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PRODUCT LIABILITY: THE CONSTRUCTIVE WARRANTY*

*Walter H. E. Jaeger***

Within the past decade, and especially during the past five years, the number of jurisdictions which have permitted recovery by the ultimate consumer for breach of warranty in other than food cases has steadily increased. Somewhat reminiscent of the early development of tort liability where the first deviation from the privity requirement occurred in connection with the sale of a drug or pharmaceutical, the early departures from privity of contract were concerned with food, beverages, drugs and similar or related products.

Paralleling the development of actions in tort are the many cases dealing with automobiles, automotive accessories and other mechanical devices, beginning

* This article is based on an address delivered to the students of Notre Dame Law School under the auspices of Gray's Inn.

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with that celebrated landmark, *Henningsen v. Bloomfield Motors, Inc.*,¹ which, in a few short years, has become a classic, repeatedly cited and quoted.²

Fully as significant as the evolution of case law is the adoption, by a substantial majority of the jurisdictions, of the Uniform Commercial Code.³ It makes two specific inroads on the privity "requirement."⁴ One is in favor of a member of the family or of the household or a guest in the home of the purchaser of the product which results in injury to the consumer or user.⁵ The other eliminates an atavistic and decidedly archaic survival of an earlier era, the notion that purveying food to a traveler is a service and not a sale.⁶ This has been specifically changed (for the better) by the Code.⁷

In certain jurisdictions, as will be seen, the requirement (so-called) of privity has been expressly abolished by statute. In many others, courts have unhesitatingly assumed the responsibility for "judicial legislation," mindful of the role the early judges played in creating the artificial stricture of privity. Some

1 32 N.J. 358, 161 A.2d 69 (1960).

2 *Italia Societa v. Oregon Stevedoring Co., Inc.*, 376 U.S. 315 (1964); *Schultz v. Tecumseh Products*, 310 F.2d 426 (6th Cir. 1962); *Lartigue v. R. J. Reynolds Tobacco Co.*, 317 F.2d 19 (5th Cir. 1963); *Ford Motor Co. v. Mathis*, 322 F.2d 267 (5th Cir. 1963); *Stearns v. Hertz Corp.*, 326 F.2d 405 (8th Cir. 1964); *Chapman v. Brown*, 198 F. Supp. 78 (D. Hawaii 1961), *aff'd* 304 F.2d 149 (9th Cir. 1962); *Noel v. United Aircraft Corp.*, 204 F. Supp. 929 (D. Del. 1962); *Duckworth v. Ford Motor Company*, 211 F. Supp. 888 (E.D. Pa. 1962); *Rogers v. Hexol, Inc.*, 218 F. Supp. 453 (D. Ore. 1962); *Picker X-Ray Corp. v. General Motors Corp.*, 185 A.2d 919 (D.C. Ct. App. 1962); *Simpson v. Logan Motor Co.*, 192 A.2d 122 (D.C. Ct. App. 1963); *George v. Willman*, 379 P.2d 103 (Alaska 1963); *Greenman v. Yuba Power Products, Inc.*, 59 Cal.2d 67, 27 Cal. Rptr. 697, 377 P.2d 897 (1962); *Simpson v. Powered Products of Michigan, Inc.*, 24 Conn. Sup. 409, 192 A.2d 555 (1963); *Posey v. Pensacola Tractor & Equipment Co.*, 138 So.2d 777 (Fla. App. 1962); *State Farm Mutual Automobile Insurance Co. v. Anderson-Weber, Inc.*, 252 Iowa 1289, 110 N.W.2d 449 (1961); *Reed v. Bunger*, 122 N.W.2d 290 (Iowa 1963); *Morrow v. Caloric Appliance Corporation*, 372 S.W.2d 41 (Mo. 1963); *Long v. Flanigan Warehouse Company*, 382 P.2d 399 (Nev. 1963); *Tackling v. Chrysler Corporation*, 77 N.J. Super 12, 185 A.2d 238 (1962); *Jakubowski v. Minnesota Mining & Manufacturing*, 80 N.J. Super 184, 193 A.2d 275 (1963); *Greenberg v. Lorenz*, 9 N.Y.2d 195, 213 N.Y.S.2d 39, 173 N.E.2d 773 (1961); *Randy Knitwear, Inc. v. American Cyanamid Company*, 11 N.Y.2d 5, 226 N.Y.S.2d 363, 181 N.E.2d 399 (1962); *United Pacific Ins. Co. v. Balcrank, Inc.*, 193 N.E.2d 920 (Oh. 1963); *Payne v. Valley Motor Sales, Inc.*, 124 S.E.2d 622 (W.Va. 1962).

As a partial indication of the importance attached to the decision in *Henningsen v. Bloomfield Motors, Inc.*, *supra* note 1, a number of legal periodicals which have noted or discussed the case are listed:

12 *Baylor L.Rev.* 345 (1960); 2 *B.C. Ind. & Com. L.Rev.* 133 (1960); 48 *Calif. L.Rev.* 873 (1960); 46 *Corn. L.Q.* 607 (1961); 65 *Dick. L.Rev.* 64 (1960); 29 *Fordham L.Rev.* 183 (1960); 74 *Harv. L.Rev.* 630 (1961); 59 *Mich. L.Rev.* 467 (1961); 7 *N.Y. L.F.* 59 (1961); 39 *N.C. L.Rev.* 299 (1961); 36 *Notre Dame Law.* 233 (1961); 40 *Ore. L.Rev.* 364 (1961); 14 *Rutgers L.Rev.* 829 (1960); 35 *St. John's L.Rev.* 178 (1960); 13 *S.C.L.Q.* 131 (1960); 12 *Syracuse L.Rev.* 123 (1960); 39 *Tex. L.Rev.* 694 (1961); 8 *U.C.L.A. L.Rev.* 658 (1961); 29 *U.Cin. L.Rev.* 519 (1960); 38 *U.Det. L.J.* 218 (1960); 109 *U. Pa. L.Rev.* 453 (1961); 14 *Vand. L.Rev.* 681 (1961); 18 *Wash. & Lee L.Rev.* 124 (1961); 7 *Wayne L.Rev.* 382 (1960); 12 *Western Res. L.Rev.* 387 (1961).

3 Jurisdictions which have adopted the Uniform Commercial Code: Alaska, Arkansas, California, Connecticut, District of Columbia, Georgia, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, West Virginia, Wisconsin, and Wyoming.

4 UNIFORM COMMERCIAL CODE §§ 2—314, 2—318.

5 As a third party beneficiary of express or implied warranties, UNIFORM COMMERCIAL CODE § 2—318.

6 As held in *Nisky v. Childs Company*, 103 N.J.L. 464, 135 Atl. 805 (Ct. Err. & App. 1927).

7 UNIFORM COMMERCIAL CODE § 2—314 reads in pertinent part: "Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale."

judges have suggested that if there is to be a change, it should be accomplished by the legislature rather than by the courts.

In future discussions of this subject, insofar as products other than food or its analogues are concerned, *Henningsen* will no doubt be considered the turning point. In an elaborate, well-considered and far-reaching opinion, Mr. Justice Francis, speaking for all of his brethren of the Supreme Court of New Jersey, boldly broke away from the outworn and harmful privity concept and held for the plaintiff-wife of the purchaser of an automobile in which she was injured.⁸ In its telling effect, this decision can certainly be compared with that of *MacPherson v. Buick Motor Co.*⁹ in the field of tort law.

I. INTRODUCTION

Out of the welter of cases and the confusion and controversy surrounding product liability, certain questions emerge: Should the remedy be in tort? Should it be in contract? Or does it have to be in either? One thing is crystal clear: Nothing could be less material to the injured consumer than the manner of his recovery, provided he recovers.

The purpose of this article is to suggest that an action for breach of warranty, more specifically, constructive warranty or one imposed by law, need not sound in *either* tort or contract.¹⁰ Actually some of the courts have not been too concerned with what they have described as unnecessary and unwanted legal niceties.¹¹

Traditionally, the tort cases were the first to break away from the repressive concept of privity and the proponents of the tort action in product liability cases have the advantage of an early start. However, associated with "tort" is the fundamental notion of "fault," "negligence," or "lack of due care." Yet, what is needed to afford the consumer adequate protection is absolute liability of the

8 *Henningsen v. Bloomfield Motors, Inc.*, *supra* note 1.

9 217 N.Y. 382, 111 N.E. 1050 (1916).

10 See MURPHY, *CONTRACTS CASEBOOK* 1057 (temp. ed. 1964).

11 *Chapman v. Brown*, 198 F. Supp. 78 (D. Hawaii 1961) *aff'd* 304 F.2d 149 (9th Cir. 1962); *Ketterer v. Armour & Co.*, 200 Fed. 322 (S.D.N.Y. 1912); *Thompson v. Reedman*, 199 F. Supp. 120 (E.D. Pa. 1961); *Picker X-Ray Corp. v. General Motors Corp.*, 185 A.2d 919 (Mun. Ct. App. D.C. 1962); *Klein v. Duchess Sandwich Co.*, 14 Cal.2d 272, 93 P.2d 799 (1939); *Greenman v. Yuba Power Products, Inc.*, 59 Cal.2d 67, 27 Cal. Rptr. 697, 377 P.2d 897 (1962); *Hamon v. Digliani*, 148 Conn. 710, 174 A.2d 294 (1961); *Simpson v. Powered Products of Michigan, Inc.*, 24 Conn.Sup. 409, 192 A.2d 555 (1963); *Hector Supply Co. v. Carter*, 122 So.2d 22 (Fla. App. 1960); *Green v. American Tobacco Co.*, 154 So.2d 169 (Fla. 1963) discussed in Jaeger, *NEWSLETTER*, General Practice Section, ABA Volume 1, No. 3 (Jan. 1964), p. 1; *State Farm Mutual Automobile Ins. Co. v. Anderson-Weber, Inc.*, 252 Iowa 1289, 110 N.W.2d 449 (1961); *Swengel v. F. & E. Wholesale Grocery Co.*, 147 Kan. 555, 77 P.2d 930 (1938); *Sams v. Ezy-Way Foodliner Co.*, 157 Me. 10, 170 A.2d 160 (1961); *Spence v. Three Rivers Builders & Masonry Supply*, 353 Mich. 120, 90 N.W.2d 873 (1958); *Manzoni v. Detroit Coca-Cola Bottling Co.*, 363 Mich. 235, 109 N.W.2d 918 (1961); *Midwest Game Co. v. M. F. A. Milling Corp.*, 320 S.W.2d 547 (Mo. 1959); *Morrow v. Caloric Appliance Corp.*, 372 S.W.2d 41 (Mo. 1963); *Worley v. Procter & Gamble Mfg. Co.*, 241 Mo. App. 1114, 253 S.W.2d 532 (1952); *Henningsen v. Bloomfield Motors, Inc.*, *supra* note 1; *Greenberg v. Lorenz*, 9 N.Y.2d 195, 213 N.Y.S.2d 39, 173 N.E.2d 773 (1961); *Randy Knitwear, Inc. v. American Cyanamid Co.*, 11 N.Y.2d 5, 226 N.Y.S.2d 363, 181 N.E.2d 399 (1962); *Goldberg v. Kollman Instrument Corp.*, 12 N.Y.2d 432, 191 N.E.2d 81 (1963); *Parish v. Great Atlantic & Pacific Tea Co.*, 13 Misc.2d 33, 177 N.Y.S.2d 7 (N.Y. Munic. Ct. 1958); *Rogers v. Toni Home Permanent Co.*, 167 Ohio St. 244, 4 Ohio Op. 2d 291, 147 N.E.2d 612 (1958); *General Motors Corp. v. Dodson*, 338 S.W.2d 655 (Tenn. App. 1960); *Jacob E. Decker & Sons, Inc. v. Capps*, 139 Tex. 609, 164 S.W.2d 828 (1942); *Mazetti v. Armour & Co.*, 75 Wash. 622, 135 Pac. 633 (1913); *LaHue v. Coca-Cola Bottling, Inc.*, 50 Wash.2d 645, 314 P.2d 421 (1957).

manufacturer, producer or processor of the defective product. And here, the advocates of the contract remedy are stymied by the unfortunate strictures of the so-called "privity requirement." Since neither remedy appears satisfactory, and since there is no compelling need for the use of either, it is submitted that a distinct remedy for breach of constructive (or implied in law) warranty may have evolved which is *sui generis*, and hopefully, *sui juris*.

In this action, then, absolute liability would be imposed upon the manufacturer in an action by the ultimate consumer or user of the former's product *regardless of fault or privity*. In warranties imposed by law, absence of mutuality of assent has no significance, whereas in the case of express or implied-in-fact warranties, mutuality of assent is significant; these warranties being part of the consideration bargained for, privity is important. But even here, at least in certain types of cases, the third party beneficiary doctrine has been recognized and applied.¹²

On the other hand, simply because the warranty is imposed by law or is "constructive" is no reason why the remedy for its breach must be in tort. Historically, it is true that ten years after the ill-advised *obiter* opinions in *Winterbottom v. Wright*¹³ were rendered, *Thomas v. Winchester*¹⁴ decided that privity would be no bar to an action in tort where negligence was involved. Three score and four years later, the classic case of *MacPherson*¹⁵ consecrated and enlarged this departure and concluded that the defendant company "owed a duty of care and vigilance" to others besides the immediate purchaser.¹⁶

But even with these inroads upon the doctrine of privity, once the plaintiff failed to prove negligence (or defendant showed "due care"), there was still no recovery: Thus, the remedy in tort left (and still leaves) much to be desired.¹⁷

Within the last half-century, the courts began to recognize the rights of an ultimate consumer where a breach of warranty was the basis for his cause of

12 Discussed in *Parish v. Great Atlantic & Pacific Tea Co.*, *supra* note 11, citing numerous cases including *Ward Baking Co. v. Trizzino*, 27 Ohio App. 475, 161 N.E. 557 (1928) and *Glanzer v. Shepard*, 233 N.Y. 236, 135 N.E. 275 (1922). The court lists the following states as having rejected the privity requirement completely: California, Florida, Illinois, Iowa, Kansas, Louisiana, Michigan, Mississippi, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Washington. In light of the decision of the Supreme Court of Pennsylvania in *Hochgertel v. Canada Dry Corp.*, 409 Pa. 610, 187 A.2d 575 (1963), it would seem that the inclusion of Pennsylvania in this group of jurisdictions, based on *Mannsz v. Macwhyte Co.*, 155 F.2d 445 (3d Cir. 1946), is no longer accurate.

13 10 Mees. & W. 109, 11 L.J. Ex.415, 152 Eng. Rep. 402 (Ex. 1842); the statement of Abinger, G.B. was to the effect that "every passenger, or even any person passing along the road, who is injured by the upsetting of the coach" could sue; by way of dictum, he observed that there was "no privity of contract between these parties," and therefore defendant should have judgment.

Sharing this view, Alderson, B., was of the opinion that if the plaintiff could sue, "there is no point at which such actions would stop." He concluded that "the only safe rule is to confine the right to recover to those who enter into the contract."

14 6 N.Y. 397 (1852).

15 *Supra* note 10.

16 *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 385, 111 N.E. 1050, 1053 (1916).

17 In addition to having to prove negligence, the plaintiff may be defeated by contributory negligence or even "assumption of risk." Cf. *Chapman v. Brown* *supra* note 11, for a discussion of these defenses which were held inapplicable in the opinion rendered by Judge Tavares, speaking for the federal district court of Hawaii. In *Smith v. Albert*, 168 N.E.2d 495 (Ohio App. 1959), the court discussed the questions of contributory negligence and assumption of risk in connection with a case involving the personal injuries of a farm employee who fell from a wooden ladder. Basically, the court had to determine whether such a ladder "as a matter of law" is a "simple tool." A split of authority was noted; the leading case holding it to be a jury

action. As in the case of the tort remedy as noted above, the first departure from the "requirement" of privity occurred in cases involving foods, beverages, or related products.¹⁸ And here again, as in the case of torts, the next truly significant break with precedent involved an action arising out of the sale of a defectively manufactured automobile, *Henningsen v. Bloomfield Motors, Inc.*¹⁹ Most recently several of the leading jurisdictions have discarded privity entirely and, as to certain types of products, have applied the doctrine of absolute liability.²⁰ While the list is growing, there seems to be a standard criterion for determining when privity is to be discarded: Has the consumption or use of the product caused the death or personal injury of the plaintiff?

The reaction of many courts to the artificial requirement of privity has been well summarized: "The remedies of injured consumers ought not to be made to depend upon the intricacies of the law of sales."²¹ If to this is added: "Nor upon the subtle niceties of the law of torts," the consumer would undoubtedly utter a fervent amen to these sentiments.

Now turning to the cases, and then to the statutes, the evolution, development and emergence of a distinct cause of action for breach of "constructive" or implied-in-law warranty will be examined and discussed.

question and which the Ohio court followed is *Kalash v. Los Angeles Ladder Co.*, 1 Cal.2d 229, 34 P.2d 481 (1934). Said the Ohio court, at 499: "After a careful examination of the record in this case, including the splendid briefs furnished by counsel and the decisions in many jurisdictions involving actions for personal injuries resulting from the use of a defective ladder, and especially the decisions of the Court of Appeals of Kentucky classifying a stepladder and a 'chicken ladder' as not being 'simple tools,' we must conclude that the uncontradicted evidence adduced by the plaintiff presents an issuable fact to be determined by the jury; that this court cannot say, as a matter of law, that the ladder used by the plaintiff was a 'simple tool,' and that the issues of negligence by the defendants and contributory negligence and assumption of risk by the plaintiff are questions that should be submitted to the jury."

18 *Coca-Cola Bottling Co. of Puerto Rico, Inc. v. Negron Torres*, 255 F.2d 149 (1st Cir. 1958); *Gladiola Biscuit Co. v. Southern Ice Co.*, 267 F.2d 138 (5th Cir. 1959) *reversing* 163 F. Supp. 570 (E.D. Tex. 1958); *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292 (3d Cir. 1961); *Ketterer v. Armour & Co.*, 200 Fed. 322 (S.D.N.Y. 1912); *Klein v. Duchess Sandwich Co.*, 14 Cal.2d 272, 93 P.2d 799 (1939); *Rubino v. Utah Canning Co.*, 123 Cal. App.2d 18, 266 P.2d 163 (1954); *Cliett v. Lauderdale Biltmore Corp.* 39 So.2d 476 (Fla. 1949); *Florida Coca-Cola Bottling Co. v. Jordan*, 62 So.2d 910 (Fla. 1953); *Tiffin v. Great Atlantic & Pacific Tea Co.*, 18 Ill.2d 48, 162 N.E.2d 406 (1959); *Welter v. Bowman Dairy Co.*, 318 Ill. App. 305, 47 N.E.2d 739 (1943); *Patargias v. Coca-Cola Bottling Co. of Chicago*, 332 Ill. App. 117, 74 N.E.2d 162 (1947); *Sharpe v. Danville Coca-Cola Bottling Co.*, 9 Ill. App.2d 175, 132 N.E.2d 442 (1956); *Davis v. Van Camp Packing Co.*, 189 Iowa 775, 176 N.W. 382, 17 A.L.R. 649 (1920); *Swengel v. F. & E. Wholesale Grocery Co.*, 147 Kan. 555, 77 P.2d 930 (1938); *Nichols v. Nold*, 174 Kan. 613, 258 P.2d 317, 38 A.L.R.2d 887 (1953); *Gernes v. Pittsburg Coca-Cola Bottling Co.*, 183 Kan. 758, 332 P.2d 258 (1958); *Le Blanc v. Louisiana Coca-Cola Bottling Co.*, 221 La. 919, 60 So.2d 873 (1952); *Miller v. Louisiana Coca-Cola Bottling Co.*, 70 So.2d 409 (La. App. 1954); *Sams v. Ezy-Way Foodliner Co.*, 157 Me. 10, 170 A.2d 160 (1961); *Rainwater v. Hattiesburg Coca-Cola Bottling Co.*, 131 Miss. 315, 95 So. 444 (1923); *Biedenharn Candy Co. v. Moore*, 184 Miss. 721, 186 So. 628 (1939); *Greenberg v. Lorenz*, 9 N.Y.2d 195, 213 N.Y.S.2d 39, 173 N.E.2d 773 (1961); *Parish v. Great Atlantic & Pacific Tea Co.*, 13 Misc.2d 33, 177 N.Y.S.2d 7 (N.Y. Munic. Ct. 1958); *Markovich v. McKesson & Robbins, Inc.*, 106 Ohio App. 265, 7 Ohio Op.2d 10, 78 Ohio L. Abs. 111, 149 N.E.2d 181 (1958); *Cook v. Safeway Stores Inc.*, 330 P.2d 375 (Okla. 1958); *Nock v. Coca-Cola Bottling Works*, 102 Pa. Super. 515, 156 Atl. 537 (1931); *Jacob E. Decker & Sons, Inc. v. Capps*, 139 Tex. 609, 164 S.W.2d 828 (1942); *Campbell Soup Co. v. Ryan*, 328 S.W.2d 821 (Tex. Civ. App. 1959); *Mazetti v. Armour & Co.*, 75 Wash. 622, 135 Pac. 633 (1913); *Laffue v. Coca-Cola Bottling, Inc.*, 50 Wash.2d 645, 314 P.2d 421 (1957).

19 *Supra* note 1.

20 *Chapman v. Brown*, *supra* note 11; *Picker X-Ray v. General Motors Corp.*, *supra* note 11; *Greenman v. Yuba Power Products, Inc.*, *supra* note 11; *Hamon v. Digliani*, *supra* note 11; *Green v. American Tobacco Company* and other cases listed *supra* note 11.

21 *Ketterer v. Armour & Co.*, 200 Fed. 322 (S.D.N.Y. 1912).

II. DEFINITION, NATURE AND TYPES OF WARRANTY

Definition and Nature

A warranty is a statement or representation made by the seller of goods contemporaneously with, and as a part of, the contract of sale, although collateral to the express object of it, having reference to the character, quality, or title of the goods, and by which he promises or undertakes to insure that certain facts are or shall be as he then represents them. A warranty is express when the seller makes an affirmation with respect to the article to be sold, pending the treaty of sale, on which it is intended that the buyer shall rely in making the purchase; and there is authority for the proposition that any warranty derived from express language should be considered an express warranty. A warranty is implied when the law derives it by implication or inference from the nature of the transaction, or the relative situation or circumstances of the parties. Stated otherwise, an express warranty is one imposed by the parties to the contract, while an implied warranty is not one of the contractual elements of an agreement but is, instead, imposed by law.²²

The afore-quoted definition of warranty appears in *Mitchell v. Rudasill*,²³ decided a few years ago in Missouri. The cows, which were the subject matter of the contract of sale, were found to have mastitis of the udder which prevented them from giving wholesome milk. As the vendor had been made aware that the cows were to be a part of the buyer's dairy herd, that suitable milk was an essential, the court held that there had been a breach of the warranty of soundness of the animals. Although the plaintiff had submitted his case on the theory of implied warranty, he actually proved an express representation that the cows had sound udders and would give "a decent flow of milk."²⁴

A somewhat similar case, *Reed v. Bunger*,²⁵ decided last year, involved an

22 *Mitchell v. Rudasill*, 332 S.W.2d 91, 94-95 (Mo.App. 1960).

23 332 S.W.2d 91 (Mo.App. 1960).

24 On this point, the court observed: "But it does not necessarily follow in this case that the judgment must be reversed because the plaintiff submitted his case on the theory of an implied warranty rather than that of an express warranty. While it has been stated, as defendant urges, that an express warranty excludes an implied warranty, this has been criticized as too broad a statement of the rule. Williston on Sales, Rev. Ed. Vol. 1, p. 625, Sec. 239a. A more accurate statement of the correct rule is that an express warranty excludes an implied warranty of fitness (1) if the express warranty is inconsistent with the warranty which would have been implied had none been expressed; or (2) if the express warranty relates to the same or a similar subject matter as one which would have been implied. 164 A.L.R., p. 1328; Williston on Sales, *supra*; 2 Mechem on Sales, p. 1095, Sec. 1295. In the principal case cited by defendant, *Hunt v. Sanders*, 313 Mo. 169, 281 S.W. 422, 425, after stating the general rule, the court went on to say: "Where the warranty expressly agreed upon is precisely the same as the one the law would imply from the mere fact of sale, in case of breach it can be of no consequence whether the warranty be regarded as express or as implied. In such case the distinction is without importance except as to the matter of proof." *Mitchell v. Rudasill*, *supra* note 22.

In addition to the *Mitchell* case, there have been any number of similar cases involving warranties of animals; among these may be cited: *Ver Steegh v. Flaugh*, 251 Iowa 1011, 103 N.W.2d 718 (1960), boar for breeding; *Lyle v. W. H. Hodges & Co.*, 82 So.2d 457 (La. App. 1955), bull calf died some three days after purchase; warranty held breached; *Grovedale Feed Co. v. Corron*, 155 N.E.2d 291 (Munic. Ct. of Findlay, Ohio 1957), chickens were sick, held that warranty was breached; *Vander Eyk v. Bones*, 77 S.D. 345, 91 N.W.2d 897 (1958), Battle Pioneer, a bull, failed to breed; however, as notice of breach was not given within a reasonable time, the buyer could not rescind.

25 122 N.W.2d 290 (Iowa 1963); the court held that the word "goods" as used in the statute, IOWA CODE ANN. § 554.77 (1950), is broad enough to include cattle, the subject matter of the instant contract.

After a comprehensive review of the earlier cases upon which defendant relied, the court

action by the buyer of twenty heifers against the vendor for breach of express and implied warranties and for fraud. The trial court held that an express oral warranty had been proved and that under the Uniform Sales Act²⁶ an implied warranty of fitness for the particular purpose for which the cows were purchased had arisen since the plaintiff buyer had relied on defendant's "skill and judgment in selecting the ones [heifers] to be shipped." Of the twenty head of cattle which were sold, the court held a breach of warranty, either express or implied or both, had occurred in the case of fifteen which were either older than represented, suffered from mastitis, or were otherwise unfit to furnish the required quantity of milk.

