federal act would be thereby defeated. See *Wabash Western Ry. Co. v. Brow*, 164 U.S. 271 (1896).

If, however, there has been a demurrer, plea or motion in the state court which would amount to a general or special appearance and in addition a petition for removal, it follows that on remand, the state court should have the same jurisdiction of the defendant as if there had been no petition for removal. *Cf. State v. Love*, 110 Fla. 91, 148 So. 208 (1933).

Sales—Implied Warranty of Fitness for Consumption by Restaurant Keeper—[Federal].—Plaintiff, injured by a particle of glass in an ice cream soda served at defendant's soda fountain, sued defendant for breach of an implied warranty of fitness for consumption. *Held*, plaintiff may not recover for breach of warranty, the transaction constituting, not a sale of food, but merely a furnishing of service and a license to consume as much food as is desired. *F. W. Woolworth Co. v. Wilson*, 74 F. (2d) 439 (C.C.A. 5th 1934).

At common law, and to a large extent under the Uniform Sales Act, where there is a sale of food by a retail dealer for immediate consumption, there is an implied warranty that the food is wholesome. 1 Williston, Sales (2d ed. 1924), §§ 241, 242*b*. Courts which hold there is a warranty even though food is served for consumption on the premises consider the transaction to be a sale. *Barringer v. Ocean S.S. Co. of Savannah*, 240 Mass. 405, 134 N.E. 265 (1922); *Temple v. Keeler*, 238 N.Y. 344, 144 N.E. 635 (1924); *Clark Restaurant Co. v. Simmons*, 29 Oh. App. 220, 163 N.E. 210 (1927). Other courts hold the rule of sales to be inapplicable and regard the transaction as merely a furnishing of service and a license to the patron to consume as much as he desires and leave the residue. *Merrill v. Hodson*, 88 Conn. 314, 91 Atl. 533 (1914); *Nisky v. Childs Co.*, 103 N.J.L. 464, 135 Atl. 805 (1927). The license theory seems to be based on the statement found in two old English cases that an innkeeper does not sell his provisions but utters them. *Crisp v. Pratt*, Cro. Car. 549 (1639); *Parker v. Flint*, 12 Mod. 254 (1698). This theory has not only been held inapplicable to the modern restaurant or cafeteria, where the customer pays not for the meal but for a definite portion of food; *Barrington v. Hotel Astor*, 184 App. Div. 317, 171 N.Y.S. 840 (1918); 1 Williston, Sales (2d ed. 1924), § 242b; 12 Corn. L. Q. 535 (1927); but has also been criticized as unsound.

The meal served is part of the consideration for the price paid, and the customer is entitled to the full consideration. To say that although the customer may eat all the food, he may not carry away that which is uneaten seems to be rather arbitrary. It can hardly be said that the parties intended a transaction which would make the customer guilty of a tort or a crime if he removed the uneaten food. See 1 Univ. Cinn. L. Rev. 369 (1927). But in any event even though the transaction is not considered a sale, it is still possible that there be an implied warranty of fitness. The basis of an implied warranty is justifiable reliance on the skill and judgment of the warrantor rather than a technical sale. 7 Cal. L. Rev. 360 (1919); 81 Univ. Pa. L. Rev. 483 (1933); 1 Williston, Sales (2d ed. 1924), § 242b; see *Barringer v. Ocean S.S. Co. of Savannah*, 240 Mass. 405, 134 N.E. 265 (1922). The suggestion has been made that the imposition of absolute liability is as justified here as in cases of extra-hazardous conduct. 81 Univ. Pa. L. Rev. 483 (1933); 25 Yale L. J. 679 (1916).

