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count need be in existence when the notice is filed.[77] As has been contended, this statute merely clarifies what a court in construing the present statute should hold is the law in Ohio today.

It should be noted, albeit briefly, that the Uniform Commercial Code does differ from the Ohio statute on the substantive question of the assignment of expectancies. It provides that a valid assignment can be made of future accounts arising out of future contracts.[78] This would allow a greater use of "floating liens," which Freedheim and Goldston have pointed out can be utilized to some extent under our present statute.[79]

CONCLUSION

Since accounts receivable financing has become so important to our economy, and because of its beneficial aspects, the law, as would be expected, has grown to adapt itself to the credit practices. It is necessary that the law in this area be as clear and as settled as possible. Notice-filing, while acceptable to the lending interests, has afforded an added protection against secret liens, and reduced to some extent the possibilities of fraud both to subsequent assignees and creditors. It seems a satisfactory compromise between the two strong policies of protection of the public and freedom for the lending interests.

The entire advantage of notice-filing for the commercial interests would be destroyed by the construction that the filing of notice protected only the assignments of accounts in existence when the notice was filed. Since this view neither conforms with business practices, nor is essential for public protection, it should not be adopted as an interpretation of the Ohio Accounts Receivable Act.

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Remedies for the Consumer of Deleterious Food

There was a time when one did not speak of the "rights" of a consumer. In those golden days of simplicity one could smugly encompass the sum total of means by which a consumer protected himself in the oft-quoted maxim "buyer beware." Needless to say, it was not an onerous task for the learned chancellor to arrive at a correct solution of a consumer problem. But "time," to quote an equally famous maxim, "marches on." And on that march the courts have deigned to afford several weap-

[77] *Ibid.*

[78] UNIFORM COMMERCIAL CODE § 9-204(3).

[79] See, Freedheim and Goldston, *supra* note 47, at 85.

ons to the consumer. The progress of modern civilization has seen more and more attempts to compensate the product-consuming public. As the lines of battle array themselves, we find that their configurations are the results of diametrically opposed pressures. Manufacturers and retailers have attempted to limit their liability while on the other hand the consumer strives for greater protection than ever before.

Gradually the scope of protection broadened, encompassing such items as automobiles,[1] medicines,[2] oils,[3] drugs,[4] coffee urns,[5] and restaurants.[6] Food has similarly been afforded protection against contamination introduced by retailer and/or manufacturer. The grounds for recovery against a manufacturer and a retailer are usually predicated upon theories of either tort or contract or both. Each of these doctrinal tools, however, contains some inherent obstacle which prevents it from being the panacea of the consumer. When pursuing a recovery upon theories of contract the ultimate consumer encounters a serious difficulty in the problem of privity of contract. On the other hand, utilization of tort theories, although avoiding the problem of privity, presents the difficulty of proving negligence on the part of the manufacturer or retailer. Whether the ultimate consumer can recover from the manufacturer or retailer, and whether the theory of recovery will be based on tort or contract are questions on which the courts heartily disagree.

Tort Remedies

There is no doubt that all courts will hold a retailer of food liable for the sale of deleterious food if he did in fact make an inspection of the food.[7] Liability will similarly be imposed upon the retailer if he in all reasonableness should have known of the contamination in the products which he has sold.[8] A majority of the courts, however, has refused to impose tort liability as long as the retailer had no reasonable grounds for believing that he should inspect the food product or if he had no opportunity to make an inspection.[9] For such reasons courts have been

[1] McPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

[2] Abbott Laboratories v. Lapp, 78 F. 2d 170 (7th Cir. 1935).

[3] Merchant's Bank v. Sherman, 215 Ala. 370, 110 So. 805 (1926).

[4] Thomas v. Winchester, 6 N.Y. 397 (1852).

[5] Statler v. Ray Mfg. Co., 195 N.Y. 478, 88 N.E. 1063 (1909).

[6] Yochem v. Gloria, Inc., 134 Ohio St. 427, 17 N.E. 2d 731 (1938).

