years after the Supreme Court's construction of section twenty of that act,[23] intentionally omitted that section from the Illinois Act.[24] Without this definition clause, the wording of the act seems broad enough to permit an opposite result to that reached in the present case. On the other hand the adherence to legislative intent in interpreting the statute yielded in this case to the policy consideration that an employer who can satisfy his employees as to wages, hours, conditions, *et cetera*, should not be subjected to economic pressure from third parties without some relief from the courts. It is suggested that this view is the more reasonable upon the particular facts. However, in Illinois, labor will have this precedent to face in cases where picketing is economically justifiable because of poor wages, hours, and conditions which the employees themselves are cowed into accepting.[25] S. M. M.

SALES—IMPLIED WARRANTY—LIABILITY OF MANUFACTURER TO CONSUMER IN SALE OF FOOD—[California].—Plaintiff Klein purchased from a retailer a sandwich manufactured, packaged, and sold to the retailer by defendant. His wife, co-plaintiff in this action, upon biting into the sandwich found that it was crawling with maggots. She became ill and suffered injuries for which she seeks damages on twin counts of negligence and breach of implied warranty. Defendant's motion for a directed verdict was granted at trial. The supreme court reversed the court below and *held*, (1) that there was a case of negligence for the jury and (2) that defendant was liable in warranty since the legislative intent was that the implied warranty of fitness raised by section 15(1) of the Uniform Sales Act, should inure in the case of footstuffs to the ultimate consumer, and that it was not intended that strict "privity of contract" should be essential in an action for its breach.[1]

With this decision California joins a growing minority of states attacking privity as it applies to the responsibility in warranty of manufacturers or processors of foodstuffs to the ultimate consumer. Liability has been founded in a number of these states on the technical grounds that the contract between manufacturer and retailer, to the extent that it raises a warranty of quality, is for the benefit of the ultimate consumer;[2] or that such a warranty "runs with the goods";[3] or that public policy renders the

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23. Clayton Act passed in 1914; Illinois Act passed in 1925. Duplex Printing Press Co. v. Deering (1921) 254 U. S. 443; American Steel Foundries v. Tri-City Central Trades Council (1921) 257 U. S. 184.

24. See notes 11 and 21, supra, for the provisions of both acts.

25. For the economic argument on the other side of the question see the dissenting opinion of Swing v. A. F. of L. (1939) 372 Ill. 91, 22 N. E. (2d) 857, 860. Also see: (1939) 33 Ill. L. Rev. 722; (1935) 14 Ore. L. Rev. 501; (1939) 14 Temple L. Rev. 1; (1938) 8 Law Society Journal 306; 8 Int'l Jurid. Assoc. Mthly. Bull. (Oct. 1939) no. 4, p. 1.

1. Klein v. Duchess Sandwich Co., Ltd. (Cal. 1939) 93 P. (2d) 799.

2. Ward Baking Co. v. Trizzino (1928) 27 Ohio App. 475, 161 N. E. 557.

3. Coca-cola Bottling Works v. Lyons (1927) 145 Miss. 876, 111 So. 305; Biedenharm Candy Co. v. Moore (Miss. 1939) 186 So. 628; Coca-Cola Bottling Co. v. Smith (Tex. Civ. App. 1936) 97 S. W. (2d) 761.

manufacturer liable, apparently on some separate warranty made directly to the consumer.[4]

The approach of the California court is novel in that it rests recovery squarely on the provisions of section 15(1) of the Uniform Sales Act.[5] In extending to the consumer of food the protection of the warranty of fitness by the manufacturer to the retailer, however, the court is actually indulging in judicial legislation.[6] On the other hand, since the Act clearly raises the warranty, merely failing in section 69 to trace its subsequent application,[7] its inurement to the consumer might well be engrafted on the terms of section 15 without undue violence to the legislative intent. It is to be noted, though, that the warranty raised is only one of fitness for resale. Does such a warranty afford adequate protection to the consumer? While fitness for resale may coincide with fitness for consumption in most cases involving food, it need not in all. For example, a defect common to a given brand may possibly render an article unfit for consumption but leave its fitness for resale unaffected.[8] Moreover, if the consumer's rights derive only from the warranty of fitness by manufacturer to retailer, they are primarily dependent on its existence and secondarily subject to its defects. A disclaimer by the manufacturer,[9] or proof that the retailer did not rely on him,[10] might operate to cut off recovery by the consumer

