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Carry-Over Effect of Express Warranties on Subsequent Sales

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Obviously the Roman law did not cover all the ramifications which a modern conservation program might entail. However, it did try to apply to the erosion problem, as then known, the basic legal principles governing the every-day conduct of its citizens. In this respect, we might well learn from it. The "damage to an adjoining farm from uncontrolled gullies" described as such a problem in the above-quoted report[25] of the Chief of the Soil Conservation Service is exactly the case covered by the *actio aquae pluviae arcendae*. Similarly, the *interdictum quod vi aut clam* offers a private approach to a conservation problem for which the United States Forest Service proposes as the only solution public regulation.

Is it not justified to ask why we should be stumped by situations for which effective remedies were developed nineteen hundred years ago and that from a law that was virtually like ours on the subject of negligence, trespass and nuisances. In fact, the principles used by the Romans have governed the law of adjoining land owners since the dawn of history. Already the *Codex Hammurabi* (2000 B. C.) provided that a farmer who failed to use proper care in building his dykes or letting in irrigation water was liable to surrounding property owners for any damage by flooding.[26]

The defense against soil erosion, not only in a situation like gullying but in most other instances of man-made erosion like the plowing of dust bowls and the destruction of watershed protection could be materially aided by a simple assertion of the same principles as embodied in the common law and used in cases like *Rylands v. Fletcher*,[27] *Miles v. A. Arena & Co.*[28] and *Miller v. Letzerich*.[29] Such assertion in a civil action would hold the despoilers of our soil resources accountable as common tortfeasors for damage done to their neighbor's property. In addition, it would by-pass the controversy about government regulation and thereby deprive the offenders of the opportunity of publicly masquerading as the champions of free enterprise.

CARRY-OVER EFFECT OF EXPRESS WARRANTIES ON SUBSEQUENT SALES

Commercial transactions over the past half century have undergone a profound transition. In an era marked by the unparalleled growth of industry and urban development, it was inevitable that the laws governing man's dealing with new-born industry and his fellow man must bend under increasing pressures. Previously the seller and buyer of goods stood in the same position; each was felt to have equal knowledge of the goods as to quality and identity.

25. See note 1 *supra*.
26. HAMMURABI, XV, 7-45 (Harper's transl. 1904).
27. L. R. 3 H.L. 330 (1868) (only partially adopted in this country).
28. 23 Cal. App. 2d 680, 73 P. 2d 1260 (1937).
29. 121 Tex. 248, 49 S. W. 2d 404 (1932).

The seller consequently owed the buyer no duty other than to deal in good faith and not knowingly misrepresent the quality of the goods.[1] With the advent of modern means of transportation, communication and credit and security transactions, the buyer, whether wholesaler or retailer, more frequently than not entered into contracts of sale without seeing the goods. Greater reliance on the seller's good faith and integrity was a necessary consequence of the above-mentioned transition. To keep abreast of the times the courts shifted the burden from the buyer to the seller; *caveat vendor* became the rule of law.[2] The Uniform Sales Act was the outcome of this change in the law when it established the warranties, both express and implied,[3] which are incident to a sale of goods.

Much has been written on the law of express warranties and its concomitant circumstances.[4] However, there seems to have been little consideration of how far these express warranties carry beyond the original transaction. The material forming the substance of this paper addresses itself to the question—does an express warranty given on a sale of goods carry over to subsequent sales of identical goods between the same parties? As is the case in a great portion of the law of sales, the *intention* of the parties as gleaned from their dealings is of considerable moment. Factual as this question may ultimately be, certain patterns have been followed by the courts in determining intention. Three situations will be discussed in this connection—1) trial orders and tests by the buyer; 2) reference in subsequent orders to previous orders to which express warranties attached; 3) an anticipated future course of dealings between the parties.

