

BOOK REVIEWS

Cases on Torts. By Edward S. Thurston and Warren A. Seavey. St. Paul: West Publishing Co., 1942. Pp. xxxix, 1027. \$6.00.

Cases and Materials on Torts. By Harry Shulman and Fleming James, Jr. Chicago: Foundation Press, Inc., 1942. Pp. xvii, 1093. \$6.50.

Thurston and Seavey's case book is the new Harvard case book on torts. Shulman and James' case book is the new Yale case book on torts. Both appeared the same year. This Harvard case book is a continuation of the long tradition of the leading and ever developing Harvard case book on torts, which two generations of lawyers have known in its successive editions under the name of Ames and Smith's Cases on Torts. The Yale case book is a new venture which in this subject now terminates at Yale the necessity of importation of the needed instructional case book merchandise from rival schools. The Harvard case book is a new and much improved model of a well-established and favorably-known line of basic law school merchandise. The Yale case book is an effort of a new competitor to reach the same general market with a new and strikingly different product designed to serve the same general use. To those whose collegiate emotions respond to contrasts and competitions between Harvard and Yale, this aspect of the contrast between these two case books can afford a pungent stimulator.

Having examined these case books with some care but without classroom experience with their use, I am impressed that each can be made the foundation for an excellent law school course in the law of torts. Other good torts case books are also available. The question of which is to be regarded as the very best for purposes of law school instruction may largely involve personal factors and points of view. In this regard, of course, much will depend on the interest and skill as well as the point of view of the instructor in charge who uses the book. The law of torts is itself so intrinsically fascinating that any of the available torts case books of reasonable completeness of subject matter can become the foundation for a good course, irrespective of the compiler's particular views of the subject.

This Harvard case book apparently differs from its predecessors chiefly in three significant aspects. It adopts, broadly speaking, the general arrangement of the materials which was exemplified in former Dean Pound's temporary edition of the Ames and Smith Case Book, thus finally replacing the Topsy-like "just grewed" conglomeration presented in the somewhat disjointed combination of the separate and less analytically systematized collections of Dean Ames and Professor Smith. It brings the law of torts up to date by introducing many recent cases which have synthesized modern thought, largely a result of novel fact situations and activities, with older legal conceptions. While setting out with reasonable completeness certain leading cases showing how the courts have reasoned in applying the law to the facts involved in each of the main topics selected for instructional attention, it supplements these leading cases with a large number of digested or summarized cases. This last mentioned feature the compilers indicate in their preface as their most distinctive contribution to this case book in its present form.

The Yale case book also includes many recent cases, but is a much more emphatic departure from the pattern of earlier case books in this field. Other torts case books traditionally have opened with the relatively familiar and relatively well settled materials on battery and assault, imprisonment, etc.; have proceeded thereafter to the topic of negligence in its various ramifications, and have come much later in the course to definite consideration of the highly controversial topic of absolute liability. This Yale case book, however, opens with absolute liability, then passes to an elaborate examination of negligence and related matters, goes on to misrepresentation and defamation, and does not reach assault, battery and imprisonment till its closing chapter. This book departs from the pattern of most of the earlier case books on torts, too, in using "Motor Vehicles" as one of its chapter and classification heads, about which to gather legal materials, rather than at this point to arrange the materials according to legal categories. This chapter in the book is reminiscent of Dean Green's case book on torts at Northwestern University, which arranges practically all of its materials according to fact groupings rather than according to legal categories.

These large differences between the Harvard and the Yale case books on torts afford tempting opportunities to a reviewer to expand his views on the functional approach to legal materials. I prefer, however, in the personal comments that follow to dwell on two aspects that in connection with these two books happen to interest me more. This personal comment of course mainly exemplifies certain differences between the compilers and myself in our respective points of view in dealing with the torts materials assembled. I realize that such comment can be as much a reflection upon the reviewer as upon the works upon which he comments.

My first personal comment on these case books touches their treatment of the materials dealing with absolute liability. The Harvard case book puts great emphasis on the negligence materials. It relegates direct treatment of liability without fault to a minor place, devoting to it only about a tenth of the space given to negligence materials. It tends to leave the impression that fault is the general basis for tort liability, and that absolute liability, being in this respect exceptional in character, can be properly applied only if the facts in the instance fall clearly within the range of certain narrowly limited groups of legal precedents. This general viewpoint has been widespread in the legal profession. I believe, however, that even negligence when adequately analyzed demonstrably involves absolute liability up to the point found to constitute due care. I also believe that absolute liability is both more pervasive and more expanding in its range of application than is indicated by the traditional verbal formula about "no liability without fault." Accordingly, I would have liked to see greater emphasis placed on absolute liability in this Harvard case book. An instructor in charge of the course, however, can here readily give added emphasis of his own in using these materials.

