Current Legal Periodicals

Candler v. Crane Christmas & Co.: Negligent Misrepresentation by Accountants. By WARREN A. SEAVEY. 67 Law Quarterly Review: 466-481.

In *Candler* v. *Crane Christmas & Co.* it was held that an accountant was not responsible for the negligent but not fraudulent misrepresentations made to a person who had not employed him but who had suffered loss from reliance on the misrepresentations.

Ogilvie, the managing director of a corporation whose books were being audited by the accounting firm, informed the firm that the accounts were to be shown to a prospective customer, the present plaintiff. Before much work was done, the customer was shown the certification sheet reading, "We have audited the balance sheet above set forth . . .". A clerk who worked on the accounts knew for what purpose the accounting was being done but he nevertheless accepted Ogilvie's statement of assets and liabilities without any real independent investigation, with the result that the customer was shown accounts that led him to the reasonable conclusion that the business in question was a flourishing one, whereas it was on the brink of bankruptcy.

The modern law of tort has developed from the ancient law of individual torts. "In fact, there are those who even today believe there are no principles of tort, but only a number of torts which are classified in that way only because they cannot be grouped under some other head". Professor Seavey argues that too much emphasis has been put on the origin of torts and that this homage to antiquity, along with a rigid application of the rule of stare decisis, has done much to close the law to dynamic growth. "Without change, the law must obey the order of all living things and die." Fortunately there have been instances in the past in which the law of tort has not always been so strictly determined. In support of this conclusion he cites cases like *Rylands* v. *Fletcher*, *Lumley* v. *Gye*, and *Donoghue* v. *Stevenson*. These cases when they were decided were substantially new law, but they were based on principles of tort easily deducible from

previously decided cases. The author takes the progressive view that a remedy must not be refused merely because it does not come within the four corners of a previously decided case, and that principles of law must frequently be allowed to supersede individual rules of law. "After all, the fundamental principle is justice."

The *Donoghue* case was a striking victory of principle over rules of law, and the author argues that the basis of liability that received such a complete exposition in that case should be equally applicable in *Candler* v. *Crane Christmas & Co.* The Anglo-American courts have not given, however, the same protection to purely economic interests as to the physical security of persons or of things, of reputation or of family relations.

Therefore, if the *Donoghue* principle does not apply to the facts of the *Candler* case, it must be a result of the nature of the interest and not the means used to invade it, since, in both cases, the means that resulted in harm was the negligent misrepresentation; but, the author argues, "There is no intrinsic reason why the rules as to liability for physical harm should be different from those as to the liability for harm to pecuniary interests not involving physical harm". In support, he quotes Cardozo, who in *McPherson* v. *The Buick Motor Co.* stated that the general principles of tort require liability where one, by his carelessness, has caused harm either physical or economic. "The controlling circumstance is not the character of the consequences, but its proximity or remoteness in thought and purpose of the actor." Economic interests must be considered and an answer reached by balancing the essential interests involved in order to ascertain how far it may be just or expedient to extend or limit the defendant's duty or the plaintiff's rights. In applying these considerations to the *Candler* case, he feels that the purchaser has an economic interest worthy of legal protection.

There should be a more flexible interpretation of the doctrine of stare decisis. "The Court missed a golden opportunity to accept the interpretation of the rule of 'stare decisis' which, by and large, has enabled the Common Law of England to do justice during centuries of change." (R. T. G. McBAIN)

Custom as a Source of English Law. By E. K. BRAYBROOKE. 50 Michigan Law Review: 71-94.

The orthodox meaning of the statement, "custom is a source of law", is generally that "In any given case a course of conduct

persisted in by all or most of the members of a society engenders a rule of law enjoining the continuance of that source of conduct". In other words, as C.K. Allen puts it in his *Law in the Making*, "the thing done" becomes "the thing which must be done".

How generally is this true? Custom can be studied under four headings: general custom of the realm, borough customs, mercantile customs and local customs. An example of a so-called "general custom of the realm" is perhaps the special liability of innkeepers. But was the money paid by the innkeepers for lost property an indemnity always freely given, or a rule imposed by courts in response to overwhelming public opinion? It seems more likely that the latter is true, and that the "custom" is actually a custom of the courts, and hence certainly beyond the usual definition of popular custom. Similarly the "common custom of the realm" referred to in certain old writs is so technical in nature as to be almost certainly of official, rather than popular origin. The only genuine general custom admitted by Mr. Braybrooke is that referred to in *Veley* v. *Burder* (1841), 12 Ad. & El. 265, under which the parishioners are responsible for repairs to the nave of a church, and the rector for those to the chancel. This custom has actually been traced to the laws of Canute, which were apparently declaratory of previous law.

