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NOTES

WHERE TRESPASS AND ASSUMPSIT CLASH

The scene is a self-service market; the characters—Mrs. A and Mrs.B, housewives doing their shopping.

Mrs. A, among other things, selects a jar of vacuum-packed coffee which she places in her cart. Proceeding to the aisle of the counter where payment is to be made Mrs. A places her hand upon the jar of coffee, preparatory to lifting it from the cart, when it explodes, injuring her hand and arm.

Meanwhile Mrs. B, being a great drinker of ginger ale, picks up two bottles of the beverage, whereupon one of them explodes, injuring her leg severely.

Mrs. A and Mrs. B both sue the remote vendor for damages. Mrs. A recovers a verdict of $370. Mrs. B suffers the embarrassment of a judgment for defendant on preliminary objection.

This is precisely what happened in two recent cases. Mrs. A's recovery occurred in *Dillon v. William S. Scull Co.*[1] decided by the Superior Court of Pennsylvania. Mrs. B's failure to recover was decided in *Loch,* et ux *v. Confair,* et ux[2] by the Supreme Court of Pennsylvania.

On the surface these cases seem to be in definite conflict, but on closer examination we find one major difference between the two cases. Mrs. A brought her action in trespass, on the basis of negligence. Mrs. B brought her suit in assumpsit, on the basis of a breach of an implied warranty.

Now let's put ourselves in the position of Mrs. A or Mrs. B. Whom shall we sue and on what theory?

There are four possibilities which can be readily seen:

1. Sue the immediate vendor on the theory of a breach of implied warranty in assumpsit.[3]
2. Sue the immediate vendor in tort, theory—negligence.[4]
3. Sue the remote vendor (mfg'r) in assumpsit—breach of implied warranty.[5]
4. Sue the remote vendor in trespass for negligence.[6]

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1 — Pa. Super. —, 64 A. 2d 525 (1949).
2 — Pa. —, 63 A. 2d 24 (1949).
3 Bonenberger v. Pittsburgh Mercantile Co., 345 Pa. 559, 28 A. 2d 913 (1942).
4 Ebbert v. Phila. Electric Co., 330 Pa. 257, 198 A. 323 (1938).
5 Nock v. Coca Cola Bottling Works of Pittsburgh, 102 Pa. Super. 515, 156 A. 537 (1931).
6 Dillon v. Scull, —Pa.—, 64 A.2d 525; MacPherson v. Buick Motor Co., 217 N. Y. 382, 111 N. E. 1050 (1916).

All of these methods have been successful under various factual situations. It is our purpose here to note the difference between these various arrangements of fact so as to know which of the above combinations will result in a favorable decision in our particular case.

In 1842 the case of *Winterbottom v. Wright* decided that a person not a party to a contract did not have a cause of action for damages resulting therefrom.[7] The decision went no farther than the contract itself; however, it was universally construed to mean that there could be no action, even in tort, for injuries resulting from the contract by a person not a party to the contract.[8] This then is the basis of the often quoted rule that the manufacturer or supplier of chattels is not liable for defects in manufacture, and harm resulting therefrom, to any person not a party to the contract.[9]

It did not take the courts long to realize the impropriety of this rule, and exceptions soon arose. Notable among these was the case of *Thomas v. Winchester* which in 1852 laid down the rule that the supplier of drugs and medicines is liable to persons though no contractual relation existed between the manufacturer and the person injured.[10]

Judge Cardozo was given the opportunity to set the law on the subject in 1916, when he decided the leading case of *MacPherson v. Buick Motor Co.*[11] He said that the manufacturer of chattels is liable to a person not a party to the contract for injuries resulting from defects in the manufacture of such chattels. This rule is not limited to things which in their normal operation are implements of destruction, but extends to any article whose nature is such that negligent manufacture will place persons in peril.[12] In addition to this, the decision creates a duty on the part of the manufacturer to inspect his products, which duty is independent of contract.

