The Law Commission

Working Paper No. 70

Law of Contract

The Parol Evidence Rule

LONDON
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Item I of the First Programme

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PART I - INTRODUCTION

1. In our First Programme[1] we recommended that the law of contract be examined with a view to codification, and in our First Annual Report, 1965-1966,[2] we stated that our intention was not merely to reproduce the existing law but to reform as well.

2. After much work had been done towards the preparation of a draft contract code, we came to the conclusion that the publication of such a code, however fully annotated, would not be the best way of directing public attention to particular aspects of the law of contract which might be in need of reform or of promoting examination and discussion of those aspects in depth.[3] Work on the production of a contract code has, therefore, been suspended and we now intend to publish a series of working papers on particular aspects of the English law of contract with a view to determining whether, and if so, what amendments of general principle are required. This will be in line with our method of dealing with most subjects and has the advantage of concentrating public discussion on specific problems.

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1 Law Com. No.1 (1965), Item I.

2 Law Com. No.4 (1966), para.31.

3 Eighth Annual Report, 1972-1973, Law Com.No.58 (1973), paras. 3-5.

3. The topic with which this paper is concerned is the parol evidence rule, of which the famous American jurist Professor J.B. Thayer wrote "Few things are darker than this, or fuller of subtle difficulties."[4]

The parol evidence rule

4. We must start by explaining what we mean by "the parol evidence rule". When a transaction is recorded in a document, it is not generally permissible to adduce other evidence of (a) its terms or (b) other terms not included, expressly or by reference, in the document or (c) its writer's intended meaning. There are here three distinct rules which exclude what is known as extrinsic evidence, being evidence outside or extrinsic to the document. The evidence excluded is usually oral, but it may be other documentary evidence. The three rules, either separately or together, are sometimes known as the parol evidence rule.[5]

5. The first rule excludes a particular means of proof, namely secondary evidence of a document: where the rule applies it prevents the contents of the document being proved by any means other than the production of the document. This is more usually known as the "best evidence rule". By the second rule extrinsic evidence is inadmissible for the purpose of adding to, varying, contradicting or subtracting from the terms of the document: the writing is conclusive. The third rule deals with the admissibility of facts in aid of the interpretation or construction of documents.

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4 A Preliminary Treatise on Evidence at the Common Law (1898), ch.10, p.390.

5 G.D.Nokes, An Introduction to Evidence (4th ed., 1967), p.239. See, in this connexion, Phipson on Evidence (11th ed., 1970), ch.43, para.1761 and Phipson's Manual of the Law of Evidence (10th ed., 1972), p.125.

6. The three rules are considered separately in the leading text-books on the English law of evidence.[6] The first is a rule of evidence and does not impinge in any way upon the general law of contract; we are not concerned with it in this paper. The third is concerned with the interpretation of documents and the extent to which parol evidence may be adduced to show what the maker or makers of the document intended by the words used. Much of the relevant case-law on the third rule is concerned with the interpretation of wills, a topic on which the Law Reform Committee reported in 1973.[7] There is also case-law on the admissibility of parol evidence as an aid to the interpretation of written contracts. However this is not our present concern. The distinction between the second and third rules is not always easy to see in practice; for example, where parol evidence is admitted to the effect that the expression "1000 rabbits" in a contract means "1200 rabbits",[8] it is not clear whether this is an exception to the second or third rule. Nevertheless we should make it clear at the outset that our sole concern in this paper is with the operation of the second of the three rules. It has been summarised as follows:-

> "Parol testimony cannot be received to contradict, vary, add to or subtract from the terms of a written contract, or the terms in which the parties have deliberately agreed to record any part of their contract."[9]

When, in the paragraphs that follow, we refer to "the parol evidence rule" we mean the rule just described and no other.

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6 Phipson on Evidence (11th ed.,1970), chs. 43, 44 and 45; Phipson's Manual of the Law of Evidence (10th ed., 1972), pp.126-128, 128-133, and 133-143. Cross on Evidence (4th ed., 1974), pp.519-527, 533-540 and 540-555; G.D.Nokes, An Introduction to Evidence (4th ed., 1967), pp.239-245, 245-256 and 256-263.

7 Nineteenth Report (1973), Cmnd. 5301.

8 See para. 19, below.

9 Bank of Australasia v. Palmer [1897] A.C. 540,545, per Lord Morris.

7. The parol evidence rule forbids the proof of certain kinds of fact. The written contract may be an incomplete or inaccurate record of what the parties agreed, but the rule binds the parties to what was written: extrinsic evidence of terms which were agreed but which were, by accident or design, omitted from the written agreement, may not as a general rule be given; such evidence is shut out by the parol evidence rule. The decision in Evans v. Roe and Others[10] shows how the rule can work in practice.

