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THE ADMISSIBILITY OF EVIDENCE TO ESTABLISH ORAL CONTEMPORANEOUS INDUCING PROMISES TO AFFECT WRITTEN INSTRUMENTS IN PENNSYLVANIA.

There may be found matter for thought in some recent decisions of our Supreme Court which indicate a tendency to return, so far as may be possible, to the strict rule of the English and Roman law that renders parol evidence inadmissible to vary or contradict written instruments. For a century Pennsylvania was unique in her failure to acquiesce in that doctrine. Early decisions recognized that exceptions to the rule were admitted in this state,[1] until with the multiplication of the exceptions the rule itself was so frittered away that in *Kostenbader* v. *Peters*[2] Judge Paxson went the whole length of declaring that "the Eng-

[1] *Rearick* v. *Swinehart*, 11 Pa. 233; *Greenawalt* v. *Kohne*, 85 Pa. 369; *Chalfant* v. *Williams*, 35 Pa. 212.

[2] 80 Pa. 338.

EDITOR'S NOTE, see p. 672, *infra*.

lish rule that parol evidence is inadmissible to vary the terms of a written instrument does not exist in this state." That statement was perhaps too broad, and the same judge more cautiously observed in the later case of *Phillips* v. *Meily* [3] that "it would perhaps be more accurate to say that the rule has been relaxed;" but the extent to which the relaxation had then gone, or the state of the law then or now, is well-nigh impossible of definition. The decisions are helpful only as showing the varying tendencies of the court, for the difficulty of framing a statement as to the law itself has found even judicial expression. "In the numerous cases involving the question as to when parol testimony is admissible in contradiction of written instruments there is much apparent and some real conflict," admits Mr. Justice Dean in the recent case of *Fuller* v. *Law*, 207 Pa. 101.[4] The rise and growth and current limitations upon the rule that oral inducing agreements and promises, upon the faith of which written instruments are executed, are admissible although they vary, contradict, or alter the written instruments, are, however, tendencies clearly marked in the decisions, susceptible of demonstration; and it is these which it is proposed to set forth in this paper. Fortified by the concurrence of the courts for over a century in this exception to the English rule, it cannot be dislodged by a single decision; but there have been so many recent intimations from the Supreme Court that the general rule will henceforth be insisted upon to the gradual elimination of the exception that the attention of the bar may well be called to this reactionary tendency, and, with a statement of some of the reasons which should compel the ultimate establishment of the strict English rule, its assent to the current tendency of the Supreme Court won.

Outside of Pennsylvania in all English-speaking tribunals close adherence is given to the rule that parol contemporaneous evidence is inadmissible to contract or vary the terms of a valid written instrument. "When parties have deliberately put their

[3] 106 Pa. 536.

[4] See also Chief Justice Waite in *Bast* v. *Bank*, 101 U. S. 93.

engagements into writing," says Greenleaf,[5] "in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, were reduced to writing; and all oral testimony of a previous *colloquium* between the parties, or of conversations or declarations at the time when it was completed, or afterwards, as it would tend in many instances to substitute a new and different contract for the one which was really agreed upon, to the prejudice, possibly, of one of the parties, is rejected." The Roman law developed the same rule, expressed in the maxim, *"contra scriptum testimonium, non scriptum testimonium non fertur."*[6] Within this rule it was still permissible to introduce evidence to attack the validity of the written instrument. Fraud, accident, or mistake in procuring its execution could be shown and reformation or rescission obtained in equity upon such grounds. Prior to the establishment of courts of equity in Pennsylvania, relief against fraud, accident, or mistake in the execution of a written instrument could be had only in the law courts in actions wherein the written instruments were placed in evidence. The earliest cases establishing the peculiar Pennsylvania rule under discussion were decided by the court under the belief that it was admitting evidence of fraud; and it is due more to the varied uses and meanings of the term "fraud" than perhaps to any other single cause that in the end evidence of oral, contemporaneous, inducing promises was admitted to affect and control written instruments.

Two lines of decisions are readily traceable and distinguished in the application of the rule admitting oral, contemporaneous, inducing promises. The broader line formulated the rule laid down in *Greenawalt* v. *Kohne*,[7] where Mr. Justice Sharswood said: "Where at the execution of a writing a stipu-

[5] Greenleaf: Evidence (16th Ed.), § 275. See also Stephen: Evidence, Art. 90.

[6] Cod., lib. 4, tit. 20, l. 1.

[7] 85 Pa. 369.

lation has been entered into, a condition annexed, or a promise made by word of mouth, upon the faith of which the writing has been executed, parol evidence is admissible, though it may vary and materially change the terms of the contract." More tersely this rule is stated by Mr. Justice Trunkey in *Building Association* v. *Hetzel,*[8] thus: "Parol evidence is admissible to show a verbal contemporaneous agreement, which induced the execution of a written obligation, though it may vary or change the terms of a written instrument."[9] Another line of decisions established the rule that parol evidence is admissible to affect written instruments where there has been an attempt to make a fraudulent use of the instrument in violation of a promise or agreement made at the time the instrument was signed and without which it would not have been signed, which promise or agreement stated the use to which it would be put or purpose for which it was executed.[10] This rule evidently is but one phase of the broader rule first stated, and is included in it. If oral inducing agreements are all admissible, inducing agreements as to the use to which the instrument will be put or purpose for which it was signed are admissible. The latter are a narrower class of cases embraced in the former general class. The distinction is, however, important. The broader rule developed from the narrower one, and the present reactionary tendency of the Supreme Court has gone no further than to throw a doubt upon the soundness of the broad rule, while it has left the narrow one unquestioned; or, more accurately, the recent decisions seem to limit the broad rule to cases embraced in the narrow one.

The earliest of the reported cases involving the rule is *Thompson* v. *White,* 1 Dall. 424 (1789), where Chief Justice McKean admitted evidence to fasten a direct oral trust upon a landowner whose deed, absolute on its face, was executed and

[8] 103 Pa. 507.

[9] For similar statements of the rule, see *Walker* v. *France,* 112 Pa. 203; *Cullmans* v. *Lindsay,* 114 Pa. 166; *Close* v. *Zell,* 141 Pa. 390, and *Smith* v. *Harvey,* 4 Pa. Super. 377.

[10] *Rearick* v. *Swinehart,* 11 Pa. 233; *Phillips* v. *Meily,* 106 Pa. 536; *Jackson* v. *Fayne,* 114 Pa. 67; *Cloud* v. *Markle,* 186 Pa. 614.

delivered in reliance upon his verbal promise to hold in trust for certain named persons. In the course of his opinion he said: "It has, indeed, been a general rule . . . that no parol proof shall be admitted to contradict, add to, diminish, or vary from a deed or writing. But it is certain that there are several exceptions to this rule and many cases may be found in which parol proof has been admitted, notwithstanding writings have been signed between the parties. For instance, where a declaration is made before a deed is executed, *shewing the design with which it was executed,* the decisions in the Court of Chancery have been grounded upon parol proof." In these words is found the source from which developed the rule—as yet unassailed—that the *use* to which a written instrument may be put may be proved by the oral contemporaneous promises which induced its execution.