The next step for imposing liability upon the remote seller of chattels was to create a strict liability based upon an implied warranty.[13] From this point there seems to be confusion and dilemma, the ultimate result of which is the emanation of the two cases forming the hypo, those of Mrs. A and Mrs. B.

(1) *Suit Against the Immediate Vendor in Assumpsit For Breach of Implied Warranty*

The first case of this type in Pennsylvania was decided in 1942, *Bonenberger v. Pittsburgh Merchantile Co.*[14] It was said in this case that as between the seller

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7 11 L. J. Ex. 415 (1842).
8 PROSSER, TORTS §83, p. 674.
9 Huset v. J. I. Case Threshing Machine Co., 120 F. 865, 61 L.R.A. 303 (1903).
10 6 N. Y. 397, 57 Am. Dec. 455 (1852).
11 217 N. Y. 382, 111 N. E. 1050 (1916).
12 RESTATEMENT, TORTS § 395.
13 PROSSER, TORTS § 83, p. 689.
14 345 Pa. 559, 28 A. 2d 913 (1942).

and the consumer of food-stuffs there is an implied warranty that the food is fit for human consumption. The court said that an implied warranty exists in the case of food sold in the original container, under Sec. 15(1) of the Sales Act.[15]

The seller's obligation rests not upon negligence, but upon warranty. Therefore the trespass cases cited are of little value.

The cause of the damage in this case was a piece of shell in a can of oysters, which piece of shell the plaintiff unfortunately swallowed. We should note that the food was inclosed, and thus there was no opportunity for the seller to discover the danger by an inspection. There was no duty upon the seller of any type, and consequently there could be no breach of a non-existent duty through negligence. The plaintiff thereupon looked to another form of action. There was a contract between plaintiff and defendant. The plaintiff had relied upon the skill and recommendation of the seller in selecting this brand of oysters. Upon these facts there was an implied warranty under Sec. 15 of the Sales Act that the food was fit for human consumption. The warranty being breached, the defendant was liable for all injuries suffered by plaintiff as a result of the breach, and it should be noted that the measure of damages for the personal injury was the same as if the action had been brought in trespass.

It should also be noted that the court distinguished this case as one founded upon contract and therefore refused to accept the rulings of cases founded upon negligence which were presented by counsel.

Prior to this case there was one which came up in the Superior Court in 1913[16] against the immediate vendor, predicated upon breach of warranty. No recovery was allowed in this case because of an insufficiency of evidence submitted by the plaintiff. However the court did not say that assumpsit was the wrong form of action, but left the question to a later date.

Another case decided in 1942 in the Superior Court[17] throws some light on the question. The local dealer had installed a heating system in the plaintiff's house pursuant to a contract. The job was negligently done and resulted in considerable injury to the house. The action was brought in assumpsit, and the court said this was proper although it sounded in tort. Citing Sec. 330, Restatement of Contracts, they said that the damages were sustained as the natural, foreseeable result of the breach of the contract through negligence. The amount of the damages were left for the jury to determine, so long as the injured party was fully compensated for the loss directly resulting from the breach.

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15 Act of 1915, PL 543, 69 PS 124. Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill and judgment (whether he is the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.

16 McSorely v. Katz, 53 Pa. Super. 243 (1913).

17 Siegel v. Struble Brothers, 150 Pa. Super 343, 28 A. 2d 352 (1942).

The important points in this case are: first, there was a contract; second, it was breached; third, damages resulted which should have been reasonably foreseen at the time of making the contract to be the natural result if the contract were not carried out according to its terms, i.e., without negligence.

The court admitted that the real issue, though it might have been brought in trespass, was whether the dealer was guilty of negligence in the performance of his contract.

This case then represents the borderline situation in which either trespass or assumpsit could be chosen as the form of action, because there has been both a contract which has been wrongfully breached, and injury wrongfully inflicted as the result of negligence. In either form the amount of damages recovered would be the same.

