



8-1-1955

Evidence -- The Parol Evidence Rule: Its Narrow Concept as a Substantive Rule of Law

Paul R. Jackiewicz

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

Recommended Citation

Paul R. Jackiewicz, *Evidence -- The Parol Evidence Rule: Its Narrow Concept as a Substantive Rule of Law*, 30 Notre Dame L. Rev. 653 (1955).

Available at: <http://scholarship.law.nd.edu/ndlr/vol30/iss4/4>

This Note is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

NOTES

Evidence

THE PAROL EVIDENCE RULE: ITS NARROW CONCEPT AS A SUBSTANTIVE RULE OF LAW

Introduction

The nature of the parol evidence rule as a substantive rule of law has in some respects been questioned by the reasoning of the courts. On the surface the rule seems to present no problem as to its application. Briefly expressed, it states “. . . parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument.”¹ Nevertheless, evidence which is admitted without objection in proving a written instrument has been held to constitute a waiver of the rule.² The question immediately arises whether the parol evidence rule, by its very nature, is subject to waiver.

Logically speaking, the application of the waiver doctrine to the parol evidence rule cannot be reconciled with the principle of the rule.³ The term “valid written instrument” points at the principle upon which the rule rests. That is, the rule protects jural relations which men create between themselves and which have been set down in writing. It favors the written work and thus has become especially adaptable to the customs of the business world. The policy⁴ of the rule operates upon this principle and seeks to interpret the jural relation created according to the terms used in the instrument and thereby exclude parol evidence as a matter of right. This right has been restricted, however, by the conflicting right, also recognized by the courts, to have the terms of the writing interpreted in the way they were intended.

The parol evidence rule, because it is so broad, is subject to many exceptions upon which parol evidence may be admitted to

¹ 1 GREENLEAF ON EVIDENCE 372 (15th ed. 1892).

² *Higgs v. DeMaziroff*, 263 N.Y. 473, 189 N.E. 555 (1934).

³ “Of *principle*, because such instruments are in their own nature and origin entitled to a much higher degree of credit than that which appertains to parol evidence.” 2 STARKIE ON EVIDENCE 544 (1837).

⁴ “. . . of *policy*, because it would be attended with great mischief and inconvenience if those instruments upon which men’s rights depended were liable to be impeached and contradicted by loose collateral evidence.” *Ibid.*

⁵ “That rule [parol evidence] already has so many exceptions that only with difficulty can it be correctly stated in the form of a rule.” Corbin, *Conditional Delivery of Written Contracts*, 36 YALE L.J. 443, 456 (1927).

prove a writing.⁵ These exceptions are categorized according to the four aspects of the rule which include: 1) Creation; 2) Integration; 3) Solemnization; and 4) Interpretation.⁶ Many courts mistakenly conclude that the parol evidence rule is subject to the waiver doctrine on the basis of the admission of evidence under one of these exceptions.⁷

Another means of admitting parol evidence follows as a consequence to the tendency of the courts to determine the true intent of the parties when such is not readily ascertainable from the terms of the writing.

. . . the words of the document should be allowed to have the meaning and operation which the writer meant them to have, and therefore the process of interpretation should, subject to these rules, take account of the writer's actual intention.⁸

The use and application of the exceptions to the rule has certainly caused much of the confusion in the decisions concerning the proper application of the rule.⁹ This has led Professor Thayer to say of the rule, "Few things are darker than this, or fuller of subtle difficulties."¹⁰ But these instances of admitting parol evidence do not obtain under the waiver doctrine and must be distinguished. The problem involving the application of the waiver doctrine lies elsewhere.

Waiver and Procedural Consequences

The problem of waiver is at issue in a case where parol evidence, otherwise rejected under the rule, is admitted without objection. The question then arises as to whether counsel may later seek to have such evidence, whether it be oral testimony or other written matter,¹¹ struck from the record; or the matter may come up in a request for a jury instruction; or it may come for the first time on appeal.¹² Most courts agree that if the matter

⁶ 9 WIGMORE ON EVIDENCE §§ 2400-2478 (3d ed. 1940).

