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The Use Of Parol Evidence In Cases Involving Written Instruments

By WILLIAM BURNETT HARVEY

Undertaking to write a short paper on the use of parol evidence will succeed, where all else may fail, in making a man humble. This is particularly true of a law teacher assuming to write especially for the practicing bar. The use of parol evidence is as broad as the practice of law itself, and I know of no area where the published opinions of appellate courts, the primary raw materials of the teacher, provide so few real-life insights into the way our processes of litigation and decision-making actually operate.

Thus constrained, I trust, to humility, I want to discuss briefly the use of parol evidence, emphasizing its relation to written contracts, without any implication that the problems are so limited. This subject immediately calls to the mind of any lawyer a fearsome thing called the parol evidence rule, one of the classic misnomers of our law. The doctrine parading under this name does not operate solely to exclude “parol” evidence, if by this term is meant “oral” evidence. Many kinds of documentary evidence, letters, draft contracts, binder agreements, and such, may find their path into the record blocked by the invocation of the doctrine. Secondly, the doctrine is not a rule of evidence, at least not directly, since it is not concerned primarily with the probative value of evidence or with its tendency to mislead or prejudice the trier of fact. In its proper application the doctrine is basically a reflection of substantive notions designed to delimit the scope and content of legally significant acts. And thirdly, the doctrine is not “a rule”, rather, it is a whole complex of rules dealing with analytically discrete problems. However, despite these terminological defects, it is impossible immediately to purge our literature or our thinking of the common term, parol evidence rule, and it will be used occasionally in this paper.

Native of Greenville, South Carolina, William Burnett Harvey received his A.B. from Wake Forest College in North Carolina in 1943. Following three years of Navy service, he entered the University of Michigan Law School, obtaining a J.D. in January 1949. For the next two years he was associated with the Washington firm of Hogan and Hartson, but since 1951 has been an associate professor of law at the university.
While I was reviewing the Michigan decisions in the preparation of this paper, one fact became increasingly apparent. Among the multitude of opinions, there was no carefully articulated analysis and statement of the parol evidence rule. In this situation, perhaps the best approach is to work backward to an affirmative statement of doctrine by reference to some well-settled rules as to what the parol evidence rule is not—as to situations in which it clearly does not apply. In the first place, it is entirely clear that the rule does not apply to proof of a modifying agreement made after formation of the written contract.\(^2\) The mere fact that parties have made an agreement, and with all due solemnity incorporated it in a writing, does not deprive them of the private autonomy which enabled them to contract initially. They may later modify, vary or utterly wipe out their earlier written agreement, and, absent a distinct legal requirement of a writing, they may do so by an oral transaction, proof of which is admissible in a later action on the instrument. It should be emphasized, however, that such modifying transactions will themselves be tested by substantive rules like those concerning mutual assent, consideration, discharge, waiver, and, in some instances, requirements as to form such as the Statute of Frauds. But these have nothing to do with the so-called parol evidence rule.

It is also clear that extrinsic evidence is admissible to show that a written instrument is voidable because induced by fraud.\(^3\) This is true even though the writing contains an express provision that no agreements or representations, written or oral, other than those printed in the document, shall be binding on the parties.\(^4\) Similarly, evidence is admissible to show that the document is void or voidable on the ground of duress, illegality, mistake or incompetence of parties. Thus, before the parol evidence rule can apply to protect a writing as a legal act, it must be free of these defects in its creation.

**Counsel Not Sought**

Unfortunately, parties about to execute a document intended to affect their legal relations in some important way frequently do not seek competent counsel to assist in its preparation, but rely on themselves, their banker, broker or insurance agent. Not uncommonly it is later found that the instrument prepared to state their understanding does not do so, but by mistake contains words the parties did not intend to use, or else the words they intended to use do not have the legal effect they contemplated. We refer to such cases as involving a mistake in integration—that is, the word symbols chosen by the parties as the integrated expression of their transaction do not reflect their intention. It is well recognized that in an equity suit or its modern successor, the party aggrieved by the mistake may seek to have the writing reformed, and toward that end may prove the true agreement by extrinsic evidence, written or oral.\(^5\) The parol evidence rule has no operation here. A more interesting question is whether such evidence is usable only in an equity suit for reformation of the instrument, or whether it may be adduced to support a defense of mistake when a law action is brought on the mistaken document. This latter use may sidestep certain safeguards as to burden

