REVIEWS AND NOTICES

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The Law in Quest of Itself. By LON L. FULLER. Chicago: The Foundation Press, Inc. 1940. Pp. vii, 147. ($2.00)

This book comprises the three lectures delivered by Professor Fuller at the Law School of Northwestern University in April of this year, which were provided for by the Julius Rosenthal Foundation for General Law. Here is no arid treatment of an abstruse subject. The lectures are informed by a balanced and easily followed argument, supplemented by illustrations, which reveals the dangers of legal positivism; and the discussion proceeds against a background of the function of legal philosophy, conceived as the attempt "to give a profitable and satisfying direction to the application of human energies in the law" (p. 2).

Professor Fuller concerns himself with a problem of choosing between alternative methods of applying our energies in law, of choosing between the two competing directions of legal thought called legal positivism and natural law. Legal positivism he defines as that direction of legal thought which purports to distinguish the law *that is* and the law *that ought to be;* natural law, on the other hand, denies that any exact differentiation of the *is* and the *ought* is possible. The adoption of the one or other of these approaches to law is of importance to the Judge, the counsel, the law professor and the law student, for the difference between them is the difference between sterility and creativeness.

The legal positivist seeks a critique by which he can tell what at any given moment is the law on any point, a criterion that will enable him to keep the law *that is* free from the taint of morality. Can the law *that is* be delivered pure, tied up in a neat package? Do not the questions "Is it law?" and "Is it good law?" generally overlap? Is it not true that in the progressive application of principles of the common law and in the interpretation of statutes the law *that is* is always in the process of becoming? Too, how can we say that there exists a body of moral precepts outside the law and independent of it when we must be aware of the extent to which the legal order shapes common morality? The law is clearly an important element in our moral environment; consider, for example, how it influences our conceptions of traffic morality or our sense of right and wrong in the business world. It is true that differences may be pointed to between law and morality but it does not follow from this that a criterion is discoverable which will enable one to make a sharp distinction between them.

Positivism in Hobbes', the father of the movement, and even in Austin's thinking, finds some anchorage in natural law. The imperative theory of law, under which men were to obey even unjust rules of the sovereign, was framed with a view to a definite political purpose, *viz.*, the primary need for peace and order. Hobbes was not otherwise concerned with distinguishing law from the whole field of morality. The later positivists have become so engrossed in pursuit of a criterion for making the distinction that they have hardly adverted to whether it would serve

any useful purpose. Their efforts have become exercises in analyzing or clarifying uses of legal language, done in the belief that clarity of thought requires that law and morality not be confused. As a result they have had nothing significant to say about the content of the law, a question of surpassing importance for the ordinary citizen.

The positivist position of looking to the commands of the sovereign, a single unity, as the test of the law *that is*, has become increasingly difficult in modern times when there is no easy answer to the questions who or where is the sovereign. Besides the problem presented by judge-made law there are problems for the positivists in the legal limitations on sovereignty, in contradictory commands, in gaps in the law. The ambiguity in Austin's work in respect of whether the sovereign was real or merely a juristic conception has found expression in modern realistic jurisprudence and in the normative jurisprudence of Kelsen. In the realistic tradition, Gray in his *Nature and Sources of the Law* defined law as rules *laid down* by the Courts. The problem of disagreeing Judges could be resolved only by saying that law was what was laid down by a majority of the Supreme Court, and Gray departed too from Holmes' early assertion that law consisted of rules *acted on* by the Courts. Because the sovereign was not a tangible creature the realistic development has generally been in the direction of trying to discover what the Judges do rather than what they say. Realists study judicial behaviour patterns, but Professor Fuller says that he has never seen a behaviour pattern of a Judge and has no notion of what one would look like. The realist programme, he feels, is based on three assumptions: (1) that a strict separation of the *is* and *ought* is possible, enabling law to be studied apart from its ethical context; (2) that this separation is so desirable that it is unnecessary to justify the expenditure of human energy needed to achieve it; and (3) that apparently only after the *is* has been scientifically and completely extracted can anything significant be said about the *ought*. The inhibitive effect of a positivist approach to legal thinking, even without the reinforcement of realism, is plainly evident in many sections of Canada where little attention is paid to the content of the law, the search is always for the "neat" case and a counsel is careful to "know his Judge". Realism modernizes this bent and even carries over into the moving world of fact the attempt, as in the moving world of law, to separate the *is* and the *ought;* the tendency is to prefer the non-moral facts, those capable of statistical presentation, to the neglect of those attitudes and conceptions, intangible to be sure, which pervade the field of legal study.

