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Book Reviews

Edward J. Murphy

Thomas L. Shaffer

BOOK REVIEWS

PRODUCTS LIABILITY IN THE AUTOMOBILE INDUSTRY. By Cornelius W. Gillam. Minneapolis: University of Minnesota Press, 1960. Pp. x, 239. $4.75. A generation ago Mr. Justice Cardozo observed that "the assault upon the citadel of privity is proceeding in these days apace." [1] The observation was accurate enough at the time; it is even more so today. In a recent article, Dean Prosser examines the course of the battle, concluding that "a goodly part of the citadel still holds out; but the assault goes on with unabated vigor." [2] The present book is yet another potent weapon thrown into the struggle, and it will doubtless contribute to the almost certain limitation, if not demise, of the privity defense in products liability cases.

The author concentrates upon the automobile industry. The basic problem can be simply stated. Manufacturer sells an automobile to Dealer, who in turn sells to Consumer. There is no contract between Manufacturer and Consumer; they are not in privity. What recourse, then, does Consumer have against Manufacturer for defects in the product? His complaint is usually double-barrelled: tort (negligence) and (contract) warranty. Tort recoveries are common, but the stubborn privity concept has thwarted attempts to succeed on breach of warranty. Since the impetus furnished by the familiar *MacPherson v. Buick Co.*,[3] decided in 1916, American courts have achieved virtual unanimity in holding an automobile manufacturer liable for defects in design or manufacture caused by its negligence. However, not until this year has an appellate court squarely held that such a manufacturer is accountable to the ultimate consumer on a theory of implied warranty.[4]

There is no dearth of literature in this field. And with but few exceptions, the message is the same: "Privity's gotta go." Mr. Gillam is with the majority, but he undertakes more than a limited analysis of judicial decisions. He is intent upon considering industrial responsibility for product defects under all relevant aspects—business, economic and ethical. He even expresses the hope of finding "significant clues to the development of a social philosophy of law." [5] In this respect, he rightly perceives that, historically, attitudes toward the general doctrine of *caveat emptor* and its variants have largely determined the precise obligations of a seller and remedies of a buyer. But his pre-*Winterbottom v. Wright* (1842) history is sketchy and at points very misleading. For example, Mr. Gillam states that "the origin of *caveat emptor* is the medieval Christian belief that business is outside the law." [6] Whatever else it might be, *caveat emptor* is neither medieval nor Christian. Indeed, studies which the author cites refute his statement.[7] As Tawney, among others, has clearly demonstrated, there was no room in medieval

1 Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441, 445 (1931).

2 Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).

3 217 N.Y. 382, 111 N.E. 1050 (1916).

4 Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

5 Text at vii.

6 *Id.* at 20.

7 "*Caveat emptor* is not to be found among the reputable ideas of the Middle Ages. As custom of trade or rule of law it is not to be met with upon the highways of medieval culture." Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133, 1136 (1931).

> To begin with, it [*caveat emptor*] is not very ancient. It goes back only to about the time of Coke, and marks a new individuality of thought and custom current in his time and found in the frontier days of our own country. . . . It was not a legal principle of the Middle Ages, nor is it found in the Roman Law, despite its Latin expression. LeViness, *Caveat Emptor Versus Caveat Venditor*, 7 MD. L. REV. 177, 178 (1943).

theory for a view that would exempt any human actions from moral scrutiny.[8] As he put it,

> [E]conomic interests [were] subordinate to the real business of life, which is salvation, and . . . economic conduct is one aspect of personal conduct, upon which, as on other parts of it, the rules of morality are binding. [9]

According to Tawney,

> The most fundamental difference between medieval and modern economic thought consists . . . in the fact that, whereas the latter normally refers to economic expediency, however it may be interpreted, for the justification of any particular action, policy, or system of organization, the former starts from the position that there is a moral authority to which considerations of economic expediency must be subordinated. [10]

The usual criticism is that there was too much of a tendency to "legislate morals," with the restrictions on usury advanced as a prime exhibit. Once off on a false start, Mr. Gillam compounds the error when he writes that "*laissez faire* and the Industrial Revolution modified the principle of *caveat emptor* as they destroyed the conditions under which it was tolerable." [11] The plain fact is that *caveat emptor* never gained wide acceptance until the triumph of *laissez faire* economics.

