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REFORMATION AND THE PAROL EVIDENCE RULE

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THE parol evidence rule of itself is never an obstacle to reformation, provided there is satisfactory evidence of a mistake in integration.[1] If the parties intend to express the terms of a transaction in a writing, which is then to be looked to as the sole repository of those terms, the longstanding tradition of the law courts, described as the parol evidence rule, has been that the writing is controlling. If through mistake the writing failed to express correctly what the parties meant to express, the law courts still regarded the written word as decisive, but it has been recognized for a long time that equity will give relief through correction of the writing. Certainly by 1801,[2] if not earlier, it was settled in English law that the parol evidence rule did not bar reformation in equity. Nonetheless, there remains a certain amount of confusion due to the occasional failure to distinguish between the parol evidence rule and the statute of frauds.[3] There are cases refusing reformation through the use of "parol evidence" which might be thought to rest on an application of the parol evidence rule when in fact the reason for denying relief was the statute of frauds.[4]

As just seen, one effect of the parol evidence rule is that it gives rise to the *need* for reformation, as a means of achieving enforcement of the actual agreement, where there has been a mistake in integration. The fact that the rule does not *prevent* reformation provides

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1. In innumerable decisions courts have said that the case for reformation must be established by "clear and convincing evidence." Day v. Fireman's Fund Ins. Co., 67 F.2d 257 (5th Cir. 1933); Gagnon v. Pronovost, 97 N.H. 58, 80 A.2d 381 (1951); Broida v. Travelers Ins. Co., 316 Pa. 444, 175 Atl. 492 (1934); Kirchgestner v. Denver & R.G. W.R.R., 118 Utah 41, 233 P.2d 699 (1951); Bergstrom v. Olson, 39 Wash. 2d 536, 236 P.2d 1052 (1951).

2. Townshend v. Stangroom, 6 Ves. 328, 332-38, 31 Eng. Rep. 1076, 1077-79 (Ch. 1801), per Lord Eldon. To refuse reformation, Story wrote, "would be to allow an act, originating in innocence, to operate ultimately as a fraud, by enabling the party, who receives the benefit of the mistake, to resist the claims of justice, under the shelter of a rule [the parol evidence rule] framed to promote it." 1 STORY, EQUITY JURISPRUDENCE § 155 (3d ed. 1843).

3. The effect of the statute of frauds is considered in Palmer, *Reformation and the Statute of Frauds*, 65 MICH. L. REV. 421 (1967).

4. An example is Le Witt v. Park Ecclesiastical Soc'y, 103 Conn. 285, 130 Atl. 387 (1925). The case is cited in 35 YALE L.J. 739, 740 (1926), as denying reformation because of the parol evidence rule, but a careful study of the opinion makes it clear that the statute of frauds was regarded as the stumbling block.

a perspective for assessment of the rule, and this is a principal purpose of the present article. The availability of reformation raises serious doubts as to the wisdom of some common applications of the rule.

I. The Uncertain Scope of the Parol Evidence Rule

There is considerable difference between the parol evidence rule as stated by some of the leading text writers and as applied by most courts. The rule formulated by Wigmore has been stated as follows: "Any or all parts of a transaction prior to or contemporaneous with a writing intended to record them finally are superseded and made legally ineffective by the writing."[5] In Wigmore's view the question whether the writing was a final and exclusive embodiment of the transaction or of some part of it "depends wholly upon the intent of the parties . . . [to] be sought where always intent must be sought, namely, in the conduct and language of the parties and the surrounding circumstances."[6] Stated boldly, this means that if the trier of the facts finds that the parties made an oral agreement and intended it to be effective, it is effective even though it adds to, varies, qualifies or contradicts the terms of the writing, since a finding that the extrinsic agreement was intended to be effective despite the writing is also a finding that the writing was not intended to displace that agreement. Among contemporary writers Corbin has been the most effective advocate of this view. His central position is perhaps best summed up in his statement: "The 'parol evidence rule' does not itself purport to establish the fact of 'integration'; and until that fact is established the 'rule' does not purport to have any legal operation."[7] This general conception seems to have

5. Chadbourn & McCormick, *The Parol Evidence Rule in North Carolina*, 9 N.C.L. Rev. 151, 152 (1930). Dean McCormick's views on the rule are stated more fully in McCormick, Evidence ch. 24 (1954), and in McCormick, *The Parol Evidence Rule as a Procedural Device for Control of the Jury*, 41 Yale L.J. 365 (1932).

6. 9 Wigmore, Evidence § 2430 (3d ed. 1940).

7. 3 Corbin, Contracts § 581 (1950). See also *id.* §§ 576, 582 and 583, as well as Corbin, *The Parol Evidence Rule*, 53 Yale L.J. 603 (1944). Williston was not prepared to go this far, although his general formulation of the rule followed Wigmore in making integration turn on the intent of the parties. 3 Williston, Contracts §§ 632, 633, 636, 638 (rev. ed. 1936). In § 636 he wrote: "If the parties never adopted the writing as a statement of the whole agreement, the rule does not exclude parol evidence of additional promises." In § 633, however, discussing the sources available for determining this question, he spoke with apparent approval of the cases holding that "the contract must appear on its face to be incomplete in order to permit parol evidence of additional terms." The text of § 633 remains the same in the current edition of *Williston* (3d ed. 1961), but a change in paragraphing may distort his meaning. Williston's views are reflected in Restatement, Contracts §§ 229, 230, 237 (1932). The difference between the Wigmore-Corbin view and the view expressed in the *Restatement* is discussed in Morgan, Basic Problems of Evidence 396-400 (1962).

been adopted in the Uniform Commercial Code, which makes the issue turn on whether the writing was "intended by the parties as a final expression of their agreement with respect to" the terms that are in question.[8]

Certainly there are many decisions that do not support this conception of the rule. In countless cases the extrinsic evidence has been rejected out of hand, merely on the ground that it "varies the terms of the writing,"[9] without inquiry into whether the writing was intended to be a complete and accurate embodiment of the agreement.[10] Frequently it is recognized that the intention of the parties is in theory controlling, but explicitly or otherwise the court holds that the writing itself is conclusive on the issue: an appearance of completeness is regarded as decisive.[11] It is on this point perhaps that most of the difference of opinion occurs in modern decisions. Some judges have followed Wigmore's view that the writing does not speak conclusively for itself,[12] whereas others adhere to the view expressed by the New York court in *Higgs v. de Maziroff*,[13] that an appearance of completeness means "the contract was as a matter of law integrated in the writings."

