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## Contracts – Assignment of Warranty – Quantity

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in the decisions emphasizes the high regard with which the courts look upon these civil liberties.

The wide variance of opinion as to the specific freedom of speech violated and the true resultant evil to be avoided demonstrates the difficulty of applying the clear and present danger test to the situation. The requirement that an oath be taken setting forth the affiliations and beliefs of the individual is perhaps a violation of a freedom of silence rather than of speech. It has been suggested that such a liberty is protected by the Fifth Amendment rather than by the First.<sup>14</sup>

It is the contention of the National Labor Relations Board that Congress has afforded a facility for the unions, the privilege of becoming an exclusive bargaining agent, and that § 9(h) is merely a condition to qualify the recipient of the favor.<sup>15</sup> It is true there have been many situations in which Congress has been upheld in its power to condition the utilization of facilities afforded upon compliance with certain conditions, as in the use of the mails.<sup>16</sup> However, the Fifth Amendment guards against the imposition of arbitrary and discriminatory conditions.<sup>17</sup> The question then becomes a matter of whether the requirement established by Congress that the affidavits be furnished is reasonably calculated to accomplish the protection of interstate commerce from political strikes without imposing an extremely unfair burden on particular individuals or groups.

Congress decided the means selected would best accomplish this end when it amended the National Labor Relations Act. In deciding that § 9(h) does not violate the Constitution, the Court affirmed the findings of Congress and refused to substitute its judgment as to the necessity of such restrictions. There is danger that, unless the decision of the Court be restricted very narrowly to the specific situation involved, it could prove a precedent for permitting Congress to infringe upon First Amendment rights indirectly and gradually diminish individual liberties.

## CONTRACTS — ASSIGNMENT OF WARRANTY — QUANTITY

A vendor of whiskey in storage gave to the original vendee a warranty, against excess loss in quantity,<sup>1</sup> which was assigned to the sub-purchaser in a general sale of assets. *Held*, the sub-purchaser, as assignee, can enforce the warranty of quantity against the original vendor, though there is no

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14. See Nutting, *Freedom of Silence*, 47 MICH. L. REV. 181, 219 (1948).

15. *American Communications Ass'n v. Douds*, *supra* note 8, at 679.

16. *Milwaukee Publishing Co. v. Burleson*, 255 U.S. 407 (1921); *Lewis Publishing Co. v. Morgan*, 229 U.S. 288 (1913); *Champion v. Ames*, 188 U.S. 321 (1903).

17. *cf. Walling v. Sun Publishing Co.*, 47 F. Supp. 180, 191 (W.D. Tenn. 1942).

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1. The warranty was against excess outage. Outage is loss of content from seepage, evaporation or whatever the cause. Excess outage is all outage beyond that allowed by the Government for tax computation purposes. *Hunter-Wilson Distilling Co. v. Foust Distilling Co.*, 181 F.2d 543, 544 (3d Cir. 1950).

privity of contract. *Hunter-Wilson Distilling Co.*, 181 F.2d 543 (3d Cir. 1950).

The general rule is that the mere resale of a warranted article does not transfer to the sub-purchaser any rights under an original warranty.<sup>2</sup> Not only does the warranty not flow with the goods<sup>3</sup> as a result of the sale, but it cannot be assigned as a contract right. The legal bar to an attempted assignment of a warranty is the lack of privity,<sup>4</sup> a modern heritage from the early common law which denied the right to assign a chose in action arising out of any contract.<sup>5</sup> Assignment of rights in contracts was denied because of the personal nature of contracts in general,<sup>6</sup> formed by promises made with the personality and character of the promisee as an important factor. However, in time, it became recognized that the importance of the personal consideration in inducing the promise was, and is, a matter of degree.<sup>7</sup> Consequently, rights arising out of a contract, in which the personal consideration is inconsequential, may be assigned to a stranger by an original promisee.

Warranties, however, as contracts, have remained an exception and generally are not assignable.<sup>8</sup> The reason lies in the history of the action and not in logic. Early actions on warranties were brought in deceit,<sup>9</sup> but with the growth of *assumpsit*,<sup>10</sup> the suits shifted to the latter action<sup>11</sup> because proof of *scienter* was eliminated and relief was easier.<sup>12</sup> A sub-purchaser, however, was without relief since an assignment of a warranty, like other contracts, was not permitted because of the lack of privity. With the growth of action on the case and modern negligence actions, suits for damages resulting from the purchase of defective articles again shifted to tort.<sup>13</sup> Original purchasers could successfully maintain actions in tort,<sup>14</sup> but the defense of lack of privity, which originated in *assumpsit* and had some foundation in logic as a bar to assignment, was carried over as a defense against a sub-purchaser who alleged negligence.<sup>15</sup> It was not until after the

2. 4 WILLISTON, *CONTRACTS* § 998 (Rev. ed. 1936).

