MANUFACTURER'S LIABILITY FOR INJURIES CAUSED BY HIS PRODUCTS: DEFECTIVE AUTOMOBILES

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 WHEN a manufactured article fails to meet the reasonable expectations of the purchaser-user and in consequence he suffers personal injury or property damage, is the manufacturer responsible? When the user purchases from the manufacturer, so that there is privity of contract and the formulated concepts of sales and warranty law are available, we have a relatively simple situation which it is not the primary purpose of this paper to discuss. The common-law concepts for dealing with such problems seem to have been formulated in times when this privity element was usually present, and it is therefore not a matter of wonder that the privity element came to be regarded as necessary. Manufacture was not on a mass basis in those days. Even coffins were made to order. The user ordered the thing he wanted and it was made accordingly. There was direct dealing, i.e., privity between maker and prospective user; and, if the article was not up to expectations and caused the purchaser harm, he could sue the maker for breach of the agreement and recover appropriate damages in accordance with the terms of the agreement, express or implied. As a feature of contracts of sale, there came in time to be recognized a seller’s obligation described by the word “warranty.” Such obligations or warranties

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1 As to what is a warranty, there are innumerable definitions. In this study we are interested only in sellers’ warranties and, among those, chiefly in warranties of quality. For definitions, see Vold, Sales, § 140 (1931). Professor Vold’s “black letter” definition is as follows: “A seller’s warranty in connection with a contract to sell or a sale of goods is an obligation, incidental to the transaction, that the seller shall be answerable for various matters relating to the goods. The scope of the warranty may vary, depending on the circumstances, such as the terms of the seller’s actual promises, express or inferred in fact, the seller’s express or tacit representations of fact serving
might be expressed in the contract; but the law also attached duties as incidental to the sale, varying with the nature of the subject matter, which were known as implied warranties. The limits of this field of implied warranty are yet not clearly defined. The pull of conflicting social and economic pressures and other factors continue to influence the courts in deciding these cases, thus producing asymmetry from time to time and place to place.

In general, the common law has been somewhat chary of implied warranty. There has been no general implied warranty as to the quality of goods already in existence, if the buyer is given an opportunity to inspect. However, there have been important exceptions. For example, when an article was to be made to order for a use known to the seller, then there was an implied warranty that it should be fit for the purpose for which such an article is generally used or for which it was specially made. Also, the manner in which the parties dealt had a bearing on the nature and extent of the warranty. The fact of buyer’s reliance on seller’s description, plus seller’s knowledge of such reliance, was important. Then, too, there came into being an implied warranty of the quality of food for household use.

as inducements to the bargain, and broader considerations of policy. The warranty obligation may thus be either promissory in its nature, or independently imposed by law, or both.

In 1 WILLISTON, SALES, 2d ed., § 195 (1924), Professor Williston points out that the action upon a warranty originated as tort but today is generally conceived of as contractual. Ibid., § 197: "A positive representation of fact is enough to render him [the seller] liable. The distinction between warranty and representation which is important in some branches of the law is not appropriate here. The representation of fact which induces a bargain is a warranty. . . . As an actual agreement to contract is not essential, the obligation of the seller in such a case is one imposed by law. . . . that this point of view has been lost sight of by some courts is no doubt due to the fact that assumpsit became so generally the remedy for the enforcement of a warranty. But even at the present time an action of tort for warranty still lies irrespective of any fraud on the part of the seller or knowledge on his part that the representations constituting the warranty were untrue." See also 4 WILLISTON, CONTRACTS, rev. ed., § 968 et seq. (1936).

VoLD, SALES, § 140 (1931); Llewellyn, Cases and Materials on the Law of Sales 204 (1930); Bogert and Fink, "Business Practice Regarding Warranties in the Sale of Goods," 25 Ill. L. Rev. 400 at 410 (1931), where it is pointed out that so far as express warranty goes, the standard manufacturers' warranty clause "is a guaranty for a limited period against defects in the materials or workmanship of the goods sold by the manufacturer, the sole or a supplementary remedy for breach usually being repair or replacement of the defective part on certain conditions." As to the history of implied warranty of quality, see 1 WILLISTON, SALES, § 228 (1924).

VoLD, SALES, § 147 (1931); 1 WILLISTON, SALES, 2d ed., § 257 (1924); Uniform Sales Act, § 15.

VoLD, SALES 464-465 (1931); 1 WILLISTON, SALES, 2d ed., §§ 241, 242,
In studying the broad question of a manufacturer's responsibility to consumers, there are at least two very important reasons why the law about warranty cannot be ignored. In the first place, the notion of privity tied in with warranty has been an effective check on the ability of the judicial process to meet modern conditions even in the cases where negligence is present. In the second place, the legal problems arising from the function of manufacturers in the modern social organization cannot be handled adequately on the basis of negligence alone. Proof of negligence is impossible in many cases where human nature instinctively senses obligation. Moreover, manufacturers' representations to distant, unknown, possible consumers through advertising broadcast to them by such means as nationally circulated magazines, radio and highway billboards, ought to entail responsibility.

In such
cases privity again stands in the path, a more stubborn bete noir than when the negligence approach is followed. An alternative approach in many such cases is an action in deceit. How effective this branch of the law will be in allocating losses occasioned by manufactured goods will depend largely upon the concept of deceit in the locale, particularly the attitude toward “scienter.”7 Deceit may mean conscious fraud or of the manufacturer’s warranty against defects in material and workmanship is that the complaints are satisfied either by the manufacturer directly or through the agency of the dealer. The manufacturer assumes that he is directly liable to the user. If the complaint goes through the dealer, it is for convenience’s sake. The dealer does not regard himself as having any personal responsibility. All parties regard him as a conduit or intermediary for adjustment purposes, even though he has himself warranted the goods and sold them as his own. These facts manifest a practical repudiation by the manufacturers and dealers of the legalistic notion that warranties of personal property should be effective only between parties in privity of contract. Business practice in this regard is in accord with the minority of American courts, and may, if supported by other commercial usage, justify an overthrow of the majority privity of contract theory. Such a result would be another praiseworthy assimilation of the law of real and personal property.”

7 Deceit, the special adaptation of the action on the case which developed as a tort action, without reference to the existence of any contract relation between the parties to the action, and in the form familiar to us today as an independent tort action, goes back to Pasley v. Freeman, 3 T. R. 51, 100 Eng. Rep. 450 (1789). This action depended upon the presence of certain elements variously stated but comprehended within the following: (1) false representation of fact (2) fraudulently made, (3) under circumstances which entitled the plaintiff to rely thereon, (4) the plaintiff did rely thereon, (5) to his damage. While these several elements are variables, they are nevertheless limitations upon the scope of the action. The most important limitation on the use of deceit in actions by users against manufacturers is that covered by the second of these elements: when is a representation “fraudulently made,” when is there such “scienter” as to make one guilty of deceit? It may mean in different parts of the legal world anything from the conscious fraud required by the House of Lords in Derry v. Peek, 14 App. Cas. 337 (1889), through a range of modifications in the states of this country to those which hold that a statement of fact which is capable of accurate ascertainment, if made by one as of his own knowledge, will render the speaker liable, if it turns out to be false, and one, properly relying and acting thereon, is damaged thereby. For collection of many cases, see such sources as Williston, “Liability for Honest Misrepresentation,” 24 Harv. L. Rev. 415 (1911).

