It has also been suggested that the doctrine does not apply when there is direct evidence as to the cause of the accident.[19]

While courts in other states have frequently permitted plaintiffs to establish a cause of action in certain types of explosion cases by a reliance upon the *res ipsa* doctrine,[20] there had previously been little support for such reliance in Ohio. It may be that the effect of the principal case will be to extend the use of the doctrine of *res ipsa loquitur* in Ohio to this type of case. R. L. R.

Sales-Torts—Manufacturer's Liability for Sale of Unfit Food

Plaintiff's intestate purchased a can of corned beef from his neighborhood grocer and ate a part of it for his supper. By midnight he was seriously ill, and he died the following morning. The coroner's certificate stated that an autopsy revealed that death was the result of ptomaine poisoning caused by eating canned meat. The can of meat was packed by a South American company, but was distributed by the defendant under its own name. The court held that violation of a penal statute covering the sale of unwholesome provisions was negligence *per se*, that the statute set up an absolute standard, and it was no defense that the defendant exercised a high degree of care and was free from negligence. Plaintiff had only to prove that the meat was sold under the defendant's name and that the death was caused because the meat in the can was unfit.[1]

The problem of who shall be liable for the sale of unfit food has long been before the courts. They have experienced no difficulty in holding the retailer liable. Since the thirteenth century it has been recognized that one who sells food for human consumption is liable in tort for any injury caused by unfitness of the food sold.[2] The development of the doctrine that one who sells food impliedly warrants to the purchaser that the food sold is wholesome gave to the claimant a choice of remedies.[3] He could sue either in tort for the negligence of the seller or in contract for the breach of the implied warranty. Public policy was behind the formation of these rules since the ordinary consumer

[19] *See* Cleveland R. Co. v. Sutherland, 115 Ohio St. 262, 264, 152 N.E. 726, 727 (1926).

[20] For discussion of cases on this point see, 25 C. J. 205, Sec. 38. Also see notes in 8 A.L.R. 500, 23 A.L.R. 484, 39 L.R. 1006 and 56 A.L.R. 593.

[1] Hunter v. Derby Foods, Inc., 110 F. (2d) 970, (1940). This case was decided in a Federal District Court in New York, but the Ohio law was the basis for the decision.

[2] 51 Hen. III Stat. 6, (1266); Burnby v. Bollett, 16 M.&W. 644, (1847).

[3] Sinclair v. Hathaway, 57 Mich. 60, 23 N.W. 459 (1885); Fairbank Canning Co. v. Metzger, 118 N.Y. 260, 23 N.E. 372, 16 Am. St. Rep. 753 (1890); Van Bracklin v. Fonda, 12 Johns. (N.Y.) 468 (1815); 3 Bl. Comm. 165.

did not have the means of examination available to the retailer and had to rely on the latter's integrity.[4] But it was not until the middle of the nineteenth century that the consumer was given a right of action directly against the manufacturer, since heretofore the lack of privity between the manufacturer and the consumer had stood in the way. The courts overlooked the lack of privity in the negligence cases and if the plaintiff could establish a claim based on the actual negligence of the manufacturer he could recover.[5] This was one of the first exceptions to the general rule which allowed a manufacturer to escape liability to the ultimate consumer for its negligence where the consumer purchased from a middleman.[6] This is the rule today in many of the states.[7] But negligence is an elusive charge to prove and difficulty in obtaining proof often prevents the injured person from establishing his claim. In those states which apply the *res ipsa loquitur* doctrine the claimant's task is made easier.[8] Because the claim is necessarily based on facts within the exclusive control of the manufacturer a *prima facie* case of negligence is presumed against the manufacturer. This puts the burden on the defendant to rebut the presumption and prove its freedom from negligence.

There is a group of states which applies the implied warranty of fitness doctrine.[9] Until recently the courts refused to waive the requirement of privity of contract between the manufacturer and the person suing for breach of the warranty. But the recent trend of decisions in the food cases is to relax, and in many cases abolish, the requirement.[10]

[4] Van Bracklin v. Fonda, *supra*, note 3; Wright v. Hart, 18 Wend. (N.Y.) 449 (1837).

