



NORTH CAROLINA LAW REVIEW

Volume 30 | Number 2

Article 19

2-1-1952

Sales -- Implied Warranty of Wholesomeness -- Requirement of Privity

Walker Y. Worth Jr.

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>

 Part of the [Law Commons](#)

Recommended Citation

Walker Y. Worth Jr., *Sales -- Implied Warranty of Wholesomeness -- Requirement of Privity*, 30 N.C. L. REV. 191 (1952).

Available at: <http://scholarship.law.unc.edu/nclr/vol30/iss2/19>

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

While a prisoner in North Carolina may earn gain time credits for good conduct,¹⁹ there is no express provision for forfeiture of this time except by escape or attempted escape,²⁰ or participation in mutiny, riot, insurrection, destruction of state property, or attack upon any officer or inmate.²¹ North Carolina, being in the third category, is therefore similar to most jurisdictions in that the statute remains silent as to the status of gain time credits upon revocation of parole.

It has been the administrative policy in North Carolina to allow an ex-parolee to retain his acquired gain time credits, and this policy is founded on the belief that the administrative agency is without authority, under the present statutes, to deprive him of that time.²² In the light of what has been said before, this view seems entirely proper from both a legal and a policy standpoint.

ROGER B. HENDRIX.

Sales—Implied Warranty of Wholesomeness—Requirement of Privity

A wrongful death action was brought in North Carolina against a retail druggist for breach of an implied warranty of wholesomeness of a salt substitute, sold in its original package to plaintiff's intestate. The defendant retailer joined his wholesaler as third-party defendant, on the allegation that the wholesaler was primarily liable on the same implied warranty. The wholesaler demurred for failure to state a cause of action and for misjoinder of parties and causes of action. The overruling of the demurrer was affirmed and the joinder held proper because the retailer, if held liable, would be able to recover the loss from the wholesaler.¹

Most jurisdictions recognize the implied warranty of fitness for human consumption in the sale of food.² A majority of jurisdictions,

¹⁹ *Rules and Regulations Governing the Management of Prisoners under the Control of the State Highway and Public Works Commission*. §2 (1949), as authorized by N. C. GEN. STAT. §148-12, 13 (1943). Time earned is dependent on the grade of the prisoner. Additional time may be earned if the prisoner is of a certain grade and on continuous good behavior for twelve months; credit may also be earned for Sunday, holiday or emergency work.

²⁰ N. C. GEN. STAT. §148-41 (1943).

²¹ *Rules*, *op. cit. supra* note 19, §6(o).

²² Informal opinion, State Highway and Public Works Commission. But see note 18 *supra*.

¹ *Davis v. Radford*, 233 N. C. 283, 63 S. E. 2d 822 (1951).

² Under the common law: *Stanfield v. F. W. Woolworth Co.*, 143 Kan. 117, 53 P. 2d 878 (1936); *Degouveia v. H. D. Lee Mercantile Co.*, 231 Mo. App. 447, 100 S. W. 2d 336 (1936); *Walker v. Packing Co.*, 220 N. C. 158, 16 S. E. 2d 668 (1941); *Williams v. Elson*, 218 N. C. 157, 10 S. E. 2d 668 (1940); *Rabb v. Covington*, 215 N. C. 572, 2 S. E. 2d 705 (1939); *Jacob E. Decker & Sons v. Capps*, 139 Tex. 609, 164 S. W. 2d 828 (1942); *Colonna v. Rosedale Dairy Co.*, 166 Va. 314, 186 S. E. 94 (1936); *Burgess v. Sanitary Meat Market*, 121 W. Va. 605, 5 S. E. 2d 785 (1939); 1 WILLISTON, SALES §242 (Rev. ed. 1948). The Uniform Sales Act has been adopted in 34 states. See 1 UNIFORM LAWS ANNOTATED, SALES, p. xv, (1950), Table III, for a list of the states which have adopted it, the dates of adoption, and the respective state statutes. The implied warranty of fitness under the Uniform

including North Carolina, require privity between the parties for a recovery for its breach.³ This limitation rests on the ground that the warranty is contractual in its nature; therefore any party to an action for its breach must also have been a party to the sale contract.⁴ Thus, the privity rule imposes two limitations: (1) It prevents a person who is not the purchaser of the deleterious food from recovering for a breach of the implied warranty of fitness, and (2) it prevents an injured purchaser from maintaining a breach of warranty action against any but his immediate vendor.⁵ However, a vendor against whom a judgment

