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Book Reviews

BOOK REVIEWS

Cases on the Law of Damages. By JUDSON A. CRANE. St. Paul: West Publishing Company. 1940. Pp. xx, 521.

One of the problems posed for law schools by the law of damages is whether to treat the subject by a separate course in the curriculum or to treat it by some incidental materials on damages in connection with other courses, like contracts and torts. The reviewer is of the opinion that the law of damages should be treated by a separate course. The subject is a unity. There are certain fundamental principles which run through the whole of the course. There are special topics which cannot well be covered when an attempt is made to fit the subject into other courses. Mr. Crane and other editors who compile casebooks on damages agree with the reviewer on this point. For this reason, no matter what those adopting the other theory might say, the reviewer, so far as this point is concerned, commends the work of Mr. Crane.

Another problem posed by the law of damages, for those who are compiling casebooks, is the best analysis of the subject of damages and the best approach to that subject. The reviewer, so far as this problem is concerned, is of the opinion that the best analysis of the subject and the best order in which the topics should be treated is: (1) To treat the nature and theories of the law of damages and the different kinds of damages; that is, what damages a person is entitled to recover. This would include such topics as nominal damages, exemplary damages, substantial damages, direct damages, consequential damages, entire damages, prospective damages, and perhaps general damages and special damages, although the latter damages involve pleading. (2) Then he would consider the way in which the above kinds of damages are measured; that is, how the amount of recovery is determined. This would involve the consideration of liquidated damages where damages are measured by the parties, value and interest where they are measured by standardized rules of law, and the sound discretion of the jury where there are no such standardized measures. In measuring the damages in any one of these three ways, there are various matters which have to be taken into consideration, the most important of which is the elements of injury, pecuniary and non-pecuniary. Pecuniary injuries include such matters as loss of property, loss of bargain, loss of earning capacity, loss of reputation, loss of services and society, loss of support, and expenses; and non-pecuniary injuries include such matters as physical pain, inconvenience and discomfort, and mental suffering. The rules as to foreseeability in contracts and proximate causation in torts are limits of injury which also have to be considered in measuring the damages. In addition, there are certain matters of aggravation and mitigation which have to be considered, as well as matters of limitations of interest. (3) After all of these matters have been considered, the reviewer would in the next place consider questions of pleading and practice. (4) After these fundamental matters of damages have been covered, the reviewer would treat of specific applications of these general principles of damages to various kinds of contracts, and to specific torts and to cases of eminent domain.

Some compilers of casebooks follow this analysis and approach, while others follow either a procedural approach, or an approach from the standpoint of how damages are measured. Mr. Crane has chosen to follow what is more nearly like the procedural approach. Probably he has the privilege of choosing the manner of presenting his materials and he should not be criticized for his choice. All the reviewer can do is to say he prefers the other method.

However, even if the compiler is to be allowed to follow his own method of approach, it would seem as though the order of his materials might be changed to some advantage; and the reviewer would suggest making the topic of interest follow the topic of value and bring these topics and the topic of liquidated damages and the jury's function in determining damages closer together. He also would suggest a heading either of compensatory damages or substantial damages following the heading of exemplary damages so as to have a heading comparable with that of non-compensatory damages. Mr. Crane does not have cases specially developing the law of damages for eminent domain. It might have been wise to have given this topic separate treatment.

It seems to the reviewer that the editor has maintained a good balance between the amount of materials devoted to the different topics. The compiler also has apparently chosen enough important English cases to give historical development, and in selecting United States cases, has on the whole selected good cases from the best courts; and about one-third of his cases may be called recent cases. One or two recent cases refusing to follow the *Restatement's* position on the matter of damages which have been omitted might well have been included. A comparison of Mr. Crane's casebook with two other recent casebooks on damages (McCormick's and Bauer's) shows that only three cases in Mr. Crane's book are found in both of the other books, and only 20 other cases in either one of the other books, while 110 cases are found in neither of the other books. This is a remarkable showing. It is almost unthinkable that there should not be more than three cases found in all three of the casebooks; and it must be a criticism of either one or all that this is not so.

The physical appearance of the book is pleasing, and the publisher's work seems to be good.

