Current Legal Periodicals

Maintaining Democratic Processes During Wartime Economic Controls. By DONALD S. FREY. 36 Virginia Law Review: 741-751.

Can valuable democratic processes in the conduct of human affairs be maintained during wartime? The Defense Production Act, 1950, and the legislation it envisions affect every small business firm and individual in the land. Difficult as it is to remain calm in an atomic world, it is a duty to maintain all democratic processes in spite of the imposition of military preparedness. If these processes are not preserved the cause for which we are struggling becomes illusory. They were generally maintained during World War II and it seems, from the act, that it is the intention of Congress to do so again. There are six fundamental processes pertinent to major defence efforts, these being:

I. Only those controls absolutely necessary to defence should be imposed. Priorities of certain contracts cannot be assigned nor should allocation powers over materials and facilities be exercised unless "necessary or appropriate to the national defense". Price controls cannot be imposed unless prices have risen or threaten to rise above a stipulated period. Where price ceilings are put into effect there will be a corresponding wage control and wage increases will be denied where they would result in an increase in price ceilings or impose hardship or inequities on those operating under the price ceiling. Credit controls for consumer purchases and housing construction is limited to four factors: the trend of the credit, effect on purchasing power and realty demand, need of sound credit and need for increased defence production.

II. The act avoids discrimination and bias and attempts to secure a maximum degree of fairness consistent with a minimum of delay. The allocation power is limited so as to provide "a fair share of the available civilian supply". Procedure will be developed to ensure the opportunity to begin new enterprises or engage in new lines. Small businesses will be protected through provision of full information, business advisory committees and exemptions

where feasible. Intentional violators of the act will be promptly punished.

III. Provision is made for launching protests against a price ceiling within thirty days of its imposition and then for an appeal to the Emergency Court of Appeals, it having been recognized that unduly delaying an appeal is equivalent to a denial of relief. A commission similar to the War Labor Board is also set up, as well as a Joint Committee on Defense Production whose function is to study defence needs and report them to Congress. The President is empowered to make such adjustments as he deems necessary to prevent or correct inequities.

IV. The imposition of each new control will be explained in an explanatory brochure. Since the increased defence expenditures are expected to remain between three and fifteen per cent there will be a reliance, to some extent, upon statistics. To this end the President has power "to require [of each firm] such reports and records . . . as is necessary to the enforcement of the Act". The Attorney-General and Federal Trade Commission will study the monopoly effects of the act and submit reports to Congress.

V. The act exculpates anyone from liability arising directly or indirectly from compliance with the controls. This provision goes beyond the one adopted during World War II, since it embraces tort claims as well as those arising out of contractual relationships. It also prohibits discrimination against priority orders and thus prevents some abuses of World War II, when contractors sought to be relieved of certain private contracts and obtain government priority orders on more favourable terms.

If defence efforts and consequent controls must increase, our private enterprise system is threatened unless some means is achieved of writing long term contracts of sufficient certainty. It is suggested that contracts (1) provide for such future events, (2) provide for temporary suspension, (3) stipulate the degree of frustration which will permit cancellation, (4) provide for cancellation if the buyer of goods by purchasing will violate the regulations. All "cancellation charges" would be unenforceable under the exculpatory clause whether the contract was signed before or after the enactment.

VI. The President is authorized to encourage individuals and groups to advance any programme in the public interest. It is provided that any act or omission under voluntary agreement "in the public interest as contributing to the national defense" shall be exempt from anti-trust laws. The Attorney-General and the Federal Trade Commission will be consulted on all such programmes.

Industry and labour advisory committees are forms of voluntary organizations capable of advancing such matters and the President is empowered so far as is practicable to consult with those substantially affected by the regulations. It is further provided that all regulations must indicate that labour and industry representatives have been consulted.

This statute, although providing wide regulatory powers over economic life, safeguards the democratic processes developed in recent years. It is essential that they be maintained if we are to clarify our democratic way of life to the other nations of the world. Rather than a "garrison state", we become "an arsenal of democracy". For as Lincoln said, "It is as much the duty of government to render prompt justice against itself in favor of citizens as it is to administer the same between private individuals". (A. A. HIRSCHFIELD)

Hospital Authorities and Locatio Operarum. By J. J. GOW. 62 The Juridical Review: 169-194.