Sales Act is found in Section 15 (1): "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 the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose." Making known the purpose and reliance on the seller's skill are both required under the common law and the Uniform Sales Act. The courts have generally been lenient in finding both requirements in food cases. A purchaser of food is recognized as wanting the food to eat, and the mere fact of purchase has been regarded as giving rise to a presumption of reliance or as being sufficient evidence of reliance. See 1 WILLISTON, SALES §242 (Rev. ed. 1948); DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER, 32, 44-48 (1951).

Consideration of the liability of the restaurateur is excluded from this note. The weight of authority holds him liable for breach of implied warranty. See DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER, 159-180 (1951); Wasserman, *Commentary on Diners' Protection*, 61 N. J. L. J. 57 (1938); Note, 14 NOTRE DAME LAW. 318 (1939).

³ *E.g.*, Borucki v. MacKenzie Bros. Co., 125 Conn. 92, 3 A. 2d 224 (1938); Vaccarino v. Cozzubo, 181 Md. 614, 31 A. 2d 316 (1943); Newhall v. Ward Baking Co., 240 Mass. 434, 134 N. E. 625 (1922); Hazelton v. First National Stores, 88 N. H. 409, 190 Atl. 280 (1937); Stave v. Giant Food Arcade, 125 N. J. L. 512, 16 A. 2d 460 (1940); Hopkins v. Amtorg Trading Corp., 265 App. Div. 278, 38 N. Y. S. 2d 788 (1943); Thomason v. Ballard & Ballard Co., 208 N. C. 1, 179 S. E. 30 (1935); Colonna v. Rosedale Dairy Co., 166 Va. 314, 186 S. E. 94 (1936); Prinsen v. Russos, 194 Wis. 142, 215 N. W. 905 (1927); 1 WILLISTON, SALES §244 (Rev. ed. 1948).

⁴ The action of express warranty originally sounded in tort. In *Stuart v. Wilkins*, 1 Dougl. 18, 99 Eng. Rep. 15 (1778), Lord Mansfield held that the proper action was one in assumpsit. When implied warranties came to be recognized, the action of assumpsit was accepted as correct. See DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER, 34-37 (1951); 1 WILLISTON, SALES §§195-197 (Rev. ed. 1948).

⁵ See note 3 *supra*.

Some states will not allow suit for breach of the implied warranty of fitness against the retailer of deleterious food sold by him in its original sealed container. The theory is that the retailer can have no greater knowledge of possible defects than the buyer, and since the buyer knows it, there can be no reliance on the retailer's skill in selection. Common law states: *Davis v. Williams*, 58 Ga. App. 274, 198 S. E. 357 (1938); *Kroger Grocery Co. v. Llewelling*, 165 Miss. 71, 145 So. 726 (1933); *Pennington v. Cranberry Fuel Co.*, 117 W. Va. 680, 186 S. E. 610 (1936). Uniform Sales Act states: *Kirkland v. Great Atlantic & Pacific Tea Co.*, 233 Ala. 404, 171 So. 735 (1937); *Coca-Cola Bottling Co. v. Swilling*, 186 Ark. 1149, 57 S. W. 2d 1029 (1933); *Bigelow v. Maine Central R. R.*, 110 Me. 105, 85 Atl. 396 (1912); *Wilkes v. Memphis Grocery Co.*, 23 Tenn. App. 550, 134 S. W. 2d 929 (1939). Quite a few states have expressly repudiated this doctrine under both the common law and the Uniform Sales Act, and it does not appear to be gaining in popularity. *Burkhardt v. Armour & Co.*, 115 Conn. 249, 161 Atl. 385 (1932); *Ward v. Great Atlantic & Pacific Tea Co.*, 231 Mass. 90, 120 N. E. 225 (1918); *Griffin v. James Butler Grocery Co.*, 108 N. J. L. 92, 156 Atl. 636 (1931); *Rabb v. Covington*, 215 N. C. 572, 2 S. E. 2d 705 (1939); *Bonenberger*

has been obtained by an injured consumer or intermediate vendee may generally recover over against his vendor on the same warranty until the party ultimately responsible for the breach is held liable in damages.⁶ Where there is an express warranty by the manufacturer on the outside of the package, North Carolina allows the injured purchaser to sue directly for a breach, free of the privity requirement.⁷

