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## PRIVITY OF CONTRACT AS A REQUISITE FOR RECOVERY ON WARRANTY\*

JAMES A. SPRUILL, JR.\*\*

As one court has remarked, with a nostalgic sigh, the old order of our ancestors, when the household was an almost self-sufficient unit, has yielded to a new, mass production age wherein manufacturers are assuming to remove even the appetizing odors from the family kitchen.<sup>1</sup> Grandma no longer bakes "Grandmother's Bread". Today it comes to us from a bakery of fabulous size and cleanliness; and, in all likelihood, it does not pass directly from the baker to us. It, along with almost all those worldly goods which meet our needs for life and the amenities of life, comes to us from a retailer rather than from him who made it. Men make and buy and live according to a new pattern. And as life has changed the law has been in labor.

*Winterbottom v. Wright*<sup>2</sup> laid down "horse and buggy" law for a "horse and buggy" age—the law that one furnishing chattels to another owes no duty of care to a third party with whom he is not in privity of contract. Yet, even as *Winterbottom* rode atop the defective mail-coach provided by *Wright* for the Postmaster-General, the Industrial Revolution was gathering momentum apace;<sup>3</sup> and courts and their law are free, only within limits, to lag behind economic and social change. Law which circumscribed duty within the limits of contract became increasingly incongruous. There could be but one result—that evolution through *Thomas v. Winchester*<sup>4</sup> and *Huset v. The Case Threshing Machine Co.*<sup>5</sup> to *MacPherson v. Buick Motor Co.*<sup>6</sup>

There are still doubts and questionings;<sup>7</sup> but Mr. Justice Cardozo's epochal opinion in the *MacPherson* case has blasted "the notion that the duty to safeguard life and limb, when the consequences of negligence

\* The writer wishes to acknowledge his great indebtedness to Professor Karl Llewellyn whose seminar on *Sales and Law in Society* it was his privilege to attend some years ago; but, at the same time, he wishes to assume entire responsibility for such error and triteness as he may spread upon the record.

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<sup>1</sup> *Graham v. John R. Watts & Sons*, 238 Ky. 96, 105, 36 S. W. (2d) 859, 863 (1931).

<sup>2</sup> 10 M. & W. 109 (Ex. 1842).

<sup>3</sup> Witness the Factory Act, 1847, 10 & 11 Vicr., c. 29.

<sup>4</sup> 6 N. Y. 397 (1852).

<sup>5</sup> 120 Fed. 865 (C. C. A. 8th, 1903).

<sup>6</sup> 217 N. Y. 382, 111 N. E. 1050 (1916). For the classic treatment of the subject see Bohlen, *Liability of Manufacturers to Persons Other than Their Immediate Vendees* (1929) 45 L. Q. REV. 343.

<sup>7</sup> "Privity is no longer the fetish it was fifty years ago. Yet while on the wane, it still has vitality." Bohlen, *Fifty Years of Torts* (1937) 50 HARV. L. REV. 725 & 1225 at 1232.

may be foreseen, grows out of contract and nothing else".<sup>8</sup> There a purchaser from a retailer was allowed to recover from the manufacturer for his neglect of duty. The law's protection against bodily harm consequent upon negligence is no longer limited by that requirement of privity which made Winterbottom go unrecompensed for his lameness.<sup>9</sup> And it seems that the law is moving on to afford a like protection to property<sup>10</sup> as, indeed, it must if it is to complete the logic of *MacPherson v. Buick Motor Co.*<sup>11</sup>

This brief sketch of expanding liability for negligent conduct has been attempted in the belief that it throws some light upon the problem as to how far privity of contract is, and should be, a requisite for recovery on warranty. The writer believes that it is possible, in the field of warranty, to see economic and social change effecting, at this moment, that remaking of the law which has so nearly reached completion in the field of negligence. But, before setting out to explore this possibility, it is necessary to examine the meaning of "warranty".

#### THE NATURE OF WARRANTY

The writer wishes to acknowledge that his use of the term "warranty" is somewhat unfortunate by reason of the fact that the term has acquired a significance, or, to be more exact, significances, which do not always accord with the manner in which he uses it. He uses "warranty" because of what it excludes rather than by reason of what it is generally deemed to include. In default of a better term, he employs it to exclude liability for conscious misrepresentation, for negligent misrepresentation, and for negligence in the selection, manufacture, preservation, or inspection of articles or commodities sold. He uses it to distinguish cases involving liability for fault and to embrace all cases where the vendor bears a liability because he has engaged to do so, or, in the alternative, because the law makes him an insurer as to certain characteristics of the thing sold.

It has been said of warranty that, "A more notable example of legal miscegenation could hardly be cited."<sup>12</sup> It originated in tort as a species

<sup>8</sup> *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 390, 111 N. E. 1050, 1053 (1916).

<sup>9</sup> RESTATEMENT, TORTS (1934) §§392 & 395.

<sup>10</sup> *E. I. Du Pont De Nemours & Co. v. Baridon*, 73 F. (2d) 26 (C. C. A. 8th, 1934); *Murphy v. Sioux Falls Serum Co.*, 44 S. D. 421, 184 N. W. 252 (1921). *Contra*: *Tompkins v. Quaker Oats Co.*, 239 Mass. 147, 131 N. E. 456 (1921); *Pease & Dwyer Co. v. Somers Planting Co.*, 130 Miss. 147, 93 So. 673 (1922).

<sup>11</sup> Professor Freezer has criticized the *Restatement of Torts* for stating the rule as extending only to the protection of life and limb when the law had already progressed beyond that point. Freezer, *Tort Liability of Manufacturers* (1935) 19 MINN. L. REV. 752 at 761. See Note (1934) 19 CORN. L. Q. 648 tracing the decisions and favoring a broad application of the principle of the *MacPherson* case.