In affirming judgment for plaintiff buyer, the Supreme Court of Iowa noted a tendency "to narrow application of the rule of caveat emptor and extend the doctrine of implied warranty in sales of personalty."²⁷ In breach of implied warranty actions, said the court, "the seller's lack of knowledge [that] it does not comply with the warranty" and "Good faith and lack of the seller's negligence are no defense."²⁸

In *Miller v. Penney*,²⁹ the subject matter of the sale and of the accompanying warranty of fitness was a purebred bull, not a group of heifers as in the preceding case. Eileenmere 627th, the fanciful appellation by which this "Grand Champion" of eleven prize contests was known, priced at \$10,600 and sold for breeding purposes, proved a complete disappointment to his new owner (not to mention the cows). Granting rescission, the federal district court commented in truly humorous vein:³⁰

Eileenmere 627th was born in the stable of luxury and raised in the field of plenty. With a long line of champions as his an-

concluded that the uniform statute had liberalized the doctrine of warranty and restricted the rule of *caveat emptor*. It held that the older decisions were no longer applicable.

26 UNIFORM SALES ACT §§ 12, 15, IOWA CODE ANN. §§ 554.13, 554.16, 554.77 (1950).

27 Citing *Drager v. Carlson Hybrid Corn Co., Inc.*, 244 Iowa 78, 56 N.W.2d 19 (1952); *Farmers State Bank v. Cook*, 251 Iowa 942, 103 N.W.2d 704 (1960).

28 *Reed v. Bunger*, 122 N.W.2d 290, 298 (Iowa 1963), citing *Ver Steegh v. Flaugh*, 251 Iowa 1011, 103 N.W.2d 718 (1960) and *Doden v. Housh*, 251 Iowa 1271, 105 N.W.2d 78 (1960).

29 *Miller v. Penney*, 77 F. Supp. 887 (W.D. Mo. 1948). Introducing the issues, the court remarked: "This is a bull case, and I sincerely regret that I agreed to decide it rather than to have it tried before a jury composed of stockmen and farmers who through experience would have been more familiar with the commercial 'love life' of a 'blooded' bull than I.

While my youth was spent in rather close association with bulls, they were not the kind involved here. They were common, plebeian bulls which at this time of the year roamed the woods and fields and walked the fence rows, challenging with low growling moans or shrill bellows every animate or inanimate object. They were bulls which pawed the dirt and rolled their heads in impassioned, frenzied wrath that knew no bounds and respected no normal enclosure. But Eileenmere 627th, No. 735647, is an aristocrat of the kine world, a product of this age of high prices." *Miller v. Penney*, *supra* at 887-88.

30 This is delightfully illustrated by the following quotation from the opinion of the court: "He was touted as the great son of a noble sire and heralded far and wide [wide?] as the outstanding 'Star of the Year' and the new Junior Sire of an equally aristocratic herd of Aberdeen-Angus cows and heifers. But, alas, while his meretricious charms made him a champion in the show ring, they were unavailing in the mating pen. The cruel hand of fate had destined the great Eileenmere 627th, 735647, to be a celibate. Never could he become the proud Junior Sire of so noble a herd, with ambitious visions no doubt of becoming, in time, a prouder Senior Sire; never would he know the proud, chest-expanding pride of seeing his own flesh and blood walk the green pastures among a herd over which he would majestically preside. There would be no Eileenmere 628th. Because of defective hind quarters and genital defects he was physically unable to perform the mating act, which nature intended should result in reproduction. He was worthless for the purpose for which he was purchased." *Miller v. Penney*, *id.* at 888.

cestors, he was destined from the day he was calved to follow in the hoofsteps of his illustrious progenitors. In this respect, at least, he did not disappoint his "fitters" (a term applied to those who prepare bulls for the show ring). Before he was two years old he had traversed the "circuit," appearing in twelve shows. Eleven times he was acclaimed as Grand Champion and the twelfth time as champion of his class. This is no mean record where competition in glamour and other bullish qualities, obscure to the uninitiated, is so pronounced as it is in the world of show bulls. Finally having won his laurels as a great star in the show ring, he attracted by his reputation the "big money" buyers. After this was accomplished, he, like most others of his kind, was removed from the tinsel surroundings of the show world and returned to his home that he might bring to the enjoyment of his owners the fruits of his success.³¹

Types

At the very outset it is essential to understand the distinction between various types of warranty in order that the confusion be not worsened as has been the case in some of the decisions.³² The true warranty, as it has developed from the early concept of deceit, is quite generally deemed contractual. This includes both express and implied-in-fact warranties. While discussing these to a limited extent, this article is more concerned with the implied-in-law or "constructive" warranty and this is where the major emphasis will be placed. In connection with the latter, it must be constantly borne in mind that it is not a creature of contract at all but is based on an obligation which the law imposes, regardless of the wishes of the producer, manufacturer, or vendor in the absence of an express disclaimer.³³

As the concept of express warranty developed,³⁴ precise words gradually yielded to intention³⁵ and this, in turn, to the question of whether there had been a promise or affirmation as to the character and quality of or title to the goods. While at first it was thought that an intent to warrant was essential³⁶

31 *Miller v. Penney*, *supra* note 29, at 888; for other cases wherein actions were brought for breach of warranties regarding animals see *supra*, note 24.

32 A typical and unfortunate example is contained in the opinion of the court in *Hochgertel v. Canada Dry Corp.*, 409 Pa. 610, 187 A.2d 575 (1963).

33 *Infra* IV. Implied warranties under the uniform statutes for cases dealing with disclaimer of liability; see especially *Henningsen v. Bloomfield Motors, Inc.*, *supra* note 1.

34 For an example of express warranty, see *Mitchell v. Rudasill*, *supra* note 22.

35 This development is similar to the early development in other fields of the common law as, for example, in the case of instruments under seal. Referring to this, a New Jersey court has said: "Words in early times, like form in a document or pleading were all important." Commenting on the difference in approach between the ancient and modern law, the court said: "The ancient land law imputed a thaumaturgic quality to language. If the judicial eye in scanning the instrument chanced upon a pet phrase the inquiry was ended without resorting to the arduous effort of reconciling evident inconsistencies therein. The universal touchstone today is the intention of the parties to the instrument. . . ." *Oldfield v. Stoeco Homes, Inc.*, 26 N.J. 246, 139 A.2d 291 (1958), quoted in 4 *WILLISTON, CONTRACTS* § 600A, at 291 (3d ed. Jaeger 1961).

36 *Pasley v. Freeman*, 3 T.R. 51, 100 Eng. Rep. 450 (K.B. 1789); 1 *WILLISTON, SALES* § 198 (3d ed. 1948). In this case it was said, "an affirmation at the time of a sale is a warranty provided it appears on evidence to have been so intended." See also *Borrekins v. Bevan*, 3 Rawle (Pa.) 23 (1831); *McFarland v. Newman*, 9 Watts (Pa.) 55 (1839), where the Supreme Court of Pennsylvania expressed its regret that the rule of *Chandelor v. Lopus*, Cro. Jac. 4, 79 Eng. Rep. 3 (Ex. 1625) should have been "swept away by a flood of innovation in England and some of our sister States."

this was eventually held unnecessary.³⁷ The distinction between express and implied warranties has been well stated in a classic case:³⁸

Warranty may, but need not, be based on contract.

There can be no doubt now, of course, that a seller may promise, in consideration of the purchase of goods from him, that he will be answerable for their present, or, indeed, for their future condition. Nor is it open to doubt that a seller who in terms warrants the goods which he sells thereby enters into such a contract. But when a seller is held liable on a warranty for making an affirmation of fact in regard to goods in order to induce their purchase, to hold that such an affirmation is a contract is to speak the language of pure fiction. It should not be the law and it is not the law that a seller who by positive affirmation induces a buyer to enter into a bargain can escape from liability by denying that his affirmation was an offer to contract. A positive representation of fact is enough to render him liable. The representation of fact which induces a bargain is a warranty.³⁹ In truth, the obligation imposed upon the seller in such a case is imposed upon him not by virtue of his agreement to assume it, but because of a rule of law applied irrespective of agreement. The obligation in such a case is quasi contractual, and at least if the seller knows the falsity of his representation there is also a tort.⁴⁰

As to the constructive warranty in connection with the sale of food it has been said:

1. In any case where a dealer sells articles of food for immediate human consumption, the purchaser may rely upon an implied warranty that such articles are wholesome and not deleterious, and in the event he sustains injuries from consumption thereof, he may waive any tort there may have been and maintain his cause of action upon such implied warranty.

2. Where articles of food for human consumption are manufactured or packed by a manufacturer or packer and by a series of transactions reach a retail dealer who sells to the consumer, the manufacturer or packer, each intermediate dealer, and the retail seller impliedly warrant that such articles of food are wholesome and fit for immediate human consumption.⁴¹

A lesser, though growing number of jurisdictions recognize the existence of a constructive warranty in cases which do not involve articles for human consumption. Principal among these are decisions relating to products of mechanical construction, any of which may have hidden defects threatening life or limb, as will be seen from the subsequent discussion.⁴²

37 *Ford Motor Co. v. Cullum*, 96 F.2d 1 (5th Cir. 1938), *cert. denied*, 305 U.S. 627 (1938); *Becker v. Sprowles*, 310 Ky. 636, 220 S.W.2d 564 (1949); *Adams v. Peter Tramontin Motor Sales, Inc.*, 42 N.J. Super. 313, 126 A.2d 358 (1956); *Jackson v. Gifford*, 264 P.2d 313 (Okla. 1953); *Kiddell v. Burnard*, 152 Eng. Rep. 282 (Ex. 1842).

38 *Davis v. Van Camp Packing Co.*, 189 Iowa 775, 176 N.W. 382 (1920).

39 Citing *Foot v. Wilson Mercantile Co.*, 104 Kan. 191, 178 Pac. 430 (1919).

40 *Davis v. Van Camp Packing Co.*, *supra* note 38, quoting 5 WILLISTON, CONTRACTS § 1505 (Rev. ed. 1937).

41 *Swengel v. F. & E. Wholesale Grocery Co.*, 147 Kan. 555, 77 P.2d 930 (1938), quoted with approval in *Nichols v. Nold*, 174 Kan. 613, 258 P.2d 317 (1953), where the court cites and discusses many of these cases arising in Kansas, as well as those from other jurisdictions including, *inter alia*, *Davis v. Van Camp Packing Co.*, *supra* note 38.

42 *Infra* III. Recent cases.

Following the lead of *Henningsen v. Bloomfield Motors, Inc.*,⁴³ and with a similar determination to conform to the modern trend, the Court of Appeals of the District of Columbia rejected privity as a requirement in an action for breach of implied warranty, *Picker X-Ray Corp. v. General Motors Corp.*⁴⁴ As in *Henningsen*, a defective steering mechanism on a new automobile was responsible for the damage. When plaintiff sued the manufacturer and dealer, defendant manufacturer moved to dismiss on the ground that there was no privity of warranty; the trial court granted the motion and plaintiff appealed.

In a lucid and forward-looking opinion, Judge Myers cited many of the leading precedents⁴⁵ and effectively overruled the earlier jurisprudence of the District.⁴⁶ He stated the essential elements for recovery in actions for breach of implied warranty:

There seems to be some confusion in understanding the nature of implied warranty liability. In the first place, concepts of negligence and fault, as defined by negligence standards, have no place in warranty recovery cases. Proof of negligence is unnecessary to liability for breach of implied warranty and the lack of it is immaterial to defense thereof. Since the warranty is *implied*, either in fact or in law, no express representations or agreements by the manufacturer are needed. Implied warranty recovery is based upon two factors: (a) The product or article in question has been transferred from the manufacturer's possession while in a "defective" state, more specifically, the product fails either to be "reasonably fit for the particular purpose intended" or of "merchantable quality," as these two terms, separate but often overlapping, are defined by the law; and (b) as a result of being "defective," the product causes personal injury or property damage.⁴⁷

III. THE EARLY CASES

One of the earliest precedents of note, *Klein v. Duchess Sandwich Co.*,⁴⁸

⁴³ *Supra* note 1.

⁴⁴ 185 A.2d 919 (D.C. Munic. Ct. App. 1962).

⁴⁵ Such as *Chapman v. Brown*, 198 F. Supp. 78, 104, 119 (D. Hawaii 1961); *Asher v. Coca-Cola Bottling Co.*, 172 Neb. 855, 112 N.W.2d 252, 255 (1961); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960), 75 A.L.R.2d 1; *Randy Knitwear, Inc. v. American Cyanamid Company*, *supra* note 2; *Greenberg v. Lorenz*, 9 N.Y.2d 195, 213 N.Y.S.2d 39, 173 N.E.2d 773 (1961); *General Motors Corp. v. Dodson*, 47 Tenn. App. 414, 338 S.W.2d 655 (1960) (*cert. denied* Sup. Ct. Tenn.); *Jacob E. Decker & Sons, Inc. v. Capps*, 139 Tex. 609, 164 S.W.2d 828, 831 (1942), 142 A.L.R. 1479.

⁴⁶ "We are aware that in this jurisdiction the United States Court of Appeals for the District of Columbia Circuit decided in 1932 that 'according to the great weight of authority, a manufacturer of food is not liable to third persons under an implied warranty, because there is no privity of contract between them.' *Connecticut Pie Co. v. Lynch*, 61 App. D.C. 81, 57 F.2d 447 (1932). This ruling was followed in another food case, *Hanback v. Dutch Baker Boy, Inc.*, 70 App. D.C. 398, 107 F.2d 203 (D.C. Cir. 1939).

"Ordinarily we would feel bound to apply this principle of law to the present case. However, from a study of recent decisions on the question of privity in implied warranty cases involving food products as well as manufactured articles, we note that there is a distinct trend to repudiate this doctrine entirely. The more recent authorities, in cases involving both food and defectively-manufactured products which would be dangerous to life or limb, have eliminated the requirement of privity between the maker and the reasonably-expected ultimate consumer or user and have ruled that, in keeping with modern methods of commerce and sales, an implied warranty runs between the manufacturer or wholesaler and the consumer who buys his product through a retail outlet. Three of the cases relied upon in *Connecticut Pie Co. v. Lynch*, *supra*, have been overruled or modified." *Picker X-Ray Corp. v. General Motors Corp. supra*, note 44, citing *Randy Knitwear, Inc. v. American Cyanamid Co. supra* note 2.

⁴⁷ *Picker X-Ray Corp. v. General Motors Corp.*, *supra* note 44.

⁴⁸ 14 Cal.2d 272, 93 P.2d 799 (1939).

was decided in a jurisdiction which has since declared itself for absolute liability.⁴⁹ Having bought his wife a ham and cheese sandwich, the husband's consternation (not to mention his spouse's disgust) may well be imagined when she bit into the sandwich and found it "crawling with maggots and worms." When Mrs. Klein brought this action, the manufacturer defended on the tried and rarely found wanting ground of lack of privity. The Supreme Court of California refused to entertain this defense and affirmed a judgment for the plaintiff. This decision has since served as a persuasive precedent in any number of cases.⁵⁰

But of even greater importance is *Jacob E. Decker & Sons v. Capps*.⁵¹ None of the earlier cases was as definitive in its rejection of privity as a requirement for a breach of warranty action. Speaking through its Chief Justice, the Supreme Court of Texas, without the slightest equivocation, grounded its decision on considerations of public policy: Protection of the consumer is the prime consideration. Here, a summer sausage, cervelat, encased in cellophane was purchased from a retailer by Capps. Various members of the family partook of the sausage, all became ill, and one died. When this action was brought against the manufacturer, the jury found no negligence imputable to him. But, since the sausage was obviously unfit for human consumption, as the injury and death of those ingesting it tragically demonstrated, judgment for breach of warranty was rendered for the plaintiffs by the trial court and affirmed by the Court of Civil Appeals.⁵²

The Supreme Court reviewed the entire history of implied warranties accompanying the sale of food, traced its source to the early common law as far back as 1266 A.D. and then observed "a growing tendency . . . to discard the requirement of privity and to hold the manufacturer liable directly to the ultimate consumer."⁵³ The court continued:

After having considered the matter most carefully, we have reached the conclusion that the manufacturer is liable for the injuries sustained by the consumers of the products in question. We think the manufacturer is liable in such a case under an implied warranty imposed by operation of law as a matter of public policy. We recognize that the authorities are by no means uniform, but we believe the better reasoning supports the rule which holds the manufacturer liable. Liability in such case is not based on negligence, nor on a breach of the usual implied contractual warranty, but on the broad principle of the public policy to protect human health and life. It is a well-known fact that articles of food are manufactured and placed in the channels of commerce, with the intention that they

49 California, see *Greenman v. Yuba Power Products, Inc.*, *supra* note 2.

50 As, for example, *Chapman v. Brown*, *supra* note 2; *Ruderman v. Warner-Lambert Pharmaceutical Co.*, 23 Conn. Sup. 416, 184 A.2d 63 (1962); *Burr v. Sherwin Williams Co.*, 42 Cal.2d 682, 268 P.2d 1041 (1954); *Peterson v. Lamb Rubber Co.*, 54 Cal.2d 339, 353 P.2d 575 (1960); *Collumb v. Pope & Talbot, Inc.*, 135 Cal. App.2d 653, 288 P.2d 75 (1955); *Whitfield v. Jessup*, 31 Cal.2d 826, 193 P.2d 1 (1948); *Vallis v. Canada Dry Ginger Ale, Inc.*, 11 Cal. Rptr. 823 (1961); *Rubino v. Utah Canning Co.*, 123 Cal. App.2d 18, 266 P.2d 163 (1954); *Parish v. Great Atlantic & Pacific Tea Co.*, *supra* note 11.

There were earlier cases, and *Parks v. G. C. Yost Pie Co.*, 93 Kan. 334, 144 Pac. 202 (1914); *Mazetti v. Armour & Co.*, 75 Wash. 622, 135 Pac. 633 (1913) are among the earliest.

51 *Supra*, note 45.

52 The case is discussed in Jaeger, *Privity of Warranty: Has the Tocsin Sounded?*, 1 *DUQUESNE U.L. REV.* 1 (1963).

53 *Jacob E. Decker & Sons, Inc. v. Capps*, 139 Tex. 609, 617, 164 S.W.2d 828, 832 (1942).

shall pass from hand to hand until they are finally used by some remote consumer. It is usually impracticable, if not impossible, for the ultimate consumer to analyze the food and ascertain whether or not it is suitable for human consumption. Since it has been packed and placed on the market as a food for human consumption, and marked as such, the purchaser usually eats it or causes it to be served to his family without the precaution of having it analyzed by a technician to ascertain whether or not it is suitable for human consumption. In fact, in most instances the only satisfactory examination that could be made would be only at the time and place of the processing of the food. It seems to be the rule that where food products sold for human consumption are unfit for that purpose, there is such an utter failure of the purpose for which the food is sold, and the consequences of eating unsound food are so disastrous to human health and life, that the law imposes a warranty of purity in favor of the ultimate consumer as a matter of public policy.⁵⁴

A companion case, *Griggs Canning Co. v. Josey*,⁵⁵ also decided in 1942 by the Supreme Court of Texas, held the canning company liable to the ultimate consumer. Plaintiff suffered from food poisoning caused by spinach which had been sold in a sealed container. A much more recent case, *Campbell Soup Co. v. Ryan*,⁵⁶ adds a modern touch. A "T-V Chicken Dinner" was purchased by the plaintiff who, while eating it, was injured by a metal washer which was concealed in the food. Relying on *Jacob E. Decker & Sons v. Capps*, the Court of Civil Appeals, affirming judgment for plaintiff, emphasized that liability of a manufacturer to the consumer of unhealthy food products "does not rest in tort or contract in Texas, but upon a broad principle of public policy imposing an obligation in the nature of an implied warranty to protect public health."⁵⁷ Pointing out that the Supreme Court of Texas had rejected the so-called requirement of privity, the appellate court added, "the rule that the implied warranty 'runs with the article' is logical and sound. The rationale of the decision [*Capps*] is that the manufacturer expects the 'appearance of suitability to continue with the product until someone is induced to consume it as food.'" ⁵⁸

In an early case in Ohio, *Ward Baking Co. v. Trizzino*,⁵⁹ the plaintiff bought a cake from a retail grocery store. Defendant baking company had produced the cake which contained a needle, the cause of certain internal injuries. In the action which followed, based on the implied warranty of wholesomeness embodied in the contract of sale to the grocer, judgment was given for plaintiff. The court used an interesting and rather appealing theory. It held that the plaintiff was a third-party beneficiary of the contract made between the

54 The opinion in the *Capps* case *supra* note 45 has been cited and quoted in a number of cases such as *Chapman v. Brown*, *supra* note 2, *Parish v. Great Atlantic & Pacific Tea Co.*, *supra* note 11 and *Campbell Soup Co. v. Ryan*, 328 S.W.2d 821 (Tex. Civ. App. 1959).

55 139 Tex. 623, 164 S.W.2d 835 (1942).

56 *Supra*, note 54.

57 *Campbell Soup Co. v. Ryan*, 328 S.W.2d 821, 822 (Tex. Civ. App. 1959).

58 The suggestion that "the implied warranty 'runs with the article'" has been mentioned in some other cases as, for example, *Davis v. Van Camp Packing Co.*, *supra* note 38; *Anderson v. Tyler*, 223 Iowa 1033, 274 N.W. 48 (1937); *Coca-Cola Bottling Works v. Lyons*, 145 Miss. 876, 111 So. 305 (1927); *cf. Escola v. Coca-Cola Bottling Co.*, 24 Cal.2d 453, 150 P.2d 436 (1944), separate concurring opinion.

59 27 Ohio App. 475, 161 N.E. 557 (1928).

baking company and the grocery store, including the warranty of wholesomeness which had been breached by the vendor. Ohio has since adopted the Uniform Commercial Code which incorporates this principle under the title "Third Party Beneficiaries of Warranties Express or Implied."⁶⁰ The section reads:

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.⁶¹

In the comment to this section it is stated that while the members of the family, household, and guests of the purchaser are expressly included, beyond this, "the section is *neutral* and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain."⁶²

A few years ago, in *Glanzer v. Shepard*,⁶³ the New York Court of Appeals had intimated that the third party beneficiary doctrine, as originally postulated in *Lawrence v. Fox*,⁶⁴ might be applicable to such situations. This view has been strongly endorsed by a leading authority on the law of contracts and sales.⁶⁵ Professor Williston has said:

And if the test of "intent to benefit" is applied, it must be quite clear that buying food for consumption by another is rather generally, criminal intent being absent, intended to have beneficent results. Nor should the sale of food be accompanied by any other intent.⁶⁶

It seems curious that where third party beneficiaries have been recognized for so many decades in so many fields, there should be so much reluctance to recognize them in their most important aspect; oftentimes, in a matter of life or death.⁶⁷

A similar development allowing the ultimate consumer to recover even in the absence of privity developed in connection with various bottled beverages. Most of the cases involve actions for injuries caused by the presence of foreign deleterious substances in a carbonated beverage. Very often, a dead mouse is

60 Uniform Commercial Code § 2—318.

61 Jurisdictions which have adopted the Uniform Commercial Code are listed *supra*, note 3.

62 UNIFORM COMMERCIAL CODE § 2—318, comment 3; this should give the more progressive jurisdictions ample opportunity for the exercise of judicial discretion. Certainly, as the Court of Appeals of New York points out in *Greenberg v. Lorenz*, *supra* note 2, what law judges have made (especially by way of *obiter dictum*) can be unmade or corrected when inequity results by the courts themselves without the aid of legislative intervention. *But see: Hochgertel v. Canada Dry Corp.*, *supra* note 12. *Sullivan v. H. P. Hood & Sons, Inc.*, 341 Mass. 216, 168 N.E.2d 80 (1960).

A wholesale dealer of a stepladder was not liable under this section for breach of warranty, in an action brought by an employee of one who purchased the stepladder from a retail dealer, for injuries sustained by the employee when the stepladder collapsed, because even if the employee were considered a member of the buyer's household, she could proceed only against the retail seller, with whom the buyer was in privity, and not against the remote vendor. *Kaczmarkiewicz v. J. A. Williams Co.*, 13 Pa. D. & C.2d 14 (C.P. of Allegheny County, 1957), 106 Pittsb. Leg. J. 1.

63 233 N.Y. 236, 135 N.E. 275, quoted with approval in *Parish v. Great Atlantic & Pacific Tea Co.*, 13 Misc.2d 33, 177 N.Y.S.2d 7 (N.Y. Munic. Ct. 1958); *Glanzer* is analyzed in *American Casualty Co. v. Memorial Hospital Assn.*, 223 F.Supp. 539 (E.D. Wis. 1963).

64 20 N.Y. 268 (1859); JAEGER, LAW OF CONTRACTS 338 (1953, Supp., 1964).

65 2 WILLISTON, CONTRACTS, § 378A (3d ed. Jaeger 1959).

66 As to the "intent to benefit" test, see the discussion in *op. cit. supra* note 65, at §§ 356, and especially 356A, notes 2-6, pp. 835-37.

67 *Id.* at 976; quoted in Jaeger, 1 DUQUESNE U.L. REV. 1, 59-60.

the offender.⁶⁸ However, insects and other vermin run a close second.⁶⁹ Tobacco products, such as cigar stubs or cigarette butts,⁷⁰ acids,⁷¹ and many other noxious items, such as particles of glass,⁷² have been found in beverages marketed for human consumption, and the cases dealing with them are legion.⁷³ Contrary to

68 *Gray v. Pet Milk Co.*, 108 F.2d 974 (7th Cir. 1940), *cert. denied*, 309 U.S. 688; *Coca-Cola Bottling Co. of Puerto Rico v. Negron Torres* 255 F.2d 149 (1st Cir. 1958); *Bellingrath v. Anderson*, 203 Ala. 62, 82 So. 22 (1919); *Coca-Cola Bottling Co. v. Barksdale*, 17 Ala. App. 606, 88 So. 36 (1920); *Alabama Coca-Cola Bottling Co. v. Ezzell*, 22 Ala. App. 210, 114 So. 278 (1927); *Eisenbeiss v. Payne*, 42 Ariz. 262, 25 P.2d 162 (1933); *Coca-Cola Bottling Co. v. Davidson*, 193 Ark. 825, 102 S.W.2d 833 (1937); *Hope Coca-Cola Bottling Co. v. Jones*, 222 Ark. 52, 257 S.W.2d 272 (1953); *Coca-Cola Bottling Co. v. Misenheimer*, 222 Ark. 581, 261 S.W.2d 775 (1953); *Moss v. Coca-Cola Bottling Co.*, 103 Cal. App.2d 380, 229 P.2d 802 (Dist. Ct. App. 1951); *Martin v. Waycross Coca-Cola Bottling Co.*, 18 Ga. App. 226, 89 S.E.495 (1916); *Duvall v. Coca-Cola Bottling Co.*, 329 Ill. App. 290, 68 N.E.2d 479 (1946); *Jackson Coca-Cola Bottling Co. v. Chapman*, 106 Miss. 864, 64 So. 791 (1914); *Blount v. Houston Coca-Cola Bottling Co.*, 184 Miss. 69, 185 So. 241 (1939); *Norman v. Jefferson City Coca-Cola Bottling Co.*, 211 S.W.2d 552 (Mo. App. 1948); *Trembley v. Coca-Cola Bottling Co.*, 285 App. Div. 539, 138 N.Y.S.2d 332 (1955); *Tate v. Mauldin*, 157 S.C. 392, 154 S.E. 431 (1930); *Amarillo Coca-Cola Bottling Co. v. Loudder*, 207 S.W.2d 632 (Tex. Civ. App. 1947).

