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Book Reviews

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BOOK REVIEWS

THE SPIRIT OF THE COMMON LAW. By Roscoe Pound. The Dartmouth Alumni Lectures, 1921. Boston: Marshall Jones Company. 1921. Pp. xv, 224.

The title of this brilliant little volume might, more accurately, have been, "The Spirits of the Common Law," for it depicts the common law as the battleground of many conflicting spirits, from which a few relatively permanent ideas and ideals have emerged triumphant. As a whole, the book is a pluralistic-idealistic interpretation of legal history. Idealistic, because Dean Pound finds that the fundamentals of the common law have been shaped by ideas and ideals rather than by economic determinism or class struggle; he definitely rejects a purely economic interpretation of legal history, although he demands a sociological one (pp. 10-11). Pluralistic, because, unlike those nineteenth-century philosophers who tried to make legal history stand for the unfolding of a single idea—rational will (Hegel), popular spirit (Savigny, Puchta)—Dean Pound finds a number of ideas which have contributed to the spirit of the common law.

The title is reminiscent of two other volumes, one in the eighteenth and one in the nineteenth century, which are of the same philosophical pedigree: Montesquieu's *"L'Esprit des Lois"* and Jhering's *"Geist des römischen Rechts."* Montesquieu's book, which antedates Comte, has been called by Ehrlich "the first attempt to fashion a sociology of law"; his doctrine of the relativity of law to geographical, ethnical and economic conditions was at war with the dominant law-of-nature theory of his time. Jhering, though usually classed as a "social-utilitarian" (Paulsen, a follower, calls it "eudaemonism"), has contributed several important ideas to the program of the sociological school—among them the conception that "interests" are the ultimate realities back of "legal rights," the teleological or functional viewpoint in solving legal problems, and the negation of the sufficiency of purely juristic concepts, logically applied, to satisfy the jural needs of modern society. These contributions Dean Pound, as a leader of the sociological school, gracefully acknowledges in the present volume (pp. 203-5).

We must hasten to add, however, that the present volume does not pretend to cover the ground that the other two "Spirits" do. Dean Pound's immediate task in the present volume is that of presenting to a well-educated but non-professional audience an understandable picture of our legal institutions. This object he has faithfully adhered to. Whether the well-educated layman will be able to understand the volume in print is another question. Those who have heard Dean Pound lecture on these same topics will notice many slurrings of detail, many omissions of concrete illustration, which make his lectures vivid and comprehensible. Those who are familiar with the author's articles on "Sociological Jurisprudence" will miss the apparatus of foot-notes in which he is wont to overwhelm the reader with the

wealth and variety of his citations. There is not a single foot-note in the present volume. Obviously, a book for laymen!

Yet the lawyer will find many stimulative ideas crowded into these two hundred pages—ideas which will help him to solve the first problem at the office tomorrow morning, for Dean Pound has the rare virtue, for a legal philosopher, of always keeping his feet on the ground. Take, for instance, the feudal notion of "relation," which the author seems to have rescued from the limbo of nineteenth-century jurisprudence. Under the feudal system, the relation between lord and man was one of reciprocal rights and duties (p. 20) which were defined by the law, once it was found that the relation existed. This, the author says, became the typical common-law method of dealing with legal problems. In the nineteenth century it was crowded aside by the individualistic conception of contract (legal transaction), borrowed from the Roman law (modern), by which it was sought to derive all legal consequences of a given human relation from the manifestations of the wills of the parties voluntarily entering thereinto.

Thus, viewed as an attempt to coerce the wills of employer and employee into making a certain contract involving fundamental changes in their reciprocal rights and duties, as previously interpreted, a Workmen's Compensation Act is an arbitrary and officious interference with individual liberty. But viewed as an exercise of the time-honored prerogative of lawmakers to alter and prescribe the legal incidents of the relation of master and servant in such a way as to secure weighty social as well as individual interests, such a statute is in harmony with the spirit of the common law (pp. 29, 30). More recent still are statutes regulating the incidents of the relation of landlord and tenant, which was the basic relation of the feudal system (p. 22). By judicial decisions, chiefly, the relation of carrier and passenger has been regulated with a minuteness of detail which no theory of free-willing contractors can adequately explain. The relation of parent and child, for centuries almost untouched by law, has recently been regulated by juvenile court legislation. Thus, to a surprising degree, "relation" explains recent legal developments as in harmony with the spirit of the common law.