I. Trial Orders and Tests by Buyer

An express warranty has been defined as "any affirmation of fact or any promise by the seller relating to the goods . . . if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon."[5] Reliance on the seller's affirmations of fact or promises has been considered an essential element of

1. Otis & Co. v. Grimes, 97 Colo. 219, 48 P. 2d 788 (1935); Davis v. Central Land Co., 162 Iowa 269, 143 N. W. 1073 (1913); Hadcock v. Osmer, 153 N. Y. 604, 47 N. E. 923 (1897). See Bohlen, *Misrepresentation as Deceit, Negligence or Warranty*, 42 Harv. L. Rev. 733 (1929).

2. Uniform Sales Act § 12. Landman v. Bloomer, 117 Ala. 312, 23 So. 75 (1898); Hacket v. Lewis, 36 Cal. App. 687, 173 Pac. 111 (1918); Dietrich v. Badders, 90 Atl. 47 (Del. Super. Ct. 1913). See also Vold, Sales § 142 (1931).

3. Uniform Sales Act §§ 12-16 (N. Y. Pers. Prop. Law §§ 93-97).

4. See Williston, *What Constitutes an Express Warranty in the Law of Sales*, 21 Harv. L. Rev. 555 (1908); Bogert, *Express Warranties in Sales of Goods*, 33 Yale L. J. 14 (1923); Sholley, *Manufacturer's Advertisement as Express Warranty to Consumer*, 7 Wash. L. Rev. 351 (1932).

5. Uniform Sales Act § 12 (N. Y. Pers. Prop. Law § 93).

any express warranty.[6] And this reliance by the buyer must be reasonable and justifiable under all the circumstances.[7]

When the buyer purchases a small quantity of a seller's product and makes it known that the purchase is merely a trial order to test the product, the normal inference to be drawn from such a purchase is that the buyer will only make subsequent purchases if the goods conform to his needs.[8] Reliance is not placed on the seller's warranties other than for the original purchase.[9] In effect, the buyer is saying—"On the basis of your express warranties, Mr. Seller, I will make a single purchase of your product. I will then test your product. If, after testing, I am satisfied that the product will serve my needs, I shall continue to use it. But the *tests* will be the determining factor—not the *warranties*." Where no other sufficient evidence is produced to override the inference of non-reliance by virtue of the trial order,[10] the courts have little difficulty in concluding that the express warranty was intended only to apply to the first sale. The original sale was a single completed transaction and once consummated, what was said and done then is ended with that transaction.[11]

In *Sure Seal Co. v. Loeber*[12] the plaintiff's salesman sold air-tight caps to the defendant to protect his bottled preserves. Seller gave warranties; but the purchase was on trial only. Subsequently the defendant ordered 300,000 more caps which were defective and caused the defendant's preserves to spoil. The buyer's counterclaim founded on breach of express warranty was denied, the court declaring:

"It is quite clear that this construction is unsupported by the evidence. . . . [because] defendant Charles C. Loeber repeatedly and explicitly testifies that the order, given in February was a trial order, and that he would rather be shown the excellence of the caps than take the salesman's word for it. . . . Defendants,

6. Dunbar Bros. Co. v. Consolidated Iron & Steel Mfg. Co., 23 F. 2d 416, 419 (2d Cir. 1928); Foote v. Wilson, 104 Kan. 191, 178 Pac. 430 (1919); Redfield v. Engel, 171 Mich. 207, 137 N. W. 60 (1912); Ellen v. Heacock, 247 App. Div. 476, 286 N. Y. Supp. 740 (4th Dep't 1936); Smith v. Alphin, 150 N. C. 425, 64 S. E. 210 (1909).

7. Bogert, *Express Warranties in Sales of Goods*, 33 YALE L. J. 14, 27 (1923).

8. In such cases there would not be even an implied warranty of fitness since the seller does not contract to furnish goods for a specified object or purpose. Linen Thread Co. v. Shaw, 9 F. 2d 17 (1st Cir. 1925); Robinson v. Barteldes Seed Co., 139 Md. 486, 115 Atl. 757 (1921); Turl's Sons, Inc. v. Williams, 136 App. Div. 710, 121 N. Y. Supp. 478 (2d Dep't 1910).

