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the right-of-way and started the fire. The court held that defendant was negligent in maintaining his property in such condition and that the intervening cause did not absolve him from liability. In *Newton v. Texas Company*[46] defendant maintained a distributing plant where he stored large quantities of gasoline. Gas leaked from the warehouse and into the street. In imposing liability for the ensuing explosion, the court said that a reasonable inference could be drawn that the spark came from a passing train, from carelessly discarded matches, cigarettes, or otherwise. Thus *Phelps* cannot be correctly explained on the grounds of an intervening cause which may have ignited the combustibles.

These cases indicate that the court has taken a very restrictive approach to the issue of causal relationship. While all the reasons may not be apparent, the implications are quite clear—trial practitioners who find themselves confronted with the issue of cause had best proceed with utmost care.

JAMES G. BILLINGS

Torts—Products Liability—Is Privity Dead?

The movement to abolish the privity requirement in "warranty" actions has in the past decade played an increasingly successful role in the American judicial theater.[1] The crusade has not left the North Carolina Supreme Court unaffected, and a recent decision by that court may prove to be the signal for privity's final exit from the legal stage in North Carolina.

In *Corprew v. Geigy Chemical Company*[2] the North Carolina Supreme Court sustained a complaint based on warranty and

[46] 180 N.C. 561, 105 S.E. 433 (1920). The court said:

> [I]f the defendant, by its negligence, produced a situation or condition of danger by allowing gasoline to escape . . . where it would probably come into contact with fire, sparks . . . or live ashes from a lighted cigar or cigarette . . . we do not see why this would not be negligence . . . . [I]f the negligence of the defendant combined with the act of some other person . . . the defendant would be liable, though he had no connection with the conduct of the third party and had no control over him.

Id. at 563-64, 105 S.E. at 434.

[1] Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

[2] 271 N.C. 485, 157 S.E.2d 98 (1967).

negligence even though no privity of contract existed between the plaintiff and the defendant-manufacturer. Plaintiff, a farmer, purchased a chemical weed killer from a retail seller who in turn had procured it from the distributor, an agent of the manufacturer. Instructions on the bags of the chemical specified its use as a weed killer on corn, but warned against planting another stand of corn or other crop of the small grain variety on the same land in the same year. Plaintiff used the chemical on his corn crop with satisfactory results. The following year the plaintiff planted soybeans and peanuts on the land and due to the low yield and poor quality he suffered financial loss for which he brought suit.

The privity rule for warranty and negligence actions has traditionally been an obstacle to the consumer for recovery from the manufacturer. The court explicitly removed this barrier in negligence actions—a rather hollow victory since the "inherently dangerous" exception had already swallowed the rule[3]—but just how far the court went in discarding privity in "warranty" actions is uncertain.

To understand the changed position taken by *Corprew,* a brief review of case law on the privity requirement is necessary, including a look at a recent food and drink case which may have significant consequences in this area.[4] North Carolina freed itself from the doctrine of caveat emptor and adopted the rule of implied warranty in sales between purchaser and seller as early as 1925.[5] In an early decision dealing with food,[6] however, the court held that no liability to the ultimate consumer arose on an implied warranty where no contractual relation, *i.e.,* privity, existed between the manufacturer and the consumer. The manufacturer, said the court, was not an insurer of his product. An exception was recognized to the privity requirement in *Simpson v. American Oil Company.*[7] A spray can of "Annox" insecticide purchased by the plaintiff had a statement printed on it informing the user that the contents were deadly to bugs, but non-poisonous to human beings. The plaintiff de-

[3] Gwyn v. Lucky City Motors, Inc., 252 N.C. 123, 113 S.E.2d 302 (1960); Tyson v. Long Mfg. Co., 249 N.C. 557, 107 S.E.2d 170 (1959).

[4] Tedder v. Pepsi-Cola Bottling Co., 270 N.C. 301, 154 S.E.2d 337 (1967).

[5] Swift & Co. v. Etheridge, 190 N.C. 162, 129 S.E. 543 (1925).

