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Advertising and the Buyer's Remedies

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NOTES

ADVERTISING AND THE BUYER'S REMEDIES

The institution of advertising is of comparatively ancient origin.[1] Indeed, many of the features of modern advertising and many of its abuses were present in the formative period of the common law of sales.[2] However, when the total national expenditure for advertising exceeds five and a half billion dollars, as it did in 1950,[3] there is evidence that this institution has grown beyond the imaginations of the 17th and 18th century jurists. Particularly is this true when we consider the continent-wide scope of present-day advertising. It seems self-evident that the contact which existed between producers and consumers in earlier economic systems has, to a large measure, presently disappeared, except insofar as it has been maintained through advertising.

It has been felt for many years that the abuses of advertising deserve curative measures, even by the advertising profession itself.[4] The measures that have been adopted, however, as expressed in the *Federal Food, Drug, and Cosmetic Act*,[5] and the *Federal Trade Commission Act*,[6] are of little help to the individual consumer who seeks damages or restitution for the injury he has suffered through misleading advertising. These statutory remedies are social remedies — criminal and injunctive[7] — and of mere tactical value to the buyer-plaintiff. Thus the injured consumer has been left with the often archaic remedies of the common law as they have been codified in the *Uniform Sales Act*. Therefore, it seems appropriate to examine the relationship between advertising and a buyer's civil remedies.

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1. Lyon, *Advertising*, 1 ENCYC. SOC. SCI. 469 (1930).
2. *Id.* at 470.
3. *Advertising*, 1951 BRITANNICA BOOK OF THE YEAR 20.
4. Note, 36 YALE L.J. 1155 (1927), describes the editorial efforts of PRINTERS INK, an advertising trade journal, to promote a statute making fraudulent advertising a misdemeanor. This Note also relates the close cooperation of the advertisers' associations in this endeavor.
5. 52 STAT. 1041 (1938), as amended, 21 U.S.C.A. §§ 301 *et seq.* (1952).
6. 38 STAT. 717 (1914), as amended, 15 U.S.C.A. §§ 41 *et seq.* (1952).
7. Federal Alcohol Administration Act, 49 STAT. 981 (1935), as amended, 27 U.S.C.A. §§ 205(f), 207 (1952); Federal Food, Drug and Cosmetics Act, 52 STAT. 1041 (1938), as amended, 21 U.S.C.A. §§ 321, 332, 333. 334 (1952); Federal Trade Commission Act, 38 STAT. 717 (1914), as amended, 15 U.S.C.A. §§ 41 *et seq.* (1952). The laws relating to the United States Post Office provide similar remedies, REV. STAT. § 3929, as amended, 39 U.S.C.A. § 259 (1928); and 63 STAT. 94 (1949), 18 U.S.C.A. § 1341 (1950). With regard to federal regulation of advertising, see Note, 53 HARV. L. REV. 828 (1940). On state statutes regulating advertising, see collection of statutes in Note, 36 YALE L.J. 1155 (1927), and collection of cases in 89 A.L.R. 1004 (1934). Generally, see FINKELHOR, LEGAL PHASES OF ADVERTISING c. 21 (1938); BORDEN, THE ECONOMIC EFFECTS OF ADVERTISING 801 *et seq.* (1942) (considerable discussion of the "ethical" problem, but admittedly concerned only with the abstract problem of the seller's honesty); Isaacs, *The Consumer At Law*, 173 ANNALS 177, 180 (1934) ("In any event, a legal remedy is a poor substitute for not having been hurt in the first place." Small consolation for the injured buyer.)

It is the purpose of this Note to show how injured buyers have obtained relief where the sales to them were induced by misleading advertising, in spite of many legal doctrines which fail to take into account the widespread development of the institution of advertising.[8] Since most advertising directed to the general public concerns sales of chattels, no attempt is made herein to discuss sales of realty or intangibles. The *Uniform Sales Act* is so limited,[9] and the many special concepts surrounding sales of realty and corporate securities[10] necessitate a delimitation in this respect.

I. Problems of Integration

One of the first problems facing the buyer-plaintiff is that of integrating the advertisement that induced the sale into the sale itself upon which his action is based. The manufacturer, wholesaler, retailer and consumer have tended to think of the two as parts of a whole, or as steps in a process.[11] Thus the advertisers' theory is that the advertisement creates a desire in the buyer, and that the purchase is a fulfillment of that desire. Nevertheless, the law has traditionally viewed sales as completely apart from the advertising which induced them and has demanded a showing of a link between the two in order to consider the advertising at all.

A. *Advertisements as Offers*

The question of whether there is a contract upon which to sue may depend upon whether the advertisement constitutes an offer. It is theoretically possible for an advertisement to be an offer.[12] Nevertheless, courts have generally held that an advertisement constitutes merely an invitation to the reader to make an offer.[13] This theory as-

8. Nearly all of the older cases and many modern cases treat representations found in advertising like any other representations by a seller. Contrast this attitude with the very analytical approach found in such cases as Madouros v. Kansas City Coca-Cola Bottling Co., 230 Mo. App. 275, 90 S.W.2d 445 (1936); Simpson v. American Oil Co., 217 N.C. 542, 8 S.E.2d 813 (1940); Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409, 88 A.L.R. 521, *aff'd mem. on rehearing*, 15 P.2d 1118 (1932). Even Williston avoids making any analysis of sales induced by advertising separate from the general law of sales. See, however, 1 Williston, Sales § 202 (Rev. ed. 1948). For the most part cases cited herein are cases involving advertising. However a number of rules of law apply to all forms of representations and not merely to advertisements. Thus frequent citation is made to general authorities on sales where a legal proposition is supported by nonadvertising cases. For an almost complete collection of cases on advertising, see Notes, 28 A.L.R. 991 (1924) and 158 A.L.R. 1413 (1945). See generally, Finkelhor, Legal Phases of Advertising (1938).

9. Uniform Sales Act § 76. 3 Williston, Sales § 619(a) (Rev. ed. 1948).

10. See, *e.g.*, the *Securities Act of 1933*, 48 Stat. 74 (1933), 15 U.S.C.A. §§ 77a *et seq.* (1951); and the various state "blue sky laws."

11. Vold, Sales 444 (1931); Bogert and Fink, *Business Practice Regarding Warranties in the Sale of Goods*, 25 Ill. L. Rev. 400, 409, 416 (1930).

12. 1 Williston, Contracts § 27 (Rev. ed. 1936).

13. Georgian Co. v. Bloom, 27 Ga. App. 468, 108 S.E. 813 (1921) (seller assumed advertisement binding and sought unsuccessfully to charge publisher for

sumes that "haggling over prices" is still the dominant feature of sales transactions,[14] and that an advertised price is only an argumentative starting point. The assumption is no longer true in fact, and the too frequent application of the rule has been criticized.[15] Certainly the question depends for its answer upon the manifest intention of the parties,[16] and some types of advertisements have been construed as so intended[17] — notably advertisements offering rewards.[18] In the leading English case of *Carlill v. Carbolic Smoke Ball Co.*,[19] the advertiser announced that it would pay a reward to anyone contacting influenza after using its patent medicine. The advertisement was held to constitute an offer on the authority of the "reward cases." It is significant, however, that the advertisement was actually intended to induce sales,[20] even though it was in the form of an offer of reward.

