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will materially mitigate damage. But in any event if the libel is consummated through publication the estate is liable to the one defamed.

It would seem equally clear that the executor's act of presenting the will for probate resulting in publication is absolutely privileged and he is absolved from liability. While an action for damages will lie against the estate, the one defamed may also petition the deletion of the defamatory matter from the instrument as admitted to probate.

THE PRIVITY RULE AND THE AGENCY FICTION WITH REGARD TO IMPLIED WARRANTIES

"The victory is not for the partisans of an inflexible logic nor yet for the levelers of all rule and all precedent, but the victory is for those who shall know how to fuse these two tendencies together in adaptation to an end as yet imperfectly discerned." *Cardozo,* GROWTH OF LAW 143 (1927).

It is now a deeply rooted and firmly established rule of the law that upon the sale of food for human consumption there arises an implied warranty of fitness for that purpose. This principle permeated the decisions of our courts at common law,[1] and today is provided for in the Uniform Sales Act.[2] The traditional majority view in the United States proceeds upon the basis that this warranty as well as the other implied warranties accompanying a sale transaction is contractual in origin and can consequently give rise to no rights nor impose any obligations except in so far as a contractual relation is established. Having determined that this warranty is contractual in nature the courts of these jurisdictions apply the law of contracts. Hence the rule is that there must be privity of contract in order to recover for breach of warranty of fitness.[3]

In contrast to this view it has been urged that while this rule is undeniably sound with reference to express warranties given in connection with a sales transaction, implied warranties are neither historically nor otherwise promissory in character, and do not arise out of any agreement between the seller and the buyer, but are on the contrary imposed upon the seller by operation of law, independently of any assent on his part. They are imposed as a matter of public policy. They exist of course where there is privity of contract, but not solely

1. Race v. Krum, 222 N.Y. 410, 118 N.E. 853 (1918); Maxwell v. Marsh, 173 App. Div. 1003, 159 N.Y. Supp. 1128 (4th Dep't 1916), aff'd without opinion, 225 N.Y. 637, 121 N.E. 878 (1918).

2. Uniform Sales Act § 15. ". . . 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 . . . there is an implied warranty that the goods shall be reasonably fit for such purpose."

3. Nelson v. Armour Packing Co., 76 Ark. 352, 90 S.W. 288 (1905); Welhausen v. Charles Parker Co., 83 Conn. 231, 76 Atl. 271 (1910); Vaccarino v. Cozzubo, 181 Md. 614, 31 A. 2d 316 (1943); State v. Consolidated Gas, Elec. L. & P. Co., 146 Md. 390, 126 Atl. 105 (1924); Gearing v. Berkson, 223 Mass. 257, 111 N.E. 785 (1916); Roberts v. Anheuser-Busch Brewing Co., 211 Mass. 449, 98 N.E. 95 (1912); Hazelton v. First Nat'l Stores, 88 N.H. 394, 190 Atl.

because thereof, and consequently should not be limited to cases where privity exists but should be extended to any other cases where the same consideration of policy exists.[4]

The basis for extending the vendors' liability to those not their immediate vendees can be readily understood by viewing the opposing influences which have guided the courts of various jurisdictions. One school of thought maintains that the seller should not be liable to those parties that have no contractual relation with him. This school fears that the imposition of unrestricted liability on the seller would have the effect of making him the object of multitudinous spurious suits.[5] Another school of thought is based on the historical principle of caveat venditor—let the seller beware. This line of thought is stimulated by the fact that the buyer can not determine by inspection the safety of the product, or the wholesomeness of the food.[6] Today the tendency of the courts in many jurisdictions has seemingly been to apply the latter reasoning quite liberally in food cases. In breach of warranty cases where the injurious substance is one other than food, there does not seem to be a discernible trend.[7] It is suggested that the implication of a warranty against the manufacturer or producer is justified by the public interest in recompensing an injured consumer and that therefore, the immediate cost for reimbursement for injury should be on the person best able to distribute his loss to the general public, i.e., the seller,[8] who can protect himself by insurance and by changing his prices.

In reflecting upon the history of warranties, it seems that all artificial explanations made to circumvent the privity rule are unnecessary fictions. Originally an action for breach of warranty sounded in tort, similar to an action of deceit for a false representation but without the necessity of alleging scienter.[9] It was not until 1778 that a case was first recorded allowing an action for breach of warranty to be brought in contract. Historically therefore, there was no requirement of privity of contract in order to recover for a breach of warranty since the remedy was a tort action.[10]

280 (1937); Stave v. Giant Food Arcade, 125 N.J.L. 512, 16 A. 2d 460 (1940); Turner v. Edison Storage Battery, 248 N.Y. 73, 161 N.E. 423 (1928); Chysky v. Drake Bros. Co., 235 N.Y. 468, 139 N.E. 576 (1923); Hopkins v. Amtorg Trading Corp., 265 App. Div. 278, 38 N.Y.S. 2d. 788 (1st Dep't 1942); Thomason v. Ballard & Ballard Co., 208 N.C. 1, 179 S.E. 30 (1935); Criggor v. Coca-Cola Bottling Works, 132 Tenn. 545, 179 S.W. 155 (1915); Colonna v. Rosedale Dairy Co., 166 Va. 314, 186 S.E. 94 (1936); 1 Williston Sales §§ 244-244a (rev. ed. 1948).