Had this book been delayed in publication for a few weeks the author could have added a most fitting climax. For *Henningsen v. Bloomfield Motors, Inc.*,[12] decided by the Supreme Court of New Jersey in May of this year, has the promise of starting the judicial breakthrough which Mr. Gillam proposes. The format is typical, and the court deals with the problems in a decisive and forthright manner. Claus Henningsen purchased a new Plymouth from Bloomfield Motors and gave it to his wife, Helen, as a Mother's Day gift. Ten days later while Helen was driving the car, there was an apparent failure in the steering mechanism and she sustained serious personal injuries. The car had 468 miles on the speedometer at the time. Helen sued both the dealer and the manufacturer, Chrysler Corporation, claiming both negligence and breach of warranty. The husband joined in the action. The negligence counts were dismissed by the trial court, but the cause was submitted to the jury for determination solely on the issue of implied warranty of merchantability. Substantial verdicts were returned against both defendants. On appeal, the Supreme Court of New Jersey affirmed. There was a dual privity problem here. Chrysler did not sell to Claus, and Helen was not in privity with either the dealer or the manufacturer. After an exhaustive review of authorities, the court holds that "when a manufacturer puts a new automobile in the stream of trade and promotes its purchase by the public, an implied warranty that it is reasonably suitable for use as such accompanies it into the hands of the ultimate purchaser." [13] Moreover, the court disregards Helen's lack of privity, stating as follows:

> It is our opinion that an implied warranty of merchantability chargeable to either an automobile manufacturer or a dealer extends to the purchaser of the car, members of his family, and to other persons occupying or using it with his consent. It would be wholly opposed to reality to say that use by such persons is not within the anticipation of parties to such a warranty of reasonable suitability of an automobile for ordinary highway operation. Those persons must be considered within the distributive chain.[14]

Finally, the court makes a sharp attack on the uniform warranty of the Automobile Manufacturers Association, the standard form in use in the industry, which limits all warranty obligation to

> making good at its factory any part or parts . . . which shall, within

8 TAWNEY, RELIGION AND THE RISE OF CAPITALISM (Mentor Book ed. 1952).
9 *Id.* at 34.
10 *Id.* at 41-42.
11 Text at 21.
12 32 N.J. 358, 161 A.2d 69 (1960).
13 *Id.* at 84.
14 *Id.* at 100.

> ninety (90) days after delivery of such vehicle to the original purchaser or before such vehicle has been driven 4,000 miles, whichever event shall first occur, be returned to it with transportation charges prepaid and which its examination shall disclose to its satisfaction to have been thus defective. . . .[15]

In holding the added disclaimer violative of public policy and hence no bar to the instant actions, the court does not equivocate, as the following excerpts will attest:

> The warranty before us is a standardized form designed for mass use. It is imposed upon the automobile consumer. He takes it or leaves it, and he must take it to buy an automobile. No bargaining is engaged in with respect to it. In fact, the dealer through whom it comes to the buyer is without authority to alter it; his function is ministerial — simply to deliver it. . . . Such control and limitation of his remedies are inimical to the public welfare and, at the very least, call for great care by the courts to avoid injustice through application of strict common-law principles of freedom of contract.[16]

Caveat venditor!

If, as seems likely, the views expressed in *Henningsen* gain more judicial acceptance, the way may be opened for real progress in the area. Not that the frontal attack on privity and invalidation of the standard warranty is the answer, but because the need for serious study and compromise will become more urgent and apparent. This is not a simple "either-or" proposition. The choices are not confined to maintenance of the privity defense in all its strictness or the wholesale abandonment of it. Nor is the latter alternative made more acceptable by indicating how the risks may be insured against and the cost of the insurance borne by the consuming public. The question remains: what risks? What should be the extent of a manufacturer's liability for defects in the product not shown to have resulted from negligence on its part? What type of warranty is fair under the circumstances? What of disclaimers? Answers to these questions can only come from far greater effort than has heretofore been expended. Perhaps there will be solutions on an industry-by-industry basis. And there will surely be the need for some legislation. It is one of the merits of Mr. Gillam's book that it is calculated to hasten the day when such action will be undertaken.

*Edward J. Murphy**

THE CORPORATION IN MODERN SOCIETY. Edward S. Mason, Editor. Cambridge, Massachusetts: Harvard University Press, 1960. Pp. xv, 335. $6.75.

> Our grandfathers quarreled with corporations because, as the phrase went, they were "soulless." But out of the common denominator of the decision-making machinery, some sort of consensus of mind is emerging, by compulsion as it were, which for good or ill is acting surprisingly like a collective soul.[1]
>
> Adolph A. Berle

Editor Mason, in a detailed introduction, and Berle, opening the work with a foreword, join with 13 writers in this ambitious attempt to evaluate the place of the corporation in the midst of social and economic revolution. Most of the essays can be said to deal with corporate economics, one with political significance and three with international activity. Twelve of the 14 contributors, not counting Berle, are educators.

