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Implied Warranty as Between Manufacturer and Consumer

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the decisions in New York is almost an exact reproduction of that of the Pennsylvania cases. Since the decision of the Court of Appeals of New York in *Matter of Swift, 137 N. Y. 86, 32 N. E. 1096,* it has been settled that where there is an equitable conversion by will of realty owned by a resident testator in a sister state, such equitable conversion will not subject the property to a transfer inheritance tax. The doctrine of this case, which was based on the theory that taxation is based on facts, and not legal and equitable fictions, was extended to include an attempted tax on contracts for the sale of land in another state, in the cases of *In re Baker's Estate, 124 N. Y. S. 827* and *In re Wolcott's Estate, 157 N. Y. S. 268.*

Pennsylvania, by the decision of its Supreme Court in *Paul's Estate,* is apparently following these New York decisions, though the latter two, being lower court cases, are not mentioned anywhere in the Court's opinion. At the present time, then, it is safe to say that in Pa. where a resident testator, prior to his death had owned real property in another state, for which he had executed contracts of sale, the unpaid purchase price on those contracts at the time of his death does not constitute personal property taxable as such, an equitable conversion of the realty to personalty by the executed contracts not being enough to give Pa. the right to tax the interests as such.

A search of decided cases fails to reveal any cases other than the New York cases discussed, which are directly analogous to the case of *Paul's Estate.*

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IMPLIED WARRANTY AS BETWEEN MANUFACTURER AND CONSUMER

There is a considerable conflict in authority as to whether an action can be maintained directly against a manufacturer of a defective article for an injury to the ultimate consumer who purchased from a middleman, and if so, whether this action should be in trespass for the tort

or in assumpsit for breach of an implied warranty. There seems to be no doubt that an action on the tort will lie.

In Pennsylvania the case of *Rozumailski v. Phila. Coca Cola Bottling Co.*,[1] settles this principle. The facts were that a dealer sold a bottle of coca cola, removed the cap and handed it to the plaintiff, who was injured by swallowing ground glass. In this case the plaintiff was allowed to recover three thousand dollars in trespass for the negligence from the manufacturer. Could such a plaintiff recover in an action of assumpsit against the manufacturer? This question in many cases has been related so closely to the question of negligence that the decisions are not always susceptible of clear classification.[2]

In the case of *Birmingham Chero Cola Bottling Co. v. Clark*,[3] it was held that one who purchases from a retailer a bottled beverage and who is made ill by the presence of a fly in it cannot maintain an action upon the implied warranty. But, in the case of *Davis v. Van Camp Packing Co.*,[4] it was held that one who puts up food to be sold through dealers for human consumption impliedly warrants that it is not deleterious and is liable to a consumer injured by eating food not fit for human consumption and the question of privity of contract is not controlling.

In an article entitled "Necessity of Privity of Contract in Warranty by Representation"[5] it is said in substance that if the liability of warranty is to be imposed on the original vendor or manufacturer it must spring from representations directed to the ultimate consumer. Such representations may be accomplished by advertising, branding, canvassing, sampling, etc., and by putting food on the market for sale in the original packages. In the latter case the manufacturer alone is able to protect the consumer from injury and by his invitation to purchase requires the reliance of the consumer. The remedies of the

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[1] 296 Pa. 114.
[2] 17 A. L. R. 709.
[3] 205 Ala. 678, 89 So. 64.
[4] 176 N. W. 382 (Iowa).
[5] 42 Harvard Law Review 414.

injured consumer ought not be made to depend upon the intricacies of the law of sales and the obligations of the manufacturers should not be based alone on privity of contract but on the sound demands of social justice.

In the recent case of *Nock v. Coca Cola Bottling Works,*[6] the plaintiff purchased a bottle of coca cola from a retailer, who took the bottle from the ice chest, removed the cap and handed it to the plaintiff. While the plaintiff was drinking its contents, she became conscious of a creeping sensation on her lips, which proved to be a worm that had been in the bottle. The plaintiff brought an action of assumpsit for injuries from foreign substance in the bottled beverage and recovered five hundred dollars in the lower court. On appeal the defendant contended that assumpsit was the wrong action. The court below said the plaintiff could waive the tort and sue in assumpsit and recover under the act of May 4, 1889[7] providing that, "In every sale of green, salted, pickled or smoked meats, lard and other articles of merchandise used wholly or in part for food, said goods or merchandise shall correspond in kind and quality with the description given either orally or in writing, by the vendor; and in every sale of such goods or merchandise, unless the parties shall agree otherwise, there shall be an implied contract or undertaking that the goods or merchandise are sound and fit for household consumption." But the upper court said food does not include drink.[8] The action therefore cannot be upheld on this ground but the upper court sustains it on other grounds. The court admits the decisions are in confusion in this class of cases. Some courts base this sort of action on negligence alone; others on implied warranty; still others say if implied warranty exists it does not extend

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[6]102 Pa. Super. Ct. 515.