The conception of a legal transaction (contract, in the broadest sense) "regards individuals only. In the pioneer agricultural societies of nineteenth-century America such a conception sufficed. In the industrial and urban society of today classes and groups and relations must be taken account of no less than individuals" (p. 31). "Relation" is a more concrete, more human concept than our bloodless conception of contract, which, as Ehrlich has pointed out, does not describe the interest to be protected, but merely designates the conditions under which the claim to legal protection arises. In this respect, moreover, the "relation" of the common law is to be distinguished from the abstract metaphysical "jural relations" which Professor Kocourek (starting from Savigny) has written about lately, and from the analytical "legal relations" which Professor Corbin advocates. The former (the "relation" of the common law) is a species of concrete

human association, contrasted with such legal categories as contract and pure tort; the latter are generic categories embracing all phases of human conduct having legal consequences, including contract and tort. The legal consequences of the one are derived from a consideration of the interests involved in the particular relation, by a process largely intuitive; the legal consequences of the other are derived by *a priori* reasoning from the abstract nature of the concept. The latter is a logical conception; the former may be called, for lack of a better word, a sociological conception.

Dean Pound is not unaware of some of the disadvantages of the common-law relation. In the first place, it leads to a certain narrowness in the field of tort-liability; the judges tend to exclude liability with undue strictness where no "relation" is involved (p. 24). The passenger in the Pullman, for example, is entitled to the highest degree of care, but the tramp on the "blind baggage" is scarcely regarded as a human being. Again, the amplification of the incidents of a particular relation is apt to develop a sort of "law-of-nature," in which fanciful duties and over-refined standards of conduct are imposed. The fiduciary relations of equity (p. 25) have sometimes been over-refined. The law of mortgagor and mortgagee and of carrier and passenger might be drawn upon for further examples. Thirdly, while, as Dean Pound points out (p. 30), relation is to be distinguished from "status," or the capacity for legal rights and duties (infancy, coverture, slavery), yet is it not conceivable that the sum-total of the disabilities incident to a series of relations may be but little short of those imposed by an inferior status?

Of the eight essays, the one on "Puritanism and the Law" is the least convincing. Religious interpretations of legal history are apt not to be satisfactory, as the author realizes. At first we are told that the Puritan insisted upon a maximum of individual liberty, and, as a corollary thereto, desired a minimum of legislation (p. 46). Yet the Puritan, both in England and New England, was a prolific legislator (p. 47). Dean Pound endeavors to reconcile these two statements by saying that the Puritans believed in *instruction* through legislation (p. 47), in a multitude of rules with no adequate provision for carrying them into effect (p. 56). It seems too much to say that the "blue laws" were merely meant to be advisory. Weakness of law enforcement is a common American trait, not less conspicuous in the non-Puritan South than in Puritan New England. At all events, the author's indictment of Puritanism makes interesting reading.

In "The Pioneers and the Law" Dean Pound departs from his dazzling manipulation of ideas to give us a sociological interpretation of the formative period of American legal history. Here are depicted with bold, sure strokes the social factors of the period 1800-1860 which made for intense individualism in our legal and political philosophy and for certain archaic features in state judicial organization (pp. 121-2), for our "sporting theory" of judicial procedure (p. 125) and for many features of our slow and creaky machinery of criminal justice (p. 123).

The final chapter, deceptively entitled "Legal Reason," deals with the

stage of legal development upon which we are now entering: the "socialization of the law," in which legal philosophy is once more to come into its own (p. 149). The author takes pains to assure the timid reader that "socialization" does not mean "socialism" (p. 195). Here we are given a taste—but only a taste—of the methods and concrete results of sociological jurisprudence. Without attempting to define "interest" (Bentham gave it up nearly a century and a half ago), yet paraphrasing it carefully as "claim," "demand," "want," Dean Pound says, cautiously, that "at least" six groups of social interests may be enumerated as "involved in the existence of civilized society" (p. 208). Thus, the author's scheme of social interests is not a closed system; he does not purport to have discovered (as many legal philosophers before him have done) all the philosophical premises or criteria of a legal system.

