

BOOK REVIEWS

THE JUDICIAL PROCESS IN TORT CASES—by Leon Green.† Second Edition. The West Publishing Co., St. Paul, 1939. Pp. xxi, 1356. \$7.50.

In this second edition of his case book, Dean Green has not altered the fundamental scheme of the original work.¹ The principal changes he has made are these:

1. The omission of former Parts 2 and 3 which comprised over 600 pages of the first edition, and the substitution for them of some forty pages of explanatory material. These parts were called Interests in Relations with Others and Interests of Personality, Property, and in Relations with Others, and included, among other things, wrongful death and defamation. These topics are now taught in a separate Torts course in the Northwestern Law School.

2. The shortening of the remaining material by about ten per cent, and the printing of it in very readable larger type. The book is now no longer than several other torts case books.

3. The addition (and substitution) of a generous supply of cases decided since the first edition and a careful revision of footnotes.

4. Some rearrangements of the materials. The most important of these is to be found in the chapter now called Threats, Insults, Blows, Attacks, Fights, Restraints, Nervous Shocks.² The number of section headings in the chapter has been increased (though some of these are lumped together for treatment, *e.g.* § 5 Use of Firearms, § 6 Sports and Practical Jokes, § 7 Conduct of Children and Insane Persons, and § 8 Fright and Nervous Shock). The self-defense cases have been put in a separate section. The old heading Conduct With Reference to Women has been discarded and its contents divided: the rape cases being put under Offensive Physical Contacts and the fright and shock cases being labelled as such.

The chapter on Keeping of Animals has lost its separate existence to become a subsection under the treatment of Occupancy of Land. The

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¹For reviews of the first edition, see Keigwin (1932) 20 GEORGETOWN LAW JOURNAL 549; Goodhart (1932) 32 COL. L. REV. 762; Shulman (1932) 45 HARV. L. REV. 1445; Polikoff (1932) 80 U. OF PA. L. REV. 929; Gifford (1932) 41 YALE L. J. 1264.

²Now c. II, p. 5; formerly c. I, p. 1.

order of three other chapters has been changed³ though the scope of each remains about the same.

As I have said, the underlying scheme of the first edition, with its concomitant point of view, is basically unchanged. Dean Green believes that a more fruitful approach to the subject can be made by grouping cases on the basis of factual situations than is afforded by conventional classification according to legal concepts. Legal rules and formulas are *not* regarded as unimportant. On the contrary, they "give the power of language to the student, lawyer, and judge to deal with the transaction involved in litigation."⁴ But in most types of cases these rules and principles are "numerous and competitive," so, it may be inferred, they do not determine the outcome of the cases,⁵ and therefore cannot form a satisfactory framework for a study of torts (or, I suppose, of anything else). Few lawyers—whether in or out of law teaching—are actually unaware that many things besides doctrine influence the decisions of the law. Some of these other factors may well be—singly or in combination—more influential in shaping the outcome of a single case or the course of a legal trend than is the reasoning commonly found in judicial opinions. This much can be and I think usually is pointed out to law students.

The question is, how much more about these non-legal determinants and consequences of legal action, can usefully be taught. And that in turn depends on whether anything roughly approaching systematic knowledge of a cause and effect relationship between legal decisions and any given set of non-legal factors can be had. Professor Underhill Moore has attempted a really scientific inquiry into some questions of this kind⁶ but it would be impossible today to compile a casebook on torts that came anywhere near to satisfying his standards. On the other hand, it is fair to expect a radically new arrangement of tort cases to provide at least a likelihood that it will disclose factors which afford a better basis for prophecy and understanding of the judicial process than the older

³*Viz.* former chapters V, VI, and VII are now chapters VIII, VII, and V respectively.

⁴Preface to first edition reprinted (2d ed.) p. vii. The notion is not unlike that expressed by Thurman Arnold's phrase "argumentative technique."

⁵See GREEN, JUDGE AND JURY (1930) 19; *cf.* CORWIN, TWILIGHT OF THE SUPREME COURT (1934).

