maintain an action the day he was so appointed where the bankrupt could not maintain such an action the day before the reorganization petition was approved. If the jurisdiction of the federal court is *concurrent* with that of the state court, an even greater anomaly would result if Judge Clark's dissenting opinion were adopted: the trustee would be able to sustain his action in a federal court because of the Bankruptcy Act, but if federal jurisdiction were based upon diversity grounds or the cause pursued in a state court by the bankrupt prior to reorganization proceedings, or by the trustee following the proceedings, the action would be dismissed.

When this is brought to light, the opinion of the court in the principal case that the proceeding was based wholly upon a state created claim which was not incorporated into the Bankruptcy Act and was not to be construed as being a part of "proceedings in bankruptcy" for which uniformity was sought, is the only proper and practical conclusion.

SALES—IMPLIED WARRANTY—NON-LIABILITY OF WHOLESALER FOR UNWHOLESOME PACKAGED FOOD

Plaintiff's wife purchased some "apricot puff" cookies in their original package from a retail grocer, who had previously bought them from defendant, a wholesaler. In eating one of the cookies he was injured when he swallowed a wire allegedly contained therein. The trial court gave judgment for the plaintiff. On appeal the intermediate appellate court affirmed the trial court's decision and certified the question of whether the wholesaler is directly liable to the consumer to the Texas Supreme Court. On the first hearing, the question was answered in the affirmative, but on a re-hearing, the question was answered in the negative, four judges dissenting. The liability of the wholesaler is logically contingent on that of the retailer. Since the retailer is not liable to the consumer because he has no better knowledge of the contents of the container than the consumer, the wholesaler is not liable.[1]

The court in the principal case reached the same result as the majority of courts which have considered this problem, but for a

1. Bowman Biscuit Co. of Texas v. Hines, 251 S.W.2d 153 (Tex. 1952).

different reason.[2] The chief reason advanced by other tribunals for their denial of recovery has been the lack of an immediate contractual relation between the parties.[3] The Texas court, however, does not conceive liability under an implied warranty as contractual but rather as a liability imposed by operation of law as a matter of public policy.[4] Therefore the privity problem was not even discussed in the principal case. Instead the court took the position that, as a matter of logic, the wholesaler is not liable on such facts unless the retailer would be liable on the same facts. Since Texas has not adopted the Uniform Sales Act, the determination of the possible liability of the retailer was guided by common law rules.

At common law, the retailer who sold to the consumer for immediate consumption impliedly warranted the wholesomeness or fitness of the food.[5] This warranty was based on the belief that the consumer should be allowed to rely on the judgment of the retailer, who, because of his experience in dealing with food, was in a better position to inspect and judge its fitness for human consumption.[6] With the development of the technique of packaging food in sealed containers, however, a question arose as to the applicability of this warranty to such food since there was no way for the retailer to inspect it and the consumer therefore could not reasonably rely on the skill of the retailer. The result

2. Carlson v. Turner Centre System, 263 Mass. 339, 161 N.E. 245 (1928); De Gouveia v. H. D. Lee Mercantile Co., 231 Mo. App. 447, 100 S.W.2d 336 (1937); Cornelius v. B. Fillipone and Co., 119 N.J.L. 540, 197 Atl. 647 (1938); Singer v. Zabelin, 24 N.Y.S.2d 962 (N.Y. City Ct. 1941). *Contra:* Swengle v. F. & E. Wholesale Grocery Co., 147 Kan. 555, 77 P.2d 930 (1938); Nelson v. West Coast Dairy Co., 5 Wash. 2d 284, 105 P.2d 76 (1940).

3. Carlson v. Turner Centre System, *supra* note 2, De Gouveia v. H. D. Lee Mercantile Co., *supra* note 2, Cornelius v. B. Fillipone and Co., *supra* note 2, Singer v. Zabelin, *supra* note 2.

It will be noted that there was an additional privity problem in the principal case due to the fact that plaintiff's wife and not plaintiff purchased the cookies. Some courts have avoided this issue by considering the wife as the agent for the husband. Vaccarino v. Cozzubo, 181 Md. 614, 31 A.2d 316 (1943) (the retailer was not held liable but on grounds other than lack of privity); Ryan v. Progressive Grocery Stores, 255 N.Y. 388, 175 N.E. 105 (1931); Visusil v. W. T. Grant Co., 253 App. Div. 736, 300 N.Y. Supp. 652 (2d Dep't 1937). As was pointed out above, however, the court in the principal case did not consider this problem since it conceived liability under implied warranty not as contractual but as liability imposed by operation of law.

