BOOKS AND PERIODICALS

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CIVIL INJURIES IN ENGLISH LAW.[1]

Sir John Salmond, before his untimely death, was privileged to bring out no less than six editions of his important work on the Law of Torts, the last having appeared in 1923. The seventh edition comes out under the hand of one of the teachers of law at Oxford, a sufficient guaranty of care and scholarship in its preparation. Mr. Stallybrass confesses that in approaching his undertaking his anxiety was to steer between the Scylla and Charybdis of text-book editorship—that is to say by retaining, on the one hand, such portions of the author's work as have been staled by changes in the law, and, on the other, re-writing the original text without indicating to the reader that this has been done. His method is to make the fact clear to the reader whenever he has felt it necessary to depart from the author's views or treatment of any particular topic. In this way the pages of the new edition are not encumbered with bracketed matter that has become obsolete. Brackets are an abomination in this unleisured age, which demands that the dead past of the law should bury its dead.

Mr. Stallybrass uses the medium of the 'excursus' to discuss three important topics in respect of which Sir John Salmond ventured opinions not in harmony with those of other jurists of equal authority. The first (Excursus A.) deals with the general principles of liability in tort. The editor thinks that if the learned author's views had not been formed until 1928 the first chapter of the work would have been different. When Salmond wrote in 1907 that there was no English law of tort, but merely a list of acts and omissions which in certain circumstances became actionable as wrongs, he disregarded the fact that a body of substantive law had already grown up in the domain of tort. To illustrate this Mr. Stallybrass quotes Chief Justice Pratt's observation in *Chapman* v. *Pickers* (1762, 2 Wils. 146) that "Torts are infinitely various, not limited

[1]*The Law of Torts: A Treatise on the English Law of Liability for Civil Injuries.* By Sir John Salmond. 7th edition by W. J. Stallybrass. London: Sweet & Maxwell Limited. Toronto: The Carswell Company Limited 1928. Price $9.50.

nor confined." Many other opinions are cited in the new edition to show that "there is a law of tort, not merely of particular torts." But the editor's criticism of Salmond's view is probably best supported by what Dr. Holdsworth has to say on the subject (H. E. L. Vol. VIII, p. 432):

> In the mediæval period the law of tort was largely contained in the rules as to the competence of various forms of action—Detinue and various forms of Trespass, Case and the various forms of Case. During this period the law was acquiring a number of substantive rules, which are independent of adjective law; and this new importance of the rules of substantive law will increase during the eighteenth and early nineteenth centuries.

The history of the development of English law has repeated the history of earlier systems. In the incipient stages of social order rights are taken for granted rather than defined, and the formulation of remedies is the chief concern of lawyers. (See Vinogradoff, Hist. Jur. Vol. 1, p. 353).

In Excursus B. the editor discusses and combats Salmond's theory (in Chapter IX) that the rule in *Rylands* v. *Fletcher* is merely one branch of the law of Nuisance. He thinks that the rule laid down there "created a new cause of action by applying the mediæval principle of so-called absolute liability to certain actions upon the Case which do not fall within the action upon the Case for Nuisance." True, this view is not in harmony with that of Fletcher Moulton, L.J. in *Wing* v. *London General Omnibus Co.* ([1909] 2 K.B. at pp. 665-666) but it has the support of Sir Frederick Pollock (Law of Torts, 12th ed. p. 495 note (1)(*l*)).

