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RESTATEMENT OF THE LAW OF TORTS, VOLUME IV: A COMPARISON BETWEEN AMERICAN AND ENGLISH LAW *

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Volume IV of the *Restatement of the Law of Torts* is perhaps the most interesting of the *Restatements,* for it is concerned with such controversial topics as interference with business relations, private nuisance, interference with privacy, and damages. It is also of particular interest from the standpoint of comparative law as the differences between English and American law seem to be more marked here than they are in the other branches of the law of torts dealt with in previous volumes. This may be more apparent than real, due to the fact that the American Law Institute, having gained confidence with experience, seems to have stated doubtful rules in a more categorical fashion than was its earlier practice. Thus, for example, Section 867, which deals with "interference with privacy", is far more absolute on this point than are most of the other American authorities on the law of tort.

INTERFERENCE WITH BUSINESS RELATIONS

Volume IV begins with a chapter on the miscellaneous trade practices which are condemned by the American law. These rules are considerably more stringent than are the corresponding ones in England, but it is doubtful whether in practice American commercial morality

* This article concludes a series of articles by Professor Goodhart on Volumes one, two and three of the *Restatement.* The earlier articles appeared in 83 U. OF PA. L. REV. 411 and 968, and in 89 U. OF PA. L. REV. 265.

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is stricter than is the English. It would be an interesting study for a sociological jurist to consider to what extent the provisions as stated here in the *Restatement* are expressions of an ideal, rather than actual rules of conduct which are enforced in practice by the courts.

Section 757 deals with liability for disclosure or use of another's trade secret. It provides that a person is liable not only where he breaks a contract of secrecy or induces another to break such a contract, but also where he knows that the secret is being disclosed to him improperly or by mistake and he takes advantage of it. The American law is based on the general principle that the use of another's trade secret is a wrong unless there is a privilege to do so. There is no such tort in English law as the violation of a trade secret. To induce another to break a contract involving a trade secret is a tort because there is a general principle against the violation of contracts and not because a trade secret is involved. Similarly the theft of a paper on which a secret formula is written would fall under the head of conversion, and would not differ in principle from the theft of any other kind of paper. In these cases English law bases liability on the breach of contract or on the conversion, and not on the fact that a trade secret is involved. As the practical result here is the same in both American and English law it may be said that it does not matter what the general principle is, but it does become a question of major importance when further circumstances come into consideration. Thus the *Restatement* lists [1] eavesdropping or other espionage as improper means which entail liability because the trade secret is thus obtained without a privilege to do so. In English law eavesdropping or espionage do not *per se* constitute tortious conduct unless they involve trespass, and therefore it would not be tortious to obtain a trade secret by such means, however reprehensible such conduct might me from the purely moral standpoint.

Perhaps the American principle finds its widest extension in the rules concerning breach of confidence. The *Restatement* holds [2] that when A comes to B, his former teacher, for free advice which B is willing to give with respect to the secret, then B is liable if he thereafter discloses the secret in breach of confidence. It can be stated with some certainty that English law would not hold B liable in such circumstances, for he would be under no contractual or trust duty, and there is no tort covering breach of confidence. There is something to be said for the English view that a person who seeks free advice is not entitled to ask the law to help him if the confidence is violated.

1. RESTATEMENT, TORTS (1939) § 757, comment *g*.
2. *Id.* at comment *j*.

On the other hand, the American law seems preferable to the English when dealing with inducement to breach of contract. According to the *Restatement* [3] a person has notice that the formula is secret and that it has been obtained by a third party (usually a former employee) by improper means "if, from the information which he has, a reasonable man would infer the facts in question, or if, under the circumstances, a reasonable man would be put on inquiry." This seems to be preferable to the English rule as stated in *British Industrial Plastics, Ltd. v. Ferguson* [4] where the House of Lords held that the defendants, who had acted in an incredibly stupid manner in not realizing that the secret formula belonged to the plaintiffs, were not liable because they had not acted with a fraudulent mind. It does not seem fair that a person should be entitled to profit, as the defendants did in that case, because of his stupidity.

On the other hand, the American law as stated in Section 758 seems unduly strict. If a person discovers another's trade secret by an innocent mistake why should he not be enabled to profit thereby? It ought to be the duty of the holder of the secret to guard it properly: the American law seems to give him a semi-patentable protection with a strong equitable flavor. It must be difficult for a court to decide under what circumstances it is inequitable to subject one who has learned another's trade secret to liability. What, for example, is "a substantial investment" on the part of the defendant which will prevent the holder of the secret from recovering?

Section 759 provides that it is a tort to procure by improper means information about another's business. Most of the improper means as set forth in comment *c* would by themselves constitute tortious conduct in English law, *e. g.* theft or trespass, but some go further than this. Thus "procuring one's own employees or agents to become employees of the other for purposes of espionage" would not come under any recognized head in English law. Whether the English Courts would hold a defendant liable on these facts is exceedingly doubtful.

In Section 760 which deals with misrepresentation in marketing goods of which another is the commercial source, English and American law meet again, except that in English law it is not necessary to prove fraud.[5] Although this was originally necessary at common law,[6] equity [7] has established the principle that it is an actionable wrong to

3. *Id.* at comment *l.*
4. [1940] 1 All E. R. 479.
5. SALMOND, LAW OF TORTS (9th ed. 1936) § 152 (3).
6. Crawshay v. Thompson, 4 M. & G. 357 (C. P. 1842).
7. Millington v. Fox, 3 Myl. & Cr. 338 (Ch. 1838); Singer Machine Manufacturers v. Wilson, 3 App. Cas. 376 (1877); Cellular Clothing Co. v. Maxton, [1899] A. C. 326.

do anything which to the knowledge of the defendant will in fact deceive the public, even though such deception is not desired or intended.

Section 761 is a startling one for an English lawyer to read as there is no principle resembling it in his law. It provides that one who diverts trade from a competitor by fraudulently representing that his own goods have qualities which they do not possess is liable to the competitor, whose goods possess these qualities, for harm so caused. The *Restatement* says that the basis of this liability is deceit, but it carries the doctrine further than any English case has done, for here A can recover for the harm he has suffered through B's deceit of C. As it may be impossible for any particular competitor to prove that he has been harmed by the deceit, the American law provides [8] that all the actor's competitors may join in asking for an injunction. Here the citation of some actual cases would have been of particular value because it is difficult to picture how this rule works in practice. Do competitors really bring such actions whenever they believe that a rival has claimed qualities for his own goods which they do not possess? We can remember no New York case in which this remarkable doctrine has been applied.

Refusal to Deal or Breach of Contract

Chapter 37 is perhaps the most interesting in the whole *Restatement* as it deals with questions concerning which there is considerable difference of opinion. On some of the points considered here the English law is less definite than the American seems to be. Whether in practice the American law is more easily administered than is the English is a question which cannot be answered without a comparison of a large number of cases.

Section 762 states the general principle, which is then analysed with more particularity in the succeeding sections. It provides that refusal to deal with another is not tortious unless (1) it is the actor's duty to the other arising from the nature of his business or from a legisislative enactment, (2) it is a means of accomplishing an illegal effect on competition, or (3) it is part of a concerted refusal by a combination.

Provision (1) is discussed in more detail in Section 763. Here English and American law seem to be the same. Common carriers and common inn-keepers at common law, and various public utilities by statute are required to render services without discrimination, and failure to perform this service subjects them to liability.