⁷ Discussed *infra*, note 22.

⁸ THAYER, PRELIMINARY TREATISE ON EVIDENCE 390 (1896).

⁹ As to the conflict appearing in one state alone, see *Hanrahan-Wilcox Corp. v. Jenison Machinery Co.*, 23 Cal. App.2d 642, 73 P.2d 1241 (1937).

¹⁰ Thayer, *op. cit. supra*, note 8 at 390.

¹¹ The parol evidence rule applies to matters written as well as oral, 5 WIGMORE ON EVIDENCE § 2400 (3d ed. 1940).

¹² Other instances where the parol evidence rule may be initially applied: in ruling upon a demurrer to the evidence, *Seal Oil Co. v. Roberson*, 175 Okla. 140, 51 P.2d 801 (1935); or a motion for nonsuit, *Hanrahan-Wilcox Corp. v. Jenison Machinery Co.*, 23 Cal. App.2d 642, 73 P.2d 1241 (1937); or in a motion for a directed verdict, *Mears v. Smith*, 199 Mass. 319, 85 N.E. 165 (1908).

is brought up before the trial court, and it is ruled on, the decision is binding upon the appellate court.¹³ Likewise, the courts hold that the matter cannot be brought up initially on appeal.¹⁴ Thus, it becomes essential, in the light of these procedural matters, to determine whether the parole evidence rule is subject to waiver.

One of the most common errors in the decisions that consequently leads to the most significant procedural disadvantages, is the treatment of the parole evidence rule as a rule of evidence.¹⁵ This perhaps results from the fact that the application of the rule as substantive or procedural has been relegated to the courts.¹⁶ Both operations have the problem of admissibility of evidence in common but this is where the analogy stops. The incompetency of evidence under either rule is determined by a different set of rules, the one procedural, the other substantive.¹⁷ It can be readily seen that where no distinction is made between substance and procedure a great disadvantage accrues to the lawyer who brings suit in reliance upon the validity and inviolableness of a written instrument.

When parole evidence is thus admitted upon the same basis and under the same rules that ordinarily govern the admissibility of incompetent evidence, consideration of such evidence is given to the court and jury, and if it shall have probative value, due weight will be given it accordingly, notwithstanding the fact that it varies or contradicts the writing in issue.¹⁸ A ruling that the decision of the court may be based upon such evidence has

¹³ *Higgs v. DeMazirow*, 263 N.Y. 473, 189 N.E. 555 (1934).

¹⁴ *Ibid.* The appellate court will not consider the question of the admissibility of evidence which was admitted without objection, *Coppinger v. Broderick*, 37 Ariz. 473, 295 P.2d 780 (1931). Objection at the proper time with an exception taken to an adverse decision preserves the record for appeal, 3 AM. JUR., *Appeal and Error* § 344 (1939).

¹⁵ Typical of these holdings is the statement made in *Sykes v. Everett*, 167 N.C. 600, 604, 83 S.E. 585, 588 (1914), "This is a question of evidence, and the admission of the oral proof could only be incompetent on the ground that it would vary, alter, or contradict the terms of a contract which the parties have reduced to writing as the only expression of their agreement, and would violate the general rule of evidence prohibiting the introduction of such evidence."

¹⁶ *Gianni v. R. Russell & Co.*, 281 Pa. 320, 126 Atl. 791 (1924); the law of evidence has been judicially determined as a result peculiar to the Anglo-Saxon system of jury trials, TRACY, *HANDBOOK OF THE LAW OF EVIDENCE* 1 (1952).

¹⁷ That admissibility under the parole evidence rule is governed by substantive rules, see note 34, *infra*.

