BOOK REVIEWS.

THE FOUNDATIONS OF LEGAL LIABILITY. A Presentation of the Theory and Development of the Common Law, by Thomas Atkins Street, A.M., LL.B. In three volumes. Edward Thompson Company, Northport, R. I., 1906. Pp. xxix. 500; xviii, 559; xi, 572.

It is some time since there has appeared in the field of legal literature so ambitious a production as these volumes on the Foundations of Legal Liability by Mr. Street. With the professed purpose of presenting a synthesis of the fundamental principles of the Common Law in the several fields of Tort, Contract and Actions, and indicating their evolution along scientific and historical lines, the magnitude of the work might well appall any author of legal treatises. Certainly the effort challenges our attention and calls for careful consideration, in spite of the fact that one is naturally led to expect defects in so comprehensive a work produced by one man within the time apparently given these volumes.

The subject matter is presented in three volumes, the first being devoted to Torts, the second to Contracts, and the third to Actions. This division is obvious, but it may be said on the threshold that the author's arrangement of his subject matter, though perhaps open to criticism in some respects, is in general very satisfactory. His classification is in frequent instances novel, and based on a theory of the law which renders the division of the subject a means of effecting clearness of thought and presenting the rules of law in a helpful light by showing their interrelation in a new perspective.

We feel also that special mention should be made of Mr. Street's style of expression. He has treated his subject in terse, clear English, an element of no small merit in legal treatises and one rather infrequently met with. We have no hesitation in commending his work in this regard most highly, and whatever may be our views as to the essential merit of his production as an exposition of the law, lawyers will no doubt find it, as a treatise of this kind, unusually readable and interesting.

During the last thirty years an enormous amount of attention has been devoted to the historical development and scientific analysis of the foundation of the law. Mr. Street in his preface frankly admits his indebtedness to the many articles contained in various legal publications embodying

the results of these researches. He has in many places set out in his usual clear admirable English. a résumé of the results thus obtained. In other instances the views of these writers appear indirectly in their influence upon his opinions. On the whole Mr. Street has done a great service in bringing in concise form, though not always adequately or accurately, this information before the profession to whom these articles, though their existence is known, are practically inaccessible.

The criticisms which we find it necessary to make upon this production result largely from its ambitious scope. A book that purports to investigate generally the foundations of the Common Law and present the rules thereof, as at present existing, describing at the same time their evolution, must be considered on a very different basis from a book of more modest pretensions. Accuracy in details, thoroughness in treatment and philosophical depth and grasp in analysis, are naturally to be expected. The book fails, we believe, to reach the high standard which its preface leads us to expect. There is, as a rule, little effort to pursue the rules of law to their philosophical source. Perhaps the author has not had this purpose in mind and the omission to present his principles in this aspect should be considered a criticism rather upon his conception of the scope of his work than upon the completeness with which he attains his purpose. Still, in a work on the Foundations of Legal Liability, philosophical considerations as to the ultimate reasons for the various rules of law have not only a proper but an indispensable place if the subject is to be treated in the most illuminating manner.

It is however in respect to his exposition of modern rules of law and his theories as to the historical development of the law that Mr. Street's sins of commission appear most clearly.

It would be, of course, impossible to take up Mr. Street's work chapter by chapter, and to point out what in the reviewer's opinion is good, what is novel, and what is erroneous or inaccurate. Our purpose is merely to indicate the general quality of the work which he has done, and how closely he has approached to, how widely departed from, that standard of finality and excellence which he has in his preface claimed for his production. For this purpose it is necessary to indicate what appear to the reviewer certain inaccuracies of statement and falsities of view-point.

An illustration of the difference between Mr. Street's somewhat superficial method and imperfect comprehension of historical development and the accuracy and thoroughness of an original investigator can be found in a comparison

between his discussion of the subject of *trespass ab initio* and the admirable exposition of the same subject by Prof. Ames, 11 *Harvard Law Review*, pages 287 to 289.

Mr. Street's position that tort liability is primarily based on harm to the plaintiff, while it reflects the attitude of the modern law which allows no new right of action unless actual temporal detriment be shown, none the less ignores the historical development of the law and leaves without adequate explanation that large group of torts, direct descendants of the originally quasi if not wholly criminal action of trespass, which preserve the punitive character of their parent and require no proof of appreciable temporal detriment.