69 *Cockroaches*: *Whited v. Atlanta Coca-Cola Bottling Co.*, 88 Ga. App. 241, 76 S.E.2d 408 (1953); *Laborde v. Louisiana Coca-Cola Bottling Co.*, 15 So.2d 389 (La. App. 1943); *Coast Coca-Cola Bottling Co. v. Bryant*, 236 Miss. 880, 112 So.2d 538 (1929); *Oklahoma Coca-Cola Bottling Co. v. Dillard*, 208 Okla. 126, 253 P.2d 847 (1953); *Caines v. Marion Coca-Cola Bottling Co.*, 198 S.C. 204, 17 S.E.2d 315 (1941); *Coca-Cola Bottling Co. v. Smith*, 97 S.W.2d 761 (Tex. Civ. App. 1936); *Coca-Cola Bottling Co. v. Heckman*, 113 S.W.2d 201 (Tex. Civ. App. 1938).

Spiders: *Alabama Coca-Cola Bottling Co. v. Smith*, 29 Ala. App. 324, 195 So. 560 (1940); *Coca-Cola Bottling Co. v. Eudy*, 193 Ark. 436, 100 S.W.2d 683 (1937); *Coca-Cola Bottling Co. v. Morrison*, 194 Ark. 248, 106 S.W.2d 601 (1937); *Hollis v. Ouachita Coca-Cola Bottling Co.*, 196 So. 376 (La. App. 1940); *Smith v. Coca-Cola Bottling Co.*, 152 Pa. Super. 445, 33 A.2d 488 (1943).

Worms: *Nock v. Coca-Cola Bottling Works*, 102 Pa. Super. 515, 156 Atl. 537 (1931); *Peters v. Double Coca Bottling Co.*, 224 S.C. 437, 79 S.E.2d 710 (1954); *Norfolk Coca-Cola Bottling Works v. Land*, 189 Va. 35, 52 S.E.2d 85 (1949); *Parr v. Coca-Cola Bottling Works*, 121 W. Va. 314, 3 S.E.2d 499 (1939).

Other Vermin: *Whistle Bottling Co. v. Searson*, 207 Ala. 387, 92 So. 657 (1922); *Dr. Pepper Co. v. Brittain*, 234 Ala. 548, 176 So. 286 (1937); *Crystal Coca-Cola Bottling Co. v. Cathey*, 83 Ariz. 163, 317 P.2d 1094 (1957); *Coca-Cola Bottling Co. v. Swilling*, 186 Ark. 1149, 57 S.W.2d 1029 (1933); *Anheuser-Busch v. Southard*, 191 Ark. 107, 84 S.W.2d 89 (1935); *Coca-Cola Bottling Co. v. Cromwell*, 203 Ark. 933, 159 S.W.2d 744 (1942); *Rowton v. Ruston Coca-Cola Bottling Co.*, 17 So.2d 851 (La. App. 1944); *Ferguson v. Parr*, 85 So.2d 117 (La. App. 1955); *Tafoya v. Las Cruces Coca-Cola Bottling Co.*, 59 N.M. 43, 278 P.2d 575 (1955); *Peters v. Double Coca Bottling Co.*, 224 S.C. 437, 79 S.E.2d 710 (1954).

70 *Try-Me Beverage Co. v. Harris*, 217 Ala. 302, 116 So. 147 (1928); *Macon Coca-Cola Bottling Co. v. Chancey*, 216 Ga. 61, 114 S.E.2d 517 (1960); *Sheenan v. Coca-Cola Bottling Co.*, 41 N.J. Super. 213, 124 A.2d 319 (Super. Ct. App. Div. 1956); *Keller v. Coca-Cola Bottling Co.*, 214 Or. 654, 330 P.2d 346 (1958); *Boyd v. Coca-Cola Bottling Works*, 132 Tenn. 23, 177 S.W. 80 (1915); *Von Herr v. Louisiana Coca-Cola Bottling Co.*, 148 So. 75 (La. App. 1933); *cf. Chero-Cola Bottling Co. v. Watford*, 31 Ala. App. 493, 19 So.2d 77 (1944).

71 *Coca-Cola Bottling Co. v. Munn*, 99 F.2d 190 (4th Cir. 1938); *Slaughter v. Atlanta Coca-Cola Bottling Co.*, 48 Ga. App. 327, 172 S.E. 723 (1934); *Laurel Coca-Cola Bottling Co. v. Hankins*, 222 Miss. 297, 75 So.2d 731 (1954); *Evans v. Charlotte Pepsi-Cola Bottling Co.*, 216 N.C. 716, 6 S.E.2d 510 (1940); *Caskie v. Coca-Cola Bottling Co., Inc.*, 373 Pa. 614, 96 A.2d 901 (1953).

72 *Albany Coca-Cola Bottling Co. v. Shiver*, 63 Ga. App. 755, 12 S.E.2d 114 (1940); *King v. Louisiana Coca-Cola Bottling Co.*, 151 So. 252 (La. App. 1933); *Gunter v. Alexandria Coca-Cola Bottling Co.*, 197 So. 159 (La. App. 1940); *Jackson Coca-Cola Bottling Co. v. Grubbs*, 143 Miss. 590, 108 So. 732 (1926); *Smith v. Salem Coca-Cola Bottling Co.*, 92 N.H. 97, 25 A.2d 125 (1942); *Manning v. Harvey C. Hines Co.*, 218 N.C. 779, 10 S.E.2d 727 (1940).

73 *Fisher v. Washington Coca-Cola Bottling Works, Inc.*, 66 App. D.C. 7, 84 F.2d 261 (D.C. Cir. 1936); *Opelika Coca-Cola Bottling Co. v. McEachern*, 242 Ala. 628, 7 So.2d 570 (1942); *Medeiros v. Coca-Cola Bottling Co.*, 57 Cal. App.2d 707, 135 P.2d 676 (1943); *East Kentucky Beverage Co. v. Stumbo*, 313 Ky. 66, 230 S.W.2d 106 (1950); *Basile v. World Bottling Co.*, 17 So.2d 734 (La. App. 1944); *Manzoni v. Detroit Coca-Cola Bottling Co.*, 263 Mich. 235, 109 N.W.2d 918 (1961); *Rupy v. George Schneider & Co.*, 286 App. Div. 1095, 145 N.Y.S.2d 489 (1955); *Murray v. Ballantine & Sons*, 75 R.I. 13, 62 A.2d 895, 63 A.2d 730 (1948). See also cases cited notes 68-72 *supra*.

the great majority of jurisdictions, a few still adhere to the archaic and pernicious doctrine of privity.⁷⁴ However, the present situation has been well summarized in a leading case:⁷⁵ "In state courts, requirement of privity has been generally abandoned in food product actions based upon implied warranty violations where the food products are shown to be in the same condition as when they left the control of the manufacturer."⁷⁶

IV. THE RECENT CASES

Food

Of the recent cases dealing with food none has been found which is more comprehensive in its treatment of the rights of the ultimate consumer who has been injured by noxious food products than *Parish v. Great Atlantic & Pacific Tea Company*.⁷⁷ Here, Judge Starke, in a masterful opinion deals a lethal blow to privity. He surveys the various theories, fictions and exceptions⁷⁸ which the courts have employed to afford a remedy to the injured consumer confronted with the defense of lack of privity. In the *Parish* case, a jar of jam was purchased by the mother of two infant daughters. When the latter began to partake of the jam, they found worms in it and became ill.

When this action was brought on behalf of the infants, the expected defense, lack of privity, was interposed. But this time, Judge Starke, who had become convinced of the inequities of this defense by the facts in an earlier case which he had adjudicated, *Conklin v. Hotel Waldorf Astoria Corp.*,⁷⁹ was ready to demolish it with a powerful attack. The court examined the question under various headings. Analyzing the "New York trend," Judge Starke concluded that it pointed the way towards the forthright abolition of the so-called privity

74 *Birmingham Chero-Cola Bottling Co. v. Clark*, 205 Ala. 678, 89 So. 64 (1921); *Smith v. Salem Coca-Cola Bottling Co.*, 92 N.H. 97, 25 A.2d 125 (1942); *Soter v. Griesedieck Western Brewery Co.*, 200 Okla. 302, 193 P.2d 575 (1948).

75 *Picker X-Ray Corp. v. General Motors Corp.*, *supra* note 2.

76 In some jurisdictions as, for example, Connecticut, Georgia and Virginia, the privity requirement has been expressly eliminated in certain situations by statute; and as has been noted above, the Uniform Commercial Code has introduced certain departures from the privity concept in § 2—318.

77 13 Misc.2d 33, 177 N.Y.S.2d 7 (N.Y. Munic. Ct. 1958).

78 Such as the agency theory, the conduit exception, "warranty running with the goods," a general offer of warranty made when the manufacturer advertises his product extensively; privity deemed constructively present when the consumer is a subpurchaser within the distributive chain or conduit; public policy.

79 5 Misc.2d 496, 161 N.Y.S.2d 205 (1957); Judge Starke while sitting in *Parish v. Great Atlantic & Pacific Tea Co.*, 13 Misc.2d 33, 35, 177 N.Y.S.2d 7, 10 (N.Y. Munic. Ct. 1958) wrote:

This Court was greatly disturbed by the inanity of the strict application of the privity doctrine when the subject arose in the Conklin case, *supra*. As a result, the Waldorf case represents the first direct and concentrated judicial attack in New York upon the citadel of privity. The Court was roused into investigating the entire privity problem far beyond the precise question in the case, and made an exhaustive research and study of the subject. That which went beyond the decisional need for the Waldorf case was submitted in the form of Articles to the New York Law Journal and appeared in its editorial columns on April 8, 9, 10, 1957. The Articles reviewed the modern trend, aspect and approach by courts in this state and other states, with emphasis on the non-purchaser consumer's rights against the manufacturer as well as the dealer, for breach of warranty rather than in negligence. . . . It is hoped that, because the privity problem is of vital concern, the higher courts will clarify the legal atmosphere clouding the subject. As Lord Mansfield said: "Lawyers and litigants are entitled to know where they stand as to what their rights are and what the law is."

requirement.⁸⁰ Subsequent events have completely vindicated the soundness of his judgment. The New York trilogy,⁸¹ culminating in *Goldberg v. Kollsman Instrument Corp.*,⁸² lead inevitably to the conclusion that privity has been definitely obliterated from New York Law.⁸³

The court then surveys two other theories used by the courts to set at naught the defense of privity: (1) Agency, and (2), the third party beneficiary doctrine. Under agency, four well-known cases, *Ryan v. Progressive Stores, Inc.*,⁸⁴ *Bowman v. Great Atlantic & Pacific Tea Company*,⁸⁵ *Mouren v. Great Atlantic & Pacific Tea Company*,⁸⁶ and *Hopkins v. Amtorg Trading Corp.*⁸⁷ were discussed. The court simply held that where a member of the household purchased the food, he was acting as agent for the other members of the family.⁸⁸ Of course, this is subject to the inevitable question: What happens if the purchaser is not really the agent of the injured consumer? Under those circumstances, it may be necessary to rely on the third party beneficiary doctrine discussed above.⁸⁹

Under the rubric "Historical Background and Error," the court directs attention to the mixed or hybrid nature of actions for breach of warranty stating that "it is actually *sui juris*, a combined tort and contract action — commencing in contract and resulting in tort where the seller has violated his obligation and the tacit representation that the food is wholesome. *The warranty is imposed by law*, in the name of public health and public policy, and not because of any express or implied-in-fact understanding of the parties."⁹⁰

"Historically, there is no justification for the notion that privity of contract is essential to support an action for breach of an implied warranty."⁹¹

A familiar argument thoroughly disposed of by the lucid reasoning of the

80 Since the opinion in the Parish case written, Judge Starke's hope has been fully realized by the decisions of the New York Court of Appeals in *Greenberg v. Lorenz*, *supra* note 2, and *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 191 N.E.2d 81 (1963), the latter of which took the final step towards consigning privity to a well-deserved and long overdue limbo.

81 *Greenberg v. Lorenz*, *supra* note 2, *Randy Knitwear, Inc. v. American Cyanamid Co.*, 11 N.Y.2d 5, 226 N.Y.S.2d 363 (1962), and *Goldberg v. Kollsman Instrument Corp.*, *supra* note 80.

82 12 N.Y.2d 432, 191 N.E.2d 81 (1963).

83 The lower courts in New York have followed *Goldberg v. Kollsman Instrument Corp.*, *supra* note 80; to this effect see *Williams v. Union Carbide Corp.*, 17 App. Div.2d 661, 230 N.Y.S.2d 476 (1962); *Simpson v. Eichenbrunner*, 31 Misc.2d 958, 217 N.Y.S.2d 678 (1961); *50 New Walden, Inc. v. Federal Ins. Co.*, 39 Misc.2d 460, 241 N.Y.S.2d 128 (1963).

84 255 N.Y. 388, 175 N.E. 105 (1931).

85 284 App. Div. 663, 133 N.Y.S.2d 904 (1954).

86 1 N.Y.2d 884, 154 N.Y.S.2d 642 (1956).

87 265 App. Div. 278, 38 N.Y.S.2d 788 (1942).

88 "In *Hopkins v. Amtorg Trading Corp.*, 265 App. Div. 278, 38 N.Y.S.2d 788, the Appellate Division, 1st Dept., stated the petitioner * * * might be in a position to show the son who purchased the crabmeat was acting simply as his agent in making the purchase and that the cause of action accrued to the father, relying on *Ryan v. Progressive Grocery Stores*, 255 N.Y. 388, 175 N.E. 105, 74 A.L.R. 339, and sent the case back for a new trial. In the *Ryan* case, the Court sustained the verdict in favor of the plaintiff. The first paragraph of the opinion reads as follows: 'Plaintiff, through his wife, who acted as his agent, bought a loaf of bread at the defendant's grocery. The loaf had concealed in it a pin, which hurt the plaintiff's mouth.'" *Parish v. Great Atlantic & Pacific Tea Co.*, 13 Misc.2d 33, 41, 177 N.Y.S.2d 7, 15 (Munic. Ct. 1958), quoting from *Mouren v. Great Atlantic & Pacific Tea Co.*, 139 N.Y.S.2d 375, 377 (Sup. Ct. 1955).

89 *Supra*, notes 60 *et seq.*

90 *Parish v. Great Atlantic & Pacific Tea Co.*, *supra* note 79, at 16. (Emphasis added.)

91 Here, the court continued: "Originally the remedy for breach of such warranty was an

court is that legislative action is necessary if privity is to be eliminated.⁹² Discussing with approval the early case of *Klein v. Duchess Sandwich Co.*,⁹³ heretofore considered,⁹⁴ the court finds that the pertinent sections of the statutes in effect in California and New York imposing the pertinent warranties are identical.⁹⁵ Since the California court had found in the *Klein* case that the intention of the legislature was to include consumers within the ambit of the warranties enacted for their protection, the New York court could find no valid reason for supposing that the intent of the New York legislature was any different.⁹⁶ Finally, the court evaluates the public policy factor.⁹⁷ Consumer protection, urges Judge Starke, is a cogent reason for the elimination of the privity requirement:

The rule limiting the right to recover for breach of an implied warranty in the sale of foodstuffs to those in privity with the seller, being obviously technical, and shown to be historically unsound, has created dissatisfaction in the legal profession with the result that it has been repeatedly criticized.⁹⁸

Great dissatisfaction with the strict privity doctrine has been frequently expressed by modern legal educators and writers.⁹⁹ They view the problem as essentially an enterprise liability, and that the ultimate consumer in food cases should not only have the right of suing the retailer for breach of warranty but should also have that right against the manufacturer as the guarantor of the fitness and wholesomeness of its product when it is used for the purpose and in the manner intended. In no other way, they argue, can a fair and

action on the case for breach of an assumed duty, a tort action in the nature of deceit but in which scienter or intent to deceive did not have to be alleged. Warranty was viewed as a form of misrepresentation and the gravamen of the action was the warranty and not conscious deception. . . ." *Parish v. Great Atlantic & Pacific Tea Co.*, 13 Misc.2d 33, 42, 177 N.Y.S.2d 7, 17 (N.Y. Munic. Ct. 1958).

92 This is suggested in a concurring opinion in *Greenberg v. Lorenz*, *supra* note 2 and in *Hochgertel v. Canada Dry Corp.*, *supra* note 12.

93 *Supra* note 11.

94 *Supra* p. 510.

95 Uniform Sales Act § 15 was in effect in both jurisdictions at the time. It has since been superseded by the Uniform Commercial Code § 2—315.

Of *Klein v. Duchess Sandwich Co.*, the Court said: "The intention of the legislature was discussed in the thoroughly illuminating, educational and convincing decision by a California court (where their Sec. 1735 WEST'S ANN. CIVIL CODE, is absolutely identical with our Sec. 96, Personal Property Law, Sub. 1), in *Klein v. Duchess Sandwich Co.*, 1939, 14 Cal.2d 272, 93 P.2d 799, 804 (1938)" at 23.

96 The court finds this argument persuasive in *Chapman v. Brown*, *supra* note 2.

97 This was the controlling factor in *Jacob E. Decker & Sons v. Capps*, *supra* note 11, *Griggs Canning Co. v. Josey*, 139 Tex. 623, 164 S.W.2d 835 (1942), and *Campbell Soup Co. v. Ryan*, 328 S.W.2d 821 (Tex. Civ. App. 1959) (*inter alia*).

98 *Parish v. Great Atlantic & Pacific Tea Co.*, *supra* note 79, citing at 33: 7 CAL. L. REV. 360 (1919); 23 CAL. L. REV. 621 (1935); 33 COL. L. REV. 868 (1933); 1 DUKE UNIV., *Law and Contemporary Problems of the School of Laws* 1 (1933); 4 FORDHAM L. REV. 295 (1935); 34 HARV. L. REV. 762 (1921); 42 HARV. L. REV. 414 (1929); 30 ILL. L. REV. 398 (1935); 5 IOWA L. BULL. 86 (1919); 29 MICH. L. REV. 906 (1931); 9 N.Y. UNIV. L. REV. 360, 366 (1932); 4 ST. JOHN'S L. REV. 80 (1929); 9 ST. JOHN'S L. REV. 216 (1934); 27 YALE L.J. 1068 (1918); 29 YALE L.J. 782 (1920); VOLD, *SALES* 476 (1st. ed. 1931).

99 Bohlen, *Liability of Manufacturers to Persons Other Than Their Immediate Vendees*, 45 L.Q. REV. 343 (1929); Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961); Condon, *Progress of Products Liability Law*, 31 N.Y.S. B. BULL. 119 (1959); Ehrensweig, *Products Liability In the Conflict of Laws*, 69 YALE L.J. 794 (1960); Feezer, *Tort Liability of Manufacturers and Vendors*, 10 MINN. L. REV. 1 (1925); Feezer, *Tort Liability of Manufacturers*, 19 MINN. L. REV. 752 (1935); Fricke, *Personal Injury Damages in Products Liability*, 6 VILL. L. REV. 1 (1960); Gillam, *Products Liability in a Nutshell*, 37 ORE. L. REV. 119 (1958); Green, *Should the Manufacturer of General Products Be Liable Without Negligence?* 24 TENN. L. REV. 928 (1957); Hotes, *Advertised-Product Liability: Viewpoint of the Consumer*, 8 CLEV.-MAR. L. REV. 81 (1959); Jaeger, *Privity of Warranty: Has the Tocsin Sounded?* 1 DUQUESNE U.L. REV. 1 (1963); Jaeger, *Warranties of*

reasonable measure of security be obtained for the public at large. Courts throughout the land have endeavored to extend the buyer's protection under classic warranty law to the non-buyer consumer by either abandoning or liberally construing the privity requirement, some being on "public policy," some on "breach of duty," others on "social justice," and still others on the third party beneficiary rule.¹⁰⁰ Again, it is the food cases with their constant stress upon the promotion of public health which have led the way.¹⁰¹

In *Greenberg v. Lorenz*,¹⁰² the Court of Appeals of New York was confronted with a situation similar to that in the *Parish* case. The father of the injured infant had purchased a can of salmon containing a metal tag which caused the damage. Although the trial court entered judgment for the infant plaintiff, refusing to accept the defense of privity of warranty, the Appellate Division reversed, holding that without strict privity there could be no recovery, following the early cases of *Chysky v. Drake Brothers*,¹⁰³ and *Salzano v. First National Stores*.¹⁰⁴ Motion for leave to appeal to the high court of New York having been granted, the latter reversed the Appellate Division, commenting:¹⁰⁵

Our difficulty is not in finding the applicable rule but in deciding whether or not to change it. The decisions are clear enough. There can be no warranty, express or implied, without privity of contract. . . .¹⁰⁶ The unfairness of the restriction has been argued in writings so numerous as to make a lengthy bibliography. . . .¹⁰⁸ About 20 States have abolished such requirements of privity the latest being Virginia and New Jersey.

The court then cited *Swift & Co. v. Wells*¹⁰⁷ and *Henningsen v. Bloomfield*

Merchantability and Fitness for Use: Recent Developments, 16 RUTGERS L. REV. 493 (1962); James, *General Products—Should Manufacturers Be Liable Without Negligence?* 24 TENN. L. REV. 923 (1957); James, *The Liability of Manufacturers for Faulty Goods*, 1960 J. BUS. L. 287; Jeanblanc, *Manufacturers' Liability to Persons Other Than Their Immediate Vendees*, 24 VA. L. REV. 134 (1937); Keeton, *Assumption of Risk in Products Liability Cases*, 22 LA. L. REV. 122 (1961); Lucey, *Liability Without Fault and the Natural Law*, 24 TENN. L. REV. 952 (1957); Morris, *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight*, 70 YALE L.J. 554 (1961); Noel, *Strict Liability of Manufacturers*, 50 A.B.A.J. 446 (1964); Noel, *Manufacturers of Products—The Drift Toward Strict Liability*, 24 TENN. L. REV. 963 (1957); Plant, *Strict Liability of Manufacturers for Injuries Caused by Defects in Products*, 27 TENN. L. REV. 938 (1957); Prosser, *The Implied Warranty of Merchantable Quality*, 24 MINN. L. REV. 117 (1943); Prosser, *The Assault Upon The Citadel (Strict Liability To The Consumer)*, 69 YALE L.J. 1099 (1960); Russell, *Manufacturers' Liability to the Ultimate Consumer*, 21 KY. L.J. 388 (1933); Ruud, *Manufacturers' Liability for Representations Made by Their Sales Engineers to Subpurchasers*, 8 U.C.L.A. L. REV. 251 (1961); Skeel, *Advertised-Product Liability: Nature of the Problem—What is "Warranty"?* 8 CLEVE.-MAR. L. REV. 2 (1959); Spruill, *Privity of Contract as a Requisite for Recovery on Warranty*, 19 N.C.L. REV. 551 (1941); Willis, *Product Liability Without Fault: Some Problems and Proposals*, 15 FOOD, DRUG, COSM. L. J. 648 (1960); Wilson, *Products Liability*, 43 CALIF. L. REV. 614 (1955).

A comprehensive bibliography on products liability has been published in 7- No. 5 THE PRAC. LAW. 70 (1961).

¹⁰⁰ 2 WILLISTON, CONTRACTS § 378A (3d ed. Jaeger, 1959) which recommends the use of this means to enable consumers as beneficiaries of the contracts of sale of foodstuffs and similar items to recover for injuries suffered by the consumption of these products where privity is lacking.

Supra notes 60 *et seq.*

¹⁰¹ *Parish v. Great Atlantic & Pacific Tea Co.*, *supra* note 79; numerous authorities and cases cited by the court are omitted.

¹⁰² 9 N.Y.2d 195, 213 N.Y.S.2d 39, 173 N.E.2d 773 (1961).

¹⁰³ 235 N.Y. 468, 139 N.E. 576 (1923).

¹⁰⁴ 268 App. Div. 993, 51 N.Y.S.2d 645 (Sup. Ct. App. Div. 1944).

¹⁰⁵ *Greenberg v. Lorenz*, *supra* note 102, at 198-99.

¹⁰⁶ The court cited the articles which Judge Starke published in the New York Law Journal of April 8, 9, and 10, 1957; a part of this "lengthy bibliography" is listed *supra* notes 98 and 99.

¹⁰⁷ 201 Va. 213, 110 S.E.2d 203 (1959).

*Motors, Inc.*¹⁰⁸ as illustrative of the latest defections from the ranks of the jurisdictions requiring strict privity. The Court of Appeals concluded:

The injustice of denying damages to a child because of non-privity seems too plain for argument. The only real doubt is as to the propriety of changing the rule. . . . But the present rule which we are being asked to modify is itself of judicial making since our statutes say nothing at all about privity and in early times such liabilities were thought to be in tort. Alteration of the law in such matters has been the business of the New York courts for many years. . . .¹⁰⁹

To decide the case before us, we should hold that the infant's cause of action should not have been dismissed solely on the ground that the food was purchased not by the child but by the child's father. Today when so much of our food is bought in packages it is not just or sensible to confine the warranty's protection to the individual buyer. At least as to food and household goods, the presumption should be that the purchase was made for all the members of the household.¹¹⁰

One judge, while concurring in the unanimous decision of the court, felt constrained to bring forth a timeworn argument in his concurring opinion: "However much one may think liability should be broadened, that must be left to the Legislature."¹¹¹ Substantially the same argument appears in *Hochgertel v. Canada Dry Corp.*¹¹² and substantially the same refutation may be made to

108 32 N.J. 358, 161 A.2d 69 (1960).

109 Citing *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916); *Ultra-mares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931).

110 *Greenberg v. Lorenz*, *supra* note 102, at 199-200; the court's estimate of "about twenty states" has certainly been augmented in the past three years.