B. *Parol Evidence Rule*

When, in a suit by a buyer-plaintiff, the existence of a contract is not at issue, his problem is to show that the promises or representations in the advertisement are a part of the existing contract. The chief obstacle to this showing arises when the defendant invokes the parol evidence rule — that an unambiguous written contract cannot be varied by extrinsic evidence.[21] There are two principal methods by which this rule may be made inapplicable.

Obviously where the contract refers the buyer to a catalogue or circular for his warranties, those warranties are a part of the contract

misprinting advertisement); Lovett v. Frederick Loeser & Co., 124 Misc. 81, 207 N.Y. Supp. 753 (N.Y. Munic. Ct. 1924); cf. Craft v. Elder & Johnston Co., 38 N.E.2d 416 (Ohio App. 1941); *see* Salisbury v. Credit Service, Inc., 9 Harr. 377, 199 Atl. 674, 682 (Del. Super. Ct. 1937). *But cf.* R. E. Crummer & Co. v. Nuveen, 147 F.2d 3, 157 A.L.R. 739 (7th Cir. 1945); Vigo Agricultural Society v. Brumfield, 102 Ind. 146, 1 N.E. 382 (1885); Tarbell v. A. J. Stevens & Co., 7 Iowa 163 (1858); Reynolds & M'Farlane v. M'Farlane, 1 Over. *487 (Tenn. 1809). For collection of cases, see Note, 157 A.L.R. 744 (1945).

14. See *infra* Part I, § D, on auctions, where "disciplined haggling" is still the dominant feature.

15. 1 WILLISTON, CONTRACTS § 27 (Rev. ed. 1936).

16. RESTATEMENT, CONTRACTS § 25 (1932). Compare the "test" in 1 WILLISTON, CONTRACTS 58 (Rev. ed. 1936), with "test" in 1 WILLISTON, SALES 6 (Rev. ed. 1948).

17. See, *e.g.*, R. E. Crummer & Co. v. Nuveen, 147 F.2d 3, 157 A.L.R. 739 (7th Cir. 1945); Vigo Agricultural Society v. Brumfield, 102 Ind. 146, 1 N.E. 382 (1885); Tarbell v. A. J. Stevens & Co., 7 Iowa 163 (1858); Reynolds & M'Farlane v. M'Farlane, 1 Tenn. 487 (1809).

18. Carlill v. Carbolic Smoke Ball Co., L.R. [1893] 1 Q.B. 256 (C.A. 1892); 1 WILLISTON, CONTRACTS 58 (Rev. ed. 1936).

19. L.R. [1893] 1 Q.B. 256 (C.A. 1892).

20. The judges in the case were aware of this distinguishing feature. Note their concern with the question of the consideration for the advertiser's promise, L.R. [1893] 1 Q.B. at 264, 271.

21. Refinery Equipment, Inc. v. Wickett Refining Co., 158 F.2d 710 (5th Cir. 1947); A. C. McClurg & Co. v. Herbert O. Tomlinson, 186 Ill. App. 55 (1914); Rock Island Implement Co. v. Wally, 268 S.W. 904 (Mo. App. 1925); Madison-Kipp Corp. v. Price Battery Corp., 311 Pa. 22, 166 Atl. 377 (1933); Somerville v. Gullett Gin Co., 137 Tenn. 509, 194 S.W. 576 (1917); Buchanan v. Laber, 39 Wash. 410, 81 Pac. 911 (1905).

by the doctrine of incorporation by reference.[22] One case[23] has indicated that a circular attached in some manner to the written contract forms a part of that contract. It might be argued then, that an order blank forming one of the pages of a mail order catalogue incorporates that catalogue, even without express reference thereto.

Another manner in which the parol evidence rule may be avoided is by construing the contract as an informal one comprising all the negotiations leading to the sale.[24] Any single written document therefore would not embody the entire contract, and any disclaimer of warranty contained therein would not eliminate prior representations by the seller. Realistically the seller usually has control of the negotiations. The mere fact that he maneuvers the buyer into signing a written document as the last step in these negotiations should not be said to exclude them from the contract unless the document actually purports to be the entire written contract.[25] Whether a formal written contract exists is a question of law.[26] Of course, the parol evidence rule is not a defense when the prior, unintegrated representation of the seller was fraudulent.[27]

C. *Lapse of Time*

The courts have given relatively little attention to the problem of when a representation by the seller should be said to have lapsed. Assume that a dealer has advertised in his catalogue that his mill "will grind equally well substances as hard as flint and as soft as lime."

22. Refinery Equipment, Inc. v. Wickett Refining Co., 158 F.2d 710 (5th Cir. 1947); Hemwall Auto Co. v. Michigan Avenue Trust Co., 195 Ill. App. 407 (1915); Rock Island Implement Co. v. Wally, 268 S.W. 904 (Mo. App. 1925); *see* Somerville v. Gullett Gin Co., 137 Tenn. 509, 519, 194 S.W. 576, 579 (1917); Milburn Wagon Co. v. Nisewarner, 90 Va. 714, 19 S.E. 846 (1894); Buchanan v. Laber, 39 Wash. 410, 81 Pac. 911 (1905).

23. Johnston Bros., Inc. v. Village of Coopersville, 261 Mich. 26, 246 N.W. 551 (1932).

24. See, *e.g.*, Luitweiler Pumping Engine Co. v. Ukiah Water & Improvement Co., 16 Cal. App. 198, 116 Pac. 707 (1911); Meyer v. Packard Cleveland Motor Co., 106 Ohio St. 328, 140 N.E. 118, 28 A.L.R. 986 (1922). For an extreme case holding the other way, see A. C. McClurg & Co. v. Herbert O. Tomlinson, 186 Ill. App. 55 (1914). Williston discusses this technique at length: WILLISTON, CONTRACTS § 643 (Rev. ed. 1936); 1 WILLISTON, SALES § 215 (Rev. ed. 1948).

25. See cases cited note 23 *supra*. *Cf.* Claghorn v. Lingo, 62 Ala. 230 (1878); Anderson v. Tyler, 223 Iowa 1033, 274 N.W. 48 (1937); Robben v. Farmers' Co-operative Co., 120 Kan. 310, 278 Pac. 10 (1929); A. Leschen & Sons Rope Co. v. Case Shingle & Lumber Co., 152 Wash. 37, 276 Pac. 892 (1929).

26. Claghorn v. Lingo, 62 Ala. 230 (1878); CORBIN, CONTRACTS § 595 (1951) (except in very close cases). *Contra*: Luitweiler Pumping Engine Co. v. Ukiah Water & Improvement Co., 16 Cal. App. 198, 116 Pac. 707 (1911); Cobb v. Wallace, 45 Tenn. 539 (1868). To allow the jury to determine whether the writing was intended to embody the whole contract would require that the prior representations be admitted in evidence conditionally and that the jury disregard them if it finds the writing so intended — a difficult matter even for reasonable jurymen. See cases collected in Note, 70 A.L.R. 752 (1931).