Kelsen was aware that the sovereign was intended to serve the purpose of making possible a distinction between the law *that is* and the law *that ought to be;* but the sovereign was no longer something real, and while it was set up to circumscribe the field of law it itself could be defined only in legal terms, involving a begging of the question which positivism had to answer. Accordingly Kelsen substituted for the Austinian sovereign a basic norm, a postulate or assumption which should be the touchstone of what is law. Those rules which were consistent with or in accordance with the basic norm (itself an *ought*) were rules of law. The idea of a basic norm meant a constitutional legal order with the constitution as the highest norm, although it does seem that there must be some ultimate norm behind the constitution to give it validity. Professor Fuller asserts that Kelsen is merely offering an analysis of assumptions ordinarily

underlying positivism, these assumptions being the expression of certain ethical desiderata which Hobbes discussed, *e.g.* the need for peace and order, but which later positivists have largely ignored (p. 75).

The departure of the realist and Kelsen schools from the Austinian position has resulted in their ending up in the realm of pure fact and of pure assumption respectively. And as to Kelsen's alleged dynamism of his view, Professor Fuller finds it as dynamic as an empty wheelbarrow; "To be sure you can dump anything you wish into it, and you can push it in any direction you like. But there is absolutely nothing to make it go" (p. 114). This is positivism divorced from any ethical objective.

In treating of natural law Professor Fuller emphasizes that he is not advocating any doctrine of natural rights. That the two have no necessary relation is quite clear from numerous judgments of our Canadian Courts in which a "natural rights" attitude has been obstructive to a development of the law *that ought to be;* and this largely because those natural rights stem from a refusal to modify old conceptions in the light of present day needs. The natural law turn of mind believes in pushing reason as far as it can, though it is quite clear that a social order founded on reason alone is unattainable. But positivism stultifies human effort in so far as it denies the independent force of ideas or sees limits to their growth. What may be called "positive law" governs only a small area of human relations, that area in which the possibility of conflict is most likely or in which common conceptions of justice are not a sufficient sanction. In the large field of autonomous order a combination of custom and natural law governs and regulates problems of the social order. An extension of the changing field of autonomous order is preferable to its contraction with the resultant growth of the legal order, lest every man become officer to another. A revival of natural law would be of consequence at a time "when our social structure requires to be held together by a cement firmer than that supplied by the abstract principle of respect for law as such" (p. 116).

Among the reasons for the strength of American positivism is the influence of a negative notion of democracy under which majority rule is preferred because it is most likely to be obeyed rather than because it is most likely to be right. This is nurtured by an intellectual skepticism of the possibility of achieving justice. "Democracy is rested not on an affirmation, but on a denial that government and law can in the end be anything but arbitrary" (p. 121). But, says Professor Fuller, "democracy must be founded not on a negation of the force of ideas but on a faith that in the long run ideas are more important than the men who form them" (p. 122). Only a barren trust in majority rule could induce the belief that major social readjustments could be carried through without some common faith or programme. The pre-eminence of democracy lies in the forces which are permitted to play on the electorate, on the free play of ideas. Contrast this with the dictatorship countries where ideas owe their success to their capacity to serve the interests of those in power. "Some minimum faith in ideas is necessary to give practical significance to the doctrine of free speech and free thought" (p. 126).

Professor Fuller is of opinion that the effects of legal positivism are traceable in the notes on recent cases in American law reviews which fail to discuss the extra-legal considerations in those instances in which they say that such considerations have conduced to the court's decision. Then

there is the tendency to seek legal reform by legislation which, of course, fits more easily than does judge-made law into positivistic theory. Finally, there is the effect positivism has on legal writing in demanding an answer to the question whether the article states the law or the writer's idea of what the law ought to be. Creative legal writing has received none too cordial a reception, by the Courts in Canada at any rate, though in very recent years there have been hopeful indications of a changing attitude.