<sup>12</sup> Note (1929) 42 HARV. L. REV. 414.

of relief for misrepresentation.<sup>13</sup> Later there was added to this concept of warranty another which was consensual in nature. In time, special *assumpsit* rather than trespass on the case for deceit became the normal remedy for breach of warranty<sup>14</sup> and men came to think of warranty as contract. But the old remained along with the new. Consequently warranty is neither *tort* nor *contract*. It is *both*.<sup>15</sup>

#### PROMISSORY WARRANTY

The consensual or contractual side of warranty causes relatively little difficulty. Here, if one, who bought from a retailer<sup>1</sup> or is the donee of a purchaser, would recover from someone other than his vendor or donor without a showing of fault on the part of such defendant, he must show either (1) an offer addressed to him individually or as a member of a class plus acceptance of such offer, or (2) a promise made for a consideration to a third party for his benefit, or (3) an assignable contract with some third person which has been assigned to him. The celebrated *Smoke Ball* case<sup>16</sup> presents an example of the first type of liability. There the defendant company published a newspaper advertisement stating that it would pay £100 to anyone who contracted influenza after using one of its carbolic smoke balls three times daily for two weeks. The smoke ball used without effect by the plaintiff was purchased by her from a retail chemist rather than from the defendant manufacturer; yet the court held that the plaintiff might recover on a unilateral contract as the offer of the company was addressed to the general public and was accepted by her. It would seem that all the elements of a contract would likewise have been present had she received the smoke ball as a gift.

Such a promise as was here addressed from the maker to the user is a rather common one<sup>17</sup> but seems to have given rise to practically no litigation. This is probably due to the fact that many adjustments are made by manufacturers in the interest of future sales and, to the additional fact that, unlike the promise in the *Smoke Ball* case, most such undertakings are so worded as to be fairly negligible in value. In gen-

<sup>13</sup> BL. COMM. \*165; Ames, *The History of Assumpsit* (1888) 2 HARV. L. REV. 1 & 53 at pp. 8 & 69; Williston, *Liability for Honest Misrepresentation* (1911) 24 HARV. L. REV. 415 at 416; WILLISTON, SALES (2d ed. 1924) §§195 & 196.

<sup>14</sup> The older tort remedy continued possible. Here warranty was the gist of the action and it was not necessary to allege or prove scienter. *Shippen v. Bowen*, 122 U. S. 575, 7 Sup. Ct. 1238, 30 L. ed. 1172 (1887).

<sup>15</sup> WILLISTON, SALES (2d ed. 1924). §197; 5 WILLISTON, CONTRACTS (2d ed. 1937) §1505.

<sup>16</sup> *Carlill v. Carbolic Smoke Ball Company* [1893] 1 Q. B. 256.

<sup>17</sup> Bogert and Fink, *Business Practice Regarding Warranties in the Sale of Goods* (1930) 25 ILL. L. REV. 400 at 409.

eral they contain a rather restricted promise as to repair or replacement and make no provision to indemnify for injury consequent upon use.<sup>18</sup>

A manufacturer can, of course, negotiate and contract directly with one who is nominally a purchaser from a retailer.<sup>19</sup> There is likewise no reason why a manufacturer cannot constitute an independent dealer his agent to make contractual engagements with the consuming public; but a dealer *qua* dealer has no such authority.<sup>20</sup> In a particular case the dealer may serve as the intermediary through whom the manufacturer and the consumer negotiate and in such case the manufacturer may be held to have contracted directly with the buyer in consideration of his purchase from the retailer.<sup>21</sup> This is an unusual contract rather than a novel doctrine of relief.

The same observation is pertinent when one considers a promissory warranty for the benefit of a third person. Where a third party beneficiary's rights are recognized this factual situation would present no difficulty. But the butcher does not say: "If you will buy this excellent pork roast I will be answerable to your children or guests who contract trichinosis from it." The real problem concerning third party beneficiaries arises when one comes to deal with obligations created by law as distinguished from promises made by vendors.

The same is true as to the assignability of a warranty. If the warranty consists of an agreement to be liable to the other contracting party if certain things are presently untrue, or if certain things happen, or fail to happen, in the future, then the rights of an assignee should be determined by general principles as to the assignability of contracts. On the other hand, if the vendor's obligation is created by law rather than agreement, there is no reason to assume that the law of contracts should control. And this paper is primarily concerned with such non-consensual warranties.

#### REPRESENTATION AS WARRANTY

The great mass of litigation concerning a vendor's liability on warranty arises where his performance has fallen short of that which the

<sup>18</sup> A tag attached to an electrical appliance bought by the writer a few days ago set out the following undertaking: "We hereby guarantee that this appliance has been thoroughly checked and tested before shipment, and is free of mechanical and electrical defects. Should defects due to faulty materials or workmanship develop within one year from date of sale, the appliance will be repaired and put in working condition free of charge, providing it is returned to our factory or authorized service station transportation prepaid. This guarantee does not cover cord or plugs, nor is it valid if the item has been misused, abused or tampered with." For an example of a very restricted warranty by an automobile manufacturer see *Ford v. Willys-Overland, Inc.*, 197 N. C. 147, 148, 147 S. E. 822 (1929).

<sup>19</sup> *Malooly v. York Heating & Ventilating Corp.*, 270 Mich. 240, 258 N. W. 622 (1935).

<sup>20</sup> *Ford v. Willys-Overland, Inc.*, 197 N. C. 147, 147 S. E. 822 (1929).

<sup>21</sup> *Timberland Lumber Co. v. Climax Mfg. Co.*, 61 F. (2d) 391 (C. C. A. 3d, 1932).

law requires rather than where he has failed to perform his promise. Such warranty is not only non-promissory; it exists independently of any intention to warrant.<sup>22</sup> The common law prescribing such obligation is codified in the Uniform Sales Act, Sections 12 through 16.

Section 12 of the Sales Act provides: "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon." Here are both types of warranty—the one created by promise and the other founded on representation plus reliance. Both of these are denominated express warranty. The four sections which follow deal with what is called implied warranty. It seems to the writer, however, that the implied warranties prescribed by the Sales Act are indistinguishable in legal principle from the warranty arising by representation. The law says you represent, or you sell as your own, or you sell by description, or by sample, or you sell to one relying on your skill to provide goods suitable for his particular purpose which is known to you, therefore you must be answerable. In each instance the source of the liability is in the law; but one can, perhaps, understand this distinction in terminology if he realizes that the original action for breach of warranty was for misrepresentation. Section 12 deals with express representations. The following sections concern situations where it seems that one can, without unduly straining a point, find implicit representations. Does not he who sells represent that he owns or has the right to sell? If he sells by sample or description, is not a representation fairly to be implied? And where a buyer expressly, or by implication, makes known to a seller that he relies upon his judgment to supply goods suitable for a particular purpose, does a tender of goods by the seller not imply that they will satisfy that purpose? If these questions can be answered in the affirmative, then it would seem that the best approach to the study of non-promissory warranty is through the law of misrepresentation.

