
# The Law Commission

(LAW COM. NO. 154)

## LAW OF CONTRACT

## THE PAROL EVIDENCE RULE

*Presented to Parliament by the Lord High Chancellor*
*by Command of Her Majesty*

*January 1986*

*LONDON*
HER MAJESTY'S STATIONERY OFFICE
£3.90 net

Cmnd. 9700

The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Commissioners are—

The Honourable Mr. Justice Beldam,* *Chairman*

Mr. Trevor M. Aldridge

Mr. Brian J. Davenport Q.C.

Professor Julian Farrand

Mrs. Brenda Hoggett

The Secretary of the Law Commission is Mr. J. G. H. Gasson and its offices are at Conquest House, 37-38 John Street, Theobalds Road, London WC1N 2BQ.

* Succeeded The Honourable Mr. Justice Ralph Gibson (now The Right Honourable Lord Justice Ralph Gibson) on 1 October 1985.

# LAW OF CONTRACT

# THE PAROL EVIDENCE RULE

## CONTENTS

# THE PAROL EVIDENCE RULE

*Summary*

In this report the Law Commission examines what has sometimes been thought to be a rule of law under which evidence cannot be received which would have the effect of contradicting, varying, adding to or subtracting from the terms of a written contract. The Commission concludes that the rule is not as far-reaching as once it appears to have been thought to be: evidence will only be excluded if to give effect to it would be inconsistent with the intention of the parties. The Commission does not recommend legislation relating to the rule.

# THE LAW COMMISSION

## LAW OF CONTRACT

## THE PAROL EVIDENCE RULE

*To the Right Honourable the Lord Hailsham of St. Marylebone, C.H., Lord High Chancellor of Great Britain*

## PART I

## INTRODUCTION

1.1. Twenty years ago, when the Law Commission was established, it recommended that the law of contract be examined with a view to its codification and reform.[1] In 1972, after a good deal of work had been done towards the preparation of a draft contract code, the Commission came to the conclusion that the publication of such a code 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.[2] Work on the production of a contract code was therefore suspended and the Commission stated that it intended to publish a series of working papers on particular aspects of the law of contract with a view to determining whether, and if so what, amendments of general principles were required. One of those working papers, issued in 1976, concerned the parol evidence rule.[3]

1.2. It is necessary, first, to see what the Commission had in mind when it referred to the "parol evidence rule". This was explained in the working paper:[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.
>
> 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".

---

[1] First Programme, Law Com. No. 1, Item I; First Annual Report, 1965-1966, Law Com. No. 4, para. 31.
[2] Eighth Annual Report, 1972-1973, Law Com. No. 58, paras. 3-5.
[3] Working Paper No. 70.
[4] Paras. 4-7.

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.[5]

The three rules are considered separately in the leading text-books on the English law of evidence. 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. . . . 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",[6] 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."[7]

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

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.

This report is concerned with the same subject-matter as Working Paper No. 70 although, for reasons set out in Part II, below, we now view the rule somewhat differently from the way in which it appeared to our predecessors who issued that paper.

1.3. For the purposes of the working paper it was assumed that an identifiable rule of law existed in the terms referred to above. In it, the Commission considered what it saw as the many exceptions which permitted the court to receive evidence otherwise inadmissible under the terms of the assumed rule, and concluded that the exceptions were so numerous and so extensive that it

---

[5] The term was recently used in this sense by Harman J. in *Rabin* v. *Gerson Berger Association Ltd.* [1985] 1 W.L.R. 595, at pp. 596-7; affirmed, *The Times*, 21 November 1985 (C.A.).

[6] *Smith* v. *Wilson* (1832) 3 B. & Ad. 728.

[7] *Bank of Australasia* v. *Palmer* [1897] A.C. 540, at p. 545, *per* Lord Morris. Although this statement has often been treated as one of the leading statements of the parol evidence rule, it was not part of the reasoning of the Privy Council and, as Lord Morris explained, had been agreed by counsel. His statement was cited by Lord Kilbrandon in *National Westminster Bank Ltd.* v. *Halesowen Presswork & Assemblies Ltd.* [1972] A.C. 785, at pp. 818-819, although the point does not appear to have been argued in that case.

might be wondered whether the rule itself had not been largely destroyed.[8] If the rule did exist and were abolished the result would be the same for many cases; in some there might be a different and more just result. On balance, therefore, the Commission provisionally concluded that the parol evidence rule should be abolished.

1.4. In response to the working paper the Commission received a substantial number of comments and we are grateful to all those who took the trouble to assist us by letting us have their views.[9] A list of those who commented appears in the Appendix to this report.

1.5. Other commitments interrupted the Commission's work on this project for a while. When work was resumed, attention was focused in particular on the suggestion which had been made that if the parol evidence rule were to be abolished it would work injustice on assignees of contractual rights and duties. Suggestions were made for overcoming this problem and in 1982 the Commission carried out a limited round of consultation on this aspect of the matter. Again, we are grateful to all those who responded to our request for assistance.

1.6. Most of those who responded to the working paper did so on the assumption that the parol evidence rule was as therein set out. Differing views were expressed as to whether such a rule of law should be abolished. Some saw it as an essential rule to uphold the certainty of contractual statements made in documents. Others saw it as excluding evidence which should be admitted if justice were to be done. The former wanted the rule to be retained, the latter wanted it to be abolished. Some of those consulted, however, carried out their own analysis of the relevant authorities and expressed doubts as to the statement of the law in the working paper. In particular, the Law Reform Committee of the Senate, in a paper prepared by Mr. Donald Nicholls, Q.C. (now Mr. Justice Nicholls) and Mr. Andrew Pugh, subjected the rule to a detailed analysis and concluded that it no longer exists in the form suggested, causes no injustice and is now merely a feature in the historical development of the common law.

1.7. We have been much assisted by the many different views expressed on consultation. We have now concluded that a parol evidence rule such as is described above, and which on occasions may have been applied to exclude or to deny effect to relevant evidence, no longer has either the width or the effect once attributed to it. In particular, no parol evidence rule today requires a court to exclude or ignore evidence which should be admitted or acted upon if the true contractual intention of the parties is to be ascertained and effect given to it.[10] In the light of this conclusion we see no reason for legislation to

[8] Working Paper No. 70, para. 21.

[9] The Law Commission is also particularly grateful to Mr. Hugh Beale of Bristol University who, at the request of the Commission, read Parts I and II of this report in draft and who made many helpful suggestions. The Commission is, however, responsible for all conclusions expressed in this report.

[10] Our reasons for reaching this conclusion are set out in detail in Part II of this report. We have sought to confine the text of that Part to the main grounds upon which our conclusion is based, leaving detailed consideration of the supporting material to the (sometimes lengthy) footnotes.

change the law. Is legislation required, however, not to change the law but to clarify misunderstandings or to declare that the law is as we now assert it to be? In our view, declaratory legislation for this purpose would be difficult to draft, uncertain of effect and is unnecessary.[11] In so far as there may be different views about the substance and effect of the parol evidence rule, the conclusions reached in this report may help to clarify the position.

1.8. Our conclusions are thus different from those provisionally expressed in the working paper. However, the fact that different conclusions are expressed in the working paper and this report as to the nature of the parol evidence rule is, in our opinion, almost entirely irrelevant to the practical working of the law and to the way in which cases are decided or settled. Acceptance of the conclusions reached in this report will, for all practical purposes, lead to the same end result as that intended by those who wrote the working paper. When the working paper was published there was then no evidence of courts being compelled by the working of any parol evidence rule to decide cases in a way which appeared to be unjust. The working paper stated that so effective and extensive were the exceptions to the rule that "the scope of the rule, if not its existence, is doubtful".[12] This report, in short, is concerned with a question of legal analysis which is of importance in legal theory but does not, in our view, affect the way in which cases are required by law to be decided in courts or tribunals.

[11] We discuss this conclusion in detail in Part III of this report.
[12] Working Paper No. 70, para. 21.

## PART II

## EXAMINATION OF THE PAROL EVIDENCE RULE

2.1. The rules of law relating to proof of contractual terms have developed over a long period in accordance with changes in the general rules of procedure and in the requirements of our society. The history of this development has been set out in the work of academic lawyers.[1] For the purposes of this report a very brief summary of that history is sufficient.

2.2. In early English legal history,[2] the courts graded evidence in order of merit. Matter of averment was inferior to matter under seal, which was in turn inferior to matter of judicial record. As a strict rule of law, evidence could not be contradicted by evidence of an inferior nature. Thus, a deed could not be contradicted by oral testimony. At that time, almost all legal documents were under seal[3] and early cases must be treated with caution since a reference in them to "writing" may have been a reference only to a deed. When such rules were current oral evidence might have been excluded because of the old rules of gradations of evidence, rather than any general "parol evidence rule". It would appear that unsealed writings were not considered superior to oral testimony,[4] but the hierarchy of evidence has occasionally been cited as a reason for the exclusion of oral evidence in contradiction of a written instrument.[5]

2.3. There was, furthermore, a marked reluctance on the part of many judges up to the middle of the nineteenth century to admit oral evidence which would have contradicted or supplemented existing written evidence, although different judges took different approaches and disparities can be seen even between decisions of the same judge.[6] One reason for this reluctance may have been that the rules of procedure at that time prevented the parties to an action and persons with an interest in its outcome from giving oral evidence in that action. If one party could persuade a competent witness to testify that additional or different terms were orally agreed, the other party could not himself give evidence to counter those allegations. There were thus obvious opportunities for fraud. One means of eliminating such fraud was the Statute of Frauds 1677,[7] which required that certain transactions be made in writing and

---

[1] See, for example, *Wigmore on Evidence* 3rd ed., (1940), vol. IX, § 2425; Holdsworth, *A History of English Law*, 3rd ed., (1944), vol. IX, pp. 173-177.

[2] By the end of the thirteenth century, the practice of affixing a seal to a document had become established as a reliable means of authenticating documents in what was largely an illiterate society. At this time, however, documents were of merely evidential value in establishing the terms of a transaction. The fifteenth century, Wigmore suggests, was a period of transition during which the legal significance of documents increased and new rules concerning the conclusiveness of deeds as evidence of the terms of the transactions to which they relate "struggled for ascendency": *Wigmore on Evidence* 3rd ed., (1940), vol. IX, § 2426, at p. 88.

[3] See Salmond, "The Superiority of Written Evidence" (1890) 6 L.Q.R. 75, at p. 76.

[4] Salmond, *op. cit.*, at p. 77.

[5] See, for example, *Davis* v. *Symonds* (1787) 1 Cox, Eq. Cas. 402. A later example is *Guardhouse* v. *Blackburn* (1866) L.R. 1 P. & D. 109.

[6] Contrast, for example, the decision of Lord Ellenborough C.J. in *Powell* v. *Edmunds* (1810) 12 East 6 with his decision in *Jeffery* v. *Walton* (1816) 1 Stark. 267.