The effect of the position taken by the New York court will often be to enforce a contract differing from the actual agreement, as occurred in the *Higgs* case. In connection with a loan from the plaintiff, the defendant executed promissory notes with fixed due

8. UNIFORM COMMERCIAL CODE § 2-202. It is debatable whether the language quoted in the text is meant to permit direct contradiction of a written term which the parties did not intend to be an accurate expression of their actual agreement. This is the situation in Zell v. American Seating Co., 138 F.2d 641 (2d Cir. 1943) (discussed in text accompanying note 18 *infra*), and Grubb v. Rockey, 366 Pa. 592, 79 A.2d 255 (1951) (discussed in text accompanying note 29 *infra*). If the propriety of such a contradiction was contemplated it would have been better to provide: "intended by the parties as a final and accurate expression etc." Still, as a question of interpretation of the statutory language, it is arguable that a written term knowingly made inaccurate is not a "final expression" of the agreement with respect to that term. But McCormick reads the Code as making the writing conclusive with respect to the terms embodied therein. MCCORMICK, EVIDENCE 432-33 (1954). See also Hunt Foods & Industries, Inc. v. Doliner, 26 App. Div. 2d 41, 270 N.Y.S.2d 937 (1966), *noted in* 66 COLUM. L. REV. 1370 (1966).

9. 9 WIGMORE, EVIDENCE § 2431 (3d ed. 1940).

10. Cases are cited in 3 CORBIN, CONTRACTS §§ 573, 582 (1950).

11. Brintnall v. Briggs, 87 Iowa 538, 54 N.W. 531 (1893); Thompson v. Libby, 34 Minn. 374, 26 N.W. 1 (1885); Naumberg v. Young, 44 N.J.L. 331 (Ct. App. 1882); Mitchill v. Lath, 247 N.Y. 377, 160 N.E. 646 (1928); Hayden v. Hoadley, 94 Vt. 345, 111 Atl. 343 (1920). Other cases are cited in 3 CORBIN, CONTRACTS § 582 (1950); 4 WILLISTON, CONTRACTS § 633 (3d ed. 1961). The New York cases are collected in a study by Professor Edwin Patterson for the New York Law Revision Commission, N.Y. LEGIS. DOC. No. 65C, at 265-66 (1955).

12. Brown v. Oliver, 123 Kan. 711, 256 Pac. 1008 (1927); 3 CORBIN, CONTRACTS §§ 581, 582 (1950).

13. 263 N.Y. 473, 189 N.E. 555 (1934); *accord*, Seitz v. Brewers' Refrigerating Mach. Co., 141 U.S. 510, 517 (1891); Pitcairn v. Philip Hiss Co., 125 Fed. 110 (3d Cir. 1903).

dates and delivered paintings to the plaintiff as security, under a written contract that spelled out the details of the security arrangement. When the defendant was sued on the notes his defense was a contemporaneous oral agreement that the notes would not be enforced until the paintings were sold, an event which had not occurred. The trial court found there was such an agreement and held it was a defense, but this was reversed on appeal without questioning the findings of fact.

II. The Two Basic Situations: Mistake and Intentional Omission

The important substantive issue today is the extent to which the parol evidence rule prevents enforcement of the actual agreement,[14] especially when the consequence is to give effect to a contract differing from that actual agreement.[15] The time has come to eliminate such consequences. Although some courts[16] and writers[17] are prepared to do so, it must be recognized that this goes further than most courts are willing to go. A crucial test is provided by the facts of *Zell v. American Seating Co.*,[18] where the Second Circuit applied Wigmore's conception of the rule. According to the plaintiff's allegations, accepted as true for purposes of decision, the defendant orally agreed to pay him $1,000 a month for his services in procuring national defense contracts, and also agreed to pay him a minimum commission of three per cent on the "purchase price" of any contracts so procured. Thereafter a written contract was signed which appeared "on its face to embody a complete agreement between" the parties, but which omitted the agreement for a commission and

14. A few examples of this result are as follows: Cargill Comm'n Co. v. F. A. Swartwood, 159 Minn. 1, 198 N.W. 536 (1924); Mitchill v. Lath, 247 N.Y. 377, 160 N.E. 646 (1928); Gianni v. R. Russel & Co., 281 Pa. 320, 126 Atl. 791 (1924).

15. In one sense this is perhaps true of all refusals to give effect to the actual agreement, but it becomes most apparent in a case such as Grubb v. Rockey, 366 Pa. 592, 79 A.2d 255 (1951), where, in a suit by the purchaser, a contract for the sale of land was specifically enforced at a price of $10,000, despite the trial court's finding that the price actually agreed on was $11,200. The vendor's evidence was that the lower figure was inserted in the writing to conceal the true price from the purchaser's family. The case is discussed in the text accompanying note 29 *infra*.

In Ferry v. Stephens, 66 N.Y. 321 (1876), the result of applying the parol evidence rule was to grant specific performance of a contract for the sale of land when, if the defendant's evidence was believed, there was *no* contract. The defendant's evidence was that the recital of consideration was a sham, that he intended to make a gift, but that the gift was ineffective for want of delivery.

16. Zell v. American Seating Co., 138 F.2d 641 (2d Cir. 1943), *rev'd*, 322 U.S. 709 (1944). See also Jarvis v. Cunliffe, 140 Conn. 297, 99 A.2d 126 (1953).

17. 3 Corbin, Contracts §§ 576, 581-83 (1950); Hale, *The Parol Evidence Rule*, 4 Ore. L. Rev. 91 (1925); Note, 100 U. Pa. L. Rev. 703 (1952).