Few fields of law have been treated so often and ably as has misrepresentation<sup>23</sup> but it is not the writer's purpose to attempt to review

<sup>22</sup> Williston, *Representation and Warranty in Sales: Heilbut v. Buckleton* (1913) 27 HARV. L. REV. 1; WILLISTON, SALES (2d ed. 1924) §198.

<sup>23</sup> Smith, *Liability for Negligent Language* (1900) 14 HARV. L. REV. 184; Williston, *Liability for Honest Misrepresentation* (1911) 24 HARV. L. REV. 415; Bohlen, *Misrepresentation as Deceit, Negligence, or Warranty* (1929) 42 HARV. L. REV. 733; Green, *Deceit* (1930) 16 VA. L. REV. 749; Carpenter, *Responsibility for Intentional, Negligent and Innocent Misrepresentation* (1930) 24 ILL. L. REV. 749; Weisiger, *Bases of Liability for Misrepresentation* (1930) 24 ILL. L. REV. 866; Bohlen, *Should Negligent Misrepresentation be Treated as Negligence or Fraud?* (1932) 18 VA. L. REV. 703; Green, *Innocent Misrepresentation* (1933) 19 VA. L. REV. 242; Harper and McNeely, *A Synthesis of the Law of Misrepresentation* (1938) 22 MINN. L. REV. 939.

the literature on the subject.<sup>24</sup> He is not here interested in liability for conscious misrepresentation: that is, in the action of deceit as limited in *Derry v. Peek*.<sup>25</sup> Neither is he concerned with responsibility for negligent representation. This likewise entails an element of fault and he has defined warranty in such a manner as to exclude liability for such cause. He is interested only in those cases where representation creates obligation even though there is no manner of fault to be attributed to the one making such representation. And indisputably there are such cases, call them what one may.

Professor Williston has recognized and approved liability for honest, non-negligent misrepresentation.<sup>26</sup> He has, however, sought to classify cases affording such relief under the heading of deceit. Probably in deference to the old and generally prevailing rule that warranty is only available as between a buyer and seller in privity of contract,<sup>27</sup> he has not identified this liability as that of a warrantor. Indeed, he has, in effect, distinguished warranty by using it, along with estoppel *in pais* and rescission for misrepresentation, as an analogy to support his thesis that liability for honest, non-negligent misrepresentation is justifiable.<sup>28</sup> Professor Bohlen has spoken out against the classification of this liability as deceit rather than against its existence.<sup>29</sup> He would make it clear that: "Those courts, which by arbitrary presumption make a statement of a fact 'capable of knowledge' a basis sufficient for liability if it prove false, even though its author is honestly and reasonably convinced of its truth, have enriched the law of warranty."<sup>30</sup> He has seen that the problem of contractual privity is the same for the traditional warranty and for this new form of warranty as he calls it.<sup>31</sup> Dean Green,<sup>32</sup> Professor Weisiger,<sup>33</sup> and Professor Harper and Miss Mc-

<sup>24</sup> This has been well done by Professor Harper and Miss McNeely, *loc. cit. supra* note 23.

<sup>25</sup> [1889] 14 A. C. 337. Accord: RESTATEMENT, TORTS (1938) §526.

<sup>26</sup> "Undoubtedly there are many decisions and more *dicta* opposed to the decisions which have just been cited, but there is certainly enough authority to put the bench and bar upon enquiry as to the intrinsic merit of the proposition that one who makes a positive statement of fact in regard to a matter about which he may be reasonably supposed to have information, and makes the statement for the purpose, or apparent purpose, of inducing another to enter into a business transaction, is liable if the statement is false." Williston, *supra* note 23 at 433.

<sup>27</sup> *Chysk v. Drake Bros. Co.*, 235 N. Y. 468, 139 N. E. 576 (1923); *Thomas v. Ballard and Ballard Co.*, 220 N. C. 1, 179 S. E. 30 (1935); WILLISTON, SALES (2d ed. 1924) §244.

<sup>28</sup> Williston, *supra* note 23, at 417.

<sup>29</sup> "Whether liability should be so extended is an interesting problem of public policy; very possible it should. . . . There seems no good reason why, in commercial or business dealings, any statement of a fact, which purports knowledge of its existence, should not be a sufficient assurance that the fact exists." Bohlen, *supra* note 23, 18 VA. L. REV. at 704.

<sup>30</sup> *Ibid.*

<sup>31</sup> Bohlen, *supra* note 23, 42 HARV. L. REV. at 747.

<sup>32</sup> Green, *supra* note 23, 16 VA. L. REV. 749 and 19 VA. L. REV. 242.

<sup>33</sup> Weisiger, *loc. cit. supra* note 23.

Neely<sup>34</sup> have all argued strongly for the existence of such a liability without fault based upon representation.

If such a liability exists, does it spring from any representation which one party may make and another act upon? The obvious answer is "no"; for answerability for misrepresentation is predicated upon reliance, and reasonableness of reliance, as well as upon falsity and injury. Not every statement merits credit and reliance. Indeed, it is only in the exceptional case that one should be held as an insurer of the truth of his representations. But, "If one makes a statement in regard to a matter upon which his hearers may reasonably suppose he has the means of information, and that he is speaking with full knowledge, and the statement is made as part of a business transaction, or to induce action from which the speaker expects to gain an advantage, he should be held liable for his misstatements."<sup>35</sup> "What is important is that statements are made by one who professes a reasonable certainty of knowledge, or whose position makes accurate information peculiarly available to him. Not only parties to the contract itself, but those interested in and closely connected with the subject matter who, because of such connection, are in a position to furnish accurate information, or who purport to impart it, may well be held to answer here for even innocent information."<sup>36</sup> "There are situations in which action is commonly taken in business negotiations upon the assumed existence of certain facts. Business proceeds not upon the assumption that representations are merely honestly and cautiously made, but that they are true."<sup>37</sup> As applied to the problem under consideration, this principle might be stated thus: One in, or apparently in, a position to know, who, actuated by self-interest, makes a representation intended to induce, and reasonably inducing another to purchase or to use goods, is an insurer of the truth of the matter so represented.

If this analysis be followed and representation be regarded as warranty, then privity of contract will be seen in a different perspective. It now becomes significant only in so far as it evidences a reasonable basis for reliance. And here, in the principle of reliance, one can, perhaps, see the reason for the conventional rule that recovery on warranty may be had only where there is privity of contract. For, while warranty is not contract, it would seem that until recently it was only in situations where contract existed that one would find that reasonable reliance which serves as the basis for liability without fault. This statement is, of course, subject to some exceptions; but the law has a tendency to fit the average and ignore the exceptional situation.

