Other judges have preferred to rely solely on legal processes to establish a contractual liability. In *Ward Baking Co. v. Trizzino*[47] the court said in effect that the contract of warranty between the original vendor and his immediate vendee is really one made for the benefit of the ultimate consumer, who may then sue the original vendor under the American rule of contract law permitting the third-party beneficiary to sue the original obligor.

The courts in Pennsylvania limit the application of the breach of warranty theory to those instances where the article sold and prepared by the original vendor is placed in a package which is not to be opened by the intermediate vendor.[48] This apparently takes cognizance of a physical fact to sustain a privity of contract which is essentially a legal relationship. However, it has the merit of giving some remedy in warranty to the consumer in those states which follow the doctrine of *Aronowitz v. F. W. Woolworth Co.*[49] and hold that there is no implied warranty of fitness made by the intermediate vendor in such a situation.

The better rule would seem to be in favor of an absolute liability on the original vendor in view of: (1) the practical difficulty in proving that a certain process in the manufacture of a foodstuff has been conducted negligently, when the processes of manufacture are so complicated that an individual not in the employ of the defendant could have very little knowledge concerning their details; (2) the nature of the use to which food is to be put, demanding the greatest protection available, which can be gained most certainly by the imposition of an absolute liability; (3) the fact that the universal adoption of the "pure food" statutes shows a legislative recognition of a public policy to secure to the people the utmost protection of the public health; and (4) the fact that the jury would still exist as a safeguard to prevent the success of fraudulent suits against a manufacturer by persons not actually injured by his products.

HERBERT K. MOSS, '33.

RECENT EXTENSIONS OF THE RES IPSA LOQUITUR DOCTRINE

It is a well established principle in the Anglo-American legal system that specific negligence must be proved in cases of unintended personal injury in order to attach tort liability to the defendant. It is equally well recognized that the doctrine of *res*

[47] (1928) 27 Ohio App. 475, 161 N. E. 557.

[48] Nock v. Coca-Cola Bottling Works of Pittsburg (1931) 102 Pa. Super. Ct. Rep. 515, 156 Atl. 537.

[49] (1929) 134 Misc. Rep. 272, 236 N. Y. S. 133.

ipsa loquitur—"the thing speaks for itself"—exists to modify the application of this general rule. This latter doctrine, by means of an inference of negligence founded upon general facts, permits the plaintiff to recover under certain circumstances without showing any specific negligent act or omission of the defendant.

Like most principles of the common law the doctrine of *res ipsa loquitur* was applied in actual cases before it was formulated into precise legal terminology. Probably the earliest instance of a ruling which was later explained on the basis of this doctrine was in *Christie v. Griggs*[1] in 1809. In that case the plaintiff, a sailor, had been thrown to the ground and injured when the axle of a coach, on which he had been riding, suddenly broke. He sued the owner of the coach. Only the breaking down of the coach and the injury to the plaintiff were shown. Sir James Mansfield allowed this general proof of negligence, saying:

> I think the plaintiff has made a prima facie case by proving his going on the coach, the accident, and the damage he has suffered. It now lies on the other side to show that the coach was as good a coach as could be made, and the driver was as skillful a driver as could anywhere be found. What other evidence could the plaintiff give? The passengers were probably all sailors like himself;—and how do they know if the coach was well built, or whether the coachman drove skillfully? . . . when the breaking down or overturning of a coach is proved, negligence on the part of the owner is implied. He has always the means to rebut this presumption, if it be unfounded; and it is now incumbent on the defendant to make out,[2] that the damage in this case arose from what the law considers a mere accident.

Here the fact of the plaintiff's ignorance in regard to the coach and the consequent impossibility of his protecting himself by vigilance largely controlled the court's decision. It is extremely doubtful whether this case would meet the tests imposed by later decisions for the application of the *res ipsa* doctrine, since coach axles probably broke frequently on account of flaws in the material even when no one was negligent.

In *Byrne v. Boadle*,[3] decided in 1863, the plaintiff, while passing the warehouse of the defendant was hit and injured by a barrel of flour which fell from a window of the warehouse. Pollock, C. B., said that it was the duty of the defendant to see that barrels

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[1] (1809) 2 Camp. 79, 170 Eng. Repr. 1088.

[2] Cf. comment on the effect of the res ipsa loquitur doctrine on the burden of proof p. 82.