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of proof which have been thought to characterize the equity suit, but there is some Michigan authority for it.\(^6\)

**Conditional Delivery**

Another well-recognized area of non-applicability of the parol evidence rule may be described as the "conditional delivery" situation. The term delivery has remained more meaningful in relation to deeds of conveyance than it has with respect to contracts. Nevertheless, the term is still used in relation to informal contracts to indicate those operative facts manifesting an intention that the agreement become presently effective between the parties. Since contractual obligations are, in theory at least, consensual, and since deeds of conveyance are volitional acts of the grantor, such intention for present effectiveness is vital in each case.

Now assume that plaintiff sues defendant for damages for breach of a contract, whereby defendant promised to buy a large quantity of bricks from plaintiff. Plaintiff introduces in evidence a lengthy written agreement of sale and testifies to its execution by himself and defendant. Later defendant offers oral evidence of an understanding between the parties made before or contemporaneously with the signing of the written agreement that the contract was not to be binding unless and until defendant secured a contract with the local school district for the construction of a school house, and that he didn't get the contract. When this line of evidence is offered, one can well imagine plaintiff's attorney objecting strenuously to its admission on the ground that it would contravene the parol evidence rule by varying the terms of the written contract.

Prima facie the objection taken by plaintiff is plausible. The writing states an unadorned promise by defendant to buy. Yet now defendant is seeking to show that his promise was really "I promise to buy IF." Thus it would seem that defendant is trying to change an unconditional promise into one containing a condition precedent to any immediately performable duty thereunder. Yet defendant should be able to get the evidence in, supported by a long line of authorities in every state in the Union, including Michigan.\(^7\) The theory is that defendant's evidence is not intended to alter the terms of a contract, but to show that the writing was signed conditionally and therefore never became a contract since the specified condition did not occur. Thus the parol evidence rule does not apply since it only protects the terms of effective instruments.

**Showers and Frischkorn Cases**

The "conditional delivery" analysis is theoretically unimpeachable. It has provided a vehicle for utilizing extrinsic evidence in many instances where arguably the parol evidence rule should have compelled its being disregarded. The utility of the theory and its hazards, are, however, revealed by an analysis of two Michigan cases: *White Showers, Inc. v. Fischer\(^8\)* and *Frischkorn Real Estate Co. v. Haskins.\(^9\)* In *White Showers* plaintiff and defendant executed a written agreement whereby defendant agreed to buy an irrigation system. The writing expressly stated that "this order covers all agreements", and was accompanied by defendant's post-dated check for one-half the purchase price of the system. Upon defendant's refusal to accept delivery, his stoppage of payment on the check, and his refusal to pay the balance, plaintiff sued for damages for breach of contract. The defense, in support of which defendant offered parol evidence, was that he had ordered an irrigation system from another supplier, that when the written contract was made with plaintiff, it was agreed that it would be ineffective unless defendant could cancel the other


\(^8\) Note 7, above.

order, and that he had been unable to do so. This evidence was admitted by the trial court, the verdict was for defendant, and the judgment was affirmed by the Supreme Court. The court clearly enunciated the conditional delivery rule, declaring: "No attempt was made . . . to alter, vary, contradict, or add to the writing, but oral testimony was offered in support of the proposition that there never was a contract." The court disposed of the argument that this theory was foreclosed by the stipulation in the writing that "this order covers all agreements" by observing that the stipulation "pre-supposes a binding contract inasmuch as only a binding contract could give life to the stipulation. Without such a contract, there is nothing to which the stipulation could be attached. It is an essential part of the contract, if there be one, and could only have force and effect after proof of the existence of the contract itself. It cannot be used to give life to something which had not as yet come into being."