The Yale case book places much greater emphasis on absolute liability as an underlying basis of responsibility for torts. This increased emphasis, naturally, I greatly appreciate. I greatly doubt, however, the pedagogic usefulness of the arrangement of topics here adopted. If that arrangement is followed, the course in torts for first year law students will begin with the deepest and most controversial question that arises in the entire subject, and postpone to its close the much more familiar questions of intentional interference involved in assault, battery, and imprisonment. These latter

are matters which are relatively much better settled, even though at times complicated with other questions, such as malicious prosecution.

Each of these case books might contain more definite references showing the relation between the expanding range for the application of absolute liability in tort cases and the increasing concern for general security manifested in our own time both at home and abroad.

The public conscience of our time is sensitive to the moral concept of the brotherhood of man. Even its verbal expression in current political vernacular has broadly taken the form of regulations assertedly designed to prevent exploitation of the weak by the strong. Such an underlying public conscience can hardly fail to glimpse a sinister aspect in the basic morality which is embodied in the slogan of "no liability without fault." That basic morality, which lets the careful operate with impunity at the expense of the careless, is in some respects closely akin to the basic morality of the much older and more primitive slogan of "might makes right," to which the international gangster nations of our time are in effect committed.

Substantially unsupported verbal slogans were popularized in this country, through the early professional writings of such men as Justice Holmes and Professor Bohlen, to the effect that it is inherently unjust to hold an innocent actor answerable for the harm his proper conduct inflicts upon his equally innocent victim. Such slogans were forgetful of the underlying policy which supports workmen's compensation acts and other instances of well-established absolute liability. Such slogans can no longer be accepted as axiomatic, if, indeed, they are entitled to any weight whatever. In the light of present-day standards of justice, such unsupported slogans seem hollow and unconvincing. How can it be necessarily unjust to require him who reaps the advantage of his own harmful activity also to bear the burden which he thereby inflicts upon his neighbors? How is it necessarily more just in such cases to give the benefit to the actor while throwing upon his innocent victim without redress the risk and burden of harm caused thereby?

The reality of course is that neither negligence nor absolute liability have a universal range of application as the basis for tort liability. Each has a more limited and, historically, a more or less fluctuating range of application. Whether newly arising problems fall within the range of the one or the other is a constantly recurring fundamental inquiry whose merits must from time to time be re-examined.

For the perspective of absolute liability suggested in the foregoing comment occasional direct hints can be found in the Yale case book. The compilers of the Yale case book without directly mentioning "allocation of risk" do repeatedly point out the problem of the "distribution of the loss" for consideration on its merits. Direct suggestions of this sort, however, are at this point much less obvious in the Harvard case book. The Harvard case book in this regard almost entirely leaves the student to seek his own interpretation of the legal materials from which he must select controlling precedent from the field of negligence or from the field of absolute liability for application to novel situations.

My second personal comment on these two case books touches their dealing with the problem of defamation by radio. It was my very great professional good fortune to participate in the litigation involved in the case of *Sorensen v. Wood*.¹ This was the

¹ 123 Neb. 148, 243 N.W. 82 (1932).

first appellate case of this type anywhere reported. It applied the law of defamation to the broadcasting station as well as to the speaker before the station's microphone. It was at the time a completely new case on a novel state of facts. It involved the very fundamental underlying question of whether the liability of the broadcasting station was properly to be controlled by analogies drawn from negligence or from the absolute liability of defamation as the basis for legal responsibility in the instance.

Such being the fundamental problem involved in defamation by radio, it seems to me a little odd to find the Harvard case book introducing the subject of defamation by radio through a case which did not touch that fundamental problem at all, but was preoccupied only with the minor incidental question as to whether defamation by radio was to be treated as slander or as libel—and which, according to my own view, even reached the wrong result on that. A little further on in this material, however, the Harvard case book appropriately puts in juxtaposition the two cases now available whose opinions most elaborately discuss from opposing standpoints that fundamental question itself. Knowing Professor Seavey as I do from my acquaintance with him while he was my law school dean at Nebraska for an interval years ago, I am not surprised that in his case book he has not directly indicated which of the conflicting views he himself believes to be “sound.”