4. Nock v. Coca-Cola Bottling Works (1931) 182 Pa. Sup. 516, 156 Atl. 537; Madouros v. Kansas City Coca-Cola Bottling Co. (1936) 230 Mo. App. 275, 90 S. W. (2d) 445; Hertzler v. Manshum (1924) 228 Mich. 416, 200 N. W. 155. This last decision has been said to be limited by the terms of section 15(1) in Cheli v. Cudahy Bros. Co. (1934) 267 Mich. 690, 255 N. W. 414, 416; and said to be limited to its facts in Paull v. McBride (1935) 273 Mich. 661, 263 N. W. 877, 879.

5. "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 grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose."

6. Among other things, where in the act itself does the court find justification for inferring a legislative intent to treat sales of foodstuffs differently from sales of other goods, as it implies in its holding? Klein v. Duchess Sandwich Co. (Cal. 1939) 93 P. (2d) 799, 804. Nowhere does the act refer to foodstuffs as a category apart.

7. Section 69, in enumerating the remedies available for breach of warranty, provides for no one but the immediate buyer. But the maxim *expressio unius est exclusio alterius* need not apply.

8. For example, boxes of candy of a given brand commonly containing arsenic might be fit for resale as articles of the brand but unfit for consumption.

9. See Linn v. Radio Center Delicatessen (N. Y. Mun. Ct. 1939) 169 Misc. 879, 9 N. Y. S. (2d) 110, 112, where the court says that such a disclaimer by the impleaded defendant manufacturer is against public policy.

10. Cf. Cheli v. Cudahy Bros. Co. (1934) 267 Mich. 690, 255 N. W. 414, in which consumer's recovery was barred because there was no disclosure by buyer to seller. The court does not make it clear whether the terms "buyer" and "seller," with respect to the non-disclosure, refer, respectively, to consumer and retailer, or to retailer and manufacturer. If the latter, as seems probable, this case is parallel to one in which there is no reliance by the retailer on the manufacturer.

if the court's theory is rigorously adhered to.[11]

The question whether such a warranty originally arose is ignored by this court and by courts generally, although its existence is a necessary hypothesis underlying this approach. The usual procedure is to assume that a warranty does exist and that its terms protect the consumer, without bothering to inquire what sort of warranty it may be and what it may cover. To make such an unverified assumption in all cases is in effect to set up a warranty by the manufacturer directly to the consumer, independent of the obligations he may or may not have assumed to his immediate buyer.[12] But openly to impose liability on a warranty of this sort, where the Sales Act is in force, would be to contravene the express terms of section 15.[13] On the other hand, to extend those terms to impose liability as an offshoot of the warranty of fitness to the retailer is to leave at least theoretical chinks in the consumer's armor. A fastidious court struggling to achieve adequate consumer protection within the terms of the Sales Act is faced at once with this dilemma.

Considerations of public health impel the growing feeling that a manufacturer of food ought to guarantee to the consumer the wholesomeness of his product—a feeling justified in fact by the superior position of the manufacturer with respect to the discovery and prevention of defects, which are ordinarily undiscernible or at least undiscerned by the consumer.[14] The potency of this feeling has thus far outweighed the legalistic misgivings, if any, in the minds of those courts which have dispensed with requirements of privity. The present tendency of this minority is to impose liability "because of," in disregard of, or if need be in spite of the Uniform Sales Act.

A. C. G.

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11. The objections here advanced apply with equal force to the theories of a third party beneficiary contract and of a warranty which "runs with the goods."

12. Cf. cases cited supra, note 4.

13. The first paragraph of section 15 reads: "Subject to the provisions of this act and of any statute in that behalf, *there is no implied warranty* or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, *except as follows* * * * " (italics supplied). Of the six subsections which follow, only 15(1) is germane to the situation. But 15(1) provides for a warranty of fitness between seller and buyer. The manufacturer, in these cases, is not seller to the consumer; and the consumer, if buyer at all, is not buyer from the manufacturer, but only from the retailer in a wholly separate sale. The implication of any warranty directly by manufacturer to consumer flouts the plain meaning of the act.

14. Madouros v. Kansas City Coca-Cola Bottling Co. (1936) 230 Mo. App. 275, 283, 90 S. W. (2d) 445, 450.