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Note and Comment

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NOTE AND COMMENT

SALES—LIABILITY FOR THE PRESENCE OF MICE AND OTHER UNCOMMON THINGS IN FOOD.—A group of recent decisions presents a somewhat farcical conformity with *Montesquieu's* thesis that "law" may vary with time and geography. It strikingly illustrates, also, the importance of the particular theory of liability upon which a suit is predicated. The unusual similarity in detail of the operative facts of these cases lends peculiar emphasis to the difference in the judgments rendered.

The plaintiff in *Merrill* v. *Hodson* (July, 1914), 88 Conn. 314, had been poisoned by the unwholesomeness of some creamed-sweetbreads, which had been prepared by defendant's servants and served to plaintiff in his restaurant. The suit, to recover for damage suffered, was based "in both pleading and proof" on the theory of an implied warranty that food so served was fit to be eaten. In other cases it had been held, and has since been held, that the serving of food in a restaurant was a "sale" within the meaning of statutes prohibiting sales of game, liquor, adulterated milk, *etc.* *State* v. *Lotti*, 72 Vt. 115; *Com.* v. *Warren*, 160 Mass. 533; *People* v. *Clair*, 221 N. Y. 108; *Com.* v. *Phoenix Co.*, 157 Ky. 180; *Com.* v. *Miller*, 131 Pa. 118. This case, however, the court said, was the first case of its particular kind to come before a supreme appellate tribunal. The court held that neither by the common law nor in the sense of the Uniform Sales Act was the transaction between a restaurant keeper and a patron a "sale," and that as there was no "sale" there could be no implied warranty. The plaintiff was therefore denied recovery. (While the court seems to have been correct in its statement that no similar case had come before a supreme tribunal, such

cases had been before the intermediate courts of New York, in *Leahy* v. *Essex Co.* (July, 1914), 148 N. Y. S. 1063, and *Race* v. *Krum* (1913), 146 N. Y. S. 197, affirmed, 222 N. Y. 410, and in both cases the transaction had been held to be a sale.) A conclusion that such transactions are not sales was reached by the federal court in *Valeri* v. *Pullman Co.* (Dec., 1914), 218 Fed. 519.

At this time there was apparent in other decisions a strong tendency to hold persons who prepare food for human consumption to be under a duty of so high a degree of care as to make them almost insurers of the fitness for use of such food. The unfitness of the food practically branded, *per se,* the one who had prepared it as negligent. In *Parks* v. *Yost Pie Co.* (Nov., 1914), 93 Kan. 334, decided the same year as the Connecticut case, it appeared that the plaintiff's husband had died as the result of poison in a pie prepared by defendant company and sold by it to a retailer, who, in turn, sold it to plaintiff's husband. There was no privity of contract between plaintiff, or her husband, and the defendant on which any pretense of contract could be based. The action was in tort, on the theory of negligence. No direct proof of negligence appears in the report of the case, nor is it even suggested. Nevertheless, a verdict for plaintiff was sustained on the ground that a manufacturer of food for human consumption is held to so high a degree of care, because of the serious consequences which might follow negligence, that "Practically he must know it is fit or take the consequences." (Citing *Tomlinson* v. *Armour & Co.,* 75 N. J. L. 748). The Washington courts, in the preceding year, had reached the same conclusion, and held a defendant liable, in an action based on tort, without any proof of negligence other than the fact that the food was unwholesome. *Mazetti* v. *Armour & Co.* (1913), 75 Wash. 622. In *Jackson* v. *Cocoa Cola Co.* (Mo., April, 1914), 64 So. 791, it appeared that plaintiff had found, too late, a swollen and mephitic mouse in Cocoa Cola bottled by the defendant and sold to a retailer, who resold to plaintiff. There was no evidence that the defendant had been negligent in bottling the mouse. "How it happened is not told." The court held the bottler to be "under a legal duty to see to it that in the process of bottling no foreign substance shall be mixed with the beverage, which, if taken into the human stomach will be injurious," and that this duty is owing, "to the general public for whom his drinks are intended as well as to the retailer to whom he sells." In a number of actions by patrons directly against the restaurant keeper whose unwholesome food had injured them, it had been held, "that every one ought to know the qualities, good or bad, of the things which he fabricates in the exercise of the art, craft or business of which he makes public profession.*** He is therefore at fault if these articles prove to be vitiated or deleterious." *Doyle* v. *Fuerst,* 129 La. 838; *Pantaze* v. *West.* 7 Ala. App. 599. This liability was denied only by an occasional case such as *Valeri* v. *Pullman Co.,* 218 Fed. 519, requiring only the carefulness of a reasonably prudent man, and *Liggett & Myers Tobacco Co.* v. *Cannon* (1915), 132 Tenn. 419, 14 MICH. L. REV. 164. The latter denied a manufacturer's liability for the presence of a bug in a plug of tobacco. This decision, however, was differentiated on the ground that tobacco is not food, and might have been on the

