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The Worker and the Law

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BOOK REVIEWS
REVUE DES LIVRES

The Law of Torts. By JOHN G. FLEMING. Third Edition. Sydney: The Law Book Co. of Australasia Pty Ltd. 1965. Pp. xlviii, 718. ($14.25)

Examining any decision on tort law always poses to the judge and lawyer the question, "is this decision good law now?" No branch of law reflects quite so well the changing social concepts surrounding a citizen's freedom of action and his corresponding duty of care. Creative judicial action has been at work continually and where it has been insufficient to make the law equal to the task of adjusting losses the legislature has intervened frequently. New situations daily illustrate the inadequacy of previous legal solutions and challenge the ingenuity of the lawyer in finding ways of resolving them. The history of the law of torts has centered around the search for an adjustment between two basic interests of individuals—the interest in security and the interest in freedom of action, and at any given time the rules of tortious liability reflect the compromise between these two competing ideas. Leaving aside those white and black areas where there is a clear answer to liability, the courts and the practitioner encounter a substantial gray area where the conflicting rights of the parties make a precise answer difficult. In this area an examination of legal precedents often serves to highlight their uncertainty and frequently they indicate more than one solution. It is here that the bench and bar owe to Professor Fleming a great debt for his work on the law of tort. No better description can be given of it than that of the author when he says: "The profile this book seeks to depict is frankly more function-oriented than many of its competitors, more concerned with the effect and operation of legal rules, with their aims and reasons, than with the mechanistic problems of the internal consistency of decisions within the framework of any given system of precedent."[1] From the beginning to the end the reader realizes the author is talking to him in the solution of the legal problems at hand. The feeling is more than having at his side a research specialist, the practitioner quickly concludes he has as his associate a master of the law of torts who displays an amazing insight into

[1] P. vi.

practical problems while at the same time preserving the perspective of the great teacher. One feels at home with Fleming as he sketches the historical development of a particular branch of the law, shows the trend of the authorities and then enunciates the rule or concept in such precise and effective language that it becomes a corner stone for future thought. The rule is seen in better focus when one knows the reason for its development, and an appreciation of its efficacy is enhanced by an understanding of the factors that brought it about. Where the reason for the rule no longer exists, or must bow to more contemporary social demands, the author indicates those factors which augur change. He says: "Law is only a means, not an end, it falls to be adjudged not by any internal standard peculiar to it as a closed system, but by the degree to which it furthers relevant social ends; that accordingly legal solutions or rules have to stand the test of functional adequacy in terms of contemporary values—for short, that there be a 20th century reason for all rules, judicial or legislative, with any pretence for survival." [2]

Few authors have examined so fully the factors that make for change in the law and show how they work and indicate their probable effect on the future course of the law. These are often overlooked and make for difficulty in the understanding of the seeming conflicting standards of care imposed on different members of the community. As an illustration the author says: [3]

> Moreover, it is imperative for a realistic appraisal of the legal process to recognize the discrepancy, which is so marked in this context, between verbal theory, as reflected in jury instructions or court opinions, on the one hand, and law in action on the other. In fact, there is a noticeable variance in the standard applied to different relations, in accordance with current notions of social responsibility and other factors bearing on the allocation of risks. For example, the standard tends to special stringency in the case of defendants, like motorists and employers, who offer a well-recognized focus for loss-distribution, particularly when insurance is either compulsory or widely held. In contrast, a discernible pattern of leniency prevails in judging the conduct of medical men whose professional reputation is peculiarly vulnerable to adverse verdicts. Most noticeable of all is the dual standard in dealing with the respective issues of negligence and contributory negligence; because, here again, the factor of loss-bearing capacity and the policy of aiding loss distribution support alike a distinction which warrants our asking more of defendants than of plaintiffs.

It is refreshing to meet an author who so frankly discusses the role of the hidden persuaders in tort litigation whether it be the presence of liability insurance, the capacity of a defendant to bear and distribute losses, the idiosyncrasies of juries, strict liability and a host of others, not overlooking the modern trend toward

[2] P. v.

