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## A VIEW OF THE PAROL-EVIDENCE RULE.\*— PART I.

§ 1. *Parol Evidence Rule not a Rule of Evidence.* An unfortunate employment of a terminology in which the subject cannot possibly be discussed with accuracy and lucidity, a lack of systematic treatment in its proper department and surroundings, and an inherent necessity for certain distinctions which are simple in themselves but are in application to individual cases often unavoidably indecisive and difficult to trace—these considerations alone would suffice to account for the confusion, the apparent inconsistency, and the discouraging difficulties that attend the so-called parol-evidence rule and make it perhaps the most troublesome in the whole field of evidence. No one can approach the subject, in any attempt to restate its limitations, except with a sense of temerity; and the following brief arrangement of the leading topics of the rule is offered merely in the belief that no new way of stating them can be more confusing than some of those now to be found, while a mode of statement discarding the evidential terminology,

\* The following pages were prepared for use in a forthcoming edition of Greenleaf on Evidence; they have not been altered for the present purpose except by the omission of some citations, cross-references and brief paragraphs.

and emphasizing certain related doctrines of substantive law, may make it easier, if not to solve the various problems, at least to appreciate what is the nature of the problem to be solved.<sup>1</sup>

(1) It is first to be noticed that the rule or rules concerned are not rules of evidence. They do not exclude certain data because those data for one reason or another are untrustworthy or undesirable means of evidencing something to be proved. They do not declare that something here is admissible evidence while something there is not. What the rule does is to forbid a certain thing to be proved at all, and this, of course, is in effect to declare that the thing is legally immaterial for some reason of substantive law. When a thing is not to be proved at all, the rule of prohibition is not a rule of evidence, even though the words "proof" or "evidence" are employed in stating the prohibition; just as, on a plea of self-defence to an action for battery, if we say that no evidence of the plaintiff's insulting words will be admitted, we mean that his words are no excuse for the battery. If, then, we dismiss once for all any notion that the parol-evidence rule is concerned with any doubts or precautions or limitations based on the nature of certain evidentiary matter, or indeed with any regulation about evidence, we shall have taken the first step to a clearer understanding of the working of the rule.

(2) It is next to be noted that the thing that is to be excluded as immaterial by the rule is not particularly anything that can clearly be described as "parol." Without attempting to discriminate the various possible senses of this word, it will be enough to note that, so far as it conveys the impression that what is excluded is excluded because it is oral—because somebody spoke or did something not in writing, or is now offering to testify orally,—this impression is not the correct one. Where the rule is applicable, what is excluded may be written material as well as conversations, circumstances, and oral matter in general; and where the rule is applicable so

<sup>1</sup> For an acute analysis and historical examination of the whole subject, see ch. 10 in Professor Thayer's "Preliminary Treatise on the Law of Evidence."

as to exclude certain written material, nevertheless certain oral material may properly be considered. So that the term "parol" affords no necessary clue to the kind of material excluded; and it conduces to the intelligent use of the rule to dismiss any notion that oral or parol matters are inherently the object of its prohibition.

(3) Again, within the scope of the rule are usually treated two distinct bodies of doctrine, which do not properly touch each other, except in certain relations at certain points. One of these concerns the constitution of legal acts, the other concerns their interpretation; and the difficulties of principle and lines of precedents for these two subjects are as a whole entirely distinct, and cannot properly be subsumed under any single generalization or rule.

In short, then, the "parol-evidence rule" does not concern doctrines of evidence; nor is it to be tested by the oral nature of the fact to be proved; nor is there any one rule on the subject.

§ 2. *Constitution and Interpretation of Legal Acts; Parol-Evidence Rule.* A person's conduct is one of the chief sources of any changes that occur in his legal relations. The creation, transfer, and extinction of a right and of an obligation are made in great part to depend upon specified kinds of conduct on his part. This conduct, regarded as having legal consequences of the above sort, may be spoken of, in individual instances, as a legal act.<sup>1</sup> The terms or nature of the act vary, of course, according to the nature of the right or the obligation aimed at—a contract, a sale, a will, a notice, and so on; the substantive law specifies these terms appropriately in the various instances, and the various branches of the substantive law are to be sought for these essential terms of the conduct required to constitute an effective act.