¹⁸ An exclusionary rule of evidence not invoked is waived, *Tralle v. Chevrolet Motor Co.* 230 Mo. App. 535, 92 S.W.2d 966 (1936).

been upheld.¹⁹

Where a party utilizes parol evidence in support of his own case it is in for all purposes.

But whether the evidence was competent in this view or not, it was admissible because the plaintiff, having opened the door and availed himself of its benefit, was foreclosed from precluding the defendant from its benefit.²⁰

The plaintiff cannot therefore introduce parol evidence to substantiate his position and object to parol evidence on the part of the defendant to rebut the contention.

The procedural aspects of this problem are obvious. If the substantive rights commensurate with the principle and policy of the parol evidence rule are to be protected, the courts must make a distinction between substance and procedure. Such a distinction would help clarify the reasoning of the decisions and it would be a great help to counsel, if for no other reason, than to create a basis for appeal.

The Higgs Case

The question of waiver by a failure to object was faced in the case of *Higgs v. DeMazirow*.²¹ There parol evidence was admitted without objection and at the end of the trial counsel sought to have the jury instructed to disregard the oral testimony regarding the written contract. The lower court refused, but on appeal this was reversed and the motion allowed. The court stated, however, that since attention had properly been directed to this question in the trial court and ruled on, it was proper for appeal. Notwithstanding the substantive nature of the parol evidence rule, however, the court intimated that had no objection been made a waiver of this right would have been effected.

The *Higgs* case, in applying the waiver doctrine to the parol evidence rule, reflects the minority holding of the decisions in point.²² The minority holdings proceed under the general principle that a rule of evidence not invoked is waived.²³ The reasoning in support of these holdings is that parties in litigation may, by agreement, make their own rules of evidence for their

¹⁹ *Sahm v. Realty & Ins. Exch.*, 138 Md. 653, 114 Atl. 567 (1921); *American Gas Control Co. v. Kramer*, 21 Misc. 57, 46 N.Y. Supp. 871 (1897).

²⁰ *Sun Printing & Publishing Association v. Edwards*, 113 Fed. 445, 448 (2d Cir. 1902).

²¹ 263 N.Y. 473, 189 N.E. 555 (1934).

²² See Note, 92 A.L.R. 810 (1934).

²³ *Brady v. Nally*, 151 N.Y. 258, 45 N.E. 547 (1896).

own case, and that parties may consent to the waiver of any rule of law except when contrary to the interests of the public.²⁴ As applied in this sense it becomes difficult to distinguish the parol evidence rule from a mere rule of evidence.²⁵

The cases fail to establish a consistent explanation of how the waiver doctrine can be reconciled with the parol evidence rule as a substantive rule of law. One case does make the point, more or less as dictum, that in admitting parol evidence without objection, ". . . a party allows the issue to be changed. . . ."²⁶ This is premised on the theory that the parties, in admitting parol evidence to prove a written contract, agree that the writing was not intended to be a final memorial of the contract. This appears as an attempt to base the waiver doctrine upon the admission of parol evidence under one of the generally accepted exceptions to the parol evidence rule, namely, the "partial integration" doctrine.²⁷

Where an exception to the parol evidence rule is involved, some courts fail to recognize that the admission of parol evidence is not dependent upon waiver by a failure to object.²⁸ The evidence is duly admissible whether objected to or not. Instances in which the courts mistakenly apply the doctrine of waiver in situations that are really exceptions to the parol evidence rule occur when evidence is admitted in proof of fraud,²⁹ and where the writing involved does not purport to cover the entire agreement.³⁰ The waiver doctrine has been applied to evidence otherwise in effect admissible under the best evidence rule.³¹ These cases must be distinguished since, in effect, they admit parol evi-

²⁴ *Ibid.*

²⁵ "Of course, the rule against introduction of parol evidence to contradict, vary, add to or take from a written contract, though accorded a high degree of sanctity and rigidly enforced by the courts, like any other mere rule of evidence, may be waived by failure to invoke it." *Leckie v. Bray*, 91 W.Va. 456, 459, 113 S.E. 746, 748 (1922); West Virginia has since amended its holding recognizing that, "The reference in the *Leckie Case* is clearly inadvertent." *Hall v. Burns*, 113 W. Va. 820, 169 S.E. 522, 523 (1933). The latter case declared that the rule is substantive. Cf. *Baird v. Divide County*, 58 N.D. 867, 228 N.W. 226, 230 (1929), where in showing an ultra vires act it was said, "It is elementary that the parol evidence rule may be waived."

