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Parole Evidence Rule In Warranties of Sales of Goods- Contractual Disclaimers

the solution revealed by the decisions in the *Prison Goods* cases,[157] it would seem politically unwise at this time to so amend our Constitution. This remedy of national and state cooperation has the virtue of preserving state control. Because of the alarming increase in national bureaucracy, this advantage alone merits that solution a trial. This compromise seems capable of removing the last stages of child labor from the American scene.

PAROL EVIDENCE RULE IN WARRANTIES OF SALE OF GOODS—CONTRACTUAL DISCLAIMERS.—A cursory examination of bargains for the sale of personalty will indicate that warranty representations are matters of recurring dispute, and that in such transactions the time-honored and precautionary formalities impressed upon realty transfers are usually lacking. In the feudal system the transfer of personalty did not attain the dignity and solemnity of a sale of realty. The transfer of a chattel was, and was treated as, relatively unimportant; it was carried through with informality. Litigation over the terms of the transfer resulted. These personal dealings, and over the counter sales of chattels, not unsuited to an age of informal barter, are rapidly being overshadowed by modern business practice. In the course of a century the economic world has seen the transition of sales agreements from the setting and practices of the small town or sea port to the intricate commercial processes of the present day,[1] but the litigation over the terms of the sales contract continues. The outcome of such litigation often depends upon the effective proving of warranties alleged to have been made by the seller. If the contract had consisted of written or printed matter, the proof of the warranty is dependent upon the exclusionary effect of the parol evidence doctrine. It is this relationship of the parol evidence rule and the warranty obligation which will be treated here.

Clarity requires that the commentary be divided into the following topics: I. The History and Nature of the Parol Evidence Rule; II. The Completeness of the Written Contract; III. Warranties as Collateral Agreements; IV. The Express Warranty; V. The Restatement on Express Warranties; VI. The Implied Warranties; VII. The Express Warranty Excluding the Implied Warranty; VIII. Written Disclaimers of Warranties.

I. THE HISTORY AND NATURE OF THE PAROL EVIDENCE RULE

The doctrine of parol evidence, that oral testimony is inadmissible to contradict, vary, add to, or subtract from the terms of a valid written contract, has found general acceptance in the common law; despite this general acceptance, however, few principles in the realm of jurisprudence have been so subject to diversified opinion and contradictory application. The testing ground for the doctrine is the heavily litigated field of warranties of personal property.

Originally, no unique validity attached *per se* to written forms.[2] The truth

157. Whitfield v. Ohio, 297 U. S. 431 (1936); Kentucky Whip & Collar Co. v. Illinois Central Ry., 299 U. S. 334 (1936).

1. LLEWELLYN, CASES AND MATERIALS ON THE LAW OF SALES (1930) 204.

2. The fact was that the writing did not legally establish anything. 5 WIGMORE, EVIDENCE (2d ed. 1923) § 2426.

or falsity of alleged happenings was determined generally at early common law by "transaction witnesses"[3] introduced by the parties. Indeed, it is understandable that in an age of pandemic illiteracy very few had recourse to writing as a memorial of their dealings. So unique was the ability to write that the possessor was a child of special legal privilege, and so mystifying was his accomplishment that it was met only with the suspicion of the ignorant. It required the introduction and popular acquisition of the seal,[4] with its accompanying doctrine of incontrovertibility,[5] to create incipient respect for the trustworthiness of instruments. The seal which men imposed on their written declarations was of sufficient weight to stifle denial in court.[6] A man's word was as good as his bond. With the decay of the cumbersome method of proof by transaction witnesses and the widespread knowledge of reading and writing further impetus was given to the doctrinal regard for writing. The mercantile theory of the indisputability of credit instruments had made its impression on the common law.[7] Not to be minimized was the favor with which the common law judges had looked on the parol evidence rule because they recognized in it an excellent weapon for the control of the jury.[8] With the enactment of the Statute of Frauds[9] the parol evidence rule assumed its modern proportions. The Statute, although restricted in its application, gave a validity to unsealed writings which they did not before possess.[10] The writing, thereafter, was no longer mere evidence of an agreement, but had a constitutive force of its own.[11] It no longer "witnesseth"; it is the fact itself. It is the "shibboleth repeated in 10,000 cases."[12]

3. *Ibid.* The cases in which this mode of trial was used appear to have been confined to claims arising out of sales or loans. HOLMES, THE COMMON LAW (1881) 255.

4. At first the seal belonged properly only to the kings and nobles. HOLMES, THE COMMON LAW (1881) 272. By the end of the thirteenth century freemen had their seals. 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW (2d ed. 1923) 221.

5. Backus, *The Origin and Use of Private Seals Under Common Law* (1917) 51 AM. L. SCHOOL REV. 369.

6. In such high repute was the seal held that the owner was bound by it even though affixed without his consent. 9 HOLDSWORTH, HISTORY OF ENGLISH LAW (1926) 157; HOLMES, THE COMMON LAW (1881) 272.

7. The common law courts were undoubtedly influenced by the law merchant (5 WIGMORE, EVIDENCE (2d ed. 1923) § 2426), but it was not until the year 1666, however, that the courts declared the mercantile law to be "the law of the realm". Woodward v. Rowe, 2 Keb. 105, 84 Eng. Reprints 67 (1666).

8. The common law judges frequently expressed distrust of the jury. Lawrence v. Dodwell, 1 Lut. 734, 125 Eng. Reprints 384 (1659); Strode v. Russel, 2 Vern. 621, 23 Eng. Reprints 1008 (1708). This distrust, it is said, has been somewhat confirmed by the comparative freedom exercised in the reformation of writings by courts of equity where no jury sits. McCormick, *The Parol Evidence Rule as a Procedural Device for Control of the Jury* (1932) 41 YALE L. J. 365, 368.

9. 29 Car. II, c. 3 (1676).

10. The first and third sections of the Statute required "writings" or a "deed or note in writing." The seal was not necessary.

11. Section 7 of the Statute read: ". . . shall be manifested and *proved* by some writing signed . . . or else they shall be void and of none effect." The Statute (which appeared as a mark rather than a cause of the final development), by requiring proof in writing, emphasized the constitutive force of the document. 5 WIGMORE, *loc. cit. supra* note 2.