The next case upon the subject is *Wallace* v. *Baker,* 1 Binn. 610 (1809), important not so much for the point decided as for the opinion of Chief Justice Tilghman, whose influence in establishing the Pennsylvania doctrine was easily paramount. His statement of the colonial case of *Hurst's Lessee* v. *Kirkbride,* decided in 1773, and his concurrence in its decision, furnish the source from which developed the broad rule under which all inducing oral promises made at the execution of a written instrument were admissible in evidence. "There have been many decisions in this court," said Tilghman, "in favor of the admission of parol evidence, even in contradiction to written instruments. These decisions have been chiefly in cases of *fraud* and of *trust.*" He then refers to *Thompson* v. *White, supra,* and states that the leading case upon the subject is *Hurst's Lessee* v. *Kirkbride.* That case is not in print, but from the notes of counsel in the case Tilghman was able to narrate the facts. Parol evidence was admitted to prove that at the execution of a deed conveying, in terms, all the lands of the vendor to one Hurst, the parties thereto orally excepted a certain manor. Of Hurst's conduct in subsequently laying claim to the excepted land Tilghman says, "Now it was a gross fraud in Hurst, after all that had passed, to set up a claim to the manor." The full signifi-

cance of Tilghman's opinion, as establishing the broad rule above referred to, becomes clear when reference is had to the succeeding cases of *Christ v. Diffenbach,* 1 S. and R. 464 (1815), and *Campbell* v. *McClenachan,* 6 S. and R. 171 (1820). In the former Judge Yeates said, "I have always understood the settled law in this government, since the decision in *Hurst's Lessee* v. *Kirkbride,* cited in 1 Binn. 616, to be, that whatever passed at and immediately before the execution of any instrument, might be given in evidence to impeach the fairness of the transaction." In the latter case Tilghman said, "Parol evidence may be given of what passed between the parties at and immediately before the execution of a writing, . . . where the plaintiff was induced to execute the articles of agreement by the defendant's promise."

In the language of the cases quoted above there is no limitation of the admissibility of parol evidence to the disclosure of the purpose or use for which the written instrument was executed. In *Christ* v. *Diffenbach,*[11] the facts present a typical case within the broad rule that admitted all oral, contemporaneous, inducing promises. There was and could be no contention that the case was one within the narrow rule that admits evidence to establish merely the use or purpose for which the writing was signed. In an action of replevin for goods distrained for rent in arrear the lessee was permitted to prove that he executed the lease upon the faith of the lessor's oral undertaking to make certain improvements and repairs. That Judge Yeates understood that the rule that rendered admissible all that took place at and to induce the execution of a written instrument was an extension of the rule admitting evidence to disclose the purpose for which it was executed is clear from his language that "it was bottomed on the decision of *Harvey* v. *Harvey,* 2 Ch. Cas. 180, that a court of equity would receive parol evidence of the declarations made, before a deed was executed, to show its real design and character." And that such evidence was declared to

[11] *Supra.*

be admissible upon the ground that it established fraud is plainly stated by Judge Tilghman in the same case.

With the decision in *Campbell* v. *McClenachan* ended the formative period of the rule, which for the sake of brevity may be called the "Pennsylvania rule"—a name which at least expresses the jurisdictional limits of its authority. Championed by Judge Tilghman, its establishment was complete with the McClenachan case. That case was decided in 1820, and for over sixty years, until 1882, the soundness of the rule was almost unquestioned in the decisions. Within that period but a single case suggests that our courts had gone too far in the admission of parol evidence.[12] The history of the rule within that period may be briefly told. The early cases involving it were decided upon the ground that the oral evidence was admissible to establish the use or purpose for which the instrument was executed; that is to say following the decision of *Thompson* v. *White* [13] they were cases within the narrow phase of the broad rule. *Miller* v. *Henderson,* 10 S. and R. 290 (1823), and *Lyon* v. *Bank* [14] were the last of the decisions of Judge Tilghman upon the subject, the former containing a vigorous statement of the reasons upon which he conceived that the rule was grounded, and which will be the subject of further study when these reasons are considered hereafter. Judge Tilghman died in 1826, and the next noteworthy name in connection with the rule is that of Judge Bell, whose opinion in *Rearick* v. *Swinehart,* 11 Pa. 233 (1849), will engage respectful attention in connection with the opinion of Tilghman just mentioned. A collection of the cases decided before 1882 is contained in the notes.[15] Within the same period

[12] *Martin* v. *Berens,* 67 Pa. 459 (1871).

[13] 1 Dall. 424.

[14] 14 S. and R. 283 (1826).

[15] No attempt has been made to render this list of decisions exhaustive. After Tilghman's death came *Holtz* v. *Wright,* 16 S. and R. 345 (1827), and *Oliver* v. *Oliver,* 4 Rawle, 141 (1833). Judge Bell's decisions include *Renshaw* v. *Gans,* 7 Pa. 117 (1847); *Rearick* v. *Swinehart,* 11 Pa. 233 (1849); and *Rearick's Exec.* v. *Rearick,* 15 Pa. 66 (1850). Among the later decisions are *Lippincott* v. *Whitman,* 83 Pa. 244 (1877); *Barclay* v. *Wainwright,* 86 Pa. 191 (1878), and *Hoopes* v. *Beale,* 90 Pa. 82 (1879).

the cases enunciating the broad rule of *Campbell* v. *McClenachan* and *Christ* v. *Diffenbach,* that any oral, contemporaneous, inducing agreement or promise was admissible, were equally numerous, and verbal promises or undertakings upon the faith of which the writing was executed were frequently admitted to contradict or vary the terms of the instrument, where no question was raised as to the evidence establishing merely the use to which it was agreed that the instrument should be put, or the design or purpose which led to its execution.[16]

In 1882 this middle period, constituting the hey-day of the broad Pennsylvania rule, came to an end. Before turning to the decisions of that year a word should be said as to some of the influences that had developed to render a reaction possible, and convenient opportunity will be afforded to examine with some care the reasons upon which the rule was established.

The rejection of oral evidence to contradict, alter, or vary written instruments is based upon grounds of policy. Coke long ago[17] found in the "slippery memory" of witnesses sufficient reason to exclude testimony of the verbal negotiations that preceded or accompanied the execution of the written instrument which the parties by their own act designated as the chart of their rights and liabilities; and judges of varying attainments have since never ceased to sound the praises of the rule that preserves the inviolability of the terms of a written instrument from the assaults of witnesses whose testimony, if unbiased, is still subject to the aberrations which distort perception and memory. In Coke's day the bias of a witness was not more to be guarded against than was his treacherous memory, for parties in interest were not allowed to testify but when litigants and parties in interest were permitted to become witnesses the English parol evidence rule found another reason for existence in rendering unas-

[16] *Chalfant* v. *Williams,* 35 Pa. 212 (1860); *Powelton Coal Co.* v. *McShain,* 75 Pa. 238 (1874); *Shugart v. Moore,* 78 Pa. 469 (1875); *Caley* v. *R. R.,* 80 Pa. 363 (1876); *Greenawalt* v. *Kohne,* 85 Pa. 369 (1877); *Keough* v. *Leslie,* 92 Pa. 424 (1880).

