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THE PAROL EVIDENCE RULE AND WARRANTIES OF GOODS SOLD

By John S. Strahorn, Jr.*

When a sale or a contract to sell is created by or integrated in an operative writing, to what extent may extrinsic evidence be offered either to prove warranties of the goods sold which are not raised by the writing itself or to negative those warranties which may thus be created? This is essentially the problem of the relation between the parol evidence rule and warranties of goods sold.

The problem lies in one of the particularly difficult parts of the parol evidence rule field. For while it is more clear that the parol evidence rule forbids an express written term of a transaction or one implied from the writing to be altered or stricken out by extrinsic evidence, it is not so obvious that the rule as well forbids adding a term to a written contract which is already so complete as to be capable of being enforced without it. On the basis of this latter general proposition one would expect it to be the rule that is not permitted to show parol warranties in the face of a written sale. Two matters, however, raise a ques-

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2. Stephen, Digest of Evidence, article 90, concludes his statement of the rule as follows: "... Nor may the contents of such document be contradicted, altered, added to or varied by oral evidence." The present writer prefers the following as a statement of the rule, in which the concept of the incapability of adding to a written transaction by parol is implicit: "No evidence can be considered for the purpose of varying the legal effect of the written part of a transaction in issue which has achieved and continued valid existence." Strahorn, The Unity of the Parol Evidence Rule, (1929) 14 Minnesota Law Review 20, 46. To add to the written part of a transaction would, in effect, be "varying the legal effect" of it.

3. See 2 Williston, Contracts, secs., 639 and 643.
tion as to how far this generalization should actually be carried. The one is the fact that some warranties are express and some implied. It would seem that the parol evidence rule should not exclude "implied" obligations of this sort. Then, further in this direction, Professor Williston has made a cogent suggestion that as certain types of "express" warranties, i.e., affirmations of fact, are today, under the Uniform Sales Act, other than contractual in nature, they, too, should be allowed to be shown by parol. The Restatement of Contracts in one of its "illustrations" reaches the same conclusion. It is proposed at this time to investigate the involved legal materials and as well the theoretical implications of Professor Williston's suggestion and the Restatement illustrate.

4Williston, Sales, 2nd ed., sec. 215: "Another principle which has not yet been very clearly brought out by the cases should be plain wherever it is recognized that an affirmation or representation may form the basis of liability in warranty even though there is no intent to warrant, and the representations cannot fairly be construed as an offer to contract. The basis of the parol evidence rule is that it must be assumed that when parties contracted in regard to a certain matter and reduced their agreement to writing, the writing expressed their whole agreement in regard to that matter. This reason is obviously inapplicable to a situation where an obligation is imposed by law irrespective of any intention to contract. Such is frequently the case with warranties. Therefore, if a buyer is induced by positive statements of fact to enter into a written contract for the sale of goods, there seems no reason why these statements should not be admitted in evidence. False and fraudulent statements inducing the formation of a written contract may, of course, be proved, and if, apart from the parol evidence rule, a false but honest statement, inducing the buyer to enter into the bargain, renders the seller liable as a warrantor though he does not intend to contract, there seems every reason for admitting evidence of such statements in spite of the fact that the bargain was reduced to writing." See also 2 Williston, Contracts, sec. 643, containing much the same terminology. Professor Vold puts it as follows:

"For accurate analysis of the problem, however, it must be remembered that warranty obligations may be independently imposed by law quite as well as they may be promissory in their nature. Thus it can readily be seen that, where the warranty obligation is derived from express or tacit representations serving as inducements to the bargain, or rests on even broader considerations of policy, the admission of parol evidence in that regard does not serve to vary in any way the written words to which the parties have agreed. . . . Accordingly the parol evidence rule has no proper application to evidence bearing on the presence of warranties independently imposed by law, unless the writing in terms effectually includes a disclaimer of such warranties." Vold, Sales, sec. 151.

5Restatement, Contracts, pp. 339-40, Illustrations of Clause (1) B of sec. 240: "7. 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."
Parol Evidence Rule and Warranties

6 With a view to finding how far case law or theory supports the proposition that assertive and implied warranties are not debarred by the parol evidence rule.

The problem of proving extrinsic conduct capable of creating a warranty is one of showing terms "collateral" to the writing which are based upon the same consideration as the written obligations. 7 In analyzing the separate type situations which raise this problem in warranty law it is proposed to use a modified form of the phraseology adopted by the Restatement of Contracts for handling the general problem of the operative effect of additional oral agreements based upon the same consideration as the written part of the transaction. A warranty, which from one angle is a duty upon the seller, is thus based upon the same consideration as supports the seller's promise to sell or act of selling.

The Restatement of Contracts permits to be shown, despite an operative writing, such an extrinsic "agreement" 8 based upon the same consideration as "might naturally be made as a separate agreement by parties situated as were the parties to the written contract." 9 This can be stated also in a converse manner to the effect that the parol evidence rule forbids adding to a written transaction such extrinsic operative facts as would naturally be included in such a writing by parties situated as were the parties.

6 Although the suggestion that assertive warranties should be showable by parol has been made by Professor Williston, Professor Vold and in the illustration in the Restatement of Contracts, in this paper, for purposes of convenience, it will be treated as Professor Williston's.

7 The present writer has had occasion when treating the parol evidence rule generally to touch on the matter of "collateral" terms in a contract. Strahorn, The Unity of the Parol Evidence Rule, (1929) 14 Minnesota Law Review 20, 39-41.

8 At first it might appear that this clause of the Restatement was not intended to solve problems of the admissibility of assertive warranties because it deals with "agreements," whereas the operative fact in question for the assertive warranty is a representation or affirmation not intended to be contractual but made legally binding by operation of law irrespective of intent. The answer is that the Restatement "illustration," supra n. 5, which reaches the same conclusion as Professor Williston's contention about assertive warranties, is to be found listed under this very provision of the Restatement text.

9 Restatement, Contracts, sec. 240—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.
to the particular writing.\[^{10}\] This altered phraseology does no more violence to the original form than to express the proposition in terms of what is forbidden rather than by what is permitted.\[^{11}\]

The problem thus will be to determine whether those types of oral activity which the courts permit to be shown are those "naturally" not included in the respective writings, and vice versa; and whether Professor Williston's suggestion calls for permitting to be shown something likewise not "naturally" so included. The discussion both of the cases and of Professor Williston's suggestion will be in terms of the "naturalness" of writing the particular oral activity into the specific writing in the case. Before beginning this it is proposed to list the various types of facts creating warranties or similar jural relations.