111 The concurring opinion continues:

There are two sides to the problem before us—and one of them is the plight of the seller. It is just as unfair to hold liable a retail groceryman, as here, who is innocent of any negligence or wrong, on the theory of breach of warranty, for some defect in a canned product which he could not inspect and with the production of which he had nothing to do, as it is to deny relief to one who has no relationship to the contract of purchase and sale, though eating at the purchaser's table. . . .

It is for the Legislature to determine the policy of accommodating those conflicting interests after affording all concerned an opportunity to be heard. Indeed, the Legislature has not been unaware of the problem for, in three separate years—1943, 1945, 1959—as noted by the Chief Judge, the New York State Law Revision Commission recommended that the benefits of implied warranties be extended to the buyer's employees and to the members of his household, but the Legislature has declined to act, despite the introduction of legislation. I do not think we should now assume their powers and change the rules, which will undoubtedly affect many cases in which lawyers and litigants understood the law to be otherwise, and governed themselves accordingly. *Greenberg v. Lorenz*, *supra* note 102, at 201.

It is submitted that the foregoing argument that any change should be left to the legislature does not take into consideration that the privity requirement was originally judge-made, as the principal opinion emphasizes, and certainly, if the Supreme Court of New Jersey could decide that under certain circumstances privity was unnecessary, there seems no cogent reason why the high court of New York could not do the same in an increasing number of situations where public policy might require it. Also, as to the plight of the retailer: He may seek recovery from the manufacturer or canner whose products he selected in the first place and thereby set in motion the entire train of events, culminating in the consumer's injury. It may tend to induce him to be more careful in the selection of the foods he offers for sale and of the manufacturers and food processors upon whom he bestows his patronage, as suggested by the court in *Sams v. Ezy-Way Foodliner Co.*, 157 Me. 10, 170 A.2d 160 (1961).

112 409 Pa. 610, 187 A.2d 575 (1963); the *Hochgertel* case is discussed in considerable detail and the majority opinion criticized in Jaeger, *Privity of Warranty: Has the Tocsin Sounded?* 1 DUQUESNE U.L. REV. 1, 3, 20-24 (1963).

the effect that this was originally judge-made *obiter dictum* "law,"¹¹³ namely that "alteration of the law in such matters," as Chief Judge Desmond declared in the principal opinion, "has been the business of the New York courts for many years."¹¹⁴

Before leaving the subject of food, three very recent cases will be considered. In the first, *Sams v. Ezy-Way Foodliner Co.*,¹¹⁵ the Supreme Court of Maine, speaking through Chief Justice Williamson, made a careful and exhaustive analysis of the effect the Uniform Sales Act¹¹⁶ had upon the doctrine of privity in that jurisdiction. His opinion must be included among the lucid and most significant that have been rendered in several decades. The facts showed that the plaintiff had purchased certain sausages contained in a sealed plastic bag. When he ate the sausages, particles of glass injured his gums, and the consumer brought this action.

After a comprehensive review of the leading precedents,¹¹⁷ the court held that the implied warranty of merchantable quality had been breached and plaintiff was entitled to recover.¹¹⁸

113 *Greenberg v. Lorenz*, *supra* note 102; the *obiter dicta* (there were two) in *Winterbottom v. Wright*, 10 Mees & W. 109, 11 L.J. Ex. 415, 152 Eng. Rep. 402 (Ex. 1842), are quoted *supra* note 13.

114 *Greenberg v. Lorenz*, *supra* note 102, at 200. In *Parish v. Great Atlantic & Pacific Tea Co.*, *supra* note 79, at 22, Judge Starke, after analyzing and interpreting the statutory language of the sales law found applicable, disposes of the suggestion or contention that the legislature must act:

There is absolutely no need for legislative change because it never could have been the intention of the legislature to deprive an infant of the warranty right simply because the mother purchased the goods.

The words "reasonably fit for such purpose" means that the goods are fit "for the purpose for which they are sold and bought." . . . [T]he ordinary purpose for which a housewife purchases foodstuffs is—for *human consumption*—"domestic meals" and household table use . . .

Ordinary "household table use" and "domestic meals" contemplates consumption by the non-buyer consumer, whether he be an infant, husband, or even a friend or relative who has been invited as a guest to partake of a meal.

115 *Supra* note 111.

116 Section 15, adopted in Maine to be effective in 1923, see ME. REV. STAT. ANN. ch. 185, §§ 1-78 (1954) (repealed by Me. Public Laws 1963, ch. 362, § 34, effective Dec. 31, 1964).

117 As, for example, *Ryan v. Progressive Grocery Stores*, 255 N.Y. 388, 175 N.E. 105 (1931); *Botti v. Venice Grocery Co.*, 309 Mass. 450, 35 N.E.2d 491 (1941); *Mead v. Coca-Cola Bottling Co.*, 329 Mass. 440, 108 N.E.2d 757 (1952); *Henningsen v. Bloomfield Motors, Inc.*, *supra* note 1.

118 In the course of its opinion, at 165, the Supreme Court concluded that by the great weight of authority, there is no "sealed container exception," citing the following cases in support:

Jackson v. Watson & Sons (1909), 2 K.B. 193, 16 Am. & Eng. Annot. cases 492; *Martin v. Great Atlantic & Pacific Tea Co.*, 301 Ky. 429, 192 S.W.2d 201 (changing sealed container rule under Kentucky common law); *Ward v. Great Atlantic & Pacific Tea Co.*, 231 Mass. 90, 120 N.E. 225 (1918); *D'Onofrio v. First National Stores, Inc.*, 68 R.I. 144, 26 A.2d 758 (1942); *Burkhardt v. Armour & Co.*, 115 Conn. 249, 161 Atl. 385, 90 A.L.R. 1260 and Annotation; *Dow Drug Co. v. Nieman et al.*, 57 Ohio App. 190, 13 N.E.2d 130.

The court also took occasion to disapprove specifically a precedent of fifty years' standing, *Bigelow v. Maine Central R.R.*, 110 Me. 105, 85 Atl. 396 (1912), wherein food served at a restaurant (dining car) was held not a sale and the unhappy traveler who suffered food poisoning from the meals eaten there would have to prove negligence. Now, he would be the beneficiary of an implied warranty of wholesomeness; cf. Uniform Commercial Code § 2-314 where such service is expressly declared a sale.

The second case, *Gonzales v. Safeway Stores, Inc.*,¹¹⁹ presents a situation where, on the patriotic occasion of Washington's birthday, a wife unwittingly served her husband peas which were inedible by virtue of the presence of certain "bugs." She had purchased the canned peas (which were labelled "A Safeway Guaranteed Product") from defendant. During dinner, the husband, after eating some of the peas, found a "bug" among them. He became nauseated and vomited for three days. The Supreme Court of Colorado, citing *Griggs Canning Company v. Josey*,¹²⁰ reversed the trial court which had granted defendant's motion to dismiss. Apparently, the Court did not consider lack of privity (the wife had purchased the peas) a bar to the husband's recovery of judgment since privity was not even mentioned.¹²¹

*Gilbert v. John Gendusa Bakery, Inc.*¹²² is the third and final case to be considered here. A homely product, jelly doughnuts, were the subject of the sale which resulted in this litigation. It seems the doughnuts contained "small black insects." Plaintiff's infant son, while eating the doughnuts, which had been sold in a sealed glassine bag bearing defendant's label, discovered the insects, showed them to his mother and then became acutely ill. He was taken to the doctor who administered an anti-emetic. The following day he suffered "acute gastro-enteritis, diarrhea, abdominal pains, nausea and vomiting."

In his action, the plaintiff alleged that the warranty "of purity and wholesomeness" had been breached and judgment was rendered in favor of plaintiff. Affirming, the appellate court stated the law:

We feel that the plaintiff proved his case by a convincing preponderance of evidence and should prevail in this action. In cases of this type, the manufacturer and the vendor of foodstuff designed for human consumption, both, are virtually insurers that such merchandise is pure, wholesome and free from foreign materials and deleterious substances. We find that there was a breach of implied warranty that these doughnuts were wholesome and fit for human consumption.¹²³

Beverages

Any number of cases have arisen in connection with the presence of noxious foreign substances in beverages. Kansas was one of the earliest jurisdictions which held that the liability of the manufacturer or bottler was absolute, being based on considerations of public policy as a federal appellate court accurately concluded from the available Kansas precedents:¹²⁴

Under the law of Kansas an implied warranty is not contractual. It is an obligation raised by law as an inference from the acts of the parties or the circumstances of the transaction and it is created

119 147 Col. 358, 363 P.2d 667 (1961).

120 139 Tex. 623, 164 S.W.2d 835 (1942).

121 This would seem to indicate that Colorado has aligned itself with the jurisdictions which have discarded privity as a requirement in breach of warranty actions where food products are involved. These jurisdictions now represent a substantially preponderant majority of the United States.

122 144 So.2d 760 (La. App. 1962).

123 Citing *MacLehan v. Loft Candy Stores*, 172 So. 367 (La. App. 1937); the court also quotes extensively from *Ogden v. Rosedale Inn*, 189 So. 162 (La. App. 1939).

124 *Nichols v. Nold*, 174 Kan. 613, 258 P.2d 317 (1953); *Graham v. Bottenfield's Inc.*, 176 Kan. 68, 269 P.2d 413 (1954).

by operation of law and does not arise from any agreement in fact of the parties. The Kansas decisions are in accord with the general rule laid down in the adjudicated cases. And under the Kansas decisions privity is not essential where an implied warranty is imposed by the law on the basis of public policy.¹²⁵

This statement of the public policy of Kansas was later quoted with approval by the Supreme Court of that jurisdiction in *Rupp v. Norton Coca-Cola Bottling Company, Inc.*¹²⁶ This case and its companion, *Connell v. Norton Coca-Cola Bottling Company, Inc.*,¹²⁷ presented the same factual situation: Two sisters visited their mother, a patient in the Norton County Hospital. During their stay at the hospital, they purchased a bottle of Coca-Cola from a vending machine in the waiting room. After opening the bottle, one of the sisters began to drink its contents and noticed a peculiar taste. The other sister took a swallow and also noticed that there was something unnatural about the flavor of the beverage. After each had taken two or three more sips, a large decomposed centipede became noticeable in the bottom of the bottle. Both plaintiffs became nauseated and suffered severe vomiting spells. They were attended by a physician but continued to suffer nausea and vomiting. At the trial, medical testimony indicated that this condition might continue for some time and was the result of seeing the centipede in the bottle. The trial court rendered judgment for plaintiffs, and the Supreme Court affirmed, quoting the earlier classic, *Cernes v. Pittsburg Coca-Cola Bottling Company*:¹²⁸

It may be stated as a general rule of this court that where beverage is manufactured and bottled for immediate human consumption and by a series of transactions reaches a retail dealer who sells to the consumer, the manufacturer or bottler impliedly warrants such beverage is wholesome and fit for immediate human consumption. Moreover, the manufacturer or bottler must know the beverage is fit or take the consequences if it proves injurious. Where he places such bottled beverage in the hands of a dealer for sale, the manufacturer is responsible for damages to the consumer, who pro-

¹²⁵ *B. F. Goodrich Co. v. Hammond*, 269 F.2d 501 (10th Cir. 1959). It seems curious that the year before the United States Court of Appeals, in *Alexander v. Inland Steel Co.*, 263 F.2d 314 (8th Cir. 1958) had declared that "implied warranties, in the absence of privity, are restricted in Kansas to food and beverage products, glass containers of beverages, and hair dye," at 319. It would appear that the later decision in *Hammond* is compatible with the progressive trend of the times.

In the latter case, the contract had been made in Missouri and the fatal accident involving the blowout of Goodrich Premium Lifeguard tires (the subject of the sale), occurred in Kansas, so the federal court considered the jurisprudence of each and found that the highest court in Missouri had not spoken:

It is true that the Missouri decision is by an intermediate court of appeals. However, where jurisdiction rests solely on diversity of citizenship and there is no controlling decision by the highest court of a state, a decision by an intermediate court should be followed by the Federal court, absent, as here, of convincing evidence that the highest court of the state would decide otherwise. 269 F.2d 501, 506.

It is reassuring to note the accuracy of the Tenth Circuit's prognosis; the Supreme Court of Missouri in *Morrow v. Caloric Appliance Corp.*, 372 S.W.2d 41 (1963), confirmed the federal court's Erie-educated guess and pronounced privity of warranty dead on arrival, citing with approval Jaeger, *Privity of Warranty: Has the Tocsin Sounded?* 1 DUQUESNE U.L. REV. 1, especially the conclusions stated at 141-42.

¹²⁶ 187 Kan. 390, 357 P.2d 802 (1960).

¹²⁷ 187 Kan. 393, 357 P.2d 804 (1960).

¹²⁸ 183 Kan. 758, 332 P.2d 258 (1958).

cures such beverage from the dealer and is injured by partaking of it.¹²⁹

Our decisions further hold that a manufacturer or bottler of food or beverage for human consumption is in effect an insurer that such food or drink will cause no harmful effects because of deleterious matter therein. The basis for imposing this liability is a matter of public policy for the protection of the people, as discussed in many of our cases.¹³⁰

In *Keller v. Coca-Cola Bottling Co.*,¹³¹ a case of novel impression in Oregon, many of the principal authorities and precedents are reviewed, including *Le Blanc v. Louisiana Coca-Cola Bottling Co.*,¹³² *Miami Coca-Cola Bottling Co. v. Todd*,¹³³ *Jordan v. Coca-Cola Bottling Co. of Utah*,¹³⁴ *Wichita Coca-Cola Bottling Co. v. Tyler*,¹³⁵ and one of the great classics of all time, *Escola v. Coca-Cola Bottling Co. of Fresno*.¹³⁶ The court rejected the suggestion that the cigar stub contained in the bottle was the result of tampering and affirmed the judgment in favor of plaintiff. As the court observed, "in this case, as well as in every other one we have examined, there has been no evidence that tampering by competitors or busybodies was an actual probability. The only indication is the contention that the opportunity or possibility existed. This is not sufficient to establish such a probability as matter of law, as defendant requests us to do."¹³⁷

A very usual situation in connection with beverages is presented by the exploding or breaking bottle. A typical case, with unfortunate results for the plaintiff, is *Hochgertel v. Canada Dry Corp.*¹³⁸ George Hochgertel was a bartender in a fraternal club and was injured by flying glass when an unopened soda water bottle exploded while standing on a counter behind the bar. When this action was brought, preliminary objections in the nature of a demurrer were sustained by the trial court and Hochgertel appealed. Instead of seizing the opportunity for advancing the interests of the consuming public the court adhered to the archaic and worn-out notion of privity and sustained the trial court's decision declaring that Hochgertel as an employee of the club where he worked did not come within the protection of the warranty. The court limited the operation of the implied warranty, without distinguishing between implied-in-fact warranties and con-

129 Citing *Simmons v. Wichita Coca-Cola Bottling Co.*, 181 Kan. 35, 309 P.2d 633 (1957); *Sharp v. Pittsburg Coca-Cola Bottling Co.*, 180 Kan. 845, 308 P.2d 150 (1957); and cases cited therein.

130 *Connell v. Norton Coca-Cola Bottling Co.*, *supra* note 127, at 807, quoting from *Cernes v. Pittsburg Coca-Cola Bottling Co.*, *supra* note 128, at 261-62, where the court added:

"Webster's New International Dictionary, Unabridged, Second Edition, defines 'wholesome' as promoting mental health or well-being, or physical well-being, beneficial to the health or the preservation of health; 'fit' as suitable; and 'deleterious' as hurtful or destructive, injurious, detrimental."

131 214 Ore. 654, 330 P.2d 346 (1958).

132 221 La. 919, 60 So.2d 873 (1952).

133 101 So.2d 34 (Fla. 1958).

134 117 Utah 578, 218 P.2d 660 (1950).

135 288 S.W.2d 903 (Tex. Civ. App. 1956).

136 24 Cal.2d 453, 150 P.2d 436 (1944); referring to the *Escola* case *supra*, the *Keller* court observed, at 349: "The concurring opinion of Mr. Justice Traynor in that case is probably more frequently cited in recent law reviews and texts than any other found."

137 *Keller v. Coca-Cola Bottling Co.*, *supra* note 131.

138 409 Pa. 610, 187 A.2d 575 (1963); the case is criticized in Jaeger, *Privity of Warranty: Has the Tocsin Sounded?* 1 DUQUESNE U.L. REV. 1, 20-23 (1963), and in Jaeger, *General Practice Section*, 1 A.B.A. NEWSLETTER No. 2, pp. 3, 4 (Oct. 1963).

structive warranties, to the purchaser or those within "the distributive chain." This decision certainly retarded consumer protection in Pennsylvania.

An excellent opportunity was afforded for the progressive development of the law of warranty since the Uniform Commercial Code adopted ten years earlier in Pennsylvania extends protection to members of the buyer's family, his household, or guests in his home.¹³⁹ As to anything beyond that, the Code is neutral, that is, it leaves it to the individual jurisdictions to decide whether privity is to be relegated to a bygone era.¹⁴⁰ Curiously enough, as has been previously signalized,¹⁴¹ as the rule was made by the court¹⁴² it would seem that the courts, as in New Jersey and New York in *Henningsen* and *Goldberg* respectively,¹⁴³ could correct this lapse. On this point the Supreme Court of Pennsylvania takes refuge in the ancient saw about "judicial legislation" and comments: "Further, it is not for us to legislate or by interpretation to add to legislation, matters which the legislature saw fit not to include."¹⁴⁴ Nevertheless, the court recognizes that in food cases, "nearly a third of the American jurisdictions, including Pennsylvania, have broken away from the rule of 'privity of contract' in cases involving food, beverages and like goods for human consumption, and have for various reasons permitted a *subpurchaser* to sue the manufacturer directly in *assumpsit* . . ."¹⁴⁵ Thus, considering that plaintiff "has an adequate remedy in trespass," the court left George to his remedy(?) in tort, since he was not a subpurchaser.

A companion case from a sister jurisdiction, *Giociola v. Delaware Coca-Cola Bottling Company*,¹⁴⁶ is instructive as to what may happen when plaintiff relies on a tort theory of recovery in an exploding bottle case, as suggested in *Hochgertel*. The action was brought by a grocer and his minor daughter to recover for injuries sustained by the daughter when the bottle broke in her hands when she was attempting to open it and a tendon was severed in her left hand.¹⁴⁷ Plaintiffs alleged three causes of action (1) breach of implied warranty; (2) negligence; and (3) *res ipsa loquitur*. As to each, a verdict for the defendant was directed: In the first, recovery was denied "because of the lack of privity of contract between the minor plaintiff and the defendant." As to the second, there was a directed verdict for the defendant upon a showing of "due care"; finally, as to *res ipsa* the court pointed out there was no occasion for any inference as to negligence by the defendant and consequently, a directed verdict

139 UNIFORM COMMERCIAL CODE § 2—318.

140 UNIFORM COMMERCIAL CODE Comment 3 to § 2—318.

141 *Supra* p. 502.

142 *Winterbottom v. Wright*, *supra* note 13, where both *obiter dicta* are quoted.

143 *Supra* note 1 and *supra* note 11.

144 *Hochgertel v. Canada Dry Corp.*, *supra* note 138, at 577.

145 Since the plaintiff could not recover in *assumpsit* in this case, the *Hochgertel* court suggested, at 579, that he had "an adequate remedy in trespass." Whether this remedy is truly adequate may well be doubted, especially in jurisdictions where *res ipsa loquitur* has not progressed and it is possible for the defendant to show "due care" and escape liability. Once again, a strong argument can be made for a separate and distinct action for breach of warranty holding the manufacturer absolutely liable.

146 53 Del. 477, 172 A.2d 252 (1961).

147 The court stated the facts:

On Thanksgiving Day, about 2:00 p.m., one of the *Giociola* children, not the minor plaintiff, took three bottles of Coca-Cola from the cooler for consumption by the three *Giociola* children. He noticed nothing unusual about the bottles. The minor plaintiff rested the one given to her on a table,

for the defendant on that count "was proper." Thus, in the classic tradition, the Supreme Court of Delaware did not aid the cause of consumer protection.¹⁴⁸

Three months earlier, a Superior Court in the same jurisdiction had followed the traditional line in *Behringer v. William Gretz Brewing Co.*¹⁴⁹ which is cited in the *Ciociola* case. The same old moth-eaten strictures were then hauled out to defeat recovery in this action for personal injuries. The plaintiff was an employee of a woman who operated a liquor store in Wilmington. Within the scope of her employment, plaintiff opened a case of beer and took out a carrier which held six sixteen-ounce bottles of beer. The cardboard carrier was defective, and all six bottles fell through the bottom and struck plaintiff's left foot and ankle causing injuries forming the basis of her complaint.

Two grounds of relief were alleged: (1) Negligence, including *res ipsa loquitur*; and (2) breach of warranty. As to negligence, the court reviewed the earlier cases,¹⁵⁰ and concluded that unless the danger was "reasonable foreseeable — probable, not merely possible," there would be no recovery. Holding that the bottom's falling out of the cardboard carrier was not "reasonably foreseeable," defendant's motion for summary judgment was granted. This also disposed of *res ipsa loquitur*.¹⁵¹

As to the second count for breach of warranty, the court made short shrift by declaring that "privity of contract is essential in order to recover for breach of warranty," citing *Barni v. Kutner*.¹⁵² Again, summary judgment was granted defendant.

In two other cases, the court achieved much more satisfactory results. *Vallis v. Canada Dry Ginger Ale*¹⁵³ was an action by a kitchen helper in a restaurant; the proprietor had purchased a bottle of "club soda" which exploded injuring the plaintiff. After a judgment of nonsuit had been entered, this appeal was taken. The judgment below was reversed on the ground that an implied warranty of merchantability as to the bottle was available to the employee, and

holding it with her left hand grasping the bottle at about the middle, and attempted to open the bottle with an ordinary bottle opener held in her right hand. She applied normal pressure to the opener whereupon the bottle broke in two parts. The break started at the top of the bottle in the area of the lip and extended diagonally down to the level of the liquid. The break was clean and the two parts thereafter fitted together perfectly. The minor plaintiff looked at the bottle before she attempted to open it but noticed no defect in it.

As a result of the breaking of the bottle, a tendon in the left hand of the minor plaintiff was severed in the area of the base of the thumb and index finger. *Ciociola v. Delaware Coca-Cola Bottling Co.*, *supra* note 146, at 254-55.

148 It has sometimes been suggested that the courts are more reluctant to deviate from the privity concept in the case of the container since there is always the possibility of tampering. However, more and more jurisdictions are requiring that the manufacturer or bottler establish some basis for the allegation of tampering if this defense is to be successful.

149 53 Del. 365, 169 A.2d 249 (Del. Super. Ct. 1961).

150 *Gorman v. Murphy Diesel Co.*, 42 Del. 149, 29 A.2d 145 (Del. Super. Ct. 1942); *Hartford Accident & Indemnity Co. v. Anchor Hocking Glass Corp.*, 44 Del. 39, 55 A.2d 148 (Del. Super. Ct. 1947); *Hunter v. Quality Homes, Inc.*, 45 Del. 100, 68 A.2d 620 (Del. Super. Ct. 1949).

151 In a number of jurisdictions, the concept of *res ipsa loquitur* has been broadened to include a number of situations where bottles have broken or exploded.

152 45 Del. 550, 76 A.2d 801 (Del. Super. Ct. 1950).

153 190 Cal. App.2d 35, 11 Cal. Rptr. 823 (Dist. Ct. App. 1961); *Jones v. Burgermeister Brewing Corp.*, 198 Cal. App.2d 198, 18 Cal. Rptr. 311 (Dist. Ct. App. 1961).

that this warranty had been breached. The court reviewed many of the leading precedents,¹⁵⁴ and cited in support *Peterson v. Lamb Rubber Co.*¹⁵⁵

A Florida court in *Canada Dry Bottling Co. of Florida v. Shaw*¹⁵⁶ adopted much the same line of reasoning in giving judgment for the plaintiff who was injured when a bottle of soda broke in her hand. Recognizing that the general trend all over the country is towards greater consumer protection, the court decided that "If poisonous, unhealthful and deleterious food are placed by the manufacturer upon the market and injuries occur by the consumption thereof then the law should supply the injured person an adequate and speedy remedy. It is our conclusion that the implied warranty remedy of enforcement will accomplish the desired end."¹⁵⁷ This certainly is a sound approach and one which may be counted on to afford the ultimate consumer much greater protection.¹⁵⁸

A comprehensive examination of beverage cases appears in *Manzoni v. Detroit Coca-Cola Bottling Co.*¹⁵⁹ The question presented to the Supreme Court of Michigan was whether the wife of a purchaser of a bottle of Coca-Cola could properly maintain an action for breach of implied warranty when she became ill from consuming the contents. Chemical analysis revealed that foreign substances were present in the beverage. Although the action was for the breach of implied warranty of fitness for human consumption, defendant argued that "the burden was upon the plaintiffs to show negligence." With a remarkably casual disregard of the true state of the law, defendant also declared that there is "no distinction between a count in implied warranty or in tort." In demolishing this argument, Mr. Justice Smith, speaking for the Supreme Court, also indicated how plaintiff could readily find himself on the horns of a dilemma when seeking to pursue the traditional remedies of either tort or contract:¹⁶⁰

The fallacy in what is urged is the assertion that there is no distinction between counts in warranty and in tort. Their similar-

¹⁵⁴ *Escola v. Coca-Cola Bottling Co. of Fresno*, 24 Cal.2d 453, 150 P.2d 436 (1944); *Mahoney v. Shaker Square Beverages*, 64 Ohio L. Abs. 200, 102 N.E.2d 281 (Ohio C.P. 1951); *Tennebaum v. Pendergast*, 55 Ohio L. Abs. 231, 89 N.E.2d 490 (Ohio C.P. 1948); *cf. Alaska Pacific Salmon Co. v. Reynolds Metals Co.*, 163 F.2d 643 (2d Cir. 1947); *Trust v. Arden Farms Co.*, 50 Cal.2d 217, 324 P.2d 583 (1958); *Gordon v. Aztec Brewing Co.*, 33 Cal.2d 514, 203 P.2d 522 (1949); *Healey v. Trodd*, 124 N.J.L. 64, 11A.2d 88 (1940); *Cooper v. Newman*, 11 N.Y.S.2d 319 (N.Y. City Ct. 1939).

See also Pound, *The Problem of the Exploding Bottle*, 40 BOSTON U. L. REV. 167 (1960).

