SALES

IMPLIED FOOD WARRANTIES — NECESSITY OF PRIVITY OF CONTRACT

Plaintiff sustained injuries by eating a liver pudding containing "rat dung," the food being purchased by plaintiff's mother from a retail dealer to whom the food had been sold by the defendant manufacturer. The case came to the Supreme Court of Ohio on a motion to quash a service of summons, which motion the court upheld by finding neither joint tort liability nor contract liability, the latter being due to a lack of privity of contract between the plaintiff and the defendant manufacturing company. *Canton Provision Co.* v. *Gauder,* 130 Ohio St. 43, 196 N.E. 634 (1935). This case, although decided on a point of procedure, is of extreme importance because of its strong dictum which makes privity of contract essential in such suits between consumer and manufacturers of impure foods. There are no Supreme Court decisions directly ruling on this subject in Ohio.

In *Ward Baking Co.* v. *Trizzino,* 27 Ohio App. 475, 161 N.E. 557, motion to certify record overruled in 26 O.L. Rep. 189 (1928), the court held that where a purchaser was injured by a needle found in bread which he ate, recovery would be allowed against the manufacturer, for his implied warranty extended to the ultimate consumer without the necessity of a contractual relationship. This view is admitted by Judge Levine in the *Trizzino case, supra,* to be in the minority, although many recent cases have supported it. *Coca Cola Bottling Works* v. *Simpson,* 158 Miss. 390, 130 So. 479 (1930); *Brown Cracker & Candy Co.* v. *Jensen,* 119 Tex. 447, 32 S.W. (2d) 227 (1930); *Nock* v. *Coca Cola Bottling Works,* 102 Pa. Sup. Ct. 515, 156 Atl. 537 (1931); *Davis* v. *Van Camp Packing Co.,* 189 Iowa 775, 176 N.W. 382 (1920); *Mazetti* v. *Armour Co.,* 75 Wash. 622, 135 P. 633 (1913). The majority of the courts still regard privity of contract as an essential requirement for recovery upon implied warranty of foods. *Chvsky* v. *Drake Bros. Co.,* 235 N.Y. 468, 139 N.E. 576 (1923); *Burkhardt v. Armour & Co.,* 115 Conn. 249, 161 Atl. 385 (1932); *Pelletier* v. *Dupont,* 124 Me. 269, 128 Atl. 186 (1925); *Nehi Bottling Co.* v. *Thomas,* 236 Ky. 684, 33 S.W. (2d) 701 (1930); *Crigger* v. *Coca Cola Bottling Co.,* 132 Tenn. 545, 179 S.W. 155 (1915).

In those states dispensing with privity of contract as a requirement for recovery on implied warranty the courts are not in accord with each other as to who may recover from the manufacturer. Some allow

recovery only to the purchaser consumer. *Rhodes* v. *Libby, McNeill, & Libby*, 133 Ore. 128, 288 P. 207 (1930); *Binion* v. *Sasaki*, 5 Cal. App. (2d) 15, 41 P. (2d) 585 (1935). Others allow recovery to to those for whose benefit the article was bought. *Cassini* v. *Curtis Candy Co.*, 113 N.J.L. 91, 172 Atl. 519 (1934). Still others to the donee of the purchaser. *Coca Cola Bottling Works* v. *Lyons*, 145 Miss. 877, 111 Co. 305 (1927). In the *Trizzino case* the court stated that the manufacturer was liable to the "ultimate consumer," but since the purchaser was the plaintiff it was not necessary for the court to make so broad a statement. While the injured party in the *Canton provision Co. case, supra,* was a member of the purchaser's family, it is doubtful whether the case can be distinguished on that point. The doctrine, at least, should be extended to permit recovery in favor of the family of the purchaser. *Sed quaere,* whether it should be extended to include guests and donees.

