North Dakota Law Review

Volume 37 | Number 1 Article 23

1961

Book Reviews

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BOOK REVIEWS

JURISPRUDENCE. By Roscoe Pound. St. Paul: West Publishing Company, 1959. Five Volumes. Price: $110.00.

This five volume work represents the professional lifetime effort of a towering figure in the field of jurisprudence. The skeleton of these volumes had already been long in existence in Pound's "Outline of Jurisprudence", which had run through five editions to 1943. So, in a sense this publication is nothing new, and is merely providing the flesh and interstices of a work that had already been long in existence. Although "Jurisprudence" bears the publishing date of 1959, Pound reveals in his preface that it was planned and writing commenced in 1911. Thus, it represents the most matured intellectual product of perhaps the most versatile and prestigious American legal scholar of the contemporary period. And there are no doubt many of his admirers who would consider such a statement far too limited and cautious a characterization of him. A story, of uncertain authenticity, is related of Pound to the effect that when a certain individual was asked to write a letter of introduction for Pound, this individual composed the following terse message: "This will introduce you to Roscoe Pound. He knows everything."

Yet, such a story, along with some of the testimonials that have been written about Pound, smacks somewhat of sycophancy, which Pound himself would be the first to repudiate. It is apparent that no scholar of the depth, caution, and sensitivity that he exhibits would consider that he had so far outdistanced his fellow man as to be beyond the reach of criticism, even by those who may be far below his level of professional accomplishment. So, while in attempting a critique of Pound one senses he is taking on a Goliath, nevertheless one should not take the attitude that he has before him some immeasurable quantity before which it is appropriate only to lay burnt offerings. Still, this review is a hasty and casual one in view of the depth and scope of the material involved. Its purpose is accordingly a limited one of attempting a general description of the work and its manner of presenting its subject, without attempting a thorough critique and analysis of the material.

Thus, it requires a fair amount of temerity for one to undertake a review of these five volumes that comprise "Jurisprudence". This perhaps accounts at least in part for the fact that the Index to Legal Periodicals to date reflect little comment on this highly significant contribution to legal literature.[1] It may also reflect a sound view

1. Most notably Patterson, *Roscoe Pound on Jurisprudence*, 60 Colum. L. R. 1124 (1960).

that to make an adequate assessment of these volumes requires a prolonged period for the study and digestion of their contents, and that there has been insufficient time as yet since the publication was released for such reviews to appear.

In these volumes, as in the antecedent "Outline of Jurisprudence", Pound's purpose is to provide an organization and structure for the entire field of jurisprudence, and this appears to be the most extensive such attempt to be found in the American literature of jurisprudence. The three thousand pages of text, printed on relatively small pages with generous-sized type, are less bulk of material than one might expect in a work of such scope. The five volumes are divided into eight parts. The first three parts cover the first two volumes, and these are devoted to the underlying concepts of law as a general phenomenon. The balance of the work deals more with the branches and tendrils of jurisprudence, and the application of the underlying premises to the various large divisions or concepts of substantive and procedural law — e. g., "The Securing of Interests," "Persons," and "Proprietary Rights."

In the first two volumes the author discusses the various schools of jurisprudence, and classifies them according to a conventional scheme as analytical, historical, philosophical and sociological. He characterizes them initially according to how they respond to five questions he propounds for each school. Then, with regard to their views on the "end of law", he slices these schools a different way, and discusses them in terms of the stages of law, which he classifies as primitive law, strict law, equity and natural law, mature law, and, somewhat less convincingly, socialization of law. Throughout this exposition, Pound makes commentaries and critiques which both provide and stimulate analytical thought on the material. It is from these commentaries on specific points that Pound's own ideas are mainly reflected, but he does not provide any recognizable and recurring theme or *leit-motif* of a general legal philosophy of his own.

