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experience, but only for a consequence which is probable, according to the ordinary and usual experience."

The contract price difference appears to be in the "possible" class rather than in the "probable" class. Furthermore, the shipment to Sioux City was one made of the plaintiff's own volition, the defendant having nothing to do with the making of that contract. The making of the second contract appears to be an intervening and independent decision too remote to enter into the damage caused by the faulty scales.

The real damages occasioned by the negligence are those which took effect immediately—the shrinkage of the cattle in driving them into Melstone and back to their range and the expense incurred in so doing.

In conclusion, the Supreme Court has apparently extended the liability involved in rendering gratuitous services and for making negligent statements to a reasonable and desirable point needed in the modern complex society where dependence upon others is the rule rather than the exception in business activity. It is hoped that by this case the court has withdrawn from the too liberal rule applied in the *Standard Publishing Co.* case and has put liability on the firm basis of reliance.

Bill Bellingham.

Liability of the Manufacturer to the Ultimate Consumer Under Modern Merchandising Practices

A question that has perplexed the courts a great deal since the turn of the century is that of the liability of either the manufacturer or packer to the ultimate consumer for injuries sustained as a result of a defect in the article he has sold. Since both the orthodox tort and warranty remedies have proved inadequate to cope with this question there is a great need, by judicial interpretation or by legislation, to revise these rules, or to make new ones, in order to clarify the law and give the consumer his just relief.

Since the rule was first laid down in *Winterbottom v. Wright*[1] that a contractor, manufacturer, or vendor is not liable to a third person

[1] (1842) 10 M. and W. 109, 152 Eng. Reprint 402. See also COOLEY, LAW OF TORTS (Throckmorton ed. 1930) §345, pp. 695-9.

with whom he has no contractural relation for any defect in the article, the courts have striven to circumvent it in order to give the consumer the relief he demands. The problem is made more complex by modern merchandising practices. The retailer today is often reduced to little more than an agent who dispenses the goods at the request of the purchaser, while, on the other hand, the manufacturer, by national advertising of branded goods, creates the demand for his products. He thus assumes the place of the retailer in this respect. By this practice the retailer is seldom a party to the representation relied on, and the manufacturer is not a party to the contract of purchase. To meet this new situation most of the states attempt to apply the old rules pertaining to deceit and breach of warranty. The result has been confusing to say the least.

In order to understand the problems involved one must examine the traditional theories used. Shortly after the rule requiring privity of contract to maintain an action for defects in the article was first laid down, exceptions began to arise. The first was in New York with the case of *Thomas v. Winchester,*[2] in which the defendant, a manufacturer of drugs, negligently placed a harmless label on a bottle of poison which was afterwards purchased by the plaintiff from a retail store. The court said that because the injury was not likely to fall on the dealer but rather on the remote purchaser, the defendant's negligence put the purchaser's life in danger and decided that he should be held even though there was no privity of contract. Thus the exception of inherently, imminently, or essentially dangerous instrumentalities was established. Under this exception include such objects as oils and explosives,[3] weapons,[4] and automobiles.[5]

[2](1852) 6 N. Y. 397, 57 Am. Dec. 445.

[3]Riggs v. Standard Oil Company (1904) 130 F. 199; Catlin v. Union Oil Company (1916) 31 Cal. App. 597, 161 P. 29; O'Rourke v. Day and Night Water Heating Company (1939) 31 Cal. App. (2d) 597, 88 P. (2d) 191; Jacobs v. Adams Electric Company (Mo. App. 1936) 97 S.W. (2d) 849; Luntz v. Standard Oil Company (1936) .....N.H. ....., 186 A. 329; Cohn v. Soenz (1919) 211 S.W. 492, 194 S.W. 685.

[4]Herman v. Markham Air Rifle Company (1918) 258 F. 475; Welshausen v. Charles Parker Company (1910) 83 Conn. 231, 76 A. 271; Favo v. Remington Arms Company (1901) 67 App. Div. 414, 73 N. Y. Supp. 788.

[5]Johnson v. Cadillac Motor Car Company (1912) 194 F. 497; Hupp Motor Car Corporation v. Wadsworth (C.C.A. 6th 1940) 13 F. (2d) 827; McPherson v. Buick Motor Company (1916) 217 N. Y. 382, 111 N.E. 1050, L.R.A. 1916F 696, Am. Cas. 1916C 440, 13 N.C.C.A. 1029; Reusch v. Ford Motor Company (1928) 196 Wash. 213, 82 P. (2d) 556, 4 N.C.C.A. (N.S.) 788.

