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Tax Sales: A Threat to Unguarded oil, Gas, and Mineral Rights

RECENT CASES

COMMONWEALTH v. BOSURGI AND COMMONWEALTH v. COCKFIELD: UNREASONABLE SEARCH AND SEIZURE, VARIATIONS ON A THEME

The decision of *Mapp v. Ohio*,[1] called a "hurricane"[2] and "the most significant event in criminal law since the adoption of the fourteenth amendment,"[3] requires state courts to exclude evidence obtained by "unreasonable searches and seizures."[4] Prior to the *Mapp* case a motion to suppress illegally seized evidence was an "expensive futility"[5] in Pennsylvania because the Commonwealth subscribed to the non-exclusionary rule.[6] Since *Mapp* a motion to suppress evidence has been a vortex of confusion for Pennsylvania's lower courts.[7] In two recent cases, *Commonwealth v. Bosurgi*[8] and *Commonwealth v. Cockfield*,[9] the Supreme Court of Pennsylvania surveyed the debris of hurricane *Mapp*. The court ostensibly held that the state courts can determine what constitutes an unreasonable search and seizure on an appeal from an order to suppress evidence. The court also attempted to construct guidelines for the determination. This Recent Case will examine the rationale underlying both of these decisions with a consideration of federal law pertaining to search and seizure; persuasive practical considerations influencing the court's decisions will be noted. Special attention will also be directed to the test of reasonableness applicable to search and seizure.

Bosurgi's indictment charged burglary, larceny, and receiving stolen goods. Prior to trial his counsel filed a motion to suppress certain evidence

1. 367 U.S. 643 (1961).
2. Commonwealth v. One 1955 Buick Sedan, 198 Pa. Super. 133, 135, 182 A.2d 295 (1962).
3. Specter, *Mapp v. Ohio: Pandora's Problems for the Prosecutor*, 111 U. PA. L. REV. 4 (1962). For an analysis of the problems created by *Mapp* see 75 HARV. L. REV. 152-60 (1961).
4. U.S. CONST. amend. IV. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or thing to be seized."
5. Brief for Appellee, p. 3, Commonwealth v. Bosurgi, 411 Pa. 56, 190 A.2d 304 (1963).
6. *E.g.*, Commonwealth v. Dabbierio, 290 Pa. 174, 138 Atl. 679 (1927); Commonwealth v. Grasse, 80 Pa. Super. 480 (1923); Commonwealth v. Finch, 80 Pa. Super. 386 (1923).
7. Specter, *supra* note 3, at 5.
8. 411 Pa. 56, 190 A.2d 304 (1963).
9. 411 Pa. 71, 190 A.2d 898 (1963).

allegedly obtained by unreasonable search and seizure. The Court of Quarter Sessions of Philadelphia County granted the motion. The superior court reversed and the supreme court granted *allocatur*.[10] In holding that the Commonwealth may appeal an order to suppress evidence, the Supreme Court of Pennsylvania rejected appellant's argument that Pennsylvania should adopt the rule laid down by the United States Supreme Court in *Dibello v. United States*.[11] That case held that the prosecution could not appeal preindictment orders to suppress evidence.[12] Justice Jones, writing for the majority in the *Bosurgi* case, noted that the *Mapp* decision did not require state courts to follow federal procedural requirements in carrying out the exclusionary rule.[13] Prior Pennsylvania decisions have allowed the Commonwealth to appeal rulings in criminal cases in certain situations: where the appeal involves a question of law,[14] where the order is definitive in nature,[15] or where the order would terminate the prosecution.[16] Since in *Bosurgi* a suppression of evidence would have terminated the prosecution,[17] the court could have relied on the rationale of *Commonwealth v. Richards*.[18] Rather, the court chose to elaborate on the right of appeal from an order suppressing evidence and indicated that such an order was appealable by the Commonwealth even if it did not terminate the prosecution.[19] This expansion of the *Richards* rule rested on the rationale that "without a right of appeal in the Commonwealth . . . the Commonwealth is deprived of any opportunity to secure appellate court valuation of the order of suppression which forces the Commonwealth to trial without *all* its evidence."[20] While this rule may be criticized as depriving the accused of his right to a speedy trial and as an unwarranted ex-

10. *Supra* note 8, at 60, 190 A.2d at 307.

11. 369 U.S. 121 (1962).

12. *Ibid.* The rationale underlying this decision may be that the United States is not prejudiced by a pre-indictment order suppressing evidence anymore than by an adverse ruling on evidence during trial. *Supra* note 8, at 61 n.5, 190 A.2d at 307 n.5 (dictum). However, one should not lose sight of the fact that statutory authority has been given to the Government to appeal from interlocutory judgments in other circumstances, and Congress had declined an opportunity to give such authority for an appeal from a pre-indictment order to suppress. The Court may have believed that this indicated congressional disapproval or that Congress was the one to decide whether the Government could appeal. See Annot., 156 A.L.R. 1207 (1945).

13. Mapp v. Ohio, *supra* note 1, at 659 n.9.

14. Commonwealth v. Melton, 402 Pa. 628, 629, 168 A.2d 328 (1961).

15. Commonwealth v. Rich, 174 Pa. Super. 174, 100 A.2d 144 (1953).

16. Commonwealth v. Richards, 198 Pa. Super. 39, 42, 182 A.2d 291, 293 (1962). See Specter, *supra* note 3, at 34.

17. *Supra* note 8, at 61, 190 A.2d at 307.

18. *Supra* note 16, at 42, 182 A.2d at 293.

