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Editorial Preface to This Volume

Joseph H. Drake

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LAW

AS A MEANS TO AN END

BY

RUDOLF VON IHERING

Late Professor of Law in the University of Göttingen

TRANSLATED FROM THE GERMAN BY

ISAAC HUSIK

Lecturer on Philosophy in the University of Pennsylvania

WITH AN EDITORIAL PREFACE BY

JOSEPH H. DRAKE

Professor of Law in the University of Michigan

AND WITH INTRODUCTIONS BY

HENRY LAMM

Justice of the Supreme Court of Missouri

AND

W. M. GELDART

Vinerian Professor of English Law in the University of Oxford

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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 Ox-

ford, 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,—

whom he laughingly insults by calling him the Puchta of the classical world — is indicative of his revolt against the juristic tendencies in Germany in the middle of the nineteenth century, tendencies which are apparently still operative in America in this first quarter of the twentieth century. The jurist Paulus, in his endeavor to systematize the law of possession, had assigned as the reason for the fact of possession, the intention of the holder to possess. He gave this as the logical reason for the existence of certain anomalous rules of possession existing in the Roman law of the classical period. Ihering boldly announced that these rules had no logical explanation, but had arisen simply because of accidents in the historical development of the doctrine of possession in Roman law. Savigny had devoted his life to the careful working out of certain legal principles which in the course of history had been developed in the Roman law. Puchta had attempted to fashion these principles into a philosophic system and to crystallize them in a body of dogmatic juristic doctrine possessing a philosophic validity.

In our Anglo-American system of jurisprudence, Coke, in the earlier period, and Blackstone, in the later, have played the part of a Paulus in their giving of naïve and superficial reasons for the legal anomalies of our system. The careful investigation of the historical sources of our law and the presentation of the results in case-books and treatises, which have absorbed the energies of our best English and American legal scholars during the life of the past generation, have performed for our law a service comparable to that rendered to Roman law by the great Savigny; but we find among our own historical scholars a tendency similar to that found among the followers of Savigny, to rest content with this historical achievement and to ignore or even

to ridicule the possibilities of directing by philosophic prevision the development of law in the future. As an example of this somewhat contemptuous attitude toward law as it ought to be, note the disparaging reference to the "philosophic jargon of the German" made by one of our most distinguished representatives of the English historical school of jurists. On the other hand, we find many a Puchta among our American jurists, both on and off the bench, who apply the principles that have been worked out in the development of our Common Law as though they were "à priori" mathematical axioms and not "à posteriori" working formulæ, which have to be constantly reshaped to adapt them to the ever changing requirements of a developing society.

American juristic thinking at the present time needs a von Ihering. Our jurists, our legislators and our courts, both bench and bar, are still holding fast to an historical "Naturrecht" built up on the precedents of the Common Law, which has many analogies to the type of juristic thinking in vogue in Germany during the first half of the nineteenth century. All of our lawyers, judges and legislators who are trained in the traditions of the Common Law hold with characteristic and commendable professional conservatism to the good that is and has been in our legal system, insisting, too, upon the prime virtue of a system of law that is certain, but apparently forgetting that law is not an end in itself and as such to be brought to a state of formal and static perfection, but that the end is the good of society. The public is crying out against our crystallized and inelastic theory and practice of law. The proper application of the idea of law as purpose would, in many cases, loosen our legal shackles and open the way out of our legal difficulties.

This idea of Ihering may not be the last word on the philosophy of law. Possibly the criticism made by some

of his German successors that it is not a philosophy at all may be well founded. But it certainly is an uplifting and inspiring idea and is not too far ahead of our own prevalent juristic thinking to make the adoption of it a practical impossibility for us. In those very difficult cases where our judges are confronted with the task of extending a principle of law to meet a new set of facts which call loudly for a remedy, if the courts had the idea that the purpose of law was to satisfy properly our changing social demands, we should have fewer reactionary decisions that have caused so much popular discontent with the law — decisions which are justified by the courts handing them down, by the arguments that there are "no precedents" in the Common Law for them, or that to extend the principle will "open the flood-gates of litigation." The days of "laissez faire" in legal matters have gone by in America as well as in Germany. We, too, must recognize that our historical Common Law is not sufficient for the demands of present day life unless, by our struggles with a purpose, we can add to the law as it is and has been, some of the principles of the law as it ought to be, in order to satisfy our growing social needs.