REVIEWS AND NOTICES

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The Principles of Contract. By SIR FREDERICK POLLOCK. Eleventh Edition by P. H. WINFIELD. London: Stevens & Sons Limited. 1942. Pp. xxxii, 603. ($9.75).

The editor, in his preface, mentions two serious defects of the original book, namely, Pollock's failure to take sufficient notice of extra-judicial writing (strange in the author's case because, as Lord Wright said (1937), 53 L.Q.R. 151, in a tribute to Pollock: "This at least is clear, that he has vindicated to this generation the vital importance of extra-judicial writing in law"), and Pollock's failure to appreciate the value of Williston on Contracts and the American Law Institute's Restatement of the Law of Contracts (compare the high praise of these works by the editor of the present edition with the almost contemptuous way in which the author in the preface to the 10th edition dismissed the Restatement). The value of the book has been notably enhanced by the editor's frequent references to Williston and the Restatement and to articles published in English law reviews. It is fortunate that Pollock's book has been edited by so competent a person as Dr. Winfield, and perhaps in a future edition the range of reference to law review articles will be enlarged. When an article is cited, it would seem to be desirable to mention the name of the author and the title of the article.

The editor has made many additions to the footnotes and has occasionally inserted new passages in the text or rewritten old passages, all printed within square brackets. The changes in the text include a discussion of a "contract to make a contract" (pp. 36–38); two problems as to necessaries (pp. 60–62), (but the heading "contracts for necessaries" (p. 58) is misleading, and the quotation from *Ryder* v. *Wombwell* (1868), L.R. Ex. 32, might well have been followed by a cross-reference to the author's opinion, apparently not completely approved by the editor (p. 47, note 5), that the liability of an infant for necessaries is quasi-contractual, not contractual); the liability of lunatics and drunken persons (pp. 76–77); signing, sealing and delivering (p. 119); agreements for part payment in satisfaction of whole debt (pp. 154–155); third party suing as trustee or otherwise (pp. 173–174); frustration of contract (pp. 233–235, 253); origin of the doctrine of public policy (p. 291) and a note on public policy (pp. 295–297); scope of an arbitration clause (p. 311); and recovery back of money paid on goods or land transferred under an unlawful agreement (pp. 353–355).

Although the proofs of the book had been passed when the judgment of the House of Lords in *Fibrosa* v. *Fairbairn* (now reported, [1943] A.C. 32) was delivered, the editor was fortunately able to insert in the text (pp. 247–248) a note of the overruling of *Chandler* v. *Webster*, [1904)] 1 K.B. 493, and to add a further note at the end of the book (p. 574) . He might in the latter place have found room for at least a sentence drawing attention to the unsatisfactory feature of the judgment in the *Fibrosa Case*, namely, that the result is to shift the loss entirely to the sellers, notwithstanding that they have taken the precaution of stipulating for a down

payment, one of the obvious purposes of which is to secure the sellers against the risk that work done in preparation for performance may not be paid for. In connection with the provisions of Roman law which Blackburn J. in *Taylor* v. *Caldwell* (1863), 3 B. & S. 826, seemed to think were relevant (p. 245, note 95), the editor might have added a reference to Buckland, *Casus and Frustration in Roman Law and the Common Law* (1933) 46 Harv. L. Rev. 1281, as showing that Roman texts relating to unilateral discharge or excuse for non-performance do not support Blackburn J.'s doctrine that both parties are excused by unilateral impossibility: *cf.* book review (1942), 20 Can. Bar Rev. 269. Buckland's article is cited, without its title, on another point (p. 247).

In connection with Pollock's definition of a contract as "a promise or set of promises which the law will enforce," the editor says that the Restatement, §1, has substantially the same definition (p. 1). In fact the Restatement definition is more accurate: "A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." This definition covers unenforceable contracts (§14). The case of *Upton-on-Severn R.D.C.* v. *Powell*, [1942] 1 All E.R. 220, is cited as an example of a promise to pay implied from acceptance of services (p. 9); but *semble* the problem raised by the case is not quite so simple: see (1942), 20 Can. Bar Rev. 557; (1943), 21 Can. Bar Rev. 123. In a future edition the editor might correct Pollock's reference to the discussion of *Harvey* v. *Facey*, [1893] A.C. 552, by Mr. Justice Russell, (of Nova Scotia, not Ontario), and complete the citation by reference to the whole correspondence in (1923), 1 Can. Bar Rev. 398, 694, 713, 891. With regard to contracts of insane persons (pp. 77, 78) it would have been interesting to have some discussion of the instructive judgment of the High Court of Australia in *McLaughlin* v. *Daily Telegraph Newspaper Co.* (1904), 1 Commonwealth L.R. 243, affirmed, *sub. nom. Daily Telegraph Newspaper Co.* v. *McLaughlin*, [1904] A.C. 775; *cf.* Brown, *Can the Insane Contract?* (1933), 11 Can. Bar Rev. 600. The implied commendation of BOWSTEAD ON AGENCY (p. 80) is hardly justifiable, in view of the grave defects of that book as an exposition of modern agency law: *cf.* book review (1939), 17 Can. Bar Rev. 248.

