

1959

THE ANATOMY OF THE WORLD. Michael Macdem. – HANDBOOK OF MODERN EQUITY. William Q. de Funiak. – TRAFFIC VICTIMS – Tort Law and Insurance. Leon Green.

Stanley D. Rose

John L. Garvey

Vernon X. Miller

Follow this and additional works at: <http://scholarship.law.edu/lawreview>

Recommended Citation

Stanley D. Rose, John L. Garvey & Vernon X. Miller, *THE ANATOMY OF THE WORLD. Michael Macdem. – HANDBOOK OF MODERN EQUITY. William Q. de Funiak. – TRAFFIC VICTIMS – Tort Law and Insurance. Leon Green.*, 8 Cath. U. L. Rev. 51 (1959). Available at: <http://scholarship.law.edu/lawreview/vol8/iss1/6>

This Book Review is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized administrator of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.

BOOK REVIEWS

THE ANATOMY OF THE WORLD. Michael Macklem. Minneapolis. University of Minnesota Press, 1958. Pp. viii, 139. \$3.50.

This little book describes a debate that took place among English writers of the seventeenth and eighteenth centuries over the structure of the earth and the relationship between physical and moral law. The ideas considered are undoubtedly now obsolete and they may appear to be of interest only to antiquaries. But the ideas being traced in the book are the ideas that were in general currency at the time of our own Revolution. These English writers had reached general agreement on the nature of man. It can be shown that their views were those held by our founding fathers. Because these particular ideas are seldom discussed in histories of the period and because the ideas have real significance, this volume being reviewed deserves close consideration.

It was part of the common knowledge of the men of the seventeenth century that the sin of Adam and Eve had brought disorder and decay not only upon man but also onto the hitherto perfect and incorruptible physical world. Massive volumes were devoted to both theological and empirical proofs of the earth's characteristics that demonstrated the validity of these beliefs. The irregularities of the earth's surface, such as mountains, were taken as a clear sign of corruption. The general belief was that mountains had appeared only after the Flood.

The new advances in astronomy in the early seventeenth century appeared to support the view that the disorder extended to the heavens. Galileo's telescope showed the irregularities on the surface of the moon. Kepler demonstrated that the planets moved in elliptical orbits, not in the more perfect spherical movements. It seemed clear that God had indeed cursed the earth and left it, as John Donne said in 1611, with "all coherance gone."

The assumptions upon which this outlook was based began to be rejected in the middle of the seventeenth century: Newton's discovery of the laws of motion and of gravitation demonstrated that the entire physical universe was within a framework of strict law. This law was taken to demonstrate the present interest of God in the world. As such it made untenable any belief in the continuing decay of the world. Mountains became not manifestations of worldly corruption but majestic spectacles of the power of God. The issues of the debate now shifted to man. If the natural world was not corrupt and in a state of decay, could it be contended likewise of the moral world?

The opposing points of view can be exemplified by John Milton and Alexander Pope. In *Paradise Lost*, published in 1667, Milton told of man's first disobedience in eating the forbidden fruit and the awful consequences of that act. Less than seventy years later, in 1733, Pope's *Essay on Man*¹ described a general order of the universe which included both nature and man and which because of a complete interlacing of law proved that "whatever is, is right." In these years, evil had ceased to be a consequence of sin and had become, what Dr. Macklem calls, a

¹ This essay and Addison's *Spectator* were the most widely read literary works in colonial times. Rossiter, *Seedtime of the Republic* 126 (1953).

condition of existence. If evil arises out of the natural operation of either the physical world or human nature, it must simply be endured. We cannot change nature's laws. They are conditions of existence. Existence cannot be wrong. That has no meaning. Therefore whatever is, is right. The moral law as a command arises from a belief that it expresses the will of God. The moral law will consist merely of descriptive statements of fact if one believes that the moral law is but part of the immutable structure of the universe. This latter belief was arrived at early in the eighteenth century.

As astronomy and physics had revealed the natural laws governing the physical universe, so now the nature of man was investigated to derive the basis of the moral law. The analogy was believed to be valid. Reason had discovered the way the stars work. No obstacle was apparent that would bar the human mind from understanding of the nature of man.

