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THE PAROL EVIDENCE RULE

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WHEN two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing. This is in substance what is called the "parol evidence rule," a rule that does not deserve to be called a rule of evidence of any kind, and a rule that is as truly applicable to written evidence as to parol evidence. The use of such a name for this rule has had unfortunate consequences, principally by distracting attention from the real issues that are involved. These issues may be any one or more of the following: (1) Have the parties made a contract? (2) Is that contract void or voidable because of illegality, fraud, mistake, or any other reason? (3) Did the parties assent to a particular writing as the complete and accurate integration of that contract?[1]

In determining these issues, there is no "parol evidence rule" to be applied. On these issues, no relevant evidence, whether parol or otherwise, is excluded. No written document is sufficient, standing alone, to determine any one of them, however long and detailed it may be, however formal, and however many may be the seals and signatures and assertions. In determining these issues, however, there is no necessity for being gullible or simple minded. The party presenting the writing will testify to its execution and to its accuracy and completeness. The form and substance of the document may strongly corroborate his testimony; or it may not. There may be disinterested witnesses who corroborate him or contradict him. There may or may not be corroboration by virtue of other circumstances that are proved. When the other party testifies to the contrary on any of these issues, he should always be listened to; but

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1. A contract may be held to be fully integrated in writing, even though there are several writings in which parts of the contract are contained. See Curtis v. Pierce, 157 Ga. 717, 122 S. E. 208 (1924) (bond for deed, inventory, and writing setting out terms of agreement); Sig. C. Mayer & Co. v. Smith, 112 Ore. 559, 230 Pac. 355 (1924) (three telegrams).

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he does not have to be believed. His testimony may be so overwhelmed that it would be credited by no reasonable man; or it may not. Perhaps a verdict should be directed; but perhaps not. This is a question of weight of evidence, not of admissibility.[2]

2. In Strakosch v. Connecticut Trust & Safe Deposit Co., 96 Conn. 471, 479, 114 Atl. 660, 663 (1921) the court said: "Whether the parties intended the writing to embody their entire oral agreement or only a part of it, was a question for the trial court, to be determined from the conduct and language of the parties and the surrounding circumstances. . . . Where the parties do not intend to embody their entire oral agreement in the writing, the rule invoked does not apply." In Higgs v. Maziroff, 263 N. Y. 473, 189 N. E. 555 (1934), a written contract for a loan provided that the defendant should give a note for $15,000 payable in nine months. In an action on this note, the defendant testified without objection that the plaintiff had agreed the note was to be payable only out of the proceeds of certain paintings desposited as security. The trial court's judgment for the defendant was reversed on appeal, the court saying, "The contract was as matter of law integrated by the writings." *Id.* at 479, 189 N. E. at 557. It may be that the parties had both assented to the writing as a complete integration intending to nullify plaintiff's inconsistent assurance as to payment. Such assent and intention, however, was a question of fact, not of law and should have been regarded as a matter mainly for the trial court. The Court of Appeals should not have reversed unless the weight of evidence against the defendant was obviously overwhelming. Although defendant's oral testimony, in contradiction of the writing, was received without objection, the plaintiff moved to dismiss the defense at the close of the defendant's case for lack of proof, and because "the agreement . . . does not contain any condition such as claimed." The trial judge denied this motion; it does not appear why. Nor does a factual basis appear for the Court of Appeals' holding that this denial was error. It reversed the trial court's judgment for the defendant, stating "The contract was as matter of law integrated by the writings." *Id.* at 479, 189 N. E. at 557. See comment on this case in Zell v. American Seating Co., 138 F. (2d) 641, 643 (C. C. A. 2d, 1943). Such a rationale is clearly erroneous. The existence of an "integration" as the act of the parties is a matter of fact, not a "matter of law." In the case before the court, credible evidence had been presented that the writings were not a complete and accurate integration. The trial court believed that evidence to be true. The appellate court should not have summarily reversed, directing judgment for the plaintiff. Possibly it would have been justified in ordering a new trial, with directions to permit the plaintiff to introduce testimony in rebuttal of the defendant's oral testimony.

In Pitcairn v. Philip Hiss Co., 125 Fed. 110 (C. C. A. 3d, 1903), there was a written contract for interior decoration. In a suit for the price of the completed work, the defendant was allowed to testify without objection that the duty to pay was by mutual agreement conditional on the approval of the work by the defendant's wife. The plaintiff testified to the contrary. The trial judge instructed the jury that the oral testimony must be disregarded even if they believed it to be true, and this instruction was sustained by the court of appeals. The court thought that the "parol evidence rule" is a rule of substantive law, making oral agreements inoperative. As to this the court was correct; but its decision was nevertheless erroneous. The written integration makes the previous understanding inoperative only if in executing the integration the parties in fact agree upon it as the final and complete statement of terms. The evidence of such agreement before the court, other than the written instrument itself, was the plaintiff's positive testimony. This testimony was flatly denied by the defendant, his wife, and her niece, who testified that the defendant said when he signed the writing that he did so only on the express condition of satisfaction. If this testimony is believed, there is no rule of

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In hundreds of cases stating and purporting to apply the "parol evidence rule," the reported opinion has failed to indicate the basis of the court's finding (or assumption) that the writing presented in court had in fact been assented to as the complete and final integration of agreement. Such cases are of little or no service as precedents; and it is futile to cite them in this article. In many such cases, it may not have been substantially disputed that the writing was executed as a complete integration; and the testimony offered may have been solely for the purpose of showing that earlier negotiations were different and that the document would not have been executed had those negotiations been recalled to mind at the time of execution. But such forgetfulness would not have prevented the written contract from being enforceable according to its expressed terms, unless there had been such a "mistake" as justified rescission or reformation.

In other cases the evidence offered to prove an assertion that the writing was not assented to as a complete integration, may have been quite unworthy of belief. The credibility of evidence is mainly a question for the trial court. When the appellate court later said that the evidence offered to vary or contradict the writing was not admissible, it may in fact have been merely assenting to the trial court's finding made after listening to the evidence.[3]

In still other cases, both the trial court and the appellate court may have assumed the completeness and correctness of the writing, merely by reason

substantive law that makes the oral agreement inoperative. The question is one as to weight of testimony. See McCormick, *The Parol Evidence Rule as a Procedural Device for Control of the Jury* (1932) 41 YALE L. J. 365. See the case of Zell v. American Seating Co., 138 F. (2d) 641 (C. C. A. 2d, 1943). With an enlightening opinion, the court there correctly held that the "parol evidence rule" is a rule of substantive law and that it does not exclude evidence that the parties intentionally omitted a term from the writing, such as the promise by an employer, there involved, to pay a percentage contingent fee to his agent, in addition to the stated salary of $1,000 per month, which was so made in order to "avoid any possible stigma which might result" if the provision should become known to third parties. It was error for the trial court to render summary judgment for the defendant when sued for the promised compensation. Surprisingly, however, the Supreme Court reversed the decision of the Circuit Court of Appeals in a *per curiam* decision. In this case two members of the court think that the Circuit Court of Appeals should be affirmed. Seven are of the opinion that the judgment should be reversed and the judgment of the District Court affirmed. Four because proof of the contrast alleged in respondent's affidavits on the motion for summary judgment is precluded by the applicable state parol evidence rule, and three because the contract is contrary to public policy and void, American Seating Co. v. Zell, 64 Sup. Ct. 1053 (U. S. 1944). Such an opinion does not affect the existing law as to the "parol evidence rule."

3. An illustrative case is Halloran-Judge Trust Co. v. Heath, 70 Utah 124, 258 Pac. 342 (1927). The oral evidence was admitted by the trial court; after weighing it, the court made a finding that the writing was a full integration. Of course such a finding should seldom be reversed on appeal. A similar rule should generally be applicable to a finding that the writing is not a full integration.

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of the form and content of the document itself; but the opinion of the appellate court is seldom sufficient to show that such an assumption was made without supporting evidence. In such cases, it is impossible to tell whether or not the decision was correct; and once more the report fails to show a precedent that can be followed.[4]

All these cases may, indeed, be accepted as precedents for the proposition that if the parties have stated the terms of their contract in the form of a complete written integration, it cannot be varied or contradicted by proof of antecedent negotiations and agreements. This is a mere statement of the obvious. There is no need to support it by a thousand citations.[5]

It should be clearly observed that a written integration has no greater effect upon antecedent parol understandings and agreements than a parol integration has upon antecedent written agreements. In both cases alike, the later agreement discharges the antecedent ones in so far as it contradicts or is inconsistent with the earlier ones. In both cases it must be shown that the later agreement was in fact made and that its terms were assented to, especially those terms that vary or contradict antecedent expressions and agreements.[6]

4. That the document cannot, by itself, prove its own character as a complete integration is asserted by Wigmore. 9 WIGMORE, EVIDENCE (3d ed. 1940) § 2430(2): "The document alone will not suffice"; *id.* at § 2431, the proposition that "the writing is the sole criterion . . . is untenable, both on principle and in practice."

5. An illustrative case is Childs v. South Jersey Amusement Co., 95 N. J. Eq. 207, 122 Atl. 803 (1923), where a mortgage was given to secure payment of a sum of money in one year. The court held that foreclosure for non-payment in one year would not be denied because of testimony that before execution of the mortgage the plaintiff had promised not to require payment for two years. The defendant clearly understood the terms of the writing and did not even assert that he did not. Wigmore says: "Such is the complexity of circumstance and the variety of documentary phraseology, and so minute the indicia of intent, that one ruling can seldom be of controlling authority or even of utility for a subsequent one. The opinions of judges are cumbered with citations of cases which serve no purpose there except to prove what is not disputed,—the general principle." 9 WIGMORE, EVIDENCE, § 2442.

RESTATEMENT, CONTRACTS (1932) § 237, reads as follows: "Except as stated in §§ 240, 241, the integration of an agreement makes inoperative to add to or to vary the agreement all contemporaneous oral agreements relating to the same subject-matter; and also, unless the integration is void, or voidable and avoided, all prior oral or written agreements relating thereto. If either void or voidable and avoided, the integration leaves the operation of prior agreements unaffected."

6. It may be objected that "parol integration" is a contradiction in terms; and so it is, if "parol" means oral and "integration" means paper and ink. The phrase is here intentionally used to describe an oral agreement, the terms of which are definitely assented to and satisfactorily proved. In the light of the habits of men, paper and ink may be strongly evidential of assent and of completeness and finality; but they do not constitute conclusive evidence. The "parol evidence rule" might well have been stated in this fashion, as a "paper and ink rule."

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All Contracts Can Be Discharged by a Substituted Agreement. Any contract, however made or evidenced, can be discharged or modified by subsequent agreement of the parties.[7] 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 what happened yesterday cannot change the effect of what happens today. This, it is believed, is the substance of what has been unfortunately called the "parol evidence rule."

By the early common law, a written contract, sealed and delivered, could be modified or discharged only by a similarly executed instrument.[8] Some traces of this rule may still exist; we are not troubled by them at this point. It is now perfectly clear that informal contracts, whether written or oral, can be modified and discharged by a subsequent agreement, whether written or oral.[9] However, the subsequent agreement, even though it is in writing, does not discharge the previous oral agreement if it is not agreed that it shall do so and if it is not inconsistent therewith.[10]

The existence and the terms of this modifying or discharging agreement can be proved by the same kinds of evidence that are admissible to prove any other kind of contract; and one denying the making or the terms of such an agreement can support his denial by the usual type of testimony, written or oral.

But after a court has found, as a fact, the making and the terms of a modifying or discharging agreement, it is not interested in the terms of an antecedent contract for the purpose of enforcing them, in so far as

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7. It is to be observed, however, that the subsequent agreement must itself comply with the requirements of a valid contract. The antecedent agreements are not discharged by a later agreement that is void for lack of consideration; nor are they discharged by a later agreement that is voidable for fraud if the power of avoidance is exercised.

8. *"Unumquodque dissolvitur eodem ligamine quo ligatur"*: so read the words of mystery.

9. The "parol evidence rule" does not exclude proof of subsequent oral agreements. Where a writing provided for the transfer of horses, saying nothing as to place of delivery, a subsequent oral agreement fixing the place was operative. Musselman v. Stoner, 31 Pa. 265 (1858). See also Atlas Petroleum Co. v. Cocklin, 59 F. (2d) 571 (C. C. A. 8th, 1932), in which evidence of a parol agreement cancelling a prior written contract for the sale of oil was admitted; Lampasona v. Capriotti, 296 Mass. 34, 4 N. E. (2d) 621 (1936), allowing proof that changes in the mode of performance called for by a written construction contract were made by oral agreement from time to time as the work progressed. A provision in a contract against any subsequent modification except by a writing is not effective. Frank Wirth, Inc. v. Essex Amusement Corp., 115 N. J. Law, 228, 178 Atl. 757 (1935). There is a conflict of authority as regards sealed instruments; the better view holds that they may be discharged by subsequent parol agreement. Chesapeake & Ohio Canal Co. v. Ray, 101 U. S. 522 (1879); Blakeslee v. Board of Water Commissioners, 121 Conn. 163, 183 Atl. 887 (1936).

10. United States Navigation Co. v. Black Diamond Lines, 124 F. (2d) 508 (C. C. A. 2d, 1942), *cert. denied*, 315 U. S. 816 (1942).

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those terms have been nullified by the new agreement. They are of yesterday; and their jural effect has been nullified by the events of today. This is the ordinary substantive law of contracts; it is not a rule of evidence and is not stated in the language of evidence, parol or otherwise.[11]

If the foregoing is true of antecedent contracts that were once legally operative and enforceable, it is equally true of preliminary negotiations that were not themselves mutually agreed upon or enforceable at law. The new agreement is not a discharging contract, since there were no legal relations to be discharged; but the legal relations of the parties are now governed by the terms of the new agreement. This is so because it is the agreement of today, whether that which happened yesterday was itself a contract or was nothing more than inoperative negotiation.

It is obvious that this rule was as applicable in equity as at common law. The Chancellor did not deny to two parties the power to integrate their agreements or to nullify and supplant their agreements and negotiations by subsequent agreements. Oral or written evidence of supplanted agreements was for the purpose of enforcing them, just as immaterial in equity as at common law. It is true that the Chancellor was somewhat readier to listen to evidence of fraud or mistake, for the purpose of avoiding the new substituted agreement; but by statute, procedural rules, and court unification, the rules and practice of nearly all courts have become those of the courts of equity.

It has been very plausibly argued that the "parol evidence rule," even though based to some extent on the mystery of the written word, became in time a device for the control of the jury.[12] The belief that oral testimony varying or contradicting a written instrument is likely to be false or mistaken, and the fear that the jury will give it credence out of sympathy for a loser, has led some to say that the courts have prevented such a result by declaring the offered testimony "inadmissible."

11. See Bank of America National Trust & Savings Ass'n v. Pendergrass, 4 Cal. (2d) 258, 48 P. (2d) 659 (1935); Cohn v. Dunn, 111 Conn. 342, 149 Atl. 851 (1930); Western Newspaper Union v. Dittemore, 264 Mass. 74, 161 N. E. 908 (1928). In like manner, a general release of all claims operates exactly as it reads, so long as it is not avoided for fraud or mistake. An antecedent claim cannot be enforced by making proof that it was not included within the terms of the release. The words have no ambiguity, are later in time than the understanding now offered in evidence, and are in direct contradiction of that evidence. The Cayuga, 59 Fed. 483 (C. C. A. 6th, 1893); Allen v. Ruland, 79 Conn. 405, 65 Atl. 138 (1906). Such a general release, however, does not discharge the obligation of a promise in exchange for which the release itself was given; and the "parol evidence rule" does not exclude evidence that the release and the new oral promise were thus exchanged. Clarke v. Tappin, 32 Conn. 56 (1864).

12. "The phrase becomes a shibboleth, repeated in ten thousand cases. It obviously enables the judge to head off the difficulty at its source, not by professing to decide any question as to the credibility of the asserted oral variation, but by professing to exclude the evidence from the jury altogether because forbidden by a mysterious legal ban." McCormick, *supra* note 2, at 365.

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There may be truth in this suggestion, insofar as the courts have in fact excluded parol testimony in a jury case. It should be observed, however, that parol testimony to prove the variation or contradiction of a written instrument by an oral agreement or understanding made subsequently to the execution of the writing has not been excluded, although the danger of a sympathy-induced verdict may have been equally great. Furthermore, the "parol evidence rule" has frequently been stated and applied by a judge in cases where no jury has been empanelled, and also by an appellate court for the correction of a trial judge who had made his finding and decision without the aid of a jury. Certainly, other elements besides the desire to control the jury have entered into the survival and the application of the declared rule. Its statement in the form of a rule of evidence may in part have been due to mere confusion of thought; and its continued repetition may be a mere matter of habit. In this form, it enables a court to make a decision without appearing to rest it upon a finding as to the weight and credibility of human testimony. Indeed, the court may deceive itself into thinking that it has made no such finding when it assumes either with or without extrinsic evidence, that the instrument before it has been executed as a complete and accurate integration of the terms of agreement.

Statute of Frauds Compared with the "Parol Evidence Rule." The Statute of Frauds and the "parol evidence rule" have sometimes both been applied in a single case. To promote clear thinking and correct decision, they should be compared and contrasted.[13] They appear to have a similar purpose, at least when we regard the latter rule as in truth a rule of admissibility. That purpose is the prevention of successful fraud and perjury. Under both Statute and rule, this purpose is only haltingly attained; and if attained at all, it is at the expense and to the injury of many honest contractors. Both the Statute and the rule may have caused more litigation than they have prevented. Both may have done more harm than good. Both have been convenient hooks on which a judge can support a decision actually reached on other grounds. Both are attempts to determine justice and the truth by a mechanistic device and thus evidence a distrust of the capacity of courts and juries to weigh human credibility. And, in order to prevent the infliction of gross injustice on honest men,

13. In Preston v. Merceau, 2 Blackstone 1249 (1779), an action was brought for rent due under a lease. The lease provided for payment of £26 per annum; but the plaintiff offered testimony that the tenant had also orally promised to pay £2 12s per year in addition, the ground rent due to a superior landlord. The court held the testimony inadmissible, "else the statute of frauds would be eluded." Blackstone, J., said: "We can neither alter the Rent nor the Term, the two things expressed in this agreement. With respect to collateral matters it might be otherwise. He might show who is to put the house in repair, or the like, concerning which nothing is said, but he cannot by parol evidence shorten the term . . . or . . . make the rent other than £26 per annum. *Id.* at 1250. He did not refer to a parol evidence rule.

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the courts have been forced to make numerous exceptions and fine distinctions in connection with both Statute and rule, with such resulting complexity and inconsistency that a reasoned statement of their operation requires volumes instead of pages and the case must be rare in which a plausible argument can not be made for deciding either way.

So much for the apparent similarities of the Statute of Frauds and the "parol evidence rule." These similarities are found in their social aims. But in the means that they employ and in their juristic effects, they are very different. The Statute makes certain oral contracts unenforceable by action, if not evidenced by a signed memorandum; the "parol evidence rule" protects a completely integrated writing from being varied and contradicted by parol. The Statute does not exclude any parol evidence, such evidence always being admissible to show that the writing does not correctly represent the agreement actually made;[14] the "parol evidence rule," as commonly stated, purports to exclude such evidence. The Statute does not require that the written memorandum shall be an "integration" of the agreement, although such an integration satisfies its requirements; the "parol evidence rule" does not purport to have any operation at all unless such an integration exists. The Statute, when strictly applied, may prevent the enforcement of a contract that the parties in fact made; the application of the "parol evidence rule" results in the enforcement of a contract that the parties did not make, if in fact the written document was not agreed upon as a final and complete integration of terms.

The Statute stipulates a requirement for enforceability which the party to be charged may at any time supply (without knowledge or consent of the other party), recognizes oral agreements as operative for many purposes, and is in no respect a rule as to discharge of contracts; the "parol evidence rule," in its only true operation, is a rule of discharge, a discharge of previous understandings by mutual agreement, a discharge the nullification of which requires the assent of both parties.

Does The "Parol Evidence Rule" Exclude Parol Evidence? After a court has determined, as a fact, the making and the terms of the new agreement of today, is there a rule of evidence that excludes testimony, parol or otherwise, of what happened yesterday? This article does not purport to state rules of evidence, but it is believed that the answer to the question just stated is in the negative. Evidence of what happened yesterday—of the antecedent agreements, statements, and negotiations—is often material, or even necessary, in order to prove or disprove the making and the terms of an alleged new agreement. Until this new agreement is established, there is no rule that excludes such evidence.[15] And after this new

14. It will be observed that in the case just quoted Blackstone was applying a parol evidence rule rather than the Statute of Frauds.

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agreement is established, there is still no rule that excludes such evidence, except in so far as it is quite immaterial, even if it is true.

A court having determined the making and the terms of the new agreement of today, it is not reasonable to expect it to waste time in listening further to evidence of an antecedent agreement or antecedent negotiations which the court has just held to have been discharged and displaced. That is to say, it is unreasonable if the purpose of the offered testimony is the enforcement of the discharged old, in place of the substituted new that has just been established. This seems to be what is meant by, and to be the proper effect of, what has been unhappily termed the "parol evidence rule."[16]

We can say with equal accuracy that *written* evidence of antecedent understandings and agreements is not admissible to vary or contradict the new integrated agreement.[17] This may with at least equal propriety be

15. Strakosch v. Connecticut Trust Co., 96 Conn. 471, 114 Atl. 660 (1921), was an action against an executor for breach of an oral agreement by the testator to settle an income on plaintiff when adopted by him. The court found that the written instrument of adoption had not superseded this oral agreement, applying the following test as the one approved in other Connecticut cases: "The plaintiffs claim that the existence of the written agreement rendered the prior oral agreement between the parties . . . of no avail to the defendant. This claim is based on the so-called 'parol evidence rule,' that where parties merge all prior negotiations and agreements in writing, intending to make that the repository of their final understanding, evidence of such prior negotiations and agreements will be rejected as immaterial . . . . Whether the parties intended the writing to embody their entire oral agreement or only a part of it, was a question for the trial court to be determined from the conduct and language of the parties and the surrounding circumstances; and that court has found that the parties had no such intent, and there is nothing in the record to show that the court in reaching that conclusion, erred either in law or in logic." Chadbourn and McCormick, *The Parol Evidence Rule in North Carolina* (1931) 9 N. C. L. Rev. 151.

16. "When the oral testimony goes directly to the question whether there is a written contract or not, it is always competent; but when the effect of the oral testimony is to establish the existence of a written contract, which it is designed to contradict or change by parol, then the spoken word must yield to the written compact." Smith v. Dotterweich, 200 N. Y. 299, 305, 93 N. E. 985, 987 (1911). This quoted statement is not as helpful as it looks. The oral testimony may be offered to prove that the writing is not a complete and accurate integration of an agreement actually made.

