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PRIVITY OF WARRANTY: HAS THE TOCSIN SOUNDED?

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I. INTRODUCTION

Declaring their independence of an anachronism, sown in dictum and grown in error, more and more jurisdictions are participating in the movement to expunge the requirement of privity from the law of warranty. A veritable revolution against the artificial strictures of privity of warranty and its unwarranted, and all too often unjust, results has occurred in recent years.[1] The number of jurisdictions

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1. Mannsz v. Macwhyte Co., 155 F.2d 445 (3d Cir. 1946); Coca-Cola Bottling Co. of Puerto Rico, Inc. v. Negron Torres, 255 F.2d 149 (1st Cir. 1958); Alexander v. Inland Steel Co., 263 F.2d 314 (8th Cir. 1958); Gladiola Biscuit Co. v. Southern Ice Co., 267 F.2d 138 (5th Cir. 1959) *reversing* 163 F. Supp. 570 (E.D.

engaged in repudiating their allegiance to this unfortunate anachronism is steadily mounting. Pennsylvania seemed to be as active in this revolution as it had been in an earlier Revolution which is regularly celebrated by appropriate ceremonies throughout the Nation, especially as it was the first jurisdiction to adopt the Uniform

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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); Magee v. General Motors Corp., 117 F. Supp. 101 (W.D. Pa. 1953); 213 F.2d 899 (3d Cir. 1954); 124 F. Supp. 606 (W.D. Pa. 1954); *aff'd* per curiam, 220 F.2d 270 (3d Cir. 1955); McAfee v. Cargill, Inc., 121 F. Supp. 5 (S.D. Cal. 1954); Chapman v. Brown, 198 F. Supp. 78 (D. Hawaii 1961), *aff'd* 304 F.2d 149 (9th Cir. 1962); Thompson v. Reedman, 199 F. Supp. 120 (E.D. Pa. 1961).

Klein v. Duchess Sandwich Co., 14 Cal.2d 272, 93 P.2d 799 (1939); Burr v. Sherwin Williams Co., 42 Cal.2d 682, 268 P.2d 1041 (1954); Rubino v. Utah Canning Co., 123 Cal. App.2d 18, 266 P.2d 163 (1954); Collum v. Pope & Talbot, Inc., 135 Cal. App.2d 653, 288 P.2d 75 (1955); Gottsdanker v. Cutter Laboratories, 182 Cal. App.2d 602, 6 Cal. Rptr. 320 (1960); Cliett v. Lauderdale Biltmore Corp., 39 So.2d 476 (Fla. 1949); Florida Coca-Cola Bottling Co. v. Jordan, 62 So.2d 910 (Fla. 1953); Matthews v. Lawnlite Co., 88 So.2d 299 (Fla. 1956); Hector Supply Co. v. Carter, 122 So.2d 22 (Fla. App. 1960).

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); Cernes 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. Louisana 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); Spence v. Three Rivers Builders & Masonry Supply, 353 Mich. 120, 90 N.W.2d 873 (1958); 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); Midwest Game Co. v. M.F.A. Milling Co., 320 S.W.2d 547 (Mo. 1959); Worley v. Procter & Gamble Mfg. Co., 241 Mo. App. 1114, 253 S.W.2d 532 (1952); Seaton Ranch Co. v. Montana Vegetable Oil & Feed Co., 123 Mont. 396, 217 P.2d 549 (1950).

Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960); Greenberg v. Lorenz, 9 N.Y.2d 195, 213 N.Y.S.2d 39 (1961); 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 Ops. 2d 291, 147 N.E.2d 612, 75 A.L.R.2d 103 (1958); Markovich v. McKesson & Robbins, Inc., 106 Ohio App. 265, 7 Ohio Ops.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 A. 537 (1931); 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); 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); Martin v. J. C. Penney Co., 50 Wash.2d 560, 313 P.2d 689 (1957); LaHue v. Coca-Cola Bottling, Inc., 50 Wash.2d 645, 314 P.2d 421 (1957).

Commercial Code just a decade ago.[2] However, the Supreme Court of Pennsylvania has just spoken definitively, albeit disappointingly (and regrettably), in *Hochgertel v. Canada Dry Corporation*,[3] wherein the majority has seen fit to adhere to this archaic and senseless doctrine. Lower court decisions reveal a similar disinclination to break with this judge-made dictum and declare their independence of an outmoded and harsh "requirement."[4] In sharp contrast are several federal court decisions purporting to apply Pennsylvania law which reveal an increasingly hostile attitude toward this baseless concept.[5] Thus, even before the adoption of the Code, the United States Court of Appeals for the Third Circuit had hopefully declared, basing its opinion on the evidence of Pennsylvania law then available in the pertinent cases:

> We think it is clear that whether the approach to the problem be by way of warranty or under the doctrine of negligence, the requirement of privity between the injured party and the manufacturer of the article which has injured him has been *obliterated* from the Pennsylvania law.[6]

While emphasizing Pennsylvania law, this article will also deal with privity of warranty generally. Major subdivisions include the nature of warranty, its origin and early development, statutory

2. Enacted in 1953 to become effective July 1, 1954, PA. STAT. ANN. tit. 12A. The pertinent provisions are quoted in the text at notes 163, 172, 177 and in note 98, *infra*.

3. .....Pa....., 187 A.2d 575, No. 53, March Term, 1962, aff'g s.c. 110 Pittsburgh L.J. 82 (1962); for a statement of the case, see *infra* notes 80a to 80k inclusive in text. Cf. Jarnot v. Ford Motor Co., 191 Pa. Super. 422, 156 A.2d 568 (1959).

4. As, for example, Kaczmarkiewicz v. J. A. Williams Co., 13 Pa. D. & C.2d 14 (1957); Hochgertel v. Canada Dry Corp., 110 Pittsburgh L.J. 82 (1962). Through the cooperation of the editors of the Duquesne University Law Review, the writer's attention has been called to the unreported case of Ford v. Owens-Illinois Glass Co., #1345, October Term 1960 (1961), where the defense of lack of privity was successfully maintained. Plaintiff wife had purchased a vaporizer which broke and cut her thumb. The action for damages was based on breach of an implied warranty of fitness for use. Citing Kaczmarkiewicz v. J. A. Williams Co., *supra* and Nock v. Coca-Cola Bottling Works, 102 Pa. Super. 515, 156 Atl. 537 (1931), the court found that an exception had been made in food cases and then distinguished Jarnot v. Ford Motor Co., 191 Pa. Super. 422, 156 A.2d 568 (1959), on the basis of the extensive national advertising which defendant Ford Motor Company had carried on and which the plaintiff had relied on in purchasing the defective truck. The author gratefully acknowledges the assistance of Professor Donald T. Kiley.

5. Mannsz v. Macwhyte, *supra* note 1; McQuaide v. Bridgeport Brass Co., 190 F. Supp. 252 (D. Conn. 1960); Thompson v. Reedman, 199 F. Supp. 120 (E.D. Pa 1961).

6. Mannsz v. Macwhyte, *supra* note 1, at page 449; italics supplied.

changes, products liability insurance, and a treatment of warranty as applied to various categories of products, notably:

(1) Foodstuffs, beverages and their containers;
(2) Drugs and pharmaceuticals;
(3) Cigarettes and other tobacco products;
(4) Cosmetics, detergents and related chemical preparations;
(5) Wearing apparel;
(6) Automotive vehicles, aircraft and their accessories; and
(7) Miscellaneous products.

II. DEVELOPMENT OF PENNSYLVANIA LAW

How did the United States Court of Appeals come to state that the requirement of privity has been "obliterated" from Pennsylvania law as a bar to recovery for breach of warranty? And does this represent the present judicial approach? A review of the cases demonstrates that this optimistic declaration does not represent the present judicial approach, more's the pity!

As in other jurisdictions, the courts in Pennsylvania quite early decided that where food is sold, even though in the original package, there is an implied warranty that the goods are of merchantable quality and fit for human consumption. To trace the development of warranty, a number of the earlier cases will now be examined.

Although the core of this discussion is centered on privity, it is nevertheless instructive to include some cases dealing with the general concept of warranty in this preliminary review of Pennsylvania jurisprudence. Almost a half-century ago, in one of the earliest food cases, *Catani v. Swift & Co.*,[7] where trichinosis caused illness—an example of a rather frequent cause of action—the Supreme Court of Pennsylvania reversed a judgment in favor of the defendant company. The court held that the meat packer had not sustained its burden of due care by showing the pork to have been properly inspected.[8]

Some twenty years later, the presence of part of a mouse in a jar of raspberry preserves was held to be a breach of warranty in *Young*

7. 251 Pa. 52, 95 Atl. 931 (1915) error dis. 241 U.S. 690; see next note. Cited with apparent approval in Hochgertel v. Canada Dry Corporation, *supra* note 3.

8. Three years later in Tavani v. Swift & Co., 262 Pa. 184, 105 Atl. 55 (1918) evidence was introduced to show that no method of examination would insure the discovery of trichinae in pork and hence, it was not the custom of meat packers to inspect for trichinae; judgment was rendered for defendant.

v. Great Atlantic & Pacific Tea Co.[9] In *Murphy v. Yuengling Dairy Products Corp.*,[10] decided just two years later, the plaintiff's minor son had allegedly sustained injuries because of the presence of a foreign substance in ice cream in a "Dixie" cup produced by defendant dairy. The court held that although the foreign substance was not specifically identified, this was not essential to recovery. In a more recent case, *Miller v. Meadville Food Service*,[11] decided some ten years ago, the action was brought against a cafeteria for injuries sustained when the plaintiff, while eating some pineapple pie, bit into a foreign substance. The lower court held for defendant; on appeal, this was reversed, the appellate court rejecting defendant's contention that plaintiff was barred from recovery by her failure to identify the foreign substance in the pie.[12]

In *Newcomb v. Armour & Co.*,[13] pieces of wire were found in sausages manufactured by the defendant and eaten by the plaintiff. Holding for the latter, the court found that the presence of the wire in the food product was sufficiently demonstrated. Damages were sought against the manufacturer of a certain kind of oil which the plaintiff had purchased from an intermediary in *Mattiucci v. C. F. Simonin's Sons, Inc.*;[14] when used for the manufacture of mayonnaise, the presence of certain foreign substances ruined the mayonnaise and made it unfit for sale. The court held that there could be recovery in spite of the absence of privity and in spite of the fact that only property damage, not personal injury, was alleged.[15]

Where the plaintiff brought a breach of warranty action for injuries resulting from an oyster shell in oysters purchased in a sealed

9. 15 F. Supp. 1018 (D.C. Pa. 1936).

10. 34 Pa. D.&C. 355 (1938); in light of the Hochgertel decision, *supra* note 3, the query arises: Was the minor son in the Murphy case in the "distributive chain"?

11. 173 Pa. Super. 357, 98 A.2d 452 (1953).

12. An opposite result was reached in Horn & Hardart Baking Co. v. Lieber, 25 F.2d 449 (3d Cir. 1928) where the plaintiff while eating strawberries served by the defendant sustained injury from biting into tack or nail of the type used in making berry baskets. The court held that this did not evidence lack of due care by defendant since it was shown that the latter had used proper care in preparing the strawberries for its patrons. It may be doubted whether after some 35 years, the same result would obtain, especially if the action were brought for breach of warranty.

13. 39 F. Supp. 716 (D.C. Pa. 1941).

14. 40 Pa. D. & C. 535 (1941).

15. Where glass was found in liverwurst which caused injury to a patron eating the liverwurst in a sandwich, the court held that the evidence did not exclude the possibility that the glass might have been in the liverwurst before it came into possession by the meat company or after it had been sold to the restaurant in question, Werner v. Armour & Co., 320 Pa. 440, 138 Atl. 48 (1936).

can, the court held an implied warranty of fitness applicable and that the warranty was not eliminated by the fact that the can was not open to immediate inspection by defendant retailer. Since the latter is in a better position, said the court in *Bonenberger v. Pittsburgh Mercantile Co.*,[16] to know or ascertain the reliability and responsibility of the packer or processor than is the purchaser, the retailer can recoup his losses from the packer. This is a recognition of the fact that as the purchaser generally selects the retailer he does business with, it is only fair to make the retailer answerable to his purchaser.

As will be seen subsequently,[17] there has been considerable controversy as to whether tobacco products may be properly assimilated to foodstuffs when considering the consequences of breach of warranty. More than three score and ten years ago, a Pennsylvania court held the "guarantor" liable in damages when certain tobacco he had warranted was found to have deteriorated in the case of *Conestoga Cigar Co. v. Finke.*[18] After the better part of a century has passed, it seems entirely fitting that another court applying Pennsylvania law in a diversity of citizenship case,[19] should reach a similar conclusion when confronted with a similar question: Is there a breach of warranty when injurious effects are experienced by a person using cigarettes advertised to be harmless? *Pritchard v. Liggett & Myers Tobacco Co.*[20] is of outstanding importance, not only from the point of view of Pennsylvania jurisprudence, but also because of its national significance.[21] As there has been a tendency to absolve manufacturers of tobacco products, especially where the smoke is inhaled rather than when tobacco is masticated,[22] the *Pritchard* case may have far-reaching consequences. The plaintiff had been smoking Chesterfield cigarettes from 1921 until 1953 when a medical examination indicated cancer of the right lung requiring its excision. After his lung had been removed, Pritchard brought this action against the manufacturer alleging negligence and breach of warranty.[23]

16. 345 Pa. 559, 28 A.2d 913 (1942); the Bonenberger case is cited with apparent approval in Hochgertel v. Canada Dry Corp., *supra* note 3.

17. Text at notes 20-28 *infra.*

18. 144 Pa. 159, 22 Atl. 868 (1891).

19. Pritchard v. Liggett & Myers Tobacco Co., *supra* note 1.

20. 295 F.2d 292 (3d Cir. 1961).

21. *Infra* note 23.

22. Text at notes 468-489, *infra.*

23. There had been an extensive advertising campaign conducted by Liggett & Myers Tobacco Co., to overcome the suggestions that there might be a connection between cigarette smoking and lung cancer. This led to representations that Chesterfield cigarettes were not injurious to the respiratory organs and could be used without ill effects.

The trial court granted defendant company's motion to dismiss the warranty count at the close of the plaintiff's evidence. When all of the evidence on the negligence count was in, the court directed a verdict for the defendant company. Pritchard appealed; the appellate court concluded that these motions had been improperly granted, and that there was sufficient evidence on both counts to require submission to the jury. Consequently, a new trial was ordered. Especially impressive was the testimony of the five medical expert witnesses proffered by the plaintiff in response to the trial court's requirement that proof first be tendered to show the causal connection between inhaling cigarette smoke and lung cancer.[24] That physicians as a whole had not subscribed to this opinion was deemed unimportant.

The court's ruling on the warranty aspect of the case is of particular significance. It was held that the evidence supported the existence of both warranties: The warranty of merchantability, namely, that the cigarettes were reasonably suitable for the general purposes for which they were sold, and the warranty of fitness for use or consumption, namely, that they were reasonably fit for smoking and generally so intended without causing physical injury. The court adverted to the extensive advertising campaign regarding the quality and purity of Chesterfield cigarettes and especially to one claim made during the campaign to the effect that "the nose, throat and accessory organs" are not "adversely affected by smoking Chesterfields."[25] From this, the jury could well conclude that there were

24. Dr. Kremer [Pritchard, *supra* note 1, at 299, 300] testified that knowledge of the connection between smoking and epidermoid cancer was being disseminated many years prior to 1953. Dr. Kaunitz testified that he noted a relationship between heavy smoking and lung cancer as early as 1946, while Dr. Cameron said that literature on the relationship between smoking and lung cancer was available half a century ago. He himself became interested in the relationship in the mid 1930's.

Dr. Overholt testified that he became suspicious that a connection existed between heavy smoking and lung cancer in the early 1940's, and that he himself stopped smoking. Dr. Levin started research on the relationship between smoking and lung cancer in 1939 after reading a German article dealing with the subject.

25. In a concurring opinion, some of these statements were quoted: "There is language in some of the advertisments for Chesterfield cigarettes shown in the evidence which could be understood to assert a claim on the defendant's part that these cigarettes are harmless. In newspaper and magazine advertisements the public was told that 'Nose, throat, and accessory organs [are] not adversely affected by smoking Chesterfields,' and that 'A good cigarette can cause no ills and cure no ailments.' Arthur Godfrey, on a program sponsored by defendant, broadcast that he 'never did believe they [Chesterfields] did any harm and now we, we've got the proof.' If a manufacturer assures his potential public that his product is harmless, and it is proved that it is not harmless, he can be held, no doubt, for breach of warranty. Pa. Stat. Ann. tit. 12A, § 2—313 (Supp. 1960); Uniform Commercial Code § 2—313; Uniform Sales Act § 12.", at 301.

express statements that the lungs would not be harmfully affected. As to the timeliness of the notice of breach, the court held that the ten months which elapsed between the removal of the lung and the notice of breach of warranty given was not too long a period to be unreasonable under the Pennsylvania statutes.[26] In any case, the question was for the jury.[27]

With respect to the negligence count, the appellate court ruled that the evidence adduced might bring the defendant company within the Pennsylvania rule that where one supplies a product to another and knows or should know that the foreseeable use is dangerous to human life unless certain precautions are taken, and who realizes or should realize that the user will not, in the exercise of reasonable vigilance, recognize the danger is under a duty to warn the consumer. Since it

26. Uniform Sales Act § 49, Uniform Commercial Code § 2—607(3); 5 WILLISTON, CONTRACTS §§ 714, 715, 887B (3d ed. Jaeger 1961).

27. On this point, the court said:

Section 49 of the Uniform Sales Act, 69 PURDON'S PA. STAT. ANN. § 259, contains the notice requirement and provides:

". . . But if, after acceptance of the goods, the buyer fails 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."

Plaintiff's notice, which was received by defendant's agent on October 21, 1954, read:

"This is to inform you that our client, Otto E. Pritchard, has elected to treat an injury he received as a result of smoking Chesterfield Cigarettes as a breach of warranty on the part of Liggett & Myers Tobacco Co."

Where more than one inference may be drawn from undisputed facts, or the facts are disputed, the timeliness and sufficiency of a notice of breach of warranty are questions for the jury to resolve. The question of reasonableness must be determined from the circumstances in the individual case. Columbia Axle Co. v. American Automobile Ins. Co., 63 F.2d 206, 208 (6th Cir. 1933).

There is authority to support the proposition that the peculiar circumstances surrounding the buyer after he knew or should have known of the breach may be considered. That was true in Pennsylvania even before passage of the Uniform Sales Act.

Pritchard v. Liggett & Myers Tobacco Co., *supra* note 1, at 298.

In support of sending question of reasonableness to the jury, see Bonker v. Ingersoll Prod. Corp., 132 F. Supp. 5 (D.Mass. 1955) which is cited and discussed in Burket v. Westmoreland Supply Co., 41 Westmoreland L.J. 35 (Pa. Com. Pl. 1958). The Uniform Commercial Code (PA. STAT. ANN. tit. 12A, § 2—607(3) (1954)), carried forward the requirements on notice of breach under § 49 of the Uniform Sales Act. Draftsmen's comments to that subsection read as follows:

> The time of notification is to be determined by applying commercial standards to a merchant buyer. 'A reasonable time' for notification from a retail consumer is to be judged by different standards so that in his case it will be extended, *for the rule of requiring notification is designed to defeat commercial bad faith,* not to deprive a good faith consumer of his remedy. (Emphasis supplied.)

could be established that a great deal had been written about the possible connection between cigarette smoking and certain types of cancer, and that there is a considerable body of scientific opinion which appears to hold the connection between the two established as a scientific fact based on research and experimentation, the court concluded that the jury should have been permitted to pass on the question of whether or not defendant company should have conducted additional tests to determine if the cigarettes in question were actually harmless. In any event, the assertion that the respiratory organs would not be "adversely affected by smoking" the said cigarettes could certainly be regarded as a warranty which would be deemed breached the moment the consumer could show that the use of these cigarettes had caused his cancerous condition.[28]*

An examination of some of the other cases in which the courts have been faced with the question of privity and its status in Pennsylvania law reveals several significant opinions dealing with the liability of manufacturers to third parties which deserve analysis. Basing its rank on the frequency of citation, *Jarnot v. Ford Motor Co.*[29] is among the foremost of these. Here, a tractor had been pur-

28. Pritchard v. Liggett & Myers Tobacco Co., *supra* note 1.

*Editor's Note: On the remand, after six weeks of trial, *Pritchard* was submitted to the jury on interrogatories. Answering the interrogatories, the jury found that smoking Chesterfield cigarettes caused the plaintiff's cancer; that the defendant was not negligent; that the plaintiff had given timely notice that he intended to treat his injury as caused by the defendant's alleged breach of warranty; that no express warranty had been made by the defendant; that there was no breach of any implied warranty; and that the plaintiff assumed the risk of injury by smoking. The jury did not answer a question about the plaintiff's contributory negligence. Under the instructions, the jury was not required to consider the amount of monetary damage if it did not find liability.

Presently pending before the district court are a motion to amend the judgment and a motion for a partial new trial. The basis for these motions is that the court should not have permitted the jury to consider assumption of risk in connection with the warranty counts nor in connection with the evidence of negligent misrepresentation and failure to warn. It is also contended that the law and the evidence require a finding of the existence of an express warranty and a finding of a breach of an implied warranty. The question may well be raised, in light of the jury's finding that there was no express warranty and no breach of an implied warranty, why was the jury asked to pass on the matter of timely notice of "breach of warranty"?

29. Jarnot v. Ford Motor Co., *supra* note 3.

chased from an authorized Ford dealer by the plaintiffs. While being driven by an experienced operator and hauling a trailer containing a cargo weighing fifteen and a half tons, the tractor incurred an accident which resulted in the complete destruction of the trailer and substantial property damage to the truck. While the tractor was proceeding on a down grade near Washington, Pennsylvania, there was a sudden sharp report or "bang" which came from the front of the truck; the kingpin had broken.[30] This prevented the driver from steering the tractor, and when the brake mechanism no longer functioned, both tractor and trailer rolled into the ditch. True to tradition, the Ford Motor Company defended on the grounds of lack of privity and an express disclaimer in its limited warranty, a standardized one used in the automotive trade.[31]

Basing their action on the alleged breach of implied warranty by the Ford Motor Co. as to the fitness of the tractor for the uses for which it was designed, manufactured and sold, plaintiffs recovered judgment in the trial court for the value of the trailer and the cost of repairing the tractor. When the usual motions by defendant were denied and judgment entered, defendant appealed. After reviewing the evidence and finding that the operator had exercised due care, the appellate court held that the expert testimony introduced by plaintiffs disclosed a weakness in the kingpin which constituted a breach of warranty when the ensuing damage occurred.[32] The court reviewed a number of other cases including *Frigidinners v. Branchtown Gun Club*,[33] *The White Company v. Francis*,[34] *Loch v. Confair*,[35] *Silverman v. Samuel Mallinger Co.*,[36] *Mannsz v. Macwhyte*

30. It was pointed out that in the evidence submitted, the kingpin, an essential part of the steering mechanism, was shown to have been defective.

31. The "warranty," or disclaimer, limited the liability of the manufacturer to "making good at its factory any part or parts [of the tractor] which shall, within ninety (90) days after delivery of such vehicle to the original purchaser or before such vehicle has been driven 4,000 miles, whichever event shall first occur." This, however, did not preclude the co-existence of an *implied* warranty of fitness for intended use. A similar disclaimer was held contrary to public policy in Henningsen v. Bloomfield Motors, Inc., *supra* note 1.

32. The trial court had given judgment for plaintiff on the ground that the national advertising campaign of the manufacturer had represented the tractor as being safe and dependable and this constituted a direct assurance to the purchaser or driver that the product was not defective and could be used without ill effect.

33. 176 Pa. Super. 643, 109 A.2d 202 (1954).

34. 95 Pa. Super. 315, (1928).

35. 361 Pa. 158, 63 A.2d 24 (1949), discussed in Hochgertel v. Canada Dry Corp., *supra* note 3.

36. 375 Pa. 422, 100 A.2d 715 (1953), cited in Hochgertel v. Canada Dry Corp., *supra* note 3.

Co.,[37] *Conestoga Cigar Co. v Finke*,[38] and finally, *Knapp v. Willys-Ardmore, Inc.*,[39] which the court described as "perhaps most nearly analogous, to the instant action, of the cases in our reports."[40]

Earlier, the court had said: "Even though a sales contract may negative a warranty because not contained in the writing, this does not preclude evidence of an implied warranty."[41] Citing *Mannsz*, the court observed, "it was held that under Pennsylvania Law privity between the injured party and the manufacturer is not required to impose liability on the manufacturer, either on grounds of negligence or on grounds of breach of warranty."[42]

The court then affirmed the decision against the Ford Motor Company, but amended the judgment by striking the name of the authorized dealer from whom the tractor had been purchased because the jury had found only against the Ford Motor Company.

Some doubts remained as to the validity of the statement in *Mannsz v. Macwhyte Co.*[43] with respect to the obliteration of the privity requirement because of a later decision by the Supreme Court of Pennsylvania in *Loch v. Confair*.[44] There, a bottle of ginger ale had exploded in a self-service food store before it was taken to the check-out counter and paid for, and the court held that there was no breach of warranty. However, another automobile case, *Thompson v. Reedman*,[45] suggested that the *Loch* case could be differentiated or distinguished since there had been no *sale* of the ginger ale, and therefore, no warranty.[46]

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37. *Supra* note 1.

38. *Supra* note 18.

39. 174 Pa. Super. 90, 100 A.2d 105 (1953).

40. Jarnot v. Ford Motor Co., *supra* note 3 at 431.

41. *Id.* at 429.

42. *Id.* at 430.

43. *Supra* note 1.

44. *Supra* note 35.

45. *Supra* note 1.

46. *Sed quae re*: Is a sale necessary for warranty? Not according to the separate opinion by Chief Justice Gibson in Trust v. Arden Farms Co., 50 Cal.2d 217, 324 P.2d 583 (1958): "With respect to Arden, however, I am of the view that the judgment of nonsuit should be reversed, because the evidence is not insufficient as a matter of law to sustain plaintiff's cause of action for breach of warranty. As shown by the discussion in the concurring and dissenting opinions of Justices Carter and Traynor, there is testimony from which the jury could reasonably infer that the bottle was not improperly handled in plaintiff's home and that when the bottle was delivered by Arden it contained a defect which caused it to break. If an inference to that effect were drawn by the jury, the defect in the bottle would constitute a breach of warranty by Arden under section 1735 of the Civil Code (Uniform Sales Act, §15), which reads in part: '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

In *Thompson v. Reedman,*[47] the United States District Court for the Eastern District of Pennsylvania stated that when the Third Circuit Court remarked that the requirement of privity had been obliterated from Pennsylvania law, it meant exactly that and no case decided by the Supreme Court of Pennsylvania up to that time (the lower courts felt themselves bound by the privity requirement in non-food cases) had derogated from its authority. Reinforcing its views, the court quoted extensively from *Jarnot v. Ford Motor Co.,*[48] *Magee v. General Motor Corp.,* [49] *Pritchard v. Liggett & Myers Tobacco Co.,*[50] and *Mannsz v. Macwhyte.*[51] The facts in the *Thompson* case[52] are simple enough:

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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. (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.' (Italics added.)

Section 1735 does not refer merely to goods sold but to all 'goods supplied under a contract to sell or a sale.' It has been held that when bottled beverages are sold, the bottles in which they necessarily must be delivered are *supplied under the contract of sale* within the meaning of the statute although the bottles are bailed rather than sold. Geddling v. Marsh (1920), 1 KB 668; see 1 Williston on Sales (rev ed 1948), 582, n 1. The Gedding case related to a sale of 'lime juice and soda' in bailed bottles and was decided under section 14 of the English Sale of Goods Act, 1893, which contains provisions nearly identical with those quoted above from section 1735. The findings in that case showed that the sale came within the first subdivision of the section, but the reasoning of the court is equally applicable to a sale coming within the second subdivision. Accordingly, even if we assume that the bottle involved here was bailed, it would be subject to any warranty which would be applicable under either of the quoted subdivisions if the bottle had been sold.

The sale of a bottle of milk by a dairy under the circumstances appearing here clearly comes within the language of the second subdivision of the statute, and the seller's implied warranty of merchantable quality under this provision includes a warranty that his product is reasonably fit for the general purpose for which goods of that kind are sold. See Simmons v. Rhodes & Jamieson, Ltd., 46 Cal.2d 190, 194, 293 P.2d 26; Burr v. Sherwin Williams Co., 42 Cal.2d 682, 694, 268 P.2d 1041. It is obvious that a milk bottle which is so defective that it will break under normal handling is not fit for the ordinary use for which it was intended and that the delivery of such a defective bottle constitutes a breach of warranty.

The buyer may recover for breach of the statutory warranty without proving negligence on the part of the seller."

47. Thompson v. Reedman, *supra* note 1.
48. 191 Pa. Super. 422, 156 A.2d 568 (1959).
49. 117 F. Supp. 101 (W.D. Pa. 1953).
50. *Supra* note 1.
51. 155 F.2d 445 (3d Cir. 1946).
52. 199 F. Supp. 120 (E.D. Pa. 1961).

Plaintiff was injured during a collision between the automobile in which he was riding as a guest and another private car. The accident was caused by the accelerator pedal becoming stuck; this released an excessive flow of gasoline and the automobile, contrary to expectation, suddenly lunged forward. The automobile, a Chevrolet, was purchased new; the injured passenger claimed that he was entitled to recover regardless of lack of privity of warranty. Plaintiff's attorney argued ingeniously that according to the Uniform Commercial Code, a guest in an automobile should be assimilated to the statutory words "a guest in his [the buyer's] home."[53] However, the court, quoting the comment to this section, rejected this argument stating "it is too much of a leap, it seems, to classify a guest passenger in an automobile as a guest in the *home.*"[54] Nevertheless, based on its analysis of the cases it cited and quoted as shown above, the court concluded that privity was not necessary and that defendant's motion to dismiss would be denied.[55] Since the decision in *Hochgertel v.*

53. Uniform Commercial Code, PA. STAT. ANN. tit. 12A § 2—318: "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. (1953, April 6, P.L. 3, § 2—318.)"

54. The court added: "Plaintiff argues that since 'a guest in his home' is covered, then a guest in an automobile should similarly be covered. The Uniform Commercial Code Comment, however, says:

> 'This section expressly includes as beneficiaries within its provisions the family, household, and guests of the purchaser. 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.'

To this Court, it seems more consistent with the plain meaning of words to understand the comment as leaving this present situation at large. It is too much of a leap, it seems, to classify a guest passenger in an automobile as a guest in the *home.* In that light, the question remains one of gleaning the rule from 'the developing case law.' "

55. The court disposed of the privity argument: "The question was presented to the United States Court of Appeals for the Third Circuit in 1946 in Mannsz v. Macwhyte Co., 155 F.2d 445 (3rd Cir. 1946), Maris, Goodrich and Biggs, Circuit Judges; opinion by Biggs, J. In that diversity action, plaintiffs' injuries were claimed as having resulted from failure of wire rope sold by Bradford and manufactured by defendant Macwhyte. The complaints alleged breach of warranty and negligence by Macwhyte in connection with manufacture and inspection of the rope, and in misrepresentations of its fitness for the purpose (suspending scaffolds). At page 449, the Court said:

> * * * We think it is clear that whether the approach to the problem be by way of warranty or under the doctrine of negligence, the requirement of privity between the injured party and the manufacturer of the article which has injured him has been obliterated from the Pennsylvania law. * * *

Canada Dry Corporation,[55a] this would no longer seem to be the law as the plaintiff passenger was neither a subpurchaser nor within "the distributive chain."

In another diversity of citizenship case,[56] *McQuaide v. Bridgeport*

The opinion continues with a discussion of the manner in which the requirement of privity was eliminated, case by case, collecting over a dozen authorities at page 450. Mannsz v. Macwhyte Co., 155 F.2d 445, 450 (3rd Cir. 1946)."

The court then discusses the facts in a "later Pennsylvania warranty case [which] rather pointedly cites and follows the Mannsz case," referring to Jarnot v. Ford Motor Co., *supra* note 3, from which the court quoted in its opinion: "A person, who after the purchase of a thing, has been damaged because of its unfitness for the intended purpose may bring an action in assumpsit against the manufacturer based on a breach of implied warranty of fitness; and proof of a contractual relationship or privity between the manufacturer and the purchaser is not necessary to impose liability for the damage. Cf. Loch v. Confair, 361 Pa. 158, 63 A.2d 24; Silverman v. Samuel Mallinger Co., 375 Pa. 422, 100 A.2d 715. There is some analogy in the principle referred to . . . in Conestoga Cigar Co. v. Finke, [*supra* note 18] long before The Sales Act, *supra* [of May 19, 1915, P.L. 543, §§ 15 & 69, 69 P.S. §§ 124, 314]. In Mannsz v. Macwhyte Co., 155 F.2d 445, it was held that under Pennsylvania Law privity between the injured party and the manufacturer is not required, to impose liability on the manufacturer either on grounds of negligence or on grounds of breach of warranty. That case was cited in Silverman v. Samuel Mallinger Co., [375 Pa. 422, 100 A.2d 715 (1953)], *supra*, in support of the principle. * * *" [156 A.2d 572]

The court notes that the Pennsylvania cases have not been too clear on the subject of privity, observing: "In his discussion of 'Products Liability—Privity' in 75 A.L.R.2d 39, 53-54, n. 18, the annotation writer ventures that 'this reference to the Silverman Case is perplexing' and takes the position that the reference to Mannsz in Silverman in truth exemplifies an exception to the general requirement of privity."

Be that as it may, however, there are later cases, apart from that already mentioned, which seem to reinforce plaintiff's position. An example is one which came before the courts four times under the caption of Magee v. General Motors Corp., 117 F. Supp. 101 (W.D. Pa. 1953); 213 F.2d 899 (3rd Cir. 1954); 124 F. Supp. 606 (W.D. Pa. 1954); *aff'd per cur.* 220 F.2d 270 (3rd Cir. 1955)."

This entire discussion must be reexamined and evaluated in light of the latest decision of the Pennsylvania Supreme Court in Hochgertel v. Canada Dry Corp., *supra* note 3. The case is stated in detail in text, *infra* notes 80a to 80k inclusive.

55a. *Supra* note 3.

56. On this point, the court remarked: *"Breach of Warranty Construed As A Contract Or Tort Action For Purposes Of Conflict of Laws*: This being a diversity case, under the rule of Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188 (1938), this Court must follow the conflict of laws rules prevailing in the State of Connecticut. Klaxon Co. v. Stentor Electric Manufacturing Co., 313 U.S. 487, 61 S. Ct. 1020, 85 L.Ed. 1477 (1941).

The first inquiry is how do the Connecticut courts construe a cause of action for breach of warranty—as a contract action or a tort action—for purposes of conflict of laws? The answer is that the Connecticut courts have not declared what conflict of laws rule is applicable to a breach of warranty action."

Brass Co.,[57] a woman bought an insecticide at a supermarket in Pittsburgh; the manufacturer was located in Connecticut. When plaintiff sustained certain injuries from using the insecticide, she brought this action. The defendant company moved to dismiss on the ground of lack of privity. Holding Pennsylvania law to be applicable under either the theory of warranty or the theory of negligence, the federal court concluded that lack of privity could not be a bar since privity has been "obliterated," quoting *Jarnot* and *Mannsz,* supra.[57a] So therefore, whether tort or contract was involved, the applicable law would still not preclude a recovery. If based on tort, Connecticut, where the action is being brought, would follow the law of Pennsylvania where the injury occurred. And if the action is regarded as sounding in contract, the result would not be different since the sale was made in Pittsburgh and the court would apply the *lex loci contractus.*[58] Although the court quoted the opinion in *Mannsz v. Macwhyte*[59] with approval on this point, the authority of this statement must be doubted in view of the limitations which appear in *Hochgertel v. Canada Dry Corporation*:[59a]

> We think it is clear that whether the approach to the problem be by way of warranty or under the doctrine of negligence, the requirement of privity between the injured party and the manufacturer of the article which has injured him has been obliterated from the Pennsylvania law. The abolition of the doctrine occurred first in the food cases, next in the beverages decisions and now has been extended to those cases in which the article manufactured, not dangerous or even beneficial if properly made, injured a person because it was manufactured improperly.[60]

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57. 190 F. Supp. 252 (D. Conn. 1960).

57a. That privity has not been obliterated, see Hochgertel v. Canada Dry Corp., *supra* note 3.

58. "If the breach of warranty alleged in the second count is construed as a contract action, the Connecticut courts, in determining the existence of the warranty and the persons to whom it extended, would apply the law of the place where the contract was to have its beneficial operation. Craig & Co. v. Uncas Paperboard Co., 104 Conn. 559, 133 A. 673 (1926); McLoughlin v. Shaw, 95 Conn. 102, 111 A. 62 (1920).

"If the breach of warranty, however, is regarded as a tort action, then under Connecticut conflict of laws rules the law of the place where the tort occurred governs. Bissonnette v. Bissonnette, 145 Conn. 733, 142 A.2d 527 (1958)." McQuaide v. Bridgeport Brass Co., *supra* note 57.

59. *Supra* note 1.

59a. *Supra* note 3; however, in the McQuaide case, the result would have been the same, since the plaintiff was a subpurchaser.

60. The court points out that the opinion in the Mannsz case was written by Judge Biggs, and concurred in by Judges Maris and Goodrich, McQuaide v. Bridgeport Brass Co., *supra* note 57, at 254.

And from *Jarnot v. Ford Motor Co.*,[61] the following was deemed pertinent:

> A person, who after the purchase of a thing, has been damaged because of its unfitness for the intended purpose may bring an action in assumpsit against the manufacturer based on a breach of implied warranty of fitness; and proof of a contractual relationship or privity between the manufacturer and the purchaser is not necessary to impose liability for the damage.[62]

The court also reviewed a number of cases from other jurisdictions[63] and articles by various legal scholars.[64]

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61. *Supra* note 3.

62. Quoted in McQuaide v. Bridgeport Brass Co. *supra* note 57, at 254; the court notes: "Pennsylvania, unlike other states including Connecticut (see e. g. Hermanson v. Town Motors, D.C. Conn. 1953 126 F.Supp. 519,) seems not to require privity of contract where breach of warranty, express or implied, is alleged." In light of the decision in Hamon v. Digliani, 148 Conn. 710, 174 A.2d 294 (1961), there may be some doubt as to whether Connecticut still adheres to the privity requirement. Of course, since the Hermanson case, Connecticut has adopted the Uniform Commercial Code, see *infra* note 196.

63. Gosling v. Nichols, 59 Cal. App.2d 442, 139 P.2d 86 (1943); Medeiros v. Coca-Cola Bottling Co., 57 Cal. App.2d 707, 135 P.2d 676 (1943); Greco v. S.S. Kresge Co., 277 N.Y. 26, 12 N.E.2d 557 (1938); S.H. Kress & Co. v. Lindsey, 262 Fed. 331 (5th Cir. 1919); Sterling Aluminum Products v. Shell Oil Co., 140 F.2d 801 (8th Cir. 1944) cert. den. 322 U.S. 761 (1944).

64. Ames, *History of Assumpsit*, 2 HARV. L. REV. 1 (1888); Ehrenzweig, *Products Liability In The Conflict of Laws*, 69 YALE L.J. 794 (1960); Prosser, *The Assault Upon The Citadel (Strict Liability To The Consumer)* 69 YALE L.J. 1099 (1960). Products liability has stimulated a prolific flow of periodical literature as the following articles will attest:

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); 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 VILLANOVA 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*, 8 CLEVELAND-MARSHALL L. REV. 81 (1959); Jaeger, *Warranties of Merchantability and Fitness for Use: Recent Developments*, 16 RUTGERS L. REV. 493; James, *General Products—Should Manufacturers Be Liable Without Negligence?* 24 TENN. L. REV. 923 (1957); James, *The Liability of Manufacturers for Faulty Goods*, THE JOURNAL OF BUSINESS LAW 287 (1960); Jeanblanc, *Manufacturers' Liability to Persons Other Than Their Immediate Vendees*, 24 VA. L. REV. 134 (1937); Lucey, *Liability Without Fault and the Natural Law*, 24 TENN.

Among the cases frequently cited and relied on by the courts as stated above is *Frigidinners, Inc. v. Branchtown Gun Club,*[65] where the vendor appealed from an order of the lower court opening a judgment which had been confessed in the amount of the price of a food freezer sold to the Gun Club. Judgment had been entered against the Club in the amount of $730.00, based on a note executed by the Gun Club as collateral security for the payment of the purchase price of the freezer.[66] The basis for opening the judgment was the allegation that the freezer was not performing satisfactorily and that the food served from it was not merchantable, or in short, not edible. In con-

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L. REV. 952 (1957); Morris, *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight,* 70 YALE L.J. 554 (1961); 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,* 24 TENN. L. REV. 938 (1957); 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,* 8 CLEVELAND-MARSHALL 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,* 15 FOOD, DRUG, COSMETIC 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 PRACTICAL LAWYER 70 (1961).