19. *Supra* note 17, at 62-64, 190 A.2d at 308 (dictum). This dictum foreshadowed the holding in Commonwealth v. Wright, 411 Pa. 81, 190 A.2d 709, 710 (1963) and Commonwealth v. Cockfield, *supra* note 9.

20. Commonwealth v. Bosurgi, *supra* note 8, at 63, 190 A.2d at 308. (Emphasis added.)

tension of the "finality" concept in appellate review,[21] the rule does have decided practical advantages in light of the *Mapp* case. This holding will bring search and seizure issues before the superior court and supreme court sooner and allow them to clarify the law in the area. Subsequent cases, *Commonwealth v. Wright*[22] and *Commonwealth v. Cockfield*,[23] settled the rule that the Commonwealth may appeal a pretrial order to suppress evidence.[24]

In passing on the validity of the lower court's order to suppress evidence the court in *Bosurgi* had to determine if the following search violated the fourth amendment. On July 10, 1961, some watches and other jewelry were stolen from a wholesale jewelry store in Philadelphia. The police were notified. During their investigation they requested people in that area to report to detective headquarters any person seen with watches. Subsequently an unidentified person called detective headquarters and reported that a man with bushy grey hair, needing a shave, short in stature, Italian in appearance, and attired in tweed pants and a striped shirt was trying to sell watches in a taproom near the burglarized store. Detectives immediately went to the named taproom but did not see the man described. Bosurgi, who answered the description, was found in a nearby bar. Bosurgi was directed to stand up; the detectives "patted him down" and found several watches later identified as part of the stock taken from the burglarized store. At detective headquarters, Bosurgi was ordered to remove his trousers which were vacuumed revealing glass particles that might have come from the broken plate glass window of the jewelry store.[25]

The court addressed itself to the question of whether that search was unreasonable. Preliminarily, the court said "a study of *Mapp* would indicate that, at least by implication, state courts are still free to apply their own, rather than the federal, criteria of 'reasonableness.' "[26] The remainder of this Recent Case will consider whether the Pennsylvania Supreme Court's criteria for "reasonableness" (as illustrated in the *Bosurgi* case and the *Cockfield* case) does differ from the federal standard and whether the criteria given will sufficiently guide the lower courts and the police.

Under federal and Pennsylvania law a search incidental to a lawful arrest, even performed without a warrant, may not constitute unreasonable search and seizure.[27] An arrest may be lawful without a warrant when an

21. 2 PENNSYLVANIA LAW ENCYCLOPEDIA, *Appeals* § 21 (1957).
22. *Supra* note 19.
23. *Supra* note 9.
24. This right is not accorded to the accused since he may take an appeal from the trial. Commonwealth v. Bosurgi, *supra* note 8, at 64, 190 A.2d at 308-09.
25. Brief for Appellee, p. 2, Commonwealth v. Bosurgi, *supra* note 8.
26. Commonwealth v. Bosurgi, *supra* note 8, at 65, 190 A.2d at 309. *But see* Ker v. California, 374 U.S. 23 (1963).
27. *E.g.*, Henry v. United States, 361 U.S. 98 (1959); Draper v. United States,

officer has "reasonable grounds" or "probable cause" for the arrest.[28] " 'Probable cause' has been said to exist where the facts and circumstances within . . . [the arresting officers'] knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed and that the person to be arrested has committed or is committing the offense."[29] The supreme court adopted this statement of the rule to determine if the search in *Bosurgi* was unreasonable. As noted, this standard is similar to the federal one, and the assertion that Pennsylvania may adopt a different test is dictum. "In dealing with probable cause . . . we deal with probabilities. These are not technical, they are factual and practical considerations of every day life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved."[30] The facts which gave the arresting officers "probable cause" in *Bosurgi* were his telephoned description and his presence near the burglarized store and across from the taproom described in the call. The detectives did not see Bosurgi attempt to sell any watches; they did not wait to observe any of his actions; they arrested him on sight. In *Cochran v. United States*[31] an unidentified informant told police that Cochran might be responsible for a hold-up. The informant told the officers the approximate location of Cochran's residence and said that he had a car of the type the officers were trying to find. Detectives made the arrest of Cochran in his room. A search of the room revealed a gun. Cochran moved to suppress this evidence. The court held that the police did not have probable cause to make the arrest and therefore the seizure was illegal. Mere suspicion, said the court, is not enough to justify an arrest. It would seem that the facts of the *Cochran* case and those of the *Bosurgi* case are similar, and that the *Cochran* court would not have found probable cause in the *Bosurgi* fact situation. Usually under the federal standard there is something more than information from an anonymous in-

358 U.S. 307 (1959); Brinegar v. United States, 338 U.S. 160, *rehearing denied*, 338 U.S. 839 (1949); Agnello v. United States, 269 U.S. 20 (1925); United States v. Murphy, 290 F.2d 573 (3d Cir. 1961); United States v. Law, 190 F. Supp. 100 (S.D. Cal. 1960); Commonwealth v. Stubler, 84 Pa. Super. 32 (1924); Commonwealth v. Finch, 80 Pa. Super. 386 (1923).

28. Wong Sun v. United States, 371 U.S. 471 (1962); Draper v. United States, 358 U.S. 307 (1959); McCarthy v. DeArmit, 99 Pa. 63 (1881); Wakely v. Hart, 6 Binn. 316 (Pa. 1814).

