RECENT ENGLISH DECISIONS.

In the Court of Exchequer—November, 1861.

EMERTON *vs.* MATHEWS.[1]

A butcher purchased a carcase of beef exposed for sale in Newgate market, of a meat salesman there, without any express warranty of its soundness. Upon the meat being cooked, it was discovered to be unfit for human food, and returned. The defect did not appear when it was raw, and there was no evidence that defendant knew, or had any reason to suspect, that the beef was otherwise than good and wholesome meat, fit for human food:

Held, that there was no implied warranty in such case, and, as there was no proof of any express warranty, the plaintiff could not recover; that no action for deceit would lie, as there did not appear, on the part of the defendant, to be fraud.

This was an action by a butcher against a meat salesman (who is a person that sells on commission the meat consigned to him by his employers,) for a breach of an implied warranty that certain meat exposed by him in Newgate market for sale, was then good and fit for human food. It appeared that on the 20th October the plaintiff, a butcher, bought of the defendant, a meat salesman, 60 stone of beef, at 2*s.* 6*d.* a stone, the meat being at the time publicly exposed for sale in Newgate market. It had not then the appearance of being bad or unfit for human food. The plaintiff took it away, and in about two hours afterwards cut up part of it and sold it to his customers. On cooking it, it was found to be very offensive, both to the taste and smell, and was represented as like the meat of an animal that had been lately physicked, and altogether unfit for human food. The plaintiff, on hearing this, returned the residue to the defendant, who sold it as refuse for 6*d.* a stone.

The declaration stated that the defendant warranted certain meat to be fit for human food, and sold the same to the plaintiff, whereas it was not fit for human food, whereby the plaintiff lost the money he paid to the defendant for it, and the profit he would have made by selling the same to his customers, and was injured

[1] From 5 Law Times, N. S., p. 681.

and damaged in his character of a butcher, and put to expense in returning the said meat to the defendant.

Pleas: 1. Denying the warranty. 2. That it was unfit for human food at the time of the alleged warranty.

The cause was tried before the Common Sergeant, in the Lord Mayor's Court, in London, when, as no express warranty was proved, he directed a verdict to be entered for the plaintiff for £8, reserving leave to the defendant to move to set that verdict aside and enter a nonsuit, with liberty to the plaintiff to amend the declaration if the court above should be of opinion that a right of action existed upon the facts of the case, and a rule *nisi* having been obtained,

J. C. F. S. Day showed cause. There was no express warranty with this meat when it was sold, nor was there any evidence that the defendant, at the time of sale, knew it was unfit for human food; but in every sale of meat, the meat being exposed for sale in a public market, intended for, and known as intended for, human food, there is a warranty *implied* that it is sound and fit for human food. The plaintiff being a butcher makes no difference, and the public should be protected. At all events, the plaintiff would be entitled to maintain an action upon the case without proving fraud as against the defendant. The Legislature has, upon several occasions, made the sale of unwholesome provisions a criminal offence; and such a sale, whether it involves a warranty of soundness or not, express or implied, is a nullity, and the purchase-money may be recovered back in an action for money had and received. If the court should be of that opinion, the declaration is, by leave reserved at the trial, to be amended accordingly. (The Pillory and Tumbril Act, 1266; 1 Stat. at Large, 51 Hen. 3, stat. 6, s. 3; the Bakers' and Brewers' Act, temp. inc., 1 Stat. at Large, 11 & 12 Vict., c. 107, s. 3; and the 14 & 15 Vict., c. 91, s. 12. See, also, "Action of Deceit," 11 Edw. 4, p. 6; Brief de Deceit sur le Cas, 9 Hen. 6, p. 53; 4 Inst. 261; *Roswell* vs. *Vaughan*, Cro. Jac. 196: and *Burnby* vs. *Bollett*, 16 W. & M. 644, were cited.)

Keane, contra, in support of the rule. It has been argued that an action for money had and received would lie, because the con-

tract is illegal and void; that there has been a failure of consideration, and therefore it is void *ab initio*. But the very essence of that offence would be, a guilty knowledge on the part of the defendant, and here none is proved, nor could be proved, for in truth none existed. The defendant believed, when he sold the meat to the plaintiff, that it was perfectly sound, and could then no more see it as unfit for human food than the plaintiff. The duty of seeing that meat sold is sound, is only laid upon a person who must have the opportunity of knowing whether it be sound or no. This is shown by the use of the words "marcellarii" and "carnifices," as opposed to "carnarii." How could a person be convicted under the criminal statutes that have been referred to, for selling unwholesome provisions, without showing the person charged to have a guilty knowledge of the offence? Suppose the action to have been brought for deceit, it could not be supported upon the facts of this case, because the very gist of it would be a *scienter*, and it is clear no *scienter* could be proved. The subject matter was discussed in *Burnby* vs. *Bollett*, but the point now raised was not decided. So far as that case goes, it is in favor of the defendant here. *Cur. adv. vult.*

