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## The Inconsistent Collateral Contract

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## *I. Introduction*

### *1. The Parol Evidence Rule*

The parol evidence rule provides that evidence extraneous to a written contract cannot be received to add to, vary or contradict its terms. Although it can be so simply stated, this rule has been the source of a great deal of confusion in the law of contract. It was enforced rigidly when it first became established as part of the common law but has since been gradually relaxed. As the English courts became faced with new situations where too strict an adherence to the rule would have caused injustice, they created numerous apparent exceptions to it.

The decisions of the Canadian and other Commonwealth courts have followed a similar pattern. The rule has often been stated and applied in wide exclusionary terms yet, in a whole host of cases, evidence has been admitted to vary or add to, and sometimes even to directly contradict, the terms of a writing. In most of these instances, it was not made clear whether the evidence had been admitted by way of exception to the rule or because its true scope did not extend to cover them. The practice of the courts has been singularly divergent and many of the cases are impossible to reconcile. Part of the trouble has resulted from the fact that there has been no leading case which has attempted to collect all the authorities and definitively restate the scope of the rule. Nowadays, it almost seems that when a judge wants to exclude parol evidence, perhaps to save him the trouble of deciding between competing witnesses, he simply appeals to one of the many broad statements of the rule, whilst, if he wants to admit such evidence, he invokes one of the numerous exceptions or even ignores the rule altogether.

A notable instance of the inconsistent practice of the Canadian courts is their decisions dealing with the effect of clauses in contractual documents purporting to limit the parties' agreement to the terms set out therein. These "merger" or "disclaimer" clauses are the parol evidence equivalent of exemption clauses. They may

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be found in many standard form contracts and usually consist of a brief statement that there are no representations, promises, warranties or conditions other than those set out in the writing or simply that the writing contains the whole contract between the parties. On some occasions<sup>1</sup>, the Canadian courts have refused to allow such clauses to prevent the enforcement of what was seen to be the real agreement between the parties. However, on others<sup>2</sup>, they have been regarded as conclusive of the intention of the parties to exclude from their contract oral representations or promises.

## 2. *The Collateral Contract*

This is perhaps the most commonly invoked “exception” to the parol evidence rule. During the latter half of the nineteenth century, the English courts were willing on some occasions to give effect to oral promises by holding that there was a collateral contract. Parol evidence was regarded as inadmissible for the purpose of adding a *term* to a written document, nevertheless the courts would admit such evidence to prove that the parties entered into a prior separate contract, the consideration for which was the entry into the written principal contract. Not wishing to make a frontal attack on the rule, the courts used this device, albeit spasmodically, to cope with cases where too strict an adherence to the rule would have caused obvious injustice, i.e. where they were satisfied on the facts that the oral promise had been given.

Thus, in *Lindley v. Lacey*,<sup>3</sup> the plaintiff had refused to sign a contract for the sale of his business to the defendant until he received the latter’s promise to settle an action brought against him by one Chase. The Court of Common Pleas held that the promise was a separate collateral contract, the consideration for which was

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1. E.g., *Long v. Smith* (1911), 23 O.L.R. 121 (D.C.); *California Standard Co. v. Chiswell* (1955), 14 W.W.R. 456 (Alta. S.C.); *Frontier Finance Ltd. v. Hynes* (1957), 10 D.L.R. (2d) 206 (Ont. C.A.) *Ferland v. Keith* (1959), 15 D.L.R. (2d) 472 (Ont. C.A.); *Francis v. Trans Canada Trailer Sales Ltd.*, [1969] 6 D.L.R. (3d) 705 (Sask. C.A.); *Canadian Acceptance Corp. v. Mid-Town Motors Ltd.* (1970), 72 W.W.R. 365 (Sask. D.C.).

2. E.g., *Allcock v. Manitoba Windmill and Pump Co.* (1911), 18 W.L.R. 77 (Sask. S.C.); *Advance Rumely Thresher Co. v. Keene*, [1919] 2 W.W.R. 143 (Sask. C.A.); *Kaster v. Cowan*, [1925] 2 W.W.R. 186 (Alta. S.C.); *Empire Milking Machine Co. v. Petherick*, [1933] O.W.N. 356 (C.A.); *Spelchan v. Long* (1956), 2 D.L.R. (2d) 707 (B.C.C.A.); *Aetna Factors Corp. v. Breau* (1957), 10 D.L.R. (2d) 100 (N.B. Cty. Ct.); *Dodds v. Millman* (1964), 47 W.W.R. 690 (B.C.S.C.).

3. (1864), 17 C.B. (N.S.) 578; 144 E.R. 232.

the entry into the later written contract, and could be enforced against the defendant. Erle C. J. said:<sup>4</sup>

I take it to be substantially the same as if, the agreement for the sale of the goods being before them, Lacey had said to Lindley, 'In consideration of your signing that agreement, I will settle Chase's action'.

In *Morgan v. Griffith*<sup>5</sup> the plaintiff refused to sign a lease unless the defendant promised to destroy the rabbits that were overrunning the land. The defendant gave his undertaking that they would be destroyed and the plaintiff then requested that a term to that effect should be inserted in the lease. The defendant refused but repeated his promise to destroy the rabbits, whereupon the plaintiff signed the lease. The Court of Exchequer enforced the oral promise as a collateral contract. This decision was followed two years later on similar facts in *Erschine v. Adeane*.<sup>6</sup>

The Canadian courts soon followed suit and enforced oral agreements as collateral contracts in a number of early cases.<sup>7</sup>

Although contrary to its spirit, the collateral contract did not constitute a departure from the letter of the rule. The courts' reasoning may be summarised as follows — "The parol evidence rule only prevents the addition of *terms* to a written contract. When we find a collateral contract, we are not adding terms. Indeed, we are accepting that the written contract contains a complete record of its terms. A collateral contract is a separate contract altogether and is related only in the sense that the entry into the written contract furnishes its consideration." Despite this readily acceptable rationalisation, the collateral contract is a "device" because, although there must be some indication on the facts that the parties could have intended to make two contracts rather than one, in reality they intend one contract only. However, its utility to overcome the parol evidence rule has never been doubted, particularly since the House of Lords decision in *Heilbut, Symons & Co. v. Buckleton* where Lord Moulton summed up the law as follows:<sup>8</sup>

It is evident, both on principle and on authority, that there may be a contract the consideration for which is the making of some

4. (1864), 17 C.B. (N.S.) 586; 144 E.R. 235.

5. (1871), L.R. 6 Ex. 70.

6. (1873), L.R. 8 Ch. App. 756.

7. E.g. *Byers v. McMillan* (1887) 15 S.C.R. 194 (Man.); *Brownsberger v. Harvey* (1909), 12 W.L.R. 596 (Sask. S.C.); *Tocher v. Thompson* (1913), 5 W.W.R. 812 (Man. C.A.).

8. [1913] A.C. 30 at 47 (H.L.).

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.

The device of the collateral contract has, of course, been utilised in contexts other than the parol evidence rule. For example, where the transaction is one which is required to be evidenced in writing by the Statute of Frauds, the courts, by adopting a two-contract rather than a one-contract analysis, have been able to avoid rendering the transaction unenforceable on the ground that the memorandum does not contain all the material terms.<sup>9</sup> The collateral contract has also been utilised to enforce third party promises<sup>10</sup> and as a saving device where the written contract is illegal<sup>11</sup> or where to regard the 'collateral' promise as part of the one contract would render the whole contract illegal.<sup>12</sup>

It is not, however, the writer's intention to consider in detail in this article the nature of the collateral contract or the situations in which it has been used. These topics have been adequately dealt with elsewhere.<sup>13</sup> Rather it is proposed to discuss the important limitation placed on the enforceability of a collateral contract by the early decisions that it must not contradict the terms of the principal written contract. It will be the writer's contention that, in principle, this requirement is unjustified, despite the overwhelming weight of authority to the contrary.

## II. *The Requirement of Consistency*

On numerous occasions, alleged collateral contracts have been upset on the ground that they contradicted the terms of the principal contract and, even on the occasions when a collateral contract has been upheld, the requirement of consistency has almost always been emphasised. The authorities include decisions of the Privy

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9. *Angell v. Duke* (1875), L.R. 10 Q.B. 174; *Jameson v. Kimmel Bay Land Co.* (1931), 47 T.L.R. 593 (C.A.).

10. As in *Andrews v. Hopkinson* [1957] 1 Q.B. 229; [1956] 3 All.E.R. 422

11. As in *Strongman (1945) Ltd. v. Sincok*, [1955] 2 Q.B. 525; [1955] 3 All.E.R. 90 (C.A.).

12. *Mouat v. Betts Motors Ltd.*, [1959] N.Z.L.R. 15 (J.C.)

13. K. W. Wedderburn, *Collateral Contracts*, [1959] Camb. L.J. 58.

Council,<sup>14</sup> the Supreme Court of Canada<sup>15</sup> and other Canadian courts,<sup>16</sup> the English Court of Appeal,<sup>17</sup> the High Court of Australia,<sup>18</sup> and the New Zealand Supreme Court.<sup>19</sup>

The sole authority to the contrary is *City and Westminster Properties (1934) Ltd. v. Mudd*.<sup>20</sup> The defendant had been tenant of the plaintiff's shop for a number of years and, during this period, he had been allowed to sleep in a room behind the shop. In the course of negotiations for a new lease, the defendant had managed to have struck out a clause prohibiting "lodging dwelling or sleeping", but another clause restricting the use of premises to "showrooms, workrooms and offices only" was retained. The defendant told the plaintiff's agent that he would not sign the lease with a clause about not sleeping there and that he wanted a clause inserted stating expressly that he could sleep on the premises. The agent replied that this was impossible because it was against the terms of the head lease; this was in fact untrue but was held not to be fraudulent. However, the agent later added that there would be no objection to the defendant's continuing to reside there if he would sign the lease. Six years later the plaintiff claimed forfeiture of the lease on the ground that the defendant was residing on the premises in breach of the covenant in the lease. Harman J. found that a promise had been made to the defendant before the execution of the lease that, if he would sign it in the form put before him, the landlord would not enforce the covenant about using the premises for business purposes only, and that it was in reliance on this promise that he executed the lease. After rejecting the claim for rectification and the argument

14. *Lysnar v. National Bank of New Zealand Ltd.*, [1935] N.Z.L.R. 129 (J.C.).

15. *Byers v. McMillan* (1887), 15 S.C.R. 194 (Man.); *Hawrish v. Bank of Montreal*, [1969] S.C.R. 515 (Sask.).

16. *Steine v. Mathieu*, [1923] 3 W.W.R. 493 (Sask. C.A.); *Spurr v. Grevatt*, [1923] 3 D.L.R. 137 (N.S.S.C.); *Canadian Fur Auction Sales Co. v. Neely*, [1954] 2 D.L.R. 154 (Man. C.A.); *Kaplan v. Andrews*, [1955] 4 D.L.R. 553 (Ont. C.A.); *Canadian Imperial Bank of Commerce v. Wilcox* (1969), 68 W.W.R. 710 (Sask. Q.B.).

