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Book Reviews

Richard E. Ball

Alfred Long Scanlan

Elton E. Richter

BOOK REVIEWS

INVESTMENT COMPANY SHARES, by Alec Brock Stevenson.[1] New York: Fiduciary Publishers, Inc., 1947. 52 pages. $1.00—The foreward outlines the theme of the book in that the announcement, "This book was conceived and written especially for those individual and institutional investors large and small, whose approach to investment management is that of the fiduciary, rather than that of the short-term trader," describes well the approach of the author to the material understudy. The author has extensive financial and fiduciary experience to support his research into a field which, in both the legal and economic sense, has been sparsely and superficially analyzed.

The investment company is not a newcomer to the public but a general understanding of its basic operations seems lacking. Essentially it is a financial institution designed to collect a large investment fund from many individuals, and to give that fund a continuous management and a degree of diversification which is not available, generally, to any of its individual shareholders. This basic idea of pooled funds is not new, having made its appearance on the European continent in the early nineteenth century. A boom period in its history was brought to a close with the Baring Crisis in 1890 in England. The resurgence of pooled investment companies found motive power during the speculative era of the 1920's, and since that time they have influenced investment thinking in many directions. Suffice it to say they are at the present time of considerable importance in our securities markets, and undoubtedly will continue to be growing as a medium of investing funds, both large and small.

The author has divided his monograph into two parts; one dealing succinctly with a history and description of these investment companies, and the other discussing the problems facing the fiduciary who today evidences something more than academic interest in the use of investment company shares for the investment of funds under his care. It is the second part of this monograph which holds interest for lawyers and trustees, more than for the general investor and the cursory reader.

The problems involved when a trustee decides upon the use of investment company shares are magnified because of the haziness of legal writing on this problem and because the courts in various jurisdictions have not been in agreement on basic concepts. To quote the author, who has seen these problems relating to the legal aspects of trusteeship, "The trustee who has satisfied himself as to the investment qualities of an investment company share must, consequently, pause and carefully examine the ground with an eye to seeing what defensive positions it may contain, in case his act of purchase or retention is attacked." In those states which regulate trust investments by means of a list of "legal" investments, or by the promulgation of standards to which securities must conform to be designated "legal", trustees are generally forbidden to purchase corporate shares, and it seems reasonable that investment company shares should be treated likewise when statutory tests are applied. Some inroads have been made in "legal" or New York Rule states and the author reminds us that Nebraska has removed prejudice attaching to investment company shares and has admitted them to trustee investment consideration when the minimum standards (which, incidentally eliminate the great majority of shares) have been met.

When, however, the trustee is operating in a Massachusetts Rule state, his trust instrument frees him from statutory restrictions. The question of the use of investment company shares without fear of surcharge or charges of delegation of trustee responsibility has not been determined adequately by rule of law. The

[1] Vice-President and Trust Officer, American National Bank of Nashville.

attack that there is a delegation of powers by the trustees to the managers of the investment company seems to have its foundation in the very roots of the idea of a trusteeship itself, and has been a powerful one to date. The author propounds a sound idea when he states that "the trustee buying an investment company share makes an affirmative selection of it, just as he would if it were the share of a bank, insurance company or industrial corporation. Such a selection is quite the opposite in intention of an act of delegation." Yet the author does not face the fact that investment company portfolios from time to time have securities in them which a prudent man probably would not consider a proper vehicle for the conservation of funds. Is this not, then, an improper delegation inasmuch as it would entail the sale of the share in its entirety to eliminate the hazard of the proportion which is speculative; That there is not a clearly defined position for the trustee even operating under the prudent man rule is unfortunate since it lends hazards of charges of improper stewardship to the operation of purchase or sale of these shares. And the really good investment company shares suffer a stigma which is not reasonable in view of their value in certain situations.