12. McCormick, *op. cit. supra* note 8, at 369.

The very statement of the parol evidence rule is not without complexity.[13] Generally the rule declared is that parol testimony cannot be received to contradict, vary, add to, or subtract from the terms of a valid written instrument.[14] The underlying policy is the preservation of the stability of written contracts;[15] the theory being that the parties to the contract, by their preference for the written act over the oral one, have deliberately integrated[16] the entire terms of their engagement without any uncertainty as to its object and extent.[17] Hence, as often stated, it is conclusively presumed that the whole engagement of the parties is confined to the four corners of the writing.[18]

II. The Completeness of the Written Contract

Logically, the application of the parol evidence rule is denied in those instances where it is determined that the parties intended to restrict the writing to certain specific elements of the contract, and did not intend it as a full statement of their contractual rights and obligations.[19] Prevalent examples of written contracts of sale which are incomplete on their face are those that qualify the writing "as per conversation",[20] or "as hereafter agreed".[21] Obviously, casual writings and memoranda of a transaction are not within the purview of the rule and contemporaneous parol agreements may be shown to

13. "Few things are darker than this, or fuller of subtle difficulties." Thayer, A Preliminary Treatise on Evidence at the Common Law (1898) 390. See West v. Kelly, 19 Ala. 353, 354, 54 Am. Dec. 192, 193 (1851).

14. Jones, The Law of Evidence in Civil Cases (3d ed. 1924) 656; Chase's Stephen's Digest of the Law of Evidence (2d Am. ed. 1912) 219. The rule as set forth is subjected to the criticism that if the parties intended to integrate only a part of their agreement, the remainder of the agreement might be proved, although it added to, or varied the written portion. 5 Wigmore, Evidence (2d ed. 1923) 309.

15. Countess of Rutland's Case, 5 Co. Rep. 256, 77 Eng. Reprints 89 (1604); see *In re* Tomarchio, 269 Fed. 400, 497 (E. D. Mo. 1920). "The rule breaths the spirit of the Statutes of Frauds and Wills." Hale, *The Parol Evidence Rule* (1925) 4 Ore. L. Rev. 91, 92; see Strahorn, *The Unity of the Parol Evidence Rule* (1929) 14 Minn. L. Rev. 20, 24.

16. Integration is the "process of embodying the terms of a jural act in a single memorial." 5 Wigmore, Evidence (2d ed. 1923) 289. The terminology has been adopted by the Restatement, Contracts. See footnote 68, *infra*.

17. Newark v. Mills, 35 F. (2d) 110 (C. C. A. 3d, 1929) see 1 Greenleaf, Evidence (16th ed. 1899) 460.

18. Seitz v. Brewers' Refrigerating Machine Co., 141 U. S. 510 (1891); Lathrop v. Rice & Adams Corp., 17 F. Supp. 622 (W. D. N. Y. 1936); Bell v. Flanders, 115 Me. 332, 98 Atl. 825 (1916). Although the courts speak of presumptions the parol evidence rule is not a rule of evidence but a rule of substantive law. See Pitcairn v. Philip Hiss Co., 125 Fed. 110, 113 (C. C. A. 3d, 1903); 1 Greenleaf, Evidence (16th ed. 1899) § 305a. The parol evidence rule is neither parol nor is it evidence. 5 Wigmore, Evidence (2d ed. 1923) 238.

19. Bird & Son, Inc. v. Guarantee Const. Co., 295 Fed. 451 (C. C. A. 1st, 1924); American Bridge Co. v. Crawford, 31 F. (2d) 708 (C. C. A. 3d, 1929); Blanchard Lumber Co. v. Maker, 250 Mass. 159, 145 N. E. 62 (1924). See 3 Williston, Contracts (Rev. ed. 1936) 1830, and authorities cited therein.

20. Selig v. Rehfuss, 195 Pa. St. 200, 45 Atl. 919 (1900); Klueter v. Joseph Schlitz Brewing Co., 143 Wis. 347, 128 N. W. 43 (1910).

21. Morrison v. Dickey, 119 Ga. 698, 46 S. E. 863 (1904).

fill out the vacua in the instrument.[22] But even here, it should be noted, those terms which are definitely treated in the incompleted writing cannot be varied or contradicted,[23] in the absence of fraud[24] or mistake.[25] An instrument is not incomplete because it is silent as to all the details which might possibly have been included in the writing;[26] to say that it is, is to beg the whole question. However, the determination of the writing's completeness may be ultimately dependent on the amount of detail found in the writing.[27]

The difficulty which the courts have encountered in determining whether the contracting parties intended to reduce their whole agreement to writing is readily attributable to the necessarily restricted and inadequate legal devices for guaging contractual intent. Apparently, the accepted determinant of the completeness of the writing is the face of the writing itself.[28] The test is subject to the criticism that the courts cannot conclude what elements the instrument is intended to cover unless evidence of the subject matter and the circumstances of the execution of the writing be shown.[29] Indeed, an examination of the cases indicates that many courts adhering to the rule that a writing complete on its face cannot be varied, actually construe its completeness in the light of the purpose and the circum-

22. Rosenburg v. Capital Cut Stone Co., 28 Ariz. 505, 238 Pac. 330 (1925). Where the statute requires a written memorandum of a contract, oral evidence cannot be used to supply proof of the contract terms. Manufacturer's Light Co. v. Lamp, 269 Pa. 517, 112 Atl. 679 (1921).

23. Campbell v. City of Boston, 283 Mass. 365, 186 N. E. 577 (1933) (general receipt); Kay v. Spencer, 29 Wyo. 382, 213 Pac. 571 (1923) (the parol evidence rule has no application to recitals of fact); 5 WIGMORE, EVIDENCE (2d ed. 1923) 306; *cf.* Davis v. Wells Fargo & Co., 104 U. S. 159 (1881).

24. Blecher v. Schmidt, 211 Iowa 1063, 235 N. W. 34 (1931); Bareham & McFarland Co. v. Kane, 228 App. Div. 396, 240 N. Y. Supp. 123 (4th Dep't 1930); American Pure Food Co. v. G. W. Elliot & Co., 151 N. C. 393, 66 S. E. 451 (1909). Under the Pennsylvania rulings any oral agreement, prior to, or contemporaneous with the writing could be proved if it induced the written contract of sale. Juniata Building Association v. Hetzel, 103 Pa. St. 507 (1883). This was upon the theory that the attempt by a party to take advantage of the omission in the writing is a fraud upon the other party. Coal Co. v. McShain, 75 Pa. St. 238 (1874). In Michigan, warranty representations made prior to a written contract which contains specific warranties cannot be shown to be fraudulent. Bates Tractor Co. v. Gregory, 199 Mich. 8, 165 N. W. 612 (1917).

25. Andrews v. Andrews, 81 Me. 337, 17 Atl. 166 (1889); Goode v. Riley, 153 Mass. 585, 28 N. E. 228 (1891).

26. Armstrong Paint & Varnish Works v. Continental Can Co., 301 Ill. 102, 133 N. E. 711 (1921); Thompson v. Libbey, 34 Minn. 374, 26 N. W. 1 (1885); Van Doren v. Guardian Casualty & Guaranty Co., 99 Wash. 68, 168 Pac. 1124 (1917).

