

# **TEXTUAL HARASSMENT: A NEW HISTORICIST REAPPRAISAL OF THE PAROL EVIDENCE RULE WITH GENDER IN MIND**

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**Textual Harassment: A New Historicist Reappraisal of  
the Parol Evidence Rule with Gender in Mind**

*Abstract*

This year marks the four hundredth anniversary of the Parol Evidence Rule, the rule that dictates that the interpretation of a written contract should be determined solely according to its *text* and not influenced by prior contradictory external information. This article uses the occasion to offer a feminist perspective and a fresh interdisciplinary view of the Rule. The analysis presents a unique contribution to the heated debate regarding the desired levels of formalism and textualism in present-day contract law, by using New-Historicist tools.

Unexplored aspects of the roots of the Rule are illuminated through an in-depth investigation of the *first* case of the contractual Parol Evidence Rule, the *Countess of Rutland's Case* (1604). To examine this Case, the article suggests the use of "Legal New Historicism" – researching both human and non-human "actors" who played a role in this Case, and re-narrating the story of Isabel, the Countess of Rutland. This method reveals, for example, rare maps and romantic stories which lead to a critical look at the Rule's total exclusion of context and helps to expose its gendered nature.

The article further presents a close reading of the most influential paragraph in Sir Edward Coke's report of the Case. Coke's words and phrasing, it is proposed, should not be read as incidental choice of language, but rather as carefully planned and, as such, reflective of the dominant values of the legal culture within which they were written. It is further argued that the choice to exclude the context is far from a mere omission. De facto it can be seen as actively creating and then taking into account a *manufactured context* – one that does not exist and is deeply patriarchal. An exploration of the political and cultural contexts of Coke's report explains the possible *motives* for establishing the Rule and phrasing it in such manner. It is argued that the Case played an active role in Coke's efforts to strengthen the diminishing status of the Common Law, in the face of increasing threats, as a component of a marketing project aimed at improving the Common Law's image without significantly changing its content.

Along the way the first Case is paired with an almost-twin contemporary case, which resulted from a Hollywood scandal, *Clark v. Hannah-Clark* (2003). Based upon the juxtaposition of this new legal narrative of Nicolette (Hannah-Clark) with the older story of Isabel (the Countess of Rutland), it is concluded that the flaws and biases underlying the Rule remain acute and call for a serious reconsideration of its justification. In this way the article offers an original and, hopefully, useful argument against excessive formalist textualism in present-day contract law.

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She lost her home.

The judge simply wrote that she “has no interest in that property”,<sup>1</sup> but for her it was not merely “that property”. It was home, the place where she had lived for more than ten years, ever since her son was born, and she *did have* an interest in it– the father of her son gave it to her.

So she appealed but failed again.<sup>2</sup> Neither the legal logic of this final decision nor its description of the facts could be reconciled with the full story she knew too well. Yes, of course, she worked “for John and Lynn, husband and wife, taking care of their young daughter”,<sup>3</sup> but no, that was not the reason she lived at the little cottage nearby their house. Why hadn’t the Judge mentioned the undisputed fact that she lived there because John, who once was her boss, became her lover and the father of her child? Why is there no word about John’s manifest insistence that she and their son live close to him while he kept his marriage; no mention of his frequent visits to the cottage?

And what about the period of time when she had to move out from the cottage until “it was improved with a paint job, a new carpet and a new heating and air conditioning system” due to its “bad condition”?<sup>4</sup> Despite the decision’s phrasing, this period (“between May 1997 and July 1998”) was *not* simply a break in her continuous stay at the cottage. It was precisely this break that later led John to make an effort to bring them back, and it was in order to bring them back that he made a deed transferring the cottage to her. As even his wife Lynn told the

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<sup>1</sup> The quote is taken from Judge John H. Reid’s words in *Clark v. Hannah-Clark*, Case no. SC063529 (not published) at the Superior Court of California, County of LA (Jan. 11 2002).

<sup>2</sup> *Clark v. Hannah-Clark*, Case no. B157749 (not published) at the Court of Appeal of California, Second Appellate District, Division 3 (Decided on May 22 2003 by Klein, Kitching and Aldrich).

<sup>3</sup> *Ibid*, opening line of the decision.

<sup>4</sup> The quotes are taken from John’s brief that was submitted to the appellate court on November 22<sup>nd</sup> 2002 in response to Nicolette’s opening brief.

court, and as John himself admitted, the cottage was transferred to her “by grant deed dated July 24, 1998” and John did this in order “to continue his contact” with Nicolette and their son and “to prevent them from moving out again.”<sup>5</sup> They moved back to the cottage, this time as its owners.

So if the cottage was hers, how then did she lose it? Well, as both John and Lynn told the court, it turned out that gifting the cottage had severe tax consequences for John.<sup>6</sup> Upon realizing his error, John asked for Nicolette’s cooperation: he requested that she give the cottage back to him, promising to transfer it back to her again in a different method, by “creating a trust for [their son’s] benefit and placing the [cottage] in that trust”.<sup>7</sup> And indeed on December 1998, trusting John, Nicolette returned the cottage to him – by deed – only five months after it was given to her.

He did not fulfill his promise about the trust.

She did not have it in writing.

And that is how she lost her home.

## **Introduction**

There is an ongoing and heated debate in contract law regarding the value of formalism which entails loud calls for New Formalism.<sup>8</sup> Part of this debate raises the question of

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<sup>5</sup> The quotes are taken from section I(c) (“statement of facts”) of Lynn’s brief that was submitted to the appellate court on November 22<sup>nd</sup> 2002.

<sup>6</sup> In John’s own words, taken from his written response to Nicolette’s opening Brief: “When John’s accountant pointed out that this transaction raised a huge gift tax bill, John then planned to take the house back before the end of the year, and transfer it in the new year to his son [the name is omitted] by way of a tax free irrevocable trust.”

<sup>7</sup> The quote is taken from Lynn’s brief, *supra* note 5.

<sup>8</sup> *See, e.g.,* Avery Wiener Katz, *The Economics of Form and Substance in Contract Interpretation*, 104 COLUM. L. REV. 494, 499-500 (2004) (“in recent years the debate has intensified; in the field of contracts, this new debate has increasingly been conducted in the language of the economic analysis of law. This flourishing of scholarship has followed in the wake of a wider school of thought that some have labeled the ‘new formalism.’ What is new about this new formalism, both in contractual scholarship and elsewhere, is that it attempts explicitly to ground formalism in functional terms; it tries to show how formal methods of interpretation help to

*textualism*:<sup>9</sup> to what extent should the written version of the transaction be adhered to (formalism) – to what extent is there a place for considerations of fairness, distributive justice and so forth (anti-formalism)<sup>10</sup> The greater the formalist-textual position is, the stronger the belief in adherence to the parol evidence rule becomes,<sup>11</sup> and vice versa.

In this study I will illuminate unexplored aspects of the parol evidence rule, in a manner that challenges and undermines the formalist-textual position from a new angle, namely a New Historicist one. This unique point of view provides innovative ammunition for the argument that excessive formalism may injure the weak – and that, therefore, a more flexible and inclusive approach is required.<sup>12</sup>

I first read the story of Nicolette losing her home as it was represented in the “official” judicial texts of both the initial and the appellate decisions. It was a disturbing story, at least for a reader with a feminist chip on her shoulder,<sup>13</sup> like me. Back then I did not know a thing

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forward practical goals such as efficiency, procedural fairness, and public accountability.”); Robert E. Scott, *RELATIONAL CONTRACT THEORY: UNANSWERED QUESTIONS A SYMPOSIUM IN HONOR OF IAN R. MACNEIL: The Case for Formalism in Relational Contract*, 94 NW. U.L. REV. 847, 851 (2000); David Charny, *FORMALISM IN COMMERCIAL LAW: The New Formalism in Contract*, 66 U. CHI. L. REV. 842 (1999).

<sup>9</sup> See, e.g., Michael P. Van Alstine, *Of Textualism, Party Autonomy, and Good Faith*, 40 WM. & MARY L. REV. 1223 (1999); Eric A. Posner, *The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation*, 146 U. PA. L. REV. 533 (1998); Stephen Ross and Daniel Tranen, *The Modern Parol Evidence Rule and Its Implications for New Textualist Statutory Interpretation*, 87 GEO. L. J. 195 (1998).

<sup>10</sup> See, e.g., Alstine, *Id.*; Peter Linzer, *Rough Justice: A Theory of Restitution and Reliance, Contracts and Torts*, 2001 WIS. L. REV. 695; Stewart Macaulay, *Relational Contracts Floating On a Sea of Custom? Thoughts About the Ideas of Ian Macneil and Lisa Bernstein*, 94 NW. U. L. REV. 775 (2000); John E. Murray, Jr., *Contract Theories and the Rise of Neoformalism*, 71 FORDHAM L. REV. 869 (2002).

<sup>11</sup> The phrase “parol evidence rule” (or in short “the rule”) is used here as a representation of the idea that the terms of a written contract are not to be varied by extrinsic evidence. For a more elaborate account see, for example, Alstine, *Id.* at 1231-1241. The nuanced meanings of the rule are far beyond the scope of this piece but I think the complexity is elegantly captured by words written more than one hundred years ago with regard to the rule: “Few things in our law are darker than this, or fuller of subtle difficulties.” J. Thayer, *The ‘Parol Evidence’ Rule*, 6 HARV. L. REV. 325, 325 (1893). However, one qualification seems necessary: despite the broad acceptance of the textualist nature of the parol evidence rule, the rule also excludes textual evidence predating the integration of the written contract. I thank Prof. Gerald Frug for this clarification.

<sup>12</sup> See, e.g., Macaulay, *Id.* at 800 (“To the extent we ignore custom and courses of dealing and performance, we reinforce the power of the formal written contract. This, in turn, reinforces the power of those who draft those documents, usually the lawyers who represent those with superior bargaining power.”).

<sup>13</sup> Here I am using Mary Joe Frug’s categorization in tribute to the influential ideas that have outlived her. See: MARY JOE FRUG, *POSTMODERN LEGAL FEMINISM* 57 (1992). For some of the feminist concerns see *infra* note 115.

about the parties involved, or about the Hollywood scandal that resulted from these deeds. I did not realize that “Lynn” is actually the celebrated actress Lynn Redgrave, or that “John” is the Hollywood producer John Clark.<sup>14</sup> It just sounded rather peculiar, even unbelievable, that according to the law all that happened was the transfer of a \$317,000 cottage as a mere gift followed shortly thereafter by the “cancellation and returning”<sup>15</sup> of that same gift. Many questions came to my mind, but two of them were truly troubling: first, was it really a gift and second, did she actually mean to return it?

As to the first question: the first deed specifically emphasized that John “received nothing in return”.<sup>16</sup> Is this a truthful declaration? It might be true if you are thinking in strictly monetary terms. It might be sincere if you are willing to ignore the value of a beloved son who lives nearby, as part of your family, a son that without knowing of your blood connection was taught to call you “papa”.<sup>17</sup> As the jewel in the crown of the market place, contract law is known for its obliviousness to non-monetary aspects of life. I was therefore annoyed but not surprised to learn how easy it was for the judges to embrace this narrow definition of contractual consideration and, as a result, to adopt the wording of the first deed as the whole truth and nothing but the truth: that the transfer of the cottage was an honest representation of a gift. Yet, this might be considered a marginal issue, since neither of the two courts decided the case on the merits of that first deed.<sup>18</sup> They both were willing to assume that for a short while Nicolette did indeed become the owner of her home. It is

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<sup>14</sup> The much-published Hollywood scandal might make the story more titillating but it could also give us a clue as to the power disparities between the parties in this Case.

<sup>15</sup> This was the statement of the second deed as quoted by the appellate court, *supra* note 2.

<sup>16</sup> The quote is taken from the court’s decision, *supra* note 2 (citing the deed).

<sup>17</sup> John’s brief, *supra* note 4.

<sup>18</sup> The appellate decision, *supra* note 2, ends with the following words: “The [second] deed is dispositive because Nicolette therein reconveyed her interest in the property. Therefore, it is *unnecessary* to address any contentions by Nicolette relating the [first] deed.” (emphasis added)

therefore my second question and the second deed that turned out to be crucial: had she or had she not intended to return the gift to John?

I read the appellate decision again and found out that Nicolette had tried to argue that the cottage was never meant to be returned to John. I also read how she was immediately silenced. The legal tool that was used to silence her emerges in footnote number 6 of the appellate decision:

“We observe Nicolette’s claim that she deeded the property back to John in December 1998 in exchange for his promise to transfer the property in trust to their son raises an issue as to the parol evidence rule. As indicated, the December 1998 deed indicated it was a cancellation and return of gift which is inconsistent with Nicolette’s position that she deeded the property back to John in exchange for his promise to transfer it to their son.”<sup>19</sup>

I was startled by the strict way the parol evidence rule enabled the courts to twice read the written documents so narrowly and to ignore the details of this salacious story. Just as the courts interpreted the first deed as a gift for nothing, here again they strictly followed the written words of the second deed. The result was, to my eyes, a legal tale that was in fact a castrated story; so many details were left out that it made no sense at all. My response was to search for more information and to try to fill in some of the holes of this “Swiss-cheese” story. This is why I started to look for the parties’ briefs; this is how I learned that no one, not even John, denied that what the courts viewed as a simple cancellation of a gift was in fact a

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<sup>19</sup> *Id.* Note that this application of the parol evidence rule is especially significant in light of the fact that California is most known for what Posner named a “soft parol evidence rule” (roughly that of Corbin and the Second Restatement of Contracts), as opposed to hard parol evidence rule (roughly the Williston, four-corners, plain meaning approach), see Posner, *supra* note 9, at 534-538. See also, Susan J. Martin-Davidson, *Yes, Judge Kozinski, There Is a Parol Evidence Rule in California - The Lessons of a Pyrrhic Victory*, 25 SW. U. L. REV. 1 (1995).



much more complicated arrangement, one that wholly contradicted the final conclusion that Nicolette “has no interest in that property”.<sup>20</sup>

In their use of the parol evidence rule, the courts seemed willfully to ignore the voices that were trying to tell them what had actually happened. They disregarded not only the interested testimony of Nicolette but also those declarations that had come from the opposing end of the field, from both John and Lynn. As far as the second deed was concerned, all three sides of this “romantic” triangle repeated the same story. They all told how, despite the words of the deed noting a cancellation and return of a gift, it was obvious that at the end of the day the cottage was not supposed to revert to John but instead to be transferred by trust to Nicolette’s and John’s son. Naturally, each of the parties had their own explanation as to the motives that caused John to break his promise to create a trust,<sup>21</sup> but it was agreed by *everyone* that the words of the second deed never reflected what was truly happening: everyone but the courts, that is. The courts were thus utilizing the parol evidence rule as a means of reshaping reality.

One might think that the use of the parol evidence rule as a legal tool for preferring contractual text over a fuller context is a good idea, and one might say that Nicolette is just a sad instance of a failed litigation. I just could not: I was concerned by the missing and misleading story, and I began to ask myself where and when such a rule was born and decided to “hit the road”. My initial intention was to go back in time in order to better understand the past of the parol evidence rule. Ultimately, the journey became much more

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<sup>20</sup> Quoting, again, Judge Reid’s words, *supra* note 1.

<sup>21</sup> The most elaborate version may be found in John’s brief to the appellate court, *supra* note 4. Refraining from using a lawyer as a lingual mediator, John informed the courts in a very expressive manner of many events that ultimately were left out of the judicial decision. One of these events was the emergence of a new amorous relationship in Nicolette’s life. John was apparently extremely upset by the appearance of this new man, which he refers to in a telling way as his plumber, and his brief includes unrepeatable remarks about the race and the alleged criminal history of his rival. Lynn’s brief to the appellate court, *supra* note 5, supports this hypothetical motive for John’s behavior adding that “Sometime in 1998, Nicolette began her relationship with Ernesto, and John did not like it...There was a barrage of angry “love” emails between John and Nicolette in December 1998...”

complex and intriguing. I return with a novel perspective, one which proves how contemporary the far past can be. What comes next is therefore a report of my journey - a journey to the roots of the contractual parol evidence rule, a journey not yet taken by others.

The goal of this report is to provoke fresh reconsideration of the aging parol evidence rule.

In the *first section* I describe the journey's itinerary and elaborate on my use of New Historicist and feminists methodologies. Having done this, the actual journey begins and the *second section* focuses on the Countess of Rutland's Case (the "Case") that is considered to have established the parol evidence rule exactly four hundred years ago, in 1604. This part tells two versions of the Case's story: first the formal and thin account, and then a thicker description of what appears to have happened. An analysis of the significance of the remarkable disparity between these two versions concludes the section, highlighting the gender bias that is entailed in the legal decision to ignore the thicker version, i.e. the context.

The *third section* offers a close reading of the most influential paragraph in Sir Edward Coke's report of the Case. Coke's words, I suggest, should not be read as incidental choice of language but should instead be seen as carefully planned and as such reflecting the dominant values of the legal culture within which they were written. Accordingly, the *fourth section* focuses on the political and cultural contexts of Coke's report. Here, Coke's words are read in light of his broader legacy and in line with his other writings about the law in general and contract law in particular. Considered in this way, the Case can be seen as playing an active and productive role in Coke's efforts to resist the amassing threats to the Common Law: the admiration of Roman law, the use of oaths, and the need to distinguish law and lawyers from the common people. Building on this idea, I propose that the Case can be viewed as a component of a marketing project aimed at enhancing the Common Law's popularity by offering a new and improved image of the same old product without significantly changing

its real identity. A comparison between Coke's marketing efforts and the labors of Shakespeare's Portia to gain authority in court wraps up this section emphasizing the artificial nature of the parol evidence rule. The *conclusion* calls for a serious reconsideration of the rule's necessity after four hundred years of an unveiled attempt to exclude real-life from the contractual interpretation process.

## I. THE JOURNEY'S PLAN

### A. *Taking the New Historicist Trail*

My vehicle during this journey is going to be a New Historicist one. For most scholars "New Historicism" is a literary practice aimed at interpreting literary texts with culture in mind.<sup>22</sup> Although used outside of the fictional arena, most famously by the anthropologist Clifford Geertz, whose works on "culture as text" inspired the literary New Historicist high-tide,<sup>23</sup> New Historicism is seldom used in legal works.<sup>24</sup> While I strongly believe that what I here name "Legal New Historicism"<sup>25</sup> is a promising critical method, I think that its rarity

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<sup>22</sup> With Stephen Greenblatt as the acknowledged founder and his book *RENAISSANCE SELF-FASHIONING: FROM MORE TO SHAKESPEARE* (1980) as the book that is considered to have initiated New Historicism in literary studies.

<sup>23</sup> Much of this inspiration came from Clifford Geertz's celebrated book *THE INTERPRETATION OF CULTURES* (1973). The nature of this inspiration defies chronological order. As explained by the New Historicists Greenblatt and Gallagher: "It is a tribute to Geertz that it was not his method that seemed powerful to us (after all, that method was in part borrowed from literary criticism), but rather the lived life that he managed so well to narrate, describe and clarify." See CATHERINE GALLAGHER & STEPHEN GREENBLATT, *PRACTICING NEW HISTORICISM* 28 (2000).

<sup>24</sup> For the general argument that New Historicism is seldom used in legal works see Penelope Pether, *Measured Judgments: Histories, Pedagogies, and the Possibility of Equity*, 14 *CARDOZO STUD. L. & LIT.* 489, 520 (2002). For exceptions see, as examples: Hendrik Hartog, *Pigs and Positivism*, 1985 *WIS. L. REV.* 89; Hendrik Hartog, *Mrs. Packard on Dependency*, 1 *YALE J.L. & HUMAN.* 79 (1988); W. Fisher, *Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History*, 49 *STAN. L. REV.* 1065, 1084 (1997); Ariela J. Gross, *Litigating Whiteness: Trails of Racial Determination in the Nineteenth-Century South*, 108 *YALE L. J.* 109 (1998) (and the works mentioned there in footnote 23).

<sup>25</sup> Fisher, *ibid.*, used the name "New Historicist Legal History" – a phrase that neatly grasps his view of the method as part of the larger field of "legal history" on which he focused in his article. Since I see the critical potential embedded in this practice I prefer to name it in a way which will also allow a wider legal use, including *outside* the legal-history arena. Compare also to Binder's and Weisberg's view: "Instead of seeing the "cultural criticism of law" as simply an application of New Historicism to law, we can see both developments as aspects of the emergence of a broader interdisciplinary field of "Cultural Studies" which blurs the boundaries between the humanities and the social sciences, viewing the phenomena studied by social scientists (including historians) as social texts available for interpretation and criticism" - Guyora Binder and Robert Weisberg,

necessitates further development and discussion. Nevertheless, at this stage I will resist the temptation to do so and instead try to better explain my specific choice to apply New Historicism to the contractual parol evidence rule.

