

August 1971

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Recommended Citation

Robert R. Skinner, *Contracts--Parol Evidence Rule--Admissibility of Agency Not Appearing in Written Contract*, 74 W. Va. L. Rev. (1971).
Available at: <https://researchrepository.wvu.edu/wvlr/vol74/iss1/15>

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victim protection and provide judicial review in *all* illegal searches and seizures. Excluding flagrant violations would protect the integrity of the judicial system and remove the court from any participation in the *Rochin*⁴⁵ type case—the case in which evidence is obtained by means that “shock the conscience.” Since such police conduct would be oblivious to a tort remedy justice would be better served by excluding the evidence.

Dennis C. Sauter

**Contracts—Parol Evidence Rule—
Admissibility of Agency Not Appearing in Written Contract**

How does the parol evidence rule¹ apply to a written contract which on its face appears to have only two parties, but in which one of the parties wants to introduce extrinsic evidence that one of the signatories is an agent for another person? Part one of this note will discuss present case law and part two will show how that law compares with modern theories of the parol evidence rule.

⁴⁵ *Rochin v. California*, 342 U.S. 165 (1952). Police illegally broke into Rochin's home, attempted to forcibly open his mouth to extract pills, and subsequently pumped his stomach.

¹The rule as it is often stated with respect to contracts is that “extrinsic evidence is not admissible to vary, add to, modify, or contradict a valid, complete, unambiguous, written contract.” See 32A C.J.S. *Evidence* § 901 (1964) and cases cited therein at n.21. The Uniform Commercial Code [UCC] statement of the parol evidence rule for sales is UCC § 2-202: “Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented (a) by course of dealing or usage of trade . . . or by course of performance . . . ; and (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.” Notice particularly the “official” comments to § 2-202 which reject the idea that the court must find ambiguity in the contract language before admitting extrinsic evidence and the idea that language should be given a construction contrary to the meaning arising out of the commercial context in which it was used. The comments also state that the best indication of what the parties intended is their course of actual performance. In addition it is stated that extrinsic evidence should be kept from the trier of facts only when the “additional terms are such that, if agreed upon, they would *certainly* have been included in the document” UNIFORM COMMERCIAL CODE § 2-202, Comments 1-3 (emphasis supplied). The Uniform Commercial Code provision dealing with the signing of commercial paper by an agent is UCC § 3-403. For other statements of the parol evidence rule for contracts, see 3 A. CORBIN, *CONTRACTS* § 573 (1960); 4 S. WILLISTON, *CONTRACTS* § 631 (3d ed. 1961).

I. THE DECISIONS

There are three contexts in which the courts have discussed the parol evidence rule in such contracts: (1) where one signing party, *T*, wants to show that the other signer, *A*, is an agent of the principal, *P*, in order to hold *P* liable; (2) where *P* wants to introduce evidence of the agency in order to entitle himself to hold *T* liable, and (3) where *A* wants to introduce evidence that he is merely an agent so as to relieve himself from personal liability to the other signing party *T*.² Where the phrases "disclosed principal" and "undisclosed principal" are used, they have nothing to do with what is in the writing. In all the cases to be discussed below, there were no words in the writing which indicated that an agency relationship might exist. A casual reader of the writings would quickly conclude that they had only two parties—the two signing parties. "Disclosed principal" means only that the two signing parties knew when they executed the writing that one of them was acting as the agent of another person, *P*, whose identity may or may not have been known to the other signing party, *T*.

In the first situation, where *T* wants to introduce evidence of a disclosed agency relationship in order to hold *P* liable, there is a split of authority.³ For example, in *Schneider Marble Co. v. Knight*,⁴

² As a general rule, if the evidence of the agency relationship is before the court, the agent making a contract for a disclosed principal is not personally liable on the contract. *Mosekian v. Davis Canning Co.*, 229 Cal. App. 2d 118, 40 Cal. Rptr. 157 (Dist. Ct. App. 1964); *Rayden Engineering Corp. v. Church*, 337 Mass. 652, 151 N.E.2d 57 (1958); *Azzarello v. Richards*, 99 N.Y.S.2d 597 (Syracuse Mun. Ct. 1950); RESTATEMENT (SECOND) OF AGENCY § 320 (1958).