[7] Armour & Co. v. Leasure, 177 Md. 393, 9A. 2d 572 (1939); Johnson v. Stoddard, 310 Mass. 232, 37 N.E. 2d 505 (1941), *see* 36 Corpus Juris Secundum, *Food,* § 59 (1943).

[8] Albany Coca Cola Bottling Co. v. Shiver, 63 Ga. App. 755, 12 S.E. 2d 114 (1940).

[9] Kratz v. American Stores Co., 359 Pa. 335, 59 A. 2d 138 (1948).

reluctant to apply the doctrine of *res ispa loquitur* in suits against a retailer for the sale of contaminated food.[10]

Several states have, however, passed pure food laws[11] the effect of which is to impose strict liability upon the retailer for selling unwholesome food. A violation of these pure food laws has been held by the courts to constitute negligence *per se*.[12] Liability is imposed upon the vendor even though he had no knowledge that the food was contaminated.

By basing his theory of recovery upon tort rather than contract, the consumer receives an immediate benefit: the problem of privity does not present itself.[13] On the other hand, unless suit is instituted in a jurisdiction which holds that violation of its pure food laws is negligence *per se*, other obstacles to recovery are still present.

The Ohio Pure Food Law

Ohio has taken its stand with those jurisdictions which maintain that violation of the pure food law constitutes negligence *per se*.[14] Only by employing such a theory can the retailer be found negligent in selling deleterious canned food for it will understandably be a rare situation in which a retailer would find cause to inspect a sealed can. The original pure food law in Ohio was passed in 1831.[15] An amendment to the statute was passed in 1896, eliminating the necessity of proving knowledge on the part of the seller.[16] Absolute liability is not imposed upon the retailer under this statute, however, and contributory negligence may be raised as an affirmative defense by the retailer.[17]

The gradual growth in Ohio of protection for the product consuming

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[10] Lipari v. National Grocery Co., 120 N.J.L. 97, 198 Atl. 393 (1938).

[11] GA. CODE § 42-101 (1954); MONT. REV. CODES ANN. § 27-101 (1947); TEX. REV. CIV. STAT. art. 4470 (1951 ed.).

[12] Donaldson v. Great Atlantic & Pacific Tea Co., 186 Ga. 870, 199 S.E. 213 (1938); Kelley v. John R. Daily Co., 56 Mont. 63, 181 Pac. 326 (1919); Walker v. Great Atlantic & Pacific Tea Co., 131 Texas 57, 112 S.W. 2d 170 (1938).

[13] *See* Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117 (1943).

[14] Portage Markets Co. v. George, 111 Ohio St. 775, 146 N.E. 283 (1924); The Great Atlantic & Pacific Tea Co. v. Hughes, 131 Ohio St. 501, 3 N.E. 2d 415 (1936); Drock v. Great Atlantic & Pacific Tea Co., 61 Ohio App. 291, 22 N.E. 2d 547 (1939).

[15] 29 OHIO LAWS 152 (1831).

[16] The present statute is OHIO REV. CODE § 3715.21. "No person shall sell, offer for sale, or have in his possession with intent to sell, diseased, corrupted, adulterated, or unwholesome provisions without making the condition thereof known to the buyer."

[17] Leonardi v. Habermann Provision Co., 143 Ohio St. 623, 56 N.E. 2d 232 (1944); Kurth v. Krumme, 143 Ohio St. 638, 56 N.E. 2d 227 (1944).

public has been as inexorable as it is laudable. The *Portage Market Co.* case,[18] decided in 1924, remains the leading case in the area of retailer liability under the provisions of the pure food law. In the *Portage Market Co.* case a purchaser of unwholesome meat was held to be entitled to recovery against the retailer. But whether the pure food laws applied to canned goods and to consumers other than the purchaser was left unanswered.

