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John E. Murray Jr.

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THE PAROL EVIDENCE RULE: A CLARIFICATION

JOHN E. MURRAY, JR.*

One of the paradoxes of American law review writing at its present stage of development is the concern which contributors demonstrate for esoteric matters when fundamental areas remain to be further explored or clarified. While an occasional article dealing with a so-called elementary area is published, most law review writing considers narrow areas where controversy rages or is started by the writing. There is a great need for legal scholarship in the narrow areas, but this modest piece is dedicated to the function of clarification. It is a response to this writer's observation of the fog or mystery which surrounds that nexus of ideas grouped under the title, "The Parol Evidence Rule." There are few, if any, new ideas here, but it is hoped that the attempt to expose concisely the quintessence of the subject will aid many students, some lawyers, and perhaps a few judges.

When the parties to a contract embody the terms of their agreement in a writing, intending that writing to be the final expression of their agreement, the terms of the writing may not be contradicted by evidence of any prior agreement. This is a statement of the parol evidence rule. The first thought that should occur to any lawman is that the rule can be described easily. However, the description of any legal concept usually succeeds in doing little more than creating an illusion of certainty. To

* B.S., 1955, LaSalle College; L.L.B., 1958, Catholic University of America; S.J.D., 1959, University of Wisconsin. Member of the Wisconsin Bar. Professor of Law, Duquesne University.

1. No article in this area would be complete without a reference to the statement of JAMES BRADLEY THAYER, TREATISE ON EVIDENCE AT THE COMMON LAW 390 (1898): "Few things are darker than this, or fuller of subtle difficulties."


3. For a modern statement of the rule see UNIFORM COMMERCIAL CODE § 2-202. It should be noted that any statement of the rule in this article avoids the use of the word "contemporaneous" on the theory that the alleged extrinsic element is either prior to or subsequent to the writing and that "contemporaneous" merely clouds the issue. There is no mention of the problem of "partial integration" in the article. For a discussion of this subject, see CORBIN, op. cit. supra note 2, at § 581.
understand the parol evidence rule, the purpose of the rule must be ascer-
tained.

If the parties to a transaction express agreement and subsequently
express another agreement, intending the subsequent agreement to prevail
over their antecedent expression, their final expression will prevail. This
is not a statement of the parol evidence rule. It is a much broader state-
ment because it would be correct in any of the following situations:

(a) Both expressions of agreement are oral;
(b) the first expression is written and the second is oral;
(c) both expressions are written;
(d) the first expression is oral and the second is written.

The machinery of the parol evidence rule may become operative only
in situations (c) and (d). If the subsequent agreement is evidenced by a
writing, the rule may become operative, whether the prior agreement was
oral or written. If one of the parties alleges that the subsequent written
agreement was intended to be the final and complete expression of the
parties' agreement, thereby discharging any prior agreement, the parol
evidence machinery is activated. It now becomes necessary to decide a
question of fact—did the parties intend the subsequent written agreement
to be their final and complete or "integrated" expression, or, did they
intend any prior agreements (oral or written) to be part of their total
agreement with the written manifestation? It matters not how this ques-
tion of fact is decided. Whatever the decision, the parol evidence rule has
been invoked. It is important to recognize that this is the only situation
in which the rule is invoked. If the parties disagree as to what their mani-
festations of intent mean, the parol evidence rule will not solve the prob-
lem. If one of the parties alleges that the writing does not state the true
intention of the parties, the remedy of reformation may or may not be
granted, but, once again, the parol evidence rule is not involved.

Why has this relatively simple matter, the determination of intention
(a question of fact), taken on an air of mystery? In the first and second
situations, supra, (a) and (b), if the question was whether the parties
intended the second expression to prevail over the first, the question would
be determined in the usual fashion in attempting to ascertain the total
agreement. However, when the second expression is written, this same
question invokes the parol evidence machinery. When the prior expression
is oral and the second is in writing, courts have traditionally followed a
policy of affording special protection to the writing. They early recognized
that a jury may fail to adequately consider the relative unreliability of
the prior oral expression. The writing is unchanged at the time of trial,
but the oral expression may be the subject of the favorable (conscious or
unconscious) recollection of the party who is urging that the writing is
not final and complete. Because of this lack of sophistication in juries in
choosing between the competing manifestations of agreement, courts did not wish to trust juries with the question. Thus, this question of fact was reserved to the courts. The experience of judges could be trusted in this matter. Yet, this meant an invasion of the traditional province of the jury, to wit, a question of fact would now be decided by the court. The courts were unwilling to clearly indicate what they were doing. Thus, they cloaked their fact-finding with "rules" which sounded very much like rules of evidence.

