

sale of food articles between a dealer in provisions and a retailer there was no implied warranty of wholesomeness. Assuming that a different rule exists in a case of the sale by such a dealer to a consumer, the latter, in the absence of statute cannot hold the original vendee to a higher decree of duty than that cast upon him by the common law, with respect to his own vendee. And further that to select out of the entire class of transactions covered by a well established rule of the common law a single mode for the imposition of a different rule, based upon considerations of public welfare, is essentially a legislative function and that therefore the facts set forth in the declaration that the defendant had packed diseased ham in a can and had sold it to a retail dealer, of whom it was bought by plaintiff, who from eating a piece of such ham became sick, that these facts do not constitute a cause of action. Whether or not, as has been before stated, this rule of the court below was a correct statement of the law, the higher court does not pass upon.

"While the English authorities would seem to support the doctrine that there is no implied warranty in such a case, yet that great old master of common law, Blackstone, vol. 3, p. 165, laid down the doctrine that in contracts for provisions it was always implied that they are wholesome, and that if they are not wholesome, an action on a case for deceit lies against the vendor. He cites no authority for this proposition and it may be safely assumed that it probably appeared to him to be a doctrine founded upon sound common sense, and public policy, so manifestly just that citations were not required. That there is no implied warranty, it is said in the American & English Encyclopedia of Law, second edition, page 1237, is the rule adopted in the United States, at least to this extent that there is no implied warranty of soundness or wholesomeness arising from sale of food provisions to a dealer or middleman, who buys on the market not for consumption, but for sale to others. As illustrations of this doctrine a case is given where a live cow is sold by a farmer to a retail butcher, there being no implied warranty that she is fit for food, although the seller knows that the animal is bought to be