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### Liability of Manufacturers of Food to Ultimate Consumers

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## LIABILITY OF MANUFACTURERS OF FOOD TO ULTIMATE CONSUMERS.

I. *On Theory of Warranty.*

That the ordinary consumer possesses little means of determining the quality of any food product that he may desire to purchase, much less whether or not any specific brand that he selects is superior to any other brand which he might have chosen, is beyond dispute. The consumer, accordingly, is virtually dependent on the manufacturer and dealer to furnish food products which are fit for human consumption.

Under the Uniform Sales Act,<sup>1</sup> this reliance of the buyer upon the superior knowledge of the seller may give rise not only to an implied warranty of fitness for a particular purpose, but also to an implied warranty of merchantability. Section 15(1) of the Act<sup>2</sup> provides:

“Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller’s skill or judgment (whether he be the grower or manufacturer or not<sup>3</sup>), there is an implied warranty that the goods shall be reasonably fit for such purpose.”

Under this section it has been held that “the mere purchase by a customer from a retail dealer in foods of an article ordinarily used for human consumption does by implication make known to the vendor the purpose for which the article is required”,<sup>4</sup> so that if the article sold is unwholesome, there is a breach of this warranty.<sup>5</sup> This is so notwithstanding that the articles of food are sold by the dealer in their original package.<sup>6</sup> In such a case, although the buyer knows

<sup>1</sup> This is embodied in N. Y. PERS. PROP. LAW §§ 82-159.

<sup>2</sup> N. Y. PERS. PROP. LAW § 96(1).

<sup>3</sup> Under the common law, only a manufacturer or grower was held liable upon these warranties. The Act, by the inclusion of the words “whether he be the grower or manufacturer or not,” results in making all sellers liable for breach of these warranties. See WHITNEY, SALES (2d ed. 1934) 195.

<sup>4</sup> Rinaldi v. Mohican Co., 225 N. Y. 70, 73, 121 N. E. 471, 472 (1918). Accord: Gindraux v. Maurice Mercantile Co., 90 Cal. 154, 47 P. (2d) 708 (1935); Great A. & P. Tea Co. v. Eiseman, 259 Ky. 103, 81 S. W. (2d) 900 (1935); Farrell v. Manhattan Market Co., 198 Mass. 271, 84 N. E. 481 (1908).

<sup>5</sup> *Ibid.*

<sup>6</sup> Sloan v. F. W. Woolworth Co., 193 Ill. App. 620 (1915); Ward v. Great A. & P. Tea Co., 231 Mass. 90, 120 N. E. 225 (1918); Griffin v. James Butler Grocery Co., 108 N. J. L. 192, 156 Atl. 636 (1931); Lieberman v. Sheffield Farms, 117 Misc. 531, 191 N. Y. Supp. 593 (1921); Rinaldi v. Mohican Co., 225 N. Y. 70, 121 N. E. 471 (1918). *Contra*: Great A. & P. Tea Co. v. Gwilliams, 189 Ark. 1037, 76 S. W. (2d) 65 (1934); Scruggins v. Jones, 207 Ky. 636, 269 S. W. 743 (1925); Bigelow v. Maine Central R. R., 110 Me. 105, 85 Atl. 396 (1912).

that the seller has had no opportunity to inspect the contents thereof,<sup>7</sup> yet "he relies on the dealer to provide a stock of provisions to select from, all of which is suitable as wholesome food."<sup>8</sup> However, where the purchaser orders the article of food under a trade or patent name, he is presumed to have exercised his own judgment as to its suitability for his purposes, so that no warranty of fitness for a particular purpose will be implied.<sup>9</sup> But Section 15 of the Act continues:<sup>10</sup>

"Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of a merchantable quality."

It has been held that a sale under a trade or patent name may also be a sale by description, and, therefore, will give rise to an implied warranty of merchantability.<sup>11</sup> Obviously, the sale of food not fit for human consumption will result in a breach of this warranty, for unwholesome food cannot be said to be of merchantable quality.<sup>12</sup> Thus, the establishment of liability of a vendor to his immediate vendee for damages resulting from the sale of unwholesome food, being predicated on these warranties, is comparatively simple. All the plaintiff need prove in such an action is the contract of sale, the presence of the injurious substance, and the resulting injury.<sup>13</sup>

Where the plaintiff is not the immediate vendee, but an ultimate consumer, and his action is directed not at the retailer, but at the manufacturer with whom he is not in privity of contract, a different situation is presented. Some jurisdictions, adhering to a more liberal viewpoint, hold that an action between a remote consumer and a manufacturer is no different than if the consumer were an immediate

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<sup>7</sup> *Arnowitz v. F. W. Woolworth Co.*, 134 Misc. 276, 236 N. Y. Supp. 133 (1929).

<sup>8</sup> VOLD, SALES (1931) 465; see note 6, *supra*.

<sup>9</sup> *Hubbard Fertilizer Co. of Baltimore City v. American Trona Corp.*, 142 Md. 246, 120 Atl. 522 (1923); *Acorn Silk Co. v. Herscovitz*, 250 Mass. 553, 146 N. E. 34 (1925); *Ryan v. Progressive Grocery Stores*, 255 N. Y. 388, 175 N. E. 105 (1931); *Matteson v. Lagace*, 36 R. I. 223, 89 Atl. 713 (1914); *Aetna Chemical Co. v. Spaulding & Kimball Co.*, 98 Vt. 51, 126 Atl. 582 (1924); *Northwestern Blaugas Co. v. Guild*, 169 Wis. 98, 171 N. W. 662 (1919).

<sup>10</sup> N. Y. PERS. PROP. LAW § 96(2).

<sup>11</sup> *Pew Co. v. Karley*, 168 Iowa 170, 150 N. W. 12 (1914); *Glover Machinery Works v. Cooke Jellico Coat Co.*, 173 Ky. 675, 191 S. W. 516 (1917); *Ireland v. Liggett Co.*, 243 Mass. 243, 137 N. E. 371 (1922); *Bekkenold v. Potts*, 173 Minn. 87, 216 N. W. 790 (1927); *Ryan v. Progressive Grocery Stores*, 255 N. Y. 388, 175 N. E. 105 (1931); *Wisdom v. Morris Hardware Co.*, 151 Wash. 86, 274 Pac. 1050 (1929).