Another exception, and the most notable, is that of foods[6] and beverages.[7] Every state allows an ultimate consumer to bring an action directly against the manufacturer or packer for injuries sustained from the use of food kept in its original container. The majority of these require that the action be grounded in tort, as negligence or deceit.[8] The theory is that the manufacturer was negligent in making the goods which he has placed on the market as sound, and, in the deceit cases, that in putting the food or articles on the market he represents that they are fit for the purpose for which they are intended. If they are not what he claims them to be then he must respond in damages.

A minority of the American jurisdictions, in the case of foodstuffs only, allow an action for breach of implied warranty of fitness,[9] and

[6]Kelly v. John R. Daily Company (1919) 56 Mont. 63, 181 P. 326; Ketterer v. Armour and Company (C.C.A. 2d(1917) 247 F. 921, L.R.A. 1918D 796; Karger v. Armour and Company (1936) 17 F. Supp. 484; Linker v. Quaker Oat Company (1935) 11 F. Supp. 794; Drury v. Armour and Company (1919) 140 Ark. 371, 216 S.W. 40; Salmon v. Libby, McNeil and Libby (1905) 219 Ill. 421, 76 N.E. 574; Davis v. Van Camp Packing Company (1920) 189 Ia. 775, 176 N.W. 382, 17 A.L.R. 649; Roberts v. Anhauser Busch Brewing Company (1912) 21 Mass. 449, 98 N.E. 95; Tomlinson v. Armour and Company (1908) 75 N.J.L. 748, 70 A. 314, 19 L.R.A. (N.S.) 923; Lewis v. V. La Rosa and Sons (1942) 128 N.J.L. 474, 26 A. (2d) 879; Cassini v. Curtis Candy Company (1934) 113 N.Y.L. 91, 172 A. 519.

[7]Fisher v. Washington Coca Cola Bottling Company (App. D.C. 1936) 84 F. (2d) 261 ante 1034, 105 A.L.R. 1034; Coca Cola Bottling Company v. Strather (1936) .....Ark....., 96 S.W. (2d) 14; Coca Cola Bottling Company v. Barksdale (1920) 17 Ala. App. 606, 88 So. 36; Coca Cola Bottling Company v. Chapman (1914) 106 Miss. 864, 64 So. 791; Middlesboro Coca Cola Bottling Company v. Campbell (1942) 179 Va. 693.

[8]24 R.C.L. **Sales,** §468, p. 197, §806, pp. 514-15; Annotation 164 A.L.R. 659: "Most of the cases point out that a manufacturer is not, and should not be held to be, an insurer."

[9]Bolitho v. Safeway Stores (1939) 109 Mont. 213, 95 P. (2d) 443; Kelly v. John R. Dailey Company, **supra;** Catini v. Swift and Company (1915) 241 U. S. 690, 60 L. Ed. 1238, 36 Sup. Ct. 554; Eisenbeiss v. Payne (1935) 42 Ariz. 262, 25 P. (2d) 162; Patargias v. Coca Cola Bottling Company (1947) 332 Ill. App. 117, 74 N.E. (2d) 162 (strict liability based on public policy); Davis v. Van Camp Packing Company (1920) 189 Ia. 775, 176 N.W. 382, 17 A.L.R. 649; Parks v. Yost Pie Company (1914) 93 Kan. 334, 144 P. 202, L.R.A. 1915C 179, 7 N.CC.A. 100; Nemela v. Coca Cola Bottling Company (1937) ..... Mo. App....., 104 S.W. (2d) 773; Chysnosky v. Drake Brothers Company (1920) 192 App. Div. 186, 182 N. Y. Supp. 459; McSpidon v. Kunz (1936) 271 N. Y. 131, 2 N.E. (2d) 513, 105 A.L.R. 1947 (statutory implied warranty of merchantability); Catini v. Swift (1915) 251 Pa. 52, 95 L.R.A. 1917B 1272 (statutory implied warranty of wholesomeness); Mazetti v. Armour and Company (1915) 75 Wash. 622, 135 P. 633, Ann. Cas. 1915C 140, 48 L.R.A. (N.S.) 213; Jacob E. Decker and Sons v. Capp (1942) .....Tex....., 164 S.W. (2d) 828 (imposed as a matter of public policy).

in some of these states the liability is statutory.[10] The argument for allowing such an action is based on public policy, that because the life and health of the public are concerned there should be an exception to the privity rule. In a few recent cases the courts have intimated an express warranty in the form of representations made to induce the purchase.[11] However desirable this may be, there is a question whether they were recognizing this theory or basing it on one of the more orthodox grounds; or, in the one case, whether it is a new theory the court has adopted.[12]

To meet the modern merchandising practices these remedies have distinct disadvantages. An action in deceit requires the element of knowledge of the falsity of the statement.[13] On the other hand, while *scienter* need not be shown in actions for breach of warranty,[14] there remains the requirement of privity of contract. In the effort to circumvent these requirements the courts have resorted to various legal fictions. Where the action is in deceit or fraud some courts have held that there may be liability for innocent misrepresentation; others say that there is a duty on the producer to know the truth of his statements;[15] while still others say that the manufacturer is presumed to have the knowledge.[16] Where the action is in breach of warranty it has been held that the representations are made to the public at large.[17] One writer[18] has likened such representations to the famous English "smoke ball" case.[19] There the

[10]R.C.M. 1935, §7618, "One who makes a business of selling provisions for domestic use warrants, by a sale thereof, to one who buys for actual consumption that they are sound and wholesome." Other states include South Carolina, Georgia, Ohio, Wisconsin and Pennsylvania.