The case of *Jones v. Boggs and Buhl*[18] did not present such a well-defined choice. Plaintiff purchased a fur coat, the collar of which caused a skin disease. The action was brought in assumpsit (claiming a breach of warranty) for the purpose of evading a two year statute of limitation[19]—"upon any action brought to recover damages for injury to the person." The court held that the statute applied to the cause of action rather than to the form which the action ultimately took. They intimated that had the action been brought within the two year period, assumpsit would have been a proper form of action and recovery would have been allowed in accordance with Sec. 69(6) of the Sales Act[20]—(the measure of damages for breach of warranty is the loss directly and naturally resulting from the breach of warranty). They further cite the *Bonenberger* case as authority for the proposition that assumpsit is the proper form of action to recover for the negligent breach of a warranty which results in personal injury.

(2) *Suit Against the Immediate Vendor in Trespass For Injury Resulting From Negligence*

The previous cases illustrate the modern trend toward making the obligation of a warrantor contractual in nature. However, the action upon a warranty was in its origin a pure tort.[21] The idea was that the warranty created a duty, and a negligent breach of this duty was a tort. Therefore it is only natural that suits should be brought in trespass for a negligent breach of warranty.

The famous *Ebbert* case[22] seems to be the landmark and final word on this phase of the problem. The facts very briefly are these: the dealer expressly warranted a washing machine, more particularly the safety device on the wringer. In

18 355 Pa. 242, 49 A. 2d 379 (1946).
19 Act of 1895, PL 236, § 2.
20 Act of 1915, PL 543.
21 I WILLISTON, SALES § 197, p. 373.
22 Ebbert v. Phila. Electric Co., 330 Pa. 257, 198 A. 323 (1938).

the course of use, plaintiff had occasion to use this safety device, which failed to release the wringer of the washer, and caused injury to the plaintiff by reason of her hand and arm being caught in the wringer. The court said, "An action in trespass may be maintained for the breach of a warranty contained in a written contract of sale, and damages for personal injuries may be recovered as consequential damages."

In analyzing this case it must be remembered that the court relied considerably upon the *MacPherson v. Buick* case,[28] to be discussed later; both cases are concerned with enforcing public policy. The characteristic of cases in this category is that a chattel is involved which, if made negligently, or negligently inspected, will be dangerous, causing harm to the public. To alleviate this danger to the public, if the immediate vendor assumes through contract the duty of inspecting such goods, and this inspection is negligently made, and the chattel thereby becomes dangerous to the public, the dealer will be held liable for the damage due to his negligence. The question of bringing this action in assumpsit does not appear to have been considered. In keeping with the modern trend there seems to be no reason why it could not be brought in assumpsit, should a similar case arise today. There was a contract (privity); the warranty was breached; injury resulted which could reasonably have been foreseen by the dealer in event of a breach of his contract. The action however, was in trespass. In basing the cause of action upon the negligence of the dealer the following must be remembered: (1) there was a duty, (2) the duty was breached through negligence, and (3) this negligence in performing the duty resulted in harm.

In this case the duty was created by a contract. However, the fundamental distinction between the tort and contract action is seen here. In the former, a duty has been performed negligently. In the latter, a contract has been performed negligently. In the latter, privity is essential; in the former, there need be no privity between the parties. Ordinarily, the duty breached is created by law. However in this instance the duty was voluntarily assumed by contract. The statement by the court that an action in trespass may be maintained for the breach of a warranty contained in a written contract of sale seems to be technically accurate, under the original construction that a breach of warranty was a pure tort. However the breach of warranty under the modern construction could provide a cause of action in assumpsit, and damages for personal injuries could be collected as consequential damages. The *Ebbert* case exemplifies the situation where a duty was created in law because of public policy, as a result of the dealer's having voluntarily assumed it.