27. See, *e.g.*, Williams v. Bullock Tractor Co., 186 Cal. App. 32, 198 Pac. 780 (1921); Ventura Mfg. & Implement Co. v. Warfield, 37 Cal. App. 147, 174 Pac. 382 (1918); 1 WILLISTON, SALES 557-58 (Rev. ed. 1948).

Two years later a buyer orders such a mill from this seller. Is the seller still bound by his two-year-old representation? The intention of the parties is mainly involved here,[28] and the reasonable man test might be invoked.[29] The following factors are offered as possibly affecting the result: the length of time between the representation and the sale, the type of goods sold, customs of the trade, frequency of new catalogues,[30] changes in the seller's line which may have occurred in the interim[31] and intervening factors acting upon the buyer which may have induced the sale, such as recommendations by other users.[32] Obviously, if the contract sets up a time limitation on the warranties,[33] such a provision would control.

D. *Special Rules Regarding Auctions*

The auction sale is one of the oldest methods by which chattels are sold. Advertisements of these auctions, by poster and handbills, were one of the first forms of advertising.[34] The common law of sales is well grounded in the facts here because the auction is one of the few economic institutions that has not changed materially since the Industrial Revolution. From the buyer's viewpoint, little complaint can be made of the doctrine that the advertisement of an auction is an invitation to make an offer[35] or the general rule that the oral terms of sale announced immediately prior to the auction prevail over the terms stated in the advertisement.[36] In auction sales, the buyer and seller, or his agent, confront each other; there is usually opportunity for buyers to inspect the goods to be sold; and the competition is between relatively skilled buyers rather than sellers — a situation atypical to modern commercial life.

28. *Cf.* Asbestolith Mfg. Co. v. Howland, 120 N.Y. Supp. 93 (Sup. Ct. 1909).
29. R. E. Crummer & Co. v. Nuveen, 147 F.2d 3, 157 A.L.R. 739 (7th Cir. 1945); *see* Carlill v. Carbolic Smoke Ball Co., L.R. [1893] 1 Q.B. 256 (C.A. 1892) (an offer, but note facts as discussed in § A, *supra*).
30. *Cf.* Wilcox, Gibbs & Co. v. Henderson, 64 Ala. 535 (1879).
31. *Ibid.*
32. *Cf.* Morris v. Bradley Fertilizer Co., 64 Fed. 55 (3d Cir. 1894).
33. *Cf.* Snow v. The Schomacker Manufacturing Co., 69 Ala. 111, 44 Am. Rep. 509 (1881).
34. Cherington, *Auctions*, 2 ENCYC. SOC. SCI. 309 (1930); see also, Korber v. City of Portland, 135 Ore. 233, 295 Pac. 203 (1931), for historical discussion.
35. Ransberger v. Ing, 55 Mo. App. 621 (1894); Ashcom v. Smith, 2 Penr. & W. 211, 21 Am. Dec. 437 (Pa. 1830); *cf.* Eisenhauer v. Brosnan, 44 La. Ann. 742, 11 So. 43 (1892). See also cases cited note 12 *supra*.
36. Kendall v. Boyer, 144 Iowa 303, 122 N.W. 941, 24 L.R.A.(NS) 488, Ann. Cas. 1912A 1127 (1909); *accord*, Lipsett Wrecking & Salvage Corp. v. Joseph Reid Gas Engine Corp., 137 F.2d 847, (3d Cir. 1943); Satterfield v. Smith, 33 N.C. 60 (1850); *cf.* Eisenhauer v. Brosnan, 44 La. Ann. 742, 11 So. 43 (1892); Nott & Co. v. Bank of Orleans, 19 La. 22 (1841); Burling v. Brinn, 116 Misc. 130, 189 N.Y. Supp. 707 (Sup. Ct. 1921); Steen v. Neva, 37 N.D. 40, 163 N.W. 272 (1917). *But cf.* United States v. Atlanta Wrecking Co., 8 F.2d 542 (N.D. Ga. 1925); Palmer v. Mt. Sterling Nat. Bank, 13 Ky. L. Rep. 790, 18 S.W. 234 (1892); Navarette v. Travis-Ziegler Co. 194 N.Y. Supp. 832 (N.Y. Munic. Ct. 1922); Flight v. Booth, 1 Bing. N.C. 370, 131 Eng. Rep. 1160 (C.P. 1834) (last four cases indicate fact situations where either buyer or seller may be able to urge binding force of advertisement).

II. Remedies

Beginning in the Nineteenth Century, the courts tended to forget the earlier history of the common law, when actions on warranties were in trespass on the case,[37] and regarded the warranty obligation as promissory in nature.[38] Thus the requirements of privity of contract[39] and intent to warrant[40] were often grafted onto what should have been actions sounding in tort for misrepresentation. This has been criticized as unduly limiting the buyer's chances for recovery, on the theory that warranties can arise either from promises or from representations alone.[41] However, many of these strict requirements have now been eliminated.[42] Furthermore, liberal rules of pleading allowing joinder of causes of action now give the buyer opportunity to fire a broadside complaint containing counts in implied or express warranty, deceit and negligence.[43]

The common basis for all the buyer's remedies is illustrated by the case of *Marsh v. Usk Hardware Co.*,[44] where a buyer of explosives was injured by following directions for use contained in the seller's advertising brochure and sued for negligence. The court stated that technically the action was one for deceit, but pointed out the element of negligence involved in an action for deceit and concluded, "Even in an action resting upon a wrong growing out of a breach of warranty contained in a contract of sale of an article inherently dangerous, the

37. 1 Williston, Sales § 195 (Rev. ed. 1948).

38. 1 Williston, Sales § 197 (Rev. ed. 1948). Many cases still commit this error. See, *e.g.*, Chanin v. Chevrolet Motor Co., 89 F.2d 889, 111 A.L.R. 1235 (7th Cir. 1937); Pelletier v. Dupont, 124 Me. 269, 128 Atl. 186 (1925); Degouveia v. H.D. Lee Mercantile Co., 231 Mo. App. 447, 100 S.W.2d 336 (1936); Jordon v. Brouwer, 86 Ohio App. 505, 93 N.E.2d 49 (1949). That this conclusion is not required under the Uniform Sales Act, see Williston, Sales 499-500 (Rev. ed. 1948).

39. See *infra*, § A, subsec. 5.

40. See *infra*, § A, subsec. 1.

41. Vold, Sales §§ 140, 142 (1931); 1 Williston, Sales §§ 194, 197 (Rev. ed. 1948). This distinction and the fact that a third type of warranties are not affected by the seller's representations but imposed by law, *i.e.*, implied warranties, is carefully discussed in Ferson, *Agency to Make Warranties*, 5 Vand. L. Rev. 1 (1951).