The joinder of the wholesaler in the principal case has the practical effect of avoiding the immediate vendor-vendee limitation of the privity rule.⁸ Since there was no allegation of a separate breach of the warranty by the retailer, he could recover over from the wholesaler the amount of his liability in the same action.⁹ However, this effect is limited by the fact that the defendant and not the plaintiff had control of the joinder. But practically, a defendant would hardly resist joining his vendor if he could thereby escape liability. In addition to any doubt that might be cast upon the validity of the requirement of privity by this decision, there was a dictum in the opinion that: "Under the decision in *Simpson v. Oil Co.*¹⁰ . . . it would seem that the plaintiff here [consumer] could have maintained an action against . . . the distributor for

v. Pittsburgh Mercantile Co., 345 Pa. 559, 28 A. 2d 913 (1942). A debate on the question of imposing absolute liability on the retailer is found in the following: Waite, *Retail Responsibility and Judicial Law Making*, 34 MICH. L. REV. 494 (1936); Brown, *The liability of Retail Dealers for Defective Food Products*, 23 MINN. L. REV. 585 (1939); Waite, *Retail Responsibility—A Reply*, 23 MINN. L. REV. 612 (1939).

⁶ *Royal Paper Box Co. v. Munro & Church Co.*, 284 Mass. 446, 188 N. E. 223 (1933); *Carleton v. Lombard*, 19 App. Div. 297, 46 N. Y. Supp. 120 (1897); *Aldridge Motor Co. v. Alexander*, 217 N. C. 750, 9 S. E. 2d 469 (1940); *Williams v. Chevrolet Co.*, 209 N. C. 29, 182 S. E. 719 (1935); *Wolstenholme v. Randall & Bro., Inc.*, 295 Pa. 131, 144 Atl. 909 (1929); 3 WILLISTON, SALES §614a (Rev. ed. 1948); 22 AM. JUR., Food §110 (1938).

⁷ *Simpson v. American Oil Co.*, 217 N. C. 542, 8 S. E. 2d 813 (1940). Here plaintiff-purchaser suffered violent skin irritations from the use of an insecticide, the package of which carried the words, ". . . non-poisonous to human beings, but . . . not suited for internal use." The court stated, "We know of no reason why the original manufacturer and distributor should not, for his own benefit and that, of course, of the ultimate consumer, make such assurances, nor why they should not be relied upon in good faith, nor why they should not constitute a warranty on the part of the original seller and distributor running with the product into the hands of the consumer, for whom it was intended." *But cf. Pelletier v. Dupont*, 124 Me. 269, 128 Atl. 186 (1925), where the court failed to find an express warranty as to the wholesomeness of bread from the words on the label, "Purity Nutrition Cleanliness absolutely applies to Edgeworth Bread.", and also stated that there must be privity between the parties for an action on express warranty. Also see *Alpine v. Friend Bros., Inc.*, 244 Mass. 164, 138 N. E. 553 (1923) and *Newhall v. Ward Baking Co.*, 240 Mass. 434, 134 N. E. 625 (1922), where the actions were for deceit rather than for breach of express warranty.

⁸ See note 6 *supra*.

⁹ The following cases allowed similar joinders: *Ochchipinti v. Buscemi*, 267 App. Div. 874, 46 N. Y. S. 2d 292 (1944); *Linn v. Radio Center Delicatessen*, 169 Misc. 879, 9 N. Y. S. 2d 110 (N. Y. Munic. Ct. 1939); *Weiner v. Mager & Throne*, 167 Misc. 338, 3 N. Y. S. 2d 918 (N. Y. Munic. Ct. 1938); *McSpedon v. Kunz*, 271 N. Y. 131, 2 N. E. 2d 513 (1936); *Barker v. Weingarten Riverside Co.*, 232 S. W. 2d 692 (Tex. Civ. App. 1950).

