LAW

AS A MEANS TO AN END

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GENERAL INTRODUCTION TO THE SERIES

By the Editorial Committee

"Until either philosophers become kings," said Socrates, "or kings philosophers, States will never succeed in remedying their shortcomings." And if he was loath to give forth this view, because, as he admitted, it might "sink him beneath the waters of laughter and ridicule," so to-day among us it would doubtless resound in folly if we sought to apply it again in our own field of State life, and to assert that philosophers must become lawyers or lawyers philosophers, if our law is ever to be advanced into its perfect working.

And yet there is hope, as there is need, among us to-day, of some such transformation. Of course, history shows that there always have been cycles of legal progress, and that they have often been heralded and guided by philosophies. But particularly there is hope that our own people may be the generation now about to exemplify this.

There are several reasons for thinking our people apt thereto. But, without delaying over the grounds for such speculations, let us recall that as shrewd and good-natured an observer as DeTocqueville saw this in us. He admits that "in most of the operations of the mind, each American appeals to the individual exercise of his own understanding alone; therefore in no country in the civilized world is less attention paid to philosophy than in the United States." But, he adds, "the Americans are much more addicted to the use of general ideas than the English, and entertain a much

greater relish for them." And since philosophy is, after all, only the science of general ideas — analyzing, restating, and reconstructing concrete experience — we may well trust that (if ever we do go at it with a will) we shall discover in ourselves a taste and high capacity for it, and shall direct our powers as fruitfully upon law as we have done upon other fields.

Hitherto, to be sure, our own outlook on juristic learning has been insular. The value of the study of comparative law has only in recent years come to be recognized by us. Our juristic methods are still primitive, in that we seek to know only by our own experience, and pay no heed to the experience of others. Our historic bond with English law alone, and our consequent lack of recognition of the universal character of law as a generic institution, have prevented any wide contact with foreign literatures. While heedless of external help in the practical matter of legislation, we have been oblivious to the abstract nature of law. Philosophy of law has been to us almost a meaningless and alien phrase. "All philosophers are reducible in the end to two classes only: utilitarians and futilitarians," is the cynical epigram of a great wit of modern fiction.[1] And no doubt the philistines of our profession would echo this sarcasm.

And yet no country and no age have ever been free (whether conscious of the fact or not) from some drift of philosophic thought. "In each epoch of time," says M. Leroy, in a brilliant book of recent years, "there is current a certain type of philosophic doctrine — a philosophy deep-seated in each one of us, and observable clearly and consciously in the utterances of the day — alike in novels, newspapers, and speeches, and equally

[1] M. Dumaresq, in Mr. Paterson's "The Old Dance Master."

in town and country, workshop and counting-house." Without some fundamental basis of action, or theory of ends, all legislation and judicial interpretation are reduced to an anarchy of uncertainty. It is like mathematics without fundamental definitions and axioms. Amidst such conditions, no legal demonstration can be fixed, even for a moment. Social institutions, instead of being governed by the guidance of an intelligent free will, are thrown back to the blind determinism of the forces manifested in the natural sciences. Even the phenomenon of experimental legislation, which is peculiar to Anglo-American countries, cannot successfully ignore the necessity of having social ends.

The time is ripe for action in this field. To quote the statement of reasons given in the memorial presented at the annual meeting of the Association of American Law Schools in August, 1910: —

> The need of the series now proposed is so obvious as hardly to need advocacy. We are on the threshold of a long period of constructive readjustment and restatement of our law in almost every department. We come to the task, as a profession, almost wholly untrained in the technic of legal analysis and legal science in general. Neither we, nor any community, could expect anything but crude results without thorough preparation. Many teachers, and scores of students and practitioners, must first have become thoroughly familiar with the world's methods of juristic thought. As a first preparation for the coming years of that kind of activity, it is the part of wisdom first to familiarize ourselves with what has been done by the great modern thinkers abroad — to catch up with the general state of learning on the subject. After a season of this, we shall breed a family of well-equipped and original thinkers of our own. Our own law must, of course, be worked out ultimately by our own thinkers; but they must first be equipped with the state of learning in the world to date.
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> How far from "unpractical" this field of thought and research really is has been illustrated very recently in the Federal Supreme Court, where the opposing opinions in a great case (*Kuhn* v. *Fair-*

mont Coal Co.) turned upon the respective conceptions of "law" in the abstract, and where Professor Gray's recent work on "The Nature and Sources of the Law" was quoted, and supplied direct material for judicial decision.

Acting upon this memorial, the following resolution was passed at that meeting: —

That a committee of five be appointed by the president, to arrange for the translation and publication of a series of continental masterworks on jurisprudence and philosophy of law.