Excursus C. questions the soundness of Salmond's contention (in Chapter XIV) that "the defence of fair comment is simply a particular instance of qualified privilege." Salmond did not hesitate to stigmatize as "unfortunate dicta" what was said by Lord Esher, M.R. and Lord Bowen, in *Merrivale* v. *Carson* (20 Q.B.D. 275), in accepting as better doctrine concerning the nature of this defence the view of Crompton, J., in *Campbell* v. *Spottiswoode* (3 B. & S. at p. 778) instead of that of Willes, J. in *Henwood* v. *Harrison* (L.R. 7 C.P. 606). Mr. Stallybrass does not justify his author's arraignment of Lord Esher and Lord Bowen for "obscuring" the nature and meaning of the defence of fair comment, but contends that "if the privilege is thrown only around fair comments, and the presence of malice prevents a comment from being fair, there is no need to talk of privilege at all; or, if we needs must, the privilege is absolute, not qualified." That strikes one as no

mere 'attorney's logic,' but good, stout reasoning. If a statement is made of malice how can he who makes it be said to be 'speaking fair'? Lord Shaw in *Sutherland* v. *Stopes* ([1925] A.C. p. 82) was disposed to think that the doctrine of fair comment as a defence in defamation actions was ripe for review. We quote:

> I purposely refrain, my Lords, from much of the law as developed more particularly in English authorities as to what is relevant or required to establish a plea of fair comment. The law upon that subject will, no doubt, demand early review. But I refrain because in my opinion the point of fair comment was never reached, or ought never to have been reached in this case . . . I have to confess accordingly that while the Lord Chief Justice, confronted with conflicting authorities, was placed in a position of difficulty, yet in my opinion he would have been warranted in stating broadly that if the justification in its entirety of all the libel were proved the jury need not trouble about fair comment.

Sir John Salmond brought a well-furnished mind to the consideration of legal problems, but his solution of them was not always convincing. Very often he did not see the wood for the trees. Yet six editions of his book in twenty years testify to its usefulness. Revised and to some extent rearranged as it has been in this new edition it is necessarily of greater value and authority than it was in former editions.

Mr. Stallybrass has performed his difficult task of editorship with distinction to himself, and with a very high measure of advantage to teachers and students of the law as well as to lawyers in active practice.

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A TIMELY BOOK.

The Law of Nations. An Introduction to the International Laws of Peace. By J. L. Brierly, Oxford: The Clarendon Press: 1928; Pps. VIII. and 228; Price 5/-.

Mr. Brierly, Professor of International Law at Oxford and a member of the League of Nations Committee for the Codification of International Law has written an excellent introduction to international law and has written it briefly and interestingly. The book itself gives a general summary of the jurisprudence of international law; something of its history and sources; a list of the most important writers on the subject, with a short statement of the particular contribution of each; and then goes on in a more general way to

discuss the problems facing international law; its limitations and the reasons for them; some suggestions as to future developments together with a very excellent and well balanced statement of the contribution of the League of Nations and international organizations generally, to international law.

The section dealing with the international status of the British Dominions (page 70 et seq.) is particularly interesting, for out of this international status and these practical Empire arrangements arise problems that lawyers will have to solve. The statement of the law as to jurisdiction in territorial waters (page 110 et seq.) and that regulating international rivers (page 121 et seq.) is most interesting in view of the Customs Act amendments and the proposed St. Lawrence development. The immunities of diplomatic agents and the conclusiveness of a statement by a Secretary of State as to those immunities as stated on pages 130 et seq. has been reaffirmed by a recent decision of the House of Lords: *Engelke* v. *Musmann,* Times 19-7-28, despite a contrary and well reasoned opinion of the Court of Appeal, and must be taken as the law in that matter.

The recent important judgment of the Permanent Court of Justice in the "Lotus Case" is discussed on page 147 and the dictum of Judge Moore to the effect that "it appears to be now universally admitted that when a crime is committed in the territorial jurisdiction of one state as the direct result of the act of a person at the time corporeally present in another state, international law by reason of the principle of constructive presence of the offender at the place where his act took effect, does not forbid the prosecution of the offender by the former state, should he come within its territorial jurisdiction" is cited with approval, although the actual decision is open to argument inasmuch as it allowed a Turkish court jurisdiction over a French citizen, because of his responsibility for a collision between a Turkish and French ship on the high seas.

