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The
Struggle for Law

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Translated from the Fifth German Edition

By JOHN J. LALOR
of the Chicago Bar

SECOND EDITION

With an Introduction by

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To
George W. Smith
of the Bar of Chicago
this volume is
respectfully inscribed

Contents

	<i>Page</i>
Introduction	vii
Translator's Note	xxxv
Author's Preface	xliii
<i>Chapter</i>	
I. Origin of the Law	I
II. The Life of the Law a Struggle	21
III. The Struggle for his Rights a Duty of the Person whose Rights have been Violated, to Himself	31
IV. The Assertion of One's Rights a Duty to Society	69
V. Importance of the Struggle for Law to National Life	97
VI. The Roman Law of To-day, and the Struggle for Law	109

Introduction

to the Translated Volume

BY ALBERT KOCOUREK¹



It is the fortune of the generality of men to follow the beaten path, to use tools already designed, and to think in terms already fashioned. In such lives there is no room for cataclysms, or great events; there is no place there, either, for quarrel with the existing order, or for effort to alter the accepted course. Such lives constitute the cell matter of the social organism, reacting mechanically, or at least without fixed resistance, to the influences from without and within. Rarely, however, in the complicated web of history, a labyrinth of lines will cross each other at a common point to mark out persons

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Introduction

of great fortune or misfortune. Such was the imagery adopted by an accomplished novelist to explain his fatalistic views; and if there be merit in this sprightly figure, we will have no difficulty in conceiving an interesting conjunction of favoring lines to explain the brilliant career of Rudolph von Jhering.

One does not read far into jurisprudence without encountering both his name and his influence. He was a builder of new roads, a maker of new tools, and a creator of ideas. He came upon the world's stage as the last great influence out of centuries of struggle beginning with the revival of the study of Roman law at Bologna, and the successive stages of Glossators and Commentators, "Mos Italicus" and "Mos Gallicus," the Practical School and Natural Law, and finally the Historical School, to compose the differences between Romanists and Germanists, and to prepare the way for the Civil Code.¹

¹ For a full account of the development of German law, see "A General Survey of (etc.) Continental Legal History" ("Continental Legal History Series," Vol. i), Boston, 1912, p. 311 seq.

Introduction

Jhering, the son of a lawyer, was born at Aurich on the shores of the North Sea, in East Frisia, August 22, 1818. He studied law at Heidelberg, and (after the established custom of German students who wander from one university to another) also at Munich, Göttingen, and Berlin. He became a "Privat-Dozent" at Berlin in 1844 just as Gustav Hugo, the founder of the Historical School which Jhering was later to overthrow, laid down his labors in death. He became ordinary professor at Basel 1845, Rostock 1846, Kiel 1849, Giessen 1852, Vienna 1868, and at Göttingen 1872, where he remained until his death on September 7, 1892.¹

If Jhering had not become the most renowned jurist of the second half of the last

¹ The following sketches treat the life, character, and works of Jhering more completely than can be here attempted: *M. de Jonge*, "Rud. von Jhering" (1888); *A. Merkel*, "Rud. von Jhering" (1893) (translated as an appendix to *Jhering*, "Law as a Means to an End") ("Modern Legal Philosophy Series," Vol. v); *Eck*, "Zur Feier des gedächtnisses von B. Windscheid und R. v. Jhering" (1893); *Munroe Smith*, "Four German Jurists," *Pol. Sc. Q.*, Vols. x, xi, xii. Reference may also be made to volume ii, in the "Continental Legal History Series," under the title "Great Jurists of the World from Papinian to von Jhering."

Introduction

century, it is not unlikely that he would have gained fame in any other calling where personality, a comprehensive and lively domination of complex realities, or the literary quality might play a part in the attainment of success. The power of his personality is attested by the fact of his great popularity; his lectures were always crowded with listeners; and his home was the shrine at which the devoted from all quarters of the world worshiped. Ideas were obliterated and men effaced before him. Merkel, who himself became a jurist of great fame, says that after hearing Jhering lecture on Roman law, the discourse of Vangerow became a closed book. He was able to arouse great enthusiasm, to attract the multitude from within and without the university, and to enliven with bright colors the neutral themes of the law. He could sway the world both by his personal presence, and in no less degree by his writings. It is natural to speculate as to what might have been the career of such a man if his labors had dealt not alone with

Introduction

the learned public, but with the unorganized and unthinking masses in issues more stirring than the unemotional materials of legal science. At a hospitable juncture he might have created or subverted a dynasty. The literary quality of Jhering's writing is well shown in the opening lines of his "Geist," which might be mistaken for the stately measures of a sonorous epic. Another phase is exhibited in the address here published. Never before has a moral duty been asserted with such eloquence; never before has a "lay sermon addressed to the conscience"¹ been more spontaneously and widely accepted. Within two years this address went into twelve editions, and although first published in German more than forty years ago, it is still being republished, the last German edition being the eighteenth. At this time

¹ *Munroe Smith*, "Four German Jurists," *Pol. Sc. Q.*, xi, 301. Prof. Smith heard Jhering lecture on Roman law, and his able essay therefore sounds an intimate note which adds to the value of his analysis. This study also shows the dominating importance of Jhering, and Prof. Smith's essay might well have been entitled "Jhering and Three other German Jurists," for the others are only as foils in the play.

Introduction

it has appeared in nearly thirty different languages, including Japanese. There have been two translations into English, the present rendering by Mr. Lalor first published by Messrs. Callaghan & Co. in 1879, and a version published at London in 1884 under the title "Battle for Right." The present work has even been the inspiration of a novel by Karl Emil Franzos published (1882) under the same German title.