There has been much discussion in late years as to whether liability should be imposed for negligent misrepresentation. There are scattered cases so holding, including a group in New York, a jurisdiction which has insisted that deceit means conscious falsehood. This tendency to impose liability for negligent misrepresentation in New York seems to have been checked since Ultramares Corporation v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931). A state of writing upon this topic has brought out a number of strongly conflicting opinions in the exposition of which there has been generated some heat. As to which develops the more light, the reader may judge for himself. Smith, “Liability for Negligent Language,” 14 Harv. L. Rev. 184 (1900); Williston, “Liability for Honest Misrepresentation,” 24 Harv. L. Rev. 415 (1911); Bohlen, “Misrepresentation as Deceit, Negligence or Warranty,” 42 Harv. L. Rev. 733 (1929); Carpenter, “Responsibility for Intentional, Negligent and Innocent Misrepresentation,”
mere negligent misrepresentation or some elusive in-between. Except in so far as it may become pertinent in the discussion of particular cases, the present paper will not undertake to explore this vast territory.

It would be gratifying to begin to take up at this point the particular subject of automobiles towards which this is intended to lead; but the background is so large and has been so well sketched by Karl Llewellyn that the reader cannot fail to be helped on his way through what follows by another reading of at least part of what Professor Llewellyn has said in his Casebook on Sales:

"The law of seller's obligation as to quality ("warranty") presents the sweep of sales law in its most dramatic form. The picture begins in terms of a community whose trade is only one step removed from barter. . . . Two vital presuppositions reign: first, that the goods in question are there to be seen; second, either that everybody knows everybody's goods, individually, in a face-to-face, closed, stable group; or that trade with strangers in a shop is an arm's length proposition, with wits matched against skill. In either event, only a fool believes anything he hears. . . . Manufactured goods are handicraft articles, made by some one you know, and for the most local of markets.

"Out of this we move gradually into a credit and industrial economy. . . . Markets widen with improved transportation. . . . Sellers begin to build for good will, in wide markets, to feel their standing behind goods to be no hardship. . . . The law of seller's obligation must change, to suit.

"And the conceptual growth is as striking as the shift from seller's to buyer's protection." 8

"Meantime another line of seller's obligation was developing

24 ILL. L. REV. 749 (1930); Green, "Deceit," 16 VA. L. REV. 749 (1930) reprinted in GREEN, JUDGE AND JURY, c. 10 (1930); Weisiger, "Bases of Liability for Misrepresentation," 24 ILL. L. REV. 866 (1930); Bohlen, "Should Negligent Misrepresentations be Treated as Negligence or Fraud?" 18 VA. L. REV. 703 (1932); Green, "Innocent Misrepresentation," 19 VA. L. REV. 242 (1932).

Professor Williston, in his article just above cited, favors strict liability for misrepresentations inducing the sale of goods, saying [24 HARV. L. REV. 415 at 437, 419 (1911)]: "If a man makes a statement in regard to a matter upon which his hearer may reasonably suppose he has the means of information, and that he is speaking with full knowledge, and the statement is made as a 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 misstatement. . . . it is law, nearly, if not quite everywhere where the common law prevails, that any representation of fact as to the quality of goods made for the apparent purpose of inducing the buyer to purchase them amounts to a warranty."


8 LLEWELLYN, CASES AND MATERIALS ON THE LAW OF SALES 204 (1930).
focused in the concept of ‘fitness for a particular purpose.’ It has to do with *purchase for final consumption.* Even while buyer and seller still dealt largely at arm’s length, this type of liability was pretty largely recognized—at least to the extent of requiring ‘due care’ of the manufacturer, and even of the dealer, who sold to an outsider. ... with the growing specialization of industry comes the complete dependence of the ... consumer upon the wares put into a national market. ... consumer has neither skill nor means of testing the wares before use. He buys and uses, he must buy and use, at hazard of his skin. ... What is wanted is to protect the consumer dependent on a producer who is a stranger, or even anonymous. That needed protection is twofold: to shift the immediate incidence of the hazard of life in an industrial society away from the individual over to a group which can distribute the loss; and to place the loss where the most pressure will be exerted to keep down future losses. ... And it is desired to do this in the quickest, least expensive, most effective way. ... Obviously, the place of primary incidence should, then, be the group which is in substantial control of the production. The first group liable, to any consumer, should be the manufacturer. ... The consumer, barring his own fault in use, should have no negligence to prove; that the article was not up to its normal character should be enough. Advertisements should be responsible affirmations of normal character. ... Under such an ideal system of law the loss would lie ultimately where it belongs, on the consumers of the article concerned en masse [italics added], in competition with other articles each carrying its own true costs in human life and effort. ...

"The actual decisions have moved from problem to problem one by one. The tools were two: liability in negligence, with the tendency to constantly raise the degree of care required, and to constantly decrease the extent of proof required to get to the jury. ... And warranty. The emotional drive and appeal of the cases centers in the stomach. The negligence line begins with belladonna masquerading as dandelion extract. The warranty line finds some historical support in the ancient law of food; it waxes great by way of glass in beverages or bread, and poisonous meat. ... But the development is not confined to this, its center. It spreads to cover other hazards to consumers." 

Professor Llewellyn has outlined the situation. This paper seeks to inquire how the courts have applied these various concepts in meet-

ing the problem of the automobile. References must be made here and there to cases involving other sorts of manufactured articles but these will be limited to instances when it is believed that the analogies they furnish are pertinent and cogent.

This discussion as to automobiles must begin with a horse and buggy case decided in 1842, Winterbottom v. Wright. In this case the declaration stated that the defendant had a contract with the postmaster general to supply coaches for carrying the mails over a certain route. Under this contract the defendant undertook to keep the coaches in repair. Plaintiff was a driver in the employ of one who had a separate contract with the postmaster general to furnish horses and driver and operate the coach. The plaintiff further declared that he relied on the defendant's contract to provide a safe coach. It was also alleged that defendant had in fact furnished a coach having certain latent defects of which plaintiff did not know. The coach broke down and plaintiff was injured. A demurrer to this complaint was properly enough sustained, because the plaintiff was not a party to this contract and there was of course no third party beneficiary aspect possible. The court added:

"The only safe rule is to confine the right to recover to those who enter into the contract..."  

This statement, not necessary to the decision and purely dictum, has, however, been the refuge of every court desiring to hold the obligation of manufacturers within the limits fixed for it in times of such simple marketing procedures as those referred to by Professor Llewellyn in the extract quoted above. As the reader of course knows, this doctrine of Winterbottom v. Wright became riddled with exceptions which were the expression of the well realized but judicially concealed truth that the rule of non-liability for negligent manufacturers would no longer serve. Then in 1916 Justice Cardozo, at that time a judge of the New..."
York Court of Appeals, cleared the air to a considerable extent by his opinion in *MacPherson v. Buick Motor Co.* The scope of the rule of this famous case is probably adequately stated and limited in this sentence:

A manufacturer owes the affirmative obligation to employ reasonable care in the manufacture or assembling of chattels which, while not necessarily dangerous if properly constructed, constitute a menace to life and limb if not carefully made; and this duty is owed not only to his immediate vendee but to anyone likely to be harmed by the defective article while the same is being lawfully used for the purpose intended.

Thus, in effect Justice Cardozo defined the duty of manufacturers as to subvendees and other third persons injured by negligently made automobiles. He made it clear that the manufacturer has duties not based upon his contract of sale with the dealers, who after all are unlikely to encounter any substantial hazard from negligent defects in the cars they sell to others. This decision properly defined the manufacturer’s duty in terms of the problem before the court and perhaps too cautiously applied that test of liability only to things menacing to health and life.

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article intended to preserve, destroy, or affect human life, is actionable by third parties who suffer from the negligence. . . . The second exception is that an owner’s act of negligence which causes injury to one who is invited by him to use his defective appliance upon the owner’s premises may form the basis of an action against the owner. . . . The third exception to the rule is that one who sells or delivers an article which he knows to be imminently dangerous to life or limb to another without notice of its qualities is liable to anyone who suffers an injury therefrom which might have been reasonably anticipated, whether there were any contractual relations between the parties or not.”