[17] *Countess of Rutland* v. *Earl of Rutland,* 5 Rep. 26a (1604).

sailable the terms of a writing against the biased testimony of interested parties.[18]

Parties in interest were made competent witnesses in Pennsylvania in 1869, and it was not long thereafter before the courts called attention to the necessity for closer adherence to the rule excluding oral evidence to affect writings. The first note of warning against any further extension of the relaxation of the rule in this state was uttered in the well-known case of *Martin* v. *Berens,*[19] decided in 1871. In concluding a statement of the principles which govern the admission of parol evidence to affect written instruments Mr. Justice Williams said: "Where parties, without any fraud or mistake, have deliberately put their engagements in writing, the law declares the writing to be not only the best, but the only, evidence of their agreement, and we are not disposed to relax the rule. It has been found to be a wholesome one, and now, that parties are allowed to testify in their own behalf, the necessity of adhering strictly to it is all the more imperative." "In cases of fraud, accident, or mistake, the rule is different;" he had previously said, "Where equity would set aside or reform the instrument on either of these grounds, parol evidence is admissible to contradict or vary the terms of the agreement as written."

With the above-quoted statements of Judge Williams the law elsewhere than in Pennsylvania is in entire accord. Evidence is everywhere admitted to attack the validity of the written instrument for mistake, for accident, or for fraud in its execution. But when in support of that rule Judge Williams cites *Christ* v. *Diffenbach, Miller* v. *Henderson, Renshaw* v. *Gans, Rearick* v. *Swinehart,* discussed above, and others of our cases in which the parol evidence was admitted to establish inducing promises upon the faith of which writings were executed, and when he continues and unmistakably identifies the admission of such tes-

[18] See *Tracy* v. *Union Iron Works,* 104 Mo. 193 (1891); *Underwood* v. *Simonds,* 12 Met. (Mass.) 275 (1847).

[19] 67 Pa. 459.

timony with the admission of testimony to establish fraud, he clearly reveals that while in terms it is possible to express our rule so that it coincides with the general law, yet such verbal accord is gained only by a perversion or extension of the meaning of the term "fraud" as used in the English rule. There can be no doubt, however, that Judge Williams accurately summarized the results of our early cases. They were decided on the theory that oral inducing agreements were admissible because they established fraud. Thus in *Christ* v. *Diffenbach*,[20] where evidence was offered to prove that a lease had been executed on the faith of the lessor's promise to repair and improve the leased premises, Chief Justice Tilghman said, "The evidence offered in the present case went directly to establish a fraud." So in *Rearick* v. *Swinehart*,[21] where the court admitted evidence of an oral inducing agreement as to the use to which the written agreement was to be put, Judge Bell said: "In Pennsylvania, perhaps, the door has been opened wider than elsewhere for the admission of parol proof to reform, modify, or even to extinguish a written instrument, in cases of fraud, mistake, or trust. . . . Nor is it essential that a fraud was originally intended. It is enough that, though the parties acted in mutual good faith at the inception of the transaction, an attempt is made to wrest the instrument to a purpose not contemplated, or to use it in violation of the accompanying agreement. It is as much a fraud to obtain a paper for one purpose, and use it for a different and unfair purpose, as to practise falsehood or deceit in its procurement." In the later case of *Coal Co.* v. *McShain*[22] Judge Gordon said: "It is certainly permissible to give evidence of a verbal promise made by one of the parties, at the time of the making of a written contract, where such promise was used as an inducement to obtain the execution thereof. . . . This rule is put upon the ground that the attempt afterwards to take advantage of the omission from the contract of

[20] 1 S. and R. 464.

[21] 11 Pa. 233.

[22] 75 Pa. 238 (1874).

such promise is a fraud upon the party who was induced to execute it upon such promise, and hence he will be permitted to show the truth of the matter. . . ."

These early cases established that it was a species of fraud, opening the door for the admission of parol testimony, for one to obtain the execution of a written contract by means of his oral promise, not incorporated in the writing, which he subsequently seeks to violate or repudiate. The danger of such a rule was not lost on the court; but in the days when parties were not competent as witnesses the reasons for the admission of the testimony prevailed over those against it. "The destruction of a written instrument, by parol evidence, may seem dangerous, and, in fact, it is so," wrote Chief Justice Tilghman in *Miller* v. *Henderson*,[23] "but the community would be in a still worse condition if it were established as an inflexible rule that when a man's hand was once got to an instrument, no matter by what means, the door should be shut against all inquiry. The encouragement to fraudulent villainy would be so great, under such a system, that the consequences might be intolerable." The experience of other courts does not sustain Judge Tilghman. Fraud everywhere will be relieved against. But the fraud that elsewhere will justify the admission of parol evidence to affect written instruments is something other than the attempted violation or repudiation of an oral promise made to induce the execution of a written instrument.

Outside of Pennsylvania the fraud that will render parol evidence admissible to affect a writing is such fraud as in Pennsylvania we are familiar with as a ground for the rescission of contracts. In brief, it consists in a misrepresentation of *facts*. With the other elements of such fraud, the knowledge of the falsehood, the intention to deceive, and the actual deception, we need not be concerned. Similar elements may exist in the cases in which, in Pennsylvania, oral inducing promises are admitted to control writings. There may be the same guilty intention and

[23] 10 S. and R. 290.

actual inducement to act upon the faith of the statement; but there is the vital difference that in the one case there is a misstatement of fact, in the other, at most, a misstatement of intention, a mere promise whose fulfilment may or may not be contemplated. The law guarantees to every man about to contract that he shall act under the influence of a conception of existing facts free from any distortion produced by the wilful wrong of the other party. The soundness of his knowledge or conception of the facts being thus preserved, as a basis upon which he may enter into contractual relations, from the fraudulent misrepresentations of his co-contractor, he is left in reducing his contract to writing to secure his rights by himself. He is conclusively bound by the writing, and must incorporate in it whatever terms he may desire to enforce. Against fraudulent misrepresentation of fact by the party with whom he is dealing one cannot always guard. The law will protect him. For the securing of rights under a contract to be reduced to writing one can protect himself; and, in order to prevent perjury, the sanction which attaches to the terms of a contract is afforded by law to only the written terms when the contract is reduced to writing. Such is the general law elsewhere than in Pennsylvania. The same arguments that in Pennsylvania prevailed to admit of the reception of evidence of oral promises and engagements to affect writings whose execution they induced have been made in other courts, but misrepresentation of intention has elsewhere not been confused with misrepresentation of fact or identified with fraud.[24] It will be recalled that Judge Gordon in *Coal Co.* v.