ground that the damage resulting from a bug in chewing tobacco would be nominal at most.

In view of this definite authority on either theory, the attorney might be pardoned who chose thereafter to sue a restaurant keeper on the theory of implied negligence rather than that of sale and implied warranty. In 1916, in *Jacobs* v. *Childs Co.,* 166 N. Y. S. 798, "counsel for the plaintiff at first proceeded upon the theory of the defendant's implied warranty of the fitness of the food for consumption; but subsequently moved to change the cause of action to one in tort predicated upon the negligence of the defendant * * *" The plaintiff had been injured through biting on a nail hidden in a cake manufactured by the defendant and served in defendant's restaurant. The court denied liability of the defendant, on the ground that no negligence had been directly proved and that it could not be inferred from the facts of this case. It pointed out a distinction between a cake containing deleterious and unwholsome ingredients and a cake containing a foreign substance but otherwise fit for human consumption. The latter is not, the court said, like the former, a case of *res ipsa loquitur,* although "if the nail had been necessarily used in the making of the cake or were an integral part thereof, a different situation would be presented." (Citing *Hasbrouck* v. *Armour & Co.,* 139 Wis. 357; distinguishing *Watson* v. *Augusta Co.,* 124 Ga., 121 and *Garvey* v. *Namm,* 121 N. Y. S. 442). A remarkably similar case was decided in the same way this year. *Ash* v. *Childs Co.* (Mass., Sept., 1918), 120 N. E. 396. The plaintiff was injured through biting on a tack in a piece of blueberry pie manufactured by defendant and supplied to plaintiff as a patron of its restaurant. The action was in tort, based on defendant's negligence. No direct proof was presented and the court refused to apply the doctrine of *res ipsa loquitur.* (*Jacobs* v. *Childs Co., supra,* was not cited.) The question of negligence was left to the jury in *Greenwood Café* v. *Lovinggood* (1916), 197 Ala. 34. In *Crigger* v. *Cocoa Cola Co.* (1915), 132 Tenn. 545, the action was based on averment of negligence, for damages resulting from plaintiff's having swallowed a long defunct mouse interred in Cocoa Cola, bottled by the defendant, and sold to a retailer, who sold to plaintiff. The court held that there was no implied warranty which would "run with the article" because the article was not "inherently dangerous," and that evidence of actual negligence was essential to recovery. *Accord, Gearing* v. *Berkson,* 223 Mass. 257; in this case, however, the defendant while a dealer, had not prepared the article in any way relative to the defect.

While the cases contemporaneous with *Merrill* v. *Hodson* were being thus disregarded and distinguished, counsel who, despite that case, stuck to the idea of sale and warranty were winning. In *Friend* v. *Childs Co.* (Mass., Sept., 1918), 120 N. E. 407 the plaintiff sued for injury suffered through biting on a stone in a dish of baked beans prepared by defendant, and served in its restaurant. Here, again, there was no direct proof of negligence. And certainly the presence of a stone in the beans would no more justify application of the doctrine of *res ipsa loquitur* than would the presence of a nail in the cake or a tack in the pie. But in this case the suit was based on the theory of "breach of an implied warranty of fitness to eat, in a