<sup>12</sup> *Granstein v. Wyman*, 250 Mass. 290, 145 N. E. 450 (1924); *Ryan v. Progressive Grocery Stores*, 255 N. Y. 388, 175 N. E. 105 (1931); MELICK, *THE SALE OF FOOD AND DRINK* (1936) 50.

<sup>13</sup> *Leahy v. Essex Co.*, 164 App. Div. 903, 148 N. Y. Supp. 1063 (3d Dept. 1914); WHITNEY, *op. cit. supra* note 2, at 201.

vendee, and accordingly impose liability upon the manufacturer for breach of these warranties. This viewpoint was expressed in *Nemela v. Coca-Cola Bottling Co.*<sup>14</sup> In that case, the court said: "It is only when the action is brought by the ultimate consumer against the manufacturer or packer that the difficulty arises, warranty being founded on contract, and there being no privity of contract, at least in the ordinary sense of the term, between the ultimate consumer and the manufacturer who has merely put the goods upon the market for sale to the general public at retail. But even in this situation the action for breach of warranty is nevertheless allowed in the case of foodstuffs, beverages, and the like, which are put up in such a way that the condition of the contents may not be known until opened for use by the ultimate consumer, the theory being that 'under modern conditions when products of food or drink have been prepared under the exclusive supervision of the manufacturer and the consumer must take them as they are supplied, the representations constitute an implied contract, or implied warranty, to the unknown and helpless consumer that the article is good and wholesome and fit for use. If privity of contract is required, then, under the situation and circumstance of modern merchandise in such matter, privity of contract exists in the consciousness and understanding of all right-thinking persons.'" <sup>15</sup>

In New York, however, it is settled that a manufacturer is not liable for breach of an implied warranty to an ultimate consumer unless privity of contract exists between them, and since there is usually no such privity, the manufacturer cannot be held for breach of these warranties. *Chysky v. Drake*<sup>16</sup> is the leading New York case enunciating this rule. In that case, the plaintiff was injured when a nail embedded in a cake that she was eating, stuck in her gum and so infected it as to necessitate the removal of three of her teeth. It appeared that the plaintiff, who was employed as a waitress in a lunch-room, received lodge and board as part of her wages, and that the cake in question was furnished to her by her employer as part of her lunch. The cake was made and sold to her employer by the defendant. In denying her a recovery against the defendant manufacturer, the Court of Appeals said: "If there were an implied warranty which inured to the benefit of the plaintiff it must be because there was some contractual relation between her and the defendant, and there was no such contract. She never saw the defen-

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<sup>14</sup> 104 S. W. (2d) 773, 775 (Mo. App. 1937).

<sup>15</sup> The following have held a manufacturer liable to an ultimate consumer for breach of warranty: *Eisenbeiss v. Payne*, 42 Ariz. 262, 25 P. (2d) 162 (1890); *Davis v. Van Camp Packing Co.*, 189 Iowa 775, 176 N. W. 382 (1920); *Challis v. Hartloff*, 136 Kan. 823, 18 P. (2d) 199 (1933); *Hertzler v. Manshum*, 228 Mich. 416, 200 N. W. 155 (1924); *Curtis Candy Co. v. Johnson*, 163 Miss. 426, 141 So. 762 (1932); *Ward Baking Co. v. Trizzion*, 27 Ohio App. 475, 161 N. E. 557 (1928); *Nock v. Coca-Cola Bottling Works*, 102 Pa. 515, 156 Atl. 437 (1931); *Flesscher v. Carstens Packing Co.*, 93 Wash. 48, 160 Pac. 14 (1916).

<sup>16</sup> 235 N. Y. 468, 139 N. E. 576 (1923).

dant, and so far as appears, did not know from whom her employer purchased the cake. The general rule is that a manufacturer or seller of food, or other articles of personal property, is not liable to third persons, under an implied warranty, who have no contractual relation with him. The reason for this rule is that privity of contract does not exist between the seller and such third persons, and unless there be privity of contract, there can be no implied warranty. The benefit of a warranty, either express or implied, does not run with a chattel on its resale, and in this respect is unlike a covenant running with the land so as to give a subsequent purchaser a right of action against the original seller."<sup>17</sup> But the court seemed to have lost sight of the fact that a warranty may be a duty independently imposed by law because of consideration of social advantage, and that it is not necessarily contractual in its nature.<sup>18</sup> As is said by Pro-

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<sup>17</sup> It is interesting to note that the plaintiff could not recover on the theory of implied warranty even against her employer. This is for the reason that there was no sale of the food by her employer to her, and in New York it is also held that an implied warranty can only arise as an incident to a sale. See *Haag v. Klee*, 162 Misc. 250, 293 N. Y. Supp. 266 (1936). Thus, plaintiff was left without a remedy unless she could prove negligence on either the part of her employer or the manufacturer.

The following have held that privity of contract is essential in an action for breach of an implied warranty: *Birmingham Chero-Cola Co. v. Clark*, 205 Ala. 678, 89 So. 64 (1921); *Drury v. Armour & Co.*, 140 Ark. 371, 216 S. W. 40 (1919); *Binion v. Sasaki*, 80 Cal. App. Dec. 910, 41 P. (2d) 585 (1935); *Moore v. Macon Coca-Cola Bottling Co.*, 180 Ga. 335, 179 S. E. 916 (1935); *Abercrombie v. Union Portland Cement Co.*, 35 Idaho 231, 205 Pac. 1118 (1922); *Nehi Bottling Co. v. Thomas*, 236 Ky. 684, 33 S. W. (2d) 701 (1930); *Pelletier v. Dupont*, 124 Me. 269, 128 Atl. 186 (1925); *Goldman & Freeman Bottling Co. v. Sindell*, 140 Md. 488, 117 Atl. 866 (1922); *Newhall v. Ward Baking Co.*, 240 Mass. 434, 134 N. E. 625 (1922); *Howson v. Foster Beef Co.*, 177 Atl. 656 (N. H. 1935); *Tomlinson v. Armour & Co.*, 75 N. J. L. 748, 70 Atl. 314 (1908); *Thomason v. Ballard & Ballard*, 208 N. C. 1, 179 S. E. 30 (1935); *Minutilla v. Providence Ice Cream Co.*, 50 R. I. 43, 144 Atl. 884 (1929); *Crigger v. Coca-Cola Bottling Co.*, 132 Tenn. 545, 179 S. W. 155 (1915); *Dunn v. Texas Coca-Cola Bottling Co.*, 84 S. W. (2d) 545 (Tex. C. A. 1935); *Prinsen v. Russos*, 194 Wis. 142, 215 N. W. 905 (1927).

