NOTES AND COMMENTS

CRIMINAL LAW

VICARIOUS CRIMINAL RESPONSIBILITY

The Buffalo Pharmacal Company, Inc., and Joseph H. Dotterweich, its president and general manager, were charged with delivering misbranded and adultered drugs in interstate commerce in violation of the Federal Food, Drug, and Cosmetics Act.[1] Evidence was adequate to support the finding of misbranding and adulteration, but there was a total lack of evidence of conscious fraud, personal participation, or acquiescence in the illegal act by the defendant Dotterweich. Held, that the question of Dotterweich's responsibility was properly left to the jury. Dotterweich was found guilty; the corporation was acquitted. The conviction against Dotterweich was reversed by the Circuit Court of Appeals (131 F. 2d 500), and this judgment was reversed by a five-four decision of the Supreme Court. United States v. Dotterweich, 64 Sup. Ct. 134 (1943). (Justices Murphy, Roberts, Reed, and Rutledge dissenting).

Upon first analysis the doctrine of this case seems to be violative of the basic principle that " . . . to constitute crime . . . there must be first a vicious will. . . . "[2] This fundamental canon of Anglo-American jurisprudence,[3] until comparatively recent times, branded as odious and intolerable any notion of vicarious criminal liability.[4] But, during the last century, along with the great industrial upheaval and consequent increase in congested areas, the legislatures have enacted many regulatory statutes creating "Public Welfare Offenses,"[5] the mass enforcement of which has dispensed with the classical requirement of "mens rea."[6] Thus the modern rule would

1. 52 Stat. 1059 (1938), 21 U.S.C.A. § 1 et seq. (Supp. 1943).
2. 4 Bl. Comm.* 21.
3. See May, "Law of Crimes" (4th ed. 1938) 21; Miller, "Criminal Law" (1943) 52; 14 Am. Jur. (Criminal Law) § 29.
4. Baron Parke, in the case of Regina v. Woodrow, 15 M. & W. 404, 153 Eng. Rep.R. 907 (Ex. 1846), wrote one of the first opinions emphasizing this new development. Some of the earlier cases rationalized the departure from the "mens rea" requirement upon the ground that although the proceeding was criminal in form it was civil in nature, hence "mens rea" was not essential. Regina v. Stephens, 1 Q. B. 702, 707 (1866). See Barnes v. State, 19 Conn. 398 (1849), for one of the first American decisions in line with this new development.
5. See Sayre, "Public Welfare Offenses" (1933) 33 Col. L. Rev. 55.
6. Id. at 69, where Professor Sayre says: "It is needless to point out that, swamped with such appalling inundations of cases of petty violations, the lower criminal courts would be physically unable to examine the subjective intent of each defendant, even were such determination desirable." See Tenement House Department of City of New York v. McDevit, 215 N. Y. 160, 168, 109 N. E. 88 (1915); People ex rel. Price v. Sheffield Farms-Slawson-Decker Company, 225 N. Y. 25, 121 N. E. 474 (1918).

seem to be that "mens rea" is a necessary ingredient of criminal offenses unless a statute either expressly or by necessary implication dispenses with it.[7] The extent that we may go in prudently eliminating the "intent" element is indeed a moot question.[8]

Modern tribunals are no longer troubled with the apparent antinomy of corporate criminality.[9] Further, as there are many cases where individuals are held criminally guilty with culpability[10] (e.g. traffic violators), so there are many instances where culpability is not a condition precedent to corporate criminality.[11] This apparent harshness is rationalized on the grounds of public expediency.[12] The pure food laws afford an example.

