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Sales, Implied Warranty, Manufacturer Liable to Ultimate Consumer on Theory of Public Policy

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> where a fact is equally susceptible of two interpretations one of which is consistent with the innocence of the accused, they can not arbitrarily adopt that interpretation which incriminates him.[12]

Where the prosecution's case lies somewhere in a muddle of hypotheses, justice can hardly be served when absolute guilt is extracted where they are strong importations of innocence. Such a verdict can not be called, "beyond a reasonable doubt."

S. G.

[12] Burton and Conquest v. Commonwealth, 108 Va. 892, 899, 62 S.E. 2d 376 (1908).

SALES, IMPLIED WARRANTY—MANUFACTURER'S LIABILITY TO ULTIMATE CONSUMERS ON THEORY OF PUBLIC POLICY

The manufacturer of food for human consumption, who packages such food in sealed containers, will be liable to the ultimate consumer where the consumer has suffered damages as a consequence of impurities therein on the theory of implied warranty, irrespective of a lack of privity of contract between the manufacturer and the ultimate consumer.[1] The Supreme Court of Virginia supports this theory on the basis of public policy, where a smoked pork shoulder wrapped in cellophane and labeled by the processor was purchased from a supermarket and the purchaser's wife became ill from eating the pork due to impurities in it prior to the time it left the processor's plant.[2]

Heretofore, Virginia has followed the common law doctrine that one who sells foodstuffs for human consumption impliedly warrants its' fitness and wholesomeness for such purpose and is liable not only for the result of any neglient act involved in failing to use reasonable care in the preparation and handling of his product, but is liable on implied warranty where there is

[1] Decker & Sons, Inc. v. Capps, 139 Tex. 609, 164 S.W. 2d. 828, 142 A.L.R. 1479, (1940).

[2] Swift v. Wells, 201 Va.—, 110 S.E. 2d. 203 (1959).

privity of contract between vendor and vendee.[3] In a reconsideration of the common law principle the court has relied heavily on a well-reasoned Texas decision.[4] There the court laid down a broad public policy that was a turning point in that jurisdiction, allowing recovery on implied warranty even though privity of contract is lacking. It is interesting to note that the Texas court gave considerable attention to a Virginia Law Review article, "*Manufacturer's Liability to Persons Other Than Their Immediate Vendees.*"[5] It would seem that the Virginia court was waiting for a "test" to institute the theory of recovery on implied warranty irrespective of privity.

In reaching their decision, the court said, "This permits the placing of the loss occasioned upon the manufacturer who is in the best position to prevent the production and sale of unwholesome food."[6] Here the court seems to be relying on public policy; putting the health and welfare of the public ahead of what some writers refer to as the technical barrier of privity. It was said by Professor T. F. Lambert, Jr., "It is a melancholy state of affairs to witness courts more preoccupied with privity than consumer protection."[7]

The Law of warranty is older by a century than the principles which govern it.[8] Much has been written on the pros and cons of implied warranty; contract or tort?[9] Warranty seems to be a child of no one, a hybrid between tort and contract, and until recent years it has been held by the courts to lean further towards contract. The original recovery was through an action on the

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[3] Norfolk Coca-Cola Bottling Works, Inc. v. Krausee, 162 Va. 107, 173 S.E. 497 (1934); Colonne v. Rosedale Dairy Company, 166 Va. 314, 186 S.E. 94 (1936); Kroger Grocery & Baking Company v. Dunn, 181 Va. 390, 25 S.E. 2d. 254 (1943); Blythe v. Camp Manufacturing Company, 183 Va. 432, 32 S.E. 2d. 659 (1945).

[4] *Supra*, Note 1.

[5] 24 Va. L. Rev. 134-158 (1937).

[6] *Supra*, note 2.

[7] 21. N.A.C.C.A. 419 (1957).

[8] 1 Williston on Sales § 195.

