

# University of Pennsylvania Law Review

And American Law Register

FOUNDED 1852

Copyright 1935, by the University of Pennsylvania

---

---

VOLUME 83

FEBRUARY, 1935

No. 4

---

---

## RESTATEMENT OF THE LAW OF TORTS

ARTHUR L. GOODHART †

In the preface to his most recent edition of the *Law of Torts* Sir Frederick Pollock said:

“As I write these lines I hear that a very learned committee of the American Bar is engaged on a restatement of the law of torts. Nothing but good can come of this if it is borne in mind that the object of any such statement is not to effect a verbal reconciliation of all the authorities, but to frame such a rule as a well-informed Court of last resort might lay down; and that, if in any case the result is a proposition which cannot be made intelligible to a jury, there is like to be something wrong either with the drafting (which should not happen to a committee including expert draftsmen) or with some of the less authoritative decisions.”<sup>1</sup>

It is no criticism of the first two volumes of the *Restatement of the Law of Torts* to say that the black-letter propositions at the head of each section would not, in many instances, be intelligible to a jury, even if the jury were composed of professors of law. For a jury to understand it, a legal rule must be framed in simple and concise language, but in the *Restatement* the purpose of the American Law Institute has been to achieve absolute accuracy rather than simplicity. It speaks to the judge rather than to the jury. This is not a code which the layman can understand but is rather a storehouse in which the expert can find material for his arguments or judgments. As the Director writes in his interesting introduction to these volumes: “The object of the Institute is accomplished in so far as the legal profession accepts the Restatement as prima facie a correct statement of

---

† M. A., LL. M., LL. D., D. C. L.; Professor of Jurisprudence, Oxford University; Fellow of University College, Oxford, and of Corpus Christi College, Cambridge; editor, *LAW QUARTERLY REVIEW*; author of *POLAND AND THE MINORITY RACES* (1920); *ESSAYS IN JURISPRUDENCE AND THE COMMON LAW* (1931); *PRECEDENT IN ENGLISH AND CONTINENTAL LAW* (1934); and of various articles in legal periodicals.

1. POLLOCK, *THE LAW OF TORTS* (13th ed. 1929) vii.

the general law of the United States.”<sup>2</sup> Whether hereafter the *Restatement* ought to be recast in the simpler form of a code is another question, and does not concern us here.

It is impossible to compare the *Restatement* with any other legal production, for it is constructed on original lines which bring it half way between a text-book and a code. Perhaps its closest analogy is Sir James FitzJames Stephen's *Digest of The Law of Evidence*,<sup>3</sup> but a comparison between the two will show as many differences as similarities. Stephen's purpose was "to make a digest of the law, which, if it were thought desirable, might be used in the preparation of a code": he therefore compressed the subject into "precise definite rules" which were intended to be complete in themselves. The explanatory notes, which were few in number, were printed separately at the end of the book. In the *Restatement* far more emphasis is given to the comments which in many instances cover several pages and, as for example in sections 63 and 289, take the form of particularly valuable legal essays. For the English reader they will probably prove the most interesting part of the *Restatement*, for in them he will find striking examples of Professor Bohlen's brilliant legal analysis and extensive historical learning. The style of the black-letter propositions is at times rather clumsy,<sup>4</sup> a result which is probably due to committee drafting; but the phrasing of the comments is delightfully clear. In them we frequently find restated in simpler language what has been set out in more technical form in the black-letter propositions. It is necessary, however, to remember that the comments may contain new matter which is as important as that included in the rule itself; thus, for example, most of the references to damages are dealt with in this way. This system might prove confusing to the reader if it were not for the index, which is a model of its kind in its thoroughness and arrangement.

The Institute has also adopted a novel method in the illustrations which are attached to many of the sections. Instead of referring to actual decided cases the Committee has constructed a series of moot cases, many of which are distinguished by their ingenuity. This has the advantage that anything immaterial can be left out, and the facts can be stated in the shortest possible space. Moreover, the Institute can by this means illustrate a rule which may not be covered by any actual case. On the other hand, this system has certain serious disadvantages. The first is that the reader is left uncertain to what extent the rule is based on practical experience, and, in some instances, he may be left with the suspicion that it has, in part, been invented. Second, the disadvantage of a moot case is that the reader

---

2. RESTATEMENT, TORTS (1934) *Introduction* ix.

3. (1st ed. 1867).

