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CURRENT LEGAL LITERATURE.[1]

1. Smith's Leading Cases. 4th ed. By Mr. Justice Willes and Mr. Keating, Q. C., M. P.,
2. Blackstone's Commentaries abridged. By Samuel Warren, Esq., Q. C., M. P.
3. Commentaries on the Common Law. By Herbert Broom, M. A., Reader in Common Law to the Inns of Court. London: Maxwell.

The titles above collocated, of works occupying several and distinct portions of the field of legal literature, and addressed to different classes of readers or students of our law, suggest to us important questions, which are now beginning somewhat vehemently to agitate and perplex the mind of the community. Is law susceptible, as any other science, of being exhibited in a definite shape to the inquirer's eye,—of being mapped out,—reduced within fixed rules and principles, and put forth as an intelligible whole? Is our Law, indeed, but a crude and ill-digested mass of subtleties and arbitrary *dicta*,—of statutory provisions, untranslatable by the vulgar,—of precedents which by seeming analogies invite but to destruction the unwary or unadvised? These are questions to which none who had

[1] From the Law Magazine and Law Review, for May, 1856, p. 139.

pondered on and considered them would willingly respond with a simple yea or nay. And there is another problem still behind, to the solution of which the thinking part of our population is beginning steadfastly to apply itself. Can the codification of our common or unwritten law successfully be attempted? If carried out, would it effectuate the ends which those who advocate codifications have in view? Questions such as these—of grave and serious import—suggest themselves to us on perusing the titles merely of the works prefixed to this article; by any one who examines, with even moderate assiduity, their contents, the importance and pertinency of the queries above submitted will most indubitably be recognized. In these Leading Cases, selected with a cautious and unerring judg ment,— in these commentaries upon the law, abridged and condensed within the very strictest limits,—we find compressed and methodized an amount of matter tested as to its accuracy by the most recent decisions, and elaborated with the most earnest care, which, we really think, might go far towards supplying the desideratum of a code to the full as good as that of our continental neighbors; or at all events might convince the most stubborn and sceptical of non-codifiers that the plan which has been proposed for their acceptance is feasible and sound. Without, however, committing ourselves at this moment to a decided opinion in reference to the point here mooted, we can very earnestly deprecate one objection, which we have occasionally heard put forward to the scheme of codifying our common law:—"Granted that this be done," it is said, "how many cases annually will call for judicial settlement not falling within the letter of the code?" To which the answer offered is, "So many that the code itself will prove to be of little use, perchance will become an incumbrance, instead of a help, to the administrators of justice." Now, admitting that reports will still be needed—not a whit less than at present—by that race of lawyers who shall witness the promulgation of a code; admitting, as we most unfeignedly do, that laws cannot be framed or organized applicable "to every possible transaction,"—every contingency or state of facts,—we yet think that the public has a right to demand that the leading rules, civil as well as criminal, which are to govern it, shall be presented in a clear,

simple, and intelligible form, so that he who will may read, learn, and understand them. That the object here indicated might be effected by a code, and never has been or will be effected by treatises of a technical character, or by critical disquisitions upon decided cases, we most surely and most cordially believe.

During that long interval, however, which will indubitably elapse ere the codification of our common law be realized, recourse must be had for information upon legal topics to treatises and commentaries upon law, to selections of cases, or to the reports themselves, of which the arrears, accumulated for centuries, have now to be digested by the lawyer. In this belief, and without further preamble, we shall proceed to direct the attention of our readers, very briefly, to the list of books noticeable *suprà*.

To the fourth edition of "J. W. Smith's Leading Cases,"[1] by Mr. Justice Willes and Mr. Keating, we have applied ourselves with very lively interest. In the first volume, we mark the omission, necessitated by recent changes, of four cases; viz., *Aslin* vs. *Parkin*, *Crogate's case* (for which has been substituted *Taylor* vs. *Cole*, 3 T. R. 292), *Robinson* vs. *Raley*, and *Trueman* vs. *Fenton*. In the second volume of the work before us, one case—*Bent* vs. *Baker*,—is omitted, and one—*Doe* d. *Didsbury* vs. *Thomas*—is added. To the report of *Godsall* vs. *Boldero* is subjoined that of *Dalby* vs. *The India and London Life Assurance Company* (15 C. B. 365); and in the Note appended to these cases various important additions and alterations have been made.

