

# NEW JERSEY COURT OF ERRORS AND APPEALS.

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SARA V. TOMLINSON,	}	
Plaintiff in Error,		ON WRIT OF ERROR
vs.		TO NEW JERSEY
ARMOUR AND COMPANY,		SUPREME COURT.
Defendant in Error.		

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BRIEF OF GASKILL AND GASKILL, FOR DEFENDANT IN  
ERROR.

## I.

The plaintiff in error declared in the court below that the defendant in error was engaged in the business of canning and vending ham for food and that it was its duty to prepare and can for such purpose nothing but wholesome and edible meats, but that in disregard of this duty, Armour & Company negligently put in a certain can meat that was diseased and deleterious to health; that this product was later sold to a retail dealer of whom the plaintiff in error purchased it for food and as a result of its consumption was rendered sick, for

which physical disability damages were asked. The action was, as this recital indicates, in tort. There was no averment of fraud or of scienter on the part of the defendant in error.

To this declaration a demurrer was filed and was upon argument sustained, the opinion of the Supreme Court being pronounced by Mr. Justice Garrison. To this judgment of the Supreme Court, on writ of error, the common assignments of error are filed. There being no bill of exceptions, the record only is now before this Court, in which manifest error must appear as a necessary basis for a reversal of the judgment below, and in the absence of which the judgment must be affirmed.

To defend the exceptionally well reasoned opinion of Mr. Justice Garrison seems superfluous, so ably and thoroughly has he there set forth the conclusion of the Supreme Court and the legal and logical arguments which inevitably lead to that conclusion. The opinion contains in itself the most convincing reasoning that could be adduced in its support.

By analysis of this opinion it will be seen that the correctness of the conclusion reached by the Supreme Court rests upon three main propositions, which are quoted from the opinion as follows:

I. "The liability of the defendant as the original vendor of such product is claimed to be due, not to his own vendee, but to the plaintiff as vendee of such vendee. It would seem to be clear therefore that if the original vendee may be thus eliminated and his place be taken by the plaintiff, her rights can rise no higher than those of the vendee in whose shoes she stands. From this it follows that if the duty sought to be raised by the pleader on behalf of the plaintiff is greater than

that raised by the law on behalf of the vendee, the averment of such duty to the plaintiff is without legal foundation, unless, of course, such duty is imposed by some public law. Admittedly, however, there is no statutory basis for the plaintiff's action."

2. "In view of the established rule of the common law touching the sale of provisions to general dealers, the declaration before us is anomalous to this extent, viz.: that by force of a rule that applies only to purchases made for immediate consumption, it seeks to cast upon a vendor who sold only to general dealers a liability that is not within the common law rule touching such sales. That the plaintiff cannot maintain her action upon this theory must be apparent."

3. "These considerations and others that might be added point strongly toward the exception of this class of food products (hermetically sealed goods) from the rule of caveat emptor as we have inherited that doctrine from the common law. Considerations of public health and comfort may even imperatively require such an alteration of the established law, but the fact nevertheless remains that alterations of established law, based upon such considerations, are essentially legislative in character. To apply the law as it is found to be established is essentially ~~legislative in character.~~"

*the duty of the courts.*

Upon the acceptance of these propositions depends the maintenance of the judgment of the Supreme Court.

## II.

We will consider first, then, the thesis that the duty owed by the defendant in error, in an action of tort, to the ultimate vendee of his primary vendee is no greater than that which is due in the first instance to the original vendee.

“Admittedly,” says Justice Garrison, “there is no statutory ‘basis’ for any distinction in favor of the ultimate vendee over the original vendee.” If the action which must depend upon such distinction has no foundation in statute law, can the necessary support for it be found elsewhere? We contend that such support does not exist.

The operations of Armour & Company, negligent or otherwise, in the production and sale of food products reach the plaintiff to cause her alleged injured physical condition, with a consequential existence of rights and duties on either hand, only through and by means of a sale from Armour & Company on a wholesale basis to a retail dealer, without special or general warranty, and not for immediate consumption, but for a retail trade. This sale therefore gauges the extent of Armour & Company’s liability to this first vendee in any action of contract, and determines by its express and implied terms mutual responsibility between vendor and vendee. The vendor and the vendee being the only parties to the sale, no subsequent vendee of the first vendee can have the benefit of the original contract of sale in an action against the original vendor, i. e., the manufacturer. The subsequent sale by the first vendee to his vendee is an individual and separate transaction, totally distinct in many characteristics from the original sale. For instance, it may carry an implied warranty. On contract, therefore, the action of each successive vendee must lie only against his particular vendor, varied as it may be by the terms, express or implied, of each such sale. (For argument a series of successive sales is assumed, to illustrate the principle.) The plaintiff in

error in this action, therefore, cannot have an action against this defendant in error based on contract. *Neither can she be allowed an action sounding in tort against the original vendor based upon a duty not found within the scope of the duties raised by the original contract of sale. Where there is no duty there can be no breach.* Therefore, the ultimate vendee must inevitably stand in the shoes of the first vendee, for the duty owed to each is the same. And the first vendee and the last are equally without foundation for an action of this present class, unless there be read into the contract of sale under which the product left the manufacturer's hands some implied warranty of quality, or unless a new responsibility be created by this court, based upon some considerations of public policy, which leads to the second proposition, i. e., the status of the law with reference to implied warranty in cases of the class now presented.

### III.

At common law in the United States, which is unaffected by legislation in this State, the rule prevails that there is no implied warranty of soundness or wholesomeness in a sale of food provisions to a dealer or middleman, who buys not for consumption but for sale to others.

*15 Am. & Eng. Enc. of Laws, 1237*, and cases there cited. The English rule is stated in the same volume, p. 1278, and because of the variation between the rule as observed in the two countries the English cases cannot be considered as authorities.

Unquestionably at common law there was implied a warranty of wholesomeness in a sale for immediate con-

sumption as distinguished from a sale for a purposed future sale in the course of business. It is unnecessary to cite these cases, but as they have frequently been cited as authorities in support of the broader principle advanced by the plaintiff in error in this case, they are referred to only by way of precaution and differentiation. In considering the various cases found in the books, no clear line of demarcation can be found on the reasons assigned for the conclusions reached, upon which the existing distinction can be based, but the subsequent citations will show that the Courts of this country, following the rule stated above, have denied the existence of an implied warranty of wholesomeness of food provisions in a sale to a retail dealer or middleman, while they have admitted its existence in those cases where the sales have been, to the vendor's knowledge, for present consumption by the vendee, while the English cases have leaned more and more toward the rule of the civil law.

