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IMPLIED AND ORAL WARRANTIES AND THE PAROL EVIDENCE RULE

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I

IMPLIED warranties of quality in connection with sales or contracts for the sale of goods must usually be proved by evidence of facts which are extrinsic to the contract. That is necessarily so since the parties usually omit from the contract that information which is the very foundation of an implied warranty of quality, such as—that the goods have been bought by sample,[1] or by description from a dealer in goods of such description;[2] or that the buyer has made known a particular purpose to the seller, and has relied on the seller's skill and judgment in selecting goods fit for such purpose.[3] When the sale or contract of sale is oral, any evidence necessary to show the presence of those elements is ordinarily admissible. At least it is never excluded because it is parol evidence.[4] Such situations may be dismissed without further comment, since they do not involve the application of the parol evidence rule.

Assume, therefore, a contract of sale in writing to which a buyer is seeking to append an implied warranty of quality by means of parol evidence. If the warranty is one of merchantability, the buyer must show: (a) that the goods were bought by description, (b) from a seller dealing in goods of that description, (c) and that the judgment of the seller was actually relied upon in respect to that quality of the goods. If a warranty of fitness for

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[1]Sales Act, sec. 16.

[2]Sales Act, sec. 15 (2).

[3]Sales Act, sec. 15 (1).

[4]The parol evidence rule has no application to oral contracts.

a particular purpose: (a) that he either expressly or impliedly indicated the particular purpose to the seller, (b) and that the judgment of the seller was actually relied upon in respect to *that* quality of the goods.[5] Also assume that the buyer can and does offer parol evidence of such facts for the purpose of establishing the implied warranty against the seller, and that the establishment of the warranty is material to the buyer's case—what should be the ruling of the court upon an objection by the seller that such evidence is rendered ineffective by the parol evidence rule and is, therefore, irrelevant and immaterial?

In a few cases the presence of those facts which are essential to the implication of the particular warranty may appear from some construction of the written contract, but in most instances they can only be proved by extrinsic evidence of conversations or communications had at or prior to the execution of the writing. Should such evidence be excluded, under the parol evidence rule, as contradicting, adding to, or inconsistent with the terms of the written contract?

A review of the authorities has disclosed but fragmentary discussions of the problem in the decided cases, and not all of them are entirely in agreement upon the question. Yet it is a matter of considerable importance to many lawyers and this fact, in the writer's belief, justifies an attempt to extract what seem to be the correct principles upon which to decide the question.

It seems self-evident that any defensible answer to the inquiry must be predicated upon some combination of the following factors: the contents of the written contract, one's conception of the proper nature and function of the parol evidence rule, and a similar conception of implied warranties of quality. Taking the first of these as the basis for discussion (for reasons more clearly appearing hereafter) the cases thereunder systematically fall into four groups:

(1) Where the contract contains an express stipulation, in substance negativing the existence of any warranties or obligations not therein provided for.

(2) Where the contract contains an express warranty or warranties, one or more of which is shown to be inconsistent with the warranty sought to be imposed by implication.

(3) Where the contract contains an express warranty or warranties, none of which are regarded as inconsistent with the proposed implied warranty.

[5]Sales Act, sec. 15.

(4) Where the contract contains neither express warranties nor stipulations in regard to them.

Attention is called to the fact that in the cases falling in groups (1) and (2) the particular warranty has been dealt with contractually by the parties, thereby bringing it directly within the express provisions of the agreement, whereas, in the cases of groups (3) and (4), the parties have not dealt with the particular warranty contractually in such a way as to bring it directly within the express provisions of the agreement. For convenience, the material of this paper relating to implied warranties will correspondingly be divided in two parts.

1. Where the Parties Have Dealt With the Particular Warranty Contractually

Concerning the cases of group (2), where an inconsistent express warranty appears in the contract, not much need be said. Unless one is prepared to maintain that the particular obligation of implied warranty should be imposed by the law irrespective of the wishes of both parties to the transaction, it is clear that no warranty can be rationally implied for any purpose if an inconsistent express warranty is found in the contract. There the parties have mutually recognized the desirability of a warranty upon a particular characteristic of the subject matter of the sale, and have elected to put the warranty in written form, incorporating it in the written contract, definitely expressing the nature and extent of the seller's obligation with reference to that characteristic of the subject matter. Under such circumstances no room is left for the implication of a warranty. The essential basis for implied warranties of quality is the fair inference that the buyer relied upon the seller for certain purposes and in respect to certain characteristics or qualities of the goods.[6] Therefore, where the warranty is provided for by an express agreement which is made a part of the contract of sale, the inference of reliance by the buyer on the seller must necessarily be confined to the terms of the express agreement, and by means of the parol evidence rule, all oral evidence tending adversely to affect its legal operation (other than evidence of fraud, mistake, etc.) should be excluded.[7]

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[6] 11 Minnesota Law Review 485, 487.