4. RESTATEMENT, TORTS (1934) § 36 (2) is an example of this difficult style: "The confinement is complete although there is a reasonable means of escape unless the actor knows thereof."

does not know whether every fact stated in it is intended by the Committee to be essential to the decision. Thus the illustration to section 17 reads: "A drives his automobile close to the curb for the purpose of frightening B, a woman known to A to be pregnant. B sustains a severe shock which causes a miscarriage. A is liable to B." Does this mean that A would not have been liable to B had he not known that she was pregnant? The third disadvantage is the counterpart to the previous one—an essential fact may be omitted. Thus illustration 1 of section 29<sup>5</sup> seems to be incomplete, since the shopkeeper, under ordinary circumstances, is entitled to order B to leave his shop and to use reasonable force if he refuses to go. Every teacher who has had to set problems in an examination paper is worried by the fear that he may have omitted or misstated some essential point, and this is a danger which the Institute does not seem to have avoided in all cases. To take extreme instances, in illustration 2 of section 345 and illustration 2 of section 379 it is obvious that the stock error of confusing the initials of the various parties has been made. The fourth and most serious disadvantage of a moot case is that the reader is not able to follow all the grounds on which the conclusion has been reached, for there is no opinion, except perhaps the brief comment, to explain the judgment. Where the references are to actual cases, the method adopted by Stephen, it is possible to continue one's researches and to determine for oneself how much weight should be given to the decision. This is probably what the Institute particularly intended to avoid, but if this was its purpose, it does not seem to have gone about it very successfully for many of the supposed moot cases are easily recognizable actual cases. Over twenty well-known English cases have been included in the *Restatement*, and the only result of not giving the references is that the reader has to annotate his copy for himself. Finally, from an English standpoint, a law book without a table of cases is nearly as inconvenient as one without an index, for English law to a considerable extent is grouped around leading cases. To take a simple example, an English reader when consulting a book on torts to see what the author has to say on the subject of absolute liability will naturally turn to *Rylands v. Fletcher*<sup>6</sup> in the table of cases rather than to the index. This may explain why the recent eighth edition of Salmond's *Law of Torts*,<sup>7</sup> which has been prepared with unusual care, has an index which is ludicrously inadequate according to American standards. Its table of cases, on the other hand, has been carefully arranged.

It is not entirely clear at first sight on what basis the moot cases have been planned as some of them, in contrast with the advanced character of

---

5. "A and B are engaged in an altercation in A's shop. B refuses to leave A's shop at A's order. A collects his workmen who muster around B, tucking up their sleeves and aprons and threatening to break B's neck if he does not leave. A and his workmen are liable to B."

6. L. R. 3 H. L. 330 (1868).

7. (1934).

the black-letter rules and comments, are so obvious that any moderately intelligent person, even without any legal training, could give the answer. It seems strange to include the following problem in a *Restatement* intended for competent lawyers: "A, a guest in B's house, while reading a book in B's library, writes comments on the margin of the pages. A is liable to B."<sup>8</sup> Even a child must realize that this is a tort: the only legal question that can arise is whether the host is privileged, to use the phraseology of the *Restatement*, to murder the guest.

In the arrangement of the subject matter the Institute has, on the whole, followed traditional lines. This obviously was desirable as a *Restatement* is not the place in which to indulge in experiments, however interesting they may be. As Chapter 1 begins with a definition of the word "interest" we thought at first that the plan was going to resemble that of Dean Green's casebook on the law of torts<sup>9</sup> in which the various interests are classified and dealt with separately. This method, which would probably be desirable if the law were being constructed *de novo*, has the disadvantage of running counter to the historical origin of the law, based as it is on the old forms of action. The *Restatement*, in spite of its modern phraseology, is more conservative in its division into intentional and unintentional wrongs, thus following to a considerable extent the old division between trespass and case. Fortunately the Institute has not been pedantic in always insisting on following a definite separation when another approach might prove more convenient; we therefore find in the first volume, which deals with intentional wrongs, numerous references to negligence. Thus, the whole of topic 2 of Chapter 7 is concerned with reckless or negligent entries on land and those resulting from extra-hazardous activities.

On one point we feel that the Institute might have been more conservative. Most legal systems as they reach maturity tend to develop certain words and phrases which sum up legal concepts in a kind of shorthand. This is a natural tendency, for the more concise the form in which the law can be stated the more convenient it is for the reader. But in the matter of space the Institute has been in an expansive mood, frequently making two words grow where one grew before. The continual repetition of the phrase "harmful or offensive contact" in the first volume could have been avoided without much difficulty. Nor does this phrase necessarily add to precision of thought for in section 33 the phrase is "harmful or bodily contact", and we are left uncertain as to the distinction between the two. It is not clear why the Institute has jettisoned the convenient and long established words "battery and assault".

