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Sales -- Liability of Remote Vendor on Implied Warranty

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It is submitted that the test applied in the *Hubsch* case is in accord with the technical rules of forgery, and that it is a valid test in determining whether, under the particular fact situation, the crime of forgery has been committed by the use of a fictitious name. However, it may be questioned whether an area already beset with technicalities and dubious distinctions should be further complicated by revitalizing a test which originated in the days when forgery was a capital offense.

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Sales—Liability of Remote Vendor on Implied Warranty

Plaintiff,[1] a manufacturer of refrigerated biscuits, purchased "Snow Ice" (an integral part of its biscuits sold for human consumption) from a distributor, who had bought the product from the defendant ice manufacturer. Upon finding glass in the ice, plaintiff, at considerable expense, destroyed the biscuits and biscuit dough and recalled the biscuits made the previous day with the glass-contaminated dough. Plaintiff sued the ice manufacturer in federal district court to recover these expenses. The biscuit company, conceding the lack of contractual privity with defendant and foregoing the negligence theory, contended defendant was liable under Texas law by reason of the *Decker*[2] case. In that case it was held that a non-negligent manufacturer who processed and sold contaminated food to a retailer for resale and human consumption was liable to a consumer for injuries sustained by him as a result of eating such food. The court, after noting a trend of the Texas courts away from the *Decker* holding, distinguished that case and held it inapplicable on the ground that it involved a consumer eater whereas the principal case involved a consumer non-eater.[3] The lack

[1] Gladiola Biscuit Co. v. Southern Ice Co., 163 F. Supp. 570 (E.D. Tex. 1958).

[2] Jacob E. Decker & Sons. Inc. v. Capps, 139 Tex. 609, 164 S.W.2d 828 (1942). "Liability in such a case is not based on negligence, nor on a breach of the usual implied contractual warranty, but on the broad principle of the public policy to protect human health and life." *Id.* at 612, 164 S.W.2d at 829. Thus privity of contract between plaintiff and defendant is not necessary under the *Decker* rule.

[3] The court may have been influenced by the so-called general rule that there is no implied warranty of fitness for food where the sale is made by one dealer to another dealer for purposes of resale, as distinguished from a sale by a dealer to a buyer for immediate consumption. Howard v. Emerson, 110 Mass. 320 (1872); Emerson v. Brigham, 10 Mass. 197 (1813); Moses v. Mead, 1 Denio 378 (N.Y. 1845); 1 WILLISTON, SALES § 242 (Rev. ed. 1948); Perkins, *Unwholesome Food as a Source of Liability*, 5 IOWA L. BULL. 6, 17-18 (1919); Annot., 15 L.R.A. (n.s.) 886 (1908); Annot., 22 L.R.A. 195 (1893); Annot., 14 L.R.A. 494 (1891). Texas has experienced difficulty with this rule, and there are inconsistent cases dealing with it. Comment, 32 TEXAS L. REV. 557, 564-66 (1954).

Other jurisdictions hold that the sale by one dealer to another dealer for purposes of resale carries with it an implied warranty that the goods are wholesome and fit for food. Annot., 1917F L.R.A. 472. A recent case is Draughon v. Maddox, 237 N.C. 742, 75 S.E.2d 917 (1953), 32 N.C.L. REV. 351 (1954).

No matter which line of cases is accepted, the implied warranty of merchantability would be equally available in the dealer-to-dealer sale for purposes of resale

of contractual privity was deemed to preclude recovery on an implied warranty theory. Accordingly, a verdict was directed for the defendant.

The *Decker* case had concerned the liability of a *manufacturer*. *Griggs Canning Co. v. Josey*,[4] decided the same day, resolved in favor of the consumer the question of whether a *retailer* of foodstuffs was liable on implied warranty. A review of the Texas law of implied warranties since *Griggs* and *Decker* indicates the trend away from the philosophy evinced by the court in those decisions. In *Bowman Biscuit Co. v. Hines*,[5] the Texas Supreme Court refused to apply the *Griggs* rule against a *wholesaler*. In a five to four decision it was held that one who had sustained injury from eating contaminated food purchased in a sealed package from a retailer who had bought the product from the wholesaler could not recover damages in a direct action against the wholesaler. Four majority justices favored overruling *Griggs* and since in their view a retailer would not be liable, a fortiori, defendant wholesaler, who was one step further removed from the consumer and with whom there was no privity, should not be made liable. Four minority justices approved the *Griggs* rule and said that adherence to this rule should require a finding of wholesaler liability. The ninth justice, distinguishing between wholesaler and retailer liability, considered *Griggs* inapplicable and concurred with the "majority" in result only. Thus the *Bowman Biscuit Co.* case preserved the *Griggs* rule but held no wholesaler liability to a consumer not in contractual privity. Paradoxically, this ultimate state of the law was approved by only one of the nine justices who decided the *Bowman Biscuit Co.* case.[6] In two significant situations, where the container[7]

