THE FOUNDATIONS OF LAW.

It is occasionally the luck of a reviewer that in looking over a collection of books submitted for his consideration two or more of them will be found so closely allied in subject-matter as to yield themselves conveniently to group treatment. That has happened in the case of three books[1] before me at the moment. All of them deal more or less with the theory of law and two of them survey—one exclusively—the history of law. Of the three Dr. Holdsworth's book makes the most direct appeal to the practical mind because it serves to show that English lawyers in the mass are not concerned to find a philosophic basis for the principles of the Common Law. One can concede this and yet take issue with the generalization in Mr. Manson's *Builders of Our Law* that: "Englishmen are seldom philosophers. Of them it may be said, in Cicero's words, 'totum illud displicet philosophari.'" To say that is to ignore the impressive procession of philosophers in England from Bacon to Bertrand Russell—men who have "tuned the instruments of the muses" in the orchestra of modern thought. But confining myself for the present to the negligible influence of purely philosophic thought upon the content of the Common Law, it is easy to understand that those who sought to give England in the incipiency of her national life not only a workable but a distinctive system of law were more concerned with the practical bearings of its rules upon the temper and usages of the people than with a desire to make those rules respond to the requirements of any philosophy of law prevalent at the time. This was in no wise attributable to their ignorance of what had been done in relating philosophy to law by thinkers of the past and of their own times. For the royal justices of the thirteenth century, who laid the foundations of a system of law common to the whole of England by unifying and systematizing the heterogeneous collection of local customs that they found in the Plea Rolls, were familiar with the Civil Law, and its derivative

[1] *Some Lessons from our Legal History.* By W. S. Holdsworth, D.C.L., K.C. Hon. LL.D. Toronto: The Macmillan Company of Canada, 1928. Price $2.35. *Law and Morals.* By Roscoe Pound, Dean of the Harvard Law School. University of North Carolina Press. 1924. Price $1.50. *Forms of Individuality.* By E. Jordan, Professor of Philosophy in Butler University. Indianapolis: Charles W. Laut & Company, 1927. Price $5.00.

the Canon Law, as well as with the theory of law woven round the latter by the Scholastic philosophy. Vacarius had taught Roman Law at Canterbury (possibly at Oxford) in the twelfth century, and had prepared for his impecunious students a digest of Justinian known as the *Liber Pauperum*. But while the royal justices of Henry III's reign used the technique or method of the Roman Law to give coherence to the rules of the new body of law they were creating they did not concern themselves with the philosophy or juridical theories of the Civilians. So that if the royal justices, learned ecclesiastics as they were, turned aside from philosophy in their law-making, it is not surprising that when judicial offices in the latter part of Henry's reign began to be filled by laymen of small learning, who knew the Civil Law only as a foreign thing that offended their insular patriotism, we hear nothing of the metaphysics but a great deal of the mechanism of the law. Bracton, the best known to us of all the ecclesiastical judges, endeavoured to stem the unscientific trend given to the English law by unwise and unlearned ("per insipientes et minus doctos") laymen who in his time had ascended the Bench; and to counteract their influence was one of his motives for writing that great treatise "De Legibus et Consuetudinibus Angliæ," which endeavours to dress the infant Common Law in the Roman technique, and also feed it to some extent with the pure milk of the *Corpus Juris*. Perhaps it is not to be wondered at that the real influence of his work was postponed until Fitzherbert's "Grand Abridgement" of the Laws of England appeared in the sixteenth century, and Holt, C.J., in the early years of the eighteenth century built up the English law of bailments in *Coggs* v. *Bernard*. Since then our law has taken on a better architecture, if not a more rational spirit. But the prepossession for the more technical side of the law which characterized the early history of the legal profession in England has persisted down to our own time, and the result has been that the field of pure Jurisprudence—which in the opinion of some cuts athwart the domain of Philosophy—has been left to lawyers who choose to walk "the studious cloister's pale" rather than to pursue the more irksome though more lucrative path of the advocate; and while the result of their labours has greatly enriched the literature of the law, the books in which it is embodied are not carried into the Courts. So that the foreign observer might not be wide of the mark if he came to the conclusion that the practitioners of the Common Law subscribe to the

opinion expressed in one of Goldsmith's plays that "Philosophy is a good horse in the stable, but an arrant jade on a journey."

