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Family Allowances—Survival of Action to Widow's Estate—Discretion of Trial Court in Granting; Evidence—Admission by Silence—Test of Prejudicial Error; Sales—Warranty—Liability of Wholesaler to Ultimate Consumer

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try. Merely by way of suggestion, the following are offered as possible, and it is believed, practical solutions: (1) An absolute repudiation by the courts and the National Labor Relations Board of the misconceived and inapplicable position that jurisdiction will not be assumed over inter-union disputes because the rivals are affiliated with the same parent; (2) utilization of the ordinary contract and tort approach in all cases where the employer has a valid and binding agreement with one of the rival unions; (3) legislation prohibiting picketing, boycotting and comparable activities in purely jurisdictional disputes;[67] and (4) a modification of the anti-injunction statutes, both state and federal, restoring the right of the courts to exercise their equitable jurisdiction where the dispute is between two unions and no question of wages, working conditions or hours is involved. If these propositions appear too radical, it can only be said in reply that unless some corrective is soon applied there will be no end to the needless loss and suffering engendered by these unprofitable jurisdictional conflicts. DONALD R. COLVIN

[67] Similar legislation has been enacted in Oregon (Ore. Laws 1939, c. 2) and Minnesota (Minn. Laws 1939, c. 440). At this writing their constitutionality has not been passed upon by the United States Supreme Court but it would appear that the reasonable exercise of the state police power would save them from condemnation and place them outside the authority of Thornhill v. Alabama, 310 U. S. 88, Sup. Ct. 730, 84 L. ed. 1093 (1940).

RECENT CASES

FAMILY ALLOWANCES—SURVIVAL OF ACTION TO WIDOW'S ESTATE—DISCRETION OF TRIAL COURT IN GRANTING. *W*, a widow of *H*, with no surviving minor children, petitioned the trial court for a family allowance which was granted in the sum of $575 and paid. Thereafter *W* petitioned *R*, executrix of *H's* estate for an additional allowance which *R* denied. *W* then brought action against *R*. Prior to trial of the case *W* died and *E*, executrix of *W's* estate was substituted as plaintiff to the action. *R* applied for a writ of prohibition to restrain further proceedings. The writ was issued by the Supreme Court which *held:* that "the right to the family allowance in this case is personal to the widow, and that the action does not survive to the executrix to her estate." There was a dissent by Justice Millard on the grounds of the impropriety of the writ of prohibition, a question not within the scope of this note, and a dissent by Justice Simpson taking issue with the court's interpretation of the statute involved, REM. REV. STAT. § 1476. *State ex rel. Cook v. Superior Court for Grant County*, 123 Wash. Dec. 231, 160 P. (2d) 606 (1945).

> REM. REV. STAT. § 1476 provides: "In addition to the awards herein provided for, the court may make such further reasonable allowance of cash out of the estate as may be necessary for the maintenance of the family according to their circumstances, during the progress of the settlement of the estate, and any such allowance shall be paid by the executor or administrator in preference to all other charges, except funeral charges, expenses of last sickness and expenses of administration."

The majority of the court, in an opinion written by Justice Mallery, stated the case to be one of first instance in this state and cited as the basis of its decision *Easton v. Fessenden*, 65 R. I. 259, 14 A.(2d) 508 (1940), which, reviewing the decisions on the question, concluded that the survival of the right of action to the widow's estate depended upon whether the wording of the statute awarding the allowance was mandatory, so as to vest the right to ". . . a fixed and definite allowance of certain personal property out of her husband's estate . . ." in the widow immediately upon death of the husband, or whether the wording of the statute was discretionary, permitting, but not ordering the court or other body or person properly authorized to grant and fix the amount of the allowance. Under the latter type of statute, the Rhode Island court concluded, ". . . the cases generally hold that the right to the personal property of the husband's estate herein described is personal to the widow and will not pass to her executor or administrator . . ."

The cases cited in the A. L. R. annotation on the question of survival of right of family allowance, 144 A. L. R. 270, substantially support the position taken by the Rhode Island court and followed by our court. Representative examples of the type of mandatory statute referred to provide that on the death of the husband some authorized person or body of persons shall select or set aside personal property of a certain type or in a certain amount for the use of the widow. *In re Hearn's Estate*, 22 Del. Ch. 447, 195 Atl. 367 (1937); *Brown Adm'r v. Joiner Adm'r*, 77 Ga. 232, 3 S. E. 157 (1888) and 80 Ga. 486, 5 S. E. 497 (1888); *Pyles v. Bowie*, 123 Md. 13, 90 Atl. 772 (1914); *Williams v. Schneider*, Mo. App., 1 S. W. (2d) 230 (1928) and Mo. App., 1 S. W.(2d) 232 (1928); *In re James Estate*, 38 S. D. 107, 160 N. W. 525 (1916); *Stetson v. Hoyt*, 139 Ohio St. 345, 40 N. E. (2d) 128 (1942).

