

REVIEWS

CASES ON THE LAW OF DAMAGES. Third Edition. By Judson A. Crane. St. Paul: West Publishing Company, 1955. Pp. xxii, 337. \$8.00.

CASES ON REMEDIES. By Charles Alan Wright. St. Paul: West Publishing Company, 1955. Pp. xxv, 498. \$9.50.

AFTER fifteen years of drought, relieved only once by a gentle shower in the form of a second edition of McCormick's *Cases*,¹ a two-casebook downpour has fallen on the field of Damages. First came Professor Wright's *Cases on Remedies*, which concentrates on the substantive law of damages but does not neglect the alternative restitutionary and equitable remedies. It was followed within a few weeks by Professor Crane's *Cases on the Law of Damages*, a third edition which continues to confine itself strictly to problems involving the classic damage remedy.²

Both books are the product of the same rainmaker, the West Publishing Company. Hence both appear in the new red-covered, two-columned, slim-jim format recently designed by West to facilitate student and teacher cartage at the expense of marginal note space. Both volumes follow the current trend toward shorter books—a trend that is unfortunately as traceable to the demands of overworked teachers for books that can be taught on an automatic “for tomorrow take the next twenty pages” basis as it is to increased paper and printing costs. Both books can, and will, be used by teachers offering courses called “Damages.” But here the resemblance ends. In both aim and attitude, Professors Crane and Wright are generations apart.

Professor Crane has set out to do no more in his 1955 model of *Cases on the Law of Damages* than to bring this well-seasoned casebook³ up-to-date. The organization and coverage remain almost exactly the same as in the second edition. Part one again passes in review such general principles of damage law as foreseeability, certainty and avoidable consequences. In part two “the application of these principles in some of the more common types of litigation is presented in greater detail.”⁴ The presentation of many of the principles and many of the applications, however, continues to be considerably less than detailed. Sometimes, as in the sixteen page chapter on “Value,”⁵ the thinness of the treatment becomes disturbingly apparent. Despite the fact that the value

1. MCCORMICK & FRITZ, *CASES AND MATERIALS ON THE LAW OF DAMAGES* (2d ed. 1952).

2. Professor Crane occasionally nods in the direction of that close remedial relative, restitution at the election of the injured party, but his recognition of this type of relief is so casual as to seem almost inadvertent.

3. The first edition was published in 1928 and the second in 1942.

4. *CASES ON THE LAW OF DAMAGES* ix.

5. *Id.* c. 7.

concept is basic to the whole compensatory structure of damage relief, the chapter contains only five cases. And if there is a reference to Bonbright's brilliant chapters on the subject,⁶ I could not find it. A teacher eager to explore with his class the ways in which courts oversimplify valuation problems by uncritical use of that wonderfully elastic term "market value" will get little help from Professor Crane. Those teachers interested in suggesting the similarities both in purpose and in result of the Contract rule of *Hadley v. Baxendale*⁷ and the Tort requirement of proximate cause will be equally disturbed by the scant aid available to them in the eighteen pages of chapter three titled "Foreseeability." And there is a similar sparseness of materials raising questions about the effect on personal injury damage law of such modern reimbursement devices as corporate accident and health insurance plans, union welfare funds, and workmen's compensation and old age pension legislation.

Other shortcomings of the earlier editions continue to appear in this one. There is still the notable absence of material other than cases; not even statutes are given text-room. There is still the notable absence of questions other than those cast in the too-familiar "Result? See *Black v. White*" mold. There is still the notable absence of problems designed to stimulate student speculation about the extent to which "fundamental damage principles" meet the needs of modern life.

The third edition of *Cases on the Law of Damages*, in short, continues the familiar casebook pattern of the mid-twenties. Its emphasis now, as then, is on vocabulary and on rule. Its cases are carefully and ably selected and arranged to show the historical development of what are believed to be working principles, and to illustrate the application of those principles in a variety of situations. There are teachers like me who criticize this pattern as too limited to meet the demands of modern legal education. But this criticism must be—and is—directed at Professor Crane's mark, not his marksmanship. The target he set for himself in this new edition was merely to bring "to the attention of the students in a more permanent form than casual citation in the class room" such new developments in damage law as the "trend toward the recognition of mental suffering as an element of damage in cases other than bodily injury."⁸ This target he has hit. It was not a long shot, but there was no need for him to try one. Editors of new editions of well-accepted casebooks cannot be blamed if they do not try new angles that might alienate their loyal friends. For such innovations we must look to youngsters like Professor Wright's new book.

Not much looking is needed to convince the reader that whatever other sins may be chargeable to Professor Wright's account, lack of ambition and narrowness of view are not among them. His book ranges widely over the entire field of remedies, treating the judgment for damages as merely one—though admittedly by far the most important—remedial alternative. Nor can he be

6. 1 BONBRIGHT, VALUATION OF PROPERTY cc. I-XV (1937).

