

# Washington Law Review

---

Volume 7 | Number 3

---

11-1-1932

## Manufacturer's Advertisement as Express Warranty to Consumer

J. B. Sholley

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wlr>



Part of the [Consumer Protection Law Commons](#)

---

### Recommended Citation

J. B. Sholley, Notes and Comments, *Manufacturer's Advertisement as Express Warranty to Consumer*, 7 Wash. L. Rev. 351 (1932).

Available at: <https://digitalcommons.law.uw.edu/wlr/vol7/iss3/4>

This Notes and Comments is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact [lawref@uw.edu](mailto:lawref@uw.edu).

# WASHINGTON LAW REVIEW

Published Quarterly by the Law School of the University of Washington  
Founded by John T. Condon, First Dean of the Law School

SUBSCRIPTION PRICE \$2.50 PER ANNUM, SINGLE COPIES \$1.00

R. H. NOTTELMANN ..... *Editor-in-Chief*  
FRANK L. MECHEM ..... *Associate Editor*  
LESLIE J. AYER ..... *Associate Editor, Bench and Bar*  
J. GRATTAN O'BRYAN ..... *Business Manager*

## STUDENT EDITORIAL BOARD

Frederick G. Hamley, President

Alec Duff, Article Editor	Saul D. Herman, Case Editor	
Howard R. Stinson, Note Editor	Robert Maxwell, Student Bus. Mgr.	
Arthur J. Grunbaum	Bryant R. Dunn	John B. Sholley
Byron E. Congdon	Wilbur J. Lawrence	Albert A. King
William F. Starr	Francis LeSourd	Jack C. Pearl
	Earl W. Jackson	

The Law School is very happy to announce that the formal dedication of the new building for the Law School will be held Friday, January 6, 1933, at eight-thirty o'clock in the evening. Preceding the exercises from seven to eight-thirty, there will be an open house for the guests, for the purpose of inspecting the building.

## NOTES AND COMMENTS

**MANUFACTURER'S ADVERTISEMENT AS EXPRESS WARRANTY TO CONSUMER.** One of the important developments in economic life in recent years has been the greatly increased production of packaged and labeled goods, advertised and distributed nationally by the manufacturer. The scope of the retailer's function has been correspondingly reduced, especially in regard to inspection. Naturally there has resulted a tendency in the law to increase the responsibility of the manufacturer to the consumer.

The Washington court in a recent case, *Baxter v. Ford Motor Co.*,<sup>1</sup> has taken a decided step in this direction. Plaintiff alleged that in reliance on representations made by defendant manufacturer that Ford cars were equipped with non-shatterable windshields he purchased a Ford car from a regular retail dealer, that while driving this car some months later the windshield was struck by a flying pebble, causing it to shatter, and that a piece of glass entered his eye, resulting in the loss thereof, for which injury damages are sought. The trial court refused to admit in evidence certain catalogues and circulars furnished by defendant to the retail dealer for sales assistance which had been shown to plaintiff prior to the sale, took the case from the jury, and entered judgment

<sup>1</sup> 68 Wash. Dec. 384, 12 P. (2d) 409. Affirmed on rehearing, 70 Wash. Dec. 2.

for the defendant.<sup>2</sup> One such catalogue, which plaintiff testified he relied upon, contained the following statements

“All of the new Ford cars have a Triplex shatter-proof glass windshield—so made that it will not fly or shatter under the hardest impact. This is an important safety factor because it eliminates the dangers of flying glass—the cause of most of the injuries in automobile accidents. In these days of crowded, heavy traffic, the use of this Triplex glass is an absolute necessity. Its extra margin of safety is something that every motorist should look for in the purchase of a car—especially where there are women and children.”<sup>3</sup>

Upon appeal the Supreme Court reversed the judgment and ordered a new trial, holding that the catalogues were improperly excluded, and that it was for the jury to determine whether the failure of defendant to equip the car with non-shatterable glass was the proximate cause of plaintiff's injury. The court recognized that this decision was contrary to precedents and based it squarely upon public policy in the light of changing economic conditions. Speaking through Mr. Justice Herman, it said