[7] Alderson v. General Electric Co., (C.C.A. 4th Cir. 1913) 210 Fed. 775; Wasatch Orchard Co. v. Morgan Canning Co., (1907) 32 Utah 229, 89 Pac. 1009; Ward v. Liddell, (1921) 182 N. C. 223, 108 S. E. 634; J. I. Case Plow Works v. Niles & S. Co., (1895) 90 Wis. 590, 63 N. W. 1013; Earle v. Boyer, (Ark. 1927) 289 S. W.

If the foregoing remarks present an acceptable ratio decidendi for the cases of group (2), it would seem to follow that the same reasoning is applicable to cases of group (1) with correspondingly similar results.[8] The principle that a warranty of quality can only be implied, rationally, where the written agreement of the parties (representing their wishes and desires) expresses nothing inconsistent with the inference of reliance by the buyer upon the skill and judgment of the seller (which inference would arise from the extrinsic facts, if considered alone) as to some characteristic of the goods in question, is as applicable in cases of group (1) as in cases of group (2).

A number of authorities might be cited approving that view; however, one or two will be sufficient.

A recent case from the Georgia court of appeals, *Hoffman v. Franklin Motor Car Co.*,[9] involved the sale of an automobile, it appearing that the written contract of the parties contained a stipulation that "the vendor does not warrant said property and makes no representation concerning same except that the title to same is in the vendor, and free from incumbrances." Said the court:

"Where, without fraud, accident, or mistake touching its execution, the parties to a sale of personalty enter into a written contract with respect thereto in which is contained a stipulation that 'the vendor does not warrant said property and makes no representation concerning same except that the title to same is in the vendor, and free from incumbrances', such stipulation amounts to an

490; E. F. Elmberg Co. v. Dunlap Hardware Co., (Tex. App. 1920) 267 S. W. 258.

Since the parol evidence rule operates only to protect the contratual obligations of contracting parties, it would here be inapplicable if an express warranty is not regarded as a contractual obligation. While there is some conflict of authority, two things seem to be true of express warranties: (1) it is not essential that they should be part of the contractual obligation of the parties. They may consist of mere representations as distinguished from promises. Sales Act, sec. 12; Williston, Sales, sec. 194. (2) In the great majority of cases, they are part of the contractual obligation of the parties, and the parol evidence rule applies to protect them. 27 Harv. L. Rev. 1.

[8]Again in this class of cases a distinction must be made between collateral stipulations excluding warranties which are not part of the contractual obligation, and terms of the contract, excluding warranties which constitute an agreement. The parol evidence rule has application only in the latter case, and it is purely a question of construction of the contract, ordinarily, which view will be taken of such terms. Since such limitations of liability are generally proposed by the seller and accepted or rejected by the buyer, it seems, upon principle, that they should usually be regarded as contractual obligations. It also seems probable that the parties to the contract ordinarily so regard them.

[9](1924) 32 Ga. App. 229, 122 S. E 896.

express refusal by the vendor to warrant the property except as to title, and the vendee cannot contradict the terms thereof by pleading a breach of the other ordinary implied warranties of the law or of express warranties and representations made by the vendor prior to or at the time of the sale, as to the condition of the property sold. *Harrel v. Holman,* 21 Ga. App. 159, 93 S. E. 1021; *Payne v. Chal-Max Motor Co.,* 25 Ga. App. 677, 104 S. E. 453; *Branch v. James,* 4 Ga. App. 90, 60 S. E. 1027; *Connell v. Newkirk-George Motor Co.,* 28 Ga. App. 382, 111 S. E. 749; *Washington & Lincolnton R. Co. v. Southern Iron & Equipment Co.,* 28 Ga. App. 684, 112 S. E. 905."

This case did not mention the Uniform Sales Act, it not having been accepted in Georgia.