as in a dealer-to-buyer sale for immediate consumption. DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER 30 (1951); Perkins, *supra* at 18-19; Prosser, *The Implied Warranty Of Merchantable Quality*, 27 MINN. L. REV. 117 (1943). North Carolina follows this latter rule in Ashford v. H. C. Shrader Co., 167 N.C. 45, 47, 83 S.E. 29, 31 (1914) and Lexington Grocery Co. v. Vernoy, 167 N.C. 427, 428, 83 S.E. 567, 568 (1914).

[4] 139 Tex. 623, 164 S.W.2d 835 (1942). The *Griggs* case, as did *Decker*, imposed a warranty on defendant as a matter of public policy. See 21 TEXAS L. REV. 454 (1942) for a discussion of these two cases.

[5] 151 Tex. 370, 251 S.W.2d 153 (1952), 31 TEXAS L. REV. 594 (1953), 1953 WASH. U.L.Q. 327, 10 WASH. & LEE L. REV. 255 (1953).

[6] 31 TEXAS L. REV. 594, 597 (1953).

[7] In Annheuser-Busch v. Butler, 180 S.W.2d 996 (Tex. Civ. App. 1944) plaintiff bought beer in a tavern, took it home, and opened it. The bottle exploded, injuring plaintiff. Defendant was held not liable on implied warranty of fitness. Distinguishing the *Decker* case in which injury was caused by eating, the court said, [Here] there was no injury sustained as a result of eating or drinking unwholesome food or drink. For aught we know, the beer may have been . . . harmless. . . . The fact that the glass bottle . . . might have been defective or improperly filled, or improperly capped, would not necessarily change the fitness of the beer for human consumption." *Id.* at 997. Accord, Jax Beer Co. v. Schaeffer, 173 S.W.2d 285 (Tex. Civ. App. 1943). In 23 TEXAS L. REV. 87, 88 (1944) it is said that these cases create an over-refined distinction in recognizing liability when injury is caused by a piece of glass inside the bottle but denying

rather than the foodstuff was defective and where the product was not meant for immediate, internal consumption,[8] Texas has refused to extend the *Decker* rule.

How would the principal case be decided in North Carolina? Although a consumer without contractual privity can proceed against the manufacturer on the theory of breach of *express* warranty where the warranty is printed on the product container,[9] there is some doubt as to whether he can recover against the manufacturer on a theory of breach of implied warranty. *Thomason v. Ballard & Ballard Co.*[10] established the rule that in the absence of contractual privity, a consumer could not recover against a manufacturer on implied warranty. However, in *Davis v. Radford*,[11] which involved a consumer against retailer for breach of implied warranty, the court stated that *Simpson v. American Oil Co.*[12] would permit the consumer without contractual privity to maintain an action against the *wholesaler*[13] on the implied warranty theory.[14] Some authorities[15] have interpreted this *Davis* dictum as authority for the proposition that North Carolina no longer requires privity in breach of implied warranty situations. Granting that this dictum indicates an attitude that would not require privity, it is submitted that the *Thomason* decision remains the rule. Accordingly, the plaintiff biscuit company could not recover from the ice manufacturer in North Carolina in a direct action. However, the manufacturer might not escape liability. The plaintiff could maintain an action against the

liability where the defective bottle itself causes injury. See PROSSER, TORTS § 84, at 509 (2d ed. 1955).

[8] In Brown v. Howard, 285 S.W.2d 752 (Tex. Civ. App. 1955) a manufacturer of insecticide spray was sued by the owner of some cattle which had been killed by the spray. Because of no contractual privity between plaintiff and defendant, there was no breach of implied warranty. The court seemed to regard the *Decker* rule as onerous.