Now the conduct which may go to make up the terms of a

<sup>1</sup> The true point of view has thus been obscured by our traditional handling of the subject in terms of evidence. The German discussions of the general subject, while of no service in elucidating our special problems, take a better standpoint for discussion; a profitable work is "Der Irrthum bei nichtigen Verträgen," by Rudolph Leonhard, Dümmlers, Berlin, 1892.

legal act may normally be spread over various times and contained in various materials—as where a contract to sell goods may have to be gathered from conversations; letters, telegrams, price-lists, and other data. If there were no such rule as the “parol-evidence” rule, such would always be the various data in which would be sought the terms of the act. Conceivably, and frequently, they would not be found in a single utterance or a single writing, nor in writings nor utterances made at one time. But there is a doctrine, founded on sound policy and experience, which imposes restrictions upon the sort of data that are to be considered as effectively supplying the terms of a legal act. The restrictions thus imposed affect both time and material; *i. e.* they may require the terms of the act to be sought in the utterances or conduct of one occasion (forbidding a range over preceding occasions of the same negotiation); and they may require the terms to be contained in a special mode of expression, *i. e.*, writing or its equivalent (excluding the use of oral utterances).<sup>1</sup> Usually the two sorts of restriction are combined, *i. e.*, the terms of the act are to be sought in a single writing made at one time.

When do such restrictions become applicable, so as to have this effect of giving legal standing and validity to a single writing only, and of forbidding the consideration of all other conduct as supplying the terms of the legal act? The restrictions may become applicable in two kinds of situations: (1) where a specific rule of law provides that the act, to be effective legally, must be contained in a single writing, as where a will or a deed is required to be in writing; (2) where the parties to the act have by intention made a single writing the sole memorial and repository of its terms,—as where the parties to a contract finally, after sundry negotiations, embody in a single writing the terms agreed upon. This process of reducing the act’s terms to a single memorial, whether by re-

<sup>1</sup> It may be noted that, as Mr. J. Blackburn has acutely pointed out (when arguing as counsel in *Brown v. Byrne*, 3 E. & B. 703), the parol-evidence rule might conceivably apply even to an oral utterance constituting the final fixing of the terms, thus excluding other oral utterances; so also *Gilbert v. McGinnis*, 114 Ill. 28; but practically this possibility need not be considered.

quirement of law or by intention of the parties, may be, for convenience of discussion, termed Integration, *i. e.*, the constitution of the whole in a single memorial.

This principle is well established and unquestioned in the law. The difficulties that arise are concerned with the scope of its application. The effect of the principle is an exclusionary one, *i. e.*, to reject from consideration, as having no legal standing and effect, data of conduct other than the sole written memorial. The matter thus excluded has come to be termed "parol evidence," although, as already pointed out, it is not evidence and not necessarily in parol. As the question usually comes up in a court, a writing is received from one party; and then matter other than this writing, and tending to overturn its legal effect, is offered by the other party, and is objected to by the first party by virtue of the present principle. The inquiry is thus presented whether the data thus offered in opposition are obnoxious to this rule of Integration. In other words, granting that there is a writing by the party or parties, is this sufficient to exclude the opposing data? Does the mere fact of the writing have that effect? Are there not many cases in which such data, although affecting the writing in the interest of the opponent, are nevertheless receivable without being obnoxious to the Integration rule? Unquestionably there are such cases; but the difficulty is to draw the line consistently and to expound the reasons soundly and systematically. The great mass of the rulings upon the parol-evidence rule are concerned with the attempt to draw this line and define these situations. The various cases in which such data are receivable seem to fall under the following heads:—

I. (1) It may always be shown that no legal act at all has ever been consummated or that some defence or excuse exists which overturns or sets aside an act conceded to have been done. (a) Under the first of these heads, there are certain constantly recurring situations, depending somewhat for their solution upon the particular department of law (contracts, wills, etc.), yet capable of being discussed in general terms applicable to all legal acts. They concern the will or con-

scious volition of the person in setting his hand to the act; and the question is whether he has after all consummated any legal act at all or an act of the alleged tenor, *i. e.* whether it is to be treated as his act (that is, an act having the supposed legal consequences) if he has merely drafted its terms but not finally willed to execute it, or if he has done it with the understanding that it is to be only morally binding, or if he has done it subject to another's approval, or if he has signed a writing without reading it over, and the like. (*b*) The second of these heads deals with the effect of some accompanying circumstance as making the act, though consummated and intrinsically effective, potentially avoidable, *i. e.* subject to some defence or excuse which will enable the actor to repudiate it or set it aside or successfully defend against the consequences, *e. g.* whether fraud, or an agreement to hold in trust or for security, will avail for this purpose. Thus, these two kinds of situations allow a consideration of all data by which it appears, as a rule of substantive law (*a*) that no legal act has been consummated at all, or (*b*) that the act, though consummated, is subject to avoidance upon grounds justifying such a defence.

(2) Independently of the preceding, it is further true that the Integration rule, excluding other data, does not apply unless there has been integration. Consequently, such extrinsic data may always be considered (*a*) where there has not been, by intention of the parties, any integration at all, or (*a'*) only a partial integration, not extending to the matters in question; and (*b*) where the law does not specifically require an integration in writing.