In *Minneapolis Threshing Machine Co. v. Hocking,*[10] it was objected that the exclusion of implied warranties by stipulation in the written contract of sale was inconsistent with the provisions of the Uniform Sales Act dealing with implied warranties. In regard to the objection, the court said:

"The defendant further contends that the machinery purchased by him was purchased for a particular purpose known to the plaintiff, and therefore under the provisions of subdivision 1, sec. 15, of the Sales Act (chapter 202, S. L. 1917), there was an implied warranty that the machinery should be reasonably fit for that purpose; that this implied warranty was outside of and beyond the contract entered into by and between the parties; that therefore the limitations of the contract as to notice and as to remedies in case of breach were inapplicable in case of a breach of such implied warranty; that here the evidence incontrovertibly establishes such a breach, and so it follows that in considering such breach the damages flowing from it and to be recovered therefor, and the notice with respect thereto to be given, no regard need be paid to the terms of the written contract. Defendant cites, as sustaining this contention: *Minneapolis Steel & Machinery Co. v. Casey Land Agency et al.* (N.D.) 201 N. W. 172; *International Harvester Co. of America v. Thomas,* 43 N. D. 199, 176 N. W. 523; *Advance-Rumely Thresher Co. v. Geyer,* 40 N. D. 18, 168 N. W. 731; *Kopan v. Minneapolis Threshing Machine Co.,* 39 N. D. 27, 166 N. W. 826; *Comptograph Co. v. Citizens' Bank,* 32 N. D. 59, 155 N. W. 680. We think, however, that these authorities do not sustain the position thus taken by the defendant. The contract, in the instant case, expressly excludes and negatives all statutory or implied warranties excepting as to title, and further expressly provides that in no event shall the company (the plaintiff) be subject to any other or further liability, except such as may be expressly given and provided for in the contract itself, and only

[10](1926) 54 N. D. 559, 209 N. W. 996.

on the conditions stipulated in the contract. The cases cited are all cases in which the warranties in question were not negatived and excluded, and hold that, since under the circumstances variously disclosed such implied warranties were not negatived, they were available, and any restrictions imposed in the contracts, either as to the requirement regarding notice or as to the remedies applicable, or otherwise, apply only to the express warranties of the contract. In the instant case, however, as we have indicated, all statutory or implied warranties, except as to title, are negatived and excluded by the terms of the contract itself. But, insists the defendant, in this respect the contract is in contravention of the Sales Act (chapter 202 S. L. 1917), and to that extent it must be held to be inoperative. With this contention we cannot agree. The Uniform Sales Act is not intended to be a restriction upon the rights of parties to contract. It is simply a statement of the rules applicable in the construction of such contracts as may be made. It does not contract for the parties; it measures their rights under the contracts they themselves make. It does not purport to create a mold in which all such contracts must be cast. There is nothing contained within its provisions which can be said to prohibit the inclusion of any lawful term that the parties may desire in a contract for sale, nor is there anything therein contained which can be said to avoid any lawful term or provision that may be thus mutually agreed upon. See section 71 of the Sales Act; *Renne v. Volk* (Wis.) 205 N. W. 385; *Hunt v. Hurd,* 205 Mich. 142, 171 N. W. 373; *Cadillac Machine Co. v. Mitchell-Diggins Iron Co.,* 205 Mich. 107, 171 N. W. 479. See, also, *Minneapolis Steel & Machinery Co. v. Casey Land Agency,* supra. We therefore hold that, the parties to the contract here in question having by express terms negatived and excluded all implied warranties, the defendant cannot claim the benefit of any such as might have been available had the contract not done so."[11]

There is, however, apparently some authority to the contrary. For example, in *Morris Run Coal Co., Inc., v. Carthage Sulphite Pulp & Paper Co., Inc.,*[12] a written contract was entered into whereby the plaintiff agreed to deliver certain coal screenings to the defendant "as is." Some correspondence was previously had with respect to the goods in which the plaintiff represented them as of "good quality," but such terms were never incorporated in the contract of sale. The goods proved to be wholly unfit for defendant's particular use, and in an action by the plaintiff for the contract price, defendant set up breach of warranty of fitness for the particular purpose as a defense. The court held that:

"Even though the screenings were bought 'as is,' still there was a representation that they were 'good' screenings. They were

[11]See also: J. B. Colt Co. v. Kocher, (Kan. 1927) 255 Pac. 48.
[12](1924) 210 App. Div. 678, 206 N. Y. S. 676.

known to be purchased for use in the defendants' furnaces, and the representation that they were 'good,' together with their sale for a known use, was a warranty that they were usable for the purposes for which they were sold. Personal Property Law, 95, 96 (as added by Laws 1911, c. 571); *Hawkins v. Pemberton,* 51 N. Y. 198, 10 Am. Rep. 595; *Prentice v. Fargo,* 53 App. Div. 608, 65 N. Y. S. 1114. The jury should have been allowed to pass on the question of the alleged breach of warranty."