Pound's own views on the nature of law appear in more accessible form in his small book entitled "An Introduction to the Philosophy of Law", (1922). It is there rather than here that one should seek for a general conceptual grasp of jurisprudence, and Pound's basic approaches. He refrains from joining overtly in the polemic fray of positivism versus natural law, and probably deems such contentions something apart from (and perhaps beneath) his mission of analysis and organization of the field of jurisprudence. But Pound

is reputed to be a "positivist", and this view is reflected at various turns, such as the following passage: "The province of jurisprudence is social control through the systematic application of the force of politically organized society. That gives rise to the legal order, it requires a body of authoritative materials in which tribunals are to find the grounds of determinations, and in a developed legal order it requires a judicial and administrative process admitting of reasonable prediction."[2] Yet he makes comments of an unfriendly nature to the basic notions of some of the leading positivists such as Kelsen, and it requires considerable distinguishing and interpretation to keep Pound from going over into the supposedly opposing camp of natural law when he makes statements such as: "But, except for the purposes of schematic laying out of boundaries of social science, it is not possible to separate the content of legal precepts from their application."[3]

There is a staggering amount of citations to writings in the footnotes, which comprise a most impressive bibliography of jurisprudence. Nevertheless, the authorities cited are far from exhaustive, as Pound has been selective rather than complete in his citations. In the absence of making a statistical survey, there is an impression that non-English language sources substantially outweigh those in English. There is a heavy citation of German works, and Jhering appears as a particular favorite, with the index indicating that he has been accorded as much prominence as more noted Germans such as Kant and Kelsen.

And there seems to be a slighting of the natural law tradition, in its Scholastic aspects and otherwise. It is not, of course, entirely ignored, and Aristotle, Aquinas, and Grotius make their appearance. But there is relatively little amplification of their positions, and there are glaring omissions in the absence of such significant contributors to jurisprudential thought as Vitoria on the classical side and Lon Fuller in the contemporary non-Thomistic natural law theory.[4] The exposition of the entire natural law tradition appears somewhat fragmentary, at least compared with the minute analysis of some of the relatively obscure nineteenth century writers, and indeed, the setting forth of Aquinas' juristic thought sometimes seems scarcely recognizable.[5]

For all his prodigious talents and fluency in several languages,

2. Vol. I, 16.
3. Vol. I, 332.
4. *E.g.*, Fuller, THE LAW IN QUEST OF ITSELF (1940).
5. Vol. II, 40.

Pound is not a master in the art of communication with his fellow man. Although a sentence of Pound's seems to read simply and lucidly from a mechanical and grammatical standpoint, somehow the meaning of it easily eludes one. Perhaps he unconsciously assumes that the reader will bear in mind all that has gone before, with a few if any slippages, as Pound himself would be capable of doing. But few of us are so gifted, and require continuous reminders of what we have read in order to do sustained reading intelligently. At least that is true with the intricate mental structures which he lays before his readers. Perhaps also Pound does not sufficiently realize the disparity of background and capacity that is apt to exist between him and his reader, and makes presuppositions in this regard that are flattering to the reader, but detrimental to his learning processes.

More flagrant and tangible bits of obscurantism are the untranslated use of foreign words and phrases. The amount of any foreign language that one can expect even a scholarly reader to have as a matter of general background cannot be large, particularly in languages other than Latin or French. Pound offends especially in failing to translate Greek, which has long ceased to be standard academic equipment among scholars, and he sometimes leaves his readers to flounder with scraps of German. He is doubtless acutely aware that to translate is to sacrifice something in the way of precision of meaning, but this is scarcely helpful when failure to translate is going to destroy communication altogether in the majority of instances.

Indeed, the scrupulous regard for precision is probably at the root of Pound's communication difficulties. Rather than sketch a concept initially in broad outline, with the detail of the various nuances and aspects to be supplied later, he immediately furnishes the reader with the qualifications, limitations, or implications of the concept in question. This is likely to cause the reader to become confused on what was the essence of the concept, and as a result to be ill-prepared to follow the discussion of the succeeding concept, which presupposes a mastery of the first one. In a sense this extraordinary concern for the truth and accuracy of one's statements is a tribute to the author's high ideals of scholarship, and provides goals and exhortations for raising intellectual standards in the direction of Pound's attainments. And some may feel that the foregoing comments represent the plaintive voice of sloth or mediocrity seeking easy flight from stimulating intellectual challenge and activity. But

surely there is an optimum middle ground between scholarly obscurantism on the one hand and banality on the other, and it is toward the former, if either, that Pound has tended to deviate.