27. Wheaton Roller Mill Co. v. John T. Noye Mfg. Co., 66 Minn. 156, 68 N. W. 854 (1896).

28. Armstrong Paint & Varnish Works v. Continental Can Co., 301 Ill. 102, 133 N. E. 711 (1921); Thompson v. Libbey, 34 Minn. 374, 26 N. W. 1 (1885); Naumberg v. Young, 44 N. J. L. 331, 43 Am. Rep. 380 (1882); Brantingham v. Huff, 174 N. Y. 53, 66 N. E. 620 (1903).

29. The principle is illustrated by Professor Wigmore: "When two parties are found playing a game of chess, it cannot be told whether this is the sole and decisive game, or merely one of a series, by watching that particular game." 5 WIGMORE, EVIDENCE (2d ed. 1923) § 2431.

stances of its making.[30] This coupling of the tests is not contradictory[31] because "although in form the witnesses may be allowed to recite the facts, yet in truth the facts will afterwards be treated as immaterial and legally void if the rule is held applicable."[32] The dispute over the proper guage of completeness however cannot be regarded as academic. Not only may the actual intent of the parties be controverted, but the problem also assumes substantial importance in those jurisdictions where the question of completeness is considered a question of fact within the province of the jury[33] and not a question of law, as it usually is,[34] for the court. In such cases findings of fact may be shaped and controlled by the personal prejudices of the juryman who tends to favor the party who asserts the warranty, and the jury may read a warranty into a writing which the litigants at the time of the sale actually intended to express their whole agreement.[35]

III. Warranties as Collateral Agreements

Although a written contract of sale may, on its face, give evidence of being in every way a complete document, it is possible at the same time that the parties may have made an oral agreement separate and distinct from the written one.[36] If such an oral agreement does not contradict the provisions

30. Naumberg v. Young, 44 N. J. L. 331, 43 Am. Rep. 380 (1882); Potter v. Easton, 82 Minn. 247, 84 N. W. 1011 (1901); Wheaton Roller Mill Co. v. John T. Noye Mfg. Co., 66 Minn. 156, 68 N. W. 854 (1896), complementing Thompson v. Libbey, 34 Minn. 374, 26 N. W. 1 (1885); Sund v. Flagg & S. Co., 86 Ore. 289, 168 Pac. 300 (1917), distinguishing Looney v. Rankin, 15 Ore. 617, 16 Pac. 660 (1888). North Carolina presents the extreme of the rule: if oral agreements are made and not included in the writing then the writing is incomplete and the parol evidence rule does not apply. Exum v. Lynch, 188 N. C. 392, 125 S. E. 15 (1924). It would appear that the liberalized test of "completeness" indicates a trend away from the doctrine of *caveat emptor*. But see McCormick, *The Parol Evidence Rule as a Procedural Device for Control of the Jury* (1932) 41 YALE L. J. 365, 366.

31. However, to allow a party to show that a writing is incomplete by oral testimony and then prove by parol the part omitted would, in effect, dispense with the reason of the rule. Forsyth Mfg. Co. v. Castlen, 112 Ga. 199, 37 S. E. 485 (1900); Thompson v. Libbey, 34 Minn. 374, 26 N. W. 1 (1885); see Eighmie v. Taylor, 98 N. Y. 288, 294 (1885).

32. Moran Bros. Co. v. Pacific C. C. Co., 48 Wash. 592, 94 Pac. 106 (1908).

33. Hines v. Wilcox, 96 Tenn. 148, 33 S. W. 914 (1896); Ft. Worth & D. C. Ry. v. Wright, 30 Tex. Civ. App. 234, 70 S. W. 335 (1902) *semble*.

34. Seitz v. Brewers' Refrigerating Machine Co., 141 U. S. 510, 517 (1891); South Florida Mills v. Breuchaud, 51 F. (2d) 490 (C. C. A. 5th, 1931); Harrison v. McCormick, 89 Cal. 327, 26 Pac. 830 (1891); Armstrong Paint & Varnish Works v. Continental Can Co., 301 Ill. 102, 133 N. E. 711 (1921).

35. The jury more often than not upon finding an actual oral agreement *dehors* the writing, would determine the contract to be incomplete on grounds of morality rather than legality. MCCORMICK, *op. cit. supra* note 8, at 366. For the moral necessity of the seller to recompense the buyer for his loss see AQUINAS, SUMMA THEOLOGICA, ETHICUS, 11, II, question LXXVII, act. 4, (Ricaby translation, 2d ed. 1896) v. 2, 93-94.

36. Pyskoty v. Sobusiak, 109 Conn. 593, 145 Atl. 58 (1929); Mitchell v. Lath, 247 N. Y. 377, 160 N. E. 646 (1928). Typifying the confusion of the doctrine of incompleteness with the doctrine of collateral contracts is the decision of the court in Forsyth Mfg. Co. v. Castlen, 112 Ga. 199, 37 S. E. 485 (1900), wherein it is stated that before parol

of the written one, most courts permit it to be proved on the ground that it is supplementary and collateral to the written document.[37] This doctrine that a collateral contract may be proved is distinct from and should not be confused with, the rule that an incomplete instrument may be completed by parol.[38] The tests vary. It is often said that such a collateral contract, to be provable by parol, must refer to a subject matter separate and distinct from that covered by the writing.[39] A more ephemeral test of collateralness is the closeness of the dependency of the oral[40] upon the written. The best determinant, and that generally accepted,[41] is substantially that applied to test the completeness of the contract, *i.e.*, the intent of the parties. Would the ordinary contracting parties under similar circumstances be expected to embody such oral agreements in the written documents? If not, then the agreement is distinct, separate and collateral and may be proved.[42]

Historically, warranties were collateral in form. This early form was shaped by the rigorous enforcement of the doctrine of *caveat emptor*, well exemplified in the oft-cited case of *Chandelor v. Lopus*.[43] There the mere affirmation that the vendor's stone was a bezar stone was held insufficient to establish an action in deceit; *"warrantizando vendidit"* was a necessary allegation. The result was that the creation of an effective warranty necessitated the formulaic use by the seller of the phrase "is warranted" as necessary evidence of an intent to incur an obligation.[44] The warranty obligation is still commonly described by cases[45] and text[46] as a "collateral" contract. In the English

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evidence can be admitted to show a collateral agreement, it must appear either from the contract itself or from attendant circumstances that the contract is incomplete.

37. Buckner v. A. Leon & Co., 204 Cal. 225, 267 Pac. 693 (1928); Johnson v. Burnham, 120 Me. 491, 115 Atl. 261 (1921); Roof v. Jerd, 102 Vt. 129, 146 Atl. 250 (1929). See note 36 *supra*.

