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Sales--Express Warranty--Agreement of Privity

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good faith was a defense to charges of discriminatory discharges even when the employer knew that he was discharging workers expelled from the union because of trying to change their bargaining representative at an appropriate time; that the NLRA expressly authorized closed shop contracts and the NLRB could not, by administrative amendment, make action under such contracts an unfair labor practice.

It should be noted that this is not the rule under the Taft-Hartley Act, successor to the NLRA. Under the Taft-Hartley Act, closed shop agreements are invalid.¹⁸ Moreover, while maintenance-of-membership and union shop agreements are valid,¹⁹ under this Act the employer apparently is precluded from discharging employees expelled by the union if he has reasonable grounds for believing that their union membership was terminated because of rival union activity.²⁰

BERNARD R. HOLLANDER

SALES — EXPRESS WARRANTY — REQUIREMENT OF PRIVITY

The plaintiff, relying on an express warranty which was printed on a can of anti-freeze and which stated that the liquid therein was "safe," bought the anti-freeze from a distributor who was not the manufacturer of the product. The anti-freeze caused corrosion which damaged the plaintiff's automobile. The plaintiff brought suit against the manufacturer for breach of the express warranty. Judgment was given in favor of the plaintiff by the Municipal Court of Cincinnati. The defendant appealed on questions

¹⁸ 49 STAT. 452 (1935), 29 U.S.C. § 158(3) (1946), as amended 61 STAT. 140 (1947), 29 U.S.C. § 158(a) (3) (Supp. 1947) (Labor Management Act of 1947). Under § 8(a) (3) closed shop agreements are prohibited but union shop agreements and maintenance-of-membership agreements are permitted. TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING §§ 398.63 and 398.64 (Supp. 1948) See Note 1 *supra*.

¹⁹ *Ibid.*

²⁰ "§ 8(a) (3) *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership." A further limitation restricting the employer's right to discharge employees expelled for rival union activity designed to change representatives *at an appropriate time*, was included in the Senate Bill, but does not appear in the final enactment. S. 1126, 80th Cong., 1st Sess. 8(a) (3) (1947). The *Rutland Court* case and doctrine were expressly presented at the Senate hearing, 93 Cong. Rec. 1891 (March 10, 1947), and it was reported that: "The Board's present policy, as enunciated in the *Rutland Court* case and other cases applying that principle, is thus enacted into law." SEN REP. No. 105, 80th Cong., 1st Sess. 22 (1947) (on S. 1126). However, the above provision was not present in H.R. 3020 (the House bill) and was omitted in conference.

of law. *Held*: judgment of the lower court reversed. The court stated that it is necessary to establish privity of contract between the parties in order for the plaintiff to recover for breach of an express warranty where the injury is to a chattel.¹

Most courts which have followed the traditional rule of denying recovery to the purchaser from an intermediate seller in an action against the manufacturer for breach of warranty have insisted that warranty is contractual and therefore require privity of contract between the parties before imposing liability.² Because of its historical origin and development, however, warranty liability is both tortious and contractual in nature.³ Some American courts have expressly recognized the split personality of warranty and have stated that recovery may be had either in tort or in contract.⁴ Although the traditional rule requiring privity between the parties if recovery is to be had for breach of warranty presented not too great a problem when the system of distribution was typically that of the consumer dealing directly with the manufacturer, under modern marketing methods involving the use of many middlemen and extensive advertising by the manufacturer aimed at the consumer, the rule has been strongly criticized by legal writers.⁵

The trend of judicial opinion is to extend to the ultimate consumer a right of recovery for breach of warranty even though there is no privity of contract between the parties.⁶ Such an extension was first made in cases

¹ *Jordon v. Brouwer*, 56 Ohio L. Abs. 495 (Ct. App. 1950).

² 1 WILLISTON, SALES § 244a (Rev. ed. 1948).

³ Ames, *History of Assumpsit*, 2 HARV. L. REV. 1 (1888).

⁴ *Shuppen v. Bowen*, 122 U.S. 575, 7 Sup. Ct. 1283 (1887); *Pearl v. William Filenes' Sons Co.*, 317 Mass. 529, 58 N.E. 595 (1945); *Webb v. Brown & Williamson Tobacco Co.*, 121 W. Va. 115, 2 S.E. 2d 898 (1939). The tort nature of warranty has been acknowledged in applying the tort statute of limitations. *Schlick v. New York Dugan Bros. Inc.*, 22 N.Y.S.2d 238, 175 Misc. 182 (1940); *Jones v. Boggs & Buhl*, 355 Pa. 242, 49 A.2d 379 (1946). Cf. *Lovich v. Salvation Army*, 81 Ohio App. 317, 75 N.E.2d 459 (1947). The Uniform Sales Act, Section 12, includes both the tort and contract concepts of warranty in defining an express warranty.

⁵ 5 WILLISTON, CONTRACTS § 1505 (Rev. ed. 1937); 1 WILLISTON, SALES §§ 244, 244a (Rev. ed. 1948); PROSSER, TORTS 689, 690 (1941). See also Spruill, *Privity of Contract as Requisite for Recovery on Warranty*, 19 N.C.L. REV. 551 (1949). Manufacturers themselves commonly seem to repudiate the privity notion by regarding themselves as directly accountable to the ultimate consumer. Bogert and Fink, *Business Practice Regarding Warranties in Sale of Goods*, 25 ILL. L. REV. 400, 416 (1930).