With reference to a book so very well known and thoroughly appreciated as this, laudatory remarks would be superfluous. We shall, however, be of some service to such of our readers as are conversant with the preceding edition of it, by suggesting a perusal of

[1] This valuable work has been *five times* reprinted in this country by the enterprising house of T. & J. W. Johnson, Law Booksellers of this city. Its value has been much enhanced to the American lawyer, by American notes more elaborate and extended than those of the English annotators. The American editors of four editions, were Judge Hare and the late lamented Horace Binney Wallace; and of the fifth edition, published no longer ago than last winter, Judge Hare and John William Wallace. These volumes, so well known to students and practitioners, need no commendation at our hands, but we cannot refrain from adding that we believe they exhibit "with fulness and correctness, the actual state of the law as displayed in the adjudged cases of both countries upon the points discussed."—*Eds. A. L. Reg.*

the following passages:—The observations as to the science and system of pleading since the passing of the Common Law Procedure Act, 1852; and as to New Assignments, and the consequences which are now to be apprehended from a mistake in the form of action (vol. I. pp. 102—105, and 358); the rule of law applicable where the plaintiff has himself contributed to an injury caused mainly, or in part, by the defendant's negligence (*id.* p. 220); and the lucid statement of the law exhibited under the form of nine distinct propositions, touching "the exoneration, satisfaction, or discharge of debts or demands not under seal,"—a subject very complicated and difficult.—(*Id.* p. 253.)

In the second volume of this work we observe, that in commenting on *Hadley* vs. *Baxendale* (9 Exch. 341,) the learned editors give as their opinion that the rule there laid down "is one which it would be in many cases difficult to apply in its precise terms, and it was not perhaps intended to lay down that the amount of damages should depend on the *mere* knowledge or ignorance of the defendant of the surrounding circumstances, apart from contract, express or implied, to be liable for the extraordinary amount of damages to which those circumstances might give rise; and, reading the expressions in the judgment *secundum subjectam materiam*, they appear capable of this construction."

Of Mr. Warren's work[1] we have already recorded a favorable opinion in London *Law Magazine* for August 1855, p. 8; it is a masterly abridgment of Blackstone's Commentaries, and much more than an abridgement, inasmuch as the changes in our law are here traced out down to the most recent period, and explained with much care, clearness, and conciseness. "It is considered," remarks the author, "that the proper method of preparing for the public such a work as the present, is to conceive, if possible, how Sir W. Blackstone would now look at the edifice of our laws and constitution after a century's legislation, giving him credit for being himself imbued with the spirit of an age entitled to be regarded as one of progress and enlightenment. It has been endeavored to do this in the present volume, which may be regarded as a synopsis of our

[1] This book has not been, we believe, re-produced in this country.—*Eds. A. L. Reg.*

laws and constitution as they stand in the year 1855."—(Introd. p. xlix.) The object here set forth has, we think, been zealously kept in view and faithfully carried out by the learned compiler of these Abridged Commentaries. They should be put into the hands of the student of our law as a first book, wherein, if well advised, he will read with special care and attention those chapters which treat of our Constitution and forms of Government; of the British Parliament; of the doctrine of the Hereditary Right to the British Throne; of the Succession of our Sovereigns, and of the Royal Prerogative; in connection with which latter subject the excellent treatise of Mr. Allen should also be consulted. As introductory to Mercantile Law and the Law of Contracts, the fifty-second and fifty-third chapters of Mr. Warren's volume will prove very serviceable to the student, who of course cannot reasonably look for *many* details of decided cases illustrative of subjects so vast and comprehensive within the narrow limits here assigned to them. He will, however, find in those portions of this Abridgment which are devoted to a consideration of the leading departments of our Common Law, a few *well-selected* cases cited to support the proposition stated in the text, which should be diligently perused and studied in the Reports whence they have been culled. This work, we repeat then, cannot fail to be of much value to him who, being as yet ignorant of the nature of our legal institutions, and of the law which governs the community, would acquire some definite ideas respecting them, and would lay down for himself a solid foundation of knowledge upon which afterwards to build.

The plan of the work placed third on our list is this:[1]—it treats, in the first book, of Legal Rights and Remedies; in the second book, of Contracts; in the third book, of Torts; in the fourth and last book, of Criminal Law. The plan of the first book gives the author an opportunity of describing the origin, history, and jurisdic-