³ Evidence admitted: *Moore v. Consolidated Products Co.*, 10 F.2d 319 (8th Cir. 1925); *Schneider Marble Co. v. Knight*, 37 Ga. App. 646, 141 S.E. 420 (1928); *Winston & Co. v. Clark County Const. Co.*, 186 Ky. 743, 217 S.W. 1027 (1920); *Woodhouse v. Duncan*, 106 N.Y. 527, 13 N.E. 334 (1887). Evidence excluded: *Bloom v. Coates*, 190 Cal. 458, 213 P. 260 (1923); *Ferguson v. McBean*, 91 Cal. 63, 27 P. 518 (1891); *Cartwright v. Giacosa*, 216 Tenn. 18, 390 S.W.2d 204 (1965); see also 9 J. WIGMORE, EVIDENCE § 2438 (3d ed. 1940), where it is indicated that if the parties were aware of the agency at the time of entering the contract and did not put some indication of the agency into the writing, parol evidence could not be used to hold the principal liable. In addition it should be remembered that the above cases do not apply to negotiable instruments. Under the Negotiable Instruments Law [NIL] and UCC, no person may be held liable on a negotiable instrument whose name does not appear thereon. See UCC § 3-401 and NIL § 18. In those few cases where one of the signing parties entered the contract not knowing of the other's agency, there is no clear trend. In *Pitman v. Roberts*, 122 So. 2d 333 (Fla. App. 1960), the evidence was admitted. In *Shinn v. Smiley*, 1 N.J. Misc. 459, 122 A. 531 (1922), it was excluded.

⁴ 37 Ga. App. 646, 141 S.E. 420 (1928).

where an individual signed a contract for purchase of a war memorial with the seller's knowledge that he was acting for a committee, the Georgia Court of Appeals held parol evidence admissible to render the members of the committee liable on the contract. However, in *Cartwright v. Giacosa*,⁵ the plaintiff contracted to purchase land from the defendants, husband and wife. The husband signed the contract but the wife did not. When the defendants refused to convey, the plaintiff sued for specific performance. The plaintiff claimed that the husband signed both as owner and as agent for his wife. The Tennessee court held that where there was nothing in the contract to indicate that the wife was a party, extrinsic evidence was not admissible to show that the husband was acting as her agent.

In the second context the principal wants to introduce evidence of an agency relationship in order to hold the other signing party, *T*, liable. The general rule is that this evidence is admissible.⁶ In *Ford v. Williams*,⁷ the principal sued a party who had entered a written contract to purchase flour from his agent. Although the other party at the time of executing the contract was unaware of the agency, the United States Supreme Court admitted the evidence. The Court stated that the evidence did not contradict the writing but merely explained it, and that the effect of the evidence was not to discharge the signing parties from liability, but to show that another party, *P*, could hold *T* liable.⁸

In the third context, where the agent seeks to introduce the agency in order to relieve himself from liability on the contract, the courts considering the question refused to admit the evidence.⁹ In *Bulwinkle & Co. Cramer & Blohme*,¹⁰ the defendant agent, signing his own name, contracted to sell corn to plaintiff. When the corn was

⁵ 216 Tenn. 18, 390 S.W.2d 204 (1965).

⁶ *E.g.*, *Ford v. Williams*, 21 How. (62 U.S.) 287 (1858); *Brooks v. Minturn*, 1 Cal. 481 (1851); *Genova v. Johnson*, 213 Ore. 47, 321 P.2d 1050 (1958); *Weiss v. Gumbert*, 191 Ore. 119, 227 P.2d 812 (1951); *Barbre v. Goodale*, 28 Ore. 465; 38 P. 67, 43 P. 378 (1896).

⁷ 21 How. (62 U.S.) 287 (1858).

⁸ *Id.* at 289.

⁹ *Nash v. Towne*, 5 Wall. (72 U.S.) 689 (1866); *Ricker v. B-W Acceptance Corp.*, 349 F.2d 892 (10th Cir. 1965); *Western Mach. Co. v. Northwestern Improvement Co.*, 254 F.2d 453 (9th Cir. 1957); *Pickands, Mather & Co. v. H. A. & D. W. Kuhn & Co.*, 8 F.2d 704 (6th Cir. 1925); *Martindell v. Bodrero*, 256 Cal. App. 2d 56, 63 Cal. Rptr. 774 (1967); *Bostwick Banking Co. v. Arnold*, 227 Ga. 18, 178 S.E.2d 890 (1970); *Spiegel v. Hayes*, 103 Ga. App. 293, 119 S.E.2d 123 (1961); *Mid-America Corp. v. Miller*, 372 P.2d 14 (Okla. 1962); *Bulwinkle & Co. v. Cramer & Blohme*, 27 S.C. 376, 3 S.E. 776 (1887); *Cream City Glass Co. v. Friedlander*, 84 Wis. 53, 54 N.W. 28 (1893); RESTATEMENT (SECOND) OF AGENCY § 323 (1958).