[7] See, further, paras. 2.37-2.41, below.

that others be evidenced in writing. It has been suggested[8] that this statute was highly influential in the development of judicial attitudes towards the acceptance of oral evidence of transactions.

2.4. In the nineteenth century parties to an action were, for the first time, permitted to give oral evidence.[9] Certain concepts, such as the collateral contract[10] and the contract made partly orally and partly in writing,[11] were developed which have been seen by some to be exceptions to what they considered to be a rule excluding extrinsic evidence.[12] Sometimes courts denied effect to evidence which, if accepted (and sometimes after being accepted by a jury[13]), would have varied or supplemented written contractual terms.[14] On

---

[8] *Wigmore on Evidence* 3rd ed., (1940), vol. IX, § 2426.

[9] This change was effected, in the case of persons interested in the outcome of an action, by the Evidence Act 1843 and, in the case of parties to an action, by the Evidence Act 1851.

[10] An early example of this analysis is *Denn d. Jacklin* v. *Cartright* (1803) 4 East 29. It would seem that this analysis was next employed in *Lindley* v. *Lacey* (1864) 17 C.B.N.S. 578. In *Newman* v. *Gatti* (1907) 24 T.L.R. 18 (a case referred to in the working paper as an example of the parol evidence rule being applied to exclude evidence of the terms on which the parties were found, as a fact, to have agreed) the plaintiff relied on an oral collateral warranty. The jury found in the plaintiff's favour but the Court of Appeal held that there was no evidence to support the alleged warranty. The Court accepted the principle of the collateral warranty although it said that there could not be such a warranty if the intention of the parties was that a particular document should be a complete record of their transaction or if the transaction was required by law to be in writing. In our view, the Court did not decline to give effect to the oral evidence because of any rule of law but because that evidence was not sufficient to establish the plaintiff's case. The principle of the collateral warranty was, however, fully accepted.

[11] For example, in *Malpas* v. *London & South Western Railway Company* (1866) L.R. 1 C.P. 336; *Mercantile Bank of Sydney* v. *Taylor* [1893] A.C. 317.

[12] See below, paras. 2.30-2.31.

[13] It has been suggested that judges developed strict rules against the admission of extrinsic evidence to obviate the risk that, out of sympathy for the economically weaker party in a case, a jury might perversely conclude that a document was not intended to be a conclusive record of the contract. By this means, the completeness or otherwise of a document could be ruled upon as a matter of law by the judge and the evidence would never be heard by the jury: see C. T. McCormick, "The Parol Evidence Rule as a Procedural Device for Control of the Jury", (1932) 41 Yale L.J. 365; *Wigmore on Evidence* 3rd ed., (1940), vol. IX, § 2426. In England and Wales, except in defamation actions and cases involving allegations of fraud, juries may be employed in civil matters only with the leave of the court and are now exceedingly rare (Administration of Justice (Miscellaneous Provisions) Act 1933, s. 6(1): see now Supreme Court Act 1981, s. 69). The use of juries in civil cases had been in decline since the middle of the 19th century.

[14] See, for example, *Evans* v. *Roe* (1872) L.R. 7 C.P. 138. (The report of this difficult case is very short and reference should also be made to 26 L.T. 70). This case was considered in the working paper to be the paradigm instance of the application of the parol evidence rule as it was there perceived to be. Because we are now taking a different view of the rule from our predecessors this case must be examined in a little detail in order to ascertain what propositions of law can properly be derived from it.

The plantiff entered into the employment of the defendants in April 1871 and was dismissed with a week's wages on 3 June. He claimed damages for wrongful dismissal, alleging that the agreed period of his employment was 12 months. It was admitted that on 13 April 1871 he and the defendants signed a document providing that he was to be employed by them at the rate of £2 weekly starting on 19 April. He alleged and proved, in addition, that at the time he signed this document he asked if the engagement was understood to be for a year and that one of the defendants replied, "Yes, certainly". At the trial before Blackburn J. the jury awarded the plaintiff £30 damages. The case is reported on the defendants' appeal to the Court of Common Pleas.

In 1871 s. 4 of the Statute of Frauds 1677 still provided that contracts which were not to be fully performed within 12 months of their making were unenforceable if not evidenced in writing. If the plantiff's contract did not take effect until 19 April it would fall within the section and would be unenforceable if any part of it were made orally. On this footing, the plaintiff could not safely rely upon any alleged oral term that the contract was to run for 12 months from 19 April. Proof of an oral term would have enabled the defendants successfully to contend that the contract was unenforceable.

other occasions extrinsic evidence was admitted either because no parol evidence rule was thought to apply[15] or because it was held that one of the "exceptions" did apply.[16]

2.5. A source of confusion in the development of this part of the law has been the many instances where, by statute or special rule of common law, a particular type of transaction is required to be contained in or evidenced by a document or, in some cases, a deed.[17] For example, a promissory note must be in writing,[18] and oral evidence to vary the terms of a promissory note cannot be effective, not because of any general parol evidence rule but because of the statutory requirement that such a note must be in writing.[19] Sometimes a wide parol evidence rule, which would have the effect of excluding evidence contrary to the actual intention of the parties, has been stated in or derived from cases on transactions which were required to be in a particular form.[20]

---

[14] *contd.*

Three arguments seem to have been advanced on behalf of the plaintiff. First, reference in the written contract to a weekly wage was not inconsistent with a hiring for a year (at common law contracts of service were for a year unless there was an inconsistent express provision. Reference to weekly wages was, however, considered to be an inconsistent provision). Secondly, the contract was on its wording to take effect on 13 April and to run for a year from that date (in which case the Statute of Frauds would not apply and the contract could be proved to have been made partly orally). Thirdly, the oral statement could be relied upon to explain the writing which was unclear. It was not, it seems, even argued by the plaintiff that there was an oral term of the contract that the hiring was to be for a year from 19 April.

The defendants' appeal was allowed. Byles J. said that the contract on which the plaintiff relied was a written contract which, from the reference to a weekly wage, clearly provided for a weekly hiring. Brett J. said that the plaintiff's case was hopeless: the contract was reduced to writing and oral evidence of negotiations could not be heard to vary it. Grove J. said that it would render written agreements useless if evidence of conversations which took place at the time could be admitted.

The relevant part of the Statute of Frauds was repealed by the Law Reform (Enforcement of Contracts) Act 1954 and we, like our predecessors in the working paper, have little doubt that *Evans* v. *Roe* would be argued differently today and probably decided in the plaintiff's favour. The plaintiff would allege that his contract was made partly orally and partly in writing and, depending upon the precise facts, this allegation would be likely to be accepted. Alternatively, the plaintiff might rely upon a collateral contract.

It is difficult, in our view, to derive any clear principle of law from *Evans* v. *Roe.* In so far as the court was saying that the entire contract was in writing, the case is consistent with the analysis of the law which we believe would be accepted today. In so far as the court rejected the argument that oral evidence could be admitted to explain a written term, it would be followed today. But, if any member of the court was saying that just because there was a contractual document in existence, therefore no extrinsic evidence of terms could be admitted, his judgment would not, in our view, be followed today.

A further 19th century case (mentioned briefly in the working paper) in which the court's analysis may have been similar to that advanced in the working paper is *Mercantile Agency Co. Ltd.* v. *Flitwick Chalybeate Co.* (1897) 14 T.L.R. 90 but the report is so abbreviated that the grounds of decision are unclear.

In *Hawrish* v. *Bank of Montreal* [1969] S.C.R. 515 the Supreme Court of Canada held that the parol evidence rule rendered inadmissible evidence of an oral agreement which would have varied or altered a written guarantee. The court did not explain its reasoning but we doubt how far an English court today would follow this decision save, perhaps, by special reference to the Statute of Frauds which still applies to guarantees.

[15] For example, *Harris* v. *Rickett* (1859) 4 H. & N. 1; *Stones* v. *Dowler* (1860) 29 L.J. Ex. 122; *Wake* v. *Harrop* (1861) 30 L.J. Ex. 273, at pp. 277–278, *per* Bramwell B.

[16] See below, paras. 2.30–2.31.

[17] See below, paras. 2.37–2.41.

[18] Bills of Exchange Act 1882, s. 83(1). The rule was the same at common law before the Act.

[19] See, for example, *Hitchings & Coulthurst Co.* v. *Northern Leather Co. of America and Doushkess* [1914] 3 K.B. 907.

[20] See, for example, *Byles on Bills of Exchange* 25th ed., (1983), at p. 368.

**Nature of the parol evidence rule**

2.6. So far as we are aware, no English or Commonwealth court has ever found it necessary to analyse the parol evidence rule in detail as to its applicability, width and effect.[21] In the cases in which the rule has been mentioned, it has generally been in terms which seem to indicate that the judges thought it was both obvious and well known. For the purpose of deciding whether the parol evidence rule should be abolished or amended by statute, it has been necessary to analyse the rule in detail. We had to be clear as to what the rule was which might be abolished, amended or declared.

2.7. We have now concluded that although a proposition of law can be stated which can be described as the "parol evidence rule" it is not a rule of law which, correctly applied, could lead to evidence being unjustly excluded. Rather, it is a proposition of law which is no more than a circular statement: *when it is proved or admitted that the parties to a contract intended that all the express terms of their agreement should be as recorded in a particular document or documents, evidence will be inadmissible (because irrelevant) if it is tendered only for the purpose of adding to, varying, subtracting from or contradicting the express terms of that contract.*[22] We have considerable doubts whether such a proposition should properly be characterised as a "rule" at all, but several leading textbook writers and judges have referred to it as a "rule"[23] and we are content to adopt their terminology for the purposes of this report.

2.8. Our conclusion as to the nature of the parol evidence rule is no new theory. The opinions of some leading textbook writers, who reached a similar conclusion long before we approached the subject, confirm us in our view that the parol evidence rule is no more than as we have stated above.[24] In his celebrated work on evidence, Wigmore discussed the process whereby the net result of a series of negotiations may come to be embodied in a single document, and concluded that,[25]

---

[21] A very full academic treatment of the rule is to be found in *The Parol Evidence Rule* by Professor D. W. McLauchlan (Wellington, New Zealand, 1976). Our indebtedness to Professor McLauchlan's work will be evident throughout this report. The American courts have given detailed consideration to the rule. One commentator, however, concluded that, "This 'simple' rule is, in fact a maze of conflicting tests, subrules, and exceptions adversely affecting both the counseling of clients and the litigation process" (J. Sweet, "Contract Making and Parol Evidence: Diagnosis and Treatment of a Sick Rule" (1968) 53 Cornell Law Review 1036). See also Farnsworth, *Contracts* (1982), § 7.2 et seq., and the Restatement Second of Contracts Chapter 9, Topic 3, § 209-218. For the views of Corbin, Wigmore and Williston, see paras. 2.8 and 2.9, below. The rule as it applies in South Africa is analysed in detail by Hoffmann in *South African Law of Evidence* 2nd ed., (1970), chap. 9.

