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## Sales -- Torts -- Foreign Matter in Food

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## Sales—Torts—Foreign Matter in Food.

Plaintiff ordered ice cream in defendant drug store. It was scooped out and served to him on a plate and he was injured by glass imbedded in it. He sued both the manufacturer of the ice cream and the drug store. *Held*: nonsuit as to the drug store reversed, the court saying that it was under duty to exercise ordinary care to see that the ice cream was free from deleterious foreign matter, even though it was proved that the glass was in the ice cream when it was sold to the druggist by the manufacturer.<sup>1</sup>

When one is injured by eating food containing harmful foreign matter, he may have either of two grounds for recovery: (1) tort action for negligence,<sup>2</sup> or (2) contract action for breach of implied warranty.

In the tort action, the plaintiff consumer must of course prove the negligence of the defendant, whether he be a manufacturer, retail dealer or restaurant keeper. Some courts hold that proof of injury and the presence of deleterious matter raises a *prima facie* case of negligence.<sup>3</sup>

<sup>1</sup> *Crowley v. Lane Drug Stores*, 189 S. E. 380 (Ga. 1936).

<sup>2</sup> In some cases the plaintiff, unable to show actual negligence, has recovered for the defendant's violation of a pure food statute, such violation being held to constitute actionable negligence as a matter of law. *Meshbeshier v. Channellene Oil and Mfg. Co.*, 107 Minn. 104, 119 N. W. 428 (1909); *Kelley v. Daily*, 56 Mont. 63, 181 Pac. 326 (1919); see *Ward v. Morehead City Sea Food Co.*, 171 N. C. 33, 34, 87 S. E. 958, 959 (1916). N. C. CODE ANN. (Michie, 1935) §4751 provides that "No person, firm, or corporation, by himself or agent, shall manufacture, sell, expose for sale, or have in his possession with intent to sell, any article of food, drug, confectionery or liquor which is adulterated or misbranded. . . ."

<sup>3</sup> *Hertzler v. Manshum*, 228 Mich. 416, 200 N. W. 155 (1924) (arsenate of lead in flour); *Jackson Coca-Cola Bottling Co. v. Chapman*, 106 Miss. 864, 64 So. 791 (1914) (mouse in coca-cola); *Freeman v. Schults Bread Co.*, 100 Misc. 528, 163 N. Y. Supp. 396 (1916) (nail imbedded in bread); *Pillars v. R. J. Reynolds Tobacco Co.*, 117 Miss. 490, 500, 78 So. 365, 366 (1918) (decomposed human toe in chewing tobacco, the court saying "we can imagine no reason why, with ordinary care, human toes could not be left out of chewing tobacco . . . and it seems to us that somebody has been very careless."); *Copeland v. Curtis*, 36 Ga. App. 288, 136 S. E. 324 (1926). In the last-mentioned case the court said: "While negligence on the part of the defendant must be alleged and proved, where plaintiff establishes the unwholesome quality of the food, with injury from its consumption, these facts in themselves would sufficiently speak of defendant's negligence to make a *prima facie* case; and, until defendant is exonerated, the jury would be authorized to apply the maxim *res ipsa loquitur*, and to find such issue in favor of plaintiff."

*Contra*: *Horn and Hardart Baking Co. v. Lieber*, 25 F. (2d) 449, 28 N. C. C. A. 189 (C. C. A. 3rd, 1928) (tack in dish of strawberries); *Ash v. Childs Dining Hall Co.*, 231 Mass. 86, 120 N. E. 396, 4 A. L. R. 1559 (1918) (tack in blueberry pie made and sold by defendant, court refusing to apply *res ipsa loquitur* on the ground that it was just as likely that the tack became imbedded in one of the berries before the defendant received them); *O'Brien v. Liggett Co.*, 255 Mass. 553, 152 N. E. 57, 47 A. L. R. 148 (1926) (glass in strawberry short-cake); *Jacobs v. Childs Co.*, 166 N. Y. Supp. 798 (1916) (where nail was concealed in cake, *held*, *res ipsa* did not apply because the nail was obviously not used in mixing the dough nor in connection with the other ingredients of the cake, but was apparently dropped into the dough carelessly or wilfully by one of the defendant's servants or an outsider); *Liggett and Myers Tobacco Co. v. Cannon*, 132 Tenn. 419, 178 S. W. 1009, L. R. A. 1916A 179 (1915) (bug in chewing tobacco).