*Hugh E. Willis**

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A Trustee's Handbook. By AUGUSTUS PEABODY LORING. Fifth Edition, Revised and Enlarged by MAYO ADAMS SHATTUCK. Boston: Little, Brown and Company. 1940. Pp. lxxi, 425.

The first edition of this book made its appearance in 1898. Since then the profession has had the benefit of Professor Bogert's seven volume treatise, the Restatement of Trusts, and Professor Scott's four volume work. In this fifth edition Mr. Shattuck has satisfied the demand for an up-to-date one

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volume work on the duties and powers of trustees and the problems of trust administration.

Consulting the Handbook alone will answer a majority of inquiries. Copious references to the Restatement and Professor Scott's treatise aid the reader in the solution of problems requiring further investigation. The Handbook is concerned with the express trustee[1] and consequently little space is devoted to constructive or resulting trusts. Mr. Shattuck has not hesitated to take issue with certain views expressed in the fourth edition.[2] When he does so he invariably supports his position with competent authority or sound argument. Of particular value is the section on the trustee's duty not to delegate.[3] The trustee is reminded that his is a position of personal confidence, that it is his services and not the services of some investment counsel to which the beneficiary is entitled.[4]

There is a separate chapter on the Conflict of Laws. Here the reader is frequently referred to the Restatement of Conflicts and Professor Beale's treatise. In this chapter the author warns of the danger of multiple taxation and discusses the effect of such cases as *Curry v. McCanless*[5] and *Graves v. Elliott*.[6] In the light of the importance of tax problems to the present day trustee a separate chapter on Taxation would not have been amiss. The author's style is direct. The book is easily read and, thanks to a very detailed index, easy to use. Some 1300 cases are cited. The appendix is divided into three sections in which a summary of state statutes and decisions is given on the questions of the trustee's compensation, legal investments and spendthrift trusts.

This concise and very able handbook is certain to prove most valuable to lawyers and trustees alike.

*Herbert R. Baer**

Wake Forest, North Carolina

Studies in Federal Taxation. (Third Series). By RANDOLPH E. PAUL. Cambridge: Harvard University Press. 1940. Pp. xvii, 539.

This volume continues the federal tax studies which Mr. Paul began in 1937 and continued in 1938.[1] Writing sometimes alone, sometimes in collaboration, he has ranged over many of the questions currently pressing in the administration of federal income, estate, and gift taxes.

A simple recital of the contents of the three volumes is enough to show their intensely practical character. The first dealt with tax avoidance, valuation, and the bad debt provision. The second considered local property rules, tax compromises, *res judicata,* ascertainment of "earnings or profits",

[1]P. 96.
[2]Pp. 21, 34, 99, 106 and 203.
[3]Sec. 20, p. 71.
[4]P. 75.
[5]307 U. S. 357, 59 S. Ct. 900 (1939).
[6]307 U. S. 383, 59 S. Ct. 913 (1939).
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[1]The first two volumes were published by Callaghan and Company.

step transactions, motive and intent, and the tax status of will contestants. The present volume contains a long study of reorganizations, another of revocable trusts and the income tax, shorter studies of federal income tax problems of mortgagors and mortgagees, the income tax with regard to life insurance and annuities, and the use and abuse of tax regulations in statutory construction. Mr. Paul clearly does not care how many angels can dance upon the point of a needle.

In content, the studies in this third volume measure up to Mr. Paul's high standard. Each is exhaustive, with full consideration of historical background and complete coverage of administrative rulings as well as decisions of the courts and the Board of Tax Appeals. The review of tax law in reorganizations is perhaps the best and most thorough now available, although the discussion of closing agreements, in view of their importance as a part of the "law in action", seems too brief, and might well have been supplemented by illustrative material. The study on trust income might have been entitled "The Taxation of Trust Income to the Grantor", since it deals not only with revocable trusts, but also with short-term trusts, alimony trusts, and trusts for support. The study on tax regulations is an intelligent and provocative discussion of the "reenactment rule", in the light of recent Supreme Court decisions. This doctrine, of late the subject of much searching criticism,[2] is nevertheless a vital consideration in many of the tax cases now[3] coming before the courts.

