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Twenty-Five Years of Parol Evidence in North Carolina

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"Get the agreement in writing, signed by the other man, but leave out one or two of the important provisions; depend on his oral promise for those items." That would seem to be the policy followed in a surprising number of cases, and leading to the litigation which has confused the law on one of the obviously sensible rules of our common law system. The parties sign and deliver a formal document stating their contract in detail, giving every indication of being a completely final record thereof, and yet they deliberately omit one part of the transaction. If man were always a reasonable animal, the parol evidence rule would offer no serious problem in statement or application, especially if he were reasonable as judged in the light of later developments. As it is, our court decisions on the rule have left the law in confusion, and the ablest legal minds have studied the cases only to achieve disagreement as to what the law is, or should be.

In this state, the North Carolina Supreme Court has often stated the rule in the traditional phraseology and emphasized its importance; but the only detailed study of the local decisions reached this conclusion in 1931: "The North Carolina court in a long line of cases has abrogated the parol evidence rule for most purposes."[1]

The purpose of this article is to look at the developments in the same field since 1931. Startling changes in the common law are hardly to be expected in a quarter of a century; but it may be helpful to attempt to bring such a valuable survey up to date.[1a]

I. THE RULE AND ITS PURPOSE

The parol evidence rule as generally recognized may be stated as follows:

> When the parties have (1) made a valid contract, and (2) have approved a writing as the final, complete statement of the con-

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[1] Chadbourn and McCormick, *The Parol Evidence Rule in North Carolina*, 9 N. C. L. REV., 151, 156 (1931). This article is cited in 9 WIGMORE, EVIDENCE § 2425 n. 1 (3d ed. 1946) and in 3 CORBIN, CONTRACTS p. 265, n. 76 (1951); the latter writer expresses the opinion that a similar survey in other states would show much the same liberality toward parol evidence, and confusion in the decisions, as was found in North Carolina.

[1a] [To illustrate the development of the parol evidence rule, cases are cited in chronological order—Ed.]

> tract, that writing supersedes every other prior and contemporaneous term and agreement between the parties relating to the subject matter.[2]

The written record approved as the final embodiment of the agreement has been commonly called an "integration" ever since Wigmore first used the term in that sense. The purpose of the rule is to give effect to the intent of the parties. They have made their agreement in writing in order to have a record of the contract terms that is precise, permanent and reliable. They intend the integregation as protection against forgetfulness and against falsehood. The parol evidence rule is aimed to achieve that objective.

The statute of frauds was a legislative device aimed at the same objective; for decades it has been criticized by courts and other authorities as causing more fraud than it prevents.[3] But no such attack has been made upon the parol evidence rule, except in Corbin's treatise on *Contracts,* where the statement is that the rule has done more harm than good.[4] This court-made rule has been generally recognized as a sensible, necessary protection for the man who is prudent enough to insist on paper and ink rather than oral promises dissolving in air. Even the decision which refuses to apply the rule often goes out of its way to comment on the wisdom inherent in the rule within its proper limitations.

II. Parol Evidence as to Validity

Before applying the rule, the court must determine that a valid contract was made. On any point essential to validity then, parol evidence —evidence outside the writing—is acceptable and indeed necessary.

If conditional delivery is claimed, the writing itself can hardly give the answer. Delivery can never be proved by the language of the instrument involved; for delivery of the instrument cannot take place until after the instrument is completed. Any words in a writing purporting to characterize delivery of that writing can only be a forecast of future events; they can speak only of that which is to come after the words are written. The North Carolina position allowing parol evidence to prove conditional delivery, even where the writing expressly specified

[2] For more detailed statements of the rule, see 3 Williston, Contracts § 632 (Rev. ed. 1936); Restatement, Contracts § 237 (1932); 3 Corbin, Contracts § 573 (1951); Uniform Commercial Code § 2-202 (1952).

[3] See the Report of the English Law Revision Committee on the Statute of Frauds, 15 Can. B. Rev. 585, 593 (1937).

[4] 3 Corbin, Contracts § 575 (1951). The more usual evaluation of the rule is that indicated in a North Carolina decision as "a principle which has always been considered one of the greatest barriers against fraud and perjury. * * * [T]he wise rules which are intended for the protection of the provident should not be refined away for the relief of the negligent." Moffitt v. Maness, 102 N. C. 456, 459, 9 S. E. 399, 401 (1889).

that delivery should be absolute and unconditional, is quite logical.[5]

Parol evidence is also proper to prove illegality of the agreement.[6] Fraud or misrepresentation making the contract voidable is, of course, provable by parol.[7] There is no substantial doubt, in this state or elsewhere, that the court should consider evidence outside the writing which bears upon any of these factors concerned with the validity of the contract, and upon some other issues referred to in the notes.[8]

III. Effect of Express Merger Clause

It is likewise essential to the application of the parol evidence rule that the parties have assented to a document as a final, complete repository of the terms of their contract. Whether such assent has been given is clearly a question of intent of the parties—intent that is externally indicated, communicated, and so contractually effective. If the document states the necessary intent, saying "every term of our contract is fully stated herein," or words to that effect, there is an express integration, and, generally, no further problem, for the rule applies and any promises or conditions not in the document are not part of the contract.