Borough customs have not all been used "time out of mind", although they always had to be alleged in the old pleadings. The allegation was a legal fiction, for most English borough customs were conscious imitations of other boroughs; and many boroughs were created by way of concessions granted by the lord. And all borough customs seem official and procedural in nature, and hence beyond our definition once again.

Then there are the mercantile customs, of a more general nature than the borough customs. But is not the liability of the acceptor of a bill of exchange founded on the contractual principle rather than immemorial custom? The law merchant seems a collection of continental civil law rather than of the customs of the international merchant class. Historically, mercantile "customs" were adopted by the English courts in a conscious effort to extend their jurisdiction; if the dictum were true that "custom is a source of law", would not the courts have already felt themselves bound by custom? And the attitude of later courts, in holding that mercantile customs can no longer alter the rules of law, does not lend much support to the idea that law is the common custom of the realm. On the contrary, the author's study of mercantile customs indicates that the process is something like

this: common customs are a source from which judges may draw rules; rules become inflexible through the development of precedent, so that they often conflict with popular custom; and, finally, we have popular customs pleaded in order to persuade judges to modify the rules.

Many local customs cited in various cases largely involve giving the residents of a locality certain rights over a piece of land in derogation of the owner's common law rights. Either the rights existed before the title to the land vested, or the customary rights have arisen by encroachment. A few particular cases trace copyhold rights (in derogation of those of the lord of the manor) back to the customs of the free village community which existed before the feudal system; these support the first view. But most cases support the second view, for in them the courts find it necessary to postulate a lost act of Parliament, or an original grant from the lord or some such thing, in order to render a custom binding. Two elements appear to be necessary for a custom to become law: a consistent disobedience and forbearance to enforce. At any rate, the majority of cases emphasize the importance of something in addition to the mere voluntary uniformity of usage.

The common use of the word "custom" is too narrow. The word must include a sort of official, rather than popular, usage, in order to have any effect on the law. "A usual or habitual pattern of behaviour is the routine administration of the affairs of a community subject to some defined jurisdiction."

Dealing with John Dewey's question, What happens when a custom becomes a law? in other words, How is custom binding in a community possessing courts and other machinery for the administration of justice?, the author supports Kelsen's view that the constitution must envisage the existence of custom as a "law-creating fact" in order for custom to have any validity. If we view the English constitution as an absolute monarchy after the Battle of Hastings, English history seems to approve. For William the Conqueror is said to have summoned a representative assembly which put on record thirty-nine articles of custom. William accepted them as embodying the laws of Edward the Confessor, and like his successors agreed to be bound by them. In this way it became the custom of monarchs to bind themselves to the custom of the realm, a procedure, incidentally, still embodied in the coronation oath. Thus it may be that the validity of customs depends on the custom of monarchs. (J. H. McDONALD)

Some Aspects of the Problem of Superior Orders in the Law of War. By N. C. H. DUNBAR. 63 Juridical Review: 234-261.

The defence plea of superior orders is a most important and controversial one in war crimes, because it affects the proof of mens rea and also the reconciliation of the demands of military discipline and the necessity of preserving the supremacy of law. The problem is discussed on the basis of criminal law principles.

In 1715 the British military code made it a capital offence for a soldier to refuse to obey the order of a superior. Not until 1749 did the qualification of the lawfulness of the command appear. Since the early 19th century the law of both the United States and Britain has been that a soldier cannot cloak himself with the defence of superior orders when the act committed was or should have been known to him to be unlawful. In the United States the case of *Little v. Barreme,* which laid down the principle of strict liability in tortious causes, has not generally been followed. The case of *U.S.* v. *Jones* laid down that a superior officer has no power to give an unlawful command and that disobedience to such a command by an inferior was not punishable by military law. Many cases have taken the same line, and the doctrine of qualified subordinate liability has been firmly established. The requirements of military discipline have qualified the rule of strict liability. The qualified rule was established in Scotland as early as 1807 in the trial of Maxwell, where the court said the order must be legal in the surrounding circumstances. In England a court held a soldier responsible for obeying the orders of a superior to fire on civilian ships. In *Regina* v. *Smith,* the rule, now followed, was laid down that a soldier is protected by superior orders if he himself honestly believes it is his duty to obey and the order is not so manifestly illegal as to be obviously unlawful.

