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# THE PAROL EVIDENCE RULE IN NORTH CAROLINA

JAMES H. CHADBOURN\* AND CHARLES T. McCORMICK\*\*

"There is a grouping together of a mass of incongruous matter, and then it is looked at in a wrong focus." So speaks Thayer of the case law on parol evidence.<sup>1</sup> That the familiar formula against varying, adding to, or contradicting the terms of a writing has confounded the precedents will hardly be gainsaid. Only the master hand of Wigmore has been able to erect a logical superstructure out of the bulk of conflicting data. On the other hand, judicial expressions of dissatisfaction have not been wanting. The admonition of Shepherd, J., in *Moffitt v. Maness*<sup>2</sup> is reiterated in many North Carolina cases and doubtless supplies an inarticulate premise in others:

"There is, we fear, too great a tendency to relax the well settled rules of evidence against the admissibility of parol testimony, to contradict, vary or add to, the terms of a written contract, and it is thought that the courts, in their anxiety to avoid probable injustice in particular cases, are gradually construing away a principle which has always been considered one of the greatest barriers against fraud and perjury. . . . The principles upon which parol testimony is excluded in the case of written contracts are plain, but their application to the infinite variety of transactions daily arising is exceedingly difficult, and the books are full of conflicting decisions on the subject. We think we have gone far enough in this State in their liberal application, and the wise rules which are intended for the protection of the provident should not be refined away for the relief of the negligent."

The purpose here desired to be accomplished by a strict construction of the rule—protection of the provident from fraud and perjury—is a legitimate aim of the law. But the present confusion calls for more than a policy of construction. It indicates the need of a critical appraisal of the local precedents. This is the purpose of present discussion. It is made possible by the masterful analyses of Thayer, Wigmore, and Williston.<sup>3</sup>

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<sup>1</sup> THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW, 390.

<sup>2</sup> 102 N. C. 457, 9, 64, 9 S. E. 399, 401 (1889).

<sup>3</sup> THAYER, *op. cit. supra* note 1, c. x; 5 WIGMORE, EVIDENCE (1923) c. lxxxvi; 2 WILLISTON, CONTRACTS (1920) §631 *et seq.*

## I. THE RULE IN GENERAL

A discussion of the local aspects of the problem should be prefaced by some general considerations. The theoretical nature of the rule is no longer open to doubt. Thayer and Wigmore have shown convincingly that, despite the popular notion, it is not a rule of evidence based on a supposed superior probative force of written over unwritten evidence. It is rather a rule of substantive law defining what facts are legally effective when there is a writing.<sup>4</sup> The acceptance of this premise calls for a restatement of the rule in other than the conventional form.

Wigmore's statement is preceded by an elaborate and enlightening discourse on the constitution of jural acts, that is, those having legal effectiveness. It is believed that the following definition distills the essence of his conclusions from the necessarily technical language of his theory of jural acts: *Any or all parts of a transaction prior to or contemporaneous with a writing intended to record them finally are superseded and made legally ineffective by the writing.* It will be noted that prior or contemporaneous agreements are superseded whether they are oral or written.<sup>5</sup> The rule obviously does not operate to exclude proof of oral or written agreements subsequent to the writing.<sup>6</sup>

Three situations are common under the rule. The writing in question may be only a casual memorandum of the transaction, not intended to supersede any oral agreements. Receipts, memoranda of auction sales, and perfunctory letters in business intercourse are common examples in the books.<sup>7</sup> At the opposite extreme the writing often contains an explicit statement that it supersedes all prior

<sup>4</sup> THAYER, *op. cit. supra* note 3; 5 WIGMORE, *op. cit. supra* note 3, §2400. In North Carolina the rule is treated as one of evidence. Witness the decisions when the rule is invoked for the first time on appeal. Instead of applying the principle that the appellate court will give either party the benefit of a rule of substantive law in his favor, whether raised at the trial below or not, the cases hold that either party has waived the benefit of the rule by not objecting to the evidence below. *Scott v. Green*, 89 N. C. 278 (1883). See *Sykes v. Everett*, 167 N. C. 600, 4, 83 S. E. 585, 8 (1914); *Miller v. Farmers' Federation*, 192 N. C. 144, 7, 134 S. E. 407, 9 (1926).

<sup>5</sup> *Lindsay v. King*, 23 N. C. 401 (1841); *Newbern v. Newbern*, 178 N. C. 3, 100 S. E. 77 (1919) (proof of contents of letter disallowed).

<sup>6</sup> *Harris v. Murphy*, 119 N. C. 34, 25 S. E. 708 (1895); *Freeman v. Bell*, 150 N. C. 146, 63 S. E. 682 (1909).

<sup>7</sup> *Satterfield v. Smith*, 33 N. C. 60 (1850) (paper read in connection with hiring slave at auction); *Lutz v. Thompson*, 87 N. C. 335 (1882) (writing alleged to be contract in connection with settlement of estate); *Adickes v. Drewry*, 171 N. C. 667, 89 S. E. 23 (1916) (letter referring to terms of former contract). Receipt cases *post* note 71.

and contemporaneous agreements of the parties.<sup>8</sup> Finally the writing may supersede only a part of the prior and contemporaneous agreements. It is then final as to the part of the transaction it is intended to embody, but offers no obstacle to the proof of the other part. Since Wigmore's treatise it has become popular to speak of the process by which a writing supersedes the prior and contemporaneous agreements in a transaction as an integration. The integration is then complete, as illustrated in the second situation mentioned above, or partial, as illustrated in the situation last discussed. The bulk of the problems presented by the parol evidence rule center on a determination of whether the writing has accomplished the one or the other of these two kinds of integration.

At the outset the facile statement of the rule raises two concrete questions of weighty importance: (1) What is the proper procedure for determining the intent with which a writing was made? (2) Is the test of such intent subjective or objective?

If the parol evidence rule were a genuine rule of evidence the procedural query would be foreclosed by the familiar principle that the trial court is to determine questions of fact on which depends the admissibility of testimony challenged under the technical rules of competency or admissibility. But the conclusion that the trial court should decide the vital question of intention may still be deduced by a glance at the unexpressed policy that underlies this rule of substantive law.

The rule itself seems a compromise between two ideas. The overthrow of written contracts by fabricated extrinsic negotiations should be prevented. At the same time the freedom of parties to determine their contractual rights and duties should not be unduly impaired. The result is that the categorical exclusion of negotiations extrinsic to the writing which one aspect of the policy demands is supplanted by an exclusionary rule based on the intent with which the written instrument was made. Now the judge by virtue of training and experience possesses an expertness qualified to effectuate the twofold purpose of the rule. The reactions of a jury are far more likely to be predominantly emotional than those of the judge. Clever fabrications tending to overthrow the writing fare well under the democratic standards of the traditional triers of fact. A mind of judicial temper is better suited to apply a rule intended to protect the written agreement.

<sup>8</sup> Cases cited *post* note 30.

What test of intention shall the court apply? Three patently spurious tests should be dismissed from the beginning. It has been said that the test of whether the writing supersedes the oral agreement is whether the latter "contradicts, varies, or adds to" the writing.<sup>9</sup> The oral agreement will always add to or vary the writing. If it does not there is no necessity for proving it. This fallacy is doubtless produced by the thoughtless repetition of the traditional phraseology of the rule. Again it is said that the writing is the sole test of the intent.<sup>10</sup> Obviously it cannot be determined whether the oral agreement was intended to be covered by the writing without examining the oral agreement to determine the relation of the two. Finally it has been said that the test is whether the oral agreement is "collateral" to the writing.<sup>11</sup> This so-called test is so vague that it must be dismissed as meaningless. The real choice that forces itself to the forefront is not between any of the foregoing vagaries, but between subjective or objective intent. The problem is brought out in bold relief by the contrast of a Pennsylvania and Connecticut case. The Pennsylvania case of *Gianni v. R. Russel & Co.*<sup>12</sup> was a suit by the lessee of a building against his lessor. The written lease provided that plaintiff could sell fruit, drinks, etc., but not tobacco. Plaintiff sued for breach of an alleged oral agreement that he was to have the *exclusive* right to sell fruit and drinks in the building. The court held, applying the following test, that the written lease had superseded the oral agreements:

"When does the oral agreement come within the field embraced by the written one? This can be answered by comparing the two, and determining *whether parties, situated as were the ones to the contract, would naturally and normally include the one in the other if it were made* (italics ours). If they relate to the same subject-matter and are so interrelated that both would be executed at the same time and in the same contract, the scope of the subsidiary agreement must be taken to be covered by the writing. This question must be determined by the court."

The Connecticut case of *Strakosch v. Connecticut Trust Co.*<sup>13</sup> was an action against an executor for breach of an oral agreement by the testator to settle an income on plaintiff when adopted by him. The

<sup>9</sup> 5 WIGMORE, *op. cit. supra* note 3, §2431 criticising this so-called test.

<sup>10</sup> Childs v. South Jersey Amusement Co., 95 N. J. E. 207, 122 Atl. 803 (1923).