contract for food—." The court strongly leaned toward the position that the transaction was a "sale," but held that, in any event, it was a *contract* to furnish food, which contract impliedly contained a term that the food should be fit for use. In a somewhat startling case of the same year, *Barrington* v. *Hotel Astor* (July, 1918), 171 N. Y. S. 840, such a transaction was held unqualifiedly to be a sale. The plaintiff had ordered kidney saute in the defendant's restaurant and was made violently sick by the discovery therein of a mouse, chopped in two. There was no direct proof of negligence, indeed the defense was that plaintiff had "planted" his own mouse in the dish with a view to such a suit. The court held that "under modern conditions the food is sold and the hotel keeper impliedly warrants that it is wholesome to eat". Thus New York and Massachusetts seem fairly well settled on both theories, but otherwise the whole result is Biblical, authority for both sides upon either theory. J. B. W.

BURDEN OF PROOF.—The case of *Rowe, Admx.* v. *Colorado and Southern R. R. Co.* (Tex. Civ. App. 1918), 205 S. W. 731, is typical of the confusion all too common in the use of this term "burden of proof".

Mrs. Rowe, as administratrix of her deceased husband, brings her action to recover against the Railroad Company, for the benefit of herself, as widow of deceased, and their minor children, for the injury resulting from the death of her husband, upon the theory that the death was caused by the negligence of the defendant companies.

The negligence charged was defective condition of a car loaded with coal, and absence of proper inspection which would have discovered the defect. The court of Civil Appeals, in an opinion granting a new trial upon the application of the plaintiff, uses the language following: "The question of whether or not the car was inspected before being placed in charge of the train crew, was a fact lying peculiarly within the knowledge of the appellees, (Railroad Company), and the burden of proving it rested on them". It is a real misfortune that the use of this term "burden of proof" in legal discussion can not be confined to a single legal concept embodying a definite legal principle. One had reason to expect that the mass of enlightening discussion of this question in recent years would find its reflection in the opinions of the courts of last resort. It is still difficult to discover that it has had any marked effect. We still can find many illustrations of its use in very different senses.

It is not clear in what sense the court used the term in the case under discussion. Did the court in its use of the term mean that if there were no evidence offered by either party from which it could be determined whether or not the car was inspected, that the jury should be advised that it should find that it was not inspected because the burden was on the defendants to prove inspection? Or, if evidence were offered by both parties on this issue, did the court intend by what it said, to indicate that if the jury were to find such evidence so evenly balanced as that it could not tell where the preponderance did lie, it would be the duty of the jury to find that there was no

inspection because the defendants had failed to lift the burden which was theirs? If such be the meaning of what the court says, it is a declaration that the jury is to determine that the defendants are liable in plaintiff's action for negligent injury although it is unable to find they were guilty of the negligence charged. In the clause immediately following the one quoted the court goes on to state that the plaintiff did introduce evidence from which the jury would be justified in concluding that the car was not inspected.

It must be concluded then that the court does not use the term "burden of proof", as indicating the obligation which a party to civil litigation takes upon himself to establish those facts essential to his cause of action or affirmative defense, by a preponderance of evidence, or be defeated of his cause of action or defense. As already indicated, it is difficult to attach any definite meaning to the words as used in the opinion in this case. Apparently the court is saying that some legal effect in the field of evidence is to be given to the fact that the means of proof of a particular fact are more accessible to one party than to the other. But what legal effect? Is it more than that the jury would be justified in taking something against a party shown to be in possession of evidence if he shall fail to produce it?

Because no one may know so well as the defendant whether he be guilty of the murder charged against him, are we to say that he shall have the burden of showing that he is innocent? Are we to say that because no one knows so well as the defendant whether he is the author of a libellous publication, that he is to be found guilty though no evidence be produced against him? No more is it true that because no one may know so well as the defendant whether he inspected a car wheel on a particular occasion, in an action charging him with that failure and depending upon proof of that fact, it is to be found that he did not inspect it though no evidence be produced upon the question.

