REVIEWS AND NOTICES

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A Text-Book of the Law of Tort. By P.H. WINFIELD, F.B.A., LL.D. London: Sweet and Maxwell. Toronto: The Carswell Company. 1937. Pp. xl, 728. ($9.00)

Nowhere in the law is the swift tempo of modern life so evident as in that branch dealing with tortious liability. No topic is subject to such change and no topic is capable of so many different approaches, analyses and starting points. One naturally has in mind the far-reaching effects, indeed from the standpoint of the English case law, revolutionary effects, of such cases as *Donoghue* v. *Stevenson*, [1932] A.C. 562, *Haynes* v. *Harwood*, [1935] 1 K.B. 146, and *Rose* v. *Ford*, [1937] A.C. 826. Whither do they lead us? What is the next step? How far will that step be conditioned and checked by historical accidents or the peculiarities of ancient procedure?

England has been exceedingly well served by the works of Pollock and Salmond, the latter more recently having been triumphantly carried through later editions by Dr. W. T. S. Stallybrass. In this controversial field Dr. Winfield has had the courage to offer another text-book, and to anyone familiar with the work of Winfield, not only in *The Province of the Law of Tort*, but also in his numerous contributions to the legal periodical literature of England and the United States, the appearance of his *Text-Book of the Law of Tort*, was an event keenly to be anticipated. Whether one's anticipations were realized or not depends in large part, of course, on what was anticipated. It is extremely difficult for a reviewer to be completely objective about any book dealing with a topic on which he has ideas that may be contrary to those of the author. All he can hope to do is attempt te realize the task the author has set himself and try to make an evaluation of the book in the light of that objective. If, further, the reviewer is foolish enough to question the objectives and general scheme of the book, it must be remembered, and above all in a subject like torts, that this is a matter of opinion only, and when that opinion is expressed by a reviewer of another jurisdiction it is more than possible he has failed to appreciate the legal atmosphere in which the book was conceived.

Professor Winfield has avowedly written a book designed "primarily" for students. To the extent that enthusiasm, accuracy of language devoid of prolixity, and a sense of humour which appears delightfully in unexpected places, are tests of a good text-book—and the reviewer believes they are—the present book is an undoubted success and should be deservedly popular. In addition, the author has called in his vast knowledge of legal history to explain many of the "queer" spots in the law over which countless students have worried in the past. This is done in such a way that the reader scarcely observes that he has been subjected to "ancient learning"—a thing which the modern law student, perhaps unfortunately, regards with the utmost suspicion. The author has not frightened the reader with an accumulated mass of cases but has selected carefully and has set out leading

cases in the text fully enough to meet the demands of even the most impatient student. In this respect, therefore, there can be not the slightest doubt that Professor Winfield has written a text-book which deserves a place in the front ranks of English treatises.

At the same time, the present reviewer must express a slight feeling of disappointment,—not with what the author has done but with what, in the reviewer's opinion, he might have done and which the reviewer believes ought to be done. The present volume contains new approaches to some topics, and expresses a different opinion on many subjects from that stated in the existing English books. This is not only natural, it is inevitable in such a subject. The amazing part (at least to this reviewer) is that there is so little difference in the general treatment of the entire subject from that of Pollock and of Salmond. Of the latter two, particularly since Dr. Stallybrass has edited Salmond, Winfield seems to have been influenced to a great extent in method of treatment by Pollock.