38. Naumberg v. Young, 44 N. J. L. 331, 43 Am. Rep. 380 (1882); Mitchell v. Lath, 247 N. Y. 377, 160 N. E. 646 (1928).

39. Naumberg v. Young, 44 N. J. L. 331, 43 Am. Rep. 380 (1882); Baca v. Fleming, 25 N. M. 643, 187 Pac. 277 (1920).

40. Roof v. Jerd, 102 Vt. 129, 146 Atl. 250 (1929).

41. J. I. Case Threshing Machine Co. v. Buick Motor Co., 39 F. (2d) 305 (C. C. A. 8th, 1930); Brosty v. Thompson, 79 Conn. 133, 64 Atl. 1 (1906); Forsyth Mfg. Co. v. Castlen, 112 Ga. 199, 37 S. E. 485 (1900).

42. Putnam v. Prouty, 24 N. D. 517, 140 N. W. 93 (1913); North v. Atlas Brick Co., 281 S. W. 608 (Tex. Civ. App. 1926).

43. Cro. Jac. 4, 79 Eng. Reprints 3 (1625). See McMurtie, *Chandelor v. Lopus* (1887) 1 HARV. L. REV. 191. "Note that by the civil law every man is bound to warrant the thing that he selleth or conveyeth although there be no warranty; but the common law holdeth him not unless there be a warranty either in deed or in law, for *Caveat Emptor*." Co. LITT.* 102 a.

44. "This case is a dangerous case and may be the cause of a multitude of actions, if it be thought that the bare affirmation of the vendor causes the action. . . ." Popham, J., from the manuscript report reprinted in (1894) 8 HARV. L. REV. 282.

45. Sanderson v. Trump Mfg. Co., 180 Ind. 197, 102 N. E. 2 (1913); Naumberg v. Young, 44 N. J. L. 331, 43 Am. Rep. 380 (1882); Hurley-Mason Co. v. Stebbins, 104 Wash. 171, 140 Pac. 381 (1914). See 1 WILLISTON, SALES (2d ed. 1924) § 182.

46. VOLD, SALES (1931) 441; BENJAMIN, SALES (7th ed. 1931) 686.

Sale of Goods Act[47] and in many American jurisdictions[48] it is described as such. In form, many warranties are still collateral, such result being achieved by the express employment of the word "warrant" or "guaranty" outside the body of the terms of sale.[49] In some aspects the warranty is collateral to the main aspects of the sale. Thus, the passage of title to goods is not conditioned upon the existence of a warranty,[50] and the breach of the obligation does not *ipso facto* avoid the transfer.[51] Moreover, the breach of the warranty may be the subject of an independent action for damages.[52] The American courts, however, in adhering to the doctrine enunciated in *Seitz v. Brewers' Refrigerating Machine Co.*[53] almost uniformly hold that a warranty is one of the terms of a sale, and not a separate contract.[54] Thus the assumption is that the natural acts of the contracting parties would be to incorporate the warranty in the writing, and consequently a parol warranty cannot be added to a complete written contract on the ground that it is collateral to the writing.[55] Of course a warranty supported by separate consideration can always be proved as an independent contract.[56]

IV. The Express Warranty

An express warranty, as generally distinguished from a warranty independently imposed by law,[57] is defined under the Uniform Sales Act as, "Any affirmation of fact or any promise by the seller relating to the goods . . . if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon."[58] Originally, the warranty obligation was treated as sounding in tort alone,[59]

47. Sale of Goods Act (1893) § 62.

48. See note 45, *supra*.

49. Holt & Duggan Co. v. Clary, 146 Ga. 46, 90 S. E. 381 (1916) ("guarantee above property only as to title").

50. Burntisland Shipbuilding Co. v. Barde Steel Products Corp., 278 Fed. 552 (1922) (express disclaimer of warranty).

51. Shupe v. Collender, 56 Conn. 489, 15 Atl. 405, 1 L. R. A. 339 (1888). Uniform Sales Act (1907) § 69 (1); Sale of Goods Act (1893) § 62 (1).

52. Berman v. Littauer, 141 Md. 639, 119 Atl. 565 (1922); Uniform Sales Act (1907) § 69 (1) (b).

53. 141 U. S. 510 (1891).

54. The three leading cases on the subject are Seitz v. Brewers' Refrigerating Machine Co., 141 U. S. 510 (1891); Naumberg v. Young, 44 N. J. L. 331, 43 Am. Rep. 380 (1882), and Thompson v. Libbey, 34 Minn. 374, 26 N. W. 1 (1885).

55. Century Electric Co. v. Detroit Copper & Brass Rolling Mills, 264 Fed. 49 (C. C. A. 8th, 1920) (oral warranty of brass rods); Naumberg v. Young, 44 N. J. L. 331, 43 Am. Rep. 380 (1882) (oral warranty that a boiler would furnish sufficient steam for the business). "The rule forbids to add by parol where the writing is silent, as well as to vary where it speaks." Thompson v. Libbey, 34 Minn. 374, 377, 26 N. W. 1, 2 (1885).

56. Offenburg v. Arrow Distilleries Co., 222 Ill. App. 512 (1921); Lewis v. Seabury, 74 N. Y. 409, 30 Am. Rep. 311 (1878).

57. An express warranty "is derived from express language no matter whether in form a promise or representation." Williston, Sales (2d. ed. 1924) § 194.

58. Uniform Sales Act (1907) § 12.

59. Chandelor v. Lopus, Cro. Jac. 4, 79 Eng. Reprints 3 (1625). See 1 Street, Foundations of Legal Liability (1906) 389. The action on the breach of warranty may still

and the courts, fearing increased litigation by disappointed purchasers,[59] strictly enforced the doctrine of *caveat emptor*. This rigid policy deprived the courts of an adequate means of repressing fraud. "Between the two propositions that there can be no warranty without an express agreement and no fraud without actual knowledge of the falsity of the representation, the ingenious rascal went free."[61] The decision of *Stuart v. Wilkins*[62] introduced the curative and modern theory that the warranty obligation is contractual as well as delictual in nature. So tenacious has been the doctrine laid down in that case that for a long time some courts required that an express warranty be promissory in form.[63] Most courts, however, treat express warranties as purely contractual[64] and hence do not permit the oral express warranties to be shown by parol where the complete contract of sale has been reduced to writing.[65] The oral affirmation or promise is excluded on the ground that it adds to and varies the written contract.[66] If, however, the contract is incomplete an oral warranty may always be proved by parol.[67]

V. The Restatement on Express Warranties

The rule laid down by the Restatement of the Law of Contracts[68] is upon casual reading in accord with the preponderant holdings of the courts concerning the exclusion of express warranties. However, the presentation of an example[69] illustrating the Restatement rule indicates that a distinction long favored by textbook writers[70] is followed. Thus, where *A*, the vendor, and *B*, the vendee,

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be brought in tort: *scienter* need not be alleged or proven. Shippen v. Bowen, 122 U. S. 575 (1886).

60. See note 44, *supra*.

61. 1 Street, Foundations of Legal Liability (1906) 380.

62. 1 Doug. 18, 99 Eng. Reprints 15 (1778).