See also Noel, *Manufacturers' Negligence of Design or Directions for Use of a Product,* 71 YALE L.J. 816 (1962) discussed in Keeffe, *Practicing Lawyer's Guide to the Current Law Magazines,* 49 A.B.A.J. 109 (1963).

65. 176 Pa. Super. 643, 109 A.2d 202 (1954).

66. In the petition to open judgment the appellee averred inter alia: (1) that the parties had agreed that Frigidinners were to be placed upon the premises of appellee for thirty days but if not satisfactory they were to be removed and all the papers executed, including the conditional sales contract and the judgment note, were to be null and void; (2) that the Frigidinners had not performed properly and were not satisfactory; (3) that the food served with the Frigidinners was not merchantable. The appellant denied the allegations in the petition and in its answer averred, inter alia, that the conditional sales agreement constituted the entire contract between the parties, and that the contract in no way provided for food to be served with the Frigidinner appliance. Regarding the application of the appellee Club, the court remarked: "It is well established that an application to open a confessed judgment is addressed to the sound discretion of the court which, in the exercise thereof, is governed by equitable principles; and on appeal the court's dispositive order will not be reversed except for a clear abuse of discretion. Baron v. Bernstein, 175 Pa. Super. 608, 106 A.2d 668. In passing upon a rule to open a judgment both the pleadings and the testimony may be taken into consideration in determining whether or not a meritorious defense has been indicated by one who seeks to open judgment confessed against him. Lloyd v. Jacoby, 156 Pa. Super. 105, 39 A.2d 525."

sequence, the Gun Club was anxious to rescind the contract.[67] One of the reasons the vendor contended that the lower court had abused its discretion in opening the judgment was the presence of an express disclaimer in the contract of sale which stated: "This Contract contains the entire agreement between Seller and Buyer; there are no other representations, warranties or covenants by either party. This Contract may not be modified except in writing."

This argument, however, did not seem to impress the Superior Court which found that as there was no express disclaimer of *implied* warranties, the implied warranty of merchantability would survive the disclaimer provision. The court quoted the Uniform Sales Act §§ 15 and 71,[68] to the effect that "there is an implied warranty that the goods shall be of merchantable quality,"[69] unless the parties have expressly agreed otherwise, citing *Hobart Manufacturing Co. v. Rodziewicz,*[70] where the court had said:

> The doctrine is well established that when a buyer relies on the judgment of a seller who knows the purpose for which the property is to be used, there is an implied warranty that the property is reasonably fit for the purpose for which it was bought, and it is not excluded by a written contract eliminating any warranty that may have been made by the seller. The implied sales warranty arises independently and outside of the contract and is imposed by operation of law.[71]

Signalizing the difference between express warranties where the parol evidence rule precludes the admission of any extrinsic evidence to vary or contradict the terms of the contract,[72] and implied or constructive warranties,[73] the court remarked, "parol evidence may

67. Appellant argued that the judgment note and the conditional sales agreement for which it was collateral security constitute the entire contract between the parties and their respective rights and obligations are fully contained therein in clear and unambiguous terms.

68. Uniform Sales Act, P.L. 543, (PA. STAT. ANN. tit. 69, § 124) (1915) provides in § 15: "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."

Section 71 reads: "Where any right, duty, or liability would arise under a contract to sell or a sale, by implication of law, it may be negatived 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." PA. STAT. ANN. tit. 69, § 332.

69. Uniform Sales Act § 15, *supra* note 68.

70. 125 Pa. Super. 240, 189 Atl. 580 (1937).

71. Citing Bekkevold v. Potts, 173 Minn. 87, 216 N.W. 790 (1927).

72. WILLISTON, CONTRACTS (3d ed. Jaeger, 1961) § 643.

73. Text at note 136, *infra.*

be received to show circumstances tending to establish an implied warranty."[74] It was held that the evidence relating to the warranty had been properly admitted, and that as it also tended to show a breach thereof, the court concluded that a *prima facie* instance of a breach of an implied warranty had been established.[75]

A similar case[76] decided under the Uniform Commercial Code involved the sale of certain bottle "pourers". These were devices to be attached to beverage bottles to measure and insure uniformity in the amount of each drink dispensed. When the 123 pourers were found deficient in various respects, especially as to uniformity of measurement, the purchaser defaulted on his note. From a refusal by the lower court to open a judgment entered by confession upon purchaser's note, the maker appealed. Reversing the lower court and holding that in spite of an express warranty, there was also an implied warranty of fitness for a particular purpose because these warranties are not inconsistent, the appellate court quoted the Uniform Commercial Code: "Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose,"[77] and held that the vendee had a right to rescind when the warranty was breached.[78]

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74. Frigidinners v. Branchtown Gun Club, *supra* note 33 at 648, citing Hobart Manufacturing Company v. Rodziewicz, *supra* note 70, where the court's entire statement is: "The weight of authority, and we think the sounder reasoning, supports the view that while parol evidence is not admissible to prove an express warranty, it is admissible to show circumstances tending to establish an implied warranty." The court also noted that: "In White Co. v. Francis, 95 Pa. Super. 315, as in the case at bar, judgment had been entered by confession under a warrant in a bailment lease. We held that a contract providing that the written agreement constituted the entire contract did not preclude the defendant from relying upon an implied warranty that the truck in question was reasonably fit for the purpose for which it was manufactured and leased." Hobart Manufacturing Co. v. Rodziewicz, *supra*.

75. In this connection, the court stated: "For the purpose of the rule to open judgment the appellee was only required to show that it had a good defense in whole or in part of the claim on which the judgment was founded. Once this requirement was met it became the duty of the court below to open the judgment and allow the appellee to definitely prove its case by proper evidence before a jury. Plympton Cabinet Co. v. Rosenberg, 96 Pa. Super. 330. Moreover, where, on the pleadings and proof, doubts exist as to what is the real justice and equity of the case, the court below, ordinarily, will not be reversed for opening or refusing to open a judgment since its order, when interlocutory, as is the present one, is within its sound discretion." Frigidinners v. Branchtown Gun Club, *supra* note 33.

76. L. & N. Sales Co. v. Stuski, 188 Pa. Super. 117, 146 A.2d 154 (1958).

77. Uniform Commercial Code, § 2—317(c). *Cumulation and Conflict of Warranties Express or Implied.*

78. The court cited Frantz Equipment Co. v. The Leo Butler Co., 370 Pa. 459, 88 A.2d 702 (1952).

Pennsylvania has had its fair share of soft drink cases, *Caskie v. Coca-Cola Bottling Co., Inc.*[79] being somewhat typical. Plaintiff purchased a bottle of Coca-Cola from a vending machine; upon drinking a part of it, he noticed that its odor was like that of "brake fluid." Actually, it turned out to be hydrochloric acid and was the cause of his subsequent illness. When the trial court gave judgment for plaintiff in the amount of $6,500, the defendant company appealed. Citing *Rozumailski v. Philadelphia Coca-Cola Bottling Co.*,[80] the appellate court affirmed, holding that "a breach of the implied warranty of fitness" had been proved by establishing the presence of the acid in the beverage.

However, the Supreme Court of Pennsylvania has made it quite clear that if recovery is to be had for breach of warranty in a bottled beverage case, the plaintiff must be a purchaser or subpurchaser "in the distributive chain," *Hochgertel v. Canada Dry Corporation.*[80a] Here, the plaintiff, a bartender in a clubhouse, was injured by flying fragments of glass from an unopened soda water bottle which exploded while standing on a counter behind the bar. The trial court sustained preliminary objections in the nature of a demurrer,[80b] and an appeal was taken. Said the Supreme Court:

> There is no doubt that when the defendant manufacturer sold the bottle of soda water to the fraternal lodge involved, it impliedly warranted *to the purchaser* that the contents of the bottle were fit for the purposes intended.[80c]
>
> Two interesting questions are posed by this appeal: (1) Did this implied warranty extend to the plaintiff, an employee of the purchaser? (2) Did the warranty cover the container as well as the contents of the bottle? Our answer to the first question is determinative of the case.

The court then quotes Section 2—318 of the Uniform Commercial Code, the Official Comments 2 and 3 thereto, and continues:

> It is clear from the language used [in § 2—318 and the quoted Comments thereto] that in order to qualify as a person (not a buyer), who is within the protection of the warranty, one must be a member of the buyer's family, his

79. 373 Pa. 614, 96 A.2d 901 (1953); *cf.* Nock v. Coca-Cola Bottling Works, *supra* note 1.

80. 296 Pa. 114, 145 Atl. 700 (1929).

80a. *Supra* note 3.

80b. Hochgertel v. Canada Dry Corp., *supra* note 4, for lower court citations.

80c. Citing Bonenberger v. Pittsburgh Mercantile Co., *supra* note 16, and Loch v. Confair, *supra* note 35.

household or a guest in his home. An employee is definitely in none of these categories.[80d]

The Supreme Court suggests that as the Uniform Commercial Code was not intended by its framers to restrict the case law in this field, a study of the pertinent Pennsylvania authorities becomes necessary:

> The general rule in the United States is that the mere resale of a warranted article does not give the subpurchaser the right to sue the manufacturer in assumpsit, on the basis of breach of warranty, for damages incurred by him due to a defect in the quality of the goods. Pennsylvania decisions are in accord with this general proposition. The warranty is personal to the immediate or original buyer, and he alone may avail himself of the benefit thereof. This limitation is based on the rule of privity of contract.[80e]
>
> However, 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 for breach of an implied warranty that the food was wholesome and fit to eat.[80f]

After citing certain Pennsylvania cases discussed heretofore,[80g] the Court declares that a close study thereof will show that the courts therein did not "outrightly reject the 'privity of contract' rule, but extended the obligation of the manufacturer to the subpurchaser in such instances upon the basis of the demands of 'so-

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80d. The Court adds: "For the meaning of the words, 'Family' and 'household' see, *Way Estate,* 379 Pa. 421, 109 A.2d 164 (1954) and *Shank Estate,* 399 Pa. 656, 161 A.2d 47 (1960)."

UCC § 2—318 is quoted *supra* note 53; Comment 3 to this section appears in footnote 54, *supra.*

In a footnote at this point in the opinion, the Court cites Duart v. Axton Cross Co., 19 Conn. Supp. 188, 110 A.2d 647 (1954) to the effect that a statute "exactly similar" to § 2—318 of the UCC adopted in Connecticut to be effective October 1, 1961, was interpreted to the effect "that a *maid* was not a member of the buyer's household" (emphasis supplied). Actually, it was a *cook* employed by a college who was held not to be a member of the household, which may, perhaps, be somewhat more justifiable than so holding with respect to a maid living with the family by whom she is employed. The cook in question neither lived at the college nor took her meals there, but came in by the day.

80e. Citing Williston on Sales, § 244 (3d ed., 1948) and C.J.S., Sales, § 305.

80f. Citing Prosser on Torts, Ch. 17, § 84 (2d. 1955); Nock v. Coca-Cola Bottling Works, *supra* note 1; Catani v. Swift & Co., *supra* note 7.

80g. Nock and Catani, *supra* preceding note.

cial justice.' Regardless of the rationale employed in these decisions, it is now established beyond argument in Pennsylvania that a subpurchaser may sue the manufacturer directly in food cases for breach of an implied warranty of fitness regardless of the lack of privity. . . .

The Court then concludes:

> In no case in Pennsylvania has recovery against the manufacturer for breach of an implied warranty been extended beyond *a purchaser* in the distributive chain. In fact the inescapable conclusion from *Loch v. Confair*[80h] is that no warranty will be implied in favor of one who is not in the category of a purchaser.

Finding that there is no "impelling meritorious reason" why the implied warranty should be extended to the bartender, an employee of the purchaser, since he is a complete stranger "to any contractual transaction involved," the court concludes in a somewhat incomprehensible manner by not distinguishing between *implied in fact* warranties and constructive (implied in law) warranties:

> Further, in express warranties the purchaser or subpurchaser can rely thereon, for they are considered part of the consideration for the purchase and are meant to be relied upon by the purchaser.[80i] So also, the basis for recovery upon an implied warranty . . . must be that the implied warranty forms a part of the consideration for the contract[?], and flows from the manufacturer to subpurchaser through the conduit of a contractual chain.[80j]

This leaves the plaintiff bartender to his remedy in tort since the Court suggests that he "has an adequate remedy in trespass." On this point, opinions may well differ since if the defendant company can show due care, the plaintiff may still be left without any real remedy although he was truly "an innocent bystander."

Analysis of the opinion in *Hochgertel v. Canada Dry Corporation*[80k] leaves some perplexing questions: Why should a privity requirement be interposed when the warranty is constructive, that is, originally and basically sounding in tort rather than contract? What type of "implied warranty" did the Court have in mind in its opinion? Who may properly be considered within the distributive chain?

80h. *Supra* note 35.

80i. Citing Silverman v. Samuel Mallinger Co., *supra* note 36.

80j. Hochgertel v. Canada Dry Corp., *supra* note 3. There was a vigorous dissenting opinion by Mr. Justice Musmanno.

80k. *Supra* note 3.

Does this decision point the way to recovery by subpurchasers of products in addition to foodstuffs if they are within the distributive chain? It would seem that it does if the fair implications of the opinion are followed through to a logical conclusion.

In still another connection, the courts of Pennsylvania have had occasion to consider the question of warranty in the sale of articles of apparel. In a case of novel impression, *Barrett v. S. S. Kresge Co.*,[81] the plaintiff purchased a dress from the defendant company for one dollar. Upon wearing it, she suffered an attack of acute dermatitis, a serious skin irritation. Thereupon the plaintiff brought this action. When the jury returned a verdict in favor of the plaintiff, defendant moved for judgment *n.o.v.*, based on the lack of reliance upon the vendor's skill or judgment and alleging that there was insufficient evidence of any deleterious substance in the dress to take the case to the jury.[82] Although the trial court noted a similarity between articles of clothing designed and sold for human wear "and the foodstuff cases" defendant company's motion was nevertheless granted because of an apparent allergy plaintiff had which precluded recovery against the vendor.[83]

One of the unfortunate limitations circumscribing the action for breach of warranty is well illustrated by *Frankel v. Styer*,[84] a recent federal district court case tried in the Eastern District of Pennsylvania. Here, an action was brought by the guardian of certain minor children alleging that the wrongful death of their father was caused by a breach of warranty. In another count, negligence was alleged but the allegation of breach of warranty was also incorporated in this count. The court held that under Pennsylvania law, the guardian of minor children was without a right to bring this action saying, "there is no such thing in the law of Pennsylvania as an action for wrongful death based on breach of warranty," quoting "the leading case" of *Birch v. Pittsburgh C. C. & St. L. Railway.*[85] As the theory of recov-

81. 31 Pa. D. & C. 379 (C.P. 1938); 144 Pa. Super. 516, 19 A.2d 502 (1941).

82. The court referred to an English case, Grant v. Australian Knitting Mills, Ltd. (Privy Council 1935), L.R.A.C. 85 (1936) in which the "privity requirement" alleged to exist by the *obiter dicta* in Winterbottom v. Wright, 10 Mees. & W. 109, 11 L.J. Ex. 415, 152 Eng. Rep. 402 (Ex. 1842) was flatly rejected.

83. Where allergies exist, it is the general rule that recovery will be denied unless the allergy is so prevalent that the manufacturer or retailer is under a duty to warn prospective customers of the possibility of injury from the use of the product, *cf.* Scientific Supply Co. v. Zelinger, 139 Colo. 568, 341 P.2d 897 (1959); Crotty v. Shartenberg's New Haven, Inc., 147 Conn. 460, 162 A.2d 513 (1960); Jacquot v. Wm. Filene's Sons, 337 Mass. 312, 149 N.E.2d 635 (1958); Zampino v. Colgate-Palmolive Co., 10 Misc.2d 686, 173 N.Y.S.2d 117 (Sup. Ct. 1958).

84. 201 F. Supp. 726 (E.D. Pa. 1962).

85. 165 Pa. 339, 30 Atl. 826 (1895).

ery was "unclear," according to the court, it was necessary to grant defendant's motion to dismiss—with leave, however, to the plaintiff to amend his complaint.[86] This emphasis on the use of the tort action is further highlighted in *Hochgertel v. Canada Dry Corporation*,[86a] where the Supreme Court of Pennsylvania observes in regard to a plaintiff not in privity: "His cause of action is basically one of tort . . . Plaintiff has an adequate remedy in trespass, and with the judicious regulations as to proof, enunciated in *Loch v. Confair*,[86b] supra, both parties will enjoy a fair day in court."[86c] With these rather cryptic statements regarding "judicious regulations as to proof," and "a fair day in court," the Supreme Court sustained the lower court's order of dismissal.

Another limitation which has been recognized by the Pennsylvania courts and represents a general rule is that imposed by the disclaimer of liability.[87] In *Eimco Corp. v. Joseph Lombardi & Sons*,[88] a typical provision was made a part of the written contract of sale of certain rockershovel machines; it read:

> All equipment offered herein is fully guaranteed for a period of one (1) year from the date of initial operation and any parts which prove defective through improper workmanship or material will be replaced, without charge f.o.b. Salt Lake City, Utah. (4) (a) The Company agrees to have repaired at its factory, or to replace without cost F.O.B. its factory, any defective parts of its manufacture which within one year from date of shipment and following examination by the Company's inspectors shall prove to have been defective in either workmanship or material when shipped. The Company's liability for damages or losses incurred or caused by such defectives shall be limited to the foregoing.[89]

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86. On this point, the court observed: "While the second count of the amended complaint does charge defendant with negligence, it also incorporates by reference every allegation of the first count respecting breach of warranty, and plaintiff's theory of recovery under the second count is unclear.

"We think both the interests of justice and of clarity require that plaintiff be afforded an opportunity to file a more definite statement in the particulars indicated, and to amend the caption to accord with Pa.R.C.P. 2202(b)." Frankel v. Styer, *supra* note 84.

86a. *Supra* note 3. Case is stated *supra* notes 80(a) to 80(k).

86b. *Supra* note 35.

86c. Hochgertel v. Canada Dry Corp., *supra* note 3.

87. Text at note 174, *et seq. infra.*

88. 193 Pa. Super. 1, 162 A.2d 263 (1960).

89. Other provisions of the contract considered pertinent were quoted by the court: "(6) The Company shall not be held liable under this contract for any special, indirect or consequential damages whatsoever."

The court concluded that the sale of these shovels was clearly intended "to be one of a specified article under its patent and trade name," and therefore there was no implied warranty as to its fitness for any particular purpose.[90] Citing *Frantz Equipment Co. v. Leo Butler Co.*,[91] the court remarked: "The only question remaining is whether there was a breach of any implied warranty of merchantability. This is a warranty implied by law that the goods are reasonably fit for the general purpose for which they are sold."[92]

The court found that the written contract definitely limited the liability of the manufacturer of the shovels by the provisions quoted above, namely, to replacement of defective parts (reminiscent of a similar disclaimer clause used in the standard automotive sales contract).[93] The court also found that there was a custom in the mining industry which limited liability to this extent.[94] After quoting the Uniform Sales Act,[95] it was found that the manufacturer had "fulfilled its agreement by replacing the damaged parts and restoring the machine to operation without charge, which was their only obligation under the contract."[96]

Under the statutes,[97] there is a further requirement which must be fulfilled by the party claiming damages for breach of warranty. The condition precedent to recovery by the buyer is the giving of notice to

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"(10) (a) This contract expresses the entire agreement between the parties hereto and all previous negotiations, conversations and understandings are merged herein; and this contract cannot hereafter be modified except by writing signed by the Customer and approved by an officer of this Company. All proposals are subject to price changes, without notice, fifteen days after date issued."

90. The court quotes the Uniform Sales Act § 15. Implied warranties of quailty (4), referring to sales of articles under "patent or other trade name."

91. *Supra* note 77.

92. Citing Uniform Sales Act § 15(2).

93. This disclaimer clause is referred to by the court in Jarnot v. Ford Motor Co., *supra* note 3, but not deemed applicable and is set forth in Henningsen v. Bloomfield Motors, Inc., *supra* note 1, but held unenforceable as contrary to public policy.

94. As to custom and usage generally, see 5 WILLISTON, CONTRACTS (3d ed. Jaeger 1961) Chapter 23.

95. Section 71: "Where any right, duty or liability which would arise under a contract to sell or a sale, by implication of law, it may be negatived 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 . . . . " PA. STAT. ANN. tit. 69, § 332 (1915).

96. Eimco Corp. v. Joseph Lombardi & Sons, *supra* note 88.

97. Uniform Commercial Code, § 2—607; Uniform Sales Act § 49.

the seller "within a reasonable time" under both the Uniform Commercial Code[98] and the Uniform Sales Act.[99]

In a recent case, *Pritchard v. Liggett & Myers Tobacco Co.*,[100] the court reviewed the Pennsylvania cases and observed: "Defendant correctly contends that the requirement of notice within a reasonable time is a condition precedent to plaintiff's right of recovery, as to which plaintiff has the burden of proof." The court held that the plaintiff had given notice within a reasonable time. This requirement is embodied in the statutes of the great majority of jurisdictions; however, as might be expected, there is no uniformity to be found in the decisions as to what constitutes a "reasonable time."

III. WHAT ARE THE WARRANTIES INVOLVED?

From this panoramic review of the history of warranty in Pennsylvania, it may readily be inferred that the concept of warranty without privity even when limited to food did not, like Venus, spring "full-panoplied" from the brow of its progenitor. In fact, the law affords few better illustrations of the slow, agonized, faltering development of a rule of public policy than the gradual obliteration of the requirement of privity from the doctrine of warranty in certain specified cases.

Any discussion of privity of warranty necessarily requires an examination of the nature of warranty. Almost six centuries ago, when

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98. Section 2—607(3)(a) reads in pertinent part: "Where a tender has been accepted 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 . . ." (Italics supplied).

99. Section 49 reads in pertinent part, "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." (Italics supplied).

100. 134 F. Supp. 829 (W.D. Pa. 1955), *aff'd* 295 F.2d 292 (3d Cir. 1961), holding that although the plaintiff was required under Pennsylvania law to prove that notice of breach of warranty had been given within a reasonable time, an allegation to that effect in the complaint was unnecessary. As to reasonable time, the court noted the following authorities: "See Pa. Uniform Sales Act § 49, 69 P. S. § 259; Texas Motorcoaches, Inc. v. A. C. F. Motors Co., 154 F.2d 91 (3d Cir. 1946); Kull v. General Motors Truck Co., 311 Pa. 580, 166 A. 562 (1933); Wright v. General Carbonic Co., 271 Pa. 332, 114 A. 517 (1921); Hazelton v. First Nat. Stores, Inc., 88 N.H. 409, 190 A. 280 (1937). The foregoing decisions of the Pennsylvania Supreme Court also indicate that in the state courts, the buyer has the further burden of pleading with a fair degree of specificity that notice was given within a reasonable time." Pritchard v. Liggett & Myers Tobacco Co., *supra* at 832; as to the present posture of this case, see *supra* note 28.

the earliest reported case on warranty arose,[101] it was conceived as essentially sounding in tort, and it was not until another century had passed that special assumpsit found its place among the recognized forms of action.[102] In its early form, assumpsit was deemed a trespass upon the case as demonstrated by *Slade's Case*.[103] However, this tort action soon evolved as a contract action to be classified with covenant rather than tort. There is no longer any question that this is the view taken of assumpsit today.[104]

Although this is true, and warranty is regarded as a promise or special form of contract, this loses sight of the original character of the action and confusion is caused by the failure to realize that a vendor's liability for breach of warranty may sound in tort as well as in contract.[105] Apparently, the first reported case in which an action for breach of warranty was brought in assumpsit was *Stuart v. Wilkins*,[106] decided less than two hundred years ago. Thus, for some four centuries, the action rested on a wrong or tort, not on the breach of an enforceable promise.[107]

In the early cases, it was held that the word "warrant" would have to be used if an actual warranty were to be found. This emphasis on the use of the word as being essential continued until the close of the eighteenth century when a mere affirmation of fact that certain paintings were the authentic works of a specified painter was found to be a warranty in *Power v. Barham*.[109] And in *Jendwine v. Slade*,[110] a somewhat similar case, a statement as to the identity of the painter of certain pictures was deemed a matter of opinion.[111]

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101. Ames, *History of Assumpsit*, 2 HARV. L. REV. 1, refers to *Fitz Ab Monst de Faits*, pl 160 (1383) as "perhaps, the earliest reported case upon a warranty."

102. WILLISTON, SALES (3d ed. 1948) §§ 195 *et seq.*

103. 4 Coke 92b, 76 Eng. Rep. 1072 (K.B. 1602).

104. WILLISTON, *op. cit.* note 102 § 196.

105. WILLISTON, CONTRACTS (Rev. ed. 1936) § 970.

106. 1 Dougl. 18, 99 Eng. Rep. 15 (K.B. 1778).

107. WILLISTON, SALES (3d ed. 1948) §§ 196-257.

108. Chandelor v. Lopus, Cro. Jac. 4, 79 Eng. Rep. 3 (Ex. 1625); Stuart v. Wilkins, *supra* note 106.

109. 4 Ad. & El. 473, (K.B. 1836).

110. 2 Esp. 572 (N.P. 1797).

111. This was based on the view of Lord Kenyon that it was not possible to consider this a case of warranty since the artists who were supposed to have painted the pictures in question had died almost a century ago and thus, it could only be a matter of *opinion* by whom they were painted. In Power v. Barham, *supra* note 109, by contrast, the representation that the pictures were painted by Canaletti stated in the bill of sale was found to be a warranty by the jury and this was held to be correct.

Aside from this necessity of proving the use of the word "warrant,"[112] there was yet another obstacle introduced to defeat the plaintiff seeking recovery for breach of warranty. An *intent* to warrant was held essential in *Pasley v. Freeman,*[113] where it was said, "an affirmation at the time of a sale is a warranty provided it appears on evidence to have been so intended."[114] There seems to be no earlier precedent for this statement and as might be expected, leading authorities have criticized it as not representative of the actual law.[115]

Curiously enough, Pennsylvania retained this concept for almost three hundred years; indeed, the Chief Justice expressed regret that the rule of *Chandelor v. Lopus*[116] should have "been swept away by a flood of innovation in England and some of our sister States."[117] This rigid adherence to form makes the recent decision in *Hochgertel v. Canada Dry Corporation*[118] all the more understandable, even if not acceptable. Until the very end of the nineteenth century, the Supreme Court of Pennsylvania was still insisting on

112. The phrases generally required were *"warrantizando vendidit"* or *"warrantizando barganizasset"*; the word "guaranty" originally attributed to Norman-French would readily become "warranty" by a change of the initial letter comparable to the anglicized form of "Guillaume," or William. Until the 18th century, the use of these technical expressions was still prevalent, Butterfield v. Burroughs, 1 Salk. 211 (Q.B. 1706).

This insistence on form is reminiscent of the early development in other fields of common law such as instruments under seal. In alluding to this, a 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).

Somewhat reminiscent of this ancient era is the adherence of the court to the archaic dictum in Winterbottom v. Wright, *infra* note 208, in the recently decided case of Hochgertel v. Canada Dry Corp., *supra* note 3. Case is more fully stated *supra* notes 80a to 80k.

113. 3 T.R. 51, 100 Eng. Rep. 450 (K.B. 1789); 1 WILLISTON, SALES § 198 (3d ed. 1948).

114. Pasley v. Freeman, *supra* preceding note.

115. Williston, *op. cit. supra* note 113 § § 198 *et seq.*

116. *Supra* note 108.

117. Borrekins v. Bevan, 3 Rawle (Pa.) 23 (1831); McFarland v. Newman, 9 Watts (Pa.) 55 (1839).

118. *Supra* note 3. WILLISTON, SALES § 199. American law—Pennsylvania (3d ed. 1948).

something more than "a naked averment of a fact" to find a warranty. The Court concluded that, although statements had been made by the vendor that a horse being sold "was kind, sound and gentle," these were mere assertions of fact "which the cases cited[119] show was not a warranty, nor the evidence of one."[120]

Modern decisions have consistently rejected the view that any special words are necessary, or that an intent to warrant is essential, in order to create a warranty.[121] In fact, the tendency has been to enlarge the scope of the warranty so that express words are certainly not necessary, but it has even been suggested that in appropriate instances, a statement of opinion may be sufficient to bind the vendor, as where the latter is in the position of a fiduciary or expert, as illustrated by the opinions in *Aultman v. Weber,*[122] and *Couchman v. Hill.*[123]

That intent to warrant is not a prerequisite is exemplified by *Kiddell v. Burnard.*[124] Here the court was confronted with a warranty of soundness of a horse. It was held that if there was any disease from which the horse was suffering or had suffered which would "diminish the natural usefulness of the horse, such horse is unsound."[125] Warranties of soundness play a most important role in the rural sections of this country where animal husbandry is an important means of earning a livelihood. In a recent case, *Mitchell v. Rudasill,*[126] the court made this statement:

> 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

119. McFarland v. Newman, *supra* note 117; Jackson v. Wetherill, 7 S. & R. (Pa.) 480 (1822).

120. Holmes v. Tyson, 147 Pa. 305, 23 Atl. 564 (1892).

121. Ford Motor Co., v. Cullum, 96 F.2d 1 (5th Cir. 1938) cert. den. 305 U.S. 627 (1938); Becker v. Sprowles, 310 Ky. 636, 220 S.W.2d 564 (1949); Adams v. Peter Tramontin Motors Sales, Inc., 42 N.J. Super. 313, 126 A.2d 358 (1956); Jackson v. Gifford, 264 P.2d 313 (Okla. 1953).

122. 28 Ill. App. 91 (1888).

123. [1947] 1 K.B. 554 (C.A.) (1946).

124. 152 Eng. Rep. 282 (Ex. 1842).

125. *Id.* at 283.

126. Mitchell v. Rudasill, 332 S.W.2d 91 (Mo. App. 1960).

> 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.[127]

The court found that the cows which were the subject matter of the sale had mastitis of the udder which prevented them from giving a suitable amount of milk; this was held to be a breach of the warranty of soundness.[128]

In a truly representative case, *Miller v. Penney,*[129] the court had occasion to consider a similar warranty with respect to the soundness of a bull of pedigreed ancestry.[130] This prize animal had been ac-

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127. *Id.* at 94-95.

128. It appeared that the plaintiff had submitted his case on the theory of an implied warranty rather than that of an express warranty; however, he actually proved an express affirmation that the cows had sound udders and would give "a decent flow of milk." Nevertheless, the court affirmed, stating: "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.'"

129. 77 F. Supp. 887 (W.D. Mo. 1948).

130. 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, plebian 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.

claimed as "Grand Champion" on eleven occasions and was considered an outstanding specimen. Although sold for breeding purposes for the sum of $10,600, he completely disappointed the cows and his new owner who brought this action to recover the price, as well as the cost of care and maintenance to which this champion of the "bull ring" had become accustomed.

In highly humorous vein,[131] the federal district court rendered an opinion in favor of the plaintiff and held that the bull was not as warranted since he was totally unfit for breeding purposes.[132]

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.

"Eileenmere 627th was born in the stable of luxury and raised in the field of plenty. With a long line of champions as his ancestors, 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 tinselled 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." . . . Miller v. Penney, *supra* note 129.

131. This is adequately demonstrated by the following excerpt from the court's opinion: "He was touted as the great son of a noble sire and heralded far and wife [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."

132. In addition to Miller v. Penney, *supra* note 129, there have been any number of similar cases involving warranties of animals; among these may be cited: Ver Steegh v. Flaugh, 251 Ia. 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 (Mun. Ct. 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.

A. *Express Warranty*

The distinction between express and implied warranties which the court makes in *Mitchell v. Rudasill,*[133] is to be emphasized since it is one that is sometimes not observed or noted by the courts and by attorneys generally. As indicated, the warranty is express when the seller makes an affirmation on which it is intended that the buyer shall rely in making the purchase; similarly, a warranty in fact would be implied from the conduct of the parties including their prior dealings. As used by the court in the above quotation, the implied warranty is one imposed upon the parties by law, and should more properly be described as a *constructive* warranty.

Another source of confusion which often plagues litigants and may sometimes bemuse courts is the failure to observe that *scienter,* so fundamental a requisite in fraud, is not an essential ingredient in warranty. Although the basic elements of warranty and of fraud are readily recognized in theory, the cases often fail to apply the well-established distinction between the two in practice; and it may, therefore, not be amiss to draw attention to court decisions which state with clarity the fact that guilty knowledge is a *sine qua non* in fraud, but not in breach of warranty. " 'The representation of fact which induces a bargain,' " said the court, " 'is a warranty. 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 of a warranty is absolute, and is imposed as a matter of law irrespective of whether the seller knew or should have known of the falsity of his representations. Fraud, on the other hand, involves the additional requirement that the seller knew, or, in the exercise of reasonable diligence should have known, that his representations were false."[134]

The principal development in the law of express warranty is to be found in the cases holding manufacturers liable on advertisements, tags, or labels containing factual representations as to the products being offered for sale. With the tremendously increased coverage of the media for the dissemination of advertising, more especially radio and television, such a development is both logical and necessary, and

133. *Supra* note 126.

134. Mary Pickford Co. v. Bayly Bros., 12 Cal.2d 501, 86 P.2d 102 (1939), quoting WILLISTON, CONTRACTS § 1505 (Rev. ed. 1937). Cf. Green v. Caribou Oil Mining Co., 179 Cal. 787, 178 Pac. 950 (1919); Young v. Three For One Oil Royalties, 1 Cal.2d 639, 36 P.2d 1065 (1934); Gillis v. Pan American Western Pet. Co., 3 Cal.2d 249, 44 P.2d 311 (1935); Boss v. Silent Drama Syndicate, 82 Cal. App. 109, 255 Pac. 225 (1927); Belden v. California Fireproof Storage Co., 140 Cal. App. 706, 35 P.2d 1034 (1934). WILLISTON, *op. cit.* §§ 673, 970, 974, 1487, 1505.

Pennsylvania seems to apply it when the subpurchaser is within "the distributive chain."[135]

B. *Implied or Constructive Warranty*

While there may be some justification for requiring privity in connection with actions for breach of express warranties, this seems totally missing when the warranty is imposed by law and should run to anyone injured by the harmful or defective nature of the product. Any number of cases have recognized the existence of this "implied" or constructive warranty in connection with foodstuffs and beverages.[136]

> 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.[137]

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135. According to the decision in Hochgertel v. Canada Dry Corp., *supra* note 3; cf. Jarnot v. Ford Motor Co., *supra* note 3.

136. Thus, it has been said, in Stanfield v. F.W. Woolworth Co., 143 Kan. 117, 53 P.2d 878 (1936):

"2. One who, for compensation, sells or provides food for immediate consumption to another impliedly warrants the food to be wholesome. This is true whether the transaction is in all of its aspects properly classified as a sale.

"3. One to whom, for a compensation, food is sold or provided for immediate consumption, and who suffers food poisoning as a result of consuming the food, may maintain an action upon the implied warranty of its wholesomeness without alleging or proving negligence in the selection or preparation of the food by the one who sold or provided it."

137. 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., 189 Iowa 775, 176 N.W. 382, to this effect:

"1. A manufacturer who prepares and puts upon the market in sealed packages an article of food for human consumption, is held not only to the *highest degree* of care in preparing such article, but is also held to impliedly

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

This *implied* warranty is fully recognized in *Jarnot v. Ford Motor Co.*[138] Here, even in the presence of an express disclaimer, the court held that the constructive warranty would not be affected thereby, quoting *Frigidinners v. Branchtown Gun Club.*[139] But the case which has left the most widespread impact on the concept of constructive warranty is *Henningsen v. Bloomfield Motors Co., Inc.*[140] Disregarding privity, the court not only held the maufacturer liable to the purchaser for breach of the implied warranty, but both the manufacturer and the vendor were found liable to the injured wife of the purchaser.[141]

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warrant to the ultimate consumer that the article is fit for human consumption. It follows that the consumer, in purchasing such an article, is not shackled by any rule of *caveat emptor,* and, if injured, without want of care on his part, by eating such article, he may maintain an action for damages against the manufacturer, both (1) for negligence and (2) for breach of implied warranty, even though there is no *privity of contract* between the parties."

The court also cites numerous authorities and quotes 5 WILLISTON, CONTRACTS § 1505 (Rev. ed. 1937):

"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. (Citing Foote v. Wilson [Mercantile Co.], 104 Kan. 191, 195, 178 P. 430.) 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. [The court quotes the next two paragraphs of the same section as well]." Davis v. Van Camp Packing Co., *supra.*

138. *Supra* note 3.

139. *Supra* note 33.

140. *Supra* note 1.

141. After a comprehensive discussion of the impact of the uniform sales act on the common law, the court summarized its effect by declaring: "The uniform act codified, extended and liberalized the common law of sales. The

An important consequence of the recognition of the distinction between the express warranty and the constructive warranty is in the admissibility of evidence.[142] According to the usual interpretation of the parol evidence rule, evidence extrinsic to the written contract of sale and the warranties therein contained would not be admitted to vary or contradict these warranties.[143] However, where the warranty is imposed by law, the parol evidence rule is held inapplicable as in *Huddleston v. Lee.*[144] The court discussed the distinction between warranties and pointed out that the early common law regarded the warranty as an obligation imposed by the law of torts, citing the case of *Kohn v. Ball.*[145] In this case it was held that the sale of an automobile under an express warranty did not exclude a warranty of merchantability imposed by law.[146]

Although the courts have seen fit to extend the "implied" or *constructive* warranty to foodstuffs, beverages and similar articles,[147] it is inconceivable that there has been any extension of this protective device comparable to the development of the warranty of seaworthiness.[148] From a rather humble beginning in *The Osceola,* [149] down

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motivation in part was to ameliorate the harsh doctrine of *caveat emptor,* and in some measure to impose a reciprocal obligation on the seller to beware. The transcendent value of the legislation, particularly with respect to implied warranties, rests in the fact that obligations on the part of the seller were imposed by operation of law, and did not depend for their existence upon express agreement of the parties. And of tremendous significance in a rapidly expanding commercial society was the recognition of the right to recover damages on account of personal injuries arising from a breach of warranty . . . .

"The general observations that have been made are important largely for purposes of perspective. They are helpful in achieving a point from which to evaluate the situation now presented for solution. Primarily, they reveal a trend and a design in legislative and judicial thinking toward providing protection for the buyer. It must be noted, however, that the sections of the Sales Act, to which reference has been made, do not impose warranties in terms of unalterable absolutes. [The Act] provides in general terms that an applicable warranty may be negatived or varied by express agreement. As to disclaimers or limitations of the obligations that normally attend a sale, it seems sufficient at this juncture to say they are not favored, and that they are strictly construed against the seller." Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960) noted 14 RUTGERS L. REV. 829 (1960).

142. 4 WILLISTON, CONTRACTS § 643 (3d ed. Jaeger 1961).

143. *Op. cit.,* §§ 631 *et. seq.*

144. 39 Tenn. App. 465, 284 S.W.2d 705, *cert. den.* (1955).

145. 36 Tenn. App. 281, 254 S.W.2d 755 (1953).

146. This is in accord with the majority rule.

147. Text at note 313, *infra.*

148. For a discussion of the development of this warranty, see 4 WILLISTON, CONTRACTS § 643 (3d ed. Jaeger 1961), especially pp. 1101-1109.

149. 189 U.S. 158 (1902).

to and through *Mitchell v. Trawler Racer, Inc.*,[150] the courts by judicial construction have steadily enlarged the protection afforded to seamen and longshoremen, when engaged in the ship's service, until finally it has been said that the obligation to furnish a seaworthy vessel, even as to stevedores, "is a form of absolute duty."[151] 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.[152] 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."[153]

C. *Warranty of Fitness for a Particular Purpose*

Where the purchaser made known to the vendor the purpose or use for which he was buying the chattel and relied on the seller's superior judgment, skill and experience, the common law considered that a warranty that the goods in question would be "reasonably fit for that purpose, accompanied the sale."[154] By a process of gradual development, the courts now imply this warranty from the mere fact that the goods have been sold by the vendor after the buyer has stated his needs and the purpose for which he proposes to use the

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150. 362 U.S. 539 (1960).

151. Grzybowski v. Arrow Barge Co., 283 F.2d 481 (4th Cir. 1960); Williston, *op. cit.* § 643, note 20 at pp. 1103-1104.

152. Citing Booth Steamship Co., v. Meier & Oelhaf Co., 262 F.2d 310 (2d Cir. 1958).

153. 4 WILLISTON, *op. cit.* § 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), noted 34 NOTRE DAME LAW. 576.