[22] Where the capacity in which one of the parties has acted (for example, as "owner") is stated in the contract, extrinsic evidence of his having acted in some other capacity may be excluded on similar principles: see *Bowstead on Agency* 15th ed., (1985), at pp. 320 and 449.

[23] For example, *Chitty on Contracts* 25th ed., (1983), para. 802; *Phipson on Evidence* 13th ed., (1982), chap. 38; and the cases cited in n. 15 above.

[24] See, for example, Cheshire and Fifoot, *Law of Contracts* (1946), at p. 80 (the latest edition of that work (10th ed., 1981) takes a similar view at pp. 108-110); *Halsbury's Laws of England* 4th ed., vol. 9, paras. 216 (n. 3), 267 and 287; *Cross on Evidence* 6th ed., (1985), at pp. 615-616.

[25] *Wigmore on Evidence* 3rd ed., (1940), vol. IX, § 2425. This view is maintained in Professor Chadbourn's edition of this work (rev. ed., (1981)).

> Where a jural act is embodied in a single memorial all other utterances of the parties on that topic are legally immaterial for the purpose of determining what are the terms of their act.

And Corbin wrote that the real issues involved in many contract cases were,[26]

> (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"[27] of that contract? In determining these issues, or any one of them, 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.

2.9. A conflicting analysis of the parol evidence rule given by Williston in the United States is that when a document appears on its face to be a complete record of the parties' contract, then it must be conclusively presumed to be so.[28] On this view, any examination by the court of an allegation by one party that the contract was made partly orally and partly in writing would be precluded by the production by the other party of a document which appeared to contain a complete contract. Such a rule would be logically capable of application, but no English court, so far as we are aware, has so stated the rule[29] and we are confident such a proposition does not represent English law today.[30] Not only is such an extreme proposition unsupported by English authority but it would be inconsistent with such statements as that of Lord Russell C.J. in *Gillespie Bros. & Co.* v. *Cheney, Eggar & Co.*,[31]

> ... although when the parties arrive at a definite written contract the implication or presumption is very strong that such contract is intended to contain all the terms of their bargain, it is a presumption only, and it is open to either of the parties to allege that there was, in addition to what appears in the written agreement, an antecedent express stipulation not intended by the parties to be excluded, but intended to continue in force with the express written agreement.

---

[26] *Corbin on Contracts* rev. ed., (1960), vol. 3, § 573.

[27] "What is integration? An agreement is integrated where the parties thereto adopt a writing or writings as the final and complete expression of the agreement." Corbin, *ibid.* § 540, n. 66. This term was first used by Wigmore: see Greenleaf, *Law of Evidence* 16th ed., (1899), edited by Wigmore.

[28] *Williston on Contracts* 3rd Ed., (1961), § 633.

[29] Traces of such an approach can, perhaps, be seen in the judgment of Street C.J. in *L. G. Thorne & Co.* v. *Thomas Borthwick & Sons (Australia) Ltd.* (1956) 56 S.R. (N.S.W.) 81, at p. 88. A contrasting view of the parol evidence rule was taken by Herron J. in his dissenting judgment in that case.

[30] In America statements to this effect can be found in a number of cases. For example, in *Gianni* v. *R. Russel & Co.* (1924) 281 Pa. 320; (1924) 126 Atl. 791, it was said that, in order to decide whether or not a document was conclusive as to the terms of the parties' agreement, "the writing will be looked at, and if it appears to be a contract complete within itself ... 'it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, were reduced to writing' ". However, it seems that the present trend of American case law favours Corbin's approach: see Farnsworth, *Contracts* (1982), § 7.3.

[31] [1896] 2 Q.B. 59, at p. 62.

2.10. The two principal reasons which have led us to our conclusion on the nature of the parol evidence rule are, in substance, two aspects of the same process of reasoning. The first relates to the circumstances in which the rule is to be applied. In our view, some statements of the rule may have given rise to misunderstandings because they have concentrated on the *effect* of the rule rather than *when it is to be applied.* The effect of the rule is to exclude evidence or to cause the judge to ignore the evidence if given. As to the application of the rule, Lord Morris' statement in *Bank of Australasia* v. *Palmer*[32] refers to the inadmissibility of parol evidence to "contradict, vary, add to or subtract from the terms of a *written contract*"[33] (emphasis added). Thus, the rule can only be applied where the parties have entered into a "written contract". Parties can only be said to have entered into a written contract when "the writing is intended by the parties as a contractual document which is to contain all the terms of their agreement".[34] When the parties have set down *all* the terms of their contract in writing,[35] extrinsic evidence of other terms must be ignored. If the contract is not entirely in writing, it is not a written contract.[36] There are many authorities and dicta to support this view.[37] For example, in *Harris* v *Rickett*[38] Pollock C.B. said,[39]

> [The jury] have not found, nor does it appear to us, that the writing was intended to contain the whole agreement, and we are of opinion that the rule relied on by the plaintiffs only applies where the parties to an agreement reduce it to writing, and agree or intend that that writing shall be their agrement.

More recently, Denning L.J. (as he then was) said, in *Turner* v. *Forwood*,[40]

> The rule excluding parol evidence only applies when the parties set down in writing the terms agreed.

---

[32] [1897] A.C. 540, at p. 545. See para. 1.2, above.

[33] In *Jacobs* v. *Batavia and General Plantations Trust Ltd.* [1924] 1 Ch. 287, Lawrence J. said (at p. 295), in what is sometimes taken to be a leading statement of the parol evidence rule, "It is firmly established as a rule of law that parol evidence cannot be admitted to add to, vary or contradict a deed or other written *instrument*" (emphasis added). This statement could be read as authority for the existence of a wider parol evidence rule than that stated by Lord Morris (see n. 32 above), since the judge spoke of a written *instrument* as being sufficient to exclude oral evidence, whereas Lord Morris said that there had to be a written *contract.* However, we do not believe that to have been the intention of the judge; his language was dictated by the fact that that case involved a deposit note, rather than an ordinary contract.

[34] D. W. McLauchlan, *The Parol Evidence Rule* (1976), at p. 143.

[35] As to the situation where it is proved or admitted that the parties intended the writing to be conclusive as to only a part of their agreement, see para. 2.19, below.

[36] Of course, if the parties intended to put all the terms of their agreement in writing but accidentally omitted from the writing some term upon which they had agreed, it would be open to either party to apply to have the writing rectified. The rectified contract would be a written contract properly so called. Rectification is discussed in paras. 2.22–2.24, below.

[37] Even the statement of the parol evidence rule in *Bank of Australasia* v. *Palmer* [1897] A.C. 540, at p. 545 (set out in para. 1.2, above) can be read as having this meaning. While it has not always been understood in this sense (for example, in Working Paper No. 70), it may be that Lord Morris was saying no more than we now believe the rule to be, although he did not find it necessary in that case to define the term "written contract". The Privy Council were of the opinion that the extrinsic evidence was properly admitted in that case because the writing it sought to contradict was not intended by the parties to contain any part of their contract.

[38] (1859) 4 H. & N. 1. See also *Howden Bros. Ltd.* v. *Ulster Bank Ltd.* [1924] I.R. 117.

[39] (1859) 4 H. & N. 1, at p. 7.

[40] [1951] 1 All E.R. 746, at p. 749.

If it is proved or admitted that all the terms of the contract have been set out in a particular document or documents, then evidence of other terms must be irrelevant and therefore inadmissible, because inconsistent with the finding that the parties have entered into a written contract.

2.11. The second reason for our conclusion as to the nature of the parol evidence rule is exemplified by the concept of the contract which is made partly orally and partly in writing. Save where statute or some special rule of the common law provides otherwise, parties are free to state their contractual terms in whatever form they please. This may be in a deed or deeds, in an unsealed document or documents, in an oral statement or statements of those terms, or by any combination of these or other methods. For present purposes we concentrate upon the proposition that parties may make a contract partly orally and partly in writing. If a contract is in this form, there is no room for the application of the parol evidence rule because that rule only applies when the contract is entirely in writing. In *J. Evans & Son (Portsmouth) Ltd.* v. *Andrea Merzario Ltd.*,[41] Roskill L.J. (as he then was) held that the parties had entered into a contract that was made partly orally, partly in writing, and partly by conduct. In these circumstances, he said,[42]

> The court is entitled to look at and should look at all the evidence from start to finish in order to see what the bargain was that was struck between the parties.

2.12. Because a contract can be made partly orally and partly in writing, the mere production of a contractual document, however complete it may look, cannot as a matter of law exclude evidence of oral terms if the other party asserts that such terms were agreed. If that assertion is proved, evidence of the oral terms cannot be excluded because the court will, by definition, have found that the contractual terms are partly to be found in what was agreed orally as well as in the document in question. No parol evidence rule could apply. On the other hand, if that assertion is not proved, there can be no place for a parol evidence rule because the court will have found that all the terms of the contract were set out in the document in question and, by implication, will thereby have excluded evidence of terms being found elsewhere. The pleadings in the action should normally reveal whether there is an issue as to where the contractual terms are to be found and what those terms are. If there is an issue, it will be an issue of fact for resolution on the balance of probabilities. If there is no issue, neither partly will be permitted to adduce evidence of the contractual terms being found elsewhere than as admitted in the pleadings.

2.13. Of course, the more the parties have done to create what appears to be a written contract, the greater are the probabilities that the court will conclude that they did indeed make such a contract. In this connection, in

---

[41] [1976] 1 W.L.R. 1078.

[42] *Ibid.*, at p. 1083. In his judgment, Roskill L.J. contrasted the contract made in writing (where extrinsic evidence could not be admitted but where there might be a collateral contract) with a contract made partly orally and partly in writing.

considering the parol evidence rule in 1959, Professor Lord Wedderburn concluded that,[43]

> What the parol evidence rule has bequeathed to the modern law is a presumption—namely that a document which *looks* like a contract is to be treated as the *whole* contract.

While we have no doubt that this statement accurately reflects the practical effect of the parol evidence rule as we now believe it to be, the presumption (which can be displaced by evidence) is not a rule of law laying down whether a particular type of evidence should be admitted or, if it is admitted, whether the court should give effect to it.[44] Moreover, we do not think that in this context it is strictly correct to refer to a "presumption". In reaching a conclusion as to whether a document which looks like a complete contract was the whole contract, the court does not apply any presumption of law. Rather, it will reach its conclusion on the evidence tendered, applying to its judgment the prima facie probability derived from its experience of how people normally behave in a given situation. For example, if the plaintiff proves that the parties signed a document, such as a complicated lease of a commercial chattel, which document appears to be a complete contract and which is in a form generally adopted for setting out all the contractual terms, it may be difficult in practice for the defendant to prove, on the balance of probabilities, that terms were orally agreed in addition to those set out in the document.