Any layman who reads the reports of *Reidford* v. *The Magistrates of Aberdeen*, [1933] S.C. 276, and *Gold* v. *Essex County Council*, [1942] 2 K.B. 293, would be justified in saying that there is a conflict between two types of judicial minds. In the former case, the First Division found the governing body of a public hospital not liable for the alleged professional negligence of doctors and nurses on its staff. In the *Gold* case, the Court of Appeal held that the hospital authority was liable for the negligence of a radiographer.

The purpose of this article is to suggest and submit (a) that the conflict between English and Scottish decisions is brought about by the courts' obsession with contractual relationship, and the distinctions between "service" and "services", and (b) these distinctions may be avoided by the use of a simpler and more fundamental principle.

The English law before *Gold* was accurately analysed by Professor Goodhart in "Hospitals and Trained Nurses" (1938), 54 L.Q.R. 553, but the principle contended for here differs from Professor Goodhart's. He considered that the view generally held in England was based on two conflicting grounds: (1) that a trained nurse when acting in a professional capacity is not the servant of the hospital (she is *performing services* not service), or (2) that the nurse is a servant but the hospital is exempt from liability on the basis of an implied contract between the patient and the hospital whereby the hospital will not be held liable for damages caused by the nurse's negligence.

Professor Goodhart submitted that a trained nurse is the servant of the hospital which employs her to *render service*. Lord Greene M.R. in the *Gold* case said at page 302: "The idea that in the case of a voluntary hospital the only obligation which the hospital undertakes to perform by its nursing staff is not the essential work of nursing, but only so called administrative work appears to me not merely unworkable in practice but contrary to plain sense". Goddard L. J. at page 313 said: "I cannot understand on what principle a hospital authority is to be exempt from liability if a nurse carelessly administers poison to a patient, and yet is liable if the cook mixes some deleterious substance in the patient's food. . . . That they [hospital authorities] are not liable for the doctor's [those not on the permanent staff] negligence is due simply and solely to the fact that he is not a servant. Whether the authority would be liable for negligence of a doctor on the permanent staff would depend on whether or not there is a contract."

Collins v. *Hertfordshire County Council*, [1937] 1 K.B. 598, followed *Gold* and held that the authorities were liable for the negligence of a resident full-time medical officer, but not liable for the negligence of a consulting surgeon.

It appears that the judges in both cases proceeded on the ground that the contractual relationship in each was one of *service*.

There appear to be only three cases in point in Scotland: *Foote* v. *Directors of Greenock Hospital*, [1912] S.C. 69; *Lavelle* v. *Glasgow Royal Infirmary*, [1932] S.C. 245; *Reidford* v. *Magistrates of Aberdeen*, [1933] S.C. 276. Of these only the last one is authority for the proposition that the hospital authorities are not liable for the negligence of the professional members of the staff on the ground that these members render services and not service. Thus it would seem that the two systems of law on this matter stand at opposite poles, and the axis which keeps them apart is "service" versus "services".

The essence of the distinction between "services" and "service" for Lord President Clyde in *Reidford* was whether or not the employer could *direct* how the work was to be done — on this basis *Reidford* was correctly decided. Goddard L.J. thought the test was whether or not the employer could *order* the doing of the work — on this basis *Gold* was correctly decided! Of the decision in *Stephen* v. *Thurso Police Commissioners*, 3 R. 535, which was decided by one of the strongest Second Divisions in the Court of Session, it is contended that there is no foundation in Scot's law

for the test made by Lord President Clyde. In the *Thurso* case Lord Gifford stated, "I use the expression 'personal control' because I think that is always the turning point in such cases".

None of the above three is wholly correct, but there are to be found in Scot's law well defined and flexible principles adequate for the purpose, namely:

(1) vicarious liability of authorities for admitted negligence of another is generally dependent on whether there was a closeness of control over the *modus operandi* of the wrongdoer;

(2) where professional persons are concerned as in *Gold* and *Reidford,* where there is no personal control over the skill of the wrongdoer, the tests to be applied will be

(i) was the negligence merely collateral and extraneous to the work delegated to the wrongdoer or did it arise out of an imperfect performing of the very work delegated?