[3] Pp. 125-126.

enterprise liability as a basis for adjustment when the fault concept proves unacceptable. He says:[4]

> Despite these significant developments, however, it is important to guard against too sanguine an estimate of the extent to which this process of transformation has been carried up to the present time. Modern tort law is "schizophrenic". Its "expressed" doctrines, couched in the cabbalistic terminology of fault liability, are rapidly becoming obsolete under the pressure of modern social forces. "They are horse and buggy rules in an age of machinery." Change of legal doctrine, however, is bound to be slow, because precedent dies hard, and we will undoubtedly have to rest content for a long time to come with rules of law which mean one thing, but are increasingly being used (often no doubt quite unconsciously) to achieve another. This is a well-known phenomenon in periods of transition, for which there is ample precedent in the history of the common law.
>
> The temper of our time seems to favour the growth of social security, because mid-twentieth century man has become interested, less in acquisition and exploitation, than in the preservation of existing human and material resources. In the long run, the ultimate choice may be between socialism, on the one hand, under which the state directly assumes the function of compensating accident victims in the form of public social insurance, on the basis of need, and distributes the burden among all its members, and some system of collectivization of accident losses, on the other, in which the courts cooperate with insurance companies to distribute the cost among those who participate in the benefits of the dangerous, and yet indispensable, enterprise or activity that has produced the loss. If our future is to remain linked to a free enterprise economy, the advantage seems to lie in a continued growth of "sponsor" or "enterprise" liability, along the lines long charted by workmen's compensation and the vicarious liability of employers. In this manner, instead of society as a whole making itself responsible for the cost of repairing the casualties of accidents through welfare grants, the burden can be allocated with greater discrimination to that segment of the public which reaps the benefits of the accident-producing activity and, by the same token, may fairly be expected to underwrite its losses.

An interesting illustration of the author's views will be found in the recommendations of the Ontario Select Committee on Automobile Insurance that to each motor vehicle policy there be attached an endorsement providing for payment to anyone injured by the vehicle certain benefits without proof of fault on the owner or driver.[5] Amendments to the Uniform Insurance Act indicate that similar considerations will soon be examined in other provinces, although in the province of Saskatchewan such benefits have been enjoyed by motor vehicle victims for many years.[6]

[4] P. 13.

[5] Final Report of the Select Committee on Automobile Insurance (1963).

[6] See generally, Shumiatcher, Legislation, State Compulsory Insurance Act. An Appraisal (1961), 39 Can. Bar Rev. 107.

Thus we see how, in a free enterprise economy, government in co-operation with industry can extend benefits to its citizens without becoming a socialist state or without abrogating the fault concept which is so vital to the modern law of torts.

Without doubt Fleming *on Torts* is a practitioner's book calculated to give to him a clear and precise statement of the law as it is and as it is becoming. In this latter respect there is value to the student and the legislator. In many areas the assistance of the legislator is required to meet the needs of a very mobile and dynamic society. The chapter on occupier's liability illustrates the complexities of this branch of the law and one must agree with the author that the time is ripe for the same drastic reform in other parts of the Commonwealth that was brought about by the English Occupier's Liability Act, 1957,[7] which created a common duty of reasonable care in favour of all lawful visitors alike. The chapter on products liability serves to highlight the need for reform in the area of warranties. By modern advertising methods the manufacturer is able to produce a psychological effect of representation without incurring its penalties. Each of us frequently acquires and uses some nationally advertised product because of our faith in its quality brought about by the advertisement. We are astounded when the loss occurs to find the "no privity of contract" rule applied. The author's references to the various cases and to the American Uniform Commercial Code are very interesting. These are only a few of the areas in tort law where reform is indicated. In almost every chapter separate paragraphs are inserted showing the trend of the decisions and indicating the area of growth either by judicial creativeness or legislative assistance.

