where the obligation resting on the defendant is to see at his peril that care is taken either by himself or the person to whom the task is delegated. The difficulty which then arises, however, is that the principle asserted, when interpreted in this fashion, becomes circuitous. If one requires to know *in what circumstances* a duty of this kind rests on the defendant it is of no assistance to learn that in the circumstances where a duty of this kind exists the defendant will be liable for the negligence of the person to whom he has delegated the task. It follows that where in the absence of specific authority such a duty is supposed to be derived from such a principle, what is really happening is that a judicial innovation is taking place and this is what appears to have happened in Denning, L.J.'s judgment in *Cassidy's Case*, rather than the strict application to the circumstances of a settled principle. It may indeed be questioned whether the proposition which his Lordship derives from his argument, namely that a hospital is liable for the negligence of any surgeon it selects, whether resident or consultant, can yet be regarded as settled law.

It may be concluded that in its formulation of general principles the work under review offers some examples of over-simplification. In the light of its modest aims, however, it would be carping to withhold a recommendation of it to those who seek a short and readable account of an interesting subject.

W. L. MORISON*

Inquiries into the Nature of Law and Morals, by Axel Hägerström (ed. K. Olivecrona, transl. C. D. Broad). Uppsala, Sweden, Almquist & Wiksells, 1953. xxxii and 377 pp., with biblio. and index.

This work—an excellent translation by Professor C. D. Broad—makes available to the English reader some basic thoughts of the Swedish legal and moral philosopher, Axel Hägerström (1868-1939), who has had a considerable influence on the contemporary legal theory of Northern Europe. From his philosophy springs the vigorous school of Scandinavian legal realism, whose main living exponents are Vilhelm Lundstedt and Karl Olivecrona in Sweden, and Alf Ross in Denmark. This school has a notable affinity with American legal realism as regards its general spirit and its directions of inquiry. The affinity of both schools carries possibilities of cross fertilisation: the Americans can offer empirical material gathered and elaborated for practical purposes in exchange for many valuable theoretical insights of the Scandinavians derived from their struggle against ideas in which lie the roots of the rival traditional and modern schools of jurisprudence.

The general tendency of Hägerström's thought is expressed in the motto he selected for his philosophy: "*Praeterea censeo metaphysicam esse delendam*".[1] The anti-metaphysical attitude announced in this motto links Hägerström's thought with Anglo-American logical positivism as expounded, for example, by Alfred Ayer in the United Kingdom and Hans Reichenbach in the United States.[2] The other characteristic feature of Hägerström's thought is expressed in his thesis that scientific theories can be founded only on spatial and temporal data of experience. From the anti-metaphysical and empiricist orientation of his thought it follows that Hägerström must deny the objective existence of values. He contends that values are not *found* in real entities but are *ascribed*

* D.Phil. (Oxford), B.A., LL.B. (Sydney), Associate Professor of Common Law in the University of Sydney.

[1] See p. xi of the work under review.

[2] See A. J. Ayer, *Language, Truth, and Logic* (1948); H. Reichenbach, *The Rise of Scientific Philosophy* (1951).

to them. Correspondingly there are no objective duties. Behind the statement "This is my duty", lies the association of the feeling of conative impulse with the idea of action. For Hägerström there can be no science of duties but only *actual ideas* of duties.

Since no science of objective values, duties, or objective "Ought" is possible, Hägerström conceives the task of legal philosophy to lie (1) in the analysis of notions actually used by the lawyer such as the concepts of rights and duties; (2) in the inquiry into ideas such as justice and the purposes of law; (3) in the study of legal institutions such as punishment. Thus Hägerström's conception of legal philosophy largely coincides with what is now generally understood by legal sociology. Hägerström's own main contribution to legal theory seems to lie in his extensive criticism of juristic notions, which criticism was continued and carried to extreme in the often passionate pages of the works of Vilhelm Lundstedt.[3] Although Hägerström never published any elaborate answer to the fundamental question, what is law?, his relative thoughts dispersed in several writings seem to establish clearly enough that he conceived law as a psychological fact, which conception was developed into a noteworthy theory by Karl Olivecrona[4] and by Alf Ross.[5]

Hägerström's penetrating and comprehensive criticism of current legal notions was not directed only against natural law doctrines, which criticism follows inevitably from the anti-metaphysical trend of his thought, but also against legal positivism, which he considered to be permeated with natural law conceptions. Everywhere in juristic thought Hägerström traced magical and mystical ideas, and exposed all the principal current juristic notions as metaphysical sham concepts. He held the view that the usual distinction between primitive and modern thinking was unwarranted; the modern mind still retained, according to him, important elements of primitive thinking.

The contents of the present book include the Editor's Preface, giving a good account of Hägerström's thought; "General View", being the introductory chapter of Hägerström's monumental treatise on the Roman law of obligation;[6] three essays on the will-theory of law; a critique of Kelsen's legal theory; and an essay on the fundamental notions of law. All these writings are, in the reviewer's opinion, important contributions to legal theory. Legal scholars interested in fundamental problems of law can find in them a wealth of relevant historical facts, penetrating critical observations, and valuable theoretical insights, irrespective of whether they share the author's philosophical beliefs or agree with his conclusions.