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13 217 N. Y. 382, 111 N. E. 1050 (1916).
14 In Smith v. Peerless Glass Co., 259 N. Y. 292 at 295, 181 N. E. 576 (1932), the New York Court of Appeals applied the doctrine of the Buick case to the manufacturer of a soda water bottle and considering the question which was mentioned by Judge Cardozo but not settled, as to whether the maker of a component part would be liable as the Buick Co. was, in the light of subsequent decisions said, “There emerges we think, a broad rule of liability applicable to the manufacturer of any chattel, whether it be a component part or an assembled entity. Stated with reference to the facts of this particular case, it is that if either defendant was negligent in circumstances pointing to an unreasonable risk of serious bodily injury to one in plaintiff’s position, liability may follow though privity is lacking.”

These questions are dealt with in 2 *Torts Restatement*, c. 14, § 388-408 (1934), “Liability of Persons Supplying Chattels for the use of Others.” See particularly in connection with the problem under discussion, § 395, which approximately states the rule of *MacPherson v. Buick Motor Co.*, as it is laid down in Cardozo’s opinion, viz., “A manufacturer who fails to exercise reasonable care in the manufac-
The idea which the MacPherson case gave to the legal world has not been accepted in all jurisdictions, but it has found a cordial reception in many jurisdictions and is probably one of the most quoted and cited cases of its time. It has replaced Winterbottom v. Wright and its brood of exceptions in a considerable number of states; and where it has not been accepted thus, it has nevertheless been influential in extending the obligation of the manufacturer by enlarging the list of recognized exceptions. There is an increasing number of cases from year to year extending the MacPherson case rule to include instances of property damage as well as personal injuries. Along with this recognition of a duty under the law of negligence there has been an extension of res ipsa loquitur to make it possible for the plaintiff to establish the necessary negligence.

The present writer has elsewhere undertaken to point out that the law of torts had gone beyond the scope of this rule at the time the Restatement was issued. Feezer, "Tort Liability of Manufacturers," 19 MINN. L. REV. 752 (1935). The Baxter case is likewise approved by Prof. Norman Latham of Ohio State University Law School in his article "Sales," 35 OHIO JURISPRUDENCE 645 at 887 (1934).

Professor Bohlen says, "Judge Cardozo's opinion cuts through fallacious and arbitrary distinctions and goes to the very root of the problem. Admirable as is the result, convincing as is the reasoning, the doctrine in that case has not gained the acceptance which its merits deserve." Feezer, "Tort Liability of Manufacturers," 19 MINN. L. REV. 752 (1935), and various law review notes therein cited, particularly 31 MICH. L. REV. 264 (1932); 14 MINN. L. REV. 306 (1929).

In the cases involving unwholesome food and injurious foreign material in food, the doctrine of res ipsa loquitur has been extended farthest as a basis of proving negligence of a manufacturer not in privity with an injured consumer. See note 18, infra. But the doctrine has also been used in the cases involving the explosion of bottled beverages to the injury of a person not in privity with the manufacturer, Payne v. Rome Coca-Cola Bottling Co., 10 Ga. App. 762, 73 S. E. 1087 (1912); Atlanta Coca-Cola Bottling Co. v. Danneman, 25 Ga. App. 43, 102 S. E. 542 (1920); Riecke v. Anheuser-Busch Brewing Assn., 206 Mo. App. 246, 227 S. W. 631 (1921); Stolle v. Anheuser-Busch, Inc., 307 Mo. 520, 271 S. W. 497 (1925); Atlanta Coca-Cola Bottling Co. v. Shipp, 41 Ga. App. 705, 154 S. E. 385 (1930); Goldman & Freiman Bottling Co. v. Sindell, 140 Md. 488, 117 A. 866 (1922); Macon Coca-Cola Bottling Co. v. Crane, 55 Ga. App. 573, 190 S.E. 879 (1937); Georgia-Alabama Coca-Cola Bottling Co. v. White, 55 Ga. App. 706, 191 S. E. 265 (1937).

In cases involving other defective chattels, there has been little disposition to extend the doctrine. This is illustrated in connection with automobiles in Rotche v.
There has also been a rather special development with reference to food stuffs. *Res ipsa loquitur* has been given extremely free field in these cases and there are also cases which allow the plaintiff to recover against the manufacturer for injuries due to spoiled foods and food containing deleterious foreign substances without the allegation of negligence. These cases furnish a convenient stepping stone for the


Some of the more recent cases have extended the theory of warranty so that it runs with the goods in cases involving injury to subsequent parties through the use of unwholesome food. In Curtiss Candy Co. v. Johnson, 163 Miss. 426 at 433, 141 So. 762 (1932), finding liability on the basis of implied warranty in favor of a consumer, the court said, “The liability is not in tort and does not proceed upon the theory of negligence.” Davis v. Van Camp Packing Co., 189 Iowa 775, 176 N. W. 382 (1920); Anderson v. Tyler, (Iowa 1937) 274 N. W. 48; Rainwater v. Hattiesburg Coca-Cola Bottling Co., 131 Miss. 315, 95 So. 444 (1923); Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927); Ward Baking Co. v. Trizzino, 27 Ohio App. 475, 161 N.E. 557 (1928) (this case seems to go on the third party beneficiary theory); Cantani v. Swift & Co., 251 Pa. 52, 95 A. 931 (1915); Kroger Grocery Co. v. Lewelling, 165 Miss. 71, 145 So. 726 (1933); Parks v. C. C. Yost Pie Co., 93 Kan. 334, 144 P. 202 (1914).

In applying the doctrine of *res ipsa loquitur* in food cases, the courts have allowed juries to impose liability upon very slight evidence. In Buffalo Rock Bottling Co. v. Stephenson, 22 Ala. App. 605, 118 So. 498 (1928), the question of the bottler’s negligence was allowed to go to the jury on the evidence that the plaintiff vomited up a roach after drinking a bottled beverage prepared by the defendant. See also 49 A.L.R. 592 (1927) for annotation on illness after partaking of food or drink as evidence of negligence on the part of one who prepared or sold it. Where the evidence shows foreign material found in the food although with no actual proof of negligence as to its presence there, the doctrine of *res ipsa loquitur* is more generally applied. Chaproniere v. Mason, 21 T. L. R. 633 (1905), evidence merely showed plaintiff was injured by biting a stone in a bun; Freeman v. Shultz Bread Co., 100 Misc. 528, 163 N. Y. S. 396 (1916), injury was shown from biting into bread containing nail; Liggett & Myers Tobacco Co. v. Rankin, 246 Ky. 65, 54 S. W. (2d) 612 (1932), evidence showed poisonous worm pressed into plug of chewing tobacco; Fisher v. Washington Coca-Cola Bottling Works, Inc., (App. D. C. 1936) 84 F. (2d) 261, 105 A. L. R. 1034, mouldy substance in beverage; Nehi Bottling Co. v. Thomas, 236 Ky. 684, 33 S. W. (2d) 701 (1930), where a small package of arsenic was found in the beverage.

Frequently several theories of liability are found discussed in the same case, so that it is difficult to tell which the court is relying upon. Brown Cracker & Candy Co. v. Jensen, (Tex. Civ. App. 1930) 32 S. W. (2d) 227, is decided upon the theories of negligence, breach of implied contract and misrepresentation. For collections
inclusion of other manufactured articles in the same category. We have now reached a point where we can no longer lean very heavily on *MacPherson v. Buick Motor Co.* The language of that decision distinctly required negligence as an element of the plaintiff's case.