The North Carolina decisions are fairly consistent in such cases. At least in cases which appear from the official report to belong in that category, there has been little tendency to allow parol evidence either to add to or to vary a term.[9] This was brought home to the laundryman sued on a contract for the purchase of new presses, who alleged an oral guaranty that they would be more efficient and economical than his old equipment. The salesman must have used some such language—he would hardly be a salesman if he did not make so modest a claim; probably he guaranteed as much in positive terms as the defendant alleged. But the contract signed by the laundryman included these words:

> "This . . . contract constitutes . . . the entire agreement between the parties. . . . There are no representations, agreements, prom-

[5] Wilson v. Stndard Fertilizer Co., 203 N. C. 359, 166 S. E. 76 (1932); Roberson v. Swain, 235 N. C. 50, 69 S. E. 2d 15 (1952). In Jefferson Standard Life Ins. Co. v. Morehead, 209 N. C. 174, 183 S. E. 606 (1936), the writing negatived conditional delivery, but parol evidence of conditional delivery was allowed. The conservative authorities would not allow parol evidence of conditional delivery, when the writing contains express language inconsistent therewith: 3 Williston, Contracts § 634 (Rev. ed. 1936); Restatement, Contracts § 241 (1932).

[6] Usury proved by parol, Pugh v. Scarboro, 200 N. C. 59, 156 S. E. 149 (1930).

[7] Willett v. National Accident etc. Ins. Co., 208 N. C. 355, 180 S. E. 580 (1935); Anderson Cotton Mills v. Royal Mfg. Co., 218 N. C. 560, 11 S. E. 2d 550 (1940). (The latter case was a tort action for deceit.)

[8] As to interpretation: Robinson v. Benton, 201 N. C. 712, 161 S. E. 208 (1931); Owens v. Reserve Loan Life Ins. Co., 206 N. C. 864, 175 S. E. 203 (1934). As to mistake, in case seeking reformation: Robinson v. Benton, *supra;* Alexander v. Virginia-Carolina J. S. Land Bank, 201 N. C. 449, 160 S. E. 460 (1931); Life Ins. Co. of Virginia v. Edgerton, 206 N. C. 402, 174 S. E. 96 (1934); Ollis v. Board of Education of Avery County, 210 N. C. 489, 187 S. E. 772 (1936).

[9] A possible exception is Colgate Co. v. Latta, 115 N. C. 127, 20 S. E. 388 (1894).

ises or warranties relating to the subject matter of this contract other than expressed herein."

The court was unanimous in holding that any defense based on a breach of the alleged parol warranty was barred by the parol evidence rule.[10] When the purchaser signed the order containing those statements, he clearly agreed that any assurances expressed by the salesman, if not in the writing, were not in the contract.

The defense in an action on a stock subscription contract met the same answer. The agreement concluded with this paragraph:

"No representations, statements or agreements other than as herein recited have been made, or are binding on said corporation, and my entire contract is herein expressed."

The subscriber-defendant claimed that he was induced to sign only by oral representations. The court said the alleged representations were all promissory, and that, in the absence of fraud, evidence thereof was properly excluded.[11]

In neither of these cases did any direct contradiction appear between the parol evidence and a specific term (other than the merger clause) in the writing. The written contract for the sale of laundry machinery certainly did *not* read: "The seller does not warrant this equipment to be any improvement over the old equipment which it replaces." The enforcement of the alleged parol warranty would not conflict with any of the terms in the writing other than the merger clause itself. That is the course approved, in such a situation, by many North Carolina decisions, in the absence of a merger clause;[12] but such a clause prevents any addition.

If the parol evidence faces not only a merger clause but also a direct, specific contradiction elsewhere in the writing, the parol evidence is, of course, the more likely to be discarded. The purchaser of an automobile, who financed the purchase by a chattel mortgage on the car naming the seller as mortgagee but intended for immediate assignment to the finance company, offered parol evidence that the finance company promised to insure the car. The chattel mortgage, however, stipulated that the mortgagee was under no duty to secure any insurance and the mortgage contained a merger clause. The conclusion of the court was that "the

[10] American Laundry Machinery Co. v. Skinner, 225 N. C. 285, 34 S. E. 2d 190 (1945). The court was divided as to the defense of fraud, holding four to three that the statements of the salesman as to how the machinery would perform were not misrepresentations of fact.

[11] Elizabeth City Hotel Corporation v. Overman, 201 N. C. 337, 160 S. E. 289 (1931).

[12] See p. 428 *infra*.

writings supersede the oral agreements of the parties and express their actual agreements."[13]

Applying the Parol Evidence Rule as Evidence Law

The express merger clause in one North Carolina contract was without effect however, because of the tendency in the court to treat the parol evidence rule as a rule of evidence, as its name suggests. One point on which all the ablest students of the rule are agreed—Wigmore and Williston, Thayer before, and Corbin after them—is that the name of the rule is misleading. It is not a part of our procedural law of evidence; it is substantive law fixing the limits of contract rights. Wigmore states:

> "It is *not a rule of Evidence* because it has nothing to do with the probative value of one fact as persuading us of the probable existence of another fact. . . . It is a rule of substantive law, because it deals with the question where and in what sources and materials are to be found the terms [of a contract]."[14]

Nonetheless, the North Carolina court generally regards the parol evidence rule as a rule of evidence; and that theory has led to a decision within the last twenty-five years admitting parol evidence in the face of an express integration agreement.

The action was to collect for a tractor bought on a written order including a merger clause in these words:

> "This order . . . is understood to be our entire contract. * * * [T]he above warranties . . . are agreed to be the only warranties, given in lieu of all implied warranties."

The defense, in spite of the above language, was breach of an implied warranty that the tractor was suitable for use in logging operations. The court saw the case as centered around evidence that the plaintiff-seller knew that the tractor was being bought for logging operations. Defendant offered such evidence; plaintiff objected, but later testified himself that he had such knowledge. The court did not deny that defendant was attempting to change the integrated contract by parol evidence. Nevertheless, it held that plaintiff, by his own evidence on the matter, waived his objection to the parol evidence, so that the contract was changed by this evidence and the judgment was for the defendant on the ground of breach of warranty.