First, the rule seems to the American legal mind as a given, and although many have spent time debating its extent, only a few have questioned its very existence. My turn to New Historicism is therefore an attempt to focus on this latter question of existence. Here, this practice can offer the option of de-familiarizing what is taken for granted by taking a closer look at the times of birth and the critical moments of emergence, the transference from non-existence to existence.<sup>26</sup>

Second, despite its procedural name, the parol evidence rule influences the substantive question of contractual *interpretation*. Such interpretation becomes highly textual as the rule bans unwritten data, and the interpretative tool of New Historicism therefore seems especially appropriate to the project at hand. Highlighting this linkage between interpretation and the New Historicist practice, Geertz noted in a recent interview:

“When I work in the field on anything, whether it’s something sort of airy-fairy like religion or something more concrete like a market, I start with the notion that I don’t understand it. Then I try to understand it better by tacking back and forth between large and little things. And that’s what you really do when you “interpret”.<sup>27</sup>

The main object of interpretation in this paper is the Case, where it is believed the parol evidence rule was “born”. This Case serves, in New Historicist terminology, as the “textual unit” or as the “cultural text” under investigation. I use the legal report of the Case in a way

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*SYMPOSIUM: THE CRITICAL USE OF HISTORY: Cultural Criticism of Law* 49 STAN. L. REV. 1149, 1150 (1997).

<sup>26</sup> This “closer look” has been described as “something akin to what in optics is called ‘foveation’, the ability to keep an object (here a tiny textualized piece of social behaviour) within the high-resolution area of perception. Foveation in cultural interpretation is rather difficult because of problems of both scale and focus. The interpreter must be able to select or to fashion out of the confused continuum of social existence, units of social action small enough to hold within the fairly narrow boundaries of full analytical attention, and this attention must be unusually intense, nuanced, and sustained.” GALLAGHER & GREENBLATT, *supra* note 23, at 26.

<sup>27</sup> John Gerring *Interview with Clifford Geertz* in QUALITATIVES METHODS 26 (Fall 2003).

similar to Geertz's use of his own field reports: as a textual unit, "an imaginative act", a "made, composed, fashioned" thing,<sup>28</sup> one which is no less suitable to literary criticism than the fictions that are part of the literary western canon. Indeed, the way Geertz, as an anthropologist, interprets his exemplary texts (his notes) is parallel to the way the legal reporter interpreted a legal case in England four hundred years ago. Both the anthropologist and the reporter can be compared to writers and the texts they composed can be read as "embedded in the cultures from which they come" and as texts that "possess within themselves more and more of the culture's linked intentions".<sup>29</sup> My aim is thus to offer a "thick description"<sup>30</sup> of the legal report that brought us the contractual parol evidence rule, and to attempt to understand the imaginative universe within which the act of reporting this case was a sign.

Third, a critical look at the parol evidence rule, with its insistence on the autonomous nature of the contractual text and its rejection of non-textual materials, requires critical tools that address the specific phenomenon of textuality. Again, New Historicism seems apposite, for its roots lie precisely in strong resistance to literal criticism which rigidly adopts a highly textual approach, namely new-criticism. The New Historicist focus on anecdotes as a powerful vehicle in the search for meanings, in plural, seems extremely useful here: these anecdotes constantly cross and blur the lines of relevancy, lines between inside and outside, center and margins, main and subordinate, lines which the parol evidence rule so fiercely tries to establish and maintain.

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<sup>28</sup> GALLAGHER & GREENBLATT, *supra* note 23, at 27-28.

<sup>29</sup> *Ibid*, 25.

<sup>30</sup> The term "thick description" is not about the length of the description. It comes from the philosophical works of Gilbert Ryle who in his essays on thinking used it with regard to description which "entails and an account of the intentions, expectations, circumstances, settings, and purposes that give actions their meanings." See *ibid* at 23.

Fourth, it is meaningful that the parol evidence rule was founded in the last days of Queen Elizabeth's reign and the first days of King James', the early-modern times of Tudors and Jacobeans. This period, with the plays of Shakespeare at its core, served as the nursery for the development of literary New Historicism,<sup>31</sup> and thus could naturally be revisited by the same method – this time with law, instead of literature, in mind.

Last, and apropos Shakespeare, New Historicism gives various texts the ability to converse, to participate in the cultural discourse of their time. It is under this New Historicist umbrella that I offer this kind of conversation between the chief text – the 1604 legal case – and Shakespeare's *The Merchant of Venice*. To use the words of Catherine Belsey, the fictional text of Shakespeare could “offer definitions and redefinitions which make it possible to reinterpret a world we have taken for granted.”<sup>32</sup>

These five factors I have just outlined join together in one typical New Historicist desire, and that is to explore the ways in which the old long-forgotten textual unit that engendered the parol evidence rule was both culturally produced and culturally productive. This desire is grounded in the belief that New Historicism “entertains the possibility that any social or political document can be read not only instrumentally but also aesthetically, as describing

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<sup>31</sup> In addition to Stephen Greenblatt's book, *supra* note 22, which is considered by many to have initiated the movement, many more New Historicist works with relation to the same period may be found. See Generally: H. ARAM VEESER, ED., *THE NEW HISTORICISM* (1989). For more examples see: Walter Cohen, *Political Criticism of Shakespeare*, in *SHAKESPEARE REPRODUCED: THE TEXT IN HISTORY AND IDEOLOGY* (Jean E. Howard & Marion F. O'Connor eds., 1987); JONATHAN GOLDBERG, *JAMES I AND THE POLITICS OF LITERATURE* (1983); *The Politics of Renaissance Literature: A Review Essay*, *ELH* 49 (1982), *Recent Studies in the English Renaissance*, in *STUDIES IN ENGLISH LITERATURE* (1984); Stephen Greenblatt, *Invisible Bullets: Renaissance Authority and Its Subversion*, in *POLITICAL SHAKESPEARE* (Jonathan Dollimore & Alan Sinfield eds., 1985), *SHAKESPEAREAN NEGOTIATIONS* (1988); Richard Helgerson, *The Land Speaks: Cartography, Chorography, and Subversion in Renaissance England*, *REPRESENTATIONS* 16 (1986); Jean E. Howard, *The New Historicism in Renaissance Studies*, *ENGLISH LITERARY RENAISSANCE* 16 (1986); Louis A. Montrose, *Of Gentlemen and Shepherds: The Politics of Elizabethan Pastoral Form*, *ELH* 50 (1983); Edward Pechter, *The New Historicism and Its Discontents: Politicizing Renaissance Drama*, *PMLA* 101 (1987); Don E. Wayne, *Power, Politics, and the Shakespearean Text: Recent Criticism in England and the United States*, in *SHAKESPEARE REPRODUCED: THE TEXT IN HISTORY AND IDEOLOGY* (Jean E. Howard & Marion F. O'Connor eds., 1987).

<sup>32</sup> Catherine Belsey, *Disrupting Sexual Difference: Meaning and Gender in the Comedies*, in *ALTERNATIVE SHAKESPEARES* 167, 190 (John Drakakis ed., 1985).

the cultural forces that underlie its production and as reinterpreting cultural forms and norms.”<sup>33</sup>

### *B. Turning onto the Feminist Path*

In western culture and since the days of the Odyssey a journey has been a masculine undertaking: Odysseus went away and Penelope, well, she waited at home. So my planned journey is in itself a feminist method. But in what other ways is a New Historicist journey connected to feminist voyages? I think it all starts with the use of “anecdotes” *against* the hegemonic order of things,<sup>34</sup> as a way of producing counter-narratives. To grasp this subversive spirit, listen to the New Historicists describing themselves by saying:

“...the undisciplined anecdote appealed to those of us who wanted to interrupt the Big Stories. We sought the very thing that made anecdotes ciphers to many historians: a vehement and cryptic particularity that would make one pause or even stumble on the threshold of history.”<sup>35</sup>

For feminists seeking ways to expose and resist male dominance, which is often so axiomatic by nature, these words represent a powerful potential. No wonder that “some of the legal scholars most interested in the promise of New Historicism are feminists.”<sup>36</sup>

Feminist works<sup>37</sup> and New Historicism share not only the impulse to resist hegemony, but also elements of methodology.<sup>38</sup> Among these are the tendency to avoid grand theories, the

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<sup>33</sup> GUYORA BINDER & ROBERT WEISBERG, LITERARY CRITICISMS OF LAW 477-478 (2000).

<sup>34</sup> One useful definition for the term “hegemonic is: “The predominant influence, as of a state, region, or group, over another or others.”THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH Language (Fourth Edition 2000),

<sup>35</sup> GALLAGHER & GREENBLATT, *supra* note 23, at 51.

<sup>36</sup> Judy M. Cornett, *Hoodwinked by Custom: The Exclusion of Women from Juries in Eighteenth-Century English Law and Literature*, 4 WM. & MARY J. OF WOMEN & L. 1, 7 (1997).

<sup>37</sup> But not all of them. For a general updated review that also addresses the problem of essentialism using a narrative style see Linda E. Fisher, *CREATING CONTEXT: JOURNALS IN HISTORICAL PERSPECTIVE: I Know It When I See It, or What Makes Scholarship Feminist: A Cautionary Tale*, 12 COLUM. J. GENDER & L. 439 (2003).

attempt to refrain from abstract models and a zealous search for “the touch of the real”,<sup>39</sup> the connection to lived experiences which are patronizingly excluded under the general rules of hegemonic disciplines. These are the methodologies I will now attempt to employ.

## II. THE COUNTESS OF RUTLAND’S CASE

### A. *The Thin Version*

The Countess of Rutland’s Case is considered to be the origin of the contractual parol evidence rule.<sup>40</sup> According to this belief, the rule was born in 1604, making it exactly four hundred years old. A good occasion to celebrate, but also a suitable time for reconsideration. Even though the general principal that emerged from the Case was much quoted and is – actually – still quoted until today,<sup>41</sup> few are aware of its particulars.<sup>42</sup> One main reason for this is that the reports of the Case provide an extremely brief and slim description of what had happened, what was pleaded and what was decided.<sup>43</sup> The first and better known report, written by Sir Edward Coke, is less than two and a half pages long<sup>44</sup> and the second, written by Sir George Croke, is even shorter – only half a page.<sup>45</sup> However, the length of the texts is not the only problem for someone who seeks the legal story with its specifics. Croke’s text

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<sup>38</sup> Judith Lowder Newton, *History as Usual? Feminism and the New Historicism*, in THE NEW HISTORICISM, *supra* note 31, at 152-155. The essay also critiques New Historicism for not being attentive enough to gender biases.

<sup>39</sup> I am using here the nifty title of the first chapter of Gallagher & Greenblatt’s book, *supra* note 23, pp. 20-48.

<sup>40</sup> Friedrich Kessler Et al., CONTRACTS: CASES AND MATERIALS 823 (1986); Charles T. McCormic, *The parol Evidence Rule as a Procedural Device for Control of the Jury*, 41 YALE L. J. 365, 366-67 & n. 3 (1932); D. W. McLAUCHLAN, THE PAROL EVIDENCE RULE 12 (1976); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 899 n. 73 (1985); MICHAEL R.T. MACNAIR, THE LAW OF PROOF IN EARLY MODERN EQUITY 138 (1999); Lawrence M. Solan, *Theory Informs Busyness Practice: The Written Contract as a Safe Harbor for Dishonest Conduct*, 77 CHI.-KENT L. REV. 87 (2001).

<sup>41</sup> For instance in 2001 in England: *Bank of Credit and Commerce International SA V. Munawar Ali, Sultana Runi Kahn and others* (Appeal to the House of Lords decided on March 1<sup>st</sup> 2001, see <http://www.lawindexpro.co.uk>) [hereinafter BCCI decision].

<sup>42</sup> One important exception is Prof. Michael Macnair whom I deeply thank for sharing his knowledge with me.

<sup>43</sup> Legal historian John Hamilton Baker, one of the most prominent contemporary authorities on English legal history, describes the early development of law reporting as a movement from record to report. J.H. Baker, *Records, Reports, and the Origins of Case-Law in England*, in JUDICIAL RECORDS, LAW REPORTS, AND THE GROWTH OF CASE LAW 21 (1989).

<sup>44</sup> *Countess of Rutland’s Case* (1604) 5 Co Rep 25b, 77 ER 89 [hereinafter Coke’s Report].

<sup>45</sup> *Countess of Rutland v. Earl of Rutland*, Croke Jac. 29, 79 ER 23.



does not tell us the facts at all and concentrates only on the legal principals upon which the Case was decided. Yet, even through Coke's longer text – which states the facts – one finds it hard to grasp what the Case was all about, especially when trying to read this text today, from a distance of centuries. Other than “technical” barriers to the modern reader, such as the use of Law-French, “a totally artificial language”,<sup>46</sup> it seems that the text itself is cryptic to the point where it is almost incomprehensible. It is a report of a case that refrains from telling us, perhaps refuses to tell us, a story.

The little that is possible to know from simply reading Coke's report is that Isabel, the Countess of Rutland and the widow of Edward, the 3<sup>rd</sup> Earl of Rutland, sued Roger, the 5<sup>th</sup> Earl of Rutland. At the heart of these legal proceedings stood a manor called Eykering House and additional land of unclear nature named the “Lady Park” – both located in “the county of Nottingham”. It appears from the thin description in Coke's report that the Countess blamed the Earl “for breaking her house and close”, but no further details are provided regarding this occurrence. There is no hint as to the nature of this breaking but, at any rate, we are informed that the Earl's response was “not guilty”. We are then told (in a very complicated manner) that the dispute between the Countess and the Earl arose from a conflict between two written contracts that were both made by the late Edward Earl of Rutland with regard to the property, i.e. Eykering House and the Lady Park. In the first contract Edward covenanted (contracted by deed) with several trustees that he would convey to them the property in order to ensure his own and his wife's use of the property, during their life together. The covenant went on to say that if he, Edward, died first – his wife, Isabel, would have the right to use the property for the rest of her life. According to this covenant it was only after the Countess' death that

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<sup>46</sup> David Ibbetson, *Law Reports in England from 1603 to 1660*, in *LAW REPORTING IN BRITAIN* 121 (1995).

the property was supposed to fall into the hands of Edward's heirs, who were represented by Roger, the current Earl of Rutland.

More than half a year later another written contract was made by the same Edward. This later contract dealt with a much larger parcel of land which contained many properties *including* Eykering House. This time the list of trustees was longer and they were supposed to make sure that the specified lands, including the disputed property, were transferred in male-tail only, which means from Edward directly to his male heirs without any rights whatsoever to be given to Isabel the Countess.

With regard to Eykering house and the Lady Park the question was thus which of the two contracts should govern: the first, which would enrich the Countess, or the second which would supplement the current Earl's fortune. Importantly, the witnesses' testimony came into the picture not as an independent source of information separate from the writings, but as a support for one of the two rival documents. As Coke's report tells us:

“...it was proved by diverse witnesses that the said Earl Edward...told them, that the said countess should have the manor of E[ykering] for her jointure.”<sup>47</sup>

It appears that no one knows for sure whether Isabel, the Countess, or Roger, the Earl, won the Case. What is known through the reports is only the directory to the jury made by the judges. Chief Justice Popham, together with “all the court”, was reported by Coke as setting the general rule that a written deed will bar parol evidence. The reasoning was, in Coke's much-quoted words, that:

“...it would be inconvenient that matters in writing made by advice and on consideration, and which finally import the certain truth of the agreement of the

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<sup>47</sup> Coke's report, *supra* note 44, at 89-90.

parties should be controlled by averment of the parties to be proved by the uncertain testimony of slippery memory.”<sup>48</sup>

Ironically, the first parol evidence rule’s case was not decided upon this general rule and in fact the jury was instructed to hear the witnesses despite the presence of a written deed. The reasoning behind this outcome has its roots in the Early-modern legal way of conveying land and is difficult to explain based solely on Coke’s report alone. In the early 17<sup>th</sup> century the declaration of a trust was only the initial step in the process of gaining the landowner’s control over the future of his properties. In order to finalize the transaction a further (and crucial) step was needed. Edward, the grantor of the property should have, in Coke’s words, “acknowledged” his obligation to the trustees and the beneficiaries by executing a suitable “fine”. A fine was an artificial and fictional legal practice in which the grantor of the land was sued by the people who were supposed to receive it. In practice, such a suit was not litigated but instead a settlement was achieved and approved by the courts. In order to constitute a valid contractual obligation this settlement had to be congruent to the primary deed and that is exactly where the two deeds of our Case failed. Although Edward did “acknowledge” both his first specific deed and his second more general one, on two consecutive days, it seems that “the fines actually levied were *inconsistent with either deed*.”<sup>49</sup> Presumably it was because of these special circumstances that the judges decided to allow parol evidence.<sup>50</sup> However, as I note above, the Case is better known for its setting of

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<sup>48</sup> *Id.* 90. the quoted words became proverbial, and others even generalized them to include written documents of a non-contractual nature. See Powell, *supra* note 40, at 948.

<sup>49</sup> See Macnair, *supra* note 40, at 139. The fine regarding the first deed was levied after the deadline set in the deed, while the fine regarding the second deed was probably levied without mentioning the Eykering house. Support for this may be found in Moore’s report regarding the Countess’ unsuccessful attempt to litigate the same matter in the Wards. See *Le Countee De Rutland Case* Moore (KB) 723 (1592) (“Another fine was levied of the other lands, *but not of Eckering* to the persons named in the second indenture...”). Note the French-like name of the case, which nicely demonstrates the Law-French phenomenon.

<sup>50</sup> These special circumstances also disrupt the chronological order of prior and later between the two written documents, an order which might have been crucial, at least under a modern parol evidence rule. For another hypothesis see *infra* note 83.

the general rule forbidding the parol evidence than for its concrete conclusion to allow such evidence in the dispute resolution at hand.

To sum up the thin version of the story, we could say that Isabel and Roger held contradicting documents that gave each of them the exclusive rights to Eykering House (and the Lady Park). Isabel had in addition several witnesses to support her claim and the court allowed hearing them as an exception to the more general rule that it had just made: the parol evidence rule. This is indeed a poor story: who are these people, what were they fighting over, and why, what is (or at least might be) the explanation for such great inconsistencies between the legal devices? In the next section I will try to deal with these questions by sketching a thicker version of the story.

## B. *A Thicker Version*

### 1. *The Main Characters*

In constructing a thicker version of the Case, I will first focus on its three main characters. Viewing both humans and non-humans as active “actors” in the emerging plot, I will then continue with the disputed land itself, and conclude the review, briefly, with two additional minor characters.

I will open with Isabel, the Countess of Rutland who gave the Case its name. However, it is worth emphasizing that researching a female figure, especially one from the Early-modern times, is a much more complicated task than collecting information on her male counterparts.

#### a. *Isabel Manners*

Isabel was born in Vale Royal in Cheshire on an unknown date, to Juliane Jennings and Thomas Holcroft.<sup>51</sup> As such she did not originally belong to the English aristocracy of her

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<sup>51</sup> Her father, Thomas Holcroft, was also born in Vale Royal.

time,<sup>52</sup> a fact of great importance to our story. Isabel joined the nobility via her marriage to Edward Manners, the 3<sup>rd</sup> Earl of Rutland, on 1573, by which she became the Countess of Rutland. While married to Edward, Isabel enjoyed a luxurious life. She resided mostly in the lavish Belvoir Castle – the residence of the Earls of Rutland back then and the seat of the Dukes of Rutland in our time. Her journey to London with her husband in 1586 involved “forty-one servants, including a chaplain, trumpeter, gardener and apothecary.”<sup>53</sup>

In 1575 Isabel gave birth to her only child – a daughter named Elizabeth – who according to the rules of the period could not be the heir of most of the family’s estates. The fact that Isabel and Edward had no male heir to inherit most of the family’s properties created a serious and ongoing conflict between Isabel, who outlived her husband, and his male heirs. So bitter were the relationships that Edward’s younger brother John (Isabel’s brother in-law), who became the 4<sup>th</sup> Earl of Rutland, tried to prevent her from receiving what was clearly promised to her under her late husband’s will – claiming that the huge payment for Edward’s funeral should first be paid in full out of her share.<sup>54</sup> Isabel had to sue her brother in-law and seemed to have won, if only partially, when the issue was decided by arbitrators, including Lord Burghley, an important figure in our thickening story. John’s revenge was to try to take from Isabel the custodial rights over her young daughter, maintaining that her bourgeois ancestry made her an unsuitable guardian for a great lady. Evidently, Edward’s male heirs were extremely unhappy about his decision to marry Isabel, especially since they had to support her throughout her widowhood after she contributed little, or nothing, to the family’s fortunes. However, it is quite clear that it was the lack of a son that required Isabel to fight so

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<sup>52</sup> Her father, Thomas Holcroft was described as “the younger son of an undistinguished county landowner...” but his ambition and his many talents had led him to economic success as well as to political achievements and on 1544 he was knighted.

<sup>53</sup> THE DICTIONARY OF NATIONAL BIOGRAPHY (founded in 1882 by George Smith, London: Oxford University Press, 1949-1950), Vol. XII, 933 [hereinafter DNB].