63. McFarland v. Newman, 9 Watts 55, 34 Am. Dec. 497 (Pa. 1839).

64. See cases cited in notes 41, 54, 55, *supra*. See 1 Street, Foundation of Legal Liability (1906) 390.

65. *Ibid.*

66. *Ibid.*

67. See notes 19, 20, 21, 22, *supra*.

68. "In What Cases Integration Does Not Affect Prior or Contemporaneous Agreements, (1) an oral agreement is not superseded or invalidated by a subsequent or contemporaneous integration, nor a written agreement by a subsequent integration, relating to the same subject matter, if the agreement is not inconsistent with the integrated contract, and (a) is made for a separate consideration, or (b) is such an agreement as might naturally be made as a separate agreement by parties situated as were the parties to the written contract." Restatement, Contracts § 240.

69. "A and B in an integrated contract respectively promise to sell and to buy a specific automobile. A contemporaneous oral undertaking on the part of A to warrant the quality of the machine beyond the warranties that the law would otherwise impose is inoperative. Oral representations by A of the quality of the machine which induce B to enter into the written contract are, however, operative to create a warranty. The representations are independent of the contract, though an inducement to its formation, and the obligation of a warranty is imposed by law not from a promise but from an assertion of fact." Restatement, Contracts § 240 (1) (b) [7].

70. Williston, Sales (2d ed. 1924) § 215; Vold, Sales (1931) § 151.

make an agreement in writing for the sale of a specific horse which *A* contemporaneously promises will be of a gentle and tractable nature, the oral warranty is inoperative under the Restatement. But if *A* should orally represent that the horse he sells is gentle and tractable, and such representation serves as an inducement to the sale, such oral representation may be shown by parol. The distinction suggested by the Restatement seeks sanctuary in the Uniform Sales Act which in defining an express warranty speaks disjunctively of warranties based on a "promise" or those based on an "affirmation" of fact.[71] In the English Sale of Goods Act, the precursor of the Uniform Sales Act, no such distinction is made.[72] The diverse results attained in the Restatement examples, where the warranty consists of an affirmation and not a promise, flow from the assumption that although the writing may be presumed to represent the whole agreement of the parties, such presumption does not militate against proof by parol, even in the face of an integrated writing, of affirmations or representations of fact. These affirmations or representations, it is argued, are obligations independently imposed by law,[73] and as such, they are not excluded by the operation of the rule declared in *Seitz v. Brewers' Refrigerating Machine Co.* which was limited in its operation to the contractual obligations of the parties. The difficulty with the Restatement thesis is that, seemingly, both promissory warranties and warranties affirmative of facts are similar in that the affirmative warranty may often contain the essentials of a promise implied in fact.[74] If the affirmation is a mere puffing statement or seller's talk, the vendor, of course, incurs no liability.[75] The actual intent motivating the vendor's affirmation that "this horse will run the mile in 1:48" differs little from the situation where the vendor expressly employs the word "promise" or "warrant". In justice to the distinction drawn by the Restatement, it must be admitted that the present day seller may not intend to be answerable for his affirmation that "this horse will run the mile in 1:48" because he, with a mistaken reverence for the tyranny of words, may not think he is bound unless he says "I guarantee" or "I warrant": but the intent to warrant is not an essential of the express warranty under the Sales Act;[76] the tendency to induce the sale is the vital element.[77] Even though there is subjectively, no

71. "Any affirmation of fact *or* any promise by the seller relating to the goods is an express warranty . . ." UNIFORM SALES ACT (1907) § 12.

72. "Warranty . . . means an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract . . ." SALE OF GOODS ACT (1893) § 62 (1). As to the varying meanings of the word "warranty" see ANSON, CONTRACTS (14th ed. 1919) 461.

73. Notes 69, 70, *supra*.

74. But see Mechem, *Implied and Oral Warranties and the Parol Evidence Rule* (1928) 12 MINN. L. REV. 210, 222, where it is said that such a suggestion (*i.e.*, that every assertive warranty contains an implied promissorial element) "leads into a blind alley" for in many cases the implication could only be one of law.

75. Coats v. Hord, 29 Cal. App. 115, 154 Pac. 491 (1915); Boston Consol. Gas Co. v. Folsom, 237 Mass. 565, 130 N. E. 197 (1921).

76. UNIFORM SALES ACT (1907) § 12, and the Commissioners' Note thereunder; Schley v. Zalis, 191 Atl. 563 (Md. 1937).

77. *Id.*

intent on the seller's part to be answerable, the ascertainment of the seller's intent is exceedingly difficult, in the absence of formulaic words. How is the aforementioned warranty to be classified? Is it promissory or is it assertive of fact?

The major objection to the distinction that the Restatement draws between promissory warranties and warranties based on affirmations of fact is that it is in conflict with the very rule[78] it attempts to illustrate. The rule adopted in the Restatement is substantially that laid down in *Seitz v. Brewers' Refrigerating Machine Co.*, namely, that an oral agreement is not superseded by a subsequent or contemporaneous integration in writing if the oral agreement is such as might naturally be made as a separate agreement by parties situated as were the parties to the contract. The test, as stated, is not based on any theoretical distinction between contract and quasi-contract, or obligations imposed by the parties as distinguished from obligations imposed by law. The assumption that affirmations of fact are not naturally integrated in writing whereas promissory warranties are, is of somewhat doubtful validity. As has been indicated, both warranties are usually identical in form. Both warranties are usually similar in that they are jurally unfavorable to the seller, and the jurally unfavorable facts of a contract, the inducements to the sale, are those which the ordinary contracting parties would naturally be expected to integrate in the written contract.[79]

Apparently the Uniform Sales Act did not intend to draw a sharp distinction, or line of demarcation, between promises and affirmations of fact, between nob and nabob, but merely intended to point out that statements other than those promissory, in form or basic intent, might give rise to an express warranty.[80]

VI. The Implied Warranties

An implied warranty is an obligation which is not expressly made by the parties but which the law implies from the facts of a sale.[81] The distinction between the express and implied warranties is that the express warranty obligation arises from the agreement of the parties whereas in the implied warranties

78. See note 68, *supra*.

79. Strahorn, *The Parol Evidence Rule and Warranties of Goods Sold* (1935) 19 Minn. L. Rev. 725, 746.

80. Strahorn, *The Parol Evidence Rule and Warranties of Goods Sold* (1935) 19 Minn. L. Rev. 725, 740, n. 39. The New York rule, at common law, was directly opposed to the distinction set down by the Restatement. Under the Restatement rule an oral, prophetic or promissory warranty that a chattel sold will perform in the future in a certain manner may not be proved. See Strahorn, *The Parol Evidence Rule and Warranties of Goods Sold* (1935) 19 Minn. L. Rev. 725, 729. In New York it may be proved. Chapin v. Dobson, 78 N. Y. 74, 34 Am. Rep. 512 (1879). Whereas under the Restatement the assertive warranty based on an affirmation of fact concerning the present condition of the chattel may be proved by parol, Strahorn, *ibid;* in New York, it may not. Eighmie v. Taylor, 98 N. Y. 288 (1885).