> "The plaintiff contends that the written contract between the parties as to warranties and representations cannot be varied by

[13] Wilkins v. Commercial Finance Co., 237 N. C. 396, 403, 75 S. E. 2d 118, 124 (1953).

[14] 9 WIGMORE, EVIDENCE p. 76 (3d ed., 1950).

> oral testimony. This principle is not applicable on the present record. Plaintiff introduced the written 'warranty and agreement' and in his testimony stated on cross examination: 'I sold him the tractor for use in logging operations and understood he was going to use it for logging.' * * * All of the above evidence of plaintiff indicates that the tractor was sold to be used in logging. It is well settled that an objection to evidence is immaterial where the same evidence is later admitted without objection."[15]

The integration here included an express warranty, and specifically excluded "all implied warranties." The effect of this decision was to hold that because the seller knew the tractor was being purchased for use in logging operations, he warranted its fitness for that use, though the buyer agreed in a written sale contract that there should be no such warranty; in other words, in this respect the parties could not decide for themselves what their contract obligations were to be.[16] Without doubt there was evidence before the court that the seller knew the purpose for which the tractor was purchased; but the question was what effect that evidence had on the contract signed by the parties. The conclusion which the court drew that there was a warranty of fitness, when the buyer had signed a written contract expressly negativing all implied warranties, seems supportable only on the theory that if the seller knows the purpose for which the article is bought, he cannot escape a warranty of fitness for that purpose, even though the buyer clearly renounces such warranty in the contract. The decision illustrates the unfortunate results which may follow from looking upon the parol evidence rule as controlling simply what evidence is properly in the record, rather than as indicating what effect that evidence has on the contract rights of the parties.[17]

IV. Written Agreements Without Merger Clause

In the cases where there is a merger clause there is no serious prob-

[15] Edgerton v. Johnson, 217 N. C. 314, 317-318, 7 S. E. 2d 535, 537 (1940). The buyer-defendant succeeded in getting into the record evidence that his son had been killed while operating the tractor, in an accident which the buyer claimed was caused by the unsuitability of the tractor for logging operations.

[16] Williston speaks of implied warranties of quality in words suggesting that they are not within the parties' control: "[T]he implied warranty is not based on a supposed agreement of the parties, but is an obligation imposed by law." 1 Williston, Sales p. 627 (Rev. ed. 1948). However, it is plain from the context (as in § 239 c, p. 628) that he does not mean that the parties cannot relieve the seller of all liability on implied warranties, by clearly stating that to be their intent, but rather that the amplied warranty is based upon an implication of fact clearly recognized by a rule of law.

[17] In Smithfield Mills v. Stevens, 204 N. C. 382, 384, 168 S. E. 201, 202 (1933), the court also held an objection based on the parol evidence rule was waived by the objecting party introducing his own evidence on the matter, in this case evidence denying the truth of the parol evidence earlier offered.

lem. The parties having declared their intent in the writing, having said in effect "any term ont set out over our signatures is not a part of our contract." The instrument is, of course, to be treated as an integration, and the parol evidence rule will generally be applied in its broadest form, in North Carolina as elsewhere. But if there is no such express statement in the writing, what test or standard should be applied to determine whether the parties intended the document to be a complete integration, or only a partial integration? At this point the courts experience some difficulty and the text writers disagree. To make the problem concrete: a written contract for the sale of a tract of country land is made only after the seller promises to remove an old ice-house from another tract across the road. The signed instrument contains no merger clause, and no reference to the ice-house. Is the absence of such reference properly to be taken as an indication that the parties abandoned that contract term? In theory, at least, the basic question is not what the parties intended at the time they signed the document, but what intent they indicated; for in forming a contract, it is the intent communicated outwardly that is controlling.

The conservative view treats the writing as a complete integration, just as if it contained a merger clause, unless it appears on its face to be incomplete. Williston reasons that the intention of the parties on this matter must be drawn from the writing:

> "[I]f the court may seek this intention from intrinsic circumstances, the very fact that the parties made a contemporaneous oral agreement will of itself prove that they did not intend the writing to be a complete memorial. The only question open would be whether such a contemporaneous oral agreement was in fact made. * * * [T]he practical value of the rule would be much impaired if either party to a writing were allowed to rebut the presumption by proof of any contemporaneous oral agreement. Certainly the law does not permit this. The question arises chiefly where it is asserted not that there is no integration at all, but only a partial integration. It is generally held that the contract must appear on its face to be incomplete in order to permit parol evidence of additional terms."[18]

He approved the statement by Finch, J.:

> "If we may go outside of the instrument to prove that there was a stipulation not contained in it, and so that only a part of the contract was put in writing, and then, because of that fact, enforce

[18] 3 WILLISTON, CONTRACTS pp. 1820-21 (Rev. ed. 1936).

the oral stipulation, there will be little of value left in the rule itself."[19]

The Williston rule seems appealing in its simplicity of application; but Corbin and Wigmore reject this solution. Both state emphatically that the writing canot prove its own completeness.[20] The question of whether the parties intended the writing to supersede the disputed parol agreement, according to Wigmore and Corbin, must be determined not simply by examination of the writing to decide whether it appears to be complete, but by examination of the alleged parol agreement and the writing. This decides whether the writing, construed in the light of all the circumstances, indicates an intent to approve it as a complete integration, thus superseding the alleged parol agreement, or an intent to leave that parol agreement still effective as part of the transaction.[21]