²⁶ *McCarney v. Scott*, 146 F.2d 624, 626 (2d Cir. 1944).

²⁷ 5 WIGMORE ON EVIDENCE § 2425 (3d ed. 1940). The counterpart to this doctrine is the "collateral agreement" doctrine, *Mitchill v. Lath*, 247 N.Y. 377, 160 N.E. 646 (1923).

²⁸ As where a stranger may not invoke the parol evidence rule, *Larsen v. Sjogren*, 67 Wyo. 447, 226 P.2d 177 (1951).

²⁹ *Graham v. Smither*, 53 Cal. App. 2d 701, 127 P.2d 1024 (1942).

³⁰ *Maison Blanche Co. v. Gilbride*, 164 So. 813 (La. 1935).

³¹ *Brown v. Jones*, 137 Ore. 520, 3 P.2d 768 (1931).

dence under an exception; they cannot be considered as holding the parol evidence rule can be waived by a failure to object.

If all courts recognized that substantive rights were not subject to waiver, the only problem would be to determine whether the parol evidence rule in that particular jurisdiction was substantive or procedural, that is, a mere rule of evidence. But the fact that the rule, even when it is substantive, following the ruling in the *Higgs* case, can be waived, the outcome becomes unpredictable. The final consequence of the minority ruling in this respect is inconsistent with the policy and principle of the parol evidence rule as a substantive rule of law.

The Majority View

Most courts agree with the authorities that the parol evidence rule is a substantive rule of law and not a mere rule of evidence.³² Based upon this, the majority holding is to the effect that parol evidence admitted without objection does not constitute a waiver.³³ Apparently, the basis for the rule stems from the theory that a failure to object to evidence at the time it is introduced, does not, as a matter of law, concede the competency of such evidence.

It does not follow that the omission to object to testimony is a concession that it is competent. Counsel may deem certain evidence offered entirely irrelevant and immaterial, and therefore harmless, and for that reason, raise no objection to its introduction.³⁴

In this sense, the majority ruling appears to be more logical and

³² As to the meaning of the rule as a substantive rule, see *Mitchell v. Lath*, 247 N.Y. 377, 160 N.E. 646 (1928), "... the parol evidence rule—a rule of law which defines the limit of the contract to be construed." *Pitcairn v. Philip Hiss Co.*, 125 Fed. 110, 113 (3d Cir. 1903), "The writing is the contractual act, of which that which is extrinsic, whether resting in parol or in other writings, forms no part." *Fogelson v. Rackfay Construction Co.*, 300 N.Y. 334, 336, 90 N.E.2d 881, 882 (1950), "An important principle of substantive law . . . it was designed to permit a party to a written contract to protect himself against 'perjury, infirmity of memory or the death of witnesses.'" See also, *Heckmann v. Van Graafeiland*, 291 S.W. 190 (Mo. 1927).

³³ *Bauer v. Monroe*, 158 P.2d 485 (Mont. 1945); *F.N. Phillips Co. v. Gay's Express, Inc.*, 112 Vt. 49, 20 A.2d 102 (1941), in which case Vermont repudiates the minority doctrine and adopts the substantive law view; *Pitcairn v. Philip Hiss Co.*, 125 Fed. 110 (3d Cir. 1903). See Note 92 A.L.R. 810 (1934).