By both British and American military law the order must be lawful. The doctrine of absolute defence appeared in 1906 in Professor Oppenheim's treatise on international law, but it has since been overruled. The general rule was established in 1918 by the Birkenhead Committee of Enquiry on War Crimes, which set forth that superior orders were not a defence if the action was contrary to the laws of war. In 1944 the principle was incorporated in both British and United States military manuals.

In Germany unconditional obedience has never been a principle. As early as 1845 the Prussian military code recognized the moral choice available to the soldier, and held him liable if he obeyed an order he should have known was aimed at a crime.

The legal inability of an officer to give an unlawful command was also recognized. Subsequent military codes have reiterated these principles. Article 47 of the 1872 German code, which governed in the Second World War, provided a subordinate could be punished if he went beyond the order given him, or if he knew the act ordered was aimed at a crime. But the strict interpretation given these sections made them practically non-existent. In 1921, however, in a case involving the killing of survivors from a torpedoed hospital ship, a German court held that the accused were guilty, because the act was universally known to be against the law.

In international law it has been difficult to establish a definite principle. The matter was discussed at the Preliminary Peace Conference in 1919, and at the Washington Convention of 1922. At the beginning of the Second World War the problem was discussed by many unofficial bodies. It was generally recognized that the defence of superior orders would not lie for acts against the rules of war or of so heinous a nature as to shock the sentiments of humanity. Yet no limit was put on the plea, and the courts were left to decide each case in its circumstances. The United Nations War Crimes Committee considered it inadvisable to formulate any general principle, but recognized that the plea did not ipso facto relieve a subordinate of responsibility for criminal actions carried out under the orders of a superior. In 1945 article 8 of the Charter of the International Military Tribunal provided that "The fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires". Similar provisions have been adopted in the law of many member states.

The courts at the War Crimes Trials discredited the plea of superior orders as an absolute defence, but refused to accept the doctrine that it could never be a defence. From a study of the trials, the following general principles are evolved: (1) the municipal law of most civilized states does not recognize the plea of superior orders as constituting an absolute defence to a criminal act; (2) a subordinate need obey only lawful commands; (3) the requirements of military discipline cannot serve to extenuate guilt when violation of the laws of war have been carried out on an extensive scale in flagrant disregard of generally recognized moral standards; (4) the evidence must establish beyond reasonable doubt that the subordinate knew or should have known that the

order was unlawful and was not coerced so as to deprive him of his will or capacity to resist; (5) an unlawful act may be justified if carried out under superior orders as a reprisal against similar conduct on the part of an adversary; (6) superior orders may in certain circumstances operate in extenuation of responsibility.

It is generally considered inadvisable to attempt to formulate any rigid, strict rule. While a person does not by wearing a military uniform dissociate himself from his responsibility as a human being, nevertheless the duties of the soldier must be considered. Distinction must be made between orders carried out in the stress of battle, where obedience is often vital to the success of an operation, and orders performed at greater leisure.

The law cannot permit the plea of superior orders to succeed in cases of mass atrocities unrelated to the necessities of war. Efforts must be continued to gain common agreement between the states on the principles of law to be followed. (G. C. PARKS)

The Liability to Third Persons of the Transferor of Defective Chattels. By R. W. BAKER. 25 Australian Law Journal: 2-7.

The law affecting the liability in tort of a supplier of defective chattels to third persons suffering injury has not yet been settled. The case of *Donoghue* v. *Stevenson*, [1932] A.C. 562, laid down the principle that a manufacturer, who sells chattels in such a form that they reach the ultimate consumer without any possibility of intermediate inspection or examination, is liable to third persons for injury caused by defects in the chattels unknown to him but which he could have discovered by the exercise of reasonable care.