The development of the warranty action shows a cause for the confusion surrounding recovery on such theory. Warranty in its early stages was in tort and recovery was held by an action on the case in deceit. With the case of *Stuart* v. *Wilkins*, 1 Dougl. 18 (1778), an action of assumpsit was permitted for recovery in warranty. Street, "Foundation of Legal Liability," Vol. 1, p. 389. "The confusion of thought as to the nature of the obligation seems to be in great measure due to the allowance in modern times of this remedy (assumpsit) for the breach of any warranty, whether in reality constituting a contract or only a representation." 3 Williston, "Contracts" sec. 1505. It has been said, "The statement that a warranty is necessarily a contractual obligation . . . defines an arbitrary limitation imposed by courts . . . not resting upon necessities of logic but upon a conception of policy . . . though sound should be open to exception." 42 Harvard L.R. 416 (Jan. 1929). Decisions allowing declarations in tort without alleging scienter are still permissible. *Erie City Iron Works* v. *Barber & Co.*, 106 Pa. 125 (1884); *Farrell* v. *Manhattan Market Co.*, 198 Mass. 271, 84 N.E. 481 (1907). These cases do not follow the early authority for recovery in tort but recognize the fact that warranty is a hybrid between tort and contract. Williston, "Contracts," *supra.* In pleading the warranty, the allegations may be framed in two counts, one in contract and one in tort, and a forced election of the counts is error. *Davis* v. *Van Camp Packing Co.*, 189 Iowa 775, 176 N.W. 382 (1920); *Bark* v. *Dixon*, 115 Minn. 172, 131 N.W. 1078 (1911). Thus if the warranty action is in contract, no duty can arise save towards persons who are parties to the contract. "But the modern

tendency is to make the fundamental nature of the obligation the test as to whether the action is founded upon either tort or contract. If the obligation is one imposed by law, either to act or to refrain from action . . . in order to prevent probable injury to others, the obligation is fundamentally one in the law of torts." Bohlen, "Studies in the Law of Torts," pp. 86-7. This is the type of obligation owed by the manufacturer to the public, the breach of which should make him liable in tort on the implied warranty of the fitness of his food. This tort action is to be distinguished from the one that is usually allowed the injured party for the manufacturer's breach of duty in negligence. The former is predicated on implied warranty and requires no privity of contract or showing of particular negligence of the manufacturer.

However, the view of the majority does not recognize this hybrid nature of the warranty action, or if it does, they disregard it and allow recovery solely on contractual principles. When the food is resold by a dealer, there is no contractual relationship between the manufacturer and consumer to which an implied warranty in respect to the food can attach. *Thomason* v. *Ballard & Ballard Co.*, 208 N.C. 1, 179 S.E. 30 (1935). The warranty of quality of a chattel has usually been held not to run with the chattel on its resale, and hence is not available to the sub-vendee. *Burns* v. *Baldwin-Doherty Co.*, 132 Me. 321, 170 Atl. 511 (1934); *contra, Coca Cola Bottling Works* v. *Lyons, supra.* In a direct sale from the manufacturer to the consumer the manufacturer is held liable in warranty for selling unwholesome food because the required privity element is present. *Kroger Baking Co.* v. *Schneider*, 249 Ky. 29 (1933), 60 S.W. (2d) 594. The Kentucky Court recognized that the consequences of the purchase may be so disastrous to the health of the consumer that the public safety demands that there be an implied warranty imposed upon the vendor that the article is fit for human consumption. If that reasoning is accepted, there should be no difference in liability because the purchaser was a sub-vendee of the same article instead of a direct purchaser from the manufacturer. *Blood Balm Co.* v. *Cooper*, 83 Ga. 457, 10 S.E. 118 (1889). Especially so when the food is in cans, bottles, or sealed packages and neither the dealer nor the sub-vendee has an opportunity to inspect. *Curtiss Candy Co.* v. *Johnson*, 163 Miss. 426, 130 So. 479 (1930). The ultimate contemplated destination is human consumption and the manufacturer knows this. *Hertzler* v. *Menshum*, 228 Mich. 416, 200 N.W. 155 (1924).

Radio, billboards, and printing presses create a demand for the manufacturer's product. This advertising is aimed at the ultimate con-