A warranty is, generically, something\[^{12}\] which gives rise to a right in the buyer of goods to money damages or to a privilege either to refuse to carry out or to rescind the performance of his agreement to buy, which right or privilege is contingent upon the failure of the chattel sold to meet a certain specific standard as to its quality or performance. From the seller's standpoint a breached warranty creates a duty or a "no-right." These two capacities in the buyer, the right to sue and the privilege to rescind, follow by legal effect from the operative facts creating

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\[^{10}\]See McCormick, The Parol Evidence Rule as a Procedural Device for the Control of the Jury, (1932) 41 Yale L. J. 365, 375-376, dealing with this provision of the Restatement generally. See also, Ibid, 383-384, footnote 43, suggesting that the Restatement proviso should be amended to read as follows: "such an agreement as [in the opinion of the trial judge] might naturally be made as a separate agreement."

\[^{11}\]With all deference to the Contracts Restatement the writer feels that this converse way of stating the proposition better fits the exigencies of the warranty problem, for it avoids question begging as to whether the operative facts creating warranties are "agreements" or not. This is avoided by thinking of the "naturalness" of writing in the "operative facts" creative of the warranty in question. It would seem that the parol evidence rule does preclude as not collateral all those operative facts creative of warranties which are naturally written into such writings.

\[^{12}\]The word "something" is used advisedly, in view of the varying types of activity which may create the legal consequences which are here considered under the heading of "warranty." It is not proposed to attempt any more specific description in the way of a single phrase. Some, the express ones, result from promissory expressions or manifestations of intention. Others, the implied ones, result from certain of the details of the transaction created for other purposes and having, except in their peculiar legal results, no definite significance peculiar to warranties alone. See Williston, Sales, 2nd ed., sec. 180, citing with approval the definition of warranty laid down by Lord Abinger in Chanter v. Hopkins, (1838) 4 M. and W. 399, 8 L. J. Ex. 14: "A warranty is an express or implied statement of something, which the party undertakes shall be part of the contract; yet collateral to the express object of it..."
breached warranties. Other special capacities may be expressly provided for in addition, such as the seller's expressed promise to refund the money, to repair the defective chattel, or to supply a new one. These are not warranties in themselves but rather special capacities occasionally found to be incidental to express warranties.

There appear to be seven type situations in which a seller of goods may acquire liability concerning the ownership, quality or performance of goods then sold by him. Not all of these are "warranties," and the peripheral ones will be considered only for purposes of contrast. These seven are prophetic or promissory express warranties, implied warranties of fitness, assertive express warranties, fraudulent representations or deceit, tort liability for negligent construction, implied warranties of merchantability, and implied warranties of title.

A prophetic or promissory express warranty follows when the seller has promised that the chattel sold will perform in the future in a certain manner. The implied warranty of fitness for purpose also involves the future performance of the chattel, but it follows without express promise when the buyer, relying on the seller's judgment, informs him of the purpose for which the chattel is to be used, and the seller, aware of this, selects the chattel.

An assertive express warranty is based on an affirmation of fact by the seller about an existing quality of the chattel. This

13The distinction between prophetic and assertive warranties is indicated both by Professor Williston's suggestion and by the terminology of the Uniform Sales Act, sec. 12: "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. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty."

14Professor Williston defines express and implied warranties as follows: "An express warranty is derived from express language no matter whether in form a promise or representation. An implied warranty arises where the law attaches an obligation which is not expressed in any form." Williston, Sales, 2nd ed., sec. 194. See also Mechem, Implied and Oral Warranties and the Parol Evidence Rule, (1928) 12 Minnesota Law Review 209-24, footnotes 7 and 8.

15Uniform Sales Act, sec. 15: "(1) Where the buyer, expressly, or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for that purpose. . . . (4) In the case of a contract to sell or a sale of a specified article under its patent or trade name, there is no implied warranty as to its fitness for any particular purpose."
affirmation, with certain stated exceptions, regardless of whether the seller knows it to be false, will impose liability therefor if it tends to induce and does induce the sale to the buyer. An historical and procedural distinction must be observed between the assertive express warranty and the tort liability of the seller for fraudulent representations or deceit. If with knowledge of its falsity the seller makes a false material statement about the chattel, he can be made liable therefor by this device. Then, too, a manufacturer of chattels sold can be held for injuries caused by negligence in their manufacture. Thus we see the three legalistic devices for handling the one problem of liability for the quality of the goods at the time of the sale all of which require more than the mere fact of sale to raise liability.

Certain liability concerning the goods follows more or less automatically from the mere fact of sale without proof of extrinsic statements by seller or buyer or of other extrinsic detail. Thus, there are the implied warranty of merchantability imposing on the seller the duty of furnishing goods up to a normal standard, and the implied warranties of title.

The problem now is, in terms of the Restatement terminology as here adapted, to what extent is it "natural" to integrate the various types of activity capable of creating the above mentioned forms of liability into normally complete writings so that such unintegrated oral activity will, by virtue of the parol evidence rule, be no longer of valid effect. In considering in this vein the various types of liability resembling or coming under the concept of warranty it is proposed to adopt as a datum point the nature of a

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16I.e., statements of value and of mere opinion do not without more constitute warranties. Uniform Sales Act, sec. 12.

17See Williston, Sales, 2nd ed., sec. 195.


19Uniform Sales Act, Sec. 15: "... (2) Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality."

20Uniform Sales Act, Sec. 13: "In a contract to sell, or a sale, unless a contrary intention appears, there is—(1) An implied warranty on the part of the seller that in case of a sale he has a right to sell the goods, and that in case of a contract to sell he will have a right to sell the goods at the time when the property is to pass. (2) An implied warranty that the buyer shall have and enjoy quiet possession of the goods as against any lawful claims existing at the time of the sale. (3) An implied warranty that the goods shall be free at the time of the sale from any charge or encumbrance in favor of any third person, not declared or known to the buyer before or at the time when the contract or sale is made..."
simple promise or of an agreement or contract composed of such promises. Essentially a promise is a statement by the promisor making a prophecy of certain future activity on his part which may, in certain events, be legally operative and create a duty to perform or to pay money. Warranties are not of this sort save in the exceptional events of the additional capacities which may be specifically provided to follow their breaches. The real essence of a warranty, viz., the existing quality or future performance warranted, does not involve the future activity of the seller. To be sure the seller's duty to pay money or no-right to enforce the bargain upon breach may involve future activity, but they are rarely "promised" and for that matter are but the normal incidents which follow the breach of any promise.

In the order set out above the operative facts to create the various sorts of warranty and similar liability get further and further away from the nature of a simple promise, viz., a prophecy of the future activity of the speaker. A prophetic or promissory warranty is a statement of the obligor, prophesying to be sure, but prophesying something other than his own conduct. The implied warranty of fitness does not even require the statement of the one to be bound. That of the other will suffice. An assertive warranty is not even a prophecy of any future happening. It is a narration of present fact. So it is with fraudulent representations. Tort liability for negligent construction is not even dependent upon statements, nor are the implied warranties of merchantability and of title.

