lowing the rule that a certificate of judgment by a deputy is sufficient if the presiding judge certifies that it is in due form of law, there is no need for a clerk of court to personally sign the certificates.[22]

It is submitted that the principal case may be justified upon the desire of our court to follow the national policy of re-employing all persons entering military service and all due consideration should be given to our fighting forces.[23] M. E.

SALES—IMPLIED WARRANTY OF WHOLESOMENESS—[Texas].—Plaintiff's husband bought from a retail merchant some sausage commercially known as "Cervelot." The manufacturer had advertised the sausage as being suitable for human consumption in the summer time. It was consumed soon after the purchase by members of plaintiff's family; and as a result of having eaten the sausage one child died and other members of the family became seriously ill. Plaintiff, whose husband had died from other causes, brought suit against the manufacturer for herself and as next friend for those members of her family who became ill. The jury found that the sausage, at the time of processing and manufacturing, was so contaminated and poisonous as to be unfit for human consumption. The jury also found that neither the plaintiff nor the defendant was negligent. The Texas District Court and Court of Appeals gave judgment for the plaintiff. *Held,* Affirmed. The manufacturer and vendor of sausage is liable to consumers for injuries caused them by poisonous and contaminated substances in the sausage at the time the manufacturer processed and sold the same, even though the manufacturer was not negligent in the processing thereof. The retailer of foods has an absolute duty to sell only wholesome food, and is liable to the consumer for a breach of such duty when the latter relies on the former in the selection of the food and has no opportunity to examine it. *Jacob E. Decker & Sons, Inc. v. Capps.*[1]

In addition to possible remedies against the retailer, there being no express warranty that the food is wholesome, there are two alternative remedies against the manufacturer open to the injured consumer of food sold for immediate human consumption. One is an action in tort for the negligence of the manufacturer and the other is an action for breach of

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sonally all judgments when he knows these are to be sued upon in other states.

22. Stedman v. Patchin (1861) 34 Barb. (N. Y.) 218.

23. Selective Service Act (1940) 50 U. S. C. A. (Sec.) 308.

"(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within 40 days after he is relieved from such training and service—

(C) if such position was in the employ of any State or political subdivision thereof, it is hereby declared to be the sense of the Congress that such person should be restored to such position or to a position of like seniority, status, and pay."

1. (Texas 1942) 164 S. W. (2d) 828.

an implied warranty of wholesomeness. Both actions require a breach of a duty by the manufacturer to protect the consumer from injury, and injury to the consumer as a result . . . of such breach.[2] The tort action formerly required privity with the manufacturer,[3] an exception being made in cases where the article sold was inherently dangerous to human life and health.[4] But today this exception to the requirement of privity has been extended to include articles which may become dangerous to human life and health if negligently prepared.[5] Thus food for human consumption has been held by the courts to be within this exception.[6] The degree of cogency of negligence necessary differs with the various American courts, some requiring evidence of actual negligence, while others apply the doctrine that when proof of unwholesomeness is shown, a *prima facie* case of negligence is established. In those courts where a *prima facie* showing of negligence is sufficient, some say that such a showing justifies an inference, while others apply the doctrine of *res ipsa loqitur*. Although the tort action is available to others than the purchaser-consumer because privity is not required, it utterly fails in cases such as the instant case where no negligence can be shown on the part of the manufacturer. In the principal case the Supreme Court of Texas held that there was a breach of an implied warranty of wholesomeness of food sold for human consumption, and that the warranty arose by operation of law to protect the public health and safety.[7]

At the present time the American courts are divided in their opinion as to the nature of these warranties.[8] A majority of the courts hold that the action sounds in contract, the warranty arising by reason of the contractual relationship; a minority group takes the view that the action sounds in tort and the modern tendency is in this direction. As will be seen, the majority rule does not follow the early English common law theory of the nature of the implied warranty of food. An ancient English criminal statute[9] laid the foundation for the law of implied warranty of wholesomeness in the sale of food for immediate human consumption, stating: "It is ordained that none shall sell corrupt victuals." In the first

2. Harper, *A Treatise On The Law Of Torts* (1st ed. 1933) 241, sec. 106.

3. Winterbottom v. Wright (1842) 10 M. & W. 109; 152 Eng. Rep. 402. This is the leading case for the doctrine that a manufacturer is not liable for the injuries resulting from his negligence to a purchaser of his vendee.

4. MacPherson v. Buick Motor Co. (1916) 217 N. Y. 382, 111 N. E. 1050.

5. Melick, *The Sale Of Food And Drink* (1936) 270.

6. Comment (1919) 7 Cal. Law Rev. 360; Comment (1935) 4 Fordham Law Rev. 295; Comment (1933) 46 Harv. Law Rev. 530; Comment (1918) 27 Yale Law J. 1068.

