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NOTES

PERMISSIBLE CONTRACTS IN RESTRAINT OF TRADE.

A and B were non-competing telephone companies occupying the same field. Each desired to extend its activity through the territory occupied by the other and to accomplish this they entered into an agreement that each should build to a common point and that each should use the other's line. They mutually contracted not to compete with each other, that neither would compete with or take subscribers in territory occupied by the other, and that neither would enter into any other contract impairing any of the privileges and advantages acquired by the contract between the two companies. *Held* that this was not a contract in restraint of trade contrary to the common law, *Wayne Co.* v. *Ontario Co.*, 112 *N. Y. Sup.* 424.

The view that the law has taken in regard to contracts in restraint of trade has been gradually varied as commercial conditions have changed. In 1415 any contract in restraint of trade appears to have been void,[1] but by 1613 a partial restraint was permitted.[2] In 1711, in the leading early case on the subject, the doctrine was laid down that there could be a restraint unlimited as to time though it must be limited as to space.[3] The reason of the rule was that it was necessary in certain cases to allow such a contract in order to give persons the legitimate fruits of their toil, such as to allow one to sell the good will of a business, which would have been impossible had the vendor been prevented from binding himself not to engage in the same trade; and in order to facilitate the carrying on of certain business relations, such as agencies and apprenticeships, which could not have been carried on unless the agent or apprentice had been permitted to bind himself not to use his principal's or master's trade secrets after the termination of the relation.[4] The limitation as to space was added because it was thought that a contrary doctrine would cause the expatriation of the convenantor, he being considered unable to carry on another trade, and further because it was not necessary for the protection of the covenantee.[5]

The final test, however, was laid down to be one of reasonableness with regard to (1) the protection of the covenantee, and (2) any injury the restraint might do the public.[6] The legal reason given by Fry, J., for the change of test is that if you adhere to the rule making all contracts in restraint of trade over unlimited space bad, you are restraining those which are reasonable as well as those which are unreasonable, a result which no one can desire.[7] The political and economic causes of the change were that owing to modern conditions there was no danger of expatriation,[8] and that because of the shrinking in size of the commercial world the protection of the covenantee demanded that the restraint be more extensive than formerly.[8]

The rule that the contract must be reasonable with regard to the covenantee's protection without injury to the public shows that the main object of the contract must be the protection of

[1] Wald's Pollock on Contracts, Third Ed., by Sam'l Williston, 471.
[2] *Rogers* v. *Parry*, Bulstrode, 136.
[3] *Mitchell* v. *Reynolds*, 1 P. Wins. 181.
[4] *U. S.* v. *Addystone*, 29 C. C. A. 141 (1898), at p. 150.
[5] *Roussilon* v. *Roussilon*, L. R. 14, Ch. D. 351 (1880), per *Fry, J.*
[6] *Roussilon* v. *Roussilon*, L. R., 14 Ch. D. 351 (1880), at pp. 366-7.
[7] *Lee Herreshoff* v. *Boutineau*, 17 R. I. 3 (1890), at p. 6.
[8] *Lee Herreshoff* v. *Boutineau*, 17 R. I. 3 (1890), at p. 7.

the covenantee and the restraint must be ancillary, and that where this is the case the restraint is permissible.[9] It has been held, however, where the main object was the protection of the covenantee in his purchase of the good will of a business, that the contract was void as tending to a monopoly.[10]

The principal case is well within the rule. Each company virtually gave its lines over to the other to use as its agent and necessarily had to protect itself from misuse of the property by the agent—the main object was protection; and the public was not injured, especially as the companies were non-competing, but its convenience was enhanced by the contract.

May Damages be Recovered by a Non-Resident Alien for the Death of a Son?