The shibboleths which are often called statements of the parol evidence rule began. The usual statement was that parol evidence is not admissible to "contradict or vary the terms of the writing." 4 Unfortunately, few wondered, why not? Suppose the writing did not state the true intention of the parties? Suppose the parties intended their agreement to include a prior expression even though it contradicted, varied or added to the terms of the agreement as manifested by the writing? The popular statement of the rule succeeded in preserving the question of fact for the court, but it also succeeded in masking the real problems. This led to confusion on the part of the courts themselves who were too often content to repeat the mistakes as well as the wisdom of the past. Another favorite statement of the rule was that when the parties executed a writing, it was conclusively presumed to contain the entire agreement. 5 Once again, this result should only follow if the parties intended the writing to be complete and final. The language of "conclusive presumption," however, tended to further bury and confuse the essential problems. Still other statements, though beginning to focus upon the real question, were expressed in the form of a conclusion. Thus, the question was asked, was the writing "integrated"? 6 If it was, no prior expressions of agreement would be admitted. If not, such expressions could be considered as part of the total agreement. This statement, however, tended to obscure the difficult question, how does the trial judge determine whether the writing is integrated? If the writing is integrated, this means that the parties intended it to be the final and complete statement of their agreement. The essential question of fact—the intention of the parties—remained. A corollary of this statement was another expression of conclusion which continues to thrive in the cases. The question would be asked, was the prior agreement "collateral" to the writing? 7

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6. Restatement, Contracts § 228 (1932).
7. See Mitchill v. Lath, 247 N.Y. 377, 160 N.E. 646 (1928) in which the court considered this as one of the inquiries.
to characterize the prior expression as "collateral" and thereby admit evidence of it. None of these statements assisted the trial judge who still found himself confronted with the question of fact. Even characterizing the question as one of law (because the trial judge decided it) was of no help to the judge. Learned writers in the fields of contracts and evidence were harping on what quickly became a favorite theme: the so-called parol evidence rule is not a rule of evidence; it is a rule of substantive law. In focusing upon this matter, the writers were somewhat remiss in failing to suggest effective guides for the trial judge, who continued to face the question of the parties' intention in any case in which the rule was invoked. However, two of the writers suggested formulae for the trial judge which have been repeated in many opinions.

Dean Wigmore suggests an aid, not a conclusive test. He directs the trial judge to determine the question of intent by considering whether the alleged extrinsic negotiation is dealt with at all in the writing. If it is mentioned at all, presumably the writing was intended to embody that element of the negotiation and, therefore, the prior expression is excluded. Professor Williston's more flexible suggestion smacks of the "reasonable man" test. He asks the trial court to determine the inherent probability that parties, situated as were the parties involved, would or might generally enter into the written agreement and also the alleged parol agreement.

One of the landmark cases dealing with the parol evidence rule indicates some of the confusion which appellate courts find in dealing with the essential question. In *Gianni v. Russel*, the Supreme Court of Pennsylvania, in an opinion by Justice Schaffer, quotes the Wigmore "aid." However, earlier in the opinion the question is posed, "When does the oral agreement come within the field embraced by the written one?" The question is answered in language which can hardly be distinguished from the Williston test: "[Would] parties, situated as were the ones to the contract, . . . naturally and normally include the one in the other if it were made?" There is no citation to the Williston treatise at this point in the opinion. Arguably, the same result is appropriate under the facts in the case whether either test is used. However, the perhaps unconscious interchangeable use of the tests fails to consider the possible difference in result under other facts. In addition, there are recent indications that

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10. Wigmore, *op. cit. supra* note 9, at § 2430.
13. Id. at 324.
some contracts specialists are unaware that both tests were stated in *Gianni.*

A hard fact which the trial judge must often face in parol evidence cases is not considered by either test. The tests are predicated on the assumption that a prior expression of agreement really exists. Often a party urges the writing not as the final and complete statement of the parties' agreement, but as the only statement of agreement. Neither test attempts to cope with the situation where the trial judge simply does not believe that the prior expression ever existed. Dean Wigmore clearly did not intend the trial judge to decide the question of existence and, presumably, neither did Professor Williston. However, there is a strong argument that the purpose of the parol evidence rule is best served when the trial judge can preclude the admission of prior expressions of agreement which he considers to be clearly fabricated.

