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LEGAL EFFECTS OF SERVING IMPURE FOOD BY A RESTAURANT KEEPER TO HIS GUESTS.

The English courts have held that an innkeeper or a restaurant keeper¹ is not a trader so as to come within the bankrupt laws. In *Crisp v. Pratt*,² the court said that: "an innkeeper does not get his living by buying and selling, for although he buys provisions to be spent in his house, he doth not properly sell it, but utters it at such rates as he thinks reasonable gain, and the guests do not take it at a certain price, but they may have it or refuse it at will."³ Prof. Beale, in his work on Innkeepers (Sec. 169), states the reason for the rule very clearly: "As an innkeeper does not lease his rooms, so he does not sell the food he supplies to the guest. It is his duty to supply such food as the guest needs, and the corresponding right of the guest is to consume the food he needs, and to take no more. Having

¹"The analogy between the two cases of an innkeeper and a victualler is so strong that it cannot be got over." Lord Mansfield in *Saunderson v. Rowles*, 4 Burrows, 2067, 2068.

²Croke, Par. 549.

³To the same effect are *Parker v. Flint*, 12 Mod. 254; *Saunderson v. Rowles*, *supra*; *Newton v. Trigg*, 1 Salk. 110.

finished his meal, he has no right to take food from the tables, even the uneaten portion of food supplied him, nor can he claim a certain portion of food as his own to be handed over to another in case he chooses not to consume it himself. The title to food never passes as a result of an ordinary transaction of supplying food to a guest."

The Supreme Court of Connecticut in the recent case of *Merrill v. Hodson*, 91 Atl. 533, adopted the English rule, holding that a restaurant keeper did not sell the food he supplied to a guest, and therefore he could not be held liable on the theory that there had been a breach of an implied warranty that food so served was wholesome and fit for consumption.⁴ The reasoning of the court accords with the extract from Prof. Beale's work, cited above; the court quotes that section in the opinion.

No case, aside from this one, has apparently ever been based upon an alleged implied warranty of quality by a restaurant keeper. The cases in which restaurant keepers have been sued for the harmful consequences from impure food or drink have all been based upon the negligence of the restaurant keeper.⁵ However, the rule is laid down in *Sheffer v. Willoughby*, 163 Ill. 518, that a restaurant keeper does not impliedly insure the soundness and wholesomeness of food, not manufactured by him, which he furnishes to his patrons.⁶ The same holding in effect is given in *Bigelow v. Maine Central R. R. Co.*, 110 Me. 105. In *Pantanze v. West*, 7 Ala. App. 599, the duty of the restaurant keeper is said to consist in using due care to see that the food is fit for eating purposes. The Massachusetts court in the case of *Crocker v. Baltimore Lunch Co.*, 214 Mass. 177, expressly refused to consider the question of implied warranty, as the complaint was based on negligence. The conclusion, therefore,

⁴The definition of a sale under the Sales Act as adopted by Connecticut, that: "a sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price," *Public Acts of Conn.*, 1907, Ch. 212, Sec. 1, (2), is the same as the common law definition of a sale. Blackstone defines a sale as "a transmutation of property from one man to another in consideration of some price," 2 *Bl. Com.* 446.

⁵*Sheffer v. Willoughby*, 163 Ill. 518, 45 N. E. 253, 34 L. R. A. 464, 54 Am. St. Rep. 483; *Bigelow v. Maine Central R. R. Co.*, 110 Me. 105, 85 Atl. 396, 43 L. R. A. (N. S.) 627; *Crocker v. Baltimore Lunch Co.*, 214 Mass. 177, 100 N. E. 1078; *Pantanze v. West*, 7 Ala. App. 599, 61 So. 42; *Doyle v. Fuerst & Kramer*, 129 La. 838, 56 So. 906, 40 L. R. A. (N. S.) 480, Ann. Cas. 1913 B. 1110.

⁶This is also stated to be the rule in 22 Cyc. 1081.

reached in the Connecticut case that the restaurant keeper cannot be held on the ground of implied warranty is in accord with the sentiment of the American courts where the question has been touched upon.