The use of human reason to discover moral law followed upon a then current predisposition to dispense with a Deity. A starting point in this line of reasoning is Thomas Hobbes' premise that the safety and preservation of each man is a law of nature discoverable by reason. Hobbes, by discovering the laws of nature by reason alone and deriving from them the moral law, was denying the will of God as the ultimate basis of morality. He made law the command of the sovereign and inferred that there was no necessary requirement that such commands be based on justice. Hobbes' contemporaries doubted that reason could produce such a distasteful result. They argued that right reason which could discover the laws of nature must be just because it was the will of God. This argument required the belief that right reason originated in God's understanding and was sanctioned by His will. But the eighteenth century *pro tem.* rejected the use of God for this sort of argument. The debate now progressed by challenging the use of reason as a sanction for moral law.

Understanding and willing are different functions. If reason were to discover the law, from whence would come the obligation that it be obeyed? The ancient answer had been that men should do the will of God, but that answer had been put aside. Early in the eighteenth century, a plausible solution was worked out by shifting study from a consideration of the sources of morality to an examination of the moral agent. It was suggested that each man has within him a moral sense that signals to him whether the contemplated act is morally right or wrong. Moral law was thus naturally known by being implanted in the heart of each man. Moral goodness was a quality that secured approbation for the actor. Or, as it soon became, moral goodness was tested by the pleasure given by the act. It was inferred that it was the natural desire of men to give pleasure to others. The function of reason was limited to seeking out the appropriate *means* for doing virtuous acts. The *ends* of human action, however, are naturally determined from within. Thus, moral law simply described what gave satisfaction to either the actor or observer. It did not command or oblige. Moral law and physical law are identical in nature. They do not command that anything be or not be done. They describe what is. Between the two, they encompass the universe. No thing can act contrary to them, therefore, whatever is, is right.

This analytical study of an important segment of our intellectual history should be of interest to us. When Thomas Hobbes used his reason to discover the

nature of man and when he decided on self-interest as the foundation of moral law and civil government, he helped to divert natural law from its classical basis in divine law. The ultimate result was the natural rights philosophy which saw its culmination in the French Revolution and against which Edmund Burke thundered.

The decision that not reason but the passions governed the moral nature of man had an important part in the development of democracy in America. It could be admitted that the natural endowment with respect to intelligence differed markedly among men. The extent of education presented an even greater contrast. It seemed preferable, therefore, to leave the government in the hands of the natural aristocracy of the rich and well-born. But such differences were irrelevant if each man carried in his own heart the instinct or sense of what was right and felt an impulse to do this right. Aware of this theory and believing in it, Jefferson knew that the moral sense of men impelled them to desire the greatest good for all other men. All men, of whatever station in life, could therefore be trusted with government. Democracy was worth trying. The spread of education would make a democracy even better.

There is, of course, no need to evaluate the ideas considered by Dr. Macklem. They are of an historical period long gone, but cosmology is not a new science. Perhaps some Englishmen in the seventeenth and eighteenth centuries forgot St. Thomas when they were seeking answers to the riddle of the universe. To men in the twentieth century the riddle seems twenty times greater, and patterns are more difficult to discover. St. Thomas can help us to find them.

STANLEY D. ROSE*

HANDBOOK OF MODERN EQUITY. William Q. de Funiak. 2d ed. Little, Brown and Company, 1956. Pp. xii, 269. \$5.00.

Though the reviewers¹ had only light praise for the original edition of this work, public response justified three printings² in the six years that passed before the appearance of this second edition. The personal experience of this reviewer in teaching Equity during the past four or five years bears testimony to the popularity of the work among students. Possibly a re-examination of the book will shed light on the secret of Professor deFuniak's success.

Undoubtedly, some of the work's popularity has come by default. Now that the separate course in Equity has fallen by the way in most law schools, there is a marked lack of interest in the preparation of new texts on Equity. One is tempted to say that this and McClintock's hornbook are the only current American texts in the field, although the recent edition of Clark's work might cause some to quarrel with the statement. Be that as it may, this and the hornbook are the only current works on American Equity which purport to treat in a more or less extensive

* Department of Justice, Washington, D. C.