17. *Carter v. Salmon* (1880), 43 L.T. 490 (C.A.); *Henderson v. Arthur*, [1907] 1 K.B. 10 (C.A.); *Horncastle v. The Equitable Life Assurance Soc. of U.S.A.* (1906), 22 T.L.R. 735 (C.A.).

18. *Hoyt's Proprietary Ltd. v. Spencer* (1919), 27 C.L.R. 133 (H.C. of A.); *Maybury v. Atlantic Union Oil Co.* (1953), 89 C.L.R. 507 (H.C. of A.).

19. *Bradshaw v. Fitzgerald*, [1919] G.L.R. 78 (N.Z.S.C.); *Hammond v. Commissioner of Inland Revenue* [1956] N.Z.L.R. 690 (S.C.).

20. [1959] Ch. 129; [1958] 2 All.E.R. 733.

21. *Id.* at 145-146.

based upon equitable estoppel, he held that "there was a clear contract acted upon by the defendant to his detriment and from which the plaintiffs cannot be allowed to resile".<sup>21</sup>

This oral contract was clearly inconsistent with the terms of the lease. The latter provided that the premises could *only* be used for trade purposes, whereas the oral contract was that this covenant would not be enforced and that the defendant could live on the premises. The difficulty with the case is that Harman J. did not actually refer to the contract as a "collateral contract" and neither was reference made to the long line of authorities holding that a collateral contract must not be inconsistent with the terms of the principal contract. In particular, the objection can be raised that the decision cannot be reconciled with a number of prior English Court of Appeal decisions<sup>22</sup> and the Privy Council decision in *Lysnar v. National Bank of New Zealand Ltd.*<sup>23</sup> The justice of the decision, once the defendant's evidence was accepted, is, however, apparent.

The decision in *Lysnar* means that the New Zealand courts will no doubt feel bound to uphold the requirement of consistency and therefore will not follow *Mudd*. However, the Supreme Court of Canada is no longer bound by decisions of the Privy Council, since the abolition of appeals thereto. Nor is it apparently now bound by its own previous decisions.<sup>24</sup> Accordingly, it is possible for the Supreme Court to reject its decision in *Hawrish v. Bank of Montreal*<sup>25</sup> and follow *Mudd*. It will be suggested in the following pages that this course ought to be adopted should the occasion arise because there are no valid reasons why a collateral contract must be entirely consistent with the terms of the principal written contract.

That a collateral contract could not contradict the parties' written contract seems to have been regarded by the early courts as so obvious as not to require explanation. They could conceive of contracting parties making an oral arrangement on *additional* points but certainly not one which actually contradicted the written agreement. Would not the parties alter the written agreement in the latter case? The written form was seen as necessarily being the dominant expression of the contract. The collateral contract was a concession, contrary to the spirit of the parol evidence rule, and was

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22. See cases cited note 17, *supra*.

23. [1935] N.Z.L.R. 129 (J.C.)

24. See generally, B. Laskin, *The British Tradition in Canadian Law* (London: Stevens and Sons, 1969) at 62-67.

25. [1969] S.C.R. 515; (1969), 2 D.L.R. (3d) 600 (Sask.)

not to be taken too far. However, once it is understood that the object of evidence as to a collateral contract is to set up a separate contract so that the parol evidence rule has no application, then some other reason must be found for rendering a collateral contract unenforceable on the ground of inconsistency with the principal contract. Since the parol evidence rule does not apply to collateral contracts, it cannot logically be appealed to as a justification for the consistency requirement.

### *1. The Argument Based on the Doctrine of Consideration*

It was briefly noted in *Walker Property Investments (Brighton) Ltd. v. Walker*<sup>26</sup> that where the alleged collateral contract contradicts the principal contract, the promisee cannot show any consideration for it. The Australian courts have adopted a similar approach but have explained this objection in rather more detail. The leading case is *Hoyt's Pty. Ltd. v. Spencer*,<sup>27</sup> which was expressly approved by the Supreme Court of Canada in *Hawrish v. Bank of Montreal*.<sup>28</sup> The defendant subleased certain premises to the plaintiff for a period of four years, the lease providing that the defendant might, at any time during the term, terminate the lease by giving four weeks' notice in writing. Before the expiration of the term the defendant did give the requisite notice. The plaintiff brought an action claiming damages for breach of contract, alleging that prior to the execution of the lease the defendant had promised that, if the plaintiff would take the lease, he would not give notice unless required to do so by the head-lessor. He further alleged that he took the lease in reliance upon this promise and that the defendant had not been required by the head-lessor to give notice. It was held by the High Court of Australia that, assuming the prior oral agreement had been made, nevertheless it was invalid and unenforceable on the ground of inconsistency with the written contract.

There can be no doubt that the two agreements were in conflict. The lease gave the lessor the unqualified right to give the stipulated notice, whereas the parol agreement limited that right; it was only to arise upon a requirement made by the head-lessor. The reason why

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26. (1947), 177 L.T. 204 at 206 (C.A.).

27. (1919), 27 C.L.R. 133 (H.C. of A.).

28. [1969] S.C.R. 515; (1969), 2 D.L.R. (3d) 600 (Sask.).



this inconsistency rendered the prior agreement unenforceable was explained by Isaacs J. as follows:<sup>29</sup>

The main contract here, when utilized to form the consideration for the collateral contract, must be taken exactly as it is. Its provisions do not change according as it is considered as an independent contract or as a consideration for the collateral contract. A principle that must govern the bargain of a contractual promise made in consideration of entering into the main contract is that the parties shall have and be subject to *all* (not some only) of the respective benefits and burdens of the main contract.

Later he said:<sup>30</sup>

The truth is that a collateral contract . . . being supplementary only to the main contract, cannot impinge on it, or alter its provisions or the rights *created by it*; consequently, where the main contract is relied on as the consideration in whole or part for the promise contained in the collateral contract, it is a wholly inconsistent and impossible contention that the other party is not to have the full benefit of the main contract as made.

Similar reasoning was later adopted by the High Court in *Maybury v. Atlantic Union Oil Co. Ltd.*<sup>31</sup> The appellant, a well-known radio personality, had entered into a written contract with the respondent company to broadcast a number of commercial radio programmes on its behalf. He claimed damages for breach of a collateral agreement whereby the hours his programmes were to be broadcast were not to coincide with broadcasts by another radio personality. However, in the written contract there was a clause stating that “the date, hour or time for each broadcast shall be as determined by the company”. The High Court refused to enforce the alleged collateral contract on the ground that

if such a collateral agreement is to have effect as a contract it must be consistent with the provisions of the main agreement, the making of which by the other party provides the consideration. If the promise sought to modify, control or restrict the principal agreement *it would detract from the very consideration which is alleged to support the promise.*<sup>32</sup>

The view taken in both these cases is that the assumption of *all* the obligations under the written contract can be the *only*

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29. (1919), 27 C.L.R. 133 at 145-146 (H.C. of A.)

30. *Id.* at 147.

31. (1953), 89 C.L.R. 507 (H.C. of A.)

32. *Id.* at 517. Emphasis added.

consideration for a collateral contract. Of course, if this is the correct view then, where the collateral contract is inconsistent with the terms of the written contract, the consideration for the former will be illusory. If A promises B that he will not broadcast B's programme at a certain time in consideration of B's entering into a written contract, one term of which gives A complete discretion as to the times of broadcast, what is B's legal position? If A breaks his promise and B sues for breach of a collateral contract, A will query the consideration for the promise. B will reply, "my entering into the written contract", but he then faces the difficulty that part of *that* consideration is the promise to permit A to broadcast the programmes at any time. If he refuses to allow A to do so, he is failing to observe his obligations under the principal contract.

However, it is suggested that the view adopted by the High Court that the assumption of *all* the obligations under the written contract can be the *only* consideration for a collateral contract cannot be supported. It is true that, when a collateral contract is inconsistent with the terms of the principal contract, it cannot be argued that the assumption of *all* the obligations under that contract provides consideration for the collateral contract. But why must it be all or nothing? Cannot the promisee argue that the assumption of the obligations under the principal contract, *other* than those negated by the oral agreement, provides adequate consideration?

The approach of Isaacs J. in *Hoyt's Pty. Ltd. v. Spencer* was based upon the traditional conception, arising from the early cases, of a collateral contract as being necessarily "supplementary only to the main contract"<sup>33</sup> and therefore, by definition, not being inconsistent therewith. This has largely resulted from the use of the word "collateral" which has unfortunate connotations in that it

suggests something that stands side by side with the main contract, springing out of it and fortifying it. But . . . the purpose of the device usually is to enforce a promise given prior to the main contract and but for which this main contract would not have been made. It is rather a preliminary than a collateral contract.<sup>34</sup>

The natural result of this general usage of the word "collateral" to describe what is in truth a "preliminary" contract has been that the subsequent written contract has always been regarded as necessarily

33. (1919), 27 C.L.R. 133 at 147 (H.C. of A.).

34. Cheshire & Fifoot, *The Law of Contract* (2d. Aust. ed. Sydney: Butterworths, 1969) at 144.

*dominant*, as governing the operation of the preliminary oral contract, despite the fact that the latter exists as a separate legal contract. Why should this be so? Prior to the conclusion of the “collateral” contract, there is no binding written contract and since, without the collateral contract, the written contract would never have been entered into, is it not more realistic to regard the first contract as having been intended to govern the operation of the subsequent written contract? Since the objective of the court is to determine the true intention of the parties, it is manifest, once it is clearly established that an oral contract was made the consideration for which was the entry into a later written contract, that the intention of the parties must have been that the oral contract was to prevail in the event of its being inconsistent with the terms of the written contract.

Furthermore, it is suggested that there is no valid reason why, when the entry into a written contract is utilised as the consideration for the entry into another contract, the benefits and burdens of the former must remain completely intact, as stated by Isaacs J. in *Hoyt's Pty. Ltd. v. Spencer*. The test of whether a contract, the consideration for which was agreed upon as the entry into another contract, can stand should *not* be whether each of the parties can get the full benefit of the later contract as drawn up. The real question should be viewing the terms of the first contract in the light of the terms of the second contract, *is there adequate consideration to support the first contract?*

When the “preliminary” contract is inconsistent in some respects with the terms of the principal contract, then, if enforceable, it has the effect of reducing the value of the consideration that the promisor will get from the principal contract. However, this does not mean that there is *no* consideration at all for the preliminary contract. What the promisee can argue is that the consideration is not the assumption of *all* the obligations under the principal contract, but the assumption of such obligations as are not inconsistent with what the promisor agreed to under the first contract. Indeed, once that contract has been *proved* to the court's satisfaction, it is manifestly absurd to analyse the transaction in any other way. Otherwise, if the High Court approach is adopted, the preliminary contract must be regarded as if the promisor said, for example, “I promise not to do this in consideration of your promising to let me do it.” The only realistic analysis is that the

promisor has waived in advance certain of his rights contained or to be contained in the written contract.