18. 138 F.2d 641 (2d Cir. 1943).

stated that the $1,000 monthly payment was plaintiff's full compensation.[19] The plaintiff alleged that the commission arrangement was intended to be effective but was omitted from the writing because of the defendant's apprehension of "adverse comments . . . made in Congress of such contingent-fee arrangements in connection with war contracts." Through the plaintiff's efforts contracts were obtained on which he would have been entitled to approximately $178,000 in commissions under the oral agreement, and suit was brought to recover this amount after the defendant refused to pay. The Second Circuit, Judges L. Hand, Swan and Frank sitting, held that plaintiff could recover on the oral agreement if it were established. The parol evidence rule was no bar since it does not apply where "it has been proved by extrinsic evidence that the parties did not intend [the writing] to be an exclusive authoritative memorial of their agreement."[20] The judgment was reversed by the Supreme Court in a per curiam opinion stating that seven justices had voted for reversal, four because the plaintiff's proof was precluded by the parol evidence rule, three because the commission agreement was contrary to public policy and void.[21]

The oral agreement in the *Zell* case directly contradicted the terms of the writing, and it is here undoubtedly that a court is most likely to hold that the writing controls as a matter of law.[22] Yet a

19. The written contract provided that the monthly payment "will be full compensation, but the company may, if it desires, pay you something in the nature of a bonus." *Id.* at 642.

20. *Id.* at 643.

21. American Seating Co. v. Zell, 322 U.S. 709 (1944).

22. Seitz v. Brewers' Refrigerating Mach. Co., 141 U.S. 510 (1891); Dalzell, *Twenty-Five Years of Parol Evidence in North Carolina*, 33 N.C.L. REV. 420, 428 (1955). In a somewhat ambivalent discussion of the question whether a court may go behind an appearance of completeness, Williston wrote:

> Even if the oral agreement is repugnant to the writing, what was orally agreed would be of equal importance with what was written, since its existence would prove that there was no complete integration of the contract in regard to the matter to which it related. The parol evidence rule would then be of importance only as establishing a presumption that prior and contemporaneous oral agreements and negotiations were merged in the writing, but the practical value of the rule would be much impaired if either party to a writing were allowed to rebut the presumption by proof of any contemporaneous oral agreement. Certainly the law does not permit this.

3 WILLISTON, CONTRACTS § 633 (rev. ed. 1936).

The "law" was prepared to permit this two centuries ago in Pitcairn v. Ogbourne, 2 Ves. Sr. 376, 28 Eng. Rep. 1079 (Ch. 1751). On the marriage of his son the plaintiff executed an "annuity-bond" promising to pay £ 150 per annum to the husband and wife. Later he sued "to be relieved" on the bond and introduced evidence to show that the actual agreement was for an annuity of £ 100, the larger figure having been inserted in order to induce the bride's uncle to make a more generous provision for her. The court was prepared to grant relief except for the fact that it regarded the plaintiff as party to a fraudulent scheme and therefore not entitled to the aid of a court of equity.

comparison of the results achieved through reformation suggests that the parol evidence rule should not bar relief. If the agreement for commissions had been omitted from the writing by mistake it would be given effect in equity through a decree for reformation. There are no sufficiently persuasive reasons for a different result because the incorrect expression was intentional. In each case the trier of the facts must be satisfied that there was such an oral agreement and that this was the agreement the parties meant to put into effect. The burden of establishing these facts is heavy because the writing tends to speak for itself, but in the reformation cases this has led only to an insistence that the evidence be "clear and convincing,"[23] not to a denial of relief as a matter of law. The same approach should be taken to a case such as *Zell.*

This is not to say that the two situations are in substance identical, for they are not. The case for relief where there is mistake is beyond serious dispute. Mistake in expressing the terms of a written transaction is so common that it would be intolerable to refuse correction of the writing so as to carry out the transaction intended. In addition, the fact that the parties *attempted* to express their agreement in the writing works in favor of relief. The proper solution of a case such as *Zell,* where this factor is lacking, is more debatable, yet the similarity in the two situations is such as to suggest that finality should not be attached to the writing in either.

In both situations the party seeking relief from the writing must establish that the parties reached a certain agreement and that they intended it to become effective. Since the writing does not express this agreement there must be a convincing explanation of the discrepancy. This is the purpose of evidence showing a mistake in integration: the affirmative effect of such evidence is to establish that the oral agreement was meant to be operative. It should be permissible to establish this ultimate fact by any other type of evidence. When there is no mistake in integration, any evidence that provides a rational explanation of the discrepancy is directed toward establishing that the extrinsic agreement was meant to be effective. The plaintiff's allegations in *Zell* sought to provide such an explanation, but four justices of the Supreme Court held in effect that such evidence would be irrelevant.[24] The writing was conclusive. This pre-

23. See note 1 *supra.*

24. The four justices relied on the "applicable state parol evidence rule." 322 U.S. 709 (1944). The Second Circuit concluded that Michigan law was applicable and relied on Woodard v. Walker, 192 Mich. 188, 158 N.W. 846 (1916). That, however, was a case in which the court enforced an oral agreement after finding that a later written contract was a sham, not intended by the parties to have *any* legal effect.

sents the central issue, that is, whether the terms of a written contract can of their own force be conclusive, even though the parties did not intend them to be. Most authority seems to recognize that such force can be given to words.[25] This does of course tend to support the stability of business arrangements reduced to writing, but at a cost when the writing does not express the true or the entire arrangement—and no one really knows how high this cost is.

If the position of the Second Circuit in *Zell* were to be accepted, the parol evidence rule would lose much of its significance as a rule of substantive law. It would become a complicated way of saying that a court will not enforce an oral agreement that varies from the writing unless satisfied that there was such an agreement and that it was meant to be controlling on the point in issue. Some differences would remain, however, between an intentional and a mistaken variation of the writing from the actual agreement, largely with respect to jury trial. When the case is concerned with the application of the parol evidence rule, as in *Zell*, it is commonly said that, even though the trial is to a jury, the judge is to decide whether the writing was intended by the parties to be the complete and accurate embodiment of the contract, or of that element of the contract in issue. If the judge finds there was such an integration, this makes the extrinsic agreement legally immaterial and the matter does not go to the jury. If he finds that there was not, he does not decide that there was such an agreement but merely that if there was it is legally effective; it is then left to the jury to determine the question of fact.[26]

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25. Lumber Underwriters v. Rife, 237 U.S. 605 (1915). Thus a "merger" or "integration" clause is usually regarded as conclusive. 3 CORBIN, CONTRACTS § 578 (1950); MCCORMICK, EVIDENCE 451-52 (1954). As a practical matter the clause will usually be decisive, but it should be susceptible of contradiction the same as any other term of the writing. This has been allowed in a few cases, *e.g.*, Johns-Manville Corp. v. Heckart, 129 Ore. 505, 277 Pac. 821 (1929), where the court gave effect to an oral warranty on the ground that the statement in the merger clause "was not true." See also note 39 *infra*.