II. Furthermore, a legal act existing, it has constantly to be interpreted in order to be made effective; for, since its terms will be found chiefly in words, and since words are merely symbols indicating external objects as to which the right or duty is predicated, the connection between these symbols and all possible objects must be ascertained in order to carry the terms into effects corresponding with their significance as predetermined by the party or parties to the act. In this process of Interpretation, various data have to be considered; and there may be rules of guidance for choosing or

ascertaining the proper meaning ; a new series of questions arise, peculiar to this subject ; but the general process of using the interpreting data is not obnoxious to the Integration rule.

These several subjects may now be examined in more detail.

§ 3. (I) *Constitution of Legal Acts ; (1) Whether an Act has been Consummated at all.* Only a small part of conduct is legal conduct, *i. e.* conduct intended to have legal effectiveness. The same conduct may under varying circumstances be intended to have other sorts of consequences than a legal one or the particular legal one,—as where a person hands a parcel to another, or writes a letter ; and the distinction will often turn entirely on the accompanying intent. In other words, whether an act of an alleged tenor has been consummated will often depend chiefly on whether an intention to do an act of that tenor accompanied the conduct in question. At the same time, since for reasons of policy designed to protect others in their dealings against undisclosed and undiscoverable defects in their rights, there may be cases in which the doing of the conduct itself, irrespective of the intention, must be taken as finally consummating the act. Thus the problem is to define these situations in which the effectiveness or validity of the act is to depend merely on its doing and apart from its intention. Put in the shape of a rule of exclusion, the question becomes : When may it not be shown that the intention of the actor was not to do an act of the sort apparently done? Observing that this is distinctly a question of substantive law determining the existence of rights and duties, and that the solution may well be different in different parts of the law, we may notice briefly the various types of situation. The alleged incompleteness of the act may be attributed to the circumstance (*a*) that the act was intended to have no legal significance at all, but only a moral or social one ; or (*b*) that the act was provisional or preparatory only, and never finally willed as a consummated act ; or (*c*) that though a legal act of some sort was intended, yet it was not this legal act, but an act of some other tenor, either wholly or in part.

(*a*) This variety of situation, while common enough, seldom

gives rise to legal controversy. An invitation to dine, extended to a friend, illustrates it, and is to be contrasted with the promise of a restaurateur to furnish a meal. An instance of a different sort is found in *Earl v. Rice*,<sup>1</sup> where it was allowed to be shown that an agreement, signed by husband and wife, as to the sale of her lands and the disposition of the proceeds for the benefit of the children, was understood between them to be only morally binding. In this aspect, the "parol-evidence rule" may be stated somewhat thus, namely, that conduct apparently having the form of a legal act may always be shown to have been done with the intent to assume only moral or social consequences.<sup>2</sup>

(b) This variety of situation gives rise to constant legal controversy, chiefly because it is often difficult to distinguish practically between such a total absence of effective intent as to leave the act merely inchoate and such a partial modification of the effect of a consummated act as concedes the consummation but violates the principle of Integration by improperly setting up a competing agreement to modify the integrated act. An instance of the less difficult sort is the writing of a draft promissory note for possible use, where the lack of intent to consummate a note leaves the writing without final legal significance. Again, in *Nicholls v. Nicholls*,<sup>3</sup> it was allowed to be shown that a paper purporting to be a will was written during a friendly conversation, in the course of which the writer put certain words on a paper, and said "That is as good a will as I shall probably ever make;" these words indicating possibly that the writing was intended merely as an experiment or suggestion. Instances of the more difficult sort are cases of contract-writings drawn up in complete detail and signed, but agreed not to be regarded as binding and consummated until the happening of some condition precedent. Thus, it may be shown that an agreement, though signed, was understood not to be a binding act until the signature of

<sup>1</sup> 111 Mass. 17.

<sup>2</sup> See *Gunz v. Giegling*, 108 Mich. 295; *Church v. Case*, 110 id. 621; *Grand Isle v. Kinney* (Vt.), 41 Atl. 130.