3. *Chanin v. Chevrolet Motor Co.*, 89 F.2d 889 (7 Cir. 1937).

4. *Farlow v. Jeffcoat*, 78 Ga. App. 653, 52 S.E.2d 30 (1949).

5. *Hillsdale Distillery Co. v. Briant*, 129 Minn. 223, 152 N.W. 265 (1915); 2 WILLISTON, *CONTRACTS* § 405 (Rev. ed. 1936).

6. *Atlantic & C. N. R.R. v. Atlantic & N. C. Co.*, 147 N.C. 368, 61 S.E. 185 (1908).

7. *Garford Motor Truck Co. v. Buckson*, 4 Harr. 103, 143 Atl. 410 (1927); *Parker v. Beasley*, 40 N.M. 68, 54 P.2d 687 (1936).

8. 4 WILLISTON, *CONTRACTS* § 998 (Rev. ed. 1936).

9. 3 HOLDSWORTH, *HISTORY OF ENGLISH LAW*, 428, 434 (4th Ed. 1935).

10. *Stuart v. Wilkins*, 1 Doug. 18 (Mich. 1778).

11. Ames, *History of Assumpsit*, 2 HARV. L. REV. 1, 8 (1889).

12. *Williamson v. Allison*, 2 East 446 (K.B. 1802).

13. Ames, *supra* note 11.

14. *Waters-Pierce Oil Co. v. Deselms*, 212 U.S. 159 (1909); *Ebbert v. Philadelphia Elec. Co.*, 330 Pa. 257, 198 Atl. 323 (1934); *Wright v. Howe*, 46 Utah 588, 150 Pac. 56 (1915).

15. It was feared that industry would be impeded by subjecting a supplier of chattels to multiplicity of actions in scattered localities, *Winterbottom v. Wright*, 10 M. & W. 109, (Ex. 1842), and later because the injury to third parties could not be a foreseeable consequence. *Hussey v. J. I. Case Threshing Mach. Co.*, 120 Fed. 865 (8th Cir. 1903).

case of *McPherson v. Buick*<sup>16</sup> that lack of privity could be eliminated as a defense against a sub-purchaser of any article.<sup>17</sup> As a result, many warranty cases now are brought as negligence actions, and breach of warranty and negligence in manufacture are almost interchangeable concepts.<sup>18</sup>

Pure breach of warranty has not followed the development of either eliminating lack of privity in negligence,<sup>19</sup> or liberalizing the right of assignments in contracts in which the personal consideration is inconsequential. On the contrary, contracts of warranty, as a group, are construed as highly personal and are not assignable.<sup>20</sup> Individual warranties are not examined for the true degree of personal consideration, unlike other contracts, but are personal by dint of being warranties. There are exceptions of warranties which do flow with the resale of the goods. Sub-purchasers of food and of inherently dangerous instrumentalities have been allowed recovery against the original vendors.<sup>21</sup> This closely parallels the negligence cases before *McPherson v. Buick*, and in some of the jurisdictions allowing these exceptions there is a trend to extend the right to other articles.<sup>22</sup>

A sub-purchaser who has been allowed an action on breach of warranty must spell it out and define its terms. There is always a warranty of quality and title if there is a warranty at all. There may be an express warranty<sup>23</sup> or a warranty implied in law from the sale alone.<sup>24</sup> There may also be a warranty construed from the acts and words of the seller in his inducements to the buyer.<sup>25</sup> A description of quality in an express warranty may be detailed, but may be an implied warranty created from custom, usage and good sense. Because other defects, such as short shipments, incorrect colors

16. *McPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

17. *Dillon v. William S. Scull Co.*, 164 Pa. Super. 365, 64 A.2d 525 (1949).

18. *Hruska v. Parke, Davis Co.*, 6 F.2d 536 (8th Cir. 1925); *Marler v. Pearlman's R.R. Salvage Co.*, 230 N.C. 121, 52 S.E.2d 3 (1949); *Amarillo Coca-Cola Bottling Co. v. Louder*, 207 S.W. 2d 632 (Tex. 1948); *Jacob E. Decker & Sons v. Capps*, 139 Tex. 609, 164 S.W. 2d 828 (1942); *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P.2d 409 (1932), on rehearing, 179 Wash. 123, 35 P.2d 1090 (1934); see PROSSER, TORTS § 85, 707 (1941).