<sup>54</sup> Anastasia B. Crosswhite, *Note: Women and Land: Aristocratic Ownership of Property in Early Modern England*, 77 N.Y.U.L. REV. 1119, 1132-1134 (2002).

desperately for her rights; just as she had to do later – in the Case we are dealing with – against John’s son Roger, the 5<sup>th</sup> Earl of Rutland.<sup>55</sup>

*b. Edward Manners*

Edward Manners, the 3<sup>rd</sup> Earl of Rutland, was born in 1549 to an aristocratic family and was the eldest son of Henry, the 2<sup>nd</sup> Earl of Rutland. When he was 14 years old his father died and he was made one of the Queen’s wards under the close charge of Lord Burghley. It was this powerful man who took care of the young boy’s fine education in “Oxford, Cambridge and possibly Lincoln’s Inn”<sup>56</sup> and indeed Edward was later described as a learned man and a profound lawyer. His legal talents were so remarkable that the Queen appointed him, on April 12, 1587, to the distinguished position of Lord Chancellor, a title he held for only a few days until his sudden death. During his life Edward showed both business skills and administrative abilities and the Earldom of Rutland was described as flourishing under his hands.<sup>57</sup>

A salient feature of Edward’s profile was his decision to marry Isabel. In a society obsessed with status and hierarchy, as Tudor England was, marriage was a key issue. Far from contemporary romantic images associated with the idea, marriage had a highly functional and pragmatic role, especially for members of the aristocracy. What was perceived as “good marriage” had little to do with love or with the quality of the relationship of the spouses; instead it was more about social rank, political power and, above all, property. The decision

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<sup>55</sup> The fact that due to Edward’s will those male heirs stood to lose a considerable additional amount of property to Elizabeth, Isabel’s only daughter, surely added to the hostile atmosphere.

<sup>56</sup> LAWRENCE STONE, *FAMILY AND FORTUNE: STUDIES IN ARISTOCRATIC FINANCE IN THE SIXTEENTH AND SEVENTEENTH CENTURIES* 172 (1973) [hereinafter STONE, *FAMILY AND FORTUNE*].

<sup>57</sup> STONE, *FAMILY AND FORTUNE*, *Id.* at 174 : “after [Edward’s] death Sir Gervase Clifton told his brother and heir to reflect on ‘how barely he was left and how well he left you...’”.

whom to marry was seldom a matter of individual choice but rather a crucial part of a familial strategy. One major objective of such family planning was, to use Lawrence Stone's words, "the acquisition through marriage of further property or useful political alliances."<sup>58</sup> In other words, in those days of "arranged marriages" it was not only the groom marrying the bride but, in a sense, his whole family marrying the bride's family.<sup>59</sup> Other than the obvious aspirations to promote the family's status by means of the "proper" wedding, there were two additional factors that played a role in shaping this familial perception of marriage, both of them tightly connected to our story. The first was the *dowry* the considerable amount of property, or, in its absence, of cash money ("portion"), that had to be transferred from the family of the bride to the family of the groom in order to facilitate the marriage. In return for that fortune the bride was guaranteed an annual sum to support her in the event of widowhood, or a *jointure* – a term which plays an essential role in the Case. The burden of financing the daughters' dowry was heavy enough to make it a rational strategy for the whole family to cautiously choose its recipient. The wealth and the trustworthiness of the potential groom's family were relevant both in terms of the safeguard the jointure would assure the bride and in terms of the ability of the bride's family to pay for the marriages of its other daughters as well.

The second factor was the *primogeniture*, a principal according to which the eldest *son* in each family inherited all its assets. The other children, both daughters and younger sons, were hence dependant economically on their father and later on his sole heir, their elder brother. This principal contributed immensely to the importance of the eldest son's marriage, since in each family he was the one with the better upwardly mobility chances – he was more

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<sup>58</sup> LAWRENCE STONE, *THE FAMILY, SEX AND MARRIAGE IN ENGLAND 1500-1800* 37 (Abridged edition, 1979) [hereinafter STONE, *SEX AND MARRIAGE*].

<sup>59</sup>*Id.* at 72.

likely to marry a wealthy bride accompanied by a hefty dowry that would add to the family assets and would suffice to cover the portions of his sisters.

It was against this concrete background that Edward decided to follow his heart and to marry Isabel. Taking into account the cultural and economic forces of the period sheds a light upon such a decision and enables us to better comprehend its meaning. As the eldest son of his most respected aristocrat family,<sup>60</sup> Edward's marriage was of utmost importance and yet it appears he assumed the freedom not only to marry far beneath his social rank, but also to upset his family's expectations of a substantial dowry. For one thing, this marriage is presumed to have been considered at the time as *mésalliance*,<sup>61</sup> "a union between two people that is thought to be unsuitable or inappropriate".<sup>62</sup> More than that, it was claimed by Isabel's mother "that the Earl was so deeply in love that he was willing to marry the girl even *without a marriage portion*".<sup>63</sup>

But Edward's marriage was more than mere noncompliance with the cultural norms of his time.<sup>64</sup> It seems essential to understand that he preferred Isabel to several other brides, far more appealing in terms of money and position, and furthermore, had put his very future (and consequently that of his younger siblings as well) at risk. As mentioned earlier, when Edward

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<sup>60</sup> In his explanation for choosing the Manners as one of the few families which his book deals with Lawrence Stone writes that: "all the examples are drawn from the very topmost ranks of the aristocracy, an elite within elite, members of a group which in France was known as 'Les Grandes'." See STONE, FAMILY AND FORTUNE, *supra* note 56, at xv. Later Stone goes on to present the Manners as a family that "... rose in the late fifteenth and early sixteenth centuries to become one of the leading members of the country's great landed aristocracy." – *Id.* at 165. After describing the massive acquisition of land by the Thomas 1<sup>st</sup> Earl of Rutland Stone adds: "The result of this gigantic investment in real estate was to make the Manners family a major social and political force both in the north midlands, in Leicestershire, Nottinghamshire' and Lincolnshire, and also in the north, in Yorkshire." – *Id.* at 167.

<sup>61</sup>*Id.* at 173.

<sup>62</sup> OXFORD ENGLISH DICTIONARY ONLINE (<http://dictionary.oed.com>) [hereinafter OED].

<sup>63</sup> STONE, FAMILY AND FORTUNE, *supra* note 56, at 173 (emphasis added). This claim might be honest since, in Stone's words: "No marriage contract has in fact survived, so there is no means of knowing whether or not the Earl obtained a substantial cash sum on his marriage with Isabel on 1573." My own correspondence with the representatives of Belvoir Castle supports the above conclusion of Stone regarding the lack of marriage contract.

<sup>64</sup> But compare to Hill's claim which criticizes the assumption that love before marriage was rare at the end of the sixteenth century. CHRISTOPHER HILL, THE COLLECTED ESSAYS OF CHRISTOPHER HILL (VOL. 3): PEOPLE AND IDEAS IN 17<sup>TH</sup> CENTURY ENGLAND 203 (1986).



married his father was already long dead and his future as well as all of the family's estate was controlled by William Cecil, Lord Burghley, the powerful guardian of the Elizabethan aristocracy.<sup>65</sup> Despite his general obedience to his influential guardian,<sup>66</sup> Edward refused Burghley's suggestion to marry his daughter, an offer that few would have dared to decline and many would have loved to take up.<sup>67</sup> The exceptional nature of Edward's decision to marry Isabel should therefore be viewed in a multilayered way, taking into account its many dimensions that, combined together, reinforce the impression that this rare marriage could only have been based upon love.<sup>68</sup>

*c. Roger Manners*

The 5<sup>th</sup> Earl of Rutland and the defendant in our Case was born in 1576 as the eldest son of John, the aforementioned 4<sup>th</sup> Earl of Rutland who fought so bitterly against Isabel.<sup>69</sup> When his father died Roger was still under-aged but wealthy enough to induce Lord Burghley to engage himself in a fierce contest over the young Earl's ward. This contest was won by Burghley, previously Edward's guardian and now entrusted by the Queen with the custody over another Earl of Rutland, Roger.<sup>70</sup> One of Burghley's first moves as a warden was to order Roger's mother, Elizabeth, to send Roger back to Queens' College in Cambridge,

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<sup>65</sup> Since Lord Burghley was included in the text of Coke's report, I will discuss his character in more detail below. See text next to footnotes no. 99 to 101.

<sup>66</sup> Edward is described as one of the most obedient and grateful wards of Lord Burghley, a fact that makes his refusal to marry his mentor's daughter even more significant. See STONE, FAMILY AND FORTUNE, *supra* note 56, at 172-173.

<sup>67</sup> He is also reported to have given up other beneficial marriage options: "After negotiations with several other ladies like Frances Howard (*daughter of Lord William Howard of Effingham, later Countess of Hertford*) and Elizabeth Hastings (*dau. of Francis, second Earl of Huntingdon, later Countess of Worcester*), he married... Isabel..." DNB, *supra* note 53, 934. The words in italics do not appear in the DNB and are taken from <http://www.tudorplace.com>. It is fascinating to know that it was the same Edward that years later insisted his daughter to marry upwardly, a command she obeyed by marrying Lord Burghley's grandson, Sir William Cecil the 2<sup>nd</sup> Earl of Exeter. STONE, FAMILY AND FORTUNE, *Id.* at 175 and 177.

<sup>68</sup> Additional support for this conclusion might be found in Edward's will in which he was very generous toward his widow. See STONE, FAMILY AND FORTUNE, *Id.* at 175; Crosswhite, *supra* note 54, at 1133-1134.

<sup>69</sup> See the text next to *supra* note 54.

<sup>70</sup> STONE, FAMILY AND FORTUNE, *supra* note 56, at 177. The fact that this was the second time that Burghley obtained control over an Earl of Rutland serves as another indication of his deep involvement in the lives of the Manners.

where he was educated for many years. The tension between Burghley and Elizabeth was so acute that Roger had to ask his permission to visit his own mother.

So different from his talented late uncle Edward, Roger seems to have been a big disappointment to his mentor, both in terms of education and in terms of business skills.

While tracking the young Earl's expenses Stone notes: "Though he did buy a Livy, it is noticeable that it was in translation, and his very limited expenditure on books suggest a young man of some natural intelligence but who had failed to master the classics and whose main interests lay elsewhere."<sup>71</sup> Roger was quite adventurous and spent a lot of time

traveling the world, probably more than he could afford himself as the head of the Earldom.

When Roger was not even twenty, and shortly after his mother's death in 1595, Lord

Burghley approved his journey to the continent – but wrote bluntly that the young Earl knew very little about his estate.<sup>72</sup> It was in Paris, toward the end of his "Grand Tour" in 1597, that

he first met the Earl of Essex, an acquaintance that would have enormous influence on his

life as well as an interesting effect on our legal story.<sup>73</sup> Charmed by Essex, Roger followed

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<sup>71</sup> STONE, FAMILY AND FORTUNE, *Id.* at 179. Titus Livy (59 B. C. to A. D. 17), the famous Augustan historian, was born in the Northern Italian city of Padua. His History of Rome was and still is one of the most popular pieces of classical literature. But compare Stone's conclusion to an opposite view of the same Roger made by those who see him as possibly the actual author of Shakespeare's works. The general argument is that Roger was Shakespeare because, among other things, his life parallels that of Shakespeare's life as presented through the Plays. For instance Roger was an English ambassador to Denmark, and when he had studied at Padua University in 1596, two of his fellow students were named Rosencrantz and Guildenstern. See ILYA GILILOV, THE SHAKESPEARE GAME: THE MYSTERY OF THE GREAT PHOENIX (Trans. by Gennady Bashkov et al. 2003); PETR SERGEEVICH POROHOVSHIKOV, SHAKESPEARE UNMASKED (1940). John Mitchell's WHO WROTE SHAKESPEARE (1996) offers an enjoyable survey of the authorship question.

<sup>72</sup> DNB, *supra* note 53, Vol. XII, at 940.

<sup>73</sup> Robert Devereux, the 2d Earl of Essex (1567–1601) was an English courtier and favorite of Queen Elizabeth I. Succeeding to the earldom on the death of his father, he too (like Edward and Roger Manners) came under the guardianship of Lord Burghley. He distinguished himself in action while serving (1585–86) as a cavalry officer in the Netherlands under his stepfather, Robert Dudley, Earl of Leicester. When he returned to England he soon became a marked favorite of the queen. Essex became a national hero when he shared command of the expedition that captured Cádiz in 1596, but he failed the next year in an expedition to intercept the Spanish treasure fleet off the Azores. In 1599, at his own demand, he was made Lord Lieutenant of Ireland and sent there with a large force to quell the rebellion of the earl of Tyrone. Failing completely to accomplish his mission, he made an unauthorized truce with Tyrone and returned to England. He was confined by the Council, and it was eight months before he was tried for disobedience by a special council and deprived of his offices (1600). He was soon released but was banned from the court. Still popular, Essex planned a coup that would oust the enemy party and establish his own about the queen. To this end he sought support from the army in

him to the Azores and continued to ignore the rising need for his involvement in his family's businesses. In the years that followed, Roger is described as a reckless spender who would, for instance, pay huge amounts of money for princely clothing. According to Stone, his "rate of expenditure was almost certainly higher than of any other private individual in the country".<sup>74</sup> That irresponsible attitude, combined with the need to pay for his sisters' marriages led Roger and his dependants into a severe economic crisis that lasted from 1601 to 1606,<sup>75</sup> significant years in the legal fight with Isabel. There can be no doubt that in those years Roger found himself under heavy financial pressure. He had to borrow large sums of money for mortgage and was also quoted as requesting Royal help while stressing "the weakness of my estate and greatness of my debts".<sup>76</sup>

What had deepened the crisis even more was Roger's involvement in the Essex revolt, for which he was fined by the Privy Council on May 1601 the enormous sum of £30,000.<sup>77</sup> This incident was not only an economic disaster but also one of Roger's most serious mistakes and further proof of his impulsive nature. As I have already mentioned, Roger was one of Essex's admirers and close friends, so on February 8<sup>th</sup> 1601, when Essex called his supporters for help, Roger did not hesitate and immediately gathered around Essex's house. It is worth mentioning here that Lord Essex' relationship with Queen Elizabeth had just reached its lowest point ever. Only months after Sir Edward Coke – as one of Essex's prosecutors for his Ireland fiasco – dared to blame the Earl for disloyalty, the Queen was ready to follow him and distrust her favorite Earl. New indications arose and she was now

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Ireland and opened negotiations with James VI in Scotland, but these efforts failed. The sad ending of Essex' life – in which Roger was so heavily involved – is discussed below. See DNB, *supra* note 53, Vol. V, at 875-890.

<sup>74</sup> STONE, FAMILY AND FORTUNE, *supra* note 56, at 180.

<sup>75</sup> For details and numbers see *Id.* at 182-184.

<sup>76</sup> *Id.* at 184.

<sup>77</sup> *Id.* at 182.

even more convinced that Essex was indeed plotting against her.<sup>78</sup> The Privy Council sent for Essex, they had questions to ask. Essex claimed to be ill and refused to come.

“No sooner was the messenger gone than the Earl received an anonymous note, warning that he was in danger and had best provide for himself. Essex sent out runners over the city; all night they spread the alarm...”<sup>79</sup>

It was in response to this alarm that Roger was waiting at dawn in front of Essex’s house, together with several other Earls and hundreds of gentlemen. He was standing there on this Sunday morning when a special and much respected mission sent by the Queen arrived at the courtyard; among them was Chief Justice Popham – the leading judge in our Case. As if to prove the Queen’s suspicions, Essex led his honorable guests to his library and... locked them in! He then left home and ran to the streets waving his swords and yelling “For the Queen, for the Queen!” His aim was the royal palace, but to Essex’s grief not many were willing to risk themselves and join him and his small group of followers, Roger included.

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<sup>78</sup> ALLEN D. BOYER, *SIR EDWARD COKE AND THE ELIZABETHAN AGE 276-280* (2003). Following Essex’ disgraceful failure in Ireland (see *supra* note 73) he was put under house arrest but the Queen released him after a while. Then two major events occurred: the first was the completion of the legal proceeding against Dr. Hayward who wrote a history book about a king who was deposed and murdered for his ill governance. It was Coke who forced a confession out of Hayward and who wanted to use the dedication to Essex in order to bring charges against the Earl too. Finally no charges were formally brought but the Queen ordered the renewal of the home arrest of Essex. The second event was the special performance of Shakespeare’s *Richard II*, on Saturday February 8<sup>th</sup> 1601, an event that was organized on Essex’ behalf and paid for by his aids. *Richard II*, written around 1595, is the first play in Shakespeare's second "history tetralogy," a series of four plays that chronicles the rise of the house of Lancaster to the British throne. Richard II, who ascended to the throne as a young man, is a regal and stately figure, but he is wasteful in his spending habits, unwise in his choice of counselors and detached from his country and its common people. When he raises taxes to fund his pet wars in Ireland and elsewhere, both the commoners and the king's noblemen decide that Richard has gone too far. Richard has a cousin, named Henry Bolingbroke, who is a great favorite among the English commoners. Early in the play, Richard exiles him from England for six years. When Richard unwisely departs to pursue a war in Ireland, Bolingbroke assembles an army and invades England in his absence. The commoners welcome this invasion and, one by one, Richard's allies in the nobility desert him and defect to Bolingbroke's side as he marches through England. By the time Richard returns from Ireland, he has already lost his grasp on his country. Bolingbroke is crowned King Henry IV while Richard is imprisoned in a remote castle. There, an assassin (who both is and is not acting upon King Henry's ambivalent wishes for Richard's expedient death) murders the former king. The Queen is known for saying later: “I am Richard the Second, know ye not that.” See BOYER, *Id.* at 286-287; DNB, *supra* note 53, Vol. V, at 886.

<sup>79</sup> CATHERINE DRINKER BOWEN, *THE LION AND THE THRONE: THE LIFE AND TIMES OF SIR EDWARD COKE (1552-1634)* 132 (1956).

After a violent encounter with a few soldiers Essex fled back home by boat, only to discover that his hostages were gone.

“By midnight, Essex was in prison and his friends captured: the Earls of Southampton and *Rutland*; the Lords Sandys, Monteagle, Cromwell; Sir Gilly Merrick...Desperate men; ruined men, now, scattered in prisons throughout the city.”<sup>80</sup>

On May 19<sup>th</sup> 1601 Essex was brought to trial and his prosecutor was none other than Coke, who bought himself worldly glory through this trial. Preparing himself for his big performance, Coke wrote himself lengthy notes which indicate how central Roger’s involvement was perceived to be.<sup>81</sup> At a crucial point in the trial Coke called Chief Justice Popham as a witness and, “Wrapped in the majesty of judicial scarlet, Popham stepped from the bench and stood waiting for the first question.”<sup>82</sup> Popham testified in detail not only about his traumatic imprisonment, but also about things he heard while crossing Essex’s courtyard on the way to his house. It is probable, therefore, that he also recognized our Earl of Rutland standing there on this Sunday morning.<sup>83</sup> By the end of this long day of legal hearings,<sup>84</sup> Essex was found guilty of treason and was beheaded.

The Earl of Rutland was more fortunate: his life was saved but he suffered a substantial fine, larger than that of any of Essex’ other followers, a fact that serves as a further indication of just how seriously his contribution to the plot was perceived. At any rate, based on a gloomy description of his financial plight this fine was later reduced (to around £20,000); the remainder was never enforced and finally was cancelled by King James.<sup>85</sup>

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<sup>80</sup> BOWEN, *Id.* at 134 (emphasis added).

<sup>81</sup> BOYER, *supra* note 78, at 281: “*Traitors’ names*, Coke writes in the margin of his memorandum, and begins taking examinations. *The Earl of Rutland*, Bridget Patron’ cousin, confides in his kinsman. Coke examines other witnesses...[list]” (emphasis added).

<sup>82</sup> BOWEN, *supra* note 79, at 149.

<sup>83</sup> This might have influenced his decision against Roger in our Case and could explain the puzzling exception to the newborn parol evidence rule.

<sup>84</sup> For a vivid and detailed description see BOWEN, *Id.* at 139-159.

<sup>85</sup> Stone, Family and Fortune, *supra* note 56, 183.

*d. The Disputed Land - Eykering House and the Lady Park*

Bruno Latour has explained how non-human objects may play an important role in a story.<sup>86</sup> Inspired by such theories,<sup>87</sup> it seems valuable to take a detour to Nottinghamshire, England, where the manor over which Isabel and Roger fought once stood. What was named in Coke's report of the Case as "Eykering" is to be found today in *Eakring* (note the slight change of spelling) – a village in the center of Nottinghamshire.<sup>88</sup> "Eykering" was indeed one of the several spellings of this place's name, a spelling that apparently evolved from the Old-Norse origins of the name as "Eikhringr", meaning a *ring of oaks*.<sup>89</sup> It is unclear exactly how and when this property came into the Manners' hands, but in the Domesday survey of 1086, Eakring was listed as Echering and most of the village and its lands were divided between two manors.<sup>90</sup> One of these manors was handed down through the Eakring family, the Lexingtons, the De Suttons and finally the De Roos family, which merged with the Manners and became the Earls of Rutland.<sup>91</sup>

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<sup>86</sup> Bruno Latour, *The Historicity of Things: Where Were Things: where were Microbes before Pasteur?*, in PANDORA'S HOPE: ESSAYS ON THE REALITY OF SCIENCE STUDIES 145-173 (1999). Latour suggests that "it is precisely when turning towards the non-human elements [material artifacts] that the polemical, controversial and strategic discourse should increase, not decrease."

<sup>87</sup> Thomas F. Gieryn, "What Buildings Do?" 31 THEORY & SOC'Y 35-74 (2002). One of the most renowned works about buildings is Pierre Bourdieu's, *The Kabyle House or the World Reversed* in BOURDIEU, ALGERIA 1960 (1979).

<sup>88</sup> There has been a great variation in spellings over the centuries, all of which were pronounced as "Aykering". The pronunciation has changed only in recent years to match the modern spelling.