An illustration

8. In Evans v. Roe and Others the plaintiff, Mr Evans, was engaged by the defendants, J.T.Roe & Co., as foreman of their works. He signed a memorandum prepared by one of the defendants which provided as follows:-

> "April 13, 1871. I hereby agree to accept the situation as foreman of the works of Messrs. J.T. Roe & Co., flock and shoddy manufacturers, etc., and to do all that lays in my power to serve them faithfully, and promote the welfare of the said firm, on my receiving a salary of two pounds per week and house to live in from 19th April, 1871."

Before signing the agreement, the plaintiff asked the defendants if the engagement was to be understood to be an engagement for a year and one of the defendants answered "Yes certainly." The reason the engagement was to commence at a future day was because the plaintiff had to bring his family from Gloucestershire. The plaintiff moved and started work on 19 April but on 3 June 1871 the defendants gave him a week's wages and dismissed him. On a strict construction of the memorandum the defendants were acting within their rights. But the jury, after hearing evidence of the conversation, found as a fact that the hiring was agreed to be for a year and that the defendants had broken the contract by dismissing the plaintiff when they did. They awarded him

10 (1872) L.R. 7 C.P. 138.

damages. However, the verdict of the jury was set aside on appeal on the ground that the evidence of what was said at the time the contract was made ought never to have been admitted. Grove J. said "It would render written agreements useless if conversations which take place at the time could be let in to vary them."[11] So the plaintiff lost his case.[12]

9. Our purpose in this paper will be to examine the ambit of the parol evidence rule and to consider whether it serves any, and if so, what useful function.

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11 Ibid., at p.142.

12 He would probably have lost it anyway because of the provisions in the Statute of Frauds 1677 concerning agreements that were not to be performed within one year of the making. The provision was repealed in 1954: Law Reform (Enforcement of Contracts) Act 1954.

PART II - EXCEPTIONS TO THE PAROL EVIDENCE RULE

10. The parol evidence rule has many exceptions. Some, like the exception that allows parol evidence of fraud to be received, are obvious. Others, such as the exception for collateral contracts, are subtle and complicated and have given rise to many apparently conflicting decisions. It is, for example, hard to reconcile the decision in Evans v. Roe which we have already mentioned,[13] with the decisions in Malpas v. L. & S.W.Ry.Co.,[14] Couchman v. Hill,[15] Webster v. Higgin[16] and City & Westminster Properties (1934) Ltd. v. Mudd.[17] The result is that the present ambit of the parol evidence rule cannot be stated with certainty.[18] We shall summarise the major exceptions and give an indication of the broad scope of each but it must be conceded that there are, at the periphery, many borderline cases where the law is unclear.

Vitiating factors

11. Although a written contract may be regular and binding on the face of it parol evidence may be adduced to prove the presence of a vitiating factor that deprives the contract of its binding character. For example, the parol evidence rule was never a bar to proof of fraud whether as a defence to a claim founded on a written contract[19] or as

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13 (1872) L.R. 7 C.P. 138; para. 8, above.

14 (1866) L.R. 1 C.P. 336; para. 16, below.

15 [1947] K.B. 554; para. 17, below.

16 [1948] 2 All E.R. 127.

17 [1959] Ch.129; para. 18, below.

18 For a detailed discussion of the exceptions and their ambit see Phipson on Evidence (11th ed., 1970), ch.44, paras. 1787-1838 and G.H.Treitel, The Law of Contract (4th ed., 1975), pp.121-128.

19 Pickering v. Dowson (1813) 4 Taunt.779; 128 E.R. 537.

a ground for claiming damages.[20] Furthermore, if the written contract is a "sham" which has been devised to give the appearance of legality to an agreement the performance of which contravenes the law, parol evidence of the "real" agreement may be given.[21] Another example of a vitiating factor is the defence of non est factum; parol evidence may be adduced by a party that he made such a mistake about the document that he signed as would support this defence in an action on a written contract.[22]

Condition precedent

12. The parties to a written contract may have agreed orally that the contract should only take effect upon the happening of a certain event, such as the giving by some third person of his approval of its terms. The happening of the event in question is a condition precedent to the contract's existence and evidence of such an agreement may be given.[23]

Rectification

13. The terms of an antecedent oral agreement made by parol may also be admitted in a case where it is a question of the rectification of a written document on the ground that it does not give effect to the real agreement between the parties.[24] In Joscelyne v. Nissen,[25] for example, an agreement for the transfer of a business and premises was negotiated between a father and a daughter, it being understood that the father

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20 Dobell v. Stevens (1825) 3 B. & C.623; 107 E.R.864.

