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The Decline of Caveat Emptor in the Sale of Food

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made a few hours before the disclosure of the decision,[53] the reversal of which is asserted to have been the predominant reason for their selection.[54] It is therefore clear almost to the point of demonstration that the President did not "pack" the Supreme Court in order to secure a reversal of *Hepburn v. Griswold*, —equally manifest it is that learned and able justices were selected, who knew their rights and appreciated their duties while retaining the courage to assert and perform them in a way perhaps impolitic but nevertheless legitimate.

While it would be indeed rash and precipitous to assume a dogmatic position upon a subject which provokes disagreement among the eminent jurists not only of this country but of the world,[55] yet in consideration of the legitimacy of the end, the appropriateness of the means, and the consistency thereof with the letter and spirit of the Constitution,—in view of the existence of all these essential elements, it is submitted that the gold clause legislation[56] represents a proper exercise of the auxiliary powers delegated by the Constitution to the Congress of the United States.

THE DECLINE OF *Caveat Emptor* IN THE SALE OF FOOD.—In recent years the law of sales of personal property has assumed an increasing importance. Modern methods of distribution and of large scale manufacture have rendered many long-tried rules inadequate to cope with the problems of the contemporary situation.[1] Not the least insistent of the new demands for readjustment relates to the measure of liability of the manufacturer or vendor for injuries resulting from the consumption of unwholesome foods. The vast increase in the sale of food in cans and sealed packages has deprived the consumer of the

53. 6 LEWIS, GREAT AMERICAN LAWYERS (1909) 359. There is no evidence of the egregious breach of ethics of disclosing the decision before it was read from the bench. *Id.* at 359-360.

54. A further manifestation of the innocence of the increment to this Court is that, prior to the ultimate selection of justices, Secretary of War Stanton and Attorney General Hoar were chosen by President Grant to fill the vacant posts. Mr. Stanton died before taking office and Mr. Hoar's appointment was refused confirmation by the Senate. With this disappears the last vestige of insidious plot attempted to be connected with the Strong-Bradley elevation to the Supreme Bench, since it could not have taken place without these almost unpredictable happenings.

55. The decisions of the House of Lords, Feist v. Société Intercommunale Belge d'Electricité, [1934] A. C. 161, and of the Permanent Court of International Justice, Cases of Serbian and Brazilian Loans, Publications P. C. I. J., Series A, Nos. 20-21 (1929), are regarded as indicative of a tendency hostile to the Gold Clause Cases, even apart from the absence of the background of the Constitutional Law of the United States.

56. The provisions relative to private bonds are the only ones in contemplation here.

1. See Hertzler v. Manshum, 228 Mich. 416, 200 N. W. 155, 156 (1924); Baxter v. Ford Motor Co., 168 Wash. 456, 12 P. (2d) 409, 412, (1932). (Recognizing the influence of modern advertising in creating a demand for goods.)

opportunity to judge for himself the quality of that which he buys and has obliged the courts to relax the rule of *caveat emptor*.[2]

This invasion of the ancient doctrine which placed the burden of scrutiny on the buyer has been accomplished in a number of ways, which may be classified under the two broad denominations of actions sounding in tort and actions sounding in contract. And whether the one or the other has been the method adopted to make the manufacturer or remote vendor responsible to the ultimate consumer, the obstacle to be overcome has been the requirement of privity of contract.

Liability Sounding in Tort

The greatest inroads on *caveat emptor* have been made in the field of negligence.[3] An exception to the general rule that the manufacturer or vendor of personal property is not liable for negligence in the construction or sale of a chattel to third parties with whom he stands in no privity of contract[4] was early recognized in the case of articles inherently dangerous to human life and safety.[5] The exception has been extended to include articles which, while not in their nature imminently dangerous, become so if negligently constructed or prepared,[6] and it is now generally recognized that foodstuffs are in one or the other of these categories.[7] The extent of favor shown the consumer

2. Nock v. Coca-Cola Bottling Works, 102 Pa. Super. 515, 156 Atl. 537 (1931) (where a manufacturer sells goods in a bottle or original package, the common law doctrine of *caveat emptor* does not prevail); Tomlinson v. Armour & Co., 75 N. J. Law 748, 70 Atl. 314 (1908). (Canned goods are susceptible of no practical test except eating, and, the buyer having no opportunity to look out for himself, the fundamental condition on which *caveat emptor* is based is absent.)

3. See Pelletier v. Dupont, 124 Me. 269, 128 Atl. 186, 188 (1925).

4. Huset v. J. I. Case Threshing Mach. Co., 120 Fed. 865 (C. C. A. 8th, 1903); Windram Mfg. Co. v. Boston Blacking Co., 239 Mass. 123, 131 N. E. 454 (1921); Winterbottom v. Wright, 10 M. & W. 109, 152 Eng. Reprints 402 (1842).

5. Ketterer v. Armour & Co., 247 Fed. 921 (C. C. A. 2d, 1917); Thomas v. Winchester, 6 N. Y. 397 (1852); MacPherson v. Buick Motor Co., 217 N. Y. 382, 111 N. E. 1050 (1916).

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

7. Ketterer v. Armour & Co., 247 Fed. 921 (C. C. A. 2d, 1917)·(sale of meat); Birmingham Chero-Cola Bottling Co. v. Clark, 205 Ala. 678, 89 So. 64 (1921) (beverage); Collins Baking Co. v. Savage, 227 Ala. 408, 150 So. 336 (1933) (bread); Heineman v. Barfield, 136 Ark. 456, 207 S. W. 58 (1918) (flour); Drury v. Armour & Co., 140 Ark 371, 216 S. W. 40 (1919) (meat); Watson v. Augusta Brewing Co., 124 Ga. 121, 52 S. E. 152 (1905) (soda water); Salmon v. Libby, 219 Ill. 421, 76 N. E. 573 (1905) (mince-meat); Davis v. Van Camp Packing Co., 189 Iowa 775, 176 N. W. 382 (1920) (canned beans); Parks v. G. C. Yost Pie Co., 93 Kan. 334, 144 Pac. 202 (1914) (pie); Coca-Cola Bottling Works v. Shelton, 214 Ky. 118, 282 S. W. 778 (1926) (beverage); Liggett & Myers Tobacco Co. v. Rankin, 246 Ky. 65, 54 S. W. (2d) 612 (1932) (Chewing tobacco is within the rule applicable to articles manufactured for human consumption and the manufacturer is liable for negligence in its preparation which renders it imminently dangerous to life and health); Bishop v. Weber, 139 Mass. 411, 1 N. E. 154 (1885) (liability exists in negligence independent of privity of contract); Roberts v. Anheuser-Busch Brewing Association, 211 Mass. 449, 98 N. E. 95 (1912) (food preparation of malt and hops); Wilson v. J. G. & B. S. Ferguson Co., 214 Mass. 265, 101 N. E. 381 (1913) (pie); Richenbacher v. California Packing Corporation, 250 Mass. 198, 145 N. E. 281 (1924) (canned spinach); Sullivan v.

in the application of the rule has varied. That the manufacturer or distributor of articles intended for human consumption is held to a high degree of care is the common view.[8] But the courts have differed as to the *quantum* of proof required to make out the plaintiff's case. Many hold that proof of the unwholesome and deleterious condition of the food *prima facie* establishes want of due care and shifts to the defendant the burden of overcoming the inference of negligence.[9] Others do not distinguish in the matter of proof from the

Manhattan Market Co., 251 Mass. 395, 146 N. E. 673 (1925)) (pie); Craft v. Parker, Webb & Co., 96 Mich. 245, 55 N. W. 812 (1893) (meat); Tomlinson v. Armour & Co., 75 N. J. Law 748, 70 Atl. 314 (1908) (canned goods); Cassini v. Curtis Candy Co., 113 N. J. Law 91, 172 Atl. 519 (1934) (candy); Rosenbusch v. Ambrosia Milk Corp., 181 App. Div. 97, 168 N. Y. Supp. 505 (1st Dep't 1917) (dried milk). (The manufacturer of a food product which is subject to deterioration held under a duty to issue instructions as to its preservation and use); Ternay v. Ward Baking Co., 167 N. Y. Supp. 562 (Sup. Ct. 1917) (bread); Freeman v. Schults Bread Co., 100 Misc. 528, 163 N. Y. Supp. 396 (Mun. Ct. 1916) (Food is an article which it is reasonably certain will become dangerous to life and limb if negligently made); Ward v. Morehead City Sea Food Co., 171 N. C. 33, 87 S. E. 958 (1916); Boyd v. Coca-Cola Bottling Works, 132 Tenn. 23, 177 S. W. 80 (1915); Haley v. Swift, 152 Wis. 570, 140 N. W. 292 (1913). See Pelletier v. Dupont, 124 Me. 269, 128 Atl. 186, 187 (1925). *Contra*: Liggett & Myers Tobacco Co. v. Cannon, 132 Tenn. 419, 178 S. W. 1009 (1915) (chewing tobacco).