[6] Thompson v. Ballard & Ballard, 208 N.C. 1, 179 S.E. 30 (1935). The plaintiff sued for breach of implied warranty when he became ill after eating baked bread and subsequently discovered a dead mouse in the sack of flour produced by the defendant, but bought at a local grocery.

[7] 217 N.C. 542, 8 S.E.2d 813 (1940).

veloped a severe skin ailment after spraying a room with the insecticide and brought suit against the manufacturer. The court held that where an express warranty on the product's container was addressed to the ultimate consumer no privity was required. In *Davis v. Radford*[8] the plaintiff's intestate died after using a salt substitute which contained poisonous ingredients. Suit was brought only against the retailer, but in dictum the court suggested that, based upon *Simpson,* the plaintiff could bring an action against the distributor on implied warranty despite the lack of privity. The court said that the wholesale distributor would be primarily liable since the retail seller could recover over against him. By a later holding[9] it seems that to come within the *Simpson* rule in non-food cases, the express warranty must appear on the package itself and be addressed to the ultimate consumer. Yet language in another case strictly limits the *Simpson* doctrine to food and drink for human consumption sold in sealed containers with labels addressed to the purchaser.[10] A green fly in a soft drink bottle offered the court an opportunity to re-examine its policy on privity in implied warranty actions in *Terry v. Double Cola Bottling Company,*[11] but the court reaffirmed its view that warranty was contractual in nature and required privity. A concurring opinion,[12] however, argued for privity's abandonment and gave the first suggestion of possible change.

This, then, was the procedure generally followed in an implied warranty action before the court altered its position. One injured by a defect in a product could bring an action on implied warranty only against the immediate seller with whom he was in the "holy state of privity."[13] The seller, in turn, could seek redress on the same theory against the distributor or manufacturer who was in privity with him.[14] The obvious defects in this procedure are that the retailer may be insolvent, there may be a multiplicity of actions, the suit may become barred by the statute of limitations, and often the court may lack jurisdiction over the parties.

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[8] 233 N.C. 583, 63 S.E.2d 822 (1951).

[9] Murray v. Bensen Aircraft Corp., 259 N.C. 638, 131 S.E.2d 367 (1963).

[10] Perfecting Serv. Co. v. Product Dev. & Sales Co., 261 N.C. 660, 136 S.E.2d 56 (1964).

[11] 263 N.C. 1, 138 S.E.2d 753 (1964).

[12] *Id.* at 3, 138 S.E.2d at 754.

[13] Aldridge Motors, Inc. v. Alexander, 217 N.C. 751, 9 S.E.2d 469 (1935).

[14] *Id.*

In *Tedder v. Pepsi Cola Bottling Company,*[15] a decision handed down in the late spring of 1967, the first shift took place. A woman became ill after drinking a portion of the defendant's bottled beverage which contained deleterious matter. She sued the bottler for breach of implied warranty of fitness though the drink was purchased at a local supermarket. The bottler's employee had placed the bottles on the shelves of the grocer, and the plaintiff was the only person to handle the bottle before opening. The court held that the mass advertising conducted by the bottler and the direct manner of travel of the product from the bottler to the consumer were sufficient to take the case to the jury on the theory of implied warranty. The court stopped short of abolishing the privity requirement in the food and drink area. Whether or not a manufacturer by placing his product on the market impliedly warrants to the ultimate consumer that the food and drink in sealed containers is fit for human use was not decided by the court. However, the court did make reference to the legal principles of Justice Sharp's concurrence in *Terry* which had argued for privity's repudiation in cases involving food products. *Tedder* can be viewed as a narrow decision, limiting the area emancipated from the privity requirement to cases of food and drink sold in sealed containers where there has been mass advertisement and direct travel of the product to the consumer.

What is *Corprew's* affect on the privity requirement? The decision lacks clarity and is open to at least four possible interpretations.

(1) The narrowest interpretation would limit the area free of the privity rule to cases where a product was sold in a sealed package which contained a label of warning or instruction. If either element were lacking, the consumer would have to meet the privity requirement to state a cause of action against the manufacturer. For example, if a new outboard motor boat sunk shortly after being launched and several persons were drowned, the owner could not sue the maker even if a label appeared on the vessel since it was not sold in a sealed package.