The premise by which the Connecticut court reaches this conclusion, namely that there is no implied warranty because the act of the restaurant keeper in furnishing food to a guest is not a sale of goods, is apparently not supported by any American decision, although it accords with the English cases as previously stated. This doctrine, moreover, is expressly denied in two American courts. In the case of *Commonwealth v. Miller*, 131 Pa. State, 118, the defendant was prosecuted under a statute prohibiting the sale of oleomargarine. The oleomargarine had been furnished to guests in the defendant's restaurant as part of a meal. In the particular transaction complained of the guests took the oleomargarine away with them. The court said: "That the food furnished to McRay and Spence, or so much of it as they saw fit to appropriate, was sold to them, cannot be reasonably questioned; when it was set before them it was theirs to all intents and purposes, to eat all, or a part, as they chose, subject only to the restaurateur's right to receive the price. It is certain that the oleomargarine composed a part of the meal the price of which was paid, and was embraced in the transaction as an integral part thereof." Of similar effect is the decision by the Massachusetts court in *Commonwealth v. Warren*, 160 Mass. 533, where it was held that if milk is ordered by and delivered to a customer in a hotel as a part of his breakfast, for which he pays a round sum, it is a sale of milk, which, if the milk is "not of good standard quality," will support a prosecution based upon a statute forbidding the sale of such milk.

The rule in these cases that the food and drink which a guest orders at a restaurant is sold to him, seems a more natural conclusion, and one more in accord with every-day experience, than the English rule followed in the Connecticut case that the customer pays for the right to satisfy his appetite by the process of destruction.

THE RIGHT OF INHERITANCE OF FREEDMEN BORN OF SLAVE PARENTS.

It has been recently decided by the United States Supreme Court that the surviving brothers and sisters of a colored freedman dying intestate, who were the children of a born slave and

were themselves born slaves, are not denied the equal protection of the laws, contrary to the fourteenth amendment of the Constitution of the United States, by a decision of a State court construing a code provision preferring the brothers and sisters of an intestate dying without issue over the husband or widow, as applying only to brothers and sisters born free, with the result that the intestate's real property acquired by him while he was a freedman passed to his widow under a section of the code providing that if one dies intestate "leaving no heir at law capable of inheriting the real estate, it shall be inherited by the husband or wife in fee simple."¹

Admitting that the *lex rei sitæ* governs inheritance which is not a natural or absolute right but the creation of statute, can it be said that a law which permits one class of citizens to take as collateral heirs and does not permit another class to do so because, though they are now freedmen with the same rights and privileges of other citizens, they are descendants of sometime slaves, does not discriminate unjustly? Our Supreme Court has said that it does not because a slave had no inheritable blood and, because he had not, a descendant cannot inherit where it is necessary to trace his line of descent through him, except where there is express statutory authority. In other words, that slave ancestry in the law of descent is an algebraic cipher except where there is express statutory provision to the contrary.

Practically the only reason for the rule is given in a North Carolina case cited in the opinion in the case under discussion. There the court said: "While negro slavery prevailed in this State, the laws regulating the descent of estates of inheritance did not apply to slaves. There were no marriages among them recognized by law, and they could neither own nor inherit property. After they were emancipated—became freedmen—it was practically impossible to trace their relationship by blood while they were slaves, with any tolerable degree of certainty. The confused condition of their family ties and relationships, and their circumstances as slaves, rendered it necessary to prescribe by statute who should be the heir at law, and from whom he might inherit."² But the Supreme Court of Florida in the same connection stated: It is a part of the history of the extinct institution of slavery in the southern States that these slave marriages were often had with the approbation of the owners

¹ *Jones vs. Jones*, 34 Supreme Court Reporter, 937.

² *Tucker vs. Bellamy*, 98 N. C. 31, 32.

of the slaves; that the marriage ceremonies were publicly celebrated, often by the ministers of the gospel, and were sanctioned by the churches of the country. * * * The children born of those marriages were regarded as standing upon a different plane to those slave children who were bastards pure and simple."³ At best the question of relationship is one of fact, and if a negro can prove to the satisfaction of the court his line of descent—and there was no question on that score in the case before us—though it pass through slave ancestry, he should be entitled to the same consideration as a native born white person.

In a North Carolina case⁴ in point two brothers born of slave parents had been held entitled to inherit the estate of their father and upon the death of one of them the survivor was held to be his heir, notwithstanding a code provision similar to that in the case here. There may have been some other provision applicable to the case, for the court stated that "the right of inheriting thus conferred," referring to the first code provision mentioned, "does not extend beyond parents and children and the estate of such parents;" and it may be that the fact that the brothers were heirs of their father had some bearing in the matter. These considerations might distinguish the case from the Tennessee case, in which it is cited, but on the face of it it is an authority to the contrary despite the contradictory statement in the opinion. On the whole we feel that the brothers and sisters were entitled to take as collateral heirs and that a decision to that effect, which would have declared the Tennessee statute as construed by the Supreme Court of that State unconstitutional, would have had the support of common sense.