The White Showers decision came down twelve years after Frischkorn. A brief review of the earlier case will reveal the fundamental similarity of facts and the polar disparity of the holdings. The plaintiff in Frischkorn sued defendant on a written contract for the exchange of real estate. The writing provided that "In the event that the exchange is not affected [sic] by reason of my [defendant's] refusal or inability to do so, I agree to pay Frischkorn Real Estate Co., all damages they may sustain by reason thereof." The defense asserted that there was a condition upon delivery of the written contract that defendant could secure the consent of a mortgagee to a division of his mortgage on the whole tract, part of which was to be exchanged. Not securing that consent, defendant contended that the agreement never became effective as a contract. The trial court admitted evidence to support this defense, and defendant had verdict and judgment in his favor.

The Supreme Court reversed the judgment, holding this evidence inadmissible. While it recognized and approved earlier decisions applying the conditional delivery analysis to justify admission of extrinsic evidence, the court held that the evidence offered by defendant related to a term covered by the quoted clause, that it varied the terms of the writing and should not have been admitted.10

I submit that these two decisions are basically in conflict despite the court's slight effort in the White Showers case to reconcile its earlier holding. Why the provision of the Frischkorn contract that defendant would pay damages if he was unwilling or unable to perform, foreclosed evidence that this provision and the rest of the writing never became a contract because of the non-occurrence of a condition precedent, while the term of the White Showers writing that it covered all agreements between the parties did not render extrinsic evidence of a condition on delivery inadmissible is, I believe, a question no aspect of the parol evidence rule theory is capable of answering. The answer, if any there is, lies in the court's unspoken general reaction to the merits of the defense in each case or the credibility of the evidence to support it. Sporadic and unexplained departures from or refusals to apply recognized doctrine create real difficulty for lawyers; they make prediction hazardous. Yet, it seems that such apparent aberrations as the Frischkorn decision lie outside the main stream. The conditional delivery theory remains a useful device for the lawyer seeking to utilize extrinsic evidence to relieve his client of an obligation because of non-occurrence of a condition precedent where the writing indicates the duty is unconditional.

Understanding of Parties

The application of the conditional delivery analysis frequently means adoption of a view of the case which probably differs from the actual understanding of the parties. The White

Showers case again can be used for illustration. According to the view there accepted by the court, no contract was to come into existence between the parties until defendant had determined that he could cancel his other order for an irrigation system. Therefore, until that event occurred, theoretically no binding obligation of any kind existed between the parties. We might say that the parties had agreed that defendant’s acceptance of plaintiff’s offer to sell would become effective at a future time on the happening of the specified condition. This is all well and good, but what if defendant had decided, before the condition occurred, that he preferred not to go through with the deal because of an attractive new offer from another supplier of irrigation systems. Could he avoid liability on the written agreement with plaintiff merely by withdrawing his acceptance before the condition precedent to its effectiveness occurred? Our general theories of mutual assent would indicate that he could, but does anyone really believe such was the actual intention of the parties at the time they signed the writing and agreed that defendant would not be bound unless he could cancel his earlier order? I doubt seriously that the parties intended to reserve such freedom of action. They, of course, would not be expected to think in terms of a nice distinction between a condition precedent to the existence of a contract and a condition precedent to an immediately performable duty under an existent contract. Yet if they had, the latter would in all probability have been their intention. They probably intended to bind each other fully, at the time they signed the writing, but with the understanding that defendant would not have to perform if unable to secure his release from the other order. In legal parlance, they doubtless intended to make a present contract with defendant’s promise to buy being conditional. But, encumbered by the parol evidence rule, the court felt unable to countenance evidence that a promise appearing in writing without any condition attached was in fact conditional. This obstacle miraculously vanished, however, if the condition was regarded as precedent to the existence of any contract at all.

Despite these difficulties, the “conditional delivery” analysis can render yeoman service—and without any sharpshooting with the facts by counsel who wants to prove the condition. His client and the other party to the agreement have in 99.9% of the cases not analyzed their transaction in legal terms. If the parol condition was agreed to, the “conditional delivery” analysis does effectuate their intention in substance. Admittedly, close analysis can tear the rationale to shreds, but as a practical matter, it serves remarkably well to neutralize the rigidity of much parol evidence rule thinking. It doesn’t take much of a stick to beat a third-rate dog.