The ice-house case, the example suggested above, confronted the New York Court of Appeals, and produced conflicting opinions, each of which seems, as it is read, to give the only right answer. The vendee liked the farm which was for sale, but not the vendor's old ice-house facing it across the road. The vendor agreed to remove the old building, and a written sale contract was made which was silent both as to the ice-house and as to merger. The farm was conveyed, but the seller refused to move the ice-house, and the vendee brought an action to enforce the promise of removal. The court expressed no doubt that the oral promise had been made, but added that this was immaterial. The majority of the Court (including Chief Judge Cardozo) denied effect to the oral agreement, on the ground that the writing, read in the light of the circumstances—including the knowledge that the purchaser objected to the ice-house—suggested only one conclusion: that it set forth everything agreed upon between the parties. Any agreement for removal of the ice-house was so closely related to the subject matter of the writing that it would normally be included in the writing if made; being excluded from the writing, it could not be treated as part of the sale agreement. The opinion conceded that the rule worked occasional injustice, but "on the whole it works for good."[22] The dissent, by two members of the court, agreed with the standard approved by the majority, but not with its application to the case. The minority opinion

[19] Eighmie v. Taylor, 98 N. Y. 288, 294 (1885).

[20] 3 CORBIN, CONTRACTS § 582 (1951); 9 WIGMORE, EVIDENCE § 2431 (3d ed. 1940).

[21] 9 WIGMORE, EVIDENCE § 2430 (3d ed. 1940); 3 CORBIN, CONTRACTS § 582 (1951); Chadbourn and McCormick, *op. cit. supra* n. 1 at p. 155. Williston concedes that some writings are partial integrations only, and approves a similar standard for distinguishing such cases; 3 WILISTON, CONTRACTS p. 1834 (Rev. ed. 1936).

[22] Mitchill v. Latch, 247 N. Y. 377, 380, 160 N. E. 646, 647, 68 A. L. R. 239, 240 (1928).

conceded that the written contract in no way suggested that it was incomplete; but reasoned that the subject of the writing was the transfer of one tract of land, while the subject of the parol agreement was removal of an eye-sore from another tract not to be conveyed—a matter so separate that it might reasonably be dealt with outside the conveyance agreement.[23]

The North Carolina court would have agreed with the minority, for its parol evidence rule is certainly not the rule supported by Williston, and in some decisions it seems to afford the written contract even less protection than does the rule stated by Corbin and Wigmore. As pointed out in the earlier article,[24] there is a tendency in North Carolina when parol evidence is offered as affecting a written contract without a merger clause, to handle it in two questions, one for the court, the other for the jury. First, the court would decide whether there was any necessary contradiction between the parol evidence and the writing, such total inconsistency as would make co-existence of the written agreement and the oral agreement impossible. If no contradiction were found, the jury is left to say whether the alleged oral agreement was made; if so, it is enforced. For if the oral agreement was made, it is concluded that the writing was incomplete, a partial integration only.

This seems to mean that the situation described in the above quotation from Williston's treatise, and apparently regarded by him as a *reductio ad absurdum,* has prevailed in North Carolina courts: "[T]he very fact that the parties made a contemporaneous oral agreement" has of itself been taken as proof "that they did not intend the writing to be a complete memorial." The only question open was "whether such a contemporaneous oral agreement was in fact made."[24a]

In other words, though the North Carolina court often states the parol evidence rule in its traditional form as a bar to any prior or contemporaneous agreement which "adds to, varies, or contradicts" the writing,[25] the rule actually applied here in many cases seems to allow parol evidence which adds to the writing without contradicting it. This is the tendency since 1931 as well as before.

Sale Contracts Without Merger Clause

The parol evidence rule has been invoked, and the North Carolina version applied, in the usual number of sales contract cases within the last twenty-five years. The evidence has been received or excluded de-

[23] *Id.* at 384, 160 N. E. at 648, 68 A. L. R. at 242.
[24] Chadbourn and McCormick, *op. cit. supra* n. 1 at p. 157.
[24a] WILLISTON, CONTRACTS pp. 1820-21 (Rev. ed. 1936).
[25] The decision in what is possibly the leading North Carolina case on the parol evidence rule exemplifies both the classic statement of the rule, and its distortion in this state: Evans v. Freeman, 142 N. C. 61, 64, 54 S. E. 847, 848 (1906).

pending on whether it appeared to the court to be consistent or inconsistent with some term of the written contract. In *Smithfield Mills v. Stevens*[26] the court saw no contradiction, and allowed the evidence to be considered. Plaintiff had given defendant-brokers several written orders for the purchase of cotton on margin. The writings were silent as to further margin, but plaintiff alleged that when the orders were given, defendant-brokers had agreed to furnish additional margin if it became necessary. The court said the parol evidence was not "totally inconsistent with the sales agreements introduced in evidence,"[26a] and was therefore admissible.

On the other hand the farmer who complained because his written order for corn and cotton fertilizer did not bring him tobacco fertilizer found no relief. He claimed that his only need was for tobacco fertilizer, that the seller-defendant knew that fact and promised to deliver tobacco fertilizer; but the court pointed out the inconsistency between the written order which the farmer-plaintiff signed, and the parol evidence, and refused to consider the latter.[27]

The distinction between evidence which adds a term and evidence which contradicts is not always clear. Where a written contract called for the sale of 145 acres for $14,000, and the vendee claimed another thirteen acres because the preceding oral agreement had been to sell 158 acres for $14,000, this parol evidence was held to conflict with the writing, and was rejected.[28] On petition for rehearing, however, the court decided that parol evidence should be heard in support of plaintiff's claim that the written contract was understood by both parties to cover some farming implements, though the writing spoke only of land. In other words, parol evidence which adds thirteen acres to the 145 described in the writing is inconsistent therewith; but parol evidence which adds farm implements is an addition, not a contradiction.[29] This distinction did not satisfy the entire court, as there was vigorous dissent by three justices, who would have excluded the evidence as to the farm implements. But the distinction which the court recognized is not unreasonable, and it may well be consistent with the Wigmore test of in-

[26] 204 N. C. 382, 168 S. E. 201 (1933).