<sup>34</sup> Harper and McNeely, *loc. cit supra* note 23.

<sup>35</sup> Williston, *supra* note 23, at 437.

<sup>36</sup> Harper and McNeely, *supra* note 23, at 968.      <sup>37</sup> *Id.* at 945.



When Winterbottom went shopping, the courts were just coming to see the social inadequacy of *caveat emptor* and to regard his reliance on his vendor as reasonable and deserving of legal significance. But when our law of warranty was being made for the Winterbottoms of the last century, branded, mass-produced goods were not being sold in a national market. Seldom would a purchaser have known the identity of the producer or manufacturer who might stand back of his vendor; and the law would not be quick to find reasonable reliance where there was no knowledge of identity. And, if reliance is unreasonable in most cases, the ever present urge for consistency would dictate that it should be without legal consequence in all cases where there was no contract between the parties. In short, whether the courts of the last century had regarded warranty as tort or as contract, they would equally have evolved the rule as to privity. But, if it is now regarded as tort for misrepresentation, it is easier to achieve that emancipation from the bonds of privity which has been traced in the case of negligent injury to person or property.

The Sale of Goods Act<sup>38</sup> and the Uniform Sales Act<sup>39</sup> were drafted as codifications of the common law. For this reason they reflect the production and merchandising pattern of the past century rather than the present. They make no provision for warranty for the benefit of a subvendee;<sup>40</sup> but it would seem clear that neither act was intended to exclude such liability.<sup>41</sup> And where one is seeking to extend liability on warranty for the benefit of a subvendee or donee, his great difficulty is not the Sales Act but the fact that such relief has been so frequently denied as to make the rule as to the necessity of privity seem almost axiomatic. But, despite this obstacle, the law is on the move.

#### LIABILITY ON WARRANTY BY EXPRESS REPRESENTATION

In some jurisdictions a virtual insurer's liability is enforced for the benefit of subvendees and donees against manufacturers, packers and canners under the guise of relief for negligent conduct. This is accomplished by receiving evidence of the defect or imperfection as evidence of the negligence of the defendant so as, in effect, to force the defendant to exculpate himself to the satisfaction of a jury—and generally a jury of the plaintiff's peers and neighbors.<sup>42</sup> But, while the doctrine of

<sup>38</sup> 1894.

<sup>39</sup> 1906.

<sup>40</sup> Section 76 of the Uniform Sales Act defines "buyer" thus: "Buyer means a person who buys or agrees to buy goods or any legal successor in interest of such person." It would seem that this definition might have been as an instrument for extending the rights of subvendees and donees but it has not been so used. *Hanback v. Dutch Baker Boy*, 70 App. D. C. 398, 107 F. (2d) 203 (1939).

<sup>41</sup> *Klein v. Duchess Sandwich Co.*, 14 Cal. (2d) 272, 93 P. (2d) 799 (1939); Note (1929) 42 HARV. L. REV. 414 at 415.

<sup>42</sup> *Eisenbeiss v. Payne*, 42 Ariz. 262, 25 P. (2d) 162 (1933); *Ward Baking Co. v. Trizzio*, 27 Ohio App. 475, 161 N. E. 557 (1928); *Whitethorn v. Nash Finch*

*res ipsa loquitur* can be used to serve the same function as warranty, it, in theory, affords relief only for fault; and, no matter how great the assistance of the presumption, the defendant must still be found guilty of negligence. There is, however, an increasing number of cases holding a manufacturer or other vendor liable to a subvendee or donee on the score of misrepresentation or warranty without regard to scienter or negligence.

One of the most interesting of these cases is *Roberts v. Anheuser-Busch Brewing Co.*<sup>43</sup> Here the plaintiff sought recovery for injuries to his wife and infant son. They had been poisoned by a bottle of malt nutritine manufactured by the defendant and bought by the plaintiff from a retailer. The Supreme Judicial Court of Massachusetts stated that an action for breach of warranty would not lie because privity was lacking. Then, however, it went on to hold that it was error to direct a verdict for the defendant because the defendant had made representations in its advertisements as to the healthfulness and other beneficial qualities of its product. Nothing was said of scienter or of negligence. The court cited *Thomas v. Winchester*,<sup>44</sup> which was distinguishable because there negligence was alleged. Here an insurer's liability seems to have been imposed upon the maker of the malt nutritine because of the representations. The Supreme Court of Georgia has recognized a like liability where a patent medicine has been misrepresented in advertisements and in folders accompanying the bottle.<sup>45</sup> In both these cases there is an appeal like that of the mislabelled belladonna which did its bit to destroy the rule of *Winterbottom v. Wright*. Here, however, the play is different. Both courts are dealing with the stuff of which warranty was made—and is being made. The fact that neither court realized this truth does not make it the less significant.

In *Baxter v. Ford Motor Co.*<sup>46</sup> the Supreme Court of Washington, with a full awareness of what it was doing, held the defendant manufacturer as an insurer of the truth of its representations. In catalogues and circulars the defendant advertised the windshields of its automobiles as "shatter-proof". The plaintiff bought, and rode, and lost an eye when his windshield was shattered by a pebble thrown by a passing car. The plaintiff did not buy directly from the defendant. He bought as the defendant intended he should buy and sought to induce him to

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Co., 293 N. W. 859 (S. D. 1940). *Contra*: *Enloe v. Charlotte Coca Cola Bottling Co.*, 208 N. C. 305, 180 S. E. 582 (1935). See Heckel and Harper, *Effect of the Doctrine of Res Ipsa Loquitur* (1928) 22 ILL. L. REV. 724.

<sup>43</sup> 211 Mass. 449, 98 N. E. 95 (1912).

<sup>44</sup> 6 N. Y. 397 (1852) (belladonna labelled as dandelion).

<sup>45</sup> *Blood Balm Co. v. Cooper*, 83 Ga. 457, 10 S. E. 118 (1889).