In this light, it will be useful to reconsider the basic facts in *Hoyt's* case. A says to B, "I will sign this lease only if you promise that you will not give notice unless event C occurs". If it happens that the lease includes a covenant that B may give four weeks' notice at any time, the prior oral agreement ought to be construed as if B has promised not to enforce that covenant except in event C. Furthermore, it is suggested that A's promise to sign the lease and therefore, implicitly, to comply with the various terms set out therein, *except* any relating to notice, ought to be regarded as providing adequate consideration for the oral agreement.

If the attention of the lessee in *Hoyt's* case had been expressly drawn to the provision in the lease relating to notice, it is possible that the preliminary agreement might have been expressed rather differently. The lessee may have said, "I will sign this lease if you promise not to enforce clause 10 relating to notice unless event C occurs". Adequate consideration can more easily be inferred when the preliminary agreement is actually expressed in terms of a promise not to enforce the inconsistent covenant in the principal contract. A *benefit* accrues to the lessor in that the lessee will sign the lease and abide by all the covenants, albeit except clause 10. The *detriment* to the lessee is that he commits himself to lease the premises on the terms set out, again except clause 10.

## 2. *A Question of Weight*

In the situation just considered, the more natural and usual way of carrying out the oral agreement would have been by amending clause 10 of the lease. However, this should not automatically render the oral agreement unenforceable or evidence of it inadmissible. It indicates perhaps that the alleged oral agreement was never made, but it is not conclusive. Other evidence may satisfactorily explain why the parties did not adopt the ordinary course of altering the written document. Maybe they were reluctant to alter a formal looking document prepared by their legal advisers, or one of the parties legitimately wanted to keep the term a secret from his relatives or other third parties. Perhaps the lessee was too embarrassed to ask for an amendment lest he be met by a testy reply, "Do you doubt my word?" Anyway, the long history of litigation on the parol evidence rule indicates that contracting parties, for reasons best known to themselves, have often not

adopted what might appear from the outside to be the ordinary course of amending their written agreement in order to bring it more into line with their actual agreement. Therefore, it is suggested that the failure of the parties to amend the principal contract is a matter which goes only to *weight*. The courts ought always to be more prepared to accept evidence of an *additional* agreement (something on a topic not covered at all in the writing) than of a *contradictory* oral agreement, but if the evidence satisfies the court that the latter agreement was concluded, it ought to be enforced.

It is not possible to explain *Hoyt's* case on the basis that the oral agreement was not proved. The High Court assumed for the purposes of its decision that the oral agreement had in fact been made, so that no question of the likelihood of it not having been made arose. It is therefore suggested that the case was wrongly decided and ought not to be followed.

In his judgment in *Hoyt's* case, Knox C. J. gave the following example of an inconsistent collateral contract which was unenforceable.<sup>35</sup>

I will sign a contract to pay you £1,000 for a house, £250 in cash and the balance by promissory notes at 12, 24 and 36 months, if in consideration of my signing that contract you will enter into an agreement with me that you will not seek to enforce payment of the £250 cash or delivery of the agreed promissory notes but will accept other promissory notes of different amounts and currency.

It is suggested that even in this rather extreme example adequate consideration for the oral contract can be discerned. The purchaser at least suffers the detriment of being obliged to purchase the house and to eventually pay £1,000 for it, and the seller gets a corresponding benefit. The fact that it is very unlikely that the parties would have made such an agreement without altering the written contract is a matter that goes to weight. Cogent evidence would be required. However, if the purchaser can establish the existence of the oral agreement, and this will generally involve his explaining to the court's satisfaction why the written contract remained unaltered, it should be enforced.

It is not suggested that all the cases where the courts refused to uphold an oral agreement as a collateral contract on the ground of inconsistency were wrongly decided. Indeed, in the writer's opinion, it is on the ground that no collateral contract was made out

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35. (1919), 27 C.L.R. 133 at 140 (H.C. of A.).

on the facts that the actual decision of the Privy Council in *Lysnar v. National Bank of New Zealand Ltd.*<sup>36</sup> can be justified. The facts were rather unusual and it is necessary to set them out in some detail. The plaintiff owned a sheep-station which was mortgaged to the East Coast Commissioner. The venture had proved unsuccessful and the Commissioner put the property up for sale and bought it in. The defendant bank had also made heavy advances to the plaintiff which were outstanding, the principal security being a mortgage over the stock. Both the plaintiff and the defendant wanted to avoid a forced sale of the stock which, at the time, would not have realised nearly enough to pay off the debt. Negotiations took place between the plaintiff and the Commissioner, with the plaintiff of necessity keeping the defendant informed as to developments. Finally, the Commissioner by letter dated 29 April, offered the plaintiff a lease of the land on the terms set out therein. The letter required the defendant to assist the plaintiff either by joining in a tripartite agreement or by making an agreement with the plaintiff to do what was necessary on its part to carry out the Commissioner's conditions. These conditions prohibited the defendant from controlling the management and finance of the station, the object being to preclude the defendant from applying significant amounts of the revenue towards reduction of its debt.

On 1 May, the manager of the defendant bank, a Mr. Grose, signed and handed a letter to the plaintiff agreeing to assist him in terms of the Commissioner's letter. The plaintiff immediately took this letter to the Commissioner and then accepted his offer. On 2 May, the defendant wrote to the plaintiff stating, in effect, that it was a condition of its providing financial assistance that the bank was to control the management and finances of the station. Although this letter was clearly inconsistent with the terms of the Commissioner's letter, the bank did not send a copy of it to the Commissioner and neither was he warned that the bank was alleging a different agreement from that contained in its letter of 1 May. On the contrary, the bank, on 4 May, wrote to the Commissioner confirming the contents of that letter.

Upon receiving the bank's letter of 2 May, the plaintiff replied denying the condition as to management, whereupon the bank repudiated the arrangement. On 14 May, the bank finally sent a copy of its letter of 2 May to the Commissioner and stated that, as

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36. [1935] N.Z.L.R. 129 (J.C.).

the plaintiff would not agree to the conditions set out, the negotiations were at an end. As a result the Commissioner refused to grant the lease and the plaintiff sued for damages for breach of contract. Before the Privy Council, the defendant alleged that, if its letter of 1 May must be regarded as a contract in writing, there was concluded at the same time a collateral oral contract in the terms afterwards set out in the letter of 2 May. However, it was held that evidence of the collateral oral contract was inadmissible since it was inconsistent with the terms of the contract in writing.

This decision can be supported on the alternative ground given by the Privy Council, viz. that it was inconceivable that the alleged oral agreement was in fact made. Lord Wright said.<sup>37</sup>

In this case it is not easy to reconcile with the idea of the suggested oral agreement the fact that Mr. Grose signed the letter he did sign, with the intention that it should be passed on to the Commissioner, who, as he knew, had taken a strong stand throughout on the question of management. He intended his letter to be shown to the Commissioner as the condition on which a lease should be granted; if he had intended to insist on the terms quoted above which appeared in the letter of 2 May 1931, in particular, the terms putting him in the position of a mortgagee in possession, and about management and control, it is scarcely credible that he would not have expressed them in his letter which he wrote at the interview . . . Their Lordships have felt some difficulty in understanding why, if Mr. Grose was insisting that what he agreed was contained in the letter of 2 May 1931, he did not at once inform the Commissioner, instead of waiting to do so until he had decided to repudiate the whole transaction, and why on that assumption he came to write to the Commissioner the letter of 4 May 1931.

Such was the nature of the transaction and the subsequent conduct of the defendant that it was inconceivable that the oral agreement was made. The surrounding circumstances clearly indicated that the bank had had a change of heart and was seeking a way out. The only other possibility was that the parties fraudulently intended to deceive the Commissioner which, obviously, the defendant was not in a position to argue.

The decision of the Supreme Court of Canada in *Hawrish v. Bank of Montreal*<sup>38</sup> can also be supported on the ground that no collateral contract was made out on the facts. Hawrish executed a guarantee of a company's indebtedness to the bank. The guarantee stated that it

37. *Id.* at 141-142.

38. [1969] S.C.R. 515; (1969), 2 D.L.R. (3d) 600 (Sask).

was to be continuing and to cover existing as well as future indebtedness of the company up to \$6000. It also contained a clause whereby the guarantor acknowledged that no representations had been made to him on behalf of the bank. However, Hawrish alleged that he received an oral assurance from the assistant manager of the bank that the guarantee was to cover existing indebtedness only and that he would be released from his guarantee when the bank obtained a joint guarantee from the directors of the debtor company. He argued that parol evidence of this oral agreement was admissible since it amounted to a collateral contract. It was held that the alleged collateral contract was unenforceable since it clearly contradicted the terms of the written guarantee. However, Judson J. did state that he was not convinced that the evidence clearly indicated the necessary contractual intention. Although it was not in issue he was disposed to agree with the view of the Saskatchewan Court of Appeal on this point.<sup>39</sup> There Hall J. A. held that Hawrish had not established<sup>40</sup>

a clear contract or undertaking on the part of the [bank] not to rely on the rights set out in the guarantee but rather to discharge [him] when the directors had signed the guarantee, and further that [he] relied upon such undertaking and would not have executed the guarantee without it.

In other words, Hawrish had not discharged the onus of proving the necessary *animus contrahendi*, as required by Lord Moulton in *Heilbut, Symons & Co. v. Buckleton*.<sup>41</sup>

### 3. Some Further Arguments

There are a number of subsidiary arguments that can also be raised against allowing inconsistency to operate as a bar to the enforcement of a collateral contract. These mainly relate to the problem of distinguishing, on the basis of the courts' decisions on various aspects of the parol evidence rule, between what is a *contradiction* and what is merely *additional* or *supplemental* to the terms of a written contract. Although expressly recognised on a few occasions,<sup>42</sup> no detailed consideration of the problem has ever been

39. *Id.* at 520.

40. (1967), 61 W.W.R. 16 at 22 (Sask. C.A.).

41. [1913] A.C. 30 at 47 (H.L.).

42. *Lysnar v. National Bank of New Zealand Ltd.*, [1935] N.Z.L.R. 129 at 140 (S.C.); *Hammond v. C.I.R.*, [1956] N.Z.L.R. 690 at 696 (S.C.).



attempted in the collateral contract cases. However, some indication of the difficulties inherent in distinguishing between a contradiction and a mere addition to or variation of the terms of a written contract can be seen from an examination of the cases in which the courts have considered whether a term should be implied into a written contract by reference to a custom or usage prevailing in a particular locality or trade.

#### 4. *Parol Evidence of Implied Terms*

The parol evidence rule only applies to the *express* terms of a written contract. It prevents the variation or contradiction of the express terms and the addition of orally agreed terms, but has no application to *implied* terms which courts sometimes read into contracts by reference to the presumed intention of the parties. Therefore, parol evidence is admissible, without contravening the parol evidence rule, to prove the existence of facts and circumstances surrounding the making of the contract which are relevant in determining whether or not an implied term ought to be read into the contract.