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

5. "The door to fraud would be opened wide for false claims on the part of consumers against distant manufacturers, who would be under serious handicaps in making defense." Liggett & Myers Tobacco Co. v. Cannon, 132 Tenn. 419, 425, 178 S.W. 1009, 1010 (1915).

6. See note, 21 Minn. L. Rev. 315, n. 7 (1937).

7. Note, 9 N.Y.U.L.Q. Rev. 360 (1932).

8. Cf. Douglas, Vicarious Liability, 38 Yale L.J. 584 (1929).

9. 1 Williston, op. cit. supra note 3, §§ 195, 244a; Ames, The History of Assumpsit, 2 Harv. L. Rev. 1, 8 (1888).

10. Jeanblanc, Manufacturer's Liability to Persons Other Than Their Immediate Vendees, 24 Va. L. Rev. 134 (1937); Notes, 18 Cornell L.Q. 445 (1933), 42 Harv. L. Rev. 414 (1929), 9 Cornell L.Q. 487 (1924).

To dispense with the necessity of privity of contract would not only be historically correct and logically sound, but would also obviate the need of our courts to employ such deviations of sound law and incongruous fictions as the "agency theory" in order to circumvent the anachronism which they themselves have created and to which they have succumbed.

Historically we have seen how an action to recover on a warranty originally stemmed in tort and eventually evolved into a contract action. The practice of bringing the action in assumpit later became so popular that the action in tort was seldom used.[11] There were many reasons for the descent of the tort action into disfavor and the relegation of its forms to the dusty chambers of legal archives. Foremost in bringing about this descent was the tedious effort required to prove the existence of negligence. In the normal course of events when the action was in tort it was necessary to prove the res ipsa loquitur doctrine, and this was rarely possible where no one person had control from the preparation of the article through the sale.[12]

With the adoption of the contract theory as the substitute action for the disfavored tort action there developed the requirement of privity among the parties. Because of the privity rule the implied warranty runs only as between the contracting parties and not as to third persons, who are strangers to the agreement, be they sub-purchasers or donees.[13] Of course even as to those parties who are not in privity with the vendor an action ex delicto would sound if the articles were negligently or improperly manufactured, provided that the articles were of the type categorized as inherently dangerous to life or property.[14] In addition the same would have to be adequately attested to. The general rule has been somewhat extended in New York so that, ". . . liability [will] be imposed when manufacturers' negligence *causes* articles to be inherently or imminently dangerous. . . ." as well as ". . . when articles, which are inherently or imminently dangerous when properly constructed, are caused to be defective by reason of the manufacturers' negligence."[15] Under the aforementioned categories recovery in negligence is allowed notwithstanding the absence of contractual privity.

The difficulty with a recovery predicated upon a right of action sounding in tort is that the plaintiff must be able to allege negligence of the seller. Often, in fact, there was no negligence, or if there was, the burden of proof was too great to overcome.[16] Where the action is ex contractu however, the process becomes

11. 1 Williston, op. cit. supra note 3, § 195; Ames, supra note 9, at 1.

12. 22 Rocky Mt. L. Rev. 176 (1950).

13. In Chysky v. Drake Bros. Co., 235 N.Y. 468, 472, 139 N.E. 576, 577 (1923), McLaughlin, J., declared: "If there were an implied warranty which enured to the benefit of the plaintiff it must be because there was some contractual relation between her and the defendant and there was no such contract. . . . The general rule is that a manufacturer or seller of food, or other articles of personal property, is not liable to third persons, under an implied warranty who have no contractual relations with him."

14. MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916); Statler v. Ray Mfg. Co., 195 N.Y. 478, 88 N.E. 1063 (1909); Thomas v. Winchester, 6 N.Y. 397 (1849).

15. Davis, A Re-Examination of the Doctrine of MacPherson v. Buick and its Application and Extension in the State of New York, 24 Fordham L. Rev. 204, 207 (1955).

16. In Gearing v. Berkson, 223 Mass. 257, 111 N.E. 785 (1916), the plaintiffs, a husband and wife were injured by unwholesome pork chops purchased from the defendant. The court

somewhat more simplified and the pleadings less complicated, as all that is required of the plaintiff is the introduction into evidence of the contract, and the subsequent breach thereof.[17]

In spite of the fact that formerly the traditional holding was, and the undoubted present weight of authority is, that privity of contract is essential to support a suit for breach of warranty, today the tide seems to be turning. Recently, there has arisen a respectable and increasing body of authority denying that such privity is requisite and allowing maintenance of such an action independently of negligence or privity of contract. Recent cases in many jurisdictions show a decided trend in this direction, and it may even be that before long they will represent the weight of authority in the United States.[18] Leading jurists and writers have also joined in decrying the use of privity as the decisive factor in cases of breach of warranty.[19] Williston states that there seems to be no reason why the imposition of implied warranties should be an exception to the rule of contractual assignability;[20] and Judge Cardozo in *Ultramares v. Touche* remarked that "the assault upon the citadel of privity continues these days apace."[21]

It is indeed unfortunate that the subsequent attacks against the privity rule by our courts could not have been harnessed so that the results would be more in line with accepted legal principles. In dispensing with the privity rule those courts that have attempted the task have neither directly overruled the privity

granted recovery to the husband for injuries sustained but denied recovery to the wife because being the agent of the husband she was not in privity of contract with the defendant and therefore her only remedy lay in proving negligence. The wife was unable to overcome this burden of proof and therefore was denied recovery.

