

# Sales--Action by Husband Against Vendor for Breach of Warranty Made to Wife (Giminez v. Great Atlantic and Pacific Tea Co., and Mitsui & Co., 264 N.Y. 390 (1934))

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the defendant is altogether dependent upon the culpability of one exonerated in a prior suit upon the same facts by the same plaintiff.<sup>7</sup> All that is necessary to render a judgment effectual as a bar to another action is that the cause of action be substantially the same,<sup>8</sup> *i. e.*, the material issues must be the same.<sup>9</sup> The reason therefor is that the rule of *res adjudicata* does not rest wholly on the narrow grounds of technical estoppel, nor on the presumption that a former judgment was right and just, but rather on the ground that public policy requires a limit to litigation.<sup>10</sup> Thus, on both principle and precedent, where a plaintiff has one cause of action based on alleged issues (the negligence of the servant, the imputed negligence of the master and his own freedom from contributory negligence) he shall be bound by his election as evidenced in a prior suit.

A. S.

SALES—ACTION BY HUSBAND AGAINST VENDOR FOR BREACH OF WARRANTY MADE TO WIFE.—Plaintiff's wife bought from defendant retailer, on her own account, a quantity of crab meat. The food proved to be contaminated and she became ill from the consumption thereof. Plaintiff brought action against the retailer for loss of con-

<sup>7</sup> See *Bigelow v. Old Dominion Copper Co.*, 225 U. S. 111, 127, 32 Sup. Ct. 641 (1911); *Pangburn v. Buick Motor Co.*, 211 N. Y. 228, 105 N. E. 423 (1914) (The unusual action of the jury in holding the defendant liable and exonerating the driver caused the court to grant a new trial instead of dismissing the complaint); *cf. Featherston v. President etc.*, 71 Hun 109, 111 24 N. Y. Supp. 603, 605 (1893): "A judgment in favor of the principal or surety on a ground equally applicable to both should be accepted as conclusive against the plaintiff's right of action."

The exception is not allowed in cases involving joint tortfeasors where the liability is joint and several. *Russell v. McCall*, 141 N. Y. 437, 36 N. E. 498 (1894) (Court held each of the several wrongdoers severally liable for the full amount of the misappropriated funds); *Jefson v. Int'l Ry. Co.*, 80 Misc. 247, 140 N. Y. Supp. 941 (1913) (A judgment against the plaintiff in a prior suit was not held a bar to the action because the defendant was liable jointly and severally).

<sup>8</sup> *A. H. G. M. and M. Co. v. Andrews*, 55 N. Y. Super. Ct. 93 (1887), *aff'd*, 120 N. Y. 58, 23 N. E. 987 (1890); 34 C. J. 1500, n. 32.

<sup>9</sup> *Lorillard v. Clyde*, 48 N. Y. Super. Ct. 409 (1882), *aff'd*, 99 N. Y. 196, 1 N. E. 614 (1885); *cf. DeSollar v. Hanscome*, 158 U. S. 216, 221, 15 Sup. Ct. 816 (1894): "It is of the essence of estoppel by judgment that either it appear on the face of the record or be shown by extrinsic evidence that the precise question was raised and determined in the former suit."

<sup>10</sup> See *Eissing Chemical Co. v. People's National Bank of Brooklyn*, 205 App. Div. 89, 91, 199 N. Y. Supp. 342 (2d Dept. 1923), *aff'd*, 237 N. Y. 532, 143 N. E. 731 (1923); *Haverhill v. Int'l Ry. Co.*, 217 App. Div. 521, 523, 217 N. Y. Supp. 522 (4th Dept. 1926), *aff'd*, 244 N. Y. 582, 155 N. E. 905 (1927) wherein the court states that a sound public policy demands that successive trials of the same issues of fact shall not be allowed to a party, although he selects different parties as defendants not technically privy to the preceding judgment or the immediate controversy in which it was granted.

sortium based upon the breach of warranty of fitness for use and merchantable quality which the retailer impliedly made to the vendee wife.<sup>1</sup> The plaintiff husband, disclaiming at the trial any theory of negligence as a basis of recovery, succeeded in the Trial Term and in the Appellate Division.<sup>2</sup> On appeal, *held*, reversed. Privity of contract is essential to recovery in any action for breach of warranty. *Giminez v. Great Atlantic and Pacific Tea Co., and Mitsui & Co.*, 264 N. Y. 390, 191 N. E. 27 (1934).

In cases of actions for breach of warranty, our courts have been consistently rigid in requiring contractual relation as a basis for suit.<sup>3</sup> But the factual set-up of these cases differs from that of the instant case in that the plaintiffs therein were either sub-vendees or donees who were themselves injured. The close relationship of husband and wife has been held to overcome the defect of lack of privity in some branches of the law of contracts.<sup>4</sup> Historically, the action for breach of warranty originally sounded purely in tort.<sup>5</sup> Likewise, the damages allowed the wife in her action against the retailer were awarded on the theory of a wrong, as in other cases where the omission to perfect a contract obligation was considered to be tortious in nature by the court.<sup>6</sup> Other jurisdictions have been somewhat less strict in applying the rule requiring privity,<sup>7</sup> and in one case it was entirely disregarded.<sup>8</sup> The majority of jurisdictions,

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<sup>1</sup> N. Y. PERS. PROP. LAW (1911) §96, subds. 1, 2; *Rothmiller v. Stein*, 143 N. Y. 581, 38 N. E. 718 (1894); *People v. Clair*, 221 N. Y. 108, 116 N. E. 868 (1917); *Race v. Krum*, 222 N. Y. 410, 118 N. E. 853 (1918); *Rinaldi v. Mohican Co.*, 225 N. Y. 70, 121 N. E. 471 (1918); *Temple v. Keeler*, 238 N. Y. 344, 144 N. E. 635 (1924); *Ryan v. Progressive Grocery Stores*, 255 N. Y. 388, 175 N. E. 105 (1931); *Bernstein v. Queens County Jockey Club*, 222 App. Div. 191, 225 N. Y. Supp. 449 (2d Dept. 1927).

