

in order to determine whether a given shipment could leave the place of manufacture.<sup>21</sup> The shipment of an article would necessitate an inquiry as to whether any of its component parts were the products of child labor. Similar practical difficulties would be encountered in the labeling of goods produced with child labor.

In view of these rather apparent defects, the alternative legislation would appear to be a poor substitute for the proposed Amendment. As an improvement on present conditions, it deserves support. The Child Labor Amendment, however, would concentrate control, simplify procedure, and unify requirements so as to escape the above objections to the alternative legislation. It is submitted that a comparison between the two suggested solutions discloses the alternative legislation to be an unnecessarily intricate and comparatively ineffective method of settling the problem of child labor.

FRED L. KUHLMANN.

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## EFFECT OF ADVERTISING ON THE MANUFACTURER'S LIABILITY

"Look for the big red letters on the package." Advertisements by radio, newspaper, circulars, and labels today comprise the method of inducing the public to purchase commodities by brands and trade names. Advertising has had a tremendous growth since 1900. Thirty-seven years ago a full page advertisement aroused fears for the solvency of a company.<sup>1</sup> Today millions of dollars are spent on advertising. The economic results have been the extension of modern research and mass production. The legal problem is whether the manufacturer has been made to bear responsibility in proportion to the benefits reaped by his advertising.

Under present day conditions the consumer is dependent upon remote producers.<sup>2</sup> Business has become more and more complex under modern marketing conditions, until, it would seem today,

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21. Mr. Corwin suggests that this type of cooperative action will make it possible for the federal government to use state officials in the enforcement of its law. This would eliminate the duplication of effort on the part of federal and state officials.

Ibid. l. c. 604, 610, 612 f. n. 52.

The practicability of such a proposal is, however, questionable. Certain states are definitely opposed to the proposed restrictions on child labor. Efficient enforcement of the law by the officials of such a state could not be expected.

1. Wm. T. Nardin, *St. Louis Globe-Democrat*, Jan. 19, 1937, p. 1B:4.

2. Vold, *Sales* (1931) 476.

that social justice demands a relaxation of the old rule of *caveat emptor*.<sup>3</sup> The dealers of goods are tending to become mere conduits for the passage of goods from the manufacturer to the ultimate consumer. Personal contacts between the manufacturer and the consumer have largely disappeared. Yet the courts are reluctant to increase the liability of the manufacturer. They are not strict disciples of Montesquieu's theory that law should vary with time and geography.<sup>4</sup>

The purpose of this note is to examine the various theories advanced by the courts and legal writers in regard to the liability of the manufacturer to persons with whom he has no privity of contract. It is convenient to divide the manufacturer's liability into tort liability and warranty liability. Special attention will be paid in this note to the importance given to modern advertising by the courts under these various theories of tort and warranty liability.

## I. MANUFACTURER'S TORT LIABILITY

### A. Exceptions to *Winterbottom v. Wright*

The manufacturer's liability today is based chiefly upon the principles of tort.<sup>5</sup> The general rule as laid down by *Winterbottom v. Wright*<sup>6</sup> is that there can be no liability placed upon upon the manufacturer in favor of a party to whom the manufacturer bears no contractual relation. The basis of the rule was the fear of courts to extend liability of the manufacturer indefinitely.<sup>7</sup> The balancing of the interests of the ultimate consumer against the dangers involved in the extension of liability and the possibility of spurious claims, was one of the first difficulties which the courts had to meet.

The first exception to the rule of *Winterbottom v. Wright* was laid down by the case of *Thomas v. Winchester*,<sup>8</sup> in which it was held that if a manufacturer places upon the market an imminently dangerous drug, intended to protect or preserve human

3. Note, 11 N. Y. L. Rev. 615 (1933).

4. Comment, 17 Mich. L. Rev. 261 (1918).

5. For a good discussion of tort liability of the manufacturer in general see 17 A. L. R. 709; 39 A. L. R. 1000; 63 A. L. R. 340; 88 A. L. R. 527; Bohlen, Liability of the Manufacturer to Persons Other than His Immediate Vendee (1929) 45 L. Q. 343.

6. *Winterbottom v. Wright*, 10 Mees & W. 109, 152 Eng. Rep. 402 (1842).

7. *Davidson v. Nichols*, 11 Allen 514 (Mass., 1866), the rule of liability *ex contractu* or *ex delicto* can be maintained only by a party to the contract or there would be no limit to the liability which might be incurred.

8. *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455 (1852); food is under this, see *Boyd v. Coca Cola Bottling Works*, 132 Tenn. 23, 177 S. W. 80 (1915); See for collection of cases, *supra*, note 5.

life, then he is liable for injuries to a consumer produced by his negligence, without regard to privity of contract. The case involved a carelessly labelled drug and the defendant was held liable despite the absence of privity of contract with the purchaser, because the law imposed upon him a duty to avoid acts dangerous to others. Another exception to the general rule was announced in the case of *Huset v. J. I. Case Threshing Machine Co.*<sup>9</sup> The court said that when one sells a defective article knowing of its defective condition, and the article is imminently dangerous to life, health or property, the manufacturer is liable without privity of contract. A third exception is that developed in *Mac Pherson v. Buick Motor Car Co.*,<sup>10</sup> in which the court refers to articles which are "inherently dangerous."

These three exceptions have led to much confusion in the court decisions and to many ridiculous consequences. Some of the courts became confused as to what to consider imminently dangerous. One line of decisions holds that the article must be imminently dangerous in and of itself.<sup>11</sup> Others say that it is sufficient if the article is imminently dangerous because of negligent manufacture.<sup>12</sup>

Sanborn, J., in the *Huset* case classified articles such as food, drink, explosives and firearms as imminently dangerous.<sup>13</sup> Here the courts have become involved in a matter of interpretation and construction. They have differed as to whether chewing tobacco is a food, and thus whether the manufacturer was liable for teeth broken by foreign substances in the tobacco.<sup>14</sup>

The tendency of the courts is to extend the exception of the *Huset* case to cases in which the manufacturer had not knowingly sold a defective article but was merely negligent in failing

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9. *Huset v. J. I. Case Threshing Machine Co.*, 120 Fed. 865 (C. C. A. 8, 1903); *Kolash v. Los Angeles Ladder Co.*, 88 Col. Dec. 62, 34 P. (2d) 481 (1934) (defective rung in ladder).

10. *MacPherson v. Buick Motor Car Co.*, 217 N. Y. 382, 111 N. E. 1050 (1916); *Supra*, note 6; *Kotch v. Buick Motor Car Co.*, 358 Ill. 507, 193 N. E. 529 (1934); *Morris v. E. I. Du Pont de Nemour*, 68 F. (2d) 788 (C. C. A. 8, 1934); *Flies v. Fox Bros. Buick Co.*, 196 Wis. 196, 218 N. W. 855 (1932); *Kearse v. Seyb*, 200 Mo. App. 645, 209 S. W. 635 (1919).

11. *Kuellog v. Rodderick Leon Mfg. Co.*, 84 N. Y. Supp. 622 (1903); *Bohlen, Liability of the Manufacturer to Persons Other than His Immediate Vendee* (1929) 45 L. Q. 343, classifies this as an untenable distinction.

12. See 17 A. L. R. 709.

13. *Bohlen, Liability of the Manufacturer to Persons Other than His Immediate Vendee* (1929) 45 L. Q. 343.