Jan. 14.—POLLOCK, C. B., delivered judgment. This case was argued last term before my brothers Martin, Bramwell, and myself, on a point reserved by the Common Sergeant. It was an action upon an alleged warranty that a carcase of beef, sold by the defendant to the plaintiff, was fit for human food. The evidence proved that the plaintiff was a butcher, or retailer of meat, and the defendant was a salesman in Newgate market, within the city of London. A salesman is a person who sells, on commission, meat consigned to him by his employers. The carcase in question had been consigned to him for sale in the usual course of business. It was publicly exposed for sale in Newgate market; it looked bright to the eye and appeared to be good meat. The plaintiff saw it and bought it, believing it to be so. It was taken to the shop and cut up into several joints, and retailed to the customers. On being cooked, it became black, and had a very bitter taste, and it must be taken as

a fact in the case, that it was not fit for human food. The defect, however, was such that it could not be detected so long as the meat was raw, and it appeared only on its undergoing the process of cooking. There was no evidence that the defendant knew, or had the means of knowing, or any reason to suspect that the meat in question was not good, wholesome meat, fit for human food. The plaintiff bought on his own inspection, with no actual warranty, nor was anything said about the quality. These were the facts, as proved at the trial. The learned counsel for the defendant objected that there was no evidence of any warranty, and it was agreed by the counsel on both sides that there was no fraud on the part of the defendant, and no knowledge of any defect. A verdict by consent was entered for the plaintiff, with leave reserved to the defendant by the learned Common Sergeant, to enter a nonsuit. The plaintiff was to be at liberty to amend the declaration in any way he thought fit, if the court should be of opinion that any cause of action existed under the circumstances. The questions arising in the case are, first, is the count on the warranty sustained? and if not, secondly, can the count for money had and received be made available? No action for deceit was suggested, because, it being admitted that there was no fraud, and that the defendant acted *bona fide*, obviously no such action could be maintained. On the first point, as nothing passed at the time of sale about the quality of the meat, the question is, whether there is by law a warranty, under the circumstances of this case, that the carcase sold by the defendant to the plaintiff was fit for human food, and was free from any such defect as it turned out to have. The undoubted general law is, that in the absence of all fraud as to the specific article sold, the buyer having an opportunity to examine it, and selecting it, the rule of *caveat emptor* applies. *Chater* vs. *Hopkins*, 4 Mau. & S. 399; *Parkins* vs. *Lee*, 2 East, 314; *Morley* vs. *Attenborough*, 3 East, 500. And the plaintiff has to establish that in the case of a salesman dealing with a retail buyer, there is an exception to the general rule, and that there is an implied warranty that the meat is fit for the purpose for which, in all probability, it was bought. There was no evidence as to the time when the busi-

ness of meat salesmen commenced in London. It is, comparatively speaking, of modern date. At present it is very considerable, and since the introduction of railways large supplies of slaughtered meat arrive from the country to be disposed of by salesmen, the nature of whose occupation is well known. We have taken time to consider our judgment, because it was contended, on the argument, that in all cases of the sale of an article to be used as food for man, the law implied a warranty that it was fit for the purpose. Another ground was, that it was penal to expose meat for sale that was unfit for human food; and in support of this view, our attention was called to the statutes 51 Hen. 3 and Edw. 4, not printed in the statute book, but referred to in the 4th Inst., p. 261; also to a more recent act of Parliament, 14 & 15 Vict., c. 91, (local and personal,) called the City of London Sewers Act, passed in 1851; and it was argued that, the contract being illegal, the money might be recovered back, as a count might be framed on the statutes. Any legal point which may in the remotest degree bear on the subject of health and the general safety of the community, is deserving of the fullest consideration. Having given that consideration, we are of opinion that there is no case that at all governs the present, and none of the cases cited at the bar decide this case, though in *Burnby* vs. *Bollett*, 16 M. & W. 644, all the law is examined and collected, and the matter very much discussed, that a salesman offering for sale a carcase with a defect, of which he was not only ignorant, but had not the means of knowing of the defect being latent, he is not liable to any penalty, and does not, as a matter of law, imply a warranty that the carcase is fit for human food, and is not bound to return the price of it, should it turn out not to be fit for sale, and we think that the counts suggested would be bad on demurrer. The result, therefore, is, that the rule to enter a nonsuit must be made absolute.

Rule absolute.