The books of jurists do not usually come within the mental range of the so-called general reader; as a rule they are limited to some definite system of law and to those technically learned in that system. A large part of Jhering's writings, however, carries an interest uncircumscribed by geographical boundaries, and has gained the widest reception of perhaps any European jurist, not alone among those learned in the law, but also among the cultured lay classes. It is not difficult to understand this fortunate and unusual extension of Jhering's fame; for it appears to rest on two chief grounds:

Introduction

first, that he treated by preference what Austin has called pervasive legal ideas — ideas of universal significance, ideas unlimited by the accidents of history, or the particularities of legal systems; and, second, that he had the faculty of powerful literary presentation. Jhering was a philosopher in the law, if not of the law, and had he been less, it is not unlikely that he would have remained a national factor of limited importance, instead of becoming an international figure.

Comparative biography was a completely realized art before comparative law was even thought of; and writers who have dealt with the lives of jurists have commonly resorted to the comparative method. In the case of Jhering the counter balance naturally has been either Windscheid (who died in the same year and within a few weeks of Jhering, and whose span of life was almost identical with his), or Savigny, the most conspicuous representative of the Historical School. The dissimilarities are striking in either case

Introduction

whether we consider the contrasted figures either from the point of view of personality, method, or ideas. Savigny, aside from being the leader of a great school, was the greatest Romanist of the first half of the nineteenth century. Jhering at the age of 24 had written a doctoral study, "De hereditate possidente" (Berlin, 1842), which already was considered a "remarkable dissertation," and when in 1852 (at the age of 34) he published the first volume of his "Geist," the star of Savigny's genius paled in the glare of Jhering's rising fame.

The theory of the Historical School, of an unconscious growth of law, was contradicted by Jhering, who insisted on conscious purpose as the dominant factor of legal evolution.¹

Two observations may be permitted at this point: first, that fundamental theories in the science of law necessarily produce

¹ *Tanon*, "L'Evolution du Droit et la Conscience Sociale" (3d ed., Paris, 1911), p. 44 seq. This part of Judge Tanon's essay has been translated as an appendix to *Jhering*, "Law as a Means," etc. (see note p. ix, supra); *Alessandro Levi*, "Contributi ad una Teoria filosofica dell' ordine giuridico," Sec. 34, p. 402 seq.

Introduction

important consequences either first or last in any legal system. The legislative era could not have come to pass so long as the Historical School remained in the ascendancy. If it is to be supposed that Savigny intended to assert an irremediable lack of competence in the people to attain the conscious stage of legislation, then that distinguished jurist was spared some part of the mental anguish of witnessing the historical refutation of such a position, had his life been prolonged another quarter of a century. He himself became Prussian minister for the revision of legislation, and lived to see the formulation of the General German Bills of Exchange Code (1847) and the General German Commercial Code (1861) in the time of the "Bund"; but a benignant fate closed his eyes before the date of the imperial statute (1873) which authorized a commission to codify the whole domain of private law, resulting finally (1896) in the enactment of the German Civil Code.

The second observation is that any assertion of a simple unifying principle in the

Introduction

realm of causality is likely to assert too much. It is entirely clear to us now that there was an important element of truth in the theory of an unconscious development of law; it is equally apparent that the principle of purpose is also true. The error lies only in claiming an exclusive operation for either theory of law. It is, however, one of the most interesting phases of historical study to trace out the actions and reactions of ideas, and Jhering was a man who was able to do this with a lofty and inspired outlook on the manifold complication in the restless flow of life. The ascending spiral of evolution of juristic thought is plainly visible, to speak only of recent centuries, in the age of rationalism with its revolutionary by-product which gave way to an era of reactionary conservatism in the Historical School, and which later is supplanted by the epoch of legislation and socialization of the law. But, now, to attempt a simple generalization of causality in history, even with our better fortified knowledge, and in the light of an

Introduction

accumulation of experience, would likely be as dangerous and as inadequate as before. It should be noticed that when we speak of causality we enter the sphere of the historian and jurist, provinces where Jhering attained his surest fame. It is true that Jhering later attempted the treacherous problem of finality — a problem perilous even for the trained philosopher — but it is believed that if he had restricted himself to his earlier aspirations that his labors would have remained a standing monument of unquestioned juristic scholarship throughout the corroding processes of time.

Merkel makes an illuminating comparison between Savigny and Jhering sufficient in itself to explain the differences of character of these two great civilians.¹ Savigny, he says, retired to the shadows of his canvas. Both were masters of expression, but Savigny hid his personality behind his work, while Jhering projected himself in living reality in every line. He attempted, as Merkel again says, to

¹ *Op. cit.* (p. ix note 1, *supra*).

Introduction

carry his reader by storm. Savigny sheltered himself in a mantle of reserve and directed his forces of ideas from a sequestered distance, while Jhering waged his battles on the firing line and determined the issues of war by the commanding aid of his conquering presence.

Of Windscheid, who was the great figure at Vienna when Jhering was the chief attraction at Göttingen, we may speak again in connection with a fundamental legal theory which has turned out to be of the greatest practical moment, and which has been a point of great controversy in German legal science for several decades.¹ Windscheid defined rights from the standpoint of protection of the will,² while Jhering made interests the essence of rights. The logical consequences of Windscheid's view is a formal, individualistic, and unhistorical conception of law; while Jhering's definition, on the

¹ *Gareis*, "Introduction to the Science of Law" ("Modern Legal Philosophy Series," i), p. 33.

² "Recht ist eine von der Rechtsordnung verliehene Willensmacht oder Willensherrschaft."—*Windscheid*, "Lehrbuch des Pandektenrechts," 9th ed. (Kipp), 1906, erster Band, p. 156 (and note 3).