<sup>2</sup> *Giminez v. Great Atlantic & Pacific Tea Co. and Mitsui Co.*, 240 App. Div. 238, 269 N. Y. Supp. 463 (2d Dept. 1934).

<sup>3</sup> *Boardwell v. Collie*, 45 N. Y. 494 (1871); *Chysky v. Drake Bros.*, 235 N. Y. 468, 139 N. E. 576 (1923); *J. Aron Co. v. Sills*, 240 N. Y. 588, 148 N. E. 717 (1925); *Turner v. Edison Storage Battery Co.*, 248 N. Y. 73, 161 N. E. 423 (1928); *Ryan v. Progressive Grocery Stores*, *supra* note 1.

<sup>4</sup> *Buchanan v. Tilden*, 158 N. Y. 109, 52 N. E. 724 (1899).

<sup>5</sup> 1 WILLISTON, SALES (2d ed. 1924) 195, p. 373.

<sup>6</sup> *Wade v. Kalbfleisch*, 58 N. Y. 282 (1874); *Rich v. New York Central & Hudson River Railroad Co.*, 87 N. Y. 382 (1882), wherein Finch, J., said: "Between actions plainly *ex contractu* and those early *ex delicto* there exists what has been termed a borderland where the lines of distinction are shadowy and obscure and the tort and the contract so approach each other and become so nearly coincident as to make their practical separation somewhat difficult"; *Gillespie v. Brooklyn Heights Railroad Co.*, 178 N. Y. 347, 70 N. E. 857 (1904); *Bush v. Interborough Rapid Transit Co.*, 187 N. Y. 388, 80 N. E. 197 (1907); *Boyce v. Greeley Square Hotel Co.*, 228 N. Y. 106, 126 N. E. 647 (1920); *Bernstein v. Queens County Jockey Club*, *supra* note 1.

<sup>7</sup> *Davis v. Van Kamp Packing Co.*, 189 Iowa 775, 176 N. W. 382 (1920); *Parks v. Yost Pie Co.*, 93 Kan. 334, 144 Pac. 202 (1914); *Catani v. Swift*, 251 Pa. 52, 95 Atl. 931 (1915); *Coca Cola Bottling Works v. Lyons*, 145 Miss. 877, 111 So. 305 (1927).

<sup>8</sup> *Coca Cola Bottling Works v. Lyons*, *supra* note 7. Here the recovery was by a donee, the court holding that the warranty followed the title.

however, insist on privity.<sup>9</sup> A recovery on the ground of negligence would have been more difficult here<sup>10</sup> than in other states,<sup>11</sup> and to bring himself under the statute,<sup>12</sup> plaintiff would have had to prove that the deleterious substance had been added,<sup>13</sup> whereas it developed after the can had been sealed. While not going so far as to invoke so broad a third party beneficiary rule as in *Lawrence v. Fox*,<sup>14</sup> it is submitted that the close relationship of the plaintiff to the injured party in the instant case might, without departing radically from established legal precedent, or opening the door to extensive litigation, form a basis of recovery.

J. R. O'D.

TRADE ASSOCIATIONS—LAWFUL HARM—RULE APPLIED TO TRADE ASSOCIATIONS.—Plaintiff, a civil engineer, furnished, according to submitted building plans and specifications, estimates of iron and wire to metal fabricators of whom thirty-two are members of a voluntary, unincorporated association. Plaintiff's service enabled smaller and irresponsible concerns to bid and this, the parties appear to agree, was ruinous to the trade. The association adopted a resolution requiring its members to make their own estimates on bids for metal work used in construction and enforced it by censure, fines and expulsion. From an award of the Supreme Court granting plaintiff damages and injunctive relief both sides appeal, *held*, reversed and complaint dismissed. The association acting in good faith for the benefit and advantage of its members and in the best interests of the trade was within its rights although plaintiff's business was damaged by the resolution and its enforcement. *Arnold v. Burgess*, 241 App. Div. 364, 272 N. Y. Supp. 534 (1st Dept. 1934).

Persons affiliating themselves with a voluntary association thereby agree to abide by its constitution and by-laws since the latter are the terms of the contract which define the privileges secured and the duties assumed by those who become members.<sup>1</sup> At common law

<sup>9</sup> 1 WILLISTON, SALES (2d ed. 1924) 244, n. 47.

<sup>10</sup> WHITNEY, LAW OF SALES (2d ed. 1934) §175, p. 201. In *Sheppard v. Beck Bros., Inc.*, 131 Misc. 164, 225 N. Y. Supp. 438 (1927) it was held that the mere presence of a tack in the food did not give rise to a *res ipsa loquitur* case.

<sup>11</sup> Cases cited in *supra* note 7, in which the court said that an implied warranty ran to the sub-vendee to establish a duty, the breach of which afforded a cause of action.

<sup>12</sup> N. Y. AGRICULTURE AND MARKETS LAW (1925) c. 612, subd. 8.

<sup>13</sup> Instant case.

<sup>14</sup> 20 N. Y. 268 (1859).

<sup>1</sup> *Polin v. Kaplan*, 257 N. Y. 277, 177 N. E. 833 (1931); see *Rankin v. Probey*, 131 App. Div. 328, 331, 115 N. Y. Supp. 832 (3d Dept. 1909):