The problem today is: Does that principle extend beyond manufacturers, repairers and assemblers, and include vendors, bailors and donors of chattels? That is, does the principle include a transferor who has not actively created the danger but who could have discovered the defect complained of if he had exercised reasonable care?

Certain principles of liability for injury caused by dangerous chattels are clear from the decided cases. First, a vendor, bailor or donor of a chattel is liable to third persons for fraudulently misrepresenting a chattel to be safe. Secondly, a transferor who fails to warn the recipient of a chattel, which to his knowledge is defective, is liable to third persons. Thirdly, a transferor who represents a chattel to be harmless without any knowledge whether it is or not is liable to third persons. Fourthly, a transferor who receives a chattel without having an opportunity to inspect or

examine it is not responsible for injury caused to third persons by a defect in the chattel, unless he has knowledge of the defect. Fifthly, a transferor who supplies a chattel to someone knowing that it is to be used for a purpose for which, by reason of some defect, it is not fit is liable to third persons if the defect is of such a nature that he should have known of it. There are, however, no cases which have held that a vendor, bailor or donor of chattels is liable to third persons for supplying them with defective chattels, not dangerous in themselves, where the defect could have been discovered by the exercise of reasonable care.

Should the position of a transferor be the same as that of a manufacturer? The answer to the question depends upon the ratio decidendi of *Donoghue* v. *Stevenson*. The essential basis of that decision appears to be (1) that someone had negligently manufactured a defective chattel, and (2) that neither the transferee nor the ultimate consumer could have been expected to examine it. If that is so, the ratio decidendi should not apply to a vendor, bailor or donor who is not responsible for the defect and who does not know of it. Only if in some way he contributed to the defect should he be held liable.

The case of *Ball* v. *The London County Council*, [1949] 1 All E.R. 1056, is disappointing because the courts did not discuss the application of *Donoghue* v. *Stevenson* to the particular facts. In the *Ball* case, the defendants installed in the plaintiff's house a boiler that was not fitted with a safety valve. When lit by the plaintiff's daughter, the boiler exploded and injured her. The judge in the lower court found as a fact that the boiler was dangerous and that its condition was known to the defendants, or should have been known to them if they had exercised reasonable care. The judge held, however, that the defendants were liable, on the ground that they had committed a breach of a general duty owed to persons likely to use the chattel.

The Court of Appeal reversed the decision, holding that since the boiler was not dangerous per se, the defendants, who installed it, had no special degree of care imposed on them and were not liable for negligence to third persons. This case has been strongly criticized; but the court would probably have arrived at the same conclusion if it had discussed the liability of the defendants as suppliers of a dangerous chattel and applied the ratio decidendi of *Donoghue* v. *Stevenson*.

The law as it stands today compels a person seeking to hold a transferor liable for injury suffered as a consequence of a defective chattel to show that the chattel in question comes within

a class of things dangerous per se. It seems that a transferor, even if negligent, cannot be held liable if the chattel is a thing normally harmless but dangerous in the particular instance.

From an analysis of *Donoghue* v. *Stevenson* and *Ball* v. *London County Council*, it would appear that, since a manufacturer stands in a fundamentally different position from a vendor or donor, the vendor or donor should not be held responsible for defective chattels to the same extent as the manufacturer. It may well be, however, that in future the courts will say that a transferor who could have discovered a defect in a chattel by a simple test must make that test or be held liable to those injured by the undiscovered defect. Such a trend of judicial decision might well come about as a consequence of the increasing number of mechanical instruments and devices now being placed on the market. (PETER S. MORSE)

Congressional Investigations: Historical Development. By M. NELSON MCGEARY. 18 University of Chicago Law Review: 425-439.

In 1792, less than three years after the birth of the new Republic, the House of Representatives set up the first congressional investigating committee, charged with the task of inquiring into the circumstances surrounding Major General St. Clair's abortive expedition against the Indians. Congress never doubted its inherent power to order such investigations, having an abundant store of precedent at hand in the practice of the Imperial Parliament and of many colonial legislatures. Some conception of the utility of this inquisitorial weapon is obtained when it is noted that, since 1792, over six hundred investigations have been authorized by Congress. The frequency and importance of investigations has fluctuated greatly, but a noticeably constant feature has been the steady broadening of the implied power of the national legislature, despite a sharp check administered by the U.S. Supreme Court in *Kilbourn* v. *Thompson* (1880).