It may well be said, that if there is evidence upon the question, that the fact that the defendants are shown to be in better position than the plaintiffs to know whether there was inspection and to produce evidence of it, a failure on their part to do so might be considered by the jury, with the other evidence, in determining whether there was, or was not inspection. In other words the instruction might, under such circumstances, be justified, that the jury might find there was no inspection upon evidence having less probative value than would be justifiable if the contested fact were not one, the evidence of which was peculiarly within the knowledge and control of the defendants.

Let us not give over pleading for the recognition, in all authoritative declarations of law, of a single definite meaning for the term "burden of proof". It would be a real service to procedural law if so desirable a result could be accomplished.

As previously indicated, that meaning of the term most nearly correct theoretically, and best supported upon authority, is one making it stand for the legal concept that parties in civil cases must establish their causes of action or defenses by a preponderance of the evidence; that an affirmative defense of a defendant in a criminal case must be established under the

same rule, and that the State must establish the facts essential to the guilt of the crime charged by evidence which satisfies the jury beyond any reasonable doubt.

The case of *Lisbon* v. *Lyman,* 49 N. H. 553, well illustrates a discriminating use of the term. Excellent discussions upon principle and authority can be found in *Thayer's Preliminary Evidence at the Common Law,* p. 353, and in Wigmore's Evidence, §§ 2483 et seq. V. H. L.

THE WRITING REQUIRED TO ESTABLISH AN EXPRESS TRUST OF LAND.—It has frequently been said that the Seventh Section of the Statute of Frauds, concerning Trusts of land, requires a writing containing "all the terms of the trust." *Forster* v. *Hale,* 3 Ves. 707; *Smith* v. *Matthews,* 3 DeG., F. & J. 139; *Loring* v. *Palmer,* 118 U. S. 321; *Gaylord* v. *Lafayette,* 115 Ind. 423; *McClellan* v. *McClellan,* 65 Me. 500; *Blodgett* v. *Hildreth,* 103 Mass. 484; *York* v. *Perrine,* 71 Mich. 567; *Newkirk* v. *Place,* 47 N. J. Eq. 477; *Steere* v. *Steere,* 5 Johns. Ch. 1; *Cook* v. *Barr,* 44 N. Y. 156; *Dillaye* v. *Greenough,* 45 N. Y. 438; *Dyer's Appeal,* 107 Pa. 446; *McCandless* v. *Warner,* 26 W. Va. 754. This doctrine comes to the test in a case where there is a writing, signed by the person who is enabled to declare the trust, sufficiently identifying the land, and declaring that it is held in trust, but without naming the beneficiaries or otherwise failing to meet the stated requirement, but where parol evidence sufficiently establishes the terms of the trust to enable the court to enforce it if the Statute does not prevent. In such a case, does the Statute render the trust unenforcible? It is submitted that it does not.

The policy of the Statute of Frauds is to prevent frauds through perjury, not generally but in particular classes of cases, selected and defined, we must assume, upon the theory that such frauds are more likely in these than in other cases, or would in these, if perpetrated, be more than commonly obnoxious, or that, in these cases, the imposition of the statutory requirements upon an honest claimant would involve less than ordinary hardship. The method adopted to prevent such frauds in such cases is to relieve the putative victim from the necessity of meeting and disproving a claim supported only by parol, and presumably perjured, evidence, requiring in such cases higher evidence, usually a writing over the signature of the putative victim. The Statute is extremely concise, considering the complexity of the problems touched by it, and leaves much to judicial interpretation, as to the cases embraced, the character of the writing required, and otherwise. Such interpretation should obviously proceed with the policy of the Statute clearly in view.