Liability for the violent touching of the person or the mere walking upon the land of another appears wholly abnormal if its origin be overlooked.

Again, while Mr. Street disagrees with the prevailing view that tort is a breach of a law-imposed duty and repudiates Mr. Justice Holmes' definition, which he condenses (p. xxvii) as follows: "A tort is a wrong which consists in the infliction of temporal damage by a responsible person under circumstances of such nature that the person inflicting the damage knows or in common experience ought to know, that his conduct is likely to result in harm," it is hard to see how the investigation is advanced any closer to final solution by considering tort as a legal delinquency. It is difficult to the average mind to conceive of an act being wrongful in the absence of a duty to refrain from it. While Mr. Justice Holmes' definition is open perhaps to the criticism Mr. Street makes that at best it is only partially applicable, on close analysis it will be seen to adequately cover all the field of living modern tort liability, and to supply a safe and just guide for its future growth. Its inadequacy, if inadequate it be, is in this, that it, like Mr. Street himself, takes no account of those liabilities which are survivals of the punitive action of trespass and of those actions in which the plaintiff's title is alone important, which were drawn into tort when the earlier possessory actions fell into desuetude and which still preserve their essentially proprietary character.

But what Mr. Justice Holmes' definition possesses to the full—appreciation of social duty as the standard of legal conduct—Mr. Street entirely overlooks. Thus he appears to miss the dominant keynote of modern tort liability. This is the more curious since he has clearly stated (Chap. VI) the steps by which the early stringent duty of answering for all the direct consequences of any voluntary act was modified by the growth of the justification that the technical trespasser intended no harm and had taken every care

to avoid it. He points out (p. 189 et seq.) for the first time, so far as the reviewer knows, that this excuse became fully recognized just about the time when the action on the case for injuries done in the performance of one's own projects indirectly and without violence, was coming into prominence and that the same principles were naturally applied to them.

Once depart from the stringent early measure of trespass liability, and it is evident that one of two things becomes inevitable, either that no one shall be held a wrong-doer unless he intended to work injury, nor responsible beyond the harm intended (a liability adequately punishing moral and ethical delinquencies but affording no sufficient protection to the innocent sufferer from unintended harm), or that there shall be set up some purely external standard of legally permissible behavior such as that actually adopted—the conduct of the normal average good citizen who considers not only his own interests but his neighbor's safety.

In negligence, the typical action on the facts of the particular case, there is normally presented as a preliminary question the wrongfulness or innocence of the particular act or omission. This question, though by no means always absent, is not normally important in other tort actions, in many of which as in trespass to person or property, or in libel, the wrongfulness of the act if committed, is, in the absence of justification, undoubted. Mr. Street adopts, page 90, the theory taken from Beven on Negligence (p. 106) which he states to be that, "reasonable foresight of harm supplies the criterion for determining the preliminary question as to whether negligence exists in a particular case, but that negligence once established, the extent of the liability is determined by the rule of liability which applies in tort." He fails however, to perceive that this distinction is based upon this, that while social duty is the test of permissible legal conduct, legal delinquency being shown, the policy of the law, which to protect others considers wrongful acts probably injurious to them, requires, in order that the protection shall be adequate, that the liability shall extend to all the harm actually resulting therefrom. Mr. Street unfortunately fails to perceive that this distinction is based on conceptions inherent in the very nature of tort (or law imposed) liability and allows himself to be misled by the apparent similarity between the test for ascertaining negligence and the admitted test for ascertaining the extent of the liability for breach of contract. He jumps to the conclusion that foresight is the test for ascertaining negligence, while hindsight ascertains the measure of damages for the reason that negligence is neither wholly tort nor altogether contract, but something

half way between the two, having in one aspect affinity to tort, in the other to contract. He rejects as arbitrary the time honored distinction between tort and contract. Legal liability he thinks should be properly divided into delict, active misfeasance, and omission of duty, passive non-feasance. Only delicts are true torts. Contracts he appears to consider only a special type of omission of duty. Negligence, he says, is on the equatorial belt, sometimes delictual and tortious, and sometimes omissive and so approaching contract.