I pause for a moment to cite two judicial opinions from the books illustrating the point in a concrete way. In the old case of *Millar* v. *Taylor*,[2] Mr. Justice Willes said that in the practical affairs of the law "metaphysical reasoning is too subtle," and Mr. Justice Aston said that "great men ruminating back to the origin of things lose sight of the present state of the world." And, more than a century later, Mr. Justice Lindley in *Citizens Life Insurance Co.* v. *Brown*[3] thought that imputing malice to corporations introduced "metaphysical subtleties which are needless and fallacious."

Further instances might be cited from the reports revealing the age-long disinclination of English lawyers to set up a side-altar to Thales in the temple of Astraea, but lack of space forbids. I must be content with quoting two pertinent passages from Dr. Holdsworth's book. At page 94 he says: "The development of the Common Law has never been very directly or deeply affected by the speculations of legal and political theorists." Enlarging upon this at page 110 he remarks:

> The facts of life, with which our system of case law brings our common lawyers into close contact, are infinitely complex. No one theory will fit them all; and so our common lawyers have been content to go from precedent to precedent, and to build up gradually rules to fit each case, with the result that they have used a mixture of logic, of experience, and of legal and political theory, to evolve their principles. Hardly ever have they allowed themselves to become so enslaved to logic and theory, that they have evolved rules which are wholly out of harmony with the illogical and haphazard facts of daily life. Bagehot once said that 'there is a play in unconscious creation which no voluntary elaboration and preconceived fitting of distinct ideas can ever hope to produce.' No better illustration of this truth could be found than the history of the manner in which our Common Law has been built up; and this history goes far to explain the mental attitude of our common lawyers to legal and political speculation.

Dr. Holdsworth's book is abundantly interesting and instructive from cover to cover. It consists of a series of lectures delivered by him as Julius Rosenthal Foundation Lecturer for 1927 in Northwestern University, Chicago. In the first chapter the learned author emphasizes the necessity of a study of legal history in order to apprehend the manner in which the chief sources of our law came into being, how the rules of our law were gradually adapted to meet new

[2] (1769) 4 Burr. Pt. IV, at pp. 2334 and 2339.
[3] [1904] A.C. at p. 426.

needs, and the conditions of their efficient working. In the second chapter he points out the value of history in revealing the evolution and operation of two important parts of the mechanism of the Common Law—the Writ of Habeas Corpus and the Jury System. And here I pause to say that his comments on the usefulness of the Jury will gladden the hearts of its apologists in Canada. He says that for some hundreds of years it has been "constantly bringing the rules of law to the touchstone of contemporary common sense." In his third chapter Dr. Holdsworth shows that legal history opens the door of knowledge to those who would understand the sphere of influence of the Common Law in the domain of English political theory. Perhaps it is not too much to gather from his discussion of the subject that a great deal of the spirit and somewhat of the principles of the Common Law are subsumed in the English doctrine of Sovereignty. The title of the fourth chapter of the book is "A New Discourse on the Study of the Laws," and in it those who are still dubious about the value of university training in law will receive much enlightenment. Incidentally here the 'case method' comes in for a warm encomium.

