1939

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THE LIABILITY OF RETAIL DEALERS FOR DEFECTIVE FOOD PRODUCTS

By ROBERT C. BROWN*

At the beginning of an able article published about three years ago under the title of Retail Responsibility and Judicial Law-Making, Professor John Barker Waite, of the Law School of the University of Michigan, propounded the following problem:

When the corner grocer sells a can of beans and a peck of fresh spinach, does he make himself responsible for the contents of the can, or acquire liability because of a green worm buried deep in the leaves?

The question is thus a double one: is a retailer who sells food products in the ordinary tin can or other sealed container responsible for the injury to his customers either from some foreign article in the can or from unwholesomeness of the food; and second, is the retailer who sells food products in bulk, which are defective in some way for which the retailer cannot reasonably be held at fault, liable for injuries resulting to his customers from the defect? The facts in the question as to the can are avowedly a virtual copy of the leading case of Ward v. Great Atlantic & Pacific Tea Company; and the other situation is a typical one where the retailer could have discovered the defect but should not seriously be blamed for having in fact failed to do so. There is, of course, no controversy that a retailer who is careless and thereby injures his customers should be liable. But certainly the greatest care will not acquaint the retailer with the contents of a sealed can sold by him; and even if the food is not in a sealed container, it can hardly be regarded as necessarily negligence for the retailer not to discover every possible defect, even such as can be found by careful inspection. For these reasons, Professor Waite, in the article cited above, though conceding that the authorities are considerably split, reaches the conclusion that the retailer should be freed from liability in both cases. It is the purpose of this article to suggest the desirability of a result directly contrary to that advocated by Professor Waite, and to maintain that the cases imposing such liability are sound in prin-

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1 (1936) 34 Mich. L. Rev. 494. See also, Waite, Sales (1938) 223 ff.
2 (1918) 231 Mass. 90, 120 N. E. 225.
ciple and policy, and should, therefore, become the prevailing view in the future.

The problem of the food sold in bulk—the spinach in the question above—may well be deferred until we have considered somewhat fully the canned food. Suffice it to say at this point that Professor Waite's theory that a retailer should not be liable except for personal negligence entirely wipes out the whole doctrine of warranty in the law of sales. No one ever has contended that the negligent retailer should be freed from liability for the damage done to his customers by the product which he carelessly handles. Until we find a retailer free from fault, there is no reason for discussing the possibility of liability for warranty. The acceptance of Professor Waite's theory then means the wiping out of the whole law of warranties, or at least of implied warranties. This may perhaps be desirable; but we ought at least to know what we are doing.

AUTHORITIES ON THE CANNED GOODS SITUATION

But laying this problem aside, we come to consider the problem of the liability of the retailer for injuries from defects in goods sold by him in sealed containers. When Professor Waite wrote his article, the authorities were considerably divided, and so they remain. If there has been no very widespread tendency to extend a rule holding the retailer in this situation, neither has there been any considerable tendency to exempt him from liability.

In England, the controlling authority still seems to be Jackson v. Watson & Sons, holding the retailer of canned salmon liable for the death of the customer's wife, resulting from the unwholesomeness of the salmon. Professor Waite criticises this decision as based upon a precedent which does not support it—a criticism which, it is submitted, is immaterial. He also suggests that it was not "stated that the sellers had not themselves filled the can." It may be answered that it was likewise not stated that they had. There seems no escape from the proposition that the English courts are, at present, committed to the proposition that the dealer is liable in this situation.

Massachusetts has contributed what is conceded the leading


4Frost v. Aylesbury Dairy Co. [1905] 1 K. B. 193. Here the facts do not show whether the defendant was only a retailer, or whether it was also the supplier. Furthermore, the unwholesome article (milk) may have been sold in bulk.

American case in favor of holding the dealer for injuries resulting from the unsoundness of food sold by him in a sealed can, or from some improper article contained in such food. This is the case of Ward v. Great Atlantic & Pacific Tea Company,6 already referred to. Since the publication of Professor Waite's article, the Massachusetts court three times has rendered decisions in accordance with the Ward Case,7 so that Massachusetts may be regarded as completely committed as any jurisdiction can be to holding the dealer.

New York was somewhat slower in formulating its view. Some of the lower courts of that state declined to hold the dealer under these circumstances;8 though others took the opposite view.9 The court of appeals declined to decide the question as long as it could avoid doing so,10 but finally, in 1934, the court was presented with a state of facts which made further evasion of the decision impossible. The court then held that the dealer who sells unwholesome food, or food containing injurious substances, is liable for the injury thus caused, even though the food was in a sealed can.11 This doctrine has been approved by the same court in another case decided in 1938,12 though here it might perhaps be a question as to whether there was actually a sealed container.

A decision of the New Jersey court in 1931, cited by Professor

10Rinaldi v. Mohican Co., (1918) 225 N. Y. 70, 121 N. E. 471, holding a meat dealer liable for unwholesomeness of meat sold, but explicitly reserving the question whether the liability would have been imposed if the sale had been of food in a sealed container. See also, Race v. Krum, (1918) 222 N. Y. 410, 118 N. E. 853.
11Gimenez v. Great Atlantic and Pacific Tea Co., (1934) 264 N. Y. 390, 191 N. E. 27. The court had previously decided that a grocer was liable for injuries to a customer from a pin inside a loaf of bread sold by him. Ryan v. Progressive Grocery Store, (1931) 255 N. Y. 388, 175 N. E. 105. But in Canavan v. Mechanicville, (1920) 229 N. Y. 473, 128 N. E. 882, by a 4-3 decision the court held a city not liable for furnishing water infected with typhoid germs, on the ground that the city had no notice that the water would be used for drinking. While the decision seems very questionable, it is obviously entirely outside the problem of this article.
Waite, seems to commit that jurisdiction to the same view.\textsuperscript{13} This case was followed in a similar decision made after the publication of his article.\textsuperscript{14} Connecticut\textsuperscript{15} and Montana\textsuperscript{16} also have taken the same view, though in neither of these states do there appear to have been any decisions since the publication of the article under discussion.

