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Sales

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chased the homestead would have it free of encumbrances, other than mortgages. The court said this impliedly exempted the proceeds of the sale from garnishment for a reasonable time after sale.

Applying this rationale to the *Lien* case, the court reasoned that if the homestead were to be encumbered by a judgment lien after it had been sold to a purchaser for value, it would be virtually impossible for one who declares a homestead to sell his land. RCW 6.12.090 gives the holder of a homestead the right to: (1) sell the homestead; (2) hold the proceeds free from execution for a year after the sale; (3) purchase a new homestead which is free from execution. The court reasoned that these three rights would be "hollow and, for practical purposes, meaningless," unless there is a concurrent right in one who declares a homestead to "convey the homestead to a bona fide purchaser for a valuable consideration free of a judgment against the former owner of the homestead."

SALES

Recovery on Breach of Implied Warranty of Fitness—Necessity of Contractual Privity. In *Martin v. J. C. Penney Co.*[1] the plaintiff, an infant, was allowed recovery for the breach of an implied warranty of fitness on a cotton shirt that had been purchased as a birthday gift for him by his mother. The scope of this note is limited to the treatment of the requisite of contractual privity between the plaintiff and the warrantor-defendant.

It was stipulated by the parties[2] that the plaintiff's claim should be predicated solely upon an implied warranty of fitness under the Washington Uniform Sales Act.[3] This statutory provision establishes that when the buyer makes known to the seller, either expressly or by implication, the purpose for which the article is to be used, and the buyer relies upon the seller's skill and judgment as to fitness, there is an implied warranty that the goods shall be reasonably fit for such purpose. The court correctly found that these requisites were satisfied by virtue of the mother's notification to the seller that the shirt purchased was to be a birthday present for her fourteen-year-old son, and by the fact that she had no personal knowledge as to the quality of the material of the garment, especially its inflammable propensities.[4]

In addition to these elements of knowledge of purpose and reliance, Washington has adopted the general rule that if there is to be a recovery on an implied warranty based upon this statutory provision the

[1] 50 Wn.2d 560, 313 P.2d 689 (1957); *petition for rehearing denied,* 151 Wash. Dec. 182 (1957).

[2] Martin v. J. C. Penney Co., docket No. 482272, Superior Court for King County, Washington.

[3] RCW 63.04.160.

[4] See Ringstad v. I. Magnin & Co., 39 Wn.2d 923, 239 P.2d 848 (1952), for a nearly identical fact situation in this respect.

parties to the action must be in contractual privity with each other.[5] To this general rule are appended several exceptions, the two most common of which negate the necessity of establishing privity in sales warranty cases involving unwholesome food eventually consumed by the plaintiff,[6] or an article that "is of a noxious and dangerous kind."[7] It is also recognized that the privity requirement in implied warranty actions can be supplied by the existence of either an agency relationship between the initial purchaser and the ultimate plaintiff,[8] or by the plaintiff being a third party beneficiary to the original sale.[9]

Was there privity between the plaintiff and the defendant in the *Martin* case, or were the facts such that privity was not required? The problem was at least recognized at the trial level, the plaintiff including in his trial brief the statement that "No serious argument on privity is expected. . . ."[10] He was right, and perhaps unfortunately, for had there been a ruling on that issue, Washington law would have been substantially clarified in reference to sale warranty cases. However, the privity question was not raised by either party on the appeal, and the court's decision did not mention it.

To enlighten the problem as to what would have happened in the *Martin* case had the issue of privity been raised by the defense, consideration will be made of all the possible methods of satisfying this requirement. Initially the possibility that the requirement for privity may have been eliminated under the "article for internal consumption" exception should be disposed of, for clothing is clearly not within that definition. It is also evident that privity could not be supplied on any theory of an agency relationship, for the purchase was to be a gift to the plaintiff, who had no knowledge of the transaction and no control over either the purchaser or the defendant-seller.[11]

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[5] Cochran v. McDonald, 23 Wn.2d 348, 161 P.2d 305 (1945); Mazetti v. Armour & Co., 75 Wash. 622, 135 Pac. 633 (1913) (dictum); Fleenor v. Erickson, 35 Wn.2d 891, 215 P.2d 885 (1950); Freeman v. Navarre, 47 Wn.2d 760, 289 P.2d 1015 (1955) (dictum); see *Privity; Property Damages; and Personal Injuries . . . A Re-Appraisal*, 32 WASH. L. REV. 153 (1957).