The courts have stipulated that an implied term must not *contradict* the written terms. However, this is not a result of the parol evidence rule. Since the implication of a term into a contract rests upon the assumption that it represents the intention of the parties, it must necessarily be excluded if the express terms of the contract disclose a contrary intention.

The cases on terms implied from custom, in particular, show how the courts have never come to grips with the concept of contradiction. Of course, in some of the cases, the custom *did* quite clearly contradict the express terms. These were cases where the written contract specifically dealt with the very subject matter of the custom. Thus, in *Palgrave, Brown & Son Ltd. v. Owners of S. S. Turid*<sup>43</sup> a charterparty provided that the risk and expenses of discharging the cargo should be borne by the *charterer* and it was held that a custom whereby the risk and expenses were to be borne by the *shipowner* was inconsistent with the charterparty and, accordingly, could not be enforced.<sup>44</sup> Another case where there was a clear contradiction is *Les Affreteurs Reunis Societe Anonyme v. L.*

43. [1922] 1 A.C. 397 (H.L.).

44. See also *Rederi Aktiebolaget Acolus v. W. N. Hillas & Co.* (1927), 136 L.T. 385 (H.L.).

*Walford (London) Ltd.*<sup>45</sup> A clause in a charterparty provided that the respondent, a broker, who had negotiated the charterparty on behalf of the charterers, was entitled to a commission on the estimated gross amount of hire *on signing the charter*. It was held that the shipowners could not set up a custom whereby commission was payable only *if hire was earned* under the charterparty since it contradicted the terms of the clause.<sup>46</sup>

These are clear cases but others are not so easy to reconcile. The courts have pointed out that

merely that it varies the apparent contract is not enough to exclude the evidence; for it is impossible to add any material incident to the written terms of a contract without altering its effect, more or less.<sup>47</sup>

However, there are many situations where the distinction between what varies or adds to the written terms and what *contradicts* them is difficult to draw. As Treitel points out, the matter is often “largely one of emphasis”.<sup>48</sup>

In *Webb v. Plummer*<sup>49</sup> the custom of the country dictated that an out-going tenant was entitled to an allowance for foldage (“a mode of manuring the ground”)<sup>50</sup> from an in-coming tenant. It was held that an express stipulation in a lease whereby *other* payments were to be made by the in-coming tenant excluded the implication of the custom. Because the lease made express provision for certain payments this was taken to be an exhaustive list. However, it is arguable that the custom did not contradict the express terms of the lease since it made no reference to foldage whatsoever — it did not deal with the very subject matter of the custom.

*Webb v. Plummer* illustrates that whether parol evidence contradicts the written terms will often depend upon the starting-point adopted. The court could have chosen either of two possible criteria against which to assess whether or not the written terms excluded the custom. They were either (a) reference to payment for *foldage*, or (b) reference to payment of *any type*. The

45. [1919] A.C. 801 (H.L.).

46. For another clear instance, see *Summers v. The Commonwealth* (1918), 25 C.L.R. 144 (H.C. of A.).

47. *Brown v. Byrne* (1854), 3 El. & Bl. 703 at 715-716; 118 E.R. 1304 at 1309 (per Coleridge J.) (Q.B.D.).

48. *The Law of Contract* (3d ed. London: Stevens & Sons, 1970) at 156.

49. (1819), 2 B. & Ald. 746; 106 E.R. 537 (K.B.D.).

50. *Hutton v. Warren* (1836) 1 M. & W. 466 at 477; 150 E.R. 517 at 522 (per Parke B) (Exch.).

court chose the latter, which was much wider. However, it could equally well have chosen the narrower criterion (reference to payment for foldage) and said that, since the contract only dealt with *other* payments and not with the exact subject matter of the custom, it was not inconsistent with the written terms. Let us assume that a written contract provides that a payment shall be made upon the happening of events A. B. and C. On one possible view, it is clearly inconsistent therewith to allege that there is a further event D. upon which payment is to be made. If, on the other hand, the criterion adopted is whether the contract anywhere refers to event D, then it is not inconsistent with the written terms to introduce evidence thereof, since they only deal with events A. B. and C. Indeed, some of the subsequent cases have adopted this latter approach. Two good illustrations are *Hutton v. Warren*<sup>51</sup> and *Brown v. Byrne*.<sup>52</sup>

In *Hutton v. Warren* a custom of the country entitled the tenant of a farm to receive, on quitting, a reasonable allowance for seeds and labour spent on the arable land in the last year of his tenancy. The lease contained an express stipulation that the tenant was to consume three-quarters of the hay and straw upon the farm and spread the manure arising therefrom; the landlord was to pay a reasonable price for any manure left over at the end of the term. It was argued that since the lease expressly dealt with payment for the tenant on his quitting, this was the only payment to be made. However, the court rejected this argument holding that the custom did not contradict the written terms which dealt with manuring only, not with sowing and ploughing as did the custom. *Webb v. Plummer* was distinguished on the ground that<sup>53</sup>

no doubt could exist in that case but that the language of the lease was equivalent to a stipulation that the lessor should pay for the things mentioned, and no more.

Instead of measuring inconsistency against whether the lease specified *any* payments upon quitting, the Court chose the narrower criterion of whether the lease dealt with the very subject of the custom — payment for seeds and labour.

In *Brown v. Byrne* there was a contract to pay freight on delivery at a certain rate per pound. By custom the shipowner was bound to

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51. *Supra*.

52. (1854), 3 El. & Bl. 703; 118 E.R. 1304 (Q.B.D.).

53. (1836), 1 M. & W. 477; 150 E.R. 522 (*per* Parke B) (Ex ch.).

allow three months' discount but he refused on the ground that the custom was not binding in law as it contradicted the written contract. It was held that the shipowner must allow the deduction. Coleridge J. said:<sup>54</sup>

The written contract expressly settles the rate of payment: the custom does not set this aside; indeed it adopts it, as that upon which it is to act, by establishing a claim for allowance of discount upon freight to be paid after that rate. The consignee undertakes to pay freight on delivery after that rate; the shipowner undertakes to allow three months' discount on freight paid after that rate; the latter contract is dependent on the former, but is not repugnant to it.

This case emphasises the difficulty of distinguishing between mere *additions* and *contradictions*. In effect, the contract provided for payment at one rate and the custom for payment at another, so that the custom did contradict the contract. However, the court avoided this conclusion by holding that the custom merely *added to* the written terms because the discount was calculated on the rate of freight specified in the contract. It is difficult to accept this reasoning because the custom did effectively reduce the freight payable.

Compare the decisions in *Webb v. Plummer* and *Brown v. Byrne*. If a contract provides that payment shall be made upon the occurrence of events A. B. and C., and a party alleges that there is an event D. upon which payment is to be made also, then, following *Webb v. Plummer*, such evidence contradicts the written contract. Yet, if there is an obligation to pay money at a certain rate per pound, it is not contradictory of the written contract to allege that three months' discount is to be allowed so that a lesser sum is due. It is suggested that no real distinction can be drawn between these two situations.

The essential differences between *Webb v. Plummer*, on the one hand, and *Hutton v. Warren* and *Brown v. Byrne*, on the other, is one of approach. In *Webb v. Plummer*, the court applied the presumption of completeness against the party alleging the additional customary term and accordingly adopted the wider criterion against which to measure inconsistency. Whereas, in *Hutton v. Warren*, the Court, from the outset, was more willing to entertain the prospect of customary terms and in fact emphasised "the principle of presumption that, in such transactions, the parties

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54. (1854), 3 El. & Bl. 716; 118 E.R. 1309, (Q.B.D.).

did not mean to express in writing the whole of the contract by which they intended to be bound, but a contract with reference to those known usages".<sup>55</sup> Accordingly, the narrower criterion was adopted. Similarly, in *Brown v. Byrne* Coleridge J. emphasised that parties to mercantile contracts "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."<sup>56</sup>

Later cases adopted this latter approach. In *Humfrey v. Dale*<sup>57</sup> Lord Campbell C. J. proposed the following test of inconsistency: "To fall within the exception, therefore, of repugnancy, the incident must be such as if expressed in the written contract would make it insensible . . ." This test approves the narrower criterion against which inconsistency might be measured. It means that a custom will be inconsistent with the written terms only when they deal expressly with the very subject matter of the custom. The test involves reading the custom with the alleged contradictory terms, 'in order to see whether the two can sensibly stand together. Applying it to *Webb v. Plummer*, the contract would not have been "insensible" since it made no reference to payment for foldage.

Lord Campbell's test has been approved in subsequent cases.<sup>58</sup> However, unfortunately, it has been applied as excluding a custom when the very subject matter of that custom was *not* expressly dealt with in the written contract.

In *London Export Corporation Ltd. v. Jubilee Coffee Roasting Co. Ltd.*<sup>59</sup> a written contract for the sale of goods contained a clause providing that in case of a dispute, arbitration was to be conducted according to the rules of a certain association which were appended thereto. Each party could appoint an arbitrator and the arbitrators, if they disagreed, could appoint an umpire. A party dissatisfied with the umpire's award had a right of appeal to a special board. The rules also provided that no one who had acted as an arbitrator or umpire could be appointed a member of the board of appeal. In the present case, at the hearing of an appeal by the buyers against the

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55. (1836), 1 M & W. 475; 150 E.R. 521 per Parke B. (Exch.).

56. (1854), 3 El. & Bl. 715; 118 E.R. 1309 (Q.B.D.).

57. (1857), 7 El. & Bl. 266 at 275; 119 E.R. 1246 at 1249 (K.B.D.).

58. *Myers v. Sarl* (1860) 3 El. & Bl. 306 at 319-320; 121 E.R. 457 at 462 (K.B.); *Westacott v. Hahn*, [1918] 1 K.B. 495 at 514 (C.A.); *Palgrave, Brown & Son Ltd. v. Owners of S.S. Turid*, [1922] 1 A.C. 397 at 406 (H.L.).

59. [1958] 1 W.L.R. 661; [1958] 2 All E.R. 411 (C.A.).

umpire's award, the chairman of the board asked the umpire to remain with the board after the parties had retired. The buyers' objection was overruled by the chairman on the ground that it was the customary practice of the association, which had prevailed for many years and was well known to all persons in the trade, to ask the umpire to remain and confer with the board. However, the Court of Appeal set aside the board's award in favour of the sellers on the ground that the presence of the umpire was contrary to the rules relating to the conduct of arbitration proceedings. These rules were terms of the parties' contract and the custom was inconsistent therewith.