8. Ketterer v. Armour & Co., 247 Fed. 921 (C. C. A. 2d, 1917); Davis v. Van Camp Packing Co., 189 Iowa 775, 176 N. W. 382 (1920); Parks v. G. C. Yost Pie Co., 93 Kan. 334, 144 Pac. 202 (1914). (Manufacturer of foods for human consumption is held to a higher degree of care than manufacturer of animal foods, and the latter to greater care than manufacturer of ordinary articles of commerce.); Newhall v. Ward Baking Company, 240 Mass. 434, 134 N. E. 625 (1922) (high degree of care exacted of manufacturer of food because of the serious consequences to human life likely to result from his negligence); Sullivan v. Manhattan Market Co., 251 Mass. 395, 146 N. E. 673 (1925); Hertzler v. Manshum, 228 Mich. 416, 200 N. W. 155 (1924); Rozumailski v. Philadelphia Coca-Cola Bottling Co., 296 Pa. 114, 145 Atl. 700 (1929); Crigger v. Coca-Cola Bottling Co., 132 Tenn. 545, 179 S. W. 155 (1915). *Contra*: Collins Baking Co. v. Savage, 227 Ala. 408, 150 So. 336 (1933) (tacks in loaf of bread; held to the degree of care that "a reasonably skillful and diligent person engaged in a similar business would have used."); Coca-Cola Bottling Co. v. McBride, 180 Ark. 193, 20 S. W. (2d) 826 (1929); Freeman v. Schults Bread Co., 100 Misc. 528, 163 N. Y. Supp. 396 (Mun. Ct. 1916) (manufacturer of bread bound to use ordinary care and skill).

9. Collins Baking Co. v. Savage, 227 Ala. 408, 150 So. 336 (1933) (Proof that foreign substance was in loaf of bread made by defendant at the time it was eaten by plaintiff, who was thereby injured, makes out a *prima facie* case); Drury v. Armour & Co., 140 Ark. 371, 216 S. W. 40 (1919) (Sale of sausage meat. The court held that the evidence was sufficient to make out a *prima facie* case, but stated that "It is not a case where the thing speaks for itself so as to create a presumption of negligence."); Atlanta Coca-Cola Bottling Co. v. Dean, 43 Ga. App. 682, 160 S. E. 105 (1931) (Where there is proof that the condition of a beverage, alleged to contain a foreign substance which caused the plaintiff's illness, was not changed during the interval between leaving defendant's hands and coming to the plaintiff's, the jury may apply the doctrine of *res ipsa loquitur* and find against the defendant on the issue of negligence); Coleman v. Dublin Coca-Cola Bottling Co., 47 Ga. App. 369, 170 S. E. 549 (1933) (In determining whether a nonsuit is proper, *res ipsa loquitur* is to be applied to the evidence); Davis v. Van Camp Packing Co., 189 Iowa 775, 176 N. W. 382 (1920) (Proof that plaintiff ate unwholesome beans canned by the defendant, and that illness resulted, made out a *prima facie* case); Liggett & Myers Tobacco Co. v.

ordinary negligence action.[10] And in some instances pure food and drug laws have been held to give rise to civil as well as criminal liability, and the remote consumer has been permitted to recover in negligence against a manufacturer who has violated such a statute without direct proof of want of care, negligence being implied from a violation of the statute.[11]

The manufacturer or vendor may also be liable in an action of fraud or deceit for false representations, in the absence of contractual relationship.[12]

Rankin, 246 Ky. 65, 54 S. W. (2d) 612 (1932) (*Res ipsa loquitur* applies); Costello v. Morrison Cafeteria Co. of Louisiana, 18 La. App. 40, 135 So. 245 (1931) (*Res ipsa loquitur* applies and it is not necessary to allege specific acts of negligence, a general allegation of negligence being sufficient); Goldman & Freiman Bottling Co. v. Sindell, 140 Md. 488, 117 Atl. 866 (1922); Richenbacher v. California Packing Corp., 250 Mass. 198, 145 N. E. 281 (1924) (not error to apply *res ipsa loquitur*); Hertzler v. Manshum, 228 Mich. 416, 200 N. W. 155 (1924) (Proof that poison was in the food when purchased by the plaintiff makes out a *prima facie* case); Stolle v. Anheuser-Busch, 307 Mo. 520, 271 S. W. 497 (1925) (*Res ipsa loquitur* applicable where bottled beverage explodes); De Groat v. Ward Baking Co., 102 N. J. Law 188, 130 Atl. 540 (1925) (Presence of broken glass in loaf of bread baked by the defendant is sufficient to raise an inference of negligence); Cassini v. Curtis Candy Co., 113 N. J. Law 91, 172 Atl. 597 (1934) (Proof of illness resulting from presence of worm in candy sufficient to justify an inference of negligence, and proof of the high quality of the product and care in its manufacture does not warrant a reversal of a verdict for the plaintiffs); Cook v. People's Milk Co., 90 Misc. 34, 152 N. Y. Supp. 465 (Sup. Ct. 1915), *aff'd*, 175 App. Div. 966, 161 N. Y. Supp. 1121 (4th Dep't 1916) (Proof that plaintiff became ill as a result of drinking milk bottled by the defendant, which contained a poisonous substance, makes out a *prima facie* case); Rozumailski v. Philadelphia Coca-Cola Bottling Co., 296 Pa. 114, 145 Atl. 700 (1929). (The court, in affirming a judgment in favor of the plaintiff, recognized that the court below had invoked the doctrine of *res ipsa loquitur* to sustain the action.)

10. Ketterer v. Armour & Co., 247 Fed. 921 (C. C. A. 2d, 1917) (The trial court properly dismissed the complaint where there was no proof of negligence.); King v. Davis, 296 Fed. 986 (App. D. C. 1924) (If the defect cannot be discovered by the exercise of reasonable care the defendant will not be liable); Swenson v. Purity Baking Co., 183 Minn. 289, 236 N. W. 310 (1931) (Without proof of negligence there can be no recovery, and proof of up-to-date and sanitary factory conditions warrants a directed verdict for the defendant.); Perry v. Kelford Coca-Cola Bottling Co., 196 N. C. 175, 145 S. E. 14 (1928) (broken glass in beverage bottled by defendant. *Res ipsa loquitur* held not to apply.); Reece v. Durham Coca-Cola Bottling Co., 197 N. C. 661, 150 S. E. 198 (1929); *cf.* C. C. Hooper Cafe Co. v. Henderson, 223 Ala. 579, 137 So. 419 (1931) (Sale by restaurant keeper to customer. Negligence is not to be presumed, and proof that the plaintiff ate the food and became sick does not make out a *prima facie* case); Ash v. Childs Dining Hall Co., 231 Mass. 86, 120 N. E. 396 (1918) (Sale by restaurant keeper to customer. *Res ipsa loquitur* does not apply and the burden of proving negligence by either direct or inferential evidence is on the plaintiff. Disbelief of defendant's testimony as to the precautions used does not take the place of evidence of negligence).

11. Meshbesher v. Channellene Oil & Mfg. Co., 107 Minn. 104, 119 N. W. 428 (1909); Kelley v. John R. Daily Co., 56 Mont. 63, 181 Pac. 326 (1919). *Contra*: Cheli v. Cudahy Bros. Co., 267 Mich. 690, 255 N. W. 414 (1934). See Note (1934) 11 N. Y. U. L. Q. Rev. 615 for a discussion of this ground of liability and of the proposed revision of the present federal Pure Food and Drug Act.

12. Woodward v. Miller & Karwisch, 119 Ga. 618, 46 S. E. 847 (1904) (carriage with defective spindle); Kuelling v. Roderick Lean Manufacturing Co., 183 N. Y. 78, 75 N. E.

However, the cases in which such an action would lie are comparatively few, for while the representations might well be made out in many instances where food is placed on the market for sale to the public, knowledge of the falsity of the representations is essential to liability,[13] and sound business as well as the prevalence of pure food legislation would ordinarily discourage such wilful conduct.

Liability Sounding in Contract

Liability founded on negligence or fraud has not been considered wholly satisfactory, and some courts have preferred to base their decisions on an implied warranty.[14] Here again the obstacle to be overcome where the consumer seeks to fasten liability on the manufacturer or remote vendor is the requirement of contract privity, for a warranty is essentially contractual in nature.[15] A number of courts have seen fit to disregard this requirement altogether, or have disposed of it in some manner apparently to their satisfaction. Probably the leading case is *Davis v. Van Camp Packing Co.*,[16] decided by the Supreme Court of Iowa in 1920. There the plaintiff sued for damages for poisoning sustained, allegedly, from eating a can of pork and beans prepared and packed by the defendant. The plaintiff stood in no privity of contract with the defendant. Compelled by the trial court to elect whether to proceed on the theory of tort or breach of warranty, the plaintiff abandoned

1098 (1905) (sale of defective road roller); Liggett & Myers Tobacco Co. v. Cannon, 132 Tenn. 419, 178 So. 1009 (1915) (insect in chewing tobacco); see Newhall v. Ward Baking Company, 240 Mass. 434, 437, 134 N. E. 625, 627 (1922) (tack in loaf of bread).