26. 9 WIGMORE, EVIDENCE § 2430 (3d ed. 1940); McCormick, *The Parol Evidence Rule as a Procedural Device for Control of the Jury*, 41 YALE L.J. 365, 374-75 (1932). Dean McCormick would insist on certain minimum evidentiary requirements for making this initial determination. "Let the trial judge," he suggests, "after hearing the testimony as to the alleged oral agreement, including the evidence of substantiating circumstances, compare it with the terms of the writing, and if he considers that it is one which parties situated as these were would 'naturally and normally' have recited in the writing itself, had they made it and intended it to stand, then he will reject the evidence thus tentatively heard." McCormick, *supra* at 379. See also RESTATEMENT, CONTRACTS § 240 (1932). This would lead, quite unnecessarily, to a refusal to enforce the oral agreement in Higgs v. de Maziroff, 263 N.Y. 473, 189 N.E. 555 (1934) (discussed in text accompanying note 13 *supra*).

McCormick was concerned only with keeping cases that did not satisfy his test out of the hands of the jury. The test would thus be irrelevant to a case such as Grubb v. Rockey, 366 Pa. 592, 79 A.2d 255 (1951), where the suit was in equity for specific

On the other hand, had there been mistake in integration in *Zell*, all issues of fact with respect to the making of the oral agreement and the reason why it was not expressed in the writing would be in equity under the traditional view. Even under the Second Circuit's formulation of the parol evidence rule in that case, the rule still applies when there is mistake, since this means that the parties *did* intend to embody the agreement in the writing.[27] According to the traditions of the law court the oral agreement was of no legal significance; only equity gave relief to the injured party through reformation.[28] Whether the different modes of trial of the fact issues, dependent on whether the variation was intentional or unintentional, should persist today is another question, to be discussed hereinafter.

III. The Relation Between the Parol Evidence Rule and the Statute of Frauds

In *Grubb v. Rockey*[29] the price stipulated in a written contract for the sale of land was $10,000, and after the purchaser had paid

performance. In that case, presumably, he would be satisfied to let the judge decide whether the oral agreement was made and was meant to be controlling. But it seems unfortunate to preserve a distinction between law and equity to the end that in equity the contract enforced will be the one made, whereas at law it will sometimes be the one expressed in the writing. (As to whether the true agreement could be enforced in equity on the facts of *Grubb v. Rockey*, this depends on the effect of the statute of frauds and is discussed in the text accompanying note 31 *infra*.)

27. The rule would still have the effect of turning some questions into questions of interpretation. If the parties intended to embody their entire agreement in the writing, and did so without mistake in expression, a difference of opinion over the meaning of the writing raises only an issue of interpretation. Evidence of what the parties intended must be directed to explaining the writing, rather than giving effect to an oral agreement as such. Although it is sometimes difficult to know where interpretation ends and reformation begins, it is submitted that there should be no gap between the two. That is, if the parties reached an agreement which they meant to express in the writing, the agreement should be made effective either through interpretation or reformation. See Sadowski v. General Discount Corp., 81 F. Supp. 381 (E.D. Mich. 1948). Whether there sometimes is such a gap is a puzzling question; if there is, this probably occurs because of the view that "oral statements by the parties of what they intended" cannot be used in construing a written contract. Restatement, Contracts § 230 (1932). Any such rule should be rejected. It seems to have originated in the interpretation of wills, where the testator's "declarations of intention" are usually regarded as inadmissible. 3 Corbin, Contracts § 543 (1950); 9 Wigmore, Evidence § 2471 (3d ed. 1940). Whatever the reasons may be for such an exclusion, they arise out of the requirements of the statute of wills, and it is a mistake to carry the idea over to the interpretation of written contracts.

28. The written contract may not have been in accordance with the intention of the parties. It may have expressed, by mistake, one consideration, when the real intention out of mind at the moment of its execution, was that it should have expressed another. But, whatever may have been the mistake, or how produced, it can find no recognition until the written contract shall have been reformed and made to conform to the intention of the parties, and this, a Court of Law, cannot effect. A Court of Equity alone can reform a written contract. Boyce v. Wilson, 32 Md. 122, 129 (1869).

29. 366 Pa. 592, 79 A.2d 255 (1951).

that amount he sued for specific performance. The vendor's defense was that the agreed price was actually $11,200, but that the lower figure was inserted in the writing to conceal the true price from the purchaser's family. The trial judge found this to be the agreement and refused specific performance, but this was reversed by the Pennsylvania Supreme Court on the basis of the parol evidence rule; even accepting the fact that the actual agreement was for a price of $11,200, the legally effective contract according to the appellate court was the one expressed in the writing.

This is of course a rejection of the view that the parol evidence rule applies only when the parties intended the writing to be a complete and accurate expression of their entire agreement, or at least of the term in question. Like *Zell* it illustrates the thin line between the case before the court and a case of mistake in integration. Had the parties intended to insert a price of $11,200 in the writing, the mistaken insertion of the $10,000 figure would by most authority provide a ground for reformation in favor of the vendor, leading to the enforcement of their actual agreement instead of the enforcement of a contract they never made. Mistake is accepted as an explanation of the discrepancy, but all other explanations are rejected, no matter how clearly proved and believable they may be.