The difficulty in this case lies in the submission of the question of warranty to the jury, in view of the fact that the written contract provided for delivery of the goods "as is." By virtue of the parol evidence rule, all evidence of prior representations that the goods were of "good quality" should be excluded as ineffective to vary the express refusal in the final agreement to make any warranties with respect to them. For similar reasons, evidence offered for the purpose of establishing the existence of implied warranties of quality should have been excluded, since the provisions of the contract above referred to effectually foreclose the possibility of any inference that the buyer placed a justifiable reliance upon the judgment or skill of the seller as to quality.

Then it has been suggested that irrespective of the stipulations in the written contract, the warranty of merchantability ought always be implied because, it is said, there is a "presumption that men who receive something of value in commercial transactions intend to give in return, something of value."[13] Recognition of that principle involves the recognition of the fact of sale (in which one party has received something of value) as the basis of implied warranties of merchantability. It would also involve the recognition of an implied warranty of merchantability in connection with practically *every* sale. Fortunately, such is not the law.

As has been heretofore indicated, the sound legal basis for the implication of any warranty of quality rests in the justifiable reliance by the buyer upon the seller, and where the parties have by written stipulation exhibited a clear intention to preclude such reliance, it is difficult to conceive of any other basis upon which the warranty may be predicated. The presumption above suggested is, no doubt, ordinarily justifiable, but it certainly is not a conclusive presumption. As Professor Williston has aptly said:

"It must be possible, however, to sell unmerchantable goods even if the seller is a dealer or manufacturer, and even though the buyer either does not inspect the goods or his inspection in the nature of the case can reveal nothing because the defects are latent.

[13]Swift & Co. v. Etheridge, (1925) 190 N. C. 162, 129 S. E. 453.

The ordinary way to do this is for the seller expressly to state that the buyer must take the goods as they are."[14]

2. WHERE THE PARTIES HAVE NOT DEALT WITH THE PARTICULAR WARRANTY CONTRACTUALLY

At common law it was frequently stated as a general rule that an express warranty in a contract for the sale of an article excluded the idea of an implied warranty. To quote from the opinions:

"The contract sued upon contains the following express warranty: 'The said party of the first part warrants said goods, stock and fixtures free of any debt, mortgage, incumbrance, or adverse claim of any kind.' . . . The contract containing an express warranty excludes the idea of any other warranty than that so expressed."[15]

"Upon the subject of implied warranty we are of opinion that the case is ruled by *Monroe v. Hickox, Mull & Hill Co.,* 144 Mich. 30, 107 N. W. 719. We think defendants counsel are correct in the claim that there can be no implied warranty when one is expressed; that the undertaking of the defendant to replace promptly all defective parts constituted a warranty within the doctrine of the case above cited."[16]

"We will say, in passing, that the pleadings and evidence on the part of the defendant in the case were directed to an express warranty, and the case was tried upon the theory of an express warranty. We think that under these circumstances an implied warranty was excluded. This court has frequently held that an express warranty excludes an implied warranty."[17]

"The only warranty in the sale of this machinery was the express warranty found in the contract. There can be no implied warranty, if there is an express one."[18]

That rule, applied as broadly as stated, would include *all* cases of class (3) and exclude *all* implied warranties in those cases. Fortunately, in none of the cases was the rule so broadly applied as stated. An examination of them will reveal that in each there was either an *inconsistent* express warranty, or, a clause in the contract indicating an unwillingness of the seller to be bound by any obligations not expressed in the contract.[19] Hence, it cannot be said that there is any direct authority supporting the rule, but

[14]1 Williston, Sales, 2nd ed., 471.

[15]Thomas v. Thomas, (1906) 146 Ala. 533, 41 So. 141.

[16]Hall v. Duplex-Power Car Co., (1912) 168 Mich. 643, 135 N. W. 118.

[17]American Varnish Co. v. Globe Furniture Co., (1917) 199 Mich. 316, 165 N. W. 1050.

[18]Gaar, Scott & Co. v. Hodges, (Ky. 1906) 90 S. W. 580.

[19]In Thomas v. Thomas, (1906) 146 Ala. 533, 41 So. 141, there was an inconsistent express warranty; likewise in Hall v. Duplex-Power Car Co., (1912) 168 Mich. 643, 135 N. W. 118; in American Varnish Co. v. Globe Furniture Co., (1917) 199 Mich. 316, 165 N. W. 1050,

rather that it must be relegated to that class of vaguely defined and loosely used ideas and principles which we continually encounter in the discussion of legal problems, and which are the genesis of many legal formulations leading to doubtful conclusions.