<sup>18</sup> See *VOLD, op. cit. supra* note 8, at 439 *et seq.*; *MELICK, op. cit. supra* note 12, at 94; *Williston, The Progress of the Law* (1921) 34 HARV. L. REV. 762; *Perkins, Unwholesome Food as a Source of Liability* (1919) 5 IOWA L. BULL. 86, 96. See also notes 15, *supra*, and 63, *infra*; *Craig v. Pellet*, 209 Ill. App. 368 (1918) ("An implied warranty in the case of a sale of an article is an obligation imposed by law"); *Bekkevold v. Potts*, 173 Minn. 87, 89, 216 N. W. 790, 791 (1927) ("An implied warranty is not one of the contractual elements of an agreement. It is not one of the essential elements to be stated in a contract, nor does its application or effective existence rest or depend upon the affirmative intention of the parties. It is a child of the law. It, because of the acts of the parties, is imposed by law. \* \* \* The purpose and use of the implied warranty is to promote high standards in business and to discourage sharp dealings. It rests upon the principle that honesty is the best policy \* \* \*"); *Hoe v. Sanborn*, 21 N. Y. 552, 564 (1860) ("Implied warranties do not rest upon any supposed agreement in fact. They are obligations which the law raises upon principles foreign to the actual contract; principles which are strictly analogous to those upon which vendors are held liable for fraud").

fessor Williston,<sup>19</sup> a warranty obligation is analogous to a quasi-contract or tort obligation, and that since the action originally was founded in tort (although it later developed into *assumpsit*<sup>20</sup>), an actual agreement to contract is not necessary. Recognition of this fact by the court would have resulted in placing the risk upon the party best able to bear the burden and who was at fault in the first instance. Furthermore, there seems to be no logical reason for compelling the purchaser to proceed against the retailer. This was observed in *Ritchie v. Sheffield Farms Co., Inc.*,<sup>21</sup> wherein Pankin, J., said: "My own opinion, however, is that, though there be no privity of contract, where a manufacturer prepares articles or manufactures foodstuffs in sealed packages, and what these sealed packages contain is held out as fit for human consumption, the preparer or manufacturer of the articles would be ultimately liable. The distributor with whom the contract is made by the consumer, in event of damage to him by reason of some defect in the food product distributed, would under the law have the right to recover from the person or group manufacturing or preparing the article that he distributed. Under the new Civil Practice Act, the distributor might even bring in the manufacturer or producer as a party defendant, so that if the recovery is to be against him, he might in turn recover as against the producer or manufacturer. This situation requires some modification in the law. The courts have held repeatedly that, where negligence can be proved, privity of contract need not be shown. It is not always possible to prove negligence. \* \* \* Why there should be one rule when the action rests in negligence, and another rule when the action is for breach of warranty, \* \* \* is not apparent to me. If, in the end the manufacturer or producer is liable for any defect or unwholesomeness in the article that he manufactures, and which he holds out to the public as being fit for the purposes manufactured for, there seems to be no reason why intermediate action should be required."<sup>22</sup>

In some jurisdictions, the courts have circumvented the barriers presented by the privity rule, by invoking the third party beneficiary doctrine, reasoning that since the manufacturer is fully aware that the retailer does not purchase the article for his own consumption, but purchases it for the purpose of sale to the members of the public who are ultimate consumers, he must have intended the implied warranty for their benefit.<sup>23</sup> But this theory was rejected in *New York v. Giminez v. Great Atlantic & Pacific Tea Co.*<sup>24</sup> Therein the court

<sup>19</sup> 1 WILLISTON, SALES (2d ed. 1924) 368.

<sup>20</sup> See WHITNEY, *op. cit. supra* note 2, at 201.

<sup>21</sup> 129 Misc. 765, 766, 222 N. Y. Supp. 725, 726 (1927).

<sup>22</sup> See also WHITNEY, *op. cit. supra* note 2, at 202.

<sup>23</sup> *Curtiss Candy Co. v. Johnson*, 163 Miss. 426, 141 So. 762 (1932); *Ward Baking Co. v. Trizzino*, 27 Ohio App. 475, 161 N. E. 557 (1928); see *Challis v. Hartloff, Machin*, 136 Kan. 823, 18 P. (2d) 199 (1933).

<sup>24</sup> 264 N. Y. 390, 191 N. E. 27 (1934).

said: "We do not overlook the fact that a sort of third party beneficiary rule might be invoked to give the husband [not the immediate vendee] 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."<sup>25</sup>

Although one is generally not liable for breach of an implied warranty to one with whom he is not in privity, yet it would seem that a manufacturer may be liable to an ultimate consumer on an express warranty made by way of labels, advertisements, etc.<sup>26</sup> In

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<sup>25</sup> Although the third party beneficiary doctrine has been held not to apply to warranty cases in New York, the rules and principles governing undisclosed agencies do apply. Accordingly, if an agent purchases food products for an undisclosed principal who is injured because of the unwholesomeness thereof, the undisclosed principal may bring an action against the vendee based upon breach of implied warranty. This situation usually arises where a wife purchases food with money furnished by her husband. In such a case, if the husband is injured because of the unfitness of the food, he may maintain an action against the seller for breach of implied warranty, although he himself did not make the purchase. *Ryan v. Progressive Grocery Stores*, 255 N. Y. 388, 175 N. E. 105 (1931) (husband entitled to recover on theory of warranty for injuries sustained when he ate bread containing a concealed pin, although his wife made the purchase with money supplied by him). Again, "a person whose agency is unknown, contracts in his own right", so that although the undisclosed principal (the husband) may bring suit on the contract, this does not preclude the agent (the wife) from also maintaining suit. *Meyer v. Kerschbaum*, 133 Misc. 330, 232 N. Y. Supp. 300 (1928) (wife, who purchased buns from a bakery and was injured by a tack in the bun, was entitled to recover for her injuries on the theory of breach of implied warranty, and this notwithstanding the fact that her husband had supplied her with the funds to make the purchase). But if the vendee knew that the wife was acting as agent for the husband, there would not be an undisclosed agency, but a disclosed one, and, in such a case, only the principal (the husband) could maintain action. See *Jones v. Gould*, 200 N. Y. 18, 92 N. E. 1071 (1910). If the wife purchases the food in her own right, *i.e.*, with her own funds, there is no agency, and the husband can maintain no action for breach of warranty. *Giminez v. Great A. & P. Tea Co.*, 264 N. Y. 390, 191 N. E. 27 (1934). In this connection, it will be presumed that the wife was purchasing in her own right, in the absence of affirmative evidence to the contrary. *Giminez v. Great A. & P. Tea Co.*, *supra*. But since there is ordinarily no agency between parent and child, where the parent makes the purchase and the child is injured by eating the unwholesome food, the child cannot bring action against the vendee on the theory of breach of warranty. *Redmond v. Borden Farm Products Co.*, 245 N. Y. 512, 157 N. E. 838 (1927). Similarly, a husband cannot recover for injuries to his wife where the wife made the purchase in her own right, *Giminez v. A. & P. Tea Co.*, *supra*, though if the husband made the purchase, he may recover, as an incident to his damages, doctors' bills and other damages sustained by him by reason of the injury to his wife. *McAllister v. Stevens & Sanford*, 147 Misc. 317, 265 N. Y. Supp. 142 (1933).