This is the better view, as the plaintiff would usually have considerable difficulty in proving what the defendant's actual negligence was. In this connection the courts apparently make no distinction between suits against a manufacturer, retail dealer and restaurant keeper, except in the case of a retail dealer who purchased the food from a reputable dealer and sold it in the original package. There is no presumption of negligence on the part of the retailer in such a case, since he could not be expected to open for inspection the individual packages.<sup>4</sup>

There is some dispute among the authorities as to the validity of the doctrine of implied warranty when one is injured by food containing foreign matter. When the defendant is a manufacturer of food sold to the consumer by a retailer, the trend favors the application of the doctrine, in spite of the lack of contractual relation between the manufacturer and the consumer.<sup>5</sup> Likewise, the doctrine applies generally in a suit against a retailer.<sup>6</sup> But when the retailer sells goods in the original package, the majority view, in those states not having the Uniform Sales Act, is that he cannot be held on implied warranty, since he has no means of knowing the condition of the package's contents.<sup>7</sup> Under the Uniform Sales Act,<sup>8</sup> a warranty is implied, if the buyer relies on the retailer's judgment instead of asking for a particular brand.<sup>9</sup> When the defendant is a restaurant keeper, an interesting problem arises. Some cases<sup>10</sup> have held the transaction to be a service rather than a sale

<sup>4</sup> *Fleetwood v. Swift and Co.*, 27 Ga. App. 502, 108 S. E. 909 (1921) (decomposed rat's head in butter).

<sup>5</sup> *Eisenbeiss v. Payne*, 42 Ariz. 262, 25 P. (2d) 162 (1933); *Cudahy Packing Co. v. Baskin*, 170 Miss. 834, 155 So. 217 (1934).

<sup>6</sup> *Heinemann v. Barfield*, 136 Ark. 500, 207 S. W. 62 (1918); *Wiedemann v. Wheeler*, 171 Ill. 93, 49 N. E. 210 (1897).

<sup>7</sup> *Kroger Grocery Co. v. Lewelling*, 165 Miss. 71, 145 So. 726 (1933); *Julian v. Laubenberger*, 16 Misc. 646, 38 N. Y. Supp. 1052 (1896); *Pennington v. Cranberry Fuel Co.*, 186 S. E. 610 (W. Va. 1936); *Scruggins v. Jones*, 207 Ky. 636, 638, 269 S. W. 743, 744 (1925), in which the court said: "Neither seller nor purchaser can otherwise judge of its condition (canned goods) and in this respect both stand upon equal footing. So that . . . where the article is one of general use and put up by a reputable manufacturer or packer in a sealed can, the exterior of which is in good condition, the retailer is not responsible to his customer for defective or unwholesome condition of the contents unless and except at the time of the sale he expressly warrants the same to be free from defects." *Contra: Chapman v. Roggenkamp*, 182 Ill. App. 117 (1913); *Sloan v. Woolworth Co.*, 193 Ill. App. 620 (1915).

<sup>8</sup> Section 15, subsection (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."

<sup>9</sup> *Burkhardt v. Armour and Co.*, 115 Conn. 249, 161 Atl. 385, 90 A. L. R. 1269 (1932); *Bowman v. Woodway Stores*, 258 Ill. App. 307 (1930); *Ward v. Great A. and P. Tea Co.*, 231 Mass. 90, 120 N. E. 225, 5 A. L. R. 248 (1918); *Griffin v. Butler Grocery Co.*, 108 N. J. 92, 156 Atl. 636 (1931). *Contra: Aronowitz v. Woolworth Co.*, 134 Misc. 272, 236 N. Y. Supp. 133 (1929).

<sup>10</sup> *Valeri v. Pullman Co.*, 218 Fed. 519 (S. D. N. Y. 1914); *Nisky v. Childs Co.*, 103 N. J. 464, 135 Atl. 805 (1927).

and hence that there is no implied warranty.<sup>11</sup> However, a number of courts have leaped this technical barrier and have raised an implied warranty, because of the high regard the law has for human life.<sup>12</sup> Where the Uniform Sales Act is in effect, the restaurateur has been held on implied warranty, since the transaction amounts to a sale under this statute and the purchaser clearly relies on the restaurateur's judgment.<sup>13</sup>

The doctrine of implied warranty seems rather harsh, especially in the case of goods in cans or packages, in that it makes the retailer or restaurateur an absolute insurer of the quality of his food, he being liable though not at fault. The courts are naturally anxious to protect the unfortunate consumer; but it would not be necessary for them to resort to this often unfair doctrine if they would instead apply *res ipsa loquitur* in tort actions. This course would seem justifiable in that the purchaser has little chance of proving negligence, not being in possession of the facts. With canned food, the burden under the *res ipsa* doctrine would be placed not on the retailer but on the manufacturer, where it should be.

