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Sales--Breach of Warranty--Death Action Under Decedent Estate Law Section 130 (Greco v. S. S. Kresge & Co., 277 N.Y. 26 (1938))

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property not in existence at the time the mortgage was made and recorded.[14]

In the instant case it was held that there was no express agreement that the personalty should become part of the realty and that the facts did not indicate such an intent. But *quaere,* what if it did affirmatively appear from the facts and circumstances that the maker of the mortgage intended that the after-acquired personalty should be deemed within the coverage of the mortgage, and it was then purchased under a conditional sales contract or a chattel mortgage? The result would be the same. The mortgagor's intention could not affect the rights of the conditional vendor which would be prior to the rights of the first mortgagee, because title to the chattels would still be in the conditional vendor and not in the owner of the property. The mortgagor could not mortgage property he did not own. It would appear, however, that the mortgage under these circumstances would cover the owner's equity in the chattels and upon satisfaction of the conditional sales contract or chattel mortgage, the personalty would come within the coverage of the mortgage in equity.[15]

F. D. M.

SALES — BREACH OF WARRANTY — DEATH ACTION UNDER DECEDENT ESTATE LAW SECTION 130.—An action was brought to recover for the wrongful death of plaintiff's wife. The defendant offered provisions and foodstuffs for sale to the public as part of its retail business. Among said foodstuffs were pork frankfurters or sausages, a quantity of which the deceased purchased and consumed, contracting therefrom the disease of trichinosis, of which she died. The plaintiff sought recovery on the theory of breach of the implied warranty of fitness for use. *Held,* breach of the implied warranty that the food was fit for human consumption was such a "default" or "wrongful act" as to bring the case within the purview of Section 130

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[14] Prudential Insurance Co. v. Sanford Real Estate Corp., 157 Misc. 563, 284 N. Y. Supp. 73 (1935), *aff'd,* 246 App. Div. 567, 282 N. Y. Supp. 840 (4th Dept. 1935). The mortgage is subject to the construction enjoined by statute (REAL PROP. LAW § 54) notwithstanding that it contains, in addition to the words of the statutory form, other provisions. Property not on the premises when the mortgage was given could not be covered by the mortgage unless it became a part of the realty. The mortgage could not cover personal property not then in existence. *Cf.* Perfect Lighting Fixtures Co. v. Grubar Realty Corp., 228 App. Div. 141, 239 N. Y. Supp. 286 (1st Dept. 1930).

[15] Kribbs v. Alford, 120 N. Y. 519, 24 N. E. 811 (1890); Rochester v. Rasey, 142 N. Y. 570, 37 N. E. 632 (1894).

of the New York Decedent Estate Law.[1] *Greco* v. *S. S. Kresge & Co.*, 277 N. Y. 26, 12 N. E. (2d) 562 (1938).

It is a condition to recovery in a death action that the wrong be of such a nature that had death not ensued, defendant would have been liable to the decedent.[2] It is also a well established rule of law that in the retail sale of foodstuffs the seller impliedly warrants that the food is wholesome.[3] Therefore, in the instant case, had the decedent not died, an action predicated on breach of warranty would have accrued to the said party.[4] Apparently the cases which have been adjudicated determining whether or not an action pursuant to Section 130 of the Decedent Estate Law exists have been based on principles of pure tort.[5] The reason for this limitation is easily under-

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[1] N. Y. DECEDENT ESTATE LAW § 130: "* * * The executor or administrator * * * of a decedent who has left him or her surviving a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect or default, by which the decedent's death was caused, against a natural person who, * * * would have been liable to an action in favor of the decedent * * * if death had not ensued * * *."

[2] *Ibid.*; see (1938) 12 ST. JOHN'S L. REV. 362.

[3] N. Y. PERS. PROP. LAW § 96; Race v. Krum, 222 N. Y. 410, 118 N. E. 853 (1918) (New York rule); Ward v. Great Atlantic and Pacific Tea Co., 231 Mass. 90, 120 N. E. 225 (1918) (reason for rule); Rinaldi v. Mohican Co., 225 N. Y. 70, 121 N. E. 471 (1918) (criticism of rule); Parks v. G. C. Yost Pie Co., 93 Kan. 334, 144 Pac. 202 (1914); Hauk v. Berg, 105 S. W. 1176 (1907); Farrel v. Manhattan Market Co., 198 Mass. 571, 84 N. E. 481 (1908); Gearing v. Beikson, 223 Mass. 257, 111 N. E. 785 (1914); *cf.* Pelletier v. Dupont, 124 Md. 269, 128 Atl. 186 (1925) (where it was held that if the selection of the food is left to the judgment and skill of the dealer, the general rule of *caveat emptor* applies and the dealer is not liable, in the absence of knowledge by him that the provisions are unsound).