The six groups of social interests are: 1, "the general security, the claim or want of civilized society to be secure from those acts or courses of conduct that threaten its existence," which includes "peace and order," "the general health," "the security of acquisitions" and "the security of transactions"; 2, "the security of social institutions," "domestic, religious and political"; 3, "the conservation of social resources," which seems to include natural resources, whether privately owned or not; 4, "the general morals, the claim or want of civilized society to be secure against those acts and courses of conduct which run counter to the moral sentiment of the general body of those who live therein for the time being." It is not clear that this group may not be distributed under the other groups; but it is perhaps worth while, pragmatically, to catalogue separately the demand that law shall not be out of harmony with popular sentiments generally. The author has elsewhere indicated that not all moral principles are to be turned into legal rules (pp. 43-44); 5, "general progress," "economic, political and cultural." This group must remain somewhat nebulous until the social scientists or the philosophers give us a definition of "progress." Dean Pound probably means to include such things as freedom of speech and of scientific research; 6, "the social interest in the individual human life, the claim or want of civilized society that each individual therein be able to live a human life according to the standards of the society." This interest is different from the individual's interest in his own life. It would seem to postulate the general prevalence of an altruistic social philosophy.

Individual interests are not included in this enumeration; apparently they are to be secured only in so far as they may happen to coincide with or run parallel to a social interest (p. 203). This subordination of individual interests is fundamentally opposed to the conclusion reached by all the dominant nineteenth-century schools of legal philosophy, since each of these, whatever its premises, finally arrived at the view that the object of law was to secure a maximum of individual self-assertion (p. 151).

Dean Pound gives a number of examples in which he contrasts the nineteenth-century way of looking at specific legal problems with the method of sociological jurisprudence (pp. 196-203). The method advocated is the

balancing of interests. "The criterion actually employed is the one proposed by William James as a principle of ethical philosophy—'since all demands conjointly cannot be satisfied in this poor world,' our aim should be 'to satisfy as many as we can with the least sacrifice of other demands'" (p. 199). This method seems essentially the same as that advocated by two leading Continental writers of the sociological school, Ehrlich and Kantorowicz. Dean Pound adopts the pragmatic ethics. But pragmatism is eclectic, a method rather than a system of philosophy. How are we to know which interests to protect and which to sacrifice? Surely it is not to be determined by a mathematical formula; we cannot count interests as we count votes, and adopt that solution of a problem which has a numerical majority of interests in its favor. The author here appears to rely upon Kohler's "jural postulates of civilization" (p. 82), for he emphasizes frequently "the existence of civilized society" as the fundamental thing to be protected (pp. 208, 201). Perhaps it is a virtue rather than a defect of sociological jurisprudence that it has no definite philosophical premises, no *Weltanschauung*. In many of the examples given by Dean Pound the solution, once we catalogue the interests involved, will appear fairly certain, whatever one's social philosophy may be. For the more doubtful cases, the sociological jurist is in a position to accept the conclusions of sociologists, if they have any.

So far as the present volume goes, the method put forth is that of balancing interests by intuition or on the basis of casual observation. Obviously, in balancing interests we are not to consider merely the individual case, but to treat it in terms of universal principles. The social interest in Jean Val Jean's existence must be secured in some other way than by sacrificing the universal social interest in the security of acquisitions as represented in the ownership of the loaf of bread. Yet even so, the method, if it is to be used as an instrument of constructive advancement rather than as an explanation of what has already happened, seems too subjective in its present shape to be an enduring criterion of legal rules and doctrines in a scientific age. The program of the sociological school includes a more exact plan of progress through coöperation between jurists and social scientists, whereby the former will adopt the scientific conclusions of the latter. How is this plan to be worked out? Where are we to get the trained investigators to carry out this program, and how are their results to be made available to the judge, the lawyer, and the legislator? Must the law lag behind until the sociologists' conclusions become axiomatic, or may we allow an elective judiciary, making, finding, interpreting, and applying the law by the method of judicial empiricism (Chapter VII), to balance social interests by the method of casual observation?