WHAT FACTS ARE NECESSARY TO MAKE A CASE AGAINST AN AUTOMOBILE OWNER?

In a recent case¹ decided by the Supreme Court of Massachusetts it was held that proof that the defendant owned the automobile, and that the chauffeur was his servant, and that he was driving the car at the time of the accident does not make out a *prima facie* case, that the chauffeur, when he ran into the plaintiff's intestate, was driving the car for a purpose within the scope of his employment.

³ *Williams v. Kimball*, 35 Fla. 49.

⁴ *Jones v. Haggard*, 108 N. C. 178.

¹ *Hartnett v. Gryzmish*, 105 N. E. (Mass.) 988.

The court did not consider that when these facts were shown an inference arose that the chauffeur was acting within the scope of his employment. This inference was necessary to constitute a *prima facie* case. In failing to give rise to the presumption, it is contended that the Court was in error.

A presumption is a probable inference which our common sense draws from circumstances usually occurring in such cases.² A presumption is an inference of the existence of a certain fact arising from its necessary and usual connection with other facts that are known.³

Courts must decide questions of law on precedent or on principles of justice and reason, when there is no precedent. It is submitted, that as a fact of ordinary experience, it is reasonable to presume in the big majority of cases that when the chauffeur is driving his master's car, accompanied by the master or not, that he is acting within the scope of his employment. In addition, by recognizing this presumption, no injustice would be done to the master. The result would be to charge the master with a fact which the big majority of ordinary and reasonable people would infer from these circumstances. Another result of raising this presumption is to shift the burden of proceeding with the proof from the plaintiff to the defendant to the extent of balancing the scales of evidence and thereby refuting this *prima facie* case. And it is submitted that the defendant is the party upon whom the burden of proceeding with the evidence ought to be. When a servant who is employed for the special purpose of operating an automobile for a master, is found operating it in the usual manner, the presumption naturally arises that he is running the machine in the master's service. If he is not so running it, this fact is peculiarly within the knowledge of the master and the burden should be on him to overthrow this presumption by evidence of which the law presumes he is in possession. It would be a hard rule to require the party complaining of the tortious act to prove by positive proof that the servant was acting within the scope of his employment.⁴

² *Newton v. State*, 21 Fla., 53, 98.

³ *Home Ins. Co. v. Weide*, 78 U. S. 438; *Hilton v. Bender*, 69 N. Y. 75, 82.

⁴ *Long v. Nute*, 123 Mo. App., 204, 209; *Shamp v. Lambert*, 121 S. W. (Mo.) 770; *Edgeworth v. Wood*, 58 N. J. L. 463; *Schuete v. Holliday*, 54 Mich. 73; *Laman v. Hohler*, 122 N. Y. 646; *Knust v. Bullock*, 59 Wash. 141; *Ludgberg v. Barghoorn*, 131 Pac. (Wash.) 1165.

In the case of *Purdy v. Sherman*, 74 Wash. 309, the Court went a step further and held that where it is shown that the wagon and team belonged to the defendant at the time of the injury, that fact establishes *prima facie*, that whoever was driving was doing it for the owner.

The Court relies on *Bourne v. Whitman*, 209 Mass. 155, as an authority for their decision on this point, but the point involved there was whether or not the son was in fact chauffeur for the father and not whether he was acting within the scope of his employment. The relation of master and servant was proved. Also *Reynolds v. Denholm*, 213 Mass. 576, is mentioned. There the defendant employed a chauffeur who took his meals and had his laundry done elsewhere. The master permitted him to use his car to go for his meals and laundry as he found it convenient. While going for his laundry he ran into the plaintiff and injured her. The Court said, "If under these circumstances the jury should find that this use of the machine was assented to by the defendant, then he would be liable." The Court also did not see how as a matter of law they could rule that the jury could not so find. In the principal case, allowing the presumption, it would not preclude the jury from a contrary finding unless the *prima facie* case was not refuted. There are other cases which seem to agree with the principal case but the facts are not analogous.⁵ Many of these cases fail to distinguish between burden of proceeding with the evidence and the burden of proof.

That the rule as suggested is reasonable, based upon common sense, upheld by decisions in other states, and consistent with well-recognized rules in regard to presumptions, are reasons for questioning the soundness of the rule laid down in the principal case.

⁵ *Farber v. Railway*, 116 Mo. 81; *Lotz v. Hanlon*, 217 Pa. 239; see 227 Pa. 448.