(2) Under a less narrow interpretation of *Corprew,* the privity rule would be eliminated in cases where the article is sold in a sealed container. Both *Tedder* and *Corprew* involve products marketed in closed packages. Under this interpretation a label or advertising would not be required, but the privity rule would still be viable for

[15] 270 N.C. 301, 154 S.E.2d 337 (1967).

such products as lawn mowers, automobiles, and airplanes which are not sold in sealed packages. The matter of the sealed container, however, would seem to go more to the evidence of breach as is discussed later.

(3) Since the court found that the statement on the package amounted to an express warranty that the chemical would not be harmful to crops planted in the next year, a third interpretation is that the court in effect was restating the doctrine set out in the earlier *Simpson* decision, *i.e.,* that where a warranty appears on the product addressed to the ultimate consumer no privity is required. Under this interpretation it is the label, not the container, that is important. Thus the exception to the privity rule would again include non-food items. If so construed, privity would remain a requirement except where a label of warning or instruction is printed on the product; or where, as in *Tedder,* there is mass advertising which can be viewed as equivalent to a label. The court's thinking quite possibly could revolve around the notion that the label or mass advertising bridges the gap between the manufacturer and consumer and creates a type of privity or bond between the two sufficient to sustain an action. This reasoning might be influenced by the fact that the plaintiff could have been induced to purchased the product by the representations made by the producer on the product itself, or by the advertisement.

The question immediately arises: Should a label be required? If a person is injured when the blade flys off a lawn mower the first time it is started, should he have to show that there was a label of safety or warning on the mower before he could sue the manufacturer? Under this latter interpretation he would.

(4) There is broad language in the opinion making it susceptible to the more liberal interpretation that the court has finally abrogated the privity requirement for warranty and has adopted in effect a theory of strict liability:

> Under modern marketing conditions a manufacturer places goods upon the market in sealed containers, and the container without substantial change is sold to the ultimate purchaser in the condition in which it is placed by the manufacturer on the market for sale. By placing its goods upon the market, the manufacturer represents to the public that they are suitable and safe for use, and by packaging, advertising, and otherwise, frequently upon a national scale, it does everything it can to induce that

> belief. The middleman is no more than a conduit, a mere mechanical device through which the thing is to reach the ultimate consumer. The manufacturer has invited and solicited the use of its product, and when it leads to disaster it should not be permitted to avoid the responsibility by saying that it made no contract with the consumer. The manufacturer should be held liable because it is in a position to insure against liability and add the cost to the product.[16]

In this paragraph the court states the forceful argument that a manufacturer ought to be held accountable if his product causes injury to a lawful user or consumer even though the manufacturer is not negligent. This sounds like the theory of strict liability in tort. In dictum[17] the court strengthens this interpretation by reference to Justice Sharp's concurring opinion in *Terry*. Evidently the court intended to incorporate into *Tedder* the legal principles stated in this concurrence which had cogently argued for the demise of privity in food product cases, contending that the manufacturer should be held liable, label or not.[18] Though the case concerned food products in sealed containers, the same policy arguments apply to non-food articles as in *Corprew*. Under this last interpretation, a consumer would have recourse against the manufacturer whether or not the product was in a sealed container or a label was attached thereto. The manufacturer would be subject to strict liability.

While rejoicing at the prospects of privity's departure, lawyers must remember that the manufacturer is not being served to the

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[16] Corprew v. Geigy Chemical Corp., 271 N.C. 485, 491, 157 S.E.2d 98, 102 (1967). It is arguable that the court was talking about negligence only, but the broad language would indicate that the court was also referring to "warranty."

[17] As to implied warranty as between manufacturer and consumer, in the absence of immediate privity of contract, in respect of food and drink placed on the market by the manufacturer in sealed containers, see the legal principles set forth in the concurring opinion of Sharp, J., in *Terry v. Bottling Co.*, 253 N.C. 1, 138 S.E.2d 753, and the application thereof in our decision of May 10, 1967, in *Tedder v. Bottling* Co., 270 N.C. 301, 154 S.E.2d 337.

Id. at 498, 157 S.E.2d at 107.