42. See *infra*, § A subsec. 1, 5.

43. See, *e.g.*, Mannsz v. Macwhyte Co., 155 F.2d 445 (3d Cir. 1946) (warranty and negligence); Rachlin v. Libby-Owens-Ford Glass Co., 96 F.2d 597 (2d Cir. 1938) (deceit and warranty); Chanin v. Chevrolet Motor Co., 89 F.2d 889, 111 A.L.R. 1235 (7th Cir. 1937) (deceit and warranty); Laclede Steel Co. v. Silas Mason Co., 57 F. Supp. 751 (W.D. La. 1946) (warranty and negligence); Davis v. Van Camp Packing Co., 189 Iowa 775, 176 N.W. 382, 17 A.L.R. 649 (1920) (warranties, express and implied, and negligence); Simpson v. American Oil Co., 217 N.C. 542, 8 S.E.2d 813 (1940) (warranty and negligence). For problems involved where the contract suggests an exclusive remedy to the buyer, see 3 Williston, Sales § 611a (Rev. ed. 1948). As to whether the buyer must elect as between an action for damages and for rescission, see 3 Williston, Sales §§ 612, 612a (Rev. ed. 1948).

44. 73 Wash. 543, 132 Pac. 241 (1913).

right of recovery may in a sense be regarded as resting upon the negligence on the part of the seller."[45]

The seller's advertising involves mainly three remedies available to the buyer: breach of express warranty, breach of implied warranty and negligence. The buyer's action in tort for deceit differs from the above-mentioned remedies only in the requirement of scienter[46] and in the amount of damages allowable.[47] Neither of these items is peculiarly affected by the seller's advertising, and though an action for deceit may be predicated on deceitful expressions in advertising, these are no different in function than any misrepresentations by a seller of goods.

A. *Breach of Express Warranty and Nonfraudulent Misrepresentation*

1. *Intent to Warrant and Reliance*

The older cases required a showing by the plaintiff that the warranty upon which the suit was based was so intended by the seller.[48] Though this requirement has been eliminated in many cases,[49] the authorities do require reliance by the buyer as an element of his cause of action.[50] If the seller's liability is regarded as contractual, it would seem more realistic to say that what is contemplated by the courts in using the words "intention to warrant" and "reliance by the buyer" is no more than the mutual assent necessary for any contractual obligation. This, in turn, should be governed by the objective theory of contracts, rather than an attempted dissection of the parties' motives. If, as is urged by Williston and Vold,[51] the liability is *ex delicti,* the seller's intention is an intention to warrant; but reliance is essential to proof of causation.

Under either theory, there does not seem to be any justification for denying the buyer his remedy in sales resulting from advertising, merely because of a failure to prove technical "intention to warrant" or "reliance." It is indisputable that the advertiser intends to communicate the facts represented to the potential buyer. And it should be assumed that the buyer relied on the advertisement which induced his purchase. The buyer-plaintiff should only be required to show that (1) the advertisement was published correctly as ordered by the ad-

45. 132 Pac. at 245.

46. 3 WILLISTON, SALES 406 (Rev. ed. 1948).

47. 3 WILLISTON, SALES § 613a (Rev. ed. 1948).

48. Burns v. Limerick, 178 Mo. App. 145, 165 S.W. 1166 (1914); League Cycle Co. v. Abrahams, 27 Misc. 548, 58 N.Y. Supp. 306 (Sup. Ct. 1899); Enger v. Dawley, 62 Vt. 164, 19 Atl. 478 (1890); 1 WILLISTON, SALES § 211 (Rev. ed. 1948).

49. See cases cited in 1 WILLISTON, SALES § 201 (Rev. ed. 1948).

50. See, *e.g.*, Landman v. Bloomer, 117 Ala. 312, 23 So. 75 (1898); Harrington v. Smith, 138 Mass. 92 (1884); Ralston Purina Co. v. Cox, 141 Neb. 432, 3 N.W.2d 748 (1942); VOLD, SALES 446-7 (1931).

51. See note 40 *supra.*

vertising seller; and (2) the buyer was induced by the advertisement to make his purchase.

The new *Uniform Commercial Code* apparently recognizes the realities of modern sales induced by advertising, for it defines an express warranty in the following terms: "Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes a basis of the bargain creates an express warranty. . . . It is not necessary that [the seller] have a specific intention to make a warranty. . . ."[52]

2. *Fact Patterns*

Whether the parties contemplated an express warranty in the advertising depends upon the facts of the particular case and is ordinarily a question for the jury.[53] Certain tentative generalizations, however, can be made as to particular fact patterns. In the sale of agricultural seeds and fertilizers, sellers have been held to a rather high standard on their representations in advertising,[54] but it should be noted that many seed catalogues contain disclaimers of any general warranty of crop success.[55] It was held in *Baumgartner v. Glesener*[56] that an advertisement of a 95 per cent germinating test of seed does not guarantee 95 per cent germinating power. This distinction seems artificial and the particular case held there was an implied warranty of germinating power.[57] It is self-evident that seeds advertised as oats are warranted to raise oats and not wheat.[58]

Sales of animal feeds and animal medicines present a similar fact pattern, since factors beyond the control of the seller, such as proper administration, sanitary conditions, and so forth, would militate against

52. UNIFORM COMMERCIAL CODE § 2-313 (Official Draft, 1952).

53. See, *e.g.*, Wilcox, Gibbs & Co. v. Henderson, 64 Ala. 535 (1879); Kuhn v. Campbell, 118 Ohio St. 392, 161 N.E. 25 (1928) *semble*; Davis v. Ferguson Seed Farms, 255 S.W. 655 (Tex. Civ. App. 1923); *accord*, Roberts v. Anheuser-Busch Brewing Ass'n, 211 Mass. 449, 98 N.E. 95 (1912).

54. See, *e.g.*, Wilcox, Gibbs & Co. v. Henderson, 64 Ala. 535 (1879); Claghorn v. Lingo, 62 Ala. 230 (1878); Baumgartner v. Glesener, 171 Minn. 289, 214 N.W. 27 (1927); White v. Miller, 71 N.Y. 118, 27 Am. Rep. 13 (1877); Bell v. Mills, 68 App. Div. 531, 74 N.Y. Supp. 224, 78 App. Div. 42, 80 N.Y. Supp. 34 (4th Dep't 1902); Reiger v. Worth Co., 130 N.C. 268, 41 S.E. 377, 89 Am. St. Rep. 865 (1902); Robson v. Miller, 12 S.C. 586 (1879); Gray v. Gurney Seed & Nursery Co., 57 S.D. 280, 231 N.W. 940 (1930), 62 S.D. 97, 252 N.W. 3 (1933); Davis v. Ferguson Seed Farms, 255 S.W. 655 (Tex. Civ. App. 1923); Hoover v. Utah Nursery Co., 79 Utah 12, 7 P.2d 270 (1932).

55. Bell v. Mills, 68 App. Div. 531, 74 N.Y. Supp. 224, 78 App. Div. 42, 80 N.Y. Supp. 34 (4th Dep't 1902); Gray v. Gurney Seed & Nursery Co., 57 S.D. 280, 231 N.W. 940 (1930), 62 S.D. 97, 252 N.W. 3 (1933); Davis v. Ferguson Seed Farms, 255 S.W. 655 (Tex. Civ. App. 1923); Hoover v. Utah Nursery Co., 79 Utah 12, 7 P.2d 270 (1932).

56. 171 Minn. 289, 214 N.W. 27 (1927).

57. *Id.* at 28.