The inference of reliance by the buyer on the skill and judgment of the seller, which is the basis of any implied warranty of quality, arises from the nature of the contract, relative position of the parties with reference to the goods, method of conducting the transaction, and the kind of goods to be sold. By what rule of reason, then, would the presence in the contract of a written warranty of title rebut and exclude the inference of reliance with respect to quality and the resultant implied warranty of quality? Is there anything at all inconsistent in the implication of a warranty of quality in such cases? A substantial number of courts, directly confronted with the question, rightly decided there was not,[20] and so with the Sales Act, which provides in section 15 (6) that "an express warranty or condition does not negative a warranty or condition implied under this act unless inconsistent therewith."

As a rule of reason the parol evidence rule would not, therefore, render ineffective parol evidence to establish the basis for an

there was a stipulation in the written contract which the court construed as an agreement excluding warranties; there was an inconsistent express warranty in Gaar, Scott & Co. v. Hodges, (Ky. 1906) 90 S. W. 580. Whether or not an express warranty is inconsistent with a proposed implied warranty is, of course, dependent upon the particular facts of each case. A similar problem of construction arises when it is claimed that a stipulation in the contract excludes a proposed implied warranty. It is probably impossible to reconcile all of the decisions on these questions.

[20]Illinois Zinc Co. v. Semple, (Kan. 1927) 255 Pac. 78; Loxterkamp v. Lininger Implement Co., (1910) 147 Ia. 29, 125 N. W. 830; Boulware v. Victor Automobile Mfg. Co., (1911) 152 Mo. App. 567, 134 S. W. 7; Crankshaw v. Schweizer Mfg. Co., (1907) 1 Ga. App. 363, 58 S. E. 222 (the court said: "Not infrequently a mere shade of difference determines whether the issue calls for the application of the doctrine of implied warranty or excludes it. In many cases, in our experience, the line of demarcation was very dim, and we think there can be cases in which, as to different portions of even the same transaction, the law of express warranty will control so far as there has been express warranty without excluding the application of an implied warranty to other portions of the contract. We are aware that this statement seems contradictory, and is not in accord with the general view, for in Johnson v. Latimer, (1883) 71 Ga. 470, it was held that 'it is only in the absence of an express warranty that resort can be had to implied warranty, and where there was an express warranty, the court could refuse to charge on the subject of implied warranty' . . . This is an express holding that there can be no implied warranty, if there is an express warranty. We yield to it as binding authority."); J. I. Case Plow Works v. Niles & S. Co., (1895) 90 Wis. 590 63 N. W. 1013; International Harvester Co. v. Smith, (1906) 105 Va. 683, 54 S. E. 859.

implied warranty of quality in cases of this class, even when the express warranty contained in the contract is admittedly a contractual obligation.

But it has been suggested that where the parties have reduced their contract of sale to writing, the parol evidence rule makes ineffective any parol evidence for the purpose of establishing warranties, express or implied, not evidenced by the writing, and irrespective of whether or not the writing contains an express warranty.[21]

It is no part of this article to attempt a critical analysis of the parol evidence rule as a rule. The rule is taken "as is" and the problem to be considered here is solely one of application.[22] It can no longer be doubted that the rule is one of substantive law making ineffective all parol evidence offered for the purpose of contradicting, altering, or adding to the contractual obligations of the parties insofar as they are expressed in the written contract—thereby defining the legal limits of the enforceable contractual obligations in all cases involving written contracts.[23] The basis of the rule is the practical necessity for certainty with respect to written contractual obligations, without which written contracts would be reduced to the vicissitudes of oral agreements. But implied warranties fall neither within the statement nor the reason of the rule. They are not contractual obligations, but obligations implied by law, resting not upon agreements or promissorial utterances of the parties, but upon equitable principles of fairness between the parties, designed for the protection of the buyer who has placed a justifiable reliance in the judgment and skill of the seller. The use of parol evidence for the purpose of establishing such warranties is, therefore, no infringement upon the contractual obligations of the written contract of sale. The argument of the court in *Roeblings Sons & Co. v. Southern Power Co.*[24] gives full support to that position. The court said:

"In some of the decisions, both in this and in other states, broad language has sometimes been used to the effect that an ex-

[21]Kullman, Salz & Co. v. Sugar Apparatus Mfg. Co., (1908) 153 Cal. 725, 96 Pac. 369.

[22]This is a problem not dealt with in the Sales Act. Therefore it must be solved on common law principles.

[23]There are a number of well-settled "exceptions" (or limitations) to the parol evidence rule, which will qualify this general statement. However, we are not here interested in such limitations, since what is wanted is a solution based upon a situation to which none of the limitations extend.

