Michigan Law Review

Volume 13 | Issue 8

1915

Book Reviews

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BOOK REVIEWS.

THE FORMAL BASES OF LAW. By Giorgio del Vecchio. Translated by John Lisle. With an Editorial Preface by Joseph H. Drake and Introductions by Sir John Macdonell and Shepard Barclay. Modern Legal Philosophy Series: Vol. X. Boston: 1914.

Under title, which will surely mislead many, three of the important contributions of Professor del Vecchio, of the University of Bologna, to the philosophy of law have been recently translated and published as the tenth volume in a new well known series, as follows: I. Philosophical Presuppositions of the Idea of Law; II. The Concept of Law, and III. The Concept of Nature and the Principle of Law. The volume's title is misleading through the word "formal," which in general usage does not have either the intended technical Aristotelian meaning or the kindred meaning of Kant's transcendental "forms," hardly less technical, but a meaning almost if not quite opposite to these. Thus in ordinary usage the "formal" is hardly the essential or the logically primary and yet by the "Formal Bases of Law" are here meant the first principles, the basal and essential ideas, the original presuppositions, that underlie all positive law and so that constitute a philosophy of law; in the present instance a lawyer's "transcendental idealism." Why try to win the law to philosophy at the point of the sword?

And the reviewer may make another criticism, perhaps a bit unjust or ill-humored or at least the result of a first impression rather than of the fairer second thought. Del Vecchio's own work is so hard to find for the extensive supplementary material, the Preface, the several Introductions, the Critiques. Indeed one has the feeling that comes when a too officious chairman has taken most of the time with his introduction of the real speaker of the evening. Yet, this first impression confessed, the implied criticism of it is really made after all to be answered rather than to be urged. Others have made it of this volume, as of other volumes in the series, but how superficial it is; how obviously based on a false analogy. A printed volume, from whose sections one may freely choose, is not like a public meeting. An editor is not a chairman. Still more to the point, in the case of the book now in review the supplementary material is without exception excellent in itself and helpful in association with del Vecchio's three essays. Any truly interested student of the philosophy of law, therefore, will only welcome what the other contributors to the volume have to say about del Vecchio and his work. In general that many, uninitiated in the ways of philosophy, even if they get safely beyond the title, again and again will find the running hard is to be expected, but one needs only to add, quoting the General Introduction to the Series (pp. vi-vii), that although hitherto lawyers and jurists "have been oblivious to the abstract nature of law" and "philosophy of law has been to them almost a meaningless and alien phrase," now "the time is ripe for action in this field." Like many another interest, long special and provincial in its method and outlook, under the great demands of the changed conditions of

the day law is feeling the need, whatever the difficulties and even whatever the resulting revolutions, of the comprehensive view afforded only by philosophy. Let it be hoped—in a reviewer's parenthesis—that philosophy will meet the law at least half way, giving freely and as sympathetically as possible whatever it has to offer.

