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Sales - Warranties - The Necessity of Privity of Contract in Suits Bases on Warranties

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SALES — WARRANTIES — THE NECESSITY OF PRIVITY OF CONTRACT IN SUITS BASED ON WARRANTIES

ONE MANIFEST deficiency found in the Uniform Sales Act has been the operation of the sections which provide for warranties, express or implied, in the sale of goods.[1] These sections set out the situations in which warranties arise in the sale of merchandise but refer only to "buyer" and "seller," by implication excluding those who do not fall in those categories. It is a well-settled majority rule that consumers who purchase from a middleman cannot recover from the original manufacturer of a defective chattel, but must proceed instead against the seller because they are not in privity of contract with the manufacturer.[2] And *a fortiori* the courts have denied relief on the basis of a warranty action in cases where, for one reason or another, the person injured by a defective chattel was not legally a buyer.[3]

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[1] "Definition of Express Warranty. Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchased the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty." Uniform Sales Act §12, N.D. Rev. Code §51-0113 (1943).

"Implied Warranties of Quality. Subject to the provisions of this chapter and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale except as follows:

"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 is the grower or manufacturer or not, there is an implied warranty that the goods shall be reasonably fit for that purpose;

"2. Where the goods are bought by description from a seller who deals in goods of that description, whether he is the grower or manufacturer or not, there is an implied warranty that the goods shall be of merchanteable quality;

"3. If the buyer has examined the goods, there is no implied warranty as regards the defects which such examination ought to have revealed;

"4. In the case of contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose;

"5. On implied warranty or condition as to the quality or fitness for a particular purpose may be annexed by the usage of trade; and

"6. An express warranty or condition does not negative a warranty or condition implied under this chapter unless inconsistent therewith." Uniform Sales Act §15, N.D. Rev. Code §51-0116 (1943). For the distinction between a sale and a contract to sell, referred to in the provision above, see 1 Williston, Sales §9 (2d ed. 1924).

[2] Wood v. Advance Rumely Thresher Co., 60 N.D. 384, 234 N.W. 517 (1931); Prinsen v. Russos, 194 Wis. 142, 215 N.W. 906 (1927); Jeanblanc, *Manufacturers Liability to Persons Other Than Their Immediate Vendees*, 24 Va. L. Rev. 134, 148 (1937).

[3] Loch v. Confair, 361 Pa. 158, 63 A.2d 24 (1949), was a case where a customer in a self service grocery store was injured when a bottle of gingerale which

As one commentator has stated, ". . . a study of the liability of the manufacturer to the ultimate purchaser presents the evolution of one phase of the law of sales in dramatic form. In less than a century the rapid changes in merchandising methods have demanded a shift from the policy of protecting the manufacturer to that of protecting the consumer as against the manufacturer." [4] Inherent in any such shift, it is apparent, are basic considerations of social policy shaped by the transformation of the business world from a relatively direct manufacturer-purchaser relationship to a vastly more complicated system of sub-vendees — wholesalers, warehousemen, retailers and the like — who stand between the consumer and the manufacturer. By holding a manufacturer liable for defects in the goods he sends into the stream of commerce, even in the absence of a showing of negligence, he is in effect being made an insurer of the goods.[5] This is concededly a drastic result, and there is good reason for hesitating to impose such an absolute liability on manufacturers as would result from a rule permitting suits on warranties even in the absence of privity of contract.[6] Nevertheless, the enforcement of this type of liability appears both desirable and just, especially in the case of articles intended for human use, because it places responsibility upon the agency in the best position to prevent the production of defective and unwholesome merchandise, the manufacturer.[7]

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she was placing in a merchandise cart to take to the cashier exploded. The customer sued the bottler for breach of an implied warranty of fitness concerning the bottle. It was held that the suit was improperly brought, since the customer had no contractual relation with the store until payment of the price for the bottle and therefore she could not claim damages for the breach of warranty, since the warranty did not extend to her in the absence of some contractual relationship. *Accord*, Lasky v. Economy Grocery Stores, 319 Mass. 224, 65 N.E.2d 305 (1946), 47 Col. L. Rev. 156, 41 Ill. L. Rev. 676 (1947). But compare Maybach v. Falstaff Brewing Co., 222 S.W.2d 87 (Mo. 1949) (similar facts in negligence action with apparent strict liability rule imposed on bottler).