A trend toward liberality has been noted by the author in the aforementioned state (Nebraska), and, in the recent actions of the courts in other states, in admitting that these investment company shares may be securities similar in content and importance to those ordinarily available for trustee use. With the growing demand for these shares, it seems inevitable that their use will be more commonly acceptable in situations which today do not admit them as vehicles for trust investment. The many shibboleths which have been used by the courts seem to be in revision towards greater freedom but with a restraint comparable to that imposed upon the discretionary trustee.

*Richard E. Ball**

THE NATURAL LAW. By Heinrich A. Rommen.[1] Translated by Thomas R. Hanley, O. S. B. St. Louis and London: B. Herder Book Company, 1947. 290 pages. $4.00—The volume here reviewed is a translation of DIE EWIGE WIEDERKEHR DES NATURRECHTS (Liepzig: VERLAG JAKOB HEGNER, 1936). The English version, however, amounts to a revised and enlarged edition of the original work and contains many additions and alterations thereto. The author has had the foresight to divide the book into two main sections. The first treats of the historical evolution of natural law as a legal philosophy and registers its rise, temporary fall, and reappearance, with splendid continuity and integration of narrative. The second main division of Dr. Rommen's book is devoted to a consideration of the philosophical content of the natural law jurisprudence. Because of its content, it is perhaps more abstruse than the first section of the book. However, for lawyers and jurists who seek both a rationalization and a methodology with which to approach the perplexing legal problems of our time, this latter section should prove invaluable.

Tracing the history of the natural law, the author relates its emergence in the philosophy of the ancient Greek philosopher Heraclitus who first articulated the idea of an eternal law of nature corresponding to man's reason and sharing in the eternal *logos*. Early in the history of the natural law arose the Sophists who were the first to attack the existing (or positive) law of the Greek city-states by comparing it to the law which was right by nature. This is a phenomenon which is to occur throughout history; its occurrence at such an early date manifests the great utility which the natural law theory possesses as an instrument of legal re-

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*Instructor, College of Commerce, University of Notre Dame.

1 Professor of Political Science, College of St. Thomas, St. Paul, Minnesota.

form. Equally early was the genesis of the positivist theory of law, i. e., the only valid law was the promulgated law of the individual societies of states. The first such positivists, Dr. Rommen demonstrates, were the Epicureans, whose distrust of objective and natural right led them to turn their backs on the idea of a natural law as espoused by the Sophists. This clash of views has found a continuing parallel throughout history in the running encounter between the natural law school and the legal positivists.

Plato and Aristotle, of course, embraced the idea of a natural law. But, as the author points out, they were less specific as to its content and were convinced that the positive law wishes to realize the natural law as opposed to the more critical approach of the Sophists whose attacks on the existing laws of the city-states so often provoked Socrates to retaliation. The more realistic natural law philosophy of Plato and Aristotle was one based on metaphysics; that of the Sophists had to rest on reason alone.

Transmitted by the Stoics to Rome where it found a great advocate in Cicero, the natural law served as the means by which the *praetor peregrinus* and the *juris consultes* fashioned the *ius gentium* of the Roman world. The metaphysical quality, which allowed the natural law to transcend the diversity of peoples who comprised the empire, also allowed it, as the author pertinently shows, to be the cornerstone upon which the famous *ius gentium* and the later civil law were based.

Dr. Rommen next takes up the age of Scholasticism during which the metaphysical (as opposed to the purely rationalistic) natural law achieved its most masterly expression in the writings of St. Thomas Aquinas. The conflict between Thomistic philosophy with its accent on the primacy of the intellect against the moral postivism of Occam and others who emphasized the will as the nobler faculty is portrayed in such a way by the author that the reader may clearly understand the philosophical background of a struggle whose ramifications spill over on to the political and jurisprudential plane even to the present. The fight between the concept of a universal moral norm and the will of the state continues unabated in our own generation.