21 Madell v. Thomas & Co. [1891] 1 Q.B. 230.

22 Roe v. R.A.Naylor Ltd. (1918) 87 L.J.K.B.958, 964 per Scrutton L.J.

23 Pym v. Campbell (1856) 6 E. & B. 370; 119 E.R. 903.

24 Henderson v. Arthur [1907] 1 K.B. 10, 13, per Cozens-Hardy M.R.

25 [1970] 2 Q.B. 86.

should continue to live in the premises and that the daughter should pay his gas and electricity bills. No provision for such payments was made in the formal contract finally executed. It was held that the document should be rectified to include the provision that had been omitted.

Specific performance and rescission

14. It is convenient to mention at this stage the remedies of specific performance, rescission and damages for misrepresentation. The remedies of specific performance and rescission are equitable and in deciding whether to award an equitable remedy the court is not confined to the terms of the agreement, even where the agreement is in writing. So where a plaintiff claims the specific performance of a written agreement the court may refuse the remedy on equitable grounds because of the plaintiff's failure to carry out terms which were not in the written agreement but which were agreed orally.[26] Similarly, where one party to a written agreement has induced the other party to sign by making a misrepresentation of some material fact, it may be a ground for allowing the rescission of the agreement.[27] In either case evidence may be admitted of matters outside the written contract that are relevant to the giving or withholding of the equitable remedy.

Damages for misrepresentation

15. Damages for misrepresentation are not confined to cases where fraud is proved. Damages may, in certain circumstances, be recovered at common law on proof that one party induced the other to enter the contract by a misrepresentation of fact negligently made.[28] Furthermore,

26 Martin v. Pycroft (1852) 2 De G.M. & G. 785, 795; 42 E.R. 1079, 1083.

27 G.H.Treitel, The Law of Contract (4th ed., 1975), pp.243-257.

28 Esso Petroleum Ltd. v. Mardon [1976] 2 W.L.R. 583.

since the passing of the Misrepresentation Act 1967, a person who has been induced to enter a contract by a misrepresentation made by the other party may recover damages without proving fraud or negligence[29] and, in some cases, even where the misrepresentor proves that he believed on reasonable grounds that the facts represented were true.[30] These remedies are available although the representation in question may have induced the making of a written contract which contained no reference to the facts represented. In short, evidence that a contract has been induced by a misrepresentation is not excluded by the parol evidence rule.[31]

Where the written agreement is not the whole agreement

16. A further exception to the parol evidence rule has been founded on the argument that the rule "only applies where the parties to an agreement reduce it to writing and agree or intend that that writing shall be their agreement."[32] If, therefore, the parties agree to commit only part of their agreement to writing, evidence may be admitted of the other part which was agreed orally. The facts of Malpas v. L.& S.W. Ry. Co.[33] provide an example. The plaintiff made an agreement with the defendants, by parol, that they would convey his cattle to Kings Cross Station. At the same time, without noticing its contents, he signed a consignment note by which the cattle were to be taken to Nine Elms, an intermediate

29 Misrepresentation Act 1967, s.2(1). It is, however, a defence to such a claim for the misrepresentor to prove that he believed on reasonable grounds that the facts represented were true.

30 Ibid., s.2(2). The court has a discretion to award damages in lieu of rescission if of the opinion that it would be equitable to do so.

31 Although the misrepresentor may rely on a term in the contract that excludes or restricts his liability for the misrepresentation (or the other party's remedy in respect of it) if it would be fair and reasonable for him to rely on it in the circumstances of the case: Misrepresentation Act 1967, s.3.

32 Harris v. Rickett (1859) 4 H.& N. 1,7; 157 E.R. 734,737, per Pollock C.B. Emphasis has been added.

33 (1866) L.R. 1 C.P. 336.

station on the line to Kings Cross. When the defendants took the cattle to Nine Elms and no further it was held that parol evidence was admissible to show that the defendants had agreed to convey the cattle on to Kings Cross as this did not contradict but only supplemented the written contract. In Turner v. Forwood[34] the courts went further and allowed parol evidence of a term of the contract that was not in the written document and appeared to conflict with it. The plaintiff had assigned a debt due to him from a company to one of its directors by a deed stated to have been made for a nominal consideration. It was held that evidence was admissible to show that there was a substantial consideration for the assignment.

17. Finally, in this connexion, we should mention Couchman v. Hill.[35] The plaintiff, a farmer, purchased a heifer for £29 at an auction. In the sale catalogue the heifer was described as "unserved", but the catalogue went on to say that the sale would be subject to the usual conditions and that all lots must be taken subject to all faults. Before the auction the plaintiff was assured by the owner of the heifer and by the auctioneer that the heifer was unserved, but this turned out to be untrue and the animal later died as a result of the strain of carrying a calf at too young an age. The plaintiff claimed damages and the Court of Appeal held that the oral warranty "overrode the stultifying condition in the printed terms"[36] and that the claim accordingly succeeded.