It is suggested that the custom did not directly contradict the rules. They merely provided that an umpire could not be appointed a *member* of the board of appeal, and were silent as to whether the board could *confer* with an umpire. The court adopted a similar approach to that in *Webb v. Plummer* and adopted a wider criterion against which to assess whether or not the custom contradicted the written terms, viz, the course of proceedings defined by the rules:<sup>60</sup>

The rules as to arbitration here indicate a two-stage arbitration: first, by the arbitrators, or upon the arbitrator's disagreeing, by an umpire; and secondly, by the appeal board at the instance of the dissatisfied party. *That is to be the course of the proceedings* . . . The proceedings contemplated are proceedings in those two stages, and, in my view, it would be repugnant to introduce a third stage in the form of a conference between the appeal board and the umpire.

By adopting a narrower criterion, viz., whether the contract dealt with the very subject matter of the custom, it could have been held that the custom did not contradict the written terms. They only provided that an umpire could not be appointed a member of the board and were silent as to whether he could *confer* with the board.

The court was obviously reluctant to give effect to such a custom as it smacked of a breach of the principles of natural justice. Accordingly, as in *Webb v. Plummer*, it applied the presumption of completeness against the party alleging the additional customary term and adopted the wider criterion against which to assess inconsistency. Whereas, in the previous cases the courts presumed the opposite — that the parties did in fact intend to contract with reference to the custom — and, in order to give effect to that custom, a narrower criterion was adopted.

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60. *Id.* at 675 (*per Jenkins L.J.*) Emphasis added.

“Contradiction” is such a variable notion that the courts are able to reach the desired conclusion in accordance with what they consider the parties *ought* to have intended by adopting the appropriate terms of reference. Of course, similar problems do arise in other areas of the law of contract. For example, whether a *mistake* renders an object different in kind depends upon which category you decide the object originally belonged to. This, in turn, depends upon the level of generality at which you abstract the original category: e.g. is the subject matter of the contract “an old master” or is it just “a painting”. In the present context, the difficulty of distinguishing between a contradiction and a variation or addition is merely put forward as one of the reasons for not accepting the rule that a collateral contract must not contradict the principal contract.

The problem is further accentuated if the courts’ reasoning in some of their decisions on other aspects of the parol evidence rule is accepted. Apparently inconsistent oral agreements have been upheld on the ground that they merely make an addition to the written terms.

### 5. The Consideration “Exception”

It is well established that, despite the parol evidence rule, extrinsic evidence is admissible to prove the existence of consideration where none is stated or to supplement the expressed consideration, so long as it does not contradict the written contract.<sup>61</sup> However, the cases have emphasised that it is not a contradiction of a written contract to prove a larger consideration than that which is stated in it. Thus, parol evidence has been admitted to show that the true consideration was £1,500 and not £1,050 as stated in the written contract.<sup>62</sup>

Although their authority is beyond challenge, it is very difficult to accept the courts’ reasoning in the “consideration” cases. Parol

61. *Clifford v. Turrell* (1845), 14 L.J. Ch. 390; *Frith v. Frith*, [1906] A.C. 254 (J.C.); *Turner v. Forwood*, [1951] 1 All E.R. 746 (C.A.); *Marsh v. Hunt* (1884), 9 O.A.R. 595.

62. *Hawke v. Edwards* (1948), 48 S.R. (N.S.W.) 21 (N.S.W.S.C. In Banco). See also *Mullenger v. Mullenger*, [1922] N.Z.L.R. 510 (S.C.) (true consideration 118 as opposed to 60) and *Marsh v. Hunt*, *supra*, note 61 (7500 as opposed to 5000). Cf. *Firmin v. Public Trustee* (1889), 7 N.Z.L.R. 277 (S.C.) (true consideration 209 not 360 as stated in the deed). This was a clear extension of the previous cases which permitted evidence of an *additional* consideration only. The evidence clearly contradicted the deed.

evidence is said to be admissible to prove a further consideration which is consistent with the consideration stated on the face of the document. It is not inconsistent with or a contradiction of an instrument to prove a larger consideration than that which is stated in it. Thus, an obligation to pay £30 is said to be consistent with an obligation to pay £28.<sup>63</sup> This line of reasoning is untenable. It cannot be said, for example, that, if the price specified in the writing is \$10, it is not contradictory of this obligation to allege that in fact the real price is \$20. Although the original obligation in a sense still subsists, the obligation to pay the larger amount is quite clearly inconsistent with an obligation to pay the lesser sum.<sup>64</sup> It is surprising that the contrary view has so often been accepted without question.

Similar reasoning to that in the consideration cases was adopted by the Court of Common Pleas in *Malpas v. London and South Western Railway Co.*,<sup>65</sup> a remarkable case which typifies much of the confusion which has marked the courts' consideration of the parol evidence rule. The defendant company orally agreed to carry the plaintiff's cattle to King's Cross station. The plaintiff signed a consignment note, which he did not read, providing that the cattle were only to be sent to Nine Elms, an intermediate station on the line to King's Cross. The cattle were left at the former station and the plaintiff sued for damages. It was held that parol evidence was admissible to show that the defendant had agreed to carry the cattle to King's Cross on the ground that the evidence "does not vary or contradict the written document, but only makes an addition to it."<sup>66</sup>

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63. As in *R. v. Scammonden* (1789), 3 T.R. 474; 100 E.R. 685 (K.B.D.).

64. See *Peacock v. Monk* (1748) 1 Ves. Sen. 127 at 128; 27 E.R. 934 at 935 (Ch.D.) where Lord Hardwicke L. C. said that "where any consideration is mentioned . . . if it is not said also *and for other considerations*, you cannot enter into proof of any other; the reason is because it would be contrary to the deed; for when the deed says, it is in consideration of such a particular thing, that imports the whole consideration, and is negative to any other." This eminently sensible dictum was regarded as so astray in *Clifford v. Turrall*, (1845) L.J. Ch. 398 that the old argument was raised that Lord Hardwicke may have been misreported!

See also *Preston v. Merceau* (1775), 2 Black W. 1249 at 1250; 96 E.R. 736 (K.B.) where Blackstone J. held that parol evidence "never ought to be suffered, so as to contradict or explain away an explicit agreement". He then exclaimed: "Here is a positive agreement that the tenant shall pay 26. Shall we admit proof that this means 28 12s 6d.?"

65. (1866), L.R.1 C.P. 336.

66. *Id.*, at 339 (*per* Erle C.J.) Willes J. concurred.



This reasoning can be challenged on a number of grounds. Even if the evidence did not contradict the written document, it at least had the effect of *varying* it by making a physical addition to the contract journey. Furthermore, the parol evidence rule, as usually formulated, extends beyond evidence varying or contradicting, to that *adding to*, the terms of the written contract. However, more important for present purposes, the parol evidence did in fact *contradict* the written terms. If a contract of carriage specifies that goods are to be carried to a destination *five* miles away, it is clearly contradictory of that contract to say that they must in fact be carried *ten* miles. So, it must be contradictory of a contractual obligation to carry goods to Nine Elms station, to say that they must in fact be taken further along the line to King's Cross.

#### *6. Some Cases Where Inconsistent Collateral Contracts Upheld*

There have also been some collateral contract cases where the oral contract has been upheld when it was clearly inconsistent with the terms of the written contract, despite the court's insistence on the requirement that it ought not to be.

The very first collateral contract case, *Lindley v. Lacey*,<sup>67</sup> is one notable instance of a court insisting on the requirement of consistency but then upholding a collateral contract which was in fact inconsistent with the terms of the written contract. The collateral contract was a promise by the plaintiff to sign a written contract for the sale of his business to the defendant if the latter promised to settle an action brought against him by one Chase. However, the written contract contained the following clause — "Lindley authorises Lacey to settle the action *Chase v. Lindley*". This clause on its face gave the defendant an option as to whether he settled the action, whereas the collateral contract took away this option and obliged him to do so. It was therefore quite inconsistent with one of the terms of the written contract. Strangely, none of the judgments referred to the clause. It may have been open to the court to interpret the word "authorises" as meaning "requires", since it hardly makes much sense to go to the trouble of inserting a term in a contract for the sale of a business which merely gives the purchaser an *option* to discharge one of the vendor's debts. However, the court cannot be said to have so interpreted it because this would have removed the need for finding a collateral contract.

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67. (1864) 17 C.B. (N.S.) 578; 144 E.R. 232 (C.P.).

The collateral contract in *Erskine v. Adeane*<sup>68</sup> was also inconsistent with the written contract. The court upheld as a collateral contract a promise by the lessor of a farm that he would kill down the game and not let the shooting during the tenancy. However, it appears from the report that

the lease reserved to the lessor, his heirs and assigns, the exclusive right to all game and fish, and to preserve the same, and by himself and themselves, his and their friends and servants, to enter upon the premises and to shoot and sport over the same . . .<sup>69</sup>.

The collateral contract was clearly inconsistent with this term which, (a) entitled the lessor to assign to others the right to shoot the game, and (b) gave the lessor an *option* to preserve the game. It is to be noted that the defendant in this case had refused to alter the lease because he wanted to keep the leases of all his properties uniform. Therefore, the inference could easily have been drawn that there was a promise by the defendant not to assert his rights under the above quoted clause. The case was rightly decided but it cannot be supported on the ground that the collateral contract was consistent with the terms of the lease.

### 7. Inconsistency May Depend Upon Way Agreement Expressed

A final reason for not regarding inconsistency as a bar to the enforcement of a collateral contract is that it may be purely fortuitous that the contract is actually expressed in terms inconsistent with the principal contract. The classic instance of a collateral contract is that given by Lord Moulton in *Heilbut, Symons & Co. v. Buckleton*:<sup>70</sup>

If you will make such and such a contract I will give you one hundred pounds.

Therefore, it follows that there is a valid collateral contract where A. says to B,

If you will sign this written contract for the sale of your car [which states the purchase price at \$500] I will pay you \$100.

Why should there not be a valid collateral contract where the evidence shows that, in fact, A said to B,

If you sign this contract I will pay you \$600 instead of \$500?

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68. (1873) 8 Ch. App. 756.

69. *Id.* at 758. Emphasis added.

70. [1913] A.C. 30 at 47 (H.L.).

The above illustrations amount to different ways of saying the same thing, yet, on the authorities, the latter would be unenforceable as a collateral contract since the obligation to pay \$600 is clearly inconsistent with an obligation to pay \$500.<sup>71</sup> It is suggested that in both the above examples A's promise ought to be enforceable as a collateral contract. Their effect is the same — to increase the consideration of the principal contract by \$100. Of course, the more natural and usual way of carrying out both agreements would be by modifying the principal contract, but that is a matter that goes to weight and should not be regarded as rendering evidence of either collateral contract inadmissible or rendering them unenforceable for want of consideration.

The decision in *Hammond v. Commissioner of Inland Revenue*<sup>72</sup> provides another illustration of a situation where, if the parties had actually adopted an alternative way of expressing their agreement, it would have been invalid on the ground of inconsistency with the principal contract. A mortgage was executed subject to an alleged collateral oral agreement that the mortgagor was to receive a credit of £800 against the sum advanced in respect of work previously performed by him. Turner J. stated:<sup>73</sup>

I agree that it is difficult to draw the line between cases where the parties simply execute a mortgage for £2,000, agreeing orally that only £1,200 is to be payable . . . and cases where the parties execute such a mortgage, but agree that a claim which the mortgagor has already outstanding against the mortgagee shall survive and be available as a credit against the sum advanced: but there does seem to me to be a distinction.

