end of law was the orderly "maintenance of the social *status quo*." In modern times, until nearly the beginning of the twentieth century, law was commonly conceived of "as existing to promote or permit the maximum of free individual self-assertion." But at about the beginning of the twentieth century jurists began to think of the end of law "as a maximum satisfaction of wants," that is, to think that law existed to satisfy as many human wants or interests as possible with a sacrifice of a wants or interests as possible and that therefore conflicting wants or interests should be balanced and the more important ones secured and the less important ones sacrificed. And this is the theory which is today tending to become dominant.

In view of the present-day tendency toward a state of legal fluidity the lecture on the application of law is, in many respects, the most interesting and useful. After the "law" has been "found" and "interpreted" how is it to be applied to the cause in hand? Three theories of application of law obtain in legal science today, the analytical, the historical and the equitable. Among practitioners the analytical theory has the largest following. Under this theory each case is put by a purely logical process into its pre-appointed pigeonhole and the result is formulated into a judgment. Among teachers, a historical theory has the largest following. Under this theory statutes and decisions are regarded as in the main declaratory or illustrative of the principles to be found by historical study of the older law. Among Continental jurists and to some extent among common-law jurists an equitable theory of application is tending to become dominant. Under this theory "the essential thing is a reasonable and just solution of the individual controversy." The legal precept, whether legislative or judicial, is conceived of as a general guide to the judge, leaving him free to deal with the individual case so as to meet the demands of justice in accordance with the *mores* of the times. The author thinks it inadvisable to attempt to administer justice exclusively by either method. Some cases are unique and cannot be justly decided merely by applying a detailed rule. The application of some flexible standard such as the standard of the reasonably prudent man may be necessary in order to do justice in individual cases. Rule must give way to discretion. "And the sacrifice of certainty in so doing is more apparent than actual. For

the certainty attained by mechanical application of fixed rules to human conduct has always been illusory."

The lecture on liability deals with the situation whereby one may exact legally and the other is legally subjected to the exaction. The outstanding feature of the lecture is a discussion of the tendency toward liability without culpability. In the last century it was commonly thought that "liability could flow only from culpable conduct or from assumed duties." But today, to consider only the tort side of liability, for the author confines himself mainly to tort liability, there is a tendency to ask not so much whether the person sought to be held liable is culpable but rather whether to hold that person liable would secure a maximum of interests with a minimum sacrifice of interests. An application of this tendency seems to be the justification of some otherwise unjustifiable cases in the present generation such as the recent cases in which a non-culpable owner of an automobile is held liable for the negligent use thereof by one not an agent when there is some relation such as the parental relation existing between the owner and the user. But see *Jones v. Cook*, 90 W. Va. 710, 111 S. E. 828 (1922) and note, 29 W. VA. L. QUAR. 53. Under this tendency the social interest in the general security is better satisfied and thereby the end of law is better served.

In the lecture on property the author, after discussing in detail the various theories by which men have sought to give a rational account of property, says in conclusion: "We may believe that the law of property is a wise bit of social engineering in the world as we know it, and that we satisfy more human wants, secure more interests, with a sacrifice of less thereby than by anything we are likely to devise." Property is therefore a social institution with a social function to perform: an institution to secure a maximum of interests with a minimum sacrifice. The reviewer's ideas as to the author's general views in this respect have already been indicated in this volume, 29 W. VA. L. QUAR. 195.

The concluding lecture is particularly noteworthy. It is a jural postulate of civilized society, the author asserts, that men must be able to assume that those with whom they deal will carry out their undertakings according to the expectations which the moral sentiment of the community attaches thereto. "This social interest in the security of transactions, as one might call it, requires that we secure the individual interest of the promisee, that is, his claim or demand to be assured in the expectation created, which has become part of his substance." But in countries governed by the

common-law this interest is not so adequately secured as in civil-law jurisdictions, largely for the reason that the common-law doctrine of consideration as generally applied unduly prevents the realization of such expectations. The author's discussion of the doctrine of consideration is unusually enlightening. "Projects for 'restatement of the law' are in the air. But a restatement of what has never been stated is an impossibility and as yet there is no authoritative statement of what the law of consideration is. Nothing could be gained by a statement of it with all its imperfections on its head." But says the learned author in conclusion, an important service will be rendered by the twentieth-century philosophical theory, whatever it is, which puts the jural postulates of civilized society with respect to promises "in acceptable form and furnishes jurist and judge and lawmaker with a logical critique, a workable measure of decision and an ideal of what the law seeks to do, whereby to carry forward the process of enlarging the domain of legally enforceable promises and thus enlarging on this side the domain of legal satisfaction of human claims."

The book, though not an extensive work, is perhaps unequalled for brilliancy in Anglo-American literature on jurisprudence. The author's erudition and insight into fundamental legal problems are remarkable. It is doubtful whether any other Anglo-American jurist could crowd so much useful legal learning into such a small and at the same time readable volume.

THOMAS PORTER HARDMAN.

West Virginia University
College of Law.

THE PROBLEM OF PROOF, ESPECIALLY AS EXEMPLIFIED IN DISPUTED DOCUMENT TRIALS.—A Discussion of Various Phases of the Proof of the Facts in a Court of Law, with Some General Comments on the Conduct of Trials. By Albert S. Osborn, New York and Albany: Matthew Bender & Company, Inc., 1922, pp. xxi, 526.

This book, written by the learned author of "Questioned Documents," is strictly speaking, not a legal treatise but a work written by a noted hand-writing expert who has had much and varied experience in his profession, and also great opportunities to study the conduct of trials in courts of law, and being a layman he discloses from that point of view the faults, shortcomings and mis-