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Book Reviews

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High School		
Graduate before study	25,194	
Graduate before examination	15,591	40,785
3 years completion	1,528	
2 years completion	4,954	6,482
Grammar school	4,506	4,506
No requirement	28,540	28,540
		122,508

It will seen from the above figures that 80% of the legal profession in the United States are classified higher than North Carolina, which shows the necessity for raising the standards of English education required.

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BOOK REVIEWS

Handbook of Roman Law, by Max Radin. St. Paul, West Publishing Company, 1927. Pp. xiv, 516. The Hornbook Series.

"This book is intended to be a brief and simple introduction to a large and difficult subject. I hope that it may be intelligible to those who have neither law nor Latin; but it is primarily designed for lawyers and law students who wish to become acquainted with the more elementary notions of the great system" of Roman Law.

If the thirty-three Hornbooks on common law subjects, and as many more like them, were condensed into one volume of five hundred pages, would such a book give laymen enough understanding of the common law to make its reading worth while? To what extent do lawyers and law students turn to the Hornbook Series for any purpose other than refreshing memory of large fields through condensed statements? For any other purpose, of what use is a handbook?

Marcus Junius Brutus, ancestor of the Brutus of Caesarian fame, referred, in 150 B. C., to the rule that a man who drove a borrowed beast to a place further than the point he had borrowed it for, was guilty of "theft" (a civil action against the tort-feasor on the part of

the owner). In A. D., 1910, in New Jersey, one Sheffler borrowed a mare in Englewood to drive to Hackensack, a distance of four miles. He drove to Leonia, "a very considerable distance further," and was held liable for conversion therefor. By showing the connecting links between the two, a very striking example of continuity is made out. One wishes that Professor Radin had employed (or would yet employ) this "vertical" device to illustrate comparison and contrast of Roman law ideas with common law concepts, such as "culpa" and negligence or "causa" and consideration, even at the expense of the extent to be covered.

However, except for a few such passages, inconsiderable in amount, directed to the uninitiated, Professor Radin has turned his attention from preface to finis and index, to the task of acquitting himself honorably in the eyes of scholars and critics of Roman law. That he has succeeded, there can be no doubt. Sound scholarship and careful presentation are the outstanding features of the book. But he has forgotten entirely those "who have neither law nor Latin," and it is only occasionally that he remembers the "lawyers and law students who wish to become acquainted with the more elementary notions of the great system which has successfully disputed the domination of the modern world with the law of England." Insofar as Hornbooks are of value when they can be read critically, in the light of background, this Handbook of Roman Law may readily take its place among the best of the series. But the very fact of condensation, where so much is compacted into so small a space, seriously diminishes its value to the beginner.

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Rationale of Proximate Cause, by Leon Green. Vernon Law Book Co., Kansas City, Mo., 1927. Pp. x, 216.

In order to form a basis for this review of Professor Green's book and particularly for the reader who is not familiar with it, Professor Green's analysis is herewith presented:

"In any tort case all of the following inquiries arise. Any one or more of them may present difficult problems. But it is seldom that more than one or two of them give trouble in a particular case.

(1) Is the plaintiff's interest protected by law, i.e. does the plaintiff have a right?

(2) Is the plaintiff's interest protected against the particular hazard encountered?

(a) What rule (principle) of law protects the plaintiff's interest?

(b) Does the hazard encountered fall within the limits of the protection afforded by the rule?

(3) Did the defendant's conduct violate the rule which protects the plaintiff's interest?

(4) Did the defendant's violation of such rule cause the plaintiff's damage?

(5) What are the plaintiff's damages?"[1]

Point (1) refers to the variety of claims of personality, property, economic advantage, etc., which individuals are continuously calling upon society to protect. Whether the law protects the injured interest is always a question of law and must be answered in the plaintiff's favor before the case can go on. Claims for protection against pre-natal injury, nervous shock, mental anguish present illustrations of interests which may or may not be recognized by law. Whether they are protected in one jurisdiction or not protected in another is always a question of policy and has no connection with proximate cause, although the courts usually assign proximate cause as their reason for deciding the cases. While this is not new, it is to Professor Green's credit that he has made the distinction clear.

Point (2) represents the author's original and distinctive contribution. Admittedly, the determination of the rule or principle of law which shall govern a case is seldom difficult. Ordinarily the plaintiff invokes the proper rule for the protection of his injured interest. Yet there are leading cases where this has not been so. In *Bird v. Jones*,[2] the defendant erected seats across a highway and enclosed it so that the plaintiff could not get through. The plaintiff sought to recover under the rules and principles of law governing imprisonment. The decision was that he was not protected under those rules. In the well known "Squib Case",[3] the question was whether the plaintiff was protected under the rules of trespass.