If Professor Williston's suggestion be supported by cases, it would seem to be because the courts have concluded that prophetic warranties, viz., prophecies of the future performance of the chattel sold, are naturally included in operative writings; while assertive and implied warranties, depending upon statements of present fact, or upon other things than any statement of the obligor are not naturally so included. This hypothesis, as here stated, would seem to be based upon an assumption that it is natural to include in writings all prophecies, whether of future conduct of the promisor or of other happenings, but not to include other types of operative facts capable of creating warranty lia-

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21I.e., no other statement is involved than the "description" of the chattel itself which is a requisite under Uniform Sales Act, sec. 15 (2). But such a statement has other jural purposes than merely to create the implied warranty of merchantability. See also Uniform Sales Act, Section 16, in connection with the analogous implied warranty when the sale is by sample.
bility. Thus the question boils down to the theoretical and authoritative validity of his suggested distinction between the naturalness of writing in all prophecies and of not writing in other operative facts.

The materials will be discussed under three headings: first, a comparative treatment of prophetic warranties and implied ones of fitness, both of which involve the future performance of the chattel; second, implied warranties of merchantability and of title; and, third, a contrast of assertive warranties with the tort types of liability concerned with the present state of the chattels.22

Prophetic Warranties and Implied Warranties of Fitness for Known Purpose

These warranties are similar, because they both involve liability for the future performance of the chattel sold.23 They dif-

22The great mass of the cases involving parol warranties makes it necessary to eliminate certain topics from the present discussion. The present treatment will be limited to the question of whether the integration of the sales transaction, as such, by virtue of the parol evidence rule alone, eliminates parol warranties which, otherwise, would be of operative effect. Thus there will be eliminated the following problems: (1) The extent to which a stated warranty (written or oral), by virtue of its being stated, eliminates implied warranties; (2) The extent to which parol warranties are allowed to be shown on a theory that the writing is "incomplete;" and (3) cases in which parol warranties have been excluded not because of the fact of a writing, but because of the presence of a stipulation therein expressly negating extrinsic warranties. On the other hand, cases permitting extrinsic warranties in the face of such stipulations will be used, on a theory that such cases would as soon, or sooner, permit extrinsic warranties in the face of a writing alone.

23A question may be raised as to the validity of putting into separate groups (1) those warranties which concern the future performance of the chattel and (2) those which concern its present quality. Is it valid to group together the prophetic (promissory) express warranties and the implied one of fitness for purpose as involving the future, and the assertive express warranties, tort liability for deceit, and tort liability for negligent construction, as involving the present? Do not all five of these eventually turn on how the chattel actually does perform after the time of the sale? The answer is that the breach of all of them, as a practical matter, does depend on future performance, but the demarcation contended for arises both from the Sales Act, Section 12, and from the basis of Professor Williston's thesis in contending for a distinction between assertive and prophetic warranties. The ensuing footnote deals with that point more particularly. Analysis discloses that the prophetic warranty and the implied warranty of fitness both involve liability for the future performance of the chattel, as such, while the assertive warranty (assertion of existing fact), tort liability for deceit (false representation of existing fact), and tort liability for negligent construction (which construction is complete before the delivery of the chattel) all jurally are liability for the existing state of affairs. In the former two, subsequent performance is an operative fact to fix liability. In the latter three, subsequent performance is but evidential of the true operative facts, i.e., the quality of the chattel at the time of the sale or contract to sell.
fer in the operative facts which create them and also in that the former type of warranty usually is as to a more specific detail than the latter. For the prophetic express warranty the essential operative fact is a "promise"\textsuperscript{24} or statement by the seller prophesying certain future happenings on the part of the thing sold which will work liability for the failure of these things to happen if it is of a sort which naturally tends to induce the sale and actually does so.\textsuperscript{25} As we shall see, this type of operative fact has been thought by the courts to be "naturally" included in an integration of a sales transaction, and hence not provable by parol. For the implied warranty of fitness for purpose, which also involves the future performance of the chattel, the essential operative fact is a statement by the buyer notifying the seller as to the use to which the buyer intends to put the chattel.\textsuperscript{26} Thus, if the seller be aware of this notification and if the buyer has relied upon his skill and judgment in the matter, there results liability upon the seller for the failure of the chattel efficiently to perform the expected function.

The problem now is the extent to which these operative facts may be shown in the face of an integrated transaction omitting to

While, to be sure, the implied warranty of fitness for known purpose can be said to involve a present quality of being fit, yet inasmuch as the future element is expressed in its definition, which is not so for the three types of liability clearly involving the present, this warranty seems more a matter of the future than of the present. In view of the facts (A) that such a distinction is the basis of the contention of Professor Williston, now under discussion, (B) it has theoretical validity, and (C) is suggested only for purposes of convenience in making contrasts concerning the naturalness of integrating the various types of operative facts, it is proposed to use it for this last purpose. As is disclosed later, the writer is not contending that the difference between warranties of future performance and present quality determines the matter of their provability by parol. Quite the opposite is the case. The distinction is used only to point out that the cases have not followed that line of difference in determining the major issue.

\textsuperscript{24} A question suggests itself as to whether under Uniform Sales Act, sec. 12, "promises" and "affirmations of fact" are mutually exclusive as to subject matter in the manner assumed by the present writer, viz., that "promises" refer to prophecies of the future performance of the chattel, while "affirmations of fact" are assertions about present facts concerning it. The writer considers that "affirmation of fact" must refer to an existing fact and that even if "promise" could include statements both of present fact and future performance the former is jurally obsolete in view of the fact that liability can be more easily worked out on the basis of the affirmation which, ipso facto, it also is. Thus for practical purposes they are mutually exclusive and synonymous with "prophetic warranty" and "assertive warranty" as used here. The only warranties which have to be analyzed in terms of "promise" under the Sales Act are those concerning the future performance of the chattel.

\textsuperscript{25} Uniform Sales Act, Sec. 12.

\textsuperscript{26} Uniform Sales Act, Sec. 15, parts (1) and (4).
mention them. Does the parol evidence rule forbid the showing of statements by the seller prophesying the future performance of the chattel and of statements by the buyer notifying the seller of the expected future performance, along with facts to prove reliance upon the seller's skill and judgment? The state of the cases is that prophetic warranties cannot be shown by parol in the face of a

writing, while implied warranties of fitness for purpose may, by the majority view, thus be shown.\textsuperscript{28}

This would seem to show that the law fails to attach any particular significance to the nature of the quality warranted, i.e., whether it is as to present fact or future performance, for these cases show a failure to treat on the same basis the diverse operative facts reaching the same end of liability for future perfor-


This would indicate that the validity of Professor Williston's suggestion about the assertive warranty will have to be determined, as will be contended later, in terms other than those of the difference in the quality allegedly warranted and this despite the fact that his suggestion—that for a distinction between prophetic and assertive express warranties—appears to be based on such a difference, i.e., one between assertive warranties of present fact and prophetic ones of future performance.