Non-Applicability

One rather significant limitation on the utility of the conditional delivery analysis should be noted. With respect to deeds of conveyance, a grantor cannot establish by extrinsic evidence that the deed he manually delivered to the grantee was not to become effective until the happening of a certain condition.11 Two grounds are given for this view: first, the parol evidence rule and second, the ancient common law notion that a delivery in escrow must be made to a stranger and not to the grantee. History, not reason or the demands of justice, explains this limitation on the concept of conditional delivery.

Another well recognized area of non-applicability of the parol evidence rule is in interpreting the terms of an ambiguous document. The idea that extrinsic evidence is not admissible to aid in interpreting an unambiguous instrument is stated repeatedly in the Michigan cases. I will not undertake to develop fully the criticisms which can be made of this limitation. It seems based on the notion that some words, and perhaps most, have a fixed generally known meaning, and that evidence to show that the parties to the instrument attributed to its terms a different meaning is to vary, alter or contradict the

writing. This view was expressed in Mr. Justice Holmes' well-known observation that "it would open too great risks if evidence were admissible to show that when they said five hundred feet they agreed it should mean one hundred inches, or that Bunker Hill Monument should signify the Old South Church." 12

It is perhaps a sufficient answer to the proponents of this view that every day parties are so agreeing on special meanings in special codes, and that the risks are being borne. Words should be recognized as fluid symbols of meaning, used in differing ways by different persons or groups of persons and, not infrequently, by the same persons at different times. It should be realized of course, that the person who urges that five hundred feet was really intended to mean one hundred inches has, and should have, a greater risk of not persuading the court and jury that his assertion is true, than might another who asserted that "red feet", "pink feet" or some other ambiguous term meant one hundred inches. If the term is patently ambiguous, or if its common meaning makes no sense in the context, the more probable it becomes that the parties by agreement have fixed its meaning for the transaction. Also a court may properly exclude testimony of a party that when the writing he signed said, "I promise to pay $100" he really meant "I promise to pay $75." But this exclusion depends not upon the mere fact that "$100" is unambiguous, but on the fact that a person's objectively manifested intention, and not his subjective intention or will, determines the consequences of his acts. The administration of justice is not improved by attempting to handle difficult problems of the credibility of evidence or substantive questions concerning what intention shall be legally operative within the format of the parol evidence rule.

Some Flexibility

Despite the tendency expressed in the Michigan cases to limit the use of extrinsic evidence for the purpose of interpreting an instrument to those cases in which the writing is ambiguous, considerable flexibility remains. Actually it is doubtful that the asserted limitation provides much of a barrier to the admission of evidence. In the first place, in applying the rule, the court must first determine if there is an ambiguity. Here wide discretion is available. The court recognizes a distinction between patent ambiguity—that which appears from the face of the writing—and latent ambiguity—that which arises when an effort is made to apply the verbal symbols to external objects. The court holds that extrinsic evidence is admissible to show that a latent ambiguity exists, 13 and if an ambiguity is thus found it may be explained by extrinsic evidence. Ambiguity is in any event a highly relative matter. Thus the term "profit" has been held ambiguous and therefore explainable by extrinsic evidence, 14 as has the term "steam pipes and steam engines" in an insurance policy. 15 On the other hand, the Michigan court has held the words "any and all money due us" in an assignment to be unambiguous and therefore not subject to interpretation. 16 It is interesting to note, however, that in the last mentioned case the court did not in fact interpret the instrument it declared unambiguous without any reference to extrinsic evidence. It, at least, took account of the fact that the document had been prepared by one of the parties so as to apply the rule of interpretation contra proferentem.

