the additur in the federal courts. The additur has a definite value in facilitating judicial administration and the position taken by the Circuit Court of Appeals in the instant case may indicate to the changed personnel of the Supreme Court a method by which the unduly restrictive decision in *Dimick v. Schiedi* may be avoided.

Despite the apparent absence of limitation upon its adoption,\(^8\) the additur has received comparatively little recognition in the state courts.\(^9\) In a few cases its use has been expressly overruled, but these decisions may be distinguished on the ground that there was some question as to whether the defendant was liable at all since there was either an express finding of no liability,\(^10\) or the damages awarded by the jury were merely nominal.\(^11\) In Illinois the device seems to be limited to cases where the inadequacy of the verdict is due to the omission of some specific, definitely calculable item.\(^12\) Some courts, however, have permitted the use of the additur in cases where the deficiency in the damages awarded cannot be accurately fixed.\(^13\) Thus, in *Gaffney v. Illingsworth*\(^14\) the New Jersey court approved the trial judge's conditional denial of the plaintiff's motion for a new trial. Where the trial judge is given the power to set aside a verdict and order a new trial solely on the ground of inadequate damages,\(^15\) there seems to be no objection to allowing the defendant to avoid the expense of retrial by consenting to an increase in the verdict to the least amount which the court would have approved in the first place.\(^16\)

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**Sales—Implied Warranty—Liability of Restaurateur to Customer's Guest—[England].**—The plaintiffs, husband and wife, entered a restaurant and each ordered food. The wife's subsequent illness was caused by contaminated fish served by the defendant. She brought this action for breach of an implied warranty of fitness; her husband who paid for the meals claimed special damages for the expenses of her illness. *Held,* recovery granted both plaintiffs. The court found an implied contract between the wife

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\(^8\) The Seventh Amendment applies only to the federal courts, *Pearson v. Yewdall*, 95 U.S. 294 (1877). Most state constitutions do not follow the narrow language employed in the Seventh Amendment, 44 Yale L.J. 318, 322 (1934).


\(^12\) Carr v. Miner, 42 Ill. 179 (1866); James v. Morey, 44 Ill. 332 (1867). See also Autman v. Thompson, 19 Fed. 490 (C.C. Minn. 1884); E. Tris Napier Co. v. Glass, 150 Ga. 561, 104 S.E. 230 (1920); Clark v. Henshaw Motor Co., 246 Mass. 386, 140 N.E. 593 (1923).

\(^13\) Marsh v. Minn. Brewing Co., 92 Minn. 182, 99 N.W. 630 (1904); Ford v. Minn. Street Ry. Co., 98 Minn. 95, 107 N.W. 817 (1900); Bernard v. City of No. Yakima, 80 Wash. 472, 147 Pac. 1034 (1914); Clausing v. Kershaw, 129 Wash. 67, 224 Pac. 573 (1924).

\(^14\) 90 N.J.L. 490, 107 Atl. 243 (1917) (an action for personal injuries).


\(^16\) Under Wisconsin practice a new trial is ordered unless the plaintiff consents to a judgment for the least amount a jury could reasonably award and the defendant consents to a judgment for the greatest amount a jury could reasonably award, *Campbell v. Sutliff*, 193 Wis. 370, 214 N.W. 374 (1927).
and the restaurant on which it allowed her to base an implied warranty from the defendant. *Lockett v. Charles, Ltd.*

In order to allow the plaintiff wife to recover for the breach of an implied warranty of fitness, the court was forced to find an implied contract between her and the defendant where a layman's rules of etiquette would find none. It was able to do so by laying down the proposition that when two people, whether or not husband and wife, order food in a restaurant, each makes himself liable for the price of the food, regardless of the arrangement between the two for the ultimate distribution of the expense. This situation is to be contrasted with the one in which one person arranges a banquet, for here the contract is clearly between the one "in charge of the proceedings" and the hotel or restaurant, and presumably guests made ill by the food could not recover damages on a warranty theory but would be limited to a negligence action.

The legal relations of restaurateur and customer have been frequently the subject of notes. Some jurisdictions hold a restaurateur liable to a customer only for negligence, a few aiding the plaintiff with the doctrines of *res ipsa loquitur* or negligence *per se* for the violation of a public health or pure food statute. These jurisdictions hold that the providing of food by a restaurateur is not a sale but merely the providing of a service. The more modern view is that a restaurateur sells food as does a retailer, and is liable for defective food on an implied warranty theory, which in effect is the imposition of absolute liability.

The interesting problem presented in the present case was the court's handling of the legal position of the woman plaintiff so as to allow her to maintain her action on an implied warranty theory. The fact that the court went to great lengths to establish an implied (in fact) contract between the wife and the restaurant may indicate that its holding has somewhat the character of a legal fiction, and as such may not always give adequate relief to a non-purchaser who has been damaged by unfit food. Thus the court implied that banquet guests could not maintain an action on an implied warranty theory but would be limited to a negligence action.