[1] This work has also been reprinted in this country, by the Messrs. Johnson, and has been given to the profession in their Law Library, in numbers 271, 272, &c., for the months of July, August, September, &c., 1856. The established reputation of Mr. Broom, so well and favorably known to his professional brethren by his Legal Maxims, is a sure guaranty that this book is an accession to its own complicated and extended branch of legal literature.—*Eds. A. L. Reg.*

tion of the superior and inferior common law courts, the nature of the rights enforceable therein, and the mode of procedure prescribed by the recent statutes of 1852 and 1854, and the new rules relating to Pleading and to Practice. In one of the chapters of this book, which is entitled "Of an action at law," after referring to the general rules of pleading, the author remarks as follows:—"In the Schedule (B) to the first common law procedure act are contained various forms of declarations adapted to circumstances of ordinary occurrence. Whilst, however, it is enacted that these statutory precedents shall be sufficient, it is also provided, that 'the like forms may be used, with such modifications as may be necessary to meet the facts of the case,' and that nothing in the Act contained 'shall render it erroneous or irregular to depart from the letter of such forms so long as the substance is expressed without prolixity'. Undoubtedly, therefore, *some* latitude is in every case to be allowed in framing the declaration; and this further appears from sect. 50, which enacts, that where issue is joined on demurrer, 'the court shall proceed and give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, omission, defect in or lack of form; and no judgment shall be arrested, stayed or reversed for any such imperfection, omission, defect in or lack of form.' This provision, however, will not justify the pleader in indulging in inaccurate or verbose language. He must still take heed that he neither plead that which is mere matter of evidence, nor that, which the court takes notice *ex officio*, nor that which would come more properly from the other side; nor should he allege circumstances which the law presumes, or which are neccesary implied; nor effect an excessive particularity, on the one hand, which is not essential to his case; nor allow, on the other hand, a statement to be made so vague and general in its terms as to give to his adversary information which is not sufficiently specific." Other faults of pleading, such as "departure" and "argumentativeness," are also briefly explained (p. 188).

With regard to the condition of pleading at the present day, some difference of opinion exists. We must of course assume that the learned pleaders—following all the rules and guarding against

all the known faults of their art—can, if they are so minded, present their points of attack and defence comprehensibly, so that logical exactitude being duly observed, but the traps of technicality being cast aside, the advantage of expedition, cheapness, and certainty in the procedings, may now at last be happily achieved. But somehow, we fancy that of late we have been hearing learned judges at *Nisi Prius* not unfrequently protest against certain specimens of pleading which have come before them; and we do imagine it has been said, on competent authority, that while, on the one hand, lengthy and antiquated forms are sometimes needlessly employed, on the other, a novel and unscientific laxity in language is often, by the present generation of pleaders, indulged in with impunity.

In the second book of these Commentaries, devoted to the Law of Contracts, we would draw attention more particularly to the chapter on the "Measure of Damages"—a subject which, although it has been in America very amply discussed by Mr. Sedgwick, has not, hitherto, received adequate notice from legal authors in our country. We lack space, however, for extracts from the chapter in question, and shall content ourselves with citing the author's concluding remarks upon the Law of Contracts.

"In taking leave of the subject of contracts, some brief concluding observations may not be deemed superfluous. The importance of a knowledge of the higher classes of contracts, and of the qualities which attach to judgments of our Courts of Record, or to instruments under seal, will, I apprehend, readily be conceded. And the necessity of having an acquaintance with the characteristics of simple contracts (to a consideration of which the foregoing pages have principally been devoted) will be at least equally obvious, when we reflect that mercantile engagements, almost without exception, belong to this, the lowest class of contracts; that transactions such as these, ranging from the simplest to the most elaborate and important, depend often upon nothing more than the hastily written and peculiarly worded correspondence of trading firms, separated by either of the great oceans from each other: bearing this in mind, we shall perforce admit, that not merely to the professed lawyer, but to the layman, some considerable familiarity with the elements—with the principles—of our Law Merchant, is essential. In the

ordinary affairs of life, also, in the constantly recurring cycle of daily or familiar events, as well as the most momentous as the most trivial compacts known to law, are authenticated neither by seal nor by record. The purchase of necessaries in a shop, and the solemn contract of marriage, which is founded on the consent of the contracting parties—evidenced *per verba de præsenti*—seem to be, in strictness, alike referable to this class of simple contracts.

"In proportion, however, to its importance, is the difficulty of acquiring the knowledge here alluded to. Not only are causes of action *ex contractu* almost infinitely varied, but the matters of defence pleadable in such actions are equally diversified; whilst statutory provisions, relative to the one and to the other, are extremely numerous. Hence the learning applicable to contracts can but be acquired gradually—by experience and practice. In connection with the lowest, as with the best authenticated contract—with that which is oral as with that which is founded on record or on Act of Parliament (which latter has been designated as the highest kind of specialty)—points of perplexity and doubt will suggest themselves to the inquirer. The great principles, however, which support this entire subject, are, at all events, surely traced and ascertained; and the better they are understood, illustrated by a comparison of decided cases, tested and examined, the more will they be found consistent with common sense—with sound policy—with the dictates of wisdom and of justice."