58. *Compare* White v. Miller, 71 N.Y. 118, 27 Am. Rep. 13 (1877), *with* Hoover v. Utah Nursery Co., 79 Utah 12, 7 P.2d 270 (1932).

any general warranty of good results.[59] Similar questions of fact arise in advertisements of sales of animals. Here, however, buyers and sellers are more often on an equal footing, and sales are frequently made by auction. Representations of presently existing facts, such as soundness and pregnancy,[60] are more often held to be intended by the parties as warranties than representations of less determinable facts, such as breeding capacity.[61] In *Kuhn v. Campbell*,[62] a representation in the advertisement that a horse could "trot a 2:15 gait and do it right" was held by the Supreme Court of Ohio to be a warranty which was breached when the animal's best time was 2:24, notwithstanding the fact that the test was run on an eighth of a mile stretch and the difference in times was thus only slightly over a second. This result seems extremely favorable to the buyer.

In sales of machinery and allied goods, representations in advertising are held with greater frequency to be express warranties, since performance is more capable of scientific measurement.[63] Along this same line a declaration of chemical constituents, tensile strength, and so forth, is usually held to be an express warranty.[64]

In the sale of canned foods, dairy and bakery products, such words as "wholesome," "pure" and "healthful" in the advertising are not generally held to be express warranties,[65] but buyers might successfully rely on the remedies for implied warranties of merchantability and fitness.[66]

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59. Charles Lomori & Son v. Globe Laboratories, 35 Cal. App.2d 248, 95 P.2d 173 (1939); Ralston Purina Co. v. Cox, 141 Neb. 432, 3 N.W.2d 748 (1942); Ralston Purina Co. v. Iiams, 143 Neb. 588, 10 N.W.2d 452 (1943).

60. Ryan v. Brown, 206 Ill. App. 534 (1917) (horse is sound); Wallace v. Shoemaker, 194 Ind. 419, 143 N.E. 285 (1924) (sow is with litter); Hadley v. The Clinton County Importing Co., 13 Ohio St. 502, 82 Am. Dec. 454 (1862) (cow is sound); Kuhn v. Campbell, 118 Ohio St. 392, 161 N.E. 25 (1928) (horse's ability to trot a 2:15 gait).

61. Roberts v. Applegate, 153 Ill. 210, 38 N.E. 676 (1894) (horse would "make his mark as a foal getter"). *But cf.* Blair v. Hall, 201 S.W. 945 (Mo. App. 1918) (cow was regular breeder).

62. 118 Ohio St. 392, 161 N.E. 25 (1928).

63. Sharples Separator Co. v. Skinner, 251 Fed. 25 (9th Cir. 1918); Lathom v. Shipley, 86 Iowa 543, 53 N.W. 342 (1892); Turner v. Central Hardware Co., 353 Mo. 1182, 186 S.W.2d 603, 158 A.L.R. 1402 (1945); Charter Gas-Engine Co. v. Kellom, 79 App. Div. 231, 79 N.Y. Supp. 1019 (1st Dep't 1903); Buchanan v. Laber, 39 Wash. 410, 81 Pac. 911 (1905).

64. Mannsz v. Macwhyte Co., 155 F.2d 445 (3d Cir. 1946) (wire rope); Monumental Bronze Co. v. Doty, 92 Mo. App. 5 (1902) (whitebronze monument); A. Leschen & Sons Rope Co. v. Case Shingle & Lumber Co., 152 Wash. 37, 276 Pac. 892 (1929) (wire rope).

65. Newhall v. Ward Baking Co., 240 Mass. 434, 134 N. E. 625 (1922); Lewitus v. Brown & Secomb, 228 App. Div. 146, 239 N.Y. Supp. 261 (1st Dep't 1930); *accord*, Davis v. Van Camp Packing Co., 189 Iowa 775, 176 N.W. 382, 17 A.L.R. 649 (1920); Pelletier v. Dupont, 124 Me. 269, 128 Atl. 186 (1925). VOLD, SALES 447 (1931). *But cf.* Roberts v. Anheuser-Busch Brewing Ass'n, 211 Mass. 449, 98 N.E. 95 (1912).

66. See, *e.g.*, Davis v. Van Camp Packing Co., 189 Iowa 775, 176 N.W. 382, 17 A.L.R. 649 (1920). Implied warranty provisions of the Uniform Sales Act are in §§ 14-16.

3. *Testimonials*

One form of advertising in general use is that which utilizes the testimonials of satisfied users, actual or fictitious. Two older cases have indicated that expressions in testimonials are not the warranties of the advertiser unless he expressly adopts them.[67] No recent cases have passed on this question, but it seems likely that the advertiser could be held on an express warranty, whether or not he expressly affirms the statement of the indorser. One recent writer has even argued that the indorser himself should be liable.[68] Such a doctrine would open wide the field of buyers' remedies since modern day indorsers are usually noted for their prominence and solvency.

4. *Dealer's Talk*

One of the greatest obstacles to a buyer's recovery is the doctrine that only positive representations of fact are express warranties, and that statements on the seller's opinion, "dealer's talk," or "puffing," do not fall within this category.[69]

Economists usually distinguish between informative and persuasive advertising.[70] Informative advertising is of considerable economic importance. In fact, it has been asserted that mass production and mass marketing are completely dependent upon informative advertising.[71] Persuasive advertising, on the other hand, is not so defensible from the economist's viewpoint.[72] The argument that persuasive advertising

67. Richey v. Daemicke, 86 Mich. 647, 49 N.W. 516 (1891); Mason v. Chappell, 15 Gratt. 572 (Va. 1860).

68. Note, *Liability of Advertising Endorsers*, 2 STAN. L. REV. 496 (1950).

69. Refining Equipment, Inc. v. Wickett Refining Co., 158 F.2d 710 (5th Cir. 1947); James Spear Stove & Heating Co. v. General Electric Co., 12 F. Supp. 977 (E.D. Pa. 1934), *aff'd mem.*, 80 F.2d 1012 (3rd Cir. 1935); Berman v. Woods, 38 Ark. 351 (1881); Roberts v. Applegate, 153 Ill. 210, 38 N.E. 676 (1894); Ralston Purina Co. v. Iiams, 143 Neb. 588, 10 N.W.2d 452 (1943); Ralston Purina Co. v. Cox, 141 Neb. 432, 3 N.W.2d 748 (1942); Madison-Kipp Corp. v. Price Battery Corp., 311 Pa. 22, 166 Atl. 377 (1933); Gray v. Burney Seed & Nursery Co., 57 S.D. 280, 231 N.W. 940 (1930); Mason v. Chappell, 15 Gratt. 572 (Va. 1860); Jendwine v. Slade, 2 Esp. 572, 170 Eng. Rep. 459 (K.B. 1797); Wilson v. Shaver, 27 Ont. L.R. 218, 8 D.L.R. 627 (1912); *see* Calhoun v. Vechio, 4 Fed. Cas. No. 2310 at 1049, 1050 (C.C.D. Pa. 1812). *But cf.* Luitweiler Pumping Engine Co. v. Ukiah Water & Improvement Co., 16 Cal. App. 198, 116 Pac. 707 (1911); Ryan v. Brown, 206 Ill. App. 534 (1917); Hicks v. Stevens, 121 Ill. 186, 11 N.E. 241 (1887); Economy Hog & Cattle Powder Co. v. Compton, 132 N.E. 642 (Ind. App. 1921), *rev'd on other grounds*, 192 Ind. 222, 135 N.E. 1 (1922); Keystone Mausoleum Co. v. Salzman, 72 Pa. Super. 437 (1919); Missouri Drug Co. v. Wyman, 129 Fed. 623 (C.C.E.D.Mo. 1904). See also 1 WILLISTON, SALES § 202 (Rev. ed. 1948).

