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.

This volume contains a series of six lectures delivered on the Storrs foundation at the Yale Law School and is a worthy addition to the many series previously delivered on this foundation by leaders of juristic thought. Dean Pound first defines for us the Function of Legal Philosophy; then follow chapters on the End of Law, the Application of Law, "Liability," Property, and Contract.

Perhaps the chief criticism to which philosophers of the past have been subject is that they have presented their very finite wisdom as if it were infinite, that in a world of constant evolutionary adjustment to an ever changing environment they have claimed a universal and eternal validity for their rules and explanations. They have sought to give us an "ultimate solving idea," "a moral and legal and political chart for all time," "a perfect law which should stand fast forever." Dean Pound says that we are not to "scoff at this ambitious aim"; but this means only that criticism should be polite and that the critic should first demolish his own glass house. The following quotation indicates the view of the author: "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 law have fixed their eyes chiefly on the third. But this is the least valuable part of legal philosophy."

He proceeds to state for us the contribution to legal philosophy of the Greeks, the Romans, the Middle Ages, the age of colonization, and the 19th century, there being alternation between periods of growth, when theories of "natural law" have prevailed, and periods of consolidation or reaction, when emphasis was put upon authority and the law was regarded as complete and in need of nothing that could not be supplied by history and analysis.

Philosophies, theories of law and its purpose, grow out of the particular needs and activities of men at any given time and place. Thus, primitive theory is that the end of law is the keeping of the peace. The Greeks, Romans, and the Middle Ages regarded it as the maintenance of the social *status quo*. In the age of discovery and expansion it was the maximum of liberty. Since 1900 it has been the maximum satisfaction of wants and the relative valuation of these. We now distinguish between factual wants and legal rights and privileges, arriving at the latter by a conscious compromise. The question now is, how are we to weigh conflicting interests and effect the compromise. There is no definite answer ready to be given.

The lecture on the Application of Law is a discussion of the methods by which the courts have tried to apply rules of law to cases so as to square with the *mores*, the current notions of justice and morality. The author stresses the necessity of rules and the equal necessity of disregarding them on occasion. He argues that the public must be educated up to a proper conception of the function of the judge as that of logical interpreter in the main, but also and in a large degree that of administrator and legislator as well. The dogma of separation of powers cannot control; it results merely in a division of labor. Especially is this true in periods of growth like the present. The judge can no longer merely apply a "rule." In many fields, cases are unique and cannot be decided merely by a rule. They have to be decided by application of a "standard"—as,

for example, that of the reasonably prudent man—and standards change much faster than rules. He is a wise judge who can maintain the proper balance between "rule" and "discretion." As justice becomes "individualized," rules become undermined and uncertain, respect for law declines, and a demand begins to be heard for restatement and simplification.

In the lecture on "Liability," that term is chosen to express the relation of right and duty between two persons, the discussion being limited in the main to the field of torts. The most striking part of this discussion lies in the assertion—surely correct—that to base liability for negligence upon "fault," "blameworthiness," or "culpability" is to base it upon a "dogmatic fiction." "Is an act blameworthy because the actor has a slow reaction time or was born impulsive or is naturally timid or is easily 'rattled' and hence in an emergency does not come up to the standard of what a reasonably prudent man would do in such an emergency, as applied *ex post facto* by twelve average men in the jury box?" "But what the law is really regarding is not his culpable exercise of his will but the danger to the general security if he and his fellows act affirmatively without coming up to the standard imposed to maintain that security." This is sound and true, but it cuts deeper than may appear; it affords the explanation of morality as well as of negligence. "Fault" ceases to be a "dogmatic fiction" as soon as we realize that it is merely a failure to come up to a standard and that any kind of immorality is the same. Our standards of morality are based upon the experience of the race and are so strongly believed to be necessary to survival that those who cannot live up to them are penalized, regarded with dislike, and gradually edged off the earth.

It would help all of our lawyers, radical and conservative alike, if they would read and could understand Dean Pound's discussion of property and contract. They, too, are merely evolutionary adjustments through the long centuries. His last word on property is as follows:

> "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—we may believe this without holding that private property is eternally and absolutely necessary and that human society may not expect in some civilization, which we cannot forecast, to achieve something different and something better."