¹⁰ *Simpson v. American Oil Co.*, 217 N. C. 542, 8 S. E. 2d 813 (1940) (foot-note ours).

the cause set out in his complaint, though he has elected to sue only the retail dealer."¹¹ The case here relied upon is distinguishable from the principal case, since it involved an express warranty by the manufacturer to the consumer through the medium of the product's package, rather than an implied warranty.¹² Nevertheless, such language may indicate a feeling that the privity limitation is no longer proper as a matter of policy.¹³

Recent decisions in other jurisdictions have allowed recovery by the ultimate consumer where no contractual relationship existed between the parties. This may indicate a general trend toward the elimination of the requirement of privity in sale-of-food actions. Various theories have been advanced to sustain this result. Some cases have avoided the result of the privity requirement where the purchaser and the consumer are different, but related, parties by holding that the right to sue a retailer is actually based on an agency-principal relationship between the plaintiff-consumer and the purchaser.¹⁴ Others, recognizing the requirement of privity, have found that the implied warranty runs with the goods so that ownership is the basis of recovery,¹⁵ or that the consumer is a third party beneficiary of the contract between the manufacturer and the retailer and as such can sue.¹⁶ A third class of cases allows recovery by doing away with the requirement of privity on the specific ground of public policy¹⁷ or upon general policy considerations.¹⁸

¹¹ *Davis v. Radford*, 233 N. C. 283, 286, 63 S. E. 2d 822, 825 (1951).

¹² See note 7 *supra*.

¹³ For certain policy considerations, see *Thomason v. Ballard & Ballard Co.*, 208 N. C. 1, 5, 179 S. E. 30, 32 (1935) (dissenting opinion); Condon, *The Practical Impact of the Proposed Uniform Commercial Code on Food Poisoning Cases*, 5 FOOD DRUG COSMETIC L. J. 213 (1950); Jeanblanc, *Manufacturers' Liability to Persons Other Than Their Immediate Vendees*, 24 VA. L. REV. 134 (1937); Perkins, *Unwholesome Food as a Source of Liability*, 5 IOWA L. BULL. 86 (1920); Note, 7 WASH. L. REV. 351 (1932).

¹⁴ *Welter v. Bowman Dairy Co.*, 318 Ill. App. 305, 47 N. E. 2d 739 (1943); *Vaccarino v. Cozzubo*, 181 Md. 614, 31 A. 2d 316 (1943); *Colby v. First National Stores*, 307 Mass. 252, 29 N. E. 2d 920 (1940); *Wadleigh v. Howson*, 88 N. H. 365, 189 Atl. 865 (1937); *Ryan v. Progressive Grocery Stores*, 255 N. Y. 388, 175 N. E. 105 (1931).

¹⁵ *E.g.*, *Coca-Cola Bottling Works v. Lyons*, 145 Miss. 876, 111 So. 305 (1927) (donee of purchaser allowed to sue); *Coca-Cola Bottling Co. v. Smith*, 97 S. W. 2d 761, 767 (Tex. Civ. App. 1936) (suit by injured purchaser against the manufacturer of a bottled coca-cola: ". . . the defendant's implied warranty to the retailer who purchased from it with knowledge and intention on the part of the defendant that the beverage would be sold and consumed by a purchaser from the retailer ran with the article and inured to the benefit of the plaintiff who purchased from the dealer.").

¹⁶ *Dryden v. Continental Baking Co.*, 11 Cal. 2d 33, 77 P. 2d 833 (1938); *Ward Baking Co. v. Trizzino*, 27 Ohio App. 475, 478, 161 N. E. 557, 559 (1928) (Suit by injured consumer against manufacturer of cake containing needle which was purchased from retail groceryman: "Whatever implied warranty arises in favor of the groceryman, who established the contractual relationship with the Baking Company, is for the benefit of this third party, namely, the ultimate consumer.").