As the *Buick* case was unquestionably a landmark, it is likewise possible that *Baxter v. Ford Motor Co.*, decided by the Supreme Court of Washington in 1934, may be another. Here is a case which has extended the automobile manufacturer's obligation without reference to negligence. The plaintiff Baxter purchased from the St. Johns Motor Company, a retail dealer, an automobile made by the Ford Motor Company, and represented in advertising matter furnished by the maker as containing a windshield of "shatter-proof" glass. This circular stated:

"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."

The windshield was struck by a pebble thrown by the tire of a passing car, a bit of glass was chipped off and entered the plaintiff's eye. Plaintiff sued both dealer and manufacturer. As to the dealer it of cases showing the development of the manufacturer's liability, see 4 A. L. R. 1559 (1919); 17 A. L. R. 688 (1922); 39 A. L. R. 995 (1925); 47 A. L. R. 148 (1927); 63 A. L. R. 343 (1929); 88 A. L. R. 530 (1934); 98 A. L. R. 1496 (1935); 105 A. L. R. 1039 (1936); 111 A. L. R. 1239 (1937).

Of course the traditional doctrine that warranties do not run with personal property still remains the rule in many if not the majority of states. A typical recent case expressing the conservative view is *Colonna v. Rosedale Dairy Co.*, 166 Va. 314 at 324, 186 S. E. 94 (1936), in which was held that a son could not recover on implied warranty from the dairy which sold milk to his father. This is a representative case expressing the conservative view, which the court summarized as follows:

"(1.) A dealer who sells unwholesome foodstuff for immediate consumption is responsible for any ill effects which may follow therefrom. He is liable for the results of any negligent act of his which should reasonably have been anticipated by a prudent man, and he is also liable on an implied warranty.

"(2.) For negligence he must be sued in tort. On an implied warranty he must be sued on contract. . . .

"(3.) For negligence he is liable to one whose hurt could reasonably have been anticipated.

"On contract he is liable to his vendee but not to sub-vendees or others."

19 217 N. Y. 382, 111 N. E. 1050 (1916), discussed at note 13, supra.
was held that inasmuch as the written contract of sale (a form supplied by the Ford Motor Company) by its terms stated that it contained the entire contract and also that "It is further agreed that no warranty either express or implied is made by the dealer under this order or otherwise covering said car," therefore, under the parole evidence rule it was incorrect to admit in evidence the printed advertising matter.

As to the Ford Motor Company, this printed matter was excluded in the trial court, the case taken from the jury, and a verdict directed for the defendant. This was reversed on appeal and a new trial ordered. Verdict and judgment for the plaintiff at the second trial was again appealed from and the state supreme court affirmed the judgment for plaintiff.

The theory of the case is not entirely clear. 21 There was no allegation of negligence. In the opinion in the second appeal 22 the court said of its previous holding,

"In that decision, we held that, in an action for breach of warranty of non-shatterable glass in a windshield, catalogs and printed statements furnished the dealer for sales assistance are admissible against the manufacturer, although there was no privity of contract, since the falsity of the representations could not be readily detected; and that, in an action for a breach of warranty of non-shatterable glass in a windshield, plaintiff is entitled to show his absence of familiarity with non-shatterable glass, and that he had had no experience enabling him to recognize the difference between it and ordinary glass."

The Washington court, in Mazetti v. Armour & Co., 23 previously had held the manufacturer of unwholesome food liable to a subvendee for injury to his business as a result of having served this food in his restaurant. In the Baxter case the court quoted from the Mazetti case as follows:

"It has been accepted as a general rule that a manufacturer is not liable to any person other than his immediate vendee; that the action is necessarily one upon an implied or express warranty, and that without privity of contract no suit can be maintained; that each purchaser must resort to his immediate vendor. To this rule certain exceptions have been recognized: (1) Where the thing causing the injury is of a noxious or dangerous kind; (2) Where

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21 See infra, page 15 et seq.
22 179 Wash. 123 at 125, 35 P. (2d) 1090 (1934).
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the defendant has been guilty of fraud or deceit in passing off the article; (3) Where the defendant has been negligent in some respect with reference to the sale or construction of a thing not imminently dangerous."

The court also expressed the thought that due to the changing conditions of society, which had produced the three exceptions above mentioned, another should be added, saying:

"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 restraint of some statute, declare a rule that will meet the full intendment of the law."

The Baxter case goes on to cite Thomas v. Winchester, one of the earliest cases where the privity rule was ignored, and proceeds to say,

"The rule in such cases does not rest upon contractual obligations, but rather on the principle that the original act of delivering an article is wrong, when, because of the lack of those qualities which the manufacturer represented it as having, the absence of which could not be readily detected by the consumer, the article is not safe for the purpose for which the consumer would ordinarily use it."

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24 168 Wash. 456 at 460-461, quoting 75 Wash. 622 at 624.
25 75 Wash. 622 at 629, quoted in 168 Wash. at 461.
26 6 N. Y. 397, 57 Am. Dec. 455 (1852). This is the case which, as Judge Cardozo said in MacPherson v. Buick Motor Co., laid the foundation of this branch of the law. A drug dealer labeled beladonna as extract of dandelion and a retail druggist sold it to the plaintiff as such. The retail purchaser was permitted to recover from the party not in privity (evidently a wholesaler or manufacturer) who had mislabeled it. The theory of the case was not warranty or deceit but negligence. This case happened to deal with a substance "imminently dangerous" and there was for some time a tendency to confine the right of recovery to such substances. The full complement of exceptions indicated in Huset v. Case Threshing Machine Co., quoted in note l 2, supra, did not develop at once. The slow development following this precedent was therefore probably due to the particular circumstances of the Thomas case, but the opinion uses language indicating a broader view of the whole problem of liability without privity (6 N. Y. 397 at 409-410): "In the present case, the sale [by the defendant] of the poisonous article was made to a dealer in drugs, and not to a consumer; the injury, therefore, was not likely to fall on him, or on his vendee, who was also a dealer; but much more likely to be visited on a remote purchaser, as actually happened. The defendant's negligence put human life in imminent danger. Can it be said, that there was no duty on the part of the defendant to avoid the creation of that danger, by the exercise of greater caution? or that the exercise of that caution was a duty only to his immediate vendee, whose life was not endangered? The defendant's duty arose out of the nature of his business, and the danger to others incident to its mismanagement."

27 168 Wash. 456 at 462, 463.
It was decided that the catalogues furnished by the manufacturer should be admitted to show the representations by the manufacturer that the windshield would not shatter. "Appellant . . . had the right to rely on the representations made by [the manufacturer] even though there was no privity of contract."

Again, in the opinion on the second appeal the court seems almost to treat the whole case as founded on deceit, and in this connection it is made evident that the court is content to rest the result on considerations quite apart from negligence. It is said:

"If the plaintiff was fortunate to find himself before the Washington court. This is one of the states which does not demand that the defendant shall have been guilty of a conscious lie in order to be liable for deceit. McDaniel v. Crabtrees, 143 Wash. 168, 254 P. 1091 (1927). This court has definitely adopted the rule 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 for the injury caused thereby by showing that he did not know his representations were false or that he believed them to be true. "This," says the note on Baxter v. Ford Co., in 18 Cornell L. Q. 455 at 449 (1933), "is . . . general enough . . . to cover the principal case. The facts as to the glass in the windshield were certainly susceptible of knowledge by the Ford Co., and the plaintiff relied thereon to his injury."

This question whether the plaintiff, in cases like Baxter v. Ford Motor Co., does in fact rely on the manufacturer's representations may present some difficulty. How is the plaintiff suing a manufacturer to show that he did in fact rely on such representations as are found in the advertising of the product in question? This is a question of fact and an illusive one. If the plaintiff's own testimony is to be admitted, as it is in these days, it is quite likely that counsel will be able to coach their clients to testify up to any rule of law about the necessity of showing this "reliance" which the courts may evolve. The plaintiff's mental processes leading up to the decision to buy the article, car or what not, are known only to himself and perhaps his family or such other close friends as will almost invariably be biased witnesses. The plaintiff alone knows what weight the shatterproof glass representation had in his decision to buy the car he did buy, rather than some other. However, the law of deceit does not require that plaintiff shall have relied entirely upon defendant's representations. It is enough if he relied upon them in part. The question of reliance, therefore, is a question of fact, and if there is a case made for a jury, plaintiff is surely entitled to instructions that if defendant's representations did play a part in causing him to act, that is enough.

