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Contractual Disclaimers of Warranty

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NOTES

CONTRACTUAL DISCLAIMERS OF WARRANTY

In early common law the doctrine of *caveat emptor* placed the risk of the success of the transaction on the prospective vendee in the absence of express warranties. But with the development of the doctrine of implied warranties the risk of the transaction was shifted to the vendor, who found himself bound beyond the intention of the parties in many instances. It was primarily in order to repose the risk, once again, upon the vendee that the device of contractual disclaimer was invented.

The disclaimer of warranty is a fairly recent development. Although there may have been a few scattered cases involving this device at an earlier date, this instrument is first noticed around the start of the twentieth century. From 1897 to 1926 the development was gradual. Throughout the United States during those thirty years some fifty or more cases involving disclaimers were decided. But in the last ten years, from 1927 to the present, this development has numbered over sixty cases. Such an increase in the number of cases is merely a means of measuring a vastly wider trend and a much broader development in the use of disclaimers, for only a small minority of the actual instances of use of a disclaimer ever are brought before a court.

This device is noticeable mainly in the southern, north-central and far western states. Although it has extensive use throughout the commercial world in any and every sale to the consumer, disclaimers are used chiefly in three types of transactions: sales of seed, sales of fertilizer, and sales of mechanical implements. This may be due to various factors: possibilities for enormous speculative damages, possibility of the vendor not having the opportunity to be aware of the true nature and qualities of the goods he sells, and perhaps just to a general trepidation against bearing the risk of the success of the transaction. But its use is by no means limited to these commodities.

Now, as has been said above, the sole purpose of the disclaimer of warranty is to repose the risk of the transaction upon the prospective vendee. If it fails in this purpose, the disclaimer is of no use whatsoever. This article is intended to deal solely with the consideration of how to make the disclaimer most effective and thereby succeed in the accomplishment of its purpose. It excludes such questions as the parol evidence rule, the exclusion

of implied warranties by express warranties, a full and complete discussion of the distinction between conditions and warranties, and other independent problems which, although relevant to the general subject, are too lengthy to be included. Also it is confined to American law and does not treat the English cases on this subject. It treats solely the considerations in drafting a disclaimer in this country which will effectively cast the risk of the transaction upon the vendee and relieve the vendor from liability for defects in the article or articles of sale. The intention of the writer should not be construed, however, as favoring the right of the vendor to avoid all liability through the use of disclaimers, and so militate against the interests of the vendee. That question of policy is for the legislature, and in the absence of legislative action thereon a merchant should be justified in attempting so to draft his contract within the provisions of the law as to make it most satisfactory to his own interests.

In conformity with general principles of the law of sales, the intention of the parties controls and the contract of sale is the document containing that intention. In their agreement the parties may define and restrict their respective rights and liabilities, and this power is unrestrained as long as it conforms with public policy. This right is too firmly established to require the citing of a long list of cases asserting the right.[1] The fundamental question is how may this right be most effectively exercised to reach the desired result?

I. NOTICE

The first consideration in the effectual use of the disclaimer is that the disclaimer must have been brought to the notice of the vendee before it can be binding upon him. This element is important because many disclaimers are found in billheads, in catalogues, on containers, and on cards or slips inserted in the package containing the article or articles purchased, and in other out-of-the-way places likely to escape the attention of the buyer. As a general rule, in accord with ordinary principles of Contract Law, the disclaimer, unless brought to the notice of the parties is of no effect and will be excluded from the evidence.[2] An ex-

1. Minneapolis Threshing Machine Co. v. Hocking, 54 N. D. 559, 209 N. W. 996 (1926); Leonard Seed Co. v. Crary Canning Co., 147 Wis. 166, 132 N. W. 902, 37 L. R. A. (N. S.) 79, Ann. Cas. 1912D 1077 (1911); Uniform Sales Act, sec. 71.

2. Amzi Godden Seed Co. v. Smith, 185 Ala. 296, 64 So. 100 (1913); Wm. A. Davis Co. v. Bertrand Seed Co., 94 Cal. App. 281, 271 Pac. 123 (1928); Vaughan's Seed Store v. Stringfellow, 56 Fla. 708, 48 So. 410 (1909); Blizzard Bros. v. Growers' Canning Co., 152 Ia. 257, 132 N. W. 66 (1911);

ceptional case on this point is *Calhoun v. Brinker*[3] which would seem to waive the question of notice, and hold that the vendee is bound in spite of the lack of actual notice. But the vast weight of authority would urge the party making a disclaimer expressly to call attention to the buyer of this fact in order to be safely protected from future liability.