The courts of Ohio have been rather uncertain as to their views on this matter. Professor Waite undoubtedly was justified in asserting that this jurisdiction had not decided definitely to hold the retailer, for there was one definite dictum that he should not be held,\textsuperscript{17} and only two or three rather weak cases tending to show that he should be liable.\textsuperscript{18} Since the publication of his article, however, several cases have rather conclusively taken the position that a retailer of food is not free from liability for defects therein merely because the food when sold was in a sealed can or other container.\textsuperscript{19}

Illinois also has taken the position, squarely and repeatedly, that a dealer who sells canned food is liable for injuries to his customers from unwholesomeness of the food or foreign substances in the can,\textsuperscript{20} although there do not appear to have been any decisions in that jurisdiction since publication of Professor Waite's article. Texas is likewise committed to this view. Though the rule in that state was originally somewhat unsettled,\textsuperscript{21} a square decision of the supreme court, promulgated since the publication

\textsuperscript{13}Griffin v. James Butler Co., (1931) 108 N. J. L. 72, 156 Atl. 636.
\textsuperscript{14}Brussels v. Grand Union Co., (1936) 14 N. J. Misc. 751, 187 Atl. 582.
\textsuperscript{17}See McMurray v. Vaughn's Seed Store, (1927) 117 Ohio St. 236, 157 N. E. 567.
\textsuperscript{20}Chapman v. Roggenkamp, (1913) 182 Ill. App. 117, relying on Wiedeman v. Keller, (1897) 171 Ill. 93, 49 N. E. 210, which, however, was not a sale of food in a closed container; Sloan v. F. W. Woolworth Co., (1915) 193 Ill. App. 620; Bowman v. Woodway Stores, (1930) 258 Ill. App. 307. The last case was reversed in (1931) 345 Ill. 110, 177 N. E. 727, but solely on the ground that the court thought there was no proof that the milk which caused the injury was contaminated when sold; it seemed that it might just as well have become contaminated after the can was opened.
\textsuperscript{21}S. H. Kress & Co. v. Ferguson, (Tex. Civ. App. 1933) 60 S. W. (2d) 817 and F. W. Woolworth Co. v. Wilson, (C.C.A. 5th Cir. 1934) 74 F. (2d) 439, take opposite views as to the liability under Texas law of a storekeeper who serves unwholesome ice cream not made by him.
LIABILITY OF RETAIL DEALERS

of Professor Waite's article, takes the position that the dealer is liable. The California supreme court has likewise held the dealer under these circumstances.

Finally, two jurisdictions, Missouri and the District of Columbia, which previously had not passed on the point, have decided since the publication of this article that the dealer is to be held. The same may perhaps be said of Virginia, though the decision of that court is perhaps not a square authority on the point, since the facts are not clear as to whether the unwholesome food-product there involved (milk) was sold in a sealed bottle or in bulk.

Thus there is a strong line of authority in favor of holding the dealer. It must be conceded, however, that there is still a considerable group of cases holding the other way. Probably the leading case for the latter position—that a dealer selling food products in a sealed container is not liable to his customers for injuries resulting from the unwholesomeness of the food or some foreign substance in the can—is the Maine decision of Bigelow v. Maine Central Railroad Co. Pennsylvania, Kentucky, Georgia, Tennessee, and Mississippi all follow this view.


The leading "text-book" argument in favor of this view, outside of Professor Waite's writings, is the often quoted language in 11 R. C. L. 1124-5.

West v. Emanuel, (1901) 198 Pa. St. 180, 47 Atl. 965. This is strictly a case of the service of food by a restaurant-keeper rather than an ordinary sale by a dealer; but no point is made of this. See also Pelletier v. Dupont, (1925) 124 Me. 269, 128 Atl. 186.

West v. Emanuel, (1912) 110 Me. 105, 85 Atl. 396. This is strictly a case of the service of food by a restaurant-keeper rather than an ordinary sale by a dealer; but no point is made of this. See also Pelletier v. Dupont, (1925) 124 Me. 269, 128 Atl. 186.


though none of these jurisdictions appear to have decided further cases involving this question since Professor Waite's article. Cases from Utah\textsuperscript{34} and Michigan\textsuperscript{35} have explicit dicta to the same effect, and a Washington case\textsuperscript{36} a distinctly dubious dictum; but all of these cases were decided before the Waite article was published.

On the other hand, Arkansas has not merely promulgated the view that the dealer is free from liability under these circumstances,\textsuperscript{37} but has adhered to the same view in a case\textsuperscript{38} decided since Professor Waite's article was published. And two jurisdictions, Alabama\textsuperscript{39} and West Virginia,\textsuperscript{40} which has not taken a position on this point prior to the publication of the same article, have since held in accordance with its thesis that the dealer should not be liable.

It may perhaps be contended successfully that the trend at present is in favor of holding the dealer under these circumstances. But possibly such a contention would be too bold, since there is an almost equal tendency in other jurisdictions toward exempting the dealer from liability. However this may be, it can certainly be said that the authorities do not justify Professor Waite's prophecy\textsuperscript{41} that future decisions may reasonably be expected to show a strong and almost unanimous tendency—at least where the question had not definitely been decided—toward freeing the dealer from liability in these circumstances.

\textbf{Allied Problems Which Need Not Be Considered Fully}

There are a number of problems which are somewhat closely connected with the specific problem now under consideration—that is, the liability of the dealer who sells food products in cans or other sealed containers—which are often more or less confused, even by the courts which uphold such liability. These problems are mentioned merely to eliminate them, and thus to

\begin{itemize}
\item \textsuperscript{34}See Walters v. United Grocery Co., (1918) 51 Utah 565, 172 Pac. 473.
\item \textsuperscript{35}See Hertzler v. Manshum, (1924) 228 Mich. 416, 200 N. W. 155.
\item \textsuperscript{36}Flessher v. Carstens Packing Co., (1916) 93 Wash. 48, 160 Pac. 14.
\item \textsuperscript{37}Coca-Cola Bottling Co. v. Swilling, (1933) 186 Ark. 1149, 57 S. W. (2d) 1029; Great Atlantic and Pacific Tea Co. v. Gwilliam, (1934) 189 Ark. 1037, 76 S. W. (2d) 65. If the dealer is actually negligent in handling the food product, he is liable. Heinemann v. Barfield, (1918) 136 Ark. 456, 207 S. W. 58.
\item \textsuperscript{38}Green v. Wilson, (Ark. 1937) 105 S. W. (2d) 1074.
\item \textsuperscript{39}Kirkland v. Great Atlantic and Pacific Tea Co., (1937) 233 Ala. 404, 171 So. 735.
\item \textsuperscript{40}Pennington v. Cranberry Fuel Co., (1936) 117 W. Va. 680, 186 S. E. 610.
\item \textsuperscript{41}Note 1, supra.
\end{itemize}
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restrict the problem to the very definite one to which Professor Waite has quite properly limited his consideration.