9. Nicholson v. Am. Hide & Leather Co., 307 Mass. 456, 30 N. E. 2d 376 (1940); Sure Seal Co. v. Loeber, 171 App. Div. 225, 227, 157 N. Y. Supp. 327, 328 (1st Dep't 1916); Crocker-Wheeler Electric Co. v. Johns-Pratt Co., 29 App. Div. 300, 301, 51 N. Y. Supp. 793 (1st Dep't 1898), *aff'd without opinion*, 164 N. Y. 593, 58 N. E. 1086 (1900); Wait v. Borne, 123 N. Y. 592, 25 N. E. 1053 (1890); *see* Childs *et al.* v. O'Donnell, 84 Mich. 533, 535, 47 N. W. 1108, 1109 (1891).

10. Moore v. King, 57 Hun 224, 10 N. Y. Supp. 651 (4th Dep't 1890).

11. Wait v. Borne, 123 N. Y. 592, 602, 25 N. E. 1053, 1054 (1890).

12. 171 App. Div. 225, 157 N. Y. Supp. 327 (1st Dep't 1916).

therefore, signally failed in the attempt to show that they were induced to buy the 300,000 caps by actual misrepresentation or express warranty."[13]

These purchases on a trial basis must be distinguished from analogous situations wherein the transaction has all the earmarks of a completed sale on a trial basis but in reality there was only a sale on condition subsequent or no sale at all. Thus, where the buyer is given a thirty day trial period in which to test a machine before purchasing it[14] or some other form of option to return the product if it doesn't perform as guaranteed,[15] there is no express warranty. The trial periods, options or guarantees are not warranties "but special and additional contracts made at the same time as the sales contract. They do not relate to the character, quality or title of the goods, but to some act which the seller agrees to perform in respect to the goods."[16] Consequently any subsequent dealings between the parties in this type of transaction could not result in the establishment of an express warranty in reliance on previous conversations.

II. Subsequent Orders Made With Reference to Previous Orders on Which Warranties Were Given

Another situation frequently occurs where the issue is raised as to the carry-over effect of express warranties. In this type of case the buyer makes an original purchase relying on the express warranties of the seller. Subsequently more orders are placed with the seller for the same product and in each order specific reference is made to the original purchase to which the express warranties had attached. To illustrate the problem in its simplest form the buyer's order might read: "100 barrels of glu-bond of the same kind and quality as you furnished on 10/10/49."

The courts have held that such reference to the previous sale disclosed an intention to have the same warranties attach in the subsequent transactions as existed on the initial purchase.[17] Thus in *Zabriskie v. Central Valley R.R.*[18] the plaintiff agreed to furnish coal of the same quality and kind as furnished

13. *Id.* at 227, 157 N. Y. Supp. at 328.

14. Birch v. Kavanaugh Knitting Co., 34 App. Div. 614, 54 N. Y. Supp. 449 (3d Dep't 1898), *aff'd*, 165 N. Y. 617, 59 N. E. 1119 (1900); Hurley-Mason Co. v. Stebbins, 79 Wash. 366, 140 Pac. 381 (1914).

15. Warren v. Rinault Freres Selling Branch, 195 Ill. App. 117 (1915); Childs *et al.* v. O'Donnell, 84 Mich. 533, 47 N. W. 1108 (1891); Elliot Supply Co. v. Hanson, 39 S. D. 570, 165 N. W. 991 (1917).