¹⁷ *E.g.*, *Blanton v. Cudahy Packing Co.*, 154 Fla. 872, 19 So. 2d 313 (1944); *Patargias v. Coca-Cola Bottling Co.*, 332 Ill. App. 117, 74 N. E. 2d 162 (1947);

One court interpreted the Uniform Sales Act as expressing legislative intent to do away with the privity limitation.¹⁹

An injured purchaser of deleterious food in its original package may generally bring a negligence action directly against the manufacturer, privity not being required.²⁰ He is aided in many jurisdictions by the application of the doctrine of *res ipsa loquitur*,²¹ or the principle that the violation of pure food and drug acts by the manufacture of unwholesome food constitutes negligence per se.²² But in North Carolina, if the plaintiff is unable to show actual negligence, the only other way that he may prove his cause of action is by evidence that products manufactured under substantially similar conditions, and sold by the defendant "about the same time," contained foreign or deleterious sub-

Welter v. Bowman Dairy Co., 318 Ill. App. 305, 47 N. E. 2d 739 (1943); Davis v. Van Camp Packing Co., 189 Iowa 775, 176 N. W. 382 (1920); Helms v. General Baking Co., 164 S. W. 2d 150 (Mo. App. 1942); Madouros v. Kansas City Coca-Cola Bottling Co., 230 Mo. App. 275, 90 S. W. 2d 445 (1936); Sincavage v. Armour & Co., 41 Luz. Leg. Reg. 183 (Pa. C. P. 1950); Amarillo Coca-Cola Bottling Co. v. Loudder, 207 S. W. 2d 632 (Tex. Civ. App. 1948); Jacob E. Decker & Sons v. Capps, 139 Tex. 609, 164 S. W. 2d 828 (1942); Nelson v. West Coast Dairy Co., 5 Wash. 2d 284, 105 P. 2d 76 (1940); Mazetti v. Armour & Co., 75 Wash. 622, 135 Pac. 633 (1913).

¹⁹ Swengel v. F. & E. Wholesale Grocery Co., 147 Kan. 555, 77 P. 2d 930 (1938); Cudahy Packing Co. v. Baskin, 170 Miss. 834, 155 So. 217 (1934); Rainwater v. Hattiesburg Coca-Cola Bottling Co., 131 Miss. 315, 95 So. 444 (1923); Griffin v. Asbury, 196 Okla. 484, 165 P. 2d 822 (1945).

Louisiana does not require privity under the civil law. Arndt v. D. H. Holmes Co., 9 La. App. 36, 119 So. 91 (1928); Doyle v. Fuerst & Kraemer, 129 La. 838, 56 So. 906 (1911); DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER, 65, n. 3 (1951).

It seems that Montana has reached the same result. Bolitho v. Safeway Stores, 109 Mont. 213, 95 P. 2d 443 (1939) (recovery on implied warranty theory by daughter of purchaser).

²⁰ Klein v. Dutchess Sandwich Co., 14 Cal. 2d 272, 279, 93 P. 2d 799, 804 (1939). The California statute is identical with Section 15(1) of the Uniform Sales Act. The opinion stated, "In adopting the statute here concerned as a part of the Uniform Sales Act, it was the clear intent of the legislature that, with respect to foodstuffs, the implied warranty provision therein contained should inure to the benefit of any ultimate purchaser or consumer of food; and it was not intended that a strict 'privity of contract' would be essential for the bringing of an action by such ultimate consumer for an asserted breach of the implied warranty."

²¹ Pillars v. R. J. Reynolds Tobacco Co., 117 Miss. 490, 78 So. 365 (1918); Tomlinson v. Armour & Co., 75 N. J. L. 748, 70 Atl. 314 (1908); Freeman v. Schultz Bread Co., 100 Misc. 528, 163 N. Y. Supp. 396 (N. Y. Munic. Ct. 1916); Minutilla v. Providence Ice Cream Co., 50 R. I. 43, 144 Atl. 884 (1929); PROSSER, TORTS, 673-678 (1941).