In the dawn of English law there prevailed a notion that they, who had an interest in the life of a person, were entitled to compensation from him who wrongfully caused his death. The reparaton was known as *weregild,* and existed under the early Saxon laws.[1] When the forfeiture of goods to the king followed all homicide, the individual, seeing that no property remained from which he might satisfy his right, abandoned it. Thus the enforcement of *weregild* disappeared from the English law.[2] The action of an individual, on the death of another was recognized, without the pecuniary relief in the appeal of murder as late as 1819,[3] when the statute of 59 George III abolished this procedure. However vigorous this idea of the individual right persisted, the maxim of *actio personalis moritur cum persona* crept into the law at an early date and was invoked to prevent recovery for the death of a person.[4] Not until Lord Campbell's Act was this relief given.[5] Most American jurisdictions have passed statutes similar in their provisions to the English act,[6] allowing recovery by the kin of the deced-

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[9] *U. S.* v. *Addystone,* 29 C. C. A. 141 (1898).

[10] *Lupkin Co.* v. *Fringeli,* 57 Ohio St. 596 (1898).

[1] Blackstone Commentaries, 188.

[2] *Shields* v. *Yonge,* 15 Ga. 349 (1854).

[3] *Ashford* v. *Thornton,* 1 Barn. and Ald. 405 (1818).

[4] *Higgins* v. *Butcher,* 1 Yel. 89 (1606); *Carey* v. *Railroad Co.,* 1 Cush. (Mass.), 1848.

[5] 9 and 10 Vict., c. 93 (1846).

[6] Mass. Stat. 1898 c, 535; Penna., Apr. 15, 1851, P. L. 675, sec. 22.

ent within certain degrees as husband, widow, children or parents.[7]

The question of whether a non-resident alien may sue under these statutes has arisen. Two recent cases have passed judgment upon this question. In *Fulco* v. *Schuylkill Stone Company,*[8] the plaintiff was a subject of the Kingdom of Italy and sought recovery for the death of her son whch occurred in Pennsylvania. The Court followed the interpretation placed by the courts [9] of Pennsylvania upon their own act and denied that the scope of the act included non-resident foreigners. The treaty of Feb. 26, 1871,[10] which gave the right to Italian citizens to resort to the courts to maintain and defend their rights as freely as natives, was held to apply only to Italians resident in this country,[11] and not in the slightest degree to vary the decision of the Court in its interpretation of the Pennsylvania statute. The reasoning adopted by the Wisconsin [12] and Pennsylvania courts, which seem to be alone in their stand is: first, that their laws have no intrinsic force *proprio vigore* extra territorially; secondly, that statutes apply generally only to those who owe obedience to the legislature which enacts them and whose interest it is their duty to protect; and thirdly, it is usually required to grant or concede rights to aliens to make express mention of them. In *Mahoning* v. *Iron and Steel Co.*,[13] following the courts of Colorado,[14] whose statute was in question a diametrically opposite decision, was reached. At least a dozen jurisdictions have reached a like conclusion.[15] The English courts agreed with the Pennsylvania interpretation, when the question was first offered for their consideration.[16] A later case, *Davidson* v. *Hill,*[17] has taken a clear dissent from the earlier case refusing to follow it. It would therefore seem that such courts as rely upon the early English doctrine are weakened to a great degree.

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[7] Penna., Apr. 26, 1855 P. L. 309.

[8] 163 Fed., 124 (1908).

[9] *Deni* v. *Railroad,* 181 Pa. 525 (1897): *Maiorano* v. *Baltimore R. R.,* 216 Pa. (1907).

[10] 17 Stat. 845.

[11] Article 23.

[12] *McMillan* v. *Spider Lake S. M. Co.,* 115 Wis. 332.

[13] 163 Fed. 827 (1908).

[14] *Hayes* v. *Williams,* 17 Colo. 465 (1892).

[15] See *Patek* v. *American Co.,* 154 Feb. 1901 (1907), for an array of cases.

[16] *Adams* v. *British Steamship Co.,* 2 Q. B. (1898), 430.

[17] 2 K. B. [1901], 606.