There is one feature of the author's conclusions which requires some revision in so far as Canadian lawyers are concerned and that is the role of the civil jury. In all provinces except Ontario and British Columbia, the civil jury is used rarely, and in Ontario it is under attack where it is used in motor vehicle cases and where required by the Judicature Act[8] in actions of defamation, criminal conversation, seduction, malicious arrest and prosecution and false imprisonment unless the parties waive a jury trial. Most motor vehicle accident cases are tried by judge alone. In all other civil actions in Ontario the tendency is to try them without a jury, either by common consent, or where a jury notice is served the trial judge in his discretion often strikes out the jury because of the complexity of the issues. Throughout his work Professor Fleming makes reference to what might be called the liberal views of jurors and the various methods adopted by the courts to control jury verdicts. Undoubtedly the jury plays an important role in other jurisdictions. For example, in many of the United States where there is no

[7] 5 & 6 Eliz. 2, c. 31.

[8] R.S.O., 1960, c. 197, as am.

comparative negligence law the system of compensation in motor vehicle accidents would collapse were it not for the jury's polite quarrel with the law and their willingness to take a broad view. However, in the Province of Ontario there has been a marked change in respect to the demand for juries. A generation ago a jury could be expected to display definite sympathy for a traffic victim at the expense of the automobile insurer. Today almost all of our jurors are automobile drivers and are paying ever increasing insurance premiums. They are "driver" rather than "pedestrian" minded and display a consistent sympathy toward the motorist. In regard to the matter of damages their overall tendency is to award less than the judges. The result is that solicitors for the defendant's insurer are the ones who usually serve the jury notice satisfied that their client will obtain a better result with a jury and at the same time knowing that the insurer can afford to appeal if things go wrong. It is likely the days of the jury in automobile cases in Ontario are numbered, but in the meantime, counsel would be well advised not to rely on the jury's so called "liberal view".

Finally there is another feature on Fleming *on Torts* which should not be overlooked by the lawyer who wants to keep up to date. In recognition of the rapid changes in this branch of the law the author has brought out frequent editions. The first appeared in 1957, the second in 1961, and now the third in 1965. It is hoped he will continue this practice. Nothing is quite so acceptable in a text as the reader's knowledge that it is the last word.

EDSON L. HAINES*

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The Worker and the Law. By K. W. WEDDERBURN, Professor of Commercial Law, London School of Economics. London: Pelican Books. 1965. Pp. 368. (7/6d)

Professor Wedderburn's addition to the *Pelican Law Series* is, in keeping with the best of that series, an excellent introduction to the industrial law of the United Kingdom. Like its predecessors this book is written "both for the general reader and for the student of our social and legal system".[1] However, general readers will have to be rather sophisticated in the law to stay with Professor Wedderburn from "The Foundations of Labour Law", through five chapters on the "law of industrial peace" and four on the "law of industrial conflict", to his conclusion. In Canada, I suspect, lawyers and law students will be his audience; and who better to receive his admonition:[2]

*The Honourable Edson L. Haines, of the Supreme Court of Ontario.
[1] P. 7. [2] P. 8.

> But technical law by itself is useless, at best an arid game played by keen minds in court rooms and academic ivory towers. To understand its significance we must look at its historical and social setting, we must question what are the value and policy judgments enshrined within the propositions of law. . . .

Never forgetting the social significance of the doctrines of English industrial law, Professor Wedderburn "resolutely enter[s] the muddy waters of the law itself"[3] to the great profit of any student of Canadian labour law who seeks to understand its English parent.

From the first line of chapter one to his closing paragraph Professor Wedderburn expounds the central theme of "abstention of the law" in the area of industrial relations.[4] Collective agreements, which regulate the terms of employment of two-thirds of the working population of the United Kingdom,[5] are not enforceable as contracts. Keeping collective bargaining "outside the grasp of the law" is a "habit which will be as appropriate to new problems as it was to the old"[6] the author suggests. This means that there is not, and in his opinion should not be any certification of bargaining agents, statutory period during which collective agreements are to be honoured or any of the legal apparatus of labour relations that characterizes the system on this continent.