7. Texas has not adopted a Sales Act, and chose to adopt the common law rule of Illinois.

8. Jeanblanc, Manufacturer's Liability To Persons Other Than Their Immediate Vendees (1937) 24 Va. L. Rev. 134; Lessler, Implied Warranty Of Quality In Sales Of Food (1940) 14 Conn. B. J. 47; Perkins, Unwholesome Food As A Source Of Liability (1920) 5 Ia. L. Bul. 6, 86.

9. Statute of Pillory and Tumbrel and of the Assize of Bread and Ale, 51 Hen. 3, stat. 6 (1266) 1 Stat. 47. The statute applied only to vintners, brewers, butchers, and cooks.

reported adjudication under this statute, the court allowed an action when corrupt food had been sold.[10] Early cases held that the vendor was under such an absolute duty to sell wholesome victuals that lack of knowledge of defects or any degree of care would be no justification.[11] Blackstone declared that action on the case for deceit was the widely used remedy.[12] But in the latter half of the eighteenth century the action for warranty declared in assumpsit came about[13] as a matter of convenience to permit the adding of the money counts[14] and made possible the present diverse positions of the courts.[15] Thereafter the law of England was changed to limit the implied warranty of wholesomeness in the sale of foods.[16] The earlier common law doctrine, however, was carried over to America and was first effectively stated in New York in 1815 by the leading case of *Van Bracklin v. Fonda.*[17]

Succeeding cases firmly established the existence of an implied warranty of fitness of food for human consumption in sales by retail dealers and allowed recovery in a wide variety of such cases.[18] But after 1900 the New

10. Y. B. 9 Hen. 4, 53, B, where the defendant had sold unwholesome wine to plaintiff. The defense was that there was no express warranty, but the court (Babington, J.) held that an action on the case lay, even though there was no express warranty, by effect of the Statute of Pillory and Tumbrel and of the Assize of Bread and Ale.

11. In Keilway's Reports 91 (22 Hen. 7) 72 Eng. Rep. 254, the court stated that no man can justify selling corrupt victual, but an action on the case lies against the seller, whether the victual was warranted to be good or not. The court further indicated in the opinion that the sale of food was an exception to the doctrine of *caveat emptor* by saying that knowledge was necessary in cases of merchandise, unless there was an express warranty. In Roswel v. Vaughan (1607) Cro. Jac. 196, 79 Eng. Rep. 171, 172, the court said: "But if a man sell victuals which is corrupt, without warranty, an action lies, because it is against the commonwealth."

12. Blackstone stated: "In contracts for provisions, it is always implied that they are wholesome; and if they be not, the same remedy (action on the case for damages for deceit) may be had." 3 Blackstone Comm. sec. 166 (Lewis's ed.)

13. Williston declares that the law of warranty is a century older than special assumpsit. But it should be remembered that the action of deceit, which was the basis for the law of warranty, was several centuries older than special assumpsit. See 1 Williston on Sales (2d ed. 1924) 368, sec. 195.

14. The first reported case was Stuart v. Wilkins (1778) 1 Doug. 18, 99 Eng. Rep. 15, where an action for breach of warranty declared in assumpsit was allowed, predicated upon the contractual relation existing and the failure of the seller to fulfill his implied promise or warranty. Mansfield was hesitant to allow the action, but Buller, J. approved it, believing that it had been previously practiced for many years.

15. See note 8, supra.

16. Parkinson v. Lee (1802) 2 East 315, 102 Eng. Rep. 389; Burnby v. Bollett (1847) 16 N. & W. 644, 153 Eng. Rep. 1348; Emmerton v. Matthews (1862) 7 H. & N. 586, 158 Eng. Rep. 604; Gardiner v. Gray (1815) 4 Camp. 144, 171 Eng. Rep. 46.

17. (1815) 12 Johns. (N. Y.) 468, Am. Dec. 339, in which case plaintiff bought an unwholesome quarter of beef and recovered in the suit on the theory of deceit. The case was decided on this theory, not breach of warranty, but the dictum of the court plainly states that there was an implied warranty of wholesomeness of food sold for domestic use.