<sup>89</sup> Old Norse is the language spoken and written by the inhabitants of Scandinavia around 1000 A.D. and earlier. The modern Nordic languages of Swedish, Danish, Norwegian, Icelandic and Faroese descended from Old Norse. The original Old Norse 'Eik-hringr' dates back to the mid-9<sup>th</sup> century when the Danish settled in the English Midlands.

<sup>90</sup> THE DOOMSDAY BOOK is a great land survey from 1086, commissioned by William the Conqueror to assess the extent of the land and resources being owned in England at the time, and the extent of the taxes he could raise. The information collected was recorded by hand in two huge books which provide extensive records of landholders, their tenants, the amount of land they owned, how many people occupied the land (villagers, smallholders, free men, slaves, etc.), the amounts of woodland, meadow, animals, fish and ploughs on the land and other resources.

<sup>91</sup> Correspondence with Mr. Mark Dorrington, Principal Archivist of the Nottinghamshire Archives. The merge of the Manners with the De Roos family was accomplished via marriage in 1469 and was the way the "Manners transformed from remote Northumbrian squires to landed magnates of the north-east midlands". See STONE, FAMILY AND FORTUNE, *supra* note 56, 165. However, it is possible that the Eakring estate only came into the

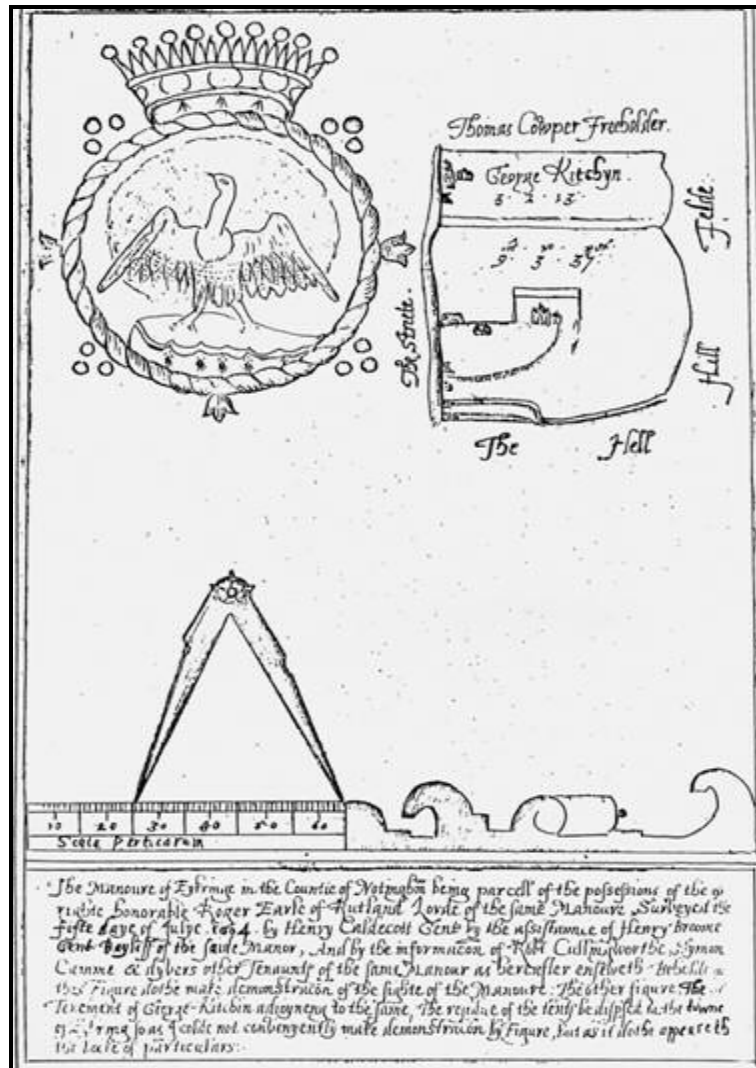
Most attractive for our purposes is the fact that in 1604 – the year of the Case – Eakring itself was subject to a special survey performed by a gentleman named Henry Caldecott who, with the assistance of some tenants of the same manor, drew beautiful plans of the place and its surroundings.<sup>92</sup> This survey allows us a rare peek at the disputed territory as it looked four hundred years ago; but it does much more: it sheds light on the term “Lady Park” as it appears in Coke’s report of the Case and it also gives us a serious clue regarding the unknown result of this Case.

Let us start from *the end*: The plans that resulted from this survey do not mention Isabel the Countess of Rutland in any way. Instead, at the bottom of the plan that depicts the manor itself there appear words of explanation:

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hands of the earls of Rutland years later when, in 1539, Gertrud Manners, the eldest daughter of Thomas the first Earl of Rutland, married Sir George Talbot of the De Roos family. See text accompanying *infra* note 97.

<sup>92</sup> HENRY CALDECOTT, SURVEY OF THE EAKRING MANOR OF 1604 (Terrier of Eakring with plans, DD.SR 227/17). The original plans are kept in Nottingham Archives.



“The manoure of Eykringe in the Countie of Nottingham being parcel of the possessions of the right honorable Roger Earle of Rutland Lorde of the same Manoure. Surveyed the fiftte daye of Julye. 1604...”

These words, written in the same year as the judicial decision in our Case, suggest that it was Roger who had ultimately won the legal battle as well as the disputed land.<sup>93</sup> Further evidence for Roger’s victory, albeit less conclusive, is the fact that it was he who sold the manor to others.<sup>94</sup>

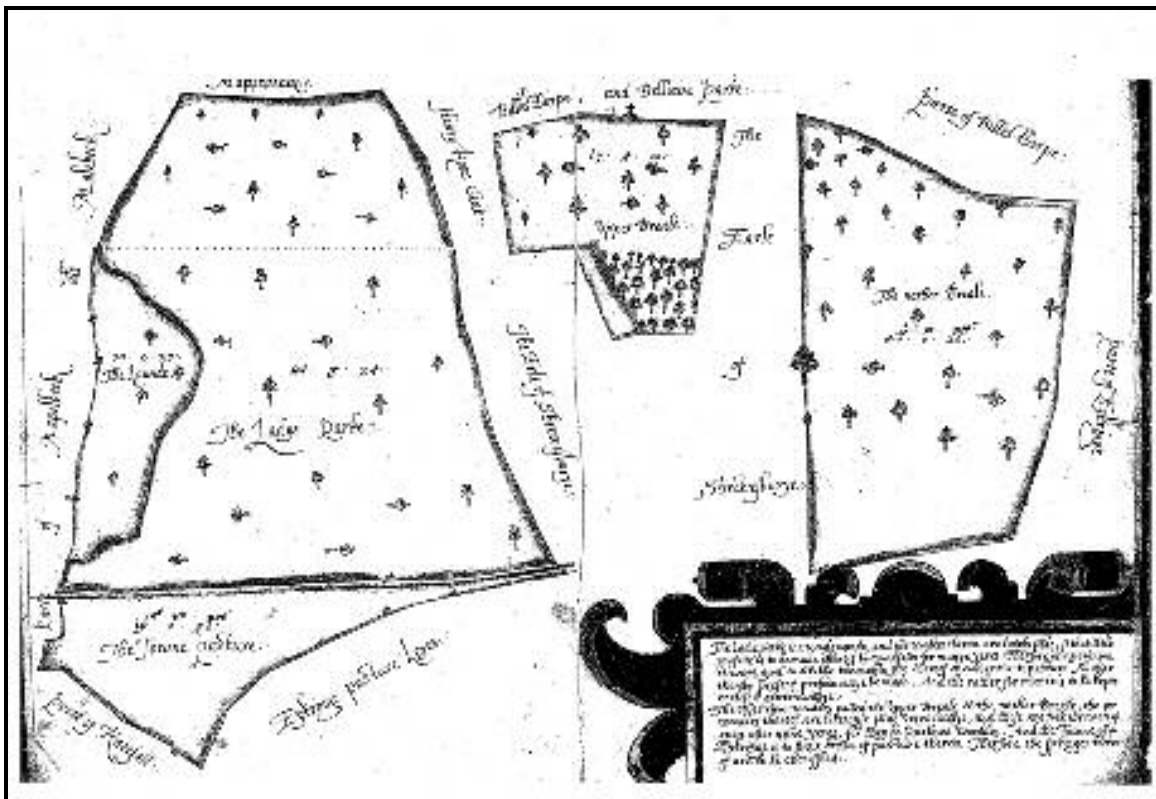
<sup>93</sup> Note that the legal basis for such supposed victory is still unknown. The Case ends with guidelines to the jury but no one seems to know what happened later. At any rate, what happened later had probably to do more with the question of who won the juries sympathy (or who “bought” it) than it had to do with legal arguments. I thank Professor Macnair for the last point.

<sup>94</sup> ROBERT THOROTON, THE ANTIQUITIES OF NOTTINGHAMSHIRE 198 (John Throsby's edited and enlarged edition (1790-6), volume III), (The manor was probably sold to the Marquess of Dorchester).



Other than “Eykering House”, the manor house referred to in the above quote with its associated lands, the dispute in the Case concerned an additional item called the “Lady Park”. It is impossible to know why this “Lady Park” warranted special reference in the Case and was not simply considered part of the Eykering House, especially since it was close to the manor *house* (or ‘Hall’) itself .

However, the same survey from 1604 provides us, literally, with a picture of this mysterious “object”. This magnificent illustration of the park portrays an enclosed land full of tiny sketches of trees (oaks?).



As shown in the plan above the Lady Park was adjacent to what is titled in the plan as “Eykringe pasture leyes” and lay just over a mile from the manor itself. At the lower right-hand corner of the plan an economic analysis is offered (reprinted here with no change of spelling):

“The Ladie parke is a woodgrounde, and the wooddes therin are lately solde, sothat little profite is to be made thereof by woodsales for manye yeres. Therefore in my opinion it were good to stubbe the moste p[ar]te thereof & convert it to pasture. So that thereby present profite maye be made, And the rather for that it is to be kepte enclosed continuallye.”

The information provided by this text gives us reason to suspect that due to the sale of all its wood, the Lady Park’s value decreased significantly during the years between the making of the indentures and the legal debate regarding their meaning.

Having understood what the “park” was, we now turn to the “lady” that gave it its name. One of the most appealing and symbolic possible explanations is that Isabel was not the first wife to receive this land from her husband and that the park was given to one of the Ladies in past generations as a *morning gift*, a gift given to the bride by her newly wedded husband in exchange for her loss of virginity upon the consummation of their marriage.<sup>95</sup> One possibility may be that this part of the estate was given to Gertrud Manners upon her marriage to George Talbot in 1539.<sup>96</sup> Support for this may be found in an indenture made by Gertrude’s father, Thomas the 1<sup>st</sup> Earl of Rutland:

“An Indenture between Francis Talbot, Earl of Shrewsbury and Thomas Manners, Earl of Rutland, whereby the former leaves to his son George, Lord Talbot, on his marriage with Gertrude, daughter of the latter, the Manor of Rufford, the Lordship of Ekeryng, with lands in Rufford, Ekeryng and Kirketon. Co.Nottingham.”<sup>97</sup>

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<sup>95</sup> Correspondence (December 30<sup>th</sup> 2003) with Mr. Derek Walker, Chairman of the Nottinghamshire Local History Association at the time.

<sup>96</sup> See *supra* note 91.

<sup>97</sup> Correspondence (March 5<sup>th</sup> 2004) with Mr. Derek Walker, Chairman of the Nottinghamshire Local History Association at the time. The indenture is dated 32 Hy.VIII (the 32<sup>nd</sup> year of King Henry’s reign, i.e. 1540/1541). The original document is kept in the Nottinghamshire Archives Office as a *Savile of Rufford* deposit: DD.DR 207/338.

Another charming possible explanation for the “lady” in “Lady Park” concerns female deer hunters. It seems that the term ‘Lady Park’ did not appear until Elizabethan times and may have referred to the Queen herself. It was accepted that the monarch, invariably a man up until the time of her sister Mary and Elizabeth herself, took part in the exercise of hunting and particularly in the hunting of deer. But this was a very physical activity for which a woman was not considered suited, and so the Lady Park developed whereby Elizabeth – and her ladies – would sit in carriages and the deer would be driven past them, allowing the ladies comfortable aim. This became fashionable in Elizabethan times, which could explain why the name does not appear earlier in Eakring. The Eakring Park was quite small and perhaps particularly suitable for this type of hunting. Taking all this into account, it is probable that Isabel hunted in this style in the Rutlands’ Lady Park at Eakring.<sup>98</sup>

On a more general note, it is interesting that the findings of the 1604 survey seem to indicate that the overall size of the Eykering House together with its surrounding lands was 1015 acres (including land held by tenants), a relatively modest estate in view of the Rutlands’ vast possessions at the time.

## 2. *The Minor Characters*

### *a. Lord Burghley*

Lord Burghley appears in our story explicitly in the second written indenture, where Edward names him, among others, as responsible for the transference of a long list of properties to his male heirs. Indirectly, as we have already seen, Lord Burghley was heavily involved with the Manners in many ways and hence it seems worthwhile to try and learn more about him. He was born in 1520 as William Cecil and was highly educated in what was at that time the best

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<sup>98</sup> Correspondence (March 25<sup>th</sup> 2004) with Mr. Derek Walker, Chairman of the Nottinghamshire Local History Association at the time.

college in England: St. John's College in Cambridge. Curiously, in a way that might remind us of Edward Manners' marriage to Isabel, he married against his father's will a woman of "slender means"<sup>99</sup> after the failure of his ambitious father's plan to prevent this by moving him to another university.

Cecil would be one of Queen Elizabeth's chief advisors for decades. Upon her accession to the throne she immediately made him the Secretary of State – a position he held until 1572, whereupon he was made the Lord Treasurer until his death in 1598. Despite the fact that Elizabeth was not generous in creating new peerages,<sup>100</sup> she raised her loyal advisor to the peerage in 1571 giving him the title of Lord Burghley - a decision that reflects well the power he gained in the days of the Elizabeth's reign. Lord Burghley is often described as the most influential man in the Elizabethan era.<sup>101</sup> In the context of our story it may be enormously important in understanding the audacity and impact of Edward's decision to refuse to marry this dominant man's daughter, as well as the extraordinary and to the high value of the eventual marriage of Edward's daughter to Burghley's grandson.<sup>102</sup>

#### *b. Gilbert Gerard*

Sir Gilbert Gerard's name appears on both of the contradictory indentures, a peculiarity that did not escape Coke's attention.<sup>103</sup> It is important, thus, to explore Gerard's connection to the Manners and the legal skills he brought to his responsibilities under these documents. In this

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<sup>99</sup> DNB, *supra* note 53, Vol. III, at 1315.

<sup>100</sup> There were only fifteen new creations in her 44 years of reign.

<sup>101</sup> See, for instance, ANNE SOMERSET, *ELIZABETH I* (1991) at 63-64, 279, 501, 505-506 and in general CONYERS READ, *LORD BURGHELY AND QUEEN ELIZABETH* (1960).

<sup>102</sup> See *supra* note 67.

<sup>103</sup> In an edition of Coke's Reports from 1826 a remark by Coke is printed next to one of the appearances of Gilbert's name saying: "note, Sir Gilb. was party to both the indentures." *THE REPORTS OF SIR EDWARD COKE, KNT. [1572-1617] IN THIRTEEN PARTS* (London: J. Butterworth and Son; etc., 1826). This rare edition is kept in the Robbins Collection of the Law library of University of California, Berkeley. The Case is included in a chapter titled "Cases of Covenants, Agreements &c. concerning Leases Assurances &c."

regard it is significant to learn that Gilbert Gerard and Isabel were first-cousins: his mother, Margaret Holcroft, was the sister of Isabel's father. In addition, his co-trustee to the first indenture was Thomas Holcroft, Isabel's brother, who is mentioned in our Case as Edward's "brother" for being his brother in-law.

Furthermore, Gerard had a fine legal education in Gray's Inn and his legal reputation was so exceptional that Elizabeth nominated him to the influential position of Attorney-General soon after her accession.<sup>104</sup> Thirty seven years later she would nominate Coke, the reporter of our Case, to the same influential position.<sup>105</sup> In 1581 Gerard climbed another step up the legal ladder of the times and was appointed Master of the Rolls – an office he held until his death in 1593.

### *3. Wrapping-up the Thicker Story: the Outlawing of Context*

The thicker story I have tried to sketch above adds some *context* to the slim *text* of the report of the Countess of Rutland's Case, a context so absent from Coke's description. Going back to the central question of the two conflicting indentures made by Edward Manners, it now seems more evident that the context of the Case could loudly speak for the first indenture, which promised the land to Isabel. The indications are numerous and I will only point out a few: Edward, a very talented and experienced legal professional, took the legal effort of making a specific indenture that was dedicated to Eykering – one relatively small and marginal property among the many assets of the prosperous Manners family. For the purposes of this indenture he particularly chose respected trustees from his wife's family and

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<sup>104</sup> According to the DNB "he thus never took the degree of serjeant-at-law" DNB, *supra* note 53 , at 1097.

<sup>105</sup> The achievement of becoming an Attorney-General was described by one of Coke's best friends in these words: "This office is one of the greatest, and largest, concerning the possessions of the Crown, an extraordinary place for the preservation of the King's royal prerogatives, and inheritances, so that by this diligent care, he may increase them, and by the neglect of his duty, he may more diminish them' than any of his Majesty's ministerial office." BOYER, *supra* note 78, at 253.

entrusted them to make sure that his beloved wife, for whom he was willing to risk so much during his lifetime, should have an adequate jointure for her widowhood. He did so knowing that he had no son and that his wife would therefore most likely be dependant upon the mercy of his male heirs. He calculated that these heirs could not be trusted to care enough for his wife's welfare, not only because the responsibility for jointures was viewed in those times as an economic disaster, but also because of his heirs antagonism towards Isabel because of her inability to contribute to the family's fortunes upon their marriage. The choice of Eykering of all the family's properties can be seen as a conscious decision on Edward's part – Eykering being a not-too-important asset, but still one that could provide a decent income for his widow, for instance, thorough the sale of wood from the Lady Park and the collection of rent from tenants.

We can not be sure, of course, but it well may be that the fact that Edward included the same property of Eykering House and the Lady Park in the two different – and conflicting – documents was simply a mistake on his part. In light of Edward's vast legal and business talents, such an error seems more plausible than the possibility that he consciously created conflicting indentures. All of the above circumstances would seem to support the supposition that he never meant to include this special property in the later and much more general document.

In this same context, we can also find support for the possibility that Roger's fight over Eykering did not necessarily arise from any solid belief in his legal right but from a desperate economic situation and an urgent need to get rid of an excessive burden of jointures.<sup>106</sup> Given all the indications as to Roger's general irresponsibility, it does not seem implausible to

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<sup>106</sup> For support of this argument see Crosswhite, *supra* note 54, at 1138.

assume that his “breaking” to Isabel’s house was a hasty attempt to deal with his financial crisis by making use of the presumed weakness of his widowed rival.

The gap between the story that Coke told us and the thicker version of the story as presented here is remarkable. This gap emphasizes the terse nature of the legal report and suggests that its slimness was intentional. A possible response could point to the general manner in which law reports were written in Coke’s times.<sup>107</sup> This kind of response would, of course, explain the fact that Coke’s text is indeed oblivious of its context. But, as I will now argue, Coke’s text does not only *refrain* from the context but it also consciously and bluntly *resists* it.

Coke’s text could and indeed should be read as a *text about texts*: their importance, their supremacy and their desired reign. Of the two reporters of the Case it was only Coke who reported Judge Popham to say:

“Also it would be inconvenient, that matters in writing made by advice and on consideration, and which finally import the certain truth of the agreement of the parties should be controlled by averment of the parties to be proved by the uncertain testimony of slippery memory.”<sup>108</sup>

These words reflect much more than a pro-textual approach and upon close reading their anti-contextual attitude is evident. The alternative to the written text is the unreliable “slippery memory” of witnesses, and an apocalyptic warning follows:

“And it would be dangerous to purchasers and farmers, and all other in such cases, if such nude averments against matter in writing should be admitted.”<sup>109</sup>

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<sup>107</sup> Especially since, as mentioned before, Coke’s text is the more elaborate. See text accompanying *supra* notes 44 and 45 .

<sup>108</sup> Coke’s report, *supra* note 44, at 90.

<sup>109</sup> *Id.*

From this choice of strong words such as “dangerous” and “nude” it seems that the author’s purpose is to elevate the text to sanctity and to eliminate entirely any other contradictory information. We can grasp the deliberate effort made here to outlaw context if we remind ourselves of the facts of the Case, which involved two incompatible documents *and not* a clash between a written text and competing (risky) testimony.