8. RESTATEMENT, TORTS (1939) § 761, comment *e*.

Section 764 which is concerned with the refusal of one person to deal with another in order to establish an illegal monopoly is a remarkable one. It is important to note that this section is not concerned with conspiracies, which are dealt with in Section 765, but with the act of a single person. Such an act could not be a tort in English law because a monopoly established by a single person would not be illegal. Such a situation as described here has never been considered by the English Courts. It would be interesting to know how many American cases there are where a single person, even a corporate one, has refused to deal with another in order to establish a monopoly. A few illustrations would have been useful as it is difficult to imagine under what circumstances this rule can be applicable.

Section 765 is concerned with the concerted refusal to deal with another. This involves the whole vexed question of civil conspiracy which has given English lawyers, and especially text-book writers, so much trouble in the past. The *Restatement* provides that the justification for such a concerted refusal depends on various factors including (1) the objects to be accomplished, (2) the hardship caused, (3) the appropriateness of the means, (4) the relation between the parties and their relative economic power, and (5) the effect on the social interest. The comment adds [9] that "self-interest, particularly a purpose to advance the business interest of the actors, may be a justification even though the harm caused by the refusal is intended to be the means of advancing that interest." It is this self-interest which is the essential factor in the English law of conspiracy as established by the House of Lords in the recent case of *Crofter Harris Tweed Co. v. Veitch.*[10] This was an action brought by seven producers of tweed on the island of Lewis against the respondents, two officials of the Transport and General Workers' Union, who had ordered the dockers not to handle the appellants' goods, with the result that the appellants were completely cut off from the mainland and their business brought to a standstill. Their Lordships, having found that the dominant purpose of the embargo was to benefit the trade union, held that the respondents were not liable for conspiracy, even though they might be said to have acted in an unreasonable manner. Provided the combination is acting in the bona fide trade interest of the members, the English courts are not concerned with the hardship caused, the appropriateness of the means (provided they are not otherwise illegal), the relation of the parties, or the effect on the social interest. This obviously makes the English law a much narrower one than that given by the *Restatement,* for the

9. *Id.* at § 765, comment *d.*
10. [1942] A. C. 435.

number of combinations organized predominantly for the purpose of ill-will or for a purpose other than self-interest must be comparatively limited. The result is that the English law can be administered more easily, but there is much to be said for the American view that the social interest should be taken into consideration in these cases. Would the American courts have decided *The Crofters' Case* [11] in the same way as did the House of Lords? This would make an interesting moot case to be discussed in the law schools after the war has finally destroyed the greatest of all illegal conspiracies.

Inducing Breach of Contract or Refusal to Deal

English law draws a clear distinction between acts which are intended to prevent the making of a contract and those which induce the breach of a contract already made. The *Retatement,* in dealing with these two situations together, seems to regard them as if they were *ejusdem generis.* Thus Section 766 states that it is a tort, if there is not a privilege to do so, to induce a third person (a) not to perform a contract, or (b) not to enter into or continue business relations with another. English law provides that it is tortious to induce another to break a contract, but it is only in exceptional circumstances that an attempt to induce a third person not to enter into a contract with another constitutes a wrong. There are only a few cases on this latter point. In *Garrett v. Taylor* [12] it was held that a quarryman had a cause of action against the defendant who had by threats of mayhem induced the plaintiff's customers not to buy stones. This case was followed one hundred and seventy years later by *Tarleton v. McGawley* [13] where the defendant, by firing a cannon, frightened away natives who were about to trade with the plaintiff; the latter brought a successful action for the loss thus sustained. These cases, although never questioned, cannot be said to have established a wide principle: it goes no further than the statement in Salmond: [14] "Any person is guilty of an actionable wrong who, with the intention and effect of intimidating any other person into acting in a certain manner to the harm of the plaintiff, threatens to commit or procure an illegal act". The *Restatement* takes a different view when it says that [15] "The predatory means in the early cases, intimidation and fraud, were tortious toward the plaintiff because they were calculated to, and did, affect the conduct of third persons to the plaintiff's damage. But other means may be

11. See Note (1942) 58 L. Q. REV. 150, concerning this appellation.
12. Cro. Jac. 567, 2 Roll. Rep. 162 (K. B. 1620).
13. 1 Peake 270 (N. P. 1793); *cf.* Lyons v. Wilkins, [1896] 1 Ch. 811; [1899] 1 Ch. 255.
14. SALMOND, *op. cit. supra* note 5, at § 155 (2).
15. RESTATEMENT, TORTS (1939) § 766, comment *b.*

equally calculated and effective to produce that result; and primarily the plaintiff is concerned with that result rather than with the means by which the third persons were caused to act". It may be true that the distinction between legal and illegal acts may not be logically sound when regarded from the standpoint of the plaintiff whose interests have been injured, but the English law does not seem to have gone beyond illegal acts. It would be interesting to know on what cases the Institute has based its view that the English law is wider than this. Certainly the recent case of *Dunkels v. de Stempel,*[16] which was bitterly fought up to the House of Lords, does not support such a view, for in that case the point at issue was whether the defendant had induced a third person to break his contract with the plaintiff. It was common ground that the defendant had attempted successfully to stop the third person from entering into a further contract with the plaintiff, but it occurred to no one that a claim could be founded on this. In English law it is not tortious for A to persuade B not to employ C, even if the persuasion is malicious.

The *Restatement* also discusses the liability imposed for interference with business expectancies based on the principle established by *Lumley v. Gye.*[17] It says that[18] "the significance of *Lumley v. Gye* lies in the extension of the rule of liability to non-tortious methods of inducement. Particularly in view of subsequent interpretations of that case in England, it established no rule peculiar to contracts". Here again it would be interesting to know on what cases the Institute bases the view that *Lumley v. Gye* has established so broad a principle. There seems to be nothing in the English text-books to suggest that that case is an authority for anything beyond a breach of contract, and there appears to be no English case covering the various types of expectancies mentioned in Section 766, comment *c.*

The *Restatement* says[19] that it is a tort against C if A destroys goods which B is about to deliver to C, if the purpose is to disable B from performing his contract with C. English courts would probably reach the same conclusion on the authority of *G. W. K. v. Dunlop Rubber Co.*[20] In this case the first plaintiffs, who were manufacturers of motor cars, made an agreement with the second plaintiffs, who manufactured tires, to use their tires at all exhibitions. The defendants, who were aware of the agreement, secretly removed the second plaintiffs' tires and substituted their own. It was held that they were liable to both plaintiffs.

16. 55 T. L. R. 655 (H. L. 1939).
17. 2 E. & B. 216 (Q. B. 1853).
18. RESTATEMENT, TORTS (1939) § 766, comment *b.*
19. *Id.* at comment *d.*
20. 42 T. L. R. 593 (C. A. 1926).

Comment *k* provides that "to subject the actor to liability under this rule, his conduct must be directed to the diversion of custom from a specified person and must be so understood by those whom he seeks to influence". No reason is given for this rule. If A, a newspaper proprietor, publishes an editorial urging his readers to break their contracts with all Frenchmen, why should not a Frenchman who has been injured thereby be entitled to recover?

Section 767 deals with the various factors which determine whether there is a privilege to induce a third person not to perform a contract or to enter into business relations. These must be considered separately as far as English law is concerned as it is only in exceptional cases that a person is privileged to induce a breach of contract. The extent of this privilege is uncertain, Salmond saying:[21] "What amounts to a justification is a question of law, to which as the authorities stand no answer can be given". *Camden Nominees Ltd. v. Forcey*[22] illustrates the strictness of the English law on this point. The plaintiffs, owners of a block of flats, were under a contractual duty to their tenants to provide central heating and other services. The defendant, a tenant, who claimed that the plaintiffs had failed to perform their obligations, tried to persuade the other tenants to refuse to pay rent until their grievances were remedied. Simonds, J., held that the defendant's action could not be justified on the claim that she was acting in the common interest, and that the inequality in wealth between the landlord and the tenants did not entitle her to adopt such a measure of self-help. On the other hand in *Brimelow v. Casson*[23] the Court of Appeal held that a theatrical protection committee was justified in inducing a theatre owner to break a contract with a producer who was so underpaying his actresses that they were forced to lead immoral lives, but in this case the theatre owner was himself probably entitled to refuse to perform his contract on the ground that it had been entered into owing to the plaintiff's misrepresentation.