³⁴ *Hamilton v. New York Central R.R.*, 51 N.Y. 100, 106 (1872). "A deliberate purpose, to waive the rule as to the binding force of a written contract is hardly inferable from a mere omission to object to evidence of a contemporaneous oral agreement which under the law could not effect it." *Edward Thompson & Co. v. Foster*, 101 Kan. 14, 165 Pac. 841, 842 (1917).

commensurate with the nature and principle of the rule.³⁵

The majority view recognizes that although the parol evidence rule concerns itself with evidence, it is not ordinary evidence in the sense that it falls subject to the law of evidence. The distinction between evidence and the law of evidence is the gist of a proper analysis of the rule.³⁶ There is a difference between evidence which should be excluded because it lacks probative value, or because it was not properly obtained, and evidence which is otherwise admissible under the ordinary rules of evidence, but which should be excluded as a matter of right based on other grounds.

Relaxed Treatment of the Parol Evidence Rule

Perhaps the relaxed treatment of the parol evidence rule as a substantive rule of law is due mainly to the fact that because many of the reasons for the rule have disappeared, the rule itself fails.³⁷ The substantive reasons for the rule have been decreased by modern policies and practices; many of the historical reasons for the rule have been outmoded; and modern judicial practice is far removed from the formalism required by the strict period of the law.³⁸ The realization of this fact is engendered mostly through modern commercial practice; and the modern mediums of communication, such as the telephone and stock exchange practices, have had their effect. Also the growing complexity of transactions and brevity in drafting have engendered reliance upon auxiliary oral communiques.³⁹ The remedy-seeking objectives of the equity courts have played an important role in this field also.⁴⁰

³⁵ See notes 3 and 4, *supra*.

³⁶ The changes that have occurred in the parol evidence rule are due to a narrowing of the substantive nature of the rule and not to a broadening of the law of evidence. THAYER, *op. cit. supra*, note 8, at 406. A distinction rarely found appears in *Dollar v. International Banking Corp.*, 13 Cal. App. 331, 109 Pac. 499, 504 (1910), "The purpose of the rule relating to the varying of a writing by parol evidence is to prohibit this from being done, while the rule relating to the admission of secondary evidence goes only to the form in which the evidence may be introduced."

³⁷ For an extreme argument advocating the full abolition of the parol evidence rule, see the opinion of Judge Frank in *Zell v. American Seating Co.*, 138 F.2d 641 (2d Cir. 1943), *rev'd per curiam*, 322 U.S. 709 (1943).

³⁸ Formalism, ". . . left little or nothing, at all events within the sphere of procedure, to the discretion of the justices." 2 POLLOCK & MATTLAND, *THE HISTORY OF ENGLISH LAW* 563 (2d ed. 1952). See discussion, *United States v. Forness*, 125 F.2d 928, 935 (2d Cir. 1942).

³⁹ See GRAY, *THE NATURE AND SOURCES OF LAW* 292 (2d ed. 1927).

⁴⁰ W. Barbour, *Some Aspects of Fifteenth-Century Chancery*, 31 Harv. L. Rev. 834 (1918).

Historically speaking, the parol evidence rule was evolved much in the nature of a rule of evidence, and like a rule of evidence has experienced a practical change in its application. The rule claims ancestry in the distrust of the jury which is common to many rules of evidence.⁴¹ Modern jury practice, as compared with the days when the jurors were themselves witnesses, has, to a great extent, removed such suspicion of the integrity of the jurors.

Nevertheless, the court still has the duty of deciding whether the parol evidence rule applies and in so doing they determine the latitude of jury determination. Along these lines comes the theory, advanced by Professor Williston, that whenever the question is whether the parties intended the writing to incorporate the whole agreement, the issue should go to the jury with all the facts and the writing should control, with the test finally resting on the inherent probability of such parol collateral agreement.⁴² Professor Wigmore also says the question of total integration is one of fact, and favors the jury determination.⁴³ Therefore, with what degree we may say that the confidence in the veracity of jury determinations has grown, we may say with like degree that the tendency toward a more liberal application of the parol evidence rule has advanced.