To summarize briefly on the use of parol evidence for the purpose of interpreting a written instrument, I believe counsel is warranted in urging a court


that whether extrinsic evidence offered will vary or contradict the document cannot be determined until it is first ascertained what the words of the instrument itself mean. If these words have a generally accepted meaning which would make sense in the context, the risks are, of course, increased that the person who asserts that they really have some special, peculiar meaning will not convince the court or the jury that his assertion is true. If the trial judge is not convinced, he may exclude the evidence or tell the jury to disregard it on the ground that the instrument itself is unambiguous and needs no interpretation. On the other hand, if a substantial showing is offered that the special meaning was intended, the process of interpretation by reference to extrinsic parol evidence is usually available. As Professor Corbin has observed: "Just when the court should quit listening to testimony that white is black and that a dollar is fifty cents is a matter for sound judicial discretion and common sense. Even these things may be true for some purposes. As long as the court is aware that there may be doubt and ambiguity and uncertainty in the meaning and application of agreed language, it will welcome testimony as to antecedent agreements, communications, and other factors that may help to decide the issue."

In view of the risk that a court may foreclose use of extrinsic evidence if the terms of the document seem comprehensible and readily referable to external objects, counsel may in some cases prefer to seek reformation in equity on the ground of mutual mistake in integration, rather than to seek the same end by the process of interpretation of the instrument as written. Choosing the course to pursue requires counsel to evaluate past judicial behavior carefully in order that he may better predict the future.

**Where Admissible**

We have thus far noted that extrinsic parol evidence is admissible to show the

17. Corbin on Contracts, Sec. 579 (1951).


20. 111 Conn. 342, 149 Atl. 851 (1930).
dehors the writing. If so, such evidence must be excluded. If, however, it appears that the parties intended to restrict the writing to specific subjects of negotiations, then other subjects may be proven 'even though they be (as they always are) different from the writing.' This intent is to be sought in the conduct and language of the parties and the surrounding circumstances."

The court in the same case approved the following statement by Dean Wigmore:

"The document alone will not suffice. What it was intended to cover cannot be known until we know what there was to cover. The question being whether certain subjects of negotiation were intended to be covered, we must compare the writing and the negotiations before we can determine whether they were in fact covered."

The basic rationale of these statements is clear: before evidence of additional or different undertakings by one or more of the parties can be declared legally inoperative, the writing adduced must be established by extrinsic evidence to have been agreed upon as a final and complete integration of all the agreements. Until it has been so characterized, there is no rule of evidence or substantive law which forecloses reliance on other agreements made earlier.

It has often been thought that in determining the applicability of the parol evidence rule it was essential to determine whether the additional undertaking was collateral to the writing, not in conflict with any of the written terms, and of such nature that in common practice parties would reasonably be expected to leave it in parol while writing the rest of their agreement. I submit that, at most, these factors are some evidence of intention but not absolute requirements for the admission of the extrinsic evidence. It seems only reasonable for the trier of fact to be less inclined to believe that another promise was made, if that promise was typical of those customarily included in a writing of the kind the parties have executed, and it does not appear in the document introduced. But parties not infrequently, for reasons sufficient to them, depart from the norm. Since the so-called parol evidence rule does not purport to require a writing for validity or enforceability of the promise, the parol or extrinsic promise should be given effect if the one asserting it can convince the trier of fact that it was made and not abrogated by later agreement. The tendency to cloak the difficult process of evaluating the probative value of evidence behind a supposedly absolute rule of exclusion is a kind of judicial weasel- ing that cannot be approved.

What the Rule Is

Having explored some major areas where the parol evidence rule does not apply and having considered what it is not, perhaps we can formulate an affirmative statement of what the rule is. For the sake of simplicity, this formulation will be limited to contractual transactions. The rule might read as follows: when parties have made a valid contract, not subject to any vitiating defects in its inception, and have then accurately stated their agreement in a written instrument whose terms are clear or have been properly interpreted by extrinsic evidence, and have also agreed that the document shall be the integration of the totality of their agreement, this document cannot be altered, varied or contradicted by proof that earlier they had negotiated about or come to agreement on different terms. So stated, the parol evidence rule makes quite good sense. It amounts to nothing more than saying that if at a certain point in time, the parties have agreed that the written instrument contains the totality of their undertakings, any earlier, inconsistent agreements must have been abrogated by mutual assent. If they have been abrogated, they are legally inoperative, and there is no reason to clutter the record by introducing evidence of such matters. Thus the actual exclusion of
such evidence can be predicated on a clearly valid rule of evidence—that proof which is irrelevant and immaterial to the issues involved in the action should not be admitted. The parol evidence rule itself thus appears, not as a rule for the exclusion of evidence, but as a substantive rule of discharge or rescission of earlier undertakings which the parties have agreed shall no longer be binding upon them.