17. See 4 St. John's L. Rev. 80 (1929).

18. See 142 A.L.R. 1490 (1943); 140 A.L.R. 191 (1941); 111 A.L.R. 1239 (1937); 105 A.L.R. 1502 (1936); 88 A.L.R. 527 (1932); 63 A.L.R. 340 (1929); 39 A.L.R. 993 (1925); 17 A.L.R. 672 (1922). See also Dobrenski v. Blatz Brewing Co., 41 F. Supp. 291 (S.D. Mich. 1941); Ketterer v. Armour & Co., 200 Fed. 322 (S.D. N.Y. 1912); Klein v. Duchess Sandwich Co., 86 P. 2d 858 (Cal. Dist. Ct. App. 1939); Davis v. Van Camp Packing Co., 189 Iowa 775, 176 N.W. 382 (1920); Parks v. C.C. Yost Pie Co., 93 Kan. 334, 144 Pac. 202 (1914); Hertzler v. Manshum, 228 Mich. 416, 200 N.W. 155 (1924); Coca-Cola Bottling Co. Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927); Rainwater v. Hattiesburg Coca-Cola Bottling Co., 131 Miss. 315, 95 So. 444 (1923); Helms v. General Baking Co., 164 S.W. 2d 150 (Mo. App. 1942); Madouros v. Kansas City Coca-Cola Bottling Co., 230 Mo. App. 275, 90 S.W. 2d 445 (1936); Ward Baking Co. v. Trizzino, 27 Ohio App. 475, 161 N.E. 557 (1928); Catani v. Swift & Co. 251 Pa. 52, 95 Atl. 931 (1915); Nock v. Coca-Cola Bottling Works, 102 Pa. Super. 515, 156 Atl. 537 (1931); Jacob E. Decker & Sons Inc. v. Capps, 139 Tex. 609, 164 S.W. 2d 828 (1942); Mazetti v. Armour & Co., 75 Wash. 622, 135 Pac. 633 (1913).

19. Prosser, Torts 688-93 (1st ed. 1941); 1 Williston, op. cit. supra note 3, §§ 244-244a; Spruill, Privity of Contract as Requisite for Recovery on Warranty, 19 N.C.L. Rev. 551 (1949); Bogert & Fink, Business Practice Regarding Warranties in Sale of Goods, 25 Ill. L. Rev. 400 (1930); Notes, 37 Colum. L. Rev. 77 (1937), 15 N.Y.U.L.Q. Rev. 292 (1937), 33 Colum. L. Rev. 868 (1933), 29 Mich. L. Rev. 906 (1931). "Manufacturers themselves commonly seem to repudiate the privity motion by regarding themselves as directly accountable to the ultimate consumer." Bogert & Fink, supra at 416.

20. 1 Williston, op. cit. supra note 3, § 244.

21. 255 N.Y. 170, 180, 174 N.E. 441, 445 (1931).

requirement nor have they implored the legislature in seeking a remedy; rather they have resorted to ingenious fictions to circumvent the rule. Examples of these fictions are: (1) that the consumer is a third party beneficiary for whose benefit the contract was made, and as such can sue;[22] (2) that there is an implied warranty in the sale of food which "runs with the goods" so that indicia of title will entitle recovery;[23] (3) that the manufacturer has made representations to the public at large and any consumer is entitled to rely on them;[24] (4) that a plaintiff who is not the actual purchaser can sue as an assignee of the purchaser's right;[25] (5) some courts ignore the privity requirement by treating the original vendee as a mere "conduit" between the manufacturer and the consumer;[26] (6) that a warranty is imposed under a public policy created for the protection of the ultimate consumer.[27]

While these fictions have on occasion enabled our judiciary to temper the harsh

22. Dryden v. Continental Baking Co., 4 Cal. App. 2d 33, 77 P. 2d 833 (1938); Ward Baking Co., v. Trizzino, 27 Ohio App. 475, 161 N.E. 557 (1928); Menaker v. Supplee-Willis-Jones Milk Co., 125 Pa. Super. 76, 189 Atl. 714 (1937); Nock v. Coca-Cola Bottling Works, 102 Pa. Super. 515, 156 Atl. 537 (1931); Lockett v. Charles Ltd., 159 L.T.R. 547 (K.B. 1938). See also Note, 9 N.Y.U.L.Q. Rev., supra note 7.

23. Welter v. Bowman Dairy Co., 38 Ill. App. 305, 47 N.E. 2d 739 (1943); Anderson v. Tyler, 233 Iowa 1033, 274 N.W. 48 (1937); Davis v. Van Camp Packing Co., 189 Iowa 775, 176 N.W. 382 (1920); Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927); Coca-Cola Bottling Co. v. Smith, 97 S.W. 2d 761 (Tex. Civ. App. 1936).

24. Graham v. Watts, 238 Ky. 96, 36 S.W. 2d 859 (1931); Roberts v. Anheuser-Busch Brewing Co., 211 Mass. 449, 98 N.E. 95 (1912); Kuelling v. Roderick Lean Mfg. Co., 183 N.Y. 78, 75 N.E. 1098 (1905).