Waterman Steamship Corp. v. Dugan & McNamara, Inc., and Crumady v. The Joachim Hendrik Fisser, *supra,* as well as the other leading cases in this field are discussed in Italia Societa Per Azioni di Navigazione v. Oregon Stevedoring Co., 310 F.2d 481 (9th Cir. 1962) where the court observed: "In recent history liability for breach of warranty has been associated with contract more than anything else. . . . Concepts of privity of contract are ever more gradually giving way to sweeping coverage of warranty. . . . In Waterman and Crumady the shipowner was allowed to recover for breach of warranty even though there was no direct contract relationship between him and the stevedoring company. However, the contract idea was adhered to since the ship or shipowner were considered to be that third-party beneficiaries of the contract between the stevedoring company and the one who contracted for its services." See also Nordeutscher Lloyd, Brennan v. Brady-Hamilton Stevedore Co., 195 F. Supp. 680 (D. Ore. 1961) where the court discusses the Waterman, Crumady and other leading cases dealing with the warranty of seaworthiness.

154. Dushane v. Benedict, 120 U.S. 630 (1886) at 636.

goods.[155] Even where the chattel comes within the general description of articles of its kind, if it is not fit for the particular purpose so stated, the vendor is nevertheless liable on this warranty.[156] It is most frequently encountered in sales of food products, drugs, pharmaceuticals, cosmetics and more recently, detergents.[157] And it has found its way into other fields as well. In the case of foodstuffs and the like, there is little room for differentiation between this warranty and that of merchantable quality which will be discussed later.[158]

The distinction has been succinctly stated by the United States Court of Appeals for the Third Circuit in a case applying Pennsylvania law:[159] "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."[160]

And this concept has been incorporated in the statutes:[161]

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:

155. The S.S. Angelo Toso, 271 Fed. 245 (3d Cir. 1921); Fruehauf Trailer Co. v. Gilmore, 167 F.2d 324 (10th Cir. 1948); Burge Ice Machine Co. v. Weiss, 219 F.2d 573 (6th Cir. 1955); Shafer v. Reo Motors, Inc., 108 F. Supp. 659 (W.D.Pa. 1952), *aff'd*, 205 F.2d 685 (3d Cir. 1953); Buchanan v. Dugan, 82 A.2d 911 (D.C. Munic. Ct. App. 1951); Fraley v. Ford, 81 Ariz. 268, 304 P.2d 1068 (1957); Wallower v. Elder, 126 Colo. 109, 247 P.2d 682 (1952); Kaufman v. Katz, 356 Mich. 354, 97 N.W.2d 56 (1959) (barrels held unfit for special purpose); Knapp v. Willys-Ardmore, Inc., 174 Pa. Super. 90, 100 A.2d 105 (1953) (goods must be suitable for special purpose of the buyer, not merely fit for general purposes of goods of that classification); Croton Chemical Corp. v. Birkenwald, 50 Wash.2d 684, 314 P.2d 622 (1957); Roddis Plywood Corp. v. Dorchester Furniture Co., 268 Wis. 17, 66 N.W.2d 702 (1954).

156. White v. Oakes, 88 Me. 367, 34 Atl. 175 (1896); Beggs v. James Hanley Brewing Co., 27 R.I. 385, 62 Atl. 373 (1905); Preist v. Last, [1903] 2 K.B. 148 (C.A.); Frost v. Aylesbury Dairy Co., Ltd., [1905] 1 K.B. 608 (C.A.).

157. Hamon v. Digliani, 148 Conn. 710, 174 A.2d 294 (1961) "Lestoil"; Worley v. Procter & Gamble Mfg. Co., 241 Mo. App. 1114, 253 S.W.2d 532 (1952) "Tide"; cf. Cumberland v. Household Research Corp., 145 F. Supp. 782 (D. Mass. 1956).

158. See text at note 164, *infra*.

159. For a discussion of Pennsylvania law, see Section II (text at notes 7-100, *supra*).

160. Pritchard v. Liggett & Myers Tobacco Co., *supra* note 1.

161. Uniform Sales Act and Uniform Commercial Code.

(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appear 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.[162]

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.[163]

D. *Warranty of Merchantable Quality*

Of real assistance to the injured consumer is the warranty of merchantability.[164] At common law, this requires that the goods shall be salable as goods of the general kind which they were described or supposed to be when purchased, or reasonably suitable for the ordinary uses for which they were manufactured or produced.[165] When applied to the sale of foods or drugs, and more recently to cosmetics and even detergents, this warranty requires that the product be fit for human consumption, if so intended, or suitable for use without injurious after-effects. In these situations, the warranty has received its broadest application; in the more outspoken jurisdictions, this breadth of interpretation has quite candidly been attributed to public policy which entitles the consumer to protection whether he be in privity or not.[166] In these changing times, the warranty of merchantable quality has been held to cover the sale of mechanical instrumentalities such as automobiles, aircraft, and their accessories, even where an express disclaimer purports to limit or negative liability.[167] In *Henningsen v. Bloomfield Motors Co., Inc.*,[168] the court did not hesitate to ground its decision on the firm

162. USA § 15.

163. UCC § 2—315.

164. 1 WILLISTON, SALES, §§ 243 et seq. (3d ed. 1948).

165. 2 WILLISTON, CONTRACTS, § 378A (3d ed. Jaeger 1959).

166. See cases discussed in Section VII (text at note 310 *et seq., infra*).

167. For a discussion of the effect of a disclaimer provision, see Section IV (text at note 174, *et seq., infra*).

168. *Supra* note 1.

base of public policy.[169] The necessity of protecting the general public, where such a large segment uses the automobile, even in the absence of privity, would outweigh considerations of freedom of contract, particularly where the contract of sale is standardized, *i.e.*, where it is a contract of adhesion.[170] And the statutes embody these considerations:

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.[171]

UNIFORM COMMERCIAL CODE

> (1) Unless excluded or modified (Section 2—316[172]), 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.[173]

IV. NOTICE AND DISCLAIMER OF LIABILITY

A. *Notice*

In addition to the privity "requirement" so-called, a condition precedent of notice to the vendor by the buyer is imposed where recovery in damages is sought for breach of warranty.

At common law, there was considerable confusion among the decisions as to the effect of acceptance and retention of goods which had been sold on the right of action for breach of warranty.[174] Prior to

169. For a discussion of the effect of public policy on contracts, see WILLISTON, *op. cit.* §§ 615A and 626 (3d ed. Jaeger 1961).

170. Such as automotive contracts or insurance policies.

171. USA § 15.

172. UCC which reads: "Exclusion or Modification of Warranties."

173. UCC 2—314.

174. WILLISTON, SALES §§ 488, 489, for an elaborate citation of the authorities.

the adoption of the uniform statutes, it was essentially a question of fact as to whether acceptance of defective goods constituted a waiver of the rights of the buyer, particularly with respect to breach of warranty.[175] Both the Uniform Sales Act and the Uniform Commercial Code require that the *buyer* must notify the vendor of breach of warranty within "a reasonable time" after he discovers or should have discovered any breach; the pertinent provisions of these statutes read:

UNIFORM SALES ACT

> 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.[176]

UNIFORM COMMERCIAL CODE

> (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; . . .[177]

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

175. North Alaska Co. v. Hobbs, Wall & Co., 159 Cal. 380, 120 Pac. 27 (1911); in Reininger v. Eldon Mfg. Co., 114 Cal. App.2d 240, 250 P.2d 4 (1952), the court said: "Prior to the Uniform Sales Act it was a pure question of fact whether the receipt and retention by the buyer was made in such a way as to indicate he was assenting to the tender of nonconforming goods. It has never been the law in California that mere acceptance of defective goods with knowledge of their defects cuts off a buyer's right of action for breach of an express warranty as a matter of law. . . " 5 WILLISTON, CONTRACTS § 714 (3d ed. Jaeger 1961).

176. USA § 49. Acceptance Does Not Bar Action For Damages. THE RESTATEMENT OF CONTRACTS § 412 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."

177. UCC § 2—607(3)(a).

> 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.[178]

The purpose of the notice requirement, as the courts have signalized, "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."[179]

While, as has been pointed out, both of the uniform laws require the buyer to give reasonable notice, the rather strict interpretation given the Uniform Sales Act in some jurisdictions[180] to the effect that the nature of the defect and of the damage caused thereby must be disclosed has led to the change in terminology of the Uniform Commercial Code provision. The comments thereto and the section[181] dealing with definitions under the Code leave no doubt that

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178. WILLISTON, *op. cit.* § 714, at 399.

179. Judge Learned Hand in American Manufacturing 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., *supra* note 175.

180. Federal Sugar Refining Co. v. Midland Grocery Co., 23 F.2d 167 (2d Cir. 1927); Truslow v. Diamond Bottling Corp., 112 Conn. 181, 151 Atl. 492 (1930); Simonz v. Brockman, 249 Wis. 50, 23 N.W.2d 464 (1946) rehearing den. 249 Wis. 50, 24 N.W.2d 409; cf. Texas Motorcoaches v. A.C.F. Motors Co., 154 F.2d 91 (3d Cir. 1946).

Texas Motorcoaches v. A.C.F. Motors Co., *supra* is cited with approval in Clarizo v. Spada Distributing Co., 373 P.2d 689 (Ore. 1962), where the court remarked, "the requirement of notice, to be given by the vendee charging breach of warranty, is imposed as a condition precedent to the right to recover, and the giving of notice must be pleaded and proved by the party seeking to recover for such breach. . . .

"This court has construed ORS 75.490 to require that the buyer must notify the seller not only of the breach of warranty but also that he intends to claim damages for such breach. [Citations omitted] Other courts have adopted a similar construction. [Citing Whitfield v. Jessup, *supra* preceding note]." ORS 75.490 is U.S.A. § 49 quoted in text.

181. The official comment to this section (2—607, UCC) reads: *Purpose of Changes:* To continue the prior basic policies with respect to acceptance of goods while making a number of minor though material changes in the interest of simplicity and commercial convenience . . .

The time of notification is to be determined by applying commercial standards to a merchant buyer. "A reasonable time" for notification from a retail consumer is to be judged by different standards so that in his case it will be extended, for the rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy.

there was every intent on the part of the draftsmen to liberalize the notice requirement so that the rights of non-commercial buyers would not be jeopardized by this requirement.

However, under either statute, the question of what is "a *reasonable* time" still continues to plague the courts, leaving them hopelessly at odds. And while the statutes are "uniform," the interpretation the courts give them (or may give them), remains far from uniform, as the cases amply demonstrate.[182]

The content of the notification need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched . . .

Indicative of the greater liberality with respect to notice which the Uniform Commercial Code imports into the law is § 1—201. *General Definitions* . . . (25) which reads: "A person has 'notice' of a fact when:

(a) he has actual knowledge of it; or
(b) he has received a notice or notification of it; or
(c) from all the facts and circumstances known to him at the time in question he has reason to know that it exists."

For a general discussion of notice in its many implications, see WILLISTON, *op. cit.* § 887B.

182. United States v. Dewart Milk Prod. Co., 300 F. 448, construing Pa. Act 10 month's delay discoverable by inspection is unreasonable; Ruggles v. Buffalo Foundry Co., 27 F.2d 234 (CCA 6), applying Mich. Act 1 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 140 (C.A. 9), delay of two years in giving notice that shirt was defective held unreasonable.

Elkus Co. v. Voeckel, 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 A.D. 421, 165 N.Y.S. 468 (1917), 3 weeks held reasonable when the buyer did not know the seller's name and address; Ficklen Tobacco Co. v. Friedberg, 196 A.D. 409, 187 N.Y.S. 561 (1925), a year is an unreasonable time; Stone v. Bleim, 176 N.Y.S. 25 (App. Term) (1919), 10 days not unreasonable as matter of law; Pierce Foundation Corp. Co. v. Eagle Supply Co., 180 N.Y.S. 88 (App. Term) (1920), 4 months held unreasonable; Kaufman v. Levy, 102 Misc. 689, 169 N.Y.S. 454 (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.S. 227 (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, 155 Atl. 562 (1933), notice of breach of warranty as to age of trucks

It has also been held that a remote buyer must give notice to his immediate vendor as a condition precedent to recovery of damages for breach of warranty.[183] This may be true where there is a contractual warranty and privity is deemed necessary, but it should certainly not obtain where the warranty is imposed by law for the protection of the consumer and the manufacturer or other vendor has not been too greatly prejudiced by the delay.[183a]

B. *Disclaimer*

Aside from the so-called privity "requirement" and the condition precedent of notice discussed above,[184] there is another significant limitation on the possibility of recovery for breach of warranty: Rejection of liability by the use of a disclaimer provision. Here too, however, the courts have shown an inclination to protect the consumer, either by a strict construction of the limitation of liability clause,[185] or by categorically refusing to enforce the disclaimer.[186]

The unfortunate consequences of the rigid enforcement of a disclaimer provision are well illustrated by the decision in *Gagnon v.*

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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), 1 month delay of notice reasonable in sale of fishing boat; Chess & Wymond Co. v. LaCrosse 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), 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.*

Cf. Aced v. Hobbs-Sesack Plumbing Co., (Cal.) 360 P.2d 897 (1961), dealing with warranty of merchantability.

183. Columbia Axle Co. v. American Auto Insurance Co., *supra* note 179.

183a. It was so held in Greenman v. Yuba Power Products, Inc., 23 Cal. Rptr. 282 (Cal. App. 1962), where the court after citing the leading cases including Spence, Henningsen, Worley, Decker & Sons, all to be found, *supra* note 1, declared: "No sound reason exists for requiring the consumer to give notice of his intention to hold the manufacturer liable for a claimed breach of the latter's representations. . . ." As there is no relationship of buyer and seller between these parties, § 49 of the U.S.A. as adopted by California, Civ. Code, § 1769, would not apply, citing La Hue v. Coca-Cola Bottling, *supra* note 1.

184. Section IV, Part A (text at note 174 *supra*).

185. WILLISTON, *op cit.* §§ 602A, 626.

186. As, for example, in Henningsen v. Bloomfield Motors, Inc., *supra* note 1.

Speback.[187] There, the contract called for the sale of a specified lot of potatoes, one-half of the purchase being covered by a note given by one of the partners who bought the potatoes. He was given a bill of sale stating, "this sale is made with *the express understanding that there is no warranty of quality or quantity whatsoever.*"[188] When many of the potatoes turned out to be far from merchantable,[189] the partnership did not honor its note, and judgment was entered thereon *pro confesso.* Relying on a classic precedent, *International Milling Co. v. Hachmeister,*[190] the majority of the court held that parol evidence was inadmissible to show that 75% of the potatoes were unmerchantable. Thus, the partnership acquired title to certain potatoes which were "in a frozen, decayed and grossly unfit and unmerchantable state."[191] The decision seems subject to some criticism because if

187. 383 Pa. 359, 118 A.2d 744 (1955).

188. This is a typical disclaimer provision; emphasis supplied by the court. But as pointed out in the dissent, *infra* note 191, this should have no effect on *Constructive* warranties.

189. In the testimony, they were described graphically by various eyewitnesses as being "a mess," looking like "mud balls," "a sticky mess," and the frozen potatoes were described as "soft" and they were rotten.

190. 380 Pa. 407, 110 A.2d 186 (1955).

191. So described in the dissenting opinion by Musmanno, J. 383 Pa. 359, at 367, 118 A.2d 744, at 747-48; criticizing the majority opinion, the dissent continues: "The Majority Opinion states that the 'defendants could have examined and determined for themselves the merchantibility of the potatoes.' It was a question of fact for a jury to decide whether the defendants could have examined, or were required to inspect, each individual potato to ascertain its condition. In this connection, it is also noteworthy that when Kuzneski was specifically asked: 'Was it practical for you to dig down and check and examine these potatoes thoroughly,' he replied: 'It was impossible.'

"It is true that upon receiving the $15,000 cash from the defendants, the plaintiff made up a receipt in which appeared the statement that 'there is no warranty of quality or quantity whatsoever.' But even this apparently iron-sheeted barricade erected by the plaintiff may not shut off justice from one who has been palpably and grossly victimized. Whatever aggrieves fundamental fairness between man and man aggrieves the law.

"Regardless of what may have happened in the past when form frequently dominated over substance, and the letter of the law often ignored factual reality, it is the established jurisprudence of today that 'when a buyer relies on the judgment of a seller who knows the purpose for which the property is to be used, *there is an implied warranty that the property is reasonably fit for the purpose for which it was bought, and it is not excluded by a written contract eliminating any warranty that may have been made by the seller.* The implied sales warranty arises *independently and outside of the contract and is imposed by operation of law.*' Hobart Mfg. Co. v. Rodziewicz, 125 Pa. Super. 240, 244, 189 A. 580, 582 (1937).

"It does not comport with fair dealing that a seller may disobligate himself from plainspoken requirements of the law by inserting into a bill of sale a statement that he will not abide by the law. A potato merchant may refuse to

the potatoes were actually no longer potatoes, but merely a putrefied mass, then it would appear that there was either a lack, or a failure, of consideration.[192] This would justify rescission of the contract.

Of course, it is understood that as a general rule, disclaimer is merely an example of freedom of contract. However, where the contract in question is one of adhesion, the courts are quite uniform in interpreting it strictly against the vendor. In appropriate instances, as in *Henningsen v. Bloomfield Motors, Inc.*,[193] courts have refused to give any effect to disclaimer provisions on grounds of public policy. The desirability of limiting freedom of contract where its use would lead to abuse has been recognized in a statement by Chief Justice Hughes in *Morehead v. New York ex rel. Tipaldo*:[194]

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accept responsibility for the quality of his potatoes, but the article he sells must actually be *potatoes*. No disavowal of warranty can protect a businessman who sells oleomargarine for butter, or may it immunize from liability a wine dealer who markets cider as champagne. No amount of disclaimer of quality could save the trader who sells infected milk. It is, in fact, an affront to human intelligence and to every concept of responsibility which goes to make up civilized society for any vendor of food to proclaim that he will not be held to an accounting for taking money for bad food.

"The evidence reveals that the goods Gagnon sold to the defendants were not merchantable. He knew that the potatoes had been subjected to a severe frost as well as to the rigors of a snow storm and unusual rains. It was within his knowledge that potatoes hammered at by such severe climatic elements would quickly rot and become unfit for human consumption. Gagnon did not sell what he promised to sell, that is, potatoes.

"Despite the most valiant effort at self-preservation, a potato may deteriorate to the point where it is no longer a potato. Most of the tubers in this case had reached a stage of almost complete self-effacement. Bruised and debilitated from the attack of the frost, snow, and rain in the fields, they could offer no resistance to the forces of disintegration in the warehouse which levelled them into a common denominator and compounded them into an inedible mass.

"Although a potato seems to be more firmly constructed than an egg, its outer covering is no less susceptible to the elements of deterioration than those which attack an egg. A dealer in potatoes is charged with that particular knowledge. Thus, he may no more escape responsibility for selling rotten potatoes than the egg merchant who purveys rotten eggs. It needs no argument to prove that in the market of fair dealing, a rotten egg has lost all standing as an egg.

"What Gagnon sold to the defendants had lost all standing as potatoes. . . ." Gagnon v. Speback, *supra* note 187, *dissenting* opinion, where, quoting Hobart Manufacturing Co. v. Rodziewicz, *supra* note 70, at 244, the following appears: "The implied sales warranty arises *independently and outside of the contract and is imposed by operation of law.*" Since it is *dehors* the contract, it is constructive.

192. WILLISTON, *op. cit.* § 119A. Lack of and Failure of Consideration Distinguished.

193. *Supra* note 1; *cf.*, however Shafer v. Reo Motors, Inc., 108 F. Supp. 659 (W. D. Pa. 1952).

194. 298 U.S. 587 (1936).

> We have had frequent occasion to consider the limitations on liberty of contract. While it is highly important to preserve that liberty from arbitrary and capricious interference, it is also necessary to prevent its abuse, as otherwise it could be used to override all public interests and thus in the end destroy the very freedom of opportunity which it is designed to safeguard.[195]

Clearly, the *Henningsen* decision points the way to greater consumer protection by the simple expedient of refusing to enforce disclaimer provisions when these would tend to limit the protection to which the consumer is justifiably entitled. Since New Jersey (and Pennsylvania) are among the states which have adopted the Uniform Commercial Code[196] and since the Code specifically declares that the courts may decline to enforce unconscionable agreements,[197] it would appear that their courts may continue to refuse to enforce disclaimers embodied in standardized contracts wherein the consumer has no opportunity to bargain but must accept the agreement as written.[198]

It has also been held that disclaimers refer only to express warranties and do not affect warranties imposed by law as, for example, the warranty of fitness for a particular purpose or use, as in *Bekkevold v. Potts*[199] and *Meyer v. Packard Cleveland Motor Co.*,[200] oft-quoted and cited to this effect. And even where meat was delivered pursuant to a contract clause reading "with all faults and defects," it was held not to negate liability under a warranty of description when it was proved that the meat was adulterated and not equivalent to the description.[201]

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195. Morehead v. New York ex rel. Tipaldo, *supra* note 194, Chief Justice Hughes *dissenting,* at 627.

196. Jurisdictions which have adopted the Uniform Commercial Code, together with effective dates, include:
Alaska, January 1, 1963; Arkansas, January 1, 1962; Connecticut, October 1, 1961; Georgia, April 1, 1963; Illinois, July 1, 1962; Kentucky, July 1, 1960; Massachusetts, October 1, 1958; Michigan, January 1, 1964; New Hampshire, July 1, 1961; New Jersey, January 1, 1963; New Mexico, January 1, 1962; New York, September 27, 1964; Ohio, July 1, 1962; Oklahoma, January 1, 1963; Oregon, September 1, 1963; Pennsylvania, July 1, 1954; Rhode Island, January 2, 1962; Wyoming, January 2, 1962.

197. UCC § 2—302. Unconscionable Contract or Clause.

198. As, for example, in automotive sales contracts, insurance policies, and similar agreements; some of these are discussed in WILLISTON, *op. cit.* §§ 626, 643.

199. 173 Minn. 87, 216 N.W. 790 (1927).

200. 106 Oh. St. 328, 140 N.E. 118 (1922).

201. Robert A. Munroe & Co. v. Meyer, [1930] 2 K.B. 312.

It is clear that the Uniform Commercial Code[202] recognizes the right of a vendor to make a limited warranty or none at all. And where the disclaimer does not offend against public policy, it will be enforced as made.[203]

This, however, still leaves the question of the effect of a disclaimer upon a third party not in privity of warranty. Here, there is no question of contract unless the third party is a beneficiary.[204] In that case his recovery must be based on the contract and its limitations. But where the third party seeks recovery under a warranty imposed by law, he is not affected by a disclaimer from the manufacturer to the retailer from whom he has purchased the defective product.[205] Actually, it should make no difference whether the case involves an express or constructive warranty, the result should be the same—the disclaimer should be ineffectual as to third parties. It was so held in *Henningsen*:

> It is important to express the right of Mrs. Henningsen to maintain her action in terms of a general principle. To what extent may lack of privity be disregarded in suits on such warranties?[206] . . . it is our opinion that an implied warranty of merchantability chargeable to either an automobile manufacturer or a dealer extends to the purchaser of the car, members of his family, and to other persons occupying or using it with his consent. It would be wholly opposed to reality to say that use by such persons is not within the anticipation of parties to such a warranty of reasonable suitability of an automobile for ordinary highway operation. Those persons must be considered within the distributive chain.[207]

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202. UCC § 2—316; Comment, *Effect of Disclaimer Clause on Implied Warranty of Merchantability*, 7 S. D. L. REV. 133 (1962).

203. WILLISTON, *op. cit.* §§ 615A, 626, 643.

204. *Id.* § 378A.

205. Marino v. Maytag Atlantic Co., 141 N.Y.S.2d 432 (N.Y. Mun. Ct. 1955) where the court said that "such express waiver should apply only in express contracts between and executed by the parties to such express contract."; Sokoloski v. Splann, 311 Mass. 203, 40 N.E.2d 874 (1942), cf. Taylor v. Jacobson, 336 Mass. 709, 147 N.E.2d 770 (1958); Jolly v. C. E. Blackwell & Co., 122 Wash. 620, 211 Pac. 748 (1922).

206. Citing and following Faber v. Creswick, 31 N.J. 234, 156 A.2d 252 (1959).

207. Henningsen v. Bloomfield Motors, Inc., *supra* note 1, at 414-15, 161 A.2d at 100. It is important to note that the court does not confine the right of action in the absence of privity to the members of the purchaser's family, but extends it "to other persons occupying or using it [the automobile] with his consent." This goes beyond the scope of § 2—318 of the Uniform Commercial Code, which became effective in New Jersey on January 1 of this year.

V. HOW DID THE REQUIREMENT ORIGINATE AND DEVELOP?

By a bizarre quirk of circumstance, the judicial precedent which gave vendors the most effective defense against their victims was a dictum in an English case, *Winterbottom v. Wright*.[208] And to add to the quizzical perversity at times characteristic of legal dogmas molded by the rigidity of *stare decisis*, the *Winterbottom* case involved neither a manufacturer nor a retailer. Comments in the various opinions [209] clearly stated that absent privity, there would be no recovery.[210] Quite suddenly, judicial inventiveness reached a new peak, possibly unequalled until the labor relations cases in this half of the twentieth century.[211] It all arose because an unfortunate coachman had the ill-luck to be injured while driving a defective

208. 10 Mees. & W. 109, 11 L.J. Ex. 415, 152 Eng. Rep. 402 (Ex. 1842); the essential facts are quite simple: The defendant was a contractor who supplied mail coaches to the Postmaster General for the carriage of mail bags from one locality to another and also undertook to keep the mail coaches in a fit, proper, safe and secure condition for this purpose. Plaintiff Winterbottom was a coachman whose services were engaged by a third party who had a contract with the Postmaster General to carry the mail. While Winterbottom was driving the mail coach, the coach broke down throwing him from his seat and causing him to be injured for life. The plaintiff declared that he had relied on the contract between the Postmaster General and defendant whereby the latter had undertaken to keep the mail coaches in a proper state of repair. This duty having been violated by the defendant Wright, plaintiff Winterbottom sought judgment in the amount of his damages. The court sustained the defendant's demurrer since plaintiff could establish no privity.

209. Abinger, C.B. declared that if Winterbottom was found to have a right of action, then "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.

210. Sharing this view, Alderson, B., in Winterbottom v. Wright, *supra* note 208, 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."

211. Especially, Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U.S. 448 (1957), where the Supreme Court of the United States calls upon the inferior federal tribunals to fashion a remedy by having recourse to "judicial inventiveness":

"We conclude," said the Court, "that the substantive law to apply in suits under Section 301 (a) is federal law which the courts must fashion from the policy of our national labor laws . . . The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will be in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem." at 457.

coach on a mail run! How could this coachman, this hapless wight, have guessed that his sad plight—no recovery for lack of privity—would be shared by so many countless thousands in the years to come?

Right after the middle of the nineteenth century, any number of cases[212] may be found wherein the courts have declared that no one not in privity of warranty with the vendor of an article could recover for breach of said warranty against the vendor. In Pennsylvania, the early cases not only held that privity was essential, but the courts declared that a mere statement of fact without intent to warrant could not be considered a warranty.[213] This further limited the possibilities of recovery. But other jurisdictions were just as dedicated to this erroneous concept and adhered to it with a dogged tenacity worthy of a better cause.[214]

However, the harsh and unfortunate consequences of this rigid adherence to the requirement of privity in tort actions soon persuaded many courts to discard it where certain categories of products were concerned. Thus, a decade after the decision in *Winterbottom v. Wright,*[215] the New York courts in *Thomas v. Winchester*[216]

Earlier, the Court had said: "Section 301 [of the Labor-Management Relations Act, 61 Stat. 154, 29 U.S.C. § 173] is more than jurisdictional . . . it authorizes federal courts to fashion a body of federal law for the enforcement of these collective labor agreements" at 451. Setting an example for the lower courts, the Supreme Court's liberal construction of federal labor law reached its apogee in a trilogy of cases: United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564 (1960), United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960), and United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

Textile Workers Union v. Lincoln Mills, *supra,* discussed in Jaeger, *Collective Labor Agreements and the Third Party Beneficiary,* 1 B. C. IND. & COM. L. REV. 125 (1960); see also JAEGER, LABOR LAW chs. 1, 2 (1939), and (Supp. 1959); JAEGER, COLLECTIVE LABOR AGREEMENTS (1962).

212. Collected in FRUMER & FRIEDMAN, PRODUCTS LIABILITY (1961) and HURSH, AMERICAN LAW OF PRODUCTS LIABILITY (1961).

213. Text at note 118, *supra.*

214. Moran v. Pittsburgh-Des Moines Steel Co., 166 F.2d 908 (3d Cir. 1948), *cert. denied,* 334 U.S. 846 (1948); Oklahoma Tire & Supply Co. v. Williams, 181 F.2d 675 (8th Cir. 1950); Parkinson v. California Co., 233 F.2d 432 (10th Cir. 1956); International Derrick & Equipment Co. v. Croix, 241 F.2d 216 (5th Cir. 1957), *cert. denied,* 354 U.S. 910 (1957).

Birmingham Chero-Cola Bottling Co. v. Clark, 205 Ala. 678, 89 So. 64 (1921); Miles v. Chrysler Corp., 238 Ala. 359, 191 So. 245 (1939); Hale v. Depaoli, 33 Cal.2d 228, 201 P.2d 1 (1948); White v. Rose, 241 F.2d 94 (10th Cir. 1957); Hunter v. Quality Homes, Inc., 45 Del. 100, 68 A.2d 620 (1949); Thrash v. U-Drive-It Co., 158 Ohio St. 465, 110 N.E.2d 419 (1953); Smith v. Atco Co., 6 Wis.2d 371, 94 N.W.2d 697 (1959).

215. *Supra* note 208.

216. 6 N.Y. 397 (1852).

held a manufacturer liable to a consumer where a bottle of belladonna had been mislabelled "dandelion," and caused injury to the plaintiff. Lack of privity, said the court, is no defense. About a half a century after that decision, a federal court declared that a party who makes or sells "an article of merchandise designed and fitted for a specific use is liable to the person who, in the natural course of events, uses it for the purpose for which it was made or sold, for an injury which is the natural and probable consequence of the negligence of the manufacturer or vendor in its construction or sale."[217]

Then came the era of great expansion of consumer protection initiated by the historic pronouncement in *MacPherson v. Buick Motor Co.*[218] "The question to be determined is whether the defendant owed a duty of care and vigilance to any one but the immediate purchaser."[219] And later, the court continued: "We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law."[220]

This was followed by a virtually universal elimination of the privity requirement in at least three categories of negligence cases: (1) Inherently dangerous or harmful character; (2) Defective product that is imminently dangerous; and (3) Fraud or deceit.[221] Today, there is hardly a jurisdiction which would even suggest the necessity of this requirement where a tort action against the manufacturer or intermediary concerns a product within one of these classes.[222] However, since the essence of this action is negligence, the question immediately presents itself: What is negligence? Here, the courts are hopelessly at odds. While many of the cases hold that the mere presence of a noxious substance in food or drink will establish a *prima facie* case of negligence,[223] a number of jurisdic-

217. Huset v. J. I. Case Threshing Machine Co., 120 Fed. 865 (8th Cir. 1903).

218. 217 N.Y. 382, 111 N.E. 1050 (1916).

219. *Id.* at 385.

220. MacPherson v. Buick Motor Co., *supra,* note 218, at 390.

221. Discussed in FRUMER & FRIEDMAN, *op. cit. supra* note 212, and in HURSH, *op. cit. supra* note 212.

222. Try-Me Beverage Co. v. Harris, 217 Ala. 302, 116 So. 147 (1928), foreign substance in beverage; Atlanta Coca-Cola Bottling Co. v. Dean, 43 Ga. App. 682, 160 S.E. 105 (1931); Davis v. Van Camp Packing Co., *supra* note 1; Nehi Bottling Co. v. Thomas, 236 Ky. 684, 33 S.W.2d 701 (1930), arsenic in soft drink; Hertzler v. Manshum, 228 Mich. 416, 200 N.W. 155 (1924), poison in flour; Minutilla v. Providence Ice Cream Co., 50 R.I. 43, 144 Atl. 884 (1929), glass in ice cream.

223. Dr. Pepper Co. v. Brittain, 234 Ala. 548, 176 So. 286 (1937), "a black substance," possibly a fly, which was unwholesome; Alabama Coca-Cola Bottling

tions permit the manufacturer to overcome this by a showing of due care and the possibility of the intermediate introduction of the foreign substance.[224] Here the manufacturers or bottlers of certain types of beverages seem to have the greatest advantage. However, the tendency toward the adoption of the doctrine of *res ipsa loquitur* is increasing. In a growing number of jurisdictions, the courts hold that the presumption of negligence becomes conclusive where the consumer purchases the product in its original sealed package or container.[225]

Res ipsa loquitur has become a real boon to the consumer in negligence cases. There has been a gradual extension of this doctrine so that in many instances, the mere presence of an unwholesome or deleterious substance in an article or product intended for human use or consumption speaks for itself.[226] But even here, there has been wide divergence of view as to the manner of its application. A number of jurisdictions fall far short of imposing strict liability since the

Co. v. Smith, 29 Ala. App. 324, 195 So. 560 (1940), beverage containing spider; Gardner v. Sumner, 40 Ala. App. 340, 113 So.2d 523 (1959), root beer contained piece of cigar; Coca-Cola Bottling Co. v. Cromwell, 203 Ark. 933, 159 S.W.2d 744 (1942), insect legs resembling those of a spider, judgment for plaintiff affirmed; Miami Coca-Cola Bottling Co. v. Todd, 101 So. 2d 34 (Fla. 1958), foreign substance; Cordell v. Macon Coca-Cola Bottling Co. 56 Ga. App. 117, 192 S.E. 228 (1937), beverage contained flies; Patargias v. Coca-Cola Bottling Co., *supra* note 1, containing mouse; Migliozzi v. Safeway Stores, Inc., 51 N.J. Super. 313, 144 A.2d 1 (1958), foreign substance; Smith v. Coca-Cola Bottling Co., 152 Pa. Super. 445, 33 A.2d 488 (1943), spider; Wichita Coca-Cola Bottling Co. v. Tyler, 288 S.W.2d 903 (Tex. Civ. App. 1956), mouse in Coca-Cola.

224. Nickols v. Continental Baking Co., 34 F.2d 141 (3d Cir. 1929), dead cockroach in loaf of bread, but defendant showed due care in making loaf; Sanders v. Nehi Bottling Co., 30 F. Supp. 332 (D. Tex. 1939), ginger ale bottle; Stewart v. Crystal Coca-Cola Bottling Co., 50 Ariz. 60, 68 P.2d 952 (1937), Coca-Cola bottle exploded; Trust v. Arden Farms Co., 50 Cal.2d 217, 324 P.2d 583 (1958); Coca-Cola Bottling Co., v. Rowland, 16 Tenn. App. 184, 66 S.W.2d 272 (1932).

225. Atlanta Coca-Cola Bottling Co. v. Sinyard, 45 Ga. App. 272, 164 S.E. 231 (1932); Coca-Cola Bottling Co. v. Creech, 245 Ky. 414, 53 S.W.2d 745 (1932); Sams v. Ezy-Way Foodliner Co., *supra* note 1, glass in sealed package of sausages; Joffre v. Canada Dry Ginger Ale, Inc., 222 Md. 1, 158 A.2d 631 (1960); Keffer v. Logan Coca-Cola Bottling Works, Inc., 141 W. Va. 839, 93 S.E.2d 225 (1956), bottle exploded.

226. Canada Dry Ginger Ale Co. v. Jochum, 43 A.2d 42 (Mun. Ct. App. D.C. 1945); Eisenbeiss v. Payne, 42 Ariz. 262, 25 P.2d 162 (1933), doctrine applied where putrefied mouse was found in beverage; Escola v. Coca-Cola Bottling Co., 24 Cal.2d 453, 150 P.2d 436 (1944); McClelland v. Acme Brewing Co., 92 Cal. App. 2d 698, 207 P.2d 591 (1949); Nichols v. Nold, *supra* note 1; Redmond v. Ouachita Coca-Cola Bottling Co., 76 So.2d 553 (La. App. 1954); Ryan v. Zweck-Wollenberg Co. 266 Wis. 630, 64 N.W.2d 226 (1954), bursting bottle; Zarling v. La Salle Coca-Cola Bottling Co., 2 Wis.2d 596, 87 N.W.2d 263 (1958); Weggeman v. Seven-Up Bottling Co., 5 Wis.2d 503, 93 N.W.2d 467 (1958), 94 N.W.2d 645 (1959).

manufacturer or producer may prove due care and avoid all responsibility. Yet in spite of this, the trend is unmistakably in the direction of greater consumer protection.[227]

In this field, surprisingly enough, it appears that the Pennsylvania courts have taken the initiative. Thus, is a leading case, *Rozumailski v. Philadelphia Bottling., Co.*,[228] the court found that where it was established by plaintiff that there was ground glass in the bottom of a bottle containing an allegedly potable beverage, this was a demonstration of negligence: "It is a case where the accident proves its own negligence cause, and the jury would be permitted to infer negligence, as the court below instructed it, from the fact that ground glass had been found in the bottom of the bottle."[229]

Other difficulties standing in the way of plaintiff-consumer's recovery are assumption of risk and contributory negligence. These are usually questions for the jury and must depend on the facts in a given case. Where the consumer disregards directions as to use, or fails to observe the limitations the manufacturer has pointed out, recovery may be denied.[230] The upshot of the cases makes it increasingly difficult to determine whether the court was holding that the mere existence of the defect is sufficient evidence of negligence, or whether the manufacturer is liable for injury caused by certain categories of goods without any negligence and merely because there were deleterious effects not attributable to any misuse by the consumer. It may be that the past generation has witnessed the evolution of insurance liability on the part of the manufacturer based on "negligence," as the courts find it, regardless of actual negligence in fact.[231]

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227. This trend was evinced more than twenty years ago in the classic case of Jacob E. Decker & Sons, Inc., v. Capps, *supra* note 1, and has more recently been emphasized in Sams v. Ezy-Way Foodliner Co., *supra* note 1; Sofman v. Denham Food Service, Inc., 37 N.J. 304, 181 A.2d 168 (1962) and Greenberg v. Lorenz, *supra* note 1.

228. 296 Pa. 114, 145 Atl. 700 (1929).

229. Rozumailski v. Philadelphia Bottling Co., *supra* note 228, at 118, 145 Atl. at 701.

230. Mannsz v. Macwhyte, *supra* note 1.

231. Bahlman v. Hudson Motor Co., 290 Mich. 683, 288 N.W. 309 (1939) noted 15 FLA. L. REV. 97, where the court observes: "Whether the result reached is best justified by holding the privity concept inapplicable because of its historical origins . . . or that the requirements of privity are satisfied by the commercial advertising and merchandising methods of defendant . . . or by finding the dealer under the circumstances defendant's agent to warrant its products . . . or by holding that the express warranty is similar to a covenant running with the land and follows the product to the ultimate consumer . . . or by application of the third party beneficiary statute to the transaction between defendant and its retail dealer . . . we have no occasion to decide. It is sufficient to state that the liability . . . is imposed on the maker of false statements and may be enforced by

Not infrequently, where there is a pertinent pure food and drug statute, or similar legislation, and the manufacturer has violated its provisions, he may be held liable, not only criminally, but civilly on the ground of negligence.[232]

Since the dawn of the century, there has been considerable preoccupation with the slow but sure poisoning of the citizenry by preservatives, adulterants, and additives of all descriptions ranging from formaldehyde to copper sulphate. Pure food and drug "addicts," that is, forceful and vociferous advocates of laws to regulate and control the marketing of foodstuffs and beverages to prevent this decimation of the population, eventually won a qualified victory in the enactment of statutory measures designed for the protection of the public. "Qualified" because the federal legislation only regulated articles in interstate commerce,[233] and not all of the states[234] followed suit.[235] In any case, here was a clear demonstration of public policy expressed by the Congress of the United States and the legislatures of a number of the several states.[236]

The consumer has another string to his bow: Fraud or deceit in the labelling, branding or advertising of products by the manufacturer results in liability if injury follows the use of the product.[237] But even this remedy has not been too effective when it is necessary to

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the ultimate consumer of the product to whom the statements are directed." Bahlman v. Hudson Motor Co., *supra;* this decision foreshadowed a similar one in Spence v. Three Rivers Builders & Masonry Supply, 353 Mich. 120, 90 N.W. 2d. 873 (1958), stated *infra* in text at notes 681 *et seq.*

232. Peterson v. Standard Oil Co., 55 Ore. 511, 106 Pac. 337 (1910). The Congress of the United States enacted the original Food and Drugs Act in 1906, and a subsequent broader statute, the Federal Food, Drug and Cosmetic Act in 1938.

