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Book Reviews

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BOOK REVIEWS

GOVERNMENTAL LIABILITY. By H. Street. New York: Cambridge University Press, 1953. Pp. 221. $5.00.

The question of the individual's right to sue the state has in recent times been moved from the realm of academic debate to that of popular clamor and legislative action. In part, this change comes as a result of increased state activity in areas traditionally carried on by private interests, but more significantly perhaps, it is part and parcel of times in which the notion of anyone's immunity from liability, be it charitable institution, government, insane person or infant, sits uneasily with democratic principles. Attack upon these traditional immunities is occurring in such widely divergent fields as parent-child, husband-wife and charitable hospital-patient. In the realm of government, the enactment in the United States of the Federal Tort Claims Act of 1946[1] and in Great Britain of the Crown Proceedings Act of 1947[2] gives evidence of this change.[3] Professor Street now recalls for us in this book the fact that the problem is by no means unique to Anglo-American law, but is well-nigh universal, and so sets out to explain how the problem is met elsewhere with a view to making such recommendations and appraisals concerning the situation as seem to him most useful. Such is the subject of this fourth published study in the Cambridge Studies in International and Comparative Law.

Professor Street, as is the case with every writer who attempts to deal with a legal subject comparatively, had to resolve two questions at the outset: what jurisdictions would be covered by the study, and in what form would the results of the comparisons be presented? The first question was resolved by the author by concentrating primarily upon Great Britain, the British Commonwealth, the United States and France, with occasional reference to other countries such as Belgium, Germany and Italy. Some restrictions being necessary, this choice seems a sound one and enables Professor Street to contrast the modern Anglo-American system with the French system of administrative courts. The author resolved the second question by presenting his material under such traditional headings as Tort, Contract, Quasi-Contract, Expropriation, Remedies and Procedure. Thus there is emphasis upon the functional problem presented rather

1. 60 STAT. 842 (1946).
2. 10 & 11 GEO. 5, c. 44 (1947).
3. In the realm of municipal immunity, see the vigorous dissent of Terrell, J., in City of Miami v. Bethel, 65 So.2d 34, 38 (Fla. 1953).

than upon the competing theories involved in supporting or denying liability. Such an approach will make his study more acceptable to the "practical" scholar or lawyer, but may well leave the scholar, who sees in the problem a basic conflict of theories, with a feeling that the method left something to be desired.

The greater portion of the study is devoted to a careful and detailed consideration of governmental liability in tort and contract in Great Britain and the United States. This is done by means of an analysis of the Crown Proceedings Act in Great Britain and of the Federal Tort Claims Act and Tucker Act in the United States with useful references to the system in France. These topics will likely hold interest for the American practitioner. The student of comparative institutions will be interested in Professor Street's evaluation of the French system of administrative courts as compared with the Anglo-American primary use of the ordinary civil courts for actions against the state, and in his conclusion that there seems to be no need for separate administrative courts in the Anglo-American system. To this reviewer, the most challenging part of the book is that in which the author deals with procedural and substantive limitations on the liability of the state. Here such important questions are broached as that of whether the Executive or the Judiciary is more competent to assess the "public interest"[4] (p.177), for example, in compelling the production of official documents or in permitting action to be brought on matters of "policy." But it is precisely in this area that this reviewer finds that the author deals too sparingly with the competing theories which underlie the dilemma of immunity or accountability. The author admits that herein is raised "one of the fundamental problems of administrative law."[5] (p.178). Certainly in these days of widespread use by government of the investigative power, this is one of the areas in which the individual may need protection from the state. Hence, it is disappointing to find so little attention paid to this question.

Professor Street is presently Professor of Law in the University of Nottingham. Much of the research on this book was done in the United States during his tenure of a Commonwealth Fund Fellowship in 1947-8. The list of works cited and of decisions and statutes reviewed testify to the breadth and depth of his research. By way of minor comment, one wonders why the author omitted reference to the case of *United States v. Humphrey's Executor*[4] at page 117 in connection with his discussion of *Myers v. United States*.[5]

The book stands as a fine beginning in this little developed field

4. 295 U.S. 602, 55 Sup. Ct. 869, 79 L. Ed. 1611 (1935).
5. 272 U.S. 52, 47 Sup. Ct. 21, 71 L. Ed. 160 (1926).

of comparative study. It should interest the political scientists as well as the jurist. It points up the fact that "much reform is called for before the individual has adequate protection against the administration" (p.186) although the author does not go the full way in suggesting specific reforms. It puts into context for Americans the curious fact that the colonies, having separated themselves from Great Britain by a revolution grounded upon a list of expressed grievances against the state, yet received with the common law of England a doctrine of sovereign immunity which had been developed in feudalism and monarchy.

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ROMAN LAW AND COMMON LAW: A COMPARISON IN OUTLINE. By W. W. Buckland and Arnold D. McNair. Second Edition, Revised by F. H. Lawson. New York: Cambridge University Press, 1952. Pp. xii, 439. $7.00.

