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Sales--Warranties--Third Persons (Pearlman v. Garrod Shoe Co., 276 N.Y. 172 (1937))

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To substantiate its ruling, the court relies to a great extent on the case of *Sajor* v. *Ampol, Inc.*[10] wherein plaintiff, a dealer in securities, was permitted to recover for stocks sold and delivered although at the time he had not complied with the Martin Act[11] which required all such dealers to file a "state notice." It is almost patent that the Agriculture and Markets Law and the Martin Act are totally dissimilar in purpose, the object of the latter being to prevent deception upon the investing public by compelling the dealer to make a full and fair disclosure of the proposed security issue and providing for a *specific* penalty for a violation thereof. Taken as a whole, the Martin Act and similar Blue Sky laws have been construed to provide but *one* penalty and no others.[12] The Martin Act is not a licensing statute whereas the Milk Control Law is a statute providing for the granting of a license by a state department, upon specifying requirements as to character, experience, equipment, financial responsibility, previous good conduct, public utility and necessity.

It appears then that neither upon fact nor principle can the instant case be differentiated from those cases whose holdings are diametrically opposed so that even if the decision is favorably viewed, the rule laid down must be looked upon with dissatisfaction.

R. J. M.

SALES — WARRANTIES — THIRD PERSONS. — This action was brought to recover for the wrongful death of plaintiff's intestate.[1] It is alleged that, relying upon defendant's express warranty that a pair of shoes were perfectly constructed and perfectly fitted to the intestate, a child of eight, her mother purchased them. A week later it was discovered that, due to faulty construction of the shoe, a blister had developed. Upon returning to the store, the mother was reassured of the perfection of the shoes, and a dressing was placed upon the blister, which, by this time, had broken. Later, an infection developed, as a result of which the child died. There was evidence of faulty construction, misfit, and of the fact that the defects were apparent to one who understood such merchandise. Recovery was sought upon the grounds of negligence and of breach of warranty. On appeal from a judgment affirming the dismissal of the complaint, *held,* reversed. Without passing upon the question of breach of warranty, there may have been a recovery on the ground of negligence,

[10] Sajor v. Ampol, Inc., 275 N. Y. 125, 9 N. E. (2d) 803 (1937).

[11] N. Y. GEN. BUS. LAW § 359.

[12] Miller v. Ammon, 145 U. S. 421, 12 Sup. Ct. 884 (1892); Pangborn v. Westlake, 36 Iowa 546 (1860); Watters & Martin, Inc. v. Homes Corp., 136 Va. 114, 116 S. E. 366 (1923).

[1] N. Y. DECEDENT ESTATE LAW § 130.

of which there was enough evidence to warrant a submission of the case to the jury. *Pearlman* v. *Garrod Shoe Co., 276* N. Y. 172, 11 N. E. (2d) 718 (1937).[2]

It is a condition of recovery in a death action that the wrong be of such a nature that if death had not ensued, defendant would have been liable to the decedent.[3] Therefore, in order to have recovered on the warranty, as divorced from negligence, plaintiff, in the instant case, would have had to prove defendant's liability to the decedent on the warranty itself. The weight of authority, as will appear, is that this cannot be done.

A warranty on the sale of personalty, unlike warranties on realty, does not run with the property.[4] For this reason, on the ground that there is no privity of contract, a subsequent purchaser or assignee cannot claim the benefit of any warranties given to the first buyer.[5] Thus, for breach of warranty there can be no recovery by the wife,[6] agent,[7] or child [8] of the purchaser even though it was expressly specified that the property was to be used by such person.[9] Where a parent, relying on an express warranty of safe construction of a gas heater, bought the heater, a defect in which caused the death of the child, it was held, in a death action, that there could be no recovery.[10]

It is true that there is a line of cases [11] of which, in New York, *McPherson* v. *Buick Motor Co.*[12] is the leading one, which hold that there may be a liability to third persons injured by defects in a chattel, even when those persons were not privy to the contract of sale. But the application of that rule had been limited to articles inherently or

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[2] *Cf.* Spry v. Kiser, 179 N. C. 417, 102 S. E. 708 (1920), where a nonsuit in a death action was held improper where it appeared that sweet oil, sold to plaintiff and expressly warranted to be of standard purity, was so rancid that it caused the death of his child. There was a dictum to the effect that whether the action was based *ex delicto* or *ex contractu,* at least nominal damages would be recovered.

[3] N. Y. DECEDENT ESTATE LAW § 130.