Merely by looking only at the two types of operative facts now being discussed, those capable of creating prophetic warranties and implied warranties of fitness for known purpose, one could deduce from the line of cases forbidding the former but allowing the latter by parol that it is "natural" to integrate into writings such operative facts for warranties as are statements jurally unfavorable to the speaker, but that it is not "natural" to integrate other statements or still other operative facts not in the nature of statements. This is one difference between the operative facts creating a prophetic express warranty and those creating an implied warranty of fitness for purpose.

And, for that matter, a promise, in addition to being a prophecy of the future conduct of the promisor, is also a statement jurally unfavorable to the speaker. The validity of Professor Williston's suggestion depends on the law's taking the attitude of declaring it not "natural" to integrate anything other than a prophecy. The cases so far mentioned do, so it happens, draw a distinction between prophecies and other conduct, but they as well distinguish between jurally unfavorable statements and other operative facts. The validity of his suggestion thus is not finally decided by these cases but must remain to be investigated further when the assertive warranty cases are examined to see if they draw the line between prophecies and other things, or between jurally unfavorable statements and other things.

For that matter, why should not even prophetic express warranties be provable by parol? They are not strictly promises in the sense of prophecies of the future activity of the speaker. One could, in denial of Professor Williston's thesis, argue that there is a similarity between prophetic warranties and assertive ones with the result that the latter must stand or fall, as regards provability by parol, on the same basis as the former. They are similar in this way: each involves the legal consequence of a duty
to perform something in the future which follows by operation of law from a statement which does not in itself predict the future conduct of the obligor at all. Are not both quasi-contractual in that the obligation engendered is not stated in the operative fact, i.e., the statement, respectively of future performance or present fact? Does a prophecy of future performance show any more contractual intent than a statement of present fact? Certainly not under the Sales Act which works out liability in either case on the basis of the same additional factors, viz., "tendency to induce the sale" and actual inducement thereof. The future conduct of the obligor, which is the normal content of "promises," is equally unexpressed in both types of warranty. Is not the obligation "independently imposed by law"29 in each case?

But prophetic warranties seem to have acquired the status of "promises" both from the phrasing of the Sales Act, with its distinction between promises and affirmations of fact under the heading of express warranties, and from Professor Williston's assumption in arguing for his suggestion. In view of the fact that the cases have so uniformly rejected parol proof of them, we must assume that it is natural to write in those prophetic statements of future performance which work this type of liability. We must gather from these cases, standing alone, that at least all prophetic jurally unfavorable statements are integrated. It seems to the writer that quibbling as to the nature of a promise is better avoided by stating that it is "natural" to integrate prophetic statements—whether prophetic of the speaker's conduct or of the chattel's performance—so that they cannot be proved by parol. The question still remains whether it is as natural to integrate certain non-prophetic statements. Professor Williston's suggestion is based on a belief that only prophetic statements are naturally integrated and that hence assertive warranties, i.e., non-prophetic operative facts to create them, may be shown by parol. When that proposition is treated directly, the suggested similarity between prophetic and assertive warranties will have bearing.

THE IMPLIED WARRANTIES OF MERCHANTABILITY AND OF TITLE30

These warranties follow more or less automatically from the bare fact of the sale and for operative facts involve a minimum

29Vold, Sales, sec. 151.
30These warranties have been put into a group by themselves for the
of subjective conduct of the parties. This conduct is the least likely to be "naturally" written into the memorandum of the transaction. Thus there is an implied warranty that the goods sold shall be of a merchantable quality, which follows, in a sale by description, when the seller is a manufacturer or grower, under the older law, and regardless of that under the newer law, and whenever, in either event, the buyer has not examined the goods in such a manner as to have been able himself to discover the specific defect. This implied warranty of merchantability is, perhaps, the equivalent of that of "soundness from full price" mentioned occasionally and that "against latent defects arising in the course of manufacture," found elsewhere. The cases permit such a warranty to be shown in the face of a writing not mentioning it.

The same result follows for the implied warranties of title. For these the only operative fact aside from those creating the sale or contract itself is, under the older law, the fact that the reason that they are so little capable of being controverted under the parol evidence rule. The operative facts creating them are so unlikely to be integrated into operative writings that there is no question but that they are provable by parol. Separating them in this manner makes it unnecessary to go into the question raised in footnote 23 of whether they involve future performance or present fact. Thus the treatment of the controverted types of liability which is dealt with in that fashion is enabled to be made a bit more clear.

31 Williston, Sales, 2nd Ed., secs. 232 and 233.
32 Uniform Sales Act, sec. 15: "... (2) Where the goods are bought by description from a seller who deals in goods of that description (whether he be a grower or manufacturer or not) there is an implied warranty that the goods shall be of merchantable quality...." See also Ibid, Section 16 (c), with reference to the similar warranty in sales by sample.
33 As in Wells v. Spears, (1820) 1 McC. L. (S.C.) 421.
goods are in the seller's possession. This is no longer an essential fact.

Practically the only cases which reject any implied warranties by parol are the minority group of cases involving implied warranties of fitness for purpose which have been treated above. While the majority cases on this point have determined that it is not "natural" to integrate the buyer's statement of his purpose in buying, yet it can be seen that such a statement is more naturally written than the operative facts for implied warranties of merchantability and title. The buyer's statement as an operative fact for the warranty of fitness does involve subjective conduct of the parties more peculiar to the instant transaction. And it could be expressed feasibly in the bill of sale or other memorandum, such as "Sold one truck, for hauling coal."

The operative facts in these implied warranties do not involve jurally unfavorable statements. While these cases do not, standing alone, support a conclusion that it is "natural" to integrate jurally unfavorable statements, yet they do carry forward the tentative suggestion made in the preceding part of this treatment from a contemplation of the cases on prophetic warranties and implied warranties of fitness for purpose. Here we find certain operative facts which are not jurally unfavorable statements held by the cases to be not "naturally" written. It will remain to be seen in the ensuing section whether the cases squarely decide that the line of "naturalness" is to be drawn between jurally unfavorable statements and other things or between prophecies and other things.

THE ASSERTIVE WARRANTIES AND SIMILAR FORMS OF LIABILITY FOR THE EXISTING CONDITION OF THE CHATTEL WHEN SOLD

Thus far we have dealt principally with the operative facts which create liability for the failure of the chattel to come up to certain standards of future performance. We have seen that the parol evidence rule applies to the clearly contractual prophetic warranty and does not apply to the quasi-contractual implied warranties of fitness for a known purpose, merchantability, and title. Now we have to deal with the quasi-contractual assertive warranty which is the principal subject of Professor Williston's contention.