In 1944, the Supreme Court of Ohio provided an affirmative answer to the former problem. In *Wolfe v. The Great Atlantic and Pacific Tea Co.*,[19] the court stated, in speaking of the pure food law, that "Section 12760,[20] General Code, contains no exception in respect of provisions contained in cans or other original packages and we are not justified in reading any exception into the statute."

Further clarification was supplied by the court in the case of *Drock v. The Great Atlantic and Pacific Tea Co.*[21] The court, in the *Drock* case, cited the *Portage Market Co.* case with approval and added that the protection of the pure food law did not run solely to the purchaser. Others, too, might benefit, as the members of the purchaser's family did in that instance.

Liability of the Manufacturer

A consumer bringing suit against a manufacturer for the sale of deleterious food, though favorably received by the courts, nevertheless is confronted with the formidable hurdle of proving negligence, which has often times proved fatal to such a suit.[22] Manifestly, the injured plaintiff will rarely have any direct proof of what has happened at the manufacturer's factory. Recognizing the difficulty, many courts have permitted an application of the doctrine of *res ipsa loquitur*.[23] Several jurisdictions have proceeded one step further and have held that such a manufacturer, by violating the pure food laws, is negligent *per se*.[24] Two states, Penn-

[18] Portage Markets Co. v. George, 111 Ohio St. 775, 146 N.E. 283 (1924).

[19] 143 Ohio St. 643, 56 N.E. 2d 230 (1944).

[20] OHIO REV. CODE 3715.21.

[21] 61 Ohio App. 291, 22 N.E. 2d 547 (1939). Subsequent affirmation of this doctrine was granted by the Ohio Supreme Court in Leonardi v. Habermann Provision Co., 143 Ohio St. 623, 56 N.E. 2d 232 (1944).

[22] Joynes v. Jones Fine Bread Co., 147 S.W. 2d 1112 (Tex. Civ. App. 1941); Johnston v. Swift & Co., 186 Miss. 803, 191 So. 423 (1939).

[23] Zentz v. Coca Cola Bottling Co., 39 Cal. 2d 436, 247 P. 344 (1952); Paolinelli v. Dainty Foods Manufacturers, 322 Ill. App. 586, 54 N.E. 2d 759 (1944); Ortego v. Nehi Bottling Works, 199 La. 599, 6 S. 2d 677 (1942).

[24] Hertzler v. Manshum, 228 Mich. 416, 200 N.W. 155 (1924); Culbertson v. Coca Cola Bottling Co., 157 S.C. 352, 154 S.E. 424 (1930); Burnette v. Augusta Coca

sylvania and Kansas, when dealing with food cases have placed the burden of producing evidence of due care upon both retailer and manufacturer when they are sued together.[25]

Ohio Wrestles with the Torts Problem

Language utilized by the Ohio Supreme Court in *Canton Provision Co. v. Gauder*[26] and *Kniess v. Armour & Co.*,[27] indicates that a manufacturer of unwholesome food will be held liable under the Ohio pure food law. The problem has not been squarely met since both cases dealt primarily with procedural problems.[28] Perhaps the best rationale for imposing liability upon a manufacturer in such a situation can be found in the *Kniess* case:

> "Public policy demands that care and caution should be exacted from manufacturers of food who sell for the purposes of general disposition and sale to the general public."[29]

One of the leading cases in Ohio[30] imposing liability on the manufacturer indicated that resort to the doctrine of *res ipsa loquitur* was unnecessary: "The presence of the needle in the cake bearing the name of the Ward Baking Company is an evidential fact from which negligence may be inferred."[31] Basic tort considerations should permit a finding of negligence against the manufacturer. Applying the classic test of "foreseeability" to such a situation, it is elemental that when goods are sold to a dealer, nothing is more certain than that they will be re-sold to a consumer. If the product is unwholesome the person injured thereby falls well within the limits of legal causation. It should not shock even the foremost legal sensitivists that there should be imposed a duty on the manufacturer when his affirmative conduct is so likely to affect the physical interests of others.