[9] Simpson v. American Oil Co., 217 N.C. 542, 8 S.E.2d 813 (1940).

[10] 208 N.C. 1, 179 S.E. 30 (1935). This rule is repeated in dictum in Caudle v. F. M. Bohannon Tobacco Co., 220 N.C. 105, 110, 16 S.E.2d 680, 683 (1941) and Enloe v. Charlotte Coca-Cola Bottling Co., 208 N.C. 305, 307, 180 S.E. 582, 583 (1935).

[11] 233 N.C. 283, 63 S.E.2d 822 (1951).

[12] 217 N.C. 542, 8 S.E.2d 813 (1940).

[13] It would appear that by this language plaintiff could proceed against the manufacturer as well as the wholesaler, because when the privity requirement is removed, the plaintiff can sue either the retailer, wholesaler, or manufacturer. Heimsoth v. Falstaff Brewing Corp., 1 Ill. App. 2d 28, 116 N.E.2d 193 (1953).

[14] "In case of sale of goods for human consumption the requirement of privity of contract is not always controlling. . . .

"Under the decision in *Simpson v. Oil Co.* . . . it would seem that the plaintiff [consumer] here could have maintained an action against . . . the distributor, for the cause set out in his complaint, though he has elected to sue only the retail dealer." 233 N.C. at 286, 63 S.E.2d at 825. It has been suggested that this dictum should be weighed carefully against the *Simpson* case, because that case involved express warranty, whereas in the *Davis* case there was no express warranty. 30 N.C.L. REV. 191, 194 (1952).

[15] PROSSER, TORTS § 84, at 509 n. 28 (2d ed. 1955).

"Snow Ice" wholesaler, who apparently[16] could join the manufacturer as party defendant so that the court could determine the ultimate liability of the two defendants.[17]

What result would have obtained under the Uniform Sales Act?[18] It appears that plaintiff ordered the ice by description,[19] hence there arose the implied warranty of merchantability[20] from the wholesaler to plaintiff. This warranty would also exist between manufacturer and wholesaler.[21] Some courts would extend the warranty to the ultimate consumer.[22] The implied warranty of merchantability is included in the Uniform Commercial Code.[23] However, a majority of the states adopting these uniform acts[24] still requires privity in breach of implied warranty cases.[25] Hence the plaintiff would not be able to recover in these states.[26]

[16] The rule of the *Davis* case was that the retailer, when sued by the consumer for breach of implied waranty, could join his (retailer's) vendor as a party defendant.

[17] N.C. GEN. STAT. § 1-222 (1953). The theory suggested in the text presupposes that the manufacturer is subject to North Carolina's jurisdiction.

[18] The Uniform Sales Act is in effect in 33 states, District of Columbia, Hawaii, and Panama Canal Zone. UNIFORM LAWS ANNOTATED, SALES at 6 (Supp. 1957). North Carolina has not adopted the Uniform Sales Act.

[19] A sale by description is any sale where there is no adequate opportunity to inspect. Kohn v. Ball, 36 Tenn. App. 281, 254 S.W.2d 755 (1952).

[20] UNIFORM SALES ACT § 15(2): "Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality."

A popular meaning of merchantable quality is that goods must be reasonably suited for the ordinary uses which they were manufactured to meet. Giant Manufacturing Co. v. Yates-American Machine Co., 111 F.2d 360 (8th Cir. 1940). For more complete definitions of merchantability see 1 WILLISTON, SALES § 243 (Rev. ed. 1948), and Prosser, *supra* note 3, at 125-32.

[21] See note 3 *supra*.

[22] Helms v. General Baking Co., 164 S.W.2d 150 (Mo. App. 1942); Markovich v. McKesson and Robbins, Inc., 149 N.E.2d 181 (Ohio Ct. App. 1958); Baum v. Murray, 23 Wash. 2d 890, 162 P.2d 801 (1945). *Contra*, Smith v. Salem Coca-Cola Bottling Co., 92 N.H. 97, 25 A.2d 125 (1942), Lombardi v. California Packing Sales Co., 83 R.I. 51, 112 A.2d 701 (1955).

