

Law Finding Through Experience and Reason (Book Review)

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the fine features and substance of the prior editions, and has proceeded to even higher levels of scholarship; he has updated and clarified, amplified and revived the cornerstone of contract law. Not only has Doctor Jaeger provided the bench and the bar with the ultimate authority in the field of contracts, but he also has provided an example of dedication and scholarship for his confreres who desire to share their knowledge and love of the law.

JOHN G. MCGOLDRICK *



LAW FINDING THROUGH EXPERIENCE AND REASON. By Roscoe Pound. Athens, Georgia: University of Georgia Press, 1960. Pp. 65. \$2.50.

As Dean J. Alton Hosch says in his Foreword, the School of Law at the University of Georgia was chartered in 1859, and a prospectus of the opening session on October first was issued in June of that year. To inaugurate the Centennial Celebration, Dean Emeritus Roscoe Pound of Harvard Law School was invited to give the lectures now published in this book. Neither Dean Hosch nor Dean Pound mentions the unhappy occurrence in 1861 of the firing on Fort Sumter, which, with its historic aftermath, undoubtedly affected the early days of this effort to advance legal education from office apprenticeship training into regular university studies. Dean Hosch does mention, however, another happier anniversary, Dean Pound's ninetieth birthday, which occurred in 1960. Were this little book not remarkable for its content it would still have a unique significance of its own.

As a matter of fact, those familiar with Dean Pound's long list of distinguished publications in the field of jurisprudence will find several new and welcome ideas expressed here. The author does refer to some of his better known views, but he himself tends to speak of them in the past tense, and hails more recent developments as being of current significance. For example, he mentions his former use of the word "social" in speaking of social engineering or social interests, but notes that "social" has now become an unpopular word. His earlier habit of speaking of "received ideals" now yields to a new concern with "principles." He shows the shift in emphasis from property to person, from

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"consideration" to promise, and from deduction to analogies, in recent juridical reasoning; and devotes a whole lecture to the trend away from "stare decisis," or stability, as an end in itself, and toward treating the decisions as a means of finding justice in changing situations. He does not, however, accept Judge Jerome Frank's overemphasis on fact-finding as a judicial function, nor does he accept codification as a suitable goal.

Briefly, he places a renewed reliance on the reasoning process coupled with experience, and rejects the theory that law is binding because it is politically enforceable. Obligation he considers more moral than political, and based upon justice rather than formal enactment. This he acknowledges to be a different foundation from that of enforcement still currently held by many who were trained in an era of "strict" law. His characteristic practice of reading widely in comparative law fields, and especially among contemporary jurists of the civil law system, tends to draw him ever further away from the 19th century positivist schools. His own development seems to be leading him away from an alien philosophical idealism and back toward the moderate realism implicit in the common law.

The writers he mentions as important continue to include Stammler, Kohler, and Radbruch. He is more impressed with Bentham's procedural reforms, however, than with the latter's and Austin's theories of law as sovereign command. He considers the unification of commercial law since Mansfield a real advance. And he relies on Coke, rather than Blackstone, for an exposition of the "artificial" reasoning of the law. On page 28 he pays an unusual tribute to François Géný, saying that his "book has not been appreciated as it deserves in the English-speaking world which, perhaps, has been repelled by an atmosphere of Thomistic orthodoxy which does not affect its intrinsic value." This recalls, of course, Justice Holmes' opinion to the contrary in the latter's petulant comment about natural law¹ in noting the appearance of the Géný volume that reached this country around 1918.

Dean Pound acknowledges on several occasions the importance of philosophy in the development of law. He looks toward the universal idea of the medieval jurists as a basis for the world law needed today rather than to the enactments of a politically organized world-state. He recalls that a council of the early church, in a pronouncement of Christian morals incorporated in the *Corpus Juris Canonici*, laid down faithful keeping of promises as a tenet of Christian morals. Indeed he says that "philosophy of law, as we understand it today, begins with St. Thomas Aquinas."

¹ Holmes, *Natural Law*, 32 HARV. L. REV. 40 (1918).

And he observes that "in 1891 Ihering noted a tendency to depart from ideas which had governed the maturity of law," *e. g.*, property was formerly valued over person, but now, person is valued over property. Dean Pound is not quite conversant enough with the "new jurisprudence" of the social encyclicals of Popes Leo XIII and Pius XI (Pope John's *Mater et Magistra* was issued in 1961, subsequent to these lectures) to remember that 1891 marked the appearance of *Rerum Novarum* of Pope Leo XIII, and that Ihering's recognition of a new trend was therefore not surprising. There is, however, still lingering in Dean Pound's memory the former attribution to Grotius rather than to Vitoria of the foundation of international law, which suggests an inconsistency with his own rejection of the will-command theory of law (closer to Grotius) in favor of the reason-justice theory (closer to Vitoria). And he still speaks of the "emancipation" of jurisprudence from theology although he may be thinking of 16th century theocracy rather than 13th century realism.

The wide learning characteristic of all Dean Pound's writings is to be found in this book. His ability to make jurisprudence interesting as well as important is here as well. And his brief but pointed allusions to matters that still puzzle law students, such as consideration in contracts, causation in torts, lack of intent in actions on the case or negligence, the narrowing of issues in pleading, strict liability, property rights in oil and gas, injuries arising "in the course of" employment, unjust enrichment, fictions, good faith, and similar topics, tend to give new hope that contemporary students of the law may meet the need for greater clarification more successfully than their predecessors have done. If a challenge is expected, it also can be found here, where he says: "There is need of study of reasoning from analogies in the civil law, in the common law, and in the overhauling of law which is going on today."² For all these reasons this is a good book to read, to buy, to keep. Both Dean Hosch and Dean Pound are to be congratulated on this important commemoration of the founding of the University of Georgia Law School one hundred years ago.

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² POUND, LAW FINDING THROUGH EXPERIENCE AND REASON 46-47 (1960).

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