[5] Thomas v. Winchester, 6 N.Y. 397, 57 Am. Dec. 455 (1852); Norton v. Sewall, 106 Mass. 143, 8 Am. Rep. 298 (1870); Watson v. Augusta Brewing Co., 124 Ga. 121, 52 S.E. 152 (1905); Ketterer v. Armour & Co., 200 F. 322 (1912); Boyd v. Coca-Cola Bottling Works, 132 Tenn. 23, 177 S.W. 80 (1914).

[6] Huset v. J. I. Case Threshing Machine Co., 120 F. 865 (1903); *See* Winterbottom v. Wright, 10 M. & W. 109 (1842), for a statement of the general rule.

[7] Menaker v. Supplee-Willis-Jones Milk Co., 125 Pa. Sup. Ct. 76, Atl. 714 (1937); (1937,) Delk v. Liggett & Meyers Tobacco Co., 180 S.C. 436, 186 S.E. 383 (1936); Corum v. R. J. Reynolds Tobacco Co., 205 N.C. 213, 171 S.E. 78 (1933); Flora Ash v. Child. Dining Hall Co., 231 Mass. 86, 120 N.E. 396, 4 A.L.R. 1556 (1918).

[8] Blevins v. Raleigh Coca-Cola Bottling Works, — W.Va.—, 3 S.E. (2d) 627 (1939); Webb v. Brown & Williamson Tobacco Co., — W.Va. —, 2 S.E. (2d) 898 (1939); Murphy v. Yeungling Dairy Products Co., 34 D.&C. (Pa. Com. Pl.) 355 (1938); Eisenbeiss v. Payne, 42 Ariz. 262, 25 P. (2d) 162 (1933); Nehi Bottling Co. v. Thomas, 236 Ky. 684, 33 S.W. (2d) 701 (1930); Goldman & Frieman Bottling Co. v. Sindall, 140 Md. 488, 117 A. 866 (1922).

[9] Catini v. Swift & Co., 251 Pa. 52, 95 A. 931 (1915); Ward Baking Co. v. Trizzino, 27 Ohio App. 475, 161 N.E. 557 (1928); Klein v. Duchess Sandwich Shop Co., 14 Cal. (2d) 272, 93 P. (2d) 799 (1939).

[10] Ketterer v. Armour & Co., *supra*, note 5; Davis v. Van Camp Packing Co., 189 Iowa 775, 176 N.W. 382, 17 A.L.R. 649 (1920); Mazetti v. Armour & Co., 75 Wash. 622, 135 Pac. 633 (1913).

In *Ward Baking Co.* v. *Trizzino*[11] the court held that the warranty from the manufacturer to the retailer was for the benefit of the ultimate consumer and allowed the latter to sue for the breach of the warranty on the theory of third party beneficiary. Other courts have abolished completely the necessity for privity by holding that the warranty attaches to the article sold and runs with the article and becomes available to the person injured by the article.[12] A similar result is obtained by some courts by imposing the tort doctrine of liability without fault on the manufacturer.[13] Thus whether the plaintiff wishes to use the warranty doctrine[14] or the liability without fault doctrine the result will be the same.

In those states having statutes[15] which cover the sale of unwholesome provisions the problem of liability is solved much more simply. There is no need to imply a warranty or prove negligence. The Ohio statute[16] has been so construed that a violation of it imposes an absolute liability on the one who violates it,[17] and no privity of contract need be shown by the plaintiff. Thus in states such as Ohio, which have both the statute and the warranty of fitness doctrine, the consumer has a relatively simple case to prove in order to recover for an injury. Under the statute, negligence is conclusively presumed, and under the warranty doctrine there is no need to consider negligence.

Some courts have distinguished cases involving canned and packaged foods from those involving food sold in bulk.[18] This distinction is based on the impossibility of inspecting sealed foods before purchase. But this is not a valid distinction because very few members of the general public are able to properly ascertain the fitness of food even when open. The rule has little, if any, following today.

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[11] *Supra*, note 9.