⁶ PROSSER, TORTS §83 (1941). This trend is reminiscent of that which finally resulted in the repudiation of the requirement of privity as a basis for a negligence action by the ultimate consumer against the manufacturer. The Proposed Uniform Commercial Code extends liability for breach of express and implied warranty, regardless of privity, to the consumer of the goods who is injured in person by the

of injury to the person from food or beverages.⁷ The majority of recent cases leaves little doubt that the extension is becoming the rule in good and beverage cases.⁸ Recovery for personal injuries has been allowed on the basis of warranty in actions against manufacturers brought by users of automobiles⁹ and other articles¹⁰ which they had bought from intermediate sellers. Finally, a few courts have extended the consumer's remedy for breach of warranty against the manufacturer, without the requirement of privity, to situations where the only damage was to property.¹¹

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breach of the warranty. Proposed Uniform Commercial Code §2-318 (Proposed Final Draft, Spring 1950).

⁷ *Ketterer v. Armour & Co.*, 200 Fed. 322 (S.D.N.Y. 1912); *Davis v. Van Camp Packing Co.*, 189 Iowa 775, 176 N.W. 382 (1920); *Hertzler v. Manshum*, 228 Mich. 416, 200 N.W. 155 (1924); *Grapico Bottling Co. v. Ennis*, 140 Miss. 502, 106 So. 97 (1926); *Ward Baking Co. v. Trizzino*, 27 Ohio App. 475, 161 N.E. 557 (1928); *Nock v. Coca-Cola Bottling Works*, 102 Pa. Super. 515, 156 Atl. 537 (1931); *Mazetti v. Armour & Co.*, 75 Wash. 622, 135 Pac. 633 (1913).

⁸ *Hunter v. Derby Foods, Inc.*, 110 F.2d 970 (2d Cir. 1940); *Blarjeske v. Thompson's Restaurant Co.*, 325 Ill. App. 189, 59 N.E.2d 320 (1945); *Swengel v. F. & E. Wholesale Grocery Co.*, 147 Kan. 555, 77 P.2d 930 (1938); *Helms v. General Baking Co.*, 164 S.W.2d 150 (Mo. App. 1942); *Jacob E. Decker & Sons, Inc. v. Copps*, 139 Tex. 609, 164 S.W.2d 828 (1942); *Nelson v. West Coast Dairy Co.*, 5 Wash.2d 284, 105 P.2d 76 (1940).

⁹ *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P.2d 409, *aff'd*, 179 Wash. 123, 35 P.2d 1090 (1932) (allowed recovery on an express warranty made by advertisement); *see* *Murphy v. Plymouth Motor Corp.*, 3 Wash.2d 180, 183, 100 P.2d 30, 32 (1940). *Bahlman v. Hudson Motor Car Co.*, 290 Mich. 683, 288 N.W. 309 (1939). *But cf. Rachlin v. Libby-Owens Ford Glass Co.*, 96 F.2d 597 (2d Cir. 1938) (no breach of warranty); *Channin v. Chevrolet Motor Co.*, 89 F.2d 889 (7th Cir. 1937).

¹⁰ *Lindroth v. Walgreen Co.*, 329 Ill. App. 105, 67 N.E.2d 595 (1946); *Simpson v. American Oil Co.*, 217 N.C. 542, 8 S.E.2d 813 (1940); *See Escola v. Coca-Cola Bottling Co. of Fresno*, 24 Cal.2d 453, 461-8, 150 P.2d 436, 440-4, (1944) (concurring opinion) *Cf. Mannsz v. MacWhyte Co.*, 155 F.2d 445 (3rd Cir. 1946); *Raymond v. J. R. Watkins Co.*, 88 F. Supp. 932 (D.C. Minn. 1950).

¹¹ *Laclede Steel Co. v. Silas*, 67 F. Supp. 751, (W.D. La. 1946) (scrap iron in bundle compared with food placed in can by manufacturer with no opportunity for inspection by consumer). In *United States Pipe & Foundry Co. v. City of Waco*, 100 S.W.2d 1099 (Tex. Civ. App.) *aff'd*, 130 Tex. 126, 108 S.W.2d 432, *cert. denied* 302 U.S. 749, 58 Sup. Ct. 266 (1937), recovery was allowed on an express warranty. The court in affirming stated that the tendency of modern courts is away from the narrow legalistic view of necessity of formal immediate privity of contract in order to sue for breach of an express or implied warranty. *Cf. North American Fertilizer Co. v. Combs*, 307 Ky. 869, 212 S.W.2d 526 (1948) (there is privity between manufacturer and consumer); *Ebers v. General Chemical Co.*, 310 Mich. 261, 17 N.W.2d 176 (1945) (manufacturer held liable for breach of warranty but court talked of negligence); *Wisdom v. Morris Hardware Co.*, 151 Wash. 86, 274 Pac. 1050 (1929) (based on fictitious agency)