¹⁵⁵ 54 Cal.2d 339, 5 Cal. Rptr. 863, 353 P.2d 575 (1960).

¹⁵⁶ 118 So.2d 840 (Fla. Dist. Ct. App. 1960).

¹⁵⁷ *Canada Dry Bottling Co. v. Shaw*, *supra* note 156, at 843, quoting the opinion of Florida Coca-Cola Bottling Co. v. Jordan, 62 So.2d 910, 911 (Fla. 1953), which, in turn quotes the leading case of *Blanton v. Cudahy Packing Co.*, 154 Fla. 872, 19 So.2d 313, 315 (1944).

¹⁵⁸ Other cases which have dealt with the same question include *Nichols v. Nold*, 174 Kan. 613, 258 P.2d 317 (1953); *cf. Maryland Cas. Co. v. Owens-Illinois Glass Co.*, 116 F. Supp. 122 (S.D.W.Va. 1953); *Naumann v. Wehle Brewing Co.*, 127 Conn. 44, 15 A.2d 181 (1940); *Atwell v. Pepsi-Cola Bottling Co. of Washington, D.C.*, 152 A.2d 196 (Mun. Ct. App. D.C. 1959); *Canada Dry Ginger Ale Co. v. Jochum*, 43 A.2d 42 (Mun. Ct. App. D.C. 1945); *Poplar v. Hochschild, Kohn & Co.*, 180 Md. 389, 24 A.2d 783 (1942); *Lasky v. Economy Grocery Stores*, 319 Mass. 224, 65 N.E. 2d 305 (1946).

¹⁵⁹ 363 Mich. 235, 109 N.W.2d 918 (1961).

¹⁶⁰ *Coca-Cola Bottling Co. of Puerto Rico v. Negron Torres*, 255 F.2d 149 (1st Cir. 1958), is a case of novel impression similar to the *Manzoni* case, *supra* note 159. The federal court was called on to determine what the Supreme Court of Puerto Rico might do under the circumstances where the action was brought by the plaintiff consumer against defendant distributor. Privity was absent, but the court recognized an exception to the doctrine in the case of foods and similar products, affirming judgment for plaintiff consumer, relying on *Castro v. Payco, Inc.*, 75 P.R. 59 (1953).

ity in the present context lies only in the fact that each is a remedy aimed at the liability of the manufacturer and that each may be grounded upon the presence of a deleterious or harmful substance (e.g., mouse, fly, snake, mold, animal or human organs or residue) in an article for human consumption. At this point, however, similarities end and distinctions take over. The warranty action, of ancient lineage, did not require a showing of negligence (though a showing of negligence, of course, did not defeat it) but it did require privity of contract. The negligence action, on the other hand, did not require privity but it did require that the plaintiff show a lack of due care with respect to the particular article, e.g., the bottle of Coca-Cola in the present case. *Either of these doctrines*, literally applied, *gave the manufacturer a virtual immunity*. As for privity, the injured consumer and the manufacturer were contractual strangers, unless related by a fiction. As for negligence, the annual output of such bottles often ran into the millions. To show the negligence of the manufacturer with respect to any particular bottle was an impossibility.¹⁶¹

The court then comments on the extensive changes wrought by the facts of modern trade and commerce, centralized manufacturing operations in strategic areas, and the tremendous volume of advertising and "assurances of quality directly aimed at the ultimate consumers." The net result of the operation of these forces has been a significant change in legal theory. Foods and beverages constitute but a small segment in the ever-broadening field of products liability: "It ranges through areas both of contract and tort," as the court remarks, "from the liability of the manufacturer of a defective automobile wheel, or cinder blocks to that of the seller of an inflammable dress, or the distributor of unwholesome food or contaminated drink, or even the purveyor of a caustic perfume."¹⁶²

This statement of the court appears to justify the conclusion that a new action, breach of constructive warranty, imposing absolute liability on the manufacturer or producer of deleterious or injuriously defective products is emerging. This remedy would eliminate proof of negligence and discard any requirement of privity.

Tobacco

While not exactly a food product, tobacco has by analogy been considered in three recent cases as being in the same category with respect to privity. The first of these, *Green v. American Tobacco Company*,¹⁶³ was a referral case from

161 *Manzoni v. Detroit Coca-Cola Bottling Co.*, *supra* note 159, at 238, 109 N.W.2d at 920 (Emphasis supplied). Affirming judgment for the plaintiff, the court noted that manufacturers are well placed to shoulder liability and to distribute its burdens and in consequence, many jurisdictions have abandoned the requirement of privity outright. It may safely be concluded that beverages are assimilated to foodstuffs in most jurisdictions.

162 *Id.* at 239-40, 109 N.W.2d at 921. Quoting extensively from the closely reasoned and ably formulated opinion of Mr. Justice Francis in *Henningsen v. Bloomfield Motors, Inc.*, *supra* note 1, Mr. Justice Smith, delivering the opinion of the Michigan Supreme Court, declared: "The Supreme Court of New Jersey has recently given this modern development exhaustive examination." *Id.* at 240, 109 N.W.2d at 921.

The court also cites *Jacob E. Decker & Sons v. Capps*, *supra* note 11; *Sharp v. The Pittsburg Coca-Cola Bottling Co.*, 180 Kan. 845, 308 P.2d 150 (1957); *Spence v. Three Rivers Builders & Masonry Supply, Inc.*, *supra* note 11; *Carter v. Yardley & Co., Ltd.*, 319 Mass. 92, 64 N.E.2d 693 (1946).

163 154 So.2d 169 (Fla. 1963).

the Fifth Circuit.¹⁶⁴ Briefly stated, the facts disclosed that Green died of lung cancer (carcinoma) after having smoked Lucky Strike cigarettes most of his adult life. His widow brought this action against the American Tobacco Company, the manufacturer, in the federal district court. Breach of warranty was alleged since it was established that Green's carcinoma was the result of continued overindulgence in cigarette smoking. The trial court entered judgment for the defendant manufacturer and plaintiff widow appealed. The judgment below was affirmed by a divided court.¹⁶⁵ There was a strong and well-reasoned dissent wherein the pertinent Florida cases were reviewed.¹⁶⁶ Upon petition for rehearing, this being a case of novel impression, the court decided to certify the question of what Florida law would hold to the Supreme Court of Florida pursuant to the provisions of the applicable Florida statute.¹⁶⁷

Chief Justice E. Harris Drew of the Supreme Court of Florida found that Florida does not require privity of warranty in cases involving food and related products such as tobacco. In his able and closely reasoned opinion, the Chief Justice reviewed the earlier precedents¹⁶⁸ and held the manufacturer absolutely liable without regard to foreseeability as to the consequences to be experienced from the use of his product or "actual knowledge or opportunity for knowledge of a defective or unwholesome condition" which, he said, "is wholly irrelevant to his liability on the theory of implied warranty and the question certified [Is the manufacturer absolutely liable?] must therefore be answered in the affirmative."¹⁶⁹

When the case was returned to the Fifth Circuit, the manufacturer argued that it should have a directed verdict as there was no evidence that the cigarettes in question were not "reasonably fit and wholesome." Plaintiff contended that the only issue remaining was a determination of damages. The appellate court was not persuaded by either argument, but concluded: "The jury has not made any sufficient finding on the question of reasonableness, that is, whether or not the cigarettes were 'reasonably fit and wholesome.'"¹⁷⁰ Remanding the case, the court directed that a new trial should not cover the issues of causation which had been decided adversely to the manufacturer during the first trial and which were now the law of the case. Nor could defendant manufacturer litigate anew the question of decedent's reliance on the implied warranty. In a strong dissenting opinion it was stated that the remand, to

164 304 F.2d 70 (5th Cir. 1962).

165 This case is an excellent illustration of the difficulties which confront a federal court when faced with the necessity of determining what the highest state court would do if it were presented with a similar factual situation. This is further discussed *infra* pp. 552-54.

166 These include: *Smith v. Burdine's, Inc.*, 144 Fla. 500, 198 So. 223 (1940); *Blanton v. Cudahy Packing Co.*, 154 Fla. 872, 19 So.2d 313 (1944); *Cliett v. Lauderdale Biltmore Corp.*, 39 So.2d 476 (Fla. 1949), where the Supreme Court of Florida quoted from the able opinion in *Cushing v. Rodman*, 65 App. D.C. 258, 82 F.2d 864 (D.C. Cir. 1936); *Lambert v. Sistrunk*, 58 So.2d 434 (Fla. 1952); *Hoskins v. Jackson Grain Co.*, 63 So.2d 514 (Fla. 1953); *Food Fair Stores of Florida v. Macurda*, 93 So.2d 860 (Fla. 1957); *Miami Coca-Cola Bottling Co. v. Todd*, 101 So.2d 34 (Fla. 1958); *Carter v. Hector Supply Co.*, 128 So.2d 390 (Fla. 1961).

167 This certification is provided for under FLA. STAT. ANN. § 25.031 (1959).

168 In addition to the cases cited *supra*, note 166, *Sun Insurance Office, Ltd. v. Clay*, 133 So.2d 735 (Fla. 1961), appears in note 1, and *Frumer & Friedman, Products Liability*, is quoted as to the significance of *Betehia v. Cape Cod Corp.*, 10 Wis.2d 323, 103 N.W.2d 64 (1960).

169 *Green v. American Tobacco Co.*, *supra* note 163, at 170-71.

170 *Green v. American Tobacco Co.*, 325 F.2d 673, 677 (5th Cir. 1963).

conform to the opinion of the Supreme Court of Florida as clearly stated by Chief Justice Drew, would leave only the question of damages for determination by the new trial. The dissent declared that it was "a complete rejection of the law of warranty to hold that it could abrogate the requirement that one admittedly injured by the use of tobacco could not recover unless he showed further that the cigarettes were not reasonably fit and wholesome for use by the general public."¹⁷¹

In the two other cases, a somewhat more reactionary result is encountered. In Pennsylvania, the Third Circuit had before it on appeal a diversity of citizenship case, *Pritchard v. Liggett & Myers Tobacco Company*,¹⁷² where the facts were quite similar to the *Green* case supra. Plaintiff Pritchard had used Chesterfield cigarettes for more than thirty years before carcinoma compelled him to have one lung removed. He alleged that he had relied on many representations and assurances that the "nose, throat and accessory organs" are "not adversely affected by smoking Chesterfields."¹⁷³ It was proved that such statements appeared in advertisements in newspapers and periodicals and were frequently made on a national television program.¹⁷⁴ When the lower court dismissed the action for damages, plaintiff appealed. The Third Circuit reversed on the ground that a jury question was present which made the trial court's action in granting motions to dismiss and for a directed verdict erroneous. As the ap-

171 *Id.* at 681, where the court continued: "Those words are used in the warranty to demonstrate the universality of its application. Every sale it makes carries a warranty to each and every member of the public. But each warranty is separate and covers the liability of the Tobacco Company to each separate individual to whom a sale is made. The finding of the jury has settled the fact that the cigarettes sold to Green were not reasonably fit and wholesome for use by him. No other question is, in my opinion, involved under the law of Florida with which alone we are dealing."

172 295 F.2d 292 (3rd Cir. 1961).

173 These assurances and representations were emphasized by the court as having been made in various periodicals as well as on television; said the court, at 297:

One systematic and nationwide advertising campaign stands out in the record. In essence, it said that "Nose, throat, and *accessory organs* not adversely affected by smoking Chesterfields." (Emphasis supplied.) It appeared in a Pittsburgh newspaper, a national magazine, and was repeated on a national television program featuring Arthur Godfrey. Typical of the commercials he presented was the following:

"* * * You hear stuff all the time about 'cigarettes are harmful to you' this and that and the other thing. * * *"

"Here's an ad, you've seen it in the papers—please read it when you get it. If you smoke it will make you feel better, really."

"Nose, throat and accessory organs not adversely affected by smoking Chesterfield. This is the first such report ever published about any cigarette. A responsible consulting organization has reported the results of a continuing study by a competent medical specialist and his staff on the effects of smoking Chesterfield cigarettes."

Later, Godfrey said: "That they mean what they say—that specialist said it, Liggett and Myers have substantiated it. Remember that when you're wondering about cigarettes. Smoke Chesterfields—they're good. Thank you." We think that the clear import of this advertising campaign was to lead smokers to believe that in order to "Play Safe—Smoke Chesterfield." Plaintiff testified that he relied on these assurances thinking that he would suffer no adverse effects from smoking Chesterfields. Whether it was reasonable for him to so rely was, of course, a matter for the jury. *Pritchard v. Liggett & Myers Tobacco Co. supra* note 172, at 297. (Footnotes omitted.)

174 Among the publications mentioned in the court's footnotes are *Time*, *Life*, *Saturday Evening Post*, and the *Pittsburgh Press*.

pellate court observed: "From the evidence, the jury could very well have concluded that there was an implied warranty of merchantability."¹⁷⁵

Upon remand, it appears that judgment was given for defendant.¹⁷⁶

In sharp contrast to the *Green* case, and holding to the line of orthodox decisions which the billion dollar tobacco industry has been careful to preserve, the Fifth Circuit, in *Lartigue v. R. J. Reynolds Tobacco Company*,¹⁷⁷ rejected the doctrine of absolute liability advanced by the widow of the decedent cigarette smoker in her action against the two manufacturers whose products her husband had used with fatal results. In its reactionary opinion, the appellate court approved the language of the federal district court:

"But such implied warranty does not cover substances in the manufactured products, the harmful effects of which no developed human skill or foresight can [avoid] . . ."¹⁷⁸ The court had quoted the opinion in the original *Green* case¹⁷⁹ to the effect that the doctrine of implied warranty by a manufacturer "is founded on his superior opportunity to gain knowledge of the product and to form a judgment of its fitness."¹⁸⁰ What is truly remarkable is the court's statement that this principle is clearly deducible "from all of the Florida cases on implied warranty."¹⁸¹ A rude awakening was in store for the Fifth Circuit when the opinion of Chief Justice Drew was delivered in *Green v. American Tobacco Company*¹⁸² a few weeks later: "our decisions conclusively establish the principle that a manufacturer's or seller's actual knowledge or opportunity for knowledge of a defective or unwholesome condition is wholly irrelevant to his liability on the theory of implied warranty . . ."¹⁸³

The reasoning in *Lartigue v. R. J. Tobacco Co.*¹⁸⁴ and the test applied leave something to be desired. Assume for the sake of argument that a new wonder "drug" is to be marketed under the name "Myomyomyocin." It has been carefully checked and put through any number of different tests. Nevertheless, when it is finally made available for public consumption a number of people have varying degrees of unfortunate side effects ranging from headaches to fainting spells. Sometimes the injury is permanent. Should it be said that lack of foreseeability should relieve the manufacturer of liability?¹⁸⁵ If so, then the tort action does not provide an adequate remedy and thus there is a further argument for having a separate breach of constructive warranty action wherein the manufacturer would be held absolutely liable as the Supreme Court of

175 *Pritchard v. Liggett & Myers Tobacco Co.*, *supra* note 172, at 297.

176 See Jaeger, *Privity of Warranty: Has the Tocsin Sounded?* 1 DUQUESNE U.L. REV. 1, 9 n. 28. Cf. *Lartigue v. R. J. Reynolds Tobacco Co.*, *infra* note 177, at 38 n. 42, citing *Pritchard v. Liggett & Myers Tobacco Co.*, D.C.W.D. Pa. 1962, on remand.

177 317 F.2d 19 (5th Cir. 1963).

178 *Lartigue v. R. J. Reynolds Tobacco Co.*, *supra* note 177, at 39.

179 *Green v. American Tobacco Co.*, 304 F.2d 70 (5th Cir. 1962).

180 This statement is criticized in the dissenting opinion in *Green v. American Tobacco Co.*, 325 F.2d 673, 680 (5th Cir. 1963), referring to the *Lartigue* case, *supra* note 177, at 37-39.

181 *Green v. American Tobacco Co.*, *supra* note 179, at 77; in light of the analysis of these cases as cited in note 166 *supra* by the Supreme Court of Florida, this statement seems hardly supportable.

182 154 So.2d 169 (Fla. 1963).

183 *Id.* at 170.

184 *Supra* note 177.

185 As in several of the cases which deal with the liability of manufacturers of tobacco products, as in *Pritchard v. Liggett & Myers Tobacco Co.*, *supra* note 172.

Florida indicated in *Green v. American Tobacco Co.*¹⁸⁶ As between having one of two innocent parties bear the loss, the one best able (who is also the one initiating the entire chain of circumstance) should be the one to take the loss.

The same criticism which pertains to the *Lartigue* case is applicable with even greater force to *Ross v. Philip Morris & Co.*¹⁸⁷ Not only does it illustrate the grave mistakes a federal court can make while seeking to divine state law when required by diversity of citizenship¹⁸⁸ to make an *Erie*¹⁸⁹-educated guess, but underlines the law's slow, insolent delays. Plaintiff had smoked Philip Morris steadily for eighteen years when a cancer operation had to be performed on his throat. He filed his action in the Circuit Court of Jackson County, Missouri, in 1954; it was then removed to the United States District Court for the Western District of Missouri on the ground of diversity of citizenship. It was finally tried to a jury in that court in June and July 1962. In spite of a substantial number of cases emanating from various courts in Missouri which plaintiff adduced, and which clearly pointed to the obliteration of privity as a defense in breach of implied warranty cases, the federal court steadfastly adhered to its express belief that the Supreme Court of Missouri would continue to follow the pernicious precedent(?) of the judges' *obiter dicta* in *Winterbottom v. Wright*.¹⁹⁰

The court reviewed the various "food and drink" cases cited by plaintiff in support of his action and then quoted an appellate court opinion in *Belt Seed Company v. Mitchelhill Seed Co.*:¹⁹¹

Implied, unlike express, warranties are arrived at by operation of law and conclusions announced by the court upon established facts. For the sake of convenience, merely, such an obligation (an implied warranty) is permitted to be enforced under the form of a contract.¹⁹²

"Such pronouncement," commented the federal district court, "is the ratiocination of the rulings made by the intermediate courts of appeals of Missouri in the above-cited cases."¹⁹³

The court then observes, contrary to what the plaintiff contends, and what the Supreme Court of Missouri has since held,¹⁹⁴ as to breach of implied warranty:

While the foregoing cases involve decisions of the several intermediate courts of appeals and not of the Supreme Court of Missouri, it is plaintiff's contention that they set forth a well recognized and firmly entrenched Missouri doctrine with regard to products manufactured and sold for human consumption, and show that the ultimate purchaser-consumer can recover against a manufacturer of products on the theory of breach of implied

186 *Supra* note 182.

187 164 F. Supp. 683 (W.D. Mo. 1958), *aff'd*, 328 F.2d 1 (8th Cir. 1964).

188 See *infra* p. 552.

189 *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

190 *Supra* note 13.

191 153 S.W.2d 106 (Mo. App. 1941).

192 *Id.* at 112.

193 *Ross v. Philip Morris & Co.*, *supra* note 187, at 691.

194 *Morrow v. Caloric Appliance Corp.*, 372 S.W.2d 41 (Mo. 1963).

warranty of wholesomeness and fitness. With much certitude, plaintiff asserts:

“ . . . it appears evident (from the foregoing decisions) that when the Supreme Court (of Missouri) does get a case before it between an ultimate purchaser-consumer against a remote manufacturer, based on implied warranty—it will hold as the three Courts of Appeals held in the numerous cases hereinbefore cited.”¹⁹⁵

The argument that plaintiff makes in respect to the above propositions is cogent, but it leaves us neither convinced nor persuaded that such is the progression to be given to Missouri law in light of the opinion of the Supreme Court of Missouri in *State ex rel. Jones Store Co. v. Shain*.¹⁹⁶

At this point, the court cites one of its own decisions, *McIntyre v. Kansas City Coca-Cola Bottling Co.*,¹⁹⁷ as a precedent for the instant case, concluding that it has correctly apprehended the law of Missouri, and states its conviction that “the doctrine of implied warranty of merchantability was not an axiom likely to be sustained by the Supreme Court of Missouri . . . [w]e understand the controlling law of that State to be that a remote vendee of goods produced by a manufacturer *cannot* maintain an action for breach of implied warranty.”¹⁹⁸ The court thereupon rendered summary judgment for defendant company, and plaintiff appealed. In the meantime, the Supreme Court of Missouri emphatically and unequivocally disagreed¹⁹⁹ with the United States District Court for the Western District of Missouri and held specifically that the two cases²⁰⁰ which were cited in support of its opinion by that court in *Ross v.*

195 Quoting at 691 Brief for Plaintiff, p. 11, *Ross v. Philip Morris & Co.*, *supra* note 187; the cases which are reviewed include the so-called (by the court) “food and drink” decisions: “*Madouros v. Kansas City Coca-Cola Bottling Co.*, Mo. App. St. Louis 1936, 90 S.W.2d 445; *Nemela v. Coca-Cola Bottling Co.*, Mo. App. St. Louis 1937, 104 S.W.2d 773; *McNicholas v. Continental Baking Co.*, Mo. App. St. Louis 1938, 112 S.W.2d 849; *Hutchison v. Moerschel Products Co.*, Mo. App. Kansas City 1939, 133 S.W.2d 701; *Carter v. St. Louis Dairy Co.*, Mo. App. St. Louis 1940, 139 S.W.2d 1025; *Helms v. General Baking Co.*, Mo. App. St. Louis 1942, 164 S.W.2d 150; *Holyfield v. Joplin Coca-Cola Bottling Co.*, Mo. App. Kansas City 1943, 170 S.W.2d 451; *Norman v. Jefferson City Coca-Cola Bottling Co.*, Mo. App. Kansas City 1948, 211 S.W.2d 552; *Foley v. Coca-Cola Bottling Co.*, Mo. App. St. Louis 1948, 215 S.W.2d 314; *Williams v. Coca-Cola Bottling Co.*, Mo. App. St. Louis 1953, 285 S.W.2d 53. In a like form of action, the St. Louis Court of Appeals sustained a claim for breach of implied warranty, for skin infection incurred from use of a detergent produced by defendant when purchased from an independent retailer. See *Worley v. Procter & Gamble Mfg. Co.*, Mo. App. St. Louis 1952, 253 S.W.2d 532.” *Ross v. Philip Morris & Co.*, *supra* note 187, at 690.

196 352 Mo. 630, 179 S.W.2d 19 (1944).

197 85 F. Supp. 708 (W.D.Mo. 1949). Concerning this case, the court said in *Ross*, *supra* note 187, at 691: “We had occasion to examine and survey the law of Missouri as to a right of action for breach of implied warranty.” However, the court was dealing “with a donee of a remote vendee and an object other than one for human consumption in original packages.” (Emphasis supplied.)

198 *Ross v. Philip Morris & Co.*, *supra* note 187, at 691. (Emphasis supplied.)

199 *Morrow v. Caloric Appliance Corp.*, *supra* note 194; the Supreme Court of Missouri took note of the fact that the federal district courts in Missouri, as well as the eighth circuit had endeavored to prognosticate what the Missouri law would hold as to implied warranty and that their forecast indicated that Missouri would not grant recovery in the absence of privity. To this conclusion, the Supreme Court rejoined, at 52: “Those cases, of course, are not binding upon this court”

200 *Jones ex rel. Store Co. v. Shain*, *supra* note 196; *Zesch v. Abrasive Co. of Philadelphia*, 353 Mo. 558, 183 S.W.2d 140 (1944).

*Philip Morris & Co.*²⁰¹ were inapposite since they did not involve lack of privity.²⁰²

The United States Court of Appeals for the Eighth Circuit just a few months ago, having the benefit of *Morrow v. Caloric Appliance Corporation*,²⁰³ wherein the high court of Missouri had effectively disposed of the privity argument, quoted from *Williams v. Coca-Cola Bottling Co.*,²⁰⁴ a case which had been stressed by the plaintiff in the court below:

Considerations of public policy * * * and the protection of the health of the consuming public require that an obligation be placed upon the manufacturer of Coca-Cola to see to it, *at his peril*, that the product he offers the general public is fit for the purpose for which it is intended, namely, human consumption. The "demands of social justice" require that his liability should be made *absolute*.²⁰⁵

The appellate court also noted the definite trend in Missouri to get away from the privity requirement in actions by the ultimate consumer against a manufacturer for breach of implied warranty of fitness.

And this trend embraces products other than those in the typical food or beverage situation; as the court recognizes, "we conclude that under the proper factual situation the Missouri courts would impose the same strict liability upon a manufacturer of cigarettes as has been applied in the food and beverage cases."²⁰⁶

However, the court was disinclined to hold the manufacturer *absolutely* liable as had the Florida court in the *Green* case, and thus revealed a curiously anachronistic tendency completely at odds with the usual predilection of the federal judiciary as declared in *Picker X-Ray Corporation v. General Motors Corporation*.²⁰⁷ "Federal judges, in following state law, have been prone to advance implied warranty liability at the expense of the privity requirement."²⁰⁸ Holding that since "no developed human skill or foresight could afford knowledge" of the cancerous effect of smoking defendant's cigarettes,²⁰⁹ the lower court's summary judgment for defendant manufacturer would be affirmed.²¹⁰

201 *Supra* note 187, at 691-92.

202 *Morrow v. Caloric Appliance Corp.*, *supra* note 194, where, at 51, the Supreme Court said: "In the Jones case there was *no question of privity*. Privity existed because the suit was by a purchaser of a satin blouse from defendant in the defendant's store." Referring to the *Zesch* case, *supra* note 200, the court stated, at 52, that it dealt with "a *vendor-vendee situation where privity of contract existed*." As to privity generally, and its abolition see Jaeger, *Privity of Warranty: Has the Tocsin Sounded?* 1 DUQUESNE U.L. REV. 1 (1963), which the Missouri Supreme Court cites, at 54, with approval, "especially the conclusion therein reached, Loc. Cit. 141-42."

203 *Supra* note 194.

204 285 S.W.2d 53 (Mo. App. 1955).

205 *Id.* at 55. (Emphasis supplied.) Quoted in the *Ross* case, 328 F.2d 1, 8 (8th Cir. 1964).

206 *Ross v. Philip Morris & Co.*, 328 F.2d 1, 8 (8th Cir. 1964).

207 *Supra* note 2.

