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and were understood to confer no power of sale, but merely authority to show diamonds to a customer and report to the owner. There the Court thought that the words "on approval" necessitated explanation. Without the words, the duty to return would have been absolute. With them, the memorandum was ambiguous and oral testimony was necessary to clarify the import of the instrument.³¹

While the line of demarcation between the cases is obscure, the law evolved remains constant. The interpretation of the instrument is of paramount importance. If it be clear and intelligible on its face, the evidence of the custom and usage will be excluded. But if the instrument is ambiguous, the ruling of *Smith v. Clews*³² will apply, and the evidence will be admitted.

JOSEPH A. SCHIAVONE.

RECENT LIMITATION OF DOCTRINE OF LIABILITY FOR NEGLIGENCE
TO THIRD PARTIES.

"General principles do not decide concrete cases."¹ In this modern day of complex commercial relations it is equally evident that not a small part of the judicial process deciding a specific case is devoted to avoiding the effect of general principles in order to leave the way open to decide the particular case in accordance with the economic and commercial requirements of the particular situation.

The case of *Ultramares Corporation v. Touche*,² recently decided by the Court of Appeals, is significant as a limitation upon the growing tendency to impose liability for negligence in favor of parties not in a contractual relationship or other relation of privity with the negligent party—a limitation prompted by expediency.

The public accounting firm of Touche, Niven and Company was employed by the Stern Company to audit its books and prepare a certified balance sheet for the year ending December 31, 1923, as it had at the end of each of the preceding three years. The certified balance sheet ascribed to the Stern Company a net worth of over \$1,000,000., whereas, in fact, the company was insolvent. On the strength of one of the 32 counterpart originals issued by the defendant, audit company, the plaintiff to whom it was exhibited made a series of loans to Stern Company. In the month preceding the total collapse of the business in 1924, the plaintiff had advanced

³¹ See *Smith v. Clews*, second appeal, 114 N. Y. 190, 21 N. E. 160 (1889).

³² *Supra* note 29.

¹ *Lochner v. N. Y.*, 198 U. S. 45 at 76, 25 Sup. Ct. 539 at 554 (1905), per Holmes, J.

² 255 N. Y. 170, 184 N. E. 441 (1931).

over \$165,000., most of it unsecured, and it is for the loss suffered through these loans that the plaintiff sued the defendant.

The plaintiff's complaint was framed in negligence, a second cause of action sounding in fraud, which was added on the trial, having been dismissed without consideration by the jury.^{2a} That there was negligence on the part of the defendant, the Court concedes, and this is sustained by the evidence, but the question at bar is the liability of *this defendant to this plaintiff*, who was not a party to the contract of hiring nor in any direct relationship with the defendant.

Analogous to the doctrine of beneficiary contracts³ there has been an increasing tendency in New York to give to third parties an enforceable remedy against negligent actors. A manufacturer who negligently produced an automobile so defective that its operation exposed the user to a serious risk of bodily harm has been held liable to him for resulting injuries, although privity was entirely lacking between them.⁴ Other recent cases have reached a similar result.⁵ The instant case is distinguished on the ground that what was there considered was a physical force, while here the Court is "asked to say that a like liability attaches to the circulation of a thought or a release of the explosive power resident in words."⁶

While it was assumed by Pollock many years ago that "generally speaking, there is no such thing as liability for negligence in word, as distinguished from act," and that "this difference is founded in the nature of the thing,"⁷ much discussion has evolved about the proposition. The case of *Derry v. Peek*,⁸ decided in 1889, in which the English courts were said to have recognized this view, was a case of fraud rather than negligence and what was said there

^{2a} Plaintiff's cross-appeal from such dismissal successful, *ibid*.

³ The following observations of Chief Judge Cardozo in his opinion are significant: "The assault upon the citadel of privity is proceeding in these days apace. * * * In the field of the law of contract there has been a gradual widening of the doctrine of *Lawrence v. Fox*, 20 N. Y. 268 (1859) until today the beneficiary of a promise, clearly indicated as such, is seldom left without a remedy (*Seaver v. Ranson*, 224 N. Y. 233, 1918)." He further points out that "something more must appear than an intention that the promise redound to the benefit of the public or to that of a class of indefinite extension. The promise must be such as to bespeak the assumption of a duty to make reparation directly to the individual members of the public if the benefit is lost" (*Moch Co. v. Rensselaer Water Co.*, 247 N. Y. 160, 164 (1928)," *supra* note 2 at 180, 174 N. E. at 445.

⁴ *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050 (1916).

⁵ *Robbins Dry Dock & Repair Co. v. Flint*, 275 U. S. 303, 48 Sup. Ct. 134 (1927); *Chycky v. Drake*, 235 N. Y. 468, 139 N. E. 576 (1923); *Pine Grove Poultry Farm v. Newtown B. P. Mfg. Co.*, 248 N. Y. 293, 162 N. E. 84 (1928).