[4] Jeanblanc, *supra* note 2, at 134.

[5] See Note, 29 B.U.L. Rev. 107, 114 (1949).

[6] "If it is desirable to insure every customer against such a risk, is it fair to make manufacturer, or those who by chance are his customers, bear its burden? If it is desirable, it seems a more straightforward result might be reached by proposing it as a government insurance, thus giving everyone concerned, in theory, a part in administering the policy, rather than permitting those administering the question of civil liabilities to effect a collateral result by burdening those who chance to be within their jurisdiction. On the single ground of desirability of insuring consumers against injury, without anything more, it does not seem that the absolute liability result can be pronounced fair to the parties." Peairs, *The God in the Machine, A Study in Precedent*, 29 B.U.L. Rev. 35, 77 (1949).

[7] Jeanblanc, *supra* note 2, at 157.

It has been said that the classic case, ". . . with which any discussion of this topic must begin,"[8] is the decision of *Winterbottom v. Wright.*[9] This was an action on the case for injuries sustained by a driver of a mail coach who was injured when the coach broke down because of latent defects. The defendant had a contract with the plaintiff's employer to keep the coach in repair. It was held that the plaintiff could not recover because the defendant's duty under the contract ran to the plaintiff's employer alone, and the plaintiff was not a privy to the contract. The language used in this decision came, in time, to be quoted for the rule that where one was injured by a defective chattel due to the negligence of the manufacturer supplying it, he could not recover against the manufacturer because he was not in privity of contract with the manufacturer.[10] The harshness of such a rule appears self evident, but later decisions quickly established a series of exceptions.

Thus, lack of privity of contract was held no barrier to recovery by some courts where the contract was a unilateral one between the manufacturer and the ultimate consumer.[11] It has been held that the implied warranty which a manufacturer extends to a retailer is also available to the sub-purchaser of the goods on the principle sustaining third party beneficiary contracts.[12] The Washington Supreme Court has held that an implied warranty of fitness of the chattel runs to the sub-purchaser as if the warranty were a covenant running with the land.[13] Sales of unwholesome food and beverages were held exceptions to the rule that there can be no recovery without privity of contract.[14] One writer comments that the North Carolina court has talked as if there were a separate law of Coca-Cola.[15] Other writers have argued that manu-

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[8] Feezer, *Tort Liability of Manufacturers and Vendors*, 10 Minn. L. Rev. 1, 2 (1925).

[9] 10 M. & W. 109, 152 Eng. Repr. 402 (1842).

[10] Feezer, *supra* note 8, at 3; Jeanblanc, *supra* note 2, at 134.

[11] Carlill v. Carbolic Smoke Ball Co., (1893) 1 Q.B. 256, 62 L.J.Q.B. 257; Timberland Lumber Co. v. Climax Mfg. Co., 61 F.2d 391 (3d Cir. 1932).

[12] Ward Baking Co. v. Trizzino, 27 Ohio App. 475, 161 N.E. 557 (1928). This holding appears to be accepted by the tentative draft of the Uniform Commercial Code §2-318 (May, 1949), discussed *infra.*

[13] Mazetti v. Armour & Co., 75 Wash. 622, 135 Pac. 633 (1913).

[14] Newhall v. Ward Baking Co., 240 Mass. 434, 134 N.E. 625 (1922); Broom v. Monroe Coca Cola Bottling Co., 200 N.C. 55, 156 S.E. 152 (1930); 9 N.Y.U.L.Q. Rev. 360, 362 (1932). *Cf.* Tompkins v. Quaker Oats Co., 239 Mass. 147, 131 N.E. 456 (1921); Wilson v. Ferguson Co., 214 Mass. 265, 101 N.E. 381 (1913).