He admits that Courts however much they differ as to the proper method of damages in actions for negligence, have never attempted to distinguish between misfeasance and non-feasance, or to apply to the one a delictual, to the other a contractual standard of liability. But there being in all negligent cases two questions always presented, first whether a particular act or omission was negligent; second for how much of the ensuing injuries should the wrong doer answer, his theory is that the Courts, dimly feeling, rather than clearly perceiving the dual nature of negligence, have as a sort of happy compromise split the difference and applied to the first a test appropriate to contract, to the second a test appropriate to delictual wrong or tort, and thus whether the particular alleged wrong was active or passive, delict or omission of duty. We are forced to agree with Mr. Street that this is indeed a marvel.

Mr. Street's reasoning appears to be based on a fundamental error. The distinction between tort and contract is as fundamental as any in the common law. Nor is that distinction based upon the fact that the misconduct is usually active in the one, and mere omission of duty in the other. A breach of contract may consist in doing a thing agreed not to be done just as a tort may be a failure to take some required precaution. That a breach of contract is by active misconduct no more enlarges the measure of damages than the omissive nature of a tort restricts it. The distinction lies deeper than the mere character of the breach. Tort duty is imposed by law for the protection of others irrespective of the consent of him on whom it is laid. In contract, on the other hand, both the obligation and the right are created by the consent of the parties expressed by word or act and are limited by it. The different nature of the duty has inevitably led to the different method of damages. Courts have naturally refused to impose any greater obligation upon a party to the contract, either as to performance or upon breach, than he could realize that he was assuming, nor do they give to the other party a benefit which he had not intended to acquire.

While the test for ascertaining the measure of damages in contracts and the negligence of a particular act or omission, are both based on the foresight of the average man, and both differ from the measure of damages for an admitted tort, the difference in the one case is due to the difference between tort liability and the contractual obligation, while in the other it is due to the historical development of the law of tort, whereby a breach of social duty became the test of legal delinquency in lieu of voluntary violent action.

Mr. Street's classification of negligence into delict and omission of duty, while not novel might have been developed in a way to be of real value. Unfortunately, however, he uses it only to draw a false analogy between contract and omissive negligence.

While engaged in attempting to demonstrate an untenable proposition he slights the real problem presented. There is an essential difference between non-feasance and misfeasance. Liability for a failure to take active steps to protect others is by no means so extensive as liability for harmful action. Lord Esher, who in *Heaven* v. *Pender*, 11 Q. B. D., 503, had advanced as the test for both the foreseeable probability of injury, if the act were done or the precaution omitted, was forced in *Le Lievre* v. *Gould* 1893, 1 Q. B., 499., to admit that this test was fully applicable only to active misconduct.

What is the fundamental difference between the two which leads to this result? Is there any basic principle upon which the law imposes positive duties and if so, what is it? Mr. Street's treatment of these problems (Chap. XIII) throws little or no new light on these most difficult questions.

The grouping of the subject matter under the head of what Mr. Street has designated the secondary trespass formation is valuable in its suggestions, though there is a curious intermingling of cases illustrating principles probably derived as he suggests from the primitive duty of a landowner to confine at his peril his movable chattels within the limits of his premises with cases which have always heretofore been considered as negligent breaches of social decorum.

Mr. Street's view that a landowner is bound to keep his property in safe condition and that his resulting absolute liability is only restricted by the counter principle of the voluntary assumption of risk by those who use it, is neither accurate nor helpful. While it may account for the difference in liability to a trespasser who of course knows he must look out for himself and a licensee who may expect not to be led into concealed danger, it affords no adequate explanation for the distinction existing in England at least, to which by the way Mr. Street does not allude, between the landowner's

duties to one invited on the owner's business and to the social guest or the licensee permitted to come on the land for some purpose of his own.

Again his treatment of contributory negligence is especially superficial. He accepts without question or investigation the view that both the defense itself and the doctrine of last clear chance, which he appears to think of universal acceptance, are questions of proximate legal causation. No mention is made of the position taken by many courts that this defense is based on the principle that both plaintiff and defendant are joint wrong doers between whom no contribution is allowed. This theory is upheld with differing results in Pennsylvania where the last clear chance doctrine has been repudiated and in New Hampshire where it has been fully accepted. Nor does he attempt to explain why it is that the plaintiff's negligent act is a defense because it is an intervening agent breaking the chain of causation, while the same act done by the third party is but a concurrent cause in no way relieving the defendant from liability; though at p. 130 he cites two cases (*Hogle* v. *R. R.* and *Wiley* v. *R. R.*), showing this to be so.