⁶ *Supra* note 2 at 181, 174 N. E. at 445.

⁷ Pollock on Torts (8th ed., 1908), p. 553.

⁸ L. R. 14 A. C. 337 (1889). For an analysis of the case, and a discussion of the problem see Smith, *Liability for Negligent Language* (1900) 14 Harv. L. Rev. 184.

on this point was merely *obiter dictum*. In New York, however, three principal cases⁹ have established the doctrine of liability for negligent words and each of them might well be taken as authority for the disposition of the present case.

The first of the cases is *Glanzer v. Shepard*,¹⁰ where the liability of the defendants—public weighers—was based upon their legal duty to use care, as following a “common calling,” although the services rendered were given at the order of and for payment by another, not the plaintiff. The distinction made between the *Shepard* case and the case at bar is said to be not merely in the kind of services rendered, but that the services rendered were for the immediate benefit of a third party, who was “in effect, if not in name, a party to the contract;” and the benefit was the primary object of the transaction, and not, as in the instant case, collateral to it. It is true that the Court in *Glanzer v. Shepard* indicated that the decision might have been based on the rule in *Lawrence v. Fox*,^{10a} and not in terms of legal duty. That the emphasis was laid upon the latter is significant; that the opinions in both were written by the same learned Judge, equally so.

Nor need the Court be at a loss for an even further extension of the doctrine, to include not only a single party, but a class which may enforce the liability we are here considering. In *Doyle v. Chatham & Phenix National Bank*,¹¹ decided by the same court only a year ago, a member of a wholly indeterminate class—possible investors in a corporation, who relied on the negligent certification by the bank that certain notes had been deposited with it as collateral for the issuance of bonds—was allowed to recover. Yet the Court here dismisses the case from consideration as totally indecisive because the investors, by the act of subscription to the bonds, had become *cestuis qui trustent*.

Another case discussed at length by the Court in its review of the ostensible authorities, is *International Products Co. v. Erie R. R. Co.*¹² While in one phase of the doctrine this case is in advance even of *Glanzer v. Shepard*^{12a}—that a negligent service need

⁹ *Glanzer v. Shepard*, 233 N. Y. 236, 135 N. E. 275 (1922); *International Products Co. v. Erie R. R. Co.*, 244 N. Y. 331, 155 N. E. 662 (1927); *Doyle v. Chatham & Phenix Nat. Bank*, 253 N. Y. 369, 171 N. E. 574 (1930). For a complete statement of the facts in each, see review of the opinion of the Appellate Division in *Ultramares Corp. v. Touche et al.*, *supra* note 2, in a Note (1930) 5 St. John's L. Rev. 76.

¹⁰ *Supra* note 9. The defendants, public weighers, were requested by the sellers of beans to make weight and furnish the buyers with a copy of the return, on which payment was to be based. The weight was negligently computed and the plaintiff buyer sued to recover the amount paid in excess of value. The defendants were held liable.

^{10a} 20 N. Y. 268 (1859).

¹¹ *Supra* note 9.

¹² *Ibid.*

^{12a} *Supra* note 9.

not precede the negligent words on which liability is predicated—it is still distinguished from it by the instant case. In the Erie case, the relationship of bailor and bailee existed between the parties, although the negligent information on which the action was based was for the benefit of another. The distinction hinges on the slim post of that relationship; because the defendant as bailor should have known where the goods were to be stored, the case is said to come within the class

“where a person within whose special province it lay to know a particular fact, has given an erroneous answer to an inquiry made with regard to it by a person desirous of ascertaining the fact for the purpose of determining his course accordingly, and has been held bound to make good the assurance he has given.”¹³

These distinctions do not appeal to us as being particularly meritorious. Surely the Shepard case lays down the rule that one engaged in a public calling has the duty of care not only to his immediate employer, but to a third party, who, he knows, will rely on his report. It is said that certified public accountants “are public only in the sense that their services are offered to any one who chooses to employ them.”¹⁴ Is this the proper test? Then, too, is the unskilled laborer, willing to work for any master who will pay him, engaged in a “public calling.” The public character of duly licensed accountants must mean more; surely its scope is as great as that of public weigher. Our attention is also directed to the fact that the public weigher *knew* that his determination would be relied upon by the plaintiff, and his report stated as much. It can scarcely be doubted that the public accountants hired by the Stern Company were as much aware that the certificates they issued in duplicate would not be kept by their employer alone, but exhibited to prospective lenders, and the Court admits as much.