81. Allis-Chalmers Mfg. Co. v. Frank., 57 N. D. 295, 221 N. W. 75 (1928) (the implied warranty of suitability for a particular purpose exists independently of the contract).

the obligation can only arise by operation of law.[82] The latter are imposed by law in the spirit of *caveat venditor* as a protection to the buyer, to promote higher standards of business conduct, and to prevent sharp dealing by the seller.[83] The implied warranties under the Uniform Sales Act are the implied warranties of title,[84] quality,[85] and warranties in sales of goods by description or sample.[86] It is evident if the parties to a sale have integrated their agreement in writing, evidence of certain extrinsic facts must be shown in order to prove the implied in law warranty. For example, the buyer in order to prove a warranty of fitness for a particular use must show:

1) That he made known, expressly or by implication to the seller, the particular purpose for which the goods were purchased,

2) That he relied on the seller's skill and judgment.[87]

At first glance, the parol evidence rule would seem to preclude the introduction of evidence of the implied warranties because they would certainly add to, or vary, the terms of a written contract. But, as has been seen, the scope of the rule as applied to warranties is restricted to contractual obligations, either expressly made, or implied in fact from the language of the parties, or if we might speak in terms of what is "naturally" included, it has been deemed that the parties would not naturally integrate in the document of sale the implied in law warranties.[88] In fact it is not unusual for the contracting parties to state specifically that the writing covers all the agreements of sale, without intending to exclude the implied in law warranties.[89] It would seem, however, that the implied warranty of fitness for a particular purpose is an obligation which might readily or naturally be included in the

82. Ward v. Great Atlantic & Pacific Tea Co., 231 Mass. 90, 120 N. E. 225 (1918) (warranty of merchantableness). "While this peculiar obligation is called a warranty [merchantableness] for convenience, it does not rest upon any supposed intention of the parties or agreement in fact but is one which the law raises upon principles foreign to the contract in the interest of commercial honesty and fair dealing, and analogous to those upon which vendors are held liable for fraud." Carleton v. Lombard, Ayers & Co. 149 N. Y. 137, 144 (1896). The obligation is quasi-contractual. WILLISTON, SALES (1909) 304.

83. Bekkevold v. Potts, 173 Minn. 87, 216 N. W. 790 (1927).

84. UNIFORM SALES ACT (1907) § 13.

85. UNIFORM SALES ACT (1907) § 15. In North Carolina there is no implied warranty as to quality in the sale of personalty. Ashford v. Schrader, 167 N. C. 48, 83 S. E. 29 (1914), but there is an implied warranty of merchantability because the law assumes that the seller does not desire to obtain money for a worthless article. Hall Furniture Co. Inc. v. Crane Breed Mfg. Co., 169 N. C. 41, 85 S. E. 35 (1915).

86. UNIFORM SALES ACT (1907) §§ 14, 16.

87. UNIFORM SALES ACT (1907) § 15 (1).

88. Kellogg Bridge Co. v. Hamilton, 110 U. S. 114 (1883); Minneapolis Steel and Machinery Co. v. Casey Land Agency, 51 N. D. 832, 201 N. W. 172 (1924). But see Kullman, Salz & Co. v. Sugar Apparatus Mfg. Co., 153 Cal. 725, 729, 96 Pac. 369, 371 (1908) where the general rule of law is stated to be that "oral representations or warranties, and implied warranties, and all oral negotiations are merged in the written contract, and by its terms the parties must be bound."

89. Colt v. Bridges, 162 Ga. 154, 132 S. E. 889 (1926); Bekkevold v. Potts, 173 Minn. 87, 216 N. W. 790 (1927).

writing. Thus, where the buyer makes known to the seller the purpose for which he purchases a horse, it would seem that the parties would ordinarily and naturally integrate in writing that purpose, *e.g.*, "a horse for hauling stone".[90] In fact, many of these warranties of suitability for a particular purpose are contractual in their nature. The silent acquiescence of the seller to the statement of the purchaser concerning the use to which the article of sale is to be put, contains all the elements of an implied in fact warranty. The exclusion of the operative facts which give rise to this implied in law warranty has been recognized as subversive to the purpose of the implied in law warranties, and the majority view is that a warranty of fitness may be shown even in the face of a complete written contract.[91]

A similar problem arises in sales by sample. Apparently the majority view is that, where the sale by sample is not mentioned in the writing, evidence of implied warranties arising from such sales is inadmissible as adding to or varying the instrument.[92] Such decisions are harmonious with the test laid down by *Seitz v. Brewers' Refrigeration Machine Co.* The natural acts of the parties would be to integrate their agreement in relation to the sample in their writing since it constituted one of the essential facts of their dealing. On the basis that the parol evidence rule excludes only the contractual obligations of the parties, the result is defensible since the sale by sample, although described as an implied warranty at common law and by the Sales Act, is an implied in fact contractual warranty.[93] Usage alone required the retention of the term implied warranty.[94]

This frequent failure of the courts to clearly define what is meant by the term "implied warranty"[95] tends to leave doubtful the rights of the vendee in the event of the breach of another so called implied warranty, that of title. Generally, it has been indiscriminately described as an "implied warranty."[96] If it is implied in law, its existence is provable even in the face of a complete document of sale; if it is implied in fact, its existence cannot be proved since it is a term naturally included in the integrated contract. The sparseness of decisions on the point is due in large part to the fact that the vendor generally warrants title in the instrument of sale, rarely by express declaration, more

90. Ottawa Bottle & Flint Glass Co. v. Gunther, 31 Fed. 208 (1887); Ventimiglia v. Brockway Motor Truck Corp., 143 Misc. 681, 257 N. Y. Supp. 27 (Sup. Ct. 1932).

91. International Harvester Co. v. Bearn, 159 Ky. 842, 169 S. W. 549 (1914); Allis-Chalmers Mfg. Co. v. Frank, 57 N. D. 295, 221 N. W. 75 (1928).

92. Standard Milling Co. v. De Pass, 154 App. Div. 525, 139 N. Y. Supp. 611 (1st Dep't 1913), *aff'd*, 214 N. Y. 638, 108 N. E. 1108 (1915). *Cf.* Stroock & Co. v. Lichtenthal, 224 App. Div. 19, 229 N. Y. Supp. 371 (1st Dep't). Although a sample may not be used to establish a warranty, it is admissible to establish the identity of the subject matter of the sale. Germain Fruit Co. v. Armsby Co., 153 Cal. 585, 96 Pac. 319 (1903).

93. See Bradford v. Manly, 13 Mass. 138, 143, 7 Am. Dec. 122, 124 (1816); Gurney v. Atlantic Ry., 58 N. Y. 358, 364 (1874); WILLISTON, SALES (1909) 304.