<sup>11</sup> De Lassalle v. Guildford, L. R. (1901) 2 K. B. 215.

<sup>12</sup> 281 Pa. 320, 126 Atl. 791 (1924).

<sup>13</sup> 79 Conn. 133, 64 Atl. 1 (1906).

court found that the written instrument of adoption had not superseded this oral agreement, applying the following test as the one approved in other Connecticut cases:

"The plaintiff's claim that the existence of the written agreement rendered the prior oral agreement between the parties . . . of no avail to the defendant. This claim is based on the so-called 'parol evidence rule,' that where parties merge all prior negotiations and agreements in writing, intending to make that the repository of their final understanding, evidence of such prior negotiations and agreements will be rejected as immaterial. . . . *Whether the parties intended the writing to embody their entire oral agreement or only a part of it* (italics ours), was a question for the trial court to be determined from the conduct and language of the parties and the surrounding circumstances; and that court has found that the parties had no such intent, and there is nothing in the record to show that the court in reaching that conclusion, erred either in law or in logic."

As a matter of abstract theoretical accuracy it is not to be denied that the proper test for the trial court to apply is the subjective one—what did these parties intend? It should hear the evidence and make a specific finding that the parties did or did not actually intend that their writing should supersede the oral agreement. This means that the court must pass on the credibility of the witnesses and make a finding that one or the other speaks untruthfully. The strain is great. On the other hand, if the specific finding should be what reasonable men would have intended under the circumstances, the embarrassment of imputing mendacity to the witnesses is relieved. The theoretical artificiality of substituting the hypothetical intent of the "straw man" for the actual intent of the parties is outweighed by the greater ease with which a finding can be made on the former. Furthermore, the probability that in the judge's mind the two will almost always coincide needs scarcely to be emphasized. It is true that the application of the objective standard, notably in negligence cases, normally falls within the province of the jury. At least one analogy, however, supports the conclusion that it is within the legitimate province of the trial court in cases arising under the parol evidence rule. In actions for malicious prosecution the trial court determines the question of probable cause.<sup>14</sup> Other examples could be cited where sound procedural policy has dictated the delegation to the judge of certain difficult questions of fact where the jury's in-expert handling of them is likely to result in serious abuse. The

<sup>14</sup> *Wilkinson v. Wilkinson*, 159 N. C. 265, 74 S. E. 740 (1912).

difficulties of the application of the parol evidence rule demand the expert hand for guidance if written transactions are to be relied on.

## II. THE NORTH CAROLINA DOCTRINE

The North Carolina court in a long line of cases has abrogated the parol evidence rule for most purposes. However inadvertently this result may have been reached, it is manifest and apparent. The doctrine is summed up by Walker, J., in *Evans v. Freeman*:<sup>15</sup>

‘But this rule applies only when the entire agreement has been reduced to writing, for if merely a part has been written, and the other part has been left in parol, it is competent to establish the latter part by oral evidence, provided it does not conflict with what has been written. . . . Numerous other cases have been decided by this Court in which the application of the same principle has been made to various combinations of facts, all tending, though, to the same general conclusion that such evidence is competent where it does not conflict with the written part of the agreement and tends to supply its complement or to prove some collateral agreement made at the same time. . . . This Court refused to apply the principle in (citations omitted) because the oral evidence tended to contradict or vary the written part of the contract and not merely to add other consistent terms. . . .’

The records disclose that neither the court nor the jury makes any finding as to the intent with which the writing is made, but oral agreements are admitted wherever they do not directly contradict the writing. The jury, it is true, is often charged in substance as follows: Parol evidence is admissible when the contract is partly written and partly oral, but the oral part cannot contradict the written.<sup>16</sup> But if this is a direction to them to find the intent with which the writing was made (which may be doubted in view of the ritualistic way in which the sentence is used), it is made ineffectual by the form in which the issues are cast. The issues are generally: (1) Was the oral agreement made? (2) Was it breached? (3) Damages? This offers the jury no chance to express a finding of the intent of the parties, even if they have construed the charge as such a direction. *Greene v. Bechtel*<sup>17</sup> is typical. The action was to recover architect fees. The written contract provided for part payment in the stock of the Land O’ Sky Development Co. Plaintiff demanded the entire amount in cash, alleging breach of a parol agreement by defendant

<sup>15</sup> 142 N. C. 61, 54 S. E. 847 (1906).

<sup>16</sup> E.g. the charge in *Greene v. Bechtel*, 193 N. C. 94, 136 S. E. 294 (1926).

<sup>17</sup> *Supra* note 16.

to convey land to the Development Company which would have given its stock value. The jury was charged as follows:

"When a contract is written, the law will not allow it to be altered, varied from, or contradicted by parol evidence. When they put their contract in writing, that is the contract, but when a part of the contract is written and a part of it is in parol or verbal, and the verbal part does not alter, vary or contradict the written part, then the party claiming that parol agreement may show it by parol evidence. That if the alleged parol contract in this case was made as claimed that it does not contradict or alter the written agreement and may be shown by verbal evidence. . . ."

The issues were:

1. Was plaintiff induced to enter into the contract with the defendant and to perform said contract as architect upon the parol agreement by the defendant, made at the time of the written contract, that he would convey the Stradley Mountain lands to the . . . Development Co.?
2. If so, did defendant fail to convey said land. . . ?
3. What damages, if any, is plaintiff entitled to recover?"

A judgment for the plaintiff was affirmed. Under this procedure, which is illustrated in many other cases, it is obvious that the only check on the admissibility of extrinsic agreements is whether they contradict the writing. If the trial court decides this question favorably to the proponent of the extrinsic agreement, the jury are asked merely whether such an agreement was made. The procedure followed by the cases carries the quoted language of Walker, J., to its full extent.

It is often said that the admission of extrinsic agreements under the above procedure does not "vary, contradict, or add to" the written contract, but merely shows the entire contract that was made.<sup>18</sup> This begs the question. Whether the writing is all of the contract or only part of it is the inquiry.<sup>19</sup> This depends on the vital question of intent. The consistency of the written and oral agreements is important only for the light it sheds on the question of what reason-

<sup>18</sup> Clark, C. J., in *Garland v. Improvement Co.*, 184 N. C. 551, 115 S. E. 164 (1922): "This is not varying, altering, or contradicting the written instrument, but merely showing further the entire contract that was made."

<sup>19</sup> The same fallacy is involved in the following reasoning from *Farquhar Co. v. Hardy Hardware Co.*, 174 N. C. 369, 93 S. E. 922 (1917): "If we should decide otherwise in this case and hold the evidence (of an oral agreement) to be competent it would be making a contract for the parties which they did not make for themselves."



able men would intend under the circumstances. To admit oral agreements merely because they are not contradictory to the writing and without determining the actual or apparent intent of the parties as to whether oral and written words should both stand, is to make of the traditional prohibition against adding to the terms of the contract an empty mockery. It overlooks the vital truth that ordinarily when parties omit alleged oral agreements from writings complete in form, they do so because they have either never made such oral agreements or have discarded them in the course of negotiations.

The qualification that even though the contract is only partly written, the parol agreement cannot be admitted when it would contradict the writing, is often expressed as a qualification that the agreement must not "vary" the writing. Obviously any parol agreement of any practical significance will vary the writing. The word "vary" is apparently used in a technical sense. The fact is that much of the traditional phraseology has become a litany. The court repeats the trilogy of prohibitions—varying, contradicting, adding to—either without a thought of their common usage or intending to give them a technical signification. A random example is the language in *Hite v. Aydlett*.<sup>20</sup> Plaintiff sued to recover architect fees. The contract was in writing. Defendant alleged breach of an oral stipulation that the completed plans would call for a building not to cost over \$17,000, when in fact the lowest bid on the plans had been \$22,000. The court allowed the oral agreement and said:

"The terms of the contract, which defendant contended were not included in the (written) proposal and acceptance and which the parol evidence tended to establish, do not contradict, vary, or add to the terms of the contract as contained in the writing."

A short summary at this point may prove helpful. 1. Two possible tests for the application of the parol evidence rule are suggested: If a prior or contemporaneous agreement was made (a) did these parties intend the writing to supersede it or (b) would parties ordinarily so intend? The latter test seems preferable.

2. If the desired protection of written transactions is to be secured, the judge instead of the jury should decide the question.

3. Seemingly North Carolina has unconsciously, while professing to adhere to the parol evidence rule, actually abandoned it except in

<sup>20</sup> 192 N. C. 166, 134 S. E. 419 (1926).

cases of contradiction, that is "total inconsistency" between the alleged oral transaction and the writing.

The local cases applying the doctrine of *Evans v. Freeman* are legion. Much conflict of result is to be expected. Such is the inevitable effect of the looseness of the test applied—merely whether the oral agreement contradicts the writing. Judges have suggested different epithets in the hope, necessarily a forlorn one, of avoiding more confusion. Hoke, J., suggests that the test is whether the oral agreement "radically changes the writing."<sup>21</sup> Brogden, J., has recently suggested the phrase "total inconsistency."<sup>22</sup> A frank adoption of the objective standard of intention, the enlightened test of the *Gianni* case, is the only sound move towards a reinstatement of the rule in this jurisdiction. Indeed it may be that this natural way of solving the problems arising under the rule is implicit even in opinions which speak the language of *Evans v. Freeman*. This can be determined only from an examination of the cases.