It is contended that to imply a warranty, thus placing liability on the restaurant owner without negligence, is not only harsh, and productive of groundless claims, but

is also an ineffective method of public protection compared to pure food laws and rigorous inspection of sources of food supply. *Valeri v. Pullman Co.*, 218 Fed. 519 (S.D. N.Y. 1914); *Kenney v. Wong Len*, 81 N.H. 427, 128 Atl. 343 (1925); 12 Corn L. Q. 535 (1927); 22 Ky. L. J. 452 (1930); 13 Minn. L. Rev. 265 (1929). These considerations hardly seem persuasive in view of the necessity of guarding public health and safety, and the tendency to place absolute liability on purveyors of food in general. *Friend v. Childs Dining Hall Co.*, 231 Mass. 65, 120 N.E. 407 (1918); *Kroger Grovery & Baking Co. v. Schneider*, 294 Ky. 261, 60 S.W. (2d) 594 (1933); 9 N.Y. Univ. L. Q. 360 (1932); 11 *id.* 300 (1932). It would seem that a restaurant keeper has at least as great an opportunity to discover and provide against deleterious foods as the retail seller of food, against whom a warranty is implied. *Smith v. Carlos*, 215 Mo. App. 488, 247 S.W. 468 (1923); 1 Williston, Sales (2d ed. 1924), § 242b; 75 Univ. Pa. L. Rev. 676 (1927). Negligence is often difficult to prove because the defect in the food was latent; nor does the doctrine of *res ipsa loquitur* afford full protection, the restaurant keeper very often being able to disprove negligence by showing a clean kitchen and care in the selection and preparation of food. See for applications of *res ipsa loquitur: Corin v. S. S. Kresge Co.*, 110 N.J.L. 378, 166 Atl. 291 (1933); *Clark Restaurant Co. v. Ran*, 41 Oh. App. 23, 179 N.E. 196 (1931). Whether or not the restaurant owner is negligent, it does not seem too harsh to impose liability on him as one of the risks incident to a business closely related to the public health and safety.

Torts—Liability to Parent for Nervous Shock Induced by Fear for Safety of Child—[Wisconsin].—Deceased, from the window of her home, saw defendant negligently run over and kill her small child. The shock and emotional disturbance which ensued caused her death. In a suit by deceased's administrator to recover for her death, it was *held*, that plaintiff may not recover, for defendant was under no duty to act so as not to subject the parent of the child to the risk of shock from seeing the child imperiled. *Waube v. Warrington*, 258 N.W. 497 (Wis. 1935).

Nervous shock involving physical consequences is today generally actionable whether the result of intentional or negligent conduct. *Rogers v. Williard*, 144 Ark. 587, 223 S.W. 15 (1920); *Great A. & P. Tea Co. v. Roch*, 160 Md. 189, 153 Atl. 22 (1931); *Wilkinson v. Downton*, [1897] 2 Q. B. 57; *Hambrook v. Stokes Bros.*, [1925] 1 K. B. 141; *contra, Alexander v. Pacholek*, 222 Mich. 157, 192 N.W. 652 (1923). But recovery is not so generally granted where the shock was induced by apprehension for the safety of another whom defendant had endangered. Liability does exist where the person imperiled was a member of plaintiff's immediate family and the imperiling conduct was intentional. *Jeppsen v. Jensen*, 47 Utah 536, 155 Pac. 429 (1916); *Lambert v. Brewster*, 97 W.Va. 124, 125 S.E. 244 (1924); *contra, Bucknam v. Great Northern R.R. Co.*, 76 Minn. 373, 79 N.W. 98 (1899). In the absence of intentional imperiling conduct, there is reluctance to impose liability. Thus, to establish a cause of action where the imperiling conduct was negligent, it has been held insufficient to show merely that the person endangered was of plaintiff's family. *Southern Ry. Co. v. Jackson*, 146 Ga. 243, 91 S.E. 28 (1916); *Cleveland, Cincinnati, Chicago & St. Louis Ry. v. Stewart*, 24 Ind. App. 374 (1900); *Nuckles v. Tenn. Elec. Power Co.*, 155 Tenn. 611, 299 S.W. 775 (1927). It must be shown, in addition, that plaintiff, too, was in peril of physical injury. *Spearman v. McCrary*, 4 Ala. App. 473, 58 So. 927 (1912); *Bowman v. Williams*, 164 Md. 397, 165 Atl. 182 (1933).