[11]Bakhnan v. Hudson Motor Car Company (1939) 290 Mich. 683, 288 N.W. 309; Mannsz v. MacWhyte Company (1946) 155 F. (2d) 445; Baxter v. Ford Motor Company (1932) 168 Wash. 456, 12 P. (2d) 409, 15 P. (2d) 1118, 88 A.L.R. 521.

[12]Mannsz v. MacWhyte Company, **supra.**

[13]R.C.M. 1935, §7575; 37 C.J.S. **Fraud,** §19-22, pp. 254 to 260. COOLEY, LAW OF TORTS (Throckmorton ed. 1930) §300, pp. 598-600.

[14]4 WILLISTON, CONTRACTS (Revised ed. 1937) §1505, pp. 4198-9.

[15]PROSSER, TORTS (Hornbook Series, 1941) §87, pp. 741-2.

[16]Lehigh Zinc and Iron Company v. Bainford (1893) 150 U. S. 665, 14 S. Ct. 219, 37 L. Ed. 1215; Edwards v. Sergi (1934) Cal. App. 369, 30 P. (2d) 541 (a person is presumed to know the extent of his land).

[17]Helms v. General Baking Company (1912) .....Mo. App....., 164 S.W. (2d) 150; Jacob E. Decker and Sons v. Capp (1942) 144 S.W. (2d) 404, 140 A.L.R. 250; Baxter v. Ford Motor Company, **supra,** note 11; Mazetti v. Armour and Company, **supra,** note 9.

[18]**Liability of Manufacturers to Sub-purchaser for Breach of Express Warranty,** 25 MINN L. R. 83.

[19]Carill v. Carbolic Smoke Ball Company (1893) 1 Q.B. 256, 62 L.J.Q.B. 257, 9 T.L.R. 124.

court held that the defendant's advertisements that he would pay a sum of money to anyone who became sick of the influenza after using his "smoke ball' cure was, in effect, an offer to the public which was accepted by performance of the conditions. Following this reasoning a warranty contract is made between a consumer and a manufacturer who represents the quality of his products to induce the consumer to purchase in reasonable reliance thereon. Indeed some cases have intimated as much.

By way of illustration two recent cases are in point. One shows the inadequacy of the orthodox remedies, and the other the desirable result when not attempting to follow these theories. The former is a Washington case, *Dobbin v. Pacific Coast Coal Company*,[20] where the plaintiff bought from a contractor a newly constructed house in which a furnace had been installed. He claimed that he bought in reliance upon certain advertising matter he had seen in a Tacoma paper to the effect that this type of furnace used less fuel than other types, heated more efficiently, and was accepted by the Federal Housing Agencies, but that because of faulty design it failed to heat his house. It was held that the plaintiff could not recover against the distributor, retailer, or builder on a theory of breach of warranty because there was no privity of contract between the purchaser and the defendants.

The latter is a federal case, *Mannsz v. MacWhyle Company*,[21] applying Pennsylvania law in which the plaintiff's deceased husband bought a rope from a retailer relying on representations in a manual published by the defendant as to the tensile strength of the rope. The decedent and another used it to support a scaffold, the rope broke and decedent was killed. Under Pennsylvania law, these representations were held to constitute an express warranty the breach of which rendered the manufacturer liable.

Washington was not without authority from its own courts when the *Dobbin* case arose. The leading one was *Baxter v. Ford Motor Company*[22] in which the ultimate consumer was allowed to recover from the manufacturer of an automobile purchased by the plaintiff in reliance upon circulars to the effect that the car had a shatterproof windshield. The plaintiff was injured by a piece of glass when a pebble struck the windshield. Though the court did not specifically say on what ground the recovery was allowed they likened it to the dangerous instrumentality,[23]

20 (1946) 25 Wash. (2d) ....., 170 P. (2d) 642.
21 (1946) 155 F. (2d) 445.
22 **Supra**, note 11.
23 The court cited Thomas v. Winchester with approval, saying that the action could be grounded in negligence.

food,[24] and breach of warranty cases. However, a subsequent Washington[25] decision said that the action was one for the breach of ". . . an express warranty to the effect that shatterproof glass would not fly or shatter under the hardest impact. . . ."

