REVIEWS AND NOTICES

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THE LAW OF DELICTS. By H. C. Goldenberg, Montreal: Wilson & Lafleur, Limited. 1935. Pp. 155. Price $2.50.

Mr. Goldenberg, who is a graduate of McGill Law School, and Sessional Lecturer in Economics and Political Science in McGill University, has in this small text stated with great conciseness and clarity the cardinal principles of the law of Delicts—offences and quasi-offences—in Quebec, and cited the leading cases to point the doctrine. Much more could have been said and numerous avenues investigated; but the author set himself to the narrower task of outlining cardinal principles which it is important to be able to seize and act upon quickly. And he has succeeded admirably.

The basic principle is that of *alterum non laedere*—the general duty, irrespective of contract, not to cause injury without lawful excuse; to act with care, to protect, to warn—on the principle that we have no more right to be awkward, careless, thoughtless, than we have to be dishonest. In our French law we sum one phase of the matter in the concept of the *bon père de famille*, in those cases where, e.g., an employer has others in his care as employees. The sanction is the civil responsibility to repair or compensate for the damage which results from failure to take care.

A more complex civilization has widened the area of duty and responsibility; and various Codes have tried to extend the categories of fault, with the intent that none shall be omitted. Thus the new German Code requires thirty articles to formulate its law of torts. The Quebec Civil Code still requires but four; and the very voice of Justinian echoes in its central text: "*Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill.*" When that text was formulated in 1866, summing our ancient law, the modern machine age was only in its infancy; and the radio, aeroplanes, automobiles, the electrification of cities and railroads, the multitudinous expansion of industry, unknown.

Yet the courts, with great skill, imagination and intelligence have dealt with the novel and complex cases arising under modern conditions, aided only by the general rule; finding here capacity and the duty to discern right from wrong, and there fault due to imprudence, neglect or want of skill. It is doubtful that a wider statement, such as that of the German Code, would give the elasticity inherent in our jurisprudence which in consequence has something of the power for growth and adaptation characteristic of the English common law. In the true line of tradition was the recent decision that a girl driving an automobile was, in the circumstances, negligent and derelict of duty because she was smoking a cigarette and thereby hindered in her driving.

Fault is the core round which responsibility adheres. Yet not every act which causes damage is fault. The act must be wrongful: be committed outside the exercise of a right; if wrongful, whether an act of commission or of omission, there is fault if damage result; if in the prudent exercise of a right, there is not fault though damage result. He who digs on his land for a foundation and disturbs the water level on his neighbour's land, is not

responsible, though the neighbour's house settle. The result is unfortunate, but the digging not imprudence. Yet if the mere excavation loosen the footings of the neighbour's foundation, the excavator must take steps to prevent its collapse. There is imprudence when all the prudence which the circumstances suggest has not been observed.

The doctrine of common fault, and the distinction made by Quebec law and English common law, are clearly set out by Mr. Goldenberg. Where both parties have been at fault, the courts in Quebec are guided not so much by definite rules as by weighing the facts and circumstances. It is worthy of note that the English rule derived from Roman law; while the Quebec rule is based on French law which departed from the Roman precedent. Here, we divide the responsibility. The plaintiff who also has been at fault does not necessarily see his suit dismissed: he bears a proportion of the loss in the degree in which he and the defendant were to blame; but he will not succeed where the accident would not have happened but for his own want of prudence. "The problem of the civil law is to determine the relative blameworthiness of the parties in order to apportion the damage; the problem of the English law is to determine the *cause* of the damage."

One of the most interesting chapters deals with vicarious responsibility, which sets up a presumption of fault. A person may be vicariously responsible for persons who know right from wrong and would thus be liable for fault, but for whom he must answer—*respondeat superior;* for persons who know right from wrong and would thus be liable, but for whom he is responsible because they are under his control; and for persons who are incapable of discerning right from wrong, and things animate or inanimate, because they are in his control or charge. The incidence of the presumption; the shifting of the burden of proof; the distinction that, in the case of inanimate things, the damage must be caused by the thing itself without external intervention, are carefully and fully dealt with.