29. Commonwealth v. Bosurgi, *supra* note 8, at 67, 190 A.2d at 310. See Brinegar v. United States, *supra* note 27; Husty v. United States, 282 U.S. 694 (1931); McCarthy v. DeArmit, 99 Pa. 63 (1881). See generally MACHEN, LAW OF ARREST 48 (1950), I VARON, SEARCHES, SEIZURES AND IMMUNITIES 80 (1961); Note, 75 U. PA. L. REV. 485 (1927).

30. Commonwealth v. Bosurgi, *supra* note 8, at 67, 190 A.2d at 310, quoting Brinegar v. United States, *supra* note 27, at 175.

31. 291 F.2d 633 (8th Cir. 1961).

formant needed to constitute probable cause: the fact that the informant is known to be reliable,[32] observance by police officers to substantiate their information,[33] or flight by the accosted when the police identify themselves.[34] In *Bosurgi* no attempt to corroborate the information was made before the arrest; the arrest was made solely on the strength of the phone call.[35] However, even when courts agree on the rule of law to apply to a probable cause situation, they may disagree on the effect of its application to given facts. Perhaps the assertion that Pennsylvania was free to adopt its own standard of reasonableness was dictum; but it may be that Pennsylvania is only paying lip service to the federal standard, actually loosening the requirements for probable cause and subtly promulgating a different standard for reasonableness. This case is not clear on the issue; one cannot be sure what the differences, if any, are between the federal view and the Pennsylvania view as to what constitutes probable cause.

In *Commonwealth v. Cockfield*[36] the Supreme Court of Pennsylvania again held a search reasonable under the "Homeric epithet,"[37] incidental to a lawful arrest. A Philadelphia fire claimed the lives of a mother and her two children. Investigation at the burning building led detectives to suspect arson. They discovered a strained relationship between the mother and her boy friend, identified as one Cockfield. He had exhibited a pattern of violence toward the deceased. On the strength of this information, a detective went to Cockfield's home but was denied entrance. Learning that Cockfield was the registered owner of a 1953 Dodge, a detective looked for and found his car. After watching the car for three hours the detective searched it and found a "two gallon Gulf, blue and orange gasoline can lying on its side" with a "wet spot" smelling "like gasoline" underneath. He saw a roll of pale green toilet tissue, charred around the edges. These articles were not removed, but the car was taken to a nearby precinct station where its distributor cap was removed.[38] The car disappeared from in front of precinct head-

32. Draper v. United States, *supra* note 27.
33. United States v. Murphy, *supra* note 27.
34. Levine v. United States, 138 F.2d 627, 629 (2d Cir. 1943). *But see* Wong Sun v. United States, *supra* note 28.
35. Compare Costello v. United States, 298 F.2d 99 (9th Cir. 1962).
36. *Supra* note 9.
37. Brief for Appellant, p. 10, Commonwealth v. Cockfield, *supra* note 9.
38. *Id.*, p. 17a. The following is taken from the interrogation on direct of detective Raifer:

Q. After you saw these things, did you take them out of the car?
A. No, sir.
Q. What did you do?
A. I closed the trunk.
Q. Closed the trunk?
A. Yes.
Q. Then what did you do?

quarters that afternoon.[39] On April 8th Cockfield was taken into custody and on April 9th he admitted to the police that he had thrown gasoline on the burned house but denied that he ignited the gasoline. On April 10th Cockfield's car again was searched and the gasoline can and toilet tissue were seized. Cockfield's counsel moved to suppress the introduction into evidence of the gasoline can and toilet tissue. The Court of Quarter Sessions of Philadelphia granted the motion, and the Commonwealth appealed.[40]

The supreme court stated the general rule that "if an arrest is valid, a search and seizure which are incidental to that arrest are valid."[41] In this case the validity of the arrest was not questioned. The decision turned on whether the search and seizure performed fifty-seven hours after the defendant was taken into custody were incidental to the arrest. Cockfield was not arrested in his car. Little danger existed in this situation of the car's removal before a warrant could have been taken out.[42] The court said however,

> "Incidental" in its pertinent meaning, refers to that which follows as an "incident," i.e., "an event of accessory or subordinate character" [The Oxford English Dictionary, Vol. 5, p. 152]. In our view, the search and seizure of the contents of Cockfield's automobile were clearly "incidental" to the arrest and the one logically followed the other. The time which elapsed between the time of the arrest and the time of the search does not destroy the character of the search as incidental to the arrest. . . . [V]iewed under all the circumstances presented on the instant record, the search and seizure were clearly reasonable in nature and "incidental" to the valid arrest.[43]

If this language means that the Pennsylvania test for incidental to an arrest requires merely that one logically follow the other, it would seem that the *Cockfield* court has added to the confusion by introducing a standard which has no defined meaning in light of previous cases, and little or no basis in the

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A. I think that policeman Merryweather got behind the wheel, and I pushed the automobile from 57th and Spruce to 55th and Pine.

Q. Why did you do that?

A. I felt that was the way that I could get to reach Cockfield, that he would come to get the automobile, and I could further my investigation as to what happened at the fire premises.

Brief for Appellant, p. 37a, Commonwealth v. Cockfield, *supra* note 9. It was not argued that this conduct was unreasonable.

39. "Cockfield, in the meantime, found his automobile in front of the precinct station, apparently was told the police did not want it, went out and bought the parts necessary to start it and removed the automobile to the residence of one Curtis Wally, Cockfield's friend." Commonwealth v. Cockfield, *supra* note 9, at 71 n.1, 190 A.2d at 900 n.1.