4. Decker & Sons, Inc. v. Capps, 139 Tex. 609, 164 S.W.2d 828 (1942).

5. 1 WILLISTON, SALES § 242 (3d ed. 1948).

6. *Ibid.*

was a split of authority with regard to the retailer's liability.[7] Those courts which extended his liability under an implied warranty of fitness to canned and packaged food advanced the following reasons, among others, for their decisions: (1) the retailer's superior skill, which then applied, not to his inspection of the goods, but to his selection of a reputable and reliable manufacturer,[8] (2) the protection of public health,[9] and (3) the practical consideration that if liability were imposed on the retailer, he in turn could recoup his losses from the manufacturer or wholesaler from whom he purchased the goods.[10] The tribunals that refused to allow recovery against the retailer stated the same reason as that given in the principal case, *i.e.*, that since the retailer could not possibly ascertain whether the contents of the can or package were unwholesome, the consumer could not reasonably rely on his judgment and therefore it would be unfair to subject him to liability.[11] This reasoning has been questioned as injecting a fault element into the situation, and, therefore, as being con-

7. The following cases held that the retailer was not liable: Scruggins v. Jones, 207 Ky. 636, 269 S.W. 743 (1925); Bigelow v. Maine Central R.R., 110 Me. 195, 85 Atl. 396 (1912); Kroger Grocery Co. v. Lewelling, 165 Miss. 71, 145 So. 726 (1933); Julian v. Laubenberger, 16 Misc. 646, 38 N.Y. Supp. 1052 (N.Y. Munic. Ct. 1896); Pennington v. Cranberry Fuel Co. 117 W. Va. 680, 186 S.T. 610 (1936). In the following cases the retailer was held liable: Sencer v. Carl's Market, 45 So.2d 671 (Fla. 1950); Sloan v. F. W. Woolworth Co., 193 Ill. App. 620 (1915); Chapman v. Roggenkamp, 182 Ill. App. 117 (1913); De Gouveia v. H. D. Lee Mercantile Co., 231 Mo. App. 447, 100 S.W.2d 336 (1937); *accord*, Rabb v. Covington, 215 N.C. 572, 2 S.E.2d 705 (1939). The case of Griggs Canning Co. v. Josey, 139 Tex. 623, 164 S.W.2d 835 (1942), in which the retailer was held liable, was in effect overruled in the principal case.

8. De Gouveia v. H. D. Lee Mercantile Co., 231 Mo. App. 447, 452, 100 S.W.2d 336, 339 (1937).

9. Chapman v. Roggenkamp, 182 Ill. App. 117, 121 (1913).

10. De Gouveia v. H. D. Lee Mercantile Co., 231 Mo. App. 447, 452, 100 S.W.2d 336, 339 (1937). Another reason that has been advanced for holding the retailer liable is that if the consumer were allowed to recover from the manufacturer or packer only, he might have considerable difficulty in reaching that party so as to be able to sue him. *See* Swengle v. F. & E. Wholesale Grocery Co., 147 Kan. 555, 561, 77 P.2d 930, 935 (1938). The same reason was expressed in Griggs Canning Co. v. Josey, 139 Tex. 623, 633, 164 S.W.2d 835, 840 (1942), which case was in effect overruled in the principal case.

11. Scruggins v. Jones, 207 Ky. 636, 269 S.W. 743 (1925); Bigelow v. Maine Central R.R., 110 Me. 105, 85 Atl. 396 (1912); Kroeger Grocery Co. v. Lewelling, 165 Miss. 71, 145 So. 726 (1933); Julian v. Laubenberger, 16 Misc. 646, 38 N.Y. Supp. 1052 (N.Y. Munic. Ct. 1896); Pennington v. Cranberry Fuel Co., 117 W. Va. 680, 186 S.E. 610 (1936). It has been further argued that public safety could be preserved by allowing the consumer to recover from the manufacturer, the party actually at fault. See Kroeger Grocery Co. v. Lewelling, 165 Miss. 71, 82, 145 So. 726 (1933).