<sup>46</sup> 168 Wash. 456, 12 P. (2d) 409 (1932) and 179 Wash. 123, 35 P. (2d) 1090 (1934).

buy. He bought from a retail dealer. But this presence of the retailer did not serve to insulate the defendant from liability even though no bad faith or negligence could be charged against it. In reaching this decision the court had recourse to wobbly authority but its decision is firm.<sup>47</sup> But although firm, the basis of the decision is not definitely elaborated and it has meant "all things to all men".<sup>48</sup> The writer regards it as warranty by representation and so the Supreme Court of Washington has recently defined it.<sup>49</sup>

It is as yet too early to judge the survival and propagation power of the rule in the *Baxter* case. In the few times such cases have since reached appellate courts, it has been followed in a striking decision by the Supreme Court of Michigan<sup>50</sup> and has been disapproved by two circuit courts of appeal.<sup>51</sup> But it is not so much judicial refusal to bridge the gap between manufacturer and consumer as it is more cautious advertising that bids fair to minimize the consequences of the *Baxter* case. "Shatter-proof" glass has become "safety" glass.<sup>52</sup> The prospective purchaser is shown a photograph of an expert overturning the car at sixty miles per hour but is given no assurance that he may do likewise with impunity.<sup>53</sup> Moreover, in the present state of our law, it seems that the manufacturer or dealer is free to raise expectations by representations, made without knowledge of their falsity, and at the same time defeat the usual consequence of reliance on such representations by the instrumentality of a written contract.<sup>54</sup> Until our

<sup>47</sup> For a detailed criticism of the citations used in the *Baxter* case see Leidy, *Another New Tort* (1940) 38 MICH. L. REV. 964 at 967. Professor Leidy vigorously opposes the decision of the Washington court. It has, however, been as vigorously defended. Freezer, *Manufacturer's Liability for Injuries Caused by His Products: Defective Automobiles* (1938) 37 MICH. L. REV. 1.

<sup>48</sup> Leidy, *supra* note 47, at 972; Notes (1933) 18 CORN. L. Q. 445, (1933) 46 HARV. L. REV. 161, (1932) 81 U. OF PA. L. REV. 94, (1935) 7 ROCKY MT. L. REV. 221, (1933) 7 WASH. L. REV. 351.

<sup>49</sup> *Murphy v. Plymouth Motor Corporation*, 100 P. (2d) 30, 32 (Wash. 1940).

<sup>50</sup> *Bahlman v. Hudson Motor Car Co.*, 290 Mich. 683, 288 N. W. 309 (1939). Here the plaintiff bought "A Rugged Fortress of Safety" with "An Improved Seamless Steel Roof." He recovered when, on overturning his car, he injured his head on a seam where two pieces of the roof were welded together. Contributory negligence was held to be no defense. Cf. *Cheli v. Cudahy Bros. Co.*, 267 Mich. 690, 255 N. W. 414 (1934) (trichinosis contracted from eating raw sausage). On this problem of contributory negligence see Note (1940), 25 CORN. L. Q. 625.

<sup>51</sup> *Chanin v. Chevrolet Motor Co.*, 89 F. (2d) 889 (C. C. A. 7th, 1937); *Rachlin v. Libbey-Owen-Ford Glass Co.*, 96 F. (2d) 597 (C. C. A. 2d, 1938).

<sup>52</sup> *Rachlin v. Libbey-Owen-Ford Glass Co.*, 96 F. (2d) 597 (C. C. A. 2d, 1938).

<sup>53</sup> *Murphy v. Plymouth Motor Corporation*, 100 P. (2d) 30 (Wash. 1940). The writer has no quarrel with the decision in this case but it does suggest the observation that consumer's rights are too often sacrificed to a judicial leniency towards "puffing." A narration of superlatives should be at least an implicit assurance that the article or commodity possesses those very ordinary and general characteristics which the public has come to expect in all vendible articles or commodities of the type advertised.

<sup>54</sup> For an example of such a contract see *Ford v. Willys-Overland, Inc.*, 197 N. C. 147, 148, 147 S. E. 822 (1929). As to the effect of the parol evidence rule

law is changed the manufacturer can always escape as did the dealer in the *Baxter* case.<sup>55</sup>

The Kentucky court has enforced an insurer's liability against a packer of seed who put an alfalfa label on sweet clover seed with the consequence that the plaintiff, a farmer who bought from a retailer, saw his alfalfa field yield clover.<sup>56</sup> This decision has been criticized on the ground that it should have been put on the basis of negligence.<sup>57</sup> The court, however, considered the label to be a representation addressed to the ultimate consumer; and, believing the law to be "a progressive and resourceful science",<sup>58</sup> it held that the defendant should be, and consequently was, liable for the falsity of his representation. Recovery was for deceit but had faith was not alleged and is not to be imagined in such a case. Negligence is, of course, possible but the plaintiff made no such allegation. Here *deceit* is *warranty*. The Supreme Court of Texas has achieved a like result where a manufacturer misrepresented his product directly to the City of Waco in order to induce it to specify, in a construction contract with a third party, a particular type of pipe made by the defendant.<sup>59</sup> And in a Pennsylvania case the defendant's tag attached to a sample of tobacco was held, because of the custom of the particular trade, to be available as a warranty to a subvendee.<sup>60</sup>

#### THE FOOD CASES

The food cases present an even more striking picture. Professor Llewellyn, in speaking of expanding seller's liability, has said: "The emotional drive and appeal of the cases centers in the stomach."<sup>61</sup> And

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on recovery for warranty resulting from statements in advertising see Note (1929) 29 COL. L. REV. 805.

<sup>55</sup> The policy of limiting the effect of such contractual disclaimers seems to deserve legislative consideration. See Bogert and Fink, *Business Practice Regarding Warranties in the Sale of Goods* (1930) 25 ILL. L. REV. 400 at 413.

<sup>56</sup> *Graham v. John R. Watts & Son*, 238 Ky. 96, 36 S. W. (2d) 859 (1931).

<sup>57</sup> Russell, *Manufacturer's Liability to the Ultimate Consumer* (1933) 21 KY. L. J. 388 at 403. The author favors the principle of *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050 (1916) in its broadest form but would limit recovery to cases where there has been a "wrongful act".

<sup>58</sup> *Graham v. John R. Watts & Son*, 238 Ky. 96, 105, 36 S. W. (2d) 859, 863 (1931).

<sup>59</sup> *U. S. Pipe & Foundry Co. v. Waco*, 130 Tex. 126, 108 S. W. (2d) 432 (1937). At 130, 108 S. W. (2d) 434 the court says: "Here the manufacturer, in order to secure to itself the benefits of a large sale of its pipe, induced the city by representations as to its fitness and quality, to specify the same. By indirection it thus secured for itself a sale as certainly, and presumably as profitably, as if a direct contract of sale had been made with the city. Having secured the benefits, it may not now avoid the burdens of the transaction. It did not need to speak, but having done so and secured the sale of its product, the law required it to speak the truth."

