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Review of “Judge and Jury,” By Leon Green

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Book Reviews

JUDGE AND JURY, by *Leon Green*. Kansas City: Vernon Law Book Co., 1930. Pp. 429.

This book is a collection of essays on the law of torts which indicate the breadth and depth of Dean Green's approach to the subject. It is neither a textbook which only marshals citable cases, nor an attempt to supply culture in legal terms for long winter evenings. It is a grasp for the realities and exigencies of "courthouse justice" with the tort case on the docket, realities and exigencies which Dean Green knew at first hand as a practicing lawyer, analyzed with the careful impartiality of a scholar. It is impossible to expound the scope of the usefulness of this book in the space allowed for a review. Suffice it to say that it should prove stimulating and helpful to the lawyer who tries cases, the judge who decides them, and the student who attempts to understand them. Nevertheless, the book is not an unmixed blessing; it is not to be taken as a gospel of torts (nor would Dean Green—with his wholesome fear of frozen ideas—have it so).

Dean Green gives us a picture of "courthouse justice"; abstract law and the trial of cases are synthesized in a wider view than that conventionally taken. But the reviewer feels that Green's view is narrower than that prerequisite to courthouse dispensations which will best serve the needs of the world beyond courthouse walls. In his insistent focus on judges in courthouses conducting trials, the relations between lawsuits and life at large have a disappointing trick of disappearing under phrases which merely point to those crucial stages of hearings at which the judge or jury must do something toward furthering the trial process. The reviewer, however, must be careful not to give the impression that Green is not interested in how the law of torts "works" beyond the trial of cases. He has done some valuable thinking on the needs of society which are served by tort trials and judgments. Outcroppings of such thought are found at intervals throughout the book. It is found in the most undiluted form in the two chapters which deal with the source of legal duties (pp. 38-152). Unfortunately, these important ideas are relegated to the psychology of judges as factors influencing judgment—complex, rarely spoken about, though compelling and decisive.

It would seem that Dean Green slights the most valuable part of his scheme by leaving the vital problems of torts floating around in judges' heads. His law of torts straddles two levels: On one level the thrilling game of litigation is played at high stakes; and on another an unenunciated psychology of judges can be counted on to dictate the decisions on the rules of play, which—practically unbeknown to the players or umpires—will turn the energies of the game into such channels that the problems which confront men living in organized society will be solved. In other words, Green, who would take a scientific approach to the law of torts, makes the Aristotelian mistake of looking for the inherent nature of the trial process; he has the Newtonian good luck of seeing judges at work with purposes of effecting adjustments in the lives of men; but the relations between the purposes of judges and the effects of litigation are left out of the picture. It is the reviewer's opinion that these relations are the crux of a science of law.

Perhaps the source of this failure to keep the problems arising out of the exigencies of trial focused against the problems which give rise to the trial itself is the result of Green's feelings about words. He sees that most of the words habitually uttered by judges as "the law" in tort cases, play little part in the decisions; and that when they do play a part they are more likely to be a stumbling block than an aid. His reaction seems to be a profound fear of words. But he does realize that the tort court is the scene of action in which there are many participants; and that verbal devices are the only available devices which can be used to unify the conduct of judges, juries, lawyers, and witnesses into a trial, and to indicate the roles and responsibilities of the various participants. For him, then, the words which comprise the law of torts are little more than indicia of the organization of the tort court. They are the cues for the action of particular actors; they indicate to the judge, "now it's your turn," and they indicate to the jury "now it's your turn." But the decisions are made by men, not by words; words can only indicate whose turn it is to act, and how decisive his action will be. So one gets the impression that Dean Green would set the law of torts aright by compelling the candid admission that legal jargon has no meaning except as indicating the organization of the court in action and by the perpetuation of only that part of the contemporary jargon which is fit for such service; whereupon, the actual process of judging will take care of itself as best it can, words being powerless to aid in that complex, psychological phenomenon.