70. TAYLOR, THE ECONOMICS OF ADVERTISING 26-32 (1934). LEVER, ADVERTISING AND ECONOMIC THEORY 47 *et seq.* (1947), indicates that nearly every advertisement is composed of both persuasive and informative features. But even insofar as the distinction is a matter of degree the following discussion is pertinent.

71. Lyon, *Advertising*, 1 ENCYC. SOC. SCI. 469, 470 (1930).

72. See, BORDEN, THE ECONOMIC EFFECTS OF ADVERTISING 150-89, 489-524 (1942); LEVER, *op. cit. supra* note 70, at 57-95, 122; TAYLOR, *op. cit. supra* note 70 at 69-88.

creates demand, which increases production, which, in turn lowers costs, is said to be incapable of statistical proof.[73] Furthermore, even assuming that such a result were theoretically possible,[74] it would be probable only under a system of imperfect competition where the monopolistic producer was able to manipulate supply and demand to achieve his most profitable level of production.[75] It should be noted that our national public policy has been dedicated to increasing competition since the passage of the Sherman Act in 1890.[76]

Thus there seems to be a conflict between economic and legal theory, since it is the advertising least desirable from the economist's viewpoint that is most protected by the law. This is not to say that purely informative advertising, *i.e.*, positive affirmations of fact, should be any less binding upon the advertiser. But the apparent conflict in theory does indicate that the "puffing" loophole should be carefully guarded lest irresponsible advertisers misuse it.

There is no doubt but that the copywriter's problem is a more difficult one than that which confronts the individual salesman.[77] Yet, the only restraint upon the advertiser is the documentary evidence which he prepares against himself when he publishes an advertisement. Public policy would be well served by preventing this one restraint[78] from being vitiated by a too lenient attitude of the courts in calling representations "dealer's talk."

Two of the most extreme decisions allowing the seller to escape liability for his "dealer's talk" were decided by the Supreme Court of Nebraska, both in favor of the same company.[79] The seller had stated on the radio and in newspapers that 300 lbs. of its feed would produce 100 lbs. of pork. Through a security device in favor of the seller, the

73. Taylor, *op. cit. supra* note 70, at 72-74, 89.

74. In an equilibrium economy, every producer would be producing at his most profitable level. Thus advertising which induced greater demand for the product would merely attract new producers. Taylor, *op. cit. supra* note 70, at 70.

75. "[T]his will happen if the advertising increases the demand proportionately by an amount which is greater than the proportionate increase in overhead costs resulting from the advertising." Lever, *op. cit. supra* note 70, at 94. This hypothesis also assumes that the elasticity of demand for the product is constant, that marginal costs are constant, that the product is manufactured under conditions of increasing returns and that the monopolistic producer has a complete knowledge of his cost conditions. It is doubtful whether these assumptions are all true in every case, particularly the last assumption. *Id.* at 82-95. See also Taylor, *op. cit. supra* note 70, at 74-76. It must be granted that a new producer or a producer making a new product would find advertising essential to reaching optimum production and that advertising, in such a case would result in lower costs. Taylor, *op. cit. supra* note 70, at 71. And note, in this connection, the phenomenon of nonadvertising producers obtaining benefits of demand for new products stimulated by the advertising, such as the various imitators of Coca-Cola. Borden, *op. cit. supra* note 72, at 502.

76. 26 STAT. 209 (1890).

77. Taylor, *op. cit. supra* note 70, at 123-4.

78. *See* Hicks v. Stevens, 121 Ill. 186, 11 N.E. 241, 245 (1887).

79. Ralston Purina Co. v. Iiams, 143 Neb. 588, 10 N.W.2d 452 (1943); Ralston Purina Co. v. Cox, 141 Neb. 432, 3 N.W.2d 748 (1942).

buyers were further lulled into the belief that the amount of feed bargained for would be sufficient for the winter. The feed sold ran out and the seller foreclosed on his security. The seller was allowed to recover a deficiency judgment against the purchasers of the feed, the court holding that the advertising campaign was "dealer's talk."[80] These two cases seem clearly wrong and against the weight of authority.[81]

5. *Privity of Contract*

The requirement that the plaintiff and defendant be in a relation of privity of contract[82] has received more attention from the courts than any other element of the buyer's cause of action for misrepresentation or breach of warranty. As a consequence, considerable liberalization of the privity requirement has been achieved.[83]

One reason for the abolition of the privity requirement is that it has become extremely unworkable and unjust in the context of modern business. Today several intermediate persons may stand between the manufacturer and the ultimate consumer, any one of which may have agents, and any of which may be wholly or partially responsible for representations in advertising.

The most significant feature of modern merchandising practice is the control over distribution that the manufacturer retains although he has made an outright sale of the product to a middleman.[84] It is common knowledge that dealerships in automotive and related machinery fields are closely supervised, and that beverage bottling franchises and territorially exclusive contracts for the handling of high quality and style merchandise are arranged by manufacturers who then advertise on a national scale, often listing the establishments where their products can be purchased.

In the old domestic economy, goods were sold directly to the consumer by the maker; thus every sale involved privity of contract with the producer. In the early stages of the Industrial Revolution, the manufacturer sold goods outright to local retailers who then carried out all merchandising functions including advertising. In both stages

80. 143 Neb. 588, 10 N.W.2d at 455; 141 Neb. 432, 3 N.W.2d at 749.

81. See cases cited note 68 *supra.*

82. See, *e.g.*, Chanin v. Chevrolet Motor Co., 89 F.2d 889, 111 A.L.R. 1235 (7th Cir. 1937); Pelletier v. Dupont, 124 Me. 269, 128 Atl. 186 (1925); DeGouveia v. H. D. Lee Mercantile Co., 231 Mo. App. 447, 100 S.W.2d 336 (1936); Jordon v. Brouwer, 86 Ohio App. 505, 93 N.E.2d 49 (1949)

83. See, *e.g.*, Mannsz v. Macwhyte Co., 155 F.2d 445 (3d Cir. 1946); Laclede Steel Co. v. Silas Mason Co., 67 F. Supp. 751 (W.D. La. 1946); Davis v. Van Camp Packing Co., 189 Iowa 775, 176 N.W. 382, 17 A.L.R. 649 (1920); Simpson v. American Oil Co., 217 N.C. 542, 8 S.E.2d 813 (1940); Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409, 88 A.L.R. 521, *aff'd mem. on rehearing*, 15 P.2d 1118 (1932); *see* Madouros v. Kansas City Coca-Cola Bottling Co., 230 Mo. App. 275, 90 S.W.2d 445, 450 (1936).

84. Taylor, *op. cit. supra* note 70, c. 1. For further evidence of this practice, see Robinson-Patman Act, 49 STAT. 1526 (1936), 15 U.S.C.A. § 13 (1951).

any representations sued on by a dissatisfied buyer had been made by a party with whom that buyer was in privity of contract. In our present economy, however, the seller often makes few advertising representations, and the manufacturer who does make them[85] is not in a contractual relationship with the buyer.