14. *Liggett Meyers Tobacco Co. v. Cannon*, 132 Tenn. 419, 178 S. W. 1009 (1915) held not a food; to the same effect, *Corum v. R. J. Reynolds*, 205 N. C. 213, 171 S. E. 73 (1933); cf. *Pillars v. R. J. Reynolds Tobacco Co.*, 117 Miss. 490, 78 So. 365 (1918).

to discover the defect. They have extended the rule of the *Mac Pherson* case to articles not inherently dangerous.<sup>15</sup> A shoe with a defective heel,<sup>16</sup> and a bed with defective slats,<sup>17</sup> have been held not inherently dangerous while a sanitary napkin with a pin concealed in it<sup>18</sup> has been held to be inherently dangerous. Soap containing poison<sup>19</sup> has been considered inherently dangerous, but a bar of soap containing a needle<sup>20</sup> not inherently dangerous. A pop bottle which explodes has been considered both inherently dangerous in one case and not so in another case in the same jurisdiction.<sup>21</sup>

It would seem that the courts do not consider the social problem implicit in these cases, *viz.*, whether the risk of loss should be shifted from the consumer to the manufacturer, who is better able to bear it. Instead courts flounder with the question whether an article is inherently or imminently dangerous, with frequent confusion and ridiculous results.

The courts are inclined to construe the rule of liability of the manufacturer liberally when food is concerned. The courts may treat improperly prepared food as inherently dangerous to human life.<sup>22</sup> A frequent statement is that the manufacturer owes the public a duty to see to it that he does not endanger the lives and health of the community by putting unwholesome food on the market,<sup>23</sup> or as it is tersely put in *Catani v. Swift*,<sup>24</sup> the duty of the manufacturer is absolute. In *Weiser v. Holzman*,<sup>25</sup> the court laid down the rule that the liability of the manufacturer does not rest upon contract but rather upon the original act of

15. 3 Cooley, *Torts* (4th ed. 1932) sec. 498.

16. *Cook v. Garside*, 259 N. Y. Supp. 947 (1932).

17. *Field v. Empire*, 166 N. Y. Supp. 509 (1917).

18. *La Frumento v. Kotex Co.*, 226 N. Y. Supp. 750 (1928).

19. *Armstrong Packing Co. v. Clem*, 151 S. W. 576 (Tex., 1912).

20. *Hasbrook v. Armour & Co.*, 139 Wis. 357, 121 N. W. 157 (1909).

21. Note, 21 Ky. L. Rev. 398, 399 (1932); *Coca Cola Bottling Co. v. Shelton*, 214 Ky. 218, 282 S. W. 778 (1926) (dangerous); cf. *Stone v. Van Noy News Co.*, 153 Ky. 240, 154 S. W. 1092 (1913).

22. *Holy v. Swift & Co.*, 152 Wis. 570 (1913); *Boyd v. Coca Cola Co.*, 132 Tenn. 23, 29 (1914): "Practically all modern cases are to the effect that the ultimate consumer of food, medicines, and beverages may bring his action directly against the manufacturer for injuries caused by negligent preparation." *Doyle v. Continental Baking Co.*, 262 Mass. 516, 160 N. E. 325 (1928); *Tomilson v. Armour*, 75 N. J. L. 748, 70 Atl. 314 (1907); *Whistle Bottling Co. v. Searson*, 207 Ala. 387, 92 So. 657 (1922); *Liggett Meyers v. Wallace*, 69 S. W. (2d) 857, (Tex., 1934) where a plug of tobacco containing metal was inherently dangerous.

23. *Watson v. Augusta Brewing Co.*, 24 Ga. 121 (1905); *Crigger v. Coca Cola Bottling Works*, 132 Tenn. 545, 179 S. W. 155 (1915).

24. *Catani v. Swift*, 251 Pa. 52, 62, 95 Atl. 931 (1915).

25. *Weiser v. Holzman*, 33 Wash. 87, 73 Pac. 797 (1903).

delivery of the article. If the food is unwholesome, the manufacturer must be liable for the natural consequences of his act.

Advertising plays its part under these exceptions to the rule requiring privity; and a manufacturer has been held liable for failure to warn the consumer, by means of labels or advertisements, of the dangers involved in the use of his products. Liability may be imposed for negligent advertising. The failure to warn by label of the danger of deterioration of powdered milk if not properly cared for,<sup>26</sup> or of the danger of oil in lamps,<sup>27</sup> has rendered the manufacturer liable. If the advertising itself is considered negligent the manufacturer will be held. Thus a false description on a package of sparklers that they were harmless,<sup>28</sup> and the improper advertising of toy guns as harmless, has made the manufacturer liable for injuries sustained by children.<sup>29</sup> Assurances by a manufacturer that a gasoline stove was perfectly safe founded the liability of the manufacturer for an explosion of the stove.<sup>30</sup> In *E. I. Dupont de Nemours* case<sup>31</sup> it was stated that the manufacturer owes a duty to those who rely upon his advertisements and must exercise reasonable care in regard to his advertising or take the consequences. In *Marsk v. Ursk Hardware*<sup>32</sup> the manufacturer had sent out circulars in which it was stated that certain gun powder might safely be handled in every way. It exploded while being tamped into the ground, and the manufacturer was held liable. These cases of negligent advertising should not be confused with the deceit cases following.

### B. The Deceit Theory

The court may in considering advertising put the manufacturer's liability upon the ground of deceit. The problem then arises whether the advertising constitutes a representation of fact or a mere puffing statement.<sup>33</sup> The courts are very reluctant to permit the action of deceit. It is well settled, however, that the representations in deceit may be made to a class.<sup>34</sup> It has been held that an advertisement of a heat control device, that it "func-

26. *Rosenbush v. Ambrosia Mills Co.*, 168 N. Y. Supp. 505 (1917).

27. *Wellington v. Oil Co.*, 104 Mass. 64 (1870).

28. *Henry v. Crook*, 195 N. Y. Supp. 642 (1922).

29. *Crest v. Art Metal Co.*, 243 N. Y. Supp. 469 (1930).

30. *King Hardware Co. v. Ennis*, 147 S. E. 119 (Ga. App., 1929).

31. *E. I. Du Pont de Nemours v. Baridon*, 73 F. (2d) 26, (C. C. A. 8, 1934).

32. *Marsk v. Ursk Hardware*, 73 Wash. 543, 132 Pac. 241 (1913).

33. *Handler False and Misleading Advertising* (1929) 39 Yale L. J. 22.

34. *Leonard v. Springer*, 197 Ill. 532, 64 N. E. 199 (1902); Note, 9 Cornell L. Q. 187 (1924).

tioned with precision unequalled," was mere dealer's talk, and that the manufacturer was not liable because the dealer was unable to sell the article.<sup>35</sup> In *Graham v. John Watts*<sup>36</sup> a farmer had purchased clover seed which was incorrectly labelled alfalfa. The court here was confronted with the Biblical maxim, "whatsoever a man soweth that shall he also reap." The wholesaler was held liable for false representations.

In the food cases the courts are very strict in their construction of the advertisement. In the leading case of *Newhall v. Ward*<sup>37</sup> representations on the wrapper of a loaf of bread that it was "100% pure, healthful and nutritious" and contained specific ingredients was considered to refer only to the absence of such deleterious substances as would constitute adulterations and not to refer to such foreign substances as a nail in the bread. Such an interpretation precluded the action of deceit. In *Alpine Brothers v. Freund*<sup>38</sup> a label stating that "the bread is made under ideal conditions, of the best materials and by expert bread-makers," was held not to represent that foreign substances would under no conditions be found in the loaf.

