St. John's Law Review

Volume 11
Number 2 *Volume 11, April 1937, Number 2*

Article 35

The Sale of Food and Drink at Common Law and Under the Uniform Sales Act (Book Review)

Frederick A. Whitney

treated in sixty-four pages in Part One of Cook's Cases, is confined to thirty pages near the end of Book Two of McClintock's volume. The development of equity's power to act *in rem* is not as full and complete as that in Chafee and Simpson, and the omission of material on the doctrine of *lis pendens*, writs of assistance, and sequestration, is noticeable. The extra-territorial effect of a decree receives scant treatment, probably due to the author's belief that these difficult problems belong to a course in Constitutional Law or Conflict of Laws.[13]

Enough has been said to show that the book has been built by a master craftsman. Teachers will welcome this volume. To fall into the triteness of book reviews, the true test of the work is in its class use. The case material, together with the excellent text mentioned before, should answer the problems of many teachers of equity.

JOHN P. MALONEY.*

THE SALE OF FOOD AND DRINK AT COMMON LAW AND UNDER THE UNIFORM SALES ACT. By Harry C. W. Melick.[1] New York: Prentice Hall, Inc., 1936, pp. xlii, 346.

How has it come to pass that most modern courts have made it so difficult for the consumer of defective food or drink to recover damages from the manufacturer or restaurateur, by refusing to imply a warranty unless there is a sale and privity of contract between them, thus compelling the injured consumer to resort to a tort action in which the burden of proving negligence is onerous, if not impossible, to sustain? In his quest for the answer the author delves into the hoary past and leads out from their tombs in the archives, two ancient and moribund statutes[2] enacted in the reigns of Henry III and Edward I, respectively, under which taverners, victuallers and other common dispensers were liable to punishment for selling corrupt victuals, wine and beer. These statutes, it appears, were not repealed until the time of Queen Victoria. But for a long time after their enactment they had a profound influence in establishing, in civil actions for damages, this doctrine: that since the sale of unwholesome food and drink was an offense against public health, there was a duty arising, not from contract, but from the trade and calling, to sell wholesome stuff,—and a corresponding right in everyone who partook of it, whether as donee, guest, or purchaser, to have that duty performed. Therefore, in offering to sell food and drink at sound prices, victuallers impliedly represented that they were complying with the public law. Hence, any consumer made ill by injurious stuff was permitted to sue the maker or dispenser in an action on the case for

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[13] See in a short note, p. 140, the author's reference to the leading Law Review articles and to a number of the important cases covering this subject.

* Professor of Law, St. John's University School of Law.

[1] Member of the New York Bar.

[2] Statute, 51 Hen. III (1226); Statute, *De Pistoribus et Brasiatoribus et aliis Vitellariis* (between 1272 and 1307); Statute, 12 Car. II c. 25 (1660); and 1 Statutes of the Realm p. 204, entitled *De Venditione Farinae.*

deceit. Since in a sale of unwholesome articles a representation wilfully false was presumed, there was no need of proving *scienter*. Thus, the author finds, as a starting point for solution of the problem, an absolute (insurer's) liability resting at early common law upon those who made or dispensed unwholesome food and drink in the tort action on the case for deceit available to any consumer, be he a donee, guest, or purchaser. The greater part of the book is devoted to showing and explaining the gradual judicial let-down from this old strict point of view.

The first let-down appears to have resulted through the widespread use of the action of assumpsit by injured consumers (instead of the tort action on the case for deceit), it being found more convenient to declare in assumpsit for the sake of adding the money counts. But now the basis of the action, *i.e.* the implied representation that the manufacturer or restaurateur was complying with the statutes—which in the action on the case arose from the nature of their trade and calling, and was deemed to have been made to any one partaking of the food or drink—became, in the action for assumpsit, a term, condition, or warranty *of the contract*, thus introducing the requirement of privity of contract, which requirement considerably narrowed the field of consumers who could maintain the action.

The author also attributes the departure from the strict early law, to the enactment of the English Sale of Goods Act and the Uniform Sales Act of America on which it is modeled and based. Under the wording of these statutes, the favored position which sales of food and drink occupied in the early common law no longer exists, since no distinction is made under the Acts between sales of food and drink and sales of merchandise generally, for in both classes of sales, the only warranties implied are those of merchantable quality and reasonable fitness for the purpose. The leading English and American cases, both at common law and under the Acts, are discussed and commented upon, often with the purpose of showing how the courts have strayed from, and lost sight of, the principles of the early common law,—and how the cases on which they relied in doing so, were either not in point, or merely *obiter dicta*.