<sup>60</sup> *Conestoga Cigar Co. v. Finke*, 144 Pa. 159, 22 Atl. 868 (1891).

<sup>61</sup> (1930) CASES AND MATERIALS ON SALES 342.

so one finds when he examines to see how far warranty has transcended the bounds of contract.<sup>62</sup> He finds a wealth of miscitation and confusion but he finds a very definite and growing urge to afford relief. In particular, he finds many negligence cases being used to create liability irrespective of negligence.<sup>63</sup> He finds cases where the defendant is not a warrantor of the quality of his goods but of the fact that he has used the highest degree of care and where, apparently, proof of care will exonerate.<sup>64</sup>

Perhaps the most interesting line of food cases is that which is to be found in Mississippi. In the first, the court found neither negligence nor warranty, but just a mouse in a bottle of Coca-Cola bought from a retailer and bottled by the defendant.<sup>65</sup> But that sufficed to permit recovery; and with this beginning, the court went on to create the rule that on the sale of food there was an implied warranty of quality which was available for the benefit of subvendees and donees on the principle of a covenant running with the land.<sup>66</sup> Later the court felt free to admit the speciousness of its authority and to reaffirm the rule because it existed and was desirable.<sup>67</sup> In one case, where the purchaser from a retailer was suing the manufacturer of a nationally advertised candy bar, the court said that the plaintiff bought upon his faith in the reputation of the manufacturer.<sup>68</sup> But when the consumer buys a soft drink in a bottle this element is usually lacking. Apparently the court finds,

<sup>62</sup> Professor Perkins has expounded the thesis that the food cases are governed by rules which are different from those applied in other cases. Perkins, *Unwholesome Food as a Source of Liability* (1919 and 1920) 5 IOWA L. BULL. 6 and 86. But see WILLISTON, SALES (2d ed. 1924) §242a.

<sup>63</sup> Perhaps the three most conspicuous of such cases are: *Ketterer v. Armour & Co.*, 200 Fed. 322 (S. D. N. Y. 1912); *Parks v. Yost Pie Co.*, 93 Kan. 334, 144 Pac. 202 (1914); *Mazetti v. Armour & Co.*, 75 Wash. 622, 135 Pac. 633 (1913). In the first of these cases the court uses this oft quoted language at 200 Fed. 323: "The remedies of the injured consumers ought not to be made to depend upon the intricacies of the law of sales. The obligation of the manufacturer should not be based alone upon privity of contract. It should rest, as was once said, upon 'the demands of social justice'."

<sup>64</sup> *Parks v. Yost Pie Co.*, 93 Kan. 334, 144 Pac. 202 (1914); *Hertzler v. Manshum*, 228 Mich. 416, 200 N. W. 155 (1924).

<sup>65</sup> *Jackson Coca Cola Bottling Co. v. Chapman*, 106 Miss. 864, 64 So. 791 (1914). The court said: "A sma' mousie caused the trouble in this case. The wee, sleekit, cow'rin, tim'rous beastie drowned in a bottle of coca cola." And appellee "did not get joy from the refreshing drink. He was in the frame of mind to approve the poet's words:

The best-laid schemes o' mice an' men  
Gang aft aglay  
An' lea'e us nought but grief an' pain,  
For promis'd joy."

<sup>66</sup> *Rainwater v. Hattisburg Coca Cola Bottling Co.*, 131 Miss. 315, 95 So. 444 (1923); *Grapico Bottling Co. v. Ennis*, 140 Miss. 502, 106 So. 97 (1925); *Coca Cola Bottling Works v. Lyons*, 145 Miss. 876, 111 So. 305 (1927). It is the last of these cases which brings the theory to full fruition.

<sup>67</sup> *Chenault v. Houston Coca Cola Bottling Co.*, 151 Miss. 366, 118 So. 177 (1928).

<sup>68</sup> *Curtiss Candy Co. v. Johnson*, 163 Miss. 426, 435, 141 So. 762, 764 (1932).

in the mere putting of human food and drink upon the market, an implied representation on the part of the anonymous maker.<sup>69</sup> In other words, the consumer eats and drinks in reliance upon someone's implicit representation that the food or drink is suitable for the purpose for which it was put upon the market and for which he acquired it. Only when something has gone amiss does he inquire for more specific information. This is a very liberal protection for consumers and the reason for it becomes more apparent when it is realized that in Mississippi the consuming public is without the protection of warranty as against a retailer who sells food in the original package.<sup>70</sup> From this it naturally follows that a wholesaler who has sold food in the original package, without identifying it as his own, is exempt from a warrantor's liability to an injured consumer.<sup>71</sup> One other comment is necessary as to the Mississippi law. The rule as to human food is unique. There is no warranty except between parties privy on the sale of animal food.<sup>72</sup>

In cases involving human food the courts of California,<sup>73</sup> Iowa,<sup>74</sup> Kansas,<sup>75</sup> Missouri,<sup>76</sup> Pennsylvania,<sup>77</sup> Texas,<sup>78</sup> and Washington<sup>79</sup> have likewise dispensed with the requirement of privity without, however, stating any consistent or well-articulated reasons for their holdings. In the much discussed case of *Ward Baking Co. v. Trizzio*<sup>80</sup> the Ohio Court of Appeals held that the purchaser of a cake from a retailer might recover on warranty from the manufacturer when he was injured by a needle contained in the cake. The court laid down a rule as to negligence which was so stringent as, in effect, to make the manufacturer an insurer; but it likewise held that the plaintiff was entitled to go to the jury on the theory of an implied warranty made by the manu-

<sup>69</sup> *Coca Cola Bottling Works v. Simpson*, 158 Miss. 390, 130 So. 479 (1930).

<sup>70</sup> *Kroger Grocery Co. v. Lewelling*, 165 Miss. 71, 145 So. 726 (1933).

<sup>71</sup> *Elmore v. Grenada Grocery Co.*, 197 So. 761 (Miss. 1940).

<sup>72</sup> *Royal Feed & Milling Co. v. Thorn*, 142 Miss. 92, 107 So. 282 (1926).

<sup>73</sup> *Klein v. Duchess Sandwich Co.*, 14 Cal. (2d) 272, 93 P. (2d) 799 (1939).