From that part of the work before us which is dedicated to the subject of "Torts," we transcribe some passages, which set forth clearly the classification adopted by the author. It is characterized by originality and simplicity, and if correct, must, we conceive, be worthy of perusal. We present it to our readers, with some necessary abbreviations, and with the omission of the references to cases cited.

"A tort is described in statutory language as 'a wrong, independent of contract.' It involves the idea, if not of some infraction of law, at all events of some infringement or withholding of a legal right—or some violation of a legal duty.

"An action of *tort* will lie for a direct injury to the person or property, for the wrongful taking or conversion of goods, for conse-

quential damage: the right of action for a tort being founded—1. On the invasion of some legal right: or 2. On the violation of some duty towards the public productive of damage to the plaintiff; or 3. On the infraction of some private duty or obligation productive likewise of damage to the complainant.

"The importance of having a correct perception of the nature of a right of action founded upon tort, or wrong independent of contract, will justify a brief examination of each of the three classes of cases above specified.

"First, then, as to the class of cases in which complaint is made of the invasion of some legal right (that is, of some legal right actually in the possession of the complainant, and to the enjoyment whereof he is exclusively entitled)—*ex. gr.* where wrong is done to the person or reputation—where goods are tortiously converted, or a direct injury is done to property. Here, a plaintiff, in order to entitle himself to damages, *may* be called upon to show two things—the existence of the right alleged, and its violation.

"Now, the existence of the right alleged will have to be established by reference to legal principles. It sometimes admits of easy proof, as in the case of an action of trespass for taking away goods," &c. * * * * *

"But, further, the existence of a right may have to be proved by an appeal to elementary principles, and by deductions ingeniously drawn from them, by a discussion of general doctrines of public policy, or by embarrassing inquiries touching the intention of the Legislature. In support of this remark, I would refer to the great case of *Ashby* v. *White*, formerly abstracted—to the equally important judgment in *Semayne's case*, illustrating the fundamental maxim of our law, that 'every man's house is his castle,'—to the opinions of the judges, and the decision of the House of Lords, in *Jeffreys* v. *Boosey*, where the long vexed question as to the existence of copyright at common law was re-agitated, and an opinion in the negative regarding it was expressed—to all those numerous cases (some of which will have to be hereafter noticed) wherein the existence of a right has been found to depend upon the interpretation of the statute law, and the unravelling of its perplexities.

"In the class of cases now under consideration, it will be noticed that proof of actual damage has not been specified as requisite to entitle a complainant to recover. Many instances confirmatory of this remark—that an action may lie for the invasion of a right without proof of special damage—were cited in a former chapter; where, *inter alia*, reference was made to various decisions which establish that the fraudulent use and appropriation of a trade-mark is, *per se*, actionable. To what was then said upon this part of the subject, I would add, that, in close analogy to the principle just stated, it has been decided in the United States, that a coach-proprietor running carriages between a railway-station and a town has no right falsely to hold himself out as being in the employment or under the patronage of a particular hotel-keeper in such town, by affixing to his carriages, &c., the name of the hotel, this being done to the detriment of some other party lawfully entitled to the privilege in question. And, in the case just cited, it was further held, that the representation thus falsely made for the purpose of enticing passengers from the plaintiff's carriages, would be a fraud on him, and a violation of his rights, for which an action would lie *without proof of actual or specific damage.*

"Secondly. An action *ex delicto* may be founded on the violation of some public duty (*i. e.* of some duty towards the public,) and consequent damage to the complainant. Now, here three different matters must be proved in order to entitle the plaintiff to a verdict: viz., the existence of the alleged duty, its breach, and damage; the first of which items, viz., the existence of the public duty, must be shown, either by bringing the facts of the case within the reach and control of some acknowledged doctrine of the common law, or by showing that they are within the words, spirit, or purview of an Act of Parliament.

"Let us, under the term 'public duty,' include the duty of refraining from doing, as well as that of doing, acts of a particular kind or tendency, and we may then lay down the proposition above stated, thus, in a somewhat expanded form—Wherever a duty has to be observed towards the public by an individual, and another is specially injured in consequence of the non-observance or non-dis-

charge of such duty, or through misfeasance or malfeasance in its discharge, an action will lie at suit of the latter party against the former.

"As simple illustrations of the practical working of this proposition, I may at once refer to the cases below cited, which establish, that wherever an instrument, dangerous in its existing state, and calculated to inflict damage on those who may come in contact with it, is so placed as to be likely to cause injury, the person thus placing it is liable, if injury ensues, to the party injured.