¹⁰ 27 S.C. 376, 3 S.E. 776 (1887).

found defective, plaintiff brought an action for damages. Defendant attempted to introduce oral testimony of an understanding between the parties that defendant was merely an agent and was not to be held personally liable. In excluding the evidence the South Carolina court quoted *Nash v. Towne*:¹¹ "Parol evidence can never be admitted for the purpose of exonerating an agent, who has entered into a written contract in which he appears as principal, even though he should propose to show, if allowed, that he disclosed his agency and mentioned the name of his principal at the time the contract was executed."¹²

Although there are no West Virginia cases involving contracts unambiguously appearing to have only two parties, dicta in related cases suggest what the West Virginia high court might do. In *Deitz v. Providence Washington Insurance Co.*,¹³ plaintiff, who had no title and thus no insurable interest in a house, purchased insurance in his own name for his wife, the record owner. When the house burned, the insurer refused to pay and the husband brought an action for his wife's benefit. The court held extrinsic evidence admissible to entitle the agent-husband to hold the insurer liable. The court stated: "[P]arol evidence is admissible for the purpose of introducing a new party, but never for discharging an apparent party to the contract."¹⁴ This statement would seem to indicate that the court might allow a principal to sue the third party on the contract but would not allow the agent to introduce the agency in order to escape liability. In *Clark v. Talbott*,¹⁵ the defendant signed a note, "W.M. Talbott, Agt." The court allowed the defendant to show that he had signed as agent for another in order to escape liability. However the court said: "If a simple contract, on its face, is the undertaking of the agent only, no reference being made on its face to representative capacity, parol evidence will not be received to exonerate the agent"¹⁶

II. EVALUATION

The decisions cannot be reconciled among themselves. Where *T* or *P* wants to introduce the agency, many courts allow the in-

¹¹ 5 Wall. (72 U.S.) 689 (1866).

¹² 27 S.C. at 385, 3 S.E. at 780.

¹³ 31 W. Va. 851, 8 S.E. 616 (1888).

¹⁴ *Id.* at 855, 8 S.E. at 619.

¹⁵ 72 W. Va. 46, 77 S.E. 523 (1913).

¹⁶ *Id.* at 50, 77 S.E. at 525.

roduction of the evidence, but where *A* seeks to introduce the agency, the courts zealously refuse to admit the evidence. Those courts which admit the evidence in the first two situations usually justify their decisions on the theory that the introduction is not a variation of the terms of the written contract but is merely "identifying the real party in interest."¹⁷ This may be true, but it is equally true in the third situation. In all three situations, the facts to be introduced—facts probative of the existence of the agency—are the same. If that creates a variance or contradiction of terms when introduced by the agent, then it likewise creates a variance when introduced by the principal or third party.

Another problem with the decisions is that the introduction of the agency relationship may not violate the parol evidence rule. The rule is not evidentiary but substantive.¹⁸ The usual statement of the rule is misleading because it purports to deal with the admissibility of evidence when in fact the primary thrust of the rule is to deal with its effect. Admissibility is only secondary. A more correct statement of the rule would be that extrinsic evidence of prior agreements is not *effective* to vary a written contract; therefore it is inadmissible. Professor Corbin claims that the parol evidence rule is really only a confusing way of stating the obvious substantive contract principle¹⁹ that the latest agreement of the parties governs.²⁰

¹⁷ See, e.g., *Pittman v. Roberts*, 122 So. 2d 333 (Fla. App. 1960).

¹⁸ As Dean Wigmore stated:

[T]he rule is in no sense a rule of Evidence, but a rule of Substantive Law. It does not exclude certain data because they are for one or another reason untrustworthy or undesirable means of evidencing some fact to be proved. It does not concern a probative mental process,—the process of believing one fact on the faith of another. What the rule does is to declare that certain kinds of fact are legally ineffective in the substantive law; and this of course (like any other ruling of substantive law) results in forbidding the act to be proved at all.