As a student in the jurisprudence course Pound taught at Harvard during the last semester prior to his retirement, I found the same disparity between the professor's prodigious scholarship and his capacity to impart his subject to the class. My impression was shared by many of my classmates, but there have also been many opposite reactions, as various published comments of earlier students of the old master indicate. But he was uniformly well-liked as well as revered by his students since, along with the sense he inspired of awe and privilege at taking instruction under him, he imparted a glow of geniality. Though he lectured rapidly and rather colorlessly, there were lively digressions when he departed from his prepared notes. Most of the class scribbled furiously, to catch as many as possible of the precious drops of wisdom as they came from the old man, before they were lost forever so far as the class was concerned. Thus, digestion of thought in class tended to be minimized. Perhaps I was simply more frivolous than even the average law student, but this process failed to structure the subject for me, and the whole came out as a conglommerate mass. Thus, somehow I managed to complete the course with a presentable book of notes and a creditable grade without having acquired a recognizable grasp of jurisprudence. A casual reading of "Jurisprudence" would be likely to achieve the same result.

"Jurisprudence" is not in the nature of an encyclopedia. It is more of a step-by-step process, building from chapter to chapter, so that it is difficult to seek to isolate a particular topic and inform oneself on Pound's treatment of it alone, without having had the background of the development Pound may have given to any particular topic. At least that is particularly true for the first three parts. However, in much of the remaining parts of the work, one can find discussions of more or less black letter propositions of doctrines of law, with comparisons between different legal systems; material of this sort is usable without delving so deeply into background. This latter aspect of the work is particularly valuable for purposes of historical and comparative jurisprudence.

As to the index, it sprawls over 138 pages more because of its large print rather than the volume or detail of material indexed. The indexing of legal literature has rarely stimulated much praise or enthusiasm, and there is no reason for this one to provide any

exception. Probably jurisprudence is a more difficult legal subject than most to index, due to its intangible and nebulous qualities. But the index provided here is of so crude and fragmentary a nature, that the amount of help it provides scarcely warrants the expense and effort of its compilation. There are entries in the index that would lead one to suspect the quality not only of the index itself, but of the entire work. Two entries, one immediately following the other alphabetically, may serve as illustrations: "POPULATION, increase since 1650, III, 20," and "PORTUGAL, followed French Civil Code, III, 696." Why such incidental topics should appear as main headings at all in a book on jurisprudence is at best mysterious. Of course, finding absurdities in many of the indices of legal literature is much like the proverbial shooting of ducks in a rain barrel, so perhaps this point need not be further belabored. It seems apparent that the index is entirely a creation of the publisher, and that Pound had no hand in its preparation or supervision.

As a matter of general appraisal, it is obvious that this five volume work by Pound on jurisprudence is a primary addition to legal literature. In a sense, it was already in existence long prior to publication, and was predestined to be born a classic. This would be true even if the suggested shortcomings are valid and were to be multiplied many fold. To live with this work long enough to turn acquaintance with it into familiarity is to ensure an education in jurisprudence of the highest order.

JOHN H. CRABB.*

PRODUCTS LIABILITY. By Louis R. Frumer and Melvin I. Friedman. New York: Matthew Bender and Co., Inc., 1960. Two Volumes. Price: $4.50.

It is a matter of common knowledge that the volume of litigated products liability cases is constantly increasing. The modern consumer recognizes that manufacturers and other suppliers owe him a duty and is eager to impose liability if a product causes harm. The development of products liability law has paralleled industrialization. Frumer and Friedman have made the first attempt to present the whole law of products liability in one unified work.

First is discussed manufacturer's liability in negligence and the development of the general rule of no liability to consumers and users of a product not in contractual privity with the manufacturer.