(ii) was the work of such a nature as to involve a high degree of probability of injurious consequences to third parties if performed negligently?

(iii) was the relationship between the pursuer and defender so close as to infer that the latter assumed responsibility for any hurt caused to the former by reason of negligence on the part of the expert?

If any one question is answered affirmatively the defender will be liable. It is readily seen that the doctrine contended for here eliminates the need of distinguishing between service and services, and also eliminates the need for a contractual relationship between the employer and employee. (J. W. SIMPSON)

The Study of Jurisprudence — A Letter to a Hostile Student. By SAMUEL MERMIN. 49 Michigan Law Review: 39-72.

There are various grounds to justify the appearance of a course in jurisprudence on the curriculum of a law school. Such a study serves to integrate the whole field of law which, for reasons of practical instruction in the schools, digests and textbooks have divided or grouped under convenient topics. For the student there exists the need to assimilate the variety of subject matter to which he is exposed. Many basic legal concepts, for example the doctrine of stare decisis and the ratio decidendi of a case, which for the most part are given a cursory glance in other classes, are intensively analyzed in a jurisprudence course. A study of this sort helps the student to appreciate and analyze the use of words and to guard against the pitfalls of ambiguity and futile legal discus-

sions. In short, although other courses in law acquaint the student with the tools of his trade, jurisprudence assists him to appreciate them. In the pursuit of a legal training jurisprudential study clarifies the inter-relationship of law with other social sciences.

At the very outset of such a course the student is often discouraged by the variety of "schools" in existence and the ambiguous language used to explain them. When faced with a variety of opinions and contradictions he asks himself wherein lies the truth. This uncertainty is more apparent than real. What may be truth for one person may, but as often does not, constitute truth for another. We speak of truth in the sense of a universal belief while it is often only a private truth. The same perplexity arises when we use the term "justice". We are repeatedly informed that a judge applies the law to a particular set of facts but underlying this apparent scientific application either consciously or unconsciously is the judge's view of the "justice" of a particular measure. He must necessarily, even if subconsciously, contemplate not only "what is" but also "what ought to be".

The writer directs the attention of the student to an address by Holmes entitled "The Path of the Law", in which the speaker admonishes his listeners to imagine themselves for the moment indifferent to moral considerations. "The law is full of phraseology drawn from morals and by the mere force of language continually invites us to pass from one domain to the other without perceiving it as we are sure to do unless we have the boundary constantly before our minds." Holmes maintains that underlying the apparent impartiality of judicial decisions is a conception of "what ought to be", that is, the moral consciousness of the community at least as seen through the eyes of the judges. Why does the law imply a condition in a contract? Holmes replied that "It is because of some belief as to the practice of the community or of a class or because of some opinion as to policy or in short, because of some attitude upon a matter not capable of exact quantitative measurement and therefore not capable of founding exact logical conclusions". The result is to leave some uncertainty over the outcome of a particular legal dispute. The law becomes "more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves and when the grounds for desiring that end are stated (this occurs all too infrequently) or are ready to be stated in words". The ends sought to be attained by the law require diligent social research.

The student is cautioned against becoming despondent over the definition battles he encounters in a study of jurisprudence.

There are, for example, many apparently conflicting definitions of what is law. Any such defined term is expressly or impliedly restricted by a writer in the light and for the purpose of communicating his view clearly and for that particular limited purpose. Definitions are subject to classification. A definition may assert the characteristics of an agreed entity, it may be the understanding that a group of people has about the meaning of a word or a convenient "substitute symbol". In all fairness to any writer's definition, it must be assessed in the light of the context in which it is used. As such, a definition can be conditionally accepted and within the bounds of its confinement can be neither true nor false. It is, for example, possible to argue at indeterminable length the question: Does a tree make a noise if it falls in the forest and no one is there to hear it? Once, however, the disputants agree on the definition of noise for the purpose, the difference of opinion dissolves. The student must appreciate at the outset, therefore, the limits of a definition for a prescribed or intended context. Many writers in jurisprudence have veiled the subject in vagueness and confusion by refusing or neglecting to avoid ambiguity of language.

