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.

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to be bound by his promise at the time he makes it and this intention, which is nothing more than the expression of the promisor's free will, is what binds him. Accordingly, the external sanction which can be invoked by the promisee if there is a failure on the promisor's part to perform the contract has nothing to do with the existence of an obligation binding the promisor: "the duty of the promisor arises from his own will unaided by the will of the promisee".[1] In other words, it is quite inaccurate to describe the promisor as being bound *to the promisee*: he is bound not to the promisee but to a particular course of conduct of which the promisee may take advantage. This involves the consequence that the duty of the debtor under a contract can arise before the corresponding right of the creditor since the duty comes into existence as soon as the promisor resolves to embark on the course of conduct required of him by the terms of his promise. This in turn brings about the somewhat paradoxical consequence that a debtor can come into existence before there is a creditor, and that a duty to perform a contract can be imposed on the debtor before any right exists in the creditor to insist on performance. The imposition of the duty is, therefore, not the result of any external control imposed on the promisor since all the elements that bind him have come from within himself alone. The promisor is not a slave of the promisee since he is bound only to the line of conduct he has resolved on, and this resolve is prompted by nothing but his own untrammelled will.

This is an interesting thesis but a somewhat confused one. The confusion stems from a failure to formulate with precision precisely what the problem is. To say emotively that current theories of contractual obligation make the debtor the creditor's slave depicts the law of contract as an instrument of repression. But all law involves restraint and there is no reason for making contract the subject of special mention in this regard: the tortious defendant made liable to the plaintiff in damages is on this interpretation of freedom more akin to a slave than is the recalcitrant promisor, for the latter at least could be said to have got what he bargained for. The point is that if freedom is to mean (as Mr. Pawate's argument seems to suggest) the determination of conduct by the agent's undetermined will, it is a concept that is both philosophically unsound and one which would deny freedom to any person who is subject to law. The freedom of the subject which is spoken of as being preserved by the common law is the immunity of the subject from all illegal restraint: it merely expresses the existence of the rule of law. A promisor who is bound to perform his contract is, therefore, not unfree in this sense merely because certain courses of conduct are denied him: the law does not stultify itself by using the name of freedom to confer the privilege of lawlessness. A man may, therefore, retain his freedom in this sense even though he is not free to break a contract. Accordingly, when the author argues[2] that, since loss of freedom is abhorrent to the spirit of the common law, it cannot countenance the subordination of the promisor to the promisee's will, he is interchanging the two senses of the word. The conclusion that even after entering into the obligation and in the performance of the duties of the obligation the debtor is exercising his freedom to the fullest extent, is no solution to the initial problem unless the word "freedom" is used in a sense which makes the conclusion manifestly untrue.

Mr. Pawate's suggestion that a legal duty can exist despite the absence of any corresponding right likewise involves a failure to appreciate what flows from the concept of a *vinculum juris*, namely, that duty is a relation and not a quality. A right is a demand that can be made good by the intervention of the machinery of law enforcement: duty is the relation between the demander and the demandee. And since a relation presupposes the existence of related things, the duty of the promisor cannot precede the existence of a promisee.

[1] At 2.
[2] At 35-36.

Yet in support of the argument that the right of the creditor is not the source of the debtor's obligation, the conclusion is drawn[3] that the duty of the debtor under a contract can arise before the right of the creditor and can survive its extinction. The translation of Mr. Pawate's propositions into Hohfeldian terms introduces illumination at this point. When the promisor makes an offer, this act of his own free will creates a liability that the offer will be accepted. But until the conduct of the promisee brings into being contractual relations between the parties, the promisor may withdraw the offer. He is, therefore, merely liable to be bound if he chooses to leave the offer open, and it is not sense to say that the extent of his obligation does not depend on whether the offer is accepted or not.

In the second part of the book Mr. Pawate meets the objection that the need for consideration to make a simple contract enforceable means that the promisor's own good intentions are not invariably sufficient to bind him. He does so by advancing a view, termed the "merit" theory of consideration, that the presence of consideration has nothing to do with whether or not the promisor is bound but merely provides a test for determining whether the promisee should have a cause of action against him.[4] To maintain an action against the promisor the promisee must, therefore, have done something to earn the court's sympathy; unlike the donee under a deed he must have suffered some detriment. "The law as to simple contracts differs only in the additional requirement it makes for the purposes of enforcement only, that the promisee shall show a cause for his demand in addition to the promise itself".[5] As long as the promisee has "paid" or suffered some detriment it does not matter that he has not "paid for" the promise with consideration passing from him to the promisor.