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Like all general rules this one soon found itself with many exceptions and in 1903 the case of *Huset v. J. I. Case Threshing Machine Co.*, 120 Fed. 865 (8th Cir. 1903), set out these exceptions. Liability was imposed where (1) there was an imminently dangerous product and a failure to disclose this fact, (2) defendant furnished a defective product on his premises for plaintiff-invitee's use, (3) defendant was negligent in the manufacture or sale of an imminently dangerous product intended to preserve, destroy, or affect human life. The best way to avoid the privity requirement was for the court to find a product imminently dangerous. The authors say that it is not until *Mac Pherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916), that the modern rule of liability is "stated in affirmative terms of liability rather than in terms of a negative rule of nonliability to which an exception must be found." The extension of the rule of Mac Pherson is then discussed as applied to various legal relationships, such as arise in bailments, sale or construction of buildings and in cases of the repairing of products. Progress of the Mac Pherson rule has not been uniform under all these situations, as for instance in the case of a gratuitous bailee where the privity requirement still exists to bar recovery by third persons from the gratuitous bailor who permits the use of a faulty product.

Since the manufacturer is under a duty to use due care in the manufacture of his wares any negligence occuring in the inspection, testing, plan and design of his products become matters of proof for the plaintiff's lawyer. In this volume is an extensive discussion of law and science as applied to various sampling techniques and as applied to plan and design of products. These sections are written by contributing authors who are specialists on the various topics discussed and are designed to give the lawyer some understanding of the terminology and scientific principals that would be encountered in the use of an expert to prove faulty testing or design of a product. The importance of the expert witness is stressed and the authors point out the sources of expert testimony such as our own local universities and colleges which are so often overlooked in the search for a qualified expert.

Even though the manufacturer turns out a product perfectly made there may still be a duty to warn of foreseeable and latent dangers attendant upon the proper and intended use of his product. Since more and more complicated products with potentiality for harm are being sold to the general public there has been a judicial recogni-

tion of the manufacturers' duty to keep abreast of scientific advances and the duty to make tests to ascertain the nature of the product. The manufacturers' superior knowledge of his products makes it imperative that the public be warned of any harm which may result from the intended use of the product. However, the duty to warn can raise some very interesting questions as to forseeability of the manner of the use of the product and the manner in which the injury was caused. The treatment of this topic is made particularly thorough by the use of illustrative cases which have been before the courts.

Almost as familiar as the privity requirement in products liability cases is the doctrine of *res ipsa loquitur*. The old problem in the ordinary negligence case of whether *res ipsa loquitur* gives rise to (1) a permissible inference of negligence, (2) a presumption of negligence or (3) shifts the burden of proof to defendant to prove non-negligence is common in product liability cases and there are cases taking each of the three positions. The law of each jurisdiction will determine what the effect of *res ipsa loquitur* will be but it is interesting to note that some cases have either ignored or rejected *res ipsa loquitur* and have permitted an inference of negligence from circumstantial evidence thereby accomplishing the same things as *res ipsa loquitur*.

Recovery against a manufacturer on a warranty theory may be barred by the lack of contractual relationship or privity of contract. The author's discussion of manufacturers warranty cases is not at all friendly to the privity requirement, and leaning heavily on *Rogers v. Toni Home Permanent Co.*, 167 Ohio St. 244, 147 N.E.2d 612 (1958), the pioneer case in the field of express warranty in advertising, it is shown that the productive efforts of manufacturers are directed to the public and that liability should follow these efforts. However, in the absence of legislation, privity has been necessary in most cases of warranty.

A strict liability based on warranty without the privity requirement raises the question whether there should be a breach of warranty if the defect or hazard is one which cannot be detected regardless of the amount of care exercised. The authors feel that policy factors must be considered or some vital products would not be manufactured. The determination of whether there will be strict liability as applied to a particular product should be on the basis of the scientific knowledge. There is a distinction between the manufacturer who merely shows that he was not negligent in failing to

discover the defect or hazard and the manufacturer who shows it is not humanly possible, in view of the present state of scientific knowledge, to discover or eliminate the defect or hazard. In the latter instance the product should be considered reasonably fit or merchantable.