It is evident from the extended formulation of the parol evidence rule just suggested, that some troublesome questions of fact must be decided before the rule can properly be invoked. The rule is not applicable merely because there is a writing offered by one of the parties. The writing must have a very special character, given to it by the agreement of the parties. How then is the determination to be made that the writing was given that character? Who decides this preliminary question of fact? In short, how is the determination made that the parol evidence rule applies?

Certain Michigan decisions, particularly some of the earlier ones, asserted that where parties in a contractual situation have executed a writing, it must be presumed that the writing contains the totality of their agreements, that a contract cannot rest partly in writing and partly in parol.21 If by such statements the Supreme Court meant that the document in some way conclusively proves its own character, its own completeness, its own status as an integration of all the agreements of the parties, the statements are patently unsound. Putting aside for the moment a few very special cases such as the ancient document or certain instruments acknowledged before a public official, one can assert that no document proves itself in any respect, and a contractual looking document, no matter how formal in terminology or how bedecked with ribbons and seals has, per se, no more bearing on the legal relations of the parties to the lawsuit than a recent edition of the London Times. The execution and delivery of the instrument, its freedom from vitiating defects, and its completeness and accuracy as an integration of the totality of the undertakings of the parties must be established or at least may be negated by extrinsic evidence.

Impact on Trial

If the foregoing analysis of what the parol evidence rule is, is sound, does it have any meaningful impact at all on the trial of cases, beyond of course the substantive impact as a rule of discharge or rescission mentioned earlier. It clearly does in at least one respect. In common law cases we generally accept without question the proposition that the jury is the trier of fact and that it is not the proper function of the court to determine the credibility of witnesses or make the essential factual determinations. The parol evidence rule represents one rather important inroad on this generalization. For example, if a contractual transaction rests entirely in parol, the parties may adduce evidence of what the promise was, and it is clearly the function of the jury to determine if defendant made the promise which he denies and plaintiff asserts. But suppose that in the transaction, the parties executed a writing containing “promise one” by defendant and plaintiff now asserts that defendant also made “promise two” which the parties agreed should not be stated in the document. In this kind of situation, the court is inserted in front of the jury as the trier of fact on at least a tentative basis. The court will first determine whether the parties intended the writing to be the totality of their agreement, and if its conclusion is in the affirmative, it has laid the foundation for regarding evidence of the alleged oral promise made earlier as irrelevant and immaterial. Even in making this preliminary determination, the trial court should hear evidence of negotiations and surrounding circumstances, though it may determine later that this

evidence is to be disregarded. If the court at this stage concludes that the parties did not agree upon the writing as a final and total integration, it then passes on to the jury the question whether defendant actually made the promise plaintiff is asserting. In this connection the jury uses the same evidence the court considered in making its preliminary determination of the question of integration.

It is pointless here to argue the merits of this judicial pre-emption of the fact-finding function. The parol evidence rule is not its only illustration. Judicial distrust of the vagaries of juries is an age old phenomenon and perhaps it is sufficient merely to recognize its manifestations.

Inconsistencies

While the foregoing analysis of the parol evidence rule and its operation seems to me to be sound, and while it finds ample support in the Michigan cases, candor and realism require a recognition that its application has not been consistent, or, in any event, not consistently apparent. For example, Michigan is one of the minority of jurisdictions employing the parol evidence rule as a basis for rejecting proof of an express oral understanding concerning a term which would be in the writing only by implication. Thus where a written contract is silent as to the time for performance, the Supreme Court has held inadmissible evidence of an extrinsic agreement on this subject, on the ground that it would vary the implied provision for performance within a reasonable time. Yet this situation would seem to lend itself peculiarly well to a conclusion, supported by extrinsic evidence, that the parties did not agree upon the document as a final integration of the totality of their undertakings and that the extrinsic agreement should control.