There is a limited body of statute law, "the law of industrial peace", to be found in areas that cried out for correction before collective bargaining came into its own. Professor Wedderburn sums it up as:

> . . . calculation and payment of wages in acts from 1831 to 1960; protection of "sweated" trades in 1909 which becomes the modern Wages Council "prop" to autonomous bargaining; control of hours and conditions of the weaker groups, young persons and women; maintenance of standards of safety, health and welfare for factory workers, and so on.[7]

Nevertheless, in "the law of industrial conflict" the law of the United Kingdom reveals its policy of abstention. Except in wartime there has been no provision for compulsory arbitration or conciliation prior to strike,[8] social security legislation is framed to put "the Welfare State firmly on the fence in industrial conflict",[9] and, with a few exceptions,[10] Parliament has not prohibited strikes.

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[3] *Ibid.*

[4] First given positive statement by Professor Kahn-Freud, in Ginsberg (ed.), Law and Opinion in the 20th Century (1959), p. 215, esp. pp. 227-244.

[5] P. 101. [6] P. 140.

[7] P. 176. See also "Statutory Interventions", dealing with provisions for non-compulsory conciliation and arbitration, p. 122 *et seq.*

[8] P. 281.

[9] P. 283, *i.e.* by not refusing the striker any benefits unless they would, in effect, help to finance the strike.

[10] In the case of the police, aliens, seamen and utility and other workers

Until the decision in *Rookes* v. *Barnard* in 1964[11] it seemed that the courts had accepted Parliament's policy of abstention.[12] Because on this point especially an appreciation of "the value and policy judgments enshrined in propositions of law" is an absolute prerequisite to an understanding of the law itself, Professor Wedderburn deals briefly but graphically with the tug-of-war between Parliament and judges that resulted in the modern English law of trade disputes. Half a dozen statutes aimed at freeing the trade unions of judge-made legal liabilities seemed finally to stop the incursions of the courts and in the *Crofter* case[13] of 1942 the House of Lords, led by Lord Wright, appeared to accept that industrial relations is an area where interest groups must clash and work out their differences unregulated by the law.

This is the central theme, and it is the emphasis upon it that will bring into focus for the Canadian reader the basic differences between the industrial law of this country and of the United Kingdom. He will understand why those doctrines of English labour law that our courts do occasionally import for application in strike and picketing situations are a mass of semantic distinctions, anachronistic even in England and of little relevance here. What else, he may ask could be expected of laws that can have developed hardly at all in the last fifty years because of a demonstrated policy of abstention. Moreover, he will understand why our legislatures decided to take such matters out of the hands of judges and to follow the American example of putting labour relations under the jurisdiction of specialist boards. In Canada too, the policy of the the law is to recognize that labour relations is a "conflict of interests which we can scarcely hope to eradicate from our society"[14] but, rather than abstaining, our law has taken a positive approach to containing the conflict "within acceptable institutions".[15] "The law", however, is not "the courts"; and the re-entry of the courts into the labour field[16] parallels in our law the new disruptive developments in United Kingdom industrial relations law that concern Professor Wedderburn so deeply.

In *The Worker and The Law* the author discusses for more than thirty pages the two 1964 decisions of the House of Lords, *Rookes* v. *Barnard*[17] and *Stratford* v. *Lindley*.[18] This review is not

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who have cause to believe that serious bodily injury or injury to property will result from a cessation of work, pp. 276-278. To the same effect see The Canadian Criminal Code, s. 365.

[11] [1964] A.C. 1129 (H.L.). [12] Pp. 264 and 23.

[13] *Crofter Hand Woven Harris Tweed Co. Ltd.* v. *Veitch*, [1942] A. C. 435.