19. *Dillon v. William S. Scull Co.*, 164 Pa. Super. 365, 64 A.2d 525 (1949).

20. *Farlow v. Jeffcoat*, 78 Ga. App. 653, 52 S.E.2d 30 (1949).

21. *Laclede Steel Co. v. Silas Mason Co.*, 67 F. Supp. 751, (W.D. La. 1946); *Patorgias v. Coca-Cola Bottling Co. of Chicago*, 332 Ill. App. 117, 74 N.E.2d 162 (1948); *Amarillo Coca-Cola Bottling Co. v. Louder*, 207 S.W.2d 632 (Tex. 1948); *Jacob E. Decker & Sons v. Capps*, 139 Tex. 609, 164 S.W.2d 828 (1942); *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P.2d 409 (1932); *Mazetti v. Armour Co.*, 75 Wash. 622, 135 Pac. 633 (1913). *Contra Barucki v. Mackenzie Bros. Co.*, 125 Conn. 92, 3 A.2d 224 (1939); *Smith v. Salem Coca-Cola Bottling Co.*, 92 N.H. 97, 25 A.2d 125 (1942); *Salzano v. First Nat. Stores*, 268 App. Div. 993, 51 N.Y.S.2d 645 (1945).

22. *Raymond v. J. R. Watkins Co.*, 88 F. Supp. 932 (D. Minn. 1950) (shampoo); *Free v. Sluss*, 87 Cal. App.2d 933, 197 P.2d 854 (1948) (soap); *Ebers v. General Chemical Co.*, 310 Mich. 261, 17 N.W.2d 176 (1945) (tree spray).

23. *Orrison v. Ferrante*, 72 A.2d 771 (D.C. Munic. Ct. 1950).

24. *Mazetti v. Armour Co.*, 75 Wash. 622, 135 Pac. 633 (1913).

25. *Jacob E. Decker & Sons v. Capps*, 139 Tex. 609, 164 S.W.2d 828 (1942); *Fleenor v. Erickson*, 215 P.2d 885 (1950); *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P.2d 409 (1932).

or incorrect sizes are of the heart of the sales contract, they need not be warranted, and there is simply a breach of contract.<sup>26</sup>

In the instant case, there was an express warranty covering excess loss in quantity, which is rare, but exists as a custom in the alcoholic beverage trade. If the warranty were treated as any other contract, it could be assigned, since there was no personal consideration. The whiskey stored in a warehouse was untouched and unseen by the purchaser, and would have been warranted to any vendee. Yet, because of the treatment of the assignment of warranties as different from other contracts, the court could not examine this contract and call it assignable. Instead, it allowed assignment on the basis of a distinction of this warranty of quantity from the usual one of quality and title. If the court were faced with a situation in which a warranty was clearly of quality and was equally as impersonal as this one, it is uncertain whether assignment would be permitted. But the decision does show a dissatisfaction with the practice of grouping warranties and classifying them as unassignable. It also shows an inclination to examine the individual warranty for its own terms and to consider it on its own merits. This attitude is much more in keeping with the needs of a complex modern business structure than is a rigid rule of lack of privity based in antiquity and illogically perpetuated.

### EMINENT DOMAIN — JUST COMPENSATION — COST OF REMOVAL OF PERSONAL PROPERTY

The United States expropriated, for a term of years with an option to renew, a warehouse leased by the defendants. The period originally condemned by the government would have expired before the termination of the leasehold, but the government, by exercising its option, exhausted the leasehold. The cost of removal of personal property was included in the just compensation award of the lower federal courts. *Held*, that the market rental value would not include the cost of removal of personal property, when the exercise of the renewal option exhausted a leasehold which originally was not entirely condemned. *United States v. Westinghouse Electric & Manufacturing Co.*, 70 Sup. Ct. 644 (1950).

The Government may condemn property<sup>1</sup> for a term of years, or for an indefinite number of years,<sup>2</sup> by condemning with an option to lengthen or shorten the initial expropriation. When an option is, or is not, exercised

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26. But see *Abounader v. Strohmyer & Orpe Co.*, 243 N.Y. 458, 154 N.E. 309 (1926).

1. U.S. CONST. AMEND. V; 56 STAT. 177 (1942), 50 U.S.C. APP. 632 (1946); see *United States v. Gettysburg Elec. Co.*, 160 U.S. 668, 681 (1896).

2. *United States v. Petty Motors Co.*, 327 U.S. 372 (1946); *United States v. General Motors Corp.*, 323 U.S. 373 (1945); see *United States v. Certain Parcels of Land*, 55 F. Supp. 257 (D.C. Md. 1944).