[4] Bordwell v. Collie, 45 N. Y. 494 (1871); Walrus Mfg. Co. v. McMehen, 39 Okla. 667, 136 Pac. 772 (1913); see Chysky v. Drake Bros. Co., 235 N. Y. 468, 472, 139 N. E. 576, 578 (1923); Note 51 L. R. A. (N. S.) 1111. *Contra:* New Orleans Public Serv. v. Stewart, 9 La. App. 511, 119 So. 435 (1928).

[5] Turner v. Edison Storage Battery Co., 248 N. Y. 73, 161 N. E. 423 (1928); Galvin v. Lynch, 137 Misc. 126, 241 N. Y. Supp. 479 (1930); Birmingham Chero-Cola v. Clark, 205 Ala. 678, 87 So. 64 (1921); Gearing v. Berkson, 223 Mass. 257, 111 N. E. 785 (1916); see 55 C. J. 665 *et seq.;* 24 R. C. L. 158.

[6] Gearing v. Berkson, 223 Mass. 257, 111 N. E. 785 (1916).

[7] Chysky v. Drake Bros. Co., 235 N. Y. 468, 139 N. E. 576 (1923).

[8] State etc. v. Consolidated Gas Co., 146 Md. 390, 126 Atl. 105 (1924).

[9] Tally v. Beever, 33 Tex. Civ. App. 675, 78 S. W. 23 (1903).

[10] State etc. v. Consolidated Gas Co., 146 Md. 390, 126 Atl. 105 (1924) (here, as in the principal case, it was a condition of recovery that the decedent, if he had lived, may have maintained an action in his own behalf).

[11] See cases cited in 17 A. L. R. 683 *et seq.*

[12] 217 N. Y. 382, 111 N. E. 1050 (1916).

imminently dangerous.[13] Further, it should be noted that *such liability is not predicated upon any theory of contract or warranty.*[14] Indeed such an idea was expressly repudiated in New York, where, speaking of the liability of makers of dangerous instruments to third persons the court said: "This is not upon the ground of warranty express or implied, but because the vendor owes to the public a duty not to expose human life to danger by negligently and carelessly putting upon the market an article as harmless, which is in fact dangerous." [15] Judicial protest against any doctrine extending the right of persons to sue *ex contractu* in such cases is not wanting.[16]

As far as third persons are concerned, warranties are of significance only insofar as their breach constitutes negligence.[17] In any case of breach of warranty therefor, there can be no recovery by a third person where the breach alone is relied upon. Where a third person was injured because of a defect in a vacuum cleaner which constituted a breach of warranty to the purchaser, recovery was denied.[18] It would seem from the above that in the case of a chattel inherently dangerous, no negligence appearing, a person injured because of a defect, amounting to a breach of warranty to the purchaser, cannot recover. Also, that in the case of a chattel not within the "dangerous instrumentality" rule, where there is a defect amounting to a breach of warranty, negligence is immaterial.[19] There can be no recovery *ex delicto* or *ex contractu.*

A. W.

SPECIFIC PERFORMANCE—CONTRACT BY RAILROAD TO ERECT STATION—SUFFICIENCY OF DEFENSES OF LACK OF NECESSITY—HARDSHIP.—In 1905 the legislature authorized the city of New York to grant to the defendants the right to use certain underground areas for track and station facilities; plans therefor to be subject to approval

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[13] See note 11, *supra.*

[14] "If to the element of danger, there is added knowledge they will be used by persons other than the purchaser, and used without new test, then, *irrespective of contract,* the manufacturer of this instrument of danger is under a duty to make it carefully." [Italics ours.] Cardozo, J., in McPherson v. Buick Motor Co., 217 N. Y. 382, 389, 111 N. E. 1050, 1053 (1916).

[15] Favo v. Remington Arms Co., 67 App. Div. 414, 73 N. Y. Supp. 788 (3d Dept. 1901); see National Savings Bank v. Ward, 100 U. S. 195, 204, 25 L. ed. 621, 624 (1879).

[16] See National Savings Bank v. Ward, 100 U. S. 195, 25 L. ed. 621; Davidson v. Nichols, 11 Allen 514 (Mass. 1866).

[17] Cunningham v. C. R. Pease House Furnishing Co., 74 N. H. 435, 69 Atl. 120 (1908) *semble.*

[18] Galvin v. Lynch, 137 Misc. 126, 241 N. Y. Supp. 479 (1930).

[19] The result, in the instant case, would seem to indicate that even shoes might be included in the "dangerous instrumentality" rule. See Note (1938) 12 ST. JOHN'S L. REV. 281.