[24](1914) 142 Ga. 464, 83 S. E. 138.

press warranty excludes an implied warranty; but such expressions are to be considered in connection with the question involved in the case in which they were used. It would seem to be wholly illogical and unreasonable to say, if in the sale of goods the title was expressly warranted, this excluded all implied warranty of merchantability or of the absence of latent defects, or, on the other hand, that if there was an express warranty that goods were of a certain character or quality, it excluded an implied warranty that the seller had a valid title to them. There is no conflict between the two, and one does not overlap or exclude the other. If a merchant ordered coffee warranted to be equal to a given sample, he certainly would not mean that he waived any question as to whether the seller owned the coffee. Where the express contract covers or supersedes the implied warranty of the law, it excludes the latter; but where the two are not in any conflict, and the parties have not undertaken by the express warranty to cover the whole subject-matter of the sale and of the warranties which the law itself implies, they are not excluded, except so far as the express warranty deals with the subject-matter of the implied warranty.

"There is undoubtedly much confusion on this subject. The theory that, where the parties have reduced their contract to writing, they will be presumed to have covered all matters touching the sale, is only partially true. If a merchant should order goods of a certain character, without specifying time for delivery, and the order should be accepted, this would be an express contract, and if in writing, an express written contract; and yet who doubts that the law would imply that the delivery should be made within a reasonable time? Nor is it likely that any one would contend that, because the contract was reduced to writing, the law would imply nothing further. If a contractor should agree in writing to complete a house, specifying the size, number of rooms, etc., the law would unquestionably imply that the work should be done in a workmanlike manner, and if he agreed to furnish materials that they should be proper and suitable for the purpose. Many instances might be cited in which parties enter into express contracts, and yet the law implies certain incidents or terms in regard to the carrying out of the contract. So that the maxim, 'expressum facit cessare tacitum,' has its limitations. Suppose that a purchaser should order from a manufacturer a table warranted to be of certain dimensions and with certain ornamentations; can it be contended that this would exclude an implied warranty that the table should be properly put together, and that such a contract would be fulfilled by supplying a table with the dimensions and ornamentations specified, although it might be constructed of such inferior material as to fall down as soon as the purchaser should place a dictionary upon it and turn to the word 'warranty'? Or if the paint used was so improper in character as to soil or corrode everything put upon it, or if the legs were fastened on with carpet tacks? Or, if a piano should be warranted to be a genuine Knabe, would there be no implied warranty that the manufacturer should sell a piano

with proper chords and keys? Or if a carpenter should order from a manufacturer an auger, specifying a certain length and diameter and with a certain character of handle, would there not be an implied contract or warranty that it should be an auger which would bore? Could it be made of lead or pot metal, on the theory that the specification of the size and handle excluded any other contract or warranty implied by law? We are not now discussing a possible difference between implied terms in a contract, and whether general descriptive terms are more properly to be called warranties or agreements; but we are endeavoring to show that an arbitrary and unlimited statement that, because a contact has been made in writing, nothing else can be implied in regard to the subject-matter, can be carried to such an extreme as to result in a reductio ad absurdum.

"We are not contending that terms can be added to a written contract by parol testimony, but that where the parties make a written contract the law may make certain implications in regard to the subject-matter, and that one of the things which it implies in a sale of personalty is a warranty of certain things, unless that warranty is excluded by reason of the terms of the contract itself or by reason of the nature of the transaction. This is an implication which the law itself imposes, except under the circumstances mentioned; and it is an entirely different matter from endeavoring to superadd to a written contract parol agreements."

What has been said concerning the application of the parol evidence rule to the cases of class (3), is equally applicable to and decisive of the cases of class (4).[25]

II.

Whether or not the parol evidence rule makes an oral warranty of quality ineffective in connection with a written contract of sale, is a matter upon which there is apparently an increasing conflict of opinion. In a recent treatise upon the law of evidence it is said that the rule as usually stated is to the effect that parol testimony is legally ineffective to contradict, vary, add to or subtract from the terms of a valid written instrument.[26] That a literal application of the rule, thus stated, to contracts, would necessarily render ineffective anything in the nature of an oral warranty is self-evident. But, with reference to contracts, the rule has been

[25]Miller v. Winters, (1913) 144 N. Y. S. 351; Sampson v. Frank F. Pels Co., (1922) 199 App. Div. 854, 192 N. Y. S. 538; Elgin Jewelry Co. v. Estes, (1905) 122 Ga. 807, 50 S. E. 939.