25. Davis v. Van Camp Packing Co., 189 Iowa 775, 176 N.W. 382 (1920). See also 1 Williston op. cit. supra note 3, § 244 for discussion of this theory. It has been suggested that "a warranty is a promise, express or implied, and should be assignable in the same manner as any other promise. There is no logical objection to the theory that the resale of a chattel, especially when the reseller is only a conduit of title, includes in its terms an implied assignment of the warranty given by the original vendor." Note, 29 Mich. L. Rev. 905, 907-08 (1931).

26. Scruggins v. Jones, 207 Ky. 636, 269 S.W. 743 (1924); McMurry v. Vaughan's Feed Stores, 117 Ohio St. 236, 157 N.E. 567 (1927).

27. Blanton v. Cudahy Packing Co., 154 Fla. 872, 19 So. 2d 313 (1944); Patargias v. Coca-Cola Bottling Co., 332 Ill. App. 117, 74 N.E.2d 162 (1947); Welter v. Bowman Dairy, 318 Ill. App. 305, 47 N.E. 2d 739 (1943); Davis v. Van Camp Packing Co., 189 Iowa 775, 176 N.W. 382 (1920); Helms v. General Baking Co., 164 S.W. 2d 150 (Mo. App. 1942); Madouros v. Kansas City Coca-Cola Bottling Co., 230 Mo. App. 275, 90 S.W. 2d 445 (1936); Catani v. Swift & Co., 251 Pa. 52, 95 Atl. 931 (1915); Crigger v. Coca-Cola Bottling Co., 132 Tenn. 545, 179 S.W. 155 (1915); Jacob E. Decker & Sons, Inc. v. Capps, 139 Tex. 609, 164 S.W. 2d 828 (1942); Nelson v. West Coast Dairy Co., 5 Wash. 2d 284, 105 P. 2d 76 (1940); Baxter v. Ford Motor Co., 168 Wash. 456, 12 P. 2d 409 (1932); Mazetti v. Armour & Co., 75 Wash. 622, 135 Pac. 633 (1913). In Crigger v. Coca-Cola Bottling Co., supra at 546, 179 S.W. at 156, Fancher, J. said: ". . . we see no reason or principle upon which a warranty might run with an article for consumption like a warranty of title running with land. We think the real ground of liability of the seller to the ultimate consumer is, more properly speaking, a duty one owes to the public not to put out articles to be sold upon the markets for use injurious in their nature, of which the general public have not means of inspection to protect themselves."

rule of privity by allowing the collateral consumer a mode of recovery which is not burdened by the almost impossible task of proving negligence, on the other hand they foster additional difficulties. They have encouraged a multitude of complexities which hover over the law of warranties and serve to obstruct the path of the attorney seeking a simplified rule of recovery. The common denominator of all these fictions is that they are subterfuges employed to circumvent the traditionally unjust results arising from the privity rule. Their ultimate effect however, has been to confuse the law of warranty rather than to clarify the rights of the parties.[28]

New York and other jurisdictions, motivated by a similar desire to evade the privity rule, allow a right of action to one not an immediate purchaser by indulging in the fiction of an agency relation between him and the actual purchaser; a fiction, in that the agency or relation is not based on any act or prior stipulation between the parties, but imposed wholly for convenience and by operation of law. This spurious device enables the courts of the state of New York, both to adhere to and circumvent the rule requiring privity of contract. The results, in spite of the fact that they have adequately sated the demands for justice and have appeased the Court of Appeals,[29] may be considered somewhat ironic and bizarre. The agency fiction though mitigating the severity of the privity rule, creates its own hazards. Consequently a cause of action to one member of the family not the immediate purchaser, would deny such right to another member, injured in the same manner, notwithstanding that the latter was the actual purchaser.[30]

The first decision of the New York Court of Appeals involving an action for breach of an implied warranty of the fitness of food for human consumption with its attendant problem of privity of contract, was the case of *Chysky v. Drake Bros. Co.*[31] The court in denying recovery to the plaintiff laid down the rule that a seller of food is not liable under an implied warranty of fitness for human consumption to third persons who have no contractual relation with him. Since that time the privity rule barred recovery to *collateral consumers*—those that did not contract to buy the article of food, but who nevertheless ate the food and were made ill thereby. It was not until some eight years later that this proposition began to falter.

The first direct attack made on the privity rule was made in *Ryan v. Progressive Grocery Stores, Inc.*,[32] where a plaintiff was allowed to recover in a breach of warranty action notwithstanding that his wife was the actual purchaser, while he was merely a collateral consumer. The immediate effect of this decision was said to be ". . . that the husband might sue when the wife acted simply as his agent in making the purchases; when the only contract in such case existed between the husband and the seller, and when the cause of action in contract

28. Note, 8 Md. L. Rev. 61 (1943).

29. Ryan v. Progressive Grocery Stores, 255 N.Y. 388, 175 N.E. 105 (1931).

30. For a general discussion of privity and its historical background, see Notes, 18 Cornell L.Q. 445 (1933), 9 Cornell L.Q. 487 (1924). See also Perkins, Liability of a Dealer to One Not His Vendee, 5 Iowa L. Bull. 86, 95 (1920).

31. 235 N.Y. 468, 139 N.E. 576 (1923).