40. The right of the Commonwealth to appeal is discussed pp. 420-21 *supra.*

41. Commonwealth v. Cockfield, *supra* note 9, at 75, 190 A.2d at 901.

42. See Carroll v. United States, 354 U.S. 394 (1924).

43. *Supra* note 9, at 77, 190 A.2d at 901-02.

historical development of the rule permitting searches incidental to a valid arrest. Search incidental to arrest was recognized as an exception to the requirement for a search warrant under the common law since early times; this exception was considered implicit under the fourth amendment by federal and state courts.[44] Two reasons exist for the exception.

> No matter how innocent the person may appear, there is always a possibility that he is armed, and the officer is not required to run the personal risk of holding a person in custody without finding out by the only sure method—a thorough search. . . . [F]requently the accused will have on his person the very instrument with which the crime was committed, such as the club used in the assault or the knife used in the murder, or he may have the fruits of the crime, such as the stolen watch or counterfeit coin. This may be seized in order to prevent the accused from destroying it.[45]

The word "incidental" has always connoted a search immediately after arrest. To include within the doctrine the search of an automobile many hours after the accused had been arrested at another place would seem to pervert the reason for the rule. Necessity is absent.

While the language of *Cockfield* suggests that Pennsylvania has a different standard for reasonableness than the federal one, the holdings in both *Cockfield* and *Bosurgi* may share the federal rationale if viewed in light of the decision in *United States v. Rabinowitz*.[46] The respondent was convicted of selling, possessing, and concealing forged and altered obligations of the United States with intent to defraud. In the words of Mr. Justice Minton, "The question presented here is the reasonableness of a search without a search warrant of a place of business consisting of a one-room office, *incident to a valid arrest.*"[47] Government officers armed with a warrant went to Rabinowitz's business office. Placing him under arrest, the officers conducted an extensive hour and one-half search of his office finally finding 573 stamps on which it was later determined that overprints had been forged. The respondent made a timely motion to suppress that evidence. The place of a valid arrest, held the court, may be included in the search "in order to find and seize things connected with the crime as its fruits or as the means by which it was committed."[48]

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44. See Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); People v. Chiagles, 237 N.Y. 193, 142 N.E. 583 (1923) (opinion by Cardozo, J.).

45. MACHEN, THE LAW OF SEARCH AND SEIZURE 62-63 (1950).

46. 339 U.S. 56 (1949). See Henry v. United States, 361 U.S. 98 (1959); Draper v. United States, 358 U.S. 307 (1959); Marron v. United States, 275 U.S. 192 (1927); United States v. Kerchenblatt, 16 F.2d 202 (2d Cir. 1926) (opinion by Learned Hand); Commonwealth v. Stubler, 84 Pa. Super. 32 (1924).

47. United States v. Rabinowitz, *supra* note 46, at 57. (Emphasis added.)

48. *Id.* at 61.

Previously, in *Go-Bart Importing Co. v. United States*[49] and *United States v. Lefkowitz*[50] the Supreme Court was confronted with cases in which government officers made valid arrests within a building and then violently ransacked the premises in search of incriminating evidence. Even though these searches passed the incidental test, they were condemned as "exploratory searches," violative of the fourth amendment. These decisions gave rise to a further question in *Rabinowitz*: Was the search in this case of such intensity and duration that it was violative of the fourth amendment?[51] Discussing this issue the Court made its oft-quoted statement,

> What is a reasonable search is not to be determined by any fixed formula. The Constitution does not define what are unreasonable searches and, regrettably, in our discipline we have no ready made litmus paper test. The recurring question of the reasonableness of searches must find resolution in the facts and circumstances of each case.[52]

Rabinowitz has been interpreted to mean that whether a search is incidental to an arrest may be just one factor in the "total atmosphere of the case."[53] This view makes the federal standard uselessly vague. The case only holds that even a search which is incidental, must be performed in a reasonable manner, or fourth amendment rights are violated.[54]

If the Pennsylvania Supreme Court has adopted the broader rationale of *Rabinowitz* in the *Bosurgi* and *Cockfield* decisions, one may view them as *ad hoc* determinations of reasonableness and nothing more.[55] This interpretation of the cases is suggested by their language. Fourth amendment rights may be accorded the accused in this manner at the appellate level, but, practically, *ad hoc* determinations furnish little guide for the lower courts or the police. Countless unreasonable searches and seizures may take place because the police have no concrete standard to restrain them in their daily conduct. In these situations the innocent suffer because their cases rarely reach the trial or appellate level.

Bosurgi and *Cockfield* have done little to clarify what is a reasonable search and seizure in Pennsylvania. The ambiguous test of reasonableness

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49. 282 U.S. 344 (1930).
50. 285 U.S. 452 (1932).
51. See MACHEN, *op. cit. supra* note 45, at 78.
52. *Supra* note 46, at 63.
53. *Id.* at 65-66. Note the language used in Commonwealth v. Scull, 200 Pa. Super. 122, 126, 128, 186 A.2d 854, 856, 857 (1962); Commonwealth v. Czazkowski, 198 Pa. Super. 511, 514, 182 A.2d 298, 299 (1962); Commonwealth v. Richards, 198 Pa. Super. 39, 43, 182 A.2d 291, 293, 294 (1962).
54. MACHEN, *op. cit. supra* note 45, at 82. To get an idea of the aftermath of *Rabinowitz*'s ambiguity see Chapman v. United States, 365 U.S. 610 (1961).
55. This argument was used by the Commonwealth in Commonwealth v. Bosurgi, *supra* note 8. Brief for Appellee, p. 15.

set out in *Rabinowitz* makes any comparison between the federal standard and the Pennsylvania standard inconclusive. Mr. Justice Clark accurately summed up the present state of search and seizure; it is a "quagmire"[56] and the Pennsylvania courts have gotten their feet wet.