Evidently, then, it is not to the operation of the normal rules of proximate cause that this defense is to be referred but to some peculiar modification of them applicable only between parties to the actions. What principle or policy of law requires this modification, or how a defense can be based upon a principle which must be entirely remodeled to support it, Mr. Street does not attempt to explain.

Nor is Mr. Street's treatment of the subject of breach of statutory duty any more satisfactory. His criticism of *Couch* v. *Steel* p. 174 that "nowadays this provision [of a penalty for breach] would be accepted as showing that the legislature did not intend to give an action for damages and the action for the penalty would be held the sole remedy," is directly contrary to *Grove* v. *Winborne*, 2 Q. B. (1898) 402. He also states p. 174 that it is not open to serious doubt that he has "stated the true doctrine" in drawing a distinction between acts prohibited by statute which, if done, are he believes done at the actor's peril no matter how improbable the resulting injury might appear, and positive duties imposed by statute where only such injury is actionable as the legislature has intended to prevent. Notwithstanding Mr. Street's confident assertion it is more than doubtful whether any such distinction exists. In all the cases given by him the injury caused by the prohibited misconduct was of the sort which the statute was designed to prevent though its grave extent or the precise chain of events by which it was caused

was perhaps exceptional and unforeseeable. Would Mr. Street claim that if an act prohibited the sale of oleomargarine the vendor would be liable for injuries received by one falling on a buttered slide prepared therewith by an infant vendee?

Mr. Street in his preface, page 8, says:

"While the treatment of conversion will appear to be rather novel, it is believed that the subject is treated upon right lines. Here we have, somewhat happily it seems, hit upon the term 'disseisin of chattels' as expressive of the fundamental idea in this tort. The reader will no doubt be agreeably surprised to find how readily the law of conversion assumes consistency when viewed from the standpoint indicated in this expression."

While the use of the term is novel, the fundamental idea which he states as expressed therein, is not. In his treatment of the subject of conversion he merely states, in his usual clear and excellent style, the legal conclusions to which Prof. Ames' admirable collection of cases on Disseisin and Conversion in his cases on Torts, second edition vol. 1, pages 264 to 385, logically and inexorably lead.

The subject of Defamation is on the whole well treated though one is inclined to doubt, in the absence of some cited authority, the broad statement "that speaking the truth is not a ground of legal liability at all" and to prefer the established view that truth is a justification peculiar to defamation as showing that the plaintiff does not deserve a reputation free from the imputation in question. It is possible to conceive of cases where to disclose facts true and perhaps even generally creditable may manifestly tend to bring about immediate injury if spoken for the purpose of causing the very harm sustained, and while slander would probably not lie it is by no means certain that the injured party could not obtain redress by an action on the case. Nor will all persons agree with him in thinking that it is a blot on the Common Law that all derogatory spoken words should not be actionable. While there may be doubts as to the logic, the average practitioner will agree as to the practical utility, of the restrictive distinction between slander and libel.

The chapters on Deceit are perhaps the best in the book. His position that the American cases which consider actionable misrepresentations made in honest though unreasonable belief in their truth "are really to be supported on the ground of breach of implied warranty" is particularly valuable and suggestive.

In view of the fact that in Trade and Labor cases the law is only in the making it is not surprising that Mr. Street has

failed to give any satisfactory analysis of the law on the subject, contenting himself with the statement that it is a "new and distinct species of wrong" in which liability neither "depends upon the use of any of the means generally recognized as wrongful per se" nor can "be properly referred to any of the recognized heads of delict like nuisance, fraud, and trespass," p. 371. Here again his failure to evolve any general conception of tort liability leaves him helplessly unable to deal with a novel branch of the subject which has not yet become crystallized into definite form by judicial decision.

He appears also unable to realize that since these cases usually involve triangular dealings it by no means follows that because as between A and B, A has the legal right to act as he does, he may also use that right for the purpose of causing B to act injuriously to C the plaintiff, and leans to the view that if the act be rightful as toward B no impropriety of object as to C can make it a wrong to him. See note 2, p. 369. Our courts are to-day constantly drifting further and further away from this line of thought and Mr. Street's attitude seems more than questionable.