* * * Dean Pound's book is composed of his McNair Lectures at the University of North Carolina in 1923. My notice of it is a tardy one, but time does not stale anything the Dean has to say about matters juristic. His themes may be age-worn but his treatment of them has an abiding appeal to the reading man. Speaking for myself, I laid aside Miss G. B. Stern's gripping *Debonair* to read the Dean's lectures, but of course a reviewer is not a reading man. He presents us here with a very lucid survey of the nature of law, the obligation of legal precepts, and the relation of law and morals as expounded respectively by the Historical, Analytical and Philosophical schools of the nineteenth century. He starts out with the statement that all discussion of the relation of law to morals and that of jurisprudence to ethics turns back to the thinkers of ancient Greece who sought a surer basis of legal obligation than "the mere habit of obedience," or the will of those who might be for the time being in control of the political machinery of the State; and after completing his survey of the methods of looking at the relation of law to morals by the three schools mentioned he states the result of it as follows:

> We have seen that no theory has been able to maintain itself, so that after twenty-four hundred years of philosophical and juristic discussion we are substantially where we began. If we said that to the analytical jurist

law was law by enactment, that to the historical jurist it was law by convention, and that to the philosophical jurist it was law by nature, we should do the cardinal juristic doctrines of the last century no injustice and should be putting them in terms that would be entirely intelligible to a Greek philosopher. Moreover, he would perceive that we are still debating the questions he debated and that at bottom we had made little progress with them.

Dean Pound also declares that while the limits of his lectures forbade a treatment of the relation of law and morals as incident to the sociological theories of the present day, yet the Greek philosopher would be inclined to treat the endeavour of our mechanical sociologists to put the matter wholly in terms of ethical custom as their way of saying what the historical jurist of the nineteenth century had already said, namely, that law was law by convention. Confronted with the conflicting theories of the ultimate sanctions of law by these schools of thought the practical lawyer is apt to conclude that all theorizing about the matter is futile, and agree with Carlyle's Teufelsdröckh that "naked Facts, and Deductions drawn therefrom in quite another than that omniscient style, are my humbler and proper province." But whether we are prepared to philosophize about our law or not there is a feeling abroad to-day that legal institutions must square themselves with the pervading sense of moral right in the community in which they prevail. It is but a natural growth of the modern spirit of Democracy which demands equality before the law, and equality is a term which has an ethical connotation. Dean Pound, speaking of the tendency of our time to coördinate law with other social institutions, says that:

> Along with this movement there has gone a revival of philosophy of law, through the rise of a social philosophical school of many types in place of the metaphysical school of the last century. And one feature of this revival has been new theories of legal precepts as having for their end the realization of moral rules, and in consequence a revival of the old subordination of jurisprudence to ethics.

The force of the argument against finding in moral rules the test of any right or duty prescribed by law lies, of course, in the fact that no code of morality is of universal acceptance, and ethical concepts vary with growth in spiritual enlightenment of particular communities. That is a commonplace of history. But if we regard morality in the abstract as an element constraining social conduct, it is nothing more than the better or loftier part of public opinion—what public opinion conceives to be just and right—and the public opinion of any democratic community is the opinion of the major-

ity of its members. This affords all that is needed for the ultimate sanction of law in a particular community, and legal rules made in conformity with it take on an ethical significance. At present certain social philosophers are girding at the "mere lawyer" for regarding the law as an end in itself instead of a means to an end, namely, a more perfect freedom for men in society. On his head is heaped the blame that this freedom has all too slowly broadened down from precedent to precedent. For him, so these philosophers hold, the rule of law is no more than a dreary routine of prohibitions and a discipline of fear; whereas they claim that its purpose should be to enable the State to make the life of its citizens happy. Well, that is getting back to the views of the old Greek political thinkers, which, as Dean Pound says, we cannot avoid doing when we forget the mechanism of the law and envisage its place in sociology. The orator Isocrates said that nothing devoid of the fundamentally beautiful was worth while, and that of all manifestations of life virtue is the most beautiful. Nor can later Greek thought be overlooked. Plotinus, the Neo-Platonist, writing in the third century of our era, declared: "Nor may those tell of the splendour of Virtue, who have never known the face of Justice and of Wisdom, beautiful beyond the beauty of Evening and of Dawn." To Plotinus living in society should be nothing else than an art and not a grim regimen; and the ideal of Plotinus may well be realized in the modern world if visible tendencies in our civilization are not checked.