The scope of this form of action was restricted in Alpine v. Friend Bros. Inc., 244 Mass. 164, 138 N. E. 553 (1923), where it was held that a representation as to bread baked by the defendant that consumers "may eat as many slices as they please without fear of harm" is not a declaration that under no circumstances can there be a foreign substance in the bread, and the plaintiff is not entitled to recover in tort for deceit for injuries caused by a piece of tin imbedded in a loaf of bread.

13. Alpine v. Friend Bros. Inc., 244 Mass. 164, 138 N. E. 553 (1923); Kuelling v. Roderick Lean Mfg. Co., 183 N. Y. 78, 75 N. E. 1098 (1905).

14. *E.g.*, Ward Baking Co. v. Trizzino, 27 Ohio App. 475, 161 N. E. 557 (1928).

15. This statement cannot be accepted without qualification. As Professor Williston points out, the original remedy for a breach of warranty was an action in tort. 1 WILLISTON, SALES (2d ed. 1924) § 195. Stuart v. Wilkins, 1 Dougl. 18, 99 Eng. Reprints 15 (1778) is apparently the earliest reported case in which a declaration in assumpsit was allowed, although from the language of the opinion it would seem that the practice of declaring in that form had already existed for some time. Following that decision it became permissible to declare either in case or in assumpsit for breach of warranty. Schuchardt v. Allens, 68 U. S. 359 (1863); Beeman v. Buck, 3 Vt. 53 (1830); Williamson v. Allison, 2 East 446, 102 Eng. Reprints 439 (1802); *cf.* Caldbeck v. Simanton, 82 Vt. 69, 71 Atl. 881 (1909). *Contra*: Ross v. Mather, 51 N. Y. 108 (1872). The two forms of action became concurrent remedies. Schuchardt v. Allens, *supra*; Beeman v. Buck, *supra*; see Farrell v. Manhattan Market Co., 198 Mass. 271, 274, 84 N. E. 481, 482 (1908). But in spite of its tort origin, a warranty has generally been treated as contractual, as Professor Williston freely admits. 1 WILLISTON, SALES §§ 197, 244a. And even though the dual remedy exists, privity of contract is necessary to maintain either form of action. Roberts v. Anheuser-Busch Brewing Ass'n, 211 Mass. 449, 98 N. E. 95 (1912).

16. 189 Iowa 775, 176 N. W. 382 (1920).

his count upon the warranty. One of the questions considered on appeal was as to the correctness of this ruling. The court decided in favor of the plaintiff, holding squarely that privity of contract is not necessary to maintain an action for breach of implied warranty.[17]

The decision of the Iowa court, however justifiable it may be from the point of view of social justice and public policy, in the legal perspective lacks the support of any considerable authority. *Catani v. Swift & Co.*,[18] frequently cited as sustaining a similar view, is not a satisfactory decision. An action was brought to recover damages for the death of plaintiff's husband resulting from the consumption of diseased meat slaughtered by the defendant and sold by it to a retail merchant. The plaintiff purchased from the retailer. The court held that the defendant impliedly warranted the goods to the dealer, and that the warranty extended to subsequent purchasers and was available to the plaintiff. The absence of privity of contract was not discussed, nor was any ground stated for the decision that the plaintiff could avail himself of the warranty.[19] Indeed, whether the court had clearly in mind the nature of the action before it, is further obscured by statements in the opinion which refer to the duty of the defendant to know the quality of the meat it distributes and which seem to draw on the law of tort liability to sustain the decision.[20] However forthrightly the court may have stated its conclusion that the implied warranty of the defendant inured to the benefit of the ultimate consumer, the opinion is unsatisfactory and inconclusive in disposing of the requirement of contract privity.

Pennsylvania has, since the *Catani Case* was decided, imposed liability on the manufacturer in favor of the ultimate consumer on the ground of negli-

17. In Dothan Chero-Cola Bottling Co. v. Weeks, 16 Ala. App. 639, 80 So. 734 (1918), the Alabama Court of Appeals took the same view. But in Birmingham Chero-Cola Bottling Co. v. Clark, 205 Ala. 678, 89 So. 64 (1921) the Supreme Court of Alabama overruled Dothan Chero-Cola Bottling Co. v. Weeks, *supra*, with the statement that it "is not in line with the best-considered cases," and held that there can be no implied warranty in the absence of privity of contract.

18. 251 Pa. 52, 95 Atl. 931 (1915).

19. "And when, despite lack of privity, some court proclaims a 'warranty' and *therefore* a recovery—does this mean that Act, 69 comes into play between persons who have not contracted together? Is it a case of 'warranty' as we know it in mercantile sales law, or of a technical excuse for shifting a risk which seems to call for shifting?" LLEWELLYN, CASES AND MATERIALS ON THE LAW OF SALES (1930) 343.

20. Catani v. Swift & Co., 251 Pa. 52, 95 Atl. 931 (1915). The meat had been inspected by United States government officials, but the defendant had made no inspection of its own. The court made the statements that proof that the meat was diseased and caused the death complained of made out a *prima facie* case, and that the defendant was under an absolute duty to know that the meat was unwholesome, which duty it had not performed by showing a government inspection and approval. Such language, implying as it does that the duty spoken of is capable of performance sufficient to free the defendant from responsibility, bespeaks the contemplation of an action sounding in tort, not in contract. The exercise of caution, however great, will not protect a warrantor from liability if the food is in fact unwholesome. Greenwood Cotton Mill v. Tolbert, 105 S. C. 273, 89 S. E. 653 (1916)); 1 WILLISTON, SALES § 237. The dictum in Eisenbeiss v. Payne, 25 P. (2d) 162, 166 (Ariz. 1933) that the manufacturer of foods or beverages for human consumption impliedly warrants his product to every purchaser is subject to the same criticism as the opinion in Catani v. Swift & Co., *supra*.

gence.[21] And in *Nock v. Coca-Cola Bottling Works of Pittsburgh*,[22] the Superior Court of Pennsylvania held that as to food and beverages in the original package, the manufacturer may be liable to the ultimate consumer with whom he has had no actual dealing for breach of implied warranty. The decision does not embrace the situation which existed in *Catani v. Swift & Co.*, where the article was not sold in the original package. The case is one of several which, while not expressly invoking the well known third-party beneficiary doctrine of the law of contracts, use language which indicates that the decision of the court might well be based on the assumption that the implied representation of the manufacturer or vendor is a promise made for the benefit of a third person not a party to the contract of sale, namely, the ultimate consumer.[23]

The Supreme Court of Kansas in a recent case, *Challis v. Hartloff*,[24] reached the same conclusion as the Pennsylvania court in a similar opinion. A broker sold a quantity of flour to the defendant Hartloff, a retail merchant, who in turn sold a part to the plaintiff. The plaintiff became ill after using the flour and brought action against both the broker and Hartloff for breach of implied warranty. The action was commenced one day less than three years after the sale to the plaintiff was alleged to have taken place. Both defendants pleaded the two-year statute of limitations applicable to tort actions. The defendants contended that, regardless of the theory on which the plaintiff brought his action, it was in its nature a tort action and the two-year statute applied. The plaintiff demurred to the defense of both defendants of the two-year statute of limitations, and the question whether the action sounded in tort or in contract was squarely before the court. The opinion, holding the broker to be liable to the plaintiff on an implied warranty, seems to be based on the fact that the sale to the dealer was made with full knowledge that the goods were purchased for the purpose of resale to the plaintiff or some other consumer.[25]

21. Rozumailski v. Philadelphia Coca-Cola Bottling Co. 296 Pa. 114, 145 Atl. 700 (1929).

22. 102 Pa. Super. 515, 156 Atl. 537 (1931).

23. It is true that the opinion seems to indicate that the court finds a privity of contract to exist between the manufacturer and the ultimate consumer. The third-party beneficiary doctrine is not based on a contract privity between the promisor and the beneficiary but is applied in the absence of such privity. See Seaver v. Ransom, 224 N. Y. 233, 237, 120 N. E. 639, 640 (1918). But inasmuch as the particular consumer into whose hands the article came could not have been known at the time the implied representation was made, it is obvious that no such privity in fact could exist. See Roberts v. Anheuser Busch Brewing Association, 211 Mass. 449, 451, 98 N. E. 95, 96 (1912); Pease & Dwyer Co. v. Somers Planting Co., 130 Miss. 147, 93 So. 674 (1922). Thus the most that could be said of the warranty is that it was made for the benefit of the consumer. However Professor Williston suggests that the manufacturer might establish a direct contractual relation with a subpurchaser by means of advertisements and labels which would constitute a general offer to anyone who will buy, similar to an offer of reward. 1 WILLISTON, SALES § 244a. See Note (1929) 42 HARV. L. REV. 414.

24. 136 Kan. 823, 18 P. (2d) 199 (1933).