In other cases the Supreme Court has disapproved the trial court's admission of extrinsic evidence or approved its rejection by the casual invocation of a supposedly clear-cut rule of exclusion without giving any real indication of the basis upon which it was concluded that the writing was a total integration superseding all earlier parol agreements. For example, there is a line of cases holding that upon sale of the assets of a going business, the sale being evidenced by a written agreement, parol evidence of a prior or contemporaneous agreement by the seller not to compete with the purchaser cannot be used. Other illustrations may be found in the cases holding inadmissible, or at least inoperative, evidence of express warranties of goods sold which are not stated in the writing. (These decisions do not, of course, foreclose reliance on an implied warranty of fitness in appropriate cases.) In many, if not all, of these cases it would be hard to argue dogmatically that the actual decision was wrong or for that matter that the court did not reach its conclusion on exactly the basis suggested here. If the trial court has heard evidence as to the negotiations and surrounding circumstances


and has then concluded that the writing was agreed upon as a final and complete integration, evidence of earlier negotiation and agreement becomes, as has been noted, quite irrelevant. If the Supreme Court later approves the trial court’s determination, it may very well elide its approving discussion by a terse reference to a rule forbidding variation of a writing parol. The cases where the Supreme Court reverses on the ground that the trial court erred in admitting the extrinsic evidence are a little harder to explain and justify. They may, however, represent nothing more than a conclusion that on the record reasonable men could only have decided that the parties did intend to integrate, that the trial court’s contrary determination was not supported by substantial evidence, and that superseded and therefore irrelevant agreements were improperly given force and effect. It can only be said that the rationale is not always clear.

Other Cases

One further group of cases is worthy of brief mention, since they seem to indicate clearly that the parol evidence rule and its proper operation have not received from our court the careful analysis they merit. For want of a better name, these may be called the “sham agreement” cases. Typically they present situations where the parties have executed a formal and *prima facie* complete instrument, contract, mortgage, etc., but have agreed that it shall not be operative at all or that the obligation shall not be complete and personal but will only be satisfied in a particular way or out of a particular source. Here the Michigan cases seem to be in hopeless conflict and confusion. For example, it was held in an early case that parol evidence was admissible to show that a purchase money mortgage was agreed to be a sham, given only to keep the mortgagor’s relatives from knowing he had given the land to the mortgagor.27 Similarly, evidence was admitted to show that a written land contract was agreed to be without binding effect, signed only to mislead the vendor’s children, and that the vendee could get specific performance of an earlier, unabrogated oral agreement.28 The court has approved the admission of evidence to show an oral agreement that a contract to pay for the services of a tree surgeon was understood to be unenforceable and to have been signed only to indicate that the workers had completed the job.29 In an action on a promissory note signed by defendant as guardian of a minor, the Supreme Court approved the use of evidence that defendant was not authorized to bind the infant’s estate and that there was a parol understanding that defendant would not be personally liable on the note.30 Other illustrations of similar import could be given.31

On the other hand, the Supreme Court has held extrinsic evidence inadmissible to show that a note, signed by defendant, was agreed to be, not a personal obligation, but one to be paid, if at all, only from the dividends of certain stock.32 The court also has disapproved the use of extrinsic evidence to show that a note signed by defendant was understood and agreed to be unenforceable and to have been given for the sole purpose of clearing the records of a stock broker until certain stock could be sold elsewhere.33

The cases in the first group referred to are entirely understandable and are in accord with the views on the use of parol evidence expressed here. If the statements in the latter group of cases are taken literally, they can only mean that the Supreme Court has not always recognized that the parol evidence rule does not, or should not, be applied to protect a document until that document has been established as the final and complete integration of a contract which the parties meant to be presently enforceable according to its terms.

