

## **Negligence--Food--Foreign Substance--Agriculture and Markets Law (Aime Bourcheix v. Willow Brook Dairy, Inc., 268 N.Y. 1 (1935))**

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going on. If constructive notice is sufficient it places on electric light companies an unreasonable burden which requires a constant lookout over all vacant property or building operations which is too strict a rule to apply.<sup>7</sup> But apparently the burden has been placed on electric light companies operating under conditions similar to the defendant.

G. H. M.

NEGLIGENCE—FOOD—FOREIGN SUBSTANCE—AGRICULTURE AND MARKETS LAW.—A servant living with his master was injured by swallowing broken pieces of glass about the size of beans, apparently contained in an unchipped bottle of cream delivered to the master's house. There was evidence to show that glass was in the bottle after some of the cream had been used and that the cereal did not contain any broken glass. The dairy introduced evidence respecting the customary safety tests surrounding the bottling of the cream.

The court charged the jury that there was an implied warranty that the cream contained no deleterious substance harmful to the person *who used it*. Upon appeal, after verdict for plaintiff, the Appellate Division recognizing that such an implied warranty applies only to the benefit of the purchaser,<sup>1</sup> affirmed the verdict because it felt that the error did not affect the result since there was negligence present as a matter of law, being inferred on the theory that Section 50 of the Agriculture and Markets Law applies to the facts here.

Upon appeal to the Court of Appeals, *held*, that the Agriculture

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<sup>7</sup> Carlock v. Westchester Lighting Co., 268 N. Y. 345, dissenting opinion of Crane, C. J.

<sup>1</sup> Giminez v. The Great Atlantic & Pacific Tea Co., 264 N. Y. 390, 191 N. E. 27 (1934).

There are many jurisdictions which hold that an implied warranty follows through the dealer to the purchaser or ultimate consumer, Dothan Chero-Cola Bottling Co. v. Weeks, 16 Ala. App. 639, 80 So. 734 (1918); Watson v. Augusta Brewing Co., 124 Ga. 121, 52 S. E. 152 (1905); Parks v. C. C. Yost Pie Co., 93 Kan. 334, 144 Pac. 202 (1914); Ward v. Morehead City Sea Food Co., 171 N. C. 33, 87 S. E. 958 (1916); Catani v. Swift Co., 251 Pa. 52, 95 Atl. 931 (1915); Madden v. The Great Atlantic & Pacific Tea Co., 106 Pa. Super. Ct. 474, 162 Atl. 687 (1932); Mazeth v. Armour & Co., 75 Wash. 662, 135 Pac. 633 (1913).

Cases holding no warranty except to original purchaser: Birmingham Chero-Cola Bottling Co. v. Clark, 205 Ala. 678, 89 So. 64 (1921); Flacconio v. Eysink, 129 Md. 367, 100 Atl. 510 (1917); Pelletier v. Dupont, 124 Me. 269, 128 Atl. 186 (1925); McCaffrey v. Mossberg and Branville Mfg. Co., 23 R. I. 381, 50 Atl. 651 (1901); Crigger v. Coca Cola Bottling Co., 132 Tenn. 545, 179 S. W. 155 (1915).

and Markets Law<sup>2</sup> did not apply to the facts under consideration since the provisions of the law were not intended to be aimed at foreign substances such as stones, tacks or broken glass which do not "masquerade as cream" but were designed to preserve the quality of the liquid and to establish its standard, that where the issue had been sent to the jury on the wrong theory (implied warranty rather than common law negligence) the verdict should be reversed, no matter how strong the evidence was either for or against the plaintiff. *Aime Bourcheix v. Willow Brook Dairy, Inc.*, 268 N. Y. 1, 196 N. E. 617 (1935).

In holding that the Agriculture and Markets Law was inapplicable the court strictly construed the statute since it is penal in nature<sup>3</sup> and derogatory of the common law. Apparently if the glass had been "ground glass"<sup>4</sup> and as such a part of the cream, the decision would have followed the case of *Pine Grove Poultry Farms Inc. v. Newtown By-Products Co.*,<sup>5</sup> which held that wire ground up in chicken feed became a part of the feed and accordingly the Agriculture and Markets Law was applicable. These two cases indicate when the foreign substance is not of such a nature that it becomes part of the food product, the person seeking damages must rely on common law negligence or implied warranty and not on the Agriculture and Markets Law. Proof of foreign substance in a food package not tampered with makes out a *prima facie* case of manufacturer's negligence, which if not overborne by manufacturer's evidence, is sufficient to sustain a verdict for the injured consumer.<sup>6</sup> If all the possibilities that the foreign substance might have entered the container after opening were excluded it seems that *res ipsa loquitur* would apply.<sup>7</sup> Such circumstances border on negligence in law although it has been held that even where a statute prohibited the sale of adulterated food, it was not intended to impose on the