233. *Supra* note 232; see Symposium, *Advertised-Product Liability,* 8 CLEVELAND-MARSHALL L. REV. 1 (1959).

234. Pennsylvania is not listed in the table cited *infra,* note 235.

235. Dunsmore, *Advertising Law and Product Liability,* 8 CLEVELAND-MARSHALL L. REV. 62, Table 1, listing statutes of the various states governing the advertising of foods, drugs and cosmetics. About thirty states have laws similar to the federal statutes, *supra* note 232.

236. *Supra,* notes 232 and 235.

237. Wright v. Carter Products, 244 F.2d 53 (2d Cir. 1957), deodorant; Strand v. Librascope, Inc., 197 F. Supp. 743 (E.D. Mich. 1961), giving an extensive discussion of misrepresentation and nondisclosure; Gentry v. Little Rock Road Machinery Co., 232 Ark. 580, 339 S.W.2d 101 (1960), false representation that tractor was in A-1 condition; Dixie Seed Co. v. L.A. Smith, 103 Ga. App. 386, 119 S.E.2d (1961), requiring a showing of intent to deceive the plaintiff; Pearl v. William Filene's Sons Co., 317 Mass. 529, 58 N.E.2d 825 (1945); Smith v. Leppo, 360 Mich. 557, 104 N.W.2d 128 (1960); Miller v. South, 174 N.E.2d 140 (Oh. App. 1960); Hobbs v. Smith, 27 Okla. 830, 115 Pac. 347 (1911), punitive damages awarded where defendant knew he was selling diseased hogs.

prove that the representation was conscious and intentional.[238] More recently, the courts have been increasingly inclined to base recovery on the mere making of the representation, a demonstration of its falsity and resultant injury to the consumer.[239] This, of course, is where action on the warranty has its greatest advantage since it matters not whether the warrantor knew or did not know the truth or falsity of the affirmation.

The ultimate has probably been reached in Massachusetts where the court, holding for the plaintiff in *Carter v. Yardley,*[240] made short shrift of privity: "The time has come for us to recognize that that asserted general rule [of privity] 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."[241]

Privity has received a set-back in many particular fields, as a recently decided case in California, *Lucas v. Hamm,*[242] suggests. In an able and carefully-reasoned opinion, the Supreme Court, speaking through Chief Justice Gibson, disapproving and overruling *Buckley v. Gray,*[243] declared that a beneficiary under a will would have a right of action against an attorney where the latter was negligent in drafting the will:[244]

> The reasoning underlying the denial of tort liability in the *Buckley* case, i.e., *the stringent privity test, was rejected*[245]

238. Chanin v. Chevrolet Motor Co., 89 F.2d 889 (7th Cir. 1937); Dixie Seed Co. v. L.A. Smith, *supra* note 237; Cantwell v. Harding, 249 Ill. 354, 94 N.E. 488 (1911); Newhall v. Ward Baking Co., 240 Mass. 434, 134 N.E. 625 (1922); Dobbin v. Pacific Coast Coal Co., 25 Wash.2d 190, 170 P.2d 642 (1946).

239. Hammond v. Digliani, 148 Conn. 710, 174 A.2d 294 (1961); Worley v. Procter & Gamble Mfg. Co., *supra* note 1; Rogers v. Toni Home Permanent Co., *supra* note 1; Markovich v. McKesson & Robbins, Inc., *supra* note 1; General Motors Corp. v. Dodson, 47 Tenn. App. 438, 338 S.W.2d 655 (1960); Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409 (1932).

240. 310 Mass. 92, 64 N.E.2d 693 (1946).

241. *Id.*, quoted in Spence v. Three Rivers Builders & Masonry Supply, *supra* note 1, at 128, 90 N.W.2d at 878, discussed in 2 WILLISTON, CONTRACTS § 378A (3d ed. Jaeger 1959).

242. 56 Cal.2d 583, 15 Cal. Rptr. 821, 364 P.2d 685 (1961), *cert. den.* 368 U.S. 987.

243. 110 Cal. 339, 42 Pac. 900 (1895), JAEGER, LAW OF CONTRACTS, p. 353 (1953).

244. It was, however, determined, contrary to the view of the lower court, that the attorney in question had not been proved to be lacking in ordinary "skill and capacity," and that he had "drafted the will in such manner that the trust was invalid because it violated the rules relating to perpetuities and restraints on alienation. These closely akin subjects," observed Chief Justice Gibson sagely, "have long perplexed the courts and the bar."

245. Emphasis supplied.

in *Biakanja v. Irving*,[246] where we held that a notary public who, although not authorized to practice law, prepared a will but negligently failed to direct proper attestation was liable in tort to an intended beneficiary who was damaged because of the invalidity of the instrument. It was pointed out that since 1895, when *Buckley* was decided, the rule that in the absence of privity there was no liability for negligence committed in the performance of a contract had been greatly liberalized.[247] In restating the rule it was said that the determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury, and the policy of preventing future harm.[248] The same general principle must be applied in determining whether a beneficiary is entitled to bring an action for negligence in the drafting of a will when the instrument is drafted by an attorney rather than by a person not authorized to practice law.[249]

Of transcending importance in bringing about this disregard of privity were the changes in the nature of the goods being manufactured, the means of transportation and especially of communication. From a localized economy, the country progressed to a national, or even super national economy where goods were advertised and sold on a gigantic, indeed worldwide scale.[250] Also, the possibility of discovering concealed or latent defects became increasingly difficult if not virtually impossible as processing and packaging became ever more complex and the possibility of inspection dwindled to the vanishing point.

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246. 49 Cal.2d 647, 320 P.2d 16 (1958).

247. Citing 49 Cal.2d at 649.

248. Citing 49 Cal.2d at 650.

249. Lucas v. Hamm, *supra* note 242.

250. It is interesting to note that in this advertising race for a share of the consumer's dollar, the principal products advertised were (1) Food and food products; (2) Cosmetics and the like; (3) Automotive products; (4) Soaps, Cleaners, and Detergents; (5) Drugs and Pharmaceuticals; (6) Cigarettes and other tobacco products; (7) Building products and household equipment; and (8) Wearing apparel and accessories; see Dunsmore, *op. cit. supra* note 235.

VI. GRADUAL EROSION OF PRIVITY OF WARRANTY

Privity having been largely eliminated as an essential prerequisite in certain types of negligence cases previously discussed, ways and means were found to circumvent, obliterate or discard it in actions for breach of warranty. Some of these departures from the privity "rule" are noteworthy; they may be grouped under the headings of fictions, exceptions or, quite simply, elimination or obliteration. It should be understood, however, that the courts at times use an eclectic theory and combine these devices to achieve greater consumer protection.[251] One thing is quite clear—the plaintiff is completely indifferent as to theory so long as the practical result is judgment in his favor. Nor is there any valid reason why the courts should be too concerned about rejecting this judge-made rule when it seems too self-evident to be argued that what they have done they can also undo where the justification is so clear.[252]

By way of fiction, the courts have resorted to the agency theory, the "household-fund" variation, the general offer, the direct warranty to the consumer, the conduit concept, warranty "running with the goods," and the third party beneficiary principle. Exceptions have been created in favor of certain categories of products to which, it is judically asserted, the privity "requirement" just does not apply. Finally, an increasing number of jurisdictions with commendable candor simply declare that it is in the public interest to abolish this baseless and untoward defense.

The agency theory was applied in *Ryan v. Progressive Stores, Inc.*,[253] where the wife was held to be the agent of the husband when she purchased food. Actually, the agency had not been proved, but the court presumed from the relationship of husband and wife that the husband furnished the money for the purchase. Following this

251. Quite often, these fictions and exceptions shade into each other and no fixed line of demarcation can be drawn.

252. That what the judges have done they can also undo is recognized in a variety of cases such as Spence v. Three Rivers Builders & Masonry Supply, *supra* note 1; Henningsen v. Bloomfield Motors, Inc., *supra* note 1; Parish v. Great Atlantic & Pacific Tea Co., *supra* note 1.

However, in Hochgertel v. Canada Dry Corp., *supra* note 3, the Pennsylvania Supreme Court has expressly declined to do this, saying: "Under the Statutory Construction Act of May 28, 1937, P.L. 1019, 46 P.S., § 533, words and phrases must be construed according to their common approved usage. Further, it is not for us to legislate or by interpretation to add to legislation, matters which the legislature saw fit not to include [Citations omitted]." This argument is not very impressive since the privity "requirement" so-called actually originated in *dicta* formulated by certain judges in Winterbottom v. Wright, *supra* note 208.

253. 255 N.Y. 388, 175 N.E. 105 (1931).

reasoning, the court in *Mouren v. Great Atlantic & Pacific Tea Co.*[254] and *Welch v. Schiebelhuth,*[255] held for the plaintiff (who was not in privity) on a breach of warranty complaint. These decisions were based on the "household-fund" theory formulated in *Bowman v. Great Atlantic & Pacific Tea Co.,*[256] according to which the plaintiff, who was not the purchaser, was held entitled to recover, although her sister had made the purchase, since the money came out of a common household fund.

It has also been held that the manufacturer who uses various advertising media makes a general offer of a continuing unilateral character to the public as illustrated by *Carlill v. Carbolic Smokeball Co.*[257] and *Timberland Lumber Co. v. Climax Manufacturing Co.;*[258] the manufacturer is held directly liable to the customer who has purchased the product and is injured thereby. Somewhat related to this is the conduit concept where the retailer or distributor is held to be a medium of transmission (or even the agent) for the warranties made by the manufacturer. This is the reasoning in *General Motors Corp. v. Dodson*[259] where the court said "the jury could have found that General Motors was the actual person or entity with whom plaintiffs were dealing and [the dealer] was a *conduit* or subterfuge by which General Motors tried to exempt itself from liability to the consumers who are the plaintiffs."[260] When the defendant sought a rehearing basing its petition on an earlier case, *Burkett v. Studebaker Bros. Mfg.,*[261] the court declared that the latter had been specifically overruled.[262]

In the oft-quoted classic, *Rogers v. Toni Home Permanent,*[263] the Supreme Court of Ohio held that since the defendant company had engaged in extensive advertising of its hair preparation and stated on the label that it was "Very Gentle" the manufacturer would be held liable on its express warranty:

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254. 1 N.Y.2d 884, 154 N.Y.S.2d 642 (1956).

255. 11 Misc.2d 312, 169 N.Y.S.2d 309 (Sup. 1957).

256. 308 N.Y. 780, 125 N.E.2d 165 (1955).

257. [1893] 1 Q.B. 256.

258. 61 F.2d 391 (3d Cir. 1932).

259. 47 Tenn. App. 438, 338 S.W.2d 655 (1960).

260. *Id.* at 661.

261. 126 Tenn. 467, 150 S.W. 421 (1912).

262. By Dunn v. Ralston Purina Co., 38 Tenn. App. 229, 272 S.W.2d 479 (1954).

263. *Supra* note 1; Rogers v. Toni Home Permanent has been quoted and cited repeatedly as, for example in Coca-Cola Bottling Co. of Puerto Rico v. Negron Torres, 255 F.2d 149 (1st Cir. 1958), at 151-152.

> Occasions may arise when it is fitting and wholesome to discard legal concepts of the past to meet new conditions and practices of our changing and progressing civilization. Today, many manufacturers of merchandise, including the defendant herein, make extensive use of newspapers, periodicals, signboards, radio and television to advertise their product.[264] The worth, quality and benefits of these products are described in glowing terms and in considerable detail, and the appeal is almost universally directed to the ultimate consumer. Many of these manufactured articles are shipped out in sealed containers by the manufacturer, and the retailers who dispense them to the ultimate consumers are but conduits or outlets through which the manufacturer distributes his goods. The consuming public ordinarily relies exclusively on the representations of the manufacturers in his advertisements. What sensible or sound reason then exists as to why, when the goods purchased by the ultimate consumer on the strength of the advertisements aimed squarely at him do not possess their described qualities and goodness and cause him harm, he should not be permitted to move against the manufacturer to recoup his loss. In our minds no good or valid reason exists for denying him that right. Surely under modern merchandising practices the manufacturer owes a very real obligation toward those who consume or use his products. The warranties made by the manufacturer in his advertisements and by the labels on his products are inducements to the ultimate consumers, and the manufacturer ought to be held to strict accountability to any consumer who buys the product in reliance on such representations and later suffers injury because the product proves to be defective or deleterious.[265]

Soon thereafter, the question of implied warranty presented itself with respect to a beauty preparation in *Markovich v. McKesson & Robbins, Inc.;*[266] the court refused to recognize any distinction between liability on an express or implied warranty and held that the case should have been submitted to the jury.

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264. Similar reasoning is used by the court in General Motors Corp. v. Dodson, *supra* note 1, where the *conduit* theory was invoked; it would appear that a similar result would obtain in Pennsylvania according to the rules formulated in Hochgertel v. Canada Dry Corp., *supra* note 3, with this significant difference: A subpurchaser within the distributive chain could maintain an action for breach of warranty regardless of any advertising campaign.

265. Rogers v. Toni Home Permanent, *supra* note 1.

266. *Supra* note 1.

It has even been held that a warranty "runs with the goods," in two Iowa decisions, *Davis v. Van Camp Packing Co.*[267] and *Anderson v. Tyler,*[268] as well as in *Coca-Cola Bottling Co. v. Lyons.*[269] In *Escola v. Coca-Cola Bottling Co.,*[270] a concurring opinion suggested adoption of the same theory. In the latter case, the majority rested its decision on *res ipsa loquitur* which covered the bottle containing the beverage. In *Klein v. Duchess Sandwich Co.,*[271] the court held that the warranty "inures to the consumer's benefit" even in the absence of privity. An appellate court in Texas has endorsed this theory in *Campbell Soup Co. v. Ryan.*[272]

But of all the devices used to enable the injured third party to recover, none has been as appropriate as the generally accepted doctrine of the third party beneficiary.[273] The leading case was decided in Ohio, *Ward Baking Co. v. Trizzino,*[274] where the court held that the "contract between the groceryman and the Ward Baking Co. to all intents and purposes was a contract entered into *for the benefit of a third party, to wit, the ultimate consumer.*"[275] Application of this doctrine is strongly advocated by Professor Williston:[276]

> One of the most significant extensions of the doctrine of third party beneficiaries is the recognition of a right of action by consumers of food or users of certain products to recover damages from a manufacturer or dealer for breach of warranty of wholesomeness or fitness, even though the particular consumer had no contractual relationship with the manufacturer or dealer and was not in privity with him.
>
> In the ever-increasing tendency to permit recovery on warranties covering foods or other substances intended for human use of consumption, even in the absence of privity

267. *Supra* note 1.

268. 223 Iowa 1033, 274 N.W. 48 (1937); *cf.* Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927).

269. *Supra* note 268.

270. 24 Cal.2d 453, 150 P.2d 436 (1944).

271. *Supra* note 1.

272. 328 S.W.2d 821 (Tex. Civ. App. 1959).

273. 2 WILLISTON, CONTRACTS § 378A (3d ed. Jaeger 1959).

274. 27 Ohio App. 475, 161 N.E. 557 (1928).

275. Since the decision in Ward Baking Co. v. Trizzino, *supra* note 274, Ohio has adopted the Uniform Commercial Code which consecrates this principle in § 2—318 under the title "Third Party Beneficiaries of Warranties Express or Implied," but limits it "to any natural person who is in the family or household of his buyer [meaning the seller's buyer] or who is a guest in his [the buyer's] home . . . . A seller may not exclude or limit the operation of this section."

276. *Op. cit.* § 378A. Recovery by Undetermined Beneficiary on Warranty.

> of contract, the third-party beneficiary concept is playing a significant role . . . .
>
> 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; ofttimes, in a matter of life or death.[277]

The third party principle is adverted to in a recent case[278] in Michigan. Referring to the strictures imposed by the privity "requirement," the Supreme Court of that State said: "Thus the older and narrower doctrines have given way in response to the 'ever-growing pressure for protection of the consumer, coupled with a realization that liability would not unduly inhibit the enterprise of manufacturers and that they were well placed both to profit from its lessons and to distribute its burdens.'[279] As a result, the requirement of privity has been abandoned outright in many jurisdictions rather than by the use of fictions,[280] thereby opening the door to the widespread use of the warranty theory."[281] As to "the use of fictions," the court observed: "E.g., The consumer is a third-party beneficiary of the manufacturer-dealer contract,"[282] *Manzoni v. Detroit Coca-Cola Bottling Co.*[283]

This doctrine has much to recommend it and was approved in *Klein v. Duchess Sandwich Co.*,[284] citing *Dryden v. Continental Baking Co.*,[285] where the court observed that, although the husband bought the bread, "assuming that privity is an essential element of such an action, it might well be urged that the wife . . . was a *third party beneficiary of the contract.*"[286]

In an exhaustive review of the authorities, Judge Starke of the New York Supreme Court called attention to the trend away from privity and towards greater liberality, *Parish v. Great Atlantic &*

277. *Id.* at 967 *et seq.*

278. Manzoni v. Detroit Coca-Cola Bottling Co., 109 N.W.2d 918 (Mich. 1961), where "mold filaments and mold spores" were found.

279. Quoting HARPER AND JAMES, TORTS, § 28.1, at 1535.

280. Such as, the court suggests "the assignment" of the dealer's cause of action to the consumer.

281. Manzoni v. Detroit Coca-Cola Bottling Co., *supra* note 278 at 921-22.

282. This is stated in a footnote *id.* at 922.

283. *Supra* note 278.

284. *Supra* note 1.

285. 11 Cal.2d 33, 77 P.2d 833 (1938).

286. Quoted in Klein v. Duchess Sandwich Co., *supra* note 1; emphasis supplied.

Pacific Tea Co.,[287] and the adoption of the third party principle. This trend culminated in the holding by the Chief Judge of the New York Court of Appeals that an infant who was injured by eating some canned salmon which contained a sharp metal tag would be allowed recovery against the vendor although clearly, privity was lacking; he observed:[288] "The injustice of denying damages to a child because of nonprivity 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.[289] Alteration of the law in such matters has been the business of the New York courts for many years."[290]

Perhaps the most vigorous abolition or better still, annihilation, of privity is based on public policy. Courts which have accepted this method of awarding damages to the injured consumer simply declare that it is in the interest of the public to protect the purchaser or user against breaches of warranty by the manufacturer or vendor, regardless of privity.[291] *Jacob E. Decker & Sons v. Capps*,[292] decided some twenty-one years ago, has reached its majority and become the leading precedent on this approach to the problem. The Supreme Court of Texas notes a growing tendency "to discard the requirement of privity and to hold the manufacturer liable directly to the ultimate consumer."[293] The same court again held for the plaintiff where canned spinach caused food poisoning stating that its decision was based on

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287. *Supra* note 1.

288. Greenberg v. Lorenz, 9 N.Y.2d 195, 213 N.Y.S.2d 39 (1961).

289. Citing PROSSER, TORTS § 84, at 507 (2d ed. 1955); 1 WILLISTON, SALES § 195, at 502 (rev. ed. 1948).

290. Citing MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916); Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931).

> "To decide the case before us," the court added, "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."

291. Chapman v. Brown, *supra* note 1; Klein v. Duchess Sandwich Co., *supra* note 1; Nichols v. Nold, *supra* note 1; Spence v. Three Rivers Builders & Masonry Supply, Inc., *supra* note 1; Williams v. Campbell Soup Co., 80 F. Supp. 865 (W.D. Mo. 1948); Henningsen v. Bloomfield Motors, Inc., *supra* note 1; *cf.* Blanton v. Cudahy Packing Co., 154 Fla. 872, 19 So.2d 313 (1944).

292. *Supra* note 1.

293. *Id.* at 617, 164 S.W.2d at 832.

grounds of public policy.[294] Much more recently, the Supreme Court of Florida also found the vendor liable when worms were found in a can of spinach, *Food Fair Stores v. Macurda*:[295]

> The evidence here clearly supports the conclusion that the can of spinach was crawling with worms. Can the worms be considered deleterious, unwholesome or unfit for human consumption?
>
> Admittedly we are not connoisseurs of cuisine that qualifies us to view as delicacies some foodstuffs that might be indigestible by others. To certain tribes of American Indians we understand that such creatures as worms, grasshoppers, snails and the like are acceptable as delicious morsels of food. We are told that canned Mexican worms grace the shelves of many delicatessens and in certain swank social levels, which few of us ever reach, it is said that roasted snails are available with the trays of hors d'oeuvres at the pre-dinner cocktail party. However, for the masses who have moved ahead of the Indians but who perhaps have not yet reached the "snail set," such invertebrates as worms and snails are generally frowned upon as totally unwholesome and unfit for human consumption. Indeed, they are in a class with roaches, mice, flies and other nauseous intruders that the cases indicate have at times found their way into bottles, cans or other foodstuff containers. We therefore hold that worms such as those revealed by the photographic exhibits here are deleterious and unfit for human consumption.[296]

This doctrine was reaffirmed by the Court of Civil Appeals of Texas in *Campbell Soup Co. v. Ryan*[297] where a "T-V Chicken Dinner" contained a metal washer which caused injury to the consumer; citing the *Capps* case,[298] the court emphasized the rejection of the privity requirement by the Supreme Court of Texas and its basic reliance on public policy.

Kansas[299] and Hawaii[300] are equally outspoken in their insistence

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294. Griggs Canning Co. v. Josey, 139 Tex. 623, 164 S.W.2d 835 (1942).

295. 93 So.2d 860 (Fla. 1957).

296. Food Fair Stores v. Macurda, *supra* note 295 at 861.

297. *Supra* note 1.

298. Jacob E. Decker & Sons v. Capps, *supra* note 1.

299. In Nichols v. Nold, *supra* note 1; *cf.* Worley v. Procter & Gamble Mfg. Co., *supra* note 1.

300. Chapman v. Brown, *supra* note 1; one might wonder whether there is any connection between insularity and consumer protection in light of the en-

that privity must not be a bar to a person who has been injured or damaged by some injurious substance which has been warranted, expressly or impliedly, to be safe and non-noxious. Michigan,[301] New Jersey[302] and New York[303] have cases that follow this general line of reasoning, although the situation in the last mentioned jurisdiction is not entirely clear because of the indication in *Greenberg v. Lorenz*[304] that the elimination of privity would be accomplished one step at a time. However, since the adoption of the Uniform Commercial Code,[305] legislative approval has been given to the *Greenberg* extension, that is, to members of the family, and beyond that, to guests in the home.[306] And in an even more recent case, *Randy-Knitwear, Inc. v. American Cyanamid Co.*[307] the court appears to have taken another step in the elimination of privity.

However, there seems to have been no more explicit and comprehensive rejection among the more recent cases than in *Henningsen v. Bloomfield Motors, Inc.*[308] and *Chapman v. Brown.*[309] Here the courts in able and well-documented opinions have made no bones about recognizing the effect of public policy upon privity of warranty and its relegation to the limbo of lost defenses. These and a number of other cases are analyzed and discussed in the next section.

VII. PRODUCTS LIABILITY BY CATEGORY: RECENT CASES

The first faltering attempts to circumvent the privity requirement were dictated, as has been indicated, by a desire to alleviate the hardships resulting from a rigid application of this requirement. But in this analysis, it will be observed that the courts are going far beyond comestibles, viands, sweet-meats and potables in seeking to preserve the consuming public from the ill-effects of harmful and

lightened thinking revealed in the opinon of the federal court applying Puerto Rican law in Coca-Cola Bottling Co. v. Negron Torres, *supra* note 264.

301. Spence v. Three Rivers Builders & Masonry Supply, Inc., *supra* note 1.

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

303. Greenberg v. Lorenz, *supra* note 1; cf. Parish v. Great Atlantic & Pacific Tea Co., *supra* note 1.

304. *Supra* note 288.

305. To become effective in New York on September 27, 1964.

306. Uniform Commercial Code § 2—318. *Third Party Beneficiaries of Warranties Express or Implied.*

307. 11 N.Y.2d 5, 226 N.Y.S.2d 363 (1962), stated in text, *infra* notes 695 *et seq.*

308. *Supra* note 1.

309. *Supra* note 1.

noxious products. In fact, injury or harm to the person is no longer essential in the more advanced jurisdictions;[310] it may suffice to show damage to the purse.[311] And this latest and continuing trend portends a potential protection of the ultimate consumer which would cause the judges who sat during *Winterbottom v. Wright*[312] to groan in their graves.

A. *Foodstuffs, Beverages and Their Containers*

Food. While the question of privity has been confused and muddled as the cases have shown, it appears that Pennsylvania has repudiated the "requirement" as to subpurchasers "in the distributive chain" so completely that any further discussion would be a work of supererogation.[313] So the point will not be labored, but instead, some of the more recent cases from other jurisdictions which have seen the light will be examined.[314]

Perhaps no more significant case dealing with foodstuffs has been decided in the past quarter century than *Jacob E. Decker & Sons v. Capps.*[315] While it is true that there are earlier cases,[316] none is as sweeping and definitive in its rejection or abolition of the privity "requirement." The Supreme Court of Texas speaking through its Chief Justice placed its decision squarely on the ground of public policy—the necessity of protecting the consumer.[317] In the *Capps* case, which reaches its majority this year,[318] a summer sausage wrapped in cellophane was purchased from a retailer. It was eaten by various members of the Capps family all of whom became ill, and one

310. As, for example, Michigan.

311. Spence v. Three Rivers Builders & Masonry Supply, Inc., 353 Mich. 120, 90 N.W.2d 873 (1958); the case is stated and discussed with approval in 2 WILLISTON, *op. cit.* § 378A at 968 *et seq.*

312. *Supra* note 208.

313. As the Supreme Court of Pennsylvania has recently said, "it is now established beyond argument in Pennsylvania that a subpurchaser may sue the manufacturer directly in food cases for breach of an implied warranty of fitness regardless of the lack of privity. . . ." Hochgertel v. Canada Dry Corp., *supra* note 3.

314. Among the most recent of these is Gonzales v. Safeway Stores, Inc., 363 P.2d 667 (Colo. 1961), which will be discussed subsequently, see *infra* note 328.

315. 139 Tex. 609, 164 S.W.2d 828 (1942).

316. 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.

317. Jacob E. Decker & Sons v. Capps, *supra* note 315.

318. The opinion has been cited and quoted in any number of cases, such as Parish v. Great Atlantic & Pacific Tea Co., *supra* note 1, and Campbell Soup Co. v. Ryan, *supra* note 1.

of the children died. This action was brought against the manufacturer as to whom the jury found no negligence. However, since the sausage was unfit for human consumption, judgment was rendered for the plaintiffs and affirmed by the Court of Civil Appeals. Reviewing the entire history of implied warranties which accompany the sale of food, and tracing its source to the early common law dating back to 1266 A.D., the Supreme Court observed "a growing tendency . . . to discard the requirement of privity and to hold the manufacturer liable directly to the ultimate consumer."

> 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 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.[319]

319. Jacob E. Decker & Sons, Inc. v. Capps, *supra* note 315, at 617, 164 S.W.2d at 832.

Griggs Canning Co. v. Josey[320] is a companion case decided the same year by the same court. Here the situation was further complicated by the fact that the spinach which caused the food poisoning was sold in a sealed container.[321] However, this did not deter the court from holding the canner liable to the ultimate consumer. The fact that Texas continues to adhere to its enlightened policy is demonstrated by a recent decision, *Campbell Soup Co. v. Ryan.*[322] The purchaser of a "T-V Chicken Dinner" brought this action against the manufacturer alleging that he was injured by a metal washer concealed in the "dinner." Citing *Jacob E. Decker & Sons v. Capps,*[323] the Court of Civil Appeals declared that liability of a manufacturer to the consumer of defective 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." It also emphasized the fact that the Supreme Court of Texas had seen fit to reject the requirement of privity, stating that "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 suitableness to continue with the product until someone is induced to consume it as food.' " Judgment was given for the plaintiff.[324]

A few years earlier, another landmark case had been decided by the Supreme Court of California.[325] In this instance, too, the product (a ham and cheese sandwich) was encased in its original wrapping, sealed waxpaper, when purchased by the husband of the consumer. The action was brought against the manufacturer who promptly defended on the ground of lack of privity. During the trial it was shown that the sandwich was "crawling with maggots and worms" which caused the consumer to become ill and experience

320. *Supra* note 294.

321. As to the so-called "sealed container" exception, see text at note 369, *infra.*

322. *Supra* note 1.

323. *Supra* note 315.

324. The quoted excerpts are from Campbell Soup Co. v. Ryan, 328 S.W.2d 821 (Tex. Civ. App. 1959), at 822.

325. Klein v. Duchess Sandwich Co., *supra* note 1. The case has served as a leading precedent and is cited or quoted in any number of opinions including: Chapman v. Brown, *supra* note 1; Burr v. Sherwin Williams Co., *supra* note 1; Peterson v. Lamb Rubber Co., 54 Cal.2d 339, 353 P.2d 575 (1960); Collum v. Pope & Talbot, Inc., *supra* note 1; Whitfield v. Jessup, 31 Cal.2d 826, 193 P.2d 1 (1948); Vallis v. Canada Dry Ginger Ale, Inc., 11 Cal. Rptr. 823 (1961); Parish v. Great Atlantic & Pacific Tea Co., *supra* note 1; Rubino v. Utah Canning Co., 123 Cal. App.2d 18, 266 P.2d 163 (1954).

great pain.[326] Rejecting the lack of privity defense, the Court gave judgment for the plaintiff.[327]

Proceeding across the continent in an easterly direction, a case recently decided in Colorado is worthy of mention. In *Gonzales v. Safeway Stores, Inc.*,[328] a husband and wife brought an action against the vendor of a can of peas labelled "A Safeway Guaranteed Product." Preparatory to serving dinner on Washington's birthday, the wife opened the can, poured the peas into a clean saucepan and heated them. She then served her husband and herself on clean plates on which, in addition to the peas, she placed a small piece of steak and a baked potato. When the husband had eaten two spoonfuls of peas and was on the verge of eating another, he found a "bug" among the peas. The husband became nauseated and vomited for three days. Citing *Griggs Canning Co. v. Josey*,[329] the Supreme Court of Colorado reversed the trial court which had granted defendant company's motion to dismiss. Although it was the wife who had purchased the peas, no mention of privity was made. Apparently, the court did not consider this a stumbling block to eventual recovery of judgment.[330]

Continuing on this eastbound flight, a profound change in the treatment of privity is discernible in New York. In particular, two cases, *Parish v. Great Atlantic & Pacific Tea Co.*[331] and *Greenberg v. Lorenz*,[332] must be examined. In the *Parish* case, Judge Starke embarks upon a veritable dissertation as to the means whereby consumers not in privity have been afforded remedies for injuries suffered from eating or using unwholesome products.[333] Here, a mother had pur-

326. There is early precedent for recovery of damages by persons so afflicted. For many centuries in England food handlers who sold noxious products were criminally liable, and from an early day, the plight of the unhappy consumer was recognized by the English courts and authorities. Thus, it was laid down broadly that "in contracts for provisions it is always implied that they are wholesome, and if they be not, the same remedy [damages for deceit], may be had," 3 BLACKSTONE, COMMENTARIES 166. And in a leading case, Burnby v. Bollett, 153 Eng. Rep. 1348, 1352 (Ex. 1847), it was said: "That they, the common dealers . . . are liable criminally for selling corrupt victuals, is clear; . . . if a man sells corrupt victuals . . . an action lies, because it is against the commonwealth. . . ."

327. Klein v. Duchess Sandwich Co., *supra* note 1.

328. *Supra* note 314.

329. *Supra* note 294.

330. This would seem to align Colorado with those jurisdictions which hold that privity is not essential for recovery of judgment in actions for breach of warranty in food cases.

331. *Supra* note 1.

332. *Supra* note 288.

333. The grave significance of the food warranty cases prompted Judge Starke to write: "This Court was greatly disturbed by the inanity of the strict

chased a sealed jar of jam from the defendant; when her two infant daughters began to eat the jam, they found it contained worms and became sick. When the mother brought this action, the time-honored (but anachronistic) defense of lack of privity, as might be expected, was interposed. However, the court was ready with a 33-page broadside and refused to follow alleged precedent.[334] The reasons adduced were, *inter alia,* "The New York Trend" which Judge Starke found was in the direction of discarding "the requirement of privity altogether."[335]

The court then proceeded to examine "The Effect of the Agency and Third Party Beneficiary Doctrines on Privity."[336] In this connection, two significant cases, *Ryan v. Progressive Stores, Inc.*[337] and *Bowman v. Great Atlantic & Pacific Tea Co.,*[338] were discussed, the former under the agency concept, the latter as an illustration of the "household-fund" variation of this concept.[339] In a more recent case, *Mouren v. Great Atlantic & Pacific Tea Co.,*[340] the court was quoted as stating: "I find, as a matter of law that the implied warranty extended to the benefit of the plaintiff wife [the husband had

application of the privity doctrine when the subject arose in the Conklin case [Conklin v. Hotel Waldorf Astoria Corp., 5 Misc.2d 496, 161 N.Y.S.2d 205 (1957)]. 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.'"

334. The court makes a careful analysis of the New York cases beginning with Chysky v. Drake Bros. Co., 235 N.Y. 468, 139 N.E. 576 (1923), where all the mischief of privity started, and declares that "a state of confusion presently exists." Parish v. Great Atlantic & Pacific Tea Co., *supra* note 1, at 10.

335. *Id.* at 11; undoubtedly, Judge Starke was at least moderately gratified to find the New York Court of Appeals in Greenberg v. Lorenz, *supra* note 288, taking cognizance of the fact that there was a split of authority among the lower courts in New York and giving at least a qualified approval to his views as expressed in Parish v. Great Atlantic & Pacific Tea Co., *supra* note 1.

336. *Id.* at 26.

337. 255 N.Y. 388, 175 N.E. 105 (1931).

338. 284 App. Div. 663, 133 N.Y.S.2d 904 (1954).

339. See text following note 252, *supra.*

340. *Supra* note 254.

made the purchase]."[341] *Hopkins v. Amtorg Trading Corp.*[342] was cited in support of this proposition.[343] In the next section of the opinion in the *Parish* case, "Historical Background and Error," attention is invited to the hybrid nature of the action for breach of warranty:[344]

> It starts out contractually but in reality emanates from the failure to either perform a duty to provide food which is wholesome, or to carry out an implied representation that the food is wholesome. Thus, 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.[345]

> Historically, there is no justification for the notion that privity of contract is essential to support an action for breach of an implied warranty. Originally the remedy for breach of such warranty was an 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 . . . .[346]

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341. Quoted in Parish v. Great Atlantic & Pacific Tea Co., *supra* note 1 at 15.

342. 265 App. Div. 278, 38 N.Y.S.2d 788 (1942).

343. As follows: "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.'"

344. The court cites the following authorities: Prosser, *The Implied Warranty of Merchantable Quality,* 27 MINN. L. REV.; James, *Products Liability,* 34 TEX. L. REV. 192; HARPER & JAMES, LAW OF TORTS, Sec. 28.15 et seq.; 34 ORE. L. REV. 59; 8 VAND. L. REV. 149; 1 WILLISTON, SALES, Sec. 197.

345. Parish v. Great Atlantic & Pacific Tea Co., *supra* note 1, at 16-17.

346. And the court observes: "Whether the action be one on warranty or negligence, it comes to the same thing. It sounds in tort." Davis v. Williams, 58 Ga. App. 274, 278, 198 S.E. 357, 360.

The court places considerable reliance on *Klein v. Duchess Sandwich Co.*,[347] heretofore discussed,[348] in rejecting the argument that to eliminate privity legislative action is essential.[349] Observing that the pertinent sections of the California and New York statutes[350] imposing the applicable warranties are identical, Judge Starke could find no reason for supposing that the legislative intent did not extend to others than the immediate purchasers. In any event, a doctrine early found in New York law in *Lawrence v. Fox*[351] would support recovery by such others as third party beneficiaries, said the court, citing numerous cases including *Ward Baking Co. v. Trizzino*.[352] Finally, under the heading "The Public Policy Factor," it is strongly urged that consumer protection 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."[353]

> Great dissatisfaction with the strict privity doctrine has been frequently expressed by modern legal educators and writers. 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

347. *Supra* note 1.

348. Text at notes 271 and 284, *supra.*

349. 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.

350. *Supra.*

351. 20 N.Y. 268 (1859), JAEGER, LAW OF CONTRACTS, 338 (1953).

352. 27 Ohio App. 475, 161 N.E. 557 (1928).

353. Here the court cites: "7 CAL. L. REV. (1919), 360; 23 CAL. L. REV. (1935), 621; 33 COL. L. REV. (1933), 868; 1 DUKE UNIV., *Law and Contemporary Problems of the School of Laws* (1933), 1; 4 FORDHAM L. REV. (1935), 295; 34 HARV. L. REV. (1921), 762; 42 HARV. L. REV. (1929), 414; 30 ILL. L. REV. (1935), 398; 5 IOWA L. BULL. (1919), 86; 29 MICH. L. REV. (1931), 906; 9 N.Y. UNIV. L REV. (1932), 366; 4 ST. JOHN'S L. REV. (1929), 80; 9 ST. JOHN'S L. REV. (1935), 216; 27 YALE L.J. (1918), 1068; 29 YALE L.J. (1920), 782; VOLD, SALES, p. 476."

> and 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. Again, it is the food cases with their constant stress upon the promotion of public health which have led the way. . . .[354]

"Public policy and the sacredness of human life demand that the warranty right of the ultimate consumer be extended against the manufacturer, particularly in the case of sealed food and drug products. . . ."[355] Saying this, the court held for the plaintiffs.

Adopting a rather more guarded approach, the New York Court of Appeals suggested that any inroads on the privity requirement should be made one step at a time. The factual situation in *Greenberg v. Lorenz* was similar to the one in the *Parish* case. An infant was injured by a metal tag contained in a can of salmon purchased by plaintiff's father. The trial court gave judgment for the infant plaintiff and refused to permit the defense of privity of warranty where plaintiff was alleging the existence of an implied warranty of fitness for human consumption. By a divided court, the Appellate Term affirmed. Also by a divided court, the Appellate Division reversed the decision of the lower courts invoking strict privity as laid down in *Chysky v. Drake Bros.* and *Salzano v. First Nat'l Stores.* Motion for leave to appeal to the Court of Appeals was then granted; the latter, reversing the Appellate Division, declared: "Our difficulty is

354. The numerous authorities and cases cited by the court are omitted.

355. Borrowing a leaf from the advertising notebook used in General Motors Corp v. Dodson, *supra* note 1, and similar cases, the court adds: "The requirements of privity are satisfied by today's commercial advertising, printed labels and merchandising methods wherein the dealer, in acting as the distributor of the manufacturer's product for the purpose of resale to the public, may be rightly considered under the circumstances to be the manufacturer's agent for the purpose of warranting the fitness and wholesomeness of the product. The manufacturer's goal, in marketing a product, is the ultimate consumer. From the very moment the manufacturer puts the product on the market, he makes a tacit representation through his distributors aimed squarely at 'Joe Doakes', the man on the street, that the product is fit and wholesome. Therewith is privity supplied. The warranty and representation is not made only to the dealer and does not stop there. The contract between the manufacturer and the dealer that the food be fit for human consumption is made for the benefit of a third party—not only the purchaser but the ultimate consumer. It continues from the time of marketing until the process of reaching the ultimate consumer through merchandising channels is attained, the retailer merely acting as a conduit." Parish v. Great Atlantic & Pacific Tea Co., *supra* note 1.

not 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.*"[356]

The highest court of New York reviewed a number of the cases which had been examined during the course of the opinion in *Parish v. Great Atlantic & Pacific Tea Co.*,[357] and found that there had been extensions of the doctrine of privity based largely on an agency theory. "But a dependent child," said the court, "is not a contracting party and cannot be a warrantee so no damages are due him."[358]

"The unfairness of the restriction has been argued in writings so numerous as to make a lengthy bibliography. . . . About twenty states have abolished such requirements of privity, the latest being Virginia and New Jersey." The court then cited *Swift & Co. v. Wells* and *Henningsen v. Bloomfield Motors, Inc.* as illustrative of the latest defections from the ranks of the jurisdictions requiring strict privity and quoted the Uniform Commercial Code in pertinent part: "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."[359]

The Court of Appeals concluded by saying:

> 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. . . . 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 the child's father. Today when so much of our food is bought

356. Greenberg v. Lorenz, *supra* note 288; Chysky v. Drake Bros. cited above may be found *supra* note 334; Salzano v. First Nat. Stores, 268 App. Div. 993, 51 N.Y.S.2d 645 (1944).

357. *Supra* note 1.