In the volume on the subject of Contract we find Mr. Street lays particular emphasis on his discussion and so-called discovery of the nature of the bilateral contract. This contract he contends is not based on the presence of consideration at all but rests entirely upon the consent of the parties. No sooner, however, has this proposition been laid down, than he finds it necessary to qualify it by adding that the mutual consent, or rather the mutual promises, must be promises with respect to something substantial,—something which according to the established law of consideration would be regarded as adequate to support contractual liability. We confess that the presentation of the theory seems to us rather a new presentation of the difficulty involved in the bilateral contract than a solution of this difficulty. It can hardly be called a discovery that in the contract founded on mutual promises, consideration in its ordinary sense of a detriment to the promisee does not exist; and while the fallacy of suggesting that the obligation to perform in such contracts is the consideration has not always been recognized, still legal students have not failed to observe this, and attempts to solve the difficulties involved in a satisfactory explanation of the bilateral contract are not few.

To us indeed, Mr. Street's "discovery" does not seem a discovery at all but rather a clear presentation of the puzzle involved in this form of contract, and an explanation, new undoubtedly in form, but not reaching any ultimate basis.

If the contract rests upon mutual consent the question at once arises why must the promises be "substantial"?

Furthermore the results which Mr. Street claims follow from a full appreciation of his exposition of this contract and their effect in explaining the cases do not, we feel, justify his belief. In the first place he finds it necessary to disregard the case of *Shadwell* v. *Shadwell*, 9 C. B. N. S. 159. We confess that a theory running counter to a case so carefully considered as *Shadwell* v. *Shadwell* and not yet overruled must find much to support it before it can be accepted. Furthermore the cases which he cites to sustain his view do not all appear on examination to bear out his contention. Thus *Lingenfelder* v. *Wainwright Brewing Co.*, 103 Mo. 578, cited on page 129, is clearly a case of a bilateral agreement. So also is *King* v. *Duluth*, 61 Minn. 482, cited at the same place. *Erb* v. *Brown*, 169 Pa., 216, also cited, is hardly in point. Furthermore *Scotson* v. *Pegg*, 6 H. & N. 295, has generally been treated as an unilateral agreement. Mr. Street recognizes that Professors Williston, Langdell and Ames all consider it in this light. A case susceptible of being so misunderstood by such eminent gentlemen, can hardly be regarded as a basis on which to rest an important theory with respect to the nature of contractual liability. Of still less importance as a foundation stone for Mr. Street's theory is *Scotson* v. *Pegg* where we find that the decision is based upon an imaginary disputed right to the coals.

Furthermore, as in the instances already referred to, judicial interpretation has failed entirely to lend its weight to the conception of bilateral contract suggested by Mr. Street. Admitting its proper differentiation from other contracts we cannot see that Mr. Street has met the difficulties; and his conclusions run counter to too many decisions to obtain any general acceptance. The effort to found the obligation solely on the promises to perform something substantial does not prove enlightening.

Furthermore, the real question as to what is substantial at once arises. If we understand Mr. Street correctly, and we have taken care to understand him, he would have us decide the substantiality of the promise separate and apart from its surroundings. For example if A, having already contracted with B to paint B's house, in response to a promise from C that, if he will do what he has already agreed to do, C will compensate him, then promises to paint B's house a contract arises, according to Mr. Street. The second promise to paint the house, he says, is a promise to do something substantial, notwithstanding the fact that the obligation to paint the house already exists. Why is it substantial? This question

remains unanswered and the mere dogmatic assertion that the promise must be divested of its surroundings is not helpful to legal thought. Furthermore, if it be said that A incurs a new obligation to C to do the act, this is simply another phase of the fallacy so often involved in the explanation of the bilateral contract. The old difficulty encountered where A, for a new promise from B, agrees to do the very thing which he has already obligated himself to B to do, is also said by Mr. Street to be cleared away by this discovery of the true nature of the bilateral contract. He tells us that where "the new agreement takes the form of mutual promises, this seems necessarily to involve an abrogation or waiver of the old contract." (ii–130.) But why? There is no abrogation if there is no substantiality in the new counter-promise.