One immediate lesson that can be learned from the thicker version of the story, the one that includes context, is that at the beginning of the seventeenth century the act of establishing a legal rule that crowned text and expelled context was a truly hegemonic act. Back then the contractual *text* was totally inaccessible to women,<sup>110</sup> and it was only the wider *context* that had the potential to disclose their gendered reality and inferiority. Concerning the availability of the texts of contracts to women in those days, several points are worth mentioning: First, women were in general far less literate and educated than men. Second, women’s literacy was confined for the most part to the well-to-do women, and those who were lucky enough to be able to read were usually directed to readings of “female-literature” such as romances, plays and poetry.<sup>111</sup> Third, needless to say there was no way an early-modern Englishwoman could earn the legal education that would enable her to comprehend, let alone write, a contract. And fourth, once married a woman could not even be a passive side to a contract, for instance by signing it without reading it, since according to the rule of coverture she had no legal entity of her own.<sup>112</sup>

This last point brings us directly to the gendered impact of rejecting context. Not only insignificant details were left out by focusing only on the text. Rather, as Isabel’s Case

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<sup>110</sup> Of course some (but not all) of the limitations were also a product of low socio-economic background and not only gender.

<sup>111</sup> STONE, *SEX & MARRIAGE*, *supra* note 58, at 143.

<sup>112</sup> *Id.* at 136.



beautifully demonstrates, it was for the most part the patriarchal nature of the story that was excluded: Isabel's inability, as any other married woman's inability, to hold or control personal property, necessitating third-party contractual arrangements; the difficulty in enforcing these arrangements and fulfilling the intent of a husband who sought to bypass patriarchal inheritance rules in order to secure the future of his wife; the strong resistance to brides who could not bring along hefty dowries; and finally, the need to fight for jointure lands against powerful male heirs of the patriline. Hence, shaping a rule that decidedly gives the text ultimate control over the interpretation of the contract/s at issue had, even if unknowingly, a strong patriarchal meaning.

To get a better sense of this patriarchal nature of the Case we can attempt to track Isabel's voice. She is first silenced due to her absence from the contractual text as a result of her marriage and her merger into her husband's person. She then gains a distinct voice as a plaintiff through her new status as a widow, that allows her to appear in court and, as a result, in the report's text. But still, her voice could not be heard since the English seventeenth century law of evidence excluded the parties themselves from the witness stand.<sup>113</sup> Instead, others, namely the "diverse witnesses",<sup>114</sup> speak for her and they represent her voice as coming from *outside* the text. And here is the catch: their voices, which are a poor variation of hers, are ridiculed as the unbelievable result of their "slippery memory".

From a contemporary perspective the above analysis may produce two chief conclusions regarding the nature of the parol evidence rule. On the one hand, we see how the rule was "born in sin", as Coke's text about the supremacy of contractual texts did indeed create a chauvinistic act. On the other hand the historical reality that made the rule so female-

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<sup>113</sup> J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 348-349 (fourth edition, 2002).

<sup>114</sup> Coke's report, *supra* note 44, at 89-90 ("...it was proved by diverse witnesses that the said Earl Edward...told them, that the said countess should have the manor...").

excluding to begin with has so changed by the beginning of the twenty-first century that one might argue that what was born in sin is now purified and hence sustainable. But is it?<sup>115</sup> To address this question I feel I should go smaller<sup>116</sup> again: to the details of the text that supposedly constituted the parol evidence rule and then to the specifics of its creation.

### III. CLOSE READING OF THE TEXT

One specific paragraph of Coke's report has been quoted repeatedly through the centuries and indeed has been seen as constituting the modern parol evidence rule. As these words have remained influential long after the litigation that led to their writing was forgotten, it is important to look at them more closely:

“...it would be inconvenient that matters in writing made by advice and on consideration, and which finally import the certain truth of the agreement of the parties should be controlled by averment of the parties to be proved by the uncertain testimony of slippery memory. And, it would be dangerous to purchasers and farmers, and all other in such cases, if such nude averments against matter in writing should be admitted.”<sup>117</sup>

Several characteristics of the newborn rule are evident even from its wording alone: its aspiration to separation, its hierarchical nature, its alleged rationality, its claim to certainty and its pro-market orientation. Together, as I will now further explore, these characteristics

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<sup>115</sup> For negative answers from feminist perspectives see PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991) 106; Judith L. Maute, *Peevyhouse v. Garland Coal & Mining Co. Revisited: The Ballad of Willie and Lucille*, 89 NW. U. L. REV. 1341, 1412-1416 (1995). However, these responses are based on the current American form of the Parol Evidence Rule where as mine concentrates on exposing its older English roots.

<sup>116</sup> Here I am inspired by Prof. Mariana Valverde's approach. MARIANA VALVERDE, *LAW'S DREAM OF A COMMON KNOWLEDGE* (2003).

<sup>117</sup> Coke's report, *supra* note 44, at 90.

portray a highly masculine profile, based upon common stereotypes of men, while alienating traits which are usually (and, again, stereotypically) associated with femininity.<sup>118</sup>

#### A. *An Aspiration to Separation*

By *separation* I mean the assumption that the written text of the contract can and should be separated from all that surrounds it. The above quote from our Case divides the world into two groups: the first is “matters in writing” – a phrase which appears twice in this short paragraph – and the second group – also appearing twice – is that of “averments”. It is easy to see what “matters in writing” are, given the very tangible nature of the written words; it is much more difficult to grasp what stands against it, under the title “averments”. Literally the last term refers to the action of proving the truth, and etymologically it comes from Latin (*advēre*) and French (*avére*), which emphasize the same search for the truth.<sup>119</sup> Legally the term was reserved for a formal offer to prove a line of facts, to verify what was pleaded. Confronting “matters of writing” with “averments” suggests that the two groups are indeed separable: there are indisputable facts that are part of the written text and there are other *alleged* facts that need to go through the process of averment; there are “solid” facts that are included in a “matter in writing” and there are “fluid” facts that exist in the “slippery memory” of the witnesses. Since the rule quoted above bans the second type of facts, the fluid facts, it seems that a separation between the solid and the fluid is inherent to it and defines its very essence.

But, the separation is not that simple. Just consider, for instance, the fact that the trustees of the first indenture were Gilbert Gerard and Thomas Holcroft. Since these names were written

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<sup>118</sup> By highlighting the correlation between the words used to phrase the parol evidence rule and gender stereotypes, I do not in any way mean to imply that such stereotypes are representative of a true essence of either gender or should be sustained. On the contrary, in doing so I hope to expose more of the rule’s biased nature.

<sup>119</sup> OED, *supra* note 62.

in the indenture itself, they can be seen as “solid” facts that come from a “matter in writing”. But what about the family ties of these two trustees to Isabel the Countess of Rutland? As we saw earlier they were *her* relatives, obviously a fact that might support her claims. But what kind of fact is that? Fluid? Solid? On the one hand, the family ties are not part of the written text, but on the other hand the name Thomas Holcroft is written and might be connected easily to the Countess’ maiden name, which is not written. Are we facing an averment which is going to be rejected under the new rule or are we in the realm of “in writing”? Or perhaps Holcroft’s connection is part of the written text while Gerard’s ties are only a fluid fact?

The same question arises regarding the “Lady Park”. The name of that property was almost certainly written on the first indenture, but its use as a hunting place for ladies probably was not mentioned. Is it enough that the word “lady” was written to make its special meaning a matter in writing – or is this contextual information too fluid and therefore in need of averment? As these brief examples illustrate, the division at stake is not that natural and is more a result of a conscious and somewhat arbitrary effort.

The ability to separate “matters in writing” from other facts that require averment stands at the base of a rule that suggests forbidding such averment. Still, it is worth noticing that it also works the other way around: a legal system which adopts such a rule is aspiring to separation and thus declaring its strong belief in the positive value of separation.

A closer look at the tendency to separate things and to divide them into disconnected groups might expose a gendered facet of the rule.<sup>120</sup> The general argument is that the very attempt to draw strict borderlines and build high walls between concepts correlates with masculine

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<sup>120</sup> Note that this is a contemporary look. It is based on the assumption that even if the early-modern reality has changed in a manner that makes the contractual text accessible to women, still the rule that prefers the text can harm women due to its masculine nature.

stereotypes. Such attempt is based upon a belief that the ability to separate one thing from another is a human achievement and a sign of development. A further underlying belief is that through acts of disconnection we will find ways to better control our lives, by organizing them in neat and independent categories.

Fundamental ideas that shape western culture support and reinforce the linkage between maleness and the capability of creating a separation. One legendary instance is Sigmund Freud's theory concerning the stages of development of the human personality. According to this theory boys deal with their Oedipal complex by *separation*: the boy represses his libidinal impulses toward the mother and detaches himself from her. Freud draws a connection between this crucial separation and the boy's competence to develop his super-ego. Problematically, but nevertheless with enormous influence on our culture, he then goes on to claim that boys enjoy a moral superiority over girls who remain entangled in their own Electra complex without a similar separation ability that would enable them to resolve it.<sup>121</sup>

In contrast to this masculine image, women are not identified with the trait of separation. From cultural feminism we have learned that women do not perceive themselves, their tasks or their experiences as isolated units. Motherhood, as a leading example, pushes women to do just the opposite – to combine – and not to separate – their spheres of involvement: career, parenthood, and so forth.<sup>122</sup> Radical feminism is known to respond sharply to this argument, and maintains that such description of women is not their nature, but rather a symptom of

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<sup>121</sup> Naturally, this last part of the theory - the equation of separation and development - has attracted a great deal of feminist criticism. It is important to mention that a strong argument - which supports the feminist criticism - has recently been made from a masculine perspective. The claim is that the separation and disconnection model not only deprives women but hurts men as well. For example, in his first book psychotherapist Terrence Real claims that the separation process does not advance men or symbolize their development, but is rather a social dictate imposed on men, one which exacts a heavy toll and leads to male depression. See TERRENCE REAL, *I DON'T WANT TO TALK ABOUT IT* (1998).

<sup>122</sup> Robin West, *Jurisprudence and Gender*, 55 U. Chi. L. Rev. 1 (1998). On the reality of such efforts to combine see e.g., Jacquelyn H. Slotkin, *Should I Have Learned to Cook? Interviews with Women Lawyers Juggling Multiple Roles*, 13 HASTINGS WOMEN'S L.J. 147 (2002).

their weakness and inferiority: male power perpetuates its control over women, among other methods, by describing them as incapable of the correct and admired way of thinking – that is, thinking that distinguishes and separates.<sup>123</sup> However, despite this disagreement the feminisms are united in their objection to the idea that separation is attainable and valuable.

Applying this critique to the separation at hand, as done under the parol evidence rule, it can be argued that the attempt to distance text from context and “matters in writing” from “averments” presents a masculine model. Dealing with the messy information that might shed light on the contract’s interpretation by arbitrary categorization of its pieces is not necessarily a sign of intellectual or moral development. Indeed, it is an indication that the chosen model suffers from a lack of feminine qualities.

### *B. A Hierarchical Nature*

The dichotomies of text/context or “matters in writing”/“averments” entail not only a dubious separation but also an evident hierarchy. The written text is placed high above the “other” pieces of information. Such positioning is made clear by the text quoted earlier in two ways: by praising the superior term and by condemning its lower counterpart.

As to the praise, the text symbolizes clearly which of the dichotomized possibilities we should trust. The most conspicuous signifier is the association of the “matter of writing” with the word “truth” - and not just with a simple truth but with a “certain” one. Indeed the uplifting label of “certain truth” is so powerful that it is almost unnecessary to look for other signifiers. However, the characterization of writing as “made by advice and on consideration” powerfully suggests how thoughtful the process of writing is and hence how clever is its result.

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<sup>123</sup> See e.g., Catharine A. MacKinnon, *Difference and Dominance: On Sex Discrimination*, in FEMINISM UNMODIFIED 32 (1987).

The element of condemnation of “averments” involves several signifiers. The first is quite hidden and might work unconsciously – the inferior end of the hierarchy does not even have a name. As we saw earlier, the term “averments” covers something ambiguous defined only as the negation of what was put in writing, something still waiting to be proved. The lack of a name is meaningful when the question of dependability is at stake – how can one trust that which has no name? The namelessness is a representation of nonexistence and it directly leads to the desired conclusion, i.e. that these “averments” should be ignored.

Second, the text seems to verify our understanding of the hierarchy by using derogating signifiers as well. In contrast to the “certain truth” which produces the “matters of writing”, the averments are “uncertain” since they result from uncertain testimony.

Even though this would be more than enough to clarify the order of things to the reader, the text provides a third indication by stressing that the uncertainty derives from “slippery memory” – a disparaging term particularly in the context of the comparison with “matter of writing”; in Coke’s “lexicon”, as well as in others’ texts, “slippery memory” was frequently used as an antonym of fine legal writing and indeed as a means for advocating writing as well as printing and publishing.<sup>124</sup>

The fourth “hint” regarding the bottom of the hierarchy emerges from the use of the word “nude” to describe the averments. In legal archaic language “nude” meant unattested, unconfirmed, unproved.<sup>125</sup> In a narrower contractual context it bore the even worse meaning

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<sup>124</sup> RICHARD HELGERSON, FORMS OF NATIONHOOD: THE ELIZABETHAN WRITING OF ENGLAND 81 (1992); Richard J. Ross, *The Memorial Culture of Early Modern English Lawyers: Memory as Keyword, Shelter, and Identity, 1560-1640* 10 YALE J.L. & HUMAN. 229, 273, 305, 326 (1998). In another case reported by Coke he used an expression which was even more clearly negative saying: “therefore the intention of the parties never was to leave it to the *sliding and slippery memory* of men, which would be lost in a short time...” See *Dowman’s Case* 9 COKE REPORT 7b, 77 ER 473 (emphasis added).

<sup>125</sup> OED, *supra* note 62.

of being *void* due to lack of consideration unless made by *written* deed.<sup>126</sup> In any case, to say that the averments are “nude” clearly adds to their characterization as undependable.

And finally, the vertical view of the relationship between the written and the unrecorded is further strengthened by the less general words that precede the words that are quoted here, words which clearly portray a ladder:

“...if other agreement... be made by writing, or by other matter *as high or higher*, then the last agreement shall stand; for every contract or agreement ought to be dissolved by matter of *as high a nature* as the first deed.”<sup>127</sup>

That a hierarchical rule is of a hegemonic nature needs little elaboration. As many feminists, from different strands of feminism, have claimed before – women tend to be the systematic victims of hierarchal thinking and are usually associated with the lower end of each fundamental dichotomy that constitutes the western culture. In leading dichotomies such as normal/strange, subject/object, main/marginal, active/passive, culture/nature, rational/emotional, strong/weak, public/private, autonomous/dependant, and so on, the female stereotype is echoed by the second, less appreciated side of each pair.<sup>128</sup> Whenever a dichotomous separation is defined, the human instinct responds with vertical arrangement of its parts. Furthermore, many times creating such a vertical arrangement and defining the supremacy of one of the items in each pair is indeed the initial motivation for distinguishing the favorite item from its surroundings to begin with. Applying this analysis to the dichotomy at hand, we can instantly observe the phenomenon in action in Coke’s text: in the dichotomies of certain/uncertain, truthful/deceitful, solid/fluid, written/oral and covered/nude – as in the many other dichotomies mentioned before – the female stereotype correlates with the second item in each pair, the less valued, the less trustworthy.

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<sup>126</sup> *Id.*

<sup>127</sup> Coke’s report, *supra* note 44, at 90.

<sup>128</sup> HILAIRE BARNETT, INTRODUCTION TO FEMINIST JURISPRUDENCE 201 (1998).



### C. An Alleged Rationality

What did Coke mean when he wrote that it would be *inconvenient* to let matters in writing be controlled by averment? To address this question it is important to realize how frequent and intentional the legal use of this word was.<sup>129</sup> Coke used *inconvenient* to mean *inconsistent*<sup>130</sup> and preached for a consistent rule of law, a rule that adheres to its internal logic. Ideally such a rule would be based upon general reason, would offer a broad solution which could apply to most cases, and would better serve the public interest. The use of *inconvenient* thus represented flinching from reasonableness. It also worked the other way around to signify that avoiding such inconvenience would lead to a continuous possession of reason as well as to its preservation. In a world which defines rationality as the “the quality of possessing a reason; the power of being able to exercise one’s reason” staying away from the inconvenient meant just that – appearing to uphold rationality.<sup>131</sup>

That Coke was aware of the risk to concrete justice that is involved in such an approach is quite clear. His response was that it is better “that a private person should be punished or damnified by the rigor of the law, than a general rule of the law should be broken...”<sup>132</sup> The use of *inconvenient* thus represented a fairly rigid devotion to abstract rationality at the conscious expense of individuals’ concerns.

To say that it would be inconvenient to let the messy reality influence the interpretation of a written contract is, in fact, to say that dedication to the written is logical and rational. This

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<sup>129</sup> The term was quite common but no other reporter of the time seemed to use it more than Coke who – according to the English Reports online at [www.jutastat.com](http://www.jutastat.com) – used it 42(!) times throughout his 13 volumes of reports.

<sup>130</sup> Decoding “inconvenient” also involves coping with either Latin or Law-French. See *supra* note 46 and the text next to *infra* note 194. See also Allan D. Boyer, *Understanding, Authority and Will: Sir Edward Coke and the Elizabethan Origins of Judicial Review* 39 B.C.L. REV. 43, 72 (1997) (“Coke continued: “*Nihil quod est inconueniens, est licitum*. And the law, that is the perfection of reason, cannot suffer anything that is inconvenient.”).

<sup>131</sup> The quote is taken from the OED, *supra* note 62.

<sup>132</sup> BOYER, *supra* note 78, at 72 (quoting Coke’s words from 1635 in his A LITTLE TREATISE OF BAILE AND MAINPRIZE). 29-30

raises a gender issue that has been addressed in numerous feminist works. In a nutshell, such a critique denounces the logo-centricity of law and its artificial mask of rationality. From a feminist perspective these traits tend to silence and frustrate many women by denying the value of other means of expression and other sources of knowledge which are not a product of lingual analysis.

Even at the lingual level the search for the antonym of “rational” is a telling one. Apart from the obvious “irrational”, such a search would produce words such as: illogical, unreasonable, foolish, crazy, ridiculous, absurd, silly, unfounded, groundless and so forth. Evidently those are all disapproving ways of describing what is not rational. However, studies have suggested that “not-rational” ways of communication are an integral part of women’s lives, as women are more sensitive to non-lingual symbols such as body language, tone of voice or facial expression, and indeed tend to use such symbols much more than men.<sup>133</sup> While one might resist the essentialist flavor of these findings, as I do, if only because there can not be one “women’s way of thinking”, there is still a disturbing point that is worth making here. To reject proof of unwritten facts as “inconvenient” and irrational means to discard what is perceived as “feminine” knowledge together with ways of communication that are more associated with women.<sup>134</sup> It is almost needless to note that this was an especially biased move in early-modern times when the official way of performing rationality, i.e. legal writing, was not even an available option for women. Critiques of this kind challenge the dominance of rationality in the legal discourse and call to open legal space for extra-rational

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<sup>133</sup> See, e.g., JANET S. HYDE, *HALF THE HUMAN EXPERIENCE* 112-121 (fifth edition, 1996). To use only one legal example it seems that female lawyers and clients use emotional verbs a lot more than their male lawyer and client counterparts. Peggy Davis, *Contextual Legal Criticism: A Demonstration Exploring Hierarchy and ‘Feminine’ Style*, 66 N.Y.U. L. REV. 1635, 1660 (1991).

<sup>134</sup> See, e.g., Kathryn Abrams, *Hearing the Call of Stories*, 79 CALIF. L. REV. 971, 976 (1991) (“many feminist narratives contain an epistemological claim. The “scientific rationality” that prevails in our society -- and in our legal argumentation -- privileges universality, statistical significance, and logical deduction as ways of knowing about the world. Experiential narratives are significant not only for the substantive message they convey but for the way they claim to know what they know. Feminist narratives present experience as a way of knowing that should occupy a respected, or in some cases a privileged position, in analysis and argumentation”).

knowledge.<sup>135</sup> It seems to me that it is exactly the creation of such a space that was prevented so effectively back in 1604 by the formation of a contractual parol evidence rule.

#### D. *A Search for Certainty*

One reason why adhering to the written is considered rational (“convenient”) is that it entails or even promotes certainty.<sup>136</sup> According to our quoted text, the written document carries the “*certain truth*” while the averments are made of “*uncertain testimony*”. Positioning “*certain truth*” against “*uncertain testimony*” not only suggests the preference for what is written, to which we referred in the earlier discussion of “*hierarchy*”, but can be seen as a representation of the certain as well as a barrier against the deceitful nature of uncertainty. The question would then be – is this really the case? Assuming certainty is achievable, which is doubtful, is it necessarily better? Is it in fact truthful?

From a feminist perspective, as well as from a post-modern viewpoint, the answer seems quite negative. To assume that certainty is so desirable means to believe that we should struggle to maintain the status-quo. But who is most interested in maintaining the status-quo if not the powerful who are best served by it and feel comfortable with it? For the weaker members of a given society, those who yearn for change, it is the status-quo that prevents hope. For such members their inferiority is certain and the uncertain transformation is what they dream of.

Certainty, in other words, is valuable for some but not for all. It is valuable not necessarily because of its “*truthful*” nature but because of the service it provides for the “*haves*” at the

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<sup>135</sup> See, e.g., Paul J. Spiegelman, *Integrating Doctrine, Theory and Practice In the Law School Curriculum: The Logic of Jack’s Ladder in the Context of Amy’s Web*, 38 J. LEGAL EDU. 243, 254-255 (1988); Kate Green, *Being here: What a Woman Can Say about Land Law*, in FEMINIST PERSPECTIVES ON THE FOUNDATIONAL SUBJECTS OF LAW 87, 102 (Anne Bottomley ed., 1996) (“Law comes from the whole of human life, not only from the disembodied intellect.”).