The editor notes (p. 42) that a "learned reviewer" [Dr. C. A. Wright] of the 10th edition (1936), 14 Can. Bar Rev. 784, finds it difficult to reconcile the "ticket" cases with *Carlisle Banking Co.* v. *Bragg*, [1911] 1 K.B. 489, and adds: "But that case is not *in pari materia*." The reason for Dr. Winfield's failure to understand the point of Dr Wright's criticism is perhaps to be found in Pollock's unsatisfactory treatment of the ticket cases. *Semble* the true principle is that a person is bound by the terms of a document which he accepts or signs if he knows, or *ought to have known*, of the terms. This principle, applied to the *non est factum* cases, makes the *Bragg Case* indefensible, because the signer was negligent, and the point should have been mentioned in this connection (p. 387). Applied to the ticket cases, the principle suggests the distinction between a document such as a bill of lading or a contract for the sale of goods on commission, as to which the signer ought to have known that there would be special terms, and documents of a simpler character. It is only as to documents of the latter kind that the person who is claiming the benefit of special terms must show that he did what was reasonably necessary to bring the special terms to the notice of the other party.

Pollock's discussion of marriages within the prohibited degrees (pp. 270-272) needs to be rewritten. The earlier cases did, it is true, speak of such marriages as "contrary to God's law", but in the modern cases the subject is discussed simply as a matter of capacity to marry governed by the law of the domicile of the parties, at least if both parties are capable or incapable, as the case may be, of marrying each other by the law of their domicile. Pollock has no adequate discussion of the troublesome cases of unilateral incapacity, that is, where the parties are domiciled in different countries, and one party is capable, and the other party is incapable, by his or her domiciliary law; *cf.* comment (1940), 18 Can. Bar Rev. 220, on *In re Paine*, [1940] Ch. 46. In note 74 on p. 272 the reference should be to *Sottomayor* v. *De Barros*, and in note 75 it should be to *Sottomayer* v. *De Barros*.

Pollock's *volte face* on the subject of rescission for innocent misrepresentation was criticized by Dr. Wright in his review of the 10th edition (1936), 14 Can. Bar Rev. 784, 785, and, it is submitted, the present editor has not adequately dealt with the criticism (p. 432). *MacKenzie* v. *Royal Bank of Canada*, [1934] A.C. 468, is cited in another place (p. 452) without reference to the probability that on the facts the case was one of substantial difference between the situation as represented and the situation as it existed so as to constitute a case of total failure of consideration within the doctrine of *Kennedy* v. *Panama* (1867), L.R. 2 Q.B. 580, and therefore justifying recission even if the contract is executed: *cf. Freear* v. *Gildes* (1921), 50 O.L.R. 217, 64 D.L.R. 274; *Redican* v. *Nesbitt*, [1924] S.C.R. 135, [1924] 1 D.L.R. 536. The lowly position, in point of authority in England, of a decision of the Privy Council has been emphasized in decisions of English courts: *Fanton* v. *Denville*, [1932] 2 K.B. at p. 332; *Dulieu* v. *White*, [1901] 2 K.B. at pp. 677, 683; *cf.* (1941), 19 Can. Bar Rev. 682, 686. It is therefore difficult to understand why the oracular utterance of Lord Akin in *MacKenzie* v. *Royal Bank of Canada* should be accepted literally without due regard being had to the approval of *Kennedy* v. *Panama* expressed by Lord Atkin and others in *Bell* v. *Lever Brothers*, [1932] A.C. 161. Incidentally, in the discussion in another place (p. 411) of *Bell* v. *Lever Brothers*, there might have been added a reference to Wade (1941), 7 Cambridge L.J. 361.

Although I have ventured with respect to note some individual points on which I do not agree with Pollock or the editor of the new edition, Dr. Winfield has undoubtedly produced an improved version of a valuable book. Oddly enough, the increase in the size and the contents of the pages in the new edition (presumably required by war conditions) has resulted in a much more easily handled volume than the short stout book of the earlier editions.

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A Textbook of the Law of Torts. By P. H. WINFIELD. Second Edition. London: Sweet & Maxwell. 1942. Pp. xxxix, 744.

