Volume 37 | Issue 3 Article 21

April 1931

Essays in Jurisprudence and the Common Law

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ESSAYS IN JURISPRUDENCE AND THE COMMON LAW. By Arthur L. Goodhart.* Cambridge: At the University Press; New York: The McMillan Company. 1930. Pp. xiii, 295.

It is not easy for a reviewer to present an appraisal of a book which has no central theme but which consists of a group of essays on a variety of legal subjects. However, several general reactions to Professor Goodhart's book may readily be described. In the first place the writer has achieved great heights in subjecting legal subjects to a literary style. This reviewer found the volume pleasant reading. It is notable for the versatility of interest of the author and the sustained reflective level of his discussion. The only thin spot in the book is the essay, *Recent Cases on Banking and Negotiable Instruments,* which bears the marks of time limitations in its preparation.

The other essays of a restricted scope include four discussions of tort problems and single essays on *Three Cases on Possession, Blackmail and Consideration in Contracts, Costs and The Legality of the General Strike.* Four topics of more general interest, *Determining the Ratio Decidendi of a Case, Recent Tendencies in English Jurisprudence, Case Law in England and America* and *The New York Court of Appeals and the House of Lords,* complete the volume.

Only passing comment can be made upon the generality of these studies, reserving particular reference for a very few. They should attract the interest of the American reader not so much by reason of the fact that they deal with legal problems alive in our law as by force of the perspective with which the writer views our situation and the valuable comparative material on Anglo-American law. The picture presented of the way the English Courts use costs to control litigation engenders the surmise that much unwarranted suing and defending, and what not, might well be prevented on this side of the water, if upon investigation the English system were found, even in part, adaptable to our legal environment.

In the realm of negligence Professor Goodhart repeatedly[1] "stands pat" on forseeability as the test of reasonable or due care

* Professor Goodhart is a native of New York City and graduate of Yale University. For ten years he has been a fellow of Corpus Christi College, Cambridge, and since 1926 he has been editor of the LAW QUARTERLY REVIEW. On the publication of this book he has been created Doctor of Laws at Cambridge and appointed Professor of Jurisprudence at Oxford.

in preference to any test based on probability. He does not cajole himself into the belief that this by-no-means new doctrine will render the law substantially less vague, but relies on it to make a man responsible only for those consequences of his conduct "which a reasonable man placed in his position would have foreseen as possible and would have avoided by due care". But if this is concededly at best only an insistence upon one, probably more accurate, vague formula in preference to another where does it get us? One can only guess what the jury, enshrouded in that mystic shrine, the jury room, makes of such generalizations as forseeability but Dean Green is probably not far wrong in his suggestion that the formula may not be expected to control the judgment of jurors.[2]. Formulae are distinctly useful; one cannot envision any sort of thinking or rationalizing which does not involve concepts and categories. At the minimum we find them useful in stating legal problems. But one can hardly claim for them any absolute meaning or vitality.

The carefully reasoned essay on *The Ratio Decidendi of a Case* offers a rather complete scheme for extracting from a case the "principle" which it embodies, if any. The key to this scheme is the emphasis upon looking at the facts only as the judge sees them, taking into account the facts he found to be material. "The principle of the case is found by taking account (a) of the facts by the judge as material, and (b) his decision as based on them." To this end Professor Goodhart stamps the view of Professor Oliphant and others that "it is what the judge does and not what he says that matters" as fallacious and deprecates the disposition of American law libraries to collect the complete records in cases as encouraging "a practise which is inconvenient in operation and disastrous in theory." The point is well taken. The case being adjudicated is the case pictured by the court. From its general picture the court settles upon the material facts which are found to control the case. (The reference to what American law libraries are doing condemns the tendency only for its harmful potentialities in the present direction. Certainly the material being collected is valuable for other purposes than finding the meaning of a decision). The difficulty lies in ascertaining just what facts the court considered material. At this stage of the game the opinion

[1] For example see the essay, *Liability for the Consequences of a Negligent Act*, 110, at 114, 127 and *The Palsgraph Case*, 128 at 130, 141-142.
[2] Green, *The Palsgraf Case* (1930) 30 COL. L. REV. 789, 798.

of the court is very important. In the situation where a court decided a case without opinion Professor Goodhart would consider all the facts in the record material save those immaterial on their face. This means that a much narrower "principle," one depending on fewer material facts, will be reared out of the case than the court would be likely to adhere to and, accordingly, the decision would embody only a tentative principle. Thus in a later case it might well be found that certain facts presented in the two cases were not material. Fortunately the courts decide without opinions only those cases where the factual material has been rather thoroughly worked over in previous cases.

Armed with this well-tempered tool the student proceeds to dig the gold out of the cases. He is immediately faced with this difficulty—why should he analyze cases so carefully when the courts themselves cite past decisions and *dicta* indiscriminately and the several judges on a bench would hardly agree in any event on what constitutes the *ratio decidendi* of a case? Little wonder if he experiences a momentary feeling of frustration! It is common knowledge that courts do not have the requisite time and do not in fact deal with past cases with as great discrimination as does the average law review contributor. This difficulty is becoming more apparent, and that with emphasis, as our American case system labors under the great "welter of decisions" and opinions ground out every month. Does this mean that the case system, bound up in its doctrine of *stare decisis*, is doomed to collapse "under its own weight"? Professor Goodhart in his essay on *Case Law in England and America* ventures to envision such a state of affairs. The restatements of the American Law Institute, he foresees, will give tremendous impetus to the forces now operating toword the breakdown of precedent; the restatements, whether official or unofficial, will constitute an adequate substitute in the form of a code of law. Can American lawyers derive much comfort from this prophecy? It seems arguable, to say the least. What more do the restatements contain than generalizations based on what is considered the best of our judicial output? The formulation of legal principles proceeds as before—the important difference being that the lawyer will have less difficulty in settling upon a given generalization of the restatement than he would in rooting it out of the cases and textbooks under the existing system. The code, then, would be old wine in new bottles. In this particular many will doubtless cherish the hope that the prediction of the distinguished author will not "pan out".

Professor Goodhart is not in sympathy with the so-called realistic school of jurisprudence, which is just now so actively agitating its new gospel in the forums of the law.[3] He seems by no means convinced that the law is the epitome of uncertainty. Granting that no new case is identically like any past one (as are not any two leaves upon a great oak) he believes that in the great run of new cases the variations from the material of past adjudications are not commanding, that for ordinary purposes the material elements in any new case are relatively few and quite subject to the force of existing formulations. Doubtless the law is workably certain and predictable for the most part. But there is a realm, a great frontier, where the law is not certain, in many instances has not even been formulated. The realists draw from this source in developing their views of the nature of law. Probably Professor Goodhart has not had their views brought directly home to him. In any event he does not in this book suscribe to them.

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[3] See FRANK, LAW AND THE MODERN MIND (1930); Book Review (1931) 37 W. VA. L. Q. 322.