The Monroe Doctrine is commented on (pages 163-164) and is properly stated to be a matter of American policy, not a rule of International law. The permanence of treaties and the continuous binding effect of such agreements, as opposed to the constant necessity for change is always a "moot point" in international law and it is becoming increasing apparent, as Prof. Brierly points out (pages 165 et seq.), that some arrangement must be arrived at for their legitimate alteration as circumstances may demand.

Distinctions between arbitral award and judicial decisions are discussed (pages 177 et seq.) and it is suggested that political methods

are sometimes preferable to either, for various reasons, among them the divergences between Anglo-American and continental legal systems and the tendancies of judicial bodies to apply the legal principles in which they have been trained, which gives a decided advantage to that system possessing a majority of the judges or arbitrators. The League of Nations is considered in the concluding chapters and its possibilities and defects together with the reasons for some of those defects are discussed in a most interesting manner. As a whole, the book is one of the best antidotes to the excessive optimism of the well meaning but uninformed idealist, and the undue pessimism of the equally uninformed sceptic, that has been written.

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AN IMPORTANT FUNCTIONARY.

The Claim Agent and His Work. By Smith R. Brittingham LL.B., Assistant General Solicitor, Seaboard Air Line Railway Company. New York: The Ronald Press Company. 1927. Price $6.00.

While this subject is chiefly discussed in relation to steam railroads, the principles enunciated have a wider application. The broad principles of negligence do not change with the actors in the human drama.

The modern railroad Claim Agent can hardly be more than forty years old, but the advent of the automobile in the last twenty or twenty-five years requires not only a greater number of Claim Agents but men of a greater degree of intelligence and greater education than formerly. The railway mileage of the United States exceeds a quarter of a million; more than a billion passengers and a billion and a half tons of freight are carried annually; in three years (1922-1925) over 20,000 persons were killed and 450,000 injured in accidents in which railroads played a part. There are upwards of twenty-two million automobiles in the United States and great is the mortality arising from these modes of locomotion.

It is the function of the Claim Agent to recognize those claims which should be promptly paid. "Agree with thine adversary quickly while thou art in the way with him" is still excellent advice.

The earlier chapters of this book deal with the legal status rights and obligations of a Claim Agent, legal first principles, and fundamentals of legal liability.

The passenger, the employee under the common law, licensees and trespassers, invitees and guests are then instructively discussed. The tendency to abrogate the common law rule of contributory negligence and substitute the comparative negligence rule is exemplified in the Federal Employers' Liability Act. Apparently the author has not heard of the Contributory Negligence Acts of the Common Law Provinces towards the enactment of which so much assistance has been given by the Canadian Bar Association.

In the chapter on releases the result of judicial decisions is stated to be "that wherever a settlement is attacked on the ground of fraud, mistake, duress or undue influence, it will be set aside if the Court can by any process of legal reasoning justify such a course."

Psychology, medical phases and some problems regarding Claim Agency are also discussed.

The author in rather sombre fashion refers to the ethical standards of the profession in the United States. He says that "the law's delays are chargeable, not to any involved rules of practice, but to procrastinating, listless, designing or affirmatively dishonest lawyers;" that the requirements for admission to the bar are practically nil; that disbarment is rare in America; and concludes that the practices of the shyster, the ambulance-chaser and other types of unethical practitioners constitute problems for the Claim Agent; while the injured person has the right to employ a lawyer, if he needs one, the debtor has a right to demand that that lawyer shall represent his client without violation of the criminal law and the canons of legal ethics.

There is an important discussion concerning accidents at highway grade crossings.

The author is of opinion that laws requiring automobilists to stop before passing over highway grade crossings have not grown in favour,—that a provision requiring the automobilist to operate at a safe speed in coming to and passing over a grade crossing is better than requiring him to come to a full stop, and that the railroad should give continuous signals on approaching grade crossings.

The author has taken pains to give to the profession the fruits of his labours in an attractive and informing manner.

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