Another historical reason for the parol evidence rule, the strict reverence held for the written word, has since then relaxed mostly through the effect of modern business practice. Jural relationships, as enforced by the courts, are now founded more and more upon the intent of the parties.⁴⁴ It is the fact of intent and not the mere form thereof, which has invited the formation of new standards. The means of ascertaining intent are no longer relegated to the writing, and courts have proved such jural relationships ac-

⁴¹ McCormick, *The Parol Evidence Rule as a Procedural Device for the Control of the Jury*, 41 *YALE L.J.* 365 (1932).

⁴² 3 *WILLISTON ON CONTRACTS* § 638 (rev. ed. 1938).

⁴³ 9 *WIGMORE ON EVIDENCE* § 2430 (3d ed. 1940). Cf. *Cobb v. Wallace*, 5 *Coldwell* 539, 98 *Am.Dec.* 435 (*Tenn.* 1868), advocating the question is for the jury, with the weight of authority as represented in *Naumberg v. Young*, 44 *N.J.L.* 331, 43 *Am. Rep.* 380 (1882), holding that the intent should be interpreted only from the writing.

⁴⁴ "The application of the rule, resting as it does upon the parties' intent, can be properly made only after a comparison of the kind of transaction, the terms of the document, and the circumstances of the parties." 9 *WIGMORE ON EVIDENCE* § 2442 (3d ed. 1940). Pursuant to the object of showing actual intent, ". . . oral evidence may be received, for the purpose of showing [sic] what that subject-matter was, of every fact within the knowledge of the parties before and at the time of the contract." *MacDonald v. Longbottom*, 120 *Eng. Rep.* 1177, 1179 (1859); cf. *Doherty v. Hill*, 144 *Mass.* 465, 469, 11 *N.E.* 581, 583 (1887).

ording to objective standards.

The courts of equity have provided another facility for deminimizing the parol evidence rule as a substantive rule. The policy of these courts has always been convenient for loose procedural practices so far as evidence is concerned.⁴⁵ Hence, in equity, where remedy is the objective, the courts are not relegated to strict procedural rules of law, nor are they hampered by absolute substantive rules.

Conclusion

It would seem that the present day narrow concept of the substantive nature of the parol evidence rule is a result of many factors. To name a few, the modern liberal trend of the courts, the retirement of formalism, modern business practice, and the policy of the equity courts. All these factors create exceptions to the rule. The great number of exceptions that have developed to the substantive rule have had their sterilizing effect and there exists today very little practical application of the rule. Consequently, substantive rights afforded thereby have been easily avoided by the courts and the waiver doctrine has been applied more readily.

The modern trend of the courts along with the almost total absence of any of the historical reasons for the substantive application of the rule has minimized the distinction between substance and procedure so far as the parol evidence rule is concerned. Nevertheless, this distinction should be made in light of the procedural consequences which may result in its absence. The failure of the courts to make this distinction is not commensurate with the policy that seeks to protect the substantive rights of an individual. The waiver of the right to have incompetent parol evidence excluded is especially dependent upon this distinction. Such questions will remain unsolved if the courts persist in failing to distinguish the rule from the exceptions to it, and in treating the rule as a mere rule of evidence.

Paul R. Jackiewicz

⁴⁵ "Courts of equity by the end of the seventeenth century, besides looking more freely at extrinsic facts, had begun to use a writer's extrinsic expressions of intention in a much freer way than courts of law." THAYER, *op.cit.* *supra* note 8, at 429. This theory is applied in proving lost or concealed instruments, *J.A.B. Holding Co. v. Nathan*, 120 N.J.Eq. 340, 184 Atl. 829 (1936); where issues of fact in a chancery suit are tried by the chancellor, a demurrer to the evidence will not be considered, *Hiss v. Hiss*, 283 Ill. 414, 81 N.E. 1056 (1907).