Section 768 provides that a person is privileged to cause a third person not to enter into or continue a business relation with a competitor if the actor does not employ improper means and he does not intend thereby to create an illegal restraint of competition. The *Restatement* does not state what constitutes an illegal monopoly: if the only grocer in a small village tries to keep out a possible rival is he maintaining a monopoly? The English law when compared to the rather complicated rules of Section 768, is simple, for it provides (a) that it is a tort to

21. SALMOND, *op. cit. supra* note 5, at § 101 (4).
22. [1940] 1 Ch. 352.
23. [1924] 1 Ch. 302.

cause a third person to break a contract which he has made with a competitor, and (b) that it is *not* a tort to cause him not to enter into such a contract even if the purpose is to create a monopoly.

Section 770 is an astonishing one. This provides that one who is charged with responsibility for the welfare of another is privileged purposely to cause him not to perform a contract if he does not employ improper means and acts to protect the welfare of the other. Welfare means the physical, moral or economic welfare of the person. Apparently, if we have read the wording of this section correctly, a father may induce his son to break his contract if he thinks that it is for the son's economic welfare for him to do so. English law knows no such doctrine. The only illustration given for this section is not a happy one, for if A, who has entered into a contract to go to Asia, discovers that it would be fatal for him to go there, it is doubtful if his refusal to go constitutes an actionable breach of the contract. Therefore a physician in advising him not to go under such circumstances could hardly be said to be inducing a breach, even if this advice could be said to be an inducement.

American and English law do not seem to be identical concerning the privilege to advise, although the difference is not an important one in practice. Section 772 provides that honest advice within the scope of a request for advice is privileged. It is doubtful whether in English law even volunteered and gratuitous advice is actionable. Thus Salmond says:[24] "There must be an inducement in the strict sense—that is to say, the intentional creation of some inducing cause or reason for the breach of contract. . . . To *induce* a breach of contract means to create a reason for breaking it; to *advise* a breach of contract is to point out the reasons which already exist. The former is certainly actionable; the latter has never been held to be so, and is probably innocent". There is, however, no English case in which this question has been directly raised so that it is possible that a purely malicious adviser might be held liable. There is nothing in the leading case of *South Wales Miners' Federation v. Glamorgan Coal Co.*[25] to prevent such a conclusion.

Labor Disputes

Chapter 38 deals with labor disputes. Here the English law has departed to a great extent from its common law origin, and is now based almost entirely on statutes such as the Trade Disputes Act, 1906,[26] and the Trade Disputes and Trade Unions Act, 1927.[27] As

24. SALMOND, *op. cit. supra* note 5, at § 101 (2).
25. [1905] A. C. 239.
26. 6 EDW. VII, c. 47 (1906).
27. 17 & 18 GEO. V, c. 22 (1927).

the former Act provides that "an action against a trade union, whether of workmen or masters, or against any members or officials thereof on behalf of themselves and all other members of the trade union in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any Court", it is exceedingly rare nowadays to find a tort action relating to trade disputes. The 1927 Act has made only minor alterations in the law on this point, and so far no cases have had to be decided by the courts concerning such disputes.

Section 775 of the *Restatement,* in which the general principle is given, is rather vague: the statement that "workers are privileged intentionally to cause harm to another by concerted action if the object and the means of their concerted action are proper" is not particularly helpful, unless we are told what objects and means are proper. As this principle is equally applicable to all persons, whether workers or not, it is rather misleading to state it as if it were peculiar to this branch of the law. The *Restatement* by dealing with each subject as if it were in a water-tight compartment may be rendering a doubtful service to the law, for the more highly developed a legal system is, the more clearly ought it to be based on general principles and not on separate rules. Roman law is, perhaps, the best illustration of this. It is only necessary to compare its generalized form with the particular rules of the more primitive codes to realize this.

Section 779 deals with fair persuasion and picketing. Fair persuasion must not include any threats, even of economic loss, and picketing is limited to the other person's place of business. It is interesting to compare this with section 3 (1) of the Trade Disputes Act, 1927, which provides that attendance at a place of residence or business is unlawful only if done in such a manner as to intimidate any person there, or if it is calculated to cause an obstruction or to lead to a breach of the peace. Intimidation includes a reasonable apprehension of injury to oneself or to a member of one's family or of injury in respect of one's business, employment or other source of income. Section 3 (4) of this Act also provides that it is unlawful to watch or beset a house where a person resides for the purpose of inducing him to work or to abstain from working. As no cases have as yet arisen under this Section it is difficult to say whether there is any difference between the English and American law on the problem of picketing. But although the difference in the rules may be slight there is, as has been frequently pointed out, a radical difference in their administration.

The twenty pages which cover Sections 782 to 791 might without difficulty have been compressed, as most of the points they deal with

are self-evident. Is it necessary to state, as Section 784 does, that the "maintenance or change of terms of employment relating to hours, wages, working conditions or other perquisites or duties of employees is a proper object of concerted action by them", and even if it is thought necessary to state this in black letter for the sake of completeness are two pages of comment required to explain such an obvious idea?

Section 792 is an interesting one. It provides that a strike to force an employer to pay a fine or a penalty which he has not agreed to pay is illegal, as such a demand constitutes extortion. Although there seems to be no reported English case on the point, it is clear that the courts would reach the same conclusion if the imposition of such a fine could not be justified. The only question would be whether all such demands would necessarily constitute extortion. In *Thorne v. Motor Trade Association*[28] the House of Lords held that a demand for payment of a fine was not unlawful if the demand was reasonably capable of being associated with the promotion of lawful business interests. It is conceivable that such a demand by a labor union might in certain circumstances be connected with lawful business interests and therefore not illegal.

Section 793 is rather peculiar as it is difficult to conceive that the situation covered by it would arise. It provides that a strike to prevent an employer from becoming a member of an association of employers is illegal if his employees do not reasonably believe that his non-membership will aid their collective interest. Why the workers should strike if their interest is not reasonably involved is not clear.

Section 796 is an important one. It provides that a strike is illegal if it involves both proper and improper objects. It is probable that the Trade Disputes Act, 1906, would be interpreted in a similar way: thus a strike both in furtherance of a trade dispute and for a political object would not fall within the protection of the Act.

Section 798 deals with the question when is it legal to induce workers "to withhold services", or in simpler words, when is it legal to call a strike. The phrase "withhold their services" is not a happy one. Does it mean that the workers are breaking a contract of employment or that they are merely refusing to enter into such a contract? In Illustration 1 the words used are "withdraw from employment already accepted". Does that mean "break a contract of employment"? Nor does the index refer to any other section where this question is dealt with. As the English law draws a sharp distinction between breach of a contract of employment and refusal to accept employment, it is unfortunate that the *Restatement* has not made this point clear. Section 3 of the Trade

28. [1937] A. C. 797.

Disputes Act, 1906, alters the common law by providing that an act done in furtherance of a trade dispute shall not be actionable on the ground that it induces some other person to break a contract of employment, but if it were not for this Statute such an act would be illegal.

Section 802 deals with the workers' refusal to work on non-union goods. This is legal only "if the actors have a substantial interest in the third person's employment relations". It is explained in the *Rationale* that "the rule does not go the full length of recognizing the class solidarity of workmen as a justification". English Courts are fortunate in not having to decide what is "a substantial interest" in such a situation, for all such strikes are legal. The six important factors set out in Section 804 cannot be easy to determine in the complicated social and economic communities of the present day.