The obvious objective of the pure food laws is to protect the public against the fraud and imposition of manufacturers and vendors of inferior and unwholesome food and medicinal products.[13] Noting the probable difficulty of proof of the normal requirement of criminal intent, the legislators have deemed it expedient to uproot this prerequisite[14] and have formulated an "at peril" dogma. Thus even the

7. See 22 C. J. S. (Criminal Law) §§ 29, 30.
8. See Ballantine, "Manual of Corporation Law and Practice" (1930) 311, 312; Hall, "Prolegomena to a Science of Criminal Law" (1941) 89 U. of Pa. L. Rev. 563-569; Hall, "Interrelations of Criminal Law and Torts: II" (1943) 43 Col. L. Rev. 986-996; Sayre, "Public Welfare Offenses" (1933) 33 Col. L. Rev. 55.
9. See New York Central and Hudson River R. R. v. United States, 212 U.S. 481 (1908); United States v. Nearing et al., 252 Fed. 223, 231 (S. D. N. Y. 1918); United States v. American Socialist Soc. et al., 260 Fed. 885 (S. D. N. Y. 1919). See also Edgerton, "Corporate Criminal Responsibility" (1927) 36 Yale L. J. 827.
10. See note 6 supra.
11. The doctrine of respondeat superior, rendering the principal responsible for the acts of its servant, is applicable to criminal as well as tort actions. In such cases the corporation is liable, notwithstanding the lack of culpability. See note 16 infra. William Draper Lewis, Director of the American Law Institute, said, "The rule is this: One who has ownership in or control of a business is personally liable, unless that liability is limited by statute, for acts done in the course of and for the business." Lewis, "The Liability of the Undisclosed Principal in Contract" (1909) 9 Col. L. Rev. 116, 128.
12. In the instant case at 136, Mr. Justice Frankfurter said, "The purposes of this legislation thus touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self protection." Id. at 138 he said, "Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless." See also 22 C. J. S. (Criminal Law) § 30.
13. See Groff v. State, 171 Ind. 547, 548, 85 N. E. 769 (1908).
14. Much importance was attached to this point in the celebrated case of Hobs v. Winchester Corporation, 2 K. B. 471, 480, 484 (1910). But see Hall, "Prolegomena to a Science of Criminal Law" (1941) 89 U. of Pa. L. Rev. 549, 568, where it is said, "But

exercise of the highest degree of care will not absolve liability.[15]

There is ample authority for the proposition that a corporation is criminally liable for the acts of its agents if the acts are committed within the scope of the agents' employment.[16] Also, it seems to be the accepted opinion of the authorities that the personal criminality of corporate officers includes an element of "mens rea" or at least acquiescence.[17] In the instant case it will be noted that the corporation was acquitted, but the corporate officer was convicted. It is conceded that the legislature intended, even in the complete absence of guilty knowledge, that violations of the act should not go unpunished. That the legislature intended that an individual should bear the penalty merely because he was the managing director of the corporation and the superior officer of the unknown person who was, in fact, the violator is not so readily conceded.[18] Here the decision would tend to make corporate officers vicariously liable for all the acts of their subordinates.[19] If this had been the legislative intent they should have stipulated it "plainly and unmistakably."[20]

Inasmuch as the record is devoid of evidence of even negligence on the part of the corporate officer, this decision appears to depart

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it is apparent that the problems of proof, case by case, offer no greater difficulties than in most felonies, and much less than in some, e.g., receiving stolen property."

15. See Groff v. State, 171 Ind. 547, 85 N. E. 769 (1908); People v. Dennis, 114 N.Y. Supp. 7 (1909); People v. Tatsera, 138 App. Div. 446, 122 N. Y. Supp. 915 (1910); Hobbs v. Winchester Corporation, 2 K. B. 471 (1910).

16. There are many statutory declarations to this effect. The Federal Food and Drug Act, 52 Stat. 1059 (1938), 21 U.S.C.A. § 331 (Supp. 1943); The Grain Standards Act, 39 Stat. 482 (1916), 7 U.S.C.A. § 73. See Edgerton, "Corporate Criminal Responsibility" (1927) 36 Yale L. J. 827, where it is said, "A corporation should be considered capable of any crime, and guilty of any crime if the human persons who commit the crime act in the course of their employment so as to make the corporation responsible in tort." But see Ballantine, "Manual of Corporation Law and Practice" (1930) 310; Stevens, "Handbook on the Law of Private Corporations" (1936) §§ 80, 81.