2.14. The issue whether parties intended that the whole of their agreement should be as recorded in a particular document or documents is to be judged objectively. The court is not concerned with whether both parties, in their minds, intended the writing to contain the whole of the agreement between them but whether, having regard to what was said or done, and to what documents were signed and exchanged, and when, a reasonable person would have understood the writing to contain the whole of the agreement. A party is not permitted to give evidence of his private but uncommunicated intention as to what was to be agreed, or as to what the written agreement was to mean.[45]

2.15. Sometimes parties may include in their contracts a clause to the effect that the whole contract is contained in the document and that nothing was agreed outside it (sometimes called a "merger" or "integration" clause). In particular, it may be provided that nothing said during negotiations is intended to be of any contractual effect unless recorded in the document. Without

---

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

[44] The Restatement Second of Contracts states that "Where the parties reduce an agreement to a writing which in view of its completeness and specificity reasonably appears to be a complete agreement, it is taken to be an integrated agreement unless it is established by other evidence that the writing did not constitute a final expression" (§ 209, (3)). In so far as the Restatement Second represents this statement as a rule of law, we do not believe that it would reflect the position in English law. The apparent elevation of this proposition to a rule of law by the Restatement Second is, perhaps, a result of the continued use of the jury in civil trials in the United States: see n. 13, above.

[45] This principle explains why, on occasion, the court has been able, in cases such as *Hutton* v. *Watling* [1948] 1 Ch. 26 and 398, to rule that evidence tendered to show the intention of one party was inadmissible without hearing that evidence: see the judgment of Lord Greene M.R. at p. 403.

legislative provision such a clause cannot, we think, have conclusive effect.[46] It may have a very strong persuasive effect but if it were proved that, notwithstanding the clause, the parties actually intended some additional term to be of contractual effect, the court would give effect to that term because such was the intention of the parties. If the parties intended that the additional term should have been recorded in the document, the contract could be rectified.[47] If it had been their intention that the term should be of contractual effect but not be included in the document, the analysis likely to be adopted by the court is that the parties agreed a collateral contract alongside the written one.[48] But if it were proved that the intention of the parties was to make one contract partly in writing and partly orally, the court would give effect to that contract.[49] The parties might have been aware of the integration clause when they agreed the additional terms but have agreed to ignore it, or they might have forgotten about the clause or never read it. Whatever the reason for there being an integration clause and additional terms, the court will give effect to the intention of the parties as it is proved or admitted to have been.

2.16. The same analysis should, we think, be applied to the situation where it is proved that the parties intended that their transaction was partly as recorded in a document and partly as agreed orally, although the oral terms conflict with the written terms.[50] Such a situation is no different in principle from that in which the parties agree two inconsistent terms both of which are set out in the same document. The court will have to decide which of the inconsistent terms more nearly represents the intention of the parties.[51] If it is impossible to resolve this issue the court may be driven to the conclusion that no contract came into existence because it is impossible to say what the terms of that contract were.

2.17. The conclusion which emerges from the discussion above is that there is no *rule of law* that evidence is rendered inadmissible or is to be ignored solely because a document exists which looks like a complete contract. Whether it is a complete contract depends upon the intention of the parties, objectively judged, and not on any rule of law.

---

[46] In the United States, under the Uniform Commercial Code (Sales, § 2–202) such clauses are generally effective to render extrinsic evidence inadmissible. Although the Code has no legal force in itself, most American states have enacted corresponding legislation.

[47] For a discussion of rectification, see paras. 2.22–2.24, below.

[48] For example, *City and Westminster Properties (1934) Ltd.* v. *Mudd* [1959] Ch. 129, where there was no merger clause but inconsistent terms were agreed. This case is considered in detail in n. 89, below.

[49] However, if the extrinsic statement which it is sought to exclude by reference to the clause were held to be a misrepresentation (that is, a false statement of existing or past fact), that clause would be void insofar as it had the effect of excluding or restricting any liability which would otherwise have arisen out of the misrepresentation, or any remedy which would otherwise have been available to the injured party, unless the clause were "reasonable", as defined by s. 11 of the Unfair Contract Terms Act 1977: Misrepresentation Act 1967, s. 3. See, also, *Brikom Investments Ltd.* v. *Carr* [1979] Q.B. 467, at p. 480, *per* Lord Denning M.R.

[50] The admissibility and effectiveness of oral evidence which conflicts with written evidence is discussed further in paras. 2.35–2.36 below.

[51] *Walker* v. *Giles* (1849) 6 C.B. 662. The courts continue to apply to deeds *inter vivos* the rule that in cases where the intentions of the parties cannot be ascertained, the earlier of two inconsistent clauses will prevail over the later, whereas in the case of testamentary instruments, the converse applies: *Doe d. Leicester* v. *Biggs* (1809) 2 Taunt. 109; a recent example is *Joyce* v. *Barker Bros. (Builders) Ltd., The Times*, 26 February 1980.

**What is a "written contract"?**

2.18. Because the question whether the parties entered into a contract is at the root of the parol evidence rule, it is necessary briefly to examine the principal types of written contract. The circumstances in which the parties may conclude and record or evidence their agreement vary greatly. Therefore, general rules for the making of what may properly be called a written contract cannot be laid down. However, the following categories of written contract may be postulated:

(i) The offeree accepts, in writing or orally, the offeror's written offer. The large number of contracts which are negotiated and concluded entirely by exchange of letters are written contracts within this category.[52]

(ii) After negotiation, the parties arrive at a provisional agreement, but do not intend to be bound by that agreement until a formal written contract setting out all the terms is drawn up and assented to.

(iii) After negotiation, the parties orally agree to terms and later record them in writing, which they agree will supersede the oral agreement.[53]

The difference between the situation in (iii) and that in (ii), above, is that in (iii) the oral or partly written agreement is binding on the parties until the formal written contract is concluded, when it ceases to have effect, whereas in (ii) no terms are binding until the formal document is executed. It is a question of construction in each case whether the contract falls within (ii) or (iii).[54]

2.19. So far, we have discussed only the situation in which it is proved or admitted that the whole of the parties' contract is intended to be as recorded in a particular document. However, similar principles will apply where only a part of the contract is so recorded. In that situation, once it is proved or admitted that the parties intended the document to be conclusive as to the matters mentioned in it, then further evidence as to their agreement on those matters will be irrelevant.

**Need there be a written contract?**

2.20. Although the parol evidence rule, as we have stated it and as the working paper perceived it to be, is based upon the parties having entered

---

[52] The situation may arise in which an offer is made orally but is accepted in writing, the written acceptance repeating all the terms of the oral offer. This may be treated as a written contract if it is proved or admitted that the offeror agreed that the written acceptance constituted a complete and accurate statement of the terms of the contract.

[53] It might be argued that a contract within (iii), above, is not a written contract at all but is an oral contract evidenced in writing. This may be strictly correct in some cases but the distinction is not relevant for present purposes. The parol evidence rule will still apply to the contract in question, since what is important for this purpose is not the manner in which the contract is made but the form in which the parties agree it shall be evidenced. Even if the parties made an oral agreement, the fact that it is admitted or proved that the parties intended that the document in question was to be the sole evidence of the terms of that agreement is sufficient ground for the application of the parol evidence rule. The intention of the parties will, of course, have to be judged objectively on the balance of probabilities.

[54] *Von Hatzfeldt-Wildenburg* v. *Alexander* [1912] 1 Ch. 284.

into a written contract, logically this need not be so. If it were proved or admitted that all the terms of the contract were as spoken by one party to the other on a particular occasion, evidence of the terms of the contract being found elsewhere would be inadmissible because irrelevant.[55] It seems to us, however, that such a situation is unlikely and that it is more helpful to continue to think in terms of a written contract. Nevertheless, it should be observed that there is no magic to be attached to a document in the present context and that it would be quite proper to analyse an oral agreement by reference to the principles of the parol evidence rule, if it were helpful to do so.

### What is "parol" evidence?

2.21. Another feature of the parol evidence rule which may cause confusion is that the word "parol" does not have its ordinary dictionary meaning of "oral" or "by word of mouth".[56] In a strict legal sense "parol" means "not under seal"[57] but when used in relation to the parol evidence rule the word has come to mean *any* evidence extrinsic to what is, or what is claimed to be, the written record of the parties' agreement. In theory, therefore, extrinsic evidence derived from a deed could be excluded by the parol evidence rule.

### Rectification

2.22. It is the very essence of the parol evidence rule that the parties wrote down all that they had agreed, at least in relation to a particular subject-matter. It is in these circumstances that evidence of anything else which it is alleged they agreed is excluded. However, having agreed orally what had to be written down, the parties might mistakenly have written down something else or mistakenly have omitted something which they intended should be in the contractual document. The writing would not then accurately record their agreement. In these circumstances the party who alleges and is able to prove the error in the written contract can obtain from the court an order of rectification.[58] The effect of the order is retrospectively to amend the document so that it states what it should have stated all the time.[59] Parol evidence is, of course, admissible in support of an application to rectify.

---

[55] See Restatement Second of Contracts, § 209 comment (b); McCormick, *Law of Evidence* (1954), § 214; Farnsworth, *Contracts* (1982), § 7.3; *Wigmore on Evidence* 3rd ed., (1940), vol. IX, § 2425.

[56] In *Jacobs* v. *Batavia and General Plantations Trust Ltd.* [1924] 1 Ch. 287, Lawrence J. seemed to give the word this meaning in his definition of the parol evidence rule. His reason for doing so was probably that the contract in question was a deposit note, and it seems to have been accepted that such a transaction had to be made in writing. Evidence of extrinsic *written* terms was admitted.

[57] Its use in this sense would appear to date from early times when all important documents were sealed. At that time, writings not under seal may have had no greater weight than oral assertions: see *Jowitt's Dictionary of English Law* 2nd ed., (1977); and para. 2.2, above.

[58] We do not intend here to explain rectification in detail. Such an explanation may be found, for example, in *Chitty on Contracts* 25th ed., (1983), paras. 352–373, *Snell's Principles of Equity* 28th ed., (1982), at pp. 610–619, and Treitel, *The Law of Contract* 6th ed., (1983), at pp. 243–247.

[59] "After rectification the written agreement does not continue to exist with a parol variation; it is to be read as if it had been originally drawn in its rectified form": *Craddock Bros.* v. *Hunt* [1923] 2 Ch. 136, at p. 151, *per* Lord Sterndale M.R.

2.23. Rectification may be sought of any written contract or the written part of a contract which is partly oral and partly in writing. The essence of the remedy is that the written agreement does not accurately state what it was intended it should state.[60] If, therefore, the parties agreed a term but also agreed that it should not appear in the written contract, rectification could not be ordered so as to include that term in the document.[61] It is important to note that the factual basis for rectification must be very clearly proved.[62]

2.24. In one sense rectification may be seen as complementary to the parol evidence rule: if the parties made a contract and they intended that all they had agreed should be recorded in writing, effect can be given to omitted terms by rectifying the agreement so as to include them. If the parties did not intend their agreement to be wholly in writing, the parol evidence rule does not exclude evidence of oral terms. The terms would be enforced as terms of a contract made partly orally and partly in writing. Alternatively, they could be enforced as a collateral contract.