The reviewer has restated Professor's Fuller's arguments at some length and, he hopes, with care, intruding his own opinions to but a limited extent. No doubt he has in the retelling, to borrow Professor Fuller's illustration, produced something which combines the lectures as he read them and his understanding of them, so that this review is a product of the *is* and the *ought*. He found *The Law in Quest of Itself* stimulating and provocative, and deserving of a wide circulation. We in Canada, where there has been little articulation of legal philosophy, can derive much useful instruction from this and other such books, which the maturer legal order of the United States has brought forth. And we can hope that very soon our own legal scholars will give us works of equal merit.

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Toronto.

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Trust Business in Common Law Countries. By GILBERT T. STEPHENSON. New York: Research Council, American Bankers Association. Pp. 901. ($5.00)

The Research Council of the American Bankers Association has published a series of trust research studies of which the present volume is the fifth. It has been prepared by a leading authority on trust business, Mr. Gilbert T. Stephenson, who is Director of the Trust Research Department of the Graduate School of Banking of the American Bankers Association, and an instructor in the course in Trusts in the same institution. While Mr. Stephenson is now a research director his knowledge of trust business was for the most part acquired in the practical school of experience as vice-president of a trust company, and prior to that he practised at the Bar of his native North Carolina.

One of the chief values of a series of studies on trust business in different countries of the world is the fact that such studies invite comparative study. The author analyzes trust business in each of the common law countries as a separate and complete study. Eighteen of the twenty chapters cover trust business in England, Wales, Scotland, Ireland, Canada, New Zealand, Australia, South Africa, British India, and other countries of the British Commonwealth, as well as the United States. All phases of trust company functions and trust business are covered under such standard topical heads as: historical background, trust institutions, trust functions, trust policies, trust compensation, trust legislation, trust statistics, trust earnings, trust supervision, trust promotion, trust education, trust literature, trust associations, trust branches, and so on.

While the roots of trust business reach back into the 19th and in the case of British India even into the 18th century, the development of trust business throughout the common law world is essentially a phenomenon

of the 20th century. The desire for the performance of certain functions by trust companies seems to have made itself felt almost simultaneously over a wide area. Trust business began at nearly the same time in the United States, South Africa, New Zealand and Canada. These countries must have had something in common which made them, unknown to each other so far as the record reveals, turn to corporations of the same general type — trust companies, banks, insurance companies and public trustees, for their trust services.

The main thesis of the book is that there is a common law system of trust business which is an outgrowth of the common law itself. "Is a lawyer or trust man interested in the collective investment of trust funds? Let him study the common funds of New Zealand, Australia and the United States. Is he interested in the state's going into the trust business? Let him study the public trust offices of England, New Zealand, Australia and British India. Is he interested in the guaranteeing of trust funds? Let him study the guaranteed accounts of Canada. Is he interested in the relations between banking and trust business? Let him study the Canadian and English systems. Is he interested in the relations between the practice of law and trust business? Let him study the situation in South Africa. Is he interested in trust legislation? Let him study the trust Acts of England, Scotland, Canada, New Zealand and British India. Is he interested in the government supervision of trust business? Let him study the systems of the United States and Canada . . . . . Is he interested in custodianship and in advisory trusteeship? Let him study the systems of New Zealand and Australia . . . . . By every test, then, the system of each common law country seems to be an offspring of a general common law system of trust business."

The appendix includes "The Manitoba Trustee Act," (S.M. 1931, cap. 52, as amended 1935, 1937 and 1938). It will be recalled that in 1927 the Committee of the Canadian Bar Association on Comparative Provincial Legislation and Law Reform drafted a uniform trustee Act and submitted it to the Association and to the Conference of Commissioners on Uniformity of Legislation in Canada. Consideration of the proposed Act by the Commissioners was shelved because of the length of time that would be required for this purpose and because of the fact that there was no immediate demand for it by the various provinces. It was laid over, therefore, until such time as three or more of the Attorneys-General of the provinces requested the Commissioners to reconsider the matter. The draft Act was based largely on the English Trustee Act of 1925 and the Ontario Act as revised in 1926. The Manitoba legislation followed substantially the draft uniform act. The author expresses the hope that with a view to modernizing and improving the several trustee Acts, the other provinces will take steps before long to revise them and will use the draft uniform Act as the basis for such revision.

Mr. Stephenson's style is most readable, the arrangement of subject matter is excellent, and there is a helpful 55-page index.

J. RAGNAR JOHNSON.

Toronto.