Tracing the rule in the history of the common law, we turn naturally to the great commentator, in this instance, to be obliged to argue him in the wrong.

Blackstone says (3 Bl., 165) :

“In contracts likewise for sales, it is constantly understood that the seller undertakes that the commodity he sells is his own; and if it proves otherwise an action on the case lies against him to exact damages for this deceit. In contracts for provisions, it is always implied that they are wholesome, and if they be not, the same remedy may be had.”

(An interesting query may be had as to whether this does not imply an action on the case for *deceit*; see *Burnby vs. Bollett*, 16 M. & W., 644. If so, the present action cannot be sustained on this basis, as it has no founda-

tion in deceit, since no scienter is alleged, but is rather trespass on the case for negligence.) As Mr. Justice Garrison remarks, no authorities are cited in support of this proposition by Blackstone, but in any event it can be used as nothing more than an authority for an action for deceit. However, the arguments of counsel, the authorities cited and the colloquy between counsel and Court, as exhibited in the report of *Burnby vs. Bollett*, *supra*, show convincingly that the *sale of unwholesome meat was prohibited by an ancient statute*, and it may well be that this statutory prohibition and the presumptions arising from what became thereby a criminal act had colored the cases upon which Blackstone in 1765 pronounced his opinion. Baron Parke, in *Burnby vs Bollett* (1846), comments with much stress upon this fact, when the citation from Blackstone is adduced to him as an authority.

“They are likewise punishable as a common nuisance for selling corrupt meat, by virtue of an ancient *statute* and this certainly if they know the fact—probably, also, if they do not. Such persons are therefore civilly responsible to those customers to whom they sell such victuals for any special particular injury by the breach of the law, which is thereby committed.”

“This,” continues Baron Parke, “explains the note of Lord Hale in 1st Fitzherbert’s *Natura Brevium*, 94, that there is diversity between selling corrupt wines and merchandise; for there an action on the case does not lie without warranty; otherwise, if it be for a taverner or victualler, if it prejudice any. The defendant in this case was not dealing in the way of a common trader and was not punishable by indictment for what he did; he merely transferred his bargain to the plaintiff and at his own request. He therefore falls within the reason of the former

part of Lord Hale's distinction, and there being no evidence of a warranty or of any fraud he is not liable."

Evidently, therefore, Blackstone misconceived the basis of liability in a sale of corrupt provision. It had its basis in the presumptions of scienter raised by an act contrary to a penal statute and not upon an implied warranty. Otherwise, as Lord Hale says as to merchandise. And so the proposition of the text writer failed of acceptance by the Court. There was no implied warranty of quality.

This case was followed and cited in *Emmerton vs. Mathews*, 7 H. & N., 586 (1862). This was an action between a wholesaler and a retail butcher, the declaration alleging warranty but none proven. There was no fraud and no knowledge of defect. Here, too, was a question of a statute prohibiting the sale of diseased meat and it was argued that sale in open market implied a warranty that the quality of the meat was within the terms of the law.

Pollock, C. B., in pronouncing the opinion of the Court said:

"The undoubted general law is that, in the absence of  
 "all fraud, if a specific article be sold, the buyer having  
 "an opportunity of examining and selecting it, the rule  
 "of caveat emptor applies and the plaintiff has to establish  
 "that in the case of a salesman dealing with a retail  
 "butcher there is an exception to the general rule and that  
 "there is an implied warranty the meat is fit for the pur-  
 "pose for which probably it is bought \* \* \*

"Any legal point which in the remotest degree bears  
 "upon the public health and the general safety of the  
 "community is deserving of the fullest consideration,  
 "but having given that consideration we are of opinion—  
 "that there is no case that at all governs the present—  
 "none of the cases cited at the bar decide this case, though

“in *Burnby vs. Bollett*, 16 *M. & W.*, 644, all the law is “collected and the matter was much discussed.”

Which means that the Court of Exchequer, moved to careful consideration of the case by the exigencies of public welfare, with all the law collected before them, could find no precedent either in text or court record to govern their decision, surely the strongest testimony as to the state of the “common law,” and as a result of their careful inquiry and consideration, denied the implied warranty. The proposition of Blackstone, which was before this last mentioned Court, is not therefore a correct statement of the common law.

This denial is confirmed by *Emerson vs. Brigham*, 10 *Mass.*, 202, decided (1813). Contra is *Van Bracklin vs. Fonda*, 12 *Johnson (N. Y.)*, 468, but apparently no consideration was given by this Court to the statutes upon which the early English cases were founded, as has been shown. And in addition there appeared to be an element of concealed knowledge equivalent to false representation, which returns the case to the basis of scienter, an action for deceit, and it is not therefore presently applicable.

The cases following support the principle contended for by the defendant in error, showing the acceptance by the courts of the United States of the true doctrine of the common law.

*Windsor vs. Lombard*, 18 *Pick. (Mass.)*, 57.

*Hart vs. Wright*, 17 *Wend. (N. Y.)*, 267; affirmed in 18 *Wend. (N. Y.)*, 449.

*Moses vs. Mead*, 1 *Denio (N. Y.)* 378; affirmed in 5 *Denio (N. Y.)*, 617.

In the last named case the authority of Blackstone's proposition is vigorously commented upon.

*Julien vs. Laudenberger*, 16 Misc. (N. Y.), 646.

*Colton vs. Reed*, 25 Misc. (N. Y.), 380.

*Howard vs. Emerson*, 110 Mass., 439.

*Giroux vs. Stedman*, 145 Mass., 439.

*Weideman vs. Kellar*, 171 Ill., 98.

*Nelson vs. Armour*, 90 U. Rep., 288.

15 Amer. & Eng. Enc., 1237, and cases cited.

These authorities have been carefully examined and selected and a study of them cannot but convince the Court of the soundness of the proposition contended for.

In the fourteenth edition of Kent's Commentaries, star page 478, will be found a most learned and interesting dissertation upon this subject, with a large number of collected cases. In a note commencing on page 479 at "(c)" and proceeding, there is set forth the tendency of more modern English cases toward the rule of the civil law as opposed to the rule of the common law with the citation of cases, but the annotator points out the opposition of the American courts to this divergence and their traditional adherence to the common law.

The Court should carefully distinguish from the case at bar and the authorities cited that class of cases which deals with the sale of chemicals, drugs or other articles that are in themselves necessarily dangerous to the life and health of mankind, such as *Thomas vs. Winchester*, 6 N. Y., 397, known as the Belladonna case, or *Blood Balm Company vs. Cooper*, 83 Ga., 457. These cases and similar cases hold those who sell and deliver an article which is known to be imminently dangerous to life, without notice to the vendee of its quality, is liable to any

person who suffers injury therefrom, which might have been reasonably anticipated whether there were any contractual relations between the parties or not. But it will be seen that the basis of these actions is the *knowledge* on the part of the manufacturer of the *dangerous quality* of the product, and there is a wide distinction drawn by the cases between the sales of poisonous drugs and food products. For instance, in the case of *Wise vs. Morgan*, 44 L. R. A., 548, the liability of the manufacturer of foods and the manufacturer of poisonous drugs is clearly distinguished. There is no law requiring a manufacturer of foods to label his products as poisonous, even though he knows it to be so; he is prohibited absolutely from traffic in such an article; whereas in the case of a manufacturer of a poisonous drug he is required to label such a product as poisonous, and if, through his omission or want of care, he fails so to label his product, the law extends to the party aggrieved a right of action against the wrong-doer.

See also *O'Neill vs. James*, 68 L. R. A., 342.

Beyond question, therefore, in the case of sales of provisions as merchandise and not for immediate consumption, there is no implied warranty of wholesomeness at common law.

#### IV.

The creation of a new class of liability is a legislative and not a judicial function.

There is no need to advert to the constitutional division of the departments of the State government. The

only question is as to the power of the Court, by interpretation and application of well defined legal principles, to create a new responsibility which can have no other foundation than the judicial action.

Chancellor Green, in *Story vs. Plank Road Co.*, 1 C. E. Green, 13, expressed his opinion thus :

“The proper office of courts of justice is to maintain  
“and enforce the legal and equitable rights of parties  
“litigant as established by existing law. It is no part  
“of their office to determine in advance what laws ought  
“or ought not to be enacted, or to interfere directly or  
“indirectly with the course of legislation.”

This would seem final, limiting courts to an exposition and application of existing laws and the enforcement of existing duties.

#### V.

Following these steps, in none of which is there fault or lack of proof, the conclusion of the Surpeme Court is inevitably reached. If the vendee of the vendee stands equipped with no greater rights to maintain this action than her vendor enjoys, if that vendor could not maintain this action at common law as now recognized in this country, and if the courts must apply the law as it exists and cannot create a new liability, then the vendee of the primary vendee, i. e., the plaintiff in error, cannot maintain this present action against the orignal vendor, that is, the defendant in error.

The judgment should be affirmed.

Respectfully submitted,

GASKILL & GASKILL,

Attorneys and of Counsel for Defendant in Error.

## NEW JERSEY COURT OF ERRORS AND APPEALS.

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SARAH V. TOMLINSON,

Plaintiff and  
Plaintiff in Error,

vs.

ARMOUR & COMPANY,

Defendant and  
Defendant in Error.

ON ERROR.

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BRIEF OF CARROW AND KRAFT,

For Plaintiff in Error.

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The declaration in this case alleges that the defendant, Armour and Company, is engaged in the business of manufacturing and putting up ham in cans and vending the same for food and domestic use; that it was its duty to put up said ham from healthy and wholesome pork; that notwithstanding its duty it negligently put up diseased and unwholesome ham which was deleterious and poisonous to the human body, and that the plaintiff purchased

a can of such diseased ham from a retail dealer in New York City and after eating a portion of said ham became, by reason thereof, sick with ptomaine poisoning and permanently injured.

The defendant demurred to the declaration, and the Supreme Court (*65 Atl. Rep.*, 883) sustained the demurrer, holding that the defendant owed the plaintiff no duty which was violated when it carelessly put up diseased and poisoned ham, which, when partaken of by the plaintiff, caused her severe personal injury.

This writ of error is designed to question the correctness of the law as laid down by the Supreme Court in this case.

## I.

The plaintiff in error claims that the defendant, being held out as a manufacturer of wholesome and edible meats, packed in hermetically sealed cans for domestic use, owed a general duty to the public or a special duty to the plaintiff not to put up in said cans diseased or poisonous meat and that the company is legally liable to her for injuries sustained by a breach of that duty.

It will be observed that neither the retail dealer nor the plaintiff had an opportunity of inspection, and neither knew nor could know what was in the can, nor was any obligation of inspection imposed upon them. The can of ham was purchased upon the faith of the manufacturer's label that it was canned ham for domestic use and fit for human food. Therefore defendant assumed all the responsibility regarding the character and quality of its

food products. Under these circumstances the defendant was clearly under the duty of putting upon the market only wholesome ham. The defendant also knew that if it canned diseased ham and put it on the market great injury to human health would result therefrom.

To say, therefore, that the defendant is not responsible for such gross negligence is to exempt from liability all manufacturers of food stuffs who put up diseased or poisonous meats for domestic use, regardless of how many persons are injured or killed as a result of using the same. Reason and authority are indeed against such immunity.

In *Salmon vs. Libby, McNeill and Libby*, 219 Ill., 421 (reversing 114 Ill., App. 258), suit was brought to recover damages for the death of plaintiff's testator, caused, as it was alleged, from eating a piece of mince pie made from mince meat which was poisonous and destructive to human life, and which mince meat was prepared, put in a package and sold to the trade by the defendant, and which in due course of business passed through the hands of a wholesale dealer, a retail dealer and came into the hands of one H., in the State of Kansas, and was made by her into a pie, of which the plaintiff's testator there ate, and in consequence of which he died.

Held, "A declaration alleging that defendant was a manufacturer of mince meat, and was so negligent in its manufacture that the meat became poisonous, and that when lawfully partaking of same testator was poisoned and died \* \* \* \* states a good cause of action."

In *Thomas vs. Winchester*, 6 N. Y. (2 *Sheld.*), 397, the complainant alleged that the defendant from 1843 to 1849 was engaged in putting up and vending certain vegetable extracts at a store in the city of New York, and among the extracts so prepared and sold were those known as the extract of dandelion and the extract of belladonna, the former a mild and harmless medicine and the latter a vegetable poison; that at some time between the periods named the defendant put up and sold to J. S. Aspinwall, a druggist in New York City, a jar of the extract of belladonna which had been labelled as the extract of dandelion, which jar was bought from Aspinwall by the plaintiff and that the plaintiff took the medicine and became ill.

*Held*, "A dealer in drugs and medicines who carelessly labels a deadly poison as a harmless medicine and sends it so labelled into the market is liable to all persons who, without fault on their part, are injured by using it as such medicine.

*The liability of the dealer in such cases arises not out of any direct contract or privity between him and the person injured, but out of the duty which the law imposes upon him to avoid acts in their nature dangerous to the lives of others. He is liable therefore, though the poisonous drug with such label may have passed through many intermediate sales before it reaches the hands of the person injured."*

In *Watson vs. Augusta Brewing Co.*, 52 N. E. Rep., 152, the petition of complaint alleged that the defendant was the manufacturer of soda water which it sold to a

merchant in Thompson, and that the plaintiff, with the permission of such merchant, drank a bottle of such soda water, which contained broken glass, thereby causing the illness of the plaintiff. *Held,*

*“When a manufacturer makes, bottles and sells to the retail trade, to be again sold to the general public a beverage represented to be refreshing and harmless, he is under a legal duty to see to it that in the process of bottling no foreign substance shall be mixed with the beverage which, if taken into the human stomach, will be injurious. If, then, one who buys a patent medicine may rely upon the obligation of the manufacturer not to place therein ingredients which, if taken in the prescribed doses, would injure his health, certainly the purchaser of an alleged harmless and refreshing beverage should have the right to rest secure in the assumption that he will not be fed upon broken glass.”*

In *Bishop vs. Weber, 139 Mass., 418*, the plaintiff with others attended a musicians' ball; the defendant was a caterer and was employed to cater the ball; the declaration charged that the defendant sold the plaintiff unwholesome food and that it was improperly and negligently prepared and that the plaintiff upon partaking of said poisonous food became ill.

*Held,* “*That it was unnecessary to aver that the defendant knew of the injurious quality of the food. (Page 418.)*

*The furnishing of provision which endanger human life or health stands clearly upon the same grounds as the administering of improper medicines, from which a*

*liability springs irrespective of any question of privity of contract between the parties."*

In *Craft vs. Parker Webb Co.*, 96 Mich., 245, the plaintiff's brother bought a piece of spiced bacon from the defendant, and took it to the plaintiff's house, where it was cooked; the plaintiff ate a piece of the bacon, became ill, and charged the defendant with vending unwholesome and poisonous bacon and asked damages for the injuries sustained by him through the negligent conduct of the defendant.

Held, "*A dealer who sells food for consumption impliedly warrants that it is fit for the purpose for which it is sold, and if he sells food that is dangerous to those who eat it, he is liable for the consequences, if he knew it to be dangerous or by proper care on his part could have known its condition.*"

"One who is engaged in the general business of selling meats or other goods for consumption is bound to use due care to the end that the foods which he sells shall be fit for human consumption. There is an implied warranty in every such sale that the thing sold is fit for the purpose for which it is sold and if it is unfit for such purpose the vendor is liable in damages for the breach of the implied warranty, but where the action proceeds on the footing of negligence, the vendor of unwholesome food will be liable to any third person for whose use it was purchased."

*1 Thomp. Neg., sec. 823.*

"The proprietor of a patent medicine who puts upon the bottle containing it a prescription stating that it is to be taken in certain quantities, and sells it to a druggist for re-sale to anyone who may wish it, is liable for any injury sustained on account of its poisonous affect by one who bought it of the druggist and used it according to prescription."

*Blood Balm Co. vs. Cooper*, 5 L. R. A., 612.

While the precise question raised in this case has not been passed upon by this Court, yet this Court recognized the principle involved in the case of *Stiles vs. Long Co.*, 41 Vr., 302, when it said:

"There are cases where the existence of the contract subjects the parties to duties which are independent of the duty to perform the contract. The duties of carriers of passengers (*Marshall vs. York, Newcastle and Berwick Railway Co.*, 11 Com. B., 655); the duty of a vendor of drugs (*Thomas vs. Winchester*, 6 N. Y., 397); the duty of a vendor of a gun to a person for whom it was bought (*Landridge vs. Levy*, 2 Mees & W., 519; 4 Id., 337); the duty of a person who participates in the management of a highly dangerous agency (*Van Winkle vs. American Steam Boiler Company*, 23 Vr., 240); \* \* \* \* are all of them instances where the duty was held to be a positive duty, independent of contract, although arising out of a state of facts created by the contract. The contract creates a situation which gives rise to the duty."

## II.

The cases cited in the opinion of the learned Justice below were decided upon the doctrine of caveat emptor and are not in point.

The cases of *Cotton vs. Reed*, 25 Misc. (N. Y.), 380, and *Howard vs. Emerson*, 110 Mass., 320, related to the sale of live cows, and it was held that the doctrine of caveat emptor applied. In the latter case, however, the Court distinguished the case from one where provisions are sold directly to a consumer for domestic use and held that in

“Such cases it may be reasonable to infer that there is a tacit understanding that enters into the contract that the provisions are sound.”

*Giroux vs. Stedman*, 145 Mass., 439, was also decided upon the ground of caveat emptor, the Court stating,

“That the situation of a purchaser buying from a retail dealer for domestic use did not arise and consequently was not decided.”

*Wiederman vs. Keller*, 171 Ill., 93, was a suit by a purchaser against a retail dealer and raised,

“The question of law \* \* \* \* whether a retail dealer in meats and provisions for consumption is to be regarded as a warrantor that the goods he sells for immediate consumption are sound, wholesome and free from all defects that may injure the health of the purchaser,

or whether the vendor is relieved of responsibility where he has no knowledge of the defective character of the article sold and has used reasonable and ordinary care to guard against the selection or purchase of defective and unwholesome articles for sale to his customers?"

The Court (page 99) said "in an ordinary sale of goods the rule of caveat emptor applies. \* \* \* \* Where, however, articles of food are purchased from a retail dealer for immediate consumption the consequences resulting from the purchase of an unsound article may be so serious and may prove so disastrous to the health and life of the consumer that public safety demands that there should be an implied warranty on the part of the vendor. \* \* \* \* It may be said that the rule is a harsh one, but as a general rule in the sale of provisions the vendor has so many more facilities for ascertaining the soundness or unsoundness of the article offered for sale than are possessed by the purchaser, that it is much safer to hold the vendor liable than it would be to compel the purchaser to assume the risk."

*Julian vs. Landenberger*, 16 Misc. (N. Y.), 646, was also a suit by a purchaser against the retail dealer, and it was held that the defendant who sold the can of meat did not impliedly warrant it because it was known by the buyer that the retail dealer did not prepare it and that he was ignorant of its contents, but the Court said,

"I have discussed simply the question of implied warranty. Questions of actual fraud, deceit in sales, or where there is a sale of provisions with knowledge of the condition, are not important to discuss in this case; they proceed upon an entirely different rule."

In *Nelson vs. Armour & Co.*, 90 S. W. Rep., 288, the cause of complaint stated that the defendant put up tongue in cans for domestic use and thereby guaranteed and warranted that it was wholesome and free from impurities, &c. The Court decided that when articles of human food are sold to the consumer for immediate use there is an implied warranty that they are sound and fit for food, but the Court sustained a demurrer to the declaration upon the ground that there was no privity of contract between the plaintiff and the defendant packing company, and that the warranty did not pass with the property.

### III.

That a writ of error lies to review the judgment in this case seems settled.

“When the demurrer is joined on any pleadings in chief, as on the declaration, plea in bar, or other pleadings which go to the action, the judgment is final \* \* \* so that, on demurrer to any of the pleadings which go to the action, the judgment for either party is the same as it would have been on an issue of fact joined upon the same pleading and found in favor of the same party.”

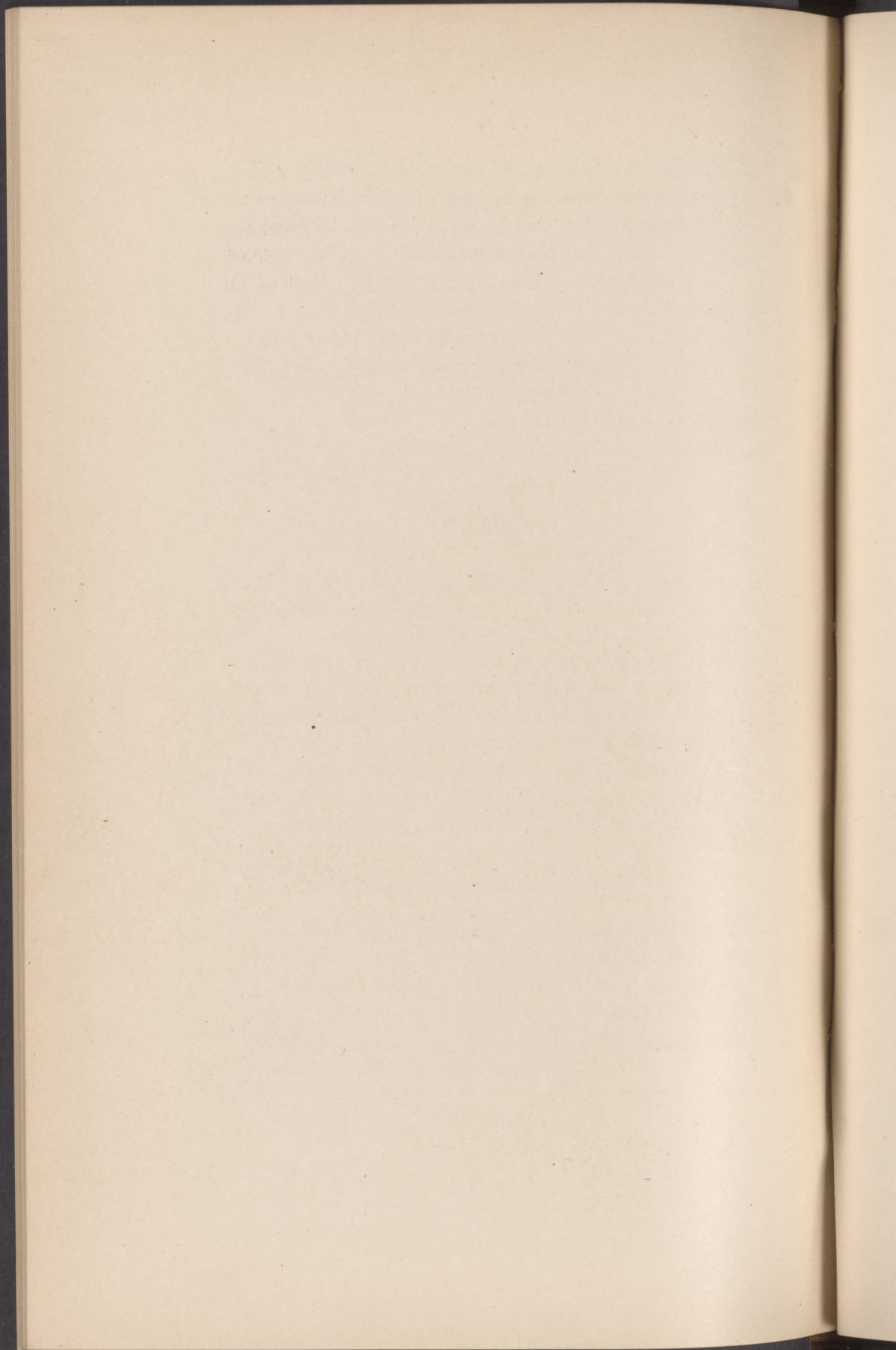
*Hale vs. Lawrence*, 2 Zab., 72 and 80.

In *American Print Works vs. Lawrence*, 1 Zab., 248, the plaintiff sued for damages occasioned to its property by the blowing up by gunpowder of certain buildings in New York. The defendant pleaded in bar of the action a statute of the State in justification of his act, to which plea the plaintiff demurred.

On error to the Court of Errors and Appeals, *1 Zab.*, 714, the Court held that the plea of justification was not a bar to the action, and that the judgment of the Supreme Court sustaining the demurrer should be reversed.

It is respectfully submitted that the judgment of the Supreme Court should be reversed.

CARROW & KRAFT,  
Attorneys of Plaintiff and Plaintiff in Error.



# NEW JERSEY COURT OF ERRORS AND APPEALS.

## WRIT OF ERROR.

NEW JERSEY, SS.

The State of New Jersey to the Chief Justice and other Justices of our Supreme Court of Judicature, Greeting: 19

Forasmuch as in the record and proceedings and also in the giving of judgment in a certain plaintiff which was in our said Supreme Court of Judicature, before you, between Sara V. Tomlinson, plaintiff, and Armour & Company, defendant, in an action of tort, manifest error hath intervened to the great damage of the said plaintiff as it is said; we being willing that the error, if any there be, should in due manner be corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you that if judgment be thereupon given and affirmed then you distinctly and openly send, under your seal, the record and proceedings aforesaid and all things touching the same to our judges of our Court of Errors and Appeals in the last resort in all causes, at Trenton, on the eighth day of May next, together with this writ, that the record and proceedings aforesaid being inspected, we may cause to be further done for correcting that error what of right and according to the law and custom of the State of New Jersey ought to be done. 20 30

Witness our Chancellor, President Judge of our said Court of Errors and Appeals, at Trenton aforesaid, the nineteenth day of April, nineteen hundred and seven.

S. D. DICKINSON,  
Clerk.

CARROW & KRAFT,  
Attorneys.

**RETURN OF WRIT OF ERROR.**

The answer of the Justices of the Supreme Court of the State of New Jersey within named. The record and proceedings whereof mention is within made, with all things touching and concerning the same, we do certify to the Court of Errors and Appeals of said State, in a certain schedule to this writ annexed, as within we are commanded.

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WILLIAM S. GUMMERE,  
C. J.

NEW JERSEY SUPREME COURT.

	SARA V. TOMLINSON,	}	IN TORT.
20	vs.	}	RULE SUSTAINING
	ARMOUR & COMPANY.	}	DEMURRER.

The Court having heard the argument of counsel upon the demurrer of the defendant to the plaintiff's declaration heretofore filed in this cause, and having duly considered the same;

It is ordered that the demurrer be sustained with costs.  
Entered February 28, 1907.

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On motion of

GASKILL AND GASKILL,  
Attorneys.

I, WILLIAM RIKER, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of a rule made by said Court in the above stated cause and entered in the minutes thereof.

In testimony whereof, I have set my hand and the seal of said Court at Trenton, this twenty-third day of April, A. D. nineteenth hundred and seven.

[SEAL.]

WILLIAM RIKER, JR.,  
Clerk.

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**SUMMONS.**

NEW JERSEY, SS.

**10**

The State of New Jersey to our Sheriff of  
[L. s.] our county of Hudson, Greeting:

We command you to summon Armour & Company (a corporation) to be and appear before the Supreme Court of the State of New Jersey, to be held at Trenton, in and for said State, on the twenty-fourth day of July, instant, to answer unto Sara V. Tomlinson of a plea in an action of tort, to her damage twenty thousand dollars, and have you then and there this writ. **20**

Witness, Honorable WILLIAM S. GUMMERE, Chief Justice, at Trenton aforesaid, the ninth day of July, A. D. one thousand nine hundred and six.

WILLIAM RIKER, JR.,  
Clerk.

CARROW & KRAFT,  
Attorneys.

**30**

## DECLARATION.

## NEW JERSEY SUPREME COURT.

Of the twenty-fourth day of July, A. D. nineteen hundred and six.

CUMBERLAND COUNTY, SS.

- 10 "Armour & Company" (a corporation), the defendant in this suit, was summoned to answer unto Sara V. Tomlinson, the plaintiff herein, of a plea in an action of tort, and thereupon the said plaintiff, by Carrow & Kraft, her attorneys, complains for that whereas the defendant, from August first, nineteen hundred and four, to April fourth, nineteen hundred and five, was engaged in the business of putting up in tin cans or vessels and vending meats or ham for food and domestic use, at Chicago, in the State of Illinois, to wit, at Bridgeton, in the county of Cumberland and State of New Jersey, and it then and there became its duty to put up and can said ham from healthy, wholesome and edible pork; that sometime between the periods above named, the defendants put up a certain can of ham for food and domestic use which was sold by the defendant to a retail dealer in canned meats and ham for food and domestic use in the city of New York and State of New York, to wit, at Bridgeton, in the county of Cumberland aforesaid, to be sold to customers and patrons; that on April 30 fourth, nineteen hundred and five, in the city of New York aforesaid, to wit, at Bridgeton aforesaid, the plaintiff, for a certain charge then and there paid to said retail dealer, purchased said certain can of ham for food and domestic use.

Nevertheless, the said defendant, not regarding its duty in that behalf, did, to wit, between August first, nine-

teen hundred and four, and April fourth, nineteen hundred and five, at New York City aforesaid, to wit, at Bridgeton aforesaid, so carelessly, negligently, recklessly and improperly put up in said certain can of ham, diseased, unfit and unwholesome pork or ham which was deleterious, dangerous and poisonous to the human body and health; that the said plaintiff, on April fourth, nineteen hundred and five, at New York City aforesaid, to wit, at Bridgeton aforesaid, after purchasing said certain can of ham, and without any fault or negligence on her part, then and there ate a piece of ham taken from said certain can of ham purchased by her as aforesaid. and immediately thereafter, and as the immediate and direct consequence thereof, became, was and still is diseased, disordered, poisoned, sick, sore and diseased with ptomaine poison, and so remains and continues for a long space of time, to wit, from thence hitherto, and has suffered and undergone great pain and agony of body and mind, and has been unable to attend to her ordinary affairs and business, and without any fault or negligence on her part, and has been obliged to lay out and expend, and has necessarily laid out and expended, divers large sums of money in and about endeavoring to be healed and cured of her said disease and disorders and injuries as aforesaid, and for providing for herself in her sick and helpless condition.

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All to her damage twenty thousand dollars, and therefore she brings her suit.

CARROW & KRAFT,  
Attorneys for Plaintiff.

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## DEMURRER.

NEW JERSEY SUPREME COURT.

10	SARA V. TOMLINSON,	}	IN TORT.
	vs.		
	ARMOUR & COMPANY.		DEMURRER.

The defendant demurs to the declaration filed by the plaintiff in this cause for the following reasons:

1. The time for the committing of the tort by the defendant is generally stated to have been between August 1st, 1904, and April 4th, 1905, which is so vague, general and indefinite that the defendant is not notified with sufficient particularity as to the time when the particular tort is alleged to have been committed, and therefore cannot prepare its defence upon this point.

2. The declaration alleges that the defendant "put up a certain kind of ham for family and domestic use," but the special trade name of the product by which the same may be particularly identified by this defendant is not given, and as this defendant, as is generally known, prepares and markets a number of preparations of hams, it is impossible to prepare a defence with reference to the preparation of the particular product referred to.

3. The declaration alleges that the said can of ham was sold by the defendant to a retail dealer from whom the plaintiff purchased the same, but the name of this dealer and his address are not given, so that this defendant is unable to identify the dealer in question or to trace any of its products to the said dealer, or to identify any of the products sold to the said dealer, nor in any

way to prepare a defence with reference to the preparation of this particular product in question.

4. That the declaration does not contain any allegations that the defendant knew or should have known that the said preparation of ham was prepared from diseased and unwholesome pork, or that the same was not wholesome and fit for food when marketed.

5. That by the manufacture and sale of the said product to the said retail dealer, as stated in the said declaration, there was no responsibility of this defendant for the quality of the said product to a purchaser from the said retail dealer. **10**

GASKILL & GASKILL,  
Attorneys for Defendant.

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STATE OF NEW JERSEY, )  
CAMDEN COUNTY, ) ss.

NELSON B. GASKILL, of full age, being duly sworn according to law, on his oath deposes and says, that he is one of the firm of Gaskill & Gaskill, attorneys for the defendant in the foregoing matter; that the defendant is a corporation located in Chicago, and inaccessible for the purpose of making affidavit to the foregoing demurrer; that this demurrer is not interposed for the purpose of delay, but that this deponent verily believes that the said defendant has a good defence upon the merits of the case. **20**

NELSON B. GASKILL. **30**

Sworn and subscribed before me this 13th day of October, A. D. 1906.

WILBERT V. PIKE,  
Attorney-at-Law of New Jersey.

## OPINION OF SUPREME COURT.

## NEW JERSEY SUPREME COURT.

SARA V. TOMLINSON,

vs.

ARMOUR &amp; COMPANY. }

**10**

Submitted December 6, 1906. Decided February 25, 1907.

1. At common law on a sale of food articles to a dealer in provisions there was no implied warranty of wholesomeness. Assuming that a different rule exists in the case of a sale by such dealer to a consumer, the latter in the absence of a statute cannot hold the original vendor to a higher degree of duty than that cast upon him by the common law with respect to his own vendee.

**20** 2. To select out of an entire class of transactions covered by a well established rule of the common law a single member for the imposition of a different rule based upon considerations of public welfare is essentially a legislative function.

3. A declaration alleged that the defendant had packed diseased ham in a can and had sold it to a retail dealer of whom it was bought by the plaintiff who from eating a piece of such ham became sick.

**30** *Held*, that these facts did not state a cause of action by the plaintiff against the original vendor.

### DEMURRER TO DECLARATION.

Before Gummere, Chief Justice, and Justices Garrison and Garretson.

For the Plaintiff—CARROW & KRAFT.

For the Defendant—GASKILL & GASKILL.

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The opinion of the Court was delivered by

GARRISON, J.

This is a demurrer to a declaration. Reduced to narrative form the essential allegations of the declaration are that Armour & Company were engaged in the business of canning and vending ham for food and that it was their duty to put up only wholesome and edible ham, but that in disregard of this duty they negligently put in a certain can of diseased ham that was deleterious to health and sold said can to a retail dealer of whom the plaintiff purchased it for food and upon eating a piece of the ham was rendered sick of ptomaine poison. 20

The pleader, it will be observed, avers, in general terms, the existence of a duty; and by means of certain adverbs characterizes the defendants' performance of that duty as negligent, &c. Nothing is added to the legal force of the declaration by such averment or by such characterization. 30 which are exclusively the conclusions drawn by the pleader from the facts stated. With the facts before us we ourselves must ascertain their legal efficacy. Such is the object of a demurrer.

The transaction described by the declaration was a sale of an unwholesome food product. The liability of the

defendant as the original vendor of such product is claimed to be due not to his own vendee, but to the plaintiff as the vendee of such vendee. It would seem to be clear therefore that if the original vendee may be thus eliminated and his place be taken by the plaintiff her rights can rise no higher than those of the vendee in whose shoes she stands. From this it follows that if the duty sought to be raised by the pleader on behalf of the plaintiff is greater than that raised by the law on behalf of the vendee the averment of such duty to the plaintiff is without legal foundation, unless, of course, such duty is imposed by some public law. Admittedly however there is no statutory basis for the plaintiff's action. The pertinent question therefore is what was the liability at common law of a vendor who sold unwholesome provisions to a dealer who bought them to sell to consumers?

At common law the general rule was that in a sale of provisions there was no implied warranty that they were wholesome. Blackstone, it is true, states directly to the contrary (*3 Bl. Com.*, 165) but he cites no authority for his assertion which when cited to the Court of Exchequer in *Emmerton vs. Matthews* was not accepted by Chief Baron Pollock as correctly stating the common law.

7 *H. & N.*, 587.

Mr. Chitty in his work on Contracts (p. 420) repeats Blackstone's statement interpolating after the word "provisions" the words "to dealers and common traders in provisions" and in a note to the 9th edition it is suggested that *Emmerton vs. Matthews* in so far as it contradicted Blackstone's statement was not the law.

