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EVIDENCE - ADMISSIBILITY OF PAROL EVIDENCE SHOWING THAT CONTRACT IN WRITING WAS EXECUTED ONLY AS SHAM

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EVIDENCE — ADMISSIBILITY OF PAROL EVIDENCE SHOWING THAT CONTRACT IN WRITING WAS EXECUTED ONLY AS SHAM — An individual is sued on a written contract or, suing on an alleged oral agreement, is confronted by a written contract which he has signed. He offers testimony that, although he executed the instrument which bears his name freely and with full knowledge of its contents, he is not to be held liable thereon because the agreement between the parties was that it should never be legally enforceable, the sole purpose of its execution having been to deceive some third person into a belief that the parties to the instrument had contracted together as in the instrument set forth.

Is such parol evidence admissible? The great majority of the

courts say that it is.[1] Legal writers agree.[2] Legal logic supports its admissibility, for the testimony is not offered to contradict or to vary the terms of a written contract, within the letter and meaning of the parol evidence rule; it is offered to show that there never was a contract between the parties. There is no element of estoppel which will bar such testimony, for the person sought to be deceived is not a party to the suit and his rights are not involved.

If, however, the question as to the admissibility of such testimony should be put to any experienced layman, is there any doubt as to what his judgment would be? He would certainly say that the testimony should never be admitted, for the social implications of a rule to the contrary would be, to the layman, apparent.

A rule admitting such testimony encourages dishonest men in pursuing fraudulent practices. If such a man knows that he can, to his profit, with little risk to himself, deceive his neighbor by arranging to have exhibited to such neighbor a contract apparently binding but legally unenforceable, can it not be expected that he will do so? Also, would it not be equally apparent to the layman that a dishonest man, faced with certain liability on a contract which he has signed, under such a rule could always create for himself a chance of avoiding such liability by inventing testimony to show that he signed the contract only for the purpose of deceiving someone not a party to the cause? For, under the rule as laid down by the authorities, against such testimony, if believed by the jury, the court is powerless to do justice, however preposterous the court may feel it to be.[3]

Let us examine some of the cases in which the courts have felt that

[1] Grierson v. Mason, 60 N. Y. 394; Bernstein v. Kritzer, 253 N. Y. 410, 171 N. E. 690 (1930); Nightingale v. J. H. and C. K. Eagle, 141 App. Div. 386, 126 N. Y. 339 (1910); Southern Street Ry. Advertising Co. v. Metropole Shoe Mfg. Co., 91 Md. 61, 46 Atl. 513 (1900); Coffman v. Malone, 98 Neb. 819, 154 N. W. 726 (1915); Robinson v. Nessel, 86 Ill. App. 212 (1899); Humphrey v. Timken Carriage Co., 12 Okla. 413, 75 Pac. 528 (1904); Lavalleur v. Hahn, 152 Iowa 649, 132 N. W. 877 (1911); Fleming v. Morrison, 187 Mass. 120, 72 N. E. 499 (1904); Oak Ridge Co. v. Toole, 82 N. J. Eq. 541, 88 Atl. 827 (1913); Kelly v. Sayle, 15 D. L. R. 776 (1914).

[2] 16 COL. L. REV. 159 (1916); 14 HARV. L. REV. 230 (1900); 38 HARV. L. REV. 239 (1924); 75 UNIV. PA. L. REV. 261 (1927); 3 JONES, EVIDENCE, 2nd ed., sec. 1511 (1926); 1 GREENLEAF, EVIDENCE, 16th ed., sec. 284 (1899). Mr. Wigmore, however, would limit the rule to cases where the pretense is a morally justifiable one, as to calm a lunatic or to console a dying person. 5 WIGMORE, EVIDENCE, 2nd ed., sec. 2406 (1923).

[3] "How the jury, as triers of the facts, could have believed this strange story . . . may be difficult to understand. . . . however incredible this may appear to us, we cannot disturb the finding." Bernstein v. Kritzer, 253 N. Y. 410 at 416-417, 171 N. E. 690 (1930).

they must, on the basis of irresistible logic, permit the admission of such testimony.

A principal sued his agent for the proceeds of goods sold by the agent for the principal, less the agent's commissions, fixed by written contract at 5 per cent on all sales made. The defense was an alleged oral guaranty that the commissions would amount to at least $1500 a year. The defendant was permitted to testify that the written contract was entered into between the parties only for the purpose of deceiving one Woods into advancing money on the goods.[4]

An advertiser was sued on a written contract to pay for certain advertising at specified rates. His defense was that the real agreement between the parties was an oral one, for less advertising and at lower rates. He was permitted to testify that the written contract was entered into only to deceive other advertisers into the belief that the rates specified therein were the rates contracted for by defendant.[5]