Introduction

contrary, leads to the exact opposites, and invests the law with a positive social function.¹ Windscheid adhered to his position to the last, but Jhering's view has attracted the greater number of followers, and seems more nearly to indicate the real nature of rights as accepted by any of the present-day schools of legal philosophy.

Without the notion of interests, formulated by Jhering in the "Geist," he could not have reached the conception of the "Zweck." If rights are legally protected interests, it follows that the State must determine what interests it will select as fit for protection, and this question then logically develops the further inquiry of purpose in the law, which Jhering stated in the form of the principle, "the object is the creator of the law." On this three-rung ladder of reasoning, he attempted to ascend the philosophic heights, and whatever may be thought of his efforts it cannot be doubted that he laid a pragmatic,

¹ *Roscoe Pound*, "The Scope and Purpose of Sociological Jurisprudence," *Harvard Law Rev.*, xxv, 2, 143; *Korkunov*, "Theory of Law" (Hasting's tr.) ("Modern Leg. Phil. Ser.," iv), p. 107 seq.

Introduction

if not a metaphysical, foundation for a new juristic construction which enabled the law to emerge from the blind alley into which it had entered in following Kant.

It is perhaps still a question whether philosophies create movements in the outer world, or whether they only reflect or follow these movements; but in any case the social utilitarianism of Jhering came in season to synchronize with the most significant development of the law in modern times — the change from the individual to the social emphasis. Jhering's solution was not, however, the only escape from Kant's blind alley. The Neo-Kantians, too, have become social utilitarians, but their State yet has the negative character of a "Rechtsstaat." Stammler, the leading exponent of a revised Kantianism, is unable to lay down a single positive principle to govern the attitudes of the law. The difference between "do not" and "do" is all that separates the civilizations of the Orient and Occident, and a system of legal philosophy which makes the function of the State

Introduction

no different from that of a street-crossing policeman can never be productive of anything less unprogressive than a Chinese system of law. Even with its philosophic and psychological shallowness, the "Zweck" of Jhering is therefore to be preferred over the "Richtiges Recht" of Stammler.

Compared with an encyclopedic creator like Kohler, who many years ago engaged in a typically German exchange of ideas with Jhering in connection with the Shylock problem raised in this work,¹ but who has lived to supplant Jhering in the kingdom of fame and take unto himself the extraordinary distinction of the world's juristic leadership, the latter's works are not extensive beyond expectation either in bulk or item.

Briefly, Jhering's works are the following: (1) "Abhandlungen aus dem römischen Recht" (1844); (2) "Civilrechtsfälle ohne Entscheidungen" (1847); (3) "Geist des römischen Rechts auf den verschiedenen

¹ Kohler, "Shakespeare vor dem Forum der Jurisprudenz," (Würzburg, 1883), and "Nachwort" (1884).

Introduction

Stufen seiner Entwicklung" (4 vols., 1852-65); (4) "Das Schuldmoment im römischen Privatrecht" (1867); (5) "Über den Grund des Besitzschutzes" (1868); (6) "Die Jurisprudenz des täglichen Lebens" (1870); (7) "Der Kampf ums Rechts" (1872) (the present work); (8) "Der Zweck im Recht" (2 vols., 1877-83); (9) "Vermischte Schriften juristischen Inhalts" (1879); (10) "Gesammelte Aufsätze" (3 vols. 1881-86); (11) "Das Trinkgeld" (1882); (12) "Scherz und Ernst in der Jurisprudenz" (1885); (13) "Der Besitzwille: Zugleich eine Kritik der herrschenden juristischen Methode" (1889); and posthumously: (14) "Vorgeschichte der Indo-Europäer" (1894); (15) "Entwicklungsgeschichte des römischen Rechts: Einleitung" (1894).¹

¹ Jhering has been fortunate above all his jurist contemporaries in a wide and important extension of his writings into foreign tongues. The "Geist" (No. (3)), and several of his other works have been translated into French; there has also been an Italian translation of the "Geist," and further translations based on the French, into Portuguese, Spanish, and Japanese. Although no European jurist is better known in America or England than Jhering, there has unfortunately been no English translation of this work, parts of which are of great importance for what Austin calls "general," and what Salmond styles "theoretical" jurisprudence.

The "Jurisprudenz" (No. (6)) according to the author's preface

Introduction

Jhering labored diligently until the last, and although more than seventy years of age at his death, he left behind him many things in preparation, unaccomplished. His impulse to create was boundless; each idea developed a series of more general ideas, and his physical body was unable to keep pace with his mental activity. For this reason, his chief works are admittedly only fragments.

to the eighth edition (1891) had been then already translated into Italian, Hungarian, Greek, and (in abridged form) into Portuguese. An English translation has been done by Henry Goudy (Oxford, 1904). This work is considerably used by teachers to good advantage; the present writer has found it useful in examinations in analytical jurisprudence. Jhering's keen sense of legal realities is here shown developed to the highest degree. No one but a man thoroughly saturated with the feeling of the omnipresence of the law and legal relations would think of raising the question whether a guest at a hotel can take away the candles with which he has been charged, or whether he can put into his pocket fruit served at the dinner table (Goudy's translation, p. 24). Dr. Wigmore, dean of Northwestern University School of Law, perhaps, under the suggestion of this notable use of the incidents of everyday life, has published in his casebook on torts a collection of instances very similar in their novelty, interest, and analytical value.

The "Zweck" (No. (8)) has been translated into French and the first volume is soon to be issued [now out] in an English translation of Dr. Isaac Husik of the University of Pennsylvania ("Modern Legal Philosophy Series," Vol. v), by The Boston Book Company. This translated volume will contain valuable introductory material which the present writer regrettably was not able to consult.