The view of the scope of a statute embracing the provisions of Lord Campbell's Act will depend largely upon the path taken in approaching the problem. If we regard the object of the act punitive then the plausibility of including a non-resident alien is self evident in order to enforce greater efficiency in the protection of human life. This seems to have been the thought in Mr. Justice Holmes' mind in affirming the Massachusetts court [18] when he said, "It is primarily a penalty for the protection of the life of a workman in this state." By a parity of reasoning a Canadian was allowed recovery in Alabama [19] under an act to suppress murder and lynching. Other decisions under acts to augment the safety of mining operations give this right to a non-resident alien.[20]

If we consider the statute as granting a benefit to the relation of the deceased within certain defined degrees, the question of its extra territorial power arises. The Pennsylvania courts predicate their conclusion on the fact that a non-resident debtor is not entitled to the benefits of their exemption laws.[21]

The language of the various statutes is broad enough to cover the non-resident alien, but it is incumbent upon each court to decide the object of its own act. If we take a retrospective view of the whole matter, may we not say that these statutes grant no new right, but simply remove the bar which has crept into the law when the *weregild* ceased to be pursued by the individual, and it was then thoughtlessly said that the common law supports no action on death? If we answer this in the affirmative, only one logical position can be assumed, viz.: that of the majority as represented by *Hahoning Co.* v. *Blomfelt.*[22]

The Right of a Third Party Claimant to Enjoin an Execution Sale.

In Pennsylvania it has long been the practice to allow a creditor to sell on execution against the lands of the debtor, any title alleged to be in him, leaving the purchaser of such title to try the validity of it afterwards in an action of ejectment. In the recent case of *Mantz* v. *Kistler et al.* (70 Atlantic Rep. 545,

[18] *Mulhall* v. *Fallon,* 54 L. R. A. 934 (1905).
[19] *Luke* v. *Calhoun,* 52 Ala. 115 (1875).
[20] *Kelleyville* v. *Petrytis,* 195 Ill. 215 (1902).
[21] Collum's Appeal, 2 Penny. 130 (1882).
[22] 163 Fed. 827 (1908).

decided in the Supreme Court of Pennsylvania, May 4, 1908), it was held that a defendant in execution cannot enjoin, by bill in equity, a sheriff's sale of his property, on the ground that he is not the defendant against whom judgment had been obtained, but that another person of similar name is the defendant. By this decision, the proposition is affirmed that a court of equity has no jurisdiction in such a case, and the present practice sustained, although criticized by Mr. Chief Justice Mitchell, who delivered the opinion of the Court. "It is not," says the Chief Justice, "the best system, being a makeshift, in the absence of a court of chancery, for the administration of equitable principles under the forms furnished by the common law. The remedy in equity as administered in some jurisdictions, notably our neighboring state of New Jersey, is very much superior. There the rights of parties are fought out and adjusted in advance of a sale, so that every claimant or outside purchaser may bid at the sale with exact knowledge of what title will pass, and what disposition will be made of the proceeds; but the other practice has been long established here, and is only departed from in very clear cases."

In view of the adverse criticism of the Chief Justice of the State, it is interesting to note how the practice apparently grew up, and to consider the status of equity jurisdiction in Pennsylvania. In this State, lands, with certain modificatons, are chattels for the payment of debts.[1] Under the Act of 1705[2] the lands of debtors were made liable to executon, the words of the act embracing all possible titles. By a later act,[3] the right to levy on and sell the debtor's real estate was affirmed, and a system of procedure established by means of which this might be done. And it has always been settled in Pennsylvania that a purchaser at sheriff's sale takes such title as the debtor had at the time of judgment.[4]

The courts in Pennsylvania had practically no equity jurisdiction until 1836. Certain specific equity powers were conferred on the Courts of Common Pleas by an Act of Assembly passed in that year.[5] Under this Act, the courts of Philadelphia County were given greater powers than those of the other counties, although by a later act,[6] the courts in the other counties were clothed with the same equity jurisdiction as possessed by those in Philadelphia. It was provided that the

[1] *Cowden* v. *Brady*, 8 S. & R. 508.

[2] 1 Smith's Laws, 57.

[3] Act of June 16, 1836, P. L. 755, sec. 43.

[4] *Fehley* v. *Barr*, 66 Pa. 196.