Section 806 is important as it states what is an improper sympathetic strike. It is improper if (a) the employees have no substantial interest in the dispute, or (b) the object of the dispute is not a proper one. The highly controversial Trade Disputes and Trade Unions Act, 1927, is far more limited than this. It provides that a strike is illegal only if (a) it has any object other than a trade dispute within the trade or industry in which the strikers are engaged, *and* (b) is designed to coerce the Government either directly or by inflicting hardship upon the community. Certain commentators on this Act have failed to realize that both these conditions must concur before a sympathetic strike can be declared illegal.

Section 810 which deals with the non-liability of workers who procure the dismissal of an employee because he is not a member of a labor union contains a novel provision. This is that membership in the union must be open to the employee on reasonable terms. There is no such provision in English law, but as the unions in fact act fairly towards those desiring to join them there has been no complaint on this point. Moreover, it is not the usual practice in this country to insist on the "closed shop".

Section 811 has a similar provision relating to employees who have been wrongfully suspended or expelled from a union. Here again the English law has no provision on the point, although some persons have felt that it is dangerous to give unions such arbitrary power.

Injunctive Relief

Topic 7 deals with the highly controversial subject of injunctive relief. Here English and American law, although resembling each other in principle, have divided fundamentally in practice. At the

present time the use of injunctions in labor disputes is almost non-existent in England, although it is always possible to use it in special circumstances.

As pointed out in *The Labor Injunction:*[29] "The injunction in the *Debs Case* was not a new invention; it had precursors, the best known, strangely enough in view of the evolution of English law, being the decision of an English Chancery Court, *Springhead Spinning Co. v. Riley.*"[30] In that case Malins, V. C., granted an injunction restraining the defendants, the officers of a trade union, from publishing placards which were held to intimidate and prevent workmen from hiring themselves to the plaintiffs during a strike. The injunctive relief was based on the ground that the plaintiffs were thereby prevented from continuing their business, the value of their property thus being seriously injured. The authority of the *Springhead Spinning Co.* case was impaired by the judgments of the Court of Appeal in Chancery in *Prudential Assurance Co. v. Knott,*[31] where it was held that an injunction would not be granted to restrain the publication of a libel as such, even if it was injurious to property. In *J. Lyons & Sons v. Wilkins,*[32] the Court of Appeal, however, went to the extreme limit in affirming a judgment granting the plaintiffs an injunction against the defendants who had picketed the plaintiffs' premises. Again in *J. Lyons & Sons v. Wilkins,*[33] the Court of Appeal held that watching a place was illegal unless it was strictly limited to obtaining or communicating information. Any further development of the law along these lines was stopped by the Trade Disputes Act, 1906. The injunction is still used, however, in exceptional circumstances. By far the most famous instance was the judgment of Astbury, J., in *National Sailors' and Firemen's Union v. Reed,*[34] where he held that the General Strike was illegal, and granted an injunction restraining the branch officers of the Union from calling members of the union out on strike. Section 7 of the Trade Disputes and Trade Unions Act, 1927, provides that on the application of the Attorney-General an injunction may be granted restraining any application of the funds of a trade union in furtherance of an illegal strike.

Section 814 is important as setting out at length the factors which a Court ought to consider in deciding whether or not to grant an injunction. Perhaps a little more emphasis might have been placed on the ordinary enforcement of the criminal law. In England the police, as a rule, have of their own motion attempted to prevent disorder during a

29. FRANKFURTER AND GREENE, THE LABOR INJUNCTION (1930) 20.
30. (1868) L. R. 6 Eq. 551.
31. L. R. 10 Ch. App. 142 (1875).
32. [1896] 1 Ch. 811.
33. [1899] 1 Ch. 255.
34. [1926] 1 Ch. 536.

strike, without, at the same time, interfering with the liberty of the strikers. This readiness and impartiality of the police have, to a large degree, made special appeals to the courts unnecessary.

Section 815 which deals with the scope of the injunction contains certain useful but rather self-evident admonitions. In (c) it is said that "the order should be written in simple language intelligible to workers without the aid of lawyers". As no one can ever have doubted this, why is it necessary to state it in such solemn form?

Invasions of Interest in Land Other Than by Trespass

Withdrawing Support

The introductory note to this chapter is a useful statement of the conflicting theories on which this branch of the law is based. The first regards the right as in the nature of an easement, with the result that neither intention to cause harm nor negligence are necessary elements in creating liability. The second theory is that the right is not violated by the mere withdrawal of support; intention to cause harm or negligence are necessary to liability. The English law has remained true to the first theory, but the American has adopted certain features from the second.

Section 817 states the general principle that there is a right to lateral support, and that there is liability for harm to artificial additions which results from such subsidence. This is also true of English law. Both systems have the same rule, also, that the statute of limitations does not begin to run until a subsidence occurs,[35] and that an action for damages does not lie unless actual damage has resulted.

An important point is dealt with in comment *j* to Section 817. The *Restatement* makes it clear that the only person who is liable for subsidence is the actor who withdraws the support, and that transfer of the land to a third person does not relieve him of the risk of liability. The English law is equally clear that the actor is and remains liable, but there is some slight doubt whether the occupier for the time being is not also liable. Salmond,[36] after suggesting the doubt on the analogy of a continuing nuisance, reaches the conclusion that there is no such liability, as the easement of support only amounts to a negative duty not to interfere with the natural support possessed by the land. Whether this principle is also applicable where there is an absolute duty to the public, is open to question.[37]

In comment *l* to Section 817 it is stated that "the fact that a subsidence is brought on, after the support was withdrawn, by heat, rain,

35. Salmond, *op. cit. supra* note 5, at § 62 (2).
36. *Id.* at § 62 (9).
37. *Id.* at note (*x*).

snow or frost, does not relieve the actor from liability". On this point the recent English case of *Rouse v. Gravelworks, Ltd.*,[38] reaches a different conclusion. The defendants, in the course of their business as gravel merchants, created an excavated area close to the plaintiffs' land. The excavation filled with water which was driven by the wind against the land, and, by removing some material, deprived it of support. The Court of Appeal held that the plaintiffs had no cause of action as the defendants had a legal right to excavate the ground, and the accumulation of the water in the excavation and its effects on the plaintiffs' land were caused, not by the defendant's direct action, but by the natural agencies of the rain and wind, for which they were not responsible.

Section 819 marks a radical distinction between English and American law. It provides that a person who negligently withdraws lateral support of land or of artificial additions thereon is liable for the harm caused. The comment which follows states that he must give reasonable warning before excavating, and that if his sole purpose is to harm his neighbor's structures, then the excavation itself is unreasonable. The English law is more consistent, as it holds that in the absence of an easement of support the owner of land may withdraw all support from his neighbor's structures, even though this is done wilfully or negligently. Thus Lord Penzance said in *Dalton v. Angus:*[39] "It is the law, I believe I may say without question, that at any time within twenty years after the house is built the owner of the adjacent soil may with perfect legality dig that soil away, and allow his neighbour's house, if supported by it, to fall in ruins to the ground." There is much to be said for this view: why should I by building on my land be entitled to place any burden, however slight, on my neighbor?