Had the Pennsylvania court followed the position taken by the Second Circuit in *Zell*, the parol evidence rule would not have barred enforcement of the true agreement, but enforcement would have been barred by the statute of frauds. At this point there is a critical difference between the case before the court and the case of mistake in integration. In the latter, the statute of frauds should not prevent reformation, since the reformation decree is not an enforcement of the oral agreement. The decree merely corrects the writing; if enforcement follows either in the same action or in a separate action it is the written contract as reformed which is being enforced, not the oral agreement as such.[30] On the facts of *Grubb v. Rockey*, however, enforcement of the agreed price of $11,200 at suit of the vendor would be the direct enforcement of an oral term of the contract and this would be in conflict with the statute of frauds.[31]

This does not mean that, in the suit for specific performance

30. There is considerable diversity of decision on the point but the analysis in the text is believed to be a correct statement of the role of reformation and finds strong support in the cases. The general problem is the effect of the statute of frauds on the reformation of executory contracts and is discussed in Palmer, *Reformation and The Statute of Frauds*, 65 MICH. L. REV. 421 (1967).

31. It is generally agreed that in a contract for the sale of land the memorandum required by the statute of frauds must include the price. 2 CORBIN, CONTRACTS § 501 (1950).

brought by the purchaser, the contract should have been enforced as written, for this is not a permissible application of the statute of frauds. The effect of the statute is to bar enforcement of various unwritten agreements, by providing in substance that in order to be enforceable the agreement must be in a prescribed form. It is not the purpose of the statute to produce enforcement of a "contract" the parties never made. This is the effect of the parol evidence rule, as applied by the Pennsylvania court, but it is never a proper consequence of the statute of frauds.[32] Neither the language nor the policy of the statute supports such a result.

In *Grubb v. Rockey* the Pennsylvania court should have held that the vendor had a defense to the purchaser's suit for specific performance, provided the vendor established the oral agreement by clear and convincing evidence. The oral agreement would prevent enforcement of the written contract, but the statute of frauds would prevent enforcement of the oral agreement, leaving the parties with no enforceable contract for the sale of the land. But the purchaser had paid $10,000 on the price, and should be entitled to recover this payment in quasi contract unless the vendor is prepared to perform the oral agreement, as he apparently was in that case. If so, the probable result would be a completion of the transaction in accordance with the oral agreement.[33]

IV. Reformation to Add a Provision Intentionally Omitted

Numerous cases have held that reformation cannot be obtained so as to add to the writing an extrinsic agreement meant to be effective but omitted intentionally from the writing.[34] The generally agreed objective of the remedy is to correct the writing so that it conforms to the agreement the parties meant to embody in the writing; mistake in integration is therefore a necessary element which is lacking in such cases. In *Brintnall v. Briggs*[35] the parties entered into a written contract for the sale of a store building and the stock in trade, and, although the writing was silent on the point,

32. 2 Corbin, Contracts § 498 (1950).

33. This statement slides over some difficult practical problems of judicial administration, but is believed to be correct so far as it goes. 2 Corbin, Contracts § 298 (1950).

34. Taylor v. Fowler, 155 Ga. 654, 118 S.E. 212 (1923); Graves v. Greenfiel, 196 Iowa 696, 195 N.W. 252 (1923); Brintnall v. Briggs, 87 Iowa 538, 54 N.W. 531 (1893); H. C. Whitmer Co. v. Jordan, 230 Ky. 710, 20 S.W.2d 714 (1929); Holcomb v. Czenkusch, 222 Mich. 376, 192 N.W. 548 (1923); Wilson v. Deen, 74 N.Y. 531 (1878); Saum v. Orrill, 42 N.E.2d 925 (Ohio App. 1942); Brosnihan v. Brosnihan, 180 Wis. 360, 193 N.W. 74 (1923).

35. 87 Iowa 538, 54 N.W. 531 (1893).

the buyer claimed there was a contemporaneous oral agreement by the seller not to engage in a similar business in the locality. The buyer sued to reform the writing so as to include this oral agreement and to recover damages for its breach, but relief was denied. In deciding against the buyer the court pointed out that he did not claim the oral agreement was omitted by mistake; thus there was no basis for reformation, and recovery on the oral agreement would be "in plain conflict" with the parol evidence rule. Such decisions rest upon an express or tacit rejection of the view that the parol evidence rule applies only when the parties intended to integrate their agreement in the writing. Intentional omission demonstrates that the provision was not meant to be integrated in the writing, and a complete acceptance of the view that this makes the parol evidence rule inapplicable would destroy the need for reformation.[36]

Occasionally a court, restive perhaps under the weight of a rule that denies recognition of the actual agreement, escapes through the avenue of reformation instead of making a direct attack on the proper scope of the rule. In a California case[37] the plaintiff peach grower entered into a written contract as a "grower" at a stipulated price which was the usual price for "grower contracts." In fact, however, it was understood between the parties that he was to be treated as a "renter" and receive the higher price incident to "renter contracts." The court ordered reformation of the contract to comply with the extrinsic agreement and entered judgment for the sum due on the contract as reformed. The extrinsic agreement was omitted from the contract intentionally and the generally accepted basis for reformation was therefore lacking. At the same time the evidence showed that the writing was not intended to be a complete and accurate expression of the agreement. If this of itself makes the parol evidence rule inapplicable, as it should, there was nothing to stand in the way of the enforcement of the oral agreement as such. The tacit assumption that this could not be done without reformation rested on the view, seen in many cases, that when the writing has the appearance of completeness this forecloses further inquiry into whether the parties intended it as such.[38]

A few cases have reached the same result by treating the defen-

36. Again, the separate effect of the statute of frauds must be considered where the transaction is required to be in writing under that statute. The only way to make the oral agreement enforceable in such a case is to introduce it into the writing, but there is no ground for doing so when it was omitted intentionally.

37. Stafford v. California Canning Peach Growers, 11 Cal. 2d 212, 78 P.2d 1150 (1938).

38. Another example of this use of reformation is Day v. Fireman's Fund Ins. Co., 67 F.2d 257 (5th Cir. 1933).

dant's assertion of rights under the writing in breach of his oral agreement as a fraud on the plaintiff, and then proceeding on the broad ground that equity will "interfere to prevent the fraudulent use of a paper for a purpose not contemplated at the time it was made."[39] Essentially this is a refusal of equity to accept the application of the parol evidence rule so as to deny effect to the actual agreement. The relief usually takes the form of reformation, but in one case the court enjoined the defendant from maintaining an action to enforce the writing in violation of the oral agreement.[40] If this is the best that can be done the solution is acceptable, for equity has asserted a residual power to give relief in the nature of reformation when there seems to be no other satisfactory way to prevent a manifest injustice. In these instances, however, the injustice arises because a rule of law is thought to prevent recognition of an actual agreement. What is needed is a re-examination of the scope of that rule.