The collateral contract

18. We have already mentioned that parol evidence may be admitted to prove a misrepresentation as a ground for claiming damages.[37] Parol evidence may also be admitted to prove that a collateral contract, not contained in the written agreement, was made and broken. The justification for this exception to

34 [1951] 1 All E.R. 746.

35 [1947] K.B. 554.

36 Ibid., at p. 558.

37 Para. 15, above.

the rule is that a collateral contract may be concluded orally, the consideration for the oral promise being the agreement by the promisee to enter into the "main" contract.[38] Morgan v. Griffiths[39] provides an early example. Mr Griffiths took a lease of certain land from Mr Morgan after being assured by Mr Morgan that he would see that the rabbits with which the land was overrun were destroyed. Mr Morgan failed to carry out his promise, which was not embodied in the terms of the lease, and Mr Griffiths' crops were destroyed by the rabbits. He sued for damages and his claim succeeded; it was held that evidence of the parol assurance was admissible as it did not contain any terms which conflicted with the written document and was a binding collateral agreement. The "collateral contract" has been much used this century as a way of turning the flank of the parol evidence rule.[40] For example in Jameson v. Kinmell Bay Land Co.Ltd.[41] the company selling a building plot orally promised an intending purchaser that a road would be constructed and be ready within a reasonable time. In reliance upon this the purchaser signed a written contract to purchase. The purchaser recovered damages for loss caused by the company's failure to make the road. The Court of Appeal held that the promise to do so amounted to a collateral contract. To take another example, in City & Westminster Properties (1934) Ltd. v. Mudd[42] a tenant signed a lease containing a covenant to use the premises for business purposes only. He had in fact resided there for some time and was only induced to sign the lease by an oral assurance that the lessors would not object to his continuing to do so. Later the lessors brought an action for the forfeiture of the lease on the ground of breach of

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38 Mann v. Nunn (1874) 30 L.T.526; Webster v. Higgin [1948] 2 All E.R. 127.

39 (1871) L.R. 6 Ex.70.

40 K.W.Wedderburn, "Collateral Contracts", [1959] C.L.J. 58.

41 (1931) 47 T.L.R. 593.

42 [1959] Ch. 129.

covenant. The court held that there had indeed been a breach of covenant but that the oral assurance on which the tenant had relied constituted a collateral contract from which the lessors could not be allowed to resile; the lessors' claim for forfeiture was dismissed.

Custom and implied terms

19. Contracts between businessmen may be drawn up by their legal advisers. They may, on the other hand, be written out by the businessmen themselves, using their own expressions and leaving unsaid things which would, as between businessmen engaged in the same line of business, not need to be said. The courts have had to bend the parol evidence rule occasionally in order to fill out the material contained in the document so as to give the contract the commercial purpose that the parties intended. As Parke B. said in Hutton v. Warren:-[43]

> " It has long been settled, that, in commercial transactions, extrinsic evidence of custom and usage is admissible to annex incidents to written contracts, in matters with respect to which they are silent."

One of the more remarkable examples of this practice is Smith v. Wilson in which extrinsic evidence was admitted to show that by a local custom the phrase "1000 rabbits" used in the written contract was to be taken as meaning 1200 rabbits.[44]

20. Parol evidence may also be admitted of matters relevant to the existence and scope of implied terms not set out in the written contract. For example, in the case of a written contract for the sale of goods evidence may be given that the buyer made known the purpose for which the goods were required, since this could be the basis of an implied term

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43 (1836) 1 M. & W. 466, 475; 150 E.R. 517, 521.

44 (1832) 3 B. & Ad. 728; 110 E.R. 266. See para. 6, above.

that the goods would be reasonably fit for such purpose.[45]

Summary

21. The exceptions to the parol evidence rule are so numerous and so extensive that it may be wondered whether the rule itself has not been largely destroyed. It has indeed been said that the rule nowadays amounts to no more than a rebuttable presumption "that a document which looks like a contract is to be treated as the whole contract."[46] Certainly it no longer has the force that it had a hundred years ago when cases such as Evans v. Roe and Others were decided.[47] The scope of the rule, if not its existence, is doubtful. It is for consideration whether it serves any useful purpose in the present law.

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45 Gillespie Bros. & Co. v. Cheney, Eggar & Co. [1896] 2 Q.B.59.

46 K.W.Wedderburn, "Collateral Contracts", [1959] C.L.J. 58,62.

47 (1872) L.R. 7 C.P. 138. See para. 8, above.

PART III - A REAPPRAISAL OF THE RULE

Justification of the rule

22. There appear to be two main grounds on which the courts have sought to justify the parol evidence rule. The first is that its application gives effect to the agreement of the parties. As was said in Inglis v. Buttery:-[48]

> "The very purpose of a formal contract is to put an end to the disputes which would inevitably arise if the matter were left upon verbal negotiations or upon mixed communings partly consisting of letters and partly of conversations."

