

awakening to the importance of one of its traditional functions. From the promulgation of the new rules of court, the conclusion is irresistible that the court considers the statutory grounds of disbarment¹¹ directory rather than mandatory, and that it is assuming complete control over the conduct of attorneys. And since this is an inherent judicial function,¹² the court is clearly exercising a power reserved to it by the Constitution of Missouri.¹⁴

J. L. F.

AUTOMOBILES—ADVERTISING—WARRANTY—[Federal].—The acute question whether the sub-purchaser of a chattel may maintain an action against the manufacturer for breach of warranty, upon the theory that the manufacturer's advertising constituted a representational warranty to the sub-purchaser, has again come up for decision in the recent case of *Chanin v. Chevrolet Motor Company*.¹

The plaintiff, who had purchased an automobile from a dealer, joined the manufacturer as co-defendant in a suit to recover damages for injuries caused by the breaking of a windshield which the manufacturer had advertised as being shatterproof. The court adhered to the orthodox rule and held that suit for damages for breach of warranty cannot be maintained where there is no privity of contract between the plaintiff and defendant, and that the advertisements did not constitute such a contract as to bind the manufacturer.

It should be noted that this action was not based upon fraud or deceit, although a manufacturer's untrue advertisement, made with knowledge of its untruth, might be the basis for such an action.² Nor was the action one in tort, based upon the conception that the windshield was intrinsically dangerous to human life, so as to come within the rule of *Mac Pherson v. Buick Motor Company*,³ but was an action strictly on warranty.

There are, generally speaking, three classes of warranties. The first is the promissory warranty which is purely contractual;⁴ the second is the warranty based upon representations, regardless of whether or not the person making the representations intended to be bound thereby;⁵ the third is the warranty imposed by law, commonly termed "implied warranty."⁶ It

11. R. S. Mo. (1929) sec. 11707.

12. *Supra*, note 9.

13. Mo. Const. Art 3 (1875).

1. 15 F. Supp. 57 (D. C. N. C. Ill., 1935); now pending appeal.

2. *Marsh v. Usk Hardware Co.*, 73 Wash. 543, 132 Pac. 241 (1913); see *Alpine v. Friend Bros.*, 138 N. E. 553 (Mass. 1923).

3. 217 N. Y. 382, 111 N. E. 1050, Ann. Cas. 1916 C, 440 L. R. A. 1916 F; for a recent case based upon this doctrine see *Bird v. Ford Motor Company*, 15 F. Supp. 590 (D. C. W. D. N. Y. 1936).

4. *Holcombe and Hoke Mfg. Co. v. Osterberg*, 181 Minn. 547, 233 N. W. 302 (1930); *Palawink v. Allis-Chalmers Mfg. Co.*, 57 N. D. 199, 220 N. W. 638 (1928).

5. Uniform Sales Act, sec. 12; 1 Williston, *Sales* (2d ed. 1924) sec. 197, 200, 201.

6. Uniform Sales Act, sec. 12-16, for implied warranties of title, quality, etc.; see also *Foote v. Wilson*, 104 Kans. 191, 178 Pac. 430 (1919).

is on the second type of warranty that the plaintiff sought to recover in the instant case.

The rule requiring privity of contract between plaintiff and defendant in a suit to recover damages for breach of warranty has been criticized as based in its origin upon a misconception of the history of warranty.⁷ Professor Williston has popularized the historical fact that warranty originally was actionable in tort but later, with the development of assumpsit, came to be associated with contract principles.⁸ He has referred to a warranty action as "a hybrid between a tort and contract."⁹ Nevertheless the requirement of privity of warranty generally has been rigidly adhered to.¹⁰

However, some courts have tended to break away from this strict requirement and have, contrived theories to avoid its application. Thus, in *Ward Baking Company v. Trizzano*¹¹ the court considered the warranty between the dealer and the manufacturer to be for the benefit of the consumer and hence, as in a third party beneficiary contract, allowed the consumer to sue on the warranty. A recent Missouri case, *Madouros v. Kansas City Coca-Cola Bottling Company*¹² seems to have adopted the theory that the sub-purchaser was the assignee of the dealer and therefore was the assignee of the benefit of the warranty. Again, some courts have held that the warranty runs with the title to the chattel in the same manner that covenants of warranty run with land.¹³ It should be noted, however, that these are all food cases, in which the courts have been influenced by the public interest in the supply of safe and palatable food.

The first case allowing a suit on a warranty theory by a sub-purchaser of another kind of chattel was *Baxter v. Ford Motor Company*,¹⁴ upon which the plaintiff in the *Chanin* case relied almost exclusively. In that case, upon an identical state of facts, the Washington court allowed recovery against the manufacturer, although there was no privity of contract between the manufacturer and the sub-purchaser. This decision, hailed as an innovation

7. 1 Williston, *Sales* (2d ed. 1924) sec. 244 a; for a severe criticism of the orthodox view requiring privity of contract in a suit on warranty; see 42 Harv. L. Rev. 414 (1932).

