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THE PAROL EVIDENCE RULE IN MISSOURI

I. THE RULE IN GENERAL

Having deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of the engagement, it is conclusively presumed that the whole engagement of the parties and the extent and manner of their undertaking, have been reduced to writing, and parol evidence is not permitted to vary, or contradict the terms of such writing, or to substitute a new or different contract for it.¹

This comprehensive statement of the parol evidence rule is one of the first adopted,² and the most consistently used by Missouri appellate courts.³ The principle which it states is that when men make a written memorial expressing their contract, it is regarded as the only evidence of that agreement and the most trustworthy testimony of what they have transacted. Therefore, the written contract is conclusively presumed to contain all prior negotiations and to express the final agreement.⁴ Were this not so, when sued on a contract a party could admit that he signed it, but deny that it expressed the agreement he made; or admit that he signed, but deny that he read it or knew of its stipulations. This would greatly impair the value of all written contracts and negotiable instruments for there could be little reliance upon them to substantiate one's rights. The consistent application of this rule also removes the temptation and possibility of perjury which would exist if parol evidence were admissible.⁵ The Missouri Supreme Court has expressed the rationale of the parol evidence rule as follows:

The general rule excluding evidence of contemporaneous or prior verbal agreements, varying or contradicting the terms of a valid written instrument, is an outgrowth of the common experience of men. . . . It rests on principles somewhat analogous to those which underlie the conclusiveness of judgments upon the parties thereto. It is said to be the interest of the state that there should be an end to litigation. Accordingly, the record that closes a forensic controversy is regarded as merging the matters litigated to the extent declared in the judgment. So, in private adjustments of reciprocal rights, it is wisely considered that, when parties have deliberately

1. 10 R.C.L. *Evidence* § 209 (1916).

2. *Laclede Constr. Co. v. T. J. Moss Tie Co.*, 185 Mo. 25, 84 S.W. 76 (1904).

3. *Commerce Trust Co. v. Watts*, 360 Mo. 971, 231 S.W.2d 817 (1950); *Employer's Indem. Corp. v. Garrett*, 327 Mo. 874, 38 S.W.2d 1049 (1931); *Davison v. Rodes*, 299 S.W.2d 591 (K.C. Ct. App. 1956); *Sol Abrahams & Sons Constr. Co. v. Osterholm*, 136 S.W.2d 86 (St. L. Ct. App. 1940). For other statements of the rule commonly used, see *Hudler v. Muller*, 55 S.W.2d 419 (Mo. 1932); *State ex rel. Morrison Inv. Co. v. Trimble*, 301 Mo. 146, 256 S.W. 171 (1923); *Greaves v. Huber*, 235 S.W.2d 86 (St. L. Ct. App. 1932); *Rigler v. Reid*, 186 Mo. App. 111, 171 S.W. 952 (St. L. Ct. App. 1915).

4. *Poe v. Illinois Cent. Ry.*, 339 Mo. 1025, 99 S.W.2d 89 (1936); *Rollins v. Claybrook*, 22 Mo. 405 (1856); *Greaves v. Huber*, *supra* note 3.

5. *Crim v. Crim*, 162 Mo. 554, 63 S.W. 489 (1901) (en banc).

put their mutual agreements into the form of a completed written contract, that expression of their intention should be accepted as a finality, in which is merged all prior negotiations within the scope of the writing.⁶

The parol evidence rule became a part of the common law with the transition from impressive public ceremonies such as livery of seisin, to the common use of written instruments to record everyday transactions.⁷ Its purpose being to preserve the sanctity of written contracts, it is not a rule of evidence dealing with the probative trustworthiness of particular data. On the contrary, it is a rule of substantive law operating to limit evidence from which interpretive inferences may be drawn and to define the limits of the contract.⁸ It is a blanket exclusion of any evidence, written or oral, tending to alter, vary or contradict the terms of a valid written contract. In other words, parol evidence is no evidence at all. Thus, a litigant who bases his suit entirely on a matter inhibited by the parol evidence rule will inevitably suffer a directed verdict against him if his opponent requests it, even though such evidence was admitted without objection.⁹

A list of the writings to which the parol evidence rule applies is impressive. The touchstone of applicability is whether or not the terms of the writing import a legal obligation. Thus, writings of a contractual nature such as deeds,¹⁰ mortgages,¹¹ notes,¹² powers of attorney,¹³ employment contracts,¹⁴ bills of sale,¹⁵ leases,¹⁶ judicial records,¹⁷ etc., are safeguarded by the rule. But, such writings as ordinary receipts,¹⁸ letters,¹⁹ memoranda,²⁰ and common prose are not affected by it.

6. *Tracy v. Union Iron Works*, 104 Mo. 193, 198, 16 S.W. 203, 204 (1891). See also *Sunderland v. Hackney Mfg. Co.*, 193 Mo. App. 287, 181 S.W. 1192, 1195 (K.C. Ct. App. 1916), and *NICHOLS, DEFUNIAK, WILLIAMS, MOORE, CLARK, POORE & NORRIS, FEDERAL PROCEDURE* § 26.394 (3d ed. 1951):

The parol evidence rule is based on the doctrines of estoppel and merger. A party who has entered into a contract evidenced by writing, or who has executed a written instrument, cannot be heard to impair its obligation by evidence contradicting or varying it. Matters of negotiation antecedent to and de hors the writing are considered as being merged into it.

7. For the history of the parol evidence rule, see 3 WILLISTON, *CONTRACTS* § 631 (rev. ed. 1936); 9 WIGMORE, *EVIDENCE* § 2405 (3d ed. 1940).

8. *Bellows v. Porter*, 201 F.2d 429 (8th Cir. 1953); *Commerce Trust Co. v. Watts*, *supra* note 3; *Connor v. Temm*, 270 S.W.2d 541 (St. L. Ct. App. 1954); *Sol Abrahams & Sons Constr. Co. v. Osterholm*, *supra* note 3.

9. *Commerce Trust Co. v. Watts*, *supra* note 3.

10. *Williams v. Reed*, 37 S.W.2d 537 (Mo. 1931).

11. *Stephens v. Bell*, 106 S.W.2d 19 (K.C. Ct. App. 1937).

12. *Bank of Mountain View v. Winebrenner*, 355 Mo. 79, 195 S.W.2d 486 (1946) (en banc).

13. *Ashley v. Bird*, 1 Mo. 640 (1826).

14. *Isaac T. Cook Co. v. Craddock-Terry Co.*, 109 S.W.2d 731 (St. L. Ct. App. 1937).

15. *Standard Foundry Co. v. Schloss*, 43 Mo. App. 304 (St. L. Ct. App. 1891).

16. *Hargis v. Sample*, 306 S.W.2d 564 (Mo. 1957).

17. *State ex rel. Gregory v. Henderson*, 230 Mo. App. 1, 88 S.W.2d 893 (K.C. Ct. App. 1935).

18. *Wind v. Bank of Maplewood*, 58 S.W.2d 332 (St. L. Ct. App. 1933).

As to the persons affected by the parol evidence rule, it is invoked generally only in suits between the parties (and their successors in interest) who made the writing in controversy the final statement of their agreement. But strangers to the agreement are not precluded from proving the truth, no matter how contradictory to the writing it may be.²¹ Otherwise, a third person would be prejudiced by things recited in the writing contrary to the truth through the ignorance, carelessness, or fraud of the parties.²² In *Tomlinson v. Marshall*,²³ the plaintiff brought an action based on negligence for injuries incurred in a steam laundry alleged to be owned by the defendant. The plaintiff was allowed to introduce evidence contradicting a purported written lease of the laundry by the defendant to an employee of little means. The court said, ". . . plaintiff's rights are to be determined by what they actually did, and not by what they said to each other in the written instrument would be done."²⁴

A party to a contract involved in litigation with a stranger to it may also present evidence contradicting it. An example often found in Missouri cases is where a plaintiff has signed what appears to be a release of one of several joint

19. *Bagnall v. Frank Fehr Brewing Co.*, 203 Mo. App. 635, 221 S.W. 793 (K.C. Ct. App. 1920).

20. *McGinnis v. Aetna Life Ins. Co.*, 78 S.W.2d 501 (Spr. Ct. App. 1934).

21. *Coe v. Griggs*, 76 Mo. 619 (1882); *Davenport v. Murray*, 68 Mo. 198 (1878); *McKee v. City of St. Louis*, 17 Mo. 184 (1852); *Cantrell v. Burgess*, 141 S.W.2d 200 (Spr. Ct. App. 1940); *Proctor v. Home Trust Co.*, 221 Mo. App. 577, 284 S.W. 156 (K.C. Ct. App. 1926); *Murphy v. People's Ry.*, 15 Mo. App. 594 (St. L. Ct. App. 1884); *Cordes v. Straszer*, 8 Mo. App. 61 (St. L. Ct. App. 1879).