More remarkable than the content of these studies is the style in which they are written. Mr. Paul is an enlightened realist, and Mr. Justice Holmes is his household god. He speaks in terms of what courts do, not in terms of what they say. In the preface to the first volume, he recognizes the need "to decide, at least for working purposes, something about what law is; the author decided to write in terms of law not as a fixed body of unchangeable academic principles, but in the sense of what variable courts do in fact."[4] The echo of Holmes is apparent.[5] The freshness and vitality of this approach make Mr. Paul's studies not only absorbing, but thoroughly practical. Constantly he approaches tax problems from the viewpoint of a lawyer counselling his clients. Dustiness, mustiness, fustiness there is none.

I have often thought that the principle of withholding at the source should be applied to many, if not most, of the texts and treatises pressed upon lawyers today. Every practicing lawyer is familiar with the third, fourth, or fifth edition of a once good work, put together by the stooges of some big publishing company with the help of scissors and a pot of paste. All too often, he finds such a work skimming the shallows, never touching the deeps in which his interest lies, or if it should chance to do so, wading out by periphrases, caring not if one page contradicts the page before. General treatises worthy

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[2]See Griswold, *A Summary of the Regulations Problem* (1941) 54 HARV. L. REV. 398.

[3]Griswold, *supra* note 2, at 402, suggests that since the enactment of the tax laws in the permanent Internal Revenue Code in 1939, the reenactment question will tend to become less important.

[4]PAUL, STUDIES IN FEDERAL TAXATION (First Series, 1937), Preface, p. v.

[5]"The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." Holmes, *The Path of the Law* (1897) 10 HARV. L. REV. 457, at 461.

to rank with, or just behind, Williston and Wigmore, are almost as few as Jewish admirers of the Gestapo.

In the tax field particularly, with its weekly flood of decisions and rulings, the general text is at a loss. Even works of such high quality and limited scope as Paul and Mertens' *Law of Federal Income Taxation*[6] sometimes have hard sledding. In a field particularly suited to the narrow, searching, informed essay, Mr. Paul has seen his opportunity and made full use of it. No lawyer who is concerned with federal tax questions—and what lawyer, in these times, is unconcerned with them?—can afford to slight Mr. Paul's three volumes of studies. They are important not only to his information, but, more than that, to his bread and butter.

In the winery of the law, Mr. Paul's studies are sparkling champagne in a cellar of flat wines.

*Daniel G. Yorkey**

Ithaca, New York

Cases on Restitution. By EDWARD S. THURSTON. St. Paul: West Publishing Company. 1940. pp. xxviii, 964.

Professor Thurston's case-book on an important subject in the field of law deserves high praise. The reviewer, who has taught the law of quasi-contracts for several years, believes that an extremely helpful teaching tool has been provided by this work.

The review of a case-book requires inquiry into several factors that make a case-book either an asset or a liability to a course. Teachers of law will disagree as to the relative importance of these factors but to the reviewer a case-book which deserves praise must meet the requirements of (1) a proper arrangement of materials to meet the importance of various phases of the subject as it is today, (2) a selection of cases which will involve the application of the principles of law of the particular field to modern conditions, (3) a sufficient number of foundation-stone cases, (4) an amount of material sufficient to satisfy the usual time allowed for the course.

A careful analysis of Professor Thurston's work seems to indicate that his case-book fulfills these requirements. His use of the term, restitution, in the title seems to be a more happy choice than that of the traditional term, quasi-contracts, which tends to mislead the student of the subject at the outset as to the nature of this legal concept.

There has been a noticeable increase of material on restitution in equity over that found in the editor's *Cases on Quasi-Contracts*. The topic of benefits conferred under mistake covers nearly 450 pages of the case-book. The importance of this phase of the subject must be conceded. Likewise, the topic of benefits conferred in the performance of a contract seems to have ample coverage. Other topics usually found in a quasi-contract course are included together with such foundation-stone cases as the famous *Moses v. MacFerlan* and others of equal fame in this field.

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[6]Published in 1934, with supplement by Mertens in 1939.

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A considerable number of the cases concern the application of the principles of quasi-contract law to comparatively modern problems. Perhaps all law-teachers who have tried to stimulate the automobile-minded generation of law-students with cases of the horse and buggy age, will appreciate this feature of this volume.

Fortunately the author has not attempted to cover too much material in too few pages. The foot-notes are reasonable in number and in style. A very workable index will make this book a source of value long after the subject has been completed.

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