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<sup>2</sup> Section 50 of the Agriculture and Markets Law reads: "No person shall sell or exchange or offer or expose for sale or exchange, any unclean, impure, unhealthy, adulterated or unwholesome milk or any cream from the same, or any unclean, impure, unhealthy, adulterated, colored, or unwholesome cream, or sell or exchange, or offer or expose for sale or exchange, any substance in imitation or semblance of cream, which is not cream, nor shall he sell or exchange, or offer or expose for sale or exchange any such substance as and for cream \* \* \*"

<sup>3</sup> *People v. Wright*, 19 Misc. 135, 43 N. Y. Supp. 290 (1897); *People v. McDermitt Bunger*, 38 Misc. 365, 77 N. Y. Supp. 888 (1902).

<sup>4</sup> *Crane, C. J.*, in the dissenting opinion held that the Agriculture and Markets Law was applicable. This opinion, however, stated the glass to be "ground glass". The majority opinion indicated that the glass was not ground but in larger sizes, from which it might be assumed that their decision might have been different had the glass been ground. Apparently the evidence was somewhat conflicting as evidenced by the two different opinions.

<sup>5</sup> 248 N. Y. 293, 162 N. E. 84 (1928).

<sup>6</sup> *Norfolk Coca Cola Bottling Works v. Krausse*, 162 Va. 107, 173 S. E. 497 (1934); *Campbell Soup Co. v. Davis* (Va.) 175 S. E. 743 (1934).

<sup>7</sup> *Rost v. Kee & C. Dairy Co.*, 216 Ill. App. 497, 47 A. L. R. 148 (1920).

producer absolute civil responsibility of insurer where every reasonable means designed to guarantee the safety of the food for normal use had been employed.<sup>8</sup>

G. F. J.

NEGOTIABLE INSTRUMENTS LAW—BONA FIDE PURCHASER—NEGLIGENCE.—Negotiable bonds, stolen from the petitioner, were eventually purchased by the respondent, a dealer, who claims title as a holder in due course, having paid value before it noticed that the bonds were stolen property. The petitioner shows that at some time prior to the purchase, the respondent had received a memorandum describing the stolen bonds, and had been negligent in failing to make proper provisions for noting the contents of this notice of the theft. It is claimed that had the respondent used due diligence with regard to this notice, it would have known, before it paid value, that the bonds were stolen property, and would thus have been placed upon notice. Prior to this case the Illinois Supreme Court<sup>1</sup> had denied an application for certiorari to review a decision of the Illinois Appellate Court, which had held that receipt of notice of theft was conclusive evidence of bad faith.<sup>2</sup> The petitioner urges that since federal courts must accept a definite construction of a state's Negotiable Instruments Law by that state's highest court,<sup>3</sup> this court is bound by the decision in *Northwestern National Bank v. Madison & Kedzie State Bank*,<sup>4</sup> to declare that the respondent is not a *bona fide* holder in due course. On appeal, *held*, affirmed for the respondent. One may purchase stolen negotiable bonds and acquire valid title as a holder in due course, although before the purchase, notice of the theft had come to him—provided he acts in good faith and does not wilfully avoid knowledge of its contents. *Graham v. White-Phillips Co., Inc.*, 296 U. S. 27, 56 Sup. Ct. 21 (1935).<sup>5</sup>

In construing the Negotiable Instruments Law, only the decisions of the highest courts of the states are binding upon federal

<sup>8</sup> *Cheli v. Cudahy Brothers Co.*, 267 Mich. 690, 255 N. W. 414 (1934).

<sup>1</sup> The highest court of the state of Illinois.

<sup>2</sup> *Northwestern Nat. Bank v. Madison & Kedzie State Bank*, 242 Ill. App. 22.

<sup>3</sup> *Burns Mortgage Co. v. Fried*, 292 U. S. 487, 54 Sup. Ct. 813 (1934); *Farmers' Nat. Bank v. Sutton Mfg. Co.*, 22 Fed. 191 (C. C. A. 6th, 1892); *Koblyn v. Hoffman*, 229 Fed. 486 (C. C. A. 8th, 1916); *United Divers Supply Co. v. Commercial Credit Co.*, 289 Fed. 316 (C. C. A. 5th, 1923); *Gutelius v. Stanbon*, 39 F. (2d) 621 (D. C. Mass. 1930).

<sup>4</sup> *Supra* note 2.

<sup>5</sup> *Affirming White-Phillips Co., Inc. v. Graham*, 74 F. (2d) 417 (C. C. A. 7th, 1934).