Now it is at this stage that the personal opinions and prejudices of the reviewer are bound to appear. To the writer, it has always seemed that the English books failed to stress the basic problem in the law of torts. It is true that Winfield at a very early stage of his book (p. 15) devotes considerable space to discussing whether there is a general principle of tortious liability, namely that "all injuries done to another person are torts unless there is some justification recognised by law", or whether there is merely "a definite number of torts outside which liability in tort does not exist". He resolves this inquiry in favour of the former view, at which stage the proposition ceases, so far as the reviewer can see, to have any further effect on the book. In fact, in Chapter VIII, he explains that he intends to treat of nominate torts, and says that a classification "is of no particular value except for purposes of exposition". He also suggests that a proper classification is a matter for jurisprudence and has no place in a book of this kind. Does this mean, then, that we still study nominate torts, with the warning that, of course, the courts may create new nominate torts? This seems to be the result. In addition, Winfield in 218 pages deals, after the fashion of all English books, with the "general part" of the law of torts, including, *volenti non fit injuria*, remoteness of damage, remedies, etc. With this arrangement—and it is common to all the English books—the present writer has little sympathy. Nor does he believe it necessary or helpful simply because other English books have so used that arrangement.

Perhaps it is because the reviewer had the privilege of becoming acquainted with the American academic treatment of the law of torts—a treatment which, incidentally, has had effects on actual court decisions in England—that he can not appreciate this traditional English attitude. In the law of torts one meets in clearest outline the problem of all law, namely, the adjustment of conflicting claims or interests. One can point to individual cases, and say "In that case the law gave protection to a claim for the first time", and to another case and say "In that case, the claim was protected against a certain type of conduct for the first time", and so on. No textbook on torts can accurately state the "existing law" of the subject because by the time the book is off the press there will have been new adjustments made. Thus, portions of the text in Winfield will require rewriting on account of the House of Lords judgment in *Wilsons and Clyde Coal Co. Ltd.* v. *English*, [1938] A.C. 57, which overruled *Fanton* v. *Denville*, [1932]

2 K.B. 309, in relation to common employment, and the judgment in *Rose* v. *Ford*, [1937] A.C. 826, will require considerable changes in the chapter dealing with the "death" cases. What a textbook on torts, in the writer's opinion, *can* do is make the fundamental problem clear. That problem can be stated as follows: what interests have been protected: against conduct of what type have they been protected. To develop from intentional invasions of claims to physical integrity and property, to negligent invasions, to invasions which are neither intentional nor negligent is, it is submitted, to give a student a grasp of the real problems of tort law and the principles on which those problems may be solved. After interests of personality and property have been examined in the light of various types of conduct causing harm, the progression to other interests, in reputation, in domestic relations, in positions of economic advantage, in privacy, etc., can be dealt with in the same way.

This is, of course, the view adopted by the American Law Institute. The present writer holds no brief for the method or results achieved in the Restatement of Torts. He does believe, however, that the somewhat similar method adopted by Fowler in his *Treatise on the Law of Torts* (Indianapolis, 1933) is far superior in clarity, and gives a better view of what the courts are doing,—which is, after all, what a student wants to know—than the present haphazard English treatment current in all the textbooks on the subject. It may be said, with Winfield (p. 218) ,that this is merely an attempt "to wrench intractable material into neat shapes that would have little real connection with either the history or the present substance of the topic". Naturally, neatness of arrangement, while desirable, is not an end unless it makes for clearness in exposition. That history *may* have to suffer is true, but this we believe is so simply because courts do not proceed solely on historical lines. Thus, Winfield objects (p. 539) to the treatment by Blackburn J. of cattle-trespass as a species of the broader rule he laid down in *Rylands* v. *Fletcher* (1866), L.R. 1 Ex. 265, 280. That there are many differences is true. That historically Blackburn J. was wrong is probably also true. The fact remains, however, that they both illustrate the protection of claims to security of property against unintended and non-negligent acts. It is the reviewer's opinion that such matters should be treated closer together in a search for some common underlying reason of policy rather than treated as separate. (See Harper, *Liability in Anglo-American Law for Damage Done by Chattels* (1938), 2 Univ. of Tor. L.J. 280.) Likewise, why separate Dangerous Chattels (Chap. XXI)and Dangerous Land and Structures (Chap. XXII) from the duty problem in negligence which is treated in a rather barren manner in Chapter XVI? Are they not specific instances of duty-finding? Is there not throughout the same fundamental problem of discovering when affirmative obligations to take care for the protection of another arise? (See A. L. MacDonald, *Liability of Possessors of Premises* (1929-30), 7 Can. Bar Rev. 665; 8, *ibid.*, 8, 184, 344.)