Legal humor is an ancient institution; it is the agency which humanizes the bloodless operations of the legal machine. Even the Olympian gods indulged their levities, and did not narrow themselves

Introduction

The "Geist" remained uncompleted when he conceived the "Zweck," and the latter work was only a part of his plan to treat the whole domain of the normative divisions of social life. The present work was a fragment thrown off in the development of the "Zweck."

Of Jhering's achievement the "Geist" will no doubt be permanently regarded as his

to councils of lightnings and thunderbolts. Juristic humor, however, is something quite unknown in our literature. The nearest approach, to take a recent example, is Sir Frederick Pollock's "Genius of the Common Law," a work dealing with the strains and thrusts of our legal system. The chapter entitled "Surrebutter Castle" shows what a lighter touch may do with such a recondite and bitter subject as special pleading. But Sir Frederick's humor in comparison with von Jhering's is always somewhat Saturnine, or, even from another point of view, Euclidean. Jhering's contribution to this form of writing is his "Scherz und Ernst" (No. 12) which is made up of anonymous articles published while he was at Giessen, and "Talks of a Civilian" published at Vienna. The vehicle is one of amiability, but the theme is a serious one for the law. It may be considered a loss to us that this work is not in English, since the problems raised there are just now of special interest in view of the widespread changes which are giving an entirely new character to the whole face of the Common Law.

Of the remaining works the "Vorgeschichte" (14) has also been translated into English. This work has not added anything to Jhering's fame, and it may be questioned whether he had sufficiently familiarized himself with the extensive range of working materials upon which such an ambitious undertaking should of necessity be founded. This work therefore in the field of universal history is defective for the same reason as the "Zweck" in the department of general philosophy, in that it attempted problems beyond the author's special knowledge and experience.

Introduction

greatest effort.¹ When it began to be published, Rudorff, a civilian of the Historical School, referred to it in terms of reproach in his "History of Roman Law" (1857-59); but this reflection was one of the last feeble groans of an expiring and superseded theory of law. How frequently a fond parent is unable to judge impartially and justly of his own children is shown in the history of literature. Jhering rated his "Zweck" far above his "Geist," and could he have realized that the judgment of posterity would be otherwise, it would no doubt have been for him a matter of keen disappointment even though his preface to the "Zweck" foreshadows the result.

Jhering's creative period may be divided conveniently into two parts, taking his fiftieth year as the point of separation. The works of the earlier period are distinctly to be preferred against the labors of his later years. Although there seems to have been no abatement of his dynamic force in the growth of

¹ But cf. *Berolzheimer*, "The World's Legal Philosophies" (Mrs. Jastrow's tr.) ("Mod. Leg. Phil. Ser.," ii), p. 337 seq.

Introduction

years, there is apparent a gradual declination in the sound value of their fruits. His posthumous writings are decidedly in contrast, and to their disadvantage, with the studies of his earlier years.¹ He rose up out of a national law to an universal law, but as his ideas became more general they also at the last became more tenuous. As a realist confining himself to facts which he apprehended with the intuition of genius, and dealing with "practica" he was incomparable; but when he attempted the flight into an alien country he left behind him the substantial products of a vigorous and fertile intellect to enter a domain as empty as the "Begriffshimmel" created by him for the Romanists.

Jhering's claim to great distinction may be said to rest, in summary, on the following grounds:

1. He universalized Roman law, approving at once its reception, and the changes which had been made in it in the middle ages, and thus took a middle ground which compromised

¹ See. *Posener*, "Rechtslexikon," i, s. v. "Jhering."

Introduction

in effect the rigid nationalism of the Historical School and the patriotic clamors of the Germanists. The Romanists would have imposed upon the country the Byzantine law, while the Germanists would have destroyed it root and branch. Jhering's attitude in this controversy is shown by the fact that jointly with Gerber, a Germanist, he founded (1856) a journal for the study of the dogmatic of modern Roman and German private law. This conflict between the law of a foreign and extinct empire and the living domestic customs was a heritage of centuries; and while the perpetual struggle had somewhat abated, credit is due to Jhering for throwing the weight of his influence in the direction of the only practical and possible solution of Germany's effort to attain a unified system of law.

2. He is the founder of modern legal realism, and the progenitor on the juristic side, as Comte is the ancestor on the philosophical side, of the Sociological School of Jurisprudence.

Jhering was a bitter (if not always consistent) enemy of the subjective; this appears

Introduction

when he opposes, in his great work on possession, Savigny's animus theory;¹ in his conception of rights when he rejects the will as the central factor; in legal method, when he sets up a jurisprudence of facts against a jurisprudence of concepts. The cultivation of Roman law had developed into a deductive process of legal reasoning which sought to make the realities of later centuries and altered circumstances of elapsed time fit arbitrarily the verbal form of ideas of the age of Paulus.² But yet Jhering was not the enemy of the subjective in his treatment of legal evolution since this evolution itself is the expression of purpose. Law is not only teleological but psychological. The psychology of legal institutions, however, must have a factual basis, and can not be confined, he insists, to a purely conceptual and unhistorical system of ideas governed by fixed logical constructions.

¹ *Munroe Smith*, op. cit.; *Salmond*, "Jurisprudence," 3d ed., p. 263 seq.; *Holland*, "Elements of Jurisprudence" (11th ed.), p. 196 seq.

² *Sternberg*, "Allgemeine Rechtslehre," erster Teil, p. 191 seq.