The first edition of this work was published in 1936. The present second edition was done after the great Buckland's death in 1946 by his co-author, Professor McNair, and by Professor Lawson who is known to American scholars for his comparative-legal masterpiece on negligence.[1] Roman law has not changed essentially since 1936 and so it is not amazing that this edition does not differ materially from its predecessor. It is too bad though that the authors could not avail themselves of Pharr's *Theodosian Code*[2] and of Jolowicz's recent second edition;[3] but even if they had, their work would probably not have undergone any telling alteration inasmuch as it deals with Roman law chiefly in a dogmatic fashion, describing the law rather than its history or philosophy. This is not to say that the learned authors have failed to give a historic sketch of many institutions, from the law of the Twelve Tables to Justinian. Yet the emphasis is on Justinian's compilation—on the Roman law as it has been known in the late and post-medieval world.

As such it is eminently useful. It acquaints the common-law reader with the basic principles of the developed Roman law—no more, no less. The book is not intended to be read by non-lawyers who want

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1. LAWSON, NEGLIGENCE IN THE CIVIL LAW (1950).
2. PHARR, THE THEODOSIAN CODE (1952). See Parker, Book Review, 6 VAND. L. REV. 965 (1953).
3. JOLOWICZ, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW (1952).

to study Roman law; some basic knowldege of our law is indispensible to an understanding of the authors' comparison with the law of Rome. The purpose of the book—to be useful to common lawyers—has inevitably induced the authors to adhere to a common-law arrangement and approach, although this system has not been carried through. Thus the discussion of agency, adequate in itself as far as it goes, is limited by the omission of a treatment of the *mandatum,* which comes close to the civil law of agency. In our law, one who acts for another is his agent whether he is authorized to represent the principal (disclosed principal) or not (undisclosed principal); every mandatee is also an agent, at least if the third party finds and "discloses" the underlying relation. Under the Roman *mandatum* there was no agency in the sense of representation; and under modern civil law the situation is the same if the principal cares to stay "undisclosed." But the Romans did have a rudimentary form of agency which the authors discuss[4] under "Agency," which chapter, however, excludes the mandate, which is discussed elsewhere in the chapter on consensual contracts. Now, a common lawyer would expect everything to be discussed together in the Agency chapter, whereas a civilian would treat, as his Roman counterpart did, the mandate amongst the consensual contracts and agency, such as the Roman did know it, in the chapter on quasi-contracts as which this institution was conceived. I realize of course that the goal of satisfying the systematic idiosyncrasies of both legal worlds in one book is something that can be only assymptotically approximated.

The work is basic in its character although it branches out here and there to delve into one of the many problems that have beset the ever argumentative world of civil and Roman lawyers. One of these topics—on contributory negligence—is particularly well worth reading. One should hope that it destroys the persistently reiterated myth that the Romans knew anything about comparative negligence, which as the revisor has made clear in his own erudite study,[5] has its origin in the natural-law application of the Austrian Civil Code of 1811 and not in any provision of the Roman law.

The co-author's Excursus on tort Duty of Care is as confusing as any discussion on this subject ever has been. It strikes me as singularly unnecessary in a book whose main author, the late Buckland, has so lucidly disposed of this matter.[6] The Excursus of course ac-

4. *I.e.,* the *institor* (business manager), see DIGEST 14. 3. 5. 1. Likewise was the shipowner *(exercitor)* liable for acts of his *magister navis* (captain). DIGEST 14. 1. 1. 9. The authors, however, mention only the *actio institoria* but not the *actio exercitoria.*

5. *Supra,* note 1.

6. BUCKLAND, SOME REFLECTIONS ON JURISPRUDENCE 110-15 (1945).

knowledges Buckland's aversion against the duty of care concept, but McNair's attempt at refutation is an unconvincing attempt to call a spade a shovel.

I would also disagree with the authors' hazy treatment of symbolic delivery. The classical Roman lawyers had invented the *traditio brevi manu* (delivery by mere declaration, to someone who has the thing already, *e.g.*, as a borrower). The Byzantine lawyers around Justinian's time added the *constitutum possessorium* (delivery by mere declaration of him who now holds the thing for someone else, *e.g.*, the owner says that he holds the thing now as a borrower). The latter was probably not in general use before the Glossators although it was adopted in the codes of both the Visigoths[7] and Burgundians.[8] Be this as it may, the symbolic tradition, such as delivery by surrendering the key or title document to a house, was unknown to Roman law except for gifts, where, strange as this may seem to us, the legal formalities were relaxed. From the authors' discussion at pages 112-14 one might get the impression that symbolic delivery was known not only to the civil but also to Roman law. If this is the authors' opinion then it is in contrast to the generally prevailing theory and would therefore have needed further explanation and elaboration.[9]

However, it would do no good to give the impression that I were set to detract from the great scholarly value of the book. It accomplishes, more than any other work, to make Roman law popular with Anglo-American lawyers.

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7. BREVIARIUM ALARICI 8. 5. 2.
8. LEX ROMANA BURGUNDIONUM 22. 5.
9. The article by Riccobono which the authors cite does not at all support the idea that the Romans recognized the *traditio ficta*.

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