Here, as throughout, the author's capacity for brief and clear statement of principles, is manifest. This reviewer has no hesitation in warmly recommending Mr. Goldenberg's excellent and useful presentation of his subject.

WALTER S. JOHNSON.

Montreal.

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THE EFFECT OF AN UNCONSTITUTIONAL STATUTE. By Oliver P. Field, LL.B., S.J.D. Minneapolis: University of Minnesota Press, 1935. Pp. XI+355. Price $5.

This is an intriguing title for a book appearing at a time when federal constitutions are facing a different world from that in which they were created, and Canadian lawyers should not be dissuaded from consulting the book because it is devoted to the exposition of 'unconstitutionality' from the American point of view. True, the Judicial Committee of the Privy Council in *Bank of Toronto v. Lambe,* (1887) 12 App. Cas. 575, declined to be guided by the reasoning of Chief Justice Marshall in a case (*McCulloch v. Maryland,* 4 Wheat. 316) involving a problem closely resembling that confronting their lordships, because in their opinion the B.N.A. Act, which embodies the Constitution of Canada, must be treated simply as a statute and its provisions interpreted by the arbitrary rules of statutory construction

to the exclusion of general principles adopted in the interpretation of other federal systems. But much exegetical water producing fog after its kind has passed under the bridge since 1887. While the purely statutory character of the Canadian constitution has been more or less persistently kept in view, its terms have not always been rigidly construed. This is particularly true of the present time. For instance, in *Edwards v. Atty.-Gen. for Canada* [1930] A.C. 124, Lord Sankey, L.C. in delivering the judgment of the Judicial Committee said that: "The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits;" and, again, "Their Lordships do not conceive it to be the duty of this Board—it is certainly not their desire—to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation." Then, in the Aeronautics case (*Atty.-Gen. of Canada v. Atty.-Gen. of Ontario et al.* [1932] A.C. 54), Lord Chancellor Sankey said: "Great care must therefore be taken to consider each decision in the light of the circumstances of the case in view of which it was pronounced, especially in the interpretation of an Act such as the British North America Act, which was a great constitutional charter, and not to allow general phrases to obscure the underlying object of the Act which was to establish a system of government upon essentially federal principles." This judgment met with the approval of so stern a critic of the Judicial Committee as the late John S. Ewart. He said of it: "Its correctness of direction its statesman-like grasp and appreciation of actualities, and the clarity of its reasoning constitute a combination of qualities that force memory of the great American federalist, John Marshall." (9 C.B. Rev. 726). All of which would indicate that books expository of American constitutional law may upon occasion in the liberalizing trend of the present time become of practical service to the Canadian lawyer.

Professor Field's book in its opening sentences grips one's attention. "For over a hundred years, state and federal courts in the United States have been declaring statutes unconstitutional, and a great deal of discussion has centered about the American doctrine of judicial review. . . . . It is a little curious that during all these years so little should have been said or written upon the effects, legal, social, economic, and political, of unconstitutional statutes and judicial review." The author proceeds to show that the theory that an unconstitutional statute is void *ab initio* has been the traditional doctrine of the American courts since Chief Justice Marshall said in *Marbury v. Madison* (1 Cranch, 137) that "A law repugnant to the constitution is void;" but that the doctrine, as thus broadly phrased, is not now a general or universal rule governing the effect of unconstitutionality. One of the exceptions to the "void *ab initio* theory" is that the statute is to be given some effect, that is to say, it is to be given sufficient effect to constitute at least one of the facts of a case affected by its provisions. Professor Field says that in applying this view, "they often speak of giving effect to the presumption that a statute is valid until it is declared by a court to be invalid." But he adds: "Courts sometimes state explicitly that they will decide the case as though the law were valid, *admitting that it is not valid.*" (Italics ours). This invites the comment that an admission by the court that a statute is not valid makes any application of the presumption of validity to the statute in question illogical, to say the least. Nor is there a satisfactory correspondence between this passage in the author's text and the doctrine laid down by McEvoy J. in the Ontario case of *Rex v.*

Isbell (1928) 62 O.L.R. 489 at 513, namely, "Where a statute can be given an interpretation that leaves it *intra vires*, even though there is an interpretation that would render it *ultra vires*, the interpretation that leaves it *intra vires* ought to be adopted."