[6] Mazetti v. Armour & Co., note 5, supra; Geisness v. Scow Bay Packing Co., 16 Wn.2d 1, 132 P.2d 76 (1942); Baum v. Murray, 23 Wn.2d 890, 162 P.2d 801 (1945); McAfee v. Cargill, Inc., 121 F. Supp. 5 (S.D. Calif., 1954) (dog food).

[7] Fleenor v. Erickson, note 5, supra, at 898; Mazetti v. Armour & Co., note 5, supra.

[8] Freeman v. Navarre, 47 Wn.2d 760, 289 P.2d 1015 (1955) (it appears that the existence of the agency relationship was a fiction; see *Privity; Property Damages; and Personal Injuries . . . A Re-Appraisal*, 32 WASH. L. REV. 152 (1957).) Wisdom v. Morris Hardware Co., 151 Wash. 86, 274 Pac. 1050 (1928).

[9] Jeffery v. Hanson, 39 Wn.2d 855, 239 P.2d 346 (1952).

[10] Note 2, supra.

[11] A manifestation of consent to act as an agent must be derived from the principal. RESTATEMENT, AGENCY §§ (1(1), 26(a) (1933). Here the plaintiff did nothing from which consent to establish an agency relationship could be implied.

What the Washington court meant when it said in *Mazzetti v. Armour & Co.*[12] that one of the recognized exceptions to the privity requirement was "(w)here the thing causing the injury is of a noxious or dangerous kind," has never been made clear. To exemplify this exception the court in the *Mazzetti* case cited three cases[13] which they claimed supported their proposition. In two of these cases the article causing the injury was a medicine to be taken internally.[14] It would seem that these cases would easily fall within the "article for consumption" exception, and therefore are, at the most, weak authorities for the "noxious and dangerous" proposition. As to the other Washington case cited in support of the "noxious or dangerous article" exception,[15] the article causing the injury was a bottle of explosive "champagne cider," which was sold by the defendant to the plaintiff's employer. In the action to recover for injuries sustained from the bottle's explosion, the court overruled the defendant's demurrer to the complaint. But the complaint was not predicated upon any warranties of the seller as to the safety of the article; it was based entirely upon the defendant's *negligence* "for want of ordinary care in manufacturing, bottling, preparing and selling of said champagne."[16] This case is therefore no authority for actions under the warranties of the Sales Act, for it is inherent in the very definition of a "warranty of fitness" that recovery is not based upon the tortious conduct of the seller, but simply upon his failure to supply goods which are fit for their intended purpose.[17]

All subsequent Washington cases, other than those involving food, which have given lip service to the Mazetti "noxious and dangerous" exception to the privity requirement, have been actions predicated on

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[12] 75 Wash. 622, 625, 135 Pac. 633, 635 (1913).

[13] Thomas v. Winchester, 6 N.Y. 397, 57 Am. Dec. 455 (1852); Blood Balm Co. v. Cooper, 83 Ga. 457, 10 S.E. 118, 20 Am. St. 324, 5 L.R.A. 612 (1889); Weiser v. Holzman, 33 Wash. 87, 73 Pac. 797, 99 Am. St. 932 (1903).

[14] Thomas v. Winchester, note 13, supra; Blood Balm Co. v. Cooper, note 13, supra.

[15] Weiser v. Holzman, note 13, supra.

[16] 33 Wash. 87, at 89.