16. Bogert, *Express Warranties in Sales of Goods*, 33 Yale L. J. 14, 24 (1923).

17. Dewitt v. Berry, 134 U. S. 306 (1890); Zabriskie v. Central Valley R. R., 131 N. Y. 72, 29 N. E. 1006 (1892); Moore v. King, 57 Hun 224, 10 N. Y. Supp. 651 (4th Dep't 1890), *aff'd*, 134 N. Y. 596, 31 N. E. 624 (1892); Merit Machine Mfg. Co. v. DeVinne-Hallenbeck Co., 227 App. Div. 296, 237 N. Y. Supp. 472 (1st Dep't 1929); Levy v. Am. Wax & Paper Mfg. Co., 24 Misc. 204, 52 N. Y. Supp. 637 (App. Term 1898); Stranahan Bros. Catering Co. v. Coit, 55 Ohio St. 398, 45 N. E. 634 (1896). *Contra:* Camac v. Warriner, 1 C. B. 356, 135 Eng. Rep. 577 (1845).

18. 131 N. Y. 72, 29 N. E. 1006 (1892).

during the past year. The court held that in failing to supply coal of "a particular quality and kind, determinable by a standard which was equally well known and understood",[19] plaintiff breached the warranties which he had made the previous year and said warranties survived acceptance of the goods. It would seem that the same result should obtain where an oral reference is made to previous sales between the parties.[20]

The argument is made occasionally that the warranty of a previous sale can not attach to subsequent sales even when the buyer refers expressly to the previous sale and places reliance on the warranties previously given. The reason for this position is grounded on basic contract considerations—namely, to be bound the seller must intend that warranties have effect beyond the original sale and unless he agrees to respond in damages, if his statement proves untrue, he is not bound. If the seller does not evince an intention to have the warranties carry over, he has not made an offer to respond in damages which can be accepted by the buyer. This position has its origin in the common law[21] and probably is not in comformity with the best thinking of modern authorities. But it does represent the law of Pennsylvania.[22] Today it is not what the seller himself intended; but rather what the buyer is reasonably allowed to conclude from the conduct of the parties and the nature of the transaction. Mere lack of intention to warrant is not sufficient, in and of itself, to negative a warranty.[23] The seller's intent is not germane other than to show he intended to assert a fact on which the buyer might reasonably rely in making future transactions. An illustration of the far reaching effect resulting from the court's disregard of the seller's actual intention is pointed out in *Merit Machine Mfg. Co. v. The DeVinne-Hallenbeck Co.*[24] The seller had submitted a sample to induce an order from the buyer.[25] Subsequent

19. *Id.* at 77, 29 N. E. at 1007 (1892).

20. Greer v. Whalen, 125 Md. 273, 93 Atl. 521 (1915); Wait v. Borne, 123 N. Y. 592, 25 N. E. 1053 (1890).

21. Hopkins v. Tanqueray, 15 C. B. 130, 139 Eng. Rep. 369 (1854); Sauerman v. Simmons, 74 Ark. 563, 86 S. W. 429 (1905); Coats v. Hord, 29 Cal. App. 115, 154 Pac. 491 (1915); Denver Suburban Homes & Water Co. v. Fugate, 63 Colo. 423, 168 Pac. 33 (1917); Turner Bros. v. Clark, 143 Ga. 44, 84 S. E. 116 (1915); Coleman v. Simpson, 162 App. Div. 335, 147 N. Y. Supp. 865 (2d Dep't 1914); 1 Williston, Sales §§ 198-200 (Rev. ed. 1948).

22. Michelin Tire Co. v. Schulz, 295 Pa. 140, 145 Atl. 67 (1929); Walker v. Kirk, 72 Pa. Super. Ct. 534 (1919).

23. 1 WILLISTON, SALES § 210 (Rev. ed. 1948); VOLD, SALES § 140 (1931). See also Burns v. Limerick, 178 Mo. App. 145, 165 S. W. 1166 (1914); Fairbank Canning Co. v. Metzger, 118 N. Y. 260, 23 N. E. 372 (1890); Hawkins v. Pemberton, 51 N. Y. 198 (1872).

24. 227 App. Div. 296, 237 N. Y. Supp. 472 (1st Dep't 1929).

