Due primarily to the nature of the business, it is a question of policy for the courts to decide, whether they will extend the custody theory, to cover property lost anywhere on the premises of a safety deposit company. WILLIAM CREME.

SALES

IMPLIED WARRANTY OF FOOD SOLD IN A RESTAURANT — SALE OR SERVICE — JOINDER OF ACTIONS

The plaintiff's husband purchased a sandwich in defendant's restaurant, ate it and died of ptomaine poisoning caused by it. Notice of the death was given by plaintiff after her appointment as administratrix. The petition contained counts based upon negligence and implied warranty of fitness of food for human consumption. Recovery was had on the latter count, no negligence having been proved. *Schuler* v. *Union News Co.*, (Mass. 1936), 4 N.E. (2d) 465.

In the early law, an innkeeper was not liable for food served a patron on theory of implied warranty, but he was liable for negligence in its preparation. Beale, Innkeepers, Sec. 169; Keilway, 91; 1 Williston on "Sales" (2d Ed.) Sec. 242b. A majority of the courts of last resort still refuse to hold hotels and restaurants liable upon an implied warranty of food sold for human consumption. *Merrill* v. *Hodson*, 88 Conn 314, 9 Atl. 533 (1914); *Rickner* v. *Ritz Restaurant*, 13 N. J. Mis., 818, 181 Atl. 398 (1935); *Nisky* v. *Child's Co.*, 103 N.J.L. 464, 135 Atl. 805 (1927); *Valeri* v. *Pullman Co.*, 218 Fed. 519 (1914); *Rowe* v. *Louisville N.R. Co.*, 29 Ga. App. 151, 113 S.E. 823 (1922); *Travis* v. *Louisville R. Co.*, 183 Ala. 415, 62 So. 851 (1913); *Sheffer* v. *Willoughby*, 163 Ill. 518, 45 N.E. 253 (1896); *Burkhardt* v. *Arnion Co.*, 115 Conn. 249, 161 Atl. 385 (1932). "The question is supposed to depend on whether the restaurant keeper made a 'sale' to the customer of the injurious food." 1 Williston on "Sales" (2d Ed.) Sec. 2426. If it is a sale it comes within Sec. 15 (1) of the Uniform Sales Act and there is an implied warranty. *Heise* v. *Gillette*, 83 Ind. 551, 149 N.E. 182 (1925); *Smith* v. *Carlos*, 215 Mo. App. 488, 247 S.W. 468 (1923); *Barrington* v. *Hotel Astor*, 184 N.Y. App. 317, 171 N.Y.S. 840 (1919); *West* v. *Katspanas*, 107 Pa. Super. 118, 162 Atl. 685 (1932); *Goetten* v. *Owl Drug Co.*, 49 Pac. (2d) 286 (1935); *Smith* v. *Geerish*, 256 Mass. 183, 152 N.E. 318 (1926). But if it is not a sale then it is a rendition of service and there is no implied warranty. The courts which refuse to imply a warranty do so on the theory that restaurants render

services and do not sell food. *Louch* v. *Morley*, 39 Cal. App. 633, 179 Pac. 529 (1919); *Nisky* v. *Child's Co.*, *supra*; *Kennedy* v. *Len*, 81 N.H. 427, 128 Atl. 343 (1925); *Woolworth Co.* v. *Wilson*, 98 A.L.R. 681, 74 Fed. (2d) 139 (1934); *McCarley* v. *Wood Drug Co.*, 228 Ala. 226, 153 So. 446 (1934); *Lynch* v. *Hotel Bond Co.*, 117 Conn. 128, 131, 167 Atl. 99 (1933); *Merrill* v. *Hodson*, *supra*; *Sheffer* v. *Willoughby*, *supra*; *Valeri* v. *Pullman Co.*, *supra*. Two cases in Massachusetts have held that there is an implied warranty of food served in a restaurant *whether* it is a sale of food *or* rendition of services. *Friend* v. *Child's Co.*, 231 Mass. 65, 120 N.E. 407 (1918); *Barringer* v. *Ocean S. S. Co.*, 240 Mass. 405, 134 N. E. 265 (1922). But in an early decision, the Massachusetts court held that a public caterer at a dance hall was not liable on implied warranty for food sold. *Bishop* v. *Webber*, 139 Mass. 411, 1 N.E. 154 (1885). In Ohio there is only one case in point, *Clark Restaurant Co.* v. *Simmon*, 29 Ohio App. 220, 163 N.E. 210 (1927), which while based on a pure food statute, Ohio Gen. Code, Sec. 12760, holds that a restaurant makes a sale of food to a patron rather than a sale of services. This case cannot be distinguished on this point from those cases where recovery was sought on the theory of an implied warranty.