17. Clay v. Connecticut General Life Insurance Co., 69 F. (2d) 156 (C. C. A. 5th, 1934) (prior written letter excluded); Arkansas Amusement Corp. v. Kempner, 57 F. (2d) 466 (C. C. A. 8th, 1932) (prior written proposal and a letter excluded); Dickinson Tire & M. Co. v. Dickinson, 29 F. (2d) 493 (C. C. A. 2d, 1928); Welker v. Mishkin, 31 Ariz. 239, 251 Pac. 891 (1926); Sinnett v. J. R. Watkins Co., 214 Ky. 76, 282 S. W. 769 (1926) (letters and sales books excluded); Perry v. J. L. Mott Iron Works Co., 207 Mass. 501, 93 N. E. 798 (1911); Scott v. Vulcan Iron Works Co., 31 Okla. 334, 122 Pac. 186 (1912) (previous correspondence excluded); Farley v. Letterman, 87 Wash. 641, 152 Pac. 515 (1915); Wigmore, Evidence § 2400.

In Campbell v. Miller, 205 Cal. 22, 269 Pac. 536 (1928), the court thought a prior signed writing should be admissible. This view is erroneous, if the parties have in fact agreed upon a subsequent writing as a complete integration. If they have not any prior agreement, whether oral or written, should be admissible.

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called the "written evidence rule." To go even farther: these two rules, "parol" and "written," are both equally applicable even if the new agreement is not "integrated" in any written instrument, but is so far integrated in words or other expressions mutually assented to that the court has found, as a fact, the existence and the terms of this new agreement.[18]

There are many purposes, other than the variance or contradiction of the new integrated agreement, for which evidence of the antecedent agreements and negotiations are admissible. For those other purposes, the making and the adjudication of the new agreement do not cause the offered testimony, parol or written, to be inadmissible. For those other purposes, there is no "parol evidence rule" to exclude it; there are only the usual rules as to relevancy and hearsay that go to fill large treatises on "Evidence."

Evidence That No Contract Has Been Made. The first issue to be determined is: Has a contract been made? One party asserts a contract and asks its enforcement; the other denies the contract asserted by the first, and may also deny that any contract whatever has been made. If the court is convinced that no contract has been made, it will not be necessary to determine the later issue of complete integration in writing. These two issues may sometimes be so interrelated that it is easier to deal with them jointly. But whether they are joined or not it is certain that we need not exclude parol evidence until we know that a contract has been made.

It seems, in some cases, as if the court may have forgotten that a written document can not prove its own character.[19] It sometimes appears as though parol evidence were excluded as soon as there has been offered in evidence a formal looking document, bearing signatures (and perhaps seals) and well adorned with red ink lines filling the great open spaces. It is consoling, however, to observe that we may not be as simple as we

18. "If the parties have fully defined their relation, and its rights and duties, by express contract, written or unwritten, the contract must be exclusive of all other means of defining them. If it omit part of the definition, the civil law supplies it by construction. Express verbal contracts, when fully proved, are naturally as exclusive of implied ones, as if they were written; yet, because of the uncertainty of the oral testimony, by which they must be proved, indirect evidence is admitted to aid in proving or to disprove them, or to raise implied ones if the express ones should fail for want of proof.

In all cases, the express contract, written or not, is the paramount law of the parties, and, if complete, must be exclusive; and, if not complete, it must be conclusive so far as it goes, supposing it to be free from mistake and fraud. And where they have provided against all forgetfulness and misconception by putting their own definition of this relation into writing, it is of the very nature of the act that the writing, while it exists, is the exclusive evidence of those relations; for it admits of no uncertainty, and perpetuates the very terms of their agreement, which oral testimony cannot do." Miller v. Fichthorn, 31 Pa. 252, 259 (1858).

19. 9 WIGMORE, EVIDENCE, §§ 2400 (5), 2431. "Physical possession . . . is not conclusive proof" of legal delivery. Sweeney v. Sweeney, 126 Conn. 391, 394, 11 A. (2d) 806, 807 (1940).

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look. At all events, no one doubts that the execution of a written contract has to be proved. Some parol testimony is required to prove the "execution" of the document—the genuineness of the signature, the delivery as a true offer or acceptance or both, the expression of assent by each party. These cannot be proved by mere inspection of the document, although much corroborative evidence can be obtained by careful inspection and common sense interpretation. Moreover, as will appear in discussing the subject of conditions, in many cases parol evidence has been held admissible on the alleged ground that if an agreed condition had not occurred no contract was made. In some of these cases, the analysis of the facts and the use of the term condition may be faulty, but they are sound authority for the doctrine that parol evidence is admissible to prove the making of a contract, or to prove that no contract was ever made. It may be helpful to illustrate with a few hypothetical cases.

(1) *A* writes out the terms of an agreement and hands the document to *B* as an offer. *B* orally accepts. The acts of *A* and the words of *B* can be proved by parol testimony.[20] By these acts and words a contract has been made; no contract would have been made without them. If this parol testimony convinces the court that the writing contains the full statement of the terms of the contract offered by *A*, then by accepting the offer *B* nullified and discharged all previous agreements and negotiations inconsistent with the writing. But if *B* did not accept, he is permitted to give oral testimony that he did not. He can show that he conditionally accepted or made a counter offer. *A's* written offer is not an integration of the contract unless both parties agreed that it should be.[21]

20. Where one signs a writing in duplicate and mails both copies to another with the written request that he sign and return one, oral evidence is absolutely necessary and is admissible to show either that the offeree did sign and return one copy or that he did not. See O'Neal v. Moore, 78 W. Va. 296, 88 S. E. 1044 (1916).

21. In an action for goods sold and delivered, the plaintiff produced a written order contained in an order sheet made out by the plaintiff's salesman. It described the goods and stated the price and the manner and time of delivery. It recited several conditions, and stated that it was not subject to countermand and that it constituted the whole of the agreement between the buyer and seller. It was not signed, but a duplicate copy was handed to the defendant. Oral evidence was admitted to prove that the defendant had accepted the proffered written order "subject to cancellation," and that it had in fact been cancelled. The order, thus made by the defendant, was merely a counter offer, apparently assented to by the salesman. The document was not an "integration." Curlee Clothing Co. v. Lowery, 275 S. W. 730 (Tex. Civ. App., 1925).

In Utah-Idaho Sugar Co. v. State Tax Commission, 93 Utah 406, 73 P. (2d) 974 (1937), proof was allowed of an oral agreement, made simultaneously with a written agreement to convey land, stipulating that the written agreement was to be deemed tentative until approved by the grantee's bondholders' committee. The bondholders' committee accepted the agreement subject to the condition that the grantor perform a certain act. This act was not performed until almost a year later. The court rightly held that neither party was bound until the condition imposed by the bondholders' committee had

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(2) *A* writes out the terms of an agreement as before, signs the document, but does not deliver it to *B*. The latter gets possession of the document accidentally or wrongfully, signs it, and demands performance. Parol evidence is admissible to prove all these facts. There is no contract, and the "parol evidence rule" does not disable *A* from proving that there is none.[22]

(3) *A* writes out the terms of an agreement and signs it as before. He then delivers it to *B*, with the oral statement, "This is to be operative as an offer to you, and you are to have the power of acceptance, only in case event *X* happens." *X* never happens, but *B* signs the document and attempts to enforce it as a formal contract. No contract has been made; the facts showing that there is none may be proved by parol testimony. Nor does such a document as this prevent either party from proving that there was a different oral contract previously made. Even though *A* handed the executed document to *B*, it never discharged or nullified anything. *A*

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been performed. Had the acceptance by the bondholders' committee been unconditional, a binding contract would have come into existence then, as the court correctly pointed out. The performance of the act by the grantor may be regarded as his expression of assent to the counter offer (conditional acceptance) made by the bondholders' committee; but the antecedent writing was not an integration of the contract then made. Even if the grantor assented to the counter offer prior to doing the act, the antecedent writing was still not an integration. In Gross v. Campbell, 26 Ohio App. 460, 160 N. E. 511 (1927), *aff'd*, 118 Ohio St. 285, 160 N. E. 852 (1928), a letter containing terms of settlement of a disputed claim, accompanied by a check, was tendered by one party to another as an accord and satisfaction of the claim. The latter was not precluded from showing that the tendered terms were not accepted and that he made a counter oral proposition, adding a stipulation to the terms included in the letter, which was accepted.

22. In *Mercantile Co. v. Parker*, 163 N. C. 275, 79 S. E. 606 (1913), an order for goods, expressly declaring that it included all terms, was held not to exclude proof of instructions that it should not be sent in until further direction by the customer. In New Home Sewing Machine v. Westmoreland, 183 Ark. 769, 38 S. W. (2d) 314 (1931), a suit for the price of machines delivered under an alleged contract, testimony that the salesman for the plaintiff surreptitiously removed the signed but uncompleted contract from the prospective customer's office during the latter's absence and inserted unauthorized terms, was held properly admitted, not as contradicting the written contract, but as showing that no contract was made. In Jefferson Standard Life Ins. Co. v. Morehead, 209 N. C. 174, 183 S. E. 606 (1936), a suit against the indorsers of a promissory note, the note provided that it was binding on all who signed it irrespective of any agreement relative to other indorsers; but evidence was held admissible on behalf of indorsers who had no part in the delivery of the note to show that it was the understanding of the parties that the note was not to be delivered until others had indorsed it. The understanding was that the note was not to be delivered until twenty-five members of a fraternity had indorsed it. Only seven indorsers were actually secured before the note was delivered. As to those who never assented or agreed to a delivery of the note prior to its indorsement by twenty-five members, the terms of the instrument were held not to have become effective and therefore the parol evidence rule was inapplicable. It was held that those who participated in the delivery of the note, without all the other required indorsements, ratified delivery and were liable on the note.

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may prove by parol that event X never happened, or that the writing was understood to be only a specimen, or that it was handed over for examination only.[23]

(4) A hands to B a written document signed by him, saying, "This is a contract prepared by my clerk, but I do not assent to it." B keeps the document, signs it, and wrongfully attempts to enforce it as a contract. A is permitted to prove these facts by oral testimony,[24] and to prove also the terms of a previous oral agreement in contradiction to the terms of the written document. Signing a formal agreement and sending it along with a modifying letter to the other party does not so far integrate the contract as to prevent proof of the modifying letter. Retention by the other party and acceptance of performance will operate as an assent to the modification.[25]

(5) A writes out the terms of an agreement, signs it, and delivers it to B as before, saying this time that he offers it for immediate acceptance, but that the promises contained therein are to be enforceable as a contract only in case event X happens. B accepts A's offer and signs the document. Here, also, it is almost universally held that the facts can all be proved by parol testimony, and that B can enforce the contract against A on condition that event X happens. In this case there is a valid contract, but the promises of both parties therein are subject to an extrinsic condition precedent that must be proved and is permitted to be proved by parol evidence.

In many cases the writing appeared to be a complete integration of the terms of an agreement, but testimony was offered to prove that it had

23. Walter Pratt Co. v. Chaffin & Co., 136 N. C. 350, 48 S. E. 768 (1904); Rule v. Connealy, 61 N. D. 57, 237 N. W. 197 (1931). In Eaton v. New York Life Ins. Co., 315 Pa. 68, 172 Atl. 121 (1934) parol evidence was admitted to show that a sealed insurance policy was delivered merely for the purpose of permitting the insured to take it home to show to his mother and to consult her about accepting it; parol evidence was also admitted to show that the premium was never in fact paid in spite of acknowledgment of receipt contained in the policy. Here, although there was a physical tradition of the document, it was not intended, if the evidence is believed, to be an operative delivery. A similar case is McDonald v. Mutual Life Ins. Co., 108 F. (2d) 32 (C. C. A. 6th, 1939). In Curry v. Colburn, 99 Wis. 319, 74 N. W. 778 (1898), a grantor handed a deed, not dated or acknowledged, to the grantee, at his request, for his examination and the examination of his attorney. The parties were to meet later and complete the bargain. This was no delivery of the deed; and parol evidence was held admissible to show that the written instrument was never delivered so as to bind the parties thereto. See also Meadows v. McClaugherty, 167 Va. 41, 187 S. E. 475 (1936).

24. In an action on a contract, copies of which, after being signed by the parties, were handed to the plaintiff and to the defendant by the attorney who drew it, it was held a question for the jury whether the parties intended the contract to take effect on such delivery. Crosier v. Crosier, 201 Ill. App. 406 (1916).

25. United States Navigation Co. v. Black Diamond Lines, 124 F. (2d) 508 (C. C. A. 2d, 1942); Duplex Envelope Co. v. Baltimore Post Co., 163 Md. 596, 163 Atl. 688 (1933).

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never been assented to as such and that it had been executed in order to be shown to third persons so as to produce the illusion of a contract. In some of these cases this testimony has been held inadmissable as between the two parties to the writing.[26] These cases should be disapproved, for the reason that if the testimony was true no written integration of an actual agreement had occurred. In these cases, courts seem to have thought that the writings proved their own character and validity, or else that plaintiff's testimony, designed to prove that such agreements were assented to as complete integrations of contract, could not be rebutted by contradictory testimony by the defendant. Cases holding that the offered testimony is admissible are numerous;[27] they should be followed. This is not to say that the defendant's testimony must be believed. Without doubt, the form of the instrument tends to corroborate the plaintiff. Surrounding circumstances and the conduct of the parties should be given due considera-

26. Buser v. Everly, 115 Kan. 674, 224 Pac. 66 (1924); Graham v. Savage, 110 Minn. 510, 126 N. W. 394 (1910); Meyer v. Weber, 233 Mo. App. 832, 109 S. W. (2d) 702 (1937); Supreme Lodge Knights of Pythias v. Dalzell, 205 Mo. App. 207, 223 S. W. 786 (1920); Booye v. Ries, 102 N. J. Law 322, 134 Atl. 86 (1926) (six judges out of fifteen dissenting); Nightingale v. Eagle, 141 App. Div. 386, 126 N. Y. Supp. 339 (1st Dep't 1910); Kinnear & G. Mfg. Co. v. Miner, 88 Vt. 324, 92 Atl. 459 (1914).

27. *In re* Hicks, 82 F. (2d) 277 (C. C. A. 2d, 1936); Powers v. Maryland Casualty Co., 25 F. (2d) 890 (D. Mass. 1928); P. A. Smith Co. v. Muller, 201 Cal. 219, 256 Pac. 411 (1927); Chooligan v. Nordstrom, 111 Conn. 572, 150 Atl. 499 (1930); Duplex Envelope Co. v. Baltimore Post Co., 163 Md. 596, 163 Atl. 688 (1933); Beaman-Marvell Co. v. Gunn, 306 Mass. 419, 28 N. E. (2d) (443) (1940) (writing executed merely to show to a bank in getting a loan, true oral contract enforced); Woodard v. Walker, 192 Mich. 188, 158 N. W. 846 (1916) (oral contract enforced); Church v. Case, 110 Mich. 621, 68 N. W. 424 (1896) (mortgage by a donee of land was a sham to be shown to complaining relatives); Hanneman v. Olson, 114 Neb. 88, 206 N. W. 155 (1925); Bernstein v. Kritzer, 253 N. Y. 410, 171 N. E. 690 (1930); Sterling v. Chapin, 185 N. Y. 395, 78 N. E. 158 (1906); Eaton v. New York Life Ins. Co., 315 Pa. 68, 172 Atl. 121 (1934); Bernard v. Fidelity Union Casualty Co., 296 S. W. 693 (Tex. Civ. App. 1927); Northeastern Nash Auto. Co. v. Bartlett, 100 Vt. 246, 136 Atl. 697 (1927); Whitcher v. Waddell, 42 Wyo. 274, 292 Pac. 1091 (1930). In Grierson v. Mason, 60 N. Y. 394 (1875), a salesman had a contract for a salary with a commission, including a guaranty that the commission would amount to a specified minimum. He made a claim on this guaranty, and his employer introduced in evidence a document purporting to be a written contract, stating his salary and commission and containing no guaranty. The salesman was allowed to prove by oral testimony that this document was not intended as a substitute for their previous salary contract, but was executed merely to be shown to a third person for a business purpose. The court said: "The plaintiff proved an instrument which altered the contract, and the defendant had a right to prove that the instrument introduced was not intended as an alteration of the contract, but with a view of accomplishing a particular purpose. Such evidence was not given to change the written contract by parol, but to establish that such contract had no force, efficacy or effect." *Id.* at 397. See also Zell v. American Seating Co., 138 F. (2d) 641 (C. C. A. 2d, 1943), discussed *supra* note 2.

"It is no objection that such an understanding contradicts the writing; a writing is conclusive only so far as the parties intend it to be the authoritative memorial of the

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tion. The finding of the trial court, with or without a jury, should seldom be set aside by an appellate court.[28] But the court should not dodge the determination of the weight of the evidence by appealing to a "parol evidence rule" and finding that a written integration exists without listening to testimony that it does not.

It has been suggested that an "integration," even though itself void for some reason as a contract, excludes proof of any contemporaneous oral agreement.[29] It is believed that this is erroneous. First, if by "contemporaneous" is meant "simultaneous," the assumption that the parties assent at one and the same moment both to the writing and to the oral addition thereto necessarily assumes that the writing is not a complete integration. One cannot express simultaneous assent to two things and at the same instant agree that one of them supplants and nullifies the other. A finding that the parties have assented to a writing as the complete integration of their then existing agreement is necessarily a finding that there is no simultaneous oral addition. On such a finding of fact, we are no longer required to decide whether proof of a simultaneous oral agreement is admissible, for we have just found that there was no such oral agree-

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transaction. Whatever the presumptions, their actual understanding may always be shown except in so far as expressly or implicitly they have agreed that the writing alone shall control. While it is true that an intent to make a contract is not necessary to the creation of a contract and that parties who exchange promises will find themselves bound, whatever they may have thought, nevertheless they will not be bound if they agree that their words, however coercive in form, shall not bind them." Learned Hand, J., in *In re* Hicks, 82 F. (2d) 277, 279 (C. C. A. 2d, 1936).

28. See Bernstein v. Kritzer, 253 N. Y. 410, 171 N. E. 690 (1930).

29. RESTATEMENT, CONTRACTS, § 237, comment *b*, reads as follows: "The rule is not entirely confined to contracts. An integration by definition contains what the parties agreed upon as a complete statement of their promises. Therefore, even though the integrated agreement is void, or voidable and avoided, contemporaneous oral promises relating to the same subject-matter can have no validity in themselves and cannot be added to the written promises to give validity to the combination of the two. Prior agreements, however, whether written or oral, which were operative before the integration do not have their effect destroyed by an integrated agreement which is either void or is voidable and avoided."

Illustration 2, under Section 237, is as follows: "A, an owner of land, and B, a builder, enter into a building contract. Subsequently they make an integrated agreement by which B promises to build according to the original plans and A promises to pay $2,000 additional. B also makes a contemporaneous oral warranty that the timbers will stand for fifty years. The integration, though void as a contract, precludes incorporating the warranty in the agreement, which would furnish sufficient consideration for both the promise to pay and the warranty. Neither is binding." If the oral warranty was in fact simultaneously agreed upon, it is sufficient consideration for A's promise to pay $2,000 additional; and obviously the terms of the agreement then being made are not completely integrated in the writing. It is logically and factually inconsistent to assume that the writing was assented to as a complete integration and that the parties *simultaneously* assented to the oral warranty.

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ment. And a finding that there was such an oral agreement is a finding that the writing is not a complete integration.

Secondly, if "contemporaneous" does not mean "simultaneous," then the oral agreement of which testimony is offered was either antecedent to the acceptance of the writing as an integration or subsequent thereto. If it was subsequent in time, the "parol evidence rule" does not purport to exclude proof of it; if it was antecedent, its validity and effect are certainly not affected by a written integration that is itself legally void.

If *A* delivers to *B* a written document giving to *B* an option to buy land on stated terms, this may be no more than a revocable offer. The "parol evidence rule" should not be applicable to it at all. Doubtless, it is strongly evidential that any previous offer that *A* has made to *B*, on terms less advantageous to *A*, is revoked, but it should not be held conclusive. It should certainly not be held to exclude testimony that *A* had previously authorized *B* to act as agent for the sale of the land to a third person on the same or different terms.[30] There is no inconsistency between the offer to sell to *B* personally and the authority as agent. The same is true even if the document is an option contract, under seal or supported by consideration; it is not an "integration" of anything other than itself.

Effect of an Express Written Statement That There Have Been No Extrinsic Representations, Warranties, or Other Provisions. If a written document, mutually assented to, declares in express terms that it contains the entire agreement of the parties, and that there are no antecedent or extrinsic representations, warranties, or collateral provisions that are not intended to be discharged and nullified, this declaration is conclusive as long as it has itself not been set aside by a court on grounds of fraud or mistake, or on some ground that is sufficient for setting aside other contracts.[31] There is no ambiguity about it and it is later in time than the negotiations that parol evidence is offered to prove. It is similar to a general release of all antecedent claims. There have been many cases in

30. The decision in Barnett v. Lovejoy, 193 Iowa 678, 186 N. W. 1 (1922), must be disapproved. The written document was an offer to sell to *B*, and was to remain open for ten days. But testimony that *A* at the same time authorized *B* to sell the land to *C* should not have been held to vary or contradict it.

31. Pink v. Georgia Stages, 35 F. Supp. 437 (D. Ga. 1940); O. S. Stapley Co. v. Newby, 57 Ariz. 24, 110 P. (2d) 547 (1941); Bankers' Utilities Co. v. Cotton Belt Savings and Trust Co., 152 Ark. 135, 237 S. W. 707 (1922) (oral agreement not to sell the same kind of goods to any other person); Willson v. Riddle, 128 Conn. 100, 20 A. (2d) 402 (1941); Curtis v. Pierce, 157 Ga. 717, 122 S. E. 208 (1924); Sinnett v. J. R. Watkins Co., 214 Ky. 76, 282 S. W. 769 (1926) (sale contract could not be shown to be a contract of agency); Schuster v. North Amer. Hotel Co., 106 Neb. 672, 184 N. W. 136 (1921) (collateral promise by the seller to repurchase the stock sold); Mascho v. Harbour-Longmire Co., 184 Okla. 125, 85 P. (2d) 300 (1938); Dahath Electric Co. v. Suburban Electric Development Co., 332 Pa. 129, 2 A. (2d) 765 (1938); Bernhard Stern & Sons v. Chagnon, 39 R. I. 567, 99 Atl. 592 (1917); Armour Fertilizer Works v. Hyman, 120

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which the written provision was held to exclude proof of a collateral oral warranty of the quality, condition, or capacity of property sold.[32]

The fact that a written document contains one of these express provisions does not prove that the document itself was ever assented to or ever became operative as a contract. Neither does it exclude evidence that the document was not in fact assented to and therefore never became operative.

Such a provision as this, even though it is contained in a complete and accurate integration, does not prevent proof of fraudulent representations by a party to the contract,[33] or of illegality, accident, or mistake.[34] Such

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S. C. 375, 113 S. E. 330 (1922) (alleged verbal agreement whereby the seller was to allow the buyer a discount); Avery Co. of Texas v. Harrison Co., 267 S. W. 254 (Tex. Comm. App. 1924); Hall v. Hall, 133 Wash. 400, 234 Pac. 2 (1925).