II. FRAUD OR UNFAIR ADVANTAGE

Although not involved in the actual drafting of a disclaimer, it is impossible to overlook the factor that courts will relieve upon the proof of fraud or other similar pleas.[4] As the court said in *Davis v. Joyner*:[5]

> "Defendant was bound by these statements, unless he showed that he could not read, and was for that reason imposed upon, or that the note was signed under some emergency which excused the failure to read, or that the failure to read was brought about by some fraud or misleading device of the payee of the note."

So it may be that a disclaimer, perfectly good in all other respects, will be voided by a court on some equitable grounds as regards the obtaining of the disclaimer rather than because of its form or contents.

III. CONDITION OR WARRANTY

Courts have failed to consistently distinguish between a condition and a warranty in determining the effect to be given to a disclaimer; so we find parties being held liable under implied warranties in the face of seemingly good disclaimers.[6] As one court held:[7]

> "Contracts here involved relieved plaintiffs from the obligations incurred by any such warranty (implied warranty of

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Black v. B. B. Kirkland Seed Co., 158 S. C. 112, 155 S. E. 268 (1930); and Longino v. Thompson, 209 S. W. 202 (Tex., 1919).

3. 17 Ohio Dec. 705 (1907). The theory of this case is that the printing on seed package and in catalogue constitutes the contract of sale. The decision should be confined at least to its facts, i. e., a small transaction involving a very small purchase out of the usual course of commercial transactions in the seed business.

4. Tharpe v. Griffin, 144 Ga. 486, 87 S. E. 479 (1915); Mock v. Kemp & Lewis, 17 Ga. App. 448, 87 S. E. 608 (1916); and International Harvester Co. v. Bean, 159 Ky. 842, 169 S. W. 549 (1914).

5. 27 Ga. App. 132, 132, 107 S. E. 551 (1921).

6. Hobdy & Read v. Siddens, 198 Ky. 195, 248 S. W. 505 (1923); National Seed Co. v. Leavell, 202 Ky. 477, 259 S. W. 1035 (1924). See also Hall Furniture Co. v. Crane Breed Mfg. Co., 169 N. C. 41, 85 S. E. 35 (1915).

7. Downey v. Price Chemical Co. and Proto-Feed & Guano Co. v. Price Chemical Co., 204 Ky. 98, 103, 263 S. W. 690 (1924).

> fitness for communicated purpose) but did not relieve them from the implied warranty that the article sold was of the particular commercial kind or character which its description indicated."

How is one to distinguish these two warranties, unless one is said to be a condition? In *Lumbrazo v. Woodruff*,[8] the New York Supreme Court said:

> "It is unimportant whether we consider the pencil writing an express warranty, an implied warranty, or a condition.... There must be delivery of the kind of seeds ordered, unless the nonwarranty clause is specific. In other words the seed must be true to name. It is regarded, not as a breach of warranty, but of a condition."

Judgment was given to the vendee. The court, while using contradictory language, did not recognize that it was vitally important to distinguish between a condition and an implied warranty in reaching a conclusion in any one case. On appeal the judgment was reversed, the court saying,[9] "All these distinctions causing more or less confusion and uncertainty in the law have been swept away by the Uniform Sales Act. . . ." The appellate court went on to say that today there is merely an implied warranty of description against which the disclaimer was effective. If the Supreme Court was mistaken in failing to recognize the importance of the distinction, the Court of Appeals was still more mistaken in claiming that the Uniform Sales Act abolished the distinction. The case of *Smith v. Oscar H. Will & Co.*[10] illustrates the fact that there is still a distinction between a warranty and a condition even under the Uniform Sales Act; and that a disclaimer is ineffective as against a true condition.

No attempt is made here to go into the details and incidents of this distinction, but it is sought merely to point out that there is a valid distinction to which different incidents attach and that different rules of law govern the two types of obligation. It is important in the future for the sake of clarifying the law on this point, that the courts recognize more fully the existence of this distinction. Otherwise it is impossible to foretell whether a disclaimer will exclude liability under an implied warranty which may be incorrectly termed a condition of the sale and so beyond

8. 242 N. Y. Supp. 335, 339 (1930).
9. 256 N. Y. 92, 96, 175 N. E. 525 (1931).
10. 51 N. D. 357, 199 N. W. 861 (1924). Also a case of mistake in seed. Action for breach of contract was allowed, and disclaimer was held immaterial as this was not action for breach of warranty. See also Vold, *Sales* (1931) 436.

the power of the vendor to avoid; or whether, on the other hand, liability will be avoided under a condition because it is considered an implied warranty and so subject to a disclaimer. It also will be well to keep in mind this distinction under a later section on statutory imposition of liability beyond that imposed under implied warranties.