<sup>26</sup> See *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P. (2d) 409 (1932), discussed in (1933) 46 HARV. L. REV. 161; *Handler, False and Misleading Advertising* (1929) 29 YALE L. J. 22, 26; *Notes* (1932) 7 WASH. L. REV. 351; (1938) 13 IND. L. J. 508.

In the usual case, however, plaintiff fails to show that the particular defect in the food was within the terms of the express warranty. See *Davis v. Van Camp Packing Co.*, 189 Iowa 775, 176 N. W. 382 (1920) (no express warranty that canned fruit was wholesome was created by statement on the label that

such a case, privity of contract would exist between the manufacturer and the buyer, for the advertisement or label may be considered as a general offer which is accepted directly by the ultimate consumer when he purchases the article.<sup>27</sup> But in New York it is probably the law that no recovery can be had even on the theory of express warranty, for although privity of contract may be present, there is no privity of sale.<sup>28</sup> This is another element required by the New York courts in order that an action on a warranty be sustainable, namely, that not only must there be privity of contract between the defendant and plaintiff, but there must have also been a sale between them.<sup>29</sup>

## II. On Theory of Negligence.

In New York, and in most jurisdictions, lack of privity will not prevent a manufacturer of food products from being liable to a consumer because of negligence.<sup>30</sup> Even this, however, is based upon an exception to the general rule that a manufacturer of chattels is not liable for negligence in their preparation to third parties with whom he is not in privity of contract.<sup>31</sup> This exception was first recognized

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federal inspection was maintained at the place where food was manufactured, and that the contents of the can were ready for use); *Newhall v. Ward Baking Co.*, 240 Mass. 434, 134 N. E. 625 (1922) (false representation on the wrapper of bread to the effect that the bread was 100% pure did not include the accidental presence of a nail therein); *Alpine v. Friend Bros.*, 244 Mass. 164, 138 N. E. 553 (1923) (holding that newspaper advertisements by manufacturer that bread was made under ideal and clean conditions, that the materials used were of the best, did not amount to an express warranty that no foreign substance could by accident find its way into the loaf, so as to render the manufacturer liable to an ultimate consumer injured by the presence of tin in the bread).

<sup>27</sup> 1 WILLISTON, *op. cit. supra* note 19, at 491.

In this connection, it is to be remembered that knowledge of an offer is necessary for an acceptance, *Fitch & Jones v. Snedaker*, 38 N. Y. 248 (1868), so that the consumer must have read the advertisement or label prior to or simultaneous with his purchase.

<sup>28</sup> See *Turner v. Edison Storage Battery Co.*, 248 N. Y. 73, 161 N. E. 423 (1928) (the court, by way of *dictum*, states that where the goods are sold with a continuing written warranty for the benefit of the ultimate consumer, the latter's recovery is limited to an action in deceit). See also *Nelson v. Armour Packing Co.*, 76 Ark. 352, 90 S. W. 288 (1903); *Pelletier v. Dupont*, 124 Me. 269, 128 Atl. 186 (1925), holding that labels and advertisements do not constitute warranties.

It has been suggested that the purchaser should be permitted to maintain, without proof of negligence, a civil action for injury caused by the advertiser's violation of the Printers' Ink Model Statute, which is § 421 of N. Y. PENAL LAW, a penal statute enacted to protect a class of which the purchaser is a member, on the same theory that civil actions are allowed under pure food statutes. Note (1929) 29 COL. L. REV. 805, 812.

<sup>29</sup> See note 17, *supra*.

<sup>30</sup> See MELICK, *op. cit. supra* note 12, at 271, n.9 and cases cited.

<sup>31</sup> *Windram Mfg. Co. v. Boston Blacking Co.*, 239 Mass. 123, 131 N. E. 454 (1921); *Cohen v. Brockaway*, 240 App. Div. 182, 228 N. Y. Supp. 302 (3d Dept. 1934); *Winterbottom v. Wright*, 10 M. & W. 109 (1842).



in the case of articles inherently dangerous to human life,<sup>32</sup> but was later extended to include articles which, though not inherently dangerous, become so if negligently prepared,<sup>33</sup> unwholesome food being considered in the latter category.<sup>34</sup>

But in order for a consumer to avail himself of this remedy, he must establish, by direct or circumstantial evidence, actual negligence upon the part of the manufacturer,<sup>35</sup> that the negligence of the dealer was not a contributing factor,<sup>36</sup> and lack of contributory negligence on his part.<sup>37</sup> It has been held that mere proof that the plaintiff has eaten the food and consequent sickness, is not sufficient to make out a *prima facie* case, nor does it shift the duty of coming forward with evidence to establish due care on the manufacturer.<sup>38</sup> Obviously,

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<sup>32</sup> Thomas v. Winchester, 6 N. Y. 397 (1852).

<sup>33</sup> MacPherson v. Buick, 217 N. Y. 382, 111 N. E. 1050 (1916); RESTATEMENT, TORTS (1934) § 395.

<sup>34</sup> See note 30, *supra*.

<sup>35</sup> Shepard v. Beck Bros., Inc., 131 Misc. 164, 225 N. Y. Supp. 438 (1927); MELICK, *op. cit. supra* note 12, at 275, n.16 and cases cited.

<sup>36</sup> Steinberg v. Bloom, 5 N. Y. S. (2d) 774 (1938); Bourcheix v. Willow Brook Dairy, Inc., 268 N. Y. 1, 196 N. E. 617 (1935).