"Defendant sets up an alleged contemporaneous parol agreement, vitally changing the written contract, on the faith of which it executed the latter. The written contract provides that, 'It is understood and agreed that all previous communications, either verbal or written, with reference to the subject-matter of this agreement, are hereby withdrawn and annulled, and this contract shall be modified only by written agreement between the parties hereto.' In view of which, the trial court properly rejected the alleged parol modification. When the parties, as here, have deliberately put their agreement in writing stipulating therein that it contains the entire contract and shall be modified only by the parties' written agreement, such stipulation forms a material part of the contract and is enforceable as such." Gross v. Exeter Machine Works, 277 Pa. 363, 366-7, 121 Atl. 195, 196 (1923). The provision against any *subsequent* modification except by a writing is, without question, ineffective. Also, the express provision would not nullify a collateral agreement in writing simultaneously executed. The latter writing would have as much weight as the former. Brown v. Grow, 249 Mass. 495, 144 N. E. 403 (1924).

32. J. B. Colt & Company v. Clay, 216 Ky. 782, 288 S. W. 745 (1926); J. B. Colt Co. v. Farmer, 286 S. W. 399 (Mo. App. 1926); Dowagiac Manufacturing Co. v. Corbit, 127 Mich. 473, 86 N. W. 954 (1901); John N. Benedict Co. v. McKeage, 201 App. Div. 161, 195 N. Y. Supp. 228 (3rd Dep't 1922); J. B. Colt Co. v. Springle, 190 N. C. 229, 129 S. E. 449 (1925); Henry v. Kennard, 178 Okla. 368, 62 P. (2d) 1184 (1936); S. Morgan Smith Co. v. Monroe County Water, Power & Supply Co., 221 Pa. 165, 70 Atl. 738 (1908); Deaver v. J. C. Mahan Motor Co., 163 Tenn. 429, 43 S. W. (2d) 199 (1931); Baxter v. Ford Motor Co., 168 Wash. 456, 12 P. (2d) 409 (1932); Mallow v. Hall, 209 Wis. 426, 245 N. W. 90 (1932).

33. Barnsdall Refining Corp. v. Birnamwood Oil Co., 92 F. (2d) 817 (C. C. A. 7th, 1937); Hubert v. Apostoloff, 278 Fed. 673 (D. C. N. Y. 1921), *aff'd*, 285 Fed. 161 (C. C. A. 2d, 1922); Bates v. Southgate, 308 Mass. 170, 31 N. E. (2d) 551 (1941); Nash Mississippi Valley Motor Co. v. Childress, 156 Miss. 157, 125 So. 708 (1930); Berrendo Irrigated Farms Co. v. Jacobs, 23 N. M. 290, 168 Pac. 483 (1917); Lone Star O. C. v. Vinson, 168 S. W. (2d) 673 (Tex. Civ. App. 1942); Note 21 TEX. L. REV. 811; Land Finance Corp. v. Sherwin Elec. Co., 102 Vt. 73, 146 Atl. 72 (1929).

But *cf.* Sullivan v. Roche, 257 Mass. 166, 153 N. E. 549 (1926), holding in a suit to set aside a contract, that where there is no fraud in the execution of the contract, and where parties stipulated that the writing contained all representations, agreements and promises, antecedent false representations as to the rental value of the premises sold did not warrant the setting aside of the contract, and the stipulation was binding.

34. Not only is proof of fraud, mistake, or duress admissible to show that the contract is voidable (including the clause to the effect that there are no extrinsic terms,

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evidence may directly contradict the writing but at the same time it shows the whole writing to be void or voidable, including the statement by which representations and mistakes are denied. An agreement that we do now discharge and nullify all previous agreements and warranties is effective as long as it is not itself avoided. But paper and ink possess no magic power to cause statements of fact to be true when they are actually untrue. Written admissions are evidential but they are not conclusive.

There is diversity in the decisions dealing with sales of goods where false representations are alleged to have been made by the seller's agent without the seller's participation. It has been held that a principal, otherwise innocent, can not keep the benefits of a contract induced by his agent's fraud without being held responsible therefor, even though there is an express provision in the writing declaring that there have been no representations that are not contained therein.[35] But there are also cases holding that an innocent principal is justified in relying on the other party's signed statement that there have been no such extrinsic representations, whether fraudulent or not.[36]

A provision that there are no previous understandings or agreements not contained in the writing is, on its face, a statement of fact; it is also more than that. By limiting the contract to the provisions that are in writing, the parties are definitely expressing an intention to nullify ante-

representations, or conditions), but also to eliminate that exclusionary clause itself and to permit proof of collateral provisions and representations. Such an effect has even been given to a mild form of "business compulsion." See Champlin v. Transport Motor Co., 177 Wash. 659, 33 P. (2d) 82 (1934). No court likes to see the parol evidence rule used to consummate a wrong or to enforce an unconscionable advantage.

35. Northwestern Rug Mfg. Co. v. Leftwich Hardware & Furniture Co., 176 Ark. 212, 2 S. W. (2d) 1109 (1928); Good Roads Machinery Co. v. Ott, 186 Iowa 908, 171 N. W. 721 (1919); Outcault Adv. Co. v. Smalley, 101 Kan. 645, 168 Pac. 677 (1917); Smith & N. Co. v. Morgan, 152 Ky. 430, 153 S. W. 749 (1913); Plate v. Detroit Fidelity & S. Co., 229 Mich. 482, 201 N. W. 457 (1924); Bloomberg v. Pugh Bros. Co., 45 R. I. 360, 121 Atl. 430 (1923); Land Finance Corp. v. Sherwin Electric Co., 102 Vt. 73, 146 Atl. 72 (1923).

36. Gridley v. Tilson, 202 Cal. 748, 262 Pac. 322 (1927); Pacific States Automotive Finance Corp. v. Addison, 45 Idaho 270, 261 Pac. 683 (1927); Pinkerton v. Superior Motor Sales Co., 85 Ind. App. 165, 143 N. E. 365 (1924); J. B. Colt Co. v. Kocher, 123 Kan. 286, 255 Pac. 48 (1927); Arthur E. Guth Piano Co. v. Adams, 114 Me. 390, 96 Atl. 722 (1916).

In J. B. Colt Co. v. Odom, 136 Miss. 651, 101 So. 853, 1924), the court stated: "Every person has a constitutional right to limit the powers of his or its agents, and if it reserves a right to pass upon the contract as sent to it, and the purchaser represents in such contract that no outside representations have been made, and the contract contains all the agreements of the parties, such purchaser will not thereafter be permitted to show statements made by the agent to him not embraced in the contract . . . He cannot represent to the [seller] that no representations have been made by the agent to procure the execution of the contract, and thereafter repudiate it on the ground that the agent misled him." *Id.* at 660, 101 So. at 855.

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cedent understandings or agreements. They are making the document a complete integration. Therefore, even if there had in fact been an antecedent warranty or other provision, it is discharged by the written agreement. To establish fraud, it is not sufficient merely to show that the writing states that there was no antecedent agreement when in fact there had been one. If, by artifice or concealment, one party induces the other to suppose that the antecedent agreement is included in the writing, or to forget that agreement and to execute an incomplete writing, while describing it as complete, the written provision may be voidable on the ground of fraud.[37]

A statement in the writing that it contains all terms agreed upon and that there are no promises, warranties, or other extrinsic provisions, is a statement of fact that may actually be untrue. The written document may itself be obviously incomplete on its face or it may be expressed in ambiguous language. Cases may be found in which oral testimony was admitted and the express statement disregarded, on the ground that it was necessary for interpretation and for the filling of gaps.[38]

The provision stating that there are no antecedent understandings and agreements may be so worded as to show that the parties mean to exclude implied warranties as well as express ones.[39] But the wording may be such that it excludes and nullifies only such antecedent agreements and warranties as the parties may have made in express terms, and not those warranties, such as fitness for the purpose, "implied in law." [40] These latter warranties may be such as are attached to the contract on grounds of policy without any expression by the parties. The coverage of the written provision is a matter of interpretation as in the case of any other kind of provision. Here, as elsewhere, the process of interpretation leads to results that seem

37. See International Harvester Co. of America v. Bean, 159 Ky. 842, 169 S. W. 549 (1914).

38. Air Conditioning Corp. v. Honaker, 296 Ill. App. 221, 16 N. E. (2d) 153 (1938).

39. Bagley v. Gen. Fire Extinguisher Co., 150 Fed. 284 (C. C. A. 2d, 1906) (implied warranty of suitability for purpose); Sterling-Midland Coal Co. v. Great Lakes Coal & Coke Co., 334 Ill. 281, 165 N. E. 793, 1929) (implied warranty of fitness); Oldfield v. International Motor Co., 138 Md. 35, 113 Atl. 632 (1921); S. F. Bowser & Co. v. Independent Dye House, 276 Mass. 289, 177 N. E. 268 (1931); Laitner Plumbing & Heating Co. v. McThomas, ... Mo. App. ..., 61 S. W. (2d) 270 (1933); Lumbrazo v. Woodruff, 256 N. Y. 92, 175 N. E. 525 (1931) (implied warranty of description of seed); Minneapolis Threshing M. Co. v. Hocking, 54 N. D. 559, 209 N. W. 996 (1926) ("all statutory and implied warranties"); Rockwood & Co. v. Parrott & Co., 142 Ore. 201, 19 P. (2d) 423 (1933); Somerville v. Gullett Gin Co., 137 Tenn. 509, 194 S. W. 576 (1917).

40. Colt Co. v. Bridges, 162 Ga. 154, 132 S. E. 889 (1926); Hughes v. National Equipment Corporation, 216 Iowa 1000, 250 N. W. 154 (1933); Heating Co. v. Kramer, 127 Iowa 137, 102 N. W. 840 (1905); Lutz v. Hill-Diesel Engine Co., 255 Mich. 98, 237 N. W. 546 (1931); Little v. G. E. Van Syckle & Co., 115 Mich. 480, 73 N. W. 554 (1898); Dr. Schoop Family Medicine Co. v. Davenport, 163 N. C. 294, 79 S. E. 602 (1913).

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to be inconsistent and conflicting so far as can be determined from the court opinions.

Parol Evidence Admissible for Purposes of Interpretation. No parol evidence that is offered can be said to vary or contradict a writing until by process of interpretation the meaning of the writing is determined. The "parol evidence rule" is not, and does not purport to be, a rule of interpretation or a rule as to the admission of evidence for the purpose of interpretation. Even if a written document has been assented to as the complete and accurate integration of the terms of a contract, it must still be interpreted and all those factors that are of assistance in this process may be proved by oral testimony.

It is true that the language of some agreements has been believed to be so plain and clear that the court needs no assistance in interpretation.[41] Even in these cases, however, the courts seem to have had the aid of parol evidence of surrounding circumstances.[42] The meaning to be discovered and applied is that which each party had reason to know would be given to the words by the other party.[43] Antecedent and surrounding factors that throw light upon this question may be proved by any kind of relevant evidence.

41. See Arkansas Amusement Corp. v. Kempner, 57 F. 2d 466 (C. C. A. 8th, 1932); Las Animas Consol. Canal Co. v. Hinderlider, 100 Colo. 508, 68 P. (2d) 564 (1937); Bennett v. Consolidated Realty Co., 226 Ky. 747, 11 S. W. (2d) 910 (1928); Lee v. National Refining Co., 181 Okla. 556, 75 P. (2d) 406 (1938); Goggin v. Goggin, 57 R. I. 166, 194 Atl. 730 (1937). In *Las Animas Consol. Canal Co.* v. *Hinderlider,* it was held that an irrigation company's written contract not to call for or demand water to supply a certain ditch until other companies' senior priorities were fully satisfied, was plain, unambiguous, and susceptible of but one construction, and hence could not be varied by parol testimony as to the parties' intent at the time of executing the contract.

In *Bennett* v. *Consolidated Realty Co.,* it was held that, where a covenant in a deed conveying lots, forbidding their use for trade or business, was unambiguous and expressed in ordinary words, testimony relative to an oral agreement with the agent that the lots might be used as a parking place in connection with an adjacent roadhouse, was inadmissible as varying the plain meaning of a contract required to be in writing.

42. Porto Rico Sugar Co. v. Lorenzo, 222 U. S. 481 (1912), holding that a contract to grind sugar, when read with knowledge of the business, shows itself to be a contract to grind in the grinding season, and parol evidence is admissible to show what that season is in a given place; American Mut. Liability Ins. Co. v. Tuscaloosa Veneer Co., 237 Ala. 187, 186 So. 133 (1939); Colonial Trust Co. v. Joseph Hilton, Inc., 111 Conn. 77, 149 Atl. 513 (1930); Reilly Tar & Chem. Corp. v. Lewis, 301 Ill. App. 459, 23 N. E. (2d) 243 (1939); Hurst v. W. J. Lake & Co., 141 Ore. 306, 16 P. (2d) 627, 89 A. L. R. 1222, 1228 (1932), allowing a requirement of "minimum 50 per cent protein" to be explained according to its meaning in the trade so as to show that 49.5 per cent protein was a compliance therewith; Warner-Godfrey Co. v. Sheinman, 273 Pa. 105, 116 Atl. 671 (1922), allowing evidence of trade custom to show that a contract for forty inch voile is complied with by furnishing voile thirty-eight or thirty-eight and one-half inches wide; RESTATEMENT, CONTRACTS, §§ 230, 235(d).

43. "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the

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The more bizarre and unusual an asserted interpretation is, the more convincing must be the testimony that supports it. At what point the court should cease 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.[44] Such testimony does not vary or contradict the

time in which it is used." Justice Holmes in Towne v. Eisner, 245 U. S. 418, 425 (1918).

"The flexibility of or multiplicity in the meaning of words is the principal source of difficulty in the interpretation of language. Words are the conduits by which thoughts are communicated, yet scarcely any of them have such a fixed and single meaning that they are incapable of denoting more than one thought. In addition to the multiplicity in meaning of words set forth in the dictionaries there are the meanings imparted to them by trade customs, local uses, dialects, telegraphic codes, etc. One meaning crowds a word full of significance, while another almost empties the utterance of any import. The various groups above indicated are constantly amplifying our language; in fact, they are developing what may be called languages of their own. Thus one is justified in saying that the language of the dictionaries is not the only language spoken in America. . . . It is said that a court in construing the language of the parties must put itself into the shoes of the parties. That alone would not suffice; it must also adopt their vernacular." Hurst v. W. J. Lake & Co., 141 Ore. 306, 310, 16 P. (2d) 627, 629 (1932).

44. Buchanan v. Swift, 139 F. (2d) 483 (C. C. A. 7th, 1942) (promise to pay a weekly sum "for 5 years or until her death" might mean "or until her death if after 5 years"); Standard Brands v. Eastern S. S. Lines, 97 F. (2d) 918 (C. C. A. 2d, 1938) (allowing evidence to show that a shipper understood that the notation "freight on hand India Wharf" covered freight at any one of three wharves of which India Wharf was one); Smith v. Swendsen, 57 Idaho 715, 69 P. (2d) 131, 111 A. L. R. 441, 448 (1937); Keyser v. Weintraub, 157 Md. 437, 146 Atl. 275 (1929) (allowing evidence to explain what was meant by the word "loss" in an agreement by defendant to share equally in any loss that plaintiffs might sustain from uniting in a certain mortgage); Schwartz v. Whelan, 295 Pa. 425, 145 Atl. 525 (1929) (allowing evidence to show whether "plastering . . . in basement where noted" meant to plaster the whole basement or just the janitor's room, there being no writing or plan to make it certain); Leonard v. Prater, 36 S. W. (2d) 216 (Tex. Comm. App. 1931) (allowing evidence to show that drilling an oil well was considered part of "the expense of operating the lease") Fayter v. North, 30 Utah 156, 83 Pac. 742 (1906) (oral negotiations to show that "appurtenances" in a deed included a drainage ditch); Perkins v. Brown, 179 Wash. 597, 38 P. (2d) 253 (1934) (allowing evidence to show what "reimburse" meant in the phrase "for which Mortgage Purchaser herein agrees to reimburse the Vendor"); Schwemer v. Fry, 212 Wis. 88, 249 N. W. 62 (1933); Hammond v. Capital City Mutual Fire Ins. Co., 151 Wis. 62, 138 N. W. 92 (1912) ("property of Hammond Bros." shown by oral negotiations to include both partnership goods and goods separately owned).

Evidence of antecedent understandings and negotiations has been allowed for explanatory purposes: to identify the subject-matter of an agreement, Yellowstone Sheep Co. v. Diamond Dot Live Stock Co., 43 Wyo. 15, 297 Pac. 1107, 75 A. L. R. 1151, 1166 (1931) (holding proper the admission of parol evidence of prior negotiations in order to determine what was meant by "old ewes" and so identify the subject matter of the sale); to identify parties, Becker v. Farmers' Mut. Fire Ins. Co. of Rock Township, 99 S. W. (2d) 148

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written words; it determines that which cannot afterwards be varied or contradicted.

Mr. Justice Holmes once gave us the dictum that "you cannot prove a mere private convention between the two parties to give language a different meaning from its common one. 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." [45] It is believed, however, that the great judge was in error. The risks which he says would be "too great" are in fact being borne; they are not so great as he feared. We must remember that a person asserting that "five hundred feet" was used to mean "one hundred inches" bears the heavy risk of not being able to persuade the court and jury that it is true. Often he would need the

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(Mo. App. 1936) (allowing parol evidence of prior negotiations to show plaintiffs were parties intended to be insured under the designation "Press Becker Est. as per mentioned in will" in a fire policy); to show the capacity in which a party acts or the real relation of parties to a writing, Bieser v. Irwin, 101 Colo. 210, 72 P. (2d) 271 (1937), (holding parol evidence admissible to show that a word added to a signature on a note was not intended as descriptive of the person signing but was understood by the contracting parties as indicating that the contract was signed in a representative capacity); to clarify language that is indefinite, uncertain or ambiguous, Ethredge v. Diamond Drill Contracting Co., 196 Wash. 483, 83 P. (2d) 364 (1938) (holding that the trial court erred in not admitting statements of the interested parties at the time of signing the instrument as to what they meant by the words "five consecutive days of drilling" used therein); to explain technical, trade or local terms, California Canning Peach Growers v. Williams, 11 Cal. (2d) 221, 78 P. (2d) 1154 (1938) (allowing parol explanation of term "renter member" in marketing agreement between fruit grower and cooperative association).

In Smith v. Vose & Sons Piano Co., 194 Mass. 193, 80 N. E. 527 (1907), the plaintiff contracted in writing to drive a well "until 25 gallons of water per minute is obtained," for a specified compensation. The well was so driven and a flow of more than twenty-five gallons per minute was obtained. But the water was salt and unfit for the purposes of the defendant. The court held that it was error to exclude testimony of the oral conversations of the parties, at the time the contract was made, to show that the plaintiff promised to produce water that was not salt. In Jones v. Holland Furnace Co., 188 Wis. 394, 206 N. W. 57 (1925), an express warranty in writing provided that a furnace "shall give good heating service." The court admitted testimony that the agents of the defendant had assured the plaintiff that "good heating service" meant heat up to seventy degrees when the temperature outside was ten degrees below zero.

"Reading into a contract the true meaning of technical terms, familiar to and used by the parties to a contract, is in no sense supplying by parol a missing term of the agreement. Such trade usage or meaning is supposed to have been in the minds of the parties when the contract was made, and hence the real meaning of the words becomes a part of the contract . . . Neither the parol evidence rule nor the statute of frauds is violated by reading into a contract a translation of technical terms used into words of general understanding." Franklin Sugar Ref. Co. v. William D. Mullen Co., 12 F. (2d) 885, 887 (C. C. A. 3rd, 1926).

45. Holmes, *The Theory of Legal Interpretation* (1899) 12 HARV. L. REV. 417, 420; Goode v. Riley, 153 Mass. 585, 28 N. E. 228 (1891).

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corroboration of a written code signed by the other party or of some special custom or usage of a group of people.

Custom and usage of a particular place or trade can be proved to give to the words of a written contract a meaning different from that usually given them. This is true even though the words are in ordinary, common use, such as words of number or words expressing a period of time.[46]

It is often stated as a rule applicable to the law of wills that evidence of statements of intention made by the testator is not admissible in the process of determining the meaning to be given to his will. This rule—although its continued application under modern conditions of trial is not altogether approved by Thayer—is regarded by him as a rule of evidence rather than of substantive law.[47] His supporting illustrations are taken from the cases dealing with wills rather than contracts. Whether the old notions of policy behind this rule are sound or not, the rule is not a part of, or an application of, the "parol evidence rule." In the law of contracts, a statement by one of the parties as to what his intention was may be quite immaterial. So also such a statement may be, even, though expressed when the contract is being made, unless it is communicated to the other party. But a contractor is bound in accordance with the meaning that he knows or had reason to know the other party gave to the words of the contract when it was made. Statements of intention and interpretations then made are certainly not immaterial on that issue. The "parol evidence rule" does not exclude proof of them on the issue of the meaning and interpretation of the words.

Oral Proof of Fraud, Illegality, Accident, or Mistake. Certain kinds of illegality, accident, and mistake have been said to make a transaction "completely void"—i.e., to prevent the existence of a contract. In such cases, parol evidence is admissible as has been previously stated. Fraud, on the other hand, merely makes a contract voidable at the instance of the innocent party; the same is true of many types of illegality and mistake.

46. "A thousand" may be interpreted to mean twelve hundred when such is the usage in the rabbit business. Smith v. Wilson, 3 B. & Ad. 728, 110 Eng. Rep. R. 266 (K. B. 1832). Also "white" may be interpreted black, where by trade usage "white selvage" meant a selvage that was relatively dark. Mitchell v. Henry [1880] 2 Ch. 181 (C. A.), reversing Sir George Jessel who declared that 'nobody could convince him that black was white.' In Brown v. Byrne, 3 E. & B. 703, 118 Eng. Rep. R. 1304 (Q. B. 1854), a bill of lading fixed the freight to be paid on bales of cotton at "five eighths of a penny per pound." At that rate the freight was £138. But the consignee was permitted to prove a custom of the port to allow a three months' discount, even though there was no period of credit, so that the amount payable was only £136.

47. "There is one thing which cannot, under our law, be used, namely, extrinsic expressions of the writer as to his intention in the writing. This is usually and rightly regarded as an excluding rule of evidence . . . it does not rest upon any lack of materiality and probative value in such direct statements of intention, but upon the impolicy and danger of using them." THAYER, PRELIMINARY TREATISE ON EVIDENCE (2d ed. 1898) 414.

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Whether they are such as to make the contract either void or voidable, it is in no case denied that oral testimony is admissible to prove fraud, illegality, accident or mistake. This is so, even though the testimony contradicts the terms of a complete integration in writing;[48] it is so, whether the suit is for rescission or for reformation and enforcement.[49]

A contract may provide for the payment of a sum of money in case of breach "as liquidated damages." Parol evidence is admissible to contradict this language and to show that the sum so described is in fact a "penalty" and therefore unenforceable.[50] Such a provision is legally void on grounds of social policy.

