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Actions--Husband's Right of Action for Loss of Wife's Consortium Against Vendor Who Sold Her Contaminated Food (Gimenez v. Great Atlantic & Pacific Tea Co. and Mitsui Co., 269 N.Y. Supp. 463 (2d Dept. 1934))

St. John's Law Review

ordinary witness[10] such as insanity,[11] lack of knowledge,[12] self-serving declarations,[13] prior commission of a felony,[14] failure to understand questions[15] and disbelief in God.[16]

The declaration is to be restricted to a statement of the cause of death and the attending circumstances, the *res gestae*.[17] It must contain definite[18] facts,[19] to which the declarant could testify if alive,[20] not opinions and conjectures.[21]

Although originally applicable to all types of cases, the use of this exception to the Hearsay Rule, in the 18th century was restricted to criminal cases,[22] and later by statute was applied in indictments for abortion.[23] The constitutional right of the accused to be confronted with his accuser has been held not to have been violated by the use of dying declarations; that the deceased is not a witness within the meaning of the constitution, and it is sufficient if the witness who testifies as to the declaration is present.[24]

C. T. S.

ACTIONS—HUSBAND'S RIGHT OF ACTION FOR LOSS OF WIFE'S CONSORTIUM AGAINST VENDOR WHO SOLD HER CONTAMINATED FOOD.—The vendor sold to the plaintiff wife a quantity of crabmeat, which proved to be contaminated and the plaintiff wife became ill from the consumption thereof. The wife and her husband brought concurrent actions against the vendor, the wife for breach of implied

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[10] 3 WIGMORE, EVIDENCE (2d ed.) §1445.

[11] Lipcomb v. State, — Miss. —, 22 So. 188 (1897); Reeves v. State, *supra* note 8.

[12] Jones v. State, — Miss. —, 30 So. 759 (1901); Reeves v. State, *supra* note 8.

[13] Patterson v. Commonwealth, 114 Va. 807, 75 S. E. 737 (1912).

[14] State v. Baldin, 15 Wash. 15, 45 Pac. 650 (1896).

[15] People v. Saranzo, *supra* note 2; People v. Kane, *supra* note 2.

[16] State v. Razell, — Mo. —, 225 S. W. 931 (1920).

[17] People v. Davis, 56 N. Y. 95 (1874); People v. Smith, *supra* note 2; Hackett v. People, 54 Barb. 370 (N. Y. 1886); Walton v. State, — Miss. —, 126 So. 29 (1930); State v. Colvin, *supra* note 8.

[18] Odum v. State, 13 Ga. App. 687, 79 S. E. 858 (1913); Castillo v. State, — Tex. —, 69 S. W. 517 (1902).

[19] Berry v. State, 137 Mo. 125, 38 S. W. 1038 (1897); People v. Shaw, 63 N. Y. 36 (1897); People v. Falleto, *supra* note 2.

[20] People v. Shaw, Berry v. State, both *supra* note 19.

[21] Brotherton v. People, *supra* note 2; People v. Smith, *supra* note 2; People v. Falleto, *supra* note 2; Maine v. People, 9 Hun 113 (N. Y. 1876); Jones v. State, *supra* note 12; Berry v. State, *supra* note 19.

[22] People v. Falleto, *supra* note 2; 3 WIGMORE, EVIDENCE (2d ed. 1923) §1432.

[23] N. Y. CODE OF CRIMINAL PROCEDURE (1909) §398a; 3 WIGMORE, EVIDENCE (2d ed. 1923) §1432.

[24] State v. Colvin, *supra* note 8; People v. Corey, 157 N. Y. 332, 67 N. E. 303 (1898).

warranty of merchantable quality and fitness for human consumption of the food sold and the husband for damages for the loss of consortium resulting from the illness of the wife. *Held,* both husband and wife are entitled to recovery against the vendor, there being, as to the vendee wife, a warranty of merchantable quality implied, and, as to the husband, a duty on the part of the vendor growing out of the warranty which the latter had breached. The lack of privity of contract between the husband and the vendor does not prevent the husband's recovery. *Gimenez* v. *Great Atlantic & Pacific Tea Co. and Mitsui Co.,* — App. Div. —, 269 N. Y. Supp. 463 (2d Dept. 1934).

The vendor of food impliedly warrants to the purchaser that the goods are both fit for use and of merchantable quality.[1] At common law the manufacturer or grower was liable and not the dealer,[2] but this rule has been changed by statute.[3] The wife, as purchaser, could not have recovered in her own right if she had bought the goods for family use, since then she would have been the agent of her husband and would not have been in privity of contract with the vendor.[4] But if her agency in such a case had been unknown to the dealer, the reverse would be true.[5] But in the instant case the wife bought the goods for her own use, and the privity of contract element is therefore present.