22. *Burk v. Walton*, 337 Mo. 781, 86 S.W.2d 92 (1935).

23. 208 Mo. App. 381, 236 S.W. 680 (K.C. Ct. App. 1921); *Hill v. Sutton*, 8 Mo. App. 353 (St. L. Ct. App. 1880), where parol evidence was allowed in a suit against one of two partners to prove that the partnership agreement was not the partners' working arrangement.

24. *Tomlinson v. Marshall*, *supra* note 23, at 392, 236 S.W. at 684. Other common situations: Party to a deed reciting assumption of indebtedness allowed to testify he did not assume a mortgage, *Wissman v. Pearline*, 235 Mo. App. 314, 135 S.W.2d 1 (St. L. Ct. App. 1940); *McFarland v. Melson*, 323 Mo. 977, 20 S.W.2d 63 (1929); Nonassumption clause contradicted in *Empire Trust Co. v. Hitchcock*, 233 Mo. App. 581 (K.C. Ct. App. 1939).

Parol evidence allowed in third party situation to show who the real party to the contract was: *Sauer v. Brinker*, 77 Mo. 289 (1883); *Berry v. Royster*, 232 S.W. 477 (K.C. Ct. App. 1921); *Cash v. Wysocki*, 229 S.W. 428 (K.C. Ct. App. 1921); *Leckie v. Bennett*, 160 Mo. App. 145, 141 S.W. 706 (Spr. Ct. App. 1911); *Morgan v. Dennison & Co.*, 114 Mo. App. 700, 91 S.W. 1024 (K.C. Ct. App. 1905).

Parol evidence admissible in proceeding to collect attorney's fee that out-of-court settlement included defendant's agreement to pay attorney's fees: *LePure v. St. Louis Pub. Serv. Co.*, 156 S.W.2d 37 (St. L. Ct. App. 1941); *Gerritzen v. Louisville & N. R.R.*, 115 S.W.2d 44 (St. L. Ct. App. 1938).

Parol evidence allowed to show the relationships between parties was that of principal and surety: *In re Jamison's Estate*, 202 S.W.2d 879 (Mo. 1947); *Citizens' Ins. Co. v. Broyles*, 78 Mo. App. 364 (St. L. Ct. App. 1899); *Leeper v. Paschal*, 70 Mo. App. 117 (K.C. Ct. App. 1897).

tortfeasors. The plaintiff, when suing another tortfeasor, may show that the writing was a covenant not to sue rather than a release.²⁵

However, when one, though not a party to an instrument, bases his claim upon it and attempts to render it effective against one of the parties to it, the parol evidence rule applies. Thus, in *Schneider v. Kirkpatrick*,²⁶ a judgment creditor in an action against the recipient of certain stocks transferred in a compromise and settlement with the debtor was not allowed to vary the terms of the settlement.

It is not difficult to state the parol evidence rule or to explain to what and to whom it applies. The difficulty arises in determining *when* it applies. A voluminous number of so-called "exceptions" to the parol evidence rule have been proclaimed by courts and treatise writers. There are situations in which parol evidence is admissible concerning a written instrument for certain purposes. These purposes are classified into three categories for convenience of presentation and the ensuing discussion will deal with each in detail. At this point, however, an advance observation is made: for no purpose in an action between the parties to a valid written instrument is parol evidence admitted which alters, varies or contradicts the terms of that instrument. Hence a more accurate statement is that there are no exceptions to the parol evidence rule.

II. PAROL EVIDENCE IS ADMITTED FOR THE PURPOSE OF SHOWING THAT NO VALID CONTRACT EXISTS

Before the parol evidence rule may be applied, a court must initially determine whether or not the parties before it have entered into a contract.²⁷ Since the existence of a contract must be established, no relevant evidence is excluded on the issue, either on behalf of the proponent of the contract or the party sought to be charged thereunder.²⁸ "For the purpose of showing that the plaintiff did not assent or agree to the terms of the contract, extrinsic evidence is admissible, not to contradict its express terms, but to show whether it was fairly and honestly entered into."²⁹

A like situation arises where two parties contemplate the making of a contract, agree upon its terms, and even reduce it to writing, but condition its becoming effective on the happening of a certain contingency. When sued upon such a writing, one may, by parol evidence, show that the contingency was not fulfilled and therefore no binding obligation ever came into being. In *Vardeman v. Bruns*,³⁰ the de-

25. *Slaughter v. Sweet & Piper Mule Co.*, 259 S.W. 131 (K.C. Ct. App. 1924); *Slinkard v. Lamb Constr. Co.*, 212 S.W. 61 (St. L. Ct. App. 1919); *McKim v. Metropolitan St. Ry.*, 196 Mo. App. 544, 196 S.W. 433 (K.C. Ct. App. 1917).

26. 80 Mo. App. 145 (K.C. Ct. App. 1899).

27. *Warinner v. Nugent*, 362 Mo. 233, 240 S.W.2d 941 (1951).

28. *Pet Milk Co. v. Boland*, 175 F.2d 151 (8th Cir. 1949); *Thompson v. Baltimore & O.R.R.*, 59 F. Supp. 21 (E.D. Mo. 1945); *H. C. Lindsly & Son v. Kansas City Viaduct & Terminal Co.*, 152 Mo. App. 221, 133 S.W. 189 (K.C. Ct. App. 1911); *McElvain v. St. Louis & S.F.R.R.*, 151 Mo. App. 126, 131 S.W. 736 (Spr. Ct. App. 1910).

29. *McElvain v. St. Louis & S.F.R.R.*, *supra* note 28, at 154, 131 S.W. at 746.

30. 199 S.W. 710 (K.C. Ct. App. 1917).

feudant was sued for breach of a contract to use plaintiff's delivery service for his Jefferson City business. He was allowed to introduce evidence that the contract was not to become effective until his competitors had also agreed to subscribe to the plaintiff's service, and that they had not so agreed. The court characterized such evidence as not contradicting the writing, but rather ". . . the showing of a separate agreement constituting a condition precedent to the attaching of any obligation under the writing."³¹ Also, where complete and absolute delivery of a writing is essential to its validity, conditional delivery may be shown by parol.³² Waiver of the condition precedent may be proven by parol too, since without a waiver, there is no contract.³³

However, parol evidence may not be used to show a condition to one's performance not stated in a binding contract. Evidence of such a condition was excluded in *Marshall Hall Grain Co. v. P. H. Boyce Merchantile Co.*,³⁴ where an attempt was made to show that delivery of corn sold under the contract was conditioned on the seller's ability to procure freight cars.

While testimony to prove a parol condition precedent to a contract is allowed, evidence of a condition subsequent to a contract not expressed therein is not:

[P]arol evidence is not admissible which, conceding the existence and delivery of the contract obligation, and that it was at one time effective, seeks to nullify, modify, or change the character of the obligation itself, by showing that it is to *cease to be effective* or is to have an effect different from that stated therein, upon certain conditions or contingencies, for this does vary or contradict the terms of the writing.³⁵

A somewhat specialized area is presented by negotiable instruments because of extensive coverage by statute in Missouri.³⁶ Generally, it may be shown by parol that a note or similar instrument, was conditionally delivered and never became

31. *Id.* at 711; *Cf.* *Bommarito v. Southern Canning Co.*, 208 F.2d 56 (8th Cir. 1953) (lease to be effective only upon being signed by all parties having an interest in the premises); *Elmer v. Flett*, 297 S.W. 985 (Spr. Ct. App. 1927) (contract with attorney conditional on other heirs signing it); *Tutt v. Price*, 7 Mo. App. 194 (St. L. Ct. App. 1879) (release by creditors in a composition effective only on agreement of all creditors).

32. *Pfeiffenberger v. Scott's Cleaners*, 144 S.W.2d 183 (St. L. Ct. App. 1940) (lease); *Poplin v. Brown*, 200 Mo. App. 255, 205 S.W. 411 (Spr. Ct. App. 1918) (deed); *Shantz v. Shriner*, 167 Mo. App. 635, 150 S.W. 727 (St. L. Ct. App. 1912) (mortgage).

33. *Edwards v. Business Men's Acc. Ass'n*, 205 Mo. App. 102, 221 S.W. 422 (Spr. Ct. App. 1920); *Paddock-Hawley Iron Co. v. Providence-Washington Ins. Co.*, 118 Mo. App. 85, 93 S.W. 358 (St. L. Ct. App. 1906); both involving waiver of condition precedent to issuance of an insurance policy.