37 Supra note 28.
One thing which militates against the theoretical soundness of his suggestion is the difficulty of drawing any practical line of distinction between the prophetic warranty and the assertive one for purposes of applying the rule. For instance, how shall we classify an oral warranty that an automobile is constructed so as to go sixty miles an hour? Is it prophetic of performance or assertive of fact? This inquiry relates to the old problem of whether there could be a warranty of future events, here called a prophetic warranty. Blackstone, writing at a time when the tort-deceit element in warranties was predominant, thought that there could not be. This was probably because of the imposibility of "knowingly" making a false statement about the future. Professor Williston, in commenting on this, says that Blackstone's statement still holds good unless there is (1) an "actual contract" (whatever that is), or (2) a real representation as to an existing fact.

This similarity of prophetic and assertive warranties, adverted to above, would seem to indicate that they should be treated together so that all should be allowed by parol or none. Rather than to say that prophetic warranties are "contractual" and hence naturally integrated and assertive warranties "quasi-contractual" and hence not naturally written in, the writer would say that all of them are "non-contractual" in one sense, i.e., they do not immediately involve prophecies of the future activity of the speaker. But even aside from this objection to Professor Williston's thesis it seems to the writer that there are theoretical objections which can be shown even if we assume the practicality of making the basic dichotomy indicated by his suggestion. These objections

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38 The "illustration" from the Restatement of Contracts, supra note 5, which accords with Professor Williston's suggestion, makes a distinction between "undertakings" and "representations" in stating hypothetical cases of prophetic and assertive warranties, respectively. Is not this language highly conceptual and unrealistic? Does it aid in deciding which warranties are prophetic and which assertive?

39 It is submitted that the Uniform Sales Act, Sec. 12, with its distinction between promises and affirmations of facts generally as operative facts, does not make necessary a sharp classification of situations into the one or the other. Rather the two are alternative devices for giving operative effect to statements generally which fall into either or both of these classes. It is possible to argue that a given statement is one or the other of these without pointing out which. Professor Williston's suggestion, however, does require a sharp demarcation and assignment of the operative fact in question to one group alone.

40 Blackstone, Commentaries 165.

41 Williston, Sales, 2nd Ed., sec. 212.
will be treated on a basis of this assumed separateness of the assertive warranty.

We are now dealing with three types of jural activity concerning the present state of the chattel, viz., the assertive express warranty, tort liability for deceit by fraudulent representations, and tort liability for negligent construction. The last of these presents no problem under the parol evidence rule and is mentioned but for contrast. The operative facts to establish this type of liability do not lend themselves to integration into writings and so raise no question of the "naturalness" of doing so. Rather the parol evidence rule concerns the assertive express warranty, for which the tangible operative fact is the making of a statement by the seller, and the tort of deceit, for which the operative facts are such a statement and a knowledge of its falsity.

In each of these there is present a statement by the seller of some existing quality of the chattel. In the case of the warranty the other requirements are that it be false, be of a type calculated to induce the sale, and that it actually does induce the sale to the buyer's damage. These other required operative facts do not involve the subjective conduct of the parties. On the other hand, in the case of the tort liability for deceit, in addition to the requirement of a statement by the seller and the obvious ones of falsity and damage, there is an operative fact which does involve subjective conduct of at least one of the parties, the seller's knowledge of the falsity of the statement. Thus, in so far as the subjective conduct of the parties is concerned, the only difference between the assertive express warranty and tort liability for deceit is that the latter requires the knowledge of falsity on the part of the tort-feasor where the former does not require it of the obligor. It is only recently, primarily by the statutory creation of the assertive express warranty, that an analogous element, the so-called "intent to warrant," has clearly been banished from the express warranty.43

42On the other hand, both types could be called "contractual" in this sense: both represent liability resulting from the express words of the obligor.

43The Sales Act, sec. 12, has, in effect, substituted "tendency to induce the sale" for the erstwhile "intent to warrant" as an additional operative fact which must accompany the statement in order to work warranty liability. Compare both of these with the additional operative facts required in the case of the action for false representations or deceit, viz., materiality and knowledge of falsity. Are not all of these devices for selecting some, but not all, statements about chattels sold to be operative and work liability.
Despite the close similarity in operative facts between these two forms of liability the authorities have reached opposite conclusions on the question of allowing them to be shown by parol in the face of an operative writing. It seems clear that the parol evidence rule does not forbid showing fraudulent representations by parol in the face of an integration. On the other hand, the majority of cases run counter to Professor Williston's

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42 Williston, Contracts, secs. 634 and 643; Barcham and McFarland, Inc. v. Kane, (1930) 228 App. Div. 396, 240 N. Y. S. 123; C. J. Howard, Inc. v. C. V. Nalley and Co., (1931) 44 Ga. App. 311, 161 S. E. 380; Blecher v. Schmidt, (1931) 211 Iowa 1063, 235 N. W. 34; J. B. Colt Co. v. Brown, (1928) 224 Ky. 438, 6 S. W. (2d) 473; numerous dicta in the cases denying the provability of assertive warranties indicate that the assertions could have been proven had they been made fraudulently.

43 Bush v. Bradford, (1849) 15 Ala. 317 (age and soundness of horse); Hauger v. Evins and Shinn, (1881) 38 Ark. 334 (condition of boat); Federal Truck and Motors Co. v. Tompkins, (1921) 149 Ark. 664, 231 S. W. 553 (that truck was only eight months old); Bond and Maxwell v. Perrin, (1916) 145 Ga. 200, 88 S. E. 954 (that second hand auto was in good condition); Vierling v. Iroquois Furnace Co., (1897) 170 Ill. 189, 48 N. E. 1069 (that iron was "best Ohio Valley Iron"); Rodgers v. Perrault, (1889) 41 Kan. 385, 21 Pac. 287 (soundness of horse); Ehram v. Brown, (1902) 64 Kan. 466, 67 Pac. 867 (good material, first class workmanship); Storer v. Taber, (1891) 83 Me. 387, 22 Atl. 256 (soundness of jacket); Lamb v. Crafts, (1847) 12 Metc. (Mass.) 353; Keller v. Webb, (1879) 126 Mass. 393; McCormick Harvesting Machine Co. v. Thompson, (1891) 46 Minn. 15, 48 N. W. 415; Vrooman v. Phelps, (1807) 2 John. (N.Y.) 177 (that slave sold was honest and sober); Van Ostrand v. Reed, (1828) 1 Wend. (N.Y.) 424, 19 Am. Dec. 529; Mayer v. Dean, (1887) 54 N. Y. Sup. Ct. 315, 115 N. Y. 556, 22 N. E. 261, 5 L. R. A. 540 (that mustard was free from dirt); Reed v. Wood, (1837) 9 Vt. 285; Bond and Green v. Clark, (1863) 35 Vt. 577; Hebard v. Cutler, (1917) 91 Vt. 218, 99 Atl. 879; Randall v. Rhodes, (C.C.R.I. 1851) 1 Curt. 90, Fed. Cas. No. 11556 (that ship was built of white oak timber); Marmet Coal Co. v. Peoples Coal Co., (C.C.A. 6th Cir. 1915) 141 C. C. A. 402, 226 Fed. 646 (that barges were in good and navigable condition); Hamilton Iron & Steel Co. v. Groveland Mining Co., (C.C.A. 6th Cir. 1916) 147 C. C. A. 324, 233 Fed. 388 (as to the manganese content of ore); Kain v. Old, (1824) 2 B. & C. 627 (that ship was copper bolted); Harnor v. Groves, (1855) 15 C. B. 667; Blecher v. Schmidt, (1931) 211 Iowa 1063, 235 N. W. 34; First National Bank of Hagerman v. Peterson, (1929) 47 Idaho 794, 279 Pac. 302; McNaughton v. Wahl, (1906) 99 Minn. 92, 108 N. W. 467; Schweir v. Thorns, (1862) 1 J. F. & F. 243; Daniel Smith v. Obed Williams, (1810) 1 Murph. (N.C.) 426; Etheridge v. Palin, (1875) 72 N. C. 213; Jeremiah Elighnie v. Edgar B. Taylor, (1885) 98 N. Y. 288.