Since the agreement was expressed in the latter form it was enforceable as a collateral contract. However, it appears that, if the parties' agreement had been that only £1,200 of the £2,000 mortgage advance was to be repaid, the agreement would have been unenforceable because inconsistent with the principal contract. Although, as Turner J. says, there may be a distinction between the two possible agreements, it is suggested that there is not a sufficient distinction to justify a different result in each case. The parties might just as easily have adopted one method of expressing their agreement as the other. The enforceability of an agreement ought

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71. Unless the reasoning in the "consideration" cases is accepted.

72. [1956] N.Z.L.R. 690 (S.C.).

73. *Id.* at 696.

not to depend upon which of two alternative methods the parties adopt to express what is, in effect, the same transaction.

### *III. An Alternative Enforcement Route*

The object of this article has been to suggest that inconsistency ought not to operate as a bar to the enforcement of an oral agreement as a collateral contract where the making of the oral agreement has been proved to the court's satisfaction. However, it must be conceded that the long line of authorities to the contrary means that the courts will probably not feel free to accept this suggestion. Fortunately, there is an alternative way open to them to enforce inconsistent oral agreements, if the propositions in the following pages as to the modern scope of the parol evidence rule are accepted. Furthermore, so conflicting and confused are the cases in this area, there seemingly being authority for every possible shade of opinion as to the operation of the rule, that an argument in court along the lines of this alternative approach stands a greater chance of being accepted.

#### *1. The Written Contract*

Most of the difficulties with the parol evidence rule have resulted from a failure to distinguish between the *applicability* of the rule and its *effect*. The major requirement to be satisfied before the rule applies is that there must be a *written contract*. In determining whether this requirement has been satisfied, no relevant evidence, whether parol or otherwise, ought to be excluded. Obviously, there is no parol evidence rule to be applied until the prerequisites for its application have been satisfied.

What then is the nature of a *written contract*? It is at least clear that not every document which relates to or evidences a contract concluded orally will render it a contract in writing. A writing may come into existence in a number of ways and for a variety of reasons. If one of the parties makes a note of the terms so as to furnish an aid to his recollection, that will not be a written contract.<sup>74</sup> Neither will a mere receipt,<sup>75</sup> an invoice,<sup>76</sup> nor a

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74. *Dalison v. Stark* (1803), 4 Esp. 163; 170 E.R. 677 (N.P.).

75. *Allen v. Pink* (1838), 4 M. & W. 140; 150 E.R. 1376 (Exch); *McMullen v. Williams* (1880), 5 O.A.R. 518 (C.A.).

76. *Holding v. Elliott* (1860), 5 H. & N. 117 at 122; 157 E.R. 1123 at 1125 (Exch.)

memorandum of the terms written out by a third party on his own initiative.<sup>77</sup> In these situations, the contracts remain oral and the writings can be used, if at all, only for the purpose of proving the oral contracts.

However, evidentiary documents are not confined to receipts, invoices, etc. Even documents which look more like contracts may be evidentiary only. It is well established that a document, although it appears to have been executed as a contractual instrument, will not be operative as such unless it was executed with that intention. It may have been executed for quite a different purpose, e.g. "to comply with some official requisition that such a document should be filled up".<sup>78</sup> If it has, then the real contract between the parties remains that concluded orally. The parol evidence rule has no application and cannot preclude proof of the oral contract, although the form of the document may tend to corroborate the party arguing that it was executed with the necessary intention. Of course, as in other branches of the law of contract, the "intention" of the parties is to be determined objectively. Thus, a party will be precluded from denying that the document is the contract when the other party reasonably thinks that it is. He will be bound by the terms of the document although he privately intended it to operate for some other purpose than that of constituting the real agreement.

There is also a second fundamental point to be borne in mind when deciding what is a written contract. This is that, unless the Statute of Frauds applies, there is nothing in law requiring parties to set down the whole of their contract in writing. They may agree upon a contract partly in writing and partly oral if they wish. Such a contract remains an unwritten or oral contract, partly evidenced in writing, so that the parol evidence rule has no application. Although this concept of a hybrid partly written and partly oral contract has been recognised on a number of occasions by the English<sup>79</sup> and Canadian courts,<sup>80</sup> its existence and significance have too often been overlooked.

77. *R v. Wrangle* (1835), 2 Ad & E. 514; 111 E.R. 199 (K.B.D.).

78. *Rogers v. Hadley* (1863), 2 H. & C. 227 at 247; 159 E.R. 94 at 103 (Exch.) See also *Jervis v. Berridge* (1873), L.R. 8 Ch. App. 351 and *Hawke v. Edwards* (1948), 48 S.R. (N.S.W.) 21 (N.S.W.S.C. In Banco).

79. See, e.g., *Eden v. Blake* (1845), 13 M. & W. 614 at 618; 153 E.R. 257 at 259 (Exch.); *Palmer v. Johnson* (1884), 13 Q.B.D. 351 at 357 and *Quickmaid Rental Services Ltd. v. Reece*, [1970] S.J. 372 (C.A.).

80. E.g. *Eaton v. Crook* (1910), 12 W.L.R. 658 at 662 (Alb. S.C.-Full Court); *Allis-Chalmers Bullock Ltd v. Hutchings* (1912) 11 E.L.R. 350 (1913), 13 D.L.R.

It has been seen that not every document which relates to or evidences a contract can be regarded as a written contract. The document must be intended as a contractual instrument. In addition, there is nothing in law to prevent parties from making their contract partly in writing and partly oral. These two factors point to the definition of a written contract. It is *a contractual instrument which the parties agree or intend is to contain the whole of their contract*. Although this test of intention has only been spasmodically recognised,<sup>81</sup> it is indisputable once it is accepted that the parol evidence rule is not a kind of common law version of the Statute of Frauds — it does not say that where there is a writing all the terms must be in that writing, only that where there is a *written contract* you cannot add oral terms.

## 2. The Indicia of Intention

As in other areas of the law of contract, the intention of the parties is to be determined objectively, unless their actual intention is clear which will not be often. All relevant evidence of the surrounding circumstances should, therefore, be admissible in order to determine whether a document constitutes a written contract, including the evidence relating to the alleged oral term. It is a question of fact in each case, not simply one of *construction* of the instrument itself. To adopt the latter approach is to apply the parol evidence rule in the course of deciding whether it *does* apply. It amounts to attempting to find the intention of the parties from a document which, *ex hypothesi*, they may never have intended to be the final record of their agreement. What the document was intended to cover cannot be determined until what there was to cover is first examined.<sup>82</sup>

## 3. The Modern Function of the Parol Evidence Rule

The above conclusions, whilst a marked departure from the rule as initially conceived and applied, do not mean that it is now

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241 (N.B.S.C.); *Brocklebank v. Barter* (1914), 7 W.W.R. 775 (Alta. S.C.) *Wattie v. Lytton*, [1945] 1 D.L.R. 369 (Ont. C.A.).

81. It was mentioned in the following Canadian cases: *McLean v. Crown Tailoring Co.* (1913) 29 O.L.R. 455 (App. Div.); *Connors v. McGregor*, [1924] 2 W.W.R. 294 (Alta. S.C.) *Lowe v. MacDonald*, [1953] 2 D.L.R. 176 (N.S.S.C.) and *Slywka v. Gamache* (1954), 11 W.W.R. 524 (Alta. S.C.).

82. See *L. G. Thorne & Co. v. Thomas Borthwick & Sons (A/Asia) Ltd.* (1956), 56 S.R. (N.S.W.) 81 at 93-94 (N.S.W.S.C. In Banco) (*per* Herron J. (dissenting)).

completely a spent force. The major function of the rule is to raise a presumption that a document which looks like a complete contract is in fact the whole contract. Even if the court is satisfied that oral representations or promises were made, it does not follow that they must be treated as part of the contract. The mere proof of the making of oral promises or representations does not mean that they were intended to be legally binding. Their exclusion from the document does indeed indicate that they were not so intended. One possibility is that they might have been intended to be binding in *honour* only.

However, the failure to include an alleged term in the writing should never be regarded as conclusive of the parties' intention to exclude it from their contract. The evidence may show, for example, that it was excluded in order to conceal its existence from a third party.<sup>83</sup> Unless there was fraud involved, the oral promise ought to be enforced. This is an extreme case. In other situations, the approach of the court should be to weigh the factors indicating that the defendant was accepting contractual responsibility for his statement against the significance of the omission of the alleged term from the document and any other adverse factors. This is not the place to examine the factors which the courts take into account in determining whether or not a statement was intended to be a term of the contract; but let us assume, for example, that, prior to signing an apparently complete written contract, the defendant gave a positive assurance on an important topic which he was in a position to know about and which had the immediate effect of inducing the plaintiff to sign the contract. The failure to include the assurance in the written contract is adverse to the finding of a term but it is plainly outweighed by the other factors which strongly indicate that the defendant was accepting contractual responsibility. The contract ought, therefore, to be regarded as partly written and partly oral.<sup>84</sup>

#### 4. *A Question of Weight*

The strength of the presumption of completeness will, of course,

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This is the only Commonwealth decision which the writer has located containing a detailed discussion of how the intention of the parties in relation to a particular writing is to be determined.

83. As in *Jervis v. Berridge* (1873), L.R. 8 Ch. App. 351 and the noted American case of *Zell v. American Seating Co.*, 138 F. 2d, 641 (1943) (Circ C of A — 2nd Circ.).

84. A good illustration is the Western Australian case of *Van Den Esschert v. Chappell*, [1960] W.A.R. 114 (S.C. of W.A.).

vary from case to case. All evidence ought to be considered but the necessary quantum and quality of evidence required to satisfy the burden of proof imposed upon the proponent of the oral agreement, will vary according to the improbability of his contention. On some occasions the presumption will appear almost irresistible that a document was intended to contain the whole contract. However, this does not mean that the parol evidence ought not to be admitted. It ought to be admitted but not necessarily given effect. It has been unfortunate that the parol evidence rule has so often been phrased in terms of *admissibility* of parol evidence to vary a written contract, rather than its *effectiveness* to vary a written contract.

When one party testifies that the document produced was not intended to contain all the terms of the contract, he should be listened to and his testimony weighed. It may be that his evidence is so flimsy that it is overwhelmed by the initial presumption and the supporting testimony of the other party and his witnesses. His evidence may turn out to be the implausible assertion of a party who has had to suffer the burden of a contract which has not turned out to be as profitable as hoped. In this situation, the court can reject it. On the other hand, he may bring along a band of disinterested witnesses who strongly corroborate his testimony that the oral agreement was made. The whole question is one of *weight*, not *admissibility*.