[15] See Note, 33 Col. L. Rev. 868, 873 n. 29 (1933). This may well be true. The case referred to is Broom v. Monroe Coca Cola Bottling Co., 200 N.C. 55, 156 S.E. 152 (1930).

facturers' advertisements are offers to create a contractual relationship[16] or have pointed out that the action for breach of warranty historically sounded in tort and could be brought without the hampering requirement of privity.[17]

It seems clear that the development of these multiple exceptions to the rule has had little effect except to emphasize the need for a redefinition of the manufacturer's duty to the consumer. "Under modern conditions, when products of food or drink have been prepared under the exclusive supervision of the manufacturer and the consumer must take them as they are supplied, the representations constitute an implied contract or implied warranty to the unknown and helpless consumer that the article is good and wholesome and fit for use. If privity of contract is required, then, under the situation and circumstances of modern merchandise in such matters, privity of contract exists in the consciousness and understanding of all right thinking persons," the Missouri court has declared.[18] A comparable position has been taken by the federal courts, which have stated that ". . . the remedies of the injured consumers ought not to be made to depend on the intricacies of the law of sales." [19] Oddly enough, it was to a problem of this type that Franklin Delano Roosevelt once referred in citing the need for a less complicated law. "It would seem to me," he said, "that there is to be little of the sacrosanct in the problem of determining whether John Doe did actually sell a defective bill of goods to Richard Roe. The core of the matter, after all, is earthly fact, and no manner of theorizing and of the invocation of precedent is going to solve the essential issue." [20] However, attention should be called to the fact that Mr. Roosevelt was not attempting to deal with the main issue. It is not the problem of finding out whether Doe sold defective goods to Roe — really a matter of evidence — that has bothered the courts. It has been the question of decid-

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[16] Handler, *False and Deceptive Advertising*, 39 Yale L.J. 22, 26 (1929). But see, taking a contrary view, 7 Wash. L. Rev. 351, 354 (1932).

[17] 23 Calif. L. Rev. 621 (1935). For discussions of the early actions of breach of warranty which sounded in tort, see Ames, *A History of Assumpsit*, 2 Harv. L. Rev. 1, 8 (1888); 1 Williston, Sales §195 (2d ed. 1924); 18 Corn. L.Q. 445, 446 (1933).

[18] Madouros v. Kansas City Coca Cola Bottling Co., 90 S.W.2d 445, 450 (Kansas City Ct. of App. 1936).

[19] Ketterer v. Armour, 200 Fed. 322 (S.D.N.Y. 1912).

[20] 1 Public Papers and Addresses of Franklin D. Roosevelt 271 (1938).

ing whether Doe is liable for it that has caused most of the confusion.[21]

Despite the steady growth of exceptions to the rule requiring privity of contract, the rule itself has continued to cover most of the situations coming before the courts. The normal situation is illustrated by the North Dakota case of *Wood v. Advance Rumely Thresher Co.*[22] In that case, the action was for breach of an implied warranty concerning a tractor which the plaintiff had purchased from a salesman employed by the defendant. However, the tractor was not delivered directly from the manufacturer but came from a retail dealer, a fact the court regarded as controlling. The result is stated concisely in the opinion: "There being no privity of contract between the plaintiff and the defendant in the instant case, there could be no warranty and there being no warranty, it follows, that there could not be a breach of warranty . . . ." [23] This result, logical if the premise is accepted that privity of contract is an indispensable element in a suit for breach of warranty, has been reached even more decisively in the type of case where the person injured by a defect in a chattel did not stand in the position of purchaser of the chattel. Thus, it has been held that survivors of a consumer who dies because of a defect in the article purchased by the consumer cannot base their action on breach of an implied warranty since there was no privity of contract between the survivors and the retailer who sold the article.[24] Where the contract is one which the law will not recognize, such as an illegal sale of intoxicating liquor, the New York courts have held no recovery can be had for injuries caused by poisonous characteristics found in the drink on the theory of implied warranty, since to allow recovery for breach of warranty in this situation would mean recognizing

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[21] Actual business practices of manufacturers and retailers vary widely so far as warranties are concerned. This is illustrated by a field survey made by the University of Chicago Law School in 1929-1930. Out of a total of eighty reports secured from manufacturers and dealers, twenty-two cases were found in which no express warranties were made to consumers. In no case was it reported that any implied warranties arising out of the Uniform Sales Act were expressly given by the seller. In only nine cases was any warranty actually made directly to the consumer, ignoring the dealer or retailer. Bogert and Fink, *Business Practice Regarding Warranties in the Sale of Goods*, 25 Ill. L. Rev. 400 (1930).

[22] 60 N.D. 384, 234 N.W. 517 (1931).

[23] *Id.* at 390, 234 N.W. at 519.