If the law of torts is presented to a student freed from labels and artificial categories, and is developed in the light of claims pressing for recognition and protection from new risks created by changing social and economic circumstances, the result may not be neat, but it will allow for flexibility, which becomes difficult when "rights" are rigidly categorized (*cf.* the collision of "rights" in cases like *Mogul S.S. Co. Ltd.* v. *McGregor* (1889), 23 Q.B.D. 598 and *Quinn* v. *Leathem*, [1901] A.C. 495), and it will assist in reducing

the sense of shock such cases as *Donoghue* v. *Stevenson* bring to those trained to classify law in "pigeon-holes".

Further, attemps must be made, not only to lay bare the type of interest seeking legal protection, but also to consider whether the conduct of the defendant exposes that particular interest to a risk of harm in such a way that he should pay for the resulting damage. Unless this process is made clear the significance of many decisions becomes blurred, and we stand in danger of dealing with generalities which give no guidance to future difficulties. To illustrate, we may examine one or two instances in Winfield's book. At p. 622, in dealing with the doctrine of *Lumley* v. *Gye* and interference with contractual rights, he seems to state that any conduct "intentional or negligent" will found an action if it interferes with a contractual right. This, the reviewer thinks gravely open to doubt, unless the statement is considerably amplified and explained. Clearly a claim to an unimpaired contractual relation is protected against an intentional invasion. It is extremely doubtful, in view of such a case as *La Societe Anonyme de Remorquage* v. *Bennetts*, [1911] 1 K.B. 243, whether a person can claim protection for this interest when it is injured by "negligent" conduct. Of course, this raises the whole question of negligence,—when is conduct negligent? It would seem that in the last quoted case if the defendants had reason to believe their conduct was likely to expose the plaintiffs contractual right to danger, the decision should have been in favour of the plaintiff. (See Carpenter, *Interference with Contract Relations* (1928), 41 Harv. L.R. 728, 737 *ff.*) On the other hand when a defendant carelessly injures a servant of the plaintiff, is he negligent towards the master's claim to the services of such servant? Winfield queries (p. 215) the views expressed in *Admiralty Commissioners* v. *S.S. Amerika*, [1917] A.C. 38, 48, 60, that there is an anomaly in allowing any action to a master for injury to a servant. But may this not, in a sense, be right? Is conduct negligent towards a master's interest in a servant if the defendant could not reasonably believe his conduct might involve risk to that interest? Was not liability here imposed because the servant was considered as part of the personality of the master? If Toscanini is injured by a careless motorist on his way to the B.B.C., is the latter entitled to recover? It is submitted that this is an open question and depends on a court's willingness to impose a strict liability on a motorist for *all* damage caused to anyone. It is significant,—and lamentable— that *Palsgraf* v. *Long Island R.R.* (1928), 248 N.Y. 339, is not mentioned nor discussed by Winfield in dealing with negligence. This case, in the reviewer's opinion is the best discussion of the duty problem made to date by a court of common law jurisdiction. Presumably because it proceeds on a recognition of conduct involving risks to certain interests or claims as alone being negligent or tortious with respect to such claims, it is discarded as an approach foreign to English courts. But is it? Is not that very problem involved in the "nervous shock" cases?

Winfield treats such cases in the "general part" of his book before any detailed discussion of what "negligence" or a "duty of care" is. This seems to the writer a case of running before walking—or even toddling. The same objection can be made to treating remoteness of damage before the duty or negligence problem is considered. At any rate, Winfield states (p. 85) that it is questionable "whether nervous shock ought to be classified as a substantive tort". What does this mean? It is difficult to say, since on the next page he seems to imply that a claim to be free from mental