25. Although the Uniform Sales Act (Section 16) refers to implied warranties in sales by sample, most authorities have classified a sale by sample as an express warranty. 1 WILLISTON, SALES § 249 (Rev. ed. 1948); VOLD, SALES § 145 (1931). See also Ellis v. Rosalasky, 189 N. Y. Supp. 14 (App. Term 1921). Such a construction has this effect—the sample is considered in the nature of an affirmation of fact and all goods sub-

orders were also placed with the seller, express reference being made to the initial order. Some of the goods did not conform to the previous orders since they did not contain alkali-proof ink which was necessary for buyer's use and which was present in the submitted sample. The seller's defense to a charge of breach of express warranty was that he didn't know alkali-proof ink was necessary. The court held that the buyer was entitled to his contract which was to have the goods conform to the sample. Even though the seller had no actual knowledge of the need for alkali-proof ink in the buyer's merchandise, he must deliver goods which conform to the sample in every respect. Failure so to comply constituted breach of an express warranty.

In *Moore v. King*[26] the plaintiff-buyer purchased a sample of the defendant's shellac in reliance on certain express warranties. Plaintiff later ordered a barrel of the shellac "same as you sent us October 4, 1885", reference being to the sample cask delivered on that date. A further order was made in which reference was made to the second order (the one quoted above). The goods supplied under the last order were defective and suit was commenced for breach of the express warranties given with the sample.[27] The seller disclaimed any warranty on the ground that at the time of the third sale no representations were made and what was said at the first sale (the sample sale) had no binding force or application thereafter. The court held for plaintiff and found the evidence sufficient to show that the seller's agent warranted all goods would be the same as the sample order and also that the reference in subsequent orders to the first sale, even though that was by sample and as a test, extended the express warranties to the subsequent sales.

The decision in the *Moore* case is significant from two aspects. First, it gives support to the proposition that the buyer may recover on express warranties of previous sales where he makes reference to said previous sales in subsequent orders and also relies on the warranties previously given. Second, it tends to place a limitation on what has been previously said respecting sales on a trial basis. For if the court can fairly infer from the language of the buyer and seller that they "contemplated future orders, and that whatever was said as to the quality and adaptability of the goods was intended and understood to apply to subsequent sales",[28] the express warranties will carry over despite the fact that the original order was a trial order. In *Wait v. Borne*[29] the facts were almost identical with those of the *Moore* case. Yet in construing the language of the seller's agent the court felt no inference could be drawn that the warranty was to apply to all other orders which the buyer might decide to place in the future. The decisions in these cases forcibly

sequently bought in reliance on the sample must conform to the sample in every necessary detail or an action will lie for breach of an express warranty.

26. 57 Hun 224, 10 N. Y. Supp. 651 (4th Dep't 1890), *aff'd*, 134 N. Y. 596, 31 N. E. 624 (1892).

27. See note 25 *supra*.

28. 57 Hun 224, 226, 10 N. Y. Supp. 651, 653 (4th Dep't 1890), *aff'd*, 134 N. Y. 596, 31 N. E. 624 (1892).

29. 123 N. Y. 592, 25 N. E. 1053 (1890).

demonstrate that the actual holding in each case will turn largely upon what the court construes the intention of the parties to be. Each case must be considered in some measure on its own facts.

III. Express Warranties Relied on Purporting to Cover a Series of Transactions

The court in the *Moore* case indicated a possible third situation where consideration of the carry-over effect of express warranties would be relevant. If evidence is adduced to show that the parties contemplated a series of transactions or a future course of dealings, it is conceivable that the express warranties have application and effect beyond the original transaction. Although the factors to be considered in determining this intent are analogous to those considered in Section II, separate treatment of the problem is suggested in aid of sharper delineation. Professor Williston has stated the problem in these words:

"A more troublesome question arises where statements amounting to an express warranty induce a sale of goods at a shop, and the customer, relying in fact on the earlier statements, makes further purchases of the same kind of goods at the same shop. The Massachusetts Court held that a warranty does not cover the later sales, unless at least the statements relied upon purported to cover a series of transactions."[30]

It would seem that Professor Williston is actually distinguishing two groups of cases—1) where the seller has reason to expect future orders and intends himself or reasonably leads the buyer to assume that the former will be bound in the future; and 2) where the seller should not be held liable on future sales because he could not have anticipated that the buyer would make further purchases from him or because the buyer was unreasonable and unwarranted in relying in future dealings on previous transactions. This first group concerns itself most frequently with the manufacturer-retailer relationship or the wholesaler-retailer relationship. Although the courts have preferred to decide these cases on their own individual facts (thus making it difficult to set down any rule of uniform application), certain criteria may be established from an analysis of the cases and used as a guide.

In the normal course of commercial transactions, when a manufacturer or wholesaler of a standard product endeavors to induce a retailer to handle his product, he is seeking more than a single isolated transaction. He is looking for a future course of dealings between the two parties, the result of which will be that the buyer will be a steady customer, a continuing outlet for the seller's product. In such a situation it would not be overreaching for the courts to conclude that the seller intended or the buyer was justified in concluding that the warranties, given to induce the initial handling of the product, should carry over to all subsequent transactions. And this is exactly what the

30. 1 Williston, Sales § 210 (Rev. ed. 1948). The Massachusetts case to which reference is made is Smith v. Denholm & McKay Co., 288 Mass. 234, 192 N. E. 631 (1934).

courts have done.[31] In *Stranahan Bros. Catering Co. v. Coit*[32] the plaintiff manufactured cheese and required large quantities of milk. The defendant promised and agreed at the time he first sold milk to the plaintiff that he would deliver nothing but first-class milk of superior quality. Subsequent deliveries were shown to have been watered and the court in allowing plaintiff a recovery declared that "the liability of Coit was as broad under a breach of this contract as though there had been an express warranty by him of every lot of milk as it was delivered."[33]

Resolution of the question of intention in these cases is not as simple as might be suspected from the findings in the *Stranahan* case. In *Empire State Bag Co. v. McDermott*[34] the buyer offered to return six bales of burlap because he alleged it was inferior in quality to that previously furnished. There was no evidence of any intention that previous warranties would attach to subsequent purchases. In fact there was a direct conflict in the evidence as to whether the seller's employee had promised to supply goods of the same quality as on previous occasions. The court, however, observed: ". . . and it would perhaps be a fair deduction that nothing was said on the subject at the time of the making of the contract; but defendants had a right to expect a grade of material, under this agreement, as high as the plaintiff had previously furnished them. . . ."[35] The ruling in this case, it has been said,[36] necessarily carries over into the later purchases terms of the earlier bargains. Certainly it could not be said that the seller in the *Empire State Bag Co.* case intended his promises to carry over; yet the buyer was allowed to rely on these promises as incidents of all future dealings.

That the same result would be reached in all instances where a manufacturer-retailer relationship exists is very doubtful. For it must be remembered that the continuance of the express warranty on subsequent sales, other than the type of case discussed in Section II *supra,* is the exception rather than the rule. This conclusion would seem to be corroborated by the quotation from Professor Williston at the beginning of this Section. Thus, unless the court can infer from the facts that a series of future transactions were contemplated by the parties and the warranties were intended reasonably to refer to subsequent sales, no express warranties will carry over from the first transaction.[37]

31. Free *et al.* v. Sluss, 87 Cal. App. 2d 933, 197 P. 2d 854 (1948); Am. Fruit Product Co. v. Davenport Vinegar & Pickling Works, 172 Iowa 683, 154 N. W. 1031 (1915); Leavitt v. Fiberoid Co., 196 Mass. 440, 82 N. E. 682 (1907); Moore v. King, 57 Hun 224, 10 N. Y. Supp. 651 (4th Dep't 1890), *aff'd,* 134 N. Y. 596, 31 N. E. 624 (1892); Empire State Bag Co. v. McDermott, 89 App. Div. 234, 85 N. Y. Supp. 787 (2d Dep't 1903); Levy v. Am. Wax & Paper Mfg. Co., 24 Misc. 204, 52 N. Y. Supp. 637 (App. Term 1898); Groetzinger v. Kann, 165 Pa. St. 578, 30 Atl. 1043 (1895).