18. Fairbank Canning Co. v. Metzger (1890) 118 N. Y. 260, 23 N. E.

York rule was modified to restrict application of the warranty to cases involving a dealer who made or prepared the article he was selling, and even then to situations in which the buyer had no opportunity to examine the goods.[20] A majority of the courts followed the modified New York rule; but several courts broadened this rule[21] and extended the doctrine to include other than retail dealers. In addition to the aforementioned manifoldness of the courts, they also differed as to whether the rule of *caveat venditor* prevailed in the sale of food in original packages and in sealed containers when the retailer had no knowledge of the contents. Again the majority view followed the lead of the New York courts,[22] which had held that *caveat emptor* applies in the absence of an express warranty.[23] But Illinois established a clearer rule, holding that an implied warranty of wholesomeness of canned goods exists under the common law.[24] Some recent decisions support the Illinois rule.[25]

372, 16 Am. St. Rep. 753 (beef sold that had been heated before being killed); Sinclair v. Hathaway (1885) 57 Mich. 60, 23 N. W. 459, 58 Am. Rep. 327 (bread sold to a distributor); Hoover v. Peters (1869) 18 Mich. 51 (farmer sold pork to a consumer directly for food); Divine v. McCormick (1867) 50 Barb. (N. Y.) 116 (sale of a heifer for immediate consumption); Race v. Krum (1918) 222 N. Y. 410, 118 N. E. 853, L. R. A. 1918F, 1172 (ice cream sold in a drug store); Wiedeman v. Keller (1897) 171 Ill. 93, 49 N. E. 210 (retail dealer sold meats); Copas v. Provision Co. (1889) 73 Mich. 541, 41 N. W. 690 (wholesale dealer sold ham to a butcher).

19. Race v. Krum (1918) 222 N. Y. 410, 118 N. E. 853, L. R. A. 1918 F, 1172.

20. 1 Williston on Sales (2d ed. 1924) 480, sec. 242.

21. Hoover v. Peters (1869) 18 Mich. 51; Copas v. Provision Co. (1889) 73 Mich. 541, 41 N. W. 690.

22. Great Atl. & Pac. Tea Co. v. Gwilliams (1934) 189 Ark. 1037, 76 S. W. (2d) 65; Coca Cola Bottling Co. v. Swilling (1933) 186 Ark. 1149, 57 S. W. (2d) 1029; Bigelow v. Maine Central R. R. Co. (1912) 110 Me. 105, 85 Atl. 396; Trafton v. Davis (1913) 110 Me. 318, 86 Atl. 179; Walden v. Wheeler (1913) 153 Ky. 181, 154 S. W. 1088.

23. Julian v. Laubenberger (1896) 16 Misc. 646, 38 N. Y. S. 1052. In this case the court said: "The law cannot be so unreasonable as to inject into a contract what neither party had, or could have had, in mind at the time the contract was made" (knowledge of condition of the article sold).

24. Chapman v. Roggenkamp (1913) 182 Ill. App. 117; Sloan v. F. W. Woolworth Co. (1915) 193 Ill. App. 620. The Illinois courts founded this rule on the absolute duty by early statute, saying that just because canned goods were unknown when the rule was made was no reason for making this exception. The argument that knowledge is essential is discredited as contravening the rule at common law and placing the law of implied warranty on the same basis as negligence. Had this argument been accepted, there would be no liability for latent defects unless there was a special contract to that end.

Ward v. Great Atl. & Pac. Tea Co. (1918) 231 Mass. 90, 120 N. E. 225, 5 A. L. R. 242, is the leading case refusing to make exception to the liability of the dealer on implied warranties in cases of canned goods. The case was decided under the Massachusetts Sales Act but the court clearly states that this was merely a codification of the common law as it previously existed in Massachusetts.

25. The California Supreme Court reversed an appellate decision which followed the New York holding, and held that sales of canned goods are not

The English Sale of Goods Act[26] was passed in 1893, supposedly to consolidate the existing law. But under the wording of the statute there no longer exists the common law distinction between the sale of food and the sale of other goods,[27] and the common law distinction between sale by manufacturer or grower and non-manufacturer or non-grower was also abolished.[28] The Uniform Sales Act,[29] adopted in 31 states,[30] is identical in these respects to the English Act. Under section 15(1) of this Act the requirements for implied warranty of fitness for a specific purpose (better termed 'wholesomeness' in cases of foods) include the buyer's express or implied communication to the seller of the "particular purpose"[31] for which the articles are required, and the buyer's reliance on the seller's skill or judgment. Even when the purchase is that of canned goods,[32] the buyer of food for immediate human consumption still enjoys the implied warranty of wholesomeness which he had under the common law provided he can meet the above requirements.[33] But even if these requirements cannot be met, the buyer of food will have an implied warranty of merchantable quality[34] under section 15(2) of the Uniform Sales Act,[35] which

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an exception to the doctrine of *caveat venditor*. Gindraux v. Maurice Mercantile Co. (1935) 4 Cal. (2d) 206, 47 P. (2d) 708, reversing Gindraux v. Maurice Mercantile Co. (1934) 79 Cal. App. 291, 36 P. (2d) 844. Mississippi held that the packer was liable, not the retailer, and that the warranty ran to the consumer. Kroger Grocery Co. v. Lewelling (1933) 165 Miss. 71, 145 So. 726.