Introduction

It can hardly be claimed that Jhering was the first to raise the enduring problem of legal method, but never before or since has the purely conceptual method been assailed with greater vigor or efficacy. Jhering's chief merit here lies in his having brought this question into clear relief and in having advanced the teleological factor which resides in all legal rules. Neither the "Geist" nor the "Zweck" contains a minute and thoroughgoing analysis of the problem of legal logic, and the "Scherz" was much too literary in quality to furnish a solution. Jhering combated the over-extension of the conceptual process, but the ardor of satirical attack did not permit him to examine to find the boundaries of its necessary and justifiable operation. Nor does an inspection of the later literature of legal method disclose, in German literature at least, except in a few noteworthy instances, that the weapons of offense have been melted down to implements of husbandry.¹

¹ See in this connection, *Gnaeus Flavius* (Kantorowicz), "Der Kampf um die Rechtswissenschaft" (1906), and the authorities entered on p. 50. The realistic trend of thought which had its

Introduction

3. Lastly (passing over Jhering's unquestioned prominence as an historian of the Roman law, his authority on various special questions of dogmatic law, and his strictly professorial labors), Jhering's great claim to distinction is due, as already suggested, to his treatment of the nature of legal rights by which he established the juristic basis for a social reconstruction of legal institutions. His own interpretation of the test of legislative policy — social utility — may be rejected as amorphous, as a "mollusk of ideas," without derogating from the value and great practical importance of his original discovery. Unless it must be said that the world moves on regardless of the thoughts of legal scientists and legal philosophers, it is inconceivable that civilized States could have broken the barriers of the eighteenth century without

origin in Jhering's war on the concept jurisprudence is now known in Germany under the name of "freie Rechtsfindung" after Ehrlich's book of that title. Strangely enough, this tendency in legal method has attracted representatives from the most diverse positions in legal philosophy.

Introduction

the lever of Jhering's idea. Little imagination is needed to portray a horrible distortion of social life under the pressure of learning and invention of the last hundred years, operating within the rigid mould of a "laissez faire" theory of law, government, and economics. On this count, and without reference to whatever else he achieved or conceived, Jhering is deservedly entitled to a leading place among the world's creative jurists.

Of the present work, it may perhaps with considerable justice still be said as was claimed by a competent reviewer on the appearance of the first edition of this translation,¹ that it is "the most brilliant, original, and significant book on the genesis and development of law since Montesquieu"; but it may be asserted with less provocation to challenge that it is one of the most famous specimens of juristic writing that the world has ever seen. The introducer may, however, be permitted to venture two brief comments:

¹Albany Law Journal, xx, 444 (1879).

Introduction

(1) a moral duty in the assertion of rights is an undemonstrable proposition;¹ and (2) irritation arising from an infringement of one's

¹ There need no ghost from the grave come to tell us that Jhering's proposition of a duty to maintain one's rights before the law has certain affinities with the doctrine that it is the right and the duty of States to make war. The same biological arguments support both points of view. Such militant programs to be thoroughly consistent must regard as undesirable all agencies which substitute for the wounds and destruction of the combat. In the struggle for rights, even the State itself, from this standpoint, must be considered a biological obstruction. Those who assert the moral right and necessity of nations to make war to serve their interests, do not hesitate to say that "law is the weakling's game." Jhering as a lawyer probably could not have accepted a principle so far-reaching and revolutionary, even at the risk of being inconsistent for his hesitation. Yet the only state of society wherein his ethical duty of self-assertion could be imagined to have any validity is one of political non-interference. In the primitive days of private vengeance such a theory probably would need no qualifications; but as soon as the State ceased to be a mere military machine, and found it expedient to interfere in private quarrels in the interests of peace, the biological argument became less clear and the moral aspect of the question more doubtful. For the ritualistic trial ceremonies of early law were not the same as the blood feud either biologically or ethically. At any rate, even though the litigant fought his own legal battles, and would not at that day, as a matter of honor, indulge the unmanly ease of a lawyer to speak for him, earthly and supernatural hazards had intervened which sometimes thwarted the bristling demands of courage. And now, in the modern age, when the State seeks to do justice between the parties, the hazards of litigation have become still more complex and fruitful. The modern court is little like the tribal assembly, and one now will hardly seek the law-courts to vindicate his courage or to promote his honor. A sad chapter could be written on the manner in which the State has discouraged the taste for litigation. We have only to think in this connection, among a number of things, of the

Introduction

rights may sometimes be more effectively manifested than by procedural methods.²

ALBERT KOCOUREK

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dishonored position of the witness which has become a factor of no little importance in making a resort to law unpopular, of the sensational press accounts, and of the machine patterned course of litigation. It is unlikely that any device except a simple reversion to primitive justice could bring out the spirit of self-assertion which has departed from the law and sought other channels of expression.

² Even commercial litigation is seeking an escape from the delays and difficulties of justice. It must be clear, therefore, that the procedural situation offers no advantages to purely ideal reactions against what the author calls subjective injustice. But there is a deeper reason which impels self-assertion to seek either the path of "club-law," or, more likely, silence. When Jhering composed this address (1872) he could hardly have foreseen the centralization of trade, industry, credit, and population which has within the last decades revolutionized the earth. In ancient society individual rights were submerged in the activities of the group. Personality has never been quite as well protected by the law as the claims of property; but when Jhering wrote, rights of individual persons had already reached their highest point in an evolution of many centuries. If anything can be predicted safely of the future one may, perhaps, say that the individual is again rapidly on the way to the loss of his identity. The modern world with its systems, its efficiencies, and its pragmatisms (and we say it with regret) is crushing down the picturesque freedom and initiative of the individual. It will require another era to restore him to the position to which Jhering would have exalted him.