IV. STRICT AND LIBERAL CONSTRUCTION

The most important question to be answered before a disclaimer can properly be drafted in any one state is, does that state adopt the rule of liberal or strict construction as regards disclaimers? The strict rule distinguishes between an obligation implied from the agreement of the parties and an obligation imposed by operation of law, and requires that the language of the disclaimer specifically cover both; while the liberal rule does not consider such a distinction in construing a particular disclaimer. The entire success of the disclaimer in avoiding liability under implied warranties depends upon the solution to this problem, for a disclaimer perfectly good in one state may be utterly inadequate in another because different rules of construction are applied. On this question there is a wide split of authority depending mainly upon the theory of the nature of the implied warranty which has been adopted in a particular state.

There is a respectable line of authority taking the liberal rule of construction.[11] This rule is based upon the old theory that an implied warranty is derived from the intention of the parties. As said in *Couts v. Sperry Flour Co.*:[12]

> "In order to recover upon a warranty there must be two factors present, first, an affirmation of fact by the seller with reference to the thing sold, and, second, an intention on the part of the seller that his affirmation shall constitute a warranty."

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11. Hartin Commission Co. v. Pelt, 76 Ark. 177, 88 S. W. 929 (1905); Couts v. Sperry Flour Co., 85 Cal. App. 156, 259 Pac. 108 (1927); Wm. A. Davis Co. v. Bertrand Seed Co., 94 Cal. App. 281, 271 Pac. 123 (1928); Burntisland Shipbuilding Co. v. Barde Steel Products Corp., 278 Fed. 552 (D. C. Del., 1922); Jones v. George S. Riley, Jr., Co., 14 Ga. App. 84, 80 S. E. 341 (1913); Barrineau v. Holman, 21 Ga. App. 159, 93 S. E. 1021 (1917); The Sterling-Midland Coal Co. v. The Great Lakes Coal & Coke Co., 334 Ill. 281, 165 N. E. 793 (1929); Heller v. Franklin-Butler Motors, 259 Ill. App. 358 (1930); Burnett v. Hensley, 118 Ia. 575, 92 N. W. 678 (1902); W. F. Dollen & Sons v. Carl R. Miller Tractor Co., 214 Ia. 774, 241 N. W. 307 (1932); S. F. Bowser & Co. v. Birmingham, 276 Mass. 289, 177 N. E. 268 (1931); Potter v. Shields, 174 Mich. 121, 140 N. W. 500 (1913); Little v. Widener, 226 Mo. App. 525, 32 S. W. (2d) 116 (1930); Laitner Plumbing & Heating Co. v. McThomas, 61 S. W. (2d) 270 (Mo. 1933); and McCabe v. Standard Motor Const. Co., 106 N. J. L. 227, 147 Atl. 466 (1929).

12. 85 Cal. App. 156, 259 Pac. 108, 109 (1927).

And again in another case it is said:[13]

> "In order to imply a warranty from the language or contract of the seller an intention to warrant must be apparent, and it would be anomalous to hold that a warranty of grade or quality will be implied from the sale of a commodity by description where the seller expressly refuses to warrant."

Under this rule of construction, the drafting of a disclaimer is relatively simple, for any language sufficient to indicate the intention of the seller that he does not guaranty or warrant the goods is sufficient. It is also apparent that, applying this rule of construction, it is impossible to obtain a liability contrary to and in opposition to the intention of the parties.

There is an equally respectable line of authority adopting the strict rule of construction.[14] This particular rule is based upon the modern theory that an implied warranty is an additional liability imposed upon the parties by operation of law and is outside of and beyond the express agreement of the parties. As said in *J. B. Colt Co. v. Bridges*:[15]

> "A warranty may be either express or implied. The former is created by the statement of the seller. The law creates the implied warranty. . . . The latter does not arise from the contract of the parties. It is the offspring of the law. The assertion of the implied warranty does not in any way conflict with the stipulations of the written contract of sale that the instrument contains all the agreements of the parties."