[24] Kress & Co. v. Lindsey, 262 Fed. 331 (8th Cir. 1919). See Binion v. Sasaki, 80 Cal. App. 910, 41 P.2d 585, 23 Calif. L. Rev. 621 (1935).

an illegal contract.[25] A situation analogous to that faced by survivors of a sub-purchaser who dies because of some defect in a chattel is presented in cases where a person is injured by a defective chattel received in the course of his occupation. For example, it has been held that where a waitress in a lunch room received a piece of cake from her employer as part of her lunch and was injured by a nail baked into the cake, recovery could not be had against the bakery supplying the cake, since any implied warranties respecting the bakery's product extended only to the employer and not the employee.[26]

The complicated development of the law of sales concerning implied warranties appears to have left the courts in some confusion as to whether or not the action of the person injured is actually in contract or really sounds in tort.[27] It has, in fact, been suggested that the action for breach of warranty is not within the conventions of either tort or contract actions but is essentially *sui generis*.[28] A clear analogy may be developed between cases of this type proceeding on the tort theory and those proceeding on the contract theory. The general rule in tort actions established by the early American and English cases was that where a defective chattel was sold by a middleman to a sub-purchaser, the original negligence of the manufacturer was "insulated" by the resale and the purchaser's only remedy was against the immediate vendee, who in turn had recourse against the manufacturer.[29] Precisely as in the case of actions on warranties, a series of exceptions developed to mitigate the harshness of this general rule.[30] Where the chattel was of a type which the courts found "imminently dangerous," recovery was allowed directly against the manufacturer.[31] This was particularly true of food,[32] beverages,[33] and drugs.[34] Never-

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[25] Boliver v. Monnat, 130 Misc. 660, 224 N.Y. Supp. 535 (1927).

[26] Chysky v. Drake Bros. Co., 235 N.Y. 468, 139 N.E. 576 (1923). *Contra*, Ward Baking Co. v. Trizzino, 27 Ohio App. 475, 161 N.E. 557 (1928).

[27] Waite, Sales 192-197 (2d ed. 1938); Prosser, Torts §§82, 83 (1941).

[28] Waite, *supra* note 27, at 196.

[29] Prosser, *supra* note 27, §83.

[30] Liggett & Myers Tobacco Co. v. Cannon, 132 Tenn. 419, 178 S.W. 1009 (1915); Prosser, *supra* note 27, §83; Bohlen, *Liability of Manufacturers to Persons Other Than Their Immediate Vendees*, 45 L.Q. Rev. 343 (1929).

[31] Huset v. J. I. Case Threshing Machine Co., 120 Fed. 865 (8th Cir. 1903).

[32] Minutilla v. Providence Ice Cream Co., 50 R.I. 43, 144 Atl. 884 (1929); Ketterer v. Armour, 200 Fed. 322 (S.D.N.Y. 1912); Drury v. Armour & Co., 140 Ark. 371, 216 S.W. 40 (1919); Prosser, Torts §83 (1941).

[33] Boyd v. Coca Cola Bottling Works, 132 Tenn. 23, 177 S. W. 80 (1915); Freezer, *supra* note 8, at 18; Russell, *Manufacturers Liability to the Ultimate Consumer*, 21 Ky. L.J. 388, 389 (1933); Note, 17 A.L.R. 672, 696 (1922).

[34] Thomas v. Winchester, 6 N.Y. 397 (1852).

theless, the majority of cases continued to be covered by the old rule, despite the efforts of legal commentators to obtain a more liberal line of decisions.[35] In 1916, the situation came before Justice Cardozo in the famous case of *McPherson v. Buick Motor Co.*,[36] which in effect rejected the old rule and gave the consumer a direct remedy against the manufacturer of the defective chattel (in this case an automobile with a faulty wheel) though the original purchase had been through a middleman.[37] Thereafter, what Cardozo termed ". . . subtle distinction . . . between things inherently dangerous and things imminently dangerous" were not to determine whether the purchaser had or had not a direct remedy against the manufacturer.[38] The fundamental philosophy of the decision was clearly that the manufacturer ". . . by placing the car upon the market, assumed a responsibility to the consumer, resting not upon the contract but upon the relation arising from his purchase and the foreseeability of harm if proper care were not used." [39] While a few courts have adopted this point of view only after much delay,[40] it may safely be said that the *McPherson* case represents the law on the subject of tort liability.[41]