[5] Act of June 16, 1836, P. L. 784, sec. 13.

practice in equity conform to that of the Supreme Court of the United States.[7] None of the acts expressly conferred jurisdiction on the courts in cases of *quia timet* or to remove cloud on title to real estate, but the courts assumed that they were empowered to act in such cases under a clause giving jurisdiction in cases of fraud, regarding "a pretended and colorable claim as a fraud upon the real owner." [8] And it would be but a logical step to extend the jurisdiction to preventing the raising of a cloud on title. There is no doubt but that the sale in *Mantz* v. *Kistler* (*supra*), if consummated, would be a cloud on the title of the owner of the land. And it is well settled that the jurisdiction of equity lies to prevent the raising of a cloud on title as well as to remove one already in existence.[9]

The courts have, however, clung to the old practice, departing from it only so far as to grant a bill in equity to enjoin the levy and sale of a wife's real estate by a creditor of her husband's, on an execution against him, where the wife's right to the land is clearly established.[10] Where there is a dispute as to the wife's title, equity will not restrain the execution and sale thereunder.[11] It would seem, however, that even if the present practice were to be considered as justifiable before the courts had equity jurisdiction, after this was conferred so as to extend to a case like *Mantz* v. *Kistler,* the courts should have administered equitable principles under equitable forms, and the old practice should have been abrogated as no longer necessary. Had this been done, the question of title to lands seized in execution would be determined before the sale under execution, and, not only would the real owner of the land seized for another's debt be relieved from hardship, but in cases where there was no dispute as to title involved, bidders would know just what was to be sold, and would bid understandingly, so that, whereas, now, a property is sold at a sheriff's sale at a great sacrifice, the amount realized from the sale would then more nearly approach the real value of the realty, thus benefitting both debtor and creditor. It may well be that the courts at this day do not feel at liberty to remedy the defect, and it is therefore submitted that the practice now in vogue should be changed by legislative enactment and the practice prevailing in

[6] Act of February 14, 1854, P. L. 39, sec. 1.

[7] Act of June 16, 1836, P. L. 784, sec. 13.

[8] Thompson's Appeal, 107 Pa. 559.

[9] Pomeroy's Equity Jurisprudence, vol. 4 (3d Ed.), sec. 1398, note 1, and cases there cited.

[10] Hunter's Appeal, 40 Pa. 195.

[11] Winch's Appeal, 61 Pa. 424.

equity substituted. But even if the courts do not care to go the whole length of restraining the sale when the land is claimed by one other than the debtor, and the title is in dispute, there is no reason why the rule enjoining the sale of a wife's lands, seized on an execution against her husband, but to which she has fully established her title, should not be extended to cases where a stranger to the defendant in the execution fully establishes his rights in the land levied on, and seeks to prevent his land from being sold to satisfy a debt not his own.

Can a Corporation Exist Without Stockholders?

In general there may be said to be two theories concerning the nature of a corporation. (1) That it is a legal entity distinct from the members who compose it, or (2) that it is a collecton or association of natural persons formed for certain legal purposes.

Under the second theory the very definition makes stockholders necessary for corporate existence.

Under the first theory when the legal or artificial person is spoken of, it is simply because the corporation is looked at from one point of view, that is viewing one result of incorporation. To argue that as a result of incorporation there is an entity formed, and then to say that the entity can exist without the component parts of which it is made up would be clearly a fallacy.

A corporation is but an association and it would be a contradiction in terms to speak of an association existing without associates composing it.[1]

In the recent case of *In re Western Branch* v. *Trust Company*,[2] the stockholders of the Western Bank unanimously agreed to increase their capital stock from $200,000 to $500,000. On the same day the board of directors took the necessary steps looking to the subscription for an issuance of this stock. All the original shares of stock were retired and there were issued in their stead new shares. There intervened a short period of time between the retirement of the old issue and the issuing of the new.

It was contended by creditors who sought to have the Bank declared a partnership and the members bankrupt, that during this interval there were no stockholders and consequently the corporation came to an end.

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[1] I Morawetz, Private Corporations, 33.

A statute in the jurisdiction provides, that a corporation shall exist from the moment that the certificate of incorporation is filed with the Secretary of State.

The Court says: "The City Bank of Sherman [the name under which the Western Bank became incorporated] as a corporation was brought into existence by the granting of its charter. Its charter was a franchise right to be exercised by those entitled under the law to exercise it. It existed before there were stockholders so that its existence does not depend upon the existence of technical stockholders."