Before the court will permit the action of deceit the consumer must rely upon the manufacturer's advertisements, as in the *Anheuser Busch* case<sup>39</sup> where the consumer bought drugs relying on the advertisements that the mixture was "healthful and harmless." The consumer may hold the dealer liable in an action of deceit if he can establish the elements thereof,<sup>40</sup> unless it is the manufacturer who makes the representations.<sup>41</sup> The difficulty with the deceit action is that reliance is hard to prove, the parol evidence rule proves embarrassing, and the puffing doctrine is hard to circumvent.<sup>42</sup> Also the almost impossible task of proving *scienter* confronts the injured party.<sup>43</sup>

35. *James Spear Stove & Heating Co. v. General Electric Co.*, 12 Fed. Supp. 977 (D. C. E. D. Pa., 1934).

36. *Graham v. John R. Watts & Co.*, 238 Ky. 96, 36 S. W. (2d) 859 (1931).

37. *Newhall v. Ward*, 240 Mass. 434, 134 N. E. 625 (1922).

38. *Alpine v. Freund Bros.*, 244 Mass. 164, 138 N. E. 553 (1923).

39. *Roberts v. Anheuser Busch Co.*, 211 Mass. 449, 98 N. E. 95 (1912).

40. *Boysen v. Patterson*, 211 N. W. 849 (Iowa, 1927); *Oelwein v. Baker*, 214 N. W. 595 (Iowa, 1927); *Brown Cracker & Candy Company v. Jensen*, 32 S. W. (2d) 227 (Tex., 1930).

41. *Hieronymous Motor Co. v. Smith*, 241 Ky. 209, 43 S. W. (2d) 668 (1931).

42. *Milton Handler, False and Misleading Advertising* (1929) 39 Yale L. J. 22.

43. Note, 11 N. Y. L. Rev. 615 (1933).

### C. Pure Food Laws and Advertising Statutes

As early as 1266 statutes were passed treating the sale of food differently from the sale of other articles, in that the vendor might be held liable without a showing of fraud.<sup>44</sup> Some states have passed statutes which impute negligence to the manufacturer if the statute is violated, and negligence is presumed when statutory violation is shown.<sup>45</sup> Some courts, interpreting pure food statutes, say that the violation of the statute is not negligence *per se*, as the statute was not intended to make the manufacturer an insurer of his goods. Accordingly it is not necessarily a tort if the duty imposed by the statute is violated, for the violation is considered only as evidence of negligence,<sup>46</sup> and the manufacturer may escape liability by showing that he used every available means of care.<sup>47</sup> The court may take the attitude that the intent of the legislature was not to dictate a standard of care and conduct as to torts.<sup>48</sup> Under the pure food laws the courts will not consider a food as adulterated even though it be harmful if no dangerous ingredient has been added<sup>49</sup> and it would even be permissible to add foreign matter as long as the dose was such that it would not be injurious to health.<sup>50</sup>

These pure food laws do not apply to advertising, yet this is the most important means of sales promotion. People are robbed of millions of dollars every year by false and misleading advertising. "Yearly a toll of millions is taken from the sick and from the unfortunate and ignorant by advertising."<sup>51</sup> To prevent this abuse statutes have been enacted to make false and misleading

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44. Note, 5 Iowa L. Bul. 6, 36 (1920).

45. R. S. Mo. 1929, sec. 13003 et. seq.; Kelly v. John R. Dally Co., 56 Mont. 63 (1919); Bines v. Compron, 186 Minn. 573, 244 N. W. 72 (1932); Burnette v. Augusta Coca Cola Co., 157 S. C. 359, 154 S. E. 645 (1930); Solman v. Libby, 219 Ill. 421, 76 N. E. 582 (1906); Mesbeshier v. Chanelene Oil Co., 107 Minn. 104, 119 N. W. 428 (1909); Culbertson v. Coca Cola Bottling Co., 157 S. C. 352, 154 S. E. 424 (1930); Bourcheix v. Willow Brook Dairy, 286 N. Y. 1, 196 N. E. 617 (1935); Armour v. Wannamaker, 202 Fed. 423, (C. C. A. 3, 1913); Kelly v. John R. Dally Co., 56 Mont. 63, 181 Pac. 326 (1916); Portage Markets v. Gearge, 111 Ohio St. Rep. 775, 146 N. E. 283 (1924); Bolivar v. Mannon, 238 N. Y. Supp. 616 (1929).

46. Gearing v. Berkson, 223 Mass. 257, 111 N. E. 785 (1916).

47. Cheli v. Cudahy Bros. 267 Mich. 690, 255 N. W. 414 (1934).

48. Hawson v. Foster Beef Co., 177 Atl. 656 (N. H., 1934) where the court refuses to imply negligence in cases of violation of a pure food law as this would be dictating a standard of conduct to a civil case which was not the intent of the legislature.

49. Armour v. Miller, 39 Ga. 229, 147 S. E. 185 (1925).

50. United States v. Lexington Mill, 232 U. S. 399, 34 S. Ct. 337 (1914).

51. *Supra*, note 42.

advertising criminal.<sup>52</sup> Such statutes, however, are merely of a deterrent nature and afford no civil remedy.

#### D. *Res Ipsa Loquitur*

In cases in which food is bottled or packaged the courts have worked out special rules, and today the manufacturer's liability in these cases is a well recognized exception. The manufacturer is not an insurer of the goods;<sup>53</sup> rather his liability is founded upon negligence. A realization of the almost impossible task of proving negligence has led many courts to apply the doctrine of *res ipsa loquitur* where a foreign substance in the food is the cause of the injury.<sup>54</sup>

Three essentials<sup>55</sup> must be established before the *res ipsa loquitur* doctrine is applicable: (1) that the thing causing the injury was in the control of the defendant, (2) that injury would not have happened had the defendant used care, and (3) that

52. Conn. G. S. (1930) sec. 6375; Comp. Law. Fla. 1927, sec. 7311; Ky. St. (1930) sec. 883 e; Mass. G. S. (1923) c. 100, sec. 11; Tenn. Code (1932) sec. 11154; Wis. St. (1927) sec. 343, 413; 15 U. S. C. (1926) sec. 41-77; see note, 17 Col. L. R. 258 (1917); note, 36 Yale L. J. 1155 (1927); Ala. Code (1928) sec. 4133; Kan. Rev. St. Ann. (1923) c. 21, sec. 1112; Mich. Acts (1925) sec. 319; W. Va. Code Ann. (1923) c. 145, sec. 36; Wyo. Comp. St. Ann. (1920) sec. 7302.

53. For the general rule see Birmingham Chero Coca Cola Bottling Co. v. Clark, 205 Ala. 678, 89 So. 64, 17 A. L. R. 667 (1921), where the court says the action is one of tort. Cf. Kroger Co. v. Schneider, 60 S. W. (2d) 594, 249 Ky. 261 (1933) where the court said the manufacturer is the insurer of the wholesomeness of food on the ground of public policy.