It might be added as a brief digression that in food and drink cases there has been a strong tendency to apply the doctrine of *res ipsa loquitur*, thus emphasizing once again the strong appeal made by a rule of strict liability.[42] Professor Waite comments that this trend has been so strong as to make this remedy practically equivalent to a suit based on warranty.[43] Thus, the *res ipsa loquitur* theory has been applied to cases in which such varied items as gauze bandages,[44] pieces

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[35] Bohlen, *The Basis of Affirmative Obligations in The Law of Torts*, 53 U.Pa.L. Rev. 209, 273, 337 (1905), may be referred to as an early example. See also Seavey, *Mr. Justice Cardozo and the Law of Torts*, 52 Harv. L. Rev. 372, 376, 39 Col. L. Rev. 20, 24, 48 Yale L.J. 390, 394 (1939).

[36] 217 N.Y. 382, 111 N.E. 1050 (1916).

[37] This decision, at least, appeared to meet the approval of the layman. See Radin, *Case Law and Stare Decisis*, 33 Col. L. Rev. 199, 205 (1933).

[38] McPherson v. Buick Motor Co., 111 N.E. 1050, 1054 (1916).

[39] Prosser, Torts §83 (1941).

[40] The Massachusetts court, long more conservative in this regard than other tribunals, has only recently adopted the rule of the McPherson case. Carter v. Yardley & Co., 319 Mass. 92, 64 N.E.2d 693 (1946).

[41] Carter v. Yardley & Co., 319 Mass. 92, 64 N.E.2d 693 (1946); Restatement, Torts §§394-402 (1934); Feezer, *Manufacturers Liability for Injuries Caused by His Products: Defective Automobiles*, 37 Mich. L. Rev. 1 (1938).

[42] Prosser, Torts §83 (1941).

[43] Waite, Sales 203 (2d ed. 1938).

[44] Beaumont Coca Cola Bottling Co. v. Guillot, 222 S.W.2d 141 (Tex. 1949).

of glass,[45] and the skeleton of a mouse [46] were found in beverages. The manufacture of perfume which irritated the skin,[47] and bread containing foreign substances [48] have also been held sufficient to authorize application of the doctrine.[49] While some courts have been reluctant to allow recovery on the *res ipsa loquitur* theory in situations of this type,[50] it seems clear that an increasing readiness on the part of many tribunals to hold manufacturers strictly liable in tort actions is discernible.

It is submitted that this trend in tort cases might well be followed by courts in their consideration of related problems where the suit is for breach of warranty. Whether the action sounds in tort or contract is not, after all, a matter of fundamental importance. What is important is that consumers have a clear, direct remedy against manufacturers of defective goods without being hampered by technical rules of law which appear to have outlived their usefulness. Certainly the technical nature of the rule demanding privity of contract in suits based on warranty — as opposed to similar suits based on warranty — is well illustrated by the fact that in at least two situations where the ordinary rule has been that no sale exists, recovery has been allowed for breach of warranty. In the case of bailments for hire, clearly not a sale transaction, the ordinary rule is that an implied warranty of reasonable safety and suitability for the intended use will be found.[51] The rule in respect to restaurants — based on early English precedent —

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[45] Rozumailski v. Philadelphia Coca Cola Bottling Co., 296 Pa. 114, 145 Atl. 700 (1929).

[46] Eisenbiss v. Payne, 42 Ariz. 262, 25 P.2d 163 (1933).

[47] Carter v. Yardley & Co., 319 Mass. 92, 64 N.E.2d 693 (1946).

[48] Bissonette v. National Biscuit Co., 100 F.2d 1003 (2d Cir. 1939).

[49] In Robinson v. Atlantic & Pacific Tea Co., 184 Misc. 571, 54 N.Y.S.2d 42 (1946), a customer in a self-service store was allowed to recover on the res ipsa loquitur doctrine for injuries received when she was struck on the head by a can which fell from the shelf. *Cf.* Byrne v. Boadle, 2 H. & C. 722, 159 Eng. Repr. 299 (1863); Kearney v. London, B. & S.C. Ry. Co., L.R. 5, Q.B. 411 (1870). Yet in the Robinson decision, supra, and in Pollat v. Wray, 141 Neb. 9, 2 N.W.2d 352 (1942), the fact was recognized that under the self-service plan of grocery store operation, customers are expected to move about the store, to freely handle merchandise and to remove and replace the goods on the shelves. How does this result square with the idea that to apply the res ipsa loquitur doctrine, the injurious instrumentality must be under the exclusive control of the defendant?

