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Handbook of the Law of Torts (Book Review)

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BOOK REVIEWS

HANDBOOK OF THE LAW OF TORTS. By William L. Prosser. St. Paul: West Publishing Co., 1941, pp. 1309.

This is an up-to-date treatise on the law of torts. The author has expressed, and very lucidly, the modern thought on the subject of tort liability. He uses present-day terminology. For these and other reasons the book is easily readable as well as instructive and interesting. Although a lawyer's book, it may be used with profit by the student in the law school because it avoids ponderosity and abstractions, and is written in a succinct style.

Those of us who have devoted years to the study of Torts heartily agree with the statement of Professor Prosser which he makes in his Preface: "It may safely be said that since that date [1853] no other branch of the law has undergone such rapid and extensive change, expansion and development as the law of Torts. There has been a marked acceleration of this development during the last three decades. The volume of case law dealing with Torts has increased enormously, and there has been a vast outpouring of comment and discussion in legal periodicals, some of which is of much more value than anything yet included within the pages of any Text." On page 5 of his text the author says: "New and nameless torts are being recognized constantly, and the progress of the law is marked by many cases of first impression, in which the court has struck out boldly to create a new cause of action, where none had been recognized before. The law of Torts is anything but static, and the limits of its development are never set * * *." It is not a cause for wonderment, therefore, that the courts have refused to define a tort with judicial or exclusive certainty.

Not only should the content of the various legal subjects be taught to the student in the law school, but the relationship of these subjects to each other should be pointed out to him, so that he may understand that law or jurisprudence, including equity, is an entity and not merely a group of unrelated rules or principles. The author makes mention of this when he states in his Preface that the law of Torts "interlocks at every step with Property, Contracts, Agency, Statutes, Equity, Criminal Law, and many other branches which usually are regarded as more or less separate and distinct. It is trite to say that the whole is a seamless web, and that to touch it anywhere is to take hold of it all."

"In recent years," says the author on page 11 of his text, "there has been a growing appreciation of the fact that the law of Torts is concerned chiefly with the distribution of the losses inevitable in a civilized community, in accordance with the court's conception of social justice." The principles underlying such distribution of losses, *i.e.,* the grounds of tort liability, are quite fully discussed by the writer of this treatise, who says in this connection on page 15: "The law of Torts is concerned primarily with the adjustment of the conflicting interests of individuals to achieve a desirable social result. Perhaps more than any other branch of the law, the law of Torts is a battleground of social theory," and on page 33: "the law of Torts is a battlefield of the conflict between capital and labor, between business competitors and others who have conflicting claims in the economic struggle."

The author pays his respects to some of the more prominent writers of torts text books (naming them), among whom he mentions Professors Burdick and Harper, and proceeds to say on page 24: "The influence of these text writers upon the courts has been very great; and perhaps even more influential has been the constant discussion of tort problems in the law reviews." On page 24 the author continues: "Within the past seventeen years there has been a very significant attempt at a searching and exhaustive analysis of the entire field in the American Law Institute's Restatement of the Law of Torts * * *. The form of the Restatement is perhaps unfortunate, in that it seeks to reduce the law to a definite set of black-letter rules or principles, ignoring all contrary authority, and the law of Torts in its present stage of development does not lend itself readily to such treatment; and there are those who have disagreed with many of its conclusions." Perhaps this objection of Professor Prosser would be substantially lessened if the country were covered by state annotations of the Restatement.

"There are many possible approaches to the law of Torts," says the author on page 34, "and many different arrangements of the material to be considered have been attempted. Other than mere convenience in discussion, there is of course no inherent merit in any of them." Your reviewer agrees. The same result is accomplished, whatever the arrangement of the material may be, so long as the arrangement is sufficiently comprehensive to cover the whole field. The author's arrangement of his material in this book conforms to the later convention. On page 34 the author states the "General Plan" of his treatment as follows: "Tort liability always rests upon one of three fundamental grounds. These are:

a. Intent of the defendant to interfere with the plaintiff's interests.

b. Negligence.

c. Strict liability, without intent or negligence, imposed for reasons of policy."

This plan or method of treatment is the same as that adopted by the Restatement of Torts. The author then proceeds to consider these grounds of tort liability and in the order named, and in connection with each discusses those torts or invasions of the plaintiff's interests, which have been more or less exclusively identified with each, together with the defenses available against them, and in doing so he has endeavored to adhere to the terminology and the concepts which are in use in the courts, and which, therefore, are familiar to the bar.