North Carolina shows little sympathy toward one injured by consuming food which contains impurities. With the minority, it refuses to apply the *res ipsa loquitur* doctrine in a suit against the manufacturer.<sup>14</sup> The plaintiff is not required to produce direct proof of negligence; he may prove his case by other relevant facts from which actionable negligence may be inferred.<sup>15</sup> But in showing that like products manufactured by the defendant contained deleterious substances, the plaintiff must prove that they were manufactured (1) under substantially similar conditions,<sup>16</sup> (2) at approximately the same time,<sup>17</sup> and (3) that the deleterious substances were of the same nature.<sup>18</sup>

<sup>11</sup> The argument in these cases is based on the holding in *Parker v. Flint*, 12 Mod. 254, 88 Eng. Rep. 1303 (1701) that an innkeeper "does not sell but utters his provision"; and on *BEALE, INNKEEPERS* (1906) §302, where it is said that "an innkeeper is not an 'insurer' of the quality of the food that he serves but would be liable for knowingly or negligently furnishing bad or deleterious food."

<sup>12</sup> *Friend v. Childs Dining Hall Co.*, 231 Mass. 65, 120 N. E. 407 (1918); *Race v. Krum*, 222 N. Y. 410, 118 N. E. 853, L. R. A. 1918F 1172 (1918); *Temple v. Keeler*, 238 N. Y. 344, 144 N. E. 635 (1924).

<sup>13</sup> *Goetten v. Owl Drug Co.*, 49 P. (2d) 286 (Calif. 1935), affirmed on appeal, 6 Calif. (2d) 674, 59 P. (2d) 142 (1936); *Schuler v. Union News Co.*, 4 N. E. (2d) 465 (Mass. 1936).

<sup>14</sup> *Blackwell v. Coca-Cola Bottling Co.*, 208 N. C. 751, 182 S. E. 469 (1935).

<sup>15</sup> *Broadway v. Grimes*, 204 N. C. 623, 169 S. E. 194 (1933); *Hampton v. Bottling Co.*, 208 N. C. 331, 180 S. E. 584 (1935); *Enloe v. Bottling Co.*, 208 N. C. 305, 180 S. E. 582 (1935).

<sup>16</sup> *Enloe v. Bottling Co.*, 208 N. C. 305, 180 S. E. 582 (1935).

<sup>17</sup> *Collins v. Lumberton Coca-Cola Bottling Co.*, 209 N. C. 821, 184 S. E. 834 (1936) (Admission of evidence that others had found foreign substances in coca-colas manufactured by defendant was held error since there was no evidence of the time when the manufacturer sold the other bottles to dealers.).

<sup>18</sup> *Enloe v. Bottling Co.*, 208 N. C. 305, 180 S. E. 582 (1935) (Where plaintiff

In *Ward v. Sea Food Co.*,<sup>19</sup> where the defendant was a manufacturer who sold through a retailer, Chief Justice Clark stated that "the authorities are numerous that there is an implied warranty that runs with the sale of food for human consumption, that it is fit for food and not dangerous or deleterious." Yet the court in *Thomason v. Ballard and Ballard Co.*<sup>20</sup> pointed out that the decision in the *Ward* case was grounded on negligence, and held that there was no implied warranty on the part of a manufacturer who sells his products through a retailer, since there was no contractual relation between the manufacturer and the consumer.<sup>21</sup> However, *Poovey v. Sugar Co.*<sup>22</sup> held that there was an implied warranty where the defendant manufactured and himself sold to the consumer. There have been no North Carolina cases where a manufacturer sold to a consumer through a retailer and suit was brought against the retailer. From the holdings in the three cases just mentioned, it would seem that recovery might be had against the retailer on implied warranty. This would lead to an undesirable result in that the retailer, who in most cases is not at fault, would suffer. Or if the retailer were allowed to recover from the manufacturer, there would be needless circuitry of action.

The decision in the principal case is questionable.<sup>23</sup> The same reason that acquits the retailer where the food is sold in the original package—that is, he is not expected to open the package and is not in a position to discover the danger<sup>24</sup>—would seem to apply where glass is imbedded in ice cream. Though the courts should be diligent in seeing that the consumer is protected, this should not be at the expense of an innocent retail dealer. True, it is somewhat doubtful if the plaintiff will be able to prove the manufacturer's negligence.<sup>25</sup> It may have been the realization of this fact that moved the court to reverse the nonsuit judgment and give the plaintiff a shot at the retailer as well as

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was injured by rat in coca-cola, evidence of glass found in another coca-cola manufactured by defendant was held improperly admitted.).