A not surprising concentration on the problem of external control of the American commercial corporation necessarily results in a thorough survey of the engines of corporate supervision. Abran Chayes[2] discusses control in terms of stockholders, workers, consumers and government. The same theme is echoed in an evaluation

15 *Id.* at 74.
16 *Id.* at 87.
* B.S., LL.B., Assistant Professor of Law, Notre Dame Law School.

1 THE TWENTIETH CENTURY CAPITALIST REVOLUTION 183 (1954).
2 Professor of Law, Harvard University.

of corporate management by Yale Law School's Dean Eugene V. Rostow. Like Berle, Dean Rostow sees the present era as one of increasing public responsibility on the part of corporate officials — what he calls "the birth of a more benign stage in the evolution of capitalism." [3] And, in pricing, he sees the economic pressures that have developed historically as the only present, reliable means of control; this is true even in the so-called "endocratic" corporate organization, where management is separated from ownership. He hints that he favors profit control by government as a solution to private economic dictatorship, a solution which possibly overlooks the necessity for attracting investment which was emphasized in these pages by Professor David McCord Wright a few months ago.[4]

Kingman Brewster[5] argues for what he calls a "federal solution" to the control problem, a theory which has the conspicuous virtue of recognizing the corporation as a political fact, as well as an economic force. Its darker side is a concept of state control which operates — as do many of these essays — on the unspoken assumption that management presents an ominous threat to the American economy, if not to democracy itself. Brewster looks for control of corporate investment through both proscription and incentive. "If investable private capital can be deconcentrated, then government should be better able to influence the pattern of investment in the public interest without resort to public investment."[6]

The book's first attempt to analyze existing corporate power is in the fifth essay, by Carl Kaysen, Harvard economics professor. Management is dangerous, he notes, only when the impact of its decisions reaches beyond the immediate business environment in which the decisions are made. It is dangerous at this point because it is answerable neither to stockholders — business democracy being a myth — nor to government — antitrust regulation being largely unable to achieve its purposes. The result is a business oligarchy. Kaysen sees the choice as one between this "business society" and a perhaps more individualistic sort of republic. The solution, he says, is a device to enforce moral and social values on corporate management — a thesis which denies Dean Rostow's belief that corporate management in its "benign stage" has reached those values without compulsion. Kaysen concludes:

> The development of mechanisms which will change the internal organization of the corporation, and define more closely and represent more presently the interests to which corporate management should respond and the goals toward which they should strive is yet to begin, if it is to come at all.[7]

W. Lloyd Warner[8] presents some of the book's more thought-provoking content in an analysis of "The Corporation Man." The educational level of the corporate executive is rising more rapidly than the national educational level generally. This, according to Warner, is evidence of greater democracy in corporate ladder-climbing, a conclusion that assumes but does not state that discrimination against the non-degreed is somehow nobler than discrimination against the unpropertied. The "organization man" impulse in corporate personnel management militates, Warner believes, against the ends which business should be promoting. An "autonomous" man is more likely to develop the spirit and adopt the values of a democratic society and a free enterprise economy; and the growth in educational standards and the present high level of mobility in corporate management may be promoting that kind of autonomy.

Management-labor contact is treated by Neil W. Chamberlain of the Ford Foundation. The labor contest as he sees it is exclusively economic. And the labor

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3 Text at 60.
4 *Growing Union Power and the Public Interest*, 35 NOTRE DAME LAWYER 617 (1960).
5 Professor of Law, Harvard University.
6 Text at 83.
7 *Id.* at 105.
8 University Professor of Social Research, Michigan State University.

movement, one of the primary economic factors in this contest, is not really a movement at all because it lacks a social program; its force is a dollar force and, because it is economic in the narrow, pressure-group sense, Chamberlain calls it reactionary.[9] Since the bloodiest battlefields in the conflict are in the past, there is now no meaningful social struggle:

> It is probable that never before has there existed a labor movement which has voluntarily so well integrated itself with its society. And indeed, where the worker-driven Chevrolet has become almost indistinguishable from the employer-driven Cadillac, why should the worker feel himself divided from a superior class? [10]

Labor leaders have no political power, in this analysis — at least not in opposition to the power of corporate management. The union official is a sort of Babbitt in bib overalls. He is neither economically nor idealistically prepared for a class struggle, and corporate management perpetuates his ambivalence by making bitter mountains out of wage-raise mole hills, a carefully created and artificial bickering which minimizes union power while it sustains the internal power of union officials.

