BOOK REVIEWS

Handbook on the Law of Damages. By Charles T. McCormick. St. Paul: West Publishing Co., 1935. Pp. xiv, 811. $5.00

In *The Susquehanna*[1] Lord Justice Atkin (now Lord Atkin) said: "I think the law as to damages still awaits a scientific statement which will probably be made when there is a completely satisfactory text-book upon the subject." Professor McCormick in this interesting book has not attempted such a scientific statement of the law, but has preferred "to emphasize the element of administration, and to treat the doctrines, distinctions, and standards as material which is used by lawyers, judges, and jurors in the work of litigation, with lesser attention to the arrangement of the material according to a symmetrical pattern or logical system."[2] Such an essentially practical approach naturally limits the scope of the book so that it resembles rather a superior and more complete chapter in Corpus Juris than a path-breaking book such as Williston's Contracts or Wigmore's Evidence. Grateful as we are for the present work, we feel that the author is so complete a master of his subject and is so interesting when he expresses his own views on a disputed point that it is to be hoped that he may some day give us the scientific statement which is so much needed.

This lack of emphasis on a "logical system" leads the author occasionally to treat a general question as if it were merely part of a special topic because most of the decided cases happen to arise under that particular branch. Thus there is no separate chapter in this book dealing with the problems of *quantum meruit:* this subject is discussed in a rather brief manner under the heading of Construction Contracts.[3] As a result no mention is made of the difficult question whether this form of obligation depends on an inference of fact drawn from the conduct of the parties or is based on an irrebuttable presumption which a rule of law imposes on the parties for the sake of justice.[4] Even from the purely utilitarian standpoint we should have thought that this subject was of such importance that more space should have been devoted to it.

On the other hand the author's practical approach to the problem of remoteness of damage seems to us to be wholly admirable. He points out that one school of thought "has attempted to work out rules applicable generally by which to determine whether or not a cause is proximate. These systems of rules tend to become more and more complicated as they are modified to fit the multiplying decisions."[5] Against this school the author supports the one which urges the abandonment of the attempt to state all-embracing rules of legal causation and in its place to substitute a consideration of "the demands of the particular type of situation involved, in the light of custom and social and economic policy." In other words, for what consequences ought the defendant reasonably under the circumstances of the particular case be held liable? A neat illus-

[1] [1925] P. 196, 210. [2] P. v. [3] P. 462.

[4] See Greer, L. J., in the recent English case, Craven-Ellis v. Canons, Ltd., 52 T.L.R. 657 (1936).

[5] P. 266.

tration in support of this "reasonable" school as against the "mechanical" one can be found in a comparison of the approach adopted by the American and the English courts to one type of case. According to American law "the person causing an injury subjects the injured person to the risks incident to complications of the injury in the course of its treatment, and these complications may proceed not merely from the due course of treatment, but from the mistakes, negligence, or lack of skill of the attending doctor or nurse."[6] But in a recent English case,[7] the Court of Appeal held that where a surgeon had by mistake removed an injured workman's finger, the defendant company was not liable for the error. Dr. Robson in The Annual Survey of English Law, 1935, remarks that "this appears to be an astonishing decision which throws the whole burden of the error by the surgeon on the workman."[8] If the English court, instead of considering abstract questions of causation, had, in Professor McCormick's phrase, considered the demands of social and economic policy, it might have reached a more satisfactory conclusion.

From the standpoint of an English reader it is to be regretted that Professor McCormick in dealing with remoteness of damage has not referred to *Weld-Blundell v. Stephens*[9] or to *In re Polemis*,[10] for his comments on these cases would have been of value. Perhaps he dislikes these judgments as much as we do, but nevertheless it is strange to find no mention of cases which have been cited in American opinions, and which in England are thought to be the most important since *Hadley v. Baxendale*. It is not as if the author had determined to omit English references, for he devotes a page and a half to the much less interesting case of *Chaplin v. Hicks*.[11] It seems to us that in a number of instances he has tended to choose the older and less important English cases as illustrations: thus in the chapter on conversion[12] he refers twice to the unsatisfactory case of *France v. Gaudet*[13] but does not mention *The Arpad*,[14] in which the reasoning of the earlier case was distinguished out of existence and the whole body of English precedents carefully analyzed. Similarly in the "shock" cases some reference might have been made to *Hambrook v. Stokes Bros.*,[15] for here the English law seems to be more advanced than is that in many American jurisdictions. Professor McCormick may be right when he says that "in fact, except for shadows cast by a few landmarks such as *Hadley v. Baxendale* the complex picture of modern American damage law is almost wholly of our own devising," but nevertheless, whether owing to a remarkable coincidence or to some other cause, there is a striking resemblance between the American and the English systems. Certainly the English cases and text-books which are concerned with damages contain more references to American authorities than do those on almost any other subject.

After these more general remarks we can turn to a few of the many points of interest we have found in the book. The discussion of Procedure, Past and Present,[16] is by far the best introduction to the subject we have ever read: it is a model of compression and lucidity. One of Professor McCormick's comments is particularly worth noting: "in England, not only the plaintiff but the defendant, whose right of jury trial is not

[6] See p. 272.
[7] Mowlem v. Mudge, 27 B.W.C.C. 450.
[8] Robson, The Annual Survey of English Law, 1935, p. 224.
[9] [1920] A.C. 956.
[10] [1921] 3 K.B. 560.
[11] [1911] 2 K.B. 786.
[12] P. 467.
[13] L.R. 6 Q.B. 199 (1871).
[14] [1934] P. 189.
[15] [1925] 1 K.B. 141.
[16] C. 2.

regarded as satisfied by a trial in which the jury has abused their discretion, must consent to the reduction (of damages) as a substitute for a new trial."[17] Except for the legal "die-hard," there can be few who will disagree with the author's criticism of the English rule: it is only tolerable because of the fact that new trials on the quantum of damages are rare in England.