25. The decision of the Supreme Court of Kansas in Parks v. G. C. Yost Pie Co., 93 Kan. 334, 144 Pac. 202 (1914), although frequently cited in support of the doctrine that liability on an implied warranty exists where there is no actual contractual relation between the parties, is not authority for that rule, for the action was based on negligence and the opinion of the court deals with the degree of care required of a manufacturer of food for human consumption.

Prior to this decision the Supreme Court of Kansas had held that the warranty of a vendor of personal property does not run with the chattel as a warranty runs with the land in the law of real property.[26] Unless, therefore, something akin to the third-party beneficiary doctrine be assumed as the basis of the decision, an implied warranty must be treated as not a true warranty and not subject to the rules applicable to actions founded on contract.[27] Such a view is not consistent with principle.[28]

The Ohio Court of Appeals in *Ward Baking Co. v. Trizzino*,[29] made a similar observation that the warranty of the manufacturer to the retail dealer is made with knowledge that the goods are to be resold, but carried the reasoning one step farther and openly rested its decision on the ground that the ultimate consumer is entitled to enforce the warranty as a promise made for his benefit, although he is not a party to the contract.[30]

Mississippi has also sustained actions brought for breach of warranty where privity of contract is wanting between the parties, and the courts of that state are committed to the doctrine that the implied warranty in the sale of foodstuffs runs with the title to the goods and inures to the benefit of anyone into whose hands the article rightfully comes.[31]

The Supreme Court of Washington has recognized a rule which is peculiar to food sold in sealed packages and to other articles of such a character that it is impossible for the ordinary purchaser to determine for himself whether the goods may safely be put to the use for which they were intended. The doctrine is based on express or implied representations made by the manufacturer or vendor at the time of the sale. The action is apparently considered as sounding in contract, for while the decisions contain statements referable to tort liability,[32] responsibility seems to be absolute and not made to depend

26. Booth v. Scheer, 105 Kan. 643, 185 Pac. 898 (1919). The court, in stating the rule, excepted warranties in the sale of "staple or trade-marked goods." Not only is the statement a *dictum*, but the authorities cited in support of the exception do not sustain it.

27. See Hoe v. Sanborn, 21 N. Y. 552, 564 (1860), where it is said that implied warranties are obligations imposed by the law upon principles foreign to the actual contract, and are permitted to be enforced under the form of a contract merely as a matter of convenience.

28. See note 15, *supra*. See Nehi Bottling Co. v. Thomas, 236 Ky. 684, 33 S. W. (2d) 701, 703 (1930).

29. 27 Ohio App. 475, 161 N. E. 557 (1928).

30. *Contra*: Giminez v. Great Atlantic & Pacific Tea Co., 264 N. Y. 390, 191 N. E. 27 (1934).

31. Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927); Coca-Cola Bottling Works of Greenwood v. Simpson, 158 Miss. 390, 128 So. 479 (1930); Curtis Candy Co. v. Johnson, 163 Miss. 426, 141 So. 762 (1932). In Grappico Bottling Co. v. Ennis, 140 Miss. 502, 106 So. 97 (1925) the court recognized that the implied warranty passes with the title, but laid down the rule that to hold the manufacturer liable the plaintiff must have a rightful posesssion and denied recovery because the sale was made on a Sunday in violation of statute. But *cf.* Pease & Dwyer Co. v. Somers Planting Co., 130 Miss. 147, 93 So. 673 (1922) (Sale of animal feed. Warranty of quality of personal property does not run with the title and is not available to subpurchasers.)

32. In Mazetti v. Armour & Co., 75 Wash. 622, 135 Pac. 633, 636 (1913) the court stated that the changing conditions of society have brought about the need of adding another exception to "the old rule that a manufacturer is not liable to third persons who have no contractual relations with him for negligence in the manufacture of an article. . . . "

on a showing of want of due care.[33] This doctrine was first applied in *Mazetti v. Armour & Co.*,[34] a case involving the sale of meat in a sealed package. The court, recognizing the three settled exceptions to the general rule that the manufacturer is not liable to a remote vendee in the absence of privity of contract, imposes a fourth exception that a manufacturer of foods impliedly warrants his goods when sold in the original package, which warranty is available to all who may suffer damage from a use of the goods in the ordinary course of trade. In *Baxter v. Ford Motor Co.*,[35] a more recent decision of the same court, an action was brought to recover for injuries caused by flying pieces of glass from an automobile windshield which was represented as non-shatterable. Because the ordinary person could not by inspection discover whether the glass was or was not shatterable, the court treated the situation as similar to the sale of food in sealed packages and stated that the principle of the *Mazetti Case* was involved. The question before the court was whether the catalogues and other printed matter of the Ford Motor Company, containing statements that the windshield was so constructed that it would not fly or shatter under the hardest impact, were admissible in evidence. These pamphlets had been distributed to the retail dealers, from one of whom the plaintiff had purchased his car. In holding the evidence admissible the court stressed the fact that the manufacturer had represented its product to possess a quality which it did not have. However, the court considers the case analogous to *Thomas v. Winchester*,[36] the leading authority in this country, for the rule that a manufacturer or vendor may be liable in the absence of privity of contract, for negligence in the construction or sale of an inherently dangerous article. If such is the true basis of the decision, it then falls within the three exceptions recognized in *Mazetti v. Armour & Co.*, as well settled, none of which is based on a breach of warranty. But even though it be considered an additional exception applicable only to foodstuffs and articles of cognate character, whether it is founded on a warranty running from the manufacturer to the ultimate consumer is at least conjectural.

Although these cases might seem to give a quite substantial support to the rule that a warranty is available to one not in privity of contract with the warrantor,[37] the weight of authority is to the contrary.[38] The cases in support

33. Mazetti v. Armour & Co., 75 Wash. 622, 135 Pac. 633 (1913). The manufacturer of foods impliedly warrants his goods when sold in the original package, and such warranty "is available to all who may be damaged by reason of their use in the legitimate channels of trade."

34. 75 Wash. 622, 135 Pac. 633 (1913).

35. 168 Wash. 456, 12 P. (2d) 409 (1932).

36. 6 N. Y. 397 (1852).

37. The Supreme Court of Georgia in Watson v. Augusta Brewing Co., 124 Ga. 121, 52 S. E. 152 (1905), relied upon by a number of courts as sustaining that doctrine, is particular to state that the action is founded on tort and can in no sense be considered an action on a warranty. Michigan, from a consideration of the language of the opinion in Hertzler v. Manshum, 228 Mich. 416, 200 N. W. 155 (1924), might seem entitled to a place with the courts which have recognized the existence of a warranty in the absence of privity of contract. The decision refers to foodstuffs as not falling within the general rule which excludes a warranty in the absence of such privity. However the court is insistent in speaking of a duty on the part of the manufacturer—a duty capable of such performance as to

of the majority view have generally been guided by strict legal principles, and have not permitted the persuasions of expediency or public policy to outweigh well-settled rules of law.[39]

The Solutions Available

If an attempt be made to harmonize the conflicting views and settle responsibility in a definite ambit, the question first to be answered is whether foodstuffs should be considered apart from other chattels. The public policy which has prompted the invasion of the doctrine of *caveat emptor* arises from the nature of food and the manner in which it is marketed.[40] Ordinarily other chattels do not pass so swiftly through the stages of manufacture, sale, and user, nor are they inherent with potential forces of harm and destruction. In few cases is the vendee at such disadvantage to protect himself as in the sale of foodstuffs.[41]

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absolve him from liability. While declaring that the action may be brought either for negligence or for breach of implied warranty, the court states that the foundation of the action is negligence and if the manufacturer proves the exercise of the highest degree of care, "then no actionable negligence or breach of duty exists" and the consumer is without a remedy. But see Cheli v. Cudahy Bros. Co., 267 Mich. 690, 225 N. W. 414, 416 (1934) where the same court considered Hertzler v. Manshum, *supra,* as establishing the rule that the manufacturer of foods for human consumption is bound by an implied warranty that his product is free from foreign poisonous or deleterious substances.