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48. McMaster v. New York Life Ins. Co., 183 U. S. 25 (1901) (date when premium was payable to avoid forfeiture); Cities Service Oil Co. v. Dunlap, 100 F. (2d) 294 (C. C. A. 5th, 1938) (mistaken description of land corner); Barnsdall Refining Corp. v. Birnamwood Oil Co., 92 F. (2d) 817 (C. C. A. 7th, 1937) (fraud); Arnold v. Nat. Aniline & Chemical Co., 20 F. (2d) 364 (C. C. A. 2nd, 1927); Endicott v. Rosenthal, 216 Cal. 721, 16 P. (2d) 673 (1932) (illegal restraint of trade); Choolgian v. Nordstrom, 111 Conn. 572, 150 Atl. 499 (1930) (total lack of consideration); Geremia v. Boyarsky, 107 Conn. 387, 140 Atl. 749 (1928) (mistake of addition in making offer); Smith v. Crockett Co., 85 Conn. 282, 82 Atl. 569 (1912) (bribery); Cahow v. Hughes, 173 So. 471 (La. App. 1937) (sale was a mere subterfuge to disguise a donation); Gross v. Stone, 173 Md. 653, 197 Atl. 137 (1938); American Mut. Liability Ins. Co. v. Condon, 280 Mass. 517, 183 N. E. 106 (1932) (mistake in description of an insured); Wells v. Niagara Land & Timber Co., 243 Mich. 550, 220 N. W. 667 (1928) (mistake in computing the price); Ganley Bros. v. Butler Bros. Bldg. Co., 170 Minn. 373, 212 N. W. 602 (1927) (citing many cases); Lyman v. Kimball, 82 N. H. 232, 131 Atl. 690 (1928) (illegality, violation of the state prohibition law); Downs v. Jersey Central Power and Light Co., 117 N. J. Eq. 138, 174 Atl. 887 (1934); Berg v. Hoffman, 275 N. Y. 132, 9 N. E. (2d) 806 (1937) (duress); Richeson v. Wood, 158 Va. 269, 163 S. E. 339 (1932) (illegality for usury).

In Lytle v. Scottish Amer. Mortg. Co., 122 Ga. 458, 50 S. E. 402 (1905), the court said: "Even parol testimony is admitted to enable one to show that a written instrument is not valid, but void. It is always permissible to show that a paper is but a cover for usury, penalty, forfeiture, or other illegal advantage to one of the parties. For if the law did not sedulously disregard form and seek for substance, nothing would be easier than its evasion by giving innocent names to prohibited acts. What is called 'rent' may be shown to be usury. What is called 'rent' may be shown to be unreasonable liquidated damages. What is called 'rent' may be shown to be purchase money, if, as purchase money, it could not be retained by the vendor on rescission." *Id.* at 466, 50 S. E. at 406. In Craddock Bros. v. Hunt [1923] 2 Ch. 136 (C. A.), the wrong land was described in both the written contract and the ensuing deed of conveyance. The court was quite aware that it was enforcing a written contract "with a parol variation."

49. See in accord RESTATEMENT, CONTRACTS § 238. See also *id.* § 509, comment *a*: "The right of reformation of a contract wherever allowed is necessarily an invasion or limitation of the parol evidence rule; . . ."

50. "The language employed in this contract for a deduction, in the discretion of the Chief of Ordnance, of $35 per day from the price to be paid for each day of delay in delivery of each gun carriage, respectively, taken in connection with the subject matter of the contract, leaves room for the construction of that language in order to determine which was intended, a penalty or liquidated damages. While it is claimed that there is really no doubt as to the proper construction of the contract, even if the contract alone is

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A signed document may have come into the plaintiff's hands by accident or mistake, and the fraud may consist in the plaintiff's attempt to enforce it as a contract. But fraud in the inducement of assent, or an antecedent mistake by one known to the other, may make the contract voidable without preventing its existence, and without showing that the writing was not agreed on as a complete integration of its terms. In such a case the offered testimony may not vary or contradict the terms of the writing, although it would be admissible even if it did so; it merely proves the existence of collateral factors that have a legal operation of their own, one that prevents the written contract from having the full legal operation that it would otherwise have had. This is not varying or contradicting the written terms of agreement, although it does vary or nullify in part their legal effect.

Partial Integration—Reduction of Only Part of An Agreement to Writing. The two contracting parties have power to make their contract as they see fit, both as to the substance of its terms and the manner of its expression. They can agree to reduce some provisions to written form and to leave others unwritten, trusting the latter to oral expression only. Such a writing has been described as a partial integration; it is said that with respect to the provisions in writing, the "parol evidence rule" prevents their variation or contradiction by testimony of antecedent negotiations.[51]

We need not dissent from such a statement if the parties have in fact assented to such a partial integration and have drawn such clear boundaries around the terms that are in writing, that the court can determine what it is that they are meant to supersede. It should be observed, however, that when an agreement is partly written and partly oral, the oral part must nearly always have some effect upon the interpretation, application, and legal operation of the part that is in writing. To this extent, at least, the

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to be considered, yet we think that much light is given as to the true meaning of language that is not wholly free from doubt by a consideration of the correspondence between the parties before the final execution of the contract itself. Under such circumstances we think it never has been held that recourse could not be had to the facts surrounding the case and to the prior negotiations for the purpose of determining the correct construction of the language of the contract." United States v. Bethlehem Steel Co., 205 U. S. 105, 118 (1907).

51. RESTATEMENT, CONTRACTS § 239, reads as follows: "Where there is integration of part of the terms of a contract prior written agreements and contemporaneous oral agreements are operative to vary these terms only to the same extent as if the whole contract had been integrated." Cobb v. Wallace, 45 Tenn. 539 (1868), is a case in which an oral contract for the hiring of a coal barge was later supplemented by a written receipt for the barge containing a statement of the daily rental to be paid. This receipt was perhaps a "partial integration" of the antecedent oral agreement. It certainly was not assented to as a complete integration of that agreement or as a substitute operating in discharge of it.

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partial integration does not prevent its own variation by extrinsic evidence. In such cases as these, the court should be slow to find that the parties have actually assented to the partial writing as a superseding document. It may, indeed, even though partial, have great evidential weight as to the terms of agreement. But after establishing the fact that there is no complete integration of an entire contract, it must seem unlikely that the parties meant the partial writing to be conclusive as to anything.

Evidence That the Writing Was Not Assented to as a Complete and Accurate Integration. There are thousands of cases in which courts have declared that parol evidence is not admissible to vary or contradict the terms of a written contract.[52] It is stated in the form of a rule of evidence for the exclusion of offered testimony. In many of these cases, however, the published report itself shows that the offered testimony was actually heard and its credibility weighed. In spite of it, the court finds that there was a complete and accurate integration in writing, and then justifies its decision by repeating the "parol evidence rule" to the effect that such testimony is not admissible to vary or contradict the writing.[53]

Having admitted and weighed the evidence to determine whether there is such an integration in writing and having found that there is, that very evidence becomes quite immaterial for the purpose of varying or contra-

52. The following cases illustrate the supposed rule: DeWitt v. Berry, 134 U. S. 306 (1890). The writing contained an express warranty that goods would be like those sold to a third party and also like a sample. The Court held that an additional oral warranty of quality was not provable. Browning v. Haskell, 39 Mass. 310 (1840), excluded oral testimony of a lessor, when offered to show that she signed the lease under protest and in reliance on the oral promise of the tenant to execute a lease on different terms within two days. This was not a case of conditional delivery. In Smith v. Jeffryes, 15 M. & W. 560, 153 Eng. Rep. R. 972 (Ex., 1846), a contract to deliver "ware potatoes," was shown by plaintiff's testimony to mean the largest and best quality of three different qualities grown in the neighborhood. The court held that it was error to admit the testimony of the defendant that the plaintiff had said that the potatoes he sold were "Regents ware" potatoes, and not "kidney wares." The court gave no opinion justifying the decision. In Violette v. Rice, 173 Mass. 82, 53 N. E. 144 (1899), the plaintiff was employed by a written contract in which she promised "to render services at any theatres," and "to conform to all the rules and regulations adopted by" the theatre employer. Mr. Justice Holmes, speaking for the court, refused to admit testimony to show that the defendant had orally agreed to employ her in the part of Bertha Gessler in a play called Excelsior Junior. The court believed that this testimony contradicted the terms of the writing Where a marine insurance policy represented a ship as "Swedish," oral testimony to show that it was in fact American, that it was described as "Swedish" to deceive the British who were then at war with the United States, and that the defendant insurer knew these facts, was held inadmissible: "There cannot be a usage, by which a warranty that a vessel was neutral should be held to mean that she was not neutral, but only pretended to be so." Lewis v. Thatcher, 15 Mass. 431, 433 (1819).

53. No opinion can be hazarded, without careful reading of thousands of cases, as to the proportion of them in which parol evidence was described as inadmissible after some or all of it was heard and weighed. Such an extensive research is not possible for the purposes of the present article. The application of the "parol evidence rule" by the

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dicting the integration that supplanted and nullified it. It was material and was admissible on one issue; but the decision of that issue was that the parties agreed to substitute one written integration for all their antecedent negotiations. Until this decision was reached, one could not know that there had been such a substitution. The evidence may clearly show that there was no agreement to substitute the written contract for a former oral one, in which case an action for breach of that oral contract is not prevented by the parol evidence rule.[54]

The fact that the rule has been stated in such a definite and dogmatic form as a rule of admissibility is unfortunate. It has an air of authority and certainty that has grown with much repetition. Without doubt it has deterred counsel from making adequate analysis and research and from offering parol testimony that would have been admissible for many purposes. Without doubt, also, it has caused a court to refuse to hear testimony that ought to have been heard. The mystery of the written word is still such that a paper document may close the door to a showing that it was never assented to as a complete integration.

No objection whatever can be made to exclusion of the testimony if the written integration is in fact what the court assumes or decides that it is. If it is in fact a complete and correct integration of the terms on which the parties are agreed, all of their antecedent understandings and agreements are in truth merged in and discharged by the new written agreement of the parties, an agreement that is as valid and effective as are other contracts and that can be avoided only for the same reasons that avoid other contracts. In such a case, the offered testimony is indeed an attempt to prove something that is totally immaterial. But in such a case, it is not the "parol evidence rule" that makes those facts immaterial; it is the new integrated agreement that has made them immaterial.[55]

courts of North Carolina is shown in great detail in Chadbourn and McCormick, *loc. cit. supra* note 15. The authors indicate the impossibility of reconciling all the decisions. They also prove the extreme liberality with which the courts have admitted oral evidence of antecedent agreements varying or adding to a writing. It is believed that a similar survey of the cases of the other states would show substantially the same result. See, also, Hale, *The Parol Evidence Rule,* (1925) 4 ORE. L. REV. 91; McWilliams, *The Parol Evidence Rule in California* (1919) 7 CALIF. L. REV. 417.

54. United States Nav. Co. v. Black Diamond Lines, 124 F. (2d) 503 (C. C. A. 2d, 1942), *cert. denied,* 315 U. S. 816 (1942); Cobb v. Wallace, 45 Tenn. 539 (1868); Danielson v. Bank of Scandinavia, 201 Wis., 392, 230 N. W. 83 (1930).

55. A court may be aware that the supposed rule is a rule of substantive law and yet misapply it or else be in error as to what the rule actually is. See Pitcairn v. Philip Hiss Co., 125 Fed. 110 (C. C. A. 3d, 1903), where three witnesses for the defendant, in an action for the price of completed work, testified that as the writing was signed the parties both agreed that the price should not be payable unless the work was done to the "satisfaction" of the defendant's wife. The plaintiff did not object to the admission of this testimony but testified that it was not true. The court directed the jury to disregard this testimony, on the theory that a rule of substantive law made the oral agreement inoperative. But if the testimony was true, there was no agreed complete integration by which the simultaneous oral agreement could be discharged.

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The difficulty is that the court's assumption or decision as to the completeness and accuracy of the integration may be quite erroneous. The writing cannot prove its own completeness and accuracy.[56] Even though it contains an express statement to that effect, the assent of the parties thereto must still be proved. Proof of its completeness and accuracy, discharging all antecedent agreements, must be made in large part by the oral testimony of parties and other witnesses. The very testimony that the "parol evidence rule" is supposed to exclude is frequently, if not always, necessary before the court can determine the completeness and accuracy of the integration. The evidence that the rule seems to exclude must sometimes be heard and weighed before it can be excluded by the rule.[57] This is

56. Wigmore correctly says: "the conception of a writing as wholly and intrinsically self-determinative of the parties' intent to make it the sole memorial of one or seven or twenty-seven subjects of negotiation is an impossible one." 9 WIGMORE, EVIDENCE, § 2431. To the same effect, *id.* §2400(5). Nevertheless, there are many cases in which the completeness and accuracy of the writing as an agreed integration is assumed by the court after what seems to have been a mere inspection of the writing. In Thompson v. Libby, 34 Minn. 374, 26 N. W. 1 (1885), the court said: "The only criterion of the completeness of the written contract as a full expression of the agreement of the parties is the writing itself." *Id.* at 377, 26 N. W. at 2. And see in accord, Robbs v. Illinois Rural Rehabilitation Corp., 313 Ill. App. 418, 40 N. E. (2d) 549 (1942); Cargill Comm. Co. v. Swartwood, 159 Minn. 1, 198 N. W. 536 (1924); Dawson County State Bank v. Durland, 114 Neb. 605, 209 N. W. 243 (1926); Davis v. Ferguson, 111 Neb. 691, 197 N. W. 390 (1924); Sund v. Flagg & Standifer Co., 86 Ore. 289, 168 Pac. 300 (1917); Coal River Collieries v. Eureka Coal & Wood Co., 144 Va. 263, 132 S. E. 337 (1926); Braude & McDonnell, Inc. v Cohen Co., 87 W. Va. 763, 106 S. E. 52 (1921).

In Naumberg v. Young, 44 N. J. Law 331 (1882), the court said: "The only safe criterion of the completeness of a written contract as the full expression of the parties' agreement is the contract itself . . . If the written contracts purport to contain the whole agreement, and it is not apparent from the wriing itself that something has been left out to be supplied by extrinsic evidence, parol evidence to vary or add to its terms is not admissible." *Id.* at 339. But see 9 WIGMORE, EVIDENCE, § 2431: "Such a proposition, however, is untenable, both on principle and in practice. In practice, it is not enforced by its theoretical advocates."

57. 9 WIGMORE, EVIDENCE, § 2430 (2), reads as follows: "Thus the apparent paradox is committed of receiving proof of certain negotiations in order to determine whether to exclude them; and this doubtless has sometimes seemed to lower the rule to a quibble. But the paradox is apparent only. The explanation is that these alleged negotiations are received only provisionally. Although in form the witnesses may be allowed to recite the facts, yet in truth the facts will be afterwards treated as immaterial and legally void, if the rule is applicable."

It should be observed that the testimony here referred to is not admitted "provisionally" and afterwards excluded "if the rule is applicable." Like any other evidence, it is admitted on the issue of whether the offered writing was mutually assented to as a complete integration. On that issue it is admitted and it stays admitted, whatever the court's decision on that issue. But if, in spite of the received testimony, the court finds that the writing was mutually assented to as a complete integration, it thereby finds that the negotiations testified to were discharged and nullified by the parties themselves. Could the court have known this, without first hearing the testimony, it would have excluded it as immaterial. Wigmore's whole discussion is in harmony with this.

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one reason why the working of this rule has been so inconsistent and unsatisfactory. This is why so many exceptions and limitations to the supposed rule of evidence have been recognized by various courts.

There is ample judicial authority showing that, in determining the issue of completeness of the integration in writing, evidence extrinsic to the writing itself is admissible. The oral admissions of the plaintiff that the agreement included matters not contained in the writing may be proved to show that it was not assented to as a complete integration, however complete it may look on its face.[58] On this issue, parol testimony is certainly admissible to show the circumstances under which the agreement was made and the purposes for which the instrument was executed.[59] This is admitted, even by a court that has asserted the writing itself to be the sole criterion.[60]

It would have been better had no such rule ever been stated as a rule preventing the introduction of testimony. Instead, attention should be called to the accepted rule that parties can by a substituted contract discharge and annul any and all of their previously made contracts. The question may then be put: Have the parties in the instant case made such a substituted contract? On this issue of fact, no relevant testimony should

58. Ward v. Zeigler, 285 Pa. 557, 132 Atl. 798 (1926).

59. J. I. Case Threshing Mach. Co. v. Buick Motor Co., 39 F. (2d) 305 (C. C. A. 8th, 1930); Pyskoty v. Sobusiak, 109 Conn. 593, 145 Atl. 58 (1929); Brosseau v. Jacobs' Pharmacy Co., 147 Ga. 185, 93 S. E. 293 (1917); Taylor v. More, 195 Minn. 448, 263 N. W. 537 (1935); Sund v. Flagg & Standifer Co., 86 Ore. 289, 168 Pac. 300 (1917). In Danielson v. Bank of Scandinavia, 201 Wis. 392, 230 N. W. 83 (1930), the court stated: "There is language used in some prior Wisconsin cases which would indicate that whether a writing amounts to an integration of the entire transaction must be determined solely from the writing itself .... However, a careful analysis of these and other cases indicates that in considering whether or not the writing in question was intended by the parties to be an integration of the entire transaction, the subject-matter and surrounding circumstances may and should be taken into consideration." *Id.* at 397, 230 N. W. at 85.

An excellent example of a case in which a written document looked like a complete integration, but was proved by oral testimony not to be so, is Curlee Clothing Co. v. Lowery, 275 S. W. 730 (Tex. Civ. App. 1925), discussed *supra* note 21. See also Utah-Idaho Sugar Co. v. State Tax Commission, 93 Utah 406, 73 P. (2d) 974 (1937).

Another excellent case is United States Navigation Co. v. Black Diamond Lines, 124 F. (2d) 508 (C. C. A. 2d, 1942). The written contract embodied part of a former oral contract and omitted another part. The writing was signed under express protest that rights under the oral contract were reserved. It was rightly held that the writing was not executed as a complete substitution and discharge; and either parol or written evidence was admissible to prove that it was not.

60. "The true rule is that the only criterion of the completeness of the written contract as a full expression of the agreement of the parties is the writing itself; but, in determining whether it is thus complete, it is to be construed, as in any other case, according to its subject matter, and the circumstances under which and the purposes for which it was executed." Wheaton Roller-Mill Co. v. John T. Noye Mfg. Co., 66 Minn. 156, 160, 68 N. W. 854, 855 (1896).

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be excluded; it should all be observed and weighed with the clear and critical eye of experience. This is what the wiser courts, seeking justice in each separate case, have in truth been doing.[61] Operating at times through exceptions and limitations, while not denying the majesty of the supposed rule, they have not precluded the parties from "showing forth the transaction in all its length and breadth." [61a]

Much does indeed depend upon the form and wording of the written document that is asserted by one party to be a complete and accurate integration of a substituted contract.[62] While form and wording can never tell the whole story, they may easily be decisive after the signature and delivery by the objecting party have been established. Frequently the courts should do what they have often done; they should find the offered testimony, after listening to it, so flimsy and improbable as to justify a directed verdict.[63] The complete integration would then be established and previous agreements become immaterial. But the party who denies such an integration should always be given the chance to show that his offered testimony is not flimsy and improbable. He must have

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61. This exact question was put in United States Navigation Co. v. Black Diamond Lines, 124 F. (2d) 508 (C. C. A. 2d, 1942), making it quite unnecessary to discuss the application of some supposed "parol evidence rule." One judge dissented, but only because he thought the plaintiff did in fact assent to full substitution of the written contract. In his opinion, it was merely a "grumbling assent."

61a. The quotation is from an excellent opinion by Cardozo in Saltzman v. Barson, 239 N. Y. 332, 336, 146 N. E. 618, 619 (1925).

62. Of course, the form of the document may be such as to show that it was not a final and complete integration. If it is incomplete on its face it is not an integration and excludes nothing. See West v. Kelly, 19 Ala. 353 (1851); Reilly Tar & Chem. Corp. v. Lewis, 301 Ill. App. 459, 23 N. E. (2d) 243 (1939); Kinsley Mill Co. v. Waite, 112 Kan. 809, 213 Pac. 160 (1923); Shire v. Farmers State Bank, 112 Kan. 690, 213 Pac. 159 (1923); Fannin v. Williams, 231 Ky. 392, 21 S. W. (2d) 482 (1929); Mosby v. Smith, 194 Mo. App. 20, 186 S. W. 49 (1916); Strickland v. Johnson, 21 N. M. 599, 157 Pac. 142 (1916). A letter, written by one party to the other, expressly purporting to be a complete and accurate statement of terms, is not the sort of "integration" that makes the so-called "parol evidence rule" applicable, unless and until it is proved that it was assented to as such by the other party. Pettett v. Cooper, 62 Ohio App. 377, 24 N. E. (2d) 299 (1939). In Braude & McDonnell v. Cohen Co., 87 W. Va. 763, 106 S. E. 52 (1921), the "sold note" written and signed by the seller's agent should never have been held to exclude the oral evidence offered by the buyer to the effect that the agreement was for "sale or return" and not an absolute sale. The note was not signed by the defendant; and it does not clearly appear in the court's opinion that the defendant ever assented to it as an "integration." Moreover, on its face it appears that the terms of payment were not fully agreed on, since payment was to be "all or part cash." Of course, the defendant may have been a liar; but the trial judge who heard him testify believed his story.

63. In Halloran-Judge Trust Co. v. Heath, 70 Utah 124, 258 Pac. 342 (1927), the trial court admitted and weighed the oral evidence and then made a finding of fact that the writing was a complete integration. Of course, such a finding should seldom be set aside by an appellate court.

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respectable evidence to show that the antecedent agreement or expression that he alleges did in fact exist, and also to show that it has not been discharged or nullified by a new agreement—that is, that the writing produced in court is not a complete and accurate integration of a substituted agreement.[64] If he has introduced sufficient evidence to sustain a verdict or court-finding that the writing was not assented to as a complete integration, the appellate court should not reverse a judgment of the trial court, based upon such a verdict or finding, on any such ground as the inadmissibility of the evidence. Of course, if the record shows that the parties did in fact execute the writing as a complete integration, and yet the trial court allowed that writing to be varied by proof of antecedent and superseded understandings and negotiations, the error requires reversal.

Either the two parties to a transaction mutually assented to a certain writing as the complete and accurate expression of the terms of their contract, or they did not. If they did so assent, then the attempt by one of them to vary or contradict the writing, by proof of some antecedent expression or understanding, is an attempt to supplant the more recent agreement by an earlier one, to make yesterday nullify the work of today. This cannot be done. It is not necessary to call on some "parol evidence rule" to prove this.

A Note or Memorandum Is Not an Integration. What is the difference between a contract in writing and a note or memorandum of a contract? If we have nothing more than the latter, the "parol evidence rule" excludes nothing.[65] But how is one to know whether a particular writing is

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64. In Johnson v. Burnham, 120 Me. 491, 115 Atl. 261 (1921), a written contract provided for the sawing of timber "on Nash lot and McDavitt lot adjoining." The plaintiff offered testimony to prove an oral agreement that the amount of timber should be 1500 M. The court held on appeal that the verdict of the jury, for the plaintiff, was not sustained by the evidence. It said: "If the written contract is not 'of a skeleton nature' and is not 'apparently incomplete' but is on its face complete, it presumptively contains the whole agreement and the presumption can be overcome only by clear, strong and convincing evidence." *Id.* at 493, 113 Atl. at 262. This seems to render the question one as to weight of evidence, not admissibility.