These and many other problems the author leaves unsolved. Ten years have passed since Dean Pound announced his treatise on sociological jurisprudence. The present volume—brilliant, erudite, stimulating, though it is—is not a fulfillment of that promise, which is yet to be redeemed.

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THE HISTORY OF CONSPIRACY AND ABUSE OF LEGAL PROCEDURE. By Percy H. Winfield. Cambridge: The University Press. 1921. Pp. xxvii, 219.

This is the first volume of a series to be issued under the general title, Cambridge Studies in English Legal History, edited by Harold D. Hazeltine, Downing Professor of the Laws of England in the University of Cambridge. The series will include two kinds of studies, monographs and editions of texts, this being the first of the monographs. The editor expresses the hope that two volumes a year may be issued.

A reading of the present volume confirms the editor's foreword that the work consolidates the results of years of painstaking, skilful and learned research. No statement in it goes unsupported by careful reference notes, so that a great wealth of original material has been collected and marshalled in the most available form.

The subject is one which carries the reader into unfamiliar fields, for it has never before been carefully investigated; but while many of the forms of abuse of legal procedure which the book discusses are no longer of practical importance, they present a most fascinating and dramatic picture of the long struggle of society to prevent legal institutions from playing into the hands of oppressors. We complain of our courts and their processes as slow, needlessly technical and lacking in operative efficiency, and we often feel that these qualities give wealthy suitors an indirect advantage over others, but we do not observe any widespread tendency on the part of predatory individuals or classes to deliberately employ the machinery of the courts for inflicting unlawful injury or obtaining unlawful advantages. Outside of the highly controversial question of injunctive relief in labor disputes, and barring epidemics of police persecution, the resort to the courts is generally conceded to be legitimate. Purely oppressive use of legal processes is comparatively rare.

But this was not always true, as the book under review amply proves. One is amazed at the panorama which the author presents of conspiracies confederacies, maintenance, false accusations, frivolous and vexatious litigation, champerty, embracery, barratry and malicious arrests. His chief interest is the scope and development of the remedies for these abuses. The great remedy, the writ of conspiracy, he believes did not exist at common law, but originated in the Statute of Conspiritors in 20 and 21 Edward I. It was usually employed in cases of false accusations of crime, but it was sometimes brought "against land-grabbers who would snatch with the law's hands that form of property which then epitomized wealth and power." "The story of what justifies conspiracy in its old sense is the story of a long struggle to solve the legal puzzle of punishing the rogue who would kill and rob with the law's own weapons without at the same time terrifying the honest accuser or plaintiff." "The law at times seems to barricade its windows against light and air, and to leave its doors unlocked to rascals." Eventually the writ, like most of those in the ancient register, became too rigid and gave place to the action on the case in the nature of conspiracy.

Punishment for conspiracy was savagely severe, but "crime was rife in high places." "In 1330 a sweeping provision of the King and Council requires all the sheriffs of England to be removed and not to be received back, and good people and sages of the law to be assigned throughout all England to inquire, hear and determine, at the suit of both King and party, conspiracies, oppressions, grievances and trespasses made between 1 Edward II and 4 Edward III by sheriffs, coroners, constables, bailiffs, hundredors and such other ministers and others." The judgment was that they should not thereafter be put on juries, that their lands, goods and chattels should be seized by the King, that their trees should be uprooted and their bodies imprisoned. Sometimes the punishment was by branding in the face and slitting the nose, and sometimes by loss of ears, pillory, whipping and fine. But the writ of conspiracy was itself perverted, and although it was designed to stop false accusations it became a means for stifling honest ones. The ordinary courts proved inadequate to cope with the evil, and only with the establishment of the Star Chamber was the crime of conspiracy "withered at its root."