358. Greenberg v. Lorenz, *supra* note 288 at 199, 213 N.Y.S.2d at 41.

359. Uniform Commercial Code § 2—318; at this time New York had not yet adopted the Uniform Commercial Code. Swift & Co. v. Wells, 201 Va. 213, 110 S.E.2d 203 (1959) and Henningsen v. Bloomfield Motors, Inc., *supra* note 1 indicate the current trend toward the abrogation of the privity requirement.

> 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.[360]

Although the court was unanimous in ordering the reinstatement of the infant's recovery, a separate concurring opinion embodied the thought that the decision should be "limited to the facts of this case." It reads in pertinent part:

> However much one may think liability should be broadened, that must be left to the Legislature. 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 was 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.[361]

This 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.[362]

This argument is admirably dealt with in *Parish v. Great Atlantic & Pacific Tea Co.*[363] where, analyzing and interpreting the statutory

360. Greenberg v. Lorenz, *supra* note 288 at 200, 213 N.Y.S.2d at 42, citing MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916); Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931).

361. *Id.* at 201, 213 N.Y.S.2d at 43. Much the same argument appears in Hochgertel v. Canada Dry Corp., *supra* note 3.

362. This thought is expressed in Sams v. Ezy-Way Foodliner Co., *supra* note 1, and stated *infra*, text at note 366.

363. *Supra* note 1.

language of the sales law found applicable, the court stated, "there is an implied warranty that the goods shall be reasonably fit for such purpose [as is made known to the seller by the buyer]."[364] The court concluded:

> 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.[365]

Moving northward to the "stern and rock-bound" coast of Maine, the hardy traveller will soon discover that the Supreme Court of that State has aligned itself solidly with the jurisdictions which hold that the presence of a noxious substance is a breach of warranty in food cases. *Sams v. Ezy-Way Foodliner Co.*[366] must be included among the most significant and carefully prepared decisions of the past decade. The effect of the adoption of the Uniform Sales Act[367] and various departures from privity in other jurisdictions are reviewed.[368] Sams, the plaintiff, had purchased and brought home certain sausages encased in a sealed plastic bag. The retailer could not have detected the presence of slivers of glass in the sausages, nor could the plaintiff until he masticated the sausage meat and glass which injured him. He brought this action against the vendor. The court concluded that there was an implied warranty of merchantable quality which accompanied the sale of food products, whether in sealed containers or not; this warranty was held to have been breached.

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364. Quoting section 96 of the New York Personal Property Law, subdivision 1, which is the same as § 15 of the Uniform Sales Act in pertinent part.

365. Parish v. Great Atlantic & Pacific Tea Co., *supra* note 1 at 22; emphasis supplied by the court.

366. 157 Me. 10, 170 A.2d 160 (1961).

367. This statute became effective in Maine in 1923, see R.S. 1944, c. 171, §§ 1-78.

368. 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.

Suggesting that the entire case was predicated on a breach of the warranty of merchantability, the court stated that a sausage containing glass is "not fit to eat and is therefore not of merchantable quality. The test under Clause II is not that buyer and seller treated the goods as merchantable, but whether they were so in fact."[369] The court then adverted to the so-called "sealed container" exception; or, in short, is "the retailer of food in a sealed container insulated from an implied warranty of merchantability" under the Uniform Sales Act?

After citing various cases including *Ryan v. Progressive Grocery Stores,* described by the court as undoubtedly the "leading case in the country under Clause II" of section 15 of the Sales Act, *Botti v. Venice Grocery Co.,* and *Bigelow v. Maine Central R.R.,* the court concluded that "liability of the defendant in this action rests solely upon an implied warranty of merchantability under Section 15 II of the Uniform Sales Act. It arises, if at all, by contract and is not dependent in the slightest degree upon fault of the defendant." The court then quotes the pertinent provisions of section 15 of the Uniform Sales Act and compares the case with *Ryan v. Progressive Grocery Stores,* finding a decided analogy between the glass in the sausages and the pin in the bread in the *Ryan* case.[370] In fact, the court could find no valid distinction between a can of asparagus *(Bigelow),* a package of macaroni *(Botti),* a loaf of bread wrapped in paper and sealed *(Ryan),* and the "hot dogs" in a sealed plastic bag in the instant case:

> In each instance we have a sealed container or an original package effectively preventing inspection by the retailer at any time and by the purchaser until the container is opened. The basis of the sealed container exception is that the purchaser could not have placed reliance upon the retailer's skill or judgment in determining that the contents were fit to eat.[371]

The court went on to address itself to the general purpose of the Uniform Sales Act "to make uniform the laws of those states which enact it," stating that, "the Uniform Sales Act codified, extended, and liberalized the common law. Rules inconsistent with the Act were thereby abolished."[372]

The effect of *Bigelow v. Maine Central R.R.,* decided some fifty years ago and prior to the adoption of the Uniform Sales Act by

369. Sams v. Ezy-Way Foodliner Co., *supra* note 366, at 14, 170 A.2d at 163.

370. The cases cited above will be found *supra* note 368.

371. Sams v. Ezy-Way Foodliner Co., *supra* note 366, at 15, 170 A.2d at 164.

372. *Ibid.*

Maine, was then considered. In that case, the court held that a dining car operator was not liable for breach of an implied warranty of fitness when a patron became ill from eating unwholesome canned asparagus served him in the diner. Although the decision was primarily based on an antiquated anachronism (if anything, even more anachronistic than privity of warranty) to the effect that *service* (or "uttering") of food is not a sale, the court said that *Bigelow* "may fairly be said to state the common law of our state applicable, as here, in the case of the purchaser-consumer against the retailer."[373] Speaking for the court, the Chief Justice concluded that "[u]nder the Sales Act, by the great weight of authority, there is no 'sealed container exception.' "[374]

Specifically disapproving *Bigelow v. Maine Central R.R.*,[375] the Supreme Court decided:

> 'Reasonably fit for such purpose,' under Clause I, and 'merchantable quality,' under Clause II, are equivalent with respect to food for human consumption. *The test is whether the food is fit to eat.*[376]
>
> . . . Under the Sales Act, so interpreted, the purchaser-consumer has the benefit of a warranty of merchantability against the retailer. In turn the retailer may reach his seller and so through the chain of distribution to the manufacturer.[377]

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373. Bigelow v. Maine Central R.R. cited and discussed by the court in Sams v. Ezy-Way Foodliner Co., *supra* note 366, may be found *infra,* note 375.

374. Sams v. Ezy-Way Foodliner Co., *supra* note 366 at 18, 170 A.2d at 165. In support of this statement, which may be considered authoritative, the following are cited: 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 (1912); 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; Prosser, *The Implied Warranty of Merchantable Quality* (1943), 27 MINN. L. REV. 117; 4 WILLISTON, CONTRACTS §§ 995, 996; PROSSER ON TORTS § 83, p. 495; 2 HARPER AND JAMES ON TORTS, Retailer's strict liability § 28.30; DICKERSON, "PRODUCTS LIABILITY AND THE FOOD CONSUMER" (1951) § 1.3 (common law); § 1.15 (Under Sales Act); generally §§ 1.3 to 1.19; 22 AM. JUR. *Food* §§ 99, 100.

375. 110 Me. 105, 85 Atl. 396 (1912).

376. Sams v. Ezy-Way Foodliner Co., *supra* note 366, at 21, 170 A.2d at 166.

377. If the frankfurts here had not been sold in a sealed bag, inspection would not have disclosed the glass within the edible casing. Indeed, the North Carolina Court, in holding there was no sealed container rule at common law, treated a sausage as an article within a sealed container. Rabb v. Covington, 215 N.C. 572, 2 S.E.2d 705 (1939).

However, as pointed out above, the *Bigelow* decision was based on a further ground: Limitation of liability of innkeepers, hotel proprietors and restaurateurs to negligence.[378] At the ancient common law, the unhappy traveler who turned in for the night at some wayside inn was deemed the beneficiary of his host's service of food and lodging, and was therefore without benefit of warranties which were only identified with sales. Representative of this archaic view is *Nisky v. Childs Co.*[379] The facts disclose that Mrs. Nisky had eaten a meal in a restaurant operated by the defendant company in Newark, New Jersey. She ordered half a dozen fried oysters of which she ate three. Although the last one tasted bitter, Mrs. Nisky managed to swallow it but felt so sick that she complained to the waiter who gave her a cup of coffee to take away the bitter taste. She soon became nauseated, shaky, chilly, and feverish. Returning home immediately, a physician was summoned who applied a stomach pump. Mrs. Nisky recovered her health but no damages.

At common law, the court observed, "food served at a restaurant is not a sale," and a purveyor of food was only required to exercise due care in the service of food to his patrons; there being no showing of lack of due care, the granting of defendant's motion for a nonsuit by the trial court was not error, and the judgment would have to be affirmed. Here, too, the highest court in New Jersey reviewed the early cases in support of its conclusion that an innkeeper does not sell "but utters his provisions," and that the guest may consume the food he requires but take no more, nor may he remove any uneaten portion of the food served him. This conclusion alone serves to emphasize how thoroughly obsolete this concept is today. The effect of changing times and *mores* is reflected in the contrary decisions in Massachusetts and New York, respectively *Friend v. Childs Dining Hall Co.* and *Temple v. Keeler,* both of which are cited by the court in the *Nisky* case.[380]

While not expressly overruling *Nisky v. Childs,*[381] the holding of

378. This theory was adopted in the following cases: Pappa v. F. W. Woolworth Co., 42 Del. 358, 33 A.2d 310 (Super. Ct. 1943); a piece of tin in sandwich bread, Child's Dining Hall Co. v. Swingler, 173 Md. 490, 197 Atl. 105 (1938); and a mouse in roast chicken dressing, Kenny v. Wong Len, 81 N.H. 427, 128 Atl. 343 (1925). For other examples of the rule see McCarley v. Wood Drugs, Inc., 228 Ala. 226, 153 So. 446 (1934); Albrecht v. Rubenstein, 135 Conn. 243, 63 A.2d 158 (1948); Rowe v. Louisville & N.R.R., 29 Ga. App. 151, 113 S.E. 823 (1922); F. W. Woolworth Co. v. Wilson, 74 A.2d 439 (5th Cir. 1934); Horn & Hardart Baking Co. v. Lieber, 25 F.2d 449 (3rd Cir. 1928).

379. 103 N.J.L. 464, 135 Atl. 805 (1927).

380. Friend v. Childs Dining Hall Co., 231 Mass. 65, 120 N.E. 407 (1918); Temple v. Keeler, 238 N.Y. 344, 144 N.E. 635 (1924).

381. *Supra* note 379.

that absurd case is so thoroughly discredited in *Sofman v. Denham Food Service,*[382] that there is hardly a vestigial remnant of its authority left to survive. Said the majority:

> We see no resemblance between the operation of a cafeteria and the operation of the ancient inn. If it be assumed the inn did not "sell" food but merely satisfied whatever might be the needs of its wayfarer guest, surely the same cannot be said of a cafeteria, at which the consumer buys and pays for the food he wants and may carry it to where ever he wishes, on or off the premises. We can see no justificaton for applying the innkeeper rule to a factual pattern in which the consideration underlying the innkeeper rule cannot be found.[383]

Of special significance is the concurring opinion:[384]

> There are two general lines of authority on the issue of a restaurateur's liability in implied warranty. Of those jurisdictions, which have had the opportunity to pass upon the question, the numerical majority supports the view, referred to as the 'Massachusetts-New York rule,' that one serving food for immediate consumption on the premises impliedly warrants that the food served is wholesome and fit

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382. 37 N.J. 304, 181 A.2d 168 (1962).

383. Sofman v. Denham Food Service, Inc., *supra* note 382, where the court in a PER CURIAM opinion continued: "Nisky may indeed be unsound on its own facts but we believe that whether it is, should be reserved for a case in which the issue must be met. The question may not arise, since the Legislature has overturned Nisky, as well as the underlying rule which Nisky applied to a restaurant, by adopting the Uniform Commercial Code, effective January 1, 1963. . . . All that need now be decided is that the rule applicable to an inkeeper should not be applied to a cafeteria where it would be plainly a myth to say that food is not 'sold,' and that a refusal to go beyond the precise holding of Nisky is well supported by the Legislature's disapproval of the underlying concept which Nisky invoked."

384. By Mr. Justice Schettino who favors a clear-cut overruling of Nisky v. Childs Co., *supra* note 379, saying: "Although I concur in the result reached by the majority, in my view, the question presented by this case is the broad one, *i.e.,* whether a defendant engaged in the business of preparing and offering food designed primarly to be consumed on the premises is liable to a patron upon an implied warranty that the food was fit for human consumption. Because this approach would require the overruling of *Nisky,* I set forth my views in full.

"In my opinion the scope of the Nisky decision does cover the instant factual situation. Research disclosed only two jurisdictions which have had occasion to apply the doctrine of implied warranty to food sold in a cafeteria. Neither discussed any distinction for this purpose between a cafeteria and a restaurant. McAvin v. Morrison Cafeteria Co. of La., 85 So.2d 63 (La. Ct. of App. 1956); Franke's, Inc. v. Wallace, 219 Ark. 467, 242 S.W. 2d 968 (1951). When a person

> for human consumption and is liable for a breach of the implied warranty. The numerical minority of jurisdictions adheres to the view, designated as the 'Connecticut-New Jersey rule,' which is exemplified by *Nisky*. . . .
>
> The Connecticut-New Jersey rule has been severely criticized; however, as already noted, the rule was based on the belief that at common law an innkeeper merely uttered his food; and therefore, by analogy, the service of food in a restaurant today does not constitute a sale. But there is considerable doubt that a rule to that effect ever existed at common law. . . .[385]
>
> Upon an analysis of *Nisky* and the authorities relied upon by that court for its opinion and upon the balancing of the views of the Connecticut-New Jersey rule against the Massachusetts-New York rule, I feel that the latter is much more effective in securing the public health and safety. At the same time it is more realistic.
>
> Plaintiff here selected and purchased his food at a counter and was free to eat whereever he might choose, either inside or outside the premises. Viewed in this light, I perceive no material difference between the instant case and those which hold that retail dealers impliedly warrant the fitness for human consumption of the food they sell for consumption off the premises. Clearly the transaction is no less a sale than that where a customer purchases a loaf of bread. . . .[386]

The gratifying increase in the number of jurisdictions which have adopted the view that the owner or operator of a restaurant or tavern is liable to a patron or customer who suffers injuries from food or drink that is unwholesome or contains foreign substances of a deleterious nature is attributable to the recognition of the applicability of an implied warranty of the wholesomeness and fitness for human consumption or use of the food or beverage served. This is certainly

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orders food in a restaurant today, he selects a listed portion for which the restaurateur has set a fixed price. Reality would be ignored if it is said that a sale is not effected, at least as to that food which the patron consumes. Thus, while a distinction can be made between a cafeteria and a traditional restaurant, for present purposes the difference is so negligible that we should face the problem four square."

385. Citing DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER, 25 (1951).

386. Citations omitted.

indicative of a clear trend towards a rule of law inspired by better reasoning and sound public policy.[387]

Beverages. Because of the frequency with which foreign substances such as dead mice,[388] worms,[389] spiders,[390] cockroaches[391]

387. Williston expresses this view and suggests that whether the transaction is regarded as a sale or not, "every argument for implying a warranty in the sale of food is applicable with even greater force to the serving of food to a guest or customer at an inn or restaurant . . . a sale is not the only transaction in which a warranty may be implied. . . ." 1 WILLISTON, SALES § 242 (b), at 640 (rev. ed. 1948). This statement is quoted with approval in Sartin v. Blackwell, 200 Miss. 579, at 583, 28 So.2d 222, at 223 (1946).

388. Gray v. Pet Milk Co., 108 F.2d 974 (7th Cir. 1940), *cert. den.* 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) *aff'd;* Hope Coca-Cola Bottling Co. v. Jones, 222 Ark. 52, 257 S.W. 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 (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).

As one court facetiously observes in dialectic vein: "A 'sma' mousie' caused the trouble in this case. The 'wee, sleekit, cow'rin, tim'rus beastie' drowned in a bottle of coca-cola. . . . [The thirsty purchaser] did not get joy from the anticipated refreshing drink. He was in the frame of mind to approve the poet's words:

'The best-laid schemes o' mice an' men
Gang aft aglay
An' lea'e us nought but grief an' pain,
For promis'd joy!' "

Jackson Coca-Cola Bottling Co. v. Chapman, *supra* at 869, 64 So. at 791, also quoted in Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer),* 69 YALE L.J. 1099, note 44 at 1106.

389. 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).

390. 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).

391. 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.

and other vermin,[392] cigar stubs or cigarette butts,[393] acids,[394] particles of glass,[395] and any number of other deleterious items[396] appear in bottled beverages, the cases dealing with them are legion. The rule applied to them in the main is the same as has been formulated for foodstuffs: They are considered an exception to the privity "requirement" by the great majority of jurisdictions. There are a few, however, which cling with a certain dogged tenacity to this outmoded and pernicious concept.[397] It is only a question of time

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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).

392. 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).

393. 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 (1956); Keller v. Coca-Cola Bottling Co., 214 Or. 654, 330 P.2d 346 (1958); Boyde 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).

394. 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).

395. 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).

396. 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., *supra* note 413; Rupy v. George Schneider & Co., 286 App. Div. 1095, 145 N.Y.S.2d 489 (1955); Murray v. P. Ballantine & Sons, 75 R.I. 13, 62 A.2d 895, 63 A.2d 730 (1948).

397. 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).

until they too will be converted, if not by judicial action, then by statute.[398] Analysis of some of the more recent cases may prove useful in establishing this trend.

In a leading case, *Caskie v. Coca-Cola Bottling Co.*,[399] the Supreme Court of Pennsylvania affirmed a judgment for the plaintiff in an action for damages resulting from breach of warranty of fitness for human consumption.[400] The plaintiff, a police officer, had purchased a bottle of Coca-Cola from an enclosed vending machine in a police station just prior to reporting for duty at four o'clock in the afternoon. The odor that emanated from the bottle after he had consumed about half of its contents resembled that of "brake fluid" and he vomited repeatedly. Actually, chemical analysis showed the presence of 6/10ths of one percent of hydrochloric acid which made the Coca-Cola "unfit for human consumption." Citing an earlier case,[401] the court found that the presence of this concentration of acid "established a breach of the implied warranty of fitness and plaintiff did not have the burden of proving that the presence of the hydrochloric acid was due to some negligence or dereliction on the part of the defendant."[402]

A more recently decided case involving the same beverage, *Coca-Cola Bottling Co. of Puerto Rico v. Negron Torres*,[403] expressly rejected any "requirement" of privity and awarded a substantial judgment to the plaintiff. The plaintiff bought a bottle of Coca-Cola from a retailer in Puerto Rico; upon drinking a part of it, he noticed an objectionable taste, apparently caused by the presence of the putrid body of a small mouse, which led to his illness. The United States District Court found the defendant distributor liable for breach of warranty, relying on *Castro v. Payco, Inc.*[404] In the *Castro* case, the Supreme Court of Puerto Rico affirmed a judgment awarding damages to the plaintiff for personal injuries occasioned by the consumption of unwholesome ice cream. The award was based on breach of implied warranty. In the *Castro* case, however, there was privity of contract which was lacking in the instant case. Therefore, the fur-

398. As, for example, Connecticut, Georgia and Virginia; in addition, it is to be noted that the Uniform Commercial Code has made certain inroads on the privity concept, see § 2—318, Text at note 306, *supra;* for jurisdictions which have adopted the Code, see note 196, *supra.*

399. 373 Pa. 614, 96 A.2d 901 (1953).

400. At this time, the Uniform Sales Act was in effect in Pennsylvania.

401. Rozumailski v. Philadelphia Coca-Cola Bottling Co., 296 Pa. 114, 145 Atl. 700 (1929).

402. Caskie v. Coca-Cola Bottling Co., *supra* note 399, at 903, note 1.

403. *Supra* notes 1, 388.

404. 75 P.R.R. 59 (1953).

ther question still confronted the court as to whether privity of contract was essential to recovery by a consumer of unwholesome food. As there appeared to be no case in point in Puerto Rican jurisprudence, the court concluded that its decision would have to be based "upon general considerations."[405] It pointed out that Professor Williston in his work on sales[406] had called attention to the fact that historically, "the requirement of privity has no place in actions on warranties because originally redress for breach of warranty was given by an action for deceit, *i.e.* for a false and fraudulent misrepresentation, which sounds distinctly in tort; that redress by action sounding in contract was a later development to give an alternative remedy; and furthermore, that the obligation of an implied warranty is imposed by law irrespective of a promise by the seller."[407]

The court continued by suggesting that, whether correctly or not, the orthodox rule required privity of contract between parties to an action for breach of warranty. It then signalized the fact that for many years, a number of courts have recognized an exception to the general doctrine in the case of medicines and foodstuffs, holding that "the manufacturer warrants to the ultimate consumer that his article is fit for human consumption." The court added:

> We think this exception rests upon a sound basis in view of present day methods of merchandising products for human consumption, particularly those sold in cans, capped bottles or sealed containers. . . .[408]

Having examined "general considerations," as stated in an excerpt from *Rogers v. Toni Home Permanent Co.*,[409] quoted at some length,[410] the United States Court of Appeals undertook to determine what the Supreme Court of Puerto Rico might be expected to hold under the circumstances. The federal tribunal felt justified in thinking that the theoretically sound basis for the exception to the privity rule and its intrinsic merit would persuade the Supreme Court to recognize and adopt the exception. Also that in all probability, such a holding would be based on public policy rather than upon a determination that the implied warranty of fitness for human consumption is a matter of contract law. Quoting from *Castro v. Payco, Inc.*,[411] the court added:

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405. This case is quite similar to Chapman v. Brown, *supra* note 1, in that the federal court was called upon to state local law.

406. 1 WILLISTON, SALES §§ 195-97, 244 (3d ed. 1948).

407. Coca-Cola Bottling Co. v. Negron Torres, *supra* note 388 at 151-52.

408. *Ibid.*

409. 167 Ohio St. 244, 147 N.E.2d 612 (1958).

410. The quoted excerpt is reproduced *supra*, text at note 265.

411. *Supra* note 404.

> When the manufacturer of an article used for food offers it for sale for human consumption, the presumption is that he has complied with the [Puerto Rico Pure Food, Drug and Cosmetic] Act, and that he has placed on the market an unadulterated article and that he warrants that it is fit for its intended use.[412]

Affirming the judgment of the lower court, it was held that the plaintiff was entitled to recover for breach of an implied warranty of fitness for human consumption and that lack of privity was not a bar to this action under Puerto Rican law.

In a much more recent case, *Manzoni v. Detroit Coca-Cola Bottling Co.*,[413] the Supreme Court of Michigan was called upon to determine whether the wife of a purchaser of Coca-Cola could maintain an action for breach of warranty when she became ill from consuming the contents of a bottle of this beverage.[414] Chemical analysis revealed that "mold filaments and mold spores" were present. Defendant urged a rather curious argument indicating a complete lack of familiarity with the underlying concepts; in effect, it said that plaintiff sued on an implied warranty, but there is "no distinction between a count in implied warranty or in tort;" therefore, "the burden was upon the plaintiffs to show negligence." Since plaintiffs had failed to show negligence, they were not entitled to recover. Of this contention, the court said:[415]

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

412. Coca-Cola Bottling Co. v. Negron Torres, *supra* note 388. at 152.

413. 109 N.W.2d 918 (Mich. 1961).

414. For various kinds of foreign substances which have been found in Coca-Cola, see *supra* notes 388-396.

415. Manzoni v. Detroit Coca-Cola Bottling Co., *supra* note 413.

> 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.[416]

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."[417] 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:[418] "It ranges through areas both of contract and tort," as the court remarks, "from the liability of the manufacturer of a defective automobile wheel,[419] or cinder blocks[420] to that of the seller of an inflammable dress,[421] or the distributor of unwholesome food[422] or contaminated drink,[423] or even the purveyor of a caustic perfume."[424]

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416. *Id.* at 920; as to the warranty action, the court cites Kenower v. Hotels Statler Co., 124 F.2d 658 (6th Cir. (1942); also, as to negligence, the court indicates that during the year, defendant's "plant bottled 14,000,000 bottles of Coca-Cola," citing Norfolk Coca-Cola Bottling Works, Inc. v. Krausse, 162 Va. 107, 112, 173 S.E. 497, 498 (1934).

As Mr. Justice Smith so clearly states it, either doctrine, whether breach of warranty or tort, when literally applied can readily defeat the rights of the consumer. This is well illustrated by the recent case of Hochgertel v. Canada Dry Corp., *supra* note 3, where the Supreme Court of Pennsylvania relegated the innocent victim of an exploding soda bottle to his remedy in tort because he was not a subpurchaser within the distributive chain. The case is stated, *supra* in text, notes 80a to 80k inclusive.

417. Mazoni v. Detroit Coca-Cola Bottling Co., *supra* note 413 at 921.

418. See Wilson, *Products Liability,* 43 CALIF. L. REV. 614, 809 (1955).

419. Citing MacPherson v. Buick Motor Co., *supra* note 360.

420. Citing Spence v. Three Rivers Builders & Masonry Supply, Inc., *supra* note 1.

421. Noone v. Fred Perlberg, Inc., 268 App. Div. 149, 49 N.Y.S.2d 460 (1944) *aff'd* without op. 294 N.Y. 680, 60 N.E.2d 839 (1945); *cf.* Frank R. Jelleff, Inc. v. Braden, 98 App. D.C. 180, 233 F.2d 671 (D.C. Cir. 1956), inflammable smock; Chapman v. Brown, *supra* note 1, hula skirt.

422. Citing Jacob E. Decker & Sons, Inc. v. Capps, *supra* note 1.

423. Citing Sharp v. The Pittsburg Coca-Cola Bottling Co., 180 Kan. 845, 308 P.2d 150 (1957); see cases cited in notes 388-396.

424. Citing Carter v. Yardley & Co., Ltd., 319 Mass. 92, 64 N.E.2d 693 (1946), quoted in text at note 240, *supra.*

Quoting extensively from the closely reasoned and ably formulated opinion of Mr. Justice Francis in *Henningsen v. Bloomfield Motors, Inc.*,[425] 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."[426]

In Michigan, it appears that recovery in these cases is afforded "either on a theory of negligence, or implied warranty."[427] The court expressly refuses to retract its earlier decision in *Spence v. Three Rivers Builders & Masonry Supply, Inc.*[428] and adheres to the view that it is unnecessary to show negligence in a suit upon breach of warranty of fitness for human consumption, and that "such warranty is available to all who may suffer damages by reason of their use in the legitimate channels of trade."[429] Citing a precedent of almost forty years' standing, *Hertzler v. Manshum*,[430] wherein the same court had stated, "the poisoned flour speaks for itself; unexplained, it evidences negligence, for no proof of negligence could be more direct than the flour with arsenate of lead in it."[431] Commenting on this, Mr. Justice Smith adds:

> It speaks with equal clarity when the action is brought on a theory of warranty. Unexplained it evidences such breach, as well as negligence. Here the jury was not satisfied with the explanation tendered, and we are not persuaded there was error of law in their determination.[432]

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.[433]

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425. *Supra* note 1.

426. Manzoni v. Detroit Coca-Cola Bottling Co., *supra* note 413 at 921.

427. Quoting Spence v. Three Rivers Builders & Masonry Supply, Inc., *supra* note 1.

428. *Id.* at 135, 90 N.W.2d at 874.

429. Quoting LaHue v. Coca-Cola Bottling, Inc., 50 Wash.2d 645, 314 P.2d 421 (1957).

430. 228 Mich. 416, 200 N.W. 155 (1924), later app. 237 Mich. 289, 211 N.W. 754 (1927).

431. Hertzler v. Manshum, *supra* note 430 at 421, 200 N.W. at 156.

432. Manzoni v. Detroit Coca-Cola Bottling Co., *supra* note 413 at 922.

433. Dr. Pepper Co. v. Brittain, 234 Ala. 548, 176 So. 286 (1937); LeBlanc v. Louisiana Coca-Cola Bottling Co., 221 La. 919, 60 So.2d 873 (1952); Tafoya v. Las Cruces Coca-Cola Bottling Co., 59 N. Mex. 43, 278 P.2d 575 (1955); *cf.* Caskie v. Coca-Cola Bottling Co., 373 Pa. 614, 96 A.2d 901 (1953); Keller v. Coca-Cola Bottling Co., 214 Ore. 654, 330 P.2d 346 (1958).

Bottles and Other Containers. In some jurisdictions, fortunately a small minority, a rather illogical distinction has been attempted between containers and their edible or potable contents. Somewhat akin has been the "distinction" sometimes made between the sale of the container and its bailment where the container may be returned and the deposit recovered.[434]

In the first category are numerous instances of "exploding" bottles, or other defectively made containers.[435] A recent case of novel impression in California, *Vallis v. Canada Dry Ginger Ale,*[436] dealt with this question. Vallis was employed as a helper in the kitchen of a restaurant, whose proprietor had purchased the bottle of "Club Soda" which exploded and injured the plaintiff. The trial court entered a judgment of nonsuit; on appeal, this was reversed on the ground that an implied warranty of merchantability as to the bottle, distinguished from its contents, extended to the employee. The court reviews the precedents pro and con citing cases on both sides and quotes a leading article:[437] "This metaphysical distinction between the container and the contents can only be regarded as amazing. The two are sold by each seller, and received by the ultimate purchaser, as an integrated whole; and where the action is against the immediate seller, it is well settled that the warranty covers both."[438] It is the court's reasoned conclusion that it is a matter of general knowl-

434. McIntyre v. Kansas City Coca-Cola Bottling Co., 85 F. Supp. 708 (W.D. Mo. 1949) appeal dis. 184 F.2d 671 (8th Cir. 1950); Escola v. Coca-Cola Bottling Co., 24 Cal.2d 453, 150 P.2d 436 (1944); McAlester Coca-Cola Bottling Co. v. Lynch, 280 P.2d 466 (Okla. 1955); Anheuser-Busch, Inc. v. Butler, 180 S.W.2d 996 (Tex. Civ. App. 1944).

435. Canada Dry Bottling Co. of Fla. v. Shaw, 118 So.2d 840 (Fla. Dist. Ct. App. 1960), wherein the split of authority is discussed; 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).

436. 11 Cal. Rptr. 823 (Cal. App. 1961) reh. den. See also Escola v. Coca-Cola Bottling Co., of Fresno, 24 Cal.2d 453, 150 P.2d 436 (1944); Mahoney v. Shaker Square Beverages, 102 N.E.2d 281 (Ohio C.P. 1951); Tennebaum v. Pendergast, 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, 11 A.2d 88 (1940); Cooper v. Newman, 11 N.Y.S.2d 319 (1939).

437. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer),* 69 YALE L.J. 1099 (1960); see also Pound, *The Problem of the Exploding Bottle,* 40 BOSTON U. L. REV. 167 (1960).

438. Prosser, *supra* at 1138.

edge that the explosion of a defective bottle containing a carbonated beverage may cause serious physical harm to those handling it or near it when the explosion occurs. Such a bottle is not of merchantable quality, and it is to be expected that an employee of the vendee will handle it in the normal course of his job. That he will be injured by a defective bottle is entirely foreseeable, citing another recent California case, *Peterson v. Lamb Rubber Co.*,[439] in support, and comparing *Gottsdanker v. Cutter Laboratories.*[440]

In sharp and deplorable contract to *Vallis v. Canada Dry Ginger Ale,* supra, is the most recent Pennsylvania case, *Hochgertel v. Canada Dry Corporation.*[440a] Here, the facts are strikingly similar: substitute "bartender" for "helper" and "fraternal organization" for "restaurant," and the cases are factually on all fours. Also, in each case, the lower court held for the defendant, accepting the defense of lack of privity; however, on appeal, the decisions are diametrically opposite for the Supreme Court of Pennsylvania affirmed the order of dismissal, insisting on privity of warranty to the extent that only a purchaser, or a subpurchaser within the distributive chain, could be granted recovery for breach of warranty.[440b]

As to the second of these spurious "distinctions" indicated above, namely, between the sale or bailment of the container, the court quotes extensively from *Trust v. Arden Farms Co.*,[441] where the first of the concurring and dissenting opinions reads:

"However, a question does arise as to whether there was a sale of the bottle. This has never been authoritatively answered in California; there is a split among the cases in other jurisdictions that have considered the question, but the weight of authority is that there is a sale of the bottle."[442]

Pointing out that the English Sale of Goods Act has a section nearly identical with the California Code provision regarding implied warranties,[443] the court discusses *Geddling v. Marsh,*[444] an English precedent, where the suggested distinction was summarily re-

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439. 54 Cal.2d 339, 5 Cal. Rptr. 863, 353 P.2d 575 (1960).

440. 182 Cal. App.2d 602, 6 Cal. Rptr. 320 (1960).

440a. *Supra* note 3; the facts are stated in text at notes 80a to 80k inclusive.

440b. Hochgertel v. Canada Dry Corp., *supra* note 3.

441. 50 Cal.2d 217, 324 P.2d 583 (1958).

442. *Id.* at 232, 324 P.2d at 592.

443. Sale of Goods Act (1893) 56 & 57 Vict. § 14, and § 1735, CALIFORNIA CIVIL CODE, corresponding to Uniform Sales Act § 15.

444. [1920] 1 K.B. 668.

jected and the warranty held applicable whether the bottle was *sold* or *bailed.*[445] This seems a sound conclusion.

Canada Dry Bottling Co. of Florida v. Shaw[446] is an example of similarly enlightened reasoning. This time the offender was a bottle of soda which broke when plaintiff attempted to open it. The broken bottle injured the purchaser's hand and she brought this action. Referring to the doctrine of strict liability obtaining in numerous jurisdictions,[447] and citing cases in support, the court rejected the purported distinction:

> The warranty which these courts find is one of merchantable quality or fitness for the general purpose for which the goods are made, rather than any special purpose of the buyer. The deliberate policy of carrying the responsibility back to the manufacturer who is best able to meet it is indicated by a few decisions which have refused to find any warranty from a wholesaler to the consumer. Less comprehensible are the decisions of three courts which have confined the manufacturer's warranty to the food or beverage inside of a container, and have refused to find any warranty that the container itself will not explode in the customer's face. . . .
>
> The distinction of course makes no sense. One may speculate that these courts were uneasy about the proof that the plaintiff had not damaged the container himself.[448]

Recognizing that the trend is definitely in the direction of greater consumer protection, the court concluded:

> The implied warranty theory of liability comports with the general trend of the best reasoned cases. The manufacturer knows the content and quality of the food products canned and offered to the public for consumption. The public generally is vitally concerned in wholesome foods, or its health will be jeopardized. If poisonous, unhealthful and deleterious foods are placed by the manufacturer upon the

445. This is also the view expressed in 1 WILLISTON, SALES § 227, note 1 (3d ed. 1948), citing Geddling v. Marsh, *supra* note 444.

446. 118 So.2d 840 (Fla. Dist. Ct. App. 1960).

447. California, Florida, Illinois, Iowa, Kansas, Louisiana, Minnesota, Mississippi, Missouri, North Carolina, Ohio, Oklahoma, Pennsylvania, Texas, and Washington, and possibly in Alabama, Arizona, and Kentucky.

448. Canada Dry Bottling Co. of Florida v. Shaw, *supra* note 446.

The same question was presented in Hochgertel v. Canada Dry Corp., *supra* note 3, where the Supreme Court of Pennsylvania asked: "Did the warranty cover the container as well as the contents of the bottle?" However, since the Court found that the plaintiff had no cause of action, not being "a purchaser or subpurchaser in the distributive chain," no answer was deemed necessary.

> 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.[449]

B. *Drugs and Related Products*

Gottsdanker v. Cutter Laboratories,[450] a recent California decision, is a further step in the repudiation of the obsolete privity requirement. Coming a century after the first really significant deviation,[451] this case involves the sale of polio-myelitis vaccine manufactured by Cutter laboratories and found to contain "live and active poliomyelitis virus." Two children who were vaccinated with it became infected and made ill thereby. The court refused to give the manufacturer immunity from liability for his breach of the implied warranties of fitness for use or merchantable quality and held him to strict liability. Using a somewhat unique reverse approach, the court suggested that if such immunity were to be granted, it would have to be done by statute, not by judicial legislation.[452]

There are any number of cases which have held the manufacturer or vendor of drugs and pharmaceuticals liable, regardless of privity, where the negligence of either has been responsible for the death or injury of those who have taken them.[453] Typical of these is *Martin v. Bengue, Inc.*, [454] where an ointment was rubbed on the patient's chest and shoulders; when he struck a match, its head fell off and ignited his pajama top which was impregnated with the salve. The fire burned with greater intensity than it otherwise would, and the court held that a jury could properly find the manufacturer liable.[455]

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449. *Id.* at 843, quoting the opinion in Florida Coca-Cola Bottling Co. v. Jordan, 62 So.2d 910 (Fla. 1953), which quotes the leading case of Blanton v. Cudahy Packing Co., 154 Fla. 872, 19 So.2d 313 (1944).

450. 182 Cal. App.2d 602, 6 Cal. Rptr. 320 (1960).

451. Thomas v. Winchester, 6 N.Y. 397 (1852).

452. Gottsdanker v. Cutter Laboratories, *supra* note 450.

453. Valmas Drug Co. v. Smoots, 269 Fed. 356 (6th Cir. 1920); Hruska v. Parke, Davis & Co., 6 F.2d 536 (8th Cir. 1925); Abbott Laboratories v. Lapp, 78 F.2d 170 (7th Cir. 1935); Wennerholm v. Stanford University, 20 Cal.2d 713, 128 P.2d 522 (1942); Keating v. Hull, 78 Conn. 719, 62 Atl. 661 (1905); Blood Balm Co. v. Cooper, 83 Ga. 457, 10 S.E. 118 (1889); Fuhs v. Barber, 140 Kan. 373, 36 P.2d 962 (1934); Tiedje v. Haney, 184 Minn. 569, 239 N.W. 611 (1931); Martin v. Bengue, Inc., 25 N.J. 359, 136 A.2d 626 (1957); Willson v. Faxon, 208 N.Y. 108, 101 N.E. 799 (1913); *cf.* Gielski v. State, 10 App. Div.2d 471, 200 N.Y.S.2d 691 (1960), *rev'g* 18 Misc.2d 508, 191 N.Y.S.2d 436 (1959), settled 11 App. Div.2d 974, 205 N.Y.S.2d 1003 (1960).

454. *Supra* note 453.

455. Martin v. Bengue, Inc., *supra* note 453.

The manufacturer of a certain vaccine known as "Bacterin" was held liable to the plaintiff who had vaccinated his sheep to provide them with immunity from certain diseases. Instead, the sheep died, allegedly as a result of the vaccination; the court, in *Brown v. Globe Laboratories,*[456] held that a circular issued by the manufacturer stating that "a protective degree of immunity is established" constituted a warranty for the breach of which the plaintiff was entitled to judgment. Privity was not even mentioned as a requirement.

Surgical nails and similar devices have occasioned litigation when shown to have been defectively made. Thus, in *Bowles v. Zimmer Manufacturing Co.,*[457] the federal court, following *Spence v. Three Rivers Builders & Masonry Supply Co.,*[458] held that privity was not essential to recovery for breach of warranty when certain surgical nails were found defective. The United States Court of Appeals for the Fourth Circuit also had occasion to determine the liability of a manufacturer of surgical nails which had been misbranded, *Orthopedic Equipment Co. v. Eutsler.*[459] The plaintiff was permanently injured because of the use of one of these nails; from a judgment in his favor, defendant company appealed. Affirming, the court found that there had been a violation of the Federal Food, Drug, and Cosmetic Act[460] when the nails were misbranded: "the breach of this duty may give rise to civil liability," said the court.[461] The facts in this case are of considerable interest: While assisting his father to remove a tree from the paternal farm, the plaintiff was injured when the tree fell on him. Examination at a nearby hospital disclosed a fracture of the leg and other injuries; an operation was considered

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456. 165 Neb. 138, 84 N.W.2d 151 (1957).

457. 277 F.2d 868 (7th Cir. 1960).

458. *Supra* note 1.

459. 276 F.2d 455 (4th Cir. 1960).