### *Deeds*

A liberality in allowing parol agreements is noticeable where the writing is a deed. Here the idea that reasonable men would not intend the deed to supersede all of the previous oral agreements of the transaction may be exerting an unexpressed influence. The deed is required by law to be written. In the normal case is it not probable that the deed would be executed only to comply with the law and not to supersede all oral agreements? This feature, unique in the type of cases under consideration, was perceived by Pearson, C. J., in *Flynt v. Conrad*:<sup>23</sup>

"It would be strange if the execution of one part of the agreement in the only way in which it could be executed, should exclude proof and defeat the other part. . . ."

The usual allowable oral agreement is a reservation of crops, or an agreement to make repairs.<sup>24</sup> The liberality ceases when the oral

<sup>21</sup> *Lytton Mfg. Co. v. House Lumber Co.*, 161 N. C. 430, 77 S. E. 233 (1913).

<sup>22</sup> *Miller v. Farmer's Federation*, *supra* note 4, at 147.

<sup>23</sup> 61 N. C. 191 (1867) (parol reservation of growing corn from deed of land allowed to be shown).

<sup>24</sup> *Allowed*: *Manning v. Jones*, 44 N. C. 369 (1853) (agreement to make repairs); *Johnson v. R. R.*, 116 N. C. 926, 21 S. E. 28 (1895) (agreement to pay grantor additional sum for all land in excess of 20 ft., no amount being specified in deed); *Buie v. Kennedy*, 164 N. C. 290, 80 S. E. 445 (1913) (agreement of grantor to pay for shortage in turpentine boxes); *Pate v. Gaitley*, 183 N. C. 262, 111 S. E. 339 (1922) (parol reservation of rent cotton due under previous lease); *Anderson v. Nichols*, 187 N. C. 808, 123 S. E. 86 (1924) (agreement

agreement would change the essential nature of a deed absolute. Thus a deed absolute cannot be converted into a mortgage by an oral agreement,<sup>25</sup> though an absolute assignment of a mercantile contract can be shown to have been made as a security.<sup>26</sup> Also a parol trust or agreements equivalent to a trust in favor of the grantor may not be shown,<sup>27</sup> though a parol trust in favor of one other than the grantor may be shown.<sup>28</sup> Normally, the intent to supersede oral agreements as to the user of the estate would be the same in all these cases. The *Gianni* test would have tended to minimize these irreconcilable conflicts. Leases for terms of more than three years involve the same features. The point is not emphasized in the cases.<sup>29</sup>

of mortgagor to reconvey furniture in hotel covered by mortgage); *Exum v. Lynch*, 188 N. C. 392, 125 S. E. 15 (1924) (agreement of grantor to release grantee on note upon resale by latter and to substitute liability of grantee's vendee).

*Disallowed*: *Boone v. Hardie*, 87 N. C. 73 (1882) (agreement that trustee should take possession immediately, deed providing that should take possession in 12 months); *Walker v. Venters*, 148 N. C. 388, 62 S. E. 510 (1908) (agreement that consideration be paid in money at vendee's option, deed providing for payment in cotton); *Wilson v. Scarboro*, 163 N. C. 380, 79 S. E. 811 (1913) (timber deed providing that timber be cut in 5 years; oral agreement to cut continuously and make bond).

<sup>25</sup> *Newbern v. Newbern*, 178 N. C. 3, 100 S. E. 77 (1919).

<sup>26</sup> *Carson v. Insurance Co.*, 161 N. C. 441, 77 S. E. 353 (1913).

<sup>27</sup> *Dickenson v. Dickenson*, 6 N. C. 279 (1813) (absolute deed of slave not allowed to be shown to have been given subject to parol agreement to reconvey); *Bonham v. Craig*, 80 N. C. 224 (1879) (same for deed of land); *Egerton v. Jones*, 102 N. C. 278, 9 S. E. 2 (1889) (parol agreement to treat absolute deed as deed of trust in favor of grantor disallowed); *Gaylord v. Gaylord*, 150 N. C. 222, 63 S. E. 1028 (1909) (same—the leading case); *Walters v. Walters*, 172 N. C. 328, 90 S. E. 304 (1916) (parol agreement of grantee to sell land and give grantor part of proceeds disallowed). In *Thomas v. Carteret County*, 182 N. C. 374, 109 S. E. 384 (1921), defendant, in consideration of the Governor's promise of a pardon, gave a deed of trust to secure plaintiff county for return of funds which defendant's nephew had misappropriated. The court relied on this line of cases to exclude proof of county's oral promise to seek first other sources of indemnity. A better line of cases would have been that cited in note 24. Perhaps the liberality of those cases in favor of parol agreements and the strong equity of the county in the case in hand explain the court's assiduous avoidance of the authorities nearest in point. See generally Lord and Van Hecke, *Parol Trusts in North Carolina* (1930) 8 N. C. L. Rev. 152.

<sup>28</sup> *Jones v. Jones*, 164 N. C. 320, 80 S. E. 430 (1913).

<sup>29</sup> *Allowed*: *Cumming v. Barber*, 99 N. C. 332, 5 S. E. 903 (1888) (lease provided for election by lessee to rebuild in case of fire and that he should have insurance in such case; parol agreement that he was to have insurance immediately and for purpose of rebuilding); *Bunn v. Wall*, 180 N. C. 662, 104 S. E. 470 (1920) (lessor's agreement to build a barn).

*Disallowed*: *Ray v. Blackwell*, 94 N. C. 10 (1886); (lessee's agreement that lessor could move building); *Taylor v. Hunt*, 118 N. C. 168, 24 S. E. 359 (1896) (agreement that debt secured by lease should be indulged).

*Contracts of Sale*

The large manufacturer or distributor selling to the small consumer usually has as one of the terms of the written contract of sale a stipulation that it contains the entire agreement of the parties, and that no representations or warranties of the agent shall be binding on the company unless included in the writing. The written provision seem always to control.<sup>30</sup> A realistic view of the situation of the parties might conduce to the opposite conclusion. The economic pressure and superior bargaining power of the large manufacturer enable him to exact the written provision for complete supersession from his economically weaker customer. The court might take the view that this was patently a tribute of the weak to the strong; that both parties knew that the written provision did not express the buyer's real intention; and that consequently it was of no effect. Suffice it to say that this view has not been taken, though a perusal of these cases leads to the conclusion that often it would have worked more substantial justice than the legalistic view of the transaction.

The singular consistency of result in the above situation is naturally enough not found in others. The cases concerning contracts of sale where there is no written stipulation for the complete supremacy of the writing are conflicting in their results.<sup>31</sup> The loose-

<sup>30</sup> *Medicine Co. v. Mizell*, 148 N. C. 384, 62 S. E. 511 (1908); *Simpson v. Green*, 160 N. C. 301, 76 S. E. 237 (1912); *Bland v. Harvester Co.*, 169 N. C. 418, 86 S. E. 350 (1915); *Farquhar Co. v. Hardy Hardware Co.*, 174 N. C. 369, 93 S. E. 922 (1917); *Murray Co. v. Broadway*, 176 N. C. 149, 96 S. E. 990 (1921); *Colt Co. v. Turlington*, 184 N. C. 137, 113 S. E. 600 (1922).

<sup>31</sup> **SALE OF LAND.** *Allowed:* *Stern v. Benbow*, 151 N. C. 460, 66 S. E. 445 (1909) (guarantee of acreage); *Anderson v. Suburban Corporation*, 155 N. C. 131, 71 S. E. 221 (1911) (promise to make improvements); *Brown v. Hobbs*, 147 N. C. 73, 60 S. E. 716 (1908) (agreement that vendee would resell and pay vendor part of profit); *Henderson v. Forrest*, 184 N. C. 230, 114 S. E. 391 (1922) (agreement that vendee would see that another purchased if he did not, contract having given him option).

*Disallowed:* *Nickelson v. Reves*, 94 N. C. 559 (1886) (promise to pay additional sum if acreage exceeded that described); *Summit Avenue Building Co. v. Sanders*, 183 N. C. 413, 111 S. E. 705 (1922) (parol stipulation as to organization of enterprise by defendants).