The Yale case book in its handling of defamation by radio shocks me more violently. The compilers introduce the problem of defamation by radio through the *Summit Hotel Company* case,² which involves a defamatory interpolation. The compilers submit an abstracted statement of the underlying facts involved in that case. This abstract repeats without comment or correction the preposterous fact assertion which the court's opinion in that case indiscriminately repeated in substantially the language found in briefs of counsel for the broadcasting company, that the broadcasting company had rented its facilities to the advertising concern that supplied the speaker at the microphone. The compilers thus without warning put law students using this book into the verbal trap for the unwary laid for the courts by counsel for the broadcasting companies. This verbal trap for the unwary places the analysis of the problem on the entirely fictitious factual basis of investigating whether the lessor of radio broadcasting facilities can properly be held liable for defamation perpetrated by his lessee. After this distortion of the real facts in this summary form, the compilers reproduce considerable portions of the court's opinion which discusses the question thus posed. This opinion, thus reproduced, also avowedly proceeds on the utterly erroneous basic legal assumption that in our law, outside of certain narrowly restricted land cases, there can be no tort liability without fault.

In the treatment thus accorded in the Yale case book in dealing with defamation by radio, what has happened to the compilers' perspective on absolute liability as an underlying basis for tort responsibility? Do the compilers, like Professor Bohlen, regard it as good policy in cases of defamation by radio for the law to throw the risk of non-negligent defamatory broadcasts upon the passive and innocent victim rather than upon the radio station that did the broadcasting? If so, why? On the other hand, did the compilers select the *Summit* case as a horrible example? It may well be used for that purpose. These questions still remain with me after finding the compilers at a later page³ paying me the doubtful compliment of emphasizing my connection with

² *Summit Hotel Co. v. Nat. Broadcasting Co.*, 336 Pa. 182, 8 A. (2d) 302 (1939).

³ P. 1004.

Sorenson v. Wood and then citing against that case the very one-sided and inaccurate list of law articles cited against it in footnotes in the opinion of the *Summit* case. That list, as I have elsewhere pointed out, consists almost entirely of selections inspired from sources directly traceable to attorneys for broadcasting companies. This Yale case book at this point leaves with me the impression that whether or not the compilers regard the lusty legal infant, *Sorenson v. Wood*, as in any sense my child they are in any event inclined to regard him as a naughty boy. He certainly has been much maligned in writings by lawyers for broadcasting companies. A number of courts, however, have treated him much more kindly. I have been gratified to notice, also, that the latest comprehensive discussions of this matter to come to my attention⁴ also treat him much more kindly.

LAWRENCE VOLD*

A Cataloging Manual for Law Libraries. By Elsie Basset. New York: H. W. Wilson Co., 1942. Pp. 365. \$5.00.

The scope of the manual is much wider than its title would indicate. It deals with law cataloging, law classification, assignment of subject headings, administration of the cataloging department, and relation of the cataloging department to other divisions of the library. The textual presentation is enlarged by appendixes consisting of subject heading outlines and classification schemes, bibliographies with recommended readings for each chapter, and a sample catalog.

The manual is projected against the general cataloging rules which have been adopted by the American Library Association and interpreted in cataloging treatises of a general nature—rules which are put into practice by the majority of the American libraries.

In introducing the chapters dealing with the various aspects of cataloging and classification, Miss Basset does not tell anything which a person trained in cataloging would not have known. But this background material is not intended for the trained librarian. It is a person without library training who will appreciate the succinct and plain overviews. The reviewer does not wish to imply that the chapters on cataloging are not valuable to the general cataloger who is faced with the cataloging of a law collection. After skimming a few introductory paragraphs in each chapter, he will find adaptations of the general cataloging rules to the field of law and examples drawn from the field of law which are infrequently encountered in general cataloging literature. Let us take as an example the assigning of book (or Cutter) numbers. As a rule, a book number is taken from the author's name in order that the arrangement of the books on the shelves may follow the arrangement of the catalog cards. Library practice makes an exception of this rule in the case of biographies. The Cutter number is chosen from the name of the biographee rather than from the biographer's name—a procedure which brings together all writings about a certain person. Miss Basset rightly extends this exception to the determination of Cutter numbers for documents concerning single trials. Such documents are "cuttered" from the name of the trial rather than

⁴ Finlay, *Defamation by Radio*, 19 Can. Bar Rev. 353 (1941); Eldredge, *Modern Tort Problems* (1941).

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