**The doctrine of merger**

2.25. The doctrine of merger has in many cases an effect identical to that of the parol evidence rule. The doctrine has several aspects, but the one which is relevant for present purposes is the rule that, where an executory contract is concluded orally or in writing, and the parties later carry out that contract in a formal document, often a deed, then the contract is said to be "merged" in the document, with the result that the right to sue upon the preliminary contract is extinguished. However, any part of the preliminary contract which is not carried into the document will subsist and be enforceable alongside it, if such was the intention of the parties; if that was not their intention, then that part, too, is extinguished by the merger.

2.26. The doctrine of merger is most commonly encountered in conveyancing,[63] where the contract for the transfer of an interest in land will merge in the deed by which that transfer is actually effected. It may be established, however, that some terms of the contract were not intended to have been merged in the deed; such terms will be enforceable concurrently with the deed. The law in this respect was explained by Bowen L. J. in *Palmer* v. *Johnson*,[64]

> Now it is commonly said, that where there is a preliminary contract for sale which has afterwards ended in the execution of a formal deed, you must look to the deed only for the terms of the contract, but it seems to

---

[60] In *Joscelyne* v. *Nissen* [1970] 2 Q.B. 86, it was held that a written contract can be rectified even if there was no concluded contract before the execution of the instrument which it is sought to rectify, so long as there was a clear common intention as to the provision in question. The court is able to rectify by reliance on the maxim of equity that the court will treat that as done which should have been done.

[61] *City and Westminster Properties (1934) Ltd.* v. *Mudd* [1959] Ch. 129, at p. 143, *per* Harman J.

[62] *Joscelyne* v. *Nissen* [1970] 2 Q.B. 86; *Ernest Scragg & Sons Ltd.* v. *Perseverance Banking and Trust Co. Ltd.* [1973] 2 Lloyd's Rep. 101.

[63] For a discussion of this doctrine in that context, see *Emmet on Title* 18th ed., (1983), at pp. 246-247 and *Barnsley's Conveyancing Law and Practice* 2nd ed., (1982), at pp. 444-445.

[64] (1884) 13 Q.B.D. 351, at p. 357.

me one cannot lay down any rule which is to apply to all such cases, but must endeavour to see what was the contract according to the true intention of the parties. Suppose the parties should make a parol contract, with the intention that it should afterwards be reduced into writing; and that that which is reduced in writing shall be the only contract, then, of course, one cannot go beyond it; but if they intend, as they might, that there should be something outside such contract, they might agree that that should exist, notwithstanding it was not in the contract which was put into writing.

2.27. The origins of the doctrine of merger probably lie in the old doctrine that a deed was a superior type of evidence which could not be contradicted, varied or discharged by an unsealed writing or by word of mouth.[65] The modern basis of the rule, however, is that the preliminary contract, being an agreement to transfer an interest in land, is performed, and therefore discharged, by the deed that actually carries out that transfer. In *Knight Sugar Company Ltd.* v. *Alberta Railway Company*, Lord Russell of Killowen, delivering the opinion of the Privy Council, said,[66]

> ... it is well settled that, where parties enter into an executory agreement which is to be carried out by a deed afterwards to be executed, the real completed contract is to be found in the deed. The contract is merged in the deed: *Leggott* v. *Barrett*.[67] The most common instance, perhaps, of this merger is a contract for sale of land followed by conveyance on completion. All the provisions of the contract which the parties intend should be performed by the conveyance are merged in the conveyance, and all the rights of the purchaser in relation thereto are thereby satisfied. There may, no doubt, be provisions of the contract which, from their nature, or from the terms of the contract, survive after completion. An instance may be found in *Palmer* v. *Johnson*,[68] in which it was held that a purchaser could, after conveyance, rely upon a provision of the contract and obtain compensation. The foundation of this decision was that, upon the construction of the contract, the provision for compensation applied after completion. In other words, the parties did not intend it to be performed by the subsequent deed, and it was therefore not satisfied by, or merged in, that deed.

2.28. An effect similar to that of merger in a deed can be achieved by an unsealed writing which gives effect to a prior oral agreement. The writing supersedes the oral contract, if that was the intention of the parties. This was recognised by Brett L.J. in *Leggott* v. *Barrett*, where he said:[69]

> ... where there is a preliminary contract in words which is afterwards reduced into writing, or where there is a preliminary contract in writing which is afterwards reduced into a deed, the rights of the parties are

---

[65] See para. 2.2, above.
[66] [1938] 1 All E.R. 266, at p. 269.
[67] (1880) 15 Ch. D. 306.
[68] (1884) 13 Q.B.D. 351.
[69] (1880) 15 Ch. D. 306, at p. 311. See also, *Jacobs* v. *Batavia and General Plantations Trust Ltd.* [1924] 2 Ch. 329, at p. 334, *per* Pollock M.R.

governed in the first case entirely by the writing, and in the second case entirely by the deed.

2.29. The doctrine of merger has a very similar effect to that of the parol evidence rule, and a leading commentator has suggested that the parol evidence rule is now no more than an aspect of the doctrine of merger.[70] Strictly, the doctrine of merger will only operate where the preliminary contract is one in which the parties agree to make a subsequent contract, and which is performed when the subsequent contract is made. The doctrine of merger would not, therefore, apply where the parties agree that there will be no binding contract between them until a formal document is drawn up. In practice, it will rarely be necessary to distinguish between it and the parol evidence rule. A parol evidence rule which excluded evidence of the intention of the parties would hardly be consistent with a doctrine of merger which only extinguished that which it was proved the parties intended should be superseded. The parol evidence rule, as we now conceive it to be, is consistent with the doctrine of merger.[71]

**"Exceptions" to the parol evidence rule**

2.30. The working paper saw the parol evidence rule as a general rule of exclusion to which there were a number of exceptions,[72] and other commentators have explained the rule in these terms.[73] For example, it is said to be an "exception" to the "rule" that parol evidence might be heard to prove a plea of non est factum,[74] to prove that the parties did not intend their contract to take effect until some condition precedent was fulfilled,[75] or to show that one of the parties signing the document did so as agent for a third party.[76] Extrinsic evidence, it was suggested, was admissible to prove that a contract—even a written contract—had been varied by a subsequent agreement,[77] or had been rescinded,[78] or that its enforceability had been suspended by a promissory estoppel,[79] or to vary the consideration shown in the document.[80]

2.31. Whether these occasions on which extrinsic evidence will be admissible are to be viewed as "exceptions" to a rule depends upon what the rule is. Our conclusion is that such "exceptions" are, in reality, examples of situations in which the parol evidence rule, as we believe it to be, could never apply. The issues raised in such cases are issues of general contractual validity and

---

[70] See *Cross on Evidence* 6th ed., (1985), at p. 616.

[71] As to statements that, where a preliminary agreement is made and is then followed by a deed and there is inconsistency between the two, any doubt must, *as a matter of law*, be resolved in favour of the deed, see paras. 2.35-2.36, below.

[72] Working Paper No. 70, Part III.

[73] See, for example, *Chitty on Contracts* 25th ed., (1983), paras. 802-833; Treitel, *The Law of Contract* 6th ed., (1983), at pp. 151-158.

[74] *Foster* v. *Mackinnon* (1869) L.R. 4 C.P. 704.

[75] *Pym* v. *Campbell* (1856) 6 E. & B. 370.

[76] *Wake* v. *Harrop* (1861) 30 L.J. Ex. 273.

[77] *Goss* v. *Lord Nugent* (1833) 5 B. & Ad. 58.

[78] *Morris* v. *Baron & Co. Ltd.* [1918] A.C. 1.

[79] *Central London Property Trust Ltd.* v. *High Trees House Ltd.* [1947] K.B. 130.

[80] *Clifford* v. *Turrell* (1845) 14 L.J. Ch. 390; *Turner* v. *Forwood* [1951] 1 All E.R. 746. However, see also *Peffer* v. *Rigg* [1977] 1 W.L.R. 285, at p. 293, *per* Graham J.

enforceability, to which the parol evidence rule has no application. In a strictly logical sense, if the parol evidence rule applies only to written contracts it cannot apply to a writing which, although purporting to be a contract, does not fulfil some legal requirement and is not, therefore, a contract at all. Viewed more broadly, however, we see the cases which are said to be exceptions to the parol evidence rule as being independent of that rule. They are instances of the application of other rules of law which are to be applied to contracts, whatever form those contracts may take.

**Collateral contracts**

2.32. The concept of the collateral contract has also been seen as an exception to the parol evidence rule. The nature of such a contract was explained by Lord Moulton in *Heilbut, Symons & Co.* v. *Buckleton*,[81]

> It is evident, both on principle and on authority, that there may be a contract the consideration for which is the making of some other contract. "If you will make such and such a contract I will give you one hundred pounds," is in every sense of the word a complete legal contract. It is collateral to the main contract, but each has an independent existence, and they do not differ in respect of their possessing to the full the character and status of a contract.

2.33. The collateral contract seems to us to be a useful conceptual tool to assist in analysing what may be a complicated situation. If it is proved that the parties did intend to enter into a collateral contract, effect may be given to that contract whether the parol evidence rule is as we now consider it to be or whether it is as our predecessors perceived it to be in the working paper. Where extrinsic evidence of terms is inadmissible under the parol evidence rule, effect will nevertheless be given to evidence of a collateral contract if it was the intention of the parties to make such a contract.

2.34. The development of the concept of the collateral contract has, perhaps, been one reason why the courts have not found it necessary fully to analyse the parol evidence rule. If it is clear that the parties agreed oral terms additional to those which they wrote down, the court can analyse the situation as being a contract and a collateral contract rather than a single contract made partly orally and partly in writing; it will rarely make any difference in practice how the court analyses the situation.[82] However, a collateral contract analysis is necessary if the parol evidence rule applies. This situation will occur if it is established that all the terms of a contract were as set out in a particular document and it is also shown that one party made the other an oral collateral promise. If the parties make a contract which must be in a certain form, it may be possible to have a collateral contract which is not in that form. It may relate to a wholly different subject matter. It may even relate to the written

[81] [1913] A.C. 30, at p. 47.

[82] See, for example, *De Lassalle* v. *Guildford* [1901] 2 K.B. 215, and *Mendelssohn* v. *Normand Ltd.* [1970] 1 Q.B. 177, at p. 186, *per* Phillimore L.J. See, further, K. W. Wedderburn "Collateral Contracts" [1959] C.L.J. 58, at p. 71.

contract but not be of the type which is required to be in writing.[83] On the other hand, the subject-matter of the collateral agreement may be such that it must, if it is to be valid, be in the same form as the contract to which it is collateral.[84] The collateral contract analysis may be of particular value in the case of the negotiable instrument.[85] Immediate parties may be bound by an oral collateral warranty while holders in due course are bound only by the contract contained in the written instrument.[86]

**Proof of contradictory terms by parol evidence**

2.35. It has been said in a number of old cases[87] that there cannot be a valid oral contract which is collateral to but inconsistent with a written contract. One of these cases is *Henderson* v. *Arthur*,[88] a decision of the Court of Appeal. There are, however, several modern decisions in which effect has been given

---

[83] For example, by s. 32 of the Arbitration Act 1950 an " 'arbitration agreement' means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not". An oral agreement collateral to an arbitration agreement (for example, as to the identity of the arbitrator) would seem not to take the agreement outside the Act.