In the course of Professor Field's book some differences between the interpretative methods of the various American courts are manifest; but there is much in the content of the book of value to Canadians whose business or bias gives them an interest in the problems of constitutional law. We especially commend the learned author's examination in Chapter VI of the doctrines lying at the base of what is known in his country as 'judicial review.' Speaking of this at an earlier place he says: "A study of the effect and significance of judicial review must include more than its law, however; it should reach into politics, economics and government. . . . . The effect of decisions or statutes upon private parties alone offers an intriguing subject for study, and it is of the highest significance. . . . . Much bad feeling has often been engendered because of the exercise of judicial review; governmental inefficiency has often been promoted thereby."

CHARLES MORSE.

Ottawa.

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THE PROBLEM OF THE DEFAULTING PURCHASER: By P. R. Watts, B.A., LL.B., The Law Book Company of Australasia, Ltd. (Sydney, Melbourne and Brisbane). 1935.

This little volume is a compilation of a number of articles dealing with the subject of the defaulting purchaser under a sale agreement covering land, these articles having been published in *The Australian Law Journal* over a period of the last seven years. Written at a time in world economic affairs when conditions are certainly not of the best they serve to emphasize the many objectionable features of time payment agreements covering the sale of land, and perhaps form a persuasive argument in favour of the return by vendors to the more satisfactory method of requiring the purchaser to pay down a substantial sum in exchange for a transfer, and execute a mortgage back to secure the unpaid balance of the purchase money. Certainly the comparison of the powers of a vendor under a sale by instalment and those of a mortgagee of a mortgage given as security for the balance of unpaid purchase price shows the odds strongly in favour of the mortgagee in the event of default of the purchaser.

Throughout the series of articles the uncertainty that has developed and clouded the real meaning of the decision of the leading cases because of the misuse of the word "rescission" is clearly demonstrated, and the reader cannot but come to the conclusion that much of the uncertainty could have been avoided by a more careful choice of words, and greater regard for the use of words in their proper sense. As the author puts it—"The uncertainty that exists in these matters seems however, to have arisen largely from that prevalent vice of the law—the use of a word without a precise meaning, or with several meanings."

While dealing primarily with particular problems peculiar to local conditions in Australia, the volume is of general interest in that it discusses and criticises the well known Canadian cases on the subject, viz:—*Kilmer v. British Columbia Orchard Lands* (1913) A.C. 319; *Steedman v. Drinkle*, (1916) 1 A.C. 275 and *Brickles v. Snell*, (1916) 2 A.C. 599—and also forms

a very useful source of illuminating information on the general principles underlying the relationship between vendor and purchaser.

E. H. CHARLESON.

Ottawa.

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CASES ON EQUITY JURISDICTION AND SPECIFIC PERFORMANCE.—By Zechariah Chaffee, Jr., and Sidney Post Simpson. Volumes 1 and 2. Published by the Editors at Langdell Hall, Cambridge, Massachusetts, 1934. Price $8.00.

This work presents abundant materials for a comprehensive study of the nature of equity jurisdiction and the principles of equity as developed in the law of specific performance of contracts, in the law of equitable servitudes on land and chattels, and in the law of vendor and purchaser. The editors, both of them professors of law at Harvard, state that the primary purpose of the book is to enable the student to understand the operation of equitable remedies and doctrines under present-day conditions; and they are persuaded that modern applications of equitable principles can be adequately comprehended only in the light of a 'genetic' study. With that view and to that end they present in the work elements of equity in the making gathered from mediaeval as well as modern sources. Some idea of the spread of the field explored in the work is conveyed by the fact that amongst the body of cases cited on the Specific Performance of Contracts we find *Cokayn* v. *Hurst* (decided in 1458 and published in 10 Seld.Soc. Pub.No.142); *Dominion Iron and Steel Co.* v. *Dominion Coal Co.* (1908) 43 Nova Scotia Rep. 77, [1909] A.C. 293; and *Zygmunt* v. *Avenue Realty Co.* (1931) 108 New Jersey Eq.Rep.462.