<sup>3</sup> *Prerog. Ct.*, Ann. Reg. 1814, p. 278.

another party was obtained,<sup>1</sup> or until the approval or consent of a third person should be obtained,<sup>2</sup> or that some other act should be done by a party or a third person.<sup>3</sup> On the other hand, an understanding which concedes that an effective legal act has been consummated but purports to affect the terms of the obligation, by limiting the conditions of default or specifying events on which it shall by condition subsequent cease to be binding, does not come within the above notion, and is excluded because it comes in competition with the terms of the written act under the principle of § 5, *post*; thus, an understanding that a note is to be payable out of certain funds only,<sup>4</sup> or that its payment will not be enforced at all,<sup>5</sup> or only upon certain conditions,<sup>6</sup> would not be considered.<sup>7</sup> Under the present head seems also to belong the class of cases in which it is desired to show that the person attempted to be charged as a party to a document did not sign as a part but only as a witness; this may be shown, because it means that as to that person there was no legal act.<sup>8</sup>

<sup>1</sup> *Pattle v. Hornbrook*, 1897, 1 Ch. 25; *State v. Wallis*, 57 Ark. 64; *Robertson v. Rowell*, 158 Mass. 94; *Kelly v. Oliver*, 113 N. C. 442; *Mfrs. Furn. Co. v. Kremer*, 7 S. D. 463; *McCormick Co. v. Faulkner*, *ib.* 363; *Gillman v. Gross*, 97 Wis. 224; see *Beard v. Boylan*, 59 Conn. 181.

<sup>2</sup> *Cleveland Ref. Co. v. Dunning* (Mich.), 73 N. W. 339; *Tug R. C. & S. Co. v. Brigel*, U. S. App., 86 Fed. 818; *Pym v. Campbell*, 6 E. & B. 370.

<sup>3</sup> *Blewitt v. Boorum*, 142 N. Y. 357; *Curry v. Colburn* (Wis.), 74 N. W. 778.

<sup>4</sup> *Stein v. Fogarty* (Ida.), 43 Pac. 681; *Mumford v. Tolman*, 157 Ill. 258; *Gorrell v. Ins. Co.*, 24 U. S. App. 188; *contra*: *Clinch Co. v. Willing*, 180 Pa. 165.

<sup>5</sup> *First Nat'l B'k v. Foote*, 12 Utah, 157; *Bryan v. Duff*, 12 Wash. 233.

<sup>6</sup> *Van Syckel v. Dairyple*, 32 N. J. Eq. 233; *Northern Trust Co. v. Hiltgen*, 62 Minn. 361; *Van Etten v. Howell*, 40 Nebr. 850; *Wilson v. Wilson*, 26 Or. 251; *Shea v. Leisy*, 85 Fed. 243; *Nebr. Expos. Ass'n v. Townley*, 46 Nebr. 893; *Taylor v. Hunt*, 118 N. C. 168; *Murchie v. Peck*, 160 Ill. 175.

<sup>7</sup> For other instances illustrating the above distinctions, see *Guidery v. Green*, 95 Cal. 630; *Ryan v. Cooke*, 172 Ill. 302; *Hanck v. Wright* (Miss.), 23 So. 422; *Western Mfg. Co. v. Rogers* (Nebr.), 74 N. W. 849; *Ellison v. Gray*, N. J. L., 37 Atl. 1018; *Lowenfeld v. Curtis*, U. S. App., 72 Fed. 103. Needless to say, the application of the distinctions in a given instance may offer much room for difference of opinion.

<sup>8</sup> *Garrison v. Owens*, 1 Pinney 473; *Isham v. Cooper*, N. J. L., 39 Atl. 760. In the law of negotiable instruments, several questions of an anal-

(c) In this situation the execution of some legal act is conceded, but it is desired to show that its purporting terms were, either wholly or in part, not intended by the party doing the act. The typical cases are those of one signing a blank paper afterwards filled out by another without any authority or differently from a limited authority; of a blind or illiterate person signing a document whose contents are, fraudulently or otherwise, incorrectly stated to him; of an ordinary person signing a document whose terms he has misread or has not read at all. Here there is opportunity for much difference of policy, depending on the nature of the act and the relations of the parties. In general, it seems fair to insist that, where the intention was to do a legal act of some sort, the efficient element is supplied, and the terms of the specific act intended should depend solely on the document and not on the unexpressed state of mind of the party doing the act; so that a mistake due to one or the other of the above reasons should be immaterial. At the same time there are certain situations in which policy may well allow a relaxation of this rule. In the first place, it need not be enforced in favor of a party who by fraud or carelessness has brought about the mistake—as in the case of one fraudulently misreading a document to an illiterate person.<sup>1</sup> In the next place, it need not be enforced where the writing is equally fallacious in representing the terms as understood by the opposing party; in other words,

ogous sort arise, but peculiar considerations apply in that field of the law; for example, the effect of a parol agreement that an indorsement in blank or in full shall be without recourse against the indorser; of an agreement that an indorsing payee is to be treated as guarantor, co-surety, or joint maker; of an agreement that joint makers or maker and indorser, or indorser and indorsee, are to be treated between themselves as sureties. In the law of agency, also, some special questions arise, governed by more or less peculiar considerations; for example, the effect of an agreement that a person signing a contract is to be treated as agent only, or that a person signing as agent is to be treated as also a principal; and the doctrine of undisclosed principal.