32. 255 N.Y. 388, 175 N.E. 105 (1931).

accrued to him."[33] The more dynamic result of the *Ryan* case was the fathering of a new doctrine whereby the courts of New York were to circumvent the old established privity rule and allow a collateral consumer recovery in an action for breach of warranty. This was the inception of the agency fiction.

The first attempt at extending the rule of *Ryan v. Progressive Grocery Stores, Inc.* occurred three years later in *Gimnez v. Great Atlantic & Pacific Co.*[34] In the latter case, a wife purchased a can of crab meat from a grocer. Upon eating the contents, she was internally injured by glass contained in the meat and sued her grocer for breach of warranty. She sued and her husband joined in a count for loss of consortium and medical expenses. On the trial the defendant's motion to dismiss the wife's cause of action on the ground that she bought as agent for her husband and hence was not in privity with the seller was denied. The denial was affirmed by the Appellate Division,[35] holding the evidence ample to find that the wife purchased the food in her own behalf. The Court of Appeals affirmed, declaring: ". . . we take the law to be that where the wife is the purchaser the right of action is hers, and she is presumably the purchaser."[36] However, the husband's count was denied, the court holding that there was no privity of contract between him and the vendor.

The cases that fall within the scope of the agency theory can be better understood by placing them in various classifications. On examination of the cases decided by the New York courts and jurisdictions which employ the same fiction, the following artificial categories are suggested as a means of discussing the problem:[37] (1) when the purchaser or the shopper is the plaintiff; (2) when the wife is the shopper and the plaintiff-husband is the only one injured; (3) when the husband is the shopper and the plaintiff-wife is the only one injured; (4) when the wife is the shopper and both plaintiff-wife and plaintiff-husband are injured; (5) when the husband is the shopper and both plaintiff-wife and plaintiff-husband are injured; (6) when the child is the shopper and the plaintiff-mother or plaintiff-father, or plaintiff-brother or plaintiff-sister, or all of them are injured; (7) when the father or mother is the shopper and the plaintiff-child is injured; (8) when any member of the family is the shopper and the plaintiff-guest is injured; (9) when the shopper is the agent in fact of the plaintiff.

(1) When the Purchaser or the Shopper is the Plaintiff

A purchaser may buy food in one of three capacities: (a) as agent of an undisclosed principal; (b) as a principal buying in his own behalf; or (c) as an agent for a disclosed principal.[38] When the party who comes to court seeking redress is the purchaser, a presumption arises that he is the contracting party, provided that he is the sole plaintiff.[39] The presumption that the purchaser is the con-

33. Gimnez v. Great Atlantic & Pacific Tea Co., 264 N.Y. 390, 393, 191 N.E. 27, 30 (1934).

34. 264 N.Y. 390, 191 N.E. 27 (1934).

35. Gimnez v. Great Atlantic & Pacific Tea Co., 240 App. Div. 238, 269 N.Y. Supp. 463 (2d Dep't 1938).

36. 264 N.Y. 390, 393, 191 N.E. 27, 30 (1934).

37. See 92 N.Y.L.J. 52 (Aug. 31, 1934).

38. Colby v. First Nat'l Stores Inc., 307 Mass. 252, 29 N.E. 2d 920 (1940).

39. Gimnez v. Great Atlantic & Pacific Tea Co., 264 N.Y. 390, 191 N.E. 27 (1934). See

tracting party is not rebutted, despite the preponderance of evidence offered by the seller in support of the contention that the shopper was acting in the capacity of an agent for an undisclosed principal.[40] It is now a well established rule of the law of agency that an agent who contracts in his own name for an undisclosed principal does not cease to be a party because of his agency. Such an agent may enforce the contract though the principal has renounced it.[41] In *Meyer v. Kerschbaum*[42] the court in effect said that where there is an undisclosed principal the agent may elect to sue the seller provided that the principal does not wish to initiate any litigation in his own behalf. However, under sound principles of law the presumption should be rebutted upon evidence that the shopper purchased as agent for a disclosed principal.[43] However, it is in regard to the latter that the courts seem to convert the agency theory, which is the application of sound principles of the law of agency, into the agency fiction which is an unorthodox application of the rules of agency to further substantial justice. In spite of the fact that an agent for a disclosed principal has no basis in law for being considered the contracting party, the courts are reluctant to deny recovery to a purchaser who stands in that position by virtue of being a married woman.[44] Consequently, it has been held that the fact that the seller knew that the plaintiff was a married woman does not preclude the inference that the wife purchased the food as a principal; and the finding that the wife made the purchase in her own behalf is not precluded by evidence that she bought the food on behalf of the family with money supplied by her husband for the support of the family.[45] The rule in New York is that when a wife acts as an agent in purchasing food, she may recover if injured by the food notwithstanding that there is not the slightest pretense of the purchaser acting or being considered as a principal. Any evidence offered to establish the existence of the agency, or the status of the purchaser as agent, is immaterial.[46]

(2) When the Wife is the Shopper and the Plaintiff-Husband is the Only One Injured

When the wife of the plaintiff purchases the food of which the plaintiff-husband partakes, and consequently is injured, the husband, when he is the party seeking redress, is presumed to be the contracting party,[47] and the warranty of fitness

Colby v. First Nat'l Stores Inc., supra note 38; Meyer v. Kerschbaum, 133 Misc. 330, 232 N.Y. Supp. 300 (Sup. Ct. 1928).