Some courts which have denied the survival of this right of action have determined the point from a consideration of the procedure necessary to vest the right in the widow, finding that her failure to select personal property or to request an allowance before her death prevented her estate from succeeding to a valid claim. *In re Hemphill's Estate*, 157 Wis. 331, 147 N. W. 1089 (1914); *Zunkel v. Colson*, 109 Iowa 695, 81 N. W. 175 (1899). Other courts have settled the issue by consideration of the more general question of strict application of common law principles of non-survival of personal actions in absence of explicit statutes. *In re Samson's Estate*, 142 Neb. 556, 7 N. W.(2d) 60, 144 A. L. R. 264 (1942). Since the latter more general consideration is ultimately involved, the decision of the respective court on the specific question is bound to reflect that court's attitude on survival of personal actions generally. In this respect it is in point to note that the Washington court subscribes to the common law position, disfavoring survival. *Warner v. Benham*, 126 Wash. 393, 218 Pac. 260 (1923); *Jones v. Matson*, 4 Wn.(2d) 667, 104 P.(2d) 591 (1940).

The court in the present case stressed the discretional words of REM. REV. STAT., § 1476, ". . . the court *may* make such further reasonable allowance of cash out of the estate *as may be necessary* . . ." (italics supplied by the court), and concluded, "If the court, in its sound discretion, may determine that no allowance is necessary and hence deny one in any amount whatever, it would follow that a right to an allowance would not vest immediately upon an application for one." This statement seems directly to contradict prior holdings of the court that a family allowance, even under REM. REV. STAT. § 1476, is virtually mandatory under the liberal con-

struction of this statute to be given on general grounds of public policy. *In re Hooper's Estate,* 117 Wash. 463, 201 Pac. 740 (1921); *In re Andrews Estate,* 123 Wash. 546, 212 Pac. 1073 (1923); *In re Van Duyn's Estate,* 129 Wash. 528, 225 Pac. 446 (1924); *In re Behre's Estate,* 130 Wash. 458, 227 Pac. 859 (1924); *In re Hilleware's Estate,* 159 Wash. 580, 294 Pac. 230 (1930).

The apparent contradiction of these holdings to the position taken by the court in the present case arises from changes in the wording of the allowance statute which the court apparently regarded as immaterial until the present time. In *Griesemer v. Boyer,* 13 Wash. 171, 43 Pac. 17 (1895), the court granted an allowance to a non-resident widow even though she had received substantial amounts from life insurance, pointing out that the statute in effect at that time, 2 HILL'S CODE § 973, stated ". . . if the amount thus exempt (from execution) be insufficient for the support of the widow . . . the court shall make such further reasonable allowance out of the estate as may be necessary for the maintenance of the family according to their circumstances during the progress of the settlement of the estate." The court here said of the allowance, "It is an absolute right that the statute gives unqualified by collateral conditions." In *In re Murphy's Estate,* 30 Wash. 9, 70 Pac. 109 (1902) the court construed the same statutory provisions, then contained in BAL. CODE, § 6220, to be broad enough to allow, under general considerations of public policy, a surviving father amounts sufficient to take care of household expenses and needs of minor children in spite of the fact that the language of the statute specifically granted the allowance only to widows and minor children. In *In re Bell's Estate,* 70 Wash. 498, 127 Pac. 100 (1912), claims were made against an administrator under the terms of REM. & BAL. CODE § 1466 and § 1467, which contained provisions identical to those of 2 HILL'S CODE § 973, for expenses incurred in rendering medical and other services to the widow. The claims were allowed by the court, though they had been rendered by the creditors and the widow had died before the proceedings were completed in the lower court, under the principles enunciated in the *Murphy* case, *supra.*

The broad principles of public policy laid down by the court in these early cases were later cited to sustain grants of family allowance made under REM. REV. STAT., § 1476, the court going so far in one instance, *In re Van Duyn's Estate, supra,* as to cite in reference to the current family allowance statute, the statement "Our statute . . . is mandatory." from *In re Gorkow's Estate,* 20 Wash. 563, 56 Pac. 385 (1899), where the statement was made not of the allowance statute, but of the homestead exemption provisions, 2 HILL'S CODE § 972. These considerations of policy emphasized by the court led it to overlook entirely, until the present case, the fact that the language of the allowance statute was changed in the Laws of 1917, c. 156, § 106, p. 672, from its old form of ". . . the court shall make such further reasonable allowance . . ." to ". . . the court may make such further reasonable allowance . . ."