The common-law rule prevailing in most states to the effect that there was no implied warranty of wholesomeness where food was sold in original sealed containers (because the vendee knew that the vendor did not have superior knowledge as to the contents), is vigorously and convincingly attacked. After pointing out that the Sales Act does not require the article to be absolutely fit for the purpose but merely "reasonably" fit, the interesting question is raised whether canned fish with bones in it, or fruit pies with pits in them, are "reasonably" fit for the purpose. Finding no cases directly on the point, the author ventures the opinion that they are, since "Experience has taught us that a number of articles of food for human consumption, such as the above, are sold containing bones, pits, and seeds, all of which may be said to come within the category of things that are to be anticipated. Thus it would seem that neither the purchaser can be taken to have expected, nor the seller to have intended or warranted, that the entire contents of such cans of fish, or fruit pies were to be fit for consumption."[3] On this point it is interesting to note what

[3] P. 53.

the author has to say as to the case of *Gimenez* v. *Great A. & P. Tea Co.*,[4] in which the plaintiff claimed that her stomach was lacerated by a "hard" substance like glass which she swallowed in eating some canned crab-meat. The author points out[5] that the record on appeal showed that she introduced no evidence to show its nature or that it was foreign to the crab-meat or deleterious if eaten, but that merely shortly after eating it she was troubled with nausea and pains in her stomach. On the other hand, the defendant produced as a witness an inspector of the Department of Health. He testified that he examined the uneaten portion of the crab-meat and found similar substances in it, of the hardness of ordinary salt, formed from the natural juices of the crab-meat which had crystallized after canning and which disintegrated and disappeared when put into the inspector's mouth. The author says that from this "it would appear that the crab-meat was shown to be 'reasonably' fit for consumption, although seemingly found otherwise by the jury in bringing in a verdict for the plaintiff" which was affirmed by the Court of Appeals.

The privity of contract rule is attacked by saying: "The limitation of the right to recover for breach of an implied warranty in the sale of food and drink for human consumption, to those in privity with the seller, is based more on technicality than on reason and overlooks the fundamental conception of liability under the early law."[6] That statement and the following: "Public policy based on the desire to protect the health of the people was the fundamental reason for placing upon the seller of food an insurer's liability in the early days and that reason exists at present, with the same, if not greater force as a result of the Federal Food and Drugs Act and the remarkable advance in the packing and sale of food in sealed containers,"[7] seem to be the "theme song" of the author running through the entire book. He makes an eloquent and convincing plea for adoption of the third party beneficiary doctrine in order to permit the ultimate consumer to sue the manufacturer or producer on an implied warranty.[8]

Other interesting side excursions are found in the discussion of the liability of manufacturers or bottlers for defective containers where the latter are merely loaned and not sold, but are supplied under a contract of sale of the contents.[9] Also the discussion as to whether the law will imply a warranty of merchantable quality in a casual sale of goods, by one who is not in the business of supplying such goods, in view of the provisions of the Sales Act characterizing the seller as one "who deals in goods of that description."[10]

In the reviewer's estimation the hundred-odd pages devoted to the liability of keepers of restaurants, hotels and inns—for defective food and drink furnished to patrons and guests—constitute the most interesting section of the book. Cases in England and in many jurisdictions in this country are discussed and commented upon. Here are presented clearly both sides of the mooted question

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[4] 264 N. Y. 390, 191 N. E. 27 (1934).
[5] P. 56.
[6] P. 94.
[7] P. 30.
[8] Pp. 152 *et seq.*
[9] Pp. 72 *et seq.*
[10] Pp. 36 *et seq.*

as to whether the transaction is a sale with implied warranty, or merely the furnishing of service with liability only for negligence.

There follow short chapters on Negligence and Damages.

From the title of the book the reader might reasonably expect to find a complete dissertation as to the law pertaining to the sale of food and drink, including among other matters, licensing regulations, penal law provisions as to adulteration, sanitation, *etc.* But as already shown, the book is limited in its scope,—principally to a discussion of the liability of manufacturers, producers, and dispensers of food and drink upon an implied warranty. The bulk of the book deals with the sale of food and drink for immediate human consumption and only sparingly does the author touch on the sale of food and drink between dealer and dealer.

This treatise shows a vast amount of research work in its preparation and admirable legal acumen, in its best form, in treating the problems involved. It should prove of great assistance to the practicing lawyer and professional teacher in any one of the states in this country.

FREDERICK A. WHITNEY.*

NEW LIGHT ON DELINQUENCY AND ITS TREATMENT. By William Healy and Augusta F. Bronner. New Haven: Yale University Press, 1936, pp. vii, 226.

Dr. Healy and Dr. Bronner have made another valuable contribution to both the understanding and treatment of delinquent children. They compile in this book not only the results of three years of intensive study and treatment of 103 delinquent children, but also a comparison of 103 non-delinquent siblings. The work was carried on in three cities (Detroit, New Haven and Boston) under the auspices of the Institute of Human Relations.

Careful comparison of the delinquent with the non-delinquent child of about the same age, in the same family, and therefore with the same economic and social backgrounds, clearly reveals one outstanding difference between the two groups. Evidence of deep emotional stress was found in 91% of the delinquent children whereas it was found in only 13% of the non-delinquent siblings. The stress may have been due to real or fancied rejection by a parent, a sense of inadequacy or insecurity in relation to brothers, sisters or school fellows, or to other causes. But the essence of the stress in almost every instance was traceable to a consciousness of unsatisfying human relations during early childhood. Although the mental abilities of the two groups was approximately the same, a marked feeling of inferiority was expressed by thirty-eight delinquents as compared to four non-delinquents.

After carefully studying the family and individual background of the delinquent children, the authors expressed their conclusion that the normal desires

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* Professor of Law, St. John's University School of Law.