

BOOK REVIEW

RESTATEMENT OF THE LAW OF TORTS, Vol. III, American Law Institute, Publishers, St. Paul, 1938; pp. xxvi, 759.

The publication of this volume adds another link to the chain of texts promulgated by the American Law Institute in its effort to present an orderly statement of the general common law in the United States, including long established and frequently construed statutes as well as such law as is developed solely by judicial decision.

Like its predecessors, the third volume of the Restatement of Torts is another example of careful phraseology, based upon a thorough and exhaustive study of all pertinent precedents. Naturally, the rules expressed will not be in complete accord with the existing law in the many jurisdictions, but that unavoidable deficiency will be corrected by the publication of separate annotations for the individual states, as has already been done for a number of the previous volumes. This latter work is necessarily slow, requiring as it does the assistance of legal groups within each state, and which are independent of the Institute.

Chapter 20, the first in the volume, is devoted to the question of liability of the possessors of animals, domestic and otherwise. As to wild animals, the rule stated is that of vicarious liability, for which *Rylands v. Fletcher* became famous, and denying the defense that utmost care was exercised. However, in Chapter 21, dealing with ultrahazardous activities other than the keeping of wild or dangerous animals, the Institute caveats whether the accumulation of large quantities of water or fluid is an ultrahazardous activity. This, of course, was the situation in *Rylands v. Fletcher*, but the Institute has avoided injecting itself into the controversy which has raged around that decision by expressing no opinion as to the law in connection with the facts of that case.

Chapters 22 and 23, dealing with fraud and deceit, treat only of that type of fraud which is actionable as a tort, in a proceeding seeking compensation by way of money damages. In this connection, note that scienter, or actual or constructive knowledge of the falsity of a representation by the actor, is an essential of the wrong before it is rendered actionable. It will be important for New Jersey practitioners, in referring to these chapters, to make careful distinction between fraud as an actionable tort, and fraud asserted as a defense or raised in some way or another in a court of equity. Suits in tort for fraud are comparatively rare in this state, because of the absence of a requirement for the proof of scienter in the courts of equity. This distinction brings to mind the leading case of *Crescent Ring Co., Inc. v. Travelers Indemnity Corp.*, 102 N.J.L. 85. In that case suit was brought in tort for deceit against an insurer, seeking to impute to it the fraud of its agent who falsely represented that the policy involved, a messenger robbery policy, would cover the same risks as a block policy. It would appear from this decision that the fraud of an agent cannot be charged against his principal, but this is obviously not true. The *Crescent Ring* case itself gives an example of a

situation where it can be imputed, that is, in a suit to rescind the contract and recover the premium paid.

Chapters 24 to 28, inclusive, deal with libel and slander to the reputation of persons, under the heading "Defamation" and with slander of title and its associated wrongs, under the heading "Disparagement." The topics are exhaustively treated, and the rules are liberally sprinkled with comments and illustrations, which are so essential to correct the inaccuracies of words.

Chapters 29, 30 and 31 consider the rules of malicious prosecution, civil and criminal, and malicious abuse of process. These branches of the law of torts have long needed the careful correlation and reconciliation which has been accomplished here.

Tortious interference with domestic relations is covered by the next two chapters. To some extent these will be of little value with the abolition of a number of the actions falling into this category.

The law usually included in the classification of "Trademarks and Unfair Competition" is dealt with in Chapters 34 and 35 as "Interference with Business Relations," and the use of the term "competition" is studiously avoided. That word has resulted in more confusion and illogical reasoning than perhaps any other, for, as pointed out in the comment on page 537, "This branch of the law deals not only with harm caused by the trade practices of one person to another who competes with him directly in the sale of goods or services, but also with the harm caused by the trade practices of one person to another who is engaged in a different business and who sells different goods or services. The phrase 'trade practices' rather than the word 'competition' is used, therefore, as the classification rubric of these Chapters." While this change in approach to the subject is desirable there is some question as to how receptive the courts will be to the suggestion. The Restatement is not cited frequently enough in legal arguments to call the court's attention to it; and some courts have little appetite for the niceties of legal distinction which must be made in those fields where the careless use of words has built up an unnecessary confusion.

In all, this volume follows the standards set by those previously published and is accordingly to be highly recommended.

VINCENT P. BIUNNO.

NEWARK, N. J.