[50] See Ruffin v. Coca Cola Bottling Co., 311 Mass. 514, 42 N.E.2d 259 (1942); Maybach v. Falstaff Brewing Co., 222 S.W.2d 87 (Mo. 1949).

[51] Gambino v. John Lucas & Co., 263 App. Div. 1054, 34 N.Y.S.2d 383 (1942); Hoisting Engine Sales Co. v. Hart, 237 N.Y. 30, 142 N.E. 342 (1923); General Talking Pictures Co. v. Shea, 187 Ark. 568, 61 S.W.2d 430 (1933). Contra, Copeland v. Draper, 157 Mass. 558, 32 N.E. 944 (1893).

is that a customer does not purchase food but service,[52] yet the clear trend of judicial authority appears to be that recovery will be allowed on the warranty theory whether the transaction is held to be a sale or not.[53]

Despite the arguments advanced against the rule of strict liability,[54] it seems clear that the rule of privity is on its way toward rejection in warranty cases. The most authoritative single example is provided by the American Law Institute, which has included a provision directly covering the subject in the latest draft of the Uniform Commercial Code: "A warranty whether express or implied extends to any natural person who is in the family or household of the buyer or who is his guest or one whose relationship to him 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 . . ." [55] The comment following this section states that this provision is intended to broaden the right of the consumers in warranty and ". . . to free them from any technical rules as to 'privity' and to make them, insofar as feasible, directly enforceable against the party ultimately responsible for the injury." [56] Beyond this, the basic test set up by the Uniform Code is whether the ". . . person injured was in such a relationship to the buyer as could reasonably be expected to result in his use, handling or consumption of the goods in ordinary course, or was the type of relationship which could reasonably be expected to result in his being affected by the breach of warranty." [57] The Uniform Code also makes provision for the retailer who is sued by an injured consumer by providing that the retailer may interplead the manufacturer.[58]

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[52] Merrill v. Hodson, 88 Conn. 314, 91 Atl. 533 (1914); Prinsen v. Russos, 194 Wis. 142, 215 N.W. 905 (1927); F. W. Woolworth Co. v. Wilson, 74 F.2d 439 (1934); Kenny v. Wong Len, 81 N.H. 427, 128 Atl. 343 (1925); Nisky v. Childs, 103 N.J. Law 464, 135 Atl. 805 (1927); Bigelow v. Maine C. Ry., 110 Me. 105, 85 Atl. 396 (1912).

[53] Amdal v. F. W. Woolworth Co., 84 F.Supp. 657 (N.D. Iowa 1949), 26 N.D. Bar Briefs 59 (1950); Cushing v. Rodman, 82 F.2d 864 (App. D.C. 1936); Cliett v. Lauderdale Biltmore Co., 39 So.2d 476 (Fla. 1949); Harman v. S. H. Kress & Co., 78 F.Supp. 952 (S.D. Texas 1948); Vold, Sales §§ 152, 153 (1931); Tentative Draft, Uniform Commercial Code § 2-314 (1), comment 5 (May, 1949).

[54] Notably by Mr. Peairs in his article referred to in footnote 6.

[55] Tentative Draft, Uniform Commercial Code § 2-318 (May, 1949).

[56] *Id.* §2-318, comment 1.

[57] *Id.* §2-318, comment 2.

[58] *Id.* §2-718. This provision, together with the sections cited above, also solve the problem faced by the consumer who is forced to sue a middleman and then cannot collect because of insolvency.

The right of the consumer injured by breach of warranty to sue the retailer directly is also recognized.[59]

The result of these provisions of the Uniform Commercial Code, if adopted, would undoubtedly be of fundamental importance in the law of sales. The practical effect is to incorporate the foreseeability test of tort actions envisaged by the *McPherson* case into the law of warranty as a basis for determining whether a manufacturer shall be held strictly liable to the consumer injured because of a defective chattel. The procedure outlined by the Uniform Commercial Code therefore appears highly desirable, providing the clear, direct remedy against manufacturers which has been lacking under the Uniform Sales Act because of the privity requirement.