From the report of the case it is not clear what acts were performed when the old stock was retired and the new stock issued. But there does not seem to be any reason why if all the stockholders agreed to retire their stock with intent that it should be re-issued, they thereby ceased to be stockholders.

One or more of the stockholders, it is conceivable, could surrender their rights in the corporate property to the corporation [3] taking in return merely a promise from the corporation to issue to them at a certain date in the future new shares. In this interval those who surrendered their stock would not have rights which they could enforce against the corporation property either at law or in equity. In this case the persons surrendering their property rights would have given them up to the other stockholders. But if all the stockholders unanimously gave up their rights, taking merely a promise in return, the question arises as to who is now the owner of the corporate property. Surely the answer must be that the associates have not in reality given up their property rights at all. Their certificates of stock may have been destroyed, but they would still be stockholders in the sense that they each had property rights in the corporation property.[4]

But let us assume, as the Court appears to have done, that there were in fact no stockholders during the interval.

The statute in the jurisdiction provides that " the existence of the corporation shall date from the filing of the charter in the office of the Secretary of State." Therefore in some sense it must be admitted that the corporation existed prior to the existence of stockholders. But this existence could only be in name.[5]

It has been held that the acts of the signers of the certificate of incorporation done in the corporate name, have bound the

[2] 163 Federal Rep. 713.

[3] Taylor, Priv. Corp. 136.

[4] *Cattle Co.* v. *Burns,* 82 Texas, 56.

[5] I Morawetz, 33.

corporation when later fully organized. Such a corporation has been held to be capable of holding property,[6] and capable of issuing promissory notes.[7] But on the other hand not capable of being a party to a contract.[8]

The principal case then holds that the existence of a corporation in name alone is sufficient to keep that corporation alive during an interval between the retirement of old stock and the issuance of new, when in that interval there are no stockholders.

IS A COMMUNICATION BY A COMMERCIAL AGENCY PRIVILEGED?

The question as to the liability of a mercantile agency for libel in case of an honest though erroneous expression of opinion was raised in the recent case *Mackintosh* v. *Dunn*, L. R. (1908) App. Cas. 390. An action was brought against the defendant and others who conducted a commercial agency for damages resulting from the publication of two libels which concerned the plaintiffs in respect to their business. The defendant's business was the usual one of commercial agencies, that of obtaining information with reference to the commercial standing and position of persons and of communicating such information confidentially to subscribers to the agency in response to specific and confidential inquiries. The single question presented to the court was whether the occasion on which the admitted libels were published was or was not a privileged one. The House of Lords held the occasion not a privileged one although no carelessness or ill faith was alleged on the part of the defendant company. The Court cited the opinion of Parke, B., in the case of *Toogood* v. *Spyring*[1] as the settled law in regard to the publication of information injurious to the character or business of another: "The law considers such publications as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned. In such cases the occasion prevents the inference of malice. If fairly warranted by any occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society." The Court holds that the underlying principle is "the common

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[6] *Coyote* v. *Ruble*, 8 Ore. 284, 293.

[7] *National Bank* v. *Texas Co.*, 74 Tex. 421, 435.

[8] *Aspen W. & L. Co.* v. *Aspen*, 5 Colo. App. 12, 18.

[1] 1 C. M. & R. 181.

convenience and welfare of society," not the convenience of individuals or the convenience of a class; or as held by Erle, C. J.,[2] "the general interests of society." After having stated that in their opinion the motive of the defendant company in furnishing the information was not a sense of public duty but one of self interest, of a business carried on as other businesses are, in the hope of profit, the Court put the real question in issue: "Is it in the interests of the community, is it for the welfare of society, that the protection which the law throws around communications made in legitimate self-defense, or from a bona fide sense of duty, should be extended to communications made from motives of self-interest, by persons who trade for profit in the characters of other people?" The question is answered by the Court in the negative and the occasion held not a priveleged one, the communication being made from motives of self interest and not made in the general interests of society and from sense of duty.

