



3-1-1930

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Recommended Citation

Joseph Urquico, *Parol Evidence Rule*, 5 Notre Dame L. Rev. 303 (1930).

Available at: <http://scholarship.law.nd.edu/ndlr/vol5/iss6/2>

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Parol Evidence Rule

By JOSEPH URQUICO

The term "parol" is of French origin. Its literal meaning is word, or speech. In this sense it is synonymous with the term "oral." In practice, however, it also has a conventional meaning. As applied to contracts it means not under seal. In other words a parol contract is a simple contract, as distinguished from a contract under seal. It may be in writing, or merely oral. If a contract under seal be subsequently modified by oral agreement of the parties it will become thereby wholly parol. This has been decided in *Munroe v. Perkins*, 26 Mass. 298.

The term "parol" as used in the law of pleadings, has also a conventional meaning. The pleadings themselves are called the parol; and in some cases the term is used to denote the entire pleading in the cause.

In the law of evidence, the term is also used in conventional sense. As used in the phrase "Parol Evidence Rule" it is synonymous with term "verbal" as distinguished from the term "oral." These two terms, however, are often incorrectly used and interchangeably.

The Parol Evidence Rule, is one of the most ancient rules of evidence of wide application which rests upon the principle that no testimony can be received to contradict, vary, add to, or subtract from the terms of a valid written instrument. The two chief reasons for the rule are: (1) The uncertainty of memory, and (2) The danger of falsehood. The rule is also founded on the long experience, that written evidence is so much more certain and accurate than that which rests in fleeting memory only, that it would be unsafe, when parties have expressed the terms of their contract in writing, to admit weaker evidence to control and vary the stronger, and to show that the parties intended a different contract from that expressed in the writing signed by them. Justice Sewall says, "The preference which the law gives to written evidence, when compared with parol testimony, of parol agreements, is the unavoidable result of experience. It is impossible to attain that certainty and exactness in the one form of evidence, which is found in

the other. When a contract has been stated in a writing assented to and signed by the parties concerned, and that continues in being, and under the control of the parties relying upon it, evidence of the other parol agreements, to explain or vary the written agreement, would be a rejection of that evidence which is necessarily the best. Justice Dean says, "If it were not for the rule, no man would be able to protect himself by the most solemn forms and attestation against falsehood, misrepresentation and perjury." Mr. Stephen states the rule more fully in this way: "When any judgment of any court, or any other judicial or official proceeding, or any other disposition of property had been reduced to the form of a document or series of documents, no evidence may be given of such judgment or proceeding, except the document itself, or secondary evidence of its contents in case in which secondary evidence is allowed. In *Van Sickel v. Dalrympel*, it was held that when the parties to a contract had deliverately put their engagement into writing, in such terms as to import legal obligation without any uncertainty as to the object or intent of their engagement, it is conclusively presumed that every part of their contract it was reduced to writing, and oral evidence therefore of what was said during the negotiations of the contract, or at the time of the execution must be excluded on the ground that the parties have made the writing the only repository and memorial of the truth, and whatever is not found in the writing is waived and abandoned.

In *Weston v. Ames*, (Thayer 115) it was decided, that a written contract can not be altered by parol evidence to show that a particular ship different from that described in the policy of insurance, was verbally accepted at the time of the contract.

There are, however, numerous exceptions and qualifications which limits the application of the parol evidence rule. If the rule were strictly applied to those writings, which are incomplete, informal or transitory in their character, it might be deemed unreasonably rigid and harsh, but there can be no such criticism of the rule when applied to those more solemn documents in which the parties have made a complete and distinct memorial of their agreement.

One of the cases which we may regard as a qualification of the general rule, is the case when an oral evidence is introduced on the ground that duress or fraud has been perpetrated in the execution of the contract. Such proof does not recognize the contract as ever existing as a valid agreement, and is received from the necessity of the case, to show that, that which appears to be a contract is not and never was a contract. In *Day v. Lown*, it was decided, that parol evidence may be introduced to prove that a conveyance or other contract has been obtained by fraud, or that the wrong boundaries have been pointed out in the sale of land. For the purpose of proving the fraud, verbal statements which are material and fraudulent, although made before or at the same time with the written agreement, may be proved. In such case the rule that prior negotiations are merged in the written agreement does not apply; this has been decided in *Johnson v. Cummings* (55 P. 269).