The question whether a counter-promise which consists in merely repeating a prior promise, is or is not substantial only presents the old difficulty under a new name. Of course if the old contract is destroyed by mutual rescission the ground is cleared for a new contract. But unfortunately for the uniformity of contract law, the same facts which amount to mutual rescission in Massachusetts and Michigan, are regarded in Maine and Missouri as establishing only black-mail. There is certainly no solvent efficacy or unifying element in the final conclusion of Mr. Street:

"Perhaps, after all, the safest and simplest way of stating the rule is to say that where a new bilateral agreement is substituted for the old and the respective rights under it are mutually waived, the new agreement is valid." (ii–130.)

Mr. Street's treatment of the subject of accord and satisfaction can be given unqualified praise. He is clear, complete and accurate and furnishes a discussion of this subject which will no doubt find proper recognition.

It should be noted, we think, that in developing the doctrine of consideration along the established lines, although the author gives full credit to Professor Ames for the explanation that the action of Assumpsit on mutual promises is an outgrowth of the action of deceit, he fails to note that the first to announce this discovery of the origin of Assumpsit was Judge Hare; to whose book Professor Ames himself has given full recognition. The originality and lucidity of Judge Hare's chapters on Consideration were deserving we believe of at least a passing recognition. Nor will the student of Early English Contracts who is familiar with Professor Ames' Essay on Parol Contracts prior to Assumpsit endorse Mr. Street's assertion that the field of "the Innominate Contract" was an "hitherto untold chapter in our English law of Contracts."

We cannot pass without criticism the treatment accorded

by Mr. Street to the right of a third party to sue on a contract made for his benefit. In this part of his subject he has not, we believe, aided in clearing up the difficulties. Furthermore his suggestion that the provision, found in the Codes of States which have adopted the Reformed Procedure, viz., that suits must be brought in the name of the real party in interest has a bearing on the question, constitutes in our judgment a very great misconception of that Code provision, and also comes near overlooking the real difficulty in the problem. This difficulty is, Is the third party the real party in interest? When A and B make a promise for the benefit of C, is C the real party in interest? Mr. Street does not entirely overlook this criticism of his view and takes the position (page 156) that the old rule was a procedural one and that a legal duty contractual in its nature does exist in favor of the third party, but a legal duty which has always existed and yet has never been enforceable is somewhat of an anomaly. What does Mr. Street mean by legal duty? If it is not a duty which the law will enforce, it becomes a conception whose content should be clearly defined and the circumstances under which it will come into existence definitely stated. Nothing of this sort is attempted, but Mr. Street contents himself with saying that there is a legal duty, but that for procedural reasons this duty could not be enforced by the Common Law, but may under the Reformed Procedure. In our opinion, instead of solving difficulties this idea of a legal duty incapable of enforcement raises more serious problems for new solution. Furthermore, whatever may be said of the merit of the theory, it overlooks the fact that decisions have not accepted it. For example, in New Jersey the provision as to the real party in interest is in force (See Acts of 1898, page 481) and in *Styles* v. *Long Co.*, 38 Vroom 413, the Court follows the old decisions as illustrated in *Crowell* v. *Currier*, 27 N. J. Equity 152 (1876). This reference to the provision of the Reformed Procedure, which has not infrequently been made by persons superficially acquainted with this subject, deserves, we believe, severe criticism as only serving to befog the issue and to raise new questions for solution.

Further specific criticism we regard unnecessary. Our purpose has been to refer to such matters as would enable our readers properly to appraise this book. Its demerits in our opinion result largely from its ambitious scope. Volume III. on Actions is open to criticisms of a similar nature to those we have made in respect to Volumes I. and II. Its merits likewise are similar. That Mr. Street has done excellent and unusually comprehensive work as a compilator of previous material every careful student will cheerfully concede. That

the book however fails to reach the degree of value and originality announced in the preface or the excellence to which the ideal treatise on such subjects should attain must certainly be admitted by any one familiar with the problems dealt with by Mr. Street.

H. W. B.

The reviewer is indebted to Francis H. Bohlen, Esq., for that part of this review which is devoted to a consideration of the volume on Tort (Volume I), and to Crawford D. Hening, Esq., for various suggestions and criticisms in reference to the volume on Contract (Volume II).