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BOOK REVIEWS

THE FOUNDATIONS OF LEGAL LIABILITY. A Presentation of the Theory and Development of the Common Law. By Thomas Atkins Street, A. M., LL.B. In three volumes, Vol. I, Theory and Principles of Tort, pp. xxix, 500; Vol. II, History and Theory of English Contract Law, pp. xviii, 559; Vol. III, Common Law Actions, pp. xi, 572. Northport, Long Island, New York. Edward Thompson Company, 1906.

It is difficult in the space available to do justice to this important contribution to the history and theory of the Common Law. The Author, formerly a member of the Law Faculty of Vanderbilt University, now of the staff of the Edward Thompson Company, has made a first hand and an independent study of the Foundations of Legal Liability, as set forth in the original sources of the English and American Law, and has presented the results of his study clearly, vigorously, systematically, and with an assurance that is begotten only by an intimate acquaintance with, a careful study of, and long reflection upon, the crucial cases underlying the law of Torts, Contracts, and Actions.

The author, himself, claims full credit for what he feels he has done, and says (Preface to Vol. I): "As might be expected from the adoption of new methods of inquiry, and from the opening of new lines of thought, we have turned up many new ideas and have been able to present the old truths in new and more enlightening aspects. The discovery and establishment of what we have called the 'secondary trespass formation' represent, we make bold to believe, a considerable advance in legal knowledge." After treating of the violent trespass,—forcible hurt to person or property,—with the qualifications and exceptions (Chapters I to IV), the author, in "Chapter V, Secondary Trespass Formation," treats of "Responsibility for Agents of Harm,"—meaning thereby "those situations where one is held accountable for damage done by independent agents,"—not only human agents, but also animals, domestic and wild, and inanimate dangerous agents, such as fire, firearms, explosives, poisons, dangerous accumulations of water, or inanimate agents not dangerous in themselves, and concludes that we have here "a reduplication of the phenomena which are found in the field of trespass," and in which "the law so far identifies the creator, maintainer or user of the harmful agent with the thing itself that he becomes legally responsible for the damage it does." It is a secondary trespass, however, instead of a primary one directly committed by the wrong-doer himself. Mr. Street recognizes (p. 67) that where the danger is obvious, the responsibility is nearly or quite absolute; where the danger is less obvious the factor of negligence begins to make its presence felt; and finallly, in case of harm done by agents not ordinarily dangerous *per se,* negligence is the basis of liability. With the exception of careless transmission of telegrams and negligent breaches of the contract of bailment, negligence, according to the author, is confined to forcible injuries to person and property, and therefore figures exclusively in

the fields of trespass and secondary trespass; it is not a distinctive tort itself, but, like fraud and malice in deceit and malicious injury, is an important element or factor in primary and secondary trespass. Although admitting that, according to the old cases [*Case of Thorns* (1466), Y. B. 6th Ed. IV 7, pl. 18; *Weaver* v. *Ward* (1617), Hob. 134; *Dickerson* v. *Watson* (1682), T. Jones, 205; *Underwood* v. *Hewson* (1723), 1 Stra. 596; *Leame* v. *Bray* (1803), 3 East 593], liability in trespass was absolute for accidental as well as intentional injuries and that no question of negligence was involved, the author declares that such doctrine is no longer tenable, and liability now is and must be based upon some degree of negligence or blame, though any degree of negligence is sufficient in the case of direct injuries done by dangerous instruments. He relies upon the cases of *Davis* v. *Saunders* (1771), 2 Chit. 639; *Wakeman* v. *Robinson,* (1823), 1 Bing. 213; *Hall* v. *Fearnley* (1842), 3 Q. B. 919; *Brown* v. *Kendall* (1850), 6 Cush. (Mass.) 292; *Castle* v. *Duryee* (1865), 2 Keyes (N. Y.) 169; *Holmes* v. *Mather* (1875), L. R. 10 Exch. 261; *Stanley* v. *Powell* (1891), 1 Q. B. 86, which fully support this doctrine. The author believes the same doctrine will be adopted in the case of secondary trespass, though it has not yet been so in the case of injuries by dangerous wild animals. There is, however, a tendency this way in some of the late cases. See *Parsons* v. *Manser* (1903), 119 Iowa 88, 93 N. W. 86, 62 L. R. A. 132, 97 Am. St. Rep. 283; note 287; *Hays* v. *Miller* (1907), — Ga. —, 43 South. 818; *Malloy* v. *Starin* (1908), 191 N. Y. 21, 83 N. E. 588, 104 N. Y. Supp. 1133, 99 N. Y. Supp. 603. The author's views on trespass should be compared with those of Mr. POLLOCK (TORTS, 6th Ed.) and Mr. HOLMES (THE COMMON LAW, Lecture III).