disturbances is not protected at all. What, then, is the interest or claim protected? Surely the claim to physical or bodily integrity. Then the question is, against what type of conduct? If against negligent conduct, that must mean negligent as exposing the plaintiff to a risk of physical harm. What, then, of a woman on the tenth floor of an office building who sees her child run over and as a consequence becomes ill? There is some justification in *Hambrook* v. *Stokes Brothers*, [1925] 1 K.B. 141, for saying there might be liability, although the reasoning of Atkin L.J. is contrary, as is that of Kennedy J. in *Dulieu* v. *White*, [1901] 2 K.B. 669. If there is liability, it is a recognition of an interest in freedom from mental shock as opposed to an interest in bodily freedom. This may, perhaps, be not too great a burden to place on the motorist, but unless we point the problem in the way suggested, the law will remain a series of unrelated phenomena. As Magruder has demonstrated (*Mental and Emotional Disturbance in the Law of Torts* (1936), 49 Harv. L. Rev. 1033), no case has yet allowed recovery when the plaintiff was not within the ambit of possible physical harm. At least the approach indicated shows the actual problem the courts must decide.

In what has become a much too lengthy review enough has been said to show why the present reviewer was somewhat disappointed in the present book. The disappointment is not in Professor Winfield so much as it is in the apparent tradition of English text-writing. The reviewer had hoped that a new text-book on torts might really seek to develop on a logical pattern the main problems of tortious liability. Professor Winfield, himself, departed from English tradition in exposing the underlying conception of "unjust enrichment" in quasi-contractual obligations. There can be no doubt that the impetus given by him and by the work of the American Law Restatement on Restitution has led to a renewed interest in the analysis of and the approach to this neglected topic. (See Lord Wright's Book Review of the Restatement on Restitution in (1937), 51 Harv. L. Rev. 369, and see Seavey and Scott, *Restitution* (1938), 54 L.Q.R. 29.) Is there not still an opportunity of an approach to the law of torts in such a way as to expose—if not to solve—its glaring inconsistencies, and thus bring to fruition the truth inherent in the view that there is a "law of tort" and not a series of labelled torts?

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The Citizen's Choice. By ERNEST BARKER. Cambridge: At the University Press. Toronto: The Macmillan Company of Canada. 1937. Pp. ix, 185. ($2.50)

The essays in the present volume are, for the most part, a persuasive advocacy of democracy or "government by discussion". Amidst the clash of modern "ideologies" the author wends a liberal and well reasoned way well adorned with classical allusions and illuminated by historical insight. He is almost irritatingly fair to Facism, Communism and the Corporative State. "Democracy," says the author, "means something more than mass weight of numbers, something greater than a mode of government by mathematics. It is a way of giving to each individual person as such and

because he is such, a voice and influence in determining the conditions of life in his community."

This is indeed the faith, however vaguely formulated, that is in most of us. The author leaves to more controversial writers the proposition that it is an ideal which demands radical, economic social and moral changes for its realization. We may well be grateful, however, to this philosopher who expounds most attractively a philosophy that may help us to withstand the cruder philosophies of the hour.

To the lawyer the last essay on "Maitland as a Sociologist" is of particular interest. Maitland's great work in throwing light on the tremendous sociological influence of the Law of Trusts is recalled. This branch of law may have had its origin in the interests of a dominant social class as the Marxists would have it, but it soon forgot its Marxist origin and served as a shelter and refuge for a great wealth of groups and societies which were far from being grounded in the interests of a dominant class. Not the least of these were Trade Unions and Free Churches.

We are also reminded of Maitland's words about the Inns of Court whose members were "gregarious, clubbable men, grouping themselves into hospices which became schools of law—arguing, learning and teaching, the great mediators between life and logic, a reasoning and reasonable element in the English Nation". The author concludes with the question of what could be greater or more important to normal human growth than free social experimentation made possible by the freedom of such spontaneous organizations.

These essays have the virtues and defects of their original form as speeches or lectures. They are to be commended to all who would enjoy a colloquial and scholarly exposition of some aspects of the liberal faith. They are particularly recommended as a model to those who from time to time are called upon to make speeches on modern tendencies and current events to those voluntary associations and groups to which the author refers.

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