

June 1922

The Spirit of the Common Law

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Recommended Citation

Thomas P. Hardman, *The Spirit of the Common Law*, 28 W. Va. L. Rev. (1922).
Available at: <https://researchrepository.wvu.edu/wvlr/vol28/iss4/19>

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BOOK REVIEWS

THE SPIRIT OF THE COMMON LAW—By Roscoe Pound. Boston: Marshall Jones Co., 1921, pp. xiv, 224.

In Anglo-American law, says the brilliant author of this valuable volume, "a new crisis is at hand." The common law, "essentially a mode of judicial and juristic thinking, a mode of treating legal problems rather than a fixed body of definite rules", is "under indictment (p. 6) . . . The world-wide movement for socialization of law, the shifting from the abstract individualist justice of the past century to a newer ideal of justice, as yet none too clearly perceived, is putting a strain upon all law everywhere," (p. 7). For this and other enumerated reasons the learned author says: "The lawyer ought not to sit by silently when" proposed cures for our legal ailments, "flying in the face of all that experience has taught us in the course of legal history, are making head in the community." The lawyer ought "to examine the body of legal tradition on which he relies, to ascertain the elements of which it is made up, to learn its spirit, and to perceive how it has come to be what it is, to the end that we may know how far we may make use of it in the stage of legal development upon which the world has now entered" (p. 10). Such an investigation constitutes the object of this very interesting and profoundly learned volume.

That the world is entering upon such a stage of legal development is almost universally conceded. As an eminent judge has recently said extra-judicially: "Ours is a time of change in the law, when it is to be recast; one of those periods when the bud is bursting its sheath and the flower unfolding." Dean Pound's book is, therefore, of very timely importance, especially in view of the fact that by common consent there is no one in America quite so eminently qualified to discuss this stupendous problem as Dean Pound.

To the lawyer the book reads almost like a novel; to the layman of education it should read almost equally well. And yet it covers, with sweeping generalizations and comparisons, practically the whole field of the law, common and civil, ancient and modern; private and public; tells, as it were, the story of the law, its trials and triumphs, its ends, its accomplishments; and in conclusion, not-

withstanding the premise that the common law is under indictment, intimates an optimistic prophecy as to its future.

The book consists of a series of lectures delivered by the author in 1921. Its domain is the field of jurisprudence. Its method is largely that of generalization and comparison. Thus, we are told in the first and second lectures that the common law has two distinguishing characteristics: (1) an ultra-individualism, an uncompromising insistence upon individual interests and individual property as the focal point of jurisprudence (pp. 13, 37), (2) a tendency to affix duties and liabilities independently of the will of those to be bound, to look to relations rather than to legal transactions as the basis of legal consequences and to impose both liabilities and disabilities upon those standing in certain relations as members of a class rather than upon individuals (p. 14).

Seven factors, the author tells us, have contributed to shape our American common law: (1) an original substratum of Germanic legal institutions and jural ideas; (2) the feudal law; (3) Puritanism; (4) the contest between the courts and the crown in the seventeenth century; (5) eighteenth century political ideas; (6) the conditions of pioneer communities in America in the first half of the nineteenth century; (7) the philosophical ideas with respect to justice, law and the state in the formative period of our law. The influence of these factors in the shaping of our law is dealt with, in the author's inimitable manner, in the first six lectures. In the two other lectures entitled "Judicial Empiricism" and "Legal Reason," the author discusses chiefly the influence of judicial empiricism in the growth of the law and the twentieth-century theory of the end of law. These two lectures, with the other six as a background, bring into bold relief the author's conception of the spirit of the common law. What is the common law? The author tells us in his first lecture that, in opposition to the lawyer's usual conception, "it is essentially a mode of judicial and juristic thinking, a mode of treating legal problems rather than a fixed body of definite rules." With this conception of the common law in mind, we may better appreciate the author's views as to the manner in which the law may grow, and his sociological theory of the end of law. It is in these two lectures, perhaps, that Dean Pound is most helpful by showing, *inter alia*, that, while at first the law grows subconsciously, today "it may grow consciously, deliberately and avowedly through juristic science and legislation

tested by judicial empiricism" (p. 173). Therefore we must have faith in the efficacy of effort to improve the law, in order that it may be fully efficacious to adjust human actions and relations in accord with the new social demands of the times.

We are now entering upon a new stage of legal development which the author and others call the socialization of law. The tendency is to break away from the ultra-individualist theory of law and to subject all law to the test of its utility to promote the interests of society, *i. e.*, social interests, to the extent that an adequate securing of such social interests requires a sacrifice of individual interests. The sociological theory of the end of law is, briefly, that the end of law is to secure as many interests as may be, with as little sacrifice of other interests as may be, with the emphasis on the protection of social interests. A few decades ago it was the interests of the individual that the law sought to secure at the expense of the interests of society. Today, since law involves a compromise of conflicting interests, there is a strong tendency to secure social interests and sacrifice individual interests so far as such sacrifice is necessary to subserve the best interests of society as a whole. In other words, the approved tendency today is to socialize the law.

In a class discussion of a recent decision of the United States Supreme Court (*Block v. Hirsh*, 41 Sup. Ct. 458, 1920), in which four judges dissented, and in which the majority handed down a highly socialized opinion, a student declared with disapproval that the Court had turned "socialist." And lest some reader of this review should think that the author too has turned "socialist," perhaps it will be well to quote the language of the author in this connection: "If the term 'socialization of law', has alarming implications for any of you, if, like the Russian censor who blocked out the words "dynamic" and "sociology" in Ward's "Dynamic Sociology" wherever they occurred—not that he knew what they meant, but because they sounded too suspiciously like dynamite and socialism, . . . it is possible to put the matter in wholly innocuous phrases" (p. 195). But for this, and for the illuminating examples of the socialization of the law as that process is taking place before our eyes, the reviewer must refer the reader to the author's inimitable and invaluable discussion of this all-important problem.

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