54. Linker v. Quaker Oats Co., 11 Fed. Supp. 994 (D. C. N. D. Okl. 1935); Ternay v. Ward Baking Co., 167 N. Y. Supp. 562 (1917); Ruhemberger v. Col. Packing Corporation, 250 Mass. 198, 145 N. E. 281 (1924); Goldman v. Sindell, 140 Md. 488; 117 Atl. 866 (1922); Davis v. Van Camp, 189 Iowa 775, 176 N. W. 382; Rudolph v. Coca Cola Bottling Co., 4 N. J. Misc. 318, 132 Atl. 508 (1926); Eisenbeiss v. Payne, 25 P. (2d) 162 (Ariz., 1933); Minutilla v. Providence Ice Cream Co., 50 R. I. 143, 144 Atl. 884; Madouros v. Kan. City Coca Cola Co., 90 S. W. (2d) 445 (Mo., 1936); Hackman v. St. Louis Dairy, 90 S. W. (2d) 177 (Mo., 1936); Merriman v. Coca Cola Bottling Co., 68 S. W. (2d) 149 (Tenn., 1933); Reichart Milling Co. v. George, 162 So. 393 (Ala., 1934); Goldman & Fireman Bottling Co. v. Sindell, 140 Md. 488, 117 Atl. 866 (1922); Richenbacker v. California Packing Co., 250 Mass. 198, 145 N. E. 281 (1924); O'Brien v. Louis Ky. Ligget Co., 282 Mass. 438, 185 N. E. 28 (1933); Nehi Bottling Co. v. Thomas, 236 Ky. 684, 33 S. W. (2d) 701 (1930); Moore v. Coca Cola Bottling Co., 178 S. E. 711 (Ga., 1935); Coleman v. Dublen Coca Cola Bottling Co., 170 S. E. 549 (Ga. App., 1933); Cudahy Packing Co. v. Baskin, 155 So. 217 (Miss., 1934); Rozumailski v. Philadelphia Coca Cola Co., 296 Pa. 114, 145 Atl. 700 (1929); Carbonne v. California Packing Co., 169 Atl. 855 (N. J., 1934); Cassini v. Curtis Candy Co., 113 N. J. L. 91, 172 Atl. 519 (1934); Norfolk Coca Cola Works v. Krause, 173 S. E. 97 (Va., 1934).

55. 3 Cooley, *Torts* (4th ed., 1932) sec. 480.



there is no explanation by the defendant. Those courts which accept the doctrine have laid down definite limitations. They refuse to apply the doctrine where the plaintiff is injured by food, some of the ingredients of which were purchased from or handled by others, on the theory that the carelessness of parties other than the defendant might have caused the injury.<sup>56</sup> If the food does not reach the consumer in the original package the consumer has the further burden of proving that the foreign matter was in the food when it left the manufacturer's possession.<sup>57</sup> The inference of negligence may be overcome by the manufacturer's showing that he had exercised a high degree of care, had done everything possible to guard against such an injury, and had taken every possible mechanical precaution.<sup>58</sup>

But some courts refuse to apply the last limitation. They will not permit the manufacturer to escape liability by showing he used a high degree of care. Thus in the case of *Kroger Co. v. Schneider*<sup>59</sup> the court held, on the ground of public policy, that the manufacturer should be considered an insurer of the wholesomeness of food. The court said that one manufacturing provisions for domestic consumption is bound to determine at his peril that the provisions are sound and cannot escape liability for injury to his customers by proving extraordinary care in the preparation of the food. Public safety demands that the plaintiff should recover, and a mere showing of injury should be sufficient to take the case to the jury. The *Schneider* case involved a sale between the defendant and the consumer. But the same rule of *res ipsa loquitur* should apply against a manufacturer whose goods passed through hands of a retailer if it can be inferred that the defect was in the article when the article was prepared.<sup>60</sup>

There is conflict as to whether the doctrine is applicable when

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56. *Ash v. Childs Dining Hall*, 231 Mass. 86, 120 N. E. 396 (1918); *Horn Hardart Baking Co. v. Lieber*, 25 F. (2d) 449 (C. C. A. 3, 1928); *Hobart v. Coca Cola Bottling Co.*, 98 S. W. (2d) 113 (Tenn., 1936).

57. *Cudahy Packing Co. v. Baskin*, 155 So. 217 (Miss., 1934); *Merriman v. Coca Cola Bottling Co.*, 68 S. W. (2d) 149 (Tenn., 1936).

58. *Tavani v. Swift*, 363 Pa. 184, 105 Atl. 55 (1918), where it was a complete defense to show trichinae could not be detected by a scientific method. *Crigger v. Coca Cola Bottling Co.*, 132 Tenn. 545, 179 S. W. 155 (1915); *Sheffer v. Willowly*, 163 Ill. 518, 45 N. E. 253 (1896); *Crocher v. Baltimore Dairy Lunch*, 214 Mass. 177, 100 N. E. 1078; *McPherson v. Cupano*, 31 Ga. App. 82, 121 S. E. 580 (1924).

59. *Kroger Co. v. Schneider*, 60 S. W. (2d) 594, 249 Ky. 261 (1933).

60. *DeGroat v. Ward Baking Co.*, 102 N. J. L. 188, 130 Atl. 540 (1925); *Ternay v. Ward Baking Co.*, 167 N. Y. Supp. 562 (1917); *Minutilla v. Providence Ice Cream Co.*, 50 R. I. 43, 144 Atl. 884 (1929).

a bottle of Coca-Cola explodes.<sup>61</sup> Here the issue turns on the question whether the manufacturer is an insurer of the bottle as well as of the contents.

A dealer may become liable by using his own labels and stickers on the original package although he is not the manufacturer of the goods. He may be liable for defects which are caused by the manufacturer's negligence because he has subjected himself to the liability of the manufacturer by using his own labels exclusively.<sup>62</sup>

Some courts refuse to apply the *res ipsa loquitur* doctrine to packaged goods. These courts hold that negligence must be proved by a preponderance of the evidence<sup>63</sup> and that the plaintiff must bring his suit under the doctrine of one of the exceptions to *Winterbottom v. Wright*. Under this view the foreign substance in the bottle does have an evidentiary value.

### E. Conclusion of Negligence Theories

From the following discussion it would seem that courts are very reluctant to extend tort liability and that there is much judicial confusion in cases of negligence involving the sale of chattels. The rules are more liberal as regards food, but even then negligence must be shown, and proof of the absence of negligence leaves consumer without a remedy. There is a clear need for a remedy in cases of purely accidental injury. Because of this need, perhaps, some courts have lately developed theories of warranty by which the manufacturer is held liable. The difficulty of establishing negligence and the other requirements of tort liability requires a shift of emphasis from tort liability to warranty liability.

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61. *Loebig v. Coca Cola Bottling Co.*, 81 S. W. (2d) 910, 259 Ky. 124 (1935) where the *res* doctrine was rejected because the manufacturer was not an insurer of the bottle. But see *Taylor v. Berner*, 7 N. J. Misc. 597, 146 Atl. 674 (1929); *State v. Anheuser-Busch*, 271 S. W. 497 (Mo., 1925).

62. *Swift v. Hawkins*, 164 So. 231 (Miss., 1935); *Slavin v. Francis Liggett Co.*, 114 N. J. L. 421, 177 Atl. 120 (1935).