[17] "The Seller's obligation is not based on negligence." 1 WILLISTON, SALES § 237 (rev. ed. 1948). Blessington v. McCrory Stores Corp., 305 N.Y. 140, 111 N.E.2d 421 (1953), held that in an action based on implied warranty of fitness, negligence was not an element and that the tort statute of limitations was not applicable. The facts of the case are similar to those in Martin v. J. C. Penney; the suit being to recover damages for pain and suffering sustained by infant son who was burned to death when cowboy suit his mother purchased for him ignited. The plaintiff's appellate brief submits that privity is not required where the goods are "inherently dangerous" and gives in support the Washington cases cited in note 9, supra. The court's decision makes no mention of the issue.

negligence, in which there was a foreseeable risk of injury to others than the buyer.[18] Therefore it is not clear that there is a "noxious and dangerous" exception to the privity requirement in recoveries based on implied warranties of fitness. But if the court should recognize this "dictum without authority" from the *Mazetti* case, it would seem that because of the substantial danger of grave injury that is inherent in a highly inflammable shirt such as that sold by the J. C. Penney Co., such an article should be within that exception and the seller should be liable for resultant injuries to whomever wears that shirt.[19]

In *Jeffrey v. Hanson*[20] it was held that a third party beneficiary of a sales contract was in such privity with the seller as to be able to maintain an action for breach of an express warranty against him. Because the seller knew that the article was for resale to the plaintiff, and the parties to the sale intended the same, the warranty obligation inured to the plaintiff as a beneficiary of the contract.

Could the infant plaintiff in the *Martin* case qualify as a third party beneficiary to the sale of the shirt by the defendant store to his mother? "Where performance of a contractual promise will benefit another than the promisee, the beneficiary is a donee beneficiary, if the promisee intends to make a gift to such beneficiary or grant him rights against the promisor to performance neither due nor asserted to be due from the promisee."[21]

At the time the shirt was sold to the plaintiff's mother it was expressly understood between the parties that it was to be a gift to the buyer's fourteen-year-old son; the evident intent of the buyer was to bestow a gift to the plaintiff, and it was so understood by the defendant store. With full realization that the performance was to

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[18] Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409, *aff'd* 15 P.2d 1118 (1932) (car windshield shattered; action apparently in tort); Bock v. Truck & Tractor, Inc., 18 Wn.2d 458, 139 P.2d 706 (1943) (faulty repair of truck).

[19] In Cochran v. McDonald, 23 Wn.2d 348, 161 P.2d 305 (1945) (sale of defective antifreeze resulting in injury to plaintiff's automobile; recovery against wholesaler on breach of warranty denied for lack of privity), our court gave what may be a clue to their inclination in these cases. They distinguished the Baxter and Bock cases, note 18, supra, on the ground that in those cases there was severe injury to the person, not damages to his property as caused by the antifreeze. "There is no question of public policy involved in this case." The court felt that they were not compelled to allow recovery in face of the lack of privity. See also Carson v. Weston Hotel Corp., 342 Ill. App. 602, 97 N.E.2d 620 (1951) (seller of wire rope should know that any defect in product may result in injury to many others; held to warrant the product to third persons so injured).

[20] 39 Wn.2d 855, 239 P.2d 346 (1952).

[21] Ridder v. Blethen, 24 Wn.2d 552, 166 P.2d 834 (1946); Sayward v. Dexter Horton & Co., 72 Fed. 758, 19 C.C.A. 176 (1896); Burton v. Larkin, 36 Kan. 246, 13 Pac. 398 (1887).

be the plaintiff, under the theory of the *Jeffery* case there is no reason for finding that any warranties of that performance should not also go to the plaintiff. The factual situations are essentially the same in each case. The fact that in the *Jeffery* case the warranty was express, while in the *Martin* case it was implied by law, would seem immaterial in light of the application of the exception to the privity requirement in cases of food sales, regardless of whether the warranty was express or implied.[22]

Adopting the third party beneficiary reasoning, the warranty obligation of the defendant-seller accrued to the infant plaintiff in the *Martin* case by virtue of the intent of the parties of the original sale to bestow that obligation upon him as a third party beneficiary of the sale.