In drafting a disclaimer to conform with this rule of construction, it is necessary to be extremely careful of the form and content of the disclaimer. Of course, any disclaimer which specifically excludes liability under "implied" warranties, normally will be successful even under strict construction;[16] but if the

13. Hartin Commission Co. v. Pelt, 76 Ark. 177, 179, 88 S. W. 929 (1905).

14. J. B. Colt Co. v. Bridges, 162 Ga. 154, 132 S. E. 889 (1926); Hardy v. General Motors Acceptance Corp., 38 Ga. App. 463, 144 S. E. 327 (1928); Stracener v. Nunnally Bros. Motor Co., 11 La. App. 541, 121 So. 617 (1929), rehearing denied 11 La. App. 541, 123 So. 911 (1929); Little v. G. E. Van Syckle & Co., 115 Mich. 480, 73 N. W. 554 (1898); Lutz v. Hill-Diesel Engine Co., 255 Mich. 98, 237 N. W. 546 (1931); Bekkevold v. Potts, 173 Minn. 87, 216 N. W. 790 (1927); S. F. Bowser & Co. v. McCormack, 243 N. Y. Supp. 442 (1930); Hooven & Allison Co. v. Wirtz, 15 N. D. 477, 107 N. W. 1078 (1906); J. A. Campbell Co. v. Corley, 140 Ore. 462, 13 P. (2d) 610 (1932); The White Co. v. Francis, 95 Pa. Super. Ct. 315 (1928); Liquid Carbonic Co. v. Coclin, 161 S. C. 40, 159 S. E. 461 (1931) and 166 S. C. 400, 164 S. E. 895 (1932). See also Vold, *Sales* (1931) 468.

15. 162 Ga. 154, 158, 132 S. E. 889 (1926).

16. Williams v. Bullock Tractor Co., 186 Cal. 32, 198 Pac. 780 (1921); Bridgeport L. A. W. Corp. v. Levy, 110 Conn. 255, 147 Atl. 841 (1929);

word "implied" is not so used, liability may attach beyond the actual intention of the vendor: as where the disclaimer read, "covers all the agreement,"[17] "no warranties have been made by the seller unless indorsed hereon in writing,"[18] "we will not be responsible for any written or verbal contract or promise other than written or printed on the face of this contract,"[19] or "no warranties have been made by the seller to the buyer unless written hereon."[20] It should be noticed that all these cases drew a distinction between liabilities agreed to by the parties in their written contract and liabilities imposed by operation of law; the disclaimer in each case being construed to apply only to implied warranties of the former type and not to those of the latter. Under the liberal rule of construction any or all of these disclaimers would have been sufficient. It is true that these courts say that they are merely "getting at the intention" of the parties, but it seems obvious, that, in reality, they are disregarding the ill-stated intention of the vendor not to be bound beyond his express stipulations, which would exclude implied warranties of all types.

In framing a disclaimer, it is obvious that it would be better in all cases so to word it that it will withstand the application of the rule of strict construction. Then the vendor can feel sure that in any case he will be amply protected, and that the contract of sale, in law, will be held to contain the "entire agreement" of the parties. This can best be accomplished by framing the disclaimer so as expressly to exclude warranties "implied by operation of law or otherwise."

V. LOOSE LANGUAGE AND MISCELLANEOUS CASES

Frequently it happens that because of the loose wording of the disclaimer the courts, in interpreting such a contract, attach to the phrase a meaning not intended by the parties. Because of such interpretation the disclaimer may be useless as it fails to exclude certain liabilities, which purpose was the very reason for having a disclaimer in the contract.

Such would seem to be the result in *Miller Rubber Co. v.*

Davis v. Joyner, 27 Ga. App. 132, 107 S. E. 551 (1921); Kolodzcak v. Peerless Motor Co., 255 Mich. 47, 237 N. W. 41 (1931); Industrial Finance Corp. v. Wheat, 142 Miss. 536, 107 So. 382 (1926); and Sayeg v. Gloria Light Co., 259 N. Y. Supp. 492 (1932).

