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BOOK REVIEWS

Cases and Materials on the Law of Damages. By Charles T. McCormick. The Foundation Press, Chicago. Pp. xv, 798. 1935.

Handbook on the Law of Damages. By Charles T. McCormick. West Publishing Co., St. Paul, Minn. (Hornbook Series.) Pp. xiv, 811. 1935.

A criticism occasionally directed at the modern law school and its teaching methods is that it tends to stress too much the academic, philosophical and historical approaches to the study of law and to ignore or slight the practical approach. Certainly, if a law school acquaints its students with the cultural background of their chosen profession and sends them out into practice equipped with a thorough foundation upon which to build in years to come, it is a matter for gratification. Nevertheless, the charge that the law school is overlooking the fact that its chief purpose is to train men for the *practice* of law, is one that is entitled to serious consideration. Consequently, any piece of work which brings home to the law student and to the law teacher the practical and procedural problems of the law, without sacrificing to any substantial degree the broad cultural and historical precepts and philosophies, is worthy of note and commendation.

Professor McCormick appears to have accomplished this result so far as the field of damages is concerned in the two books, one a casebook and the other a text, recently written by him upon the subject of Damages. In the introductory chapter of the Handbook, the author states that, although he has made no attempt to separate with exactness the kindred questions of liability and damages, he has sought throughout to place the emphasis upon the problems of planning and presenting a case in respect to the amount of recovery and upon the technique of measuring compensation in jury trials. Throughout both the textbook and the casebook, the author has adhered religiously to this method of presentation. This emphasis upon the factors and elements which the practitioner should consider in "building-up" his case makes these books valuable to those engaged in practicing law as well as to those engaged in teaching it.

There has been a tendency in recent years to dismember the courses in Damages and apportion it piece-meal among various other substantive law courses, such as Contracts, Torts and Property, where, in most instances, it expired speedily. The tendency was a natural one which resulted from an erroneous impression of the fundamental nature of

the course, an impression which was occasioned in turn by the undue emphasis given to the question of "proximate cause" and other basic doctrines which are normally dealt with in the above-mentioned fields of substantive law. Professor McCormick's emphasis upon problems of Procedure and Evidence serves to place the subject in the proper perspective, and, it is hoped, will help to restore it to its former status as an individual, integrated and important law school subject.

Both the Casebook and the Handbook adopt substantially the same approach to the problem. Both books are divided into five main parts: (1) procedure; (2) rules, standards and elements of damages applicable generally; (3) damages in tort actions; (4) compensation for property taken by the public; and (5) damages for breach of control. The cases selected give the books a distinctly modern flavor. Almost two-thirds of the principal cases used in the case book were decided within the last twenty-five years, and only about one-fifth of those used were decided prior to 1900. About ten per cent of the cases are United States Supreme Court cases, and about ten per cent are New York cases. Except for a few lower federal court decisions and even fewer English decisions, the rest of the cases were decided by state courts. Almost every state has contributed one or more decisions. The small number of English cases, as compared with the number usually found in casebooks on Damages, is striking. Professor McCormick has recognized that Damages, as a question of law, is much more lively in the United States than in England and he has looked to the United States for about ninety-seven per cent of his case material.

Adequate and instructive footnotes are contained in both books. In addition, the casebook contains a number of interesting and enlightening problem cases and examples which should stimulate classroom discussion and individual research into specific problems. Whether the practice of pointing out these by-paths in the text itself instead of leaving it to the teacher to suggest them in classroom discussion, will appeal to the individual teacher will depend upon his own preferences and methods of teaching. Certainly the student of Damages who is denied the opportunity of personal instruction will find this feature valuable.

The casebook also contains numerous excerpts from *The Money Value of a Man*, by Dublin and Lotka. This inclusion of a substantial amount of valuable material obtained from non-legal sources, but which definitely relates to the question of damages is an innovation worthy of mention, and one which other legal writers might adopt advantageously. The legal profession can benefit greatly from a study of data and information collected, analyzed and interpreted by the social scientists and

the experts in other extra-legal fields. The incorporation of such studies into our textbooks and casebooks should, therefore, be commended.

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Law and the Lawyers, by Edward Stevens Robinson. New York, Macmillan, 1933. Pp. viii, 348.

"This book attempts to show that jurisprudence is certain to become one of the family of social sciences—that all of its fundamental concepts will have to be brought into line with psychological knowledge. . . . American juristic realism has thus far been a critical rather than a constructive movement. It has seemed to me that the next step is a systematic cultivation of that area common to jurisprudence and psychology. In the present book I have sought to make a beginning in that direction." (pp. v, vii)

Aligning himself definitely with the realists, the author has sprinkled the first chapters with a variety of thrusts at the conservative and absolutist legal thinkers. These are likely to be received with mixed cheers and boos by the audience of variously-minded lawyers. In the complacently ritualistic lawyer (and there still be such), this book may awaken a distrust of concepts and beaten paths. But the more sophisticated, acquainted with contemporary realistic ranting, it will disappoint, for like other such efforts, it debunks too much, and leaves the reader groping for something which remains always, just around the corner.