The Washington court, in *Freeman v. Navarre*,[23] expressed its opinion that "it appears that a realistic, judicial analysis and reappraisal of the privity rule would be quite appropriate." Although the court could have allowed recovery in the *Martin* case on the theory of either a "noxious and dangerous" article, or a "third party beneficiary," it seems that a conspicuous opportunity to clarify the application of these exceptions to the privity requirement in warranty on sales cases was unfortunately missed.

Under the Uniform Commercial Code[24] the problem presented in the *Martin* case would be substantially clarified, as Art. II, §318, entitled, "Third Party Beneficiaries of Warranties Express or Implied," provides that such warranties shall extend to anyone who is in the family or household of the buyer or a guest in his home, if it could be expected that such person would use, consume, or be affected by the goods sold. The comments to this section reflect the codifiers' predispositions to abolish the privity requirement when the injury is to one closely associated with the actual buyer.[25]

The Washington decisions have displayed a similar predisposition,[26] but have failed to express how extensive this negation of the privity requirement shall be. In the food cases the court has recognized

[22] Freeman v. Navarre, 47 Wn.2d 760, 289 P.2d 1015 (1955) (it appears that the existence of the agency relationship was a fiction; see *Privity; Property Damages; and Personal Injuries... A Re-Appraisal*, 32 WASH. L. REV. 152 (1957). Wisdom v. Morris Hardware Co., 151 Wash. 86, 274 Pac. 1050 (1928).

[23] 47 Wn.2d 760, 289 P.2d 1015 (1955).

[24] UNIFORM COMMERCIAL CODE § 2-318.

[25] *Ibid.*, comment 3.

[26] See in particular Freeman v. Navarre, note 8, supra, reviewing cases.

strong policy arguments and said that there shall be no privity requirement. As to a noxious and dangerous article they said the same, but have yet to have such a case. Beyond this the court has negated the effect of the privity requirement only by resort to other legal concepts, such as the third party beneficiary and the agency relationship. Unfortunately these concepts are awkward to apply, often requiring fictions or at least extention of the concepts into a new area. While this may be expedient in particular cases, eventually the application of these "borrowed" concepts may prove unworkable, especially where the equities of the case demand denial of recovery.

The U.C.C.'s provision is a practical and realistic extention of the warranty obligation, based upon strong policy arguments; such an approach requires no torturing of existing legal principles, and provides a high degree of predictability. There is no obstacle to the court making this equitable exception to the privity requirement[27] when the injury is inflicted on someone in the buyer's household. Cases such as *Martin v. J. C. Penney* could be brought directly within such an exception, without resort to other legal concepts.

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SECURITY TRANSACTIONS

Mortgages—Obligation Requirement. In Koster v. Wingard, 50 Wn.2d 855, 314 P.2d 928 (1957), the court refused to accept the plaintiff's contention that an equitable mortgage was created by the acts of the parties. During the course of the opinion the court stated that "...a mortgage can not exist without a debt, and that debt must be identified and the amount fixed with certainty." Since the court needed only to decide whether the alleged equitable mortgage was actually supported by an obligation, the court's language was broader than required by the issue before it. The Washington court has previously used the language "a mortgage cannot exist without a debt" in other situations where the case did not require the statement of so broad a rule. *Hays v. Bashor,* 108 Wash. 491, 185 Pac. 814 (1919); *Tesdahl v. Collins,* 2 Wn.2d 76, 97 P.2d 649 (1939); *O'Reilly v. Tillman,* 111 Wash. 594, 191 Pac. 866 (1920).

The court in *Koster v. Wingard, supra,* may have meant to state a general requirement for both equitable and legal mortgages that if the obligation for which the mortgage is given fails for some reason, the mortgage is not enforceable. WALSH, MORTGAGES 74 (1934); OSBORNE, MORTGAGES 74 (1951); Osborne § 103 (1951); 3 GLENN, MORTGAGES § 396-97 (1943). In stating the requirement as broadly as it did, the court would apparently invaliadet gift mortgages, mortgages given for advances to be made in the future, and those mortgages which secure unliquidated debts. There is a considerable amount of authority to support the proposition that money need not be

[27] See *Privity; Property Damages; and Personal Injuries...A Re-Appraisal.* note 8, supra.