Since it may always be shown that the document in question never had a legal existence, it follows that it may be shown to be tainted with illegality. In such case the court will go behind the apparently valid and written instrument, and deal with transaction on its merits; and it is immaterial whether the illegality of the transaction is created by the statute, or whether it is immoral, or in some other way contravenes the general policy of the law. In *Sherman v. Whilder*, (106 Mass. 537) has been decided, that a contract which was made for the furtherance of an adulterous intercourse, was null and void as against public policy. On the same general principle it may be said that evidence may be introduced to show by parol evidence that the apparent written contract has no legal existence by reason of the incapacity of the party to make a contract. In *Barret v. Buxton* (2 Atl. 267) it was decided that a contract was null and void because one of the parties was intoxicated. In *Van Valkenburg v. Rourke* (12 Atl. 357) it has been decided that the infancy is a legal impediment which prevented the making of a binding contract.

One of the well recognized exceptions to the general rule, against varying the terms of a written instrument is that the rule does not apply in all cases to exclude evidence

of mistake of fact. The right to vary an instrument by proof of mistake is based solely on the ground that it would operate as a fraud upon the party in the given case, if the alleged mistake could not be corrected. In *Razor v. Razor* (142 Ill. 375). It was decided that parol evidence is admissible to show the intention of the parties with the view of correcting the mistake. We must therefore treat the cases in which equity affords relief, and allows parol evidence to vary and reform written contracts and instruments upon the ground of accident and mistake, as properly forming like cases of fraud, exceptions to the general rule, which excludes parol evidence, and as standing in the same policy as the rule itself. In *Emery v. Molher* (62 Ill. 69). It has been held that "Strangers to a written instrument, when their rights are concerned, are at liberty to show by parol evidence, that the contract of the parties is different from what it purports to be on the face of the writing. And the rule that parol evidence is not admissible to vary the terms of a written contract is not applicable to a suit between one of the parties to it and a third person."

Dates of written instrument are, like the consideration, prima facies correct. But the date is treated as one of the mere formal parts of the instrument; and parol evidence is often admitted to show that, through mistake or some other reason, the date named is incorrect. The rule that dates are presumed to be correct does not apply where there is reason to suspect that the date is false because of collusion. The most common illustration of this is in cases where adultery is the issue, and the dates of letters between the parties become material. In such cases no presumption of correctness should be relied upon, but the dates should be proved to be correct. In *Sweetser v. Lowell* (33 Mass. 446). It has been held that, it may be shown that a note offered in evidence is the one secured by a mortgage, though it vary in date from the description of it given in the mortgage. In *Vaughan v. Parker*, (16 S. E. 908) it was allowed to prove by parol evidence that a writ bearing date on Sunday was in fact made on a different day.

Where a writing although embodying an agreement, is manifestly incomplete, and is not intended by the parties

to exhibit the whole agreement but only to define some of its terms, the writing is conclusive as far as it goes. But such parts of the actual contract, as are not embraced within its scope, may be established by parol. Thus has been decided in *Joannes v. Mudge*, (6 Allen, 345). That when an agreement is made between parties and for some reason or another the place of carrying out of the contract is not specified, it is clearly manifested the incompleteness of the contract and in this case, parol evidence is allowed to prove as to what place they agreed to have the contract carried out. Incomplete documents are not within the scope of the parol evidence rule. A contract which is partly in writing and partly oral is regarded as a parol contract; and extrinsic evidence is admissible to prove the oral part, provided such evidence is not repugnant to the written part.

Parol evidence is admissible in the construction of contracts, to define the nature and qualities of the subject matter, the situation and relation of the parties, and all the circumstances, in order that the court may put themselves in the place of the parties, see how the terms of the instrument affect the subject matter, and ascertain the signification which ought to be given to any phrase or term in the contract which is ambiguous or susceptible of more than one interpretation; and this although the result of the evidence may be to contradict the usual meaning of terms and phrases used in the contract; but if the words are clear and unambiguous a contrary intention may not be derived from the circumstances. Thus, in the following bequests, "I give and bequest to my son William the sum of i.x.x. To my son Robert Charles the sum of o.x.x.," etc., parol evidence is admissible to show the meaning of the letters i.x.x. and o.x.x. *Kell v. Charmer* 23 N. E. 869.

It sometimes happens that the subject-matter of a document, after being correctly and completely described, is given a super-added and incorrect description. In such cases the latter description may be rejected as surplusage. As said by Chief Justice Caton, "If I give a bill of sale of my black horses, and describe them as being now in my barn, I shall not avoid it by showing that horses were in the pasture or on the road. The description of the horses being

sufficient to enable witnesses acquainted with my stock to identify them, the locality specified would be rejected as surplusage. Nor is this rule confined to personal property. It is equally applicable to real estate. If I sell an estate, and describe it as my dwelling house in which I now reside, situated in the city of Ottawa, I shall not avoid the deed by showing that my residence was outside the city limits.