[23] UNIFORM COMMERCIAL CODE 2-314(2): "Goods to be merchantable must be at least such as
(c) are fit for the ordinary purposes for which such goods are used; . . ." The Uniform Commercial Code is in effect at the date of this writing in Pennsylvania and Massachusetts. PA. STAT. ANN. tit. 12A §§ 1-101 through 10-104 (1953); MASS. G.L. (Ter. Ed.) c. 106 (1957).

[24] UNIFORM LAWS ANNOTATED, SALES § 15, n. 10.

[25] However, the trend is toward abandoning the privity requirement. DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER 63-65, 94-99 (1951); SMITH AND PROSSER, CASES AND MATERIALS ON TORTS 906, 912 (2d ed. 1957); 1 WILLISTON, SALES § 244 n. 7 (Rev. ed. 1948) and Supp. (1957). New York seems to have broken away recently from the privity requirement in Welch v. Schiebelhuth, 169 N.Y.S.2d 309 (Sup. Ct. 1957), Comment, 24 BROOKLYN L. REV. 308 (1958), 9 SYRACUSE L. REV. 326 (1958).

[26] Regarding the Uniform Commercial Code, this result is unfortunate. Section 43 of the Uniform Revised Sales Act, which has been replaced by § 2-318 of the Code, provided an almost complete departure from the antiquated privity requirement. See Note, 29 IND. L.J. 173, 184-88 (1954). The Code has made a change in the present privity requirement in that a member of the buyer's family or a guest

The decision in the principal case is harsh in that it necessitates circuity of action. Plaintiff can sue only the middleman, who in turn will sue the ice manufacturer in order to place liability at the point of origin. The biscuit company is placed in the anomalous position of being subject to liability without contractual privity, under the *Decker* rule, to a consumer who sustains injury by eating unwholesome biscuits. Yet the company which has been diligent in preventing injury to ultimate consumers by destroying the glass-contaminated dough cannot recover its loss from the ice manufacturer because of a lack of contractual privity.[27] It is submitted that this privity requirement is law for law's sake.[28]

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Torts—Charitable Immunity

The doctrine that charitable institutions[1] are immune from liability for torts committed by their servants evolved from dictum set forth in *Duncan v. Findlater*,[2] an English case decided in 1839. This doctrine was later recognized and followed in England for a brief period; it was completely discarded in 1866.[3]

McDonald v. Massachusetts General Hospital,[4] in 1876, was the first case to adopt the doctrine in this country, the court holding that a charity was immune from liability if it had exercised due care in the selection and retention of its servants. Since that time a majority of the states have followed the Massachusetts rule, but have differed greatly

of the buyer no longer is required to have privity with the buyer's vendor to recover for breach of implied warranty. But a suit by a buyer against a remote vendor is left unchanged, therefore the majority rule requiring privity in such a situation is left intact. *Legislation*, 15 U. PITT. L. REV. 331, 352-55 (1954).

[27] Of course plaintiff could sue defendant on grounds of negligence, but in this case this theory would be quite difficult to prove. PROSSER, TORTS § 84, at 505 (2d ed. 1955).

[28] Spruill, *Privity Of Contract as a Requisite for Recovery On Warranty*, 19 N.C.L. REV. 551, 565-66 (1941).

[1] An institution "is deemed to be eleemosynary or charitable where its property is derived from charitable gifts or bequests and administered, not for purpose of gain but in interest of humanity. . . ." Ettlinger v. Trustees of Randolph-Macon College, 31 F.2d 869, 870 (2d Cir. 1929).

[2] 6 Clark and Fin. 894, 7 Eng. Rep. 934 (H.L. 1839).

[3] The dictum of Duncan v. Findlater, *supra* note 2, was followed in Holliday v. St. Leonard's, 11 C.B.N.S. 192, 142 Eng. Rep. 769 (1861). However, this case was expressly overruled by Mersey Docks Trustees v. Gibbs, L.R. 1 H.L. 93, 11 Eng. Rep. 1500 (1866), thus repudiating the doctrine in England. See also Hillyer v. St. Bartholomew's Hospital [1909] 2 K.B. 820; Foreman v. Canterbury Corp., L.R. 6 Q.B. 214 (1871).

[4] 120 Mass. 432 (1876). This case was decided ten years after Mersey Docks Trustees v. Gibbs, *supra* note 3, had overruled the doctrine in England; but the Massachusetts court relies on Holliday v. St. Leonard's, *supra* note 3.