In any approach to the study of jurisprudence there is a variety of source material. There is the literature which is designed to develop word-consciousness — linguistic anthropology and legal language habits. Another type of material emphasizes the rôle of "logical manipulation of legal propositions in the judicial process", while yet another approach is to examine and compare the various "schools" of jurisprudence. Every approach has its particular value and assists in the development of jurisprudential thought. A recent survey such as Simpson and Stone's *Law and Society* strives to assimilate these various classes of source material. The variety of relevant reading material available to the student is a constant reminder that law is not an end in itself but a means to serve human ends. (G. E. PILKEY)

English Legal Training. By L. C. B. GOWER, 13 Modern Law Review: 137-205.

This article is a scathing criticism of English legal education and the apathy displayed by the legal profession towards legal education for the last hundred years. In 1846 the Legal Education Committee reported that "the present state of legal education is extremely unsatisfactory and incomplete and in striking contrast and inferiority to such education in all the more civilised States of Europe and America". In the opinion of the author, this statement is appropriate even in 1950.

There are today three independent systems of legal education in England. For call to the bar it is necessary to join an Inn of Court after matriculating and to "keep terms" by eating dinners, normally during three years. During that time the student must pass the two parts of the bar examination and, if he wishes, he can spend a few months in a solicitor's office and may read in the chambers of a practising barrister. But the only essential requirement is the ability to pass an examination.

For admission as a solicitor, a student, after matriculation, must article to a solicitor for five years, during which he must not engage in any employment. Before admission to practice he must pass the Law Society's intermediate and final examination and, unless he has previously taken a law degree, attend an approved law school for at least a year commencing within fifteen months from the beginning of articles. He normally has to pay his principal a premium anywhere up to five hundred guineas, so that admission as a solicitor is much more stringent than the call to the bar.

The universities alone attempt to give a thorough scientific training in law, but their law degree is not recognized as a professional qualification and is in no way obligatory for a future barrister or solicitor.

The author sets out three basic requirements for a thorough training in law: (1) an extended course of theoretical training designed to give a background of general legal principles and techniques; (2) a period of practical apprenticeship supplemented by institutional training; and (3) some examination test to ensure proper qualifications for the practice of law. Judged by these three tests, the present system is seriously deficient. The requirements of the bar do not necessitate compliance with any of them. There is no compulsory theoretical training or practical apprenticeship and, although there is a compulsory examination, it is remarkably easy and is the only proof of a person's qualifications as a barrister.

The requirements for solicitors are certainly more satisfactory, but even here there are grave defects as regards theoretical training, and, although the practical training period is fully adequate, its quality is left to chance, since no supervision is exercised over the training given. The examinations are unbearable, a candidate being required to take six papers, each of twelve questions, with three hours in which to answer all twelve questions.

Another defect in the present day system is the lack of co-ordination between the universities and professional bodies, which results in unnecessary duplication in the subjects given by the two groups. Coupled with the expense involved by the very nature of

the present system, a student contemplating taking law is faced with insurmountable obstacles.

The author suggests the following re-organization to remove the present defects: (1) every barrister or solicitor should first be required to take a university degree in law; (2) thereafter there should be a practical apprenticeship of two years, with a solicitor spending the whole two years in a solicitor's office and a barrister spending the first year in a solicitor's office and the second year in a barrister's chambers; (3) during the last six months of apprenticeship, attendance should be compulsory at evening classes at a professional law school; (4) finally the entrant should be required to pass a professional qualifying examination.

At the university the student should be taught the organization of the judiciary and the legal profession, the doctrine of precedent, the interpretation of statutes and documents and elementary legal bibliography. Legal history should not be taught as a separate subject but in relation to each particular branch of the law. The student should also be enlightened on the scope of English law and the nature and general content of each branch. The first year subjects should be organized under the following heads: legal method and the place of law in the social sciences; the English legal system; elements of English private law; and constitutional law. In the second year the subjects suggested are contract, tort, criminal law and land law. For the third year, the author proposes administrative law, family law, jurisprudence and comparative law.