7. 9 Exch. 341, 156 Eng. Rep. 145 (1854).

8. CASES ON THE LAW OF DAMAGES ix.

accused of slavishness to tradition in the treatment of his subject. No development of general principles first and then their application in a "part two" for him. He plunges immediately in chapter one into a consideration of all of the modern remedies for wrongful death and personal injury. In subsequent chapters he deals in this same fashion with injuries to personal and to real property,⁹ with injuries to business and to personal interests,¹⁰ and with injuries arising out of enforceable, unenforceable and voidable agreements.¹¹ Thus he follows through on his preface's rather belligerent disclaimer of interest in either "historical differences between remedies which once existed but today are of little importance,"¹² or sweeping generalizations about those remedies, paraded under the banner *fundamental principles*.¹³ To borrow two of his own phrases, he scorns emphasis on "doctrinal niceties" in favor of the "practical realities,"¹⁴ and aims to demonstrate to students how, when and where the complete arsenal of today's remedies work. Fortunately for legal education, he also spends a good deal of space on inquiring into how well they work from the standpoints of both society and the litigants.

Specifically, Professor Wright intends his book to serve for a course that will replace one or all of three subjects now offered in most law schools—Equity, Damages and Restitution. His work has its origin in experimentation with just such a merger at Minnesota where eight hours of courses (four of Equity and two each of Damages and Restitution) were telescoped first into a six hour and eventually into a four hour course. Professor Wright's casebook is the result of this operation. From it I have no doubt he teaches an excellent, stimulating course. What luck others may have with the book is a different matter—but not, I think, a matter of primary importance. In my eyes the principal value to legal education of a new casebook lies not so much in how helpful it may be to teachers in getting their courses taught as in how helpful it may be to them in getting their courses re-thought. In this large sense Professor Wright has done a fine job; his is a needling and a challenging sort of casebook. It not only offers a useful pattern for presenting remedial problems that are now not adequately covered in the substantive courses to which they pertain; it also suggests a hopeful pattern for a course that would synthesize for senior law students the complex of private law courses through which they have been introduced to the law. It is an open secret that part of the popularity of Conflict of Laws in many law schools is due to student hunger for its supposed review value. Because of the intimate relationship between right and remedy, a comprehensive survey course built around the unifying problem of remedial alternatives may well be the answer to the curricular puzzle of how to satisfy this appetite. Even those teachers who tend to scorn

9. CASES ON REMEDIES cc. 2-3.

10. *Id.* cc. 4-5.

11. *Id.* cc. 6-8.

12. *Id.* at ix.

13. *Id.* at x.

14. *Ibid.*

as spoon feeding the use of organized review materials should find Professor Wright's plan not too objectionable. At least his remedies course would feed with a big spoon.

But *Cases on Remedies* is offered for sale as a teaching tool and hence it must also be judged as such. In this respect it is not, in my opinion, a good book. My reasons for thinking so will at least mark Professor Wright as a first-rate prophet. For he has helpfully—if again belligerently—described in his preface the criticisms he expects from his reviewers, and I cheerfully adopt almost all of them.

The first of these anticipated criticisms is one that Professor Wright himself concurs in. He puts it this way:

“This book is tailored closely, probably too closely, to the needs of the Remedies course as I teach it. As a teacher I dislike the casebook which offers a tailor-made package, and allows me no room to follow my own whims as to coverage, order of presentation, and similar matters. But I have written just such a casebook.”¹⁵

I agree that he has. He has so tightly organized his materials and has made so much use of the reference-back device that an instructor will omit or rearrange at his peril. And as a teacher I dislike such a book just as much as Professor Wright does. I dislike it not only for my own use but also for its sterilizing effect, as I see it, on the law teaching fraternity. As I have said elsewhere: “What bothers me is that our stepped-up production of [such] streamlined equipment is over-encouraging teachers to become operators instead of designers.”¹⁶

Mr. Wright's next prediction as to where he and his reviewers will fall out is one that he is less inclined to go along with. He says:

“Reviewers object to casebooks in which the cases have been severely edited, and call for a return to the magnificent casebooks of the 19th century, where the cases were presented in all their pristine garrulousness, undefiled by the editor's scissors.”¹⁷

Again he has neatly anticipated this reviewer's criticism. For though I hardly call for “a return to the magnificent casebooks of the 19th century,” I do object to the sort of scissoring that Professor Wright indulges in. Occasionally a case, like a man, needs an operation. But Professor Wright has not run a hospital, he has run a slaughterhouse. The only value he can see in including cases not thus butchered is that it may be “good for the student's soul to demand that he wade through page after irrelevant page, searching out those facts, issues, and holdings which are related to the course.”¹⁸ I submit that it is also good for his development of legal skill. The fact that it is is one reason why the introduction of the case method marked such a significant advance

15. *Id.* at xi.