The first of these is the problem of the liability of restaurant keepers and others who are considered merely as serving food rather than as selling it as the grocer or other food merchant does. It may be said in passing that the restaurant keeper rarely serves food in a sealed container, in the strict sense. But the usual reason given for not holding a restaurant keeper, except for negligence, is that this is not a sale at all, but merely a service; and this doctrine is accepted even by some of the courts which hold that a dealer in food products in sealed containers is liable.42 Perhaps in fact the weight of authority exempts the restaurant keeper from liability except for negligence,43 though there are a number of excellently reasoned cases the other way.44 It is submitted that on principle, the restaurant keeper should be held even more rigidly than the dealer, since the customer of the restaurant is even less able to protect himself, and the protection of the public health demands rigid liability.45 Nevertheless, this is not our present problem.

Another question which is not strictly within our province involves the liability of sellers of products which are not food, but which, because of some defect, result in personal injury to the buyer. Since the fundamental reason for the extreme liability with respect to sales of food, which seems to have been imposed for centuries, is the necessity for protection of the public health and safety,46 it would seem that this should be extended to all articles where there is substantial danger of personal injury from defects. Yet the law does not seem to have gone so far.47 Cer-

46Perkins, Unwholesome Food as a Source of Liability, (1919-20) 5 Iowa L. Bull. 6, 86.
47Chanin v. Chevrolet Motor Co., (C.C.A 7th Cir. 1937) 89 F. (2d) 889. See Feezer, Tort Liability of Manufacturer and Vendors, (1925) 10
tainly, it has not yet imposed so rigid a liability for mere property damage. And there is even some dispute as to liability for personal injuries from defective food containers, or other articles. The tendency is to hold dealers and others for defects in chewing tobacco to the same extent as in the case of sales of food, but there is at least one authority which insists on a sharp differentiation between tobacco and food. There does not seem to be much sense in most of these distinctions, but however this may be, we are concerned with food alone.

The occasional difficulty of the courts as to the precise nature of warranties in general, and even in this particular situation, need also not concern us. Whether the liability for breach of warranty is basically for breach of contract or for tort, or, as seems most probable, a little of both, is not generally material in this quest on. It does seem sometimes to have some influence in decisions as to the requirement of privity; but this latter requirement is sufficiently important to merit separate consideration.

Another problem which does not seem particularly pertinent is the effect of state pure food laws, and the like. In a number of cases, liabilities of dealers for the sale of food have been increased, or at least made more rigid, through consideration of such laws.


49 Such liability was imposed in Morelli v. Fitch & Gibbons, [1928] 2 K. B. 634, but was denied in Crandall v. Stop and Shop Co., (1937) 288 Ill. 543, 6 N. E. (2d) 685.

50 In Pearlman v. Garrod Shoe Co., (1937) 276 N. Y. 172, 11 N. E. (2d) 718, a shoe dealer was held liable for the death of a child from infection due to an improperly made shoe. At the time of the purchase, the defendant was notified that the child was a toe-dancer, and so needed to be fitted with especial care. The court seems to rely especially on express warranties made by the defendant.


52 Liggett & Myers Tobacco Co. v. Cannon, (1915) 132 Tenn. 419, 178 S. W. 1009. The writer of the opinion seems to have been influenced by his personal abhorrence of the practice of chewing tobacco.

53 It has been held that warranty is purely contractual. Challis v. Hartloff, (1933) 136 Kan. 823, 18 P. (2d) 199. In accordance with this view, it is held that there is no action for breach of warranty resulting in death, as a mere breach of contract is not within the death statute. Howsor v. Foster Beef Co., (1935) 87 N. H. 200, 177 Atl. 656. But the usual holding is that a breach of warranty is a tort, for this and other purposes. Greco v. S. S. Kresge Co., (1938) 277 N. Y. 26, 12 N. E. (2d) 557.

54 Kelley v. John R. Daily Co., (1919) 56 Mont. 63, 181 Pac. 326; Great
It would seem, however, that such laws are entirely unnecessary to justify such liability, and, at the most, they are merely arguments for results which can reasonably be reached without them. The New York Farms and Market Act has been construed as imposing special liabilities upon persons selling stock foods to farmers, but rather curiously does not seem to protect human beings. On the whole, therefore, these statutes do not seem particularly helpful either way.

Probably more pertinent is the Uniform Sales Act, which has been adopted in most American jurisdictions. The part of the Act important for our purposes is section 15, which provides in effect that a seller of any product who does not expressly state the contrary, impliedly warrants its fitness for the purpose for which the buyer intends it, provided that the seller is notified of such purpose, and provided further that the buyer relies upon the seller to select goods adapted for this purpose, rather than relying upon his (the buyer's) own judgment.

Professor Waite thinks, however, that this section of the Sales Act does not solve the difficulty. He concedes that the seller is informed of the buyer's purpose in acquiring food products—namely, to eat them. But he insists that the second condition—namely, the buyer's reliance upon the seller—is entirely lacking in the case of a sale of food products in a can, since the buyer knows that the seller can have no knowledge of what is contained in the can.


In Abounader v. Strohmeyer, etc. Co., (1926) 243 N. Y. 458, 154 N. E. 309, it was suggested that the New York Pure Food Act was intended to do away with the requirement of privity.


Where the purchase is of an article "by its patent or other trade name," there appears to be no implied warranty of fitness for purpose; but there is still a warranty of merchantability, which would ordinarily be broken if the food is unwholesome or contains dangerous foreign matter. Wren v. Holt, [1905] 1 K. B. 610; Ryan v. Progressive Grocery Store, (1931) 255 N. Y. 888, 175 N. E. 105; Dow Drug Co. v. Niemann, (1936) 37 Ohio App. 190, 13 N. E. (2d) 130. It should be noted that the special reliance upon the seller by the buyer required for the implied warranty of fitness for purpose is not necessarily applicable for the implied warranty of merchantability.
As a pure matter of the terms of the Act, there is undoubtedly some force in this argument. It seems, however, that there has been considerable tendency to give greater weight to the precise wording of the Sales Act than it suggests. Certain it is (though this is hardly pertinent to the present consideration) that the Sales Act was intended to strengthen liabilities upon the sales of other than food products, so as to make them equal to that already imposed with respect to food products. A careful examination of the authorities seems to show that the authorities holding the dealer in canned food products are more numerous under the Sales Act than before its adoption.

