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Sales--Express and Implied Warranties

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"nonsigner" clause contravenes the due process clause of the Ohio Bill of Rights, by arbitrarily denying a seller the privilege of disposing of his property on terms of his own choosing.[15] Finally, it delegates legislative power and discretion to private persons. Choosing to face the issue squarely, in disregard of the time-honored tenet that a case shall be disposed of, if possible, on other than constitutional grounds, the Court ignored the dissenting contention of Justice Taft that the third party contract, by which appellant allegedly was bound, was void for lack of consideration.

In *Nebbia v. New York*[16] the Supreme Court of the United States declared that the function of the courts in the application of the due process clause is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority, or condemn it as arbitrary or discriminatory. Before deciding the constitutionality of the statute in that case, the Supreme Court launched into an exhaustive analysis of the related economics of production, distribution, and consumption of the product involved, in order to evaluate properly whether or not the statute was arbitrary.

Although the Ohio Court's ruling seems to be in harmony with prevailing public sentiment, a more thorough analysis of the economic implications, and an explanation thereof, should have been included in the decision in order to elucidate the reasons for holding the Fair Trade Act to be an unreasonable exercise of the state police power.

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SALES — EXPRESS AND IMPLIED WARRANTIES

Plaintiff purchased from a retailer a home permanent kit which the defendant manufacturer, in its nationwide advertising, represented as safe and gentle. After using the product in accordance with directions, the plaintiff lost her hair. In her petition plaintiff pleaded three causes of action, viz., negligence, express warranty, and implied warranty.

The trial court sustained the defendant's demurrer to the latter two causes of action due to the absence of privity of contract. Though she could have continued to plead in the negligence action,[1] plaintiff declined to plead further, and allowed judgment to go against her. The

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> Uncontrolled price cutting is a two-edged sword; it is a means of crushing the small rival by the great trusts to the end that complete monopoly may be acquired to the disadvantage of the public. . . .

[15] OHIO CONST. art. I, § 1. "All men . . . have certain inalienable rights, among which are those of . . . acquiring, possessing, and protecting property. . . ."

[16] 291 U.S. 502 (1934). It was contended that because the Milk Control Law of New York purposed to control prices, it denied due process.

court of appeals upheld the trial court's ruling as to implied warranty, but reversed the ruling with respect to express warranty. The Ohio Supreme Court, by a unanimous decision, affirmed the decision of the court of appeals.

The issue before the Supreme Court was whether privity of contract was a prerequisite to an action based on either express or implied warranty. The court held that privity was not necessary to maintain an action based on express warranty, although it was a requisite to an action based on implied warranty.[2] The basis of the distinction is the way in which each is created. An express warranty is created by an affirmation or promise which must be explicitly stated,[3] while an implied warranty is one which the law derives by inference from a factual situation.[4] Thus, there can be an express warranty without a contract.[5]

Historically, express warranty existed at least 100 years before the action of assumpsit,[6] and it was initially a tort action in the nature of deceit. The main distinction between warranty and deceit is the element of *scienter.* An action for breach of warranty will lie merely if some fact is not as warranted, while an action for deceit requires the seller to know that the facts are not as he says they are.[7]

The case of *Rogers v. Toni Home Permanent Co.*[8] might be a recognition of modern merchandising methods, and an attempt to modernize the archaic provisions of the Uniform Sales Act. Sections 12 through 16 of the Uniform Sales Act[9] are essentially a codification of the common law. These sections were designed for an economy which had not yet conceived of supermarkets and mass media of communications.[10] In

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[1] MacPherson v. Buick, 217 N.Y. 382, 111 N.E. 1050 (1916) (Liability for negligence without privity of contract); RESTATEMENT, TORTS § 395 (1939).

[2] Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958).

[3] Burr v. Sherwin Williams Co., 42 Cal.2d 682, 268 P.2d 1041 (1954); PROSSER, TORTS § 83 (2d ed. 1955). See OHIO REV. CODE § 1315.13; UNIFORM SALES ACT § 12; UNIFORM COMMERCIAL CODE § 2-313.

[4] Burr v. Sherwin Williams Co., 42 Cal. 2d 682, 269 P.2d 1041 (1954); PROSSER, TORTS § 83 (2d ed. 1955). See OHIO REV. CODE §§ 1315.14 and 1315.16; UNIFORM SALES ACT § 15; UNIFORM COMMERCIAL CODE § 2-314.

[5] Burr v. Sherwin Williams Co., 42 Cal.2d 682, 268 P.2d 1041 (1954); PROSSER, TORTS §§ 83 and 86 (2d ed. 1955); 1 WILLISTON, SALES §§ 195-98, 201, 244, 244a (rev. ed. 1948). *But see,* 1 WILLISTON, SALES §§ 199-200 (Some jurisdictions require privity of contract).

[6] Ames, *History of Assumpsit,* 2 HARV. L. REV. 1 (1888).

[7] PROSSER, TORTS § 86 (2d ed. 1955); 1 WILLISTON, SALES § 198 (rev. ed. 1948); *cf.* 1 *id.* § 202.

