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BOOK REVIEWS

CASES ON DAMAGES. (Second Edition). By Judson A. Crane. St. Paul: West Publishing Co. 1940. pp. xx, 521. $5.00.

The litigant, who, after witnessing his counsel prove a perfect case of liability, recovers merely nominal or small actual damages, because the substantial damages sought were not properly pleaded or proved or were too speculative to be recoverable, might well be justified in considering his victory a Pyrrhic one. The story has its medical counterpart: "The operation was a success, but the patient died."

Admittedly the subject of Damages should, and does, occupy a secondary position in the law school curriculum, but we must not lose sight of the fact that it is an eminently practical subject, a knowledge of which is indispensable to the future trial practitioner. Some teachers of law believe that the curriculum can do without a separate course in Damages. They may point to the fact that the problem of measuring the amount of compensation to be awarded for a wrong is always subordinate to the paramount question of liability and that, generally speaking, it is difficult for a student to attain an adequate understanding of the law of Damages unless he is fairly well grounded in the concepts of liability as they are dealt with in the more basic courses, such as Contracts, Torts, Property and Sales; that in many cases the liability and damage issues are so interwoven as to defy separate treatment and that the technique of pleading and proving damages belongs, for the most part, to the broader fields of Procedure and Evidence. On the other hand, the fact remains that the importance and difficulty of the non-damage aspect of the problems presented in these major courses usually absorb the entire attention of both student and professor and precludes any really worth-while and comprehensive analysis of the damage question. Moreover, a number of topics in law, such as Nominal, Punitive and Liquidated Damages, are of a distinctively damage nature. Besides there are some legal principles, such as those dealing with the Certainty and Avoidable Consequences requirements—what we might denominate the two great rules of exclusion of the law of Damages—and those principles collected under the headings of Interest and Value, which are so generally applicable and common to varying forms of damage litigation and to different types of action as to require special and unified treatment. In any event, whatever may be the arguments for and against a separate course in Damages, those conducting and taking such a course will find in Professor Crane's recent casebook a well-chosen collection of authorities which should certainly prove useful.

This book is a second edition of a casebook originally compiled by Professor Crane in 1928. The author has purposely limited the size and contents for use in a one-semester course, two hours a week being the time usually allotted to such a course. This edition contains 513 pages comprising 131 cases, the opinions of which are fully reported, or at least such parts of them as bear on the point of Damages. Many more cases are summarized in the notes to these principal cases. The first thing that impresses one in reading the book is its up-to-dateness. About one-third of the cases fully reported have been decided since the publication of the first edition and the notes call attention to many late cases. Reference is made in the preface and in the notes to the important decision of *Erie Railroad v. Tompkins*,[1] which has recently had such precedent-shattering effect in Damages as in other fields of Federal law. Of course, the mere newness of the material in a casebook

1. 304 U. S. 64 (1938).

should furnish small reason for its publication, if the most recently decided cases inserted are but restatements of principles found in older leading authorities. But Damages, as a distinct division of the law, is a young and growing subject and many of the latest cases contain important variations of the old standards of measurement. Aside from such a landmark as *Hadley v. Baxendale*,[2] there are few really leading cases and the general principles which go to make up the body of the law of Damages are, in the abstract, few and not very complicated. However, possibly more so than in most other subjects, the solution of a particular problem in Damages depends on the fact situation involved. Problems caused by the changes and complexities in the manner of present-day living and doing business, the new values placed on things and the more exact scientific data now available necessitate a presentation of this practical subject in a modern twentieth-century setting. In this respect Professor Crane has made a wise selection of cases. To take one instance among many, the conflicting rules governing the measure of damages in the action of deceit, known as the "loss of bargain" rule and the "out-of-pocket loss" rule will be found discussed in a Federal decision, *Shonts v. Hirliman*,[3] involving the Securities Act of 1933, which adopts the latter rule. Despite the newness of much of the material utilized, there are no instances, so far as this reviewer can find, where the exposition of fundamental principle has been sacrificed for the sake of novelty. The opinions have been selected from the reports of courts throughout the country, especially from the Federal courts and the highly esteemed tribunals of New York, Massachusetts and Pennsylvania. There are only seven English decisions included in the collection and for the most part they are of merely historical value, such as *Ashby v. White*[4] on nominal damages and *Huckle v. Money*[5] on exemplary damages. This comparative dearth of English decisions may be readily explained by the fact, adverted to by one writer on the subject,[6] that the modern law of Damages has, to a great extent, had a growth indigenous to the United States, the tendency of the English judges being to leave the measurement of damages to the jury's discretion.

