COGITATIONS ON TORTS. By Warren A. Seavey. Lincoln: The University of Nebraska Press, 1954. Pp. 72. $2.00.

As the thousands of students who have attended his classes at Harvard Law School well know, Professor Seavey is more inclined to listen and to provoke others to thought than to express himself, except by animated reactions to what has been confidently proposed. When he does have something to say, his observations are the result of no little insight and reflection, and it is fortunate that his high regard for Dean Pound induced him to deliver the third set of lectures in the Roscoe Pound Lectureship Series which make up this little book.

Professor Seavey considers that on the whole the law of torts has fulfilled effectively its function of continuously marking out new areas of protection in the range of human concerns. While in some areas he finds definite need for change and development, he feels that the courts "have done a magnificent job in working out the pattern needed for justice."[1] And Professor Seavey believes the judges rather than the legislature should make the needed changes, even those as extensive as the adoption of comparative negligence rules, or major revisions of the defamation law. The courts "have power to change their judge-made rules"; there is no necessity to wait for a statute, with its undesirable "attention to minutia."[2] In the field of negligent misrepresentation, for example, several courts have shown themselves able to advance with discretion, making due distinctions between purchases by ignorant people and those by intelligent businessmen whose experience leads them to discount sellers' statements and rely on their own investigations.[3] Without waiting for legislation, judges can continue to develop rules along the lines of the Securities and Exchange Act, and thereby keep abreast of the current practices of reputable merchants, rather than consider themselves bound by the habits of horse traders.[4]

Professor Seavey points out that there is much less need to adhere to the doctrine of stare decisis in the field of torts than in the realm of property and commercial law. No unfair upsetting of prior arrangements would be involved, for example, if in connection with affirmative duties to aid the helpless a court should "impose liability for the first time upon the Pharisees and the scribes who passed on the other side," in situations where aid could have been given without serious inconvenience.[5] Likewise, without undue hardship, changes could be made in the unreasonable rule denying contribution, or the one that payment by one person to compromise a contingent obligation does not reduce the damages owing from another party found to be negligent. Professor Seavey also hopes that the judges will make it unnecessary for him to continue to shock his students, as he has for years, by telling them that "if by mistake one were

1. Pp. 5, 70.
2. P. 57.
3. P. 42.
4. Pp. 61-8.
5. P. 68.

to take another man's hat, believing it to be his own, and were intercepted on the spot, an apology and tender of the hat would not relieve him of a duty to pay its value."[6]

There are several matters in the book of special interest to teachers and students. Those looking for a brief but convincing explanation of the risk theory of liability, designed to replace "proximate causation" concepts and language, will find here just such an explanation by the leading modern proponent of the risk doctrine.[7] Many helpful observations are made in connection with the leading defamation cases. For example, Professor Seavey approves of the conditional privilege of *Coleman v. MacLennan*[8] to make misstatements about public officers and candidates, but not on the usual ground that this privilege will improve the quality of public officials. That is a matter which Professor Seavey does not believe can be ascertained. Nevertheless, he feels that "electors should be free to state what they reasonably believe" and that it "is far better to have the statements made openly where they can be met and, if not true, disproved, than to drive them into despicable whispering campaigns or publication in pamphlets by unknown authors."[9] With reference to the distinction between libel and slander, Professor Seavey suggests that whenever a statement is made in a public speech, whether or not broadcast by radio, it should be classified under the more strict rules of libel. On the other hand, he feels that it is unfair to impose strict liability on radio speakers and newspapers for words of unknown defamatory connotation, as was done in *Cassidy v. Daily Mirror Newspapers, Ltd.*,[10] "as if words were in the category of known explosives or poison."[11] In connection with strict liability generally, Mr. Seavey refers to its present "very limited" area, and believes that this is one field where stare decisis should protect a defendant who may not have protected himself by liability insurance.[12] There is no discussion, either pro or con, of the possibility of extension of strict liability to less hazardous activities under share-the-risk doctrines or the like.

This reviewer was particularly interested in what Professor Seavey has to say about the teaching of law. It is significant that, while he has no inclination to disparage the function of a teacher and scholar, he has allotted a minimum of his own working time to the writings of scholars, preferring to devote himself to reading and digesting judicial opinions. He remarks, in connection with our tendency to criticize judges, that we are likely to become prisoners of our own specialization, so that "[a]t best our criticisms are colored by our academic

6. P. 52.
7. See pp. 33-6.
8. 78 Kan. 711, 98 Pac. 281 (1908).
9. P. 59.
10. [1929] 2 K.B. 331.
11. P. 58.
12. Pp. 43, 67.

life," and "[a]t worst they are unreal."[13] Perhaps Professor Seavey's own unusual freedom from academic narrowness and unreality is due in part to his willingness to devote so much time to the opinions of judges. An even more important factor in this connection, however, would seem to be a willingness to learn from his students. In what is perhaps the most characteristic passage in the book this preëminent teacher says of students: "They give us far more than they receive."[14] He points out how discussion with students continuously gives us new points of view, which benefit not only us, but also the law, so far as we may affect it through teaching and writing. As specialists, we tend to exclude considerations beyond our specialty, and as individuals we are apt to be unduly affected by early indoctrination in outmoded economic and social theories. Discussion with young but educated law students obliges us to look at additional factors, and to consider the various trends of modern thought presented by eager minds representing all segments of the community.

Professor Seavey considers that his own principal work has been as a law teacher, although it is evident that his work on *Restatements of the Law* and his widely read law review articles often have aided judges and practitioners as well as students and other teachers. It is to be hoped that judges will be encouraged by this book to effect the changes in the law of torts to which Professor Seavey lends the weight of his support. The fact that many appellate court judges, as well as many of those who practice before them, are his former students should help to implement his suggested reforms. Furthermore, judges generally will be attracted by Professor Seavey's approach, for he fully recognizes their difficulties. They are faced with a great variety of problems, being called on one day "to untangle a snarl in a corporate reorganization requiring intimate knowledge of many diverse matters of fact," and the next "to determine an intricate tax matter which may depend upon a succession of more or less conflicting federal and state statutes."[15] In addition to the difficulty of having no opportunity to specialize, judges are faced with the necessity of coming to a prompt decision. A judge cannot wait, like a scholar, until a happy solution strikes him. While it may be, as Professor Seavey fears, that "to our students we must appear to arrogate to ourselves an intellectual superiority over the judiciary,"[16] surely no one would feel after reading this book that Professor Seavey himself is a captious or intolerant critic.

No one interested in the field of torts, regardless of how selective he may be in his reading, can afford to overlook this little volume. These cogitations are of value to judges, teachers, practitioners, and students alike, and will continue to be so for many years to come.

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13. P. 50.
14. P. 48.
15. P. 49.
16. P. 48.

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