8. Ames, *The History of Assumpsit* (1888) 2 Harv. L. Rev. 1 at 8; 1 Williston, *Sales* (2d ed. 1924) sec. 195.

9. Williston, *Liability for Honest Misrepresentation* (1910) 24 Harv. L. Rev. 415.

10. *Standard Oil Company v. Murray*, 119 Fed. 575, 25 L. Ed. 621, (C. C. A. 7, 1902); *Switzer v. Henking*, 158 Fed. 784, 15 L. R. A. (N. S.) 1151 (C. C. A. 6, 1908); *Turner v. Edison Storage Battery Company*, 248 N. Y. 73, 161 N. E. 423 (1928); for a reductio ad absurdum of the privity of contract theory in warranty see *Gearing v. Berkson*, 223 Mass. 257, 111 N. E. 785, L. R. A. 1919 E, 1006.

11. 27 Ohio App. 475, 161 N. E. 557 (1928); see comment on this case, 2 U. of Cin. L. Rev. 330 (1928).

12. 90 S. W. (2) 445 (1936).

13. *Mazzeti v. Armour*, 75 Wash. 622, 135 Pac. 633 (1913); *Dothan Chero-Cola Bottling Company v. Weeks*, 16 Ala. App. 639, 80 So. 734 (1918); *Coca-Cola Bottling Works v. Lyons*, 145 Mass. 876, 111 So. 305 (1927).

14. 12 Pac. (2) 409, 68 Wash. Dec. 384; Affirmed on rehearing, 70 Wash. Dec. 2 (1932).

in the law of warranty,¹⁵ was a recognition of modern business practices whereby manufacturers through the media of large scale distribution and national advertising are substantially dealing directly with the ultimate consumer.¹⁶ The court was impressed by the injustice of the orthodox rule which would permit manufacturers to create a demand for their goods through advertising representations, and then deny the consumer the right to recover merely because there was no privity of contract existing between the consumer and the manufacturer.¹⁷

It appears that the return to the orthodox view is not in keeping with the more enlightened authorities who point out that there is no essential difference between a representation made to an immediate buyer and one made to the public through the media of advertising.¹⁸ Neither is it in keeping with the need for a progressive law to meet changing social conditions.

O. R. A.

BANKS AND BANKING—DEPOSITS—BANK COLLECTION CODE—[MISSOURI].
 —One Davidson, the payee, received a check drawn on the Commerce Trust Company by the defendant, in exchange for grain receipts which turned out to be spurious. Davidson endorsed the check without restriction, and deposited it to his credit in plaintiff bank, and was permitted to draw against the check. Plaintiff bank forwarded the check to the Commerce Trust Company for collection, but defendant had stopped payment because of Davidson's alleged fraud. Plaintiff bank sued defendant as drawer of the check for \$18,296. *Held*: plaintiff was the owner of the check and not an agent for collection, notwithstanding that the deposit slip was on a form stating that the bank took check as agent for collection.¹

At common law there were three general types of deposits of a check or draft. If a customer presented a check or draft, endorsed without restriction, for deposit, the bank became the owner of the check or draft and the relationship of debtor and creditor was created.² If the depositor restrictively endorsed his check or draft, such as, "for collection and remittance,"

15. Note, 81 U. Pa. L. Rev. 94-5 (1932); 46 Harv. L. Rev. 161-2 (1932); 7 Wash. L. Rev. 351-9 (1932); 18 Cornell L. Q. 445-52 (1933).

16. For a study of the modern business practice of manufacturers in making representations to ultimate consumers, see Bogert and Fink, *Business Practice Regarding Warranties in the Sale of Goods* (1930) 25 Ill. L. Rev. 400.

17. *Supra*, note 14.

18. 1 Williston, *Sales* (2d ed. 1924) sec. 244a; Vold, *Sales* (1931) sec. 152, 153; see also Uniform Sales Act, sec. 12.

1. *Liberty Nat. Bank v. Vanderslice Lynds Co.*, 95 S. W. (2d) 324 (Mo. 1936).

2. *Ayres v. Farmers' & Merchants' Bank*, 79 Mo. 421 (1883); *McKeen v. Boatmen's Bank*, 74 Mo. App. 281 (1898); in re *Purl's Estate*, 147 Mo. App. 105, 125 S. W. 849 (1910); *Padgett v. Bank of Mountain View*, 141 Mo. App. 374, 125 S. W. 219 (1910); *Ellington v. Cantley*, 300 S. W. 529a (Mo. 1929); in re *North Missouri Trust Company*, 39 S. W. (2d) 412 (Mo. 1931).