Book Review of Hugh E. Willis: “Principles of the Law of Damages” (1910).

In 1910, a treatise on damages by Professor Hugh Evander Willis of the University of Minnesota Law Department was published by The Keefe, Davidson Co. of St. Paul. A review in Volume 58 University of Pennsylvania Law Review, pages 519-520 (May 1910), follows:

“This volume is designed on somewhat the same principle as Mr. A. G. Sedgwick's most valuable little treatise upon the same subject. It consists in the statement of a series of formulae purporting to express in authoritative form the general principles of legal rights and legal injury, the principles upon which damages are assessed, and the application of these latter to a great variety of specific actions. These principles are derived from and supported by cases taken from those collected in the case books of Professors Beale and Mechem, together with a considerable number of cases selected by the author. The author in his preface expressly calls attention to this fact.

“In laying down authoritative formulae the author is constantly and inevitably confronted with the task of choosing between the conflicting rules prevalent in different jurisdictions. In most cases the existence of rules other than those chosen by him is stated in the explanatory text, though he does not always do so, as in the case of the right to recovery the highest, or, as he calls it in his index, “the higher”, intermediate value of shares of stock, converted or not delivered as agreed. Pp. 77 and 78. Nor does his choice of the particular rule or the reasons given for its selection appear to be always sound. For instance, he prefers (§ 63) the New York and Massachusetts rule as to the damages recoverable against a vendor who has falsely misrepresented the quality, etc., of an article sold, in preference to that adopted by the courts of England and the United States Supreme Court. The latter he regards as “contrary to the full, true purpose of the Law of Damages, and the author does not think that the objection of its advocates to the rule herein adopted is well taken. The ground of objection is uncertainty, but the damage is no more uncertain here than in the case of breach of warranty, and the ordinary rule in regard to certainty should apply.” It is submitted that the reason lies much deeper; unless the vendor is bound to make the representation good, which, in the absence of warranty or contract that the goods are as stated, he is not bound to do, the vendee has no legal right to have the article in the condition represented and is entitled to no compensation for his disappointment. He is merely entitled to be replaced in the same position that he occupied before he was misled by the false statement. This is fully accomplished when he receives the

difference between the value of the article which he has bought and the price he paid for it. The New York and Massachusetts doctrine confuses actions of deceit or cases upon warranties and actions of deceit in which no warranty is alleged or proved. The earliest case in which the New York doctrine is announced, *Whitney v. Allaire*, I N. Y. 305 (1848), is largely based upon the case of *Sherwood v. Sutton*, 5 Mason I (1827), which the Court there cites for the rule of law set forth in the syllabus without appearing to notice that the charge of Story, J., is directly opposed to the rule as so stated.

Professor Willis champions with great eloquence and some apparent heat the view, expressed by Professor Greenleaf in his well known controversy with Mr. Theodore Sedgwick, that the giving of exemplary damages is a pure anomaly, which he says, p. 31, is "altogether inconsistent with sound legal principles and should never have found lodgment in the common law as it never has in Equity which is supposed to be in advance of the common law." The policy of allowing the jury to award such damages is a matter as to which legal opinion has been and will probably continue to be divided, but to a student of the historical development of the Law of Torts the suggestion that this is a late judicial invention is, to say the least, startling. That the Law of Torts was in its original form punitive may be accepted upon the authority of the late Professor W. F. Maitland. That the action on the case has even to-day an important deterrent function to perform, in securing, by the punishment of their violation, the due observance of private rights of a sort too unimportant to make the violation thereof a matter with which the State does, or can be expected to, concern itself, is evident from that class of case, to mention only one among many, of which *Laird v. Traction Co.*, 161 Pa. (1895), and *R. R. v. Baker*, 125 Georgia 562 (1902), may serve as examples.

"Possibly due to this very lack of attention to the historical development of the law and to a tendency to regard all rules as good or bad as they agree with, or run counter to, the author's ideas of utility and justice and as they do or do not preserve the symmetry of the *a postiori* theory which he unreservedly accepts, that the object of all common law procedure is solely to secure compensation to the injured party, it is in these parts of the book, in which the author indulges in extended discussion of the theoretical basis of the rules which he lays down, that the work is least worthy of praise.

"To give only one more instance, it might perhaps be well to allow to one who has innocently dealt with the property of another without his authority a *quasi* contractual right to compensation for labor, etc., bestowed upon the improvement of the property, and to work out a fair adjustment of the rights of such trespasser and of the owner of the property, by allowing the former to set off such a claim when the latter sues for damages for the conversion of his property. The one difficulty is that no such general *quasi* contractual right is recognized in any known case. If the owner can lay hands on the improved property he may retake it and no action lies by the technical trespasser for reimbursement for the cost incurred by him in improving it. It is only where the Court is

asked to lend its aid to enforce the harsh rule that the owner of the property is legally entitled to it at all times and in whatever condition it may be that they balk at the hardship which the logical result of this rule would entail upon a merely innocent trespasser and, out of mercy to him rather than upon any definite theory, in many jurisdictions allow the jury to deduct from the damages recoverable the beneficial expenditures of the defendant."

"It may be pointed out also that the author, apparently appalled by the difficulties of that most intricate subject, proximate and remote cause, contents himself in glittering generalities in regard to it. Nor are his statements, general as they are, wholly consistent with one another. The rule stated in § II: "Consequential damages are substantial compensatory (and special) damages awarded for such injuries as are certain and, though not necessary and immediate, as result naturally * * * because, in torts, they are the natural and probable consequence of the wrongful act, whether foreseen by the wrongdoer or not," is far from equivalent to his statement, p. 40, that "In tort cases, substantial damages include compensation for any injurious consequences, whether foreseen by the wrongdoer or not, provided the operation of the cause is not interrupted by any intervening cause and but for the operation of the cause the consequence would not have ensued."

"While this volume will hardly be of any great service to one who desires to understand the rationale of the Law of Damages, it appears to accomplish the object which the author desires to attain and, in the main, to state in definite form and with commendable clearness of expression the effect of the cases with which he deals, the value of which is assured by the character of the sources from which they are taken."

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The complete text of Professor Willis' treatise is posted separately in the archives of the MLHP.

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