administrative interpretations it would appear that little restriction of coverage of maintenance employees was effected by the 1949 amendment. The real effect of the amendment will not be known definitely until some case in these borderline areas reaches the Supreme Court. Until then it is probable that coverage under the act will not only be materially restricted but that it will continue to be extended in spite of the amendment.

JEANNE OWEN

Sales—Warranties—Implied in Sale of Food for Human Consumption

In the recent case of Draughon v. Maddox¹ the North Carolina Supreme Court held that in the sale of a cow at auction on a public market to a retail dealer there was an implied warranty that it was fit for human consumption. The court relied on two earlier North Carolina cases in which it was held (1) that there was an implied warranty that the article sold was suitable for the purpose intended² and (2) that there was an implied warranty in the sale of food for human consumption that it was wholesome and fit for that purpose.³ Relying on the statute requiring a health certificate with a cow if not sold for immediate slaughter,⁴ the court found that this cow, sold without a health certificate, must have been intended for immediate slaughter and therefore for human consumption.

The North Carolina cases on implied warranty of fitness for the purpose intended are not wholly consistent. In the early case of Dickson v. Jordan⁵ the court had held that there was no implied warranty of quality even where the seller knew the purpose for which the article was to be used, basing the decision on the fact that since the same price was paid by the one who did not reveal his purpose as by the one who did, there was no consideration to support a warranty of fitness.

Some doubt must have been cast on this rule by the decision in Thomas v. Simpson⁶ where the seller who contracted to furnish shingles was denied recovery because they were not fit for the purpose intended. The court did not mention the earlier case. Then in a dictum in a much later case, the court again said that if there was a sale for a particular purpose, the seller warranted the article to be fit for that purpose.⁷

One year after that dictum, however, there was a direct holding

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¹ 237 N. C. 742, 75 S. E. 2d 917 (1953).
⁵ 33 N. C. (11 Ired.) 166, 53 Am. Dec. 403 (1850).
⁶ 80 N. C. 4 (1879).
⁷ W. F. Main Co. v. Field, 144 N. C. 307, 311, 56 S. E. 943, 944 (1907).
that there was no warranty where the seller knew the purpose unless there was appropriate language to be a warranty. The court relied on the Dickson case and stated that there were some cases where a warranty would be implied, as where the article was manufactured for a particular purpose, citing the Thomas case. By way of dictum two years later, the court again stated that there would be no implied warranty even where the seller knew the purpose for which the article was intended.

Since that time, the court has ignored these earlier cases denying implied warranties and with a few exceptions has indicated that there is an implied warranty of fitness for the purpose for which the article is intended, the court frequently not making it clear whether the warranty is one of suitability for general purposes or one of fitness for a particular purpose. In some of these cases, the court has indicated that if the article was wholly unfit for the purpose intended, there would be a failure of consideration.

At times the rule as to implied warranty for fitness has been stated so broadly that it could cover even those sales where the seller did not know the intended purpose, although in all of the cases in which the

10 Poovey v. International Sugar Co., 191 N. C. 722, 725, 133 S. E. 12, 13 (1926) (dictum that there is a warranty if the seller assures the buyer the article is suitable); Hampton Guano Co. v. Hill Live-Stock Co., 168 N. C. 442, 447, 84 S. E. 774, 775 (1915) (dictum that there is no implied warranty of fitness).
problem has arisen the seller actually knew. In only two of the cases was reliance of the buyer on the seller's skill or judgment expressly made a factor to be considered in determining whether there was an implied warranty.

Where the article sold is for human consumption, whether the North Carolina court recognizes an implied warranty seems to depend upon whether there is a contractual relation between the parties. Thus in suits by the consumer against the retailer, North Carolina has recognized an implied warranty of fitness for human consumption. Likewise in suits by the retailer against his vendor, the court has recognized such an implied warranty. But in suits by the ultimate consumer against the manufacturer, the court has refused to recognize an action for breach of implied warranty. Thus as between the vendee and his immediate vendor, North Carolina has consistently allowed an action on implied warranty of fitness for human consumption.

In most of these cases recognizing an implied warranty of fitness for human consumption, the court apparently has based its decision on the general rule of fitness for the use intended, although the court in one case talked about the policy of preservation of public health and by way of dictum in a case involving the sale of feed for cattle, the court said that the rule was based on the public policy of regard for human life.

The decision in the instant case would appear to be consistent with the more recent North Carolina cases both as to warranty of fitness for the purpose intended and for human consumption. The inference seems


15 Davis v. Radford, 233 N. C. 283, 63 S. E. 2d 822 (1951) (salt substitute; immediate issue was whether defendant-retailer could bring in his vendor as codefendant in suit on implied warranty); Williams v. Elson, 218 N. C. 157, 10 S. E. 2d 668 (1940) (sandwich); Rabb v. Covington, 215 N. C. 572, 2 S. E. 2d 705 (1939) (sausage).