The committee spent a year in collecting the material. Advice was sought from a score of masters in the leading universities of France, Germany, Italy, Spain, and elsewhere. The present series is the result of these labors.

In the selection of this series, the committee's purpose has been, not so much to cover the whole field of modern philosophy of law, as to exhibit faithfully and fairly all the modern viewpoints of any present importance. The older foundation-works of two generations ago are, with some exceptions, already accessible in English translation. But they have been long supplanted by the products of newer schools of thought which are offered in this series in their latest and most representative form. It is believed that the complete series will represent in compact form a collection of materials whose equal cannot be found at this time in any single foreign literature.

The committee has not sought to offer the final solution of any philosophical or juristic problems; nor to follow any preference for any particular theory or school of thought. Its chief purpose has been to present to English readers the most representative views of the most modern writers in jurisprudence and philosophy of law. The series shows a wide geographical representation; but the selection has not been centered on the

notion of giving equal recognition to all countries. Primarily, the desire has been to represent the various schools of thought; and, consistently with this, then to represent the different chief countries. This aim, however, has involved little difficulty; for Continental thought has lines of cleavage which make it easy to represent the leading schools and the leading nations at the same time. Germany, for example, is represented in modern thought by a preponderant metaphysical influence. Italy is primarily positivist, with subordinate German and English influences. France in its modern standpoint is largely sociological, while making an effort to assimilate English ideas and customs in its theories of legislation and the administration of justice. Spain, Austria, Switzerland, Hungary, are represented in the Introductions and the shorter essays; but no country other than Germany, Italy, and France is typical of any important theory requiring additions to the scope of the series.

To offer here an historical introduction, surveying the various schools of thought and the progress from past to present, was regarded by the committee as unnecessary. The volumes of Dr. Berolzheimer and Professor Miraglia amply serve this purpose; and the introductory chapter of the latter volume provides a short summary of the history of general philosophy, rapidly placing the reader in touch with the various schools and their standpoints. The series has been so arranged (in the numbered list fronting the title page) as to indicate that order of perusal which will be most suitable for those who desire to master the field progressively and fruitfully.

The committee takes great pleasure in acknowledging the important part rendered in the consummation of this project, by the publisher, the authors, and the translators. Without them this series manifestly would have been impossible.

To the publisher we are grateful for the hearty sponsorship of a kind of literature which is so important to the advancement of American legal science. And here the Committee desires also to express its indebtedness to Elbert H. Gary, Esq., of New York City, for his ample provision of materials for legal science in the Gary Library of Continental Law (in Northwestern University). In the researches of preparation for this Series, those materials were found indispensable.

The authors (or their representatives) have cordially granted the right of English translation, and have shown a friendly interest in promoting our aims. The committee would be assuming too much to thank these learned writers on its own behalf, since the debt is one that we all owe.

The severe labor of this undertaking fell upon the translators. It required not only a none too common linguistic skill, but also a wide range of varied learning in fields little travelled. Whatever success may attend and whatever good may follow will in a peculiar way be attributable to the scholarly labors of the several translators.

The committee finds special satisfaction in having been able to assemble in a common purpose such an array of talent and learning; and it will feel that its own small contribution to this unified effort has been amply recompensed if this series will measurably help to improve and to refine our institutions for the administration of justice.

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EDITORIAL PREFACE TO THIS VOLUME

By Joseph H. Drake

I. The Author and The Translator. Rudolf J. von Ihering was born at Aurich, in East Friesland, on August 22, 1818. He was descended from a long line of lawyers and administrators. Following the family tradition he studied law, hearing lectures at Heidelberg, Munich, Göttingen and Berlin. He received his doctor degree from the University of Berlin in 1842, with a dissertation entitled "De Hereditate Possidente." In the following year he began work as an instructor in law. He became professor of law at Basel in 1845, was called to Rostock in 1846, to Kiel in 1849, to Giessen in 1852, and to Vienna in 1868. In 1871 he was recalled from Austria to the newly established German university at Strassburg. After one year's residence here he received a call to Göttingen, where he continued to teach until his death, on September 17, 1892, declining calls to Leipsic and Heidelberg. During his stay at Vienna he received his title of nobility from the Emperor of Austria.