460. Sections 91-902(b), 201(j), 301(a), 502; 21 U.S.C. §§ 301-392.

461. Orthopedic Equipment Co. v. Eutsler, *supra* note 459 at 460; see Note, 26 VA. L.REV. 100 (1939). The court states that the following cases which it cites are representative of the majority rule: "Donaldson v. Great Atlantic & Pacific Tea Co., 186 Ga. 870, 199 S.E. 213, 128 A.L.R. 456 (1938); Doherty v. S. S. Kresge Co., 227 Wis. 661, 278 N.W. 437 (1938); Kelley v. John R. Daily Co., 56 Mont. 63, 181 P. 326 (1919); Meshbesher v. Channellene Oil & Mfg. Co., 107 Minn. 104, 119 N.W. 428 (1909); Pine Grove Poultry Farm, Inc. v. Newtown By-Products Mfg. Co., 248 N.Y. 293, 162 N.E. 84 (1928); Portage Markets Co. v. George, 111 Ohio St. 775, 146 N.E. 283 (1924); Tedder v. Coca-Cola Bottling Co., 224 S.C. 46, 77 S.E.2d 293 (1953). Contra: Howson v. Foster Beef Co., 87 N.H. 200, 177 Atl. 656 (1935); Cheli v. Cudahy Bros Co., 267 Mich. 690, 255 N.W. 414 (1934); Gearing v. Berkson, 223 Mass. 257, 111 N.E. 785, L.R.A. 1916D, 1006 (1916)." See also Cotton, *A Note on the Civil Remedies of Injured Consumers.* 1 LAW AND CONTEMP.PROB. 67 (1933); *Note,* 26 VA. L.REV. 100 (1939); 2 HARPER AND JAMES, THE LAW OF TORTS, § 28.26 (1956); Annotation, 128 A.L.R. 464.

necessary. The contemplated surgery required the use of a "Kuntscher Cloverleaf Intramedullary Nail." After a hole had been drilled in the thigh bone, a nail of the specified type was selected based on its being labelled "9 mm." in width. When it was driven into the orifice previously prepared, it stuck and would not penetrate as intended. Thereupon, the upper or protruding part was cut off, the wound closed and a plaster cast applied in the hope that the bone would atrophy sufficiently to permit the withdrawal of the nail. The first attempt to accomplish this proved abortive, and it was not until two months after the operation that the nail could be removed. When measured, it was found that the width of the nail varied from "a minimum of 9.27mm. to a maximum of 10.12mm." Because of the malfunctioning of the nail, plaintiff lost the use of his leg permanently, and ultimate amputation was to be expected. The defense raised by the company was to the effect that its products were not covered by the Act;[462] this the court flatly rejected.[463]

There is one group of cases which may well be disapproved. These concern the furnishing of blood plasma which causes the death of the patient. Adopting a specious distinction between "supplying" or "furnishing" on the one hand, and a "sale" on the other, somewhat resembling the pseudo-distinction said to exist between "uttering" food and selling it in a restaurant,[464] the courts have held hospitals immune from liability on any theory of warranty, or even of negligence where death or injury results. A leading case is *Perlmutter v. Beth David Hospital,*[465] where the statement appears:

> The supplying of blood by the hospital was entirely subordinate to its paramount function of furnishing trained personnel and specialized facilities in an endeavor to restore plaintiff's health. It was not for blood—or iodine or bandages—for which plaintiff bargained, but the wherewithal of the hospital staff and the availability of hospital facilities to provide whatever medical treatment was considered ad-

462. Food, Drug, and Cosmetic Act, *supra* note 460.

463. Orthopedic Equipment Co. v. Eutsler, *supra* note 459; in fact, the court found to the contrary. "The dicta quoted in defendant's brief to the effect that the Act was designed primarily to protect the public, especially consumers, do not support the inference that defendant seeks to draw, namely that surgical instruments are not meant to be covered by the Act since they are not ordinarily sold to members of the public. On the contrary, these expressions are more consistent with the inclusion of such instruments within the scope of the Act, for the patient as a member of the public is the ultimate consumer," at 460.

464. Text at note 379, *supra.*

465. 308 N.Y. 100, 123 N.E.2d 792 (1954), *reversing* 283 App. Div. 789, 129 N.Y.S.2d 232, and 128 N.Y.S.2d 176 (Sup. Ct. 1953); Gile v. Kennewick Pub. Hosp. Dist., 48 Wash.2d 774, 296 P.2d 662 (1956).

> visable. The conclusion is evident that the furnishing of blood was only an incidental and very secondary adjunct to the services performed by the hospital and therefore, was not within the provisions of the Sales Act.[466]

The suggestion that "the furnishing of blood was only an *incidental* and very secondary adjunct" to the services rendered by the hospital seems open to serious criticism. What could be more important, what could be more a matter of life and death to the patient than providing the right type of blood? It would seem that here again, a technicality is depriving the user or consumer of essential protection.[467]

C. *Cigarettes and Other Tobacco Products*

As has been noted in an earlier section,[468] Pennsylvania took an early lead in this field in *Conestoga Cigar Co. v. Finke.*[469] Of far more recent vintage is *Pritchard v. Liggett & Myers Tobacco Co.*[470] While it does not precisely answer the question whether tobacco products intended and produced for human consumption should be assimilated to foodstuffs, it does hold that the manufacturer may be liable for a breach of warranty of fitness for use and of merchantable quality, as well as any express warranties made during an advertising campaign. It may be recalled that the plaintiff had been smoking Chesterfield cigarettes for more than thirty years, relying on numerous representations and assurances that the "nose, throat and accessory organs" are "not adversely affected by smoking Chesterfields."[471] These statements were contained in advertisements in various newspapers and periodicals and were also made on a national television program. As the United States District Court for the Western District of Pennsylvania had dismissed the action, the plaintiff

466. Perlmutter v. Beth David Hospital, *supra* note 465 at 106, 123 N.E.2d at 795, quoted in Krom v. Sharp & Dohme, 180 N.Y.S.2d 99 (App. Div. 1958) at 101, and holding that there was no cause of action for breach of warranty where death resulted from using blood plasma carrying jaundice germ.

467. However, this technicality seems to have taken such a firm hold that legislation may be essential to safeguard the lives of hospital patients threatened with blood plasma infusions.

468. *Supra* Section II.

469. *Supra* note 18.

470. 295 F.2d 292 (3d Cir. 1961).

471. *Id.* at 296-297, where the court quotes *verbatim* many of the claims made by defendant company through various advertising media.

If the decision in Hochgertel v. Canada Dry Corp., *supra* note 3, is a criterion, it would appear that an advertising campaign is not essential to finding the existence of a warranty and giving a remote purchaser rights for a breach thereof provided he is "in the distributive chain." However, it is equally clear that the plaintiff must be a purchaser or subpurchaser to have this right.

appealed; and the Third Circuit, after a comprehensive review of the Pennsylvania cases, reversed on the ground that a jury question was presented which precluded granting defendant's motions to dismiss and for a directed verdict.

The appellate court observed:[472] "From the evidence, the jury could very well have concluded that there was a breach of an implied warranty of merchantability."[473] The court rejected defendant's argument that the plaintiff had failed to show that Chesterfield cigarettes did not meet the standards of merchantability of cigarettes sold *generally,* citing *Frantz Equipment Co. v. Leo Butler Co.*[474] in support. It is interesting to note in passing that the Supreme Court of New Jersey also cited the *Frantz* case in its epoch-making decision in *Henningsen v. Bloomfield Motors, Inc.*[475] Upon remand, it is understood that the jury returned a verdict for the defendant company.[476]

As to the allegations made, and the facts in general, there is a remarkable similarity between *Cooper v. R. J. Reynolds Tobacco Co.*[477] and the *Pritchard* case. An examination of the advertisements which the defendant company used disclosed a statement that "20,000 doctors say that 'Camel' cigarettes are helpful." Also, on television programs, Camel cigarettes were described as "harmless to the respiratory system." Although the trial court had granted a motion by defendant company to dismiss plaintiff's complaint, the appellate court reversed on the ground that the representations regarding the non-injurious nature of the cigarettes were untrue and actionable.

Upon a subsequent appeal in this case,[478] summary judgment for the defendant company was affirmed after it had filed an affidavit stating that no copy of advertisements of any kind relative to Camel cigarettes was furnished for publication by any newspaper or other

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472. Pritchard v. Liggett & Myers Tobacco Co., *supra* note 470 at 297.

473. Here, the court added: "If supported by the record, the district court could charge the jury that they are to consider the practices of other cigarette manufacturers and the quality of cigarettes they manufacture as bearing on the question of merchantability. Such practices, however, are not conclusive, for 'what usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not.' Texas & Pacific Ry. Co. v. Behymer, 1903, 189 U.S. 468, 470, 23 S.Ct. 622, 47 L.Ed. 905. . . ." Pritchard v. Liggett & Myers Tobacco Co., *supra* note 470.

474. 370 Pa. 459, 88 A.2d 702 (1952).

475. *Supra* note 1.

476. This understanding is based on a news report, but no official report has been received; see editor's note, *supra* note 28.

477. 234 F.2d 170 (1st Cir. 1956).

478. Cooper v. R. J. Reynolds Tobacco Co., 256 F.2d 464 (1st Cir. 1958), *cert. den.,* 358 U.S. 875.

publication, or by radio or television, during the period under consideration which contained the statements regarding the helpfulness of Camels alleged in the complaint. This, of course, does not decide what the liability of the company might have been had the statements been made and actually relied on. It has been held that there can be recovery for injuries resulting from breach of warranty in the sale of tobacco products such as chewing tobacco,[479] or smoking tobacco.[480] It has even been held that a warranty of merchantability applies to retail sales of tobacco products when sold in the original sealed packages received from the manufacturer.[481] The chewing tobacco cases are probably more nearly assimilable to the food cases than any of the other tobacco products. Any number of courts have held the manufacturer liable when the "chew" was found to contain some foreign deleterious substance which injured the user. Typical of these is *Webb v. Brown & Williamson Tobacco Co.*,[482] where a plug of "Blood Hound" chewing tobacco was found to contain a dead worm with numerous stingers which injured the consumer. Judgment for plaintiff against defendant manufacturer was affirmed.

In *Liggett & Myers Tobacco Co. v. Wallace*,[483] "an enormous quantity of small metal particles resembling steel filings or bits of small wire" were found in "Tinsley's Natural Leaf Tobacco" and injured the plaintiff who sued the manufacturer. Lack of privity was held no bar, judgment being rendered against the manufacturer.

The most recent case involving tobacco products, *Green v. American Tobacco Company*,[484] came up on appeal to the United States Court of Appeals for the Fifth Circuit last year. As in *Pritchard* supra, and *Cooper* supra, the question was whether the manufacturer was liable on an implied warranty. Lung cancer was alleged to have been brought on by the constant and exclusive use of Lucky Strike cigarettes. After a vigorous contest, the trial court gave judgment for the manufacturer which was at first affirmed after an extensive

479. Liggett & Myers Tobacco Co. v. Rankin, 246 Ky. 65, 54 S.W.2d 612 (1932); Weiner v. D. A. Schulte, Inc., 375 Mass. 379, 176 N.E. 114 (1931); Corum v. R. J. Reynolds Tobacco Co., 205 N.C. 213, 171 S.E. 78 (1933); Liggett & Myers Tobacco Co. v. Wallace, 69 S.W.2d 857 (Tex. Civ. App. 1934); Webb v. Brown & Williamson Tobacco Co., 121 W.Va. 115, 2 S.E.2d 898 (1939).

480. Foley v. Liggett & Myers Tobacco Co., 136 Misc. 468, 241 N.Y.S. 233 (1930) *aff'd* without op. 232 App. Div. 822, 249 N.Y.S. 924.

481. Dow Drug Co. v. Nieman, 57 Ohio App. 190, 6 Ohio Ops. 77, 13 N.E.2d 130 (1936).

482. *Supra* note 479.

483. *Supra* note 479.

484. 304 F.2d 70 (5th Cir. 1962).

review of the Florida cases which were held controlling.[485] However, upon petition for rehearing, it was decided to certify the question to the Supreme Court of Florida.[486] The basis for this decision was first, there was no controlling precedent in Florida: and second, there was a strong and ably-reasoned dissenting opinion which also reviewed the Florida cases[487] but reached a diametrically opposed conclusion. The dissent discussed the *Pritchard* case supra, upon which defendant company placed some reliance, but found that it was not applicable since Florida is governed by common law.[488] No word has come from the Florida Supreme Court as of this writing.[489]

D. *Cosmetics, Detergents and Related Chemical Preparations*

Cosmetics. Of the many cases dealing with hair preparations or wave lotions, it is probable that none has been cited more frequently than *Rogers v. Toni Home Permanent.*[490] Plaintiff's mother applied a wave preparation to her daughter's hair, following the directions on the package. However, instead of creating the hoped-for curls, plaintiff's hair fell out, to her discomfiture and embarrassment. The label on the product stated that it was "Very Gentle;" one might wonder what would have happened had it not been "Gentle." When defendant company's demurrer was sustained with respect to the breach of warranty action which plaintiff had filed, the Supreme Court of Ohio examined the authorities and concluded that in a growing number of cases, "a warranty of fitness for human consumption carries over from the manufacturer or producer to the ultimate con-

485. The Florida cases reviewed included 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).

486. This certification is provided for under § 25.031, FLORIDA STATUTES 1959, F.S.A.

487. Cited in note 485 *supra.*

488. Green v. American Tobacco Co., *supra* note 484 at 83. Cf. Ross v. Philip Morris Co., 164 F. Supp. 683 (W.D. Mo. 1958).

If the teaching of Hochgertel v. Canada Dry Corp., *supra* note 3, is correctly understood, a plaintiff in the situation of Green who purchased the cigarettes would have a cause of action in Pennsylvania if he could prove breach of warranty, express or implied, by the manufacturer since plaintiff could show he was within the distributive chain.

489. February 1, 1963.

490. 167 Ohio St. 244, 147 N.E.2d 612 (1958).

sumer, regardless of privity of contract."[491] This was in spite of the holding in *Wood v. General Electric Co.*[492] where privity was deemed a prerequisite in cases of breach of warranty. The Supreme Court limited its holding to finding a breach of an express warranty since the manufacturer had by means of advertisements and labels made positive representations as to the non-injurious nature of his product.[493]

Only a few years later an intermediate appellate court in Ohio had occasion to consider the liability of a manufacturer on an implied or constructive warranty when a permanent wave lotion sold under the name of "Prom Home Permanent" caused a "quantitative loss of hair."[494] Or, as the attending physician described his patient: "The hairs, were still there, just like short grass would be after cutting the lawn." In short, plaintiff acquired an involuntary cosmetic crew-cut. President Judge Skeel delivered the unanimous opinion of the Ohio Court of Appeals holding the defendant company liable for breach of the implied warranty, following and quoting *Rogers v. Toni Home Permanent*:[495]

> Where an implied warranty is imposed by law, words of description used to identify the property which induced the sale, can hardly be distinguished from an express warranty as that term is defined by law, that is, a representation relied upon by the buyer which has the effect of inducing the sale. Under such circumstances where the obligations are imposed by law, it would be most difficult to distinguish between them in attempting to impose privity as a necessary element in making out a cause of action.[496]

After a careful analysis of the development of warranties and the so-called requirement of privity the court concluded: "Under the circumstances here presented, no distinction between establishing an express or implied warranty should be made. The plaintiff's case,

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491. Rogers v. Toni Home Permanent, *supra* note 490 at 246, 147 N.E.2d at 614.

There is no reason to suppose that the Pennsylvania courts would hold otherwise since plaintiff in the Rogers case was the purchaser and quite clearly would be found in the distributive chain, Hochgertel v. Canada Dry Corp., *supra* note 3.

492. 159 Ohio St. 273, 112 N.E.2d 8 (1953).

493. It expressly reserved any decision with respect to the breach of an implied or constructive warranty.

494. Markovich v. McKesson & Robbins, Inc., 106 Ohio App. 265, 149 N.E.2d 181 (1958).

495. *Supra* note 490.

496. Markovich v. McKesson & Robbins, Inc., *supra* note 494, 149 N.E.2d at 187.

based on implied warranty, should have been sustained for the consideration of the jury."[497]

Last year, in still another case involving a wave lotion, the United States Court of Appeals for the Sixth Circuit was called upon to decide what the Michigan courts would do if confronted with the circumstances of the case. The trial court had rendered judgment for the plaintiff and defendant company appealed, *Bathory v. Procter & Gamble Distributing Co.*[498] Again, loss of hair and dermatitis followed the use of "Pin-It," the name of the permanent wave compound. After discussing various cases, and the expert opinion expressed by the medical witnesses, the court concluded that the judgment should be affirmed, relying especially on an Ohio case, *Sicard v. Roux Distributing Co.*[499]

Before leaving the subject of cosmetics it seems appropriate to point out that in a number of instances the allergy of the plaintiff to a given ingredient has afforded a defense to the manufacturer.[500] This is an area of considerable controversy as illustrated by some of the cases such as *Zampino v. Colgate-Palmolive Co.*,[501] *Jacquot v. Wm. Filene's Sons*,[502] and *Crotty v. Shartenberg's New Haven, Inc.*[503]

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497. *Id.* at 188. *Cf.* Kennedy v. General Beauty Products, Inc. 167 N.E.2d 116 (Ohio App. 1960), citing Rogers, *supra* note 490, and Wood, *supra* note 492.

Somewhat similarly, in a recent decision in Pennsylvania, Hochgertel v. Canada Dry Corp., *supra* note 3, the court makes no distinction between express and implied warranties, saying, "in express warranties the purchaser or subpurchaser can rely thereon, for they are considered a part of the consideration for the purchase and are meant to be relied upon by the purchaser. See, *Silverman v. Samuel Mallinger* [*supra* note 36]. So also, the basis for recovery upon an implied warranty . . . must be that the implied warranty forms a part of the consideration for the contract, and flows from the manufacturer to subpurchaser through the conduit of a contractual chain."

498. 306 F.2d 22 (6th Cir. 1962).

499. 133 Ohio St. 291, 13 N.E.2d 250 (1938); similar cases are Graham v. Bottenfield's Inc., 176 Kan. 68, 269 P.2d 413 (1954); Patterson v. George H. Weyer, Inc., 370 P.2d 115 (Kan. 1962), citing the Bottenfield case *supra*.

500. In Hanrahan v. Walgreen Co., 243 N.C. 268, 90 S.E.2d 392 (1955), the court defines cosmetic as "any external application intended to beautify and improve the complexion, skin, or hair."

501. 10 Misc.2d 686, 173 N.Y.S.2d 117 (Sup. Ct. 1959).

502. 337 Mass 312, 149 N.E.2d 636 (1958).

503. 147 Conn. 460, 162 A.2d 513 (1960); Bonowski v. Revlon, Inc., 251 Iowa 141, 100 N.W.2d 5 (1959), consumer was allergic to sun-tan lotion; Ingham v. Emes [1955] 2 All Eng. Rep. 740, allergy to hair dye which produced dermatitis. See also Wright v. Carter Products, Inc., 244 F.2d 53 (2d Cir. 1957); Briggs v. National Indus., 92 Cal. App. 2d 542, 207 P.2d 110 (Dist. Ct. App. 1949); Haberly v. Reardon Co., 319 S.W.2d 859 (Mo. 1958); *cf.* Casagrande v. F. W. Woolworth Co., Inc., 340 Mass. 552, 165 N.E.2d 109 (1960); Barrett v. S. S. Kresge Co., 144 Pa. Super. 516, 19 A.2d 502 (1941).

Detergents. A decade ago, a Missouri court was faced with an action based on injuries alleged to have been incurred while using "Tide," *Worley v. Procter & Gamble Manufacturing Co.*[504] The ultimate consumer was suing the manufacturer of this detergent which was described as being "kind to hands;" in plaintiff's case, use of Tide resulted in a skin infection. The court held that in spite of the absence of privity, an exception would be recognized "in the case of sales of foods, beverages, drugs and articles likely to produce physical injury if improperly manufactured."[505]

Since the opinion in *Worley v. Procter & Gamble Manufacturing Co.*[506] was delivered, there has been an enormous growth in the advertisement of detergents, soap powders and cleansers of every description. In television, now seemingly a household necessity, the manufacturer and his subsidiaries have found a magnificent sounding board for indulgence in hyperbole as to the excellence of his product. *Hamon v. Digliani,*[507] decided less than a year ago, is a shining example. "Lestoil" was the offending product, and the plaintiff sought recovery for breach of express and implied warranties.[508] Said the court:

> Within recent years, numerous cases have arisen in other jurisdictions in which the courts have extended breach of warranty law to encompass a right of action against the manufacturer for breach of either an express or an implied warranty of his product and have eliminated privity of contract as an element essential to recovery. Dean Prosser, in an extensive review of the cases and trends in this regard, points out that the privity requirement was abolished by judicial fiat in cases involving the sale of food and that since 1934 thirteen jurisdictions have applied against the manufacturer a rule of strict liability for statements which prove to be false, if they were made to the public in labels on the goods or in the manufacturer's advertising or disseminated literature and it can be found that the plaintiff relied on the statements in making his purchase. . . .[509]

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504. 241 Mo. App. 1114, 253 S.W.2d 532 (1952).

505. *Id.*, 253 S.W.2d at 534.

506. *Supra* note 504.

507. 148 Conn. 710, 174 A.2d 294 (1962).

508. See text at notes 133-153, *supra.*

509. Hamon v. Digliani, *supra* note 507 at 712-13, 174 A.2d at 295, referring to Prosser, *"The Assault Upon the Citadel, (Strict Liability to the Consumer)"*, 69 YALE L.J. 1099 (1960); the court added: "As these counts are not affected by the judgment on the demurrer they remain to be tried when issue is joined. The plaintiff, by her appeal, is endeavoring to change the rule, which has existed in

Chemical Preparations. Any number of chemical preparations have caused injury to the user, not infrequently in the face of an assurance by the manufacturer of their harmless nature. Examples are furnished by such products as shoe-dye,[510] dry-cleaning fluids,[511] fish-net preservative,[512] hydraulic fluid,[513] caustic drain cleaners,[514] and disinfectants.[515] But of all the chemical preparations which have occasioned litigation, herbicides and insecticides appear to be in the lead. *McQuaide v. Bridgeport Brass Co.*[516] is one of the best of the recent cases. As mentioned above,[517] the federal court applied Pennsylvania law since the contract for the sale of the insecticide spray was made in Pittsburgh, and the injury to the plaintiff occurred there.[518] The court held that the lack of privity could not be a valid defense whether the action was regarded as breach of warranty in contract, or as sounding in tort. In fact, the court did not seem too concerned as to which theory of recovery was adopted, relying largely on *Mannsz v. Macwhyte Co.*[519] Defendant's motion to dismiss the complaint was denied.

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this state at least since Welshausen v. Charles Parker Co., 83 Conn. 231, 76 A. 271, that in order to sustain an action for breach of express or implied warranty there has to be evidence of a contract between the parties, for without a contract there could be no warranty. . . ."

Since nearly three years have elapsed since the article referred to above was written, it should be noted that other jurisdictions have adopted the rule of strict liability, as, for example, Hawaii (Chapman v. Brown), New Jersey (Henningsen v. Bloomfield Motors, Inc.), Virginia (by statute) and perhaps Connecticut (Hamon v. Digliani).

510. Steber v. Kohn, 149 F.2d 4 (7th Cir. 1945); Idzykowski v. Jordan Marsh Co., 279 Mass. 163, 181 N.E. 172 (1932).

511. Magnolia Petroleum Co. v. Beck, 41 S.W.2d 488 (Tex. Civ. App. 1931).

512. Richardson v. De Luca, 53 So.2d 199 (La. App. 1951).

513. Celanese Corp. of America v. John Clark Industries, Inc., 214 F.2d 551 (5th Cir. 1954).

514. Pabellon v. Grace Line, Inc., 191 F.2d 169 (2d Cir. 1951) *cert. den.* 342 U.S. 893.

515. Cumberland v. Household Research Corp., 145 F. Supp. 782 (D. Mass. 1956); W. T. Rawleigh Co. v. Shoultz, 56 F.2d 148 (3d Cir. 1932); Miller v. New Zealand Insurance Co. 98 So.2d 544 (La. App. 1957).

516. 190 F. Supp. 252 (E.D. Conn. 1960). *Cf.* Herndon v. Southern Pest Control Co., 307 F.2d 753 (4th Cir. 1962), holding that buyer of insecticide which killed hogs was entitled to go to the jury.

517. *Supra,* Section II.

518. This being a diversity of citizenship case the court declared that under the rule of Erie Railroad v. Tompkins, 304 U.S. 64 (1938), it would be obligated to follow the conflict of laws rules prevailing in the State of Connecticut.

519. Although Mannsz v. Macwhyte Co., *supra* note 1, has been overruled to a certain extent by the Pennsylvania Supreme Court in a recent decision, Hochgertel v. Canada Dry Corp., *supra* note 3, it would appear that the holding

Even more recently, stating Oregon law, a federal district court was rather emphatic in rejecting privity:

> This Court is quite of the opinion that if the Oregon Supreme Court today was presented with the question, that it would determine that the absence of privity of contract does not remove or permit the mentioned warranties running to the ultimate user, who stands within the reasonable contemplation of the parties to the warranty, might be reasonably expected to suffer a harm from its use.[520]

However, in spite of this conclusion, judgment was entered for defendant company because plaintiff had failed to give timely notice of his claim for damages to his bean crop as the result of using the herbicide manufactured by defendant.

Where a chemical compound was sold for the purpose of exterminating caterpillars on pecan trees, and the trees themselves died, the Supreme Court of Alabama held that a warranty had been made since the buyer had disclosed the purpose for which he was purchasing the lethal mixture, *Van Antwerp-Aldridge Drug Co. v. Schwarz.*[521] From a judgment for the buyer, the drug company appealed; affirming, the court held that there had been no error in the finding of breach of warranty.

Two western jurisdictions have had occasion to look into this question: California and Washington have made their contribution. *Burr v. Sherwin-Williams Co. of California,*[522] which has become a classic, discusses in detail the various questions which are raised by this type of case. When plaintiff found insects infesting his cotton field, he was advised to spray with DDT, manufactured by defendant company. When the cotton was damaged he brought this action; judgment in his favor was affirmed on appeal.[523] Relying on *Klein v. Duchess Sandwich Co.,*[524] the District Court of Appeal held that liability in this type of case does not depend on warranty "nor does it depend on

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in McQuaide v. Bridgeport Brass Co., *supra* note 516, would still emerge unscathed since the plaintiff was a subpurchaser "in the distributive chain." The Hochgertel case is stated in text, *supra* notes 80a-80k inclusive.

520. Spada v. Stauffer Chemical Co., 195 F. Supp. 819 (D.C. Ore. 1961).

521. 263 Ala. 207, 82 S.2d 209 (1955).

522. 42 Cal.2d 682, 268 P.2d 1041 (1954), *reversing* 258 P.2d 58 (Cal. App. 1953).

523. Although affirmed by the District Court of Appeal, Fourth District, it was subsequently reversed, *supra* note 522.

524. *Supra* note 1.

privity of contract. . . . liability depends rather on a breach of a public duty owing to all persons into whose hands the article may lawfully come and by whom it may be used. This rule has been applied to food and drug cases intended for human consumption, and might properly be extended to chemicals which are contaminated and therefore unfit for the purposes for which they are compounded and the uses and purposes contemplated by the label under which they are sold."[525]

Wise v. Hayes,[526] a companion case, involved the use of a spray designed for the destruction of insects in orchards. There was a label on the ten-gallon drum containing the "DDT-50" spray material which described its contents. The manufacturer "guaranteed the material to be true to label," but otherwise disclaimed the making of any warranty. Upon damage to the orchard from use by the spray, this action was brought. Affirming judgment for the plaintiff, the Supreme Court of Washington formulated the three exceptions to the privity rule:

> The rule that, if there is no contractual privity, there can be no warranty, has three exceptions: (1) Where the article causing the injury is of a noxious or dangerous nature, (2) where fraud or deceit has been shown on the part of the offending party, or (3) where the manufacturer has been negligent in some respect with reference to the sale or construction of an item not imminently dangerous.[527]

E. *Wearing Apparel*

What is probably the principal case in Pennsylvania dealing with clothing, *Barrett v. S. S. Kresge Co.*,[528] has heretofore been discussed.[529] The case is similar to various others in that it related to a dress which caused dermatitis; however, it appeared that the wearer was overly sensitive to the dye the dress contained and the plaintiff could not recover.

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525. Burr v. Sherwin-Williams Co., 258 P.2d 58 (Cal. App. 1953) at 64; this holding by the Court of Appeal was the basis for the reversal in 42 Cal.2d 682, 268 P.2d 1041 (1954) which was anticipated in Pruett v. Burr, 118 Cal. App. 2d 188, 257 P.2d 690 (1953).

526. 361 P.2d 171 (Wash. 1961).

527. *Id.* at 173.

528. 144 Pa. Super. 516, 19 A.2d 502 (1941).

It does not appear that the most recent pronouncement of the Pennsylvania Supreme Court in Hochgertel v. Canada Dry Corp., *supra* note 3, would affect the defense of "allergy," as interposed in the Barrett case, *supra*.

529. Text at note 81, *supra*.

But an even more frequent cause of action is furnished by the inflammable nature of certain kinds of fabric used in the manufacture of wearing apparel. *Frank R. Jelleff, Inc. v Braden*[530] is in point. Plaintiff had purchased a housecoat or smock from defendant clothing store and while wearing it, the smock was ignited by an electric stove. A fierce and sudden fire caused deep burns, and this action resulted. Affirming judgment for the plaintiff, the court held that the evidence was sufficient to warrant submission of the question of breach of warranty to the jury.

In a rather similar case, *Martin v. J. C. Penney Co.*,[531] a mother bought her son a shirt which suddenly burst into flames when it came into contact with an electric range which had been left on causing the wearer to be severely burned. The Supreme Court of Washington had no hesitancy in deciding the case for the plaintiff, although privity was absent. Actually, this "requirement" was not even mentioned; this is not altogether singular in light of the much earlier case of *Baxter v. Ford Motor Co.*,[532] which had substantially discarded privity some twenty-five years before. And in another burning shirt case in a sister jurisdiction, *Owen v. Sears, Roebuck & Co.*,[533] there seemed no doubt as to the right of recovery for breach of warranty. The federal court, however, since it was a diversity of citizenship case, applied Oregon law which included the Uniform Sales Act[534] requiring notice within a reasonable time.[535] While recognizing that the material was highly inflammable the court was constrained to hold that there could be no recovery since the condition

530. 98 App. D.C. 180, 233 F.2d 671 (D.C. Cir. 1956).

531. 50 Wash. 2d 560, 313 P.2d 689 (1957).

Since by its latest decision, the Supreme Court of Pennsylvania requires the plaintiff in breach of warranty cases to be "in the distributive chain," the query arises, would the plaintiff (son of the purchaser) in the Martin case, *supra*, have been nonsuited in Pennsylvania since he was not the purchaser or subpurchaser? It appears that he would be, and left to his action in tort according to Hochgertel v. Canada Dry Corp., *supra* note 3.

532. 168 Wash. 456, 12 P.2d 409 (1932).

533. 273 F.2d 140 (9th Cir. 1959).

534. O.R.S. 75.490; U.S.A. § 49. Oregon has since adopted the Uniform Commercial Code effective September first, this year.

535. As to notice, the Supreme Court of Oregon has said, "the clear and practically unbroken current of authority establishes the doctrine that *the requirement of notice, to be given by the vendee charging breach of warranty, is imposed as a condition precedent to the right to recover, and the giving of notice must be pleaded and proved by the party seeking to recover for such breach* . . . ." Maxwell Co. v. Southern Oregon Gas Corp., 158 Ore. 168, 74 P.2d 594, 75 P.2d 9 (1937), quoted in and emphasis supplied by the court, Owen v. Sears, Roebuck & Co., *supra* note 533. And see Williston, op. cit. § 887 B.

precedent of timely notice had not been performed. The plaintiff had permitted two years to elapse before notifying the defendant of the injuries suffered from the burning of his cigarette-ignited shirt. Although the shirt was purchased by his wife, lack of privity was not made a ground of defense; in fact, it was not even mentioned by the court.

But of all the cases where the unfortunate wearers of highly inflammable clothing were burned, none has received publicity or justly deserved attention equal to the one colloquially denominated "the case of the hot hula skirt," *Chapman v. Brown.*[536] The purchaser of the skirt permitted her infant niece to borrow and wear it to a masquerade party. Toward the end of the evening, the skirt suddenly burst into flames, and the wearer was severely burned. When the niece, Carol Chapman, had recovered, she brought this action against the vendors, the complaint alleging, *inter alia,* the breach of an implied warranty of fitness for use. As was to have been expected, a most important ground of defense was lack of privity between the vendors and the plaintiff. Also alleged were contributory negligence, assumption of risk, and failure to give notice of the breach of the implied warranty within a reasonable time from the date of the accident.[537]

As the skirt had been purchased from a gift shop in Honolulu by the plaintiff's aunt, a resident of British Columbia, Canada, and the plaintiff herself was a resident of the State of Washington, diversity of citizenship was established and the case was tried in the federal court.[538] The contract of sale having been made in Honolulu, the court held that the law of Hawaii would apply.[539] As the jurisprudence of that state failed to disclose a case in point, it became necessary, somewhat as in *Coca-Cola Bottling Co. of Puerto Rico v. Negron*

536. 198 F. Supp. 78 (D. Hawaii 1961), *aff'd* 304 F.2d 149 (9th Cir. 1962), *rehearing den.*

537. As to the requirement of notice, see Section IV(A), *supra* at notes 174-183. It should be noted that § 49 of the *Uniform Sales Act* was in effect at the time. The appellate court said, "the better rule is that contributory negligence is not a defense to breach of warranty," Chapman v. Brown, 304 F.2d 149 (9th Cir. 1962) at 153.

538. Other cases which involve diversity of citizenship and are discussed above include Pritchard v. Liggett & Myers Tobacco Co., *supra* note 1; Thompson v. Reedman, *supra* note 1; McQuaide v. Bridgeport Brass Co., *supra* note 516.

539. Citing "Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938); Texas Motorcoaches, Inc. v. A. C. F. Motors Co., 154 F.2d 91, 93 (3rd Cir. 1946); Francis v. Flanchet, 2 Haw. 96, 109 (1858)."

Torres,[540] to determine how the Supreme Court of Hawaii would decide a similar case.[541]

The court first disposed of what it considered the minor defenses, including the allegation that the husbands of the women who had sold the hula skirt were *not* parties to the contract; the complaint had included them as defendants on the theory of a joint venture.[542] However, the issue having been submitted to the jury, the latter found that Mr. Brown was a party to the joint venture while the other woman's husband was not. The court also submitted to the jury, the issues of assumption of risk, and the reasonableness or timeliness of the notice given; as to each, the jury found for the plaintiff.

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540. *Supra* note 388, where the federal court was called on to determine how the Supreme Court of Puerto Rico would decide an action for breach of warranty where privity was absent; judgment for the plaintiff was sustained on appeal.

541. As to this, the court observed: "This being a diversity case based on breach of an implied warranty claimed to have been made in Hawaii, the law of Hawaii applies. Here there is no Hawaii decision clearly setting forth the rule by which we are to be guided, and hence this court must guess at what the Hawaii Supreme Court would decide in a similar case.

If there is no State Court decision, the Federal Court must attempt to determine what the State Courts would decide. McAfee v. Cargill, Inc., 121 F.Supp. 5 (D.C. Cal. 1954); Mutual Ben. Health & Accident Ass'n v. Cohen, 194 F.2d 232, 241 (8 Cir. 1952).

In the absence of a decision by a court whose judgment is authoritative on a court trying a case, a judge must exercise his best judgment on legal questions submitted to him in accordance with his own views, although other courts have reached a contrary conclusion. 21 C.J.S. *Courts* § 186, p. 297. United States v. Hopkins, 95 F.Supp. 14, 17 (D.C. Ohio 1951)." Chapman v. Brown, *supra* note 536.

For an interesting instance of the unsuccessful endeavor to anticipate or prognosticate what the highest state court would hold, see Mannsz v. Macwhyte, *supra* note 1, which was partially overruled, or at least limited, by the Supreme Court of Pennsylvania in Hochgertel v. Canada Dry Corp., *supra* note 3, 16 years later. Under the guidelines laid down in the latter case, it appears clear that the plaintiff niece in the principal case (Chapman v. Brown, *supra*) would have no cause of action for breach of warranty, express or implied, since she was not a subpurchaser (nor a purchaser).

542. At the time of the purchase, the business of the shop was being operated in the joint names of two of the defendants, Edith L. Brown, and Helen Chase, doing business as a general partnership duly registered as such under the laws of the State of Hawaii. Although the defendant husbands were not registered as partners, plaintiff claimed that they were in fact partners or principals or joint venturers in this enterprise, and the jury found on the evidence that Charles E. Brown was in fact a general partner or joint venturer along with Mrs. Brown and Mrs. Chase, but that Mr. Chase was not such a general partner or joint venturer.

As to joint ventures generally, see Jaeger, *Joint Ventures*, 9 AM. U.L. REV. 1, 111 (1960); Jaeger, *Partnership or Joint Venture?*, 37 NOTRE DAME LAW. 138 (1961); WILLISTON, CONTRACTS §§ 317-18 (3d ed. Jaeger 1959).

The court then proceeded to deal with "the crux of this case," namely, privity of warranty. Basically, the question was whether it was correct for the trial court to instruct the jury that privity was not required in this case. It was defendants' contention that at the time Hawaii adopted the Uniform Sales Act,[543] the majority or common law rule required privity of warranty in actions for breach of warranty. The Uniform Sales Act, said the defendants, embodied this rule. Were this so, the court concluded, it would be necessary to hold for the defendants *non obstante veredicto.*[544]

Although a "strong technical argument" had been made by the defendants to the effect that privity was essential, and the court scrutinized it carefully, it felt that the Supreme Court of Hawaii, in the absence of a specific precedent, would look to the law of other jurisdictions as propounded in their more recent decisions. With this introduction, the court examined *Martin v. J. C. Penney Co.,*[545] briefly discussed above,[546] *B. F. Goodrich Co. v. Hammond,*[547] and *Spence v. Three Rivers Builders & Masonry Supply, Inc.*[548] Finally, the court placed great reliance upon *Henningsen v. Bloomfield Motors, Inc.,*[549] analyzing the holding, quoting from the opinion, and then followed its *rationale.* After this careful survey, the court concluded that if the arguments advanced by the defendants were to be carried to their logical end, the result would be that no one not in privity, regardless of the category of goods involved, including food, would ever be permitted to recover judgment. This result would have to follow since the statute declares that the warranties in question run only in favor of the *buyer.* However, by the clear weight of authority today, this is not true, for these warranties (of merchantable quality and fitness for use) have certainly been held to run to others with respect to food and certain other products.[550]

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543. In 1929.

544. Chapman v. Brown, *supra* note 536 at 102.

545. *Supra* note 531.

546. Text at note 531, *supra.*

547. 269 F.2d 501 (10th Cir. 1959).

548. *Supra* note 1.

549. *Supra* note 1.

550. As the court succinctly notes: "Yet, as hereinafter demonstrated, by the clear weight of authority today, even in jurisdictions having the Uniform Sales Act, with respect to food and/or some other categories of goods, such a warranty runs to others than the immediate buyer as narrowly defined in the Act. (§ 202—75 supra)." Chapman v. Brown, *supra* note 536 at 102.

In this connection, it is important to note that Pennsylvania (which adopted the Uniform Commercial Code ten years ago) now permits breach of warranty actions by *subpurchasers* "in the distributive chain," Hochgertel v. Canada Dry Corp., *supra* note 3, nor is this limited to foodstuffs, but appears to have been extended to other products as well. The case is stated in text, *supra* footnotes 80a to 80k inclusive.

Judge Tavares, speaking for the court, found that a number of expedients have been adopted to circumvent the privity requirement and signalized three in particular: First, the theory of the third party beneficiary; second, various agency concepts; and third, other fictions tending to establish a relationship between the vendor or manufacturer and the consumer. These fictions and exceptions make it quite clear that the statute, in its interpretation, at least, is anything but uniform. The court pointed out that in spite of *Winterbottom v. Wright*[551] and its *obiter dicta,* there was no reference to privity in the Uniform Sales Act. Also, since the privity requirement led to harsh results, it was discarded in negligence cases to such an extent that today, it is virtually extinct. And in warranty situations, where not expressly rejected, so many deviations and exceptions have been invented that they may be deemed to have swallowed up the requirement.

An analysis of the American authorities on privity led the court to find that of the jurisdictions that have had occasion to consider the privity requirement, a substantial majority have rejected it where public policy is best served by so doing.[552] Even in England, where

551. *Supra* note 208.