Some support for the court's present position may be found in the fact that the legislature has retained the word "shall" in reference to other awards under probate proceedings in REM. REV. STAT. § 1474 and §1475. Thus it may well have intended the trial court to have power of discretion in the matter of granting family allowances as well as in determining the amount. If public policy would seem to dictate otherwise for the protection of the survivors the remedy would seem to lie in the legislature, for it would

be difficult to predict whether the higher court will now pursue the "discretionary" approach to the family allowance question opened by its reexamination of the statute, or whether it will revert to the "public policy" concepts of its former decisions. R. G. L.

EVIDENCE—ADMISSION BY SILENCE—TEST OF PREJUDICIAL ERROR. *D* was arrested by *A* who was near the scene of but did not witness the affray between *D* and the state's prosecuting witness. On turning *D* over to two policemen *A* stated in their presence that "he cut a man with a knife." At the trial one of the policemen was permitted to testify over *D's* objection that the statement by *A* was made in *D's* presence and hearing and that he failed to deny it. *D* was convicted of third degree assault. On appeal it was *held:* that upon assumption that the defendant was under arrest when the accusatory statement was made, the admission of the evidence was error, although the majority were of the opinion that the error was not prejudicial and the judgment was affirmed. Four judges dissented. *State v. Redwine,* 123 Wash. Dec. 435, 161 P. (2d) 205 (1945).

This jurisdiction follows the general rule as stated in the majority opinion of the instant case that "when a statement is made in the presence of an accused that is accusatory or incriminating in character, and such statement is not denied, contradicted, or objected to by him, both the statement and the fact of his failure to deny, contradict, or object are admissible in a criminal trial as evidence of his acquiescence in its truth." *State v. Baruth,* 47 Wash. 283, 91 Pac. 977 (1907); *State v. Goodwin,* 119 Wash. 135, 204 Pac. 769 (1922); *See* notes (1932) 80 A. L. R. 1235; (1938) 115 A. L. R. 1510; *Also* 4 Wigmore, *Evidence* (3d ed. 1940) § 1071.

But if the accused is under *arrest* or in *custody,* evidence of such accusatory statements and the fact of failure to deny them is inadmissible. *State v. McKenzie,* 184 Wash. 32, 49 P.(2d) 1115 (1935). *See also State v. Cullen,* 18 Wash. 394, 59 Pac. 1040 (1897). The *rationale* for this exception to the general rule seems to be that silence is perhaps the best strategic policy whether guilty or innocent, and such restraint as arrest imposes "destroys the basis for an inference of acquiescence by silence or failure to controvert." 2 Wharton, *Criminal Evidence* (11th ed. 1935) § 661. This exception seems necessary in view of WASH. CONST. Art I, § 9, which provides no person shall be compelled in any criminal case to give evidence against himself. It would be anomalous to allow circumvention of this constitutional safeguard by permitting an accused's silence to be used against him.

The instant decision recognizes the rule of the *McKenzie* case and holds that upon the assumption accused was under arrest (a fact questioned in the majority opinion but assumed *arguendo)* at the time the accusatory statement was made, then the admission of the statement and the accused's failure to deny it was error. But by the rule of the instant case to be *prejudicial* error, it must appear that the exclusion of the evidence would probably have resulted in a different verdict. In holding that the error was not prejudicial the court emphasized that appellant did not testify or produce evidence in his own behalf.

The dissenting judges felt that the conclusion of the majority that the error was not prejudicial was conjectural. One dissenter said that to so hold "is to claim clairvoyant powers and is to arrogate to ourselves the attribute of omniscience, a quality inherent only in Deity." Another dissenting justice (formerly a trial judge of long experience) said that in none of

the cases tried before him was he "able to ascertain what evidence compelled a verdict."

This case seems to mean that unless the defendant testifies or produces other evidence in his behalf, admission of evidence of his "silence," even while under arrest, although technically error under the *McKenzie* rule, will not work a reversal. M. B. K.

SALES—WARRANTY—LIABILITY OF WHOLESALER TO ULTIMATE CONSUMER. *X* manufacturer sold anti-freeze which contained highly corrosive elements, to *D*, wholesaler. *D* resold the anti-freeze to *A*, a retailer, who in turn sold it to *B*, a service station. *P* purchased a sealed gallon jug of the anti-freeze from *B* without knowledge of the defect, and used it in the radiator of his car according to directions. The radiator and motor were damaged as a result of corrosion and *P* brought suit against *D*, having failed to obtain service of process upon *X*. *Held: P* could not recover from *D* on the basis of an implied warranty because no privity of contract existed between the parties. *O. K. Cochran v. H. D. McDonald*, 123 Wash. Dec. 324, 161 P.(2d) 305 (1945).