<sup>19</sup> 171 N. C. 33, 87 S. E. 958 (1916).      <sup>20</sup> 208 N. C. 1, 179 S. E. 30 (1935).

<sup>21</sup> Clarkson, J., dissented vigorously, pointing out that the weight of authority is opposed to the view taken by the majority of the court. 26 C. J. 785; 11 R. C. L. 1122.

<sup>22</sup> 191 N. C. 722, 133 S. E. 12 (1926).

<sup>23</sup> In a comparable case, *Sheehan v. Menkes*, 8 Misc. 867, 152 Atl. 326 (N. J. 1930), where defendant manufacturer sold mincemeat to defendant retailer who made pie out of it and served it to plaintiff who broke a tooth on an iron bolt in the pie, the manufacturer only was held liable when the retailer, by showing his own due care, proved facts from which it reasonably appeared that the bolt was in the mincemeat when the manufacturer sold it to him. The principal case presents an even stronger situation favoring a decision for the retailer, since glass in a solid lump of ice cream would be more difficult to discover than an iron bolt in mincemeat out of which pie was made.

<sup>24</sup> *Howard v. Jacob's Pharmacy Co.*, 189 S. E. 373 (Ga. 1937) (worms in patent medicine).

<sup>25</sup> Judgment of nonsuit as to the manufacturer also was reversed.

the manufacturer. But rather than bearing down on the retailer, it is submitted that a more equitable result would be reached by application of the doctrine of *res ipsa loquitur* against the manufacturer.

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### Usury—Insurance—Life Insurance as Condition Precedent to Loan.

A North Carolina statute, enacted in 1915, provides that an insurance company, as a condition precedent to lending money, and in addition to other collateral, may require the borrower to take out an insurance policy with the company on his own life, or that of another, and deposit such policy as collateral with the company.<sup>1</sup> A recent North Carolina case held that the statute was not unconstitutional as being violative of §7 Article I of the Constitution of North Carolina, which provides, "No man or set of men are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services."<sup>2</sup>

The court admits that the statute is unconstitutional if its effect "is to exempt insurance companies from the provision of" the usury statutes. The holding that the statute does not so exempt insurance companies reverses decisions made prior to the enactment of the statute that it was usurious to require a borrower to insure with the company as a condition precedent to making the loan.<sup>3</sup> The federal courts hold that such a transaction is usurious.<sup>4</sup>

It is uniformly stated by the courts that if an insurance company, with the purpose of evading the usury statutes, requires a borrower to take a policy with the lender company, merely as a device to conceal its usurious nature, the transaction is nevertheless usurious.<sup>5</sup> It is difficult to understand how the courts determine that a guilty intent is lacking in most cases where the point under discussion is involved. Why should an insurance company require a policy as a condition precedent, if it does not seek a profit in addition to the maximum rate of interest allowed by law? It is well known that insurance companies do not

<sup>1</sup> N. C. CODE ANN. (Michie, 1935) §6291.

<sup>2</sup> *Cowan v. Security Life and Trust Co.*, 211 N. C. 18, 188 S. E. 812 (1936).

<sup>3</sup> *Roberts v. Life Ins. Co. of Virginia*, 118 N. C. 429, 24 S. E. 780 (1896); *Miller v. Life Ins. Co. of Virginia*, 118 N. C. 612, 24 S. E. 484 (1896); *Carter v. Life Ins. Co. of Virginia*, 122 N. C. 338, 30 S. E. 341 (1898).

<sup>4</sup> *Moore v. Union Mutual Life Ins. Co.*, Fed. Cas. No. 9, 777 (C. C. D. Neb. 1876); *Missouri Valley Life Ins. Co. v. Kittle*, 2 Fed. 113 (C. C. D. Neb. 1880); *National Life Ins. Co. v. Harvey*, 7 Fed. 805 (C. C. D. Iowa, 1881); *Brower v. Life Ins. Co. of Virginia*, 86 Fed. 748 (C. C. W. D. N. C. 1898); see *Brown v. Fletcher*, 244 Fed. 854 (D. C. S. D. N. Y. 1917), *aff'd*, 253 Fed. 15 (C. C. A. 2nd, 1918).

<sup>5</sup> *John Hancock Mutual Life Ins. Co. v. Nichols*, 55 How. Prac. 393 (N. Y. 1878.)