34. 203 Mo. App. 220, 211 S.W. 725 (Spr. Ct. App. 1919). See also *Scullin Steel Co. v. Mississippi Valley Iron Co.*, 308 Mo. 453, 273 S.W. 95 (1925) (en banc); *Neville v. Hughes*, 104 Mo. App. 455, 79 S.W. 735 (St. L. Ct. App. 1904).

35. *Farmers' State Bank v. Sloop*, 200 S.W. 304, 305 (K.C. Ct. App. 1918). For particular application to negotiable instruments see *BRITTON, BILLS AND NOTES* § 55 (1943).

36. § 401.011, RSMo 1959, Presumptions as to date; § 401.014, RSMo 1959, When blanks may be filled in; § 401.017, RSMo 1959, Construction where instrument is ambiguous.

binding in a suit between the original parties and their privies.³⁷ In the leading Missouri case of *Earle v. Woodruff*,³⁸ the maker of the note was able to show that the note was given on condition that a settlement of a pending law suit be made in a certain way, and that it was in fact made another way. And, as between the original parties to a note, an accommodation indorser may show by parol that the proceeds of the note were to be used for a special purpose and were used for a different purpose.³⁹ But extrinsic evidence that a note, absolute on its face, is payable only on a contingency is inadmissible.⁴⁰ In *Third Nat'l Bank v. Reichert*,⁴¹ it was held that the maker of a note was not entitled to urge a parol agreement that it was to be paid only in the event enough money was earned by a certain milling corporation to pay the note from its profits.

Although a written contract exists, it may be void or voidable because of fraud, mistake, duress, undue influence, or illegality in its inception. Parol evidence is admissible to show that a contract is unenforceable for one of these reasons.

As a general rule in cases involving fraud, the parol evidence rule is not a bar to its exposure. This is based on reasoning similar to that expressed by the court in *Richards v. Phoenix Mut. Life Ins. Co.*:⁴²

[T]he vital additional element in fraud is the party's state of mind, which neither can be nor is intended to be embodied in the written document, and . . . hence the parol evidence rule does not forbid considering it wherever it is the vital element of the claim.⁴³

A clear demonstration of this principle would allow extrinsic evidence in a case where one, presented with what appears to be a petition for better government, actually signs a note or mortgage concealed by an overlap of the papers. However, most claims of fraud involve fraudulent misrepresentation rather than fraud in the execution and present a much closer question on the admissibility of parol evidence.

37. *J. B. Colt Co. v. Gregor*, 328 Mo. 1216, 44 S.W.2d 2 (1931); *Barrett v. Davis*, 104 Mo. 549, 16 S.W. 377 (1891); *Bunch v. Phillips*, 79 S.W.2d 785 (Spr. Ct. App. 1935); *Bank of Hollister v. O'Brien*, 220 Mo. App. 1276, 290 S.W. 1009 (Spr. Ct. App. 1927); *Slupsky v. Starr*, 223 S.W. 816 (St. L. Ct. App. 1920); *Settles v. Moore*, 149 Mo. App. 724, 129 S.W. 455 (St. L. Ct. App. 1910); *Shelton v. Durham*, 7 Mo. App. 585 (St. L. Ct. App. 1879).

38. 274 S.W. 107 (Spr. Ct. App. 1925).

39. *St. Louis Nat'l Bank v. Flanagan*, 129 Mo. 178, 31 S.W. 773 (1895); *Mutual Life v. McKinnis*, 47 S.W.2d 564 (Spr. Ct. App. 1932); *Schlamp v. Manewal*, 196 Mo. App. 114, 190 S.W. 658 (St. L. Ct. App. 1916).

40. *Smith v. Thomas*, 29 Mo. 307 (1860); *Jones v. Jeffries*, 17 Mo. 577 (1853); *F. M. Deuchler & Co. v. Hampton*, 339 S.W.2d 499 (St. L. Ct. App. 1960); *Bay v. Elmer*, 237 S.W.2d 932 (Spr. Ct. App. 1951); *In re Kenage's Estate*, 3 S.W.2d 1041 (Spr. Ct. App. 1928); *First Nat'l Bank v. Limpp*, 221 Mo. App. 951, 288 S.W. 957 (K.C. Ct. App. 1926); *First Nat'l Bank v. Henry*, 202 S.W. 281 (K.C. Ct. App. 1918).

41. 101 Mo. App. 242, 73 S.W. 893 (St. L. Ct. App. 1903).

42. 215 F.2d 114 (8th Cir. 1954), which contains a survey of leading Missouri cases involving fraud and the parol evidence rule. See also *Gooch v. Conner*, 8 Mo. 341 (1844).

43. *Richards v. Phoenix Mut. Life Ins. Co.*, *supra* note 42, at 116.

Where the plaintiff seeks to enforce a contract he was induced to sign on the basis of fraudulent misrepresentations, the problem arises whether the written contract can be ignored in an action at law, and the parties' rights adjusted according to the oral contract alone? Or must the written contract be first cancelled or reformed by a court of equity? If the first alternative is chosen, then parol evidence is permitted to change a written contract which is complete and not suggestive of any omitted terms in outright violation of the parol evidence rule. On the other hand, it seems unjust to allow the plaintiff to be cheated out of the bargain he made because of the defendant's fraud in inducing him to sign a contract differing from the agreement made.⁴⁴ At least one Missouri decision has dealt with this problem. In *Koffman v. Southwest Mo. Elec. Ry.*,⁴⁵ the plaintiff was injured in a street car collision and brought suit on an alleged agreement that the defendant was to furnish a physician until such time as the plaintiff's broken leg was completely mended. The defendant produced a writing signed by the plaintiff in which it agreed only to provide medical services until the plaintiff was able to get home. The plaintiff contended that his signature was fraudulently obtained by representations made to him that the writing contained their agreement when in fact the defendant knew it did not. The court ruled in favor of the defendant:

It must be borne in mind, in considering this subject, that the common law adheres more rigidly to the rule against varying or contradicting written instruments by parol evidence than does equity. That rule was originally a part of common-law procedure, and not of equity; and exceptions are admitted in equity practice that the law will not admit. . . . When the suit is to be brought on the agreement as made, but not written, the writing must be rectified by a proceeding in equity. . . .⁴⁶

Other Missouri decisions are in accord with the statement of the *Koffman* case and have been liberal in allowing plaintiffs to produce extrinsic evidence of fraudulent misrepresentations in actions brought in equity for rescission or other equitable relief.⁴⁷ More common examples are rescission based on misrepresentations concern-

44. TRACY, EVIDENCE 98 (1952).

45. 95 Mo. App. 459, 68 S.W. 212 (St. L. Ct. App. 1902).

46. *Id.* at 472, 68 S.W. at 216, 217. Cf. *Metropolitan Paving Co. v. Brown-Crummler Inv. Co.*, 309 Mo. 638, 274 S.W. 815, 819 (1925) (en banc):

If a party defrauded misunderstands the nature of the contract so that the minds of the parties never meet on its terms, it is void. But, if understanding its terms, he is induced to sign it by fraudulent representations outside of its terms, it is voidable and must be set aside before the party defrauded can maintain an action upon it.

47. *Frey v. Onstott*, 357 Mo. 721, 210 S.W.2d 87 (1948); *Johnson v. Dur-Est, Inc.*, 224 S.W.2d 611 (K.C. Ct. App. 1949); *Bixler v. Wagster*, 256 S.W. 520 (St. L. Ct. App. 1923) (misrepresentation as to quality of jewelry purchased); *McTernan v. Mason*, 188 S.W. 923 (K.C. Ct. App. 1916); *Shallcross Printing & Stationery Co. v. Brown*, 185 S.W. 745 (St. L. Ct. App. 1916) (representations on the number of issues presold in which advertising was contracted for); *Cook v. Smith*, 184 Mo. App. 561, 170 S.W. 672 (Spr. Ct. App. 1914); *American Hardwood Lumber Co. v. Dent*, 121 Mo. App. 108, 98 S.W. 814 (St. L. Ct. App. 1906) (representations as to grade of lumber); *Elgin Jewelry Co. v. Withaup & Co.*, 118 Mo. App. 126, 94 S.W. 572 (St. L. Ct. App. 1906); *Stone v. Barrett*, 34 Mo. App. 15 (K.C. Ct. App. 1889).

ing used cars,⁴⁸ and the number of acres contained in a tract of land purchased by plaintiff.⁴⁹

This problem is avoided when a person who discovers he has been defrauded rescinds the contract by returning whatever of value he has received and brings an action in tort for damages.⁵⁰ Parol evidence is then clearly admissible to prove fraud, because the suit is not on the contract as reduced to writing, but is grounded in tort.⁵¹ Thus in *National Theater Supply v. Rigney*,⁵² in a counterclaim for damages, the defendant's testimony was admitted to prove false representations that the air conditioning equipment purchased for his theater would lower the temperature twenty degrees.