An examination of the law in North Dakota, while clearly disclosing the present rule to be that privity of contract is a necessity to a suit on an implied warranty,[60] nevertheless indicates some disposition on the part of the courts to give purchasers a direct remedy for breach of warranty despite efforts of the vendors to contract against such liability. Thus, in *Smith v. Oscar M. Wills & Co.*,[61] it was held that a complete disclaimer of warranty in a contract for the sale of alfalfa was not sufficient to bar recovery by the vendee when the seed turned out to be sweet clover, the court stating that despite the disclaimer of warranty the vendee could recover for "breach of contract." In *Ward v. Valker* [62] a similar warranty disclaimer was held ineffective to bar recovery by the vendee.[63] The subsequently decided case of *Minneapolis Threshing Machine Co. v. Hocking* [64] held, however, that such a disclaimer of warranty would be given effect by the court in the sale of farm machinery where the plaintiff had not rescinded within a reasonable time as permitted by North Dakota law.[65] Despite this decision, it seems

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[59] *Id.* §2-719.

[60] Wood v. Advance Rumely Thresher Co., 60 N.D. 384, 234 N.W. 517 (1931).

[61] 51 N.D. 357, 199 N.W. 861 (1924).

[62] 44 N.D. 598, 176 N.W. 129 (1920).

[63] However, see §51-0172, N.D. Rev. Code (1943): "Where any right, duty, or liability would arise under a contract to sell or a sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by custom, if the custom is such as to bind both parties to the contract or the sale."

[64] 54 N.D. 559, 209 N.W. 996 (1926).

[65] N. D. Rev. Code § 51-0707 (1943), provides that in the case of sales of certain types of farm machinery, the purchaser shall have a reasonable time after delivery in which to rescind the sale if the machinery fails to be reasonably fit for the purpose for which it was purchased, any provision to the contrary in the contract of sale being void as against public policy.

clear that *Smith v. Oscar H. Wills & Co., supra,* and *Ward v. Valker, supra,* show a disposition on the part of the North Dakota court to adopt liberal, non-technical rules with respect to warranties wherever possible. As has been previously pointed out in the *North Dakota Bar Briefs* [66] this is partly because of the recognized public policy in this state of protecting agricultural interests. The logical next step would be a decision overruling or modifying the rule of *Wood v. Advance Rumely Thresher Co., supra,* — a decision out of harmony with this policy — thus incidentally giving North Dakota consumers a clear-cut remedy against manufacturers of defective goods.

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STERILIZATION — SCOPE OF THE STATE'S POWER TO USE STERILIZATION ON MENTAL DEFECTIVES AND CRIMINALS — OPERATION OF NORTH DAKOTA STATUTE

FEW TOPICS have caused more vigorous debate among members of the legal profession than the operation and effect of statutes providing for the use of sterilization upon mentally defective human beings and upon habitual criminals. Touching, as they do, a fundamental part of human existence, the statutes have been bitterly assailed and vigorously defended by partisans on both sides of the controversy. Despite the attack leveled against them, the use of sterilization procedures has increased rapidly since the first statutes were enacted. Today, sterilization has become one of society's major weapons in the fight to preserve a healthy and intelligent human race.

CONSTITUTIONALITY OF STERILIZATION STATUTES

State statutes concerned with sterilization have been in force since the beginning of the 20th century.[1] The legality of

[66] Nordine, *Sales — Warranties — Disclaimers — Effectiveness as to Variety in a Sale of Seeds by Description,* 24 N.D. Bar Briefs 151 (1948).

[1] The date of enactment of first statute is in parenthesis following the name of the state:

Alabama (1919), statute declared unconstitutional, *In re* Opinion of Justices, 230 Ala. 543, 162 So. 123 (1935); Arizona (1929) Ariz. Code §§ 8-401, 8-406 (1939); California (1909), Cal. Code § 6624 (Deering 1937), Cal. Code § 2670 (Deering Supp. 1941); Connecticut (1909), Conn. Rev. Stat. c. 209 (1918); Delaware (1923), Del. Rev. Code § 3098 (1935); Georgia (1937); Idaho (1925), Idaho Code §§ 64-601 to 64-612 (1932); Indiana (1907), Burns Stat. §§ 22-1601 to 22-1618 (1933); Iowa (1911), Iowa Code §§ 145.1 to 145.22 (1946); Kansas (1913), Kan. Stat. §§ 76-149 to 76-155 (1935); Maine (1925), Me. Rev Stat.