The first volume of "Der Zweck im Recht" was published in 1877; the second volume, not until 1883. The English work here presented is a translation of the first volume of the 4th German edition, published by Breitkopf and Härtel (Leipsic, 1903). The other published works of the author are: "Abhandlungen aus dem römischen Rechts" (Leipsic, 1844); "Zivilrechtsfälle ohne Entscheidung" (Leipsic, 1847; 11th edition, Jena, 1909); "Der Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwickelung" (4 vols., Leipsic, 1852–1865; 5th and 6th editions, Leipsic, 1906–

07); "Ueber den Grund des Besitzschutzes" (Jena, 1868; 2nd edition, Jena, 1869); "Die Jurisprudenz des täglichen Lebens" (Jena, 1870; 13th edition, Jena, 1908); "Der Kampf ums Recht" (Regensburg, 1872; 17th edition, Vienna, 1910); "Vermischten Schriften juristischen Inhalts" (1879); "Gesammelte Aufsätze" (3 vols., 1881); "Das Trinkgeld" (Brunswick, 1882; 3rd edition, 1889); "Scherz und Ernst in der Jurisprudence" (Leipsic, 1885; 10th edition, Leipsic, 1909); "Der Besitzwille; Zugleich eine Kritik der herrschenden juristischen Methode" (Jena, 1889). After his death there appeared "Die Vorgeschichte der Indo-Europäer" (Leipsic, 1894) and "Die Entwickelungsgeschichte des römischen Rechts" (Leipsic, 1894). In 1852, he established along with Gerber the "Jahrbücher für die Dogmatik," which immediately became one of the most important legal periodicals of Germany, a position due in great part to Ihering's contributions to it.

A sketch of his life by Mitteis may be found in "Allgemeine Deutsche Biographie," Vol. L. A very interesting and sympathetic account of him as a scholar, teacher and man was published by Munroe Smith in the articles entitled, "Four German Jurists" ("Political Science Quarterly," Vol. 10, pp. 664–692 and Vol. 11, pp. 278–309). A critical appreciation of him by his pupil and life-long friend, Adolf Merkel, appeared in the "Jahrbücher für die Dogmatik" shortly after his death. This has been translated and published in this volume in Appendix I.

"Der Kampf ums Recht" has been translated into English, under the title of "The Struggle for Law," by John J. Lalor of the Chicago Bar. Chicago: Callaghan and Company, 1879. "Die Jurisprudenz des täglichen Lebens" has been translated by Henry Goudy, D. C. L., Regius Professor of Civil Law in the University of Oxford, under the title of "Law in Daily Life." Oxford: Clarendon Press, 1904.

The translator of the present volume, Dr. Isaac Husik, is a Ph.D. of the University of Pennsylvania. He is Instructor in Hebrew, Gratz College, Philadelphia and a Lecturer on Philosophy in the University of Pennsylvania, a member of the American Philosophical Association, of the American Association for the Advancement of Science and of the Third International Congress of Philosophy, held at Heidelberg, September, 1908. He has written articles on the Aristotelian philosophy and other topics, and is well known as an authority in mediæval philosophy.

II. BENTHAM AND IHERING. To American lawyers Ihering is known as the German Bentham. The similarities between them are due rather to the facts that they thought along the same lines, that each belonged to a transition period in the legal thinking of his own country, and that each suggested similar correctives for the legal fallacies of his time and his environment, than to any direct imitation of the English Utilitarian by the German jurist. In the first volume of "Der Zweck im Recht" it will be noted that Ihering makes but little use of Bentham's ideas. In the second volume, published six years after the first, when he comes to a presentation of his own ethical theory, he cites Bentham as a commendable type of the earlier Utilitarians. He credits Bentham (Vol. II, p. 133) with a very important contribution to ethical theory. "Those concepts which appear but dimly in Leibnitz ('omne honestum publice utile, omne turpe publice damnosum'), which Kant, too, had before him in his 'supremely good' ('Weltbesten'), Bentham first recognized with perfect clearness, and, under the very appropriate name of Utilitarianism developed into an independent ethical system." But

it is evident that Ihering uses Bentham's fundamental concept merely as a starting point for his own philosophy. Taken as a point of departure, however, it is, as Ihering himself says, of the greatest importance.

Bentham's basic maxim was that the test of right and wrong is the greatest happiness of the greatest number. He thought that in this he had discovered a principle of ethical and legal calculus by the use of which ethical norms and legal rules could be worked out which would have absolute validity. "Nature," says Bentham, "has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*. The principle of utility recognizes this subjection and assumes it as the foundation of that system. By the principle of utility is meant that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question." This doctrine is of course not new, but in Bentham's hands it was turned from a philosophic doctrine into a political device for the legislative reform of an effete legal system. It commends itself for its simplicity. Find out what rules are adapted to bring about the greatest happiness for the greatest number, adopt these rules as laws by the sovereign power of the state, and a political and legal millennium is assured.