38. Connecticut Pie Co. v. Lynch, 57 F. (2d) 447 (App. D. C. 1932) (Nail in pie); Birmingham Chero-Cola Bottling Co. v. Clark, 205 Ala. 678, 89 So. 64 (1921) (Fly in bottled beverage. The benefit of a warranty does not run with a chattel on its resale); Nelson v. Armour Packing Co., 70 Ark. 352, 90 S. W. 288 (1905) (Warranty on sale of personalty does not run with the property); Drury v. Armour & Co., 140 Ark. 371, 216 S. W. 40 (1919); Smith v. Williams, 117 Ga. 782, 45 S. E. 394 (1903) (Warranty of title in the sale of personal property does not run with the article sold. Sale of food not involved.); Young v. Certainteed Products Corp., 35 Ga. 419, 133 S. E. 279 (1926) (Sale of food not involved.); Nehi Bottling Co. v. Thomas, 236 Ky. 684, 33 S. W. (2d) 701 (1930) (bottled beverage); Hieronymous Motor Co. v. Smith, 241 Ky. 209, 43 S. W. (2d) 668 (1931) (sale of automobile); Pelletier v. Dupont, 124 Me. 269, 128 Atl. 186 (1925) (pin in bread); Roberts v. Anheuser-Busch Brewing Ass'n, 211 Mass. 449, 98 N. E. 95 (1912) (food preparation of malt and hops); Gearing v. Berkson, 223 Mass. 257, 111 N. E. 785 (1916) (Sale of meat. Implied warranty does not run with the goods.); Cassini v. Curtis Candy Co., 113 N. J. Law 91, 172 Atl. 597 (1934) *semble;* Chysky v. Drake Bros. Co., Inc., 235 N. Y. 468, 139 N. E. 576 (1923) (The benefit of a warranty, express or implied, does not run with a chattel.); Giminez v. Great Atlantic & Pacific Tea Co., 264 N. Y. 390, 191 N. E. 27 (1934); Wood v. Advance Rumely Thresher Co., 60 N. D. 384, 234 N. W. 517 (1931) (sale of machinery); Minutilla v. Providence Ice Cream Co., 50 R. I. 43, 144 Atl. 884 (1929) *semble*; Crigger v. Coca-Cola Bottling Co., 132 Tenn. 545, 179 S. W. 155 (1915) (beverage); Prinsen v. Russos, 194 Wis. 142, 215 N. W. 905 (1927) (meat); see Collins Baking Co. v. Savage, 227 Ala. 408, 150 So. 336, 337 (1933) (bread); Flaccomio v. Eysink, 129 Md. 367, 100 Atl. 510, 515 (1917).

39. Nehi Bottling Co. v. Thomas, 236 Ky. 684, 33 S. W. (2d) 701 (1930); Pelletier v. Dupont, 124 Me. 269, 128 Atl. 186 (1925); Crigger v. Coca-Cola Bottling Co., 132 Tenn. 545, 179 S. W. 155 (1915).

40. See Ketterer v. Armour & Co., 200 Fed. 322, 323 (S. D. N. Y. 1912); Hertzler v. Manshum, 228 Mich. 416, 200 N. W. 155, 156 (1924).

41. See Tomlinson v. Armour & Co., 75 N. J. Law 748, 70 Atl. 314, 317 (1908) (Can-

Such a discrimination could well be made without doing violence to principle if liability be settled in negligence.[42] Nor need settled rules be disturbed to permit a remote vendee or donee to recover on this ground,[43] and practically absolute liability can be effected by the application of doctrines already in favor in many jurisdictions.[44] But if an extension of liability be founded on an implied warranty, objections arising from the law as it now stands can not so easily be overcome. If contract privity is to be utterly abandoned, there seems no justification to abandon it as to articles of food alone. However strong might be the reasons for so doing, the law cannot consistently say that in one case a warranty is contractual, demanding privity, and that in another it is not. However, such a distinction might be made by invoking the third-party beneficiary doctrine and, in conformity with recent extensions of that rule,[45] founding liability on a public duty, which could be held to exist solely in the sale of food and articles of like character.[46] But such an extension of that doctrine has not found much favor.[47] If an extension of liability is desir-

ned goods are subject to no practical test except eating); *cf.* dissenting opinion in Drury v. Armour & Co., 140 Ark. 371, 216 S. W. 40, 43 (1919), where Judge Hart makes the same observation.

42. Articles which are not inherently or imminently dangerous to human life and safety may be excluded from the operation of the rule. *Cf.* Windram Manufacturing Company v. Boston Blacking Co., 239 Mass. 123, 131 N. E. 454 (1921), where the court refused to extend liability to a case where the article is likely to cause injury to property.

43. See cases cited in note 7, *supra.*

44. It is the general view that holding a manufacturer or vendor liable in negligence does not make him an insurer. King. v. Davis, 296 Fed. 986 (App. D. C. 1924); Nehi Bottling Co. v. Thomas, 236 Ky. 684, 33 S. W. (2d) 701 (1930); Swenson v. Purity Baking Co., 183 Minn. 289, 236 N. W. 310 (1931). But the application of *res ipsa loquitur* or the closely allied rule that proof of the unwholesome condition of the food and consequent injury makes out a *prima facie* case may have the practical effect of holding the defendant as an insurer. In Richenbacher v. California Packing Corporation, 250 Mass. 198, 145 N. E. 281 (1924) the court held that it was not error to apply the doctrine of *res ipsa loquitur* and that proof of the precautions taken in preparing and canning the product did not establish that it was impossible for a foreign substance to find its way into the food, but rather justified an inference that it could have gotten there only through the negligence of someone whose duty it was to see that the system was properly carried out. In Coca-Cola Bottling Co. v. McBride, 180 Ark. 193, 20 S. W. (2d) 862 (1929) the court reached the same result without expressly applying the doctrine of *res ipsa loquitur.* See the dissenting opinion of Judge Adkins in Goldman & Freiman Bottling Co. v. Sindell, 140 Md. 483, 117 Atl. 866, 872 (1922) where it is said the doctrine of *res ipsa loquitur* would make the defendant an insurer "without the slightest evidence of negligence" on his part. Violation of a pure food statute has also been held to impose liability without proof of negligence other than failure to comply with the statute. Meshbesher v. Channellene Oil & Mfg. Co., 107 Minn. 104, 119 N. W. 428 (1909).

45. See Glanzer v. Shepard, 233 N. Y. 236, 239, 241, 135 N. E. 275 (1922). But see H. R. Moch Co. v. Rensselaer Water Co., 247 N. Y. 160 (1928), where the doctrine is limited to circumstances in which the benefit to the public is primary and immediate, and not merely incidental and secondary.

46. Ward Baking Co. v. Trizzino, 27 Ohio App. 475, 161 N. E. 557 (1928).

47. Gimenez v. Great Atlantic & Pacific Tea Co., 264 N. Y. 390, 395, 191 N. E. 27, 28 (1934).

able it should be made to rest on a responsibility imposed by law, independent of contract and independent of fault on the part of the manufacturer or vendor.[48] It is evident that uniformity cannot be attained through judicial decision,[49] and if a change is to be made it must be in the legislature, where the difficulties which have beset the courts can easily be overcome.[50]

The Desirability of Extending Liability

However, practical as well as legal expediency is involved in a breakdown of *caveat emptor* in the sale of food. If liability be extended in the field of negligence, even though the consumer is given the benefit of favorable evidentiary and substantive rules of law,[51] he will frequently be faced with the difficulty and expense of making out a case against a distant manufacturer or vendor. In many instances he cannot resort to an action against the retail dealer on a warranty because he is not the purchaser and cannot satisfy the requirement of privity of contract.[52] And where he has that remedy available, he is often met with the difficulty that the retail dealer is not financially responsible for the judgment.[53]

On the other hand there is the real danger, although not frequently expressed by the courts, that the manufacturer or vendor will be met with a multitude of spurious claims.[54] Such cases are not susceptible of easy refutation. But to prove substantial damages in a court of law ordinarily requires dishonesty not only on the part of the particular plaintiff but of men of professional standing.[55] It is hardly the part of the law of warranties to correct that abuse.

Modern industrial development has placed the consumer in a position where he cannot in many instances protect himself against the dangers inherent in unwholesome food.[56] His only remedy is recoupment after he has suffered injury. It is not the consumer, but the one who sets the harmful cause in motion, whether manufacturer or merchant selling manufactured goods as his own product, who is in a position to distribute the loss.[57] The public health and safety are so directly involved that the law should both protect and compensate the consumer by placing the burden of care and the incidence of loss on the one ultimately responsible, and practical objections should be met by practical remedies.

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48. See VOLD, SALES (1931) 476.

49. But *cf.* the dissenting opinion of Judge Hart in Drury v. Armour & Co., 140 Ark. 371, 216 S. W. 40, 43 (1919) for a discussion of the considerations counselling a relaxation of the requirement of privity of contract in the case of food products, where such a change is defended, at least as to goods in cans and sealed packages, on the ground that no rule of property is involved and there is, therefore, no reason why prior decisions should not be overruled.

50. See Editorial N. Y. L. J., Aug. 31, 1934, at 592.

51. See cases cited in notes 8, 9, *supra.*

52. Gimenez v. Great Atlantic and Pacific Tea Co., 264 N. Y. 390, 191 N. E. 27 (1934).

53. See Ketterer v. Armour & Co., 200 Fed. 322, 322 (S. D. N. Y. 1912).

54. See Liggett & Myers Tobacco Co. v. Cannon, 132 Tenn. 419, 178 S. W. 1009, 1019 (1915); VOLD, SALES 476.

55. "There are perjured doctors, bogus injuries. . . " LLEWELLYN, *op. cit. supra* note 19, at 343.

56. Tomlinson v. Armour & Co., 75 N. J. Law 748, 70 Atl. 314, 317 (1908).

57. See LLEWELLYN, *op. cit. supra* note 19 at 341.

CONFLICTING INTERPRETATIONS OF THE PROPERTY CONCEPT.—The fundamental concept of "property" is deep rooted in American and English jurisprudence. The inherent nature of man's acquisitive right has been woven into the Constitution. Yet the term itself defies definition, and no word in the legal lexicon has been productive of greater confusion.