CHAPTER II

THE LIFE OF THE LAW A STRUGGLE



NOW turn to the real subject of my essay — the struggle for concrete law. This struggle is provoked by the violation or the withholding of legal rights. Since no legal right, be it the right of an individual or of a nation, is guarded against this danger, it follows that this struggle may be repeated in every sphere of the law — in the valleys of private law, as well as on the heights of public and international law. War, sedition, revolution, so-called lynch-law, the club-law, and feudal law of the middle ages, and the last remnant of it in our own times, the duel; lastly, self-defense, and the action at law — what are they all, spite of the difference of the object striven for and of the thing which is staked, of the form and dimensions of the struggle — what but forms and

The Struggle for Law

scenes of the one same drama, the struggle for rights, the struggle for the principles of law? If now, of all these forms, I choose the least violent, the legal struggle for individual rights in the form of an action at law, it is not because it has for jurists a higher interest than any other, but because, in a trial at law, the real nature of the case is most subject to the danger of being ignored both by jurists and the laity. In all other instances this real nature of the case appears in all its clearness. That in all other instances there is question of wealth or goods which warrant and repay great risk, even the dullest mind understands, and no one will, in such instances, raise the question: Why fight; why not rather yield? The magnificence of the sight of the highest display of human strength and sacrifice irresistibly carries all of us along with it and lifts us to the height of ideal judgment. But, in the struggle for individual private rights, just mentioned, the case is very different. The relative smallness of the interests with which it is concerned — uniformly the

The Life of the Law a Struggle

question of mine and thine, the dull prosiness which uniformly attaches to this question — makes of this struggle, it would seem, simply a matter of cold calculation and sober contemplation; and the forms in which it moves (the mechanical routine of litigation, with the exclusion of all free, individual action and of the claimant himself) are ill calculated to weaken the unfavorable impression. However, even in the case of the action at law, there was a time when the parties to the action themselves were called on to enter the lists, and when the true meaning of the struggle was thus made to appear. While the sword still decided the controversy concerning mine and thine, when the medieval knight sent the challenge to his opponent, even the non-participant may have been forced to surmise that, in the struggle, there was question not only of the value of the thing, of averting a pecuniary loss, but that the person, in the thing, defended himself, his rights and his honor.

But we shall not need to conjure up a condition of things long past and vanished to

The Struggle for Law

discover from it the meaning of that which, even if different in form, is in essence the same to-day. A glance at the phenomena of our actual life and psychological self-observation will perform the same service for us.

Whenever a person's legal right is violated, he is placed face to face with the question, whether he will assert his right, resist his opponent—that is, engage in a struggle; or whether, in order to avoid this, he will leave right in the lurch. The decision of this question rests entirely with himself. Whatever his answer to the question may be, some sacrifice accompanies it in both cases. In the one case, the law is sacrificed to peace; in the other, peace is sacrificed to the law. Hence, the question seems to formulate itself thus: Which sacrifice, according to the individual circumstances of the case and of the person, is the more bearable? The rich man will, for the sake of peace, sacrifice the amount in controversy, which to him is insignificant; and the poor man, to whom this same amount is comparatively great, will sacrifice his peace

The Life of the Law a Struggle

for its sake. Thus would the question of the struggle for the principles of law reduce itself to a simple problem in arithmetic, in which advantage and disadvantage are weighed one against the other, by each side, and the decision thus reached.

But that this is really by no means the case, every one knows. Daily experience shows us cases at law in which the value of the object in controversy is out of all proportion to the prospective expenditure of trouble, excitement, and money. No one who has dropped a dollar into a stream will give two to get it back again. For him, indeed, the question, how much he will expend upon its recovery, is a simple problem in arithmetic. But why does he not go through the same process of calculation when he contemplates a suit at law? Do not say that he calculates on winning it, and that the costs of the suit will fall upon his opponent. Every lawyer knows that the sure prospect of having to pay dearly for victory does not keep many persons from suing. How frequently it happens

The Struggle for Law

that the counselor who exposes to a client the badness of his case and dissuades him from suing receives for answer: Bring suit, cost what it may!

How explain this mode of action which, from the standpoint of a rational estimation of material interests, is simply senseless?

The answer usually given to this question is well known. It is, we are told, the miserable mania for litigation, the pure love of wrangling, the irresistible desire to inflict pain on one's opponent, even when it is certain that one will have to pay for it more heavily than one's opponent.

Let us drop the consideration of the controversy between two private persons, and in their place put two nations. The one nation, let us suppose, has, contrary to law, taken from the other a square mile of barren, worthless land. Shall the latter go to war? Let us examine the question from precisely the same standpoint from which the theory of the mania for litigation judges it, in the case of the peasant from whose land a neighbor has

The Life of the Law a Struggle

ploughed away a few feet, or into whose meadow he has thrown a few stones. What signifies a square mile of barren land compared with a war which costs the lives of thousands, brings sorrow and misery into the palace and the hut, eats up millions and millions of the treasure of the state, and possibly imperils its existence? What folly to make such a sacrifice for such an end!

Such would have to be our judgment, if the peasant and the nation were measured with the same measure. Yet no one would wish to give to the nation the same advice as to the peasant. Every one feels that a nation which looked upon such a violation of law in silence would have signed its own death sentence. From the nation which allowed itself to be deprived of one square mile of territory by its neighbor, unpunished, the rest also would be taken, until nothing remained to it to call its own, and it had ceased to exist as a state; and such a nation would deserve no better fate.

But if a nation should have recourse to

The Struggle for Law

arms, for the sake of a square mile of territory, without inquiring what its value, why not also the peasant for the sake of his strip of land? Or must we dismiss him with the decree: *quod licet Jovi, non licet bovi*. The nation does not fight for the square mile of territory, but for itself, for its honor and independence; and so in those suits at law in which the disproportion mentioned above exists between the value of the object in controversy and the prospective cost and other sacrifices, there is question not of the insignificant object in controversy, but of an ideal end: the person's assertion of himself and of his feeling of right. In respect to this end, the person whose rights have been invaded no longer weighs all the sacrifices and inconveniences which the suit at law draws after it — the end in his eyes is compensation for the means. It is not a mere money-interest which urges the person whose rights have been infringed to institute legal proceedings, but moral pain at the wrong which has been endured. He is not concerned simply with

The Life of the Law a Struggle

recovering the object — he may, perhaps, as frequently happens, to prove the real motive in suing, have devoted it from the first to a charitable institution — but with forcing a recognition of his rights. An inner voice tells him that he should not retreat, that it is not the worthless object that is at stake but his own personality, his feeling of legal right, his self-respect — in short, the suit at law ceases to appear to him in the guise of a mere question of interest and becomes a question of character.