<sup>37</sup> In determining contributory negligence, whether an ordinarily prudent person must examine a piece of bread to discover possible presence of foreign or deleterious substances, before eating it, is a question for the jury. Ternay v. Ward Baking Co., 167 N. Y. Supp. 562 (1917).

<sup>38</sup> Sheffer v. Willoughby, 163 Ill. 518, 45 N. E. 253 (1896); Bigelow v. Maine C. R. R., 110 Me. 105, 85 Atl. 396 (1912); Crocker v. Baltimore Dairy Lunch Co., 214 Mass. 177, 100 N. E. 1078 (1913); Jacobs v. Childs Co., 166 N. Y. Supp. 798 (1916); Shepard v. Beck Bros., Inc., 151 Misc. 164, 225 N. Y. Supp. 438 (1927); Lamb v. Boyles, 192 N. C. 542, 135 S. W. 464 (1926); 11 R. C. L. 1121; *cf.* McPherson v. Capuano, 31 Ga. App. 82, 121 S. E. 580 (1924). *Contra:* Steel-Smith Dry Goods Co. v. Blythe, 208 Ala. 288, 94 So. 281 (1922); Davis v. Van Camp Packing Co., 189 Iowa 775, 176 N. W. 382 (1920) (proof of eating unwholesome pork and beans prepared by defendant, and consequent injury constituted *prima facie* case); Doyle v. Fuerst & Kraemer, 129 La. 838, 56 So. 906 (1911) (proof of eating cake and chocolate with whipped cream in a confectionery store and consequent illness made out *prima facie* case).

In *Rosensbusch v. Ambrosia Milk Corp.*, 181 App. Div. 97, 168 N. Y. Supp. 505 (1st Dept. 1917), the court, holding that defendant was negligent as a matter of law for failure to indicate on the labels of its product that the contents were subject to deterioration, said: "It has been held that where one is poisoned or injured by food purchased at a restaurant, or by bread or by milk, proof of that fact alone is sufficient to place the burden upon the proprietor of the restaurant, the manufacturer of the bread, or the vendor of the milk, to show the exercise of all due care on his part." The court cites New York cases in support of its contention, but all, except *Cook v. People's Milk Co.*, 90 Misc. 34, 152 N. Y. Supp. 465 (1915) (holding that mere proof of the drinking of poisonous milk, plus resulting injuries, entitled plaintiff to recover on the theory of negligence against defendant), were not negligence cases, but were decided on the theory of breach of implied warranty, where, of course, negligence need not be shown. But in *Cohen v. Dugan Bros.*, 132 Misc. 896, 230 N. Y. Supp. 743 (1928), *rev'd on other grounds*, 227 App. Div. 714, 236 N. Y. Supp. 769 (1st Dept. 1929), the court held, *contra* to the weight of authority, that "the plaintiff, by showing the purchase of the defendant's bread and the presence of the nail therein, and the resulting injury, has made out a *prima facie* cause of action in negligence."

therefore, it is often very difficult for a consumer, who in most instances has no means of obtaining proof of the manufacturer's negligence, such facts being within the peculiar knowledge of the manufacturer or his servants, to sustain this burden.<sup>39</sup> In some cases, however, the consumer may avail himself of certain rules of law which may facilitate the establishment of his *prima facie* case, namely, the doctrine of *res ipsa loquitur*, and the rule that violation of a pure food statute is negligence *per se*.

*a. Res Ipsa Loquitur.*

The authorities are in accord as to the requirements for the application of the doctrine, *viz.*: (1) that the instrumentality causing the injury must have been under the exclusive control of the defendant or his agents; (2) that the injury must be such as ordinarily would not have occurred had not the defendant been negligent; and (3) that the plaintiff must not have contributed in any voluntary way to his injury.<sup>40</sup> Where all the essential requirements are present, the plaintiff has a presumption of negligence in his favor, so that if the defendant offers no evidence in rebuttal, the plaintiff will be entitled to a directed verdict, providing his evidence is credible and unsuspecting.<sup>41</sup> Thus, the advantages to a plaintiff of having a *res ipsa* presumption in his favor, is obvious.

In the usual food case, however, although the accident may be such as would not have happened had those in control used proper care, yet the essential requirement that the thing causing the injury be under the exclusive management and control of the defendant is lacking.<sup>42</sup> After the food product leaves the manufacturer's possession, it is often handled by a jobber, a retailer, and then the ultimate consumer. Who is to say whether the unwholesome condition of the food was caused by the manufacturer, and not by the improper handling or storage of those who later handle it?<sup>43</sup> It is because of

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<sup>39</sup> See *Cushing v. Rodman*, 82 F. (2d) 864 (App. D. C. 1936), wherein the court said: "Restricting recovery by the injured member of the public to cases predicated upon negligence is a seriously inadequate means of securing the social interest in the individual safety, because of the great difficulty of proof for the plaintiff. \* \* \* He can hardly expect wholly unprejudiced testimony from the defendant and his servants if they are called as witnesses. Cases will fail for lack of the plaintiff's proof where there was no lack of the defendant's fault, with the result that the individual injured will be unjustly burdened with illness and expense."

<sup>40</sup> See Note (1937) 11 ST. JOHN'S L. REV. 280.

<sup>41</sup> *Hogan v. Manhattan Ry.*, 149 N. Y. 23, 43 N. E. 403 (1896); see 1 JONES, EVIDENCE (4th ed. 1938) § 104a; Note (1937) 11 ST. JOHN'S L. REV. 280, 285.

But if the defendant offers satisfactory evidence in rebuttal, the plaintiff must sustain his contention by a fair preponderance of evidence on the *whole* case. *Plumb v. Richmond Light & R. R.*, 233 N. Y. 285, 135 N. E. 504 (1922).

<sup>42</sup> *Jacobs v. Childs Co.*, 166 N. Y. Supp. 798 (1916); *Bourcheix v. Willow Brook Dairy, Inc.*, 268 N. Y. 1, 196 N. E. 617 (1935).