In actions sounding in contract there is much authority that advertisements of the seller are a part of the contract of sale and may constitute a part of the warranty collateral thereto. If the case is on the theory of deceit with the questions of privity and scienter aside, the rule as to reliance should be no different. See 28 A.L.R. 991 (1924), in which are collected cases holding that, where a salesman points out statements in advertising material, it is proper for the purchaser to testify that he relied on the advertisements. This is, of course, not so freely allowed where the buyer is experienced and informed in regard to the goods which are the subject of the sale, but where, as in the Baxter case, the plaintiff was allowed to testify as to his total unfamiliarity with safety glass, his general testimony as to reliance should clearly be material.

See Meyer v. Packard Cleveland Motor Co., 106 Ohio St. 338-339, 140 N. E. 118 (1922), wherein Wanamaker, J., stated: "It may be urged that this is a sub-
"Indeed, it would seem that whether there was any better make of shatter-proof glass manufactured by anyone at that time would be wholly immaterial, under the law as decided by us on the former appeal, since it was the duty of appellant to know that the representations made to purchasers were true. Otherwise, it should not have made them. If a person states as true material facts susceptible of knowledge to one who relies and acts thereon to his injury, if the representations are false, it is immaterial that he did not know they were false, or that he believed them to be true. . . . It has become almost axiomatic that false representations inducing a sale or contract constitute fraud in law."  

The portions quoted from these two opinions in the case of Baxter v. Ford Motor Co. seem to the writer the most significant, but they still do not make it entirely clear that the decision is based on the adoption of any one definite theory which can be reconciled with the general requirement of the law of sales calling for privity of contract.  

This case has been noted in several law reviews. The best of these notes, in the Cornell Law Quarterly, suggests four grounds on which substantial modification of the old doctrine of caveat emptor, let the buyer beware. Is it not high time, however, that that doctrine should be somewhat modified; at least that it should have no higher place in the business life of a nation than the companion doctrine, let the seller beware? There is entirely too much disregard of law and truth in the business, social and political world of today. . . . It is time to hold men to their primary engagements to tell the truth and observe the law of common honesty and fair dealing. Such a change, in my judgment, would not be so much in the line of revolution as in the line of reasonable reform. Honest men need not fear it; dishonest men should be kept in fear of it."

29 179 Wash. 123 at 128, 35 P. (2d) 1090 at 1092. Professor Williston uses almost the same expression in his article, "Liability for Honest Misrepresentation," 24 Harv. L. Rev. 415 at 419 (1911): "At the present day it is law, nearly, if not quite, everywhere where the common law prevails, that any representation of fact as to the quality of goods made for the apparent purpose of inducing the buyer to purchase them amounts to a warranty."

The difference is that Professor Williston is speaking of warranty, which, as we have seen is not generally an effective remedy in recent times without privity of contract. This court is talking about fraud in that loose way in which courts so often do, in that undefined sense in which they so often use it in aid of a variety of other concepts, such as deceit, warranty, estoppel, rescission, cancellation, reformation of instruments, constructive trusts, quasi-contract and others which do not come to mind at the moment. See also I Williston, Sales, 2d ed., § 197 (1924).

30 46 Harv. L. Rev. 161 (1933); 81 Univ. Pa. L. Rev. 94 (1932); 7 Wash. L. Rev. 351 (1933); 18 Corn. L. Q. 445 (1933); 7 Rocky Mt. L. Rev. 221 (1935).

31 18 Corn. L. Q. 445 (1933). The reader of this paper is urged to read this note. It contains a better discussion of the theoretical basis of Baxter v. Ford Motor Co. than has been undertaken in this paper.
the decision might have been put, but does not definitely state which one it believed the court to have adopted. These four grounds are:

1. That warranty historically was a tort action not depending on the existence of contract relations between the parties.\(^{32}\)

2. An extension of the idea of *MacPherson v. Buick Motor Co.* to include the concept that non-shatterable glass is imminently dangerous.\(^{33}\)

3. Deceit; this is simple enough in a state like Washington which does not require a showing of conscious fraud (scienter).\(^{34}\) Perhaps the most difficult element for the plaintiff to establish on this theory is that of reliance.\(^{35}\) The *Baxter* case seems practically to have taken reliance for granted.

4. An extension of the doctrine of warranty to the effect that it runs with personal property as covenants of warranty run with land, or that this situation is one calling for a third party beneficiary warranty.\(^{36}\)

The *University of Pennsylvania Law Review*\(^ {37}\) interprets *Baxter v. Ford* as an innovation in the law of warranty and as being in accord with the theory of Professor Williston that representation should be made the basis of strict liability. It also suggests that, leaving aside the matter of scienter, liability for misrepresentation is strictly imposed by much authority. It is also suggested in the same note that there is a close analogy to the strict liability\(^ {38}\) imposed on persons engaged in extra-hazardous activities.

"The buyer's unfamiliarity with the complicated mechanics of manufacture leaves him dependent upon the honesty of the manu-

\(^{32}\) See sources referred to in note 5, supra.

\(^{33}\) The note in *18 Corn. L. Q. 445* (1933) points out as the most serious obstacle to this, "that a car with ordinary windshield glass is not in its nature imminently dangerous. ... Under such a strong pronouncement of public sentiment [as statutes requiring it] a court may well justify a theory that furnishing a car without shatter-proof glass is furnishing an imminently dangerous vehicle." The present writer has not made a check to determine how many states now require this type of glass by statute, but the reader well knows that nearly all states do have such legislation.

\(^{34}\) See note 28, supra; also Bohlen, "Misrepresentation as Deceit, Negligence or Warranty," *42 Harv. L. Rev.* 733 at 738 (1929).

\(^{35}\) Note 28, supra.

\(^{36}\) I WILLISTON, SALES, 2d ed., § 244 (a) (1924); VOLD, SALES, §§ 152, 153 (1931), and see especially cases cited page 475; Perkins, "Unwholesome Food as a Source of Liability," 5 Iowa L. Bul. 6, 86 (1919-1920).

\(^{37}\) 81 UNIV. PA. L. REV. 94 (1932).

\(^{38}\) Bohlen, "Misrepresentation as Deceit, Negligence or Warranty," *42 Harv. L. Rev.* 733 at 741 (1929).
manufacturer's representations. An injury due to reliance on such mis-statements might well be compared to an injury caused by the carrying on of a dangerous occupation. . . . this type of protection should not be withheld from the consumer. . . . The modern manufacturer no longer requires the protection his predecessors enjoyed. The burden should fall upon him who can best distribute its weight. 39

The Harvard Law Review 40 looks upon the case as an extension to other chattels of the well established exception to the doctrine of privity which has hitherto been confined to food-stuffs. All the comments applaud the decision and in effect say, "why not?" So also, the writers of treatises and periodicals generally point out that the doctrine of privity in such cases, having crept into the law with the development of the action of assumpsit and having perhaps served a purpose in assisting the development of industry, is in any event no longer necessary under the requirements of modern social justice and should be dropped. 41

The writer has discovered two other shatter-proof windshield cases. In Bird v. Ford Motor Co. 42 suit was brought against the manufacturer by a passenger in an automobile who was injured when the shatter-proof windshield was broken in a collision. The complaint alleged negligence in that proper tests by the maker would have disclosed that the shatter-proof glass was defective. It was also alleged that this glass was imminently dangerous when used in automobiles. Defendant moved to dismiss. His argument, so far as disclosed in the report, seems to turn largely on lack of privity. It was held that the complaint stated a cause of action under the doctrine of MacPherson v. Buick Motor Co. This court also said by way of dictum that the plaintiff could not recover for breach of warranty.