Where fraud is raised as a pure defense to an action brought against the party allegedly defrauded, the theory must be, not that the parties actually had a verbal agreement that differed from the written contract, but rather that the contract itself constituted a fraud, or else that its execution by the defendant was procured and induced by fraudulent representations regarding matters to which the contract relates.⁵³ These principles preclude the defense that the parties agreed the defendant would not be liable on the note, or bound by the terms of the contract he signed, regardless of the purpose for which it was otherwise signed.⁵⁴ In other

48. *Ruler v. M. & M. Motor Co.*, 231 S.W.2d 277 (St. L. Ct. App. 1950); *Clancy v. Reid-Ward Motor Co.*, 237 Mo. App. 1000, 170 S.W.2d 161 (K.C. Ct. App. 1943) (mileage); *Bunch v. Paxton, Duke & Bradley*, 295 S.W. 474 (K.C. Ct. App. 1927) (model); *Tiffany v. Times Square Auto. Co.*, 168 Mo. App. 729, 154 S.W. 865 (K.C. Ct. App. 1913), where relief was allowed despite a recital in the contract that no warranties or representations were contracted for other than those stated in writing.

49. *Rabenau v. Harrell*, 278 Mo. 247, 213 S.W. 92 (1919); also *McPherson v. Kisse*, 239 Mo. 664, 144 S.W. 410 (1912) (undisclosed indebtedness on land); *Burch v. Schmelig*, 300 S.W.2d 838 (St. L. Ct. App. 1957). *But cf.* *Dowd v. Lake Sites, Inc.*, 365 Mo. 83, 276 S.W.2d 108 (1955), where the court refused to enjoin defendants from violating the terms of an oral agreement concerning use of recreation facilities in a subdivision made to induce plaintiffs to purchase lots.

50. *Parker v. Marquis*, 164 Mo. 38 (1876); *Whitlow v. Shortridge*, 237 S.W. 834 (St. L. Ct. App. 1922); *Harms v. Wolf*, 114 Mo. App. 387, 89 S.W. 1037 (St. L. Ct. App. 1905); *Rhodes v. Dickerson*, 95 Mo. App. 395, 69 S.W. 47 (St. L. Ct. App. 1902).

51. *Judd v. Walker*, 215 Mo. 312, 114 S.W. 979 (1908) (suit for damages in fraudulent, material acreage discrepancy); *Burns v. Vesto Co.*, 295 S.W.2d 576 (K.C. Ct. App. 1956) (used television set represented as new). *Horwitz v. Schaper*, 119 S.W.2d 474 (St. L. Ct. App. 1938); *Kite v. Pittman*, 278 S.W. 830 (Spr. Ct. App. 1926) (acreage discrepancy); *Newmeyer v. Williams*, 205 Mo. App. 460, 225 S.W. 109 (K.C. Ct. App. 1920) (undisclosed mortgage); *Morbrose Inv. Co. v. Flick*, 187 Mo. App. 528, 174 S.W. 188 (K.C. Ct. App. 1915) (fraudulent representations about used cars); *Horne v. John A. Hertel Co.*, 184 Mo. App. 725, 171 S.W. 598 (K.C. Ct. App. 1914) (employer's fraud in representations on product to be sold by employee); *Stratton v. Dudding*, 164 Mo. App. 22, 147 S.W. 516 (K.C. Ct. App. 1912); *Wells v. Adams*, 88 Mo. App. 215 (K.C. Ct. App. 1901).

52. 130 S.W.2d 258 (K.C. Ct. App. 1939).

53. *Fishman-Harris Realty Co. v. Kleine*, 82 S.W.2d 605 (St. L. Ct. App. 1935).

54. *St. Joseph Lead Co. v. Fuhrmeister*, 353 Mo. 232, 182 S.W.2d 273 (1944) (provision of a deed not to be enforced); *F. M. Deuchler & Co. v. Hampton*, *supra*

1962]

words, breach of an oral, contemporaneous promise not to enforce the signed instrument does not constitute fraud.

Examples of successful defenses of fraud are *Rice v. Lammers*⁵⁵ and *Conroy's Inc. v. Brooks*,⁵⁶ where plaintiffs fraudulently induced defendants to purchase goods by showing them a sample not representative of the goods delivered; and *Metropolitan Lead & Zinc Mining Co. v. Webster*⁵⁷ where plaintiffs used sham articles of incorporation to induce defendants to sign stock subscriptions.

A common claim is that the plaintiff fraudulently represented the writing in question to embody the agreement made, and in reliance, the defendant signed without reading it. The early Missouri case of *Wright v. McPike*⁵⁸ held that if one procured the signature of another to a written contract, whether by fraud or not, which did not contain the contract made, but a different one, he could not avail himself on the written contract but must stand by the one made. However, this liberal position was overruled in 1901 by *Crim v. Crim*,⁵⁹ on the ground that such a policy would allow anyone to avoid his legal obligations by claiming he did not read the contract although he signed it, and thus greatly impair the value of all contracts and negotiable instruments. The law in Missouri today is that falsely representing to one in possession of his faculties and able to read, that a writing embodies a verbal agreement is not such fraud as will allow him to avoid the contract as reduced to writing, either in law or in equity.⁶⁰ However, if the plaintiff purports to read the contract in its entirety and purposely misreads it to induce the defendant to sign, this is fraud that will excuse non-performance.⁶¹ Also

note 40; *Phoenix Mut. Life Ins. Co. v. Goessling*, 121 S.W.2d 182 (St. L. Ct. App. 1938); *Meyer v. Weber*, 233 Mo. App. 832, 109 S.W.2d 702 (St. L. Ct. App. 1937); *England v. Houser*, 178 Mo. App. 70, 163 S.W. 890 (Spr. Ct. App. 1914) (contract to be for information purposes only); *American Copying Co. v. Muleski*, 138 Mo. App. 419, 122 S.W. 384 (K.C. Ct. App. 1909) (part of printed form not to be included in contract); *New England Loan & Trust Co. v. Workman*, 71 Mo. App. 275 (K.C. Ct. App. 1897).

55. 65 S.W.2d 151 (St. L. Ct. App. 1933).

56. 50 S.W.2d 708 (St. L. Ct. App. 1932).

57. 193 Mo. 351, 92 S.W. 79 (1906). For other cases in which the defense of fraud was effective to save defendant from liability, see *Oldham v. Siegfried*, 202 S.W.2d 132 (K.C. Ct. App. 1947); *International Harvester Co. v. Jeffries*, 4 S.W.2d 501 (Spr. Ct. App. 1928); *Guess v. Russell Bros. Clothing Co.*, 231 S.W. 1015 (K.C. Ct. App. 1921); *Geo. O. Richardson Mach. Co. v. Nelson*, 191 Mo. App. 230, 177 S.W. 1082 (K.C. Ct. App. 1915).

58. 70 Mo. 175 (1879).

59. *Supra* note 5.

60. *Dryssen v. Union Elec. L. & P. Co.*, 317 Mo. 221, 295 S.W. 116 (1927); *Hall v. Kansas City So. Ry.*, 209 S.W. 582 (K.C. Ct. App. 1919); *Ely v. Sutton*, 177 Mo. App. 546, 162 S.W. 755 (St. L. Ct. App. 1913); *Paris Mfg. & Importing Co. v. Carle*, 116 Mo. App. 581, 92 S.W. 748 (St. L. Ct. App. 1906); *Magee v. Verity*, 97 Mo. App. 486, 71 S.W. 472 (K.C. Ct. App. 1903); *United Breeders v. Wright*, 134 Mo. App. 717, 115 S.W. 470 (K.C. Ct. App. 1909); *Zellar v. Ranson*, 140 Mo. App. 221, 123 S.W. 243 (Spr. Ct. App. 1909); *Leicher v. Keeney*, 98 Mo. App. 394 (K.C. Ct. App. 1903); *Johnston v. Covenant Mut. Life Ins. Co.*, 93 Mo. App. 580 (K.C. Ct. App. 1902); *Catterlin v. Lusk*, 98 Mo. App. 182, 71 S.W. 1109 (K.C. Ct. App. 1903).