<sup>74</sup> *Davis v. Van Camp Packing Co.*, 189 Iowa 775, 176 N. W. 382 (1920); *Anderson v. Tyler*, 223 Iowa 1033, 274 N. W. 48 (1937).

<sup>75</sup> *Swengel v. F. & E. Wholesale Grocery Co.*, 147 Kan. 555, 77 P. (2d) 930 (1938). This case is unique in that defendant was the wholesaler of a nationally advertised product which it had not identified as its own. There is nothing to show that plaintiff knew of the existence of defendant until after his injury.

<sup>76</sup> *Madouros v. Kansas City Coca Cola Bottling Co.*, 230 Mo. App. 275, 90 S. W. (2d) 445 (1936); *McNicholas v. Continental Baking Co.*, 112 S. W. (2d) 849 (Mo. App. 1938); *Carter v. St. Louis Dairy Co.*, 139 S. W. (2d) 1025 (Mo. App. 1940). But cf. *Conner v. Great Atlantic & Pacific Tea Co.*, 25 Fed. Supp. 855 (W. D. Mo. 1939) (here no recovery allowed donee and Missouri cases distinguished as allowing recovery by subvendee against manufacturer).

<sup>77</sup> *Catani v. Swift & Co.*, 251 Pa. 52, 95 Atl. 931 (1915); *Nock v. Coca Cola Bottling Works of Pittsburgh*, 102 Pa. Super. 515, 156 Atl. 537 (1931); cf. *Mena-ker v. Supplee-Wills-Jones Milk Co.*, 125 Pa. Super. 76, 189 Atl. 714 (1937).

<sup>78</sup> *Decker & Sons v. Capps*, 144 S. W. (2d) 404 (Tex. Civ. App. 1940).

<sup>79</sup> *Nelson v. West Coast Dairy Co.*, 105 P. (2d) 76 (Wash. 1940).

<sup>80</sup> 27 Ohio App. 475, 161 N. E. 557 (1928).

facturer to the retailer for his benefit. The court apparently overlooked the implied warranty of merchantability in which the retailer had a real interest and assumed that he was interested only in receiving an implied warranty of suitability for the benefit of his customers. This, however, would seem a less substantial objection than the fact that this warranty is not the creature of contract. For this reason, to apply here the theory of a contract for the benefit of a third party is to have recourse to pure fiction although, under the circumstances, it may be desirable to do so.

#### THE FAMILY AS A CONSUMING UNIT

If the third party beneficiary doctrine is to make headway, one would expect to find it employed not so much to reach beyond the retailer to the manufacturer as to give other members of the household of the purchaser the same right as he. It is when the traditional rule as to privity is applied here that the results seem most unsatisfactory. A child is made ill by eating an unwholesome chocolate éclair or by drinking infected milk. The child who ate and drank has no right to recover on warranty.<sup>81</sup> That right is in the parent who bought but did not eat or drink. The parent may recover on warranty for his expenses in providing medical care for the infant but the child must prove negligence.<sup>82</sup>

Confusion results when a husband and wife are concerned. If she buys and he is injured, he may<sup>83</sup> or may not<sup>84</sup> recover for breach of warranty on the theory that she purchased as his agent. If the wife purchases and is injured, she may recover as buyer,<sup>85</sup> or as agent for an undisclosed principal who is entitled to recover as principal,<sup>86</sup> or she may be denied recovery on the theory that she bought as agent for her husband and that warranty runs to him.<sup>87</sup> This sounds like nonsense so long as we have the family as a basic social and consuming unit; but the New York Court of Appeals has specifically refused to extend liability in such situations by recourse to the rule of third party bene-

<sup>81</sup> *Hanback v. Dutch Baker Boy*, 70 App. D. C. 398, 107 F. (2d) 203 (1939); *Colonna v. Rosedale Dairy, Inc.*, 166 Va. 314, 186 S. E. 94 (1936).

<sup>82</sup> *Stave v. Giant Food Arcade*, 125 N. J. L. 512, 16 A. (2d) 460 (Sup. Ct., 1940).

<sup>83</sup> *Ryan v. Progressive Grocery Stores, Inc.*, 255 N. Y. 388, 175 N. E. 105 (1931).

<sup>84</sup> *Gimenez v. Great Atlantic and Pacific Tea Co.*, 264 N. Y. 390, 191 N. E. 27 (1934).

<sup>85</sup> *Schlosser v. Goldberg*, 123 N. J. L. 470, 9 A. (2d) 699 (Sup. Ct., 1939).

<sup>86</sup> *Timmins v. F. N. Joslin Co.*, 303 Mass. 540, 22 N. E. (2d) 76 (1939); *Colby v. First National Stores, Inc.*, 29 N. E. (2d) 920 (Mass. 1940); *Meyer v. Kershbaum*, 133 Misc. 330, 232 N. Y. Supp. 300 (Sup. Ct., 1928).

<sup>87</sup> *Gearing v. Berkson*, 232 Mass. 257, 111 N. E. 785 (1916); *Vaccaro v. Prudential Condensed Milk Co.*, 133 Misc. 556, 232 N. Y. Supp. 299 (N. Y. City Cts., 1928).

ficiary.<sup>88</sup> Yet so strong is the urge to grant relief in the family situation that in a very recent case the City Court of New York has applied this very doctrine to enable a child to recover on warranty against a retailer who sold a can of contaminated salmon to her mother.<sup>89</sup> The rule of the case was limited to the family circle. Here it appeared that the husband of the purchaser and a guest of the family were likewise injured. Presumably this court would permit the husband to recover but would not extend its protection to the guest. She stands in need of still greater extension of the third party beneficiary doctrine or of the elimination of the necessity for privity.

#### CONCLUSION

If any court wishes to drop the requirement of privity, there is now ample and respectable authority to justify its decision to the legal world. There are likewise a number of theories to advance in support of such a decision;<sup>90</sup> but a theory is by no means necessary. A decision can achieve eminent respectability although it is fathered by no generally acceptable legal principle. In such cases elaboration of legal theory is by way of justification and is remote from cause.<sup>91</sup> It is with the realization that this is but another rationalization of a developing legal phenomenon that the writer has attempted the development of his thesis of warranty as representation. He believes that warranty can best be unshackled by regarding it as tort for misrepresentation.<sup>92</sup> As to whether it should be unshackled, that is another matter.

