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Sales

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that collateral circumstances of each case must be considered, *e.g.*, intents and purposes of the parties; the construction of the instrument as a whole.

SALES

Liability of a Manufacturer to Persons Other than His Immediate Vendee. The recent case of *Freeman v. Navaree*[1] illustrates the liberality of the supreme court in finding an agency relationship in order to meet the privity requirement in an action for breach of warranty under the Uniform Sales Act.[2] The court also dealt another blow towards the dying concept that privity plays a part in a negligence action against a manufacturer of personal property.[3]

In this case, the appellant (plaintiff below) employed a general architect for the development of the Bellevue Shopping Square. The architect, with appellant's approval, hired a heating consultant to aid him in the design of the project. The respondent manufacturer represented to the heating consultant that it manufactured pipe units for a completely engineered underground heating system of long life and high thermal efficiency. On the basis of these representations,[4] respondent's pipe units were included in the contract specifications for the "Square's" underground heating system. The contract was let to a contractor who purchased and installed the pipe units according to the contract specifications. In 1949, two years after construction, the pipes began to leak. The respondent, the heating consultant, and the contractor, attempted to repair the pipes until 1951, when the efforts were abandoned. The appellant sued these three parties in the lower court. At the close of the appellant's evidence, the court dismissed the suit against the respondent because of lack of privity. The jury later returned a verdict in favor of the heating consultant and the contractor. No appeal was taken from the jury verdict. The supreme court reversed the lower court's dismissal for the following reasons:

1. Implied and Express Warranty[5]

The court began its decision by a general discussion of the privity requirement in warranty actions. The discussion pointed out that the privity requirement was born in an age where the consumer dealt directly with the manufacturer on a personal basis. The opinion went on to emphasize the significant change in modern day business methods

[1] 147 Wash. Dec. 686, 289 P.2d 1015 (1955).
[2] RCW 63.04.
[3] PROSSOR, TORTS § 84. (2d ed. 1955).
[4] The minority opinion felt the heating consultant did not rely on the respondent's representations.
[5] Implied Warranty: RCW 63.04.160; and Express Warranty: RCW 63.04.130.

with the attendant "... mass production, large scale or national promotion, and distribution...." After examining what the court called Washington's exceptions to the privity rule, such as food produced for human consumption,[6] and inherently dangerous instrumentalities,[7] the court stated "*... it appears that a realistic judicial analysis and reappraisal of the privity rule would be quite appropriate.*" (emphasis supplied).

Rather than make that reappraisal, the court held there was privity of contract because the contractor who purchased the pipe units from the respondent was the appellant's agent for the purpose of the purchase.[8] The reasoning of the majority was since the contract specifications called for respondent's pipe, the contractor was entirely subject to the appellant's control and was an agent for the purpose of the purchase of the pipe.[9] This agency device has been used in two previous Washington cases. In *Wisdom v. Morris Hardware Co.*,[10] the court allowed recovery of damages on express warranty of tree spray where the defendant hardware dealer had made representations to a neighbor who relayed them to the claimants. The claimants ordered the spray from another hardware dealer who gave the claimants financial aid. This hardware store purchased the spray from the defendant. The rationale was that because the purchasing hardware store gave the claimant's financial aid, they were the claimants' agent for the purpose of purchasing the spray. The second case is *Ingraham v.*

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[6] Mazetti v. Armour & Co., 75 Wash. 622, 135 Pac. 633 (1913). Plaintiff, a restaurant lessee, recovered for loss of profits occasioned by serving unwholesome tongue to a customer. The defendant was a meat packing company who sold the tongue to a grocer who sold it to the plaintiff.

[7] The court cited Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409, 15 P.2d 1118 (1932), as authority for a supposed "inherently dangerous instrumentality" exception. The author feels this is erroneous. Although the case is ambiguous to say the least, it seems to stand for the proposition that statements of fact contained in a manufacturer's advertisements are express warranties as to consumers who in justifiable reliance thereon purchase the product in the ordinary course of trade. In this case, the plaintiff purchased a new automobile from a dealer after reading the defendant-manufacturer's literature representing the car's windshield as shatterproof. The plaintiff was granted a recovery from the defendant for an eye injury suffered when a rock shattered the windshield.

[8] The three dissenting judges held there was no agency relationship or privity of contract between the appellant and the respondent; that the case did not fall within any of the exceptions to the privity rule; and that privity was required in order for the appellant to recover on the theory of negligence or breach of warranty.

[9] Judge Mallery concurred specially with the majority and agreed the contractor was the agent of the appellant. He rested his decision on RCW 60.04.010. This provides that a contractor who has charge of the construction of a project "... shall be held to be the agent of the owner *for the purposes of the establishment of the lien created by [the statute]....*" (emphasis supplied). The instant case did not involve a lien of any kind.

[10] 151 Wash. 86, 274 Pac. 1050 (1928).