17. J. B. Colt Co. v. Bridges, 162 Ga. 154, 132 S. E. 889 (1926).

18. Hardy v. General Motors Acceptance Corp., 38 Ga. App. 463, 144 S. E. 327 (1928).

19. Little v. G. E. Van Syckle & Co., 115 Mich. 480, 73 N. W. 554 (1898).

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

Blewster-Stevens[21] where the contract contained a provision that the "warranty was given solely to the original user," but one other than the original user was allowed to recover on an implied warranty on the ground that there was no express refusal to warrant. Likewise in *New Birdsall Co. v. Keys*,[22] where the contract read "this warranty does not apply to secondhand machinery or machines that are manufactured by parties other than the New Birdsall Co.," recovery was allowed on such machinery under an implied warranty. The court held that the provision prevented the express warranty from applying, but did not prevent the implied warranty. And in *Hansmann v. Pollard*,[23] where there was a provision that unless a note was given for the purchase price before delivery vendor was "discharged from all warranties," the Supreme Court of Minnesota held that this applied to the express warranties but not to implied warranties. In two North Carolina cases[24] the provision read, "without any warranty as to results from its use or otherwise." The court held that "or otherwise" did not include implied as well as express warranties and so allowed recovery under an implied warranty. A disclaimer drafted so as to cover implied as well as express warranties would have avoided such fatal interpretation in these cases.

A different type of disclaimer was involved in *Watson v. Smith*[25] but a somewhat similar result was reached. There the disclaimer read "Does not warrant health, life, and soundness of said stock, but only the title thereto." This would seem to indicate an intention to warrant nothing except the vendor's title. The court, however, limited the extent of the refusal to warrant and confined such refusal to the particular things named, or closely related subjects, and held that there was no express refusal to warrant that the horse sold was reasonably suited for the purpose intended. The court intimated that it might have been otherwise if the language had been broader and more comprehensive. That case should be compared with *Payne v. Chal-Max Motor Co.*[26] which contained a provision that "vendor does not warrant said property except that the title to same is in vendor and free from encumbrance." There the court held that

21. 171 Ark. 1179, 287 S. W. 577 (1926).
22. 99 Mo. App. 458, 74 S. W. 12 (1903).
23. 113 Minn. 429, 129 N. W. 848 (1911).
24. Swift & Co. v. Etheridge, 190 N. C. 162, 129 S. E. 453 (1925); and Swift & Co. v. Aydlett, 192 N. C. 330, 135 S. E. 141 (1926).
25. 15 Ga. App. 62, 82 S. E. 633 (1914).
26. 25 Ga. App. 677, 104 S. E. 453 (1920).

the provision amounted to an express refusal to warrant and that this refusal was so broad that it extended to and covered any implied warranty. But the disclaimer was essentially the same in both cases.

This problem comes very close to that raised by another very large class of cases, contracts in which liability is avoided due to the contract or conduct of the parties.[27] By this is meant that in certain cases the peculiar terms of the contract, for instance sale "as is," or the conduct of the parties and the circumstances surrounding the transaction are such as to exclude the possibility of recovery under an implied warranty. Although the same result may be reached in both instances, these are not true disclaimers, and therefore a thorough consideration of those cases is not included here.

In the previous cases, where recovery was allowed, it was due to the failure of the vendor to make his intention sufficiently clear and so the blame was on him. But that cannot be said of the decision in *Ideal Heating Co. v. Kramer*[28] where there was present the usual disclaimer that the writing "shall fully express the agreement between the parties;" yet the court held that the clause "is nothing more than a paraphrase of the long-settled rule of law that the writing is presumed to contain the entire agreement, and parole evidence is not admissible to vary its terms. It does not exclude an express warranty where one otherwise would be found."[29] The same view was taken in the Iowa case of *Hughes v. National Equipment Corp.*[30] and the Missouri case of *National Cash Register Co. v. Layton.*[31] This result could only be explained in the light of the strict rule of construction, although it would seem that Iowa and Missouri are liberal in this regard.[32] If disclaimers generally are to have any value whatsoever, it is necessary to consider them as more than a mere codification of the parole evidence rule.

An infrequent situation is found in a Minnesota[33] and in a

27. Ferguson v. Kock, 204 Cal. 342, 268 Pac. 342, 58 A. L. R. 1176 (1928); Morris Run Coal Co. v. Carthage Sulphite Pulp & Paper Co., 206 N. Y. Supp. 676 (1924), order affirmed 242 N. Y. 567, 152 N. E. 430 (1926); Fruit Dispatch Co. v. C. C. Taft Co., 197 Ia. 409, 197 N. W. 302 (1924); Yandell v. Anderson & Spilman, 163 Ky. 702, 174 S. W. 481 (1915); and Tamkin v. Nelson-Dowling Coal Co., 82 N. H. 96, 130 Atl. 26 (1925).

28. 127 Ia. 137, 102 N. W. 840 (1905).

29. 127 Ia. 137, 143, 102 N. W. 840 (1905).

30. 216 Ia. 1000, 250 N. W. 154 (1933).