Invention and technological development have largely passed from private and governmental hands to corporate enterprise, an aspect of corporate power discussed in these essays by Jacob Schmookler.[11] Corporations now do around three-fourths of all inventing, and a greater proportion of the developing of inventions. In contrast to the thesis of Berle, that economic progress has almost ended product competition, Schmookler's argument is that product competition accounts for the high incidence of corporate research activity in the United States, and the lack of product competition accounts for the lack of corporate research in nations like Great Britain. But, if industry does the experimenting, government pays for it. More than half of the research and development bills in the United States are paid by the federal government and a higher proportion of the cost of "pure science," non-commercial research, is borne by the taxpayer. Schmookler's conclusion is that even more government aid is necessary; he advocates abolition of the patent system, which, he says, discourages inventor initiative, and institution of a system of government bounties for useful inventions.

The four-fifths of the book that is devoted to corporate economics is completed by essays on corporate finance by John Lintner[12] and corporate satellites by Norton E. Long.[13] Lintner notes that nonfinancial corporations control major fractions of the nation's real estate, tangible assets, equities, and private debts.[14] In meeting the thesis of some earlier chapters — that big corporate management is an economic sponge — he notes that 55 to 60 per cent of the internal resources of American corporations are used for expansion and that the larger the corporation is, the greater the percentage of its profits it distributes to its stockholders.

Long regrets the passing of the local factory owner, with his feudal landlord influence on the community, and the coming of his replacement, the itinerant executive-trainee from the home office. Johnny-come-lately branch managers lack the influence and prestige of the 19th-century factory owner, in Long's observation, as well as the ability to make community decisions and to lead community projects, which, consequently, are now managed on a sort of "everybody-is-a-hired-hand" plan. Branch managers are "more the representatives of a foreign power than the rightful chiefs of the local tribe." [15]

Internal corporate affairs are treated in a chapter by Earl Latham[16] which

9 Text at 124-25; cf. David McCord Wright, *Growing Union Power and the Public Interest*, 35 NOTRE DAME LAWYER 621-24 (1960).
10 Text at 125.
11 Associate Professor of Economics, University of Minnesota.
12 Professor in the Graduate School of Business Administration, Harvard University.
13 Professor of Political Science, Northwestern University.
14 Text at 173-77.
15 *Id.* at 214-15.
16 John B. Eastman, Professor of Political Science, Amherst College.

takes its main force from the apparently demonstrable fact that large corporate personnel structures stifle initiative as effectively as does the commune.

> In the name of free enterprise, corporate collectivism has made deep inroads upon the celebrated individualism of the economy, and corporate welfarism has gone an equal distance toward tranquilizing the historic initiative of the individual in a smother of narcotic "togetherness." [17]

Modern corporate organization is a prototype of the 20th-century welfare state. The internal corporate structures carry their recognizable trappings — political parties, an executive elite, figurehead leadership carefully avoiding interference with a well-entrenched bureaucratic control, systems of rewards and punishments and an attitude toward employees that Latham calls the "bureaucratization of benevolence." [18]

The picture of corporate management as a baronage in three-button suits lends itself well to an analysis of the British corporation by C.A.R. Crosland, and of the Soviet industrial structure by Harvard economics professor Alexander Gerschenkron. The synthesis of these essays is that corporate management — under the American system of modified free enterprise, under the British system of democratic nationalization, and under the totalitarian nationalization in the Soviet Union — is essentially similar in attitudes, personnel and power. In a vague way, in all three systems, management — even though effectively separated from investment — works for the good of investors. This is so in the Soviet Union because, as Gerschenkron observes, as long as management produces profits, the totalitarian regime will leave it to its own devices; and in England this is true, by Crosland's estimate, because of a vague sense of duty in management not unlike that which presumably impels a last-term elected official to give the position his best efforts. (One can almost hear Crosland say that bureaucratic management works devotedly for the British taxpayer because it would not be cricket to do anything else.)

In a mature industrial society like Great Britain's, the conclusion is inevitable that nationalization as a means of corporate control serves no purpose that fear of government interference and moral responsibility were not serving as well before nationalization. For the adolescent industrial society in Russia, Gerschenkron describes a corporate management which in its ethic, its conduct, and its status symbols bears marked resemblance to America's robber barons of two generations ago. And government tolerates this bourgeois anomaly because production and profit perpetuate dictatorial power.

