landlord had only the option of suing on the contract or treating it as abrogated and entering into an entirely new contract;[29] (e) on the ground that such an executed agreement is a waiver of the balance of the rent, a voluntary relinquishment of a known right, for which consideration is not necessary.[30] In California a statute provides for a waiver of the balance.[31]

From these cases then, it may be said that written agreements, and executed oral agreements, to reduce rent from that originally reserved, must be supported by consideration, but that the courts will find consideration in almost any benefit to the lessor, or detriment to the lessee. It is significant that almost without exception, every case since 1900 involving the two foregoing classes of cases has been held valid and binding upon the lessor.

In the principal case the court held that where the lease provides that in the event the property is rendered unfit for occupancy because of fire the rent for the remainder of the term should abate, and if a fire occurs at the end of the ninth month of the rent-year, the rent for the succeeding three months is abated, and the lessor may not recover the rent for the last three months, either on the theory that the entire annual rental should have been paid in the first nine installments, or on the theory that the lessor may so apply the payments made that the rent for the first three months of the annual term shall remain unpaid, and the irregular installments of rent applied to the rent for the last three months. On the second of the two theories the lessor relied on the case of *Felix* v. *Griffiths*, 56 Ohio St. 39, 45 N.E. 1092 (1897), which held that rent paid in advance cannot be recovered under the fire clause in this lease.

J. Ernest Stilwell

NEGLIGENCE

Liability of Manufacturers and Vendors

Ascertaining the liability of a manufacturer or vendor to those not in privity of contract with them has presented the courts with a difficult problem. In the recent Ohio case of *Sicard* v. *Kremer*, 133 Ohio St. 291, 13 N.E. (2d) 250, 10 Ohio Op. 367 (1938), the plaintiff, who owned a beauty-shop, purchased hair dye from a retailer to whom the

[29] *Conlan* v. *Spokane Hardware Co.*, 117 Wash. 378, 201 Pac. 26 (1921).

[30] *Hurlbut* v. *Butte-Kansas Co.*, 120 Kan. 205, 243 Pac. 324 (1926).

[31] California Code of Civil Procedure, sec. 2076, provides that objection to the amount of a tender must be made at the time the tender is made, or the person to whom the tender is made is deemed to have waived the balance. Applied in *Julian* v. *Gold*, 214 Cal. 74, 3 Pac. (2d) 1009 (1931).

defendant distributor had sold. In using the dye on a customer the plaintiff suffered injuries as a consequence of some poisonous substance therein. The Supreme Court of Ohio reversed the holding of the Appellate Court that it was error to charge the jury on the issue of negligence.

The problem suggested is susceptible to two entirely separate avenues of approach: one based on tort; the other on warranty. The two theories are readily distinguishable since in order to maintain an action in tort it is necessary to prove negligence, whereas in order to maintain an action in warranty only a breach thereof need be shown. Under the latter theory, however, it is necessary to show privity of contract. The necessity of privity in a tort action was probably first asserted in the celebrated case of *Winterbottom* v. *Wright*, 10 M. & W. 109, 152 Eng. Reprint 402 (1842), wherein by the way of dicta, it was said that a manufacturer or vendor was not liable for negligence to one with whom he had no contractual relations. Bohlen, "Liability of Manufacturers to Persons other than their Immediate Vendees," 45 L. Q. Rev. 343 (1929). Always recognized as the general rule, numerous exceptions have been established to avoid the consequences of this doctrine. The first exception was noted in the case of articles inherently dangerous to life and health or intended to preserve or destroy life. *Thomas* v. *Winchester*, 6 N.Y. 397, 57 Am. Dec. 455 (1852). Although the courts have quite generally recognized an exception in the case of inherently dangerous articles, there has been considerable confusion in determining what articles should be placed in this category. Freezer, "Tort Liability of Manufacturers and Vendors," 10 Minn. L. Rev. 1 (1925). The early cases construed the exception strictly and included only those articles which were intended to preserve or destroy life. Thus drugs, *Thomas* v. *Winchester, supra; Norton* v. *Sewall*, 106 Mass. 143, 8 Am. Rep. 298 (1870); *Davis* v. *Guarnieri*, 45 Ohio St. 470, 15 N.E. 350 (1887); weapons, *Herman* v. *Markham Air Rifle Co.*, 258 Fed. 475, 17 A.L.R. 701 (1918); *Ross* v. *Dunstall*, 62 Can. S.C. 393, 63 D.L.R. 63 (1921); and explosives, *Ellis* v. *Republic Oil Co.*, 133 Iowa 11, 110 N.W. 20 (1906); *Weiser* v. *Holzman*, 33 Wash. 87, 99 Am. St. Rep. 932, 73 Pac. 797 (1903), fell within this category. Later food, *Davis* v. *Van Camp Packing Co.*, 189 Iowa 775, 176 N.W. 382, 17 A.L.R. 649 (1920); *Ketterer* v. *Armour & Co.*, 247 Fed. 921, 160 C.C.A. 111, L.R.A. 1918D, 798 (1917) was included and many other articles have followed. *Pillars* v. *R. J. Reynolds Tobacco Co.*, 117 Miss. 490, 78 So. 365 (1918); *Cahill* v. *Inecto*, 208 App. Div. 191, 203 N.Y. Supp. 1 (1924).