[3] (1863) 2 H. & C. 722, 159 Eng. Repr. 299.

of flour did not roll out of the windows of his warehouse; such an occurrence could not happen without some negligence; and since the plaintiff could not ascertain whether the defendant was negligent or not, the case "beyond all doubt affords prima facie evidence of negligence."

The case most frequently cited as formulating the *res ipsa loquitur* rule is *Scott v. The London & St. Katherine Docks Co.*,[4] which was decided in 1865. Here the plaintiff was injured by being struck by six bags of sugar which fell out of a window of the defendant's warehouse. Erle, C. J., said:

> There must be reasonable evidence of negligence.
> But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.

The first clear statement of the principle in the United States was by the New York Court of Appeals in *Mullen v. St. John*,[5] where the injury was caused by the falling of a wall of the defendant's building. The Court sustained an instruction to the jury wherein it was stated that it is reasonable to presume negligence in the absence of explanation when the cause of the accident is under the control of the defendant and the accident is one which does not ordinarily happen in the case of non-negligent conduct:

> When the plaintiff proved the building fell into the street and injured her, she had made out a case, in the absence of any explanation on the part of the defendant, as buildings do not normally or necessarily fall, and then it is for the jury to say, under all the evidence, whether that explanation, on the part of the defendant, is reasonably made.

As has been well pointed out by Cullen, J., in *Griffen v. Manice*[6] it is not enough to prove the mere occurrence of the accident.

> . . . it is not the injury, but the manner and circumstances of the injury that justify the application of the maxim and the inference of negligence.

From these cases there may be deduced two elements which traditionally must be present to make possible the application

[4] (1865) 3 H. & C. 596, 159 Eng. Repr. 665.
[5] (1874) 57 N. Y. 567.
[6] (1901) 166 N. Y. 188, 59 N. E. 925.

of the *res ipsa loquitur* doctrine.[7] The accident must be such as does not ordinarily happen if there has been no negligence. The thing which caused the injury must have been under the exclusive control of the defendant or his agents and servants. The first of these is decided by observed human experience, but the question as to the type of control required has been a matter for sharp legal debate. It would seem to be necessary that the defendant or his agents and servants have had exclusive right to the physical control of the instrument involved both at the time of the alleged negligence and of the injury. From the exclusiveness of such control and the language used in such early cases as *Christie v. Griggs* some courts have derived the further requirement that the defendant must have had exclusive knowledge of the cause of the injury and hence that if the plaintiff happens to know something about the instrumentality involved, he cannot invoke the doctrine of *res ipsa loquitur*, for then he would have the ability to point out the specific negligence of the plaintiff.[8]

The application of these general principles to particular fact situations causes most of the conflicts among the modern cases. It is true that there are many instances in which the courts do not differ. Typical of the cases to which the doctrine is universally applied are those of injury to passengers arising out of the wrecking or derailment of railroad trains, the courts feeling that thanks to modern safety devices such accidents do not ordinarily happen unless there has been negligence in the maintenance of the track,[9] the upkeep and repair of the train,[10] or the actual operation of the train.[11] The courts are equally unanimous in regard to injuries from falling objects, on the theory that inanimate objects do not usually fall from high places unless they have been put in motion negligently by some human agency or have been carelessly placed in a precarious position.[12] There is similar agreement where the plaintiff has been injured by con-

[7] Pollock on Torts (13th ed. 1929) 463; Salmond on the Law of Torts (7th ed. 1928) 34.

[8] Patton v. Texas & Pacific Ry. Co. (1901) 179 U. S. 658; St. Louis, I. M. & S. Ry. Co. v. De Lambert (1914) 112 Ark. 446, 166 S. W. 544; Mensch v. Pennsylvania Railroad Co. (1892) 150 Pa. St. 598, 25 Atl. 31; note (1917) L. R. A. 1917 E 1; cf. McCloskey v. Koplar (Mo. 1932) 46 S. W. (2d) 557.

[9] Lowery v. Hocking Valley Ry. Co. (C. C. A. 6, 1932) 60 F. (2d) 78.

[10] Rose v. Minneapolis, St. P. & S. S. M. Ry. Co. (1913) 121 Minn. 363, 141 N. W. 487.

[11] Sullivan v. Boston Elevated Ry. Co. (1916) 224 Mass. 405, 112 N. E. 1025.