In compiling a casebook on a subject like Damages, which touches on so many phases of the law, the matter of classification and arrangement of cases is of importance. The grouping of cases and topical arrangement in Professor Crane's book are, on the whole, orderly and systematic. It may be that the initial cases in that part of the Introduction dealing with the "General Nature of Damages in Various Actions" might better have been distributed among other portions of the book, since they contain principles considered later in the book. The second part of the Introduction includes cases concerned with the procedural aspect of the law of Damages, especially the matter of pleading. Under the topic "Judicial Control Over Amount of Verdicts" the author has been particularly fortunate in having available the thorough discussion contained in the majority and minority opinions of the Supreme Court in the comparatively recent decision of *Dimick v. Schiedt*.[7] Chapter 2 deals with the two forms of non-compensatory damages, i.e., nominal and exemplary damages. Then follows in Chapters 3, 4, 5, 6 and 7 a consideration of general principles, which

2. 9 Ex. 341, 156 Eng. Reprints 145 (1854).
3. 28 Fed. Supp. 478 (1939).
4. 2 Ld. Raym. 938, 92 Eng. Reprints 126 (K. B. 1703).
5. 2 Wils. 205 (K. B. 1763).
6. Foreword to McCormick, Hornbook on the Law of Damages (1935).
7. 293 U. S. 474 (1935).

form the backbone of the course, under the headings Foreseeability, Certainty, Avoidable Consequences, Interest and Value. The author makes no attempt to break down these general headings into more detailed subtopics. In the first edition of this book and in the older casebooks, principles relating to topics such as Mitigation, Fluctuations in Value, Expenses Incurred, Counsel Fees, Singleness of Recovery, Limited Interests, Profits, Mental Suffering, etc. were singled out for separate consideration under appropriate headings. The table of contents came near furnishing a topical analysis of the subject. Pedagogical opinion may differ as to the advisability of extreme pigeonholing of cases. In a book of the size of the one under review, where it is apparently the compiler's purpose to treat the subject from the broad viewpoint, it is this writer's opinion that the simple and comprehensive classification adopted is preferable. Approximately half of the casebook (Chapters 8 and 9) is devoted to certain specific wrongs, both tort and contract, which in the author's opinion, involve the problem of measuring the amount of recovery frequently enough to merit specific presentation. Chapter 10 is assigned to Liquidated Damages.

Professor Crane is frank to admit that he makes no attempt to cover the whole field of Damage law in his book, adapted, as it is, to a one-semester course. This fact must be constantly borne in mind in comparing the book with casebooks of somewhat greater length, such as Professor McCormick's and Professor Bauer's. In judging the merits of such a shorter selection of cases, consideration must be given to the material omitted and that which is emphasized. Here again it must be said that, as to matter which does not form an essential part of the course, it will be a nice question of judgment upon which teachers will differ whether certain material should be discussed in the course or left to other courses or the student's own research.

A notable departure from the first edition is the exclusion from the new casebook of the cases involving the problems discussed under the head of "Proximate Cause". The present edition supplants these cases (nine in all) with a note on "Foreseeability of Consequences of Torts". Since causation plays a decisive part in determining whether or not a particular item of loss is recoverable, where liability clearly exists, the so-called doctrine of proximate cause does properly have a place in the field of Damages. However, as Professor Crane states in his note on page 120, "The significance of foreseeability of harm as an element of tort liability is fully treated in courses in Torts, under the topics of Proximate Cause and of Negligence. It does not seem necessary to go over the same ground in a course in Damages." The modern tendency seems to agree with Professor Crane in thus leaving the discussion of this most difficult problem to the longer course in Torts, where it can be more completely covered.[8] Proximate Cause "appears to be more important in determining whether a wrongdoer is liable at all than it is in measuring the extent of the consequences for which he is legally responsible." At least those who hold with the theories of Leon Green will most likely concur in this view.[9]

While one may regret the omission from this edition of a case such as *Griffin v. Colver*,[10] it must be admitted that its importance today is mostly historical and the rule of Certainty, which it was one of the earliest decisions to recognize, is adequately covered in the other cases dealing with the rule. The well-reasoned opinions in *Cook v. Packard Motor Car Co.*,[11] touching on the subject of loss occasioned by

8. Preface to MCCORMICK, CASES AND MATERIALS ON DAMAGES (1935).

9. GREEN, THE RATIONALE OF PROXIMATE CAUSE (1927).

10. 16 N. Y. 489 (1858).