Interference with Use of Land

Chapter 40 deals with "invasions of interests in the private use of land". The words "private use of land" are not particularly happy ones. Would not a more accurate and grammatical phrase have been "use of private land" in contrast to the use of public land, such as a highway, etc.? The *Restatement* has chosen this rather clumsy nine-word title to replace the traditional words "private nuisance" on the ground that the latter are ambiguous, but it is doubtful whether anything has been gained by this substitution except novelty. On the other hand, convenience has undoubtedly been lost, for it is necessary to re-

38. [1940] 1 K. B. 489.
39. 6 App. Cas. 740 and 804 (1881).

classify leading cases under new headings. The *Restatement* points out that the term "nuisance" is used in several senses, but the courts have found no difficulty in distinguishing them. Nor is there in practice sufficient confusion between public and private nuisance to justify the sacrifice of established terms. Moreover, this change of name involves an important point of principle, for the *Restatement* refuses to recognize the distinction between the action for private nuisance and the action for negligence on the ground that [40] "a negligent interference with the use and enjoyment of land is private nuisance in respect to the interest invaded." This may be true but it does not follow that the two types of action ought to be identified, for, as Professor Winfield has pointed out,[41] there are three important distinctions between nuisance and negligence: (1) in negligence it is necessary to prove a legal duty to take care while this is not required in the case of nuisance; (2) in negligence the question is, "Did the defendant take reasonable care?", but this is not true in nuisance; (3) contributory negligence is a defence to negligence but not to nuisance. These distinctions can, we believe, be brought out more clearly if the two forms of action are dealt with separately. By confusing the two we get such difficult and doubtful statements as the "general rule" in Section 822.[42] English law seems to be simplier because once the invasion has been proved it is not necessary to consider whether this is due to the intentional or unintentional action of the defendant.

In Section 822, comment *m*, the *Restatement* says that "it is only when unintentional invasions are caused by another's conduct which is negligent, reckless or ultrahazardous that the law subjects the actor to liability". This statement may be misleading, for, as the *Restatement* points out thereafter in Section 839, the possessor of land is under a duty to abate a nuisance created by a third person. In such a case there has been neither negligence nor recklessness in his conduct. To say that in such circumstances the invasion has been "caused" by the possessor's conduct is an odd use of language. If the authors of the

40. RESTATEMENT, TORTS (1939), introduction to Chapter 40 at 222, the *Restatement* adds: "Many interests other than those in the use and enjoyment of land may be invaded by negligent, reckless or ultrahazardous conduct, and it is only when an interest in the use and enjoyment of land is invaded that an action for private nuisance and an action based on the type of conduct involved are actions for the same cause, and are not to be distinguished but identified."

41. Winfield, *Nuisance as a Tort* (1931) 4 CAMB. L. J. 189.

42. The *Restatement* distinguishes between invasions which are either:
"(i) intentional and unreasonable; or
(ii) unintentional and otherwise actionable under the rules governing liability for negligent, reckless or ultrahazardous conduct."
If A's waste pipe bursts so that the sewage escapes into B's land, then A would, under English law, be liable to B even though he could prove that he had used every precaution. Is the same true in American law as stated in § 822?

Restatement had not sought to explain liability for nuisance on the basis of fault it would not have been necessary for them to use such a forced construction.

It is rather difficult to understand why the four illustrations to Section 825 have been included. Would any first-year law student on the first day of his course fail to answer these correctly? There are a large number of such self-evident illustrations in the *Restatement* the omission of which would have shortened it to its advantage. Illustration 3 is not only self-evident but it is also misleading, for it may suggest that A is not liable for the nuisance to B's land.[43]

Section 826 states that an intentional invasion is unreasonable "unless the utility of the actor's conduct outweighs the gravity of the harm". This is not true of English law. No amount of utility will make an invasion reasonable which causes substantial harm. This is stated by Salmond as follows:[44] "No use of property is reasonable which causes substantial discomfort to other persons, or is a source of damage to their property". This is equally true even where the benefit is a public one. "A nuisance may be the inevitable result of some manufacture or other operation that is of undoubted public benefit—a benefit that far outweighs the loss inflicted upon the individual—but it is an actionable nuisance none the less. No consideration of public utility can be suffered to deprive an individual of his legal rights without compensation."[45] This we believe was at one time true of American law, but the wording of Section 826 suggests that the principle has been altered.

Section 827 discusses the factors involved in the gravity of harm. The first two factors—extent and character of the harm involved—are self-evident. It is hardly necessary to state at length in the comment that the longer a nuisance lasts the more serious it may be. The next two factors, although they may be of importance on other grounds, are oddly placed in this section for they do not affect the gravity of the harm. The social value of the actor's conduct and the character of the locality may be taken into consideration in determining whether the actor's invasion constitutes a nuisance or not, but they cannot affect the amount of harm suffered by the plaintiff. To lump these together can only lead to confusion.

43. This Illustration reads as follows: "Same facts as in Illustration 2, except that there is no stream on A's or B's land. B gets water for his poultry business from a well on his land, and A dumps the waste matter in a depression on his land from which it seeps into the ground and is carried 300 yards underground to B's well by an unknown flow of percolating water. The water in B's well is contaminated so that it cannot be used in his poultry business for some time. The invasion of B's interest in the use and enjoyment of his hand is not intentional."

44. SALMOND, *op. cit. supra* note 5, § 55 (5).

45. *Id.* at § 55 (2).

The same criticism can be made of Section 828 which states the factors involved in determining the utility of conduct. The character of the locality and the impracticability of preventing the invasion cannot be said to determine the utility of the conduct itself. For that matter the unsuitability of the neighborhood may add to the utility of the couduct, as *e. g.* a butcher shop in a residential street, but this will not prevent the activity from being a nuisance. In English textbooks the relation between locality and nuisance is discussed under a separate heading unaffected by the question of utility. The fact that variable standards of comfort exist in different localities is explained in English law on the ground that[46] "the law of nuisance does not guarantee for any man a higher immunity from discomfort or inconvenience than that which prevails generally in the locality in which he lives . . . He who loves peace and quiet must not live in a locality devoted to the business of making boilers or steamships." On the other hand, one who makes boilers cannot carry on his business in a residential neighborhood, however great the utility of his conduct might be.[47] Locality and utility ought, we believe, to be dealt with separately as different considerations affect their relation to nuisance.

Section 829 which is entitled "gravity v. utility" raises a question of importance. Illustration 1 holds that a person who constructs a spite fence on his land is liable to his neighbor because his act has no utility and may cause grave harm. In English law a possessor of land is free to build a spite fence on his own land, for this does not constitute a nuisance, there being no invasion of his neighbor's land by such an act. The fact that an act is of no utility cannot by itself turn it into a nuisance. This does not conflict with the recent case of *Hollywood Fox Farm v. Emmett*[48] in which Macnaghten, J., held that the defendant, who had fired a gun for the purpose of frightening the plaintiff's foxes, was liable in nuisance. A person is only entitled to send a reasonable amount of noise over his neighbor's land, and malicious noise cannot be reasonable.

Section 830 which deals with avoidable invasion again marks a difference between English and American law. Illustrations 1 and 2 deal with the question whether A, who operates a copper ore reduction plant, is liable to B, a textile manufacturer, if the fumes from his plant injure the textiles. According to the *Restatement* the answer depends on whether or not it is reasonable for A to install an expensive device to prevent the fumes from escaping. In English law A would be liable

46. *Id.* at § 54 (4).
47. *Id.* at § 55 (2) (3).
48. [1936] 2 K. B. 468.

on these facts, even if the expenditure would render the operation of his plant unprofitable.

Section 832 states in three pages that the pollution of waters may constitute a nuisance. Illustrations 1 and 2 will not place an undue strain on the reader's intelligence.