[7]Act of May 4, 1889, P. L. 87, Sec. 1.

[8]Commonwealth v. Kebort, 212 Pa. 289; Commonwealth v. Pflaum, 50 Pa. Super. Ct. 55 and 236 Pa. 294; Webster's definition of food is "nutritive material absorbed or taken into the body of an organism for purposes of growth or repair and for the maintenance of the vital processes".

to third parties. It is generally conceded that a tort action could have been brought but the question is whether that remedy is exclusive. The question presented specifically is whether or not assumpsit based on implied warranty of fitness may be maintained by the ultimate consumer, who bought from a dealer, against the manufacturer.

The general rule in 26 Corpus Juris 783 is that in all sales by a dealer of food or beverages for immediate consumption there is an implied warranty of fitness or wholesomeness for the consumer. A substantial weight of authority holds that assumpsit will lie.[9]

In *Catani v. Swift Co.*,[10] an action of trespass was brought by the consumer against the manufacturer for diseased food and Justice Frazier said "That where the sale of articles of food is for immediate consumption there is an implied warranty that the food is wholesome and fit for the purpose intended, irrespective of the seller's knowledge of disease or defects therein."

The court in the *Nock Case* says that the sound principle of law is that in a sale of food or beverages there is an implied warranty that it shall be free of a foreign substance which may be injurious to the well being of the consumer. There is no good reason why sales of food and beverages intended for human consumption should not carry with it the implied warranty that it is suitable and wholesome. By Section 15 of the Sales Act[11] an implied warranty as to quality or fitness for a particular purpose may be annexed by usage of trade and nothing is clearer than that coca cola is exclusively made for the purpose of drinking.

Next the court says that assuming the action of assumpsit is improperly brought, it will not reverse it on

[9]Crigger v. Coca Cola Bottling Co., 132 Tenn. 545, 179 S. W. 155; Craft v. Parker and Co., 96 Mich. 245, 55 N. W. 812; Boyd v. Coca Cola Bottling Works, 132 Tenn. 23, 177 S. W. 80; Truschel v. Dean, 77 Ark. 546, 92 S. W. 781; Bunch v. Weil, 72 Ark. 343, 80 S. W. 582; Nelson v. Armour Packing Co., 76 Ark., 354, 90 S. W. 288; Walters v. United Grocery Co., 51 Utah 565, 172 Pac. 473.

[10]251 Pa. 52.

[11]Act of May 19, 1915, P. L. 543 Sec. 15.

such a formal ground notwithstanding the fact the case was tried as if brought in trespass without objection to the form of action. Trial on the merits waives the pleadings; but are we to suppose that this objection could have been raised in the court below before trial on its merits? That is the question which is still unanswered. Or does this expression mean that implied warranty is a good cause of action, but even if not, it cannot be attacked now? The latter is probably what the court meant.

The question is raised whether there must be privity of contract. The court says ordinarily a manufacturer may not be liable to those with whom he has no contractual relation but if he puts goods on the market in a bottle, can, or an original package, he in effect represents to each purchaser the contents thereof are wholesome and suitable for the purpose for which they are sold and the common law doctrine of caveat emptor does not apply. The plaintiff could maintain his action on implied warranty even though an element of tort was mixed in with it.[12]

After the *Nock Case* the law in Pennsylvania seems to be that a manufacturer of beverages contained in sealed bottles is liable in an action of assumpsit for injuries sustained by a purchaser because of a foreign substance in the bottle; and that in all cases of sales of food or beverages for immediate consumption, there is an implied warranty of fitness or wholesomeness for the consumer upon which the latter may sue the manufacturer in assumpsit for injuries sustained.

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[12]Coyle v. Schnell, 49 Pa. Super. Ct. 386; Cowan v. Nagel, 89 Pa. 122; Carry v. Pennsylvania Railroad, 194 Pa. 516; Parry v. The First National Bank of Lansford, 270 Pa. 556.