40. Colby v. First Nat'l Stores Inc., 307 Mass. 252, 29 N.E. 2d 920 (1940); Gimnez v. Great Atlantic & Pacific Tea Co., 264 N.Y. 390, 191 N.E. 27 (1934); Kelley Asphalt Block Co. v. Barber Asphalt Paving Co., 211 N.Y. 68, 105 N.E. 88 (1914); Meyer v. Kershbaum, 133 Misc. 330, 232 N.Y. Supp. 300 (Sup. Ct. 1928).

41. Kelley Asphalt Block Co. v. Barber Asphalt Paving Co., supra note 40; Meyer v. Kershbaum, supra note 40; Tiffany, Agency § 101 (2d ed. 1924). Contra Vaccaro v. Prudential Condensed Milk Co., 133 Misc. 556, 232 N.Y. Supp. 299 (Sup. Ct. 1927).

42. 133 Misc. 330, 232 N.Y. Supp. 300 (Sup. Ct. 1928).

43. 1 Williston, op. cit. supra note 3, § 261; Note, 45 Harv. L. Rev. 182 (1931).

44. Colby v. First Nat'l Stores Inc., 307 Mass. 252, 29 N.E. 2d 920 (1940).

45. Ibid.

46. Meyer v. Kershbaum, 133 Misc. 330, 232 N.Y. Supp. 300 (Sup. Ct. 1928).

47. Hazelton v. First Nat'l Stores Inc., 88 N.H. 409, 190 Atl. 280 (1937); Ryan v. Pro-

for human consumption runs directly to him. Here we see that there is a shifting presumption, depending on who is bringing the action. We have seen that if the wife is the purchaser, and she alone is injured, she is presumed to be the contracting party.[48] The presumption disappears when under the same facts the husband is injured; the presumption then is that he is the contracting party. This situation arises because the wife, though not an express or implied in fact agent, is an agent implied in law for her husband. This reasoning originates from the common law, where the husband is charged with the burden of supporting his wife and therefore is liable for her necessaries.[49] This transaction has sometimes been called an "agency in law," but accurately speaking, it is not referable to the law of agency, for the husband's liability does not depend upon any authority conferred by him, for he may be liable for necessaries supplied to his wife against his express orders. The fact that the wife has not been authorized to bind him is immaterial.[50] According to all the authorities, there is no mandate in the law which states that the mere existence of the fact of marriage gives rise ipso facto to an inference that the wife is the agent in law of her husband, except in the case of necessaries.[51] In the latter case, the relation of husband and wife is ipso facto a letter of credit to the wife for necessaries suitable and proper to the sphere in which she moves.[52] In cases other than for necessaries, however, the liability of the husband depends solely on the principles of agency, i.e., an agency in fact must be spelled out. The courts have never clearly defined what articles constitute necessaries. It is universally agreed, however, that food for household use is a necessary as a matter of law.[53]

Though there exists a prima facie presumption that the wife is the husband's agent as to the purchase of food, this presumption can be rebutted by presentation of affirmative evidence that she was adequately maintained.[54] The burden of proof is on the seller to show that the husband has made suitable provisions for her by supplying her with necessaries himself, or by giving her adequate cash to buy the same. This presumption has also been applied where the vendor has extended credit to the wife, believing the husband would pay. However, the fact that the presumption that the wife is the agent in law of her husband as to necessaries can be rebutted, does not preclude the establishment of an agency in fact between the husband and his wife.

In spite of this, the courts have indicated that a husband may recover where the wife actually paid for the food.[55] The courts consider the wife the agent in

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gressive Grocery Stores Inc., 255 N.Y. 388, 175 N.E. 105 (1931); Visusil v. W. T. Grant Co., 253 App. Div. 736, 300 N.Y. Supp. 652 (1st Dep't 1937).

48. See note 39 supra.

49. Wanamaker v. Weaver, 176 N.Y. 75, 68 N.E. 135 (1903); Stevens v. Hush, 107 Misc. 353, 176 N.Y. Supp. 602 (Sup. Ct. 1919).

50. Wanamaker v. Weaver, supra note 49.

51. Ibid.

52. Calkins v. Long, 22 Barb. 97 (N.Y. 1855).

53. Conant v. Burnham, 133 Mass. 503 (1882); De Brauwere v. De Brauwere, 203 N.Y. 460, 96 N.E. 722 (1911); Note, 4 St. John's L. Rev. 80 (1929).

54. Wanamaker v. Weaver, 176 N.Y. 75, 68 N.E. 135 (1903).

55. Meyer v. Kershbaum, 133 Misc. 330, 232 N.Y. Supp. 300 (App. T. 1st Dep't 1928).

law of her husband, despite the fact that there is no basis in law to establish an agency under these circumstances.