“Since the rule of *caveat emptor* was first formulated, vast changes have taken place in the economic structures of the English speaking peoples. Methods of doing business have undergone a great transition. Radio, billboards and the products of the printing press have become the means of creating a large part of the demand that causes goods to depart from factories to the ultimate consumer. It would be unjust to recognize a rule that would permit manufacturers of goods to create a demand for their products by representing that they possess qualities which they, in fact, do not possess, and then, because there is no privity of contract existing between the consumer and the manufacturer, deny the consumer the right to recover if damages result from the absence of those qualities, when such absence is not readily noticeable.

“An exception to a rule will be declared by courts when the case is not an isolated instance, but general in its character and the existing rule does not square with justice. Under such circumstances, a court will, if free from the restraint of some statute, declare a rule that will meet the full intentment of the law’ *Mazetti v. Armour & Co.*, 75 Wash. 622, 135 Pac. 633.”

The rule to be deduced from the case seems to be, that those statements of fact concerning his product contained in a manu-

<sup>2</sup> This is a simplified statement of the case designed to set forth only such facts as are necessary to present the problem under discussion. In the actual case, plaintiff joined the retail dealer, who relied on an express disclaimer in the bill of sale. A *limited* express warranty by the manufacturer was printed on the back of this bill of sale.

<sup>3</sup> Note that these statements preclude defendant from setting up that plaintiff's injury was not foreseeable or not within the contemplation of the parties.

facturer's advertisements are express warranties as to a consumer who in justifiable reliance thereon purchases the product in the regular course of trade. How far and in what manner this rule will vary or extend the recognized obligations of the manufacturer to the consumer may be indicated in part by a brief comparison of the facts here with the essentials of the various forms of action and categories of liability. This, too, may serve to test the validity of the deduction, that is, determine whether or not the rule as stated is a necessary inference from the holding under the particular facts.

The defendant's possible liability is not based upon any negligence in the manufacture or inspection of the windshield. This is apparent from the language of the opinion. In any event, the general rule that a manufacturer is liable to only his immediate vendee for defects in his product<sup>4</sup> would apply, since the defect here is not of the type which would render the automobile a "thing of danger" within the exception to the rule announced in *MacPherson v. Buick Motor Co.*<sup>5</sup> That which was standard equipment in 1927 could hardly be deemed imminently dangerous in 1930.

Nor is this a case of fraud or deceit under the recognized limitations of those actions.<sup>6</sup> The great majority of courts require *scienter* or recklessness on the part of the defendant.<sup>7</sup> As the Washington court has phrased it, "it must appear that the maker [of the representations] knew them to be false or made them recklessly as facts without knowledge of their truth."<sup>8</sup> This is probably the rule in this state in situations where no privity of contract exists despite general statements in more recent cases that *scienter* is immaterial.<sup>9</sup> In view of the many tests successfully conducted

<sup>4</sup> *Kramer v. Carbolineum Wood Preserving Co.*, 105 Wash. 401, 177 Pac. 771 (1919); *Huset v. J. I. Case Threshing Mach. Co.*, 120 Fed. 865, 57 C. C. A. 237, 61 L. R. A. 303 (1903); 45 C. J., p. 887 *et seq.* The cases are collected in 17 A. L. R. 672; 39 *id.* 992; 63 *id.* 340. See also 40 Harv. L. Rev. 886 (1927), and 10 Minn. L. Rev. 1 (1925).

<sup>5</sup> 217 N. Y. 382, 111 N. E. 1050, Ann. Cas. 1916C, 440, L. R. A. 1916F, 696 (1916). Cardozo, J.: "If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger." (111 N. E. 1053), and the manufacturer is liable to the consumer for defects. For the older rules see *Huset v. J. I. Case Threshing Mach. Co.*, *supra* note 4, and *Olds Motor Works v. Shaffer*, 145 Ky. 616, 140 S. W. 1047, Ann. Cas. 1913B, 689, 37 L. R. A. (N.S.) 560 (1911). 45 C. J. p. 691.