**SALE OF PERSONALTY.** *Allowed:* *Wilson v. Holley*, 66 N. C. 408 (1872) (fishing apparatus; oral agreement as to place of delivery); *Typewriter Co. v. Hardware Co.*, 143 N. C. 97, 55 S. E. 417 (1906) (typewriter; oral agreement that purchaser should have agent's commissions on four other sales); *Willis v. Construction Co.*, 152 N. C. 100, 67 S. E. 265 (1910) (R. R. materials; oral agreement as to transportation and place of delivery); *Lytton Mfg. Co. v. House Lumber Co.*, 161 N. C. 430, 77 S. E. 233 (1913) (appliance; oral agreement as to exchange); *Brown v. Mitchell*, 168 N. C. 312, 84 S. E. 404 (1915) (sick mule; oral title retention agreement—dictum); *Crown Co. v. Jones*, 196 N. C. 208, 145 S. E. 5 (1928) (bottle crowns; oral agreement as to size of shipments).

ness of the test applied—merely whether the oral matter contradicts the written—should be expected to produce such a result. One extreme case drawn from the class under discussion deserves special comment. In *Colgate Co. v. Latta*<sup>32</sup> defendant ordered in writing 100 boxes of octagon soap at a stipulated price. He was allowed to show a parol agreement that he was to pay for only 50 boxes. The court makes the remarkable assertion that "The extrinsic evidence . . . did not tend to contradict the writing." The statement and the result seem palpably erroneous.

The cases on proof of warranties resting in parol (where there is no written stipulation of complete supremacy) are few. They are all decided adversely to the proponent of the extrinsic warranty.<sup>33</sup> In two of them the writing contained a warranty of title and it was sought to prove a parol warranty of soundness. The obvious circumstance of significance is the fact that the writing does deal with the subject of warranties, a strong indication that reasonable men would intend it to deal with the subject finally.

### *Contracts for Services*

Contracts for rendering services of all kinds which present the problem of partial integration abound in the books. The written stipulation of complete supremacy is conspicuously absent, and the conflict of result is dumbfounding. For example, in *Meekins v. Newberry*<sup>34</sup> a parol agreement as to furnishing rafting gear was allowed in aid of a written contract for rafting logs. The opposite result was reached in *Garland v. Improvement Co.*<sup>35</sup> where a parol agreement as to furnishing hauling facilities was not allowed in aid

*Disallowed:* *Clark v. McMillan*, 4 N. C. 244 (1815) (sale of note, payment forthcoming on recovery from maker; oral agreement to start suit against maker in 10 days); *Donaldson v. Benton*, 20 N. C. 572 (1832) (logs; oral agreement for no payment until resale by vendee); *Fertilizer Works v. McLawhorn*, 158 N. C. 274, 73 S. E. 833 (1912) (fertilizer; oral agreement as to analysis); *American Potato Co. v. Jenette Bros.*, 172 N. C. 1, 89 S. E. 791 (1916) (potatoes "to be best quality shipped from county"; oral agreement that were to be good, medium size, and bright). See same case 174 N. C. 236, 93 S. E. 795 (1918) where purchaser won on theory of fraud and mistake; *Acme Mfg. Co. v. McPhail*, 181 N. C. 205, 106 S. E. 672 (1921) (written stipulation that seller to be at no expense after arrival of goods at X; oral agreement that he should pay logging road freight to Y).

<sup>32</sup> 115 N. C. 127, 20 S. E. 388 (1894).

<sup>33</sup> *Smith v. Williams*, 5 N. C. 426 (1810) (written warranty of title; parol warranty of soundness); *Fender v. Fobes*, 18 N. C. 250 (1835) (same); *Etheridge v. Palin*, 72 N. C. 213 (1875) (written contract for sale of fishing apparatus; oral warranty of quantity and quality).

<sup>34</sup> 101 N. C. 17, 7 S. E. 655 (1888).

<sup>35</sup> 184 N. C. 551, 117 S. E. 787 (1922).

of a written contract for cutting timber. The other cases are cited in the note, which discloses similar inconsistencies.<sup>36</sup>

### *Miscellaneous Contracts*

The doctrine of *Evans v. Freeman* has been applied to other types of transactions—stock subscriptions, partnership contracts, agency contracts, deeds of gift of personalty, bond bids, road subscriptions, and insurance policies. It is impossible to generalize further. The cases are cited below and the conflicts noted.<sup>37</sup>

### *Judicial and Legislative Records*

Judicial records rest on special grounds. Here a written record of the entire transaction is required by law. The consequence is the oft-quoted phrase that the records of a court "import verity."<sup>38</sup> The

<sup>36</sup> *Allowed*: *Terry v. R. R.*, 91 N. C. 236 (1884) (R. R. construction in one sector; oral agreement for same in another); *Doubleday v. Asheville Ice Co.*, 122 N. C. 675, 30 S. E. 21 (1898) (storing grapes; oral agreement as to keeping storeroom in shape); *Ivey v. Cotton Mills*, 143 N. C. 189, 55 S. E. 613 (1906) (services as mill superintendent; oral agreement as to competency); *Sumner v. Lumber Co.*, 175 N. C. 654, 96 S. E. 97 (1918) (cutting timber in one tract; oral agreement to cut on another tract at same price); *Hite v. Aydlett*, 192 N. C. 166, 134 S. E. 419 (1926) (facts in text); *Greene v. Bechtel*, 193 N. C. 94, 136 S. E. 294 (1926) (facts in text).

*Disallowed*: *Walker v. Cooper*, 150 N. C. 128, 63 S. E. 681 (1909) (to cut 40,000 ft. of lumber per week; oral agreement that amount might be less); *Patton v. Sinclair Lumber Co.*, 179 N. C. 103, 101 S. E. 613 (1919) (dressing lumber; oral agreement as to location of piling ground, it being generally stipulated in writing that defendant should furnish piling ground).

<sup>37</sup> STOCK SUBSCRIPTIONS. *Disallowed*: *N. C. Ry. Co. v. Leach*, 49 N. C. 340 (1857) (parol condition of subscription that road would be located at X); *Vaughan-Robertson Drug Co. v. Drug Co.*, 173 N. C. 502, 92 S. E. 376 (1917) (parol stipulation that part of subscription made for another).

PARTNERSHIP CONTRACTS. *Allowed*: *Faust v. Rohr*, 167 N. C. 360, 83 S. E. 622 (1914) (written contract to associate; parol agreement to rescind pre-existing contract not to compete); *Spencer v. Bynum*, 169 N. C. 119, 85 S. E. 216 (1915) (written contract for dissolution; parol agreement as to sharing losses).

AGENCY CONTRACTS. *Disallowed*: *Watson v. Spurrier*, 190 N. C. 726, 130 S. E. 724, (1925) (written agency to sell land; parol stipulation that similar agencies be gotten for adjoining lands).

DEED OF GIFT OF PERSONALTY. *Disallowed*: *Parker v. Vick*, 22 N. C. 195 (1838) (donor gave written undertaking to share slaves with plaintiff; parol agreement that plaintiff not to share till 21).

BIDS. *Disallowed*: *Slayton v. Comr's.*, 186 N. C. 690, 120 S. E. 452 (1923) (written bid for county bonds providing bidders' attorney should pass them; parol agreement that attorney who bid was to pass on them).

ROAD SUBSCRIPTIONS. *Disallowed*: *Rousseau v. Call*, 169 N. C. 173, 85 S. E. 414 (1915) (written subscription for construction of road; parol agreement that not collectible till work completed).

INSURANCE POLICIES. *Disallowed*: *Wilson v. Insurance Co.*, 155 N. C. 173, 71 S. E. 79 (1911) (parol agreement as to surrender value).

<sup>38</sup> *Cline v. Lemon*, 4 N. C. 323 (1916) (confirmation of report of special commission); *Ridley v. McGehee*, 13 N. C. 40 (1829) (Clerk's entry of probate

same is true of the records of the General Assembly.<sup>39</sup> Of course, the court can amend its own records.<sup>40</sup> The analogy is to a subsequent modification or rescission of a written contract. And it may be shown that the order or record was made in vacation, or forged, or made by a justice out of his county.<sup>41</sup> Such evidence questions the validity of the writing and may be analogized to evidence of fraud and mistake or of a condition precedent to the validity of a contract.

### *Trade Usage*

One part of the transaction usually not intended to be covered by the writing may be a known trade usage or custom. A characteristic feature of custom is its implicitness, and there is a strong natural inference that this part of the agreement is normally left out of the writing. It has been so held.<sup>42</sup>

### *Bills and Notes*

Oral agreements when the writing is a negotiable instrument are of two kinds. They may contradict or supplement the express terms of the instrument—the amount, the unconditional nature of the promise, the medium of payment, and the like. On the other hand, they may contradict or supplement the so-called implied terms—obligations growing out of indorsement, presentment, notice and the like.

In this jurisdiction the express written terms may be varied by showing a different oral agreement in three respects: 1. To show, irrespective of any question of conditional delivery, that a promise to pay money is subject to a variety of conditions and contingencies where no conditions appear in the writing.<sup>43</sup> 2. To show an apparent

and order of registration); *Wade v. Odeneal*, 14 N. C. 423 (1832) (records); *Wynne v. Small*, 102 N. C. 133, 8 S. E. 912 (1889) (certificate of probate).

<sup>39</sup> *Wilson v. Markley*, 133 N. C. 616, 45 S. E. 1023 (1903); *State v. Armour*, 135 N. C. 62, 47 S. E. 411 (1904).

<sup>40</sup> *Galloway v. McKeithen*, 27 N. C. 12 (1844).

<sup>41</sup> *Austin v. Rodman*, 8 N. C. 71 (1820); *Long v. Weaver*, 52 N. C. 626 (1860).