Following the section on manufacturer's liability is a section on retailer's liability and another on the middleman's liability. In general, these sections are of the same high quality as that of manufacturer's liability. Most of the ideas advanced in these sections follow the theories laid out in the manufacturer's liability portion of the volume.

This volume ends with a chapter devoted to food and beverages. Here again is material designed to acquaint the reader with medic-legal information about food poisoning, its symptoms and treatment, and a thorough discussion of the lowly but dangerous bottle and its manufacture. The contribution on the scientific-legal aspect of exploding bottle cases is informative and, for anyone having a case dealing with such an occurance, would be indispensible background material.

Product liability is the first complete treatise on the law of liability for harm done by a product. Volume I has not only explained the law on the topic but has given me an understanding of the evidenciary aspects of a suit involving products liability. I look forward to Volume II.

WILLIAM F. HODNY.*

SACCO-VANZETTI: THE MURDER AND THE MYTH. By Robert H. Montgomery. Boston: The Devin-Adair Company, 1960, 356 pages. Price: $5.00.

Since 1921, when Nicola Sacco and Bartolomeo Vanzetti were convicted of the crime of muder and subsequently put to death many people, laymen and jurist alike, have attempted to vindicate them. Some have said that they were victims of the times — that they were convicted of radicalism rather than murder. Others have attempted to place the blame on the judge and say that he was unfair — that he misled the jury and favored the prosecution. Mr. Justice Holmes, interpreted the case as an ordinary murder made into a text by the Reds.

The author considers these variations as myths and in his book

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he attempts to tell the truth about the case and to answer two questions: Were they guilty? Did they have a fair trial? Mr. Montgomery says in his preface: "I am not young enough to believe that telling the truth about the case will demolish a myth so dear to the credulous who have defied Vanzetti and so valuable to the powerful influences here and abroad who still use it for propaganda and mass agitation." Yet, after reading his book it is hard for this writer to conceive of one still believing that they were given anything but a fair trial.

In attempting to answer the question of whether Sacco and Vanzetti were guilty, the author takes the reader through a detailed step by step analysis of the sequence of events leading to their conviction. The author points out that actually the arrest was made by accident. They were caught in a trap set for someone else. As the arresting officer approached them on a streetcar, Sacco reached for a gun. He was disarmed and they were both taken to the precinct station where their answers to routine questions were so vague and evasive that they were held for further investigation.

Vanzetti was found to be carrying a pistol of the same make as that taken from the slain guard during the South Braintree holdup and murder. But the single most damaging item was the gun Sacco was carrying. It was of an unusual make that required certain obsolete bullets, of which some were found on his person. The bullet recovered from the dead guard was proved at the trial to have been fired from Sacco's gun. Throughout the trial and the many appeals thereafter taken, this one single most damaging fact still remained uncontroverted. Mr. Montgomery interviewed the now living jurors and they all agreed that the Sacco gun was the one thing that they relied on most in arriving at their decision.

Notwithstanding the gun, the prosecution also brought in Sacco's cap which was dropped at the scene of the crime; they destroyed the alibi's of both Sacco and Vanzetti with eyewitnesses as well as circumstantial evidence that tended to strongly show their conciousness of guilt. The prosecution was well planned and at no time did the record show any hint of bias or prejudice on the part of either the prosecution or the judge. The author arrived at the conclusion that Sacco and Vanzetti were convicted solely and rightly on the evidence unfolded in the course of a fair trial.

Mr. Montgomery goes into great detail to show how the radicals and the Communists came to the defense of Sacco and Vanzetti and how they soon distorted and suppressed significant facts until it be-

came apparent that they were only interested in fomenting trouble and making the two defendants a couse célébre rather than earnestly defending them. In attempting to show the reader how the defense went about the process of making the defendants martyrs, the author relates in detail how an attempt was made to shift the gun barrel from Sacco's gun and replace it with another of the same or similar make so as to disprove the prosecutions contention that Sacco killed the guard. He shows in great detail how the defense rigged the testimony of witnesses for Sacco and Vanzetti; and he shows the falsity of affidavits presented by the defense on appeal. All of these manuvers are painstakingly torn apart by Mr. Montgomery and revealed for what they are — namely radical and Communist efforts to stir up trouble in the country with no thought to actually defending two men accused of murder.