The essential injustice of this is apparent, especially in view of the fact that the manufacturer is highly benefited by the advertising which stimulates demand and induces future sales,[86] even though he has sold the goods to the intermediate vendor before he wages his advertising campaign.

Some courts still consider actions for breach of warranty as being contractual in nature and distinguish therefrom actions sounding in tort for deceit or negligence. Thus, these courts require privity in the first instance and not in the second.[87] It is to be noted, however, that a just and well-reasoned opinion in a "tort-sounding" action for misrepresentation will frequently motivate other courts to follow it and dispense with the privity requirement in *ex contractu*-type actions for breach of warranty.[88] This seems to support the contention of modern authorities[89] that the action for breach of warranty is not necessarily either purely contractual nor delictial.

Two theories have been advanced to overcome the absence of privity in the traditional sense. The first is that warranties made by manufacturers run with the chattel to the ultimate consumer.[90] It can be argued that this theory embodies a realistic approach, since there is some evidence that both manufacturers and consumers so regard the manufacturer's obligation.[91] However, it should not be necessary to take the real property doctrine of covenants running with the land out of the context that gave rise to it merely to achieve a just result. The

85. Taylor, *op. cit. supra* note 70, c. 1.

86. "Here we have written assurances that were obviously intended by the manufacturer and distributor . . . for the ultimate consumer. . . . The assurances [were] an attractive inducement to the purchaser for consumption, and such purchase in large quantities was advantageous to the manufacturer." Simpson v. American Oil Co., 217 N.C. 542, 8 S.E.2d 813, 815 (1940).

87. See, *e.g.*, Chanin v. Chervolet Motor Co., 89 F.2d 889, 111 A.L.R. 1235 (7th Cir. 1937); Carter v. Yardley & Co., 319 Mass. 92, 64 N.E.2d 693, 164 A.L.R. 559 (1946); Newhall v. Ward Baking Co., 240 Mass. 434, 134 N.E. 625 (1922).

88. In the leading case of Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409, 88 A.L.R. 521, *aff'd mem. on rehearing*, 15 P.2d 1118 (1932), the court held that no privity of contract was required in a tort-sounding action for misrepresentation. The next following decisions citing this case in the Supreme Court of Washington all dealt with contract-sounding actions for breach of warranty, but the court did not attempt to draw any distinctions therefrom: Reusch v. Ford Motor Co., 196 Wash. 213, 82 P.2d 556, 559 (1938); Murphy v. Plymouth Motor Corp., 3 Wash.2d 180, 100 P.2d. 30, 31 (1940); Bock v. Truck & Tractor, Inc., 18 Wash.2d 458, 139 P.2d 706, 709 (1943).

89. VOLD, SALES § 140 (1931); 1 WILLISTON, SALES § 194 (Rev. ed. 1948).

90. Roberts v. Anheuser-Busch Brewing Ass'n, 211 Mass. 449, 98 N.E. 95 (1912); Simpson v. American Oil Co., 217 N.C. 542, 8 S.E.2d 813 (1940).

91. VOLD, SALES 444 (1931); Bogert and Fink, *Business Practice Regarding Warranties in the Sale of Goods*, 25 ILL. L. REV. 400 (1930).

second theory is that in view of the circumstances of modern business practice and the control over distribution retained by the producer, an actual relationship of privity of contract does exist between the manufacturer and the consumer.[92] This theory was effectively expressed in *Madouros v. Kansas City Coca-Cola Bottling Co.*[93]: "[T]he representations . . . constitute an implied contract, or implied warranty, to the unknown and helpless consumer. . . . If privity of contract is required, then, under the situation and circumstances of modern merchandising in such matters, privity of contract exists in the consciousness and understanding of all right-thinking persons."

6. *Adoption of Manufacturer's Warranties*

Where the buyer, fearing to sue the manufacturer because of lack of privity with him, chooses to sue the retailer, he may be confronted with the reverse side of the privity problem, since the representations he sues on may have been made by the manufacturer.[94] Recognizing the buyer's dilemma, the courts have reacted as they did in the face of the privity requirement, and have held that, in the interests of justice, the dealer has adopted the representations of the manufacturer.[95] Whether the local dealer will be held to have so adopted the manufacturer's representations depends upon the facts of the particular case. Proffer of a manufacturer's pamphlet by a salesman of the dealer indicates adoption.[96] Likewise, the advertising has been held to furnish evidence of a salesman's authority to make a similar warranty on behalf of his employer.[97] Where the relationship of a

92. Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409, 88 A.L.R. 521, *aff'd mem. on rehearing*, 15 P.2d 1118 (1932), 18 CORNELL L.Q. 445 (1933), 46 HARV. L. REV. 161, (1932) 7 WASH. L. REV. 351 (1932); *see* Madouros v. Kansas City Coca-Cola Bottling Co., 230 Mo. App. 275, 90 S.W.2d 445, 450 (1936); Chanin v. Chevrolet Motor Co., 89 F.2d 889, 891, 111 A.L.R. 1235 (7th Cir. 1937) (buyer-plaintiff argued that "the manufacturer is heavily interested in the distribution of its product by the retail dealer and, having carried on extensive advertising . . . for the promotion of sales of its product by its dealers, and . . . has brought about a relationship between himself and the consuming public out of which grows a direct contractual liability. . . ." But the same was not pleaded, so not considered on appeal.); UNIFORM COMMERCIAL CODE, § 2-318 (Official Draft 1952).

93. 230 Mo. App. 275, 90 S.W.2d at 450.

94. See note 83, *supra*.

95. Ventura Mfg. & Implement Co. v. Warfield, 37 Cal. App. 147, 174 Pac. 382 (1918); Silverstein v. R. H. Macy & Co., 266 App. Div. 5, 40 N.Y.S.2d 916 (1st Dep't 1943), *aff'd mem.*, 269 App. Div. 651, 53 N.Y.S.2d 311 (1st Dep't (1945); Sicard v. Kremer, 133 Ohio St. 291, 13 N.E.2d 250 (1938) *semble; cf.* Jones v. Hackensack Auto Wreckers, Inc., 124 N.J.L. 289, 11 A.2d 595 (Sup. Ct. 1940); *see* Cool v. Fighter, 239 Mich. 42, 214 N.W. 162, 163 (1927). *Contra:* Pemberton v. Dean, 88 Minn. 60, 92 N.W. 478 (1902); Cochran v. McDonald, 23 Wash.2d 348, 161 P.2d 305 (1945). See generally, Waite, *Retail Responsibility and Judicial Law Making*, 34 MICH. L. REV. 494 (1936).

96. Silverstein v. R.H. Macy & Co., 266 App. Div. 5, 40 N.Y.S.2d 916 (1st Dep't 1943), *aff'd mem.*, 269 App. Div. 651, 53 N.Y.S.2d 311 (1st Dep't 1945).