V. The Roles of Law and Equity

A. *Mistake in Integration*

As we have seen, in cases not involving mistake in integration a party seeking to avoid application of the parol evidence rule does so by attempting to establish that the parties did not intend to embody the agreement or some aspect of it in the writing. In reformation cases, on the other hand, it is usually conceded that the parties did so intend, but the claim is made that the writing is an incorrect expression of the agreement. As Anglo-American law developed, the law courts held that the writing was controlling, and thus it was left to equity to give relief through reformation. Under older procedures the evidence of the extrinsic agreement would be received only

39. Murray v. Dake, 46 Cal. 644, 648 (1873); Wollan v. McKay, 24 Idaho 691, 135 Pac. 832 (1913). This seems as good an explanation as any of Brandwein v. Provident Mut. Life Ins. Co., 3 N.Y.2d 491, 146 N.E.2d 693 (1957), where the court had to escape the effect of both the parol evidence rule (as it conceived the rule) and the statute of frauds.

The Pennsylvania Supreme Court used the "fraud" label as a reason for holding the parol evidence rule inapplicable in a law action. International Milling Co. v. Hachmeister Inc., 380 Pa. 407, 110 A.2d 186 (1955). A written contract not only had the appearance of completeness but also contained an "integration clause" ("This contract constitutes the complete agreement between the parties hereto"), but the court nonetheless gave effect to an extrinsic agreement of the seller that flour was to conform to certain quality standards. The court's statement that there was fraud in the making of the contract was not supported by the evidence set forth in the opinion —it was merely a manipulation of words in order to avoid the undesirable consequences of a rule without re-examining the content of the rule itself.

40. Taylor v. Gilman, 25 Vt. 411 (1853). The consequence was to give effect to the extrinsic agreement.

where the pleadings specifically indicated that reformation was sought.[41]

Modern procedural reforms have forced courts to refashion the historic distinction between law and equity. In modern procedure it is coming to be recognized that a formal prayer for reformation is not needed in order to achieve the results of reformation where such results are warranted by the facts.[42] Hence, if the plaintiff seeks a money judgment to which he would be entitled under the actual agreement, but the written contract varies from this agreement, it would seem that he should recover when he pleads and proves the facts that provide a basis for reformation, even though his complaint is not in the form of a bill in equity containing a prayer for such relief.[43] Once this is recognized, it seems that parol evidence has been admitted in a law action to vary the terms of the writing. As to what, if anything, is left of the distinction between law and equity, the chief question has related to jury trial.

On the facts just described, where a party seeks affirmative relief justified only if the writing is reformed, there is general agreement that the issue of mistake is equitable, with no constitutional right to jury trial in most states.[44] This does not of course settle the question whether trial of the issue should be by court or jury when other issues in the case are being tried by jury. The question is one to be worked out by legislation or judicial decision, unless the jurisdiction is one of the few in which there is said to be a constitutional right

41. Forsythe v. Kimball, 91 U.S. 291 (1875); Goldband v. Allen, 245 Mass. 143, 139 N.E. 834 (1923); Van Syckel v. Dalrymple, 32 N.J. Eq. 233 (Ch. 1880); Vermont Marble Co. v. Eastman, 91 Vt. 425, 101 Atl. 151 (1917).

42. United States Plywood Corp. v. Hudson Lumber Co., 210 F.2d 462, 465 (2d Cir. 1954); Broidy v. State Mut. Life Assur. Co., 186 F.2d 490, 496 (2d Cir. 1951) (dictum); Del Rio Bank & Trust Co. v. Cornell, 57 F.2d 142 (5th Cir. 1932); Metropolitan Cas. Ins. Co. v. Friedley, 79 F. Supp. 978 (N.D. Iowa 1948); Hayes v. Flesher, 34 Idaho 13, 198 Pac. 678 (1921) (suit in equity); Cox v. Hartford Fire Ins. Co., 172 Miss. 841, 160 So. 741 (1935); First Nat'l Bank v. Oppenheimer, 123 Wash. 290, 212 Pac. 164 (1923).

An example of dogged insistence on adherence to outmoded procedure is Blay v. Pollard, [1930] 1 K.B. 628 (C.A.), where one reason given for reversing a judgment allowing mistake in integration as a defense was that the defendant's pleadings did not include a prayer for reformation.

43. Calton v. Lewis, 119 Ind. 181, 21 N.E. 475 (1889); Ragsdale v. Turner, 141 Iowa 604, 120 N.W. 109 (1909); Dahlhjelm Garages v. Mercantile Ins. Co., 149 Wash. 184, 270 Pac. 434 (1928). *Contra*, Farquhar v. Farquhar, 194 Mass. 400, 80 N.E. 654 (1907). Recovery in quasi contract is regularly allowed where the purchaser of land in a sale by the acre has overpaid due to a deficiency in acreage. Usually the contract will call for a lump sum price so that proof of the basis of the sale comes from extrinsic evidence and recovery of the overpayment rests essentially on reformation of the price term. The parol evidence problem goes largely unnoticed. Cases are collected in Annot., 153 A.L.R. 4, at 19 (1944).

44. City of Morgantown v. Royal Ins. Co., 169 F.2d 713 (4th Cir. 1948). Reformation was denied when the case was tried on the merits, 98 F. Supp. 609 (N.D. W. Va. 1951).

to a *non-jury* trial of equitable issues.[45] Under the usual procedure trial will be by the court,[46] but this is not the universal practice. In a Nebraska case, for example, the action was to recover for the loss by fire of buildings allegedly insured by the defendant, but one of the buildings was on land not described in the policy. It was held within the trial court's authority to let the whole case go to the jury, including proof of mistake in integration, and a judgment in favor of the insured as though the policy had been reformed was affirmed.[47]

The relation between law and equity has arisen most frequently where mistake in integration was asserted as a defense to an action at law. The widespread allowance of equitable defenses at law[48] means that the reformation issue will be decided in the single action. Most courts follow the view that the mode of trial developed in equity should be employed for the equitable issue,[49] but until recently New York was a notable exception. In an action to recover money due under the terms of a written contract the court of appeals held that the defendant could introduce evidence to establish a different agreement which the writing failed to express because of mistake, with all the evidence to go to the jury.[50] There are occasional instances of a similar practice in other states.[51]

Such decisions suggest a need for re-examining the policies behind the parol evidence rule. Beginning with Thayer's classic analysis in 1898[52] attention became centered on the rule as one of substantive law until McCormick pointed to its importance as a "procedural

45. Van Hecke, *Trial by Jury in Equity Cases*, 31 N.C.L. REV. 157 (1953); Note, *The Right to a Nonjury Trial*, 74 HARV. L. REV. 1176 (1961).