[12] McCloskey v. Koplar (Mo. 1932) 46 S. W. (2d) 557 (falling radiator in theater); St. Louis Southwestern Ry. Co. v. Armbrust (1915) 121 Ark. 351, 181 S. W. 131 (piece of coal from tender of express train); Khron v. Brock (1887) 144 Mass. 516, 11 N. E. 748 (piece of zinc from roof of building).

tact with an electrically charged wire[13] or by the explosion of chemicals.[14]

However, there are many types of accidents in which the courts have not reached such an accord. In some of these the judges are divided as to what is shown by human experience, in others as to whether the necessary element of control is present.

Explosions of boilers not infrequently destroy the boiler so thoroughly that little information as to the cause of the explosion can be acquired by an examination of the wreckage. Under these circumstances the question whether the plaintiff shall have any real possibility of recovering damages depends upon whether or not the *res ipsa loquitur* doctrine is applicable. It is clear that the control test is satisfied. Those courts which follow the weight of authority take the view that ordinarily boilers do not explode unless the person in charge is negligent in allowing the boiler to operate under too great a head of steam or unless the boiler itself is inherently defective.[15] Other judges think that the doctrine should not be applied because they consider that boilers explode for no apparent reason and that the application of the doctrine would make the owner of the boiler virtually an insurer, since it would be practically impossible to show the real cause of the explosion.[16] Under normal circumstances the defendant has not himself built the boiler and there may well have been hidden defects in its construction which he could not have discovered by any ordinary inspection. However, if the boiler has been in service for some time without trouble and it suddenly explodes, it does seem reasonable to presume that the defendant or his servants have been negligent, since then the most probable cause of

[13] San Juan Light Co. v. Requena (1912) 224 U. S. 89 (excessive current in light socket); Denver Consolidated Electric Co. v. Lawrence (1903) 31 Col. 301, 73 Pac. 39 (excessive current in the wires in plaintiff's house); Hoffmann v. Leavenworth Power Co. (1914) 91 Kan. 450, 138 Pac. 632 (defective street light); Lynch v. Meyersdale Electric Co. (1920) 268 Pa. St. 337, 112 Atl. 58 (defective light socket).

[14] Childs v. Ft. Smith Commission Co. (1919) 139 Ark. 489, 216 S. W. 11 (explosion of an ammonia pipe); Motor Sales and Service Inc. v. Grasselli Chemical Co. (La. App. 1930) 131 So. 623 (drum of sulfuric acid); Krenick v. Thorndike & Hix, Inc. (1916) 224 Mass. 413, 112 N. E. 1025 (bucket of lime).

[15] Kleinman v. Banner Laundry Co. (1921) 150 Minn. 515, 186 N. W. 123; Harriss v. Mangum (1922) 183 N. C. 235, 111 S. E. 177; Galveston, H. & S. A. Ry. Co. v. Perez (Tex. Civ. App. 1916) 182 S. W. 419; note (1923) 23 A. L. R. 484.

[16] Texas & Pacific Ry. Co. v. Barrett (1897) 166 U. S. 617; Bishop v. Brown (1900) 14 Col. App. 535, 61 Pac. 50; Reiss v. New York Steam Co. (1891) 128 N. Y. 103, 28 N. E. 24; Vieth v. Hope Salt & Coal Co. (1902) 51 W. Va. 96, 41 S. E. 187.

the explosion is that the person in charge allowed an excessive steam pressure to be developed.

The conclusions of the courts with reference to the explosions of bottles of soda-water are equally divergent. In *Wheeler v. Laurel Bottling Works*[17] the plaintiff, a restaurant owner, suing the bottler, had his eye put out by the explosion of a bottle of Coca-Cola when he raised the lid of the ice box to secure a bottle for a customer. The Mississippi Supreme Court said:

> Just what caused the explosion . . . is a matter largely of speculation . . . it is possible that when the plaintiff raised the lid of the ice box, the slight jar may have caused the bottles in the melting ice to slip or readjust themselves. It may be that the inrush of the warm air of a June night might have caused a rapid expansion of the glass.

In short the Court thinks there is too much conjecture about the cause of the accident. The Mississippi Court would probably agree with the California Supreme Court, which said:[18]

> Presumptions arise from the doctrine of probabilities. The future is measured and weighed by the past, and presumptions are created by the experience of the past. What has happened in the past under the same conditions will probably happen in the future, and ordinary and probable results will be presumed to take place until the contrary is shown.