At the professional law school, the following subjects should be compulsory for both barristers and solicitors: mercantile contracts, especially agency, sale of goods and negotiable instruments, with particular reference to cheques; partnership and company law; evidence and civil and criminal procedure; trusts and administration of estates; landlord and tenant (including rent control); industrial law; conflict of laws; revenue law, and legal ethics. In addition bar students should be required to take either matrimonial causes or conveyancing, and a practice course on pleading, while potential solicitors should be required to take conveyancing and either matrimonial causes or magisterial law or local government law.

The author agrees that the present teaching method of formal lectures supplemented by tutorial classes should be preserved, but he suggests that the American casebook system of teaching could be integrated into it. Debates and moots now in use are also valuable aids in teaching self-confidence, self-expression and the ability

to think on one's feet; and student law reviews would provide powerful stimulants for self-expression in the literary field. Above all the author proposes the introduction of training films so that a student seeing the decomposed snail floating into Mrs. Donoghue's glass from Messrs. Stevenson's bottle would retain a vivid picture of the case in his mind. The author believes that the training film has the greatest future of any method of teaching so far adopted.

University examination papers should consist of only four questions, two of the essay type and two problems, while the professional qualifying examination should consist exclusively of practical problems. In order to improve the grade of teachers at the law school, they should be given greater recognition by the profession and K.C.'s should be awarded to the most outstanding of them. They should be active practitioners and be selected with great care, not only as to their knowledge, but also as to their teaching abilities. (D. A. YANOFSKY)

Uncle Sam: A Tort-Feasor. By LAMAR TOOZE. 29 Oregon Law Review: 254-257.

The founders of the United States federal government accepted the doctrine of sovereign immunity from legal responsibility probably because it was established in each of the states before the Constitution was drafted. No state government, nor the United States government itself, can be sued today without its own express consent. The source of this immunity, peculiar to a sovereign power, seems to rest not upon any theory but, as Justice Holmes once said, "on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends".

The hardship of this doctrine brought about the practice of enacting private bills through Congress for the relief of injured parties. The practice became so popular that it placed a burdensome task upon Congress. In order to lighten it an act called the Tucker Act, 1887, was passed. The effect of this statute was to give to district courts jurisdiction to entertain certain defined claims or causes of actions against the government up to $10,000, but it specifically excluded jurisdiction over tort. It was not until 1920 that Congress recognized any kind of tortious liability by enacting the Suits in Admiralty Act, and this was only where the cause of action arose through damages caused by government-owned merchant vessels.

In 1946, an act entitled the Federal Tort Claims Act was passed. It was repealed and re-enacted in 1948. Its aim was to relieve Congress from the onerous task of reviewing private bills concerning tortious claims against the government. Since the passing of the act the U.S. Supreme Court has declared that the statute is to be considered as a broad waiver of immunity and its terms are to be liberally construed.

An important section of the act, section 1346(b), gives jurisdiction to district courts to entertain suits against the government where the tort was caused by "the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment". The effect of this section is limited by a subsequent section that excludes certain specifically enumerated claims, such as a claim upon an act or omission of an employee in the execution of a statute and a claim arising out of assault, battery, false imprisonment, malicious prosecution, libel or slander. Recent decisions have shown that the courts will apply the usual test in determining whether the negligent act is within the scope of office or employment.

Under the Federal Tort Claims Act the action must be brought in the judicial district where the cause of action arose or where the plaintiff resides, notwithstanding any local statute to the contrary. Nevertheless, the *lex loci* governs the imposition of liability and the courts must look to the local statute in deciding whether an act is negligent and actionable or not.

The United States is liable in tort in the same manner and to the same extent as an individual and *a fortiori* is entitled to raise defences available to an individual.

All claims brought under the act are to be tried without a jury and within two years from the time the cause of action first arose. The reason for this is that, since the government gives its permission to be sued, it can attach to such permission any condition it deems fit.

There is no limitation upon the amount recoverable against the government unless the local statute where the suit is brought imposes a limit. The act lays down a tariff of "reasonable fees": if the recovery amounts to $500 or more, the fee for the claimant's attorney shall not exceed 20% of the amount recovered.

In conclusion, it is important to note that the act has effectively eliminated political sympathies, and has provided judicial determination as a basis for the recovery of compensation in suits against the government. (ROBERT E. TRUDEL)