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56. Chapman v. United States, *supra* note 54, at 622.

HOCHGERTEL v. CANADA DRY CORPORATION: THE HAZARDS OF TENDING BAR

The plaintiff, a bartender in the performance of his calling, incurred personal injuries when an innocuous-looking bottle of soda water exploded behind the bar. The defendant, who manufactured the malcontent bottle, sold and delivered it directly to the plaintiff's employer. Plaintiff brought two actions;[1] in this one[2] he sought recovery on breach of warranty theories. The lower court sustained preliminary objections in the nature of a demurrer[3] and the Pennsylvania Supreme Court affirmed. This Recent Case will evaluate *Hochgertel* in the light of decisions of this and other jurisdictions. Pennsylvania's position on the various issues raised will be compared with other views; the comparison will form the basis for conclusions about the decision.

The *Hochgertel* decision leaves the law on the privity of contract requirement for recovery on contract theories in a state of some confusion in Pennsylvania. Federal courts currently make such guarded statements as this: "it is now clear that privity of contract is not required in Pennsylvania, certainly not in suits by purchasers of new automobiles against the manufacturer."[4] One wonders if the only safe approach now is to consider each of our decisions on the privity issue restricted to its own facts.

To understand the implications of *Hochgertel* it is necessary to study a long line of cases representing a trend toward abolishment of the privity requirement in this state. In the beginning the rule was stated in this manner: "Privity of contract is the relation that exists between two or more contracting parties. It is essential to the maintenance of an action on any contract that there should subsist a privity between the plaintiff and defendant, in respect to the matter sued on."[5] The leading case of *Timberland Lumber Co. v. Climax Mfg. Co.* espoused this inflexible rule in dictum as late as 1932.[6] But by then decisional inroads had penetrated the doctrine, and an exception had developed in the case of food products.[7] A little over a decade after *Timberland* a

1. Plaintiff brought separate actions of assumpsit and trespass, authorized by the supreme court in Cunningham v. Joseph Horne Co., 406 Pa. 1, 176 A.2d 648 (1961).

2. Hochgertel v. Canada Dry Corp., 409 Pa. 610, 187 A.2d 575 (1963).

3. *Id.* at 612, 187 A.2d at 577.

4. Duckworth v. Ford Motor Co., 211 F. Supp. 888, 891 (D.Pa. 1962).

5. Hartley v. Phillips, 198 Pa. 9, 13 (1901).

6. 61 F.2d 391, 393 (3d Cir. 1932) (dictum). Although in 1 WILLISTON, SALES § 244 n.8a (rev. ed. 1948) the case is cited as upholding the privity requirement, it should be kept in mind both that this was dictum and that the plaintiff conceded the point. See Del Duca, *Commercial Code Litigation: Conflicts of Law; Sales,* 65 DICK. L. REV. 283, 306 n.6 (1961); Note, *Liability of Manufacturers and Wholesalers to Ultimate Consumers in Pennsylvania for Breach of Warranty,* 31 TEMP. L.Q. 62, 64 (1957).

7. Nock v. Coca Cola Bottling Works, 102 Pa. Super. 515, 156 Atl. 537 (1931); Catani v. Swift & Co., 251 Pa. 52, 95 Atl. 931 (1915).

federal court voiced the precocious opinion that privity had been abolished from Pennsylvania law. "The abolition of the requirement occurred first in the food cases, next in the beverages decisions and now has been extended to those cases in which the article manufactured, not dangerous or even beneficial if properly made, injured a person because it was manufactured improperly."[8] But Pennsylvania courts insisted on deciding for themselves what Pennsylvania law was, and decisions indicating the contrary continued to be handed down. For example, in *Loch v. Confair*[9] recovery on breach of warranty theories was refused because the plaintiff was not party to a contract. The facts of the case have much in common with those of *Hochgertel*: plaintiff was injured by an exploding bottle *before she bought it* in a grocery store. The court was not greatly impressed by plaintiff's argument that a contract was not a necessary ingredient of an action in assumpsit, and declined warranty protection.[10] If the plaintiff had been a subpurchaser the warranties may have been extended to her.[11] But *Kaczmarkiewicz v. J. A. Williams Co.*[12] said they would not be extended to those not conventionally in privity except for warranties which ran with food products. The employee of one who purchased a stepladder sought to recover from a remote vendor, on his employer's contract. Even if the plaintiff acquired the rights of the employer, lack of privity barred the claim, concluded the court.[13] *Facciolo Paving and Construction Co. v. Road Machinery Inc.*[14] reached the same conclusion with respect to the remote purchaser of defective road-grading machinery. However, it was thought[15] that broad statements made by the Pennsylvania Superior Court in *Jarnot v. Ford Motor Co.*[16] might have the effect of overruling prior cases requiring privity in this state. In *Jarnot,* the subpurchaser of a faulty and dangerous truck was allowed to recover from the manufacturer. Shortly thereafter the famous *Pritchard* case[17] added its weight to those not requiring privity, permitting the subpurchaser of cigarettes to go against the manufacturer on breach-of-warranty theories. *Thompson v. Reedman,*[18] purporting to apply

8. Mannz v. Macwhyte Co., 155 F.2d 445, 450 (3d Cir. 1946) (dictum). Since no breach of warranty was found the statements as to privity would appear to be dictum. See Childs v. Austin Supply Co., 408 Pa. 403, 184 A.2d 250 (1962).