552. In a table appended to the court's opinion the status of privity of warranty in the various jurisdictions of the United States is shown; referring to this, Judge Tavares remarked:

"The *clear majority* of jurisdictions *today* have rejected the requirement of privity in implied warranty cases of this nature, *either in whole or in part.* As proof of this statement there is attached to this decision, as Appendix I, a table covering an exhaustive study of the American authorities on privity, with the following results:

Number of American jurisdictions holding privity necessary in all cases		15
Number of American jurisdictions holding privity not necessary in any case	4	
Number of American jurisdictions holding privity not necessary in food cases	17	
Total	21	
Add:		
Washington, which holds privity not necessary in food cases, and where product is inherently dangerous	1	
Totals	22	v. 15

In light of some of the more recent decisions and statutes, the listing of only four jurisdictions in the column marked "Privity not necessary in any case" may require modification. In addition to Florida, Georgia, Michigan and New Jersey, it may be necessary to add Connecticut, Iowa, Kansas, Minnesota and Virginia.

this entire train of events began, privity has been obliterated where negligence is present.[553]

As inroads have been made on the privity requirement, not only in food cases but various others,[554] the court cannot find any satisfactory reason for stifling the advances being made at any given point, especially as "the doctrine of privity started as a common law theory hatched up in the minds of the judges who wrote the *Winterbottom decision.*"[555] The court then undertakes a careful survey of the development of common law in Hawaii; numerous precedents are discussed, all pointing to the fact that judicial law-making continues where this is in keeping with the best interests of the body politic. Law must adapt itself to conditions "as interpreted in the light of modern experience, reason and the furtherance of justice."[556] With this in mind, the court held that were the question to be presented to the high court of Hawaii, privity would not be considered essential to the plaintiff's right of action. Thus, by sound judicial construction[557] does Hawaii, which but recently achieved statehood, take its place among the more enlightened jurisdictions which prefer to protect the consumer rather than indulge in legal subleties or technical niceties.[558]

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553. This is demonstrated by the following cases: M'Alister v. Stevenson [1932] A.C. 562 (H.L.) (also known as the Donoghue case); Grant v. Australian Knitting Mills, Ltd., [1936] A.C. 85 (Privy Council); Lockett v. A.M. Charles, Ltd. [1938] 4 All Eng. Rep. 170, 55 T.L.R. 22, noted 17 CANADIAN B. REV. 202; 6 U. of CHI. L. REV. 514.

554. As, for example, in Spence v. Three Rivers Builders & Masonry Supply, Inc., *supra* note 1.

555. Chapman v. Brown, *supra* note 531 at 104.

556. Kamau & Cushnie v. Hawaii County, 41 Hawaii 527, at 552 (1957).

557. 4 WILLISTON, CONTRACTS § 602. Interpretation and Construction Distinguished (3d ed. Jaeger 1961).

558. In its interpretation or construction of the Uniform Sales Act, the court, relying on Klein v. Duchess Sandwich Co., 14 Cal.2d 272, 93 P.2d 799 (1939), follows this decision:

"Going back, now, to the Hawaii Uniform Sales Act, it would appear to be obvious that the only way to reconcile with that Act decisions extending to a consumer who is not strictly the buyer of the product a remedy against the seller based upon implied warranty, as in this case, is to hold as was done by the California court in the Klein case, *that it was not the intent of the legislature*, at least with respect to the particular products there concerned, which happened to be food stuffs, *that the implied warranty provision should be exclusive*, and thereby exclude consumers other than the immediate buyer. This conclusion was reached on substantially the same ground hereinabove stated, namely, that *at least as to food stuffs, most courts conceded* that the *consumer who was not strictly the immediate buyer did have a cause of action in implied warranty against the seller, notwithstanding the absence of privity.* In so doing, it is believed, the California court put its finger upon *the exact ground upon which such*

It seems appropriate to mention *Grant v. Australian Knitting Mills, Ltd.*[559] before leaving the subject of wearing apparel. Plaintiff had purchased woolen underwear manufactured by defendant and after wearing it, he suffered from a severe case of dermatitis. The Supreme Court of South Australia found that bisulphite of soda in the undergarments caused this skin ailment and gave judgment for plaintiff in the breach of warranty action. On appeal, the court cited *Donoghue's Case,*[560] and affirmed even though there was no privity between plaintiff and defendant manufacturer. This case has been taken to sound the death-knell of the *Winterbottom*-dictated privity requirement, at least in so far as negligence actions are concerned.[561]

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decisions eliminating or modifying the strict privity rule can be justified in the face of the Uniform Sales Act.

"That such a construction of apparently all-inclusive language in a statute having no express exceptions, is legitimate if the *legislative intent* (which is believed simply to mean the *public policy of the state otherwise manifested) is sufficiently clear,* is established by such decisions as the Church of the Holy Trinity v. United States, 1892, 143 U.S. 457, 12 S.Ct. 511, 516, 36 L.Ed. 226, in which, after considering the broad general language of the Immigration Act there construed (prohibiting, without express exception, immigration of aliens under service or labor contracts) and holding that the law did not prohibit immigration of ministers of religion under service contracts, the court said:

'It is the duty of the courts, under those circumstances, to say that, however broad the language of the statute may be, *the act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute.*" Italics supplied by the court in Chapman v. Brown, *supra* note 531.

For an intermediate position which appears to cover other products as well as foods, see Hochgertel v. Canada Dry Corp., *supra* note 3, where the Supreme Court of Pennsylvania declines to consider the privity requirement as "obliterated" from Pennsylvania law as was stated in Mannsz v. Macwhyte, *supra* note 1, but concludes that (although there is nothing specific in the statutes or the cases which seems to require this conclusion) if the plaintiff in a breach of warranty case is a purchaser or subpurchaser within the distributive chain, he may have a right of action. Nevertheless, in spite of this holding, the Supreme Court professes not "to legislate or by interpretation to add to legislation, matters which the legislature saw fit not to include [in the latest legislation, to wit, the Uniform Commercial Code, specifically § 2—318, and Comment 2 and 3 thereto, which the court quotes *in extenso*]. . . ." The *rationale* of Chapman v. Brown, *supra,* seems preferable.

559. *Supra* note 553.

560. *Supra* note 553, involving the presence of a snail in ginger-beer.

561. Grant v. Australian Knitting Mills, Ltd., *supra* note 559, cited in Barrett v. S. S. Kresge Co., *supra* note 528, where the court, referring to Grant, *supra* said that it "flatly sustains this view in a case almost exactly similar as to facts, in which the express decision of the Privy Council is that the retailer was liable in contract, and that there was an implied warranty justifiable under both exceptions 1 and 2 to section 14 of the British and Australian Sales Acts (equivalent to the first and second exceptions under section 15 of the Pennsylvania Sales Act of May 19, 1915, P.L. 543). The reasoning in that case is exhaustive and, we think, conclusive."

F. *Automotive Vehicles, Aircraft and Their Accessories*

Automobile and Trucks. Two recent and outstanding decisions in the field of automotive sales in Pennsylvania wherein a maximum degree of protection was afforded the injured parties where the automotive vehicle was found to have been defectively manufactured present the question: Would they still be followed today, in light of the decision in *Hochgertel v. Canada Dry Corporation*?[561a]

Specifically, *Jarnot v. Ford Motor Co.*[562] and *Thompson v. Reedman*[563] present a certain divergence of theory which cannot be reconciled when the criterion laid down by the Supreme Court of Pennsylvania is applied. The *Jarnot* case conforms to the standard since the plaintiff was a purchaser or subpurchaser within the distributive chain. But in *Thompson,* the plaintiff was a passenger and therefore in relatively the same situation as the bartender in *Hochgertel* who was denied recovery for breach of warranty.[564] While there may have been some doubts as to the interpretation to be given *Loch v. Confair,*[565] these appear to have been definitively settled by the high court of Pennsylvania in *Hochgertel v. Canada Dry Corporation,* supra, which adhered to the requirement stated in *Loch,* supra, that there had to be a sale and that the right of action would be limited to the purchaser or subpurchaser in the distributive chain. As these cases have been previously discussed,[566] this brief reference to the distinction now made in Pennsylvania may serve to introduce instances of litigation involving automotive vehicles, aircraft and accessories which have arisen in other jurisdictions.

Declared to be one of the earliest cases on record, *Baxter v. Ford Motor Co.*[567] led the way to the realization that a motor car manufacturer should be made to stand behind his product and be answerable for defects in its construction which resulted in injuries to occupants. This seems quite astonishing when at the time, privity of warranty was still very much the vogue and was still considered essential with the possible exception of the food cases, and even here,

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561a. *Supra* note 3; the case is stated in text, *supra* notes 80a to 80k inclusive.

562. 191 Pa. Super. 422, 156 A.2d 568 (1959).

563. *Supra* note 1.

564. As to the similarity between Thompson and Hochgertel, neither plaintiff was a purchaser or subpurchaser "in the distributive chain."

565. 372 Pa. 212, 93 A.2d 451 (1953).

566. *Supra* notes 3 and 4; and see generally, Section II, Development of Pennsylvania Law, *supra.*

567. 168 Wash. 456, 12 P.2d 409 (1932).

one of the leading cases, *Klein v. Duchess Sandwich Co.*,[568] was not decided until several years later.

For the next quarter of a century, there were other cases dealing with automotive products which indicated a gradual extension of the exception which began with foodstuffs. These culminated in a series of cases which courageously rejected the privity requirement and quite simply declared that neither privity nor disclaimer would be permitted to stand in the way of recovery by one who had been injured by the defective manufacture of the automotive product in question.[569] Among them is an outstandingly happy trilogy which encompasses the South, the West, and the Atlantic seaboard.[570]

General Motors Corp. v. Dodson[571] was decided by an intermediate appellate court in Tennessee. Defective brakes on an Oldsmobile purchased from an authorized dealer of the General Motors Corporation by the husband of the injured driver led to a serious accident. Husband and wife brought suit and recovered judgment in the trial court; General Motors appealed. The court affirmed on the theory that the jury might well have found that the appellant was the actual person or entity with whom the plaintiffs were dealing, the authorized dealer being merely a conduit or channel for the distribution of its products, and a means whereby General Motors sought to insulate itself from liability to purchasers. Thus, both express and implied warranties had been made to the plaintiffs by General Motors. This, the court declared, was based on section 15 of the Uniform Sales Act.[572] When the defendant attempted to show that the Supreme Court of Tennessee had held that privity was essential almost fifty years before,[573] the Court of Appeals found that this early precedent had been expressly overruled by the court in *Dunn v. Ralston Purina Co.*[574] At the same time, the court suggested that it can "hardly be said that such a general rule [referring to the nonliability of a

568. *Supra* note 1.

569. The leading case is Henningsen v. Bloomfield Motors, Inc., *supra* note 1, where the court emphatically declared that neither privity nor disclaimer would be a bar to recovery by one who was using an automobile with the permission of the owner or was a passenger therein. This clearly extends the coverage afforded by the Uniform Commercial Code which became effective in New Jersey on the first of this year, *supra* note 196.

570. Dodson (Tenn.), State Farm Mutual (Iowa) and Henningsen (N.J.), *supra* note 1.

571. 338 S.W.2d 655 (Tenn. App. 1960).

572. Text at note 171, *supra.*

573. In Burkett v. Studebaker Brothers Mfg., 126 Tenn. 467, 150 S.W. 421 (1912).

574. 38 Tenn. App. 229, 272 S.W.2d 479 (1954).

manufacturer to third parties] any longer exists. . . . the exceptions have swallowed up the rule."[575]

Following Horace Greeley's admonition, the next stop is Iowa, where the purchaser of a new Mercury received a severe jolt when he suddenly saw a sheet of flame burst from under the hood. With rare presence of mind, the driver pulled the car to the side of the road, and made a hasty exit. Flames were shooting up to a height of ten feet from around the hood, and soon the car was a holocaust. The Ford Motor Company disclaimed any liability under its "warranty," and also alleged as a further defense lack of privity. The Supreme Court of Iowa, undaunted, speaking through Mr. Justice Snell in *State Farm Mutual Automobile Ins. Co. v. Anderson-Weber, Inc.*,[576] declared that the facts in the case resembled those in the *Dodson*[577] and *Henningsen* cases and that the opinions therein represented the most advanced thinking as to new car warranties, whether express or implied. Following these decisions, the court held for the plaintiff, in spite of lack of privity.

But the *piece de resistance* for any lawyer trying an automotive products case is *Henningsen v. Bloomfield Motors, Inc.*[578] Here he will find the culmination in judicial rejection of the unfortunate *Winterbottom* dictum. Claus Henningsen bought a new Plymouth automobile from the defendant, Bloomfield Motors, Inc., and presented it to his wife as a Mother's Day gift. When the speedometer reading on the Plymouth showed only 486 miles, and while Mrs. Henningsen was driving her new car home from Asbury Park, New Jersey, its steering mechanism suddenly failed, and the Plymouth rammed a solid wall with disastrous results. Mrs. Henningsen was badly injured, and the automobile was declared a total loss by the insurance carrier after its representatives had inspected the wreck. When both the vendor and manufacturer refused to be answerable for the damages incurred, the Henningsens joined both Bloomfield and Chrysler in an action based on breach of warranty. The latter defended: (1) on the ground of lack of privity as to the wife who was not a party to the sales contract; and (2) on the additional ground, as to both parties plaintiff, of an express disclaimer of liability by the manufacturer for anything except "making good at its factory any part or parts thereof [the automobile] . . . ; within ninety (90) days after delivery of such vehicle to the original purchaser or before such vehicle has been driven 4,000 miles, whichever event shall first occur."

575. *Id.* at 233, 277 S.W.2d at 481.
576. 252 Iowa 1289, 110 N.W.2d 449 (1961).
577. *Supra* note 571.
578. 32 N.J. 358, 161 A.2d 69 (1960).

Referring to this disclaimer or exculpatory provision, the Supreme Court of New Jersey, with ample justification, observed:

> 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 Manufacturers 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.[579]

After reviewing numerous precedents,[580] the court delivered an elaborate opinion and speaking through Mr. Justice Francis analyzed the trend of the law and of the current decisions and discussed warranties of merchantability and of fitness for the particular purpose for which the product is acquired. It was stated that the first type of warranty is an integral part of the transaction and simply means that the article sold is reasonably fit for the general purpose for which it is produced. The court emphasizes the fact that the distinction between warranties of merchantability and of fitness for a particular purpose are in many instances "practically meaningless." Thus, where the buyer notifies the automobile dealer that he wants a car suitable for the purpose of business and pleasure driving on streets and highways, and the dealer sells him an automobile selected by the latter, a warranty of fitness for that particular purpose would seem to arise. Yet, at the same time, a warranty of mechantability would assure the purchaser that the automobile was reasonably fit for the general purpose of being driven on streets and highways. Both warranties would comprehend an assurance that the automobile in question would be reasonably safe for driving. Nor would the sale of an article by its trade name, such as an automobile being designated as a "Plymouth, Plaza 6, Club Sedan," negate the warranty of merchantability. The court cites a well known Pennsylvania decision[581] to the effect that even where a sale is made under a trade

579. Citing Federal Motor Truck Sales Corp. v. Shanus, 190 Minn. 5, at 9, 250 N.W. 713, at 715 (1933).

580. Including Simmons v. Rhodes & Jamieson, Ltd., 46 Cal.2d 190, 293 P.2d (1956); Ryan v. Progressive Grocery Stores, *supra* note 337; Mead v. Coca-Cola Bottling Co., *supra* note 368; Faber v. Creswick, 31 N.J. 234, 156 A.2d 252 (1959).

581. Frantz Equipment Co. v. Leo Butler Co., 370 Pa. 459, 88 A.2d 702 (1952).

name there is implied an obligation on the part of the vendor that the article delivered will be of the same quality, material, workmanship and availabiltiy for use as articles generally sold under that name. So, it would be quite unreasonable to suggest that merely because an automobile was purchased under the trade name of "Chrysler," "Ford," "Oldsmobile," or "Pontiac," no implied warranty of merchantable quality accompanied the sale, when in reality the automobile had a serious defect which prevented it from being driven and made it therefore, quite useless for the general purposes for which an automobile is designed and intended to serve. Actually, the sale of an article by a trade name does not negate the existence of a warranty of merchantability.[582]

After a comprehensive discussion of the impact of the Uniform Sales Act[583] on the common law, the court indicated that the uniform statute had "codified, extended and liberalized" the common law of sales and that its purpose, at least in part, was to ameliorate the harsh rule of *caveat emptor* and to substitute, by way of reciprocal obligation in part, *caveat venditor*. The true significance of the legislation is that certain implied warranties were imposed by operation of law and did not depend for their existence upon the express agreement of buyer and seller. Of tremendous significance in a rapidly expanding commercial society is "the recognition of the right to recover damages on account of personal injuries arising from breach of warranty."[584]

Overruling or disapproving its earlier decisions,[585] which had held that privity of warranty was essential whether the warranty was express or implied, the Supreme Court of New Jersey was anticipating the adoption of the Uniform Commercial Code which became

582. Citing "Adams v. Peter Tramontin Motor Sales, 42 N.J. Super. (App. Div. 1956); Ryan v. Progressive Grocery Stores, *supra* [note 580]; Frigidinners, Inc. v. Branchtown Gun Club, 176 Pa. Super. 643, 109 A.2d 202 (1954); 2 HARPER & JAMES, LAW OF TORTS, § 28.20, p. 1082."

583. N.J. REV. STAT. 46:30-20-21(1).

584. Henningsen v. Bloomfield Motors, Inc., *supra* note 578.

585. Tomlinson v. Armour & Co., 75 N.J.L. 748, 70 Atl. 314 (1908); Cassini v. Curtiss Candy Co., 113 N.J.L. 91, 172 Atl. 519 (Sup. Ct. 1934). See also Schlosser v. Goldberg, 123 N.J.L. 470, 9 A.2d 699 (Sup. Ct. 1939); General Home Improvement Co. v. American Ladder Co., Inc., 26 N.J. Misc. 24, 56 A.2d 116 (Essex Co. Cir. Ct. 1947); Cornelius v. B. Filippone & Co., Inc., 119 N.J.L. 540, 197 Atl. 647 (Sup. Ct. 1938). All of these appear to have been disapproved, if not overruled at least by implication.

The Supreme Court of a sister jurisdiction (Pennsylvania)was afforded a splendid opportunity to follow suit and sound taps for the interment of a perniciously persisting inhibition adversely affecting adequate consumer protection in Hochgertel v. Canada Dry Corp., *supra* note 3. Declining to do so, the Court suggested that this was a legislative, not a judicial matter.

effective in that State on January first of this year. The court then formulated a general principle for the future guidance of the lower courts:

> It is important to express the right of Mrs. Henningsen to maintain her action in terms of a general principle. To what extent may lack of privity be disregarded in suits on such warranties? In that regard the Faber [v. Creswick] case[586] . . . points the way. By a parity of reasoning, it is our opinion that an implied warranty of merchantability chargeable to either an automobile manufacturer or a dealer extends to the purchaser of the car, members of his family, and to other persons occupying or using it with his consent. It would be wholly opposed to reality to say that use by such persons is not within the anticipation of parties to such a warranty of reasonable suitability of an automobile for ordinary highway operation. Those persons must be considered within the distributive chain.[587]

The court then considered the effect of the express disclaimer provision in the standard automotive warranty, commenting on its standardized form and its imposition upon the automobile purchaser. In every sense, it is a contract of adhesion, a take-it-or-leave-it offer as to which the individual buyer has no bargaining power.[588] The court pointed out that this so-called form "warranty" was used by all of the big automotive manufacturers. After an analysis of numerous cases, the court concludes that it would be contrary to public policy (since "an automobile is almost as much a servant of convenience for the ordinary person as a household utensil,") to enforce such a disclaimer and that a refusal to do so does not improperly interfere with freedom of contract. Thereupon, the court affirmed the judgment in favor of the plaintiffs and against the defendants.

Thus it is demonstrated that what judges have made, whether by way of dictum or otherwise, can be unmade by the courts, even after

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586. *Supra* note 580.

587. Henningsen v. Bloomfield Motors, Inc., *supra* note 578 at 414-15, 161 A.2d at 100. It is important to note that the court does not confine the right of action in the absence of privity to the members of the purchaser's family, but extends it "to other persons occupying or using it [the automobile] with his consent." This goes beyond the scope of § 2—318 of the UNIFORM COMMERCIAL CODE. Following Henningsen is Pabon v. Hackensack Auto Sales, Inc., 63 N.J. Super. 476, 164 A.2d 773 (App. Div. 1960). *Cf.* Comstock v. General Motors Corp., 358 Mich. 163, 99 N.W.2d 627 (1959).

588. 4 WILLISTON, CONTRACTS §§ 626, 643 (3d ed. Jaeger 1961); Comment, *Effect of Disclaimer Clause on Implied Warranty of Merchantability,* 7 So. D. L. REV. 133 (1962).

a century of error. Undoubtedly, *Henningsen v. Bloomfield Motors, Inc.*[589] represents the most definitive holding by the highest court of a state that although privity of warranty is lacking an action for breach may nevertheless be maintained. This makes *Henningsen* the most significant decision since *MacPherson,*[590] decided more than a half-century ago.

In sharp contrast to the carefully reasoned and progressive cases just discussed is *Payne v. Valley Motor Sales, Inc.,*[591] decided by the Supreme Court of Appeals of West Virginia last year. After a new Ford pickup truck had been purchased from a local dealer under the customary sales warranty "of 90 days or 4,000 miles,"[592] a wheel came off causing the total wreck of the truck. In an action for breach of warranty, the Court reviewed the more recent cases, including *Henningsen,*[593] *Dodson,*[594] and *Anderson-Weber,*[595] but declined to follow these and then concluded that where there was an express warranty any implied warranty inconsistent therewith would be excluded.[596] However, the various statements regarding privity and breach of warranty must be considered *obiter dicta* since the court concluded "that the plaintiff did not sufficiently bear the burden of proof in the case as tried by showing that a defect existed prior to the accident and became the cause thereof, which is necessary before recovery would be allowed, *even in the cases based on public policy.*"[597] However, since the doctrine of privity was a judge-made invention resulting from the *obiter dicta* in *Winterbottom v.*

589. *Supra* note 578.

590. 217 N.Y. 382, 111 N.E. 1050 (1916).

591. 124 S.E.2d 622 (W.Va. 1962).

592. The following is the typical language of such a warranty: "The Manufacturer warrants each new motor vehicle, including all equipment or accessories (except tires) supplied by the Manufacturer, chassis or part manufactured by it to be free from defects in material and workmanship under normal use and service, its obligation under this Warranty being limited to making good at its factory any part or parts thereof which shall, within ninety (90) days after delivery of such vehicle to the original purchaser or before such vehicle has been driven 4,000 miles . . ."

593. *Supra* note 578.

594 *Supra* note 571.

595. *Supra* note 576.

596. Citing Hill v. Montgomery Ward & Co., 121 W.Va. 554, 4 S.E.2d 793 (1939).

597. Here the court points out that the Uniform Sales Act was in force in the three jurisdictions, Iowa, New Jersey, and Tennessee wherein the three cases which it cites and discusses arose, namely, State Farm Mutual Automobile Ins. Co. v. Anderson-Weber, *supra* note 576; Henningsen, *supra* note 578; Dodson, *supra* note 571.

Wright,[598] it is difficult to understand why this error should be consecrated by further judge-made law.[598a] In any event, the court ordered a new trial.

Aircraft. When the pilot of a private airplane was killed, allegedly because of failure of the aircraft and its consequent crash, the federal court was called upon to apply Pennsylvania law, *Prashker v. Beech Aircraft Corp.*;[599] the executrix brought the action. It was stated in the complaint that there had been a breach of the implied warranty of merchantability; negligence was also claimed. The trial court directed a verdict in favor of the defendant vendor and manufacturer from which this appeal was taken. After reviewing the facts, the court concluded that the plaintiffs' evidence was insufficient to go to the jury nor was it sufficient to demonstrate any breach of either an express or implied warranty by the manufacturer. Therefore, it was unnecessary to decide whether privity between the manufacturer and the plaintiffs was essential for maintenance of this action according to Kansas law which was stipulated as governing the transaction. It would appear, however, from the analysis of Kansas decisions heretofore made that privity would not be required.[600]

As to the action against the immediate vendor, the court concluded that "the damage complained of must stem from the breach of warranty and not from some other cause."[601] Since it could be established that the pilot had been negligent, and that negligence had not been shown on the part of the manufacturer, there could be no recovery.

The result in *Goldberg v. American Airlines, Inc.*,[602] also an action for wrongful death, was similar. Although the airplane had been sold

598. *Supra* note 208.

598a. Nevertheless, incomprehensible as it may be, the Supreme Court of Pennsylvania refused to correct this judge-made error in Hochgertel v. Canada Dry Corp., *supra* note 3, and persisted in requiring privity in breach of warranty actions, but signalized an exception in favor of those who are purchasers or subpurchasers "in the distributive chain." The Court did not limit the type of product which might give rise to such an action.

599. 258 F.2d 602 (3d Cir. 1958).

600. As the action was brought in the United States District for the District of Delaware, the conflict of laws rule of the latter state was held to govern since the contract of sale of the airplane was entered into there between the manufacturer and the vendor, although they stipulated that Kansas law would govern. *Cf.* Nichols v. Nold, *supra* note 1; Graham v. Bottenfield's, Inc., *supra* note 499; Patterson v. George H. Weyer, Inc., *supra* note 499.

601. Prashker v. Beech Aircraft Corp., *supra* note 599 at 607.

602. 199 N.Y.S.2d 134 (Sup. Ct. 1960); *cf.* Trans World Airlines v. Curtiss-Wright Corp., 148 N.Y.S.2d 284 (Sup. Ct. 1955), where it was said: "The assault upon this 'citadel of privity,' Ultramares Corporation v. Touche, 255 N.Y. 170,

in California, the court held that since the accident occurred in New York, the law of the latter would govern: "And where recovery is sought on the theory of breach of warranty the governing law is that of the jurisdiction in which the accident rather than the sale took place."[603] This holding seems rather peculiar in light of the decisions which are to the contrary and fix the obligations of the parties according to the law of the jurisdiction where the sale was made.[604] In any event, the court granted defendants' motions to dismiss the case. The validity of this holding may be questioned since the decision in *Greenberg v. Lorenz*[605] and perchance, *Randy Knitwear, Inc. v. American Cyanamid Co.*,[606] although the latter was held to involve an express warranty.

In *Hinton v. Republic Aviation Corp.*,[607] the United States District Court for the Southern District of New York had occasion to apply its version of California law in a case where a passenger lost his life when his airliner crashed. The widow and the surviving children of the deceased brought this action. Relying on the California appellate court's decision in *Peterson v. Lamb Rubber Co.*,[608] the court observed: "Under California law, privity has been held to be not essential to recovery for breach of warranty of contract."[609] In the *Peterson* case, discussed below,[610] an action for breach of warranty, the court had held that privity was not a prerequisite for maintenance of the action and gave judgment for the plaintiff. Ironically enough, when defendant appealed, the Supreme Court of California held that privity was present between the manufacturer of the grinding wheel which injured the plaintiff, and the latter, who was an employee of the

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180, 174 N.E. 441, 445, 74 A.L.R. 1139, began even before MacPherson v. Buick Motor Co. [*supra* note 218]. Manufacturers of dangerous articles were held liable to subvendees having no privity of contract with them for defects therein causing personal injuries, Thomas v. Winchester, 6 N.Y. 397 (1852); Devlin v. Smith, 89 N.Y. 470 (1882); Torgesen v. Schultz, 192 N.Y. 156, 84 N.E. 956, 18 L.R.A.,N.S., 726 (1908); Statler v. George A. Ray Mfg. Co., 195 N.Y. 478, 88 N.E. 1063 (1909) . . ." at 287.

603. Citing Poplar v. Bourjois, Inc., 298 N.Y. 62, 80 N.E.2d 334 (1948).

604. As, for example, in Beck v. Spindler, 256 Minn. 543, 99 N.W.2d 670 (1959); *cf.* Ewing v. Lockheed Aircraft Corp., 202 F. Supp. 216 (D. Minn. 1962), citing Beck v. Spindler, *supra*. See also B. F. Goodrich v. Hammond, *infra* note 649, and especially Wojciuk v. United States Rubber Co., 108 N.W.2d 149 (Wis. 1961), lack of privity no defense.

605. *Supra* note 1.

606. 11 N.Y.2d 5, 226 N.Y.S.2d 363 (1962).

607. 180 F. Supp. 31 (S.D. N.Y. 1959).

608. 343 P.2d 261 (Cal. App. 1959); this opinion was subsequently vacated, see 54 Cal.2d 339, 353 P.2d 575, 5 Cal. Rptr. 863 (1960).

609. Hinton v. Republic Aviation Corp., *supra* note 607 at 33.

610. Text at note 660, *infra*.

purchaser.[611] It seems apparent that with this extension of the concept of privity, courts could go far in holding increasingly large categories of persons entitled to recover in breach of warranty actions. In addition to its reliance on the appellate court's opinion in *Peterson v. Lamb,*[612] the federal court in *Hinton,* citing *Klein v. Duchess Sandwich Co.,*[613] also made extensive use of the celebrated concurring opinion of Mr. Justice Traynor in *Escola v. Coca-Cola Bottling Co. of Fresno*[614] where he suggested that the privity requirement should be discarded and that absolute liability be imposed on the manufacturer of a defective product. The court refers to a number of other cases wherein privity was discussed as, for example, *Parish v. Great Atlantic & Pacific Tea Co.*[615] where the court urges that "the privity 'bugaboo', historically unsound, should be permanently discarded."[616] After a further extensive quotation from the same case, the federal court denied defendant corporation's motions to dismiss holding that a cause of action for breach of implied warranty had been stated within the provisions of the California Wrongful Death Statute.[617] The *Hinton* case was followed in *Middleton v. United Aircraft Corp.*[618] about a year later.

Applying Michigan law in a diversity of citizenship case, the same federal court denied the manufacturer's motion to dismiss a complaint based on breach of warranty of fitness of an aircraft in *Conlon v. Republic Aviation Corp.*[619] Relying on *Poplar v. Bourjois, Inc.,*[620] and citing *Goldberg v. American Airlines, Inc.,*[621] the court stated that since the accident had occurred in Michigan, "the New York Conflict of Laws Rule requires that the substantive law of the State of Michigan be applied."[622] The court found the Michigan law applicable to this situation to have been formulated by the Supreme Court of that state in *Spence v. Three Rivers Builders & Masonry*

611. Peterson v. Lamb, 54 Cal.2d 339, 353 P.2d 575, 5 Cal. Rptr. 863 (1960), which vacated the appellate court judgment, *supra* note 608.

612. *Supra* note 608.

613. *Supra* note 607.

614. 24 Cal.2d 453, 150 P.2d 436 (1944).

615. *Supra* note 1.

616. *Id.* at 63, 177 N.Y.S.2d at 37.

617. CALIFORNIA CODE OF CIVIL PROCEDURE § 377 (1872); amended Stats. 1935, c. 108, p. 460, § 1; Stats. 1949, c. 1380, p. 2401, § 4.

618. 204 F. Supp. 856 (S.D. N.Y. 1960), applying Death on the High Seas Act, Title 46, U.S.C. §§ 761 *et seq.* And see Siegel v. Braniff Airways, Inc., 204 F. Supp 861 (S.D. N.Y. 1960).

619. 204 F. Supp. 865 (S.D. N.Y. 1960).

620. *Supra* note 603.

621. *Supra* note 602.

622. Conlon v. Republic Aviation Corp., *supra* note 619 at 866.

Supply, Inc.[623] from which it quotes extensive excerpts and concludes: "The present law of Michigan appears to require no privity."[624] The court also notes "the tendency of the courts to whittle away at the 'privity' requirement either by expanding the concept of privity to bring more people within its terms, or by overruling the doctrine in certain specific areas."[625]

In a rather unusual case, *Krause v. Republic Aviation Corp.*,[626] a libel was filed by the administrator of the decedent's estate when the helicopter in which decedent was flying crashed into the Gulf of

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623. *Supra* note 1.

624. Conlon v. Republic Aviation Corp., *supra* note 619 at 867, where the court added: "It must be noted that the question here involved is not the *nature* of liability; that is the province of the trial court. The sole question is whether the plaintiff is precluded from attempting to assert a claim against the manufacturer because of the absence of a direct contractual relationship or privity with such a defendant. . . . It may be argued that the determination that privity is not required is a drastic innovation. The progressive decline of the older rule, based as it was on an infirm and fallacious foundation, is clearly evident. The fact that a manufacturer of an aircraft whose plant is located in Connecticut, for instance, may become involved because of a disaster happening in Michigan or in Texas, may have unfortunate aspects, but that is not determinative of the question at issue. This happens in respect to other obligations. The fact that modern life and developments, such as transportation, have taken on complex relationships is no anomaly. With such relationships go correspondingly complex responsibilities. If life is complex, so are the laws of human relationships, which are the results thereof."

625. Quoting 35 N.Y.U. L.REV. 319, 324 (1960), and summarizing: "The argument against the requisite of privity may be summarized as follows:

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

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.

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.'

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. The nature of this product is one which may well place life and limb in danger if it is defective.

5. There has been no logical or realistic reason advanced why privity should be retained in a breach of implied warranty case. The Spence case, *supra* [note 1], and the other cases cited herein indicate that the definite and persuasive trend is toward the abrogation of this anachronism." Conlon v. Republic Aviation Corp., *supra* note 619 at 868.

It would appear that Hochgertel v. Canada Dry Corp., *supra* note 3 would support the observation quoted in text since the concept of privity has been expanded by extending it to purchasers or *subpurchasers* "in the distributive chain."

626. 196 F. Supp. 856 (E.D. N.Y. 1961).

Mexico. The French manufacturer and the employer were joined, and it was alleged that there had been a breach of warranty for which the manufacturer and the employer were liable as joint venturers.[627] The court overruled the exceptions and objections filed by the manufacturer on the theory that if the joint venture could be proved, the manufacturer might be liable even if privity were found essential. It also held that admiralty jurisdiction extended to this case since the accident happened on the high seas; however, where the accident occurred within the navigable waters of a state, as when an airliner crashed in Boston Harbor, the federal court held that the contract pursuant to which the airline agreed to provide safe and airworthy transportation had no maritime aspects. Therefore, there was no admiralty jurisdiction as to an alleged breach of the contract of transportation, *Weinstein v. Eastern Airlines, Inc.*[628]

Ewing v. Lockheed Aircraft Corp.,[629] decided last year, also involved the death of an airline passenger. An "Electra" of the Northwest Airlines crashed in Indiana and a number of passengers including the decedent were killed. Was privity essential to maintaining an action against the manufacturer of the aircraft? The court answered this question in the negative by declaring that the "Electra" in question was sold to defendant airline for the express purpose of transporting passengers. Consequently, any warranty, express or implied, as to fitness for commercial travel "would inure to the benefit of those who were expected to be carried on the plane,"[630] alluding to *Hinton v. Republic Aviation Corp.*[631] and cases cited therein.

The federal court found that Minnesota law would govern since the contract made between Lockheed, the manufacturer, and the airline would subject the former to the provisions of a statute which governed foreign corporations doing business in Minnesota.[632] The

627. Article VII of the libel alleges: "Upon information and belief, that at the times hereinafter mentioned, respondents * * * were and still are engaged in a joint venture in the business, among other things, of designing, manufacturing, altering, testing, inspecting, repairing, assembling and selling * * * helicopters * * * and pursuant to the said joint venture employed various agents and employees and representatives." As to joint ventures generally, see Jaeger, *Joint Ventures*, 9 AM. U.L. REV. 1, 111 (1960); Jaeger, *Partnership or Joint Venture?*, 37 NOTRE DAME LAW. 138 (1961); WILLISTON, CONTRACTS §§ 317-18 (3d ed. Jaeger 1959).

628. 203 F.Supp. 430 (E.D. Pa. 1962).

629. 202 F. Supp. 216 (D. Minn. 1962); see also Great Lakes Airlines, Inc., v. Smith, 14 Cal. Rptr. 153 (Cal. App. 1961); Boy v. Riddle Airlines, Inc., 124 S.E.2d 118 (N.C. 1962); Trans World Airlines, Inc. v. Curtiss-Wright Corp., 1 Misc. 2d 477, 148 N.Y.S.2d 284 (1955), should be disapproved.

630. Ewing v. Lockheed Aircraft Corp., *supra* note 629 at 219.

631. *Supra* note 607.

632. Section 303.13, M.S.A., quoted by the court.

court reviewed various circumstances which subjected Lockheed to its jurisdiction and found that these would "not offend 'traditional notions of fair play and substantial justice.' "[633] In this connection the court relies on *Beck v. Spindler*,[634] wherein the Supreme Court of Minnesota states the law of that jurisdiction.

Automotive Accessories. In the last mentioned case,[635] Beck bought a house trailer from the defendant. It was found unsatisfactory for use as a residence during cold weather since water collected in large quantities in the ceiling and walls causing the interior to warp. The court found that it was "unfit for use in a climate such as exists in Hibbing, [Minnesota]."[636] When this action was brought against the immediate vendor and the manufacturer, the latter argued lack of privity and stated that the court did not have jurisdiction since it was a foreign corporation. The court rejected both defenses and noted a continuing trend "towards greater liberality in permitting state courts to take jurisdiction in this type of case," citing *McGee v. International Life Ins. Co.*[637]

Having disposed of the jurisdictional question, the court stated the next issue:

> We come then to the troublesome question of whether plaintiffs, under the facts of this case, may recover for a breach of implied warranty of fitness against the manufacturer, Ventoura, or if they are limited to a recovery against the dealer, Spindler. In other words, the question is whether a subvendee may recover against the manufac-

633. International Shoe Co. v. State of Washington, 326 U.S. 310 (1945); the court states that it is not unmindful of the *caveat* mentioned in Hanson v. Denckla, 357 U.S. 235 (1958) that the trend of expanding personal jurisdiction over nonresidents must nevertheless have certain minimal contacts in order not to offend these traditional notions of fair play and justice, Ewing v. Lockheed Aircraft Corp., *supra* note 629 at 220.

634. 256 Minn. 543, 99 N.W.2d 670 (1959). *Cf.* Farmers State Bank v. Cook, 251 Iowa 942, 103 N.W.2d 704 (1960), involving the sale of a trailer, where the court noted that "Undiscovered hidden defects do not deprive the buyer of the benefit of an established warranty. Risser v. Cox, 187 Iowa 990, 174 N.W. 701 (1919).

"In this connection it must be pointed out that the tendency of all modern cases on warranty is to enlarge the responsibility of the seller and restrict the application of the maxim of 'caveat emptor.' 46 AM. JUR., SALES, § 339, p. 522 . . ." And see Nyquist v. Foster, 44 Wash.2d 465, 268 P.2d 442 (1954), masonite walls of trailer became warped and buckled; rescission allowed.

635. *Ibid.*

636. Beck v. Spindler, *supra* note 634 at 673.

637. 355 U.S. 220 (1957).

> turer of a chattel, the purchase having been made from an intermediate dealer.[638]

The manufacturer contended that the plaintiffs could not recover because of the absence of privity of contract. This argument did not appeal to the court which, after quoting the provisions of the Uniform Sales Act as adopted in Minnesota,[639] concluded that it would be well to follow an outstanding precedent, *Bekkevold v. Potts*:[640]

> An implied warranty is not one of the contractual elements of an agreement. It is not one of the essential elements to be stated in the contract nor does its application or effective existence rest or depend upon the affirmative intention of the parties. It is a child of the law. . . . Because of the acts of the parties, it is imposed by the law. It arises independently and outside of the contract. The law annexes it to the contract. It writes it, by implication, into the contract which the parties have made. Its origin and use are to promote high standards in business and to discourage sharp dealings. It rests upon the principle that 'honesty is the best policy,' and it contemplates business transactions in which both parties may profit. . . . The doctrine of implied warranty should be extended rather than restricted.[641]

Finding that the doctrine of implied warranty is favored and should be liberally "construed," the court declares: "The rule is an equitable one," following *Iron Fireman Coal Stoker Co. v. Brown*.[642] Although much has been written on the subject of these implied warranties and privity, it is, in the opinion of the court, a hopeless task "to try to evolve therefrom any rational rule which would ap-

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638. Beck v. Spindler, *supra* note 634 at 679-80.

639. M.S.A. § 512.15 reading: "Subject to the provisions of this chapter 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."

640. 173 Minn. 87, 216 N.W. 790 (1927).

641. Beck v. Spindler, *supra* note 634 at 680, quoting Bekkevold v. Potts, *supra* note 640.

642. 182 Minn. 399, 234 N.W. 685 (1931).

ply to this case."[643] After reviewing a number of Minnesota cases,[644] the impact of *MacPherson v. Buick Motor Co.*[645] is considered, and a growing tendency to permit recovery against the manufacturer by a subvendee "even in the absence of privity where the theory of recovery is negligence" recognized. "Originally," the court notes, "an action for breach of warranty was a tort action."[646]

It does seem difficult to understand why it is possible to recover against the manufacturer on the basis of negligence where privity is missing but not when the manufacturer has expressly or impliedly represented that the product he is marketing is fit for the use for which it is sold, especially where the obligations are creatures of the law, not arising out of the actual agreement between the parties.[647] Impressed by this *rationale,* the court affirmed judgment for the plaintiffs, saying:

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643. Beck v. Spindler, *supra* note 634 at 680, where the court mentions the following writings: 33 COL. L.REV. 868 (1933); 18 CORNELL L.Q. 445 (1933); 42 HARV. L.REV. 414 (1929); 2 VANDERBILT L.REV. 675 (1949); 57 YALE L.J. 1389 (1948); 23 CALIF. L.REV. 621 (1935); 21 MINN. L.REV. 315 (1937); 1951 INSURANCE L.J. 797; 2 MO. L.REV. 73 (1937); 22 WASH. U.L.Q. 406 (1937); 37 COL. L.REV. 77; 22 ROCKY MOUNTAIN L. REV. 176 (1950); 5 VANDERBILT L.REV. 849 (1952); Annotations, 17 A.L.R. 709, 39 A.L.R. 1000, 63 A.L.R. 349, 88 A.L.R. 534.