<sup>6</sup> Manufacturers' advertisements may be the basis of an action in deceit. Thus in *Marsh v. Usk Hardware Co.*, 73 Wash. 543, 132 Pac. 241 (1913), the court was prepared to hold defendant liable in deceit for falsely advertising that his brand of explosive was safe to handle, but preferred to base the liability on negligence. The cases of *Newhall v. Ward Baking Co.*, 240 Mass. 437, 134 N. E. 625 (1922), and *Alpine v. Friend Bros., Inc.*, 244 Mass. 164, 138 N. E. 553 (1923), illustrate the difficulty of recovery in this type of case.

<sup>7</sup> 26 C. J. p. 1105 *et seq.*

<sup>8</sup> *Hamilton v. Mihills*, 92 Wash. 675 at 679, 159 Pac. 887 (1916); *Raser v. Moosau*, 78 Wash. 653, 139 Pac. 622, 51 L. R. A. (N.S.) 707 (1914).

<sup>9</sup> "We have held the rule to be that if a person states as true material facts susceptible of knowledge to one who relies and acts thereon to his injury, he cannot defeat recovery by showing that he did not know his representations were false, or that he believed them to be true." *Jacquot v. Farmers Straw Gas Producer Co.*, 140 Wash. 482, 249 Pac. 984 (1926), an action by the buyer against the seller of machinery. The court cites as

on these windshields it cannot be said that the statements in the catalogue were made recklessly, much less fraudulently

Neither is the liability based upon general contract principles. Conceivably this result might be reached by construing the publication of the catalogue containing such statements as a continuing offer to all members of the public to enter unilateral contracts by performing the act of purchasing a Ford car from a regular dealer, whereupon defendant would become bound to hold such purchasers harmless from any injury resulting from the failure of such car to conform to said statements. Offers to the general public have been made the basis of contracts in the prize contest cases<sup>10</sup> and a few other situations.<sup>11</sup> However, it would be highly artificial to find a contract here where neither party actually intended to enter one.

The recognized right of action to which this case most nearly approaches is that of breach of express warranty. Although the Uniform Sales Act<sup>12</sup> does not in terms cover this situation since it governs only the relations between "seller" and "buyer",<sup>13</sup> it represents the law of mercantile warranty as now existing and will no doubt greatly influence any future developments in this field. Section 12 of the Act (Rem. 1927 Supp. Sec. 5836-12, Pierce's Code, Sec. 6227-12) defines express warranties

"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. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion shall be construed as a warranty"

It will be observed that the intent of the seller to warrant is

---

authority for the above statement the following cases, all of which involved the parties to a sale of land or chattels: *Hanson v. Tompkins*, 2 Wash. 508, 27 Pac. 73 (1891) *Sears v. Stinson*, 3 Wash. 615, 29 Pac. 205 (1892) *West v. Carter* 54 Wash. 236, 103 Pac. 21 (1909) *Grant v. Huschke*, 74 Wash. 257, 133 Pac. 447 (1913) *May v. Roberts*, 126 Wash. 645, 219 Pac. 55 (1923) *Pratt v. Thompson*, 133 Wash. 218, 233 Pac. 637 (1926). Cf. *Aldrich v. Scribner* 154 Mich. 23, 117 N. W. 581 (1908) See WILLISTON, *Liability for Honest Misrepresentation* (1911) 24 Harv. L. Rev. 415, 435-7, for an argument in favor of extending the scope of the action of deceit.