[26a] *Id.* at 384, 168 S. E. at 202.

[27] Winstead v. Acme Mfg. Co., 207 N. C. 110, 176 S. E. 304 (1934). Leave to amend and allege fraud was denied. If plaintiff had proved that defendant-seller knew the fertilizer was being bought for a field of tobacco, the theory of Edgerton v. Johnson, 217 N. C. 314, 7 S. E. 2d 535 (1940), would seem to make the seller liable for breach of warranty.

[28] Williams v. McLean, 220 N. C. 504, 17 S. E. 2d 644 (1941). The 145 acres had been conveyed and paid for; plaintiff claimed a constructive trust as to the 13 acres.

[29] Williams v. McLean, 221 N. C. 228, 19 S. E. 2d 867 (1942).

tegration.[30] Parties who were closing a sale of 158 acres of contiguous farm land and a number of farm implements would be much less likely to omit 13 acres of the contiguous farm land from their written contract than to omit all reference to the farm implements. The implements are a quite different type of property from the land, and might not be grouped with the land in the normal thinking of layman or lawyer.

Farm implements were again the subject of the parol evidence as well as the writing before the court in another case ten years later. The action was to collect a balance due for a tractor and two attachments, as shown in a receipt acknowledging delivery signed by the defendant. The defense was failure to deliver two other attachments, a cultivator and a distributor, which the purchaser claimed had been promised and were essential. The terms of the receipt were not set out, but the court treated the case as a parol evidence problem, and held the evidence admissible, saying part of the contract was oral.[31]

In *Mills v. Bonin*,[32] the decision is easier to understand than the reasoning. According to defendant's evidence, he and plaintiff agreed that the latter's interest in a partnership should be transferred to defendant at its net worth. An audit showed that figure as $7,000 to $9,000, and on that basis a bill of sale was signed which fixed the price at $6,800, payable mostly in notes. A few weeks after the transfer, it was discovered that the audit was erroneous, and that the plaintiff had overdrawn his account so that the net worth of his interest was zero or less. The action was to collect on the notes, the defense was total failure of consideration, and the court held that defense to be provable by parol evidence of the oral agreement which led to the written bill of sale. The court quoted from *Fair v. Shelton*[33] to the effect that where both parties assume erroneously that the grantor has title, the consideration has failed, but otherwise where the purchase is of "such right, title and interest as grantor might have." It is not often that the language quoted in support of a decision seems to point so clearly to the opposite decision, for the bill of sale in *Mills v. Bonin*, describing the property sold, used the limiting words, "all his right, title and interest in and to the partnership assets," yet the holding was that parol evidence was admissible as to the extent of the interest to be transferred. Perhaps there was relievable misrepresentation or mistake, but the decision was not on either theory.

[30] For apparent approval of a similar distinction based upon the difference between real and personal property, see 9 WIGMORE, EVIDENCE p. 99, n. 4 (3d ed. 1940).

[31] McLawhon v. Briley, 234 N. C. 394, 67 S. E. 2d 285 (1951).

[32] 239 N. C. 498, 80 S. E. 2d 365 (1954).

[33] 128 N. C. 105, 38 S. E. 290 (1901).

Miscellaneous Contracts

Decisions in North Carolina on contracts other than sales agreements, since 1931, have been somewhat less lenient in treating parol evidence as consistent with the written contract and so admissible. A lease for a billiard parlor was accompanied, according to the lessee, by the lessor's oral undertaking not to lease other space in his building for use as a billiard parlor. This would hardly seem to be inconsistent with the terms of the written lease, but the evidence was excluded, the court quoting the classical prohibition against parol evidence "to contradict, add to, take away from or in any way vary the terms of a contract put in writing."[34]

A written employment contract described only as stating the hourly rate to be paid, was held not to include a parol agreement as to duration of the employment. The court said such evidence was "at variance with the written contract and therefore incompetent."[35] A trust agreement among the stockholders of a family corporation provided that none of the stock was to be sold without the consent of all. Evidence was offered of a parol agreement that on the death of any one, his stock should become the property of other members of the family. In the course of holding this a passive trust, the court stated that this evidence was inadmissible, as an attempt to contradict and vary the written instrument.[36] In all of these cases the court might, with some reason, have held that the parol evidence was not inconsistent with the writing, but simply established an additional term.

One of the North Carolina cases on separation agreements between husband and wife illustrates a situation where the parol evidence rule should not be applied for the reason that the omission of the parol agreement from the writing was understandable in the circumstances. The written property settlement was allegedly made partly in consideration for an oral undertaking that no divorce proceeding or other litigation should be brought upon any allegations which would reflect unfavorably upon the character of the wife. Under the circumstances, it was quite understandable that this oral agreement was omitted from the writing in order to escape publicity. Such omission might well be the normal

[34] Sakellaris v. Wyche, 205 N. C. 173, 170 S. E. 638 (1933). Parol evidence varying the expiration date stated in the written lease was excluded in Stewart v. Thrower, 212 N. C. 541, 193 S. E. 701 (1937).

[35] Sherill v. Graham County, 205 N. C. 178, 170 S. E. 636 (1933). The excluded parol evidence was plainly inconsistent with the writing in two service contract cases, both involving real estate dealers' commissions: Cathey v. Shope, 238 N. C. 345, 78 S. E. 2d 135 (1953), and Neal v. Marrone, 239 N. C. 73, 79 S. E. 2d 239 (1953); in the latter case the defendant unsuccessfully offering the parol evidence was illiterate.