It is my conclusion that this case presents an equality of choice as to which form of action will be used. However, the case applies to an express warranty,

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[28] 217 N. Y. 382, 111 N. E. 1050 (1916).

and if a case involved merely an implied warranty the courts might create a duty in law upon the immediate vendor less readily. There is little doubt that in the light of the cases discussed in the first section, an action in assumpsit for the breach of an *implied* warranty would cause fewer headaches.

A very definite limitation called "The Original Package Doctrine", has also been placed upon the right to sue the immediate vendor. The idea, as stated in *West v. Emanuel,*[24] was to the effect that the immediate vendor would not be liable to the consumer for the negligence of the original manufacturer or packer where drugs are sold in the original package. This rule was subsequently enlarged to include all types of goods sold in the original package and is as stated in *Kratz v. American Stores Co.*,[25] that the retail vendor of goods resold by him in the original sealed package, labelled with proper warnings and directions, is not liable for injuries caused by latent defects in the article except (1) in the presence of special circumstances and (2) food for human consumption. The reason for the rule evidently is that the retailer has no opportunity to inspect the goods, or to prevent any injury which might ensue. The exceptions seem to have been engrafted upon the rule by the *Bonenberger* case[26] where, under the Sales Act, an implied warranty is created because of the consumer's reliance upon the skill of the seller in selecting the brand to be used, and which by that case is limited to food sold for human consumption and drugs. Special circumstances would exist if the vendor sold the goods in the original package as his own, or if he knew, or had reason to know, that they were defective.[27]

For our purposes, whenever goods are sold in the original package, the following distinction should be made. If the subject matter is foodstuffs, it falls within the exception and the Original Package Doctrine does not apply, and thus an action against the immediate vendor would succeed. If the subject matter is not food, then the doctrine would apply, and there would be no duty upon the retailer for this reason, and a trespass action would fail. An assumpsit action would fail also if the above exceptions were strictly adhered to, although there seems to be no reason why the doctrine of the *Bonenberger* case could not be extended to other cases where an implied warranty existed under Sec. 15 of the Sales Act. The difficulty can be resolved, however, by bringing suit against the remote vendor.

(3) *Suit Against the Remote Vendor in Assumpsit Based Upon Breach of an Implied Warranty*

Of the four categories being considered, this seems to be the cause for the major portion of the confusion which is found, and is in my opinion directly responsible for the difficulty occurring in the *Loch* case.[28] It is submitted that

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24 198 Pa. 180, 47 A. 965 (1901).
25 359 Pa. 326, 59 A. 2d 93 (1948).
26 345 Pa. 559, 28 A. 2d 913 (1942).
27 RESTATEMENT, TORTS §§ 399—402.
28 See note 2, Supra.

there is no sound basis in the law for the existence of any such theory (that the remote vendor may be sued in assumpsit for breach of implied warranty in the absence of a contract.)

The advent of this doctrine in Pennsylvania occurred in 1931, with the decision in *Nock v. Coca Cola Bottling Co.*[29] It is implied in this case that an action in assumpsit will lie against the remote vendor of foods sold in the original package for breach of warranty. In view of the fact that privity has been generally considered as an essential element for bringing suit upon a contract,[30] it appears that this statement could not be more wrong.

The facts of the case are these. Plaintiff purchased a bottle of Coke from a retailer. The bottle, strangely enough, contained not only Coca Cola, but also a bug. Naturally sickness ensued. Suit was brought against the remote supplier in assumpsit. *There was a trial on the merits.* Defendant then appealed, and raised, *inter alia,* the objection that the suit was brought in the wrong form of action.

The court in considering this question came to the conclusion that after a trial on the merits, no defect of pleading which could have been raised by a demurrer will be fatal to the judgment, unless such defect was fatally injurious to the trial. This holding is perfectly consistent with procedure in Pennsylvania as it now exists. An objection to the form of action will be considered if it is timely, but the right to take advantage of the improper form of action may be waived by defendant.[31] It is too late to raise the question after a trial on the merits,[32] and unless it is shown to have injuriously affected the trial, the proper amendment will be considered made.[33] Therefore, this case seems to be decided on a procedural question, and correctly decides that point. The confusion enters as a result of a misinterpretation of the holding in the case, most probably because of the language contained in the syllabus of the report.