<sup>10</sup> *Carlill v. Carbolic Smoke Ball Co.* (1893), 1 Q. B. 256, *Minton v. F. G. Smith Piano Co.*, 36 App. D. C. 137, 33 L. R. A. (N.S.) 305 (1911) *Weisz v. Price*, 186 Iowa 640, 172 N. W. 939 (1919) *Mooney v. Daily News Co.*, 116 Minn. 212, 133 N. W. 573, 37 L. R. A. (N.S.) 183 (1911) *Holt v. Rural Weekly Co.*, 173 Minn. 337, 217 N. W. 345 (1928)

<sup>11</sup> In *Tarbell v. A. J. Stevens & Co.*, 7 Iowa 163 (1858), it was held that a banker who had advertised that he was a stockholder in a certain bank and was personally liable on its notes was under a primary contractual obligation to one who had taken the notes in reliance thereon. The decision is placed on the ground of public policy. Cf. *Westervelt v. Demarest*, 46 N. J. L. 37, 50 Am. Rep. 400 (1884)

<sup>12</sup> Laws of 1925, Ex. Ses., Chap. 142; Rem. 1927 Supp. §§ 5836-1 ff., Pierce's Code §§ 6227-1 ff.

<sup>13</sup> Sec. 76 of the act defines these terms.

not material.<sup>14</sup> The obligation is imposed upon him by law, and in this respect is similar to the tort liability for deceit.<sup>15</sup> Professor Williston describes it as "an obligation either on a *quasi*-contract or a *quasi*-tort," and points out that it was originally a tort action.<sup>16</sup> Although the usual remedy modernly is an action on the contract, recovery may still be had in tort.<sup>17</sup>

It is well established that statements of fact contained in the general advertisements of the seller are express warranties when relied upon by the buyer.<sup>18</sup> The Washington court has recently stated that "the affirmations contained in the catalogue constituted express warranties when the purchaser had knowledge thereof and acted thereon. 24 R. C. L. 164."<sup>19</sup>

The chief objection to treating the affirmations in the instant case as an express warranty is the lack of privity between the parties.<sup>20</sup>

"To sustain a finding that there was a breach of warranty express or implied, there must have been evidence of a contract between the parties, for without a contract there could be no warranty."<sup>21</sup>

It is not clear why or when this requirement of privity originated. There is a dearth of authority on the question.<sup>22</sup> One possible explanation is that it is another manifestation of that policy which

<sup>14</sup> "It would be immaterial whether the representations by the sellers were intended as a warranty, if the appellants relied on them." *Huntington v. Lombard*, 22 Wash. 202, 60 Pac. 414 (1900, before Sales Act) *Van Horn v. Stautz*, 297 Ill. 530, 131 N. E. 153 (1921) *Brennan & Cohen v. Nolan Laundry Co.*, 209 Iowa 922, 229 N. W. 321 (1930) *Cf. Spencer Heater Co. v. Abbott*, 91 N. J. L. 594, 104 Atl. 91 (1918), which sets out the English rule. 1 WILLISTON, *Sales* (2d Ed.) sec 194.

<sup>15</sup> "For if one man lull another into security as to the goodness of a commodity, by giving him a warranty of it, it is the same thing whether or not the seller knew it to be unfit for sale; the warranty is the thing which deceives the buyer who relies on it, and is thereby put off his guard," per Lord Ellenborough, C. J., in *Williamson v. Allison*, 2 East 446, 451, 102 Eng. Rep. 439 (1802) wherein the same judge stated that the contractual remedy for breach of warranty had then been in use only about forty years.

<sup>16</sup> 1 WILLISTON, *op. cit.*, sec. 197. This section is cited with approval in *Glaspay v. Wool Growers Service Corp.*, 151 Wash. 683, 277 Pac. 70 (1929).

<sup>17</sup> *Shuppen v. Bowen*, 122 U. S. 575, 30, L. ed. 1172, 7 Sup. Ct. Rep. 1283 (1887).

<sup>18</sup> *Buchanan v. Laber*, 39 Wash. 410, 81 Pac. 911 (1905), warranty in catalogue incorporated into written contract by reference held to prevent showing of inconsistent warranty by parol; *Kuhn v. Campbell*, 118 Ohio St. 392, 161 N. E. 25 (1928), statement in catalogue of auction sale that horse could trot at 2:15 gait held warranty that horse could trot that fast at time of sale; *Gray v. Gurney Seed & Nursery Co.*, --- S. D. ---, 231 N. W. 940 (1930), statement in seed catalogue that certain type of corn matures well in northern South Dakota held an express warranty. *Baumgartner v. Giesener*, 171 Minn. 289, 214 N. W. 27 (1927), advertisement in newspaper that certain seed corn had a germinating test of 95% held an express warranty. Cases are collected in 28 A. L. R. 991.