39 81 Univ. Pa. L. Rev. 94 at 95, note 6 (1932).
40 46 Harv. L. Rev. 161 (1932).
41 Note the tone on which these periodical comments close. 46 Harv. L. Rev. 161 at 162 (1932): "where, as in modern advertising, the defendant addresses representations to the purchaser which induce a sale tending to benefit the former, the mere fact that the immediate seller is a third party should be immaterial."
81 Univ. Pa. L. Rev. 94 at 95: "Apart from any such classification, however, the court in recognizing the demands which the exigencies of changing economic conditions make upon the law, reached a decision which is at once socially just and in harmony with the best legal thought."
18 Corn. L. Q. 445 at 451 (1933): "The court in the principal case . . . on this basis is declaring a new doctrine, but one which accords with the needs of modern economic society."
In *Chanin v. Chevrolet Motor Co.*

it was held in the federal
district court that there could be no recovery by the subvendee, who
was injured by the breaking of a shatter-proof windshield, from the
maker of the car or from the maker of the glass. The plaintiff in this
case declared on the theory of warranty, the complaint evidently hav­
ing been drawn on the basis of *Baxter v. Ford Motor Co.* The court
said that in no case except that, "has it been held that any one other
than the vendor, no matter what his relation to the parties, is liable to
respond in damages for a misstatement or misrepresentation as to the
qualities of an article sold, except in an action for fraud or deceit." 44
It is then stated that the Uniform Sales Act limits warranty to an
action between vendor and vendee. The court admits there is merit in
the plaintiff's argument that modern conditions make it reasonable that
a manufacturer who broadcasts his representations to the general public
by advertising should be responsible to members of the public influ­
enced by such advertising. However, this judge is one of those who
think that when the ancient formulas will not do justice, the persons
wronged must await for action by the legislature. 45 This is a familiar

44 15 F. Supp. 57 at 58.
45 This attitude upon the part of courts is evasive of the judicial responsibility
which the common law implicitly imposes upon the judge to make the law serve the
ends and needs of justice in a changing world. It has been the boast of the common
law that it possesses the flexibility to accomplish this end. It is impossible to imagine
legislation which will anticipate the innumerable variety of situations which might arise.
Thus, adequate provision for handling such cases would be attained only after con­
siderable experiment by the legislature in passing statutes and by the courts in inter­
preting them. Legislation of this sort would doubtless be opposed by powerful lobbies
of manufacturers able to enlist the further support of publishers who would have an
interest based on the expectation of advertising. Local dealers, as a part of the manu­
facturers' distributing system, would be susceptible to the influence of these manufac­
turers in securing their influence in turn with their local legislators. Then, too, it is not
beyond imagination that counsel for manufacturers might devise contract agreements
which would defeat the purpose of such statutes. Only the courts, on the job all the
time and alert to effectuate social justice, can stop the gaps.

Witness the device by which the Goodyear Company has been able to evade
practicable responsibility in a very considerable class of claims as illustrated in *McLean
v. Goodyear Tire & Rubber Co.*, (C. C. A. 5th, 1936) 85 F. (2d) 150, cert. denied
299 U. S. 600, 57 S. Ct. 193 (1936). It appears that all this company's tires are
manufactured by an Ohio corporation which in turn owns a Delaware corporation having
the same officers and directors to which it sells all its tires. The Delaware corporation
then does business with dealers throughout the country. In this case it was conceded
that the manufacturer would be liable for the damage occasioned by the bursting of
a defective tire. The plaintiff sued the Delaware company which was doing business
in Texas, and having learned of the business set-up involved, he sought to amend his
complaint to include the manufacturer. It was held, and correctly, in view of the
note. So many opinions end with this suggestion, so many judges seem unaffected by the history of the common law and how it has grown. So many courts seem to forget or ignore that it is their function first of all to decide cases and only very secondarily to write opinions reconciling those decisions with what they consider to be weight of precedent.

The statement in the *Chanin* case as to the state of the authorities aside from the *Baxter* case ignores the food cases which have allowed recovery with privity and without negligence. In the Circuit Court of Appeals,\(^{46}\) this decision was affirmed because the court thought there could be no warranty and because there could be no deceit without scienter.

Whether these cases be approached from the standpoint of negligence or of warranty or even of a strict liability, it is not enough that the subvendee or other user was hurt or that the car was not what it was represented to be. There must be some connection. As Professor Bohlen has said, "The stream of liability can flow only through a channel of duty and its breach."\(^{47}\) Causation is an element essential to awarding damages on any theory. The formula used to express this requirement has been that of "proximate cause." But as pointed out by several recent writers,\(^{48}\) the essential behind this is not the matter of causation in fact, but duty, as Professor Bohlen's words above suggest.

A leading recent case which illustrates this especially well is *Palsgraf v. Long Island R. R.*\(^{49}\) Justice Cardozo, then Chief Judge of the New York Court of Appeals, there reduced the problem to one of duty. Another case which handles this problem particularly well is *Mahoney v. Beatman.*\(^{50}\) The court therein discusses the confusion which has resulted from the effort to frame a complicated rule of proximate cause, and after referring to many articles by learned writers who have attempted each in his own fashion to elaborate a rule or set of rules,

fearful and wonderful body of law with which we deal with corporate personality, that the Ohio corporation was not subject to jurisdiction in that action. In a case against a concern of this sort the plaintiff must either have a jurisdictional amount of claim to get into federal court or bring his action in a distant state. On the whole question of manufacturers' liability, it will have been noticed by the reader that the federal courts are, to say the least, on the conservative side when it comes to extending the boundaries of responsibility.

\(^{46}\) (C. C. A. 7th, 1937) 89 F. (2d) 889.
\(^{47}\) Bohlen, "Fifty Years of Torts," 50 Harv. L. Rev. 1225 at 1227 (1937).
\(^{50}\) 110 Conn. 184, 147 A. 762, 66 A. L. R. 1121 (1929).
accepts the one stated by Jeremiah Smith 51 as the only workable one and as sufficiently simple for practical use in guiding a jury. The rule as stated by Smith is quoted in the Mahoney cases as follows:

"To constitute such causal relation between defendant's tort and plaintiff's damage as will suffice to maintain an action of tort, the defendant's tort must have been a substantial factor in producing the damage complained of." 52

This is the formula which is regarded by the Connecticut court, in Mahoney v. Beatman, as being one which cannot be reduced to lower terms and in applying which

"the court must determine whether the jury would be justified in finding that there is a negligent act and that there is a causal connection between that act and an injury. . . . The court must reach the conclusion by itself answering the question, Does the evidence reasonably justify the submission to the jury of the question, 'Was defendant's conduct a substantial factor in producing plaintiff's injuries?'" 53

As applied to the present subject of discussion this means: Does the manufacturer of automobiles or of safety glass windshields owe a duty to subvendees or other users of such automobiles that glass used therein and represented to be shatter-proof shall be so? Shall the maker be liable for injuries which result when it turns out not to be shatter-proof under the impact of stones thrown against it by other cars? This is a problem for the court. Courts must define duties wherever they find those duties, whether in contracts, statutes or common law. The court must ask itself this question, "Is there a rule of law which protects this plaintiff under these circumstances against this hazard?" 54 If the court sends such a case to a jury, it has, whether it knows it or not, ipso facto recognized such a duty. By sending the case to the jury, the court in effect says to the jury, "If you find there was a causal relation between plaintiff's damage and defendant's conduct, that is, if you find that defendant's conduct was a substantial factor in causing plaintiff's damage you may find a verdict for plaintiff."

