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Sales - Remedies of Buyer - Liability of Manufacturer to Reimburse Retailer for Damages Paid to Consumer for Breach of Express Warranty

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this section would be unconstitutional on the grounds that it permits the military direct control over a civilian. A possible solution, however, might be in the establishing of a commissioner's office, whose duty it would be to regulate the passing of prior military offenders from civilian control back into military channels, thereby creating harmony between the Uniform Code of Military Justice and our Federal Constitution.

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SALES—REMEDIES OF BUYER—LIABILITY OF MANUFACTURER TO REIMBURSE RETAILER FOR DAMAGES PAID TO CONSUMER FOR BREACH OF EXPRESS WARRANTY.—The defendant manufactured a stepladder and sold it to a retailer with an express warranty of fitness. The retailer resold it to a customer with a similar warranty. The customer, injured when the stepladder collapsed, sued the retailer and recovered a sizeable verdict. Although the retailer notified the defendant of the commencement of the purchaser's suit and demanded that it take over the defense, the defendant refused. The plaintiff, an insurance company which reimbursed the retailer for the damages he was compelled to pay, brought suit against the defendant to recover the sum thus paid. *Held,* judgment for plaintiff as a matter of law. Defendant manufacturer, having been given notice of the pendency of the suit by the customer against the retailer, was bound by the result in the prior action on the principle of res judicata. *Liberty Mutual Insurance Co. v. J. R. Clark Co.,* 59 N.W.2d 899 (Minn. 1953).

The underlying rule applied in this case is one which is apparently "well settled, that where a person is responsible over to another, either by operation of law or express contract and he is duly notified by the pendency of the suit against the person to whom he is liable over and full opportunity is afforded him to defend the action, the judgment, if obtained without fraud or collusion, will be conclusive against him whether he appears or not." [1] The same principle has often been applied in cases of warranty of title,[2] as well as in negligence cases.[3] Most of the authorities cited in the instance case involved either cases of recovery on implied warranties or for negligent manufacture.[4] The holding is thus not confined to cases involving express warranties.[5]

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1. London Guarantee & Accident Co. v. Strait Scales Co., 322 Mo. 502, 15 S.W.2d 766 (1929).
2. Goldberg v. Sisseton Loan & Title Co., 24 S.D. 49, 123 N.W. 266 (1909); 3 Williston, Sales §615a (Rev. ed. 1948).
3. Washington Gaslight Co. v. District of Columbia, 161 U.S. 316 (1896); Consolidated Hand-Method Lasting-Mach. Co. v. Bradley, 171 Mass. 127, 50 N.E. 464 (1898).
4. Dushane v. Benedict, 120 U.S. 630 (1886) (implied warranty); Dayton Power & Light Co. v. Westinghouse Elec. & Mfg. Co., 187 Fed. 439 (6th Cir. 1923); Boston Woven Hose & Rubber Co. v. Kendall, 178 Mass. 232, 59 N.E. 657 (1901) (implied warranty); *see* Pfarr v. Standard Oil Co., 165 Iowa 657, 146 N.W. 851, 855 (1914).
5. Reichard, Inc. v. Dunwoody Co., 45 F.Supp. 153 (E.D.Pa. 1942); Aldridge Motors v. Alexander, 217 N.C. 750, 9 S.E.2d 469 (1940); Gerst v. Jones & Co., 32 Gratt. 518 (Va. 1879) (A manufacturer sold a grower some tobacco boxes for the grower to pack his tobacco in. The boxes were green and molded the tobacco, causing the grower to sell defective goods to his customers. The grower recovered on an implied warranty of fitness.).

The majority of the courts hold that the consumer cannot sue the manufacturer directly for breach of either implied [6] or express [7] warranty, because there is no privity of contract between them. There are, however, clear indications that this rule is being subjected to increasing attrition through the growth of numerous exceptions regarding particular types of articles, e.g., food.[8] Where the consumer can prove negligence in manufacture, either by direct proof or indirectly on the basis of the doctrine of *res ipsa loquitur*, he can, in addition, maintain an action sounding in tort.[9] The argument among those who oppose the privity of contract restriction on the liability of manufacturers is that the rule that privity is required creates an inequity because much of the demand for the product is created and many of the assurances are made solely by the manufacturer through the medium of advertising.[10] The Uniform Commercial Code contains provisions which raise an implied warranty for a particular purpose by the retailer if any reliance at all on the part of the purchaser can be shown,[11] and in addition, makes it simpler to establish express warranties [12] and implied warranties as to merchantability.[13] It remains true, however, that the courts appear to be more lenient in permitting joinder of a manufacturer and retailer in cases based on a theory of negligence than in cases based on the theory of breach of warranty, reasoning that the liabilities are more likely to differ in the cases involving warranties than in those involving negligence.[14] It is generally held that it is not necessary for the warranties to be identical to permit a recovery uder the rule of the instant case, so long as the warranty from the manufacturer is "substantially" the same as the warranty from the dealer to the sub-purchaser. [15]