[12] Kneiss v. Armour & Co., 134 Ohio St. 432, 17 N.E. (2d) 734, 119 A.L.R. 1348 (1938); Drock v. Great Atlantic & Pacific Tea Co., 61 Ohio App. 291, 22 N.E. (2d) 547 (1939); Ward v. Morehead City Sea Food Co., 171 N.C. 33, 87 S.E. 958 (1916); Catini v. Swift & Co., *supra*, note 9; Boyd v. Coca-Cola Bottling Works, *supra*, note 5; 16 OHIO JURISPRUDENCE 168.

[13] Catini v. Swift & Co., *supra*, note 9; Jackson Coca-Cola Bottling Co. v. Chapman, 160 Miss. 864, 64 So. 791 (1914); 4 IOWA L. BULL. 102.

[14] Ward Baking Co. v. Trizzino, *supra*, note 9; Gauder v. Canton Provisions Co., 17 Ohio L. Abs. 329 (1934); Kneiss v. Armour & Co., *supra*, note 12; Drock v. Great Atlantic & Pacific Tea Co., *supra* note 12; Kolberg v. Central Fruit & Grocery Co., 37 Ohio App. 64, 174 N.E. 144 (1930).

[15] California, Illinois, Indiana, Kentucky, Massachusetts, Michigan, New York, Pennsylvania, Tennessee and West Virginia all have statutes similar to that of Ohio.

[16] OHIO G.C. 12760.

[17] Great Atlantic & Pacific Tea Co. v. Hughes, 131 Ohio St. 501, 3 N.E. (2d) 415, 6 Ohio Op. 164 (1936); Canton Provisions Co. v. Gauder, 130 Ohio St. 43, 196 N.E. 634, 3 Ohio Op. 82 (1935).

[18] Mazetti v. Armour & Co., *supra*, note 10; Crigger v. Coca-Cola Bottling Works, 132 Tenn. 545, 179 S.W. 155 (1915).

The modern rule seems to be to impose some kind of liability without fault upon the manufacturer so that he will exercise greater care in the manufacture of articles of food for human consumption. If the public is to be protected from inefficient and unsanitary methods of production some manner of penalizing the manufacturers for their mistakes is necessary. Dean Pound expressed his ideas on the subject some years ago when he said that the best way to protect the public is to impose liability without fault upon the manufacturers of food.[19] Only in this way will the manufacturers continue to improve methods of production.

G.O.A.

WILLS

Collateral Attack on the Admission to Probate of a Will — Execution — Signing in the Attestation Clause as Signing at the End under General Code Sec. 10504-3.

An instrument dated April 16, 1927 was admitted to probate on June 9, 1930, as the last will and testament of W. L. Eakins. The signature of the testator, Eakins, appeared only in the attestation clause. On July 14, 1938, another instrument, dated November 15, 1926, was offered to probate as the last will and testament of Eakins, and was refused on the ground that the 1927 instrument had already been admitted. On appeal a collateral attack was made on the admission of the later instrument, on the ground that the probate court had no jurisdiction to admit to probate an instrument not signed at the end, as required by the Ohio statute.[1] The court sustained the attack, and held that the jurisdiction of the probate court is limited to wills as prescribed by the Constitution and statute; and where it is apparent on the face of the instrument that such instrument does not even purport to be a will, the probate court has no jurisdiction to admit it as such. *In re Matter of Will of Eakins.*[2]

The right to make a testamentary disposition is purely of statutory creation, and is available only upon compliance with the requirements of the statute.[3] A usual provision and one which appears in the Ohio statute, is that a "will must be signed at the end." The apparent reason for this rule is to insure identity of the instrument, and to prevent fraudulent

[19] Pound, *The End of the Law* (1914) 27 Harv. L. Rev. 195, 233.

[1] Ohio G.C. sec. 10504-3.
[2] 63 Ohio App. 265, 26 N.E. (2d) 219, 16 Ohio Op. 586 (1939).
[3] Tyrrel's Case, 17 Ariz. 418, 153 Pac. 767, 768 (1915).