For common law rule see 3 BL. COMM. 165: "In contracts for provisions it is always implied that they are sound."; see also 35 CYC. 407, and authorities cited.

[4] N. Y. PERS. PROP. LAW § 96.

[5] Thaggard v. Vafes, 218 Ala. 609, 119 So. 647 (1928); Ludwig v. Johnson, 243 Ky. 534, 49 S. W. (2d) 347 (1932); La Goy v. Director General of Railroads, 231 N. Y. 191, 131 N. E. 886 (1921) ("One can not recover for the death of another unless the latter was exercising ordinary care for his safety and his death was the result of defendant's negligence"); Emery v. Rochester Telephone Corp., 271 N. Y. 306, 3 N. E. (2d) 434 (1936) (§ 130 of DEC. EST. LAW enacted to alleviate the harshness of the common law rule that an action for tort did not survive the death of the injured party); Pearlman v. Garrod Shoe Co., 276 N. Y. 172, 11 N. E. (2d) 718 (1937) (In which a parent, relying upon an express warranty of perfect construction of shoes, bought the shoes. A defect in them having caused the death of her daughter, it was held that recovery could be had on the theory of negligence but not on warranty, because infant had no contract with the defendant); Lichtenstern v. Augusta-Aiken R. and E. Co., 165 App. Div. 270, 150 N. Y. Supp. 992 (1st Dept. 1914); Griffin v. Bles, 202 App. Div. 443, 195 N. Y. Supp. 654 (3d Dept. 1922); 13 CYC. 318 (In most cases the question of the right to recover for the death of a person by wrongful act is merely a question of negligence and is to be governed by the same principles and considerations as questions of negligence where the results are less serious).

stood from the historical development of death actions.[6] The tortious act, however, need not necessarily be based upon the theory of negligence,[7] but may find its source in a breach of contract or warranty involving violation of a duty.[8] In the instant case the defendant, in breaching the warranty of wholesomeness, also violated a duty imposed by law predicated on considerations of public health and public policy.[9] Thus, although the action was brought on implied warranty, the breach was a wrongful act, a default, and in its essential nature, a tort.[10] This tortious aspect is further augmented by the historical development of a breach of warranty.[11]

Although it must still be regarded as current law that an action to be included within the scope of the Decedent Estate Law must be tortious in nature,[12] if not in form, there is undoubtedly a judicial trend to alleviate the hardships caused thereby.[13] The statute has, in keeping with the legislative intent,[14] been liberally construed by the courts,[15] and in the present case there is *dicta* that the shadowy line of distinction between the realm of contract and that of tort[16] should not be allowed to defeat an otherwise sound action.[17] In order to

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[6] At common law an action for personal injury abated at the death of the injured party. Hamilton v. Erie R. R., 219 N. Y. 343, 350, 114 N. E. 399, 402 (1916); Roche v. St. John's Riverside Hospital, 96 Misc. 289, 297, 160 N. Y. Supp. 401, 406, *aff'd*, 176 App. Div. 885, 161 N. Y. Supp. 1143 (2d Dept. 1916). The death statutes were enacted to alleviate the harshness of this common law rule. Emery v. Rochester Telephone Corp., 271 N. Y. 308, 310, 3 N. E. (2d) 434, 437 (1936). However, these statutes did not change the common law rule but, rather, provided a new remedy. Whitford v. Panama R. R., 23 N. Y. 465 (1861); Hamilton v. Erie, *supra*.

The first death statute was 9 & 10 VICT., c. 93. The court in the instant case at 35, in referring to this statute said: "It is clear from the title and wording of the act, the circumstances surrounding its passage, and from decisions affecting its application, that it was intended to relate only to actions that are tortious in nature." Our statutes are similar in wording and legislative intent. Instant case at 35.

