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Sales—Breach of Express Warranty—Action by Sub-Purchaser

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Sales—Breach of Express Warranty—Action by Sub-Purchaser. Action for damages for breach of an express warranty. *C*, at *P*'s request, located a tractor for sale. *P* agreed to purchase the tractor if *D*, its owner, would give a warranty of condition. *D* and *C* assured *P* that such a warranty would be made. *D* addressed a warranty formulated according to *P*'s specifications to *C*. *C* purchased the tractor, resold it to *P*, and delivered to *P* the statement of warranty. Trial court found for *P*. Appeal. *Held:* Affirmed. *P*, as beneficiary, may sue *D* directly for breach of the warranty, as *D* and *C* intended that the benefit of the warranty should run to *P*. *Jeffery v. Hanson*, 139 Wash. Dec. 789, 239 P. 2d 346 (1952).

In granting a right of action to a sub-purchaser on a third-party beneficiary theory, the decision presents a new approach toward avoidance of the contractual privity requirement to an action for breach of warranty. As a general rule, there can be no recovery in a warranty action unless privity of contract exists between the parties. *Fleenor v. Erickson*, 35 Wn. 2d 891, 215 P. 2d 885 (1950). Previous cases have established various exceptions to this general rule; *Mazetti v. Armour*, 75 Wash. 622, 135 Pac. 633 (1913) noted the following: (1) where the thing causing the injury is of a noxious or dangerous kind; (2) where the defendant has been guilty of fraud or deceit in passing off the article; (3) where the defendant has been negligent in some respect with reference to the sale or manufacture of a thing not imminently dangerous. The *Mazetti* case established a fourth exception in the case of food products. *Accord: Geisness v. Scow Bay Packing Co.*, 16 Wn. 2d 1, 132 P. 2d 740 (1942); *Nelson v. West Coast Dairy*, 5 Wn. 2d 284, 105 P. 2d 76 (1940). In *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P. 2d 409 (1932), a manufacturer was held liable on a breach of warranty theory, without regard to privity, to one who had purchased one of the defendant's cars from a dealer. The plaintiff had relied, in purchasing the car, upon representations contained in promotional material sent by the defendant to the dealer, one of such representations turning out to be false to the injury of the plaintiff. In an oft-quoted passage, the court stated: "It would be unjust to recognize a rule that would permit manufacturers of goods to create a demand for their products by representing that they possess qualities which they, in fact, do not possess; and then, because there is no privity of contract existing between the consumer and the manufacturer, deny the consumer the right to recover if damages result from the absence of these qualities, when such absence is not readily noticeable."

The case at hand affords considerable speculation as to its influence as precedent upon future breach of warranty actions brought by sub-purchasers. It may be regarded as involving an actual, not a fictitious, third party beneficiary contract—a case so unusual as to be of little or no value as precedent in the warranty field. Or, the holding may be viewed by future courts as an important ramification of the trend of judicial opinion away from strict adherence to the privity requirement in warranty actions—another device with which the general rule may be circumvented. The third party beneficiary theory has found little favor as a fiction enabling the courts to bestow a right of action upon a sub-vendee against a party with whom he is not in privity. It was invoked by the court in *Ward Baking Co. v. Trizzino*, 27 Ohio App. 475, 161 N.E. 557 (1928), a case in which a baking company was held liable to an ultimate consumer of one of its products which the consumer had purchased from a grocer. Such a use of the theory was suggested in dictum by the court in *Dryden v. Continental Baking Co.*, 11 Cal. 2d 33, 77 P. 2d 833 (1938). *Contra: Salzano v. First National Stores*, 268 App. Div. 993, 51 N.Y.S. 2d 645 (1944). *But see: Greco v. S. S. Kresge Co.*, 277 N.Y. 26, 12 N.E. 2d 557 (1938).

It must be surmised that, should the third party beneficiary theory be seized upon in the future as an artifice for overcoming the privity requirement in warranty actions,

an unlimited use of the theory by sub-purchasers would not be permitted by the courts; otherwise, the privity element in warranty actions, which has gained universal acceptance as a general requirement, would be virtually nullified. Several limitations which might be imposed upon such a use of the theory are: (1) that it be understood between the parties to the original transaction, out of which the warranty arose, that the article purchased is intended for resale to an ultimate consumer (i.e., that the vendee is merely a conduit for transmission of the article to the consumer); (2) that the sub-purchaser be known and identified as such by the parties to the original transaction; (3) that the sub-purchaser bringing action be the ultimate consumer. The second of the suggested limitations would be in conflict with *Armack v. Great Northern Ry.*, 126 Wash. 533, 219 Pac. 52 (1923), in which the court held that knowledge of the identity of the third party beneficiary, at the time of the execution of the contract, is not essential to a recovery by such person. The third limitation would be at variance with the reasoning of *Mazetti v. Armour, supra,* in which a retailer was granted recovery against the manufacturer for breach of an implied warranty of fitness, the court maintaining that the middleman risked his reputation in marketing the defendant's products without inspection in reliance upon the warranty.

The decision will, most likely, be confined to its peculiar facts which indicate the existence of an actual third party beneficiary contract, rather than afford sub-purchasers precedent for the avoidance of the privity requirement. Here, *D* knew that *C*'s only purpose in purchasing the tractor was to resell to *P*. *D* formulated his warranty according to *P*'s specifications. Both *D* and *C* assured *P* that the warranty would be made. Also, rather than adopt *D*'s warranty or issue its own, *C* delivered the statement of warranty to *P*, this indicating on the part of *C*, the promisee of the warranty, the intention that the protection of the warranty should run to *P* as issued by *D*. The attitude of future courts toward any attempt to expand this decision into a basis for the application upon the warranty field of fictitious third party beneficiary contracts is perhaps indicated by the language of the court in *Mazetti v. Armour, supra.* In establishing an exception to the rule of privity as to foodstuffs sold in original packages, the court maintained: "An exception to a rule will be declared by courts when the case is *not* an *isolated instance,* but general in its character, and the existing rule does not square with justice." (Italics supplied.)

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