Section 833 deals with interference with the flow of surface waters. It provides that a possessor of land may only interfere with the flow of surface water from his neighbor's land if such interference is reasonable, but it is not clear on what grounds the reasonableness of such interference is to be determined. Under English law a possessor of land may build an embankment against his neighbor's surface water, unless this is flowing in an established water course, even though this places a greater burden on the neighbor than would be the case if there were no embankment.[49]

The rest of this chapter is concerned with the possessor's liability for nuisance (called "harmful physical conditions") created by third persons. Here there seems to be no difference between American and English law, although some of the rules stated here have not been finally determined by the English courts. Thus, for example, it has only recently [50] been established that an employer may be liable for the ultrahazardous activity of an independent contractor, but the extent of this liability has not been determined. Section 839 provides that a possessor is under a duty to abate a nuisance if he knows or ought to have known of it, even though he has not been responsible for creating it. The House of Lords has recently reached the same conclusion in *Sedleigh-Denfield v. O'Callaghan*.[51] In that case Lord Wright said that [52] "the ground of responsibility is the possession and control of the land from which the nuisance proceeds". The possessor's liability is based not on fault, but on the reasonable principle that as he benefits from the land so also ought he to be responsible for its condition. It is difficult to reconcile with this principle the provision of Section 840 that a possessor of land is not liable if the natural condition of the land causes what would otherwise be a nuisance. Why should a distinction be drawn between a nuisance created by a trespasser and one created by nature? A dead whale is thrown onto A's land and proceeds to putrefy.[53] A is under a duty to B, his neighbor, to abate this nuisance if the whale has been placed there by fishermen, but not if it has been washed up by the sea. In the latter case B is defence-

49. Lagan Navigation Co. v. Lambeg Bleaching Co. [1927] A. C. 226.
50. Honeywill & Stein, Ltd. v. Larkin Bros. [1934] 1 K. B. 191.
51. [1940] A. C. 880.
52. *Id.* at 903.
53. *Cf.* Proprietors of Margate Pier v. Town Council of Margate, 20 L. T. R. (N. S.) 564 (Q. B. 1869).

less, because if the whale does not come within the law of nuisance then B has no right to invade A's land to abate the condition himself. What is the law if a stray horse dies in A's field? Apparently according to the categorical statement made in Section 840 he would be free to do nothing, because no human activity had brought the horse there. So odd a result must cast some doubt on the validity of the principle. According to the learned editor of Salmond,[54] English law reaches the same conclusion, but he is careful to point out that it is a mistake to speak dogmatically "when the authorities are so few and so uncertain." [55]

Interference with Use of Water

The first twenty-three pages of Chapter 41 which deal with "invasions of interests in the private use of waters (riparian rights)" contain definitions, with abundant illustrations, of the terms watercourse, lake, riparian land, riparian proprietor (who, we find, possesses riparian land) subterranean waters, surface waters, use of water, and harm which is defined [56] as "a loss or detriment of any kind to a person resulting from any cause". Why the word "harm", which has been used throughout the previous three volumes, should suddenly be defined here must remain a mystery. Only the term "water" remains undefined. This whole section might have been omitted or compressed into a single page. We stress this point because it is this unnecessary overelaboration and meticulosity which makes this volume of the *Restatement* rather laborious reading. On the other hand, the introductory note to Chapter 41 is of the greatest interest, for the comparison between the Natural Flow theory, adopted by the English courts, and the Reasonable Use theory, adopted by a number of American jurisdictions, could not have been stated in clearer or more succinct language. The *Restatement* has followed the Reasonable Use theory with the result that in this branch of the law there are marked differences between English and American law. It may be said that the American law has the advantage of being more utilitarian while the English law has the advantage of being more definite.

Section 850 marks the first difference between American and English law, for it provides that a riparian proprietor is liable for unintentional harm only if his conduct is negligent, reckless or ultrahazardous. This distinction between intentional and unintentional harm does not exist in English law.

54. SALMOND, *op. cit. supra* note 5, § 142.
55. The English and American cases are discussed in GOODHART, ESSAYS IN JURISPRUDENCE AND THE COMMON LAW (1931) Ch. VIII.
56. RESTATEMENT, TORTS (1939) § 848.

The difference between the two systems is strikingly illustrated by Sections 853 and 854 in which the factors determining the utility of use and the gravity of harm are considered. The *Restatement* places in the forefront "the social value which the law attaches to the primary purpose for which the use is made." The English courts are not concerned with this factor as the only point they need consider is ordinary riparian user,[57] and therefore they do not have to decide such difficult questions as the relative social values of irrigation and of fisheries. Nor do they have to consider "the burden on the proprietor harmed of avoiding the harm", for under English law he is entitled to the flow of the water, subject to the reasonable use by the other proprietors, even though he has suffered no material harm. Nor do English courts have to weigh the relative value of riparian and non-riparian use, for any abstraction of water for non-riparian use, however reasonable, is an actionable wrong even though no damage is suffered.[58] Similarly, priority of use, which may have some weight under American law, is not a factor in English law unless a prescriptive right has been acquired.

When we come to Section 859, which deals with subterranean water, we find another fundamental difference, because in England the right to abstract underground water is absolute and unconditional unless it runs in a defined and known channel,[59] while under American law there is liability if the abstraction is negligent, reckless or ultrahazardous. Thus there may be liability if an abnormal well is dug. Apparently the much-discussed case of *Mayor of Bradford v. Pickles,*[60] in which the House of Lords held that the defendant had an absolute right to dig wells on his land for the sole purpose of injuring the plaintiffs, would be decided differently in America, for such use of underground water cannot be held to be reasonable. There is much to be said for the American rule, for it is generally undesirable to have the law recognize as legal an act which is obviously anti-social.

Miscellaneous Rules

Chapter 42 is concerned with certain miscellaneous torts. The first is interference with a right to vote or hold office (Section 865). Although deprivation of a right to vote at a public election is a well-known tort in English law ever since *Ashby v. White* (1703),[61] the wrong of interference with the right to hold office has become obsoles-

57. Salmond, *op. cit. supra* note 5, § 65 *et seq.*
58. McCartney v. Londonderry Ry., [1904] A. C. 301.
59. Chasemore v. Richards, 7 H. L. C. 349 (1859).
60. [1895] A. C. 587.
61. 2 Raym. Ld. (4th ed. 1790) 938 (K. B. 1703).

cent in this country. The history of this tort has been described in detail by Professor Winfield [62] so that it is unnecessary to add anything here. As the last English case goes as far back as 1808, it would be interesting to know whether there are many modern American cases on this point.

The second tort is the failure to furnish facilities, prescribed by non-contractual duties, to a member of the public, as in the case of public utilities and of innkeepers (Section 866). The comment to this Section states that employees of a public utility who prevent the giving of the service, may be liable as joint tortfeasors. There seems to be no English case on this point, but in principle there is no reason against such liability, although it may cause hardship to the employees who are bound to obey their employers.

The third tort is concerned with interference with privacy (Section 867). It is rather surprising to find that the *Restatement* provides in categorical terms that a person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other. The number of States which have not as yet recognized this rule is still so large that it seems doubtful whether it can be said to represent the settled American law on the subject. In this connection it is of interest to note that although the famous "Flower of the Family" case [63] was decided by the New York Court of Appeals in favor of the defendants, the *Restatement* takes the view that on these facts an action will lie apart from statute.[64] In the English courts no action for interference with privacy has ever been recognized in the past, and it is most unlikely that anything short of legislation can alter the law on this subject.[65]

The fourth tort (Section 868) concerning interference with dead bodies does not exist in English law. On the other hand, the rule stated in Section 869 that a person who negligently causes harm to an unborn child is not liable to such child when born is also followed by the English courts.[66] This rule, although justified on the jurisprudential ground that an unborn person is not a legal person, may be unfair in practice, but the number of cases is too limited to justify legislative action.