Similarly, space could have been saved if the number of definitions in Chapter 1 had been increased. One of the most striking omissions here is

---

8. RESTATEMENT, TORTS (1934) § 252, Illustration 2.

9. GREEN, JUDICIAL PROCESS IN THE LAW OF TORTS (1931).

the word "intention" in view of the fact that Book I deals with intentional harms. As a result, it is necessary to repeat at frequent intervals in later chapters that intention and substantial certainty are synonymous for legal purposes. This paucity of definitions is particularly to be regretted as Professor Bohlen has a happy genius for analysing words, some of his most valuable contributions to the law having been made in this difficult and exacting field. It is interesting to note that the *Restatement* definition of "tortious conduct" emphasizes the fact that wrongful intent or negligence is not an essential condition of civil liability for tort.<sup>10</sup> The recent decision of the House of Lords in *Lochgelly Iron and Coal Co. v. M'Mullan*<sup>11</sup> has made this clear for English law as well. The only definition which seems of doubtful value is that of "accidental harm" in section 8. To define "accidental harm" as harm which "is not caused by any tortious act of the one whose conduct is in question" is to use "accidental" in one sense and "accident" in another, as it is obvious that an accident may be, and frequently is caused by a tortious act. As defined in section 8 accidental harm might even mean intentional harm provided that the act were not tortious. In its correct sense accidental harm is unforeseen harm and not innocent harm as used here.<sup>12</sup>

But these questions of form and arrangement are only of minor importance and do not really concern the English reader. What matters to him is that for the first time the American law of torts has been stated in a clear and authoritative manner. There has been a marked tendency in recent years to increase the references to American law in English textbooks and cases<sup>13</sup> in spite of the fact that the English barrister is lost if he has to consult the American reports. The *Restatement* will undoubtedly have the effect of developing the interest in the study of the comparative law of the two countries, and in this way it will help in the development of both systems, for intelligent comparison is stagnation's most vigorous enemy.

A comparison between the two systems, even if made hurriedly and haphazardly, may be not without value or interest and an attempt to do this will be made here by taking a few illustrations from the *Restatement*. Perhaps it may be possible in the near future to set up an English committee to annotate the *Restatement* as has been done so successfully in some of the states; until then the individual must do his best in this dangerous task of comparing two things each of which is constantly changing to some degree. How perilous this is, is illustrated by the only attempt made in the *Restate-*

10. RESTATEMENT, TORTS (1934) § 6.

11. [1934] A. C. 1. See the reference to this case in Dr. Stallybrass's preface to SALMOND, LAW OF TORTS (8th ed. 1934).

12. Cf. SALMOND, JURISPRUDENCE (8th ed. 1930) 429.

13. See, for example, the numerous references to Professor Bohlen's essays in the recent edition of SALMOND, *op. cit. supra* note 11. See also *M'Alister v. Stevenson*, [1932] A. C. 562; *Haynes v. Harwood*, 51 T. L. R. 100 (1934).

ment to refer to modern English law. Thus, in the comment to section 1 it is stated that the interest of a wife in the consortium of her husband was not recognized at common law, and that, "indeed, it is not today so recognized in any part of the British Empire and accordingly is not there protected by a legal right". Since that was written it has been held by the English courts in two cases that a wife can sue a third person who entices or persuades her husband to cease from consorting with her.<sup>14</sup> These decisions, which were a surprise to the legal profession in England, could hardly have been foreseen by the American Law Institute.

At the outset it is worth noting that the punitive or moral element seems to be stronger in American law than it is in the English. Throughout the *Restatement* the rule seems to be that if the actor does an act which is wrongful as to *A* then *B* can recover if he is incidentally injured by it, even though as to him the actor has acted neither intentionally nor negligently. Thus section 13 (a) provides that an actor is liable if "the act is done with the intention of bringing about a harmful or offensive contact or an apprehension thereof to the other or a *third person*", and this is repeated in section 16 (2). Illustration 3 to this section illustrates this question in an excellent manner.<sup>15</sup> This is stretching the doctrine of presumed intention

14. *Newton v. Hardy*, 149 L. T. 165 (K. B. 1933); *Elliott v. Albert*, [1934] 1 K. B. 650. The High Court of Australia has held in the case of *Wright v. Cedzich*, 43 Commonwealth L. Rep. 493 (1930), that the action would not lie.