The finishing touch on this complex is an essay on the operations of American corporations abroad by Raymond Vernon.[19] Pressures on foreign investors and technologists, he notes, are threefold: from the host government, from the Soviet Union, and from the American diplomatic authority. The problem, as Vernon sees it, is to meet the needs of the first, compete with the second, and serve the ultimate ends of the third. The last problem, the immediate problem, is one of finding the right coercive devices for making international corporate operations the enlightened tools of American foreign policy. His solution is a corollary of free enterprise: furnish American technology from private industry, without the usual concomitant American industrial control. He seems to favor government ownership of industry in depressed areas, on the theory that, once industry is on its feet, these governments will turn control back to private investors. American technicians can then sell their services either to the foreign governments or to the American government, with only the know-how and none of the dominance being exported.

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17 Text at 218.

18 *Id.* at 232.

19 Professor in the Graduate School of Business Administration, Harvard University. This is the third from last essay, the Crosland and Gerschenkron works coming later in the book. But, in one sense at least, it forms a logical conclusion for what might be called the book's "foreign" section.

This rather ambitious symposium explores thoroughly the problems and the potential of the commercial corporation. That is, perhaps, all it set out to do. For all that it accomplishes, though, it somehow falls short of the promise of its title. The reader might have hoped, for instance, to read at least a comment on non-commercial corporations; the title does not dispel that hope. Some allusion to the optimism expressed by Berle — that the corporation of today is the superstructure for the enlightened, functional democracy of the future — might at least have been offered, if only to condemn it. Finally, even in the purely commercial area, the book's essays rely exclusively on educators and theoreticians. Nowhere, so far as the authors' identification discloses, is the opinion or insight of a corporate investor, or manager, or stockholder found. It may be that the men in executive suite were given fair treatment in this always interesting undertaking, but they can at least complain that they were under-represented.

Thomas L. Shaffer

BOOKS RECEIVED

CRIME AND THE LAW

GENERAL PRINCIPLES OF CRIMINAL LAW (Second Edition). By Jerome Hall. Indianapolis: Bobbs-Merrill Company, Inc., 1960. Pp. xii, 642. A complete revision of the 1947 edition to keep the book in harmony with its original purpose, to "elucidate the basic ideas of criminal law in the light of current knowledge and to organize that law in terms of a definite theory."

MOSTLY MURDER. By Sir Sydney Smith.
New York: David McKay Company, Inc., 1960. $4.95. This is the autobiography of Sir Sydney Smith, former Dean of Edinburgh's Faculty of Medicine. In it Sir Sydney describes his 50 years in medicine and his 30 years' association with crime and criminals. During these years, he has repeatedly furnished invaluable, and often sensational, evidence in English and Scottish murder trials, often working against apparently incontrovertible evidence which could only be refuted by his extensive medical knowledge and remarkable deduction.

NOTHING BUT THE TRUTH. By James Horace Wood as told to John M. Ross. Garden City, New York: Doubleday & Co., Inc., 1960. Pp. 286. $3.95. This is the suspenseful, true-life story of a famous Jackson County, Georgia, murder case and of the defense attorney's two-year struggle for justice against all odds, including ostracism and bankruptcy.

FEDERAL PROCEDURE

FEDERAL JURISDICTION AND PROCEDURE. By Harry G. Fins.
Indianapolis: Bobbs-Merrill Co., Inc., 1960. Pp. 240. $6.50.

FOREIGN LAW

BELLI LOOKS AT LIFE AND LAW IN JAPAN. By Melvin M. Belli and Danny R. Jones.
Indianapolis: Bobbs-Merrill Co., Inc., 1960. Pp. 240, $6.50.
unusual book, the authors set out to tell the story of what it is like to live under the customs and laws of a foreign culture. They report on a number of sensational trials — that of William Girard, the American soldier accused of murder, and that of Tokyo Rose, accused of treason in the United States.

INTERNATIONAL LAW

TIBET AND THE CHINESE PEOPLE'S REPUBLIC. A Report to the International Commission of Jurists by Its Legal Inquiry Committee on Tibet.
Geneva, Switzerland: International Commission of Jurists, 1960. Pp. xiii, 345.

YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1953; Summer Records of the Fifth Session, I. United Nations Publication.
New York: Columbia University Press, 1960. Pp. vii, 409. $4.00.

NATURAL LAW

THE THEOLOGICAL FOUNDATION OF LAW: *A Radical Critique of Natural Law.* By Jacques Ellul. Translated from the French by Marguerite Wieser.
Garden City, New York: Doubleday & Co., Inc., 1960. Pp. 140. $3.95.