31. 207 Mo. App. 454, 232 S. W. 1091 (1921).

32. See notes 11 and 14 supra.

33. Moorhead v. Minneapolis Seed Co., 139 Minn. 11, 165 N. W. 484 (1917).

Massachusetts case.[34] In these cases the original contracts were oral and without disclaimers, but later written agreements were drawn up which contained disclaimers. The courts decided that there could be a recovery on oral warranties made in the earlier contracts and that these warranties were not defeated by the subsequent disclaimers since the original contracts were in fact performed.

The reverse situation arises where under a written contract of sale including a disclaimer goods are sent to the buyer and there follows a substitution of part of the goods. In this situation the courts have reached directly opposite results. In *Kibbe v. Woodruff*[35] it was held that subsequent delivery was controlled by the conditions of the written order, while in *Ward v. Valker*[36] the court decided that the clause in the original order was not applicable to the sale of the substituted goods. The Connecticut decision seems the better result in the absence of extraordinary circumstances surrounding the substitution such as were present in *Ward v. Valker,* for as the court there states,[37] "Plaintiff's letter complaining of the mistaken delivery of the peas does not purport to launch a new contract; it demands the fulfillment of an existing one" and this would seem to be the proper way to approach the problem unless the substitution does actually amount to a rescission of the first contract and the establishment of a new agreement.

Finally in *Jolly v. C. E. Blackwell & Co.*[38] the rule is laid down that a disclaimer does not run with the property and enure to the benefit and disadvantage of an assignee of the purchaser.

VI. NONWARRANTY BY CUSTOM

In certain businesses the almost universal practice has grown up to refuse to give any guaranties or warranties whatsoever as to the subject of sale; this is especially true in transactions involving the sale of seed. The question immediately arises as to what effect, if any, such a widespread practice or custom has on the legal rights otherwise secured to the parties. Here again it seems proper to go back to the two fundamental theories of the nature of the implied warranty.

34. Edgar v. Breck, 172 Mass. 581, 52 N. E. 1083 (1899).
35. 94 Conn. 443, 109 Atl. 169 (1920).
36. 44 N. D. 598, 176 N. W. 129 (1920). However, the court was largely influenced in reaching this decision because the vendor exercised an unusual degree of discretion in the substitution of the goods. This might be sufficient ground for distinguishing the two cases on their facts.
37. 94 Conn. 443, 445, 109 Atl. 169 (1920).
38. 122 Wash. 620, 211 Pac. 748 (1922).

Assuming that the modern theory is correct, i. e., that an implied warranty is an obligation imposed by law,[39] an insurmountable principle arises that customs and usages cannot be established in contradiction with the law.[40] This principle would prevent the vendor from proving a custom to refuse to warrant in order to escape liability under an implied warranty if such liability is enforced by law regardless of the contract of the parties. Such is the view taken in *American Warehouse Co. v. Ray.*[41]

But the weight of authority is to the contrary,[42] and proof of a custom will generally protect the vendor. This is in conformity with the older theory that an implied warranty is derived from the intention of the parties;[43] for such a custom, either known or constructively known, must have been in the minds of the parties when they contracted, and if so, must be considered with other circumstances surrounding the transaction in determining the intention of the parties. It is obvious as stated in *Miller v. Germain Seed & Plant Co.*[44] that an intention to warrant cannot be found in the face of a custom opposed to such intention.

The possibilities of such a ruling are enormous. It is apparent that a disclaimer is needless in such cases inasmuch as proof of the custom is sufficient protection against implied warranties. Would it not seem that widespread acceptance of this logic, together with the growth of such customs in various businesses, would practically return the law on this subject to the doctrine of *caveat emptor?*

VII. PUBLIC POLICY AND STATUTORY REQUIREMENTS

Earlier, in speaking of the right of the parties to define and restrict their liability, it was stated that this power is unrestrained as long as it conforms with public policy. But it was not

39. Supra, note 14.

40. 32 A. L. R. 1215, 1244.

41. 150 S. W. 763 (Tex. 1912). See also Cudahy Packing Co. v. Narzisenfeld, 3 F. (2d) 567 (C. C. A. 2, 1924); and annotations to Uniform Sales Act sec. 71.