61. *Och v. Railroad*, 130 Mo. 27, 31 S.W. 962 (1895); *Birdsall v. Coon*, 157 Mo. App. 439, 139 S.W. 243 (Spr. Ct. App. 1911); *Carroll v. Peak*, 156 Mo. App.

if the defendant is unable to read, sick, intoxicated, or is otherwise justified in relying on the defendant's representations as to the contents of the writing, his signature thereto will not bind him.⁶²

Many of the same considerations encountered in the preceding discussion of fraud apply in the situation where a party to a binding contract seeks to show by extrinsic evidence that because of mistake as to a material fact, the contract fails to express the intentions of the parties. Here, as in the fraud situations, the strict rule is that the obligee in a written contract which contains a mistake materially affecting the rights of the parties must bring a suit in equity to recover upon it to avoid violating the parol evidence rule.⁶³ At least where the mistake is one merely of misdescription not prejudicial to either party, it may be pleaded in an action at law and proven by parol.⁶⁴ But if the effect of the mistake is more substantial the plaintiff will be forced into equity where parol evidence is more freely admissible.⁶⁵ Exemplary are several Missouri cases where the action was brought to cancel a satisfaction and release recorded on a deed of trust by mistake. Such entries were held open to explanation by parol evidence.⁶⁶

Where a defendant seeks to prove a mistake by parol evidence as a defense to an action, he may do so provided that facts showing the existence of the mistake have been alleged in the pleadings.⁶⁷ When mistake is pleaded in defense, the defendant may introduce his evidence without asking for a reformation of the contract.⁶⁸ In *Dickson v. Maddox*,⁶⁹ a suit was brought to set aside several deeds on the ground that they had not been delivered. The defendant was allowed to introduce testimony that a notation on each of them to the effect that they were sub-

446, 136 S.W. 961 (Spr. Ct. App. 1911); *Tait v. Locke*, 130 Mo. App. 273, 109 S.W. 105 (St. L. Ct. App. 1908); *Broyles v. Absher*, 107 Mo. App. 168, 80 S.W. 703 (St. L. Ct. App. 1904); *Wells v. Adams*, 88 Mo. App. 215 (K.C. Ct. App. 1901).

62. *McGhee v. Bell*, 170 Mo. 121, 70 S.W. 493 (1902) (en banc); *Jackson v. Merz*, 223 S.W.2d 136 (St. L. Ct. App. 1949); *Merchants' Nat'l Bank v. Brisch*, 154 Mo. App. 631, 136 S.W. 28 (Spr. Ct. App. 1911); *Culp v. Powell*, 68 Mo. App. 238 (St. L. Ct. App. 1897).

63. *Anton W. Luecke & Co. v. Cohen*, 150 Mo. App. 48, 129 S.W. 1002 (St. L. Ct. App. 1910); *Bassett v. Glover*, 31 Mo. App. 150 (St. L. Ct. App. 1888).

64. *Continental Assur. Co. v. Van Cleve Bldg. & Constr. Co.*, 260 S.W.2d 319 (St. L. Ct. App. 1953); *McNeill v. Wabash Ry.*, 207 Mo. App. 161, 231 S.W. 649 (St. L. Ct. App. 1921); *Basset v. Glover*, *supra* note 63.

65. *Miller v. Haberman*, 359 Mo. 1012, 224 S.W.2d 1002 (1949); *Employers' Indem. Corp. v. Garrett*, 327 Mo. 874, 38 S.W.2d 1049 (1931); *Leitensdorfer v. Delphy*, 15 Mo. 160 (1851); *Sparks v. Brown*, 46 Mo. App. 529 (K.C. Ct. App. 1891).

66. *State ex rel. Kilkenny v. Dawes*, 289 S.W. 550 (Mo. 1926); *Sells v. Tootle*, 160 Mo. 593, 61 S.W. 579 (1901); *Lanier v. McIntosh*, 117 Mo. 508, 23 S.W. 787 (1893); *cf. Moore v. Albright*, 30 Mo. 249 (1860).

67. *Highland Inv. Co. v. Kansas City Computing Scales, Inc.*, 227 Mo. 363, 209 S.W. 895 (1919).

68. *Gottfried v. Bray*, 208 Mo. 652, 106 S.W. 639 (1907); *Wood & Wood v. Steamboat Fleetwood*, 22 Mo. 560 (1856); *Barlow v. Elliott*, 56 Mo. App. 374 (St. L. Ct. App. 1894); *Short v. Thomas*, 178 Mo. App. 400, 163 S.W. 252 (Spr. Ct. App. 1914).

69. 330 Mo. 51, 48 S.W.2d 873 (1932).

ject to recall by the grantor while in the hands of an escrow was due to the mistaken impression of the attorney who prepared them.

In all cases, the mistake must be one of fact, and material to allow evidence thereof to impeach the contract.⁷⁰

Forgery, alteration, erasure, and mutilation,⁷¹ as well as duress, undue influence⁷² and illegality⁷³ are grounds for nullifying the legal effect of a written instrument. Therefore, parol evidence of these factors may also be introduced for the purpose of showing that no valid contract exists.

III. PAROL EVIDENCE IS ADMITTED FOR THE PURPOSE OF SHOWING THAT THE PARTIES DID NOT ASSENT TO A PARTICULAR WRITING AS THE COMPLETE AND ACCURATE INTEGRATION OF THEIR CONTRACT

The parol evidence rule does not operate in such a way as to force contracting parties to reduce their entire agreement to writing. It may be that the writing before the court is but part of a larger agreement which has not been reduced to permanent form. Therefore, in addition to determining the existence of a contract, the court must determine whether or not the writing before it is the complete expression of that contract before the parol evidence rule becomes operative. This is well stated by the court's reply to the defendant's invocation of the rule in *Warinner v. Nugent*.⁷⁴

The difficulty with respondent's argument is that it assumes the very question presented by the evidence. The question is whether the only fair and reasonable inference is that their entire oral agreement was integrated. . . . If not the respondent and the trial court misconceived and misapplied the parol evidence rule. . . . As applied to contracts, the parol evidence rule "assumes that there has been a legal act consisting of a promise or set of promises; it also assumes the integration of that act in a written memorial according to some standard which the law adopts; and these assumptions being made, excludes from consideration all other elements of the act though they might have been material had there been no integration in a written memorial. . . . The parol evidence rule does not apply to every contract of which there is written evidence, but only

70. *Employers' Indem. Corp. v. Garrett*, *supra* note 65.

71. *Powell v. Banks*, 146 Mo. 620, 48 S.W. 664 (1898); *Medling v. Abraham Lincoln Life Ins. Co.*, 225 Mo. App. 1243, 41 S.W.2d 6 (Spr. Ct. App. 1931) (also holding that any erasure may be explained by the person charged with making it); *Murphy v. Holliday*, 223 Mo. App. 714, 16 S.W.2d 107 (K.C. Ct. App. 1929); *Stringer v. Geiser Mfg. Co.*, 189 Mo. App. 337 (Spr. Ct. App. 1915) (evidence allowed to show that blanks in a contract form had been filled in contrary to directions); *Dove v. Fansler*, 132 Mo. App. 669, 112 S.W. 1009 (K.C. Ct. App. 1908).

72. 32 C.J.S. *Evidence* §§ 981, 982 (1942).

73. *Murray v. Murray*, 293 S.W.2d 436 (Mo. 1956): "The rule which forbids the introduction of parol evidence . . . does not extend to evidence offered to show that a contract was made in furtherance of objects forbidden by statute, by the common law, or by the general policy of the law." *Taylor v. Perkins*, 171 Mo. App. 246, 157 S.W. 122 (K.C. Ct. App. 1913) (illegal consideration); *Buckingham v. Fitch*, 18 Mo. App. 91 (K.C. Ct. App. 1885) (gambling contract).

74. 362 Mo. 233, 240 S.W.2d 941, 944 (1951).

applies where the parties to an agreement reduce it to writing, and agree or intend that the writing shall be their agreement."⁷⁵

Where only part of an agreement has been reduced to writing and signed in connection with the performance of an oral contract, that part not reduced to writing may be shown by parol. This is the doctrine of partial integration. The doctrine is illustrated in *Kennedy v. Bowling*,⁷⁶ an action for faulty construction where the specifications were not made part of the building contract; in *Goodspeed v. Grand Nat'l Bank*,⁷⁷ an action for interest where the passbook did not constitute the entire deposit agreement; and in *Iowa-Missouri Walnut Co. v. Grahl*,⁷⁸ where the only writing evidencing the contract was an instrument which purported to be a check in payment of the contractual obligation.