Moving beyond considerations of negligence, it would even seem feasible to apply the concept of strict liability to the manufacturer. A can of food containing deleterious substances which causes injury is cer-

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Cola Bottling Co., 157 S.C. 359, 154 S.E. 645 (1930). And see annot., 98 A.L.R. 1496 (1935).

[25] Nichols v. Nold, 174 Kan. 613, 258 P. 2d 317 (1953); Loch v. Confair, 372 Pa. 212, 93 A. 2d 451 (1953).

[26] 130 Ohio St. 43, 196 N.E. 634 (1935).

[27] 134 Ohio St. 432, 17 N.E. 2d 734 (1938).

[28] Both cases dealt with the validity of joining the retailer and the packer as parties defendant.

[29] Kniess v. Armour & Co., 134 Ohio St. 432, 442, 17 N.E. 2d 734, 738 (1938).

[30] Ward Baking Co. v. Trizzino, 27 Ohio App. 475, 161 N.E. 557 (1928).

[31] *Ibid*, at 485.

tainly analogous to injury from any of the dangerous instrumentalities for which recovery is readily granted by the courts. Justification for use of the doctrine can be based on the fact that it is normally applied in situations involving a high degree of risk of harm to others. Since the health of the consumer is placed in jeopardy each time he takes a spoonful of food, it would be a distinctly progressive step for a court to hold the manufacturer strictly liable.

CONTRACT REMEDIES

Another doctrinal tool which is available to a consumer in a suit against the retailer is the breach of warranty. Numerous states have adopted the Uniform Sales Act to facilitate the use of this concept. The Uniform Sales Act[32] deals with warranties in various situations. Section 1315.16(A) provides in essence, that a seller warrants the goods he sells as being fit for normal use. Two conditions, however, must be present to allow recovery under this section: 1) it is necessary that the seller be informed, either expressly or impliedly, of the purpose for which the goods are purchased, and 2) reliance must have been placed upon the seller's skill or judgment by the purchaser. Such a rigid requirement inevitably results in a finding that reliance is lacking in the purchase of *foods* because the consumer usually chooses his own food in a supermarket or else requests the item by its trade name. Nevertheless courts have imposed liability upon a retailer based on the implied warranty of *general merchantability* which is provided for under section 1315.16(B) of the Uniform Sales Act. The latter section, then, will be utilized by the consumer under the more commonplace situation.

Section 1315.16(D) of the Act provides that no implied warranty of fitness attaches where there is a sale by trade name. But courts have held this section inapplicable where an implied warranty of *general merchantability* under section 1315.16(B) is found to exist[33] much as the courts have done in a situation involving section 1315.16(A) and section 1315.16(B). The definition of what constitutes merchantable quality has been stated as "reasonably suitable for the ordinary uses it was manufactured to meet"[34] or "salable as goods of the general kind which they were . . . supposed to be when bought."[35]

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[32] OHIO REV. CODE, 1315.01-1315.76. Hereinafter the applicable sections of the Uniform Sales Act will be cited according to their Ohio Revised Code sections.

[33] Goljatowska v. Albrecht Co., 17 Ohio L. Abs. 294 (Ct. App. 1934); Dow Drug Co. v. Nieman, 57 Ohio App. 190, 13 N.E. 2d 130 (1936).

[34] Giant Manufacturing Co. v. Yates-American Machine Co., 111 F. 2d 360 (8th Cir. 1940).

[35] WILLISTON, SALES § 243 (3rd ed. 1948).

In dealing with implied warranties, problems of privity arise which were avoided under tort theories. Quite often courts have taken the position that the implied warranties provided by the Uniform Sales Act which pertain to the usual sale of any product inures only to those who have had contractual relations with the retailer.[36] This seems to be a less advanced line of thinking.[37] If legislative intent is to be given any meaning whatever, it is apparent that protection against unwholesome food is the prime aim of the statute. It should be of no consequence that the consumer of the deleterious substance has not parted with the magical coins which will assure him of success in court. Responsibility for sound, healthy food should extend to any and all consumers whether they be purchasers thereof or not.