9. 361 Pa. 158, 63 A.2d 24 (1949).

10. *Id.* at 163, 63 A.2d at 26.

11. *Ibid.*

12. 13 Pa. D. & C.2d 14 (1957).

13. *Id.* at 16-17.

14. 8 Chest. Co. Rep. 375 (Pa. 1958).

15. Del Duca, *op. cit. supra* note 6, at 307 n.98.

16. 191 Pa. Super. 422, 156 A.2d 568 (1959). The case was followed in Willman v. American Motor Sales Co., 44 Erie Co.L.J. 51 (1961).

17. Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292 (3d Cir. 1961).

18. 199 F. Supp. 120 (E.D. Pa. 1961).

Pennsylvania law, extended the zone of protection considerably beyond that of any of the prior cases. A guest passenger in an automobile recovered from the remote manufacturer thereof on breach of warranty theories. The one ground on which this case might be distinguished from *Hochgertel* is that here, clearly, a dangerous instrumentality was involved—a bottle of soda water, on the other hand, has an innocent appearance. *Reedman* was followed in *Allen v. Savage Arms Corp.*[19] The plaintiff was injured when a shotgun purchased by his father blew up. In *Allen* the Uniform Commercial Code[20] overcame any problem as to privity of the boy with his father on his father's contract of sale.

At this stage of the developing trend away, down came the *Hochgertel* decision, breathing new life into the dying requirement of privity. Vindicated are the earlier lower court decisions holding that one may not recover on a contract to which he is not a party. Cases apparently contrary to *Hochgertel* are either erroneous or are exceptions to a general requirement of privity. The supreme court expressly condones cases "involving food, beverages, and like goods for human consumption,"[21] which permit a subpurchaser to sue directly. It is not possible to ascertain from the language of the opinion whether the court considers a mishap owing to a bad bottle as falling under the food-products exception to the general privity requirement. If one reads the language of the opinion carefully, some doubt is cast on whether any implied warranty would cover the bottle itself. Since the court finds that the warranty did not extend to this plaintiff it becomes unnecessary to answer the question "Did the warranty cover the container as well as the contents of the bottle?"[22] The question reserved by the court has earned Dean Prosser's amused indignation:

> There remains . . . an astonishing little argument over whether the "warranty" of food includes the safety of the container in which it is sold . . . . This metaphysical distinction between the container and the contents can only be regarded as amazing. The two are sold by each seller, and received by each ultimate purchaser, as an integrated whole; and where the action is against the immediate seller (by one in privity), it is well-settled that the warranty covers both. One can only surmise that the courts which make the distinction have been disturbed by an uneasy uncertainty as to whether, despite the evidence, the plaintiff may not have tried to open the bottle by banging it on the radiator. Suppose that a bottle of Coca Cola explodes, and cuts the plaintiff's wrist—is recovery really to turn on whether the

19. 52 Luz.Leg.Reg. 150 (1962).
20. PA. STAT. ANN. tit. 12A, § 2-318A (1954).
21. *Supra* note 2, at 614, 187 A.2d at 578.
22. *Id.* at 612, 187 A.2d at 577.

> explosion is due to a flaw in the glass or to an over-charged beverage?[23]

Escola v. Coca Cola Bottling Co.[24] and other cases held that recovery does depend on such a distinction. The Pennsylvania Supreme Court stands a good chance of replying to Prosser's question. When the plaintiff in one of these broken bottle cases is a subpurchaser, he will argue that his case falls under the food-products exception to the privity requirement. His opponent will contend that in effect the case does not because the warranty does not spread its protection over the container.

The cases not involving food products which are inconsistent with *Hochgertel* on the privity issue may involve other exceptions to the general requirement. Some of them may be explained away because they are concerned with liability for the manufacture of dangerous instrumentalities such as automobiles and shotguns. The law of privity in warranty actions may undergo the same development seen in tort actions, the development that culminated in *Macpherson v. Buick Motor Co.*[25]

Another factor which might explain apparently contrary cases is the presence of an express warranty made to the ultimate consumer by the manufacturer.[26] A very strong policy dictates that the manufacturer should be made liable to all groups within the distributive chain which are the target of commercial solicitation.[27] Among the rules of law which the *Jarnot* court draws upon in support of its decision is this: "a manufacturer who by means of advertising extols his product, in the effort to persuade the public to buy, may thereby incur liability to a purchaser notwithstanding privity between the purchaser and the manufacturer is wholly lacking."[28]

When this entire body of case law is considered, the conclusion is inescapable that the privity requirement is a tool of policy, that and nothing more. In accordance with "social justice"[29] the obligation of the manufacturer is extended "as far as the relevant social policy requires."[30] A sure sign of policy afoot is the number of fictions that play hide-and-go-seek with logic

23. Prosser, *Assault Upon the Citadel*, 69 YALE L.J. 1099, 1138 (1960). (Footnotes omitted.)

24. 24 Cal. 2d 453, 150 P.2d 436 (1944).

25. 211 N.Y. 382, 111 N.E. 1050 (1916). See RESTATEMENT, TORTS § 395 (1938).

26. Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409, *aff'd per curiam on rehearing*, 15 P.2d 1118 (1932), *aff'd on second appeal*, 179 Wash. 123, 35 P.2d 1090 (1934) is the leading case on this point.

27. Note, *Implied Warranty of Merchantability Renders Manufacturer Liable to Buyer's Wife Despite Disclaimer Clause and Absence of Privity of Contract*, 74 HARV. L. REV. 630, 631 (1961).