The minority view is well established in New York and Massachusetts, these jurisdictions holding that there is an implied warranty upon food sold in a restaurant. These courts have enlarged their concept of "sale" to include a meal purchased and consumed in a hotel or restaurant. *Leahy* v. *Essex Co.*, 164 N.Y. App. 903, 148 N.Y.S. 1063 (1914); *Muller* v. *Child's Co.*, 185 N.Y. App. 881, 171 N.Y.S. 541 (1918); *Smith* v. *Carlos*, *supra*; *Friend* v. *Child's Co.*, *supra*; *Barrington* v. *Hotel Astor*, *supra*; *Cushing* v. *Rodman*, 82 Fed. (2d) 864 (1936). But the Maine court has held that there is no liability based upon an implied warranty of canned goods served by a restaurant, since the buyer can hardly be said to rely upon the seller's judgment under such circumstances. *Bigelow* v. *Maine Central R.R. Co.*, 110 Me. 105, 85 Atl. 396 (1912). One court which has refused to hold the restaurateur upon an implied warranty, has suggested in a dictum that food sold in a drug store is warranted fit for human consumption. *Lynch* v. *Hotel Bond Co.*, *supra*, citing *Race* v. *Krum*, 22 N.Y. 410, 118 N.E. 853 (1918). The distinction suggested was that where food may be eaten either on the premises or taken away this constitutes a sale. This distinction would seem to be valid in cases involving "automats" and similar food dispensing agencies.

The principal case also raises the question as to the propriety of joining a count based upon negligence with one founded upon an implied

warranty. Historically, "Warranty in its early stages was in tort and recovery by an action of deceit," 2 Ohio St. L.J. 180. But beginning with the case of *Stuart* v. *Wilkins*, 1 Doug. 18 (1778), an action in assumpsit was allowed. "The action on a warranty is a hybrid between tort and contract," 3 Williston "Contracts" p. 1505. "In pleading the warranty, the allegation may be framed in two counts, one in contracts and one in tort," 2 Ohio St. L.J. 180, 181; *Davies* v. *Van Camp Packing Co.*, 189 Iowa 775, 176 N.W. 382 (1920); *Back* v. *Dixon*, 115 Minn. 172, 131 N.W. 1078 (1911); *Mayerhoff* v. *Wortman*, 92 Okla. 66, 218 Pac. 842 (1923). There still seems to be doubt in the minds of some courts whether these actions can properly be joined. The majority of the courts which have passed on this matter allow a joinder. *Farrell* v. *Manhattan Market Co.*, 198 Mass. 271, 84 N.E. 481 (1908); *Needham* v. *Halverson*, 22 N.D. 594, 135 N.W 203 (1912); *Ades* v. *Wash*, 199 Ky. 687, 251 S.W. 970 (1923). Some courts have forced the plaintiff to elect, *Van Tassel* v. *Beecher*, 28 N.Y.S. 73 (1894). The minority of the courts do not permit a joinder of the two courts in torts and implied warranty. *Montgomery* v. *Alexander Lumber Co.*, 140 Ga. 51, 78 S.E. 413 (1913); *Pridemore* v. *Fife*, 178 Mo. App. 332, 165 S.W. 1155 (1914). But Ohio permits an action in tort and contract to be joined when they arise out of the same transaction. *Sturges* v. *Burton*, 8 Ohio St. 215 (1848). It would seem that under this doctrine, counts based upon negligence and warranty such as were joined in the principal case would be good in Ohio. R. W. VANDEMARK.

WILLS

TESTAMENTARY CAPACITY — UNDUE INFLUENCE

In an action to set aside a will it was disclosed that the testator was a man of the age of seventy-nine and afflicted with some of the ills that flesh is heir to; that he was childish; that he was forgetful and occasionally got lost in close proximity to his own home; and that frequently he did not know his intimate friends, or knowing them refused to speak to them even when they were present as guests in his own house.

The legatee, a blood relative of testator's deceased wife, visited his house at least once a week after the death of his wife, cleaned the house, sent out the laundry, and cooked for him. During the last illness she remained at his home, continually looking after him. It was also shown that the testator referred to her as the "boss," called her a hog to want all his property, and that she, during testator's last illness, a year and a