In accordance with a similar train of thought, courts have employed various rationalizations for justifying the imposition of liability upon the retailer. Some courts circumvent the difficulty of the privity requirement by imposing liability upon the retailer to encourage him in the exercise of more care in future selection.[38] Other courts have said that the retailer is in a better position to know the reliability of the manufacturer.[39] Since the manufacturer is quite often located in another state, some jurisdictions permit the consumer to sue the retailer because it is inconvenient for the consumer to bring suit against the manufacturer.[40]

The Uniform Sales Act[41] has been the source of much difficulty for the Ohio courts. Much of the confusion can be traced to the language used by the Ohio Supreme Court in several decisions.

In examining the question of whether a retailer who sells unwholesome canned food can be held liable under the Act for breach of warranty we are confronted with the Supreme Court case of *McMurray v. Vaughn's Seed Store*,[42] and more particularly, the fourth syllabus thereof. That syllabus states:

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[36] J. I. Case Threshing Machine Co. v. Dulworth, 216 Ky. 637, 287 S.W. 994 (1925); Paull v. McBride, 273 Mich. 661, 263 N.W. 877 (1935); Turner v. Edison Storage Battery Co., 248 N.Y. 73, 161 N.E. 423 (1928).

[37] Davis v. Van Camp Packing Co., 189 Iowa 775, 176 N. W. 382 (1920); Anderson v. Tyler, 223 Iowa 1033, 274 N.W. 48 (1937); *See* Perkins, *Unwholesome Food as a Source of Liability*, 5, IOWA L.B. 86 (1919).

[38] Degouveia v. H. D. Lee Mercantile Co., 231 Mo. App. 447, 100 S.W. 2d 336 (1936).

[39] Ward v. Great Atlantic & Pacific Tea Co., 231 Mass. 90, 120 N.E. 225 (1918).

[40] Griffin v. James Butler Grocery Co., 108 N.J.L. 92, 156 Atl. 636 (1931). The extent to which courts will reach for their rationalizations is most obvious in this instance since the ease with which a manufacturer may be found to be doing business within a state is well known.

[41] OHIO REV. CODE § 1315.01-1315.76.

[42] 117 Ohio St. 236, 157 N.E. 567 (1927).

> "Where a dealer sells an article of merchandise in the *original package* as it comes from the manufacturer, and the consumer buys it knowing there has been no inspection by the dealer, there is no implied warranty and in the absence of an express warranty or representation, such dealer is not liable to the purchaser for damages caused by any deleterious substance in such merchandise, of the presence of which he had no knowledge." (Emphasis supplied)

The existence of the syllabus rule[43] in Ohio gives a certain import to the court's holding. Yet it is interesting to note that the sole question involved in the *McMurray* case was whether a purchaser-defendant would be allowed to cross-petition in tort against the retailer-plaintiff who had sued in contract to obtain the price of several bags of fertilizer which contained crop-destroying materials. Unquestionably the fourth syllabus in the *McMurray* case was dictum.

Subsequent to the ruling in the infamous *McMurray* case, several courts of appeals dealt with the problem. In 1934, Mrs. Goljatowska purchased a can of pork and beans which contained, to her chagrin, an iron nut.[44] The court of appeals decided that section 1315.16(D) of the Sales Act, which provided that no implied warranty arose when an article was purchased by its trade name, was inapplicable when action is brought under section 1315.16(B) of the Act which provides for merchantable quality in goods purchased. The syllabus set out in the McMurray case was said to be mere dictum and therefore not controlling. The court held that the retailer was liable upon the merchantability warranty if the article contained deleterious materials although no opportunity for inspection was available to the retailer.[45]

Despite the fact that the *McMurray* case has not been expressly overruled, the subsequent court of appeals case is indicative of the modern trend toward the protection of consumers from unwholesome food. Health being as important as life itself, the public is demanding, and has a right to demand, that the victuals they put into their mouths be free from taint. The public, through the courts, has placed the burden on industry. It is a burden in the nature of a trust and requires that proper selection and preparation of food will be carried out. This is necessitated because we are no longer a predominantly agrarian society in which the individual is relatively self-sufficient for his sustenance. The days in which

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[43] Rule VI, Rules of Practice of the Ohio Supreme Court.