The court applied the generally accepted rule in the law of sales that a seller is not liable to any person other than his immediate vendee, the action being one upon an implied or express warranty, and that without privity of contract no suit can be maintained. *Gearing v. Berkson*, 223 Mass. 257, 111 N. E. 785 (1916); *Prinsen v. Russos*, 194 Wis. 142, 215 N. W. 905 (1927); *Chysky v. Drake Bros. Co., Inc.*, 235 N. Y. 468, 139 N. E. 576 (1923). The Washington court has, however, along with a growing minority, recognized an aberration from the general rule and has allowed a consumer to recover under an implied warranty from the manufacturer or producer (not his immediate vendor) in those cases involving the sale of articles inherently dangerous to human life. *Weiser v. Holzman*, 33 Wash. 87, 73 Pac. 797, 99 Am. St. Rep. 937 (1903) (explosive substance); *Blood Balm Co. v. Cooper*, 83 Ga. 457, 10 S. E. 118, 5 L. R. A. 612, 20 Am. St. Rep. 324 (1889) (drugs). The exception has been invoked particularly where the sale relates to foodstuffs. *Mazzeti v. Armour & Co.*, 75 Wash. 622, 135 Pac. 633, Ann. Cas. 1915C 140, 48 L. R. A. (N. S.) 213 (1913); *McSpedon v. Kunz*, 271 N. Y. 131, 2 N. E.(2d) 513, 105 A. L. R. 1497 (1936); *Madouros v. Kansas City Coca-Cola Bottling Co.*, 90 S. W.(2d) 445 (Missouri App. 1936). This departure from the general rule by these courts is purportedly grounded upon a consideration of public policy justifying the imposition of absolute liability upon manufacturers and producers for the protection of the health and safety of the consuming public (cases cited *supra*). The principal case represents a further attempt to extend the general rule to bring the wholesaler within the realm of strict liability to the remote purchaser irrespective of a want of privity. The case is unique in that the food and dangerous article cases furnish the only available authority upon the question. There is a split among these latter cases with the majority holding the wholesaler exempt from liability. *Degouveia v. H. D. Lee Mercantile Co.*, 231 Mo. App. 447, 100 S. W. (2d) 336 (1936); *Carlson v. Turner Centre System*, 263 Mass. 356, 161 N. E. 245 (1928); *Cornelius et al. v. B. Filippone & Co., Inc.*, 119 N. J. L. 540, 197 Atl. 647 (1938). However, a contrary view has been taken in several recent decisions, adhering to the public policy consideration, and have allowed an injured consumer of unwholesome food to recover from the wholesaler. *Swengel v. F. & E. Wholesale Grocery*

Co., 146 Kan. 555, 77 P. (2d) 930 (1938); *Connor v. Great Atlantic & Pacific Tea Co.*, D. C. Mo., 25 F. Supp. 855 (1939); *Challis v. Hartloff*, 133 Kan. 221, 299 Pac. 586 (1931).

A collateral problem raised in the principal case is the applicability of Sec. 15(1) of the Uniform Sales Act. The two elements requisite to raise an implied warranty under this provision can be stated briefly: (1) that the buyer either expressly or by implication made known to the *seller* the particular purpose for which the article is to be used, and (2) that the buyer relies upon the seller's skill or judgment. It has been suggested that the first element applies only to buyer and seller who are *immediate* parties. *Smith v. Coca-Cola Bottling Co.*, 25 Atl.(2d) 125 (1942). But knowledge has been imputed to the seller where from the very nature of the article the buyer's particular purpose must have been known. *Cunningham v. C. R. Pease House Furnishing Co.*, 74 N. H. 435, 69 Atl. 120, 20 L. R. A. (N. S.) 236, 154 Am. St. Rep. 975 (1908) (stove polish). The necessity of reliance referred to above as the second element is generally held to be a question of fact to be determined by the jury. *Smith v. Burdines, Inc.*, 144 Fla. 500, 198 So. 223, 131 A. L. R. 115 (1940); *Bratberg v. Advance-Rumely Thresher Co.*, 61 N. D. 452, 238 N. W. 552 (1931). Courts upholding the doctrine in the food cases disregard the requirement in allowing the consumer to recover from the manufacturer. Manifestly, however, public policy again affords the background for these decisions. But where, as in the principal case, no element of public policy is found to exist, the present court applies the rigid rule demanding actual and justifiable reliance by the buyer on the skill and judgment of the seller.

That public policy appears to be the basis for allowing recovery in the non-privity cases seems to be established by the decisions, and the instant case is authority for the proposition that no public policy is found to exist where mere *property* damage is the hazard created by the defective goods.

W. J. McA.