[8] 167 Ohio St. 244, 147 N.E.2d 612 (1958).

[9] OHIO REV. CODE §§ 1315.13-.14 (defining implied and express warranty).

[10] Spruill, *Privity of Contract as a Requisite for Recovery on Warranty,* 19 N.C. L. REV. 551, 557-58 (1941).

an era when the artisan sold his products directly to the consumer it was difficult to visualize a situation where there could be a warranty without privity of contract. However, modern marketing methods, and a recognition of the ways in which modern advertising influences a consumer to purchase items without the recommendation of a retailer, justifies the finding of an express warranty if a misrepresentation of the product's qualities has been made in the advertising.[11] Modern merchandising methods have even brought forth strong arguments in favor of holding the manufacturer liable to the remote vendee for an implied warranty of fitness. Pursuing this view further it has been suggested that the manufacturer be made an insurer of his product for the protection of the consuming public.[12]

By admitting the existence of an express warranty, the Ohio Supreme Court has eliminated the need for fictions, used in many jurisdictions to achieve a similar result, due to the prevailing belief that privity of contract is necessary to maintain an action based on warranty. The fictions indulged in are: (1) the warranty runs with the chattel,[13] (2) the consumer is a third party beneficiary of the original contract between the manufacturer and the distributor,[14] (3) there is a unilateral contract between the manufacturer and the ultimate consumer,[15] and (4) the retailer is an agent of the manufacturer.[16]

Whether the court could have reached the same conclusion by holding cosmetics to be included within the purview of the Pure Food and

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[11] Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409 (1932) (Privity of contract not needed since representations in catalogue are a warranty). *Accord,* Mannsz v. MacWhyte, 155 F.2d 445, 449-50 (3d Cir. 1946); Canton Provision Co. v. Gauder, 130 Ohio St. 43, 196 N.E. 634 (1935); Sicard v. Kremer, 133 Ohio St. 291, 13 N.E.2d 250 (1938). See also Jeanblanc, *Manufacturers' Liability to Persons Other Than Their Immediate Vendees,* 24 VA. L. REV. 134 (1937). *Contra,* Jordon v. Bouwer, 86 Ohio App. 505, 93 N.E.2d 49 (1949) (Privity of contract required in spite of express warranty on cans of anti-freeze); Rachin v. Libby-Owens-Ford Glass Co., 96 F.2d 597 (2d Cir. 1938) (Privity of contract necessary even where ultimate consumer relies on representations made by the manufacturer in advertisements).

[12] PROSSER, TORTS § 84 (2d ed. 1955). See 1 WILLISTON, SALES § 244a (rev. ed. 1948); Note, *Liability of the Manufacturer to the Ultimate Consumer for Breach of Warranty in Ohio,* 7 WEST. RES. L. REV. 94 (1955).

[13] Chenault v. Houston Coca Cola Bottling Co., 151 Miss. 366, 118 So. 177 (1928).

[14] Ward Baking Co. v. Trizzino, 27 Ohio App. 475, 161 N.E. 557 (1928).

[15] *Cf.,* Carlill v. Carbolic Smoke Ball Co., 1 Q. B. 256 (1893) (Concept of a general offer to the public regarding the qualities of a product); Spruill, *Privity of Contract as a Requisite for Recovery on Warranty,* 19 N.C. L. Rev. 551, 553-54 (1941).

[16] *Accord,* Timberland Lumber Co. v. Climax Mfg. Co., 61 F.2d 391 (3d Cir. 1932). See also Bahlman v. Hudson Motor Car Co., 290 Mich. 683, 288 N.W. 309 (1939); PROSSER, TORTS § 84 (2d ed. 1955).

Drug Act[17] is no longer important. Cosmetics have been expressly included in the Act by a 1957 amendment.[18] The amendment provides that a cosmetic is any substance which is to be applied to a human body for purposes of beautifying the body. The express inclusion of cosmetics in the Pure Food and Drug Act means that any defect or impurity will be viewed as negligence per se,[19] as has been done in regard to items previously included under this act.

As a result of the decision in the principal case the injured consumer in Ohio has a remedy against the remote manufacturer, while the effectiveness of lack of privity as a manufacturer's defense has been greatly limited.[20]

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[17] OHIO REV. CODE § 3715.01.

[18] *Ibid.*, effective Sept. 13, 1957.

[19] PROSSER, TORTS § 34 (2d ed. 1055) (Any unexcused violation of a statute intended to protect the class of persons in which the plaintiff is included is negligence in itself.).

[20] *Compare* Welsh v. Ledyard, 167 Ohio St. 57, 146 N.E.2d 299 (1957); Wood v. General Electric Co., 159 Ohio St. 273, 112 N.E.2d 8 (1953), *with* Markovich v. McKesson & Robbins, Inc., 149 N.E.2d 181 (Ohio Ct. App. 1958); Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958). See also, (Ohio Ct. App. 1958) Symposium, *Strict Liability of Manufacturers*, 24 TENN. L. REV. 923 (1957).