15. "A and B are trespassers upon C's land. C sees A, but does not see B, nor does he know that B is in the neighbourhood. C throws a stone at A which misses him. Immediately after C has done so, B raises his head above a wall behind which he has been hiding. The stone misses A, but strikes B, putting out his eye. C is liable to B."

Professor P. H. Winfield of Cambridge University, with whom we have discussed this problem, has kindly permitted us to include here the note which he sent us on the subject:

"I deal with this problem purely from the point of view of English Law. I have not considered the American authorities.

"The problem may be approached from either of two angles.

"C may possibly be sued for

(1) Trespass to B's person, by battery; or, alternatively, for  
(2) The tort of negligence.

"As to (1) Trespass to the person, all that B need prove is that C threw the stone and that it hit B.

"C's possible defences are:

(i) That the act was done in defence of C's property. This defence is bad, for C exceeded the limits of reasonable (or necessary) private defence.

(ii) That the consequence was too remote. If the consequence is 'direct', then it is not too remote. I think that it is too remote. The chain of causation has been snapped by the fact that B was a concealed trespasser and that it was his own unlawful presence on C's land which was the decisive cause of the harm which he suffered.

"Other authorities might prefer to reach the same result by saying that B cannot recover

(a) Because *volenti non fit injuria*. But I think that that maxim is strictly applicable only where C is not in the wrong to begin with; so Pollock, but I admit that this qualification of the maxim has not been adhered to closely of late.

(b) Because B was guilty of contributory negligence. But I think that perhaps that defence ought to be confined to negligence and that it is not logically a defence to trespass to the person, which nowadays is usually regarded as *intentional* harm. But I admit again that this limitation of contributory negligence to negation of the tort of negligence is not closely observed.

further, we believe, than it is expressed in English law. We know of no English case which reaches this conclusion, and there seem to be numerous authorities which could be cited against this view. Nor is the result affected by basing the action on trespass rather than on negligence.

Trespass brings us to the next important distinction. The American rules concerning the intentional infliction of bodily harm differ in one particular from the English action of trespass to the person as the latter includes harms which, though not intended, are the direct result of the act. In America under section 18 (a) the act must be "done with the intention of inflicting a harmful or offensive contact upon the other or a third person". If the act is not done with this intention the actor is liable only in negligence for actual harm. English law gives wider protection to the person on the theory, stated by Blackstone, that "every man's person being sacred, and no other having a right to meddle with it in any the slightest manner".<sup>16</sup> Under the American rule property receives fuller protection than does the person. The answer to illustration 3 of section 18<sup>17</sup> would, therefore, be different in English law as throwing water, even if only a few drops, over a person is a trespass, and the defendant could not justify it on the ground of inevitable accident. Of course no one in England who could not show an actual injury would in practice bring an action under these circumstances for fear of having to pay the costs. The English law on this point seems the simpler: while section 18 of the *Restatement* requires

(c) Because B was a wrongdoer ('plaintiff a trespasser'). But the better view is that this defence is applicable only where the harm suffered by the wrongdoer is directly and immediately connected with his own wrongful acts; and in that sense it is better distributed under any one of the three following defences:

- (1) *Volenti non fit injuria*.
- (2) Remoteness of consequence.
- (3) Contributory negligence.

"Here, as I have said, I believe that remoteness of consequence prevents B from recovering."

"As to (2) Negligence. Here B must prove:

- (i) A duty on C's part to take care towards B.
- (ii) Breach of the duty.
- (iii) Consequent harm to B."

"C's possible defences are:

- (a) No duty to take care.
- (b) Contributory negligence of B.

"As to (a), I think that B breaks down *in limine*. C owes no duty to a trespasser except that C must not *intentionally* injure him nor *intentionally* set dangerous traps; and here C has acted *inadvertently*, not intentionally. It is true that C is presumed to intend the natural and necessary consequences of his unlawful intentional act of throwing the stone at A, but I do not think that it is a natural and necessary consequence that a *concealed* trespasser should be hit.

- (b) Even if there were a duty to take care, B ought not to recover because his contributory negligence is the decisive cause of the harm; or (what is the same thing) the consequence is too remote; or, as some authorities (*e. g.*, Scrutton, L. J.) might put it, *volenti non fit injuria*."

16. 3 BL. COMM. \*120.

17. "A, without any intention of wetting anyone, throws water out of his window at night. He knows that B is walking down the street towards his house and that there is a strong probability, though not a certainty, that the water will wet B. A is not liable to B if a small quantity of water splashes in his face, but does him no bodily harm."

twenty-two lines for its definition of a battery, Sir Frederick Pollock is satisfied with a single line: "The application of unlawful force to another constitutes the wrong called battery".<sup>18</sup> Any direct force is unlawful unless it can be justified; it is not necessary in English law to include in the definition a statement as to what is meant by a harmful or offensive contact.