<sup>136</sup> And indeed this logic is emphasized through quoting the Case until nowadays. See, for example, the BCCI decision, *supra* note 41, in section 54. Compare to Peter Linzer, *The Comfort of Certainty: Plain Meaning and the Parol Evidence Rule*, 71 FORDHAM L. REV. 799 (2002).

expense of the “have-nots”. As a representation of a concrete interest, certainty is not *The* truth but rather a partial version of truth, namely the part that was well documented in legal written terms. From the standpoint of those with no access to the written text there is nothing attractive about the “certainty” that is gained from adopting it. The tone that praises certainty is, thus, quite masculine - it holds no acknowledgement of doubt or equivocation and it does not reflect what the English poet Keats termed “Negative Capability”: the capacity to **remain** in situations of uncertainty, mystery and doubt.<sup>137</sup>

Support for this may come by deconstructing the juxtaposition of writing to averments. When Coke’s text links writing with certain truth and averments with uncertain testimonies (lies) as a reason for preferring the written, we could try a “Derrida-like” reversal.<sup>138</sup> We could consider the possibility that the virtue of the certain could be seen as the virtue of the uncertain and vice versa. What this “upside-down” view can expose is that the certain is no more truthful than the uncertain, indeed if anything it has the potential of being more misleading. As a written artifact the certain is usually more tangible than any other source of information, but it is exactly its “black and white” nature which allows manipulative planning through editing and revising. The human control of the written distances it from the authentic happening until it can no longer represent a truth, let alone a certain truth. Indeed, the very technique of law reporting in which Coke was engaged while creating the dichotomy

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<sup>137</sup> Frug, *supra* note 13, 117-119. The analysis focused on Prof. Posner’s tone in a piece of his own which praised certainty.

<sup>138</sup> The most famous example of this technique is Derrida's *Of Grammatology* where interestingly enough he treats the opposition of speech to writing (arguing that the western modern culture prefers the former and not the latter). See JACQUES DERRIDA, *OF GRAMMATOLOGY* (1976), (Gayatri Spivak, trans. 1997). As Balkin has concisely explained: “Deconstructive reversals show that the reasons given for privileging one side of an opposition over the other often turn out to be reasons for privileging the other side. The virtues of the first term are seen to be the virtues of the second; the vices of the second are revealed to be true of the first as well. This undoing of justifications for privileging is part of the deconstructionist aim of “ungrounding” preferred conceptions by showing that they cannot act as self-sufficient or self-explanatory grounds or foundations.” J. M. Balkin, *Deconstructive Practice and Legal Theory*, 96 *YALE L. J.* 743, 755 (1987).

of certain/uncertain confirms this post-modern view: the written report was not the truth but the uncertain version of the truth, a late interpretation of a specific reporter, and as I will try to show later on, one which was heavily dependent on and reflective of the reporter's personal views and agenda.

To sum up, it seems essential to view the quest for certainty with suspicion; as reflecting hegemonic motives in portraying as universally beneficial something that actually benefits only a few. The question of who these favored few are and what gender they belong to will now conclude this section.

#### *E. Præ market Orientation*

Coke's much quoted text warned that "it would be dangerous to purchasers and farmers" to admit nude averments.<sup>139</sup> The word "purchasers" probably referred to people who acquire land or property in any way other than by inheritance, while "farmers" were most likely those who rent or have a lease of such property.<sup>140</sup> Since neither purchasers nor farmers were directly involved in this specific case it seems that the use of these words was more metaphoric, reflective of a greater concern.<sup>141</sup> What was the danger that Coke had in mind? Who or what was he trying to defend?

The authentic answer to these questions may not be clear, but it appears that Coke was making a policy point: things will work better if we adhere to written words and not let them be subverted by other pieces of knowledge. Exactly which things will work better is answered by the formula of "purchasers and farmers" – and indeed it seems that their

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<sup>139</sup> For other reports in which Coke used those words see *Dillon v Freine* 1 COKE REPORT 120a, 76 ER 270; *Smith v Mills* 2 COKE REPORT 25a, 76 ER 441; *Green v Balser* 2 COKE REPORT 46a, 76 ER 519; *Mildmay's Case* 6 COKE REPORT 40a, 77 ER 311; *Burrel's Case* 6 COKE REPORT 72a, 77 ER 364.

<sup>140</sup> OED, *supra* note 62.

<sup>141</sup> Note that the Countess of Rutland herself might be considered as a potential purchaser but from her point of view there was certainly no danger at all in admitting averments, to the contrary: she was the one who was offering these averments.

concerns and businesses were Coke's focal point. Plainly he was not interested in the way noblemen or their heirs received their property due to their *status*, but rather in those who used *contract* for exchanging property. Whilst society as a whole was perhaps taking the first steps of what Maine would much later describe as a long journey from status to contract,<sup>142</sup> Coke seemed interested in the contractual tool itself, the one used by purchasers and farmers. The danger he visualized was in all likelihood the danger of chaos, of never-ending clashes and contradictions between the written contracts and the oral promises, between the legal texts and the human contexts that threaten to change their meaning. To enable commercial activity, to let purchasers and farmers bargain, it must have been seen as crucial to have law and order, law that maintains the order, law that embraces the written and knowingly chooses to ignore the surrounding circumstances. This last point is strongly connected to the value of certainty that was just discussed and it suggests that the first version of the parole evidence rule should be seen as a "pro-market" act, one that aspires to advance the embryonic market and to facilitate its operation.<sup>143</sup>

The view that this was a period of critical transformation from a feudal regime to a more contractual economy has been argued and contested at length and needs little exploration here.<sup>144</sup> What is important to realize is that gender-wise such commercial motives as

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<sup>142</sup> SIR HENRY SUMMER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS* (1861).

<sup>143</sup>The term "market" should be read with caution as it is extremely doubtful that a "market" in the sense we know today was even beginning to rise. What I mean by "market" simply refers to "business-like" activity which is executed by contracts.

<sup>144</sup> LAWRENCE STONE, *THE CRISIS OF THE ARISTOCRACY 1558-1641* (1965); KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME*; A.W.B. Simpson, *Land Ownership and Economic Freedom*, in *THE STATE AND FREEDOM OF CONTRACT* 13-43, 23 (Harry N. Scheiber ed., 1998); ANDREW MCRAE, *GOD SPEED THE PLOUGH: THE REPRESENTATION OF AGRARIAN ENGLAND 1500-1660* 14 (1996). ("The great sales of church lands in the middle of the 16th century had begun the creation of a market in real property and the opening of new positions in the Tudor bureaucracy to those without land had created a new group of buyers, expanding the landed class"); Hill, *supra* note 64, at 102 ("in the late sixteenth and early seventeenth centuries, as agriculture was being commercialized, so the Common Law was being adapted to the needs of capitalist society and the protection of property."); To a suggestion that this emerging contractual focus was occupying the dramatic imagination of the period see LUKE WILSON, *THEATERS OF INTENTION: DRAMA AND LAW IN EARLY MODERN ENGLAND 70-71* (2000).

represented in the text by the terms “purchasers” and “farmers” are, again, truly and highly problematic. The placement of women outside the admirable spheres of commerce/business/market and within inferior realms, namely the domestic spaces, is a phenomenon that has been explored by a number of scholars, in varied contexts.<sup>145</sup> Yet, it is worth repeating the point: purchasers and farmers, who contracted at the core of what was then “the market”, might have been better off relying on the written words which they could most probably write and control. Women at the time were most likely not better off. For them, as the Countess of Rutland’s Case neatly demonstrates, the chances to find the right interpretation of the contract within the four corners of the written document were very slim.

#### *F. Textual Adaptation of a Masculine Image*

To sum up the above five points, it seems that the text itself speaks in a gendered language, winking at the masculine stereotypes while emphasizing a deterrence from association with feminine ones. Whether Coke was aware of this impact is highly doubtful, but it may also be less important. Two other points seem more imperative here. First, the fact that it is this text that survived through the centuries and has been quoted repeatedly is remarkable. For some reason Coke’s phrasing “made sense” for generations to come and I think that the reason for this had much to do with the structuring of gender in our society. The oppositions that were used, as well as the way of putting things “in order” and under control, probably correlated and resonated with what was encrypted in the developing modern legal minds. Saying that the rational approach is better than the irrational one, to use only one example, probably felt natural and axiomatic – reflecting the way things *are* without the need to claim how they *should be*, just as men are, as a matter of fact, more dominant than women.

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<sup>145</sup> See, e.g., Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 NYU L. REV. 1559 (1991); John Wightman, *Intimate Relationships, Relational Contract Theory, and the Reach of Contract*, 8 FEMINIST LEGAL STUDIES 93, 98-102 (2000).

The second point concerns legitimacy and authority. For reasons that I will discuss in the fourth part, Coke’s goal appears to have been to build a better image for the Common Law. If one is engaged in such a mission, then describing the law as more masculine-like and less womanly is a fruitful and powerful rhetoric, one that has the ability to establish authority and legitimacy.<sup>146</sup> It is, to use Stanley Fish’s words, an “amazing trick” that is done by the law – “its ability to construct the (verbal) ground upon which it then confidently walks.”<sup>147</sup>

### **Nicolette**

She lost her home.

The year was 2003 and she enjoyed legal personhood and had the ability to be a party to the contract with John. And yet the contractual texts only described how she received her home as a gift from John and how, only few months later, she gave it back to him. The judges treated every other part of her story as irrelevant. But, the decision what is relevant and what is not is seldom a neutral one. The exclusion of the context by means of adherence to the text necessarily involves the creation and inclusion of a *different* context – one which does not exist in reality. This new imaginary context is loaded with monogamist patriarchal values.

The opening sentence of the appellate decision presents Nicolette as a nanny and declares that she worked for “John and Lynn, *husband and wife*”.<sup>148</sup> The rest of the judicial text diminishes the ongoing relationship Nicolette had with John, acknowledging only the most necessary facts regarding their joint son. Furthermore, the judges tell us how she “and the

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<sup>146</sup> I will elaborate on this idea by comparing Coke’s efforts to Portia’s efforts in the fourth section.

<sup>147</sup> I thank Kathryn Abrams for this way of putting the point and for referring me to Fish’s helpful metaphor. See also, Kathryn Abrams, *REVIEW ESSAY: The Unbearable Lightness of Being Stanley Fish: THERE’S NO SUCH THING AS FREE SPEECH AND IT’S A GOOD THING, TOO*, 47 STAN. L. REV. 595, 602 (1995).

<sup>148</sup> *Clark v. Hannah-Clark*, *supra* note 2 (Italics added).



boy moved into the [cottage] located near John and Lynn's home".<sup>149</sup> Notice the sense of invasion and penetration created by this phrasing. Is it not obvious that as a single mother with a newborn child (not a boy) she could not do such a thing without, at a minimum, John's invitation and Lynn's silent consent?

Of course the unusual state of a married couple and their children living together with the husband's lover and their illegitimate child, for years, could have been seen as a real challenge to the stereotyped monogamist patriarchal model. However, these special circumstances were "translated" by the court into the standard patriarchal terms. In the thrifty judicial text it was emphasized – twice – that Lynn did not know a thing, portraying her mainly as the betrayed wife. As part of this naïve description we are told that during all these years Lynn *adored* Nicolette and John's son and treated him as her own *grandson*.<sup>150</sup>

What an amazing image this extraordinary choice of words creates: the whole unorthodox situation is normalized by a serene depiction of an even bigger "normal" patriarchal family, consisting in its adapted state of *three* generations: grandchildren, parents and grandparents. In this way the image of a "warm-hearted granny" is added to Lynn's portrait and further strengthens the need to protect her from her younger rival, that is, the need to protect traditional family values.

By suggesting this reading of the judicial decision I intend to call attention to the manipulative potential of the textual approach,<sup>151</sup> and especially its patriarchal content. Just as a judge in Isabel's times knew very well that women like her could not influence the

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<sup>149</sup> *Id.*

<sup>150</sup> *Id.* ("Lynn adored the child and treated him as grandchild").

<sup>151</sup> Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 COLUM. L. REV. 1710, 1731 (1997). Captivatingly, the author argues – from a very different point of view – that the parol evidence rule (or the plain meaning rule as he refers to it) is used in a manipulative way ("the rule is used mainly as a rhetorical device, aimed at disguising the active role courts play in contract interpretation."), *Id.* at 1731.

contractual words that controlled their lives, so are judges in Nicolette's times fully aware of the disparity of power between a famous and wealthy Hollywood couple and the "nanny of their daughter".

The nature of life dictates that the professionals who deal with contracts interpretation do have the context, or at least a part thereof, in mind. As a result, the refusal to even consider the context, the conscious choice to ignore it, is more than an omission. De facto it can be seen, somewhat post-modernly, as actively creating and then taking into account a *manufactured context* – one that does not exist. This context assumes, however implicitly, a reality which all know to be fictitious: as if Nicolette had sat in front of John and, utilizing her own rich legal and business experience, carefully negotiated, on an equal basis, the words of her contracts.

I imagine it is still possible to dismiss this disturbing contemporary example, perhaps by seeing the gendered results of rigid textuality as a mere coincidence. It is this last argument that pushes me to revisit early-modern England and to revert from Nicolette to Isabel, in search of an even deeper level of analysis. What follows, then, is a closer examination of the ideas, theories, impulses and intuitions that informed the establishment of the parole evidence rule by Coke's report of the Case.

#### **IV. COKE'S REPORT**

To hold Sir Edward Coke responsible for the establishment of the contractual parole evidence rule requires some justification. After all, he was only the *reporter* of the Case and as such might be regarded as merely repeating what the King's Bench judges, led by Judge Popham,

had been saying. Yet several reasons suggest that such a narrow view of Coke's report of this Case is inadequate.

In the first place, Coke was not just yet another reporter, he was *the* reporter, and the only reporter who did not have to attach his name to his volumes of reports: considered to be the prototype, they were simply called "reports". He served as a Member of Parliament, Solicitor General, Attorney General, Chief Justice of Common Pleas, and Chief Justice of the King's Bench. Add to this his comprehensive writings about the rules of England – the four volumes of the *Institutes of the Laws of England* – and it becomes evident how he came to be known as the supreme oracle of English law,<sup>152</sup> "what Shakespeare has been to literature."<sup>153</sup> In other words, no other English jurist of his time had gained more authority of the kind needed to establish new rules of law.

Secondly, we are fortunate enough to have another report of the same legal episode made by an additional reporter of the period, Sir George Croke.<sup>154</sup> According to his report, the ruling of the Case was based on the more traditional idea of estoppel and not on the novel idea of the parol evidence rule.<sup>155</sup> Contrasting these two reports suggests that it is Coke, more than the Judges of the King's Bench, who we should credit with the construction of the parol evidence rule. Indeed, based on a similar method of comparison – i.e., to an alternative report regarding the same case – it was argued that the rule in the prominent Shelly's case "owes its authority to Coke, not to the decision."<sup>156</sup>

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<sup>152</sup> HELGERSON, *supra* note 124, at 85. BOYER, *supra* note 78, at ix-x.

<sup>153</sup> WILLIAM HOLDSWORTH, *HISTORY OF THE ENGLISH LAW* 132 (1926).

<sup>154</sup> CROKE'S REPORT, *supra* note 45.

<sup>155</sup> MACNAIR, *supra* note 42, at 139.

<sup>156</sup> BOYER, *supra* note 78, at 117.

Thirdly, Coke is considered by many to have been the kind of reporter who would liberally insert his own comments in his reports while “not distinguishing...his own views from those he was reporting”.<sup>157</sup> And finally, and even more generally, Coke was a zealous representative of a generation of reporters who believed that the historical accuracy of the report and its faithfulness to the original were less important than the publication of the “correct” legal doctrine for the purposes of future use.<sup>158</sup> As part of this “liberal” concept of reporting, it was argued that while “reporting” Coke made an effort to place a “substantive gloss” on the Common Law.<sup>159</sup> One of his techniques was to emphasize a general principle that did not actually serve as the basis for the judgment in the particular nuanced case but was – at best – part of its *obiter dicta*.<sup>160</sup> This understanding of Coke’s general methodology appears to fit our Case nicely, since (as mentioned) the general rule he reported does not lead to the concrete result of the Case.

In light of the four aspects briefly explored above, it seems probable that it was Sir Edward Coke who developed the parol evidence rule out of the judicial decision in the Case of the Countess of Rutland. Put succinctly, we can say that Coke had both the opportunity and the motive to create such a rule at such a time. I will start by exploring the possible motivations that moved Coke to use his reporting capacity for the purpose of elevating the written contractual text. As we shall see, the concept which is represented by the parol evidence rule ties in with Coke’s more general ideas and ideologies in a way that can shed light on both the rule’s nature and the reasons for its formation.

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<sup>157</sup> BAKER, *supra* note 113, at 183. Damian Powell, *Coke in Context: Early Modern Legal Observation and Sir Edward Coke’s Reports*, 21 JOURNAL OF LEGAL HISTORY 33, 47 (2000).

<sup>158</sup> BAKER, *Id.* 183; Daniel J. Hulsebosch, *An ancient Constitution and the Expanding Empire: Sir Edward Coke’s British Jurisprudence*, 21 LAW AND HISTORY REVIEW 439, 455 (2003); For a similar argument see Powell, *Id.* at 41.

<sup>159</sup> Hulsebosch, *Id.* at 469.

<sup>160</sup> Theodore F.T. Plucknett, *The Genesis of Coke’s Reports*, 27 CORNELL L. Q. 190, 212 (1942).

## A. *Elevating the Common Law*

“...the common law is the best and most common birth-right that the subject hath for the safeguard and defence, not onely of his goods, lands and revenues, but of his wife and children, his body, fame and life also.”<sup>161</sup>

These famous words written by Sir Edward Coke capture what appears to have been the prevailing idea that drove his legal work: his boundless belief in the supremacy of the Common Law over any alternative legal system and his ongoing struggle to strengthen this superiority and to reinforce the dominance of the Common Law. Coke’s general commitment to the task of elevating the Common Law is much too expansive and profound to be addressed here in detail - however, what appears crucial to the linkage between Coke’s work and the parol evidence rule is the multidimensional way in which his obsession with the Common Law led him to the battle between the oral and the written: a battle of immense importance to our understanding of the creation of the rule.

### 1. *The Common Law vs. the Roman Law*

In 1571, when Coke left Cambridge to become a student of the law, Roman civil law had been already adopted by Germany, France, Italy, Spain, Portugal, Holland, and – most meaningfully – by Scotland too. The process, also known as the “reception”, generated considerable legal anxiety in 16<sup>th</sup> century England. England had not been part of the reception process and the common view had been until then that the English law should stay insular and different.<sup>162</sup> Nonetheless, we can imagine that retaining a system so manifestly different from that of the neighboring world might become a tremendously trying experience

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<sup>161</sup> SIR EDWARD COKE, *FIRST INSTITUTE OF THE LAWS OF ENGLAND* (A Systematic Arrangement by J. H. Thomas, London: 1818), 11.

<sup>162</sup> HELGERSON, *Supra* note 124, 67.

and the source of a great sense of inferiority. Indeed, “on the Continent, the English law was looked on as brutal”,<sup>163</sup> but a critique from within, made in the 1530s by Thomas Starkey, also condemned the English legal practice as medieval and barbarous.<sup>164</sup>

The attacks were obviously a source of significant apprehension and produced a defensive response accompanied by a desire for some assimilation. Calls for legal reform, calls to join Europe by adopting some version of the Roman civil law, were starting to be heard – and the idea that England needed a written law was growing out of the combination between two different schools of thought: Renaissance humanism and English Nationalism.<sup>165</sup> In 1535 a proposal was presented to King Henry III, a “*discourse touching the Reformations of the Laws of England*”, written by Richard Morrison. What was suggested was actually *writing* the law, and Morrison was paraphrased to say:

“What the Romans did the English can and should do. They should write the law, produce an English equivalent of the *Corpus Juris Civilis*. Not only would such a book remedy the law’s confusion and uncertainty, it would stand as a mark of civility, a mark of England’s freedom from barbarism.”<sup>166</sup>

This call remained unanswered for several decades. The mission was too challenging and intimidating. If possible at all, it requires a rare jurist who is shrewd, learned, ambitious, highly respected, experienced, self-confident, meticulous, and so on and so forth. It was Coke who had all these qualities (in large quantities) and who took upon himself the lifelong mission of writing down the laws of England. Other than him “no one had attempted a picture so comprehensive, legal exposition on so grand a scale”.<sup>167</sup> First came his 11 volumes

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<sup>163</sup> BOWEN, *supra* note 79, 64.

<sup>164</sup> HELGERSON, *Supra* note 124, 65.

<sup>165</sup> *Id.* at 101.

<sup>166</sup> *Id.* at 70.

<sup>167</sup> BOWEN, *supra* note 79, at 508.

of the *reports* and they were then followed by his four volumes of the *institutes*: “together they should represent the whole law of England, spread upon paper for students to learn and see.”<sup>168</sup>

Coke wrote for years with “a persistent awareness of a rival system of law against which English law had to defend and define itself”.<sup>169</sup> Moreover, by writing these laws down he was trying to create a new image for them. No longer would they be the lived memory of small professional communities; instead, they would become something else: more stable, more systematic, more approachable and, above all, more civilized. In other words, something that could compete with the Roman law.