The plaintiff's original action in the *Dobbin* case was for breach of implied warranty but this remedy was refused because there was no privity of contract. On appeal he invoked the rule that the pleading may stand amended to conform to the proof and sought to hold the defendant on the ground of fraud and deceit. The court, quoting an earlier Washington case,[26] held that the plaintiff must show by clear, cogent, and convincing evidence the essential elements of fraud, among them being *scienter* and reliance. It found there was no evidence to show the plaintiff saw the circular until long after he bought the house, and that the evidence is not clear what was the cause of the furnace's inability to heat, the faulty design or the faulty installation. Under this finding the plaintiff was without a cause of action in any event.

It should be noted in the *Mannsz* case that the plaintiff was denied relief solely on the ground that the deceased was not using the product for the purpose for which it was intended. The court said that the words and figures in the manual, and which the retailers widely disseminated among the purchasers and prospective purchasers, were representations running to the public and constituted an express warranty within the provisions of Section 12, P.L. 543 (1915), 69 P.S. Pa. Section 121.[27] In laying down the rule they said:

> "We think it quite clear that whether the approach to the problem be by way of warranty or under the doctrine of negligence, the requirement of privity between the injured party and the manufacturer of the article which has injured him has been obliterated from the Pennsylvania law. The abolition of the doctrine occurred first in the food cases, next in the beverage cases, and now has been extended to those cases in which the article manufactured, not dangerous or even beneficial if properly made, injured a person because it was manufactured improperly."

[24]Also cited Mazetti v. Armour and Company, **supra,** and said liability might be predicated on an implied warranty running to the public.

[25]Murphy v. Plymouth Motor Corporation (1940) 3 Wash. (2d) 180, 100 P. (2d) 30.

[26]Webster v. L. Romano Engineering Corporation (1934) 178 Wash. 118, 34 P. (2d) 428 at 430.

[27]This is §12 of the Uniform Sales Act except that after the words "relying thereon" it does not continue as a new sentence.

While Pennsylvania adheres to the implied warranty rule in the case of food this is the first case the writer has been able to find holding that the requirement of privity is not necessary in dealing with articles other than food.

These two cases pose a perfect contrast. The Washington case, attempting to meet this new situation by applying the orthodox rules, causes no end of confusion. The *Mannsz* case, on the other hand, specifically states that the requirement of privity is obliterated as in the food cases. It meets the new situation without trying to slip it into a niche along with the orthodox breach of warranty and deceit.

If it is conceded that the old rules are inadequate to meet the situation, the question is what would be a working rule to establish a rule of responsibility for the truth of the representations made to induce a purchase?

By the recognition of public policy in the sale of food and dangerous articles the courts and the legislatures have just about established a rule of responsibility for the fitness or safety of such items. They are breaking away from the idea that there must be privity of contract in order to hold the manufacturer on a warranty. It is just as important to the public that the manufacturers should respond for the falsity of the representations they have made to induce the public to buy.

As we have seen, in recent years there has been a tendency on the part of the courts to enlarge the responsibility of the seller by construing every affirmation and representation made to induce a sale which is relied on by the buyer as being a warranty.[28] It is not a contract warranty in the strict sense, but rather like an estoppel. The seller is made responsible for statements relied on by the buyer. But because warranty retains its contractural character, privity of contract is necessary in order to bring an action in breach of warranty. By recognizing the modern methods of merchandising this rule could be easily carried to the situation where the manufacturer has induced the consumer to purchase. Nor would it be unduly extending the estoppel theory for the essential elements of estoppel are present that is, a representation of a fact made for the benefit of the party making it, reasonable reliance on the part of the purchaser, and a resulting injury. Thus by dropping the pretense of the requirement of privity of contract between the manufacturer and the consumer the manufacturer would be held responsible as a matter

[28]55 C.J. **Sales,** §684, pp. 676-80.

of law for the truth of the statements of fact he has made to induce the sale. In this way a desirable result could be reached.

Another way to extablish a working rule would be to abolish the requirement of *scienter* in an action in deceit. Because of this requirement the theory is inadequate in this type of case. The evidentiary rule is that fraud will not be presumed but the burden of proving it rests on the party who relies on it whether for purposes of attack or defense.[29] This is often very difficult to prove, especially where the defendant is so far removed from the buyer. The effect of the abolition of this requirement would be that the manufacturer would warrant his goods to all who bought in reliance on the representations made to induce the purchase.

It is immaterial which of the theories is followed as long as the purchaser is assured a remedy for his injuries which too frequently is denied him by the outmoded rules applied today. In either case the result would be a rule of liability not unduly oppressive to the manufacturer, yet one that would assure those who buy in reliance thereon an adequate remedy for their injuries.

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[29]37C.J.S. **Fraud**, §94, p. 398.