The law reports contain other judicial pronouncements to the like effect,[49] which make the assumption that the finality provided by the rule against parol evidence was what the parties themselves wanted when writing was used. Otherwise why use it? The parties' purpose in resorting to a written document must have been to isolate from the mass of precontractual negotiations only those proposals that were to be binding, a process that was likened by Professor Wigmore to that of separating the wheat from the chaff.[50]

23. The other main ground on which the parol evidence rule has been justified is that where there is a dispute about the terms on which the contract was made the application of the rule narrows the issues and keeps the dispute within reasonable bounds. This was perhaps of greater importance in the days when civil cases were normally tried with a jury.

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48 (1878) L.R. App. Cas. 552, 577.

49 For example "It is in vain to reduce a contract to writing, if you may afterwards refer to all that has passed by parol." Pickering v. Dowson (1813) 4 Taunt. 779, 784; 128 E.R. 537, 539, per Heath J. See also the judgment of Bramwell B. in Wake v. Harrop (1862) 30 L.J. Ex. 273, 277.

50 Wigmore on Evidence (3rd ed., 1940), vol.9, p.76.

The introduction of parol evidence added to the length of the trial and the legal costs and might bias the jury unduly.[51] It was said in one case that the admission of parol evidence in addition to or in contradiction of written documents could lead to "great inconvenience and troublesome litigation in many instances."[52] Hardship might result in individual cases from the rule being applied but the courts' view, in the early days at least, was that "... it is better to suffer a mischief to one man than an inconvenience to many ...."[53]

Commercial practice

24. Contracting parties do not always have recourse to writing when making an agreement and even where documents are brought into existence and delivered by one party to another they are not necessarily contractual in their nature. For example, a bill of lading is a receipt for the goods; it is not the contract of carriage although it may be evidence of that contract's terms.[54] To take another example, a ticket handed to a customer may not be a contractual document; it may only be a receipt for the money paid by the customer.[55] There is the further point that even where the document is contractual in its nature it does not necessarily follow that the parties have agreed to be bound by its terms and by nothing else. They may have made another agreement, orally, that is collateral to the written one and evidence of the collateral agreement may not be excluded by the rule.[56]

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51 See C.T. McCormick,"The Parol Evidence Rule as a Procedural Device for Control of the Jury", (1932) 41 Yale L.J., 365-385.

52 Mercantile Agency Co.Ltd. v. Flitwick Chalybeate Co. (1897) 14 T.L.R. 90, per Lord Haldane L.C.

53 Waberley v. Cockerel (1542) 1 Dy. 51a; 73 E.R. 112, 113.

54 The Ardennes [1951] 1 K.B. 55.

55 Chapelton v. Barry U.D.C. [1940] 1 K.B. 532.

56 See para.18, above.

25. There is another difficulty with the rule which has led to its being further qualified. It is that in practice important provisions are sometimes omitted when the contract itself is reduced into writing. This happens in commercial transactions[57] as well as in non-commercial transactions between members of the same family.[58] An explanation was offered by Lord Campbell C.J. in Humfrey v. Dale:-[59]

> "...the minds of lawyers are under a different influence from that which, in spite of them, will always influence the practices of traders.... The former desire certainty, and would have a written contract express all its terms, and desire that no parol evidence beyond it should be receivable. But merchants and traders, with a multiplicity of transactions pressing on them, and moving in a narrow circle, and meeting each other daily, desire to write little, and leave unwritten what they take for granted in every contract. In spite of the lamentations of Judges, they will continue to do so.... It is the business of Courts reasonably so to shape their rules of evidence as to make them suitable to the habits of mankind, and such as are not likely to exclude the actual facts of the dealings between parties when they are to determine on the controversies which grow out of them."

The courts have indeed sought to adapt the parol evidence rule to take account of "the habits of mankind" and its scope has been progressively reduced until there is now considerable uncertainty as to where it will be applied.[60] Thus the advantages that the rule may once have had of achieving certainty and finality have largely gone.

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57 See, for example, Hutton v. Warren (1836)1 M. & W. 446; 150 E.R. 517 and dictum of Parke B. quoted in para. 19, above.

58 See, for example, Joscelyne v. Nissen [1970] 2 Q.B. 86, the facts of which are summarised in para. 13, above.

59 (1858) 7 E.B. 266, 278-279; 119 E.R. 1246, 1250.

60 See Part II, above.

The agreement of parties

26. The injustices that would have resulted from an inflexible application of the parol evidence rule have been avoided, in many instances, by the creation of exceptions to it. We now consider whether the rule, or what is left of it, performs a useful function in the situations where it may still be applied.