Other tests have been suggested. The most obvious one is to allow the question of fact involved to be treated as are all such questions. This can be translated into the suggestion that the rule be emasculated. It would seem desirable only if there is no need to preserve the integrity of written contracts by affording them special protection when they compete with prior expressions of agreement. It is submitted that there should be special protection afforded writings in this situation. As to the trial judge's dilemma, perhaps a combination of the Wigmore, Williston and other tests should be used. The primary purpose of this article is clarification rather than the urging of a new test. Yet, the temptation to suggest a remedy will not down. One of the other tests not yet mentioned herein is that the writing be presumed to contain all of the terms of the agreement. As to the trial judge's dilemma, perhaps a combination of the Wigmore, Williston and other tests should be used. The primary purpose of this article is clarification rather than the urging of a new test. Yet, the temptation to suggest a remedy will not down. One of the other tests not yet mentioned herein is that the writing be presumed to contain all of the terms of the agreement. As to the trial judge's dilemma, perhaps a combination of the Wigmore, Williston and other tests should be used.

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15. In a recent edition of a well-known casebook in Contracts, one of the editors, Professor Farnsworth, indicates that Wigmore's test is stated in the *Gianni* case. Apparently, he feels that the Williston test is not stated. *Jones, Farnsworth and Young, Cases and Materials on Contracts* (1965).

16. At 9 *Wigmore, Evidence* § 2430, the author states: "If he [the judge] decides that the transaction was covered by the writing, he does not decide that the excluded negotiations did take place, but merely if they did take place they are nevertheless legally immaterial. If he decides that the transaction was not intended to be covered by the writing, he does not decide that the negotiations did take place, but merely if they did, they are legally effective, and he then leaves to the jury the determination of fact whether they did take place."

17. At 4 *Williston, Contracts* § 638, the author states, "The point is not merely whether the court is convinced that the parties before it did in fact do this, but whether parties so situated generally would or might do so."

to presume that the writing is complete. This presumption could be overcome. The trial judge could determine whether it is overcome by considering whether the alleged extrinsic element has been dealt with at all in the writing (Wigmore), and by considering whether parties, situated as were the parties to the contract, would naturally and normally include the extrinsic matter in the writing (Williston). Whatever his decision on the question of the parties' intent as to the finality and completeness of the writing, the trial judge would not determine the question of the existence of the alleged extrinsic negotiation. This separate question of fact would be for the jury.

If the parol evidence rule is based upon distrust of juries because they lack sophistication in comparing an oral expression with a subsequent writing, why should the rule apply when both expressions are written? Does the rule afford special protection to a subsequent writing even though such writing is competing with a prior writing? The usual statement of the rule excludes proof of prior oral or written expressions of agreement. Yet, it would seem to lose much of its force if the prior expression is written. The prior writing is not unchanged at the time of trial any more than the subsequent writing. Perhaps the rule should not be invoked at all in this situation, or, if invoked, it should not operate in the same way it does when the prior expression is oral. Returning to the four situations set forth near the beginning of this piece, the writers who have emphasized the substantive aspect of the rule have made it clear that in any of those situations, the parties' intention will control. Professor Corbin is correct when he states, "No contract, whether oral or written, can be varied, contradicted or discharged by an antecedent agreement. Today may control the effect of what happened yesterday; but yesterday cannot change the effect of what happens today."

Once again, however, this is not a statement of the parol evidence rule. It would apply in any of the four situations, whereas the rule applies only in situations (c) and (d), where the subsequent expression is written. The basis for the rule as set forth in this piece seems clearly applicable only in situation (d) (prior oral expression). If the question is put, if the parties intend, should not the subsequent writing prevail even though the prior expression is written, the answer must be, yes. But the answer is yes for the same reason that the answer would be yes to a similar question in relation to situations (a) and (b) where the subsequent expression is oral. This points up the failure to clearly identify the purpose of the rule. The rule exists to afford special protection to subsequent written expressions of agreement when the parties intend such expressions to be complete and final. Whether the parties intended this result in a particular case is a question of fact which is decided by the trial judge (according to one or more guides) because juries cannot be trusted to accord proper weight to the writing over prior oral expressions. Stating the purpose and operation of the rule in this

19. 3 Corbin, Contracts § 574.
fashion, it is difficult to clearly apply it when the prior expression is written. If juries would not accord proper weight to a final writing over a prior writing, perhaps the reason for the rule remains even where both expressions are written. Otherwise, the question of fact involved should be decided as are other questions of fact.