Though Ihering cites Bentham's basic concept with approval, he also gives in his criticism of him the distinction between his own social utilitarianism and Bentham's purely subjective view. Utility was with Bentham that which was useful to the individual, and this "subjectively useful is wrongly exalted as the measure and criterion of the objectively and socially useful." The good of the individual is never an end in itself but only a means for accomplishing a social purpose. An

individual may act for his own happiness, but this is to be done not in his own interest but in the interest of society, and this relation of the individual to society cannot be determined by "any abstract theoretical formula, but by practical considerations." Bentham's theory of law is a purely individualistic one. The law is to be invoked as a means of securing and protecting the welfare of the individual. This theory is more fully elaborated by Mill and the later English Utilitarians. With Ihering, on the other hand, law is a social force, created by society, and to be used for the benefit of the individual interest only in so far as the interest of the individual coincides with the interest of society.

Bentham and Ihering are alike in espousing an imperative theory of law, and both are brought to this not only by natural bent, but also even more by their reaction against the juristic thinking of their times. The earliest incentive to Bentham's juristic efforts came by way of repulsion to Blackstone. The doctrine of the original contract had been appealed to by Blackstone to explain the origin of society and law, and, although he disavowed definite belief in it, he had not shown just how much he really retained. He also speaks vaguely of a "natural society" that apparently grows out of the expanded family, but closes this paragraph by saying that the "original contract . . . in nature and reason must always be understood and implied in the very act of associating together." Bentham pounced on this unfortunate wabble and, after rending in tatters Blackstone's verbose contradictions, substitutes for them the simple principle of utility, which furnishes the only clew to guide one through this maze. Blackstone's definition of law was equally faulty. He puts in close juxtaposition a traditional and an imperative theory of law. Bentham boldly threw aside the traditional ele-

ment in law, poured out the vials of his wrath on the Blackstonian political optimism that lauded the system of common law as the most perfect conceivable one, and brought our whole system of jurisprudence to the test of expediency, insisting that all its provisions should be brought by legislation to conform to the wants of men and to the promotion of the greatest happiness.

As Blackstone is Bentham's *bête noire*, so is Puchta that of Ihering. Savigny, the greatest German jurist of the first half of the nineteenth century, reacting against the natural law concepts of the preceding generation, had set forth with wonderful scholarly acumen and broad historical grasp the idea that law is, like language, an historical product of the life of a people. This seems to carry with it by implication a sort of legal fatalism. The jurist can have but little influence in determining how the law is to develop. His activity as an historian is limited to a study of what is and has been in legal phenomena and his juristic philosophy to a generalization of the principles which explain these facts. Savigny, as a practical jurist and historian of the law, was never carried off his feet into the whirlpool of juristic metaphysical speculation; but Puchta, his contemporary, who was more philosopher than jurist, indulged to the full the Teutonic tendency toward abstract generalization. Ihering's expressions of disgust with these philosophic vagaries, as uttered by himself in the latter part of his "Scherz und Ernst" and in the preface to "Der Besitzwille," remind one of the opening paragraphs of Bentham's "Fragment on Government," with his like condemnation of Blackstone. Ihering brought "the jurisprudence in the air" down to "a jurisprudence of realities." Denying that law was only a growth which men could simply observe and from the observation work out the principles which they

saw developed, he asserted that law was also, and predominantly, the realization of a purpose, and that this purpose had been and could be attained only by struggle. Furthermore, this purpose was a social purpose and had for its aim the securing of the interests of the individual only so far as society recognized them.

Neither Bentham nor Ihering was a practical lawyer. To neither will the thoroughgoing metaphysician allow the title of philosopher, but to each is unanimously conceded the name of a great legal genius. Bentham brings all legal facts to a focus about his central idea that legislation must be shaped with reference to the greatest good for the greatest number. Ihering makes much of the proposition that the sense of right and justice must constantly affect the social purpose of law, and that our legal system must constantly be reshaped to allow the exercise of this purpose. The end and aim of Bentham's life work was codification and, although he did not live to see the Reform Bill of 1832, it is generally admitted that his life-long insistence on the simplicity, possibility and supreme desirability of law reform was one of the principal instrumentalities in starting the making over of law by legislative enactment, which has been the most characteristic feature of legal history of England during the century that has elapsed since his death. The codifying activity of Ihering was hardly more than an episode in his very active career. As a conclusion of his "Possessory Intention," he gives us some criticism of the first draft of the German Civil Code, and in the final draft of that wonderful instrument a few provisions are conceded to have been affected by his doctrines, but his actual part in shaping the form of the great German codification is not to be compared with that exerted by many of his contemporaries.

III. IHERING'S MESSAGE. Ihering's criticism of Puchta, of Savigny and of the Roman jurist, Paulus, —