94. 1 WILLISTON, SALES (2d ed. 1924) § 223.

95. The result of this failure has been felt generally in warranty law. Waite, *Retail Responsibility and Judicial Law Making* (1936) 34 MICH. L. REV. 494, 498.

96. Morley v. Attenborough, 3 Ex. 500, 154 Eng. Reprints 943 (1849); Eichholz v. Bannister, 17 C. B. (N. S.) 708, 144 Eng. Reprints 284 (1864).

often by necessary implication from the facts of the sale.[97] Thus, although the vendor to a conditional sales contract may not expressly warrant his title to the subject matter, he impliedly does the same thing, by reserving title in himself until full payment has been made by the vendee.[98] However, there are some written contracts from the face of which a warranty of title cannot be gleaned, and in jurisdictions where the title warranty is not considered an obligation imposed by law, the warranty cannot be proved.[99] Aside from the question whether the warranty is implied in fact, or in law, the decisions are unfortunate in that the warranty of title is not a term which the ordinary contracting parties would integrate in their writing. Experience and the Uniform Sales Act testify that the parties are rarely "title conscious".[100] Fortunately, the majority tendency is to accept the warranty of title as imposed by law,[101] which is a judicial confirmation of the fact that the buyer of a horse intends to purchase a horse and not a lawsuit.[102]

VII. The Express Warranty Excluding the Implied Warranty

Since the written terms of sale may evince by implication the intent of the parties to be bound by certain warranties, contrariwise the parties by implication may rebut the existence of a warranty obligation. It has sometimes been stated as the common law rule that an express warranty appearing in the written contract of sale excludes the possibility of the existence of an implied in law warranty.[103] The rule as broadly stated is justified in those instances where the warranty expressed in the sale is contradictory of the implied warranty sought to be effectuated. An examination of the cases laying down such a rule indicates that generally its application is limited to such contradictory warranties.[104] It is undeniable that when parties arrange for the sale of, for example, a violin warranted to be a genuine Stradivarius, certain implied warranties will arise by operation of law even though the warranty that the instrument is a Stradivarius is expressed in the written contract. It would be unreasonable to say that the express warranty excludes an implied warranty of title,[105] *i.e.*, that the seller owned the violin and could give good title to it, or that the implied warranty of suitability for a particular purpose, *e.g.*, adaptability for concert playing, was negatived by the express warranty.[106] If,

97. See Howland v. Doyle, 5 R. I. 33, 36 (1857); Morley v. Attenborough, 3 Ex. 500, 512, 154 Eng. Reprints 943, 948 (1849) where it is stated that "usage" or the very nature of the trade may evince the implied in fact intention of the parties.

98. MacDonald v. Mack Motor Truck Co., 127 Me. 133, 142 Atl. 68 (1928).

99. Sparks v. Messick, 65 N. C. 440 (1871); Howland v. Doyle, 5 R. I. 33 (1857).

100. Hence the necessity of an elaborate set of presumptions in § 19 of the Uniform Sales Act. 1 Street, Foundation of Legal Liability (1906) 383.

101. Word v. Cavin, 38 Tenn. 506 (1858); Topp v. White, 59 Tenn. 165 (1873).

102. Edwards v. Pearson, 6 T. L. R. 220 (1890).

103. American Varnish Co. v. Globe Furniture Co., 199 Mich. 316, 165 N. W. 1050 (1917). *Contra:* Kellogg Bridge Co. v. Hamilton, 110 U. S. 108 (1883).

104. Bucy v. Pitts Agricultural Works, 89 Iowa 464, 56 N. W. 541 (1893). See John A. Rochling's Sons Co. v. Southern Power Co., 142 Ga. 464, 467, 83 S. E. 138, 140 (1914).

105. *Ibid.*

106. Pryor v. Ludden & Bates Southern Music House, 134 Ga. 288, 67 S. E. 654 (1910).

however, the contract described the instrument as a Stradivarius violin suitable only for display, the implied warranty of suitability for playing cannot be enforced. In such case the parties have seemingly contracted with the implied warranty in mind, and have negatived any implication that it could operate as a binding obligation on the vendor.[107] Similarly, the sale of the instrument "as is" excludes the possibility of a warranty arising by implication of law.[108] The rule has been adopted by the Uniform Sales Act which declares, *"An express warranty or condition does not negative a warranty or condition implied under this act unless inconsistent therewith."*[109]

VIII. Written Disclaimers of Warranty

In certain phases of business sales written disclaiming clauses, expressly authorized by the Uniform Sales Act,[110] render the question of proving, by parol, warranties not expressly stated in the written contract of sale, one of purely academic interest. The noteworthy characteristic of such disclaiming clauses is their prevalence. Their use is not limited to the larger manufacturers, but their growth is fostered among the smaller industries by nation-wide trade associations.[111] These disclaimers consist of two kinds: (1) an express negation of any warranties other than those expressed in the printed or written form,[112] (2) a limitation on the purchaser's rights when the chattel fails to perform according to the express warranty or warranties.[113] This usually consists of an exclusive remedy stipulation contained in the printed agreement providing that the vendor has the right to substitute a new article or part, for the defective article or part which constituted the subject of the sale.[114]

Even a reasonable application by the courts of the maxim *caveat emptor* would, of course, completely deprive the purchaser under such a standardized contract of most of his legal remedies. Apparently, the written disclaimers of any express warranties not contained in the written contract constitute so much excess verbiage, since such express warranties would be excluded as varying, or adding to, the complete written contract even in the absence of

107. See note 104, *supra.*

108. Franklin v. Nelson-Dowling Coal Co., 82 N. H. 96, 130 Atl. 26 (1925). *Cf.* Morris Run Coal Co. Inc. v. Carthage Sulphite Pulp Co., Inc., 210 App. Div. 578, 206 N. Y. Supp. 676 (4th Dep't 1924); Prentice v. Fargo, 53 App. Div. 603, 65 N. Y. Supp. 114 (1st Dep't 1900).

109. Uniform Sales Act (1907) § 15 (6).

110. Uniform Sales Act (1907) § 71.

111. For a listing of the more influential associations, see Bogert and Fink, *Business Practice Regarding Warranties in the Sale of Goods* (1930) 25 Ill. L. Rev. 400, 403.

112. Dayton Oakland Co. v. Livesay, 34 Ohio App. 302, 170 N. E. 880 (1929) ("There are no guarantees or representations, express or implied," that are not contained in the written contract).