1 159 L.T.R. 547 (K. B. D. 1938).

2 26 Mich. L. Rev. 461 and 825 (1928); 13 Minn. L. Rev. 265 (1929); 8 So. Calif. L. Rev. 52 (1934); 2 Univ. Chi. L. Rev. 653 (1935); 24 Georgetown L. J. 1031 (1926); 2 U. of Pitt. L. Rev. 218 (1936); 20 Minn. L. Rev. 527 (1939); 15 Chicago Kent Rev. 253 (1937).


theory. In *Bishop v. Weber*, the court by *dictum* said that, where guests are entertained without pay, it is hard to establish an implied contract between the caterer, who is hired by those in charge, and each guest. And in cases of unfit food purchased from a retailer, no contract can fairly be implied between the retailer and every member of the family. In *Gearing v. Berkson* the wife purchased meat as agent for her husband. Both were made ill, but only the husband was allowed to recover for breach of an implied warranty of fitness, and since the defendant was found not guilty of negligence, the wife was without remedy. And in actions against a processor of food in sealed packages the doctrine of an implied contract likewise fails. In *Bourcheix v. Willow Brook Dairy* the plaintiff's employer was the purchaser. The court said that therefore the plaintiff could not maintain an action on an implied warranty.

Since the implied contract doctrine thus is inadequate, perhaps the third-party beneficiary doctrine would provide a more adequate remedy for non-purchasers. In England, however, a court could not allow recovery on this theory because it does not enforce an ordinary third-party contract. American courts, which could base a recovery on this theory, do not seem to have favored it. In *Giminez v. Great Atlantic & Pacific Tea Co.* the court rather tartly disposed of the suggestion by saying: "We do not overlook the fact that a sort of third party beneficiary rule might have been invoked to give the husband a cause of action in contract. The answer to that contention is that the courts have never gone so far as to recognize warranties for the benefit of third persons." In *Borucki v. Mackenzie Bros., Inc.* the court, in a more satisfactory discussion of the inapplicability of this doctrine, said the obstacle was that the benefit accruing to third parties is merely incidental and that the contract of sale was not intended to create an obligation of the seller to them. But in *Dryden v. Continental Baking Co.* the court, allowing a non-purchaser recovery on a negligence theory, said that it might well be argued that the wife was a third party beneficiary of the contract.

If, as the Connecticut court said in the *Borucki* case, the contracting parties must intend to create an obligation of the seller to the non-purchaser before such non-purchaser can come within the protection of the third party beneficiary doctrine, it seems that the adoption of this theory would advance one step beyond the implied contract

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5 139 Mass. 411, 1 N.E. 154 (1885).
8 2 Williston, Contracts § 360 (rev. ed. 1936); 4 Page, Contracts § 2380 (2d ed. 1920).
9 264 N.Y. 390, 395, 192 N.E. 27, 29 (1934).
10 3 A. (2d) 224 (Conn. 1938).
11 II Cal. (2d) 33, 77 P. (2d) 833 (1938).
12 There are two types of lack of privity, and two types of third party beneficiary contracts have been suggested to allow a plaintiff not in privity with the defendant to maintain a contract action. The Dryden case suggests a third party contract between the purchaser and seller on which a non-purchaser can base a contract action; in Ward Baking Co. v. Trizzino, 27 Ohio App. 475, 161 N.E. 557 (1928), it was suggested that the contract between the retailer and manufacturer was for the benefit of the sub-purchaser. This note is concerned with the former type.
doctrine, in that it would probably allow banquet guests to recover from the restaurateur for illness caused by defective food. But, unless the purchaser from a retailer goes through the formality of informing the seller that the food is to be eaten by members of his family, the doctrine would probably not extend the protection of a warranty to such non-purchasers. Hence it seems desirable to place a non-purchaser's rights on a less fictional basis. In Coca-Cola Bottling Works v. Lyons the plaintiff suffered injuries caused by broken glass in a bottle of the defendant's product which she had been given by a friend who was the purchaser. The court allowed the plaintiff to recover on an implied warranty theory, holding that an implied warranty inures to the benefit of anyone who comes into rightful possession of the product. This rule, although it is an obvious *tour de force*, is simple and adequate, if the courts wish to extend absolute liability.

Since the practical problem in these cases is simple, it is fair to wonder why courts have complicated the discussion with privity of contract. It seems that courts which have allowed the purchaser to maintain an action for breach of an implied warranty have done so because they felt that one engaged in the distribution of food, whether as a restaurateur, retailer, or processor, should be liable even in the absence of negligence. With a contract concept thus the basis of the remedy of a tort victim, the courts generally have proceeded to use this concept to limit recovery to purchasers, although the menace of unfit food to non-purchasers is just as great. This limitation of liability may have been the result of conceptual jurisprudence or of a deliberate intention of courts to limit a seller's or processor's liability.