In volume II, the history and theory of Contracts in general, of Bailments, of Bills and Notes, and of Agency, are treated. The author says that "the English law of simple contract is unshakably planted on two main ideas,—the conception of debt and the conception of obligation resulting from promise." He traces carefully the history of debt, and shows how it undoubtedly underlies much of our contract law. This leads him to class judgments and recognizances, not as quasi-contracts (as is usual), but as contracts, for "Judgments are debts; and as debts are and always have been called contracts (indeed, they were the first contracts known to the law), there is no necessity for denying to judgments the right to be called contracts if we only remember that they are not the same kind of contract as that in which obligation results from promise"—p. 206. He makes contract law, therefore, much broader than many recent authors, notably ANSON and POLLOCK, do, and we believe he is correct in this, and that any narrower treatment does not cover the Law of Contracts as it has existed or as it now exists. In chapter XII the author sets forth his theory of bilateral contract, basing it upon *consent* only,—the mutuality of the promises giving validity to both,—instead of basing it upon the current theory of the *consideration* arising from each party incurring a detriment in promising to do something for the other, or such a detriment

as arises from the physical and mental efforts of the parties in making the promises. The author limits his own theory, however, by saying that *consideration* enters into the bilateral contract so far as to require that the promise of each party be to do something which would itself be a sufficient consideration to make an enforceable unilateral contract, if it stood alone. Suppose A. is bound by contract with B. to do a certain thing, and C. says to A., do that thing and I will pay you $50. Then if A. says nothing, but does the thing, he has no enforceable claim against B. for the $50. *Johnson* v. *Sellers* (1858), 33 Ala. 265; *Merrick* v. *Giddings* (1882), 1 Mackey (D. C.) 394. But if A. says in reply to C., if you promise to pay me $50, I promise to do the thing, then C. is bound. *Scotson* v. *Pegg* (1861), 6. H. & N. 295; *Abbott* v. *Doane* (1895), 163 Mass. 433. The author very properly distinguishes *Shadwell* v. *Shadwell* (1860), 9 C. B. 159, from *Scotson* v. *Pegg,* supra, in that in the former there was a prior promise inducing the marriage and constituting a consideration in the ordinary way in a unilateral contract, while in the latter there was no such prior promise, but only a bilateral contract by mutual promises, one of the parties already being bound to a third party to do the thing promised. Such contracts, being based upon consent and not directly upon consideration, "are good because each promises to do an act which considered without reference to the particular facts of that case [i. e., that one is under an obligation to a third person to do the act] would be a consideration for a unilateral promise"—p. 118. One ought, however, to compare LANGDELL on CONTRACTS, § 84; 8 Harv. L. Rev. 33; 13 Ib. 27; 14 Ib. 500.

The author treats conversion as a "disseisin of chattels;" he limits quasi-contracts to contractual duties not enforceable by special assumpsit or debt; and concludes that bills of exchange are not specialties, and so require a consideration to support them.

In volume III, a succinct history of remedial law is given, after which Account, Covenant, Debt, Detinue, Trover, Assumpsit, Indebitatus Assumpsit, Replevin, Trespass, Trespass on the Case, and Distress are treated from the historical standpoint. A table of cases and a full index to all three volumes make up the remainder of volume III.

Although the author's claim (as above given) at first seems extravagant, yet it is safe to say that this work is of a kind that should be read, and studied, and pondered over, by student, teacher, practitioner, and judge; and while there are and will continue to be opinions and decisions inconsistent with the views of the author,—for he points out wherein he differs from, and is indebted to, Ames, Holmes, and other distinguished investigators,—yet his work has been done with so much care, candor, and sagacity as to make it a distinct, solid, and valuable contribution to legal theory, such as in the writer's opinion ought to, and will, place it among the treasured works of our best authors. H. L. W.