It has been suggested that whether the wife will be deemed the agent of her husband depends on whether the seller knows of the agency.[56] This distinction is made only by a lower New York court,[57] and is not mentioned in the decisions of the New York Court of Appeals. In view of the husband's obligation to supply his wife with necessaries, it seems incongruous to give any credibility to this limitation of the agency fiction. This added limitation becomes even more incompatible when an examination of the basis of the agency theory is made, i.e., the agency is created by operation of law, and therefore the fundamental requisites of creating an agency by agreement are unnecessary, and to deem it necessary would be to defeat the basis of the fiction.[58]

(3) When the Husband is the Shopper and the Plaintiff-Wife is the Only One Injured

The husband is not the implied in law agent of his wife. Consequently, if a husband purchases food which his wife consumes and is injured thereby the wife cannot recover as there is no contractual relation between her and the seller.[59] It must be borne in mind however that there is no rule of law which precludes the presentation of evidence to establish an agency in fact existing between the husband and wife.

Despite the fact that there is no cause of action accruing to the wife for her injury because of lack of privity of contract between the wife and the seller, the husband has a right to bring an action for medical expenses and loss of services.[60] This so because it has been held that a party to whom an implied warranty runs may recover all his damages, including special damages which he has suffered.[61] It has been said that, ". . . the injury to plaintiff's wife resulting in loss of services and doctors' bills was equivalent to an injury to himself and is part of his damage."[62]

(4) When the Wife is the Shopper and Both the Plaintiff-Wife and Plaintiff-Husband are Injured

When the wife is the purchaser of the goods and both she and her husband are injured as a result of eating the food, the recovery is then limited to one of them.[63] If there is no evidence presented to rebut the presumption of the wife

But cf. Vaccaro v. Prudential Condensed Milk Co., 133 Misc. 556, 232 N.Y. Supp. 299 (City Ct., City of N.Y. 1927).

56. Note, 8 St. John's L. Rev. 362 (1933).

57. Meyer v. Kershbaum, 133 Misc. 330, 232 N.Y. Supp. 300 (App.T. 1st Dep't 1928).

58. Note, 23 Calif. L. Rev. 621 (1935).

59. Zotto v. Merkel Bros. Inc., 229 App. Div. 793, 242 N.Y. Supp. 749 (2d Dep't 1930); McAllister v. Stevens & Sanford Inc., 147 Misc. 317, 265 N.Y. Supp. 142 (Sup. Ct. 1933).

60. McAllister v. Stevens & Sanford Inc., supra note 59.

61. Ryan v. Progressive Grocery Stores Inc., 255 N.Y. 388, 175 N.E. 105 (1931); McAllister v. Stevens & Sanford Inc., supra note 59.

62. McAllister v. Stevens & Sanford Inc., supra note 59 at 31, 265 N.Y. Supp. at 142.

63. Gearing v. Berkson, 223 Mass. 257, 111 N.E. 785 (1916); Hazelton v. First Nat'l Stores Inc., 88 N.H. 409, 190 Atl. 280 (1937); Schlosser v. Goldberg, 123 N.J.L. 470, 9 A. 2d 699 (1939).

being the agent in law of her husband, then the cause of action accrues to the husband as principal. If however the husband elects not to sue, the wife may bring the action as his agent. However, a recovery by either the husband as principal or the wife as agent, bars the other from recovering where the action is for breach of warranty.[64]

If the wife brings the action in breach of warranty the husband is barred from recovering for loss of services and medical expenses.[65] This rule has been criticized and it is claimed that despite the necessity of privity of contract, and the fact that the action is one for breach of warranty, the tortious element should be recognized. The adherents of this school of thought support their argument with the proposition that these elements, i.e., loss of wife's services, loss of society, and medical expenses, are barred in an action by the injured wife on the ground of the husband's superior right to them. However, they admit that this reasoning would not support the contention that the husband should recover for the loss of his wife's society, for that is a right which can only exist in the husband.[66]

Consequently where both the husband and wife are injured it is better to have the husband bring the action. The reason being that the husband being in privity of contract may recover his special damages which may include loss of services and medical expenses.[67]

(5) When the Husband is the Shopper and Both the Plaintiff-Wife and Plaintiff-Husband are Injured

When the husband is the shopper and the food purchased by him is eaten by himself and his wife, and they are both injured, the cause of action accrues only to him.[68]

(6) When the Child is the Shopper and the Plaintiff-Mother or Plaintiff-Father, or Plaintiff-Brother or Plaintiff-Sister, or all of Them, are Injured

When the child is the shopper and the mother or father is injured, whether an action inures to either of them depends on whether the facts can spell out an agency in law, or in fact. How far an infant is empowered by law to impose liability on the parent for purchase of necessaries, depends in large measure on whether the parent is under a legal obligation to support the child. The existence of an agency in law in such a circumstance frequently depends upon the age and capacity of the minor child to take charge of its own affairs and also upon whether the child is emancipated.[69] If there is found to be present an agency in law, the orthodox rules of agency are applied, and consequently, the infant is the agent of the father, if the latter is supporting the family (the child would be

64. Gearing v. Berkson, supra note 63.

65. Gimnez v. Great Atlantic & Pacific Tea Co., 264 N.Y. 390, 191 N.E. 27 (1934).

66. Note, 47 Harv. L. Rev. 1443 (1934).

67. McAllister v. Stevens & Sanford Inc., 147 Misc. 317, 265 N.Y. Supp. 142 (Sup. Ct. 1933).

68. See note 59 supra. Contra Mouren v. Great Atlantic & Pacific Tea Co., 139 N.Y.S. 2d 375 (Sup. Ct. 1955).

69. 1 Williston, Contracts § 247 (rev. ed. 1936).

the agent of the mother in the absence of a father) and only the father would be able to recover on an action for breach of warranty.[70] Since the father is the head of the family neither the mother, nor brothers nor sisters would have a cause of action in this situation.[71] However, the courts have allowed recovery to the mother, when she was the party injured by the child's purchase. This can be reconciled, since in these cases there was an agency in fact spelled out between the mother and the child.[72] A brother or sister, however, never is considered the contracting party, unless there is proof of an agency in fact.