46. CLARK, CODE PLEADING 91-110 (2d ed. 1947); JAMES, CIVIL PROCEDURE § 8.7 (1965); 5 MOORE, FEDERAL PRACTICE §§ 38.16, .22 (2d ed. 1966).

47. Central Granaries Co. v. Nebraska Lumbermen's Mut. Ins. Ass'n, 106 Neb. 80, 182 N.W. 582 (1921). In actions on insurance policies there are many cases that could be analyzed as calling for reformation which in fact are settled in a law action through applying the concept of estoppel. VANCE, INSURANCE 513-47 (3d ed. 1951). Estoppel is also sometimes used in other situations. Schlosser v. Nicholson, 184 Ind. 283, 111 N.E. 13 (1916). See also the Pennsylvania cases cited in note 56 *infra*.

48. Joiner & Geddes, *The Union of Law and Equity*, 55 MICH. L. REV. 1059, 1112 (1957).

49. Prudential Ins. Co. of America v. Strickland, 187 F.2d 67 (6th Cir. 1951); CLARK, CODE PLEADING 103-06, 621-28 (2d ed. 1947); Clark, *Trial of Actions Under the Code*, 11 CORNELL L.Q. 482 (1926).

50. Susquehanna S.S. Co. v. Andersen & Co., 239 N.Y. 285, 146 N.E. 381 (1925). Three of the seven judges dissented, without opinion. *Accord*, Bugen v. New York Life Ins. Co., 408 Pa. 472, 184 A.2d 499 (1962).

51. Zuspann v. Roy, 102 Kan. 188, 170 Pac. 387 (1918); Bugen v. New York Life Ins. Co., *supra* note 50.

52. THAYER, A PRELIMINARY TREATISE ON EVIDENCE ch. 10 (1898). See also Thayer, *The "Parol Evidence" Rule*, 6 HARV. L. REV. 325 (1893). Thayer's analysis was accepted by Wigmore. See 9 WIGMORE, EVIDENCE § 2425 (3d ed. 1940).

device for control of the jury."[53] For cases of mistake in integration the effect of the rule was to avoid what he described as:

> [the] grave danger that honest expectations, based upon carefully considered written transactions, may be defeated through the sympathetic, if not credulous, acceptance by juries of fabricated or wishborn oral agreement. Likewise, some peril to justice and to the stability of business transactions lies in the possibility that earlier and tentative oral agreements which were part of the preliminary parleying, but were actually understood by both parties to be abandoned when omitted in the final written agreement, will be stoutly asserted by one party at the trial as having been intended to stand alongside the writing. When a genuine, but superseded, oral agreement is thus set up, it will be even harder for the jury to reject the claim based on such agreement than if it were fabricated from the whole cloth.[54]

Although this danger was recognized by the New York Court of Appeals,[55] it cannot be said that the court was expressing a preference for leaving the issues to the jury despite the danger; rather, the decision rested wholly on the court's construction of a provision of the procedure code. To guard against the danger, Judge Cardozo said, there should be a "strict enforcement" of the rule applied in equity with respect to the weight of the evidence needed to overcome the writing. That is, the evidence must be "clear and convincing," or as Cardozo expressed it "of the clearest and most satisfactory character." Even with this safeguard, which it is difficult to make effective,[56] it seems wise to preserve for most cases the historic mode of trial of equity issues. It may be largely a historical accident that the separate jurisdictions of law and equity sometimes had a

53. McCormick, *The Parol Evidence Rule as a Procedural Device for Control of the Jury*, 41 YALE L.J. 365 (1932).

54. *Id.* at 367. Dean McCormick was describing the dangers involved where there is no claim of mistake, but his description is also apt where there is such a claim.

55. "Juries may find it difficult to apply the presumption that preliminary treaties are merged in the written contract if they are permitted to consider such treaties as evidence of mistake." Susquehanna S.S. Co. v. Andersen & Co., 239 N.Y. 285, 296, 146 N.E. 381, 385 (1925).

56. Note, 11 CORNELL L.Q. 396, 400 (1926). In Bugen v. New York Life Ins. Co., 408 Pa. 472, 184 A.2d 499 (1962), where the issue of mistake in integration was submitted to a jury, the appellate court said that the evidence "must be clear, convincing, and of the most satisfactory character," but there is no indication that such an instruction was given the jury. Presumably, however, such an instruction is called for in Pennsylvania. Broida v. Travelers Ins. Co., 316 Pa. 444, 175 Atl. 492 (1934). Where there are other questions of fact in the case, it may be unsatisfactory to submit the whole case to the jury with a set of instructions presenting different standards of proof on the different issues. This apparently was done in Zuspann v. Roy, 102 Kan. 188, 170 Pac. 387 (1918).

rational relation to the different modes of trial,[57] but as McCormick suggests there is such a relation here.

The New York practice has been changed in that state's new Civil Practice Law by providing that "equitable defenses and equitable counterclaims shall be tried by the court."[58] This creates a statutory *right* to a non-jury trial. There are instances in which the correction of a manifest error has been allowed in a law action without any need perceived for separating the legal and equitable issues.[59] The New York legislation should not interfere with the sensible administration of such cases.