[44] Goljatowska v. Albrecht Co., 17 Ohio L. Abs. 294 (Ct. App. 1934).

[45] This principle was similarly enunciated in Dow Drug Co. v. Nieman, 57 Ohio App. 190, 13 N.E. 2d 130 (1936); The court held that the Sales Act imposed the merchantability warranty despite the fact that the product was sold under its trade name and in the original package. The court repeated that the *McMurray* syllabus was mere dictum and voiced its opinion that the clear language of the statute should be enforced.

the general store was available for the few staples required by an agrarian society have vanished. We are dependent now, dependent on others. As Cardozo stated:

> "The dealer, as well as manufacturer or grower, affirms as to anything he sells, if purchased by description, that it is of merchantable quality. The burden is heavy. It is one of the hazards of business."[46]

Apparently the burden has not been too disproportionate inasmuch as The Great Atlantic and Pacific Tea Company, so often involved in Ohio cases, has declared its one hundred and twenty-sixth consecutive dividend.

THE WARRANTY THAT COULD HAVE RUN

Concerning the problem of whether the warranty will run to the family and guests of the consumer, there is a dearth of material. With the exception of dictum in one Ohio Supreme Court case the problem has gone unanswered. In *Gauder v. The Canton Provision Co.*,[47] the plaintiff brought his action against both the retailer and the packer. The determinative issue was a procedural one, resulting in a finding that the defendants could not be joined in tort because the packer was primarily liable and the retailer secondarily liable. By way of dictum the court went on to say that:

> "An implied contract of warranty requires a meeting of the minds the same as does an express contract. There was no privity of contract between the plaintiff and either defendants for the petition alleges that the liver pudding was purchased by the plaintiff's mother. Any liability that exists in the instant case, therefore, necessarily arises out of tort."

Nevertheless, in 1944, a court of appeals in *Leonardi v. The Habermann Provision Co.*,[48] ignored the holding of the *Gauder* case in much the same way as the court in the *Goljatowsko* case passed over the *McMurray* case. Strong language once more emanated from a court of appeals:

> "... those who as retailers sell such negligently prepared food to the retail trade *must* be held liable *either* because of breach of warranty or for a violation of the pure food statutes to *any* person damaged by the proper use of such food."[49] (Emphasis supplied)

The decision of the court was affirmed by the Ohio Supreme Court on the basis of the pure food law, neglecting to state whether breach of warranty rights would be available to all consumers, only one of whom

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[46] Ryan v. Progressive Grocery Stores, 255 N.Y. 388, 175 N.E. 105 (1931).

[47] 130 Ohio St. 43, 196 N.E. 634 (1935).

[48] 39 Ohio L. Abs. 253, 52 N.E. 2d 85 (Ct. App. 1944).

[49] *Ibid*, at 260.

had contractual relations with the retailer. The language used by the court follows one theme: liability *should* be imposed and it is inconsequential under which doctrine the court should base its decision.

WARRANTIES AND THE MANUFACTURER

According to the usual statement of the law, implied warranties under the Uniform Sales Act will only benefit those who have entered into contractual relations with the manufacturer.[50] In order to permit recovery by the non-contracting consumer, in such instances, courts have seen fit to relax the rigid requirement of privity under various theories. Some courts have negated the necessity of privity entirely in suits against the manufacturer.[51] Other courts maintain that the warranty runs with the food and accompanies it wherever it goes in much the same manner as covenants run with the land.[52] At least one court has held that the plaintiff-purchaser becomes the assignee of the retailer's rights to maintain suit against the manufacturer and consequently should be permitted to sue.[53] Another court has stated that these contracts are, in reality, third party beneficiary contracts and thus privity finds fulfillment.[54]

PROTECTION FOR THE NON-PURCHASER

One Ohio court of appeals, in the case of *Ward Baking Co. v. Trizzino*,[55] has taken a laudable straightforward approach to the topic:

> "We are content to place ourselves in the category of the minority states, if such be the case, and to hold that there is imposed the absolute liability of a warrantor on the manufacturer of food in favor of the ultimate purchaser, even though there are no direct contractual relationships between such ultimate purchaser and the manufacturer."