The doctrine of consideration is treated with an intelligent insight that is indeed rare if not unequalled. He comes to about the same conclusion as did Professor Lorenzen with respect to the doctrine of *causa* in the Roman law. *Causa and Consideration in the Law of Contracts* (1919) 28 YALE LAW JOURNAL, 621. "Projects for 'restatement of 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." It is true that past definitions and historical explanations and philosophical theories of consideration are inadequate for the law as it is being applied to-day. But no worthy "restatement" will ever merely copy past "statements." It must, instead, bring the statements up even with the applications. Dean Pound's lecture will be very helpful in doing this.

Of course, philosophical theories greatly influence the actual decisions; but they do this only because they never precede but are based upon decisions. They are the afterthoughts, frequently lame and halting ones, following upon mass movements of many individuals in their conscious and unconscious adjustment to conditions about them. The courts are reacting to the feelings and opinions of the community and are building a law of consideration. The process is continuous and never ending. A new "philosophical theory of enforcement of promises" will help, if it truly explains what the courts have already done and accurately predicts that which they are going to do.

Dean Pound's lectures are not easy reading; but those who know enough to be able to read with understanding will be rewarded with many new and enlightening ideas. Few other jurists of to-day are so broadly familiar with past tradition as he or so thoroughly emancipated from its shackles.

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The Supreme Court in United States History. By Charles Warren. In Three Volumes. Boston, Little, Brown & Company, 1922. Vol. I, pp. xvi, 540; Vol. II, 1-550; Vol. III, 1-532.

An adequate history of the Supreme Court has been long awaited. Biographies of members of the Court have multiplied—some notable biographies. Two attempts have been made to trace the history of the Court through the lives of the Chief Justices. Laborious treatises have been written on the law as expounded by the Court. Monographs without number have analyzed the decisions of the Court. A socialist writer has recorded his impressions of the interests which seem to him to have affected the utterances of the federal judges. But no attempt has been made on the scale of the work before us to treat the Supreme Court as a continuous institution whose history is inseparably intertwined with the general development of American society. In his preface and introductory chapter, however, the author of these three volumes carefully delimits his subject and warns his readers not to demand more than he has to give. And it would be a surly critic indeed who would censure him for not attempting what he has expressly refrained from doing. Surely an author may choose his own task!

The reviewer feels bound, nevertheless, to record his disappointment that only two chapters out of the thirty-eight are devoted to the history of the Court within the last thirty years—in many respects the most important epoch since Chief Justice Marshall laid the foundations of American constitutional law. If the author felt any distrust of his own fitness for writing the history of this highly controversial period, the reviewer would like to demur. In his opinion no one could have entered upon this last phase with surer step and greater poise than the author of these volumes.

Another disappointment is in store for some readers of this work. This is not a history of American constitutional law as expounded by the federal judiciary, but a history of the Supreme Court *in* American history. It is an attempt to correlate the work of the Court at different epochs with the general history of the country—"an attempt to revivify the important cases decided by the Court and to picture the Court itself from year to year in its contemporary setting." It has seemed to the author perhaps just as important—certainly just as interesting—to know what people thought and felt about the decisions of the Court, as to ascertain the legal grounds for those decisions. Unquestionably it is highly desirable to know how the public reacted to the decisions of the Court on controverted questions. The revulsion of public opinion in the North from the *Dred Scott* decision (1856, U. S.) 19 How. 393, is a circumstance of great importance in ante-bellum political history, irrespective of the effect of the decision upon the future of slavery in the territories. Or, to take a more modern instance, the decision of the court in *Lockner v. New York* (1905) 198 U. S. 45, 25 Sup. Ct. 539, has more than a legal interest to students of American politics. The protest of labor has had direct political consequences and the animus of labor may quite conceivably have reacted in subtle ways upon the judiciary, as well as upon other organs of the government.

It is this interaction between court and people which interests the author primarily. In this fascinating study he has displayed prodigious industry, for what we like to call public opinion is not always apparent nor, indeed, always easily detected. It may find expression in public utterances or in private correspondence, in pamphlets or in newspapers, in emotional news items or in thoughtful editorials. All these sources,—except for the latter portions of our history, when the task becomes extremely laborious,—have been exploited by the author. A great part of these three volumes consists of quotations from various sources, printed *in extenso* with running comments.

It must not be supposed, however, that the author conceives his rôle to be that of editor merely. There are valuable contributions to legal history scattered here and there through the volumes, often unobtrusively tucked away in footnotes. An instance in point is the discovery of reports of the federal circuit courts which show that in several cases, as early as 1792, they declared state statutes invalid because repugnant to the Constitution, "without any apparent contemporary criticism." (Vol. I, pp. 65 ff., and footnotes.)