trary to the common law concept of warranty, which held the seller liable regardless of fault.[12] In addition to mentioning that the retailer could recoup his losses from the wholesaler or manufacturer, the dissent in the principal case seemed to adopt this criticism of the majority rationale.[13]

Another common law theory on the basis of which the defendant in the principal case could possibly have been held liable is the implied warranty of merchantability, which was imposed in the case of a sale by description as distinguished from a sale of specific goods.[14] It seems clear that the cookies in question were not merchantable,[15] but the facts of the principal case do not indicate explicitly whether or not the sale was by description. Had the retailer selected the cookies on plaintiff's wife's request for some "apricot puff" cookies, there is little doubt but that the sale would have been by description.[16] If, however, plaintiff's wife had selected the cookies herself from the shelf, it might be argued that the package was specified and that therefore no such warranty could be implied; or, on the other hand, the contention could be advanced that though the package was specified due to the purchaser's selection, the cookies themselves were still sold by description, in which case the warranty would still attach. In any event, these arguments were not considered in the principal case.

In the cases which have arisen under the Uniform Sales Act, the great weight of authority holds that the retailer is liable to the immediate consumer for unwholesome canned or packaged foods on the basis of the implied warranty of fitness set forth in that act.[17] Moreover, it has been stated that the implied war-

12. 1 WILLISTON, SALES § 242 (3d ed. 1948).

13. *See* Bowman Biscuit Co. of Texas v. Hines, 251 S.W.2d 153, 161 (Tex. 1952) (dissenting opinion).

14. 1 WILLISTON, SALES § 230a (3d ed. 1948). A sale by description occurred where the identification of the goods which were the subject matter of the bargain depended solely upon a description of them and not upon an observation of them by the parties. 2 *id.* § 224. The term "merchantability," though it has been given a variety of meanings, at least required that the goods be salable as goods of the general kind which they were described to be when purchased. 2 *id.* § 243.

15. Ryan v. Progressive Grocery Stores, 255 N.Y. 388, 175 N.E. 105 (1931).

16. *Ibid.*

17. 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); Gimenez v. Great Atlantic & Pacific Tea Co., 264 N.Y. 390, 191

ranty of merchantability of the same statute offers an alternative theory by which the purchaser of unwholesome canned or packaged goods can recover against the retailer.[18]

If it is postulated that the imposition of liability under implied warranty is a matter of policy, it seems clear that the decision on the issue in the principal case could be made either way because there are valid arguments on both sides. It is, however, submitted that the reasoning in the principal case is to a certain extent faulty. To state categorically that the wholesaler should be liable if the retailer is liable does not take into consideration the fact that the profit margin of the wholesaler is smaller than that of either the retailer or the manufacturer and the fact that the wholesaler probably has even less opportunity than the retailer to inspect the goods.

TORTS — LABEL OF "COMMUNIST DOMINATED" HELD LIBELOUS PER SE

An officer of defendant organization mailed a letter and mimeographed enclosures to members of the organization's board of directors and to certain newspapers. The mimeographed enclosures dealt with the qualifications of candidates for election and in the course of discussion referred to plaintiff organization as being Communist dominated. In plaintiff's suit for libel the district court awarded judgment for the plaintiff. On appeal, held: affirmed. To write that an organization is Communist dominated is to subject such organization to public hatred and contempt, to its immediate harm, and is, therefore, "libelous per se."[1]

A publication is said to be defamatory if it tends to injure the reputation of another so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him,[2] and that criterion is appropriate whether the defamation takes the form of libel or slander.[3] Whereas, in the law of

N.E. 27 (1934). For a collection of cases in point, see Notes, 142 A.L.R 1434 (1943), 90 A.L.R. 1269 (1934).

18. Ryan v. Progressive Grocery Stores, 255 N.Y. 388, 175 N.E. 105 (1931).

1. Utah State Farm Bureau Federation v. National Farmers Service Corp., 198 F.2d 20 (10th Cir. 1952).

2. Joint Anti-Fascist Refugee Commission v. McGrath, 341 U.S. 123 (1951); RESTATEMENT, TORTS § 559 (1938).

3. MCCORMICK, DAMAGES, 415-419 (1935); Carpenter, *Defamation—Libel and Special Damages*, 7 ORE. L. REV. 353 (1928); Green, *Relational*