It is obvious that integration or partial integration of an agreement is dependent on the intentions of the parties, which are often not clearly ascertainable.⁷⁹ Furthermore, where parties put their engagement in writing in such terms as import a legal obligation, there is a *conclusive* presumption in Missouri that the entire agreement was expressed in writing.⁸⁰ Therefore it has become settled law that parol evidence of a larger oral agreement is inadmissible unless that part of the contract which is reduced to writing shows upon its face that it is incomplete and does not purport to be a complete expression of the entire contract.⁸¹ Evidence that is admitted must not add to the obligations or interfere with the terms that are written.⁸² No additional terms may be enforced if the contract is one required to be in writing by the Statute of Frauds.⁸³

75. *Id.* at 238, 240 S.W.2d at 944.

76. 319 Mo. 401, 4 S.W.2d 438 (1928); *Bernhardt v. Boeuf & Berger Mut. Ins. Co.*, 319 S.W.2d 673 (St. L. Ct. App. 1959); *Francis v. Saleeby*, 282 S.W.2d 167 (St. L. Ct. App. 1955); *Bowers v. Bell*, 193 Mo. App. 210, 182 S.W. 1068 (St. L. Ct. App. 1916).

77. 46 S.W.2d 913 (St. L. Ct. App. 1932); *In re Liquidation of Fid. Bank & Trust Co.*, 77 S.W.2d 480 (St. L. Ct. App. 1934); *cf.* *Brigance v. Bank of Cooter*, 200 S.W. 668 (Spr. Ct. App. 1918); and *Quattrochi Bros. v. Farmers & Merchants Bank*, 89 Mo. App. 500 (St. L. Ct. App. 1901), holding that an entry in a passbook is a receipt open to explanation by parol evidence.

78. 237 Mo. App. 1093, 170 S.W.2d 437 (K.C. Ct. App. 1943).

79. See *Hargis v. Sample*, 306 S.W.2d 564, 572 (Mo. 1957), where a schedule of repairs alleged to be attached to a lease when signed was held admissible although defendant denied having ever seen it: "Those matters went to the weight of plaintiff's testimony with respect to the lease and not to the admissibility of the exhibit."

80. *Tracy v. Union Iron Works*, 104 Mo. 193, 16 S.W. 203 (1891).

81. *Fox Midwest Theaters v. Means*, 221 F.2d 173 (8th Cir. 1955); *Koons v. St. Louis Car Co.*, 203 Mo. 227, 101 S.W. 49 (1907); *Davis v. Scovern*, 130 Mo. 303, 32 S.W. 986 (1895); *Grapette Co. v. Grapette Bottling Co.*, 286 S.W.2d 34 (Spr. Ct. App. 1956); *Edwards v. Sittner*, 213 S.W.2d 652 (Spr. Ct. App. 1948); *Shuffner v. Moore Shoe Co.*, 35 S.W.2d 935 (St. L. Ct. App. 1941).

82. *Mitchell v. Philippi*, 359 Mo. 754, 223 S.W.2d 441 (1949); *Koons v. St. Louis Car Co.*, *supra* note 81; *Bittner v. Crown Shoe Mfg. Co.*, 340 S.W.2d 142 (St. L. Ct. App. 1960); *Nickerson v. Whalen*, 253 S.W.2d 502 (K.C. Ct. App. 1952).

83. *Fisher v. Miceli*, 291 S.W.2d 845 (Mo. 1956); *Warren v. A. B. Mayer Mfg. Co.*, 161 Mo. 112, 61 S.W. 644 (1901); *McWilliams v. Drainage Dist. No. 19*, 204 Mo. App. 237, 224 S.W. 35 (K.C. Ct. App. 1920).

The foregoing principles are well illustrated in cases where oral warranties and guaranties aliunde the written instrument are urged. If the writing evidencing a sale appears to cover completely the sale agreement, the court is likely to adopt the sentiment expressed in *Sunderland v. Hackney Mfg. Co.*:⁸⁴ "To allow parol evidence of a verbal warranty when the writing is silent would be to add a distinct provision to the contract." But if the writing evidencing the sale is a mere receipt or memorandum, the alleged warranty stands on the same ground as any other provision of a contract not completely reduced to writing.⁸⁵

Closely related to the doctrine of partial integration, another application of the parol evidence rule permits proof of the existence of an oral agreement collateral to and executed simultaneously with a written instrument, which collateral agreement covers a material matter agreed to by the parties distinct from, but closely related to the express subject matter of the written instrument and not embodied therein.⁸⁶

The test to determine if an agreement is collateral as stated by Professor Williston is: Would a reasonable person making such agreements as are set out both in the writing and in the proffered parol evidence have naturally separated the matter into two parts?⁸⁷ He further suggests that as a practical matter collateralness will depend on whether or not the subject matter of the parol agreement is mentioned at all in the writing.⁸⁸ Missouri courts have been more lenient in enforcing a collateral agreement where it appears that it was entered into as an inducement to sign the written contract.⁸⁹ But under either test set forth above, the collateral agreement is subject to the criteria set forth in *Crossnan v. Noll*.⁹⁰

The verbal collateral agreement must be independent and distinct from the written agreement, and must not be inconsistent with it. And it must

84. 192 Mo. App. 287, 181 S.W. 1192, 1194 (K.C. Ct. App. 1915); *Little v. Widener*, 226 Mo. App. 225, 32 S.W.2d 116 (K.C. Ct. App. 1930); cf. *Crossnan v. Noll*, 120 S.W.2d 189 (K.C. Ct. App. 1938) (contract specified no warranties).

85. *St. Louis Auto Parts & Salvage Co. v. Indiana Auto Salvage Co.*, 89 S.W.2d 134 (St. L. Ct. App. 1936); *Boulware v. Victor Auto. Mfg. Co.*, 152 Mo. App. 567, 134 S.W. 7 (Spr. Ct. App. 1911).

86. *Brown v. Bowen*, 90 Mo. 184 (1886); *Whaley v. Milton Constr. Co.*, 241 S.W.2d 23 (St. L. Ct. App. 1951) (oral building contract distinct from written earnest money contract); *Roberts v. Robberson*, 215 S.W.2d 767 (Spr. Ct. App. 1948) (sales contract not inconsistent with oral commission agreement); *Feldman v. Goldman*, 164 S.W.2d 634 (St. L. Ct. App. 1942) (written exchange contract and oral commission agreement); *Hart v. Riedel*, 51 S.W.2d 891 (St. L. Ct. App. 1932) (parol contract to furnish power line not covered by deed); *Scott v. Asbury*, 198 S.W. 1131 (K.C. Ct. App. 1917) (oral contract not to compete separate from written sale of property); *Corn v. McDowell*, 185 S.W. 235 (Spr. Ct. App. 1916) (deed and oral contract to make improvements).

87. 3 WILLISTON, CONTRACTS § 639 (rev. ed. 1936).

88. *Id.*

89. *Charles A. Liemke Co. v. Krekeler Grocer Co.*, 231 Mo. App. 169, 95 S.W.2d 820 (St. L. Ct. App. 1936); *Owsley v. Jackson*, 163 Mo. App. 11, 144 S.W. 154 (Spr. Ct. App. 1912).

90. 120 S.W.2d 189 (K.C. Ct. App. 1938); *First Nat'l Bank & Trust Co. v. Limpp*, 221 Mo. App. 951, 288 S.W. 957 (K.C. Ct. App. 1926).

not be so closely connected with the transaction as to form a part of it. Therefore whatever is embraced in the writing cannot be nullified, qualified, or added to by the collateral agreement.⁹¹

The parol evidence rule does not preclude the showing of a *subsequent* oral agreement which alters or abrogates a written contract. It makes no difference how soon after the execution of the written contract that the parol one was made, if, in fact it was subsequent and not otherwise objectionable.⁹²

IV. PAROL EVIDENCE IS ADMITTED FOR THE PURPOSE OF AIDING IN THE CONSTRUCTION AND APPLICATION OF THE LANGUAGE OF THE WRITTEN INSTRUMENT

When it is established that a contract exists, and that there are no grounds for nullifying its legal effect, e.g., fraud or duress, there is still a broad area in which parol evidence is allowed in actions involving that contract. That is the area where a written contract is not entirely clear and definite in its meaning and purport; where its terms are susceptible of more than one interpretation so that reasonable men might differ in its construction. Parol evidence is then admissible to aid in arriving at the intentions of the parties and to resolve ambiguities resulting from their use of equivocal language.⁹³

Extrinsic evidence to aid in the interpretation of written contracts is ordinarily proper only after the court has ascertained the existence of an ambiguity, and then only for the limited purpose of explaining the ambiguity.⁹⁴ Furthermore, the court cannot, with or without parol evidence, make a contract for the parties where they have failed to express one in their written instrument. Hence a long-recognized distinction has been drawn between latent and patent ambiguities. Patent ambiguities are such as appear from reading the instrument without any attempt to apply it, *i.e.*, conflicting provisions. These ambiguities must be resolved by applying legal principles of construction and no resort may be had to evidence of what the parties meant or intended.⁹⁵ If the ambiguity cannot be thus resolved, the contract fails for uncertainty and is void.⁹⁶ Such was the result in *Romine v.*

91. *Crossnan v. Noll*, *supra* note 90, at 191.