The case presents the duty that is imposed upon the manufacturer by law, in that the manufacturer impliedly warrants that the goods are fit for human consumption. It is the remote supplier's duty to see that food in the original package is fit for human consumption, and a negligent breach of this duty will result in liability to the injured persons irrespective of privity. The proper form of action, as will be pointed out, is in trespass. There can be no action in assumpsit unless there has been a contract, which has been breached. When a coke is purchased from the sandwich man at a football game, the reasonable man would undoubtedly say there was a contract between the consumer and the vendor. The man who could dream up a contract between the consumer and the bottling company many

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29 102 Pa. Super. 515, 156 A. 537 (1931).
30 Black's Law Dictionary, p. 1423; Sweeney v. Houston, 243 Pa. 542, 90 A. 347 (1914).
31 Welker v. Metcalf, 209 Pa. 373, 58 A. 687.
32 Williams v. Hay, 120 Pa. 485, 14 A. 379.
33 Erie City Iron Works v. Barber & Co., 102 Pa. 156 (1883).

miles away would probably be able to solve the riddle of the fourth dimension. However, ordinary minds must admit that there is no contract between the consumer and the remote manufacturer, in the absence of an agency relationship between the vendor and the manufacturer.

However, the law would not have become as ensnarled as it did had it not been for the case of *Bilk v. Abbotts Dairies Inc.*[34] in 1941. The action was brought in assumpsit against the remote vendor. No recovery was allowed because the plaintiff failed to meet his burden of proof. They said that the action sounded in tort, and therefore the provisions of the Practice Act[35] governing tort actions should apply (all other averments shall be deemed put in issue, unless expressly admitted). However, citing the *Nock* case, the court said that plaintiff had an option to bring his action either in trespass or assumpsit. Since there was no contract between plaintiff and defendant, it does not seem that an action in assumpsit would have been technically correct.

The latest case is, of course, *Loch v. Confair.*[36] The facts have been given in the opening hypothetical case. The fundamental distinction between this case and the *Nock* case is that in the former the action did not get out of the pleading stage. It was appealed from a judgment for defendant on a preliminary objection. This is perfectly in accord with the rule stated above, that an objection to the form of action will be considered, if it is timely.

The action being in assumpsit, plaintiff was put to the task of finding a contract. An interesting question of sales was thus decided, to the effect that no sale, or contract, was completed merely by taking the goods from the shelf of a self-service store and placing them in a cart. Possession alone does not pass title. Apparently the contract is complete only after the goods have been paid for, but the court does not decide this point.

The court exercised its efforts exclusively in search of a contract between the customer and the retail vendor, and from this it might be argued that had there been such a contract, the requirement of privity for bringing an action in assumpsit would have been complied with. Although the court does not say this, it could be implied from the line of attack taken, and based upon the idea that a warranty follows the goods. I do not think that this is a correct deduction, however, and in order to avoid further confusion it should be avoided. Where plaintiff sues in assumpsit upon an implied warranty of fitness, he must show privity.[37] Privity is said to be that relationship existing between two contracting parties.[38] If two parties have never contracted with each other there could be no privity.

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34 147 Pa. Super. 39, 23 A. 2d 342 (1941).
35 Act of 1915, PL 483.
36 63 A. 2d 24, — Pa. —.
37 Dillon v. Scull, 64 A. 2d 525, — Pa. Super — (1949).
38 Black's Law Dictionary, p. 1423.

Thus, the correct rule, it would seem, is that there must be a contract between the customer and the remote vendor, otherwise a suit in assumpsit would fail, irrespective of a contract between the customer and the retailer.