Contra: Florence Wagon Works v. Trinidad Asphalt Co., (1906) 145 Ala. 677, 40 So. 49; Sorensen v. Webb, (1923) 37 Idaho 13, 214 Pac. 749 (that cow was with calf); Waterbury v. Russell, (1874) 8 Baxt. (Tenn.) 139 (that corn was equivalent of corn in crib); Wright v. General Carbonic Co., (1921) 271 Pa. St. 332, 114 Atl. 517; Fudge v. Kelley, (1915) 171 Iowa 422, 152 N. W. 39; Neal v. Flint, (1895) 88 Me. 72, 33 Atl. 669; Phelps v. Whittaker, (1877) 37 Mich. 72; Burns v. Limerick, (1913) 178 Mo. App. 145, 165 S. W. 1166; Landreth et al. v. Wyckoff, (1901) 67 App. Div. 445, 73 N. Y. S. 388; Eureka Elastic Paint Co. v. Bennett Hedgpeth Co., (1908) 85 S. C. 486, 67 S. E. 738. In the following cases the courts apparently permit the showing of assertive warranties by parol, but the cases do not
suggestion and hold that the rule forbids the showing of assertive express warranties by parol.

Why should there be this distinction between two types of liability which have a common denominator in the requirement of an assertive statement by the seller for operative facts? One explanation is the conceptual distinction between tort and contract, to the latter of which fields alone does the parol evidence rule apply. Then, too, even in the realm of contract and under the parol evidence rule, fraud, if it goes to vitiate the whole transaction, has always been permitted to be shown by parol, as a way of showing that no written transaction ever achieved and continued valid existence. The assertive warranty does not destroy the entire transaction but is merely an incident thereof. Then, aside from these conceptual considerations, the distinction made by the cases between the provability of fraudulent representations and the non-provability of the assertive warranties can probably further be rationalized along several lines. With the assertive warranty the essential operative fact—the statement—can be readily written, and so it is thought naturally written. For the tort there is, in addition to the statement, another essential operative fact, the knowledge of falsity by the seller, which cannot by nature be confined to written form. Thus in such a case it is not even required that the thing which could have been written should so be. Further, one could argue that the relaxation of the parol evidence rule is a punitive device for administering societal treatment to fraudfeasors. Similarly one could say that the existence of the guilty mind on the part of the seller makes it more likely that the buyer’s testimony as to the oral representations is itself true. It has been pointed out that one basis for the parol evidence rule generally is the likelihood of inaccurate testimony from the interested buyer. Finally, under the parol evidence rule itself, when fraudulent


\textsuperscript{47} See McCormick, The Parol Evidence Rule as a Procedural Device for the Control of the Jury, (1932) 41 Yale L. J. 365, 366-367. Does not Professor McCormick’s excellent article force us to re-think the relation
representations are set up, either in defense or as a basis for suit, is the writing an operative fact to the particular liability asserted? Is the writing part of "a transaction in issue in the instant case" within the rule that it is forbidden only to vary such as this? 48

When we look at the two phenomena in substance, however, it seems that there is an inconsistency between allowing parol proof of knowingly false statements and not allowing parol proof of innocently false ones which tend to and do induce the sale. It is this substantial inconsistency which, viewed alone, furnishes the strongest theoretical argument for Professor Williston's suggestion. 49 It is easy to argue that it was contemplated by the Sales Act, in creating the separate category of the assertive warranty, to create a form of tort liability without the requirement of guilty knowledge which would have, had this been recognized, carried with it the implication of tort liability under the parol evidence rule, i.e., provability by parol. It is interesting to speculate what would have been the situation had the relevant portion of the Sales Act been enacted by itself, away from the contractual category of sales, possibly under a delictual one, designedly to abolish the requirement of guilty knowledge in deceit. No doubt it would be held that such statements could be proven by parol.

Discussion of the effect of the Sales Act as supporting Professor Williston's suggestion is further complicated by the fact that so few of the authorities on the question come from cases decided in jurisdictions where the Sales Act was then in force and that in so few of these cases were the courts aware that the existence of the Sales Act gave them occasion to consider the

between the parol evidence rule and the typical rules of evidence? See Ibid., 373: wherein, in treating of the Thayer dogma that the rule is one of the substantive law and not one of the law of evidence, he says: "Nevertheless, though excluded from the family fold of rules of evidence, it can claim common ancestry in distrust of the jury." Consider also the relation between the parol evidence rule and the best evidence rule in the following vein: The best evidence rule is based upon a preference for written or real evidence over oral, secondary, or testimonial evidence as evidential facts, whereas the parol evidence rule indicates a preference for writings as operative facts.

44Strahorn, The Unity of the Parol Evidence Rule, (1929) 14 MINNESOTA LAW REVIEW 20, 45.

49The view contended for by Professor Williston was enunciated by the Tennessee court long before the Sales Act was drafted: "If the statement was made to influence the bargain and it did have that effect, it would be equivalent to a warranty, whether innocent or fraudulent. The fact that it was not inserted in the written contract can make no difference. It was not a part of the contract of sale, but the inducement to it. It is a distinct collateral matter on which liabilities arise that may be enforced." Hogg and Belcher v. Cardwell, (1856) 4 Sneed. (Tenn.) 151, 156-7.
desirability of Professor Williston's suggestion and the possibility of the act's having enacted a new rule.\textsuperscript{50} Cases in which the question could and ought to be decided no doubt will continue to be swamped in the sea of decisions which have been rendered prior to the adoption of the Sales Act.

Thus it seems that the courts have concluded—Professor Williston contra—that it is natural to include assertions about the chattel into operative writings creating sales or contracts to sell and that hence they are precluded if not included.\textsuperscript{51} It remains for us to discuss the significance of these contrary views and the general question of the naturalness of including assertive warranties in writings.