¹ Book Reviews, E. A. Rauscher, 25 TULANE L. REV. 152 (1950), Burt DeRieux, 2 MERCER L. REV. 455 (1951), W. F. Young, 29 TEX. L. REV. 396 (1951).

² See Preface to Second Edition at v.

manner that phase of equity's jurisdiction which has expanded so much in this century: jurisdiction in the tort field, particularly the protection of business and personal rights. It is true that Walsh's text dealt with these matters but it is now more than twenty-five years old and can hardly be considered up-to-date in this developing field; both Pomeroy's treatise and Clark's text left these areas largely undeveloped. DeFuniak's major contribution to the literature of equity lies in chapters seven and eight of this book where he deals with and summarizes the current thinking of American courts on the equitable protection of business and rights incident thereto and the protection of personal or individual rights.

It would, however, be grossly unfair to state that all of the work's popularity has come by default. Two features that endear any book on law to student and practitioner alike—possibly teachers also, but there may well be doubt about this—are advertised in its title: 1) that this is a "handbook," a brief treatment of fundamentals, and 2) that it deals primarily with "modern equity," i.e., current cases and their application of equitable principles. That this is a handbook and not a fully developed treatise is obvious from its size: only 242 pages of text. That the author was principally concerned with modern equity is evident by the vast number of recent citations found in the footnotes; indeed, it is remarkable, and a tribute to the author's continuing research, how many of these citations are post 1950—the date of the original edition of this book.

Though both of these qualities are commendable in any law book, they are not prime requisites of a good text. Their value can only be assessed by determining what has been sacrificed to accomplish them. The author's basic tool in accomplishing brevity has been the reduction of the subject matter to its barest fundamentals. This of course is the method of every handbook. By and large deFuniak has done a good job in this respect. Of course, in editing material, no author could be expected to please everyone and there are times when deFuniak has made me unhappy. The materials on rescission, reformation, and the equitable remedies of contribution, subrogation, interpleader, quia timet, and bills of peace are too short and superficial to be of much use; and the doctrine of equitable servitudes has been completely ignored. However, the book does a good job of presenting and summarizing the basic rules currently applied by courts in cases involving the specific performance of contracts, equitable relief from torts, and the more important effects of the doctrine of equitable conversion.

Successful though the book may be, it has its defects. Others have commented upon the flowing style of the author and its tendency to lull the unwary into believing that the difficult doctrines of equity are really quite simple. And others have mentioned the wealth of secondary authorities (text, law review comment, and annotations) cited in the footnotes—a boon to students with school libraries at hand but not too helpful to practitioners whose library facilities are usually more limited. My greatest objection to this book is that in his preoccupation with modern cases and their application of equitable principles deFuniak has unduly slighted the historical materials which show the function of equity in our law and thereby aid in understanding its true nature.

Equity is not merely a series of rules to be learned by generalizing the outcome of past cases and applied more or less automatically to the facts of future cases. Frequently equitable principles cannot be particularized into the form of

concrete rules. Thus while wrestling with a case³ involving the difficult doctrine of mutuality, the Supreme Court of Kansas once summarized its conclusion:

"Manifestly it is just and equitable and will thwart a fraud now to decree specific performance in the plaintiffs' favor, and manifestly it would be unjust and inequitable and would allow the perpetration of a fraud not to do so. That is sufficient. If scientific or other considerations demand a formula governing the subject, whoever needs can phrase one on that basis."

It is true that rules make for certainty and predictability but, desirable though these qualities may be, they are not the primary goal of the legal order. Governments are formed "to establish justice." Courts of equity were formed to secure this ideal to litigants when the normal processes of the law failed. Courts of equity and equitable principles have been the chief means of keeping this ideal of justice for individual litigants in the forefront of our judicial system.

