

a substantial one, especially as it relates to the problem of personnel recruitment for such institutions. Any hopes for a more rational penology must rest ultimately on our ability to create a professional group composed of men of sense and education committed to correctional work as a career. Our progress toward this objective has not been impressive. I suspect that one significant source of difficulty is the presence of the death penalty. It should not be surprising to discover that able men object to participating in the operations of an abattoir.

In short, it seems to me that a reasonable case for abolition of capital punishment can be made. At best, our handling of the death penalty is futile and not a little ridiculous. At worst, it may be positively pernicious. This is not to say, however, that abolition would be likely to remedy many of the fundamental problems that confront American criminal justice. We should still be possessed of a system that too frequently fails properly to separate the guilty from the innocent, criminal legislation based on no considered or rational principle, a penal system that aggravates rather than reduces the danger of its inmates. Nevertheless, the abolitionist case deserves to be heard. Mr. Koestler's statement of the case is not unexceptionable. But if it directs attention to issues we find too easy to avoid, it will have served well.

FRANCIS A. ALLEN*

CASES ON THE LAW OF TORTS. By Leon Green, Wex S. Malone, Willard H. Pedrick, and James A. Rahl. St. Paul: West Publishing Co. 1957. xxxvi + 855 pages. \$12.00.

This casebook is a welcome addition to the teaching tools available for teachers of torts. The senior editor has been in the forefront of imaginative thinking in this field for a generation. His book on proximate cause and his essays on the duty problem in negligence did much to clarify an area of the law which had long been a quagmire of muddy thought. To be sure, Green did not invent the modern approach to negligence. Cardozo's opinion in the *Palsgraf*¹ case was a milestone. Indeed, Brett, J., in one of those

* Professor of Law, University of Chicago.

1. *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99, 59 A.L.R. 1253 (1928).

intuitive flashes which occasionally characterized his judgments, had anticipated *Palsgraf* sixty years earlier in *Smith v. London & S. W. Ry.*² But Dean Green's contributions here were sound and filled with great insight. Nor should we overlook his work on deceit, defamation, family torts, and other multiple relation situations. He has done creative and original writing in all areas of the law of torts to which he has applied himself.

The original edition of Dean Green's casebook was published in 1931 and was the first breakaway from the conventional organization which had characterized its predecessors. The factual grouping of cases without regard to doctrinal analysis was a radical departure from what had theretofore been regarded as pedagogical orthodoxy by the Harvard casebook school of thought, which had a virtual monopoly in the industry. It more nearly resembled the somewhat haphazard bibliographical alignments of the West Publishing Company's digest system than the Langdellian casebook system.

Nevertheless, the Green arrangement of cases had merit and met with favor with an important group of torts teachers. To be sure, this book did not become a best seller and this reviewer has not used it, for reasons which may be pardonable, but it was a challenge to complacency which is always to the good.

It should be admitted by all of us who are guilty that there is something lost in the classical system of "editing" the case to bring out one point of dogma, particularly when we remember how dogma is put asunder so frequently by the facts of the case. The judges, many of whom pay lip service to the same dogmas as law teachers, are constantly reminding us that each case, in the common-law system, is determined by its own particular facts. Nevertheless, we continually try to squeeze every case into our own little conceptual pigeonholes. There is, no doubt, value and wisdom in looking at the "whole case," as modern child guidance experts like to look at the "whole child." Some cases in this book have been edited, but not very much.

On the other hand, it cannot be denied that doctrine plays an important role in the law which is not completely anti-intellectual. There is religion here, and the judges are the high priests. Dogma plays its part and while the law, like all religions, adapts itself to

2. L.R. 6 C.P. 14, 20 (1870).

the changes in society and to the changing moods of the people who live in it, it is of the nature of the rational ego to make the accommodation in a way that is satisfactory to that ego. It cannot be made too uncomfortable. Of all members of societies which share our Western culture, the rational ego has been cultivated in lawyers, judges, and law teachers as much as in any other class.

It may well be that these differences in approach are less important than we think. I should be much surprised if Dean Green's students were not as thoroughly familiar with the "doctrines" of tort law as my own—and I hope that mine are as elastically minded as his should be.

To return to this casebook, the general arrangement is not substantially different from the first and second editions. I can think of nothing more futile than to count new cases, but a casual examination indicates that there are many. The range of the book includes the usual phases of tort law except defamation and the right of privacy. This book contains 855 pages as against 1875 in Dean Green's first edition.

These remarks are not intended to minimize the contributions of the three junior editors, Wex Malone, Willard Pedrick, and James Rahl. There is, of course, no way of conjecturing on the division of labor among the editors, but the general excellence of the scholarship is a tribute to all participants.

A law teacher ordinarily, I suppose, selects the type of casebook from which he thinks he can teach most efficiently. The experimentally minded can adopt this one to advantage. Were it not for my own vested interests, I would have tried one of Dean Green's earlier books long ago.

FOWLER V. HARPER*

THE LAW OF TRUSTS. (2d ed.) By Austin W. Scott. Boston: Little, Brown and Co. 1956. lii + 4056 pages, 5 volumes. \$100.00.

When the first edition of *Scott on Trusts* appeared on the legal scene in 1939, it was widely hailed as the crowning achievement of one of America's greatest teachers and writers. Not a few of the reviewers prophesied that the treatise would be of great utility

* Professor of Law, Yale Law School.