The utility of commercial agencies of the sort of which the defendant company is a class seems to have been overlooked by the Court. That the utility of such a commercial agency is great can hardly be denied when we conceive the vast place such agencies hold in the commercial world. Neither the employer nor the employee can well dispense with such agencies. The courts in America have never questioned their utility, but on the contrary have always recognized the great impulse which such agencies have given to business. The courts have, however, held with equal consistency that their utility is dependent on their confidential limitations. In general the American courts have held that confidential communications of information to its customers by a commercial agency, bona fide, and without malice or recklessness, are privileged.[3]

Many of the American cases make the question of privilege depend upon the care used in the selection of agents and in the gathering and dissemination of the information.[4] Thus it is consistently held that if the information is given out publicly or is written on printed sheets and sent out to subscribers generally without regard to their interests in the parties named therein the communication is not privileged;[5] but if given in good faith on request of subscribers having a present interest

[2] *Whitely* v. *Adams*, 15 C. B. (N. S.) 392.

[3] *Beardsley* v. *Tappan*, 5 Batchf. 497; *Eber* v. *Dunn*, 12 Fed. 526; *Trunell* v. *Scarlett*, 18 Fed. 214; *Ormsby* v. *Douglas*, 37 N. Y. 477; *State* v. *Lonsdale*, 48 Wis. 348; *King* v. *Patterson*, 49 N. J. Law, 417; *Billings* v. *Russell*, 8 Boston Law Reports (N. S.), 699; *Pollock* v. *Munchner*, 81 Mich. 280; *Mitchell* v. *Bradstreet*, 116 Mo. 226; *Bradstreet* v. *Gill*, 72 Texas, 115.

[4] *Locke* v. *Bradstreet*, 22 Fed. Rep. 771; *Com.* v. *Stacey*, 8 Phila. Rep. 617.

in the person and his business to whom the inqury relates, it is privileged.[3]

It is quite universal law that the giving of confidential communications to a principal by an agent employed to procure information as to the solvency, credit, and standing of another, if given in good faith, is privileged.[6] If one merchant may thus employ his own private agent to seek and communicate such information, what legal objection can there be to a combination or union of two or more in the employment of the same agency? And, as a consequence, if an agent may act for several, he may make the pursuit of such information his occupation, and the question before the House of Lords as to whether the defendant was pursuing the business for gain would not affect the right.[7] The question in the minds of the American court is not whether the informant may have a motive of self-gain, but rather whether or not he acts carefully and honestly. The greater number of such agencies in the United States possibly accounts for the conflict of opinion between American and English courts. It is hard to see however why the mere fact that an individual or a company realizes compensation for their information should make the communication of that information, under faithful and confidential limitations, not to the interest and welfare of society. Surely a contrary opinion can hardly be held in the light of present commercial conditions.

Transfer of a Right of Action from a Vendor of Chattels to his Vendee.

In *Eshleman* v. *Union Stock Yard Co.*,[1] by a *per curiam* decision, the Court sustained the ruling of the lower court refusing recovery from the defendant, the owner of public stockyards, for the death of certain cattle, due to Texas fever alleged to have been contracted through negligence, in the pens of the defendant by cattle owned by the plaintiff's vendor and by them communicated to other cattle of the plaintiff which died. It was held that, even assuming that the defendant knew of the presence of "ticks" in his pens and that through negligence the disease had been contracted by the cattle there, yet no right of action for negligence could pass through the vendor to the plaintiff, the vendee.

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[5] *Sunderland* v. *Bradstreet*, 46 N. Y. 188; *Taylor* v. *Church*, 4 Seld. 452.

[6] *Washburn* v. *Cook*, 3 Denio, 110.

[7] *Ormsby* v. *Douglas*, 37 N. Y. 477.

[1] 222 Pa. 20 (1908).

The decision appears proper upon the facts proved and the law announced has no discovered decision against it nor any decision definitely to support the above *dicta.* If a right of action had accrued to the vendor, his mere sale of the cattle would not have transferred that right to his vendee. Such right could have passed only by sufficient assignment or descent.[2] It is perhaps deciding the point by an assumption in saying a right of action had accrued to the vendor and so none could accrue to his vendee.