16. Mueller, *There is Madness in our Methods*, 3 J. LEGAL ED. 93, 94 (1950).

17. *CASES ON REMEDIES* xi-xiii.

18. *Id.* at xii.

in legal education. That we may well have gone too far in the use of that case method is another matter. I personally have no doubt that it is wasteful of a student's time and wearing on a student's interest to feed him an almost exclusive diet of such case reading and analysis for three years. But the solution does not seem to me to be the substitution of twice as much half-case reading. There is a growing need in legal education for illuminatingly written text which can be used to convey information economically and thus free a student's time for independent research and project work and the training of other skills. But a parade of fact summaries and excerpts from opinions does not constitute such illuminating text. And I trust that we have not yet become such slaves to the "case system" that we can see no way to supply it other than thus to smuggle it in behind a mask of case headings.

Professor Wright anticipates the most vehement reviewer objection to his insistence on stating in such forthright terms as "nonsensical" and "silly" his own point of view about cases and problems. He flings down the gauntlet in these words:

"Finally—most horrible blunder of all in the eyes of reviewers—my own point of view on many of the problems covered herein is not concealed beneath a hypocritical pseudo-objectivity, but is stated in as forthright terms as I know how to use. Any casebook editor who imagines that his book does not depend on a particular point of view is kidding himself. The selection of cases, the arrangement of materials, the choice of note references—all these reflect what the editor thinks about the problems of his subject. I regard this as not only inevitable but also desirable. And since I think it desirable, I have tried to put my thinking out in the open."¹⁹

Casebook editors probably do not kid themselves as much as Professor Wright seems to think they do. But this does not necessarily make their failure to state positions in the most forthright terms they know how to use hypocritical pseudo-objectivity. Perhaps an editor so restraining himself is thinking of the paralyzing effect on students' minds of a casebook that asserts its own "authority" in such forthright terms as "nonsensical" and "silly." Professor Wright insists that this clear labeling encourages rather than discourages the student's independent thinking and disagreement. I doubt it. It takes a strong-minded student indeed to disagree, and an ingenious and determined teacher indeed to frame stimulating questions and provoke lively discussion in competition with opinionated case materials. No one pretends that complete objectivity is attainable. But even the most opinionated editor need not apologize for including without comment viewpoints other than his own in order to provide the student with thought-provoking alternatives. The best that I can say here for Professor Wright is that he makes far less use of what he chooses to call "forthright" statements than he leads us to believe he will.

On the credit side of the ledger must be placed the generous use Professor Wright has made of non-case materials: his book is as lavish in this respect as Professor Crane's is miserly. Statutes, selections from law reviews, excerpts

19. *Ibid.*

from treatises, and sections of the *Restatements* cram the book and offer take-off points for exciting discussions on a great variety of live and important questions. And there is more of Wright's original work in the volume than appears at first glance. His notes, questions and comments are set in text type and bear no distinguishing headings; the result is that despite their frequency they will be easily missed by the page-flipping teacher making a casual inspection. They deserve a closer look, for Wright writes well, his comments are pointed, and his questions, directed to the functions of rules and the needs presently unmet by existing remedial doctrines, are searching.

But, above all, the book as a whole cuts across traditional curricular lines to present a simplifying and sensible course pattern. Most of the editor's faults can be charged to his ambition and to his enthusiasm for his job. In trying to bring together in one book enough teachable materials to support a large part of an entire legal education, he has spread himself much too thin. He has had to over-edit and to over-organize and so in the end he has produced too rigid and too busy a teaching tool. But if Professor Wright's reach has thus exceeded his grasp, legal education is the richer for it. His *Cases on Remedies* ought to stimulate curriculum committees in general and Damages, Restitution and Equity teachers in particular to some hard and much needed thinking.

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THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT. By Robert H. Jackson. Cambridge: Harvard University Press, 1955. Pp. viii, 92. \$2.00.

A FEW days after the Supreme Court reconvened for the October Term, 1954, Robert H. Jackson died. In the next several months, the Justice's son and his law clerk footnoted and brought to publishable form a short manuscript entitled *The Supreme Court in the American System of Government*—three lectures which Justice Jackson had been preparing for delivery at Harvard the following February, and which appeared to be “substantially complete”¹ when he died.

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1. William Eldred Jackson and E. Barrett Prettyman, Jr., who shepherded the Justice's manuscript into print, say in their Foreword:

“This, therefore, is an unfinished, yet substantially completed, work. It is unfinished in the sense that had the Justice lived the final product would have been polished to the perfection which he demanded of himself. It is, however, substantially completed in the sense that it expresses his matured and deep convictions regarding the institution of which he had been so close and keen an observer, first from without and then from within, over the past two decades.”

P. viii. Jackson was to have given the 1955 Godkin Lectures at the Harvard Graduate School of Public Administration. He outlined, drafted and redrafted the lectures throughout the spring, summer and early fall of 1954. He had been hard at work on them the day before he died. P. vii.