Del Vecchio's standpoint really, if not always conspicuously, is Kantian or rather, implying more freedom, Neo-Kantian. Moreover, in view of the typical legal mind, it is doubtful if a more favorable or more convincing standpoint for introduction to a philosophy of law could be found. Thus for the moral as for the intellectual life, in its ethics as in its theory of knowledge, in its message to the individual person as in its account of man's experience of the outer natural world, the Kantian philosophy is at least formally legalistic; it maintains the spirit of the law, holding positive human experience *in toto,* as it does, to general and sublimated restraints or precedents, that is, in Kantian phrase to *"a priori* forms"; so that through it, especially as freed and broadened by Neo-Kantianism, the law is easily made conscious of that universal character from which all philosophy must of course proceed. Easily it is made to feel the closest relation both to ethics representing man's inner life, and to the experience of nature so properly a formally controlled experience, representing man's outer world. Does it not find, for example, its own boasted majesty, the majesty of the law, in the "categorical imperative" of the Kantian ethics? Or its own legal method and precision in the Kantian experience of nature that is controlled only if scientific and scientific only if mathematical? As for mathematics, however much freer than the law in subject-matter, it is in general procedure, in underlying spirit, essentially legalistic. So the Kantian standpoint affords an excellent medium through which to make the law philosophical and to this end any reader of del Vecchio will feel indebted to him for his treatment of nature and natural law and of the law's relation to these and also for his appreciation of the fundamental intimacy and dependence of law and ethics. It must be admitted that in the freedom of his Neo-Kantianism del Vecchio is often in danger of complete apostasy. In many places, notably in such a chapter as that on the "Connection between Law and Historical Conditions" (pp. 32-57), where a great deal is really made of the relativity of all positive law, one actually gets a suspicion of something freer and bigger even than Neo-Kantianism, life actually looming up as larger than anything formal or normal. But such suspicion is always soon dispelled; for one is reminded that, spite of naturalism and relativity—before which anything might be expected to lose its formal integrity, there are after all such things as the "unity of [the] history" of law, the "unity of law," the "form" or "logical type" of law, "in which all cases of juridical experience coincide, however they may differ in content," (p. 81), the "concept of law," and so on. So, in final result, del Vecchio's philosophy of law is still, however general and however "transcendental," legalistic. The philosopher is still the lawyer!

Is here a criticism? Yes; a tempered criticism. Generalization and sublimation in any field do afford an excellent introduction to philosophy, but

only an introduction. They fall short of being philosophically vital and whole. Thus a philosophy of law may not be still legalistic, for the simple reason that the law will not yet have so far lost its legal world as to find its own soul, its real life. The majesty of the law, even when robed with the "categorical imperative" and a precise knowledge of the natural world, can at best be only, like the fear of the Lord, the beginning of wisdom. Ere the end can be reached, even that majesty must pass, for philosophy plays to no conceits. A true philosophy of law, however begun, must sooner or later lead to some actual discrediting of law; it cannot stop with mere purified and translated legalism; it must even recognize illegalism, in order that, whatever the attending dangers of such anarchy, there may be real opportunity for something new; for just such revision and reconstruction as those behind the enterprise of the Legal Philosophy Series seem to foresee. Only, one can not help wondering if the lawyers and jurists really appreciate what a really illegal thing a real philosophy of law really is! ALFRED H. LLOYD.

AN ELEMENTARY TREATISE ON THE JURISDICTION AND PROCEDURE OF THE FEDERAL COURTS, by John C. Rose, United States District Judge for the District of Maryland. Baltimore, King Brothers, 1915.

"This book is intended for the use of those who know little or nothing as to the jurisdiction and proceedings of the Federal courts, and who would like to learn the fundamental rules concerning them. It had its origin in a course of lectures which for a number of years past have been given to the senior class in the Department of Law, University of Maryland." In these words the author announces the purpose of this treatise, which appeared the first of the present year in the form of a volume of about four hundred pages. The author further defines the purpose of his treatise in these words:

"This little book seeks to state and briefly to explain the general rules which determine the jurisdiction of the Federal Courts; to give some account of the organization of the Federal judicial system; to point out the more important respects in which procedure of these tribunals differs from those [that] of the States; and to say a little about those subjects of general law upon which they do not feel themselves bound to follow the decisions of the State Courts, and in which in consequence they may upon the same state of facts reach an opposite conclusion."

To carry his purpose into effect the author treats in twenty chapters the essential elements of Federal jurisdiction and procedure. Chapter I. deals with, "The Origin and Limits of the Jurisdiction of the Federal Courts"; chapter II. with "The Organization of the Federal Judicial System"; chapter III. with "The Criminal Jurisdiction and Procedure of the Federal Courts"; chapter IV, with "Civil Controversies over which the Jurisdiction of the District Court is exclusive of that of the States"; chapter V. "Of what Controversies District Courts have Jurisdiction Concurrent with State Courts"; chapter VI. with "The Amount in Controversy"; chapter VII. with "Cases Arising Under the Constitution, Treaties, or Laws of the United States"; chapter VIII. with "Diversity of Citizenship"; chapter IX. with "Venue of

