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In legislative action, its use has caused a court to declare an act uncertain, and therefore invalid.⁹ It was held that although its use in a contract was permissible and was equivalent to a direction that it be construed so as to best accord with the equity of the case, such usage cannot apply to statutes, since the legislature, in making its laws, must express its own will and leave nothing to the mere will or caprice of the courts, particularly in the matter of punishing offenses.¹⁰ But in *Ex Parte Iratacable* it was held that the presence of thirty-two "and/or's" in a statute did not render it uncertain.¹¹

George W. Wickersham, a noted member of the bar, said that the use of the symbol in pleadings and court proceedings and in legislative acts is utterly unjustified,¹² and the majority of the courts seem entirely in accord with this view.

G. M.

ATTORNEYS—RULES OF COURT—RETROSPECTIVE LAWS—[Missouri].—The Missouri appellate courts in two recent cases¹ have been confronted with the question whether the rules of the Supreme Court of Missouri² must operate prospectively when invoked in ex parte proceedings instituted for the purpose of disbarring attorneys. The Constitution of Missouri prohibits the enactment of both ex post facto and retrospective laws.³ In the *Noell* case, the alleged professional misconduct of the respondent had occurred approximately ten years prior to the adoption of the rules of court. Therefore, the respondent contended that those rules which provide for the investigation of conduct and which interdict certain conduct could not be invoked against him without violating the constitutional provision to which allusion has been made. The court, in dismissing this defense without discussion, relied upon the *Sparrow* case, and held that rules of court need not operate prospectively in cases of this character.

Mass., Mo., N. J., and N. Mexico. In at least 10 more states it has been changed by judicial decision.

9. *State v. Dudley*, 159 La. 872, 106 So. 364 (1925).

10. *Ibid.* p. 365.

11. *Ex parte Iratacable*, 55 Nev. 263, 30 P. (2d) 284 (1934).

12. 18 A. B. A. Journal 574 (Sept., 1932).

1. In re *Noell*, 96 S. W. (2d) 213 (Mo. App. June, 1936); in re *Sparrow*, 90 S. W. (2d) 401 (Mo. Dec., 1935).

2. The rules were adopted by the Supreme Court in November, 1934. 334 Mo. (Appendix i).

3. Mo. Const. Art. 2, sec. 15. An ex post facto law has been defined as one which makes an action done before the enactment of a statute penal or criminal which was innocent when committed or which aggravates a crime by making it greater than when committed or inflicts a greater punishment than existed when the offense was committed. *State ex rel. v. Works*, 249 Mo. 702, 156 S. W. 967, 238 U. S. 41 (1913). The phrase ex post facto relates exclusively to crimes. *Calder v. Bull*, 3 Dall. 386, 1 U. S. (L. ed.) 648 (1798). Retroactive laws relate only to civil rights and proceedings. *Gladney v. Snyder*, 172 Mo. 318, 72 S. W. 554 (1903). Thus, every ex post facto law is retrospective, but every retrospective law is not an ex post facto law. 6 R. C. L. 303.

In the *Sparrow* case, the alleged misconduct of the respondent had also occurred some time before the adoption of the rules of court. He contended that if applied to him, the new rules of procedure would, first, operate as ex post facto laws; secondly, would operate as retrospective laws; and thirdly, that section 3 of rule 36, giving the appropriate Bar Committee power to investigate professional conduct in a summary manner, denied him due process of law guaranteed by the fourteenth amendment of the Constitution of the United States. In denying all of these defenses, the court held, first, that a disbarment proceeding is not a criminal prosecution; that it is neither criminal nor civil but is a proceeding sui generis; and that its object is not punishment of the offender but protection of the court. Therefore, the inhibition against ex post facto laws is inapplicable. Secondly, since the question of moral fitness or the due observance of professional ethics must necessarily be determined upon preexisting facts, the contention that the rules are retrospective has no validity. Thirdly, rule 36 is merely regulatory, and by giving notice and hearing, it does not violate the fourteenth amendment.

In considering the defenses and the holding in the *Sparrow* case, it should first be noted that the rule that disbarment proceedings are neither civil nor criminal is fairly well settled,⁴ although there are dicta to the contrary.⁵ Moreover, although a rule of court touching upon procedure before the court must operate prospectively—e. g., a rule of court relative to abstracts of the record on appeal does not apply to abstracts filed before its adoption⁶—yet rules applicable to procedure in disbarment need not operate prospectively, because such action is neither civil nor criminal. Finally, if a retrospective law (and this includes a rule of court) is neither ex post facto nor one which impairs the obligation of contract, it may still be unconstitutional because of violation of due process of law,⁷ an objection to which it was held rule 36 was not open.

The principle that the power of the courts over the bar is fundamental, a power which the courts have in the past allowed the legislatures to largely usurp, is forcibly expressed in the new rules of the Supreme Court of Missouri.⁸ Although the right to remove or to suspend attorneys for unworthy conduct is said to exist in all courts having the power to admit attorneys to the bar, independent of any statutory enactment,⁹ the courts have not been active in the exercise of this inherent jurisdiction.¹⁰ Nevertheless, it is apparent from the cases under discussion that the Missouri judiciary is

4. In re Richards, 333 Mo. 907, 62 S. W. (2d) 672 (1933).

5. Mc Cord v. State ex rel. Allen, 220 Ala. 466, 126 So. 873 (1930); State v. Flynn, 160 La. 483, 107 So. 314 (1926).

6. Dalton v. Register, 248 Mo. 150, 154 S. W. 67 (1913); State ex rel. Duckett v. Bender, 239 S. W. 833 (Mo. 1922).

7. Lowe v. Harris, 112 N. C. 472, 17 S. E. 539 (1892).

8. Clark, The Rules of the Supreme Court of Missouri and Their Administration (1936) 7 Mo. Bar Journal 3.

9. State ex rel. Attorney-General v. Harber, 129 Mo. 271, 31 S. W. 889 (1895).

10. Beardsley, Effective Bar Organization (1936), 7 Mo. Bar Journal 7.

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).