CLERK AND LINDSELL ON TORTS. Twelfth edition by A. L. Armitage *et al.* [1961. London, Sweet and Maxwell Ltd. pp. clxxvi + 1094. £7.12.6.]

Clerk and Lindsell has always been, and remains, the great English repository of the law of tort. With, in this edition, over one thousand pages of text citing some six thousand cases it has no equal. When a book has reached its twelfth edition and has survived for over seventy years the function of a reviewer is rather limited and must he largely confined to commenting on the changes which have been made since the last edition. As one would expect the process of bringing the book up to date has been extremely competently performed and that is all that most users of the book ask for. Unfortunately, the decision in *The Wagon Mound* appears to have been handed down too late for it to be dealt with otherwise then by paragraphs inserted after the rest of the chapter have been written. One wonders, however, whether possibly some of the older material could not now be deleted. Over 350 of the cases cited were decided before the end of the eighteenth century. Surely there can be few cases of more than one hundred and fifty years old that are of great significance today so far as the law of tort is concerned? The retention of these authorities adds little but girth to the book.

The feature of this edition which most disappointed the reviewer is the fact that the editors have not thought fit to make any substantial alteration in the arrangement of the book. It is still necessary to wade through over one quarter of the book before one reaches any discussion of specific torts. Most modern writers recognise the need for a more practical treatment with the emphasis shifted to discussion of specific torts rather than to the general principles of liability. Surely a practitioner's work is even more in need of such an arrangement.

This point is stressed by the fact that your reviewer found the first chapter in which the "Principles of Liability in Tort" are discussed decidedly unhelpful. It is surely rather naive to regard the concept of a "law of wrongs" as a "contradiction in terms" on the ground that "A 'wrong' is a pathological condition in the legal system representing not law but disregard of law." Law is, from one point of view, simply a form of social pathology. Crime and breach of contract are equally pathological conditions but it seems rather unhelpful to say that therefore it is a contradiction in terms to talk of a law of crimes or a law relating to breach of contract.

The learned editors think that it is misleading to regard tort as a law of wrongs on the ground that such an attitude tends to overlook the fact that "even historically much of the law of torts has sprung from legally pre-existing rights." However, as the learned editors themselves point out, right and duty are but correlative terms and this fact alone makes nonsense of any attempt to distinguish between torts as infringement of a right and torts as wrongs. To say that there is a legally pre-existing right is surely to say no more than that the law will grant a remedy for interference therewith, *i.e.,* for a wrong. The learned editors seem here to be confusing analytical and historical distinctions.

The learned editors also argue that the view that the law of torts is a law of wrongs is largely responsible for its being "an unco-ordinated collection of remedies for misdoing which have developed haphazardly as they have been brought before the courts." The implication seems to be that if the law of tort were to be regarded as the law of infringement of rights it would be a neat and systematic branch of the law. There seems, however, to be no particular justification for this implication. If the law of tort had been regarded as relating to the infringement of rights there seems no reason why it would not have become an unco-ordinated collection of remedies for the infringement of rights which developed haphazardly as they were brought before the courts.

The learned editors, however, attempt to develop this distinction even further. They thus argue as follows (at p. 8):

> Where the plaintiff can establish that he has a right already recognised at common law or by statute which avails against persons generally any violation of that legal right gives rise to an action for damages in tort. It is submitted that it is not necessary to show that there is any existing ground of liability in tort which will cover the particular invasion of the plaintiff's right nor to show that the plaintiff has suffered material damage. . . . .On the other hand where the plaintiff has suffered damage at the hands of the defendant in circumstances where the plaintiff cannot point to an established legal right, the onus is on him to satisfy the court that there is some principle of the law of torts by which the court will be justified in affording him a remedy.

It is submitted that this distinction is entirely without basis. It involves what seems to be a rather curious distinction between "a right already recognised by common law or statute" and "some principle of the law of tort which will justify the court in affording him a remedy." If, however, there exists a head of tortious liability which will justify the court in affording the plaintiff a remedy then the plaintiff surely possesses an already recognised legal right — a right not to be treated in that way. On the other hand if the plaintiff possesses some already recognised right then surely he can point to some principle of the law of tort which will justify the court in affording him a remedy. This analysis of the principles of liability in tort does not, with all respect, seem to assist much in achieving an understanding of the nature of the problem.

Another chapter of the book which seems to present a rather disappointing analysis of the law is that which discusses the tortious liability of corporations. In discussing the application of the concept of *ultra vires* to this problem the learned editor, rather surprisingly, adheres to Dr. Goodhart's argument (in (1926) 2 Cam. L.J. 355) that a corporation cannot be liable in those cases in which the tort was committed in the course of an *ultra vires* activity on the ground that since *ultra vires* contracts are void the corporation cannot enter into valid contracts of service with those who carry out the *ultra vires* undertaking and therefore as the relationship of master and servant cannot exist between the corporation and the person who committed the tort, the former cannot be vicariously liable for the torts of the latter. This argument presupposes that the relationship of master and servant can only exist where there is a valid contract of service. This, however, is expressly denied later in the book (although both parts have been contributed by the same editor). It is thus stated on the authority of cases such as *Samson* v. *Aitchison* [1912] A.C. 844 that (at p. 110):

> to constitute the relationship of master and servant for the purposes of vicarious liability it is not essential that the service be rendered under a contract.

If it is not necessary that the service be rendered under a contract then presumably service rendered under an invalid contract of service would be sufficient for the purposes of vicarious liability, and if this is so then the whole basis of Dr. Goodhart's argument is destroyed.

In this connection the learned editors have drawn no distinction between the vicarious liability of a corporation and its direct liability. The chapter on vicarious liability does not discuss the question of the application of the doctrine of *ultra vires* to problems of vicarious liability, whilst the chapter on "Parties" — in which the tortious liability of corporations is discussed — does not make it clear whether it is direct or vicarious liability that is under consideration, and this contributes considerable confusion to the treatment of the tortious liability of corporations.

It may be added that it is rather surprising to find that there is no reference to the case of *The Truculent* [1952] P. 1 in the discussion of the application of the "organic theory." The case is only cited in a footnote in the section dealing with the tortious liability of the Crown, but surely it is equally significant as an authority on the application of the "organic theory."

It is again very surprising to find that there is no reference to the decision in *Christopherson v. Bare* (1848) 11 Q.B. 473 in the discussion of the extent to which consent may operate as a defence in assault. This is surely one of the more significant pronouncements on this problem and its omission in the standard practitioners work is hard to explain.

The learned editor states that (at p. 283):

> Thus, of course, anything that can be called a blow, whether inflicted with hand, weapon or missile is a battery.

This seems to be too wide in view of Lord Denman's proposition in *Christopherson* v. *Bare:*

> as to the assault it is a manifest contradiction in terms to say that the defendant assaulted the plaintiff by his permission.

There is little to be achieved by examining every proposition contained in this book for obviously these are mainly points of interpretation upon which dispute will continue for many years yet.

The only, and perhaps the sufficient, comment on this edition is that it will remain the inevitable work of reference for all who have occasion to deal with any tort problem.

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