<sup>19</sup> *Leschen & Sons Rope Co. v. Case Shingle & Lumber Co.*, 152 Wash. 37, 276 Pac. 892 (1929).

<sup>20</sup> 1 WILLISTON, *op. cit.*, sec. 244.

<sup>21</sup> *Welshausen v. Charles Parker Co.*, 83 Conn. 231, 76 Atl. 271 (1910).

<sup>22</sup> 1 WILLISTON, *op. cit.*, sec. 244, 244a.

found its best known expression in the case of *Winterbottom v. Wright*,<sup>23</sup> that of protecting a manufacturer against liability to an unknown and unlimited number of persons. Another possible explanation is that because of the almost exclusive use of the contractual *remedy* for breach of warranty, the courts came to regard a warranty as a purely contractual *obligation*.<sup>24</sup> In any event, the requirement has been applied consistently and rigorously even in rather extreme cases.<sup>25</sup>

By the weight of authority, the same rule is applied in the case of implied warranties, both of title,<sup>26</sup> and of quality.<sup>27</sup> There is a strong minority of courts, however, which allow the consumer to recover from the manufacturer on the basis of an implied warranty running with the chattel.<sup>28</sup> The Washington court adopted this view in the case of *Mazetti v. Armour & Co.*<sup>29</sup>

“Our holding is that, in the absence of an express warranty of quality, a manufacturer of food products under modern conditions impliedly warrants his goods when dispensed in original packages, and that such warranty is available to all who may be damaged by reason of their use in the legitimate channels of trade.”

---

<sup>23</sup> 10 M. & W 109, 11 L. J. Ex. 415, 152 Eng. Rep. 402 (1842). Defendant, who built a coach and sold it with an agreement to keep it in repair, held not liable to buyer's servant for personal injuries caused by defendant's failure to repair. Under similar facts the same result was reached in *Hanson v. Blackwell Motor Co.*, 143 Wash. 547, 255 Pac. 939, 52 A. L. R. 851 (1927).

<sup>24</sup> The present rule in England seems to be that actual intent to enter a contract of warranty must be found. *Heilbut Symons & Co. v. Buckleton*, (1913) App. Cas. 30. This case is criticized by Prof. Williston in *Representation and Warranty in Sales*, (1913) 27 Harv. L. Rev. 1. Cf. *Bekkevold v. Potts*, 173 Minn. 87, 216 N. W. 790, 59 A. L. R. 1164 (1927), holding that an implied warranty of quality is not barred by a written disclaimer of all warranties “made” by the seller, since it is imposed by law regardless of the intent of the seller.

<sup>25</sup> In *S. H. Kress & Co. v. Lindsey*, 262 Fed. 331, 13 A. L. R. 1170 (C.C.A., Miss., 1919) beneficiaries under a Wrongful Death Act were not allowed to recover from the seller for breach of warranty which was the proximate cause of buyer's death. In *State to use of Bond v. Consolidated Gas, Electric Light & P. Co. of Baltimore*, 146 Md. 390, 126 Atl. 105, 42 A. L. R. 1237 (1924), it was held that an express warranty that a gas heater was safe to use in living quarters did not inure to the benefit of an infant child of the buyer.

<sup>26</sup> *Peregrine v. West Seattle Bank*, 120 Wash. 653, 208 Pac. 35 (1922) refusing to extend doctrine of *Mazetti* case, *infra* note 29.