The investigatory power was employed to realize three objectives: firstly, to maintain a vigilant surveillance over the executive; secondly, to check on the qualifications of the members of Congress; and, lastly, to acquire detailed information on proposed subjects of legislation. A basic difference of opinion existed for some time over the authority of Congress to vest in a committee the power to compel a witness to testify in an inquiry to secure information on proposed legislation; but the House established a

precedent in 1827 and the Senate followed suit in 1859 when it established a special committee to inquire into the facts surrounding the seizure of the arsenal at Harper's Ferry.

The investigatory power was employed by Congress for almost a hundred years with little control or supervision on the part of the judiciary; then, in 1880, the decision of the Supreme Court in *Kilbourn* v. *Thompson* set a restrictive perimeter abouts its exercise. Henceforth all investigations were required to have a clear and precise constitutional purpose. Also, the decision could fairly be interpreted as authority for the proposition that a broad area of the private affairs of a citizen was immune from congressional scrutiny. Most important of all, an obiter dictum of the court cast considerable doubt on the power of Congress to authorize investigations and punish witnesses for contempt where the principal purpose of the investigation was to obtain information to assist Congress in drafting legislation. This doubt was not dispelled until half a century later when the second judicial milestone in the history of congressional investigating committees, *McGrain* v. *Daugherty*, was decided by the Supreme Court.

The case stemmed from the refusal of a witness to comply with a subpoena issued by a Senate investigating committee. In the course of the argument, it was urged that, following *Kilbourn* v. *Thompson*, Congress had no power to make inquiries and exact evidence in aid of contemplated legislation. This contention found no favour with the court, the unanimous decision of which stated, in part: "The power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. . . . The power is so far incidental to the legislative function as to be implied. . . ". The court maintained, nevertheless, that certain restrictions upon the investigatory power did exist, pointing out that witnesses could refuse to answer questions which were not pertinent to the matter under inquiry. However, later decisions have defined the scope of the investigatory power in such a way as virtually to eliminate any restrictions upon it. In 1947, in the case of *United States* v. *Bryan*, the court made this statement: "If the subject under scrutiny may have any possible relevancy and materiality, no matter how remote, to some possible legislation, it is within the power of the Congress to investigate the matter".

To compel witnesses to appear before committees and testify, Congress was at first limited to invoking its common-law power to punish for contempt; then, after the enactment of a penal statute in 1857, it had an alternative sanction to apply to recalcitrant witnesses. Having the instruments of coercion readily available,

Congress is seldom balked in its attempts to acquire information. But to this statement, one exception of prime importance must be recorded.

The constitutional doctrine of the separation of powers has been utilized by the executive on occasion to turn away congressional inquisitors intent on obtaining information from that branch of the government. The first President established the precedent, and his action has been followed several times by his successors, it now being customary in these instances for the President to aver that the disclosure "would not be compatible with the public interest". Congress has never conceded the validity of this action; neither has it ever risked a show-down by testing it before the courts. But the exigencies of political life place an adequate damper upon any tendency towards undue exercise of the power.

Congressional committees of investigation have attracted public attention in varying measure since their inception. As modern methods of communication have been developed, the value of a committee investigation as a sounding board and publicity gainer for its sponsors has come to be fully realized. During periods when the majority in Congress and the President have been of different political persuasions, a frequent purpose of investigations has been to embarrass the Administration or to hold it in check.

During the era of the New Deal a significant change in emphasis was noticeable, congressional investigation committees frequently lending direct aid to the Administration. The results of some investigations were designed to lend support to recommendations of the Administration for major legislative reforms. The enactment of legislation of the order of the Securities and Exchange Act of 1934 was greatly facilitated by the contributions of the Senate committee investigating stock exchange practices and banking. As a powerful factor in formulating public opinion the findings of investigating committees have been similarly exploited on many occasions.

Of late, a rising tide of criticism has been directed towards investigating committees. No one would deny that some of the criticism is justified, bearing in mind that committees have often been known to trespass upon individual rights through inept procedure or by more culpable means. The doctrine enunciated in *McGrain* v. *Daugherty* makes it clear that the responsibility for preventing misuse of the power of investigation rests for the most part on Congress itself. (D. M. PEDEN)