17. See State v. Guthrie, 176 Ark. 1041, 5 S. W. (2d) 306 (1928); State v. German, 161 Ore. 442, 90 P. (2d) 306 (1938); State v. Thoman, 123 Wash. 299, 212 Pac. 253, 255 (1923). See also Thompson, "Corporations" (3rd ed. 1927) § 5633; 13 Am. Jur. (Corporations) § 1100.

18. See Sayre, "Public Welfare Offenses" (1933) 33 Col. L. Rev. 55, 79, where the author says, "When the law begins to permit convictions for serious offenses of men who are morally innocent and free from fault, who may even be respected and useful members of the community, its restraining power becomes undermined. Once it becomes respectable to be convicted the vitality of the criminal law has been sapped."

19. See People v. Brainard et al., 192 App. Div. 816, 183 N. Y. Supp. 452 (1st Dep't 1920).

20. See United States v. Lacher, 134 U. S. 624, 628 (1889); United States v. Gradwell et al., 243 U. S. 476, 485 (1916); People v. Brainard et al., 192 App. Div. 816, 183 N.Y. Supp. 452 (1st Dep't 1920). See also 14 Am. Jur. (Criminal Law § 24.

wholly from the principle that guilt is personal and ought not be lightly imputed.[21] In the public interest of insuring prudence in the conduct of the business of the Buffalo Pharmacal Co., a majority of the Justices deemed it wise to place a criminal stigma on the defendant; a stigma that is predicated wholly upon chance, for it necessarily follows that in the absence of fraud, participation, acquiescense, or even negligence, the act of adulteration and misbranding was not within Dotterweich's power of human control.[22] It is submitted that the public interest could be as adequately protected, without a serious departure from established criminal law doctrines, by placing a presumption of guilt and a burden of proof upon the corporate officer.

CONFLICT OF LAWS

WORKMEN'S COMPENSATION AWARD HELD RES JUDICATA AS TO SECOND RECOVERY IN ANOTHER STATE.

Respondent resided, and was hired, in Louisiana as a laborer on a Texas oil well owned by the petitioner. In the course of this employment, Hunt was injured; he received a compensation award under the Texas Workmen's Compensation Act.[1] By the terms of the Texas Act this award became final.[2] Respondent later[3] brought an action under the Louisiana Workmen's Compensation Act[4] to recover for his injury; petitioner's exception was overruled and judgment was rendered for Hunt less the amount of the Texas payments. The Louisiana Appellate Court affirmed this decision,[5] with the Louisiana Supreme Court refusing to review. On writ of certiorari, held, reversed. A compensation award of one state which has become final is

21. See instant case at 139.
22. See Hall, "Prolegomena to a Science of Criminal Law" (1941) 89 U. of Pa. L. Rev. 549, 568, and Hall, "Interrelations of Criminal Law and Torts: II" (1943) 43 Col. L. Rev. 986-996.

1. Texas Statutes (Vernon, 1936) art. 8306 through 8309.
2. Texas Statutes (Vernon, 1936) art. 8307, § 5, which states in substance that a party, dissatisfied with the award of the Industrial Accident Board, may review the award by giving notice within twenty days that he will not conform to it and within twenty days after giving such notice, he must bring suit in the proper court. If no notice is given or no suit is brought within the limited time, the award of the Board shall be final and binding.
3. Hunt brought the Louisiana suit on December 18, 1940. His accident occurred on May 25, 1939, payments for which began on June 9, 1939 by petitioner's insurer; the payments continued until Octoher 26, 1940 or thereabouts when Hunt's attorneys informed respondent that they were going to bring the Louisiana suit. Disregarding adequate notice of the Texas board's hearing, Hunt did not attend, and on December 3, 1940 a decision was made from which Hunt did not appeal.
4. La. Gen. Stat. Ann. (Dart, 1939) §§ 4391 through 4434.
5. Hunt v. Maguolia Petroleum Co., —— La. App. ——, 10 So. (2d) 109 (1942).