<sup>43</sup> MELICK, *op. cit. supra* note 12, at 279 *et seq.*

this fact that the doctrine of *res ipsa loquitur* has had, and should have, a limited application in cases involving unwholesome food.<sup>44</sup> However, if the plaintiff can establish that at the time the unwholesome condition of the food came into existence it was in the exclusive control of the manufacturer, there would seem to be no reason why the doctrine should not be applicable.<sup>45</sup>

In many instances, although there is no direct evidence of the manufacturer's negligence, yet if the foreign substance is so embedded in the food that it may be inferred that it entered the article at the time of its preparation, the case will be permitted to go to the jury who may infer negligence on the part of the manufacturer.<sup>46</sup> But this is not to be confused with the doctrine of *res ipsa*, for it is only the application of a well recognized rule of evidence that circumstantial evidence may operate so forcefully as to make out a *prima facie* case of negligence.<sup>47</sup>

### b. Pure Food Statutes.

Statutes which control and regulate the preparation and sale of food, have been construed in many jurisdictions as coming "within

<sup>44</sup> *Ibid.*

<sup>45</sup> In such case the requirement as expressed in *Jacobs v. Childs Co.*, 166 N. Y. Supp. 798 (1916) and *Bourcheix v. Willow Brook Dairy, Inc.*, 268 N. Y. 1, 196 N. E. 617 (1935), that plaintiff must show that no other cause than defendant's negligence could have produced the injury would seem to be satisfied, so that the doctrine should be applicable. See Note (1937) 14 N. Y. U. L. Q. Rev. 519, 525. For cases applying the doctrine, see Notes (1919) 4 A. L. R. 1559; (1927) 47 A. L. R. 148.

<sup>46</sup> *Freeman v. Schultz Bread Co.*, 100 Misc. 538, 163 N. Y. Supp. 396 (1916) (nail embedded in bread); *Ternay v. Ward Baking Co.*, 167 N. Y. Supp. 562 (1917) (particles of glass embedded in bread); *Weiner v. Mager & Thorne*, 167 Misc. 338, 3 N. Y. S. (2d) 918 (1938) (dead worms embedded in bread); *Carroll v. New York Pie Baking Co.*, 215 App. Div. 240, 213 N. Y. Supp. 553 (2d Dept. 1926) (cockroaches embedded in crust of pie); *Miller v. National Bread Co.*, 247 App. Div. 88, 286 N. Y. Supp. 908 (4th Dept. 1936) (lump of mineral wool and iron strands which ran through bread). See Notes (1919) 4 A. L. R. 1559; (1927) 47 A. L. R. 148.

<sup>47</sup> See *Ristau v. E. Frank, Coe Co.*, 120 App. Div. 478, 479, 104 N. Y. Supp. 1059 (2d Dept. 1907), *aff'd without opinion*, 193 N. Y. 630, 86 N. E. 1132 (1908) ("\* \* \* if there were other facts showing negligence the maxim [*res ipsa loquitur*] would not be needed as evidence to carry the case to the jury at all, it is only where there is nothing but the bare happening of the accident, that the plaintiff needs and the law gives him the help of the maxim to escape non-suit"); *Minutilla v. Providence Ice Cream Co.*, 144 Atl. 884, 887 (R. I. 1929) ("Here the finding of the glass in the middle of the cream [the glass was embedded in the frozen cream], and the tracing of the wrapped-up parcel uninterfered with until served to plaintiff from the container provided by defendant and unwrapped by plaintiff would justify a reasonable human being in drawing the logical inference that the glass got into the cream as a result of the maker's carelessness in mixing. \* \* \* This inference was more than a presumption or a substitute for evidence as a matter of procedure. It was a logical deduction from the circumstances shown to exist between the making of the cream and the finding of the glass."). See also *Chevey Chase Dairy Co. v. Mullineaux*, 71 F. (2d) 982 (App. D. C. 1934); Note (1929) 59 A. L. R. 469.

the rule that where a statute for the protection or benefit of individuals prohibits a person from doing an act, or imposes a duty upon him if he disobeys the prohibition or neglects to perform the duty, he is liable to those for whose protection the statute was enacted for damages resulting proximately from such disobedience or neglect."<sup>48</sup> Since these statutes were obviously intended to protect the health of the public, anyone injured as a result of their violation may bring a civil action against the violator, and this notwithstanding that privity of contract does not exist between them.<sup>49</sup> As was said in *Aboundader v. Strohmeier & Arpe Co.*:<sup>50</sup> "We ought not to assume that the Legislature intended to limit the duties of those violating such provisions as these by any technical rules of contractual privity, but that it was intended to impose a broad and far-reaching duty which would be for the benefit of those general consumers who would be the real sufferers in health or pocket if the statute was violated." Nor need the plaintiff, in such an action, establish any intent or negligence on the defendant's part, for "violation of a statute designed for the protection of others is, in itself, negligence."<sup>51</sup> Furthermore, since the court will take judicial notice of a public statute, it is not necessary in an action of this sort to plead a violation of the statute, nor is it necessary to bring it to the attention of the court or counsel during the trial.<sup>52</sup>

In New York, the pure food statute is embodied in the Agricultural and Markets Law. Under the Act, "adulteration" is generally defined as any food which "bears or contains any poisonous or deleterious substance which may render it injurious to health."<sup>53</sup>

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<sup>48</sup> *Meshbesher v. Channellene Oil & Mfg. Co.*, 107 Minn. 104, 106, 119 N. W. 428, 429 (1909). Accord: *Kelley v. Daily Co.*, 56 Mont. 63, 181 Pac. 326 (1919); *Aboundader v. Strohmeier & Arpe Co.*, 243 N. Y. 458, 154 N. E. 309 (1926).

<sup>49</sup> *Ibid.*

<sup>50</sup> 243 N. Y. 458, 465, 154 N. E. 309, 311 (1926).

<sup>51</sup> *Armour v. Wanamaker*, 202 Fed. 243 (C. C. A. 3d, 1913); *Meshbesher v. Channellene Oil & Mfg. Co.*, 107 Minn. 104, 119 N. W. 428 (1909); *Kelly v. John R. Daily Co.*, 56 Mont. 63, 181 Pac. 326 (1919); *Aboundader v. Strohmeier & Arpe Co.*, 243 N. Y. 458, 154 N. E. 309 (1926); *Portgage Markets Co. v. George*, 117 Ohio St. 774, 146 N. E. 283 (1924); *Culbertson v. Coca-Cola Bottling Co.*, 157 S. C. 352, 154 S. E. 424 (1930). *Contra*: *Gearing v. Berkson*, 223 Mass. 257, 111 N. E. 785 (1916); *Cheli v. Cudahy Bros. Co.*, 267 Mich. 690, 255 N. W. 414 (1934); *Howson v. Foster Beef Co.*, 177 Atl. 656 (N. H. 1935).