<sup>27</sup> *Gearing v. Berkson*, 223 Mass. 257, 111 N. E. 785, L. R. A. 1916D, 1006 (1916) wife of buyer of food, *Birmingham Chero-Cola Bottling Co. v. Clark*, 205 Ala. 678, 89 So. 64, 17 A. L. R. 667 (1921), subvendee of beverage; *Pelletier v. Dupont*, 124 Me. 269, 128 Atl. 186, 39 A. L. R. 972 (1925) subvendee of bread, *Minutille v. Providence Ice Cream Co.*, 50 R. I. 50, 144 Atl. 884, 63 A. L. R. 334 (1929), subvendee of ice cream.

<sup>28</sup> *Davis v. Van Camp Packing Co.*, 189 Iowa, 175, 176 N. W. 382, 17 A. L. R. 649 (1920), subvendee of canned beans; *Coca Cola Bottling Works v. Lyons*, 145 Miss. 876, 111 So. 305 (1927) donee from subvendee of beverage.

<sup>29</sup> 75 Wash. 622, 135 Pac. 633, Ann. Cas. 1915C, 140, 48 L. R. A. (N.S.) 213 (1913). This case allowed a subvendee of spoiled canned tongue who served it in his restaurant to recover for loss of trade and good will.

As has been pointed out in a well considered case<sup>30</sup> this minority doctrine has been applied only in foodstuff cases, a situation in which all courts allow the consumer to recover in an action based on negligence regardless of lack of privity<sup>31</sup> Moreover, the courts in the foodstuff cases are prone to relieve the plaintiff of the burden of proving defendant's negligence and have adopted various theories to achieve this end.<sup>32</sup> Thus it is possible to regard the entire minority doctrine of running warranties as a mere procedural fiction, and no sound basis from which to alter substantive law in other types of cases by analogy<sup>33</sup>

On the other hand there is good reason to consider the orthodox view of privity, limited to the immediate relation of seller and buyer, as being too narrow. The manufacturer, when he advertises, clearly intends to induce purchases and thereby secure a benefit, and the consumer as clearly acts in reliance when he calls for articles by trade name and receives them in sealed packages. The retailer tends to become a passive intermediary, a mere conduit like the carrier who transports the goods. Furthermore, the large number of "warranties" to consumers appearing in advertisements, and the prevalence of the practice of replacement and repair by the manufacturer directly, indicate that the latter very often considers himself under a direct obligation to the consumer.<sup>34</sup> There is some inferential judicial support for this view,<sup>35</sup> as well

<sup>30</sup> *Pelletier v. Dupont*, *supra* note 27.

<sup>31</sup> 26 C. J. p. 785, 17 A. L. R. 688.

<sup>32</sup> *Flessner v. Carstens Packing Co.*, 93 Wash. 48, 160 Pac. 14 (1916), "The negligence consists in offering stuff not known to be wholesome for sale" *Catani v. Swift & Co.*, 251 Pa. 52, 95 Atl. 931, L. R. A. 1917B, 1272 (1915), "Defendant's duty was absolute. It was bound to know that the meat was unwholesome" *Rozumailski v. Philadelphia Coca-Cola Bottling Co.*, 296 Pa. 114, 145 Atl. 700 (1929), "the accident proves its own negligent cause" *Meshbeshier v. Channellene Oil & Mfg. Co.*, 107 Minn. 104, 119 N. W. 428, 131 Am. St. Rep. 441 (1909) negligence implied from violation of state pure food laws; *Stolle v. Anheuser-Busch*, 307 Mo. 520, 271 S. W. 497, 39 A. L. R. 1001 (1925), *res ipsa loquitur*; *Davis v. Van Camp Packing Co.*, *supra* note 28, proof of defective condition despite proper handling by retailer makes out prima facie case which defendant must rebut; *Minutilla v. Providence Ice Cream Co.*, *supra* note 27, proof of defective condition despite proper handling is sufficient to take issue to jury with burden of proof on plaintiff; *Gearing v. Berkson*, *supra* note 27, violation of pure food law merely raises presumption of negligence which is rebutted by a showing of due care, and plaintiff must give affirmative proof of negligence.