Much attention has been given naturally to the changing personnel of the Court. "The Court is not an organism dissociated from the conditions and history of the times in which it exists. It does not formulate and deliver its opinions in a legal vacuum. Its Judges are not abstract and impersonal oracles, but are men whose views are necessarily, though by no conscious intent, affected by inheritance, education, and environment and by the impact of history past and present" (Vol. I, p. 2). True, and just because judges are but men, we should like to know more than the author tells us about them. We are left in no doubt as to their political predilections; we are taken into the private councils of Presidents and allowed to observe the embarrassing circumstances which affected appointments. But of those subtle influences of tradition and economic circumstance which may have shaped individual decisions, little is said. The author is a frank admirer of the Supreme Court as an institution. It has erred, no doubt, but its voice in the long run seems to have been *vox dei*. But why have there been so few unanimous decisions? Why so many dissenting opinions? Why is it that rational men can differ so radically on points of law? The obvious answer is that the personal equation inevitably obtrudes. Here is a great field of economic-legal research awaiting the patient student. Modern psychology and the social sciences have much to suggest by way of hypothesis. A series of studies into the basic conditions which have shaped important decisions may persuade even the staunchest legalist that, as Mr. Justice Holmes has said, "the felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which Judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed." (Quoted with approval by the author, Vol. I, p. 2.)

In conclusion it should be said that these three handsome volumes are a delight to the eye. The typography leaves nothing to be desired.

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Cases on the Law of Bills and Notes. By Howard L. Smith and Wm. Underhill Moore. American Casebook Series. Second Edition. St. Paul, West Publishing Company, 1922. pp. xvi, 847.

A radical change in arrangement would neither be expected nor desired in the second edition of a casebook which has had a successful career of twelve years. If a volume is properly to be denominated as a second edition, it will

necessarily be built upon the groundwork of the first, finding its *raison d'être* in the insertion of new material, and in the rearrangement of those chapters which experience has shown to require it.

This is exactly the process which the present volume has undergone, with a distinct increase in usefulness in the field for which it was designed. The number of new cases inserted is relatively small—about fifty in the entire book. In general these have replaced older cases illustrating not quite so adequately the same points. In particular, various cases decided before the general adoption of the Negotiable Instruments Law have been removed in favor of similar cases decided since. In three chapters, the material has been rearranged: in the Introduction, cases dealing with the transferability of chattels, choses in action, and bills of lading have been omitted; the liability of the acceptor has been further developed from the American point of view by the exclusion of English cases defining the fictitious or non-existent payee, and the inclusion of more recent cases under the Negotiable Instruments Law; the cases dealing with delivery as between the immediate parties have been placed first in the chapter on Delivery, a more logical arrangement. Further, the editors have added cases involving collateral notes, and notes containing a statement of the transaction out of which the instrument arose. To a rather slight extent the footnotes have been cut down by the omission of "accord" and "contra" cases. In view of the doubtful value of such references in competition with the various annotations of the N. I. L., this seems an improvement. In short, the book has been improved by being brought down to date, without changing the classification of subject-matter originally adopted.

It is natural to question, in going over a second edition of this sort, whether the original arrangement is precisely the most desirable for the present teaching of the subject—whether the past twelve years have shown us any new approaches to the study of Bills and Notes by cases which should be reflected in the casebook. One suggested basis for a reallocation of the topics of commercial law for presentation in law schools is the so-called functional division, already used or attempted in some of the many casebooks on Business Law recently produced. See, for example, 2 Spencer, *Law and Business* (1921) 295 *et seq.*; Schaub and Isaacs, *The Law in Business Problems* (1921) ch. 10. It is said that the *foci* for the arrangement in a law school curriculum of branches of the law dealing with commercial activities should be the general problems with which business men are dealing; that under such a general classification of business problems should be grouped the various legal tools a business man may use, treated with reference to their availability for accomplishing the result he desires, rather than with reference to the peculiarities of their individual historical development. On such a basis, Bills and Notes would naturally fall in as one of the subdivisions of the general topic of credit devices. This general topic would divide itself into (1) legal devices for obtaining credit; (2) legal devices for security. Although the following topics have certain characteristics belonging to both main divisions, under (1) might be correlated bills, notes, checks, stocks and bonds; under (2) liens, pledges, mortgages, conditional sales, bills of lading, warehouse receipts, and contracts of guaranty and suretyship. Most of these topics are not now collected into a single credit or security course, but rather are treated as incidental parts of such subjects as Private Corporations, Personal Property, or Sales. Assuming that some such functional division as that suggested might be worth trying, we have two additional types of credit instruments which should be discussed to some extent along with bills, notes, and checks, and a number of other types to be correlated in a "Security" course which we need not consider here. To what extent, then, should stocks and bonds be divorced from the course on Private Corporations and inserted in the Credit course? Shares of capital stock serve two obvious functions: they rep-