Where the infant is the purchaser and is injured as well, the father has a cause of action for damages for loss of services and medical expenses. The loss of services action in the parent arises from wrongful acts against the child and exists apart from the doctrine of privity of contract, since the cause of action inuring to the father is by reason of a tort.[73]

(7) When the Father or Mother is the Shopper and the Plaintiff-Child is Injured

When a mother or father purchases food of which their infant-child partakes and becomes injured, it is almost impossible for the child to recover in an action for breach of warranty. The rule is that a parent is not the agent in law, though under rare circumstances it may be an agent in fact, of his or her infant.[74]

(8) When any Member of the Family is the Shopper and a Guest is Injured

If any member of the family purchases and a guest eats and sues, recovery under an agency in law theory is impossible. There is no agency present here at all.

(9) When the Shopper is the Agent in Fact of the Injured Party

When a person eats food which he himself has not purchased, but which another has, a recovery is not impossible. Under the orthodox principles of agency, facts may be spelled out in any situation to establish an agency between a collateral consumer and a purchaser.[75] This agency in fact will enable the

70. Vaccarino v. Cozzubo, 181 Md. 614, 31 A. 2d 316 (1943); Hopkins v. Vita Farm Products, 297 N.Y. 546, 74 N.E. 2d 475 (1947).

71. Vaccarino v. Cozzubo, supra note 70; Hopkins v. Vita Farm Products, supra note 70.

72. Brussels v. Grand Union Co., 14 N.J. Misc. 75, 187 Atl. 582 (1936).

73. Kennedy v. Woolworth, 205 App. Div. 648, 200 N.Y. Supp. 121 (1st Dep't 1923). Contra Dickinson v. Sperling, 158 Misc. 905, 286 N.Y. Supp. 934 (City Ct., City of N.Y. 1936).

74. Hazelton v. First Nat'l Stores Inc., 88 N.H. 409, 190 Atl. 280 (1937); Pearlman v. Garrod Shoe Co., 276 N.Y. 172, 11 N.E. 2d 718 (1937); Redmon v. Bordens Farm Products Co., 245 N.Y. 512, 157 N.E. 838 (1927); Salzano v. First Nat'l Stores Inc., 268 App. Div. 993, 51 N.Y.S. 2d 645 (2d Dep't 1944); Massey v. Borden Co., 265 App. Div. 839, 37 N.Y.S. 2d 571 (2d Dep't 1942); Block v. Empire State Doughnut Corp., 233 App. Div. 774, 250 N.Y. Supp. 440 (2d Dep't 1931); Smith v. Hansen, 228 App. Div. 634, 238 N.Y. Supp. 86 (2d Dep't 1929); Dickinson v. Sperling, supra note 73.

75. Hopkins v. Amtorg Trading Corp., 265 App. Div. 278, 285, 38 N.Y.S. 2d 788, 795 (1st Dep't 1943). See Edwards v. Dooley, 120 N.Y. 540, 550, 24 N.E. 827, 829 (1890). But see 45 Harv. L. Rev. 182 (1931).

collateral consumer to be considered the contracting party and hence he will be in privity of contract with the seller.

CONCLUSION

As far back as 1870 the courts began to recognize a distinction between sales of food and sales of other articles and held that in the former the desire for public safety governed and consequently, in such cases the principle of caveat emptor did not apply.[76] The inevitable result of creating laws based on the dictates of public conscience is the formation of an elastic set of rules which may be stretched to suit the desires of justice and eradicate the inequities of precedent. On the other hand these same advantages are the basic elements which undermine our judicial structure, and precedent is subrogated by an ambiguous nomer "public policy," and law succumbs to discretion.

The Commissioners on Uniform State Laws and the American Law Institute have drafted a sales article which is a part of the Uniform Commercial Code. The provisions with respect to warranty in the sale of foods provide as follows: ". . . Unless excluded or modified . . . 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 or though not a merchant states generally that they are guaranteed. The serving for value of food or drink to be consumed either on the premises or elsewhere is a sale."[77] and ". . . 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."[78]

The provisions of the Code seem to represent the most realistic approach to the problem. It presents a logical and judicially conforming rule, which integrates the desire for social justice, and the desire to protect the innocent collateral consumer, with the desire to have a cogent and precise rule of law to guide our courts of justice. It has a dual effect of protecting the collateral consumer from being left to a "hopeful application" of an ambiguous legal fiction, or to the vicissitudes of a procedural remedy, and from preventing the seller from becoming an insurer of the goods.[79]

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76. Weidman v. Keller, 171 Ill. 93, 49 N.E. 210 (1897).
77. Draft, Uniform Commercial Code § 2-314 (Text & Comments ed. 1952).
78. Draft, Uniform Commercial Code § 2-318 (1) (Text & Comments ed. 1952).
79. Note, 22 Rocky Mt. L. Rev. 176 (1950).