In doing this it is proposed to consider no longer the inconsistency between the deceit cases and the assertive warranty cases. Rather the immediate problem is to discern whether there is such an equivalent similarity between assertive warranties and implied warranties as to indicate a substantial inconsistency between the cases which permit the various implied warranties by parol and the ones which forbid assertive ones.

How can we rationalize the cases which allow implied warranties by parol and do not allow assertive ones? What light do they throw on the question of what is "naturally" written into the final integration of sales contracts? It seems to the writer that the latter cases confirm the tentative conclusion advanced.

\textsuperscript{50}In the following cases the Circuit Court of Appeals for the 6th circuit specifically rejected the contention that the Uniform Sales Act made assertive warranties provable by parol: Marmet Coal Co. v. People's Coal Co., (C.C.A. 6th Cir. 1915) 226 Fed. 646, reviewed in (1916) 16 Col. L. Rev. 253, and Hamilton Iron and Steel Co. v. Groveland Mining Co., (C.C.A. 6th Cir. 1916) 233 Fed. 388.

\textsuperscript{51}A matter analogous to that of showing an assertive warranty by parol is that of showing by parol that the goods were sold by sample when the writing fails to mention the sample. See Williston, Sales, 2nd ed., sec. 249, and Uniform Sales Act, sec. 16, concerning the implied warranties which arise when the sale is allowed to be shown to be by sample. The cases treat the use of the sample as the equivalent of an assertion about the present state of the chattel and likewise refuse to allow this to be shown by parol. Thus they likewise militate against the authoritative soundness of the Williston thesis. Harrison v. McCormick, (1891) 89 Cal. 327, 26 Pac. 830, 23 Am. St. Rep. 469; Gardiner v. McDonough, (1905) 147 Cal. 313, 81 Pac. 964; Germain Fruit Co. v. Armsby Co., (1908) 153 Cal. 585, 96 Pac. 319 (can use sample to identify subject matter but not as equivalent of warranty); Thomson v. Gortner, (1891) 73 Md. 474, 21 Atl. 371; Pike v. Fay, (1869) 101 Mass. 134; Standard Milling Co. v. De Pass, (1913) 154 App. Div. 525, 139 N. Y. S. 611, affirmed in 214 N. Y. 638, 108 N. E. 1108; Stroock and Co. v. Lichtenthal, (1928) 224 App. Div. 19, 229 N. Y. S. 371; Wiener v. Whipple, (1881) 53 Wis. 298, 10 N. W. 433, 40 Am. Rep. 775; Gardiner v. Gray, (1815) 4 Camp. 144; Comment, (1905) 4 Mich. L. Rev. 81.
above in the light of the distinction between prophetic warranties
and implied warranties of fitness. This is that it is "natural" to
write into memoranda of transactions all operative statements
which are jurally unfavorable to the immediate speaker and that
it is not "natural" to write in any other of the types of operative
facts capable of creating the sort of liability now being discussed,
whether statements not jurally unfavorable or operative facts not
in the nature of statement.\(^2\)

The cases make the distinction between the various forms of
warranty type liability; this terminology seems accurately to ra-
tionalize the distinction of the cases; and, on principle, it seems
to the writer to be a better way of stating what is "natural" to
integrate and what is not than is the conceptual disinction between
"contractual" and "quasi-contractual." The upshot of it is that,
while Professor Williston has concluded it to be natural to inte-
grate only statements about the future, i.e., prophecies, the cases
have concluded that it is natural to integrate all jurally unfavor-
able statements, which include prophecies and assertions. To this
the fraudulent representation proposition forms a substantially un-
justifiable exception.

But is it thus in fact and in human understanding natural to
write in all jurally unfavorable statements? We can discuss it
by postulating that all will agree that it is natural to write in the
most contractual of promises, the speaker's prophecy of his own
activity. That is the typical kind of objective operative fact which
is written. The cases and Professor Williston agree that likewise
the prophetic warranty, i.e., the prophecy of the future performance
of the chattel itself, is also naturally written in. Is not the assert-
te warranty, a third type of jurally unfavorable statement, as

\(^2\)It must be remembered that the phrase "jurally unfavorable state-
ment" has reference to the operative fact creative of warranty liability, and
not to the warranty itself. All warranties are jurally unfavorable to the
seller. Some warranties, however, result from statements which are jurally
unfavorable to the speaker, and other warranties result from other operative
facts, either jurally favorable statements, or other things than statements.
The writer's contention is that the provability of warranties by parol does
not directly depend on the type of warranty, but on the type of operative fact
creating it. It seems that it is natural to integrate those operative facts
which are statements jurally unfavorable to the speaker, but not natural to
integrate other statements or other facts, with the result that the question
of the warranty's having survived the writing depends on how natural it is
to integrate the specific operative fact which creates the warranty. "War-
ranties" are concepts. "Operative facts" have a trifle more reality. The test
for the warranty's survival of the writing should be in terms of the natural-
ness of writing in the relatively more real operative fact.
close analytically to the prophetic warranty as the latter in turn is to the promise of the speaker's own activity which, without doubt, is naturally written? What authority is there for saying that a jurally unfavorable statement of the future performance of the chattel is naturally written while a jurally unfavorable statement of its present status is not? It seems to the writer that the greatest quality which the assertive warranty has in common with the two types of operative fact which are agreed to be naturally written is that of its being jurally unfavorable to the speaker. No traces of this quality can be found in the other types of operative fact which Professor Williston insists on grouping with it. Analytically speaking, the former relation seems a closer bond of kinship than is the dubious one of "quasi-contractual" which is what must be relied on in order to give custody of the assertive warranty to the implied warranty family. Then, too, the distinction between jurally unfavorable statements and other operative facts is a much nearer one to make than is the one necessitated by Professor Williston's suggestion of dividing prophecies of the future from statements of the present. The cases cleave to a more workable distinction.

Apparent support of Professor Williston's suggestion would seem to come from the rule concerning proof of the description of the chattel by parol. For example, if the memorandum merely provides for "a horse," it may be shown by parol "what horse." But there is no inconsistency between this and denying permission to prove the seller's assertion about the horse. "What horse" is necessary to be known to have an enforceable contract. But the assertive warranty would be unnecessary. "What horse," when proved by parol, because necessary, does not increase the units of obligation. The contract is still for a horse, as provided for in writing. But proof of parol assertions does increase the units of liability. What was a written contract to sell a horse would become that plus a further contract to pay money if the horse did not possess a certain quality. "What horse" is not jurally unfavorable. Unfavorable consequences have resulted from the integrated

Strahorn, The Unity of the Parol Evidence Rule, (1929) 14 Minnesota Law Review 20, 36. "The rule forbids facts offered to vary the legal effect of certain writings. Facts which are permissible under this category (Insufficiency of Expression) and which furnish some detail essential to the enforceability of the written transaction carry forward the legal effect of the writing rather than vary it and so are by hypothesis not affected by the rule."
statement about "a horse." Thus the rule about parol proof of identity does not militate against the jurally unfavorable test to which the cases on parol warranties adhere.