[84] For example, a price increase under a credit agreement which is subject to the Consumer Credit Act 1974 may be unenforceable against the debtor unless in the prescribed form.

[85] See paras. 2.37–2.41, below.

[86] Doubts may still exist on certain aspects of the collateral contract analysis. For example, does the matter in the collateral contract have to be in some manner subsidiary or secondary to the subject-matter of the contract to which it is collateral? We are not aware of an English case in which it has been suggested that a collateral contract might not be valid because its subject-matter is so important to the transaction as a whole that the contract could no longer be described as "collateral". In particular, it has been held that the breach of a collateral contract can give rise to a right to repudiate the contract to which it is collateral: *Webster* v. *Higgin* [1948] 2 All E.R. 127. In addition, it may be noted that the ordinary dictionary meaning of "collateral" does not necessarily connote subordination.

[87] See, for example, *Lindley* v. *Lacey* (1864) 17 C.B.N.S. 578, at p. 586, *per* Erle C.J., and at p. 587, *per* Byles J.; *Morgan* v. *Griffith* (1871) L.R. 6 Ex. 70, at p. 73, *per* Pigott B.; *Erskine* v. *Adeane* (1873) L.R. 8 Ch. App. 756, at p. 766, *per* Mellish L.J.; *Leggott* v. *Barrett* (1880) 15 Ch.D. 306, at p. 314, *per* Cotton L.J.; *Goldfoot* v. *Welch* [1914] 1 Ch. 213, at p. 218, *per* Eve J. To similar effect are a number of Commonwealth cases: see, for example, *Hoyt's Pty. Ltd.* v. *Spencer* (1919) 27 C.L.R. 133; *Lysnar* v. *National Bank of New Zealand Ltd.* [1935] N.Z.L.R. 129 (a decision of the Judicial Committee of the Privy Council); *Hawrish* v. *Bank of Montreal* [1969] S.C.R. 515; *Donovan* v. *Northlea Farms Ltd.* [1976] 1 N.Z.L.R. 180. For a detailed discussion and criticism of these cases, see D. W. McLauchlan, "The Inconsistent Collateral Contract" (1976) 3 Dalhousie L.J. 136. Professor McLauchlan there concludes, inter alia, that there is no reason in principle why effect should not be given to an inconsistent collateral contract. Professor Treitel reaches a similar conclusion: see Treitel, *The Law of Contract* 6th ed., (1983), at p. 157.

[88] [1907] 1 K.B. 10. The plaintiff leased a theatre to the defendant for 14 years. The lease, which was contained in a deed, provided that the rent should be payable quarterly in advance. When the defendant was sued for failure to pay rent, he contended that he had made an antecedent oral agreement with the plaintiff that the plaintiff would take a bill for rent, payable at three months. (He did not claim rectification of the lease.) The Lord Chief Justice accepted his evidence and held in his favour. The Court of Appeal allowed the plaintiff's appeal. From the report of the judgments in 76 L.J.K.B. 22 and 23 T.L.R. 60 it seems that a main ground of decision was that the Court of Appeal regarded the case as a clear example of the doctrine of merger, so that the antecedent contract had been superseded by the deed. The defendant should have applied for an order for rectification. However, the Court also said that evidence of an oral agreement collateral to the lease could not be admitted if its provisions were inconsistent with the deed. In *Bolt & Nut Co. (Tipton) Ltd.* v. *Rowlands Nicholls & Co. Ltd.* [1964] 2 K.B. 10, at p. 19, Harman L.J. said that this was what *Henderson* v. *Arthur* had decided. If the case is not seen as one relating to merger, it may be explicable as one which relates to oral agreements followed by a *deed*. For reasons given below, we do not think that a court today would follow it as authority for a wider proposition that in no case can evidence of an oral contract be admitted which is inconsistent with a written contract to which it is collateral.

to oral statements made prior to or contemporaneously with the conclusion of a written contract, on the broad ground that it would be unjust to allow a person who has given an assurance[89] for the purpose of inducing another to enter into a contract later to resile from that assurance.[90] In some cases, the court has analysed the situation as one in which one contract has been made, partly orally and partly in writing.[91] In others, it has been held that the parties have made two contracts, one collateral to the other.[92] This approach extends to cases where an oral statement contradicts the written agreement.[93]

---

[89] The court may decide that the statement did not amount to a contractual promise, but was a pre-contractual representation which did not create a collateral contract or become a term of the contract to which it related. Such a statement may be actionable in tort (see, for example, *Esso Petroleum Co. Ltd.* v. *Mardon* [1976] Q.B. 801) or under the Misrepresentation Act 1967. Statements made after a contract has been concluded may, through the doctrine of promissory estoppel, prevent the enforcement of part of the contract.

[90] Such a principle was recognised by Lord Denning M.R. in *Dick Bentley Productions Ltd.* v. *Harold Smith (Motors) Ltd.* [1965] 1 W.L.R. 623, at p. 627 and in *Esso Petroleum Co. Ltd.* v. *Mardon* [1976] Q.B. 801, at p. 817.

[91] For example, *J. Evans & Son (Portsmouth) Ltd.* v. *Andrea Merzario Ltd.* [1976] 1 W.L.R. 1078; see n. 93, below.

[92] For example, *City and Westminster Properties (1934) Ltd.* v. *Mudd*, and *Brikom Investments Ltd.* v. *Carr*, above. In many cases, it will not make any difference to the result whether the single contract analysis or the collateral contract analysis is chosen. For example, in *Quickmaid Rental Services Ltd.* v. *Reece* (Court of Appeal, 21 April 1970; short reports of the judgments may be found at (1970) 114 S.J. 372 and *The Times*, 22 April 1970), Lord Denning M.R. held that an oral statement that the plaintiff company would not permit the installation of another vending machine similar to that hired by the defendant on the same road as the defendant's garage was an oral term of a contract made partly orally and partly in writing, but Megaw L.J. held it to have been an oral collateral contract.

[93] *City and Westminster Properties (1934) Ltd.* v. *Mudd* [1959] Ch. 129. The defendant, as tenant, entered into a written lease with the plaintiffs. The lease contained a covenant prohibiting him from living on the premises. However, before the plaintiff signed the lease, the landlord's representative orally told him that the covenant would not be enforced against him. Some years later, when the landlord discovered the plaintiff living on the premises, he sought to enforce the lease. Harman J. held that the case was not one of promissory esoppel but of a collateral contract which the tenant could enforce against the landlord. This case was approved by the Court of Appeal in *Mendelssohn* v. *Normand Ltd.* [1970] 1 Q.B. 177, at p. 184. In that case the plaintiff parked his car in a garage where the printed terms of the contract excluded liability for theft of the contents. When he parked the car, the garage attendant told him to leave it unlocked and that it would be locked by the attendant. The attendant failed to lock the car and a valuable suitcase was stolen from it. The Court of Appeal upheld the decision in the plaintiff's favour, holding that the statement by the attendant overrode the printed term. *Mudd's* case was also referred to with approval by Goff J. in *Frisby* v. *B.B.C.* [1967] Ch. 932, at p. 945; by Goulding J. in *Lee-Parker* v. *Izzett (No. 2)* [1972] 1 W.L.R. 775, at p. 779; and by Mustill J. (as he then was) in *Atlantic Lines & Navigation Co. Inc.* v. *Hallam Ltd.* [1983] 1 Lloyd's Rep. 188, at p. 197. There are many other examples of cases in which contradictory oral terms have been enforced. In *Couchman* v. *Hill* [1947] K.B. 554, the plaintiff purchased from the defendant a heifer at an auction. The sale catalogue provided that all lots had to be taken subject to all faults or errors of description. Before bidding, the plaintiff was told by the defendant that the heifer was unserved. The heifer was later found to be in calf and died as a result of carrying a calf at too young an age. The Court of Appeal held that the words of the catalogue would have protected the defendant but for the oral warranty which overrode the inconsistent printed condition. The defendant was liable for breach of the oral term. The judgments of the Court do not make it clear whether they viewed the case as a single contract with inconsistent terms or as one of an oral contract collateral to an inconsistent written contract. A similar case is *Harling* v. *Eddy* [1951] 2 K.B. 739. In *Curtis* v. *Chemical Cleaning and Dyeing Co.* [1951] 1 K.B. 805, the defendants' employee orally misrepresented the effect of a written exclusion clause in the contract. The Court of Appeal held that the defendants could not rely upon the clause having an effect more favourable to them than as represented. In *J. Evans & Son (Portsmouth) Ltd.* v. *Andrea Merzario Ltd.* [1976] 1 W.L.R. 1078 the defendant promised the plaintiff to ship machinery. The contract was made partly in writing, partly orally and partly by conduct. The defendant's oral promise to ship the machinery below deck was held

2.36. In our view, the courts would today follow the reasoning in these modern decisions; we are confident that effect would be given to evidence of an oral contract which was inconsistent with a written contract to which it was collateral if it were established that the parties intended to make such a collateral contract. There seems, moreover, to be no doubt that a *written* contract can vary the terms of another *written* contract to which the first is collateral[94] and there is no reason why an oral contract should be disregarded but effect be given to a written one. Modern cases show that the courts are concerned with ascertaining the true contractual intention of the parties, whether that intention is expressed orally or in writing, and even if this means giving effect to terms inconsistent with those in writing. However, as Lord Moulton said in *Heilbut, Symons & Co.* v. *Buckleton*,[95]

> Such collateral contracts, the sole effect of which is to vary or add to the terms of the principal contract, are therefore viewed with suspicion by the law. They must be proved strictly. Not only the terms of such contracts but the existence of an animus contrahendi on the part of all the parties to them must be clearly shown. Any laxity on these points would enable parties to escape from the full performance of the obligations of contracts unquestionably entered into by them and more especially would have the effect of lessening the authority of written contracts by making it possible to vary them by suggesting the existence of verbal collateral agreements relating to the same subject-matter.

**Contracts required to be made or evidenced in a particular manner**

2.37. As we have seen, the general rule of English law is that the parties to a contract may make their contract in whatever form they wish and may choose whether or not they will record all or some of its terms in a permanent form.

---

[93] *contd.*
by the Court of Appeal to override a written term giving the shipowner discretion as to how to ship it. In *Brikom Investments Ltd.* v. *Carr* [1979] Q.B. 467, before entering into new leases tenants were orally assured by the landlord that certain repairs would be carried out at the landlord's expense, despite a term in the leases to the contrary. The landlord did the work and then sought to recover the cost from the tenants (in some cases from their successors). Although the members of the Court of Appeal gave differing reasons for their decision, all agreed in holding that the effect of the oral statement was to disentitle the landlord from reliance on the inconsistent written term.