⁶Moore and Hope, *An Institutional Approach to the Law of Commercial Banking* (1929) 38 YALE L. J. 703; Moore and Sussman, *Debiting of Direct Discounts* (1931) 40 YALE L. J. 381, 555, 752, 928, 1055, 1219. But see Fuller, *American Legal Realism* (1934) 82 U. OF PA. L. REV. 429.

arrangements did, when supplemented by the amount of horse sense that every lawyer worth his salt must have.⁷ Dean Green believes that if we focus our attention on the type of situation or relationship that gave rise to the litigation we will find out more about how and why courts react than we would if we paid relatively more attention to the legal reasoning found in the opinion. I do not altogether disagree with him. Surely the growth and development of much of our recent tort law cannot be fully understood without a knowledge and appreciation of the growth of the automobile and its use, the extent and incidence of the loss it causes, the advent of liability insurance and the types of coverage it provides, the rise of a sentiment in favor of social insurance, and many other circumstances attending this relatively new social problem. Quite different considerations come into play when a doctor is sued for malpractice, and a separate treatment of the two lines of cases may have more utility than would scattering them with others through successive developments of the concepts of negligence, vicarious liability, and so on.

The only serious defect I find in Dean Green's presentation of materials is that it goes too far in one direction and not far enough in another. It goes too far in abandoning the conventional framework and in relying upon types of fact situations for its categories. I think this is so for two reasons: (1) primarily because I, more than does Dean Green, believe legal concepts, principles and rules play a more important part in determining the operation of the judicial process. The difference is simply one of degree in a matter of opinion. Obviously the amount of emphasis put on the origin, history and development of concepts as such will vary with the extent of this difference of opinion. (2) Because a complete set of significant new categories has not been offered, so that the author has been driven to formulating some that are not significant and to developing others in a way that suggests only an attempt to fill gaps. Many examples of both were given by reviewers of the first edition and most of these have not been remedied. The present heading *Freight Transportation*⁸ furnishes an instance. The first case under it deals with the unpreventable trespass of an ox being driven home from market. The next three deal with loss, damage, or delay to railroad freight ship-

⁷It would scarcely be worth while, for instance, to scrap conventional treatment just to show that juries are occasionally influenced by the personality of counsel and their clients, or that appellate courts are sometimes impressed by the fact that one lawyer arguing before them is a man of good reputation, another a known shyster.

⁸Pp. 1128-1154.

ments, the fifth is *Vincent v. Lake Erie Transportation Company*,⁹ and the last is the *Polemis case*.¹⁰

On the other hand it seems to me that Dean Green has not in his materials exploited to the full some very interesting possibilities suggested by his groupings of cases. These, we have seen, are non-legal. They could well be enriched and pointed up by use of available non-legal material. That is notably true of the section on automobile transportation. Important statutory developments in this field have also been ignored.

Notwithstanding this defect, if it is one, Dean Green's work, because of its excellent choice of cases, because of its publication of most of the cases in full, because of the superior quality of its footnotes, and because there is much that is provocative of thought in its arrangement, deserves to be ranked high among casebooks in the field today.

FLEMING JAMES, JR.*

THE LAW OF WILLS—by W. D. Rollison.† Callaghan and Company, Chicago, 1939. Pp. xxi, 827. \$6.00.

This book is a restatement for law school students of the law of descent, of wills, and of the administration of estates of decedents. The author gives unusual attention to the historical approach, tracing for each major subdivision of his work, not only the situation at the early common law and in the ecclesiastical courts, but also the pertinent provisions of the Statute of Wills, the Statute of Frauds, and the Wills Act in England, with some indication of the most usually found statutes in this country. This presentation, as an introduction to each subject, aids materially in comprehending the statutory situation respecting the particular topic under consideration.

The book is founded frankly on the cases that have been considered leading cases for some time, many of which can be located in familiar English and American selective case compilations. The author does not

⁹109 Minn. 456, 124 N. W. 221 (1910). The damage here was done in a storm by making a boat secure to plaintiff's dock. The decision awards damages though the defendant concededly did no wrong. The boat was a freighter.

¹⁰*Polemis and Furness, Witby & Co., Ltd.*, [1921] 3 K. B. 560.

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