92. *Ragan v. Schreffler*, 306 S.W.2d 494 (Mo. 1957); *George F. Robertson Plastering Co. v. Magidson*, 271 S.W.2d 538 (Mo. 1954); *Bunce v. Beck*, 43 Mo. 266 (1869); *A. B. Collins Co. v. Quentin*, 71 S.W.2d 758 (K.C. Ct. App. 1934); *Wharton v. Missouri Car Foundry Co.*, 1 Mo. App. 577 (St. L. Ct. App. 1876).

93. *Fisher v. Miceli*, *supra* note 83; *Interior Linseed Co. v. Becker-Moore Paint Co.*, 273 Mo. 433, 202 S.W. 566 (1918); *Citizens' Trust Co. v. Tinde*, 272 Mo. 681, 199 S.W. 1025 (1917); *Hellrung v. Viviano*, 7 S.W.2d 288 (St. L. Ct. App. 1928); *Ebbs v. Neff*, 220 Mo. App. 1070, 282 S.W. 74 (K.C. Ct. App. 1926).

94. *Walters v. Tucker*, 281 S.W.2d 843 (Mo. 1955); *Kalen v. Steele*, 341 S.W.2d 343 (K.C. Ct. App. 1960); *Prestigiaco v. American Equitable Assur. Co.*, 221 S.W.2d 217 (K.C. Ct. App. 1949); *Murphy v. Holliday*, 223 Mo. App. 714, 16 S.W.2d 107 (K.C. Ct. App. 1929).

95. *Jamison v. Wells*, 7 S.W.2d 347 (Mo. 1928); *Graham v. Gardner*, 233 S.W.2d 797 (K.C. Ct. App. 1950).

96. *Campbell v. Johnson*, 44 Mo. 247 (1869); *McCormick v. Parsons*, 195 Mo. 91, 92 S.W. 1162 (1906); *Hardy v. Matthews*, 38 Mo. 122 (1866).

Haag,⁹⁷ where the description in a mortgage held void read in part: "The southeast quarter of the southwest quarter of section *twenty* (25) in township. . . ."

A latent ambiguity exists where a writing presents no ambiguity on its face, but when it is sought to apply the words used to the subject matter, it is found that they do not correctly describe or clearly apply to it.⁹⁸ In such a case the ambiguity does not come out of the four corners of the writing and parol evidence is admissible to clear it up, as in the case of *Kast v. Kast*.⁹⁹ There, a clause in a property settlement gave the wife seventy-five shares of stock. When the stock split four for one, after execution of the settlement but prior to distribution, parol evidence was allowed to show that the parties had agreed that the wife was to receive one-half of all the husband's assets.

One notable relaxation of this distinction is where the party executing the instrument is dead. Whether the ambiguity is latent or patent, parol evidence is received by the court in its quest for all information possible with which to interpret the decedent's intentions.¹⁰⁰

Parol evidence is not admissible for the purpose of attempting to create an ambiguity in a contract which upon its face is capable of being a definite and certain legal meaning.¹⁰¹

Parol evidence will be received to explain ambiguous, obscure, or technical words.¹⁰² Where a written instrument contains words or expressions of a technical nature connected with some art, science, or occupation unintelligible to the common reader, but susceptible of definite interpretation by experts, parol evidence is admissible to explain the terms used. The case of *Ragsdale v. Tomboy, Inc.*,¹⁰³

97. 178 S.W. 147 (Mo. 1915).

98. *Prestigiacom v. American Equitable Assur. Co.*, *supra* note 94.

99. 361 Mo. 623, 235 S.W.2d 375 (1951); *Farm & Home Sav. & Loan Ass'n v. Theiss*, 342 Mo. 40, 111 S.W.2d 189 (1937); *Meinhardt v. White*, 341 Mo. 446, 107 S.W.2d 1061 (1937); *State ex rel. W. L. Morrison Inv. Co. v. Trimble*, 301 Mo. 146, 256 S.W. 171 (1923) (en banc).

100. *Bond v. Riley*, 317 Mo. 594, 296 S.W. 401 (1927); *Mockbee v. Grooms*, 300 Mo. 446, 254 S.W. 170 (1923); *Briant v. Garrison*, 150 Mo. 655, 52 S.W. 361 (1899); *Hall v. Stephens*, 65 Mo. 670 (1877); *Sims v. Missouri State Life Ins. Co.*, 223 Mo. App. 1150, 23 S.W.2d 1075 (St. L. Ct. App. 1930); *In re Aikens Estate*, 5 S.W.2d 662 (St. L. Ct. App. 1928).

101. *National Surety Corp. v. Curators of Univ. of Missouri*, 268 F.2d 525 (8th Cir. 1959).

102. *Moran Bolt & Nut Co. v. St. Louis Car Co.*, 210 Mo. 715, 109 S.W. 47 (1908); *Hellrung v. Viviano*, *supra* note 93.

103. 317 S.W.2d 679 (St. L. Ct. App. 1958); *Ruysser v. Smith*, 293 S.W.2d 930 (Mo. 1956) ("indemnity"); *Paisley v. Lucas*, 346 Mo. 827, 143 S.W.2d 262 (1940) ("exclusive"); *National Bank of Commerce v. Flanagan Mills & Elevator Co.*, 268 Mo. 547, 188 S.W. 117 (1916) (en banc) ("receipts"); *Finnegan v. Missouri Pac. R.R.*, 261 Mo. 504, 169 S.W. 969 (1914) ("full control"); *Friedman Textile Co. v. Northland Shopping Center*, 321 S.W.2d 9 (St. L. Ct. App. 1959) ("children's store"); *Davison v. Rodes*, 299 S.W.2d 591 (K.C. Ct. App. 1956) ("release"); *Wentzel v. Lake Lotawana Developing Co.*, 226 Mo. App. 960, 48 S.W.2d 185 (K.C. Ct. App. 1932) ("clearing"); *Hellrung v. Viviano*, *supra* note 93 ("street made"); *Wisconsin & Ark. Lumber Co. v. Baschow*, 257 S.W. 840 (K.C. Ct. App.

is typical of this situation, involving a contract under which compensation was to be the "net profits" of a certain department and a dispute arose over the precise meaning of that term.

If the writing itself is illegible and thus obscurely expressed, evidence may be heard pertaining to the relation of the parties, their antecedent acts and the subject matter.¹⁰⁴

Particularly in cases involving insurance policies, parol evidence has been resorted to in order to determine who the parties to the contract are, when those intended to be parties are not named.¹⁰⁵ A related problem arises where it is doubtful from the face of a note whether it was intended as the personal contract of the individual signing it, or as imposing the obligation solely on a third party as principal.¹⁰⁶

Similarly, where difficulty is experienced in identifying the subject matter of the agreement, parol evidence is admissible, not to vary or contradict its terms, but for the purpose of explaining them. The most common type of case in Missouri in this respect has involved boundary calls in deeds.¹⁰⁷ However, parol evidence cannot be introduced to strike down the operative words of a deed.¹⁰⁸

In other cases it may be necessary to resort to parol evidence of the intent of the parties as to the subject matter in order to construe accurately the contract.¹⁰⁹ Thus, in *Ambassador Bldg. Corp. v. St. Louis Ambassador Theater*,¹¹⁰ an action involving an extremely complicated lease, the court said:

For the purpose of determining the intention of the parties and reaching a construction that is fair and reasonable under all the facts and cir-

1924); *Lasar Mfg. Co. v. Peligreen Constr. & Inv. Co.*, 179 Mo. App. 447, 162 S.W. 691 (St. L. Ct. App. 1913) ("furring"); *But cf. Mutual Benefit Health & Acc. Ass'n v. Hobbs*, 186 F.2d 321 (8th Cir. 1951).