Hägerström's works, as well as of those other writers belonging to his school, are rich in thought and stimulating to the extent that an adequate appraisal of them would be impossible in a limited space. So the following critical remarks are intended only to voice the main disquietude which the basic ideas of Hägerström's legal theory have occasioned in the present reviewer.

Although Hägerström's hostility towards metaphysics is an attitude shared by many philosophers to-day, the call "*metaphysicam esse delendam*" is unlikely to reverberate and inspire minds outside the walls of the schools which have expressed the same demand in one way or another. For the reviewer, as for many others, metaphysics appears to be an essential direction of the inquiry which strives for a comprehensive understanding of reality. Anti-metaphysical attitudes can conceivably be based only on metaphysical grounds, and are often

[3] See especially V. Lundstedt, *Superstition and Rationality in Action for Peace?* (1925); *id.*, *Die Unwissenschaftlichkeit der Rechtswissenschaft* (vol. i 1932, vol. ii 1936).

[4] See especially K. Olivecrona, *Law as Fact* (1939), *id.*, *Der Imperativ des Gesetzes* (1942).

[5] See A. Ross, *Towards a Realistic Jurisprudence* (1947).

[6] See A. Hägerström, *Der römische Obligationsbegriff im Lichte der allgemeinen römischen Rechtsanschauung* (vol. i, 1927, vol. ii, 1941).

expressions of some unavowed dogmatism,[7] which has caused Julius Stone, whose own views are otherwise not uncongenial to those of Hägerström, to characterise the thought of Hägerström and his followers as a naive empiricism.[8]

A striking feature of Hägerström's and his followers' thought is the pathos which their concept of reality (meaning for them spatial-temporal reality) and their idea of sense experience carry. This pathos creates the suspicion whether the Hägerströmian thought is not, in its very roots, based on valuational attitudes of a special kind, whether the objectivity, the need for which they so ardently emphasize, is not strongly coloured and largely interpenetrated by subjectivity. The reviewer strongly doubts whether the Scandinavian realists' conception of and approach to reality and objectivity provide ways and means to escape from irrationalities and illusions which may be found in juristic notions and doctrines. In seeking this escape a wider concept of reality than Hägerström's concept and consideration of a wider range of entities than real entities seem to be necessary. In other words, for the theorists of law who seek a fundamental understanding of the objects of their concern, it is necessary to rely on, or create if it does not already exist, a sound general theory of entities, a theory of Being, or more shortly a sound ontology or metaphysics. Only on the basis of an adequate metaphysics would the excellent contributions of Hägerström and his followers to legal theory be recognisable in their true merit. The radical maxim "*metaphysicam esse delendam*", if followed consistently, must create confusion of thought and engender dogmatism, deleterious to any regional theory, including the theories of those who believe in this maxim. In the reviewer's opinion, the Scandinavian legal realists, like all legal theorists, need for a fuller intellectual penetration of the actuality of law, to include within the ambit of their philosophical concern not only the Reality but also the Being of law.

ILMAR TAMMELO*

Contract and the Freedom of the Debtor in the Common Law, by I. S. Pawate, M.A., LL.B. of the Bombay State Judicial Service. N. M. Tripathi Ltd., Bombay, 1953. i-xiv, 1-145 (with index).

This slim volume sets out to solve a problem which the author takes to be central to the law of contract, the problem of reconciling the fact that some promises are legally enforceable with the existence of political liberty. The problem is raised and dealt with in this way. When an enforceable contract has been entered into the will of the promisor appears to be subjected to that of the promisee since the promisee can call the law in aid to compel the promisor to do the promised act: as far as the performance of the contract is concerned the promisor is the promisee's slave. But this is not only politically odious: it is also repugnant to the common law. Any theory of contract which involves this subjection of one person to the will of another is therefore inadequate to explain the phenomena of contract. A theory must be found which makes a contract the expression of the promisor's freedom and this on analysis is what really occurs. Every honest promisor must be presumed to have the intention

[7] *Cf.* A. Truyol, "*Doctrines Contemporaines du Droit des Gens*" (1950) 54 *Revue Générale de Droit International Public* 377, at 381ff.; who criticising the doctrine of Lundstedt and other similar doctrines says: "*Au fond tout ces doctrines sont construits a priori, elles ont un caractère dogmatique frappant*".

[8] See J. Stone, *Legal Controls of International Conflict* (1954) xlix.

* LL.M. (Tartu, Estonia), Dr. Jur. (Marburg, Germany), M.A. (Melbourne); Research Fellow, Department of Jurisprudence and International Law, University of Sydney. Formerly *Privatdozent* in Jurisprudence and Legal Philosophy, University of Heidelberg.