[18] Having held him to his label in *Simpson v. Oil Co., supra,* can we seriously argue or reasonably contend that a manufacturer or supplier who, after extensive advertising, sells a retailer bottled drinks, canned pineapple, or boxes of candy for resale to the consumer, does not likewise represent to the buying public that his product is fit to eat, even though no label or imprint on the container specifically says so?

Terry v. Double Cola Bottling Co., 263 N.C. 1, 12-13, 138 S.E.2d 753, 761 (1967) (Sharp, J., concurring).

consumer on a silver platter. The plaintiff must still prove his case. It is necessary for him to show that: (1) he was injured by the manufacturer's product; (2) the injury was due to a defect in the product; (3) the defect existed when the product was sold to the plaintiff; and (4) the product was being reasonably used for the purposes intended.[19]

In the area of damages, the type of loss for which recovery is sought will be important. Where economic loss is involved the plaintiff must show compliance with the provisions of the Uniform Commercial Code to recover from the seller.[20] Recovery in a tort action for personal injury and property damage is possible against the seller and the manufacturer under the Code,[21] since it is neutral on the privity requirement.[22] Under two of the interpretations of *Corprew,* proof of a label would be necessary if the customer sought recovery from the manufacturer for injury to person or property. Corprew sued for losses incurred when crops were damaged, which the court treated as property damage. If the plaintiff had been seeking to recover the cost of the chemical because it was ineffective, the recovery sought would have been for loss of the commercial bargain—economic loss. In such an action in contract[23] the court probably would not have allowed the plaintiff to go against the manufacturer, even though a label were present, since the plaintiff would be seeking recovery on his contract in the absence of privity. If the plaintiff attempts to recover the loss of the bargain from the seller, he needs no label since his action is directed against the seller with whom he contracted. Here the purchaser has relied only on the bargain between himself and the seller. These two parties set the terms of the agreement and if the bargain is not fulfilled the plaintiff has recourse against the seller.

The proof of the elements necessary for recovery against the

[19] *Id.* at 3, 138 S.E.2d at 755.

[20] UNIFORM COMMERCIAL CODE § 2-103(1)(d); § 2-106(1); § 2-607(3)(a).

[21] UNIFORM COMMERCIAL CODE § 2-715(2)(b).

[22] UNIFORM COMMERCIAL CODE § 2-318, comment 3.

[23] The New Jersey court has had trouble already in mixing the contract and tort theories in Santor v. A & M Karagheunian, Inc., 44 N.J. 52, 207 A.2d 305 (1965), where it allowed a purchaser to recover the value of the product from the manufacturer for the loss of the bargain. The California court, in dictum, separated the two types of losses and stated that strict liability should govern personal injuries as well as physical injury to property, but that "breach of warranty" was the proper action to recover for loss of commercial bargain. Seeley v. White Motor Co., 63 Cal. 2d 1, 403 P.2d 145 (1965).

manufacturer on a "warranty" action remains a formidable task. The plaintiff can perhaps take advantage of circumstantial evidence and inferences from the facts, but he will still have to overcome any inference that the defect was caused by intervening parties, including himself, or by a long lapse of time between manufacture and use.[24] There is no warranty that the product will not eventually deteriorate after a long period or if it is misused and abused.[25] These are matters of evidence, but proof that a defect existed when it left the manufacturer is only one step removed from proving fault, *i.e.*, negligence, by the producer. For products sold in sealed containers the burden is perhaps less weighty since there is a reasonable inference that any harmful substance in the product became sealed within it when it was manufactured. This, of course, is not conclusive. The fact that the package is sealed goes far in proving that the defect was in the package when sold to the plaintiff, but the manufacturer need not fear that it will be "taken to the cleaners" by every claimant seeking enrichment on a spurious claim.[26]

In a products liability case where a person has suffered personal injury or property damage, he has recourse against the processor under the theories of negligence, warranty, or strict liability. *Corprew* has implications for the plaintiff regardless of which theory he selects.