32. 55 Ohio St. 398, 45 N. E. 634 (1896).

33. *Id.* at 405, 45 N. E. at 636.

34. 89 App. Div. 234, 85 N. Y. Supp. 787 (2d Dep't 1903).

35. *Id.* at 236, 85 N. Y. Supp. at 788.

36. 1 WILLISTON, SALES § 210 (Rev. ed. 1948).

37. See Camac v. Warriner, 1 C. B. 356, 135 Eng. Rep. 577 (1845); Wait v. Borne, 123 N. Y. 592, 25 N. E. 1053 (1890); 1 WILLISTON, SALES § 210 (Rev. ed. 1948).

The second group of cases previously referred to deals more directly with the retailer-consumer relationship or the individual-with-individual type of transaction. Here too the courts have decided the cases on their individual facts but have held generally that the express warranties do not carry over to subsequent purchases by the consumer.[38] The argument against recovery seems to reduce itself to this—there is no contemplation that a series of future transactions will result between the parties. If the consumer purchases a product in reliance on an express warranty and finds the product acceptable to his taste and needs, he is just as likely to make subsequent purchases at some other retail outlet. It is the product which satisfies his requirement and if it can be purchased in most any retail store, there is nothing which would tend necessarily to induce him to deal exclusively with the retailer who made express warranties as distinguished from any other retailer of the product.

In *A. H. Andrews & Son v. Harper*[39] the seller recommended a feed to the defendant which was a good milk maker and a fine feed. Buyer used the feed for about a year and then refused to pay for the last shipment, claiming it was not a good milk maker. He claimed a breach of the express warranty made on the original sale. The court dismissed his contention "because that recommendation as to the feed in general was made approximately a year before the sale and delivery . . . of the particular lot of feed which . . . caused the damage for which recovery is here sought. That recommendation was in no event an express warranty that the original packages sold . . . a year thereafter would not contain any deleterious or poisonous substance. . . ."[40]

As the seller in the *Andrews* case was the proprietor of a general store selling to dairymen in the neighborhood of the small town where he maintained his business, it is not improbable that the defendant was a steady and regular customer. This presents the interesting question—should the rule previously enunciated respecting retailer-consumer have application where the consumer is a steady customer? The *Andrews* case would answer in the negative. But a thorough reading of the court's opinion inclines to the belief that perhaps the original sale was a test or trial order, though the court does not ground its holding on that supposition. Hence the case may not be determinative. On reason, untrammelled by decided cases, it is submitted that the same considerations which favor the carry-over effect of express warranties in the manufacturer-retailer relationship should apply to the steady customer situation.[41] The goods are warranted with the knowledge and impliedly with the expectation that future orders will be forthcoming in reliance, in some measure, on the warranties.

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38. Beckett v. F. W. Woolworth Co., 376 Ill. 470, 34 N E. 2d 427 (1941); Smith v. Denholm & McKay Co., 288 Mass. 234, 192 N. E. 631 (1934); Shull v. Ostrander, 63 Barb. 130 (N. Y. 1863); A. H. Andrews & Son v. Harper, 137 Wash. 353, 242 Pac. 27 (1926). *Contra:* Englehardt v. Clanton, 83 Ala. 336, 3 So. 680 (1888).

39. 137 Wash. 353, 242 Pac. 27 (1926).

40. *Id.* at 357, 242 Pac. at 28.

41. See note 31 *supra.*