[26]Jones, Commentaries on Evidence, 2nd ed., 1483. And see: Buser v. Everly, (1924) 115 Kan. 674, 224 Pac. 66; Brick v. Brick, (1878) 98 U. S. 514, 25 L.Ed. 256; Childs v. South Jersey Amusement Co., (1923) 95 N. J. Eq. 207, 122 Atl. 803; Thompson v. Libby, (1885) 34 Minn. 374, 26 N. W. 1.

so narrowed in application, that, as heretofore indicated, it operates only to protect the contractual obligations of the parties as they appear in the writing, or are implied in fact from it.[27] The extent of its effect, in this connection, is to prevent the alteration or contradiction of the written agreements by *any* extrinsic evidence, and an addition to the obligations of the contract by any evidence of an extrinsic agreement.

A general survey of the authorities leaves no room to doubt the accuracy of Professor Williston's observation that "there is no more frequent application of the parol evidence rule than in cases where it is sought to attach a parol warranty to a written sale or contract to sell goods."[28] It seems evident that such holdings are both desirable, and highly proper, under the application of the rule mentioned above, when the written contract contains an inconsistent express warranty, or a stipulation excluding such a warranty, for under those circumstances all courts regard the warranty in the written contract, and the stipulation against warranties as contractual obligations which the extrinsic evidence is intended to vary or contradict.

But supposing a contract of sale in writing to contain neither a warranty nor stipulation excluding warranties—can the parol evidence rule logically be invoked in all cases for the purpose of making extrinsic express warranties ineffective?

If the extrinsic warranty was omitted from the written contract in question because of fraud, duress, or mistake, the authorities are unanimous in denying the application of the rule,[29] and a similar pronouncement has been made where the written contract is incomplete,[30] although there is some disagreement as to the proper test of completeness,[31] and the soundness of such holdings

[27]Wigmore, Evidence, 2nd ed., 2433. And see: Strakosch v. Connecticut Trust and Safe Deposit Co., (1921) 96 Conn. 471, 114 Atl. 660; Johnson v. Burnham, (1921) 120 Me. 491, 115 Atl. 261; Means v. Smith, (1908) 199 Mass. 319, 85 N. E. 165.

[28]Sales, 2nd ed., sec. 215, citing, many cases accord. See also: J. B. Colt Co. v. Farmer, (Mo. 1926) 286 S. W. 399; Stoehner & Pratt Dodgem Corp. v. Greenburg, (1925) 250 Mass. 553, 146 N. E. 34; Sorensen v. Webb, (1923) 37 Idaho 13, 214 Pac. 749; Monahan v. Watson, (1923) 61 Cal. App. 417, 214 Pac. 1001.

[29]Wright v. General Carbonic Co., (1921) 271 Pa. 332, 114 Atl. 517.

[30]Ades v. Wash, (1923) 199 Ky. 687, 251 S. W. 970; Kilroy v. Schimmel, (1922) 243 Mass. 262, 137 N. E. 366; Flannigan v. Byers, (1923) 225 Mich. 66, 195 N. W. 820; Wheaton Roller Mill Co. v. Noye Mfg. Co., (1896) 66 Minn. 156, 68 N. W. 854; Eilers Music House v. Oriental Co., (1912) 69 Wash. 618, 125 Pac. 1023.

[31]Thompson v. Libby, (1885) 34 Minn. 374, 26 N. W. 1.

are not to be questioned. In the latter category should be put all those cases in which the courts have given effect to the extrinsic warranty because it constituted a separate agreement resting upon an independent consideration, since it appears that the parties, in all such cases, have regarded it as a part of the *entire* contract, although not incorporated in the written contract in question.[32] Aside from those limitations, however, the rule has generally been given unrestricted application to exclude extrinsic warranties where the written contract expressed nothing as to warranties. The basis for this application of the rule rests in the fact that the courts, for the most part, treat all express warranties as contractual obligations, thus necessitating their exclusion as adding to the obligations of the written contract by evidence of an extrinsic agreement. And if the extrinsic warranty is, as a matter of fact, contractual in each case, the application would seem to be entirely proper. But express warranties are not necessarily contractual in this country, although they are given that attribute by the English law, under all circumstances, and for some time the same principle was adhered to by some of our own courts.[33] Therefore, if it be supposed that the express warranty, which a buyer of goods is seeking to establish against the seller, is assertive rather than contractual, it becomes exceedingly difficult to find a logical basis upon which the parol evidence rule may be applied to exclude it.

The suggestion that every assertive warranty contains an implied promissorial element and therefore logically justifies exclusion by the parol evidence rule leads into a blind alley, for the reason that in a large number of cases the implication could only be one of law resulting in a quasi-contractual obligation, all of which are unquestionably beyond the operation of the rule. In support of this conclusion, reference may be had to the appropriate provisions of the American and English acts regulating the sales of goods. The view is taken in England that an express warranty is always contractual in fact, and the contractual characteristics are indicted as existing in an express agreement or one implied in fact. In section 61 (1) of the Sales of Goods Act, an express warranty is defined as follows:

" 'Warranty' as regards England and Ireland 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, the

[32]Offenberg v. Arrow Distilleries Co., (1921) 222 Ill. App. 512.