However, in this instance the courts disagree as to what "presumptions are created from the experience of the past." In a case involving the explosion of a bottle of ginger ale, the Supreme Court of Missouri has ruled that the bottler was presumably negligent, provided it was shown that all intermediate handlers of the article exercised due care.[19] The mere fact that there is a difference of opinion as to what past experience has shown to be reasonably probable is enough to render uncertain the determination of the cause of the explosion of the bottle and hence to bar the application of the *res ipsa loquitur* doctrine. Inferences of negligence should only be allowed when past experience is interpreted in essentially the same way by most courts.

In the case of explosions of bottles of soda water there is a further opportunity for diversity of opinion in determining whether the necessary element of control is present. If the bottler is made the defendant, he certainly had control of the bottle at one time, but equally clearly the bottle was in the hands of a third person at

[17] (1916) 111 Miss. 442, 71 So. 743.

[18] Judson v. Giant Powder Co. (1895) 107 Cal. 549, 40 Pac. 1020.

[19] Strolle v. Anheuser-Busch, Inc. (1925) 307 Mo. 520, 271 S. W. 497.

the time it exploded. The courts which are desirous of applying the *res ipsa loquitur* doctrine are inclined to gloss over this obstacle. They either challenge the fundamental proposition that the defendant must have had complete control of the thing both at the time of the negligence and at the time of the injury[20] or they conclude that the product is such that the control of the bottler is constructively continued until the bottle is uncapped.[21] Courts which do not apply the doctrine maintain that actual control must be present both at the time of negligence and of the injury.[22] Because the contents of the bottle cannot be tampered with by anyone before the bottle is opened, the doctrine of constructive control has considerable plausibility.

Somewhat the same considerations apply when the injury has occurred in the course of an X-ray treatment. Some courts apply the *res ipsa loquitur* theory against the operator on the ground that the use of the X-ray is so well systematized that he should know the proper intensity to use and that if a burn results it shows either that the instrument was defective or that an improper formula was used to determine the correct intensity.[23] In either case the operator would be presumably negligent. Other courts deny the plaintiff the benefit of the doctrine because they are influenced by considerations of broad social policy as to who should bear the risks of such injury.[24] They point out that physicians use many dangerous instruments and that if the doctrine applied to X-rays it would just as logically apply to all, the result being that the practitioner might be made into a virtual insurer by unsympathetic jurors. It may also be doubted whether scientific knowledge has yet progressed sufficiently far to say that the doctor has physical control over the rays themselves, once they have been projected from his machine.

There are other circumstances in which it seems probable that some one has been negligent, but there is doubt whether or not the defendant had sufficient control of the thing involved for the *res ipsa loquitur* doctrine to be applied. This aspect of the subject is chiefly important in connection with injuries arising from the presence of foreign matter in food or accidents caused by automobiles or airplanes.

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[20] Payne v. Rome Coca-Cola Bottling Co. (1912) 10 Ga. App. 762, 73 S. E. 1087.

[21] Grant v. Graham Chero-Cola Bottling Co. (1918) 176 N. C. 256, 97 S. E. 27.

[22] Stone v. Van Noy Railway News Co. (1913) 153 Ky. 240, 154 S. W. 1092; Noonan v. Great Atlantic and Pacific Tea Co. (1927) 104 N. J. L. 136, 139 Atl. 9; Dail v. Taylor (1909) 151 N. C. 284, 66 S. E. 135.

[23] Ragin v. Zimmermann (1929) 206 Cal. 723, 276 Pac. 107; Jones v. Tri-State Tel. & Tel. Co. (1912) 118 Minn. 217, 136 N. W. 741.

[24] Nixon v. Pfahler (1924) 279 Pa. St. 377, 124 Atl. 130.