A consideration of the meaning of the term "property" is logically divisible into three sections. First, what is "property"? Second, granted the subject matter is "property," is it real or personal property? Third, is it tangible or intangible property? With the growth of civilization, the basic meanings of the very word itself have inevitably expanded. In the beginnings "property" was practically confined to real property. Even as late as Blackstone, personal property "being only the objects of the law while they remained within the limits of its jurisdiction and being also of a perishable quality, are not esteemed of so high a nature, nor paid so much regard to by the law, as things that are in their nature more permanent and immovable, as lands and houses and the profits issuing thereout . . . our first legislators entertained a very low and contemptuous opinion of all personal estate."[1] But due to the introduction of trade and commerce, " . . . Our courts now regard a man's personalty in a light nearly, if not quite equal to his realty."[2] The balance has steadily shifted so that today personal property occupies a position of dominant importance.[3] And to make the problem more difficult, the swing has been toward intangible and away from tangible property.

What Is Property?

There have been innumerable attempts to define the term "property,"[4] but the inherent complexity of the concept has rendered all definitions unsatisfactory. Many rights have acquired legal recognition as property which had never enjoyed that status until comparatively recent years. Choses in action, for

1. 2 BL. COMM. *384.

2. 2 BL. COMM. *385.

3. Foley, Revision of Law of Estates. Address delivered to N. Y. State Bar Ass'n, Jan. 20, 1928, Pamphlets Vol. 52.

4. Literally taken the word is *nomen generalissimum*, but is not always so used. As ordinarily used it means the thing possessed, but it may include the right to enjoy it. The more comprehensive meaning is presumed to have been intended by the use of such a word in a constitution. Wells Fargo & Co. v. Mayor, 219 Fed. 699 (C. C. A. 3d 1915). Property in the strict legal sense, is an aggregate of rights which are guaranteed and protected by the government and, in the ordinary sense, indicates the thing itself, rather than the rights attached to it. Fulton Light v. State, 65 Misc. 263, 121 N. Y. Supp. 536 (1909), *aff'd.* 123 N. Y. Supp. 1117 (1910). "Property" means exclusive right to possess, enjoy, and dispose of a thing, and, in broader sense, includes everything subject to ownership, whether corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal. Groenendyk v. Fowler, 204 Iowa 591, 215 N. W. 718 (1927); "The sole and despotic dominion which one man claims and exercises over the external things of the world in total exclusion of the right of any other individual in the universe." 2 Bl. Comm. *2.

example, have not always been regarded as property[5] although they today constitute a most valuable species of property.[6] To point another change in the modern conception, choses in action were once regarded as rights which could be crystallized only by an action at law. Thus Kent defines them as "personal rights not reduced to possession but recoverable by suit at law,"[7] and Blackstone speaks of "Property in action, or such where a man hath not the occupation but merely a bare right to occupy the thing in question; the possession whereof may however be recovered by a suit or action at law. . . . Thus money due on a bond is a chose in action."[8] Compare these definitions with the statement of Holmes when he wrote "Bonds and negotiable instruments are more than merely evidences of the debt. The debt is inseparable from the paper which declares and constitutes it."[9]

Not only are conceptions of certain kinds of property going through a process of "mutation," but rights which were never strictly classified as "property" have been so designated by the courts. Take a concept at once tenuous and yet thoroughly concrete to the modern mind, that of the "good will" of a business. It is hardly conceivable that an action could have been maintained in Blackstone's time for an injury to property on that basis, though it is in no way startling today. Under a statutory definition of "Injury to Property,"[10] New York has allowed an action for injury to "business,"[11] and it has been held that a suit against an attorney for negligent conduct of an action may be brought under this section for an "injury to property".[12] The

5. Pippin v. Ellison, 34 N. C. 61, 55 Am. Dec. 403 (1851), where the court stated that property in its legal sense does not include choses in action and in reference to personalty is confined to "goods" (things inanimate) and "chattels" embracing living things. The decision held that choses in action did not pass to a wife by a bequest of "all my property." In Wilson v. Bd. of Aldermen, 74 N. C. 748, the court said of Pippin v. Ellison, "Any general remarks in the opinion as to the meaning of 'property' must be referred to the facts of the case, or else they are mere *dicta.*" The facts in Pippin v. Ellison were in no way unusual and the statements referred to were not *dicta.*

6. *In re* Morace, 1 Boyce 67, 74 Atl. 375 (Del. Super. Ct. 1909) (a chose in action is, generally speaking, personal property); Stahl v. Webster, 11 Ill. 511 (1850) (the word "property" embraces money, debts and choses in action as well as things visible or tangible); *In re* Teeple's Estate, 196 Ill. App. 378 (1915) (the term personal property applies to notes and money as well as to goods and chattels); Commonwealth Fuel Co. v. McNeil, 103 Conn. 390, 130 Atl. 794 (1929) (a right of action for breach of contract is property); Dunlap v. Toledo, A. A. & G. T. Ry., 50 Mich. 470, 15 N. W. 555 (1883).

7. 2 KENT'S COMM. *432.

8. 2 BL. COMM. *397. And see 22 HALSBURY'S LAWS OF ENGLAND 389. "Where only a bare right to enjoy exists the property is said to be in action, and the chattels are called incorporeal."

9. Blackstone v. Miller, 188 U. S. 189, 206 (1903). This view has been repudiated in the later cases. Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204 (1930).

10. N. Y. GENERAL CONSTRUCTION LAW, (1920) § 25a.

11. Jay Bee Apparel Stores, Inc. v. 563-565 Main St. Realty Corp., 130 Misc. 23, 223 N. Y. Supp. 537 (Sup. Ct. 1927).

12. O'Neill v. Gray 30 F. (2d) 776 (C. C. A. 2d 1929).

right to labor,[13] to engage in business,[14] to practice a profession,[15] the office of a teacher,[16] even a name,[17] have been construed by our courts, not merely as "rights" in the sense laid down by the Bill of Rights, but definitely as "property rights," a very different concept. Copyright and patent rights are recent recruits to the ranks of "property". In Shakespeare's day anyone with a good memory, or the Elizabethan equivalent of the Gregg system was free to play havoc with his contemporaries' stage performances. The great bard himself was certainly not above what his admirers are loathe to term plagiarism but what unmistakably was nothing short of that. The similarities between "Hamlet" and the little known "Spanish Tragedy" of Thomas Kyd would result in a million dollar lawsuit today. But the courts have gone further, and have held that unpatented "ideas" may be the subject of property rights.[18] There have been many conflicting opinions,[19] but the confusion which must result from any classification of mere ideas as property is immediately obvious.

Due to this vast expansion of the including scope of the term "property," the ensuing contradictions in legal interpretations of the term follow almost inevitably. Holdsworth sums up the situation in two sentences: "We have seen, too, that the readiness with which equity recognized new forms of property, led it to treat as property, not only such things as the rights of the cestuique trust to the trust property, and rights to stock or shares, but also rights under a contract or covenant—all of which things the law grouped under the compendious title of choses in action. Equity treated them as property and allowed them to be assigned as property; and it can hardly be doubted that this divergence between law on [and] equity is the reason why it is so difficult to define a chose in action."[20] It is submitted that there is a sharp need for a reclassification of intangibles,—a new name to describe those rights which equity designates as property for purposes of protection, but which compel the courts to resort to a sprightly mental legerdemain when brought face to

13. "Labor or the right to labor is as much property as land or money." Jones v. Leslie, 61 Wash. 107, 112 Pac. 81 (1910).

14. Parker Paint & Wall Paper Co. v. Local Union No. 813, 87 W. Va. 631, 105 S. E. 911, 16 A. L. R. 230 (1921).

15. Cavassa v. Off, 206 Cal. 307, 274 Pac. 523 (1929).

16. Commonwealth v. Phillips, 1 Del. Co. R. 41 (Pa. 1881).

17. Where an announcer's name had substantial commercial value for advertising purposes, rights of a pecuniary nature resembling property rights were created in the name. Uproar Co. v. National Broadcasting Co., 8 F. Supp. 358 (D. C. Mass. 1934). *Contra:* Smith v. City of N. Y., 37 N. Y. 518 (1868) (a public office is not property); Kearns v. Howley, 188 Pa. St. 116, 41 Atl. 273 (1898) (members of a County Committee of a political party have no property right in their office).

18. New Jersey Zinc Co. v. Signmaster, 4 F. Supp. 967 (S. D. N. Y. 1933); Ullman v. Thompson, 57 Ind. App. 126, 106 N. E. 611 (1914) (an invention is "property" when a mere invention as well as after a patent has been applied for, granted or issued). *Cf.* Rosenthal v. Goldstein 112 Misc. 606, 183 N. Y. Supp. 582 (Sup. Ct. 1920).