One wonders whether a good test for the "naturalness" of writing operative facts in sales transactions could be found in terms of the ease with which the various operative facts may be translated into written words and thus set down. But were this the true test, it would merely destroy further the validity of Professor Williston's suggestion. For what is there that makes it any easier to translate a prophetic statement about the future than an assertive one about the present? The cases require that the former must always be written. To this Professor Williston agrees. Then, for that matter, were this the test, the implied warranty of fitness for purpose would also have to be written, because it would be quite simple to translate it into the words of the bill of sale, as suggested above, viz., "sold one truck, for hauling coal." One cannot conclude that such is the specific test for "naturalness" in the light of the cases. And, even if it were, it would prove Professor Williston's suggestion to be faulty. Speculating about such a hypothetical test merely lends further support to the test of whether the operative facts are jurally unfavorable statements or not.54

As further supporting the conclusion, in opposition to Professor Williston's thesis, that it is equally natural to integrate prophetic and assertive warranties, there is the matter of the terminology typically found in "stipulations" inserted by parties to sales contracts, usually by printed forms, which serve to supplement the parol evidence rule in excluding extrinsic evidence generally. Frequently one finds stipulations in the following vein: "The seller shall not be bound by any representation or promise made by any agent relative to this transaction which is not embodied herein." The present writer feels that the prevalence of this similarity of treatment of representations and promises supports a conclusion that human understanding has it that it is as natural to integrate the former as it is the latter. The parties who draft these form stipulations which are calculated merely to express what the parol evidence rule implies seem to feel that there is no discernible dis-

54A minor consideration suggests itself. The typical writings which integrate transactions generally contain two types of operative facts, records of past facts and predictions of the future conduct of the parties, viz., promises. Is it as natural to write in present statements of present facts, i.e., assertive warranties?
tinction between assertive warranties and prophetic ones. To be sure, they usually are drafted by the interested seller. But were human understanding in accordance with Professor Williston's suggestion, the seller, in order to avoid liability, would be even more explicit about the assertive warranty than about the prophetic one, because the latter one is already sufficiently taken care of to the seller's advantage by the rule itself.

Extrinsic Evidence to Eliminate Warranties Which Result from the Writing Itself

Certain warranties are said to be expressed in a writing whenever the parties see fit to write out the statements which serve as operative facts to create this type of liability. Certain others follow automatically from the written operative facts which create the main transaction itself. To what extent can any of these warranties be deprived of effect by extrinsic evidence of facts not themselves incorporated into the writing? Examples are: a showing that the article sold was a patented or trade name article or that the buyer did not rely upon the seller's judgment, either of which might be offered to defeat the implied warranty of fitness for purpose; that the seller was not a manufacturer or grower, to defeat the warranty of merchantability under the older law; or that the seller was not in possession, to defeat a warranty of title at the same stage; or any express agreement, disclaimer, waiver, or similar activity of the buyer limiting a warranty which would otherwise exist.

The few cases which have dealt with the problem exclude only the last mentioned, viz., specific activity, usually a statement, particularly limiting the warranty which would otherwise follow.

55 In general, see Williston, Sales, 2nd Ed., secs. 239, 239A. Also a note (1929) 14 Corn. L. Quart. 506.

56 The buyer's assent to the seller's statement limiting an existing warranty would, in effect, be the buyer's statement and thus would be his jurally unfavorable utterance.

57 The case squarely on the point of a disclaimer is Calpetro Producer's Syndicate v. Woods Co., (1929) 206 Cal. 246, 274 Pac. 65, denying the seller the right to show by parol that the buyer waived the implied warranty of title. The following cases hold that it cannot be shown by parol that the buyer was aware of a defect allegedly warranted against: Watson v. Roods, (1890) 30 Neb. 264, 46 N. W. 491, and Hogan's Exr. v. Carland and Rutledge, (1833) 5 Yerg. (Tenn.) 283. Some cases involving the sale of land likewise suggest useful analogies: Miller v. Desverges, (1885) 75 Ga. 407; Harlow v. Thomas, (1833) 15 Pick. (Mass.) 66; LaFrance v. Kashishian, (1928) 204 Cal. 643, 269 Pac. 655.
Why is this? Why should the one type of negativing facts be permitted and the other forbidden? Is there any difference in the nature of the operative facts? One suggests itself. That which is permitted is something other than jurally unfavorable conduct. That which is excluded is such jurally unfavorable conduct.

Thus these cases likewise support the conclusion that the true test of what is natural to integrate and what is not is that it is natural to write in such operative facts as consist of jurally unfavorable statements, either those imposing liability for extrinsic warranties themselves, or, as here, those destroying the rights of the speaker, viz., disclaimers of otherwise existing warranties.

Conclusion

The crux of Professor Williston's suggestion is that the quasi-contractual assertive warranties should be showable by parol. But how shall we determine which are contractual and which quasi-contractual? How shall we draw the line between prophecies of future events and assertions of present fact, the line which is necessitated by the proposition under discussion?

If the true test of whether it is "natural" to integrate operative facts is in terms of "contractual" or "quasi-contractual," then Professor Williston's theory is sound. If, on the other hand, the correct principle is that it is natural to integrate all jurally unfavorable statements, the suggestion is unsound.

To support the Williston suggestion, there are two matters, first, a comparison of the assertive warranty with the fraudulent representation situation, for which latter the operative facts may be shown by parol, and, second, a realization that so few cases dealing squarely with the assertive warranty have been decided under the Sales Act and in view of an understanding by the instant court that the act has possibly created a new type of liability not existing before.

On the other hand, denying the Williston thesis and supporting the test of "jurally unfavorable statement" are the cases squarely on the point of the assertive warranty, which can be rationalized in terms of the jurally unfavorable test. Also there are two other groups of cases which can be rationalized in those terms, viz., the cases differentiating between prophetic warranties and implied ones of fitness and the few cases on parol disclaimers of existing warranties.
Furthermore, on abstract theory, it seems to the writer that it is more "natural" to write in jurally unfavorable statements and to leave as oral other operative facts than it is to write in prophecies and to leave out all else. Then, too, the distinction between jurally unfavorable statements and all else is an easier one to make in practice than is the distinction necessitated by the Williston suggestion, viz., between prophecies and assertions of present fact. Finally, the assertive warranty more closely resembles the prophetic or promissory one which must be integrated than it does the implied warranties which need not be. The resemblance between prophetic and assertive warranties, indicated by the common denominator of being jurally unfavorable statements, is a much closer one than is to be found by comparing the assertive warranty with the implied ones under the concept of the attachment of liability without intention.

All things considered, the majority of theoretical propositions line up with the cases squarely in point, so that it would seem that Professor Williston's suggestion that assertive warranties should be provable by parol is sound neither in authority nor in theory.