There are several factors which will affect the strength of the presumption or the weight to be attached to the parol testimony. First, the form of the writing. Although no document, however formal and detailed its provisions, is sufficient by itself to prove that it was intended to contain the whole of the parties' contract, this obviously does not mean that all consideration of the writing should be shut out. It may strongly corroborate the party testifying to its completeness and accuracy. If the writing is formal and detailed, the courts ought to be extremely reluctant to allow a new term to be added to it. On the other hand, in the case of an informal memorandum, it is less likely that the parties intended it to contain the whole contract.

Another important factor will be the preparation of the document. The presumption of completeness will be less easy to rebut if both parties have played an active role in drawing up the document. Similarly, if, although one party has independently prepared the document, it has been submitted to the other party's solicitor for perusal. However, the position should be otherwise where the alleged written contract has been communicated unilaterally by one



party to the other after the conclusion of an oral agreement, e.g. a letter confirming the bargain sent by the vendor to the purchaser. Although failure to object to such a letter or confirmation note can be regarded as assent to it as the complete record of the terms, the weight attached to it ought not to be as great as where both parties played a part in its preparation and then signed it. In other words, it is not so unlikely that there were terms orally agreed upon intended to be part of the contract.<sup>85</sup> Letters of confirmation may often be an attempt by one party to impose his biased view of the contract on the other party. In addition, they do not ordinarily *look* like written contracts and, provided the evidence is sufficiently respectable, oral terms ought to be enforced.

Similar considerations apply to standard form contracts. Since the form has not been drawn up for the express purpose of recording the particular contract, the parties are less likely to have considered at the time the form was signed or handed over, whether oral representations or promises ought to be included in it. Furthermore, the courts have manifested considerable hostility towards standard form contracts containing wide exemption clauses and, for this reason also, will be more willing to give effect to oral terms. The English courts, in particular, have enforced oral terms directly contradicting the printed form.<sup>86</sup>

There are two further factors which are particularly important in the context of the present article. They are the nature and effect of the parol testimony and the presence of a merger clause in the writing.

### 5. *The Nature and Effect of the Parol Testimony*

If the particular element of the alleged extrinsic negotiations is dealt with in the writing, then the presumption will be stronger that the writing was intended to represent the whole agreement on that matter. If it is not, the alleged oral term being only *additional* to what is contained in the writing, there will perhaps be a stronger argument that the writing was not intended to embody the whole

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85. *Cf. Heilbut, Symons & Co. v. Buckleton*, [1913] A.C. 30 (H.L.) where a letter of confirmation was assumed to be a written contract to which an oral *term* could not be added. Most of the discussion in the House of Lords centred around whether the respondent had established a collateral contract.

86. *Couchman v. Hill*, [1947] K.B. 554; [1947] 1 All.E.R. 103 (C.A.), *Harling v. Eddy*, [1951] 2 K.B. 739; [1951] 2 All.E.R. 212 (C.A.). and *Mendelsohn v. Normand Ltd*, [1970] 1 Q.B. 177; [1969] 2 All.E.R. 1215 (C.A.).

agreement. However, the mere fact that the parol evidence will vary the terms of the writing should not be regarded as a decisive factor. The fundamental question concerns whether the parties can be said to have intended the writing to contain their entire agreement. If that intention did not exist, then the parol evidence rule does not apply, and it therefore does not prevent the other subjects of agreement from being established, even though they vary the writing. It would be a futile exercise to attempt to decide whether something which is conceded as varying the writing should be excluded, by showing that it *does* vary the writing.

On a few occasions, however, it has been suggested that, although the writing may not have been intended to contain the whole contract, yet the oral terms must not vary or contradict that part which is in writing — they must be additional to and entirely consistent with the terms of the document.<sup>87</sup> A typical view is as follows:<sup>88</sup>

There are cases . . . where the whole of the contract is not in writing but part of it is. In such cases the document is a record of part only of the contract. In such case the remaining terms can be proved by extrinsic evidence . . . But if the added matter which makes up the remaining terms of the contract is oral then it is subject to the first rule expressed, viz: the terms sought to be added must be consistent with those expressed in the instrument.

If the above quotation is correct, the law must be stated as follows. Parol evidence is ineffective to vary, add to or contradict the terms of a written contract. There will not be a written contract to which the rule applies, unless the particular writing was intended to be a complete record of the contract. Therefore, a contract which was intended to be partly in writing and partly oral is outside the operation of the rule. *Yet*, with respect to the part of the contract that is in writing, the *parol evidence rule*, prevents its variation or contradiction by the oral part. This is to invoke a rule which, *ex hypothesi*, does not apply. In effect, it is an attempt to establish a new parol evidence rule in relation to contracts partly oral and partly in writing. At one moment it is said that the rule preventing the

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87. *Bank of Australia v. Palmer*, [1897] A.C. 540 at 545 (J.C.); *Hoyt's Pty Ltd. v. Spencer* (1919), 27 C.L.R. 133 at 143-144 (H.C. of A.); *Connors v. McGregor*, [1924] 2 W.W.R. 294 at 300 (Alta S.C.); *McLean v. Crown Tailoring Co.* (1913), 29 O.L.R. 455 (App. Div.).

88. *National Oil Pty. v. Stephenson* (1950), 50 S.R. (N.S.W.) 51 at 60 (N.S.W.S.C. In Banco) (*per* Herron J.).

variation, contradiction or addition to the terms of a written contract does not apply unless the writing was intended to embody the whole contract, and then, in the next breath it is said that the part which is in writing cannot be varied or contradicted by the oral part by virtue of the same rule which has been said not to *apply*!

Of course, if a contract is partly in writing and partly oral, the oral part must always have some effect upon the application and legal operation of the written part. There may be no objection to refusing to allow the oral part to vary or contradict what is written if a clear line can be drawn between the field covered by the writing and that covered orally. Where the writing has an easily severable sphere of operation, the court may be able to ascertain what it is that the writing was intended to supersede. However, once it is established that the writing was not intended to contain the whole contract (assuming, of course, that it does relate to *one* contractual transaction), it is difficult to see how the partial writing can be regarded as having been intended to supersede anything. Furthermore, even if it is occasionally possible to draw a clear line between the sphere of operation of the writing and the terms agreed upon orally where they both relate to a single contract, to say that the partial writing can only be *added to*, not varied or contradicted, still involves inventing a new and secondary parol evidence rule. That rule, as usually phrased, extends not only to variations and contradictions of, but also to additions to, the writing.

Where the evidence shows that the writing was not intended to contain the whole contract, that writing is not a written contract subject to the operation of the parol evidence rule. Contracts partly oral and partly in writing should be regarded as oral or unwritten contracts which are to some extent evidenced by writing. It is therefore suggested that the authorities holding that the oral terms shall not vary or contradict that part of the contract which is in writing, but must be additional to and consistent with it, ought not to be followed unless the court has first found as a fact that the writing was agreed upon as a definite record of severable part of the contract. Usually, of course, the finding that there were oral terms will negative such a conclusion. If the court finds that there were oral terms varying the writing this will also prove that the writing was not agreed upon as a complete record of part of the contract.

It is suggested that the correct position is that the nature and effect of the parol testimony goes only to *weight*, not admissibility. Although it is more likely that evidence of an additional and

consistent oral term will be believed, the mere fact that the evidence varies or contradicts the written terms does not necessarily prove that it is untrue. The burden of proof ought to be stricter, but the surrounding circumstances and the testimony of other witnesses may combine to prove that the oral agreement was in fact made. Where one party alleges an oral term which varies or contradicts the written terms, he will have more difficulty in convincing the court than where the oral term is additional to the writing. It is less likely that the parties would have left the writing in its then form if they made an oral agreement varying or contradicting the obligations set out therein. Much will, however, depend on the nature of the writing. For instance, has it been drawn up for the purpose of recording the particular contract or is it a standard form? If it is the latter, there will usually be no real opportunity for amending the writing so that the evidentiary hurdle will be easier to overcome.

It is on this latter basis that some apparently anomalous decisions of the English courts can be justified. The first is *Couchman v. Hill*.<sup>89</sup> The plaintiff purchased at an auction a heifer belonging to the defendant. The heifer was described in the sale catalogue as 'unserved', but it was also stated that the sale was subject to the auctioneer's usual conditions of sale and that all lots must be taken "subject to all faults or errors of description". The conditions of sale, exhibited at the auction, also stated that the lots were sold "with all faults, imperfections and errors of description". Before bidding, the plaintiff asked both the defendant and the auctioneer whether they could confirm that the heifer was unserved and they both said, "Yes". It was later found that the heifer was in calf and it died as a result.

The Court of Appeal held that the plaintiff was entitled to damages for breach of contract. Scott L. J. pointed out initially that "in the absence of some special agreement to the contrary, when the hammer fell the resulting contract was subject to the printed conditions of sale exhibited at the auction and to the stipulations contained in the sale catalogue".<sup>90</sup> The plaintiff's evidence that the defendant and the auctioneer had orally confirmed the heifer to be 'unserved' was accepted by the court and construed as a warranty. It had been argued that if there was an oral warranty it was rendered ineffective by the exemption clause in the printed conditions of sale, but the court held that the warranty *overrode* the exemption clause.

89. [1947] K.B. 554; [1947] 1 All. E.R. 103 (C.A.).

90. *Id.* at 557.

Although the court did not refer to the parol evidence rule, the decision does support the writer's suggestion that an oral term is not necessarily rendered ineffective if it contradicts that part of the contract which is in writing. The plaintiff's evidence of the conversation was accepted by the court and held to be an oral warranty. The court seems to have regarded the contract as partly in writing and partly oral. Both parts were read together as constituting a single binding contract and the written exemption clause, though not completely overridden in that it would have excluded liability for other imperfections (subject to the doctrine of fundamental breach), had to be read subject to the oral warranty.

It is to be noted that the written document in this case was a standard form laying down in advance the terms which were to apply to every bidder. If there had been a document drawn up after the sale which appeared to record the whole contract, the plaintiff would have faced much graver difficulties, not only in getting his evidence believed, but also in convincing the court that the oral promise was intended to be legally binding. However, it must be remembered that even in the latter situation the fact that the alleged oral term contradicts an apparently complete written document, goes only to weight and the likelihood that the oral promise was intended to be legally binding. In *Couchman v. Hill* the plaintiff faced fewer difficulties because, although it might have been possible for him to have obtained a written endorsement on the sale catalogue, there was no real contract document into which the warranty might have been inserted. A document was not handed to the plaintiff which purported to be a written contract and which gave him the opportunity to say, "what about your promise that the heifer is unserved, shouldn't that go in here?"

*Couchman v. Hill* was approved and followed in *Harling v. Eddy*<sup>91</sup> and *Mendelssohn v. Normand, Ltd.*<sup>92</sup> In the latter case, the plaintiff drove his car into the defendant's parking building. He was about to lock the car when the attendant told him that the rules of the garage required that the car be left unlocked. The plaintiff explained that the car contained valuables and gave the keys to the attendant who agreed to lock it after he had moved it to a different position. The attendant then gave the plaintiff a ticket on the back of which were a number of conditions, including one which purported to

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91. [1951] 2 K.B. 739; [1951] 2 All. E.R. 212 (C.A.).