28. *Supra* note 16, at 429-30, 156 A.2d at 572.

29. *Supra* note 2, at 615, 187 A.2d at 589; see Fricke, *Personal Injury Damages in Products Liability*, 6 VILL. L. REV. 123, 155 (1960-61).

30. James, *Products Liability*, 34 TEXAS L. REV. 192, 193 (1955).

in the products liability cases.[31] "[C]ourts . . . invent a remarkable variety of highly ingenious, and equally unconvincing, theories of fictitious agency, third-party-beneficiary contract, and the like, to get around the lack of privity between the plaintiff and the defendant."[32] Another favorite fiction employed by the courts is one which visualizes a covenant running with the goods,[33] just as a covenant may run with the land. "If, as has been often said, the warranty runs with the goods, then it can protect no one who does not acquire the title; and the employee[34] . . . cannot recover. It may well be that we are not yet ready, and may never be ready, to extend the strict liability to such people; but if the time is to come when the courts are ready for it, they have laid up trouble in heaven."[35] Notwithstanding his observation Dean Prosser apparently thought that such employees would be extended warranty protection.[36]

The *Hochgertel* case concludes otherwise. The court stresses the fact that this particular plaintiff was not a purchaser.

> In no case in Pennsylvania has recovery against the manufacturer for breach of warranty been extended beyond *a purchaser* in the distributive chain. In fact the inescapable conclusion . . . is that no warranty will be implied in favor of one who is not in the category of a purchaser . . . .
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> . . . .
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> [T]he basis for recovery upon an implied warranty, absent a specific statutory exception . . . must be that the implied warranty forms a part of the consideration for the contract, and flows from manufacturer to subpurchaser through the conduit of a contractual chain.[37]

The statutory exception the court refers to is that contained in section 2-318 of the Uniform Commercial Code.[38] Evidently it was argued that an employee would fall under the extension of warranty protection afforded by that section. The provision reads as follows:

> A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may

31. For an entertaining survey of the fictions that have developed, see Gilliam, *Judicial Legislation, Legal Fictions, and Products Liability: the Agency Theory*, 37 ORE. L. REV. 217 (1958). "This article is, in essence, an essay on the usefulness of subterfuge." *Id.* at 219.

32. Prosser, *op. cit. supra* note 23, at 1124.

33. Coca Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927).

34. Here Dean Prosser cites the case of Jax Beer Co. v. Schaeffer, 173 S.W.2d 285 (Tex. Civ. Ct. App. 1943).

35. Prosser, *op. cit. supra* note 23, at 1133. (Footnotes omitted.)

36. *Id.* at 1142.

37. *Supra* note 2, at 615-16, 187 A.2d at 578-79.

38. PA. STAT. ANN. tit. 12A, § 2-318 (1954).

> use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.[39]

Based on a reading of this section, the court concludes that "Clearly the Code gives no basis for the extension of the existing warranty to an *employee* of the purchaser. . . . An employee is in none of these categories."[40] The court adopts a policy of strict construction, flatly refusing to "add to legislation,"[41] despite the fact that it quotes comment 3 to section 2-318 which says in part:

> This section expressly includes as beneficiaries within its provisions the family, household, and guests of the purchaser. Beyond this, the section is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain.[42]

One cannot help but feel that although the comment expressly provides that section 2-318 is not intended to restrict the developing case law, the court demonstrates reluctance to go beyond the enumerated classes to permit an employee to recover on the employer's warranty.

Not all jurisdictions are in line with *Hochgertel* on this point. Leading cases in other jurisdictions have adopted the view that an employee who is not party to any contract of sale may recover on his employer's sales contract for breach of warranty.[43] In the Ohio case of *Mahoney v. Shaker Square Beverages*,[44] a servant was injured when a bottle of Black Horse ale exploded. The court held that the bottle was a dangerous instrumentality, that the war-

39. "Since the Code does not deal with manufacturer's liability, its drafters apparently concluded upon an analysis of the interests that manufacturer's liability is socially less necessary than the extension of dealer's liability to the buyer's family." *Implied Warranties, op. cit. supra* note 27, at 631. The former has been referred to as the vertical and the latter as the horizontal line of extension of liability. Del Duca, *Extension of Warranty Protection Under Section* 2-318, UNIFORM COMMERCIAL CODE CO-ORDINATOR ANNOTATED 419-21 (1963).

40. *Supra* note 2, at 612-13, 187 A.2d at 577. For the meanings of the terms "family" and "household" the court in *Hochgertel* looks to the cases of Way Estate, 379 Pa. 421, 109 A.2d 164 (1954) and Shank Estate, 399 Pa. 656, 161 A.2d 47 (1960); the former dealt with the construction of an alleged family agreement and the latter with whether certain property was household property and therefore entitled to an exemption.

This court had refused to pass on the question of whether an employee was included within the class of persons to whom warranty protection was extended by § 2-318 in Childs v. Austin Supply Co., 408 Pa. 403, 184 A.2d 250 (1962).

41. *Id.* at 614, 187 A.2d at 577. The court cites Altieri v. Allentown Retirement Bd., 368 Pa. 176, 81 A.2d 884 (1951), in which a statutory construction act was cited for the rule of strict construction of the statute there involved.