It might be argued that the passing car which threw the stone against Baxter's windshield was an intervening cause. This is not the

52 Mahoney v. Beatman, 110 Conn. 184 at 195, 147 A. 762 (1929).
53 110 Conn. at 196.
54 Green, Rationale of Proximate Cause (1927).
place for an extended discussion of the various rules which have been formulated by various writers for dealing with concurrent causes. But reference should be made to *Mahoney v. Beatman*, which has approved Dean Green’s views on this:

“Green . . . expresses the opinion that intervening agencies while important in determining liability have little pertinency in a discussion of the causal relation of the injuries resulting from the wrongful act to that act. This we believe to be a true exposition of the effect of an intervening agency.”

Mr. Bohlen throws more light on this question of causal relation in a way which seems to the writer pertinent. In discussing *Baxter v. Ford Motor Co.*, he says,

“If the term ‘proximate’ cause is recognized as a convenient term to describe that causal relation which for one reason or another the law regards as sufficient to entail responsibility, no great damage is done. . . . The very term ‘proximate’ carries with it the implication that the force which is nearest in the chain of causation is peculiarly, if not exclusively, responsible for all ensuing harm. From this follows a natural tendency to regard the later of two successive wrongdoers, whose misconduct is, therefore, the nearest in operation to the injury of the plaintiff, as not merely predominantly but solely responsible. . . . The earlier of two wrongdoers, even though his wrong has merely set the stage on which the later wrongdoer acts to plaintiff’s injury, is in most jurisdictions no longer relieved from responsibility merely because the later act of the other wrongdoer has been a means by which his own misconduct was made harmful.”

This point of view is apposite in the *Baxter* case, where in the manufacturer’s earlier wrong, in putting in the “shatter-proof” glass which did shatter, was made harmful by the impact of the stone hurled by a passerby as to whom there is not even a suggestion of wrongdoing. If the glass had shattered in a collision brought about by the negligence of another driver, the same analysis should apply.

There are other cases of injuries due to the failure of automobiles to come up to the reasonable expectations of subvendees in respect of parts other than glass windshields. When a defect in materials or the process of assembling an automobile causes injury to its user, his right of action against the maker is clear enough if he can establish negli-
gence, either in jurisdictions which follow *MacPherson v. Buick Motor Co.* or in the many other states which recognize a defective automobile as an imminently dangerous thing to be included in the well established exceptions to *Winterbottom v. Wright.*67 Recovery on either of these grounds, however, calls for allegations and proof of negligence. It is obviously a difficult thing for the plaintiff to show anything of the practices in the factory where the car was made as to the care used in the construction of the parts or in their assembly.68 Evidence

67 These are stated in note 12, supra.
68 In Rotche v. Buick Co., 358 Ill. 507, 193 N. E. 529 (1934), reversing 267 Ill. App. 68 (1932), a car about a month old while being driven by the owner at about 30 miles per hour suddenly went in the ditch when the brake was applied, greatly damaging the car and permanently injuring the owner. At the garage where the car was towed it was found that certain cotter pins in the brake assembly were missing. The defendant introduced extensive testimony as to various inspections in the course of assembling the car and preparing it for delivery. The court states the an unsecured cotter pin would be negligence but says the plaintiff must show that such a condition was due to defendant's negligence and makes a great deal of the point that the cotter pin may have been tampered with between the time of the accident and the time it was discovered in the garage to be missing.

Cases of this sort seem to show that in many jurisdictions in the present state of the law an injured car owner has no redress if his defectively built car goes to pieces, however new it may be. In the first place, warranties by dealers are so worded as to exclude any practicable responsibility on their part, as was the case in Baxter v. Ford Motor Company; secondly, the manufacturer whose negligence cannot be directly proved is sheltered behind the wall of privity from responsibility on any other ground. It is submitted that this should not be. It is obviously impossible to meet the standards set up in this case. What can the subvendee of the car possibly show in any case as to factory procedure? The defendant's witnesses will invariably describe a procedure which sounds most painstakingly careful. But slips do occur. There seem to be two ways to meet the obvious requirements of justice in such situations: first, to hold that the doctrine of *res ipsa loquitur* applies; or second, to allow the injured party to sue upon the theory of warranty. It will be objected that this is an improper application of *res ipsa loquitur*, because the automobile was not under the defendant's control at the time of the accident. To this it may be said that the problem under fire is not the operation of the car but the manner of its construction, which was entirely under the manufacturer's control. The defendant may testify that he usually follows a certain procedure of inspections and he can say no more than that to the best of his knowledge this was done and that no one else touched such things as the cotter pins, in this case, before the car was delivered. If this is competent evidence it should be equally competent for plaintiff to testify that the mechanism was to the best of his knowledge untouched after delivery to him and he should be permitted to show that the condition as discovered after the accident was the sort that would naturally result in such behavior by the car. Let it go to the jury on that basis and it will not be conclusive against the plaintiff, whatever happened to the cotter pin after the accident. Of course this could not well be permitted after a car had been tinkered with by a mechanic other than the manufacturer's own representative at least.

As to warranty as a basis for shifting the burden where it can be distributed and so can best be borne, enough has already been said to indicate the writer's opinion that
on such matters and the circumstances under which the defect was created are both under the control of the defendant. Testimony must necessarily come from the maker's employees, who are likely to be hostile witnesses for the plaintiff. He can hardly expect to be able to show more than those generalities which are the prerequisites for applying *res ipsa loquitur*.

A complete study of the judicial process in those cases which allow the plaintiff to get before a jury without privity of contract, would involve an extended investigation of the use of *res ipsa loquitur* and an attempt to differentiate as to whether on any other basis the plaintiff is

this is not going too far or doing too great violence to the not even now symmetrical pattern of the law. Tradition favors it, statutes do not forbid it, social justice requires it, Baxter v. Ford Motor Co. has done it, may other courts profit by the example.

There are other cases with reference to automobiles going to pieces. In Goullon v. Ford Motor Co., (C. C. A. 6th, 1930) 44 F. (2d) 310, where the steering wheel of a tractor crumbled in the driver's hand, letting him fall under the wheels, and it was shown that the steering wheel was an experiment in cheap construction in that there was no steel core within the composition rim, it was held that there was sufficient evidence of negligence to take the case to the jury. On the other hand, Davlin v. Henry Ford & Son, (C. C. A. 6th, 1927) 20 F. (2d) 317, where a tractor seat broke off and threw the driver under the wheels, it was held there was not a case for the jury. See also Morrissey v. Mazzio, 249 App. Div. 788, 292 N. Y. S. 455 (1936); Dillingham v. Chevrolet Co., (D. C. Okla. 1936) 17 F. Supp. 615.

The reader's attention is called to the very recent case of Reusch v. Ford Motor Co., decided in the state of Washington, September 1, 1938, 82 P. (2d) 544. In this case the plaintiff, owner of a motor truck manufactured by the defendant, while driving it became mired and the truck was tilted to one side. The truck caught fire. The plaintiff leaped to save himself, tripped over a log and suffered injuries from his fall. The plaintiff based his case against the defendant manufacturer on the theory that this was all due to negligence in manufacture and design of the truck, resulting in leakage of the gas tank, and in certain other connections whereby sparks from the muffler and exhaust reached the leaking gas. It was held that the defendant was entitled to judgment as a matter of law. The Washington court refers to its decision in Baxter v. Ford Motor Company but seems to put the decision in this case on the ground that an automobile is not inherently dangerous unless negligently constructed and further seems to hold as a matter of law that gasoline leaks are not due to negligence. The court cites several of the well-known cases referred to in this article, particularly the federal cases, which appear to the present writer to be irreconcilable with its own position in Baxter v. Ford Motor Company. It is also pointed out that the poison food cases are not analogous to the situation presented in the case at bar.