When the future of the separate equity course was being debated, Orfield argued for its preservation lest "the ethical and discretionary flavor of equity will be lost . . ."⁴ Now that the battle for the separate course has been lost in so many schools, it seems more important than ever that authors of texts on equity stress its nature and purpose and not content themselves with discussing merely the modern applications of equitable principles. One of the easiest ways to accomplish this is by giving more than cursory attention to the historical materials, by relating the factors that necessitated the establishment of the separate court and pointing up the many contributions the chancellors of the past have made to our legal system. Concededly, this material must be condensed in a handbook. But I fear that deFuniak's summary treatment of it "to the probable sacrifice of what may constitute scholarliness"⁵ will result in many students' finishing the work, knowing the current applications of equitable principles but without perceiving the "spirit" of equity.

JOHN L. GARVEY*

TRAFFIC VICTIMS—*Tort Law and Insurance*. Leon Green. Northwestern University Press. Pp. 128. \$4.00.

For thirty years Leon Green has been a tort lawyer's prophet. He has inspired his students and his readers to an appreciation of the dynamics of the law. His latest book is stamped with his style and his imagination. It is the story of environments and their effects on judges who labor with doctrines in a practical world. Dean Green begins his story with the nineteenth century, and he develops it into the twentieth century and the automobile age.

In some respects the nineteenth century is the first chapter in the history of negligence. Certainly it was the period of accelerated social conflicts, when judges

* Assistant Professor of Law, The Catholic University of America.

³ *Zelleken v. Lynch*, 80 Kan. 746, 104 Pac. 563, 46 L.R.A.,N.S., 659 (1909).

⁴ Orfield, *The Place of Equity in the Law School Curriculum*, 2 J. LEGAL ED. 26, 40 (1949).

⁵ p. 2.

began to expound consciously their doctrines on negligence and fault. But the roots of negligence and master-servant go deeper than the nineteenth century. Without those roots the story of torts in England and America could have been more like the story in France after the Code Napoleon. Dean Green begins with 1800, perhaps the best beginning date for a small book, because that is when the roots began to sprout.

Dean Green does not identify him, but sophisticated readers know that the judgment-proof tortfeasor is the villain in the story. He is the dark horse who has affected the caselaw trends in every decade. A civil suit for damages can be an expensive kind of luxury. Poor men as plaintiffs could not afford to litigate until lawyers devised the contingent fee, and poor men as defendants have never been worth suing. Judges have talked much about doctrines. They have tried to be objective, and they have been impartial. It is not to their discredit that they have had to be practical. They have given us the kind of case law we have been able to afford. Dean Green has described the shift from a defendant's to a plaintiff's world, and he has supplied the key: caselaw trends have depended on risk shifting through casualty insurance.

Three-fourths of the book is background for the remedial proposal, which the Dean describes as loss insurance. The statement in the book is itself a summary which cannot be reduced effectively here. Dean Green proposes an absolute liability scheme for automobile using, with compulsory insurance and administrative hearings under court supervision for the determination of damages according to common law measures. Perhaps under court supervision masters' findings on damages can be confined by ceilings as verdicts were controlled by judges a generation ago through remittitur, although Dean Green does not think big verdicts now add much to the problem.

That there can be difficulties in effecting this program the author concedes. Political action will be necessary in every state, and in the minds of many lawmen political action like this would be revolutionary. However, conditions in the personal injury field are such that remedial action cannot longer be postponed. Something almost as drastic as Dean Green's scheme can be enacted without scrapping trial by jury. Compulsory automobile liability insurance is the first step. It is on its way now. Comparative negligence is practicable everywhere, and it will not change trial routines essentially. But comparative negligence must be pitched to the level of the Federal Employers Liability Act with complete joinder permitted by all parties coupled with contribution among all tortfeasors. All personal injury settlements should be registered in an office of the clerk of court and attorneys' fees should be identified. Dean Green asks for that as a part of his proposal.

This book is challenging from several angles. The background is worth reading for itself. The remedial proposal is the result of careful study by a mature scholar with a practical touch. It is not for this reviewer to suggest that the plan is too ambitious. Certainly he recognizes with the Dean that some kind of decision day is coming soon.

VERNON X. MILLER*

* Dean and Professor of Law, The Catholic University of America.