9 J. WIGMORE, EVIDENCE § 2400 at 3 (3d ed. 1940).

¹⁹ A prior contract is discharged by a subsequent inconsistent contract insofar as they are inconsistent. *Universal C.I.T. Credit Corp. v. Stewart*, 262 F.2d 745 (5th Cir. 1959); *Realty Corp. of America v. Burton*, 162 Cal. App. 2d 44, 327 P.2d 948 (1958); *Hulcher v. Adcock*, 25 Ill. App. 2d 255, 166 N.E.2d 168 (1960); *Martin v. Peyton*, 246 N.Y. 213, 158 N.E. 77 (1927); *Levicoff v. Richard I. Rubin & Co.*, 413 Pa. 134, 196 A.2d 359 (1964); *United Fuel Gas Co. v. Ledsome*, 109 W. Va. 14, 153 S.E. 303 (1930); *Simpson v. Mann*, 71 W. Va. 516, 76 S.E. 895 (1912); *Myers v. Carnahan*, 61 W. Va. 414, 57 S.E. 134 (1907). The prior contract or understanding, having been discharged, is irrelevant for the purpose of contradicting the later contract.

This is true whether the antecedent negotiations or agreements are written or verbal, and whether the later contract is written or verbal.²¹ The act which removes the legal efficacy from the incomplete prior negotiations or contracts of the parties is called the integration.²² Both Professors Williston and Corbin, the foremost theoreticians of the parol evidence rule, agree that integration depends on the intent of the parties.²³ However, even though they agree on the importance of "intent," they attach different meanings to that word.²⁴ Professor

Thus the prior contract terms are inadmissible. See 9 J. WIGMORE, EVIDENCE § 2400 (3d ed. 1940) and 1 J. WIGMORE, EVIDENCE § 2 (3d ed. 1940). This principle has four parts: (1) Evidence of a prior oral contract or understanding, C₁, is inadmissible to contradict a later oral contract, C₂. (2) Evidence of a prior written contract, C₁, is inadmissible to contradict a later oral contract. Most of the cases cited above in this footnote stand for the rule that a written contract is discharged by a later oral contract. Under the rule of evidence stated above, the terms of such prior written contracts would be irrelevant to disprove the later oral contract. (3) Evidence of a prior written contract, C₁, is inadmissible to contradict a later written contract. This is simply another way of stating the settled rule that the parol evidence rule prevents the introduction of prior written as well as oral evidence of C₁ to contradict a later written contract, C₂. (4) Evidence of a prior oral contract or understanding, C₁, is inadmissible to contradict a later written contract, C₂. This is the classic parol evidence rule.

²⁰ "Any contract, however made or evidenced, can be discharged or modified by subsequent agreement of the parties. No contract whether oral or written can be varied, contradicted, or discharged by an antecedent agreement. Today may control the effect of what happened yesterday; but what happened yesterday cannot change the effect of what happens today. This, it is believed, is the substance of what has been unfortunately called the 'parol evidence rule.'" 3 A. CORBIN, CONTRACTS § 574, at 371-72 (1960). Professor Corbin states that "this is the ordinary substantive law of contracts; it is not a rule of evidence and is not stated in the language of evidence, parol or otherwise." *Id.* at 375.

²¹ "It should be clearly observed that a written integration has no greater effect upon antecedent parol understandings and agreements than a parol integration has upon antecedent written agreements. In both cases alike, the later agreement discharges the antecedent ones in so far as it contradicts or is inconsistent with the earlier ones. In both cases alike, the later agreement must be shown to have been in fact made, that its terms were assented to, especially those terms that vary or contradict antecedent expressions and agreements." *Id.* at 369.

²² "This process of embodying the terms of a jural act in a single memorial may be termed the *Integration* of the act, i.e. its formation from scattered parts into an integral documentary unity. The practical consequence of this is that its scattered parts, in their former and inchoate shape, do not have any jural effect. . . ." 9 J. WIGMORE, EVIDENCE § 2400 at 76 (3d ed. 1940).

²³ Calamari & Perillo, *A Plea for a Uniform Parol Evidence Rule and Principles of Contract Interpretation*, 42 IND. L. J. 333 (1967); 4 S. WILLISTON, CONTRACTS § 633 (3d ed. 1961); 3 A. CORBIN, CONTRACTS §§ 573-96 (1960).