[7] Schloendarff v. N. Y. Hospital, 211 N. Y. 125, 105 N. E. 92 (1914).

[8] Thaggard v. Vafes, 218 Ala. 609, 119 So. 647 (1928) ("Though mere breach of contract is not a wrongful or negligent act, within the scope of the statute giving a right of action for wrongful death, the negligent or tortious breach of duty to the person whose death is caused thereby is within the statute, though such duty arises out of contract"); Roche v. St. John's Riverside Hospital, 96 Misc. 289, 160 N. Y. Supp. 401, *aff'd*, 17 App. Div. 885, 161 N. Y. Supp. 1143 (2d Dept. 1916).

[9] N. Y. PERS. PROP. LAW § 96; Race v. Krum, 222 N. Y. 410, 118 N. E. 853 (1918).

[10] Instant case at 35; see (1934) 8 ST. JOHN'S L. REV. 363.

[11] Prior to the action for assumpsit the remedy for breach of warranty was an action for deceit. AMES, LECTURES ON LEGAL HISTORY (1913) 36.

[12] See notes 5, 6, *supra*.

[13] Emery v. Rochester Telephone Corp., 271 N. Y. 308, 310, 3 N. E. (2d) 434, 437 (1936).

[14] Van Beech v. Sabine Towing Co., 300 U. S. 342, 57 Sup. Ct. 452 (1937).

[15] Instant case at 36.

[16] Instant case at 35; *cf.* Rich v. N. Y. Cent. and H. R. R., 87 N. Y. 382 (1882).

[17] See note 13, *supra*.

obviate the apparent difficulties encountered in seeking relief in tort under the Decedent Estate Law, the plaintiff may have had recourse to contract had he so elected.[18] The action, if such were the case, would be instituted on the sole theory of breach of warranty. Obviously, in following that procedure the plaintiff would be suing for the benefit of decedent's estate [20] rather than in behalf of the next of kin. The damages recoverable in the contract action would have been all the damages suffered by deceased consequentially resulting from the breach. However, the advisability of proceeding under that theory is questionable when one considers the enhanced compensation available in the death action. It is the concensus of judicial opinion that in proceedings for breach of contract the relief afforded should be limited to the actual damages suffered by the injured party himself.[21] This would, obviously, preclude a third party from maintaining suit in his own behalf.[22] In a death action the plaintiff would be allowed to *move* that the jury take into consideration, in computing the damages, such future pecuniary losses that the beneficiaries under the statute would suffer.[23] The comparative desirability, therefore, of proceeding under the Decedent Estate Law rather than in contract is self-evident.

J. R. P.

TAXATION—FEDERAL GIFT TAX—ESTATES BY THE ENTIRETY. —Plaintiff and his wife acquired realty in Indiana as tenants by the entirety. The plaintiff paid the sum of $300,000, personally furnishing the entire consideration. The collector of internal revenue taxed this transaction as a gift of the purchased realty to the wife. Plaintiff recovered in the District Court the $16,582 which he paid under protest. On appeal, *held,* reversed. Where a wife gets realty as a tenant by the entirety, without paying any consideration therefor, she is a

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[18] N. Y. PERS. PROP. LAW § 96.

[19] See note 3, *supra.*

[20] N. Y. DEC. EST. LAW § 116; Hamilton v. Erie R. R., 219 N. Y. 343, 114 N. E. 399 (1916).

[21] Orester v. Dayton Rubber Manufacturing Co., 228 N. Y. 134, 126 N. E. 510 (1920); Hallock v. Becher and Sackett, 42 Barb. 199 (N. Y. 1864).

[22] Because of lack of privity no cause of action arises in favor of or against a stranger to the contract. Chysky v. Drake Bros. Co., 235 N. Y. 468, 139 N. E. 576 (1923).

[23] Oldfield v. Harlem R. R., 14 N. Y. (4 Kern) 310 (1856); Tilley v. Hudson River R. R., 29 N. Y. 252 (1864); Hall v. Germain, 131 N. Y. 536, 30 N. E. 591 (1892); Sternfels v. Metropolitan St. Ry., 174 N. Y. 512, 66 N. E. 1117 (1903) (in an action for wrongful death, mortality tables are admissible to establish decedent's expectancy of life).