Furthermore, the author of the Sales Act has said with reference to this problem:

"The imposition of absolute liability upon a dealer who sells canned goods of reputable manufacture has been denied by the supreme court of Maine on the ground that the seller cannot positively discover that a particular can is defective, and that it is, therefore, unjust to subject him to liability. The same argument, however, may be made in regard to any implied warranty, not only of food, but of other articles where the seller could not discover the defect. Accordingly, if canned goods are to be made an exception to the general rule governing sales of food, the whole law of implied warranty should be revised and placed on the basis of negligence. But the general principle of the common law is opposed to this, and certainly if a dealer is ever to be made liable for injuries caused by defective goods where he has been guilty of no fault, the reasons are stronger for holding him liable for selling defective food than in any other kind of sale."

It may then be conceded that the argument in favor of exempting the dealer under such circumstances from liability is not entirely foreclosed by the terms of the Sales Act; but it seems clear that the Act neither does nor was intended to make any special provision for this situation, and that under the general rules laid down by the Act, a warranty of fitness for the purpose and merchantability may be implied.

The Problem on Principle

It seems rather obvious that if the non-negligent dealer is to be freed from liability in this situation, we are to that extent

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59 See Perkins, Unwholesome Food as a Source of Liability, (1919-20) 5 Iowa L. Bull. 6, 86.
60 See 90 A. L. R. 1269. See, for a good example of this, Howson v. Foster Beef Co., (1935) 87 N. H. 200, 177 Ati. 656.
61 Williston, Sales (2d ed. 1924) 481-2.
wiping out the usual rules of implied warranty by the seller, and
are going back to the old doctrine of caveat emptor. The supreme
court of West Virginia very frankly admitted this in its recent
decision in *Pennington v. Cranberry Fuel Co.*, supra holding the dealer
free from liability. The court said, "It is to be remembered that
the general rule of sales is caveat emptor," and went on to reason
that the rule of warranty as to food products is a mere exception
to the general rule, and should not apply unless the buyer has
definitely relied upon the seller, which the court thought im-
possible if the food was in a can.

But caveat emptor, whatever vitality it once had, is obviously
moribund. Undoubtedly, it once was the general rule, though it
probably should not have been—for the seller is clearly the one
who should beware and not the buyer, who presumably has less
knowledge of the goods and less skill than the seller. Long
before the Sales Act, the courts began to recognize this, and in-
truced so many exceptions to caveat emptor that it was well-
nigh eaten up. Under the Sales Act, what little was left of this
venerable blunder of the common law was done away with. It is
submitted that no other court should follow the attempt of the
West Virginia court to resurrect this justly exploded doctrine.
The present rule is and ought to be, "let the seller beware."

As already stated, however, there is considerable force as a
pure matter of logic in Professor Waite's argument that the buyer
cannot rely on the seller as to the suitability of the goods when
they are in a closed container. But this ignores the strong ten-
dency, which has just been mentioned, to impose a heavy liability
upon the seller through the medium of implied warranty. This
is because public policy demands that this heavier burden be put
upon the seller, especially of food products, and also because the
seller is in the best position, as will be explained later on, to carry
the burden. Professor Waite apparently has the idea that liability
should be imposed only for fault. It is here that the author takes
definite issue with him. Certainly liability should not be im-
posed without good reason, and fault, where it exists, is generally
a sufficient reason. But fault is not the only reason. If it were,
we should never have heard of many important departments of
the law, such as respondeat superior in its tort aspects. As the
New York court of appeals observed some years ago in a similar
case. "The rule is an onerous one, but public policy, as well as the
public health, demands such obligation should be imposed." It is submitted that this policy is a sufficient reason for imposing the liability.

One further thing should be said with reference to the suggestion that a distinction should be made between the sale of food in a closed container and in bulk. Assuming that such distinction reasonably can and should properly be made, its very application suggests difficulties. Undoubtedly, a sealed can, especially the conventional tin can, is a sealed container; and so probably is the ordinary milk bottle with a cap. But what should be said of link sausages or even a loaf of bread? Here too we have things easily cut open; but ordinarily this is not done until the goods are taken from the store to the home or other place where they are to be consumed. No doubt the application of legal rules often requires the determination of difficult questions of fact; but they should be avoided whenever it is reasonably possible to do so. The difficulty of making this distinction suggests that it should be avoided by holding the dealer in both cases, unless there are reasons for his exemption in the case of sales of goods in a closed container much stronger than have as yet appeared.

**Suit by the Customer Against the Producer of the Defective Product**

More important than these possibly somewhat theoretical considerations is the question of the practicability of the injured customer bringing suit against the producer or wholesaler. No one questions that he ought to be able to sue someone, and the only real dispute is as to who should be the defendant. If a suit against the producer is not only possible, but reasonably convenient and effective, it is all that the customer is entitled to; but if there are legal or practical obstacles (or both) which make this remedy ineffective, the customer should not be limited to this ineffective remedy, but should be permitted to sue the dealer from whom he purchased the defective or unwholesome food.

Considering first the legal obstacles to the customer's suing the producer, they are usually not insuperable, but are by no means negligible. To be sure, the prevailing, and of late years almost unanimous, authority permits such a suit where the pro-
producer is clearly guilty of negligence.68 This is not confined to food cases, but in view of the serious danger to the public health and safety from unwholesome or otherwise dangerous food products, the courts show unusual liberality in permitting suit by anyone injured.69

But suppose that negligence can not be proved. For example, in Ward v. Great Atlantic & Pacific Tea Company,70 the producer may not have been negligent; it may well be that the greatest possible care can not always be relied upon to keep a small pebble out of a can of beans. And the same thing is certainly true as to certain sorts of unwholesomeness of food, which the most careful inspection and other precautions may not always discover.71

In such cases, the producer can only be held upon the basis of warranty. Here too there is respectable authority permitting the customer to sue in this situation.72 While ordinarily a third person cannot take advantage of a warranty made in a sale to which he is not a party, many courts make an exception to the rule in the case of sales of food—the obvious reason being the same policy in the protection of public health and safety.73 It follows that the producer or wholesaler is liable whether he is negligent or not.