sumer. The consumer should not be prevented from recovering because of the lack of contractual relationship when the manufacturer, by his representations, made with the intent that they be relied upon by the consumer, has created a market for his product. *Baxter* v. *Ford Motor Co.*, 168 Wash. 456, 12 P. (2d) 409 (1932). Express warranties of a product may be found by the advertisement of its qualities in newspapers. *Baumgartner* v. *Glesener*, 171 Minn. 289, 214 N.W. 27 (1927). The manufacturer also impliedly warrants that the product is wholesome for human consumption when he puts it on the market for sale. *Tomlinson* v. *Armour & Co.*, 75 N.J.L. 748, 70 Atl. 314 (1908). Because an express warranty has been made by the manufacturer, a warranty by implication will not thereby be excluded. Both, if not inconsistent, may exist together. *Baumgartner* v. *Glessner*, *supra*; Uniform Sales Act. Sec. 15(6). This approach is comparable to the almost forgotten action of deceit on implied warranty, based on plaintiff's reliances on deceitful appearances or representations rather than on a promise. 1 Williston, "Sales" sec. 242 (2nd ed. 1924). Actions based on negligence are permitted for misrepresentations of the product although the decisions are couched in terms of implied warranties. *Parks* v. *Yost Pie Co.*, 93 Kan. 334, 144 P. 202 (1914); *Goldman & F. Bottling Co.* v. *Sindell*, 140 Md. 488, 117 Atl. 866 (1922). Cases have allowed recovery on implied warranty without privity of contract, basing their arguments on public policy and social security. *Cantani* v. *Swift & Co.*, 251 Pa. 52, 95 Atl. 931 (1915); *Chenault* v. *Houston Coca Cola Bottling Co.*, 151 Miss. 366, 118 So. 177 (1928); *Kroger Grocery Co.* v. *Lewelling*, 165 Miss. 71, 145 So. 762 (1933). The *Trizzino case*, *supra*, regarded the contract between the manufacturer and the retailer as one for the benefit of the consumer. Finding an implied warranty between manufacturer and retailer is finding a warranty for the consumer. See the dissent in *Thomason* v. *Ballard & Ballard Co.*, 170 S.E. 30 (N.C., 1935) at p. 34. The justification is concisely stated in the following summation: "When it is realized that a warranty obligation is not necessarily promissory but may often be independently imposed by law where found socially advantageous, it is clear that arguments against the expansion based merely on the absence of contractual relations are far from convincing that the expansion is wrong." Vold, "Sales" p. 476.

Courts have sometimes evaded the question by finding negligence. *Norfolk Coca Cola Bottling Works* v. *Krause*, 162 Va. 107, 173 S.E. 497 (1934). But the difficulty in food cases is to prove the negligence; therefore, they raise presumptions favoring the injured petitioner.

Some courts say the manufacture of impure foods makes the manufacturer *prima facie* negligent. *Rozumailski* v. *Philadelphia Coca Cola Bottling Co.*, 269 Pa. 114, 145 Atl. 700 (1929); *Campbell Soup Co.* v. *Davis*, 207 N.C. 256, 175 S.E. 743 (1934). Others call a proper case for the application of the *res ipsa loquitur* doctrine. *Collins Baking Co.* v. *Savage*, 227 Ala. 408, 150 So. 336 (1933); *Gainesville Coca Cola Bottling Co.* v. Stewart, 51 Ga. App. 102, 179 S.E. 734 (1935); *contra*, *Enloe* v. *Coca Cola Bottling Co.*, 208 N.C. 305, 180 S.E. 582 (1935). Although these aids favor the injured parties, they are not adequate for full protection. The manufacturer still avoids the liability by rebutting the presumptions. This he is unable to do when sued upon implied warranty in the states where a contractual relationship is not required. The risk is thus placed upon the person best able to avoid the injury—the manufacturer.

The dictum in the *Canton Provision case*, *supra*, must not be underestimated, for the Supreme Court overruled the appellate court which expressly held the Provision Co. liable upon the authority of the *Trizzino case*, *supra*. One cannot deny that the *Trizzino* case is in step with the advance of the modern economic and manufacturing world of today and should be supported. The Supreme Court of Ohio should seriously consider such contentions when called upon to decide the merits of the dictum in the *Canton Provision Co. case*, requiring privity of contract between consumer and manufacturer of unwholesome food and the *Trizzino case* dispensing with such requirement.

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TORTS

VIOLATION OF MOTOR VEHICLE LAWS BY MOTORCYCLE POLICEMAN — NEGLIGENCE PER SE — EXPRESS AND IMPLIED EXEMPTION

Plaintiff, a motorcycle policeman in the city of Toledo, while in pursuit of a violator of the speed laws was injured in a collision with the defendant's automobile. Plaintiff was operating his cycle at the speed of 65 miles per hour and crashed into the defendant when the latter made a left-hand turn at an intersection without signalling, as required by a city ordinance. The court charged the jury that if the plaintiff were found to be exceeding the speed limit prescribed by Ohio General Code, Section 12603 and Ordinance 4034 of the City of Toledo, Section 45, relating to speed limits, such violation constituted