11. 88 Conn. 590, 92 Atl. 413 (1914).

damage to the ubiquitous automobile, might well have been retained from the first edition or in its place inserted Justice Cardozo's opinion in the more recent decision of *Brooklyn Eastern District Terminal v. United States.*[12] The insertion of *Gervis v. Kay*[13] in place of the leading case of *Baker v. Drake*[14] seems justified, since the opinion in the former case fully discusses the latter decision as well as more recent ones. Most of the decisions which in the first edition were embraced under the topic "Addition of Value by Wrongdoer" have been retained in this edition under the topic "Harms to Chattels". Some would, perhaps, prefer that the amount of space devoted to these decisions in the second edition (otherwise wholly justifiable in a more lengthy casebook) be restricted in favor of other material, as was done with the cases classified in the first edition under the general topic "Entirety of Recovery". For instance, in this writer's opinion, the problem of damages in actions for defamation is not given the special treatment it deserves. The two cases included under "Infringement of Copyright" really deal with specialized subject-matter. The problem of damages in eminent domain proceedings is at least of equal recurrence and importance and yet a discussion of it is relegated to the footnotes. The case entitled In re *Schulte Retail Stores Corporation,*[15] one of three cases included under the topic "Lessor's Claims for Rent", appears to involve more the law of Bankruptcy and Suretyship than of Damages and might have been omitted. It also appears to this writer that the single case in the new edition under the title "Claims for Services" fails to add anything of value to the collection.

The notes to the principal cases are an improvement, both in form and content, over those in the previous edition. The author has continued his laudable practice of citing law review comment and has followed the lead of other compilers of casebooks in making frequent reference to sections of the American Law Institute Restatements, particularly those of Contracts and Torts. Especially noteworthy are the footnote references to Professor McCormick's excellent Hornbook on Damages, which should prove helpful to the student.

FRANCIS X. CONWAY†

CANADA AND THE LAW OF NATIONS. Edited by Norman MacKenzie and Lionel H. Laing. Toronto: The Ryerson Press. New Haven: Yale University Press. 1940. pp. 567. $4.00.

In a series of studies, principally historical and economic, prepared for the Carnegie Endowment, there has been included this "case book" of Canadian incidents in international law. The series as a whole covers the relations between Canada and the United States. This volume is not so limited in scope, for it gives the court opinions on matters of naturalization, territorial boundaries, domicile, war rights of resident aliens, without requiring that the United States or a citizen of the United States be involved in the case at issue. One for instance is the matter of *Quong-Wing v. The King;* another *Cunningham v. Tomey Homma.* In neither of these could it be said that the United States was actually involved. Nor can the matter of the

12. 287 U. S. 170 (1932).
13. 294 Pa. 518, 144 Atl. 52 (1922).
14. 53 N. Y. 211 (1873).
15. 105 F. (2d) 986 (1939).

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boundary between Canada and Newfoundland be said to concern the United States. These cases, however, do illustrate Canadian interpretations which should be known if we are to understand the attitudes of our northern neighbor.

On the other hand, it does appear that the Canada-United States aspect of the volume has been bolstered and padded by the inclusion of a few cases which concern neither Canadian law nor Canadian lands, nor even frontier matters. We can of course see the utility of including a border Indian case, and matters concerning jurisdiction over the waters of Lake Erie. But why the *I'm Alone* "rum row" case or the *MacIntosh* case have anything important to do with Canada and the law of nations, we cannot see at all. These were included, apparently, simply because the *I'm Alone* was registered as a Canadian vessel and because Dr. McIntosh was trying to exchange Canadian for United States citizenship. These cases are important in United States law. They have no relation to Canadian law, nor to Canada herself, actually.