The privity concept has been used in other types of cases deliberately to limit liability to parties to the contract. In *Ultramares Corp. v. Touche* the court used this technique to limit liability for negligent misrepresentation to parties to the contract. The policy was the court's desire to save the defendant from liability to an indefinite class.

Since the use of this concept to limit recovery on the negligence theory in the chattel cases is now subject to many exceptions, it seems obvious that there is nothing in the concept which compels limitation of liability to parties to the contract. Hence its applicability in the warranty of food cases may be doubted. And if the policy of the courts in these cases, as in the negligent misrepresentation cases, has been the result of fears that the seller would be made liable to an indefinite class, it is clear that the policy has little application in the warranty of food cases. Unfit food generally exhausts its capacity to do harm when it reaches its first victim; negligent words may continue to be relied on, or may be relied on simultaneously by an indefinitely large class of persons.

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14 145 Miss. 876, 111 So. 305 (1927). Note that in this case there was a lack of privity in both senses discussed in note 12 supra. In Mississippi the manufacturer-consumer gap had already been bridged in Rainwater v. Hattiesburg Coca-Cola Bottling Co., 131 Miss. 315, 95 So. 444 (1923). Also note that the court in the Lyons case discussed a basis of liability closely resembling that advanced by the English court in the instant case, but preferred to base its decision upon the broader theory that the warranty runs with the title to the goods.

15 Although a warranty action today is commonly regarded as based upon contract, it seems that the action more closely resembles a tort remedy. See I Williston, Sales § 197; 2 Williston, Sales § 614 (2d ed. 1924).

16 255 N.Y. 170, 174 N.E. 444 (1931).

17 Harper, Torts § 106 (1933).

18 For a discussion of this quality of defective chattels, see Labatt, Negligence in Relation to Privity of Contract, 16 L. Q. Rev. 168, 188 (1900).
Thus, although the rule that the implied warranty inures to the benefit of whoever comes into rightful possession of the product is more satisfactory than the implied contract or third party beneficiary solution discussed above, it would be preferable for courts to determine how far they wish to extend a food seller's or maker's absolute liability and to apply the rule as one of tort law, rather than to couch absolute liability in terms of contracts and warranties.

Torts—Liability of Charitable Institutions for Negligence of Employees—[Illinois].—The plaintiff, an infant, was placed in a crib in the nursery of the defendant hospital together with several other infants. Due to the negligence of the members of the hospital staff, the adjoining crib, over which an improvised incubator had been placed with defective electric wiring, was set on fire, burning the inmate of the crib to death and injuring the plaintiff when the fire spread to his crib. The trial court set aside a verdict for the plaintiff, awarding him substantial damages for the personal injuries. Held, in affirming the trial court's action, that a charitable corporation organized not for pecuniary profit, which derives its funds mainly from public and private charity, holds them in trust for the objects and purposes expressed in its charter, and is not liable for the negligence of its servants and employees. Maretick v. South Chicago Community Hospital.2

The instant case follows the view adopted by the majority of the jurisdictions that charitable corporations, such as hospitals, which are operated not for profit, are not liable to beneficiaries for personal injuries caused by the negligence of their servants or employees. The reason for the rule has been predicated on a number of different theories.2 Many courts have modified this rule of absolute immunity to the extent that charitable hospitals may be liable to their patients where due care was not used in selecting competent servants and employees,3 or where the patient has paid for services rendered,4 or where the hospital has made an express contract to give certain accom-

2 297 Ill. App. 488, 17 N.E. (2d) 1012 (1938).
3 (1) "trust fund" theory; (2) "public policy" theory; (3) "governmental agency" theory; (4) "waiver" theory; (5) "respondeat superior" theory; (6) "independent contractor" theory. A minority of states have refused to exempt charitable institutions from liability on the basis of any of these theories. See Mulliner v. Evangelischer Diakonissenverein, 144 Minn. 392, 175 N.W. 699 (1920); City of Shawnee v. Roush, 101 Okla. 69, 223 Pac. 354 (1923); Glavin v. Rhode Island Hospital, 12 R.I. 411 (1879) (overruled by statute passed by the Rhode Island legislature). For a full discussion and criticism of these various theories see: Feezer, The Tort Liability of Charities, 77 U. of Pa. L. Rev. 191 (1928); Ruback, Immunity of Charitable Corporations for Negligence of Their Servants and Agents, 12 St. John's L. Rev. 99 (1937); Sefl, Liability of Private Charitable Corporations for the Torts of Their Agents and Servants, 2 John Marshall L. Q. 234 (1938). See also Harper, Torts § 294 (1934); 2 Bogert, Trusts and Trustees § 401 (1935).
4 For example, see Taylor v. Flower Deaconess Home & Hospital, 104 Ohio St. 61, 135 N.E. 287 (1922); Roberts v. Ohio Valley General Hospital, 98 W. Va. 476, 127 S.E. 318 (1925); Morton v. Savannah Hospital, 148 Ga. 438, 96 S.E. 887 (1918); 86 A.L.R. 491, 495.