²² E.g., Reichert Milling Co. v. George, 230 Ala. 3, 162 So. 393 (1934); Eisengeiss v. Payne, 42 Ariz. 262, 25 P. 2d 162 (1933); Paolinelli v. Dainty Foods Manufacturers, 322 Ill. App. 586, 54 N. E. 2d 759 (1944); Nehi Bottling Co. v. Thomas, 236 Ky. 684, 33 S. W. 2d 701 (1930); Doyle v. Continental Baking Co., 262 Mass. 516, 160 N. E. 325 (1928); Coca-Cola Bottling Works v. Sullivan, 178 Tenn. 405, 158 S. W. 2d 721 (1942); Campbell Soup Co. v. Davis, 163 Va. 89, 175 S. E. 743 (1934).

²³ E.g., Donaldson v. Great Atlantic & Pacific Tea Co., 186 Ga. 870, 199 S. E. 213 (1938); Salzano v. First National Stores, 268 App. Div. 993, 51 N. Y. S. 2d 645 (1944); Portage Markets Co. v. George, 111 Ohio St. 775, 146 N. E. 283 (1924); Doherty v. S. S. Kresge Co., 227 Wis. 661, 278 N. W. 437 (1938).

stances.²³ The latter rule has been strictly applied,²⁴ and the evidence required under either theory is often impossible to secure.²⁵

Thus, in the vast majority of North Carolina cases the plaintiff is able to establish his cause of action only on the implied warranty, and only against the retailer. If the retailer cannot or does not join his vendor, and is himself judgment proof, as frequently may be the case, there is no practical remedy left to the plaintiff. However, the abandonment of the requirement of privity,²⁶ indicated by the dictum in the principal case, will make the manufacturer, all middlemen, and the retailer liable for injuries resulting from unwholesome products sold by them.²⁷ This will give the injured plaintiff an opportunity to select as

²³ *Coca-Cola Bottling Co. of Henderson v. Munn*, 99 F. 2d 190 (4th Cir. 1938); *Enloe v. Coca-Cola Bottling Co.*, 208 N. C. 305, 180 S. E. 582 (1935) (Contains a summary of the North Carolina rules in negligence actions of this type.); *Davis v. Coca-Cola Bottling Co.*, 228 N. C. 32, 44 S. E. 2d 337 (1947) (bursting bottle); *Woody v. Coca-Cola Bottling Co.*, 218 N. C. 217, 10 S. E. 2d 706 (1940) (oily substance in bottle); *Tickle v. Hobgood*, 216 N. C. 221, 4 S. E. 2d 444 (1939) (decomposed animal flesh in bottle); *Smith v. Coca-Cola Bottling Co.*, 213 N. C. 544, 196 S. E. 822 (1938) (shattered glass in bottle); *Hampton v. Bottling Co.*, 208 N. C. 331, 180 S. E. 584 (1935) (substance in bottle resembling paint); *Corum v. R. J. Reynolds Tobacco Co.*, 205 N. C. 213, 171 S. E. 78 (1933) (fish-hook in tobacco plug); *Perry v. Bottling Co.*, 196 N. C. 175, 145 S. E. 14 (1928) (shattered glass in bottle); *Lamb v. Boyles*, 192 N. C. 542, 135 S. E. 464 (1926); Note, 15 N. C. L. Rev. 430 (1937).

²⁴ See, e.g., *Evans v. Pepsi-Cola Bottling Co.*, 216 N. C. 716, 6 S. E. 2d 510 (1940) (Where plaintiff was injured by drinking a soft drink containing a lethal portion of arsenic, evidence that the bottle was "crooked" so that proper cleansing was impossible was held improperly admitted); *McCarn v. 3-Centa Bottling Company*, 213 N. C. 543, 196 S. E. 837 (1938) (Nonsuit held proper where plaintiff's only evidence was that he became ill from soft drink containing sediment and "slimy-appearing" substance); *Collins v. Coca-Cola Bottling Co.*, 209 N. C. 821, 184 S. E. 834 (1936) (Admission of evidence as to other deleterious substances in soft drinks manufactured by defendant was held error since there was no evidence of the time when the manufacturer sold the other bottles to dealers); *Enloe v. Bottling Co.*, 208 N. C. 305, 180 S. E. 582 (1935) (where plaintiff was injured by drinking a coca-cola containing a rat; evidence of glass in another coca-cola manufactured by defendant was held improperly admitted).