27. A contract may be made orally or in writing or partly one and partly the other or it may be made by conduct. However it is made, it is binding according to the terms that the parties have, expressly or impliedly, agreed. Where all the terms of the agreement are embodied in a written document the parol evidence rule presents no problem: the terms of the document and the terms of the agreement are coextensive. As a general rule neither party may contend before the court for the inclusion of terms that were not agreed nor for the exclusion of terms that were. Parol (or indeed any other) evidence in support of such contentions would be inadmissible because it would be irrelevant and it would be inadmissible on the same ground even if the contract had been agreed orally. Thus where there is no discrepancy between the contractual document and the terms that the parties have agreed the parol evidence rule merely excludes that which would be inadmissible anyway. It has no independent role in such a situation; it is the fifth wheel on the coach.

28. A more difficult situation is created when the terms in the written document do not tally with the terms that the parties agreed. Which should prevail, the document or the agreement?

29. One view is that the agreement should prevail and that the document should either be ignored or rectified. However, if this view were correct the parol evidence rule

would seem to have no function at all. The argument has been neatly summarised by one learned writer:-[61]

> "Thus, the 'rule' comes to this: when the writing is the whole contract, the parties are bound by it and parol evidence is excluded; when it is not, evidence of the other terms must be admitted! To say this is to say little more than that the parties are bound, as usual, by the terms which, from an objective point of view, were 'intended' by them to be contractually binding; and the peculiar difficulties introduced by the writing have been conjured away."

30. The contrary view is that the document should prevail over the agreement and that evidence of the agreement should not be admitted. Support for this view is to be found in reported cases such as Evans v. Roe[62] which we mentioned earlier,[63] Smith v. Jeffryes[64] and Mercantile Agency Co.Ltd. v. Flitwick Chalybeate Co.[65] In all these cases there was a discrepancy between what the parties had agreed and what the document provided. In each case parol evidence was admitted at the trial and a verdict was given in accordance with what the parties were found to have agreed. On appeal, however, the parol evidence was in each case held inadmissible and the decision was reversed on the ground that the court could only give effect to the terms that were to be found in the written document. The document prevailed over the agreement.

31. There are at least three reported cases since 1900 in which the parol evidence rule has been applied to exclude evidence of the terms on which the parties were found, as a fact, to have agreed. In Newman v. Gatti[66] the facts were that Miss Newman, the plaintiff, had signed a written agreement

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61 K.W.Wedderburn, "Collateral Contracts", [1959] C.L.J. 58, 60-61.

62 (1872) L.R. 7 C.P. 138.

63 Para.8, above.

64 (1846) 15 M. & W. 561; 153 E.R. 972.

65 (1897) 14 T.L.R. 90.

66 (1907) 24 T.L.R. 18.

with the defendant to be understudy for the leading lady in "The Belle of Mayfair". Before signing the agreement she demurred at the salary that she was offered but the defendant's manager gave her an oral undertaking, as the jury found, that the term of her engagement would give her the right to claim the part if the leading lady fell ill. The leading lady did fall ill and for two weeks the plaintiff took her place but then the defendant gave the part to another lady for the rest of the run. The plaintiff's claim for damages was successful at the trial but the Court of Appeal reversed the decision. It was held that since the right to play the part was not referred to in the written agreement the evidence of it was inadmissible.

32. Another decision in the same year was Henderson v. Arthur.[67] The plaintiff let certain premises to the defendant at a yearly rent payable quarterly in advance. Before signing the lease the defendant made an agreement with the plaintiff, orally, that he would accept the quarterly payments if made on the quarter-days not in cash but by bill payable at three months. In the event when the defendant tendered such a bill the plaintiff refused to accept it and sued for cash instead. The trial judge found the agreement proved and gave judgment for the defendant. The Court of Appeal reversed his decision. Collins M.R. said "Assuming that there was in fact an agreement, the question is whether it is legally available for the purpose of defeating the claim of the lessor upon the covenant."[68] The Court held that it was not.

33. The third case, Hitchings & Coulthurst Co. v. Northern Leather Co. of America and Doushkess,[69] concerned a promissory note. The plaintiffs had supplied the defendant company with

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67 [1907] 1 K.B. 10.