But while this represents the weight of authority, the author-

68See Jeanblanc, Manufacturers’ Liability to Persons Other Than Their Immediate Vendees, (1937) 24 Va. L. Rev. 134. See also, Harper, Torts (1933) 248 ff. But see note in (1937) 24 Va. L. Rev. 80, suggesting that the weight of authority still protects the manufacturer, except possibly in food cases.
70(1918) 231 Mass. 90, 120 N. E. 225. Here the customer was injured by a pebble in a can of beans.
73See Perkins, Unwholesome Food as a Source of Liability, (1919-20) 5 Iowa L. Bull. 6, 86.
ties are by no means unanimous. Several jurisdictions, notably New Jersey,\textsuperscript{74} Massachusetts,\textsuperscript{75} and New York,\textsuperscript{76} insist that the customer of a retailer cannot recover even in food cases from the producer or any wholesaler unless he can prove negligence of the defendant; in other words, they insist upon the requirement of privity in a suit upon the basis of warranty even in food cases. It would seem that if the customer is not to be allowed to sue the retailer, this very inability requires giving him the right to sue the producer;\textsuperscript{77} but at least two jurisdictions, Tennessee\textsuperscript{78} and Arkansas,\textsuperscript{79} refuse to permit the customer to sue the retailer or the producer unless the negligence of the particular defendant, whichever he is, can be proved.

To summarize the situation, the problem of privity generally does not arise, at least in food cases, if the producer or wholesaler can be proved to have been negligent. Indeed, the negligence of the dealer, though unquestionably subjecting him to liability, does not bar a suit against the producer or wholesaler if the latter also can be proved negligent.\textsuperscript{80} If, however, no negligence of the producer or wholesaler can be proved, the situation is not so clear. While many courts have laid aside the requirement of privity for suit by the customer upon the basis of the producer's warranty of fitness of purpose or merchantability in food cases, there are several important jurisdictions which have insisted upon this requirement, and therefore do not permit a customer to sue the producer or wholesaler unless the latter's negligence can be proved. In such jurisdictions, the injured customer is without

\textsuperscript{74}Cornellus v. B. Fillippone & Co., (1938) 119 N. J. L. 540, 197 Atl. 647.
\textsuperscript{77}See Mazetti v. Armour & Co., (1913) 75 Wash. 622, 135 Pac. 633.
\textsuperscript{79}Green v. Wilson, (Ark. 1938) 105 S. W. (2d) 170. There is, however, a dictum to the contrary in Coca-Cola Bottling Co. v. Swilling, (1933) 186 Ark. 1149, 57 S. W. (2d) 1029.
\textsuperscript{80}Maddox Coffee Co. v. Collins, (1932) 46 Ga. App. 220, 167 S. E. 306. But the customer must prove that the defect was the fault of the manufacturer. If it arose from careless handling by the dealer, the manufacturer is, of course, not liable. Cudahy Packing Co. v. Baskin, (1934) 170 Miss. 834, 155 So. 217.
remedy, unless suit is permitted against the retailer; and, there-
fore, most of these jurisdictions do permit it. At least two juris-
dictions, however, permit suit against neither retailer nor pro-
ducer unless negligence of the defendant can be proved—a situa-
tion which it would seem that all would agree is intolerable. It
is submitted, therefore, that on this one point alone, the rights of
the customer to sue the producer or wholesaler is by no means so
clear and undisputed as to justify leaving him only this remedy,
and depriving him of the more direct remedy against the retailer.

There are other, though rather less serious, legal difficulties
in the customer's suit against the producer. Several courts take
the position that if negligence is pleaded in a suit against the pro-
ducer or the retailer, it must be proved. This seems to be a
quite unjustifiable rule; it would seem that if under the law of
the state the defendant is liable without negligence, the plaintiff
should not be deprived of the judgment to which he is entitled
merely because he has erroneously assumed a greater burden in
his pleading—a mistake which could not possibly have injured the
defendant. But this very doctrine interposes at least a poten-
tial further difficulty in a suit by the consumer against the pro-
ducer or wholesaler.

Furthermore, the proof of negligence, if it must be proved,
is apt to be difficult, even in the case where the food is wholesome
but there is some foreign substance in it which has injured the
consumer. It would appear that under the doctrine of res ipsa
loquitur, the very presence of the foreign substance proves negli-
gence of the producer of the food, and so some courts hold, or at
least make it a prima facie case of such negligence. Probably
the weight of authority is to this effect. Here again, however,
there is a dispute, a few courts holding that the presence of such

81 See notes 78 and 79, supra. The law of North Carolina seems to be
essentially the same. Coca-Cola Bottling Co. v. Munn, (C.C.A. 4th Cir.
1938) 99 F. (2d) 190.
also, Rost v. Kee & Chapell Dairy Co., (1920) 216 Ill. App. 497, where the
court apparently favored the same view, but held that the plaintiff should
be permitted to retry the case on the basis of negligence.
84 Rost v. Kee & Chapell Dairy Co., (1920) 216 Ill. App. 497; Cohen
Hertzler v. Manshum, (1924) 228 Mich. 416, 200 N. W. 155, it was held
that the presence of arsenate of lead in flour showed negligence either of
the miller or the retailer.
a foreign substance is not even evidence of negligence. Furthermore, proof of mere unwholesomeness of food hardly shows negligence of the producer; and the customer usually has no access to evidence which might otherwise prove it.

It would seem then that in most jurisdictions the unfortunate customer would have a fairly good chance from a purely legal standpoint of recovery against the producer or wholesaler, even though the negligence of the latter cannot be proved; though even in such jurisdictions, the legal difficulties are not wholly negligible. In a number of jurisdictions, however, and these rather important ones, the customer has absolutely no chance in such a suit unless he can sustain the burden—often, if not generally, an impossible one—of proving that the producer or wholesaler was actually negligent. It is submitted that this alone is sufficient showing that a right of action against the producer or other dealer in the food before the retailer with whom the customer has dealt, is an inadequate remedy for the customer himself.

But let us now, for the sake of argument, disregard these legal difficulties, or rather assume that they can be surmounted in every case. That means that we are rather boldly assuming that there are no legal obstacles to the suit of the customer against the producer or wholesaler. Under such circumstances, has he an effective remedy?