<sup>42</sup> *Hunter v. Bynum*, 3 N. C. 354 (1805) (written agreement to race horses; oral proof of custom of forfeiture of half stakes on failure to appear); *Crown Co. v. Jones*, 196 N. C. 208, 145 S. E. 5 (1928) (written order for bottle crowns; oral proof of custom of bottlers to pay for their obsolete crowns left on manufacturer's hands).

<sup>43</sup> *Allowed*: *Walters v. Walters*, 34 N. C. 28 (1851) (that bond for \$50 should be surrendered on payment of costs in pending litigation); *Woodfin v. Sleeder*, 61 N. C. 200 (1867) (that only so much as would pay debt of certain estate would be collected); *Clark v. Clark*, 65 N. C. 655 (1871) (that only 2/3 should be collected); *Kerchner v. McRae*, 80 N. C. 219 (1879) (that credit be given for bale of cotton); *Braswell v. Pope*, 82 N. C. 57 (1880) (to

co-maker to be a surety or an apparent surety a co-maker.<sup>44</sup> 3. To show a mode of payment different from that expressed in the instrument.<sup>45</sup> Strangely enough the express terms as to time of payment

surrender notes on assignment of judgment secured by mortgage); Penniman v. Alexander, 111 N. C. 427, 16 S. E. 408 (1892) (acceptance; that drawer continue to do construction work on house); Bresee v. Crumpton, 121 N. C. 122, 28 S. E. 351 (1897) (insurance premium note; that should be surrendered if smaller policy presented); Kernodle v. Williams, 153 N. C. 475, 69 S. E. 431 (1910) (that should be paid only if needed for debts of father's estate); Martin v. Mask, 158 N. C. 436, 74 S. E. 343 (1912) (to be void if maker ejected from leased land); Kernodle v. Kernodle, 174 N. C. 441, 93 S. E. 956 (1917) (that was to be considered only as evidence of advancement); Farrington v. McNeill, 174 N. C. 420, 93 S. E. 957 (1917) (payment conditional on recovery of land in pending law suit); Insurance Co. v. Gavin, 187 N. C. 14, 120 S. E. 820 (1924) (that payment of note in series secured by mortgage under foreclosure be postponed to prior payment of other notes in series); Smith v. Page Trust Co., 195 N. C. 183, 141 S. E. 575 (1928) (that notes were made only so payee could discount for what he could get; proved to repel charge of usury). But it may not be shown that it was agreed that obligor was not to be liable under any conditions. Bank v. Moore, 138 N. C. 529, 51 S. E. 79 (1905) (note given for bank stock; agreement that maker should not be liable).

*Disallowed:* Gatlin v. Kilpatrick, 4 N. C. 148 (1814) (if horse died note to be void—dictum); Geddy v. Stainback, 21 N. C. 476 (not to collect till after death); Ijames v. McClamroch, 92 N. C. 362 (1885) (declarations of obligee that would collect only portion excluded); Moffitt v. Maness, 102 N. C. 457, 9 S. E. 399 (1889) (that should cover only what appeared to be due on future settlement); Bank v. McElwee, 104 N. C. 305, 10 S. E. 295 (1889) (recited to be given for purchase money for land; that should cover also assignment of judgment); Harvester Co. v. Parham, 172 N. C. 389, 90 S. E. 503 (1916) (that note given for manure spreader should not be payable unless knife-grinder were furnished without extra cost; Allen, J., *dissentiente*); Roebuck v. Carson, 196 N. C. 672, 146 S. E. 708 (1929) (that on payment of bonus of \$500 payee would carry maker for life).

That the instrument is non-negotiable makes no difference under the present situation:

*Allowed:* Daughtry v. Boothe, 49 N. C. 87 (1856) (bond for hire of slave with option to retake slave and provision for proportionate payment in such event; parol stipulation that slave not to be removed from county); Perry v. Hill, 68 N. C. 418 (1873) (receipt containing promise to repay; parol stipulation for forbearance to prosecute suit for conversion).

*Disallowed:* Parker v. Morrill, 98 N. C. 232, 3 S. E. 511 (1887) (additional stipulation that obligee make certain provisions in his will).

<sup>44</sup>*Allowed:* Welfare v. Thompson, 83 N. C. 276 (1880) (co-maker shown to be surety); Cole v. Fox, 83 N. C. 463 (1880) (same); Williams v. Lewis, 158 N. C. 571, 74 S. E. 17 (1912) (same); Kennedy v. Trust Co., 180 N. C. 225, 104 S. E. 464 (1920) (same); Trust Co. v. Boykin, 192 N. C. 262, 134 S. E. 643 (1926) (same); Howell v. Roberson, 197 N. C. 572, 150 S. E. 32 (1929) (same); Gillam v. Walker, 189 N. C. 189, 126 S. E. 424 (1925) (same). Williams v. Glenn, 92 N. C. 253 (1895) (apparent surety shown to be co-maker). An accommodation agreement may, of course, be shown. N. I. L. §29; Smith v. Haynes, 82 N. C. 448 (1880). Persons apparently jointly and severally liable may not be shown only pro rata liable. Woods v. Finley, 153 N. C. 497, 69 S. E. 502 (1910).

<sup>45</sup>*Allowed:* Walters v. Walters, 33 N. C. 45 (1850) (bond for payment of sum certain; parol agreement that was to be surrendered on payment of costs in law suit); Sowers v. Earnhart, 64 N. C. 96 (1870) (agreement to pay in good money after Civil War—under special remedial statutes); Bryan v. Har-



may not be contradicted.<sup>46</sup> It would seem in the normal case that as to the unconditional nature of the promise, the time, and mode of payment, the written express terms would normally be intended to supersede oral agreements. However, the reasonable intent might well be that the writing should not supersede an oral agreement that an apparent co-maker should be a surety. The arrangement between the ostensible co-maker and the payee may have been necessary to enable the latter to discount the paper. On the contrary, would not the writing normally be intended to supersede an oral agreement that an apparent surety should be a co-maker? The convenience of the parties would not be promoted in this case by not disclosing their real relationship in the writing.

Williston's incisive argument has successfully exploded the notion that rules of law are always to be considered a part of the contract of the parties based on their presumed intention to include them:

"To assume first that everybody knows the law, and second, that everyone thereupon makes his contract with reference to it and adopts its provisions as terms of the agreement, is indeed to pile a fiction upon a fiction, and certainly without any necessity, for where different conclusions are reached by means of the fiction than would be reached without it, they are not preferable to the opposite ones. . . . Doubtless, law frequently is adopted by the parties as a portion of their agreement. Whether it is or not in any particular case, should be determined by the same standard of interpretation as is applied to their expressions in other respects."<sup>47</sup>

The classic case usually used to illustrate the principle of an "implication of law" is that of a contract silent as to the time of performance. It is commonly said that the law implies performance in a reasonable

reason, 76 N. C. 360 (1877) (that note for "dollars" should be paid in gold); *Quin v. Sexton*, 125 N. C. 447, 34 S. E. 542 (1899) (to be paid only out of proceeds of another note); *Evans v. Freeman*, 142 N. C. 61, 54 S. E. 847 (1906) (payment only out of proceeds from resale of article for privilege of selling which note was given); *Bank v. Winslow*, 193 N. C. 470, 137 S. E. 320 (1927) (that payment should be from sale of goods of maker in payee's hands).

*Disallowed*: *Davis v. Glenn*, 76 N. C. 427 (1877) (bond in 1874 payable in current funds; that was not to be paid in Confederate currency); *Woodson v. Beck*, 151 N. C. 144, 65 S. E. 751 (1909) (due bill for insurance policy; that payable by surrender of old policy—Hoke and Clark dissenting).

<sup>46</sup> *Hilliard v. Newberry*, 153 N. C. 104, 68 S. E. 1056 (1910); *Cauley v. Dunn*, 167 N. C. 32, 83 S. E. 16 (1914); *Copeland v. Howard*, 172 N. C. 823, 90 S. E. 909 (1916); *Cherokee County v. Meroney*, 173 N. C. 653, 92 S. E. 616 (1917); *Acme Manufacturing Co. v. McCormick*, 175 N. C. 277, 95 S. E. 555 (1918).

In *Fertilizer Co. v. Evans*, 194 N. C. 244, 139 S. E. 376 (1927), the agreement was after maturity and was properly allowed on the theory that the rule does not prevent a showing of agreements made subsequent to the writing.

<sup>47</sup> WILLISTON, *op. cit. supra* note 3, §615.

time, and parol agreements showing any other time of performance are ordinarily not allowed. It seems probable, however, that in the normal case it would not be intended that the rule of reasonable time should supersede oral agreements relative to time of performance. This is so for the simple reason that in most cases the transacting parties will not know of such a rule. A distinction is to be taken between this case and the case of a blank indorsement. It is likely that parties indorsing negotiable paper will know of the rule of secondary liability and will intend it to be incorporated in the instrument and to supersede their oral agreements.