<sup>1</sup>See *Harriman on Contracts*, 35: *Thoroughgood's Case*, 2 Co. Rep. 9 b; *Foster v. Mackinnon*, L. R. 4 C. P. 704; *O'Donnell v. Clinton*, 145 Mass. 461; *Wanner v. Landis*, 137 Pa. 61; *Bank v. Webb*, 108 Ala. 132; *Yock v. Ins. Co.*, 111 Cal. 503; *Green v. Wilkie*, 98 Ia. 74; *Coates v. Early*, 46 S. C. 220; *Hartford L. I. Co. v. Gray*, 80 Ill. 28.

in the case of mutual mistake, where in Chancery the reformation of the instrument is allowed.<sup>1</sup> In the third place, a testator signing a will is not in the position of one on the faith of whose act another party to the transaction may be misled, and thus there may be less objection than in the case of contracts to permitting the testator's ignorance of the contents, through misreading or otherwise, to be shown.<sup>2</sup> But all these questions are here seen, more clearly perhaps than in other parts of the subject, to be in truth questions in the various departments of substantive law concerned with the different kinds of legal acts; and broad and varying considerations of policy are concerned, into which it is not necessary here to enter.

§ 4. *Same: (2) Whether a Defence or Excuse Exists, Rendering the Act Voidable.* Assuming that a legal act has been done, it may be desired to show that some defence or excuse exists, by reason of which the act is voidable and may be repudiated. There is here no attempt to alter the terms of the act; it is conceded, and its terms are conceded; but an independent defence is set up. Whether this defence may be shown depends merely on whether the policy of the substantive law applicable to that class of acts recognizes the circumstance as rendering the act voidable and constituting a defence to its enforcement. The clearest case of this sort is that of fraud. The substantive law concerned determines when fraud is to be regarded as a defence, and what circumstances are to be regarded as amounting to fraud. But there is no objection to the showing of fraud from the present point of view, *i. e.* the constitution and integration of legal acts, because no effort is made to resort to other than the integrated act for ascertaining its terms; the terms are conceded to be represented by the writing only, and the object is to set up independent cir-

<sup>1</sup> See *Wilcox v. Lucas*, 121 Mass. 22; *Bush v. Hicks*, 60 N. Y. 298; *Andrews v. Andrews*, 81 Me. 337; *Stockbridge Co. v. Hudson Co.*, 107 Mass. 290.

<sup>2</sup> See *Guardhouse v. Blackburn*, L. R. 1 P. D. 109; *Fulton v. Andrew*, L. R. 7 H. L. 460; *Morrell v. Morrell*, L. R. 7 P. D. 68; *Stephen*, Digest of Evidence, 4th Ed., App. note 35, and Pref. p. 37; *Sheer v. Sheer*, 159 Ill. 591.

cumstances rendering the act voidable.<sup>1</sup> A showing of duress also, wherever the substantive law recognizes it as an available defence, is equally unobjectionable from the present point of view.<sup>2</sup> Possibly the proceeding for reformation on the ground of mutual mistake may be regarded as properly belonging under the present head. The more difficult case is that of an accompanying agreement to hold property as trustee or to hold it as security only. It may be suggested that the title to property can be regarded as capable of separation into various qualities or modalities—title as both beneficial and legal owner, title as legal owner only (with the beneficial interest in another), and title as security holder only (with the redemption interest in another). The simple transfer of ownership will in all cases transfer the bare legal title, but it may or may not carry with it the beneficial interest of the second or third sort. The title being thus separable into distinct elements, it is easy to regard the act of separating and retaining (by mutual understanding) the beneficial interest of the second or third sort as an independent circumstance which may be availed of to cut down the apparent interest of the title-holder, by way of defence or avoidance. Thus, where the circumstances are such as to justify, by the substantive law, the recognition of a resulting trust, there is no objection from the present point of view; and it may be shown just as fraud could be shown.<sup>3</sup> So also a retention of the redemption interest in the transferor, with the effect of giving the transferee a security title only, may be shown, as an independent circumstance constituting a defence to his apparent right to claim full and beneficial title.<sup>4</sup> But in the latter case it may happen that the act of transfer clearly purports to give not merely the bare legal title, an ele-

<sup>1</sup> *State v. Cass*, 52 N. J. L. 77.

<sup>2</sup> So also for infancy or other legal incapacity to act.

<sup>3</sup> *Felz v. Walker*, 49 Conn. 93.