Recovery by the husband of the purchaser against the dealer for loss of consortium, in spite of there being no privity of contract between them, seems to rest on the proposition that the actions of both husband and wife, while based on the contract of warranty, sound in tort. There are many actions of a like nature, where the omission to perfect a contract obligation is tortious because it is a breach of a legal duty.[6] Sometimes it is the breach of contract itself

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[1] 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).

[2] Hargus v. Stone, 5 N. Y. 73 (1851); Hoe v. Sanborn, 21 N. Y. 552 (1860); Bartlett v. Hoppock, 34 N. Y. 118 (1865); Carleton v. Sanborn, Ayres Co., 149 N. Y. 137, 43 N. E. 422 (1896); Bierman v. City Mills Co., 151 N. Y. 482, 45 N. E. 856 (1897); Howard Iron Works v. Buffalo Elevating Co., 188 N. Y. 619, 81 N. E. 1162 (1907); Ryan v. Progressive Grocery Stores, *supra* note 1.

[3] N. Y. PERS. PROP. LAW, *supra* note 1.

[4] Smith v. Hanson, 228 App. Div. 634, 238 N. Y. Supp. 86 (3rd Dept. 1929); Vaccaro v. Prudential Condensed Milk Co., 133 Misc. 556, 232 N. Y. Supp. 299 (1927).

[5] Meyer v. Kerschbaum, 133 Misc. 330, 232 N. Y. Supp. 300 (1928).

[6] Wade v. Kalbfleisch, 58 N. Y. 282 (1874); Gillespie v. Brooklyn Heights Railroad Co., 178 N. Y. 347, 70 N. E. 857 (1904); Busch 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.

wherein lies the tortious nature,[7] and sometimes it is in the manner in which the breach is accomplished.[8] The action for breach of warranty itself formerly sounded purely in tort.[9] Later warranty came to be treated as contractual in nature, although the history of the change is not clear.[10] Therefore, if the damages which the husband was seeking to recover arose from his consumption of the food, lack of privity of contract would have prevented his recovery.[11] But since the damages are loss of consortium, sounding in tort, and for which the husband has a cause of action,[12] he is not barred from recovery for any lack of privity of contract.

J. R. O'D.

NEGLIGENCE—IMPUTABLE AND CONTRIBUTORY.—In an action brought to recover for wrongful death of her husband and for personal injuries to herself, due to the negligence of the defendants, the negligence of the defendants in operating the railroad train and the contributory negligence of the plaintiff's intestate in operating his automobile being conceded, *held,* no recovery for death of husband; but judgment for wife because negligence of driver is not imputable to passenger in same vehicle. *Miller* v. *Union Pacific R. R. Co.,* — U. S. —, 54 Sup. Ct. 172 (1934).

A driver of an automobile is guilty of contributory negligence where he is familiar with the crossing and the train was in plain view at the time of the accident.[1] The doctrine that the negligence of the driver of a vehicle is imputed to a passenger, however, was never accepted in this state, and, after full consideration, distinctly repudiated.[2] Whether a person in a conveyance but having no con-

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[7] *Supra* note 2.

[8] Rich v. New York Central & Hudson River Railroad Co., 87 N. Y. 382 (1882).

[9] 1 WILLISTON, SALES (2d ed. 1924) §195, p. 373.

[10] WHITNEY, LAW OF SALES (2d ed. 1934) 201.

[11] Boardwell v. Collie, 45 N. Y. 494 (1871); Chysky v. Drake Bros. Co., 235 N. Y. 468, 139 N. E. 576 (1923); J. Aron Co. v. Sills, 240 N. Y. 588, 148 N. E. 717 (1925); Jaroniec v. Hasselbarth, Inc., 228 N. Y. Supp. 302, 223 App. Div. 182 (3rd Dept. 1928).

[12] Filer v. New York Central Railroad Co., 49 N. Y. 47 (1872); Bennett, v. Bennett, 116 N. Y. 584, 23 N. E. 17 (1889); Lagergren v. National Coke & Coal Co., 132 App. Div. 912, 117 N. Y. Supp. 92 (1909); Schaupp v. Turner, 188 App. Div. 338, 177 N. Y. Supp. 132 (3rd Dept. 1919); London v. Cunningham, 1 Misc. 408, 20 N. Y. Supp. 882 (1892); Lyons v. N. Y. City Railway Co., 49 Misc. 517, 97 N. Y. Supp. 1033 (1906); 1 COOLEY, TORTS (3rd ed. 1906) 470.

[1] Chicago, R. I. & P. Railroad Co. v. Houston, 95 U. S. 697 (1887); Northern Pacific R. R. Co. v. Freeman, 174 U. S. 379, 19 Sup. Ct. 769 (1899).

[2] Little v. Hackett, 116 U. S. 366, 6 Sup. Ct. 391 (1886); Union Pacific Ry. Co. v. Lapsley, 51 Fed. 174 (C. C. A. 8th, 1892).