It is submitted that the practical difficulties of maintaining such a suit are so serious as utterly to destroy its adequacy as a remedy. In the first place, there is the matter of distance. In *Ward v. Great Atlantic & Pacific Tea Company,* the court pointed out that the plaintiff was in eastern Massachusetts and the packer of the beans was in Michigan. To sue the packer meant that the plaintiff would not only have to employ Michigan lawyers, but that he would have to take all his witnesses from Massachusetts to Michigan, and try the case there—incidentally, the trial to be before a local jury, which would be very likely to favor the producer, whose business activities and payroll would undoubtedly be one of the most important factors in the prosperity of the town. At any rate, the expenses of trying the case at a distance, especially the travel expense and maintenance

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87(1918) 231 Mass. 90, 120 N. E. 225.
of the witnesses, would not merely eat up what the plaintiff could hope to recover, but would probably make it financially impracticable to bring suit at all.

The pertinence of this consideration has been referred to by a number of other courts as a strong argument in allowing suit against the local retailer. Thus, in Griffin v. James Butler Company,\(^8\) the New Jersey court, referring to the Ward Case, said:

"As that court further points out, the seller can recover from the manufacturer, while in that regard, the retail purchaser is greatly at a disadvantage. Of this, the case at bar is an apt illustration, as the cannery was in California, and the purchase was made in Paterson, New Jersey."

In Burkhart v. Armour & Company,\(^8\) the Connecticut court quoted the language from the New Jersey case just referred to, and said:

"A still more extreme illustration is afforded by the instant case; the actual packer and the first purchaser both being located in Argentine, the distributor in Chicago, and the retailer in Connecticut."

The supreme court of Kansas, in permitting suit against the wholesaler, emphasized the same principle of distance, saying that if the retailer were insolvent, and the producer in a foreign country, the only practical remedy is against the wholesaler.\(^9\) This last might be regarded as showing that suit against the retailer may not always be an adequate remedy; and such is undoubtedly the case. It is not intended to be argued that the customer's rights should be confined to a suit against the retailer; the present author approves the doctrine that the wholesaler and the producer should be liable, whether or not they are negligent. Nevertheless, a suit against the retailer is usually the most adequate remedy, and the possibility or even reasonable certainty of remedies against others should not remove the right against the retailer. It may be added that it will not infrequently be difficult or even impossible for the customer to ascertain who the producer was and where he may be found—another reason, really sufficient in itself, to permit suit against the retailer.

\(^{88}(1931)\) 108 N. J. L. 72, 156 Atl. 636.
\(^{89}(1932)\) 115 Conn. 249, 161 Atl. 385.
\(^{90}\)In Degouveia v. H. D. Lee Mercantile Co., (Mo. App. 1936) 100 S. W. (2d) 336, the court emphasized the same point, the producer there being located in the state of Washington, and the customer in Missouri.
Even though the customer is permitted to sue the retailer, it does not follow that the retailer will always be liable. The customer may have rather serious difficulties in proving the necessary facts. In the first place, he may not be able to tell what particular article of food caused the damage. If the injury was caused by some foreign substance in the food, this difficulty does not generally arise; but if the injury results from unwholesomeness of the food, it may be difficult or impossible to determine which particular article of food was the offender. And even if this often unsurmountable difficulty is taken care of, the customer may be unable to prove—or perhaps himself to remember—at which store he procured the article.3

But this is not all. The storekeeper who is finally identified as having sold the food which injured the plaintiff may successfully set up that, to use an expression highly fashionable at present, the plaintiff was allergic to that particular food—in other words, that the food was perfectly wholesome to the ordinary individual. This will be a perfect defense, for the fault, if any, is that of the customer in buying that sort of food.4 Furthermore, the customer must prove that the defect in the food was present when sold; if it came about afterward, whether or not through the customer’s negligence, the dealer is obviously freed from liability.5

This very consideration brings us to a consideration of the not infrequent defense of the customer’s negligence. The Kansas court has suggested that negligence of the customer is no defense to an action for breach of warranty, since the basis of the action is contract rather than tort.6 It seems clear, however, that the suggestion is unsound; the measure of damages for breach of warranty, namely, the entire damage resulting, and not merely the difference between the value of the article and what it would have been if the warranty had been complied with, shows very definitely that this action has important tort aspects. Certainly, a customer who is himself at fault should not be able to recover from the dealer, or, indeed, from anyone else. Accordingly, the

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3For a general discussion of these difficulties of proof, see Swengel v. F. & E. Wholesale Grocery Co., (1938) 147 Kan. 555, 77 P. (2d) 930.
5See Bowman v. Woodway Stores, (1931) 345 Ill. 110, 177 N. E. 727, reversing (1930) 258 Ill. App. 307 on this point. If the defect resulted from negligence of someone handling the product after it left the producer’s hands, the latter is, of course, not liable. Cudahy Packing Co. v. Baskin, (1934) 170 Miss. 834, 155 So. 217; Witham v. Kroger Grocery, etc., Co., (1935) 51 Ohio App. 499, 1 N. E. (2d) 949.
prevailing authority is that the contributory negligence of the customer is a defense to any action against the retailer or the producer. Whatever may be the technical theory as to the burden of proof, it will often be quite easy for the defendant retailer to establish a prima facie case of the customer's negligence, and the customer will in fact have the burden of disproving his own negligence.

Another practical though minor difficulty of the customer in suing the retailer is the necessity of proving notice to the retailer within a reasonable time. What is a reasonable time depends upon circumstances, and the courts are not inclined to make the requirement very rigid; nevertheless, the giving of notice to the seller is a prerequisite for any action on an alleged breach of warranty.

With all these necessary burdens upon the customer, it can hardly be said that permitting him to sue his retailer gives him unreasonable and unnecessary protection. To deny him this right because the retailer sold the goods in a sealed container is not to equalize the position of the parties; it is, on the contrary, unreasonably to burden the customer and to give a correspondingly unfair exemption to the dealer—one which is unjustified by the general rules of law governing warranty, and which is even less defensible in this situation than in many others.

One or two other difficulties confronting the customer may be mentioned briefly, though they are not so clearly arguments for allowing suit against the retailer as those that have been stated. The reason is that these difficulties, where applicable, are just as effective bars in the suit against the retailer as against the producer or wholesaler; that is to say, they bar any remedy at all.