Unfortunately the Ohio Supreme Court, in the *Canton Provision Co.*[56] case, did not acquiesce. The court, in a dogmatic approach to the problem, reiterated the legalistic doctrine that an implied contract of war-

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[50] Welshausen v. Charles Parker Co., 83 Conn, 231, 76 Atl. 271 (1910); Pelletier v. Dupont, 124 Me. 269, 128 Atl. 186 (1925); Wood v. Advance Rumely Thresher Co., 60 N.D. 384, 234 N.W. 517 (1931).

[51] Blanton v. Cudahy Packing Co., 154 Fla. 872, 19 S. 2d 313 (1944); Jacob E. Decker & Sons, Inc. v. Capps, 139 Tex. 609, 164 S.W. 2d 828 (1942).

[52] Patargias v. Coca Cola Bottling Co., 332 Ill. App. 117, 74 N.E. 2d 162 (1947); Anderson v. Tyler, 223 Iowa 1033, 274 N.W. 48 (1937); Jaccarezza v. Sanguinetti, 71 Cal. App. 2d 687, 163 P. 2d 470 (1945).

[53] Davis v. Van Camp Packing Co., 189 Iowa 775, 176 N.W. 382 (1920).

[54] Dryden v. Continental Baking Co., 11 Cal. 2d 33, 77 P. 2d 833 (1938).

[55] 27 Ohio App. 475, 161 N.E. 557 (1928).

[56] Canton Provision Co. v. Gauder, 130 Ohio St. 43, 196 N.E. 634 (1935).

ranty required a meeting of the minds.[57] Since the tainted liver pudding was purchased by the plaintiff's mother it was held that there was no privity of contract.

Three years later, the same court decided the case of *Kniess v. Armour & Co.*[58] After examining the various theories under which liability has been imposed upon the manufacturer the court stated that ". . . the manufacturer or packer warrants to the public generally that the food produced is fit for human consumption." Again it must be reiterated that the impact of the court's words is vitiated by the fact that it is clearly dicta.

Let us suppose that Y purchases unwholesome food manufactured by M. Subsequently, Y invites X to dinner. X consumes it, and becomes violently ill. Does X have a cause of action against M based upon the theory of warranty? According to the wording and thought behind the *Kniess* case, as well as the recent trend, protection to the guest would be afforded. And correctly so. Though X has in no way come into direct contact with M, he should be protected against deleterious foodstuffs.

The policy of the law to protect the health and life of the produce-consuming public would merely be half served if liability is made to depend upon classical contractual warranty. Privity of contract and reliance on the skill and judgment of the manufacturer would be made a requisite for recovery in each case. Under such a rule, although a guest should accompany the host and aid in selecting the food, the host alone could recover for the injuries caused by deleterious substances contained therein on the theory that there would be no contractual relation between the guest and the manufacturer.

CONCLUSION

The chances of recovery by the ultimate consumer in Ohio are greatly enhanced when suit is instituted in tort under the pure food law. Attempted recovery under the provisions of the Uniform Sales Act is less certain of success because of dictum put forth by the Ohio Supreme Court to the effect that the consumer must be in privity with the vendor in order to recover.

Under general considerations of tort law it is virtually impossible to separate theories which apply to dangerous instrumentalities from those dealing with food. The scope of protection should be equally broad in both situations. Liability without requiring a showing of fault should be imposed from the standpoint of a public policy which is aimed at pro-

[57] *Ibid,* at 48.

[58] 134 Ohio St. 432, 17 N.E. 2d 734 (1938).