It is the reviewer's feeling that a more satisfactory law of torts lies in another direction than that to which Green points. If we are to have a more usable and understandable law of torts, we shall need words that do more than indicate how to run a trial; for such words standing alone indicate that the trial is a thing worthwhile in itself. We shall need words which will point to the problems of economic stability and social control implicit in tort cases; not only words which tell the judge and jury when to go into action, but words which will help them define the situations in which they must act and suggest situations which may result from their choice of alternate courses of action. In such words we can store thinking and observation which will denote the law of torts as a tool. Of course, discrimination of a tool *as such* must connote its uses; and we do not know with niceness how the law of torts can be used; we are not sure about the efficacy of tort punishment, the need of tort compensation, the ability of certain sorts of defendants to spread losses, and so on. On the other hand, centuries of use, observation and thought have not been spent in vain. True, many features of tort law are tinged with historical accident and adventitious growth; much of it is overlaid with hopelessly academic thinking. But still, we know something about the law of torts as a going concern. There must be a place in the words of the law of torts for this sort of knowledge so that it will be available for use in judging cases. We cannot depend on judges and juries to invent such knowledge on the spur of the moment and use it subconsciously while in the midst of trials. It must be the function of verbal tort law to make it available when needed. When this is clearly perceived, there is no doubt in the reviewer's mind that more accurate and more useful knowledge will be forthcoming. Green's scheme is one of courts in action; it falls short of law in action. Green is concerned with running trials; the reviewer is concerned with making trials

fulfil needs of men, which probably can be better fulfilled if expressed, thought about, and weighed, rather than submerged as a psychological factor in the judging process.

We are indebted to Dean Green for insisting that a study of doctrine is not sufficient in a study of torts; we are indebted to him for insisting that the nature of the tort trial is a vastly important condition of the results of tort litigation. It is perhaps ungracious to complain that he has not done enough; that he has not indicated that the trial is only viewed in perspective when the picture includes the social problems implicated and their possible solutions. Perhaps we should praise him as a prophet of transition, whose moderation will make his services more valuable than they would be if he attempted to push his best ideas to their logical conclusions.

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CASES ON CONSTITUTIONAL LAW, by *Dudley O. McGovney*. Indianapolis: The Bobbs-Merrill Company, 1930. Pp. xxxix, 1803.

The preparation of a one-volume case-book on constitutional law has become increasingly difficult with the great growth of the subject in recent decades. Professor McGovney has undertaken to solve this problem by excluding sections dealing with personal and religious liberty, protection to persons accused of crime, jurisdiction of Federal courts, territories and dependencies, and foreign relations. An advance publication of the first two chapters in 1929 indicated a final chapter on "The Treaty Power" but, probably on account of limitations of space, this does not appear in the complete volume.

While some of these omissions may be regrettable there is compensation in the fuller treatment that has been given to some of the other topics. The editor has emphasized the historical method in the selection and arrangement of cases on the subjects of the function of the courts in reviewing legislation and of the due process of law clauses as limitations upon the substance or purpose of legislation. These sections are the most significant in the case-book and distinguish it for the most valuable treatment of these topics since the publication of Professor Thayer's two volumes in 1895.

Variety of treatment has been followed in other sections. In some only the more important features have been presented. An extreme example is Chapter IV on the "Separation and Delegation of Governmental Powers" which consists of an essay by Professor Frederick Green and a single case. This is intended as an experiment in the use of treatises to supplement case study and the editor desires to receive reports regarding the experience of others in trying this method.

Other sections are presented with far more detail. The chapter on "Citizenship, National and State," includes 131 pages, or more than seven per cent of the entire volume. While probably due to the editor's special interest in this topic, the amount of space devoted to it appears excessive. Cases dealing with taxation and corporations are, for the most part, excluded from other sections and given special consideration in separate chapters devoted to these topics. The growing importance of administrative regulations and decisions is indicated by 125 pages devoted to a chapter on "Administrative Boards and Officers."