The present reviewer had the privilege of reviewing the first edition of Dr. Winfield's textbook in 1938 (16 Can. Bar Rev. 237). At that time he prophesied that the book would be a popular one, and this has been amply borne out by the fact that students of law have found it not only

a model of simplicity but a haven of refuge amidst the shifting sands of theory and speculation concerning tortious liability. The present edition does not include any radical change in treatment and is primarily concerned with integrating the many important decisions of the English courts since the first edition appeared.

The same scholarly care and lucidity which mark all of Dr. Winfield's writing are apparent in the second as they were in the first edition, and considering how well known the latter has become in the short time since it was published, this review might well have ended by noting this fact and leaving the book itself to the profession from whom we know it will have as cordial a reception as its precursor.

Reviewers of legal treatises, however, seem in recent years, by some peculiar thought process to use the occasion of a review to air their own views on a variety of subjects which very frequently have little to do with the subject of the review. This, of course, is quite improper, since many readers may believe that the result is an attack on the book, whereas it is usually the endeavour of a person who could not have written half so good a book to draw attention to his own theories and away from the author's. An author, in such case, would be quite entitled to ask the reviewer why he did not write his own book rather than use another man's book to air views only remotely germane to the reviewer's true job. And he would be right.

All of which is by way of explanation that in anything that follows we are quite in the wrong, because we cannot resist the temptation, in reviewing Dr. Winfield's book, of doing the very things we have said should not be done. And Dr. Winfield would be quite right if he told us to go and write our own book and not to criticize him for doing what he did not do or for not doing what he purposely did. Despite which, and because book reviewers, as well as fools rush in where angels fear to tread, we continue some of the observations we made on the occasion of the earlier review of the first edition of the present book.

In the earlier review we ventured to criticize the method of treating the subject of torts followed by Winfield and other English writers. We further expressed our lack of appreciation for the "traditional English attitude" and indicated our preference for the method of treatment adopted by the American writers. This view has been reinforced since that time by the appearance of the latest American textbook on the subject, namely, Prosser on Torts. (See 19 Can. Bar Rev. 551). Apparently this book has not yet reached England or if it has, it has not been used or referred to, so far as we have been able to discover, in the preparation of the present edition. The recent decision of the House of Lords in *Hay (or Bourhill)* v. *Young*, [1942] 2 All E.R. 396, has encouraged this reviewer to believe that the House of Lords, in any event, is more aware of the possibilities inherent in American legal thinking on tortious liability than the English textbooks would have us believe.

That decision, which seems to this reviewer of the utmost general importance, confirms the reviewer in the view expressed in the review of the first edition of Dr. Winfield's textbook, that there are grave difficulties in treating under a "general part" of a textbook on torts the really fundamental issues concerned with negligence, and in particular the technique of "duty of care". This is a matter on which much has been written on

this side of the Atlantic, and the influence of that writing is particularly noticeable in some of the speeches in *Hay (or Bourhill)* v. *Young*. There can be little doubt that some of the law lords, at least, are fully aware, for example, of the trend of thought given judicial expression by Cardozo C.J. in *Palsgraf* v. *Long Island R.R.* (1928), 248 N.Y. 339.

In our earlier review of Dr. Winfield's text we lamented the failure to discuss this case, but it is even more remarkable to find it omitted in the second edition in view of the latest discussion of negligence by the House of Lords. In the May issue of this REVIEW Dean Leon Green of Northwestern University School of Law indicated some of the problems which, we believe, might well have been developed by Dr. Winfield. However, in the present edition this latest decision of the House of Lords is not even mentioned in the chapter dealing with duty of care in negligence cases, and is encountered by the student in the very early part of the book under "remoteness of consequence (or damage)." Even if this is the way in which the present generation of practising lawyers are accustomed to deal with cases of nervous shock, we have little sympathy in continuing a method which has led to so much confusion in the development of tortious liability.

Several points in addition to those discussed in the earlier review of the first edition may perhaps be noted here. With regard to contributory negligence, Dr. Winfield has now abandoned (p. 456), the last wrong-doer or ultimate negligence doctrine in favour of three simple "rules," namely: (1) if the defendant caused the accident the plaintiff can recover in spite of his negligence; (2) if the plaintiff caused the accident he can not recover in spite of the defendant's negligence and (3) if the accident were caused by both plaintiff and defendant, plaintiff can not recover. We do not question the fact that English decisions have, in language, been veering towards something that looks approximately like these rules, but we must confess that we do not understand them, and that we believe the English courts are doing something entirely different than what they or Dr. Winfield would have us believe they are doing. It seems too clear for argument that in all three cases which are listed in the "rules," both the plaintiff and defendant were contributing causes, and it is just a plain falsification of fact to say that the plaintiff or defendant in any given case was not a cause where his own lack of care was a contributing factor which produced the accident. What is really going on in these cases, (and we believe it also explains *Loach Case* despite its almost metaphysical reasoning), is an attempt by the courts to pick on the most culpable wrong-doer and fasten him with sole liability contrary to the accepted theory of the cases that comparative negligence does not prevail at common law. (See MacIntyre, The Rationale of Last Clear Chance, 18 Can. Bar Rev. 665.) We do not understand why, if this is what courts are actually doing, students should be taught merely barren phraseology which is not only of no assistance in advising clients but is, indeed, apt to mislead.