<sup>33</sup> An example of the danger in this method of reasoning is found in *Grappco Bottling Co. v. Ennas*, 140 Miss. 502, 106 So. 97, 44 A. L. R. 124 (1925), where the court held that implied warranties ran to subvendees of foodstuffs generally, but not to one who purchased a beverage in violation of Sunday blue law. Cf. a later decision of the same court, *Coca-Cola Bottling Works v. Lyons*, *supra* note 28, where a donee of a subvendee was allowed to recover on an implied warranty, and *Stolle v. Anheuser-Busch*, *supra* note 32, where a bystander who was injured by the explosion of a bottled beverage was allowed recovery on ground of negligence.

<sup>34</sup> See BOGERT & FINK, *Business Practice Regarding Warranties in the Sale of Goods* (1930) 25 Ill. L. Rev. 400.

<sup>35</sup> In *Miller Rubber Co. v. Blewster-Stephens Service Station*, 171 Ark. 1179, 287 S. W. 577, 59 A. L. R. 1237 (1926) it was held that a warranty by a manufacturer expressed in terms to the consumer did not prevent the raising of an implied warranty to the retailer. A circular published by a radio manufacturer and shown to a consumer by the



as approval by commentators.<sup>36</sup> Even those courts which uphold the requirement of privity in its strictest form admit that the liability should fall upon the manufacturer, indeed, they use this argument to justify the raising of an implied warranty of quality upon the sale of goods in sealed containers by a retailer who has had no opportunity to inspect them.<sup>37</sup> Would it not be better to look through the form of the transaction to the substance, and hold the manufacturer-advertiser as the real "seller", at least to the extent of finding sufficient privity to support an express warranty? It does not seem such a great departure from precedent, considering the origin and nature of the doctrine of warranty, yet it is a step that has not been taken heretofore, and we must conclude that the instant case announces a doctrine new to the law

The ultimate adoption or rejection of this doctrine will be determined, not by such rather legalistic attempts to squeeze it into some established form of action, but on the sounder basis of public policy. Some of the arguments which might be advanced in its favor are that it will tend to promote a higher ethical tone in advertising, thus removing some of the handicap under which the strictly honest advertiser is now laboring, that it will result in an increased effectiveness for all advertising as soon as the public learns that hard cash is back of every statement of fact made;<sup>38</sup> that it will tend to discourage careless methods of manufacture, and that it will operate in some measure to spread the losses caused by defective products over society as a whole, since the manufacturer will recoup himself by raising the price of his product.<sup>39</sup> On the other hand, the doctrine would breed litigation, both

---

retailer has been held not to bind the latter. *Cool v. Fighter* 239 Mich. 42, 214 N. W. 162 (1927). An inferior Ohio court has held that the subvendee of foodstuff is a third party beneficiary of an implied warranty arising on the sale by the manufacturer to the retailer. *Ward Baking Co. v. Truzzino*, 27 Ohio App. 475, 161 N. E. 557 (1928)

<sup>36</sup>I WILLISTON, *Sales* (2d Ed.) sec. 244a, 9 Corn. L. Q. 487 (1924) 42 Harv. L. Rev. 414 (1929).

<sup>37</sup>Rugg, C. J.. "It places responsibility upon the party to the contract best able to protect himself against wrong of this kind, and to recoup himself in case of loss, because he knows or comes in touch with the manufacturer." *Ward v. Great Atlantic & Pacific Tea Co.*, 231 Mass. 90, 120 N. E. 225, 5 A. L. R. 242 (1918) Cardozo, C. J.. "Here the sale was by description, the defect was wholly latent and inspection was impossible. In such circumstances, the law casts the burden on the seller, who may vouch in the manufacturer, if the latter was to blame. The loss in its final incidence will be borne where it is placed by the initial wrong." *Ryan v. Progressive Grocery Stores, Inc.*, 255 N. Y. 388, 175 N. E. 105, 74 A. L. R. 339 (1931) *Contra, Bigelow v. Maine Central R. Co.*, 110 Me. 105, 85 Atl. 396, 43 L. R. A. (N.S.) 627 (1912), refusing to hold retailer who had no opportunity to inspect.