But experience teaches us none the less that many others in the same situation come to the very opposite decision — they like peace better than a legal right asserted at the cost of trouble and anxiety. What kind of a judgment must we pass on this? Shall we say simply: That is a matter of individual taste and temperament; one loves contention more, and the other peace; from the standpoint of law both conclusions are to be equally respected; for the law leaves to every one who has a legal right, the choice of asserting his

The Struggle for Law

right or of surrendering it. I hold this view, which is to be met with not unfrequently in life, to be reprehensible in the highest degree, and in conflict with the very essence of law. If it were possible that this view should become general, all would be over with the law itself; since whereas the law, to exist, demands that there should be always a manly resistance made to wrong, those who advocate this view preach that the law should flee like a coward before wrong. To this view I oppose the principle: Resistance to injustice, the resistance to wrong in the domain of law, is a duty of all who have legal rights, to themselves—for it is a commandment of moral self-preservation—a duty to the commonwealth;—for this resistance must, in order that the law may assert itself, be universal. I have thus laid down the principle which it is the purpose of the sequel to elaborate.

Struggle for Rights a Personal Duty

policy of the coward? The coward who flees the battle saves what others sacrifice—his life; but he saves it at the cost of his honor. Only the fact that others make a stand protects him and the community from the consequences which his mode of action would otherwise inevitably draw after it. If all thought as he, they would all be lost. And precisely the same is true of the cowardly abandonment of one's legal rights. Innocent as the act of an individual, it would, if raised to the dignity of a general principle of action, be the destruction of the entire law. And even under these circumstances, the apparent absence of danger in such a mode of action is possible only because the struggle of law against wrong is, on the whole, not affected by it any further. For, indeed, it is not individuals alone who are called upon to take part in this struggle, but, in organized states, the state-power also takes a very large part in it, inasmuch as it prosecutes and punishes all serious attacks on the life, liberty or property of the individual, of its own motion,

The Struggle for Law

thus relieving him of the hardest part of the work. But even in respect to those violations of law, the prosecution of which is left entirely to the individual, care is taken that the struggle may not be interrupted; for every one does not follow the policy of the coward, and even the latter takes his place in the line of combatants, at least when the value of the object in controversy outweighs his ease. But let us suppose a state of things in which the protection afforded by the police power and by the criminal law is wanting; let us transfer ourselves to a time when, as in ancient Rome, the pursuit of the thief and the robber was the affair only of the person injured, and who does not see to what such an abandonment of one's legal rights would have led? To what would it have conduced but to the encouragement of thieves and robbers? The very same thing is true of the life of nations. Here each nation is thrown entirely on its own resources. No higher power relieves it of the necessity of asserting its rights, and I need only recall the example

Struggle for Rights a Personal Duty

given above of the square mile, to show what that view of life which would measure the resistance to wrong according to the material value of the object in controversy, means to the life of nations. But a principle which, wherever tested, proves itself completely unthinkable, the dissolution and destruction of the law, cannot, even where, by way of exception, its fatal consequences are paralyzed by other circumstances, be called correct. I shall have occasion to show later what a disastrous influence such a principle exerts, even under such relatively favorable circumstances.

Let us, therefore, reject this morality of convenience and ease, which no nation and no individual, with a healthy feeling of legal right, has ever adopted. It is the sign and the product of a diseased feeling of legal right; it is coarse and naked materialism, in the domain of law. Even materialism has, within certain limits, its *raison d'être* in this domain. To profit by one's legal rights, to make use of them and to assert them when

The Struggle for Law

there is question of a purely objective wrong, is only a question of interest; and a legal right according to the definition which I have given of it myself,¹ is nothing but an interest protected by the law. But in the presence of arbitrariness which lifts its hand against the law, this material consideration loses all value, for the blow which it aims at my legal right, strikes my person also when it strikes the law.

It is a matter of indifference what the object of the right is. If mere chance were to put me in possession of an object, I might be deprived of it without any injury to my person, but it is not chance, but my will, which establishes a bond between myself and it, and even my will only at the price of the past labor of myself or of another;—it is a part of my own strength and of my own past, or of the strength and past of another, which I possess and assert in it. In making it my own, I stamped it with the mark of my own person; whoever attacks it, attacks me; the

¹ "Geist des röm. R." iii, p. 60.

Struggle for Rights a Personal Duty

blow dealt it strikes me, for I am present in it. Property is but the periphery of my person extended to things.

This connection of the law with the person invests all rights, no matter what their nature, with that incommensurable value which, in opposition to their purely material value, I call *ideal value*. From it springs that devotedness and energy in the assertion of legal right which I have described above. This ideal conception of the law is not a privilege of characters highly endowed by nature; but it is as accessible to the coarsest as to the most cultured, to the richest as to the poorest, to savage and to civilized nations; and, just here, we discover so clearly how firmly rooted in the innermost nature of the law this idealism is — it is nothing but the healthfulness of the feeling of legal right. The law which, on the one hand, seems to relegate man exclusively to the low region of egotism and interest, lifts him, on the other hand, to an ideal height, in which he forgets all policy, all calculation, that measure of

The Struggle for Law

interest which he had learned to apply everywhere, in order to sacrifice himself purely and simply in the defense of an idea. Law which, in the former region, is prose, becomes, in the struggle for law, poetry in the latter; for the struggle for law, the battle for one's legal rights, is the poetry of character.