65. Cases involving mere memoranda which did not exclude parol evidence: American Bridge Co. v. Crawford, 31 F. (2d) 708 (C. C. A. 3d, 1929) (two letters not an integration); New York Alaska Gold Dredging Co. v. Walbridge, 76 F. (2d) 655 (C. C. A. 9th, 1935) (same); Cooper v. Cooper, 3 Cal. App. 2d 154, 39 P. (2d) 820 (1934) (a promissory note was only a memorandum and receipt); Ehrlich v. United Smelting & Aluminum Co., 252 Mass. 12, 147 N. E. 20 (1925) (a written confirmation of a contract of purchase, although containing all the essentials of a contract, regarded as a memorandum only); In re Urban's Estate, 265 Mich. 415, 251 N. W. 537 (1933); Skuratowicz v. Highland Park State Bank, 234 Mich. 356, 208 N. W. 437 (1926) (only a receipt); Huffman v. Ellis, 64 Neb. 623, 90 N. W. 552 (1902); Frasca v. Metropolitan Life Ins. Co., 248 App. D. 588, 287 N. Y. Supp. 375 (2nd Dep't 1936) *aff'd*, 272 N. Y. 588, 4 N. E. (2d) 816 (1936) (letter was mere confirmation of a conversation); Kantor v. Aristo Hosiery Co.,

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the one or the other? Internal evidence on the face of the document is very important, but in every case some parol evidence is also necessary to show whether or not the document was delivered and accepted as a complete integration.

There seems to be a great deal of uncertainty and misunderstanding as to what constitutes a "written contract." It is true that there are innumerable cases in which no doubt arises, and none need be expressed, as to whether the agreement is a written contract or an unwritten one and as to whether or not there is a final and complete "integration." The absence of doubt may be due merely to the fact that no one has raised the question; it may also be due to the fact that no question could reasonably be raised. The agreement may have been wholly oral; or it may have been evidenced by a carefully printed document containing the parties' written confession that they have set their hands and seals thereon and notaries' certification that acknowledgment has been made of delivery as a free act and deed. Even in the latter case, however, the possibility exists that certificates may be forged, confession false, and the document a hoax, a mere illustrative specimen or a puzzle created by the scrivener's mistranscription and disarrangement.

Cases in which certainty is more obviously non-existent are those in which there is a series of letters and telegrams, in which there are abbreviations and unfilled blanks, in which the parties offer evidence of oral additions and qualifications. Other documents that are ordinarily not complete integrations of the terms of a contract of which they form a

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222 App. D. 502, 226 N. Y. Supp. 582 (1st Dep't 1928) *aff'd*, 248 N. Y. 630, 162 N. E. 553 (1928) (buyer's order for goods not signed by seller); Musselman v. Stoner, 31 Pa. 265 (1858).

In Mesibov, Glinert & Levy v. Cohen Bros. Mfg. Co., 245 N. Y. 305, 157 N. E. 148 (1927), Cardozo, J., said: "We do not overlook the difference in this connection between a contract in writing, and a note or memorandum of a contract. The one is subject to the parol evidence rule; the other may be shown by parol to be inaccurate or incomplete." *Id.* at 313, 157 N. E. at 150.

In Gaston & Co. v. Storch, 253 N. Y. 68, 170 N. E. 496 (1930), the defendant gave his check in settlement of an unliquidated claim. The plaintiff signed on the back a statement: "Full settlement of Gaston & Co. v. Storch," and cashed the check. It was held that this did not prevent the plaintiff from suing on his original claim and proving an antecedent oral agreement that the check was to operate as satisfaction only on condition that the defendant should cooperate in the prosecution of a suit against a third party. The court does not refer to the "parol evidence rule"; but it is clear that the writing on the check can be shown by parol not to have been a complete integration.

In Juilliard v. Chaffee, 92 N. Y. 529 (1883), the defendant executed a receipt for $100,000 payable on demand with interest, and when sued thereon was allowed to show that the money was advanced by the plaintiff's assignor for the purpose of being applied on debts that the assignor owed and that the money had been so applied. See 9 WIGMORE, EVIDENCE, § 2429.

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part or with which they are connected are written orders for goods,[66] negotiable bills and notes,[67] bonds, receipts,[68] and bills of parcels.[69]

66. In the case of Hydro-Centrifugals, Inc. v. Crawford Laundry Co., 110 Conn. 49, 147 Atl. 31 (1929), a seller of goods sued to recover the balance of the purchase price, and the defendant counter-claimed for damages for breach of warranty of the goods. The only documentary contract was an informal written order describing the goods and naming the price, and signed by the defendant. The court held that the "parol evidence rule" did not exclude testimony offered by the defendant as to oral representations made by the plaintiff. The court said: "The [lower] court was correct in permitting the defendant to introduce parol evidence of the surrounding circumstances, conduct of the parties, and their language as to the terms of their agreement in the oral negotiations preceding the signing of the order, to determine whether the parties intended the writing to embody their entire oral agreement or only part of it. The inquiry was particularly justified, here, in view of the form and contents of the written order. The terms of the part of the agreement claimed to be verbal were not inconsistent with those found in the written order, as in New Idea Pattern Co. v. Whelan, 75 Conn. 455, 459, 53 Atl. 953." *Id.* at 53, 147 Atl. at 32.

A written order for goods signed by the buyer does not exclude his oral testimony that it was never an agreed integration of the contract. Kantor v. Aristo Hosiery Co., 222 App. D. 502, 226 N. Y. Supp. 582 (1st Dep't 1927), *aff'd*, 248 N. Y. 630, 162 N. E. 553 (1928); Bell v. Mulkey, 16 S. W. (2d) 287 (1929); Curlee Clothing Co. v. Lowery, 275 S. W. 730 (Tex. Civ. App. 1925). In Cohen v. Jackobeice, 101 Mich. 409, 59 N. W. 665 (1894), the defendant signed a written order directing the plaintiff to carry stated advertising for twelve months at a specified rate per month. Apparently, this was accepted only by the plaintiff's act of proceeding with the advertising as requested for several months. The writing was held to be a complete integration, excluding testimony by the defendant that they orally agreed that he should have the privilege of discontinuing at any time by giving notice. Such testimony should not have been excluded.

67. Burque v. Brodeur, 85 N. H. 310, 158 Atl. 127 (1932); Martin & Garrett v. Mask, 158 N. C. 436, 74 S. E. 343 (1912); Kernodle v. Williams, 153 N. C. 475, 69 S. E. 431 (1910); Blaine v. Darwin, 160 Wash. 327, 295 Pac. 131 (1931).

68. Keene v. Meade, 3 Pet. 1 (U. S. 1830); Stegall v. Wright, 143 Ala. 204, 38 So. 844 (1905); Doolittle v. McConnell, 178 Cal. 697, 174 Pac. 305 (1918); Komp v. Raymond, 175 N. Y. 102, 67 N. E. 113 (1903); Cobb v. Wallace, 45 Tenn. 539 (Cold. 1868); Danielson v. Bank of Scandinavia, 201 Wis. 392, 230 N. W. 83 (1930); 9 WIGMORE, EVIDENCE § 2432.

69. Campion v. Downey, 77 Cal. App. 125, 245 Pac. 1098 (1926); Leavitt v. Fiberloid Co., 196 Mass. 440, 82 N. E. 682, 855 (1907).

"It is not always easy to determine that the parties have or have not put the whole transaction in writing. Arrangements made after the completion of the writing cannot, in the nature of things, be presumed to be excluded by it. Nor can matters that go in satisfaction and discharge of the writing; for it cannot declare its own fulfilment. Many writings are, in their ordinary purpose, only a part of a transaction; and, instead of showing what the transaction was, are only a means of performing one side of it. Thus, promissory notes, bills of exchange, bonds and mortgages, are often only means of satisfying contracts for the sale of lands or goods, of which conveyances and bills of parcels, with receipts, are the counterpart. Yet many writings, such as agreements for the sale of land or erection of houses or other improvements, or for partnerships, or for establishing other important or permanent relations, are generally designed to express the whole intention of the parties.

"In order to be able to declare how far a written instrument is exclusive of oral testimony, it is essential to ascertain its purpose. It is the purpose of a conveyance to

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In one New York case,[70] we are told: "The trial judge ruled that one of the documents in evidence was as matter of law a contract, and excluded all conversations at the time of signing or before, though admitting those that followed. He thus held for the plaintiff, except that he left to the jury the assessment of the damages. The Appellate Division ruled that as matter of law there was no contract, and dismissed the complaint." The Court of Appeals held that both the trial judge and the Appellate Division were wrong. In an opinion by Judge Cardozo, we are given some information about the parties, the subject matter, and the preliminary oral and written communications. It then proceeds thus with respect to the document before the court: "It is dated July 14, 1919. It begins by repeating the list of prices offered in the letter. Having thus confirmed the schedule, it states these new provisions: 'All prices are made for a period of six (6) months, week commencing Aug. 1, 1919, and terminating week ending Feb. 1, 1920, after which time they will be subject to change. It is understood that no less than 300 doz. per week should be sent in by either party. It is understood that we pay freight only on the work sent out from here, namely, Lehighton or Mauch Chunk. No extra charge for button holes in facing sleeves. Plain sleeves less .12 per doz. Bills must be paid upon receipt of B/L.' The writing is subscribed both by plaintiff and by defendants."

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declare the transfer of a title; of a lease, to pass a leasehold interest and declare its terms; of articles of partnership, to institute the relation and define the rights and duties of each; of a bond, to acknowledge an existing debt; of an assignment, to pass the title of the thing assigned.

"As effective of the special purpose for which a written instrument is executed, the writing, when there is no legal or equitable objection to its validity and completeness, is exclusive of all oral testimony to establish the fact or facts declared by it; but it does not exclude oral testimony of collateral facts, which, according to the purpose of the instrument, could not properly be declared in it, even though these facts may show a countervailing right, that neutralizes the obligation defined by the writing.

"Thus, it does not belong to the purpose of a conveyance to warrant the quantity of land, and, therefore, it is held, that it does not exclude parol evidence of such a warranty and of a deficiency: 14 S. & R. 206, 296. So the purpose of an assignment of a bond, being only to pass the title, does not exclude a parol warranty: 14 Id. 311; 16 Id. 422. A lease properly expresses the rent to be paid, and does not exclude parol evidence of failure of title to part of the term, though by this, the covenant for rent is in part set aside: 16 Id. 345. The purpose of a conveyance does not forbid an action for the purchase-money, and parol evidence of its non-payment: 3 Id. 355. A bond is not contradicted by parol evidence of the failure of its consideration. A receipted bill of parcels shows the fact of sale and payment, but does not exclude evidence of oral warranty: 13 Mass. 139; 4 Mees. & W. 140. Even the oral testimony, by which the connection between an absolute deed and a defeasance is established, is not to contradict the purpose of the deed, but to show the whole transaction; and the purpose itself is overruled when the transaction is declared a mortgage." Miller v. Fichthorn, 31 Pa. 252, 260 (1858).

70. Saltzman v. Barson, 239 N. Y. 332, 146 N. E. 618 (1925).

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The court supports its conclusion by noting that the writing stipulates mutual performances, states prices and terms of payment, and is signed by both parties. In the pleadings, both parties assert a contract, though differing on its terms. Their subsequent conduct and letters show that they believed that some contract had been made. With all this as a basis, the court says: "We cannot say as matter of law that there is here, not a contract, but only the indefinite and fragmentary memorandum of a contract to be made thereafter. . . In the light of all this, we cannot say as matter of law that the transaction had stopped short in its preliminary stages."

In the foregoing, the Court of Appeals used the signed document and much supplementary material supplied by parol evidence to justify holding that a contract may have been made. It thereupon proceeded to pay its respects to the decision of the trial judge:

"If there was error in the ruling of the Appellate Division that the complaint should be dismissed, there was error also in the ruling of the trial judge whereby the defendants were precluded from showing forth the transaction in all its length and breadth. The defendants say that in July, 1919, they were still without a plant and that their situation was known to the plaintiff, though this he denies. They contend, and tried to prove, that the writing was delivered upon a condition whereby it was to have no existence as a contract unless or until the plaintiff made a loan of $2,000 to supply them with factory and machinery. They contend also, and tried to prove, that by a further condition the writing was to be ineffective until embodied in a formal contract which was to embrace the terms set down and others. The questions and offers of proof were not as precise as they might well have been, but they were sufficient to make the defendants' position reasonably apparent. Upon the new trial which is necessary, evidence will be admissible that by force of a condition attached to the delivery the writing was not to come into being as a contract except upon the making of the stipulated loan. The distinction will, of course, be heeded between a conditional delivery and a condition or a promise modifying the obligations of an operative contract. Evidence will also be admissible that other subjects affecting the relation between the parties were reserved for future consideration, and that a contract was not to exist until there had been drawn a new document embodying the whole agreement. If we view the writing by itself 'the inference of finality is not so certain as to bar out all inquiry in respect of the purpose of the parties.' "

Can one say, in such a case as this, that there was a contract in writing or that there was not? It is a question of fact that may properly be left to the jury whether there was a contract of any kind, and what were its terms. The jury may find that there was a written integration, complete

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and final in every respect. But they can find so only by first hearing and weighing a mass of conflicting parol testimony. If they so find, it would seem that the "parol evidence rule" would declare inadmissible the very testimony that the jury had to weigh in order to determine the character of the document that made it inadmissible. But the jury may find, instead, either that there was no contract at all, or that there was a contract that was partly in writing and partly oral.

A preliminary memorandum of agreement supplemented by oral testimony may show that the parties mean to be bound immediately by a contract, even though the memorandum expressly provides for the preparation and execution subsequently of a formal document. In such a case, however, the contract cannot be said to have been integrated by the parties; the parol evidence rule is not applicable. Oral testimony is admissible both to show that the informal memorandum is not complete and that no contract was in fact made by the parties, and also to show that there were additional terms actually agreed upon by the parties and that they fully express an intention to be bound, even though the contemplated formal document should never be executed at all. A memorandum that is proved to be preliminary to another is not an "integration." [71]

Parol Evidence with Respect to Deeds, Leases, Bonds and Notes. The documents listed in this sub-heading are some of the most frequently recurring examples of written instruments that are not intended by the parties to be complete integrations of the agreement under which they are executed, a fact that is likely to be obvious on their face. Nevertheless, they are formal and carefully drawn instruments, executed and accepted in performance of some antecedent oral or written agreement. In some instances they may be so drawn as to appear complete and exact integrations, operating and intended to operate as a final substitute for and discharge of all antecedent understandings and communications in the transaction of which they are a part. It is serious error to conclude irrevocably that such is the case; there are too numerous examples of the admission of testimony to show that this is not so.[72] The purpose of a deed

71. American Bridge Co. v. Crawford, 31 F. (2d) 708 (C. C. A. 3d, 1929); Levine v. Lafayette Bldg. Corp., 103 N. J. Eq. 121, 142 Atl. 441 (1928).

72. It can be shown that the grantee in a deed of conveyance orally promised as part of the consideration to assume payment of a mortgage debt, Miller v. Fichthorn, 31 Pa. 252 (1858); that he would sell the land and account for the proceeds, Collins v. Tillou, 26 Conn. 368 (1857); that the land should not be used for the liquor business, Hall v. Solomon, 61 Conn. 476, 23 Atl. 876 (1892); that the grantee promised to pay taxes, Mereness v. De Lemos, 91 Conn. 651, 101 Atl. 8 (1917); that the grantee would pay more if acreage were found in excess, Mott v. Hurd, 1 Root 73 (Conn. 1775), or if the land were sold at an increase, Hall v. Hall, 8 N. H. 129 (1835). Similar decisions are Shult v. Doyle, 200 Iowa 1, 201 N. W. 787 (1925) (statement that grantee assumed payment of mortgage debt disproved); Dieckman v. Walser, 114 N. J. Eq. 382, 168 Atl. 582 (1933) (oral promise by grantee that he would pay a mortgage debt); Baird v. Baird, 145 N. Y. 659,

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of conveyance is to "convey," not to operate as a full memorial of the terms of agreement. Often the grantee is not even a party to the agreement and even where he is such a party the statement is equally true.

Equity long ago decreed that a deed absolute on its face can be shown to be intended as a mortgage security only. And, in like manner, a bill of sale of goods can be shown to have been given conditionally or as security only. Such evidence as this is directly contradictory of the writing; it is admitted because it shows that the writing was not a complete and true integration of contract. If such contradiction is permitted, even more clearly is it desirable that additional terms concerning which the deed says nothing should be provable.

A lease, as now ordinarily drawn, is both a conveyance and a contract, the latter aspect being the one of which the parties are more definitely conscious. Therefore it is more likely that a written lease is intended to be a complete and operative integration of agreement.[73] Evidence that it is not is admissible, but the burden of proving that it is not is a heavier burden. A non-negotiable bond presents much the same case as a lease. It is a formal contractual writing; it may be, but is not necessarily, drawn so as to express all the terms of agreement. Debenture bonds, issued in quantity along with mortgages and trust indentures, are certainly very far from being complete integrations by themselves.

Negotiable notes and bills are formal writings, the form and content of which are so drawn as to comply with the requisites of negotiability. This permits a holder in due course after negotiation to exclude many defenses, and to make proof of extrinsic agreements wholly immaterial. It is the law of bills and notes, not any "parol evidence rule" that has this effect.[74] As against a party to the agreement under which a note or bill has been issued, the writing is practically never intended as a complete integration and parol evidence is not excluded.[75] To make it so complete would too often destroy negotiability.

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40 N. E. 222 (1895) (mortgage deed executed only to protect the grantor from consequences of speculation); Flynt v. Conrad, 61 N. C. 190 (1867) (oral agreement excluding growing corn from conveyance); Sale v. Figg, 164 Va. 402, 180 S. E. 173 (1935) (oral promise by grantor to make improvements); Hannon v. Kelly, 156 Wis. 509, 146 N. W. 512 1914) (oral promise by grantor to include hay scales).

73. The often cited case of Naumberg v. Young, 44 N. J. Law 331 (1882), was a case of this kind. Its holding that the question whether the written lease was a complete integration, excluding proof of an oral warranty, must be determined solely by an inspection of the document within its four corners cannot be accepted.

74. See NEGOTIABLE INSTRUMENTS LAW §§ 16, 57.

75. Bank of British N. Amer. v. Cooper, 137 U. S. 473 (1890); Ward Motor Co. v. Assets Realization Co., 225 Ala. 548, 144 So. 25 (1932); Trumbull v. O'Hara, 71 Conn. 172, 41 Atl. 546 (1898); Andrew v. Brooks, 219 Iowa 134, 257 N. W. 315 (1934); Martin v. Mask, 158 N. C. 436, 74 S. E. 343 (1912); Ward v. Ziegler, 285 Pa. 557, 132 Atl. 793 (1926); NEGOTIABLE INSTRUMENTS LAW § 16. Cases in apparent conflict with the foregoing can sometimes be reconciled on the ground that the evidence showed an actual inte-

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It thus appears that the substantive law of conveyancing and the substantive law of commercial instruments may give the instruments listed above certain effects that can not be negatived by either parol or written testimony. Also, they may be intended to be partial integrations, the final and operative expression of such terms as are there printed or written. It would be grave injustice in any case to assume that they are complete integrations of the terms of agreement. As between the contracting parties and their assigns, the terms of the agreement under which they are issued should always be provable "in all their length and breadth." There is ample authority holding that a signer may prove that he signed only "for accommodation" or only "as surety." [76]

One of the terms of the agreement which is often less than fully and accurately expressed in the foregoing documents, or even left wholly unexpressed, is the consideration actually agreed upon in exchange for the deed of conveyance or for the promises expressed in the instrument. The cases hold with practical unanimity that, wherever the fact is material, parol evidence of what the consideration actually agreed upon was is admissible. The stated consideration, if any, can be shown to be incorrect or incomplete.[77] This is true, also, with respect to written contracts of all kinds.[78] Of course, if the instrument is in fact agreed upon as a complete and accurate integration of the consideration for promises, as well as of

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gration, total or partial; but attempts at reconciliation are often futile, here as elsewhere. It is often held that the promisor may not show that the promisee orally agreed that he need not pay or that he might pay on other terms than those expressed in the note. Kendrick v. Speck, 67 F. (2d) 295 (C. C. A. 4th, 1933) (to accept a smaller sum); Crothers v. National Bank, 158 Ind. 587, 149 Atl. 270 (1930) (signer not to be bound to pay); U. S. Nat. Bank v. Evans, 296 Pa. 541, 146 Atl. 126 (1929) (same); Trahant v. Perry, 253 Mass. 486, 149 N. E. 149 (1925) (privilege to pay at any time); Rector v. Hancock, 127 Va. 101, 102 S. E. 663 (1920) (to pay in other form than money).

Cases holding that a negotiable note was delivered subject to an orally expressed condition; Burke v. Dulaney, 153 U. S. 228 (1894); Cockrell v. Taylor, 122 Fla. 798, 165 So. 887 (1936) (note for commission payable only on payment of price of land); Goldsmith v. Parsons, 182 La. 122, 161 So. 175 (1935); Kimball-Krough Pump Co. v. Judd, 88 S. W. (2d) 579 (Tex. Civ. App. 1935) (conditional on obtaining a surety).

76. Phillips v. Preston, 5 How. 278 (U. S. 1847); Jaronks v. Czerwinski, 117 Conn. 15, 166 Atl. 388 (1933); Security Savings Bank v. Carlson, 210 Iowa 1117, 231 N. W. 643 (1930); Weston v. Chamberlain, 7 Cush. 404 (Mass. 1851); Quackenboss v. Harbaugh, 298 Mo. 240, 249 S. W. 940 (1923); Sisson v. Barrett, 2 N. Y. 406 (1849); Garrett v. Ellison, 93 Utah 184, 72 P. (2d) 449 (1937).

77. Illustrative cases: Pruett v. First National Bank, 229 Ala. 441, 157 So. 846 (1934); Clarke v. Tappin, 32 Conn. 56 (1864); Galvin v. Boston Elevated Ry., 180 Mass. 587, 62 N. E. 961 (1902); Blum v. Planters Bank and Trust Co., 161 Miss. 226, 135 So. 353 (1931); Ayres v. Cook, 140 Ohio St. 281, 43 N. E. (2d) 287 (1942); Gladden v. Keistler, 141 S. C. 524, 140 S. E. 161 (1927) Wait v. Wait, 28 Vt. 350 (1856); Ashworth v. Hagan Estates, 165 Va. 151, 181 S. E. 381 (1935); Coyne v. Coyne, 199 Wis. 263, 225 N. W. 138, 935 (1929).

78. See Zell v. American Seating Co., 138 F. (2d) 641 (C. C. A. 2d, 1943).

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the promises themselves and the conditions of promissory duties, antecedent negotiations and agreements on that subject, written or oral, are immaterial.[79] The "parol evidence rule" does not prevent proof that the instrument is such an integration, and fortunately, with respect to the consideration element, it has seldom been allowed to prevent proof that it is not such an integration. Of course, an acknowledgment that payment has been received, whether made in a separate "receipt" or in a formal and complete integration, can always be disproved by extrinsic evidence.