[14] P. 340. [15] *Ibid.*

[16] See for example: *Gagnon* v. *Foundation Maritime Ltd.*, [1960] S.C.R. 435; *Hersees of Woodstock Ltd.* v. *Goldstein* (1963), 38 D.L.R. (2d) 449 (Ont. C.A.); and *Nelsons Laundries Ltd.* v. *Manning* (1965), 51 D.L.R. (2d) 537 (B.C.S.C.).

[17] *Supra*, footnote 11. [18] [1965] A.C. 269 (H.L.).

the place for further analysis of these cases, about which there has been considerable academic writing and some popular furor in England.[19] It is however, in the context of a book like Professor Wedderburn's that the significance for English labour law can be seen of the re-entry by their courts into the labour relations area, and of their "plain satisfaction in doing so".[20] On Professor Wedderburn's analysis the Law Lords have unsettled the whole area.[21]

The question now for the United Kingdom is whether "abstention of the law" from labour relations should be retrenched or go by the boards. Professor Wedderburn's opinion is unequivocal. His recommendations for change in the trade disputes area of the law would simply effect a return to abstention, and do so more effectively, as he demonstrates,[22] than does The Trades Disputes Act 1965, which the government introduced to reverse the two House of Lords decisions while a Royal Commission under Lord Donovan considers the problem in broader context.

In his consideration of the "law of industrial peace", the author presents a survey of each topic; the contract of employment, its variation by the statutory controls that have been imposed on means of payment, the law regulating safety and working conditions, and state insurance for injury suffered at work. In relation to each there is some consideration of alternatives that have been proposed, or are practiced in various European systems. There is perhaps an undue disregard for American experience. Professor Wedderburn does seem to favor the ensuring of true job security

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[19] K. W. Wedderburn, The Right to Threaten Strikes (1961), 24 Mod. L. Rev. 572; C. J. Hamson, A Note on Rookes v. Barnard, [1961] Camb. L.J. 189; K.W. Wedderburn, The Right to Threaten Strikes II (1962), 25 Mod. L. Rev. 513; Innis Christie, Comment, (1964), 43 Can. Bar Rev. 464; K. W. Wedderburn, Intimidation and the Right to Strike (1964), 27 Mod. L. Rev. 257; C. J. Hamson, A Further Note on Rookes v. Barnard, [1964] Camb. L.J. 159; J. A. Weir, Chaos or Cosmos, Rookes, Stratford and the Economic Torts, [1964] Camb. L.J. 225; A. W. R. Carrothers. Order into Chaos: The Case of the Intransigient Draughtsman (1965), 2 U.B.C.L. Rev. 270; L. H. Hoffman, Rookes v. Barnard (1965), 81 L.Q. Rev. 116; K. W. Wedderburn, Stratford v. Lindley (1965), 28 Mod. L. Rev. 205; J. T. Cameron, Conspiracy and Intimidation: An Anti-Metaphysical Approach (1965), 28 Mod. L. Rev. 448.

[20] Pp. 265 and 287.

[21] See, for example, *Camden Exhibition and Display Ltd. Lynott*, [1965] 3 W.L.R. 763 (C.A.), in which it was argued, *inter alia*, that a collective refusal to work regular overtime, ostensibly in support of a demand for extra wages, was "really a specious cover for other ends" (at p. 769) and therefore, was not a "trade dispute" that came within the statute protecting unionists from civil suit. The Court of Appeal held there was a "trade dispute": but, clearly on such facts, before *Stratford* v. *Lindley*, *supra*, footnote 18, the argument would not have been considered worth making. It must be noted that counsel for the defendants in the *Camden Exhibition* case were Peter Pain, Q.C., who acted for the defendants in *Stratford* v. *Lindley*, and K. W. Wedderburn.

[22] Pp. 291-294.

by the establishment of a right to appeal from dismissal[23] coupled, presumably, with power vested in the courts or a special tribunal to order reinstatement.[24] He stresses that the employee's union must be given a role to play in protecting his rights under any such system.[25]

The Worker and the Law succeeds very well in its aim to "define the boundaries of the subject" and more important, it gives a perspective on industrial law in England.