The author credits the Scholastics for preserving the metaphysical natural law during those periods when it had been temporarily driven from the realm of jurisprudence. In this connection his appraisal of the temporary supremacy in the seventeenth and eighteenth centuries of the trend toward the individualistic, rationalistic natural law; the unfortunate phenomenon was, however, that each theorist painted that imaginary state as it suited him; their ideals ranged from Hobbes' view of it as a state of continuing warfare between human beings to Rousseau's semi-deification of it as a Utopia to which mankind and its law should return. Furthermore, this school, by ignoring man as a social being, lacked the necessary realism to avoid the end it finally came to, i. e., a rationalization of the status quo; in effect, a justification of legal positivism. This danger is one which legal philosophers must take care to avoid even today. Too great a devotion to the rigidities of Blackstonian legal theory has led many unsuspecting rationalists to the precipice of unabashed positivism masquerading under the guise of status quo.[2]

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[2] The pious exhortations of "due process" on the part of those American courts which have relied on that otherwise admirable constitutional concept to sanction the most socially unjust contractual relationships and to prevent reasonable legislation for the public welfare furnished evidence that this pitfall is not an illusory hazard. Those who now shout "freedom of contract" in justification of odious covenants enforcing racial restrictions fall into the same error. The moral norm has been obfuscated in the ejaculations of a desiccated Reason. See *Hurd v. Hodge* 162 F. (2d) 233 (1947).

The disappearance of natural law from the field of legal philosophy during the so-called "age of reason" has had a far reaching effect upon us today. It accounts for the semi-bankruptcy of international law since then. True, Grotius, with his background of metaphysical natural law, did turn his hands in this direction. But the supremacy of rationalistic natural law and the victory of positivism which followed in its wake severely curtailed the formulation of what might have served as another *ius gentium* for our times. Instead, positivism, in the form of nationalism and the idea of independent sovereignities, has left a legacy of cynicism as to the efficacy of a world government as a means in achieving peace and order to a chaotic world. How long will it take before the snearing nationalistic cynics acknowledge that realism along these lines lies in the direction of an international world based on universally accepted concepts of justice and truth?[3]

It is the last chapter of the first section of Dr. Rommen's work dealing with the reappearance of natural law legal theory, and the entire last part of the book treating of its moral basis and philosophical content, that should furnish the most welcome reading moments to lawyers and law students of our generation. Dr. Rommen here lays emphasis on the fact that the metaphysical natural law theory, with its recognition of the interdependence of the social sciences,[4] the social nature of man, and the necessity to examine the social and economic facts[5] of a particular society in ascertaining the just legal rule to apply in particular cases, avoids the prime error committed by a "naively romantic natural law doctrine of rationalism which attempted to set up detailed norms deduced from reason and valid for all men and all times."[6] Thus a metaphysical natural law of eternal moral validity which can be applied to varying civilizations and in different ages without loss of vigor can be truly labeled "natural law with changing and progressive applications."[7] It is not a theory affected with the myopia that causes some of our leading lawyers and judges to resist social change for the benefit of the public welfare in the name of empty shibboleths such as "freedom of contract" and the "law of supply and demand." Dr. Rommen accepts the notion that the state may remedy injustice by direct action;[8] that the iron law of wages (and presumably of prices) violates justice and equity and thus can be modified by the state in the interests of society when the existing social and economic facts so dictate.

It would be belaboring the obvious to point out the great necessity for a legal philosophy based on universal moral norms in the troublesome arena of international affairs. There, above all places, men grope for an *ordo rerum* upon which to anchor, and by which, presumably, to save, a world which now possesses the scientific know-how to destroy itself, yet which cannot seem to lay hold of the moral force which will prevent its own suicide. The author deals at length with the great possibilities of the natural law theory in this crisis.

Indeed, then, does Dr. Rommen's work appear at a propitious moment. Explaining in simple but intelligent terms the history and philosophical content of a great moral and legal theory it should be brought to the attention of the members of the bar everywhere. In the eyes of this reviewer it possesses three great attributes. First, it opens the way for a reconciliation of the natural law school and

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3 See Emery Reeves, *The Anatomy of Peace* (1945).