When the parol evidence rule is thus analyzed, most of the confusion surrounding it disappears. Any remaining mystery is attributable to incidental causes. One of the obvious incidental causes is the misnomer by which the rule is known. While it has just been suggested that the rule should, perhaps, not apply or, at least, should be applied differently where the prior expression is written, at present it applies whether the prior expression is oral or written. Thus, the anomalous term, "parol," is used to mean either an oral or written expression. Because judges, in reserving a question of fact to themselves couched the process in rules which sounded like rules of evidence, the term "evidence" is part of the title of the rule which only serves to add to the mystery surrounding it.

Another significant cause of confusion is the failure to distinguish between the parol evidence rule on the one hand, and interpretation on the other. The parol evidence machinery will determine only one question: whether the parties intended their final writing to be integrated. No matter how this question is decided, the meaning of the writing does not automatically become unambiguous. The confusion of the rule with the process of interpretation is traceable to a period when courts were inclined to deal with written words as if they had a clear meaning apart from any particular usage and when men were held to that meaning regardless of how far it may have differed from their known intent. Fortunately, progress has been made in this area. "The history of the law of interpretation is the history of a progress from a stiff and superstitious formalism to a flexible rationalism." What remains of the earlier point of view is often expressed in the supposed rule that you cannot depart from "the strict, plain, common meaning of the words themselves." One of the best responses to this notion was recently stated by Professor Corbin:

It is sometimes said, in a case in which the written words seem plain and clear and unambiguous, that the words are not subject to interpretation or construction. One who makes this statement has of necessity already given the words an interpretation—the one that is to him plain and clear; and in making the statement he is asserting that any different interpretation is "perverted" and untrue.

Still another incidental cause of confusion concerns alleged "exceptions" to the rule. For example, it is said that parol evidence is admissible to

20. Wigmore, Evidence § 2461.
show that a contract was never formed. It cannot be gainsaid that evidence is admissible for this purpose, but this is not an exception to the rule. Before any question of admitting evidence of prior expressions which vary, contradict or alter the writing can arise, there must be an enforceable agreement to vary, contradict or alter. Along the same lines, parol evidence is admissible to show the unenforceability of the contract on grounds of fraud, mistake, duress, illegality, etc. Once again, this is not an exception to the rule. Finally, parol evidence is admissible in a suit in equity to reform the writing to state the true intention of the parties. The same parol evidence could run afoul of the rule in an action on the contract, but reformation is a remedy whereby the writing is allegedly mistaken and the plaintiff seeks to have it reformed to state the true intention. If the parol evidence rule is understood, it is clear that it should have no effect on the remedy of reformation.

The criticism of the rule over the years has gone to the confusion surrounding it. While much has been written to penetrate to the underlying purpose and operation of the rule, there has been a tendency on the part of many explorers in this area to arrive at one unalterable truth concerning it. Focusing upon that truth, the typical exposé would tend to suggest it as the panacea of understanding the rule. If there is one truth which this article has focused upon above all others, it is that too little attention has been paid to the process which the trial judge undergoes in deciding that essential question of intention which is involved in every parol evidence case. It is fair to say that at least one writer has suggested the alternative guides which are available to the courts. This article has merely combined some of the guides to suggest that the trial judge should have some leeway in deciding this question. It is now for the courts to begin to understand the rule and that understanding must start with a frank recognition that the question to be decided is one of fact.

The success or failure of this piece can be tested by how well the reader understands the following statement of the parol evidence rule: the rule seeks to afford special protection to writings which the parties intend to be the final and complete expression of their agreement over prior expressions of agreement. This is accomplished by entrusting the trial judge to decide whether the parties had such an intention. The judge decides this question of fact with the help of one or more common sense guides. The parol evidence machinery is activated only in this situation. If the parties did intend their writing to be integrated, substantive contract law would insist that their intention be realized. But this would be true if the parol evidence rule never existed. It is the intrusion of the trial judge on the traditional province of the jury which is the parol evidence rule in action.