²⁵ DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER, 70-72 (1951), where it is pointed out that in negligence actions, the successful plaintiff is comparatively rare, either because there was no negligence, or no proof of negligence, or the food was in its original sealed container thereby releasing the retailer.

²⁶ The abandonment spoken of would, in all probability, be a complete abandonment, thus allowing the injured consumer, although not the purchaser of the food, to sue any or all of the prior vendors. *But cf.* the new UNIFORM COMMERCIAL CODE, final draft of 1951, section 2-318, which contains the provision: "A warranty whether express or implied extends to any natural person whose relationship to the buyer is such as to make it reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section." Comment 4 under this section indicates that the warranty would extend directly from the manufacturer to the consumer. However, the language of the section is susceptible of the interpretation that its only effect is to allow the warranty to extend from the purchaser's vendor, usually a retailer, to such reasonably anticipated consumers. The latter interpretation is perhaps the intent of the drafters since the final proposed draft of 1951 omitted sections 2-718 and 2-719 of the 1950 proposed draft which together would have expressly authorized suit by the injured consumer against any vendor in the line of distribution. See note, 26 N. Y. U. L. Rev. 352 (1951).

²⁷ PROSSER, TORTS, 669-673, 688-691 (1941).

a defendant the one most responsible financially, or to bring action against all as joint defendants, thus increasing the probability of collection of any damages, and in many cases preventing circuitry of actions.²⁸ Such a principle is recognized in negotiable instruments law in actions by a holder against prior parties,²⁹ and in real property law in actions by a grantee against all prior grantors for breach of certain covenants contained in the prior deeds.³⁰

The abandonment of the privity requirement, in addition to greatly aiding an injured plaintiff, might have the incidental but desirable effect of forcing greater care by the manufacturer, and greater discrimination and inspection in selection of the product by the middleman and retailer.

WALKER Y. WORTH, JR.

Wills—Per Stirpes or Per Capita Division

The difficult problem of determining the dispositive intent expressed in an ambiguous will has reappeared in North Carolina. The testator, in a will prepared by a layman, directed that "the remainder of my estate is to be equally divided among my legal heirs, including said Myrtle Coppedge Bunn, equally, share and share alike as provided by laws of North Carolina." A brother, a half brother, eleven children of a deceased brother and a deceased sister, and two children of a deceased nephew were involved in the action to determine if the estate was to be divided *per capita* or *per stirpes*. Held (one justice dissenting) that the estate should be divided into fifteen equal shares, a *per capita* distribution.¹

Courts have been called on many times to interpret wills using similar language. As a result, certain phrases have been singled out as being indicative of the testator's intention. As a general rule, a *per capita* division is favored unless the will shows a contrary intent.² When

²⁸ If action is brought against the manufacturer in the first instance circuitry is prevented since there will be no possibility of a purchaser-retailer action, retailer-wholesaler action, and wholesaler-manufacturer action. Or if all are joined, circuitry may be avoided by the retailer or wholesaler obtaining a judgment over against the manufacturer in the same suit.

²⁹ 8 AM. JUR., Bills and Notes §942 (1938).

³⁰ *Wiggins v. Pender*, 132 N. C. 628, 634, 44 S. E. 362, 364 (1903) quoting with approval from *Spencer's Case*, 1 Smith, L. C. (9th ed.) 174: "... [the] covenant of warranty binds the original grantor and his personal representatives to the owner of the land, and any owner during whose possession a breach occurs can sue any or all previous covenantors . . ."; 14 AM. JUR., Covenants, Conditions and Restrictions §50 (1938).

¹ *Coppedge v. Coppedge*, 234 N. C. 173, 66 S. E. 2d 777 (1951) Justice Johnson, dissenting, was of the opinion that the will should be construed to require a *per stirpes* distribution. *Id.* at 178, 66 S. E. 2d at 781.

² *Burton v. Cahill*, 192 N. C. 505, 135 S. E. 332 (1926); *Ex parte Brogden*, 180 N. C. 157, 104 S. E. 177 (1920); *Howell v. Tyler*, 91 N. C. 213 (1884); *Britton v. Miller*, 63 N. C. 268 (1869); *Bryant v. Scott*, 21 N. C. 155 (1835); 69 C. J. §1312 (1951).