As suggested in the first sentence quoted above, the place of psychology is held to be paramount in the projected re-vamping of legal thinking. "If the jurist is to adjust his science to the temper of the modern mind he will have to reject legal theories that are out of accord with plain psychological facts and he will have to describe the legal institution and legal behavior in a manner congruous with psychology and the other natural sciences" (p. 122). "Every important legal problem is at bottom a psychological problem and . . . every one of the many traditions about human nature which are to be found in legal learning needs to be gone over from the standpoint of modern psychological knowledge" (p. 51). Such coöperation between social scientists, psychologists, and lawyers is, of course, a "consummation devoutly to be wished."

But what, more precisely, does this mean? Is the author (himself a psychologist) ready to recommend to the legal thinker concepts, laws, or principles that have been developed by psychological science, facts and formulations about human behavior that the lawyer should know?

Is he about to furnish tools that have been found useful in psychological investigation, methods of experimental and clinical and statistical procedure that the man of law should learn to use? Nothing so concrete! The presentation takes rather the form of a general exhortation to develop the mental attitude of the psychologist-as-scientist: an open-mindedness toward new facts and new ways of looking at facts, and that detachment and impersonality found in the laboratory and clinic.

Now, there can be no doubt that in their extreme forms, the points of view of lawyer and of natural scientist are about as antithetical as the points of view of any two professionally trained men can well be. For the one, formal considerations and consistency have seemed the main truth-test, for the other, factual considerations and experimental repetition. The interests and employment of one have to do with the practical implications of particular concrete cases leading to some answer as to what is to be done; those of the other deal with phenomena isolated for the moment from the complexities of particularities and examined as a type. The occupation of the former is with conflicts, and he enters most often as a partisan protagonist; the work of the latter is with "facts for facts' sake."

No difference of human attitude and perspective of values could be greater than this; and the author's plea that the man of law should—in his rôle of specialist in human social arrangements—develop more and more of the spirit of the man of science will still sound radical to some legally-minded readers.

Adopting the methods of the social scientists, developing an empirical attitude, debunking of legal concepts . . . these proposals in themselves are not new. Their ring is perhaps becoming monotonous to those (and they are legion) who have been hearing it so often. New in this book is the fact that the general exhortations come from a non-lawman, a psychologist. And in that respect the book is welcome. As propaganda it will serve a useful purpose.

Those many readers who are tiring of the almost purely destructive character of the realistic movement are beginning to feel that it is time to get their teeth into something. They are looking for the next step—after the general exhortations found in Professor Robinson's book what has the psychologist to offer the man of law?

More specifically, psychology, as a result of experimental and clinical studies, does have contributions to make. For example, psychological findings show that under certain conditions a witness' correct seeing of an event is seriously warped by any color blindness (occurring in six per cent of males, though much less frequently in females), or by oncoming twilight in which an originally darker of two objects may look

the lighter. If he hears a sound he is more likely to locate it erroneously if it be straight-ahead or straight-behind than if it be off to one side. Swearing does not guarantee accuracy, though it increases it. When reporting on objects noticed, one is more likely to err in regard to their colors and positions than in regard to their sizes and especially their shapes. The loss of value of hearsay evidence is rapid between the original and the second-hand observer, but a third- or fourth-hand narrator can give almost as good a story as the second-hand one. Dogs do not make good detectives: after a trail is a half-hour old or if it is crossed often they are likely to lead pursuers in a wrong direction and to an innocent man; and as spotters of the guilty man in a line-up their successes occur only when the latter "gives himself away." When a witness lies, there are a few methods of revealing this indirectly by laboratory ways of bringing out his hidden emotional stirred-up condition (by changes in respiration or blood-circulation or sweating or finger-movements)—and these are not confused with the natural anxiety of an innocent person charged with a crime; but only the most skillful and experienced examiners can be trusted with this work. When a jury has deliberated over the evidence offered by a number of witnesses, they bring in a report less complete than the testimony or opinions of any individual witness or individual juror but clearly more accurate than that of any individual witness or juror. Concerning different clinical types of the "insane":—the paranoic is more prone to deeds of violence; yet he is exceedingly difficult to detect because clever in his rationalizing. The dementia praecox individual may sometimes be given to impulsive acts like tearing his clothes, breaking windows, or even arson, but usually he turns hobo or prostitute. The parietic is more likely to perpetrate more violent crimes, and his case is doubly serious because often unrecognized. The senile dement is given to more petty acts—small thefts, exhibiting his sex organs, picking quarrels, and the like.

Such illustrations are concerned largely with matters of court-room procedure. Not new, their acceptance by courts is none the less gradual. Only indirectly do they attack the validity of so-called fundamental legal concepts of substantive law. Into that field psychologists and lawyers must next move.

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