It is submitted that this case could and should have been decided, if the result reached was the one desired by the court, on other grounds. Perhaps also there was contributory negligence. It is also arguable that the real problem in this case, as to whether the defendant should be liable for the personal injury to the defendant when he fell on the ground, was one of causation. It would also seem reasonable to expect that the question of warranty, which was apparently a factor in Baxter v. Ford Motor Company, should have received more attention here. However, the report does not show whether or not the record on appeal raised this point.
relieved of the task of making detailed and direct proof on how negligence may have crept into any of the multiple operations which terminated in marketing the offending automobile. This cannot be undertaken in this paper. Nevertheless, it seems to the writer that without a liberal employment of this rule or a free use of warranty or some other concept which will dispense with privity (as it has been dispensed with in the cases which proceed on the negligence theory), progress in imposing the hazard of unsafe automobiles on the manufacturing group, where it can be best distributed, must be disappointingly slow.

As has already been suggested, the most substantial progress in this direction has been in the food cases. There are indeed few instances nowadays where a consumer injured by improperly prepared, packed or preserved food products, may not make out a jury case, if he lays his complaint in terms of the local law. *Res ipsa loquitur* has been very freely allowed in such cases, and in not a few states there are cases which say there is an implied warranty for the consumer. There are also the many cases where it has been possible to sustain an action in deceit upon the basis of false representations by manufacturers, especially in the matter of labels. In reference to medicines and various chemical substances and mechanical devices, very often a failure to warn users of dangerous qualities in the product furnishes sufficient proof of negligence.

When we come to a case like *Baxter v. Ford Motor Co.*, where none of the old familiar formulas will quite do the trick, the court is thrown upon its own resources. In such a predicament a court which is determined to control the process of judgment in the light of its own intelligence and its own conception of social needs and social policy will find a way. Again I turn to Karl Llewellyn's casebook, in which he says in his introduction:

"For the court has peculiar means at its disposal to adjust a rule to a case it will not fit. The court can always, and it does often,

69 Note 18, supra. There are also cases which suggest the third party beneficiary theory, Ward Baking Co. v. Trizzino, among those cited in the above note 18, seems to be decided on this basis.
60 Note 17, supra.
'save the rule' by 'construing' the facts into a pattern that bears no relation to reality; and the facts brought out in dissenting opinions leave no doubt that this is often and deliberately done in the interest of the court's view of justice in the particular case."

A little farther on he continues:

"Again, we must recognize on the one hand the opinion is often a mere justification after the event, a mere making plausible to the legal audience, of a decision reached before the opinion was begun, a decision the real reasons of which we may never learn. And on the other hand, we must remember that the opinion may, in any given case, reveal the true course of decision; and that in any event it will be a factor of power in further decisions of the same or other courts."

Again, I say, the court will find a way. It can invoke any of the various formulas which have been mentioned in this paper and others. It can narrow or broaden their meaning and application to effect its underlying purpose.

It is the writer's opinion that we shall not be given a great number of opportunities to observe whether the liberal recognition of responsibility, as imposed in Baxter v. Ford Motor Co., will be followed in reference to the specific hazard which appeared in that case, viz., misrepresented safety glass. Either this case, or other reasons unknown, appear to have modified the advertising in regard to safety glass in automobiles. The emphasis in the recent advertisements seems to be more upon qualities other than "shatter-proofness," such as clearness and freedom from distortion. Perhaps this is because the public is now so thoroughly inoculated with the idea that safety glass is shatter-proof that it is no longer considered necessary to mention that supposed quality. In other words, if one wishes to sue for injury due to shattering of glass in a 1938 automobile it is unlikely that the admissibility of such circulars as were offered in the Baxter case will be a question because of the modified content of more recent advertising.

However, the question may still arise as to the responsibility of automobile makers who do not use glass which is really shatter-proof. Perhaps the widely extant statute requiring safety glass will be interpreted as making it negligence per se, or at least evidence of negligence, for a manufacturer to install any other kind. Even without such a statute, the common law may adopt a rule that safety glass is the only

68 18 Corn. L. J. 445 (1933). See also note 33, supra.
compliance with a standard of care for the manufacture of automobiles, either by allowing juries so to find or by making its use a minimum standard of care as a matter of law. On the other hand, it may be required merely that he use the best and most nearly shatter-proof glass that the market affords.

However, the issues suggested by such a case as Baxter v. Ford Motor Co. are broader than the limited question of manufacturer’s liabilities with reference to shatter-proof glass. A decision like this opens up the whole problem whether manufacturers shall be held liable for injury when products do not live up to the representations in advertising. It is even broader than that. It suggests the possibility that makers of all sorts of products will be held responsible, as manufacturers and packers of foodstuff are now held liable, without showing negligence. There is here involved the question of fair trade as between vendor and consumer. When one producer runs down another’s product by means of advertising, by cutting prices and by various other practices, the party aggrieved may invoke all sorts of legal concepts, common-law rules, statutory and administrative regulations which are calculated to promote what is called fair trade as between competitors. What protection is there for the consumer beyond a few statutes relating to particular commodities, especially foods and drugs?

It is said that when one cigarette maker urged the public to use its brand instead of a sweet, the candy trade was able to get legal help as against unfair trade. When the user of a manufactured article suffers because the goods are not as advertised or as normally and humanly expected to be, he is confronted with the folklore of early Victorian rules and concepts about privity of contract, subject to some exceptions which we have been talking about in this paper. Must the consuming public wait upon legislation, which if it comes will be piecemeal and cannot be expected to be drawn with such foresight as to anticipate and protect against all of the innumerable situations which may arise? If such legislation does come, it will mean that litigation must drag out a long course before interpretation will be far enough advanced to assure whether the desired end has been accomplished.

The common law has the power and the flexibility to handle problems of this sort. Is it too much to ask that the courts will recognize their power and responsibility to handle these questions as they arise and to decide cases as cases? If the results can be reconciled with a symmetrical pattern of precedent, so much to the good. That will make the decisions more readily acceptable to the professional group, but,
if some of the decisions seem from the point of view of the strict conceptualist to be inconsistent with something else, that also will have to be accepted. Probably every decision is disagreed with, at least by counsel for the losing party.

American courts have repeatedly refused to accept and follow many doctrines of the common law which were unquestioned in England. These courts have frequently assigned the reason that these doctrines did not fit the conditions in this country. Place makes a difference. What may work well under one set of conditions, present in one place, may be quite unsuitable under different conditions. Likewise time makes a difference. Privity was a simple rule, easy of application, and probably worked on the whole very well in the days when things were usually made to order for the consumer. It does not fit modern conditions. The innumerable cases which avoid using the rule of privity by the well known exceptions admit that. Other cases are found where the courts throw up their hands in despair and tell the plaintiff he must go to the legislature. Why all this effort to evade the principle? Why not ignore it, why not recognize it for what it is, a ghost from the past, and formulate a new concept that will lead directly to the result which is admittedly in harmony with modern conditions and will effectuate an enlightened contemporary social policy?

Many rules of the common law relating to property, particularly the great body of that relating to incorporeal hereditaments, never found a place in this country. A homely illustration is the refusal of the states from Ohio westward to follow the English rules as to liability for trespassing live stock. The common law held the owner strictly liable. The western states refused to so hold and required the cultivator to fence them out or take the risk. The reason stated was the unsuitability of the common law to the nature of the country. In a great many states a hunting license is a defense to trespass on lands not posted as prescribed by statute, and in the early days of the west the hunter even without a license was not liable for trespass. Americans do not feel as sensitive about "poaching" as the English.