63. *King v. Louisiana Coca Cola Bottling Co.*, 151 So. 352 (La., 1933); *Russos v. Louisiana Coca Cola Bottling Co.*, 161 So. 909 (La., 1935); *Cheli v. Cudahy Packing Co.*, 273 Mich. 536, 263 N. W. 875 (1934); *Swenson v. Purity Baking Co.*, 183 Minn. 289, 236 N. W. 310 (1929); *Contana Provision Co. v. Gardner*, 130 Ohio St. Rep. 43, 196 N. E. 634 (1935); *Coca Cola Bottling Co. v. Jenkins*, 82 S. W. (2d) 15 (Ark., 1935); *Anheuser-Busch v. Southard*, 84 S. W. (2d) 89 (Ark., 1935); *Dunn v. Tex. Coca Cola Bottling Co.*, 84 S. W. (2d) 545 (Tex., 1935); *Enloe v. Charlotte Cola Co.*, 180 S. E. 582 (N. C., 1935); *Blackwell v. Coca Cola Co.*, 182 S. E. 469 (N. C., 1935); *Upton v. Harrison*, 68 F. (2d) 232 (C. C. A. 4, 1934); *Birmingham Coca Cola v. Clark*, 89 So. 64 (Ala., 1921).

## II. MANUFACTURER'S LIABILITY ON THE THEORY OF WARRANTY

The doctrine of warranty has so developed that today there is a demand for the development of a warranty action against the manufacturer who is not in privity with the consumer. The reasons justifying the action of warranty against the manufacturer may be stated as follows: (1) circuitry of action,<sup>64</sup> (2) to shift the risk of loss from the consumer to the manufacturer in purely accidental injuries, and (3) to raise the standard of care.<sup>65</sup> The answer of the courts to these arguments is that a swarm of petty and spurious claims would exist.<sup>66</sup> However, it would seem that the same danger should exist with reference to dealer's liability for warranty. Nevertheless, the courts are reluctant to base the manufacturer's liability in warranty, even though the retail dealer is today becoming a mere agent for distribution of the goods of the manufacturer.

However urgent the need for extension of liability, the general rule today is that if there is not privity of contract there is no warranty as regards chattels.<sup>67</sup> The majority of the courts refuse to permit implied warranties as regards food, when there is no privity of contract.<sup>68</sup> The Uniform Sales Act, makes no

64. 1 Williston, *Sales* (2d ed., 1924) 489; see *Kasler v. Skavouckl*, 1 K. B. 78 (1928) where there was a series of 5 recoveries over. See Williston, *Necessity of Privity of Contract in Warranties*, 42 Harv. L. Rev. 418 (1928) where this case is cited. There was a series of five recoveries over and the manufacturer ultimately paid the consumer's damages and the entire cost of litigation. Such recovery over is subject to constant failure as the financial irresponsibility at any point along the line will defeat it. It is even problematical whether a warranty of wholesomeness arises in favor of the dealer so that he can recover from the manufacturer.

65. Note, 7 Wash. L. Rev. 351, 359 (1932); Vold, *Sales* (1931) 476.

66. Llewellyn, *Cases and Material on Sales* (1930) at page 343 states: "There are those that trump claims. There are those who make a business of it. There are perjured doctors and bogus injuries. And a false claim resting on poisoning from food stuffs, based on warranty, is hard to defend."

67. *Young v. Certaineed Products Corp.*, 35 Ga. App. 419, 133 S. E. 279 (1926); *Case Threshing Machine v. Dillsworth*, 216 Ky. 637, 237 S. W. 994 (1926); *Diamond T. Motor Co. v. Cucher*, 160 Atl. 41 (N. J., 1932); *Burgner Bowman Lumber Co. v. McCord*, 216 Pac. 815, (Kan., 1923); *Rittenhouse Wintershum Auto Co. v. Kissner*, 98 Atl. 301 (Md., 1916); *Crocker v. Barron*, 234 S. W. 1032 (Mo. App., 1921); *Maudlin v. Milford*, 127 S. C. 507, 121 S. E. 547 (1924); *Jolly v. C. E. Blackwell & Co.*, 122 Wash. 620, 211 Pac. 748 (1923); *Lee v. Pauly Motor Truck Co.*, 179 Wis. 139, 190 S. W. 819 (1922); *Burris v. Baldwin Doherty Co.*, 170 Atl. 511 (Me., 1934); *Wood v. Advance Rumley Co.*, 234 N. W. 517 (N. D., 1931); *Hood v. Warrance*, 205 Ala. 332, 87 So. 524 (1921); *Wilhauser v. Parker Co.*, 83 Conn. 231, 76 Atl. 271 (1910).

68. *Thomason v. Ballard*, 208 N. C. 1, 179 S. E. 30 (1935), where the argument is advanced that the manufacturer is not an insurer of his product and should be liable only in the case of negligence. *Coca Cola*

distinction between food and other articles yet it is interesting to note the liberality of some courts with respect to food.

#### A. Implied Warranties

Some few courts, through fictional theories, have found exceptions to the general rule of warranty where food is concerned. The first food case brought on the theory of warranty in the United States was *Van Bracklin v. Fonda*.<sup>69</sup> Since that case, the litigation concerning food and implied warranties as regards the manufacturer has been tremendous, but very few courts have departed from the general rule.

In *Ward Baking Co. v. Trizzano*<sup>70</sup> the court held that whatever implied warranty arose in favor of the dealer who established the relationship with the defendant baking company was for the benefit of the ultimate consumer, on the theory that there existed a contract for the benefit of a third person. This view is open to severe logical criticism on the ground that the beneficiary was remote and indefinite.<sup>71</sup>

In Missouri the case of *Madouros v. Kansas City Coca-Cola Bottling Co.*<sup>72</sup> has been considered authority for the proposition

*Bottling Co. v. Hill*, 90 S. W. (2d) 210 (Ark., 1936); *Chysky v. Drake*, 235 N. Y. 468, 139 N. E. 576, 27 A. L. R. 1533 (1923); *Wilhauser v. Parker Co.*, 83 Conn. 231, 76 Atl. 271 (1910); *Gearing v. Berkson*, 223 Mass. 257, 111 N. E. 785, L. R. A. 1919 E. 1006 (1916); *Crigger v. Coca Cola Bottling Co.*, 132 Tenn. 545, 179 S. W. 155 (1915); *Hoback v. Coca Cola Bottling Co.*, 98 S. W. (2d) 113 (Tenn., 1936); *Pelletier v. Du Pont*, 124 Me. 269, 128 Atl. 186 (1925); *Smith v. Hanson*, 238 N. Y. Supp. 86 (1930); *Prinsen v. Russos*, 215 N. W. 905 (Wis., 1927); *Minutilla v. Providence Ice Cream Co.*, 144 Atl. 884, (R. I. 1929); *Maudlin v. Milford*, 127 S. C. 509, 121 S. E. 547 (1924); *Dunn v. Texas Coca Cola Bottling Co.*, 84 S. W. (2d) 545 (Tex., 1935); *Casini v. Curtis Candy Co.*, 113 N. J. L. 91, 172 Atl. 519 (1934); *Tomilson v. Armour*, 75 N. J. L. 748, 70 Atl. 314 (1908); *Nehi Bottling Co. v. Thomas*, 236 Ky. 684, 33 S. W. (2d) 29 (1930); *Dothan Chero Coca Cola Bottling Co. v. Weeks*, 16 Ala. App. 638, 80 So. 734 (1918); cf. *Collen Baking Co. v. Savage*, 155 So. 336 (Ala., 1933) which overrules the *Weeks* case.

69. *Von Bracklin v. Fonda*, 12 John 468 (N. Y., 1815); Note, 5 Iowa L. Bull. 6, 36 (1920).

70. *Ward Baking Co. v. Trizzano*, 270 Ohio App. 475, 161 N. E. 55 (1928).