Parol evidence is admissible to rebut a disputable presumption of law raised by principles of equity against the apparent intention of the parties as expressed in a document. Thus has been decided in *Hurst v. Beach* 5 Madd. 351 (1829). That where two legacies, of like terms and motives, are bequeathed to the same party by the same testator, in different instruments, a disputable presumption of law is raised that the legacies are not cumulative; and parol evidence is admissible to rebut this presumption. The effect of the parol evidence in such a case is not to show that the testator did not mean what the will states, but rather to show that he did mean what it states.

Parol evidence is admissible to prove a prior parol agreement, where the purpose of introducing the parol agreement is to show that the written contract was not to be binding until the performance of some condition precedent resting in parol, and where the purpose of the action is to recover damages for breach of the parol agreement, and not to defeat an action on the written contract. Thus it has been decided in *Morgan v. Griffith*, Thayer 842. That the verbal agreement was entirely collateral to the lease and was founded on good consideration, namely the promise of defendant to destroy the rabbits, without the performance of which, the plaintiff would have not signed the lease.

Parol evidence may be introduced to prove collateral and contemporaneous parol agreement when the subject-matter of the collateral parol agreement is independent and distinct from that to which the written contract relates. In *Wells v. Rhodius* (87 Ind. 1) it was decided that, a parol agreement collateral to and distinct from a written contract between the same parties made in consideration of the execution of the writing may be valid and that, the lessor in writing lease of a hotel may bind himself by a contempo-

aneous parol agreement made in consideration of the execution of the lease, not to engage in a rival business in the same city. In an action for damages for the breach of such agreement, parol evidence is competent.

In *Reynold v. Robinson*, an action was brought for the breach of a written contract for the sale of certain lumbers on credit. On the trial the court allowed def. to prove by parol evidence that the contract was to become binding at the report of defendant's agencies as to the pecuniary condition of the plaintiff. That it brings the case within the rule that parol evidence is admissible to show that a written paper which appears to be a complete instrument, is in fact subject to a certain precedent condition resting in parol.

Parol evidence is not admissible to explain phrases, words and abbreviations which have a common meaning and which are intelligible in the connections in which they are used. Such evidence, however, is admissible to explain expressions which have an ambiguous meaning, or which are rendered unintelligible or ambiguous owing to the connection in which they are used. Thus, parol evidence has been held admissible to explain such expressions as "barrels," "current funds," "thousand," "horse chains," "hard pan," and the like. In *Myers v. Sarl et al.*, Thayer 938, it was decided that although no parol evidence is admissible to contradict, vary, add to or subtract from a writing contract when the words or terms used bear not only ordinary meaning, but also one peculiar to the department of trade or business to which the contract relates, it is obvious that due effect would not be given to the intention, if the terms were interpreted according to their ordinary meaning and not to their peculiar signification.

Parol evidence is admissible to establish a resulting trust. A resulting trust is not created by the agreement of the parties, but by implication of law apart from the agreement. It springs from the acts of the parties and from their contract. As said by Justice Magruder, "When the two facts to-wit; payment of the purchase money by one, and conveyance of the title thereby purchased to another, are found to exist, then the law so construes those facts as to make them constitute a resulting trust, and, for this reason,

such a trust is said to arise by operation of law. Since the whole foundation of resulting trust of this class is the ownership and payment of the purchased money by one when the title is taken in the name of another, it follows that such trust may be established by parol evidence. *Van Buskirk v. Van Buskirk*, 148 Ill. 8.

There are two kinds of ambiguities of words; the one is *ambiguitas patens* and the other *latens*. *Patens* is that which appears to be ambiguous upon the deed or instrument; *latens* is that which seems certain and without ambiguity, for anything that appears upon the deed or instrument; but there is some collateral matter out of the deed that breedeth the ambiguity. *Ambiguitas patens* is never holpen by averment; and the reason is because the law will not couple and mingle matter of specialty, which is of the higher account, with matters of averment, which is of inferior account in law. Based upon this view, it has very frequently been said that parol evidence is admissible to explain a latent ambiguity, but not to explain a patent one. This statement, however, is altogether too broad, and quite misleading. Parol evidence is admissible to explain a patent ambiguity, except in the one case of declaration of intention. In *Reed v. Insurance Co.*, Thayer 934. A bill has been filed upon an insurance policy of ship owned by defendant and wrecked at Baker's Island. The question was about the meaning of the words, inserted on the insurance: "The owner suspends the risk while at Baker's Island loading" whether it meant for the purpose of loading or actually loading. In the first case the Co. is held liable, while in the latter it is not. It has been held, that writing may be read by the light of surrounding circumstances in order to understand perfectly the intent and meaning of the parties; but as they have constituted the writing to be the only outward and visible expression of their meaning no other words are to be added or substituted instead. The duty of the court is to ascertain, not what the parties may have secretly intended, as contradistinguished from their words expressed, but what is the meaning of the words they used. Upon this principle, the meaning of the words which are presented for our consideration, is that the risk is to be suspended while at Baker's Island whether actually loading or not.