19. The following cases hold that an idea is not property though eventually protected by patents: Hise v. Grasty, 166 S. E. 567 (Va. 1932); Haskins v. Ryan, 71 N. J. Eq. 575, 64 Atl. 436, (1906), *aff'd*, 73 Atl. 1118 (1909); Bristol v. Equitable Life Assurance Society, 52 Hun. 161, 5 N. Y. Supp. 131 (Sup. Ct. 1889).

20. 6 HOLDSWORTH, HISTORY OF ENGLISH LAW (1927) 667.

face with this kind of "property" for the purposes of interpreting particular statutes. Only the reactionary will cavil at the broadening of the field of intangible rights which are classified as property. But why not specify that these are merely "property" for purposes of equitable protection, and are, or are not, "property" subject to attachment, or garnishment, or taxation, or protection under a particular statute as the case may be? This is the very root of the difficulty. Having created a property right in, for example, the right to labor, or in a business, statements like the following are to be expected: "While the right to labor or to practice a profession may be considered a property right for the purpose of protection, services already rendered by one person for another are not 'property' for the purpose of enlarging or changing the ordinary remedies by which the indebtedness therefor may be recovered,"[21] and "There is a clear distinction between 'business' and 'property' as the words are generally used in taxing and other statutes."[22]

Real and Personal Property

Assuming a subject-matter to be property, another problem presents itself. When does "property" mean real and when personal property, when does it mean both, and, though it may appear paradoxical, when does "personal property" mean "real property?"[23] It is not surprising that the terms have been abused by the layman. Where in a will the word "personal" is omitted and the word "property" appears alone, courts almost invariably hold that real and personal property are included.[24] In a recent New York case[25] a will which was obviously the work of a layman read, "I give and bequeath to my aunt . . . all of my personal property to which I may die seized including household furniture. I authorize her to sell and dispose of all and everything

21. Gleason v. Thaw, 185 Fed. 345 (C. C. A. 3d 1911).

22. Sullivan v. Associated Billposters & Distributers of U. S. and Canada, 6 F. (2d) 1000 (C. C. A. 2d 1925).

23. The following are a few illustrative decisions: Streator Ind. Tel. and Tel. Co. v. Interstate Ind. Tel. & Tel. Co. 142 Ill. App. 183 (1908) (holding that the poles of a telephone or telegraph line are real property except for the purpose of taxation, or where they preserve the character of personal property by contract between the parties); Wisconsin Traction Light, Heat & Power Co. v. Green Bay & Mississippi Canal Co., 188 Wis. 54, 205 N. W. 551, (1925) (holding that that which in another ownership would be real estate is, when owned and used by a public utility (personal property); *In re* Ellermann's Estate, 35 Pac. (2d) 763 (1934) (holding that where a testatrix who was a resident of New Jersey had contracted to sell land in the state of Washington, legal title remained in her at her death since the balance of the purchase price was unpaid. The court held that the interest of a non-resident vendor in an executory contract for the sale of land situated within the state is intangible personal property); Transcontinental Oil Co. v. Emmerson, 208 Ill. 394, 131 N. E. 645 (1921) holding that oil and gas leases conveying the right to enter on the land to prospect and operate for oil and gas, were in effect, a sale of part of the land, so that the statute required the value of such property to be included in the total amount of the "tangible property" of the corporation.

24. *In re* Gunderson's Will, 191 Wis. 557, 211 N. W. 791 (1927); Matter of Seif, 212 App. Div. 558, 209 N. Y. Supp. 341 (2d Dep't 1925); Brooklyn City Rd. Co. v. King's County Trust Co. 214 App. Div. 506, 212 N. Y. Supp. 343 (2d Dep't 1925).

25. West v. West, 215 App. Div. 285, 213 N. Y. Supp. 480 (2d Dep't 1926).

belonging to me and give title to same." The court ruled that the word "personal" was used in the sense of "my own" and that real as well as personal property passed under the will. The court made no mention of the misuse of the word "seisin" other than to remark that the will read like an attempt to dispose of real property and that obviously, this was mere parroting of legal jargon and there was no comprehension of the true significance of the term. The decision is undoubtedly based on a sound factual interpretation. Two years later in a similar case,[26] the New York court held that when the word "personal" is coupled with the word "property," the term "personal property" has in law a distinct and technical connotation distinguishing it from real property, and went on to say that this was illustrated by the definition of the term as used in statutes, with a particular reference to the General Construction Law.[27] An examination of this statute reveals that the term "personal property" is defined as including everything which may be the subject of ownership except real property. Looking further to the leading case on the interpretation of this section,[28] "The section, . . . in terms, . . . is only applicable as I think to a statute where its general object, or the context of the language construed, or other provisions of law, do not indicate that a different meaning is intended." A more effectual method of divorcing the definition from any stabilized meaning is difficult of conception.

Statutory construction offers its own peculiar problems. For example, Section 2147 of the New York Penal Law which is captioned "Public Traffic on Sunday," provides that "All manner of public selling or offering for sale of any property upon Sunday is prohibited." In a case arising under this statute the defendant was convicted of having met someone in a railroad train on Sunday, and of having offered to sell him a certain parcel of real estate.[29] In order to extricate the defendant, the court went to Section 2149 which provided that all such property exposed for sale on Sunday should be forfeited and sold upon conviction of the offender, and ruled that the provision in this section as to forfeiture indicated that sales of real property were not intended to fall within Section 2147.

Tangible and Intangible Property

The interpretation of the single word "property" as inclusive or exclusive of tangible or intangible property has been the source of even greater confusion. The question frequently arises in the construction of statutes. It would be logical to hold that the decision should be a functional one and that though difficult, it is not impossible to determine by surrounding circumstances the scope of the particular "property" meant. However, the courts have reached exactly opposite conclusions on almost identical sets of facts, and even that solution of the enigma is not very helpful. Many states

26. Matter of Kavanagh, 133 Misc. 399, 232 N. Y. Supp. 308 (Surr. Ct. 1928); *In re* McGlathery's Estate 311 Pa. 351, 166 Atl. 886 (1933).

27. N. Y. GENERAL CONSTRUCTION LAW (1920) c. 22, § 39.

28. Matter of Bronson, 150 N. Y. 1, 5, 44 N. E. 707, 707 (1896) *modifying* 1 App. Div. 546, 37 N. Y. Supp. 476.

29. People v. Dunford, 207 N. Y. 17, 100 N. E. 433 (1912).

have statutes making a city or town liable whenever persons riotously destroy or injure property, real or personal. The United States Circuit Court of Appeals has ruled that this type of statute does not include damage to intangible property such as "business."[30] On the other hand, New Hampshire has held that a similar statute renders the city liable, not only for the damage resulting from the interruption or destruction of the plaintiff's business, but also for the injury to the good will of the business, in this instance, a newspaper.[31] An opposite conclusion was reached in Massachusetts under a statute granting that any person whose property was taken under the right of eminent domain might claim a trial by jury. The court held that business is not property within the meaning of the act, and went on, "But a business is less tangible in nature, and more uncertain in its vicissitudes than the rights which the Constitution undertakes absolutely to protect."[32] The decisions which have held in general that business is property are almost too numerous to quote.[33]

A New York statute, under the guise of defining an "Injury to Property," works out a definition of property which seems to include, at least for a limited purpose, many of the aspects of property which have been denied recognizance within other statutes. An "injury to property," reads the statute, "is an actionable act whereby the estate of another is lessened, other than a personal injury, or the breach of a contract."[34] Under this section a recovery for loss of business was allowed on the theory that, "The term 'an injury to property' does not necessarily mean a physical injury to tangible property, but includes any and every invasion of one's property rights by actionable wrong."[35] Yet, in interpreting constitutional and statutory provisions relating to taxes on property, the word has often been construed as not including business or profession. It has been held that a tax imposed on an occupation is not a tax on property within the meaning of constitutional provisions relating to uniformity of taxation.[36] A tax on an insurance company doing business in a city has been held not to be a tax on property within the constitutional requirements that taxation should be uniform and *ad valorem*.[37] On the other hand "good will", a far more tenuous concept than "business" is widely classified as property,[38] has been held in New York to be property within the

30. Wells Fargo & Co. v. Mayor, 219 Fed. 699 (C. C. A. 3d 1915).

31. Palmer v. City of Concord, 48 N. H. 211 (1868).

32. Sawyer v. Commonwealth, 182 Mass. 245, 247, 65 N. E. 52, 53 (1902).

33. O'Neill v. Grey, 30 F. (2d) 776 (C. C. A. 2d 1929); O'Hara v. Stack, 90 Pa. 477 (1879); *Ex parte* Steinman 95 Pa. 220 (1880); Robison v. Hotel & Rest. Employees Local, 35 Idaho 418, 207 Pac. 132 (1922).

34. N. Y. GENERAL CONSTRUCTION LAW (1920) § 25a.

35. Jay Bee Apparel Stores Inc. v. 563-565 Main St. Realty Corp. 130 Misc. 23, 223 N. Y. Supp. 537 (Sup. Ct. 1927).

36. *In re* Lipschitz 14 N. D. 622, 95 N. W. 157 (1903).