Actions in the Federal Courts": chapter X. with "Jurisdiction of Federal Courts as Affected by Assignments and Transfers"; chapter XI. with "Removal of Cases from State Courts to Federal Courts"; chapter XII. with "Ancillary Jurisdiction of the Federal Courts"; chapter XIII. with "Habeas Corpus"; chapter XIV. with "Civil Procedure of the Federal Courts when Sitting as Courts of Law"; chapter XV. with "Procedure of Federal Courts when Sitting as Courts of Equity"; chapter XVI. with "The Substantive Law Applied by the Federal Court"; chapter XVII. with "Appellate Jurisdiction of the Courts of the United States—Direct Appeals from District Courts to Supreme Court"; chapter XVIII. with "Appeals to the Circuit Court of Appeals"; chapter XIX. with "Writs of Error from Supreme Court to State Courts"; chapter XX. with "Class of Decisions from which Appeals may be Taken and How."

The author's classification of subjects is natural and logical, his treatment of them thorough and scientific. He considers first the constitutional grant, the statutory provisions in pursuance of the grant, then the procedure and whatever is peculiar in the Federal jurisprudence. He supports his statements by reference to cases which he states in a peculiarly engaging manner, giving the history of cases in many instances in such a way as to command the instant attention of the reader and hold it to the end. His treatment of the Limited Jurisdiction of the Federal courts and the meaning of Inferior Courts as applied to those tribunals is particularly lucid and attractive. His work exhibits his threefold character of lawyer, judge, and teacher, a combination of qualifications, which has resulted in this instance in a treatise of exceptional value to the student who desires to acquaint himself with the jurisdiction and procedure of the Federal Courts and whatever is peculiar in their jurisprudence.

Judge Rose is a member of the Federal Judiciary with a service of five years on the bench of the District Court of Maryland. For several years he has been engaged in teaching law students in the University of Maryland the subject which he extends in the present treatise. It is enough to say of his record as a lawyer that it was such as to warrant his appointment to the bench. His experience, professional, judicial, and academic, gives assurance that in any undertaking of his to make available to all who are desirous of learning the fundamentals of the jurisdiction, procedure, and jurisprudence of the Federal Courts, what in substance he has made available to the law students of the University of Maryland, he would be doing a good, a great service to the profession. This treatise will, without doubt, be of great service to the profession and will be a lasting confirmation of all of which the author's experience and ability give promise. It is designed primarily and essentially for the use of students of the law and will be received and regarded, in the reviewer's judgment, as an excellent text book on the subject with which it deals. But its value in that regard would be considerably enhanced if there were printed in connection with it, and in the form of an appendix or otherwise,—and for more than occasional reference—Art. III. of the Federal Constitution relating to the judicial branch of the Federal Govern-

ment, Art. XI. of the Amendments, the Judicial Code with its amendments, the new Federal Equity Rules, and the Judiciary Act of 1789. Although this treatise is designed primarily by the author to meet the needs and requirements of beginners in the subject, its value is not confined to them only. The experienced practitioner will be amply repaid for a careful reading of it.

R. E. B.

LAW OF SALE OF STOCKS AND BONDS, by Milford J. Thompson. Chicago. Barnard and Miller, 1915: pp. xxv, 208.

The reviewer feels himself precluded from comment upon the subject-matter of this volume because, although reasonably well acquainted with that part of our law particularly pertinent to contracts and sales, he has found himself quite unable to comprehend what this work purports to set forth. Its disregard of the rules of syntax, and inconsistent misuse of established legal terms are susceptible of contextual solution. Thus, when the author says that, "a lawful sale contract" must "evidence" a complete meeting of the minds of the parties, because "if it does not evidence such an understanding, it is not a lawful sale contract or sale," we may presume that he means that if there is no meeting of the minds there is no contract at all, lawful or otherwise. So also, in saying, "Shares of stock or bonds are of the class of things that can only be used by the buyers for profit or security, and can not be put to any other useful purpose. But personal, chattel, real or mixed property can be of use or service to buyers, as well as profit * * *" he presumably intends to make a distinction as between corporeal and incorporeal property. Again, "Section 4. Sales must in some way evidence a meeting of the minds * * *. If there is no such evidence * * * there is no sale," probably means that alleged contracts of sale must be supported by such evidence.