<sup>4</sup> *Campbell v. Dearborn*, 107 Mass. 130; *Barry v. Colville*, 129 N. Y. 302; *Hieronymus v. Glass* (Ala.), 23 So. 674; *Ahern v. McCarthy*, 107 Cal. 382; *Shad v. Livingston*, 31 Fla. 89; *German Ins. Co. v. Gibe*, 162 Ill. 251; *Bever v. Bever*, 144 Ind. 157; *Libby v. Clark*, 88 Me. 32; *Dixon v. Ins. Co.*, 168 Mass. 48; *Pinch v. Willard*, 108 Mich. 204; *Vanderhoven v. Romaine*, N. J. Eq. 39 Atl. 129; *Voorhies v. Hennessy*, 7 Wash. 243; *Shank v. Groff*, 43 W. Va. 337; *Gettelman v. Assur. Co.*, 97 Wis. 237.

ment common to all transfers of title, but also the full beneficial interest, free from any redemption interest; and where this is the case, all the possible elements of a title being accounted for and covered, a supposed retention of the redemption interest can no longer be regarded as a separate act available in defence, but comes directly in competition with the terms of the transfer, and is thus in this instance not available.<sup>1</sup> Another sort of independent act which, by setting aside the original act, substitutes a new one and furnishes a defence to any claim founded on the avoided one, is a novation; this may be shown, whether it involves a novation in the full sense, *i. e.* a complete supersession of the original act,<sup>2</sup> or merely a change of some of its terms by subsequent agreement or waiver.<sup>3</sup> An agreement not to sue, or not to sue for a limited time, is perhaps not to be regarded, at least apart from equity, as an available defence;<sup>4</sup> but an agreement to forbear forever to sue is in theory equivalent to a promise to give a release, and thus, in equity at least, is of the nature of a defence which can be set up in an action on the main contract.<sup>5</sup> But it may be difficult, in specific instances, to determine whether the agreement should be treated as genuinely one of the above sort or as merely an agreement limiting liability and thus of an admissible sort; for example, an agreement not to collect more than a part of the amount of a note may be regarded as not available,<sup>6</sup> but an agreement to credit a certain counter-claim in payment may be given effect.<sup>7</sup> It may be added that where the facts to be shown negative the very existence or consum-

<sup>1</sup> *Thomas v. Scutt*, 127 N. Y. 133. Occasionally this is laid down as a general rule, in disregard of the distinction above noted; see *Munford v. Green* (Ky.), 44 S. W. 419; *Goon Gan v. Richardson*, 16 Wash. 373.

<sup>2</sup> *Guidery v. Green*, 95 Cal. 630.

<sup>3</sup> *Goss v. Nugent*, 5 B & Ad. 863; *Smith v. Kelley* (Mich.), 73 N. W. 385; *Harris v. Murphy*, 119 N. C. 34; *Dunklee v. Goodenough*, 68 Vt. 113; *Chic., B. & Q. R. Co. v. Dickson*, 143 Ill. 368.

<sup>4</sup> *Ford v. Beach*, 11 Q. B. 852; *Dow v. Tuttle*, 4 Mass. 883. Compare the case of a contemporaneous agreement to renew: *Hoare v. Graham*, 3 Campb. 57; *Ames*, Cases on Bills and Notes, II, 124, note.

<sup>5</sup> *Dean v. Newhall*, 8 T. R. 168; *Harriman on Contracts*, 283.

<sup>6</sup> *Loudermilk v. Loudermilk*, 93 Ga. 443.

<sup>7</sup> *Bennett v. Tillmon*, 18 Mont. 28; *contra*: *Phelps v. Abbott* (Mich.), 72 N. W. 3.

mation of a legal act (as in § 3, *ante*), they may be shown as against any assignee of the supposed right created by the act, because he can obtain nothing if there was nothing to transfer to him; whereas, if the facts concern merely a defence or enable a consummated act to be avoided (as in the present section), the showing will, in some departments of the law, not be allowed as against a *bona fide* assignee for value of the right created by the act.<sup>1</sup>

§ 5. *Integration of Legal Acts by Intent of Parties; (1) Whether the Act has been Integrated at all.* The principle of Integration—*i. e.* refusing to recognize, as a part of the act or as furnishing its terms, anything but the final written memorial as adopted by the parties—assumes that there has been an integration into a final written memorial. It is therefore, of course, always possible to show that a writing offered as such has never been enacted by the parties as such a memorial, *i. e.* that there never has been an integration; and in such case any negotiations or parts of the transaction whatever may be considered in order to determine the entire terms of the act. A mere temporary or preliminary memorandum<sup>2</sup> or a series of letters,<sup>3</sup> for example, will usually not be such an exclusive memorial; though it is always a question as to the intent of the parties in the particular case. A memorandum made to satisfy the fourth and seventeenth sections of the Statute of Frauds is not as such and necessarily the exclusive memorial of the transaction.<sup>4</sup> A receipt, acknowledging the payment of money or delivery of goods, is not as such an exclusive memorial of the terms of a contract connected with the money or the goods;<sup>5</sup> though a document may be at the same time a receipt and the exclusive memorial of contract;<sup>6</sup> whence

<sup>1</sup> See *Dow v. Tuttle*, *supra*; *Martin v. Cole*, 104 U. S. 30.