In considering the question of the form of action, the court has this to say: "While there is a distinct tendency toward relaxation of the strictness of the common law as regards pleadings, a plaintiff cannot successfully maintain an action in one form by averring facts establishing a valid cause of action (if) properly brought in another form. It is immaterial that damages recoverable might be identical." As to the *Nock* case, the court said, "It is unnecessary to pass upon what was there stated." It might have been better, however, had the court cleared up the confusion which this case has caused. This case does make one point clear—*If the plaintiff would sue in assumpsit for breach of implied warranty to recover for his injuries, he must show a contract or sale.*

The court also states that a buyer of goods injured because of unfitness of the goods for their intended purpose may sue in assumpsit for breach of implied warranty, or in trespass for negligence, though the measure of damages is the same in each case. Since it has been shown that no contract existed, trespass would have been the proper form of action.

(4) *Suit Against the Remote Vendor in Trespass For Negligence*

Doubt and confusion can be readily eliminated by adherence to the thought behind the above caption. The authority for bringing the action in this form is very strong, beginning with Cardozo's opinion in *MacPherson v. Buick Motor Co.*[39] and running to the most recent case of *Dillon v. William S. Scull Co.*[40] In this case it is said that since the suit was in trespass for negligence, no privity need be shown between the plaintiff and defendant. It is only where the plaintiff sues in assumpsit upon an implied warranty of fitness that he must show such privity.

What must the plaintiff show in bringing an action in trespass? A duty; a breach of that duty through negligence; resulting injury. It has been uniformly held that the remote manufacturer is under a duty to inspect and discover any defects in his product which, if not discovered, would place other persons in peril.[41] The court in the *Dillon* case said, "It was the defendant's duty to use reasonable care and by proper inspection to prevent any such matter (which would generate gas and cause an explosion) being in the apparently inert substance which the plaintiff purchased, viz., coffee." This duty is founded on public policy, and rests in law, irrespective of privity. It will be found by the courts in any case where the negligent manufacture of the product caused it to be dangerous to the public.

The primary point that must be proved is, then, the negligence of the de-

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39 See note 11, Supra.
40 See note 1, Supra.
41 MacPherson v. Buick Motor Co., see note 11, Supra.

fendant. The court in the *Dillon* case speaks of "proof of negligence by circumstantial evidence," which is an application of the doctrine of exclusive control. The court says, "Where the instrumentality is under the exclusive control of the defendant, and it appears that in the ordinary course of experience no result follows as that complained of . . . the only reasonable conclusion is that the accident was caused by the negligence of the defendant, in the manner alleged." This is a rule of evidence which puts the risk of non-persuasion upon the defendant. The plaintiff must produce circumstantial evidence sufficient to take the case to the jury. This means that he must exclude any equally well supported belief in any inconsistent proposition or, in other words, show that under the circumstances nothing else could have caused the accident. This does not mean that he must eliminate every possible cause but only those that are probable, as suggested by the evidence. If the plaintiff gets to the jury, the burden is upon the defendant to show the exercise of due care.

There is no problem to showing the injury.

A brief review of some of the other cases in this category may serve as enlightening background for the conclusions reached in the *Dillon* case.

As has been stated, the duty upon the remote supplier of chattels to use due care with respect to goods that might become dangerous to the public if negligently made was laid down in the *MacPherson* case.

A leading case in Pennsylvania, *Rozumailski v. Philadelphia Coca Cola Bottling Co.*,[42] laid down the rule that those manufacturing or compounding foods or beverages for human consumption must use a high degree of care to see that they are free from foreign or deleterious substances. Even if the most up-to-date and scientific methods are employed, the manufacturer may be liable to an injured member of the public.

As a general rule it has been held that the seller of food is under an obligation or duty to see that the food is fit for human consumption.[43] This duty has been based both upon public policy[44] and implied warranty.[45]

In *Henderson v. National Drug Co.*[46] it was held that an action for personal injuries against the remote packer of drugs should be *ex delictu* and not *ex contractu*, and that a warranty need not be pleaded, as the duty to safeguard life and limb does not rest upon warranty but upon a duty imposed by law.