In cases such as the present one, a few courts have held that the manufacturer's liability is limited to those items of damages which were foreseeable when the warranty was given.[16] The general rule, however, is that the retailer who is held liable is entitled to recover an amount which will be sufficient to

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6. Pellerton v. Dupont, 124 Me. 269, 128 Atl. 186 (1925); Chysky v. Drake Bros., 235 N.Y. 468, 139 N.E. 576 (1923) (plaintiff ate some cake in a restaurant and the cake had a nail in it; plaintiff brought suit against the persons that had baked the cake and sold it to the restaurant and the court entered judgment for defendant on the grounds that there was no privity of contract between plaintiff and defendant).

7. Chanin v. Chevrolet Motor Co., 89 F.2d 889 (7th Cir. 1937); Standard Oil Co. v. Murray, 119 Fed. 572 (7th Cir. 1902).

8. Ketterer v. Armour, 200 Fed. 322 (S.D.N.Y. 1912); Davis v. Van Camp Packing Co., 189 Iowa 775, 176 N.W. 382 (1920); Coca Cola Bottling Works v. Simpson, 158 Miss. 390, 130 So. 479 (1930); Minutilla v. Providence Ice Cream Co., 50 R.I. 43, 144 Atl. 884 (1929); Boyd v. Coca Cola Bottling Works, 132 Tenn. 23, 177 S.W. 80 (1915).

9. Bissonette v. National Biscuit Co., 100 F.2d 1003 (2d Cir. 1939); Parks v. C. C. Yost Pie Co., 93 Kan. 334, 144 Pac. 202 (1920); Carter v. Yardley & Co., 319 Mass. 92, 64 N.E.2d 693 (1946); Beaumont Coca Cola Bottling Co. v. Guillot, 222 S.W.2d 141 (Tex. Civ. App. 1949).

10. Barter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409 (1932); Note, 26 N.Dak. L.Rev. 173 (1950).

11. Uniform Commercial Code §2-315.

12. *Id.* §2-313.

13. *Id.* §2-314.

14. See Silver v. Morgan Motor Co., 15 F. Supp. 468 (E.D.Ky. 1936) Probst v. Hinesley, 133 Ky. 64, 117 S.W. 389 (1909); Kniess v. Armour, 134 Ohio St. 432, 17 N.E.2d 734 (1938); Canton Provision Co. v. Gauderk 130 Ohio St. 43, 196 N.E. 634 (1935); Oakland Motor Car Co. v. Jones, 29 S.W.2d 861 (Tex.Civ.App. 1930).

15. Reichard, Inc. v. Dunwoody Co., 45 F. Supp. 153 (E.D.Pa. 1942).

16. Fred Wolstenholme, Inc. v. Jos. Randall & Bro., Inc., 295 Pa. 131, 144 Atl. 909 (1929); *see* Liberty Mutual Ins. Co. v. Sheila-Lynn, Inc., 185 Misc. 689, 57 N.Y.S.2d 707, 709 (1945).

compensate him for what he has lost as a result of the breach of warranty by the manufacturer, including the legal expenses incurred in defending the prior suit. This is on the theory that the retailer would never have had to defend the suit had it not been for tthe manufacturer's breach of warranty.[17] There is authority for the ruling that even though the original buyer or retailer has not yet been held liable to his vendee, the amount of his probable liability may be recovered from the original seller.[18]

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17. Reichard, Inc. v. Dunwoody Co., 45 F.Supp. 153 (E.D.Pa. 1942) (permitted recovery of all expenses, including attorney's fees); Pezel v. Yerex, 205 Pac. 475 (Cal. App. 1922) (permitted all costs but attorney's fees, saying that if each sub-vendee were permitted to recover attorney's fees, by the time the original vendor was sued, the attorney's fees would be more than the article was worth); Carleton v. Lombard Ayres & Co., 46 N.Y.S. 120 (1897) (permitted recovery of attorney's fees).

18. Hubbard Steel Foundry Co. v. Federal Bridge Co., 169 Wis. 277, 171 N.W. 949 (1919); 3 Williston, Contracts §1355 (Rev. ed. 1937).