

4-1-1955

## Sales—Retailer's Liability to Third Persons for Injury Caused by Adulterated Foods

Thomas Haymeir

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### Recommended Citation

Thomas Haymeir, *Sales—Retailer's Liability to Third Persons for Injury Caused by Adulterated Foods*, 4 Buff. L. Rev. 362 (1955).  
Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol4/iss3/19>

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SALES — RETAILER'S LIABILITY TO THIRD PERSONS  
FOR INJURY CAUSED BY ADULTERATED FOODS

Plaintiff was injured by eating adulterated food purchased from defendant retailer by her sister. *Held* (3-1): Sister's alleged agency provided sufficient privity to sustain an action for breach of implied warranty. *Bowman v. Great Atlantic and Pacific Tea Co.*, 284 App. Div. 663, 133 N. Y. S. 2d 904 (4th Dept. 1954).

Injuries caused by impure foods give rise to causes of action based on implied contractual warranties of fitness and merchantability, N. Y. PERSONAL PROPERTY LAW § 96 (1, 2); UNIFORM SALES ACT § 15 (1, 2) provided, as required by most jurisdictions, plaintiff and defendant were parties to the sales contract. PROSSER, TORTS § 83 (1941). This requirement of privity has embarrassed plaintiffs in two situations—in actions by an injured purchaser against a party other than his vendor (as the manufacturer), and in actions by a non-purchasing consumer against the manufacturer or retailer of the faulty product. The courts tend to treat these situations alike with respect to the privity requirement. *Chesky v. Drake Brothers Co.*, 235 N. Y. 468, 139 N. E. 576 (1923).

A growing number of jurisdictions permit recovery in warranty regardless of strict contractual privity and allow an ultimate consumer to recover regardless of whether he is a direct party to the sales contract. PROSSER, TORTS § 83 (1941). The rationales supporting this result include establishing the ultimate consumer as a third party beneficiary, *Ward Baking Co. v. Trizzino*, 27 Ohio App. 475, 161 N. E. 557 (1928), holding that the warranty runs with the article's title to the consumer, *Coca Cola Bottling Works v. Lyons*, 145 Miss. 876, 111 So. 305 (1927), and simply admitting that "The law imposes a warranty of purity in favor of the ultimate consumer as a matter of public policy." *Decker and Sons v. Capps*, 139 Tex. 609, 164 S. W. 2d 828 (1942). The historically tortious character of warranties also aids such a result.

The majority of jurisdictions, including New York, require strict privity of contract. In New York, "the general rule is that a manufacturer or a seller of food . . . is not liable to third persons who have no contractual relations with him. . . . The benefit of a warranty does not run with the chattel on resale." *Chesky v. Drake Brothers Co.*, *supra*. Furthermore, "the courts have never gone so far as to recognize warranties for the benefit of third persons." *Gimenez v. Great Atlantic and Pacific Tea Co.*, 264 N. Y. 390, 191 N. E. 27 (1934). "Unless there is privity of contract there can be no warranty." *Chesky v. Drake Brothers Co.*, *supra*.

## RECENT DECISIONS

An apparent exception to the privity rule in New York and several other states allows the ultimate consumer to recover from a seller that traded directly with the consumer's agent. This agency theory has been applied to a wife's purchases from a retailer as agent of her husband. *Ryan v. Progressive Grocery Stores*, 255 N. Y. 388, 175 N. E. 105 (1937); *Gearing v. Berkson*, 223 Mass. 257, 111 N. E. 785 (1916). The theory was rejected where an infant was injured by goods bought by his mother. *Redmond v. Borden's Farm Products Co.*, 245 N. Y. 512, 157 N. E. 838 (1927).

The extension of warranty liability to other than the purchaser in the instant case was limited to the agency theory. The complaint alleged plaintiff resided with and jointly kept house with her sister, that food was purchased at joint expense and for joint consumption and that in purchasing from the defendant the sister acted "for herself and also as agent for plaintiff." The court carefully pointed out that strict privity was still necessary, but this case involved a plaintiff who was "an actual party to a contract negotiated through the agency of another."

Regardless of whether the agency theory is termed an exception to the privity requirement in New York, it nevertheless provides fertile ground for overcoming the stringency of the privity requirement and drastically expanding the scope of warranty liability.

*Thomas Hagmeir*

### STATUTE OF LIMITATIONS — LICENSED FOREIGN CORPORATION HELD NON-RESIDENT UNDER C. P. A. § 13

An Illinois corporation licensed to do business in New York brought action in New York on an indemnity agreement executed in Maryland against an individual resident of New York who had been a resident of Maryland at the time of execution of the contract. *Held* (3-2): Judgment dismissing complaint on ground that action was barred by Maryland three year limitation statute affirmed. *American Lumbermen's Mutual Casualty Company of Illinois v. Cochrane*, 284 App. Div. 884, 134 N. Y. S. 2d 473 (1st Dep't 1954).

Section 13 of the Civil Practice Act provides:

Where a cause of action arises outside of this state, an action cannot be brought in a court of this state to enforce such cause of