"Let us pause here for a moment to notice one characteristic of the class of cases now under review. The breach of a public duty causing damage to an individual, in truth, combines two tortious ingredients, which are, according to circumstances, more or less clearly distinguishable from each other—the wrong done to the public, and the wrong done to the individual. That which is, in strictness, correlative to a public duty, is a right enforceable at suit of the public. But, then, the general rule of law is well settled, that individuals cannot enforce a public right, or redress a public injury, by suits in their own names. Where they suffer wrong or sustain damage *in common with other members of the community*, no personal right of action thence accrues. The private grievance is merged in that of the public, and the remedy (if any exists) will be by public prosecution, in order that the rights of the public may thus be vindicated. Even where one person sustains an injury in common with the public, and, from the circumstances in which he happens to be placed, suffers more frequently or more severely than others, he will not, on that account, have, as of course, a separate right of action. It is only where he suffers some special damage, differing in kind from that which is common to others, that a personal remedy accrues to him."

After this disquisition, the commentator proceeds to analyze and discuss some important modern cases on the subject before him; for instance, *Ellis* v. *The Sheffield Gas Consumers Company*, (2 E. & B. 767,) *Brown* v. *Mallett*, (5 C. B. 599,) *Couling* v. *Coxe*, (6 C.B. 703,) and thus proceeds:

"We may now, I think, conclude that a statutory duty towards

the public may consist either in doing or in abstaining from doing some particular act—that 'if the law casts any duty upon a person, which he refuses or fails to perform, he is answerable in damages to those whom his refusal or failure injures,'—that the non-performance of a legal obligation of this kind will not be actionable without special damage; and further, that 'where any law requires one to do any act for the benefit of another, or to forbear the doing of that which may be to the injury of another, though no action be given in express terms by the law for the omission or commission, the general rule of law in all such cases is, that the party so injured shall have an action:' this last proposition being however subject to an important qualification, viz. 'that an action will not lie for the infringement of a right created by statute, where another specific remedy for infringement is provided by the same statute,' or, as remarked in *Doe* d. *Bishop of Rochester* v. *Bridges*, 'where an Act creates an obligation, and enforces the performance in a specified manner,' it holds generally true 'that performance cannot be enforced in any other manner.'

"Thirdly, a right of action *ex delicto* may be founded on the infraction of some private compact, or of some private duty or obligation, and consequential damage to the complainant.

"Any duty, moreover, must in strictness be deemed 'private,' which is to be observed, not towards the community at large, but in relation to one or more of its members. The class of private duties is consequently extremely large—it comprehends duties flowing from contract express or implied, from bailment, from the relation of master and servant, or of landlord and tenant, from the occupancy of land, &c.: as throwing some light upon the nature of such duties, the authorities *infra* may be consulted.

"Now, in any case referable to this class, the plaintiff must, in order to sustain his action, be able to prove some kind of contract or obligation out of which the specific duty, with a breach whereof the defendant is charged, will flow in legal contemplation, or he must adduce evidence of facts establishing such a relation between the defendant and himself, that such specific duty will thence re-

sult. Further than this, he must, of course, show a breach of the duty thus raised, and consequential damage to himself.

"A private as well as a public duty may exist by virtue of the statute or of the common law. Thus, it has been held that case will lie against a railway company for acts of wrongful omission of their statutory duty in regard to the transfer of shares, and for wrongfully declaring the same forfeited and selling them. 'The declaration,' said Lord Campbell, C. J., 'shows both *injuria* and *damnum*. The defendants have been guilty of a wrongful act of omission in not registering the plaintiff's name in their books, and also of a wrongful act of commission in declaring the shares to be forfeited, and in confirming that forfeiture. It is said that the plaintiff could sustain no injury; but he has been deprived of the ordinary privileges of shareholders, and contingently of any profits that might have arisen upon the shares. Those are clearly injuries, for which he has a right to bring an action.'

"Again, a private duty may exist at common law, for breach whereof, coupled with consequential damage, an action will be sustainable."

Several important classes of cases are then brought under notice as belonging to the last of the divisions above particularized; viz., where a tort flows from the breach of the contract,—where there is a breach of a duty undertaken for the service of another—where a right of action is founded on fraud, deceit, or misrepresentation, whence ensues consequential damage; and, finally, where the right of action is founded on the malicious doing of an act also productive of consequential damage.

"A general survey of the various causes of action founded upon tort—a minute examination of precedents, of declarations, and other pleadings available in such cases, will show that in most of them no difficulty can be felt in at once assigning to its proper class the right of action *ex delicto*, originating out of given facts."

After a few additional remarks upon the actions of trover, libel, and those founded on injuries done to the wife, child, and servant, with reference to the classification of torts, previously expounded, which we need not quote, the author thus concludes his chapter: