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Article 21

Sales--Foreign Matter in Food--Section 200 of the Agriculture and Markets Law (Alphin v. La Salle Diners, Inc. et al., 197 Misc. 415 (N.Y. City Court 1950))

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consumer sale contracts more appealing, finance companies, in those states which impute knowledge to the company, have incorporated within their sales blanks "waiver clauses" which will bar the buyer from setting up defenses against the company. These clauses have been held valid.[14]

This obvious clash of interests apparently has not been resolved in the New Commercial Code,[15] for under this Code the ruling law of the individual state will be the norm in any specific action. Fear of limiting negotiability, fear of setting up definite statutory standards which will destroy the desired flexibility, and fear of unwieldy delimiting phraseology have been advanced as reasons for the refusal to uniformize this controversial subject.[16]

It would seem that present financial practices, where seller and financier work "hand in glove," in itself should prevent the specific assignee from being a holder in due course, but even further restraint is needed in the way of stronger safeguards to rectify the conditions and practices which lead to these advantages. The right of finance companies to take an unfair advantage of the Negotiable Instruments Law is to carry the rule to an absurdity. This was certainly not the law under the rules of the Law Merchant and should be quickly remedied.

SALES — FOREIGN MATTER IN FOOD — SECTION 200 OF THE AGRICULTURE AND MARKETS LAW.—The plaintiff was injured by a piece of wire imbedded in the pie purchased in a restaurant. In an action against the baker for negligence the plaintiff showed that the wire was in the pie when it was delivered by the baker. *Held,* judgment for the plaintiff. Although the plaintiff did not plead any statute, the court held that these facts constituted a breach of Section 200 of the Agriculture and Markets Law.[1] *Alphin v. La Salle Diners, Inc.* et al., 197 Misc. 415 (N. Y. City Court 1950).

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[14] National City Bank v. Prospect Syndicate, 170 Misc. 611, 10 N. Y. S. 2d 759 (N. Y. Munic. Ct. 1939).

[15] AMERICAN LAW INSTITUTE AND NAT'L CONF. OF COM'RS ON UNIFORM STATE LAWS, THE CODE OF COMMERCIAL LAW Art. III (proposed final draft, 1950).

[16] For an interesting discussion on the consumer conditional sale contract problem and The Commercial Code, see Note, 57 YALE L. J. 1414 (1948).

[1] "Food shall be deemed to be adulterated, 1. If it bears or contains any poisonous or deleterious substance which may render it injurious to health, 2. If it bears or contains any added poisonous or deleterious substance which is unsafe within the meaning of Section 202. . . ." N. Y. Agriculture and Markets Law § 202 provides that any poisonous or deleterious substance added to food may be deemed unsafe within the meaning of Section 200 except where it is required by the needs of good manufacturing process.

In another action decided about the same time for damages resulting from the presence of a screw in a loaf of bread the plaintiff contended that if the screw was in the bread when it left the defendant's factory, the defendant was guilty of negligence as a matter of law. *Held,* judgment for defendant. Section 200 did not apply and plaintiff failed to prove negligence on the part of the defendant. *Piazza v. Fischer Baking Co.,* 197 Misc. 418 (N. Y. City Court 1950).

It is unlawful in New York to sell any article of food that is adulterated.[2] Section 200 provides a statutory definition of adulteration. The provisions of the statute are intended to safeguard the public by establishing certain standards for the *inherent* quality of food which is marketed to the public.[3] These provisions are enforceable penally [4] and civilly, a breach being deemed negligence per se.[5]

Whether the negligent or accidental presence of foreign matter in food is such an impairment of food quality as is contemplated by Section 200 has not been specifically decided by a New York court of review. But decisions under similar protective statutes may well serve as analogous precedents. In *Pine Grove Poultry Farm, Inc. v. Newton* it was decided that the presence of iron filings in a poultry feed which caused the death of many of the plaintiff's ducks was a breach of the statute and therefore negligence per se.[6] By reason of the defendant's manufacturing process the filings were so ground into the feed as to become an indistinguishable part of it. In *Bourcheix v. Willow Brook Dairy, Inc.* the presence of ground glass in the cream of a bottle of milk was held not to be a violation of the statute.[7] Here the glass retained its separate identity and in no way became a component ingredient of the cream. Thus, the test of the application of the food statutes with respect to foreign matter is whether it has become a substantive part of the food so as to lower the *inherent* quality of that food.

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[2] N. Y. AGRICULTURE AND MARKETS LAW § 199-a.

[3] Blume v. Trunz Pork Stores, 269 App. Div. 1059, 59 N. Y. S. 2d 217 (2d Dep't 1945); Catalanello v. Cudahy Packing Co., 264 App. Div. 723, 34 N. Y. S. 2d 37 (2d Dep't 1942); Dressler v. Merkel, Inc., 247 App. Div. 300, 284 N. Y. Supp. 697 (2d Dep't 1936); People v. Lefkoff, 147 Misc. 70, 263 N. Y. Supp. 297 (N. Y. Munic. Ct. 1933).

[4] People v. Lefkoff, *supra* note 3.

[5] Catalanello v. Cudahy Packing Co., 264 App. Div. 723, 34 N. Y. S. 2d 37 (2d Dep't 1942).

[6] 248 N. Y. 293, 162 N. E. 84 (1928).

[7] 268 N. Y. 1, 196 N. E. 617 (1935). The court, construing former Section 199, subdivision 5 [now Section 200, subdivision 1] together with Section 46 (which defined cream as a portion of milk to which no substance whatever had been added) of the N. Y. Agriculture and Markets Law, said: "These provisions do not appear to be aimed at foreign substances such as stones or tacks or broken glass which do not become part of the substance which 'masquerades as cream' but were intended to preserve the quality of the liquid and establish its standard." *Id.* at 6, 196 N. E. at 618.

Where deleterious foreign matter does not constitute a component part of the food product a plaintiff cannot rely on a breach of the statute but may proceed on the theory of common law negligence.[8] Proof that the deleterious matter was in the food at the time of its delivery to the injured consumer and that the food was undisturbed in the same container in which it left the processor constitutes a prima facie case of negligence.[9] Also, where the food has been distributed to the consumer from a bulk package by an intermediary party, proof that such intermediary was not negligent constitutes a prima facie case against the producer.[10] In either case such proof if not rebutted would warrant the finder of facts in inferring negligence.[11]

It is submitted, therefore, that the drawing of such inference might be a real basis for the decision in the *Alphin* case, particularly since it was shown that the wire was completely concealed from the restaurant. The court in basing its decision on a breach of Section 200 ran counter to the grain of decisional law on the subject. The *Piazza* case is in accord with the precedent cases as to the application of the statute. Further, as the plaintiff failed to prove negligence and as there was no basis for inferring it, the judgment was rightly given to the defendant.

TORTS—ASSUMPTION OF RISK.—Plaintiff purchased a ticket for an unreserved seat in the defendant's baseball park. Upon entering the stadium, plaintiff seated herself in the screened portion of the stands. Told to move because all those seats were reserved, she inquired of the usher whether the unscreened section was safe. Reassured, she complied. Struck by a foul ball, plaintiff brought an action to recover for injuries sustained. The complaint was dismissed as a matter of law. *Held,* judgment affirmed. After providing screened sections, there remains the hazard that balls fouled into the unscreened portions may cause injury to patrons. Such danger is inherent in the game and obvious to all. Plaintiff's lack of knowledge could not alter this fact, nor is this hazard that type of an unreasonable risk to patrons which imposes upon the operator a duty to warn. *Anderson v. Kansas City Baseball Club,* 231 S. W. 2d 170 (Mo. 1950).

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[8] Bertha Chysky v. Drake Brothers Co., 235 N. Y. 468, 139 N. E. 576 (1923).

[9] Miller v. National Bread Co., 247 App. Div. 88, 286 N. Y. Supp. 908 (4th Dep't 1936); Cohen v. Dugan Brothers, Inc. *et al.,* 132 Misc. 896, 230 N. Y. Supp. 743 (Sup. Ct. 1928).

[10] Steinberg *et al.* v. Bloom *et al.,* 5 N. Y. S. 2d 774 (Sup. Ct. 1938); Ritchie v. Sheffield Farms Co., 129 Misc. 765, 222 N. Y. Supp. 724 (N. Y. Munic. Ct. 1927).

[11] See note 9 *supra.*