[24] The extent to which our courts confused the admission of evidence to establish inducing promises on the faith of which writings were executed with the admission of evidence to establish actual fraud—misrepresentation of fact—is shown in *Walker* v. *France*, 112 Pa. 203. In that case the defence against an action to recover the balance of purchase money due under a written contract for the sale of land was that the vendor had stated that upon the land there were ten million feet of hemlock and certain improvements, which statements were false, but upon the faith of which the defendant had contracted. This defence was clearly one of fraudulent misrepresentation of facts—actual fraud. The court above declared that the evidence was admissible under the authorities establishing the principle that a written agreement may be modified or altogether set aside by parol evidence of an oral promise or undertaking made at the time the

McShain [25] held that one was estopped from taking advantage of the omission of an oral promise from a written contract whose execution it induced on the ground that to take advantage of the omission would work a fraud upon the party who was thus induced to execute the contract. In *Insurance Co.* v. *Mowry*, 96 U. S. 544 (1877), an action upon an insurance policy was defended on the ground that under the terms of the policy the company was released by failure of the assured to pay the premium at maturity. The plaintiff contended that the defendant was estopped from making such defence by reason of the fact that he had been induced to take out the policy on the faith of the promise of the company's agent that the company would inform him of the date when premiums were due so that he would know when to pay them, and that the company had failed to inform him of the date of the maturity of the premium he had omitted to pay. Said Mr. Justice Field:

> "The previous representation of the agent could in no respect operate as an estoppel against the company. Apart from the circumstance that the policy subsequently issued alone expressed its contract, an estoppel from the representations of a party can seldom arise, except where the representation relates to a matter of fact—to a present or past state of things. If the representation relate to something to be afterwards brought into existence, it will amount only to a declaration of intention or of opinion, liable to modification or abandonment upon a change of circumstances of which neither party can have any certain knowledge. The only case in which a representation as to the future can be

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writing was signed and inducing the other to sign it. The same defence in a similar action was made in *Atherholt* v. *Hughes*, 209 Pa. 156. Evidence of the misrepresentations was rejected by the trial court on the ground that under *Martin* v. *Berens* the written agreement could not be affected by such parol evidence. In reversing the judgment of the lower court Mr. Justice Fell points out with admirable clearness the distinction between such evidence, to establish actual fraud, which is admissible under all constructions of the parol evidence rule, and evidence intended merely to alter or vary the terms of a written contract.

[25] 75 Pa. 238, *supra*, page 610.

held to operate as an estoppel is where it relates to an intended abandonment of an existing right, and is made to influence others, and by which they have been induced to act. An estoppel cannot arise from a promise as to future action with respect to a right to be acquired under an agreement not yet made.

"The doctrine of estoppel is applied with respect to representations of a party, to prevent their operating as a fraud upon one who has been led to rely upon them. They would have that effect, if a party who, by his statement as to matters of fact, or as to his intended abandonment of existing rights, has designedly induced another to change his conduct or alter his condition in reliance upon them, can be permitted to deny the truth of his statements, or enforce his rights against his declared intention of abandonment. But the doctrine has no place for application when the statement relates to rights depending on contracts yet to be made, to which the person complaining is to be a party. He has it in his power in such cases to guard in advance against any consequences of a subsequent change of intention and conduct by the person with whom he is dealing. For compliance with arrangements respecting future transactions, parties must provide by stipulations in their agreements when reduced to writing." [26]

The reasoning of our courts, in admitting parol evidence of oral, contemporaneous, inducing promises or undertakings upon the ground of fraud, it seems to the writer, cannot be sustained. It seems clear also that upon reasons of policy they erred in admitting such evidence to vary or contradict the terms of written instruments. Notwithstanding the dangers to which Judge Tilghman calls attention in *Miller* v. *Henderson*,[27] if such

[26] See also *Seitz* v. *Refrigerating Co.*, 141 U. S. 510; *Naumberg* v. *Young*, 44 N. J. L. 331.

[27] 10 S. and R. 290. See page 611.

evidence is not received, the uncertainty of memory and temptation to perjury afford stronger reasons for the exclusion of such evidence. The act of assembly making parties in interest competent witnesses first effectively brought home to the court the force of these reasons, and in *Martin* v. *Berens* [28] the necessity for strict adherence to the parol evidence rule was first announced. Our loose construction of that rule, however, remained unaltered by any judicial decision until 1882. In that year the court began to heed the warning contained in *Martin* v. *Berens,* and in *Thorne et al.* v. *Warfflein* [29] Judge Green declared: "It is not enough that there are parol stipulations contradictory of a written agreement in order to change its legal effect. There must be fraud, accident, or mistake, and the evidence of either must be clear, precise, and indubitable. We have gone very far in permitting parol contemporaneous evidence to defeat written instruments. To go farther would be to practically abrogate the rule . . . We cannot agree that it is proper to throw the whole case into the jury-box on the ground of fraud simply because one of two parties to a written contract testifies that there were parol stipulations contradictory to the terms of the writing agreed to at the same time. There must be evidence of fraud other than that which may be derived from the mere difference in the parol and written terms."

At this time however, the court still regarded oral inducing promises admissible if fraud was properly alleged in the pleadings, considering that such evidence established fraud. The change in the attitude of the court was not so much in a more rigid enforcement of the general rule as in a closer supervision of the character and quantity of evidence necessary to bring the case within the exception. In *Juniata Building Ass'n* v. *Hetzel,*[30] *Thomas* v. *Loose,*[31] and *Cullmans* v. *Lindsay* [32] the court repeatedly affirmed the rule that a written agreement may be modified

[28] 67 Pa. 459. See page 609.
[29] 100 Pa. 519.
[30] 103 Pa. 507 (1883).
[31] 114 Pa. 35 (1886).
[32] 114 Pa. 107 (1886).

or contradicted by parol evidence of oral promises or undertakings made by one of the parties at the time of, and as an inducement to, the execution of the written contract; but in each case the Supreme Court reversed the judgment of the lower court which had admitted the evidence and remitted the case for a new trial because the evidence either in quantity, quality, or character failed to establish the inducing agreement clearly, precisely, and indubitably. The inducing agreement, those cases held, could be established only by evidence sufficient to satisfy the conscience of a chancellor in equity proceedings. Oath against oath was not sufficient; the testimony of two witnesses or of one witness with corroborating circumstances was requisite.

So long, however, as the court held that oral inducing agreements could be proved, manifestly, whatever may have been the restrictions placed upon the character, quantity, or quality of the testimony necessary to establish them, oral inducing agreements would continue to be relied on to vary written instruments, the necessary evidence to establish them would be forthcoming, and writings would continue to be the subject of attack just the same as before *Martin* v. *Berens*. The writer is far from suggesting that our courts have receded altogether from their old position, but it does seem to him that they have retreated sufficiently to venture the assertion that while oral inducing agreements may still be proved to establish the use to which any writing, sealed or parol, may be put, yet other oral inducing agreements may not be proved. This last statement may be made with some confidence in the case of writings under seal, but if recent decisions are properly conceived by him the inhibition upon the proof of oral inducing agreements, other than those which establish the use to which the instrument may be put, extends as well to unsealed as to sealed writings.