Section 42, which deals with false imprisonment, raises an interesting question which has not been finally settled in English law. To constitute false imprisonment under American law the one confined must be conscious of the confinement. This was thought until recently to be the English rule as laid down a century ago in *Herring v. Boyle*,<sup>19</sup> the facts of which are almost identical with illustration 1. In this case Alderson, B., holding that there was no false imprisonment, said: "There was a total absence of any proof of consciousness of restraint on the part of the plaintiff."<sup>20</sup> But in *Meering v. Grahame-White Aviation Co.*, Atkin, L. J., said: "It appears to me that a person could be imprisoned without his knowing it. I think a person can be imprisoned while he is asleep, while he is in a state of drunkenness, while he is unconscious, and while he is a lunatic."<sup>21</sup> On this point the American law seems to be preferable, for the learned Lord Justice seems to confuse in his argument the question of false imprisonment with that of slander.

In section 45 the difficult question whether failure to provide a means of escape can constitute false imprisonment is dealt with in an admirable manner. It would have been interesting, however, if the *Restatement*, instead of giving a rather obvious illustration, had given the facts in the disputed case of *Herd v. Weardale Steel, Coal and Coke Co.*<sup>22</sup> There the plaintiff and other miners, having been lowered down the defendants' mine, wrongfully refused to work, and demanded to be taken to the surface. The defendants stopped the working of the cage for some little time, claiming that they were not bound to assist the plaintiffs until the expiration of the contract time. The House of Lords held that the plaintiffs had no cause of action. It is not clear whether the American courts would have reached the same conclusion.

As the law concerning emotional distress is still uncertain in England, it follows that the rules laid down in the *Restatement* on this subject are of particular interest. Section 47 (b) provides that emotional distress caused by tortious conduct can be taken into account in assessing damages. It would have been interesting if the comment had explained how far the courts have carried this rule and in what circumstances it has been applied.

18. POLLOCK, *op. cit. supra* note 1, at 218.

19. Cr. M. & R. 377 (Ex. 1834).

20. *Id.* at 38.

21. 122 L. T. R. 44, at 53 (Ct. App. 1919).

22. [1915] A. C. 67.



*A* defrauds *B*; can *B* recover for a nervous breakdown he has suffered in consequence? *A* libels *B*; can *B* recover for his emotional distress? On this point English courts have held that illness resulting from a slander is not a ground of special damage.<sup>23</sup>

Section 48 deals with the special liability of common carriers for insults by their servants; English law does not seem to place common carriers in a separate class in this regard. It is not clear why in the illustrations given in the *Restatement* the plaintiff did not sue in contract rather than in tort. If an employee puts a passenger, who has paid his fare, off the train this is a breach of contract even if the employee acts in good faith and on reasonable grounds. If force is used, the passenger can also sue in trespass under the doctrine of *Hurst v. Picture Theatres, Ltd.*<sup>24</sup> as his license to be on the train is irrevocable. It seems unnecessary to give him a separate remedy for insult.

Section 57 which provides that an assent to an invasion is a valid consent even though given under a mistake as to collateral matter, induced by fraud, is one of the most interesting in the *Restatement*. Comment (b) which draws a subtle distinction between liability for the invasion and liability for the fraud inducing consent to the invasion might profitably have been expanded. It would be interesting to know in how many actual cases this point had been taken. The line drawn here between "the purely dignitary interests of personality" and "interest in freedom from bodily harm" does not seem to exist in English law for we can find no reference to it in any text-book.

Sections 60 and 61 are of particular value from the English standpoint for they deal with a question which has never been settled in this country. The American rule that an assent prevents an invasion from being tortious even though the invasion constitutes a crime seems obvious good sense. It is true that a man cannot legally consent to the commission of a crime, but why should he be permitted to recover for an injury which has been induced by his own act? The traditional English view is expressed by Pollock as follows: "Wilful hurt is not excused by consent or assent if it has no reasonable object. Thus, if a man licences another to beat him, not only does this not prevent the assault from being a punishable offence, but the better opinion is that it does not deprive the party beaten of his right of action."<sup>25</sup> There are several *dicta* in *Regina v. Coney* which support this view.<sup>26</sup> On the other hand the learned editor of Salmond,<sup>27</sup> citing Bohlen's *Studies in the Law of Torts*,<sup>28</sup> says: "There are two fundamental prin-

23. *Allsop v. Allsop*, 5 H. & N. 534 (Ex. 1860); *Roberts v. Roberts*, 5 B. & S. 384 (Q. B. 1864). Cf. MAYNE, *DAMAGES* (10th ed. 1927) 476.