208 Citing some of the leading diversity cases including *Chapman v. Brown*, *supra* note 2, *B. F. Goodrich Co. v. Hammond*, 269 F.2d 501 (10th Cir. 1959); *Bowles v. Zimmer Mfg. Co.*, 277 F.2d 868 (7th Cir. 1960); *Spada v. Stauffer Chemical Co.*, 195 F. Supp. 819 (D. Ore. 1961); *Hinton v. Republic Aviation Corp.*, 180 F. Supp. 31 (S.D.N.Y. 1959).

209 *Ross v. Philip Morris & Co.*, *supra* note 206, at 10.

210 While noting that the Supreme Court of Florida had ruled that "implied warranty liability is not limited by the foreseeability doctrine, the 'reasonable application of human skill and foresight' test of tort liability," *Green v. American Tobacco Company*, 154 So.2d at 172,

Mechanical Devices

Taking its place with the automotive trilogy²¹¹ is *Ford Motor Company v. Mathis*.²¹² Here, the dimmer switch in a Ford failed the driver in his hour of need and he and the vehicle left the road and collided with a tree. Substantial injury resulted and this action was brought against the manufacturer for breach of implied warranty. At the outset, the court pointed out that it had not found "any Texas case directly in point."²¹³ However, the court did cite and discuss *S. Blickman, Inc. v. Chilton*,²¹⁴ where the legal principles adverted to were deemed helpful.²¹⁵ The court observed: "To hold the assembler liable for the negligence of its component-part manufacturer appears to be a sound and realistic doctrine. Reminiscent of the law merchant which developed out of the needs and practices of the business community, this principle surely reflects the outlook of this modern world of big business advertising in a big way."²¹⁶

The court cites many of the most significant cases including *Jacob E. Decker & Sons v. Capps*,²¹⁷ *Griggs Canning Co. v. Josey*,²¹⁸ and *Henningsen v. Bloomfield Motors, Inc.*²¹⁹ to illustrate the constantly expanding categories of products "within the area of strict liability." The court, affirming judgment for plaintiff, concluded that "Texas law holds the manufacturer-assembler liable for the negligence of its supplier of a component part."²²⁰

Also applying the law of Texas, the federal district court in *Siegel v. Braniff Airways, Inc.*,²²¹ citing certain earlier cases,²²² declared: "The trend generally is to abrogate the requirement of privity of contract."²²³ The court then cites with approval *Spence v. Three Rivers Builders & Masonry Supply, Inc.*²²⁴ and summarizes the arguments against privity:

it added, "we are not compelled to hold that the Missouri Supreme Court would arrive at the same conclusion as the Florida court." While this may well be, there is nothing in the Morrow case to suggest that absolute liability would *not* be imposed by the Missouri high court.

211 *State Farm Mutual Automobile Ins. Co. v. Anderson-Weber, Inc.*, 252 Iowa 1289, 110 N.W.2d 449 (1961); *Henningsen v. Bloomfield Motors, Inc.*, *supra* note 1; *General Motors Corp. v. Dodson*, 338 S.W.2d 655 (Tenn. App. 1960).

212 322 F.2d 267 (5th Cir. 1963).

213 *Id.* at 272; nor, says the court, has any been cited to it.

214 114 S.W.2d 646 (Tex. Civ. App. 1938).

215 The court summarized the facts: The injured plaintiff fell off a defective bar stool in a hotel. An independent contractor who was remodeling the hotel at the time was named defendant. The court gave judgment for plaintiff since the contractor had represented that the stools were a product of his own factory although in point of fact they were not. In so holding defendant contractor liable, the court adopted the Restatement of Torts rule as expounded in § 400. *Ford Motor Co. v. Mathis*, *supra* note 212, at 272-73.

216 *Id.* at 273. At this point, the court added: "Without faintly suggesting even a remote whisper of a possibility that we are now subconsciously lapsing into notions of *express* warranties, the law ought to be able to reckon with the force to which its votaries are daily exposed, at least off the bench or out of chambers." It then quotes *Randy Knitwear, Inc. v. American Cyanamid Co.*, *supra* note 11, to the effect that the world of merchandising is no longer a world of direct contract; "it is rather, a world of advertising . . ."

217 *Supra* note 11.

218 139 Tex. 623, 164 S.W.2d 835 (1942).

219 *Supra* note 1.

220 *Ford Motor Co. v. Mathis*, *supra* note 212, at 276.

221 204 F. Supp. 861 (S.D.N.Y. 1960).

222 *Jacob E. Decker & Sons v. Capps*, *supra* note 11; *International Derrick & Equipment Co. v. Croix*, 241 F.2d 216 (5th Cir. 1957); *Johnson v. Murray Co.*, 90 S.W.2d 920 (Tex. Civ. App. 1936); *Spence v. Three Rivers Builders & Masonry Supply, Inc.*, *supra* note 11; *Parish v. Great Atlantic & Pacific Tea Co.*, *supra* note 11.

223 *Siegel v. Braniff Airways, Inc.*, *supra* note 221, at 864.

224 353 Mich. 120, 90 N.W.2d 873 (1958).

1. The decisional approach which requires privity in breach of implied warranty actions is based upon fallacious reasoning.²²⁵

2. While some courts have followed the earlier cases requiring privity, the fallacy of this approach has become apparent in many jurisdictions and the privity doctrine has been discarded in numerous cases involving food.²²⁶

3. The requirement of privity in negligence causes of action has been discarded, particularly in cases where the product involved is "a thing of danger."²²⁷

4. The same considerations which have prompted the demise of the privity requisite in negligence actions and in implied warranty actions involving food are present in this breach of warranty action involving an aircraft.²²⁸

5. There has been no logical or realistic reason advanced why privity should be retained in a breach of implied warranty case.²²⁹

As might be expected from the court's careful exposition of the current trend, the motion of defendant aircraft manufacturer to dismiss the action for breach of implied warranty of quality and fitness of the airplane which had crashed was denied. It was held that under Texas law the widow and children of the airplane passenger who had been killed in the crash were proper parties to this action against the manufacturer.²³⁰

In view of the enormous increase of automotive and airborne travel, with more than 70 million vehicles, and tens of thousands of aircraft menacing the lives of countless numbers of people, it is not astonishing that there is an ever-mounting incidence of actions based on breach of implied warranties as to the suitability of these mechanical devices for their intended purpose. Of the utmost significance, and to be compared with *Siegel v. Braniff Airways, Inc.*,²³¹ is *Goldberg v. Kollsman Instrument Corp.*,²³² also involving an action by the surviving mother, the administratrix of her decedent daughter's estate. The court specifically declared:

We granted leave to appeal in order to take another step toward a complete solution of the problem partially cleared up in *Greenberg v. Lorenz*,²³³ and *Randy Knitwear, Inc. v. American Cyanamid Co.*²³⁴ The question now to be answered is: does a manufacturer's implied warranty of fitness of his product for its contemplated

²²⁵ Especially since it started by way of *obiter dicta* in *Winterbottom v. Wright*, *supra* note 13.

²²⁶ *Supra* pp. 515-21.

²²⁷ As, for example, in *MacPherson v. Buick Motor Co.*, *supra* note 16.

²²⁸ Here, the court continues: "The nature of this product is one which may well place life and limb in danger if that product is defective." *Siegel v. Braniff Airways, Inc.*, *supra* note 221, at 864.

²²⁹ The court then declares that the *Decker* case "and the other cases cited herein indicate that the definite and persuasive trend is towards the abrogation of this anachronism." *Id.*, at 865.

²³⁰ *Siegel v. Braniff Airways, Inc.*, *supra* note 221, followed in *Conlon v. Republic Aviation Corp.*, 204 F. Supp. 865 (S.D.N.Y. 1960) citing (since Michigan law would govern) *Spence v. Three Rivers Builders & Masonry Supply, Inc.*, *supra* note 11; under the New York Conflict of Laws rule the law of the place where the accident happened, *i.e.*, Michigan, would be applied.

²³¹ *Supra* note 221.

²³² 12 N.Y.2d 432, 240 N.Y.S.2d 592, 191 N.E.2d 81 (1963).

²³³ *Supra* note 2.

²³⁴ *Supra* note 11.

use run in favor of all its intended users, despite lack of privity of contract?²³⁵

The complaint alleged that a faulty altimeter was responsible for the crash of the airliner. The lower courts held that in the absence of privity no claim for breach of implied warranty might be enforced against a warrantor²³⁶ despite the decisions of the New York Court of Appeals in *Greenberg* and *Randy Knitwear*.²³⁷ This prompted the New York court to remark: "The enormous literature on this subject²³⁸ and the historical development of the law of warranties to its present state²³⁹ need not be reviewed beyond the references in our *Greenberg* and *Randy Knitwear* opinions (*supra*)."²⁴⁰

Since the defendants were arguing that California law should govern on the theory of "grouping of contracts [contracts?]",²⁴¹ the court discussed the applicable California precedents, especially *Peterson v. Lamb Rubber Co.*²⁴² and *Greenman v. Yuba Power Products, Inc.*²⁴³ in each of which strict liability "regardless of privity" was imposed on the manufacturer.²⁴⁴ However, the court concluded that it would make no particular difference as to the manufacturer's liability whether California or New York law was deemed applicable.²⁴⁵ As to the latter, it declared that "it is no extension [of existing court-made liability law] at all to include airplanes and the passengers for whose use they are built — and, indeed, decisions are at hand which have upheld complaints, sounding in breach of warranty, against manufacturers of aircraft where passengers lost their lives when the planes crashed."²⁴⁶

The majority of the court, speaking through Chief Judge Desmond, held that in addition to defendant American Airlines, Lockheed, the manufacturer of the aircraft in which the deceased passenger had been riding, should not have had its motion to dismiss granted, but that as to Kollsman, manufacturer of the defective altimeter, the motion was properly granted by the court below.²⁴⁷

235 *Goldberg v. Kollsman Instrument Corp.*, *supra* note 232, at 81.

236 23 Misc.2d 215, 199 N.Y.S.2d 134 (Sup. Ct. 1960), *aff'd*, 12 App. Div.2d 906, 214 N.Y.S.2d 640 (1961).

237 *Supra* notes 2 and 11 respectively.

238 For the many articles, comments and notes that product liability has inspired, see *supra* notes 98 and 99.

239 Fully reviewed in *Parish v. Great Atlantic & Pacific Tea Co.*, *supra* note 11.

240 *Goldberg v. Kollsman Instrument Corp.*, *supra* note 232, at 435, 240 N.Y.S.2d at 593, 191 N.E.2d at 82.

241 As explained in *Auten v. Auten*, 308 N.Y. 155, 124 N.E.2d 99 (1954), and citing *Poplar v. Bourjois, Inc.*, 298 N.Y. 62, 80 N.E.2d 334 (1948).

242 54 Cal.2d 339, 5 Cal. Rptr. 863, 353 P.2d 575 (1960).

243 59 Cal.2d 67, 27 Cal. Rptr. 697, 377 P.2d 897 (1962).

244 *Goldberg v. Kollsman Instrument Corp.*, *supra* note 232, at 435, 240 N.Y.S.2d at 593, 191 N.E.2d at 82, where these cases are discussed.

245 The court observed, "it really makes no difference whether New York or California law be applied, since in this respect both States use the same rules." *Goldberg v. Kollsman Instrument Corp.*, *supra* note 232, at 436, 240 N.Y.S.2d at 594, 191 N.E.2d at 83.

246 Citing as examples *Conlon v. Republic Aviation Corp.*, *supra* note 230; *Middleton v. United Aircraft Corp.*, 204 F. Supp. 856 (S.D.N.Y. 1960); *Ewing v. Lockheed Aircraft Corp.*, 202 F. Supp. 216 (D. Minn. 1962); *Hinton v. Republic Aviation Corp.*, 180 F. Supp. 31 (S.D.N.Y. 1959).

247 *Goldberg v. Kollsman Instrument Corp.*, *supra* note 232, stating, at 437, 240 N.Y.S.2d at 595, 191 N.E.2d at 83, "for the present at least we do not think it necessary so to extend this rule [of liability] as to hold liable the manufacturer (defendant Kollsman) of a component part. Adequate protection is provided for the passengers by casting in liability the airplane manufacturer which put into the market the completed aircraft."

Earlier, the court had said: "As we all know, a number of courts outside of New York

Thus, a gigantic step with seven-league boots was taken towards the abolition of privity. However, there was a dissenting opinion which reviewed a number of the earlier cases.²⁴⁸

The Supreme Court of Missouri resolved all doubts as to where that jurisdiction stands by its opinion in *Morrow v. Caloric Appliance Corp.*²⁴⁹ Plaintiff mother had purchased a gas range from a local dealer who had obtained it from the manufacturer's distributor. A few days after it had been installed, it proved defective in that the valves failed to control the flow of gas which, when ignited, produced flames which reached the ceiling. A service representative of the retail dealer found that the valves were defective and he made the necessary repairs, replacing the valves. Several days later the mother left her daughter in charge of the house and departed for Alabama. While cooking some food, the left side of the gas range emitted tremendous flames and soon the wallpaper was burning. By the time she had removed her ten brothers and sisters from the house, it was burning and was eventually completely destroyed.

When this action was filed against the manufacturer, judgment was rendered for the plaintiff mother who had purchased the range.²⁵⁰ The testimony had clearly indicated that defective valves had been responsible for the de-

State have for the best of reasons dispensed with the privity requirement (see Jaeger, *Privity of Warranty: Has the Tocsin Sounded?*, 1 DUQUESNE U.L. REV. 1 (1963))."

248 *Id.* at 437-43, 240 N.Y.S.2d at 595-600, 191 N.E.2d at 83-87.

249 372 S.W.2d 41 (Mo. 1963).

250 Defendant manufacturer moved "to quash the summons and service or, in the alternative, to dismiss plaintiff's action for want of jurisdiction" on the ground that it was a *foreign* corporation not "doing business" in Missouri, nor having "a registered agent or an agent for service of process" in that state. Consequently, assertion of jurisdiction over defendant manufacturer was a violation of the "due process" provision of the XIV Article of Amendment to the Constitution of the United States. Under the circumstances, when the manufacturer appealed from the judgment rendered in favor of the plaintiff vendee, the Springfield Court of Appeals transferred the "cause" to the Supreme Court of Missouri since it involved a question of constitutional interpretation or construction, *Morrow v. Caloric Appliance Corp.*, 362 S.W.2d 282 (Mo. App. 1962).

After an extensive and illuminating discussion of the activities of defendant corporation in Missouri and a detailed review of the cases, more especially *International Shoe Company v. State of Washington*, 326 U.S. 310 (1945) and *Wooster v. Trimont Mfg. Co.*, 356 Mo. 682, 203 S.W.2d 411 (1947), the Court concluded that defendant corporation was "doing business" in Missouri and that service of process had been properly made on its agent in that state. This defense illustrates one more stumbling block which may be interposed to defeat recovery where defective products are involved.

In *Nixon v. Cohn*, 385 P.2d 305 (Wash. 1963), plaintiffs were injured when they were thrown out of their seats while riding "a giant amusement machine" described as the "Meteor." Defendant, an Oregon corporation which had manufactured the machine, moved to quash service of summons and to dismiss the action against it for lack of jurisdiction. The trial court entered judgment quashing service on the corporation and plaintiffs appealed. The Supreme Court of Washington reversed and remanded, its opinion being very similar to that in *Morrow v. Caloric Appliance Corp.*, *supra* note 249. There was an extensive discussion of the *International Shoe Company* case *supra*. The *Nixon* court, at 308, referred to "the famous case of *Pennoyer v. Neff*, 95 U.S. 714, 2d L.Ed. 565, [where] it was established that the due process clause of the fourteenth amendment to the United States Constitution is violated where a court renders a personal judgment against a nonresident individual defendant without having jurisdiction over him and that, as a matter of due process, it cannot acquire such jurisdiction merely by serving process upon him outside the forum or by publication." In the many years which have intervened since the decision in *Pennoyer*, *supra*, the court found that "the concept of state jurisdiction over nonresidents has been greatly expanded." Also, that there is a definite tendency to liberalize the concept of "doing business." *Cf. De Claire Mink Ranches v. Federal Foods, Inc.*, 192 F. Supp. 148 (N.D. Iowa 1961); *Trussell v. Bear Mfg. Co.*, 215 F. Supp. 802 (E.D. Tenn. 1963); *Ford Motor Co. v. Arguello*, 382 P.2d 886 (Wyo. 1963).

struction brought about by the flaming gas range. Defendant manufacturer appealed, and the Supreme Court of Missouri summarized the issue:

The precise question now presented to *this court* (for the first time insofar as we have found) is whether privity of contract is necessary in order for an ultimate consumer to recover from a manufacturer of an implied warranty or, perhaps stated more frankly, whether a manufacturer of an instrumentality which is imminently dangerous if defectively manufactured is to be held to strict liability upon proof of the defect and of causation.²⁵¹

The appellant argued that the "overwhelming weight of the judicial decisions in the State of Missouri, and in the Federal Courts, construing [interpreting?²⁵²] the law of Missouri on the issues here involved, hold that in the absence of privity there can be no recovery by a retail customer" from the manufacturer on the theory of an implied warranty of fitness for the purpose intended. The court analyzed the various cases²⁵³ adduced by the appellant and concluded that they were not in point. As to the inaccurate guesses made by the federal courts purporting to interpret the law of Missouri, these were clearly not binding on the highest state court which so held in rejecting them.²⁵⁴ The court quoted extensively from *Worley v. Procter & Gamble Manufacturing Co.*²⁵⁵ wherein plaintiff sought to recover damages from the manufacturer of a detergent which she alleged had injured her skin. Although privity was lacking, the court found that she was entitled to invoke the theory of implied warranty.²⁵⁶

In its analysis of the case, the court indicated that the implied or "constructive" warranty under consideration although originally sounding in tort was regarded in the nature of an action on the case for deceit, and that subsequently assumpsit was employed in seeking damages for breach.²⁵⁷ After a comprehensive review of the Missouri precedents,²⁵⁸ the Supreme Court embarked

251 *Morrow v. Caloric Appliance Corp.*, *supra* note 249, at 51.

252 As to the difference between construction and interpretation of documents, whether contracts or otherwise, see 4 WILLISTON, CONTRACTS ch. 22 (3d ed. 1961), esp. § 602.

253 Including *Stewart v. Martin*, 353 Mo. 1, 181 S.W.2d 657 (1944); *State ex rel. Jones Store Co. v. Shain*, 352 Mo. 630, 179 S.W.2d 19 (1944); *Zesch v. Abrasive Co. of Philadelphia*, *supra* note 200; the court also mentions decisions of the federal courts purporting "to determine what the Missouri law as to implied warranty is or would be" and rejected their conclusions.

254 Particularly emphatic and erroneous was the federal court's opinion in *Ross v. Philip Morris & Co.*, 164 F. Supp. 683 (W.D. Mo. 1958) where it held that lack of privity would be a bar to an action by a cancerous cigarette smoker against the manufacturer of his brand; in the meantime, while the case was pending on appeal from a judgment in favor of defendant company, the *Morrow* case, *supra* note 249 was decided. Thereafter, recognizing that privity of warranty was moribund in Missouri, the Eighth Circuit affirmed on the ground that the injurious consequences, particularly the cancer-producing propensities, of cigarette smoking were not "reasonably foreseeable" by the manufacturer; see *supra* note 187.

255 241 Mo. App. 1114, 253 S.W.2d 532 (1952); this case has been repeatedly cited and quoted.

256 However, plaintiff was denied recovery on the ground "that she failed to show that 'Tide' contained any ingredients or chemicals injurious to the skin of the normal person . . ." The appellate court suggested that "in the interest of social justice," there was no good reason why they could not "reshape the law to conform to the requirements of modern economic life." *Worley v. Procter & Gamble Co.*, *supra* note 255, at 536-37. (Emphasis added.)

257 In this connection, the court remarked: "The necessities of logic do not require that we disregard legal history, which refutes the oft repeated statement that a warranty is necessarily a contractual obligation, and follow decisions which have imposed arbitrary limitations resting upon convenience, or considerations of policy not applicable at the present time." *Ibid.*

258 In addition to the *Worley* case, *supra* note 255, and those cited *supra* note 253, the court discusses *Smith v. Ford Motor Co.*, 327 S.W.2d 535 (Mo. App. 1959); *Dotson v. International Harvester Co.*, 365 Mo. 625, 285 S.W.2d 585 (1955); *Midwest Game Co. v. M.F.A. Milling Co.*, 320 S.W.2d 547 (Mo. 1959); *Albers Milling Co. v. Carney*, 341 S.W.2d 117 (Mo. 1960) in

upon a painstaking survey of the leading cases from other jurisdictions.²⁵⁹ The court was thereby impelled to its ultimate conclusion:

Careful consideration of the recent decisions of the courts of other states to the same effect, the inclination of the courts of this state to modify the harsh results flowing from a rule of *caveat emptor* in analogous fact situations, the logic of the reasoning upon which these cases (and numerous other cases therein cited) are rules in an effort to afford justice to the vast majority of the "consumer" citizenry, whose well-being, health and very lives are dependent in great degree upon processed food and manufactured articles and facilities, the fitness or safe use of which the ordinary "consumer" can know little or nothing other than the fact that the processor or manufacturer holds them out to the public as fit and reasonably safe for use by the "consumer" when used in the manner and for the purpose for which they are manufactured and sold, lead inevitably to the conclusion that under the facts as found by the jury the appellant is to be held liable as an implied warrantor of the fitness and reasonable safety of the gas cooking range here involved, despite lack of privity of contract.²⁶⁰

Other Products

Heretofore, the case discussion has been confined to instances where the defective products caused death or personal injury. But at least one jurisdiction has gone far beyond and obliterated privity where the consumer sought recovery for defective cinder blocks, *Spence v. Three Rivers Builders & Masonry Supply, Inc.*²⁶¹ The Supreme Court of Michigan, voicing its opinion through Judge Voelker,²⁶² engaged upon a comprehensive and far-reaching examination of privity and decided that the time had come to abolish this judge-made "requirement." The action was brought by a home owner, although she had not purchased the blocks from the manufacturer-defendant. The builder who had bought them appeared not to have been available and was reportedly out of the jurisdiction. Had privity been applied, Mrs. Spence's remedy against the building contractor would have been nugatory and she would have been unable to recover damages when the cinder blocks in her home disintegrated.²⁶³

the two last-cited cases, the Supreme Court held that feed intended for consumption by animals (fish and turkeys respectively) should be included in the exception to the so-called privity "requirement." *Morrow v. Caloric Appliance Corp.*, *supra* note 249, at 53-54, where the court added: "See also a more recent and extended discussion by Walter H. E. Jaeger, appearing in the Spring 1963 *DUQUESNE U. LAW REV.*, Vol. 1, pp.1-142, and especially the conclusion therein reached, *loc. cit.* 141-142."

259 *Henningsen v. Bloomfield Motors, Inc.*, *supra* note 1; *Greenman v. Yuba Power Products, Inc.*, *supra* note 11; *Ketterer v. Armour and Co.*, *supra* note 11; *Klein v. Duchess Sandwich Co.*, *supra* note 11; *Goldberg v. Kollsman Instrument Corp.*, *supra* note 11; *State Farm Mutual Automobile Insurance Co. v. Anderson-Weber, Inc.*, *supra* note 2; *50 New Walden, Inc. v. Federal Insurance Co.*, 39 Misc.2d 460, 241 N.Y.S.2d 128 (1963). In *50 New Walden supra*, the court found a breach of implied warranty *even in the absence of a contract of sale*.
260 *Morrow v. Caloric Appliance Corp.*, *supra* note 249, at 55; as might be expected by the foregoing, judgment for the plaintiff vendee of the gas range was affirmed.

261 353 Mich. 120, 90 N.W.2d 873 (1958).

262 Under the pseudonym Robert Traver, Judge Voelker wrote *Anatomy of a Murder*.

263 After installation, the cinder blocks developed red splotches described as "bleeding," and proved entirely unfit for use in walls. There had been a finding in the court below that the cinder blocks were defective and that this constituted a breach of warranty that the goods were of merchantable quality, contrary to Section 15 of the Uniform Sales Act. Michigan has since adopted the Uniform Commercial Code.

The lower court had, as might be expected, given judgment for defendant manufacturer when the latter invoked the defense of lack of privity. When plaintiff appealed, the high court of Michigan recognized that precedent gave the trial court little or no choice, stating:

In fact, in the past in these situations we have not only tended to severely limit the factual area of recovery but we have shown an equally ready disposition to adopt and embrace the whole dreary legal apparatus and rhetoric so long employed in these situations to narrow or prevent any recovery at all. Some of these open sesame phrases are: whether there was privity or the lack of it; whether the defect was latent or patent; whether or not the offending product was sold in the original package; whether a vague requirement of a higher degree of care might sometimes alter the application of the rule; or whether the defective product did or did not contain an "inherently or imminently dangerous" article or substance harmful to humans. We do not exhaust the list. There are other equally impressive and ominous catch-phrases, and awesome have been some of the semantic bogs negotiated by ours and other appellate courts when in particularly harsh cases they have attempted by such artificial exceptions to get around the barrier imposed by their own equally artificial "general rule" of nonliability.²⁶⁴

The court proceeded in humorous vein to review a number of Michigan cases in which the courts have "faltered" in their reverence for the hallowed doctrine of privity as exemplified in *Smolenski v. Libby, McNeill & Libby*,²⁶⁵ as in *Bosch v. Damm*,²⁶⁶ where the court "strayed from the paths of virtue" to the extent of approving a recovery by a remote vendee against the manufacturer of a defective refrigerator. However, the judgment was later vacated on other grounds. Another departure occurred in *Ebers v. General Chemical Co.*²⁶⁷ where the user of a defective insecticide was permitted to recover against the remote manufacturer although privity was lacking. Nevertheless, these cases were inconclusive.

Saddled with such a doctrine and its hair-splitting exceptions, it is not surprising that while a few of our decisions have afforded passing illusory comfort to all, certainty has been afforded to none. The reason is simple: A court lacking a clear and understandable rule of its own can scarcely be expected to impart it to others. Legal confusion has inevitably resulted. Aggrieved plaintiffs have scarcely known whether to sue in deceit or fraud or for negligence or breach of warranty — or indeed whether it was worthwhile to sue at all.²⁶⁸

After running through the entire gamut of variations, exceptions, the fate

264 *Spence v. Three Rivers Builders & Masonry Supply, Inc.*, *supra* note 261. In *Hertzler v. Manshum*, 228 Mich. 416, 422, 200 N.W. 155, 156 (1924), where poison was found in some flour, the Michigan court "uttered the towering legal understatement of the year" when it observed that the cases "appear hopelessly at variance." Adhering strictly to the privity concept, the court in *Hertzler* held food cases to be an exception, but "only by reason of a want of a high degree of care." This case is not unique in the "curious things courts can bring themselves to do and say when they try vainly to wed the outmoded thinking and legal clichés of the past to the pressing realities of modern life."