In *Phillips* v. *Reilly*, 106 Pa. 536, Mr. Justice Paxson wrote: "The cases in this state in which parol evidence has been allowed to contradict or vary written instruments may be classed under two heads: First, where there was fraud, accident, or mistake

in the creation of the instrument, and, second where there has been an attempt to make a fraudulent use of the instrument, in violation of a promise or agreement made at the time the instrument was signed, and without which it would not have been executed." [33] At the time when this résumé of our law was written oral, contemporaneous, inducing promises subsequently repudiated or violated, we have seen, were held to be admissible because they were considered as establishing fraud in the creation of the instrument whose execution they induced. The reasoning urged in support of that view has already been examined and the conclusion drawn that such evidence did not establish "fraud" in the usual acceptation of that term; that misrepresentation of intention was not the equivalent of misrepresentation of fact as a constituent of fraud. The current of recent decisions seems to be based upon that distinction. By a construction of the word "fraud" such as is accepted elsewhere our courts may still repeat the language of *Phillips* v. *Meily,* and adhere to the letter of the rule there laid down, but they have altered its content and meaning, for no longer does the breach or repudiation of oral promises or undertakings, upon the faith of which written instruments were executed, seem to constitute fraud and render the evidence admissible under the first of the classes named in *Phillips* v. *Meily.* This altered attitude of the courts was first worked out in cases of sealed instruments. The evolution in cases of instruments not under seal was later, perhaps is not yet complete.

In *Irvin* v. *Irvin,* 142 Pa. 271 (1891), an action was brought upon a note given to the plaintiff under the provisions of a written agreement under seal whereby the plaintiff, a married woman, released her rights in her husband's estate. The defendant was allowed to prove at the trial of the cause that at the execution of the sealed agreement it was agreed that the note should not be

[33] Similar statements of the law are found in the later cases of *Jackson* v. *Payne,* 114 Pa. 67 (1886); *Honesdale Glass Co.* v. *Storm,* 125 Pa. 268 (1889); *Hoffmann* v. *R. R.,* 157 Pa. 174 at 195 (1893); *Cooper* v. *Potts,* 185 Pa. 112 (1898); *Cloud* v. *Markle,* 186 Pa. 614 (1898), and *Fry* v. *Glass Co.,* 207 Pa. 505 (1904).

sued on until the plaintiff had obtained a divorce from her husband. In holding the admission of this testimony to be error Mr. Justice Paxson said: "I know of no decided case and no principle of law which permits an oral contract, made at the same time with a written contract under seal, and purposely omitted therefrom, to be set up not only to contradict but to destroy it. The two agreements cannot possibly stand together—one or the other must fall. When parties without fraud or mistake have put their engagements in writing, that is not only the best, but the sole evidence of their agreement." In that case, it is true, there was no allegation that the alleged oral agreement was the inducement on the faith of which the writing was executed; but in the subsequent case of *Wodock* v. *Robinson,* 148 Pa. 503 (1893), where such an inducing oral agreement was attempted to be proved to vary the terms of a sealed instrument, the same rule was enunciated and the evidence excluded. *Wodock* v. *Robinson* is the leading case in support of the view that sealed instruments may not now be modified by evidence of oral, contemporaneous, inducing promises that do not relate to the use to which the instrument is to be put. How completely the rule it lays down is at variance with the earlier rule that such evidence was admissible may best be shown by a statement of the facts of that case and of a similar case decided in the early years of the history of the rule under discussion.

In *Wodock* v. *Robinson* the plaintiff offered to prove that at the execution of a lease for certain demised premises, which obligated the lessee to maintain the premises in repair, the landlord agreed orally to put them in good repair, and that upon the faith of such promise the lessee was induced to execute the lease. A similar offer was made to establish the same facts in *Christ* v. *Diffenbach,*[34] decided in 1815, and the evidence was declared to be admissible. The subsequent breach of such an inducing promise, at that time, was held to constitute fraud sufficient to render the evidence admissible.[35] Shortly before the decision of *Wo-*

[34] 1 S. and R. 464.

[35] See page 610 above.

dock v. *Robinson* a case presenting the same facts as in *Christ* v. *Diffenbach* came before the Supreme Court in *Eberle* v. *Bonafon's Executors.*[36] The court's conception of fraud seems to have changed since the time of *Christ* v. *Diffenbach,* for though the facts were substantially the same, the court held shortly that the offer did "not tend to establish fraud, mistake, or trust. Its purpose is to establish a contemporaneous parol agreement to change the effect of the written contract," and the offer of such evidence was held to have been properly rejected. The decision in *Wodock* v. *Robinson* followed in the course laid out in *Eberle* v. *Bonafon's Executors,* Judge Thayer saying: "In the case now before us, as it is presented in the statement filed, the effort is, as it was in *Eberle* v. *Bonafon's Executors,* not only to strike out by parol a solemn covenant in a written and sealed instrument, but to write in its place another agreement flatly contradictory of it. No court should lend its aid to such an experiment." In declaring the rule as to sealed instruments he said: "It is as true now as it ever was, and is a rule too firmly rooted in justice and honesty to be easily eradicated from any system of wise laws, that all negotiations, all conversations, all oral promises, all verbal agreements, are forever merged in, superseded, and extinguished by the sealed instrument which is the final outcome and result of the bargaining of the parties. Unless you aver fraud or mistake you can no more incorporate in it what does not there appear than you can make and seal a new bond for the parties without their consent. You can no more blot out a word which it contains than you can tear off the signatures and seals of the parties." [37]

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[36] 17 W. N. C. 335 (1886).

[37] This vigorous opinion of Judge Thayer may well be studied at greater length. Upon the general rule he said: "*Manent litteræ scriptæ* is still the rule. The written instrument shall stand as the sole exponent of the minds of the parties. If it were not for this rule, no man would be able to protect himself by the most solemn forms and attestations against falsehood, misrepresentation, and perjury. In this matter the common law and the civil law are fully agreed, for *contra scriptum testimonium, non scriptum testimonium non fertur* is the language of the code: Code, lib. 4, tit. 20. The cases upon this subject are myriad, many of them at first blush seemingly inharmonious, contradictory, and irrecon-

The effect of the decisions in the cases of *Irvin* v. *Irvin, Eberle* v. *Bonafon's Executors,* and *Wodock* v. *Robinson* in establishing the principle that evidence of oral inducing promises, other than those which declare the uses to which the instrument should be put, may not be admitted to vary or contradict the terms of sealed instruments is shown in the case of *Stull* v. *Thompson,* 154 Pa. 43. In an action to recover rent reserved in a lease the lessee offered to prove that as to a portion of the sum of money so reserved the parties had agreed at the execution of the lease that the lessee could make payment by boarding the lessor, and that the lease had been signed upon the faith of this agreement. The evidence was rejected, and upon appeal the Supreme Court said: "To reverse this case would be going further than we have ever yet gone in allowing a written instrument under seal to be contradicted by parol evidence. We have gone quite far enough in that direction, especially in view of the law of evidence as it now exists, which permits a party in interest to testify. The rent under the lease was reserved in money, and the offer . . . was to show that at least a portion of the rent was to be taken out in boarding. This was a direct contradiction of the terms of the lease, and was properly excluded."