24. [1915] 1 K. B. 1.

25. POLLOCK, *op. cit. supra* note 1, at 164.

26. 8 Q. B. D. 534 (1882).

27. SALMOND, *op. cit. supra* note 11, at 39, n. (a).

28. (1926) 577.

ciples: *Volenti non fit injuria* and *Ex turpi causa non oritur actio*. Each alike negatives the right of a person to bring an action for damages caused by a criminal act to which he has consented."

Section 62 which deals with implied or fictitious consent where a person is incapable of giving actual consent states a rule which is probably true also in English law although in no case has the question been definitely raised. As has been frequently said, a rule may be so obvious that it is impossible to find authority to support it.

Section 65 (3) provides that it is a tort to repel another, except in a dwelling place, by means likely to cause death, if it is possible to avoid this by retreating. This is almost certainly not English law. As Pollock says: "It is even said that a man attacked with a deadly weapon must retreat as far as he safely can before he is justified in defending himself by like means. But this probably applies (so far as it is the law) only to criminal liability."<sup>29</sup> This seems good sense; it is not clear why a wrongdoer should be able to recover under these circumstances. The law seems to be kinder to the aggressor in America than it is in England; another example can be found in illustration 2 to section 63<sup>30</sup> where a potential murderer is allowed to recover because the person he attacks knocks him down for the wrong reason.

In the comment to section 69 an odd explanation is given for the rule that one party to an affray cannot sue the other. "In the case of a fight or affray by mutual consent, each party gives consent to those blows from which he is unable to protect himself. But each consents to the other using such force as is reasonably necessary to defend himself against his opponent's attack." Instead of seeking for this strange, implied consent, is it not simpler to say that no one can complain of an injury caused by his own wrongful act? Does not this principle explain also the case of the unfortunate lady in illustration 1 to section 57? Could she have complained even if the familiarity had caused her bodily harm?

Sections 73 and 74 deal with the fascinating problem of the "law of necessity" which is also discussed in section 197. Here again there is little English authority on the point. Both Pollock<sup>31</sup> and Salmond<sup>32</sup> are doubtful as to the extent of this privilege. The leading case is *Cope v. Sharpe*<sup>33</sup> in which it was held that the defendant was justified in burning his neighbor's heather in order to prevent a heath-fire from spreading, but the judgments are carefully limited to the facts of the case and do not state any

29. POLLOCK, *op. cit. supra* note 1, at 177.

30. "A points what appears to be a cane at B and addresses a gross insult to him. B, to avenge the insult, knocks A down. B is not privileged to do so, although the supposed cane is a disguised shotgun and A was attempting to shoot B and would have done so had B not knocked him down." *Sed quaere*.

31. POLLOCK, *op. cit. supra* note 1, at 174-176.

32. SALMOND, *op. cit. supra* note 11, at 33, 34.

33. [1912] 1 K. B. 496.

general principle. Two points seem, however, fairly clear. The first is that the English law does not recognize the doctrine of relative or comparative necessity. I am not privileged to injure my neighbour because the harm which I am seeking to escape would injure me more severely. In *Whalley v. The Lancashire and Yorkshire Ry.*<sup>34</sup> by reason of an unprecedented rainfall a quantity of water was accumulated against the defendants' embankment so as to endanger it. They cut trenches in it by which the water flowed through on to the plaintiff's land. The jury found that this was reasonably necessary, but the court held that they had no right to protect their property by transferring the mischief from their own land to that of the plaintiff. It is interesting to compare this case with illustration 4 of section 197.<sup>35</sup> The second point which distinguishes American from English law here is that English law has no provision for compensation for any damage done. It is true that in *Anthony v. Haneys*,<sup>36</sup> Tindal, J., stated that if an occupier of premises refuses on request to deliver to its owner a chattel placed on the occupier's premises by a third person "at any rate the owner might in such a case enter and take his property, subject to the payment of any damage he might commit,"<sup>37</sup> but this *dictum* stands alone. As Salmond says in commenting on the American law, "such a rule seems reasonable, but we shall see that it is doubtful whether it is the law".<sup>38</sup>

In section 76 the actor's privilege to defend third persons is stated. The cautious proviso that the third person must be "(i) a member of his immediate family or household, or (ii) a person whom he is under a legal or socially recognized duty to protect", seems strangely old-fashioned and is probably too narrow a statement if applied to English law. As Salmond says: "It may be safely assumed, however, that at the present day all such distinctions are obsolete, and that every man has the right of defending any man by reasonable force against unlawful force."<sup>39</sup> The illustration to comment (f) would seem to suggest that in America a man is not privileged to protect a young woman unless he has met her socially. Would he not have defended her even if she had not been a member of his party?