The general plan of the work is along the lines of the portion of Ames's Cases in Equity Jurisdiction (1904) which relates to the nature of such jurisdiction and the specific performance of contracts. While many of Dean Ames's cases have been retained they are supplemented by the inclusion of many new cases illustrative of problems that have recently arisen.

In addition to copious extracts from leading text-books and periodical legal literature on the subjects treated of, the editors have been permitted by the American Law Institute to use portions of its Restatement of the Law of Contracts and the draft Restatement of the Law of Conflict of Laws. Here and there the light of Dean Pound's learning illumines points of doubt.

In the opening chapter of the work we have a succinct sketch of the history of equity as it arose and was developed in the English juridical system. In the notes to this chapter attention is directed to Dean Falconbridge's paper on "Law and Equity in Upper Canada" (63 *University of Pennsylvania Law Review* p. 1), and to Townshend's *History of the Court of Chancery in Nova Scotia*, for information concerning the early history of equity in those portions of Canada.

This work is especially designed "to supply ample materials for a first course in Equity, given the second year or the latter part of the first year of the [Harvard] law school course", but its editors hope that it may prove of use to practising lawyers. That it supplies "ample materials" for study by first-year students must be conceded, but it is possible that this very amplitude will make it a source of confusion to the novice whose

path of study should be made reasonably free of curves. On the other hand the work presents a collection of material of the highest value and service to the practising lawyer who does not shy at the quest for knowledge *inter silvas Academi.*

C. M.

Ottawa.

CURRENT EVENTS

The Honourable Mr. Justice John M. McEvoy of the Supreme Court of Ontario died at his home in Toronto on the 13th instant. He had been in ill health for some time. He was born in Middlesex County, Ontario, in 1864. During his practice at the Bar, Mr. Justice McEvoy had a distinguished reputation as counsel in criminal cases.

A Government Bill has been introduced in the Ontario Legislature which aims at discouraging the practice that has prevailed to an alarming extent in recent years of piling up municipal debt. The Bill makes it obligatory that permission of the Ontario Municipal Board should be secured before a municipality is justified in entering upon any scheme or undertaking to be paid for by the issuance of debentures—except in the case of such matters being approved by a vote of the taxpayers.

An illustration of the existence of a finer humanitarianism in this age over that prevailing fifty years ago is afforded by the proposal of the Ontario Minister of Health that the word "insane" should be deleted from the Ontario Statutes wherever it may occur, and be replaced by the phrase "mentally ill and defective". People suffering from mental trouble in the past were treated very much as social outcasts, and little interest was manifested in aids to recovery from their affliction.

The members of the North Carolina Bar Association have accepted the invitation of the Council of the Nova Scotia Barristers' Society to visit Nova Scotia during the coming summer. It is expected that some 400 members of the Association will avail themselves of the invitation, arriving at Halifax on the 19th of August.

The following alteration in the dates of holding of sittings of the Supreme Court has been made by the Chief Justice and Judges of the Supreme Court of Nova Scotia to be effective from the 24th day of November, A.D. 1934. MIDLAND CIRCUIT (Cumberland) On the 3rd Tuesday of May instead of the 3rd Tuesday of June. WESTERN CIRCUIT (Digby) At Digby on the last Tuesday of May instead of the 2nd Tuesday of May. (Annapolis) At Annapolis on the 1st Tuesday of October instead of the 1st Tuesday of November. (Kings) At Kentville on the 2nd Tuesday of May and the 3rd Tuesday of October instead of the last Tuesday of April and the 2nd Tuesday of November.

The Honourable Walter G. Mitchell, K.C., of the Montreal Bar, died on the 3rd instant at the age of fifty-eight. At the time of his death Mr. Mitchell was associated with the Honourable J. L. Ralston, K.C. in the