What is it, then, that works this wonder? Not knowledge, not education, but simply the feeling of pain. Pain is the cry of distress, the call for help of imperiled nature. This is true, as I have already remarked, both of the moral and the physical organism; and what the pathology of the human organism is to the physician, the pathology of the feeling of legal right is to the jurist and the philosopher in the sphere of law; or, rather, it is what it should be to them, for it would be wrong to say that it is such to them already. In it, in truth, lies the whole secret of the law. The pain which a person experiences when his legal rights are violated is the spontaneous, instinctive admission, wrung from him by force, of what the law is to him

Struggle for Rights a Personal Duty

as an individual, in the first place, and then of what it is to human society. In this one moment, and in the form of an emotion, of direct feeling, we see more of the real meaning and nature of the law than during long years of undisturbed enjoyment. The man who has not experienced this pain himself, or observed it in others, knows nothing of what law is, even if he had committed the whole *corpus juris* to memory. Not the intellect, but the feeling, is able to answer this question; and hence language has rightly designated the psychological source of all law as the *feeling of legal right (Rechtsgefühl)*. The consciousness of legal right (*Rechtsbewusstsein*), legal conviction, are scientific abstractions with which the people are not acquainted. The power of the law lies in feeling, just as does the power of love; and the intellect cannot supply that feeling when it is wanting. But as love frequently does not know itself, and as a single instant suffices to bring it to a full consciousness of itself, so the feeling of legal right uniformly knows not what it is,

The Struggle for Law

and what it can do, so long as it is not wounded; but the violation of legal right compels it to speak, unveils the truth, and manifests its force. I have already said in what this truth consists. His legal right, the law, is the moral condition of existence of the person; the assertion of that right is his moral self-preservation.

The force with which the feeling of legal right reacts, when wounded, is the test of its health. The degree of pain which it experiences tells it what value it attaches to the imperiled goods. But to experience the pain without taking to heart its warning to ward off the impending danger, to bear it patiently and take no measure of defense, is a denial of the feeling of legal right, excusable, perhaps, under certain circumstances, in a particular case, but impossible in the long run without the most disastrous consequences to the feeling of legal right itself. For the essence of that feeling is action. Where it does not act, it languishes and becomes blunted, until finally it grows almost insensible to pain.

Struggle for Rights a Personal Duty

Irritability, that is the capacity to feel pain at the violation of one's legal rights, and action, that is the courage and the determination to repel the attack, are, in my eyes, the two criteria of a healthy feeling of legal right.

I must refrain from elaborating any further this interesting and instructive subject of the pathology of the feeling of legal right; but I would, however, ask permission to make a few remarks just here.

The sensitiveness of the feeling of legal right, otherwise the sentiment of law, is not the same in all individuals, but it increases and decreases according as, and to the extent that, each individual class or people experiences the law as a moral condition of existence; and not the law in general only, but its several parts. This I have shown above, in reference to property and reputation. As a third example, I may here add, marriage. What reflections does not the manner in which different individuals, nations, codes of law, look at adultery, suggest!

The second element in the feeling of legal

The Struggle for Law

right, action, is a mere matter of character: the attitude which an individual or a nation assumes towards an attempt on its rights is the surest test of its character. If by character we understand personality, full, self-reliant and self-asserting, there can be no better opportunity to test this quality than when arbitrariness attacks one's rights, and, with his rights, his person. The manner in which the wounded feeling of law or of personality reacts, whether under the influence of passion in wild and violent action, or with subdued, persistent resistance, is no measure of the intensity of the strength of the sentiment of legal right; and there can be no greater error than to ascribe to the savage or the uncultured man, with whom the former manner is the normal one, a stronger feeling of legal right, than to the educated man who takes the second course. This manner is more or less a matter of education and temperament; but a firm, tenacious and resolute resistance is in no way inferior to violent and passionate reaction. It would

Struggle for Rights a Personal Duty

be deplorable if it were otherwise. Were it otherwise, individuals and nations would lose the feeling of legal right in proportion as they advanced in culture. A glance at history and at everyday life is sufficient to show that this is not the case. Nor is the answer to be found in the contrast of rich and poor. Different as is the measure with which the rich man and the poor man measure the value of things, it is not at all applied in the case of a violation of legal right; for here the question is not the material value of a thing, but the ideal value of a legal right, the energy of the feeling of legal right in relation to property; and hence it is not the amount of property, but the strength of the feeling of legal right, which here decides the issue. The best proof of this is afforded by the English people. Their wealth has caused no detriment to their feeling of legal right; and what energy it still possesses, even in pure questions of property, we, on the Continent, have frequently proof enough of, in the typical figure of the traveling English-

The Struggle for Law

man who resists being duped by inn-keepers and hackmen with a manfulness which would induce one to think he was defending the law of Old England — who, in case of need, postpones his departure, remains days in the place and spends ten times the amount he refuses to pay. The people laugh at him, and do not understand him. It were better if they did understand him. For, in the few shillings which the man here defends, Old England lives. At home, in his own country, every one understands him, and no one lightly ventures to overreach him. Place an Austrian of the same social position and the same means in the place of the Englishman — how would he act? If I can trust my own experience in this matter, not one in ten would follow the example of the Englishman. Others shun the disagreeableness of the controversy, the making of a sensation, the possibility of a misunderstanding to which they might expose themselves, a misunderstanding which the Englishman in England need not at all fear, and which he quietly takes into the

Struggle for Rights a Personal Duty

bargain: that is, they pay. But in the few pieces of silver which the Englishman refuses and which the Austrian pays there lies concealed more than one would think, of England and Austria; there lie concealed centuries of their political development and of their social life.