After discussing the history of "Trespass and Case", and the meaning of "Intent", the author deals with Battery, Assault, Mental Disturbance, False Imprisonment, Trespass (to land and chattels) and Conversion, all of which are "intentional" torts. Then follows a discussion of the defenses to these torts, among which defenses are Privilege, Mistake, Consent, Self-Defense, Defense of Property, Necessity (the privilege of acting under necessity, including Forcible Entry on Land), Recapture of Chattels, Legal Authority (privilege of public officers, including legislators and judges, and arrest without a warrant, *etc.*). Then follows a lengthy discussion of the tort of

Negligence, including the principles of foreseeability, *res ipsa loquitur* and "proximate cause", and which also includes the defenses to the last-named tort, such as assumption of risk, contributory negligence, last clear chance and imputed negligence. "Strict Liability" is then treated, the author saying, on page 426: "Until about the close of the nineteenth century, the progress of the law was in the direction of limiting liability in tort to 'fault', in the sense of a wrongful intent or a departure from the community standard of conduct" (lack of reasonable care). "Modern law is developing a policy of imposing liability without 'fault', in cases where the defendant's activity is one involving a high degree of danger to others, even though it is carried on with all possible precautions. The basis of this policy is a social philosophy which places the burden of the more or less inevitable losses due to socially desirable conduct upon those best able to bear them, or to shift them to society at large." On page 466 the author says that this principle "is being extended, both by statute and by the common law, into other fields."

It is submitted that "strict liability" in the sense of "liability without fault" is neither strict nor without fault. Surely it is not less anti-social to subject a man to unreasonable risk by a highly dangerous though careful act, than it is to subject him to a risk, no more unreasonable, by the doing of a permitted act in a careless way.

The author's three bases of liability might be increased to include a fourth founded on restitutional necessities, and exemplified by liability for such things as unintentional, non-negligent and non-hazardous encroachments, and the "trespasses" of pasture-consuming animals.

A discussion of Vicarious Liability and of Employers' Liability and Workmen's Compensation follows. The tort of Nuisance is treated together with Remedies for and Defenses to that tort. Attention is given to Trespassers, Licensees and Invitees, Vendor and Vendee, and Lessor and Lessee, under the caption "Owners and Occupiers of Land." There is a chapter on the liability of Suppliers of Chattels and Contractors, following which is a chapter on Misrepresentation including Deceit. The author devotes a chapter each to Defamation, Misuse of Legal Procedure including Malicious Prosecution and Abuse of Process. Torts to Family Relations has a chapter, in which the author also treats of survival of actions and actions for wrongful death. A chapter is devoted to Economic Relations including Interference with Contractual Relations and Injurious Falsehood (Slander of Title). There is also a chapter on the Right of Privacy, followed by a treatment of harms by the sovereignty, municipal and charitable corporations, infants and insane persons under the caption "Immunities". There is also a discussion of Joint Torts, and Election to Sue for Restitution in which the tort of Conversion is considered.

There is an unusual number of valuable footnotes. A Table of Contents, a Table of Cases, and an Index add to the value of the book, and make for a readier reference to its textual contents. About 1500 cases are cited, most of which have been decided since 1910. Upwards of 2000 articles, notes and comments in legal periodicals are also referred to. The author has certainly done a prodigious amount of research.

The essential elements of the particular torts might have been treated more specifically so that they would stand out with greater prominence.

DAVID STEWART EDGAR.*

ADMINISTRATION OF THE BANKRUPTCY ACT—REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON BANKRUPTCY 1940. U. S. Government Printing Office, 1941, pp. 330.

As an appropriate means of celebrating the ushering in of the four hundredth birthday of the English Bankruptcy Law which first saw the light of day in 1542 in the reign of King Henry VIII, and the 142nd anniversary of the first American Bankruptcy Act of 1800, the Bench and Bar are taking deep draughts of the Report of the Attorney General's Committee on Bankruptcy. It may be assumed that the "festivities" will be concluded with the passage of a Congressional Act embracing substantially the recommendations of the Committee.

When earlier bankruptcy laws were the subject of criticism, Congress, instead of correcting the evil conditions by amendatory legislation, yielded to this criticism by repealing the then existing law. (Act of 1800 repealed 1803; Act of 1841 repealed 1843; Act of 1876 repealed 1878.) However, since the Bankruptcy Act of 1898 Congress has endeavored to correct the evils which crept into the Bankruptcy Law and administration by enactment of constructive amendments, thereby avoiding a hiatus in giving relief to the debtor and the creditor—and society at large.

On April 15, 1939, Frank Murphy, then Attorney General, now an Associate Justice of the United States Supreme Court, appointed a Committee on Bankruptcy composed of the following:

Robert H. Jackson, then Solicitor General, later Attorney General (now Associate Justice of the United States Supreme Court); Francis M. Shea, Dean of the University of Buffalo Law School; Robert P. Patterson, then United States Circuit Court of Appeals Judge (now Under Secretary of War); Jesse H. Jones, Secretary of Commerce; Edward H. Foley, Counsel to Treasury Department; Jerome N. Frank, then Chairman of Securities & Exchange Commission (now United States Circuit Court of Appeals Judge); Thomas McAllister, Justice of Supreme Court of Michigan; William J. Campbell, then United States Attorney (now United States District Judge, Northern District of Illinois); and Lloyd K. Garrison, Dean of University of Wisconsin Law School.

In appointing the Committee the then Attorney General, Frank Murphy, stated:

In seeking to improve the administration of justice in the Federal courts, one of the most important subjects that requires attention, is the manner in which estates of bankrupt and insolvent estates are liquidated and administered.

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