²⁴ Calamari & Perillo, *A Plea for a Uniform Parol Evidence Rule and Principles of Contract Interpretation*, 42 IND. L.J. 333 (1967).

Williston prescribes certain tests²⁵ by which one supposedly can determine the parties' intent from the written memorial alone. On the other hand, Professor Corbin believes that "intent" means the true intent of the parties, and that such intent can never be established merely by looking at a document but must always be established by extrinsic evidence.²⁶

If the courts were to use the Corbin analysis, evidence of the agency relationship would be admissible in those cases where *T* knew that *A* was *P*'s agent. Since they entered the contract with full knowledge of the agency, it could hardly be contended that they intended that a writing which made no reference to the agency was assented to as a complete expression of the agreement between them.

A Williston analysis might lead to a different result. Under this approach, the evidence would be admissible if "the alleged additional terms were such as might naturally be made as a separate agreement by parties situated as were the parties to the written contract."²⁷ However, no matter what the result, the Williston method of analysis is itself questionable since it purports to determine intent from only the writing and the opinion of the court as to what agreements would naturally be made separate from the writing, while rejecting the best source of evidence as to intent, the testimony of the parties themselves.²⁸

The history of the parol evidence rule suggests another reason for disregarding the rule in these situations. Many of the historical

²⁵ *Id.* at 338:

(1) If the writing expressly declares that it contains the entire agreement of the parties (what is sometimes referred to as a merger clause), the declaration conclusively establishes that the integration is total unless the document is obviously incomplete or the merger clause was included as a result of fraud or mistake or any other reason exists that is sufficient to set aside a contract. . . . (2) In the absence of a merger clause, the determination is made by looking to the writing. Consistent additional terms may be proved if the writing is obviously incomplete on its face or if it is apparently complete but, as in the case of deeds, bonds, bills and notes, expresses the undertaking of only one of the parties. (3) Where the writing appears to be a complete instrument expressing the rights and obligations of both parties, it is deemed a total integration unless the alleged additional terms were such as might naturally be made as a separate agreement by parties situated as were the parties to the written contract.

See 4 S. WILLISTON, CONTRACTS §§ 633, 636, 638, 645 (3d ed. 1961).

²⁶ Calamari & Perillo, *supra* note 23 at 339; 3 A. CORBIN, CONTRACTS § 582 (1960).

²⁷ Calamari & Perillo, *supra* note 23 at 338; 4 S. WILLISTON, CONTRACTS § 638 (3d ed. 1961).

²⁸ 3 A. CORBIN, CONTRACTS § 573.

forces which gave rise to the rule are no longer in existence. One of those forces was the primitive state of oral proof in trials.²⁹ Witnesses could not state the facts as they knew them but could simply swear their support for the contentions of one of the parties.³⁰ Evidence was admitted by way of documents and written averments in the pleadings rather than by oral testimony. This restricted use of oral proof made it difficult to prove prior oral contracts and negotiations for which there was no documentary support. A related problem was caused by the concept that juries were free to reach verdicts on facts known to them but not proven at trial. If an advocate could get statements contrary to the writing before the jury, he could plant the seed of doubt that might lead to an unjust verdict, even though the substance of the oral averments might not be proven. Thus, the courts originated the parol evidence rule to keep such oral statements from the jury.³¹

These situations no longer present a problem. In the modern trial, where oral testimony can easily be introduced to corroborate or contradict any oral averments as to the existence of the agency relationship, the danger that an unsubstantiated oral statement will lead to an incorrect verdict is considerably lessened. Moreover, as Professor Corbin stated, it is "a question of weight of evidence, not of admissibility."³²

Probably the real reason that the courts refuse to allow the agent to introduce evidence of the agency relationship is the implicit assumption that since he signed the writing in his own name, he is a party to the contract and therefore should be held liable. This unspoken assumption arises from the idea that the writing, rather than being only evidence of the contract, actually constitutes the contract, and that this written "contract" is superior to the oral agreements.

The idea that the writing actually becomes the contract had its inception as a result of the Statute of Frauds.³³ However, except as a shorthand method of stating how the parties have evidenced their agreement (by audible words or words written on paper), the con-

²⁹ 9 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 177-219.

³⁰ *Id.* at 178.

³¹ *Id.* at 176.

³² 3 A. CORBIN, CONTRACTS § 573, at 362 (1960).

³³ 9 J. WIGMORE, EVIDENCE § 2425 (3d ed. 1940).