As a fact, in spite of some seemingly extraneous material of this character, the volume will prove to be an exceptionally useful reference work for any lawyer who may be required to handle matters dealing with Canadian persons, Canadian trade, matters of Canadian domicile or citizenship, whether these matters come up in Canadian or in American courts. Here are questions of jurisdiction, extradition, treason, trade, and territorial waters, presented in such a fashion as to be useful for reference purposes. We do not claim, nor do the able editors claim, that this book will make one an expert; but it does develop the Canadian concepts of law on some of these points fairly fully and almost authoritatively.

In addition, it might be interesting to note the inclusion of a few documents illustrating the recent emergence of Canada into full and practically independent Dominion status, and—in these days of current belligerency—to indicate the marked tolerance of Canadian courts to alien enemies and their properties found in Canada at the commencement of the World War.

The index is fully detailed. The table of contents is so minutely expressed that it serves practically as a synopsis. There is no table of cases: these are entered in the index at the end.

ELBRIDGE COLBY†

THE JUDICIAL PROCESS IN TORT CASES. (Second Edition). By Leon Green. St. Paul: West Publishing Co. 1939. pp. 1356. $6.00.

The appearance of the second edition of Dean Green's *Cases on Torts* is very welcome. The size of the previous edition militated against its wide acceptance. More important than that, however, the *Restatement of Torts* was in full progress when the first edition appeared and the titanic struggle to whip the multifarious factual situations of tort law into doctrinal lines was occupying the attention of most teachers of the subject. Hence, Dean Green's factual treatment of tort cases failed to receive the consideration it deserved.

Conditions are now somewhat changed. The tort restatement is available as a complete doctrinal summary of the law of torts. Case books which parallel it rather closely are apt to suffer. The primary authority becomes the Restatement and the cases in the collection tend to fall into place as annotations.

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The factual approach, on the other hand, has a newness that is refreshing to the teacher. In Dean Green's book the cases are late, crisp, factual, dogmatic and rich in variety of legal theory. The collection cannot fail to appeal to the lecturer as a relief from the rather stodgy array of cases in the older books of the doctrinal sort. But that the new arrangement is a better pedagogical device than the old may well be questioned. Each crop of students comes fresh to the law of torts and, although the professor's comments may be anticipated at every step, the cases themselves are new. I am not at all certain that tort cases need careful selection in order to keep the student interested. More important than the case is the matter of legal doctrine. That the Dean's collection is a more facile tool in the hands of an experienced teacher of torts, I think will be admitted by most. The cases are classified according to fact situations, to be sure, but legal principle is abundantly represented as can be seen by an examination of some of the longer cases, where theories throng and clash in riotous confusion.

Classification according to legal principle or classification according to fact situation—which is preferable? I believe that this is a matter of personal choice. If the chosen book classifies principle, the teacher must classify fact situation; and *vice versa.* That this case book is eminently teachable I have no doubt; but that classes which use this collection will end with a conception of the nature of tort law different from those trained according to principles, seems to me to be very doubtful indeed.

THOMAS A. COWAN†

BENCH AND BAR OF OTHER LANDS. By William Burdick. New York: Metropolitan Law Book Co. 1939. pp. 652. $5.00.

Today all systems of government are facing critical tests. In these trying times, the American lawyer and law student might use some of his leisure profitably by a comprehensive comparative study of the systems of jurisprudence of the great countries of the world. Lawyers are familiar with the political formula of the various powers, but until the publication of Professor Burdick's *Bench and Bar of Other Lands,* no comprehensive analysis of the great legal systems of the world was available in so interesting and enjoyable a volume.

Professor Burdick traveled in England, France, Germany, Italy, Russia, Egypt, Palestine, India, China, and Japan, visiting the courts in session, conversing with the judges on and off the bench. His personal fame gave him access to members of the judiciary and members of the bar whence he obtained interesting, thoroughly accurate short accounts of the history and present practice and procedure of the courts in these countries.

This personal record and relation of an American professor furnishes an authoritative guide to those who think keenly enough to be interested in the comparative strength of American jurisprudence today. As Professor Burdick concludes his book, "A country may in many ways be greater than its rulers, greater than its law makers, but not greater than the prevailing character of its courts, for in the final analysis it is only by the power, the wisdom, and the integrity of its courts that justice can be made a reality."

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