71. Comment, 2 U. of Cinn. L. Rev. 330 (1928); Note, 77 U. of Pa. L. Rev. 388, 392 (1928), if the beneficiary can be considered as a beneficiary at all he must be considered as an incidental beneficiary as the contract obviously was not for the benefit of the consumer. And it is well settled that 3rd persons who are merely incidentally benefited by a contract have no right of action on that contract.

72. *Madouros v. Kansas City Coca Cola Bottling Co.*, 90 S. W. (2d) 445 (Mo., 1936); In a most recent case in Missouri, *Degouveia v. H. P. Lee Mercantile Co.*, 100 S. W. (2d) 336 (Mo. App., 1936) the *Madouros* case is recognized as an exception to the rule that the manufacturer is not liable

that the subpurchaser is the assignee of the dealer,<sup>73</sup> and therefore is the assignee of the benefits of the warranty. The court said,<sup>74</sup> "A warranty of food is available between the parties to the contract and not in favor of third parties unless they claim as assignees of the warranty." Such also was the dictum in the case of *Smith v. Carlos*<sup>75</sup> where the action was against the immediate vendee. The basis of this view is the general rule that one who has a right by contract may, by assigning his right, give his assignee power to enforce it.<sup>76</sup> However, the view has been severely criticised on the ground that there is no contract,<sup>77</sup> that the sale does not indicate the seller's intention to part with the right of action,<sup>78</sup> and that the warranty must be considered as personal to the original purchaser.<sup>79</sup>

Another theory advanced is that the warranty in the sale of food is analogous to covenants relating to real property, and that the warranty runs with the chattel.<sup>80</sup> The cases here are limited to original package cases and it would seem the action is for an implied warranty of quality.<sup>81</sup> Some courts have held that by putting the goods on the market in the original package the manufacturer, in effect, represents to each purchaser that the

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for implied warranty to third persons with whom he has no privity. And the court in this case refuses to extend this exception of the *Madouros* case further than the facts in that case saying it was not applicable in the *Lee* case because the manufacturer was in a different position in the *Lee* case than in the *Madouros* case. In the *Madouros* case the manufacturer had opportunity to inspect his goods and see to it that they were fit for a use but in this case the goods were sold to the defendant company already sealed so that he would not have an opportunity to inspect them.

73. Comment, 22 WASHINGTON U. LAW QUARTERLY 113, 114 (1936).

74. *Madouros v. Kansas City Coca Cola Bottling Co.*, 90 S. W. (2d) 445, 448 (Mo., 1936).

75. *Smith v. Carlos*, 315 Mo. App. 488, 247 S. W. 468 (1923).

76. 1 *Williston Sales* (2d ed. 1924) 437.

77. *Dunn v. Texas Coca Cola Bottling Co.*, 84 S. W. (2d) 545 (Tex., 1934) where the court held that the resale of an article does not give a right of action in warranty. The court looks for an offer of contract and finds none.

78. 1 *Williston, Sales* (2d ed. 1924) 498.

79. *Wood v. Advance Rumley Co.*, 234 N. W. 517 (N. D., 1931), where the court said the warranty was personal to the purchaser to whom the warranty was made and no subsequent sale will vest this in the subsequent vendee.

80. *Coca Cola Bottling Co. v. Lyons*, 145 Miss. 876, 111 So. 305 (1927) where there was a gift of coca cola to the plaintiff who was made ill, the court said since the gift carried with it title, the implied warranty ran with it. See comment, 7 *Miss. L. J.* 203 (1913); *Cudahy Packing Co. v. Brackin*, 155 So. 217 (Miss. 1934).

81. *Williston, Necessity of the Privity of Contract in Warranties* (1928) 42 *Harv. L. Rev.* 414, 418.

contents are wholesome and suitable for the purpose for which they are sold and that this representation supplies the needed privacy.<sup>82</sup>

The burden in these cases is on the plaintiff to show that the food was unfit for consumption.<sup>83</sup> The food must be used in the usual manner and not an unusual one.<sup>84</sup> There is also a conflict in the cases as to the liability of the dealer when the goods are in the original package.<sup>85</sup> The better view would seem to be that the dealer should not be held, as the purchaser is really relying upon the manufacturer rather than the dealer. This holding, however, might work hardship in those jurisdictions which do not allow recovery against the manufacturer; for the consumer might be wholly without remedy.<sup>86</sup> If the courts limit liability to the dealer<sup>87</sup> there might be additional hardship in cases in which the dealer is judgment proof.

### B. Cases Confusing Tort and Warranty

There is a group of cases which fail to keep clear the distinction between tort and contract, confusing these two fields of law. In *Parks v. Pie Co.*<sup>88</sup> the court spoke of implied warranty but said that the manufacturer is under a duty of care,<sup>89</sup> and concluded that he must know that food prepared by him is fit for consumption or take the consequences.<sup>90</sup> In the case of *Binion v.*

82. *Mazetti v. Armour*, 75 Wash. 622, 135 Pac. 633 (1913); *Nock v. Coca Cola Bottling Co.*, 156 Atl. 537 (Penn., 1931); Note, 36 Dickinson L. Rev. 106, 110 (1933); *Hertzler v. Manshum*, 228 Mich. 416, 200 N. W. 155 (1924); *Cheli v. Cudahy Bros.*, 267 Mich. 690, 255 N. W. 417 (1934); *Charles v. Hartloff*, 136 Kan. 823, 18 P. (2d) 199 (1933); *Parks v. Yost Pie Co.*, 93 Kan. 334, 144 Pac. 202, L. R. A. 1915C 179 (1914).

83. *Cudahy Packing Co. v. Brackin*, 136 Kan. 823, 18 P. (2d) 199 (1933).

84. *Cheli v. Cudahy Bros.*, 267 Mich. 690, 255 N. W. 414 (1934).

85. *Liable-Ramney v. Meisenheimer*, 61 Mo. App. 434, 439 (1919); *Crocker v. Barron*, 234 S. W. 1032 (Mo. App., 1921); *Cantan Provision Co. v. Gareder*, 120 Ohio St. Rep. 43, 196 N. E. 634 (1935); *Beyer v. Coca Cola Bottling Co.*, 75 S. W. (2d) 642 (Mo. App. 1934); *Walters v. U. Grocery Co.*, 51 Utah 565, 172 Pac. 473 (1918). But see for the majority view, *Dothan Chero Cola Bottling Co. v. Weeks*, 16 Ala. App. 639, 80 So. 734 (1918); *Walden v. Wheeler*, 153 Ky. 181, 154 S. W. 1088 (1913); *Trafton v. Davis*, 110 Me. 318, 86 Atl. 179 (1913); *Scruggins v. Jones*, 207 Ky. 636, 269 S. W. 743, (1925).

86. *Williston, Necessity of the Privity of Contract in Warranties* (1923) 42 Harv. L. Rev. 414; *Scruggins v. Jones*, 207 Ky. 636, 269 S. W. 743 (1925).

87. *Walter v. U. Grocery Co.*, 51 Utah 565, 172 Pac. 473 (1918) (dealer was liable and not the manufacturer).

88. *Parks v. Yost Pie Co.*, 93 Kan. 334, 337, 144 Pac. 202 (1914).

89. *Supra*, note 88 at 337.

90. *Supra*, note 88 at 337.