A further instance of a somewhat similar attempt to retain existing word concepts, which to us seem rather barren from the standpoint of actual solution of legal problems, is Dr. Winfield's insistence on keeping nuisance separate from other forms of liability, such as negligence. We are, of course, fully aware that English courts have, from time to time, stated that nuisance and negligence must be clearly differentiated. In most of the cases, however, we must admit to a lack of understanding as to why

this is necessary or whether, indeed, the very judges who said it was necessary so to separate them, actually kept them apart in practice. It may be that ignorance is a great reformer of law, but we confess that in our opinion a statement in a Canadian case, concerned with the falling of a brick wall on to a public highway where it struck a child, to the effect that, "even though the case is based on nuisance . . . . it is essentially an action for negligence," seems to us eminently good sense which could only have been improved upon by leaving out the reference to the action being based on nuisance. (See *Cowan* v. *Harrington*, [1938] 3 D.L.R. 271.) We believe that we could make out from the English cases themselves a strong case for abolishing nuisance altogether in connection with damage to persons or tangible physical property by falling trees, lamps, buildings, etc., by starting with a duty of care towards persons or property outside the premises which would involve a duty of making reasonable inspection to see that such things were not creating an undue risk of harm to such persons or property; in addition to this negligence approach, there might be an extension of liability, not based on negligence but on a doctrine of strict liability similar to that in *Rylands* v. *Fletcher*, and such cases might be found to depend on finding that an occupier of land was carrying on some extraordinary activity beyond the "give and take" rule, frequently found in discussions of nuisance in the English cases. We realize, of course, that historically, this has no justification whatsoever. By the like token, however, negligence today has a far different meaning than it ever had when used in the early English cases. The fact that many writers, as well as judges speak of "nuisance in fact" as opposed to "nuisance in law" would seem to indicate that about all the term nuisance in any realistic sense means, is an injury of sufficient importance to be brought before a court. The problem then arises whether the conduct of the defendant (including non-feasance) was such as to impose liability for the specific harm. This is hardly the place to develop this view and our only excuse for mentioning it is to suggest that a student of the common law of torts should be exposed to queries of this nature — whether they be considered heresies or not — rather than to be furnished with a collection of legal tags which may obscure realities. One has only to consider how badly fictions of "implied contract" have obscured the notion of unjust enrichment in English texts and decisions, to appreciate that a similar situation is possible in the law of torts.

Needless to say the present edition of Dr. Winfield's text is confined almost exclusively to English authorities, and in the main, with little criticism or queries as to their rightness or wrongness — which in law can at best be an opinion as to their desirability or undesirability. For example, Dr. Winfield accepts what is no doubt the current professional view in England that the House of Lords decided in *Fairman* v. *Perpetual Building Investment Society*, [1923] A.C. 74, that a visitor to a tenant in a block of flats or business building is merely a licensee of the landlord, while using such things as staircases or elevators. This reviewer respectfully shares the doubts of Scott L.J. in *Haseldine* v. *Daw*, [1941] 2 K.B. 343, and expresses the hope that Canadian courts will have courage, in any event, to make a landlord take reasonable care that elevators, etc., are reasonably safe for such persons, whose presence is not only expected by the landlord, but in an office building, especially, is the very reason why the landlord gets any remuneration from his tenant. Some regard for the

overwhelming weight of authority in the United States on this point might have assisted in reaching a result more consonant with what we may describe as our conception of common sense.

In view of the above criticisms, the reviewer hastens to add, as indeed he did in reviewing the first edition, that any quarrel he may have with the present book is not with the writer but with the English tradition of textbook writing. There can be no doubt that Dr. Winfield's textbook stands high amongst English legal treatises. Further, the method of English textbook writing, which we have ventured to criticize, may not be one with which Dr. Winfield is in sympathy, but which he is forced to use by the sheer weight of professional orthodoxy. Certainly, we wish to make it clear that the views expressed here would probably not be accepted by the vast majority of Canadian lawyers. Perhaps, therefore, this review has made criticisms from what the reviewer believes to be the point of view of an ideal textbook on torts. Probably Dr. Winfield did not intend to produce such a book so much as one which would assist the student in meeting the somewhat insular standards—as they appear to us—required by the practising bar in England for legal education. Judged by prevailing English standards regarding textbooks on the law of torts, there can be no doubt that the present book well deserves the honour in which it is held by student and practitioner alike.

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