265 280 Mich. 329, 273 N.W. 587 (1937).

266 296 Mich. 522, 296 N.W. 669 (1941).

267 310 Mich. 261, 17 N.W.2d 176 (1945).

268 *Spence v. Three Rivers Builders & Masonry Supply, Inc.*, *supra* note 261, at 128, 90 N.W.2d at 878.

of privity in the negligence cases as exemplified by *MacPherson*,²⁶⁹ and its interposition in breach of warranty cases, the court concludes that it might be well simply to eliminate the so-called "general rule" entirely.²⁷⁰

Somewhat in the same category as *Spence*, but dealing with textile material and an express rather than implied warranty, the Court of Appeals of New York reached substantially the same result: It discarded privity as an essential to bringing an action for breach of warranty. *Randy Knitwear, Inc. v. American Cyanamid Co.*²⁷¹ is a vital link between *Greenberg v. Lorenz*²⁷² and *Goldberg v. Kollsman Instrument Corp.*²⁷³ wherein privity's death knell was finally sounded in New York. The corporate plaintiff had executed several contracts for the purchase of textile material with defendant company. When some of the fabric failed to conform to written representations as to shrinkage, an action in breach of warranty was brought against the manufacturer. As expected, the traditional defense of lack of privity was relied on by defendant. The court, speaking through Mr. Justice Fuld, reviewed the somewhat inglorious history of the privity "requirement" beginning with *Chysky v. Drake Bros. Co.*²⁷⁴ where, unfortunately, lack of privity was deemed a defense.

Relying on *Greenberg*, and extending it by holding the manufacturer liable for breach of an express warranty inducing the purchase of goods by advertising certain qualities, the court observed:

The rationale underlying the decisions rejecting the privity requirement is easily understood in the light of present-day commercial practices. It may once have been true that the warranty which really induced the sale was normally an actual term of the contract of sale. Today, however, the significant warranty, the one which effectively induces the purchase, is frequently that given by the manufacturer through mass advertising and labeling to ultimate business users or to consumers with whom he has no direct contractual relationship.²⁷⁵

The opinion continues by emphasizing the changes that have occurred in the world of merchandising. Thus, it is no longer a world of direct contract relying on privity. Rather, it is a world of advertising wherein newspapers, periodicals, radio and television play a most important, often vital, role in persuading a vendee to buy products.²⁷⁶ When the representations which have induced the purchase are demonstrably false and the vendee or ultimate user or purchaser is damaged by virtue of his reliance thereon, permitting the manufacturer to escape liability on the ground of lack of privity seems impossible to justify. As Mr. Justice Fuld so gently observes:

269 *MacPherson v. Buick Motor Co.*, *supra* note 16.

270 This would be in line with the suggestion of the Supreme Judicial Court of Massachusetts in *Carter v. Yardley*, 319 Mass. 92, 104, 64 N.E.2d 693, 700 (1946), a leading case in this field: "The time has come for us to recognize that the asserted general rule no longer exists. In principle it was unsound. It tended to produce unjust results. It has been abandoned by the great weight of authority elsewhere. We now abandon it in this Commonwealth."

271 11 N.Y.2d 5, 226 N.Y.S.2d 363, 181 N.E.2d 399 (1962).

272 *Supra* note 2.

273 *Supra* note 11.

274 235 N.Y. 468, 139 N.E. 576 (1923).

275 *Randy Knitwear, Inc. v. American Cyanamid Co.*, *supra* note 271.

276 As has been humorously observed, the purpose of advertising is to induce the purchaser to buy things he doesn't need with money he hasn't got.

Manufacturers make extensive use of newspapers, periodicals and other media to call attention, in glowing terms, to the qualities and virtues of their products, and this advertising is directed at the ultimate consumer or at some manufacturer or supplier who is not in privity with them. Equally sanguine representations on packages and labels frequently accompany the article throughout its journey to the ultimate consumer and, as intended, are relied upon by remote purchasers. Under these circumstances, it is highly unrealistic to limit a purchaser's protection to warranties made directly to him by his immediate seller. The protection he really needs is against the manufacturer whose published representations caused him to make the purchase.²⁷⁷

A further argument of the defendant brings this case to a close degree of kinship with *Spence*. American Cyanamid strongly urged the court not to impose strict liability for breach of warranty on the ground that the fabric shrinkage which was the basis of the action would not cause *personal injury*. The Court, however, declined to follow this suggestion declaring specifically:²⁷⁸

We perceive no warrant for holding — as the appellant urges — that strict liability should not here be imposed because the defect involved, fabric shrinkage, is not likely to cause personal harm or injury. Although there is language in some of the opinions which appears to support Cyanamid's contention . . . most of the courts which have dispensed with the requirement of privity in this sort of case have not limited their decisions in this manner. And this makes sense. Since the basis of liability turns not upon the character of the product but upon the representation, there is no justification for a distinction on the basis of the type of injury suffered or the type of article or goods involved.²⁷⁹

V. IMPLIED WARRANTIES UNDER THE STATUTES

The Uniform Sales Act contains certain provisions dealing with implied

277 *Randy Knitwear, Inc. v. American Cyanamid Co.*, *supra* note 271; in this connection, the court also remarked: "The policy of protecting the public from injury, physical or pecuniary, resulting from misrepresentations outweighs allegiance to an old and out-moded technical rule of law which, if observed, might be productive of great injustice. The manufacturer places his product upon the market and, by advertising and labeling it, represents its quality to the public in such a way as to induce reliance upon his representations. He unquestionably intends and expects that the product will be purchased and used in reliance upon his express assurance of its quality and, in fact, it is so purchased and used. Having invited and solicited the use, the manufacturer should not be permitted to avoid responsibility, when the expected use leads to injury and loss, by claiming that he made no contract directly with the user."

278 "It is true that in many cases the manufacturer will ultimately be held accountable for the falsity of his representations, but only after an unduly wasteful process of litigation. Thus, if the consumer or ultimate business user sues and recovers, for breach of warranty, from his immediate seller and if the latter, in turn, sues and recovers against his supplier in recoupment of his damages and costs, eventually, after several separate actions by those in the chain of distribution, the manufacturer may finally be obliged 'to shoulder the responsibility which should have been his in the first instance.'" *Randy Knitwear, Inc. v. American Cyanamid Co.*, 11 N.Y.2d 5, 13, 226 N.Y.S.2d 363, 368, 181 N.E.2d 399, 403 (1962).

279 *Id.* at 15, 226 N.Y.S.2d at 369-70, 181 N.E.2d at 403-04; and the court trenchantly signalizes: "Indeed, and it points up the injustice of the rule, insistence upon the privity requirement may well leave the aggrieved party, whether he be ultimate business user or consumer, without a remedy in a number of situations. For instance, he would be remediless either where his immediate seller's representations as to quality were less extravagant or enthusiastic than those of the manufacturer or where . . . there has been an effective disclaimer of any and all warranties by the plaintiff's immediate seller. . . ." *Randy Knitwear, Inc. v. American Cyanamid Co.*, *supra* at 14, 226 N.Y.S.2d at 368-69, 181 N.E.2d at 403.

warranties.²⁸⁰ These have not, however, been uniformly interpreted or construed by the courts.²⁸¹ And the Uniform Commercial Code has not retained the phraseology of the Sales Act.

Warranty of Fitness for a Particular Purpose

UNIFORM SALES ACT

Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

(1) 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), there is an implied warranty that the goods shall be reasonably fit for such purpose.²⁸²

UNIFORM COMMERCIAL CODE

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.²⁸³

It is noteworthy that where the Sales Act requires the buyer to make known to the seller "the particular purpose for which the goods are required," the Code places the emphasis on the vendor who is merely required to have "reason to know any particular purpose for which the goods are required"; both statutes follow the common law in requiring that the buyer rely "on the seller's skill or judgment" if there is to be an implied warranty "that the goods shall be fit (or 'reasonably fit') for such purpose."²⁸⁴

²⁸⁰ Section 15.

²⁸¹ Especially with respect to the notice requirement, the validity of a disclaimer provision, and as to whether privity is essential in an action for breach of constructive or implied-in-law warranty.

²⁸² UNIFORM SALES ACT § 15; the warranties in this section are limited by the following language:

(3) If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed.

(4) In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose.

As to the latter limitation, see *Bravo v. C. H. Tiebout & Sons, Inc.*, 40 Misc.2d 558, 243 N.Y.S.2d 335 (Sup. Ct. 1963), where the employee of the purchaser of a grinding wheel brought this action for injuries he sustained when the wheel broke. The court held that the grinding wheel had been purchased "under its patent or other trade name" (N.Y. Pers. Prop. Laws § 96(4) [*supra* § 15(4), UNIFORM SALES ACT]), and that therefore, there was "no implied warranty as to its fitness for any particular purpose." The Uniform Commercial Code, having been adopted in New York effective September 27 this year, will supersede this provision which is not reproduced therein.

²⁸³ UNIFORM COMMERCIAL CODE § 2—315.

²⁸⁴ The significance of these requirements is aptly pointed out in *Fossum v. Timber Structures, Inc.*, 54 Wash. 2d 317, 341 P.2d 157 (1959), where the action was brought by certain warehouse owners against the manufacturer-installer of bowstring trusses when the warehouse collapsed because of the defective character of the trusses. The manufacturer defended on the ground that there was no "implied warranty that the trusses would be fit or suitable for the particular purpose" required by plaintiffs under the Sales Act embodied in RCW 63.04.160. As noted above there are two prerequisites, as the court points out: (1) Knowledge by the vendor

The distinction between the implied warranty of fitness and that of merchantable quality has been aptly stated by a federal court applying state law: "Under a warranty of fitness for a particular use, the seller warrants that the goods sold are suitable for the special purpose of the buyer, while a warranty of merchantability is that the goods are reasonably fit for the general purposes for which they are sold."²⁸⁵

Warranty of Merchantable Quality

UNIFORM SALES ACT

Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows: . . .

(2) 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 merchantable quality.²⁸⁶

UNIFORM COMMERCIAL CODE

(1) Unless excluded or modified;²⁸⁷

(a) a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.²⁸⁸

A comparison of the aforementioned sections of the Sales Act and Code indicates that the Code has substantially embodied the warranty of merchantable quality formulated in the Sales Act. Although the expression "whether he be the grower or manufacturer or not" has been omitted, the words in the Code "if the seller is a merchant with respect to goods of that kind" do not exclude a grower or manufacturer provided he is also a merchant.²⁸⁹ There is one significant ad-

of the particular purpose for which the goods are required as disclosed to him by the buyer; and (2), reliance by the buyer upon the vendor's skill and judgment, citing *Ringstad v. I. Magnin & Co.*, 39 Wash. 2d 923, 239 P.2d 848 (1952). The defendant argued that the contract expressly specified the weight the roof trusses were to hold and this precluded "any implied warranty that the trusses would hold any greater weight." Of course, this argument failed because here the defendant had not only undertaken to fabricate the trusses, but also to design them "with load factors that would be sufficient to support the roof of this particular warehouse."

Finally, defendant contended that as the written contract had merged all prior negotiations and understandings, no evidence should be admitted to vary its terms. In reply to this, the court pointed out:

"Appellant's position ignores the very nature of an implied warranty. Such a warranty is an obligation which the law imposes without regard to any supposed agreement of the parties. It is neither promissory nor contractual in its nature." 341 P.2d at 170. Citing *Bekkevold v. Potts*, 173 Minn. 87, 216 N.W. 790 (1927), relied on in many cases for this characterization of a "constructive" (implied-in-law) warranty. The court then concluded, "the parol evidence rule has no proper application to the evidence here bearing on the presence of a warranty independently imposed by law. The written contract of the parties still stands as the unimpeached express of the terms agreed to by the parties . . ." 341 P.2d at 170. Affirming judgment for plaintiffs.

²⁸⁵ *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292, 296 (3d Cir. 1961).

²⁸⁶ UNIFORM SALES ACT § 15(2).

²⁸⁷ Citing UNIFORM COMMERCIAL CODE § 2—316 "Exclusion or Modification of Warranties."

²⁸⁸ UNIFORM COMMERCIAL CODE § 8—314.

²⁸⁹ It seems improbable that this change in terminology will have any great significance since the responsibility imposed rests on any merchant-seller. As to the exact meaning of the expression "if the seller is a merchant with respect to goods of that kind," there may be some diversity since there appears to be no definition in § 1—201 "General Definitions," of the term "merchant."

dition: ". . . the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale."²⁹⁰ Thus ends a conflict in the decisions as to whether a restaurant owner is subject to an implied or constructive warranty in connection with the food or beverages he serves, since the early common law did not regard this as a sale. Actually, this should have made no difference since a warranty imposed by law is not confined to contracts of sale. This point is aptly illustrated by the warranty of seaworthiness which is not dependent upon contract but creates an absolute liability on the part of the shipowner or stevedore.²⁹¹ This is emphasized by the majority opinion in *Italia Societa v. Oregon Stevedoring Co.*,²⁹² decided in March of this year by the Supreme Court of the United States. What is especially interesting to note is that various leading cases on "constructive" or implied-in-law warranties having nothing to do with admiralty law are cited.²⁹³

In this connection, the not infrequently repeated statement that a sale is required if there is to be a warranty²⁹⁴ is subject to justifiable criticism. On this

²⁹⁰ UNIFORM COMMERCIAL CODE § 2—314.

²⁹¹ As has been observed the constructive warranty has been extended to foodstuffs, beverages, other similar articles, mechanical devices and other products which may cause death or injury to the consumer or user, and even to cinder blocks, but there has been no extension of this implied-in-law warranty like the development of the warranty of seaworthiness, see 4 WILLISTON, CONTRACTS § 643, 1101-09 (3d ed. Jaeger 1961). From its modest beginning in *The Osceola*, 189 U.S. 158 (1902), through the classic *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960), down to *Italia Societa v. Oregon Stevedoring Co., Inc.*, 376 U.S. 315 (1964), this warranty, by judicial construction has been steadily enlarged. Now, the protection afforded to seamen and longshoremen, when engaged "in the ship's service," has emerged as "a form of absolute duty." *Grzybowski v. Arrow Barge Co.*, 283 F.2d 481 (4th Cir. 1960); 4 WILLISTON, *op. cit. supra* § 643, 1103-04 n.20.

This warranty has been likened to the "implied warranty the manufacturer assumes as to the soundness of his product or its suitability for a particular use [citing *Booth Steamship Co. v. Meier & Oelhaf Co.*, 262 F.2d 310 (2d Cir. 1958)]. Nor is privity of contract a requirement, for the Supreme Court of the United States has said that third parties not in privity may recover as third party beneficiaries." 4 WILLISTON, *op. cit. supra* § 643, at 1106, quoting *Waterman Steamship Corp. v. Dugan & McNamara, Inc.*, 364 U.S. 421 (1960), and citing *Crumady v. The Joachim Hendrik Fisser*, 358 U.S. 423 (1959), 34 NOTRE DAME LAW. 576.

²⁹² *Supra* note 291.

²⁹³ All of the leading cases, including *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956), described by the Supreme Court of the United States as "the landmark decision in this area," are collected and many of them discussed in *Italia Societa v. Oregon Stevedoring Co.*, *supra* note 291. In the majority opinion the concept of "constructive" warranty receives a further extension, and the stevedore incurs absolute liability regardless of negligence. Said the Court: "This undertaking [to perform 'properly and safely'] is the stevedore's 'warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product,' a warranty generally deemed to cover defects not attributable to a manufacturer's negligence." 376 U.S. 318, quoting *Ryan supra* at 133-34, and citing, *inter alia*, *Crumady supra* note 291; *Hessler Co. v. Hillwood Mfg. Co.*, 302 F.2d 61 (6th Cir. 1962); *Green v. American Tobacco Co.*, *supra* note 11; *Henningsen v. Bloomfield Motors, Inc.*, *supra* note 1; UNIFORM SALES ACT, § 15(1) stated *supra* in text preceding note 282. The court also noted that in *Reed v. The Yaka*, 373 U.S. 410 (1963) it had assumed, without deciding, "that a shipowner could recover over from a stevedore for breach of warranty even though the injury-causing defect was latent and the stevedore without fault. We think," continued the Court "that the stevedore's implied warranty of workmanlike performance . . . is sufficiently broad to include the respondent's failure to furnish safe equipment pursuant to its contract with the shipowner, notwithstanding that the stevedore would not be liable in tort for its conduct," 376 U.S. at 320. (Emphasis added.) The Court also pointed out that if the stevedore is liable in warranty where he supplies defective, injury-producing equipment, the provisions of the longshoremen & harbor workers' compensation acts, 44 Stat. 1424 (1927), 33 U.S.C. §§ 901-50 (1958), will not bar recovery.

²⁹⁴ This appears in any number of cases and may be considered accurate if it refers to the specific warranties, such as express and implied-in-fact warranties which form part of the consideration of a contract of sale. However, where the warranties imposed by law regardless of a vendor-vendee relationship, contract considerations should play no part or, at least, a sale is unnecessary to the existence of the warranty.

point, the case of *Hadley v. Hillcrest Dairy, Inc.*²⁹⁵ is quite illuminating. A bottle of milk, when removed from the refrigerator after having been purchased from defendant's salesman, shattered and cut the plaintiff's right thumb and hand. Defendant asserted that as the milk bottle was returnable, there was no sale and therefore, no warranty. The court concluded that this was of no moment: "In our view it is immaterial whether or not the property in the jug passed to the plaintiff. . . . We are now of opinion that a sale of the container, as such, is not necessary in order for the implied warranties of fitness and merchantability to attach in this transaction."²⁹⁶ In support, The Supreme Judicial Court of Massachusetts quoted from the opinion of the Court of Appeals in *Gedding v. Marsh*,²⁹⁷ where the almost identical provisions of the English Sale of Goods Act were construed.²⁹⁸ The Court observed that where there was such close similarity of the pertinent sections, each of the respective acts would be "entitled to consideration."²⁹⁹

Reverting to the warranty of merchantability, it will be seen that in any number of cases, this warranty has been put to effective use by the courts; aside from the food cases, two outstanding illustrations are afforded by *Henningsen v. Bloomfield Motors, Inc.*,³⁰⁰ and *Chapman v. Brown*.³⁰¹ In each of these the courts did not hesitate to give judgment for the plaintiffs for breach of the warranty of merchantability despite the lack of privity of warranty.³⁰²

However, the aforementioned warranties are limited in their effect by (1) a requirement of notice as a condition precedent to recovery by the buyer against the seller, and (2) the recognition of the validity of a disclaimer provision properly stated.³⁰³

Notice

From the following provisions of the uniform statutes, it will be observed that the *buyer* must notify the vendor of breach of warranty within a reasonable time after he discovers or should have discovered any breach:

²⁹⁵ 341 Mass. 624, 171 N.E.2d 293 (1961).

²⁹⁶ *Id.*, at 295.

²⁹⁷ [1920] 1 K. B. 668; in this case bottled beverages were sold at retail by plaintiff. A deposit was required on each bottle by the manufacturer which was refunded when the bottle was returned. One of the bottles exploded and injured the plaintiff while she was handling it in her shop. Her action was based on the implied warranty of fitness and the trial judge gave judgment for plaintiff. It was held that it was immaterial that there had been no sale of the bottle. This was challenged by defendant manufacturer.

The Court of Appeals sustained the judgment below and concluded that whether the bottle was sold or not would not alter the liability of the manufacturer on the implied warranty which had clearly been breached.

²⁹⁸ In the English Sale of Goods Act the pertinent section corresponding to UNIFORM SALES ACT § 15 is § 14. The Uniform Sales Act has since been superseded by the adoption of the Uniform Commercial Code in Massachusetts.

²⁹⁹ Quoting *Ward v. Great Atlantic & Pacific Tea Co.*, 231 Mass. 90, 95, 120 N.E. 225, 227, *Hadley v. Hillcrest Dairy, Inc.*, *supra* note 295 at 295.

³⁰⁰ *Supra* note 1.

³⁰¹ *Supra* note 2.

³⁰² Both cases are discussed in some detail in Jaeger, *Privity of Warranty: Has the Tocsin Sounded?* 1 DUQUESNE U.L. REV. 1 (1963), and Jaeger, *Warranties of Merchantability and Fitness for Use*, 16 RUTGERS L. REV. 493 (1962).

³⁰³ As to notice generally, see 6 WILLISTON, CONTRACTS §§ 887B, 887BB (3d ed. Jaeger 1962); recently, there has been a tendency to hold disclaimer provisions in contracts of adhesion invalid as against public policy, *Henningsen v. Bloomfield Motors, Inc.*, *supra* note 1, and *Vandermark v. Ford Motor Co.*, 33 Cal. Rptr. 175, *reversal upheld on rehearing*, 34 Cal. Rptr. 723 (Cal. App. 1963), *modified*, 37 Cal. Rptr. 896, 391 P.2d 168 (Sup. Ct. 1964).

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In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But if, after acceptance of the goods, the buyer fail to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor.³⁰⁴

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- (3) Where a tender has been accepted
 - (a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy;

Of the Uniform Sales Act provision, Professor Williston says: This section of the Statute treats the seller's tender of the goods as an offer of them in full satisfaction, but the buyer is allowed a reasonable time for accepting the offer. Moreover, if he declines to take the goods in full satisfaction he need not return them. The practical advantages of the statutory rule and its ease and certainty of application commend it.³⁰⁵

The purpose of the notice requirement, as the courts have signaled, "is to advise the seller that he must meet a claim for damages, as to which, rightly or wrongly, the law requires that he shall have an early warning."³⁰⁷

Both statutes, it will be noted, require the buyer to give reasonable notice; however, a rather strict construction given the Uniform Sales Act in some jurisdictions to the effect that the nature of the defect, the damage caused thereby, and the intent to hold the vendor must be disclosed has led to the change in terminology to be found in the equivalent Code provision. It is clear from the official comments³⁰⁸ that its draftsmen intended to liberalize the notice requirement so that the rights of noncommercial buyers would not be jeopardized.³⁰⁹

Nevertheless, under the wording of either statute the question of what should be deemed "a reasonable time" will still continue to plague the courts and must be resolved upon the basis of the facts and circumstances surrounding the individual transaction.³¹⁰

304 UNIFORM SALES ACT § 49; Acceptance Does Not Bar Action For Damages.
 305 UNIFORM COMMERCIAL CODE § 2—607(3)(a).
 306 5 WILLISTON, CONTRACTS § 714 (3d ed. Jaeger 1961), at 399.
 307 American Mfg. Co. v. United States Shipping Board, 7 F.2d 565 (2d Cir. 1925), quoted with approval in Columbia Axle Co. v. American Automobile Insurance Co., 63 F.2d 206 (6th Cir. 1933), in Whitfield v. Jessup, 31 Cal.2d 826, 193 P.2d 1 (1948), and in Reininger v. Eldon Manufacturing Co., 114 Cal. App.2d 240, 250 P.2d 4 (1952). RESTATEMENT, CONTRACTS § 412 (1932), reads: "Under a contract for the sale of goods, the failure of the buyer, after acceptance of goods tendered as performance of the contract, to give notice to the seller of the latter's breach of any promise or warranty, within a reasonable time after the buyer knows or has reason to know of such breach, discharges the seller's duty to make compensation."
 308 UNIFORM COMMERCIAL CODE § 2—607, comment 4.
 309 The rule requiring notification is said to be "designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy."
 310 United States v. Dewart Milk Prod. Co., 300 Fed. 448 (M.D. Pa. 1924), construing Pa. Act, 10 months' delay discoverable by inspection is unreasonable; Ruggles v. Buffalo Foundry Co., 27 F.2d 234 (6th Cir. 1928) applying Mich. Act, one year's delay in giving notice in a contract for sale of a brine evaporator is unreasonable; Owen v. Sears, Roebuck & Co., 273 F.2d

Above all, where the warranty is constructive and imposed by operation of law, there is no occasion for requiring notification of danger or injury to the vendor by a remote consumer or user not in privity of contract.³¹¹

Disclaimer

The uniform statutes recognize the validity of a disclaimer provision rejecting liability based on what would otherwise be breach of warranty, provided that the statutory provisions are observed.

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Where any right, duty or liability would arise under a contract to sell or a sale by implication of law, it may be negated or varied by express agreement or by the course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or the sale.³¹²

Even an express disclaimer may be found contrary to public policy as was the case in *Henningsen v. Bloomfield Motors, Inc.*,³¹³ where the Supreme Court of New Jersey, speaking through Mr. Justice Francis, reviews many cases wherein a standardized disclaimer provision was held inoperative as not being a part of

140 (9th Cir. 1959), delay of two years in giving notice that shirt was defective held unreasonable.

Elkus Co. v. Voekel, 27 Ariz. 332, 233 P. 57 (1925), where goods to retailer contained a defect not readily discoverable, notice given as soon as retailer received complaints from customers was reasonable; *Mutual Electric Co. v. Turner Eng. Co.*, 230 Mich. 63, 202 N.W. 964 (1925), delay of several years held not excessive, as a matter of law, in view of constant efforts to obviate cause of complaint; *Stewart v. Menzel*, 181 Minn. 347, 232 N.W. 522 (1930), delay of 6 months in giving notice of defects in fur coat unreasonable; *Laundry Service Co. v. Fidelity Laund. Mach. Co.*, 187 Minn. 180, 245 N.W. 36 (1932), delay of 5 months in discovery and claiming defects in laundry machine held unreasonable.

Mastin v. Boland, 178 App. Div. 421, 165 N.Y. Supp. 468 (Sup. Ct. 1917), 3 weeks held reasonable when the buyer did not know the seller's name and address; *Ficklen Tobacco Co. v. Friedberg*, 196 App. Div. 409, 187 N.Y. Supp. 561 (Sup. Ct. 1925), a year is an unreasonable time; *Stone v. Bleim*, 176 N.Y. Supp. 25 (Sup. Ct. 1919), 10 days not unreasonable as matter of law; *Pierce Foundation Corp. Co. v. Eagle Supply Co.*, 180 N.Y. Supp. 88 (Sup. Ct. 1920), 4 months held unreasonable; *Kaufman v. Levy*, 102 Misc. 689, 169 N.Y. Supp. 454 (Sup. Ct. 1918), notice given immediately after examination of the goods held unreasonable when examination was deferred for 23 days, where it was customary to examine goods within 10 days; *Gleason v. Lebolt*, 126 Misc. 216, 212 N.Y. Supp. 227 (Sup. Ct. 1925), 5 months' delay in discovering defect in diamond and giving notice is reasonable as matter of law.