It is worth stressing for our purposes that putting the law in writing was a way of fighting for the Common Law’s authority. In contrast to the Roman code, here the written result was not the authentic law, but a strategic *representation* of the law. The law itself remained *oral*, chiefly what the judges had said, for years, in courts. Indeed, Coke himself pointed to the risk inherent to this oral nature of the English law and explained the importance of writing by warning against the phenomenon of “slippery memory”. Interestingly, he used this same phrase again and again, including in our parole evidence rule Case, whenever he wanted to justify writing. The danger of “slippery memory” was the danger of the “slippery slope”, the danger of losing authority. So, by mimicking the Roman law technique of writing, Coke tied the Common Law to one of the most admired characteristics of its rival, and could thus present the Common Law as the “most equal, most certain, of greatest antiquity and least delay, and most beneficial and easy to be observed.”<sup>170</sup>

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<sup>168</sup> *Id.* at 508.

<sup>169</sup> HELGERSON, *Supra* note 124, at 70.

<sup>170</sup> 2 CO. REP., opening sentences of the preface.

## 2. *The Common Law vs. the Oaths*

The Common Law was threatened by its “barbarous” image not only because of the widespread reception of Roman law, but also as a result of the flaws of its own procedures. Chief among these was wager of law - an archaic procedure, originally used in local courts all over England and a very popular defense method in cases of unpaid debt. When sued for not paying their debt, the defendants could ask to “wage” (that is, make) their law by taking an oath that they do not owe the money or the goods in question. The defendant would then bring eleven neighbors or friends (compurgators) who strengthened the initial oath by taking a secondary oath that the defendant is trustworthy and their oath was good. As time passed, this procedure expanded from the local courts to the central courts in Westminster, where it became increasingly unfeasible to bring close neighbors or friends to support the defendant’s claims.<sup>171</sup> A fictional practice of using “professionals”, hired oath-helpers, also known as “knights of the post”, was developed to cope with this problem.

At the end of the sixteenth century and at the beginning of the seventeenth century pamphlets were mocking the oath-helpers who “will swear you anything for twelve pence”, and the period’s literature was full of references to the corruption of the knights of the post.<sup>172</sup>

Dependence upon this old procedure entailed such risk to one’s reputation that even its classic beneficiaries, the defendants, were increasingly deterred from relying on it.<sup>173</sup> Not surprisingly, the practice of waging the law came at the price of increasing disrespect for, and diminishing faith in, the legal system that used it and relied on it to do justice. As Lorna

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<sup>171</sup> BAKER, *supra* note 113, at 74.

<sup>172</sup> Lorna Hutson, *Not the King’s Two Bodies: Reading the ‘Body Politic’ in Shakespeare’s Henry IV*, in *RHETORIC AND LAW IN EARLY MODERN EUROPE* 166, 184-185 (Victoria Kahn & Lorna Hutson eds. 2001).

<sup>173</sup> To use David Ibbetson’s words: “to wage one’s law was tantamount to admitting liability and refusing to pay the debt due. A gentleman would not, dared not, wage his law even when confronted with a packed jury of an obviously unfounded claim.” David Ibbetson, *Sixteenth Century Contract Law: Slade’s Case in Context*, 4 *OXFORD JOURNAL OF LEGAL STUDIES* 295, 312-313 (1984).



Hutson notes, “In literary texts, the openness of wager of law to abuse became symbolic of wider corruption in judicial and political systems.”<sup>174</sup>

The use of oaths at the turn of the sixteenth century was therefore something that needed to be abolished and it was, again – like writing the law – a mission for Coke to fulfill.<sup>175</sup> He did this by challenging the system of oaths as part of his argument in the famous *Slade’s case*.

The decision in this case practically eradicated the wager of law.

A keystone of the modern law of contract, *Slade’s case*, which was litigated during the years of 1597-1602,<sup>176</sup> is known for its legal recognition of “implied promises” arising from a contract.<sup>177</sup> However, as David Sacks pointed out, legal historians tend to agree that the decision in *Slade* was at its time mainly:

“a vehicle for accomplishing what the lawyers and judges were really after – namely, *the displacement of the older forms of action in contract with new ones capable of attracting potential plaintiffs to the common law courts...*”<sup>178</sup>

We will go back to these marketing efforts later, but for now it is important to see more generally the pains that Coke had taken to extricate the Common Law from the corrupted and barbarous stigma caused by oaths, and to portray the Common Law as a more rational and better controlled legal system. In this regard Coke had to address the claim that it was inappropriate to allow plaintiffs to opt for a procedure that would deny the defendants’

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<sup>174</sup> Hutson, *supra* note 172, at 187. Among the most influential Elizabethan authors who dealt with the problem of oaths was William Shakespeare, BOYER, *supra* note 78 at 133.

<sup>175</sup> Meaningfully, it was Judge Popham - Coke’s mentor, the head of the King’s Bench and, the same judge who was reported by Coke as forming the parol evidence rule in our Case - who entrusted the Case in Coke’s experienced hands.

<sup>176</sup> These dates, as well as the contractual context and the identity of its reporter, make *Slade’s case* entirely relevant to the discussion regarding our Case of 1604.

<sup>177</sup> The recognition of implied promises was necessary in order to facilitate the use of the new action of *assumpsit* in a larger variety of contractual situations, including cases in which the plaintiff could have used the old form of action of debt.

<sup>178</sup> David Harris Sacks, *The Promise and the Contract in Early Modern England: Slade’s Case in Perspective*, in RHETORIC AND LAW IN EARLY MODERN EUROPE, *supra* note 172, 28, 37 (emphasizes added).

“right” to wage their law. It was argued that this was especially inequitable in situations where defendants had fulfilled their share in the transaction privately and hence could not otherwise prove their innocence.<sup>179</sup>

To this Coke replied that the reliance upon oaths “induces men... to perjury”.<sup>180</sup> At the practical level his argument, albeit cynical, was at once rational, practical and highly educational: the debtor should obtain a receipt.<sup>181</sup> Here, again, we see Coke dealing pragmatically with the tension between the oral (the private payment) and the written (the receipt) and preferring the tangible record over the elusive oaths. At the policy level his argument embraced the King’s Bench modern view that considered the wager of law an “anachronistic and irrational mode of trial”<sup>182</sup> and hence offered a trial by jury.

Whether the trial by jury of the early-modern times was indeed better is highly doubtful,<sup>183</sup> but nevertheless what is important to our discussion is that it had *the appearance* of being more rational and therefore was considered an improvement. At any rate, the combination of both the practical level and the policy level of Coke’s response led to the conclusion that the best, if not the only, way to refrain from being charged for breaching one’s contract is to present tangible proof to the jury.

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<sup>179</sup> BOYER, *supra* note 78, at 130. The defendant could wage his law only in the old-fashioned action upon debt and not in the newer and emerging action of *assumpsit*.

<sup>180</sup> *Slade’s case*, 4 CO. REP. 91, 95a.

<sup>181</sup> BOYER, *supra* note 78, at 130. (as Boyer interestingly adds “Coke’s estate records...show that this was his own careful practice.”)

<sup>182</sup> Ibbetson, *supra* note 173, 312.

<sup>183</sup> A. W. B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT 139 (1975) (“A fifteenth-century jury was an oath-taking body which closely resembled a set of eleven compurgators, the main difference being the fact that its composition was not determined by the defendant.”); Ibbetson, *Id.* at 312. The dissatisfaction from a trial by jury as a substitute for wager of law was so deep that it finally led to the legislation of the Statute of Frauds in 1677. Generally, this legislation, which was cancelled only in 1954, insisted on the requirement of writing and it made certain classes of oral contract completely unenforceable. BAKER, *supra* note 113, at 348-350.

Focusing on the cancellation of wager of law we can see that *Slade's case* involves a series of dichotomies: oaths/jury, mystical/rational, medieval /Common Law, ancient/modern, corrupt/fair, suspect/trustworthy, etc. Paralleling these dichotomies we can perceive this case as representing a *move*<sup>184</sup> away from the first element, towards the second element of each dichotomy. Coke's practical suggestion – that the debtor should keep documents that could prove payment – raises, again, another dichotomy, which correlates with the above move, the one of the oral vs. the written. The “written” symbolizes *tangibly* the superior term in each of the above dichotomies: the rational, modern, fair and trustworthy Common Law law which was wise enough to get rid of the oaths in 1602.

One result of the *Slade's case* move was that many more oral contracts could now be litigated under the Common Law through the action of *assumpsit*.<sup>185</sup> This probably raised a series of questions about the status of the oral newcomers in relation to the familiar written contracts.

Was Coke, already occupied by the clash between the written and the oral in the greater context of the competition with the written civil law, aware that this complication was to follow from his victory in *Slade's*? It is hard to know the answer. However, if he did have this potential conflict in mind, this might explain why he made such an effort to establish the parol evidence rule through our Case, even though it was not required given its concrete facts.

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<sup>184</sup> On seeing *Slade's case* as a “move” as opposed to “mentalité” see Sacks, *supra* note 178, at 37. As Sacks argues “moves are highly sensitive to the particularities of the historical setting in which they are made.”`

<sup>185</sup> BAKER, *supra* note 113, at 346.

### 3. *The Common Law vs. the Common People*

What is to date considered as Coke's leading contribution to the modernization of the medieval version of the Common Law is the concept of "artificial reason".<sup>186</sup> The idea was twofold: firstly, that the Common Law is a product of reason and hence reasonable and, secondly, that this reason is not natural reason, but something else, artificial and perfect. In Coke's famous words:

"Reason is the life of the law, nay the common law itself is nothing else but reason, which is to be understood as an artificial perfection of reason."<sup>187</sup>

The first layer of Coke's concept placed "reason" at the core of law. Such a view afforded the Common Law a much-needed unifying method, one that could tie together the dispersed precedents that had been building up within it for so many years.<sup>188</sup> Coke's definition of the law as based upon reason provided the judges with a common tool of assessment: "what they found reasonable, the judges approved; whatever failed to meet the test of reason, they struck down".<sup>189</sup> This brilliant idea made the law *appear* fundamentally coherent. All of a sudden the Common Law seemed to have "common sense", and with Coke's brush it was painted as rational, consistent and logical. Simultaneously, this magical concept increased the judges' credibility and reliability, for they were the users of the efficient tool of reason and, as a result, they became the source of reason, its carrier and its reflection. Combined together, these two improvements – of both the law's image and that of its judges – contributed immensely to the strengthening of the Common Law's authority.

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<sup>186</sup> Shaunnagh Dorsett, *'Since Time Immemorial': A Story of Common Law Jurisdiction, Native Title and the Case of Tanistry*, 26 MELBOURNE U. L.R.32, 37 (2002) .

<sup>187</sup> Coke, *supra* note 161, 1.

<sup>188</sup> John Lewis, *Sir Edward Coke (1552-1633): His Theory of 'Artificial Reason' as a Context for Modern Basic Legal Theory*, 64 LAW QUARTERLY REVIEW 330, 339 (1968).

<sup>189</sup> BOYER, *supra* note 78, at 106.

It is important to notice that even Coke's choice to use the term "reason" is extremely significant. As indicated earlier, we know he was acutely aware of the increasing appeal of the sophisticated, elegant and classical Roman law. We may assume that being so knowledgeable and well-read<sup>190</sup> he had known the Roman maxim that one should follow reason rather than precedents.<sup>191</sup> This maxim plainly assumes a contradiction between "reason" and "precedent". Against this background, Coke – in an act of alchemy – turned precedent *into* reason. He took the term "reason" and used it as interchangeable with precedent: the judicial point of view *was* reason and following precedents was therefore reasonable. Looking closely at the choice of the word "reason" (for instance in the above quote whereby "the common law itself is nothing else but reason") we can see the labored effort that Coke made in presenting the Common Law *as though* it resembled the respected Roman law *without* changing its true nature. It was, I maintain, mainly a change of image rather than a substantive transition.

The second layer of Coke's idea, the "artificial" part, served as a way of distinguishing *legal* reason, reasoning and reasonableness from the more "natural" traits of reason. To Coke artificial reason was anything but the ordinary understanding of the human brain. It was artificial in the sense of "man-made", something that emerges from an extremely professional process and, to use Coke's original words, "not of every man's natural reason".<sup>192</sup> So different from the normal way of thinking, such legalized reasoning involved, to use Coke's words again, "long study, observation and experience."<sup>193</sup>

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<sup>190</sup> BOWEN, *supra* note 79, at 200.

<sup>191</sup> BAKER, *supra* note 113, at 196-197.

<sup>192</sup> COKE, *supra* note 161, 1.

<sup>193</sup> COKE, *Id.* For a description of such professionalism as "art" see Charles Gray, *Reason, Authority, and Imagination: The Jurisprudence of Sir Edward Coke*, in *CULTURE AND POLITICS FROM PURITANISM TO THE ENLIGHTENMENT* 25-66, 61 (Perez Zagorin ed. 1980).

To view law as defined by artificial reason and artificial reason as reserved for legal specialists was quite a patronizing move. As Hulsebusch put it, Coke “championed the “artificial reason” of the legal community *above* the natural reason of the individual.”<sup>194</sup> No doubt such a vision powerfully symbolized and at the same time reinforced the superiority of the Common Law and its experts. Yet, such a vision also evidently distanced and rejected the common people, those who often needed the legal services.

In a way which is meaningful to the connection between the status of the Common Law and that of writing, part of this distancing project was attained by the use of *written* lingual tools. The reasoned law, as written by Coke and others, was written in an especially reserved language, one which no “ordinary” person could fully understand.<sup>195</sup> This strange, if not secret, language even had a symbolic name: “Law-French”, a name that captures neatly the condescending character of the “members-only” legal club. Other than exposing the true demeaning spirit of “artificial reason”, it is worth seeing how such a name also constitutes a nod to Europe. However, just like writing an English version of *Institutions* and just like talking of “reason” instead of using the term precedents, this too was only a cosmetic maneuver: the words were seldom in “real” French and the content was totally English-made.

As we shall now see, the two layers of “reason” and of “artificial” are important to the creation of the parol evidence rule. This can be illustrated by a telling example that preceded

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<sup>194</sup> Hulsebosch, *supra* note 158, at 460.

<sup>195</sup> This conceited and insular attitude played a central roll in the debate over whether to print the Common Law and thereby make it more accessible to the lay (sometimes named “vulgar”) people. To a fascinating description of the debate and its philosophical and cultural grounds see Richard J. Ross, *The Commoning of the Common Law: The Renaissance Debate Over Printing English Law, 1520-1640*, 146U. P. A. L. REV. 323 (1998). I will quote two fine examples: “ ‘Which of us has not heard it objected,’ asked Thomas Wentworth in *The Office and Duty of Executors* (1641), ‘that we the professors of the law, seek to hide and secret the knowledge thereof under this dark and distasted’ French language?’” (*Id.* at 372); “Edward Coke printed his Reports but composed them in law French like the medieval yearbooks ‘lest the unlearned by bare reading without right understanding might suck out errors, and trusting to their conceit, might endamage themselves, and sometimes fall into destruction.’” (*Id.* at 376).

our Case – the well-known *Shelly's case*,<sup>196</sup> in which Coke's argument won him enormous reputation.<sup>197</sup> The dispute concerned the interpretation of a contractual formula that was commonly used in family settlements, in which owners of land tried to control the future of their estates. Edward Shelly used the formula of *to A (himself) for life, then to the heirs of A* in order to pass on his estates (or the major part thereof) to his grandson from his deceased first son. The problem, however, was that this grandson was not yet born when Edward used this formula and therefore at that specific point in time Edward's male heir was still Richard Shelly, Edward's brother. Richard's claim was that using the above formula gave him an immediate interest in Edward's estates, one which could not be rescinded by later incidents such as the appearance of a newborn grandson. The grandson's counterclaim was that the transfer only happened after Edward's death, a time in which he (and not his uncle Richard) was the closest male-heir.<sup>198</sup>

What is important, in the present context, is that *Shelly's Case* emphasizes the strong connection between the idea of artificial reason as a locus of legal expertise, on the one hand, and the interpretation of legal (and specifically contractual) language on the other. Richard's elite lawyers creatively emphasized the need to respect Edward's *intention* at the time of writing, which they took as the impartation of an immediate entitlement to his brother.

Opposing them stood Coke, who represented Edward's grandson and argued for a "reasonable" interpretation of the legal formula.<sup>199</sup> To him "reasonable" meant the way legal experts of the time would write and read the formula that Edward used. Such an argument

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<sup>196</sup> 1 CO. REP. 88b, I ANDERSON 69, MOORE 136, 3 DYER 373b (1581).

<sup>197</sup> BAKER, *supra* note 113, 286. For detailed analysis of the case see A.W. BRIAN SIMPSON, *LEADING CASES IN THE COMMON LAW* (1995).

<sup>198</sup> The facts of this case are also fascinating from a feminist point of view but this dimension is regrettably too complex to be elucidated here. EILEEN SPRING, *LAW, LAND AND FAMILY: ARISTOCRATIC INHERITANCE IN ENGLAND 1300-1800* 138 (1993) ("To B's son if he should have a son, but to his younger brother if he should not, is a limitation that cuts out in advance B's *female heirs*"), emphasis added.

<sup>199</sup> Interestingly, John Popham, the Judge in our Case, was part of the defense trio that represented the grandson Henry Shelly. BOWEN, *supra* note 79, at 116.

was based on a literal approach to lawyers' language – a language that became the visible symbol of their expertise. At a very practical level this kind of “artificial reasoning” ruled out the thesis of immediate inheritance by Richard and brought Coke's client, Edward's grandson, the victory.

However, what is even more important for the current discussion is that the same reasoning rejected the relevancy of other understandings of identical language and left out the social, political or personal meaning of the legal words. Coke's innovation was at this later level: although his argumentation followed the old feudal rules and caused the court to reaffirm them – it carried with it radical change. As Allen Boyer has written:

“This was one of the most significant achievements of Coke's era, and one of its most troubling. For the next four centuries, whenever the terms of a legal document required definition, English courts would apply the private, technical meaning current among the bar. When construing contracts, courts arrogated to themselves the construction of disputed terms, refusing to hear what the parties themselves had meant... Not until the 1950's, prodded by Lord Denning, would the English bench once again begin to read documents in terms of the parties' original intent.”<sup>200</sup>

From here the stretch to the first version of a contractual parol evidence rule seems quite easy: if legal documents speak (reasonably) in a professional language, which is so different from the natural language, then what justification can there be to accept evidence regarding the parties intentions?

It also seems that the general idea of artificial reason as well as its more lingual derivative fitted neatly with Coke's personal nature. Self-described as direct in his speech and a strong believer in bright line rules, Coke was known to prefer the most literal interpretation possible

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<sup>200</sup> BOWEN, *Id.* at 120.



to any legal written material, be it a statute, a will or a contract. His “plain-meaning” approach to questions of legal interpretation was well connected to his ways of thinking and talking, which in turn were not lacking their fair share of arrogance.<sup>201</sup>

In light of our focus on the Countess of Rutland’s Case, it is startling to see how in his report on *Shelly’s case* Coke seems to have told his readers much more than what was said in court and certainly more than what was stated in the actual judgment. In fact he was later blamed for reporting things “which had never been uttered in the courtroom.”<sup>202</sup> The famous rule that evolved from Shelly’s case, the one concerning the distinctive legal meaning of the contractual formula, the one that prevailed for centuries, was not to be found in any other account of the same case.

## B. *Marketing a New Image*

### 1. *Coke’s Efforts*

As we have just seen, at the same period in which the Countess of Rutland was fighting for her land and Coke was writing his “take” on the judicial decision on the matter, the Common Law, too, was waging its own battle. In this multi-frontier battle Coke acted as if he was the “Secretary of Defense” for the Common Law – planning and executing the strategies.<sup>203</sup>

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<sup>201</sup> *Id.* 120-121, 199-204.

<sup>202</sup> Interestingly, due to the case’s importance the Queen intervened and all the judges were summoned to hear the case. Months after this special hearing they issued their judgment in favor of Coke’s client. *Id.* at 117.

<sup>203</sup> Other than the three battles discussed above (against the Roman law, the oaths and the ordinary people) there were two serious additional battles that were going on: the struggle against the King and his absolutism and the competition with Equity (and with Sir Francis Bacon). These two reached their peak slightly after the Case of the Countess of Rutland was decided and hence are not discussed here. However, these last two conflicts seem to fit in well with the general argument raised here that the birth of the parol evidence rule should be seen as part of the larger struggle for the Common Law’s status and authority.