Oral Proof of Additional Promises, Warranties, and Other Terms. One way of proving that a particular writing was not agreed upon as a complete and final integration, is to prove that one or more additional terms, not expressed in the writing, were in fact agreed upon and never rescinded or displaced. There are many decisions holding that such additional terms can be proved by parol testimony, thereby showing that the writing is not a complete integration.[80] It is not necessary that an additional promise shall have its own separate consideration or that it shall constitute a separate contract apart from the document.

Often it is said that the additional term must not vary or contradict that which has been reduced to writing.[81] Of course, any addition is a variation in that the total agreement, including the addition, is materially different from that which is contained in the writing alone. Such an addition contradicts the writing if it is inconsistent with it and is offered for

79. Very many cases are authority for this, some of which can not be reconciled with cases just cited above. Usually the court's opinion does not make clear whether the evidence showed that the instrument had been agreed upon in fact as a complete integration or whether the court merely assumed that it had been.

80. Cohn v. Dunn, 111 Conn. 342, 149 Atl. 851 (1930); Brown v. Oliver, 123 Kan. 711, 256 Pac. 1008 (1927) (written contract for sale of a hotel, oral proof that furniture was included); Williamson v. Casa-Eguia, 253 N. Y. 41, 170 N. E. 486 (1930); Chapin v. Dobson, 78 N. Y. 74 (1879) (written sale of machines, oral guaranty of capacity); Batterman v. Pierce, 3 Hill 171 (N. Y. 1842) (oral promise by seller of wood that he would carry fire risk); Hite v. Aydlett, 192 N. C. 166, 134 S. E. 419 (1926) (oral promise by architect that building would not cost over $17,000); Britton v. Johnson-McQuity Motor Co., 120 Okla. 221, 251 Pac. 74 (1926) (seller of automobile promised that buyer should have benefit of later price reductions); Stone v. Morrison, 294 S. W. 641 (Tex. Civ. App. 1927; Danielson v. Bank of Scandinavia, 201 Wis. 392, 230 N. W. 83 (1930) (seller made a collateral promise to repurchase); Coyne v. Coyne, 199 Wis. 263, 267, 225 N. W. 138, 935 (1929) (oral proof that live stock went with the farm for one consideration); Jameson v. Kimmell Bay Land Co., Ltd., 47 T. L. R. 410, 593 (C. A. 1931) (vendor of land promised to build a road); Mann v. Nunn, 43 L. J. C. P. 241 (1874) (lessor orally promised to put house in repair).

81. See Mulholland v. Parker, 26 Cal. App. (2d) 107, 78 P. (2d) 1045 (1938); Stonecypher v. Georgia Power Co., 183 Ga. 498, 189 S. E. 13 (1936); Parriott v. Levis, 196 Iowa 875, 195 N. W. 578 (1923). Many cases hold the testimony admissible on the ground that it does not vary or contradict the writing.

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the purpose of nullifying and displacing it. Testimony to prove either kind of addition is wholly immaterial, after it is established that the writing is a complete and accurate integration; testimony of the contradictory addition is immaterial after it is established that the writing truly expresses the final agreement on the matters contained therein. Until such establishment, however, either kind of testimony should be admitted. It may be disregarded as flimsy and improbable, but that turns upon weight of evidence not upon admissibility.

Just as no written document can prove its own execution, so none can prove that it was ever assented to as either a partial or a complete integration, supplanting and discharging what preceded it. If one party is permitted to prove by oral testimony that an agreement was so executed and assented to, surely the other should be permitted to prove the contrary by the same method.

It is also often said that proof of an additional term should be excluded unless it is of such a character that it would be natural and usual for an ordinary person not to include it in the written document to which he assents.[82] This too raises a question of weight of evidence and of probability of truth; it is a question of fact. No relevant evidence should be declared inadmissible, but the flimsy and improbable should be treated as flimsy and improbable. The document as actually executed is in itself strong evidence, and if the offered addition is unnatural or unusual, the court may be quite justified in making its own finding and directing a verdict.

If testimony is offered to prove that a party made an extrinsic promise or warranty, by which his duties, liabilities, or other burdens would be increased, without any consideration other than that which is expressed in the writing, it is ordinarily said to be excluded by the "parol evidence rule." [83] Illustrations are cases in which an employer is alleged to have promised additional compensation, a seller of machinery warrants its future productive capacity, or a seller of goods warrants the present exist-

82. McDonnell v. General News Bureau, 93 F. (2d) 898 (C. C. A. 3rd, 1937); Taylor v. More, 195 Minn. 448, 263 N. W. 537 (1935); Mitchell v. Lath, 247 N. Y. 377, 160 N. E. 646 (1928) (excluding proof of vendor's promise to remove an ice house-good dissent); Thorne v. Edwards, 147 Ore. 443, 34 P. (2d) 640 (1934); Wagner v. Marcus, 288 Pa. 579, 136 Atl. 847 (1927); Gianni v. Russell, 281 Pa. 320, 126 Atl. 791 (1924) (excluding proof that lessor promised that lessee should have exclusive privilege of selling fruit and drinks in the building). RESTATEMENT, CONTRACTS § 240(1): "An oral agreement is not superseded or invalidated by a subsequent or contemporaneous integration, nor a written agreement by a subsequent integration relating to the same subject-matter, if the agreement is not inconsistent with the integrated contract, and (a) is made for a separate consideration, or (b) is such an agreement as might naturally be made as a separate agreement by parties situated as were the parties to the written contract."

83. Cases of this sort are too numerous for collection in this article. Some of the minority cases are cited below.

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ence of some quality or condition. Although the testimony offered in these cases is very generally excluded, especially where the writing already contains one or more similar promises or warranties, the cases admitting such testimony constitute so large and well considered a minority that they can not be disregarded.[84] They are ample support for admitting such testimony where justice seems to require it. There is conflict in appearance and in the worded rules laid down by the courts. In substance, the conflict is probably much less, the decision actually turning on weight of evidence and probability of truth and upon the corroboration and explanation offered for the alleged incompleteness of the writing.[85]

The fact that the writing contains one or more express warranties, is held not to exclude oral proof of a warranty said to be "implied" by law, such as warranty of fitness for a known purpose. Such warranties are "implied" for the very reason that they are ordinarily assumed and are not put into express words by the parties.

Proof of Fundamental Assumptions on Which Agreement Was Based. It frequently happens that when two parties are attempting to integrate their agreement in a writing they omit to state some fundamental assumption on the basis of which, as both of them well know, the agreement is being made. The mere existence of the writing should never be held to exclude testimony of such an unstated fundamental assumption. The

84. See Florence Wagon Works v. Trinidad Asphalt Co., 145 Ala. 677, 40 So. 49 (1906) (wearing quality of machine); Walnut Creek Milling Co. v. Smith, 178 Ga. 341, 173 S. E. 95 (1934) (quality of flour); Sorensen v. Webb, 37 Idaho 13, 214 Pac. 749 (1923) (breeding quality of a cow); Fudge v. Kelley, 171 Iowa 422, 152 N. W. 39 (1914); Neal v. Flint, 88 Me. 72, 33 Atl. 669 (1895); Phelps v. Whitaker, 37 Mich. 72 (1877); St. Louis Auto Parts & Salvage Co. v. Indiana Auto Salvage Co., 89 S. W. (2d) 134 (Mo. App. 1936); Landreth v. Wyckoff, 67 App. Div. 145, 73 N. Y. Supp. 388 (2d Dep't 1901); Eureka Elastic Paint Co. v. Bennett-Hedgepeth Co., 85 S. C. 486, 67 S. E. 738 (1908); Waterbury v. Russell, 67 Tenn. 159 (1874) (quality of corn). In Chapin v. Dobson, 78 N. Y. 74 (1879), the court admitted testimony that the seller of a machine guaranteed its capacity and promised to take it back if it failed. The court said: "The guaranty as made does not contravene the written contract, and is not inconsistent with it. If the fitness of the machine is implied, the guaranty is in harmony with it and adds nothing; if it is not implied the paper contains no declaration that the machines shall be taken with all faults and insufficiencies or at the defendant's risk. The parol evidence, therefore, contradicts no term of the writing nor varies it. The written contract and the guaranty do not relate to the same subject matter. The contract is limited to a particular machine as such. The guaranty is limited to the capacity of the machine." *Id.* at 82.

85. See Zell v. American Seating Co., 138 F. (2d) 641 (C. C. A. 2nd, 1943), holding admissible testimony to prove an employer's oral promise to pay a percentage contingent fee, in addition to the stated salary of $1,000 per month, its omission from the writing being explained by evidence that the parties left it out to "avoid any possible stigma which might result" from the provision's becoming known to third parties. Observe that such a reason may make the omission seem rather "natural" and human, but that it would still remain "unusual." But see American Seating Co. v. Zell, 64 Sup. Ct. 1053 (U. S. 1944), where four Justices thought the lower court's opinion on this point wrong.

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truth of this assumption—the existence of the fact that is assumed—is a condition of the obligation of the written promise; this is so whether we describe it as a "constructive" condition or as an "implied" condition. In reducing the terms of an agreement to writing, parties very frequently leave such gaps as this because they are not wise enough to do otherwise. They put into words their agreement on obviously necessary items, without foresight as to the events of the future, leaving unexpressed some of the fundamental assumptions of which they may be either clearly or only partly conscious. Justice requires the courts, with the advantage of hindsight, to fill some of these gaps. Evidence of the facts tending to show that such a fundamental assumption was made, though not expressed in the writing, should never be excluded by any "parol evidence rule."

Suppose that a lease of a building is executed, giving to the lessee the privilege of adding two additional stories. The parties assume that the existing walls are strong enough to bear such additional stories; but the lessee does not make his written promises conditional on the accuracy of this assumption. There are two issues here: (1) Were the lessee's promises impliedly or constructively conditional on the accuracy of the assumption? (2) Was the assumption mistaken? Oral testimony on either of these issues is not excluded by the parol evidence rule. The written lease was made on that assumption and was not assented to as a complete integration without it. On due proof of his contentions, the lessee should be given a decree of rescission or other appropriate remedy.[86]

Observe that in this case the lease was not "void" for mistake. Without question the lessor could not avoid the lease if the lessee was willing to perform in accordance with his written promises. But the lessee's duty to perform them was conditional on the strength of the walls, even though there was no writing to that effect in the lease itself.

Evidence That a Written Contract Is Subject to an Oral Condition. Conditions, often classified as precedent, concurrent, and subsequent, have been puzzling to courts and writers. Analysis and definition have been conspicuous for their uncertainty and confusion. This is particularly obvious in cases that consider the "parol evidence rule."

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86. This was the case of Hoops v. Fitzgerald, 204 Ill. 325, 68 N. E. 430 (1903). The court said: "Appellants forcibly ask, if Fitzgerald and Barker believed that the walls and foundations of the building were strong enough to support two additional stories, and if, but for such mistaken belief, the lease would not have been made, how it happens that such alleged vitally essential condition to the making of a valid and enforceable contract was not inserted in the lease. A similar question might be asked in every case wherein a rescission of a contract is sought upon the ground of a mutual mistake as to a material matter concerning the subject of the contract . . . It is perhaps the case that parties never, in the making of a contract, provide for everything then existing, but which, if first ascertained thereafter may materially affect the obligation of the parties." *Id.* at 331, 68 N. E. 430, 433.

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Everyone agrees that the mere existence of a written document does not prove that a contract has been made. This is true, even though the document has all the appearance of a contract complete in every detail, with signatures, witnessing clause, and other legal symbols. Everyone agrees, also, that if no contract has been made, the "parol evidence rule" has no application. This has supplied one of the frequently used methods by which courts have explained their admission of oral testimony in conflict with a document. A written document, unconditional on its face and fully executed, can be shown by oral testimony to have been delivered subject to a condition precedent.[87] As long as the condition has not occurred, so it is said, no contract has been made. Therefore, oral proof of the conditional delivery is admissible in spite of the recital on the face of the document to the contrary.

In most of the cases in which this reasoning has been adopted, it is quite erroneous. Without doubt, parol evidence of the condition precedent ought to have been admitted, but for reasons other than the non-existence

87. Zell v. American Seating Co., 138 F. (2d) 641 (C. C. A. 2d, 1943); English v. Hetherington & Berner, 71 F. (2d) 613 (C. C. A. 7th, 1934) (contract conditional on denial of injunction in a pending suit); Atlas Petroleum Co. v. Cocklin, 59 F. (2d) 571 (C. C. A. 8th, 1932) (contract conditional on a rise in prices); Liebling v. Florida Realty Inv. Corp., 24 F. (2d) 688 (C. C. A. 5th, 1928) (contract conditional on consent of stockholders); James v. Cortright, 220 Ala. 578, 126 So. 631 (1930) (lease not to become effective unless the landlord made certain repairs); Marshall Motor Service v. Norm Co., 194 Ark. 805, 109 S. W. (2d) 662 (1937) (contract for advertising conditioned upon the approval of X, a third party); Trumbull v. O'Hara, 71 Conn. 172, 41 Atl. 546 (1898); Russell v. Gift, 90 Ind. App. 106, 167 N. E. 546 (1929) (sales agency contract conditional on failure of a pending deal for the sale of the property); Mire v. Haas, 174 So. 374 (La. App. 1937) (lease conditional on obtaining other property); Sharrar v. Wayne Sav. Ass'n, 246 Mich. 225, 224 N. W. 379 (1929) (subscriptions not to be effective until a specific amount of stock was subscribed); White Showers, Inc. v. Fisher, 278 Mich. 32, 270 N. W. 205 (1936) (conditional on abrogation of a previous contract); Hanneman v. Olson, 114 Neb. 88, 206 N. W. 155 (1925) (conditional on repayment of money); Smith v. Dotterweich, 200 N. Y. 299, 93 N. E. 985 (1911) (insurance policy and note for the premium delivered on the condition that a loan be obtained for the maker of the note); Blewitt v. Boorum, 142 N. Y. 357, 37 N. E. 119 (1894) (sealed contract conditional on acquisition of interest of a third person); Reynolds v. Robinson, 110 N. Y. 654, 18 N. E. 127 (1888) (contract for credit sale on condition of satisfactory reports from commercial agencies as to buyers credit); Bookstaver v. Jayne, 60 N. Y. 146 (1875) (note indorsed and delivered on condition that payee would discontinue suit against the maker); Jefferson Standard Life Ins. Co. v. Morehead, 209 N. C. 174, 183 S. E. 605 (1936) (conditional on an additional indorsement); Broderick v. Colville, 41 Ohio App. 449, 179 N. E. 810 (1931) (written counter-offer with parol condition, privilege of cancellation); Whitaker & Fowle v. Lane, 128 Va. 317, 104 S. E. 252 (1920) (conditional on proper authority being given to increase the capital stock). RESTATEMENT, CONTRACTS § 241, reads as follows: "Where parties to a writing which purports to be an integration of a contract between them orally agree, before or contemporaneously with the making of the writing, that it shall not become binding until a future day or until the happening of a future event, the oral agreement is operative if there is nothing in the writing inconsistent therewith."

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of a contract. Thus, in a leading case, the plaintiff agreed to sell and the defendant agreed to buy a certain patent right at a stated price, the sale to be conditional, however, upon the approval of the patent by one Abernethie. This agreement was put in written form, properly signed and executed, except that nothing was said in the document with respect to the condition of Abernethie's approval. In an action by the seller for breach of this contract by the buyer, the latter offered to prove that the contract was conditional and that Abernethie had not approved. The court held the testimony admissible in spite of the "parol evidence rule" because until Abernethie's approval no binding contract existed.[88]

In this case, it is perfectly clear that there was a valid contract consisting of mutual promises. Price, subject of sale, terms of payment, and all other terms were mutually agreed upon. One of these terms was that the rights and duties of both parties should be conditional on Abernethie's approval of the patent. All other terms were in writing, but this term was not. Not a single item was left for future agreement, and neither party had a power of withdrawal. If Abernethie had expressed his approval, no new expression of agreement would have been required on the part of either buyer or seller. After signing the document, the legal relations of the parties were exactly what they would have been, had the provision for Abernethie's approval been embodied in the signed writing.[89]

The oral testimony in this case did not contradict the terms of the writing, unless it is contradiction to show that an unconditional written promise was in fact conditional upon an event unexpressed in the writing. The document was clear and unambiguous. Apparently it was a complete integration. Inspection of the document would show no incompleteness or defect. Its legal effect was clear and definite. Yet the document was not

88. Pym v. Campbell, 6 E. & B. 370, 119 Eng. Rep. R. 903 (Q. B. 1856). Similar cases in which the contract was, by parol, made conditional on approval of a third party: Mankin v. Bartley, 277 Fed. 960 (C. C. A. 4th, 1921) (sealed writing conditional on approval of an attorney); Pratt v. Chaffin, 136 N. C. 350, 48 S. E. 768 (1905) (order to be binding only if partner approved). In Burke v. Dulaney, 153 U. S. 228 (1894), a contract of employment was made, in which it was agreed that the employee should have an interest in the property at a specified price, if after inspection he should want it. The employee thereupon delivered his promissory note for the price. Later he decided not to take the property interest. In a suit on the note by the payee, it was held error to exclude proof of the parol agreement. Here, it is to be observed that there was a perfectly valid contract between the parties, including employment at agreed compensation, and an irrevocable option in the employee to buy property. This option to buy was part of the compensation for his work.

89. See 9 WIGMORE, EVIDENCE, § 2410, where the analysis is not identical with that given here. That a valid contract exists is fully recognized; and where specific performance is otherwise a proper remedy it may be decreed even before the third party has expressed approval. See Watson Bros. Transp. Co. v. Jaffa, 143 Fd. (2d) 340 (C. C. A. 2d, 1944).

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in fact a complete integration and the establishment of the additional term by oral testimony altered this legal effect very materially.

Suppose that *A* writes out the terms of an agreement and signs it. He then delivers it to *B*, with the oral statement, "This is to be operative as an offer to you, and you are to have the power of acceptance, only in case event X happens." *X* never happens; but *B* signs the document and attempts to enforce it as a formal contract. In this example, in truth, no contract has been made; and the facts showing there is none may be proved by parol testimony.[90] Proof of *A's* oral statement is admissible, not to show that a written contract was subject to an orally expressed condition, but to show that *B* never had power to make a contract by accepting. *A's* delivery to *B* did not deprive *A* of the power of revocation. The happening of event *X* would not in itself consummate a contract; a new expression of assent by *B* would be necessary.

In each of the two cases just stated and compared, the document sued on looked like a completely integrated contract. In each of them the same possibility existed that the offered testimony was false. If the testimony was true, then in neither case was the document a complete and accurate integration, and application of the "parol evidence rule" would have done serious injustice. Injustice might also have resulted from nonapplication of the rule if the evidence, though actually false, had been admitted and believed; but in such a case since the evidence was offered to show only that the promises of both parties were alike conditional upon the same event, the injustice would have consisted merely in the loss of the profit of the contract. The two parties would have been left *in statu quo*.[91]

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90. In Massachusetts Biographical Soc. v. Howard, 234 Mass. 483, 125 N. E. 605 (1920), a signed and delivered document was orally agreed at the time not to be operative as a contract until the signer should later send notice of his election. Here no contract, conditional or otherwise, was yet made, and the subsequent making of a contract was wholly subject to the will of the defendant. The entire transaction was operative only as an offer by the plaintiff (the party holding the document), with a power in the defendant (the signer) to accept by notice. Without doubt the parol evidence that was offered here should be subjected to severe scrutiny; but it is not excluded by the "parol evidence rule." The non-existence of a contract could certainly not be discovered by inspection of the document.

91. Cohen v. Cohn, 102 N. J. Eq. 245, 140 Atl. 319 (1928), involved a written contract for the sale of land for part of which the price had been paid. In a suit for specific performance against the vendor, he offered to prove orally that he was not to convey the land if he became reconciled to his children, who were then estranged. The court excluded the offered evidence on the ground that its purpose was to alter or vary the terms of the existing written contract, citing the case of Naumberg v. Young, 44 N. J. Law 331 (1882); "The effect of these decisions is to hold that parol evidence is not admissible which, conceding the existence and delivery of the written contract, and that it was at one time effective, seeks to nullify, modify, or change the obligation itself, by showing that it is to cease to be effective or is to have an effect different from that stated therein, upon certain future contingencies or conditions, for such evidence varies or contradicts the terms of the

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Even though the analysis of the basis of decisions admitting testimony to show a parol condition is erroneous, it does not follow that the decisions should not be approved. The decisions are numerous and generally followed. Moreover, the refusal to admit testimony to prove the parol condition precedent would do far more harm than good.[92] The testimony, if believed, demonstrates that the writing was not a complete and accurate integration. And the condition, operative with respect to all the promises in the contract alike, is one that prudent persons often do not think to put into the written instrument.

Often a written contract is delivered to a custodian in escrow, to be further delivered by him to the other party to the contract on the happening of some condition. No one doubts that such contracts may be valid and irrevocable long before the condition happens. There is no doubt also

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writing." The court distinguished O'Brien v. Paterson Brewing Co., 69 N. J. Eq. 177, 61 Atl. 437 (1905), because in that case there was never an effective contract. The court said: "The rule excluding parol evidence has no place in any inquiry, unless the court has before it some ascertained paper beyond question binding and effective, and hence parol evidence is admissible to show conditions relating to the delivery and taking effect of the instrument, as that it shall only become effective upon certain conditions or contingencies, for this is not an oral contradiction or variation of the written instrument, but goes to the very existence of the contract, and tends to show that no valid and effective contract ever existed." Here, the court clearly saw that the oral proof that was offered did not show that no contract had been made. But the exclusion of the testimony should not be approved. The fact that many courts admitting such testimony have made an erroneous analysis does not invalidate their decisions. They rest on sound policy, instinctively felt by the judges.

92. There are apparently some cases *contra.* See United Engineering & Contracting Co. v. Broadnax, 136 Fed. 351 (C. C. A. 2d, 1905); New Prague Flouring Mill Co. v. Hewitt Grain & Provision Co., 226 Mich. 35, 196 N. W. 890 (1924); Cohen v. Cohn, 102 N. J. Eq. 245, 140 Atl. 319 (1928); McClintock v. Ayers, 36 Wyo. 132, 253 Pac. 658, 255 Pac. 355 (1927).

It has often been held, though the better rule is otherwise, that if a deed of conveyance is signed in unconditional form and delivered to the named grantee, rather than to a third person as an escrow, it can not be shown that the delivery was made subject to a condition. See Stanley v. White, 160 Ill. 605, 43 N. E. 729 (1896) (holding that a grantor could not show that he delivered the deed "not to be operative unless signed by all the heirs"); Commercial State Savings Bank v. Bird, 254 Mich. 418, 237 N. W. 57 (1931); Wipfler v. Wipfler, 153 Mich 18, 116 N. W. 544 (1908); Totten v. National Ben Franklin Fire Ins. Co. of Pittsburgh, 110 N. J. Eq. 354, 160 Atl. 572 (1932); Holt v. Gordon, 107 Tex. 137, 174 S. W. 1097 (1915). *Contra,* Brown v. Cabell, 111 W. Va. 186, 161 S. E. 438 (1931), in which delivery of a deed on condition that it was to be effective only in the event that the vendee secured a long-term loan was allowed to be shown by parol evidence; Whitaker & Fowle v. Lane, 128 Va. 317, 104 S. E. 252 (1920). *Cf.* Hotaling v. Hotaling, 193 Cal. 368, 224 Pac. 455, 56 A. L. R. 734, 746 (1924) and similar cases, allowing parol evidence to show the lack of intent necessary to constitute a valid delivery, notwithstanding the manual tradition of the deed. See also Rountree v. Smith, 152 Ill. 493, 38 N. E. 680 (1894); Buchwald v. Buchwald, 175 Md. 103, 199 Atl. 800 (1938).