113. Clark Implement Co. v. Priebe, 52 S. D. 606, 219 N. W. 475 (1928) (replacement of defective parts).

114. See Palaniuk v. Allis-Chalmers Mfg. Co., 57 N. D. 190, 220 N. W. 638 (1928) for a typical exclusive remedy provision in a contract of sale. The statement of special remedy does not necessarily exclude the purchaser's other remedies. Remington Arms Co. v. Gaynor Mfg. Co., 98 Conn. 721, 120 Atl. 572 (1923).

the disclaiming clause.[115] But the rule of strict construction has been applied by many courts to the interpretation of disclaiming clauses, not in opposition to, but in spite of the doctrine of *caveat emptor*.[116] The origin and use of implied warranties as judicial and commercial counter-agents for *caveat emptor*[117] to promote high business standards, to prevent sharp dealings and to promote fair play in business transactions is the motivation for such construction.[118] The presumption that the disclaimers in written contracts were inserted for the benefit of the vendor has been described as conclusive.[119] The meaning of words has often been strained to the limits of logical elasticity to protect the purchaser. Clauses disclaiming warranties "express or implied" have been held insufficient to exclude the implied warranty of fitness for a particular purpose, on the ground that only warranties implied in fact were intended to be excluded.[120] This mode of interpretation bears marked similarity to the interpretation of clauses limiting by contract the common law liabilities of the carrier,[121] or innkeeper,[122] with the significant difference that the carrier cannot relieve itself of all its common law liabilities,[123] whereas the vendor of personalty by carefully couched wording can contract himself out of the liabilities imposed by law.[124] Strict interpretation of disclaimers may be justified on the ground that although the parties may have expressly excluded any remedy on "implied in law warranties" it is doubtful, to take the clearest example, that the seller and the buyer ever intended to negate the warranty of title *viz.*, that the seller owned the property and could transfer it to the buyer. If the present rule, that the vendor can expressly exclude an implied warranty, is carried to its logical conclusion, the implied warranty of title may by seemingly innocent phraseology be excluded on the ground that it contradicts the writing. Under the doctrine of *caveat emptor* to which all courts make some obeisance (although in its inception the doctrine had little

115. Minneapolis Steel & Machinery Co. v. Casey Land Agency, 51 N. D. 832, 201 N. W. 172 (1924).

116. Minneapolis Steel & Machinery Co. v. Casey Land Agency, 51 N. D. 832, 201 N. W. 172 (1924). Where the seller's opportunity to inspect the commodity is lacking, *caveat emptor* does not apply. Barnard v. Kellogg, 10 Wall. 387 (U. S. 1870).

117. It is said that the common law courts looked upon the implied in law warranties as "subversive" and "insidious." Hamilton, *The Ancient Maxim Caveat Emptor* (1931) 40 YALE L. J. 1133.

118. Bekkevold v. Potts, 173 Minn. 87, 216 N. W. 790 (1927), wherein it was said: "Defendant's claim does not commend itself to us as consistent with the honesty of purpose with which they are entitled to be credited in their dealings with their customers." International Harvester Co. v. Beam, 159 Ky. 842, 169 S. W. 549 (1914). Mechem, *Implied and Oral Warranties and the Parol Evidence Rule* (1928) 12 MINN. L. REV. 209, 218.

119. International Harvester Co. v. Beam, 159 Ky. 842, 169 S. W. 549 (1914).

120. International Harvester Co. v. Beam, 159 Ky. 842, 169 S. W. 549 (1914).

121. Kansas City, *etc.* Ry. v. Holland, 68 Miss. 351, 8 So. 516 (1891).

122. See Stanton v. Leland, 4 E. D. Smith 88, 91 (N. Y. 1855).

123. Louisville, *etc.* v. Wynn, 88 Tenn. 320, 14 S. W. 311 (1896).

124. Potash v. Reach, 272 Fed. 658 (C. C. A. 3rd, 1921); Minneapolis Threshing Machine Co. v. Hocking, 54 N. D. 559, 209 N. W. 996 (1926). Liability, however, cannot be evaded by a stipulation that the vendee cannot rely on fraudulent misrepresentation. Pearson & Son Ltd. v. Lord Mayor of Dublin [1907] A. C. 351.

commercial foundation[125]) it was presumed that the parties had freedom of contract. Theoretically, they still have; the vendee has the option to purchase or not to purchase. The fact is that a definite limitation exists on the purchaser's contractual freedom. For example, under a contract of sale of any type automobile, standard warranties are in universal use and the purchaser must accept them or forego the purchase of an auto of any type. It has been suggested that the aggrieved purchaser's most potent remedy lies under the extra-legal "business good will" maxim that the "customer is always right,"[126] but certainly the purchaser's rights should not be solely dependent, as they so often are, upon such an illusory remedy as good business policy. The solution offered is that "so far as rules of warranty, and more particularly, rules of *implied* warranty, are intended to *control* contractors, they must be rules of iron nature, and must therefore be not subject to effective contracting-out."[127] A belated recognition of the evil by the legislature of one state has cast certain warranties in the mold of "iron nature." Thus, a statute providing that a purchaser of farm machinery for his own use should be permitted to rescind the contract of sale if the machinery should not be reasonably fit for the purpose for which it was purchased and that any contractual provision to the contrary should be considered against public policy and void, has been upheld as a proper exercise of the police power.[128]

CONCLUSION

The operation of the parol evidence rule, insofar as warranties are affected, has seemingly fulfilled its original purpose—that of giving stability to written contracts. Cases of extreme hardship,[129] where statements which undoubtedly induced the buyer to purchase were excluded from proof by the operation of the rule, may be pointed out as examples of the harshness of this doctrine which pays so much reverence to the written word. Similarly, harsh cases have arisen under the Statute of Frauds (the spirit vitalizing the parol evidence rule) but the general benefit derived from that Statute is rarely disputed. The original severity of the parol doctrine in the warranty field has been mitigated by the recognition and enforcement of the implied in law warranties. The peril to these implied in law obligations lurks in the contractual disclaimer; the remedy whereby such disclaimers will be proscribed rests with the legislature. Such reparative legislation may result in written contracts of sale which fairly represent the obligations incurred by the parties without being subjected to variance by the inaccurate editing of uncertain memory.

125. Hamilton, *The Ancient Maxim Caveat Emptor* (1931) 40 YALE L. J. 1133.

126. Bogert & Fink, *Business Practice Regarding Warranties in the Sale of Goods* (1930) 25 ILL. L. REV. 400, 415.

127. Llewellyn, *On Warranty of Quality and Society* (1937) 37 COL. L. REV. 341, 386.

128. Advance-Rumely Thresher Co., Inc. v. Jackson, 287 U. S. 283 (1932). Analogous statutory protection has been granted to the vendee under a conditional sales contract whereby a waiver of a buyer's statutory protection is invalid. N. Y. PERS. PROP. LAW (1922) § 80 (f). The purpose of the section was to invalidate the use of waivers (usually in small type) by "unscrupulous sellers". Commissioner's Note to § 26, UNIFORM CONDITIONAL SALES ACT (1919).

129. Davis Calyx Drill Co. v. Mallory, 137 Fed. 332 (C. C. A. 8th, 1905).