In comment (c) to section 77 a point of great academic interest is raised; unfortunately, the courts are too much concerned with practical matters to discuss it. After stating the conditions under which a possessor of land is entitled to use force in expelling an intruder, the *Restatement*

34. 13 Q. B. D. 131 (1884).

35. "An unprecedented rainfall causes such a quantity of water to accumulate against one of the sides of the A Railroad Company's embankment as to endanger the embankment. A is not privileged to cut trenches and to cause the water to flow on B's land if the probable harm to B's land is in excess of or even equal to the probable harm done to A by threatened loss of the embankment. A is privileged to flood B's land if the probable harm to B's land is less than the probable harm to A from the loss of its embankment, but under the rule stated in Subsection (2), A is liable to B for any harm thereby caused to his land."

36. 8 Bing. 186 (C. P. 1832).

37. *Id.* at 193.

38. SALMOND, *op. cit. supra* note 11, at 34.

39. *Id.* at 44. See on this point *Haynes v. Harwood*, 51 T. L. R. 100 (1934).

makes the remarkable comment that "the actor is not privileged, if he uses the other's intrusion as a mere pretext to inflict a harmful contact upon him." This view has so shocked the reporter that in the next sentence he says: "Whether the one or the other situation exists may present a difficult question of tact [*sic*]." We agree with him, and it is unfortunate that no moot case is given here to show how this rule can be applied. Certainly under English law as the possessor of land is privileged to use reasonable force in expelling an intruder it does not matter for what purpose he does so.<sup>40</sup> Of course, if the possessor can get rid of the intruder without using force he is bound to do so, for under such circumstances the use of any force is unreasonable. Here again the American law seems to be more concerned with a question of morals than is the English law.<sup>41</sup>

The rule stated in section 81 (2) that the actor is privileged to threaten more force than he is privileged to inflict seems a strange one, and it would be interesting to know what actual cases there are on this point. We have not been able to find an English one to support so dangerous a doctrine. May I threaten a trespasser with a gun if I intend merely to frighten him?

Section 86 deals with the actor's privilege to defend a third person's land or chattels. There is an important difference between this section and section 76, for in the case of property the actor may intervene only if he is under a legal duty to protect the third person's possession. The comment does not explain why a social duty is not sufficient here.

In Topic 4 we come to a clear break between American and English law. Forcible entry by one entitled to possession of land is both a crime and a tort in most American states. In England it is only a crime, for in *Hemmings v. Stoke Poges Golf Club*<sup>42</sup> the Court of Appeal had no difficulty in holding that it was not a tort. Scrutton, L. J., said in characteristically vigorous terms: "But I see no reason to add to the existing privileges of trespassers on property which does not belong to them by allowing them to recover damages against the true owner entitled to possession who uses a reasonable amount of force to turn them out."<sup>43</sup>

Topic 5 deals with a forcible taking of chattels, and here again there is a marked difference between American and English law. The American rules are far more complicated, requiring forty-one lines of black type and three pages of comment to section 101 for their statement. Moreover, recaption is only permitted, as stated in section 103, if the actor acts promptly after the timely discovery of his dispossession. The English law is far

40. *Mayor of Bradford v. Pickles*, [1895] A. C. 587.

41. A similar moral approach is used in the solution of Illustration 5, of Section 50, which reads: "A, while tackling B, deliberately injures him. A is liable to B, whether the tackle was or was not otherwise within the rules and usages of football." In England, any "unnecessary roughness" is contrary to the rules of football; therefore, if A intends to injure B he is not within the rules. On the other hand, if A and B engage in a boxing match, A is not liable to B even if, in knocking him down, his sole purpose is to injure him. He is acting within the rules of boxing, whatever his ulterior aim and intention may be.

42. [1920] 1 K. B. 720.

43. *Id.* at 747.

simpler: "The true owner may retake the goods if he can, even from an innocent third person into whose hands they have come, and, as there is nothing in this case answering to the statutes of forcible entry, he may use (it is said) whatever force is reasonably necessary for the recaption."<sup>44</sup> The English rule seems to accord better with fallible human nature. "A leaves his car parked in the street. On returning to the place, he finds that it has been taken and does nothing for a week, when he sees B driving the car."<sup>45</sup> Under American law he is not privileged to use force to retake the car, nor can he, with safety, have B arrested, for B may not be the person who has taken the car. Must A stand by and see his car disappear again?