4 For a recent criticism of those lawyers who remain smugly impervious to this necessary integration see Segal, *The Relation of Lawyers to Economists* (1947) 52 Case and Comment, No. 5.

5 *The Natural Law* at p. 207.

6 *Id.* at p. 228.

7 *Id.* at p. 229.

8 *Id.* at p. 245.

those in the school of sociological jurisprudence who believe the hour has come to stop placing one's faith in the empiricism of social facts and to return to a morality which recognizes but does not worship those facts. Secondly, it enables us intelligently and dispassionately to appraise the recent increase of government regulation of private business in the interests of the general public.[9] Perhaps Roosevelt's idea of government "in which no one is left out" is not too far from the *ordo rerum* of the natural law.[10] At any rate, the rights and interests of the public at large in the eyes of a metaphysical, moral philosophy are entitled to equal respect with those of the different individuals who comprise it. Thirdly, as we look toward the forum of the United Nations where statesmen race against time in order to extricate mankind from the dilemna to which scientific skepticism and moral positivism (in the form of vicious nationalism), has led, we can only hope that for them at least, if not for all men, the words of Horace will once again be vindicated: *"Naturam expellas furca, tamen usque recurret."* "You may drive out nature with a pitchfork, yet it will always return."[11] Never was its return any more imperative. Dr. Rommen's scholarly contribution to legal thinking could serve to hasten that revestiture of international morality which alone can save the world.

*Alfred Long Scanlan**

GRISMORE ON CONTRACTS. By Grover C. Grismore.[1] Indianapolis: Bobbs-Merrill Company, 1947. 524 pages. $6.00—The author's purpose in writing this book, as stated in the preface, is to present the fundamental principles of the law of contracts as clearly and concisely as possible, and yet with sufficient illustration and explanation to enable the novice not only to comprehend their scope and application, but also to acquire some understanding of the basic assumptions which underlie them.

Has the author accomplished this purpose? The work is organized according to customary practice. The book includes thirteen chapters entitled as follows:

Chapter 1, Introductory Material; Chapter 2, Formation of Informal Contracts; Chapter 3, Formation of Contracts Under Seal; Chapter 4, The Principles Used by the Courts in Interpreting Contracts; Chapter 5, Conditions; Chapter 6, Breach of Contracts; Chapter 7, Damages For Breach of Contract; Chapter 8, Discharge of Contract; Chapter 9, Joint and Several Contracts; Chapter 10, Contract Beneficiaries; Chapter 11, Assignments; Chapter 12, The Statute of Frauds; and Chapter 13, Illegal Contracts.

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9 Dr. Rommen makes the argument that the formative stage which our labor legislation is in has led the courts to fashion it from case to case on principles of equity in a manner that completely accords with the papal social encyclicals. This same appraisal could be made of a good deal of the whole field of the still embryonic American administrative law. It is often merely an application of the moral norm of social justice to new fact situations.

10 It is interesting to note that a close colleague of the late president has commented: "To him man's relation to God seemed based upon nature. In this, of course, he *reflected the teaching of the natural law,* although he was probably unaware of that teaching. But it was strongly embedded in his mind." (emphasis supplied). Frances Perkins, *The Roosevelt I Knew* (1946), p. 142.

11 Epistles, I, X, 24.

*Professor of Law, University of Notre Dame.

1 Professor of Law, University of Michigan.

The evolution of the law discussed in the several chapters is carefully explained. the intra-chapter subjects carefully classified, and the nomenclature expressively selected.

The inquisitive student is encouraged not only by the citation of the leading cases which support the asserted legal proposition, but also by numerous refer- to the non-case legal literature which exists on the subject. The author has done an admirable job and certainly his purpose has been attained. *Grismore on Contracts* is one of the best short books on the subject.

*Elton E. Richter**

*Professor of Law, University of Notre Dame.

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