68 Ibid., at p.12.

69 [1914] 3 K.B. 907.

goods. A promissory note (by way of payment) was made payable to the plaintiffs by the defendant company and indorsed by the other defendant Mr Doushkess. At the trial Mr Doushkess adduced evidence of an oral agreement with the plaintiffs, contemporaneous with the promissory note, that he would not be called upon to pay if the goods were not up to sample, which they were not. The court held that the agreement could not be relied on because evidence of it was excluded by the parol evidence rule.[70]

34. None of the cases cited in the preceding paragraphs have been reversed subsequently so they are, presumably, still good law,[71] although they may be hard to reconcile with some of the other decisions to which we referred in Part II.[72] If the effect of the parol evidence rule is that the document must prevail over the agreement, as the cases just cited suggest, this disposes of one of the arguments in support of the parol evidence rule, namely that it gives effect to the agreement of the parties;[73] in practice it does the opposite. Thus it may only be justified on the pragmatic ground that it keeps the disputes between the parties within reasonable bounds and that its general convenience justifies the hardship that may result in a few cases.[74]

Modern developments

35. Modern reported cases show a tendency on the part of the courts to concede the existence of the rule but to find that the case before them comes within one of the exceptions

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70 If, however, the agreement had been to the effect that the promissory note was to be in suspense evidence of it would, apparently, have been admitted by virtue of section 21(2) of the Bills of Exchange Act 1882.

71 See also Hutton v. Watling [1948] Ch.26, 29-30, in which the rule was applied and oral evidence was rejected as inadmissible.

72 In particular those mentioned in para. 10, above.

73 Para. 22, above.

74 Para. 23, above.

to it. The trend in recent reforms of the law of evidence has been to remove artificial rules that prevent the courts from getting at the truth. The relaxation of the rule against hearsay evidence in civil cases[75] may be seen as part of a general movement towards making the admissibility of evidence turn on relevance and relevance alone. The gradual erosion of the parol evidence rule by the development of exceptions may be part of that same movement. Indeed where parol evidence is admitted it is sometimes justified nowadays not on the technical ground that the case falls within one of the exceptions to the parol evidence rule but on broader principles of justice. For example in Mendelssohn v. Normand Ltd.[76] the plaintiff based his case, in part, on an oral warranty that was inconsistent with a condition in the contractual document on which the defendant relied. The Court of Appeal held that his claim succeeded despite the condition in the document and Lord Denning M.R. said:-

> "The reason is because the oral promise or representation has a decisive influence on the transaction - it is the very thing that induces the other to contract - and it would be most unjust to allow the maker to go back on it. The printed condition is rejected because it is repugnant to the express oral promise or representation."77

36. The courts' approach in Mendelssohn v. Normand Ltd. makes us wonder whether cases such as those cited in paragraphs 30 to 33 might not be decided differently if they were tried today. On the other hand it may be that the rule can still be relied on at the present time to exclude otherwise relevant evidence of what it was that the parties agreed; this unattractive characteristic of the rule may still exist.

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75 See the 13th Report of the Law Reform Committee on Hearsay Evidence in Civil Proceedings (1966), Cmnd.2964, para.6 and the provisions of the Civil Evidence Act 1968.

76 [1970] 1 Q.B. 177.

77 Ibid., at p.184.

PART IV - THE ABOLITION OF THE RULE

The value of writing

37. So far we have been discussing the advantages and disadvantages of the parol evidence rule, not the advantages and disadvantages of having contracts put in writing. We accept that it is often important to the parties that their contract should be put in writing as a final record of their agreement and that there are obvious advantages in having documentary evidence of what was agreed. Where an agreement has been reduced into writing the very appearance of the thing will tell in its favour. If it looks like a complete record of what was agreed the court will infer that this is what it probably is and cogent evidence will usually be needed to show that it is incomplete or inaccurate or, as the case may be, that it is not a contract at all. This is not a matter of law but of common sense. But is the parol evidence rule a useful adjunct to the ordinary principles of common sense which are applied by the courts when evaluating documentary evidence?

38. It has been said that the parol evidence rule has bequeathed to the modern law a presumption that a document which looks like a contract is to be treated as the whole contract, but that the presumption may be rebutted.[78] This may be so, but the rule itself seems to make the presumption into a matter of legal technicality of unnecessary complexity. Let us say that the plaintiff relies on a written document as the contract made between himself and the defendant and that the defendant seeks to adduce parol evidence to the effect

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78 K.W.Wedderburn, "Collateral Contracts", [1959] C.L.J. 58, 62. See too Dean Hale, "The Parol Evidence Rule", (1925) 4 Oregon L. Rev. 91.

that different or additional terms were agreed orally. If the evidence can be brought within one of the exceptions to the rule it will be admissible, otherwise it will be inadmissible. The court cannot give a ruling on the question of inadmissibility without knowing what the evidence is and so the evidence will normally be received de bene esse. If the parol evidence is convincing and brings the defendant's case within one of the exceptions to the rule the court will hold that it is admissible and, unless it is effectively answered by the plaintiff, will further hold that the presumption that the written document was the whole contract has been rebutted.