The reasoning in the old cases of seduction,[3] which appears most nearly analogous to the facts in question, should not be extended into the general law of tort. The modern tendency is to break down those barriers which prevent recovery by one who has been injured directly or consequentially, yet proximately, through the negligence or default of another. He, who was at fault, should repay the injury of another without fault, and refined reasoning should not bar.

It is now well established that where one knowingly or fraudulently sells an article imminently dangerous[4] to human life, he is liable to any subsequent vendee or other who is injured thereby while not at fault. His liability for negligence or deliberate act to his vendee might be based on contract yet others may recover because of breach of duty to the public generally.[5] Knowledge of such condition must generally be proven. So one who sells a folding bed knowing of its dangerous condition is liable to a third person injured;[6] or he who knowingly sells a horse diseased with glanders is liable for the death of an attendant.[7] So also where the contract of sale is declared simply as an inducement but the cause of action is based not upon the contract but upon the injury received by a party contemplated in the contract through the defendant's negligence, recovery is allowed.[8] Where one labels a drink as harmless and refreshing and through negligence particles of glass are in the bottles sold, the person injured has a cause of action though knowledge be not proven.[9]

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[2] *North* v. *Turner,* 9 S. & R. 244 (1823).

[3] *Blaymire* v. *Haley,* 6 M. & W. 55 (1840); 1 Shear and Red on Neg. 116.

[4] *Standard* v. *Wakefield,* 102 Va. 824 (1904); *Elkins* v. *McKean,* 79 Pa. 493 (1875); 1 Thompson on Negligence 817, *et seq.*

[5] Benjamine on Sales, 431.

[6] *Lewis* v. *Ferry,* 111 Cal. 39 (1896).

[7] *Hartlove* v. *Fox,* 79 Md. 514 (1894).

[8] *George* v. *Skivington,* L. R. 5, Exch. 1 (1869).

[9] *Watson* v. *Augusta Brewing Co.,* 124 Ga. 121 (1905).

Thus it appears that though the law fastens on the vendor no general or public duty arising out of his contract, for a breach of which he can be held liable by those not in privity with him;[10] yet there may be a cause of action to another based upon the breach of duty entirely aside from the terms of the contract. Thus where one railroad company negligently furnishes a defective car to a second company, the first company owes a duty of care to the employees of the second.[11] Whenever one person supplies goods, or machinery or the like for the purpose of their being used by another person under such circumstances that every one of ordinary sense would, if he thought, recognize at once that unless he used ordinary care and skill with regard to the condition of the thing supplied or the mode of supplying it, there will be danger of injury to the person or property of him for whose use the thing is supplied and who is to use it, a duty arises to use ordinary care and skill as to the condition or manner of supplying such thing.[12]

Under the modern economic conditions of rapid change of ownership of chattels, real or personal, the mere fact that the seeds of the resulting injury have been planted in property when owned by one person to develop into an injury when the property is owned by another, should not of itself affect or bar the right of that other to recover from the person whose negligence was the proximate cause thereof. In the principal case, the defendant was bound not only to use due care, but to possess a competent share of skill as one who undertook to perform a public business.[13] The plaintiff was one of the regular customers, a person in contemplation. Had the negligence resulted in the cattle contracting the germs one hour later, after the sale, there would be no doubt of the plaintiff's right to recover. That the plaintiff bought immediately thereafter did not lessen the defendant's fault nor increase the plaintiff's compensation and should not affect the liability or recovery. Even if good legal reasoning could not support the cause of action, sound public policy, in such an imminently dangerous practice, as in the case of sales, should have raised a duty to the public generally and allowed recovery.[14]

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[10] *Davidson* v. *Nichols,* 93 Mass. 518 (1866).

[11] *P. R. R.* v. *Snyder,* 55 Ohio St. 342 (1896).

[12] *Heaven* v. *Pender,* L. R. 11, Q. B. D. 503 (1883).

[13] *Spencer* v. *Campbell,* 9 W. & S. 32 (1845).

[14] *Herrick* v. *Gray,* 65 Ill. 101 (1872); *Grimes* v. *Eddy,* 126 Mo. 168 (1894).