[33]Heilbut v. Buckelton, [1913] A. C. 30; McFarland v. Newman, (1839) 9 Watts (Pa.) 55, 34 Am. Dec. 497: Holmes v. Tyson, (1892) 147 Pa. 305, 23 Atl. 564.

breach of which gives rise to a claim for damages, but not a right to reject the goods and treat the contract as repudiated."

But one interpretation of this provision is possible—if there is no express agreement with respect to goods sold, and if none can be implied in fact, there can be no warranty.[34] Thus assertive warranties are automatically precluded, leaving only promissorial warranties, to which, as above stated, the parol evidence rule undoubtedly applies.

It seems reasonable to suppose that the Sales Act, which was patterned after the English Act, would have adopted the language of the original statute with respect to warranties, if a similar doctrine had been intended. It has not done so. Section 12 of the Sales Act provides:

"(Definition of Express Warranty.) Any affirmation of fact or any promise by the seller relating to the goods is an express warranty 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 . . . ."

What is the reason for this clear cut distinction between an affirmation of fact and a promise relating to the goods? Why was the very lucid language of the English Act abandoned? Undoubtedly for the purpose of expanding the English definition of warranty to include assertions of fact relating to the subject matter of the sale, which are neither expressly nor impliedly promissorial in fact.[35] And, though the courts have been slow to concede that purpose, there is an increasing tendency to recognize and apply it.[36] It is submitted that such recognition logically requires a modification of the application of the parol evidence rule so that assertive parol warranties will be excepted from its operation.

Conclusion

Courts and writers have frequently said that the parol evidence rule is a rule of policy requiring the exclusion of parol evidence in order to preserve the certainty of written instruments. So broad a principle is susceptible of two modes of application. It may be liberally applied as a rule of policy, regardless of other

[34]Heilbut v. Buckelton, [1913] A. C. 30.

[35]See 27 Harv. L. Rev. 1. Under the Sales Act the nature of an express warranty is always a subject of inquiry; under the Sales of Goods Act it is not, since there can be but one kind.

[36]Ireland v. Louis K. Liggett Co., (1922) 243 Mass. 243, 137 N. E. 371; Laline & Partridge, Inc., v. Hobbs, (Mass. 1926) 151 N. E. 59; Missouri Paint & Varnish Co. v. Merck, (1926) 170 Ark. 1037, 282 S. W. 370; Ives v. Anderson Engine & Foundry Co., (Ark. 1927) 292 S. W. 111.

rational considerations, or it may be vigorously applied chiefly as a rule of reason, diverging only when, and to the extent that practical considerations clearly demand it. From the many so-called "exceptions" to the parol evidence rule it seems apparent that the courts have rather unanimously chosen the latter alternative. Therefore it may be said that the rule should not be applied to exclude evidence of assertive parol warranties, or parol evidence of implied warranties, solely on the basis of policy unless there are practical considerations clearly demanding it. Are there such considerations? What are they?

There are few practical considerations (exclusive of logical considerations) requiring the rejection of *any* parol evidence in connection with sales contracts—on the contrary much parol evidence is used in that connection, and for a great variety of purposes. There are no practical considerations requiring that a seller of goods should be protected from liability for a parol warranty at the expense of the buyer. Under modern selling practices the seller more frequently has the potential advantage over the buyer of having dictated the contract, and of being better informed as to the legal consequences of the transaction. In fact, he is usually in a position to dominate the sale by reason of his experience, method of approach and expert knowledge. If policy is to protect anyone, the buyer would seem to be the logical recipient of its benefits.

In reviewing what has been said it must be pointed out that the purpose of suggesting any changes in the application of the parol evidence rule is to harmonize the use of the rule and the expressions of intention with respect to the establishment of warranties as indicated by the Sales Act. A logical construction of the act and a logical application of the rule (no other mode of application being necessary—or even desirable) will, it is believed, acknowledge the legal effectiveness of:

Implied warranties,

(1) when the written contract of sale contains no agreement excluding such warranties,

(2) when it contains no inconsistent express warranty.

Parol express warranties,

(1) when such warranties were omitted from the written contract by reason of fraud, duress, or mistake, etc.,

(2) when the written contract is incomplete,

(3) when, the written contract containing no inconsistent warranty and no agreement excluding warranties, the parol warranty is assertive only.