(1) Negligence remains a proper theory for recovery, and *Corprew* only officially cancels the privity requirement. The plaintiff, however, will have to sustain the extra burden of showing fault by the manufacturer without the aid of res ipsa loquitur and under the weight of the "similar instances" rule in North Carolina.[27]

(2) The plaintiff can also sue for breach of warranty—express, implied and implied for special purposes.[28] Under the *Simpson* doctrine he could rely on express warranty for his cause of action, but

[24] Jakubowski v. Minnesota Mining & Mfg. Co., 42 N.J. 177, 199 A.2d 826 (1964); Gomex v. E.W. Bliss Co., 27 Misc. 2d 649, 211 N.Y.S.2d 246 (Sup. Ct. 1961).

[25] *See* Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1144 (1960).

[26] Terry v. Double Cola Bottling Co., 263 N.C. 1, 10, 138 S.E.2d 753, 759 (1964).

[27] Graham v. Winston Coca-Cola Bottling Co., 257 N.C. 188, 125 S.E.2d 429 (1962); Enloe v. Charlotte Coca-Cola Bottling Co., 208 N.C. 305, 180 S.E. 582 (1935).

[28] For an example of an implied warranty for special purposes, see UNIFORM COMMERCIAL CODE § 2-315, comment 2.

this might be limited to food and drink unless *Corprew* reasserts that doctrine for nonconsumption items. Under a theory of implied warranty in food cases he might bring an action under the *Tedder* decision.[29]

To be considered with a "warranty" theory is the impact of the Uniform Commercial Code which went into effect in North Carolina last year. The Code establishes a warranty by law in all sales of goods,[30] but does not require privity for a warranty action against the manufacturer. As noted, the Code's official position is one of neutrality,[31] but it requires that notice of breach of warranty be given,[32] and the warranties themselves can be disclaimed.[33]

(3) Finally, if *Corprew* can be interpreted broadly as rejecting the privity rule for "warranty actions," the plaintiff could bring an action under the theory of strict liability. The language used in the opinion resembles the language of strict liability in tort,[34] but the court uses the phrase "breach of warranty" instead. Strict liability is non-fault liability. The manufacturer is held liable for injuries caused by a defective product even if it has exercised the highest degree of care and skill. If the court has indeed adopted strict liability in tort for the manufacturer, it is submitted that the continued use of the word "warranty" is undesirable and should be rejected in favor of the more accurate phrase—"strict liability in tort." "Warranty" is a contract term, as is recognized by the court,[35] and in this area the distinction between tort and contract is important. Professor Prosser, in several law review articles,[36] refers to sales warranty as the offspring of the illicit relationship between

[29] Problems may arise in determining what the implied warranty covers. In Prince v. Smith, 254 N.C. 768, 119 S.E.2d 923 (1961), where a bottle of Coke exploded in the plaintiff's hands, the court held there was no liability even to the retailer since an implied warranty did not extend to the container. Under the UNIFORM COMMERCIAL CODE § 2-314(2)(e), recovery against the retailer would be allowed.

[30] UNIFORM COMMERCIAL CODE §§ 2-313 to -315.

[31] UNIFORM COMMERCIAL CODE § 2-318, comment 3.

[32] UNIFORM COMMERCIAL CODE § 2-607(3)(a).

[33] UNIFORM COMMERCIAL CODE § 2-316.

[34] Prosser, *Strict Liability to the Consumer,* 18 HASTINGS L.J. 9, 15 (1966). Prosser states that twenty-two jurisdictions have adopted strict liability for all products on one theory or another.

[35] Terry v. Double Cola Bottling Co., 263 N.C. 1, 3, 138 S.E.2d 753, 754 (1964).

[36] Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer),* 69 YALE L.J. 1099 (1960); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer),* 50 MINN. L. REV. 791 (1966).

tort and contract and argues for its discontinued use to describe strict liability.[37] Liability for "breach of warranty" is the proper term to be used to refer to a breach in a contractual relation. Strict liability should be employed to describe the liability imposed by law on the manufacturer regardless of fault. The *Restatement of Torts* adopts the strict liability theory without using the word "warranty"[38] and a comment urges this practice.[39] This section of the *Restatement* has been adopted in several states by judicial decision.[40]

By using the terminology of strict liability as recommended by the *Restatement,* the court would also avoid the confusion and problems that are likely to arise with the notice of breach and disclaimer

[37] "Why not, then, talk of strict liability in tort, a thing familiar enough in the law of animals, abnormally dangerous activities, nuisance, workmen's compensation, libel, misrepresentation, and respondeat superior, and discard the word "warranty" with all of its contract implications?" Prosser, *The Fall of the Citadel (Strict Liability to the Consumer),* 50 MINN. L. REV. 791, 802 (1966).