Rules Applicable to Certain Types of Conduct

Chapter 43 is a sort of catch-all in which some general considerations are discussed. Section 870 which provides that a person is liable

62. Winfield, *Interference with Public Office* (1940) 56 L. Q. Rev. 463.
63. Roberson v. Rochester Folding Box Co., 171 N. Y. 538 (1902).
64. Restatement, Torts (1939) § 867, Illustration 4.
65. But *cf.* Winfield, The Law of Tort (1937) § 186 (2).
66. Walker v. G. N. Ry. Co. of Ireland, 28 Ir. L. R. 69 (1890).

for the intended consequences of a tortious act is of interest because comment *b* states that "it is immaterial to liability under the rule stated in this Section whether the tortious act is directed towards the person subsequently harmed or towards a third person". Therefore if A kills B to prevent him from making a will in favor of C, A will be liable to C. There is, as far as we know, no English case which reaches a similar conclusion. One difficulty would be to find a type of tort under which such an action could be brought for in English law as Maitland has said,[67] "The forms of action we have buried, but they still rule us from their graves".

The heavy type of Section 871, which states that a person who by a tortious act intentionally causes harm to a property interest is liable for such harm, covers a great number of diverse situations in the sixteen illustrations. Interesting as these are, it is difficult to see how they are related to each other. It is odd to find that the tort of intimidation (duress) is treated in a rather cursory fashion in comment *f*. We should have thought that it was of sufficient importance and difficulty to merit a separate section of its own.[68]

Section 872, in which tort liability based on estoppel is discussed, is a particularly valuable one for this is an idea which it is not always easy to explain in simple language. Even here it is not certain that there is not some slight confusion because it is difficult to see how Illustration 5 can be classified under the heading of tort liability.

Section 874 is a remarkable one for it provides that "a person standing in a fiduciary relation with another is liable to the other for harm resulting from a breach of duty imposed by such relation". Similarly comment *c* says that "a person who knowingly assists a fiduciary in committing a breach of trust is himself guilty of tortious conduct". This would seem to make the whole law of trusts merely a branch of the law of torts, a result which would make Lord Chancellor Eldon turn in his grave. We can see no advantage in disturbing his peace.

Contributing Tortfeasors

Chapter 44 deals with the liability of two or more persons whose tortious conduct is a legal cause of a harm to another. The *Restatement* has jettisoned the established phrases "joint tortfeasors" and "several tortfeasors", and has substituted for them "persons acting in concert" and "persons liable for concurring or consecutive independent acts", both of these being included under the blanket words "contributing tortfeasors". The result seems to be that the distinction

67. MAITLAND, THE FORMS OF ACTION AT COMMON LAW (1936) 2.
68. *Cf.* SALMOND, *op. cit. supra* note 5, § 154.

between joint tortfeasors, who join in committing a single tort, and several tortfeasors, whose independent torts contribute to the same harm, is not drawn as distinctly as in the English text-books. Although in practice this makes little difference so far as most of the rules are concerned, it may account for what we believe is the unsatisfactory conclusion reached in Section 885, discussed below.

Section 882 which deals with joinder of parties states that a single action can be brought against one, some or all of the contributing tortfeasors. In English law persons jointly liable can be joined in the same action, but as the authorities stand at present it is difficult to state definitely how far this joinder is permissible in the case of several wrongdoers.[69] At common law the joinder of several tortfeasors was never allowed, but this rule has been materially altered by the Rules of Court.

Section 885 provides that a release given to one tortfeasor discharges all others *liable for the same harm* unless the parties to the release agree that the release shall not discharge the others. This rule is both stricter and less strict than is the English one. It is stricter because under English law the doctrine of release applies only to joint tortfeasors and not to those who are severally liable for the same harm. This is logical because the reason why joint tortfeasors are released is "that the cause of action, which is one and indivisible, having been released, all persons otherwise liable thereto are consequently released." [70] There seems to be no reason why this anomalous rule should be extended to tortfeasors who are severally liable, because in their cases, the causes of action are separate. On the other hand, the American law is less strict, because under English law the release of one joint wrongdoer releases all the others, even though this was not the intention of the parties.[71] Here again the English rule is logically correct, for as the cause of action has been killed by the release, it cannot survive partially against some of the tortfeasors.

Defenses Applicable to All Tort Claims

The rules concerning justification or excuse as stated in Chapter 45 show that in this branch of the law there is no material difference between the American and English systems. Section 892 provides that a person who has consented to an act, even though it be criminal, cannot maintain an action of tort for harm resulting from it. This is probably true also of English law, although there are strong dicta in

69. *Id.* § 21 (2) note (*m*).
70. Duck v. Mayeu, [1892] 2 Q. B. 511, 513.
71. Salmond, *op. cit. supra* note 5, § 21 (4).

favor of the contrary view.[72] These are based on the argument that it would be against public policy to recognize consent to an illegal act, just as it is against public policy to recognize a contract to perform an illegal act. This, however, is not a true analogy, for in the case of the contract the plaintiff is seeking the help of the law in enforcing the contract while in the case of the tort the defendant is merely claiming that the plaintiff, who has consented to the illegal act, should not thereafter benefit from his repudiation.

Section 893 states the principle concerning voluntary exposure to risk in an admirably clear manner. Here American law seems to be definitely superior to the English rules which are in certain respects both doubtful and illogical. Evidence of the weakness of the English law on this question can be found in the fact that the judges fill their opinions with the phrases *volenti non fit injuria* and *scienti non fit injuria.* When English judges know what they are talking about they use clear terse English, but when they are uncertain about the law they invariably take refuge in Latin tags. There is a tendency to assume that these can be used, like incantations, to solve all difficult problems, when, what is really needed, is sound analysis based on accurate language. The English judges have pointed out that *volenti* and *scienti* do not mean the same thing, but they have not always determined what is comprised in the idea of *volenti.* The English law has come close to assimilating the idea of voluntary assumption of risk with that of contractual assumption of risk. Thus in *Smith v. Baker*[73] the House of Lords held that the plaintiff, who was employed in the defendants' stone quarry, which he knew was being worked in a dangerous manner, could nevertheless recover in an action against the defendants because he had not agreed to accept the risk, although he had acquiesced in it. Although one's sympathy is naturally with the employee in such a case, and he ought undoubtedly to be protected by statute, it is difficult not to agree with the American cases which hold that in these circumstances there is voluntary assumption of risk.[74]

In Section 897 which deals with merger the American law again seems preferable to the English rules. Thus Illustration 1 holds that if B and his car are injured in an accident, B cannot bring separate actions for personal injury and damage to his car. In England a divided Court of Appeal allowed such a division of actions in *Brunsden*

72. The cases are discussed in WINFIELD, THE LAW OF TORT (1937) § 13 (1). The learned author does not express a definite opinion on this point.

73. [1891] A. C. 325.

74. These cases have been brilliantly analyzed by Bohlen, *Voluntary Assumption of Risk* (1906) 20 HARV. L. REV. 91; reprinted in BOHLEN, STUDIES IN THE LAW OF TORTS (1926) 467.

v. Humphrey[75] and this has remained the law ever since, in spite of the fact that the dissenting judgment was a particularly cogent one.

REMEDIES

Damages

Chapter 47 which covers certain general statements concerning damages is of great interest because this is a subject which is as uncertain in English as it is in American law. We are not as yet in sight of any consistent principles which can be applied with precision in each case. It is hardly surprising therefore to find that although most of the general black-letter statements in this Chapter are also applicable to English law, there seems to be a wide variation in their application to particular instances. A number of the illustrations included in this Chapter have been answered differently by the English courts. Only a few of the points can be mentioned here.