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that parol evidence is admissible to prove the extrinsic condition on which the document is to be delivered by the custodian to the promisee.[93] The latter's rights are conditional on that event, even though there is no intimation to that effect in the written document.

It has often been said that there is a distinction between a "conditional delivery" of a written contract and a contract that is itself conditional; that oral proof of the conditional delivery is admissible, but oral proof that the contract itself was agreed to be conditional is not admissible.[94] This difference is an illusion. To deliver a written contract subject to a parol condition has identically the same meaning and effect as to deliver unconditionally a written contract that by its own terms makes all the promises therein conditional. Courts have also thought that the admissibility of the testimony depended on whether the condition is precedent or subsequent without noting the difference between a condition precedent to the formation of a contract and a condition precedent to the duty of immediate performance of a contract already made.[95]

In a Connecticut case, involving a written acceptance of a bill of exchange, it was orally agreed that "it should not become obligatory upon . . . [the acceptor] to pay the same until Mills (the drawer) completed the house and said sum became due him." It was held that evidence of this oral agreement should not have been admitted. The court said: "The

93. Shire v. Farmers' State Bank, 112 Kan. 690, 213 Pac. 159 (1923); Fulton v. Priddy, 123 Mich. 298, 82 N. W. 65 (1900); Conner v. Helvik, 105 Mont. 437, 73 P. (2d) 541 (1937); McDaniel v. McDaniel, 131 Neb. 639, 269 N. W. 380 (1936); Manning v. Foster, 49 Wash. 541, 96 Pac. 233 (1908).

94. See American Surety Co. v. Egan, 62 F. (2d) 223 (C. C. A. 6th, 1932); Hills Sav. Bank v. Hirt, 204 Iowa 940, 216 N. W. 281 (1927); Hudson State Bank v. Haile, 130 Kan. 322, 286 Pac. 228 (1930).

95. In Barret v. Clarke, 226 Ky. 109, 9 S. W. (2d) 1091 (1928), the suit was on a note given to a broker for commission for selling the maker's property. The maker claimed that it was agreed between him and the broker that the note was to be paid only in the event the purchasers of the property accepted the deed and made their payments as they were supposed to. It was held that these were conditions subsequent to the execution of the note and could not be shown by parol evidence. The court distinguished between conditions precedent and subsequent, saying: "If there is a contingency attached to the delivery of the note, such is precedent to its taking effect and title does not pass until such proviso is satisfied. Parol evidence is admissible to prove such conditional delivery. But if the contingency relates to matters arising subsequent to the execution of the note, that is, superimposes additional stipulations as to its payment, such are conditions subsequent, and parol evidence is clearly not admissible." *Id.* at 115, 9 S. W. (2d) at 1094. The condition here was exactly the same in kind as was that in *Pym v. Campbell*, discussed in the text; it was a condition precedent to the duty to pay the note. See also Lincoln v. Burbank, 218 Ky. 89, 290 S. W. 1081 (1927); Skelton v. Grimm, 156 Minn. 419, 195 N. W. 139 (1923); Jamestown Business College Ass'n v. Allen, 172 N. Y. 291, 64 N. E. 952 (1902); Helmke v. Prasifka, 17 S. W. (2d) 463 (Tex. Civ. App. 1929); Tripplehorn v. Ladd-Hannon Oil Corp., 8 S. W. (2d) 217 (Tex. Civ. App. 1928), *error dismissed*, 118 Tex. 195, 13 S. W. (2d) 666 (1929).

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acceptance sued upon is in writing and is an absolute and unqualified one as distinguished from a conditional one. It is well settled that in an action at law such an acceptance cannot be cut down to a conditional one even by the clearest proof of a contemporaneous oral agreement to that effect." [96]

It may be that in this case there was a fully integrated contract, consisting of the bill of exchange with the written unconditional acceptance on its face. It is clear that the acceptor was trying to show by parol evidence that his obligation or legal duty was conditional instead of absolute—that his duty as acceptor of the bill was subject to an extrinsic parol condition. The immateriality of this evidence should not have been apparent until the court found as a fact that the acceptance on the face of the bill was mutually assented to as a complete integration. This is not proved by the face of the instrument alone.

Evidence That One Promise In a Contract Is Conditional Upon a Return Performance: Failure of Consideration. A bilateral written contract consists of the exchange of reciprocal written promises. Either or both of these promises may be dependent or independent. One of them is said to be dependent if it is conditional upon the performance or tender of performance of the return promise. Frequently, however, the writing says nothing of such a condition as this. In form, the promise is wholly independent and unconditional.

For two centuries or more, after bilateral contracts were recognized, the common law courts held that the reciprocal promises were independent unless they were expressly made conditional. This was later reversed by the courts. Evidence was admitted to show that the parties contemplated an exchange of performances, as well as an exchange of promises. The defendant could show that his promise was impliedly conditioned on performance of the agreed exchange by the plaintiff. The present writer has seen no case in which the "parol evidence rule" was held to prevent proof of an oral agreement that the defendant's promise should be thus conditional. Instead, non-performance by the plaintiff is called "failure of consideration," and oral proof of such failure is not prevented by the "parol evidence rule." Indeed there are many cases allowing the defendant to prove that the plaintiff made an oral promise in return, and to show that its nonperformance was a "failure of consideration." [97]

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96. Burns & Smith Lumber Co. v. Doyle, 71 Conn. 742, 43 Atl. 483 (1899).

97. See the following cases: Lewis Publishing Co. v. Henderson, 103 Cal. App. 425, 284 Pac. 713 (1930); Kaylor v. Bolton, 48 Ga. App. 670, 173 S. E. 191 (1934); Rothbaum v. Levy, 195 Ill. App. 246 (1915); Sharrar v. Wayne Savings Ass'n, 246 Mich. 225, 224 N. W. 379 (1929); American Agricultural Chemical Co. v. Griffin, 202 N. C. 812, 164 S. E. 577 (1932); Early v. Huntley, 315 Pa. 382, 172 Atl. 683 (1934); People's Trust & Savings Bank v. Wassersteen, 226 Wis. 249, 276 N. W. 330 (1937). In a suit for restitution, or for cancellation of a written contract, on the ground of failure of consideration, oral evidence is admissible to show that the promised performances were not understood

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Proof that the defendant's written promise is dependent and conditional does not show that a contract was never made; yet, it changes materially the legal effect of the written promises. Here, too, it may be possible to show that the real agreement was for the making of a unilateral contract and that the defendant's written promise was to be no more than a revocable offer until actual performance rendered by the other party.

Suppose that a document is signed and delivered by *A* to *B*, reciting that in consideration of a stated sum of money, receipt whereof is acknowledged, *A* promises to deliver specified goods. The "parol evidence rule" is held not to prevent *A* from proving by oral testimony that this document was delivered as an offer only, that acceptance was to consist only of actual payment of the stated consideration, and that the money had never been paid.[98] The offered evidence, if true, shows the non-existence of any contract, but it directly contradicts the statements in writing.

In like manner, parol testimony is admissible to show, when there are no express words of dependency or condition, that a promise in a written contract is not dependent and conditional upon the performance of a return promise. If a vendor promises to convey by a specified date these words would be contradicted by parol testimony that he promised only to convey within a reasonable time or by a later date. But there is no such contradiction by parol testimony that the purchaser's promise to pay was not conditional on conveyance by the vendor within the specified time.[99] Such testimony merely shows the degree of importance that the parties attached to performance on time. If the writing provides in clear language that time shall be "of the essence" and that one promisor's duty shall be conditional upon performance by the other within the exact time specified in the contract, parol testimony of an antecedent agreement that conveyance within a reasonable time, or within a longer time, would be satisfactory is irrelevant so long as the validity of the writing is not attacked. The

to be equivalents or to be an agreed exchange. Such proof as this does not invalidate the contract or deny that each promise was the consideration for the other. It shows, however, that the promises are not mutually dependent and conditional, with the result that failure of one party's performance does not necessarily entitle the other party to discharge or to restitution. Hutchison v. Ross, 262 N. Y. 381, 187 N. E. 65, 89 A. L. R. 1007 (1933).

98. Bultman v. Frankart, 194 Wis. 296, 215 N. W. 432 (1927).

99. Alabama Const. Co. v. Continental Car & Eq. Co., 131 Ga. 365, 62 S. E. 160 (1908); Thurston v. Arnold, 43 Iowa 43 (1876); Browning v. Huff, 204 Ky. 13, 263 S. W. 661 (1924). Parol testimony is also admissible to show a contrary intention that performance exactly on time was of vital importance, and that the other party's promise should be held to be conditional on such exact performance, even though there are no express words to that effect. Quinn v. Roath, 37 Conn. 16 (1870) Van Winkle & Co. v. Wilkins, 81 Ga. 93, 7 S. E. 644 (1888); Austin v. Wacks, 30 Minn. 335, 15 N. W. 409 (1883); Wimer v. Wagner, 323 Mo. 1156, 20 S. W. (2d) 650 (1929); King v. Ruckman, 20 N. J. Eq. 316, 354 (1869). *Contra* and erroneous: Strunk v. Smith, 8 S. D. 407, 66 N. W. 926 (1896).

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same is true if the contract expressly provides that the vendor shall have "a reasonable time" within which to make conveyance; parol testimony that the purchaser's duty was understood to be conditional upon conveyance within a specific period would contradict the writing and would be irrelevant so long as the validity of the writing is not attacked.[100] The writing, if not attacked as invalid, shows by its clear contradiction in terms that the alleged antecedent understanding was expressly nullified and displaced.

Evidence of Oral Conditions Not Constituting the Agreed Exchange. When making a contract, parties are very likely to take it for granted that if one of them does not render his promised performance, the other will not have to render the return performance. It is natural and customary, therefore, for them to omit from any written integration a statement that both promises are alike conditional upon a particular event or that one promise is conditional upon performance of the other.

If, however, one of the parties makes his promise conditional on some uncertain fact or event, while the return promise is not conditional upon that same fact or event, both parties are much more likely to require that the written integration of terms shall contain an expression of this condition. The party making the conditional promise wishes it to be perfectly clear that his duty is limited, because the consideration exchanged for such a promise will be correspondingly less than for an unconditional promise. The other party will want the condition made clear in the writing in order to protect himself against the assertion of additional conditions that will further increase the risk of his having to perform his promise without getting anything in return.

Thus, if *A* promises to buy and *B* promises to sell a quantity of crushed stone for road building, it may not occur to them to reduce to writing an agreed condition that a State road contract shall be awarded to *A*. If the contract is not so awarded, *B* will lose the sale of his stone; but he will still have the stone to sell to someone else.[101]

If, on the other hand, *B* promises to supply *A* with stone for a house that *A* is then building, and in return *A* promises to pay a specified price, only on condition that *A's* father shall leave him sufficient money by will for that purpose, the condition is one that so limits *A's* duty that *B* may

100. Johnson v. Schuchardt, 333 Mo. 781, 63 S. W. (2d) 17, 914 (1933).

101. An example of such a case is D. L. Walker & Co. v. Lewis, 267 Ky. 107, 101 S. W. (2d) 685 (1937), where it was stated in the writing that the agreement was conditioned on the procurement of the state contract. See also Mire v. Haas, 174 So. 374 (La. App. 1937), holding, in a suit on a lease, that parol evidence that the lease was not to go into effect unless the lessee was able to lease adjoining lands also, was properly admitted; Whitaker & Fowle v. Lane, 128 Va. 317, 104 S. E. 252 (1920), holding that parol evidence was admissible to show that a sealed contract for the purchase of land was but part of a larger oral agreement, the whole of which was conditional on proper authority being given to increase the capital stock of a certain bank.

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never be paid anything for stone actually delivered and used. The promise of *A* is aleatory and conditional; the promise of *B* is absolute. If, then, these parties execute a written contract for the sale of the building stone at a specified price, without incorporating therein any statement that *A's* promise to pay is conditional on his father's will, it is highly improbable that they orally agreed on such a condition. This is especially so if the price stated in the writing is the ordinary market price for such building stone. In some cases, testimony like this, to show that one promise is aleatory and conditional, has been excluded, with responsibility for the decision being laid on the "parol evidence rule." [102]

It seems likely that in most of these cases justice was done, for the offer of such testimony may have been an attempt to limit the obligation *ex post facto*. That no statement of the condition is contained in the writing is strongly evidential against its having been agreed on, but it certainly does not absolutely demonstrate that fact. Surrounding circumstances should be received in evidence and weighed. Oral testimony of disinterested witnesses may be available. The "parol evidence rule" should not be allowed to close the door. The offered proof does not directly contradict the writing; but it gravely varies it, and the promisor's assertion needs strong support.

Oral Testimony Admissible To Prove a Collateral and Separate Agreement. Transactions between two parties sometimes follow each other in rapid succession; and it is not always easy to decide whether they have made one complex contract or two successive contracts. If the parties have reduced to writing one or two such successive parts, leaving the other part unwritten, it is usually possible to prove the latter by parol evidence.[103]

102. Pitcairn v. Philip Hiss Co., 125 Fed. 110 (C. C. A. 3d, 1903), discussed *supra* note 2.

Where it was provided in a sealed contract that the defendant should erect a sawmill at a certain location, it was held that oral evidence was not admissible to show that the defendant's duty was conditional upon the vacation of certain streets by a city. Learned v. Holbrook, 87 Ore. 576, 170 Pac. 530, 171 Pac. 222 (1918).

103. Courts generally permit proof of the unwritten portion by parol evidence. See Champlin Refining Co. v. Gasoline Products Co., 29 F. (2d) 331 (C. C. A. 1st, 1928); Bell, Rogers & Zemurray Bros. v. Jenkins, 221 Ala. 652, 130 So. 396 (1930); Gilliland v. Hawkins, 216 Ala. 97, 112 So. 454 (1927); Buckner v. A. Leon & Co., 204 Cal. 225, 267 Pac. 693 (1928); Creek v. Lebo Inv. Co., 85 Colo. 357, 276 Pac. 329 (1929); Armstrong v. Cavanagh, 183 Iowa 140, 166 N. W. 673 (1918) (lessee of garage proved oral promise by lessor to heat it in winter); Home Hdw. & Impl. Co. v. Denniston, 136 Kan. 838, 18 P. (2d) 135 (1933); Tompkins v. Sullivan, 313 Mass. 459, 48 N. E. (2d) 15 (1943); Pepis v. Red Bank Oil Co., 170 Okla. 189, 44 P. (2d) 846 (1935) (oral promise by the vendor of an oil lease to drill a test well); Roof v. Jerd, 102 Vt. 129, 146 Atl. 250 (1929), (oral promise made by the vendor of lots in an undeveloped tract that he would develop the tract by building streets and sidewalks); King v. Second Avenue Inv. Co., 117 Wash. 41, 200 Pac. 572 (1921), (where the court said it was of little consequence whether the agreement be regarded as one contract, partly in writing and partly oral, or as two separate contracts, one in writing and the other oral).

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If it is a separate contract, the "parol evidence rule" has no application to the case. Even if it is not reasonably to be described as a separate contract, it is very likely to be called one in order to prevent the exclusion of parol testimony. Generally, this result can equally well be reached by holding that the unwritten part is such as a prudent man might be expected to leave out of the writing and that there is no complete written integration.

If the part not reduced to writing consists of a promise given for its own separate consideration, it may properly be called a separate contract; and even if not so regarded, the "parol evidence rule" should never be applied so as to exclude proof of such a promise and separate consideration. If, on the other hand, the part that is not written consists of a collateral promise that is supported by no consideration other than that expressed in the writing, it should seldom be described as a separate contract, but it should be enforced on the ground that the writing was not a complete integration of agreement.

Suppose that certain shares of corporate stock are sold by a seller to a buyer for one thousand dollars paid, and that the terms of this sale are completely integrated in writing. Suppose also that the parties agree at the same time that the seller shall be obligated to repurchase the shares within a specified period at the option of the buyer. It is very commonly, and properly, held that the payment of the price by the buyer satisfies the requirements of the Statute of Frauds so that oral proof of the whole transaction is permitted, proof of the promise to sell and also of the promise to repurchase.[104] At the same time it has been held that, if the contract to sell for a thousand dollars has been integrated in writing, the buyer is not prevented by the "parol evidence rule" from introducing oral testimony to prove that the seller had promised to repurchase at the buyer's option because the promise constituted a separate contract.[105] For the purpose of

104. Hills v. Hopp, 287 Ill. 375, 122 N. E. 510 (1919); Armstrong v. Orler, 220 Mass. 112, 107 N. E. 392 (1915); Wind v. Bank of Maplewood & Trust Co., 58 S. W. (2d) 332 (Mo. App. 1933); Stratbucker v. Bankers' Realty Inv. Co., 107 Neb. 194, 185 N. W. 271 (1921); Griffin v. Bankers' Realty Inv. Co., 105 Neb. 419, 181 N. W. 169 (1920); Hankwitz v. Barrett, 143 Wis. 639, 128 N. W. 430 (1910).

105. Oklahoma Natural Gas Corp. v. Douglas, 170 Okla. 284, 39 P. (2d) 578 (1934). The sale was evidenced by a formal stock certificate, a document that would not ordinarily state all the terms of the contract of purchase and sale. *Accord,* Denver Indus. Corp. v. Kesselring, 90 Colo. 295, 8 P. (2d) 767 (1932); Pyskoty v. Sobusiak, 109 Conn. 593, 145 Atl. 58 (1929); Byrd v. Tide Water Power Co., 205 N. C. 589, 172 S. E. 183 (1934); West Texas Utilities Co. v. Ellis, 102 S. W. (2d) 234 (Tex. Civ. App. 1937); Danielson v. Bank of Scandinavia, 201 Wis. 392, 230 N. W. 83 (1930). *Contra*: Ballenger v. Macauley, 159 S. C. 389, 157 S. E. 141 (1931).

In Downs v. Jersey Central Power & Light Co., 115 N. J. Eq. 348, 170 Atl. 835 (Ch. 1934), an oral promise by seller to repurchase stock was specifically enforced. The court said: "But there is a difference between introducing parol evidence for the purpose of showing that the writing does not express the true intention of the parties, and introducing

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applying the Statute of Frauds, this transaction would be called one contract, including both the sale and the promise to repurchase. Since there was only a single undivided consideration for both, this is reasonable. Nor is it necessary to classify the promise to repurchase as a separate contract, in order to escape the supposed prohibition of the "parol evidence rule"; it is, at least, a separate promise, not inconsistent with the writing, and one which reasonable men might readily omit from the memorandum of sale. Credible testimony that not all the terms of agreement had been integrated in the writing should be received and given proper effect.

It is for reasons similar to these that collateral agreements between parties to a negotiable instrument, showing that apparent co-makers are in fact principal and surety, or that apparent co-sureties are in fact successive sureties, or that the maker signed for the accommodation of the payee, should be allowed to be proved. The integrated writing is intended to be so drawn as to have all the effects of negotiability; and holders in due course should be protected accordingly. But the instrument is not intended as an integration of all the terms of agreement between parties whose names appear thereon.[106]

Oral Evidence Admissible to Overcome Presumptions and Inferences. In making contracts, the parties often express their agreement on several terms, leaving some others unconsidered or, at least, unexpressed. This does not necessarily prevent the existence of an enforceable contract. For example, they may agree upon a sale of goods without specifying the time or place of delivery or the time of payment. The law will often supply such a gap by requiring delivery "within a reasonable time," or payment "on delivery."[107] In such cases, it is possible that the parties did so agree,

it for the purpose of showing the circumstances which make it inequitable and unconscientious to permit the mere written words to control its operation . . . and the truth is that the parol evidence rule has been applied or disregarded in courts of equity as the ends of justice required. Like all other legal rules, it is, in equity, no bar to justice." *Id.* at 354, 170 Atl. 838.

It may be observed that here we have a transaction that is held to be one contract, when applying the Statute of Frauds, and to be two contracts, when applying the "parol evidence rule." Observe, too, that by means of this verbal device the court is able to avoid the application of both the Statute and the rule and to establish and enforce the intention of the parties. Both the Statute and the rule, when strictly applied in a case in which the court believes the offered testimony to be true, operate to nullify the actual agreement of the parties. It is to avoid such a result that the courts choose between two alternative and inconsistent analyses of the transaction.

106. See First Nat. Bank of Missoula v. Holding, 90 Mont. 529, 4 P. (2d) 709 (1931); Garrett v. Ellison, 93 Utah 184, 72 P. (2d) 449 (1937); and cases cited in note 75 *supra* and WIGMORE, EVIDENCE, § 2438.

107. The court will not fill, by inference or presumption, a gap as to date for beginning performance, if the writing shows that the parties left that for a supplementary agreement. Florida Power and Light Co. v. Atlantic, Gulf, & Pacific Co., 38 F. (2d) 948 (C. C. A. 5th, 1930).

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without putting their agreement into words; but the result is the same even though the court is convinced that they did not think of the time or place element at all.

Suppose, however, that the parties did in fact think of these matters and orally agreed upon a specific time for payment and a definite time and place for delivery of goods, making this oral agreement simultaneously with the execution of a writing that states all the other terms of the selling agreement. Does the "parol evidence rule" prevent the enforcement of the oral agreement as to time and place, on the ground that it contradicts and varies a completely integrated written contract? The cases show that the courts have floundered and disagreed in answering this question. The answer should be in the negative; the writing is only a partial integration.

The problem may arise in all other kinds of contract transactions, as well as in those for the sale of goods. In the case of a sale of land, the parties may execute a writing stating all the terms agreed upon, except that the price is to be paid in two installments and that the conveyance is to be made on final payment. A written building contract may say nothing as to the time for beginning work or for completion. The like can be said of service contracts. But the courts are seldom asked to exclude proof of an oral provision, except one that affects the time or place of a payment, or the time or place of some other promised performance. If goods have been sold and delivered, or services have been performed, without any express agreement fixing the amount of the price to be paid, a legal duty of paying a reasonable price will exist; it may even be said that the law makes the inference or presumption that the parties so agreed. But there is no doubt that this presumption or inference does not prevent oral proof of an agreed price, even though there is a writing that states all other terms. That writing can be shown to be only a partial integration. The presumptions of law or fact, or the inferences, by which the court fills gaps in a contract that is in all other respects in writing, do not themselves constitute any part of the "integration" that is supposed to be protected against variance or contradiction by the "parol evidence rule." By the weight of authority, supported by the better reason, oral testimony is admissible to prove that a time or place was agreed upon and to rebut the usual presumptions and inferences that would otherwise prevail.[108] The

108. Cases involving the agreed time for performance: International Ticket Scale Corp. v. International Ticket Scale Corporation of Chicago, 56 F. (2d) 969 (C. C. A. 7th, 1932) (writing incomplete and ambiguous as to the delivery dates); Henderson v. Holmes & Dawson, 204 Ala. 203, 85 So. 536 (1920) (terms and method of payment for goods); Williams v. Hargett, 217 Ala. 280, 116 So. 125 (1928) (time for delivery of lumber); Wolters v. King, 119 Cal. 172, 51 Pac. 35 (1897) (time when agent's commission should be paid); Sivers v. Sivers, 97 Cal. 518, 32 Pac. 571 (1893) (time of payment); Kirk v. First Nat. Bank in Wichita, 132 Kan. 404, 295 Pac. 703 (1931) *semble;* Kriete v. Myer, 61 Md. 558 (1883); Harding v. Texoleum Co., 154 Minn. 55, 191 N. W. 394 (1922)

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contrary is held in a smaller number of cases.[109] Oral testimony admitted for this purpose does not vary or contradict the writing; it merely enables the court to fill a gap by adding something that is not expressed in the writing at all. Nor does it contradict a meaning found by interpretation or implication in fact.