*Sasaki*<sup>91</sup> the court said that the plaintiff could not recover for negligence since the warranty of fitness for a particular purpose was to the original purchaser only. In *Davis v. Van Camp Packing Co.*<sup>92</sup> the court said that the manufacturer was liable, regardless of privity of contract, on an implied warranty and concluded that the evidence was sufficient to go to the jury on the question whether the defendant had rebutted the plaintiff's prima facie case of negligence. In *Hertzler v. Manshum*<sup>93</sup> the court decided that the warranty existed, but that if the manufacturer could show that he had exercised the highest degree of care the plaintiff would be without remedy. The Alabama courts have confused tort and warranty, as is shown by the case of *Dothan Chero Coca Cola Bottling Co. v. Weeks*,<sup>94</sup> where the court held that the law implies the manufacturer has warranted goods as fit for use and requires that he exercise a degree of care ordinarily exercised by persons in the particular business. However, in *Collen Baking Co. v. Savage*<sup>95</sup> the Alabama Court held that a defense of contributory negligence is not a defense to a warranty action.

The case of *Ketterer v. Armour*<sup>96</sup> must be put into a class by itself. The court in that case says that the remedies of the consumer ought not be made to depend upon the intricacies of the law of sales and that the obligation of the manufacturer should not rest upon privity of contract. The court asserted that the liability of a manufacturer is demanded by social justice and that if there could be found no authority for the proposition of liability it was high time there be one.

### C. Criticism of the Privity of Contract Concept.

The privity of contract requirement has resulted in great restriction of the action of warranty. "Only by a violent pounding and twisting can the concept of implied warranty be made to yield the result called for by economic and social conditions."<sup>97</sup> The privity doctrine has been severely criticised by Williston on

91. *Binion v. Sasaki*, 41 P. (2d) 585 (Cal., 1935).

92. *Davis v. Van Camp Packing Co.*, 189 Iowa 775, 176 N. W. 382 (1920).

93. *Hertzler v. Manshum*, 228 Mich. 416, 200 N. W. 155 (1924). To the same effect see *Goldman & Friedman Bottling Co. v. Sindall*, 140 Md. 488, 117 Atl. 866 (1922).

94. *Supra*, note 68.

95. *Supra*, note 68. The Collen case straightened out the Week case and said that there should be no implied warranty and there should only exist tort liability.

96. *Ketterer v. Armour*, 200 Fed. 322, 323 (D. C. N. Y. 1912).

97. Note, 24 Col. L. Rev. 335, 357 (1924).

the ground that in its origin warranty was a tort action.<sup>98</sup> The Uniform Sales Act<sup>99</sup> fails to provide expressly for implied warranty between consumer and manufacturer. This is a distinct shortcoming of the Act. Failure to provide for such warranty has hindered the extension of implied warranty because of the belief that the Act was intended to crystallize the common law.<sup>100</sup> But provision is made under section 12 that any affirmation of fact or promise which relates to the goods and which induces the purchaser to buy has the effect of an express warranty.

#### D. Search for a New Theory

Under a recent actual survey,<sup>101</sup> it was found that the actual practice among manufacturers and dealers with regard to the operation of the manufacturer's warranty against defects was that complaints are adjusted by the manufacturer directly or through the agency of the dealer. The manufacturer assumes that he is directly liable to the consumer. If the manufacturer settles with the consumer through the dealer it is for the sake of convenience, and the dealer is merely an agent. The dealer does not regard himself as having any personal responsibility. All parties regard him as a conduit or intermediary for adjustment purposes, even though he has warranted the goods and sold them as his own. These facts manifest a practical repudiation by the manufacturer and the dealer of the legalistic notion that warranties should be effective only as between parties in privity of contract. Business practice seems to be in accord with the minority of the courts. The introduction of the middleman into the chain of distribution has been allowed to affect substantive rights.<sup>102</sup> Hindered by legal concepts of privity the courts and commentators have tried to work out theories to cover the prob-

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98. 1 Williston, *Sales* (2d ed. 1924) sec. 244a. A warranty may be imposed by the parties or by law contrary to their intention. In its origin the warranty was a tort and it should be considered as a hybrid between a tort and a contract. See Williston, *Liability for Honest Misrepresentation* (1910) 24 Harv. L. Rev. 415, where he considers a mere representation sufficient to allow a party to sue the manufacturer on the warranty theory.

99. U. S. A. (1906) sec. 12, 15.

100. Note, 33 Col. L. Rev. 868 (1933); In *Prinsen v. Russos*, 215 N. W. 905 (Wis. 1907), the court said that no warranty existed since the U. S. A. raised only an implied warranty between the buyer and the seller, and the word buyer and seller denoted and showed an obligation to be created by contract as distinguished from those implied by law.

101. Bogart & Fink, *Warranties in Sales* (1930), 25 Ill. L. Rev. 400, 416.

102. Williston, *Necessity of Privity of Contract in Warranties* (1928) 42 Harv. L. Rev. 414.



lems of modern marketing. These theories contended to get around the most insuperable difficulty of privity of contract.<sup>103</sup>

In order to provide a legal theory to fit the trade practices of today some writers assert that an express contract may be established between the manufacturer and the consumer. They treat the representations of the manufacturer as a general offer on his part, accepted by the ultimate consumer when he purchases the article from the retail dealer.<sup>104</sup> Such a contract is a unilateral contract under *Carlill v. Carbolic Smoke Ball Co.*<sup>105</sup> However imposing this theory may be, the courts are not likely to adopt it, as no intention to contract is present.<sup>106</sup>

The theory of express warranty through the medium of advertising has been advanced but rejected by the courts. They may hold that there is an express warranty between the dealer and the purchaser as in the case of *Baumgartner v. Glissner*,<sup>107</sup> where the seller advertised that 95% of his corn seed had germinated and, relying on the representation, a farmer purchased the seed, such was considered an express warranty. But when the problem arises between subpurchaser and the manufacturer, the courts are reluctant to find an express warranty. In *Davis v. Van Camp*<sup>108</sup> a label on a can of pork and beans stated that the meat had been inspected by federal inspectors and that the contents were ready for the table. There was, however, held to be no express warranty. In *Pelletier v. Du Pont*<sup>109</sup> it was decided that printed matter on a bread wrapper that the bread was pure, nutritious and clean could not be considered as an express warranty of general fitness for human consumption. The court said that

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103. Milton and Handler, False Advertising (1929) 39 Yale L. J. 22, 25, which was written before the Baxter case yet considered express warranty under section 12 of the U. S. A.

104. See comment, 2 U. of Cinn. L. Rev. 330, 331 (1928); Note, 16 Corn. L. Q. 610, 615 (1930), which says that a direct contractual relationship with the manufacturer might be established on the ground that the mechanics of advertising such as labels, etc. can be considered as an offer by the manufacturer and the purchaser accepting the offer by purchasing the goods; 1 Williston, *Sales* (2d ed. 1924) sec. 244a.

105. *Carlill v. Carbolic Smoke Ball Co.*, 1 Q. B. 256 (1893).

106. Note, 7 Wash. L. Rev. 351 (1932) The criticism of this is that neither party intended to enter into the contract.

107. *Baumgartner v. Glissner*, 171 Minn. 289, 214 N. W. 27 (1927); but see *Cool v. Fighter*, 239 Mich. 42, 214 N. W. 162 (1927); where a circular letter was sent out saying that a radio set would receive across the continent, which was not considered as an express warranty. See cases collected in Note, 32 A. L. R. 1215 (1924).

108. *Davis v. Van Camp Packing Co.*, 189 Iowa 775, 176 N. W. 382 (1920).

109. *Pelletier v. Du Pont*, 124 Me. 269, 128 Atl. 186 (1934).

the statements related to the ingredients only, and did not warrant that there would not be foreign substances in the bread.

