BOOK REVIEWS

LEGAL REALISM AND JUSTICE. By Edwin N. Garlan. New York: Columbia University Press, 1941. Pp. xiii, 161. $2.00.

The decade that has just passed and the years that lie immediately ahead will undoubtedly be given a chapter of their own by the future historian of American law. The chapter might well be called the Period of the Skeptics. Was it not in this period that even Roscoe Pound had to defend himself against the charge of being as naive as a first-year law student? Was it not in this period that the hitherto highly respected learning in the rules and doctrines of the law was seen as nothing more than some game that children play with the help of toys? American law had indeed reached the age of sophistication. Even its English mother was having trouble recognizing it. From across the waters, Holdsworth was already warning Americans that if the debunking process of the period continued, "much of the political and legal experience of the nation, which is gathered up and contained in its technical principles and rules, and in the reasoning with which they are supported, would be scrapped."[1]

To the historian of a philosophic mind, however, the period will appear simply as a time when the attention of the fraternity of the law was being shifted from teleology to epistemology, from a consideration of its sociological and economic *objectives* to an understanding of its actual *processes*. Just as in the preceding period, largely through the work of jurists like Pound and Bohlen, study of the ontology of law, of its existence and its ultimate basis, had given way to an examination of its ends and purposes, so in this period the ought-ness of law was in turn giving way to its how-ness. The questions that were now foremost in the discussions of the day were: How does this alleged rule govern the decision in this case? How did the court handle this particular concept in this particular case? How does the judicial process really work? How does law *function?*

For this interesting change in the direction of legal thinking during this period the so-called (technically, perhaps mis-called[2]) School of Legal Realists is chiefly responsible. Who are they? Why do they call themselves "realists?" Are they making an enduring contribution to the science of law? What are their shortcomings? These are questions about which no intelligent student, teacher, practitioner or judge can afford to be wholly in the dark. For whether one agrees with them or not, the mere roll-call of those who are now classified as realists—Llewelyn, Patterson, Cook, Frankfurter, Radin, Arnold, Douglas, Corbin, Hamilton, Lerner, to mention only the top-notchers—is itself a command to attention. The very grouping together of their names can hardly fail to arouse an immediate interest in whatever it is that provides their common bond.

Unfortunately, the bond is not always easily perceived—not even by the

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[1] Holdsworth, *Some Makers of English Law* (1938) 297.

[2] Professor Lerner finds a similarity between the legal realists of today and the Nominalists of the middle ages. The Shadow World of Thurman Arnold (1938) 47 Yale L. J. 687, 693.

realists themselves. At times, indeed, some of their number have insisted that there really is no school of legal realism. Occasionally, they will even whack at each other pretty hard. Despite all this, their copious writings—largely in the form of articles in law periodicals, with the exception of Thurman Arnold, whose abundance generally runs to book length—betray, in the aggregate at least, the impenetration of a common ideology. That this ideology has not hitherto received systematic formulation is perhaps understandable. The realist who starts to philosophize about his own processes, unless he is extremely wary, may well find himself hoisted on his own petard. His safest course is to stick to the particular, the concrete, the "case-*an-sich*." Articles within very narrow limits he may write—he may even essay a journey across the whole field of Sales or of Title and Contract "and a bit beyond." But to venture on a tour of the entire domain of law and report his conclusions in terms of an integrated philosophy—that would involve him in generalization, and generalization would entail the use of that wicked and lethal toy, the *concept!* Far better, then, to avoid all attempt at a philosophy of legal realism.

It is not surprising therefore that the first systematic attempt to define legal realism in its larger context should come from without rather than from within the School itself, and that it should be made by one whose primary interest is philosophy rather than law. One suspects, nevertheless, that while the author's home is philosophy—he is an instructor of philosophy at Columbia University—many an evening has been spent by him in the company of the savants of the law and, particularly, in the nearby tavern of the law faculty of Columbia University. His familiarity with legal literature is impressive—so impressive, indeed, that at times he appears to be a law teacher turned philosopher rather than a philosophy teacher turning to law. In any event, the discussion is pitched on equally high levels in both fields.

The book itself is quite small—barely more than a hundred and fifty pages in length—yet it is in many ways a very big book. The problems that it deals with are certainly the biggest in the law: Why is law problematic and indeterminate? What is Justice? What is the difference between Legal Justice and Philosophic Justice? Wherein lies the unity of Justice? No mean questions are these. In them and through them and around them spring the myriad more specific questions that constantly challenge the minds of those for whom law is something more than just a shovel with which to dig a living. What is the role of precedent? What are rights? What is meant by public policy, by due process, by impartiality, equality, decency, natural law, and all the other concepts that are the "instruments" of "law in action?"

To compress a satisfactory discussion of all these major and perennial problems of jurisprudence within a single and tiny volume is not a task for a tyro either in law or in philosophy. The job calls for the mental equipment of a master in both fields. Professor Garlan seems to have what it takes—and more. For not only is his treatment of those problems remarkably thorough *per se*. It is at the same time so handled as to bring into

continuous focus the special theme of the book—legal realism, its meaning and its contribution to the science and the practice of law.

Apparently that contribution lies mainly in the field of the judicial process—the "judge's justice." For it is only in the sphere of that justice that the realist movement is appraised in this book. Justice "with respect to the community of all living things" is dealt with only incidentally. Allowing for this limitation on the scope of the discussion, the book presents the most thoughtful, certainly the most comprehensive, examination and evaluation of the realist trend in modern law that has yet appeared in print. In the reviewer's opinion, it is the best small book in jurisprudence that has come out since the publication of Cardozo's *Paradoxes of Legal Science*. The publishers do not exaggerate when they refer to the author as "a young philosopher—full of promise." It is good to know that the law has acquired a lien on his talents.

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CASES ON RESTITUTION. By Edward S. Thurston. St. Paul: West Publishing Co., 1940. Pp. xxviii, 964. $6.00.

Although the above title is broad enough to cover the entire field, the subtitle preceding Chapter I, which is an introduction, adds Quasi Contract and Relief in Equity. The scope is therefore the field of restitutionary rights enforceable by the familiar action of general assumpsit or by a bill in equity. The writer expected that the materials included would be aligned with the treatment adopted in the Restatement of the Law of Restitution inasmuch as no casebook following the latter treatment had come to his attention. The American Law Institute publication, however, includes constructive trusts, whereas Professor Thurston has chosen to leave the treatment of the doctrine of constructive trusts to be studied in connection with the law of trusts.

It would seem that the convincing arguments given by the editor for embodying other forms of equitable relief in his Cases on Restitution would be fully as strong for including the subject matter treated under constructive trusts in the Restatement. The reasons for including constructive trusts in the field of restitution and unjust enrichment have been so clearly stated in the article by Messrs. Seavey and Scott in the Law Quarterly Review as to seem almost uncontrovertible.[1] They fully negative any need for a continued treatment of constructive trusts in connection with the teaching of trusts.

The influence of the earlier works of Professor Ames, and of Professor Cook's combination of common law and equity material in the third volume of his Cases on Equity is evident and is acknowledged by the editor in his preface. If we are to be consistent in following the plan of including all of the remedies available to correct situations of unjust enrichment, the constructive trusts and allied material of the Restatement should be divorced

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1. (1938) 54 Law Quarterly Rev. 40, et seq.