<sup>2</sup> *Ramsbottom v. Turnbridge*, 2 M. & S. 434; *Doe v. Cartwright*, 3 B. & Ald. 326; *R. v. Wrangle*, 2 A. & E. 514; *Allen v. Pink*, 4 M. & W. 140; *Vaughan v. McCarthy*, 63. Minn. 221.

<sup>3</sup> *Burditt v. Howe*, 69 Vt. 563.

<sup>4</sup> *Browne*, Statute of Frauds, cc. 17, 18.

<sup>5</sup> *Singleton v. Barrett*, 2 Cr. & J. 368; *Equit. Secur. Co. v. Talbert*, 49 La. Ap. 1393; *State v. Giese*, N. J. L., 36 Atl. 680; *Keaton v. Jones*, 119 N. C. 43.

<sup>6</sup> See *Ramsdell v. Clark*, 20 Mont. 103; *Jackson v. Ely*, 57 Oh. 450; *Allen v. Mill Co.*, 18 Wash. 216.

arises the well-known distinction that a bill of lading, as a receipt for goods, but not as a contract of carriage, may be shown to be incorrect in its terms.<sup>1</sup>

§ 6. *Same: (2) Whether the Part of the Act in Question has been Integrated.* Even though there has been an integration, *i. e.* a reduction of a transaction to a final and exclusive written memorial, yet, since several transactions may be consummated by the same parties at the same time of negotiation, and since the parties may integrate one of these transactions and not another, or may integrate one part of a transaction and not another part, it is of course always open to show that the integration was partial only; and in such case the terms of the remainder, not covered by the written memorial, may be gleaned from anything said or done by the parties independently of the writing. Effect is given to the written memorial as exclusively representing the terms of the transaction, but only because the parties have so intended it, and therefore only so far the parties have intended it. Since all depends thus on the parties' intention as to the extent or scope of the integration, the application of the principle will depend almost entirely on the circumstances of each case,—including the kind of transaction, the usual terms of such transactions, the scope of the writing, and the surrounding circumstances of the particular negotiation.<sup>2</sup> No detailed rules can be formulated; and the working of the principle can best be understood by noticing its application in particular instances. For example, where a written lease was given, an oral agreement by the lessor to destroy rabbits on the leased land was admitted;<sup>3</sup> where a written lease of a house and the furniture therein was

<sup>1</sup> The Delaware, 14 Wall. 579; Tallassee F. M. Co. v. R. Co. (Ala.), 23 So. 139; McClain, Cases on Carriers, pp. 233-248; Hutchinson, Carriers, §§ 122 ff.

<sup>2</sup> It is occasionally said (*e. g.*, in *Naumberg v. Young*, 44 N. J. L. 331, whose language has been approved in *Thompson v. Libby*, 34 Minn. 374; *Seitz v. Refrig. Co.*, 141 U. S. 510), that the parties' intention as to the exclusive effect of the document is to be gathered exclusively from the terms of the document itself; but this is unsound in principle as well as impossible in practice; the fallacy is repudiated in *Eighmie v. Taylor*, 98 N. Y. 288, and has little support.

<sup>3</sup> *Morgan v. Griffith*, L. R. 6 Exch. 70.

made, an oral agreement by the lessor to put in certain furniture was excluded;<sup>1</sup> where a deed of land abutting on a street was made, an oral agreement by the vendor to have the street graded was admitted;<sup>2</sup> where a deed of similar land was made, an oral agreement by the vendor to pay for a sewer in the course of construction was admitted;<sup>3</sup> where a deed of two houses, with the lease of a hall, was made, an oral agreement to put hard-pine flooring into the hall was admitted;<sup>4</sup> where a deed of land and a store provided that "this grant includes all the shelving in the building," an agreement to sell personalty in the store was admitted;<sup>5</sup> where a written contract was made to give possession of the promisor's premises for the purpose of building, an oral agreement to provide certain room for storage purposes was excluded;<sup>6</sup> where a covenant was made to furnish a person's support, an agreement that the promisee would live at a certain place was excluded;<sup>7</sup> where a written lease of land was made, an oral agreement by the lessor to devise the lands to the lessees, on condition that they improved the premises and paid an annual rent, was admitted;<sup>8</sup> where a written agreement was made to board "three persons," an oral agreement specifying the three was excluded.<sup>9</sup>