In *Tucker v. Seaman's Aid Society*, Thayer 959, a bill of interpleader was filed against the def. by an executor of will, leaving certain legacies to Seaman's Aid Society. It disclosed later there was three Societies. One Seaman's Friend Society in N. Y. and another . . . Seaman's Friend Society and the Seaman's Aid Society composed by females. Evidence was introduced to show that the testator meant to leave to Seaman's Friend Society and not to defendant. It was held, that this case is not of latent ambiguity. On the face of the will all is plain and clear. The description in the will in this case is sufficiently described as to give a room of doubt.

In *Stringer v. Gardner*, Thayer 976, a suit was brought about a will. The will stated the following gift: I give and bequeath to my niece Elizabeth Stringer the sum of \$20,000 and all my premises in trust for my said niece. The def. contended that the persons named in the will was the plaintiff, a grandmother, who has been in intimate terms with the testator. The said person died four years ago. It was held that this is a patent ambiguity and therefore parol evidence cannot be introduced. Plaintiff's right to the will in this case is very well established. At the time of the making of the will there was no other person who answered the description of niece at all. The grandmother was at that time in her grave, of which fact the testator was aware.

In *Hiscock v. Hiscock*, Thayer 125, the question was about the meaning of the word elder son. The testator has been married twice, and got two eldest sons, and the question is to whom the will is referred to. It was held that in this case parol evidence cannot be introduced as the introduction of any evidence would not help in any to clear up the ambiguity of the word.

The exceptions to the general rule as to explain written instruments it applies also to a negotiable paper. It is always allowed to prove the failure of consideration, illegality of the consideration for which the note was given, the material alteration on the instrument, and all other circumstances which might vitiate the execution of an ordinary contract. As between the original parties, the conditional delivery of the instrument may be shown, as that it was de-

livered in escrow. This has been decided in *Couch v. Meeker*, 2 Conn. 302. Also in *Thomson v. Thomas*, 13 Kan. 217. Where an instrument in writing partakes both of the qualities of a contract and of a receipt, it is opened to explanation or contradiction by parol evidence as to those particulars which constitute a receipt, but that parol evidence is inadmissible to contradict those particulars which import a contract. One of the most common examples of this principle is the bill of lading. From the nature of such instruments, they must contain recitals as to the receipt of goods, such as those of the time, quantity, quality and condition of the goods, as well as certain other statements which are rather in the nature of agreements than recitals. While the recitals of the character named are generally opened to explanation and contradiction, yet the agreements and promises are not. This has been decided in *Cincinnati Ry. Co. v. Pontius*, 19 Ohio 221. In *National Bank v. Chicago Ry. Co.*, 46 N. W. 432. It has been decided that the carrier may show, in an action between himself and the one claiming to have shipped the goods, that no goods were received. In *Polard v. Vinton*, 105 U. S. 7, has been decided, that a carrier may show in an action between himself and the one claiming to have shipped the goods that no goods were received, even against a bona fide holder of the bill of lading, as it is held that a common carrier is not stopped to deny such statement could have no authority to make. That a common carrier may contradict statements in bill of lading as to the condition in which the goods are received, as that owing to some latent defect, they were not in good order, although the bill of lading so imported, it was decided in *Barret v. Rogers*, 7 Mass. 297. Also in *Ill. Central Ry. Co. v. Cobb*, 72, Ill. 479.

Although there has been a considerable discussion of the question and some conflict of opinion, the weight of authority seems to be that subsequent declarations of a testator are admissible to prove the contents and existence of a lost will, as well as the facts that it had not been cancelled. *Harring v. Allen*, 25 Mich. 505. In *Steinke's Will*, 70 N.W. 61, was held that when a will can not be found, subsequent declarations of the testator may be admitted to rebut the presumption of revocation.

The relaxation of the general rule in such manner as to allow parol evidence of customs and usage for the purpose of annexing incidents to or explaining the meaning of certain contracts has for a long time been of frequent occurrence in respect to contract dealings between landlord and tenant. In a well known case Baron Parke explained that the courts had looked with favor upon evidence of usage and customs in this class of cases for the reason that the common law had done little to prescribe the relative duties of landlord and tenant; and that justice required proof of those usages which had grown up and become beneficial to the parties. *Hutton v. Warren*, 3 L. R. A. 331.

There are certain essentials which should be shown before any proof of usage can be given to affect a contract, either written or oral. The usage must be reasonable. The view has been suggested that usages of trade that are unreasonable will not gain a permanent foothold, and that if a usage had grown up this is of itself well nigh conclusive evidence that the usage is not unreasonable. 2. The usage must be an established one. 3. The usage must be known. 4. The usage must be consistent with the contract. 5. The usage must be general.