* * * Professor Jordan's book is in a way complementary to Dean Pound's survey of the three great schools of legal theory which held the stage in the nineteenth century, as it is mainly a criticism of the diverse theories of our own day concerning the foundations of social order. In the author's view it is only from a synthesis of ethical, legal, economic, political and religious principles, as they have each and every one of them developed in the experience of mankind, that a satisfying practical philosophy of society can be derived. In this way the practical is conditioned as a speculative rather than a scientific conception.

Speaking generally of the law, Professor Jordan says:

> The law, like every regulative science, is an attempt to effect the adaptation of situations of fact to a standard idea, in this case an idea of 'right.' Put in simpler practical terms, it is the attempt to control, or, more accurately, to order, things in the interest of ends. It is however often overlooked that this regulatory notion of the law is really secondary. The

primary and essential purpose which represents the nature of the law is, as Aristotle says, the determination of what is just. And since the 'things' it attempts to control are just the things which create the ends for which the control is desired, no science has greater need of consistent and thoroughgoing critical analysis continuously applied in order to prevent the utter confusion of means and end.

Then, regarding the individual social entity—the 'person'—as the subject of rights and duties, he observes:

Insofar as a merely designative use is made of the definition it is made to refer to the 'natural person,' the biological and psychological individual. But for the law in its deeper insights the individuality is already beyond the reaches of mere fact and descriptive science, and, by the objective implications of 'right' and 'duty,' is made a question for metaphysics. The person gets its nature from the nature of things—not from itself. And this is implied in the primitive meaning of 'right' as that which is true to or squares with something other than itself, as something measured and valued by its references beyond itself. And the same implication is contained in 'duty' as what is 'bound' or 'owed' or 'obligated,' to something not itself. That is, the primary implications of individuality from the point of view of the law involve that synthesis of the particular with the universal which the rigor of logical theory forces upon the mind when the facts are once recognized. The law therefore represents that 'implicit' logic which is the core of human history and which gives it its point of value to human civilization. It is the fundamental universal feeling of the fitness of things made conscious as both the ground and guide to human endeavor, such an idea as that of 'common sense' as used in equity. The law is then the 'rightness' of life become consciously the means to the right life. Law is then the universal which life *means*. But individualism has frowned upon any such notions as these, as they are too difficult and 'metaphysical' for its immediatist purposes.

The criticism by the author of the present method of the law as that method appears in the working out of its fundamental conceptions, Property and Contract, is as drastic as it is provocative, and its bludgeon falls with impartial frequency upon what he thinks is inadequate in conservative, progressive and revolutionary theories of reform. It is impossible to give space here to any adequate synopsis of his opinions, and one more quotation from him must suffice. On the relation of the law of Contract to moral obligation he says:

Our criticism of contract under this head will undertake to show that the conception of contract as recognized by the traditional law and political theory has no kinship with the moral principle of obligation, and that this principle must be the foundation of the law which is to command the respect of men.

Professor Jordan is discursive in argument and his style in some portions of this work is atrociously bad. But who that is sworn of the tribe of Coke shall blaspheme over these defects?

* * * In leaving the three books under review is it not well to ask whether now is not a convenient season for common lawyers to take Philosophy out of the stable, to which we have seen her consigned, and try her quality on the road of law reform—a road which is bound to be much travelled henceforward whether we like it or not?

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THE OUTLAWRY OF WAR.—Secretary Kellogg's proposals for a treaty between the nations for the purpose of effectively outlawing War has met with great acceptance throughout the British Commonwealth. General Smuts, in a recent speech at Cape Town, expressed the view that the Kellogg programme afforded the world a fresh opportunity to build the fabric of world peace upon sure foundations. It supplies the missing activities of the United States in this behalf, because the League of Nations lacked the support of such activities—America not being a member of the League. General Smuts was persuaded that there are millions in America who feel that the League ought not be left to struggle for peace unaided by American brains and enthusiasm. By the Kellogg project the influence of such American sentiment will be turned in a practical direction towards securing what the League seeks to bring about. There is no doubt that Secretary Kellogg's proposals meet with the hearty support of the people of Canada.