Louisiana Law Review

Volume 4 | Number 3
March 1942

THE TORT LIABILITY OF PUBLIC OFFICERS, by Leon Thomas David. Public Administration Service, Publisher, Chicago, 1940. Pp. vi, 93.

Jefferson B. Fordham

may be sued at the domicile of one, yet no annotations are given of certain important qualifications.[15]

On the whole this revised edition of the Code of Practice is a decided improvement over the 1932 edition by the publisher and will be of great value to the bench and bar. The author and publisher have added a very valuable book to their very serviceable set.

BEN R. MILLER*

THE TORT LIABILITY OF PUBLIC OFFICERS, by Leon Thomas David. Public Administration Service, Publisher, Chicago, 1940. Pp. vi, 93.

The focus of Mr. David's booklet is the tort liability of officers and employees of municipal corporations in California although some attention is given other classes of public "officers" and comparative materials.[1] He pretty well gets over the conventional categories in terms of the California decisions and statutes. Generalizations that sweep over state lines are none too reliable in such matters. Mr. David's prime concern with his own bailiwick renders his work much more pointed and at the same time provides us an expository monograph of comparative value in other jurisdictions.

Our author's first concern is to endoctrinate his readers with certain "fundamental concepts." He adverts at this stage to sovereign immunity from tort liability but in a rather meagre fashion. More attention is given the business of defining "office" and "officer" and distinguishing officers from employees.

Respondeat superior does not apply as between superior and subordinate municipal officers, we are told, because both are instruments of the sovereign and stand on an equal plane as "servants of the law." More plainly put, this is to say that the business being conducted is not that of the superior, but of the public, and the organized public, not he, should bear the risk where he is not personally at fault.

The discussion of the liability of officers acting under unconstitutional statutes is to be tempered now by reference to the im-

15. Alpha v. Rose, 171 La. 753, 132 So. 222 (1931); Gordon v. Bates-Crumley Chevrolet Co., 182 La. 795, 162 So. 624 (1935).

*Member, Baton Rouge Bar.

1. The materials upon which Mr. David's monograph is based are to be found in a series of articles by him which first appeared in the Southern California Law Review.

portant inroads the Supreme Court has recently made, in the *Chicot County* case,[2] upon the old doctrine of nullity *ab initio* grounded upon the extravagant language of Mr. Justice Field in *Norton v. Shelby County*.[3] Surely, the relativity of constitutional questions, so emphatically punctuated in recent Supreme Court adjudication, should bespeak protection for the officer with respect to acts prior to declaration of unconstitutionality. Even thereafter, if he was not a party to the case, should he not be protected unless he had actual notice of the decision or notice be reasonably imputable to him?[4]

The liability of officers with legislative or judicial powers and duties is treated at some length along conventional lines under the broad head of discretionary powers and duties. A section on legislative fact-finding embodies a none-too-effectual effort to define the legislative process in contradistinction to the judicial process. We are told that "legislative fact-finding, therefore, does not partake of the judicial, in that it is concerned with rules rather than the determination of individual application of facts to rules;[5] in that it does not determine the rule in order to decide between disputants; in that the rule is general." This brushes lightly over the important realities of sub-legislation ordained by administrative agencies. Consider, for example, the function of the Secretary of Agriculture under the Packers and Stockyards Act. By authority of that act he may fix a schedule of rates governing the rates of market agencies serving particular stockyards. In such a case the Secretary's concern is not with broad general rules; his business is to consider a particular economic situation in its relation to the public interest and to make a determination as to rules which is not, in scope and in its effect upon the parties concerned, greatly unlike a judgment.

Under the head of quasi-judicial functions Mr. David deals with the tort liability of administrative officers. He very appropriately observes that where the attack is upon the exercise of judgment or discretion by administrative officers the tort litigation would involve review by a jury of determinations of those officers, which might amount to a substitution of the judgment of the jurors for that of the administrative officers. Certainly it

2. Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 60 S.Ct. 317, 84 L.Ed. 329 (1940).

3. 118 U.S. 425, 6 S.Ct. 1121, 30 L.Ed. 178 (1886).

4. See The Work of the Louisiana Supreme Court for the 1940-1941 Term —Symposium (1942) 4 LOUISIANA LAW REVIEW 165, 215, 222-223.

5. Doubtless it was intended here to refer to the application of rules to facts, not the converse.

seems incongruous that such a procedure should be permitted where the administrative officers have been given a discretion in the premises because of their expertise.[6]

In connection with the non-discretionary functions and duties of public officers case materials are collected by the author from police, health and other fields of administration which give practical content to the discussion.

A chapter is devoted to a discussion of California legislation governing the duties and liabilities of officers having charge of streets, buildings, and other public works. While the effect of this legislation appears somewhat to limit official liability it can hardly be regarded as very advanced legislation in the field. This reviewer believes that Mr. David would concur in the conclusion that there should be a frontal attack upon the old notion of governmental immunity in tort and a thoroughgoing extension of government, as distinguished from official, responsibility for injuries to persons and property arising out of the conduct of public business.[7] As a concomitant of the assault upon the immunity it would appear to this reviewer that a correspondingly drastic limitation of the personal liability of public officers should be made. The notion that such personal liability is a wholesome stimulant toward official rectitude belongs more to a relatively simple pre-Industrial-Revolution society than to our present complex situation in which public administration is an enormous business, in the conduct of which the responsible officials administer laws and effectuate legislative policy through great organizations rather than by direct action.

For the benefit of lay readers the author has appended a glossary in which legal terminology used in his study is defined.

JEFFERSON B. FORDHAM*

6. See Jennings, Tort Liability of Administrative Officers (1937) 21 Minn. L. Rev. 263, 308-310.

7. The reviewer has recently had his say on this subject. See Fordham and Pegues, Local Government Responsibility in Tort in Louisiana (1941) 4 LOUISIANA LAW REVIEW 720.

* Professor of Law, Louisiana State University.