42. Miller v. Germain Seed & Plant Co., 193 Cal. 62, 222 Pac. 817, 32 A. L. R. 1215 (1924); Blizzard Bros. v. Growers' Canning Co., 152 Ia. 257, 132 N. W. 66 (1911). Also in the following cases the decision is based on the presence of a custom and on an actual disclaimer which was insufficient of itself to support the decision because of lack of notice; Hooven v. Utah Nursery Co., 79 Utah 12, 7 P. (2d) 270 (1932); Seattle Seed Co. v. Fujimori, 79 Wash. 123, 139 Pac. 866 (1914); Larson v. Inland Seed Co., 143 Wash. 557, 255 Pac. 919 (1927); and Ross v. Northrup, King & Co., 156 Wis. 327, 144 N. W. 1124 (1914).

43. Supra, note 11. Also see 1 Williston, *Sales* (2nd ed., 1924) sec. 246; and annotations to Uniform Sales Act sec. 71.

44. 193 Cal. 62, 222 Pac. 817, 32 A. L. R. 1215 (1924).

meant by that that a disclaimer of itself violates public policy. There is dictum in *American Hoist & Derrick Co. v. Frey*[45] that had there been a disclaimer it would have been *contra bonos mores,* but the Supreme Court of Louisiana in a square decision on the point upheld the right to disclaim.[46] This is in accord with the prevailing view,[47] as is best proved by the numerous cases involving disclaimers. Indeed, it can hardly be controverted that, as a general principle, disclaimers do not violate public policy.

But while there is no general opposition among the states to disclaimers, there are two limitations to the broad policy. Both of these limitations are statutory in nature. The first type of restriction is prohibitive in effect, i. e., in a few states where there are interests of such vast importance that injury to them would threaten the resources of the state the legislature has declared certain specific disclaimers injurious to those interests invalid as contrary to public policy.[48] The constitutionality of such a prohibition against disclaimers in contracts involving farm machinery was upheld in *Advance-Rumely Thresher Co. v. Jackson.*[49] But these prohibitions are confined within the limits set in the legislative declaration of its policy and would not operate against disclaimers outside of the declared policy.

The second type of restriction is imperative in nature as it imposes a definite obligation upon the vendor. This new obligation cannot be termed an implied warranty, but in effect resembles a condition; and like a condition it cannot be disclaimed.[50] The same liability may be imposed by agreement of the parties

45. 127 La. 183, 186, 53 So. 486 (1910). See also Hall Furniture Co. v. Crane Breed Mfg. Co., 169 N. C. 41, 85 S. E. 35 (1915) holding an implied warranty contrary to public policy. But it would seem that the court failed to distinguish between a condition and a warranty.

46. 12 La. App. 506, 126 So. 460 (1930).

47. Supra, note 1; and Uniform Sales Act sec. 71.

48. Palaniuk v. Allis-Chalmers, 57 N. D. 199, 220 N. W. 638 (1928); Swift & Co. v. Aydlett, 192 N. C. 330, 135 S. E. 141 (1926); and Swift & Co. v. Etheridge, 190 N. C. 162, 129 S. E. 453 (1925). The North Dakota case concerned farming implements and the North Carolina cases involved fertilizer.

49. 287 U. S. 283, 53 S. Ct. 133, 77 L. ed. 306 (1932).

50. Jones v. Cordele Guano Co., 94 Ga. 14, 20 S. E. 265 (1894); and Germofert Mfg. Co. v. Cathcart, 104 S. C. 125, 88 S. E. 535 (1916). Cf. Manglesdorf Seed Co. v. Busby, 118 Okl. 255, 247 Pac. 410 (1926); and Manglesdorf Seed Co. v. Williams, 118 Okl. 258, 247 Pac. 413 (1926) in which it was held that such a statute did not create a new liability, treating it as an implied warranty, and allowed a disclaimer. These cases should be compared with the previously cited cases on condition: notes 6, 7, 8, 9, and 10 supra, and especially with Hall Furniture Co. v. Crane Breed Mfg. Co., 169 N. C. 41, 85 S. E. 35 (1915) in which it was held that an implied warranty (apparently a condition) violated public policy.

and so take the form of an express warranty.[51] As in the case of the first type of restriction, this second type also is narrow in its scope. It is limited to the requirement that fertilizer satisfy a specific chemical analysis or that seed satisfy certain conditional qualifications. In the seed cases it was held that the statute did not create a new liability and a disclaimer was allowed.[52] But it would seem that a properly drafted statute would impose an added obligation beyond those imposed under implied warranties.