Mr. Benjamin however points out that inasmuch as Blackstone himself stated that the remedy in such case was by "an action in deceit," which assumes *knowledge* of the unwholesomeness on the part of the vendor, *Emmerton vs. Matthews*, when applying the maxim *caveat*

*emptor* to the sale of articles of food did not contradict the earlier common law authorities.

*Benjamin on Sales, sec. 671.*

The repudiation of Blackstone's statement in *Emmerton vs. Matthews* is sustained by the judgment of Baron Parke in *Burnby vs. Bollett* (16 M. & W., 644) where all the old authorities were collected and cited in argument. The conclusion from these cases was that whatever might be the exception to the rule of *caveat emptor* where provisions were sold for household and immediate consumption it did not extend to sales made in the course of general and commercial transactions. 10

In the United States this rule of the common law, where not affected by legislation, prevails at least to this extent: That no warranty of soundness or wholesomeness arises from a sale of food provisions to a dealer or middleman who buys not for consumption but for sale to others.

*15 Am. & Eng. Encyclopedia, 1237, and cases cited.* 20

In the case of a sale by a retail victualer directly to a customer for immediate consumption the rule is different and various theories have been propounded to account for this difference, the most plausible of which is that suggested by Chief Justice Shaw in *Winsor vs. Lombard* (18 Pick., 57), viz., that the retail vendor of food for domestic consumption is from the nature of his calling presumed to know whether a given article is sound and wholesome. In which case *scienter* would constitute the ground of the distinction. 30

In view of the established rule of the common law touching the sale of provisions to general dealers, the declaration before us is anomalous to this extent, viz., that by force of a rule that applies only to purchases made for immediate consumption it seeks to cast upon a vendor who sold only to general dealers a liability that is not

within the common law rule touching such sales. That the plaintiff cannot maintain her action upon this theory must be apparent.

10 The form of the plaintiff's action, viz., *in tort*, would seem to indicate that the pleader had in mind the breach of some duty imposed upon the defendant from considerations of public policy. Doubtless such a duty may be imposed by statute and it may well be that the business of selling canned food presents a proper field for the exercise of such legislative activity. But when an entire class of transactions are covered by a well established rule of the common law it is no part of the judicial function to select a member of such class for the imposition of a different rule based upon considerations affecting the public welfare.

20 It has not been overlooked that the commercial business of sealing up food products by the processes of "packing" and "canning" and the vending of such products were unknown when the common law rule we have been considering was established, and also that the maxim *caveat emptor*, based as it is upon the mutuality of the opportunity of inspection by vendor and vendee, is inapplicable to the case of hermetically sealed goods. These considerations and others that might be added point strongly toward the exception of this class of food products from the rule of *caveat emptor* as we have inherited that doctrine from the common law. Considerations of public health and comfort may even imperatively require such an alteration of the established law, but the fact nevertheless remains that alterations of established law based upon such considerations are essentially legislative in character. To apply the law as it is found to be established is essentially the duty of the courts.

30 Judged by this criterion the facts stated in the present declaration trace no duty of the defendant to the plaintiff either through the medium of the private transaction of sale or as an enforceable public right. Upon this ground

therefore the demurrer to such pleading must be sustained.

The result thus reached is in substantial harmony with the cases cited from other jurisdictions in the brief of the defendant's counsel.

*Julien vs. Landenberger*, 16 Misc. (N. Y.), 646.

*Cotton vs. Reed*, 25 Misc. (N. Y.), 380.

*Howard vs. Emmerson*, 110 Mass., 320.

*Giroux vs. Stedman*, 145 Mass., 439.

*Weideman vs. Keller*, 171 Ill., 98.

*Nelson vs. Armour*, 90 W. Rep., 288.

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The cited cases holding to the contrary were almost without exception properly decided upon their facts (whatever may be thought of their reasoning) being for the most part either cases of *scienter* and deceit or of dealings in poisons and the like or else cases that fall within the exception we have noted respecting caterers and victualers of that sort.

The ground upon which the demurrer is sustained was properly raised in the record. The other grounds assigned and argued concern matters available only on special demurrer and for that reason can be taken advantage of only upon a motion to strike out.

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*Race vs. Easton & Amboy R. R.*, 33 Vroom, p. 536.

*Minnuci vs. Phila. & Reading R. R.*, 39 Vroom, p. 432.

Judgment in demurrer is for the defendant, with costs.

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NEW JERSEY COURT OF ERRORS AND AP-  
PEALS.

10	SARA V. TOLIMNSON, Plaintiff and Plaintiff in Error, vs. ARMOUR & COMPANY, Defendant and Defendant in Error.	}	IN TORT. ASSIGNMENTS OF ERROR.
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And now at this day the plaintiff in error, by Carrow & Kraft, her attorneys, says that in the record and proceedings aforesaid, and also in the giving of judgment aforesaid, there is manifest error, to wit:

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First. Because the Supreme Court decided that the declaration did not set forth a cause of action.

Second. Because the Supreme Court decided that under the facts set forth in the declaration there was no liability upon the part of the defendant.

Third. Because the Supreme Court decided that judgment be given in demurrer for the defendant.

Fourth. Because it was ordered that the demurrer be sustained with costs.

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Fifth. Because the Supreme Court decided that judgment on demurrer should be given for the defendant, whereas judgment should have been given for the plaintiff.

CARROW & KRAFT,  
Attorneys for Plaintiff in Error.

NEW JERSEY COURT OF ERRORS AND AP-  
PEALS.

SARA V. TOMLINSON,

Plaintiff in Error,

vs.

ARMOUR & COMPANY,

Defendant in Error.

ON ERROR.

JOINDER IN

ERROR.

**10**

And hereupon afterwards, to wit, on the tenth day of June, A. D. one thousand nine hundred and seven, the said Armour & Company, by Gaskill & Gaskill, their attorneys, come into court and say that there is no error either in the record and proceeding aforesaid, or in giving the judgment aforesaid, and he prays here that the Court here may proceed to examine as well the record and proceedings aforesaid, as the matters aforesaid assigned for error, and that the judgment aforesaid, in manner aforesaid given, may in all things be affirmed, etc.

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GASKILL & GASKILL,  
Attorneys for and of Counsel with  
Defendant in Error.

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