42. PA. STAT. ANN. tit. 12A, § 2-318, comment 2 (1954).

43. See Annot., 75 A.L.R.2d 39 (1961).

44. 64 Ohio L. Abs. 200, 102 N.E.2d 281 (1951).

ranty of merchantable quality was breached, and that an action could be brought against the retailer. In the case of *Petersen v. Lamb Rubber Co.*,[45] an employee was injured when a grinding wheel bought by his employer disintegrated. He was allowed to recover on breach of warranty theories against the manufacturer because the court found that his successive right to use the wheel fulfilled the privity requirement. Perhaps both these cases require a finding of dangerous instrumentality before the requirement is relaxed.[46] It must be conceded that, notwithstanding the opinion of the court in the *Mahoney* case, some valid doubt as to whether a bottle is a dangerous instrumentality may well exist.

The Connecticut Supreme Court construed an almost identical statute the same way the Pennsylvania Supreme Court construed section 2-318.[47] A college cook suffered personal injuries through the use of some soap purchased by her employer. The court refused to find that the cook was a member of the household of the purchaser, and relied heavily on the fact that the legislature could have chosen much more suitable wording to extend warranty protection to such persons had it wished to do so. One wonders if, because of commonly accepted strict-construction principles, recovery will be more limited in jurisdictions which have a limited statutory extension of protection. That conventional kind of thinking may have been a factor moving the *Hochgertel* court to deny warranty protection to an employee.

Why is it important that the plaintiff is denied warranty relief since there is always the possibility of a suit in negligence? One authority has enumerated the following reasons: (1) plaintiffs often are a considerable distance from production lines and therefore encounter difficulties of proof (the effects of this disadvantage can be alleviated by application of the *res ipsa loquitur* doctrine); (2) often the conduits in the merchandising chain are wholly free of negligence so there is no cause of action against them; (3) a shorter statute of limitations may be provided for the tort action.[48] Dean Prosser, on the other hand, is of the view that limiting the plaintiff to his remedy in tort occasions him little or no hardship.

> [A]n honest estimate might very well be that there is not one case in a hundred in which strict liability would result in recovery where negligence does not. . . .
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> . . . . [I]n every jurisdiction . . . the doctrine of res ipsa loquitur, or . . . its practical equivalent . . . gives rise to a permissible infer-

45. 5 Cal. Rptr. 863, 353 P.2d 575 (1960). *But see* Collum v. Pope & Talbot, Inc., 135 Cal. App. 2d 653, 288 P.2d 75 (1955).

46. Note, *Implied Warranties: Modification of the Requirement of Privity of Contract in California*, 34 So. CAL. L. REV. 98, 99 (1960).

47. Duart v. Axton-Cross, 19 Conn. Supp. 188, 110 A.2d 647 (1954).

48. Del Duca, *op. cit. supra* note 39, at 416.

> ence of the defendant's negligence, which gets the plaintiff to the jury. And in cases against manufacturers, once the cause of the harm is laid at their doorstep, a jury verdict for the defendant on the negligence issue is virtually unknown.[49]

Despite the strong view above advanced one cannot help but be a little uneasy about the adequacy of the negligence remedy. Although that one is always available, plaintiffs continue to battle for the remedy resting on breach of warranty.

The *Hochgertel* case, though, is of the view that the plaintiff's remedy in trespass is perfectly adequate, and points out[50] that the regulations as to proof set out in *Loch v. Confair*[51] will govern the subsequent disposition of the case. Concerning the subject that court said,

> Plaintiffs having testified to the manner in which the accident occurred, the burden should then rest upon the defendant A. & P. Company to show that after the bottle came into its possession it was not subjected to any mishandling or to any unusual atmospheric or temperature changes. The duty would then devolve upon the Beverage Company to establish that it conducted its operations with due care and according to the usual and proper methods generally employed in the bottling industry.[52]

This manner of applying the *res ipsa loquitur* doctrine has been criticized. Primarily the criticism rests on the ground that there are too many causes other than the defendant's negligence which could explain the mishap.[53] It has been said by experts that it is virtually impossible for a bottle to explode without impact.[54] If this were accepted as true it would reduce the likelihood of the manufacturer being responsible for the defect.

Some authorities are of the view that the courts even through the application of negligence principles are imposing something close to strict liability in the exploding bottle situation.[55] The courts have justified their doing so.

> It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products

49. Prosser, *op. cit. supra* note 23, at 1114-15.

50. *Supra* note 2, at 616, 187 A.2d at 578.

51. 372 Pa. 212, 93 A.2d 451 (1953).

52. *Id.* at 217, 93 A.2d at 454. For a general consideration of the manner of applying *res ipsa loquitur* in these cases, see Fricke, *op. cit. supra* note 29, at 34.

53. Possible causes of exploding bottles include such occurrences as sudden changes in temperature causing unequal expansion of different parts of the glass, overcharging of gas, defectively manufactured bottles, inadequate system of inspection for defects, excessive shaking on a hot day, and mishandling in transportation weakening the fabric of the bottle. *Id.* at 29.

54. *Id.* at 30.

55. *Id.* at 28.

> nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market.[56]

Reduce the hazard and spread the risk[57] are the arguments in support of strict liability. Arguments can be advanced in support of the court's decision in *Hochgertel.* Why should this individual have contract protection if he did not pay for it? Why, in any event, does he need it, in view of the generous application the Pennsylvania court gives *res ipsa loquitur*? But the law of the future will undoubtedly impose strict liability on manufacturers of consumers' goods. Perhaps the swiftest route to this destination is via the application of warranty principles.

MELVIN DILDINE

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56. *Supra* note 24, at 462, 150 P.2d at 440-41 (concurring opinion).

57. Dean Prosser feels that the risk-spreading argument is entitled to the most respect. Prosser, *op. cit. supra* note 22, at 1120.