B. *Intentional Variation*

There is also need for examination of the manner of trial where no mistake in integration is claimed. As we have seen, it is commonly stated that the parol evidence rule applies only when the parties intended to embody in the writing either the entire agreement or at least that part with respect to which the extrinsic evidence is relevant. No one doubts that there are times when this question of intent will be decided on all the evidence. The principal difference of opinion is over whether this will be done when the writing seems on its face to be either a complete expression of the agreement or at least a final expression of the term in issue. Thoughtful writers have argued that this question of intention is to be decided by the judge,[60] and there is substantial judicial recognition of the theoretical soundness of this view.[61] The theory is sometimes difficult to apply, although this tends to be obscured by the usual way of stating the

57. JAMES, CIVIL PROCEDURE § 8.2 (1965). The text of this part of Professor James' book appears also in James, *Right to a Jury Trial in Civil Actions*, 72 YALE L.J. 655, 661 (1963).

58. N.Y. Civ. Prac. L. & R. § 4101.

59. Brilliant v. Silk, 290 Mass. 537, 195 N.E. 737 (1935); Schultz v. Charleston, 261 Ill. App. 51 (1931). Other cases are cited in 5 WILLISTON, CONTRACTS § 1599 (rev. ed. 1937). In England it is said that "both Courts of law and of equity may correct an obvious mistake on the face of an instrument without the slightest difficulty." Wilson v. Wilson, [1854] 5 H.L.C. 40, 66, 10 Eng. Rep. 811, 822.

60. 9 WIGMORE, EVIDENCE § 2430 (3d ed. 1940); Harvey, *The Use of Parol Evidence in Cases Involving Written Instruments*, 34 Mich. St. B.J., No. 5, pp. 8, 16 (1955); McCormick, *The Parol Evidence Rule as a Procedural Device for Control of the Jury*, 41 YALE L.J. 365, 374-75 (1932). See also note 26 *supra*.

61. Seitz v. Brewers' Refrigerating Mach. Co., 141 U.S. 510 (1891); McDonnell v. General News Bureau, 93 F.2d 898 (3d Cir. 1937); South Florida Lumber Mills v. Breuchaud, 51 F.2d 490 (5th Cir. 1931); Brown v. Oliver, 123 Kan. 711, 256 Pac. 1008 (1927); Gianni v. R. Russel & Co., 281 Pa. 320, 126 Atl. 791 (1924). *Contra*, Jarvis v. Cunliffe, 140 Conn. 297, 99 A.2d 126 (1953). The usual way of stating the position that the issue is for the court is in terms of admissibility of evidence: "The question is one for the court, for it relates to the admission or rejection of evidence." Naumberg v. Young, 44 N.J.L. 331, 339 (Ct. App. 1882).

problem, that is, in terms of intent to integrate.[62] The real issues are whether the parties made the agreement in question and whether they meant it to be effective despite the writing. According to the aforementioned theory of the judge's function, he is to assume for purposes of decision that the agreement was made and then to decide whether it was intended to be effective.[63] But in many instances the two issues are virtually inseparable. It is not a hypothetical case that is up for decision but an actual case, to be decided on all the evidence.

In *Grubb v. Rockey*,[64] where the writing specified a price of $10,000 but the vendor claimed that the true oral agreement was for $11,200, it would be difficult psychologically for the judge to decide that the parties intended an oral agreement, if there was one, to be effective, without also deciding that the parties made such an agreement. In the converse situation it will often be feasible for the judge to decide that, even though such an agreement was made, it was not intended to be effective when the writing was signed. In other instances however, if the judge decides that no such agreement was to be effective he will also have decided that no such agreement was made.[65] In the *Grubb* case, instead of trying to make such a difficult provisional judgment, the court took the easy way out by attaching an unwarranted finality to the written word. This may well explain the judicial tendency to make conclusive an appearance of completeness in the instrument. Thereby the court avoids the necessity of deciding an issue of fact that is conceived to be outside its province. This keeps the issue from the jury in situations where the court would decide, given the chance, that there was no such extrinsic agreement as one party claims. Unfortunately, however, it means also that courts have declared themselves powerless to give effect to actual agreements no matter how clear the evidence of agreement. In a case such as *Grubb v. Rockey* the court should in

62. Thus, in South Florida Lumber Mills v. Breuchaud, 51 F.2d 490, 493 (5th Cir. 1931), the issue stated was "whether the matter sought to be orally proven has been integrated in the written agreement, by ascertaining from the conduct and language of the parties, and the surrounding circumstances, what was their intent."

63. If he decides that the transaction was covered by the writing, he does not decide that the excluded negotiations did not take place, but merely that *if* they did take place they are nevertheless legally immaterial. If he decides that the transaction was not intended to be covered by the writing, he does not decide that the negotiations did take place, but merely that *if* they did, they are legally effective, and he then leaves to the jury the determination of fact whether they did take place.
9 WIGMORE, EVIDENCE § 2430 (3d ed. 1940).

64. See note 29 *supra*.

65. An example is South Florida Lumber Mills v. Breuchaud, 51 F.2d 490 (5th Cir. 1931).

the first instance decide both questions. If it finds no oral agreement which was meant to be effective that ends the matter. Decision of the issues without a jury presents no serious constitutional question since there has been at most a trial of issues that previously went untried.[66] If the court finds that there was an oral agreement which the parties meant to be effective, the evidence can go to the jury with final power to decide.[67]

VI. Conclusion

From one point of view the relation of the parol evidence rule to mistake in integation can be put quite simply. The rule does not bar reformation when there is clear and convincing evidence that terms of an agreement meant to be included in the writing were misstated or omitted by mistake. But reformation is not available to insert terms which the parties intentionally omitted.

When the problems of the parol evidence rule are viewed from the reformation side, by comparing results reached where the discrepancy between the writing and the true agreement was unintentional with the results reached where it was intentional, some widely accepted applications of the rule seem unsatisfactory. There are differences in the two situations but they are insufficient to warrant the marked disparity of results. The disparity should be eliminated so as to permit recognition of the actual agreement when the *court* is satisfied that this was the agreement. The parol evidence rule should not be used so as to enforce a contract the parties never made, when this is known to be the case.

66. This is what occurs when the court holds the writing conclusive and the extrinsic evidence therefore "inadmissible."

67. The jury could find there was no oral agreement even though the judge had decided otherwise in letting the evidence go to the jury. Whether the jury's finding is sufficiently supported by the evidence would be tested by the usual standard.