Contributory negligence, however, may defeat recovery even under the statute. *Friedman v. Beck*, 250 App. Div. 87, 293 N. Y. Supp. 649 (1st Dept. 1937), discussed in (1937) 50 HARV. L. REV. 1316.

<sup>52</sup> *Meshbesher v. Channellene Oil & Mfg. Co.*, 107 Minn. 104, 119 N. W. 428 (1909); *Aboundader v. Strohmeier & Arpe Co.*, 243 N. Y. 458, 154 N. E. 309 (1926); *Pine Grove Poultry Farm, Inc. v. Newtown By-Products Mfg. Co.*, 248 N. Y. 293, 162 N. E. 84 (1928); *cf. Giminez v. Great A. & P. Tea Co.*, 264 N. Y. 390, 191 N. E. 27 (1934).

<sup>53</sup> N. Y. AGRICULTURAL AND MARKETS LAW § 200(1), amended N. Y. Laws 1939, c. 797.

This section also gives specific instances in which food shall be deemed

Previous to 1939 (at which date the Act was amended), the word "ingredient" was used in place of the word "substance".<sup>54</sup> Under the Act as it then read, the case of *Bourcheix v. Willow Brook Dairy, Inc.*<sup>55</sup> was decided. In that case, plaintiff, a chauffeur, was injured when he swallowed several pieces of glass contained in a bottle of cream given to him by his employer. The pieces of glass were about the size of a bean. In an action against defendant, who had delivered the cream to the employer, plaintiff claimed that defendant was negligent as a matter of law on the theory that the sale of cream which contained pieces of glass violated Section 50 of the Agriculture and Markets Law. In rejecting this contention, the Court of Appeals said: "Section 50 provides: 'No person shall sell or exchange or offer or expose for sale or exchange, any unclean, impure, unhealthy, adulterated or unwholesome milk or any cream from the same, or any unclean, impure, unhealthy, adulterated, colored, or unwholesome cream, or sell or exchange, or offer or expose for sale or exchange, any substance in imitation or semblance of cream, which is not cream, nor shall he sell or exchange, or offer or expose for sale or exchange any such substance as and for cream \* \* \*.' Section 199 of the same statute defines adulteration: 'Food shall be deemed adulterated \* \* \* 5. If it contains any added poisonous or other added deleterious ingredient which may render such article injurious to health \* \* \*.' Section 46 defines cream as a certain portion of described milk 'to which no substance whatsoever has been added' except milk as limited by this section. These provisions when read together indicate that the legislative purpose was to prevent the sale of milk and cream which have been subjected to some process by which their texture had been or might be rendered spurious. Water would decrease its strength, dirt of any kind its purity and other ingredients which had mixed with and become a part of it would impair its natural quality. These provisions do not appear to be aimed at foreign substances such as stones or tacks or broken glass which do not become part of the substance which 'masquerades as cream' but were intended to preserve the quality of the liquid and to establish its standard. It was not the cream which injuriously affected plaintiff, but it was the glass which constituted no ingredient or part of the cream." The

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adulterated, such as: "3. If it consists in whole or in part of a diseased, contaminated, filthy, putrid, or decomposed substance, or if it is otherwise unfit for food. 4. If it has been produced, prepared, packed, or held under unsanitary conditions, whereby it may have become contaminated with filth, or whereby it may have been rendered diseased, unwholesome or injurious to health."

There are also various sections in the Agricultural and Markets Law concerning the adulteration of specific foods, as for example, dairy products, N. Y. AGRICULTURAL AND MARKETS LAW § 46, vinegar, N. Y. AGRICULTURAL AND MARKETS LAW § 207.

<sup>54</sup> This was contained in N. Y. AGRICULTURAL AND MARKETS LAW § 199, and was as follows: "Food shall be deemed adulterated \* \* \* 5. If it contains any added poisonous or other deleterious ingredient which may render such article injurious to health."

<sup>55</sup> 268 N. Y. 1, 5, 196 N. E. 617, 618 (1935).

court distinguished *Pine Grove Poultry Farms, Inc. v. Newtown By-Products Mfg. Co.*<sup>56</sup> on the ground that "there, particles of steel wire had been ground so fine as to enter into and become a component of the food. Here, the pieces of glass were no element in the composition of the cream." The court, by emphasizing the word "ingredient" as used in the statute, and by distinguishing the *Pine Grove* case because there the wire was *ground* into the feed, limited the availability of the Act to cases where the foreign substance is so permeated with the food as to constitute a part or ingredient thereof.

But today, in view of the recent amendment to the Act insofar as the definition of adulteration is concerned, which obviously discloses the legislative intent to broaden the scope of a manufacturers' liability thereunder, and in view of the fact that the word "substance" has been substituted for the word "ingredient",<sup>57</sup> it would appear that the *Bourcheix* case is no longer authority on this point. Certainly, one would not be arbitrary and unreasonable in considering glass in cream as a "deleterious substance" rendering the cream "injurious to health", and thus within the exact words of the Act as amended.

### III. Conclusions.

Outside of the question of privity of contract, it is obvious that a more liberal view of the whole matter is required from the standpoint of the safeguardment of the public health. It is a question, not with whom plaintiff's contract was made, but rather, who, as a matter of social justice, should bear the risk involved. There is no his-

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<sup>56</sup> 248 N. Y. 293, 162 N. E. 84 (1928). In that case, plaintiff purchased some poultry feed from a dealer. The feed, containing ground wire, caused the death of several thousand ducks to which it was fed. Plaintiff's action, brought against the manufacturer to recover the losses suffered, was sustained. The court held that the sale of the food was a violation of §§ 128, 130 of the AGRICULTURE AND MARKETS LAW, which prohibits the sale of feeding stuffs containing any substance injurious to the health of animals.