[36] Security National Bank v. Sternberger, 207 N. C. 811, 821, 178 S. E. 595, 601 (1935).

course of procedure, and consequently should not be treated as indicating abandonment of the term, by Wigmore's test. The court admitted the evidence, but relied on the standard North Carolina reasoning that since the oral promise was made, the writing was not a complete integration.[37] In another separation agreement case, parol evidence that the husband promised a share in certain business property if he sold it was excluded where the writing said the wife surrendered all property rights based upon the marital relation in exchange for what she received under the terms of the writing.[38]

Deeds

It is recognized that the formal instrument conveying land may not include all the less important incidental terms agreed upon; thus parol evidence of such minor matters is more likely to be received where the writing is a deed.[39] But a deed conveying a right of way to a railroad was not allowed to be shown by parol to have been limited so that the railroad could not use it except to serve the grantor's property.[40] Nor could the usual warranty against incumbrances be extended by parol to cover liens accruing in the future for street improvements already made.[41]

In one respect the recent years have seen North Carolina turning toward a view generally accepted elsewhere. Parol evidence to prove that a deed was in fact a mortgage was formerly rejected in North Carolina.[42] The case of *O'Briant v. Lee*[43] held that where there was a deed and an option to reconvey, it may be shown to have been in fact a mortgage, this merely proving the true consideration given.

Of course, the description in the deed can be fitted to the land only by parol.[44] But this does not mean that the description can be varied by parol evidence.[45]

Notes

For obvious reasons, notes and drafts are not in any court subject to the parol evidence rule to the same extent as other contracts. Parties

[37] Boone v. Boone, 217 N. C. 722, 9 S. E. 2d 383 (1940).
[38] Bost v. Bost, 234 N. C. 554, 67 S. E. 2d 745 (1951).
[39] 3 WILLISTON, CONTRACTS § 645 (Rev. ed. 1936); 3 CORBIN, CONTRACTS § 587 (1951); Chadbourn and McCormick, *op. cit. supra* note 1 at p. 159.
[40] Reidsville Grocery Co. v. Southern Ry. Co., 215 N. C. 223, 1 S. E. 2d 535 (1939).
[41] Oliver v. Hecht, 207 N. C. 481, 177 S. E. 399 (1934).
[42] Chadbourn and McCormick, *op. cit. supra* note 1 at p. 159-160.
[43] 214 N. C. 723, 200 S. E. 865 (1939). This is in accord with the weight of authority; 9 WIGMORE, EVIDENCE § 2437 (3d ed. 1940). The claim in O'Briant v. Lee that a debtor-creditor relation existed between the parties ultimately failed for insufficient evidence; 212 N. C. 793, 195 S. E. 15 (1938), 216 N. C. 807, 6 S. E. 2d 836 (1940).
[44] Skipper v. Yow, 238 N. C. 659, 78 S. E. 2d 600 (1953).
[45] Brown v. Hodges, 232 N. C. 57, 61 S. E. 2d 603, *rehearing denied*, 233 N. C. 617, 65 S. E. 2d 144 (1951).

drawing these agreements tend to follow a form which is rather definitely standardized. If any collateral terms and conditions have been agreed upon, they may likely be omitted from the instrument because their inclusion would raise doubts, at least, as to negotiability, which is often a prime requisite. Accordingly, it is rather common for promissory notes to be no more than partial integrations, and parol evidence may well be admissible as between the original parties, so far as it is not inconsistent with express terms of the note.[46]

Outside of North Carolina it is not generally true that parol evidence may be used to contradict directly the promises made in the note. In general, a maker defending an action by the payee to collect on a note promising to pay $1,000 will not be allowed to prove that it was orally agreed, when the note was signed, either that the obligation might be discharged by delivery of cotton instead of dollars, or that the maker was obligated only to the extent that he realized the necessary funds from the sale of a stock feeding device.[47] However, decisions have been reached in North Carolina allowing such evidence where rights of a holder in due course are not involved, and the usual explanation is that parol evidence is admissible as to the "mode of payment" of a note.[48] Evidence as to mode of payment is often described in this jurisdiction as neither adding to nor varying the writing.[49] An insurance agent, defending an action to collect a note given for money which he had borrowed from his company, was allowed to prove that when the note was given the parties orally agreed that it was to be paid only to the extent that his insurance commissions supplied the funds.[50] Defendant's parol evidence on this oral agreement was convincing, being supported by a witness who had been plaintiff's general manager at the time the note was delivered. But most payees would see a difference between "I promise to pay $1,000" and "I promise to pay $1,000 if I earn that much in commissions."

The North Carolina rule that parol evidence is admissible to prove mode of payment of a note has been construed to allow proof that the signer was under no personal obligation to pay, such obligation resting upon a person not referred to in the writing. The *Stack* case is a sur-

[46] 9 WIGMORE, EVIDENCE § 2443 (3d ed. 1940); 3 WILLISTON, CONTRACTS § 644 (Rev. ed. 1936); 3 CORBIN, CONTRACTS § 587 (1951).

[47] 3 WILLISTON, CONTRACTS § 644 (Rev. ed. 1936); 9 WIGMORE, EVIDENCE § 2444 (3d ed. 1940); 3 CORBIN, CONTRACTS pp. 307-308 (1951).

[48] Kerchner v. McRae, 80 N. C. 219 (1870) (parol evidence allowed of "agreement . . . to give defendants a credit on their bond for the cotton. . . .")