resent an interest in the corporation, and their use enables the corporation to raise money for its business. The former of these functions—the rights, powers, privileges, and liabilities of an owner of some interest in the corporation—perhaps better belongs to the field of business associations, the latter to the field of credit. In the suggested course on Credit, then, stocks and bonds would be considered with reference to their legal advantages and disadvantages as credit instruments as compared with bills, notes, and checks, particularly from the holder's point of view.

It has already been indicated that the present volume is up-to-date, and is very well suited for the customary presentation of the course in Bills and Notes. To what extent could it be used to furnish material for such a course as that which is here briefly outlined? So far as arrangement is concerned, it seems quite suitable. Whatever may be the peculiar characteristics of a bill or a note as compared with other instruments used for a similar purpose, the best way to approach the subject seems to be through an understanding first of all of the distinctive form of the negotiable instrument and of the methods used in transferring it to another. Later in the course, in considering the holder in due course, the rights, powers, and privileges of a holder of other instruments might well be discussed. For such a discussion, no material is here provided. Finally, the liabilities of the different parties to the instrument might be compared briefly with those of parties to the other credit instruments on the basis of the more extended discussion of their functions in the other law school courses mentioned. Although such a credit course as that suggested involves no very great addition of material to that in the present casebook, it involves a considerable change in point of view, that is, in the attempt to give the student a new and perhaps more useful *focus* for his work in this field.

Although the usefulness of any casebook depends upon its adaptability to the method of attack upon the subject which the teacher prefers, the present volume provides a good arrangement of material for either of the approaches to Bills and Notes which have been undertaken or suggested. Business men are evolving new and more complex credit devices for the exigencies arising in the purchase and sale of the newer commodities; cases regarding these will doubtless concern the courts in the future. Doubtless casebooks will some day appear, based on a functional approach to the credit field, with full collections of cases on the various topics which should be related therein. But at least until that day, the present casebook will, it is believed, prove very satisfactory, as a sound selection of cases covering the groundwork of the field of Bills and Notes.

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Democracy's International Law. By Jackson H. Ralston. Washington, John Byrne & Company, 1922. pp. 165.

This is essentially a book of protest against what is called international law, which the author finds to be largely the embodiment of immorality and antisocial practices akin to anarchy. The author is no tyro in the field of knowledge which he so scathingly criticizes. With a respected professional connection with international law, as American Agent in the well-known Pious Fund Case, as the Umpire of the Italian-Venezuelan Mixed Claims Commission and the author of some of its most learned awards, as a practitioner of many years standing, his views cannot be dismissed as the utterances of the impractical and misinformed reformer. His attack is directed against the irresponsible State, which he finds the subject of international law, and the so-called legalization of what he regards as the lawlessness of its acts of aggression. He points out

that what is called robbery and murder in all systems of private law is seemingly ennobled as the fulfillment of national aspirations when undertaken by a group sufficiently large to be called a nation. His protest is aimed against a system which could legalize such practices and dignify results flowing from them by the name of law. In his view all the so-called laws of war, which is the natural culmination of the international state of unrestrained irresponsibility, are merely lawless practices which it is blasphemy to call law. He finds "true international law" in those rules of right living which should govern nations no less than individuals and demands of the votaries of international law a ministration of these principles and rules. He finds, for example, in the division of China into spheres of influence among the larger Powers a violation of a "natural international law of nations," the punishment for which is "absolutely certain." He manifests his lawyer's respect for sanctions by essaying to show that violations of these "fundamental" laws—which we would characterize as rules of morality—meet just retribution, eventually if not at once, and he cites the ultimate destruction of great empires. He attacks the conception of "vital interests," independence and national honor as deceptive excuses for the irresponsible State to exert its uncontrolled will upon less fortunate or weaker nations. He points out the futility of international courts as an agency for peace, because the underlying principles which they accept as law are themselves the negation of law. He says, for example, that the following "vicious propositions" would today "be accepted by a court":