In *MacPherson* v. *Buick Motor Car Co.*, 217 N.Y. 382, 111 N.E. 1050, L.R.A. 1916F 696, the plaintiff, a remote vendee, was injured when the car he had purchased suddenly collapsed due to the defective wood used in making one of the wheels. The court expressly refused to limit the manufacturer's liability to articles that were intended to affect life, and held that it was sufficient if the article was likely to endanger life and limb *if negligently constructed.* Most jurisdictions have adopted this test. *Heckel* v. *Ford Motor Co.*, 101 N.J.L. 385, 128 Atl. 242 (1925); *Johnson* v. *Cadillac Motor Car Co.*, 261 Fed. 878 (1919); *White Sewing Mach. Co.* v. *Feisel*, 28 Ohio App. 152, 162 N.E. 633 (1928); Restatement of the Law of Torts, Sec. 395.

Some authority exists for saying that there can be no recovery from the vendor or manufacturer for mere property damage. *Windram Mfg. Co.* v. *Boston Blacking Co.*, 239 Mass. 123, 131 N.E. 454 (1921); *Thompkins* v. *Quaker Oats Co.*, 239 Mass. 147, 131 N.E. 456 (1921). But more courts allow recovery if the article is of such character as to be imminently dangerous to human life and property. *Skinn* v. *Ruetter*, 135 Mich. 57, 97 N.W. 152, 63 L.R.A. 743, 106 Am. St. Rep. 384 (1903); *Quackenbush* v. *Ford Motor Co.*, 167 App. Div. 433, 153 N.Y. Supp. 131 (1915). At least one case has allowed recovery when the article was dangerous to property only. *Ellis* v. *Lindmark*, 177 Minn. 390, 225 N.W. 395 (1929).

The early Ohio cases permitted recovery in cases involving inherently dangerous articles which might be reconciled under the more narrow construction of the exception. *Almon Bailey* v. *N. W. Ohio Natural Gas Co.*, 2 Ohio C. Dec., 656, 4 Ohio C.C. 471 (1890); *Davis* v. *Guarnieri, supra. White Sewing Mach. Co.* v. *Fiesel, supra*, on the other hand, adopted the more liberal view of *MacPherson* v. *Buick Motor Car Co., supra*, and allowed recovery for injuries resulting from a negligently constructed electric plug.

The principal case is the first discussion by the Ohio Supreme Court of the liability of a vendor to a remote vendee for negligence since the *Buick* case was decided by the New York Court. On its particular facts it requires no considerable extension of the early Ohio rule to include hair dye in the category of inherently dangerous articles. Yet the apparent approval given by the Court to the *Buick* case indicates that Ohio will apply the same test. A manufacturer or vendor will be held liable to a remote vendee for negligence if the article because of negligent construction is dangerous to the vendee, even though its purpose was not to preserve or destroy life and the danger was due only to the defective construction.

It is doubtful whether the court meant to commit itself on the question of recovery on the theory of implied warranty where no privity of contract exists; yet the language of the court allows the conclusion that such a problem when presented will receive liberal treatment. For a discussion of this problem, see 4 O.S.L.J. 403.

WILLIAM L. ANDERSON

TORTS

RELEASE BY THE SOLE BENEFICIARY UNDER THE WRONGFUL DEATH ACT

Ralph Pilkington, a minor, was injured by defendant on April 7, 1934. His mother, who was his next of kin and sole beneficiary under the Wrongful Death Act, made application to the probate judge for consent to a settlement for $495 without the appointment of a guardian as provided in General Code, section 10507-19. The court gave its consent and ordered payment by defendant and execution of a release by Mrs. Pilkington (for Ralph) of any and all claims arising out of the accident and injuries. This release was executed on May 24, 1934, and on the same day, Mrs. Pilkington in consideration of $225 executed another release of all actions or claims she had or might have in the future as sole beneficiary under the wrongful death statute. The son died July 2, 1935, from the results of the injury, and the present action for wrongful death was brought by his administratrix for the next of kin. The court of appeals stated that the release by the decedent would not bar such an action, but held that the additional release by the sole beneficiary prior to the death of the injured person constituted a valid defense to any action subsequently brought by the personal representative of the deceased under the wrongful death statute. *Pilkington* v. *Saas*, 25 Ohio L. Abs. 663 (Ohio App. 1938).

In reiterating the doctrine that a settlement and release by the decedent is no defense to an action for wrongful death brought by his personal representative after his death, the court once again states the minority view which has, as yet, been followed by the courts of Ohio. General Code, section 10509-166 gives the personal representative an action to be brought for the benefit of the next of kin "when the death of a person is caused by a wrongful act, neglect, or default *such as would have entitled the party injured to maintain an action and recover damages in respect thereof, if death had not ensued.* . . . " There are like provisions in the statutes of all states. The earlier Ohio cases held that a