Enough of the Michigan cases have now been examined to indicate a rational and workable theory concerning the use of parol evidence, particularly in contract cases. Clearly however, such a theory or principle has not been consistently applied in Michigan decisions. A careful review of the cases in this area warrants the conclusion that the so-called parol evidence rule has been responsible for the wastage of much good paper and ink, for the needless expenditure of valuable time by counsel and courts, for an unfortunate confusion and lack of predictability as to the kind of evidence upon which litigants can rely, and doubtless in some instances, for a failure of our litigious processes to do justice. The rule can be analyzed and criticized until its apparent substance vanishes like a wisp of smoke. It would be a real improvement of our legal system if all the compiled learning about the parol evidence rule could, along with the rule itself, be simply expunged from the books or, at most, retained only to the extent of authorizing an instruction to the jury as to the burden of proof or the weight of evidence in actions where a party seeks to add to or contradict a written instrument.

The primary function of the advocate—the practicing lawyer—is not, however, the reformation of our legal system. He will be living and working with the parol evidence rule and with courts and opposing counsel who may regard it as an essential defense of the sanctity of instruments. Can any practical suggestions be made for wending a way safely through the maze of doctrine and conflicting decisions? I would like to state, very briefly, five suggestions, which, in part, recapitulate views expressed here.

1. On those happy occasions when the client consults a lawyer before acting and some opportunity is thus available for shaping the transaction, the lawyer can avoid much grief by seeing that any writing prepared is in fact inclusive of all the agreements which have been made. I am not concerned now only with writings required by law but also with those optional writings around which the parol evidence rule problem may arise. Some of the best advice available is tersely stated in Dean Mason Ladd's fine epigram: "If you write at all, write it all."

2. If the client is confronted by a claim upon an instrument which does not accord with the meaning he insists the parties intended the instrument to have, the lawyer must choose between two courses: (a) to seek to use extrinsic evidence for the purpose of interpreting the instrument so as to give its words a proper meaning or (b) to seek reformation of the instrument on the ground of mistake. Which course should be followed may depend on several considerations: (1) if the instrument is thought to be ambiguous, interpretation by reference to parol evidence is a clear channel; (2) if the offending words appear to be clear and have a generally accepted meaning which makes sense in the context, the reasons for using the equity road to reformation become stronger; (3) traditional equity doctrine concerning the burden of proof in reformation suits may counter-balance to some extent the advantages of the reformation proceeding. If the lawyer is urging a court to listen to extrinsic evidence for purposes of interpretation, he is certainly warranted in insisting that variation or modification of the instrument cannot be found until it is first determined what the instrument means.

3. The lawyer should be mindful of the fact that the parol evidence rule does not foreclose reliance on evidence
to show that the instrument is voidable because of fraud, duress, accident or mistake. These flexible concepts will open the door in many situations.

4. The lawyer should remember that the parol evidence rule does not apply to proof that the instrument never became an effective contract. Where the defense on a contract claim is essentially breach or non-occurrence of a condition precedent, it is frequently quite as easy, and in many respects quite as realistic, to regard the condition as precedent to the existence of a contract, as to regard it as a condition precedent to a promise within a contract. The conditional delivery analysis can often be used to avoid the stringencies of the parol evidence rule.

5. If it is clear to the lawyer that the instrument was validly executed as a presently effective contract but his client insists that other promises were also made, he may be able to get parol evidence in, not by making a frontal attack on the parol evidence rule, but by emphasizing that he seeks to show that the document was agreed upon as only a partial and not as a total integration of the contract. He can, with support from the best authorities, assert that until the latter fact is established the parol evidence rule has no application. He should emphasize the fact that the document simply cannot prove itself.

Theories are available for avoiding the parol evidence rule or limiting it to its proper sphere. If the extrinsic evidence is weak and not reasonably believable, it probably should not be given effect in any event, and one cannot complain too much if the shovel used to dig its grave is the parol evidence rule. On the other hand, if the evidence is substantial, and, if true, sufficient to show a meritorious claim or effective defense, analyses which may avoid the application of the rule and get the evidence to the trier of fact are at the lawyer’s disposal.

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