[49] Parol evidence that note was to be paid from proceeds of sale of stock feeder, and that "if there were no sales, there was to be no payment." The court said: "In such a case there is no violation of the familiar . . . rule . . . because in the sense of that rule the written contract is neither contradicted, added to, nor varied. . . ." Evans v. Freeman, 142 N. C. 61, 64, 54 S. E. 847, 848 (1906).

[50] Pilot Life Ins. Co. v. Guin, 215 N. C. 92, 1 S. E. 2d 123 (1939).

prising application of the rule. J. E. Stack, director of the Bank of Union, was indebted to the bank in the amount of $80,000, which was in excess of the limit allowed by law under the circumstances. The bank examiner insisted that this debt be reduced. Stack and his brother-in-law Blakeney, who was president of the bank, met this demand by getting notes from several of Stack's sons and heirs at law for some $40,000 of the indebtedness. These notes were secured by mortgages on land which J. E. Stack transferred to the makers for that purpose. When action was brought on the notes, Stack's sons claimed that the conveyance was a makeshift to help the bank, and that no liability was to attach to them, the whole transaction being "fixed up" by Blakeney. The court, apparently summarizing the claims of the makers of the notes, said: "The heirs at law were to assume no liability, but the indebtedness was to be paid out of the land. * * * It was well understood by the parties . . . that the makers were not to be responsible, but it was J. E. Stack's debt and he was to remain liable therefor. . . ." Blakeney testified: "I did not tell the signers of these notes . . . that they would not be held personally liable for the payment thereof. I told them that the property would stand between them and any other liability. . . ." The Bank of Union was apparently being liquidated by the state. The lower court overruled all objections to the parol evidence offered by the makers of the notes, and entered judgment that the Commissioner of Banks take nothing as against the Stack heirs. The Commissioner appealed, and the decision was affirmed, the court stating:

> "We think the main question of law involved in this controversy is: In an action between the payee and maker of a note, is parol evidence admissible to establish an agreement between the maker and payee creating a particular mode of payment? We think so under the facts and circumstances of this case."[51]

The court then added:

> "On this record in what is written and what is in parol we can see no 'total inconsistency.' The widow and certain of the children . . . did what was requested of them by the husband and father, in an effort to aid the adjustment of honest obligations to the bank, which was beyond the law limit allowed to one individual * * * the whole matter was without consideration and an accommodation for their father, and the transactions were in effect indirect mortgages of J. E. Stack by certain of his children, for the purpose of adjusting honest debts."[52]

[51] Stack v. Stack, 202 N. C. 461, 466, 163 S. E. 589, 591 (1932).
[52] *Id.* at 469, 163 S. E. at 593.

The promissory notes, then, signed by A. M. Stack and other Stack heirs were allowed to be shown by parol evidence to be the legal obligations, not of A. M. Stack, but of J. E. Stack. The Commissioner of Banks presumably relied on these notes as obligations of the Stack children, not of their father; this difference was sufficient to show compliance with, rather than violation of, the legal limitations that he had the duty to enforce in the interest of solvency of the bank. But this difference is not such inconsistency, according to the court, as to bar parol evidence relieving the signers of their apparent obligation. When the Commissioner of Banks sought to enforce the notes in the interest of creditors of the bank, he found that he had no claim against the signers of the notes, no personal claim except that against the father, which was the claim he thought had been replaced on his demand.

Other decisions point to the same conclusion.[53] On the other hand, where the evidence offered by the signer does not point to another who was to be liable, but simply indicates an undertaking by the payee that the signer would not be liable, the court rejected the evidence as contradicting the writing.[54]

Where the payee is not involved, but the dispute is between other parties to the paper, as to their relations to each other, parol evidence is unobjectionable.[55] The note is intended first of all to indicate the rights of the payee against all other parties; the rights and obligations of these other parties as among themselves are often not intended to be indicated in the writing, and must depend upon parol evidence.

Conclusion

The parol evidence rule seems to be applied with fair consistency in North Carolina in obvious cases where the writing plainly declares the intent of the parties to create an integration. And if there is no merger clause, but the parol evidence is contradictory to the written contract, the cases again give the obvious answer common in all the states; enforce the writing, discard the parol terms.

In this latter situation, however, the North Carolina courts have developed an odd concept of what terms are contradictory, especially where the writing is a promissory note. These courts see no contradiction between the written, absolute, unconditional promise and a parol limitation of the obligation to the proceeds of a specific fund, or even an oral understanding that the obligation shall rest not upon the signer

[53] Justice v. Coxe, 198 N. C. 263, 151 S. E. 252 (1930); Galloway v. Thrash, 207 N. C. 165, 176 S. E. 303 (1934); Bank of Chapel Hill v. Rosenstein, 207 N. C. 529, 177 S. E. 643 (1935).

[54] Industrial Loan etc. Bank v. Dardine, 207 N. C. 509, 177 S. E. 635 (1935); Coral Gables Inc. v. Ayres, 208 N. C. 426, 181 S. E. 263 (1935).

[55] Raleigh Banking & Trust Co. v. York, 199 N. C. 624, 155 S. E. 263 (1930); Furr v. Trull, 205 N. C. 417, 171 S. E. 641 (1933).

but upon another. It is not easy to say how a promissory note could be drawn so that the contract enforceable in these courts would be the promise signed in writing and nothing else. Even if a merger clause were included in the note, the statements in so many of the decisions that a parol agreement as to the mode of payment does not "add to, vary, nor contradict" the promise to pay, if taken literally, would afford a basis for enforcing such an oral agreement. It is not unlikely that, because of this modification of the parol evidence rule, there are an unusual number of cases in which the promissory note obligation is sought to be limited.