If the express words of a written agreement are that performance shall be within a reasonable time, any antecedent oral or written agreement fixing a specific time is superseded, and evidence to prove that agreement is immaterial. Even in such a case, however, the expressions and agreements of the parties, indicating what they thought a reasonable time to be, ought to be admitted.[110]

Even if the words of a written contract do not expressly fix a definite time or place (or a "reasonable" time or place) for performance, it may be that the written words, when subjected to interpretation according to the usual rules thereof, show that the parties intended to fix such a time or place. When such is the case, the parties have expressly agreed and there is no gap to fill. Also, antecedent agreements, oral or written, are

(time of shipment); Wehenes v. Roberts, 92 Neb. 696, 139 N. W. 212 (1912); Marcus & Co. v. K. L. G. Baking Co., 122 N. J. Law 585, 3 A. (2d) 627 (1939); Stephens-Adamson Mfg. Co. v. Bigelow, 84 N. J. Law 585, Atl. 74 (1913), 86 N. J. Law 707, 92 Atl. 398 (1914) (time of delivery); McDonald v. Supple, 96 Ore. 486, 190 Pac. 315 (1920) (time of delivery).

109. Kramer v. Harsch, 278 Fed. 860 (C. C. A. 10th, 1922) (time for delivery of goods); Miller Bros. v. Direct Lbr. Co., 207 Ala. 338, 92 So. 473 (1922) (excluding proof of oral agreement for payment in instalments); California Drilling & Mach. Co. v. Crowder, 58 Cal. App. 529, 209 Pac. 68 (1922) (saying that Civ. Code, § 1657, allowing a reasonable time was made a part of the contract, but compare cases in note 110 *infra*); Hawkins v. Stoddard, 132 Ga. 265, 63 S. E. 852 (1909); Coon v. Spaulding, 47 Mich. 162, 10 N. W. 183 (1881); Thompson v. Ketcham, 8 Johns. 189 (N. Y. 1811) (time of payment); Cameron Coal & Mercantile Co. v. Universal Metal Co., 26 Okla. 615, 110 Pac. 720 (1910); Retailers Service Bureau v. Smith, 165 S. C. 238, 163 S. E. 649 (1932) (time for delivery of advertising matter); Hayden v. Hoadley, 94 Vt. 345, 111 Atl. 343 (1920) (time for making repairs); Cliver v. Heil, 95 Wis. 364, 70 N. W. 346 (1897) (time of payment for services); Greaves v. Ashlin, 3 Camp. N. P. 426, 170 Eng. Rep. R. 1433 (K. B. 1813) (time for delivery of goods).

Cohn v. Dunn, 111 Conn. 342, 347, 149 Atl. 851 (1930), repeated the supposed rule, but did not apply it, holding that the law raised no presumption as to the "time for beginning work" and that an oral agreement might be proved.

110. *Contra*: Jenkins v. Lykes & Barco, 19 Fla. 148 (1882). Where the writing specifies no time for completion, the law holds that a reasonable time is allowed. Oral evidence of the statements of the parties is admissible to show what this reasonable time is. Its reasonableness depends largely upon their expressed views. Perth Amboy Dry Dock v. Crawford, 103 N. J. L. 440, 135 Atl. 897 (1927).

In American Historical Soc. v. Vestal, 189 Ark. 651, 74 S. W. (2d) 964 (1934), evidence that the seller's agent told the buyer that books sold under a subscription contract would be delivered in about five months was held admissible as indicating what was considered a reasonable time for performance of the contract by the parties thereto at the time of its execution. It did not alter, vary, or contradict the contract.

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superseded.[111] But in the process of interpretation, one of the usual rules is that if the express words are doubtful, proof of antecedent negotiations and agreements is admissible to aid the court. Such proof is not excluded by the "parol evidence rule." The interpretation finally given, however, will control; and if it varies from the antecedent agreement, that agreement is superseded and discharged.

It has been supposed that the provision in the Uniform Sales Act for shipment within a reasonable time when no time is fixed by the parties, as well as similar provisions in other statutes, requires the court to disregard an oral agreement when a written agreement of sale says nothing as to time.[112] It is true that the legislatures have power to enact a law having this effect as to subsequent contracts; but in fact they do not seem to have intended this result. The better decisions are that such a statute is not in aid of the "parol evidence rule" and does not make inadmissible evidence not otherwise barred by this rule.[113] The statutory presumption is meant merely to fill a gap in the express agreement; it does not differ from the common law rule of presumption which it is intended to codify. There is no gap to be filled if the parties have agreed upon a specific time, whether orally or otherwise. Of course, there is a gap in the writing, if the writing

111. In Marcus & Co. v. K. L. G. Baking Co., 122 N. J. Law 202, 207, 3 A. 2d 627, 630 (1939) the court said: "While the law presumes that, in the absence of a specification of time in the contract, the parties intended that delivery of the subject of sale should be made within a reasonable time, the question remains whether a writing entirely lacking in this particular is to be regarded as an integration of the contract, so as to bar parol evidence of an unexpressed stipulation for delivery at a given time. It would seem that, in this regard, there is an essential difference between matter covered by plain implication of fact and such as is the subject of an implication of law in the absence of express agreement. In the former case, extrinsic evidence of an agreement at variance with the implication is plainly inadmissible, while in the latter case such evidence has been accepted, on the theory that the written memorial does not purport to be complete upon its face and the extrinsic evidence does not therefore serve to vary or contradict it."

RESTATEMENT, CONTRACTS (1932) § 240, comment *c*, reads as follows: "Even where the extrinsic agreement is not in terms contradictory of the integration, there may be a clear implication of fact from the writing that it fully expresses the whole bargain in regard to the matter in question. To contradict such an implication of fact by extrinsic evidence is no more permissible than to contradict the direct words of the writing. In either case the writing is inconsistent with the oral agreement. An implication, however, that is not based on an inference of actual manifestation of assent must be distinguished from an implication made by the law to fill a gap in what has been expressed .... An oral agreement if it comes within the statements in the Section is operative to establish an obligation at variance with an implication of the latter sort; and this is true wherever it may fairly be said that the oral agreement adds to and explains the writing rather than contradicts it."

112. California Drilling & Mach. Co. v. Crowder, 58 Cal. App. 529, 209 Pac. 68 (1922). Earlier cases in the Supreme Court of California are *contra*.

113. Wolters v. King, 119 Cal. 172, 51 Pac. 35 (1897) (allowing proof of oral agreement on time of payment and holding that Civ. Code, § 1657, did not prevent such proof); Sivers v. Sivers, 97 Cal. 518, 32 Pac. 571 (1883); Stephens-Adamson Mfg. Co. v. Bigelow, 84 N. J. Law 585, 87 Atl. 74 (1913), 86 N. J. L. 707, 92 Atl. 398 (1914).

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says nothing as to time; but there is no reason why any gap in an incomplete written integration should not be filled by the parties by oral agreement.

Cases involving the sufficiency of a memorandum to satisfy the requirements of the Statute of Frauds support the conclusions stated above. If a writing states all the terms agreed upon, but says nothing as to time or place of performance, the requirements of the Statute are satisfied; and the contract is enforceable if the case is such that the law will fill the gap by a presumption. But if the parties did in fact agree upon a time or place, and the writing says nothing about it, it does not satisfy the Statute. In such case, oral proof of the agreement as to time or place is admitted;[114] it is not excluded by the "parol evidence rule" and the legal "presumption" is successfully rebutted.

Oral testimony is admissible to overcome the presumption that a negotiable instrument was given for value, or the presumption of a "resulting trust." [115] As between the co-signers of an instrument, their antecedent oral agreements may be proved to show their agreed relations with each other, as opposed to what would otherwise be presumed or inferred.[116] Those

114. Berman Stores Co. v. Hirsh, 240 N. Y. 209, 148 N. E. 212 (1925). Acebal v. Levy, 10 Bing. 376, 131 Eng. Rep. R. 949 (C. P. 1834) (price orally agreed on). In Ryan v. Hall, 13 Metc. 520 (Mass. 1847), the court excluded evidence of the oral agreement as forbidden by the "parol evidence rule." This had the effect of preventing the Statute of Frauds from making the contract unenforceable.

The oral testimony is admitted in these cases to show what the true agreement was and to show further that the writing is only a partial integration and not a sufficient memorandum to satisfy the Statute. It may be that the writing ought to be held sufficient for that purpose, since the Statute does not require a complete integration in writing; but that does not affect our present problem. If the partial memorandum satisfies the statute, this does not mean that the partial expression is to be enforced as if it were the entire contract.

115. Tanners Nat. Bank of Woburn v. Dean, 283 Mass. 151, 186 N. E. 219 (1933) (want of consideration for a note); Larrick v. Heathman, 288 Mo. 370, 231 S. W. 975 (1921) (presumption of a trust rebutted); Bennington State Bank v. Peterson, 114 Neb. 420, 207 N. W. 673 (1926) (note without consideration); King v. King, 281 Pa. 511, 127 Atl. 142 (1924) (presumption of resulting trust rebutted); Musselman v. Stoner, 31 Pa. 265 (1858) (quoting Chief Justice Gibson); Thomason v. Pacific Mut. Life Ins. Co. of California, 74 S. W. (2d) 162 (Tex. Civ. App. 1934) (proof of gift and not a trust); Beach v. Bank of Pocahontas, 157 Va. 274, 160 S. E. 68 (1931) (indorsement on a promissory note was without consideration); Shannon v. Lampton, 115 W. Va. 765, 177 S. E. 776 (1934) (lack of consideration for a note).

116. Osborne v. Osborne, 325 Ill. 229, 156 N. E. 306 (1927); Lowell v. Lowell, 185 Iowa 508, 170 N. W. 811 (1919); Mansfield v. Edwards, 136 Mass. 15 (1883); M'Gee v. Prouty, 9 Metc. 547 (Mass. 1845); Jackson v. Moore, 94 App. Div. 504, 87 N. Y. Supp. 1101 (1904); Williams v. Glenn, 92 N. C. 253 (1885). Parol evidence is admissible to prove that the joint signers of a note agreed among themselves to be bound to pay in proportion to their shares in the bank for whose benefit the note was being given, instead of being equally bound as would be the normal presumption. Adamson v. McKeon, 208 Iowa 949, 225 N. W. 414 (1929). As between two joint promisees in a note and mortgage, it may be shown that one was the real creditor and the other was one who promised to act as trustee for collection. Garrett v. Ellison, 93 Utah 184, 72 P. (2d) 449 (1937).

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appearing to be joint principals may be shown to be principal and surety;[117] those apparently co-sureties may be shown to be successive sureties or otherwise related.[118]

It is sometimes supposed that these decisions are not contrary to the "parol evidence rule" for the reason that the document purports only to state the contract of the signers with their promisee and not the contract of the signers with each other. It is clear, however, that the document frequently would be prima facie evidence of a contract between the signers or would create a particular presumption; but oral evidence is admissible to rebut such a presumption.

The parties to a contract have power, by using appropriate expressions of intention, to exclude implied warranties and other implications and presumptions that the law would otherwise make operative in the transaction.[119] If not so excluded, however, the "parol evidence rule" does not prevent their establishment by the use of parol evidence. They do not vary or contradict the writing; and the written integration is not so worded as to make them inoperative.

Question of Law or Question of Fact? If the "parol evidence rule" were in truth a rule of evidence, a rule of relevancy, or admissibility, its purpose would be the exclusion of offered testimony from consideration by the jury and its application a matter for the court. It is not such a rule. Most, if not all, of the issues raised in the application of this rule are issues of fact and often they are sent to the jury. As in all other cases, the court may direct a verdict or remove them from the consideration of the jury altogether, on the ground that the evidence that is offered by one of the parties is weak and incredible. There are other reasons, also, such as past judicial custom, for taking some of these issues from the jury. Suppose the question at issue is whether or not any contract has been made. No single and simple answer is possible. The legal operation of established facts is a matter of law for the court; the existence or occurrence of those facts is generally for the jury.

117. Paul v. Berry, 78 Ill. 158 (1875); Kaufman v. Barbour, 98 Minn. 158, 107 N. W. 1128 (1906); Quackenboss v. Harbaugh, 298 Mo. 240, 249 S. W. 940 (1923); Markham v. Cover, 99 Mo. App. 83, 72 S. W. 474 (1903); Citizens Ins. Co. v. Broyles, 78 Mo. App. 364 (1899); Howell v. Roberson, 197 N. C. 572, 150 S. E. 32 (1929).

118. Bank of Searcy v. Baldock, 153 Ark. 308, 240 S. W. 399 (1922); Reed v. Rogers, 134 Ark. 528, 204 S. W. 973 (1918); Paul v. Berry, 78 Ill. 158 (1875); Hoyt v. Griggs, 164 Iowa 672, 146 N. W. 745 (1914); Lusby v. Carr, 60 Md. 192 (1883); Cox v. Ellsworth, 97 Neb. 392, 150 N. W. 197 (1914); Paulin v. Kaighn, 27 N. J. Law 503 (1859); Apgar. Administrators v. Hiler, 24 N. J. Law 812 (1854); Barry v. Ransom, 12 N. Y. 462 (1855); Anderson v. Pearson, 2 Bailey 107 (S. C. 1831); Adams v. Flanagan, 36 Vt. 400 (1863). See also WIGMORE, EVIDENCE, § 2438.

119. Colt Co. v. Bridges, 162 Ga. 154, 132 S. E. 889 (1926); Sterling-Midland Coal & Coke Co. v. Great Lakes Coal & Coke Co., 334 Ill. 281, 165 N. E. 793 (1929); S. F. Bowser & Co. v. Birmingham, 276 Mass. 289, 177 N. E. 268 (1931); Lumbrazo v. Woodruff, 256 N. Y. 92, 175 N. E. 525 (1931).

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The question whether the parties have assented to a specific writing as a complete and accurate integration of the terms of their contract is always a question of fact. Generally, it seems to have been determined, or an affirmative answer assumed, by the court.[120] In most cases it is probably wise for the court to assume the burden of determining this issue of fact, although it is never wise to assume an affirmative answer. There must be many cases, however, in which the evidence of what the parties said and did, before and at the time of preparing or delivering a writing, is so nearly equal in weight and credibility that the court will desire the aid of a jury's verdict. If so, there is no rule against getting such aid.

The question of interpretation of the language of a writing has nearly always been treated as a question for the court. It, too, is a question of fact and not of law, except where the words are in certain stereotyped forms to which court decisions now require that a single interpretation be given. If the question is whether certain offered testimony does in fact vary or contradict the writing, it is for the court to answer, since it necessarily involves the interpretation of specific language and the determination of its legal operation.

If the question turns merely on the completeness of the integration (there being no contradiction in terms), making it necessary to determine whether the proposed addition to the writing is one that ordinary men may reasonably be expected not to include in the writing, the court should probably decide this issue also, especially if the offered testimony seems flimsy and incredible.[121]

Application of the Rule For or Against Third Persons. The question has been raised whether the "parol evidence rule" is applicable in favor of or against a third party who has not been a party to the written integra-

120. See Seitz v. Brewers' Refrig. Co., 141 U. S. 510 (1891); South Fla. Lumber Mills v. Breuchaud, 51 F. (2d) 490 (C. C. A. 5th, 1931); Watkins Salt Co. v. Mulkey, 225 Fed. 739 (C. C. A. 2d, 1915); Thoroman v. David, 199 Cal. 386, 249 Pac. 513 (1926); Pyskoty v. Sobusiak, 109 Conn. 593, 145 Atl. 58 (1929); Higgs v. Maziroff, 263 N. Y. 473, 189 N. E. 555 (1934); Gianni v. Russel, 281 Pa. 320, 126 Atl. 791 (1924). A Tennessee court held the question to be for the jury in Cobb. v. Wallace, 5 Cold. 539 (Tenn. 1868).

121. In McDonnell v. General News Bureau, 93 F. (2d) 898 (C. C. A. 3rd, 1937), a writing stated that the plaintiff agreed "to give up his news service business" as then conducted and to serve the defendant instead for a salary of $150 per week. The plaintiff offered evidence to prove that the salary was solely for his new service, and that the defendant orally promised to pay additional compensation for the abandonment of his business. The court listened to all this offered evidence, but afterwards set aside the jury's verdict for the plaintiff. The trial judge said: " . . . I make the finding (which really is a fact finding, although the basis for ruling of law) that the agreement for the purchase of the plaintiff's business and the contract of employment are so interrelated that both would naturally be executed at the same time and in the same contract." *Id.* at 900.

Cases can be found in which there was a contrary finding of fact; an appellate court, not having actually heard the testimony, should seldom reverse the finding of the trial court.

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tion. The answer is definitely in the affirmative if the rule is correctly stated and understood. If two parties have by a complete written integration discharged and nullified antecedent negotiations between them, they are so discharged and nullified without regard to the identity of the person who may be asserting or denying the fact. If *A* has a claim for damages against *B*, and this claim is honestly discharged by a release or an accord and satisfaction, the operation of this discharge is not affected by the fact that it is *C* who afterwards asserts or denies it. The same is true of a discharge by substituted contract, such as is a complete written integration.[122]

There are numerous cases laying down the contrary rule to the effect that parol evidence that might be inadmissible as between the two parties to a written contract is admissible when offered for or against a third party.[123] The actual decision in these cases can often be sustained on the

122. Pugh v. Comm'r of Int. Revenue, 49 F. (2d) 76 (C. C. A. 5th, 1931); *Ex parte* St. Paul Fire & Mut. Ins. Co., 236 Ala. 543, 184 So. 267 (1938) (result in harmony with text above); Merchants L. & T. Co. v. Ummach, 228 Ill. App. 67 (1923); Willard Storage Battery Co. v. Palmer, 205 N. W. 976 (1925); Minneapolis, St. Paul & S. S. M. R. Co. v. Home Ins. Co., 55 Minn. 236, 56 N. W. 815 (1893); State Bank of Ardock v. Burke, 53 N. D. 777, 208 N. W. 115 (1926); Waggoner v. Magnolia Petroleum Co., 252 S. W. 865 (Tex. Civ. App. 1923). See also WIGMORE, EVIDENCE § 2446; *cf.* County Trust Co. v. Mara, 242 App. D. 206, 273 N. Y. Supp. 597 (1st Dep't 1934), *aff'd*, 266 N. Y. 540, 195 N. E. 190 (1934).

This is illustrated by the case of Natrona Power Co. v. Clark, 31 Wyo. 284, 225 Pac. 586 (1924). The plaintiff had a claim against two joint tort feasors. He executed an unqualified written release of one of them in consideration of $30. Later, finding that such a release had the effect of discharging the other tort feasor also, the first two executed a "supplemental agreement" in writing stating that when the release was executed they both understood that the plaintiff reserved his rights against the other tort feasor. The court held that the written release was a complete integration, reserving nothing. If this holding was correct (and possibly it was not), then the offered evidence was immaterial, whether offered against the first tort feasor or the second. It seems to the present author that the evidence was improperly excluded. In view of the technicality of the law of discharge of joint tort feasors, a law much altered by legislation, it is naturally to be expected that parties executing a release will not think to include a reservation of rights against a third party. The written integration is not intended to include or exclude such a reservation.

123. American Crystal Sugar Co. v. Nicholas, 124 F. (2d) 477 (C. C. A. 10th, 1941); Indianapolis Glove Co. v. U. S., 96 F. (2d) 816 (C. C. A. 7th, 1938) (admissible in a tax case to show a transfer of stock was intended as wages); Root v. John T. Robinson Co., 55 F. (2d) 303 (D. C. Mass., 1931); Central Coal & Coke Co. v. Geo. S. Good & Co., 120 Fed. 793 (C. C. A. 8th, 1903); Massie v. Chatom, 163 Cal. 772, 127 Pac. 56 (1912) (in suit by broker for commission, written contract of sale shown to have been executed by mistake); White v. Woods, 183 Ind. 500, 109 N. E. 761 (1915); Nissen v. Sabin, 202 Iowa 1362, 212 N. W. 125 (1927); Levine v. Mitchell & Scott Co., 144 Ky. 380, 138 S. W. 261 (1911); Tripp v. National Shawmut Bank, 263 Mass. 505, 161 N. E. 904 (1928); Fitzgerald v. Union Stockyards Co., 89 Neb. 393, 131 N. W. 612 (1911); Albert Lifson & Sons v. Williams, 10 N. J. Misc. 982, 162 Atl. 129 (Dist. Ct., 1931); Folinsbee v. Sawyer, 157 N. Y. 196, 51 N. E. 994 (1898) (broker allowed to prove a sale,

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ground that the evidence tended to show that the integration was not complete and should have been heard and weighed even as between the parties to the writing. It may be, however, that had the suit been between the parties to the writing, the parol evidence offered would have been excluded for there has been in fact a tendency to relax the operation of the "parol evidence rule" when a stranger to the writing is involved. This tendency is to be approved when it prevents a writing from being held to be a substituted integration and discharge where the contracting parties had not so agreed. It is to be disapproved when it is used to establish the validity of some oral agreement (or a written one) that has been effectively discharged by a subsequent fully integrated writing (or by a subsequent oral contract).

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though written contract indicated a mere option); Lee v. Adsit, 37 N. Y. 78 (1867) (insurance policy shown to be for protection of a party not named); Liberty Bank v. High Park Development Co., 134 Misc. 733, 236 N. Y. Supp. 194 (Sup. Ct. 1929), *aff'd mem.*, 227 App. Div. 647, 234 N. Y. Supp. 832 (4th Dep't 1929); Kittelson v. Collette, 61 N. D. 768, 240 N. W. 920 (1932); Smith v. Shields, 59 S. D. 447, 240 N. W. 493 (1932); Hanauer v. Nat. Surety Co., 279 Pa. 345, 123 Atl. 863 (1924); *In re* Sewer Dist. No. 4, 141 Pa. Super. 7, 24 A. (2d) 678 (1942); Nashville Interurban Ry. v. Gregory, 137 Tenn. 422, 193 S. W. 1053 (1917); Pearce v. Hallum, 30 S. W. (2d) 399 (Tex. Civ. App., 1930); Olmstead v. Ore. Short Line R. R., 27 Utah 515, 76 Pac. 557 (1904) (grantor proved oral reservation of buildings, in suit for their destruction by fire); Ransom v. Wickstrom, 84 Wash. 419, 146 Pac. 1041 (1915).

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