The North Carolina cases reach the opposite conclusion. Perhaps the *Gianini* test of probable intention has not been applied even inarticulately in these cases. The rule of performance in a reasonable time is accepted as the contract of the parties,<sup>48</sup> but the rule of secondary liability is subordinated to contrary oral agreements. Parol agreements limiting the implied obligations growing out of indorsement are allowed.<sup>49</sup> It was once held that the indorser's implied secondary liability could be enlarged by an oral agreement to a primary liability. This is now prevented by N. I. L. §§ 63-4 and the cases so hold.<sup>50</sup> Of course, none of these oral agreements will be effective against a holder in due course,<sup>50a</sup> and it seems that they are equally ineffective against a holder for value without notice, even though he takes after maturity.<sup>51</sup>

### III. NON-APPLICATIONS OF THE RULE

#### *Parol Evidence of Facts Rendering the Writing Invalid*

The operation of the parol evidence rule depends on the existence of a valid writing assented to by the parties as their contract. It

<sup>48</sup> *Miles v. Walker*, 179 N. C. 479, 102 S. E. 884 (1920).

<sup>49</sup> *Davis v. Morgan*, 64 N. C. 570 (1869) (that should operate as receipt); *Mendenhall v. Davis*, 72 N. C. 150 (1875) (that was transfer of title plus guarantee against confiscation by U. S.); *Comr's. v. Wasson*, 82 N. C. 309 (1880) (that should operate only as transfer of title); *Coffin v. Smith*, 128 N. C. 252, 38 S. E. 864 (1901) (that was transfer only for purpose of securing debt). In *Hoffman v. Moore*, 82 N. C. 313 (1880), the person signing on back before delivery to payee was allowed to be shown a surety. The burden of proof is upon the one seeking to avoid the legal effect of the indorsement. *Ibid.*

<sup>50</sup> N. C. ANN. CODE (Michie, 1927) §§3044, 3045; *Meyers Co. v. Battle*, 170 N. C. 168, 86 S. E. 1034 (1915); *Busbee v. Creech*, 192 N. C. 499, 135 S. E. 326 (1926); *Wrenn v. Cotton Mills*, 198 N. C. 89, 150 S. E. 676 (1929); Note (1930) 8 N. C. L. REV. 315. *Contra*: *Wright v. Latham*, 7 N. C. 298 (parol agreement to dispense with notice of dishonor—Taylor, C. J., *dissentiente*).

<sup>50a</sup> N. I. L. §57; N. C. ANN. CODE (Michie, 1927) §3038; cases collected in 5 UNIFORM LAWS ANN. (N. I. L.) 392 (p).

<sup>51</sup> *Hill v. Shields*, 81 N. C. 251 (1879).

offers, therefore, no obstacle to any evidence which brings the validity of the writing into question. Oral conditions precedent to the taking effect of the writing are admitted.<sup>52</sup> On the other hand, oral conditions subsequent are not allowed. The one shows the non-execution of the writing; the other assumes its execution, but seeks to avoid its legal effect. Dicta in the local cases state that conditions subsequent may not be shown.<sup>53</sup> When the point is squarely raised, however, the decisions disallow the condition by the use of the language of *Evans v. Freeman*—that, although the contract may be only partly written, the oral part cannot contradict the written.<sup>54</sup> Whether the condition is precedent or subsequent will depend upon subtle connotations of the words used in pleading it. The pleader would do well ordinarily to use the words of a condition precedent and let the evidence show whether his pleading misconceives the nature of the condition. The following from the losing side illustrates the pitfall: "That the defendants agreed that they would sign an agency contract which they did upon the express condition and consideration that the same should be taken in connection with an agency contract of others."<sup>55</sup>

There is one situation that has given some difficulty. What if the writing states in effect that there are no conditions precedent to its validity? In *White v. Fisheries Co.*<sup>56</sup> Stacy, J., held that this prevented proof of a conditional delivery. But Connor, J., in *Pratt v.*

<sup>52</sup> Except in cases of conditional delivery of deed or bond to the grantee or obligee. See *post* note 58. The following illustrate the general principle: *Mercantile Co. v. Parker*, 163 N. C. 275, 79 S. E. 606 (1913) (order for goods containing "We agree that no statement made by ourselves or the salesman will be a part of this agreement unless written in the original order received and accepted by you." Defendant allowed to show agreement with salesman that order not to be sent until further instructions and violation thereof.); *Pratt v. Chaffin*, 136 N. C. 350, 48 S. E. 768 (1905) ("that it (order) should be submitted to his partner Hill and if not satisfactory to him that it should not bind the defendants and in such event they should write plaintiff at once and order them not to ship the goods."); *Building Co. v. Sanders*, 185 N. C. 328, 117 S. E. 3 (1923) (defendant's evidence that contract of lease delivered "only on condition that it would not become operative . . . unless within 10 days they could interest certain men of means in the undertaking"; *Overall Co. v. Hollister Co.*, 186 N. C. 208, 119 S. E. 1 (1923) ("that same (order) should not become effective or operative if goods ordered from another dealer were received").

<sup>53</sup> See *Thomas v. Carteret*, 182 N. C. 374, 9, 109 S. E. 384, 6 (1921); *Overall Co. v. Hollister*, *supra* note 52, at 209.

<sup>54</sup> A good illustration is *Watson v. Spurrier*, 190 N. C. 726, 130 S. E. 624 (1925).

<sup>55</sup> *Watson v. Spurrier*, *supra* note 54, at 731.

<sup>56</sup> 183 N. C. 228, 111 S. E. 182 (1922).

*Chaffin*<sup>57</sup> had previously held the contrary on the seemingly correct ground that this provision, like all others in the contract, had never become effective because of the condition:

"The contention made by the plaintiffs that, because of the statement in the order, there was no understanding with the salesman, except as printed or written on the order, the defendants are prevented from showing the agreement (that the order was not effective until approved by partner) assumes the very question in controversy whether there was any valid, binding contract."

There are early cases in this jurisdiction to the effect that there can be no delivery of a deed in escrow to the grantee or of a bond to the obligee.<sup>58</sup> But in the case of bonds and in some deed cases the court has allowed a variety of conditions to be reserved in favor of the grantor, under the theory that the contract is only partly written.<sup>59</sup> These cases have been examined. Their importance here is that they make the above principle largely impotent.

Fraud,<sup>60</sup> illegality,<sup>61</sup> and mistake may be shown because they impair the validity of the writing. The mistake, however, must be mutual,<sup>62</sup> or a unilateral mistake known to or induced by the opposite party.<sup>63</sup> A purely unilateral mistake has no effect on the validity of the writing.<sup>64</sup> In such a case the mistaken party is bound by the reasonable impression made by his words and conduct.

<sup>57</sup> 136 N. C. 350, 48 S. E. 768 (1905).

<sup>58</sup> *Gibson v. Partee*, 19 N. C. 530 (1837) (deed); and see *Chastien v. Phillips*, 33 N. C. 255, 8 (1850) (deed); *Blume v. Blume*, 24 N. C. 338 (1842) (bond); *Cross v. Long*, 51 N. C. 154 (1858).

<sup>59</sup> *Ante* notes 24 and 43.

<sup>60</sup> *Powell v. Heptinstall*, 79 N. C. 207 (1878) (defendant drew up deed and concealed fact from plaintiff that it contained more land than had been agreed under a compromise settlement); *Knight v. Houghtalling*, 85 N. C. 17 (1881) (contract to buy land; defendant purchaser allowed to show fraudulent representation as to purchase); *Hunter v. Sherron*, 176 N. C. 226, 97 S. E. 5 (1918) (misrepresentation as to effect of signing note held equivalent to fraudulent promise not to hold defendant to full extent of liability indicated by note); *Hardware Co. v. Kinion*, 191 N. C. 218, 131 S. E. 579 (1926) (agreement by plaintiff to cancel judgment in consideration of note in suit allowed to be shown to prove fraud, in that plaintiff did not intend to carry out agreement).

<sup>61</sup> *Strother v. Cathey*, 5 N. C. 162 (1807) (grant of land by state officers forbidden by law); *Hinton v. Insurance Co.*, 135 N. C. 314, 47 S. E. 474 (1905) (illegal agreement between insured and administrator).

<sup>62</sup> *Brady v. Parker*, 39 N. C. 430 (1847); and see *Jones v. Warren*, 134 N. C. 390, 4, 46 S. E. 740, 2 (1904).

<sup>63</sup> *Gray v. James*, 151 N. C. 80, 65 S. E. 644 (1909) (deed misrepresented to grantor who signed without reading); *McCall v. Toxaway Co.*, 152 N. C. 648, 68 S. E. 136 (1910) (release of personal injury claim).

<sup>64</sup> *Coleman v. Crumpler*, 13 N. C. 508 (1830) (wrong name in bond conditioned to perform decree of court); *Newbern v. Newbern*, 178 N. C. 3, 100 S. E. 77 (1919) (signing absolute deed under belief that it was a mortgage).