INNIS CHRISTIE*

* * *

The Enforcement of Morals. By PATRICK DEVLIN. London: Oxford University Press. 1965. Pp. xiv, 139. ($4.50)

Most lawyers are aware that the *Wolfenden Committee Report* of 1957 recommended "that homosexual behaviour between consenting adults in private should no longer be a criminal offence".[1] In reaching this conclusion the Committee relied on a general principle that "there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business".[2] In a lecture delivered in 1959 Lord Devlin took issue, not with the specific recommendations of the *Report*, but with the general philosophical principle on which the Committee relied. His general conclusion was that it was impossible to accept this principle as a theoretical limit on the state's power to legislate against immorality. This led him to a consideration of what *was* the relationship between English criminal law and morality. In the succeeding five years in a number of occasional lectures Lord Devlin examined the relationship between morality and the law of tort, the law of contract, and the law of marriage. Moreover the controversy provoked by his original lecture on morals and the criminal law caused him to restate his position and to reply to various objections (especially those of Professor H. L. A. Hart) in other occasional lectures.

This book is a collection of those lectures. Some of them (for example, the original essay) already have been the subject of considerable debate. On the other hand the chapters on morals and the law of contract, morals and the law of marriage and morals and contemporary social reality have not been previously avail-

[23] Pp. 90 and 98. [24] Pp. 54-55.
[25] Pp. 97-98.

*Innis Christie, of the Faculty of Law, Queen's University, Kingston, Ontario.

[1] Report of the Committee on Homosexual Offences and Prostitution (1957), Cmd. 247, para. 62.
[2] *Ibid.*

able in a printed form. Such a collection poses a problem for a reviewer. Should he retrace the arguments aroused by Lord Devlin's original lecture or should he concentrate on the insights to be gleaned from Lord Devlin's observations on the law of tort, contract and marriage? Lord Devlin is a modern Don Quixote who tilts at a number of legal institutions in this small but provocative book, and it is quite impossible to analyse all his arguments within the scope of a short book review.

Consider, for example, his statement that "the great blemish on the law of tort is its failure to provide adequately for injury other than physical done maliciously or carelessly. This seems to me to be due simply to under-development".[3] In this re-publication Lord Devlin has added a footnote in which he expresses the opinion that *Hedley Byrne* v. *Heller*[4] "should go a long way towards removing . . . the great blemish on the law of tort".[5] Various objections can be made to this broad philosophical position. On a theoretical plane it might be argued that the morality to which Lord Devlin refers is a rather simple and unsophisticated morality because there must be numerous and important exceptions to any general principle that all intentional or negligent injury should be made good. Moreover there are practical, pragmatic objections to Lord Devlin's argument. As he himself recognizes, the law of tort is a clumsy instrument for dispensing moral justice. It regards the conduct of the defendant to determine the existence of liability but not to determine its extent. Given that the degree of moral guilt is irrelevant to the extent of liability there is some justification for fixing precise limits on the rules governing the existence of liability. It is significant that where the law imposes liability despite the absence of grave moral fault the legal liability is usually covered by insurance. This overwhelmingly important fact requires a rephrasing of the moral considerations.

Alternatively we might consider Lord Devlin's suggestion that the present divorce proceeding should be split into two separate processes so that not only the interests of the parties but also those of society may be adequately represented. Lord Devlin contemplates judicial separation proceedings in which a court would deal with the material obligations of the husband and wife. Thereafter either could re-marry but only after a second proceeding the object of which would be to determine whether the public interest would be injured by a second marriage. The proposal contemplates the state exercising a rather more active role in matrimonial causes than it has in the past and it is founded on a belief that society's interest is not in any way protected by the present process.

> If the grounds are widened, the process is easier to fake; if they are narrowed it is more difficult. That is really all that reform of the law

[3] P. 41. [4] [1964] A.C. 465. [5] P. 37.

