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### Selected Topics on the Law of Torts. The Thomas M. Cooley Lectures, Fourth Series (Book Review)

John V. Thornton

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In this area of legislation, the lawyer seems to have done much for a large majority of the working population, but has done little for himself.

Chapter IX, Organization of the Legal Profession, is the concluding chapter of the book. Much of the chapter is based on Roscoe Pound's "The Lawyer from Antiquity to Modern Times" written for the Survey in 1953. Early developments of local, state and national Bar associations are traced. Reference is made to the comparatively recent organization of junior and student Bar associations and the movement for integration of the Bar.

The authors of this volume are to be congratulated for having brought together in a very readable volume the fruits of much substantial thinking and writing by a great many intellects on the problem of the American lawyer.

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LOUIS PRASHKER.\*



SELECTED TOPICS ON THE LAW OF TORTS. The Thomas M. Cooley Lectures. Fourth Series. By William Lloyd Prosser. Ann Arbor: University of Michigan, 1954. Pp. xi, 627. \$6.00.

Dean Prosser has once again demonstrated that he is that remarkable phenomenon: the scholar of depth who yet writes simply and entertainingly. Not for him the complex and dry-as-dust approach of most. Humor flashes throughout his writings, and his is the knack of making even the most difficult problem easy to understand. One need not be a torts scholar to read Prosser. The first year law student can read and readily comprehend his fine hornbook,<sup>1</sup> and, I dare say, such a student could read and comprehend the Cooley Lectures with not much more difficulty—and this despite the fact that they deal largely with little known, frontier problems of the law of torts.

In view of that indorsement there is probably no doubt where this reviewer stands on the question of the merits of the Cooley Lectures. They are, in my judgment, excellent; possibly better, within their scope, than anything Prosser has yet done in the course of a distinguished career in the field of torts.

The volume is composed of two articles written in earlier years on "Business Visitors and Invitees" and "Res Ipsa Loquitur in California," and the five Cooley Lectures, "Comparative Negligence," "Interstate Publication," "The Principle of Rylands v. Fletcher," "Palsgraf Revisited," and "The Borderland of Tort and Contract."

The entire content is top-notch. The article most appealing to me was "Palsgraf Revisited," an analysis of *Palsgraf v. Long Island Railroad Co.*<sup>2</sup> which is, as Prosser says, "perhaps the most celebrated of all tort cases." He points out that the Appellate Division justices in that case saw nothing in it but "proximate cause" and that it might never have been important at all had

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\* Professor of Law, St. John's University School of Law.

<sup>1</sup> See PROSSER, TORTS (1941).

<sup>2</sup> 248 N.Y. 339, 162 N.E. 99 (1928).

not the opinion of the Appellate Division fallen into the hands of Professor Bohlen, the Reporter for the Restatement of Torts. Bohlen was struggling with the problem of causation in negligence cases and he was disposed to the belief that in cases such as *Palsgraf* the question was essentially one of the existence of a duty which in turn depended upon a foreseeable risk to the plaintiff. Bohlen used the facts of the *Palsgraf* case to illustrate this view in a draft of the Restatement, and among the Advisers who met to consider the draft was Chief Judge Cardozo. Thus Cardozo heard—though he did not participate in the discussion or vote on the draft—a long debate on Bohlen's view which view was finally upheld by a very narrow vote of the Advisers. Cardozo evidently was also convinced, for, when the *Palsgraf* case did later come up on appeal to his court, he adopted Bohlen's view in an opinion which went far beyond the scope of the arguments of counsel.