17 Thomason v. Ballard & Ballard Co., 208 N. C. 1, 179 S. E. 30 (1935) (flour); Caudle v. F. M. Bohannon Tobacco Co., 220 N. C. 105, 110, 16 S. E. 2d 680, 683 (1941) (tobacco; dictum); Enloe v. Charlotte Coca-Cola Bottling Co., 208 N. C. 305, 307; 180 S. E. 582, 583 (1935) (bottled drinks; dictum). In an earlier case the question was raised but the court found it unnecessary to decide whether suit could be maintained on an implied warranty, since in that case there was clearly negligence. Ward v. Morehead City Sea Food Co., 171 N. C. 33, 87 S. E. 958 (1916) (fish).


reasonable that since the cow was sold without a health certificate, the seller must have contemplated that it was being bought for immediate slaughter for human food. In many cases, however, as was pointed out above, the court has stated the rule of implied warranties in such a way as to imply that knowledge of the seller is not necessary.20

Although the North Carolina court has put little stress on reliance on the skill or judgment of the seller, two cases have indicated that such reliance by the buyer was necessary.21 However, neither the instant case nor the two cases cited in it as authority22 say anything about reliance of the buyer on the seller's skill and judgment. Apparently in this case there was no reliance, since the cow was sold at auction on a public market and both buyer and seller were experienced cattle dealers.

While the Draughon v. Maddox decision seems consistent with recent North Carolina cases, it is inconsistent with the weight of authority in other states. Although a majority of the courts recognize an implied warranty of fitness where the article is sold for a particular purpose,23 the rule applies only where the buyer relies on the seller's skill or judgment.24 Under the Uniform Sales Act, also, such an implied warranty for a particular purpose is recognized, but only if there is reliance by the buyer.25 Generally, too, in sales at auction, there are no implied warranties except as to title, the rule of caveat emptor being applied.26

At common law there was also generally recognized an implied warranty that food sold for human consumption was fit for that purpose and where food was bought from a retailer it was generally assumed that the seller knew the purpose for which the food was bought and that the buyer relied on the seller's skill or judgment.27 However, that special warranty did not usually apply where the sale was between dealers, as in the instant case, although there were cases recognizing an implied warranty even there.28 The Uniform Sales Act no longer recognizes a special warranty of the fitness of food for human consumption,29 but where there is knowledge of the purpose by the seller

20 See note 13 supra. 21 See note 14 supra.
23 46 AM. JUR., Sales § 346 (1943); 77 C. J. S., Sales § 325(a) (1952); 1 WILLISTON, Sales § 227 (Rev. ed. 1948).
24 46 AM. JUR., Sales §§ 346, 348 (1943); 77 C. J. S., Sales §§ 315(b), 325(b) (1952); 1 WILLISTON, Sales §§ 206, 235 (Rev. ed. 1948).
25 UNIFORM SALES ACT § 15(1); 77 C. J. S., Sales § 315(b) (1952); 1 WILLISTON, Sales §§ 227, 235, 248 (Rev. ed. 1948).
26 5 AM. JUR., Auctions § 46 (1936); 7 C. J. S., Auctions and Auctioneers § 8c(2) (1937).
27 22 AM. JUR., Food § 94 (1939); 77 C. J. S., Sales § 331(a)(1) (1952); 1 WILLISTON, Sales § 242 (Rev. ed. 1948).
28 22 AM. JUR., Food § 109 (1939); 77 C. J. S., Sales §§ 330, 331(a)(1) (1952); 1 WILLISTON, Sales § 242 (Rev. ed. 1948).
29 1 WILLISTON, Sales § 242a (Rev. ed. 1948).
and reliance by the buyer, the same result can be reached under the
provision for an implied warranty for a particular purpose. Where
the sale of food is to the ultimate consumer, the section has been given
a liberal construction so that much the same result has been reached
as under the common law. Since in the instant case the sale was not
to the ultimate consumer and the buyer did not rely on the seller’s skill
and judgment, there would under the majority rule be no implied war-
 ranty that the product was fit for human consumption.

The court in the principal case gives no reason other than precedent
for its decision. Perhaps it is following the policy expressed in Swift
& Co. v. Aydlett in 1926, when the court in advocating an extension of
the doctrine of implied warranty said:31

The harshness of the common-law rule of caveat emptor,
when strictly applied, makes it inconsistent with the principle
upon which modern trade and commerce are conducted; the
document of implied warranty is more in accord with the principle
that “honesty is the best policy,” and that both vendor and
vendee, by fair exchange of values, profit by a sale.

Or perhaps it is following expressions in other cases that such a war-
 ranty is based on the public policy of preservation of public health or
regard for human life.32

The Draughon case raises several interesting questions. By ignoring
earlier cases requiring reliance and applying the doctrine of implied
warranty to a set of facts where there was no reliance, is the court
indicating that reliance is unnecessary? If it is desirable to extend
the doctrine of implied warranties and to protect the public from un-
wholesome food, will the court imply a warranty directly from the
manufacturer to the ultimate consumer?33

The trend in these North Carolina cases seems to point toward a
rule of implied warranty which in effect is more nearly one of absolute
liability on the sellers of food for human consumption, at least as to
the immediate purchaser, whether the sale be to the consumer or to
a dealer, whether or not there be any reliance by the buyer on the
seller’s skill or judgment, and whether or not there be any actual
knowledge by the seller of the purpose for which the article is to be
used.

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30 1 Williston, Sales § 248 (Rev. ed. 1948).
31 192 N. C. 330, 334, 135 S. E. 141, 144 (1926). Repeated in Rabb v. Coving-
32 See notes 18 and 19 supra.
33 See Note, 30 N. C. L. Rev. 191 (1952).