> since 1957 has accomplished. The sacred principle is preserved. All who desire their freedom from the bond must pass out of the hall of judgement. At the main gateway there stand custodians and there is exhibited a schedule of conditions under which permission is granted to leave. But the back door is unlocked and unguarded. Every now and again someone is caught sneaking out and is at once hustled in again with cries of disapproval. What is the use of discussing amendments to the schedule so long as the back door is left unbolted? There is some value in it certainly. It affects the lot of those who have a distaste for using back doors, but that is all.[6]

This suggestion involves several speculative arguments. If society has an interest, and the right, to regulate the re-marriage of separated spouses there is considerable realism in Lord Devlin's proposal. Moreover its adoption would make it unnecessary for the state to claim, in express terms, the power to dissolve the preceding marriage and so we could avoid giving needless offence to those who deny the state such a power. It is conceivable that this procedure would discourage some ill-advised second marriages. However it is not clear how the court would obtain the information necessary for it to make an informed judgment, or what principles the court would apply in dealing with applications. These are critical considerations. It might be argued that the state should limit its concern to property rights and the custody of children leaving the institution of marriage to draw what strength it can from the attitudes of society including the religious beliefs of that society. On this basis all you need is the judicial separation and no prohibition on subsequent marriages. If the state has an independent interest in the maintenance of the institution of marriage, as Lord Devlin asserts and the Russian experiments may prove, it must be admitted that our present system does nothing to sustain it.

In terms of the broader academic debate, Lord Devlin gives his answers to John Stuart Mill and H. L. A. Hart in chapters six and seven of this book. Basically he accuses Professor Hart of so qualifying Mill's original proposition "that Professor Hart's argument might have been clearer if he had left Mill out of it".[7] Pressing on with his discussion of Professor Hart's argument he attacks the latter's distinction between "paternalism" and "moral legalism".

> These considerations drive one to the conclusion that a distinction between moral and physical paternalism is not what Professor Hart has in mind. But the alternative hypothesis seems even more unacceptable. If it is difficult to draw a line between moral and physical paternalism, it is impossible to draw one of any significance between moral paternalism and the enforcement of the moral law.[8]

An air of unreality pervades the debate between Professor Hart

[6] P. 75. [7] P. 133. [8] P. 136.

and Lord Devlin. Both suggest limitations on any attempt to embody morality in legal principle. It is doubtful whether either of the suggested limitations can withstand critical examination. Theoretically there can be no objection to the complete legal enforcement of morality. The practical problem is the possibility, indeed the probability, of error in our moral judgments. In such a situation we might shrink from ever exercising the coercive powers of society. In fact we will, and ought to, exercise those powers and the critical question is the extent to which society should refrain from exercising its power because of this possibility of error. It is doubtful whether this critical question can be resolved in terms of any general principle because the question becomes meaningful only in a concrete situation. The solution to such a practical problem will depend on our accumulated knowledge at any given time. Our answer to the question "What ought the law to do in respect of homosexuality (or prostitution or masochism or personal hygiene)?" may change as we attain great understanding of its nature, causes and effects. Moral judgments are difficult enough. There is little value in debating moral principles that are so vague that they conceal the extent to which our difficulties are due to sheer ignorance of scientifically observable facts.

D. J. MACDOUGALL*

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Droit civil, tome 2; premier volume: les obligations; deuxième volume: les biens. Par MM. GABRIEL MARTY et PIERRE RAYNAUD. Paris: Librairie Sirey. 1962 et 1965. Pp. 927 et 460. (Fr. 80 et 50)

Tout récemment, la littérature juridique de France s'est enrichie d'un élément de première valeur. Deux grands civilistes contemporains, M. Gabriel Marty, professeur à la Faculté de droit de Toulouse, et M. Pierre Raynaud, professeur à la Faculté de droit de Paris, viennent de publier un ouvrage de droit civil consacré aux biens. Cet ouvrage vient s'adjoindre à un précédent volume que les mêmes auteurs avaient consacré à l'étude des obligations. Ainsi se trouve complété le deuxième tome d'un traité de droit civil, magistral et très moderne à la fois, dont les auteurs ont entrepris la rédaction (le tome premier de l'oeuvre était dédié à une vue d'ensemble du droit civil et aux règles gouvernant les personnes).