92. [1970] 1 Q.B. 177; [1969] 2 All. E.R. 1215 (C.A.).

exempt the defendant from liability "for any loss or damage sustained by the vehicle its accessories or contents however caused." The attendant did not lock the car and as a result the valuables were stolen. The plaintiff sued for damages and the defendant pleaded the exemption clause. The Court of Appeal found for the plaintiff on the ground, *inter alia*, that the attendant's oral promise at the time of the contract (which was construed as a promise "to see that the contents were safe"),<sup>93</sup> overrode the written exemption clause. After referring to *Couchman v. Hill* and *Harling v. Eddy*, Lord Denning M. R. held:<sup>94</sup>

The printed condition is rejected because it is repugnant to the express oral promise or representation.

Phillimore L. J. was of the same opinion, saying:<sup>95</sup>

. . . if you have an express undertaking, as here, followed by printed clauses, the latter must fail in so far as they are repugnant to the express undertaking.

These statements are rather remarkable when viewed in light of the traditional concept of the parol evidence rule. Both judges are saying that greater weight ought to be accorded to what is said orally than what is in writing. Or, in other words, "we cannot allow what the parties say orally to be overridden by what is put down in writing!" As a result, the question has, not unfairly, been posed recently:<sup>96</sup>

Are we witnessing a gradual reversal of the parol evidence rule which would place the emphasis exactly the other way?

However, it is not necessary to go this far. Although the decision in *Mendelssohn* can be justified, the above dicta are too extreme. The same decision could have been reached without ignoring or infringing the parol evidence rule. What should have been held was that the contract was partly in writing and partly oral, or rather, an oral contract which was partly evidenced in writing. Therefore, there was no parol evidence rule to prevent the oral part varying or contradicting what was in writing.

This leaves the question — how ought the courts to go about finding the parties' true agreement when the contract is partly in

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93. *Id.* at 183 (*per* Lord Denning M.R.).

94. *Id.* at 184.

95. *Id.* at 186.

96. J. Burrows, *Exception Clauses and Fundamental Breach*, [1969] N.Z.L.J. 556.

writing and partly oral, and the latter varies or contradicts the former? It is suggested that such contracts ought to be subject to the same principles of interpretation as contracts contained in two or more documents. It is established that, where two documents jointly embody the terms of a single contract, they must be construed together and the various provisions harmonised with each other. Both instruments are of equal force and validity so that it is the task of the court to resolve ambiguities and inconsistencies as best it can. "The provisions of one instrument may, for example, have to be read as creating an exception to the provisions of the other, or as imposing a condition upon a provision which in the other is apparently absolute."<sup>97</sup> One document may vary or contradict the other because this situation is outside the scope of the parol evidence rule. Jessel M. R. held in *In re Wedgewood Coal and Iron Co.*<sup>98</sup> that, where there are two documents constituting one transaction, they

are to be read together, so that if there is any ambiguity in one it may be explained by the other; and even if there is any inconsistency, you must take the two documents together and see how you can explain the inconsistency.

A similar approach ought to be taken to contracts partly written and partly oral. Since the parol evidence rule is also not applicable to such contracts there is no reason why both parts should not be regarded as of equal force and validity, and inconsistencies reconciled in accordance with the above principle of interpretation. Take the sort of situation which arose in *Couchman v. Hill*. The oral warranty, could be read as creating an exception to the operation of the written exemption clause just as the provisions of one document may occasionally have to be read as creating an exception to the terms of another, where both constitute one contract. In other words, it is for the court to determine as best it can from all the evidence what was the parties' true agreement.

## 6. *The Presence of A Merger Clause In the Writing*

The conflicting decisions of the Canadian courts on the effect of merger clauses were noted at the beginning of this article. The few other Commonwealth authorities in point are also conflicting.<sup>99</sup> It is

97. Salmond & Williams, *The Law of Contracts* (2d ed. London: Sweet & Maxwell, 1945) at 155.

98. (1877) 7 Ch. D. 75 at 99 (C.A.)

99. Contrast the early case of *Horncastle v. The Equitable Life Assurance Soc. of*

suggested that the better view is that the presence of such a clause should not be conclusive of the question whether the writing was intended to be the complete record of the parties' agreement — it should not be effective to exclude all other evidence on this preliminary issue of fact.

A merger clause is, in effect, a written statement that the parties have assented to the document as their complete written contract and, as such, is strong evidence that it was so assented to, but there seems to be no valid reason why it should be regarded as conclusive on this question. It would be illogical, if the writer's previous suggestions as to the true scope of the parol evidence rule are accepted, to exclude evidence that the writing was not intended to record the whole of the parties' contract, simply because the writing states that it was so intended. It has been seen that whether a writing was intended to completely record the parties' bargain, so as to constitute a written contract for the purpose of the *application* of the parol evidence rule, is a question of *fact*. It is not merely a question of *construing* the written document itself. To say otherwise is to apply the parol evidence rule in the course of seeing whether it does apply, to attempt to find the intention of the parties from a document which may never have been intended as the final record of their agreement. In determining this issue of fact, all relevant evidence is admissible. Whilst the form and contents of the writing may strongly corroborate the party alleging that it was intended to contain the whole contract, these factors are not decisive but go only to weight. Other evidence may combine to rebut the presumption of completeness.

It follows that the presence of a merger clause in the writing should not be conclusive on the preliminary inquiry into the intention of the parties. The fact that a document contains an express statement that it records all the terms agreed upon does not prove that *the document itself* was in fact ever so assented to. It is certainly a strong indication of the parties' intention and will be difficult to explain away. However, the essential point which must be remembered is that, at this preliminary stage, there is no parol evidence rule which *applies* to prevent either of the parties from contradicting that statement. To regard the merger clause as conclusive is to assume the application of the parol evidence rule.

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U.S.A. (1906), 22 T.L.R. 735 (C.A.) with *Stuart v. Dundon*, [1963] S.A.S.R. 134 (S.C. and S.C. In Banco).



Basically, a merger clause is a statement of fact and, as such, may actually be untrue. Other evidence may show that the writing was not assented to as a complete record of the parties' contract. A writing has no magical power to cause statements of fact to be true when they are actually untrue. A written admission is merely *evidential*, not conclusive, and in determining the parties' intention it will be necessary to weigh the other evidence against the merger clause.

If the position were otherwise, then, even in the case of a document which was obviously incomplete on its face, it would not be permissible for a court to add an orally agreed term. If the evidence is to be admitted in the latter case (as undoubtedly it should be), it must also be admissible where the document appears to be complete, although, of course, the evidential burden will be much more difficult to overcome. The parties' intention is to be determined from a consideration of all the circumstances and a merger clause is merely one of those circumstances. It would be illogical to hold that, because one circumstance points to a certain conclusion, evidence of other circumstances should not be listened to.

The above approach gains some support from the decision of the Supreme Court of Pennsylvania in *International Milling Co. v. Hachmeister*.<sup>100</sup> Although this case does not represent any uniform approach of the American courts<sup>101</sup> and, furthermore, is only of persuasive authority, it is mentioned here because it provides a neat illustration of the injustices which may result from regarding merger clauses as conclusive. The parties executed a printed form of contract for the sale and purchase of flour which contained the following clause:

This Contract constitutes the complete agreement between the parties hereto; and cannot be changed in any manner except in writing subscribed by Buyer and Seller or their duly authorised officers.

The buyer sought to give evidence that they had orally agreed that the contract was also to include certain written specifications. He explained that the written document had not been altered because the seller did not want to change the normal form of contract.

100. 110 A. 2d 186 (1955) (S.C. of Pennsylvania).

101. There have been several American cases holding merger clauses conclusive; see McCormick, *Handbook on the law of Evidence* (St. Paul, Minn: West, 1954) at 451; 3 *Corbin on Contracts* (St. Paul, Minn.: West, 1960) at para. 578.

It was held that this evidence was admissible since, if true, it showed that the writing was not intended as a complete record of the contract, despite the express provision stating the contrary. It was regarded as akin to "fraud" if the seller could insist upon the application of the parol evidence rule. The court said that the presence of a merger clause<sup>102</sup>

cannot invest a writing with any greater sanctity than the writing merits where, as here, it assertedly does not fully express the essential elements of the parties' undertakings

The weight to be attached to merger clauses will depend upon the circumstances of each case, particularly the presence or otherwise of the other factors already mentioned. In the case of a standard form contract, the presence of a merger clause ought not to render the presumption of completeness more difficult to rebut than it otherwise might be. Seldom will the complaining party have read the clause, let alone understood its effect upon the representations and promises made by the other party. On the other hand, in the case of a formal document specially drawn up by the parties' professional advisers to record the particular transaction and signed in their presence, the merger clause will make the presumption of completeness almost irresistible. However, this does not mean that all extrinsic evidence should be rejected out of hand. It must be listened to before the court can determine its probative value. It may, albeit in rare cases, be sufficiently strong, for example, to satisfy the court that the parties privately entered into an oral agreement which was intended to operate along with the agreement expressed in the writing.

### *7. The Collateral Contract — An Unnecessary Device*

If the above analysis is accepted, it follows that the collateral contract, although not a true exception to the parol evidence rule since it does not purport to add a *term* to the writing, is no longer a necessary device to avoid the application of the rule, unless the Statute of Frauds also applies. When an oral agreement is made prior to the execution of a written agreement which is intended to have contractual effect, there is in truth one contract, partly in writing and partly oral. No longer is it necessary for the courts to

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102. 110 A. 2d 186 at 191 (1955). (S.C. of Pennsylvania) See also *Air Conditioning Corporation v. Honaker*, 16 N.E. 2d 153 (1938) (App. Ct. of Ill.) where a merger clause was held ineffective because "untrue".

strain the facts of individual cases in order to infer an intention to make two contracts rather than one.

#### *IV. Conclusion*

Inconsistency ought not to be a bar to the enforcement of an oral agreement as a collateral contract where the making of the oral agreement has been satisfactorily proved. However, the long line of authorities to the contrary makes it unlikely that the courts will be willing to re-open the matter. Fortunately, there is a way open to the courts to avoid the consequences of these decisions, if the conclusions in Part III are accepted. It is no longer necessary to perpetuate the device of the collateral contract in order to get around the parol evidence rule. Where an oral agreement has been satisfactorily proved, the contract can be regarded as partly in writing and partly oral. If the oral agreement is inconsistent with the written terms, then it is for the court, as a matter of interpretation, to reconcile the inconsistency in accordance with what it considers to be the true intention of the parties. Inconsistency is not a bar to the enforcement of the oral part of the contract, but is a matter going only to *weight*. It only affects the likelihood that the oral agreement was ever made.