Maintenance and champerty are traced through the early records in the same way. Coke believed that they were offenses at common law, but the author doubts this. Statutes began to be enacted in 3 Edward I, and were at first directed against the King's officers on account of the corruption so common among them. Maintainers and barrators became a universal pest, and "king after king tried to extirpate them, but never wholly succeeded." "At one moment the King, his Council and Parliament are giving remedies against these offences. At the next he and they are committing them." "Champerty and maintenance were wide spread over the kingdom, but at times were so virulent in particular districts as to call for special measures." Here again the Star Chamber proved the salvation of the people from the threatened deluge of corruption.

The history of the punishments for these and similar offenses against legal procedure casts a particularly interesting light upon our own problem of punishment for crime. The author points out that "wherever we find in the mediaeval statute-book a batch of exceptionally harsh statutes, we can nearly always infer that there were at that period a feeble or absentee King and a lawless baronage. It is a mark of such times that the punishments for many of the worst crimes against public order are in theory tremendous, and that the laws which fix them are little more than a dead letter owing to the venality or weakness of those charged with their execution." We would show a truer historical understanding if, instead of advocating heavier penalties for crime, we made the administration of the criminal law more swift and sure.

The book is prepared with such conscientious precision that the author seems deliberately to abstain from a natural inclination toward the imaginative and picturesque allusions and side-lights which so often grace the pages of Pollock and Maitland. But while requiring close reading it is by no

means dull, and is undoubtedly a contribution of the highest importance in its field. Such a volume is a positive inspiration to the reader of legal history, who so often has to choose between stupid thoroughness and lively superficiality.

EDSON R. SUNDERLAND.

GOVERNMENTAL CONTROL AND OPERATION OF INDUSTRY IN GREAT BRITAIN AND THE UNITED STATES DURING THE WORLD WAR. By Charles Whiting Baker. Carnegie Endowment for International Peace. New York: Oxford University Press. 1921. Pp. vii, 138.

On the whole, Mr. Baker's book is a defense of the government's control of industry during the war. Perhaps we are not far enough removed from the events to expect an entirely impartial discussion of such a controversial question. Some students, however, have more nearly approximated this desirable end. The tone of the book is generally temperate and the author is not insensible to the faults of government administration, but there is an evident tendency to subordinate these faults. Most fair-minded people will probably agree with the author that, looking at the broad results attained and bearing in mind the immensity of the problems and the urgency of immediate decisions, the records of government administration in Great Britain and the United States were as good as could have been reasonably expected. This is the author's thesis and is as well supported as it could be in the brief space of 138 pages. The reviewer wonders, however, if Mr. Baker has not exaggerated the opposition to his own views in asserting that the conservative middle classes "are well-nigh unanimous in condemnation of the way the government business was carried on." Does not the sentiment shown in the demand for a return of the railroads to private ownership and for the sale of our government-owned merchant marine to private operators merely indicate a belief that the necessities of war-time and wise policy in peace-time call for quite different programs? One feels in reading the book that the author is rather missing the point of the present popular disapproval of government control of business.

The book is valuable as a summary statement of the development and conduct of government control over industry during the war. There is a brief and interesting chapter on the nature of efficiency and on the difficulty of its attainment by a government. The author then proceeds *seriatim* through a discussion of government control of railways, public utilities, shipping, labor, capital, food, and fuel, and concludes with very brief chapters on the extension of government control in peace-time and the conflict between the executive and legislative branches of government. For the general reader, perhaps, the value of the book is enhanced by the omission of many details which would be desired by the more serious student.

For the student who is interested in government administration during this period, not so much for its own sake as for the principles of adminis-

tration which it may yield and for the light which it may throw on the normal peace-time relation of the state to industry, the book will be less satisfying. Without criticising the author for writing a book with another purpose, it may be suggested that what is now needed is a study of government administration of war activities in general from this latter point of view—a book undertaken in a sympathetic mood, giving full credit to the men who gave their best efforts to the successful prosecution of the war, but concerned primarily with distinguishing between the principles of administration which were shown to be valid and those which were shown to be fundamentally unsound.

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