One of these is the position taken by some courts that neither the producer nor the retailer is liable for injuries to the customer resulting from the presence of trichinae in meat products. The reason given for this rather surprising doctrine is that it is impossible to find trichinae by any practical method of inspection;


and further that trichinae can be killed by ordinary cooking. A number of cases, however, take the opposite view and hold that the manufacturer or dealer is responsible for trichinae just the same as for any other defect in the food.\textsuperscript{100} It is probable that this is the weight of authority. But the cases which take the opposite view can be defended, if at all, only upon the theory that trichinae are actually not a defect in the food, or else that the customer is barred by his contributory negligence in not properly cooking the food; and in either case, there is no right of action against anyone.

A more serious difficulty arises when the injured person is not the purchaser of the food. It would appear on principle that any member of the family or household of the person who actually purchases the food should be entitled to recover, since the dealer knows, or is bound to know, that the food will presumably be eaten by all such persons. The protection of the public health, which is at least one of the most important reasons for imposing this liability, can not be even reasonably effected unless it thus extends this rule.

Where the requirement of privity for suit for breach of warranty in the sale of food products has been removed, this difficulty seems not to arise. But most courts which still adhere to this requirement of privity apply it in this situation also, and deny recovery by even a member of the family of the purchaser, unless negligence can be proved.\textsuperscript{101} In one case in Massachusetts,\textsuperscript{102} where the wife actually bought the defective food product, she was denied the right to recover from the dealer for her own injury, because the court said that in purchasing she acted as only an agent for her husband, who alone could sue.\textsuperscript{103}

Whatever may be said as to the propriety of enforcing privity


as a general requirement in food cases, this doctrine seems utterly unjust and absurd. It effectively prevents a complete remedy against the retailer in practically every case of sale of food in a closed container; and it imposes upon the unfortunate member of the family the burden not only of seeking out the producer, but also of proving that he is negligent. It must be admitted that these highly legalistic cases have unfortunately reduced the benefits of permitting suit directly against the retailer; but they do not even tend to prove that such a suit should not be allowed. So far as they represent the law in jurisdictions permitting suits against the retailer, they are a bad exception to a good rule; and the remedy for this is obviously not to revoke the rule, but rather the exception. If as is frequently said in this connection, "neither law nor reason require impossibilities," this argument is in favor of fully imposing this liability upon the retailer so as to remove an impossible burden from the customer, and his household, rather than one in favor of exempting the dealer.

But what of the retailer? The authorities which refuse to allow him to be sued in these circumstances, and the text-writers who support such refusal, are much worried about him. They say, and unquestionably correctly, that a retailer who sells goods in a closed container is generally not at fault for defects in the goods, since he neither does nor can inspect the goods, even in the most cursory manner. To hold him liable, they therefore argue, is a heavy and unjust burden upon him.

But certainly his legal right to sue the person with whom he has dealt—the wholesaler or producer—is absolutely clear; not like the somewhat uncertain rights of his customer to sue the same person. He is entitled to recover all that his customer has recovered from him—at least if he has notified the producer or wholesaler to come in and defend the suit—and also his legal expense, and in some cases, compensation for injury to his good will. Indeed, under modern practice, the customer frequently

104 This phrase is used in 11 R. C. L. 1124-5, as an argument for exempting the dealer in this situation; and it is often quoted by the cases which reach this result—e.g. Bigelow v. Maine Central Railroad Co., (1912) 110 Me. 105, 85 Atl. 396.


is permitted to make both the retailer and producer parties defendant. Where this is done, or where the dealer himself brings in the producer, the rights between those parties can be adjusted and the dealer promptly compensated for his loss.

It may also be noted that the retailer will rarely have to sue the producer or wholesaler. The threat of cutting off further business relations with him, plus the inevitable damage to his good will, will ordinarily induce the producer or wholesaler to make any settlement, within reason, which the retailer demands, without the necessity of the latter going into court to enforce his rights.

But it may still be argued that the dealer has the same practical difficulty in suing the producer as the customer. This certainly is not wholly true, since he not only knows who the producer is, but generally has actually dealt with him. If he has picked a producer who is a long way off, he has no right to object to the extra expense thus imposed upon himself, since it was his own doing. The dealer picks his own producer: the customer generally does not. Furthermore, even courts which deny the customer's right to sue the dealer admit that the dealer is bound to select capable, reliable, and responsible producers, and if he does not, he is himself liable for negligence. It is submitted, however, that this requirement is a mere matter of words unless the retailer is himself liable, since the customer has no way of proving what sort of producer was chosen by the dealer. If the dealer is personally liable, and he has chosen the right kind of producer, he will probably get full reimbursement; if he has not chosen the right kind of producer, he perhaps will not, but this is as it should be.

Nevertheless, there will be cases—very rare indeed, but occasionally occurring—where a dealer who has used the most extreme care in picking the producer with whom he deals will nevertheless be subjected to liability for which, by reason of the insolvency of


the producer or some failure of his own proof, he will not be able
to secure reimbursement. No doubt also it will be small comfort
to him in bearing this morally undeserved hardship that it very
rarely happens, and that he is unusually unfortunate. But such
losses do come to people in all sorts of business activities, and must
be borne. As the late Mr. Justice Cardozo said, while on the
New York court of appeals, "The burden may be heavy. It is
one of the hazards of the business."

Such a hazard can in most
cases be avoided; when it cannot, that is a very poor reason for
shifting the burden onto the customer, to whom it is at least equally
as heavy, and who has no real opportunity at all to shift it.

What seems to be the sound position on this matter is well
stated in a recent decision as follows:

"Those authorities which deny liability on the part of the re-
tail dealer, under such circumstances, say that their view of the
matter is founded upon justice and reason. Admittedly, those au-
thorities are based upon an exception to the general rule, which
all authorities recognize, that is, that under common law principles
there is an implied warranty as between the retail dealer and the
consuming purchaser in the sale of food, including a warranty of
freedom from foreign substances which may be injurious to the
latter. Apparently all of the authorities agree that there should
be no exception in the case of the sale of food in cans or sealed
packages, unless the ends of justice would be better served by
making one. We are doubtful if such ends would be better served
by denying the liability of the retail dealer. There is no doubt but
that the retail dealer is in a better position to know and ascertain
the reliability and responsibility of the manufacturer of the ar-
ticle, which he is handling, than the purchaser from him. To
adhere to the general rule places the responsibility upon the party
to the contract best able to protect himself and to recoup himself
in case of loss, because he knows, or comes in contact, with the
manufacturer or the wholesaler, as the case may be, from whom he
purchased the article and who, undoubtedly, would be responsible
over to him, upon a proper showing, on the theory of breach of
implied warranty of fitness."