"A state is a non-moral creation, only to be held responsible to others for its actions by its own consent.
"A state possesses such a right of sovereignty as enables it by force if it can to impose its will on other states without being judicially accused of wrong for so doing.
"A state must judge for itself what affects its own honor, vital interests or independence.
"A state, after a successful war, has a right to impose its will upon the vanquished.
"A state, provided it has sufficient power, may possess interests within the jurisdiction of another state and dictate the management of its affairs.
"A state may acquire from an alien conqueror complete jurisdiction over a vanquished people, violence creating title."

Much as we might be disposed to agree with the criticism of a system which necessarily invites war as the *ultima ratio* and then legalizes its consequences, it is not believed that international law is the proper focus of the criticism. Law is a science which merely follows the facts, historical, social, and economic, and records that which society and societal agents accept and enforce as binding. Much of this, even in municipal law, is essentially immoral, as for example that the State can do no legal wrong and cannot be sued. Yet so long as societal agents enforce that rule, it must be regarded as law. Mr. Ralston's objection is more properly directed against an international political and economic system which embodies so many practices and results that are in domestic affairs regarded as illegal, immoral, or anarchic, but which legally are still privileged internationally; yet even temporary peace seems preferable to permanent war, and for this reason international law has found it necessary to give legal effect to the practical consequences of facts. It is quite true that a lack of international organization, with certain *mores* of immorality, has permitted nations to be their own plaintiffs, judges and sheriffs, with the result that jungle law is perpetuated. The victory of law over violence has been slow even in municipal law. But, in so far as belligerent relations are concerned, the cure lies in the direction of a change of the *mores* by education of public opinion to the realization that the present system of international unfair competition not only leads inevitably to war but that with growing effectiveness of the means of destruction the very

existence of the human race is at stake. Thoughtful men realize that it is now a race between education in the interest of general self-preservation, and general destruction. But Mr. Ralston's criticisms of law are reminiscent of the contests waged by the school of "natural law" which also had a theory that only that which was "fundamentally right" was law. This, it is believed, confuses ethics with law. Moreover, while alleged violations of this "fundamental" law can frequently be shown to be disastrous to the violator, it by no means follows that unjust aggression always meets its just reward. On the contrary, a glance at the empires of the world might show that aggression seems to pay; and even if in due time these empires may collapse from internal or external causes it would not be provable that this is a direct consequence of their aggression. It seems that Mr. Ralston makes too great a demand on international law when he requires that it regard as illegal those acts and their consequences which do not respond to the highest conceptions of ethics and morality. International law might thus become even weaker than it is and it would not thereby make the contribution to decency which Mr. Ralston demands of it. The remedy lies in educating public opinion to an appreciation of the fact that both morality and self-interest demand a different conception of international relations, which international law would then gladly record and apply. The reading of this book in picturing the existing order in international relations will do much to afford that very education which is so much needed.

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Common Law Marriage and Its Development in the United States. By Otto E. Koegel. Washington, John Byrne & Co., 1922. pp. 179.

In the pages of this book the author makes no contribution to the solution of the problems presented by the existence of common-law marriages in the United States nor does he present any material which is at all new or original. The entire volume is summed up in one paragraph which extends from the bottom of page eight to the middle of page ten. Here the author indicates (1) that common-law marriages have not been valid in England since 1753; (2) that such marriages were valid in England before that date; (3) that such marriages were invalid at common law for possessory purposes; (4) that such marriages were invalid in some of the American Colonies and contrary to legislation and policy of all colonies; (5) that the earlier decisions in the United States are against the validity of common-law marriages, but that the later ones, following some *dicta* of Chancellor Kent's in 1809, hold that such marriages are valid, and (6) that the decisions in this country on the subject are poorly considered and are at variance with each other, and that (7) such marriages are opposed by the American Bar Association, the Commission on Uniform State Laws and "all modern authorities on Sociology, Marriage, and kindred subjects." The one hundred and sixty pages which follow add nothing to this paragraph. They simply expand the obvious by quotations from cases and textbooks which are well known. Fully half the book is made up of quotations. A great portion of the rest of the text consists of sentences introducing or connecting these quotations.

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