Section 908 states that where punitive damages are permissible, evidence of the wealth of the defendant can be given. This is logical, for, as the *Restatement* points out, the wealth of the defendant is relevant in determining whether a particular sum will constitute a punishment, but English law does not admit such evidence.[76] It is doubtful whether punitive damages are justified in a modern legal system, and we do not think that anything would be lost if they were abolished.

Section 913 which is concerned with interest shows that this may be a thorny problem. The English law on this subject has been dealt with recently in the oddly named 1934 Law Reform (Miscellaneous Provisions) Act,[77] with the result that American and English law are now substantially similar.[78]

Sections 915, 916 and 917 are of particular value for they deal with the greatly disputed question of liability for consequences. Section 915 provides that a person who commits a tort is liable for intended consequences even though they were not expectable. This is equally true of English law, but it is not certain whether the same conclusion would be reached in the cases referred to in the comment. Thus the *Restatement* holds that where a person defames another, actuated by the hope that such other will become insane because of the public disgrace, the defamer is liable for the insanity which results. An English court might hold that the consequence here was too remote. Section

75. 14 Q. B. D. 141 (1884).
76. Keyse v. Keyse, 11 P. D. 100 (1886); Hodsoll v. Taylor, L. R. 9 Q. B. 79 (1873).
77. 24 & 25 GEO. V, c. 41 (1934).
78. Under the English law more discretion is given to the court concerning the award of interest than is allowed under the more precise rules of the *Restatement*.

916 provides that where a person has intentionally committed a tort ("intentionally invaded the legally protected interests of another", in the more sonorous words of the *Restatement*) his liability for resulting unintended harm may be determined by the degree of his moral wrongfulness. How difficult it must be to apply this rule in practice is shown by the fact that Illustration 1 leaves the question unanswered. Fortunately for English lawyers, liability for unintended consequences, which is already sufficiently complicated, is not affected in English law by moral considerations.

Section 917 provides that a person who negligently harms another is liable for the consequences of such harm in accordance with the rules of causation. This we believe was the rule in English law until the Court of Appeal expressed certain novel ideas in the *Polemis* case,[79] with the result that no one knows what the English law now is. It is interesting to note that in Illustration 1 the *Restatement* reaches a conclusion contrary to that which the English courts have adopted.[80]

Section 918 provides that the injured person cannot, as a rule, recover damages unless he has used due care to avoid the consequences, but that if the particular harm was intended he can recover unless he intentionally or heedlessly failed to protect his own interests. There seems to be no English case which draws this difficult distinction involving two separate sets of mental processes, the first being that of the tortfeasor and the second that of the injured person. It can therefore be said that in English law due care must be used by the injured person in all cases, but that what amounts to due care will vary with the particular circumstances.

Section 920 provides that the value of a benefit conferred by the tortfeasor may be considered in mitigation of damages, provided that the benefit and the damage are to the same interest. English law has the same rule, as was shown by the interesting case of *British Westinghouse Electric Co. v. Underground Electric Rys. of London, Ltd.*[81] But benefits received from third persons or as the result of the plaintiff's forethought, as in the case of insurance, cannot be used in mitigation, for they are *res inter alios acta.*

On the subject of harm to business the *Restatement* holds that a person prevented by physical injury from wiring the acceptance of an advantageous offer to sell goods would be entitled to recover the profits which he would have made from the transaction. This seems a reasonable conclusion, but it is probable that the English courts would hold such damage too remote.

79. *Re* Polemis and Furness, Withy & Co., [1921] 3 K. B. 560.
80. The Arpad, [1934] P. 189; Hadley v. Baxendale, 9 Ex. 341 (1854).
81. [1912] A. C. 673.

Section 927 deals with the difficult question concerning the time at which the value of property, either converted or destroyed, should be fixed. The *Restatement* is cautious in its approach, leaving it open to the courts to give just compensation, where necessary, based on an equitable adjustment. The English courts have found this question an equally difficult one to answer, with the result that they have not always been consistent in their views.[82]

On the point concerning additions and improvements made to a chattel by the converter, the *Restatement* holds [83] that the owner may recover for its increased value if the conversion has been intentional. English law on this point is not certain, but Mayne suggests that the owner cannot recover such increased value. He says: [84] "In short, may not the real principle be this: that the property in the improvement never does, in fact, vest in the original owner; but that as his property in the subject-matter continues he has a right to have it back either in value or in specie; in the latter case the improvements must follow, because they cannot be separated. In the former case they need not." No distinction is made between intentional and unintentional conversion.

Comment *l* to Section 927 is interesting, for here there is a conflict between American and English law on an important point. The *Restatement* holds that one who has made a contract for the sale of an article is entitled to obtain from one who tortiously deprived him of it the profits which he would have made by completing the sale. But in *The Arpad* [85] the English Court of Appeal, by a majority, held that the measure of value for wheat which had been converted was the real value of the wheat unaffected by any resale contracts into which the plaintiffs had entered. The authority of the case is, however, weakened by the fact that Scrutton, L. J., that great commercial judge, delivered a strong dissenting judgment.

Finally, another interesting conflict can be found in Illustration 5 to Section 932 which reads as follows: "A detains for one month a fishing boat owned by B and essential for B's business. Because of lack of financial ability, B is unable to obtain a substitute boat. He is entitled to damages for the harm to his business thereby caused." The exact opposite was held by the House of Lords in *The Edison.*[86] The plaintiff's dredger was negligently sunk by the defendants; owing to lack of financial ability the plaintiffs were unable to purchase a substi-

82. *See* MAYNE, DAMAGES (10th ed. 1927) 113.
83. RESTATEMENT, TORTS (1939) § 927, comment *f*.
84. MAYNE, DAMAGES (10th ed. 1927) 378.
85. [1934] P. 189.
86. [1933] A. C. 449.

tute dredger, whereby they incurred increased costs in performing a contract with a third party. The House of Lords refused to allow these increased costs as damages, Lord Wright saying:[87] "The appellants' actual loss in so far as it was due to their impecuniosity arose from that impecuniosity as a separate and concurrent cause, extraneous to and distinct in character from the tort; the impecuniosity was not traceable to the respondents' acts, and in my opinion was outside the legal purview of the consequences of these acts." This conflict of opinion between eminent authorities shows that no general principles will enable us to solve these damage problems. The answers in most cases will depend on the individual predilections of the judges and nothing is so uncertain as that, for what seems to one judge to be an obviously direct cause or consequence appears to another to be extraneous and remote.

Injunctions

Chapter 48 is concerned with the appropriateness of injunction as a remedy against torts. Perhaps this remedy is of more importance in the United States than it is in England because, as we have said above, it has hardly ever been used in connection with English labor disputes since 1907. Apart from this, there seems to be no difference either in principle or in practice between the English and American rules. Attention ought to be called to Section 936 because it states in an admirably clear and thorough manner the various factors which determine the appropriateness of injunction against tort.

Conclusion

We cannot conclude this discursive commentary on the *Restatement* without expressing our appreciation of a work which will prove to be of the greatest value not only to American lawyers, for whose use it was designed, but also to the English bench and bar. Perhaps it will prove most useful just at those points where American and English law are found to differ, because these conflicts of opinion may suggest that a rule which has been accepted as established law ought to be reconsidered. It is comforting to find that these differences, although sometimes important, are rarely fundamental, and that some of them are more apparent than real when tested by actul practice. Is it unduly optimistic to feel that this congruence between the two systems suggests

87. *Id.* at 460.

that the Anglo-American law of torts is on the whole in a satisfactory state, and that, without denying the desirability of further amendments, the lawyers, who have through many generations contributed to its development, need not feel ashamed of what they have built? In this great historical process the work here done by the American Law Institute will be long valued and remembered.