It has recently been suggested that the English law on the subject of arrest should be amended as the distinction between felonies and misdemeanors is out of date. It is some comfort to realize that on this topic the American law is even more confused. The additional complications due to escape from one state to another, and the subtleties of constitutional law are avoided in England. No officer here "must at his peril know the extent to which the State or Federal Constitution limits the power of the United States or of the State to confer jurisdiction upon the court, body or official issuing the warrant".<sup>46</sup> American police officers must be so busy studying constitutional law that they can have little time left in which to arrest the criminals.

Section 141 which deals with the privileges of a police officer or a private person in preventing another from participating in an affray is of particular importance at the present time when conditions are so disturbed. It is, unfortunately, not quite clear from the *Restatement* what the Institute means by the words "participating in an affray", for it is here that the whole difficulty of the problem lies. British fascists advertise a meeting to be held in a communist district with the avowed purpose of stirring up an affray. If they are attacked can they be said to be "participating in the affray"? Under American law, as stated in section 141, could they be prevented from holding their meeting? The English law is not quite certain on this point. *Beatty v. Gillbanks* has made it clear that persons cannot be prevented from holding a meeting merely because they know that others will attack them.<sup>47</sup> Whether a meeting, called primarily for the purpose of provoking such an attack, can be prevented is more doubtful.<sup>48</sup>

Section 146 is a useful one. It provides that a member of the armed forces is privileged if the command he is obeying is believed by him to be

44. POLLOCK, *op. cit. supra* note 1, at 404.

45. RESTATEMENT, TORTS (1934) § 103, Illustration 1.

46. *Id.* § 124, comment i.

47. 9 Q. B. D. 308 (1882).

48. *Wise v. Dunning*, [1902] 1 K. B. 167. And see *Humphries v. Conner* (the "Orange Lily" case), 1 Ir. C. L. R. (1864). These cases are discussed in KENNY, *CASES ON CRIMINAL LAW* (7th ed. 1928) 392.

lawful and is not so palpably unlawful that any reasonable man would recognize its illegality. On this question English authority seems to be divided. Halsbury says that "it is in general no defence to an action for negligence that the act complained of was done in obedience to the orders of some superior naval or military authority",<sup>49</sup> and Salmond seems to take the same view.<sup>50</sup> Pollock agrees with the view expressed in the *Restatement*: "How far the orders of a superior officer justify a subordinate who obeys them as against third persons has never been fully settled. But the better opinion appears to be that the subordinate is in the like position with an officer executing an apparently regular civil process, namely, that he is protected if he acts under orders given by a person whom he is generally bound by the rules of the service to obey, and of a kind which that person is generally authorized to give, and if the particular order is not necessarily or manifestly unlawful."<sup>51</sup> If a case on this point should in the future arise in England it is certain that the rule set out in the *Restatement* will carry great weight.

There seem to be no important differences between the English and the American law concerning the discipline of children although a conflict might have been expected in view of the fact that corporal punishment is the rule in England while it is the exception in America. On one small point only is the authority of an English schoolmaster wider than it would be in America. The *Restatement* in comment (a) to section 152 states that except in so far as the conduct of the children in the vicinity of the school may cause an unreasonable annoyance, the authorities of a day-school are not privileged to punish a child for offences committed outside of the school premises. In England it has recently been held that a schoolmaster was justified in administering five strokes of a cane to a boy under sixteen who had, contrary to the rules, been smoking in the street during term-time.<sup>52</sup> Which of the two rules is the more desirable is a matter of taste.

When we began this review of the *Restatement* we intended to cover both the volumes, but now we find that we have more than filled our allotted space at the end of Chapter 6. Our only excuse is that the *Restatement* is so stimulating that it is difficult for a reviewer to limit his ardor. It is only possible to add here our congratulations to Professor Bohlen and his committee on having produced a piece of work which will fill an enduring place in Anglo-American legal literature.

NOTE—Professor Goodhart's comment upon the balance of the *Restatement* will be published in a later issue of this REVIEW.

49. 25 HALSBURY, LAWS OF ENGLAND (1913) § 194.

50. SALMOND, *op. cit. supra* note 11, at 52.

51. POLLOCK, *op. cit. supra* note 1, at 125.

52. *King v. Newport*, [1929] 2 K. B. 416.