La présente étude concernant les obligations et les biens est d'un intérêt capital pour les juristes du Canada, qu'ils soient d'ap-

*D. J. MacDougall, Visiting Fellow, Faculty of Law, University of British Columbia, Vancouver.

partenance civiliste ou disciples du *Common Law:* aucune partie du droit civil, en effet, ne peut mieux franchir les frontières de France, pour être utilisée avec profit dans d'autres systèmes de droit nationaux. Chacun est convaincu de ce que le droit des obligations, et en particulier des contrats, de ce que le droit des biens, spécialement les règles de la propriété, sont une véritable constante juridique internationale, un carrefour dans lequel se rencontrent, se rapprochent au maximum des systèmes de droit très divergents sur d'autres points.

Sous le vocable des obligations, le lecteur sera conduit avec une maitrise incomparable dans les deux domaines suivants: 1) *les sources des obligations*, où se juxtaposent la théorie générale des contrats, l'étude des actes unilatéraux, celle de la gestion d'affaires, de l'enrichissement sans cause, de la responsabilité civile. Sous cette dernière rubrique, le lecteur découvrira une étude de la responsabilité qui est, à elle seule, un véritable chef-d'oeuvre; en 271 pages, les auteurs ont su donner d'une matière aussi importante une vue étonnamment précise et documentée, à la fois sur le plan doctrinal et sur le plan pratique; 2) *l'obligation*, résultat des situations précitées, mécanisme extrêmement vivant, considéré tour à tour dans son exécution, ses garanties, ses modalités, sa cession et ses transformations, son extinction.

Quant à l'étude des biens, elle est réservée aux droits réels principaux, à l'exclusion des sûretés de type réel. Une théorie générale des droits réels est consacrée à l'étude de la possession, de la propriété, de l'indivision et de la copropriété, de l'usufruit et de la nue-propriété.

Partant d'une telle base, l'étude se poursuit à travers les règles propres aux droits réels immobiliers (structure, démembrements, acquisition et protection judiciaire de la propriété immobilière), puis à travers les techniques d'adaptation des droits réels immobiliers aux nécessités de notre époque en matière de copropriété, de voisinage, de servitudes en particulier.

La dernière partie de l'ouvrage est consacrée à l'adaptation des droits réels au domaine des meubles, domaine très différent du précédent et fort intéressant, bien entendu.

L'aperçu ci-dessus aura sans doute fait comprendre toute la valeur et l'originalité de l'étude d'un domaine aussi traditionnel, conduite dans un esprit aussi moderne. MM. Marty et Raynaud illustrent admirablement dans leur oeuvre une tendance des civilistes français de l'époque actuelle, dont les écrits savent allier un suffisant respect du classicisme juridique à un sens aigu des phénomènes propres à une société en pleine évolution économique et sociale.

Le raisonnement et l'exposé sont particulièrement intéressants et formateurs.

Un système de notes, placées au bas des pages, étaie la pensée juridique d'une armature scientifique incomparable par sa précision, sa richesse et son caractère parfaitement à jour: l'ouvrage de MM. Marty et Raynaud fait "repenser" au doctrinaire du droit toute la théorie des obligations et des droits réels, tout en donnant au praticien une source abondante de documentation parfaitement à jour.

PIERRE AZARD*

*Pierre Azard, Avocat à la Cour d'appel de Paris, ancien Doyen de la Faculté de droit civil de l'Université d'Ottawa, Professeur à la Faculté libre de droit et des sciences économiques de Paris.