A salesman brought suit against his employer for the balance due on an oral contract of employment at $7500 a year. The defense was that the contract under which plaintiff was employed was in writing, fixing his compensation at $5000 a year, all of which had been paid. Plaintiff was permitted to testify that the written contract was signed only to deceive other salesmen of the employer into thinking that plaintiff was receiving the same rate of compensation as they.[6]

An apprentice sued his master for the balance due for compensation under an alleged oral contract of employment. The defense was that the contract of employment was in writing and that the compensation provided therein had been fully paid. Plaintiff was permitted to offer testimony that the written contract was signed only to be exhibited to the Bricklayers Union, to satisfy them that plaintiff was to receive the union scale of wages for apprentices.[7]

Suit was brought on a written contract to purchase plaintiff's shares of stock in a corporation. The defense was that there never was any agreement to purchase. Defendant was permitted to testify that plaintiff, defendant, and one Snyder were all the stockholders in the corporation; that defendant desired to buy out Snyder only and that the written contract sued on was executed only to deceive Snyder into the belief that plaintiff was also selling out to defendant.[8]

Suit was brought against the endorsers on a series of promissory

[4] Grierson v. Mason, 60 N. Y. 394 (1875).

[5] Southern Street Ry. Advertising Co. v. Metropole Shoe Mfg. Co., 91 Md. 61, 46 Atl. 513 (1900).

[6] Nightingale v. J. H. and C. K. Eagle, 141 App. Div. 386, 126 N. Y. S. 339 (1910).

[7] Robinson v. Nessel, 86 Ill. App. 212 (1899).

[8] Coffman v. Malone, 98 Neb. 819, 154 N. W. 726 (1915).

notes given in payment for stock purchased. The defense was that it was mutually agreed that defendants were not to be held liable on the endorsements. Defendants were permitted to testify that the endorsements were given only to deceive the creditors, so that they would not attempt to upset the sale.[9]

If a rule of law is socially unjustifiable, in that its existence will encourage men to make sham contracts to deceive third parties, and litigants to assert incredible defenses to actions on written contracts, otherwise indefensible, why should courts and law writers continue to approve it? Is it because it is so thoroughly logical that no other decision can justifiably be made? So it would seem, when one reads the decisions [10] and the law review notes.[11] Why adhere to legalistic reasoning if such is to be the result? Why cannot the courts simply say, "We will shut our ears to any story that asserts, as a defense to a written contract, a claim that it was entered into only to deceive someone, whether the person deceived be a party to the cause or not"?

Such a pronouncement would not be altogether without precedent, for the Supreme Court of Pennsylvania made it, early in the history of that court.[12] The plaintiff owned property worth $2500. He sold it to one Gilpin for $500, as a site for a mill, but with a bond signed by other individuals to pay plaintiff $2000. When sued, these men testified that they were not to be held liable on the bond, the only reason for its execution being that plaintiff had to have it to persuade his wife to join him in the deed. The supreme court held that the trial court ought never to have listened to such a story, saying: [13]

> "If a plaintiff, who has been party to a fraud, has, in order to show consideration, or for other purposes of his action, to go beyond the instrument sued on, and unravel the transaction on which it was founded, he cannot have the assistance of Courts, either of equity or law; but, where the defendant has given the plaintiff a perfect cause of action, by an instrument unimpeachable in itself, Courts are bound to sustain it, because they are not at liberty to presume it fraudulent, and the law forbids a confederate to prove it fraudulent. The rule is calculated to make men honest in their dealings, not only as between themselves, but in respect to the absent, the dependent, and the ignorant, and we think this a fitting case to which to apply it."

[9] Bernstein v. Kritzer, 253 N. Y. 410, 171 N. E. 690 (1930).
[10] See note 1, supra.
[11] See note 2, supra.
[12] Evans v. Dravo, 24 Pa. St. 62 (1854).
[13] At p. 67.

In a subsequent case [14] arising out of the same facts the court was asked to overrule its previous decision on the ground that here the allegation of fraud came not from the plaintiff but from the defendant and that, in ruling as it did, the court violated the maxim *in pari delicto melior est conditio possidentis aut defendentis.* As to this the court said: [15]

> "The plaintiff was then and is now in possession of a legal and valid cause of action. . . . But the defendant alleges an equity which ought to restrain him, and, to make it out, is obliged to show the fraudulent transaction. In respect to that matter, the real substance of the dispute, he is the actor. He alleges and proves the fraud. This the maxim forbids him to do. . . . As to the equity relied on by him he is plaintiff in fact, whatever the forum or the position of the parties on the record."

The same position has been taken by a few other courts.[16]

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[14] Hendrickson v. Evans, 25 Pa. St. 441 (1855).

[15] At p. 444.

[16] Graham v. Savage, 110 Minn. 510, 126 N. W. 394 (1910); Town of Grand Isle v. Kinney, 70 Vt. 381, 41 Atl. 130 (1898); Supreme Lodge K. of P. v. Dalzell, 205 Mo. App. 207, 223 S. W. 786 (1920).