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## Review of “Present Status of Philosophy of Law and of Rights,” By William Ernst Hocking

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which the public force will be brought to bear upon men through the courts." To a practicing lawyer the important question is: "What will the courts decide in a particular jurisdiction?" and not: "What would the courts decide if bound only by logic and unhampered by the welfare of society or the doctrine of *stare decisis*?"

The author of this book is far more interested in criticizing the law of contracts than he is in stating it or justifying it. It is now generally held that an ordinary offer to contract sent by mail can be accepted by mail even if the second letter is not delivered. This is a rule of convenience, or a principle of pragmatism,—to use the language of philosophy. The author does not like the rule. And so he uses up most of fifty pages in attempting to prove that the doctrine is unsound. He says: "What is to be borne in mind is, that though the weight of authorities, in both number of decisions, and number of jurisdictions, is with *Adams v. Lindsell*, there is not a possible bit of logic or reasoning which can be brought to support that decision." (Page 61.) Of the 700 cases cited in the book, those cited most frequently are those which the author regards as unsound.

From the viewpoint of students in law schools, the book is valuable. One of the chief purposes of a modern law school, perhaps the chief purpose, is to enable students to analyze and criticize judicial decisions and judicial opinions. This important trick can be acquired when studying leading cases which have made the law, like *Marbury v. Madison*, and then afterwards the student can use the trick when confronted in his practice with modern mooted questions and conflicting authority. Has a common law court jurisdiction over a breach of promise to marry? Of course it has. And yet it is a splendid exercise for students to attempt to prove that the common law courts were wrong when they first assumed such jurisdiction.

This book, as the title page indicates, consists chiefly of digests of cases used as the basis of instruction for the law of contracts in modern law schools. The digests are succinct and accurate. The arrangement is according to logic and not according to historical development or jurisdictions. Indeed the author pays more attention to logic and less attention to human experience than practicing lawyers do. For many students the book would be more valuable if the author had made freer use of the most recent casebooks on Contracts, namely those of Corbin and Costigan. An excellent feature of the book is the insertion of a large number of hypothetical cases, after the style of examination questions, and a careful consideration of those cases in the light of principle and authority.

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PRESENT STATUS OF THE PHILOSOPHY OF LAW AND OF RIGHTS. By *William Ernest Hocking*, Alfred Professor of Natural Religion, Moral Philosophy, and Civil Polity in Harvard University. pp. viii and 97. New Haven: Yale University Press, 1926.

The point of view of this brilliant outline is truly indicated by its dedication to Dean Roscoe Pound. Professor Hocking is concerned with the essential task of the sociological jurists, the problem of getting at the relative importance of the various social interests which are recognized by legal action. Specifically, he proposes a scale of values among rights for the guidance of law-makers, while leaving to those learned in the law the technical work of construction.

The first half of the book is given to an analysis of the contributions of Stammler and Kohler to the present problem. He boils down the issue between them to the answers they would give to this question: what is to be done when the claims of *Kultur* and Right conflict? (Professor Hocking translates *Kul-*

*tur*, culture; Professor Pound prefers civilization.) Kohler answers: abstract justice must give way. Stammler's answer would be, that the question is fallacious, for Right is of the very substance of Culture.

The latter half of the book is devoted to the pursuit of the issue thus indicated. The statement thereof takes another form. In cases where we can know what is unjust, independently of knowing what is good for society, the courts are bound to follow the rule, "No known injustice for whatever social good." But where the injury complained of is not severe, the courts have wavered, occasionally invoking the doctrine of "balancing of injuries," namely, that a little injustice seems to be sanctioned for the sake of a considerable social utility. Professor Hocking favors the latter doctrine, holding the apparent sanction to be fallacious.

The problem involved is one of a definition of justice or of injustice. But it is necessary to define the nature of rights in order to arrive at a concept of justice. This is the most suggestive part of the work. Only a bare mention of the leading points is possible here.

Good-will of an individual towards his fellows and the public welfare is the primary condition of every presumptive right. The presumptions of the law are creative; they are aimed at conditions which it is desirable to bring about. Good-will is essential. The justification for these creative presumptions must rest in some facts concerning human nature, for "presumptive rights are the conditions under which individual powers normally develop." Rights are not primarily a series of conditions for the performance of functions, but conditions which promote the development of powers. Man has only one natural right—to become what he is capable of becoming.

Now the character of the individual human will seeking a concrete good, and the claim which this seeking makes upon every agent which can affect it, provide together a standard for the law. Developing human powers or faculties are the primary concern of right. Thus "the scale of values among rights is to be determined by the closeness of their bearing on the development of mental power in individuals." It comes down to a matter of "working out the system of human instincts within what we call 'the will'." This is the measure proposed by Professor Hocking. The final chapter outlines the application of the foregoing principles, turning on the existence of the two great presumptive rights, the right to liberty of the person and its activity, and the right to security of property.

This book contains the distilled essence of a theory which is to be elaborated in a later volume. The author invites criticism of the principles herein set forth.

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FEDERAL INCOME AND ESTATE TAX LAWS, CORRELATED AND ANNOTATED. By *Walter E. Barton* and *Carroll W. Browning*, members of the Washington, D. C. Bar. pp. XXIV and 707. Washington, D. C.: John Byrne and Company, Third Edition, 1926.

The first edition of this work, published in 1922, was a pioneer in the method of presenting the changes in the Federal Income Tax Laws by means of placing the corresponding portions of the law opposite each other in parallel columns. This method is a great improvement over the usual method of showing such changes, such as having the text of one law in ordinary type, that of another law in italics, and that of another law in bold face type, and so on. The result of the adoption of the usual method is inextricable confusion, but the work of Barton and Browning presents the corresponding sections of the Acts of 1916, 1917, 1918, 1921, 1924 and 1926, for purposes of comparison in a very clear manner.