<sup>57</sup> See note 54, *supra*. Consider AGRICULTURE AND MARKETS LAW § 200(3), which provides that food shall be deemed adulterated "if it consists in whole or in part of a diseased, contaminated, filthy, putrid or decomposed substance, or if it is otherwise unfit for food." (Italics ours.) The scope of the section italicized would seem to be limitless insofar as unwholesome food is concerned. As yet there have been no cases construing § 200. However, cases where parts of animals or insects are found in food products should clearly come within the Act. See *Tate v. Mauldin*, 157 S. C. 392, 154 S. E. 431 (1930) (where drink containing parts of a decomposed rat was held violative of the South Carolina pure food statute which provided that food is adulterated which "consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not"); *Culbertson v. Coca-Cola Bottling Co.*, 157 S. C. 352, 154 S. E. 424 (1930) (holding on the authority of *Tate v. Mauldin*, *supra*, that beverage containing yellowjacket, a poisonous insect, violated the statute, and constituted negligence *per se*).

torical basis for the privity rule.<sup>58</sup> The manufacturer, by virtue of impleader, will eventually be held liable.<sup>59</sup> In fact, as a matter of business practice, the manufacturers consider themselves as solely liable.<sup>60</sup> Limiting the consumer's remedy to an action in negligence, is not always just. Negligence, though it exists, cannot always be proven.<sup>61</sup> The inability of consumers to detect deleterious substances in food, which necessarily results in their relying on the manufacturer's care, coupled with the complexities of our modern marketing system, should result in holding the manufacturer, who prepares food-stuffs knowing that they will be sold to members of the public, liable to the consumer without the necessity of proving negligence.<sup>62</sup> Aboli-

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<sup>58</sup> See note 18, *supra*; VOLD, *op. cit. supra* note 8, at 476 ("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. Where applied, this expansion of the law of warranty throws the risk of injury from defective goods directly upon the party best able to avoid it, the producer whose conduct brought about the defect, instead of leaving the risk to rest on the ultimate user, who with regard to defects in goods necessarily used is, under present-day conditions, completely dependent on remote producers. It may, therefore, have a strong tendency to improve market conditions by eliminating such defects").

<sup>59</sup> See note 21, *supra*; N. Y. CIV. PRAC. ACT § 193(2); PRASHKER, CASES AND MATERIALS ON NEW YORK PLEADING AND PRACTICE (1937) 481.

<sup>60</sup> Bogert and Fink, *Business Practice Regarding Warranties in the Sale of Goods* (1930) 25 ILL. L. REV. 400, 417 ("\* \* \* the practice among manufacturers and dealers with regard to the operation of the manufacturer's warranty against defects in material and workmanship is that the complaints are satisfied either by the manufacturer directly or through the agency of the dealer. The manufacturer assumes that he is directly liable to the user. If the complaint goes through the dealer, it is for convenience's sake. The dealer does not regard himself as having any personal responsibility. All parties regard him as a conduit or intermediary for adjustment purposes, even though he has himself warranted the goods and sold them as his own. The facts manifest a practical repudiation by the manufacturers and dealers of the legalistic notion that warranties of personal property should be effective only between parties in privity of contract. Business practice in this regard is in accord with the minority of the American courts, and may, if supported by other commercial usage, justify an overthrow of the majority privity of contract theory. Such a result would be another praiseworthy assimilation of the law of real and personal property").

<sup>61</sup> See note 39, *supra*.

<sup>62</sup> Ketterer v. Armour & Co., 200 Fed. 322 (D. C. N. Y. 1912) ("The remedies of injured consumers ought not to be made to depend upon the intricacies of the law of sale. The obligation of the manufacturer should not be based alone upon privity of contract. It should rest, as was once said, upon 'the demands of social justice'"); Baxter v. Ford Motor Co., 168 Wash. 456, 12 P. (2d) 409, 412 (1932) ("Since the rule of *caveat emptor* was first formulated vast changes have taken place in the economic structure of the English-speaking peoples. Methods of doing business have undergone a great transition. Radio, billboards and the products of the printing press have become the means of creating a large part of the demand that causes goods to depart from factories to the ultimate consumer. It would be unjust to recognize a rule that would permit manufacturers to create a demand for their products by representation that they possess qualities which they in fact do not possess, and then, because there is no privity of contract existing between the consumer and

tion of the privity rule is not the only solution, for a more liberal interpretation of pure food statutes so as to include foods with foreign deleterious substances within the meaning of adulteration would have the same effect. True, the manufacturer would virtually be an insurer of the wholesomeness of the food. But if this is the way a manufacturer's vigilance can be stimulated, then the safeguarding of the public health requires it.

LOUIS J. GUSMANO.

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AWARD OF DAMAGES IN ADDITION TO RESCISSION IN SALE OF GOODS.

I.

The vendee's right to rescind for breach of warranty is governed in New York by Section 150, subdivision I(d), of the Personal Property Law<sup>1</sup> which reads:

" \* \* \* Where there is a breach of warranty by the seller, the buyer may at his election, \* \* \* (rescind) the contract or the sale and refuse to receive the goods, or if the goods have already been received, return them to the seller and recover the price or any part thereof which has been paid."

This section codified the New York common law rule which limited the rescinding vendee's recovery to the return of the purchase price.<sup>2</sup>

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manufacturer, deny the consumer the right to recover if damage results from the absence of those qualities when such absence is not readily noticeable"); see dissenting opinion of Clarkson, J., in *Thomason v. Ballard & Ballard*, 208 N. C. 1, 179 S. E. 30 (1935) ("It is of the greatest importance to the health of the general public that, when they purchase food or drink, it should be pure, wholesome and fit for use. It is a hard measure and almost impossible to prove negligence, and by the weight of authorities this rule under modern conditions is fast growing obsolete. The true rule, in more recent decisions, is that there is an implied warranty from the manufacturer to the consumer, the general public, where there is no opportunity to inspect, that the food or drink is pure, wholesome, and fit for consumption"); *Catani v. Swift & Co.*, 251 Pa. 52, 95 Atl. 931 (1915); *Hertzler v. Manshum*, 228 Mich. 416, 200 N. W. 155 (1924).

<sup>1</sup> N. Y. PERS. PROP. LAW § 150, subd. 1(d); note 11, *infra*.

<sup>2</sup> *Apex Chemical Co. v. Compson*, 171 N. Y. Supp. 60 (1918); *Oetjen v. Whitehead Metal Co.*, 126 Misc. 369, 213 N. Y. Supp. 600 (1926); *Bennett v. Piscitello*, 170 Misc. 177, 9 N. Y. S. (2d) 69 (1938); *Loader v. Brooklyn Chair Co.*, 64 App. Div. 615, 72 N. Y. Supp. 297 (2d Dept. 1901); *Joannes Bros. Co. v. Czarnikow-Rionda Co.*, 121 Misc. 474, 201 N. Y. Supp. 409 (1923), *aff'd*, 209 App. Div. 868, 205 N. Y. Supp. 930 (1st Dept. 1924); *Weigel v. Cook*, 237 N. Y. 136, 142, 142 N. E. 444, 446 (1923) (the court modified judgment of the lower court by deducting damages, including general expenses