[94] See, for example, *Brown* v. *Langley* (1842) 12 L.J.C.P. 62; *Jacobs* v. *Batavia and General Plantations Trust Ltd.* [1924] 1 Ch. 287 and [1924] 2 Ch. 329; *F.M.C. (Meat) Ltd.* v. *Fairfield Cold Stores Ltd.* [1971] 2 Lloyd's Rep. 221; *Gallaher Ltd.* v. *British Road Services Ltd. and Containerway & Roadferry Ltd.* [1974] 2 Lloyd's Rep. 440.

[95] [1913] A.C. 30, at p. 47. Lord Moulton gave as an example of a collateral contract an agreement between two persons, A and B, that if A will enter into a certain contract with B, B will pay A £100. This, he pointed out, would have the effect of varying the main written contract. It would, however, be valid in principle, albeit that the more usual way of achieving such a result would be an amendment to the main contract. An inconsistent collateral contract must, inevitably, "vary or add to" the terms of the written contract to which it is collateral. To that extent, the decision in *Henderson* v. *Arthur* cannot stand with the speech of Lord Moulton and the subsequent Court of Appeal decisions in which his dictum was approved, such as *Jacobs* v. *Batavia and General Plantations Trust Ltd.* [1924] 2 Ch. 329 and *Quickmaid Rental Services Ltd.* v. *Reece* (see n. 92, above). It should be noted that the English cases cited in n. 87, above, with the exception of *Goldfoot* v. *Welch*, were decided before *Heilbut, Symons & Co.* v. *Buckleton.*

To this general rule, however, there are some important exceptions.[96] First, some transactions must be effected by a deed. For example, a legal interest in land can only be created or transferred by deed.[97] Secondly, some transactions must be in writing. Examples are bills of exchange and promissory notes,[98] certain credit agreements,[99] and dispositions of an equitable interest in property.[100] Thirdly, some transactions must be evidenced in writing, viz., they may be made orally but some written record of their terms must be made. Examples of such transactions are contracts for the sale or other disposition of land or of any interest in land[101] and contracts of guarantee.[102] This special requirement relating to such transactions was first introduced in the Statute of Frauds 1677.[103] Other transactions covered by the statute but in relation to which no special rules now apply were contracts for the sale of goods to a value in excess of £10 and contracts which were not to be performed within one year of their making.[104]

2.38. Where a contract is required to be in writing, the effect of this requirement will be to prevent the court from giving effect to oral evidence which is offered for no other purpose than the variation or contradiction of the contract as contained in the writing.[105] Where the transaction is required to be in a deed, oral or unsealed documentary evidence must be similarly excluded. Where a contract must be evidenced in writing, the party seeking to rely upon such a contract would not normally wish to prove that terms were agreed orally, since proof of such terms may render the entire contract unenforceable.[106]

2.39. The consequences of a failure to satisfy the requirements of form and the precise course of a case where such a matter is in issue will vary according

---

[96] Since we are here primarily concerned with the law of contracts, the examples given below relate only to transactions which may be in the nature of contracts. However, similar principles as to the admissibility of extrinsic evidence may apply to non-contractual transactions, such as the creation of a power of attorney, the making of a will, and certain transactions relating to companies, as to which statutory requirements of form apply.

[97] Law of Property Act 1925, s. 52(1), subject to certain exceptions in subs. (2).

[98] Bills of Exchange Act 1882, ss. 3(1) and 83(1) respectively. Such a rule had also been applied at common law; see, for example, *Young* v. *Austen* (1869) L.R. 4 C.P. 553.

[99] "Regulated" agreements within the Consumer Credit Act 1974.

[100] Law of Property Act 1925, s. 53(1)(c). This provision does not affect resulting, implied or constructive trusts (s. 53(2)).

[101] Law of Property Act 1925, s. 40. An exception to this requirement is made where some act of part performance is proved, (*ibid.*, s. 40(2)).

[102] Statute of Frauds 1677, s. 4.

[103] See above, para. 2.3.

[104] Statute of Frauds 1677, s. 4; the material part of this section was repealed by the Law Reform (Enforcement of Contracts) Act 1954.

[105] Such evidence may, of course, be tendered to prove an estoppel, the effect of which may be to prevent the contract being enforced according to its terms.

[106] For example, in *Beckett* v. *Nurse* [1948] 1 K.B. 535, the plaintiff produced a document which he claimed constituted an agreement by the defendant to sell a certain plot of land. The defendant argued that the parties had agreed other terms, not evidenced by that document. It was held that the document in question was not a written contract but was a memorandum of an oral contract. It was therefore open to the defendant to lead evidence of the terms of that oral contract in order to prove that the document was not a sufficient memorandum for the purposes of s. 40 of the Law of Property Act 1925, with the result that the contract could not be enforced against him.

to the facts of the case and the type of transaction in question.[107] However, the principle underlying such cases is that one party or the other cannot effectively lead extrinsic evidence because to lead such evidence will be inconsistent with other matters which he is seeking to prove. Frequently, that inconsistency will be that the plaintiff cannot argue that the transaction in question is valid and enforceable whilst at the same time arguing that terms were agreed which are not evidenced in the required form.

2.40. Some of the cases in which seemingly strict statements were made against the admission of oral evidence have been cases which concerned bills of exchange or promissory notes,[108] both of which types of contract are required to be made in writing.[109] We do not believe that the judges who decided these cases were necessarily laying down a rule which was to apply to all types of contract[110] but a rule of general applicability has sometimes been derived from them.[111] Even if the rule laid down in those cases was intended to be of application to all contracts, it would be no different in principle from the rule explained in paragraph 2.7 above. Since those contracts must be made in writing, it will not be open to a party who wishes to uphold the contract to argue that it was made partly or wholly orally; once it is proved or admitted that one of these types of contracts was concluded between the parties, that contract can only be a written contract and only that which is stated in the writing can be admitted to prove the terms of the contract.[112] Dicta in cases concerning bills of exchange and promissory notes show that the judges deciding them were concerned to protect holders in due course of such instruments and thereby to retain the commercial efficacy of those instruments.[113] Bills of exchange and promissory notes are, of course, negotiable and it was essential that remote parties should only be bound by that which appeared in the document which they had taken.

2.41. What is relevant for present purposes is that cases in which there was a requirement of law that the transaction be recorded or evidenced in a particular form cannot be used in support of some general proposition relating to the connection between oral evidence and written contracts. Dicta in such cases must, we suggest, be used with great caution if they are to be applied to all transactions generally.

---

[107] In some cases the contract may be void, in others it may have an effect different from that intended by the parties, or it may not fall into the category of contract it was intended it should. For example, a promissory note must be a document created solely to record an agreement to pay money, and if a document is made for any other purpose, or contains any other terms, it cannot be a promissory note; see *Martin* v. *Chauntry* (1747) 2 Stra. 1271; *Akbar Khan* v. *Attar Singh* [1936] 2 All E.R. 545. By analogy, a contract not in writing cannot be a promissory note: see Bills of Exchange Act 1882, s. 83(1), which defines a promissory note as "an unconditional promise *in writing*..." (emphasis added). Thus, proof of an oral term or terms of a contract would be inconsistent with the contention that that contract was a promissory note, and the same is true of other contracts, such as bills of exchange, which are defined partly in terms of their being made in writing.

[108] For example, *Hoare* v. *Graham* (1811) 3 Camp. 57; *Free* v. *Hawkins* (1817) 8 Taunt. 92; *Woodbridge* v. *Spooner* (1819) 3 B. & Ald. 233; *Moseley* v. *Hanford* (1830) 10 B. & C. 729.

[109] Bills of Exchange Act 1882, ss. 3(1) and 83(1).

[110] However, in *Higgins* v. *Senior* (1841) 8 M. & W. 834, at pp. 844–845, Parke B. expressed the view that the rule laid down in these cases was of application to contracts generally.

[111] See, for example, *Byles on Bills of Exchange* 25th ed., (1983), at p. 368.

[112] Written evidence of additional terms or of variations would be admissible: *Young* v. *Austen* (1869) L.R. 4 C.P. 553. For the matters in respect of bills of exchange which may be proved by oral evidence, see *Byles on Bills of Exchange* 25th ed., (1983), at pp. 368–369 and 372–374.

[113] For example, *Woodbridge* v. *Spooner* (1819) 3 B. & Ald. 233.

**The value of writing**

2.42. It was strongly argued in some of the responses to our working paper that a "parol evidence rule" of wide application such as was suggested in Working Paper No. 70 was necessary to preserve the efficacy of the process by which contracting parties, in order to make clear what terms have been agreed in the course of negotiations, produce a final written statement of their contract. Of course, our analysis of the law will not of itself effect any change to the legal position of the parties, and, as we explained in Part I,[114] this analysis, if adopted by the courts, is unlikely to result in there being any change in the way cases are decided. Even so, we do not believe that our analysis implies any undermining of the certainty to be attached to commercial documents. If the parties intended that all the terms of their contract were as set out in some agreed document, then a court would give effect to that intention; the party seeking to uphold that document would be protected from an attempt to vary it or add to it by the difficulty of proving that a document apparently recording a complete contract does not in fact do so. The apparent completeness of many commercial documents has the practical effect of deterring unwarranted efforts to vary or contradict their contents by extrinsic evidence.

**Assignment**

2.43. Another problem which was drawn to our attention on consultation was the possible adverse effect on assignees of the abolition of the rule as we had previously analysed it. Some of those who wrote to us felt that, unless strict controls were imposed upon the admissibility of extrinsic evidence, assignees could find themselves bound by terms which did not appear in the document which they believed to be a complete record of the assigned contract. Again, our conclusion has no effect upon the legal rights of the parties, but we think it unlikely that assignees would be prejudiced if a court decided a case in accordance with the analysis presented here. First, negotiable instruments must by their very nature be in writing. The main examples are probably bills of exchange and promissory notes. For the reasons given in paragraphs 2.37-2.41 above, oral evidence would remain inadmissible if tendered only for the purpose of varying or adding to such contracts. Secondly, assignees of some contracts enjoy special statutory protection.[115] Thirdly, in an appropriate case, it is open to a court to find that what the parties in fact agreed was a contract contained in the writing and a separate collateral contract which was personal to the original parties and which was therefore not assigned.[116] Fourthly, it is already the case that an assignee of a chose in action takes "subject to equities", that is, subject to any defence the original contracting party would have had in an action brought by the assignor. This position would not be altered by the analysis presented here.

---

[114] See para. 1.8, above.

[115] For example, bills of lading: see Bills of Lading Act 1855, s. 1, which gives the transferee of a bill of lading rights and duties vis-à-vis 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: see *Scrutton on Charterparties* 19th ed., (1984), at p. 62.