[38] RESTATEMENT (SECOND) OF TORTS § 402A (1965) states:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

[39] RESTATEMENT (SECOND) OF TORTS § 402A (1965), comment m, states:

The rule stated in this Section is not governed by the provisions . . . of the Uniform Commercial Code, as to warranties; and it is not affected by limitations on the scope and content of warranties, or by limitations to "buyer" and "seller" in [the Code]. . . . Nor is the consumer required to give notice to the seller of his injury within a reasonable time after it occurs as is provided by [the Code]. The consumer's cause of action does not depend upon the validity of his contract with the person from whom he acquires the product, and it is not affected by any disclaimer or other agreement, whether it is between the seller and his immediate buyer, or attached to and accompanying the product into the consumer's hands. In short, "warranty" must be given a new and different meaning if it is used in connection with this Section. It is much simpler to regard the liability here stated as merely one of strict liability in tort.

[40] Garthwait v. Burgio, 153 Conn. 284, 216 A.2d 189 (1965); Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965); Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 212 A.2d 769 (1965); Wights v. Staff Jennings, Inc., 241 Or. 301, 405 P.2d 624 (1965); Ford Motor Co. v. Lonam, 217 Tenn. 400, 398 S.W.2d 240 (1966).

sections of the Code.[41] The Code is a statute designed to codify the law of commercial transactions. Strict liability in tort—and it bears repeating—is liability without fault, imposed by law on the manufacturer for personal injury or physical damage to property caused by its product.

At the least it seems safe to forecast that *Corprew* signals stormy weather for privity in the near future. Currently, the case can be limited to the abolition of the privity rule only where labeled products are sold in sealed containers. With the proper set of facts, however, the court might be convinced to impose strict liability expressly on the manufacturer across the board since it is clear that the theory does not provide automatic recovery for the consumer.

ROBERT A. WICKER

Trusts—Cy Pres Enacted in North Carolina

The 1967 General Assembly enacted legislation giving North Carolina courts power to use the doctrine of cy pres[1] in charitable trust administration. The North Carolina Supreme Court has long rejected the cy pres doctrine[2] while upholding modification

[41] In a California case which involved the UNIFORM SALES ACT, not the UNIFORM COMMERCIAL CODE, the California court held that where damages were sought for personal injuries no notice was required in an action for breach of warranty. The court treated the potential liability as non-contractual in nature and referred to it as strict liability. Greenman v. Yuba Power Prod., Inc., 59 Cal. 2d 67, 377 P.2d 897 (1963). *See generally* Comment, *Products Liability—Sales Warranties of the Uniform Commercial Code*, 46 N.C.L. REV. 451 (1968).

[1] The words "cy pres" are Anglo-French for "as near" and were originally part of the phrase "cy pres comme possible" meaning "as near as possible." The doctrine of cy pres gives to a court the power to alter the particular purpose of a charitable trust under certain circumstances. Where the testator or settlor intended that the trust property be applied to some particular purpose and yet also had a more general charitable intent, he presumably would have desired that the property be applied to a purpose "as near as possible" to the specific disposition chosen by him rather than that the trust be allowed to fail. Therefore, if the particular purpose named by the settler becomes impossible, illegal, or impracticable, the court will exercise its cy pres powers to select a disposition similar to that named by the settlor or testator. The cy pres doctrine is limited in its use to charitable trusts and is widely accepted among United States jurisdictions. *See* G. BOGERT, TRUSTS § 431 (2d ed. 1964) [hereinafter cited as BOGERT]; A. SCOTT, TRUSTS § 399 (2d ed. 1956) [hereinafter cited as SCOTT].

[2] As to the previous status of the cy pres doctrine in North Carolina, *see* E. FISCH, THE CY PRES DOCTRINE IN THE UNITED STATES § 2.03(g) (1950)