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IS THE SUPPLYING OF FOOD IN A RESTAURANT A SALE OR A SERVICE?

A variety of legal problems has arisen from the serving of food in a restaurant. Perhaps the most frequent one concerns the question whether the service of food constitutes in law a sale or a service. This problem has given difficulty in the fields of torts, contracts, criminal law and even in the field of taxation. A comparison of decisions relating to this problem in those fields reveals a considerable conflict and a lack of uniformity.

It appears to be well established that when a patron of a restaurant is made ill from the partaking of food served for his consumption, he has a valid cause of action. But the question immediately arises, is his action one in tort, or is it based on contract? In other words, is the restaurant proprietor's liability for the injury caused by the food based on negligence, or upon an implied warranty that the food is fit for consumption? It can be readily seen that the extent of the liability will depend solely upon whether the supplying of food to patrons is to be considered as a sale of the goods or merely as a service.

In the earlier cases the weight of authority was, in the absence of statute, that one serving food to be consumed on the premises was not an insurer of the fitness and wholesomeness of the food served. Such a one was liable only where there was a failure to exercise reasonable care as to the quality and preparation of the food.

Thus, in the case of Merrill v. Hobson the plaintiff entered the defendant's restaurant and ate what was designated on the bill of fare as "creamed sweet breads." The food caused the plaintiff to become ill. In suing the restaurant keeper, the plaintiff based his claim for damages on the theory that a sale of the food had taken place. But the court held that the true essence of the transaction was a service. This service, said the court, involves the satisfaction of a human need, to which the consumption of food is an essential incident since before the consumption of food title does not pass, and after consumption nothing remains to which the right of property can be said to attach.

However, a number of cases have adopted a view contrary to this weight-of-authority principle of the common law stated above, holding that one who serves food to be consumed upon the premises does impliedly warrant the same is fit and wholesome for human consump-


88 Conn. 314, 91 Atl. 533 (1914).
As an example, in a New York decision, *Temple v. Keeler*, an action was brought to recover damages for injuries alleged to have been suffered by the plaintiff as a result of eating fish in defendant's restaurant. Recovery was permitted upon the theory that a sale had taken place. The court stated that where a customer enters a restaurant, receives, eats and pays for food, the transaction is a purchase of goods. The court further said that under the circumstances the buyer by implication makes known to the vendor the particular purpose for which the article is required and the buyer may assume that he can rely upon the latter's skill and judgment. Consequently, there was an implied warranty that the food was fit for consumption.

Likewise, in decisions under the Uniform Sales Act, the tendency of the courts seems to be, in the majority of cases, to hold the service of food in a restaurant to be a sale rather than a service, as in the case of *Ford v. Waldorf System Inc.* where the plaintiff was suing for damages because of injuries resulting from a piece of wood contained in beans served to him at defendant's restaurant. Here the court held that food supplied to customers at a restaurant is a "sale of goods" and not the mere furnishing of service, and a customer injured thereby can recover in an action based on an implied warranty of quality under the Uniform Sales Act, since the transaction was a sale of goods within the meaning of the Act.

But like the conflict existing under the common law as to this question, there are decisions under the Sales Act contrary to the preceding case, such as the case of *Nisky v. Childs Co.* wherein the court held that a service was performed by defendant when plaintiff was served oysters which resulted in plaintiff's illness, for which she sought damages. The plaintiff had contended that a breach of warranty resulted from the service of the oysters under section 15 of the Sales Act. However the court in this jurisdiction stated that the serving of food cannot be regarded as a sale either at common law or under the Sales Act which, the court stated, is merely declaratory of the common law.

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4 238 N.Y. 344, 144 N.E. 635, 35 A.L.R. 920 (1924).
5 American Uniform Commercial Acts, p. 70; Uniform Sales Act § 15 (1): "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are to be required, and it appears that the buyer relies upon the seller's skill and judgment, there is an implied warranty that the goods shall be reasonably fit for such purpose."
8 Supra, note 5.
The problem has arisen in only a few criminal cases. However, while the courts may be in conflict where the question involves the collection of damages for injuries resulting from consuming improper food in a restaurant, they have agreed that for the purpose of enforcing a criminal statute the consumption of food in a restaurant is a sale.

Thus, in the case of Commonwealth v. Miller the defendant operated a restaurant in which he served oleomargarine with a regular meal as a substitute for butter. As a result he was indicted and convicted under a statute entitled, "An act for the protection of the public health, and to prevent alteration of dairy products, and fraud in the sale thereof." On appeal the conviction was affirmed on the theory that the serving of the oleomargarine was a sale within the meaning of the statute for which the proprietor could be properly indicted and convicted. However, one of the judges dissented on the reasoning that such a transaction of the oleomargarine was not a sale, saying: "If it was the intention of the legislature to prohibit not only the sale of oleomargarine, but also its use as an article of food by the proprietors of eating houses, it was easy to have said so in express terms. I am unable to see how the legal or popular meaning of the word 'sale' will support this judgment. I find nothing in the facts to justify that there was a sale of the oleomargarine."