A puzzling question arises under cases involving statutory requirements of satisfaction of chemical analysis or similar warranties as to whether evidence of the effect or result of the fertilizer on the crops is admissible, although it would not be admissible under an implied warranty because of a provision against warranting results.[53] The problem, of course, is that of possibility of misuse of evidence,[54] and the courts have split on the admissibility of such evidence. Since this is a very unsatisfactory form of evidence under the circumstances and since better evidence ought to be available to show the actual chemical properties, it would seem best to exclude such proof from the evidence.

CONCLUSION

It is expected that the use of disclaimers will continue to grow in the future and that national customs will arise in certain businesses most suited to this development. Such growth of customs together with the recognition of the doctrine of nonwarranty by custom, in the absence of disclaimers, would imperil the position of the buyer who is without peculiar knowledge of the articles of sale. In those fields where usages do not naturally develp, but where there is a practice of disclaiming, there will be the constant effort on the part of sellers to achieve a more effective draftmanship of disclaimers in order to restrict their liability to express warranties. This also works against the interests of the buyer. These developments would tend to return the law of implied warranties to the principle of *caveat emptor.*

51. Hampton Guano Co. v. Hill Live Stock Co., 168 N. C. 442, 84 S. E. 774, L. R. A. 1915D 875 (1915); and Carter v. McGill, 171 N. C. 775, 89 S. E. 28 (1916).

52. Manglesdorf Seed Co. v. Busby, 118 Okl. 255, 247 Pac. 410 (1926); and Manglesdorf Seed Co. v. Williams 118 Okl. 258, 247 Pac. 413 (1926).

53. See L. R. A. 1915D 875.

54. Such evidence was admitted in Jones v. Cordele Guano Co., 94 Ga. 14, 20 S. E. 265 (1894); Hampton Guano Co. v. Hill Live Stock Co., 168 N. C. 442, 84 S. E. 774, L. R. A. 1915D 875 (1915); and Carter v. McGill, 171 N. C. 775, 89 S. E. 28 (1916). But it was excluded in Germofert Mfg. Co. v. Cathcart, 104 S. C. 125, 88 S. E. 535 (1916).

But it is also probable that in the future there will be a movement towards declaring disclaimers in particular fields invalid as contrary to public policy. Then it is possible too for legislatures to adopt a policy of imposing additional statutory obligations wherever it is feasible and deemed necessary for the protection of a wide class of buyers. It is true that present usages indicate a limited sphere for the operation of these protective measures, but there is nothing which confines these trends to their present bounds. These weapons of the legislature should prove sufficient to withstand any combined threat on the part of vendors throughout the country to re-establish the doctrine of *caveat emptor*.

J. ROBERT GOTCH.

THE FAIR TRADE ACTS—THE LATEST ATTACK ON THE LOSS LEADER PROBLEM

The loss leader system is a business scheme whereby a widely advertised product of standard quality and popular demand is sold at little or no profit as an inducement to the customer to enter the store.[1] The loss leader problem has been an outgrowth of modern marketing. Although it represents only a segment of the larger problem of price cutting, it has been the subject of a flood of controversy.[2] The theory is that the impression of low prices created by offering the leader at a low price will induce the customer to buy other goods which yield a large profit to the retailer.[3] The result of this plan, so the proponents of resale price maintenance argue, is a detriment to the interests of other distributors, to the producer and to the general public.[4] It is asserted to be a detriment to the retailers because it results in

1. Copeland, Resale Price Maintenance, 13 *Encyclopedia of the Social Sciences* (1932) 326; Seligman and Love, *Price Cutting and Price Maintenance* (1932) part one.

2. The chief arguments against resale price maintenance are put forth in Note, 19 Col. Law Rev. 265 (1919). See also 28 Adv. and Sell. 29-30 (Dec. 17, 1936). The contrary opinion is expressed in Miller, The Maintenance of Uniform Resale Prices (1914) 63 U. of Pa. L. Rev. 22; 178 Printers Ink 100-2 (1937); 40 Sales Management 400 (March 1, 1937). A comparison of the arguments pro and con may be found in Note, 36 Col. L. Rev. 293 (1936), and Oppenheim, *Cases on Trade Regulation* (1936) 834 et seq.; Note, 13 N. Y. U. L. Q. Rev. 267 (1936).

3. Seligman and Love, *Price Cutting and Price Maintenance* (1932) c. 7.

4. Miller, The Maintenance of Uniform Resale Prices (1914) 63 U. of Pa. L. Rev. 22; Rogers, Predatory Price Cutting as Unfair Trade (1913) 27 Harv. L. Rev. 139; Federal Trade Commission, *Report on Retail Price Maintenance* (1931).