The *Baxter* case<sup>110</sup> was hailed by many critics as a landmark in the law of sales. At last a court had recognized advertising as a medium through which an express warranty could be made.<sup>111</sup> The rule of the case would seem to be that statements concerning the manufacturer's product contained in his advertisements are express warranties to the consumer.<sup>112</sup> It was indeed an innovation, for the case was not a food case.

However, the exact holding of the *Baxter* case is questionable. Among law review writers there is doubt as to whether it is a case of deceit,<sup>113</sup> a case falling within *Mac Pherson v. Buick*,<sup>114</sup> a case based on implied warranty,<sup>115</sup> a decision on the unilateral contract theory of *Carlill v. Carbolic Smoke Ball Co.*,<sup>116</sup> or a tort on warranty action.<sup>117</sup>

An examination of the *Baxter* case shows there were only two decisions cited in the body of the opinion. The court first relied on *Mazetti v. Armour*,<sup>118</sup> a food case. The court in that case had said:<sup>119</sup>

"The manufacturer is liable for implied warranty when the goods are dispensed in the original package. The manufacturer is not liable to any other person than his immediate vendee and without privity of contract no suit can be maintained. An exception to the rule will be declared when the case is not an isolated instance and does not square with justice."

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110. *Baxter v. Ford Motor Car Co.*, 12 P. (2d) 409 (1932), where the suit was against the manufacturer for a broken windshield. Plaintiff purchased the car from a retail dealer and the car was manufactured by the defendant and represented in a catalogue furnished by the dealer as having shatterproof glass. Plaintiff was injured when a pebble struck the windshield and the plaintiff lost his eye from the flying glass and the manufacturer was held liable.

111. Bogart and Britton, *Cases on Sales* (1936) 749, classifies the *Baxter* case under express warranties; Note, 7 Wash. L. Rev. 351, 352 (1932); Note, 18 Corn. L. Rev. 487 (1932); Comment, 46 Harv. L. Rev. 161 (1932).

112. Note, 7 Wash. L. Rev. 351, 352 (1932).

113. Note, 81 U. of Pa. L. Rev. 94 (1932), which puts this case in the deceit theory and thus claims that it is not a departure from the law. See also 88 A. L. R. 527, which classifies the *Baxter* case with *Graham v. John R. Watts*, *supra*, note 33 which was a deceit case.

114. Note, 18 Corn. L. Q. 487 (1932); Note, 7 Rocky Mt. L. Rev. 221 (1934); Note, 81 U. of Pa. L. Rev. 94 (1932).

115. Note, 18 Corn. L. Q. 487 (1932).

116. Note, 7 Wash. L. Rev. 351, 353 (1932).

117. Note, 18 Corn. L. Q. 487 (1932).

118. *Mazetti v. Armour*, 75 Wash. 622, 135 Pac. 633, 48 L. R. A. (N. S.) 213 (1913).

119. *Ibid.* at 634.

But the *Mazetti* case had gone further to say that the test of liability is based on the breach of duty on the part of the one who had the power to prevent the wrong. It would seem the *Mazetti* case is an implied warranty case with confused negligence terms.

The *Baxter* case goes on to cite *Thomas v. Winchester*<sup>120</sup> saying the purchaser in the *Baxter* case was in a position similar to the purchaser of labelled drugs who had relied upon the manufacturer's representations that the label correctly set forth the contents of the container.<sup>121</sup> But the *Baxter* decision further discusses the changes in society since the development of the rule of *caveat emptor*, recognizing that radio, newspapers, and billboards are the great means of creating the demands of the ultimate consumer. The court concludes that it would be unjust to recognize a rule that would permit a manufacturer of goods to create a demand for them by representing that they possess qualities which they do not possess in fact, and, then deny the consumer the right to recover. The court submits the case to the jury to determine whether the defect was the immediate cause of the injury. The writer of this note feels that the action was one of negligent advertising.<sup>122</sup>

Not only have the law review writers been confused but the courts display equal confusion as to the holding of the *Baxter* case. In *E. I. DuPont de Nemours v. Baridon*<sup>123</sup> the court cited the *Baxter* case as allowing recovery for negligence under *Mac Pherson v. Buick*. The court in *Bird v. Ford Motor Car Co.*<sup>124</sup> also cited the *Baxter* case on the negligence proposition of the *Mac Pherson* case. In *Colonna v. Rosedale Dairy Co.*<sup>125</sup> the *Baxter* case was cited for the proposition that a warranty runs with a chattel.

In *Channin v. Chevrolet Motor Co.*<sup>126</sup> the plaintiff was induced to buy a car on the representation that the windshield was shat-

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120. *Supra*, note 8.

121. Auto was represented as having a windshield of non-shatterable glass "so made that it will not fly or shatter under the hardest impact." An ordinary person would be unable to determine by the usual and customary examination of the auto whether the glass would fly or shatter.

122. *Supra*, notes 26 to 31.

123. *E. I. Du Pont de Nemours v. Baridon*, 73 F. (2d) 28, (C. C. A. 8, 1934).

124. *Bird v. Ford Motor Car Co.*, 15 F. Supp. 590 (D. C. N. D. N. Y., 1936).

125. *Colonna v. Rosedale Dairy*, 186 S. E. 94, 98 (W. Va., 1936).

126. *Channin v. Chevrolet Motor Car Co.*, 15 Fed. Supp. 57 (D. C. N. C. III, 1935).

terproof. The plaintiff brought suit on the theory of the *Baxter* case relying on an express warranty. The court held,<sup>127</sup> "That in no case except the *Baxter* case has it been held that any other than the vendor is liable for the misrepresentations except in an action of deceit." And the court states that warranty under the Uniform Sales Act is limited to actions between the vendor and the vendee. It is not the function of the court, but rather the function of the legislature to require that the manufacturer make good his representations and until such is done, "I as judge will not undertake to change a rule which has been laid down by all the courts with the single exception of the *Baxter* case."<sup>128</sup>

#### F. Conclusion

Extension of the doctrine of express warranty is the solution to the problems raised by modern day advertising. The protection of the consumer through shifting of the risk to the manufacturer, who is best able to bear it, should be affected by this means. Criticism of the many decisions would be futile. Legislative action would be the most effective way to bring about a result which is in accord with our complex society and actual practice.<sup>129</sup>

It would seem that a simple definition of the word *vendor* would solve the problem for those states which have adopted the Uniform Sales Act. The courts have felt that failure to use the word "manufacturer" in the Sales Act shows an intent of the legislators to exclude the liability of the manufacturer.<sup>130</sup> By a simple definition of the word vendor the solution could be met. Thus if the word vendor were defined to include manufacturer the courts without difficulty could find an express warranty, and the doctrine of privity would be satisfied. In those states which do not have the Uniform Sales Act a statute copying section 12 of the present Act with a definition of vendor which would include the manufacturer would attain the same result.

ROBERT LOUIS SCHNEIDER.

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127. *Ibid.* at 58

128. *Ibid.* at 58.

129. Bogart and Fink, Warranties in Sales (1930) 25 Ill. L. Rev. 400; *supra*, note 37.

130. *Channin v. Chevrolet Motor Car Co.*, 15 F. Supp. 57 (D. C. N. D. Ill., 1935); Note, 33 Col. L. Rev. 868 (1933); *Prinsen v. Russos*, 215 N. W. 105 (Wis., 1927).