104. *Black River Lumber Co. v. Warner*, 93 Mo. 374, 6 S.W. 210 (1887); *Edwards v. Smith*, 63 Mo. 119 (1876); *Smith v. Van Wyck*, 40 Mo. App. 522 (K.C. Ct. App. 1890); *Heideman v. Wolfstein*, 12 Mo. App. 366 (St. L. Ct. App. 1882).

105. *Platho v. Merchants & Mfgs. Ins. Co.*, 38 Mo. 248 (1866); *Wise v. St. Louis Marine Ins. Co.*, 23 Mo. 80 (1856); *Cotton v. Iowa Mut. Liab. Ins. Co.*, 260 S.W.2d 43 (K.C. Ct. App. 1953); *Estes v. Great American Ins. Co.*, 112 S.W.2d 153 (Spr. Ct. App. 1938); *Becker v. Farmers Mut. Fire Ins. Co.*, 99 S.W.2d 148 (St. L. Ct. App. 1936); *Newbill v. Union Indem. Co.*, 60 S.W.2d 658 (St. L. Ct. App. 1933).

106. *Sparks v. Dispatch Transfer Co.*, 104 Mo. 531, 15 S.W. 417 (1891); *Finch v. Heeb*, 107 S.W.2d 962 (Spr. Ct. App. 1937); *Meyers v. Chesly*, 177 S.W. 326 (Spr. Ct. App. 1915); *Markham v. Cover*, 99 Mo. App. 83 (St. L. Ct. App. 1903).

107. *City of Warsaw v. Swearngin*, 295 S.W.2d 174 (Mo. 1956); *Stith v. Post*, 232 S.W. 985 (Mo. 1921); *Kleine v. Kleine*, 281 Mo. 317, 219 S.W. 610 (1920); *Hubbard v. Whitehead*, 221 Mo. 672, 121 S.W. 69 (1909); *Hammon v. Johnston*, 93 Mo. 198, 6 S.W. 83 (1887); *Worthington Drainage Dist. v. Davis*, 235 Mo. App. 949, 151 S.W.2d 469 (K.C. Ct. App. 1941).

108. *Willoughby v. Brandes*, 317 Mo. 544, 297 S.W. 54 (1927); *Weisenfels v. Cable*, 208 Mo. 515, 106 S.W. 1028 (1907); *Owen v. Ellis*, 64 Mo. 77 (1876).

109. *Wilcox v. Coons*, 362 Mo. 381, 241 S.W.2d 907 (1951); *Paisley v. Lucas*, *supra* note 103; *Tuohy v. Novich*, 230 S.W.2d 152 (St. L. Ct. App. 1950); *Baptiste Tent & Awning Co. v. Uhri*, 129 S.W.2d 9 (St. L. Ct. App. 1939); *Home Trust Co. v. Shapiro*, 228 Mo. App. 266, 64 S.W.2d 717 (K.C. Ct. App. 1933).

110. 238 Mo. App. 600, 185 S.W.2d 827 (St. L. Ct. App. 1933).

cumstances, the court may consider the relationship of the parties, the subject matter of the contract, the usages of the business, the surrounding facts and circumstances attending the execution of the contract and its interpretation by the parties.¹¹¹

But where the intention of the parties is clearly expressed in an unambiguous instrument, the admission of parol evidence to prove a different intention is improper.¹¹²

The rule is now firmly established that when a statement of consideration in a contract is merely formal, it may be contradicted or explained by parol evidence.¹¹³ In such cases the consideration clause is not deemed an essential part of the instrument. Rather it is regarded as a mere recital, or receipt and as such may be explained.¹¹⁴ However, if the statement of consideration is more than a recital, and is an integral part of the contract, it is not open to contradiction under the immunity from parol attack afforded written contracts.¹¹⁵ The most common example of a formal statement of consideration is found in the ordinary deed, where such a recital as "one dollar and other valuable consideration" is open to elucidation in a legal action.¹¹⁶

Between the original parties to a note, the obligor may introduce evidence of a failure of consideration.¹¹⁷ But when the rights of a third party become involved, such evidence may not be brought before the court.¹¹⁸

111. *Id.* at 617, 185 S.W. at 837.

112. *McLean Constr. Co. v. Globe Indem. Co.*, 168 F. Supp. 318 (W.D. Mo. 1958); *Krug v. Bremer*, 316 Mo. 891, 292 S.W. 702 (1927); *Kalen v. Steele*, 341 S.W.2d 343 (K.C. Ct. App. 1960); *National Cylinder Gas Co. v. G. H. Packwood Mfg. Co.*, 208 S.W.2d 825 (St. L. Ct. App. 1948).

113. *Ragan v. Schreffler*, *supra* note 92; *Craig v. Koss Constr. Co.*, 69 S.W.2d 964 (Spr. Ct. App. 1934); *Wolfenbarger v. Metcalf*, 282 S.W. 749 (Spr. Ct. App. 1926); *Eastin v. Bank of Harrisonville*, 213 Mo. App. 130, 246 S.W. 991 (K.C. Ct. App. 1923); *Boswell v. Richards*, 224 S.W. 1031 (Spr. Ct. App. 1920).

114. *Meyer v. Weber*, 233 Mo. App. 832, 109 S.W.2d 702 (St. L. Ct. App. 1937); *Crocker v. MacCartney*, 24 S.W.2d 649 (Spr. Ct. App. 1930); *Dove v. Fansler*, *supra* note 71; *Dawson v. Wombles*, 111 Mo. App. 532, 86 S.W. 271 (St. L. Ct. App. 1905).

115. *State ex rel. Alpert v. Boyle-Pryor Constr. Co.*, 352 Mo. 1061, 180 S.W.2d 727 (1944); *Burk v. Walton*, 337 Mo. 781, 86 S.W.2d 92 (1935); *J. B. Colt Co. v. Gregor*, 328 Mo. 1216, 44 S.W.2d 2 (1931); *Ezo v. St. Louis Smelting & Ref. Co.*, 87 S.W.2d 1051 (St. L. Ct. App. 1936); *Bert v. Rhodes*, 258 S.W. 40 (St. L. Ct. App. 1924); *General Acc. Fire & Life Ins. Co. v. Owen Bldg. Co.*, 195 Mo. App. 371, 192 S.W. 145 (K.C. Ct. App. 1917); *Pile v. Bright*, 156 Mo. App. 301, 137 S.W. 1017 (Spr. Ct. App. 1911).

116. *Allaben v. Shelbourne*, 357 Mo. 1205, 212 S.W.2d 719 (1948); *Frey v. Onstott*, 357 Mo. 721, 210 S.W.2d 87 (1948); *Robinson v. Field*, 342 Mo. 778, 117 S.W.2d 308 (1938); *Finley v. Williams*, 325 Mo. 688, 29 S.W.2d 103 (1930); *Edwards v. Latimer*, 18 Mo. 610, 82 S.W. 109 (1904); *Pickett v. Town of Mercer*, 106 Mo. App. 689, 80 S.W. 285 (K.C. Ct. App. 1904).

117. *Dickherber v. Turnbull*, 31 S.W.2d 234 (St. L. Ct. App. 1930); *Stumbaugh v. Hall*, 30 S.W.2d 160 (K.C. Ct. App. 1930); *Main St. Bank v. Ennis*, 222 Mo. App. 915, 7 S.W.2d 391 (K.C. Ct. App. 1928); *In re Kenage's Estate*, 3 S.W.2d 1041 (Spr. Ct. App. 1928); *Farmers' Bank v. Harris*, 250 S.W. 946 (K.C. Ct. App. 1923); *George O. Richardson Mach. Co. v. Dix*, 245 S.W. 215 (K.C. Ct. App. 1922).

118. *First Nat'l Bank & Trust Co. v. Limpp*, *supra* note 90.

CONCLUSION

The parol evidence rule in Missouri remains one of the cornerstones of commercial law, preserving the sanctity of all writings whose terms import a legal obligation. It is not probable that the rule or its applications will change appreciably in the future. On the contrary, as new types of written transactions are developed, the parol evidence rule will continue to preserve and protect the obligations thereby created.

It is possible that the rule will become part of the statutory law of Missouri. The Uniform Commercial Code, which has been under consideration by the Missouri General Assembly, contains a statement of the parol evidence rule which does not differ in substance from that now used by Missouri courts.¹¹⁹

LYLE H. PETT

119. UNIFORM COMMERCIAL CODE § 2-202:

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement but may be explained or supplemented

- (a) by course of dealing or usage of trade (Section 1-205) or by course of performance (Section 2-208); and
- (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

One previous attempt has been made to codify the rule. The 1948 *Proposed Missouri Evidence Code*, compiled by the Missouri Bar contained a section on the parol evidence rule.