When attention is turned to the recent development of the rule with respect to instruments not under seal there is manifest the same tendency to refuse to consider that fraud, rendering parol evidence admissible, is established by evidence of oral promises contemporanous with and inducing the execution of a

cilable with the established rule and with other adjudications. But often the contradiction is only apparent and not real, and dependent upon special circumstances which clearly bring the case within the recognized exceptions of fraud, accident, or mistake. However judges and courts may have differed in the application of the rule, no judge has had the hardihood to deny it, or to refuse to apply it in a clear case, free from the qualifying circumstances which bring it within the operation of the exceptions." After an examination of *Hunter* v. *McHose,* 100 Pa. 38; *Jackson* v. *Payne,* 114 Pa. 67, and *Eberle* v. *Bonafon's Exec., supra,* he said, "The three cases which I have referred to should stand forever as perpetual landmarks and towers of defence in this state against all such attempts to overthrow the solemn agreements in writing of the parties by substituting for them the uncertain and perishable recollection of parties or bystanders, or, what is perhaps more frequently the case, their prevaricating, dishonest, and fraudulent statements."

written instrument, and where such evidence has been offered its rejection has been repeatedly held to have been warranted. The decisions to that effect are clear. The difficulty in formulating the conclusion that parol inducing promises are not admissible (unless they prove the use or purpose for which the instrument was executed) is due to numerous dicta that such evidence is admissible. It is submitted, however, that the decisions now prevail over these dicta and that the tendency is to establish the same rule in cases of unsealed as in sealed instruments. Intrinsically there is no reason for making any distinction between the two. Both sealed and unsealed instruments are subject to modification in cases of actual fraud,—fraudulent misrepresentation of fact,—and if in the one case evidence of inducing promises that the parties might well have incorporated in their writings is treated as no evidence of fraud, there is no reason why the same rule should not obtain with the other class of instruments. Where decisions and dicta are so conflicting, and in the absence of any clear, authoritative statement from the Supreme Court, one would be bold who would essay to define the law unqualifiedly, or who would declare that it is laid down in any single case. A trend of authority is discoverable, however, and the current tendency ascertained not from one but from a number of cases. No more than this will be attempted.

The comparison of *Huckestein* v. *Kelly*, 139 Pa. 201 (1890), with *Dixon-Woods Co.* v. *Glass Co.*, 169 Pa. 167 (1895), will disclose the recent reactionary tendency. The facts of the two cases are substantially alike. In each a contractor sued an owner to recover the stipulated sum for work done under a building contract, providing for the completion of the work by a given date. In each case there was urged in defence that the work was not completed by the stipulated time; and in each the plaintiff replied that his default was caused by the failure of the defendant to perform an oral undertaking made by him at the execution of the written contract upon the faith of which he had contracted to perform the work by a given date; the oral undertaking in

the one case being to construct a railroad switch to facilitate the delivery of materials, and in the other being a promise to furnish room for the storage of material to facilitate performance. In the early case the testimony of the oral, contemporaneous, inducing promise was admitted, with the result that the court permitted the jury practically to strike from the written contract the parties' own formal undertaking. In the latter case the offer was rejected and the Supreme Court, affirming the court below, said: "As plaintiff had offered in evidence the written agreement, and relied on it as a ground of recovery, we do not think it was competent to set up a contemporaneous parol agreement in rebuttal of defendant's claim for damages. It was not a failure on part of defendant to perform any part of the written contract or any act of defendant subsequent to it, not intended by it, but the offer was to prove a failure to perform another and a parol agreement, made at the same time as the written one; no fraud or mistake was alleged which would authorize a modification of the writing. The introduction in rebuttal of such new matter was not warranted by any rule of evidence." "No fraud was alleged," wrote Judge Dean. We may ponder well over that statement. Does it not mean that, contrary to *Christ* v. *Diffenbach*, *Campbell* v. *McClenachan*, *Coal Co.* v. *McShain*, and the host of early authorities, and the *Huckestein Case*, as well, fraud is not established by proof of an oral contemporaneous inducing undertaking subsequently violated, and that such evidence is not admissible to vary, modify, or contradict the terms of written instruments?

Too much weight must not be given, however, to a single decision. The light that seemed to shine for Judge Dean in *Dixon-Woods Co.* v. *Glass Co.* failed to illuminate the pen of Judge Williams when, two years later, in *Coal and Iron Co.* v. *Willing*, 180 Pa. 165 (1897), he wrote, in quite the same vein as the judges of early days: "The existence of a contemporaneous parol agreement between the parties under the influence of which a note or contract has been signed, which is violated as soon as

it has accomplished its purpose in securing the execution of the paper, may always be shown when the enforcement of the paper is attempted. It is a plain fraud to secure the execution of an instrument by representations as to the manner in which payment shall be made differing in important particulars from those contained in the paper, and, after the paper has been signed, attempt to compel literal compliance with its terms, regardless of the contemporaneous agreement without which it would never have been signed at all." And this statement of the law that learned and able judge declared was sustained by *Martin* v. *Kline,* 157 Pa. 473, and *Martin* v. *Fridenburg,* 169 Pa. 447. What forgetfulness of *Stull* v. *Thompson,*[38] decided but four years before! what misconstruction of *Martin* v. *Kline* and *Martin* v. *Fridenburg!* In *Stull* v. *Thompson* the court had refused to hear oral evidence of inducing promises as to the manner in which rent reserved in a lease should be paid. In *Martin* v. *Kline* actual fraud was proved—misrepresentation of facts. In *Martin* v. *Fridenburg* the court clearly placed the decision upon the ground that the writing sued on was but part of an entire contract, the balance of which was also in writing. Yet the decision of *Coal and Iron Co.* v. *Willing* might have been placed upon unquestioned grounds. It was an action upon promissory notes liability upon which, it was orally agreed, was to arise only upon the occurrence of certain contingencies. It is universal law that the existence of any separate oral argument, constituting a condition precedent to the attaching of any obligation under a contract, may be proved.[39]

The reactionary tendency was not stayed by *Iron Co.* v. *Willing,* however. When next the question arose in *Storage Co.* v. *Speck,* 194 Pa. 126 (1899), the rule of *Wodock* v. *Robinson*

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[38] 154 Pa. 43 (1893). See page 620 above.