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[42] 296 Pa. 114, 145 A. 700 (1929).

[43] Campbell v. G. C. Murphy Co., 122 Pa. Super. 342, 186 A. 269 (1936); Catani v. Swift, 251 Pa. 52, 95 A. 931 (1915); West v. Katsafanas, 107 Pa. Super. 118, 162 A. 685.

[44] Henderson v. National Drug Co., 343 Pa. 601, 23 A. 2d 743.

[45] Madden v. Great A & P Tea Co., 106 Pa. Super. 474, 162 A. 687 (1932); Smith v. Coca Cola Bottling Co., 152 Pa. Super. 445, 33 A. 2d 488 (1943).

[46] Henderson v. National Drug Co., 343 Pa. 601, 23 A. 2d 743 (1942).

In the light of this duty which is placed upon the remote suppliers of food and other chattels which might become dangerous if negligently made, it would seem logical that when suing the remote vendor, the correct form of action would be trespass. Negligent performance of this duty may be proved by circumstantial evidence as held in *Dillon v. Scull,* and difficulties in recovery are minimized.

It is hoped that the distinctions which have been brought forth will assist in eliminating some of the confusion which has heretofore plagued this branch of the law, and in furtherance of this aim the following summary of the preceding material has been attempted.

1. A basic and fundamental rule, which may serve as a yardstick in the future is: *When suing the immediate vendor, sue in assumpsit; when suing the remote vendor, sue in trespass.* The reason for this rule is that there is generally a contract with the immediate vendor, and there is no contract with the remote vendor.

2. Persons confronted with this problem should remember that a suit in assumpsit must be founded upon a contract. Although this is very elementary, the cases reviewed here demonstrate that some attorneys have overlooked this rule.

3. The distinguishing feature between trespass and assumpsit actions is that trespass actions for negligence are founded upon a breach of a duty. Once again an elementary rule.

As to the immediate vendor, if he had a duty owing to the customer he may be sued in trespass, otherwise he may only be sued in assumpsit. In bringing assumpsit it must be shown that a warranty was breached, and that the injury complained of was the natural, foreseeable consequence of the breach of warranty. The warranty may be express, or implied under Sec. 15(1) of the Sales Act. Damages will be in accord with Sec. 69(6) of the Sales Act, and as a practical matter will be the same as if the action had been in trespass.

If there is no warranty to be found the next quest is to find a duty imposed upon the immediate vendor.

A duty may have been assumed by the vendor in a contract, but otherwise it should be remembered that a duty is seldom imposed upon the immediate vendor by law, as in the case of a remote supplier.

The next quest would be the search for a contract between the purchaser and the remote supplier. As a practical matter such a contract will rarely be found. However, if found, a suit for breach of warranty would follow the same pattern as an identical suit against the immediate vendor.

In the absence of a contract between the remote vendor and the ultimate consumer, the remote vendor may only be sued in trespass. A duty is found imposed upon manufacturers, in the law, to the extent that remote suppliers of food and

drugs impliedly warrant to the consumer that they are fit for the purpose for which intended, and unless the producer can prove that he was not negligent in producing such products he will be liable to persons injured as a result of deleterious substances contained in the food; remote suppliers of other chattels which will become dangerous if negligently produced are liable to persons injured thereby unless they can prove that they were not negligent in producing such chattels. This assumes that the doctrine of exclusive control has been invoked, shifting the burden of proof to the defendant.

Finally, it must be remembered that if the action is prosecuted in the wrong form, the defendant waives his right to object after there has been a trial on the merits, in the absence of an injurious effect upon the trial. However, if the defendant objects in the pleading stage, the wrong form of action will be fatal, unless there is an amendment of the pleading.[47]

William L. Otten.

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[47] See *Caveat Venditor* by Charles L. Casper, 52 D. L. R. 135, for a complete discussion of the liability of vendors of food in Pennsylvania.