[116] See, for example, *Jacobs* v. *Batavia and General Plantations Trust Ltd.* [1924] 2 Ch. 329.

**Application of the parol evidence rule today**

2.44. In order to test the reasoning in this report, we consider below certain examples of factual situations in which one party might seek to rely upon the parol evidence rule to exclude evidence.

(i) A proposes to enter into a contract with B under which he agrees to hire a car from B. The contract documentation provides that the minimum period of hire is to be twelve months. Just before signing the relevant document A says to B, "I take it that I can terminate this contract at any time on giving seven days' notice". B replies, "Certainly, you may". After three months A gives B a week's notice of termination and returns the car. B claims that the contract has another nine months to run and claims damages from A. The court should give judgment in A's favour. Either there was a single contract made partly orally and partly in writing, the oral part overriding any inconsistent part of the writing, or the parties made an oral contract collateral to, and overriding, the written one. The parties' expressed intention, as understood by the conversation, was that the contract could be terminated on a week's notice. Evidence of the conversation would not be excluded by any parol evidence rule.

(ii) On 1 July 1985 A makes B a present of a cheque in B's favour for £1,000 dated 31 December 1985. B endorses the cheque in favour of C. On 1 November 1985 C presents the cheque to A's bank and, when it is unpaid, immediately issues a writ for £1,000 against A, claiming as endorsee of that cheque. C alleges that at the time A drew the cheque he orally agreed with B that although the cheque was dated 31 December, it could be presented and would be honoured on or after 1 November. Evidence of the conversation between A and B should not be admitted. It will, however, not be excluded because of the parol evidence rule but because under section 3 of the Bills of Exchange Act 1882 cheques must be in writing. C cannot sue on the cheque and rely upon evidence of oral terms.

(iii) A agrees "subject to contract" to sell his house to B for £50,000. Contracts are drawn up stating this price and are returned, signed, to the respective solicitors ready for exchange. Before exchange takes place, B complains to A that the price is too high and A agrees to reduce it by £5,000. Thinking that if they tell their solicitors of this reduction the legal fees will be increased, A and B agree to say nothing to the solicitors but confirm the reduction by exchange of letters. In due course, the solicitors exchange the contracts showing the price as £50,000. A then seeks to maintain that the price to be paid is £50,000, relying on B's signed contract. He seeks to exclude evidence of the reduction by relying on the parol evidence rule. However, the court should admit this evidence and give effect to the agreed reduction. The clear intention of the parties was that the price would be £45,000, not £50,000. The situation may be analysed either as a single contract contained in two documents, one of which was inaccurate because inconsistent with the true agreement as reflected in the other, which was intended to prevail, or the parties entered

into two contracts, the one collateral to the other but taking effect so as to override it because constituting the true intention of the parties.

**Conclusion**

2.45. For the reasons set out above, we have come to the conclusion that the parol evidence rule, in so far as any such rule of law can be said to have an independent existenee, does not have the effect of excluding evidence which ought to be admitted if justice is to be done between the parties. Those authorities which, it may be argued, support the existence of a rule which would have that effect would, in our view, be distinguished by a court today and not followed. Evidence will only be excluded when its reception would be inconsistent with the intention of the parties. While a wider parol evidence rule seems to have existed at one time, no such wider rule could, in our view, properly be said to exist in English law today.

## PART III

## SHOULD LEGISLATION BE RECOMMENDED?

3.1. The conclusion of the Commission as to the nature of the parol evidence rule binds no-one to follow it and has no value as a precedent. There are only two ways by which the law relating to the admissibility of extrinsic evidence can be stated with binding effect. First, the House of Lords in its judicial capacity or the Court of Appeal could state the relevant principles of law. However, the possibility of a case coming before either tribunal which raises the right issues is so remote that for present purposes it may be ignored.[1] Secondly, Parliament could legislate on the matter with a view to preventing misunderstanding about the rule causing relevant evidence to be excluded in future.

3.2. At first sight it may seem, in the light of our conclusion as to the nature of the parol evidence rule, that to recommend the enactment of legislation in this field would be wholly inappropriate. The practical difference between our understanding of the rule and that of our predecessors seems virtually non-existent. On their understanding of the rule, evidence relevant for doing justice would not be excluded in any case likely to occur since it could always be admitted under one of the exceptions; on our understanding, the rule simply does not apply to such evidence. Essentially, therefore, the difference between the two approaches is one of analysis. The improvement of legal analysis is not normally one of the purposes of legislation. Moreover, an Act of Parliament is not a suitable vehicle to achieve such a purpose. In particular, exposition of analysis generally requires explanation, but the legislative techniques available are inapt for the purposes of explaining a preferred legal analysis of a problem.

3.3. It might, however, be suggested that although legislation may at first sight seem inappropriate, nevertheless a different understanding of the rule is so prevalent that clarification by statute should be recommended.[2] As we have

---

[1] Even if a case were to occur in which there was an issue as to the admissibility of extrinsic evidence, it could be decided by reference to the so-called "exceptions" to the parol evidence rule. Courts do not usually decide points which do not affect the outcome of a case and full argument as to the true nature of the rule might well not be permitted.

[2] Legislation to prevent misapplication of the parol evidence rule has been proposed in Canada: see, for example, Report on Parol Evidence Rule (1979) of the Law Reform Commission of British Columbia and the many provincial law reform agency reports on the proposed new Uniform Sale of Goods Act. An example of the latter is Report 57 of the Law Reform Commission of Manitoba. The section in the draft Canadian Act is as follows:

> No rule of law or equity respecting parol or extrinsic evidence and no provision in a writing prevents or limits the admissibility of evidence to prove the true terms of the agreement, including evidence of any collateral agreement or representation or evidence of the true identity of the parties.

In New Zealand the Contracts and Commercial Law Reform Committee were divided in 1967 on the question whether the rule should be abolished by statute. The Contractual Remedies Act 1979 did not seek to abolish the rule as such but it has been suggested that the Act had a major effect on the rule (see F. Dawson and D. W. McLauchlan, *The Contractual Remedies Act 1979* (1981), chap. 4).

seen, there are authorities which can easily be read as containing rules of exclusion which are wider than can be justified. Based upon these, some legal advisers or courts may have what we believe would be an erroneous understanding of the parol evidence rule which could lead to the wrong advice being given to clients or a wrong decision being reached between litigants.

3.4. We doubt whether such misunderstanding is common. But should we recommend the enactment of a statute intended to clarify the law and thus to prevent the possibility of injustice? We have considered this matter at length and have decided that legislation in this field would be likely to be more confusing than clarifying. No-one could, we think, say that there is a pressing need for such a statute. Needless litigation might well result from even the clearest enactment. Furthermore it would be legislation of a very unusual character. In the light of these considerations we could only recommend legislation if there was some clear benefit to those who might be affected.

3.5. As we considered the nature of any such legislation, it became apparent to us that the task involved fundamental difficulties. If we approached it by abolishing the rule, or declaring it not to exist, it would be necessary either to refer to the rule by name or to describe it. Naming the rule would not be possible because, as we have noted above,[3] the same name is used for more than one rule of law. Describing the rule might seem to leave more scope for the production of a plausible provision. But we could not avoid the conclusion that any description consistent with our analysis of the rule would be circular, so that any purported abolition would plainly appear to be beating the air. We considered the possibility of legislation which would enact the opposite of the rule, instead of abolishing it. But this approach involved the same problem—if on a true analysis the rule cannot be said to have legal effect, nor can its opposite.

3.6. In addition to, or perhaps because of, the fundamental problems just described, we found that our attempts to formulate a legislative provision constantly created dangers of interfering with quite distinct rules of law which we intended to leave untouched. Examples of such rules are those requiring transactions to be in a particular form or to be evidenced in writing and those relating to merger and to rectification. These dangers would, we believe, be real ones, because the courts would be reluctant to accept that a legislative provision was not intended to have any legal effect.

3.7. The above are but some examples of the impossibility, as we see it, of drafting unambiguous and helpful legislation in this field. If we had a comprehensive code of civil evidence, the simple absence of a parol evidence rule would solve the problem. But a single statement divorced from its context, as it needs must be in the absence of a statutory code, is likely, at best, to be as confusing as clarifying. We hope that this report will itself go some way towards clarifying the law and that a process of re-educating, if necessary, is a more satisfactory means of achieving justice than any attempt to legislate.

---

[3] See para. 1.2, above.

3.8. For the above reasons we *recommend* that no legislative action should be taken to try to reform or clarify the so-called "parol evidence rule".[4]

(*Signed*) RALPH GIBSON, *Chairman*
TREVOR M. ALDRIDGE
BRIAN DAVENPORT
JULIAN FARRAND
BRENDA HOGGETT

J. G. H. Gasson, *Secretary*
30 September 1985

[4] As we explained in para. 1.2 above, the term "parol evidence rule" has been used to describe a number of different legal rules. In this report we have confined our attention to one such rule, and have not considered that rule which prevents the admission of evidence for the purpose of interpretting a document. The expression was recently used in this sense in *Rabin* v *Gerson Berger Association Ltd.* [1985] 1 W.L.R. 595; affirmed, *The Times*, 21 November 1985 (C.A.).

## APPENDIX

### List of persons and organisations who sent comments on Working Paper No. 70

Professor J. N. Adams
Association of British Chambers of Commerce
British Columbia, Law Reform Commission
British Insurance Brokers' Association
California Law Revision Commission
Confederation of British Industry
Lord Diplock
Sir John Donaldson, M.R.
Judge Norman Francis
Professor R. M. Goode
Law Society
Mr. W. A. Leitch (Office of Law Reform, Northern Ireland)
Mr. Mark Littman, Q.C.
London Boroughs' Association
Lord Chancellor's Department
Dr. F. A. Mann
Professor D. W. McLauchlan
Lord Justice Megaw
National Coal Board
National Farmers' Union
Office of Fair Trading
Mr. F. M. B. Reynolds
Lord Roskill
Senate of the Inns of Court and the Bar
Scottish Law Commission
Professor G. H. Treitel
Mr. Justice Walton

A

Printed for Her Majesty's Stationery Office by J. W. Arrowsmith Ltd.
Dd. 601700 1/86 2844 T2582

HMSO publications are available from:

**HMSO Publications Centre**
(Mail and telephone orders only)
PO Box 276, London SW8 5DT
Telephone orders (01) 622 3316
General enquiries (01) 211 5656

**HMSO Bookshops**
49 High Holborn, London, WC1V 6HB (01) 211 5656 (Counter service only)
258 Broad Street, Birmingham, B1 2HE (021) 643 3757
Southey House, 33 Wine Street, Bristol, BS1 2BQ (0272) 24306/24307
9-21 Princess Street, Manchester, M60 8AS (061) 834 7201
80 Chichester Street, Belfast, BT1 4JY (0232) 234488
13a Castle Street, Edinburgh, EH2 3AR (031) 225 6333

**HMSO's Accredited Agents**
(see Yellow Pages)

*And through good booksellers*

ISBN 0 10 197000 5