26. 56 & 57 Vict. Ch. 71.

27. See sec. 14 of the English Sale of Goods Act.

28. See sec. 14 of the English Sale of Goods Act.

29. This Act was drafted by the National Conference of Commissioners on Uniform State Laws in 1906, and recommended for enactment in all of the American states.

30. The following states have not as yet adopted a Sales Act: Arkansas, Colorado, Delaware, Florida, Georgia, Kansas, Louisiana, Mississippi, Missouri, Montana, North Carolina, New Mexico, Oklahoma, South Carolina, Texas, Virginia, and West Virginia.

31. "Particular purpose" usually is distinguished from "general purpose" in certain transactions, but in the purchase of food for immediate human consumption it is not, as then normally both general and particular purpose are to eat the food. Mere purchase of food is usually enough to give the seller notice of the purpose for which it is purchased, since most food is sold for immediate human consumption.

32. Under the Uniform Sales Act the retailer is liable for injury from food sold in sealed containers—formerly the common law of only Illinois—by reason of the historical past and the fact that the statute makes no distinction concerning the subject matter of the sale.

33. Rinaldi v. Mohican Co. (1918) 225 N. Y. 70, 121 N. E. 471, is frequently cited by the courts on this proposition.

34. In 1815 in England, Lord Ellenborough introduced merchantable quality as an implied term. In Gardiner v. Gray (1815) 4 Camp. 144, 171 Eng. Rep. 46, he said that *caveat emptor* applied if there was opportunity to inspect, and in all such contracts without express warranty, there was an implied term that the article should be salable in the market under the description mentioned. This was followed and elaborated upon in Jones v. Just (1868) 3 Q. B. 197, in which the implied term was held to exist although the defect in the goods was unknown to the seller and could not be checked at the time of contracting.

35. Ryan v. Progressive Grocery Stores, Inc. (1931) 255 N. Y. 388, 175 N. E. 105, 74 A. L. R. 339, allowed recovery under sec. 15(2) of the Uni-

has the effect, in the cases of sales of food, of the former warranty.[36] The only exception arises when the buyer has examined the goods (food) and failed to detect a patent defect.[37]

The question of the need for privity of contract also formulated an issue on which the courts divided. Obviously privity of contract is not required by those minority courts which sustain the theory that the warranty is imposed by law to protect public health.[38] But privity of contract is necessary to preserve legal symmetry in those majority courts which sustain the "contractual warranty" theory. However, many of the courts following the latter point of view have recognized the harshness of the requirement of privity and have allowed recovery when there is no direct contractual relationship between plaintiff and defendant; they indulge in fictions such as presumed negligence, fraud, assignment of cause of action from dealer to consumer, third party beneficiary, and agency of buyer for consumer. The most recent cases tend to disregard the requirement of privity and hold the manufacturer liable directly to the ultimate consumer. Missouri follows this recent trend.[39]

The Texas court in the principal case has adopted an historically logical and commendable position regarding the nature of the implied warranty in the sale of foods. Those courts which dogmatically sustain the "contractual warranty" theory have been unfortunately slow in altering their position. However, a clearer understanding of the history of the early common law and an appreciation of its frequent misinterpretation by American courts[40] have been reflected in the Uniform Sales Act. As shown above, the adoption of this statute has increased the scope of liability of the seller; and because liability rests on the seller by reason of the early common law, the warranty must surely arise by operation of law in the interests of the public health and safety, rather than from the contractual relationship. The true nature of the warranty is further revealed by the fact that some courts indulge in fiction to escape privity of contract. This is nothing more than an effort to effect absolute liability which was also the objective of the early common law. These courts should come out and say that liability is imposed by law as a matter of public policy.

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form Sales Act and gives the general rule of the United States and England.

36. See note 33, supra.

37. This is provided by sec. 15(3) of the Uniform Sales Act.

38. The doctrine of privity of contract applies only when one seeks to enforce a contract.

39. McNicholas v. Continental Baking Co. (Mo. App. 1938) 112 S. W. (2d) 849; Carter v. St. Louis Dairy Co. (Mo. App. 1940) 139 S. W. (2d) 1025; Madouros v. Kansas City Coca-Cola Bottling Co. (1936) 230 Mo. App. 275, 90 S. W. (2d) 445; Smith v. Carlos (1923) 215 Mo. App. 488, 247 S. W. 468, Helms v. General Baking Co. (Mo. 1942) 164 S. W. (2d) 150.

40. See discussion by Chief Judge Hobson of the Court of Appeals of Kentucky in Walden v. Wheeler (1913) 153 Ky. 181, 154 S. W. 1088.