Walsterholme v. Randall, 295 Pa. 131, 144 Atl. 909 (1929), notice after 11 days reasonable even though material had to be manufactured into cloth within that period; *Bodek v. Avrack*, 297 Pa. 225, 146 Atl. 546 (1929), 3 months, as matter of law, unreasonable in sale of blankets; *Kull v. General Motors Truck Co.*, 311 Pa. 580, 166 Atl. 562 (1933), notice of breach of warranty as to age of trucks given 2 years after sale held barred by laches; *Patterson Foundry Co. v. Williams Lacquer Co.*, 52 R.I. 149, 158 Atl. 721 (1932), delay of 6 months in giving notice of defects in lacquer grinding mill held unreasonable.

Suryan v. Lake Washington Shipyards, 153 Wash. 164, 300 Pac. 941 (1931), delay of notice 1 month reasonable in sale of fishing boat; *Chess & Wymond Co. v. La Crosse Box Co.*, 173 Wis. 382, 181 N.W. 313 (1921), several months unreasonable; *Knobel v. J. Bartel Co.*, 176 Wis. 393, 187 N.W. 188 (1922), expert testimony not admissible to prove 25 days a reasonable time; *Buck v. Racine Boat Co.*, 180 Wis. 245, 192 N.W. 998 (1923), three or four days held reasonable as matter of law; *Marsh Wood Products Co. v. Babcock & Wilcox Co.*, 207 Wis. 209, 240 N.W. 392 (1932), 20 months' delay in giving notice of defects in boiler tubes precluded recovery, annotation, 72 A.L.R. 726; *Schroeder v. Drees*, 1 Wis. 2d 106, 83 N.W.2d 707 (1957), citing *Marsh Wood Products v. Babcock & Wilcox*, *supra*.

311 *Greenman v. Yuba Power Products, Inc.*, *supra* note 2.

312 UNIFORM SALES ACT § 71.

313 *Supra* note 1; the case is discussed at some length in 4 WILLISTON, CONTRACTS § 643 (3d ed. Jaeger 1961), where the following appears, referring to *Henningsen*: "Destined to become a leading precedent in the field of implied warranties, the decision held the manufacturer and the vendor of the automobile in question liable . . ." at 1097-98.

the contract.³¹⁴ Applying the rule of strict construction against the author of a contract, and more severely, of a disclaimer clause, the court observed:³¹⁵

The task of the judiciary is to administer the spirit as well as the letter of the law. On issues such as the present one, part of that burden is to protect the ordinary man against the loss of important rights through what, in effect, is the unilateral act of the manufacturer. The status of the automobile industry is unique. Manufacturers are few in number and strong in bargaining position. In the matter of warranties on the sale of their products, the Automotive Manufacturers Association has enabled them to present a united front. From the standpoint of the purchaser, there can be no arms length negotiating on the subject. Because his capacity for bargaining is so grossly unequal, the inexorable conclusion which follows is that he is not permitted to bargain at all. He must take or leave the automobile on the warranty terms dictated by the maker. He cannot turn to a competitor for better security.³¹⁶

Public policy at a given time finds expression in the Constitution, the statutory law and in judicial decisions. In the area of sale of goods, the legislative will has imposed an implied warranty of merchantability as a general incident of sale of an automobile by description. The warranty does not depend upon the affirmative intention of the parties. It is a child of the law; it annexes itself to the contract because of the very nature of the transaction.³¹⁷ The judicial process has recognized a right to recover damages for personal injuries arising from a breach of that warranty. The disclaimer of the implied warranty and exclusion of all obligations except those specifically assumed by the express warranty signify a studied effort to frustrate that protection. True, the Sales Act authorizes agreements between buyer and seller qualifying the warranty obligations. But quite obviously the Legislature contemplated lawful stipulations (which are determined by the circumstances of a particular case) arrived at freely by parties of relatively equal bargaining strength. The lawmakers did not authorize the automobile manufacturer to use its grossly disproportionate bargaining power to relieve itself from liability and to impose on the ordinary buyer, who in effect has no real freedom of choice, the grave danger of injury to himself and others that attends the sale of such a dangerous instrumentality

314 This being the standard automotive contract provision limiting the liability of the manufacturer for defective parts to a period of 90 days or a distance of 4,000 miles whichever should happen sooner; the standard provision is quoted *infra* note 320.

315 Referring to the aforementioned disclaimer provision, the Supreme Court of New Jersey makes the following trenchant observation: "The terms of the warranty are a sad commentary upon the automobile manufacturers' marketing practices. Warranties developed in the law in the interest of and to protect the ordinary consumer who cannot be expected to have the knowledge or capacity or even the opportunity to make adequate inspection of mechanical instrumentalities, like automobiles and to decide for himself whether they are reasonably fit for the designed purpose. . . . But the ingenuity of the Automobile Manufacturer's Association, by means of its standardized form, has metamorphosed the warranty into a device to limit the maker's liability. To call it an equivocal agreement, as the Minnesota Supreme Court did, is the least that can be said in criticism of it." *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 375, 161 A.2d 69, 78 (1960), citing *Federal Motor Truck Sales Corp. v. Shanus*, 190 Minn. 5, 9, 250 N.W. 713, 715 (1933).

316 *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 403, 161 A.2d 69, 94 (1960).

317 Citing *Minneapolis Steel & Machinery Co. v. Casey Land Agency*, 51 N.D. 832, 201 N.W. 172 (1924).

as a defectively made automobile. In the framework of this case, illuminated as it is by the facts and the many decisions noted, we are of the opinion that Chrysler's attempted disclaimer of an implied warranty of merchantability and of the obligations arising therefrom is so inimical to the public good as to compel an adjudication of its invalidity.³¹⁸

A case decided last year, *Vandermark v. Ford Motor Co.*,³¹⁹ found the court confronted with the same standardized "dealer's warranty."³²⁰ The trial court in the action by the injured driver and passenger against the dealer and manufacturer based on breach of implied warranty because of brake failure on a new Ford granted defendants' motion for nonsuit and this appeal followed. The appellate court held that *Greenman v. Yuba Power Products, Inc.*³²¹ was controlling as to lack of privity not constituting a valid defense. Also, since the Supreme Court of California in *Greenman* had relied "heavily on *Henningsen v. Bloomfield Motors, Inc.*"³²² with respect to the invalidity of the disclaimer provision, it concluded that this "contract of adhesion" was not enforceable, stating:

In this situation the releasing party does not really acquiesce voluntarily in the contractual shifting of the risk, nor can we be reasonably certain that he receives an adequate consideration for the transfer. Since the service is one which each member of the public, presently or potentially, may find essential to him, he faces, despite his economic inability to do so, the prospect of a compulsory assumption of the risk of another's negligence. The public policy of this state has been, in substance, to posit the risk of negligence upon the actor; in instances in which this policy has been abandoned, it has generally been to allow or require that the risk shift to another party better or equally able to bear it, not to shift the risk to the weaker bargainer.³²³

And the court concluded: "Therefore, since the disclaimer clause in the

318 *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 404, 161 A.2d 69, 95 (1960). The court, at 386-98, 161 A.2d at 84-92, reviews a great variety of purported disclaimers and finds that they do not enjoy any degree of favor in the courts; they are strictly interpreted, if not construed, against the author and unless clearly a part of the contract, will be held ineffectual as in *Cutler Corp. v. Latschaw*, 374 Pa. 1, 97 A.2d 234 (1953), cited in *Henningsen*, *supra* note 1.

319 33 Cal. Rptr. 175, reversal upheld on rehearing, 34 Cal. Rptr. 723 (Cal. App. 1963), modified, 37 Cal. Rptr. 896, 391 P.2d 168 (Sup. Ct. 1964).

320 This "dealer's warranty" reads: "Dealer warrants to Purchaser (except as hereinafter provided) each part of each Ford Motor Company product sold by Dealer to Purchaser to be free under normal use and service from defects in material and workmanship for a period of ninety (90) days from the date of delivery of such product to Purchaser, or until such product has been driven, used or operated for a distance of four thousand (4,000) miles, whichever event first shall occur. Dealer makes no warranty whatsoever with respect to tires or tubes. Dealer's obligation under this warranty is limited to replacement, without charge to Purchaser, of such parts as shall be returned to Dealer and as shall be acknowledged by Dealer to be defective. This warranty shall not apply to any Ford Motor Company product that has been subject to misuse, negligence, or accident or in which parts not made or supplied by Ford Motor Company shall have been used if, in the determination of Dealer, such use shall have affected its performance, stability, or reliability, or which shall have been altered or repaired outside of Dealer's place of business in a manner which, in the determination of Dealer, shall have affected its performance, stability, or reliability. This warranty is expressly in lieu of all other warranties, express or implied, and of all other obligations on the part of the Dealer." *Vandermark v. Ford Motor Co.*, 33 Cal. Rptr. 175, 181 (Cal. App. 1963).

321 *Supra* note 2.

322 *Vandermark v. Ford Motor Co.*, *supra* note 320, at 181.

323 Quoting *Tunkl v. Regents of the University of California*, 32 Cal. Rptr. 33, 38, 383 P.2d 441, 446 (1963).

warranty agreement is void, there are present still the implied warranties of merchantability and fitness for a particular purpose."³²⁴

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Exclusion or Modification of Warranties.³²⁵

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subsection (2)

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.³²⁶

The distinction the Uniform Commercial Code makes between disclaimer of the warranty of merchantability and the warranty of fitness for particular purpose is significant. Where the first is to be excluded, "merchantability" must be specifically mentioned; as to the warranty of fitness, the language may be general, but it must be in "writing and conspicuous." There is also an important limitation on disclaimer:

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.³²⁷

In *Boeing Airplane Company v. O'Malley*,³²⁸ the federal district court held that an implied warranty of fitness for the purpose for which a helicopter was intended had been made under the Uniform Commercial Code as originally enacted in Pennsylvania.³²⁹ The parties themselves had agreed that the law of Pennsylvania should govern the contract of sale of the Vertol helicopter. When judgment was given in favor of plaintiff buyer for breach of the implied warranty, defendant vendor appealed on the ground that the trial court had committed error "in holding that there was an implied warranty as a matter of

324 *Vandermark v. Ford Motor Co.*, *supra* note 320, at 182.

325 UNIFORM COMMERCIAL CODE § 2-316.

326 As to custom or usage of trade, see 5 WILLISTON, CONTRACTS ch. 23 (3d ed. Jaeger 1961).

327 UNIFORM COMMERCIAL CODE § 2-318.

328 329 F.2d 585 (8th Cir. 1964).

329 The original provision with respect to disclaimers differed from that quoted above in text.

law," and that the alleged disclaimer inserted in the contract should not have been held ineffectual under the Uniform Commercial Code in its amended form.³³⁰

The United States Court of Appeals for the Eighth Circuit affirmed, holding that the buyer had disclosed to the seller the purpose for which the helicopter was to be used, and had relied on the skill and judgment of the vendor to select and furnish a suitable aircraft for the specified purpose.³³¹ A detailed examination of the testimony adduced at the trial supported the conclusion that the implied warranty had been breached, and that, under the pertinent provisions of the Uniform Commercial Code, the purported disclaimer was ineffectual since it had not been made specifically as the original Code provision required. The appellate court further held that when the contract of sale was entered into, the amended Code which permitted a general disclaimer of the implied warranty of fitness had not yet become effective.³³² Consequently, the contract of sale, including the purported disclaimer, was governed by the original Code provision.³³³

VI. PRODUCT LIABILITY: DIVERSITY OF CITIZENSHIP ACTIONS

Of the many facets of product liability none is more intriguing than the diversity of citizenship case requiring an *Erie*³³⁴-educated guess as to what the state court would do in an action for a breach of constructive warranty where privity is lacking. Two of the most interesting and instructive cases show the federal courts to have been mistaken in their estimate of what the state court would have done. In the first, the Third Circuit, going along with the current of authority and its analysis of Pennsylvania jurisprudence as revealed in the earlier cases,³³⁵ concluded that "privity had been obliterated in Pennsylvania law." This view, expressed in *Mannsz v. Macwhite Co.*,³³⁶ was followed in a number of subsequent cases.³³⁷ However, some 18 years later, the Supreme Court of Pennsylvania in *Hochgertel v. Canada Dry Corporation*,³³⁸ declared otherwise. The Court recognized that a substantial number of jurisdictions, including Pennsylvania, had abolished the privity requirement as to food products but

330 It was clear that the contract of sale of the helicopter had been entered into in October, 1959, and the amendments to the Uniform Commercial Code became effective in Pennsylvania as of January 1, 1960. Consequently, the court held that the original section 2—316 as to exclusion or modification of warranties governed this transaction. Thereunder, the purported disclaimer was ineffectual.

331 The court quotes UNIFORM COMMERCIAL CODE § 2—315, Implied Warranties: Fitness for Particular Purpose, *supra* note 283.

332 The court cites *Paramount Paper Products Co. v. Lynch*, 182 Pa. Super. 504, 128 A.2d 157 (1956) and *L. & N. Sales Co. v. Stuski*, 188 Pa. Super. 117, 146 A.2d 154 (1958).

333 The original provision of the UNIFORM COMMERCIAL CODE § 2—316, reads: "(1) If the agreement creates an express warranty, words disclaiming it are inoperative." Also, in paragraph 2, it stated that exclusion or modification of implied warranties "must be in specific language."

Cf. *Wilson v. Manhasset Ford, Inc.*, 209 N.Y.S.2d 210 (D.C. 1960) holding that disclaimers in motor vehicle sales transactions "must not offend against public policy."

334 *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

335 *Bonenberger v. Pittsburgh Mercantile Co.*, 345 Pa. 559, 28 A.2d 913 (1942).

336 155 F.2d 445 (3d Cir. 1946).

337 *McQuaide v. Bridgeport Brass Co.*, 190 F. Supp. 252 (D. Conn. 1960); *Thompson v. Reedman*, 199 F. Supp. 120 (E.D. Pa. 1961). Cf. *Jarnot v. Ford Motor Co.*, 191 Pa. Super. 422, 156 A.2d 568 (1959).

338 409 Pa. 610, 187 A.2d 575 (1963).

that it would be adhered to as to other products unless the consumer or user was "within the distributive chain." This may be taken to mean that the injured party must be a purchaser, sub-purchaser or sub-sub-purchaser, or a member of the family or household or a guest of the buyer.³³⁹

The Fifth Circuit was on the verge of a similar misapprehension when, after a rehearing, and largely because of a logical and well-reasoned dissent based on a careful analysis of the Florida precedents, the federal court referred the case of *Green v. American Tobacco Company*³⁴⁰ to the Supreme Court of Florida under a statute which provided for this procedure.³⁴¹ The majority must have received quite a jolt when they read the opinion of Chief Justice E. Harris Drew. He made it crystal-clear that the earlier Florida cases had discarded privity; with tobacco assimilated to food products, the manufacturer's liability was absolute.³⁴²

In two of the insular jurisdictions, the federal courts were called upon to make a similar estimate of the local legal situation. In Puerto Rico the case was *Coca-Cola Bottling of Puerto Rico v. Negron Torres*,³⁴³ in Hawaii it was *Chapman v. Brown*.³⁴⁴ In each the federal court concluded that privity was passé, and each was affirmed on appeal.³⁴⁵

Most recently, the Fifth Circuit, in *Ford Motor Co. v. Mathis*,³⁴⁶ speaking in rather humorous vein and "writing with an Erie-Texas pen," concluded that: "While it may be true that Plaintiff is not in privity with Ford we do not regard the Texas courts as requiring privity in this situation. The Supreme Court of Texas has said that privity 'applies only when one is seeking to enforce a contract.'"³⁴⁷ After discussing a number of the leading cases, including *Henningsen v. Bloomfield Motors, Inc.*,³⁴⁸ the court goes on to say:

But approaching it as does the Supreme Court of Texas on the straightforward plane of public policy in protecting what it conceives to be precious Texas lives, we cannot believe that it will differentiate between a Texan felled by a microbe and one killed by a negligently defective machine hurtling through space at great, but expected, speed.³⁴⁹

The court cites a number of cases wherein a federal tribunal was called upon to apply state law where precedents were lacking or inconclusive; among these may be mentioned *B. F. Goodrich Co. v. Hammond*,³⁵⁰ *Chapman v. Brown*,³⁵¹ *McQuaide v. Bridgeport Brass Co.*,³⁵² and *Taylorson v. American Air-*

339 This is according to UNIFORM COMMERCIAL CODE § 2—318, extending the benefit of either express or implied warranties to members of the family or household, and to guests of the buyer.

340 304 F.2d 70 (5th Cir. 1962).

341 FLA. STAT. ANN. § 25.031 (1959).

342 *Green v. American Tobacco Co.*, *supra* note 11.

343 255 F.2d 149 (1st Cir. 1958).

344 *Supra* note 2.

345 *Supra* note 343 and *Brown v. Chapman*, 304 F.2d 149 (9th Cir. 1962).

346 *Supra* note 212.

347 *Ford Motor Co. v. Mathis*, 322 F.2d 267, 275 (5th Cir. 1963), quoting *Jacob E. Decker & Sons v. Capps*, *supra* note 11.

348 *Supra* note 1.

349 *Ford Motor Co. v. Mathis*, *supra* note 347, at 276.

350 269 F.2d 501 (10th Cir. 1959).

351 *Supra* note 2.

352 *Supra* note 337.

*lines, Inc.*³⁵³ The court then noted that in several cases, Florida had rejected the Fifth Circuit's appraisal of Florida law:³⁵⁴

"And in the undulating field of products liability Florida has again registered its authoritative disagreement. *Green v. American Tobacco Co.*³⁵⁵ answering questions certified by us, in effect reversing our earlier holding.³⁵⁶ What the fate of our recent decisions for Mississippi and Louisiana will be, only time, tide and litigation will tell."³⁵⁷

Many more examples could be adduced to show the grave difficulties which are encountered when the federal courts undertake to predict what the state courts would do in the situation confronting them. This uncertainty and lack of uniformity may have unfortunate results on plaintiff's case as in *O'Shea v. Chrysler Corporation*.³⁵⁸ There, his choice of forum was fatal to plaintiff's recovery.³⁵⁹

SUMMARY AND CONCLUSION

In discussing the subject of privity of warranty, no particularly compelling reason seems to exist which would require that breach of warranty be classified as either an action in tort or an action in contract.³⁶⁰ Tort has long been identified with some form of fault, negligence or lack of due care, and yet today, a number of courts are adopting the concept of absolute liability on the part of the manufacturer, producer, or processor of certain types of goods.³⁶¹ Basically, greater protection of the consuming public is the goal, regardless of the existence of privity of contract.³⁶²

353 183 F. Supp. 882 (S.D.N.Y. 1960).

354 *Food Fair Stores, Inc. v. Trusell*, 131 So.2d 730 (Fla. 1961) and *Barnes v. Pennsylvania Threshermen & Farmers' Mutual Casualty Ins. Co.*, 146 So.2d 119 (Fla. App. 1962).

355 *Supra* note 11.

356 *Green v. American Tobacco Co.*, 304 F.2d 70 (5th Cir. 1962).

357 *Ford Motor Co. v. Mathis*, *supra* note 347, at 269-70 n.1.

358 206 F. Supp. 601 (D. N.J. 1962); what makes this case especially interesting is that it concerned an action by the driver of a defective Dodge who alleged that the steering mechanism failed causing a collision with another vehicle. He alleged breach of certain warranties in his action against the manufacturer. It seems that the issues had been litigated in an earlier action in New York which decided that the law of Washington, D.C., where the Dodge was bought was applicable. As to this point, the court, at 605, said: "It is, indeed, unfortunate for the plaintiff that he chose to litigate the issues of breach of warranty and negligence between the parties in the forum of New York where, under its conflicts of law principles, the law of Washington, D.C., is applicable and privity of contract is necessary to sustain the action. The plaintiff's attempt at recovery in the New York action on the breach of warranty and negligence issues resulted in a dismissal on the merits for lack of privity, and the attempt at recovery for contribution on the contributing negligence issue resulted in a jury verdict against him, exonerating the defendant from any negligence contributing to the accident. Having had those issues determined adversely to him he cannot now by the present action raise the same issues by asserting a different cause of action, for the issues have been adjudicated."

To add to the irony of the situation, less than six weeks later, *Picker X-Ray Corp. v. General Motors Corp.*, *supra* note 11, decided that lack of privity should be no defense in this type of action.

359 *O'Shea v. Chrysler Corp.*, *supra* note 358.

360 As has heretofore been thought; *but see supra* note 10.

361 As in *Green v. American Tobacco Co.*, *supra* note 11; *Chapman v. Brown*, *supra* note 2; *Greenman v. Yuba Power Products, Inc.*, *supra* note 11; *Simpson v. Powered Products of Michigan, Inc.*, *supra* note 11; citing *Hamon v. Digliani*, *supra* note 11; *Henningens v. Bloomfield Motors, Inc.*, *supra* note 1; *Goldberg v. Kollsman Instrument Corp.*, *supra* note 11; *Morrow v. Caloric Appliance Corp.*, *supra* note 2, to mention but a few of the most recent precedents.

362 This is clearly emphasized in *Chapman v. Brown*, *supra* note 2; *Greenman v. Yuba Power Products*, *supra* note 11; *Morrow v. Caloric Appliance Corp.*, *supra* note 2; *Henningens*

Summary

It appears that there has been a gradual, an almost imperceptible evolution towards a separate and distinct action of breach of warranty which will depend neither upon contractual requirements nor tort considerations. In other fields of law there has been a similar evolution, as witness the emergence of the collective labor agreement³⁶³ as a contract "affected with a public interest,"³⁶⁴ and of the joint venture as a separate and distinct business association differing from the partnership,³⁶⁵ although having a number of similar characteristics.³⁶⁶ There has always been a tendency by the courts to conform new developments to some existing legal concept. However, the result is often like pouring new wine into old bottles: the experiment is frequently fraught with disaster. In a rapidly expanding industrial and mechanical economy characterized by electronic devices, jet propulsion, atomic fission, nuclear energy and the many other perilous innovations that beset humanity, it is high time that public policy looked out for the consumer since he is no longer able to look out for himself. In many instances, it is impossible to examine the product that is being purchased without destroying it. There are many latent defects, noxious substances and other harmful items lurking in sealed packages, canned goods, bottled beverages and other containers to injure the consumer. Social justice and public policy demand that the risk of loss be distributed over the greatest number of those who can best bear it. There are ways and means whereby the manufacturer or processor can protect himself: An increase in the price of his product and insurance covering product liability have been suggested.³⁶⁷ Conversely, the individual consumer is ordinarily not in a financial position to assume the risk of loss to a comparable degree. Continued unemployment because of sickness or injury may place him and his family under an unbearable economic strain. When death results, the effect on the surviving dependents is often incalculable.

From the analysis of recent cases, the conclusion is inescapable that a steadily growing majority of jurisdictions have obliterated the privity requirement in actions for breach of warranty in the traditional field of foods, beverages and other products intended for human use or consumption. But what is most significant is that an increasing number are going beyond to include mechanical devices such as automotive vehicles, aircraft, and their accessories. A few jurisdictions have even gone the entire distance and simply eliminated privity by judicial

v. Bloomfield Motors, Inc., *supra* note 1; Randy Knitwear, Inc. v. American Cyanamid Co., *supra* note 2; Goldberg v. Kollman Instrument Corp., *supra* note 11; see also Ford Motor Co. v. Mathis, *supra* note 2.

363 Discussed in Jaeger, *Collective Labor Agreements and the Third Party Beneficiary*, 1 B.C. IND. & COM. L. REV. 125 (1960).

364 So described in Jaeger, *supra* note 363, at 150.

365 See *Partnership or Joint Venture?* 37 NOTRE DAME LAW. 138 (1961).

366 Discussed in Jaeger, *Joint Ventures*, 9 AM. U.L. REV. 1, 111 (1960), and 2 WILLISTON, CONTRACTS § 318 (3d ed. Jaeger 1959).

367 Typical examples of such insurance are furnished by the following cases: Stearns v. Hertz Corp., 326 F.2d 405 (8th Cir. 1964); Waterman Steamship Corp. v. Snow, 222 F. Supp. 892 (D. Ore. 1963); Orchard v. Agricultural Insurance Co. of Watertown, New York, 228 F. Supp. 564 (D. Ore. 1964); Liberty Building Co. v. Royal Indemnity Co., 2 Cal. Rptr. 329, 346 P.2d 444 (Dist. Ct. App. 1959); Maretti v. Midland National Insurance Co., 42 Ill. App. 2d 17, 190 N.E.2d 597 (1963).

This is strongly advocated in Jaeger, *Privity of Warranty: Has the Tocsin Sounded?* 1 DUCQUESNE U.L. REV. 1, at 137, where an analysis in the cases appears.

decision or by legislation, especially where the warranty is constructive, that is, imposed by law.

Some of the ways and means (other than tort actions) which have been employed to hold the manufacturer of a defective product directly liable to the injured consumer or user thereof include:

1. The consumer or other injured party is the third party beneficiary of the sales contract made between the purchaser and the vendor.

2. The conduit theory; that is, the vendor is the agent or conduit of the manufacturer and is as such the intermediary between the latter and the consumer.

3. The buyer is the agent of the injured consumer.

4. The manufacturer who advertises extensively makes a general offer of warranty to those who use his products.

5. The consumer is a subpurchaser within the distributive chain or conduit.

6. Public policy requires consumer protection or indemnification where harmful products are manufactured for distribution.

7. By specific legislation, certain jurisdictions have declared that privity shall be no obstacle to recovery against manufacturer or producer by an injured consumer.

Conclusion

From the foregoing enumeration of the various ways and means whereby the consumer has been afforded a remedy against the manufacturer, it is quite evident that consumer protection has been deemed an essential element of public policy. However, the thesis of this article is that it is not necessary to adopt any of these methods of circumvention or repudiation.

The ultimate conclusion: Breach of *constructive* warranty need not be classified as either a contract or a tort action. It may properly be entertained as a separate and distinct remedy wherein the manufacturer or other producer of harmful or defective products is made absolutely liable to the consumer or user who is injured thereby.