Presumably the foreign matter can only be present in the food if some one has been negligent. If the article has been put up in cans or other types of packages not designed to be opened until the food reaches the ultimate consumer, the same principles apply with respect to control that have caused the dispute over the liability of the bottler of soda water for injuries caused by explosion of the bottles.[25] If the food has merely been prepared by the assembly of the various ingredients, which were themselves grown or partially prepared by another, it would seem that the necessary element of control was not present unless the ingredients were of such a nature that the presence of the foreign matter must have been revealed in the subsequent preparation for serving if due care had been exercised.[26]

It seems to be generally agreed that automobile accidents do not normally occur unless some one has been negligent, except in those cases in which the immediate cause of the accident was the skidding of the car.[27] A few courts seem to think that there is an inference of negligence even when the evidence has not negatived the possibility that the automobile skidded.[28] However, it would seem in the ordinary case that it would be very dubious whether the driver had that complete control of the instrumentality which is required by the classic statements of the rule.[29] There is normally some traffic upon the streets. If the traffic is at all heavy the conduct of the driver must be governed largely by the conduct of a multitude of other drivers and pedestrians over whom he has no control. It is true that the doctrine might safely be applied in situations in which the traffic is slight, but it would be a puzzling problem to say exactly at what point the traffic becomes too heavy for its application. Also the plaintiff was probably in motion, either on foot or in another car. In view of these facts it would seem that the doctrine should not be applied in automobile accidents, except perhaps where the traffic is light and the defendant has struck a stationary vehicle or pedestrian. It would seem that the plaintiff is given ample pro-

[25] Horn & Hardart Baking Co. v. Lieber (C. C. A. 3, 1928) 25 F. (2d) 449; Rost v. Kee & Chappell Dairy Co. (1920) 216 Ill. App. 497; Pillars v. R. J. Reynolds Tobacco Co. (1918) 117 Miss. 490, 78 So. 365; Freeman v. Schults Bread Co. (1916) 100 Misc. 528, 163 N. Y. S. 396.

[26] O'Brein v. Liggett Co. (1926) 255 Mass. 553, 152 N. E. 57; Swenson v. Purity Baking Co. (Minn. 1931) 236 N. W. 310; Jacobs v. Childs Co. (1916) 166 N. Y. S. 798; note (1927) 47 A. L. R. 148.

[27] James v. Van Schuckman (Conn. 1932) 162 Atl. 3; Lambert v. Eastern Massachusetts St. Ry. (1922) 240 Mass. 495, 134 N. E. 340; Linden v. Miller (1920) 172 Wis. 20, 177 N. W. 909.

[28] Linberg v. Stargo (Cal. 1931) 297 Pac. 9.

[29] Wing v. London General Omnibus Co. (1909) 2 K. B. 652.

tection by the humanitarian doctrine and the general partiality of juries for plaintiffs under such circumstances.

In *Seaman v. Curtis Flying Service*[30] the Appellate Division reversed the decision of the trial court which had been based on the ground that the *res ipsa loquitur* doctrine should be applied in a case where the plaintiff's intestate was killed when the plane in which he was a passenger was wrecked in an attempted landing. Certainly the doctrine should not be applied to airplane accidents. It is true that the plaintiff is probably ignorant of the details of flying and hence would have difficulty in pointing out specific negligence, but too little is yet known about flying for it to be said that accidents are solely due to negligence. Instruments and flying equipment have not yet been perfected to a sufficient degree to give the pilot complete control over his plane regardless of atmospheric conditions.

It would be a great aid to the development of a proper legal system if the courts would undertake to decide each case as it arose by reference to the fundamental principles which govern the application of the rule. It may perhaps be desirable that under certain circumstances liability regardless of negligence should be imposed. If so, this should be done by the legislature rather than by the judges' permitting the jury to infer negligence under such circumstances.

NORMAN PARKER, '34.

UNSETTLED PROBLEMS IN STATE CONTROL OF CONTRACTS BETWEEN PUBLIC UTILITIES AND AFFILIATED COMPANIES

The troubles which recently have beset the tangled mass of public utility holding companies have thrown into sharp relief the need for further regulation of these companies. The pyramiding of financial structures and the excessive prices paid for controlling stock interests in operating utilities and other holding companies show that somewhere there must be possibilities of great financial returns to the groups which control a far flung organization of local operating companies. To many of the state commissions charged with the regulation of public utilities it has appeared that a rich source of such revenue is profits on contracts made by local utilities with other companies controlled by the same interests. These contracts may be for the supply of

[30] (1930) 231 App. Div. 867, 247 N. Y. S. 251. See also Sollack v. State of New York (N. Y. Ct. of Claims, 1927) 1929 U. S. Av. Rep. 42; Osterhoust, Doctrine of Res Ipsa Loquitur as Applied to Aviation (1931) 2 Air L. Rev. 9.