[39] Stephens, Digest of the Law of Evidence, Art. 90, para. 3. The effort in the case was to prove that the notes were given merely as collateral security, to be used only after other security was exhausted. The decision might also have been based upon our Pennsylvania rule that the use to which a note may be put may be proved by parol: cf. page 628, *infra.*

and *Irvin* v. *Irvin,* which those decisions laid down for sealed instruments, was applied to an unsealed instrument, just as was done in *Dixon-Woods Co.* v. *Glass Co.*

In the *Storage Company* case action was brought to recover for the storage of whiskey under warehouse receipts providing for the payment of storage charges every six months. The trial court refused to admit evidence offered by the defendant to prove that he was induced to enter into the contract with the plaintiff upon the faith of an oral agreement that charges should be paid only when the whiskey was withdrawn from storage. Chief Justice Sterrett, upon appeal, after quoting at length from *Martin* v. *Berens, Wodock* v. *Robinson,* and *Irvin* v. *Irvin,* said: ". . . there is no reference in any of said papers to the oral agreement set up by the defendant, or to any of its terms; nor was there any evidence introduced or offered for the purpose of explaining the omission, or of showing that it was not intentional, or *that it was caused by fraud or mistake. Neither of the excluded offers of evidence went any further than to show that the whiskey was stored on the faith of the alleged oral agreement.*" Here, at length, is a clear intimation from the court that the broad class of oral, inducing agreements are not admissible to vary or contradict the terms of written instruments, and that the violation of such agreements does not constitute fraud. The language of the court all the more strongly sustains that position in view of the fact that the appellant relied upon the old rule under which such inducing agreements were admissible and cited in support thereof *Thomas* v. *Loose,*[40] *Walker* v. *France,*[41] and others of the cases supporting the old rule.

Despite the plain language of *Storage Co.* v. *Speck,* and despite his own opinion in *Dixon-Woods Co.* v. *Glass Co.,* from which quotation was made above,[42] Judge Dean said in *Sutch's Estate,* 201 Pa. 305 (1902): "The rule in this state, as we have endeavored to adhere to it, is comprehensively announced thus, in

[40] 114 Pa. 35. See page 615 above.
[41] 112 Pa. 203.
[42] Page 621.

Thomas & Sons v. *Loose,* 114 Pa. 35: 'Parol evidence is admissible of a contemporaneous oral agreement which induced the execution of a written contract, though it may vary, change, or reform the instrument. . . .'" That statement, as was a similar one by the same judge in *Ogden* v. *Traction Co.,* 202 Pa. 481 (1902), was mere dictum; but it shows the doubt with which not only the Supreme Court as a body, but its members individually, regard the rule under discussion. Yet it was the decision of the same judge, Dean, in the late case of *Fuller* v. *Law,* 207 Pa. 101 (1903), which, following in the line of his decision in *Dixon-Woods Co.* v. *Glass Co.,* has apparently settled the course of the law. One other recent decision besides *Fuller* v. *Law* merits attention that of *Krueger* v. *Nicola,* 205 Pa. 38 (1903). Those two cases, in connection with the cases discussed above, seem to establish definitely that the law is as it was ruled in *Storage Co.* v. *Speck.*

In *Krueger* v. *Nicola* Mr. Justice Brown wrote: "To contradict or vary the terms of a written contract by an oral, contemporaneous agreement between the parties there must be allegation as well as proof, not only of it, but of its omission through fraud, accident, or mistake from the writing." In *Fuller* v. *Law* the defendant in an action upon a promissory note offered testimony of an oral agreement of the plaintiff contemporaneous with and inducing its execution, that payment was to be made from the dividends upon stock in a corporation which had failed to declare or pay dividends. The offer was rejected, and, upon appeal, Mr. Justice Dean said: ". . . the court below placed its ruling on the ground that the offer, even if sustained, was not proof of such fraud, accident, or mistake in the execution and delivery of the writing as rendered it admissible. In this the court was correct; the proposed evidence amounted to nothing more than an offer to prove an independent parol contract, that the note was to be paid in another method than that expressed on its face. It is straining both legal and moral definitions to call the mere failure to perform an oral promise to accept payment in a

particular form a fraud; dishonest it may be, but it is no more a legal fraud than the immediate collection of a past due debt on which the creditor has orally promised the debtor indulgence. As there was no fraud in the creation of the instrument, nor in not waiting until the dividends on the stock paid it, it comes under the rulings . . . holding that evidence of fraud, accident, or mistake can alone successfully contradict or set aside the writing." Here, again, Judge Dean declares that the violation of an oral, contemporaneous, inducing agreement does not constitute fraud, and that such evidence is not admissible. His opinion is in line with *Storage Co.* v. *Speck,* and his own opinion in *Dixon-Woods Co.* v. *Glass Co.* It lays deserved emphasis upon the principle that misrepresentation of intention or mere breach of a promise is not fraud, and, the language of Judge Williams in *Coal and Iron Co.* v. *Willing* to the contrary notwithstanding, it holds with *Stull* v. *Thompson* that the manner of making payment as provided in the written instrument may not be altered by evidence of an oral inducing agreement.

From this review of the authorities, the reactionary tendency of the Supreme Court is made manifest.[43] Indeed, Judge Dean, in *Fuller* v. *Law,* leaves the intention of the court in no doubt when he says: "Since the legislation . . . allowing the parties to such [*i. e.,* written] instruments to testify in their own behalf, we have endeavored to save whatever is left of the rule 'that parol evidence is inadmissible to vary or contradict written instruments' by somewhat more rigid rulings tending to exclude parol evidence. We concede, success in that direction has not as yet been what we hoped for." While it seems that no longer

[43] Little light can be gained by a study of the decisions of the Superior Court. That court, established at a time when the reactionary tendency of the Supreme Court had hardly gotten under way, adopted the rule as laid in the old cases, and has continued to affirm it, apparently unaware of any change in the attitude of the Supreme Court. In *Smith* v. *Harvey,* 4 Pa. Super. 377 (1897), Judge Smith held that any oral agreement contemporaneous with and inducing the execution of a written agreement may be proved although it vary or change the written terms. The same rule was followed in *Osborne* v. *Walley,* 8 Pa. Super. 193; *Harrow Co.* v. *Swoope,* 16 Pa. Super. 451; *Commonwealth Title Co.* v. *Folz,* 19 Pa. Super. 28; *Myers* v. *Kipp,* 20 Pa. Super. 311, and other Superior Court cases.

may the broad class of oral, contemporaneous, inducing promises be given in evidence to contradict or vary the terms of written instruments, yet the courts have consistently maintained the narrower rule that when the oral promise or undertaking relates to and defines the use to which the instrument may be put the evidence is admissible. It is in the reconsideration of this rule and in its restatement, after critical examination, that there is something yet to be achieved by the Supreme Court in the execution of its purpose avowed in *Fuller* v. *Law.*

The reasoning on which Judge Bell, in *Rearick* v. *Swinehart,*[44] and Judge Tilghman, in *Miller* v. *Henderson,*[45] declared that oral evidence was admissible to prove the use to which the parties agreed that the written instrument should be put, is the same as that on which the broad class of oral inducing agreements were declared to be admissible. Fraud was thought to be established by the violation of either of such agreements. In the language of the cases the fraudulent use of a written instrument may be proved by evidence of oral agreements inducing its execution and stipulating for the use to which the instrument should be put. Inasmuch as the evidence in such cases establishes not the statement or representation of facts on the basis of which the contract is made, but an undertaking or promise as to future action for which provision might well be made in the writing, which is supposed to contain the mutual stipulations of the parties for their future conduct and relations, the objections to the admission of parol evidence to establish the use to which the instruments may be put are as strong as the objections to the admission of oral testimony to prove any other inducing promise.