As in the case of conditions precedent, the showing of fraud is not prevented by a written stipulation that the writing contains the whole of the agreement. This provision, like all others, is vitiated by the fraud.<sup>65</sup>

The burden of persuasion in the fraud and mistake cases is not the familiar "preponderance," but "clear, cogent, and convincing proof." It is doubtful whether the latter epithet produces any effect on the ordinary jury's minds different from the former, but failure to propound to them the magical formula is cause for a new trial.<sup>66</sup>

### *Written Recital of Facts*

A written recital of facts does not come within the scope of the parol evidence rule. Accordingly, the date in a deed,<sup>67</sup> or the return on a warrant<sup>68</sup> may be contradicted. Likewise a written record of facts may be supplemented. Proof of the hour of registering a deed is allowed in aid of a written indorsement of the day,<sup>69</sup> and proof that a certain writing shown to a deponent was the one presently in issue is allowed in aid of a written deposition.<sup>70</sup>

The more troublesome cases concern a written recital of the receipt of a consideration. It has always been held that a mere recital of the receipt of money is disputable.<sup>71</sup> The same is true of a notation of payment on a negotiable instrument.<sup>72</sup> But when such a recital was accompanied by an exoneration or other promise, the older cases held it to be indisputable.<sup>73</sup> These cases are clearly erroneous. The recital is still one of past facts, even though it is accompanied by a promise. Williston puts the matter succinctly:<sup>74</sup>

" . . . the only case where the parol evidence rule is applicable to a recital of consideration is where the consideration recited is itself

<sup>65</sup> *Wolf. Co. v. Mercantile Co.*, 189 N. C. 322, 127 S. E. 208 (1925); *cf. Colt v. Springle*, 190 N. C. 229, 129 S. E. 449 (1925) (under similar facts evidence of fraud insufficient *semble*).

<sup>66</sup> *Harding v. Long*, 103 N. C. 1, 9 S. E. 445 (1889).

<sup>67</sup> *Cutler v. Cutler*, 3 N. C. 154 (1801).

<sup>68</sup> See *Forbes v. Wiggins*, 112 N. C. 122, 6, 16 S. E. 905, 7 (1893).

<sup>69</sup> *Metts v. Bright*, 20 N. C. 311 (1838).

<sup>70</sup> *In re Clodfelter's Will*, 171 N. C. 528, 88 S. E. 625 (1916).

<sup>71</sup> *Pritchett v. Dawson*, 32 N. C. 436 (1849); *Warlick v. Barnett*, 46 N. C. 539 (1854); *Harper v. Dail*, 92 N. C. 394 (1885); *Norwood v. Grand Lodge*, 179 N. C. 441, 102 S. E. 749 (1920).

<sup>72</sup> *Lancaster v. Stanfield*, 191 N. C. 340, 132 S. E. 21 (1926).

<sup>73</sup> *Brocket v. Foscue*, 8 N. C. 65 (1820) (exoneration); *Smith v. Brown*, 10 N. C. 580 (1825) (exoneration and condition); *Wilkinson v. Wilkinson*, 17 N. C. 376 (1833) (recital in deed); *Brown v. Brooks*, 52 N. C. 94 (1859) (promise to deliver slave); *Mendenhall v. Parish*, 53 N. C. 105 (1860) (recital in deed).

<sup>74</sup> 2 WILLISTON, *op. cit. supra* note 3, §115b.

a promise. That is, where the contract purports to be bilateral the parol evidence rule clearly forbids either party to a writing, though unsealed, to show that his own promise or that of his co-contractor was not accurately stated or was not given, as the writing states, in consideration of the other promise. This is the only estoppel by writing. It should, however, be observed that frequently when consideration is recited in a written contract as having been given, it will be true that though the consideration was not given the parties in fact agreed that the consideration recited should be given as such. This intention on any theory may be shown, since the evidence supports the instrument though varying a recital."

These early cases are overruled by *Shaw v. Williams*.<sup>75</sup>

Similarly the recitation of payment of consideration in a deed may be disputed.<sup>76</sup> It is said that this may be done for any purpose other than invalidating the deed. Put more simply, this merely means that a deed requires no consideration, but a mere recitation thereof is sufficient as a conveyancing phrase and prevents a resulting use. Acknowledgment of payment of premiums in insurance policies may likewise be contradicted.<sup>77</sup>

#### *Interpretation*

Much confusion has resulted from treating the simple processes of interpreting a writing as exceptions to the rule against adding to, varying, or contradicting its terms. The forbidding jargon about parol evidence to explain—the situation and relation of the parties, the real transaction, to fit the description to the thing, to put the court in possession of all the facts, *ad infinitum*—and the so-called doctrine of patent and latent ambiguities are reducible to a simple residuum of elementary principles.

The necessity for interpreting every writing is perennial. No matter how clear its terms, in and of itself it means nothing until applied to external things. "The words used must be translated into things and facts."<sup>78</sup> The admission of extrinsic evidence is an inevitable part of the process. The existence of the purported obligor or grantor, identification of the present parties with the writing, the existence of the subject-matter and its identity as that referred to in

<sup>75</sup> 100 N. C. 272, 6 S. E. 196 (1899). See also *Barbee v. Barbee*, 108 N. C. 591, 19 S. E. 168 (1891) (leading case).

<sup>76</sup> *Barbee v. Barbee*, *supra* note 75; *Smith v. Arthur*, 110 N. C. 400, 15 S. E. 197 (1892).

<sup>77</sup> *Kendrick v. Insurance Co.*, 124 N. C. 315, 32 S. E. 728 (1899); *Britton v. Insurance Co.*, 165 N. C. 149, 80 S. E. 1072 (1914).

<sup>78</sup> Holmes, J., in *Doherty v. Hill*, 144 Mass. 468, 11 N. E. 581 (1887), quoted in 2 WILLISTON, *op. cit. supra* note 3, §601, note 2.

the writing—these at least are necessary to give any writing significance. Pearson, J., in *Institute v. Norwood*<sup>79</sup> gives the crux of the matter:

“ . . . there being no defect of either the person or thing on the face of the instrument, it becomes necessary to fit the description to the person or thing; in other words to identify it. Here as a matter of course evidence *dehors* is admissible, because in fact it is necessary, and there is no getting on without it, in any case; for although the instrument may give the most minute description, it cannot *identify*.”

The significance of the parol evidence rule is that it defines and delimits what matters shall be subjected to interpretation. The inquiry in interpretation is always: what does the writing mean? In order to answer this question parol evidence of various sorts is provisionally admitted.<sup>80</sup> But this evidence affects the merits only through the medium of the writing by convincing the interpreter that the extrinsic evidence sheds light on the meaning of the writing. The fallacy of calling each type of evidence that is admitted for interpretative purposes an exception to the parol evidence rule is manifest.

Theoretically every circumstance helpful in arriving at the meaning of the writing should be considered. Practical safeguards have grown up against manufactured testimony tending to overthrow the clear meaning of the writing judged by popular standards in the use of words. The most important of these is the local rule that only an ambiguity can be explained, beyond the aforementioned explanation indispensable for any writing.<sup>81</sup> Another is the rule that forbids any

<sup>79</sup> 45 N. C. 65 (1852).

<sup>80</sup> The following illustrate some of the different types of evidence that have been considered: *Pitts v. Curtis*, 152 N. C. 615, 68 S. E. 189 (1910) (conveyance of “all my timber X may want for lumber” held too uncertain in absence of showing that parties had marked trees to be cut); *Taylor v. Meadows*, 175 N. C. 373, 95 S. E. 662 (1918) (previous occupancy with consent of land now in dispute); *Council v. Sanderlin*, 183 N. C. 253, 111 S. E. 365 (1922) (letter of mesne grantee recognizing reservation now disputed); *Blankenship v. Downtin*, 191 N. C. 790, 133 S. E. 199 (1926) (previous interpretation given to ambiguous grant by parties thereto).

<sup>81</sup> *Allowed*: *Graham v. Hamilton*, 27 N. C. 428 (1845) (punctuation); *Richards v. Schlegelmich*, 65 N. C. 150 (1871) (word “continues” in written condition that mine “continues . . . a good gold mine”); *Osborne v. Calvert*, 83 N. C. 365 (1880) (explaining arbitrator’s award); *Dunkhart v. Rineheart*, 89 N. C. 354 (1883) (“any of my black walnut trees not exceeding 15 in number”); *Perry v. Scott*, 109 N. C. 374, 14 S. E. 294 (1891) (“lying and being in County of Jones, and bounded as follows: on the South side of Trent River, adjoining the lands of X, Y, and others and containing 360 acres”—leading deed case; review of authorities by Shepherd, J.); *Lupton v. Lupton*, 117 N. C. 30, 23 S. E. 184 (1895) (“one-half of a boat”); *Layton v. Manufacturing Co.*, 161 N. C. 482, 77 S. E. 677 (1913) (“car load”); *Neal v. Ferry Co.*, 166

use of parol declarations of intention where the writing purports to embody the expression of that intention.<sup>82</sup> The reason for this rule is found in the practical difficulty of treating such evidence provisionally and the consequent danger of setting it up substantively in competition with the writing.