The Doyle case, as we have indicated, extends the doctrine to include liability to a large and unknown class. Are possible future investors distinguishable from possible future lenders, if any difference can be found? Then, too, the Erie case is certainly authority, as the Court itself here points out, for the proposition that mere negligent words can result in a liability to third persons, aside from acts—a liability sought to be imposed in the Touche case.

Thus we think it appears that these distinctions are more arbitrary than real. The justification for them lies in the necessity for conformity to orthodox judicial process. The instant case was decided purely on a sociological basis—this was a situation where logic and symmetry must give way to expediency. The crux of

¹³ Herschell, L. C., in *Dery v. Peek*, *supra* note 13.

¹⁴ *Supra* note 2 at 188, 174 N. E. at 448.

the decision lies in two sentences which begin and end the relevant discussion of our problem. Conceding the liability of accountants for fraud, the Court says:

"If liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class. The hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences."¹⁵

And, concluding the argument,

"We doubt whether the average business man receiving a certificate without paying for it and receiving it merely as one among a multitude of possible investors, would look for anything more (than liability for fraud)."¹⁶

Thus the Court takes judicial notice of a fact, in no way proved or sought to be proved, and bases this important decision on it.¹⁷ What the expectations of honest business men are when they receive an accountant's audit of another's business, is a fact not easily ascertainable perhaps, but still possible of discovery. We do not attempt to decide whether the Court was correct in its assumption of the prevalent belief among the class affected,¹⁸ nor is that relevant to our discussion. The inevitable conclusion from an analysis of the case is that had the Court believed the general expectations of the class seeking to impose this liability to be contrary to the adopted theory, small effort would have been made to justify the decision—the prior decisions which were so assiduously distinguished could even more easily be held as binding upon the Court.

We find support for our view in the writing of Chief Judge Cardozo himself.¹⁹ His own theory of law is that it shapes itself to an end more important than its origin, through the instrumentality chiefly of the sociological method. In approving this approach to the goal, he says:

¹⁵ *Supra* note 2 at 179, 174 N. E. at 444.

¹⁶ *Supra* note 2 at 189, 174 N. E. at 448.

¹⁷ The brief on behalf of the American Institute of Accountants as *amicus curiae* undoubtedly influenced the Court in the view it adopted.

¹⁸ Note (1930) 5 St. John's L. Rev. 76, 80. It is there suggested that it would not be an undue extension of the doctrine to hold accountants liable to a greater degree of care than required by their contracts, for sociological reasons, *contra* to the view of the present court.

¹⁹ Cardozo, *The Nature of the Judicial Process* (1921).

"The rule that functions well produces a title deed to recognition. Only in determining how it functions we must not view it too narrowly. We must not sacrifice the general to the particular. We must not throw to the winds the advantages of consistency and uniformity to do justice in the instance. * * * *But within the limits thus set, within a range over which choice moves, the final principle of selection for judges * * * is one of fitness to an end.*" (Italics ours.)²⁰

The end reached in the case of *Ultramares Corporation v. Touche*, as we have said, was evidently the result of this method: the duty of the Courts, as seen by Judge Cardozo, "to declare the law in accordance with reason and justice" as "*a phase of the duty to declare it with custom.*"²¹ The modern progressive tendency towards liberalism and freedom from the old fetters of precedent which so often stifle justice, is, wisely applied, highly desirable.

ESTHER L. KOPPELMAN.

CONSTITUTIONAL LAW—DENIAL OF DUE PROCESS BY CHANGE IN
THE ADJECTIVE LAW.

While we are all familiar with such general statements that "due process does not guarantee to a citizen of a state any particular form of procedure, its requirements are satisfied if the defendant has had notice and an opportunity to be heard,"¹ yet at times it is difficult to determine what constitutes notice or opportunity to be heard. Generally speaking, this statement is true. The hearing need not be a judicial proceeding, as the decision may be entrusted to an executive officer or administrative board.² A state may repeal a statute of limitation and thereby revive a debt that had already been barred without violating the Fourteenth Amendment.³ A state may change the number of jurors in a criminal case

²⁰ *Ibid.* at 103.

²¹ *Ibid.* at 106. (Italics ours.)

¹ *Dohany v. Rogers*, 281 U. S. 362, 369, 50 Sup. Ct. 299 (1929).

² *U. S. v. Ju Toy*, 198 U. S. 253, 25 Sup. Ct. 644 (1905).

³ *Campbell v. Holt*, 115 U. S. 620, 6 Sup. Ct. 209 (1885): "No man promises to pay money with any view to being released from that obligation by lapse of time. It violates no right of his, therefore when the legislature says, time shall be no bar, though such was the law when the contract was made. The authorities we have cited, especially in this Court, show that no right is destroyed when the law restores a remedy which has been lost. * * * We can see no right which the promisor has in the law which permits him to plead lapse of time instead of payment which shall prevent the legislature from repealing the law."