When the cases are examined in which the parol evidence was admitted upon the ground that it established the use to which the instrument may be put, it appears that in many of them the evidence establishes a condition precedent to the existence of any obligation under the instrument; in others the evidence estab-

[44] 11 Pa. 233. See page 610 above.
[45] 10 S. and R. 290.

lishes what may be literally called the use to which the instrument may be put, as, for instance, that it was given as collateral security against a particular liability, while in others the evidence establishes a mere inducing agreement which relates in no way to the use to which the instrument may be put or the purpose for which it was given, although the court places the admission of the testimony upon that ground.

When parties at the time of the execution of a written instrument orally agree that its operation shall be dependent upon the occurrence of a stipulated contingency, until which time no obligation under the instrument shall attach, it is general law that parol evidence to establish such an oral agreement is admissible.[46] Such evidence does not vary or contradict the terms of the writing; it merely establishes the conditions under which it becomes operative. No criticism can be placed upon the admission of such testimony in the cases that have arisen in Pennsylvania, but its admission should be placed upon that ground. In *Rearick* v. *Swinehart*,[47] where the liability of the defendant under a written agreement was conditioned upon an event that had not occurred, Judge Bell said: "It is enough that . . . an attempt is made to wrest the instrument to a purpose not contemplated, or use it in violation of the accompanying agreement. It is as much a fraud to obtain a paper for one purpose, and use it for a different and unfair purpose, as to practise falsehood or deceit in its procurement." There is no more fraud in attempting to enforce liability in such case than there is in any other case where no liability exists. The attempt may be in breach of the contract stipulating the contingencies upon whose happening liability is to accrue, but breach of contract is not fraud.[48]

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[46] Stephens: Evidence, Article 90; cf. *Ib.*, illustrations f and g and cases cited. Wharton: Evidence, § 927.

[47] 11 Pa. 233. See page 609 above.

[48] For other cases where the oral evidence admitted established a condition precedent to the attaching of any obligation under the writing, see *Davidson's Executors* v. *Young*, 167 Pa. 265, similar in facts to *Rearick* v. *Swinehart*, and *Ayer's App.*, 28 Pa. 179. Compare also *Clinch Valley Coal, etc., Co.* v. *Willing*, 180 Pa. 165, and *Martin* v. *Fridenburg*, 169 Pa. 447.

The second class of these so-called fraudulent use cases comprises those in which a bond or note is made or endorsed for a specific purpose, and the use to which the instrument may be put is expressly agreed upon orally. Under our rule oral evidence is admissible to establish the use agreed upon, and any other use will be prevented by the courts. Bona fide holders of negotiable instruments for value, ignorant of oral restrictions made by the maker or endorser as to their use, may, of course, enforce them according to their legal tenor but all other parties are bound by the oral stipulations. Thus in *Bank* v. *Dunn,* 151 Pa. 228, a typical case, the accommodation maker of a note delivered it to the payee with the restriction that he use it to obtain a loan. Instead of using it in that manner he pledged it with the plaintiff as security for an antecedent debt. Recovery upon the instrument was not permitted. "The expression of this one purpose was the exclusion of every other, and a restriction upon the manner in which the note should be used," said the court. Numerous other cases establish the same rule, although the general law elsewhere is that such oral agreements between parties to negotiable instruments are inadmissible.[49] Frequent application of the rule is made in cases where upon the execution of a bond accompanying a mortgage it is orally agreed, as the inducement for the execution of the bond, that general liability upon the bond shall be restricted, the amount of the bond to be collected out of the mortgaged land and no personal liability incurred.[50]

The rule that evidence of oral inducing agreements as to the use to which written instruments may be put is apparently firmly established in our Pennsylvania law. At this late date, perhaps, the courts cannot retrace their steps and declare such evidence inadmissible; but they can exercise closer supervision

[49] Other Pennsylvania cases include *Miller* v. *Henderson,* 10 S. and R. 290; *Lyon* v. *Bank,* 14 S. and R. 383; *Hultz* v. *Wright,* 16 S. and R. 345; *Ott* v. *Oyer,* 106 Pa. 6, and *Heist* v. *Tobias,* 182 Pa. 442. In *Martin* v. *Cole,* 104 U. S. 30, the authorities are reviewed and the prevailing rule is defined.

[50] *Irwin* v. *Shoemaker,* 8 W. and S. 75; *Greenawalt* v. *Kohne,* 85 Pa. 369; *Hoopes* v. *Beale,* 90 Pa. 82; *Schweyer* v. *Walbert,* 190 Pa. 334, and *Wheatley* v. *Neidich,* 24 Pa. Super. 198.

over the evidence offered under that rule and reject it where it fails to establish what is literally the use to which the instrument may be put, or a condition precedent. In their broad construction of the rule they have admitted testimony which established an ordinary inducing agreement in conflict with the terms of the instrument upon the ground that a "fraudulent" use was thus prevented, although the evidence failed to establish either a condition precedent or a restriction upon the use to which the instrument should be put.[51] There is a sense in which an attempt to enforce the terms of a written instrument, despite an oral inducing agreement at variance therewith and not relating to the intended use of the instrument, may be said to be an abuse of the instrument. If oral evidence is admissible to show all such "abuses," then all oral inducing agreements are admissible although they establish neither an agreement restricting the use of the written instrument, nor a condition precedent. The abuse in such case consists in an attempt to enforce the instrument as it is written, and not in actually using it in another than the exclusive manner agreed upon. Unless the courts resolutely exclude all such evidence the rule under which inducing agreements restricting the use of the instrument is admissible will be so extended as to include all oral, contemporaneous inducing agreements.

Much has been done by the Supreme Court in narrowing the peculiar Pennsylvania exception to the parol evidence rule. It has called attention to the reasons that make for closer adherence to the strict rule. It has declared that the broad class of oral inducing promises are not admissible to vary, alter, or contradict the terms of sealed instruments. Recent decisions seem to establish the same rule for written instruments not under seal. Assuming this to be the present state of the law, it can be asserted that, as in other jurisdictions, so in Pennsylvania, except to prove fraud, accident, or mistake, parol evidence is not admissible to

[51] See *Renshaw* v. *Gans*, 7 Pa. 117; *Lippincott* v. *Whitman*, 83 Pa. 244; *Glass Co.* v. *Storms*, 125 Pa. 268.

alter vary or contradict the terms of a written instrument save only that in the one case where such evidence establishes an oral agreement contemporaneous with and inducing the execution of the written agreement and restricting the use to which it may be put, such evidence is still admissible. Much remains yet to be done by the Supreme Court. An authoritative statement from it defining the law is needed; and, if the definition accord with the above conclusions, it should restrict the admission of oral inducing agreements to cases in which they establish either a condition precedent to the attaching of any obligation under the instrument, or a restriction upon the manner in which the instrument may be used. In admitting testimony for the last-named purpose we still are at variance with the general rule elsewhere; but the rule seems to be too firmly embedded in our law to be dislodged. It should not be extended, however, nor should it be so loosely construed that, under the pretext of establishing an oral agreement restricting the use to which a written instrument may be put, skilful counsel may be permitted to prove an oral, inducing agreement that provides nothing as to the use of the instrument.

Stanley Folz.