Associated Oil Co.,[11] where the plaintiff was allowed to recover for damages resulting from the use of the tree spray bought from a hardware store who bought the spray from the defendant-manufacturer. Both the hardware store and the defendant made representations to the plaintiff. The court stated there was sufficient evidence for the jury to find the hardware store was the agent of the defendant. No mention was made of the supporting evidence. One may disagree with the finding of an agency relationship in the first two cases as being somewhat fictional, but it is a device of some persuasiveness to a court with a distaste for the privity requirement.

2. Negligence

The court held that privity is not a requirement in a negligence action against the manufacturer of personal property. The court seemingly ignored their first holding that there was privity in the instant case. After quoting extensively from Justice Cardozo's opinion in *MacPherson v. Buick Motor Co.*,[12] the court stated the wrong does not arise from the contract, but "... consists (of) an act creating an unreasonable risk of harm to the person or property of another, where it is foreseeable that the failure to use reasonable care will create such a risk." This holding, that privity is not a requirement in a negligence action, places Washington into accord with the majority of United States jurisdictions.[13]

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Garbage—Sale, Public Service or Both?. In *Boyle v. King County*, 46 Wn.2d 428, 282 P.2d 261 (1955), the plaintiff, a hog rancher, sued for damages for the loss of seventy-nine sows and one thousand eighty-eight pigs which allegedly died from sodium flouroacetate poisoning as a result of either the defendant's negligence or breach of warranty in performing a contract permitting the plaintiff "to take and remove all edible garbage from the Firland Sanatorium, King County, Washington". The plaintiff had paid forty dollars per month for permission to "remove" the garbage. The court below, sitting without a jury, gave judgment for the defendant. This judgment was affirmed on the following grounds:

[11] 166 Wash. 305, 6 P.2d 645 (1932).

[12] 217 N.Y. 382, 111 N.E. 1050 (1916). In deciding the plaintiff could recover against the manufacturer of an automobile for negligence in placing a defective wheel on the car, Justice Cardozo stated "If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is a thing of danger." He held an automobile was such an item and allowed the plantiff to recover under the exception to the privity rule that existed where the article was inherently dangerous to human safety. It was just a short step from this case to the rule which now generally prevails, that an injured party may recover against a manufacturer of personal property in a negligence action despite the lack of a contractual relationship between the parties, provided all of the elements necessary to constitute a cause of action are alleged and proved. See note 2, *supra*.

[13] See note 2, *supra*.

(1) Negligence—lack of evidence to support the contention.
(2) Express Warranty—unsupported by assignments of error.
(3) Implied Warranty of Fitness—lack of reliance on the seller's skill or judgment as required by RCW 63.04.160 (1), and doubt as to whether the transaction was a sale.

The court, in discussing whether there was a sale of goods within the meaning of RCW 63.04.020, stated the transaction was a "public service contract." What analytical value this label has was not made clear. The court relied on *Cornelius v. City of Seattle*, 123 Wash. 550, 213 Pac. 17 (1923). This case decided a garbage purchase was a public service contract for the purpose of determining whether garbage transactions were the proper subject of the exercise of a city's police power. This holding appears to have little bearing on the instant sales question. A holding that a transaction is subject to regulation under the police power is not inconsistent with a holding that a similar transaction is a sale.

The garbage appears to be a by-product of a portion of the Sanatorium's business—that of feeding patients and personnel—and as such, a proper subject of a sales transaction. The consideration for the sale was the plaintiff's forty dollar monthly payment plus his service to the defendant which consisted of removing the garbage from the Sanatorium. If, as the court says, the transaction is questionable, the writer feels it should not be questioned in terms of "public service" as defined in the *Cornelius* case.

TAXATION

Distraint and Sale—Adequacy of Notice. Two problems are discussed in this note. The first is whether or not the court applied the proper statute in the recent case of *Metzger v. Quick*.[1] The second problem is whether or not the construction accorded the statute by the court would violate the doctrine of *Mullane v. Central Hanover Bank and Trust Co.*[2]

In *Metzger v. Quick*, the plaintiff's personal property consisting of sawmill equipment was sold for taxes which had been levied, but were not yet due, and taxes which were delinquent. The county treasurer elected to make a distraint of the personalty.[3] A notice was posted on the premises and in two public places.[4] Although not required by the statute under which the treasurer was proceeding,[5] a registered letter was mailed to the last known address of the plaintiff. The letter was returned marked "unclaimed." Ten days after the posting of the notices of distraint and sale the property was sold.[6] The plaintiff

[1] 46 Wn.2d 477, 282 P.2d 812 (1955).
[2] 339 U.S. 306 (1949).
[3] Among other defenses set up by the defendant was one that he was acting pursuant to RCW 84.56.100—.110. The writer considers it to be relatively unimportant in the light of the majority opinion.
[4] RCW 84.56.070. "He [the county treasurer] shall advertise the sale by posting written notices in three public places."
[5] RCW 84.56.070 provides only for posting.
[6] RCW 84.56.070 provides that "... such sale, which shall not be less than ten days after the taking of such property."