37. Home Ins. Co. v. Augusta, 50 Ga. 530 (1874); See (1935) 4 FORDHAM L. REV. 355; Adams Motor Co. v. Cler, 149 Ga. 818, 102 S. E. 440 (1920).

38. Harshbarger v. Eby, 28 Idaho 753, 156 Pac. 619 (1916); Robison v. Hotel & Rest. Empl. Local, 35 Idaho 418, 207 Pac. 132 (1922); Matter of Brown, 211 App. Div. 662, 208 N. Y. Supp. 359, (1st Dep't 1925) *aff'ing* 124 Misc. 437, 209 N. Y. Supp. 237 (Surr. Ct. 1924). *Order reversed*, 242 N. Y. 1, 150 N. E. 581 (1926).

provisions of the Transfer Tax Law,[39] and its loss may be the subject of damages.[40] But in a federal case, a malting company forced by the National Prohibition Act to discontinue business, was not allowed in computing income and excess profit taxes, to make deduction for obsolescence of good will, since, as the court said, good will was property in the sense of being a thing subject to damage and entitled to protection of law, but not property "used in trade or business" within the statute under which the company claimed.[41] Another good illustration of conflicting interpretations for different purposes is the liquor tax certificate. This has been held to represent property and to be itself property.[42] But for purposes of attachment on a lien for taxes it has been declared not to be property.[43]

The courts have been far more liberal in their holdings with regard to the meaning of the term "property" in private contracts as opposed to statutes. In a contract whereby the plaintiff agreed to hold the defendant harmless from all liability from damage to the personal property of the plaintiff while the defendant was repairing the building, the court ruled that the instrument included the plaintiff's business of conducting a barber shop though the plaintiff argued that the agreement did not cover his intangible property rights.[44]

Another group of perplexing problems has been provoked by the Retail Sales Tax Laws.[45] These taxes are levied on "tangible personal property." Public utilities contend that the word "tangible" does not include gas, water, and electrical energy. They argue that "tangible" is synonymous with "corporeal", and "intangible" is synonymous with "incorporeal". Comment has been directed to the fact that at common law "tangible" and "corporeal" were used to connote choses in possession as opposed to "intangible" and "incorporeal" which connoted choses in action. Are water, gas, and electricity "tangible" or "intangible"? Or is there need for still aother classification, bearing in

39. Matter of Dupignac's Estate, 123 Misc. 21, 204 N. Y. Supp. 273 (Surr. Ct. 1924); Sanderfur v. Beard, 249 S. W. 274 (1923) (holding that good will is an intangible asset, salable and taxable when its value can be ascertained).

40. Donleavy v. Johnston, 24 Cal. App. 319, 141 Pac. 229 (1914).

41. Red Wing Malting Co. v. Willcuts, 8 F. (2d) 180 (D. C. Minn. 1914).

42. Bachman-Bechtel Brewing Co. v. Gehl, 154 App. Div. 849, 139 N. Y. Supp. 807, (1913). But *cf.* Niles v. Mathusa, 162 N. Y. 546, 57 N. E. 184 (1900).

43. Heinrich v. Harrigan, 288 Ill. 170, 123 N. E. 309 (1919). This case held that no lien for taxes attaches to a tax certificate, such certificates being merely choses in action and not personal property within a revenue act. The opinion argues that the words "personal property" and "goods" and "chattels" as used in such statutes, have the same meaning, and comprehend only such personalty as may be subjected to levy and sale under execution upon judgment at law. But *cf.* Yarbrough Bros. Hardware Co. v. Phillips, 209 Ala. 241, 96 So. 414 (1923), holding that the definitions in a revenue law of the terms "property" as personal property, and "personal," as meaning and including all things other than real property which have any pecuniary value, include indebtedness to a taxpayer, and such indebtedness to a taxpayer is property owned by him on which under another statute there may be created a prior lien for payment of taxes assessed against him.

44. Woods v. Security Mutual Life Ins. Co., 112 Neb. 573, 198 N. W. 573 (1924).

45. *Conflicting Interpretations of Retail Sales Tax Laws*, 2 U. OF CHI. L. REV. 78 (1934).

mind the difference between the physicist's and the jurist's application of the word "tangible", in addition to the group of rights which are "property" for purposes of protection only? The New York and California laws have expressly exempted gas, water, and electricity from the Sales Tax when delivered through mains, lines, and pipes,[46] while the laws of Oklahoma and Michigan have defined "tangible personal property" to include gas and electrical energy only.[47]

The Circuit Court of Wayne County Michigan has recently upheld the imposition of the Michigan Sales Tax on sales of steam, where the steam was delivered directly to the consumer and was not used in the manufacture of an article itself subject to the Sales Tax.[48] The court further held that a sale of steam in the form of heat units created by passing steam through a radiating system did not constitute a taxable sale. It would seem that heat units are not tangible personal property though strangely enough steam is. The Illinois[49] and New York[50] statutes apply the Retail Sales Tax to newspapers, magazines, and periodicals by express definition. Michigan,[51] Kentucky,[52] Oklahoma,[53] Iowa[54] and Missouri[55] have taken an opposite course, while California[56] distinguishes newspapers from magazines, classing the latter as tangible, and by inference, the former, as intangible property. In a recent Pennsylvania case[57] it was held that under the Pennsylvania statute[58] medicines sold by a pharmacist who compounded them according to physicians' prescriptions were tangible personalty within the Sales Tax Act, even though, as contended, the practice of pharmacy may constitute a "profession" rather than a "business."

It is interesting to observe that similar confusion has resulted under the Bulk Sales Act[59] which makes no mention of "property" and limits itself to the sale of "stock of merchandise, or merchandise and fixtures."[60] For example, under like statutes, it has been held that the sale of a bakery, including the flour, sugar and yeast on hand came within the statute,[61] while in the exact

46. N. Y. Laws (1933) c. 281, § 390 (b); CAL. GEN. LAWS (Deering, Supp. 1933) Act 8493, § 5; 67 South Munn. v. Bd. of Public Utility Commissioners, 147 Atl. 735 (N. J.) (holding that electrical current in the aspect of sale and purchase is property).

47. Okla. Sess. Laws (1933) c. 196, sec. 4; MICH. COMP. LAWS ANN. (Baldwin, Supp. 1934) c. 61A, § 1 (b2).

48. Detroit Edison Co. v. Fry (C. C. Wayne Co. Jan. 1934).

49. Ill. Rules & Regs. Feb. 1, 1934, No. 3, Art. 15.

50. N. Y. Regs. May 14, 1933, c. 1.

51. Mich. Regs. Jan. 1, 1934, Art. 28.

52. Ky. Rulings & Explanations, Op. Atty. Gen. *re* newspapers, Sept. 1931.

53. Okla. Rules & Regs. Dec. 22, 1933, sec. 5 (18).

54. Iowa Rules & Regs. Apr. 1, 1934, Rule 60.

55. Mo. Rules & Regs. Jan. 15, 1934, sp. Rule 44.

56. Calif. Letter of Acting Director, Sales Tax Div. State Bd. of Equalization, Oct. 6, 1933.

57. Appeal of Biser, 176 Atl. 200 (Pa. 1935).

58. Emergency Relief Sales Tax Act, 72 P. S. § 3282.

59. PERSONAL PROPERTY LAW (1909) § 44.

60. See Comment (1933) 2 BROOKLYN L. REV. 247.

61. Gretzinger v. Wynne Wholesale Grocery Co. 183 Ark. 303, 35 S. W. (2d) 604, (1931).

fact situation another court ruled that the sale was not within the statute.[62] Apparently, what is needed is a definition of terms by the legislature for the purposes of each particular statute, whether the precise word at issue be "property", "merchandise", or "stock." The function of the judiciary is primarily interpretative, but the result of loose statutory construction has placed upon the courts an additional burden that begins to assume the proportions of legislation.

The Commissioners of The Restatement of the Law of Property have encountered no less confusion than have other searchers in the field.[63] The Restatement emphasizes the point already made that it is impossible to give a single comprehensive definition of "property" and that in fact, the variety of meanings which attach to the term make it undesirable to frame a single definition.[64] However, a helpful limitation is imposed, in that though "property" is frequently used to denote the things with respect to which legal relations exist, as well as the rights which exist in relation to the things, it is not so used in the Restatement.[65]

The conclusion reached in the Restatement is recommended as perhaps the best solution to the morass of conflicting views in which the courts find themselves,—"If the term 'property' is so used in the Restatement of this subject in the formulation of any rules of law that the scope of such rule would vary according to the meaning to be attached to the term 'property' the precise meaning of the term as used in the rule will be stated in connection with the formulation thereof."[66]

62. Hobart Mfg. Co. v. Joyce & Mitchell, 4 S. W. (2d) 185 (1928).
63. See Powell, *Restatement of the Law of Property* (1930) 16 A. B. A. J. 197.
64. RESTATEMENT, PROPERTY (Tent. Draft, 1929) 10.
65. *Id.* at 9.
66. *Id.* at 11.