Again, the court of appeals for the District of Columbia has
used the following significant language:

"As to the point of the undue hardship upon the dispenser:

113Cushing v. Rodman, (1936) 65 App. D. C. 258, 82 F. (2d) 864, a
case holding a restaurant keeper liable for an injury to a customer from
a stone baked in a roll. The roll was procured by the defendant from a
local confectionery."
This again is more apparent than real, for it places the burden ultimately where it belongs. If he was careless, the burden ought to rest on the dispenser. If he was not, he can pass it back to his vendor whom he will know and in the ordinary course have access to and who will be liable over to him in an action for breach of implied warranty; and again, the burden, whether borne by the dispenser, or ultimately by the manufacturer, wholesaler or grower, will be charged into the cost of business and thus spread at large in the price of goods. It is to be noted, moreover, that if in the case of goods bought from another and dispensed in original form, the dispenser is not to be liable in implied warranty to the customer, the latter is put to severe disadvantage indeed. While in the instant case he might, because the confectionery was local, have ascertained its identity, in order to seek relief against it, he would again be in difficulty in respect of proof of negligence, and, in this jurisdiction, without foundation for suit on the theory of breach of an implied warranty, for lack as between him and the confectionery, the dispenser’s vendor, of privity. We have so ruled in Connecticut Pie Co. v. Lynch, (1932) 61 App. D. C. 81, 57 F. (2d) 447. Moreover, we should choose a rule suitable to the generality of cases, not merely to a particular case, and in the ordinary instance the customer at a restaurant has no actual access to the manufacturer, wholesaler or grower of food. The national scale upon which food stuffs are marketed makes the customer remote from the source of supply. And if the customer must sue outside of this jurisdiction, he will find a division of authority upon the question of liability.

While this language was applied to a restaurant keeper rather than to a storekeeper, it is apparent that the argument of policy there stated is applicable to storekeepers to at least the same extent. It seems clear that the storekeeper should be liable in this situation, first, because the principles of the common law, as codified in the Sales Act, subject him to the same liability as any other seller of a product, the use of which is apparent, and at any rate to the implication of a warranty of merchantability; secondly, because the burden, while sometimes heavy, is one which he is in a position to assume and to pass on much better than the purchaser can; and thirdly, because the important policy of protecting public health and safety demands that this liability be assumed by all sellers of food products.

Professor Waite, in his article, in concluding his argument that the dealer who sells food in a container should not be liable,

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14Citing Vold, Sales (1931) 466.
15The attempted distinction between the liability of a food retailer and a restaurant keeper is properly criticized by Professor Waite himself, as wholly irrational. (1936) 34 Mich. L. Rev. 499-500.
LIABILITY OF RETAIL DEALERS

lays down six propositions which he states as "the probably influential factors in judicial decision."

These propositions will now be stated and briefly discussed.

1. "The precise precedents are in flat disagreement." This is true; but the tendency is certainly not in the direction of exempting the dealer from liability.

2. "Those holding him liable are not themselves predicated on authority." This may be true as to the older decisions; but, as already pointed out, this does not seem very material. It is itself new and strange doctrine to assert that a decision of a court is less binding because the court had no authority to follow. If this were so, no decision would ever be binding; for somewhere and sometime we must start without authority on a particular proposition. The more recent decisions to this effect are, of course, usually buttressed on the older cases as authority, whatever comfort may be derived from that.

3. "Established general principles do not support liability." With this the present author is flatly in disagreement. As already pointed out, the retailer can not be exempted from liability in this situation except by the invention of an exception to the general rules relating to implied warranty; and the author has attempted to show that public policy, so far from encouraging the devising of such an exception, should definitely forbid it.

4. "The Uniform Sales Act leaves the question open." As to this, much the same comments can be made as with regard to proposition 3. The general provisions of the Uniform Sales Act with respect to implied warranty seem to cover this case, and to subject the dealer to liability. The language of the Act seems to give no suggestion of a special exception in this situation; nor does the author of the Sales Act approve of such an exception.

5. "The injured person has a wholly adequate remedy against the original producer or manufacturer." This proposition seems to the author about as far from the fact as it would be possible to go. He has attempted to show that the legal rights of the customer against the producer are doubtful in many jurisdictions and clearly non-existent in some; and also that even where the legal remedy is clear, it is not merely wholly inadequate, but is, in most cases, substantially worthless. The author would prefer to state this proposition as follows:

"The injured person has only a doubtful legal remedy against the original producer or manufacturer, and such remedy, where legally valid, may be substantially worthless in fact."

6. "No public policy justifies imposition of liability upon the seller." It is hardly necessary to say that here too the author is completely in disagreement. He would phrase the proposition on this point as follows:

"Every sound reason of policy not only justifies but demands imposition of liability upon the seller."

The author must confess an inability to prophesy future court decisions with any confidence. He is, however, willing to venture a hope that the majority of the courts will in subsequent cases impose this liability upon the retailer. This hope is brightened by his inability to see any reason under general principles or public policy why they should not do so.

LIABILITY OF A DEALER WHEN FOOD PRODUCTS SOLD IN BULK

We now have to consider the second part of the question originally stated—the problem whether a dealer who sells spinach in which there is a worm is liable to the customer for injuries thus resulting. More generally, is a dealer who sells food in bulk liable to the customer by reason either of unwholesomeness of the food or some foreign substance in it, which the dealer is not really negligent in failing to discover?

Fortunately, this problem needs very little discussion. If the dealer is responsible for a defect in food sold in closed containers, he is even more clearly responsible in this case. Indeed, Professor Waite, in his article, conceded that if the dealer is liable in the former case, he is clearly liable in this one.

As already shown, it is not a question of negligence, but rather of warranty. The dealer's chance of discovering the defect is much greater in this case, and he is therefore much more likely to be guilty of negligence; but whether he is negligent or not, he must be liable under his implied warranty that the goods are satisfactory for food, or are at least merchantable. And here the argument that the buyer does not rely upon the retailer to discover possible defects—whatever force it may have when the goods are sold in a sealed container—has no force whatever. The customer knows that the retailer has a chance to discover such defects and


that he is more or less of an expert in such matters. Therefore the store-keeper should know that he is expected to discover any such defects, and that he will be responsible whether he does so or not. On the other hand, all the defenses available to him in the other situation, including the customer's negligence, are likewise available here.

This second part of the question, as well as the first part, should therefore be answered in the affirmative.