It has been said of the buyer: "He buys and uses, he must buy and use, at hazard of his skin."<sup>93</sup> The donee must likewise eat and use at hazard of his skin. Consequently there is a policy which dictates that the consumer, be he buyer or donee, should be protected at the expense of the manufacturer who can best bear the loss and eliminate the risk. The same consideration, although to a lesser extent, would

<sup>88</sup> *Gimenez v. Great Atlantic & Pacific Tea Co.*, 264 N. Y. 390, 395, 191 N. E. 27, 29 (1934).

<sup>89</sup> *Singer v. Zabelin*, 24 N. Y. Supp. (2d) 962 (N. Y. City Cts., 1941).

<sup>90</sup> Jeanblanc, *Manufacturer's Liability to Persons Other than Their Immediate Vendees* (1937) 24 VA. L. REV. 134; Notes (1933) 33 COL. L. REV. 868, (1935) 4 FORDHAM L. REV. 295, (1929) 42 HARV. L. REV. 414, (1937) 21 MINN. L. REV. 315, (1940) 25 MINN. L. REV. 83. See also Morrow, *Warranty of Quality: A Comparative Survey* (1940) 14 TULANE L. REV. 327 & 529 in which the author says at p. 550: "In France, on the other hand, privity of contract is no obstacle."

<sup>91</sup> One court enumerated five theories which might be advanced in justification of its decision and declined to adopt any one of them, saying: "It is sufficient to state that the liability . . . is imposed on the maker of false statements and may be enforced by the ultimate consumer of the products to whom the statements are directed." *Bahlman v. Hudson Motor Car Co.*, 290 Mich. 683, 288 N. W. 309, 313 (1939).

<sup>92</sup> The writer of an able Columbia Law Review note regards this as the least promising of all the theories suggested. (1933) 33 COL. L. REV. 868 at 870.

<sup>93</sup> LLEWELLYN, *CASES AND MATERIALS ON SALES* (1930) 341.



favor the donee as against the retailer. There is also the argument that it is undesirable to beget a multitude of suits by requiring each party to sue his immediate vendor.<sup>94</sup> In addition there is the consideration that the requirement of privity will defeat an injured party's claim, unless he can prove bad faith or negligence, if he bought from a financially irresponsible party or is a donee. On the other hand there is the danger that every stomach ache may become a judgment to be figured as an industrial cost and passed on to the public.<sup>95</sup> There is the even greater fear of faked stomach aches. It would seem that the rats of Hamlin were as nought in comparison with that horde of mice which has sought refreshment within Coca-Cola bottles and died of a happy surfeit. In the reports one cannot distinguish genuine claims from false; he can only suspect. And in such a field, where factual information is so unavailable, judgment is likely to follow suspicion.<sup>96</sup>

The writer knows too little of the facts to express an opinion as to whether an unshackled warranty is desirable when one considers the total picture. He would, however, make the admonition that legal theory and decisions have now reached the point where courts, in denying relief for warranty because of the absence of privity of contract, should realize that they are making a decision on policy and are not engaged in something so simple as completing a syllogism.<sup>97</sup>

<sup>94</sup> See *Kasler and Cohen v. Slavonski* [1928] 1 K. B. 78 which was the last in a series of recoveries over in which there were four actions and one settlement out of court. The judgment against the first vendor was approximately twice that received by the injured consumer.

<sup>95</sup> For an interesting discussion of allergy and difficulties of proof in food poisoning cases see, Hoy, *Liability of Packer for Injury to Consumer of Food Purchased from Middleman* (1939) 5 JOHN MARSHALL L. Q. 234. The author would limit liability to cases involving fault. Query, if his reasoning would not eliminate the warranty of suitability in all sales of human food?

<sup>96</sup> Unfortunately it seems to be impossible to draft legislation which will eliminate the fraudulent claim without barring relief for the genuine. Compare the simpler problem of the claim for breach of warranty of fertilizer which formerly vexed the courts. Here analysis before use is easy and is of far greater evidentiary value than crop failure. The requirement of such analysis or, in the alternative, a finding by a public commission of fraud or violation of law, will serve to eliminate the faker's claim. For an example of such a statute see N. C. CODE ANN. (Michie, 1939) §4689(9) (h).

<sup>97</sup> On the analogous problem of the liability of a retailer as a warrantor of goods sold in the original package, courts and writers have been more frank in their recognition of the policy element. For a summary of the diverse decisions and expositions of policy pro and con see: Brown, *The Liability of Retail Dealers for Defective Food Products* (1939) 23 MINN. L. REV. 585; Waite, *Retail Responsibility and Judicial Law Making* (1936) 34 MICH. L. REV. 494. The same problem has been less frankly handled in the cases on the service of food. Some courts, in denying the existence of warranty, have voiced such nonsense as this: "Before consumption title does not pass; after consumption there remains nothing to become the subject of title." *Merrill v. Hodson*, 88 Conn. 314, 318, 91 Atl. 533, 535 (1914). With this compare the language of Judge Augustus Hand, which might well serve as a model for judges tackling the privity of contract problem. After discussing the question as to whether a restaurateur "sells" or only "utters" his food, Judge Hand continues: "This discussion is really aside from the main question

in this case and is only indulged in by reason of the fact that it has occupied the attention of the court in so many opinions, and been discussed so fully by counsel. In the absence of any specific authority in the federal decisions, is there any ground in reason for imposing upon a restaurant keeper any obligation to furnish wholesome food to his patrons at all hazards; that is to say, is his obligation that of an absolute insurer of his foods? . . . My own feeling is that the protection of the public lies not so much in extending the absolute liability of individuals, as in regulating lines of business in which the public has a particular interest in such a way as reasonably to insure its safety." *Valeri v. Pullman Co.*, 218 Fed. 519, 521 (S. D. N. Y. 1914).

Judge Hand suggests public regulation. A study of such regulation is, of course, necessary to get a complete picture of the position of the consumer; but such a study lies beyond the scope of this paper. See Cavers, *The Food, Drug, and Cosmetics Act of 1938: Its Legislative History and Its Substantive Provisions* (1939) 6 LAW & CONTEMP. PROB. 2; Note, *The Effect of Pure Food Statutes on Civil Liability* (1939) 26 VA. L. REV. 100; Handler, *The Control of False Advertising under the Wheeler-Lea Act* (1939) 6 LAW & CONTEMP. PROB. 91; Note, *The Consumer and Federal Regulation of Advertising* (1940) 52 HARV. L. REV. 828.