97. Levis v. Pope Motor Car Co., 202 N.Y. 402, 95 N.E. 815 (1911); Keystone Mausoleum Co. v. Salzman, 72 Pa. Super. 437 (1919); *cf.* Herring, Farrell & Sherman v. Skaggs, 62 Ala. 180, 34 Am. Rep. 4 (1878); McGaughey v. Richard-

manufacturer and dealer resembles that of principal and agent — as where goods are consigned — there is an indication of adoption by the dealer. Furthermore, advertising arrangements are frequently made whereby the dealer and manufacturer share responsibility for advertising. For example, some manufacturers give their dealers "advertising credits" based on the latter's prior sales records, which are used as a basis for sharing expenses of advertising done under the direction of the local dealer. This joint venture should indicate joint liability to a buyer who has been thereby induced to purchase. The enumeration of fact patterns herein does not purport to exhaust the plaintiff's possibilities. Any determination of adoption of a manufacturer's warranties by a dealer must depend upon close analysis and persuasive presentation of the facts.

B. *Implied Warranties*

Superficially, it would seem that the seller's advertising is intrinsically inapplicable to actions for the breach of an implied warranty. Section 15(1) of the *Uniform Sales Act*[98] provides:

> "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be a grower, or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose."

A number of cases have held that when it is suggested in advertising that a product is fit for a particular purpose, there is an implied warranty of fitness for that purpose, regardless of whether or not the representation constituted an express warranty.[99] Thus in *Moeckel v. Diesenroth*,[100] it was held that an advertisement regarding a particular group of cows for sale, "All giving milk or heavy springers," was not an express warranty, but that the grouping together in the advertisement of these cows, apart from the rest of the herd being sold, caused the buyer of cows from this group to buy for a particular purpose, and gave rise to an implied warranty of fitness for that purpose.

Section 15(4) of the Act provides that where the goods are sold under a patented or trade name there shall be no implied warranty of fitness for a particular purpose. This provision can be a serious ob-

son, 148 Mass. 608, 20 N.E. 202 (1889); Boothby v. Scales, 27 Wis. 626 (1871). See also, Ferson, *Agency to Make Warranties*, 5 VAND. L. REV. 1 (1951).

98. UNIFORM COMMERCIAL CODE § 2-315 (Official Draft 1952), provides similarly.

99. Raymond v. J. R. Watkins Co., 88 F. Supp. 932 (D. Minn. 1950); Laclede Steel Co. v. Silas Mason Co., 67 F. Supp. 751 (W.D. La. 1946): Huscher v. Pfost, 122 Colo. 301, 221 P.2d 931 (1950); Moeckel v. Diesenroth, 253 Mich. 284, 235 N.W. 157, 74 A.L.R. 116 (1931); Pietrus v. Watkins Co., 229 Minn. 179, 38 N.W.2d 799 (1949).

100. 253 Mich. 284, 235 N.W. 157, 74 A.L.R. 116 (1931).

stacle to a plaintiff's recovery. Indeed, an advertiser can accomplish a two-fold objective by urging that his unseen audience request his product by its brand name, *e.g.*, "Don't say corn flakes, say Crunchies." First, demand for the product is stimulated; second, the seller is insured against liability on an implied warranty of fitness. This provision of the *Sales Act* has been criticized[101] and has been omitted from the new *Uniform Commercial Code*. Certainly it is inappropriate in today's world of national advertising and supermarkets.

C. *Negligence*

As indicated above,[102] the element of negligence may be involved in action for deceit or breach of warranty. A number of cases have held that a representation in advertising may give rise to an action sounding in negligence alone. Thus where an advertising pamphlet negligently describes the manner in which a potentially dangerous product is to be used and where a buyer is injured after following those directions, he has a cause of action for negligence.[103] Furthermore, the advertiser may be liable for negligently recommending a particular use for a product.[104] The case of *Ahrens v. Moore*[105] stated three elements for this cause of action: (1) that the product sold is not presently in general use; (2) that the seller had notice of its dangerous qualities; and (3) that he made positive representations that it was fit for a particular use which cause plaintiff's injury. The defense of contributory negligence might successfully be asserted in an action for negligent advertising, as, for example, where the buyer fails to follow directions given by the seller or otherwise known to the buyer.[106]

III. Conclusions

The law prescribing a buyer's remedies against a seller who has induced a sale by misleading advertising has not kept pace with the institutional development of advertising. Insofar as it has taken any

101. Isaacs, *The Consumer at Law*, 173 Annals 177 (1934). Hobart Mfg. Co. v. Rodziewicz, 125 Pa. 240, 189 Atl. 580 (1937), held that where the buyer relied on representations in advertisements and the sale of the article by its trade name was at the inducement of the seller's agent, then the implied warranty of fitness was not lost.

102. *Supra* p. .....

103. Marsh v. Usk Hardware Co., 73 Wash. 543, 132 Pac. 241 (1913) (strict liability); *see* E. I. Dupont de Nemours & Co. v. Baridon, 73 F.2d 26, 30 (8th Cir. 1934).

104. Hruska v. Parke, Davis & Co., 6 F.2d 536 (8th Cir. 1925); Ahrens v. Moore, 206 Ark. 1035, 178 S.W.2d 256 (1944); Anderson v. Tyler, 223 Iowa 1033, 274 N.W. 48 (1937) *semble;* Nelson v. Healey, 151 Kan. 512, 99 P.2d 795 (1940); Sicard v. Kremer, 133 Ohio St. 291, 13 N.E.2d 250 (1938) *semble.*

105. 206 Ark. 1035, 178 S.W.2d 256 (1944).

106. E. I. Dupont de Nemours & Co. v. Baridon, 73 F.2d 26 (8th Cir. 1934); McGee v. Bennett, 72 Ga. App. 271, 33 S.E.2d 577 (1945); *see* Bahlman v. Hudson Motor Car Co., 290 Mich. 683, 288 N.W. 309, 314-15 (1939) (Dissenting Opinion). Collection of cases in Note, 55 A.L.R. 1047 (1928).

notice of the widespread use and misuse of advertising in inducing sales, the law has chosen to prescribe criminal penalties rather than restitution of damages to the injured buyer. The law has been so unrealistic that businessmen themselves have accepted a duty toward those with whom they deal, beyond that which the law imposes[107]—in the same manner as the early English merchants who developed the law merchant to remedy the shortcomings of the common law in commercial matters. Evidence of this today is found in "store slogans," "manufactures' policies" and commercial codes of ethics, all based on the sound doctrine that a satisfied customer is a returning customer and the world's best advertisement.[108]

A number of fact patterns emerge from the cases, however, where buyers have been given relief in the courts for breach of warranties and misrepresentations contained in advertising. Thus, if a plaintiff's case fits one of these patterns and if he is able to prove that the representation upon which he based his suit was integrated in his contract of sale, that it did not constitute dealer's talk, and that he was in privity of contract with the defendant, he has a considerable chance of recovery. It is even possible that a plaintiff may plead and prove an implied warranty or negligence on the part of the seller, based on the seller's advertising. The numerous cases where a buyer has been denied well-merited relief indicate, however, that a revision of the law of sales is in order, to take into account one of the most important institutions in the merchandising field.

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107. VOLD, SALES 444 (1931); Bogert and Fink, *Business Practice Regarding Warranties in the Sale of Goods*, 25 ILL. L. REV. 400, 416 (1930).
108. VOLD, SALES 444 (1931).