Prosser, like many teachers of torts, is not convinced that the Bohlen-Cardozo concepts which flowered in the *Palsgraf* case have materially advanced the solution of the problem of how far negligence liability shall be carried. Rules like "the scope of the risk" and others have little improved, he finds, upon the traditional judicial formula of "proximate" and "remote" cause. "In other words, if there is a conclusion, it is that the courts may very possibly have been right all the time after all."<sup>3</sup> I am inclined to agree. I do not say that we may not someday develop a more scientific way of determining the extent of liability. But, as of today, under whatever formula of "causation" or "duty" a particular jurisdiction employs, the scope of liability becomes ultimately a question of a jury's (or, more rarely, a judge's) rough sense of fairness, justice, and social policy. How far liability shall go is then not so much a matter of logic as it is in Judge Andrews' words—"practical politics."<sup>4</sup>

Also a most interesting part of the book is the discussion of another famous decision, *Rylands v. Fletcher*.<sup>5</sup> Prosser's contribution in this area is his lucid exposition of the basic principles underlying the *Rylands* rule, and his demonstration that these principles are applied under one doctrinal title or another by all courts. Prosser confesses that he, like many others, once subscribed to the view that *Rylands v. Fletcher* is rejected by name in the great majority of American courts.<sup>6</sup> He now finds, upon further study, that the case itself, or a statement of principle clearly derived from it, has been approved in eighteen jurisdictions as against only nine which have refused to accept it. Significantly, even those few states which reject the *Rylands* doctrine by name, apply it in fact under various other guises, such as ultrahazardous activity, absolute nuisance, strict liability for dangerous animals, or trespass by blasting.

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<sup>3</sup> P. 242.

<sup>4</sup> See *Palsgraf v. Long Island R.R.*, *supra* note 2 at 352, 162 N.E. at 103 (dissenting opinion).

<sup>5</sup> *Fletcher v. Rylands*, 3 H. & C. 774, 159 Eng. Rep. 737 (1865), *rev'd*, L.R. 1 Ex. 265 (1866), *aff'd*, *Rylands v. Fletcher*, L.R. 3 H.L. 330 (1868).

<sup>6</sup> P. 152. He once said: ". . . [T]he doctrine of *Rylands v. Fletcher* still is rejected by name in the majority of American jurisdictions." PROSSER, TORTS 452 (1941).

The article on "Interstate Publication" commences with the electrifying observation: "It is an amazing and sobering thought that, by the utterance of a single ill-considered word, a man may today commit forty-nine separate torts, for each of which he may be severally liable in as many jurisdictions within the continental limits of the United States alone, and without regard to any additional liability he may incur in the possessions and territories, and in foreign countries."<sup>7</sup> The reference is, of course, to a word transmitted over radio or television or written in a nationally circulated publication. The possible ramifications of this country-wide defamation are indeed tremendous, and Prosser has done an important service by bringing together the many aspects of this too seldom considered problem and putting forth some tentative suggestions for alleviating it. He finds that the only possible remedy is legislation providing for only one action by the defamed person, such as a Uniform Law<sup>8</sup> or an Act of Congress.

What I have here commented upon are those portions of a uniformly excellent book which struck me personally as truly novel and highly significant contributions. Others may disagree, and cast their vote for "The Borderland of Tort and Contract" or "Comparative Negligence," both of which are top-grade. And the old standbys, "Business Visitors and Invitees" and "Res Ipsa Loquitur in California"—articles by Prosser published elsewhere ten and five years ago respectively—still make fine reading.

JOHN V. THORNTON.\*



THE 20TH CENTURY CAPITALIST REVOLUTION. By Adolf A. Berle, Jr. New York: Harcourt, Brace and Company, 1954. Pp. 192. \$3.00.

Since 1927, the author of this book has been Professor of Corporation Law at Columbia University Law School. He has long been a noted lawyer specializing in corporation law. For many years, he has rendered distinguished public service. He filled honorably the posts of Assistant Secretary of State from 1938 to 1944, and of Ambassador to Brazil from 1945 to 1946.

In 1933, the author (in collaboration with Dr. G. C. Means) wrote "The Modern Corporation and Private Property." In 1954, on invitation of the Faculty of the Northwestern University School of Law, the author delivered

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<sup>7</sup> P. 70.

<sup>8</sup> The National Conference of Commissioners on Uniform Laws proposed and approved in September, 1952, a statute now known as the Uniform Single Publication Act, providing in substance that a person shall have only one cause of action founded on any single publication and that a judgment in one jurisdiction shall bar any action elsewhere.

\* Adjunct Associate Professor of Law, New York University School of Law.