Mr. Pawate acknowledges that this statement of doctrine obliges him to discard the bargain theory which requires the promisee to "buy" the promise from the promisor. He does this without reluctance since that view is often responsible for a conflict between the demands of logic and the justice of the case. An example of such a situation is the revocation of a unilateral offer. Mr. Pawate takes the view that the offer is a promise and if intended by the promisor to be binding is so whether or not an acceptance is communicated to him. If the "offer" is revoked the "promise" is broken. The "acceptance" is the performance of a requested act. The question is whether the promisee merits the court's sympathy. If he has entered upon the performance of the requested act, he clearly does. Revocation of an offer is, therefore, always a breach of promise, but since the promisee does not merit assistance until he has expressed his assent or started on the performance of the act, no liability arises from the broken promise.

Whether or not the rejection of the bargain theory is justifiable depends very largely on what is offered to take its place and one cannot regard the substitute for it provided by Mr. Pawate as satisfactory. The bargain theory has the advantage of providing a determinate test; the merit theory leaves the court to grapple with the elusive concept of what the promisee "deserves". In one sense all legal rules embody what the particular community considers people in given situations "deserve"; it is not good enough to say that the promisee derives support from the rules as to consideration because he deserves it. The law requires some articulate reason for the promisee's right of action and does not make policy considerations the rules of law themselves.

Mr. Pawate's clarity of style is the most attractive feature of the book. It is a very special virtue in an author who sets himself the task of solving a self-imposed problem which depends for its existence on the random use of

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[3] At 33.

[4] In what sense the promisor is "bound" if the promisee cannot enforce the contract remains unclear.

[5] At 62.

the shifting concepts of a libertarian political philosophy.

PHILIP JEFFREY*

A Common Lawyer Looks at the Civil Law (The Thomas M. Cooley Lectures, Fifth Series), by F. H. Lawson, with a Foreword by Hessel E. Yntema. Ann Arbor, University of Michigan Law School, 1953. xvii and 238 pp., with indexes.

The title of this book could well be misleading. Apart from Professor Lawson's undoubted position as an uncommon lawyer, it is obvious that a mere look at the Civil Law would be a most fallacious basis upon which to write even a paragraph. Rather, then, is this book a successful attempt by a veritable master of laws to place the reader within earshot of the Civil Law so that he may hear and understand both its discords and its harmonies.

Now that Roman Law has lost its position of importance as an academic subject, there is an unfortunate tendency to shrug off foreign law as an example of the way in which the inhabitants of other countries, not being content to set their law down in their own language, create difficulties by rearranging it all in an unfamiliar order; this tendency, of course, being shared, *mutatis mutandis*, by civilians as well. The great merit of Professor Lawson's book is that throughout its pages he is able to correct this tendency, not merely by expounding the Civil Law as a remote collection of laws, but by making it alive, giving not only "a brief anatomy" (p. 2) but also case history, diagnosis, prognosis and, in places, a recommended treatment. The result is that neither the civilian nor the common law reader can feel that one system is over-praised to the exclusion of the other.

In all, there are five lectures in this series, treated as chapters for the purpose of the book.[1] These comprise The Historical Background, The Form and Sources of the Civil Law, The Contribution of Roman Law, The Advance Beyond Roman Law, Non-Roman Elements in the Civil Law. Here the first and fifth are probably the most important, one because it dispels the notion that the Civil Law is but Roman Law brought up to date, the other because it discards several well-worn generalisations both about the Civil Law and about the differences between it and the Common Law. Thus the presence or absence of a code, the authority given to precedent and the tendency to use either inductive or deductive reasoning are all shown to be unsure distinctions between the two systems. On the other hand, the conceptualism and the literary qualities of the Civil Law are seen to be of special importance.

But it is in the fifth chapter that Professor Lawson's mastery over the subject is seen. For Roman Law seems always so facile an explanation of the pattern of the Civil Law that the contribution made by other elements is apt to be forgotten. Such elements are, of course, external to the groundwork of the Roman Law, yet are completely internal in that they have been brought into being by local differences and changes in social behaviour throughout many centuries. To this part of the Civil Law a study of Roman Law is no introduction and it is here that the Civil Law gets near to being a common law in so far as the law therein contained is more akin to a custom of the realm than to a law of the book.

Into this field, then, not by any means well-known to continental lawyers themselves, Professor Lawson enters with confidence and, although dealing only with isolated topics, gives the reader an inkling of the full learning upon

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[1] Though at 45, 138 and 204 the term "lecture" has inadvertently been allowed to remain.