In the case of State v. Phoenix Hotel Co., a statute prohibited the sale of certain game among which one of the protected species was quail. The defendant was indicted for serving quail, in his hotel dining room, to two of his guests who ate and paid for the same. Upon the trial of the case the defendant's argument was that serving quail in this manner is not exposing it for sale within the meaning of the statute. But the court held that the quail was sold the same as if it had been purchased from a dealer and carried home by the purchaser to be served at his own table. Also in the similar case of State v. Clair the defendant served two patrons with partridges and was indicted under a statute which prohibited the selling of game out of season. It was likewise held that the partridges so served were sold and came within the prohibition of the statute. In another case, Commonwealth v. Warren, the defendant served a breakfast to one Kelly. Included in the breakfast was a glass of milk part of which was taken away and analyzed by a chemist and found to contain less than thirteen per cent of milk solids. An action was brought based upon a statute for the selling of milk not of a standard quality. The defendant requested several rulings, one which was to the effect that there was no sale of the

9 131 Pa. 118, 18 Atl. 938 (1890).
10 157 Ky. 180, 162 S.W. 823 (1914).
12 160 Mass. 533, 36 N.E. 308 (1894).
milk. The ruling was refused, the court saying: "the delivery of milk to the purchaser of a breakfast, as a part of such breakfast, is as much a sale of the milk as if a special price had been put on it, or it had been bought and paid for by itself."

In those states where a sales tax is in effect this problem has been solved by all courts consistently holding that regardless as to what the consumption of food might be for other purposes, it was a sale within the meaning of the Sales Tax Act.

In the case of Pappanastos v. State Tax Commission\(^8\) the plaintiff claimed he was not liable for food and drink served to his customers under the Sales Tax Act. The amount of the tax was to be governed by the gross sales of any tangible personal property whatever. The plaintiff's defense was that in conducting his business there was in fact no sale and consequently the act had no application. The court held that under the common law the furnishing of food at a restaurant is not a sale but merely a service. But, under the Tax Act, the serving of food and drink by a restaurant operator constituted a sale so as to make restaurant operators liable for the tax.

Likewise, in Liggett Drug Co. v. Lee\(^4\) the plaintiff's contention was that gross receipts derived from the operation of lunch and sandwich stands where meals are served, are exempt from the tax on gross sales. The plaintiff insisted that the serving of meals was not a sale and therefore could not be included under the term "gross sales." But the court held that the tax was computable on sales of articles of food and drink dispensed at plaintiff's lunch counter, and the transactions taking place there are beyond question "sales at retail" and come within the Act.

In the similar case of Brevoort Hotel Co. v. Ames,\(^5\) the plaintiff was seeking to enjoin the defendant in the collection of a tax at the rate of two per cent on his gross receipts from the furnishing of food in his hotel. The plaintiff based his case on the fact that the serving of a meal to a patron of a hotel is not a sale within the ordinary meaning of the term. It was held that the serving of the food constituted a transfer of the ownership to the purchaser for the use of consumption, and amounted to a sale under the act, and was subject to the tax imposed.

Not only is there a lack of uniformity among states on the question whether the consumption of food in a restaurant is a sale or service—which we might expect—but there is also no uniformity within certain states. New York, Illinois, and Massachusetts are each consistent in

\(^8\) 235 Ala. 50, 177 So. 158 (1937).
\(^4\) 126 Fla. 359, 171 So. 326 (1937).
\(^5\) 360 Ill. 485, 196 N.E. 461 (1935).
holding that the consumption of food is a sale. The Alabama Court presents an outstanding example of inconsistency within a state. For example, in the case of Greenwood Cafe v. Lovinggood\textsuperscript{16} the court held that in an action for damages the relationship between restaurant keeper and customer is one of service and not of sale. The same court in the case of Pappanastos v. State Tax Commission\textsuperscript{17} held that a like transaction was a sale for the purpose of collecting a sales tax. However, in all cases arising under criminal statutes, the courts are consistent in holding that for the purpose of enforcing the statutes the consumption of food in a restaurant is a sale.

In summation, therefore, it appears to depend to a large extent in which field of law the problem arises as to whether food served in a restaurant will constitute a sale or a service.

\textbf{Matthew Doyle.}

\textsuperscript{16} 197 Ala. 34, 72 So. 345 (1935).
\textsuperscript{17} 235 Ala. 50, 177 So. 158 (1937).