Even if the rule invoked is a proper one, there is left the large problem of its scope, the limits of its protection. That courts recognize this problem where a statute has been violated is easily demonstrated by an examination of the cases. To illustrate, in *Gorris v.*

[1] Green, *Rationale of Proximate Cause*, pp. 2 and 3.
[2] 7 Q. B. 742 (1845).
[3] *Scott v. Shepherd*, 2 Wm Bl. 892 (C. P., 1773).

Scott,[4] the statute required vessels carrying live stock to have cattle pens of small size to prevent the spread of infectious disease. The plaintiff's sheep were washed overboard by rough seas. Had the vessel been properly provided with pens, the loss would not have occurred. Yet recovery was denied because the court considered the purpose of the statute and decided that it did not extend to protect against a loss occasioned by high seas washing live stock overboard. When the violation of a statute is involved, the court must decide whether the statute was designed to give protection to the plaintiff's injured interest against the risk or hazard encountered. Similar reasoning should prevail where the plaintiff has violated a statute and the defendant sets up such violation in defense. Professor Green discusses this in an article in the NORTH CAROLINA LAW REVIEW (December, 1927) entitled "Contributory Negligence and Proximate Cause."[5] The article really forms an additional chapter to his book. He shows that the plaintiff is often entitled to recover in spite of his violation of a statute, if the court decides that the statute was not designed to relieve the defendant from his legal obligations. Courts usually give as a reason that there is no causal relation between the violation of the statute and the plaintiff's loss, but such reason is unconscious camouflage of the larger issues of policy. *Sutton v. Town of Wauwatosa*[6] is typical. The plaintiff was driving his cattle to market on Sunday in violation of statute. The defendant's bridge collapsed. The plaintiff was allowed to recover because his violation of the Sunday law did not relieve the defendant from maintaining the bridge in proper condition.

This process of determining the limits of protection of a rule should be used whether the rule of law involved is statutory or common law. While courts are accustomed to consider the purpose of a statute, they refuse to give like consideration to the purpose of a common law rule or principle. Courts should consider the scope of every rule, common law or statute, and decide whether it protects the injured interest against the particular hazard encountered. The problem is present in all negligence cases, and, although the reviewer was doubtful about it and somewhat startled by the idea, it is also present in contract cases[7] and in crimes,[8] as Professor Green ably

[4] L. R. 9 Exch. 125 (1874).
[5] 6 N. C. L. Rev. 3.
[6] 29 Wis. 21 (1871).
[7] Green, *Rationale of Proximate Cause*, chap. 2.
[8] Green, *op. cit.*, chap. 3.

demonstrates. In negligence cases, the problem has been constantly confused with proximate cause.

Thus Points (1) and (2) of Professor Green's analysis are pure questions of law which the judge should always decide. Moreover they are often questions of policy, and innumerable factors must necessarily be weighed. Points (3), (4) and (5) are questions for the jury wherever the evidence raises any doubt. In a case where the evidence on any of these points is conclusive, the judge should decide the issue himself. Throughout the book, the author gives much needed emphasis to the all important question of the province of the court and jury.

As a test for determining proximate cause, the courts have developed the rule of probable consequences. Such a test has nothing to do with causation and everything to do with negligence. Professor Green had previously exposed this confusion.[9] As a test for proximate cause, the author uses Jeremiah Smith's suggested formula: "Was defendant's conduct a substantial factor in producing plaintiff's injuries?"[10] This "substantial factor" test makes the cause problem relatively simple. In fact, we discover that many causation cases involve no such problem at all.

There are two sides to every case, the plaintiff's and the defendant's. When it is decided that the defendant is a wrongdoer, that is only a part of the solution of the case, often a very small part. There may be many reasons why the plaintiff should nevertheless not recover. Courts have inclined to lump these varied and complex factors into one all-inclusive category of proximate cause. It is this complex problem which Professor Green has so ably analyzed. Naturally, he builds on the past. He finds much assistance in the work of Jeremiah Smith, Sir John Salmond and Professors Bingham and Bohlen.[11] There is quite a resemblance between the conclusions of Professors Bingham and Green, which the latter cordially recognizes,

[9] Green, *Are Negligence and "Proximate" Cause determinable by the Same Test* (1923), 1 Tex. L. Rev. 243, 423.

[10] 25 Harv. L. Rev. 303.

[11] Jeremiah Smith, *Legal Cause in Actions of Tort*, 25 Harv. L. Rev. 103, 223, 303; Salmond, *Torts* (6th ed. 1924), 131-172; Bingham, *Legal Cause*, 9 Col. L. Rev. 22, 139; Bohlen, *The Probable or Natural Consequences as the Test of Liability in Negligence*, 49 U. of Pa. L. Rev. 79. Reference is also made to the leading article by Professor Beale, *The Proximate Consequences of an Act*, 33 Harv. L. Rev. 633, and the subsequent articles by Edgerton, *Legal Cause*, 72 U. of Pa. L. Rev. 349, and McLaughlin, *Proximate Cause*, 39 Harv. L. Rev. 153.