For some time a controversy has existed (one can hardly say that it has raged) as to whether the law of damages has any place in a law school course. These two latest casebooks on the subject do not exactly advance the cause of those favoring its inclusion. I hasten to add that I am not suggesting that the authors have not done a competent job. They have. They have faithfully followed the orthodox classification that almost all casebooks on damages follow, their selection of cases seems good as far as I can tell, and there is a moderate, very moderate, quantum of well-chosen and well-edited footnotes. All in all, they compare favorably with each other (if such a thing is possible), with other casebooks on damages and with the earlier editions of Bauer and Crane. At the same time I think it can fairly be said that neither the law of damages nor the teaching of damages would have suffered from arrested development if they had never been written. A nation that has dedicated itself, or has suffered itself to be dedicated, to an all-out production of war materials should not permit its people to waste their time writing, publishing and reading any books except those that have something to say. These are rather nasty remarks and I should not make them unless I can justify them.

My quarrel with the case books on damages is not confined to these two. As I say, they are probably as good and probably no better than the rest of them. What I object to is the haste with which the writers in the damages field head for their microscopes after only a fleeting glance through their telescopes. If a casebook on contracts gave only casual attention to the fundamental questions of consideration, offer and acceptance, and construction, and then jumped into a detailed examination of contracts relating to automobiles, beekeepers, corporations and all the other letters of the alphabet, we would not think it was much of a casebook. Yet the damages casebooks tend to do this sort of thing to quite an extent. Thus, both Bauer and Crane devote as much space to discussions of damages recoverable for particular types of wrongs, e.g., personal injuries, injuries to spouse, sales, construction contracts, leases, sales of realty, etc., etc., as they do to the basic propositions that are really significant in a course on damages, such as value, certainty, avoidable consequences, mitigation, foreseeability and the degree of fault and wilfulness on the part of the defendant. If the result of this were merely the inclusion of some superfluous cases in the book, it would not be serious enough to quibble about. The trouble is that it leads to superficial and inadequate treatment of the really significant things in a damages course, both by the author and the teacher.

There are important and fundamental questions in the law of damages. What is value, where is value, when is value; why is the conversion of a case of eggs which fluctuates in price treated differently from the conversion of a bond which fluctuates in price; why does one who avoids loss by carrying insurance recover money anyway, whereas one who does so by going to a doctor does not; why does one recover for unforeseeable damages if he is thrown off a train, but not if his baggage is thrown off; why is uncertainty of loss often a bar to recovery in a claim for lost profits, but not in a claim for a lost leg? There is also the fundamental question of what we are trying to do with an award of damages. Are we trying to compensate the plaintiff or punish the defend-
ant? Presumably, the former except where we award punitive damages. Why, then, do we take into consideration the wilfulness of the defendant’s act in measuring damages? Why do we let such matters come to the jury’s attention? The relation of our rules of damages to social, business and economic policy is another important matter. Whether one can recover for the expense of burying a beloved relative even though he had no legal duty to do so, how the damages for breach of a contract to drill an oil well shall be figured, are questions to be determined by reference to social conditions and economic effects and not by what Judge Dubbs said in Plott v. Plunk. Finally, there is much room for scientific investigations that could make real contributions to a better law of damages. Studies such as Dublin and Lotka’s The Money Value of a Man should, in time, seep into the consciousness of the law writers, law makers, law teachers and law students, and give us some sadly-needed help in measuring the loss resulting from personal injuries. I do not recall that either Crane or Bauer mentions the book. A study of the post-decision history of conditional remittitur cases might shed some light on whether the courts’ boast that they are not actually fixing damages is an idle one.

I do not say that such matters as I have enumerated and a lot more are completely ignored in most of the damages casebooks, but only that they do not receive the attention that their importance warrants. Bauer and Crane could improve their books greatly if they were to take the cases collected in the last halves of their books under the heading Specific Wrongs and Particular Types, distribute them discriminatingly in the first halves of the books under the heading General Principles and add a few challenging footnotes and comments. Incidentally, by doing so they would be answering the charge that a course in damages is a mere footnote to other law courses. They cannot be condemned for not answering questions of the sort I have mentioned. They can be condemned for not raising them.

So far, the discussion has been directed to damages casebooks in general, new editions as well as old. If the conventional type must be endured because it cannot be cured, may it not at least be said that it is better to use a new book than an old one? Again, I feel obliged to dissent. A new casebook is justified if it presents a better arrangement or a more comprehensive and acute view than former books did. As I have said, neither of these books seems to do this. It is also justified if the law has so changed that the old books are out of date. Thus, one could hardly teach Labor Law or Constitutional Law out of a casebook written ten, or even five, years ago. Nothing has happened in the damages field that makes a 1940 casebook much superior to a 1930 one. Some interesting developments may be occurring as a result of Erie R. Co. v. Tompkins, the civil recovery provisions of the Securities and Exchange Act, and the various Restatements. Except for some attention to the Restatements, especially in Crane, these matters receive no attention in the two books under discussion. The Erie case is not even mentioned by Bauer and is mentioned only in the preface by Crane.

All in all, I suppose my feeling is summed up in the time-honored answer to the book salesman: “No, thanks. It looks like a very nice book, but I already have a book.”

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