<sup>38</sup>Many states, including Washington (Rem. Comp. Stat. sec 2622-1) have statutes making it a crime to issue false and misleading advertising regardless of the good faith of the advertiser. It is pointed out in 36 Yale L. J. 1157 (1927) that these statutes were sponsored largely by the advertising profession.

<sup>39</sup>There is nothing novel about these arguments; very similar ones were used over a century ago in support of the then new doctrine of implied warranties of quality. Chief Justice Best in the course of his opinion rendered in *Jones v. Bright*, 5 Bing. 533, 130 Eng. Rep. 1167 (1829), said. "It is the duty of the court, in administering the law to lay down

legitimate and spurious, and add a new and substantial hazard to the many already confronting the manufacturer. As to the first of these objections the danger might be minimized by a policy of scrutinizing a plaintiff's case with a dubious eye and requiring clear proof of a material breach of warranty<sup>40</sup> As to the latter objection, each manufacturer could protect himself to a large extent by inspecting carefully and advertising cautiously<sup>41</sup>

It is submitted that the Washington court reached a desirable result, and one that is consistent both with common law principles and with modern business practice. J. B. SHOLLEY.

#### DISTRIBUTION OF EXTRAORDINARY DIVIDENDS UNDER A TRUST.

The distribution of extraordinary dividends between the life tenant and the remainderman under a trust created in corporate stock is a problem which has been extremely vexing to the courts with the result that three general rules have been developed. But, regardless of the rule followed, it is universally agreed that the intentions of the testator or trustor should be controlling.<sup>1</sup> The extraordinary dividend is most likely to arise under one of the following circumstances

1. Where an unusually large dividend is paid out of profits accumulated over a period of years.
2. In cases of total or part liquidation of the business and a distribution of the funds arising from the sale of the assets or of the business as a going concern.

Capital stock, unlike other property which may be the *corpus* of the trust, is possessed of a threefold value—par, market, and book value.<sup>2</sup> The stock is evidence of the stockholders' interest in the corporation. Hence, par value, which is merely that printed on the stock certificate, is clearly no evidence of the true interest which the owner may have, since the net worth of the company

---

rules calculated to prevent fraud; to protect persons who are necessarily ignorant of the qualities of a commodity they purchase; and to make it the interest of manufacturers and those who sell, to furnish the best article that can be supplied." (5 Bing. 533, 543). And again: "The case is of great importance; because it will teach manufacturers that they must not aim at underselling each other by producing goods of inferior quality, and that the law will protect purchasers who are necessarily ignorant of the commodity sold." (5 Bing. 533, 546).

<sup>40</sup> The construction placed upon the wording of the advertisement gives the court an opportunity to exercise its discretion. See for examples of rather strict construction the cases of *Newhall v. Ward Baking Co.* and *Alpine v. Friend Bros., Inc.*, cited in note 6 *supra*.

<sup>41</sup> But there is always the danger that a chance defect will result in liability, as in the instant case. It is somewhat ironical that the Ford Motor Co., which has the reputation of being a very conservative advertiser, should be the defendant in this action. Yet the hazard is not as great as this case might lead one to believe, since the measure of damages in most cases would be the price of the defective article.

<sup>1</sup> *Gibbons v. Mahon*, 136 U. S. 549; 34 L. ed. 525, 10 Sup. Ct. Rep. 1057 (1890) *Carter v. Crehore*, 12 Haw. 309 (1900) *Thomas v. Gregg*, 78 Md. 549, 28 Atl. 565, 44 Am. St. Rep. 310 (1894) *Holbrook v. Holbrook*, 74 N. H. 201, 66 Atl. 124, 12 L. R. A. (n. s.) 768 (1907) *Irving v. Houstoun*, 4 Paton Sc. App. 521 (1803) *Bouch v. Sproule*, L. R. 12 App. Cas. 385 (1887).

<sup>2</sup> KESTER, *Accounting Theory and Practice* (1925 Ed.), Vol. II, 398.