But the reviewer has not been able to decipher the meaning of such paragraphs as the following:—"But, if the terms of the contract so formed do not evidence a mutual meeting of the minds of the parties in the same sense and understanding, then the contract is not executed. The title to the subject of sale is not passed to the buyer, but still remains in the vendor. The contract is not a sale contract. It does not evidence the necessary meeting of the minds of the parties to create and execute a contract. Such contracts can only become executed and a binding sale contract by supplying such evidence as may be necessary to create an understanding of the contract terms in the same sense." "Executory contracts evidence the form of a contract the parties agree to make, and becomes a binding sale contract when the agreement so evidenced is performed."

The author's preface says, "The laws of property rights and personal rights, in the law of sales; and the established principles of law evidencing and enforcing such property and personal rights, force us to deny that the present practice of pretending to sell securities, in their legal representative sense, is a lawful practice." And, in the introduction, "We merely undertake to show that the established principles of law and the established rules of practice can be applied in the sale of securities." But the substance of the exposition the reviewer is unable to set forth.

J. B. W.

THE RIGHTS AND REMEDIES OF CREDITORS RESPECTING THEIR DEBTOR'S PROPERTY, by Garrard Glenn, of the New York Bar, Special Lecturer in the Law School of Columbia University, Joint Author of Elkus and Glenn on "Secret Liens and Reputed Ownership." Boston: Little, Brown & Co., 1915. pp. xlvi, 461.

This work, which is a crystallization of the author's well-known course of lectures in the Law School of Columbia University, presents most excellently an important subject which has hitherto failed to find, in any single work, as adequate a treatment as is here given. Knowlton's edition of Bigelow on Fraudulent Conveyances deals with most of the matter treated by Mr. Glenn, and is perhaps on some points to be preferred; on the other hand, it ignores or slurs many important phases of the subject, and Mr. Glenn's work certainly seems, at least to this reviewer, to be much better devised and balanced.

Although the present work now meets the need fairly well, it is rather remarkable, as well as regrettable, that no work on bankruptcy has adequately treated the subject here presented. Even Mr. Woodman's excellent work on Trustees in Bankruptcy gives only a few pages to the matter. When it is remembered that, to use the language of § 70 e of the Bankrupty Act, "The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value," and when it is borne in mind that from a practical point of view the trustee's most important function is usually that of collecting assets to augment the creditors' dividends, it seems strange that so fruitful a remedy should have been so slightingly treated by the books. It may be said, further, that the remedies set forth in Mr. Glenn's work have often been ignored also by the profession; it is a matter of frequent comment among bankruptcy lawyers that attorneys for trustees seem usually to be blind to the great extent and effectiveness of the powers given them by the Act. There is little doubt that a knowledge of the subject-matter of Mr. Glenn's book would frequently increase the assets of bankrupt estates.

Though it is doubtless only an unimportant matter of opinion, perhaps it might be urged that Mr. Glenn has too much emphasized the fact that bankruptcy is only a part of his general subject of Creditors' Rights Respecting their Debtors' Property. Historically, of course, his point of view is clearly right; practically, however, under our present Bankruptcy Act, the whole subject is clearly a matter of bankruptcy law, and no view of bankruptcy is adequate which does not lay considerable stress on the whole subject-matter of Mr. Glenn's book.

As is to be expected in a small book covering a large subject, a few errors have crept in by way of too-inclusive statements; also a few errors, apparently of haste, have been noted. On the whole, however, the book is remarkably clear and accurate, and a nice discrimination in the selection of a few authoritative typical cases adds to its value to the reader who desires a survey rather than an exhaustive citation of decisions. E. H.