The provisions touching trusts of land would seem to be designed to protect the beneficial owner from expropriation by judicial proceedings based on perjured parol evidence of a declaration of trust. If this be so, the only writing required to effectuate the policy of the statute is one identifying the land and clearly indicating that the person alleged to be a trustee has no beneficial interest therein, or only a specified interest. This position is squarely denied in *Smith* v. *Matthews, supra.* There counsel argued, "the

danger to be guarded against is the defrauding a man by establishing him to be a mere trustee on parol evidence," to which Turner, L. J., replied, "The statute was intended to guard against perjury as well as fraud. You let in the risk of perjury as between *cestuis que trust.*" With due respect, it is submitted that this dictum (for such it was) involves an unwarranted assumption as to the policy of the Statute, and produces the absurd result of preventing perjury among the contending *cestuis,* some of whom, by hypothesis, are entitled to the property, by taking the property from them all and giving it to the trustee, who has, by an adequate writing, been shown to have no beneficial interest. This sort of justice savors too much of Aesop's fables. Our case is distinguishable from that arising under the provision concerning contracts. There it may well be sound policy, and therefore presumably the intent of the statute, to require that the writing contain all the terms of the contract. Else, one who has been so ill advised as to sign a memorandum showing merely that there is a contract might have a confiscatory bargain thrust upon him by perjury. We might say that the normal contract case is like the exceptional trust case where there is a trust as to a partial interest only, the trustee being beneficial owner in part, in which case it seems essential that the writing show the trustee's interest, or, to put it the other way, the extent of the trusteeship. In both cases the putative victim of the putative fraud may be as vitally concerned with certain terms of the contract or trust as with its existence. Distinctions might also be based upon differences of phraseology between the fourth and the seventh sections of the Statute, but, as the language is not explicit in either, policy seems to be surer ground.

The cases cited above, as asserting that the writing must contain all the terms of the trust, prove upon scrutiny to be but slight authority for that doctrine. In several of them, the court would have reached the same conclusion without any statute, because it found that the evidence, written and parol, was, at most, ambiguous and insufficient to raise the burden of proof. In *Dillaye* v. *Greenough,* there was apparently no evidence whatever, either written or parol, to identify the beneficiaries. In others of the cases, though the parol evidence might have established a trust, the writing was inadequate under any theory, containing but the remotest hint that there might be a trust, or indicating but a promise, without consideration, to create a trust, or failing to identify the subject matter, under which last head may be ranged those cases where a parcel of land was identified but it appeared that the trustee had some beneficial interest and the writing did not disclose the extent of the trusteeship. Again, in several of the cases the doctrine was not applied, the trust being established and enforced upon a finding that the writing satisfied the stated requirement. But, of these last mentioned cases, two would seem to be, upon their facts, authorities against their own dicta, and even to go beyond the position here advanced. Such, are *Loring* v. *Palmer* and *Newkirk* v. *Place.* In the latter the writings contained no description, formal or informal, of the land, but the court relied upon admissions at the hearing that they referred to the land in question. It is obvious that this goes far beyond the disputed doctrine that an answer admitting the trust

is a sufficient writing, though it pleads the statute as a defence, and it is also obvious that a similar ruling would not be made upon a parallel case of contract of sale. In the former case, the court pieces together several writings which are not connected within the principle of incorporation by reference, and even then finds itself faced by the case of a trustee with a beneficial interest, the extent of which does not appear in the writings, from which position it purports to find escape by means of a "presumption" that the shares were equal. One has only to consider what the court would have done if the parol evidence, instead of indicating equal shares, as it did, had indicated a different proportion, to see that the presumption theory was of the nature of a beneficent fiction indulged to avoid the necessity of taking bolder ground. To these cases we may add two Illinois decisions which frankly accept the theory here maintained. *Kingsbury* v. *Burnside,* 58 Ill. 310; *Myers* v. *Myers,* 167 Ill. 52. See also, *Railroad* v. *Durant,* 95 U. S. 576, and cases cited by BROWNE, STATUTE OF FRAUDS, § 111. The only clear authority to the contrary seems to be *Dyer's Appeal, supra.* It is therefore submitted that authority, as well as principle, is opposed to the doctrine that all the terms of the trust must be contained in the writing.

It should be noted that the acceptance of that doctrine would be much more serious in this country than in England, because of our conservatism upon the raising of constructive trusts to prevent unjust enrichment through the breach of parol trusts. 12 MICH. L. REV. 423, 515; 28 HARV. L. REV. 237, 366. E. N. D.