For a list of articles dealing with products liability, privity and related subjects, see *supra* note 64.

644. Including Schubert v. J. R. Clark Co., 49 Minn. 331, 51 N.W. 1103 (1892); Heise v. J. R. Clark Co., 245 Minn. 179, 71 N.W.2d 818 (1955); Hartmon v. National Heater Co., 240 Minn. 264, 60 N.W.2d 804 (1953); Lovejoy v. Minneapolis-Moline Power Imp. Co., 248 Minn. 319, 79 N.W.2d 688 (1956); Hofstedt v. International Harvester Co., 256 Minn. 453, 98 N.W.2d 808 (1959).

645. *Supra* note 218.

646. Beck v. Spindler, *supra* note 634 at 681, where the court continued: "Historically, it probably was unfortunate that the implied obligation assumed by the seller or manufacturer was ever referred to as a warranty. It could as well have been referred to as an implied representation of fitness for the use for which it was made or sold, in which event the action could have continued as a tort action in the nature of one for deceit. It is difficult to justify a rule of law which permits recovery against the manufacturer on the theory of negligence and does not permit it on the theory that the manufacturer has represented that the product he puts out is fit for the use for which it is sold, no matter by what name that representation is denominated, where both obligations arise, not from the agreement of the parties, but by an obligation imposed by law."

647. "Logically it seems difficult to find any intermediate ground between basing the seller's liability either wholly on negligence or on an obligation imposed by the law entirely irrespective of negligence—an obligation analogous to that created by an express warranty. If a manufacturer is not liable for the use of defective material, in the absence of negligence it is hard to see why any seller should be liable for selling unmerchantable goods in the absence of negligence." 1 WILLISTON, SALES § 237 (3d ed. 1948) at 619, quoted by the court in Beck v. Spindler, *supra* note 634 at 682.

> We think that the trial court correctly held that Ventoura assumed contractual obligations to the purchaser and, having done so, was a seller within the meaning of our Sales Act. The implied warranty of fitness imposed by law, under the liberal interpretation accorded such warranties by our decision law, should be held to attach to all contractual obligations arising out of the sales contract. We therefore hold that, irrespective of whether privity of contract is essential to a recovery by a subpurchaser against the manufacturer of a chattel, the essential elements are present in the case now before us.[648]

In a leading case, *B. F. Goodrich Co. v. Hammond,*[649] the court dealt with a fatal accident resulting from the "blowout" of a tubeless tire. The manufacturer denied liability because of lack of privity. However, applying Kansas law, the United States Court of Appeals for the Tenth Circuit rejected this defense. It appeared that Adrien Hammond purchased four tires described as (to add a touch of macabre-irony) Premium "Life-Saver" tubeless tires for the car in which he and his wife were subsequently killed. In spite of the existence of an express warranty, the court declared:

> An implied warranty is not excluded by an express warranty in a contract of sale, unless it is inconsistent therewith and an express warranty limited to a particular person or class of persons does not exclude an implied warranty to another.
>
> The question arises as to whether an implied warranty ran to Berneice, privity between her and Goodrich being absent.
>
> Under the law of Kansas an implied warranty is not contractual. It is an obligation raised by the law as an inference from the acts of the parties or the circumstances of the transaction and it is created 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.[650]

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648. Beck v. Spindler, *supra* note 634 at 683.

649. 269 F.2d 501 (10th Cir. 1959).

650. *Id.* at 504, citing Nichols v. Nold, *supra* note 1; Graham v. Bottenfield's Inc., *supra* note 499; Swengel v. F. & E. Wholesale Grocery Co., *supra* note 1; Worley v. Procter & Gamble Mfg. Co., *supra* note 1.

After reviewing a number of cases decided in Kansas and Missouri (since the contract of sale was made in the latter state although the accident occurred in the former), the court concluded that these decisions "are in accord with the trend of modern authorities" and that there was an implied warranty of fitness on the part of the manufacturer to the decedent wife although privity was absent. Since this warranty was breached, judgment of the trial court in favor of the administratrix would be affirmed.[651]

Although there have been a number of other cases[652] where the in-

651. B. F. Goodrich Co. v. Hammond, *supra* note 649 at 506, recognizing that in Missouri, the highest court has 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.

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 or beverages, and hair dye' " at 319. It would appear that the later decision in Hammond, *supra* is compatible with the progressive trend of the times.

652. Hansen v. Firestone Tire & Rubber Co., 276 F.2d 254 (6th Cir. 1960), discussing at some length Bahlman v. Hudson Motor Car Co., 290 Mich. 683, 288 N.W. 309 (1939) and ordering judgment to be entered for the plaintiff; Gray Line Co. v. Goodyear Tire & Rubber Co., 280 F.2d 294 (9th Cir. 1960); Lander Motors, Inc., v. Lee Tire & Rubber Co. of New York, 78 S.E.2d 839 (Ga. App. 1953); Shoopak v. United States Rubber Co., 17 Misc.2d 201, 183 N.Y.S.2d 112 (1959); Levitt v. Ford Motor Co., 215 N.Y.S.2d 677 (Sup. Ct. 1961), where the court declines to entertain the suit, absent privity:

"With respect to the action for breach of warranty, it has long been the law in this state that there can be no warranty, express or implied, without privity of contract. Greenberg v. Lorenz, 9 N.Y.2d 195, 213 N.Y.S.2d 39, 42 (1961).

"Plaintiff argues, however, that the Greenberg case, supra, shows a departure from that long-established rule. That is true, but in that very case the Court of Appeals indicated that, for the present at least, the ancient rule has not been completely abandoned. The court said:

'So convincing a showing of injustice and impracticality calls upon us to move but we should be cautious and take one step at a time. * * * At least as to food and household goods, the presumption should be that the purchase was made for all the members of the household.'

"Whether the rule in the Greenberg case should be extended to automobiles is a matter for the appellate courts to decide. As the law presently stands, it does not appear that the Greenberg case has abolished, with respect to all forms of merchandise, the ancient doctrine that privity of contract is necessary to support an action for breach of warranty."

State ex. rel. Herbert, Attorney General v. Standard Oil Co., 138 Ohio St. 376, 35 N.E.2d 437 (1941); Holley v. Central Auto Parts, 347 S.W.2d 341 (Tex. Civ. App 1961).

jury was caused by tire failure, or the tires were not as represented,[653] other automotive accessories or appurtenances have come in for a fair share of litigation; *Zahn v. Ford Motor Co.* [654] is an example. Here, the plaintiff lost the sight of an eye when he was thrown against an ashtray on the dashboard when the driver of the car in which he was riding had to brake suddenly. It appeared that the ashtray was defective, and the jury returned a verdict for the plaintiff. Denying defendant manufacturer's motion for a new trial, the court found that the evidence supported the verdict and that liability existed even without privity.[655]

An automotive accessory which has been the subject of intensive advertising is the seat belt. In one of the first of the cases wherein such a belt failed to live up to the representations made for it, *Kapp v. Bob Sullivan Chevrolet Co.*,[656] decided last year, the trial court granted defendants' motions for directed verdicts. On appeal, the Supreme Court of Arkansas held that evidence as to the negligence of the installer of an automobile seat belt and its failure to warn users as to its limitations was insufficient for presentation to the jury. The seat belt had been purchased by the employer of the plaintiff for installation in the latter's automobile. When used by the plaintiff's wife it failed when most needed, that is, during a three-car collision in which plaintiff's wife was seriously injured, largely because of the failure of the seat belt to hold at the moment of impact. The court refused to accept the theory of *res ipsa loquitur* on the ground that a safety belt is not "such a piece of equipment" as to which this theory would be properly applicable where the belt breaks, quoting *Sleezer v. Lang.* [657] This seems open to serious question; after all, what is the purpose of a *safety* belt? A strong and well-reasoned dissenting opinion points out that there was ample evi-

653. Giove v. Lepcofker, 101 A.2d 259 (Mun. Ct. App. D.C. 1953).

654. 164 F. Supp. 936 (D. Minn. 1958). *Cf.* Hermanson v. Town Motors, 126 F. Supp. 519 (D. Conn. 1953).

655. Citing Torpey v. Red Owl Stores, Inc., 228 F.2d 117 (8th Cir. 1955), the court noted that in Minnesota a stranger to the contract can only maintain an action *ex delicto*; query: How does this square with the holding in Beck v. Spindler, *supra* note 634?

This appears to be in accord with the present state of the law in Pennsylvania under the holding in Hochgertel v. Canada Dry Corp., *supra* note 3, since a stranger to the consideration may not bring an action in breach of warranty, although a purchaser or subpurchaser in the distributive chain may.

656. 353 S.W.2d 5 (Ark. 1962).

657. 170 Neb. 239, 102 N.W.2d 435 (1960), where the court, oddly enough, stated that "a safety belt is not such a piece of equipment that the doctrine of *res ipsa loquitur* applies thereto in case it breaks." It is difficult to understand why this should be so.

dence to go to the jury on the question of negligence, and that it was error for the trial court to direct a verdict for the defendants.[658] It appears that separate suits were filed based on breach of warranty; these, as far as is known, are still pending.[659]

G. *Miscellaneous Products.*

Aside from automobiles, trucks, trailers, aircraft and their innumerable accessories, there are a host of other mechanical devices and contrivances which have proved defective and caused injuries to their users. Other products covered by warranties have occasioned property damage because of defects in their manufacture. A few examples of each type will conclude this examination and analysis of products liability cases. In the forefront of the first group is *Peterson v. Lamb Rubber Co.*,[660] typical of the cases not involving food or automotive products but dealing with other articles possessed of dangerous propensities. In the *Peterson* case it was a two-inch rubber bonded abrasive wheel which blew up and injured the plaintiff. Similar cases are discussed by the California court and include *Di Vello v. Gardner Mach. Co.*,[661] *Lebourdais v. Vitrified Wheel Co.*,[662] and *Zesch v. Abrasive Co.*[663] Although absence of privity between Peterson and the manufacturer was advanced as a defense, the court decided that "the trend today is towards disappearance of the requirement of privity of contract in cases where it is foreseeable that someone other than the immediate vendee will be injured by a defective product." Since the plaintiff was an employee of the purchaser of the abrasive wheel, the court concluded that he "should fairly be considered to be in privity to the vendor-manufacturer with respect to the implied warranties of fitness for use and of merchantable quality upon which recovery is here sought."[664]

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658. Kapp v. Bob Sullivan Chevrolet Co., *supra* note 656 at 19, pointing out that plaintiffs offered proof that belt was defective, that it broke, and that the breaking, with other facts, caused the injury to Mrs. Kapps.

659. It appears that two separate actions were instituted, one against the vendor, the other in a federal court against the manufacturer of the automobile and the producer of the seat belt.

660. *Supra* note 611.

661. 102 N.E.2d 289 (Ohio C.P. 1951).

662. 194 Mass. 341, 80 N.E. 482 (1907).

663. 353 Mo. 558, 183 S.W.2d 140 (1944).

664. Peterson v. Lamb, *supra* note 611 at 342, 353 P.2d at 577; this reasoning is somewhat similar to the view of the court in Rogers v. Toni Home Permanent Co., *supra* note 1; General Motors Corp. v. Dodson, *supra* note 1, and Henningsen v. Bloomfield Motors Co., Inc., *supra* note 1.

In a very recent case involving Pennsylvania law, *Smith v. Hobart Manufacturing Co.*,[665] a meat grinder from which the guard had been removed by the employer was responsible for injuries to an employee's hand. The trial court rendered judgment for the employee,[666] and the manufacturer and employer appealed. After a careful review of the evidence, and citation of various cases including *Mannsz v. Macwhyte*,[667] the appellate court reversed and remanded "with directions to order a partial new trial" in order to determine whether the employee would have been injured even if the guard had not been removed.[668] Since the decision in *Hochgertel v. Canada Dry Corporation*,[668a] this holding, at least as to the manufacturer, seems no longer valid since the employee was not a *subpurchaser* within the "distributive chain."

Another product which has been responsible for personal injuries when defectively manufactured is wire rope or cable. In *Mannsz v. Macwhyte*,[669] mentioned above, the federal court had occasion to consider breach of warranty in a case where wire rope manufactured by the Macwhyte Company had been sold to plaintiff by one Bradford. While being used to support a scaffold, it broke causing serious injuries to the plaintiff. The court examined case by case the manner in which the requirement of privity had been encroached upon and finally concluded that the requirement "has been obliterated from the Pennsylvania law." However, it was found that the rope had not been used in accordance with the directions, and therefore, no recovery was permissible. In this conclusion, the Third Circuit seems to have been mistaken in light of the latest asseveration emanating from the Supreme Court of Pennsylvania in *Hochgertel v. Canada Dry Corporation*[669a] which must be deemed as overruling *Mannsz v. Macwhyte,* supra, at least in so far as it pertains to plaintiffs who are not purchasers or subpurchasers in the distributive chain.

Florida seems to have definitely discarded the requirement of privity as is demonstrated by a similar case, *Continental Copper &*

665. 302 F.2d 570 (3d Cir. 1962).

666. 194 F. Supp. 530 (E.D. Pa. 1961); see also 185 F. Supp. 751 (E.D. Pa. 1960).

667. 155 F.2d 445 (3d Cir. 1946).

668. In addition to Mannsz v. Macwhyte, *supra* note 667, the court also relied on Foley v. Pittsburgh-Des Moines Co., 363 Pa. 1, 68 A.2d 517 (1949); Tohan v. Joseph T. Ryerson & Son, Inc., 265 F.2d 920 (3d Cir. 1959); Solomon v. White Motor Co., 153 F. Supp. 917 (W.D. Pa. 1957).

668a. *Supra* note 3; the case is stated, *supra* in text, notes 80a to 80k inclusive.

669. *Supra* note 667.

669a. *Supra* note 3.

Steel Indus. v. E. C. "Red" Cornelius, Inc., where the plaintiff recovered damages from the manufacturer when a wire rope or cable proved to be defective.[670]

Two years later, a court of appeals in Florida cited *Cornelius,* supra, in support of the proposition that privity of contract is not necessary in an action for recovery upon an implied warranty, *Hector Supply Co. v. Carter,*[671] when a defective lawn mower injured the purchaser's employee. The court cited another Florida case where an aluminum rocking chair had cut off one of the plaintiff's fingers, *Matthews v. Lawnlite Co.*[672] Reversing the trial court's judgment dismissing the complaint, although privity was absent, the appellate court felt that "no one would ever suspect danger under the arm of a lounge chair designed for ease and comfort." However, in the *Carter* case, supra, the court found that no warranty had been made.

In what promises to be a fertile field for extensive litigation, exposure to radioactive substances, there is a recent case, *McVey v. Phillips Petroleum Co.,*[673] which gives full effect to a disclaimer provision.[674] The court also found that a causal connection between the injury and the alleged negligence had not been established by the evidence although it was clear that "two radioactive pellets upon opening the reactor can [had become] pulverized and contaminated the air as radioactive dust."[675] The disclaimer provision was very broad and effectively exempted the parties from any possible warranties or other representations relative to the radioactive materials which it covered. This clause in the contract is set forth below.[676] In the face of this disclaimer, it would seem that some form of insurance would be necessary so long as the provision is not found

670. 104 So.2d 40 (Fla. App. 1958).

671. 122 So.2d 22 (Fla. App. 1960).

672. 88 So.2d 299 (Fla. 1956); this case is discussed in Noel, *Manufacturers' Negligence of Design or Directions for Use of a Product,* 71 YALE L.J. 816 (1962).

673. 288 F.2d 53 (5th Cir. 1961).

674. See Section IV (B), text at notes 184-207, *supra.*

675. McVey v. Phillips Petroleum Co., *supra* note 673 at 54.

676. "6. Neither the Government, the Commission, nor the operator of the AEC facility filling this order makes any express or implied warranty or other representation that (a) materials accepted for a service irradiation will not be destroyed, damaged, or otherwise altered in physical or chemical properties in the process of irradiation, or (b) materials furnished under this order (1) will not result in injury or damage when used for the purpose authorized by the Commission, (2) will accomplish the results for which they are requested and authorized by the Commission, (3) are safe for any other use, or (4) have particular physical or chemical properties or are of a particular quantity * * *."

contrary to public policy as in *Henningsen v. Bloomfield Motors, Inc.*[677]

A great many products liability cases have arisen from defective heating[678] or cooling installations.[679] Likewise, agricultural tractors, implements and similar machinery have often been the subject of warranties not infrequently breached.[680] In many of these, there is no question of personal injury, the only damage being to a property interest. In this field, *Spence v. Three Rivers Builders & Masonry*

677. *Supra* note 1.

678. Superior Combustion Industries v. Schollman Bros. Co., 271 F.2d 357 (8th Cir. 1959); Delta Tank Manufacturing Co. v. Weatherhead Co., 150 F. Supp. 525 (N.D. Ohio 1957); Kamen Coal Products Co., Inc. v. Struthers Wells Corp., 159 F. Supp. 706 (S.D. N.Y. 1958); Aced v. Hobbs-Sesack Plumbing Co., 55 Cal.2d 573, 360 P.2d 897 (1961); Title Insurance & Trust Co. v. Affiliated Gas Equipment, Inc., 12 Cal. Rptr. 729 (Cal. App. 1961); Delgaudio v. Ingerson, 19 Conn. Sup. 151, 110 A.2d 626 (1954); Sum Wong v. Hazard, 167 N.E.2d 565 (Ill. App. 1960); Hayes Construction Co. v. Silverthorn, 343 Mich. 421, 72 N.W.2d 190 (1955); Pineau v. White, 101 N.H. 119, 135 A.2d 716 (1957); Altman Furniture Co. v. Scarso, 122 N.E.2d 299 (Ohio App. 1954); Evens v. Young, 264 S.W.2d 577 (Tenn. 1954); Eliason v. Walker, 42 Wash.2d 473, 256 P.2d 298 (1953); Fonferek v. Wisconsin Rapids Gas & Electric Co., 268 Wis. 278, 67 N.W.2d 268 (1954).

679. Burge Ice Machine Co. v. Weiss, 219 F.2d 573 (6th Cir. 1955); Universal Major Electrical Appliances, Inc. v. Glenwood Range Co., 223 F.2d 76 (4th Cir. 1955) *aff'g* 124 F. Supp. 183 (D. Md. 1954); Donnelly v. Governair Corp., 145 F. Supp. 699 (N.D. Cal. 1956); Bayliss Machine & Welding Co. v. Huntsville Ice & Coal Co., 265 Ala. 383, 91 So.2d 483 (1956); Davies v. Motor Radio Co., 236 S.W.2d 409 (Mo. 1951); B. H. Tureen Hotels v. Nachman & Co., 317 S.W.2d 422 (Mo. 1958); Foodmaster, Inc. v. Moyer, 141 A.2d 890 (N.H. 1958); Steele v. Westinghouse Electric Corp., 159 N.E.2d 469 (Ohio App. 1958); Frigidinners v. Branchtown Gun Club, *supra* note 33; Huddleston v. Lee, 39 Tenn. App. 465, 284 S.W.2d 705 (1955); *cf.* United Engineering Co. of Louisiana v. Durbin, 68 So.2d 614 (La. App. 1953).

680. United States v. Goodman, 111 F. Supp. 32 (W.D. N.C. 1953); Rasmus v. A. O. Smith Corp., 158 F. Supp. 70 (N.D. Iowa 1958); Eaton v. Massey-Harris-Ferguson, Inc., 161 F. Supp. 853 (W.D. N.Y. 1957); D'Orsay Equipment Co. v. United States Rubber Co., 199 F. Supp. 427 (1961); The O.S. Stapley Co. v. F.O. Newby, 57 Ariz. 24, 110 P.2d 547 (1941); Hambrick v. Peoples Mercantile & Implement Co., 228 Ark. 1021, 311 S.W.2d 785 (1958); Archer v. Bucy, 357 S.W.2d 636 (Ark. 1962); Sanchotena v. Tower Co., 74 Idaho 541, 265 P.2d 1021 (1953); Williams v. Shadow, 77 So.2d 48 (La. App. 1955); Sensabaugh v. Morgan Bros. Farm Supply, Inc. 165 A.2d 914 (Md. 1960); Lewis v. Zukerman, 357 Mich. 326, 98 N.W.2d 566 (1959); Hess v. Koskovitch, 62 N.W.2d 806 (Minn. 1954); Hargrove v. Lewis, 313 S.W.2d 594; Dugan v. Trout, 271 S.W.2d 593 (Mo. App. 1954); St. George v. Grisafe, 2 N.J. Super. 297, 118 A.2d 835 (1955); Jones v. Klachkin, 199 N.Y.S.2d 155 (Sup. Ct. 1960); Tyson v. Long Mfg. Co., 249 N.C. 557, 107 S.E.2d 170 (1959); Wyatt v. North Carolina Equipment Co., 117 S.E.2d 21 (N.C. 1960); Petrus Machinery, Inc. v. Radiator Specialty Co., 125 S.E.2d 367 (N.C. 1962); Northwestern Equipment v. Tentis, 74 N.W.2d 833 (N.D. 1956); Tharp v. Allis-Chalmers Mfg. Co., 42 N.M. 443, 81 P.2d 703 (1938); Rogers v. J. I. Case Co., 272 S.W.2d 429 (Tex. Civ. App. 1954); Freeman v. Stemm Bros., 44 Wash.2d 189, 265 P.2d 1055 (1954).

Supply, Inc.[681] is as revolutionary as *Henningsen v. Bloomfield Motors, Inc.*[682] in its disregard of the so-called privity requirement. The subject matter in *Spence* was a fairly innocuous product, cinder blocks. These had been purchased by a builder for use in the construction of a home for the plaintiff who was clearly not in privity of contract with the defendant manufacturer. In a masterful opinion the court examines the pros and cons of privity, reviewing all of the pertinent precedents, and casts its lot with the more enlightened group of jurisdictions which consider privity a waning concept. After the cinder blocks had been installed, they developed red splotches described as "bleeding," began to disintegrate and proved entirely unfit for use in walls. Recognizing that in holding for the plaintiff, it was breaking with the past, the court said:

> As the court below correctly observed, there is little doubt that in the past our Court has for the most part devotedly followed the "general rule" and been reluctant to permit a third person not in privity to recover from a manufacturer on a theory of negligence or implied warranty. And it has correspondingly been reluctant to extend recovery—beyond what may loosely be termed food cases involving personal injuries—to other defective products, regardless of whether they involved personal injuries or injuries to property.[683]

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. Reverting to its discussion of the food cases, the Supreme Court of Michigan, by a closely divided court, added:

> 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

681. *Supra* note 1.

682. *Supra* note 1.

683. Smolenski v. Libby, McNeill & Libby, 280 Mich. 329, 273 N.W. 587 (1937).

> 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 non-liability.[684]

Various cases are reviewed in which the Michigan courts have "faltered" in their reverence for the hallowed doctrine of privity as exemplied in *Smolenski v. Libby, McNeill & Libby,*[685] as in *Bosch v. Damm,*[686] 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.*[687] 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 scarely be expected to impart it to others. Legal confusion has inevitably resulted. Aggrieved plaintiffs have scarely 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.[688]

In *Hertzler v. Manshum,*[689] where poison was found in some flour, the Michigan court "uttered the towering legal understatement of the year"[690] 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

684. Spence v. Three Rivers Builders & Masonry Supply, Inc., *supra* note 1 at 127, 90 N.W. 2d at 877, noted 48 GEORGETOWN L.J. 606 (1960).

685. *Supra* note 683.

686. 296 Mich. 522, 296 N.W. 669 (1941).

687. 310 Mich. 261, 17 N.W.2d 176 (1944).

688. Spence v. Three Rivers Builders & Masonry Supply, Inc., *supra* note 1 at 128, 90 N.W.2d at 878.

689. 228 Mich. 416, 200 N.W. 155 (1924).

690. The year was 1924, *supra* note 689.

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 cliches of the past to the pressing realities of modern life."[691]

Then, after running through the entire gamut of variations, exceptions, the fate of privity in the negligence cases as exemplified by *MacPherson*,[692] 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 in line with the suggestion of the Supreme Judicial Court of Massachusetts in *Carter v. Yardley*:[693]

> The long opinion in the *Yardley Case* concludes very simply: 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.
>
> To these sentiments we utter a fervent amen.[694]

In *Randy Knitwear, Inc. v. American Cyanamid Co.*,[695] decided by the New York Court of Appeals last year, there appears to be a further departure from the doctrine of privity. The plaintiff had entered into a number of contracts for the purchase of certain textile material. When some of this material did not conform to written representations regarding its qualities, breach of warranty was relied on in an action against the manufacturer. Lack of privity was, of course, the defense introduced by the defendant who had produced the resins with which the textile material had been treated to prevent the very shrinkage which had nevertheless occurred.

Beginning with *Chysky v. Drake Bros. Co.*[696] where the mischief in New York all started and the privity requirement was strictly enforced, the court reviewed the cases right up to the most recent pronouncement in *Greenberg v. Lorenz*.[697] As has been noted in a

691. Spence v. Three Rivers Builders & Masonry Supply, Inc., *supra* note 1, *supra* note 688.

692. *Supra* note 218.

693. 319 Mass. 92, 64 N.E.2d 693 (1946), described by the court as "a leading modern case in this field."

694. Spence v. Three Rivers Builders & Masonry Supply, Inc., *supra* note 1 at 135, 90 N.W.2d at 881.

695. 11 N.Y.2d 5, 226 N.Y.S.2d 363 (1962).

696. 235 N.Y. 468, 139 N.E. 576 (1923).

697. *Supra* note 1.

previous section,[698] the court held in *Greenberg* that, in cases involving foodstuffs and other household goods, the implied warranties of fitness and merchantability run from the retailer to the members of the purchaser's household, regardless of privity of contract. In *Randy Knitwear* the court was asked to extend the *rationale* of *Greenberg* to an action for breach of an express warranty by a remote purchaser against a manufacturer who induced the purchase by representing the quality of the goods in public and on labels which accompanied the goods. The court found that privity should be dispensed with here, particularly in the context of the modern world of merchandising in which the manufacturer launches a direct appeal to the ultimate consumer through the use of mass media advertising and "sanguine" representations on packages and labels.[699]

> 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.
>
> The world of merchandising is, in brief, no longer a world of direct contract; it is, rather, a world of advertising and, when representations expressed and disseminated in the mass communications media and on labels (attached to the goods themselves) prove false and the user or consumer is damaged by reason of his reliance on those representations, it is difficult to justify the manufacturer's denial of liability on the sole ground of the absence of technical privity. 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 accompanying 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

698. Text at note 356, *supra*.

699. Randy Knitwear, Inc. v. American Cyanamid Co., *supra* 695.

> 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.[700]

It is of the utmost importance to note that although the defendant strongly urged that strict liability should not be imposed because the fabric shrinkage complained of would not cause personal injury, the court declines, in the able opinion carefully prepared by Mr. Justice Fuld, to so hold and finds that "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."[701]

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700. *Id;* the court continued:

"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.

"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.'

"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. . . .

"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." Randy Knitwear, Inc. v. American Cyanamid Co., *supra* note 695.

701. Since the plaintiff was a subpurchaser in the distributive chain, it seems probable that his action against the manufacturer would have been en-

VIII. IS PRODUCTS LIABILITY INSURANCE THE ANSWER?

In an economy which boasts of so many labor saving devices, household and similar appliances, wherein defects are mostly latent and rarely patent, some sort of protection for the user is essential. It has been suggested that this protection can best be accomplished by insurance.[702] And there are in effect any number of products liability policies necessitated by the prevalence of "products hazard" exclusionary clauses inserted in general liability contracts. This development somewhat parallels the evolution of special airplane travel coverage, which was developed because of the frequency with which standard life policies excluded death or injury resulting from the use of or travel in aircraft.[703] However, even where products liability risks are covered, this coverage is often so hedged about and ringed around with exceptions that its utility becomes doubtful. An examination of some of the cases may prove enlightening.

In *Sears, Roebuck & Co. v. Travelers Insurance Co.*,[704] the insured sought a declaratory judgment to the effect that the insurer was obligated to defend the insured under a products liability provision in a "Comprehensive General Liability Policy."[705] The accident happened when a customer sat in a cane chair which was on display in the vendor's store in Ft. Lauderdale, Florida. The chair collapsed and the customer was injured. The insurance company denied coverage and refused to defend the action unless defendant company agreed to hold the insurer harmless. The court, however, held that under

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tertained in Pennsylvania under the most recent pronouncement of the Supreme Court of that State as it appears in Hochgertel v. Canada Dry Corp., *supra* note 3. For a statement of the case, see text *supra*, notes 80a to 80k inclusive.

702. More than twenty-five years ago, a writer suggested that consumer protection might well be effectuated by insurance, see Jeanblanc, *Manufacturers' Liability to Persons Other Than Their Vendees*, 24 VA. L.REV. 134 at 158 (1937).

703. Lachs v. Fidelity & Casualty Co. of New York, 306 N.Y. 357, 118 N.E.2d 555 (1954) which involved the interpretation of special "Airline Trip Insurance," and held the insurer liable in spite of an apparent exclusionary provision.

704. 261 F.2d 774 (7th Cir. 1958).

705. This policy provided:

"6. Definitions.

* * * * * * * *

"(c) Products Hazard. The term 'products hazard' means

"(1) the handling or use of, the existence of any condition in or a warranty of goods or products manufactured, sold, handled or distributed by the named insured, * * * if the accident occurs after the insured has relinquished possession thereof to others and away from premises owned, rented, or controlled by the insured * * *." Sears, Roebuck & Co. v. Travelers Ins. Co., *supra* note 704 at 776.

the terms of the endorsement, the insurance company was clearly obligated to defend the action and although the plaintiffs were unsuccessful, the insured was nevertheless entitled to a recovery for the expenses of litigation.[706]

In an action involving a policy which excluded liability for "products hazard," defined in the policy as meaning the handling or use of goods or products manufactured, sold, handled, or distributed by the insured if the accident should occur after the insured had relinquished possession, judgment was for the insurer, *Bitts v. General Accident Fire & Life Assurance Corp.*[707] Vendor-insured's customer had been injured when the latter opened the end of a refrigerator coil and it exploded. As the insured no longer had possession of the coil, the appellate court affirmed.[708]

In two other cases, the customer fared no better. In *United Pacific Insurance Co. v. Schaecher,*[709] the insurer brought this action for declaratory relief to interpret products liability coverage of a comprehensive policy where the damage was caused by the emergence of live beetles in wood used in finished homes based on breach of a warranty of quality. The insurer was held not liable since this was not an accident within the meaning of the policy, and the insured had not sustained the burden of proving coverage.[710]

In the other case, *Liberty Building Co. v. Royal Indemnity Co.,*[711] the trial court dismissed the case and this appeal resulted. Again, the question as to the meaning of "accident" was before the court. It was held that if the insured was obliged to repair or replace some product of work which proved defective, this was not within the

706. Although Sears prevailed in the White litigation, while this appeal was pending, this matter is not rendered moot. Sears seeks to recover its expense in defending the White suit, for which Sears contends Travelers is liable. *Id.* at 777.

707. 282 F.2d 542 (9th Cir. 1960).

708. Furthermore, the coil was no longer on the premises of the insured, a condition precedent to the insurer's liability.

709. 167 F. Supp. 506 (N.D. Cal. 1958).

710. The court observed that: "The term 'accident' has been variously defined. In United States Mutual Acc. Ass'n. v. Barry, 1889, 131 U.S. 100, at page 121, 9 S.Ct. 755, at page 762, 33 L. Ed. 60, 'accidental' is defined as 'happening by chance, unexpectedly taking place, not according to the usual course of things, or not as expected.' In Richards v. The Travelers Ins. Co., 1891, 89 Cal. 170, at page 176, 26 P. 762, at page 763, 'accident' is defined to include 'any event which takes place without the foresight or expectation of the person acted upon or affected by the event.' " United Pacific Insurance Co. v. Schaecher, *supra* note 709 at 508.

711. 2 Cal. Rptr. 329 (Cal. App. 1960).

coverage of the policy.[712] It appeared that substantial damage to the stucco finish of certain houses was caused by a defect in the soil upon which the houses were built. Since this was expressly excluded, there could be no recovery.

However, to counterbalance these adverse decisions, there is a case of novel impression wherein the insurer sought a declaration of non-coverage of a claim being made against its insured which arose under a "dram shop" act.[713] But the court, in *American Surety Co. v. Rodek*,[714] found that the policy had been issued to defendants in connection with the operation of their restaurant. They were alleged to have sold liquor to an intoxicated patron thereby violating the Connecticut Dram Shop Act.[715] Holding that the statute in question was "primarily compensatory in purpose rather than penal," the court held that there was no prohibition on insurance coverage. As to the second defense claimed by the company, namely an exception under the products liability provision, it was pointed out that this exception would only cover a defect in the product sold, but did not cover assaults committed by an intoxicated person to whom liquor was sold. The insurance company was held liable.

Bundy Tubing Co. v. Royal Indemnity Co.[716] is a decidedly more representative type of products insurance case, one from which prospective policy holders may take heart. When the insured was faced with three suits in California and five in Michigan based on alleged defects in certain tubing he had installed, he called on his products liability insurer to defend or settle these actions. Thin steel tubing, used by building contractors and plumbers for radiant heating, was installed in the concrete floors of houses or other buildings without basements. Hot water from a boiler flowed through the tubing; when leaks developed, the aforementioned actions for breach of warranty or negligence were filed against Bundy, the insured. He settled several of these claims and then brought this action against the insurance company. The trial court held that since the law suits in question against the insured involved negligence or

712. As the court observed: "In this connection, Exclusion (f) expressly excludes from liability under the policy, damages sustained by any 'goods or products * * * or premises alienated * * * or work completed * * * *out of which the accident arises.*' (Emphasis added.) This Exclusion means that if the insured becomes liable to replace or repair any 'goods or products' or 'premises alienated' or 'work completed' after the same has caused an accident because of a defective condition, the cost of such replacement or repair is not recoverable under the policy." Liberty Building Co. v. Royal Indemnity Co., *supra* note 711 at 331.

713. Connecticut Dram Shop Act, § 4307, G.S.1949.

714. 128 F. Supp. 250 (D. Conn. 1954).

715. *Supra* note 713.

716. 298 F.2d 151 (6th Cir. 1962).

breach of implied warranty, the damages were not caused by *accident* and were therefore, not covered by the policies. The insurer appealed and the United States Court of Appeals for the Sixth Circuit reversed holding:

> The fact that the claims here involved breach of warranty or negligence did not remove them from the category of accident. Bundy would not be legally obligated to pay a claim arising out of an accident occurring without its negligence or breach of warranty. If the liability policy were construed so as to cover only accidents not involving breach of warranty or negligence, then no protection would be given to the insured. The insured would not need liability insurance which did not cover the only claims for which it could be held liable. The word accident is common in most liability policies and should not be construed in this type of case as not including claims involving negligence or breach of warranty.[717]

In support of its holding, the court cites *Hauenstein v. St. Paul Mercury Indemnity Co.*,[718] particularly as to the definition and meaning of the word "accident" as used in an insurance policy:

> There is no doubt that the property damage to the building caused by the application of defective plaster was 'caused by accident' within the meaning of the insurance contract, since the damage was a completely unexpected and unintended result. Accident, as a source and cause of damage to property, within the meaning of an accident policy, is an unexpected unforeseen or undesigned happening or consequence from either a known or an unknown cause.[719]

The court held for the insured and noted that a similar result was reached in *Geddes & Smith, Inc. v. St. Paul Mercury Indemnity Co.*,[720] where "recovery was allowed for the cost of removal of defective aluminum doors" and the cost of installation of new ones.[721]

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717. Bundy Tubing Co. v. Royal Indemnity Co., *supra* note 716 at 153.

718. 242 Minn. 354, 65 N.W.2d 122 (1954).

719. Hauenstein v. St. Paul Mercury Indemnity Co., *supra* note 718, 65 N.W.2d at 126.

720. 51 Cal.2d 558, 334 P.2d 881 (1959).

721. In Bundy Tubing Co. v. Royal Indemnity Co., *supra* note 716, the court cited the following cases: "Diefenbach v. Great Atlantic & Pacific Tea Co., 280 Mich. 507, 273 N.W. 783 (1937); Pawlicki v. Hollenbeck, 250 Mich. 38, 229 N.W. 626 (1930); Hunt v. United States Accident Association, 146 Mich. 521, 109 N.W. 1042 (1906); New Amsterdam Casualty Co. v. Jones, 135 F.2d 191 (6th Cir. 1943)."

The insurer was also held liable in General Casualty Co. v. Larson, 196 F.2d 170 (8th Cir. 1952); Reed Roller Bit Co. v. Pacific Employers Insurance Co., 198

CONCLUSION

A clear and steadily growing majority of jurisdictions have obliterated the privity requirement from actions for breach of warranty in the traditional field of foods, beverages and other products sold for human use or consumption. But some have gone beyond and are including automotive vehicles, aircraft and other mechanical devices. There are jurisdictions which have travelled the entire distance and simply discarded privity as a bar to recovery, either by judicial decision or by legislation, especially where the warranty is constructive. This then is the end result of a long and gradual process of erosion characterized by the use of fictions, exceptions and categorical repudiation. So numerous have these exceptions become, as many courts recognize, they have devoured the rule.

These fictions or exceptions often shade into each other, nor have most courts made any effort to draw sharp lines of demarcation. As in the case of dangerous products and the tort actions they gave rise to, the privity requirement was gradually eliminated until today, it seems virtually nonexistent. In warranty cases, the major departures from strict privity fall into one of the following categories:

1. The buyer is the agent of the injured consumer;

2. The vendor is the agent of the manufacturer, or is a conduit between the latter and the consumer;

3. The manufacturer who advertises extensively makes a general offer or warranty to those who use his products;

4. The consumer is a subpurchaser within the distributive chain or conduit; and finally,

5. The consumer or other injured party is the third party beneficiary of the sales contract.

But even where the courts have been inclined to relax the doctrine of privity, they have at times considered themselves blocked by a narrow interpretation or construction of the language of a sales statute. Thus, the contention has been advanced that certain sections of the Uniform Sales Act preclude affording any relief for

F.2d 1 (5th Cir. 1952) *cert. den.* 344 U.S. 920; Liberty Mutual Insurance Co. v. Hercules Powder Co., 224 F.2d 293 (3d Cir. 1955); Nielson v. Travelers Indemnity Co., 174 F. Supp. 648 (D. Iowa 1959) *aff'd* 277 F.2d 455 (8th Cir. 1959); King v. Mason, 95 So.2d 705 (La. App. 1957) *aff'd* 234 La. 299, 99 So.2d 117; McAllister v. Century Indemnity Co., 24 N.J. Super. 289, 94 A.2d 345 (1953), *aff'd* 12 N.J. 395, 97 A.2d 160, where the policy was characterized as "most ambiguous" and accordingly, all doubts were resolved in favor of the insured; Philadelphia Fire & Marine Insurance Co. v. Grandview, 42 Wash.2d 357, 255 P.2d 540 (1953).

breach of warranty to one not in strict privity of contract. Other courts have enlarged this interpretation to include those "in the distributive chain." And some have held that the legislative intent should be held to include those who suffer injury from use of the product. Analysis of the cases heretofore considered makes one conclusion ineluctable: The desired uniformity has not been achieved under this statute.

Whether the desired harmony will be achieved under the comparable provisions of the Uniform Commercial Code remains to be seen. While the Code provides for a considerable latitude of judicial interpretation, two significant inroads on the doctrine of privity are specifically made: Express or implied warranties of the vendor extend to persons in the family or household of the buyer or guests in his home. Also, the antiquated and rather absurd notion that serving or "uttering" food in a restaurant is not a *sale* has been laid to rest in a long awaited grave.

As the dawn of the third millenium A.D. approaches, the conclusion is inescapable that the protection accorded to the consumer, whether under the guise of negligence or breach of warranty, express or implied, will be ever more in the direction of absolute liability of the vendor or manufacturer. With privity on the wane, *caveat venditor* will be the rule, not *caveat emptor*; the time has come to hold a requiem for this long overdue anachronism.