The standards of interpretation are inherently flexible and the precedents involve such inconsistencies as disallowing a showing that recitation of a \$500 note in a deed of trust to secure creditors meant a \$430 note between the same parties,<sup>83</sup> yet allowing a showing that a black horse in a chattel mortgage meant a bay horse!<sup>84</sup> The diverse rulings cited in the note demonstrate the futility of further generalization. It should be noted in passing that when an instrument is void for uncertainty the euphemism "patent ambiguity" is employed. Naturally a void instrument cannot be interpreted.<sup>85</sup> This simple principle is veiled in obscurity by the familiar assertion that "parol evidence is not admissible to explain a patent ambiguity." This

N. C. 563, 82 S. E. 878 (1914) ("approximation" in engineering contract); *Huffman v. Lumber Co.*, 169 N. C. 259, 85 S. E. 148 (1915) (that indorsement on note "payment on above" meant payment on open account attached thereto); *Richardson v. Woodruff*, 178 N. C. 46, 100 S. E. 173 (1919) ("that shrinkage be stood by purchaser").

*Disallowed*: *Miller v. Lucas*, 5 N. C. 227 (1809) (subject matter of mortgage); *Howell v. Hooks*, 17 N. C. 259 (1832) (bond); *Knight v. Bunn*, 42 N. C. 77 (1850) (that note to J. Ricks in deed of trust to secure creditors meant note to D. A. T. Ricks); *Dail v. Jones*, 85 N. C. 222 (1881) (that conveyance to take effect after death meant conveyance of present interest); *Davis v. King*, 89 N. C. 441 (1883) (that proceedings to legitimize meant a revocation of will); *Elliott v. Whedbee*, 94 N. C. 115 (1886) (that payment to personal representative meant payment to children); *White v. Carrol*, 147 N. C. 330, 61 S. E. 196 (1908) (subject matter of mortgage); *Rivenbark v. Teachey*, 150 N. C. 289, 63 S. E. 1036 (1909) (that specified acreage meant less); *Pate v. Lumber Co.*, 165 N. C. 184, 81 S. E. 132 (1913) (that "all my right, title, and interest" in deed meant less than all grantor's land); *Brick Co. v. Hodgkin*, 190 N. C. 582, 130 S. E. 330 (1925) (that easement was different from that expressed in deed).

<sup>82</sup>*Robertson v. Dunn*, 6 N. C. 133 (1812) (question whether instrument was deed or will; proof excluded that draftsman was requested to draw deed of gift—assertion by conduct); *Scott v. Green*, 89 N. C. 278 (1883) (intention of arbitrators); *Mudge v. Varner*, 146 N. C. 147, 59 S. E. 540 (1907) (intent of guarantor of notes); *Sherrod v. Battle*, 154 N. C. 345, 70 S. E. 834 (1911).

<sup>83</sup>*Dismukes v. Wright*, 20 N. C. 347 (1839).

<sup>84</sup>*Harris v. Woodward*, 96 N. C. 232, 1 S. E. 544 (1887).

<sup>85</sup>In the following cases the instruments were held void for uncertainty ("contained a patent ambiguity"): *Roundtree v. Britt*, 94 N. C. 104 (1886) (mortgage—"my entire crop of every description"); *Kiff v. Kiff*, 95 N. C. 71 (1886) (debt of defendant for "labor for 3 1/2 years" in allotment of widow's year's allowance); *Holman v. Whitaker*, 119 N. C. 113, 25 S. E. 793 (1896) (chattel mortgage—"one horse wagon"—mortgagor had four such wagons); *Farthing v. Rochelle*, 131 N. C. 563, 43 S. E. 1 (1902) ("your lot" in contract to buy—*contra*: *Sessoms v. Bazemon*, 180 N. C. 103, 104 S. E. 38 (1920)); *Cathey v. Lumber Co.*, 151 N. C. 592, 66 S. E. 580 (1909) (deed description).



verbal juggling produced the redundant "latent ambiguity" to characterize the contents of an instrument permitting interpretation by parol evidence. The unnatural and technical connotations that these Elizabethanisms (they were derived from Lord Bacon) have acquired is illustrated by the shrewd statement of Pearson, C. J., that every conceivable grant involves a latent ambiguity.<sup>86</sup> The usual case of ambiguity is one of omitting too much from the writing. If, however, the elements of a clear description are present, but are obscured by superfluous and erroneous details the writing is treated as containing an ambiguity within the rule that permits full interpretation with the aid of parol testimony.<sup>87</sup>

In the ordinary case of a written instrument, there being no ambiguity and of course the parol evidence rule preventing any competitive written or oral substantive evidence, the instrument speaks for itself aided by that minimum of collateral parol evidence necessary in every case to give significance to the writing. There is an exception in the case of deeds. No matter how clear the description, if the parties run the actual boundaries contemporaneously with the execution of the deed, this "practical location" prevails. This is not put on the basis that the written boundaries are not intended to supersede oral agreements, nor that the "practical location" is collateral evidence provisionally admitted to aid in interpreting the written description. Indeed in the normal case neither the reasonable man test of intent nor the interpretative process could bring about the results actually obtained. The doctrine seems to be a genuine exception to the parol evidence rule.<sup>88</sup> Mention should also be made of the familiar canons determining the relative importance of monuments, courses, distances, and contents in interpreting ambiguous deed descriptions.<sup>89</sup>

### *Executed Parol Agreements*

A plea of accord and satisfaction of an obligation created by a writing raises a fascinating problem, and the use of agreements extrinsic to the writing bears an analogy to their use for interpretation.

<sup>86</sup> *Institute v. Norwood*, *supra* note 79.

<sup>87</sup> *Goff v. Pope*, 83 N. C. 123 (1880) (misdescription as to location of engine conveyed by mortgage).

<sup>88</sup> *Person v. Roundtree*, 2 N. C. 378 (1796); *Reed v. Shenck*, 13 N. C. 415 (1829) (dictum); *Clarke v. Aldridge*, 162 N. C. 326, 78 S. E. 216 (1913); *Woodard v. Harrell*, 191 N. C. 194, 132 S. E. 12 (1926).

<sup>89</sup> *Lumber Co. v. Hutton*, 152 N. C. 537, 68 S. E. 2 (1910); *Gray v. Coleman*, 171 N. C. 344, 88 S. E. 489 (1916).

Of course, when a check or other instrument for less than the amount claimed is marked "in full payment" and accepted by the obligee, a parol agreement that it should cover only part of the indebtedness may not be shown. Reasonable men would intend the written notation of full payment to supersede their oral agreements.<sup>90</sup> A nicer problem is presented by *Richards v. Hodges*.<sup>91</sup> Plaintiff and defendant were majority stockholders in the Bell-Richards Shoe Co. Defendant bought plaintiff's stock giving personal notes in payment. The suit was on these notes. Defendant pleaded an accord, in that plaintiff accepted notes of the Shoe Co. in discharge of defendant's personal notes. The evidence showed that plaintiff had taken notes of the Shoe Co., and defendant offered to prove an oral agreement between them at the time the personal notes were given, to the effect that they were to be discharged in this way. The court held that, although the oral agreement contradicted the written notes, it could be shown under the plea of accord. The holding is clearly right. The vital question is the obligee's intent in accepting a different performance from that vouchsafed him by the writing. A parol stipulation contemporaneous with the writing that the performance should be that now pleaded as an accord is cogent evidence that the obligee so accepted it. It will be noticed, however, that the very plea of accord recognizes that the original obligation is determined by the writing. The factors involved in this problem are usually treated as an exception to the parol evidence rule and summed up in the loose statement that "an executed parol agreement may be shown."

#### IV. CONCLUSION

There are at least three possible hypotheses where an alleged oral transaction is sought to be used to alter what would be the effect of a writing standing alone: 1. The oral transaction may be fabricated. 2. It may have taken place but the final written embodiment may have been intended to supersede it. 3. It may have been intended by the parties to stand with equal effect with the writing. Which of these three possibilities is true is a question of fact, which under the normal division of judicial functions would fall to the jury. The parol evidence rule is a device to give the judge a special control of this three-faced fact problem, excluding the matter from the jury unless he concludes that under all the circumstances the third situation is a

<sup>90</sup> *De Loach v. De Loach*, 181 N. C. 394, 127 S. E. 419 (1925).

<sup>91</sup> 164 N. C. 183, 80 S. E. 439 (1913).

reasonable probability. This special control is thought necessary because of a supposed danger that juries for economic and emotional reasons may be too ready to allow parties to escape from burdensome written engagements. The North Carolina practice seems to be to ask only two questions—one preliminary; the other, final. They are addressed respectively to the judge and jury: 1. Does the oral agreement contradict the writing? 2. If not, was the said oral agreement made? Attention of either branch is nowhere focused upon the question—a very practical one in view of the frequency with which oral tentative agreements are abandoned when the final writing is executed—was the writing intended to supersede the oral agreement now set up in competition with it? A review of the cases suggests a serious doubt whether this method of administration is a sufficient safeguard for the stability of written transactions to meet the needs of the business elements of the community.