Neither in this state nor elsewhere is there a simple, satisfactory answer for the problem when the writing contains no merger clause, and no written statement inconsistent with the parol evidence offered. The signed instrument may then be taken to indicate an intent that it be treated either as a complete integration, excluding the parol evidence, or as a partial integration, to be considered with the parol evidence. Often the circumstances make one conclusion about as reasonable as the other. Some courts emphasize the importance of protecting the written instrument from invasion, and thus enabling the careful man to protect himself by getting the whole of his contract in writing. The emphasis in North Carolina is rather in the direction of giving the proponent of the oral agreement a chance to prove that it was made, if he can. In the absence of a merger clause, there is a tendency in many of the decisions to receive any parol evidence which it not directly contradictory to some statement in the writing. The decision in *Evans v. Freeman* is often quoted, and still more often followed, in such cases:

> "But this rule applies only when the entire contract has been reduced to writing, for if merely a part has been written, and the other part left in parol, it is competent to establish the latter part by oral evidence, provided it does not conflict with what has been written. * * * In such a case there is no violation of the familiar and elementary rule we have before mentioned, because in the sense of that rule the written contract is neither contradicted, added to, nor varied; but leaving it in full force and operation as it has been expressed by the parties in the writing, the other part of the contract is permitted to be shown in order to round it out and present it in its completeness, the same as if all of it had been committed to writing."[56]

This is parol evidence heresy by the Williston standard,[57] and to say

[56] 142 N. C. 61, 64, 54 S. E. 847, 848 (1906).

[57] But Williston states that "the tendency of the courts is toward increasing liberality in the admission of parol agreements." 3 WILLISTON, CONTRACTS p. 1835 (Rev. ed. 1936).

that the "written contract" is not "added to" by the oral evidence seems to be a self-contradictory statement by the standard of ordinary language. The expression "written contract" would usually be taken to mean the "contract as written," or the "writing," or the "instrument"; and if the oral evidence does not add anything to the writing, how can the oral evidence "round out" the writing to "completeness," as if all of the parties' agreement "had been committed to writing"? Or, for that matter, if the oral evidence does not add to, vary, or contradict the writing, why should one litigant be so anxious to get the oral evidence into the record, and the other so anxious to keep it out?

Undoubtedly what the court meant in the quotation from *Evans v. Freeman* was that the parol agreement did not add to, contradict, or vary the whole contract that the parties made, because the parol agreement was a part of that whole contract, the writing being the other part. But the basis for this conclusion appears to be simply the evidence that the parol agreement had been made in the course of the negotiations leading to the signed contract. In spite of what the court says, the decision in *Evans v. Freeman,* and many other local decisions, point to the rule that, in the absence of a merger clause, parol evidence of an additional promise made in the course of the negotiations may be considered as part of the contract, provided it does not contradict something in the writing. This is opposed to the basic hypothesis upon which the rule is founded, that normally, when the parties place their agreement on paper, they aim to make a complete record of all terms and conditions in the final agreement, which may well omit promises agreed upon provisionally in the course of negotiations—omit them because they are abandoned.

In the absence of a merger clause the authorities admit the possibility of a *partial* integration, though they differ as to the test to be used in deciding whether the writing should be treated as a complete, or only a partial integration. But the North Carolina rule almost denies the possibility of a *complete* integration, once evidence is offered of a non-contradictory parol agreement. The proof that an additional parol term was agreed to is per se proof that the integration was not complete. The possibility that the agreement was made as part of the provisional tentative arrangements preceding the final agreement, and surrendered in the bargain finally signed, sealed and delivered—that possibility seems to be ignored. Nowhere in the litigation does court or jury squarely face the question—did the omission from the writing appear to be due to the fact that the parties did not regard the term as obligatory between them, or that they looked upon it as obligatory, but

so separate from the other terms that it need not be referred to in the writing?

On the other hand, the North Carolina decisions may sometimes come closer to enforcing the contract which should be enforced than do the more conservative authorities. It is by no means impossible that the parties intended the oral term to be part of the sum total of their obligations. They were negligent in omitting it from the writing; but should their negligence interfere with enforcement of true intent once that is established? The argument is not all one way. In doubtful cases, the written contract deserves protection; the question is whether the written contract deserves protection where the fact-finding tribunal is satisfied that the writing does not state the whole agreement which, judged from all the circumstances, the parties thought they were making at the moment of signing.

It is not enough, however, that the oral agreement was "made"; that may be understood as referring simply to the uttering of a promise during the course of negotiations, provisional upon the contract being finally agreed upon. Let the tribunal determine, not only that the parties made the oral agreement, but that they did not thereafter, by omitting it from the writing or otherwise, show an intent to abandon it; that they showed an intent to include that term, as well as what was written, in their final bargain, and the basis for enforcement of the oral agreement would be substantial. The danger in this course is also substantial; the parol evidence, if not inconsistent with the writing, cannot be excluded altogether. The determination as to whether the oral agreement was made, and whether it was abandoned, can hardly be reached without considering what the alleged oral agreement was. Corbin has pointed out that the parol evidence rule, as applied even in the conservative courts, does not completely exclude the parol evidence.[58]

Possibly the court, rather than the jury, should be charged with the duty of deciding whether the parol term was apparently intended by the parties to be effective or not; this would be consistent with the theory of Professor McCormick.[59] The resolution of the problem is difficult, but it is necessarily resolved one way or the other in every decision where it arises, and the chances that it will be more fairly resolved in line with the agreement relied upon will be increased by facing the difficulty frankly.

[58] 3 CORBIN, CONTRACTS § 576 (1951).
[59] McCormick, *The Parol Evidence Rule as a Procedural Device for the Control of the Jury*, 41 YALE L. J. 365 (1932).