In dealing with avoidable consequences,[18] the author points out that in some cases it is said that the plaintiff cannot recover damages for avoidable consequences because they are not *proximately* caused by the defendant's wrongdoing. In place of this false reasoning he emphasizes the fact that the real ground for denying recovery in such circumstances is the more realistic one that persons should not be encouraged to sit passively by when, by a reasonable effort, they could avoid the injurious consequences. In section 42, in discussing the plaintiff's right to recover for expenses incurred in efforts to minimize the loss, he states that the expenditure must be reasonable, but he does not say whether it must be reasonable according to ordinary standards or according to the plaintiff's special circumstances. This was the question which the House of Lords considered in *The Edison*.[19] In that case the plaintiffs' dredger having been sunk by the defendants, the former were forced, owing to their lack of available funds, to hire another dredger from month to month at an exorbitant rate instead of being able to buy another one in replacement, which would have been far cheaper in the end. The House held that the defendants were not liable for this additional cost as it was due to plaintiffs' poverty, but it seems doubtful whether the American courts would necessarily reach the same conclusion.[20]

Chapter 8 contains a useful summary of the rules concerning counsel fees and other expenses of litigation regarded as an element of damage. Reference is made to the odd legal paradox that, under American law, in *present* litigation the successful party can recover only a small portion of his expenses, but where the present defendant has wrongfully caused the plaintiff to defend or prosecute *previous* legal proceedings then the law allows the plaintiff to recover all reasonable expenses. In this chapter section 71 contains an admirable comparison between the American and the English law on the subject of costs: it is interesting to note that Professor McCormick, after some hesitation, reaches the conclusion that the English practice is on the whole probably more just and convenient.

In the chapter concerned with *injuries resulting in death*,[21] Professor McCormick is an admirable guide through a jungle of statutes and cases. It is unfortunate that the English Law Revision Committee did not have an opportunity of seeing this before it made its recommendations on the subject; perhaps the House of Lords will consult it before it decides *Rose v. Ford*[22] which is now on appeal. In that case the House will have to decide what damages the personal representative of a person who has been negligently killed can recover under the Law Reform (Miscellaneous Provisions) Act of 1934.[23] It will be some comfort to the members of the Law Revision Committee to realize that the various American statutes seem to be almost as uncertain on this point as is the much-criticized English one which they sponsored. Perhaps the most important chapter in the book, however, is the one in which the measure of damages in con-

[17] P. 79.
[18] C. 5.
[19] [1933] A.C. 449.
[20] See the cases cited on p. 141.
[21] C. 12.
[22] [1936] 1 K.B. 90.
[23] 24 & 25 Geo. V, c. 41 (1934).

tract is discussed.[24] Professor McCormick reads the rule in *Hadley v. Baxendale* as being restrictive. As we understand the English law on the subject, however, the effect of *Hadley v. Baxendale* was the exact opposite as it increased the measure of a promisor's liability in case of breach, making him also liable for those exceptional consequences which were in his contemplation. In other words, "the measure of damages in cases of tort are the same as those in cases of contract, with the exception that in cases of tort the Court has only got to consider the first rule in *Hadley v. Baxendale*, whereas in cases of contract there may be, under the second rule in *Hadley v. Baxendale*, a larger measure of damages."[25] In section 141 the author discusses the federal rule that contemplation of the exceptional consequences is not by itself enough to make the promisor liable: there must also be a tacit agreement to assume the particular risk. In fact the English rule is the same as the federal one, for in *Hall v. Pim (Junior) & Co.*,[26] Lord Haldane said: "I do not think that the real question is one of probability or of circumstances foreseen by the seller. It is to my mind a pure question of the terms of the contract itself." It is only if this gloss on "contemplation" is kept in mind that the various English cases can be reconciled.

Finally in chapter 28, discussing land sale contracts and covenants of title, every English reader will agree with the author's criticism of *Flureau v. Thornhill*[27] and *Bain v. Fothergill*.[28] Recent English decisions have done much to reverse the old rule, but such piece-meal changes tend to leave the law in confusion. It is unfortunate that the opportunity was not taken in 1925, when the English property law was reformed, to bring the rules concerning damages up-to-date.

This lengthy review, if it has not accomplished anything else, will at least have shown how interesting we have found Professor McCormick's book. His work is so stimulating that it ought to encourage others to write on a subject which has been unfairly neglected by legal authors. His readers may not invariably agree with all the various conclusions he has reached, but they will find them stated in clear and vivid language: in a branch of the law which has been especially corrupted by vague phrases, his practical and accurate style is like a breath of fresh air.

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Legislative Loss Distribution in Negligence Actions. By Charles O. Gregory. Chicago: University of Chicago Press, 1936. Pp. xiii, 198. $2.00.

This book seeks to explore the possibilities of devising a system for distributing, through litigation, the loss arising out of an accident among all those involved in it, in proportion to their fault. Then it concretely suggests a system calculated to do this, and sets forth in detail the legislation necessary to accomplish it. What it sought to do it has done in a thorough and scholarly manner. Mr. Gregory reviews the existing attempts to distribute loss in that way, ably criticizes each, then takes up the various problems which any such system raises and follows each one through to a conclusion. He has been very acute in perceiving these problems, in the fields both of substantive law and procedure, and in tracing out the possible solutions and their manifold impli-

[24] C. 22.

[25] Greer, L. J., in The Arpad, [1934] p. 189, 216.

[26] Hall v. Pim, 33 Com. Cas. 327.

[27] 2 W.Bl. 1078 (1776).

[28] L.R. 7 H.L. 158 (1874).