Most of these instances are arguable, in the sense that a contrary decision could not be thought unsupportable; and in most of them the decisions have depended more or less on the attendant circumstances. But however arguable the ruling may be in a particular instance, the general notion is always the same and is everywhere accepted. The inquiry is, for each instance anew, Was the subject of the offered agreement intended by the parties to be covered or disposed of in the written memorial? If they intended that writing to represent

<sup>1</sup> *Angell v. Duke*, 32 L. T. N. S. 320.

<sup>2</sup> *Durkin v. Cobleigh (Mass.)*, 30 N. E. 474.

<sup>3</sup> *Carr v. Dooley*, 119 Mass. 294.

<sup>4</sup> *Graffam v. Pierce*, 143 Mass. 336.

<sup>5</sup> *Bretto v. Levine*, 50 Minn. 168.

<sup>6</sup> *Dixon-Woods Co. v. Glass Co.*, 169 Pa. 167.

<sup>7</sup> *Tuttle v. Burgett*, 53 Oh. 498.

<sup>8</sup> *Harmau v. Harman*, 34 U. S. App. 316.

<sup>9</sup> *Rector v. Bernaschina*, 64 Ark. 650.

the net result of their negotiations on that topic, then no other matter, whether oral or written, is to be consulted for ascertaining the terms of their act.—It is sometimes said that the test is whether the parol agreement “varies or adds to” the written memorial, or whether it is “inconsistent” with it. But these, it is obvious, may be fallacious tests; for, though an oral agreement which is inconsistent with or varies from the written memorial will always be ineffective and inadmissible, it is not true, conversely, that an oral agreement which is not inconsistent with the written memorial is admissible. Where the parties have clearly intended to cover the whole of a subject having many possible details, the promisor may not purport to make an engagement as to one of the possible details, and thus an oral engagement on that precise point is not in strictness inconsistent with the written memorial, nor does it vary the latter; yet it may be inadmissible if the memorial apparently intended to embrace the whole of the promise on the general subject to which that detail belongs; for example, a written contract of sale for an engine is in strictness not inconsistent with nor varied by an oral warranty of the engine’s working capacity, if the written memorial does not refer in any way to the engine’s capacity; yet such a warranty would be by most courts excluded. It seems more accurate in practice and more correct on principle to avoid such phrasings of the test, and to inquire, more broadly, whether the subject of the offered agreement has been intended to be wholly disposed of by the written memorial; if so, the agreement is not to be considered, whether it is consistent or inconsistent with the memorial’s specific terms.

The principle now under consideration finds frequent application where it is desired to imply into the contract a *custom* or usage which prevails for the class of transactions involved, and would be regarded, but for the written memorial, as an implied term of the contract. Ordinarily, parties do not intend to reduce to writing in the memorial all the usages applicable to the class of transactions involved; in other words, the scope of their intended integration includes only such matters as may or must vary with the particular transaction,

and not such matters as are uniformly arranged for by current usage;<sup>1</sup> thus, in an order for a large quantity of flour, the quantity, the quality, the grade of wheat, the consignee, the time and place of delivery, will naturally vary with the particular order, and a written memorial of the contract will therefore have necessarily for its object the reduction to certainty of these variable particulars; but the mode of manufacturing, the mode of packing, and the mode of marking, may by local usage be uniform in all cases, and hence there will usually be no occasion and no intention to deal with these matters in the written memorial; in other words, there has been on those points no intended integration; and therefore it is open to resort to current usage for the implied terms of the contract on those points. If, however, the writing, by mentioning one or another of those points, shows that there has been an intention to deal with the matter in the written memorial, or if such an intention can be otherwise ascertained, then the usage cannot be resorted to as furnishing a term of the contract. Usually, then, it may be said, that when the written memorial contains nothing on the subject of the usage offered, the usage (if of such a sort as by the law of contracts would be an implied term of the contract) may be resorted to, in spite of the existence of the written memorial. Here, however, as in all other applications of the present principle, the result will depend chiefly on the circumstances of each case.

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(To be continued.)

<sup>1</sup> "Parties are found to proceed with the tacit assumption of these usages; they commonly reduce into writing the special particulars of their agreement, but omit to specify these known usages, which are included, however, as of course, by mutual understanding. . . . The contract in truth is partly express and in writing, partly implied or understood and unwritten:" Coleridge, J., in *Brown v. Byrne*, 3 E & B. 703.