[9] See generally 24 Va. L. Rev. 134-158 (1937); 23 Col. L. Rev. 621 (1935); 27 Minn. L. Rev. 117 (1943); 30 Ill. L. Rev. 398 (1935); 5 Iowa L. Bul. 86, 96 (1919); 41 Hav. L. Rev. 263 (1927); 21 N.A.C.C.A. 419 (1957); Justice Starke, New York Law Journal, April 8-10, 1957.

case as warranty was viewed as a deceit.[10] The earliest recorded case allowing recovery on breach of implied warranty was in 1778.[11] In 1815 Lord Ellenborough said, "A dealer who contracts to sell goods of a particular description is understood to agree that he will deliver what is commonly sold in the market under that description," and from this the courts have developed implied warranty of merchantable quality.[12]

Why then privity as a barrier to recovery on implied warranty actions? Historically there seems to be no justification for the notion that privity of contract is essential to support an action for breach of implied warranty. It had been suggested that privity became a requisite only because the early law happened to satisfy it.[13] Professor Williston says of the subject, "The difficulty which most courts seem to feel in allowing the subpurchaser a remedy is based on the assumption that the liability of warranties is contractual and therefore can only run directly between a purchaser and his immediate seller; this argument does not seem impressive as an original question."[14] But in reality the action is hybrid, not tort, not contract. A New York court in recognizing its hybrid character said, "The duty rested on the defendant to see, at its peril, that the food was fit for human consumption and it is based on considerations of public health and public policy . . . in its essential nature, a tort."[15]

Most states have rejected the privity requirement at least partially.[16] "The privity doctrine is unsatisfactory. The limitation of the right to recover for the breach of an implied warranty, in the sale of foodstuffs for human consumption, to those in privity with the seller, . . . overlooks the fundamental conception of liability under the early law when food sold for human consumption occupied a preferred position over other

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[10] 27 Minn. L. Rev. 117 (1943).

[11] Stuart v. Wilkins 1 Dougl. 18 (1778).

[12] Gardiner v. Gray, 4 Camp. 144, 171 Eng. Rep. 46 (1815).

[13] Chysky v. Drake Bros. Co., 235 N. Y. 466, 139 N.E. 576, 27 A.L.R. 1533 (1923); Gimenez v. Great A. & P. Tea Co., 264 N. Y. 390, 191 N. E. 27 (1934).

[14] 1 Williston on Sales § 244a.

[15] Greco v. S.S. Kresge Co., 277 N.Y. 26, 12 N.E., 2d. 557, 561, 115 A.L.R. 1020 (1938).

[16] Mass., New Hamp., New Jersey.

goods, the dealer therein being made an absolute insurer of his product..."[17]

What then is Virginia's position with respect to implied warranty? Have we been holding to a common law doctrine that does not fit the requirements of society? The exact question presented by the recent decision has not heretofore been before the court.[18] It would seem then that Virginia has been waiting for a "test" and the Swift case has tried the Virginia law and pierced the sanctity of the privity doctrine for the first time, at least with respect to the sale of packaged and sealed foodstuffs. Since the Texas decision Virginia is one of the first jurisdictions basing relief on public policy through the broad generalization laid down by that learned court; others are following.[19]

The trend and weight of authority indicate that implied warranty irrespective of privity of contract, especially where the sale of sealed foodstuffs is concerned, is now the majority rule. The theory of public policy is becoming so entrenched that the Washington court said, "If there is no authority for the remedy it is high time for such authority."[20]

There can be no doubt as to the public policy in this state with respect to the presented situation. The Virginia Code expressly makes it unlawful to sell or expose for sale unhealthy, unwholesome, or adulterated food for human consumption.[21] The court made clear in an earlier decision that separate counts of tort and contract could be joined when the injury arises out of the same general cause of action, in a continuous course of dealing with reference to one right and where one judgment can be rendered.[22]

C. F. G.

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[17] Melick, Sale of Food & Drink pl 94; 23 Cal. L. Rev. 621 (1935).

[18] *Supra*, note 2.

[19] For other recent decisions see: Decker & Sons, Inc. v. Capps, 139 Tex. 609, 164 S.W. 2d. 828 (1940); Crystal Coca-Cola Bottling Co. v. Cathey, 83 Ariz. 163, 317 P. 2d. 1094 (1957); Lattue v. Coca-Cola Bottling Co., 50 Wash. 645, 314 P. 2d. 421 (1957); Bryer v. Rath Packing Co.,—Md.—, 156 A. 2d. 442 (1959).

[20] Mazetti et. al. v. Armour & Co., 75 Wash. 622, 135 Pac. 633, 48 L.R.A. (N.S.) 213, Ann. Cas. 1915 c. 140 (1913).

[21] *Supra*, note 2; Va. Food and Drink Act Chap. 16, Va. Code §§ 3-303, 3-308 (1950).

[22] E. I. duPont deNemours & Co. v. Universal Moulded Products Corporation, 191 Va. 525, 62 S.E. 2d. 233 (1950).