The author attacks the "mythmakers" who by presenting a distorted and sometimes fraudulent view of the proceedings have made an ordinary murder trial into one that has caused much comment around the world even today.

Such well known people as Musmanno, Wigmore and Frankfurter have, in the authors' opinion, created myths that until this book, have gone uncorrected and unexplained.

Mr. Montgomery critizes Mr. Frankfurter in particular and devotes many pages to showing where he deliberately suppressed certain facts and made light of others. The end result was "the basis for the faith of intellectuals, academicians, and clergy who could not but be impressed by what seemed on its surface to be an impartial and accurate survey by a professor of law at Harvard."

Throughout the book, Mr. Montgomery compared Frankfurter's statements of the facts with the real facts and it was his opinion that the Frankfurter book is unreliable in its statements of fact and conclusions of law. So strongly did Mr. Montgomery feel about Frankfurter's missstatements that he, on one occasion, wrote him and asked that Frankfurter give a repudiation of certain statements made. This Mr. Frankfurter flatly refused to do.

In summing up the book the following conclusions can be arrived at: 1) That Sacco and Vanzetti were convicted farily based on evidence produced and proved at the trial. 2) That the judge and jury were not swayed or intimidated by the efforts of the radicals and Communists to inject ideologies into the trial. 3) That proved, significant facts of the case have been distorted and suppressed by the Mythmakers.

Mr. Montgomery, who graduated from the University of North Dakota (A.B. 1909) and Harvard Law School (L.L.B. 1912, cum laude) has written a worthwhile, entertaining and informative book presented in logical manner by an excellent researcher and lawyer.

MELVIN E. KOONS, JR.

HOW TO TRY A FEDERAL CRIMINAL CASE. By Paul C. Matthews.* Buffalo, New York: Dennis and Company, 1960. Two Volumes. Price: $36.00.

A problem which confronts many attorneys during their practice, is "How Do I Try a Federal Criminal Case, and What Procedural and Substantive Law Steps Do I Take?" *How To Try A Federal Criminal Case* will give its reader, in some great detail, the exact steps which to follow.

The title would convey the idea that it is only designed for prosecuting attorneys, but when a closer look is given to the subject matter contained in the treatise, one can readily see that the defense attorney as well was in mind when the book was written. The work tells you "what to do", "how to do it", as well as being modern, comprehensive and complete.

The treatise has a definite arrangement and a logical order for a proper and comprehensive discussion of the problems involved. From the introduction, to the final chapter on Probation, a widespread study is given each and every procedural and substantive point which could possibly arise in the course of a criminal case. There are many areas in criminal procedure where a haze hangs heavily over certain aspects. Mr. Matthews clarifies such areas as search and seizure, due process, self incrimination, the taking of body fluids, and the removal of the indictment. He makes a detailed analysis as to the effect of hearsay upon the validity of the indictment. Wire tapping which has always been a controversial topic has now been stripped to a certainty. The Federal Youth Correction Act, which was recently enacted is fully discussed. The famous "M'Naghten Rule" is discussed along with other such criminal responsibility tests such as infants, aliens, intoxicated persons, corporations, and diplomatic representatives of a foreign government.

Under each chapter the subject matter is catagorized into various

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subsections. The topics can be readily found with the aid of the adequate index in volume two.

The treatise has no footnotes; instead the authority is cited in the subject matter being conveyed. This allows the reader to retain a constant flowing chain of thought.

An inclusively indexed section is devoted to the Federal rules and forms, which are displayed in chronological order. These forms contain the motions, complaints, petitions, affidavits, etc., all of which are pertinent to the trying of a Federal criminal case.

Since no effectual treatise has been compiled on criminal procedure since 1948, and with the many new developments and changes on this subject in recent years, this work would be a practical guide, a timesaving reference, and a valuable asset to any attorney's library.

J. F. BIEDERSTEDT.