This lifelong role that Coke took upon himself involved dealing continuously with the status of written words and their relationship to the authority of the Common Law. As demonstrated, defending the status of the Common Law – be it against the Roman law, the oaths or the ordinary people – involved considerable debate regarding the oral/written dichotomy. It appears that no easy solution was available to Coke, just as there might not be one for legal scholars nowadays. On the one hand, the Common Law was by its nature oral, but on the other hand it needed the writing in order to preserve and promote its authority. This dilemma is well captured in the following paragraph:

“The need of common lawyers to justify not only the content but the dignity of their law against the slurs of royalists, civilians, university scholars, country gentry, merchants, and divines, meant that *lex scripta* and *lex non scripta*, writing and oral/memorial tradition, opposed each other as ideal-typical constructs in debate as they worked together in practice. Unorganized, unfindable, uncertain, unsteady, primitive: These charges battered the unwritten common law.”<sup>204</sup>

What was taking place at the turn of the seventeenth century, including in our Case, can also be analyzed with postmodern tools. It is possible to say that instead of a pure dichotomy between the oral and the written, one which entails hierarchy and superiority of the oral, the two terms related to each other more interactively. The written was becoming more of a “dangerous supplement”, the “thing” that the oral was so dependent upon for the sake of preserving its own existence. So, to continue with the postmodern mind-set, around 1604 the hierarchy could be seen in a reverse way: if the oral needed the written so badly then was it not in fact the written which set the tone?<sup>205</sup> At any rate, the very activity of writing what originally was of oral nature had an *artificial* quality, the exact effort that Coke seemed to be

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<sup>204</sup> Richard J. Ross, *The Memorial Culture of Early Modern English Lawyers: Memory as Keyword, Shelter, and Identity, 1560-1640*, 10 YALE J. L. & HUMAN. 229, 235 (1998).

<sup>205</sup> Balkin, *supra* note 138.

occupied with when he was writing the law as well as when he was creating rules of law that dictated the supremacy of writing.

Coke has been described as having engaged in “creating the secular myth of the common law”.<sup>206</sup> In addition, his tactic can be seen as a campaign for improvement of image, one that was aimed at creating a better appearance for an aging product, an act of marketing. In this respect it has already been argued that *Slade’s case* – which brought litigation to the King’s Bench – was part of a market-driven process.<sup>207</sup> This process, it has been argued, came out of a growing concern on the part of Common Lawyers and judges who felt that they were losing their business in the competition between the available courts of the period.<sup>208</sup> My argument is broader and slightly more abstract. First, I believe the struggle for the elevation of the Common Law involved more than purely the narrow worries about personal profits, even though such concerns – especially in an era of rapid inflation – would certainly create a strong incentive. And second, by “marketing campaign” I mean something more expansive than simply offering “attractive deals” (as *Slade’s case* with its new option of *assumpsit* might be seen). I suggest a multifaceted change of image that had the potential for long-term results, far beyond relieving the immediate economic anxieties of the lawyers and judges involved.<sup>209</sup>

What was needed under the marketing model, where the product was a legal system and services, was more credibility, trustworthiness, firmness, certainty, self-control, steadiness,

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<sup>206</sup> Peter Goodrich and Yifat Hachamovitch, *Time out of Mind: An Introduction to the Semiotics of Common Law, in Dangerous Supplements: Resistance and Renewal in Jurisprudence* 159, 171 (Peter Fitzpatrick ed. 1991).

<sup>207</sup> Sacks, *supra* note 178, at 37.

<sup>208</sup> HELGERSON, *supra* note 124, at 66. The author presents the 1901 argument of the celebrated legal historian F. W. Maitland which included the following: “...the principal courts of the Common Law, had so little business that the lawyers just stood and ‘looked about them’.”

<sup>209</sup> Note that not only the lawyers but also the judges were paid a fee for each case brought to them and hence had a very direct interest in the popularity of their legal system.

and so on. What was required was to get rid of heavy loads of capriciousness, haziness, instability, irrationality, unpredictability, impulsiveness and the like. Skimming the above discussions again we can see that Coke did exactly that.

In this light the formation of a rule like the parol evidence rule can be perceived as a miniature of the larger story of building a new image for the Common Law. Even though a contract is, philosophically, an unwritten creature, a meeting point of abstracts like minds, wills or intentions, rather than a tangible document, the parol evidence rule still reflects the fact that something is missing. By insisting on writing, the rule seeks authority which in turn derives from the solid image of the written word.

*The Countess of Rutland's Case* should be read, therefore, as part of a larger written cloak that covers the rules of interpretation of contracts. As such it should be read together with its better known allies: *Slade's case* and *Shelly's case*. Jointly they were part of one big campaign, which was aimed at building a newer and better image of the "rule of law" for the Common Law.

The fact that all these cases belong to Coke's legacy and are all "contractual" should not be seen as mere coincidence. In a period repeatedly characterized as based on a "culture of credit" the demand for contracts and, as a result, for contractual litigation and practical contract rules, was on the rise, and contract law served as a "testing ground" for the law in general. In other words, if contracts could be dealt with in a satisfactory manner under the Common Law, in such a period of need, then the achievement would be much greater and eventually exceed the contractual arena. It would bring more business to the Common Lawyers and judges and it would reflect and signify the law's majestic power of being systematic, rational, organized, predictable and useful. The success of this marketing

campaign would represent Coke's victory, on behalf of his biggest client ever: the Common Law.

Surely the idea of gender stereotypes did not even cross Coke's mind at the time, but from a 21<sup>st</sup> century perspective his defense strategy might be seen as attributing a more masculine-like image to the Common Law while concealing feminine features. Again, but this time keeping gender in mind, it may be viewed as accrediting stereotypically-masculine qualities of credibility, trustworthiness, firmness, certainty, self-control, steadiness and so on, while hiding stereotypically-feminine traits of capriciousness, haziness, instability, irrationality, unpredictability, impulsiveness and the like. Such an observation raises two major questions with respect to the move from the "feminine" to the "masculine" as described above: first about the hegemonic rejection of the womanly qualities of the law and second about the artificiality of the whole transformation.

The first point is quite straightforward and it was explored earlier when I offered a close reading of Coke's heavily quoted text. Being detached, patronizing, authoritative, rational, commercial and full of certainty, the parol evidence rule may serve as a silencing mechanism of more womanly voices.

Pertaining to the point of artificiality, to ascribe a more masculine-like image to the Common Law was an artificial move rather than a deep conversion. To write the precedents, to switch from oaths to juries and to use artificial reason was to put on a manly mask and clothes that would hide the more stereotypically feminine sides of the law. When Coke wrote the report of our Case and formed the contractual rule that gave priority to writings he did just that: he wrote a play in which the Common Law had the leading role and he dressed the Common Law as a man.

## 2. Portia's Efforts

Even though he probably did not meet William Shakespeare in person,<sup>210</sup> Coke was certainly familiar with his play *The Merchant of Venice*, so popular in the years preceding the Case.<sup>211</sup> Generally, as Luke Wilson said, it “seems beyond dispute that the meaning of contractual relations was a matter of particular concern at least roughly at the same time as the drama flourished in the late sixteenth and early seventeenth centuries.”<sup>212</sup> More specifically, at least one early study of the legal scene in the fourth act of this famous play claimed that:

“If I were asked to name the three men in all England who were most profoundly affected by Shakespeare’s *The Merchant of Venice*, I should unhesitatingly name the following: **Sir Edward Coke**, Sir Thomas Egerton...and Sir Francis Bacon.”<sup>213</sup>

At any rate, whether inspired by Shakespearean Portia or on his own initiative, Coke can be seen to have used the parol evidence rule in a manner parallel to Shakespeare’s use of Portia’s gender bending.

In *The Merchant of Venice*, Portia disguises herself as a male lawyer in order to give a cunning speech, a feat of rationalism, in favor of Antonio, “the Merchant”, against Shylock, “the Jew”. This disguise – and it alone – invests her with the elevated status of a lawyer, the respect of others, and eventually grants her the power of persuasion, admiration and prestige.

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<sup>210</sup> BOYER, *supra* note 78, at 287.

<sup>211</sup> As the fascinating 1935 work of Mark Edwin Andrews tells: “*The Merchant of Venice* was written before 1598, for it is one of the six comedies specifically mentioned by Meres in his *Palladis Tamia* in 1598. It was very probably written after 1596 for in that year Sylvain’s *Orator*, a book which contained part of the argument of the bond plot, was published in English translation; thus, the conclusion that the play was presented for the first time late in the year 1596 or in 1597.” See MARK EDWIN ANDREWS, *LAW VERSUS EQUITY IN THE MERCHANT OF VENICE* 21 (Written in 1935 and published only much later in 1965). The play was first printed in 1600 and Andrews’ book contains a beautiful reproduction of the title page of this first quarto edition.

<sup>212</sup> Luke Wilson, *supra* note 144, at 70-71.

<sup>213</sup> Andrews, *supra* note 211 at 21 (emphasis in bold letters added). Andrews’ reading of the legal scene stresses another battle of Coke on behalf of the Common Law – the one against equity. Referring to this rivalry Andrews suggested that “Act IV, Scene i, of the play does not depict a legal quibble, as is often said, but is a profound study of the greatest judicial problem of English jurisprudence which was at its controversial height when *The Merchant of Venice* was written.” *Id.* at 23.

Only in the disguise of the “articulated lawyer”, that is to say, of a brilliant doctor of law, can she determine things with decisiveness. Only as a man, and through “male” intellectual slyness, can she defeat Shylock, as one who knows. If she had presented herself in her femininity and spoken through her true, emotional and romantic motives (to save Antonio in order to recapture her love and new husband, Bassanio) – would she have succeeded? Not likely. Support for this estimation may be found in Portia’s memorable speech in which she praises the quality of mercy, a stereotypically female quality.<sup>214</sup> Her failure to alter the interpretation of the draconic loan contract by using a feminine voice, albeit wrapped in a masculine costume, suggests a view of what the appropriate gender performance is under law.

The loan bond stated that if Antonio did not redeem his debt, Shylock could claim a fine consisting of a pound of flesh, “fair” flesh to be cut and taken from Antonio.<sup>215</sup> The “lesson” to be learned from the rejection of Portia’s attempt to call for compassion and benevolence is that in the interpretation of this commercial contract there is no room for such “soft” emotions, but rather, only for that which is termed law. Portia uses, then, the only recourse left to her – she turns swiftly to the written words of the bond and reads them in the most literal way while employing the shrewdness of linguistic rationale. She holds fast to the language of the contract and to the principle that all that is not explicitly permitted is, therefore, forbidden. As the contract manifestly determines that the fine is a pound of flesh, but *does not say* that the fine includes blood, Shylock is allowed to collect his debt, but Portia warns him that he must not shed even a drop of Antonio’s blood, or he will endanger his

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<sup>214</sup> WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE*, Act Four, Scene One. The edition referred to herein is the Penguin Popular Classics Edition (London, 1994).

<sup>215</sup> *Id.* Act One, Scene Three: “**Shylock**: ...Go with me to a Notary, seal me there/ Your single bond, and, in a merry sport,/ If you repay me not on such a day/...let the forfeit/ Be nominated for an equal pound/ Of your fair flesh, to be cut off and taken/ In what part of your body pleaseth me. **Antonio**: ...I’ll seal to such a bond,/ And say there is much kindness in the Jew.”

property as well as his life. This sophisticated logical analysis is what finally brings her the cries of admiration, “upright judge...enlightened judge.”<sup>216</sup>

Indeed, Portia’s “intellectual” acrobatics are presented to the viewer as the height of legal-contractual ability and as ensuring her professional reverence. Holding to the written words and speaking about their meaning in a rational manner is offered by Shakespeare as a way of gaining both authority and success. Is this not the same thing that Coke was trying to achieve for the Common Law? Is it not what he was seeking while reporting the Countess of Rutland’s Case? And, lastly, does not Portia as well as the parol evidence rule present an artificial image of rationalism which conceals something which is far less rational?

Having suggested this similarity it is worth pointing to one major difference between the writings of Shakespeare and Coke. While Portia’s real identity and motives are well recognized by the play’s audience, this is not true of the readers of the legal report. In contrast to theater-goers, these readers might not suspect, perhaps not even today, that the hierarchical and rigid parol evidence rule entails a disguise that hides the real nature of contractual interpretation or that of the law at large.

This disparity is quite meaningful and may offer a better appreciation of the legal rule. The theater-goers not only *know* very well that Portia is not a man, that she is bending her gender performance - they are also fully aware of the *active effort* she is making to hide her true identity and to pretend to be something that she is not. This act of imitating men – their voice, their rough steps, their brags and lies and their clothes –<sup>217</sup> by one who is originally “a Lady... fair, and, fairer than that word”<sup>218</sup> is significant. It exposes the *artificial* nature of her “masculine” speech regarding the pound of flesh. This imitation is completely at odds with the declared gender conception of the play (which reflects traditional gender stereotypes),

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<sup>216</sup> *Id.* Act Four, Scene One.

<sup>217</sup> *Id.* Act Three, Scene Four.

<sup>218</sup> *Id.* Act One, Scene One (Bassanio’s description of Portia).



according to which “a maiden hath no tongue, but thought.”<sup>219</sup> The effect of the plain act of imitation hence becomes dramatic: it is converted into an act of mockery and it gains a subversive meaning. The loud and open simulation turns the rational-logical-linguistic process of interpretation, as performed by Portia, into a “freak-show” and it exposes (and presents) its artificial nature.

This imitation, the disguise, purporting to be something she is not, undermines the unity of the masculine image of the law. It is true that everyone admires Portia for the fact that she saved Antonio from Shylock’s clutches, but does the deceit not leave us with an unsavory taste? Is there anyone who senses that the loan contract was indeed properly interpreted?<sup>220</sup> The fact that Portia is not a “real” legal expert also reduces our belief in the legal outcome. Had Shakespeare written about a real doctor of law who interpreted the contract, we would perhaps have been more trustful. The disguise creates a significant fracture in the rational legal façade and brings its limitations to the front of the stage, in both senses of the phrase.<sup>221</sup> And this, in my eyes, is the most important feminist contribution to the matter at hand: when a woman imitates a man and acquires a male image, she nevertheless remains a woman. As a consequence, the image – which is originally an entirely masculine one – is imbued with a new meaning, one which suggests a critical look at the origin. In other words, there is a challenging and thought-provoking dimension to the activity of the copycat in a field, namely the legal one, which was originally designed by actual men.<sup>222</sup> The “pretend man”, by her

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<sup>219</sup> *Id.* Act Three, Scene Two (Portia to Bassanio).

<sup>220</sup> STEWART MACAULY, JOHN KIDWELL, WILLIAM WHITFORD AND MARC GALANTER (eds.) *CONTRACTS: LAW IN ACTION* Vol. 2, 696 (1995). Such frustration was also used to support claims regarding the Anti-Semitic nature of the play.

<sup>221</sup> Stephen Greenblatt’s works often indicate this indeterminacy of Shakespearean representation which is always shifting. See, for instance, GREENBLATT, *supra* note 22, at 222.

<sup>222</sup> We all should keep in mind that at the times of *The Merchant of Venice* no real female-lawyer had ever been seen. The cultural effect, perhaps even the shock, of seeing and listening to a woman who acts like a lawyer, might be compared to the modern-day effect of seeing Matthew Bourne’s ground-breaking all-male “Swan Lake”. Here I draw upon Judith Butler’s seminal work regarding “parodic performance” and the subversive nature of the mechanism of evident imitation. See, e.g., JUDITH BUTLER, *GENDER TROUBLE* 137 (1990) (“In

very appearance in the men's arena, exposes the artificial nature inherent in the binary division into male and female professions, male and female literature, male and female justice. Crossing the gender lines, even if in disguise, casts a doubting light on the lines' existence and threatens to erase them. If all a woman needs to do in order to be a man is to dress up like one, then all of the many filaments built upon the gender images are likely to collapse.

Returning from Venice to the interpretation of contracts in the real courts of England, we may now see more clearly the motivations for covering this process with the distinguished costume of the parol evidence rule. Through these theater binoculars the disguise may be seen as another act of marketing on the part of contract law in order to sell itself and the ideological method within which it operates.<sup>223</sup> In order to be heard, contract law and Common Law at large, like Portia, needed to assume the costume of a rational expert. It seems that Shakespeare and Coke would have both agreed that adhering to the written words of the contract would serve as the best signifier of such rationality. The fact that Shakespeare told his audience about the costuming, while Coke hid it from his readers, further supports the argument that Coke was engaged in a marketing campaign.

### **Nicolette**

She lost her home.

The parol evidence rule ruled out her situation, her hardship, her need to provide for the future of her only child, her dependence on the man who loved her, her incapacity to affect

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imitating gender, drag implicitly reveals the imitative structure of gender itself--as well as its contingency,"); See also Zachary Potter & C.J. Summers, *Reconsidering, Epistemology and Ontology in Status Identity Discourse: Make-Believe and Reality in Race, Sex, and Sexual Orientation*, 17 HARV. BLACKLETTER J. 113 (2001) (suggesting a theoretical framework that the authors name as "factionalism" in order to clarify and expand upon the arguments in post-structural projects, such as Judith Butler's deconstruction of the sex/gender binary).

<sup>223</sup> Compare this to what was said above in the second section, second chapter, which deals with offer and acceptance.

the written contractual words. Sure, nothing was personal. It is, after all, so she was surely told, an established rule, four hundred years old, and back then, in the old days, they did not know a thing about her, about Hollywood or about gender bias.

And what if Isabel, the Countess of Rutland, could have heard Nicolette's story? Coming from a different age she probably could not really understand what the term "gender bias" means or even what gender is, but she surely could tell Nicolette so much about her experience: *her* hardship, *her* need to provide for the future of *her* only child, *her* dependence on the man who loved her, and, lastly, *her* incapacity to affect the written contractual words.

## CONCLUSION

Four hundred years have passed. And yet, it seems to me that so little has changed. Indeed, one can doubt the practical significance of the rule, both then and now,<sup>224</sup> or, the other way around, one can admire the rule's contribution to the functionality of contract law within the commercial sphere.<sup>225</sup> However, when looking through these women's eyes – as this research and analysis have sought to do – it becomes clear that the rule's very presence, with all that it represents, has inherently biased and injurious outcomes.

One may well admire Coke's efforts to structure a rule of law in times of trouble as well as his contribution to the stabilization of a society in times of change. But even so, through

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<sup>224</sup> See, for example, Eyal Zamir, *supra* note 151, at 1728-1731 (the text accompanying footnotes 60 to 75). In footnote no. 75 the author mentions that "Our conclusion as to the actual significance of the PMR is consistent with the conclusion of the Law Commission that examined the related doctrine, the parol evidence rule, in England. The Commission concluded that there is no need to abolish the rule by legislation because it is already devoid of any practical significance. See Law Commission, Report No. 154, 1986 (Law of Contract: The Parol Evidence Rule), in 18 Great Britain Law Comm'n Rep. 347 (Collected ed. 1987)." See also Melvin A. Eisenberg, *The Emergence of Dynamic Contract Law*, 88 CALIF. L. REV. 1743, 1769 (2000) ("The parol evidence rule, although not abandoned, has been significantly loosened in two relevant respects under modern contract law"). Indeed, commenting on an earlier draft of this article Prof. Gerald Frug noted that those who in modern days follow Corbin ("soft parol evidence rule" in Posner's terms, see *supra* note 11) might have allowed in the kind of evidence discussed here, both in Isabel and Nicolette's stories. Gerald Frug, letter to the author (July 29<sup>th</sup> 2004) (on file with author).

<sup>225</sup> See, e.g., Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L. JOURNAL 541 (2003) and the calls for new formalism, *supra* note 8.

exposing the roots of the rule I have argued that centuries later we should reconsider the need for the tree that they have sprouted. To my mind Nicolette, both as an individual and as a representative of our times, should not have to suffer the misery of Isabel and her era.

Piecing together disparate historical and cultural materials, I have attempted to portray the particular contexts of the birth of the very rule that strives to avoid context. I have tried not to take the rule for granted, not to accept its existence as natural or neutral. I have treated Coke's words in the Countess of Rutland's Case along the lines of New Historicism, as a textual unit about texts and their importance and, more implicitly, about contexts and their exclusion.

The fact that over four centuries this textual unit, which once formed the parol evidence rule, has survived the changing times and has played a continuous role in a shifting contractual doctrine is extremely meaningful: it bridges Nicolette and Isabel's stories and transforms the journey taken here from a mere search for the past to an exposure of a new understanding of the present. This journey has, in a nutshell, the flavor of Foucault's *Genealogy*<sup>226</sup>: nothing that we know today is simply here, and therefore, in order to better understand the meaning and necessity of the 21<sup>st</sup> century's parol evidence rule, we better search where did it come from.

My reading of the Case's textual unit in and against its context suggests that it played a double role: concurrently reflective and productive, simultaneously passive and active, both a mirror and a torch. On the one hand, through close reading of the text, I have offered to view the text as inertly representing the values that were highly admired within the legal culture of Coke's days. On the other hand, by exploring Coke's motives I have suggested observing this

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<sup>226</sup> Michel Foucault, *Genealogy and Social Criticism*, in *THE POSTMODERN TURN: NEW PERSPECTIVES ON SOCIAL THEORY* 39–45 (Steven Seidman ed. 1994). Generally genealogy explores what was not evident because of the institutionalization of knowledge by those in power.

text as an active player within the same legal culture, as one that was intentionally designed to shape that legal culture.

I do hope that a deeper acquaintance with the circumstances of the birth of the parol evidence rule, as offered here, makes it possible to better appreciate the motives that led to its formation. It is, after all, a crucial advantage of the New Historicist practice: knowing the particulars has the effect of de-mystifying the myth. My desire is that from this same well-informed standpoint, it will now be easier to feel confident enough to admit the rule's artificiality and biased nature, and to reappraise its necessity. I also hope that this analysis has produced a further argument, original and useful, against excessive formalist textualism in present-day contract law.