39. Where the court holds that the parol evidence comes within one of the exceptions the ultimate result is the same as if there were no parol evidence rule. Where the court rejects the evidence there has been no appreciable saving of costs because the evidence will usually have been received, albeit de bene esse. Nor has there been a narrowing of the issues. On the contrary, in addition to the question whether the document is a full and accurate record of the agreement there is the question whether the parol evidence is technically admissible. If the rule cannot be justified on the ground that it gives effect to the agreement of the parties[79] can it be justified on the other main ground that it narrows the issues between the parties and saves costs?[80] Our provisional conclusion is that it cannot.

40. Whilst we have doubts about the parol evidence rule we do not doubt that written agreements should bind the parties to what they have agreed. Where all the terms have been accurately recorded in a written contract that contract should be binding as it is under existing law. Evidence of different

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79 Paras.22 and 26 to 34, above.

80 Para.23, above.

or additional terms that might have been agreed, but were not, must be irrelevant and accordingly inadmissible; in this sense the document is exclusive of other evidence. However our provisional conclusion is that the exclusivity of writing should be justified not by the parol evidence rule or any technical presumption but by the fact that the parties have agreed upon the writing as the record of all they wish to be bound by.

The consequences of abolishing the rule

41. The consequences of abolishing the parol evidence rule would be that very many cases would be decided exactly as they are today, either where the writing prevails over oral evidence (not because the oral evidence is excluded but because this gives effect to what the parties are found to have agreed) or where the oral evidence prevails over the writing (not because the courts have discovered an exception to the parol evidence rule but again because this gives effect to what the parties are found to have agreed).

42. Some cases, such as Evans v. Roe,[81] would no doubt be decided differently, and we think that this is right. Nevertheless we do not envisage any inconvenience resulting. Where the parties put their contract in writing in order to achieve certainty, we would expect the courts to continue to uphold the document so as to give effect to what the parties themselves wanted to achieve. This would apply to most commercial transactions where writing was used. With bills of lading and bills of exchange certainty is of particular importance because the documents may be transferred by one of the original parties to someone else, but the abolition of the parol evidence rule would not in the normal way affect the transferee of such documents. Section 1 of the Bills of Lading Act 1855 gives the transferee of a bill of lading rights and duties vis-à-vis

81 (1872) L.R. 7 C.P. 138; para. 8, above.

the carrier as if a contract in the terms set out in the bill of lading had at the time of shipment been made with himself,[82] so he would not be affected by terms which were agreed orally between the original parties and not included in the bill of lading. As for bills of exchange, although evidence of terms agreed orally between the original parties to the bill would be admitted more readily than at present[83] the rights of the holder in due course[84] would remain the same as under the existing law.[85] We should welcome comments on these and other possible points of difficulty.

Provisional recommendation

43. Our provisional conclusion is that the parol evidence rule no longer serves any useful purpose. It is a technical rule of uncertain ambit which, at best, adds to the complications of litigation without affecting the outcome and, at worst, prevents the courts from getting at the truth. We accordingly make the provisional recommendation that it should be abolished.

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82 Scrutton on Charterparties (18th ed., 1974), p.61.

83 See, for example, Hitchings & Coulthurst Co. v. Northern Leather Co. of America and Doushkess [1914] 3 K.B. 907; para. 33, above.

84 "A holder who has taken a bill, complete and regular on the face of it, under the following conditions; namely
(a) That he became the holder of it before it was overdue, and without notice that it had been previously dishonoured, if such was the fact:
(b) That he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it."
Bills of Exchange Act 1882, s.29(1).

85 As between immediate parties and as regards a remote party other than a holder in due course parol evidence may be adduced to show that delivery of the bill was conditional or for a special purpose only and not for the purpose of transferring the property in the bill. However, so far as a holder in due course is concerned, a valid delivery of the bill by all parties prior to him, so as to make them liable to him, is conclusively presumed. Bills of Exchange Act 1882, s.21(2).

PART V - SUMMARY OF CONCLUSIONS

44. We end with a summary of our provisional conclusions, on which comments and criticisms would be welcomed.

Summary of conclusions

(a) The scope of the parol evidence rule has been so greatly reduced by exceptions as to lead to uncertainty in the existing law (paras.10 to 21);

(b) The advantages that the rule may once have had of achieving certainty and finality have largely gone (paras. 22 to 25);

(c) The disadvantage of the rule, that it prevents the parties from proving the terms of their agreement, may still exist in some cases (paras. 26 to 36);

(d) Where there is a written agreement the rejection of evidence to add to, vary, contradict or subtract from its terms should be justified not by the parol evidence rule but by the fact that the parties have agreed upon the writing as a record of all they wish to be bound by (paras. 37 to 40);

(e) The abolition of the rule would produce the same result in many cases but in some cases it might lead to a different and more just result (paras. 41 to 42);

(f) The parol evidence rule should be abolished (para. 43).

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